

NO. 80115-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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THURSTON COUNTY,  
Petitioners,

vs.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD and 1000 FRIENDS OF WASHINGTON  
Respondents.

And

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,  
OLYMPA MASTER BUILDERS, and PEOPLE FOR RESPONSIBLE  
ENVIRONMENTAL POLICIES,  
Petitioner-Intervenors

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KITSAP COUNTY'S *AMICUS* BRIEF IN SUPPORT OF THURSTON  
COUNTY'S PETITION FOR REVIEW

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## **I. INTRODUCTION**

Kitsap County files this amicus brief in support of Thurston County's Petition for Discretionary Review, filed in *Thurston County v. Western Washington Growth Management Hearings Board, et al.* Court of Appeals of the State of Washington, Division II, No. 34172-7-II, published at 137 Wn. App. 781, 154 P.3d 959 (2007). This is an appeal under the Administrative Procedures Act, Chapter 34.05 RCW of the Western Growth Management Hearings Board decision in *1000 Friends of Washington v. Thurston County, et al.*, WWGMHB No. 05-2-0002, Final Decision & Order (7/20/05) at 2005 WL 1995902.

## **II. ISSUES PRESENTED**

Kitsap County will address Thurston County's issues No. 2 and No. 3, as follow:<sup>1</sup>

2. Whether the Court of Appeals erred in affirming the Board's decision that ignored the presumption of validity owed to the County's minor modification of its UGA and unlawfully imposed upon the County the burden to justify the size of its urban growth area rather than recognizing that Petitioners had the burden to prove that the modifications of the UGA were clearly erroneous under RCW 36.70A.320 and .3201 of the Growth Management Act (GMA)?

3. Whether the Court, in affirming the Board's decision that the County's UGAs were too large (even though they

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<sup>1</sup> Kitsap County also supports review of the other issues presented by Thurston County, but finds they have been thoroughly briefed by Thurston and Clallam Counties and the Intervenor in this case.

were only modestly modified as a result of the required ten-year review) and in requiring the County to justify the size of its UGA, contrary to GMA's presumption of validity and assignment of burden of proof, failed to defer to and accord the county sufficient discretion in deciding how to plan for growth, as required by RCW 36.70A.3201 and RCW 36.70A.110(2)?

### **III. STATEMENT OF THE CASE**

Kitsap County relies on, and incorporates by reference, Thurston County's statement of the case.

### **IV. ARGUMENT**

A county's GMA actions are presumed valid upon adoption. RCW 36.70A.320(1). Before the Growth Hearings Board, petitioners have the burden of proving that a county's actions were not in compliance with GMA. RCW 36.70A.320(2). If they do not meet that burden, the Growth Hearings Board is *required* to uphold the county's action. RCW 36.70A.320(3) (the Board *shall* find compliance unless the county's action is clearly erroneous in light of the entire record before it). GMA requires strong deference to local government's planning decisions. In addition to these provisions, the legislature took what the Supreme Court termed "the unusual additional step of enacting into law its statement of intent in amending RCW 36.70A.320 to accord counties and cities planning under the GMA additional deference." *Quadrant Corporation v. State Growth*

*Management Hearings Board*, 154 Wn.2d 224, 237, 110 P.3d 1132

(2005). That enactment is RCW 36.70A.3201, which reads:

In amending RCW 36.70A.320(3) ... *the legislature intends that the boards apply a more deferential standard of review to actions of counties . . . 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 . . . consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties . . . in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties . . . 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 (emphasis added).

While the Court's review is governed by the Administrative Procedures Act ("APA"), Chapter 34.05 RCW, deference to the local government continues during an APA appeal. In *Quadrant*, this Court clarified the balance between the APA's deferential standard to an agency decision and the various GMA provisions providing deference to a county:

In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general.

*Quadrant*, 154 Wn.2d at 238 (internal citations and footnotes omitted).

Not too long after the *Quadrant* decision was issued by this Court, it issued another decision regarding GMA in *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005). The *Viking* court reiterated the limitations on Growth Hearings Boards when reviewing local government's plan by rejecting a "bright line" rule set down by the Central Puget Sound Growth Management Hearings Board's (CPSGMHB) in *Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039c, Final Decision & Order (10/6/1995).

In *Bremerton I*, the CPSGMHB set a "bright line" of 4 dwelling units per acre as a minimum urban density. The Growth Hearings Boards' authority to set a "bright line rule" was rejected by this Court in *Viking*, 115 Wn.2d at 129. This Court stated:

[T]he growth management hearings boards do not have authority to make "public policy" even within the limited scope of their jurisdictions, let alone to make *statewide* public policy.

*Viking*, 155 Wn.2d at 129 (emphasis in original). The *Viking* court stated that "GMA creates a general 'framework' to guide local jurisdictions instead of 'bright line' rules." *Id.*

In this case, it appears that neither the Western Board or the Court of Appeals paid much heed to this Court's direction in either *Quadrant* or

*Viking*. In analyzing Thurston County's UGAs,<sup>2</sup> the Western Board and the Court of Appeals found them too large because, they stated, Thurston County had not "justified" a 38% market factor.<sup>3</sup> In so doing, the Western Board and the Court of Appeals rely on *Diehl v. Mason County*, 94 Wn. App. 645, 972 P.2d 543 (1999). The *Diehl* decision was issued long before this Court's direction was given in *Quadrant* and *Viking*. Moreover, the *Diehl* court relied on *Bremerton I* in requiring a county to "explain why a market factor is required and how it is reached." *Diehl*, 94 Wn. App. at 654 n.4. Such a requirement not only shifts the burden of proof, it is also a "rule" set forth by the CPSGMHB that it has no authority to make per *Viking*. In *City Of Gig Harbor, et al. v. Pierce County*, CPSGMHB No. 95-3-0016, Final Decision & Order (10/31/98), 1995 WL 903183, \*32 -33, the Central Board "held":

The Board holds that counties must specify the market factor they utilize either directly in an adopted comprehensive plan or in the supporting documentation incorporated by reference in the plan. *Post-adoption rationalization in a response brief to the Board is insufficient, however accurate it may be.* (emphasis supplied).

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<sup>2</sup> Which, incidentally, were expanded by only a few hundred acres, an extremely minor modification.

<sup>3</sup> It is not clear from the Court of Appeals decision whether this market factor could also have included other allowances in sizing UGAs. Typically in sizing a UGA, one deducts land that is "unusable" such as critical areas, lands used for public facilities, rights of way, etc. A market factor accounts for those properties that will not be developed by their owners, for whatever reason. This 38% could have included all these factors (as argued before the Western Board), which would be reasonable.

The Western Board has apparently incorporated this “rule” by requiring Thurston County to also show its work in a comprehensive plan and the record prior to argument on appeal. *See 1000 Friends of Washington v. Thurston County, supra*, at 2005 WL 1995902 \*24, n.8.

The Court of Appeals appeared to have recognized petitioners’ burden in its holding regarding another issue concerning innovative techniques. On that issue, the Western Board found that Thurston County’s comprehensive plan failed to demonstrate that innovative techniques were being used to create a variety of rural densities. The Court of Appeals correctly noted:

The Act imposes a highly deferential standard for board review of comprehensive plans and development regulations. RCW 36.70A.3201. The Board must presume that a county’s comprehensive plans and development regulations are valid upon adoption, RCW 36.70A.320(1), and must find compliance unless it determines that the plan or regulations are clearly erroneous. RCW 36.70A.320(3). But on this issue, the Board required the county to show that its plan and regulations were valid. In doing so, the Board failed to presume validity and failed to require Futurewise to prove invalidity. RCW 36.70A.320(2). Accordingly, the Board erred in finding that the County’s comprehensive plan and development regulations fail to provide for a variety of rural densities through innovative techniques.

*Thurston County*, 137 Wn. App. 781, 809 (2007). The Court of Appeals should have applied this same reasoning and standard to the challenge to Thurston County’s market factor. Instead, relying on a “rule” set down in

*Bremerton I* (applied through *Diehl*), the Court shifted the burden of proof and required the County's comprehensive plan to state the reasoning for the market factor. Explanation at the hearing by counsel was not enough.

Moreover, the Growth Hearings Boards appear to still be using another "bright line rule" regarding market factors. Before the Western Board, the petitioners argued that the 38% market factor exceeded the "reasonable" 25% market factor "allowed under the GMA." *1000 Friends*, 2005 WL 1995902 at \*11. While the Board did not explicitly refer to this as a bright line rule, *1000 Friends'* argument was based upon another "bright line" rule set by the Central Board. In *City Of Gig Harbor, supra*, 1995 WL 903183, \*32 -33, the Central Board stated:

**While it is difficult to draw an absolute limit beyond which a county may not go in using such a factor, the Board holds that a "market factor bright line" will be drawn at the 25 percent threshold....**

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The Board concludes that this is a prudent approach to implement the legislature's direction that a "reasonable" market factor may be included in sizing the UGA. Where counties adopt a land supply market factor between 1 and 1.25 (i.e., 25 percent), the Board will presume that the factor is reasonable. In evaluating allegations that a county has used an unreasonable land supply market factor, the Board will give increased scrutiny to those cases where the factor exceeds the 25 percent bright line.

(Emphasis in original.) Again, the Central Board was citing to a "bright line" rule set forth in *Bremerton I*, which this Court has said it has no

authority to do. While the Court of Appeals rejected an argument that the Western Board applied this rule, it is not entirely clear from the *1000 Friends* decision that the Board did not implicitly invoke it.

Application of these “rules” not only shifts the burden of proof, but has the effect of assuming noncompliance before the Court or Growth Hearings Board has even considered the local discretion or heard argument on the issues. Thus, through application of these “rules”, the Boards and the Court of Appeals failed to afford the proper deference to the local decision as required by this Court.

#### V. CONCLUSION

Not only do Thurston County, Intervenors and amicus for Clallam County provide ample reason for this Court to accept review of this case, Kitsap County has shown further reasoning for this Court’s review. The Supreme Court needs to determine whether the Growth Hearings Boards and the Court of Appeals are properly (1) affording deference to local governments in GMA actions; (2) recognizing the discretion local governments have in making GMA planning decisions; and (3) applying the burden of proof in GMA cases.

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DATED this 9<sup>th</sup> day of July, 2007.

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