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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION III

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CECILE B. WOODS,

Respondent

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

Appellants.

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**REPLY ARGUMENT OF APPELLANT  
KITTITAS COUNTY**

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June 8, 2005

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## I. REPLY ARGUMENT

### A. Respondent mischaracterizes the issues and the arguments presented by Appellant Kittitas County.

Before reaching the merits of the respondent's argument, it is necessary to address the respondent's attempts to mislead the Court about the arguments and issues presented by Appellant Kittitas County.

First, the respondent inexplicably asserts that the County has not identified any issue presented and has not complied with RAP 10.3(a). Resp. Br. at 2, n.3. The County's assignments of error and issues presented are set forth on page 1 of the County's opening brief. Pursuant to RAP 10.1(g), the County has also adopted the arguments of appellant CESS. App. Br. (County) at 2. The County's opening brief states that the County's brief will address and supplement just a few of the issues raised in this appeal. App. Br. (County) at 2.

Second, the respondent mischaracterizes the County's argument. In an effort to justify her untimely attack on the Rural-3 zone, the

respondent asserts that there is no other venue in which she could present her argument that the Rural-3 zone violates the rural density requirements of GMA. CP 40; Resp. Br. at 37-45. The County's opening brief was a proactive response to that argument. The County has not presented new arguments about "prerequisites," "conditions," "standing" or "estoppel." Resp. Br. at 35-37. As the County's brief states, the issue is:

Whether the superior court lacked jurisdiction to determine whether the Kittitas County "Rural-3" zone violates GMA.

App. Br. (County) at 1. In order to decide that issue correctly, the Court must recognize that respondent had (and still has) access to an established GMA review process, and she must use that process to present her GMA arguments. Whether or not respondent decides to use that process, the Yakima County Superior Court is not the proper venue to decide whether the basic rural zoning policies of Kittitas County comply with GMA.

Third, the respondent mischaracterizes the issue presented. The respondent frames the issue as follows:

(iii) Whether Respondent [sic] prohibited from challenging a site-specific rezone because of a purported failure to challenge original zoning ordinance or propose amendments to zoning ordinance districts?

Resp. Br. at 2. Appellants have never argued that respondent is "prohibited" from challenging the Board's rezone decision. Respondent

may challenge that decision but may not challenge it on the assertion that the Rural-3 zone violates GMA.

More importantly, the respondent's statement of the issue erroneously suggests that the respondent could raise her GMA arguments in this LUPA case as long as she had used the GMA process first. Even if the respondent had previously presented her GMA arguments to the Board and then to the EWGHMB, the respondent still could not raise those GMA issues in superior court under LUPA. If the respondent had presented her GMA arguments to the EWGMHB, that body would have ruled on the question of whether the Rural-3 zone is an appropriate rural density in Kittitas County. The superior court would simply implement that decision. Either way, the question of whether the Rural-3 zone complies with GMA is within the *exclusive* jurisdiction of the EWGMHB. RCW 36.70A.280(1); *Somers v. Snohomish County*, 105 Wn. App. 937, 945, 21 P.3d 1165 (2001).

**B. The public, including respondent Woods, has had numerous opportunities to challenge the Comprehensive Plan and Rural-3 zone both legislatively and before the EWGMHB.**

As a threshold matter, respondent asserts that she is not challenging the validity of the Rural-3 zone in this case. Resp. Br. at 36. Respondent asserts that the trial court's ruling is limited to rural areas of

Kittitas County, and that the Rural-3 zone has “potential applicability” in urban areas of Kittitas County. These arguments are frivolous.

The Rural-3 zone is a rural zone, not an urban zone. The Kittitas County comprehensive plan recognizes 3 acre zones as rural.. CP 77. This Court of Appeals had recognized that 3 acre zones in Kittitas County are rural. In *Henderson v. Kittitas County*, 124 Wn. App. 747, 100 P.3d 842 (2004), this Court recognized that 3-acre zoning is a rural density that implements the express policies of the Comprehensive Plan for rural areas. The Eastern Washington Growth Management Hearings Board has also recognized that 3 acre lot density is a rural density in Kittitas County. In *Son Vida II v. Kittitas County*, EWGMHB No 01-1-0017, Final Decision and Order dated March 14, 2002 [see Appendix A] the Hearings Board confirmed on page 10 and page 11 that the Kittitas County Code allows for 3 acre lot density in the rural areas outside of the Ellensburg UGA. The suggestion by respondent that the Rural-3 zone is “potential[ly] applicable” to urban areas is unsupported.

If affirmed, the trial court’s decision would invalidate the Rural-3 zone throughout Kittitas County. Recognizing that the respondent is challenging the validity of the Rural-3 zone throughout Kittitas County, it becomes clear that a LUPA challenge to a site-specific rezone is not the

proper venue for the respondent's GMA argument. Respondent must use the established GMA planning process to challenge the Rural-3 zone.

**1. Respondent Woods failed to challenge the Rural-3 zone when it was enacted in 1992.**

As explained in the County's opening brief, respondent could have challenged the Rural-3 zone in a petition to the EWGMHB when the zone was first adopted in Ordinance 92-4. Respondent offers four arguments about why she could not have challenged the initial adoption of the Rural-3 zone in 1992. Resp. Br. at 37. None of these arguments have merit. Most of these arguments were anticipated in the County's opening brief, and the respondent has not addressed the County's arguments in any meaningful way.

First, respondent argues that the Ordinance 92-4 was not adopted "pursuant to" GMA. Resp. at 37-39. As explained in the County's opening brief, there is no authority to support the respondent's assertion that a zoning ordinance must be labeled "adopted under [GMA]." App. Br. (County) at 9. On the contrary, the GMA boards have jurisdiction over ordinances that predate GMA. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 567, 958 P.2d 962 (1998). If that were the case, a county could simply evade GMA board review of a

new zoning ordinance by merely failing to label the ordinance as a GMA ordinance.

Second, respondent argues that no GMHB appeal procedures were available in early 1992, and that the 60-day appeal period elapsed before the GMA boards adopted rules of procedure. Resp. Br. at 40. As explained in the County's opening brief, there is no authority for the respondent's assumption that the board must have adopted procedural rules before a petition could be filed. App. Br. (County) at 8. Given that RCW 36.70A.280 was in effect in March of 1992, Respondent has not explained why it was not possible to file a petition under that statute and simply wait for the EWGMHB to start hearing cases later that year. Nor has respondent explained why she failed to present her objections to the Board of County Commissioners when Ordinance 92-4 was adopted.

Third, the respondent points out that Kittitas County had not designated its urban growth areas ("UGAs") in 1992. Resp. Br. at 40-41. But the issue presented by respondent — whether 3-acre parcels are prohibited in rural areas — is not dependent upon the designation of particular UGAs. The Rural-3 zone is a "rural" zone, and is not appropriate for "urban" areas (UGAs). The precise boundaries of the UGAs are irrelevant to the issue presented.

Finally, respondent argues that the GMA requirements for rural areas were not adopted until 1997. Resp. Br. at 38, 42. That is not correct. Although the GMA requirements for rural areas were amended and clarified in 1997, the basic GMA requirements for rural areas were part of the original GMA statute. The original 1990 statute provided, in relevant part:

Each comprehensive plan shall include a plan, scheme, or design for each of the following: ...

(5) Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The rural element shall permit land uses that are compatible with the rural character of such lands and provide for a variety of rural densities.

Former RCW 36.70A.070 (1990); Laws of 1990, 1st Ex. Sess., ch. 17, § 7.

Based on this original provision, the GMA boards started issuing decisions about rural areas. See *Kitsap Citizens for Rural Preservation v. Kitsap County*, CPSGMHB No. 94-3-0005 (FDO, October 25, 1994). Although the body of law on rural densities under GMA has grown since 1992, nothing prevented respondent from challenging Ordinance 92-4 on the theory that 3-acre lots are too dense for rural areas.

In sum, the respondent was not prevented from presenting her rural density arguments to the EWGMHB in 1992. She simply neglected to do so.

2. **Respondent Woods has never used the docketing and public participation process under RCW 36.70A.470, the Comprehensive Plan or KCC Title 15B to suggest amendments to the Comprehensive Plan or Rural-3 zone.**

Even if the respondent was prevented from challenging Ordinance 92-4 when it was originally enacted, the respondent could have used the docketing and public participation process under RCW 36.70A.470 to challenge the comprehensive plan allowance of 3-acre zones nor the Rural-3 zone at any time in the last 10 years. The respondent does not deny that she has never attempted to resolve her objections to the Rural-3 zone through the established GMA process. Nor does the respondent argue that she has been prevented from using the docketing and public participation process.

The respondent's argument is an attack on the countywide validity of the Rural-3 zone. The issue of whether the Rural-3 zone violates GMA is a matter within the *exclusive* jurisdiction of the EWGMHB.

3. **The trial court's ruling circumvents and interferes with the established public process for implementing GMA.**

The County's opening brief explained how the trial court's ruling — which effectively invalidated the Rural-3 zone — bypassed the established public participation process and usurped the authority of the EWGMHB to decide whether the Rural-3 zone is appropriate under the particular circumstances of Kittitas County. The respondent has not

addressed these concerns in any meaningful way. Instead, the respondent continues to pretend that she is only challenging a particular rezone, and not the countywide validity of the Rural-3 zone. Resp. Br. at 46-47.

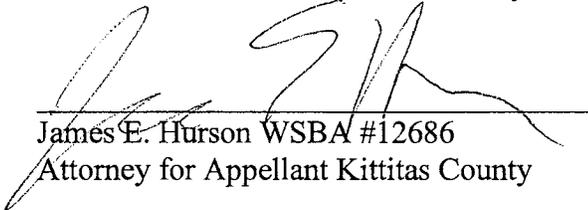
The respondent does not deny that the EWGMHB would have exclusive jurisdiction over a petition seeking to explicitly invalidate either the Rural-3 zone or the references to that zone in the Comprehensive Plan. Allowing a superior court to bypass the GMA review process and decide whether the Rural-3 zone is an appropriate rural density interferes with the legislative scheme for GMA planning. It would create multiple decision making bodies where the Legislature clearly intended only one specialized body — the GMA boards — to address GMA issues. This would encourage parties to engage in forum shopping rather than using the GMA boards. Allowing superior courts to decide Hearings Board GMA issues in the context of LUPA appeal would also encourage parties to lie in the weeds, and not challenge a particular GMA policy until it manifests itself in a particular project. The legislature intended new zoning ordinances to be promptly reviewed by the GMA boards after enactment. *See* RCW 36.70A.290(2). This allows for predictability in the planning process. The legislature did not intend superior courts to revisit a GMA compliance issue years later where the issue was not presented to the GMA boards when an ordinance was initially enacted.

These problems are highlighted in this case. For more than ten years, neither the respondent nor any one else has asked the EWGMHB to rule that the Rural-3 zone is inappropriate in the rural area of Kittitas County. The established GMA planning process has not been used. The *Somers, supra*, precedent must be followed. The superior court below had no jurisdiction to consider whether the Rural-3 zone is an appropriate rural density under GMA.

## II. CONCLUSION

For all of these reasons the trial court's decision was erroneous and must be reversed.

RESPECTFULLY SUBMITTED this 8th day of June, 2005.



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James E. Hurson WSBA #12686  
Attorney for Appellant Kittitas County

## APPENDIX A

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PROSECUTING ATTORNEY  
KITITAS COUNTY WASHINGTON

State of Washington  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON

SON VIDA II, a Washington limited  
partnership  
Petitioner,  
v.  
KITITAS COUNTY,  
Respondent.

Case No. 01-1-0017

**FINAL DECISION AND ORDER**

PROSECUTOR mail box  
COMMISSIONERS ma. l box  
DEPARTMENT ma. l box Comm.  
INSURANCE JP.

**I. PROCEDURAL HISTORY**

On September 11, SON VIDA II, a Washington limited partnership, by and through its counsel, Jeff Slothower of Lathrop, Winbauer, Harrel, Slothower & Denison LLP, filed a Petition for Review regarding Kittitas County Ordinance No. 2001-10, which amended Kittitas County Code Chapter 17.58--Airport Zone.

On October 17, 2001, the Board held a Prehearing conference. The legal issues, proposed schedule and other procedural matters were reviewed. The Board requested the Petitioner to reframe the legal issues into a question format.

On February 13, 2002, the board held the Hearing on the Merits. Present were Presiding Officer, Judy Wall and board member Dennis A. Dellwo. Board member D.E. "Skip Chilberg was unavailable. Present for Petitioner was Steve Willard and counsel Jeff Slothower. Present for Respondent was James Hurson, Deputy Prosecuting Attorney.

**II. FINDINGS OF FACT**

1. The Bowers Field Airport is located immediately north of and is adjacent to the City of Ellensburg.

2. The Airport Operations Zone of the airport includes Overflight Areas within portions of the current city limits of Ellensburg, portions of unincorporated areas of the Ellensburg UGA, and portions of unincorporated Kittitas County outside of the Ellensburg UGA.

3. Kittitas County adopted Kittitas County Ordinance No. 2001-10 on July 17, 2001. This Ordinance amended the Kittitas County Code Chapter 17.58 – Airport

1 Zone creating an Airport Overlay Zoning District, which included Inner Turning Zone 3  
2 and Airport Operations Zone 6 where the Petitioner owns approximately 59 acres.  
3 These Zones are listed as Safety Zones. 17.58.40 (B).

4 4. Inner Turning Zone 3 limits the number of dwelling units to one per acre  
5 inside the existing Ellensburg Urban Growth Area. For lands zoned Agricultural – 3, the  
6 average density will be one dwelling unit per three acres.

7 5. Airport Operations Zone 6 limits the number of dwelling units to one per  
8 acre or two dwelling units per acre with a duplex configuration inside the existing  
9 Ellensburg Urban Growth Area.

10 6. The Airport Overlay Zones were adjacent to the Airport and were within  
11 areas the County believed it was necessary to discourage the siting of incompatible  
12 uses.

### 13 III. LEGAL ISSUES

14 1. Whether the Kittitas County Airport Overlay Zone Ordinance No. 2001-10  
15 (the "Ordinance") violates the requirements of RCW 36.70A.020(1) through (5), (11),  
16 (12), RCW 36.70A.040, RCW 36.70A.120, WAC 365-195-800, and WAC 365-195-520  
17 because the Ordinance is inconsistent with the Kittitas County Comprehensive Plan,  
18 the City of Ellensburg Comprehensive Plan, and countywide planning policies for urban  
19 growth areas, housing, population, utilities, and transportation because it:

20 a) Reduces densities in that portion of the City of Ellensburg UGA  
21 (turning Zones 3 and 6) which is subject to the County Ordinance to a density level  
22 below urban density and, thereby, violates RCW 36.70A.020(1), (2), and (4); and/or

23 b) Impairs efficient distribution of utilities and public transportation  
24 improvements; and therefore is not in compliance with RCW 36.70  
25 A.020 (3), (4), (5), (10) and RCW 36.70A.040; and/or;

26 c) Impairs public and private ability to finance urban improvements  
necessary for public health, safety, and welfare and therefore is not in compliance  
with RCW 36.70A.020(3), (4), (8), RCW 36.70A.030, and RCW 36.70A.120; and/or;



1 d) Restrains annexation of real property within the City of Ellensburg  
2 UGA and frustrates the purpose and intent of the UGA designation and therefore is not  
3 in compliance with RCW 36.70A.020(3), (4) (8), RCW 36.70A.030, and WAC 365-195-  
4 170.

5 2. Whether the enactment of an Airport Overlay Zone for portions of the  
6 City of Ellensburg UGA by Kittitas County, which is different from the Airport Overlay  
7 Zone enacted by the City of Ellensburg is consistent with and violates the cooperative  
8 planning process required under WAC 365-195-800, WAC 365-195-815, WAC 365-195-  
9 520, and WAC 365-195-170.

10 3. Whether the Ordinance takes private property for public use without  
11 compensation in violation of RCW 36.70A.020(6), RCW 36.70A.370, and WAC 365-  
12 195-855.

13 4. Whether the Ordinance is arbitrary and capricious and, as such, violates  
14 RCW 36.70A.020(6);

15 5. Whether the adoption of the Ordinance by Kittitas County violates the  
16 Appearance of Fairness Doctrine in that Kittitas County owns the airport property,  
17 manages the airport property, and will financially benefit from the inclusion of portions  
18 of the airport property in the urban growth area at the expense of surrounding private  
19 property rights also in the urban growth area adjacent to the airport and, as such, the  
20 adoption of the Airport Overlay Zone violates RCW 36.70A.020(1), (5) and (11).

21 IV. LEGAL ISSUES 1-4 AND DISCUSSION

22 Issues numbered 1-4 all relate to the Airport Overlay Zone and will be  
23 answered as one issue.

24 Petitioner position

25 The Petitioner contends The Airport Overlay Zone is not consistent with the  
26 Kittitas County Comprehensive Plan because the plan provides that all urban growth  
area land be developed at an urban density in the next 20 years. The Petitioner  
further contends urban land and urban development should be more than four

1 dwelling units per acre. The Petitioner contends one housing unit per acre is not an  
2 urban density.

3 The Petitioner states the Airport Overlay Zone goal of protecting the airport  
4 from incompatible land uses is a supplemental goal. The Petitioner contends density  
5 restrictions in Zone 3 and Zone 6 are an attempt to implement the secondary goal of  
6 protecting the airport from incompatible land uses and this conflicts with the primary  
7 goals of the GMA. The Petitioner contends the Airport Overlay Zone conflicts with  
8 RCW 36.70A.020(1) and inhibits urban growth in Zone 3 and to a lesser degree Zone  
9 6. The Petitioner believes instead of reducing sprawl, it encourages sprawl.

10 The Petitioner contends the Airport Overlay Zone conflicts with RCW  
11 36.70A.020(4) because it discourages the availability of affordable housing to all  
12 economic segments of the population.

13 Petitioner believes the Airport Overlay Zone conflicts with General Planning  
14 Goals, Objectives & Policies because the density level established will not encourage or  
15 promote the construction of transportation infrastructure because it is not financially  
16 feasible. Petitioner further believes the ordinance frustrates the implementation and  
17 construction of capital facilities in the overlay portion of the City of Ellensburg UGA.  
18 The Petitioner contends density reductions increase infrastructure costs to a  
19 prohibitive level and results in inefficient expenditure of limited funds for capital  
20 improvements. Petitioner states the direct result of this conflict is no consistent or  
21 coordinated plan for utilities and transportation facilities between the City and County  
22 along arterials in the UGA affected by the overlay zone.

23 The Petitioner states this density restriction frustrates the annexation of these  
24 lands into the City of Ellensburg because 1) land must be adjacent to the City of  
25 Ellensburg to be annexed and 2) a property owner whose property is being annexed  
26 into the City must extend utilities to the property being annexed. Petitioner states in  
order to be annexed, the developer must develop the property to urban standards  
including the utility standards. The Petitioner contends this is economically unfeasible.

1 Petitioner states the County adopted an ordinance different from the City of  
2 Ellensburg's in that it sets different densities in Zone 3.

3 The Petitioner states the County ignored appropriate and already established  
4 density levels in and around airports. They believe the County could have established  
5 a density of 3 to 4 dwelling units per acre. The County chose to establish a one  
6 dwelling per acre density. The Petitioner believes this is an unconstitutional taking of  
7 Son Vida's property.

8 Petitioner cites RCW 36.70A.020(6) as having two separate and distinct goals.  
9 One is protecting against taking of property without just compensation. The other is  
10 protection of property from arbitrary and discriminatory actions. The Petitioners say  
11 the term "arbitrary" connotes actions that are ill conceived, or ill considered. The term  
12 "discriminatory" involves actions singling out a particular person or class of persons  
13 for different treatment without a rational basis upon which to make the segregation.

14 The Petitioner further believes the County creates three different classes of  
15 property owners in the City of Ellensburg UGA portion of the Airport Overlay Zone.

- 16 1. Incorporated property owners outside the Airport Overlay Zone who can  
17 develop to higher densities;
- 18 2. Incorporated property owners within the current city limits and within  
19 the Airport Overlay Zone who can develop to six dwelling units per acre  
20 maximums;
- 21 3. Unincorporated property owners who may later annex into the city but  
22 who will be limited to the one dwelling unit per acre density.

23 Petitioner contends there is no rational basis to treat these three classes of  
24 landowners in the Airport Overlay zone differently. The Petitioner further contends the  
25 County adopted a density level that is not supported by any authority.

26 **RESPONDENT'S POSITION:**

The Respondent cites the thirteen planning goals of the GMA as listed in RCW  
36.70A.020 as goals relating to urban growth, reduced sprawl, transportation,



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housing, economic development, property rights, permits, natural resource industries, open space and recreation, environment, citizen participation and coordination, public facilities and services, and historic preservation. The Respondent states these goals are not listed in any order of priority. These goals are also often in conflict with each other and cannot be looked at in isolation. The Respondent gives the following example: Environmental protection (goal 10) and natural resource conservation (goal 8) can add cost to development, but housing (goal 4) strives to promote affordable housing. The County believes the planning and implementation of the GMA requires a balancing of all these goals and not just a few taken in isolation as have been argued by the Petitioner.

The Respondent points out Bowers Field Airport is located immediately north of and is adjacent to the City of Ellensburg. The operations zone of the airport include over-flight areas within portions of the current city limits of Ellensburg, portions of the Ellensburg UGA, and portions of unincorporated Kittitas County outside of the Ellensburg UGA. The airport effectively acts as a barrier to further urban expansion to the north of Ellensburg.

The Respondent contends the Airport Overlay Zone adopted in conjunction with the City of Ellensburg is a well-balanced consideration of all factors..

The Respondent argues that Cities and Counties are required to discourage the siting of incompatible land uses adjacent to airports. The Respondent also cites 3 goals in RCW 36.70A.020 that are directly related to airports: Goal 3 relates to efficient intermodal transportation, Goal 5 encourages economic development within the capacities of public facilities, and Goal 12 encourages the preservation and establishment of public facilities and services. The County argues that an airport is by definition an essential public facility RCW 36.70A.200.

The County further contends in addition to those 13 general goals, the GMA explicitly recognized the importance of avoiding incompatible uses adjacent to an airport.



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The Respondent contends their obligation to protect the airport from incompatible uses is reconfirmed in the Kittitas County Comprehensive Plan. Section 4.2(E) (Exh. B) provides: Kittitas County Airport (Bowers Field) is the largest airport in the County and is a valuable transportation commodity. The airport is the access point to the major mode of transportation for the nation.

The City of Ellensburg, utilizing their UGA Land Needs Analysis, recognized the need for larger one-acre lots within their UGA. With this rationale they added approximately 127 acres to the UGA. (Petitioners Brief Exhibit 4 at page 10;). The City's UGA study also recognized the existence of human-created development constraints in the unincorporated UGA including the constraints related to airport noise and over- flight zones. The UGA size was adjusted to accommodate those constraints. (Petitioners Brief Exhibit 4 at page 11).

The Respondent believes the need to avoid incompatible land use adjacent to the airport is especially vital in the Airport Overlay Zone 3 area located within the higher traffic Inner Turning Zone.

The County believes the Petitioner recognizes higher density residential use is not appropriate in the inner turning zone area. The Petitioner submitted the Skagit Regional Airport Land Use Compatibility study to both the city and the county to support his position regarding proper density levels adjacent to the airport. That study placed the appropriate level for the Zone 3 inner turn zone at a range of two to ten acres per residential dwelling unit. That density is entirely consistent with density allowed by Kittitas County in Zone 3. The density the Petitioner successfully negotiated with the City for his property once it is annexed was one unit per acre for a limited portion of Zone 3. In approving that exception for the Petitioner, the City of Ellensburg agreed to that exception because:

"The future density of the remainder of the Safety Zone 3 areas extending north along Look Road toward the airport and east of Sanders Road will continue to be limited to the lower density that current County zoning allows, which is a mixture of one (1) dwelling unit per three (3) acres, and will



1 therefore provide the necessary low density safety conditions that are essential  
2 to the airport operations that occur with that Inner Turning Zone 3."

3 The County further contends that once the Petitioner annexes that property into  
4 the City, Son Vida II will be able to achieve the density he sought.. The City, in  
5 adopting its Airport Overlay Zone, continued to recognize the importance of  
6 maintaining the low-density mix of three-acre lots for Zone 3 that were adopted by the  
7 county. The City will have the same densities upon annexation as the County for land  
8 in Zone 3, except for the caveat negotiated by the Petitioner.

9 The Respondent contends the large lot areas are appropriate in the Airport  
10 Overlay Zones . The Respondent also contends the only other "remedy" would be to  
11 redraw the UGA to exclude these areas rather than allow incompatible development  
12 adjacent to the airport. Such a redrawing of the UGA is, however not the direction the  
13 City or the County would like to pursue. The inclusion within the UGA of this area  
14 allows the City to make urban services like sewer and water available rather than  
15 leaving wells and septic systems the only option for residential development.

16 The Respondent states the process used in developing the Airport Zone  
17 regulations was a joint and cooperative land use process between the City of  
18 Ellensburg and Kittitas County.

19 The City and County jointly developed an Airport Overlay Zone that will help to  
20 ensure the continued operation of Bowers Field while also meeting the needs of the  
21 airport community, and the general city and county public. The Respondent argues  
22 there are no inconsistencies between the City and County ordinances. In Zone 6 the  
23 County ordinance provides land located inside the UGA will have a one-acre minimum  
24 lot size. This is consistent with the County Comprehensive Plan, Countywide planning  
25 policies and suburban zoning and is the typical density allowed before land is annexed  
26 into the City limits. When land in Zone 6, located within the UGA, is annexed into the  
City, zoning provides for up to 3 units per acre. The County has agreed that a 3 to 4  
unit per acre density is acceptable once the City annexes the land.

1 The Respondent believes there is no inconsistency between the property  
2 owned by the Petitioner in Zone 3 and others in that Zone. The difference that exists  
3 is due to a change the City agreed to with the Petitioner after the County already  
4 adopted its ordinance and after the Petitioner filed a SEPA appeal. The Petitioner  
5 agreed to dismiss his SEPA appeals if the City inserted the change. (This change  
6 allows some property fronting on Sanders Road to maintain a maximum density of  
7 one dwelling unit per acre once annexed, rather than one dwelling unit per three acres  
8 that it was allowed when located in the unincorporated portion of the UGA).

9 The Respondent contends the Airport Overlay Zone does not take any private  
10 property rights, nor has any property been "down zoned". The Respondent also  
11 contends the adoption of the Overlay Zone allows all property to continue the same lot  
12 size densities for development as allowed prior to the enactment of the Overlay Zone.

13 The Respondent contends the Petitioner's argument that a property owner has  
14 the right to develop to the extent the owner "intended" and to the "potential it would  
15 have been able to prior to" the adoption of a land use regulation is wrong. The  
16 Respondent also contends there is no "property right" to an intended or potential use.  
17 The Respondent believes the right to divide or develop land vests only at the time of  
18 the submission of a development application such as a subdivision. Noble Manor v.  
Pierce Co., 133 Wn. 2d 269, 943 P.2d 1378 (1997).

19 The Respondent contends neither Zone 3 nor Zone 6 is arbitrary or capricious.  
20 They contend the zones were developed through a lengthy and cooperative process  
21 involving the public, Kittitas County, the City of Ellensburg, and the State of  
22 Washington. The Respondent cites from a letter from the Manager for Transportation  
23 Planning with the Washington State Department of Transportation, which in part  
24 states that this was "an exemplary land use model" and commended the collaboration  
25 between the City, County, State, and the public.

26 **DISCUSSION**

This case pertains to the Petitioner's property located near the Kittitas County  
Airport within Inner Turning Zone 3, and Airport Operations Zone 6 of the Safety

1 Zones. Chapter 17.58.40 of the Kittitas County Codes is the County's Airport Overlay  
2 Zoning District. Paragraph B therein reads as follows:

3 B. SAFETY ZONES. In order to carry out the provisions of this chapter and to  
4 promote land use compatibility on lands within and adjacent to and in the  
5 vicinity of the Kittitas County Airport (Bowers Field), there are created and  
6 established certain safety zones. Such safety zones are shown on Kittitas  
7 County Airport (Bowers Field) Overlay Zoning District Map "B", as amended.  
8 Within each of the safety zones, certain land use limitations are established and  
9 certain development standards are imposed in addition to the land uses and  
development standards of the underlying zoning. Where the requirements  
imposed by these safety zones, conflict with the requirements of the underlying  
zoning, the more restrictive requirement shall be enforced. The safety zones  
are established and defined as follows:

10 ....

11 Safety Zone #3 (Inner Turning Zone 3) is a fan shaped area extending beyond  
12 the centerlines of runways 11, 29, 07, and 25 as depicted in Map "B" (shaded  
13 area #3). This zone begins at the end of the Runway Protection Zone land  
14 extends out two thousand eight hundred (2,800) feet. The zone measures one  
thousand and ten (1,010) feet across, five hundred and five (505) feet on  
either side of the runway centerline.

15 ....

16 Safety Zone #6 (Airport Operations Zone 6) is depicted on Map "B" (shaded  
17 area #6) and begins from the outer boundaries of the Sideline Zone and  
18 extends out five thousand (5,000) feet perpendicular to the primary surface and  
connects to the sixty (60) – degree sector of the Inner Turning Zone.

19 ....

20 Kittitas County Code Chapter 17.58.40, Safety Zone 3 (Inner Turning Zone) in  
21 pertinent part states:

22 #4. Outside of the existing Ellensburg Urban Growth Area (UGA) the average  
23 density will be one (1) dwelling unit per three (3) acres on the property at the  
24 date of adoption of this ordinance.

25 #5. Inside the existing Ellensburg Urban Growth Area (UGA) for lands zoned  
26 Agricultural – 3 the average density will be one (1) dwelling unit per three (3)  
acres on the property at the date of adoption of this ordinance.



#6. Inside the existing Ellensburg Urban Growth Area (UGA) for lands zoned Suburban, the average density will be one (1) dwelling unit per one (1) acre on the property at the date of adoption of this ordinance.

Kittitas County code, Chapter 17.58.40, Safety Zone 6 (Airport Operations Zone) in pertinent part states:

#2. Outside of the existing Ellensburg Urban Growth Area (UGA) the average density will be one (1) dwelling unit per three (3) acres on the property at the date of adoption of this ordinance.

#3. Inside the existing Ellensburg Urban Growth Area (UGA) the average density will be one (1) dwelling unit per one (1) acre on the property at the date of adoption of this ordinance. Kittitas County Ordinance #2001-10.

The Growth Management Act (GMA) provides for the siting and protection of airports in the following statutes:

RCW 36.70A.510 General aviation airports:

Adoption and amendment of comprehensive plan provisions and development regulations under this chapter affecting a general aviation airport are subject to RCW 3.70.547. [1996 c 239 sec. 5.]

RCW 36.70.547 General aviation airport – Siting of incompatible uses states as follows:

Every county, city, and town in which there is located a general aviation airport that is operated for the benefit of the general public, whether publicly owned or privately owned public use, shall, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport. Such plans and regulations may only be adopted or amended after formal consultation with: Airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation. All proposed and adopted plans and regulations shall be filed with the aviation division of the department of transportation within a reasonable time after release for public consideration and comment. Each county, city, and town may obtain technical assistance from the aviation division of the department of transportation to develop plans and regulations consistent with this section.



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Any additions or amendments to comprehensive plans or development regulations required by this section may be adopted during the normal course of land-use proceedings.

This section applies to every county, city, and town, whether operating under chapter 35.63, 35A.63, 36.70, [or] 36.70A RCW, or under a charter. [1996 c 239 sec. 2.]

The County, in adopting the Airport Overlay Zone, worked with the City of Ellensburg to form what both jurisdictions felt was a well-balanced consideration of all factors.

The County is required to consult with airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation. This was done.

The manager for Transportation Planning with the Washington State Department of Transportation stated in a letter to the City of Ellensburg dated June 2001,:

"The role of the WSDOT Aviation Division through the Airport Land Use Compatibility Program is to provide the best available information and research to land use decision makers, and to advocate for the preservation of Washington State's public use airports as airports are defined as essential public facilities. The goal of the Airport Land Use Compatibility Program is to encourage a balance between infrastructure preservation and quality of life."

"We find the Airport Overlay Zoning District achieves that critical balance. Furthermore, we find the plan to be an exemplary land use model and we hope to share your successful work with other jurisdictions. We commend your leadership in collaboration with Kittitas County through the development of the Airport Overlay Zoning District as well as the aviation community, state and federal agencies and the general public."

The siting of high-density residential development adjacent to the airport has been recognized by the hearings boards as inappropriate and incompatible. In *Abenroth v. Skagit Co*, #97-2-0060c (Final Decision and Order, January 23, 1998) the Western Board ruled that the large size of the Bayview UGA was unjustified because

1 there was not a showing for such a large unincorporated residential UGA. The  
2 Hearings Board went on to state:

3 Even if the County were able to show a justification for the need for additional  
4 urban residential land in the County, we are concerned about the siting of  
5 incompatible uses adjacent to the Skagit Regional Airport. RCW 36.70A.510  
6 requires the County to adopt land use policies and development regulations  
7 (DRs) that preclude incompatible land uses adjacent to airports. The land use  
8 map for the Bayview UGA places a residential designation under the overlay for  
9 the main runway. Further, the map includes no overlay for the second runway,  
10 which is currently in use.

11  
12 As we stated in our September 20, 1995, Final Order in *Achen et al. v. Clark*  
13 *County, #95-2-0067, the county has the responsibility to preclude development*  
14 that conflicts with airport operations. Designation of a large residential  
15 component within an airport UGA does not comply with RCW 36.70A.510.

16 The case of *Achen et al. v. Clark County et al., WWGMHB #95-2-0067* (Final  
17 Decision and Order, September 20, 1995) referenced above further highlights the  
18 importance of maintaining essential public facilities like airports, and protecting them  
19 from incompatible uses. In *Achen*, the owner had closed a privately owned airport  
20 within the Vancouver UGA and the FAA had acknowledged the closure. The Hearings  
21 Board in *Achen* stated at sections 190 through 193:

22 RCW 36.70A.200(2) provides that neither a comprehensive plan nor a  
23 development regulation "may preclude the siting of essential public facilities."  
24 Clark County is not in compliance with the GMA because, as to airports, it has  
25 violated this subsection.

26 The CP allows an airport as an outright use within urban areas. Regardless of  
the questionable reality of such a provision, we note that the plan goes no  
further in restricting incompatible uses surrounding current or future airport  
sites. As can readily be seen in the quote from intervenor's brief referenced  
above, the Clark Aerodrome closed largely because of the County's failure to  
properly regulate the surrounding area. During the hearings on the merits we  
were provided with an illustration of the Evergreen Airport flight path showing  
surrounding urbanization which will likely lead to the same death knell as befell  
the Aerodrome.



1 The concept of "siting" involves future applications but also, particularly in the  
 2 case of airports, requires efforts towards maintenance of current facilities.  
 3 Development regulations are an appropriate vehicle to prevent the  
 4 encroachments that make siting and maintenance of existing public facilities so  
 5 difficult. On remand Clark County must reexamine its approach to the areas  
 6 surrounding existing airports.

7 This inattention to surrounding areas was dramatically illustrated by a portion of  
 8 case #95-2-0057 (Sadri/Mill Plain property). The property under challenge in  
 9 that case was designated residential in the CP. As noted by that petitioner, the  
 10 property in "directly in the flight path of Clark County's busiest private airport"  
 11 with the main air strip approximately 100 yards west of petitioner's land.  
 12 Property north of this airport was being developed as multi and single-family  
 13 residential, and high-density apartment units were being built to the south and  
 14 east. On remand the BOCC must reconsider this residential designation in light  
 15 of RCW 36.70A.200(2).

16 This need and obligation to protect the airport from incompatible uses is also  
 17 reconfirmed in the Kittitas County Comprehensive Plan. Section 4.2(E) (See Exhibit B  
 18 attached) provides:

19 Kittitas County Airport (Bowers Field) provides a vital transportation link,  
 20 servicing all of Kittitas County with access to modern transportation options for  
 21 emergency services, commercial operations, commuter transportation, and  
 22 recreational flying. The airport advisory committee is dedicated to preserving  
 23 this valuable asset by recommending the enactment of appropriate ordinances  
 24 and policies to accomplish the following:

- 25 \* Enhance the airport as a transportation hub and asset for economic  
 26 development.
- \* Encourage compatible development at the airport to generate revenue  
 streams to decrease subsidy of airport operations and facilities from tax  
 revenue.
- \* Protect the airport and surrounding land uses and owners from conflicting  
uses through careful and compatible land use planning. Such planning should  
include, but not be limited to, density reductions and land use and building  
restrictions designed to protect the take-off and landing and approach corridors,  
and areas adjacent to and under existing traffic patterns.

1 The densities of uses permitted under the Airport Overlay Zone are appropriate  
2 when placed in the context of location of the airport, the Countywide Planning Policies  
3 and the small percentage of the UGA that is impacted.

4 The Kittitas County Countywide Planning Policies and Comprehensive Plan both  
5 define "suburban lands" as "lands within urban growth areas or urban growth nodes,  
6 which provide for all public and private services available inside an urban area but  
7 exhibit lower density. Suburban lands are also planned to accommodate future urban  
8 development." In Kittitas County, suburban zoning provides for density of one unit per  
9 acre. The City of Ellensburg Comprehensive Plan also recognizes the desire and need  
10 for some larger sized parcels in the city and the UGA. The City noted (in part):

11 "In addition the 1995, Comprehensive Plan recognizes that some people desire  
12 to live on large lots up to one acre in size and that while that range of lots sizes  
13 is currently available in the unincorporated UGA it is not available in the city."

14 The Petitioners site a letter from CTED to the City of Ellensburg stating their  
15 recommendations of density near the airport to be four units per acre. However the  
16 letter goes on to say that this doesn't preclude staff from looking at this Airport  
17 Overlay District and designing the development to include a number of densities.  
18 CTED stated it may make sense to have a lower density for this overlay zone at its  
19 closest point to the airport and airport activities.

20 The City of Ellensburg and Kittitas County took this recommendation into  
21 consideration when making density designations in the Airport Overlay Zone. Both the  
22 City of Ellensburg and Kittitas County looked to the planning goals of the GMA. These  
23 goals relate to urban growth, reduced sprawl, transportation, housing, economic  
24 development, property rights, permits, natural resource industries, open space and  
25 recreation, environment, citizen participation and coordination, public facilities and  
26 services, and historic preservation. The 13 goals of the GMA are not listed in order of  
priority. These goals are often in conflict with each other. The Respondent gives as an  
example, environmental protection (goal 10) and natural resource conservation (goal  
8) can add cost to development, while housing (goal 4) strives to promote affordable



1 housing. The Petitioner insists Kittitas County, in adopting the Airport Overlay Zone,  
2 has created different classes of property owners in the City of Ellensburg UGA.  
3 However all property owners in each of the Safety Zones are treated in the same  
4 manner. The County and the City have adopted zoning they believe will protect the  
5 Airport and the residents adjacent to it. This zoning was arrived at after extensive  
6 public input and review by the departments and individuals listed in statute RCW  
7 36.70.547.

8 Exhibit J shows concern by the City for Airport Operations Zone 6 lands already  
9 within the City limits that are current landowner's future density expectations. The City  
10 made these determinations after lengthy public input and discussion and strikes a  
11 balance between the landowner's legitimate private property rights expectations based  
12 on current zoning versus the need to provide safe off-airport open space areas for  
13 emergency landing purposes in the Airport Overlay Zone. The Board does not find  
14 these to be arbitrary or capricious acts.

15 RCW 36.70A.320(1)(2)(3) Presumption of validity – Burden of proof – Plans and  
16 regulations.

17 (1) Except as provided in subsection (5) of this section, comprehensive plans  
18 and development regulations, and amendments thereto, adopted under this chapter  
19 are presumed valid upon adoption.

20 (2) Except as otherwise provided in subsection (4) of this section, the burden is  
21 on the Petitioner to demonstrate that any action taken by a state agency, county, or  
22 city under this chapter is not in compliance with the requirements of this chapter.

23 (3) In any petition under this chapter, the board, after full consideration of the  
24 petition shall determine whether there is compliance with the requirements of this  
25 chapter. In making its determination, the board shall consider the criteria adopted by  
26 the department under RCW36.70A.190(4). The board shall find compliance unless it  
determines that the action by the state agency, county, or city is clearly erroneous in  
view of the entire record before the board and in light of the goals and requirements  
of this chapter.

RCW36.70A.320 Intent – Finding – 1997 c 429 sec. 20(3).

1 In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997,  
2 the legislature intends the boards to apply more deferential standard of review to  
3 actions of counties and cities than the preponderance of the evidence standard  
4 provided for under existing law. In recognition of the broad range of discretion that  
5 may be exercised by counties and cities consistent with the requirements of this  
6 chapter, the legislature intends for the boards to grant deference to counties and cities  
7 in how they plan for growth, consistent with the requirements and goals of this  
8 chapter. Local comprehensive plans and development regulations require counties and  
9 cities to balance priorities and options for action in full consideration of local  
10 circumstances. The legislature finds that while this chapter requires local planning to  
11 take place within a framework of State goals and requirements, the ultimate burden  
12 and responsibility for planning, harmonizing the planning goals of this chapter, and  
13 implementing a county's or city's future rests with that community. [1997 c 429 sec.  
14 2.]

15 The legislature was very clear that each county was to be given a broad range  
16 of discretion when planning for growth and the boards are to grant deference to both  
17 the counties and cities in how they plan for that growth. The Respondent has shown  
18 that they had input from the state, public, and airport authorities. Kittitas County and  
19 the City of Ellensburg in designating urban growth areas and develop regulations may  
20 not have satisfied all citizens in their jurisdiction, but the legislature in its finding was  
21 clear when they said the Boards must give cities and counties great deference.

22 RCW36.70A.320 in part states: The board shall find compliance unless it  
23 determines that the action by the state agency, county, or city is clearly erroneous.

24 Petitioner abandoned issue number 5.

25 **Conclusion:**

26 Petitioner, SON VIDA II, a Washington limited partnership, has not presented  
evidence that leaves the Board with a firm and definite conviction that the County's  
action in adopting the Airport Overlay Zone is clearly erroneous. Therefore, the  
Petitioner has not met its burden of proof on these issues.

V. ORDER

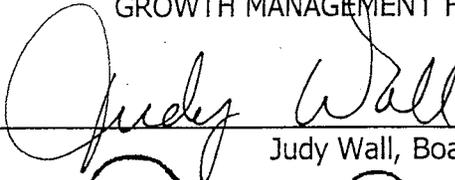
The Board finds Kittitas County is in compliance with issues 1-4 relating to the Airport Overlay Zone.

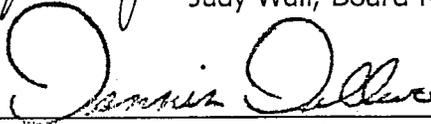
**This is a final order for purposes of appeal pursuant to RCW 36.70A.300(5).**

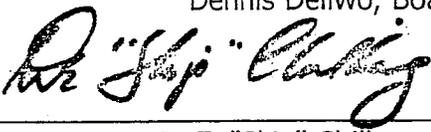
**Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this final decision and order.**

**SO ORDERED** this 14<sup>th</sup> day of March 2002.

EASTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD

  
\_\_\_\_\_  
Judy Wall, Board Member

  
\_\_\_\_\_  
Dennis Dellwo, Board Member

  
\_\_\_\_\_  
D. E. "Skip" Chilberg, Board Member

STATE OF WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON

SON VIDA II, a Washington Limited Partnership

Petitioner,

v.

KITTITAS COUNTY,

Respondent

Case No.: 01-1-0017

CERTIFICATE OF SERVICE  
BY MAIL

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; am an employee of this board and my business address is 6 South Second Street, Suite 818, Yakima, Washington 98901-2629.

On this date, I mailed a true copy of FINAL DECISION AND ORDER, in the above entitled matter, to each of the persons listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Yakima, Washington as addressed herein:

Son Vida II  
2000 124<sup>th</sup> Ave. NE, Suite B  
Bellevue, WA 98005

Jeff Slothower  
Lathrop, Winbauer, Harrel,  
Slothower & Denison LLP  
P.O. Box 1088  
Ellensburg, WA 98926

Board of Kittitas County Commissioners  
205 W. 5<sup>th</sup> Ave.  
Ellensburg, WA 98926

James E. Hurson  
Deputy Prosecutor  
205 West 5<sup>th</sup> Ave. Room 213  
Ellensburg, WA 98926

Kittitas County Auditor  
Attn: Beverly M. Allenbaugh  
205 W. 5<sup>th</sup> Ave.  
Ellensburg, WA 98926



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I certify under penalty of perjury, that the foregoing is true and correct.  
DATED this 14<sup>th</sup> day of March 2002, at Yakima, Washington.

  
\_\_\_\_\_  
Angie Andreas