

FILED

NOV 19 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29191-0-III

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

Stevens County,

Appellant,

v.

Eastern Washington Growth Management Hearings Board,

Respondent

**Appeal from Stevens County Superior Court No. 09-2-00312-1 and
Eastern Washington Growth Management Hearings Board
No. 07-1-0013**

BRIEF OF RESPONDENT JEANIE WAGENMAN

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I. INTRODUCTION

In this case, appellant Stevens County appeals an administrative order of the Eastern Washington Growth Management Hearings Board remanding certain provisions of Stevens County Code Title 3: Development Regulations for amendments needed to bring those provisions into compliance with the Washington Growth Management Act. Stevens County also appeals orders of the Superior Court affirming the Board's orders. Respondent Jeanie Wagenman, the petitioner and prevailing party before the Board, offers this brief in response to Stevens County's appeal. Ms. Wagenman respectfully asks this Court to affirm the orders of the Superior Court and the Board.

II. NOTE REGARDING CITATIONS

In the County's brief, citations to certain documents in the administrative record appear to be erroneously advanced by two pages. This brief adheres to the page numbering established in the Index of Record certified by the Board on December 18, 2009. Thus, for example, page 26 of the First Order on Compliance will be cited: CP at 208 (First Order on Compliance at 26; AR at 259).

III. ASSIGNMENTS OF ERROR

Ms. Wagenman assigns no error to the Superior Court or to the Board. This appeal as brought by Stevens County raises the following issues:

1. Under the Growth Management Act, does the deference available for local governments' actions taken in planning for growth depend on those actions being in compliance with the goals and requirements of that Act?
2. Where Stevens County's development regulations merely minimize the effects of development on critical areas instead of protecting those areas outright, where those regulations address harm to critical areas in some zones within the county but not in others, and where those regulations establish no method or guidance for decisionmakers by which protection for critical areas would be ensured, do those regulations fail to meet the requirements of the Board's Final Decision and Order of October 6, 2008 and those of the Growth Management Act?
3. Where a party has won a favorable decision before a tribunal, does she have the right to respond to an appeal of that decision by the losing party?

IV. STATEMENT OF THE CASE

In 2007, appellant Stevens County ("the County") enacted Resolution 2007-1, establishing development regulations later codified as Title 3 of the Stevens County Code ("SCC"). Respondent on appeal Jeanie Wagenman ("Ms. Wagenman") petitioned the Eastern Washington Growth Management Hearings Board ("the Board") for review of those regulations for compliance with the requirements of the Growth Management Act ("GMA"). CP at 207 (Final Decision and Order at 2;

Administrative Record (“AR”) at 2). Among the issues she raised, Ms. Wagenman drew particular attention to the failure of Title 3 chapters 3.11 Subdivisions, 3.16 Short Subdivisions, and 3.20 Decision Criteria to address storm water discharge and impervious surfaces. CP at 207 (Final Decision and Order at 48-49; AR at 48-49). Ms. Wagenman submitted into the record evidence showing the harmful effects of storm water discharge and impervious surfaces on critical areas, effects that contravene the goals and purposes of the GMA. *See* CP 208 (Petitioners’ Response to SOA 1st Compliance 3/3/09 Redacted 3/23/09 as per Order on Petitioners’ Motion to Supplement (March 23, 2009); AR at 199-213).

In their response brief to the Board, the County challenged Ms. Wagenman’s standing to appear before the Board. CP at 207 (Final Decision and Order at 21; AR at 21). The Board denied this challenge. The Board determined that, because Ms. Wagenman had participated in the County’s legislative process that produced SCC Title 3, Ms. Wagenman had “participation standing” under RCW 36.70A.280(2)(b) to initiate review before the Board. CP at 207 (Final Decision and Order at 21-24; AR at 21-24).

In its Final Decision and Order, the Board expressed its conclusion as to SCC 3.11 and 3.16 in Finding of Fact no. 12:

12. 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.

CP at 207 (Final Decision and Order at 62; AR at 62). The Board found, among other things, that Ms. Wagenman had successfully met her burden of proof to show that SCC 3.11 and 3.16 fail to protect critical areas as required by the GMA. CP at 207 (Order no. 5, Final Decision and Order at 65; AR at 65). The Board remanded those code provisions to the County for legislative action to bring those provisions into compliance with the GMA. CP at 207 (Order no. 5, Final Decision and Order at 66; AR at 66).

The County responded with Ordinance No. 3-2009, amending SCC 3.11, 3.16, and 3.20. CP at 208 (First Order on Compliance at 1; AR at 234). The County amended SCC 3.11.230 and 3.16.232 to include the following requirements for development proposals:

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

CP at 207 (Attachment 1, Respondent's Statement of Actions Taken to Comply; AR at 78 and 79). The County also added language to SCC 3.20.035, requiring the following for preliminary approval of applications for subdivisions and short subdivisions:

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 (SEPA).

CP at 207 (Attachment 1, Respondent's Statement of Actions Taken to Comply; AR at 80-81).

Upon reviewing the amended regulations, the Board found they still failed to protect the functions and values of critical areas and therefore did not comply with the Final Decision and Order and the GMA. CP at 208 (First Order on Compliance at 27; AR at 260). The amended regulations merely called for "minimization" of effects, not for "protection" of the functions and values of critical areas from those effects, as required by the GMA. CP at 208 (First Order on Compliance at 4; AR at 237). The amended regulations failed also because they addressed impervious surfaces only in rural areas, despite the Board's instruction in the Final Decision and Order to address them countywide. CP at 208 (First Order on Compliance at 2; AR at 235). And the regulations' failure to provide some more specific method or standards for local decisionmakers to apply that would ensure the protection of critical areas also kept them out of GMA compliance. CP at 208 (First Order on Compliance at 23; AR at 256). In drawing these conclusions, the Board

expressly stated that Title 3 need not be based on best available science (BAS): “[W]ith Title 3, Stevens County is amplifying protection and the Board finds nothing in the GMA which mandates the use of BAS when drafting these types of regulations” CP at 208 (First Order on Compliance at 22; AR at 255).

The Board made the following findings of fact and conclusions of law,¹ to which the County now assigns error:

18. 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.
19. Scientific literature demonstrates the relationship between increased impervious coverage, storm water flow, and critical areas impacts.
20. The amendatory language, in regards to impervious surface, is limited to rural areas and does not address urban areas.
21. 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.
22. 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.
23. The GMA requires protection of critical areas from further degradation, not the minimization of impacts.

¹ Ms. Wagenman adopts the Superior Court’s characterization of the Board’s “Findings of Fact and Conclusions of Law” nos. 18 through 20 as findings of fact and nos. 21, 23, and 24 as conclusions of law. MDAR at 14 n. 5. She additionally characterizes no. 22 as a conclusion of law.

24. The Petitioners have demonstrated Stevens County failed to comply with the Board's October 2008 Final Decision and Order and the Final Decision and Order [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.

And as part of the Board's Order:

1. 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 at 208 (First Order on Compliance at 26-27; AR at 259-60). The

Board remanded Ordinance No. 3-2009 to the County for further

legislative action. CP at 208 (First Order on Compliance at 27; AR at

260).

The County moved the Board to reconsider. CP at 208 (Order on Motion for Reconsideration at 1; AR at 293). The Board denied this motion in its entirety. CP at 208 (Order on Motion for Reconsideration at 7; AR at 299).

The County petitioned the Stevens County Superior Court for review of the Board's First Order on Compliance and Order on Motion for Reconsideration. CP at 1-44 (Petition for Administrative Review (June 5, 2009)). The Board declined to participate in this judicial review.

However Ms. Wagenman responded to the appeal and appeared as a respondent. CP at 47-48 (Notice of Appearance (July 6, 2009)).

The County moved to dismiss Ms. Wagenman from the judicial review for lack of standing. CP at 99-100 (Motion to Dismiss (October 20, 2009)). The Court denied this motion. CP at 210-211 (Order Denying Motion to Dismiss (January 11, 2010)).

After briefing and oral argument, the Superior Court affirmed the Board's actions. CP at 310-325 (Memorandum Decision on Appellate Review (June 10, 2010)). The County then initiated the instant appeal. CP at 326-448 (Notice of Appeal (June 30, 2010)).

V. ARGUMENT

A. Standard of Review

The 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. *Quadrant Corp. v. State Growth Management Hearings Board*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005); RCW 36.70A.270(7). “Under the APA, [the court] review[s] the record before the Board, sitting in the same position as the trial court” *Kitsap County v. Central Puget Sound Growth Management Hearings Board*, 138 Wn. App. 863, 871-72, 158 P.3d 638 (Div. II 2007). “[T]he ‘burden of demonstrating the invalidity of [the Board’s decision] is on the party asserting the invalidity’”—in this case the County. *Thurston County*

v. Cooper Point Ass'n, 148 Wn.2d 1, 7-8, 57 P.3d 1156 (2002) (quoting RCW 34.05.570(1)(a)).

The Board's legal conclusions are reviewed "de novo, giving substantial weight to the Board's interpretation of the statute it administers." *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Deference is accorded to agency interpretation of the law where the agency has special expertise in dealing with such issues. *City of Redmond v. Central Washington Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citing *Overton v. The Economic Assistance Authority*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981)).

The Board's findings of fact are reviewed for substantial evidence. *Swinomish Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2007). Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *King County*, 142 Wn.2d at 553 (citing *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (Div. I 1997)). Where the record contains evidence contrary to the agency's conclusion, the action must still be upheld as long as any fair-minded person could have concluded as the Board did in consideration of the record as a whole.

Callecod v. Washington State Patrol, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (Div. I 1997). The Court does not substitute its judgment for the Board's in weighing conflicting evidence. *Callecod*, 84 Wn. App. at 676 n.9. The Board is entitled to evaluate factual evidence in light of their own expertise and familiarity with the issues at hand. RCW 34.05.461(5).

Where a case presents mixed questions of law and fact, the court determines the law independently, and then applies it to the facts as found by the Board. *Cooper Point*, 148 Wn.2d at 8.

The GMA expresses the legislature's intent to afford local governments a certain amount of deference in how they plan for growth. RCW 36.70A.3201. Stevens County raises the concern that the existing standards of judicial review outlined above may cancel out that deference. CP at 262-65 (County's Brief at 27-30). The Washington Supreme Court resolved this issue in *Quadrant Corp. v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005). The court there held that "deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general," but that "this deference ends when it is shown that a county's actions are in fact a 'clearly erroneous' application of the GMA." *Quadrant*, 154 Wn.2d at 238. As discussed below, the deference to which

the County is actually entitled is not nearly as much as the County claims. Neither is it enough to reverse the Board's decision.

B. Local government actions that are not consistent with the GMA are not entitled to deference.

The Board has its own unique responsibilities and its own standard of review. "Growth management hearings boards determine compliance with the GMA and are authorized to invalidate non-complying comprehensive plans and development regulations." *Stevens County v. Futurewise*, 146 Wn. App. 493, 508, 192 P.3d 1 (Div. III 2008). Because a county's development regulations are presumed compliant, RCW 36.70A.320(1), the Board must find the county's action compliant unless it is "clearly erroneous" in light of the goals and requirements of the GMA. *Swinomish*, 161 Wn.2d at 423 (quoting RCW 36.70A.320(3)).² An action is clearly erroneous if the Board has a firm conviction that a mistake has been committed. *Id.* at 423-24 (quoting *King County*, 142 Wn.2d at 552).

The deference the County claims here is laid out in the circuitous language of RCW 36.70A.3201:

The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the

² The County's brief misstates this aspect of the Board's standard. CP at 263 (County's Brief at 28). The Board need not defer to a local government's finding of substantial evidence. Instead, the Board requires the petitioner to prove clear error. RCW 36.70A.320(2) and (3).

preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, 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 this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

The deference provided in this statute functions through application of the clear error standard.³ If a local government's action is a clearly erroneous application of the GMA, it gets no deference. *Quadrant*, 154 Wn.2d at 238. "If a board affords a county's action proper deference under the 'clearly erroneous' standard, we, in turn, defer to the board's decision." *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board*, No. 39017-5-II, at 13 (Div. II 2010).

The amount of deference due is not nearly as generous as the County seems to believe. The County does not propose a measure of how

³ The reference in the statute to a "preponderance of the evidence standard" refers to the burden of proof petitioners used to have to carry before the Board. In 1997, the legislature raised this standard to clear error. Laws of 1997, ch. 429, § 20(3). Language removed from RCW 36.70A.3201 this year used to indicate that this statement of intent refers to the legislature's intent specifically in raising that standard. Laws of 2010, ch. 211, § 12. The intent referenced in this statute originally referred to the legislature's intent in raising the burden from preponderance of the evidence to clear error. See *Quadrant*, 154 Wn.2d at 232-33.

much deference they are entitled to. The County implies without authority that the amount of deference must be absolute, or at least enough to protect its regulations from review. *See, e.g.*, CP at 262 (County’s Brief at 27) (“The GMA requires the Board to defer to the County.”). But “[t]he amount [of deference required] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction’s] actions a ‘critical review’ and is a ‘more intense standard of review’ than the arbitrary and capricious standard.” *Swinomish*, 161 Wn.2d at 424 n.8; *see also Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 505 n.16, 139 P.3d 1096 (2006).

Furthermore, the deference due the County does not supersede the Board’s jurisdiction to determine GMA compliance. Compliance with the GMA is a condition precedent to this deference. “[W]hile 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.” *Lewis County*, 157 Wn.2d at 498. The only local government actions entitled to deference are those consistent with the requirements of the GMA—which is exactly within the Board’s province to determine.

Nothing in RCW 36.70A.3201 excuses local governments from the requirements of the GMA, or from the Board’s jurisdiction to determine

whether those requirements have been met. In matters governed by the GMA, the County is entitled to deference only after it has satisfied the clear error standard.

C. Because Stevens County’s development regulations leave critical areas unprotected, they do not satisfy the requirements of the GMA.

1. The GMA requires development regulations that protect critical areas.

As the Board held in Conclusion of Law no. 21, “[t]he GMA requires protection of the functions and values of critical areas through RCW 36.70A.020(9), .020(10), .060(2), .170, and .172.” CP at 208 (First Order on Compliance at 26; AR at 259). Likewise, as stated in Conclusion of Law no. 23, “[t]he GMA requires protection of critical areas from further degradation, not the minimization of impacts.” CP at 208 (First Order on Compliance at 26; AR at 259); *see Swinomish*, 161 Wn.2d at 427-30. The County assigns error to these conclusions, CP at 239 and 240 (County’s Brief at 4 and 5), but a review of the law cited shows that these conclusions are plainly correct.

Each county and city shall adopt development regulations that *protect* critical areas that are required to be designated under RCW 36.70A.170.

RCW 36.70A.060(2) (emphasis added); *see also* RCW 36.70A.172(1).

The GMA defines “development regulations” broadly as

the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto.

RCW 36.70A.030(7). By definition, “development regulations” include not just critical areas ordinances like Stevens County’s Title 13 but also the development regulations contained in SCC Title 3. SCC 3.11 and 3.16 are development regulations and as such must protect critical areas under the GMA. If in the Board’s opinion these development regulations clearly fail to protect critical areas, they fail to satisfy the GMA and must be amended. *See* RCW 36.70A.060(2).

2. Stevens County’s amended development regulations still leave critical areas unprotected.

Before the Board Ms. Wagenman initiated the consideration of storm water and impervious surfaces and how controlling these factors in the development regulations affects the protection of critical areas. In her briefing she drew particular attention to SCC 3.11, 3.16, and 3.20. CP at 207 (Final Decision and Order at 49; AR at 49). Accordingly, the Board focused its attention on those provisions—not by any arbitrary choice of its own, but because those were the provisions Ms. Wagenman had brought before the Board. Therefore the Board was correct in addressing only these provisions, and the County’s assignment of error to the Board’s Conclusion of Law no. 24 and Order no. 1 are misplaced. CP at 208 (First

Order on Compliance at 26-27; AR at 259-60); *contra* CP at 240

(County's Brief at 5).

The Board empathized with Ms. Wagenman's particular concern for these effects:

Storm water and impervious surface are two things which are intrinsically linked and can result in adverse impacts to critical areas. It is well recognized that development of land can change the hydrologic process with buildings, roads, and parking areas introducing impervious surfaces which block rainwater infiltration. With less area for infiltration, the volume of storm water runoff increases and with it pollutants such as sediments, fertilizers, and other chemicals are introduced into water resources with little chance for filtering of these pollutants. It is these impacts that are of concern to Petitioners and were in the forefront of the prior proceeding.

CP at 208 (First Order on Compliance at 20; AR at 253). Based on the evidence of record, the Board found "[s]cientific literature demonstrates the relationship between increased impervious coverage, storm water flow, and critical areas impacts." CP at 208 (First Order on Compliance at 26; AR at 259).

The County amended SCC 3.11 and 3.16 to invoke the (already applicable) Critical Areas Ordinance (CAO) "[w]hen critical areas are present." The Board found these amendments insufficient for essentially three reasons: they merely reduce impacts on critical areas, while the GMA requires critical areas to be protected therefrom; they apply only to certain areas within the county, while the Final Decision and Order

required coverage throughout the county; and they provide no standards or guidance for local decisionmakers that would ensure the protection of critical areas.

a. The amended regulations fail to “protect” critical areas by merely “minimizing” effects.

The GMA requires that development regulations “protect” critical areas, not merely “minimize” the impacts on them. RCW 36.70A.060(2). As amended by Ordinance No. 3-2009, SCC 3.11 and 3.16 merely “minimize” and do not “protect,” thereby failing to satisfy the GMA. The County’s modifications to 3.11 and 3.16 attempt to comply with the GMA by “minimiz[ing] the effect of impervious surfaces and stormwater runoff on critical areas consistent with SCC Title 13 and SCC 3.80.” SCC 3.11.230(H) and 3.16.232(H). By “minimizing” the effects on critical areas instead of “protecting” critical areas from those effects entirely, these provisions fail to satisfy the GMA.

As noted *supra*, the relevant standard under the GMA is for the functions and values of critical areas are to be *protected with further degradation of the area being prevented*. Requiring lot design to *minimizing* [sic] *the effect* does not ensure existing functions and values are protected and maintained. The GMA requires the County to enact development language which *protect* critical areas from adverse impacts, not *minimize* the effect of those impacts.

CP at 208 (First Order on Compliance at 24; AR at 257) (emphasis in original).

b. The amended regulations fail to address impervious surfaces in all areas of the County.

The County modified SCC 3.11 and 3.16 to address impervious surface coverage merely in rural zones. By their terms, the amendments to SCC 3.11.230 and 3.16.232 do not address impervious surface coverage in the Mineral, Business, or Industrial zones or in the Master Planned Resort, Fully Contained Community, or Major Industrial Development overlay areas; and they address impervious surfaces only in certain subsets of the Urban Residential and Rural Agriculture areas. SCC 3.11.230 and 3.16.232; SCC 3.02, "Purpose & Establishment of Zones."

Yet the Board had expressly instructed the County in the Final Decision and Order to address impervious surfaces countywide. *See* CP at 207 (Final Decision and Order at 61; AR at 61). "As for impervious coverage, the Board required more than just the consideration of impervious coverage within the rural area; impervious coverage was to be considered "throughout the County" given the fact critical areas can occur in both urban and rural areas as does impervious coverage." CP at 208 (First Order on Compliance at 21; AR at 254) (citing CP 207 (Final Decision and Order at 61; AR at 61)). Therefore the Board made Finding of Fact no. 20: "The amendatory language, in regards to impervious surface, is limited to rural areas and does not address urban areas." CP at

208 (First Order on Compliance at 26; AR at 259). The County cannot truthfully say that their amendments address impervious coverage in all areas of the county, and Finding of Fact no.20 is therefore no error. CP at 208 (First Order on Compliance at 26; AR at 259); *contra* CP at 239 (County's Brief at 4).

c. The amended regulations fail to provide guidance for local decisionmakers that ensures the protection of critical areas.

By failing to provide objective, enforceable standards, SCC 3.11 and 3.16 give too much discretion and not enough guidance to decisionmakers to ensure that critical areas will be protected. The Board found as much, and its explanation speaks for itself:

The Board recognizes the need to have development regulations which provide for clear, specific standards so as to prevent arbitrary and discretionary application. In this regard, the courts have noted that without such standards it is hard for anyone to judge whether the decision is reasonable and, therefore, the burden is on the decision-making body to justify its decision without the usual presumption of validity or reasonableness being afforded. Under the County's approach, the Planning Director shoulders a heavy burden. The new language does not establish technical design standards, maximum coverage limitations, or best management practices nor does it provide for guidance from the Department of Ecology's Stormwater Manual for Eastern Washington as SCC 3.11 and SCC 3.16 does for subdivisions and short subdivisions within urban areas.⁸⁵ In other words, the County fails to denote the methods by which storm water issues will be considered or any measure by which impervious coverage could be addressed. Rather, the County addresses the effects of these impacts on lot design, apparently contending that adjusting the layout of a subdivision would mitigate and minimize the effect.

The Board fails to see how adjusting the layout of a subdivision addresses total impervious coverage of the site or controls storm water runoff. The mystery of how the “effects” would be minimized is what creates a regulation which fails to comply with the GMA.

CP at 208 (First Order on Compliance at 23; AR at 256). The Board summarized this finding in Finding of Fact no. 18: “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 at 208 (First Order on Compliance at 26; AR at 259). A reading of the amended regulations shows that Finding of Fact no. 18 is plainly correct.

d. Incorporation of the Critical Areas Ordinance into the amended regulations does not cure their flaws.

The County surmises that it can fix its noncompliant regulations by adding a reference to the CAO, then shield that fix from Board review with the statutory presumption of compliance that applies to the CAO. *See* RCW 36.70A.320(1). This notion is fallacious. To the extent SCC 3.11 and 3.16 incorporate and rely on the CAO for GMA compliance, the terms of that CAO are subject to review when SCC 3.11 and 3.16 are challenged. In this case, the CAO was not challenged or subject to remand, only the challenged provisions of Title 3 that relied on it.

Therefore the Board was correct to remand Title 3 after finding that the

terms of the CAO were not sufficient to protect critical areas from the harms of storm water discharge and impervious coverage.

Before the Board sent SCC 3.11 and 3.16 back for amendment, it made it clear in the Final Decision and Order that merely relying on the CAO would not make the challenged regulations compliant.

[T]he Petitioners correctly note, the CAO does not assign zoning densities or uses (which the limited exception of some uses sets forth in provisions applicable to CARAs) or sets forth specific design standards (i.e. minimum lot sizes, lot coverage, etc) that may assist in providing protection for the functions and values of the critical areas.

CP at 207 (Final Decision and Order at 47; AR at 47).

With the exception of provisions relating to the expansion of non-conforming uses, the CAO does not address impervious surfaces, nor, with the exception of noting one of the beneficial functions of wetlands is storm water control, does the CAO address storm water run-off itself. Therefore, these aspects of environmental protection are left to other [development regulations]. Within Title 3, despite setting forth a definition of impervious, the term is only present in regards to the expansion of non-conforming uses. . . . Setting limitations for impervious surface within SCC 3.11 Subdivisions and 3.16 Short Subdivisions, the design standard sections specifically addressed by the Petitioners, is a nominal and easily accomplished amendment that will serve in providing protections to the functions and values of critical areas throughout Stevens County

CP at 207 (Final Decision and Order at 50; AR at 50) (footnotes omitted).

Thus the Board made clear that the CAO was not sufficient to protect critical areas as far as storm water and impervious surfaces were concerned. Because the Board listed these shortcomings in the Final

Decision and Order, the County was on notice before it amended the regulations that the Board did not consider reliance on the CAO to be sufficient for GMA compliance. In light of the Board's analysis, the County's presentation of its CAO as "GMA-compliant" is "somewhat disingenuous." CP at 324 (Memorandum Decision on Appellate Review at 15).

The County argues that riparian buffer zones, as its CAO requires, are all that is needed to protect critical areas from the ill effects of storm water discharge and impervious surfaces. CP at 250 (County's Brief at 15). In fact, riparian buffers by themselves do not necessarily provide the requisite protection. *See, e.g., Whidbey Environmental Action Network v. Island County*, 122 Wn. App. 156, 93 P.3d 885 (Div. I 2004). Not all critical areas are "riparian." Critical areas include wetlands, areas with a critical recharging effect on aquifers used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas. RCW 36.70A.030(5). Geologically hazardous areas and wildlife habitat conservation areas in particular may have no nexus to any body of water, and it is difficult to see what protection a riparian buffer zone could provide such areas.

Requiring consistency with the CAO is "an appropriate first step" for the County, CP at 208 (First Order on Compliance at 20; AR at 253),

but by itself does not ensure protection for critical areas that is sufficient for GMA compliance.

3. The Board correctly remanded the challenged regulations.

The Board found in Finding of Fact no. 19 that “[s]cientific literature demonstrates the relationship between increased impervious coverage, storm water flow, and critical areas impacts.” CP at 208 (First Order on Compliance at 26; AR at 259) Because there was substantial evidence in the record supporting the relationship between increased impervious coverage, storm water flow, and critical areas impacts, Finding of Fact no. 19 is correct. *See* CP at 208 (First Order on Compliance at 26; AR at 259); *contra* CP at 239 (County’s Brief at 4). The Board expressed their ultimate conclusions in Finding of Fact no. 24 and Order no. 1:

24. The Petitioners have demonstrated Stevens County failed to comply with the Board’s October 2008 Final Decision and Order and the Final Decision and Order [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. . . .
1. 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 at 208 (First Order on Compliance at 26-27; AR at 259-60); *contra* CP at 240 (County’s Brief at 5). Both these conclusions are correct for being

based on substantial evidence in the record and the Board's authoritative application of the GMA.

Stevens County makes much of Finding of Fact No. 10 from the Final Decision and Order: "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." CP at 207 (Final Decision and Order at 62; AR at 62). The County treats Finding of Fact no. 10 as if it were a conclusion of law confirming the regulations' compliance. CP at 236-59 (County's Brief, *passim*). In fact Finding of Fact no. 10 is only one of many factual findings based on the evidence before the Board. The Board found substantial evidence to the contrary and correctly based its decision on that substantial evidence. As noted above, the existence in the record of evidence contrary to the Board's conclusion is not a basis for undoing the Board's orders; the question is whether any fair-minded person could have concluded as the Board did. *Callegod*, 84 Wn. App. at 676 n.9; *see also* RCW 34.05.570(3)(e) (requiring the Court to review evidence in light of the "whole record"). In comparison, the Board's Finding of Fact No. 12 is a specific and conclusive finding of noncompliance regarding 3.11 and 3.16:

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 valued of critical areas.

CP at 207 (Final Decision and Order at 62; AR at 62). As to the issue of compliance, Finding of Fact no. 12 is the Board's operative conclusion.

4. The Board never required the County to enact an unlawful in-kind tax.

The County believes the Board demanded a condition on development that would constitute an unlawful in-kind tax under RCW 82.02.020. CP at 253-54 (County's Brief at 18-19). The Board made no such demand. See CP at 208 (First Order on Compliance at 22; AR at 255). The Board expected the County to establish its own method by which impervious coverage will be limited in reasonable proportion to the effects of the proposed development. Such a condition is no unlawful tax under the statutory language and the attendant case law.

RCW 82.02.020 reads, in pertinent part:

Except as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably

necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.

A “tax, fee, or charge” may be in kind as well as in dollars. *Citizens’ Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 662, 187 P.3d 786 (Div. I 2008), *review denied*, 165 Wn.2d 1030, 203 P.3d 378 (2009). “RCW 82.02.020 mandates that a government imposing requirements such as the clearing limits here demonstrate that the restriction is ‘reasonably necessary as a direct result of the proposed development or plat.’ Our supreme court has repeatedly held that this statute requires ‘that development conditions must be tied to a specific, identified impact of a development on a community.’ . . . [T]he statute specifically requires that a condition be ‘reasonably necessary as a direct result of the proposed development.’” *Citizens’ Alliance*, 145 Wn. App. at 662 (quoting *Isla Verde Int’l Holdings v. City of Camas*, 146 Wn.2d 740, 761, 49 P.3d 867 (2002)) (emphasis in original).

In *Citizens’ Alliance for Property Rights v. Sims*, the King County ordinance at issue limited the amount of space to be cleared on each lot according to the size of the lot. 145 Wn. App at 654. The amount of land to be reserved had no relation to the impacts of the proposed development. *Id.* at 668. For this reason, the ordinance constituted an unlawful in-kind tax. *Id.* at 672.

In contrast, an example of a condition that qualifies for this exception is *Trimen Development Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994). In that case, the Trimmen Development Company sought relief under RCW 82.02.020 from a King County ordinance requiring dedication of open recreational space, or payment of a fee in lieu thereof, for final approval of proposed subdivisions. *Trimmen*, 124 Wn.2d at 264. The ordinance in question determined the amount of land to be dedicated (which in Trimmen's case served as the basis of a fee in lieu of dedication) based on King County's comprehensive assessment of its park needs and on its Annual Growth Report. *Id.* at 275. The supreme court concluded that the resulting fees in lieu of dedication were "reasonably necessary as a direct result of Trimmen's proposed development," *id.* at 274, and ultimately held that the King County ordinance in question was facially lawful under RDW 82.02.020, *id.* at 275.

In the instant case, while the Board did not dictate any specific regulatory scheme to the County, the Board envisioned development regulations similar to the ordinance challenged in *Trimmen*: some system by which, for each proposed development, impervious coverage would be limited in reasonable proportion to its projected effects. The Board did not demand the County enact a flat fixed percentage based restriction. CP at 208 (First Order on Compliance at 21; AR at 254). The Board

specifically left the means of an appropriate restriction to the County, indicating that a fixed percentage based restriction was only one possible solution.

The Board summarized their understanding of the law in Conclusion of Law no. 22: “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 at 208 (First Order on Compliance at 26; AR at 259). Based on the statutory language and the conclusion in *Trimen*, Conclusion of Law no.22 is correct.

D. The Superior Court correctly affirmed the Board’s remand.

1. The Superior Court applied the correct standard of review.

As the County had raised issues with the Superior Court’s standard of review, that court gave particular consideration to that issue, including the deference which the County considered threatened. CP at 312-315 (Memorandum Decision on Appellate Review at 3-6). The explication of that standard of review in this brief, *supra* at 8 and 11, is consistent with what the court outlined, CP at 312-315 (Memorandum Decision on Appellate Review at 3-6). The court concluded “there is ample guidance in appellate decisions for this court to apply and review the respective standards enunciated in both the APA (Chapter 34.05 RCW) and the GMA

(Chapter 36.70A RCW), respectively.” CP at 312-13 (Memorandum Decision on Appellate Review at 3-4).

Upon application of the appropriate standard, the court found “substantial evidence for Findings 14 through 20 and thus this court must accept them And, according the substantial weight it must to the Board’s interpretation of the GMA, . . . this court concludes that Conclusions 21, 23 and 24 are correct interpretations of the law.” CP at 323-24 (Memorandum Decision on Appellate Review at 14-15) (citations omitted). Notwithstanding the County’s assignment of error, CP at 241 (County’s Brief at 6), the Superior Court thus correctly affirmed the Board’s decision. CP at 324 (Memorandum Decision on Appellate Review at 15).

2. The standing doctrine does not bar Ms. Wagenman from responding to the County’s appeal.

The County’s effort to exclude Ms. Wagenman from this review for lack of standing is a misapplication of the standing doctrine. Because Ms. Wagenman’s participation in this review is wholly proper, the Superior Court’s denial of the County’s motion to dismiss was correct.

a. The Superior Court’s order on motion to dismiss is not properly before this Court.

As a preliminary matter, the County has not timely petitioned this Court for review of the Superior Court’s Order on Motion to Dismiss.

This order denied the County's motion to dismiss Ms. Wagenman from the review for lack of standing. First, the County's Notice of Appeal makes no mention of the Order Denying Motion to Dismiss; the County has only appealed the Memorandum Decision on Appellate Review. CP at 326 (Notice of Appeal (June 30, 2010)). Therefore the Order Denying Motion to Dismiss is not properly on appeal.

Second, to whatever extent an appeal of that order may be construed, such an appeal is untimely. Rule of Appellate Procedure 5.2(a) provides, with exceptions that do not apply here, that notice of appeal must be filed within thirty days after the entry of the decision being appealed. RAP 5.2(a). The Superior Court's Order on Motion to Dismiss was entered on January 11 of this year, CP at 210-11 (Order on Motion to Dismiss), making February 10 the County's deadline for appealing that decision. Instead the County filed its notice of appeal months afterward, on June 30. CP at 326-448 (Notice of Appeal). Therefore their appeal of this order is untimely.

For these reasons Ms. Wagenman respectfully asks this Court to dismiss the County's petition for review of Order Denying Motion to Dismiss.

b. As the prevailing party, Ms. Wagenman does not need standing to respond to the losing party's appeal.

Whether or not the Order on Motion to Dismiss is properly on appeal, the order was correctly decided and this Court should not vacate it.

Standing for judicial review of a Growth Management Hearings Board decision is determined by the standing requirements of the GMA, not those of the APA. *Project for Informed Citizens v. Columbia County, et al.*, 92 Wn. App. 290, 297, 966 P.2d 338 (Div. 2 1998), *review denied* 137 Wn.2d 1020, 980 P.2d 1281 (1999) (“[T]he GMA does not incorporate, and is not subject to, RCW 34.05.530 [the APA standing requirements].”) But the GMA’s standing requirements have no effect on a party in Ms. Wagenman’s position as the prevailing party before the Board, and now also before the Superior Court. By their terms, these standing requirements apply only to those who seek judicial review of a Board decision. The GMA provides simply that “[a]ny party aggrieved by a final decision of the hearings board may *appeal* the decision to superior court . . .” RCW 36.70A.300 (emphasis added). Ms. Wagenman has brought no appeal in this case—and with good reason: the Board’s decision was in her favor, so she was not aggrieved by it. Since she is not appealing that decision, she cannot be dismissed for lack of standing.

Even if the APA's standing requirements were applicable here instead of the GMA's, they too by their terms do not apply to a litigant in Ms. Wagenman's position. RCW 34.05.530 determines only who "has standing *to obtain* judicial review of agency action" (emphasis added). Here, the party seeking review is the County, not Ms. Wagenman. Therefore the APA standing requirement also does not call for her dismissal.

c. Even if she needed standing, Ms. Wagenman's participation standing before the Board gives her standing in subsequent judicial review.

Ms. Wagenman's standing before the Board, to whatever extent she may be required to have it, was based on her participation in the legislative process that enacted SCC Title 3. Under the GMA, the set of persons with standing to petition the Board includes and is greater than the set of qualified petitioners under the APA. RCW 36.70A.280(2). Anyone who "participated orally or in writing before the county or city regarding the matter on which a review is being requested" has standing to petition the Board. RCW 36.70A.280(2)(b). On this basis, and upon the County's challenge, the Board found that Ms. Wagenman had standing to petition the Board for review of the ordinance adopting Title 3. CP at 207 (Final Decision and Order at 21-24; AR at 21-24).

As a matter of law, a person who has this “participation standing” before the Board also has standing to appeal the Board’s decision to the courts. In *Project for Informed Citizens v. Columbia County*, Court of Appeals Division II held that a party who had participation standing before the hearings board and received an adverse decision from the board was “aggrieved” by that decision such that they then had standing to seek judicial review of the decision in superior court. 92 Wn. App. at 297 (construing RCW 36.70A.300(5)). The court held that the GMA standard conflicts with the APA standard, and where such conflicts occur, the GMA provision controls. *Id.* at 295-97; *see* RCW 36.70A.270(7). The court discerned no reason “why the GMA would grant party status at the board level, then withdraw it at the superior court level through the use of the APA standard. If the APA controls at all, it should control *both* levels.” *Id.* at 296 (emphasis in original).

Again, the standing requirement does not apply to a party in Ms. Wagenman’s position. But if it would make no sense to withdraw party status from the party who loses at the board level, it follows that the winning party is similarly entitled to retain party status and respond to an appeal of that decision. *Informed Citizens* essentially recognizes in the parties before the board an interest in the outcome of those proceedings that entitles those parties to participate in an appeal of that outcome,

whether to challenge the Board's decision or to respond to such a challenge. Therefore Ms. Wagenman, having had participation standing before the Board and having received a favorable decision, is entitled to defend that decision on appeal. Far from having been aggrieved by the Board's decision, she would prefer it be left alone. It would be illogical and unfair to preclude her from responding to a challenge of that decision.

Even if Ms. Wagenman were required to have standing in this review, the County's arguments for application of federal standing case law are erroneous. In the interest of consistency, Washington's APA refers the courts to the case law of other jurisdictions as advisory authority. RCW 34.05.001; *see Allan v. University of Washington*, 92 Wn. App. 31, 959 P.2d 1184 (Div. II 1998). But the APA does not apply to the extent it conflicts with the GMA. RCW 36.70A.270(7). As the *Informed Citizens* court held, the GMA's participation standing provision controls over any inconsistent APA provision. *Informed Citizens*, 92 Wn. App at 295-97. Therefore the APA cannot and does not incorporate other jurisdictions' standing case law, federal or state, to the extent it would conflict with the Washington legislature's express grant of participation standing in the GMA.

Because federal standing case law has not been incorporated into Washington law, it does not control the instant case. The federal case law

of standing is entirely an outgrowth of Article III's restriction on the federal courts to hearing only "cases" and "controversies." U.S. CONST. art. III § 2. The familiar requirements of injury, traceability, and redressability were established to ensure that the federal courts hear only matters that are "cases" and "controversies," in compliance with Article III. *See, e.g., Allen v. Wright et al.*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). But Article III applies solely to the federal judiciary. By its terms, Article III defines the "[t]he judicial Power of the United States," not that of the states themselves. U.S. CONST. art. III § 1. No authority exists, and the County cites none, that applies Article III's requirements to state courts.

Since the federal case and controversy requirement does not apply to the states, it cannot and does not operate to change a plain statement by the Washington legislature as to who does or does not have standing in particular circumstances. The legislature may give standing to whomever it wants. It has done so by granting participation standing in the GMA.

Thus the County is incorrect to assert that *Informed Citizens* was wrongly decided for having violated Article III. CP at 260 (County's Brief at 25). *Informed Citizens* is consistent with state law and was therefore correctly decided.

Based on *Informed Citizens* and the other reasons cited above, the Superior Court was correct to deny the County's motion to dismiss.

VI. CONCLUSION

For the above reasons, Ms. Wagenman respectfully asks this Court to affirm the decisions of the Board and the Superior Court.

Respectfully submitted this 16th day of November, 2010.

By



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CERTIFICATE OF SERVICE BY MAIL

I certify that on November 16, 2010 I mailed a copy of the foregoing Brief of Respondent Jeanie Wagenman, postage prepaid, to the following persons at their respective addresses:

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