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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 291910

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STEVENS COUNTY,**

*Appellant,*

v.

**EASTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD,**

*Respondent.*

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APPEAL FROM SUPERIOR COURT FOR STEVENS COUNTY,  
WASHINGTON Docket No. 2006-2-00312-1 IN REVIEW OF  
COMPLIANCE ORDER ENTERED BY THE EASTERN  
WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD IN  
CASE NO. 05-1-0006

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT IN REPLY

### A. The GMA Requirements That Stevens County is Alleged to Have Violated Only Apply to Regulations Adopted to Protect Critical Areas, Not Subdivision Codes.

Stevens County appealed to this court for review of the Hearings Board's ruling that Stevens County's subdivision code violates three provisions of GMA. Specifically, the Hearings Board ruled that:

Stevens County has failed to enact legislation which complies with the Growth Management Act's requirements to protect the functions and values of critical areas as set forth in RCW 36.70A.020(10), .060(2), and 172.

CP 208 (AR at 262, *First Order on Compliance* at 27).

Because none of the cited requirements apply to the regulation of subdivisions, the Board's decision should be invalidated. Taking each of the enumerated GMA provisions in turn, the Hearings Board first ruled that the County's subdivision code violates RCW 36.70.020(10). But that provision is merely one of thirteen GMA planning goals. According to the Supreme Court, GMA planning goals "are adopted to *guide* the development and adoption of comprehensive plans and development regulations . . . .". Lewis County v. W. Wash. Growth Mgmt. Hearings Bd. 157 Wn. 2d. 488, 503, fn 12 (2006) *citing* RCW 36.70A.020 (*emphasis* in original). Indeed the Supreme Court ruled against Lewis County in that case precisely because planning goals do

not independently create substantive requirements. Id. citing Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 119 Wn. App. 562 , 575, 81 P.3d 918 (2003), *rev'd in part on other grounds* , 154 Wn.2d 224 , 110 P.3d 1132 (2005); *see also* Quadrant Corp. v. State Growth Management Hearings Board, 154 Wn.2d 224, 246, 110 P.3d 1132 (2005). (so stating).

Ms. Wagenman responds that the Board's ruling is supported by conclusion of law No. 21. Wagenman Brief at 14. But she is plainly wrong because planning goals such as RCW 36.70A.020(10) do not impose substantive requirements. Quadrant Corp., 154 Wn.2d at 246. (so stating). The Hearings Board misinterpreted and misapplied the law when it concluded that Stevens County's subdivision code fails to comply with a planning goal that pertains to the protection of critical areas.

The Hearings Board also ruled that the County violated two substantive GMA provisions: RCW 36.70A.060(2) and .172. RCW 36.70A.172, provides in pertinent part:

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.

But, as the Board found, the regulations adopted in Title 3, including the subdivision codes were not adopted to protect critical areas. CP 207

(AR 062, *Final Decision and Order* (FDO) at 62, Finding No. 11). That finding was not appealed and is a verity. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Moreover, as the Hearings Board took pains to explain, “nothing in GMA mandates the use of [best available science] BAS when drafting these types of regulations” (i.e., subdivision codes). CP 208 (AR at 257, *First Order on Compliance* at 22). Clearly, the County cannot be in violation of a GMA provision that does not apply to adoption of the regulations under review in this case.

The only other substantive provision at issue on review is RCW 36.70A.060(2), which provides in pertinent part: “Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.”

Not only did the Board find that Title 3 was not developed to protect critical areas (*supra*), it also found substantial evidence in the record to support a determination that Stevens County had adopted Development Regulations that designate and protect Critical Areas. CP 207 (AR 062, FDO at 62, Finding No. 10). In other words, the Hearings Board found the county in compliance with RCW 36.70A.060(2).

In response, Ms. Wagenman asserts that the County misstated the use of a substantial evidence standard. Wagenman Brief at 11, n.2. In doing so she ignores the fact that it was the Hearings Board, and not the

County, that applied a substantial evidence standard to the County's action. Regardless, Ms. Wagenman offers no response to the County's argument that the Board's finding of compliance with RCW 36.70A.060(2) in the FDO was not appealed and is therefore a verity on appeal. Robel, 148 Wn.2d at 42.

The problem is that the *First Order on Compliance* contradicts unchallenged FDO findings. In the FDO the Board found:

10. There is substantial evidence in the record to support a determination that Stevens County has adopted Comprehensive Plan provisions and Development Regulations that designate and protect Critical Areas.

11. The County's adoption of Title 3 Development Regulations, which are not the primary regulatory mechanism by which the County is protecting the functions and values of the five mandatory categories of critical areas, serves an ancillary protection purpose by further amplifying the protections of [SCC Title 13, the Critical Areas Ordinance].

CP 207 (AR 062, FDO at 62, *emphases* added).

Thus, in the FDO the Board found that the County complied with RCW 36.70A.060(2) by adopting a development regulation (Title 13, Stevens County Code) to protect critical areas. The Board also found Title 3 was not adopted to protect critical areas but serves an "ancillary protection purpose." In response to that finding, the County "amplified" critical protections by amending Title 3 to prohibit the grant of any

preliminary plat absent a finding that all impacts to critical areas will be properly mitigated pursuant to the County's existing critical areas ordinance (Title 13). CP 207 (AR 079-081, Exhibit A to Ordinance No. 3-2009 amending SCC 3.20.035). Contrary to Ms. Wagenman's response, the court is again asked to note that these amendments apply to both rural and urban subdivision proposals. *Id.*

As noted above, the *First Order on Compliance* contradicts the findings from the FDO quoted above, ruling instead that the County's subdivision code (as a stand alone regulation) violates RCW 36.70A.060(2). That provision requires adoption of regulations to protect critical areas. The County adopted Title 13 for that purpose and the Board found that the County adopted regulations to protect critical areas. The requirements of RCW 36.70A.060(2) were satisfied and there is nothing in the GMA or elsewhere that requires subdivision regulations to protect critical areas that are already protected by other duly adopted regulations.

Importantly nowhere in this new ruling does the Board cite to new evidence in the record. In other words the Board arrived at conflicting decisions based on the same evidence. Thus, not only is the decision arbitrary in so far as it singles out the County's subdivision code alone among all of the Title 3 provisions challenged by Ms. Wagenman, it is

also arbitrary in so far as it comes to a conflicting conclusion without benefit of substantial evidence to justify the new ruling.

In summary, Stevens County was erroneously found to be in violation of (1) a planning goal that creates no independent substantive requirements, (2) a requirement to consider BAS that the board says is not applicable, and (3) a requirement to designate and protect critical areas that, according to an uncontested finding by the Hearings Board, was satisfied by adoption of Title 13 (the County's critical areas ordinance). The Board's ruling should be invalidated because it misinterprets and misapplies the law, is unsupported by substantial evidence, and is both arbitrary and capricious.

**B. The APA Standards for Review Conflict with the GMA Standard for Review, which Therefore Controls.**

Under the circumstances the only way the Board decision can be upheld is by deference to the Board's interpretation of the GMA provisions at issue under the APA standards for judicial review. It is the County's position that application of APA review standards to Hearings Board decisions impermissibly conflicts with legislative intent in the GMA for deference to local decision making.

Ms. Wagenman makes the County's point perfectly when she asserts that no deference is afforded to local government if the Hearings Board

decides that an action does not comply with requirements of GMA. Wagenman Brief at 13 citing Lewis County, 157 Wn.2d at 498. Another way of saying the same thing is that ‘the Board will defer to local government only if the Board decides local government has complied with GMA.’

Stated this way the problem is obvious because courts review compliance issues under APA standards that are deferential to the Board, which is not what the legislature intended. As Ms. Wagenman recognizes,

[t]he Administrative Procedure Act (“APA”), RCW chapter 34.05, governs judicial review of actions by the Board, *except where it conflicts with specific provisions of the GMA.*

Wagenman Brief at 8 quoting Quadrant Corp. v. State Growth Management Hearings Board, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005); RCW 36.70A.270(7) (*emphasis supplied*).

Obviously, the GMA standard conflicts with the APA standards in that GMA requires a showing that the County’s action is “clearly erroneous.” RCW 36.70A.320(2). Ms. Wagenman acknowledges, “this is a more intense standard than the arbitrary and capricious standard.” Wagenman Brief at 13 (citations omitted). In other words, the County’s action must be worse than arbitrary, it must fly in the face of a clear legal requirement. If it does not the GMA requires the Board to defer to the County.

Ms. Wagenman responds that this court must defer to the Board's "interpretation" of the GMA which the Board now says requires the County's subdivision code to independently protect critical areas. But as argued above, on their face the GMA requirements that the County is supposedly noncompliant with only apply to regulations that protect critical areas. RCW 36.70A.060(2) and .172. In the FDO the Hearings Board found that Title 3 is **not** the regulatory mechanism by which the County is protecting the functions and values of critical areas. CP 207 (AR 062, FDO at 62, Finding No. 11). Now, the Board wants deference for its new interpretation that the subdivision code must satisfy those requirements.

It is fair to wonder how it can possibly be 'worse than arbitrary' for the County to adopt a subdivision code that does not satisfy requirements applicable only to the regulations adopted for the purpose of protecting critical areas? According to Ms. Wagenman it's because the Hearings Board says so and its interpretation of GMA is entitled to deference under APA.

Under present authority the Superior Court says she is right. To remedy this obvious injustice, the Court should recognize that the APA review standards conflict with the GMA standard, which therefore controls. Quadrant Corp., 154 Wn.2d at 233. Using the GMA standard,

the court should rule that it is not clear error for the County to adopt a subdivision code that relies on its existing critical areas ordinance to satisfy GMA requirements applicable to the protection of critical areas.

**C. The GMA Does Not and Cannot Confer Standing In a Judicial Proceeding to a Party that Alleges No Injury in Fact.**

Ms. Wagenman says the County's challenge to her standing is untimely but cites no authority for the position that an interlocutory order must be appealed prior to entry of a final decision in order to preserve the issue for appeal. At page 3 of her Brief Ms. Wagenman references the standing analysis found at page 21 of the Board's FDO, but fails to mention the Board's holding that "challenges to standing are deemed jurisdictional and may be brought at any time." CP 207 FDO at 22 citing Harader v. Napavine, WWGMHB no. 40-2-0017c, FDO at 4 (February 2, 2005) citing Sullivan v. Paris, 90 Wn. App 456, 460 (1998); Diehl v. W. Wash Growth Mgmt. Hr'gs Bd., 118 Wn.App. 212, 75 P.3d 975 (2003). Thus, the County's challenge to Ms. Wagenman's standing is not untimely.

Ms. Wagenman then asserts that she does not need to satisfy any standing requirement to participate as a party to judicial review of an agency action proceeding because she prevailed and did not appeal the decision. She is mistaken. The constitution requires a case or controversy

for courts to exercise jurisdiction and standing is one of the principles by which that requirement is met. Firefighters v. Spokane Airports, 146 Wn.2d 207, 215, 45 P.3d 186 (2002). In this case the County has challenged the Board's authority to compel the adoption of subdivision codes that meet GMA requirements applicable on their face only to regulations developed to protect critical areas. Ms. Wagenman was not named and failed to show that she will suffer any personal injury in this case. In other words she lacks standing under the APA.

Ms. Wagenman claims that she has standing under the GMA because she participated in the County process to adopt the legislation reviewed by the Board. As argued previously, participation in the County process creates standing to appear before the Hearings Boards only. RCW 36.70A.280. The Washington APA applies to judicial review of the Board's order and that standing test "is drawn from and explained by federal case law." Allan v. University of Wash., 92 Wn.App. 31, 36, 959 P.2d 1184 (1998) (citing RCW 34.05.001). Under federal law, participation in an administrative process does not confer party standing for judicial review. Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct.2130, 2136 (1992).

Congress can grant anyone standing to participate in an agency proceeding regardless of whether the person satisfies Article III standing requirements. *However a*

*federal court may review on appeal only those agency adjudications in which the parties to the agency proceeding would have had standing to bring an action in federal court with respect to the matter in dispute.*

Moore's Federal Practice 3<sup>rd</sup>, § 101.61[10] (citing Wilcox Elec., Inc. v. F.A.A., 119 F.3d 724, 727 (8<sup>th</sup> Cir. 1997); Lee v. Board of Governors of Fed. Reserve Sys., 118 F.3d 905, 910-912 (2<sup>nd</sup> Cir. 1997) (*emphasis supplied*).

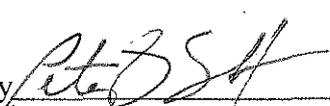
The County raises the standing issue because of the heavy burden placed on Stevens County and all local governments subject to GMA that are continually forced to defend legislative actions brought by individuals and non-residents with no demonstrable stake in the outcome.

## II. CONCLUSION

The County respectfully asks for an Order invalidating the Orders issued by the Hearings Board in this case, dismissing Ms. Wagenman and for any other relief as this Court may deem just and proper.

DATED this 15th day of December, 2010.

GOUGH, SHANAHAN, JOHNSON & WATERMAN

By 

\_\_\_\_\_  
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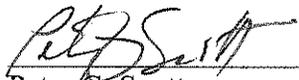
**CERTIFICATE OF SERVICE**

I declare as follows: I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and competent to be a witness in the above action, and not a party thereto; that I effected the service on the 15<sup>th</sup> day of December, 2010, by serving a true and correct copy of the foregoing "**APPELLANTS REPLY BRIEF**," in the manner described to the individual listed below, and filed with the Court by overnight delivery

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