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No. 57253-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

80395-1

CITY OF ARLINGTON, DWAYNE LANE and
SNOHOMISH COUNTY,

Appellants,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD, STATE OF WASHINGTON; 1000 FRIENDS OF
WASHINGTON nka FUTUREWISE; STILLAGUAMISH FLOOD
CONTROL DISTRICT; PILCHUCK AUDUBON SOCEITY; THE
DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT
OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT;
and AGRICULTURE FOR TOMORROW,

Respondents.

BRIEF OF RESPONDENT
STILLAGUAMISH FLOOD CONTROL DISTRICT
ON RES JUDICATA

THE PUBLIC ADVOCATE, N.C.

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A. Introduction

The Stillaguamish Flood Control District (Flood District) is a special governmental agency, governed by an elected three-member Board of Commissioners, whose boundaries, in general include the lands within the 100-year flood plain of the lower Stillaguamish River. The Flood District is the local government unit with expertise and primarily responsibility for protection of life and property from floods. The Flood District maintains and operates systems of drainageways, about eight miles of sea dikes, 22 miles of river levees, tidegates, flow maintenance facilities and other works to prevent salt-water intrusion, facilitate drainage, improve agricultural production, control flooding, improve water quality and restore fish habitat. Island Crossing is not within the boundaries of the Flood District, but it is nearby and it is within the 100-year flood plain.

Since the 1870's the land-use within the lower Stillaguamish River flood plain has been agricultural, because the Stillaguamish River valley is one of the most fertile and productive agricultural areas in the world. Agriculture is compatible with periodic flooding, if flood waters promptly drain, because there is generally little damage and existing rich topsoils are enhanced. Urban use is generally inappropriate in the flood plain because it

increases the duration and severity of flood damage and increases risks to life. Formal preservation of the agricultural character of Island Crossing began in the 1970's and each subsequent plan emphasized that the flood plain use should be limited to agricultural uses.

In 1995 Dwayne Lane proposed that Island Crossing be redesignated from rural agricultural to urban commercial uses. Initially, the Snohomish County Council approved, but following judicial review, the Council restored Island Crossing to its historic rural agricultural use. Dwayne Lane and the other parties now before the Court, chose to appeal, but did not prevail: Island Crossing's agricultural use designation was upheld by the Growth Board, the Superior Court and the Court of Appeals. Shortly after the adverse Court of Appeals decision, Dwayne Lane reapplied to the Council again to redesignate Island Crossing's permitted land use from rural agricultural to urban commercial—without showing any change in circumstances to justify departing from the fully-litigated final determinations holding that rural agriculture was the proper land use designation for Island Crossing.

Dwayne Lane and the appellants argue that he can continue, annually if necessary, to request redesignation of Island Crossing until a majority of the Council agrees, without a showing

of changed circumstances. The Flood District and Futurewise respectfully disagree. All the respondents submit in the instant appeal that the latest Dwayne Lane Island Crossing re-designations clearly violate the Growth Management Act. The focus of this brief is that where, as here, there was a prior, fully-litigated final determination involving substantially the same parties, the same land and the same issues, the prior final determination is binding, under the doctrines of res judicata and collateral estoppel, unless changed circumstances are shown justifying a departure from the prior determination.

B. Issue Pertaining to Appellant's Assignment of Error¹

Whether the Superior Court appropriately granted the Flood District's and Futurewise's Motion to Dismiss Dwayne Lane's, Snohomish County's and Arlington's appeals (these appellants will hereafter be collectively referred to as Dwayne Lane unless otherwise appropriate) based on res judicata and whether the Superior Court properly dismissed the Appellants petitions for judicial review because (a) it would have been futile for the Flood District or Futurewise to have raised the issues of res judicata or

¹ This brief focuses on Appellants City of Arlington and Dwayne Lane's Assignment of Error No. 4 and the Appellants' Issue Pertaining to Assignment of Error No. 5 and Snohomish County's assignment of Error B and the three issues pertaining to it.

collateral estoppel before the Board below and thus the Superior Court had jurisdiction over these issues, (b) in order to re-designate Island Crossing, the County must show and failed to show that there have been material changes in circumstances since 1998² and that the property is no longer properly designated as agricultural resource land and Rural Freeway service, and (c) Snohomish County's ("County") actions in this case³ were legislative actions that are subject to res judicata and collateral estoppel because judicial review was invoked, final decisions entered and affirmed on appeal in the previous action.

C. Statement of the Case

To avoid duplication, the Flood District adopts and joins the Briefs of Futurewise and the Director of the State Of Washington

² In 1998 the Board affirmed Snohomish County's designation of the subject property (Island Crossing) as agricultural resource land (75.5 acres) and Rural Freeway Service (35 acres) and removed it from the Arlington urban growth area (UGA). That decision was eventually affirmed by the Court of Appeals in an unreported decision. Dwayne Lane v. Central Puget Sound Growth Management Hearings Board, No. 46773-5-1. Ordinarily unpublished opinions may not be cited, but may be cited when the decision is relevant under the doctrines of law of the case, res judicata or collateral estoppel and that unpublished opinion may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. *In re Davis*, 95 Wn. App. 917, 920 n. 2, 977 P.2d 630 (1999), *rev. granted on other grounds*.

³ The County re-designated 75.5 acres of Island Crossing from Commercial Farmland to Urban Commercial, and 35 acres from Rural Freeway Service to Urban Commercial, rezoning the land from Agricultural-10 Acres and Rural Freeway Service to General Commercial and expanding the Arlington UGA to include this land, first in Ordinance No. 03-063 and later in Emergency Amended Ordinance No. 04-057.

Department Of Community, Trade, and Economic Development (“CTED”). This brief supplements Futurewise’s and CTED’s briefs on the issue of res judicata.

Procedural History

The facts, issues and circumstances of the instant appeal are functionally identical and the parties the same as in a case fully litigated between 1995 and 2001 and decided adversely to appellants herein (Dwayne Lane, Snohomish County and the City of Arlington). Between 1995 and 2001, the Superior Court twice and Court of Appeals once found that Island Crossing is *agricultural land of long-term commercial significance* and that Island Crossing should be designated as agricultural resource lands. The Central Puget Sound Growth Management Board (Board) outlined this 1995-2001 history of Island Crossing GMA litigation in its March 22, 2004 Final Decision and Order in the case appealed herein:

[1995-2001] HISTORY OF GMA LITIGATION RE: ISLAND CROSSING

1. Among the seventy issues challenging the GMA compliance of Snohomish County’s first comprehensive plan in 1996 was an allegation by Pilchuck Audubon Society that the County had violated the agricultural resource lands provisions of the Growth Management Act in removing from resource lands designation lands in the Island Crossing Area. The Board upheld the County’s action. CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Final Decision and Order, Case No. 96-3-0068c, April 15, 1996.

2. On November 19, 1997, Snohomish County Superior Court, in reviewing the Board's decision in *Sky Valley v. Snohomish County*, issued a "Judgment Affirming in Part and Remanding in Part," Superior Court Case No. 96-2-03675-5.
3. In an oral decision incorporated by the Court into the Judgment Affirming in Part and Remanding in Part, the Superior Court stated:

Evidence and arguments supporting de-designation were presented by [the City of Arlington] . . . focused almost exclusively on issues relating to the City of Arlington's economic growth and well-being, and not on Growth Management Act Criteria... . An isolated special purpose freeway service node does not constitute generalized urban growth . . . What happened to the fundamental axiom of the Growth Management Act that "the land speaks first"? Where does the Act state that the economic welfare of cities speaks first? Where does the evidence submitted by Arlington even reference the agricultural productivity or the floodplain status of the lands which are not proposed for automobile dealerships? Freeways are no longer longitudinal strips of urban opportunity. Agricultural lands must be conserved as a first priority, and urban centers must be compact, separate and distinct features of the remaining part of the landscape.

Id. Transcript of Proceedings, Court's Oral Ruling, at 14-18.

4. The Superior Court remanded the *Sky Valley* matter to the Board, finding no substantial evidence to support the removal of the agricultural designation. PDS Report, at 4.
5. Subsequent to the Superior Court remand, the Snohomish County Planning Commission and County Council reconsidered the land use designations for Island Crossing in 1998 and redesignated the agricultural areas as agricultural and redesignated the commercial area as Rural Freeway Service, and removed Island Crossing from the Arlington UGA.

Id.

6. Dwayne Lane, the owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land

and filed a petition for review with the Growth Management Hearings Board. The Board rejected Lane's appeal. CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane]. Jan. 20, 1999.

7. Snohomish County Superior Court affirmed the Board's January 20, 1999 Order, after which Lane appealed to the Court of Appeals. *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001).
8. The Court of Appeals described the Island Crossing area as follows:

Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. See *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).

Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devote to freeway services. Thus, the record indicates that the land is actually used for agricultural production. See *City of Redmond*, 136 Wn.2d at 53. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist. *Id.*

CPSGMHB Case No. 03-3-0019c, *1000 Friends v.*

Snohomish County, FDO, pg 2-4, March 22, 2004, CP 2564-66.

However, in 2003 the County, responding to yet another request from Dwayne Lane, adopted Ordinance No. 03-063, which once again changed the County's comprehensive plan designations for Island Crossing and gave rise to this action. Ordinance No. 03-063 changed the designation of the area around the Island Crossing I-5 interchange from *Rural Freeway Service*, which allows uses that essentially serve I-5 traffic, to *Urban Commercial*.⁴ Ordinance No. 03-063 also changed the designation of the 75-acre south portion of Island Crossing from *Riverway Commercial Farmland* to *Urban Commercial*.⁵ The Board found Ordinance No. 03-063 to be noncompliant with the GMA. The Board also found the ordinance *invalid*, pursuant to RCW 36.70A.302. In response to a routine motion by the County, the Board rescinded its finding of

⁴ Section 30.21.025(2)(f) of the Snohomish County Code provides in relevant part: "The intent and function of the rural freeway service zone is to permit the location of small-scale, freeway-oriented commercial services in the vicinity of on/off ramp frontages and access roads of interstate highways in areas outside a designated UGA boundary and within rural areas of the county. Permitted uses are limited to commercial establishments dependent upon highway users[.]"

⁵ Snohomish County *General Policy Plan*, LU 71, defines Riverway Commercial Farmland to include "farmland areas generally characterized by being in a river valley, floodplain or shoreline area, having continuous prime farmland soils, and having approximately fifty percent or more of the land area in parcels of forty acres and larger, as follows." The purpose of Chapter 30.32B of the Snohomish County Code, which includes Riverway Commercial Farmland, is "to regulate development on and adjacent to designated farmlands in order to conserve farmland resources and ensure compatibility between farmlands and adjacent uses." Section 30.32B.010(1) of the Snohomish County Code.

non-compliance and invalidity.⁶ The County responded by adopting the same provisions in Emergency Ordinance No. 04-057. After a second round of briefing and argument, the Board also found this Ordinance No. 04-057 also to be noncompliant with the requirements in the GMA, and recommended imposition of gubernatorial sanctions (CP 2562-2602). The Governor imposed economic sanctions (CP III, 592-93), but the County clarified the severability clause and the sanctions were lifted. The Board's determinations are now the subject of this appeal by appellants.

To summarize, Snohomish County now has redesignated Island Crossing as urban commercial three times under the Growth Management Act, and each time this redesignation has been found to be noncompliant with GMA. The Board, the Superior Court and the Court of Appeals have held a total of six times that Island Crossing does not qualify under GMA for any designation other than as *agricultural resource land of long term commercial significance*. Yet the same parties are now again litigating the same facts and the same issues before this court.

⁶ Ordinance No. 03-063 contained a *savings clause*. The savings clause acted to revive previous GMA compliant land use designations in the event an enactment is found by the Board to be noncompliant.

Statement of Facts

The land at issue, Island Crossing, comprises a total of 110 acres. The crux of this case involves approximately 75 acres largely owned by Dwayne Lane or his relatives or business partners. This land is shaped like a triangle pointing south. State Highway 502 is the northern border. Interstate 5 is the western border and Smokey Point Road is the eastern border. The City of Arlington was about 1.5 miles Southeast of Island Crossing.

Dwayne Lane repeatedly requested that Island Crossing's designation be changed from *rural agricultural* to *urban commercial*. The stated reason Dwayne Lane requested these changes in the land use designation is that he wishes to relocate his car dealership from downtown Arlington to his farmland property at Island Crossing but the County's action would permit and encourage general commercial development of all of Island Crossing.

The Island Crossing area has long been considered agricultural lands of long-term commercial significance and valued as such by Snohomish County. Even as of 1996, Snohomish County, an appellant herein, argued that Island Crossing was properly designated agricultural land:

Snohomish County has a rich history of preserving agricultural lands. As far back as 1970, the Snohomish

County Board of Commissioners recognized the necessity of preserving prime agricultural lands.... The Snohomish County Agricultural Preservation Plan, adopted in December 1982, indicated that the *Island Crossing area, along with other areas of "primary significance", contains "lands that should be maintained in agriculture far into the future by any means at the county's disposal, now or in the future."* The 1982 Agricultural Preservation Plan was adopted as an element of the county's comprehensive plan. GGP at LU-25... Later comprehensive plans echoed the County's commitment to preservation of agricultural land. The 1975-90 Arlington Area Comprehensive Plan listed as a goal that "[p]rime agricultural land should be preserved as a renewable resource for the use and benefit of current and future generations." That plan also singled out the *Stillaguamish floodplain as an area in which uses should be limited to agricultural.* The 1993 Interim Agricultural Conservation Plan, developed under the Growth Management Act, continued this tradition, mapping and characterizing the farmlands included in the 1982 plan.... The General Policy Plan (GPP), part of the County's GMA comprehensive plan adopted in June 1995, incorporated by reference the 1993 Interim Agricultural Preservation Plan.

CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Snohomish County's Compliance Brief RE: Island Crossing, Case No. 96-3-0068c, April 15, 1996. CP II 299-322. The courts agreed with Snohomish County and Island Crossing remained designated as agricultural land.

D. Summary of Argument

Dwayne Lane argues that it violates separation of powers and permits the court to usurp the County Council's legislative functions if res judicata is applied and therefore, the Superior

Court's dismissal of petitioner's appeal on res judicata grounds should now be reversed by the Court of Appeals. The Flood District and Futurewise respectfully disagree and maintain that that the Superior Court, after careful consideration and reconsideration of this issue, correctly dismissed Dwayne Lane's latest appeal of the Board's final decisions. Where the parties invoke judicial review and the process results in a final judicial determination, those parties are bound on the issues determined unless and until the parties seeking a different outcome establish changed circumstances. Once litigation is invoked, the parties are bound by the issues decided. Otherwise the judicial review provisions of the Growth Management Act are mere surplusage and an enormous waste of time and judicial resources. The central role of adversary litigation in our society is to provide binding answers.⁷ When the judicial review is invoked and a final decision is rendered, the parties cannot and should not be permitted to disregard the judicial decision, pretend that nothing happened and get as many more bites of the apple as they want before the local legislative body.

E. Argument

I. THE SUPERIOR COURT PROPERLY GRANTED THE RESPONDENT'S MOTION TO DISMISS APPEALS

⁷ *Hilltop Terrace Homeowner's Ass v. Island County*, 126 Wn. 2d 22, 30-31, 891 P.2d 29 (1995).

BASED ON RES JUDICATA AND PROPERLY
DISMISSED THE APPELLANT'S PETITIONS FOR
JUDICIAL REVIEW

- a. The Superior Court correctly concluded that it would have been futile for the Flood District to have raised the issues of res judicata or collateral estoppel before the Board and thus the Superior Court had jurisdiction over the issues.

Res judicata was properly before the Superior Court because the Flood District raised the issue of res judicata before the County Council and the Board and this is all it was required to do given that the Board had previously ruled in four separate cases that it did not have jurisdiction over this issue.⁸

The Flood District raised the issue before the County Council in a July 5, 2003 letter to Snohomish County Council from Chuck Hazleton, Chair of the Snohomish Flood Control District. *Growth Management Hearings Board, Case No. 03-3-0019c, Revised Index to the Record, Submission # 80 (also attached at the Appendix, hereto, CP I, 90-92)* and in its reply brief to assure that this matter was reserved for consideration by the Superior Court. The Board previously ruled in at least four cases that it did not have

⁸ *Salish Village Homeowners Assn v. City of Kirkland*, CPSGMHB, No. 02-3-0022, Order Granting Dispositive Motion, March 19, 2003; *Hensley v. Snohomish County*, CPSGMHB No. 03-3-0010, Order on Motions, August 11, 2003; *City of Tacoma, City of Milton, City of Puyallup and City of Sumner v. Pierce County*, CPSGMHB Case No. 94-3-0001, Order on Dispositive Motions, March 4, 1994, at 3-11; and *Peninsula Neighborhood Association v. Pierce County* CPSGMHB Case No. 95-3-0071, Order Denying Pierce County's Motion to Dismiss, January 9, 1996, at 2-3.

jurisdiction over res judicata issues. The basis for these rulings was RCW 36.70A.280, "Matters subject to Board Review," which governs the jurisdiction of the Board and lists the issues that may be raised before the Board. The statute does not list issues such as res judicata or collateral estoppel:

(1) A growth management hearings board shall hear and determine *only those petitions alleging either:*

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted....

Emphasis added.

Salish Village Homeowners Assn v. City of Kirkland confirms that the "matters that are subject to Board review are set forth in RCW 36.70A.280." *Salish Village*, CPSGMHB, No. 02-3-0022, Order Granting Dispositive Motion, March 19, 2003, page 4. This Court appropriately relied on *Salish Village* in its ruling. *Court's Oral Decision, page 13, line 10-16*. While *Salish Village* does not directly concern res judicata or collateral estoppel, the Board's

holding that RCW 36.70A.280 delineates the scope of its jurisdiction is directly applicable to the present case.

In *City of Tacoma, et al., v. Pierce County*, the Board determined that it does not have jurisdiction to determine cases on equitable grounds based on RCW 36.70A.280 and RCW 36.70A.300(1):

The Board's subject matter jurisdiction is specified at RCW 36.70A.280(1) entitled "Matters subject to board review"...

The Board has repeatedly referred to this provision in the GMA and the following portion of RCW 36.70A.300(1) to conclude that its subject matter jurisdiction has been strictly limited by the legislature. RCW 36.70A.300(1) provides in part:

(1) The board shall issue a final order within one hundred eighty days of receipt of the petition for review, or, when multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated. Such a final order shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040.... Emphasis added.

Thus, the Board has concluded in earlier cases that it did not have the authority to determine whether the United States or Washington State Constitutions had been violated. In its *Twin Falls* decision, the Board concluded that it lacked the requisite jurisdiction to determine whether statutes other than the GMA or the

State Environmental Policy Act (SEPA) as it relates to the GMA were violated. Furthermore, in *Twin Falls* the Board also concluded that it did not have jurisdiction to determine whether the common law had been violated.

Whether the Board has jurisdiction to determine cases based on equitable grounds is one of first impression. However, the Board's earlier analysis, in rejecting claims that the Board had jurisdiction to determine violations of the federal and state constitutions, other statutes and the common law, remains convincing. If the legislature intended that the Board have a broader jurisdiction, it would not have used the terms "only" and "based exclusively." The Board has indicated in prior decisions that this limited jurisdiction may not make practical sense because it does result in bifurcated simultaneous appeals to the Board and to the courts. This predicament is even more perplexing given the state's current political climate for instituting regulatory reform and making governmental efficiency a top priority. Nonetheless, until the legislature specifically expands the Board's jurisdiction or an appellate court informs the Board that it has erred on this point, this is the narrow road this Board will follow.

Accordingly, the County's arguments that the Board does have authority to determine cases based on equitable doctrines is rejected.

City of Tacoma, City of Milton, City of Puyallup and City of Sumner v. Pierce County, CPSGMHB Case No. 94-3-0001, Order on Dispositive Motions, March 4, 1994, at 3-11 (citations omitted).

And, in *Peninsula Neighborhood Association v. Pierce County*, the Board specifically addressed the equitable doctrine of

res judicata and held that it did not have jurisdiction over res judicata:

This Board has previously rejected Pierce County's contentions that the growth management hearings boards have jurisdiction over equitable doctrines such as res judicata and collateral estoppel. The legislature subsequently has not expanded the Board's jurisdiction to include equitable doctrines although it has given the Board jurisdiction over shoreline master programs. Accordingly, nothing has changed to cause the Board to overturn its prior holding: **the Board does not have jurisdiction to determine whether equitable doctrines such as the doctrines of res judicata or collateral estoppel have been violated.**

Peninsula Neighborhood Association v. Pierce County CPSGMHB Case No. 95-3-0071, Order Denying Pierce County's Motion to Dismiss, January 9, 1996, at 2-3 (Citations omitted, emphasis added).

Dwayne Lane's argument that the Board has jurisdiction over the res judicata doctrine fails, because whether it does or not, the Board has decided it does not and the Flood District is not required to raise an issue before the Board, because it would have been futile. The argument that in *Skagit County Growthwatch v. Skagit County* a Growth Management Hearing Board did apply the res judicata doctrine fails. *Skagit County Growthwatch*; Order on Motion to Dismiss; WWGMHB No. 04-2-0004, June 2, 2004. In that case, the Board noted Snohomish County's objections: 1) equitable

remedy of res judicata does not apply in cases before the hearings boards, and 2) that there is not an identity of persons and parties. The Board then held that res judicata did not apply because there was no identity of claims. Because the Board did not specifically address the Snohomish County's first objection, the Court herein should give more weight to the direct, indepth analysis the Central Puget Sound Board applied to the issue as opposed to the complete lack of analysis the Western Washington Board applied to the issue.

Dwayne Lane also argues that the Board has authority to decide the res judicata issue and therefore the Flood District should have raised the issue in the Board's Prehearing Statement of Issues, citing *Hilltop Terrace Homeowner's Ass v. Island County*, 126 Wn. 2d at 22; *Lejeune v. Clallam County*, 64 Wn. App 257; and *DeTray v. City of Olympia*, 121 Wn. App. 777. While the cases cited do concern the application of res judicata, none of the cases directly or indirectly deal with the review jurisdiction of Growth Management Hearings Boards.

In *Hilltop*, the Board of County Commissioners approved a land use application after denying a similar application the year prior. *Hilltop Terrace Homeowner's Ass v. Island County*, 126 Wn. 2d 22, 30-31, 891 P.2d 29 (1995). Their approval of the land use

application was appealed directly to Superior Court on a writ of certiorari. The issue was whether res judicata applied to the Island County's Board of County Commissioner when it was acting in its quasi-judicial administrative capacity. The court ruled that it did. In another case cited by Snohomish County, *Lejeune v. Clallam County*, a Board of Commissioners' approval of a preliminary plat application was appealed to Superior Court and then the Court of Appeals, in part based on res judicata. *Lejeune v. Clallam County*, 64 Wn. App. at 257. Finally, in *DeTray v. City of Olympia*, a property developer sought review of the City of Olympia's conditions for approval of his proposed development. The City's conditions were the same as those imposed in prior proceedings from which an appeal was taken but then abandoned by the developer. The Court of Appeals held that the doctrine of res judicata barred the developer from having the City's conditions considered anew. These cases all deal with the application of res judicata, but because none of the cases deal with the jurisdiction of the Growth Management Board, they are inapplicable to the present issue, especially in light of RCW 36.70A.280 which specifically governs the jurisdiction of the Board.

Further, because RCW 36.70A.280 specifically governs the jurisdiction of the Board, the more specific statute trumps the

general rule. It is a well-recognized rule of construction that where a general and a specific statute cover the same subject, the specific statute controls. *State v. Collins*, 55 Wn.2d 469, 348 P.2d 214 (1960). Using the same reasoning, a specific statute would control over a general rule that has never been applied to the Growth Management Hearing Board. Ignoring RCW 36.70A.280, Snohomish County concludes, “although *Hilltop Terrace, Lejeune*, and *DeTray* all involved permits sought at the county or city level rather than proceedings before a growth hearings board, the principle is the same: res judicata applies at the administrative level”. Snohomish County’s Brief at 47. In fact, it is not the same because the Board’s jurisdiction is limited by RCW 36.70A.280. Thus, because there is a specific statute governing the jurisdiction of Growth Management Hearings Board (RCW 36.70A.280), even if these cases were analogous they would not apply.

- b. The Superior Court correctly concluded that in order to re-designate Island Crossing, the County must show, and failed to show, that there has been a change in circumstances since 1998 and that the property is no longer properly designated as agricultural resource land and Rural Freeway service.

The Superior Court determined that the County had to show that there has been a change in circumstances since 1998 and that

the property is no longer properly designated as agricultural resource land and Rural Freeway service. These are requirements under the doctrine of res judicata. In order for a court to consider a case, there must be a justiciable controversy. A justiciable controversy is defined as:

(1) an actual, present, and existing dispute; (2) between parties having genuine and opposing interests; (3) that involves interests that are direct and substantial, rather than potential, theoretical, abstract, or academic; and (4) a judicial determination will be final and conclusive.

Bercier v. Kiga, 127 Wn. App. 809, 822, 103 P.3d 232 (2004).

Pursuant to the fourth element of a judicial controversy, the 1995-2001 litigation was a final and conclusive justiciable controversy. Because Snohomish County was a party to this final and conclusive litigation, it is bound by res judicata to that judicial determination unless it can show that something about the case has changed. The Appellants argument that the Court erroneously used the Redmond II “changed circumstances” test is an opportunistic argument praying on the semantics of the Superior Court. The Superior Court did not use Redmond II “changed circumstances” test, it used the term “changed circumstances” to mean that unless something has materially changed in connection

with the underlying basis of the prior litigation, Snohomish County and the other parties to the prior judicial review continue to be bound by *res judicata* to the prior judicial determination. Not just any changed circumstances will do, rather, the changes must be relevant to and resolve the reasons that the prior application was rejected.⁹

- c. The Superior Court correctly concluded that Snohomish County's actions in this case were legislative actions that are subject to *res judicata* and collateral estoppel because judicial review was invoked, final decisions were entered and were affirmed on appeal.

The Superior Court correctly concluded that that Snohomish County's actions in this case were legislative actions that are subject to *res judicata* and collateral estoppel because in the prior round, judicial review was invoked and final decisions were entered and affirmed on appeal. "In order to prevent repetitious litigation and to provide binding answers, the *res judicata* doctrine bars reasserting the same claim in a subsequent land use application." *DeTray v. Olympia*, 121 Wn. App. at 785.

There are many situations where a future legislative body is bound by the decisions of a past legislative body. When a County

⁹ *DeTray v. City of Olympia*, 121 Wn. App. 777, 788, 90 P.3d 1116 (2004).

Council takes the legislative action of issuing a bond, it cannot ordinarily later revoke the bond without incurring substantial penalties. **Legislative rate-making actions are subject to res judicata following judicial review and determination.**¹⁰

Another example is illustrated in *R/L Associates v. City of Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989), which is analogous to the present case. In that case, the City of Seattle was held in contempt for continued enforcement of the ordinance invalidated by the King County Superior Court. The court issued a permanent injunction prohibiting Seattle from enforcing the ordinance. In that case, Seattle stopped enforcing the provisions against the plaintiff in the action, but continued to enforce the provisions against R/L Associates, who was not a party in the prior declaratory judgment action. The Court precluded Seattle from relitigating the validity of its ordinance against other plaintiffs. Likewise, it is now appropriate to preclude Snohomish County, Dwayne Lane, and the City of

¹⁰ *State Com'n v. Wichita Gas Co.*, 290 U.S. 561, 569, 54 S.Ct. 321 (1934) (citations omitted), states: "But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be *res adjudicata* when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. But the decisions of state courts reviewing commission orders making rates are *res adjudicata* and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement.

Arlington from relitigating the validity of the prior ordinance designating Island Crossing as agricultural. Similarly, Snohomish County Council is bound by res judicata to the prior judicial determination and cannot take a substantially similar action without establishing changed circumstances.

Another example establishing that a party is bound in a current legal action by a prior determination is when they were a party in a prior determination that concerns a similar legislative action to the one they are now challenging.¹¹

- d. Appellants' new argument of separation of powers fails because it ignores the fact that res judicata was applied to the court decision not to the legislative act.

¹¹ *Deja Vu, Inc. v. City of Federal Way*, 96 Wn. App. 255, 257-58, 979 P.2d 464 (1999) (citations omitted), states: "Inspired by Bellevue's successful defense of its four-foot rule, the City of Federal Way promptly enacted a similar ordinance. ...

The Federal Way ordinance immediately became the target of a suit filed in federal court by Deja Vu-Everett-Federal Way, Inc., the only adult entertainment establishment in Federal Way. Federal District Court Judge Thomas Zilly granted Federal Way's motion for summary judgment dismissal in January 1996, giving collateral estoppel effect to the superior court decision on the Bellevue ordinance. ...

Meanwhile, the litigation on the Bellevue ordinance reached the Washington State Supreme Court. In May 1997, the Washington State Supreme Court affirmed the King County Superior Court's decision that the Bellevue four-foot rule was constitutional under both the state and federal constitutions....

Federal Way contends that the collateral estoppel effect of the Supreme Court's decision in *Ino Ino* completely bars Deja Vu, a plaintiff in that action, from relitigating the constitutionality of a four-foot limit. We agree.

Appellants City of Arlington and Dwayne Lane's separation of powers argument fails because it ignores the fact that res judicata was applied to the court decision not to the legislative act. ("If a judiciary applies res judicata and collateral estoppel to legislative acts, it will impede the ability of the legislative body to function in its proper manner." Appellants' Brief at 46). Appellants' reference to *Atetna Life Insurance's* "super power" is misleading because the circumstances of that case are not remotely applicable to the present case. In *Atetna*, the court is reviewing a trial court's finding that Washington Life and Disability Insurance Guaranty Association Act was constitutional. The court used the phrase "we are not a super legislature" in response to the Appellants' brief which went beyond the question of constitutionality:

Appellants claim that they, as foreign insurers, are not treated equally with domestic insurers in every instance under the act. We agree, but such a showing, without more, does not entitle appellants to the judicial review by this court of this legislative act. Appellants argue that the act disadvantages them more than necessary to accomplish the result desired by the legislature, and the National Association of Insurance Commissioners' "Model Act" is offered as an example of what, in appellants' view, the act before us ought to be. This approach misapprehends the limits which constitutional principles place upon this court's exercise of judicial review.

Where the constitutionality of a legislative act is before this court, we are bound "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." This is not, however, the exercise of a substantive power to review and nullify acts of the legislature apart from passing on their constitutionality, for no such substantive power exists.

We are not a super legislature.

Aetna 83 Wn.2d at 528 (emphasis added).

In contrast, the present case has been fully litigated and the court has simply ruled that because nothing has materially changed since the prior litigation, the prior decision is binding pursuant to res judicata.

For the same reason *Fritz v. Gorton*, *Lenci v. City of Seattle*, and *In re Binding Declaratory Ruling of Dept. of Motor Vehicles* do not apply. None of those cases address res judicata—they all simply express the presumption in favor of constitutionality when a court is reviewing the constitutionality of a legislative act. *Fritz v. Gorton*, 83 Wn. 2d 275, 287, 517 P.2d 911 (1974); *Lenci v. Seattle*, 63 Wn.2d 664, 668, 388 P.2d 926 (1964); *Salstrom's Vehicles v. Motor Vehicles*, 87 Wn.2d 686, 691, 555 P.2d 1361 (1976).

Appellants conclude that "Local planning decisions cannot be dictated or precluded by the fact there was a similar, or even identical ordinance in the past. Changes made in land designations

must be subject to complete review in light of the circumstances surrounding the legislative act in question, including the impact of any local conditions. To hold otherwise would allow the judiciary to usurp the legislative functions of local governments required to plan under the GMA and consider local conditions while doing so.” Appellants City of Arlington and Dwayne Lane’s Brief, pg. 48. Appellants’ argument goes too far. If appellants’ argument were accepted, the independent and separate powers of the courts to review and determine controversies under the Growth Management Act would be usurped and judicial review would be rendered meaningless. Not only would such a result be bad public policy, but it would be unconstitutional.

The Flood District is not here suggesting that the Board is relieved from affording enhanced deference to local decision makers on their planning choices under the Growth Management Act as set forth in *Quadrant Corp. v. Growth Management Hearing Board*, 154 Wn.2d 224, 238, 110 P.3d 918 (2005) (but no deference is afforded to local government actions that violate Growth Management Act requirements).¹²

¹² “While we are mindful that this deference ends when it is shown that a county’s actions are in fact a “clearly erroneous” application of the GMA, we should give effect to the legislature’s explicitly stated intent to grant deference to county planning decisions.” *Quadrant*, 154 Wn.2d at 238.

However, where as here, there was an identity of subject matter, cause of action, persons and parties and the quality of the persons for or against whom the claim is made¹³ in the present case when compared to the prior round of Dwayne Lane Island Crossing litigation, then res judicata should apply to bar subsequent re-litigation absent a showing of changed circumstances.

The policy of finality of judicial decisions is so strong that a later change in law has no effect on the conclusiveness of an earlier case even if the first decision was erroneous. *Satsop Valley Homeowners v. Northwest Rock*, 126 Wn. App. 536, 108 P.3d 1247 (2005): Collateral estoppel prevents endless relitigation of already decided issues where the parties to the earlier proceeding received a full and fair hearing on the issue in question. Where the parties fail to appeal, a subsequent change in law can have no effect on the conclusiveness of an earlier case. Otherwise, no judgment would ever be final.

In sum, if an applicant's requested land-use designation is denied, the applicant has a choice of two responses: First, it can invoke the GMA administrative and judicial review provisions to

¹³ "Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Hilltop*, 126 Wn.2d at 32, 891 P.2d 29 (quoting *Rains v. State*, 100 Wa.2d 660, 663,674 P.2d 165 (1983))." *DeTray v. Olympia*, 121 Wn. App. 777, 785, 90 P.3d 1116 (2004).

review the determination, but if that process results in affirming the determination and the applicant's appeal is unsuccessful, res judicata or collateral estoppel precludes relitigating the same application among the same parties without the applicant showing materially changed circumstances. Or, second, the applicant can under the GMA docketing process reapply to the local government hoping to convince the agency to exercise its discretion pursuant to GMA to approve the redesignation at a later time—this second option may not require the applicant to show changed circumstances if the applicant's proposal is otherwise consistent with the GMA. The Flood District submits, and the Superior Court determined, that once an applicant chooses to invoke judicial review, the determination at the end of that process is final and binding upon the parties in that and in a substantially similar proposal in the future.

Once judicial review is invoked and the process comes to a final decision, the parties should be bound because:

The most purely public purpose served by res judicata lies in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results... .

A second largely public purpose has been found in preserving courts against the burdens of repetitious litigation... .

The judicial interest in avoiding the public burdens of repetitious litigation is allied with the interest of former litigants in avoiding the parallel private burdens. For the most part, attention is focused on the need to protect a victorious party against oppression by a wealthy ... adversary... .

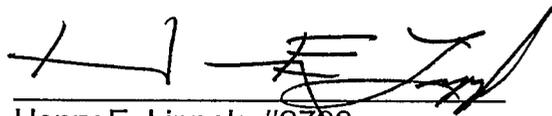
The deepest interests underlying the conclusive effect of prior adjudication draw from the purpose to provide a means for finally ending private disputes. The central role of adversary litigation in our society is to provide binding answers. We want to free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs. Repose is the most important product of res judicata.

Hilltop, 126 Wn.2d at 30-31.

F. Conclusion

Accordingly, the Court of Appeals should affirm the Superior Court's dismissal of petitioners' appeal on res judicata and collateral estoppel grounds.

Respectfully submitted this March 31, 2006.



Henry E. Lippek, #2793
Attorney for Respondent
Stillaguamish Flood Control District

CERTIFICATE OF SERVICE

I certify under penalties of perjury under the laws of the State of Washington that on the date entered below I served the foregoing Flood District brief on res judicata by depositing into the mails of the United States, postage prepaid, in properly sealed and addressed envelopes, upon the following:

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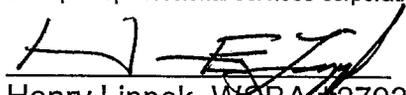
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Dated this 31st Day of March 2006 at Seattle, WA.

The Public Advocate,
a nonprofit professional services corporation


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Appendix

Stillaguamish Flood Control District

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(360) 652-9233

COMMISSIONERS:

CHUCK HAZLETON, CHAIR
ROBERTA ELDRIDGE
RICK WILLIAMS

July 5, 2003

Snohomish County Council
3000 Rockefeller MS-609
Everett, WA 98201

Subject: Island Crossing Rezone and Redesignation

Dear Members of the Council:

The Stillaguamish Flood Control District wishes to reaffirm its opposition to Dwayne Lane's request to rezone and redesignate the farmland at Island Crossing. Introducing urban development into this rural floodplain disregards every principle of modern flood hazard management.

An unobstructed floodplain is the river's hydraulic shock absorber, minimizing the risk to life and property. It is no place for urbanization. The farmland in question lies in the Stillaguamish River 100-year floodplain, is designated as floodway fringe, and suffers flooding every four years on average, sometimes severely. It is bisected by South Slough, a *de facto* floodway which conveys large amounts of floodwater, as Mr. Lane's consultant tacitly acknowledged before the Planning Commission. It is prime agricultural soil.

In our July 1, 2002 letter to PDS (attached), we pointed out that an hydraulic analysis was needed to reveal the extent of the flood hazards posed by the Lane proposal. Such an analysis has now been completed by County engineers, and its results confirm the District's concerns. According to the computer model, development of the land in question will adversely impact flood levels and drainage in a broad area of the valley. Immense fill would be required, since the analysis also found the 100-year flood elevation at Island Crossing to be four feet higher than that predicted in the 1983 FEMA Flood Insurance Study, putting the highest point of Mr. Lane's property under 3 feet of water.

The District believes the Lane proposal and the progression of urbanization certain to follow from it would set the stage for flood damages that will easily consume any tax revenue benefit. It would worsen life-threatening flood hazards. Anthony Nahajski, then Snohomish County River Engineer, issued this warning after the 1990 flooding, at most only a 15-year event, that inundated most of the land at Island Crossing: "Generally, the danger is, people don't realize that [even] these floods are not real major floods. Much heavier floods are possible."

In February, FEMA recommended Snohomish county as "an excellent candidate" for formal application to the National Flood Insurance Program's Community Rating System (CRS), which "will

ultimately lower flood insurance premiums for County residents.” They found that “Snohomish County has established a very good floodplain management program, and that the program is in the hands of a very capable staff.” This Community Assistance Visit was for the Snohomish valley; the Stillaguamish valley is scheduled soon. Approval of Mr. Lane’s proposal may well result in higher premiums for NFIP and the possibility of losing CRS eligibility altogether.

Finally, court decisions must be respected. Lane’s application was previously, fully adjudicated and his proposal found to violate key provisions of the Growth Management Act and other applicable law. Those violations remain in the current proposal, establishing it by court findings as unlawful and therefore requiring denial. Should Council approve regardless, the Prosecuting Attorney under SCC 2.90.085 should determine Council is not entitled to representation by the Prosecuting Attorney’s Office, or to indemnification at public expense in connection with litigation on this matter.

Sincerely,

/s/
Chuck Hazleton, Chair

Stillaguamish Flood Control District

P.O. Box 2512
STANWOOD, WA 98292
(360) 652-9233

COMMISSIONERS:
CHUCK HAZLETON, CHAIR
ROBERTA ELDRIDGE
RICK WILLIAMS

July 1, 2002

Mr. Steve Skorney, Senior Planner
Planning & Development Services
3000 Rockefeller Avenue, M/S #604
Everett, WA 98201-4046

RE: Dwayne Lane's proposed Island Crossing amendments EIS scope

Dear Mr. Skorney:

The Stillaguamish Flood Control District exercises primary responsibility for protection of life and property, flood control and improvement of water quality in the lower Stillaguamish River. The Flood District and its constituent property owners have a vital interest in protecting commercial agricultural lands and preventing urban development within Stillaguamish River floodplain and floodways.

The Flood District participated in investigations and hearings regarding Dwayne Lane's effort to unlawfully re-designate Island Crossing from agricultural to commercial use and extend the City of Arlington's urban growth boundary into the Stillaguamish floodplain. We are appalled that after years of litigation resulting in definitive rejection of Mr. Lane's proposals, this issue is once again on the County's agenda.

Urbanization in the floodplain poses significant dangers, calling for the utmost care and attention in your Supplemental Environmental Impact Study. In the Stillaguamish basin, development in existing urban growth areas is increasing the floodplain's hydrologic burden, magnifying the adverse impacts of converting the agricultural lowlands to urban commercial use.

The Island Crossing Supplemental EIS should include a comprehensive investigation of direct, probable and significant impacts on downstream water quality and flooding, based on the total, cumulative effect of the following factors:

- The maximum commercial development allowable under the proposed re-designation
- All existing development
- Future development that would follow if Mr. Lane's present proposals were approved.

A comprehensive study must await completion of the County's Stillaguamish River computer modeling program, to adequately forecast the effect of these factors on flood risk during both

representative and extraordinary flood events. Without sound hydraulic analysis and prohibitions on floodplain development, future damages are likely to be unacceptably high and the County may be exposed to crippling claims for improvident approval of development in a known flood hazard area.

Do not be deterred from studying the downstream impacts just because a rezone alone does not directly result in flooding impacts, leading some proponents to claim that such impacts are improbable or easily avoided later. The Washington Supreme Court in *King County v. State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993) stated that rezones like Island Crossing, done without sufficient examination of the consequences of maximum permitted development, "may begin a process of government action which can 'snowball' and acquire virtually unstoppable administrative inertia...when government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after."

The required course in a supplemental EIS is to thoroughly study the cumulative environmental impact of the total, maximum development potential permitted by the re-designation *and* likely to follow from it, in terms of flooding, water quality, impact on endangered and priority species, damage to resource lands, and all other adverse impacts.

"All zoning must bear a substantial relation to the public welfare." *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978). Upon judicial review, a zoning change has no presumption of validity and will be upheld only if it serves the public welfare, is warranted by changed circumstances, and generally conforms with existing comprehensive plans. *Cathcart v. Snohomish County*, 96 Wn.2d 201, 634 P.2d 853 (1981). In this case, there have been no material changed circumstances, and urbanizing the Stillaguamish floodplain does not serve the public welfare.

Further, a fundamental goal of the Growth Management Act is maintenance and enhancement of productive agricultural lands:

- "The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations: ... Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020.
- Under RCW 36.70A.060 each county, "shall adopt development regulations ... to assure the conservation of agricultural, forest, and mineral resource lands... . Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals."

Mr. Steve Skorney
July 1, 2002
Page 3

In connection with the County's current review of requests for converting agricultural lands to other uses, it appears that for every acre of land removed from agricultural use should be replaced by an acre from an Urban Growth Area, suitable for commercial agricultural production, closest to the removed lands. The supplemental EIS needs to analyze these agricultural and resource lands preservation requirements.

We welcome the opportunity to provide further input into the studies and investigations underlying the EIS and look forward to working with you to assure that the EIS complies with the requirements of law. Please contact me at (360) 629-9233, or Henry Lippek at (206) 689-8510 for more information and assistance.

Please also make the Flood District a party of record on this proposal so that we can remain fully and currently informed. Thank you.

Very truly yours,

STILLAGUAMISH FLOOD CONTROL DISTRICT

Handwritten signature of Chuck Hazleton in cursive, followed by the text "by fax authorization".

Chuck Hazleton,
Chair

RECEIVED
COURT OF APPEALS
DIVISION ONE

MAR 8 1 2006

No. 57253-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CITY OF ARLINGTON, DWAYNE LANE and
SNOHOMISH COUNTY,

Appellants,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD, STATE OF WASHINGTON; 1000 FRIENDS OF
WASHINGTON nka FUTUREWISE; STILLAGUAMISH FLOOD
CONTROL DISTRICT; PILCHUCK AUDUBON SOCIETY; THE
DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT
OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT;
and AGRICULTURE FOR TOMORROW,

Respondents.

BRIEF OF RESPONDENT
STILLAGUAMISH FLOOD CONTROL DISTRICT
ON RES JUDICATA

THE PUBLIC ADVOCATE, N.C.

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A. Introduction

The Stillaguamish Flood Control District (Flood District) is a special governmental agency, governed by an elected three-member Board of Commissioners, whose boundaries, in general include the lands within the 100-year flood plain of the lower Stillaguamish River. The Flood District is the local government unit with expertise and primarily responsibility for protection of life and property from floods. The Flood District maintains and operates systems of drainageways, about eight miles of sea dikes, 22 miles of river levees, tidegates, flow maintenance facilities and other works to prevent salt-water intrusion, facilitate drainage, improve agricultural production, control flooding, improve water quality and restore fish habitat. Island Crossing is not within the boundaries of the Flood District, but it is nearby and it is within the 100-year flood plain.

Since the 1870's the land-use within the lower Stillaguamish River flood plain has been agricultural, because the Stillaguamish River valley is one of the most fertile and productive agricultural areas in the world. Agriculture is compatible with periodic flooding, if flood waters promptly drain, because there is generally little damage and existing rich topsoils are enhanced. Urban use is generally inappropriate in the flood plain because it

increases the duration and severity of flood damage and increases risks to life. Formal preservation of the agricultural character of Island Crossing began in the 1970's and each subsequent plan emphasized that the flood plain use should be limited to agricultural uses.

In 1995 Dwayne Lane proposed that Island Crossing be redesignated from rural agricultural to urban commercial uses. Initially, the Snohomish County Council approved, but following judicial review, the Council restored Island Crossing to its historic rural agricultural use. Dwayne Lane and the other parties now before the Court, chose to appeal, but did not prevail: Island Crossing's agricultural use designation was upheld by the Growth Board, the Superior Court and the Court of Appeals. Shortly after the adverse Court of Appeals decision, Dwayne Lane reapplied to the Council again to redesignate Island Crossing's permitted land use from rural agricultural to urban commercial—without showing any change in circumstances to justify departing from the fully-litigated final determinations holding that rural agriculture was the proper land use designation for Island Crossing.

Dwayne Lane and the appellants argue that he can continue, annually if necessary, to request redesignation of Island Crossing until a majority of the Council agrees, without a showing

of changed circumstances. The Flood District and Futurewise respectfully disagree. All the respondents submit in the instant appeal that the latest Dwayne Lane Island Crossing re-designations clearly violate the Growth Management Act. The focus of this brief is that where, as here, there was a prior, fully-litigated final determination involving substantially the same parties, the same land and the same issues, the prior final determination is binding, under the doctrines of res judicata and collateral estoppel, unless changed circumstances are shown justifying a departure from the prior determination.

B. Issue Pertaining to Appellant's Assignment of Error¹

Whether the Superior Court appropriately granted the Flood District's and Futurewise's Motion to Dismiss Dwayne Lane's, Snohomish County's and Arlington's appeals (these appellants will hereafter be collectively referred to as Dwayne Lane unless otherwise appropriate) based on res judicata and whether the Superior Court properly dismissed the Appellants petitions for judicial review because (a) it would have been futile for the Flood District or Futurewise to have raised the issues of res judicata or

¹ This brief focuses on Appellants City of Arlington and Dwayne Lane's Assignment of Error No. 4 and the Appellants' Issue Pertaining to Assignment of Error No. 5 and Snohomish County's assignment of Error B and the three issues pertaining to it.

collateral estoppel before the Board below and thus the Superior Court had jurisdiction over these issues, (b) in order to re-designate Island Crossing, the County must show and failed to show that there have been material changes in circumstances since 1998² and that the property is no longer properly designated as agricultural resource land and Rural Freeway service, and (c) Snohomish County's ("County") actions in this case³ were legislative actions that are subject to res judicata and collateral estoppel because judicial review was invoked, final decisions entered and affirmed on appeal in the previous action.

C. Statement of the Case

To avoid duplication, the Flood District adopts and joins the Briefs of Futurewise and the Director of the State Of Washington

² In 1998 the Board affirmed Snohomish County's designation of the subject property (Island Crossing) as agricultural resource land (75.5 acres) and Rural Freeway Service (35 acres) and removed it from the Arlington urban growth area (UGA). That decision was eventually affirmed by the Court of Appeals in an unreported decision. Dwayne Lane v. Central Puget Sound Growth Management Hearings Board, No. 46773-5-1. Ordinarily unpublished opinions may not be cited, but may be cited when the decision is relevant under the doctrines of law of the case, res judicata or collateral estoppel and that unpublished opinion may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. *In re Davis*, 95 Wn. App. 917, 920 n. 2, 977 P.2d 630 (1999), *rev. granted on other grounds*.

³ The County re-designated 75.5 acres of Island Crossing from Commercial Farmland to Urban Commercial, and 35 acres from Rural Freeway Service to Urban Commercial, rezoning the land from Agricultural-10 Acres and Rural Freeway Service to General Commercial and expanding the Arlington UGA to include this land, first in Ordinance No. 03-063 and later in Emergency Amended Ordinance No. 04-057.

Department Of Community, Trade, and Economic Development (“CTED”). This brief supplements Futurewise’s and CTED’s briefs on the issue of res judicata.

Procedural History

The facts, issues and circumstances of the instant appeal are functionally identical and the parties the same as in a case fully litigated between 1995 and 2001 and decided adversely to appellants herein (Dwayne Lane, Snohomish County and the City of Arlington). Between 1995 and 2001, the Superior Court twice and Court of Appeals once found that Island Crossing is *agricultural land of long-term commercial significance* and that Island Crossing should be designated as agricultural resource lands. The Central Puget Sound Growth Management Board (Board) outlined this 1995-2001 history of Island Crossing GMA litigation in its March 22, 2004 Final Decision and Order in the case appealed herein:

[1995-2001] HISTORY OF GMA LITIGATION RE: ISLAND CROSSING

1. Among the seventy issues challenging the GMA compliance of Snohomish County’s first comprehensive plan in 1996 was an allegation by Pilchuck Audubon Society that the County had violated the agricultural resource lands provisions of the Growth Management Act in removing from resource lands designation lands in the Island Crossing Area. The Board upheld the County’s action. CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Final Decision and Order, Case No. 96-3-0068c, April 15, 1996.

2. On November 19, 1997, Snohomish County Superior Court, in reviewing the Board's decision in *Sky Valley v. Snohomish County*, issued a "Judgment Affirming in Part and Remanding in Part," Superior Court Case No. 96-2-03675-5.
3. In an oral decision incorporated by the Court into the Judgment Affirming in Part and Remanding in Part, the Superior Court stated:

Evidence and arguments supporting de-designation were presented by [the City of Arlington] . . . focused almost exclusively on issues relating to the City of Arlington's economic growth and well-being, and not on Growth Management Act Criteria... . An isolated special purpose freeway service node does not constitute generalized urban growth . . . What happened to the fundamental axiom of the Growth Management Act that "the land speaks first"? Where does the Act state that the economic welfare of cities speaks first? Where does the evidence submitted by Arlington even reference the agricultural productivity or the floodplain status of the lands which are not proposed for automobile dealerships? Freeways are no longer longitudinal strips of urban opportunity. Agricultural lands must be conserved as a first priority, and urban centers must be compact, separate and distinct features of the remaining part of the landscape.

Id. Transcript of Proceedings, Court's Oral Ruling, at 14-18.

4. The Superior Court remanded the *Sky Valley* matter to the Board, finding no substantial evidence to support the removal of the agricultural designation. PDS Report, at 4.
5. Subsequent to the Superior Court remand, the Snohomish County Planning Commission and County Council reconsidered the land use designations for Island Crossing in 1998 and redesignated the agricultural areas as agricultural and redesignated the commercial area as Rural Freeway Service, and removed Island Crossing from the Arlington UGA.

Id.

6. Dwayne Lane, the owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land

and filed a petition for review with the Growth Management Hearings Board. The Board rejected Lane's appeal. CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane]. Jan. 20, 1999.

7. Snohomish County Superior Court affirmed the Board's January 20, 1999 Order, after which Lane appealed to the Court of Appeals. *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001).
8. The Court of Appeals described the Island Crossing area as follows:

Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. See *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).

Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devote to freeway services. Thus, the record indicates that the land is actually used for agricultural production. See *City of Redmond*, 136 Wn.2d at 53. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist. *Id.*

CPSGMHB Case No. 03-3-0019c, *1000 Friends v.*

Snohomish County, FDO, pg 2-4, March 22, 2004, CP 2564-66.

However, in 2003 the County, responding to yet another request from Dwayne Lane, adopted Ordinance No. 03-063, which once again changed the County's comprehensive plan designations for Island Crossing and gave rise to this action. Ordinance No. 03-063 changed the designation of the area around the Island Crossing I-5 interchange from *Rural Freeway Service*, which allows uses that essentially serve I-5 traffic, to *Urban Commercial*.⁴ Ordinance No. 03-063 also changed the designation of the 75-acre south portion of Island Crossing from *Riverway Commercial Farmland* to *Urban Commercial*.⁵ The Board found Ordinance No. 03-063 to be noncompliant with the GMA. The Board also found the ordinance *invalid*, pursuant to RCW 36.70A.302. In response to a routine motion by the County, the Board rescinded its finding of

⁴ Section 30.21.025(2)(f) of the Snohomish County Code provides in relevant part: "The intent and function of the rural freeway service zone is to permit the location of small-scale, freeway-oriented commercial services in the vicinity of on/off ramp frontages and access roads of interstate highways in areas outside a designated UGA boundary and within rural areas of the county. Permitted uses are limited to commercial establishments dependent upon highway users[.]"

⁵ Snohomish County *General Policy Plan*, LU 71, defines Riverway Commercial Farmland to include "farmland areas generally characterized by being in a river valley, floodplain or shoreline area, having continuous prime farmland soils, and having approximately fifty percent or more of the land area in parcels of forty acres and larger.as follows." The purpose of Chapter 30.32B of the Snohomish County Code, which includes Riverway Commercial Farmland, is "to regulate development on and adjacent to designated farmlands in order to conserve farmland resources and ensure compatibility between farmlands and adjacent uses." Section 30.32B.010(1) of the Snohomish County Code.

non-compliance and invalidity.⁶ The County responded by adopting the same provisions in Emergency Ordinance No. 04-057. After a second round of briefing and argument, the Board also found this Ordinance No. 04-057 also to be noncompliant with the requirements in the GMA, and recommended imposition of gubernatorial sanctions (CP 2562-2602). The Governor imposed economic sanctions (CP III, 592-93), but the County clarified the severability clause and the sanctions were lifted. The Board's determinations are now the subject of this appeal by appellants.

To summarize, Snohomish County now has redesignated Island Crossing as urban commercial three times under the Growth Management Act, and each time this redesignation has been found to be noncompliant with GMA. The Board, the Superior Court and the Court of Appeals have held a total of six times that Island Crossing does not qualify under GMA for any designation other than as *agricultural resource land of long term commercial significance*. Yet the same parties are now again litigating the same facts and the same issues before this court.

⁶ Ordinance No. 03-063 contained a *savings clause*. The savings clause acted to revive previous GMA compliant land use designations in the event an enactment is found by the Board to be noncompliant.

Statement of Facts

The land at issue, Island Crossing, comprises a total of 110 acres. The crux of this case involves approximately 75 acres largely owned by Dwayne Lane or his relatives or business partners. This land is shaped like a triangle pointing south. State Highway 502 is the northern border. Interstate 5 is the western border and Smokey Point Road is the eastern border. The City of Arlington was about 1.5 miles Southeast of Island Crossing.

Dwayne Lane repeatedly requested that Island Crossing's designation be changed from *rural agricultural* to *urban commercial*. The stated reason Dwayne Lane requested these changes in the land use designation is that he wishes to relocate his car dealership from downtown Arlington to his farmland property at Island Crossing but the County's action would permit and encourage general commercial development of all of Island Crossing.

The Island Crossing area has long been considered agricultural lands of long-term commercial significance and valued as such by Snohomish County. Even as of 1996, Snohomish County, an appellant herein, argued that Island Crossing was properly designated agricultural land:

Snohomish County has a rich history of preserving agricultural lands. As far back as 1970, the Snohomish

County Board of Commissioners recognized the necessity of preserving prime agricultural lands.... The Snohomish County Agricultural Preservation Plan, adopted in December 1982, indicated that the *Island Crossing area, along with other areas of "primary significance", contains "lands that should be maintained in agriculture far into the future by any means at the county's disposal, now or in the future."* The 1982 Agricultural Preservation Plan was adopted as an element of the county's comprehensive plan. GGP at LU-25... Later comprehensive plans echoed the County's commitment to preservation of agricultural land. The 1975-90 Arlington Area Comprehensive Plan listed as a goal that "[p]rime agricultural land should be preserved as a renewable resource for the use and benefit of current and future generations." That plan also singled out the *Stillaguamish floodplain as an area in which uses should be limited to agricultural.* The 1993 Interim Agricultural Conservation Plan, developed under the Growth Management Act, continued this tradition, mapping and characterizing the farmlands included in the 1982 plan.... The General Policy Plan (GPP), part of the County's GMA comprehensive plan adopted in June 1995, incorporated by reference the 1993 Interim Agricultural Preservation Plan.

CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Snohomish County's Compliance Brief RE: Island Crossing, Case No. 96-3-0068c, April 15, 1996. CP II 299-322. The courts agreed with Snohomish County and Island Crossing remained designated as agricultural land.

D. Summary of Argument

Dwayne Lane argues that it violates separation of powers and permits the court to usurp the County Council's legislative functions if res judicata is applied and therefore, the Superior

Court's dismissal of petitioner's appeal on res judicata grounds should now be reversed by the Court of Appeals. The Flood District and Futurewise respectfully disagree and maintain that that the Superior Court, after careful consideration and reconsideration of this issue, correctly dismissed Dwayne Lane's latest appeal of the Board's final decisions. Where the parties invoke judicial review and the process results in a final judicial determination, those parties are bound on the issues determined unless and until the parties seeking a different outcome establish changed circumstances. Once litigation is invoked, the parties are bound by the issues decided. Otherwise the judicial review provisions of the Growth Management Act are mere surplusage and an enormous waste of time and judicial resources. The central role of adversary litigation in our society is to provide binding answers.⁷ When the judicial review is invoked and a final decision is rendered, the parties cannot and should not be permitted to disregard the judicial decision, pretend that nothing happened and get as many more bites of the apple as they want before the local legislative body.

E. Argument

I. THE SUPERIOR COURT PROPERLY GRANTED THE RESPONDENT'S MOTION TO DISMISS APPEALS

⁷ *Hilltop Terrace Homeowner's Ass v. Island County*, 126 Wn. 2d 22, 30-31, 891 P.2d 29 (1995).

BASED ON RES JUDICATA AND PROPERLY
DISMISSED THE APPELLANT'S PETITIONS FOR
JUDICIAL REVIEW

- a. The Superior Court correctly concluded that it would have been futile for the Flood District to have raised the issues of res judicata or collateral estoppel before the Board and thus the Superior Court had jurisdiction over the issues.

Res judicata was properly before the Superior Court because the Flood District raised the issue of res judicata before the County Council and the Board and this is all it was required to do given that the Board had previously ruled in four separate cases that it did not have jurisdiction over this issue.⁸

The Flood District raised the issue before the County Council in a July 5, 2003 letter to Snohomish County Council from Chuck Hazleton, Chair of the Snohomish Flood Control District. *Growth Management Hearings Board, Case No. 03-3-0019c, Revised Index to the Record, Submission # 80 (also attached at the Appendix, hereto, CP I, 90-92)* and in its reply brief to assure that this matter was reserved for consideration by the Superior Court. The Board previously ruled in at least four cases that it did not have

⁸ *Salish Village Homeowners Assn v. City of Kirkland*, CPSGMHB, No. 02-3-0022, Order Granting Dispositive Motion, March 19, 2003; *Hensley v. Snohomish County*, CPSGMHB No. 03-3-0010, Order on Motions, August 11, 2003; *City of Tacoma, City of Milton, City of Puyallup and City of Sumner v. Pierce County*, CPSGMHB Case No. 94-3-0001, Order on Dispositive Motions, March 4, 1994, at 3-11; and *Peninsula Neighborhood Association v. Pierce County* CPSGMHB Case No. 95-3-0071, Order Denying Pierce County's Motion to Dismiss, January 9, 1996, at 2-3.

jurisdiction over res judicata issues. The basis for these rulings was RCW 36.70A.280, "Matters subject to Board Review," which governs the jurisdiction of the Board and lists the issues that may be raised before the Board. The statute does not list issues such as res judicata or collateral estoppel:

(1) A growth management hearings board shall hear and determine *only those petitions alleging either:*

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted....

Emphasis added.

Salish Village Homeowners Assn v. City of Kirkland confirms that the "matters that are subject to Board review are set forth in RCW 36.70A.280." *Salish Village*, CPSGMHB, No. 02-3-0022, Order Granting Dispositive Motion, March 19, 2003, page 4. This Court appropriately relied on *Salish Village* in its ruling. *Court's Oral Decision, page 13, line 10-16*. While *Salish Village* does not directly concern res judicata or collateral estoppel, the Board's

holding that RCW 36.70A.280 delineates the scope of its jurisdiction is directly applicable to the present case.

In *City of Tacoma, et al., v. Pierce County*, the Board determined that it does not have jurisdiction to determine cases on equitable grounds based on RCW 36.70A.280 and RCW 36.70A.300(1):

The Board's subject matter jurisdiction is specified at RCW 36.70A.280(1) entitled "Matters subject to board review"...

The Board has repeatedly referred to this provision in the GMA and the following portion of RCW 36.70A.300(1) to conclude that its subject matter jurisdiction has been strictly limited by the legislature. RCW 36.70A.300(1) provides in part:

(1) The board shall issue a final order within one hundred eighty days of receipt of the petition for review, or, when multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated. Such a final order shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040.... Emphasis added.

Thus, the Board has concluded in earlier cases that it did not have the authority to determine whether the United States or Washington State Constitutions had been violated. In its *Twin Falls* decision, the Board concluded that it lacked the requisite jurisdiction to determine whether statutes other than the GMA or the

State Environmental Policy Act (SEPA) as it relates to the GMA were violated. Furthermore, in *Twin Falls* the Board also concluded that it did not have jurisdiction to determine whether the common law had been violated.

Whether the Board has jurisdiction to determine cases based on equitable grounds is one of first impression. However, the Board's earlier analysis, in rejecting claims that the Board had jurisdiction to determine violations of the federal and state constitutions, other statutes and the common law, remains convincing. If the legislature intended that the Board have a broader jurisdiction, it would not have used the terms "only" and "based exclusively." The Board has indicated in prior decisions that this limited jurisdiction may not make practical sense because it does result in bifurcated simultaneous appeals to the Board and to the courts. This predicament is even more perplexing given the state's current political climate for instituting regulatory reform and making governmental efficiency a top priority. Nonetheless, until the legislature specifically expands the Board's jurisdiction or an appellate court informs the Board that it has erred on this point, this is the narrow road this Board will follow.

Accordingly, the County's arguments that the Board does have authority to determine cases based on equitable doctrines is rejected.

City of Tacoma, City of Milton, City of Puyallup and City of Sumner v. Pierce County, CPSGMHB Case No. 94-3-0001, Order on Dispositive Motions, March 4, 1994, at 3-11 (citations omitted).

And, in *Peninsula Neighborhood Association v. Pierce County*, the Board specifically addressed the equitable doctrine of

res judicata and held that it did not have jurisdiction over res judicata:

This Board has previously rejected Pierce County's contentions that the growth management hearings boards have jurisdiction over equitable doctrines such as res judicata and collateral estoppel. The legislature subsequently has not expanded the Board's jurisdiction to include equitable doctrines although it has given the Board jurisdiction over shoreline master programs. Accordingly, nothing has changed to cause the Board to overturn its prior holding: **the Board does not have jurisdiction to determine whether equitable doctrines such as the doctrines of res judicata or collateral estoppel have been violated.**

Peninsula Neighborhood Association v. Pierce County CPSPGMHB Case No. 95-3-0071, Order Denying Pierce County's Motion to Dismiss, January 9, 1996, at 2-3 (Citations omitted, emphasis added).

Dwayne Lane's argument that the Board has jurisdiction over the res judicata doctrine fails, because whether it does or not, the Board has decided it does not and the Flood District is not required to raise an issue before the Board, because it would have been futile. The argument that in *Skagit County Growthwatch v. Skagit County* a Growth Management Hearing Board did apply the res judicata doctrine fails. *Skagit County Growthwatch*; Order on Motion to Dismiss; WWGMHB No. 04-2-0004, June 2, 2004. In that case, the Board noted Snohomish County's objections: 1) equitable

remedy of res judicata does not apply in cases before the hearings boards, and 2) that there is not an identity of persons and parties. The Board then held that res judicata did not apply because there was no identity of claims. Because the Board did not specifically address the Snohomish County's first objection, the Court herein should give more weight to the direct, indepth analysis the Central Puget Sound Board applied to the issue as opposed to the complete lack of analysis the Western Washington Board applied to the issue.

Dwayne Lane also argues that the Board has authority to decide the res judicata issue and therefore the Flood District should have raised the issue in the Board's Prehearing Statement of Issues, citing *Hilltop Terrace Homeowner's Ass v. Island County*, 126 Wn. 2d at 22; *Lejeune v. Clallam County*, 64 Wn. App 257; and *DeTray v. City of Olympia*, 121 Wn. App. 777. While the cases cited do concern the application of res judicata, none of the cases directly or indirectly deal with the review jurisdiction of Growth Management Hearings Boards.

In *Hilltop*, the Board of County Commissioners approved a land use application after denying a similar application the year prior. *Hilltop Terrace Homeowner's Ass v. Island County*, 126 Wn. 2d 22, 30-31, 891 P.2d 29 (1995). Their approval of the land use

application was appealed directly to Superior Court on a writ of certiorari. The issue was whether res judicata applied to the Island County's Board of County Commissioner when it was acting in its quasi-judicial administrative capacity. The court ruled that it did. In another case cited by Snohomish County, *Lejeune v. Clallam County*, a Board of Commissioners' approval of a preliminary plat application was appealed to Superior Court and then the Court of Appeals, in part based on res judicata. *Lejeune v. Clallam County*, 64 Wn. App. at 257. Finally, in *DeTray v. City of Olympia*, a property developer sought review of the City of Olympia's conditions for approval of his proposed development. The City's conditions were the same as those imposed in prior proceedings from which an appeal was taken but then abandoned by the developer. The Court of Appeals held that the doctrine of res judicata barred the developer from having the City's conditions considered anew. These cases all deal with the application of res judicata, but because none of the cases deal with the jurisdiction of the Growth Management Board, they are inapplicable to the present issue, especially in light of RCW 36.70A.280 which specifically governs the jurisdiction of the Board.

Further, because RCW 36.70A.280 specifically governs the jurisdiction of the Board, the more specific statute trumps the

general rule. It is a well-recognized rule of construction that where a general and a specific statute cover the same subject, the specific statute controls. *State v. Collins*, 55 Wn.2d 469, 348 P.2d 214 (1960). Using the same reasoning, a specific statute would control over a general rule that has never been applied to the Growth Management Hearing Board. Ignoring RCW 36.70A.280, Snohomish County concludes, “although *Hilltop Terrace*, *Lejeune*, and *DeTray* all involved permits sought at the county or city level rather than proceedings before a growth hearings board, the principle is the same: res judicata applies at the administrative level”. Snohomish County’s Brief at 47. In fact, it is not the same because the Board’s jurisdiction is limited by RCW 36.70A.280. Thus, because there is a specific statute governing the jurisdiction of Growth Management Hearings Board (RCW 36.70A.280), even if these cases were analogous they would not apply.

- b. The Superior Court correctly concluded that in order to re-designate Island Crossing, the County must show, and failed to show, that there has been a change in circumstances since 1998 and that the property is no longer properly designated as agricultural resource land and Rural Freeway service.

The Superior Court determined that the County had to show that there has been a change in circumstances since 1998 and that

the property is no longer properly designated as agricultural resource land and Rural Freeway service. These are requirements under the doctrine of res judicata. In order for a court to consider a case, there must be a justiciable controversy. A justiciable controversy is defined as:

(1) an actual, present, and existing dispute; (2) between parties having genuine and opposing interests; (3) that involves interests that are direct and substantial, rather than potential, theoretical, abstract, or academic; and (4) a judicial determination will be final and conclusive.

Bercier v. Kiga, 127 Wn. App. 809, 822, 103 P.3d 232 (2004).

Pursuant to the fourth element of a judicial controversy, the 1995-2001 litigation was a final and conclusive justiciable controversy. Because Snohomish County was a party to this final and conclusive litigation, it is bound by res judicata to that judicial determination unless it can show that something about the case has changed. The Appellants argument that the Court erroneously used the Redmond II “changed circumstances” test is an opportunistic argument praying on the semantics of the Superior Court. The Superior Court did not use Redmond II “changed circumstances” test, it used the term “changed circumstances” to mean that unless something has materially changed in connection

with the underlying basis of the prior litigation, Snohomish County and the other parties to the prior judicial review continue to be bound by res judicata to the prior judicial determination. Not just any changed circumstances will do, rather, the changes must be relevant to and resolve the reasons that the prior application was rejected.⁹

- c. The Superior Court correctly concluded that Snohomish County's actions in this case were legislative actions that are subject to res judicata and collateral estoppel because judicial review was invoked, final decisions were entered and were affirmed on appeal.

The Superior Court correctly concluded that that Snohomish County's actions in this case were legislative actions that are subject to res judicata and collateral estoppel because in the prior round, judicial review was invoked and final decisions were entered and affirmed on appeal. "In order to prevent repetitious litigation and to provide binding answers, the *res judicata* doctrine bars reasserting the same claim in a subsequent land use application." *DeTray v. Olympia*, 121 Wn. App. at 785.

There are many situations where a future legislative body is bound by the decisions of a past legislative body. When a County

⁹ *DeTray v. City of Olympia*, 121 Wn. App. 777, 788, 90 P.3d 1116 (2004).

Council takes the legislative action of issuing a bond, it cannot ordinarily later revoke the bond without incurring substantial penalties. **Legislative rate-making actions are subject to res judicata following judicial review and determination.**¹⁰

Another example is illustrated in *R/L Associates v. City of Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989), which is analogous to the present case. In that case, the City of Seattle was held in contempt for continued enforcement of the ordinance invalidated by the King County Superior Court. The court issued a permanent injunction prohibiting Seattle from enforcing the ordinance. In that case, Seattle stopped enforcing the provisions against the plaintiff in the action, but continued to enforce the provisions against R/L Associates, who was not a party in the prior declaratory judgment action. The Court precluded Seattle from relitigating the validity of its ordinance against other plaintiffs. Likewise, it is now appropriate to preclude Snohomish County, Dwayne Lane, and the City of

¹⁰ *State Com'n v. Wichita Gas Co.*, 290 U.S. 561, 569, 54 S.Ct. 321 (1934) (citations omitted), states: "But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be *res adjudicata* when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. But the decisions of state courts reviewing commission orders making rates are *res adjudicata* and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement.

Arlington from relitigating the validity of the prior ordinance designating Island Crossing as agricultural. Similarly, Snohomish County Council is bound by res judicata to the prior judicial determination and cannot take a substantially similar action without establishing changed circumstances.

Another example establishing that a party is bound in a current legal action by a prior determination is when they were a party in a prior determination that concerns a similar legislative action to the one they are now challenging.¹¹

- d. Appellants' new argument of separation of powers fails because it ignores the fact that res judicata was applied to the court decision not to the legislative act.

¹¹ *Deja Vu, Inc. v. City of Federal Way*, 96 Wn. App. 255, 257-58, 979 P.2d 464 (1999) (citations omitted), states: "Inspired by Bellevue's successful defense of its four-foot rule, the City of Federal Way promptly enacted a similar ordinance. ...

The Federal Way ordinance immediately became the target of a suit filed in federal court by Deja Vu-Everett-Federal Way, Inc., the only adult entertainment establishment in Federal Way. Federal District Court Judge Thomas Zilly granted Federal Way's motion for summary judgment dismissal in January 1996, giving collateral estoppel effect to the superior court decision on the Bellevue ordinance. ...

Meanwhile, the litigation on the Bellevue ordinance reached the Washington State Supreme Court. In May 1997, the Washington State Supreme Court affirmed the King County Superior Court's decision that the Bellevue four-foot rule was constitutional under both the state and federal constitutions....

Federal Way contends that the collateral estoppel effect of the Supreme Court's decision in *Ino Ino* completely bars Deja Vu, a plaintiff in that action, from relitigating the constitutionality of a four-foot limit. We agree.

Appellants City of Arlington and Dwayne Lane's separation of powers argument fails because it ignores the fact that res judicata was applied to the court decision not to the legislative act. ("If a judiciary applies res judicata and collateral estoppel to legislative acts, it will impede the ability of the legislative body to function in its proper manner." Appellants' Brief at 46). Appellants' reference to *Atetna Life Insurance's* "super power" is misleading because the circumstances of that case are not remotely applicable to the present case. In *Atetna*, the court is reviewing a trial court's finding that Washington Life and Disability Insurance Guaranty Association Act was constitutional. The court used the phrase "we are not a super legislature" in response to the Appellants' brief which went beyond the question of constitutionality:

Appellants claim that they, as foreign insurers, are not treated equally with domestic insurers in every instance under the act. We agree, but such a showing, without more, does not entitle appellants to the judicial review by this court of this legislative act. Appellants argue that the act disadvantages them more than necessary to accomplish the result desired by the legislature, and the National Association of Insurance Commissioners' "Model Act" is offered as an example of what, in appellants' view, the act before us ought to be. This approach misapprehends the limits which constitutional principles place upon this court's exercise of judicial review.

Where the constitutionality of a legislative act is before this court, we are bound "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." This is not, however, the exercise of a substantive power to review and nullify acts of the legislature apart from passing on their constitutionality, for no such substantive power exists. **We are not a super legislature.**

Aetna 83 Wn.2d at 528 (emphasis added).

In contrast, the present case has been fully litigated and the court has simply ruled that because nothing has materially changed since the prior litigation, the prior decision is binding pursuant to res judicata.

For the same reason *Fritz v. Gorton*, *Lenci v. City of Seattle*, and *In re Binding Declaratory Ruling of Dept. of Motor Vehicles* do not apply. None of those cases address res judicata—they all simply express the presumption in favor of constitutionality when a court is reviewing the constitutionality of a legislative act. *Fritz v. Gorton*, 83 Wn. 2d 275, 287, 517 P.2d 911 (1974); *Lenci v. Seattle*, 63 Wn.2d 664, 668, 388 P.2d 926 (1964); *Salstrom's Vehicles v. Motor Vehicles*, 87 Wn.2d 686, 691, 555 P.2d 1361 (1976).

Appellants conclude that "Local planning decisions cannot be dictated or precluded by the fact there was a similar, or even identical ordinance in the past. Changes made in land designations

must be subject to complete review in light of the circumstances surrounding the legislative act in question, including the impact of any local conditions. To hold otherwise would allow the judiciary to usurp the legislative functions of local governments required to plan under the GMA and consider local conditions while doing so.” Appellants City of Arlington and Dwayne Lane’s Brief, pg. 48. Appellants’ argument goes too far. If appellants’ argument were accepted, the independent and separate powers of the courts to review and determine controversies under the Growth Management Act would be usurped and judicial review would be rendered meaningless. Not only would such a result be bad public policy, but it would be unconstitutional.

The Flood District is not here suggesting that the Board is relieved from affording enhanced deference to local decision makers on their planning choices under the Growth Management Act as set forth in *Quadrant Corp. v. Growth Management Hearing Board*, 154 Wn.2d 224, 238, 110 P.3d 918 (2005) (but no deference is afforded to local government actions that violate Growth Management Act requirements).¹²

¹² “While we are mindful that this deference ends when it is shown that a county’s actions are in fact a “clearly erroneous” application of the GMA, we should give effect to the legislature’s explicitly stated intent to grant deference to county planning decisions.” *Quadrant*, 154 Wn.2d at 238.

However, where as here, there was an identity of subject matter, cause of action, persons and parties and the quality of the persons for or against whom the claim is made¹³ in the present case when compared to the prior round of Dwayne Lane Island Crossing litigation, then res judicata should apply to bar subsequent re-litigation absent a showing of changed circumstances.

The policy of finality of judicial decisions is so strong that a later change in law has no effect on the conclusiveness of an earlier case even if the first decision was erroneous. *Satsop Valley Homeowners v. Northwest Rock*, 126 Wn. App. 536, 108 P.3d 1247 (2005): Collateral estoppel prevents endless relitigation of already decided issues where the parties to the earlier proceeding received a full and fair hearing on the issue in question. Where the parties fail to appeal, a subsequent change in law can have no effect on the conclusiveness of an earlier case. Otherwise, no judgment would ever be final.

In sum, if an applicant's requested land-use designation is denied, the applicant has a choice of two responses: First, it can invoke the GMA administrative and judicial review provisions to

¹³ "Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Hilltop*, 126 Wn.2d at 32, 891 P.2d 29 (quoting *Rains v. State*, 100 Wa.2d 660, 663,674 P.2d 165 (1983))." *DeTray v. Olympia*, 121 Wn. App. 777, 785, 90 P.3d 1116 (2004).

review the determination, but if that process results in affirming the determination and the applicant's appeal is unsuccessful, res judicata or collateral estoppel precludes relitigating the same application among the same parties without the applicant showing materially changed circumstances. Or, second, the applicant can under the GMA docketing process reapply to the local government hoping to convince the agency to exercise its discretion pursuant to GMA to approve the redesignation at a later time—this second option may not require the applicant to show changed circumstances if the applicant's proposal is otherwise consistent with the GMA. The Flood District submits, and the Superior Court determined, that once an applicant chooses to invoke judicial review, the determination at the end of that process is final and binding upon the parties in that and in a substantially similar proposal in the future.

Once judicial review is invoked and the process comes to a final decision, the parties should be bound because:

The most purely public purpose served by res judicata lies in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results... .

A second largely public purpose has been found in preserving courts against the burdens of repetitious litigation... .

The judicial interest in avoiding the public burdens of repetitious litigation is allied with the interest of former litigants in avoiding the parallel private burdens. For the most part, attention is focused on the need to protect a victorious party against oppression by a wealthy ... adversary... .

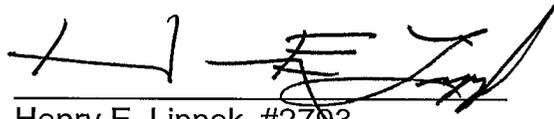
The deepest interests underlying the conclusive effect of prior adjudication draw from the purpose to provide a means for finally ending private disputes. The central role of adversary litigation in our society is to provide binding answers. We want to free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs. Repose is the most important product of res judicata.

Hilltop, 126 Wn.2d at 30-31.

F. Conclusion

Accordingly, the Court of Appeals should affirm the Superior Court's dismissal of petitioners' appeal on res judicata and collateral estoppel grounds.

Respectfully submitted this March 31, 2006.



Henry E. Lippek, #2793
Attorney for Respondent
Stillaguamish Flood Control District

CERTIFICATE OF SERVICE

I certify under penalties of perjury under the laws of the State of Washington that on the date entered below I served the foregoing Flood District brief on res judicata by depositing into the mails of the United States, postage prepaid, in properly sealed and addressed envelopes, upon the following:

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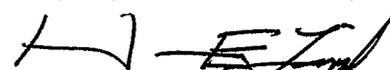
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Dated this 31st Day of March 2006 at Seattle, WA.

The Public Advocate,
a nonprofit professional services corporation


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Appendix

Stillaguamish Flood Control District

P.O. Box 2512
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(360) 652-9233

COMMISSIONERS:
CHUCK HAZLETON, CHAIR
ROBERTA ELDRIDGE
RICK WILLIAMS

July 5, 2003

Snohomish County Council
3000 Rockefeller MS-609
Everett, WA 98201

Subject: Island Crossing Rezone and Redesignation

Dear Members of the Council:

The Stillaguamish Flood Control District wishes to reaffirm its opposition to Dwayne Lane's request to rezone and redesignate the farmland at Island Crossing. Introducing urban development into this rural floodplain disregards every principle of modern flood hazard management.

An unobstructed floodplain is the river's hydraulic shock absorber, minimizing the risk to life and property. It is no place for urbanization. The farmland in question lies in the Stillaguamish River 100-year floodplain, is designated as floodway fringe, and suffers flooding every four years on average, sometimes severely. It is bisected by South Slough, a *de facto* floodway which conveys large amounts of floodwater, as Mr. Lane's consultant tacitly acknowledged before the Planning Commission. It is prime agricultural soil.

In our July 1, 2002 letter to PDS (attached), we pointed out that an hydraulic analysis was needed to reveal the extent of the flood hazards posed by the Lane proposal. Such an analysis has now been completed by County engineers, and its results confirm the District's concerns. According to the computer model, development of the land in question will adversely impact flood levels and drainage in a broad area of the valley. Immense fill would be required, since the analysis also found the 100-year flood elevation at Island Crossing to be four feet higher than that predicted in the 1983 FEMA Flood Insurance Study, putting the highest point of Mr. Lane's property under 3 feet of water.

The District believes the Lane proposal and the progression of urbanization certain to follow from it would set the stage for flood damages that will easily consume any tax revenue benefit. It would worsen life-threatening flood hazards. Anthony Nahajski, then Snohomish County River Engineer, issued this warning after the 1990 flooding, at most only a 15-year event, that inundated most of the land at Island Crossing: "Generally, the danger is, people don't realize that [even] these floods are not real major floods. Much heavier floods are possible."

In February, FEMA recommended Snohomish county as "an excellent candidate" for formal application to the National Flood Insurance Program's Community Rating System (CRS), which "will

ultimately lower flood insurance premiums for County residents.” They found that “Snohomish County has established a very good floodplain management program, and that the program is in the hands of a very capable staff.” This Community Assistance Visit was for the Snohomish valley; the Stillaguamish valley is scheduled soon. Approval of Mr. Lane’s proposal may well result in higher premiums for NFIP and the possibility of losing CRS eligibility altogether.

Finally, court decisions must be respected. Lane’s application was previously, fully adjudicated and his proposal found to violate key provisions of the Growth Management Act and other applicable law. Those violations remain in the current proposal, establishing it by court findings as unlawful and therefore requiring denial. Should Council approve regardless, the Prosecuting Attorney under SCC 2.90.085 should determine Council is not entitled to representation by the Prosecuting Attorney’s Office, or to indemnification at public expense in connection with litigation on this matter.

Sincerely,

/s/
Chuck Hazleton, Chair

Stillaguamish Flood Control District

P.O. Box 2512
STANWOOD, WA 98292
(360) 652-9233

COMMISSIONERS:
CHUCK HAZLETON, CHAIR
ROBERTA ELDRIDGE
RICK WILLIAMS

July 1, 2002

Mr. Steve Skorney, Senior Planner
Planning & Development Services
3000 Rockefeller Avenue, M/S #604
Everett, WA 98201-4046

RE: Dwayne Lane's proposed Island Crossing amendments EIS scope

Dear Mr. Skorney:

The Stillaguamish Flood Control District exercises primary responsibility for protection of life and property, flood control and improvement of water quality in the lower Stillaguamish River. The Flood District and its constituent property owners have a vital interest in protecting commercial agricultural lands and preventing urban development within Stillaguamish River floodplain and floodways.

The Flood District participated in investigations and hearings regarding Dwayne Lane's effort to unlawfully re-designate Island Crossing from agricultural to commercial use and extend the City of Arlington's urban growth boundary into the Stillaguamish floodplain. We are appalled that after years of litigation resulting in definitive rejection of Mr. Lane's proposals, this issue is once again on the County's agenda.

Urbanization in the floodplain poses significant dangers, calling for the utmost care and attention in your Supplemental Environmental Impact Study. In the Stillaguamish basin, development in existing urban growth areas is increasing the floodplain's hydrologic burden, magnifying the adverse impacts of converting the agricultural lowlands to urban commercial use.

The Island Crossing Supplemental EIS should include a comprehensive investigation of direct, probable and significant impacts on downstream water quality and flooding, based on the total, cumulative effect of the following factors:

- The maximum commercial development allowable under the proposed re-designation
- All existing development
- Future development that would follow if Mr. Lane's present proposals were approved.

A comprehensive study must await completion of the County's Stillaguamish River computer modeling program, to adequately forecast the effect of these factors on flood risk during both

representative and extraordinary flood events. Without sound hydraulic analysis and prohibitions on floodplain development, future damages are likely to be unacceptably high and the County may be exposed to crippling claims for improvident approval of development in a known flood hazard area.

Do not be deterred from studying the downstream impacts just because a rezone alone does not directly result in flooding impacts, leading some proponents to claim that such impacts are improbable or easily avoided later. The Washington Supreme Court in *King County v. State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993) stated that rezones like Island Crossing, done without sufficient examination of the consequences of maximum permitted development, "may begin a process of government action which can 'snowball' and acquire virtually unstoppable administrative inertia...when government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after."

The required course in a supplemental EIS is to thoroughly study the cumulative environmental impact of the total, maximum development potential permitted by the re-designation *and* likely to follow from it, in terms of flooding, water quality, impact on endangered and priority species, damage to resource lands, and all other adverse impacts.

"All zoning must bear a substantial relation to the public welfare." *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978). Upon judicial review, a zoning change has no presumption of validity and will be upheld only if it serves the public welfare, is warranted by changed circumstances, and generally conforms with existing comprehensive plans. *Cathcart v. Snohomish County*, 96 Wn.2d 201, 634 P.2d 853 (1981). In this case, there have been no material changed circumstances, and urbanizing the Stillaguamish floodplain does not serve the public welfare.

Further, a fundamental goal of the Growth Management Act is maintenance and enhancement of productive agricultural lands:

- "The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations: ... Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020.
- Under RCW 36.70A.060 each county, "shall adopt development regulations ... to assure the conservation of agricultural, forest, and mineral resource lands... . Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals."

Mr. Steve Skorney
July 1, 2002
Page 3

In connection with the County's recent review of requests for converting agricultural lands to other uses, it appears that for every acre of land removed from agricultural use should be replaced by an acre from an Urban Growth Area, suitable for commercial agricultural production, closest to the removed lands. The supplemental EIS needs to analyze these agricultural and resource lands preservation requirements.

We welcome the opportunity to provide further input into the studies and investigations underlying the EIS and look forward to working with you to assure that the EIS complies with the requirements of law. Please contact me at (360) 629-9233, or Henry Lippek at (206) 689-8510 for more information and assistance.

Please also make the Flood District a party of record on this proposal so that we can remain fully and currently informed. Thank you.

Very truly yours,

STILLAGUAMISH FLOOD CONTROL DISTRICT



Chuck Hazleton H. by fax authorization

Chuck Hazleton,
Chair