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No. 91475-3

No. 70796-5-I

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

WHATCOM COUNTY,

Appellant/Cross Respondent,

v.

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and DAVID STALHEIM, FUTUREWISE, AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Cross Appellants/Respondents.

REPLY BRIEF OF CROSS APPELLANTS ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and DAVID STALHEIM, and FUTUREWISE

NOSSAMAN LLP	FUTUREWISE
Jean Melious, WSBA No. 34347 1925 Lake Crest Drive Bellingham, WA 98229 (360)306-1997 jmelious@nossaman.com Attorney for Cross Appellants/-Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris, and David Stalheim	Tim Trohimovich, WSBA No. 22367 814 Second Avenue, Suite 500 Seattle, WA 98104 (206)343-0681, Ext. 118 tim@futurewise.org Attorney for Cross Appellant/-Respondent Futurewise

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I. INTRODUCTION

The Washington State Supreme Court has recently made clear that development regulations that violate the Growth Management Act (GMA) or the Washington State Environmental Policy Act can vest until a finding of invalidity is made. Once these developments vest, other remedies to address the vested, noncompliant development are not available.[1] As a result, it is critical that invalidity determinations follow the law. However, as the Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim, and Futurewise Appellants' Brief documented, the Board did not apply the correct legal standard to the request for invalidity in this case. This Reply Brief of Cross Appellants' Eric Hirst, Laura Leigh Brakke, Wendy Harris, David Stalheim, and Futurewise ("Hirst" or "Hirst Petitioners") will address the arguments related to invalidity in Reply Brief of Appellant/Cross-Respondent Whatcom County and show why the County's arguments fail.

II. ARGUMENT

A. Hirst Issue 1: Was the Board's conclusion that the "Petitioners have not met the standard for a declaration of invalidity" an erroneous interpretation or application of the GMA? (Hirst Assignment of Error 1.)

The Hirst Appellants' Brief, on pages 44 to 47, argued that the

[1] *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 181, 322 P.3d 1219, 1226 (2014).

Board misinterpreted and misapplied the GMA in denying the Hirst request for a determination of invalidity. The Board's principal error was that it did not apply the standard for invalidity in RCW 36.70A.302(1). Instead the Board applied the standard that it "will declare invalid only the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act."[2]

Whatcom County argues on pages 28 and 29 of its Reply Brief that "the mere fact that the Board exercised its discretion to declare invalid only 'the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act'" does not establish that the Board did not follow the standards in RCW 36.70A.302(1) because that phrase in the "FDO is entirely consistent with the standards of invalidity in RCW 36.70A.302(1)."[3] This argument fails for three reasons. First, the FDO does not say that it followed the standards in RCW 36.70A.302(1).[4] The FDO says that it followed the Board's invented "most egregious" standard.[5]

Second, this standard is inconsistent with two of the three

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[2] AR 1397, *Hirst v. Whatcom County*, Growth Mgmt. Hearings Bd. (GMHB), Western Wash. Region Case No. 12-2-0013, Final Decision and Order (June 7, 2013) ("FDO"), at 50 of 51. "AR" refers to the Certified Administrative Record with sequential page numbers prepared by the Growth Management Hearings Board. We omit the preceding zeroes.

[3] Whatcom County Reply Brief p. 29.

[4] AR 1397, FDO at 50 of 51.

[5] *Id.*

requirements in RCW 36.70A.302(1). RCW 36.70A.302(1)(a) requires "a finding of noncompliance" and a remand to the county or city. The Boards' standard requires that the noncompliant provisions must be the "most egregious" and "threaten the local government's future ability to achieve compliance with the Act."[6] Neither of these requirements is in RCW 36.70A.302(1).

RCW 36.70A.302(1)(b) requires "a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of" the GMA. The Board's standard says nothing about the GMA goals. So the Board's standard is not consistent with RCW 36.70A.302(1).

Third, RCW 36.70A.302(1) states that, if the violation "substantially interferes" with the GMA goals and the proper findings of fact and conclusions of law are made and the Board specifies the provisions subjection to invalidity, invalidity may be imposed. The statute does *not* impose a comparative standard, where only "the most egregious noncompliant provisions" may be found to be invalid. Under RCW 36.70A.302(1), each violation must be considered with respect to its

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[6] *Id.*

impact *on the GMA goals* – not in comparison to other GMA violations. The Board's invented standard creates a new invalidity threshold, which requires a comparison of violations and only applies invalidity to the "most egregious," rather than basing invalidity determinations on effects on GMA goals. This threshold requirement of a comparative analysis conflicts with the GMA. The Board cannot add requirements to the GMA.[7] The Board cannot require *both* that noncompliant provisions must be both "the most egregious …"[8] and meet the requirements of RCW 36.70A.302(1). This is an error of law.

Whatcom County argues on pages 27 and 28 of its Reply Brief that the Board's decision whether or not to make a determination of invalidity is discretionary. While that is true, the discretion must be exercised by applying the correct legal standard.[9] As this brief has shown, the Board did not do so as to its decision on the request for a determination of invalidity in this case.

By substituting inconsistent standards for the requirements of RCW 36.70A.302(1) the Board has erroneously interpreted and applied

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[7] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 337 – 40, 293 P.3d 1248, 1261 – 63 (2013).
[8] *Id.*
[9] RCW 34.05.570(3)(d).

the GMA.[10] This Court should remand the invalidity determination in this case back to the Board with instructions to apply the correct standard.

B. Hirst Issue 2: Are the findings of fact inherent in the Board's conclusion on invalidity supported by substantial evidence and are they based on a proper interpretation and application the GMA? (Hirst Assignment of Error 2.)

As the Hirst Appellants' Brief demonstrates, on pages 47 to 50, the record before the Board establishes that all of the requirements for invalidity are met in this case. Whatcom County, on pages 29 and 30 of its Reply Brief, incorrectly argues that the Hirst Appellants did not meet our burden because invalidity "would remove the County's existing protective measures"[11] for water quality and quantity. But invalidity does not remove any measures. Instead, invalidity prevents certain types of development from vesting to the invalid provisions. This is shown by RCW 36.70A.302(3)(a) which provides in full as follows:

> Except as otherwise provided in subsection (2) of this section and (b) of this subsection, a development permit application not vested under state or local law before receipt of the board's order by the county or city vests to the local ordinance or resolution that is determined by the board not to substantially interfere with the fulfillment of the goals of this chapter.

So invalidity will not prohibit the county from applying its existing provisions to the developments exempted from invalidity. Rather,

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[10] RCW 34.05.570(3)(d).
[11] Whatcom County Reply Brief p. 29.

invalidity will prevent certain types of developments, most notably subdivisions,[12] from vesting until the County's comprehensive plan no longer substantially interferes with the GMA goals.

While the Board, in a subsequent compliance decision, did conclude that invalidity could reduce protections,[13] the Board's conclusion was based on a misunderstanding of the effect of invalidity. The Board believed the "effect of imposing invalidity on this policy would be to eliminate the requirement to determine the adequacy of water supply."[14] However, as we have seen, invalidity prevents certain developments from vesting to invalid provisions.[15] It does not prevent the County from enforcing invalid provisions for development exempt from invalidity and, more importantly, does not prevent the County from adopting GMA compliant provisions for the rural element of the comprehensive plan.

Whatcom County, on page 30 of its Reply Brief, argues that the Board does not have the authority to impose invalidity on preexisting

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[12] RCW 36.70A.302(3)(b). While the state Supreme Court has stated that invalidity renders a provision "void" (*see Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 175, 322 P.3d 1219, 1224 (2014); *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn.2d 161, 181, 979 P.2d 374, 384 (1999)), the term "void" must be interpreted in the statutory context. The clear language of the statute provides that certain types of development can no longer vest to the invalid comprehensive plan or development regulation provisions.

[13] *Hirst et al. v. Whatcom County*, GMHB, Western Wash. Region Case No. 12-2-0013, Second Order on Compliance (April 15, 2014), at 7 of 8, 2014 WL 1884669 at *5. Westlaw version in Appendix A of the Whatcom County Reply Brief.

[14] *Id.*

[15] RCW 36.70A.302(3)(a).

development regulations, citing to the Board's Second Order on Compliance. But this argument fails for two reasons. First, the Hirst Petitioners appealed Whatcom County Ordinance No. 2012-032 which amended the rural element of Whatcom County's Comprehensive Plan.[16] The Hirst Petitioners appeal of Whatcom County Ordinance No. 2012-032 was timely; it was filed in 60 days.[17] The Board correctly determined that Whatcom County's adoption of Ordinance No. 2012-032 failed "to comply with RCW 36.70A.070(5)."[18] So the Board had authority to make a determination of invalidity for the comprehensive plan amendments in Ordinance No. 2012-032. That those amendments adopted by reference other County development regulations does not deprive the Board of its authority in RCW 36.70A.302(1) to make a determination of invalidity for the comprehensive plan amendments.

Second, the Board's Second Order on Compliance recognized that the Board had the authority to impose invalidity on the policies amended by a later Whatcom County Ordinance, Ordinance No. 2014-002.[19] The Board's Second Order on Compliance does not stand for the proposition that the Board lacked authority to make a determination of invalidity for

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[16] AR 1348, FDO at 1 of 51.
[17] AR 1352, FDO at 5 of 51.
[18] AR 1397, FDO at 50 of 51.
[19] *Hirst et al. v. Whatcom County*, GMHB, Western Wash. Region Case No. 12-2-0013, Second Order on Compliance (April 15, 2014), at 4 of 8, 2014 WL 1884669 at *2.

the rural comprehensive plan policies that Whatcom County amended by adopting Whatcom County Ordinance No. 2012-032.

Neither does the Board's January 10, 2014, Compliance Order.[20] In this first Compliance Order the Board only considered whether certain "development regulations" adopted by reference could be invalidated.[21] The Board did not consider whether the comprehensive plan amendments adopted by Whatcom County Ordinance No. 2012-032 should be subject to a determination of invalidity.[22]

In short, substantial evidence supports a finding on invalidity for the comprehensive plan amendments adopted by Whatcom County Ordinance No. 2012-032. The Court should reverse the Board's decision on the invalidity request and remand the invalidity portion of the Board's order back to the Board.

III. CONCLUSION

The Hirst Appellants respectfully request that the Court of Appeals reverse the Board on its invalidity determination and remand the invalidity

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[20] *Hirst et at. v. Whatcom County*, GMHB, Western Wash. Region Case No. 12-2-0013, Compliance Order: Finding Continuing Noncompliance, Extending Compliance Schedule, Supplementing the Record and Denying Invalidity (Jan. 10, 2014), at 7 – 8 of 9, 2014 WL 494486 at *4 – 5. Westlaw version in Appendix B of the Whatcom County Reply Brief.
[21] *Id.* emphasis added.
[22] *Id.*

question back to the Board to apply the correct legal standard to Hirst's and Futurewise's request for invalidity.

Respectfully submitted on this 16th day of July, 2014.

NOSSMAN LLP	FUTUREWISE
for Jean O. Melious authorized by email	
Jean O. Melious, WSBA No. 34347 Attorney for Appellants/Respondents Hirst *et al.*	Tim Trohimovich, WSBA No. 22367 Attorney for Appellant/Respondent Futurewise

DECLARATION OF SERVICE

I, Tim Trohimovich, certify that I am a resident of the State of Washington, residing or employed in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on July 16, 2014, I caused the following documents to be served on the following parties in the manner indicated: Reply Brief of Cross Appellants Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim, and Futurewise in Case No. 70796-5-I.

Washington State Court of Appeals
Division I
One Union Square
600 University St
Seattle, WA 98101-1176
Original and one copy

	By United States Mail postage prepaid
X	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
	By E-Mail:

Ms. Diane L. McDaniel
Attorney General of Washington
1125 Washington Street SE
PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702
Attorneys for the Growth Management Hearings Board

	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By E-Mail (by agreement): dianem@atg.wa.gov

Ms. Karen Frakes
Senior Deputy Prosecutor
Whatcom County
311 Grand Avenue
Bellingham, WA 98225
(360)676-6784
Attorneys for Whatcom County

X	By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: kfrakes@co.whatcom.wa.us

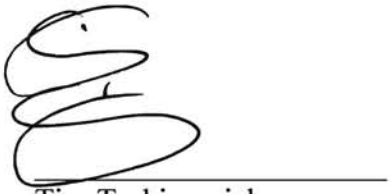
Mr. Jay Derr
Mr. Tadas A Kisielius
Mr. Duncan Greene
Van Ness Feldman GordonDerr
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372
Attorneys for Whatcom County

	By United States Mail postage prepaid
X	By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid
X	By Email: jpd@vnf.com; tak@vnf.com; dmg@vnf.com

Ms. Jean Melious
Nossaman LLP
1925 Lake Crest Drive
Bellingham, WA 98229
(360)306-1997

X	By United States Mail postage prepaid		By United States Mail postage prepaid
	By Legal Messenger or Hand Delivery		By Legal Messenger or Hand Delivery
	By Federal Express or Overnight Mail prepaid		By Federal Express or Overnight Mail prepaid
X	By Email (by agreement): jmelious@nossaman.com		By Email:

Signed and certified on this 16th day of July, 2014,



Tim Trohimovich