

78331-4

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.

SUPPLEMENTAL BRIEF OF RESPONDENT

November 9, 2006

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TABLE OF CONTENTS

I.	Introduction	1
II.	Statement of the Case	2
III.	Supplemental Argument	2
	A. The validity of the Rural-3 zone is a question of Growth Management policy that must be reviewed through the proper GMA framework.	2
	B. All three divisions of the Court of Appeals have concluded that questions of GMA compliance cannot be adjudicated under LUPA.	9
	C. Recent decisions of this Court confirm that all GMA issues are within the exclusive jurisdiction of the GMA Boards.	13
	D. The remaining issues relating to the rezone were properly decided by the Court of Appeals and are not subject to further review by this Court.	17
IV.	Conclusion	19

TABLE OF AUTHORITIES

Cases

<i>Alexanderson v. Clark County</i> , ___ Wn. App. ___, ___ P.3d ___ (October 17, 2006)	11, 12
<i>Association of Rural Residents v. Kitsap County</i> , 141 Wn.2d 185, 4 P.3d 115 (2000)	3, 16
<i>Association of Rural Residents v. Kitsap County</i> , 95 Wn. App. 383, 974 P.2d 863 (1999) <i>reversed</i> , 141 Wn.2d 185, 4 P.3d 115 (2000)	16
<i>Caswell v. Pierce County</i> , 99 Wn. App. 194, 992 P.2d 534 (2000)	9
<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002)	13
<i>Chevron USA Inc., v. CPSGMHB</i> , 156 Wn.2d 131, 124 P.3d 640 (2005)	14
<i>Citizens for Mount Vernon v. Mount Vernon</i> , 133, Wn.2d 861, 947 P.2d 1208 (1997)	14, 15, 16
<i>Diehl v. WWGMHB</i> , 153 Wn.2d 207, 103 P.3d 193 (2004)	14
<i>Ferry County v. Concerned Friends of Ferry County</i> , 155 Wn.2d 824, 123 P.3d 102 (2005)	14
<i>King County v. CPSGMHB</i> , 142 Wn.2d 543, 14 P.3d 133 (2000)	14
<i>Lewis County v. WWGMHB</i> , 157 Wn.2d 488, 139 P.3d 1096 (2006)	4, 5, 6, 14
<i>Peste v. Mason County</i> , 133 Wn. App. 456, 136 P.3d 140 (2006)	11
<i>Quadrant Corporation v. CPSGMHB</i> , 154 Wn.2d 224, 110 P.2d 1132 (2005)	5, 14
<i>Skagit Surveyors and Engineers, LLC v. Friends of Skagit County</i> , 135 Wn.2d 542, 958 P.2d 962 (1998)	3

<i>Somers v. Snohomish County</i> , 105 Wn. App. 937, 21 P.3d 1165 (2001)	10
<i>Thurston County v. Cooper Point Ass'n</i> , 148 Wn.2d 1, 57 P.3d 1156 (2002)	5, 14
<i>Viking Properties, Inc. v. Holm</i> , 155 Wn.2d 112, 118 P.3d 322 (2005)	2, 3, 7, 14, 16, 17
<i>Wenatchee Sportsmen Association v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000)	13, 14
<i>Woods v. Kittitas County</i> , 130 Wn. App. 573, 123 P.3d 883 (2005)	1, 10, 18

Statutes

RCW 36.70A.3201	3, 4
RCW 36.70A.320(3)	5, 6
RCW 36.70A.250(1); -290(2)	7
RCW 36.70A.280(1)(a)	11

Washington Administrative Code

WAC 242-02-520	6
WAC 242-02-270; -280; -.522(9)	8

Other Authorities

<i>Woodmansee v. Ferry County</i> , EWGMHB No. 95-1-0010 (Final Decision and Order, 5/13/96)	7
<i>1000 Friends of Washington v. Chelan County</i> , EWGMHB No. 04-1-0002 (Final Decision and Order, 9/2/04)	7

I. INTRODUCTION

This case arises out of petitioner Cecil B. Woods' attempt to invalidate Kittitas County's "Rural-3" zone under the Growth Management Act, RCW Chapter 36.70A ("GMA"). Woods raised this GMA-compliance issue by challenging a site-specific rezone decision under the Land Use Petition Act, RCW Chapter 36.70C ("LUPA"). The Yakima County Superior Court incorrectly ruled that the rezone violated GMA by allowing "urban" growth in a "rural" area of Kittitas County. Respondents Evergreen Meadows, LLC, Stuart Ridge, LLC, Steele Vista, LLC and Cle Elum's Sapphire Skies, LLC (collectively "CESS"), appealed to the Division Three of the Court of Appeals.

The Court of Appeals reversed, holding that the superior court lacked subject matter jurisdiction to determine whether the Rural-3 zone complied with GMA. *Woods v. Kittitas County*, 130 Wn. App. 573, 583, 123 P.3d 883 (2005). The Court of Appeals decision was clearly correct under settled Washington law. The question of whether the Kittitas County Rural-3 zoning classification violates GMA is an issue over which the Eastern Washington Growth Management Hearing Board ("EWGMHB") has exclusive jurisdiction.

II. STATEMENT OF THE CASE

The facts of this case are adequately set forth in the *Answer to Petition for Review*, and the briefs filed by CESS and respondent Kittitas County in the Court of Appeals. *See* RAP 13.7(a).

III. SUPPLEMENTAL ARGUMENT

The central issue in this case is whether the superior court lacked jurisdiction to determine whether the Rural-3 zone complied with GMA. The decision of the Court of Appeals that the superior court lacked jurisdiction was correct and should be affirmed. In support of the decision of the Court of Appeals, this supplemental brief explains how the arguments advanced by Woods are not consistent with either the structure of GMA or the recent GMA decisions of this Court and the Court of Appeals.

A. **The validity of the Rural-3 zone is a question of Growth Management policy that must be reviewed through the proper GMA framework.**

Woods' arguments about the Rural-3 zone are based on the erroneous assumption that appropriate rural density is a question of uniform state law. *See Petition for Review* at 8-9. On the contrary, appropriate rural density is a question of local policy that varies from county to county. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 125-26, 118 P.3d 322 (2005). There are no bright-line rules under GMA. *See*

Viking Properties, 155 Wn.2d at 129. The GMA boards have no authority to establish statewide policies on rural density. *Id.*

[GMA] does not prescribe a single approach to growth management. Instead, the legislature specified that “the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community.” RCW 36.70A.3201. Thus, the GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.

Viking Properties, 155 Wn.2d at 125-26.

In adopting the Rural-3 zone in 1992, Kittitas County made a deliberate policy choice based on the unique local circumstances in Kittitas County. CP 77-78; Kittitas County Comprehensive Plan (2003) at 1767-78. This choice was made after the County elected to plan under GMA. CP 40; *Supplemental Brief of Kittitas County* at 4-5. Only the EWGMHB may determine whether that choice is consistent with GMA. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 549, 958 P.2d 962 (1998). Only the EWGMHB may determine what remedy, if any, would be appropriate if the Rural-3 zone were determined to be noncompliant. *Association of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 192 n.2, 4 P.3d 115 (2000).

Although the land use planning choices of local governments are subject to review by the GMA boards, those agencies must recognize and

defer to the local circumstances and the needs of local governments. In 1997, the Legislature clearly stated that GMA boards must defer to local planning decisions:

[T]he legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. 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 boards 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.

RCW 36.70A.3201.

This Court has debated the question of how much deference should be given to the GMA boards in a particular case, but has consistently held that the basic standard of review under GMA is deferential. *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006). This Court has established that the GMA boards are required to find compliance with GMA unless the board determines that a county action “is clearly erroneous in view of the entire record before the board and in light of the

goals and requirements' of the GMA.” *Lewis County*, 157 Wn.2d at 497 (quoting RCW 36.70A.320(3)).

The GMA boards are, in turn, entitled to deference in their interpretations of GMA. This Court also has debated the question of how much deference should be granted to the GMA boards in a given case, but has consistently held that judicial review of decisions of the GMA boards is deferential. *See Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002) (affirming GMA board’s determination that extension of sewer line to rural area violated GMA); *Quadrant Corporation v. CPSGMHB*, 154 Wn.2d 224, 235-36, 110 P.2d 1132 (2005) (affirming in part and reversing in part GMA board’s decisions regarding designation of urban growth areas and fully contained communities); *Lewis County*, 157 Wn.2d at 498 (affirming in part and reversing in part GMA board’s decisions regarding agricultural lands). These decisions recognize that, although subject to judicial review, the GMA boards play a vital role in determining whether local governments are in compliance with GMA.

Woods’ theory of “parallel review mechanisms” disrupts the entire GMA framework and review process. *Petition for Review* at 15. By litigating a question of GMA policy under LUPA, the trial court eliminated all deference to local elected officials and the specialized

expertise of the EWGMHB. The policy question of rural density was taken away from the citizens of Kittitas County, their planning staff and elected officials.

A question of GMA compliance, which was indisputably within the exclusive jurisdiction of the EWGMHB, was subjected to inadequate and uninformed judicial review by a superior court in Yakima County. The trial court's determination that the Rural-3 zone was an appropriate *rural* density was a clearly incorrect interpretation of GMA. *Answer to Petition for Review* at 10-12. This error demonstrates why the Legislature has entrusted issues of GMA compliance to specialized GMA boards.

Furthermore, if the validity of the Rural-3 zone had been presented to the EWGMHB, the record would contain all of the planning materials considered by the County in enacting that zone. *See* WAC 242-02-520 (record in proceedings before GMA boards). This would have included comments and testimony from the public, studies by experts, maps and statistics, recommendations by staff and the planning commission, drafts of legislation, and environmental documents. All of this material would have been considered by the EWGMHB before deciding whether the Rural-3 zone complies with GMA. *Lewis County*, 157 Wn.2d at 497; RCW 36.70A.320(3). The superior court could not have applied the

deferential standard of review required by GMA because the necessary record of the County's legislation was not before the court.

Nor did the trial court give proper deference to the EWGMHB. The trial court did not allow the EWGMHB to decide whether, and to what extent, prior decisions of the GMA boards on rural density applied to the unique circumstances of Kittitas County. Instead, the trial court improperly gleaned a bright-line rule from other GMA board decisions in other counties. This approach to GMA was explicitly rejected in *Viking Properties*, 155 Wn.2d at 129. In determining that any rural density greater than a dwelling per five acres violated GMA, the trial court simply ignored GMA board decisions allowing greater rural densities. *Woodmansee v. Ferry County*, EWGMHB No. 95-1-0010 (Final Decision and Order, 5/13/96) (upholding 2.5 acre rural zoning in Ferry County); *1000 Friends of Washington v. Chelan County*, EWGMHB No. 04-1-0002 (Final Decision and Order, 9/2/04) (upholding 2.5 acre rural zoning in Chelan County).

Finally, if Woods were correct, a local government such as Kittitas County could be forced to repeatedly defend its land use planning choices under LUPA. Under GMA, a development regulation must be challenged in a petition for review filed in the appropriate GMA board within sixty days. RCW 36.70A.250(1); -290(2). Where multiple parties seek review

of the same regulation, the GMA boards may consolidate cases and allow other parties to intervene or participate as amicus. WAC 242-02-270; -280; -.522(9). These procedures enable the GMA boards to issue a single, consistent decision on the validity of any particular local regulation. If GMA issues could also be raised under LUPA, the validity of any particular regulation could be re-litigated every time a rezone, plat or permit was approved. This would inevitably lead to inconsistent superior court decisions and inconsistent applicable of the same regulations to different properties in the same county. Unless the GMA board ruled on the validity of the Rural-3 zone countywide, the question of whether such zoning is permitted would depend upon whether a particular rezone were challenged and whether a particular superior court concluded that the resulting density was acceptable under GMA.

In sum, Woods' theory of "parallel review mechanisms" is inconsistent with the established GMA framework and review process, and would create unprecedented uncertainty in the land use planning process. Contrary to Woods' argument, issues of GMA compliance cannot be litigated in a site-specific rezone under LUPA. The question of whether the Rural-3 zone complies with GMA is within the exclusive jurisdiction of the EWGMHB.

B. All three divisions of the Court of Appeals have concluded that questions of GMA compliance cannot be adjudicated under LUPA.

The decision of the Division Three in this case was neither the first nor most recent case in which the Court of Appeals concluded that questions of GMA compliance cannot be adjudicated under LUPA. The question has been addressed by the appellate courts on several occasions. In each case, the appellate courts have recognized that questions of GMA compliance are within the exclusive jurisdiction of the GMA boards.

In *Caswell v. Pierce County*, 99 Wn. App. 194, 992 P.2d 534 (2000), adjacent property owners challenged a conditional use permit for a mobile home park under LUPA. The property owners argued, *inter alia*, that the applicable ordinance violated GMA. *Caswell*, 99 Wn. App. at 198. Division One of the Court of Appeals noted that the issue should have been brought before the CPSGMHB, and could not be challenged under LUPA.

The Legislature established a process for the review of development regulations under the GMA, and there is no question that the issue before us would have been an appropriate subject for a growth management hearings board. To the extent the Caswells argue that Pierce County's IUGA conflicts with the GMA, they have chosen the wrong forum.

Caswell, 99 Wn. App. at 200.

Division One addressed the issue again in *Somers v. Snohomish County*, 105 Wn. App. 937, 21 P.3d 1165 (2001). In *Somers*, neighboring landowners brought an action under LUPA to review Snohomish County's approval of a residential subdivision. The neighbors argued that the subdivision constituted urban growth outside the Monroe urban growth area (UGA) in violation of GMA. The Court of Appeals disagreed:

Although the appeal of a decision approving a project permit application is generally the type of land use decision that would be subject to review by a superior court under LUPA, the present appeal is not. Rather, it is one in which the underlying issue is whether a pre-existing local zoning ordinance complies with the provisions of the Growth Management Act (GMA). Accordingly, the proper Growth Management Hearings Board (GMHB or "the Board"), rather than the superior court, has exclusive jurisdiction to review the matter.

Somers, 105 Wn. App. at 939.

In this case, Division III followed *Somers*, holding that the superior court lacked subject matter jurisdiction to review the Rural-3 zone for compliance with GMA. *Woods*, 130 Wn. App. at 583. The appellate court noted that some of the issues raised by *Woods* were properly presented under LUPA. *Id.* Those issues were reviewed and decided by the Court of Appeals. *See* section (D) (below). However, to the extent *Woods* sought to review the Rural-3 zone for compliance with GMA, the superior court lacked jurisdiction. *Woods*, 130 Wn. App. at 583.

In *Peste v. Mason County*, 133 Wn. App. 456, 136 P.3d 140 (2006), a property owner brought an action under LUPA to challenge County's denial of a site-specific rezone from R-20 to R-5. The property had previously been rezoned to R-20 as part of Mason County's efforts to comply with GMA. The owner argued, *inter alia*, that the County did not comply with GMA's notice and public participation requirements when the property was rezoned to R-20. *Peste*, 133 Wn. App. 464-65. Division II held that the GMA issue was subject to review by the GMA boards under RCW 36.70A.280(1)(a) and could not be adjudicated under LUPA. *Peste*, 133 Wn. App. at 467.

Division II recently held that underlying issue must be considered in determining whether the GMA boards have jurisdiction. In *Alexanderson v. Clark County*, ___ Wn. App. ___, ___ P.3d ___ (October 17, 2006), the Cowlitz Indian Tribe applied to the Bureau of Indian Affairs to place certain land into trust status. The County, which opposed the application, entered into a Memorandum of Understanding (MOU) with the Tribe in which the County agreed to provide certain utility services in return for certain promises by the Tribe. A nearby property owner (Alexanderson) challenged the MOU in a petition to the WWGMHB arguing that the MOU violated the environmental and planning requirements of GMA. *Alexanderson*, at ¶¶ 2-9. The

WWGMHB dismissed the petition, concluding that the MOU was not a development regulation or comprehensive plan over which the GMA board had jurisdiction. *Alexanderson*, at ¶ 10.

Division II reversed and remanded the petition to the WWGMHB. The court held that the MOU was a *de facto* amendment to the county's comprehensive plan. *Alexanderson*, at ¶ 18.

If the Tribe's application to the BIA is approved, and the subject land is designated in trust, the land will be exempt from all state regulations under the GMA, except as far as the Tribe has consented to in the MOU. Upon approval of the trust application, the MOU will govern. Because the MOU explicitly supplies water in violation of the comprehensive plan, the MOU is a *de facto* amendment to the comprehensive plan. To hold that the comprehensive plan has not been amended, where what was previously forbidden is now allowed, is to exalt form over function.

Alexanderson, at ¶ 21. Because the MOU was a *de facto* amendment to the comprehensive plan, the WWGMHB had jurisdiction. *Alexanderson*, at ¶ 21.

The decisions of the Court of Appeals in these cases are consistent and correct. Reviewing courts must examine the substance of an issue to determine whether jurisdiction lies under LUPA or with the GMA boards. The nature of the underlying land use decision is immaterial. Issues of GMA compliance are within the exclusive jurisdiction of the GMA boards and cannot be litigated under LUPA.

C. Recent decisions of this Court confirm that all GMA issues are within the exclusive jurisdiction of the GMA Boards.

Unlike the various divisions of the Court of Appeals, this Court has not addressed the specific issue presented in this case. However, all of this Court's recent decisions on GMA are consistent with the decisions of the Court of Appeals on the jurisdiction of the GMA boards.

As explained in the *Answer to Petition for Review*, Woods' argument is entirely based on dicta in *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). The actual issue in that case was whether a challenge to a rezone decision was *timely* where the rezone could have been appealed under LUPA two years earlier. *Wenatchee Sportsmen*, 141 Wn.2d at 175. The erroneous suggestion that the petitioner could have raised issues of GMA compliance in an earlier LUPA action is dicta, not relevant or necessary to this Court's holding.¹

Relying on this dicta, Woods asserts that GMA issues may be adjudicated under LUPA as well as by petitions to the GMA boards. *Petition for Review* at 10. However, this Court has not actually allowed such issues to be litigated under LUPA or in other cases involving specific properties.

¹ That dicta was simply repeated in *Chelan County v. Nykreim*, 146 Wn.2d 904, 924-25, 52 P.3d 1 (2002), where the actual issue was whether a "ministerial" land use decision (a boundary line adjustment) was reviewable under LUPA.

In the six years since *Wenatchee Sportsmen* this Court has never permitted a party to challenge a local regulation under GMA in a case brought under LUPA. All of this Court's substantive opinions on GMA were issued cases appealed from decisions of the GMA boards. *See King County v. CPSGMHB*, 142 Wn.2d 543, 14 P.3d 133 (2000) (athletic uses of agricultural lands); *Thurston County*, 148 Wn.2d 1 (sewers in rural areas); *Diehl v. WWGMHB*, 153 Wn.2d 207, 103 P.3d 193 (2004) (service of process under the Administrative Procedure Act); *Quadrant Corporation*, 154 Wn.2d 224 (designation of urban growth areas); *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005) (best available science); *Chevron USA Inc., v. CPSGMHB*, 156 Wn.2d 131, 124 P.3d 640 (2005) (due process in designation of potential annexation areas); *Lewis County*, 157 Wn.2d 488 (agricultural lands). None of these cases arose under LUPA.

In cases brought under LUPA (and in other types of cases involving specific properties), this Court has consistently recognized that the statewide policies of GMA cannot be directly applied by courts to specific situations. *See Viking Properties*, 155 Wn.2d at 126. Only development regulations adopted by local governments are applied to specific properties. *Id.* The question of whether local regulations comply with GMA is within the jurisdiction of the GMA boards. *Citizens for*

Mount Vernon v. Mount Vernon, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).

In *Citizens, supra*, the City of Mount Vernon rezoned a 40-acre parcel and approved a preliminary planned unit development (PUD). Project opponents challenged both decisions under LUPA. *Citizens*, 133 Wn.2d at 865. In response, the developer (Haggen) argued that the project opponents were required to challenge the action before the GMA board. This Court disagreed, explaining that the substantive legal issue — not the land use action itself — determines whether the GMA boards have jurisdiction.

Contrary to the position of Haggen, the challenge to the approval of the Haggen development by Citizens does not involve the issue of whether the Mount Vernon City Council properly complied with the GMA, but rather involves the effect of the comprehensive plan on specific land use decisions. The Board does not have jurisdiction over these types of issues and cannot provide the remedy or relief sought by Citizens.

Citizens' complaint does not assert that the comprehensive plan implemented by the city of Mount Vernon does not comply with the requirements of the GMA. Rather, Citizens allege that the approval of the rezone and the approval of this specific development project do not comply with the underlying zoning or with the comprehensive plan, and that the comprehensive plan cannot be used to make specific land use decisions. The Board is not able to render a decision on this issue because the approval granted by the city council falls outside the scope of review granted to the Board.

Citizens, 133 Wn.2d at 868 (emphasis added). In other words, if the project opponents in *Citizens* asserted that the comprehensive plan did not comply with GMA, that issue would have been within the GMA board's exclusive jurisdiction. This issue-based analysis in *Citizens* is entirely consistent with recent decisions of the Court of Appeals. See section B (above).

In *Association of Rural Residents, supra*, this Court reversed a decision of the Court of Appeals that purported to review an issue of GMA compliance under LUPA. Neighboring landowners brought a LUPA action to challenge the county's approval of a subdivision. The Court of Appeals held, *inter alia*, that the project violated GMA by allowing urban growth outside the designated urban area. *Association of Rural Residents v. Kitsap County*, 95 Wn. App. 383, 396, 974 P.2d 863 (1999), *reversed*, 141 Wn.2d 185, 4 P.3d 115 (2000) This Court reversed, holding that the project was governed by the pre-existing zoning regulations, and that, in the absence of new regulations adopted under GMA, the policies of GMA did not trump existing regulations. *Association of Rural Residents*, 141 Wn.2d at 197.

In *Viking Properties,*, 155 Wn.2d 112, a developer brought an action for declaratory judgment to challenge a restrictive covenant that limited density to one residence per half acre. The developer argued that

the density restriction violated public policy as set forth in GMA. Like petitioner Woods, the developer argued that the GMA boards had adopted a bright-line rule regarding urban density, and that this rule must be applied to the restrictive covenant. *Viking Properties*, 155 Wn.2d at 128-29. This Court disagreed, noting that GMA does not directly regulate specific land use activities, and that GMA does not authorize bright line rules. *Viking Properties*, 155 Wn.2d 126.

All of these cases are consistent with those decisions of the Court of Appeals holding that issues of GMA compliance cannot be adjudicated under LUPA. In this case, the Court of Appeals correctly held that the trial court lacked jurisdiction to determine whether the Rural-3 zone complies with GMA. That issue of GMA compliance is subject to the exclusive jurisdiction of the EWGMHB.

D. The remaining issues relating to the rezone were properly decided by the Court of Appeals and are not subject to further review by this Court.

Woods' LUPA action included other challenges to the rezone decision. CP 166-170. These issues were extensively briefed in the trial court. *See* CP 19-27; 30-118. The trial court did not rule on these issues because the court (erroneously) concluded that the rezone violated GMA. CP 29. After reversing the trial court on the central GMA issue, the Court

of Appeals reviewed and rejected each of Woods other challenges to the rezone. *Woods*, 130 Wn. App. at 584-89.

The Court of Appeals' disposition of the additional issues does not warrant further review by this Court. Woods does not argue otherwise. Although Woods erroneously asserts that the Court of Appeals should not have reached the additional issues, Woods has not argued that the issues were incorrectly decided or that the additional issues warrant review by this Court. *Petition for Review* at 16-17. In fact, Woods' motion for reconsideration to the Court of Appeals did not present any argument that the Court of Appeals decision was actually wrong. See *Motion for Reconsideration* at 11-13.

Only the question of whether the Court of Appeals had "jurisdiction" to review the additional issues was presented to this Court for review. Woods' argument that the Court of Appeals improperly reviewed the additional issues has no legal or factual merit. The additional issues were fully briefed in the superior court LUPA materials, and the entire record was transmitted to the Court of Appeals. The Court of Appeals had the authority to review the other issues under RAP 2.5, and its decision to do so was in furtherance of judicial economy. Because the Court of Appeals applied the correct standard of review directly to the decision of the Board of County Commissioners, the fact that the superior

court never ruled on the same issues is immaterial. *Answer to Petition for Review* at 16-18.

This Court must reject Woods' meritless challenge to the "jurisdiction" of the Court of appeals. The underlying additional issues are not before this Court under RAP 13.7(b), and are not subject to further review by this Court.

IV. CONCLUSION

For all these reasons the Court should affirm the decision of the Court of Appeals.

DATED this 9th day of November, 2006.

Respectfully submitted,

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**FILED AS ATTACHMENT
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