

No. 91475-3

No. 72132-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

WHATCOM COUNTY,

Petitioner,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD,

Respondent.

REPLY BRIEF OF WHATCOM COUNTY

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I. INTRODUCTION

This appeal of the Second Compliance Order issued by the Growth Management Hearings Board (“Board”) is linked with Whatcom County’s appeal of the Board’s earlier Final Decision and Order (FDO), which was issued in the same Board proceeding as the Second Compliance Order. As the Court noted in its order accepting direct review of this case, the Court’s decision in the County’s appeal of the FDO “would likely control the outcome of this case”¹ because the Court’s decision in that case (Case No. 70796-5-I) will resolve the fundamental legal issues in both cases.

In this appeal, the County simply asks the Court to apply those principles in the context of the County’s most current comprehensive plan. After the Board issued its FDO, the County took legislative action amending the rural element of its comprehensive plan but largely preserving the fundamental approach that the Board rejected in its FDO. The primary purpose of that legislative action was to resolve a technical issue raised by Petitioners below. Specifically, Petitioners argued that the County could not rely on its full range of protective regulations because the County had not expressly adopted them into its rural element as “measures.” The County’s 2014 action that is the subject of this case resolves that issue.

¹ Commissioner’s Ruling Granting Direct Review, Ordering Expedited Schedule, and Linking the Case with No. 70796-5-I, p. 2.

In their Response Brief, Petitioners do not deny that the County has fully incorporated all relevant elements of its regulatory program, thereby meeting the requirement under the Growth Management Act (GMA) to incorporate its entire regulatory program into the comprehensive plan. Indeed, the Petitioners offer no response at all to the County's incorporation of additional elements into its comprehensive plan. Instead, they continue to raise baseless procedural arguments and attempt to re-argue the underlying substantive issues in Case No. 70796-5-I.

The Petitioners' arguments are without merit. Their procedural and substantive arguments are unsupported by the law and the record in this case. The Court should reject the Petitioners' arguments, find that the protective measures in the County's current comprehensive plan are more than adequate to comply with the GMA's requirements to protect water availability and water quality, and reverse the Board's Second Compliance Order.

II. ARGUMENT

A. The Court Should Reject Petitioners' Procedural Arguments.

The Petitioners have repeatedly agreed that the issues in these linked cases are fundamental issues of statewide importance that should be addressed by this Court. In their Response Brief, however, the Petitioners continue to run away from the merits of this matter by raising unfounded

procedural objections. The Court should reject these procedural arguments and address the merits of this case.

1. The County's substantial evidence challenge is consistent with the requirements for assignment of error to factual findings.

Petitioners do not deny that the Board's FDO and its Second Compliance Order contain no formal findings of fact. Nevertheless, they continue to assert that the Board's "findings" in the FDO are "verities" because the County did not specifically assign error to the alleged findings under RAP 10.3(g).² Petitioners' assertion is without merit.

First, contrary to Petitioners' argument, the *King County* decision cited by the County confirms that courts will consider the merits of a factual challenge, even if a party "did not make any assignments of error in its brief" at all, as long as the nature of the challenge is disclosed in the issues section of the party's brief.³ Here, the County clearly disclosed the nature of its substantial evidence challenge in the issues section of its opening

² Petitioners' Response Brief, p. 10 (citing *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279, 1282 (1980); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.* 113 Wn. App. 615, 628, 53 P.3d 1011, 1018 (2002), rev. denied, 148 Wn.2d 1017, 64 P.3d 649 (2003)).

³ *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 91 Wn. App. 1, 21, n.46, 951 P.2d 1151, 1162 (1998), aff'd in part, rev'd in part on other grounds, as amended on denial of reconsideration (Sept. 22, 1999), 138 Wn.2d 161, 979 P.2d 374 (1999) (applying language in RAP 10.3(g) allowing court to review error that is "clearly disclosed in the associated issue pertaining thereto"). See also 3 Wash. Prac., Rules Practice RAP 10.3 (7th ed.) ("The escape clause in RAP 10.3(g) . . . applies to appeals from administrative decisions.") (citing *King County*, 91 Wn. App. 1).

brief in linked case No. 70796-5-I.⁴

Second, as explained in the County’s reply brief in case No. 70796-5-I, Petitioners’ argument regarding “verities” simply does not apply to the County’s substantial evidence challenge under RCW 34.05.570(3)(e)⁵. The County’s argument is not that the Board adopted erroneous factual findings that are not supported by the record, but rather that the Board failed to make findings regarding material facts necessary to support its conclusion that the County’s rural measures violate the GMA. The mere fact that the Board uses the phrase “the Board finds . . .” does not make a particular Board determination a “finding of fact.” Instead, a conclusion of law mislabeled as a finding will be treated as a conclusion.⁶ Further, an agency’s conclusions must still be supported by adequate findings, even when no error is assigned to the agency’s findings in an appeal.⁷ Moreover, “[t]he failure to make an express finding on a material fact is deemed to have been found against the party having the burden of proof” — here, the Petitioners before the Board. Thus, the County’s challenge

⁴ See Case No. 70796-5-I, County’s Opening Brief, pp. 4-5.

⁵ See Case No. 70796-5-I, County’s Reply Brief, pp. 16-20.

⁶ *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn. App. 194, 197, 584 P.2d 968, 970 (1978). “Findings of fact that are actually conclusions of law will be treated as conclusions of law, and it is therefore unnecessary to set them out verbatim in the brief.” *State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 266-67, 501 P.2d 290, 296 (1972).

⁷ *Manufacturers Acceptance Corp. v. Irving Gelb Wholesale Jewelers, Inc.*, 17 Wn. App. 886, 892, 565 P.2d 1235 (1977) (citing *Baillargeon v. Press*, 11 Wn. App. 59, 67, 521 P.2d 746 (1974)).

under RCW 34.05.570(3)(e) requires the Court to evaluate whether the Board's conclusions were supported by adequate evidence and findings, but it does not require the Court to "search the record" to determine whether there is evidence supporting the Board's findings – the underlying concern that RAP 10.3(g) is intended to address.⁸

Finally, as explained below, both of the linked appeals before this Court (in this case and in Case No. 70796-5-I) are part of a single Board proceeding. Case No. 70796-5-I is not, as suggested by Petitioners, "another" case that is wholly separate and distinct from this case. Rather, it is part of the same proceeding. Accordingly, the assignments of error made by the County in this case are effective as to any factual "findings" made by the Board in its FDO and its Second Compliance Order.

The Court should reject the Petitioners' strained reading of the RAP provisions regarding assignments of error and give full consideration to the County's substantial evidence challenge. This is particularly true in light of RAP 1.2, which requires the RAP to be liberally interpreted to "facilitate the decision of cases on the merits" and states that "issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands." Thus, even if the Court believes that the County did not fully comply with the

⁸ See *Davis*, 94 Wn.2d at 123 (citing RAP 10.3(g)).

RAP, the Court should nevertheless address the merits of this case. Petitioners have not identified any purpose, much less “compelling circumstances,” that would warrant a decision not to consider the issues in this case on the merits.

2. The County was not required to repeat and re-argue all of the issues raised in the first hearing before the Board.

Petitioners suggest that, because the County’s briefing and argument in the most recent hearing before the Board (which led to its Second Compliance Order) did not repeat all of the issues and arguments raised by the County in the first hearing before the Board (which led to its FDO), under RCW 34.05.554, the County is now barred from raising those issues and arguments, and this Court is precluded from even considering them.⁹ Petitioners’ argument is contradicted by case law, which holds that hearings before the Board in a particular case are part of a “single proceeding” and that no purpose is served by barring substantive review of issues that were clearly raised before the Board in earlier proceedings.

The courts have repeatedly rejected procedural arguments like the Petitioners’ contention in this case.¹⁰ In one case, the Board found that

⁹ Petitioners’ Response Brief, pp. 11-15.

¹⁰ *Clallam Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 130 Wn. App. 127, 131, 121 P.3d 764, 767 (2005) (rejecting similar argument raised by Board petitioners); *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, 395-96, 166 P.3d 748, 757-58 (2007) aff’d in part, rev’d in part, 167 Wn.2d 723, 222 P.3d 791 (2009) (rejecting same argument raised by Futurewise). See also *Thurston Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 137 Wn. App. 781, 807, 154 P.3d 959, 972 (2007) aff’d in part, rev’d in

one aspect of Clallam County’s critical areas ordinance did not comply with the GMA and issued an order remanding the ordinance to the County.¹¹ Rather than appealing this initial order, the County revised the ordinance.¹² After a subsequent compliance hearing, the Board issued another order finding that the County’s revised ordinance still did not comply with the GMA.¹³ The County then appealed the Board’s second order, which was reversed by the superior court.¹⁴ The petitioners before the Board appealed that Superior Court decision and argued to the appellate court that, because the County did not appeal the Board’s first order, the County’s appeal of the second order was barred by *res judicata*, collateral estoppel, and failure to exhaust administrative remedies.¹⁵ The appellate court rejected this argument, holding that “[t]he various stages of this litigation are part of a single proceeding.”¹⁶

Here, as in the Clallam County case, the initial hearing that led to the Board’s FDO and the compliance hearing that led to the Board’s Second

part on other grounds, 164 Wn.2d 329, 190 P.3d 38 (2008) (rejecting same argument raised by Futurewise); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn. 2d 861, 869, 947 P.2d 1208, 1213 (1997) (requiring that issues be raised at some point “at the administrative level,” not at each and every administrative hearing). Compare *King Cnty. v. Washington State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 669, 860 P.2d 1024, 1036 (1993) (review of issue barred under RCW 34.05.554 because it was “never argued to the Board”) (emphasis added).

¹¹ *Clallam Cnty.*, 130 Wn. App. at 130-31.

¹² *Id.* at 131.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 131-32.

¹⁶ *Id.* at 132.

Order on Compliance are part of single proceeding. Because the County raised all of the issues in this appeal during the initial hearing before the Board, the County has complied with all statutory and common law requirements regarding exhaustion of administrative remedies, including the requirement in RCW 34.05.554 to raise issues at the agency level before raising them in an appeal.

In another case, the Board issued an order finding that Whatcom County's comprehensive plan provisions and development regulations addressing limited areas of more intensive rural development (LAMIRDs) did not comply with the GMA.¹⁷ An intervenor appealed the Board's order to the superior court, but the County did not.¹⁸ Futurewise, the petitioner before the Board in that case, raised the same argument advanced by the Petitioners in this case: that the intervenor's arguments were barred by RCW 34.05.554 because the intervenor did not raise them in proceedings before the Board. This Court rejected Futurewise's argument, holding that "the issues were developed by the county's briefing and arguments, which were explicitly adopted by Gold Star, and no purpose would be served by barring substantive review simply because the county did not participate in the appeal."¹⁹

¹⁷ *Gold Star Resorts*, 140 Wn. App. at 383-84.

¹⁸ *Id.*

¹⁹ *Id.* at 396.

Here, by the same token, the issues raised by the County in this appeal were fully developed by the County's briefing and arguments before the Board during the first hearing that led to the FDO, and no purpose would be served by barring substantive review simply because the County did not repeat and re-argue those issues in the briefing and arguments submitted by the County during the compliance hearing that led to the Second Compliance Order. The Board and the Petitioners were well aware that the County had appealed the Board's FDO and that the County was maintaining the position it took during the first hearing, notwithstanding the County's efforts to take action in response to the FDO. Indeed, the County clearly stated in its Compliance Report to the Board that, "[w]hile actively litigating the issues in the FDO related to measures protecting water quantity and quality on appeal, the County has taken legislative action during compliance to incorporate additional measures into its comprehensive plan and resolve issues raised by Petitioners in litigation."²⁰ Thus, neither the Board nor the Petitioners was prejudiced by the fact that the County did not repeat all of the arguments it raised during the first hearing. If Petitioners' procedural argument were accepted, jurisdictions defending their planning actions would be required to repeat all of their arguments in each proceeding before the Board,

²⁰ AR 1631-32.

creating needless duplication and additional paperwork in Board proceedings.

The Court should reject Petitioners' hypertechnical interpretation of RCW 34.05.554. The County clearly raised all of the issues in this appeal during proceedings before the Board. Because all of the hearings before the Board were part of a single proceeding, the County has satisfied RCW 34.05.554, and no purpose would be served by barring substantive review of the issues in this appeal.

B. The Court Should Reject Petitioners' Substantive Arguments.

1. Petitioners' arguments regarding water availability are without merit.

Petitioners' substantive arguments regarding water availability fall into three categories. First, Petitioners incorrectly assert that "the Board did not order the County to take an action inconsistent with Ecology's instream flow rule in the Second Compliance Order."²¹ Petitioners' argument appears to be based on a reading of the Second Compliance Order in isolation and with blinders on, without considering the FDO that provided the basis for the Second Compliance Order, and without considering any of the issues or arguments raised in Case No. 70796-5-I. As explained above, however, all of the hearings before the Board are part of a single proceeding, and the Second Compliance Order must be

²¹ Petitioners' Response Brief, p. 16.

evaluated in the context of the FDO. Indeed, the Second Compliance Order effectively incorporated the FDO.²² This is particularly true because this Court has linked the County's appeal of the FDO with its appeal of the Second Compliance Order. Further, as explained at great length in the briefing in Case No. 70796-5-I, if the County and the Department of Ecology ("Ecology") have correctly interpreted Ecology's instream flow rule, the Board's FDO and its Second Compliance Order did, in fact, order the County to take action inconsistent with that rule.²³ The Court should reject Petitioners' attempt to skirt the fundamental issues in this case and in Case No. 70796-5-I by mischaracterizing the Second Compliance Order and ignoring the underlying FDO.²⁴

Second, the Petitioners argue that the additional evidence regarding

²² AR 1958 (Second Compliance Order, p. 8) ("Whatcom County is in continuing noncompliance with the Growth Management Act as found in the Board's June 7, 2013, FDO.")

²³ Specifically, the Board concluded that "the County must deny a permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows." AR 1404 (FDO, p. 42).

²⁴ In the section of their Response Brief addressing water availability, the Petitioners raise yet another baseless procedural argument, suggesting that the County's opening brief in this case was required to repeat all of the arguments raised in Case No. 70796-5-I. *See* Petitioners' Response Brief, p. 16. Because these two cases are linked, the Court will decide in Case No. 70796-5-I prior to deciding this case, and the outcome of Case No. 70796-5-I will likely control the outcome of this case, there is no legal or practical need for the County to jump through this procedural hoop as asserted by Petitioners. As explained in the County's opening brief in this case, the narrow issues presented in this appeal relate to: (1) the effect of the County's incorporation of existing regulatory measures into the County's comprehensive plan through its adoption of the 2014 Ordinance; and (2) the significance of the additional evidence introduced by the County during the compliance hearing before the Board. The Court may evaluate these narrow issues in the context of its decision in Case No. 70796-5-I, and the Court need not reconsider the arguments and issues in that case when making its decision in this case.

water availability offered by the County is consistent with the Board's Second Compliance Order. The Petitioners' central contention is that the additional evidence does not establish that "Ecology believes that applications dependent on permit-exempt wells in basins closed by Chapter 173-501 WAC" are subject to Ecology's instream flow rule.²⁵ Petitioners focus on the letters attached to the memorandum from Kyle Dodd dated January 3, 2014 (the "Dodd Memorandum") (AR 1650-63, Appendix 5 to the County's Opening Brief), but they ignore the memorandum itself and the clear implications of the letters. The Dodd Memorandum explains that, in recent years, Whatcom County "has routinely requested comments from Ecology related to water availability determinations and the legal use of exempt wells for development."²⁶ The Dodd Memorandum further explains that, in these comments, Ecology has not indicated that water under a permit-exempt withdrawal "is not legally available due to the operation of Ecology's basin rule, or that [the Whatcom County Health Department] should be requiring any additional information prior to approval of these sources."²⁷ Notwithstanding Petitioners' strained reading of the comment letters attached to the Dodd Memorandum, the clear implication of this evidence is that Ecology does

²⁵ Petitioners' Response Brief, p. 19.

²⁶ Dodd Memorandum, p. 1.

²⁷ *Id.*

not subject permit-exempt withdrawals to the restrictions in the instream flow rule. As the Court is aware, Ecology recently filed an amicus brief in which its unequivocally confirmed that the County has correctly described Ecology's position and correctly interpreted the instream flow rule.

Finally, Petitioners assert that "[t]here is no question that permit-exempt wells are adversely affecting water resources."²⁸ Even if the Court were to accept this assertion as fact, it would not constitute evidence of noncompliance with the GMA. As explained in the briefing in Case No. 70796-5-I, the County has complied with the GMA requirement to protect water resources by making its local land use decisions consistent with regulations promulgated by Ecology, the agency with primary authority over water resources. If the Petitioners believe that Ecology's regulations are inadequate to protect water resources, they should direct their concerns to Ecology, not the County.

2. Petitioners' arguments regarding water quality are without merit.

All of the Petitioners' arguments regarding water quality are based on the same flawed premise they advanced before the Board: that if any water quality problems exist anywhere in the County, then the County's rural measures should be deemed to have failed to comply with the requirement to adopt rural measures protecting water quality. As explained in the

²⁸ Petitioners' Response Brief, pp. 19-20, 23-28.

County's briefs in Case No. 70796-5-I, this premise is not supported by the GMA. The GMA cannot be interpreted to hold the County's rural element responsible for pre-existing water quality problems that cannot be prevented through the adoption of rural measures.

Moreover, the Petitioners' specific arguments regarding water quality are not supported by the record. As explained in detail in the County's briefing in Case No. 70796-5-I, the water quality protections in WCC 20.80.631 through .636 are not limited to "storm water special districts" or to areas subject to NPDES Phase II stormwater requirements. Rather, in addition to adopting more stringent protections in those specific areas, the County also adopted general stormwater management requirements that apply to all development projects.²⁹ The Petitioners' allegations regarding noncompliance with water quality protections are similarly unsupported by the fact that the County's "Water resource special management areas" regulated under WCC 20.80.735 apply only to the Drayton Harbor, Lake Padden, Lake Samish, and Birch Bay watersheds.³⁰ The Petitioners did not introduce any evidence showing that the particular protections applied in these watersheds were needed to address any specific water quality

²⁹ See WCC 20.80.630(1) ("All development activity within Whatcom County shall be subject to the stormwater management provisions of the Whatcom County Development Standards or the provision addressed herein, as applicable, unless specifically exempted.") (emphasis added).

³⁰ See Petitioners' Response Brief, pp. 29-30.

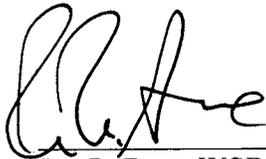
problems in other specific areas of the County. Instead, the Petitioners simply argued (and the Board agreed) that, because generalized water quality problems exist in various areas of the County, the County must apply any and all water quality protections advocated by Petitioners throughout all areas of the County – without providing any link between water quality problems in specific areas and the need for specific protections. As explained in the County’s briefing in Case No. 70796-5-I, that is not what the GMA requires. The Court should reject the Petitioners’ and the Board’s untenable interpretation of the GMA and find the County in compliance with requirements to protect water quality in rural areas.

III. CONCLUSION

For the reasons stated herein, the Court should reject the Petitioners’ arguments and reverse the Board’s Second Compliance Order.

Respectfully submitted this 19th day of November, 2014.

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I certify that I caused a copy of the Reply Brief of Whatcom
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 19th day of November 2014, at Seattle, WA.


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