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SUPREME COURT  
STATE OF WASHINGTON

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BY C. J. HERRITT

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

CECILE B. WOODS,

Petitioner,

v.

KITTITAS COUNTY, a political subdivision of the State of Washington;  
EVERGREEN MEADOWS, LLC; STUART RIDGE, LLC; STEELE  
VISTA, LLC; and CLE ELUM'S SAPPHIRE SKIES, LLC,

Respondents.

**AMICUS CURIAE BRIEF OF BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON IN SUPPORT  
OF RESPONDENTS**

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## I. INTRODUCTION

The central issue on appeal is whether appellate courts have jurisdiction under the Land Use Petition Act (LUPA) to review a local jurisdiction's rezone for compliance with the Growth Management Act (GMA). Although Petitioner's (Woods) first issue presented appears to be limited to that question, Woods expands her argument by claiming that Respondent Kittitas County's (Kittitas County) rezone of the roughly 252 acres<sup>1</sup> from Forest and Range zone (minimum density of one dwelling unit per 20 acres) to Rural-3 zone (allowing one dwelling unit per three acres) violates the GMA. *See* Pet. for Review at 6. Woods specifically argues the GMA contains a bright line rule that *any* rural density greater than one dwelling unit per five acres is a per se violation of the Act. *Id.* at 8. Woods makes this remarkable argument despite the fact that the Legislature did not include any provision in the GMA imposing a bright line minimum rural designation of one dwelling unit per five acres.

Moreover, Woods cites to Growth Management Hearings Board (Growth Board) decisions for the proposition that such a bright line rule has been established by those quasi-judicial agencies. *See* Pet. for Review

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<sup>1</sup> The property rezoned is owned by Respondents Evergreen Meadows, LLC, Stuart Ridge, LLD, Steele Vista, LLC, and Cle Elum's Sapphire Skies, LLC (collectively "CESS").

at 8-9. However, in making this argument Woods ignores this Court's clear language explaining that the GMA does not grant the Growth Boards the authority to impose bright line rules. *See Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005) (Ruling that Growth Management Hearings Boards do not have authority to make "public policy" and impose bright line rules.). Woods further ignores the deference the GMA confers to local jurisdictions when planning based on local circumstances

In addition to Woods' arguments, the Superior Court ruled that the rezone to Rural-3 would allow for development "which is urban in nature" and thus "violate[d] the GMA." *See Appendix A*. The court made this ruling without citing to any provision within the GMA or citing any case law for the proposition. The Court of Appeals properly dismissed this argument. *See Woods v. Kittitas County*, 130 Wn.App. 573, 583, 123 P.3d 883 (2005). No GMA provision imposes a minimum density within rural areas.

Accordingly, if this Court were to reach the underlying GMA issue raised by Woods, this Court should apply the proper deference owed to Kittitas County and quash Woods' attempt to impose the non-existent rural density bright line rule of one unit per five acres.

**II. IDENTITY AND INTEREST OF *AMICUS CURIAE*  
BUILDING INDUSTRY ASSOCIATION  
OF WASHINGTON**

BIAW is the state’s largest non-profit trade association. BIAW has over 12,200 members who are engaged in various development and construction related activities throughout Washington State. BIAW members are greatly affected by the Growth Management Act (GMA) and the Land Use Petition Act. BIAW has an interest in ensuring that the GMA is properly applied by local jurisdictions and the courts of this state.

**III. ISSUE OF CONCERN TO *AMICUS CURIAE***

1. Whether Kittitas County’s rezone violates the Growth Management Act by allowing a density of one dwelling unit per three acres.<sup>2</sup>

**IV. STATEMENT OF THE CASE**

BIAW adopts the Statement of the Case provided by Respondents Evergreen Meadows, LLC, Stuart Ridge, LLC; Steele Vista, LLC; and Cle Elum’s Sapphire Skies, LLC (“CESS”).

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<sup>2</sup> Because the issue and arguments as to GMA compliance is raised by the parties, *see, e.g.*, Pet. for Review at 6-9, BIAW as *amicus curiae* is not raising a new issue or new arguments of the kind disfavored by this Court. *See Rabon v. City of Seattle*, 135 Wn.2d 278, 291 n. 4, 957 P.2d 621 (1998).

## V. ARGUMENT

### A. THIS COURT SHOULD RULE AGAINST PETITIONER'S ARGUMENT THAT THE GMA IMPOSES A BRIGHT LINE RULE OF ONE DWELLING UNITS PER FIVE ACRES IF IT DECIDES THAT LUPA APPLIES TO THE CASE AT HAND

Underlying Woods' jurisdictional argument is the issue of whether Kittitas County's rezone allowing one unit per three acres is a violation of the GMA. *See* Pet. for Review at 6-9 (arguing the Rural-3 rezone violates the GMA by allowing "urban growth densities in rural areas.").

By making this argument, Woods is attempting to turn the GMA on its head by replacing the GMA's bottom-up planning approach with top-down command and control whereby the bright line rules are imposed by the Growth Boards in a uniform manner on all jurisdictions. Unlike Oregon's growth planning law and Washington's Shoreline Management Act, the GMA does **not** require state administrative approval of local regulations. *See* Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 Seattle U. L. Rev. 5, 11 (1999); *see also* *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 856, 123 P.3d 102 (2005) (J.M. Johnson, J., dissenting) (The GMA is intended to be local-focused, 'bottom up,' rather than a 'top down' planning."); *see also* WAC 365-195-010(3) (The GMA "process should be a 'bottom up' effort . . . with the central locus of decision-making at the local level.").

Nor does the GMA provide any provision requiring a minimum of five acre lots in rural areas. *See, e.g., Viking Properties*, 155 Wn.2d at 129 (This Court ruling that Growth Boards do not have authority to impose a bright line minimum four dwelling units per acre as defining urban development.).

Yet, under Woods' theory in this case, if local jurisdictions do not impose the Growth Boards' bright line rule of one dwelling unit per five acres in rural areas, they are not in compliance with the GMA. *See* Pet. for Review at 8-9. Woods makes this argument despite the GMA's explicit language and implementing regulations stressing local decision-making, along with this Court's recent case law recognizing the high level of deference granted to elected local government officials. *See* RCW 36.70A.320, .3201; *see also Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 237-38, 110 P.3d 1132 (2005) (Noting that the Legislature took the "unusual additional step of enacting into law its statement of intent" to "accord counties and cities planning under the GMA additional deference.").

Thus, if this Court were to decide the GMA issue it should grant Kittitas County the proper deference it is owed and dismiss Woods' argument that the Rural-3 zone violates the Act.

**B. THE GMA DOES NOT ELEVATE CERTAIN GOALS  
TO THE DETRIMENT OF OTHER GOALS**

Woods, in an attempt to impose a uniform rural density requirement in all rural areas, seeks to elevate the GMA planning goals of reducing sprawl and encouraging urban development to the detriment of the other goals that Kittitas County is required to weigh when adopting its development regulations. *See* Pet. for Review at 6 & 7 (listing the first two GMA goals of encouraging urban growth and reducing sprawl, but failing to list the other non-prioritized goals). This is not supported by either statute or case law.

The GMA lists 13 non-weighted goals local jurisdictions are to apply when adopting their comprehensive plans and development regulations. RCW 36.70A.020 (“The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations . . .”). In addition to the plain language of the RCW 36.70A.020, this Court recently clarified the statute and affirmed that the goals are to be applied evenly:

Viking’s public policy argument also fails to the extent that it implicitly requires us to elevate the singular goal of urban density to the detriment of other equally important GMA goals. To do so would violate the legislature’s express statement that the

GMA's general goals are nonprioritized. We are ever cognizant that this is a legislative prerogative and have prioritized the GMA's goals only under the narrowest of circumstances, where certain goals came into direct and irreconcilable conflict as applied to the facts of a specific case. We decline Viking's invitation to create an inflexible hierarchy of the GMA goals where such a hierarchy was explicitly rejected by the legislature.

*Viking Properties*, 155 Wn.2d at 127-28 (citations omitted; emphasis added).

Likewise, this Court should once again decline Woods' invitation to elevate the singular goals of encouraging growth and reducing sprawl to the detriment of the other "nonprioritized" GMA goals. Ignoring this Court's decision in *Viking Properties*, Woods fails to cite the other equally weighted GMA goals, such as protecting affordable housing,<sup>3</sup> economic development,<sup>4</sup> and property rights<sup>5</sup> which are weighted as equally as the

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<sup>3</sup> Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock. RCW 36.70A.020(4).

<sup>4</sup> Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities. RCW 36.70A.020(5).

goals of encouraging urban development and reducing sprawl.

Because no singular GMA goal is to be elevated above others, Woods' argument that the rezone from Forest and Range to Rural-3 violates just two of the GMA goals is misplaced and should not be considered by this Court.

**C. THE GMA DOES NOT CONTAIN ANY LANGUAGE  
REQUIRING A MINIMUM OF FIVE ACRE LOTS IN  
RURAL AREAS**

Woods somehow reads into the GMA a requirement that rural densities can be no greater than one dwelling unit per five acres. Yet, no such language exists in the GMA. Therefore, this Court should dismiss Woods' attempt to infuse such language into the GMA.

“The court’s fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 10, 43 P.3d 4 (2002); *see also State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). In addition, a court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to

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<sup>5</sup> Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions. RCW 36.70A.020(6).

include that language.” *State v. Delgado*, 148 Wn.2d 723, 727 63 P.3d 792 (2003). Instead, the court is to “assume the legislature ‘means exactly what it says.’” *Delgado*, 148 Wn.2d at 727, citing *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

The Legislature, with great detail, explained how local jurisdictions are to designate rural densities in rural areas. The GMA requires local jurisdictions to include a rural element within its comprehensive plan and set a variety of rural densities. The GMA provides, in pertinent part:

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

(a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate

appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and ground water resources; and

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

RCW 36.70A.070(5)(a)-(c).

Notably absent is any reference to a bright line rule requiring a minimum density of one dwelling unit per five acres within rural areas. Instead, the statute specifically allows local governments to set a variety of densities based on local circumstances. To achieve a variety of rural densities, the GMA also allows local jurisdictions to apply innovative techniques, such as clustering, which Kittitas County's Rural-3 zone provides for. *See* Kittitas County Code (KCC) 17.30.020.

Woods is attempting to add language which does not exist to the plain meaning of the statute. This Court should reject the Woods' reading

into the GMA a provision the Legislature chose not to include, namely a minimum of one dwelling unit per five acres in rural areas.

## VI. CONCLUSION

Based on the foregoing, if this Court were to reach the issue of whether Kittitas County's rezone violated the GMA, the Court should reject the Woods' patently false assertion that the GMA imposes a bright line one dwelling unit per five acres requirement in areas designated rural.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> of December, 2006,

A handwritten signature in black ink, appearing to read "A C Cook", written over a horizontal line.

Andrew C. Cook  
WSBA No. 34004  
Attorney for Amicus Curiae BIAW

# APPENDIX A



Superior Court of the State of Washington  
for the County of Yakima

Judge Susan L. Hahn  
Department No. 1  
Judge's Chambers

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October 25, 2004

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**RE: Woods v. Kittitas County, Evergreen Meadows, et al. 04-2-02188-9**

Gentlemen:

This letter constitutes my oral ruling in Woods v. Kittitas.

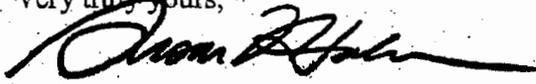
Having reviewed the memoranda, arguments and cases cited by the parties the court concludes:

1. The court has subject matter jurisdiction over this site-specific rezone. Although the GMHB has jurisdiction to determine whether Kittitas County's RR-3 zoning ordinance violates the GMA, it does not have jurisdiction to review whether the BOCC's decision to rezone the subject property as RR-3 violates the GMA as applied by allowing urban growth (RR-3) in a rural area.
2. Whether this RR-3 rezone is lawful depends on where the subject property is located within the county. In other words, the RR-3 ordinance may be consistent with the GMA when applied to some properties and inconsistent when applied to others. Since the property in this case is located outside of a designated UGA, a rezone that allows for development which is urban in nature violates the GMA. The fact that the property may never be fully built out is irrelevant to whether the application of RR-3 to this property has the potential to turn a rural area into an area of urban growth density.

3. Based on my decision that the BOCC erred by granting a rezone which allows for urban growth density in a rural area, it is unnecessary to reach the other arguments raised by Plaintiff.

Please prepare final papers for my signature within the next 30 days.

Very truly yours,



Susan L. Hahn

**DECLARATION OF SERVICE BY MAIL AND FACSIMILE**

I, Andrew C. Cook, declare as follows:

I am a resident of the State of Washington, residing or employed in Olympia, Washington.

I am over the age of eighteen years old and am not a party to the above-titled action.

My business address is 111 21<sup>st</sup> Avenue SW, Olympia, Washington, 98507.

On December 22, 2006, true copies of Motion for Leave to File *Amicus Curiae* Brief on Behalf of Building Industry Association of Washington and [Proposed] *Amicus Curiae* Brief of Building Industry Association of Washington in Support of Respondents, along with facsimiles, were placed in envelopes and sent to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Olympia, Washington and sent via facsimile.

I declare under penalty and perjury that the foregoing is true and correct and that this declaration was executed this 22<sup>nd</sup> day of December, 2006, in Olympia, Washington.

  
\_\_\_\_\_  
ANDREW C. COOK