

No. 291910

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

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COURT OF APPEALS
DIVISION III
SEASIDE, WASHINGTON

STEVENS COUNTY,

Appellant,

v.

**EASTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,**

Respondent.

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

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

On July 2, 2007, Appellant, Stevens County (the “County”), adopted a set of development regulations codified at Title 3, Stevens County Code (“SCC”). Title 3 regulates all aspects of land use and development in Stevens County; it was adopted pursuant to the Growth Management Act (GMA). RCW 36.70A.

Three *Petitions for Review* of Title 3 were filed with the Eastern Washington Growth Management Hearings Board (the “Board”). The Board consolidated the petitions into a single case with dozens of issues. On October 6, 2008, the Board issued a *Final Decision and Order* (FDO) in which the Board ruled that SCC Title 3 complies with the GMA on every issue save one. Specifically, the Board ruled that the sub-division codes were non-compliant with certain GMA requirements to protect critical areas.

The FDO found 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. Clerks Papers (“CP”) 207 (Administrative Record (“AR”) 062, FDO at 62). However the Board also said that sub-division codes in Title 3 needed “minor modifications” to “amplify” the

protections of the County's existing Critical Areas Ordinance. CP 207 (AR 053, FDO at 53).

With that characterization in mind, the County adopted Ordinance No. 3-2009, amending three provisions of Title 3. The changes clarified rural subdivisions must be designed to minimize the effect of impervious surfaces and storm water, and specified that no subdivision could obtain preliminary plat approval until any potential impacts are properly mitigated in accordance with the County's Critical Areas Ordinance (SCC Title 13).

The Board reviewed Ordinance No. 3-2009 and issued the *First Order on Compliance* which contradicts its earlier finding by concluding that the County failed to adopt legislation that protects the functions and values of critical areas. It also conflicts implicitly with the Board's determination in earlier cases that the County's Critical Areas Ordinance is GMA compliant.

The Board misinterpreted and misapplied the law because the County has a stand alone Critical Areas Ordinance and GMA does not require adoption of separate measures in other development regulations to protect critical areas. Also, the findings entered to support the Board's erroneous conclusion are not supported by substantial evidence because the Board already found in the FDO that the County had

enacted legislation that protects critical areas based on substantial evidence. That finding is unchallenged and is a verity on appeal. In addition, the determination that the County's subdivision code (alone of all land use regulations) must independently comply with the GMA's critical area protection requirements is arbitrary and capricious.

The County also assigns error to the Superior Court's determination that parties without a demonstrated injury that is both personal and particularized have standing to participate in judicial proceedings.

Finally, if this Court is inclined to affirm the Board's *First Order on Complaint*, the County assigns error to the Superior Court's application of review standards that conflict with the deferential standard of review established by the Legislature in GMA.

II. ASSIGNMENTS OF ERROR

A. ERROR ASSIGNED TO THE HEARINGS BOARD.

1. Error is assigned to the Board's failure to defer to County decision making.

a. In the absence of clear error must the Board defer to the County?

2. Error is assigned to Finding of Fact No. 18, including the extent to which it may be considered a conclusion of law.

a. Did the Board erroneously interpret or apply the law by failing to defer to the County regarding the application of design standards and control methods found in the Critical Areas Ordinance?

- b. Is the finding supported by substantial evidence when applicable design standards and control methods are found in the Critical Areas Ordinance?
- 3. Error is assigned to Finding of Fact 19, including the extent to which it may be considered a conclusion of law.
 - a. Did the Board erroneously interpret or apply the law by applying the best available science requirement of GMA to the County's subdivision code?
 - b. Is the finding supported by substantial evidence when there is no showing that protective measures adopted in the Critical Areas Ordinance fail to protect critical areas?
- 4. Error is assigned to Finding of Fact 20, including the extent to which it may be considered a conclusion of law.
 - a. Did the Board erroneously interpret or apply the law by failing to recognize that SCC 13.20.035 (as amended) applies to rural and urban subdivisions?
 - b. Is the finding supported by substantial evidence when the plain language of the amended regulation applies to both urban and rural subdivisions?
- 5. Error is assigned to Finding of Fact 21, including the extent to which it may be considered a conclusion of law.
 - a. Did the Board erroneously interpret or apply the law by applying the best available science requirement of GMA to the County's subdivision code?
 - b. Is the finding supported by substantial evidence when there is no showing that protective measures adopted in the Critical Areas Ordinance fail to protect critical areas?
- 6. Error is assigned to Finding of Fact 22, including the extent to which it may be considered a conclusion of law.
 - a. Did the Board erroneously interpret or apply the law by ruling that fixed percentage based-restrictions on land use are permissible?

- b. Is the finding supported by substantial evidence when there is no proposed development and no showing of impact to protected critical areas?
- 7. Error is assigned to Finding of Fact 23, including the extent to which it may be considered a conclusion of law.
 - a. Did the Board erroneously interpret or apply the law by ignoring the plain meaning of amendments requiring adequate mitigation compliance with the County's Critical Areas Ordinance?
 - b. Is the finding supported by substantial evidence when there is no showing that protective measures adopted in the Critical Areas Ordinance fail to protect critical areas?
- 8. Error is assigned to Finding of Fact 24, including the extent to which it may be considered a conclusion of law.
 - a. Did the Board erroneously interpret or apply the law by requiring the County's subdivision code to comply with GMA requirements that are satisfied by the County's Critical Areas Ordinance?
 - b. Is the finding supported by substantial evidence when there is no showing that protective measures adopted in the Critical Areas Ordinance fail to protect critical areas?
- 9. Error is assigned to Order No. 1, including the extent to which it may be considered a finding of fact.
 - a. Did the Board erroneously interpret or apply the law by requiring the County's subdivision code to comply with GMA requirements that are satisfied by the County's Critical Areas Ordinance?
 - b. Did the Board exceed its authority or jurisdiction by reviewing the County's Critical Areas Ordinance in connection with the adoption of a subdivision code?

B. ERROR ASSIGNED TO THE SUPERIOR COURT

- 1. Error is assigned to the Superior Court's denial of the County's Motion to Dismiss for lack of standing.

- a. Does a person who alleges no personal or particularized injury have standing in a judicial proceeding?
2. Error is assigned to the standards of review applied by the Superior Court
 - a. Does application of review standards found in the Administrative Procedures Act (“APA,” RCW 34.05) conflict with the GMA and a clear legislative mandate for deference to the planning decisions of local government?

III. STATEMENT OF THE CASE

The GMA requires local governments to designate and protect critical areas. RCW 36.70A.060(2), .170. Local governments are directed to include best available science (“BAS”) in developing policies to designate and protect critical areas. RCW 36.70A.172(1).

Stevens County adopted a Critical Areas Ordinance, codified at SCC, Title 13 (a courtesy copy has been provided to the Court). The County’s Critical Areas Ordinance uses riparian buffers to protect the functions and values of critical areas from impacts associated with development proposals.¹ SCC 13.10.025 (Wetlands) and SCC 13.10.034(Waters of the State).

The subdivision of land requires county approval and is therefore defined as a “Development Proposal.” CP 208 (AR 274 citing SCC 13.00.030 and .050). As such, any construction, excavation, clearing,

¹ The critical areas most pertinent to this case are wetlands and waters of the state. RCW 36.70A.030(5); WAC 365-190-130(2)(f).

grading, filling and a range of other activities are regulated and subject to the protection requirements established in the Critical Areas Ordinance. *Id.* (citing SCC 13.10.010, which provides “Unless the protection requirements of this Title have been met, Stevens County shall not grant approval to a development proposal as defined herein”).

The Critical Areas Ordinance was reviewed by the Board in a series of cases. *See e.g., LLPOA et al v. Stevens County*, Order on Compliance, EWGMHB Case No. 03-1-0006c (October 15, 2004), *courtesy copy attached*. As a consequence, the County amended its Critical Areas Ordinance and those amendments were not challenged. *Id.* at 5. The Critical Areas Ordinance is presumed to be GMA compliant. RCW 36.70.320(1).

On July 2, 2007, the County adopted SCC Title 3, which contains numerous development regulations organized by chapter as follows: the Establishment of Zones (SCC 3.02); Permitted Uses (SCC 3.03); Performance Standards (SCC 3.04- 3.06); Parking (SCC3.07); Subdivisions (SCC 3.11); Short Subdivisions (SCC 3.16); Binding Site Plans (SCC 3.17); Decision Criteria (SCC 3.20); Notice and Appeals (SCC 3.30); Public Participation (SCC 3.31); Enforcement (SCC 3.40); and SEPA (SCC 3.80). *See SCC Title 3*.

Three Petitions for Review of Title 3, SCC, were filed with the Eastern Washington Growth Management Hearings Board (“Board”). The petitions were consolidated into a single case with dozens of issues, challenging virtually every aspect of Title 3. In October 2008, the Board issued a *Final Decision and Order* (FDO) in which the Board ruled that SCC Title 3 complies with the GMA on every issue except one. CP 207 (AR 001, FDO).

Specifically, the Board concluded that:

10. Stevens County is not protecting Critical Areas as required by the GMA pursuant to RCW 36.70A.060, .172, .020(9) and .020(10) by enacting design standard development regulations SCC 3.11 Subdivisions and SCC 3.16 Short Subdivisions which protect all of the functions and values of critical areas, and Ordinance 2007-1 is non-compliant with the GMA’s requirements in regard to critical area protection as to the application of impervious surface coverage limitation and the consideration of stormwater discharges.

CP 207 (AR 064, FDO at 64).

The Board made the following related findings:

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, emphasis added).

So in the FDO, the Board found that Stevens County had adopted development regulations that designate and protect critical areas, but directed the County to “amplify” those protections.

The County took legislative action on February 2, 2009, adopting Ordinance 3-2009, which amended three provisions of SCC Title 3. CP 207 (AR 076, *Statement of Actions Taken to Comply*, Att. 1). Specifically, Ordinance 3-2009 added the underlined text to Title 3:

SCC 3.11.230 Design Standards (Subdivisions) Any Subdivision in the Agricultural, Forest, RA-5, AR-10, R-20 and AR-10 zones and SR overlay areas shall provide or demonstrate that the following requirements are met:

* * *

H. When critical areas are present, ensure that lot design minimizes the effect of impervious surfaces and stromwater runoff on critical areas consistent with SCC Title 13 and SCC 3.80.

SCC 3.16.232 Design Standards (Short Subdivisions) Any Short Subdivision in the Agricultural, Forest, RA-5, AR-10, R-20 and AR-10 zones and the RC, CR and SR overlay areas shall provide the following:

* * *

H. When critical areas are present, ensure that lot design minimizes the effect of impervious surfaces and stromwater

runoff on critical areas consistent with SCC Title 13 and SCC 3.80.

SCC 3.20.035 Preliminary Subdivision and Short Subdivisions - A. The County will consider the following criteria in reviewing applications for preliminary subdivisions and short subdivisions, and may only grant preliminary approval if the applicant demonstrates that all of the criteria are met

* * *

4. Lots within the subdivision/short subdivision have been designed to minimize potential impacts to critical areas resulting from stormwater discharge and impervious surfaces. Where required, potential environmental impacts resulting from stormwater discharge and impervious surfaces have been properly mitigated pursuant to SCC Title 13 and SCC 3.80.

CP 207 (AR 079-081, Exhibit A to Ordinance No. 3-2009).

The amended regulation specifies that all subdivisions must comply with Title 13 and any potential impacts from storm water or impervious surfaces must be properly mitigated before the County will grant preliminary plat approval.

Following adoption, the Board conducted a compliance hearing.

This time the Board concluded 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).

The Board's conclusion, which is challenged here, was based upon a number of findings to which the County has also assigned error.

The Superior Court affirmed the Board's decision. On appeal this Court does not review the findings or conclusions of the Superior Court with respect to the Board's action. However this Court may review the Superior Court's denial of County's Motion to Dismiss and the standard of review applied to practice before the Board.

IV. ARGUMENT

A. Standard of Review.

The standard employed by Washington Courts tasked with reviewing a Hearings Board decision is difficult to apply. In a recent case, the Supreme Court explained the standard of review as follows:

The Board 'shall find compliance' unless it determines that a county action 'is clearly erroneous in view of the entire record before the board and in light of the goals and requirements' of the GMA. RCW 36.70A.320 (3). To find an action 'clearly erroneous,' the Board must have a 'firm and definite conviction that a mistake has been committed.' Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County, 121 Wn.2d 179 , 201, 849 P.2d 646 (1993). On appeal, we review the Board's decision, not the superior court decision affirming it. King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (hereinafter referred to as Soccer Fields). 'We apply the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court.' *Id.* (quoting City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38 , 45, 959 P.2d 1091 (1998)).

The legislature intends for the Board 'to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of' the GMA. RCW 36.70A.3201. But while the Board must defer to [the] County's choices that are consistent with the GMA, the Board itself is entitled to deference in determining what the GMA requires. This court gives 'substantial weight' to the Board's interpretation of the GMA. Soccer Fields, 142 Wn.2d at 553

Lewis County v. W. Wash. Growth Mgmt. Hearings Bd., 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).

This Court has articulated the standard more succinctly, stating that "the findings used to support the conclusion that the county clearly erred need only be supported by substantial evidence." Stevens County v. Futurewise, 146 Wn. App. 493, ¶36, 192 P.3d 1 (2008) review denied 205 P.3d 132 (2008). Thus, if the Board can point to credible evidence in the record, the courts will uphold a conclusion that an action by local government is clearly erroneous.

B. The Board Found that the County Adopted Development Regulations That Designate and Protect Critical Areas.

The Board found substantial evidence in the record to support a determination that Stevens County adopted Development Regulations that designate and protect Critical Areas. CP 207 (AR 062, FDO at 62, Finding No. 10). That finding was not challenged and is therefore a verity on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

Yet, in the Compliance Order being reviewed by this Court the Board concluded 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).

That conclusion is facially inconsistent with the Board's earlier unchallenged determination that County did enact such legislation based on substantial evidence. Because the Board's unchallenged finding must be considered a verity, the Compliance Order is not supported by substantial evidence and should be invalidated.

1. The GMA Does Not Require the County's Sub-division Code to Independently Protect Critical Areas.

The Board entered several new findings in its Compliance Order that the County has assigned with error. For example the Board found:

The GMA requires protection of the functions and values of critical areas through RCW 36.70A.020(9), .020(10), .060(2), .170, and .172.

The Petitioners have demonstrated Stevens County failed to comply with the Board's October 2008 FDO and the FDO [*sic*], specifically RCW 36.70A.020(10), .060(2), and .172, by failing to enact development regulations which ensure the functions and values of the County's designated critical areas are protected from further degradation.

CP 208 (AR at 261, *First Order on Compliance* at 26, Finding No. 21 and 24).

It is difficult to see how Title 3 (as amended by Ordinance No. 3-2009) could possibly fail to comply with the GMA provisions cited in the two findings quoted above. First, the Board already found (based on substantial evidence) that the County did enact such legislation. Also, RCW 36.70A.172 requires the use of BAS but, as the Board took pains to explain, “nothing in GMA mandates the use of BAS when drafting these types of regulations.” CP 208 (AR at 257, *First Order on Compliance* at 22).

Thus, invalidation of the Board’s order is warranted. Not only because findings are unsupported by substantial evidence; but because the GMA protection requirements that the County was found to be non-compliant with do not apply to the subdivision codes.

2. The County’s Critical Areas Ordinance Imposes Specific Control Methods on Development Proposals to Protect Critical Areas.

The Hearings Board recognizes that “Stevens County is not relying on Title 3 for the protection of its critical areas.” CP 208 (AR at 257, *First Order on Compliance* at 22). But then finds:

The amendatory language does not provide specific design standards or methods of controls. No guidance is given to suggest how lot design or lot layout will reduce impacts to critical areas.

CP 208 (AR at 261, *First Order on Compliance* at 26, Finding No. 18).

The Board is incorrect. Ordinance 3-2009 directs compliance with the County's Critical Areas Ordinance, which specifies riparian buffers established using BAS as a method of controlling potential impact to critical areas. See CP 208 (AR 274, Motion to Reconsider at 9, citing SCC 13.10.025 and SCC 13.10.034). There is no evidence in this record that would tend to support a finding that riparian buffers are not effective in protecting critical areas from development related impacts. To the contrary, the buffers established in the County's Critical Areas Ordinance are based on BAS and presumed to be GMA compliant.

Nor is it true that no guidance is provided. The Board recognized that the County's subdivision code requires consideration of Ecology's *Stormwater Manual for Eastern Washington*. CP 208 (AR at 258, First Order on Compliance at 23, Footnote 85).

Finding of Fact No. 18 is unsupported by substantial evidence and misinterprets the GMA in so far as it is used by the Board to support the erroneous conclusion that Title 3 has to protect critical areas. The finding should be invalidated.

3. Any Potential Impact to Critical Areas From Storm Water and Impervious Surfaces is Addressed in the County's Critical Areas Ordinance.

The Hearings Board also finds that:

Scientific literature demonstrates the relationship between increased impervious coverage, storm water flow, and critical areas impacts

CP 208 (AR at 261, First Order on Compliance at 26, Finding No. 19).

The County uses riparian buffers to protect critical areas from potential impacts caused by storm water or impervious surfaces. The record is devoid of evidence showing that riparian buffers are not an effective way for the County to protect critical areas from such impacts. Nor does the Board make any such finding. To the contrary, the Board already found that substantial evidence supports the determination that the County enacted legislation that protects critical areas. CP 207 (AR 062, FDO at 62, Finding No. 10). Moreover, the Board concedes that subdivision codes are not subject to the GMA requirement to use BAS. CP 207 (AR 257, First Order on Compliance at 22).

Finding of Fact No. 19 is unsupported by substantial evidence and misinterprets the GMA in so far as it is used by the Board to support the erroneous conclusion that Title 3 must protect critical areas. The finding should be invalidated.

4. No Preliminary Plat May Be Approved Unless Potential Impacts to Critical Areas from Storm Water and Impervious Surfaces Are Properly Mitigated.

The Hearings Board next found that:

The amendatory language, in regards to impervious surface, is limited to rural areas and does not address urban areas.

The GMA requires protection of critical areas from further degradation, not the minimization of impacts

CP 208 (AR at 261, First Order on Compliance at 26, Findings of Fact Nos. 20 and 23).

The Board ignores the plain meaning of Ordinance 3-2009. The amended language of SCC 3.20.035 requires a finding by the County that **all subdivision proposals** (rural and urban) adequately mitigate any potential impacts from storm water or impervious surfaces consistent with the Critical Areas Ordinance. CP 207 (AR 079-081, Exhibit A to Ordinance No. 3-2009). The amended language clearly states that no preliminary plat approval (urban or rural) may be granted until such a finding is made. Moreover, all proposals to subdivide land where critical areas are present must be reviewed under SEPA for environmental impact. See WAC 197-11-756 and 197-11-800(1)(b)(i); See SCC 3.80.080 and 3.80.125 (adopting the cited WAC provisions).

The County's Critical Areas Ordinance is presumed to comply with the GMA requirement to protect critical areas. RCW 36.70A.320(1). Ordinance 3-2009 requires compliance with the Critical Areas Ordinance before any plat may be approved. There is no evidence to support this finding which simply misinterprets (or ignores) the plain

meaning of Ordinance No. 3-2009. Findings of Fact Nos. 20 and 23 should be invalidated.

5. A Fixed Percentage Based Land Use Restriction on Development is an Unlawful In-Kind Tax.

The Hearings Board announced that it expects the County to put fixed percentage-based limits on impervious surfaces. CP 208 (AR at 256, First Order on Compliance at 21); *see also* CP 207 (AR 053, FDO at 53, “The maximum permissible impervious coverage . . . [is] at the County’s discretion.”). In response the County asserted that fixed percentage-based land use restrictions established under GMA are considered an unlawful in-kind tax. Citizens’ Alliance for Property Rights v. Sims, 145 Wn App 649, 187 P.3d 786 (2008) *rev denied* 203 P.3d 378 (2009) (GMA ordinance limiting clearing of land in rural zones violates RCW 82.02.020).

The Hearings Board attempted to distinguish fixed limitations on impervious surfaces from the fixed percentage based limitation on clearing land for development that was at issue in Sims. CP 208 (AR at 257, First Order on Compliance at 22). Based on that discussion the Board found:

Washington State Law does not preclude the establishment of a fixed percentage-based restriction so long as that restriction is related to the impacts of the proposed development.

CP 208 (AR at 261, First Order on Compliance at 26, Finding of Fact No. 22).

But in Sims the Court specifically did not consider science in the GMA record. 145 Wn.App at 654 ¶6. Moreover, like King County, Stevens County has no way of knowing what development may be proposed, where it might be proposed or whether there would be any potential to impact critical areas. Establishing countywide limits on potential development is exactly what the Sims case says counties may not do, “Washington case law is clear that RCW 82.02.020 applies to ordinances that may require developers to set aside land as a condition of development.” 145 Wn.App at 662 ¶30.

Setting a fixed limit on the percentage of land that may be covered with an impervious surface is the same thing as limiting the amount of land that may be cleared for development. Such an approach is not permitted. Finding of Fact No. 22 misinterprets and misapplies the law; it should be invalidated.

C. Reviewing the Subdivision Code for Compliance with GMA Requirements to Protect Critical Areas is Arbitrary and Capricious.

The *First Order on Compliance* is arbitrary and capricious. According to the Supreme Court, an agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. ITT Rayonier, Inc. v. Dalman, 122

Wn.2d 801, 809, 863 P.2d 64 (1993); Kendall v. Douglas, Grant, Lincoln, & Okanogan Counties Pub. Hosp. Dist. 6, 118 Wn.2d 1, 14, 820 P.2d 497 (1991).

It is difficult to imagine a set of facts that fit the description any better. After citing to substantial evidence in the record, the Board found that Sevens County had adopted development regulations that designate and protect critical areas. CP 207 (AR 0062, FDO at 62, No. 10). That finding is unchallenged and therefore a verity on appeal. Robel, 148 Wn.2d at 42.

After the County amended its subdivision codes to clarify that preliminary plat approval may not be granted unless potential impacts are properly mitigated in accordance with the Critical Areas Ordinance, the Hearings Board issued a Compliance Order that contradicts its earlier finding and orders the County to adopt a subdivision code that independently complies with GMA's critical area protection requirements. CP 207 (AR at 262, First Order on Compliance at 27).

The order is arbitrary and capricious both because it ignores the Board's unchallenged findings and because there is no rational reason for applying the decision only to the subdivision codes.

The Board knows that "nothing in GMA mandates the use of BAS when drafting these types of regulations." CP 208 (AR at 257, *First*

Order on Compliance at 22). It was asked to review virtually all of Title 3. Yet, somehow, the Board concludes that only the subdivision code must independently satisfy the GMA requirements for protecting critical areas.

Critical areas are potentially affected by zoning (SCC 3.02) and permitted uses (SCC 3.03). The County's performance standards (SCC 3.04-3.06) directly apply to land uses that could impact critical areas. The parking code (SCC3.07) obviously implicates storm water and impervious surfaces. The chapter of Title 3 dealing with Binding Site Plans (SCC 3.17) sets forth an alternative method for dividing land. The County's Decision Criteria (SCC 3.20) require consideration of environmental impacts.

All of the Title 3 chapters listed above have the potential to impact critical areas. All of them require compliance with the County's Critical Areas Ordinance. All of them were challenged in the Petition for Review filed with the Board in this case. CP 207 (AR 037-038, FDO at 37-38). Yet somehow the subdivision code is singled out as non-compliant. How can it possibly be true that "airports," "binding site plans," "planned unit developments" or "master planned resorts" comply with GMA based on protections established in the County's Critical Areas Ordinance but rural short plats do not? The Board's decision is

unreasoned and made without regard to established facts. It is therefore arbitrary and capricious and should be invalidated.

D. In Judicial Review of Board Decisions the Legislative Mandate for Discretion to Local Governments is Sacrificed.

Under GMA the Legislature grants standing to appear before the Board to persons that do not satisfy the standing requirements of the APA. RCW 36.70A.280. The Legislature also established in the GMA a standard of review that is deferential to local governments. RCW 36.70A.320(1), .3201. Yet, somehow, when a Board decision is taken up for judicial review, the GMA standing provision applies and the GMA standard of review does not. As a consequence, local governments are forced to defend their actions in court against persons with no demonstrated stake in the outcome under standards of review that are deferential to the Board.

1. Judicial Standing Requires a Stake in the Outcome.

Ms. Wagenman, a *pro se* participant, has demonstrated no stake in the outcome of this case and should therefore be dismissed. Issues of standing are reviewed *de novo*. State v. Magneson, 107 Wn. App. 221 , 224, 26 P.3d 986, *review denied* , 145 Wn.2d 1013 (2001). The Washington State test for standing under the APA “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). That holding is consistent with the Legislature's express intent to achieve consistency with Federal administrative procedure. RCW 34.05.001.

This court is being asked to decide whether the Board correctly determined that the County's subdivision code (alone of all land use regulations) must independently comply with the GMA protection requirements for critical areas. Even though the Board recognizes that critical areas are protected under the County's Critical Area Ordinance.

Ms. Wagenman participated in the administrative review process and therefore had standing to appear in front of the Board. RCW 36.70A.280. However, it is well established that participation in an administrative process does not automatically confer party standing to participate in 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.

Moores Federal Practice 3rd, § 101.61[10] (citing Wilcox Elec., Inc. v. F.A.A., 119 F.3d 724, 727 (8th Cir. 1997); Lee v. Board of Governors of

Fed. Reserve Sys., 118 F.3d 905, 910-912 (2nd Cir. 1997) (*emphasis supplied*).

Federal case law establishes that the constitutional foundation for any court's consideration of standing issues is the settled rule that, "at an irreducible minimum," Article III requires a person to show that they personally have suffered some actual or threatened injury that can fairly be traced to the challenged action, and that the injury is likely to be redressed by a favorable decision. Valley Forge Christian College v. Americans United, 454 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Defenders of Wildlife, 504 U.S. at 573.

The United State Supreme Court ruled in the context of local land use ordinances that "[a]bsent the necessary allegations of demonstrable, particularized injury, there can be no confidence of a real need to exercise the power of judicial review. . .". Warth v. Seldin, 422 U.S. 490, 508 n. 18, 95 S. Ct. 2197, 45 L. Ed. 343 (1975). That is why judicial challenges are generally specific to projects, not the legislative acts of local government.

Ms. Wagenman shares a general interest in the protection of critical areas with every other person. There is no evidence or finding in this record demonstrating a particularized injury personal to her that is fairly

traceable to the County's subdivision code. Accordingly, she lacks standing to participate in judicial review of the Hearings Board's action.

In the case of Informed Citizens v. Columbia County, Div. II of the Court of Appeals ruled that standing to participate in judicial review of a Hearings Board decision is governed by the less stringent participation requirements set forth under GMA. 92 Wn. App. 290, 966 P.2d 338 (1998). However, GMA only grants standing to uninjured participants to appear before the Board, not in judicial proceedings governed by the APA. RCW 36.70A.280. Nevertheless, the Court reasoned that the Legislature could not have intended to allow citizens to participate in an administrative review only to be precluded from judicial review by application of the more stringent standing requirements of the APA. Informed Citizens, 92 Wn App at 295-96

Informed Citizens is directly at odds with Federal case law cited above and RCW 34.05.001 (explaining Legislatures intent to achieve consistency with Federal administrative procedure). Federal law, which guides the test for standing, holds that statutory standing requirements may be more rigorous, but not more lenient than the Article III requirements. Preston v. Heckler, 734 F.2d 1359, 1364 (9th Cir. 1984) (citing Valley Forge Christian College, 454 U.S. at 488 n.24).

It may not be presumed that the Legislature intended to allow persons without standing to participate as parties in judicial proceedings, but even if it did, the functions of government are constitutionally separated and the Legislature has no power to confer judicial standing upon any person that cannot meet the minimum constitutional threshold.

Under the GMA only aggrieved persons may appeal. RCW 36.70A.300(5). Under the APA an aggrieved person has standing to participate in judicial review under the APA when: (1) an agency action has prejudiced or is likely to prejudice that person; and (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. RCW 34.05.530.

The first and third prongs of this test are said to relate to "injury-in-fact," the second prong relates to "zone-of-interest." Allan, 92 Wn.App. at 36. Ms Wagenman is not aggrieved within the meaning of the APA. There is no evidence or finding in this record demonstrating a particularized injury personal to Ms. Wagenman that is fairly traceable to the County's subdivision code. The Superior Court should be reversed and Ms. Wagenman should be dismissed.

2. The Proper Standard of Review is One that Affords Deference to Local Government.

The GMA requires the Board to defer to the County. RCW 36.70A.3201. However, Washington courts apply the APA standards set forth in RCW 34.05.570(3) when reviewing Board decisions. Stevens County v. Futurewise, *supra*. The Supreme Court recognizes that the APA standards are deferential to the Board and directs reviewing courts to first determine whether the Board afforded deference to local government. Lewis County, 157 Wn.2d at 497-98. However, in practice, the conflict between ‘Board deference to local government’ and ‘judicial deference to the Board’ is invariably resolved in favor of the Board.

This court has articulated the standard of review as follows: “the findings used to support the conclusion that the county clearly erred need only be supported by substantial evidence.” Stevens County v. Futurewise, 146 Wn. App. at ¶36. This standard demolishes the Legislative intent in GMA for deference to local governments because if the Board can find any credible evidence in the record to conflict with a decision made by local government, the Board’s contrary decision will be upheld.

The practice of the Board is at issue in this case. Specifically, the County assigned error to the Board's failure to afford proper discretion to the County. The GMA says that the APA governs the practice of the Board unless the GMA conflicts. RCW 36.70A.270(7). Because the practice of the Board is at issue in this case the appropriate standard of review is the one set forth in the GMA. To do otherwise shifts the discretion for local planning away from locally elected officials who are accountable to their citizens and places it in the hands of unconfirmed gubernatorial appointees.

The GMA says: "the legislature intends that *the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard* provided for under existing law." RCW 36.70A.3201 (*emphasis added*). The Board employs a substantial evidence test. See e.g., CP 207 (AR 062, No.10, FDO at 62, No. 10). Thus, it is the Board's practice to uphold the County's decision if the evidence relied on by the County is sufficient to persuade a fair-minded, rational person of the finding's truth. State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), review denied, 149 Wn.2d 1025 (2003).

Under the APA, a factual finding by the Board will be upheld unless the reviewing court determines that:

The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter

RCW 34.05.570(3)(e).

Courts' use of the evidentiary review standard from the APA has the effect of shifting deference from the County to the Board. This record, like virtually every GMA record, contains conflicting evidence. The GMA places responsibility on the County to consider the conflicting evidence before deciding how to balance thirteen inherently contradictory planning goals. Manke Lumber v. Central Growth Mgt Bd., 113 Wa.App. 615, 626-27, 53 P.3d 1000 (2002). Under the APA standard, the Board can (and often does) discard County decisions, knowing that as long as it relies on substantial evidence presented in opposition to the local government's decision, the Board can expect to be upheld even if a fair-minded person looking at the evidence relied on by the County would conclude the County's decision was correct.

Because the practice of the Board is at issue, the GMA standard controls over the conflicting APA standard. RCW 36.70A.270(7). The proper inquiry therefore is not whether substantial evidence supports a finding by the Board. Rather it is whether substantial evidence supports

the decision made by the County. If so, the County's decision must be left unmolested.

The Board's found that the record contains substantial evidence to support a determination that the County adopted legislation that designates and protects critical areas. CP 207 (AR 062, No.10, FDO at 62, No. 10). How can it be clearly erroneous for the County to make a decision based on that finding? Under the GMA it cannot. But the Superior Court applied the APA standards and concluded that deference is due the Board. That conclusion flies in the face of Legislative Intent for deference to local government and must be reversed.

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VI. CONCLUSION

For the reasons set forth in this brief and based on the record before this Court, the County respectfully asks for an order invalidating the Compliance Order issued by the Hearings Board in this case and for any other relief as this Court may deem just and proper.

DATED this 18th day of October, 2010.

GOUGH, SHANAHAN, JOHNSON & WATERMAN

By 
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Stevens County

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 **18th day of October, 2010**, by serving a true and correct copy of the foregoing **“APPELLANTS OPENING BRIEF,”** in the manner described to the individual listed below, and filed with the Court by overnight delivery

Overnight Delivery
 Facsimile/Email
 First Class Mail
 Hand Delivered

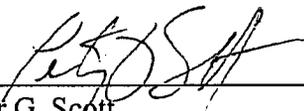
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