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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, on the Relation of Gregory M. Banks,
Prosecuting Attorney of Island County,

Appellant,

vs.

SUSAN E. DRUMMOND, and Law Offices of Susan Elizabeth
Drummond, PLLC;

Respondents,

and

ISLAND COUNTY BOARD OF COMMISSIONERS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Brian L. Stiles, Judge

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The State's opening brief explains that this case is governed by this Court's decisions in *State ex rel. Johnson v. Melton*¹ and *Northwestern Improvement Co. v. McNeil*.² Susan Drummond and the Board fail to make a persuasive case that those decisions should be overruled. Their arguments reflect a misunderstanding of the historical record and the structure of county government. Both Ms. Drummond and the Board seek to avoid resolution of the single legal issue asserted in this appeal by raising a number of procedural bars that are all foreclosed by binding precedent.

Full consideration of the merits of this case can lead to only one conclusion. The electorate's choice of the county's legal representative may be disturbed by the county commissioners only when a court of competent jurisdiction finds, pursuant to RCW 36.27.030, that the incumbent prosecuting attorney is temporarily unable to perform his or her duties. Absent such a finding, county commissioners may only contract with a private attorney to perform duties "which any prosecuting attorney is authorized or required by law to perform," RCW 36.32.200, with the prosecuting attorney's consent.

II. COUNTER STATEMENT OF ISSUES RAISED BY SUSAN DRUMMOND AND THE ISLAND COUNTY BOARD OF COMMISSIONERS

1. A public quo warranto action is properly brought to oust any person who "intrude[s] upon" or "unlawfully exercise[s] any public office."

¹192 Wash. 379, 73 P.2d 1334 (1937).

²100 Wash. 22, 170 P. 338 (1918).

RCW 7.56.010(1). Is the purpose of this provision defeated if the intruder can avoid ouster simply by not calling herself an officer and/or by not assuming a title? (Corrected Island County Board of Commissioners Response to Appellants Opening Brief (hereinafter "Board's Brief") issue (4) at page 3).

2. Is the prosecuting attorney barred from performing his statutory duty to file a public quo warranto, RCW 7.56.020, by the disapproval of the board of county commissioners? (Respondent Drummond's Amended Response to Appellant's Opening Brief (hereinafter "Drummond's Brief") issue 1(7) at page 15).

3. A prosecuting attorney has considerable discretion in deciding whether to institute a legal action. May a prosecutor overlook de minimis intrusions upon his office without forgoing the ability to ever pursue a quo warranto action to prevent significant intrusions? (Drummond's Brief issue 1(6), at page 14).

4. A quo warranto action must be filed before the term of the contract or appointment expires. A quo warranto action cannot be filed until the usurper begins to perform the duties of the rightful officeholder. Once the usurper embarks upon such duties, the legality of the appointment is subject to challenge by quo warranto during the entire period of incumbency. *Cotton v. City of Elma*, 100 Wn. App. 685, 998 P.2d 339, *review denied*, 141 Wn.2d 1029 (2000). The instant quo warranto action was filed 106 days after the execution of the 2-year contract that purportedly granted Ms. Drummond the authority to perform duties assigned by the Washington Constitution to the elected Island County Prosecuting Attorney. Was the

instant quo warranto action timely filed? (Drummond's Brief issue 1(5) at page 14 and Board's Brief issue (5) at page 4).

5. A county, county officers and the county legislative branch are provided by the Washington Constitution with legal counsel through the services of the prosecuting attorney. Does this arrangement comport with the constitutional right of access to the courts? (Drummond's Brief issue 1(4) at page 14).

III. SUPPLEMENTAL STATEMENT OF FACTS

Resolution C-48-15 was adopted by the Board of Island County Commissioners (hereinafter "the Board") in a public meeting that was preceded by two other public "work sessions." Resolution C-48-15, which contains a number of "whereas statements" that reflect the unsubstantiated opinions of the members of the Board, was first unveiled, in draft form, at the Board's April 8, 2015, work session. CP 327. A copy of this draft was not provided to Prosecutor Banks prior to the work session. CP 334. The Board made it clear during the April 8, 2015, work session that Prosecutor Banks was, with respect to the proposed resolution to hire outside counsel, simply a member of the public. *Id.*

The Board heard no evidence in support of or opposition to its proposed "whereas statements" at the April 8, 2015 work session or the subsequent April 15, 2015, work session. CP 327-342. The Board provided Prosecutor Banks with no opportunity to challenge the accuracy of the proposed "whereas statements" or to present evidence in rebuttal. *Id.*

The disputed "whereas statements" were provided to the Island County Superior Court in e-mails to the Island County Superior Court

Administrator. Prosecutor Banks was not a party to any of the communications between the Board and Island County Superior Court Judges Hancock and Churchill that related to the proposed contract to retain Ms. Drummond, or the draft resolution. *See* 224-276. The communications between the Board and Judges Hancock and Churchill were never filed with the Island County Clerk. *See* CP 298-325. The Board resisted production of these communications in this litigation. *See* CP 124 at ¶ 44, 187- 224.

Consistent with their belief that approving a contract pursuant to RCW 36.32.200 is an administrative act rather than an adjudicative act, Island County Superior Court Judges Hancock and Churchill took no evidence regarding the disputed “whereas statements.” Judges Hancock and Churchill provided Prosecutor Banks with no opportunity to be heard regarding the accuracy of the disputed “whereas statements.” CP 131 at ¶¶ 64-68. Judges Hancock and Churchill did not adopt the disputed “whereas statements” as their own. They merely stated in their April 20, 2015, letter to the Board that they believed they “should give due deference to the board’s reasons for seeking outside counsel in this regard.” CP 304.

Judges Hancock and Churchill did not file with the Island County Clerk their April 20, 2015, letter that explained to the Board why the judges were rejecting Prosecutor Banks’s legal advice regarding the hiring of a private attorney to perform his duties. CP 299 at ¶¶ 6-7. The Island County Clerk’s Office cannot process a notice of appeal from a document that was never filed with the clerk’s office. CP 299 at ¶ 9. *See also* CP 296-97.

Resolution C-48-15 was approved by the Board on April 28, 2015. The only signatories to the contract adopted by Resolution C-48-15 are the

Board and Ms. Drummond. CP 317-325. The Board did not file Resolution C-48-15 with the Island County Clerk's Office. CP 299 at ¶¶ 6-7. The Island County Clerk's Office cannot process a notice of appeal as to this document because it was never filed with the clerk's office. CP 299 at ¶ 9. *See also* CP 296-97.

IV. ARGUMENT

A. The Board's and Ms. Drummond's disputed characterizations of Prosecutor Banks' conduct are irrelevant to this appeal.

This appeal is from an order granting the Board's and Susan Drummond and the Law Office of Susan Elizabeth Drummond's (hereinafter "Ms. Drummond") motions for summary judgment. The summary judgment decision rested upon these undisputed material facts:

1. Gregory Banks is the fully qualified de jure Island County Prosecuting Attorney.³
2. Ms. Drummond has not been appointed as a deputy prosecuting attorney, a special deputy prosecuting attorney, or a temporary deputy prosecuting attorney, which appointment can be done in the prosecuting attorney's discretion pursuant to RCW 36.27.040.⁴
3. Ms. Drummond has provided legal advice to the Board of Island County Commissioners and other Island County

³CP 109 at ¶¶ 1 and 3, 134-35, 388-389, 409-416, 477 at ¶¶ 3.1 - 3.7, 551 at ¶¶ 3.1-3.7, 1298.

⁴CP 405-08, 479-80 at ¶¶ 3.19- 3.20, 538, 552 at ¶¶ 3.19 - 3.20, 634-36, 709 at ¶ 14.

officials since shortly after April 28, 2015.⁵

4. Ms. Drummond has identified Island County Resolution C-48-15 (hereinafter "Resolution C-48-15") as the source of her authority to provide legal services to the Board.⁶
5. Island County Prosecuting Attorney Gregory Banks did not consent to the Board hiring Ms. Drummond to perform any of the duties that he is authorized or required by law to perform.⁷
6. Prior to the entry of Resolution C-48-15, no court found, pursuant to RCW 36.27.030, that the duly elected and qualified Island County Prosecuting Attorney Gregory Banks was temporarily disqualified from performing the duties identified in Resolution C-48-15.⁸ No court of competent jurisdiction utilized RCW 36.27.030 to appoint Ms. Drummond a special deputy prosecuting attorney.⁹
7. Resolution C-48-15 was entered by the Board as a means of authorizing Ms. Drummond to perform duties "which any prosecuting attorney is authorized or required by law to

⁵CP 406, 479 at ¶ 3.25, 553 at ¶ 3.25, 635.

⁶See CP 633-34. *See also* CP 1339-40.

⁷See CP 405-08, 479-80 at ¶¶ 3.19- 3.20, 538, 552 at ¶¶ 3.19 - 3.20, 634-36, 709 at ¶ 14.

⁸CP 305, 389, 400, 477 at ¶ 3.8, 538, 551 at ¶ 3.8; CP 628. *But see* CP 546.

⁹CP 305, 389, 400, 628, 634.

perform.” RCW 36.32.200.¹⁰

Both the Board and Ms. Drummond acknowledge that this court’s review of a summary judgment decision is de novo. Both acknowledge that summary judgment is only proper when, based upon the undisputed material facts, the moving party can demonstrate that he is entitled to judgment as a matter of law. *See* Drummond’s Brief, at 15; Board’s Brief, at 16-17. But, after acknowledging the correct standard of review, both the Board and Ms. Drummond devote multiple pages of their briefs to legally irrelevant and disputed facts. *See generally* Board’s Brief at 4-14; Drummond’s Brief at 5-13.

The Board and Ms. Drummond identify a number of “justifications” for the adoption of Resolution C-48-15 in their briefs. The asserted justifications for supplanting Prosecutor Banks with Ms. Drummond are drawn from the preamble to Resolution C-48-15 and post hoc declarations by former and current members of the Board. *See, e.g.*, CP 528, 704, 754, 802, 932, 977, 983, 989, 1320. The Board’s and Ms. Drummond’s pre-hoc and post-hoc justifications for supplanting the voter’s chosen legal advisor is an ad hominem attack on Prosecutor Banks. The multiple pages devoted to their grievances undermines, rather than supports, their claim that RCW 36.32.200 granted the Board the power to retain Ms. Drummond without first obtaining an RCW 36.27.030 finding that Prosecutor Banks had a disability that prevents him from performing the duties identified in Resolution C-48-15.

¹⁰CP 461-469, 479 at ¶¶ 3.21 - 3.24, 538; 552-53 at ¶¶ 3.21 - 3.24, 628-629.

These “whereas statements” and the Board members’ subsequently identified justifications are strongly disputed by the State of Washington and Prosecutor Banks. *See, e.g.*, CP 109, 388.¹¹ These disputed “whereas statements” were adopted in proceedings to which Prosecutor Banks was not a party and were not made by a neutral and detached fact-finder. These disputed “whereas statements” merely reflect the unsubstantiated opinions of the current members of the Board. These disputed “whereas statements” cannot bind Prosecutor Banks or this Court. *See, e.g.*, 1 Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, at 194 (8th ed. 1927).¹² The disputed justifications for supplanting the voter-selected county legal adviser findings are legally irrelevant to this appeal. *Cf. Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991) (when reviewing an appeal from summary judgment, an appellate court will disregard any findings of fact that were entered by the trial court).

There is an appropriate time and place for the Board to air their concerns about Prosecutor Banks’s prior legal experience, the quality or competency of his deputies, and the timeliness with which his office

¹¹Both of these declarations are reproduced in appendix C.

¹²The relevant passage explains that resolutions of this sort usurp judicial powers:

Nor is it in the power of the legislature to bind individuals by a recital of facts in a statute, to be used as evidence against the parties interested. A recital of facts in the preamble of a statute may perhaps be evidence, where it relates to matters of a public nature, as that riots or disorders exist in a certain part of the country; but where the facts concern the rights of individuals, the legislature cannot adjudicate upon them. (footnotes omitted.)

1 Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, at 194 (8th ed. 1927).

performs contract review and other legal tasks. These concerns are properly raised in the political arena, or in administrative budget discussions with the elected prosecutor. *See generally In re Recall of Sandhaus*, 134 Wn.2d 662, 670, 953 P.2d 82 (1998) (“whether [the prosecuting attorney] is doing a satisfactory job of managing his office is a quintessential political issue which is properly brought before the voters at a regular election.”). These concerns do not authorize the partial or total divestment of office prior to the end of the prosecuting attorney’s term of office.

B. The merits of the State’s quo warranto action are properly before this Court.

The Board and Ms. Drummond assert a number of procedural bars. Although these procedural bars were presented to the trial court, that court based its summary judgment order solely upon the merits of the quo warranto action. *See* CP 9.

1. Ms. Drummond is subject to ouster by writ of quo warranto.

The Board contends that Ms. Drummond is not subject to removal via a writ of quo warranto because she “is providing legal counsel to the Board . . . as a special counsel under the authority of RCW 36.32.200, not as a purported county prosecutor or deputy prosecutor.” Board’s Brief at 47. Ms. Drummond similarly argues that she is not subject to a quo warranto action because she is not a public officer. Drummond’s Brief at 34.

A judgment of ouster pursuant to RCW 7.56.070 and RCW 7.56.100 turns on substance, not form. The quo warranto statute looks at the person’s actual job duties, not what she calls herself. *See Grant County Prosecuting Attorney v. Jasman*, 183 Wn.2d 633, 645, 354 P.3d 846 (2015). A quo

warranto proceeding is properly brought against a person whose sole claim to the office of prosecuting attorney is a contract with the board of county commissioners. *See State ex rel. Cline*, 21 Ohio C.D. 236, 31 Ohio C.C. 236, 12 Ohio C.C. (n.s.) 103 (1909) (quo warranto action to oust attorneys employed as legal counsel pursuant to a contract that was authorized by a statute and was entered into between the attorneys and the board of county commissioners).

The plain language of the quo warranto statute further establishes the propriety of the instant action. A quo warranto action may properly be brought against any person who “intrude[s] upon” or “unlawfully exercise[s] any public office.” RCW 7.56.010(1). These terms are not defined by statute, so their meaning is determined by reference to a standard dictionary. *See, e.g., AllianceOne Receivables Mgmt, Inc. v. Lewis*, 180 Wn.2d 389, 395-96, 325 P.3d 904 (2014). Webster’s New World Dictionary of the English Language defines “intrude” in full as follows:

1. to push or force (something *in* or *upon*)
2. to force (oneself or one’s thoughts) upon others without being asked or welcomed

Webster’s New World Dictionary of the English Language 740 (2d ed. 1976).

The same dictionary defines “exercise,” in relevant part, as follows:

1. active use or operation; employment [the *exercise* of an option]
2. performance (of duties, functions, etc.) . . . -*cised*, -*cis’ing* 1. to put into action; use; employ [to *exercise* self-control] 2. to carry out (duties, etc.); perform; fulfill . . .

Id. at 490.

Here, the undisputed facts are that Gregory Banks, as the Island County Prosecuting Attorney, may properly bring a quo warranto action on

behalf of the State of Washington, to have his office fully restored to him. *See Ladenburg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (1990) (quo warranto action to oust special prosecutor appointed by the district court); RCW 7.56.020; 27 C.J.S. District and Prosecuting Attorneys § 10, at 543-44 (2009). The undisputed facts are that Ms. Drummond has been performing duties assigned to Prosecutor Banks, without his approval. *See generally* RCW 36.27.020(1) and (2). Chapter 7.56 RCW would be useless if Ms. Drummond can avoid its reach by not using Prosecutor Banks's title.

2. A prosecuting attorney is not required to obtain permission from any officer or entity prior to filing a public quo warranto action.

Ms. Drummond contends that the instant quo warranto action is improper because Prosecutor Banks did not obtain the permission of the Board prior to filing the action. Ms. Drummond further contends that the quo warranto action is actually a suit against the Board and that such a suit is barred by Prosecutor Banks's duty of loyalty to the Board. Drummond's Brief, at 15 and 35-38. Finally, Ms. Drummond asserts that this quo warranto matter must be dismissed because it was filed "for improper purposes." *Id.* at 38.

Ms. Drummond's improper motive claim is foreclosed by this Court's precedent. In *State ex rel. Dunbar v. Am. Univ. of Sanipractic*, 140 Wash. 625, 250 Pac. 52 (1926), the defendant alleged that the quo warranto action had been instituted for improper reasons at the urging of its competitors. The attorney general, who had instituted the quo warranto action, moved to strike this affirmative defense. *Id.* at 634. The trial court granted the attorney general's motion and also refused to allow the admission of any evidence

regarding the motive for filing the quo warranto action. The supreme court affirmed, stating that “[t]he rulings in our opinion, were right; ‘the question is one of merits not motives.’” *Id.* at 635 (quoting *State ex rel. Gilbert v. Prosecuting Attorney*, 92 Wash. 484, 494, 159 P. 761 (1916)).

As for Ms. Drummond’s “allegiance” and “RPC” claims,¹³ it is doubtful that she has standing to raise these arguments. In a civil case, such as this one, only the Board has standing to raise these complaints. *Cf. Burnett v. Department of Corrections*, 187 Wn. App. 159, 170, 349 P.3d 42 (2015) (only a party who has been represented by a conflicted attorney has standing to seek the attorney’s disqualification for the conflict). The Rules of Professional Conduct, moreover, are subordinate to the Washington Constitution. *See* Comment 18 to the Preamble and Scope of the Rules of Professional Conduct.

While a prosecuting attorney may not bring a suit against a county commissioner in the name of the county,¹⁴ a public quo warranto action is brought in the name of the State of Washington. A prosecuting attorney is not required to obtain permission from any entity prior to filing a quo warranto action. *See, e.g., State ex rel. Hamilton v. Superior Court*, 3 Wn.2d 633, 101 P.2d 588 (1940) (attorney general could not restrain a prosecuting attorney from proceeding with a quo warranto action).

The quo warranto action, moreover, was brought against Ms. Drummond, not the Board. Prosecutor Banks did not challenge Resolution

¹³*See* Drummond’s Brief at 35 and 38.

¹⁴*See, e.g., Spokane County v. Bracht*, 23 Wash. 102, 62 Pac. 446 (1900).

C-48-15 in his quo warranto action. Resolution C-48-15 was relevant to the quo warranto only to the extent that Ms. Drummond identified the resolution as the source of her authority to perform duties “which any prosecuting attorney is authorized or required by law to perform.” RCW 36.32.200. The validity of Resolution C-48-15 was only injected into this action by the Board. *See* CP 1316 (counterclaim for declaratory judgment).¹⁵

There are, moreover, a number of Washington cases in which a prosecuting attorney sued one or more county commissioners or where one or more county commissioners sued the prosecuting attorney. *See, e.g., In re Recall of Sandhaus, supra* (sitting member of the Adams County Board of Commissioners filed recall action against the Adams County Prosecuting Attorney); *Melton*, 192 Wash. at 388 (Pierce County Prosecuting Attorney filed writ of mandamus to compel the members of the Pierce County Board of Commissioners to pay the salary of investigators appointed by the prosecutor); *Miller v. Pacific County*, 9 Wn. App. 177, 509 P.2d 377 (1973) (Pacific County Prosecuting Attorney filed action against Pacific County Board of Commissioners to compel payment of office expenses). Prosecuting attorneys have, in the past, filed quo warranto actions against county commissioners. *See, e.g., State ex rel. Austin v. Superior Court for Whatcom County*, 6 Wn.2d 61, 106 P.2d 1077 (1940) (a prosecuting attorney has the right to institute quo warranto proceedings to oust from office a

¹⁵Drummond’s contention that the State did not assert, in the trial court, that Resolution C-48-15 is ultra vires or that the summary judgment decision did not address this issue is contrary to the record. *See* Drummond’s Brief, at 42. Once the Board filed a counterclaim for declaratory judgment as to the validity of Resolution C-48-15, the State consistently asserted that the contract was ultra vires. *See, e.g.,* CP 98 n. 19; CP 357 n. 15. The summary judgment order expressly granted the Board’s request for declaratory judgment. *See* CP 1-10.

county commissioner); *State ex rel. Hamilton v. Superior Court, supra* (prosecuting attorney filed a quo warranto action to oust the commissioner from office). None of these opinions, or indeed any other opinion, holds that the prosecuting attorney may not defend himself or herself or may not prosecute these actions.

Finally, consistent with this Court's rule that separate attorneys should be assigned to each party when multiple clients of an elected attorney sue each other,¹⁶ Prosecutor Banks has not appeared on behalf of the Board in this litigation and the State of Washington is represented in this case by an attorney who is both from outside of the Island County Prosecuting Attorney's Office and who has never previously represented Island County or the Board. *See* CP 623 ¶ 1.

3. A prosecuting attorney is not required to bring an enforcement action every time a law is violated.

Ms. Drummond contends that the instant quo warranto action is barred by estoppel. Drummond's Brief, at 14 and 40-41. Ms. Drummond provides no legal authority in support of her position. This omission, alone, is grounds for this Court to reject Ms. Drummond's claim. *See, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (an appellate court will generally not consider arguments not supported by pertinent authority).

Ms. Drummond's argument fails on the merits. The State is not required to file suit whenever a factual basis exists that supports a violation of the law. *Cf.* RCW 9.94A.411(1) (identifying factors that justify a decision

¹⁶*See Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 480, 663 P.2d 457 (1983).

not to prosecute a violation of the law). A prosecuting attorney's decision to not file suit in one case is not a bar to a future suit. *See, e.g., Kueckelhan v. Federal Old Line Ins. Co.*, 69 Wn.2d 392, 413, 418 P.2d 443 (1966) (“The failure of [state officers] to enforce any law may never estop the people to enforce that law either then or at any future time.” (quoting *Caminetti v. State Mut. Life Ins. Co.*, 52 Cal. App. 2d 321, 325, 126 P.2d 165 (1942)); *State ex rel. Fishback v. Globe Casket & Undertaking Co.*, 82 Wash 124, 133, 143 Pac. 878 (1914) (“An officer of the state can, under certain circumstances, condone past offenses against the law, but he cannot grant indulgences to commit new or continuing offenses.”)).

4. The quo warranto action was timely filed.

Ms. Drummond contends that the State's quo warranto complaint was untimely. Ms. Drummond asserts that the State was required to challenge Resolution C-48-15 through filing an appeal to the court of appeals within 30 days of the Island County Superior Court's approval of the contract. Drummond's Brief, at 6 and 38 (citing RAP 5.2(a)). Alternatively, Ms. Drummond asserts that Prosecutor Banks was required to file an appeal pursuant to RCW 36.32.330, within 20-days of the adoption of Resolution C-48-15. *Id.* at 38-40. The Board also claims that the failure to file an appeal pursuant to RCW 36.32.330 is fatal to this quo warranto action. Board's Brief, at 48-49.

Both the Board's and Ms. Drummond's arguments depend upon their belief that this action is a challenge to Resolution C-48-15. It is not. This action is a quo warranto action to oust Ms. Drummond from performing duties assigned to the elected prosecuting attorney. *See* CP 1468. Until the

Board filed its counterclaim for declaratory relief, Resolution C-48-15 was relevant solely to the extent that Ms. Drummond identified the resolution as the source of her authority.

This quo warranto action was filed by the Island County Prosecuting Attorney on behalf of the State of Washington. A public quo warranto action may not be brought until the intended defendant actually intrudes upon or unlawfully exercises the office of another. *Cotton*, 100 Wn. App. at 695. Once the usurper actually performs the duties of another officer, the State's quo warranto is timely so long as it is initiated prior to the end of the usurper's term. *Id.* No other time limitations may be placed upon a quo warranto filed by the State. *See, e.g., State ex rel. Carroll v. Bastian*, 66 Wn.2d 546, 548, 403 P.2d 896 (1965) (relying upon former RCW 4.16.160 to reject a claim that the quo warranto action brought by the State of Washington through the prosecuting attorney was barred by a 7½ year delay in the institution of the quo warranto action).

The instant quo warranto action was filed on August 12, 2015, shortly after Ms. Drummond began to perform the duties identified in Resolution C-48-15. CP 1468. The action was filed long before the April 28, 2017, expiration date contained in Resolution C-48-15. The State, therefore, strictly complied with all applicable time limits and statutes of limitation.

a. The 20-day period for filing an appeal contained in RCW 36.32.330 does not apply to this quo warranto action.

Over the years, this Court has issued numerous decisions construing the time limits to appeal a decision by a board of county commissioners. *Osborn v. Grant County*, 130 Wn.2d 615, 632, 926 P.2d 911 (1996). The

Board's and Ms. Drummond's contention that RCW 36.32.330 required the State to file an appeal within 20-days of the entry of Resolution C-48-15 fails on two grounds.

First, RCW 36.32.330 is inapplicable because Resolution C-48-15 was not a "decision or order of the board of county commissioners." RCW 36.32.330. Because the terms "decision" and "order" are not defined in RCW 36.32.200, their meaning must be ascertained from a dictionary. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002).

The dictionary defines "order" (second definition) as "to issue commands" (2a) or "to arrange or dispose according to some plan or with reference to some end" (1a). Webster's Third New Int'l Dictionary 1588 (1976). The dictionary defines "decision" as "the act of settling or terminating by giving judgment." Webster's, at 585. These definitions clearly establish that RCW 36.32.330 applies when the Board takes a quasi-judicial action. *See State ex rel. Yeargin v. Maschke*, 90 Wash. 249, 252, 155 P. 1064, 1065 (1916) (appeals pursuant to the predecessor of RCW 36.32.330, Rem. Rev. Stat. § 4076, are limited to such cases as require the exercise of purely judicial power). Resolution C-48-15 is neither an order, a decision, or an exercise of judicial power. RCW 36.32.330 did not, therefore, apply to a direct challenge upon Resolution C-48-15, much less to a quo warranto action in which the usurper identifies Resolution C-48-15 as her source of authority.

Second, RCW 36.32.330 is inapplicable because both the State of Washington and Prosecutor Banks lack standing to pursue an appeal from

Resolution C-48-15 because they were not parties to the contract approved by the Board. In *Morath v. Gorham*, 11 Wash. 577, 40 Pac. 129 (1895), this Court clearly stated the limit upon who may appeal an action of a board of county commissioners pursuant to the former version of RCW 36.32.330.¹⁷ The *Morath* court recognized that a literal construction of that part of Laws 1893, p. 292, which stated that “any person may appeal from any decision or order of the board of county commissioners to the superior court of the proper county” would compel the court “to hold that any man or woman in the county, or state, or elsewhere, may appeal . . . regardless of his or her relation to the matter in controversy.” *Morath*, 11 Wash. at 578. The *Morath* court rejected this construction because it did “not think the legislature intended for a moment to confer such an unlimited and universal right of appeal,” stating that:

It is a generally understood proposition of law, and presumably within the knowledge of the legislature when they enacted this section, that no one but a party to an action or proceeding can prosecute an appeal from a judgment or decision therein. Hayne, *New Trial and Appeal*, ch. 31. And we must presume that when the legislature said any person may appeal, they meant any person who has properly presented a matter before the board for their determination, and who is dissatisfied with their decision. . . .

Id., at 579. Applying this above rule, the *Morath* court held that the only person who can appeal a contract between the board of county commissioners and a newspaper, was the newspaper. *Id.*, at 579-580.

The rule announced in *Morath* is still followed in Washington. A

¹⁷The statute in effect when the Washington Supreme Court issued its opinion in *Morath* was Laws of 1893, ch. 121, § 1. The text of both Laws of 1893, ch. 121, § 1, and RCW 36.32.330 may be found in appendix A.

person has no obligation to file an appeal pursuant to RCW 36.32.330 when such person is not a party to the proceeding before the commissioners. *See Ronken v. County Commissioners*, 89 Wn.2d 304, 309-10, 572 P.2d 1 (1977); *State ex rel. Mason v. King County Board of Commissioners*, 146 Wash. 449, 263 P.735 (1928), *overruled on other grounds by Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 505 P.2d 801 (1978).

Here, neither the State of Washington nor Prosecutor Banks were parties to a proceeding before the Board. Resolution C-48-15 did not order the State of Washington or Prosecutor Banks to perform any duty. Resolution C-48-15 did not settle or terminate any action between Prosecutor Banks or the State of Washington and Island County. Resolution C-48-15 did not settle or terminate any action between Prosecutor Banks or the State of Washington and Ms. Drummond. Resolution C-48-15 did not settle or terminate any action between Prosecutor Banks or the State of Washington and the Board. Thus, even if this were an action to invalidate Resolution C-48-15, rather than a quo warranto action to oust Ms. Drummond from the office of Island County Prosecuting Attorney, RCW 36.32.330 did not require an appeal to be filed in the superior court.

b. The Island County Superior Court's approval of Resolution C-48-15 was not an appealable order.

Ms. Drummond contends that the quo warranto action must be dismissed because Prosecutor Banks failed to file an appeal to the Court of Appeals from the April 20th letter authored by Island County Superior Court Judges Hancock and Churchill (hereinafter "Judges' Letter"). This argument assumes that the letter is a "decision." *See, e.g., Drummond's Brief*, at 5 n.

6, 6, 7, and 30 ns. 76 and 77. Ms. Drummond's position fails for four reasons.

First, the manner in which the Judges' Letter was generated establishes that the authors were performing an administrative task, rather than an adjudicatory function. The Board's communications with Island County Superior Court Judges Hancock and Churchill (hereinafter "Island County Judges") regarding the hiring of Ms. Drummond were carried out mainly by e-mail. While a judge may perform an administrative action via this mechanism, an adjudicative decision rendered under these circumstances would violate article I, section 10. *See generally State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011) (exchange of e-mails regarding the ability of certain jurors to sit on the defendant's trial that resulted in the court's release of the jurors violated the Washington Constitution).

The e-mails and other communications between the Board and the Island County Judges were not provided to Prosecutor Banks until December 29, 2015—more than 8 months after the Judge's Letter was authored. While a judge may perform an administrative act without providing all interested persons with an opportunity to be heard, an adjudicative decision rendered under these circumstances would violate Code of Judicial Conduct Canon 2.9.

The Judges' Letter was not reduced to a final judgment. *See* CR 54 and 58. The Judges' Letter was not filed with the Island County Clerk. CP 299 at ¶¶ 6-7. While a judge need not file documents that memorialize an administrative act with the county clerk, an adjudicative decision must be

filed with that office.¹⁸ The failure to file a decision with the county clerk presents a major barrier to the filing of an appeal.

Second, the contents of the Judges' Letter¹⁹ establish that the authors were merely exercising their discretion on whether to approve the contract and were not making a judgment on the merits of whether the Island County Prosecuting Attorney was disabled from exercising the duties of his office, whether a special prosecutor should be appointed to exercise the duties of the Island County Prosecuting Attorney, or even whether RCW 36.32.200 is constitutional. *See generally* Judges' Letter, at 4 ("we are not being asked to exercise our authority to appoint a person to discharge the duties of the prosecuting attorney in case of the disability of the prosecutor. Nor are we being asked to appoint a special deputy prosecuting attorney); *id.*, at 6 ("we believe that a court of competent jurisdiction would likely decide that the statute is constitutional").

Third, "[o]nly an aggrieved *party* may seek review by the appellate court." RAP 3.1 (emphasis added). Neither the State of Washington nor Prosecutor Banks were a party to the Judges' Letter. The Judges' Letter was not authored by either the State of Washington or Prosecutor Banks. The Judges' Letter was not addressed to either the State of Washington or Prosecutor Banks. The Island County Judges understood that Prosecutor

¹⁸Pursuant to Washington Constitution article IV, § 26, the Island County Clerk is the clerk of the superior court. The duties of the clerk of the superior court include the keeping of records, files and other books and papers appertaining to the superior court. *See generally* RCW 36.23.030; RCW 2.32.050; CR 79. *See also* CR 54(a)(1); CR 58(b), RCW 2.08.190, RCW 2.08.200.

¹⁹A copy of the Judges' Letter, without the attachment, may be found in Exhibit 1 to Drummond's Brief.

Banks' was not a party to the Board's request for judicial approval of the contract with Ms. Drummond. This is demonstrated by the Judges' Letter referring to themselves as Prosecutor Banks' "clients." Judges' Letter at 2. While Prosecutor Banks received a copy of the Judges' Letter, this no more converted Prosecutor Banks into a "party," then attending a superior court hearing as an audience member confers standing to challenge the rulings or decisions handed down by the presiding judge during the hearing.

Fourth, in civil matters if the right to appeal exists, it is a right which is granted by the legislature or at the discretion of the court. *In re Groves*, 127 Wn.2d 221, 239, 897 P.2d 1252 (1995). The legislature has granted no right of appeal to a prosecuting attorney who is aggrieved when the prosecuting attorney's client ignores his legal advice. The legislature has granted no right of appeal from a contract entered pursuant to RCW 36.32.200.

The appellate courts do not grant a right of appeal to decisions rendered by the board of county commissioners. *See generally* RAP 1.1(a) (review is limited to trial court decisions and to administrative adjudicative orders under RCW 34.05.518). The right to appeal is limited to a handful of superior court decisions and orders. *See generally* RAP 2.2. The list contained in RAP 2.2 does not extend to a letter written by a superior court judge, such as the Judges' Letter to the Board. *See also* RAP 5.3(a) and (b) (a copy of the signed order or judgment must be attached to a notice of appeal or notice for discretionary review).

5. Constitution article I, section 10 does not grant a board of county commissioners a right to public funds to hire an attorney of their choice to perform the duties of the elected prosecuting attorney.

Ms. Drummond contends the Board's constitution article I, section 10 right of judicial access is violated if the Board is not allowed to select its own attorney. *See* Drummond's Brief at 26-30. Ms. Drummond lacks standing to assert the Board's article I, section 10 rights. *See, e.g., Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994) ("The standing doctrine prohibits a litigant from raising another's legal rights."); *State v. Herron*, 183 Wn.2d 737, 743-44, 356 P.3d 709 (2015) (a criminal defendant lacks standing to assert the public's article I, section 10 rights). Ms. Drummond's contention, moreover, is unsupported by any direct legal authority.

This Court rejected Ms. Drummond's claim that the meaningful access to courts protected by article I, section 10, includes a right to publicly funded counsel in *In re Marriage of King*, 162 Wn.2d 378, 174 P.3d 659 (2007). In *King*, the Court recognized that a reference to "open courts" in the state constitution was never intended to guarantee the right to litigate entirely without expense to the litigants. *Id.* at 390-389-90.

Even if *King* was not fatal to Drummond's position, a constitutional right to a publicly funded attorney does not create a right to the attorney of one's choice. This principle is reflected in numerous Sixth Amendment cases. Those cases repeatedly indicate that an indigent defendant's right to counsel does not include a right to select which lawyer will represent the defendant. Instead, the court selects which attorney will represent the defendant. *See, e.g., State v. Sanchez*, 171 Wn. App. 518, 541-44, 288 P.3d

351 (2012), *review denied*, 177 Wn.2d 1024 (2013).

The Sixth Amendment cases also establish that a defendant, who is dissatisfied with his or her court-appointed counsel, does not have an absolute right to discharge the attorney or to a substitute attorney. To obtain new counsel, the defendant must convince a court of a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. A general loss of confidence or trust is not sufficient to substitute new counsel. *See, e.g., State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Here, the Board has been provided with a publicly funded attorney – Prosecutor Banks. The fact that the voters, rather than the Board, chose Prosecutor Banks to serve as the Board’s attorney does not violate the Board’s rights. The Board, like an indigent defendant, may not fire Prosecutor Banks or obtain a publicly funded substitute for Prosecutor Banks due to their general loss of confidence or trust in him. *See generally Oster v. Valley County*, 2006 MT 180, 333 Mont. 76, 140 P.3d 1079, 1084 (2006) (“the Commissioners may neither hire nor fire the county attorney once the voters have elected him”); *Salt Lake County Comm’n v. Short*, 199 UT 73, 985 P.2d 899, 907 (1999) (“the Commission cannot hire outside counsel to advise it when it disagrees with the advice of the elected attorney, or when it does not like the manner in which that person performs the duties of the office”). Absent a prior court determination, pursuant to RCW 36.27.030, that Prosecutor Banks suffers a disability, the Board may not obtain the services of another attorney at public expense. *See Hoppe v. King County*, 95 Wn.2d 332, 340, 622 P.2d 845 (1980) (a disagreement between the

prosecuting attorney and a county officer regarding the law does not constitute a disability under RCW 36.27.030; a county officer may second-guess the judgment of the prosecuting attorney, but not at taxpayers' expense).

C. RCW 36.32.200 does not allow the Board to utilize public funds to hire an attorney to perform the duties of a prosecuting attorney who does not suffer from an RCW 36.27.030 Disability.

The underlying theme of the Board's and Ms. Drummond's response to the State's brief is that RCW 36.32.200 has "been on the books"²⁰ for over a century, has been used throughout the state to periodically retain outside counsel, and "is so unremarkable that there are only two reported decisions²¹ that even mention the statute."²² The Board further notes that in the 111 years that RCW 36.32.200 has been "on the books" it has not been challenged in court, has not been overruled or limited." Board's Brief, at 18. Finally, the Board predicts that accepting the State's "novel theory . . . would cause severe and disruptive consequences in routine government operations, obstructing the efficient and cooperative work required in today's complex

²⁰Drummond's Brief, at 23.

²¹The Board's statement that only two reported decisions address RCW 36.32.200 is in error. Prior to 1951 when the legislature adopted an official code, RCW 36.32.200 was identified by other names. The Code Reviser, as required by RCW 1.08.020, maintains a full historical record of RCW 36.32.200 that identifies the statute's prior citations and that traces the statute back to the actual session laws. The historical record of RCW 36.32.200, as compiled by the Code Reviser, is "[1983 c 129 § 1; 1963 c 4 § 36.32.200. Prior: 1905 c 25 § 1; RRS § 4075]". See Washington State Legislature web site at <http://app.leg.wa.gov/RCW/default.aspx?cite=36.32.200> (last visited Apr. 8, 2016).

In addition to the two cases identified in footnote 1 of the Board's Brief, two other reported cases cite to an earlier incarnation of RCW 36.32.200. See *Miller v. Ungemach*, 154 Wash. 480, 282 Pac. 840 (1929); *State ex rel. Hunt v. Okanogan County*, 153 Wash. 399, 280 Pac. 31 (1929).

²²Board's Brief, at 1.

world.” Board’s Brief, at 2. The Board’s and Ms. Drummond’s position is unsupported by the law and the record.

The length of time a statute has been “on the books” does not immunize the statute from either an as applied or a facial constitutional challenge. Many practices sanctioned by numerous statutes have been declared unconstitutional decades after the statutes’ enactment. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965) (state constitutional and statutory provisions requiring voters to satisfy registrars of their ability to understand and interpret any section of the federal or state constitutions struck down decades after their adoption); *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 2d 873 (1954) (statutes providing for segregated education struck down as facially unconstitutional more than 50 years of their adoption).

This Court, moreover, has placed limitations upon the use of RCW 36.32.200. In *State ex rel. Hunt v. Okanogan County*, 153 Wash. 399, 280 Pac. 31 (1929), this Court considered whether payment could be made to an attorney for lobbying services. The attorney’s contract for these services relied upon Remington Revised Statutes (hereinafter “Rem. Rev. Stat.”) § 4075,²³ a predecessor to RCW 36.32.200. In resolving the payment issue, the Court clearly indicated that “the rule that county commissioners cannot lawfully directly assume, at the expense of the county, powers and duties expressly designated by statute to other administrative county officers,” applies to contracts pursuant to § 4075. *State ex rel. Hunt*, 153 Wash. at 421

²³The language of Rem. Rev. Stat. § 4075 may be found in appendix B.

(citing *Northwestern Improvement Co. v. McNeil*, 100 Wash. 22, 170 P. 338 (1918)). The Court ultimately upheld the contract and authorized payment because the lobbying activities contracted for were not duties assigned by law to the prosecuting attorney. *State ex. rel. Hunt*, 153 Wash. at 421-22.

That RCW 36.32.200 is subject to the rule announced in *Northwestern Improvement Co.* is further underscored by this Court's 1980 *Hoppe* opinion. In *Hoppe*, this Court linked RCW 36.27.030 and RCW 36.32.200, stating that these provisions are "for the payment of special prosecutors," and have no relationship to an officer who wishes to be represented by someone other than the prosecuting attorney. *Hoppe*, 95 Wn.2d at 340. Only when the prosecuting attorney suffers from a disability established pursuant to RCW 36.27.030, can public funds be expended on an attorney who is assigned duties that belong, by law, to the prosecuting attorney. *Hoppe*, at 340.

The absence of additional cases addressing the scope of RCW 36.32.200 is easily explained by the factual record. The factual record, as established by competent evidence,²⁴ proves that the Board's use of RCW 36.32.200 to retain counsel to perform duties that Prosecutor Banks is not disqualified from performing is unique. The factual record establishes that

²⁴See CP 285- 293, and CP 643- 676 (declarations from current and former prosecuting attorneys or deputy prosecuting attorneys setting out the actual practices with respect to RCW 36.32.200 in Benton, Columbia, Grant, Jefferson, Kitsap, Douglas, Okanogan, Pacific, San Juan, Skagit, Snohomish, Spokane, and Walla Walla counties).

While the unsworn letters submitted by the Board establish that a number of county commissioners want to use RCW 36.32.200 to displace an elected prosecuting attorney if they disapprove of the public's choice, none of the letters establish that those counties currently use RCW 36.32.200 to retain a private attorney when the prosecuting attorney is not disqualified and does not consent to the services of a special counsel. See CP 687- 697.

other county board of commissioners accept the constitutional rule established in *Northwestern Improvement Co., State ex rel. Hunt*, and *Melton*. The factual record establishes that the limitations enshrined in the Washington Constitution have not resulted in chaos or in demonstrable harm to the citizens of this state.

1. The Board of County Commissioners is neither superior to nor the supervisor of the other elected county officials.

Both the Board and Ms. Drummond envision a county government in which the board of county commissioners is superior to other elected officials. The Board characterizes the separately elected officials as mere managers of “departments” that are subordinate to the board of county commissioners which “hold[s] and exercise[s] the legislative and general executive powers of the county.” Board’s Brief, at 4. Both the Board and Ms. Drummond claim that the Board has plenary authority to take any action deemed necessary in relation to county business, including the hiring of an individual to perform the duties of a separately elected county officer. *See, e.g., Drummond’s Brief*, at 23-26; *Board’s Brief*, at 20-22. Their position is contrary to the Washington Constitution and this Court’s opinions.

The Board’s power and the power of the other elected county officials all arise from the same source – the Washington Constitution. Nothing in the history or language of the Washington Constitution supports the Board’s assertion that county commissioners may supplant another elected official in performing their duties. *See Brief of Appellant*, at 8-13.²⁵

²⁵Neither the Board nor Ms. Drummond address this portion of the State’s brief in their briefs. Neither the Board nor Ms. Drummond attempt to distinguish any of the treatises cited
(continued...)

The Washington Constitution gives the legislative authority of the county the right to set salaries of other officers and the right to monitor all public monies that the other officers receive or spend. *See* Const. art. XI, § 5. Although this authority allows the board of county commissioners the ability to determine the number of deputies and other employees another elected official may hire, RCW 36.16.070, this power does not allow the board of county commissioners to interfere with the hiring decisions of the separately elected official. *See Osborn*, 130 Wn.2d at 621-24. While the board of county commissioners sets the budget and makes appropriations for the use of every county official, *see* Chapter 36.40 RCW, this power does not allow the board of county commissioners to interfere with the priorities set by the separately elected official. *See Sandhaus*, 134 Wn.2d at 669-70. The elected officials who make poor decisions regarding hiring or the setting of priorities answer to the voters, not to the board of county commissioners. *Sandhaus*, 134 Wn.2d at 670; *Osborn*, 130 Wn.2d at 624.

The Board and Ms. Drummond support their claim of supreme power with citations to RCW 36.32.120(6). *See* Drummond's Brief, at 25 n. 68; Board's Brief, at 21. This Court, however, rejected their reading of RCW 36.32.120(6) in *Northwestern Improvement Co. v. McNeil*, 100 Wash. 22, 170 P. 338 (1918). In *Northwestern Improvement Co.*, this Court expressly

²⁵(...continued)
in this portion of the State's brief. As for the California Supreme Court cases that address the language in the 1879 California Constitution that was copied into the Washington Constitution and that are discussed at pages 29-31 of the State's brief, the Board does not mention them and Ms. Drummond merely indicates that the cases are "no longer good law" in California. Drummond Brief, at 23. The State agrees that California law changed to allow boards of supervisors to hire attorneys. This change was preceded, however, by the repeal of the provisions of the California Constitution that still appear in the Washington Constitution. *See* Brief of Appellant, at pg. 30 ns. 23, 24, and 25.

held that Rem. Rev. Code § 3890(6), which stated that “[t]he board shall *
* * have the care of the county property and the management of the county
funds and business. * * * and [have] such other powers as are or may be
conferred by law,” did not allow a board of county commissioners to
authorize someone to perform the duties of the independently elected county
assessor. 100 Wash. at 28-29.

Both Ms. Drummond and the Board argue that *Northwestern
Improvement Co.* does not apply to the hiring of an attorney due to the
existence of RCW 36.32.200. Drummond Brief, at 21; Board’s Brief, at 41-
42. This Court, however, has already held that the rule established in
Northwestern Improvement Co. applies to contracts issued pursuant to RCW
36.32.200. See *State ex rel. Hunt*, 153 Wash. at 421. The order granting the
Board’s and Ms. Drummond’s summary judgment motions must be reversed
and Resolution C-48-15, must be declared ultra vires and void.

**2. The prosecuting attorney is the sole civil legal advisor to
the county.**

The Board and Ms. Drummond both contend that the elected
prosecuting attorney is not the sole civil legal advisor to the county. They
claim that the plain language of RCW 36.27.020 gives the Board the option
of utilizing the services of the prosecuting attorney. See Board’s Brief at 32-
33. The Board claims additional support for its premise by quoting the text
of Rem. Rev. Stat. § 4130, as it appears in *Harter v. King County*, 111 Wn.2d
583, 594-96, 119 P.2d 919 (1941). Board’s Brief, at 30-31. Finally, the
Board cites to AGO 1959 No. 6 and AGO 1955 No. 48, as support for the
proposition that county commissioners enjoy carte blanche when it comes to

the selection of their attorney. Board's Brief, at 33-34. These arguments do not survive scrutiny.

a. Plain language of RCW 36.27.020

While the legislature has the power to assign additional duties to a prosecuting attorney, the legislature lacks the power to remove core functions from the prosecuting attorney. *See State v. Rice*, 174 Wn.2d 884, 905, 279 P.3d 849 (2012). The core functions of the prosecuting attorney are those that were assigned to the office at the time the constitution was adopted. *See generally, Melton*, 192 Wash. at 388. The core functions at the time the constitution was adopted included representation of the State in criminal matters and representation of the county in civil matters. *See* Brief of Appellant, at 16-19.

In modern times, the legislature continues to recognize the dual nature of the prosecuting attorney's office:

The legislature finds that an elected county prosecuting attorney functions as both a state officer in pursuing criminal cases on behalf of the state of Washington, and as a county officer who acts as civil counsel for the county . . . The elected prosecuting attorney's dual role as a state officer and a county officer is reflected in various provisions of the state Constitution and within state statute.

Laws of 2008, ch. 309, § 1.

The statute that most reflects the prosecuting attorney's dual role is RCW 36.27.020. This statute, which is a direct descendent of the territorial statutes,²⁶ sets out the core functions of the prosecuting attorney. The first

²⁶The historical record of RCW 36.27.020, as compiled by the Code Reviser, is
[2012 1st sp.s. c 5 § 2; 1995 c 194 § 4; 1987 c 202 § 205; 1975 1st ex.s.
(continued...)]

four provisions address the prosecuting attorney's duties as the county's civil counsel. The plain language of these four provisions clearly place all civil legal functions in the hands of the prosecuting attorney:

(1) Be legal adviser of the legislative authority, giving it his or her written opinion when required by the legislative authority or the chairperson thereof touching any subject which the legislative authority may be called or required to act upon relating to the management of county affairs;

(2) Be legal adviser to all county . . . officers . . . in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;

(3) Appear for and represent the . . . county . . . in all . . . civil proceedings in which the . . . county . . . may be a party;

(4) Prosecute all . . . civil actions in which . . . the county may be a party, defend all suits brought against . . . the county,^[27] and prosecute actions upon forfeited recognizances

²⁶(...continued)

c 19 § 1; 1963 c 4 § 36.27.020. Prior: (i) 1911 c 75 § 1; 1891 c 55 § 7; RRS § 116. (ii) 1886 p 65 § 5; 1883 p 73 § 10; Code 1881 § 2171; 1879 p 93 § 6; 1877 p 246 § 6; 1863 p 408 § 4; 1860 p 335 § 3; 1858 p 12 § 4; 1854 p 416 § 4; RRS § 4130. (iii) 1886 p 61 § 7; 1883 p 73 § 12; Code 1881 § 2168; 1879 p 94 § 8; 1877 p 247 § 8; RRS § 4131. (iv) 1886 p 61 § 8; 1883 p 74 § 13; Code 1881 § 2169; 1879 p 94 § 8; 1877 p 247 § 9; RRS § 4132. (v) 1886 p 61 § 9; 1883 p 74 § 14; Code 1881 § 2170; 1879 p 94 § 9; 1877 p 247 § 10; RRS § 4133. (vi) 1886 p 62 § 13; 1883 p 74 § 18; Code 1881 § 2165; 1879 p 95 § 13; 1877 p 248 § 14; 1863 p 409 § 5; 1860 p 334 § 4; 1858 p 12 § 5; 1854 p 417 § 5; RRS § 4134. (vii) Referendum No. 24; 1941 c 191 § 1; 1886 p 63 § 18; 1883 p 76 § 24; Code 1881 § 2146; 1879 p 96 § 18; RRS § 4136. (viii) Code 1881 § 3150; 1866 p 52 § 10; RRS § 4137. (ix) 1933 ex.s. c 62 § 81, part; RRS § 7306-81, part.]

See Washington State Legislature web site at <http://app.leg.wa.gov/RCW/default.aspx?cite=36.27.020> (last visited Apr. 12, 2016).

²⁷Resolution C-48-15 authorizes Ms. Drummond to "Defend[] adopted legislation." See CP 320 (Resolution C-48-15, at page 4, Section 2, Services to be Provided, no. 5). The county, of course, is a party to any action that seeks to invalidate the Board's decisions pursuant to the Growth Management Act. See, e.g., *Kittitas County v. E. Wash. Growth Mgmt. Hearings Board*, 172 Wn. 2d 144, 151, 256 P.3d 1193 (2011) (county filed suit to challenge decisions of the Eastern Washington Growth Management Hearings Board that invalidated provisions of the county's code). The Board makes no effort to explain why the
(continued...)

and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to . . . the county;

RCW 36.27.020(1)-(4).

The Board requests that this Court ignore the first clause of RCW 36.27.020(1), and focus on the phrase “when requested by the legislative authority.” Board’s Brief at 33. The rules of grammar,²⁸ however, do not support the Board’s contention that the phrase “when requested by the legislative authority” modifies the phrase “[b]e legal adviser of the legislative authority” as well as the phrase “giving it his or her written opinion.” Two different, but related, syntactic principles limit the reach of the “when requested by the legislative authority” modifier.

The nearest-reasonable referent canon, which applies when the statute contains a non-parallel series of nouns or verbs, holds that the modifying clause applies only to the nearest reasonable referent. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 152 (2012). The last-antecedent canon limits the application of the modifier to the final term in the series, unless separated from all antecedents by a comma. 2A Statutes and Statutory Construction, § 47:33, at 494-501 (7th rev. ed. 2014). *See also State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010).

²⁷(...continued)
phrase “defend all suits” in RCW 36.27.020(4), allows for the transfer of the duty to defend from Prosecutor Banks to Ms. Drummond.

²⁸The traditional rules of grammar are employed in discerning the plain language of a statute. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 839, 215 P.3d 166 (2009). “Applying grammatical rules is . . . the first step in determining whether a statute has a plain meaning. . . .” *Dep’t of Labor and Industries v. Slauch*, 177 Wn. App. 439, 448, 312 P.3d 676 (2013), *review denied*, 180 Wn.2d 1007 (2014).

Under both of these rules, application of the “when requested by the legislative authority” modifier to the “[b]e legal advisor of the legislative authority” duty, would require the insertion of a comma after the phrase “giving it his or her written opinion.” In other words, RCW 36.27.020(1) would have to be modified as follows:

(1) Be legal adviser of the legislative authority, giving it his or her written opinion[,] when required by the legislative authority or the chairperson thereof touching any subject which the legislative authority may be called or required to act upon relating to the management of county affairs;

This Court will sometimes abandon the last antecedent rule, when other factors, such as context and language in related statutes, indicate contrary legislative intent or if applying the rule would result in an absurd or nonsensical interpretation. *Bunker*, 169 Wn.2d at 577-81. Application of the last antecedent rule and/or the nearest reasonable referent rule does not conflict with legislative intent and does not result in an absurd or nonsensical interpretation. The limitation upon the request for written opinions contained in RCW 36.27.020(1), prevents the prosecuting attorney from being confronted with multiple, possibly conflicting, requests for written opinions from each individual county commissioner. This portion of RCW 36.27.020(1) recognizes that the legislative authority must act as a unit, rather than individually. *See generally* RCW 36.32.010 (at least two of the three county commissioners are needed to do business).

b. Artifacts in the commercial code.

The Board contends that its use of RCW 36.32.200 was “entirely consistent with the Supreme Court’s analysis in *Harter v. King County*, 11

Wn.2d 583, 119 P.2d 919 (1941).” Board’s Brief, at 30. The *Harter* court’s resolution of a dispute between the county prosecutor and the board of county commissioners in favor of the prosecuting attorney relied, in part, upon the language of Rem. Rev. Stat. § 4130. But the *Harter* court was mistaken that Rem. Rev. Stat. § 4130 accurately set out the law.

Remington Revised Statute § 4130 is a composite of several independent acts of the legislature, ranging from territorial days down to the 1911 session. Rem. Rev. Stat. § 4130 is

the compiler’s idea of what now remains of the many enactments of the Legislature. But the compilation has no official sanction, in the sense that it controls the construction the court must put upon the several acts. If it includes matter superseded, the matter must be rejected; and if there are matters not superseded and not contained therein, they must be searched out and given effect.

Spokane v. Franklin County, 106 Wash. 21, 26, 179 Pac. 113 (1919). Accord *Parosa v. Tacoma*, 57 Wn.2d 409, 413, 357 P.2d 873 (1960) (“In the event of a discrepancy between the law enacted by the legislature and a compilation, the legislative acts control.”).

The proviso relied upon by both the Board and the *Harter* court, “Provided, the commissioners of any county may employ other attorneys, when they may deem it for the interest of their county,” appeared solely in a pre-statehood territorial statute. Laws of 1885, pg. 61, § 5. This pre-statehood territorial statute provided for the election of prosecuting attorneys by districts comprised of multiple counties. See Laws of 1885, pg. 59, § 1. At a time of primitive transportation, primitive roads, and primitive communications, the proviso provided commissioners of the large

geographic districts²⁹ with the ability to obtain representation on time-sensitive matters when the prosecuting attorney could not be reached.

The Washington Constitution in 1889 made counties, not districts, the political unit of government and provided each county with a prosecuting attorney. *See* Const. art. XI, sec. 5. The associated reduction in the area which the prosecuting attorney was required to serve, led the legislature to eliminate the proviso that the *Harter* court relied upon from the post-ratification statute. *See Reed v. Gormley*, 47 Wash. 355, 359, 91 P. 1093 (1907) (noting that the proviso empowering the commissioners to employ other attorneys was removed from the 1891 enactment).

When language contained in an earlier statute is not included in a later statute, the omission is interpreted as an intentional act. *See, e.g., State v. Veliz*, 176 Wn.2d 849, 863, 298 P.3d 75 (2013) (“The contrast between the new statute and the old statute is stark. The legislature removed all custody and visitation language from RCW 26.50.060. It did not, however, replace it with corresponding parenting plan language. This omission indicates that the legislature did not intend DVPA orders to be parenting plans.”). Even when a court believes the omission was unintentional, the court may not add

²⁹The area of each district may be calculated using data available on the United States Department of Commerce, United States Census Bureau’s Quick Facts page. <http://www.census.gov/quickfacts/table/PST045215/00> (last visited Apr. 13, 2016). These calculations reveal that at least one district contained over 6,000 square miles and at least three other districts exceeded 2,500 square miles.

- Walla Walla County /Franklin County District contains 2512.3 sq. miles
- King County/Kitsap County/Snohomish County District contained 4597.78 sq. miles
- Lincoln County/Douglas County/Adams County District contained 6054.73 sq. miles
- Jefferson County/Clallam County/Island County/San Juan County District contained 3924.4 sq. miles

language it believes was omitted. *See, e.g., Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (“[A] court must not add words where the legislature has chosen not to include them.”); *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002) (“Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted.”).

Here, the legislature clearly believed that its omission of the proviso that had previously appeared in Laws of 1885, pg. 61, § 5, from the 1891 enactment deprived the commissioners of the ability to pay attorneys who were hired when the elected prosecutor was absent or suffered from a disability. Fourteen years later, to address this concern, the legislature enacted Laws of 1905, ch. 25, which was later codified as RCW 36.32.200.

To avoid errors such as the one inadvertently made by the *Harter* court, the legislature created a statutory law committee and the office of code reviser. *See generally* Chapter 1.08 RCW. One of the three duties assigned to the newly created entities was “to examine every word and every section in the entire code, to point out these differences that had occurred, document them, propose corrections” and then publish the corrected code. *See Anne Kilgannon, Richard O. White: Washington State Code Reviser: An Oral History Interview with Richard O. White, Representative Tom Copeland and Gary Marchesini at 2-3 (2004).*³⁰ In the course of performing this duty, the proviso that the *Harter* court relied upon was eliminated as “manifestly obsolete.” RCW 1.08.015(2)(m). The contemporary statute, RCW

³⁰ Available at <http://app.leg.wa.gov/oralhistory/white/white-interview.pdf> (last visited Apr. 13, 2016).

36.27.020, that sets out the duties of the prosecuting attorney, does not contain the language relied upon by the *Harter* court.

c. AGO 1955 No. 48 and AGO 1959 No. 6.

The Board isolates words and phrases from two Attorney General Opinions as support for its claimed right to hire private attorneys to perform the duties of the elected prosecuting attorney. *See* Board's Brief at 33-34. The relied upon quotes are dicta. Read in context, neither the quoted language nor the cited opinions, support the Board's position.

AGO 1955 No. 48 addressed the question of whether a board of county commissioners can participate in the selection and removal of deputy prosecuting attorneys. Unsurprisingly, the AGO reached the conclusion that the prosecuting attorney enjoys "unlimited discretion in the selection of his legal deputies." AGO 1955 No. 48 at 4. During the course of its analysis, the author linked RCW 36.32.200's authority to contract with other attorneys to the erroneously included proviso contained in Rem. Rev. Stat. § 4130. AGO 1955 No. 48 at 3. Even with this error, the opinion recognized that the Board's employment of a private attorney is limited to "attorneys hired by the county for a special purpose outside the usual scope of the prosecutor's office." *Id.* at 3. This statement is consistent with *State ex rel. Hunt's* holding that RCW 36.32.200 may only be used to retain attorneys to perform functions, such as lobbying, that are not already assigned to the prosecuting attorney. 153 Wash. at 421-22.

AGO 1959 No. 6 deals with the prosecuting attorney's ability to appoint a non-county resident assistant attorney general as a special deputy prosecuting attorney and the attorney general's ability to appoint a special

assistant attorney general to assist the prosecuting attorney in proceedings before a grand jury. The opinion held that while the contemporary statutes prohibited the prosecuting attorney from appointing a non-resident as a special deputy prosecuting attorney, the court could appoint as special counsel pursuant to RCW 36.27.030, a non resident lawyer. *Id.* at 3-5. The opinion further indicated that the attorney general lacks the power to perform the duties assigned by statute to the prosecuting attorney. *Id.* at 6. Beyond a reference to AGO 1955 No. 48, AGO 1959 No. 6 does not cite to RCW 36.32.200 and does not address when a board of county commissioners may appoint a special counsel. *See* AGO 1959 No. 6 at 2.³¹

3. RCW 36.32.200 does not grant the board the power to assign any of a non-disabled prosecuting attorney's duties to a private attorney.

The Board contends that the plain language of RCW 36.32.200, the legislative history of RCW 36.32.200, and Washington Attorney General Opinions establish the legality of Resolution C-48-15 and their power to hire Ms. Drummond to perform the duties contained therein. *See* Board's Brief at 25-31. Unfortunately for the Board, careful consideration of the plain language of RCW 36.32.200, the full legislative history of RCW 36.32.200,

³¹The fragment of AGO 1959 No. 6 the Board quotes on page 34 of its brief, appears in this paragraph:

In an opinion issued on March 28, 1955, to the Executive Secretary of the Washington Association of County Commissioners (AGO 55-57 No. 48), the attorney general ruled that in view of the statutes, *supra*, a deputy prosecuting attorney must be a resident of the county in which he serves. However, that opinion contained a specific statement that the conclusion reached therein was not controlling as to special attorneys appointed either by the court (RCW 36.27.020) or by the county commissioners (RCW 36.32.200)

AGO1959No.6 at 2.

and the relevant attorney general opinions establish that Resolution C-48-15 is ultra vires and void.

a. Plain language of RCW 36.32.200.

The procedure by which the board of county commissioners may retain a special attorney when the office of prosecuting attorney is vacant or when the prosecuting attorney is unable to act is contained in RCW 36.32.200. This statute states that:

It shall be unlawful for a county legislative authority to employ or contract with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of such attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.

Any contract written pursuant to this section shall be limited to two years in duration.

RCW 36.32.200.

RCW 36.32.200 is not a grant of authority to the county commissioners – it is a limitation on their authority. The statute does not state “it shall be lawful to employ” with the approval of the presiding judge. RCW 36.32.200 does not provide any authority to contract with a private attorney. The statute presumes that the authority to contract exists elsewhere, and limits the manner in which that authority can be exercised. This statute does not render lawful an otherwise unauthorized appointment.

The Board’s position to the contrary relies solely upon the logical fallacy of “denying the antecedent.” *See* Board’s Brief, at 25-28. Denying the antecedent, sometimes also called inverse error or fallacy of the inverse,

is a formal fallacy of inferring the inverse from the original statement. It is committed by reasoning in the form:

If P, then Q.

Not P.

Therefore, not Q.

See generally State v. Brush, 183 Wn.2d 550, 568 n.8, 353 P.3d 213 (2015) (Wiggins, J. concurring in part, and concurring in result). The flawed nature of such reasoning becomes readily apparent with this example:

Consider the following argument, which uses “snowing” as the antecedent and “cold” as the consequent: “Premise 1: If it is snowing, then it is cold outside. Premise 2: It is not snowing. Conclusion: It is not cold outside.” Plainly, the above conclusion does not follow from its premises; it can be cold without snow falling, even though snowfall requires a cold outside temperature.

Id.

Reduced to this syllogistic form, the Board’s argument is, essentially as follows:

[Hypothesis]: If P, then Q. If a contract to hire outside counsel is not approved by the presiding judge, it is unlawful.

Not P. The contract in this case was approved by the presiding judge.

[Conclusion]: Therefore, not Q. The contract in this case was not unlawful.

Plainly the conclusion does not follow from its premise. The contract may still be unlawful because the office of prosecuting attorney was filled by the voters.³² The contract may still be unlawful because county

³²County commissioners may employ a private attorney to perform the duties of the prosecuting attorney when the office of the prosecuting attorney is vacant due to no lawyers (continued...)

commissioners may not authorize someone else to perform the duties of a separately elected official.³³ The contract may still be unlawful because the judicial approval was not preceded by an RCW 36.27.030 finding of disability.³⁴ All three of these circumstances are present in the instant case.

b. Legislative history of RCW 36.32.200.

The Board contends that the legislative history of RCW 36.32.200, supports its position that the Board may freely retain counsel to perform the duties of the elected prosecuting attorney. Board's Brief, at 28. The Board supports this contention by a misleading and incomplete recitation of the historical record. *Id.*, at 28-30. A review of the entire record related to the adoption of Laws of 1983, ch. 129, § 1, demonstrates the legislature's respect for this Court's precedent and the Washington Constitution.

Despite this Court's holding in *State ex rel. Hunt*, that Rem. Rev. Stat.s § 4075 is subject to the rule that county commissioners may not use taxpayer moneys to directly hire someone to perform the duties of another elected official, 153 Wash. at 421, four senators proposed that RCW 36.32.200 be repealed and replaced with the following:

New Section. Sec. 1. There is added to chapter 4, Laws of 1983 and to chapter 36.27 RCW a new section to read as follows:

³²(...continued)
residing within the county. AGO 1891-92, p. 186-87 (1891).

³³Contracts with attorneys pursuant to RCW 36.32.200 are subject to the rule announced in *Northwestern Improvement Co. v. McNeil*, 100 Wash. 22, 170 P. 338 (1918). See *State ex rel. Hunt*, 153 Wash. at 421.

³⁴The power of the court to allow another attorney to perform the duties of the prosecuting attorney is limited to those circumstances mentioned in RCW 36.27.030. See *State v. Heaton*, 21 Wash. 59, 62, 56 P. 843 (1899) (discussing prior version of RCW 36.27.030).

Duties of the prosecuting attorney, as set forth in RCW 36.27.020, shall in any county entering into a contract pursuant to section 2 of this act, be modified to the extent and in the manner provided by the contract.

New Section. Sec. 2. There is added to chapter 4, Laws of 1983 and to chapter 36.27 RCW a new section to read as follows:

The legislative authority or any county may contract to employ or retain one or more persons admitted as attorneys and counselors by the courts of this state to perform any or all of the following legal services on behalf of the county:

(1) Act as legal advisor to the county officers, providing them with legal advice regarding the conduct of their public duties and drafting legal instruments used by them to perform their official business; and

(2) Appear for and represent the county in all civil proceedings to which the county or its officers are parties.

All such contacts must be in writing and shall clearly delineate the responsibilities and authority of the contracting attorney or attorneys. Nothing in this section may be construed as limiting the authority or the duties of the prosecuting attorney with respect to the prosecution of criminal actions or the administration of grand jury proceedings.

New Section. Sec. 3. Section 36.32.200, chapter 4, Laws of 1963 and RCW 36.32.200 are each repealed.

SB 3151 (1983).³⁵

This proposal was rejected by the Senate Committee on Local Government and replaced by a substitute senate bill. CP 576. SSB 3151 (1983) added two new restrictions to RCW 36.32.200. The substitute bill removed any ability to contract with a private attorney to perform the duties of the attorney general and limited the duration of all contracts with private attorneys:

³⁵The proposed bill and other historical records related to SSB 3151 (1983) may be found at CP 559-580.

It shall be unlawful for ~~the board of a county commissioners~~ legislative authority to employ; or contract with or pay any special attorney or counsel to perform any duty which ~~the attorney general or any prosecuting attorney~~ is authorized or required by law to perform unless the contract of employment of such special attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county ~~or a majority of the judges~~ in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.

Any contract written pursuant to this section shall be limited to two years in duration.

SSB 3151.

The approval of SSB 3151 was preceded by a fairly spirited floor debate with Senator Rasmussen urging the removal of all restrictions upon the hiring of private counsel. 1 Senate Journal, 48th Leg., Reg. Sess., at 554 (Wash. 1983). The Senate deferred further consideration of SSB 3151, at Senator Rasmussen's request to allow for the preparation of an amendment that would grant county commissioners the freedom to hire private attorneys to perform duties assigned to the prosecuting attorney. 1 Senate Journal, at 555.

Fourteen days later, when SSB 3151 was returned to the senate floor, a motion was made to reconsider the decision of the Senate Committee on Local Government that substituted SSB 3151 for SB 3151. 1 Senate Journal, at 736. After this motion failed, "[d]ebate ensued" regarding the wisdom of SSB 3151. 1 Senate Journal, at 736. Ultimately, SSB 3151, which added restrictions to the use of private counsel, passed with a majority vote that did not include Senator Rasmussen. 1 Senate Journal, at 736-37.

c. Washington Attorney General Opinions

The State's opening brief discusses a number of Attorney General Opinions and Attorney General Letter Opinions that were issued between 1891 and 2015.³⁶ The Board's discussion of the "1974 Attorney General Opinion No. 15," Board's Brief, at 31, demands a brief response.

The Board devotes nearly two pages of its brief to the "1974 Attorney General Opinion No. 15." See Board's Brief, at 31-32. AGO 1974 No. 15 does not contain the language the Board relies upon. Compare Board's Brief at 31-32, with AGO 1974 No. 15.³⁷ AGO 1974 No. 15 deals with employee use of an automobile that is owned or leased by the state, not with the hiring of an outside attorney.

If the Board's discussion actually relates to AGLO 1974 No. 15, their omission of the first and third sentence from the quotation that appears in footnote 56 of its brief leaves the erroneous impression that the attorney general unreservedly supports their use of RCW 36.32.200 to retain Ms. Drummond. The full paragraph dispels any such belief:

In so answering this question, we are not to be taken as having passed upon the constitutionality of RCW 36.32.200, supra. In accordance with long-standing policy, this office must presume that statute, as any other duly enacted statute, to be constitutional until such time as it is otherwise determined by a court of competent jurisdiction. Accord, AGO 1971 No. 12 [[to Gordon L. Walgren, State Senator on March 16, 1971]]. We would be remiss in this regard, however, not to point out to you the possible ramifications

³⁶Copies of every Attorney General Opinion and Attorney General Letter Opinion that the State cited may be found in appendix C to the brief of appellant.

³⁷AGO 1974 No. 15 may be found at <http://www.atg.wa.gov/ago-opinions/offices-and-officers-employees-state-institutions-salaries-use-state-owned-or-leased> (last visited Apr. 11, 2016).

upon this question of *State ex rel. Johnston v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937), as explained in our letter of July 19, 1973, to State Representative Richard King [[an Informal Opinion AIR-73615]], copy enclosed.

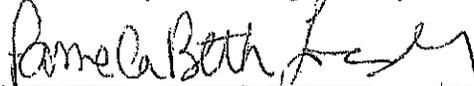
AGLO 1974 No. 15 at n. 1.

V. CONCLUSION

The Board's contract with Ms. Drummond to perform duties assigned to the Island County Prosecuting Attorney disenfranchised the voters³⁸ and unconstitutionally expended public funds. The State respectfully requests that this Court reverse the trial court's orders and remand with directions to enter an RCW 7.56.100 judgment of ouster against Ms. Drummond and with directions to declare Resolution C-48-15 ultra vires and void.

Respectfully submitted this 18th day of April, 2016.

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³⁸*McCall v. Devine*, 334 Ill. App. 3d 192, 777 N.E.2d 405, 416-17 (2004) (quoting a trial court judge) (“[R]emoval of a duly elected public official is a drastic measure for it disenfranchises the very electorate who, through its votes, has spoken.”).

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 18th day of April, 2016, I served copies of the document upon which this proof of service appears, by e-mail, pursuant to the prior agreement of counsel to

Robert Gould, Counsel for Defendants, at rbgould@nwlegalmal.com and at Lphelan@nwlegalmal.com

and to

Scott Missall and Athan E. Tramountanas, Counsel for the Island County Board of Commissioners at smissall@scblaw.com and at athant@scblaw.com and at tbackus@scblaw.com and at nthomas@scblaw.com and at lfsutton@scblaw.com

and to

Jeff Even, Deputy Solicitor General at JeffE@ATG.WA.GOV

Signed under the penalty of perjury under the laws of the state of Washington this 18th day of April, 2016, at Olympia, Washington.



PAMELA B. LOGINSKY
WSBA No. 18096
Special Deputy Prosecuting Attorney

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; Jeff (ATG) Even; Gregory Banks; Jennifer Wallace; Patti Switzer; Leona Phelan; Robert Gould; Athan Tramountanas; Linda Sutton; Nicholas Thomas; Scott Missall; Tricia Backus
Subject: RE: State ex rel. Banks v. Drummond, No. 92749-9

Received 4-18-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]
Sent: Monday, April 18, 2016 9:47 AM
To: Jeff (ATG) Even <JeffE@ATG.WA.GOV>; Gregory Banks <gregb@co.island.wa.us>; Jennifer Wallace <JenniferW@co.island.wa.us>; Patti Switzer <P.Switzer@co.island.wa.us>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Leona Phelan <LPhelan@nwlegalmal.com>; Robert Gould <rbgould@nwlegalmal.com>; Athan Tramountanas <athant@scblaw.com>; Linda Sutton <lfsutton@scblaw.com>; Nicholas Thomas <NThomas@scblaw.com>; Scott Missall <SMissall@scblaw.com>; Tricia Backus <TBackus@scblaw.com>
Subject: State ex rel. Banks v. Drummond, No. 92749-9

Dear Clerk and Counsel--

The body of the State's Reply Brief was sent by separate e-mail. Part I of appendix C to that brief is attached to this e-mail.

Please let me know if you should encounter any difficulty in opening the document.

Sincerely,

Pam Loginsky
Island County Special Deputy Prosecuting Attorney

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; Jeff (ATG) Even; Gregory Banks; Jennifer Wallace; Patti Switzer; Leona Phelan; Robert Gould; Athan Tramountanas; Linda Sutton; Nicholas Thomas; Scott Missall; Tricia Backus
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From: Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]
Sent: Monday, April 18, 2016 9:45 AM
To: Jeff (ATG) Even <JeffE@ATG.WA.GOV>; Gregory Banks <gregb@co.island.wa.us>; Jennifer Wallace <JenniferW@co.island.wa.us>; Patti Switzer <P.Switzer@co.island.wa.us>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Leona Phelan <LPhelan@nwlegalmal.com>; Robert Gould <rbgould@nwlegalmal.com>; Athan Tramountanas <athant@scblaw.com>; Linda Sutton <lfsutton@scblaw.com>; Nicholas Thomas <NThomas@scblaw.com>; Scott Missall <SMissall@scblaw.com>; Tricia Backus <TBackus@scblaw.com>
Subject: State ex rel. Banks v. Drummond, No. 92749-9

Dear Clerk and Counsel:

Attached for filing is the State's Motion for Leave to File Overlength Reply Brief and the State's Reply Brief. To ensure receipt, Appendix C to the reply brief will be sent in two separate e-mails.

I will walk the originals up to the Court this morning.

Please let me know if you encounter any difficulty in opening any of the documents.

Sincerely,

Pam Loginsky
Island County Special Deputy Prosecuting Attorney

APPENDIX A

Text of RCW 36.32.330 and of Laws of 1893, ch. 121, § 1

RCW 36.32.330

Any person may appeal to the superior court from any decision or order of the board of county commissioners. Such appeal shall be taken within twenty days after the decision or order, and the appellant shall within that time serve notice of appeal on the county commissioners. The notice shall be in writing and shall be delivered to at least one of the county commissioners personally, or left with the county auditor. The appellant shall, within ten days after service of the notice of appeal give a bond to the county with one or more sureties, to be approved by the county auditor, conditioned for the payment of all costs which shall be adjudged against him or her on such appeal in the superior court. The practice regulating appeals from and writs of certiorari to justice's courts shall, insofar as applicable, govern in matters of appeal from a decision or order of the board of county commissioners.

Nothing herein contained shall be construed to prevent a party having a claim against any county in this state from enforcing the collection thereof by civil action in any court of competent jurisdiction after the same has been presented to and filed as provided by law and

Laws of 1893, ch. 121, § 1

Any person may appeal from any decision or order of the board of county commissioners to the superior court of the proper county. Such appeal shall be taken within twenty days after such decision or order, and the party appealing shall within said time serve notice on the county commissioners that the appeal is taken, which notice shall be in writing and shall be delivered to at least one of the county commissioners personally, or left with the clerk of the board; the party appealing shall within ten days after the service of the notice of appeal give a bond to the county with one or more sureties, to be approved by the clerk of the board, conditioned for the payment of all costs which shall be adjudged against him on such appeal in the superior court. The practice regulating appeals from and writs of certiorari to justice's courts shall, so far as the same may be applicable, govern in matters of appeal from the decision or order of the board of county commissioners.

Nothing herein contained shall be so construed as to prevent a party having a claim against any county in this state from enforcing the collection thereof by civil action in any court of competent jurisdiction, after the same may have been presented

disallowed in whole or in part by the board of county commissioners of the proper county. Such action must, however, be commenced within the time limitation provided in RCW 36.45.030.

and disallowed in whole or in part by the board of county commissioners of the proper county: *Provided*, That such action be brought within three months
appeal may be taken from after such claim has been acted upon by such board.

APPENDIX B

Text of Laws of 1905, ch. 25, § 1 (codified as Remington Revised Statute § 4075) and RCW 36.32.200

Laws of 1905, ch. 25, § 1

It shall be unlawful for any Board of County Commissioners in any county in this State to employ, contract with or pay any special attorney or counsel to perform any duty which the Attorney General or any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of said special attorney or counsel shall have been first reduced to writing and approved by the Superior Judge of said county or a majority of the judges thereof, in writing indorsed thereon: Provided, this act shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.

RCW 36.32.200

It shall be unlawful for a county legislative authority to employ or contract with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of such attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.

Any contract written pursuant to this section shall be limited to two years in duration.

APPENDIX C

Declaration of Gregory M. Banks in Support of Plaintiff's Amended
Motion for Summary Judgment (November 9, 2015) CP 388-469

and

Declaration of Gregory M. Banks in Opposition to Defendants' Motion
for Summary Judgment (January 4, 2016) CP 109-185

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IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON, on the
Relation of Gregory M. Banks, Prosecuting
Attorney of Island County,

Plaintiff,

vs.

SUSAN E. DRUMMOND, and Law Offices
of Susan Elizabeth Drummond, PLLC;

Defendants

and

ISLAND COUNTY BOARD OF
COMMISSIONERS,

Intervenor/Defendant,
and Counterclaim
Plaintiff.

NO. 15-2-00465-9

DECLARATION OF GREGORY M.
BANKS IN SUPPORT OF
PLAINTIFF'S AMENDED MOTION
FOR SUMMARY JUDGMENT

I, Gregory M. Banks, certify (or declare) the following:

I am the duly elected and qualified Island County Prosecuting Attorney. I have continuously held this office since January 1, 1999.

I received the most votes in each of the general elections held in 1998, 2002, 2006, 2010, and 2014. After each election, I executed an Oath of Office and took office on January 1 of the year following each election.

1 In the November 4, 2014, general election I received 20, 685 of the 21,043 ballots cast.¹
2 The Island County Auditor issued a Certificate of Election to me (using my nickname of
3 "Greg Banks") on December 15, 2014. A true copy of that Certificate of Election is attached to this
4 affidavit as Exhibit A.
5 I swore an Oath of Office on December 23, 2014. A true copy of that Oath of Office is
6 attached as Exhibit B.
7 I posted a Public Official Bond on November 7, 2014, which is effective from January 1,
8 2015; through January 1, 2016. A true copy of that Public Official Bond is attached as Exhibit C.
9 I will renew my bond on an annual basis, as I have done since my first election in 1998.
10 I am an active member of the Washington State Bar Association. I was admitted to practice
11 on November 3, 1993, and I am now and have continuously been an attorney in good standing since
12 that date. A true copy of a Certificate of Good Standing issued on July 23, 2015, is attached as
13 Exhibit D.
14 I am also admitted to practice before the United States District Court for the Western District
15 of Washington, and the United States Supreme Court.
16 I have not been impeached by the Washington Legislature.
17 I am not, and have never been, the subject of a recall petition.
18 I have not been found, pursuant to RCW 36.27.020, to be temporarily unable to perform my
19 duties.
20 Since I first took office on January 1, 1999, the office has been organized into two divisions--
21 Civil and Criminal.
22 The Criminal Division is responsible for the prosecution of criminal and juvenile offenses,
23 and other related services. Currently, the Criminal Division is staffed by a Chief Criminal Deputy
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¹See Island County Auditor, Official Returns of the General Election Held in Island County, Washington November 4, 2014, at 27-28 (Nov. 25, 2014) (available at https://wei.sos.wa.gov/county/island/en/Elections/PastElectionResults/Documents/Past_Elections/2014/Results110414.pdf (last visited Nov. 4, 2015)).

1 Prosecutor, five deputy prosecutors, and six non-lawyer support personnel.

2 The Civil Division is responsible to provide legal advice and representation to all county
3 officials, including elected officials and appointed department heads. Currently the Civil Division
4 is staffed by a Chief Civil Deputy Prosecutor, one full-time deputy prosecutor, and a
5 paralegal/administrative assistant. In addition, depending on the demands of my criminal caseload,
6 I personally devote approximately 60% of my time to our civil clients.

7 The staffing of the Civil Division has been static since approximately 2004. Prior to that, the
8 division had a Chief Civil Deputy Prosecutor and a deputy prosecutor who split his time 50/50
9 between civil and criminal work. The full-time civil deputy prosecutor position was established to
10 respond to the growing demand for legal services caused by implementation of the Growth
11 Management Act, Chapter 36.70A.RCW. The full time civil deputy prosecutor is known as "the land
12 use deputy." Job postings for this position from the Island County Human Resources Department
13 (whose director reports to the Board of Island County Commissioners) identify the position as:
14 "Deputy Prosecuting Attorney -- Land Use."

15 Our civil legal clients are:

- 16 1. Island County Assessor
- 17 2. Island County Auditor
- 18 3. Board of Island County Commissioners
- 19 4. Island County Board of Equalization
- 20 5. Island County Board of Health
- 21 6. Budget Director
- 22 7. Island County Canvassing Board
- 23 8. Central Services / Information Technology Dept.
- 24 9. Island County Civil Service Commission
- 25 10. Island County Clerk
- 26 11. Island County Coroner

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- 1 12. Department of Emergency Management
- 2 13. District Court of Island County
- 3 14. Department of Natural Resources
- 4 15. Facilities Department
- 5 16. General Services / Risk Management
- 6 17. Health Department
- 7 18. Human Resources Department
- 8 19. Human Services Department
- 9 20. Juvenile Court Services
- 10 21. LEOFF 1 Disability Board
- 11 22. Noxious Weed Control Board
- 12 23. Parks Department
- 13 24. Planning and Community Development
- 14 25. Public Works Department
- 15 26. Island County Sheriff
- 16 27. Island County Superior Court
- 17 28. Solid Waste Department
- 18 29. Island County Treasurer
- 19 30. WSU Cooperative Extension

20 In addition, we occasionally advise smaller boards and commissions.

21 The vast majority of the work performed by our Civil Division falls into one of five
22 categories:

- 23 1. Requests for Legal Advice (designated "Legal Assistance Requests")
- 24 2. Litigation
- 25 3. Pre-execution Contract Review
- 26 4. Public Records Response Reviews
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1 5. Code Reviser Review of proposed ordinances

2 “Legal Assistance Requests” may concern any aspect of the functioning of county
3 government—including, among other areas, taxation, elections, employment law, open government,
4 tort liability, real property and eminent domain, and land use regulation. Many requests are handled
5 informally with our clients, and we respond verbally or via informal e-mails. Such work does not
6 result in the issuance of a formal opinion, and is not consistently tracked in our case management
7 system. Requests for assistance that concern complex legal issues, or that concern scenarios likely
8 to reoccur, or for other reasons are deemed worthy of more formality, will be reduced to writing,
9 and answered via confidential attorney/client privileged memorandum.

10 Neither I nor my deputy prosecutors “bill” departments for our time, and therefore do not
11 keep track of our time spent working on a particular case, project or client request.

12 Between January, 2010 and June 20, 2015, the Prosecuting Attorney’s Office has responded
13 to 661 formal requests for legal assistance. A Civil Client Satisfaction Survey conducted in July of
14 2015 reveals that nearly 60% of responding civil clients are very satisfied with the services provided
15 by the Island County Prosecuting Attorney’s Office. Less than 4% are somewhat dissatisfied with
16 the services provided by the Island County Prosecuting Attorney’s Office. The survey was provided
17 to all elected officials and department heads, as well as “high level” employees who were identified
18 by department heads as personnel in their agencies who had directly used our services. A true copy
19 of the survey results is attached to this affidavit as Exhibit E.

20 Of the 661 formal requests for legal opinions, more than 10% have been in response to
21 requests by the Planning Department. The only two agencies who had a higher percentage of
22 requests were the Board of Island County Commissioners and the Island County Auditor (21% and
23 15%, respectively). Because of constraints on meeting with more than one member of the Board of
24 Commissioners, (2 members constitutes a quorum), we favor providing advice to all three
25 commissioners in writing, which partly accounts for their high percentage.

26 The Island County Department of Planning and Community Development (hereafter,
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1 "Planning Department") is responsible for land use regulation in Island County. Long range
2 planners in the department develop, draft, review and propose amendments to the county's growth
3 management comprehensive plan and the development regulations. Short range planners review
4 development applications for compliance with state and county land use and building regulations,
5 and make permitting decisions based on their review. Enforcement officers enforce the code
6 provisions through notices of violation and, when necessary, litigation.

7 The Prosecuting Attorney's Civil Division provides legal advice and representation to
8 support all aspects of the work of the Planning Department. My deputies and I take a holistic
9 approach to advising the Planning Department, which we are able to do because we are involved
10 with all of their duties. This Department consumes a significant amount of the Chief Civil Deputy's
11 time and the majority of my current "land use deputy's" time. Declarations from Mr. Mitchell and
12 Mr. Long that discuss their duties and client demand are attached to this affidavit as Exhibit F.

13 I carefully cultivated the knowledge, skill, and resources within my office to provide
14 consistent quality legal advice to the planning department. I took this step after considering the
15 troublesome and costly past of the County's handling of Growth Management Act planning and
16 litigation. I concluded that many of the problems were caused by the County's use of outside
17 counsel in the 1990s and early 2000s. The County spent nearly a million dollars on outside counsel
18 who, many years late, and after findings of non-compliance and invalidity, shepherded the adoption
19 of regulations that were riddled with problems, and, consequently challenged vigorously by
20 opponents.

21 When the last outside counsel severed his relationship with the County, my office was called
22 upon to defend some of his poorly drafted regulations. Our record of litigation was, admittedly
23 mixed. However, the failures were owing to regulations that were not supported by science, and by
24 risky decisions to push the boundaries of the GMA made at the urging of (or with the blessing of)
25 outside counsel. In spite of some of the risky decisions, and the additional effort required to get up
26 to speed on a large package of legislation that we were not involved in drafting—my office prevailed
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1 on many issues.

2 As an elected official, I am also directly accountable to the citizens for the expenditure of
3 taxpayer's dollars. Although I have no power to authorize budgets, I do request them and I am
4 responsible to spend the allocated funds frugally. Budgets in Island County have been spare since
5 I began my tenure. I am keenly aware of the fact that any department who engages in excessive
6 spending harms the ability of other county departments to perform their duties. Hiring outside
7 counsel who, on an hourly basis, often cost ten-fold what a deputy prosecutor costs should only be
8 undertaken when benefits of such counsel are justified by the huge costs.

9 Based upon this history, I resolved to keep GMA planning advice and litigation "in house."
10 Besides the preparation of a comprehensive plan and drafting development regulations, we also
11 advise and represent the planning department on permitting decisions and enforcement actions that
12 are based upon those regulations. Cultivating first-hand institutional knowledge of the creation of
13 the regulations is greatly beneficial in advising the department on their proper application.
14 Contracting out the legal work, on the other hand, diminishes that institutional knowledge.

15 I have taken steps to keep myself and my deputies up to date regarding the GMA and related
16 statutes. Since at least January, 2006, through January, 2015, I have authorized payment for
17 membership for a deputy prosecutor in the Washington State Bar Practice Sections – the
18 Environmental and Land Use Law Section. My civil deputies and I attend continuing legal
19 education regarding land use matters and the Growth Management Act on an annual basis, and
20 sometimes more frequently, as well as keeping abreast of new developments through webinars, and
21 discussions among land use deputy prosecutors the state.

22 These educational efforts are augmented by the knowledge gained while representing the
23 Planning Department in judicial and administrative lawsuits. Most of that litigation has been
24 concerned with the compliance of the county's comprehensive plan and development regulations
25 with the Growth Management Act. As a result, I can confidently say that my civil deputy
26 prosecutors have greater knowledge of Island County's land use code than any person anywhere.

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1 In the following cases, the Island County Prosecuting Attorney has represented Island County
2 and the Planning Department. In some cases, my office took over litigation from private counsel
3 who had been originally retained in 1995. In many others, including all of the cases begun after
4 2008, my office represented the County at the inception of the case. Most of the litigation involved
5 the Whidbey Environmental Action Network (WEAN), and began in front of the Western
6 Washington Growth Management Hearings Board (WWGMHB). As can be seen, several progressed
7 to the Superior Court and the Court of Appeals. The intensity of the litigation varied greatly, from
8 little more than a Notice of Appearance, followed by agreed resolution, to a case that began in 1998
9 and was just resolved this year. The list below is non-exhaustive, and is intended to show the Court
10 that the Civil Division of the Prosecuting Attorney's office has experience and expertise in dealing
11 with land use law and litigation. It is also intended to rebut the declarations to the contrary of Ms.
12 Drummond and recently-elected county commissioners, none of who have any factual bases for their
13 hyperbolic assertions.

- 14 1. WEAN v. Island County, WWGMHB 98-2-0023c (litigation resulting in over 25
15 published WWGMHB orders between March, 1999 and March, 2015; the Island
County Prosecutor's office represented Island County since 2005)
- 16 2. Island County v. WWGMHB, Island County Superior Court Cause Nos. 99-2-00334-
17 3 and 00-2-00757-9 (on review from WWGMHB No. 98-2-0023c)
- 18 3. WEAN v. Island County and WWGMHB, 112 Wn.App. 156 (2004)(*review denied*
153 Wn.2d 1025 (2005)).
- 19 4. WEAN v. Island County, WWGMHB No. 00-2-0001
- 20 5. WEAN v. Island County and WWGMHB, Island County Superior Court No. 01-2-
21 00829-8
- 22 6. WEAN v. Island County and Seattle Pacific University, WWGMHB No. 03-2-0008
- 23 7. WEAN v. Island County, WWGMHB No. 04-2-0012 (plaintiff WEAN withdrew
24 petition for review before decision on the merits)
- 25 8. WEAN v. Island County, WWGMHB No. 06-2-0010
- 26 9. WEAN v. Island County, WWGMHB No. 06-2-0012 and 06-2-0012c
- 27 10. WEAN v. Island County, WWGMHB No. 06-2-0023
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- 1 11. WEAN v. Island County, WWGMHB No. 06-2-0027
- 2 12. WEAN v. WWGMHB, Island County, et. al., Thurston County Superior Court No.
- 3 06-2-02026-7 (on review of WWGMHB 98-2-0023c)
- 4 13. WEAN v. Island County, WWGMHB No. 07-2-0001 (plaintiff WEAN withdrew
- 5 petition for review before decision on the merits)
- 6 14. Camano Action for a Rural Environment (CARE) and WEAN v. Island County,
- 7 WWGMHB No. 08-2-0026c
- 8 15. WEAN v. Island County, WWGMHB No. 08-2-0032
- 9 16. WEAN v. Island County, WWGMHB No. 12-2-0016
- 10 17. WEAN v. Island County, WWGMHB No. 14-2-0009
- 11 18. City of Oak Harbor v. Island County, WWGMHB No. 08-2-0022
- 12 19. City of Oak Harbor v. Island County, WWGMHB No. 10-2-0017
- 13 20. City of Oak Harbor v. Island County, WWGMHB No. 11-2-004
- 14 21. City of Oak Harbor v. Island County, WWGMHB No. 11-2-005
- 15 22. City of Oak Harbor v. Island County, Thurston County Superior Court Cause No. 12-
- 16 2-00032-5 (on review from City of Oak Harbor v. Island County, WWGMHB No.
- 17 08-2-0022)
- 18 23. Rebecca Spraitzar v. Island County, WWGMHB No. 08-2-0023 (challenge to
- 19 adequacy of public participation in adopting amendments to comprehensive plan)
- 20 24. Mitchell Streicher v. Island County, WWGMHB No. 08-2-0015 (challenged to
- 21 boundaries of designated non-municipal urban growth area)
- 22 25. Cameron-Woodard Homeowners Association v. Island County, WWGMHB No. 02-
- 23 2-0004
- 24 26. Cameron-Woodard Homeowners Association v. Island County, et. al., Snohomish
- 25 County Superior Court Cause No. 02-2-07677-5
- 26 27. David Braathen, et. al. v. Island County, WWGMHB No. 04-2-0001

27 In addition, my office has represented the County in other land use lawsuits, concerned with
28 the application of zoning and development regulations which were adopted as a part of the
comprehensive planning process. Examples of such lawsuits include:

1. Island County v. State of Washington and Community Council of Camano Island,
135 Wn.2d 141 (1998) (on direct review from Thurston County Superior Court)

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2. Island County v. Maria Keifer, Island County Superior Court Cause No. 05-2-00789-8 (nuisance abatement and injunction)
3. TR Camano, Inc., et al., v. Island County, et al., Skagit County Superior Court Cause No. 06-2-00129-2 (challenge by developer of interpretation by County of permitted uses in the Rural Village Zone)
4. TR Camano, Inc. v. Island County, Court of Appeals Docket No. 56692-0-I (July 31, 2006), on appeal from Skagit County Superior Court Cause No. 05-2-00179-1
5. TR Camano, Inc. v. Island County, Island County Superior Court Cause No. 04-2-00427-1
6. Lenz Enterprises, Inc. v. Island County, Washington Court of Appeals, Docket No. 60896-7-I (June 23, 2008)(unpublished) (unsuccessful challenge by landowner to zoning determination based on Comprehensive Plan)
7. Mutiny Bay Shores, et al. v. Island County, et al., Island County Superior Court Cause No. 10-2-00098-9 (Land Use Petition Act challenging SEPA DNS)
8. Maxwellton Farm, LLC v. Island County, Island County Superior Court 13-2-00763-5 (LUPA challenged to Planning's enforcement action)
9. John Shepard and Kimberly Shepard, Paula Spina and Crockett Farm, LLC v. Island County and James Moore and Sue Symons, Island County Superior Court Cause No. 13-2-01003-2 (LUPA action challenging zoning code interpretation)
10. PC Landing Corp. v. State of Washington, Department of Ecology, Island County and Snohomish Public Utility District No. 1, Shoreline Hearings Board No. S14-010 (LUPA action challenging zoning code interpretation)
11. Tulalip Tribes of Washington v. Washington Department of Ecology, Island County, and Public Utility District No. 1 of Snohomish County, Shoreline Hearings Board No. S14-011 (LUPA action challenging zoning code interpretation)
12. PC Landing Corp. and Tulalip Tribes of Washington v. State of Washington Department of Ecology, Island County, and Snohomish County Public Utility District No. 1, Shoreline Hearings Board No. S14-010c (Consolidated). (LUPA action challenging zoning code interpretation)
13. Jeanne Congdon v. Island County, Island County Superior Court Cause No. 14-2-00412-0 (LUPA challenge to permit denial)
14. John and Patricia Aydelotte v. Island County, Skagit County Superior Court Cause No. 08-2-00826-9 (LUPA challenging Planning Department Enforcement)
15. Ralph Ferguson and Ginette Danielson v. Island County, et al., Skagit County Superior Court Cause No. 09-2-01033-4 (LUPA challenging permit issued to neighbor)
16. Island County v. Jacquelyn L. Paul and Richard Paul, Island County Superior Court Cause No. 06-2-00521-4 (County zoning code enforcement)

1 17. Camano Senior Services v. Island County, Island County Superior Court Cause No.
2 05-2-00874-6 (LUPA challenging zoning code enforcement)

3 Throughout my tenure as Island County Prosecuting Attorney I have utilized the authority
4 granted to me by RCW 36.27.040 to appoint attorneys when my office has a conflict of interest, or
5 an apparent conflict of interest that could undermine public confidence in the office's objectivity.
6 I have also utilized this authority when my clients would benefit from the special deputy prosecuting
7 attorney and/or temporary prosecuting attorney's skills and knowledge. These appointments have
8 generally been given to deputy prosecuting attorneys from other counties or to the staff attorney of
9 the Washington Association of Prosecuting Attorneys. I utilize this pool of attorneys because of
10 their knowledge about county government and the various statutes that impact county government.
11 In most of these occasions, the legal work is performed by the special deputy prosecuting attorney
12 without additional charges to Island County.

13 Throughout my tenure as Island County Prosecuting Attorney I have consented to and/or
14 acquiesced to a number of contracts entered into by the Board of County Commissioners with
15 private attorneys. I agree to the employment of private counsel when my office lacks the necessary
16 expertise or resources to provide quality legal representation with respect to a legal task. I generally
17 make the determination that my office is unable to develop the necessary expertise in a reasonable
18 period of time, after consulting with my clients. Examples of outside counsel that have been
19 retained, with my consent, by the Board of County Commissioners includes:

- 20 1. **Tort Litigation.** Numerous insurance contracts with the Washington Counties Risk
21 Pool that require the Risk Pool to retain counsel to defend Island County and county
22 officers in tort litigation. Separate contracts for legal representation have been
23 signed at the request of the Washington Counties Risk Pool. *See, e.g.*, Resolution
24 C-82-99 employing Carney, Badley Smith and Spellman to represent Island County
25 Sheriff Deputy Hardcastle and provide legal defense in lawsuit filed in District
26 Court; Resolution C-88-99 employing Lee, Smart, Cook Martin & Patterson to
27 defend Island County Sheriff Deputies Meyer and Lindner.
- 28 2. **Labor Negotiations and Litigation.** Although the county uses a non-attorney labor
negotiator for most contract negotiations and dispute resolution short of formal
litigation, attorneys have been retained on a couple of occasions. *See, e.g.*,
Resolution C-93-06 employing Summit Law Group to Represent Sheriff Hawley in
arbitration with the Deputy Sheriff's Guild regarding a claim of wrongful
termination; Resolution C-84-14 to employ Summit Law Group, PLLC with respect

1 to labor agreement issues and negotiations with the Island County Deputy Sheriff's
2 Guild Criminal Division.

- 3 3. **Bond Counsel.** *See, e.g.,* Resolution C-26-00 employing Foster Pepper, PLLC;
4 Resolution C-21-05 employing Foster Pepper, PLLC; Resolution C-08-10 to employ
5 Foster Pepper, PLLC.
- 6 4. **Solid Waste.** *See, e.g.,* Resolution C-26-00 employing Foster Pepper, PLLC;
7 Resolution C-56-05 employing Foster Pepper, PLLC; Resolution C-86-07 employing
8 Foster Pepper, PLLC; Resolution C-77-08 employing Foster Pepper, PLLC;
9 Resolution C-78-08 employing Foster Pepper; Resolution C-129-08 employing
10 Foster Pepper, PLLC; Resolution C-45-10 to employ Foster Pepper, PLLC;
11 Resolution C-74-10 to employ Foster Pepper, PLLC; Resolution C-22-12 to employ
12 Foster Pepper, PLLC; Resolution C-72-14 to employ Foster Pepper, PLLC.
- 13 5. **Tidal Energy Projects and Water Issues.** *See, e.g.,* Resolution C-24-07 employing
14 Foster Pepper, PLLC regarding Federal Permitting of Tidal Energy Projects;
15 Resolution C-35-07 employing Foster Pepper, PLLC regarding Federal Permitting
16 of Tidal Energy Projects; Resolution C-01-10 to employ Foster Pepper, PLLC
17 regarding Washington State Water Pollution Revolving Fund Loan Agreements;
18 Resolution C-74-10 to employ Foster Pepper, PLLC regarding Financial, Solid
19 Waste, Storm Water Utility, Clean Water.
- 20 6. **Land Use.** Prior to my taking office in 1999, Island County contracted with Keith
21 Dearborn and Associates, and its successor firm, Dearborn and Moss, PLLC. I did
22 not oppose the renewal of contracts with Mr. Dearborn until 2005 or 2006, when my
23 office obtained the resources necessary to handle land use matters, and it became
24 clear to me that the costs of that firm outweighed any benefit received by the county.

25 On two occasions prior to 2015, the Island County Board of Commissioners entered into
26 contacts with attorneys over my objections and/or without my consent. *See* Resolution C-86-09,
27 hiring Jon Ostlund to assist in developing Standards for Public Defense; Resolution C-85-09,
28 employing Weed, Gafstra and Benson to review a Contract to Provide Services to Drug Court.
Because both contracts were for discrete tasks and for a very limited amount of time and/or money,
it did not make sense to take any legal steps to challenge them.

I believe that contracting with a private attorney to handle a specific litigation matter or to
complete a specific contract can, in certain circumstances, benefit the voters of Island County. I
have never contracted with a private attorney to provide general legal advice to one of my clients,
when I did not have a disqualifying conflict of interest. This is because, among other reasons, some
legal issues affect multiple clients, and the advice must be consistently provided across the entire
county enterprise. For example, in the areas of government transparency, my primary duty is to the

1 public and the law. All of my clients are perceived by the public generally to be "the County," and
2 they must act consistently across offices, and always in the public interest. I have found that some
3 private attorneys are more willing to acquiesce in their client's desire for secrecy when applying the
4 Public Records Act or the Open Meetings Act. In my experience, non-governmental lawyers tend
5 believe they owe their allegiance to their clients as individual persons, rather than to their clients
6 as public officials who must always act in the public interest. This tendency of private counsel,
7 when combined with the predilection of certain county officials to avoid public discussion of
8 matters that may be embarrassing or politically disadvantageous, results in the public being harmed
9 by violations of the State's sunshine laws. I have specific concerns about Ms. Drummond, and
10 statements she has made concerning the prospects for litigation over changes to the comprehensive
11 plan, and how she might interpret the Open Public Meetings Act for the Board.

12 My county clients benefit from the institutional and cultural attributes of my office, in the
13 consistency of the advice over time, and across clients. The voters benefit because they can discern
14 the principles by which I and my deputies perform our duties when they vote to choose the county's
15 attorney every four years.

16 Neither I nor my deputies have any conflict of interest or other disability that would prevent
17 us from ethically and competently advising and representing Island County in its mandated review
18 and update of its comprehensive plan and development regulations (hereafter "the 2016 Update").

19 I have consistently stated that my office is qualified, willing and able to provide the legal
20 services needed for the development of the 2016 Update. I have expressed my ability to provide the
21 legal services to the Board of Island County Commissioners, to the staff of the Planning Department,
22 and to the Island County Superior Court Judges. I have not ever made any statements to the contrary.

23 I did decline to assist David Wechner, the Director of Planning and Community
24 Development, in the drafting of a Request for Proposal for the hiring of outside counsel to advise
25 his department. Mr. Wechner made this verbal request for assistance on, or shortly after November
26 14, 2014. I explained my refusal by stating that hiring outside counsel would be illegal without my
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1 approval, and that I had not heard anything from the Board in the regard. I believe that I discussed
2 with him the county's past bad experience with hiring outside counsel (Keith Dearborn and
3 Associates) that began before my first term and continued until around 2005 or 2006. I am fairly
4 sure that I told him that I saw no need for outside counsel, because of the history and unnecessary
5 expense to the detriment of other county services of using outside counsel.

6 Around that time (I'm not sure if it was in the same conversation), Mr. Wechner asked if I
7 would prioritize resources in my civil division toward his department during the 2016 Periodic
8 Review of the Island County comprehensive plan and development regulations. I responded that
9 I would, and we discussed ways in which my office could be more responsive to his needs. I
10 believed that I had satisfied Mr. Wechner that my office could and would provide the advice and
11 representation, and the level of responsiveness that he desired. Mr. Wechner repeatedly told me and
12 my Chief Civil Deputy that he was satisfied with the advice and representation he received from our
13 office. He made clear to me that the request for special counsel to assist his department did not
14 come from him. Mr. Wechner recently resigned from employment at the County, indicating in an
15 email to me and other county officials that he had been asked to resign by the Board. No other
16 reason was given. It is baffling to me that such an action would be taken in the middle of the 2016
17 GMA review.

18 Sometime after our November 2014 discussion, Mr. Wechner asked me if I had talked to the
19 Board about hiring outside counsel, and I told him I had not. I also explained that no one from the
20 Board's office (nor the Budget Director, who often works as an adjunct to the Board) had contacted
21 me about hiring outside counsel, or concerns that they may have had with my office.

22 Presumably, he communicated to the Board my refusal to assist with a "Request for Proposal
23 to the Board," although I have no actual knowledge of that. I say this because on February 27, 2015,
24 I met with Island County Board of Commissioners Chair Price Johnson in her office, at her
25 invitation. She seemed to be aware of my opposition to hiring outside counsel.

26 During this meeting, Chair Helen Price Johnson discussed with me her desire to retain an
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1 attorney (my memory is unclear whether a specific lawyer was identified) to provide legal advice
2 and litigation representation with respect to the 2016 Growth Management Act update. This meeting
3 was the first time any member of the Board had indicated such a desire to me. As far as I know, at
4 that time there had been no explicit public statement by any Board member or other county official
5 indicating a plan to hire outside legal counsel for the 2016 Update. I have searched Board agendas
6 concerning both the Planning Department, and the budget meetings, and found no references prior
7 to March, 2015.

8 During the meeting, I learned from Chair Price Johnson that the Board had set aside money
9 in its 2014 budget (which was adopted in 2013) as well as in its 2015 budget to pay for outside legal
10 counsel. I discussed my concerns with Chair Price Johnson that the budgeting process that had been
11 used to accrue the funds to pay for private counsel was kept from public view. The concerns I raised
12 during my meeting with Chair Price Johnson were subsequently validated when no Board member
13 or board staff member was able to identify for me: (1) any public meeting at which the Board
14 discussed this appropriation; and (2) any 2014 or 2015 budget documents that specifically refer to
15 outside legal counsel for the Planning Department or Board.

16 During the meeting on February 27, 2105, Chair Price Johnson advised me that she hoped
17 to place additional money in the 2016 budget, to have a total appropriation of approximately
18 \$250,000 for outside legal help in the 2016 Update. Her stated justification for the plan to hire
19 outside legal counsel was that my office did not have adequate resources. I pointed out that the
20 Board controlled the resources that were allocated to my office, and that I disagreed with her
21 "assessment" that appeared to be based solely on her personal desire to have private counsel at her
22 disposal. Neither she nor any other Board member ever asked me if we were adequately staffed to
23 handle the work, or whether I needed additional budget allocations to hire more staff in order to
24 accommodate the demands of the 2016 Update. Chair Price Johnson could not tell me the basis for
25 her belief that my office was incapable of performing the necessary work.

26 I advised Chair Price Johnson that my office was ready, willing and able to advise the
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1 county, and specifically the Planning Department in all of its GMA work, including the 2016
2 Update. I also explained why I objected to the plan to hire outside counsel, identifying the same
3 reasons I had provided to Mr. Wechner. Finally, I expressed my opinion that, since I had no
4 disability from performing the work in my office, it would be illegal for the Board to contract with
5 outside counsel over my objection.

6 Subsequent to the February 27, 2015, meeting with Chair Price Johnson, I learned from a
7 county employee (I do not recall who) that there was an oblique reference to the hiring of outside
8 counsel made by a county commissioner at a meeting on March 3, 2015. I listened to the
9 "Commissioner Comments" section of the March 3, 2015 regular meeting of the Board. (Meeting
10 audio and/or video recordings are on the Island County web page.) That portion of Board meetings
11 is usually reserved for Board members to informally update the rest of the Board on their individual
12 activities outside of the County enterprise, and which are not itemized on the published agendas –
13 such as meetings with community groups, community events, ribbon-cuttings and the like. At the
14 "Commissioner Comments" time on March 3, 2015, Chair Price Johnson stated that an item would
15 be added to the following day's regular "work session" agenda of the County Budget Director which
16 would be a discussion of "legal support" for the comprehensive plan update and review. No mention
17 was made of hiring private counsel.

18 On the March 4, 2015 work session recording, the Budget Director can be heard stating that
19 an unnamed attorney had been interviewed for the purpose of contracting with the Board, and it
20 would be discussed with the Board the following Tuesday – March 10, 2015. There appears to be
21 no public record of the Board authorizing the Budget Director to interview outside counsel to advise
22 and represent the Planning Director. I do not recall when I learned of the off-agenda and
23 unpublicized discussions on March 3 and March 4, but believe it was on March 6, 2015.

24 My concern that the Board intended to pursue its illegal plan to hire a private attorney to
25 perform some of the core functions of my office, led me to write the memorandum dated March 9,
26 2015, to advise both of Island County's Superior Court judges of the Board's plans to hire outside
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1 counsel, and of my opposition to the plan. The Island County Superior Court judges waived the
2 attorney/client privilege and my confidential work product, in an April 20, 2015, letter from the
3 judges to the Board of Island County Commissioners. The judges appended my memorandum to
4 their letter. The April 20, letter, with a copy of my memorandum, is attached as Exhibit G. My
5 March 9, 2015, memorandum is significantly less comprehensive than the legal analysis contained
6 in my Amended Motion for Summary Judgment.

7 Sometime between February 27, 2015, and March 10, 2015, I learned from a source I do not
8 recall (but I am certain it was not from any member of the Board or their office staff) that the Board
9 had identified Susan Drummond as the attorney they intended to contract with. I know this because
10 on March 11, 2015, I met with Commissioner Hannold to discuss the Board's plan to hire
11 Drummond.

12 At that meeting I advised him of my continued opposition to their plan (which had been
13 expressed in an earlier memo) but I indicated that I would reach out to Ms. Drummond, and seek
14 to meet with her. My intent was to consider whether I would want to hire her as a contract attorney,
15 and appoint her as a special deputy to work with my office.

16 I met with Ms. Drummond on March 18, 2015, at 9:00 a.m. in my office. Although the
17 discussion did not focus on the machinations of the commissioners, or their intent, it was clear to
18 me that she understood that they intended to hire her. It did not appear to me that she was authorized
19 to speak on behalf of the Board, or provide me notice of the Board's intent.

20 I found Ms. Drummond to be professional and knowledgeable of the GMA in general, but
21 that she had little experience in Island County, and scant understanding of the myriad interests and
22 forces that come into play whenever land use regulations are debated in our unique county. At our
23 meeting, it appeared that Ms. Drummond was unaware of pending GMA litigation in which my
24 office was currently representing the county. In my assessment, she was naïve when it came to
25 appreciating the complex, and sometimes nasty, politics in Island County. (In a subsequent meeting,
26 after Ms. Drummond had been hired, she expressed shock and surprise to me at the behavior of the
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1 county commissioners she had witnessed at her first meeting with them.)

2 As far as her experience with land use in Island County, Ms. Drummond did once
3 unsuccessfully represent the City of Oak Harbor in litigation against Island County concerning
4 aspects of the County's planning process. My office represented Island County in that litigation.
5 A true copy of the Thurston County Superior Court's order in City of Oak Harbor v. WWGMHB and
6 Island County, Cause No. 12-2-00032-5, is attached to this affidavit as Exhibit H. The arguments
7 made by my office on behalf of Island County carried the day on every one of the thirty-odd
8 assignments of error Ms. Drummond raised in her appeal.

9 While Ms. Drummond appeared to be otherwise competent, professional and personable,
10 I could see no benefit to my clients or the people of Island County to needlessly spend money on
11 private counsel to do a job my deputies were equally capable of performing, and for which they were
12 already being paid. The milieu of personalities, politics and the past are as important in representing
13 this geographically unique county, as are legal knowledge and skill. In addition, Ms. Drummond's
14 ability to perform the proposed legal tasks could be limited by her duty of loyalty to her former
15 client, the City of Oak Harbor. I was also concerned that her naiveté at dealing with a volatile Board
16 controlled by two very strong personalities would not serve the County well.

17 I ultimately decided that I would not engage Ms. Drummond, or appoint her as a special
18 deputy prosecutor. My decision was formed, in large part, on my office's ability to perform the
19 duties at a much lower cost. My current "land use deputy" prosecutor, Adam Long, earns
20 approximately \$56,000 per year, and costs the county, with benefits, approximately \$83,000. He is
21 a salaried, full time employee who works in county offices in Coupeville. He nominally works 2080
22 hours per year, but, because he is exempt from overtime rules, he can, and often does, work more
23 than 40 hours per week at no additional cost to the county. In addition to representing the Planning
24 Department, he responds to numerous other demands for legal services. In particular, he reviews
25 county contracts, and public records responses. In other words, he is available to provide
26 substantially more legal services to county clients than Ms. Drummond can, and for significantly
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1 less cost. The \$250,000 allocated for Ms. Drummond, could pay Mr. Long's salary and benefits for
2 approximately three years.

3 On March 18, 2015, I met with the Board in a public session. At that meeting, each Board
4 member made clear his or her desire to hire Ms. Drummond, notwithstanding my advice to them
5 that such action would be unlawful, wasteful of taxpayer dollars, and strategically a mistake based
6 on the county's past debacle of having a private attorney do the work of its planning department and
7 my office in the late 1990s and early 2000s. I gave the Board clear notice of my intention to
8 challenge the authority of any person, who is hired to do the work of the Island County Prosecuting
9 Attorney, through an action to oust the usurper. In fact, one commissioner asked me if I planned
10 to sue the County, and I explained, as I had in my memorandum to them, that the quo warranto suit
11 would be against the hired attorney. My desire was to avoid being an opposing party in litigation to
12 my client, the Board.

13 Despite my decision not to appoint or retain Ms. Drummond, on April 28, 2015, the Board
14 of Island County Commissioners and Susan Drummond executed a contract for provision of legal
15 services. I did not, and do not, approve that contract. A true copy of the Board resolution authorizing
16 the contract, and the contract are attached as Exhibit I.

17 On April 20, 2015, both Judges of the Island County Superior Court jointly approved of the
18 contract, and included a letter setting forth their legal and policy reasons for doing so. The judges'
19 letter included as an attachment my March 9, 2015 confidential memo to them. As noted above, the
20 judges' letter and my memo are attached as Exhibit G.

21 Ms. Drummond has been advising the Board and the Planning Department since shortly after
22 the contract was executed. She has participated in closed executive sessions, at the invitation of the
23 Board, along with my deputy prosecutors, to discuss litigation that was pending before Ms.
24 Drummond was hired. My deputies have been, and continue to be the attorneys of record, in that
25 litigation. My deputies and I continue to provide legal advice and legal representation to the Board
26 of Island County Commissioners on a variety of legal issues.

1 Ms. Drummond has occasionally (though irregularly) contacted me and my deputies to
2 inform my office of the legal advice and services she has been providing to the Board. While I have
3 reviewed some of her updates, I have made clear to Ms. Drummond that my position is she lacks the
4 authority to perform the core functions of my office and that she is rendering the services without
5 my approval or authorization. I am quite sure that I explicitly told her that, given my position
6 regarding the Board's authority to hire her, we would not turn her away, but it would be very
7 difficult for us to work collaboratively with her. Neither I nor my deputies have collaborated or
8 coordinated, to any significant degree, with Ms. Drummond in the performance of legal services.
9 Neither I nor my deputies have shared our work product directly with Ms. Drummond.

10 Our meetings with Ms. Drummond have been awkward, because we were concerned they
11 were established solely for the strategic purpose of fabricating some sort of estoppel defense to this
12 litigation. The participation of my deputies and me in meetings with Ms. Drummond was "muted"
13 to say the least. On the other hand, at executive sessions at which Ms. Drummond was present at
14 the Board's invitation, my deputies have advised our clients, notwithstanding Ms. Drummond's
15 presence, because we must put that duty first. Of necessity, in that circumstance, they have engaged
16 in some discussion with her, in deference to our duty to represent our client. Those necessary
17 interactions do not in any way constitute consent to or ratification of the illegal hiring of Ms.
18 Drummond. My opposition to her unlawfully performing the duties of the elected prosecutor has
19 been steadfast and continuous

20 I filed the instant quo warranto action on August 12, 2015. I did not take this step lightly.
21 My decision was preceded by a review of ethics treatises, opinions, and rulings as to the
22 implications of filing a quo warranto action against Ms. Drummond. I ultimately determined that,
23 as a matter of law, my disagreement with the Board over the retention of Ms. Drummond to perform
24 legal services that the voters elected me to provide does not create a conflict that would support my
25 replacement pursuant to RCW 36.27.030. *See, e.g., In re Thomas, et al.*, No. PDJ-2011-9002, slip
26 op. at 30-40 (Ariz. Disciplinary Judge Apr. 10, 2012) (available at
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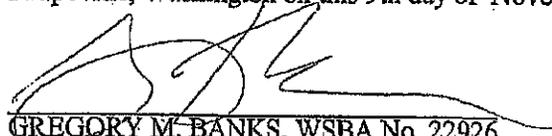
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<http://www.azcentral.com/ic/news/0410Thomas-Aubuchon.PDF>, last visited July 17, 2015).

All attached exhibits are incorporated by reference in this affidavit.

I certify (or declare) under penalty of perjury of the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge and belief.

So certified at Coupeville, Washington on this 9th day of November, 2015.


GREGORY M. BANKS, WSBA No. 22926
Island County Prosecuting Attorney

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EXHIBIT A
CERTIFICATE OF ELECTION

EXHIBIT A TO AFFIDAVIT OF GREGORY M. BANKS IN SUPPORT
OF PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363

STATE OF WASHINGTON
ISLAND COUNTY

CERTIFICATE OF ELECTION

I, *Sheilah Crider*, Auditor in and for Island County, Washington, do hereby certify that,
at an Election held in said County on the 4th day of November, A.D. 2014,

Greg Banks

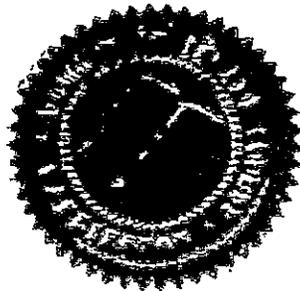
was elected to the office of

Island County Prosecuting

Attorney

in and for

Island County



as appears from the official canvass of the returns of
said County now on file and of record in this office.

IN WITNESS WHEREOF, I have hereunto set my hand
and affixed my official seal this 15th day of December,
A.D. 2014

Sheilah Crider

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EXHIBIT B
OATH OF OFFICE

EXHIBIT B TO AFFIDAVIT OF GREGORY M. BANKS IN SUPPORT
OF PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363

NOTICE OF ELECTION AND OATH OF OFFICE

STATE OF WASHINGTON,
Island County } ss.

NOTICE OF ELECTION

To: Greg Banks

Island County, Washington

12/23/2014 02:21:37 PM 4370577
Recording Fee \$0.00 Page 1 of 1
Oath Of Office
Island County Washington



DEAR SIR/MADAM:

You are hereby notified that you received the highest number of votes cast for the office of

ISLAND COUNTY PROSECUTING ATTORNEY

at the Election held in the above County and State, on the 4th day of November, 2014, and are given a Certificate of Election on taking oath of office below.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 15th day of December, 2014.

Sheilah Crider, County Auditor
or any other person empowered to administer oaths

STATE OF WASHINGTON,
Island County } ss.

OATH OF OFFICE

I, GREG BANKS do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Washington, and that I will faithfully and impartially perform and discharge the duties of the office of

ISLAND COUNTY PROSECUTING ATTORNEY

according to the law, to the best of my ability.

Subscribed and sworn to before me this 23 day of Dec., 2014.

Judge
Sheilah Crider, County Auditor
or any other person empowered to administer oaths.

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EXHIBIT C
PUBLIC OFFICIAL BOND

EXHIBIT C TO AFFIDAVIT OF GREGORY M. BANKS IN SUPPORT
OF PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363



Liberty Mutual Surety
1001 4th Avenue, Suite 1700
Seattle, WA 98164

PUBLIC OFFICIAL BOND

Bond Number: 325202951 (5978289)

KNOW ALL MEN BY THESE PRESENTS, That we, GREGORY M BANKS
of COUPEVILLE in the State of
WASHINGTON as Principal, and American States Insurance Company, a corporation duly
organized and existing under and by virtue of the Laws of the State of Indiana, and authorized to become surety on
bonds in the State of Washington, as Surety, are held and firmly bound unto ISLAND
COUNTY, WA

In the State of _____
in the full and just sum of Five Thousand Dollars And Zero Cents
(\$ 5,000.00) Dollars lawful money of the United States, for
payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and
assigns, jointly and severally, firmly by these presents.

SIGNED AND SEALED this 7TH day of NOVEMBER A.D. 2014

WHEREAS, the said GREGORY M BANKS
has been duly elected or appointed to the office of PROSECUTING ATTORNEY
for a term beginning on the 1ST day of JANUARY, 2015, and
ending on the 1ST day of JANUARY, 2016.

NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the above principal
shall, during the aforesaid term, faithfully and truly perform all the duties of said office as required by law, then this
obligation to be void, otherwise to be and remain in full force and virtue.

IN WITNESS WHEREOF, the said Principal has hereunto set his hand and the said American States Insurance
Company has caused these presents to be signed by its Attorney-in-Fact, the day and year first above
written.

James Wallace
WITNESS

GREGORY M BANKS
PRINCIPAL



American States Insurance Company
JOANN ECKMAN
ATTORNEY-IN-FACT

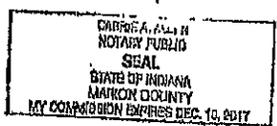
STATE OF INDIANA
COUNTY OF MARION

SS.:

Before me, this 7TH day of NOVEMBER A.D., 2014
personally appeared the said JOANN ECKMAN, to me known
and known to me to be the individual described in and who executed the foregoing bond, and he acknowledged to me
that She executed the same.

Colbie Adler
Notary Signature

9-1015
(3-89)
S-4985/AS 9/99



XDP

THIS POWER OF ATTORNEY IS NOT VALID UNLESS IT IS PRINTED ON RED BACKGROUND.

This Power of Attorney limits the acts of those named hereth, and they have no authority to bind the Company except in the manner and to the extent hereth stated.

**AMERICAN STATES INSURANCE COMPANY
INDIANAPOLIS, INDIANA
POWER OF ATTORNEY**

6750328

KNOW ALL PERSONS BY THESE PRESENTS That American States Insurance Company (the "Company"), an Indiana stock insurance company, pursuant to and by authority of the By-Laws and Authorization hereinafter set forth, does hereby name, constitute and appoint
Almae Hanks; Betty Mitchell; Caroline Nichols; Carrie A. Allen; Cynthia Stallman; Deborah L. Manox; Janny Ford; Joann Belman; Jim Jones; Melba Satterfield; Nicole Roth; Patricia M. Walker; Sally J. Finkel; Sandy Gullmer; Shanel Bready; Shannan Fickett; Sherri Smith; Tammy Henderson; Valorie Williams

all of the City of Indianapolis, State of IN, each individually (hereinafter referred to as "attorneys-in-fact") to make, execute, seal, acknowledge and deliver to and on the behalf as aforesaid, any and all undertakings, bonds, recognizances and other surety and the execution of such undertakings, bonds, recognizances and other surety obligations, in pursuance of these presents, shall be as binding upon the Company as if they had been designed by the President and attested by the Secretary of the Company in their own proper persons.

That this power is made and executed pursuant to and by authority of the following By-Laws and Authorization:

ARTICLE IV, Section 12, Power of Attorney

Any officer or other official of the Corporation authorized for that purpose in writing by the Chairman or the President, and subject to such limitations as the Chairman or the President may prescribe, shall appoint such attorneys-in-fact as may be necessary for and in behalf of the Corporation to make, execute, seal, acknowledge and deliver as aforesaid any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact, subject to the limitations set forth in this (respective) power of attorney, shall have full power to bind the Corporation by their signature and execute such instruments shall be as binding as if signed by the President and attested by the Secretary.

By the following instrument the Chairman of the President has authorized the officer or other official named therein to appoint attorneys-in-fact:

Pursuant to Article IV, Section 12 of the By-Laws, David M. Carey, Assistant Secretary of American States Insurance Company, is authorized to appoint such attorneys-in-fact as may be necessary to act in behalf of the Corporation to make, execute, seal, acknowledge and deliver as aforesaid any and all undertakings, bonds, recognizances and other surety obligations.

IN WITNESS WHEREOF, this Power of Attorney has been subscribed by an authorized officer or official of this Corporation and the corporate seal of American States Insurance Company has been affixed hereon in Plymouth Meeting, Pennsylvania this 21st day of October, 2012.



AMERICAN STATES INSURANCE COMPANY

By *David M. Carey*
David M. Carey, Assistant Secretary

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF MONTGOMERY

On this 21st day of October, 2012, before me, a Notary Public, personally came David M. Carey, to me known, and acknowledged that he is an Assistant Secretary of American States Insurance Company; that he knows the seal of said corporation, and that he executes the above Power of Attorney and affixed the corporate seal of American States Insurance Company thereto with the authority and at the direction of said Corporation.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my notarial seal at Plymouth Meeting, Pennsylvania, on the day and year first above written.



COMMONWEALTH OF PENNSYLVANIA
Notary Public
Theresa Hatella, Notary Public
Plymouth Meeting, Montgomery County
My Commission Expires March 20, 2017

By *Theresa Hatella*
Theresa Hatella, Notary Public

CERTIFICATE

I, Gregory W. Davenport, the undersigned, Assistant Secretary of American States Insurance Company, do hereby certify that the original power of attorney of which the foregoing is a full, true and exact copy, is in full force and effect on the date of this had (made), and I do further certify that the officer or official who executed the said power of attorney is an officer specially authorized by the Chairman or the President to appoint attorneys-in-fact as provided in Article IV, Section 12 of the By-Laws of American States Insurance Company.

This certificate and the above power of attorney may be signed by (a) similar or mechanically reproduced signatures under and by authority of the following vote of the Board of Directors of American States Insurance Company at a meeting duly called and held on the 18th day of September, 2009:

VOTED that the facsimile or mechanically reproduced signature of any assistant secretary of the company, wherever appearing upon a certified copy of any power of attorney issued by the company in connection with surety bonds, shall be valid and binding upon the company with the same force and effect as though manually affixed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said company, this 7th day of November, 2012.



By *Gregory W. Davenport*
Gregory W. Davenport, Assistant Secretary

Net valid for mortgage, note, loan, letter of credit, currency rate, interest rate or residual value guarantees.

To confirm the validity of this Power of Attorney call 1-810-852-6240, M-F 9:00 am - 4:30 pm EST, or any business day.

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EXHIBIT D
CERTIFICATE OF GOOD STANDING

EXHIBIT D TO AFFIDAVIT OF GREGORY M. BANKS IN SUPPORT
OF PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363

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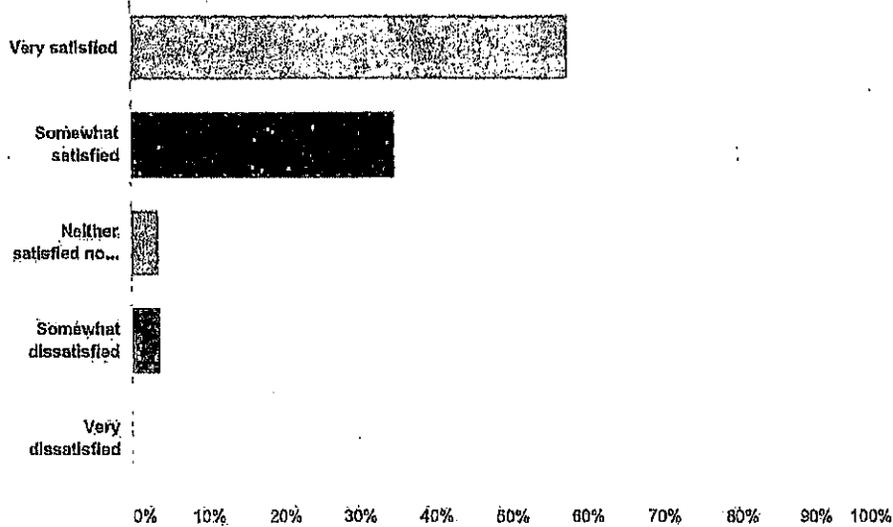
EXHIBIT E
ISLAND COUNTY PROSECUTING ATTORNEY
CIVIL CLIENT SATISFACTION SURVEY RESULTS

EXHIBIT E TO AFFIDAVIT OF GREGORY M. BANKS IN SUPPORT
OF PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363

Q1 Overall, how satisfied or dissatisfied are you with our office?

Answered: 26 Skipped: 0

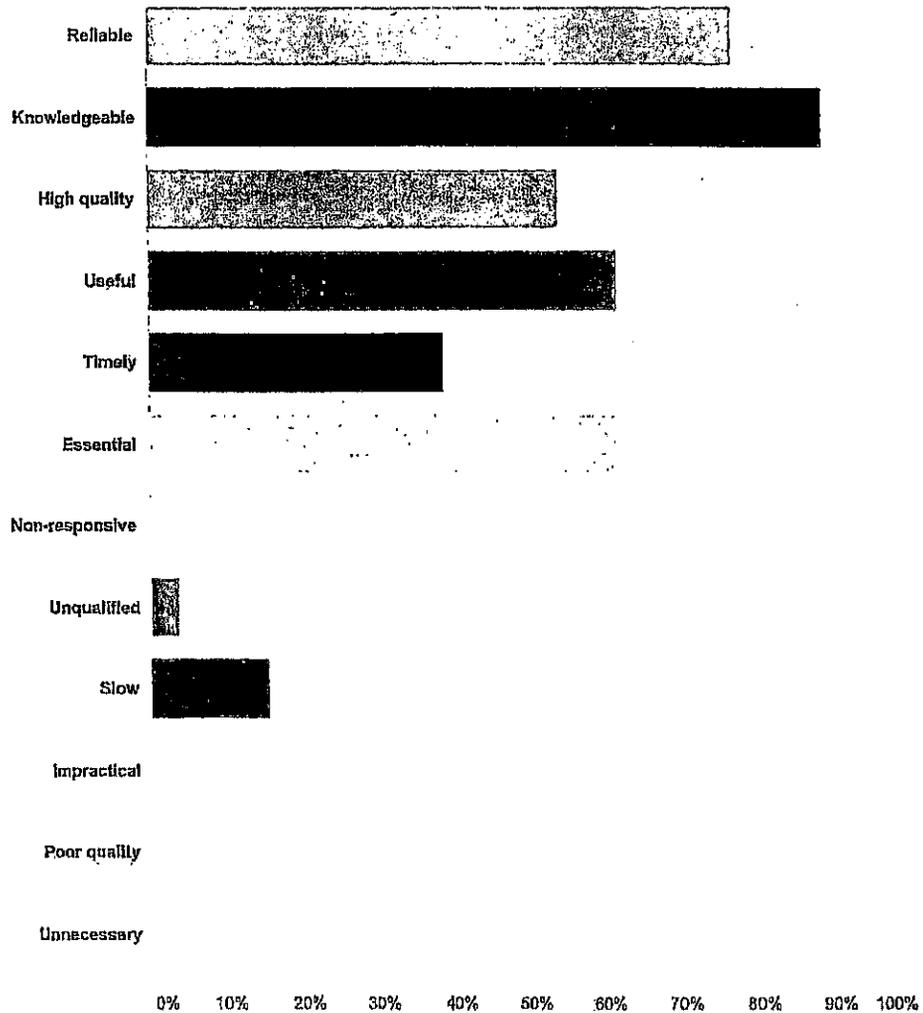


Answer Choices	Responses	
Very satisfied	57.69%	15
Somewhat satisfied	34.62%	9
Neither satisfied nor dissatisfied	3.85%	1
Somewhat dissatisfied	3.85%	1
Very dissatisfied	0.00%	0
Total		26

#	Additional Comments	Date
1	Professional, available and always useful	7/15/2015 11:29 AM
2	All in all I feel that we are receiving adequate legal assistance. Thank you for the opportunity.	7/15/2015 11:10 AM
3	Timely review of contracts/ some LARs has been the only fault I find in service from legal.	7/6/2015 12:04 PM
4	I work with Patti & Dan most often, and am thankful for their knowledge and accessibility when I am in need to advise/review questions addressed.	7/6/2015 11:31 AM
5	Generally I am very satisfied with the service we receive from the PA's office; however additional funding and resources would improve both the quality and availability of service.	7/6/2015 11:03 AM
6	I have never had a bad interaction with anyone in your office. Very helpful people.	7/6/2015 11:00 AM

Q2 Which of the following words would you use to describe our services? Select all that apply.

Answered: 26 Skipped: 0



Answer Choices	Responses	Count
Reliable	76.92%	20
Knowledgeable	88.46%	23
High quality	53.85%	14
Useful	61.54%	16
Timely	38.46%	10
Essential	61.54%	16

Island County Prosecuting Attorney - Civil Client Satisfaction Survey

SurveyMonkey

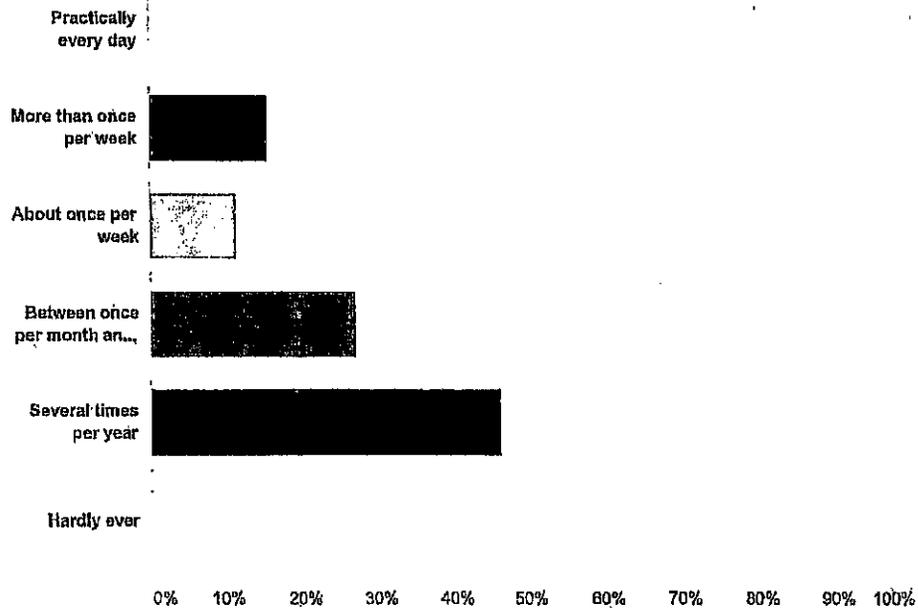
Non-responsive	0.00%	0
Unqualified	3.85%	1
Slow	15.38%	4
Impractical	0.00%	0
Poor quality	0.00%	0
Unnecessary	0.00%	0

Total Respondents: 26

#	Other (please specify)	Date
1	Degree of problem-solving has increased in the past year. This aspect of legal services is key to us making good decisions within the scope of authority provided by County code, state law and consistent with case law.	7/6/2015 12:04 PM
2	I send MANY contracts for review. When needed by a certain date your office has ALWAYS accommodated that. However, I try not to ask too often.	7/6/2015 11:31 AM
3	Sometimes contract review gets bogged down and it seems like simple changes take a long time. I don't think that's your fault though. Either process needs to change or need more people reviewing contracts..	7/6/2015 11:10 AM
4	I have sometimes found the contract review process a bit onerous.	7/6/2015 11:00 AM
5	Always available when I have questions.	7/6/2015 10:58 AM

Q3 How frequently does your office consult with us for advice or litigation representation?

Answered: 26 Skipped: 0



Answer Choices

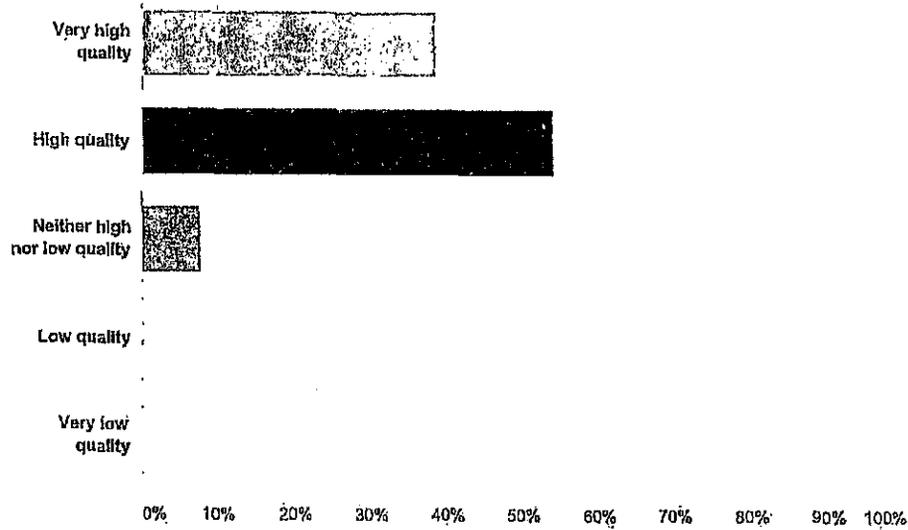
Responses

Practically every day	0.00%	0
More than once per week	15.38%	4
About once per week	11.54%	3
Between once per month and once per week	26.92%	7
Several times per year	46.15%	12
Hardly ever	0.00%	0
Total		26

#	Additional Comments	Date
1	1/ week avg., more frequently when certain issues arise - and more so in the past few months as we gear up for Comp Plan and code changes.	7/6/2016 12:04 PM
2	With 80 contracts/amendments on average annually, I simply averaged and selected "more than once per week".	7/6/2016 11:31 AM
3	3-4 times a year	7/6/2016 10:58 AM

Q4 How would you rate the quality of our services?

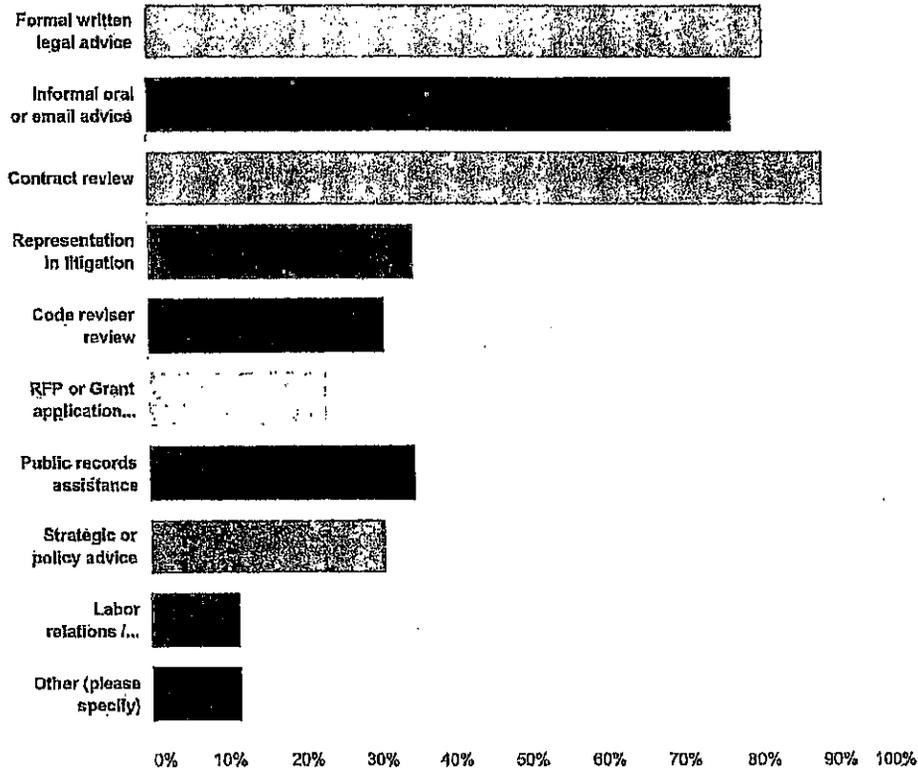
Answered: 25 Skipped: 0



Answer Choices	Responses	Count
Very high quality	38.46%	10
High quality	53.85%	14
Neither high nor low quality	7.69%	2
Low quality	0.00%	0
Very low quality	0.00%	0
Total		26

**Q5 What types of services have we provided to you during the past 12 months?
(Check all that apply)**

Answered: 26 Skipped: 0



Answer Choices	Responses	Count
Formal written legal advice	80.77%	21
Informal oral or email advice	76.92%	20
Contract review	88.46%	23
Representation in litigation	34.62%	9
Code reviewer review	30.77%	8
RFP or Grant application review	23.08%	6
Public records assistance	34.62%	9
Strategic or policy advice	30.77%	8
Labor relations / personnel	11.54%	3
Other (please specify)	11.54%	3

Total Respondents: 26

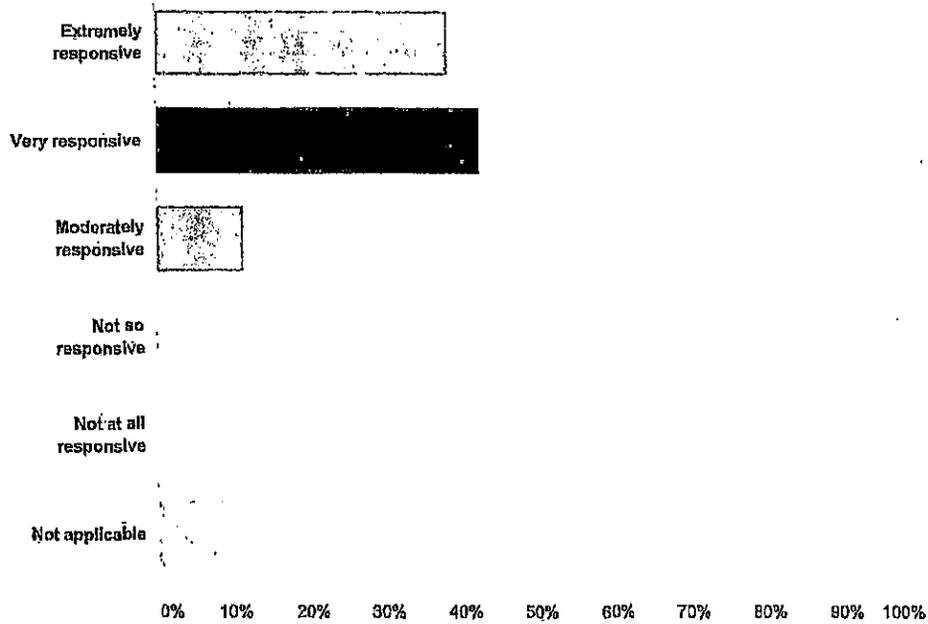
Island County Prosecuting Attorney - Civil Client Satisfaction Survey

SurveyMonkey

#	Other (please specify)	Date
1	Ballot Title Preparation	7/15/2015 10:38 AM
2	I was under the Impression informal oral or email advice was not allowed	7/14/2015 2:25 PM
3	Anything Election Related	7/8/2015 11:25 AM

Q6 How responsive have we been to your questions or concerns about our services?

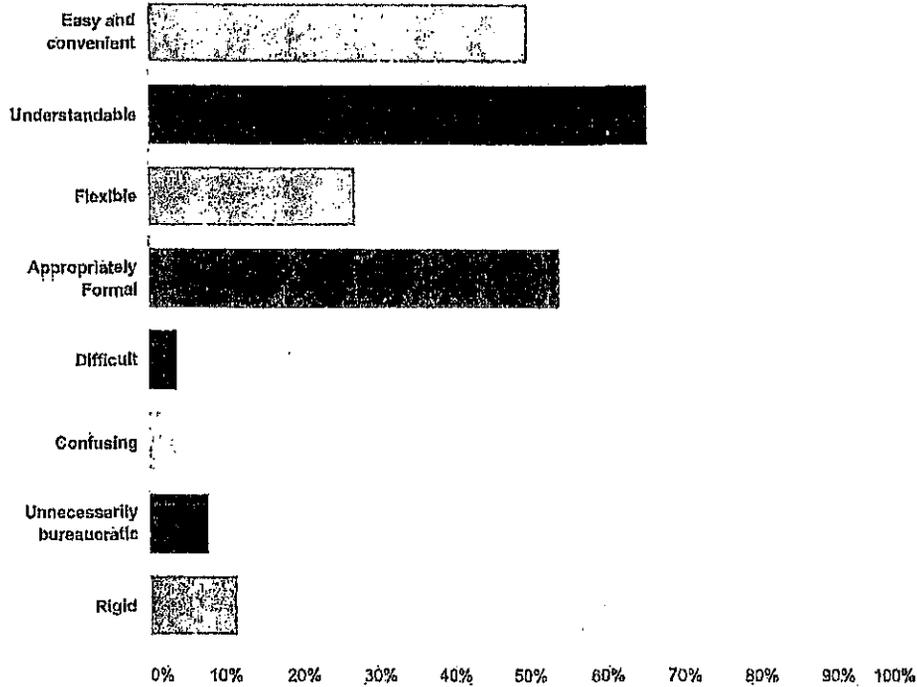
Answered: 26 Skipped: 0



Answer Choices	Responses	Count
Extremely responsive	38.46%	10
Very responsive	42.31%	11
Moderately responsive	11.54%	3
Not so responsive	0.00%	0
Not at all responsive	0.00%	0
Not applicable	7.69%	2
Total		26

Q7 What words would you use to describe the process for obtaining advice or representation services? (Select all that apply)

Answered: 26 Skipped: 0



Answer Choices	Responses	
Easy and convenient	50.00%	13
Understandable	65.38%	17
Flexible	26.92%	7
Appropriately Formal	53.85%	14
Difficult	3.85%	1
Confusing	3.85%	1
Unnecessarily bureaucratic	7.69%	2
Rigid	11.54%	3

Total Respondents: 26

#	Other (please specify)	Date
1	We need to move away from paper for contract review and stop using human carriers	7/6/2015 2:21 PM

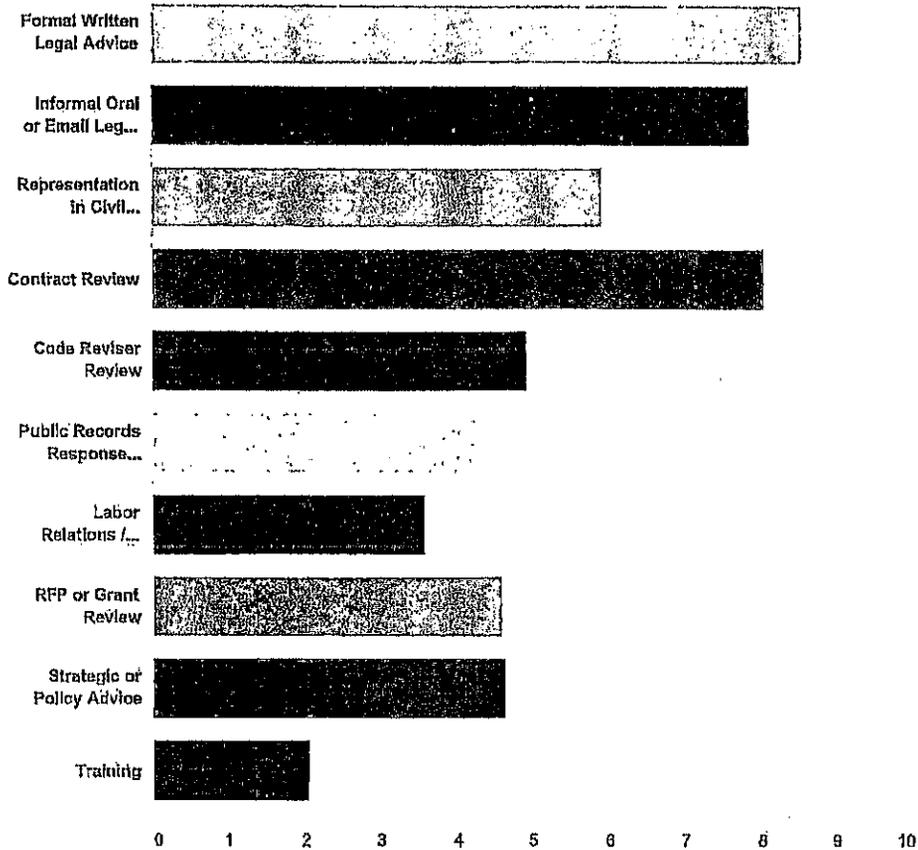
Island County Prosecuting Attorney - Civil Client Satisfaction Survey

SurveyMonkey

2	Access to legal services (civil division) via telephone has been much easier since new Chief Deputy took over. Staff is more approachable on a phone-call basis than before. Would appreciate more involvement from legal staff on contracts for services at the outset of forming the contract, rather than responding to a 'finished work' from department staff. Recommend a regular service contract format - established by the PA's office in conjunction with Risk Mgmt.	7/6/2015 12:04 PM
3	This response is primarily for the contract review process as it is the service I most utilize.	7/6/2015 11:31 AM
4	Obtaining informal advice and assistance is easy and convenient. The requirement to obtain BOCC authorization for formal LAR's and written advice seems overly time consuming and bureaucratic and should be reconsidered. Perhaps it would be enough to have LAR's authorized by department heads.	7/6/2015 11:03 AM

Q8 Please rank, in order of importance to your department, the services that we provide.

Answered: 25 Skipped: 1



	1	2	3	4	5	6	7	8	9	10	Total	Score
Formal Written Legal Advice	28.00%	36.00%	12.00%	12.00%	12.00%	0.00%	0.00%	0.00%	0.00%	0.00%	25	8.56
Informal Oral or Email Legal Advice	12.00%	24.00%	32.00%	12.00%	12.00%	4.00%	4.00%	0.00%	0.00%	0.00%	25	7.84
Representation in Civil Litigation	8.00%	12.00%	12.00%	16.00%	8.00%	12.00%	16.00%	0.00%	8.00%	8.00%	25	5.92
Contract Review	36.00%	8.00%	16.00%	20.00%	12.00%	4.00%	0.00%	4.00%	0.00%	0.00%	25	8.04
Code Reviser Review	4.00%	4.00%	0.00%	16.00%	24.00%	12.00%	8.00%	16.00%	4.00%	12.00%	25	4.92
Public Records Response Assistance	4.00%	0.00%	8.00%	16.00%	4.00%	24.00%	12.00%	16.00%	16.00%	0.00%	25	4.88
Labor Relations / Personnel	0.00%	4.00%	4.00%	4.00%	0.00%	16.00%	24.00%	12.00%	12.00%	24.00%	25	3.56

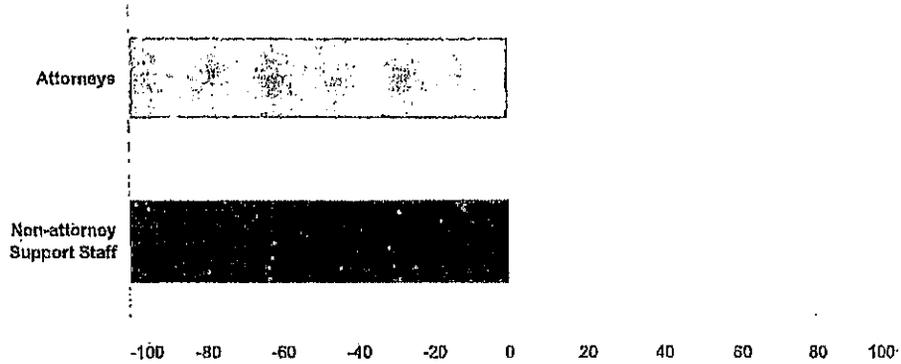
Island County Prosecuting Attorney - Civil Client Satisfaction Survey

SurveyMonkey

RFP or Grant Review	4.00%	8.00%	4.00%	0.00%	16.00%	12.00%	16.00%	20.00%	16.00%	4.00%	25	4.60
	1	2	1	0	4	3	4	5	4	1		
Strategic or Policy Advice	4.00%	4.00%	12.00%	4.00%	8.00%	12.00%	12.00%	20.00%	24.00%	8.00%	25	4.64
	1	1	3	1	2	3	3	5	6	0		
Training	0.00%	0.00%	0.00%	0.00%	4.00%	4.00%	8.00%	12.00%	20.00%	52.00%	25	2.04
	0	0	0	0	1	1	2	3	5	13		

Q9 Rate the adequacy of our staffing levels to meet your legal service needs.

Answered: 26 Skipped: 0



	Totally Inadequate - 0	1	2	3	Way More Than Required - 4	Total	Weighted Average
Attorneys	0.00% 0	8.00% 2	32.00% 8	56.00% 14	4.00% 1	25	-100.00
Non-attorney Support Staff	0.00% 0	12.00% 3	28.00% 7	44.00% 11	16.00% 4	25	-100.00

#	Comments / Suggestions	Date
1	Duplicate Patty. She is amazing.	7/16/2015 2:06 PM
2	I would have to believe that contract review time is limited by the number of attorneys and legal support that you have available at any given time. At times this process seems lengthy.	7/16/2015 11:10 AM
3	Two staff attorneys and one legal assistant are very busy - given the 'civil' issues in this County, an additional staff person seems needed to provide more timely response and allow attorneys more time to complete individual tasks.	7/6/2015 12:04 PM
4	I strive to understand the work I do and how it relates and affects other departments. I am aware that higher staffing levels throughout the county could help all of us, but even with resources the way they are, your department always supports our needs, and that is greatly appreciated!	7/6/2015 11:31 AM
5	Both the contract review and code reviewer review processes seem to take longer than they should. I don't know enough about how your office operates to know whether additional attorneys or support staff are needed, but I suspect that more of both would help.	7/6/2015 11:03 AM
6	Appreciate everything everyone does to help us.	7/6/2015 10:58 AM
7	I do not have a framework of reference to know if your office is adequately staffed. Contract review seems to take too long; maybe I just need to shorten up the "expected" date on my requests, but frequently it takes me 3 - 4 weeks (including resubmittals) to get a contract reviewed.	7/8/2015 10:54 AM

Q10 Do you have any other comments, questions, or suggestions to improve our services?

Answered: 11 Skipped: 15

#	Responses	Date
1	Keep up the good work. I find it very easy to work with this office and appreciate their service.	7/16/2015 10:55 AM
2	Prosecutors Office is an essential and vital part of our local government as it serves the community	7/15/2015 11:29 AM
3	Are you considering moving toward some form of electronic review process?	7/15/2015 11:10 AM
4	I was unaware training was something your office would provide. Advice that we cannot use publicly defeats the purpose of advice. I do not believe all documents/advice should be confidential. It defeats the purpose in many cases, making the receiving office spend time paraphrasing.	7/14/2015 2:25 PM
5	Board review/approval of LARs adds an unnecessary step in the process of obtaining legal advice. Perhaps the LAR when completed could be copied to the Board's office so they are aware of both the outcome and level of work being done.	7/6/2015 12:04 PM
6	The relates to question #8 above. I responded for myself, rather than the department as a whole; based on utilization of services primarily. Also, as it auto-filled remaining rankings, it was difficult to note that some were not areas I felt qualified to rank at all.	7/6/2015 11:31 AM
7	I always find the staff to be friendly and helpful. As said earlier would like a way to streamline contact review. Thanks.	7/6/2015 11:10 AM
8	I believe you office does what it can with the resources available and the service we receive from your employees is always excellent.	7/6/2015 11:09 AM
9	I like working with your office.	7/6/2015 11:00 AM
10	Putting the code online is a great idea because it makes it easy to find the proper reference. Offering training on navigating the code would be a good option for county officials and staff (I would take the training). Also, I appreciate the fact that you have historical files - there are many things I have needed that are unfortunately no longer present in this office (contracts)	7/6/2015 10:54 AM
11	None	7/6/2015 10:49 AM

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EXHIBIT F
DECLARATION OF DANIEL MITCHELL
and
DECLARATION OF ADAM LONG

EXHIBIT F TO AFFIDAVIT OF GREGORY M. BANKS IN SUPPORT
OF PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363

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IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON, on the
Relation of Gregory M. Banks,
Prosecuting Attorney of Island County,

No.

Plaintiff,

DECLARATION OF DANIEL B. MITCHELL

vs.

SUSAN E. DRUMMOND, and Law
Offices of Susan Elizabeth Drummond,
PLLC;

Defendants.

I, Daniel Mitchell, declare as follows:

1. My name is Daniel B. Mitchell and I am over the age of eighteen (18) and am competent to testify to the subject of this declaration.
2. I am an active member of the Washington State Bar Association.
3. I have been employed by the Island County Prosecuting Attorney's Office since March 1, 2007. From March 1, 2007, through August, 2013, I worked as a Deputy Prosecuting Attorney in the Civil Division. Since August, 2013, I have held the position of Chief Civil Deputy Prosecuting Attorney.
4. As a Deputy Prosecuting Attorney in the Civil Division, between 2007 and 2013, I provided legal advice to the elected officials, department heads, and advisory commissions, boards, and committees of Island County. I provided both informal oral or email advice, and formal legal opinions.

DECLARATION OF
DANIEL B. MITCHELL

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363

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5. During my time as a deputy prosecutor, from March 1, 2007, through August, 2013, my primary area of responsibility concerned advising our clients who dealt with land use permitting and regulation. The majority of advice and representation that I provided was to the Island County Planning and Community Development Department. That agency was my most active client during that time period. I advised the Planning Department on both short range and long range planning issues, including project permitting, zoning, regulatory compliance, and general land use and growth management issues.

6. I have represented Island County in litigation such as Land Use Petition Act (LUPA) appeals, Growth Management Act challenges, administrative appeals, nuisance abatement actions, and various other lawsuits.

7. I have provided other departments, such as the Public Works Department and the Public Health Department, with advice on land use issues.

8. Between 2007 and August, 2013, I advised the Board of Island County Commissioners in matters of land use and Growth Management Act compliance. I also advised the board on site-specific land use issues when the Board of Island County Commissioners would sit as a quasi-judicial body empowered to make final land use decisions for Island County.

9. I have always endeavored to answer every legal assistance request in a timely fashion, regardless of which client the request came from. I have never once refused or failed to provide legal advice when such advice was sought. On numerous occasions I have offered unsolicited legal advice in land use matters to clients such as the Board of Island County Commissioners and the Planning Department when I learned of potential issues which our clients may not have appreciated the risk or significance of.

DECLARATION OF
DANIEL B. MITCHELL

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363

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10. Since being promoted to the Chief Civil Deputy Prosecuting Attorney in August, 2013, my responsibilities are much broader and I service many more clients. I am now less focused on the Planning Department. However, my duties include supervising Adam Long, the county's "land use deputy prosecutor." Nonetheless, the Planning Department is still my most active client and I still spend the most time addressing short range land use and long range growth management related issues on a regular consistent basis.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of August, 2015.

By: *Daniel B. Mitchell*
DANIEL B. MITCHELL
Coupeville, WA
CITY WHERE SIGNED

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IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON, on the
Relation of Gregory M. Banks,
Prosecuting Attorney of Island County,

No.

Plaintiff,

Declaration of Adam R. Long

vs.

SUSAN E. DRUMMOND, and Law
Offices of Susan Elizabeth Drummond,
PLLC;

Defendants.

I, Adam R. Long, declare as follows:

1. My name is Adam R. Long and I am over the age of eighteen (18) and am competent to testify to the subject of this declaration.
2. I am an active member of the Washington State Bar Association.
3. I have been a member of the Environmental and Land Use Law Section of the Washington State Bar Association since October of 2014.
4. I currently work as a Civil Deputy Prosecuting Attorney in the Island County Prosecuting Attorney's Office where I have worked for approximately two years.
5. As part of my duties as a Civil Deputy, I am responsible for providing legal advice to the different Island County boards, departments, and commissions, including the department of Planning and Community Development. The majority of my time is spent advising and representing the County on land use issues. I provide both

DECLARATION OF ADAM
R. LONG

Page 1 of 2

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupaville, Washington 98239
360-679-7363

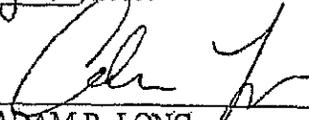
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formal, written legal advice and informal, oral legal advice to the Planning and Community Development department.

6. I have represented Island County in litigation under the Land Use Petition Act (LUPA), and I am currently representing Island County in litigation under the Growth Management Act (GMA).

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10 day of August, 2015.

By: 
ADAM R. LONG
Coupeville, WA
CITY WHERE SIGNED

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EXHIBIT G

APRIL 20, 2015 LETTER FROM SUPERIOR COURT JUDGES
AND APPENDED MARCH 9, 2015 MEMORANDUM

EXHIBIT G TO AFFIDAVIT OF GREGORY M. BANKS IN SUPPORT
OF PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Caupeville, Washington 98239
360-679-7363

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR ISLAND COUNTY

*Law & Justice Facility, 101 NE 6th St, PO Box 5000, Coupeville WA 98239-5000
Phone: (360) 679-7361 Fax: (360) 679-7383*

ALAN R. HANCOCK
Judge
VICKIE L. CHURCHILL
Judge
ANDREW SOMERS
Court Administrator

April 20, 2015

Hon. Helen Price Johnson, Chair
Board of County Commissioners
P.O. Box 5000
Coupeville, WA 98239

Hon. Jill Johnson, Member
Board of County Commissioners
P.O. Box 5000
Coupeville, WA 98239

Hon. Richard Hannold, Member
Board of County Commissioners
P.O. Box 5000
Coupeville, WA 98239

Re: Contract for special attorney services

Dear Members of the Board:

You have unanimously asked us to approve a contract for special attorney services to be provided to the Board of County Commissioners as outlined in Section 2 of Exhibit A attached to the resolution authorizing the contract.

These services include:

1. Advising the Board of County Commissioners on long-term legal strategy, relevant legal requirements, and the GMA framework for planning.
2. Coordinating and consulting with relevant County Departments on development of proposed legislation.
3. Advising on the anticipated review process and structure for considering proposed legislation.
4. Reviewing and advising on proposed legislation.

RECEIVED

Letter to Board of County Commissioners – page 1

APR 20 2015

ISLAND COUNTY
PROSECUTING ATTORNEY

5. Defending adopted legislation or resolving disputes through other means, such as settlement, as directed.

The authority under which you seek this approval is RCW 36.32.200, which provides:

"It shall be unlawful for a county legislative authority to employ or contract with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of such attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.

"Any contract written pursuant to this section shall be limited to two years in duration."
(Emphasis added.)

Prosecuting Attorney Gregory Banks has advised us that he objects to us approving this contract. He has sent us a memorandum in which he argues that the statute authorizing us to approve the contract is unconstitutional. We are enclosing a copy of his memorandum in this regard. Note that he heads his memorandum with a capitalized statement that it is exempt from public disclosure and should not be disseminated. As the clients in this situation, we are the ones who decide whether we should assert the attorney-client privilege or the work product privilege in a particular matter. We decline to assert these privileges, and we are therefore making this memorandum available for public inspection and copying.

As far as the practical reasons for approving this contract are concerned, it is our understanding that the board has publicly expressed its desire for a successful, coherent, integrated and legally defensible comprehensive plan update. The board needs counsel with special expertise in Growth Management Act issues who can provide legal and strategic advice during the update process to help guide the board in its policy-making decisions. The board would like for this technical land use expertise to be made available to county long range planners, who have the responsibility of drafting code and regulation language during the update process. The board's intention is to create a cooperative relationship between an experienced land use expert and the prosecuting attorney's office to ensure open communication and augment the talents that exist in the prosecutor's office. Mr. Banks has advised the board that his office is working at capacity and that his office is unable to provide the board with strategic advice. Mr. Banks has acknowledged that his office's work on the comprehensive plan update is subject to limitations that he says the board has placed on his office by the board's budget decisions.

It is also our understanding that the board believes that the prosecuting attorney's office does not have the necessary expertise "in-house" to perform all of the required tasks in connection with the comprehensive plan update.

You have appropriately detailed the many reasons for hiring outside counsel in this situation in the introductory "whereas" clauses of the contract.

Letter to Board of County Commissioners – page 2

We believe that we should give due deference to the board's reasons for seeking outside counsel in this regard. The board, not the prosecuting attorney, is the legislative policy-making authority for Island County. (See, e.g., RCW 36.32.120(7).) The prosecuting attorney is the legal adviser to the board and represents the county in civil litigation. (See, e.g., RCW 36.27.020(1) and (4).) We believe that you have set forth valid reasons for seeking outside counsel.

As far as Mr. Banks's legal challenges are concerned, he first argues that the county's competitive solicitation process set forth in Island County Code 2.29.030 has not been followed. However, the board has express authority under ICC 2.29.030(B)(12) to waive competitive solicitation with regard to service contracts. We can understand that the board would want to do this, since any decision as to who will provide professional services, and particularly attorney services of the sort the board is seeking, is highly individualized.

Next, Mr. Banks raises the issue of the constitutionality of RCW 36.32.200, and has expressly threatened to take legal action to prevent the board from hiring outside counsel. Therefore, we must address these issues.

We begin with the proposition that a statute is presumed constitutional and any party challenging its constitutionality must demonstrate its unconstitutionality beyond a reasonable doubt. Beias v. Kiga, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998); Island County v. State, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998).

In Island County v. State, the Washington State Supreme Court stated:

"[T]he 'beyond a reasonable doubt' standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution. [Citations omitted.] Ultimately, however, the judiciary must make the decision, as a matter of law, whether a given statute is within the legislature's power to enact or whether it violates a constitutional mandate. [Citation omitted.]

Mr. Banks cites Article 11, sections 4 and 5 of the Constitution of Washington, and argues that hiring outside counsel, over the objection of the prosecuting attorney, would violate these constitutional provisions. Article 4 provides that the legislature shall establish a system of county government. It further provides, among other things, that if a home rule charter is adopted, the election of the prosecuting attorney and the powers and authority of the

prosecuting attorney shall not be affected. Article 5 provides for the election of prosecuting attorneys, among other things.

He further cites RCW 36.27.020 concerning the duties of the prosecuting attorney, and RCW 36.27.040, which authorizes the prosecuting attorney to appoint deputy prosecuting attorneys and special deputy prosecuting attorneys.

He further cites RCW 36.27.030, which provides that a court may appoint a person to discharge the duties of the prosecuting attorney in the case of the disability of the prosecutor, and cases construing that statute. (See page 4 of March 9, 2015, memorandum from Mr. Banks to us.)

We are mindful of these statutes and the cases construing them. However, we are not being asked to exercise our authority to appoint a person to discharge the duties of the prosecuting attorney in case of the disability of the prosecutor. Nor are we being asked to appoint a special deputy prosecuting attorney. Rather, we are being asked to appoint outside counsel under the provisions of RCW 36.32.200, a separate grant of authority from the legislature. We note that there is nothing in the express terms of these constitutional provisions and statutes that prohibit the board from seeking our approval for the appointment of outside counsel. The constitution and the statutes do not state that *only* the prosecuting attorney (or a deputy prosecuting attorney or special deputy prosecuting attorney) can perform the duties of the prosecuting attorney in all instances. Thus, we must look to case law and other authorities in considering the constitutionality of RCW 36.32.200.

Mr. Banks's argument that RCW 36.32.200 is unconstitutional is primarily based on the case of State ex rel. Johnston v. Melton, 192 Wash. 379, 73 P.2d 1334 (1937), and two informal letter opinions of the Attorney General, AGLO 1973 No. 115 and AGLO 1974 No. 15.

In the Melton case, the Supreme Court dealt with a 1937 statute that authorized the prosecuting attorney to hire investigators with the same authority as the sheriff of the county, but that such investigators shall only be under the authority and direction of the prosecuting attorney. The statute further provided, among other things, that any such investigator shall have the same authority as the sheriff to make arrests. The court held that this grant of power to prosecuting attorneys violated Article 11, section 5 of the constitution, which provides for the election of various county officials, including the sheriff. Much of the court's analysis hinged on whether the investigators authorized to be appointed under the statute were county officers. The court stated: "If, when appointed, they become, in fact and in law, county officers, the section must be held to be unconstitutional." 192 Wash. at 383. The court also noted that "the investigators, although appointed by the prosecuting attorneys and placed under their direction, are given the right to exercise independent powers," and that the statute was "a definite and express grant of official power [to the investigators]." Id., at 385.

In AGLO 1973 No. 115, a state representative asked the Attorney General to opine on the question of whether a constitutional amendment would be needed in order to permit county agencies, without the approval of their respective county prosecuting attorneys, to retain other

attorneys to counsel and represent them with respect to civil matters. In answer, the Attorney General cited RCW 36.27.020, and stated:

"Therefore, while it might, conceivably, be possible to enact legislation without a constitutional amendment which would allow county agencies to employ attorneys for certain limited purposes, it seems to us that the potential utility of any such attorneys would be severely restricted unless they could be vested with at least some of the powers and functions presently performed by the prosecuting attorneys in civil matters--and this would require a constitutional amendment."

We note that informal letter opinions of the Attorney General, such as this one, have no precedential value. We further note that RCW 36.32.200 does, in fact, constitute legislation which allows a board of county commissioners to employ attorneys for certain limited purposes, with the prior approval of the county's presiding superior court judge. However, we recognize the general concern that the Attorney General raises.

In AGLO 1974 No. 15, the Attorney General opined that when a board of county commissioners has passed a resolution, approved by a majority of a county's superior court judges, authorizing the board to hire an attorney, the board may hire an attorney to advise the board on general matters of its concern. (Since this opinion was issued, the statute has been amended to provide that such a resolution must be approved by the county's presiding superior court judge.)

In a footnote in the opinion, the Attorney General cited the Melton case, and indicated that he was not to be taken as having passed on the constitutionality of RCW 36.32.200, but that, in accordance with long-standing policy, he must presume the statute to be constitutional unless it is held unconstitutional by a court of competent jurisdiction.

After due consideration, we are by no means convinced that RCW 36.32.200 is unconstitutional, much less convinced beyond a reasonable doubt that the statute is unconstitutional. As the Supreme Court stated in Island County v. State, *supra*, we assume the Legislature considered the constitutionality of the statute when passing it and we afford due deference to that judgment.

There is nothing in the statutes prescribing the duties of the prosecuting attorney, the procedures for appointing special deputy prosecuting attorneys, and the like that expressly conflicts with the action that is being undertaken by the board. While we recognize that the Melton case raises a possible constitutional question concerning the board's proposed action, the facts of that case are distinguishable from the present situation. The statute in question in Melton was a general grant of authority for the prosecuting attorney to hire investigators on an indefinite basis; such investigators were to have independent, statutory arrest and other powers which were the province of the sheriff. The constitutionality of RCW 36.32.200 was not at issue in Melton.

By contrast, in the present case, any contract approved under RCW 36.32.200 (titled "Special attorneys, employment of") requires the independent approval of the presiding superior court judge, and must be of limited duration. The informal letter opinion of the Attorney General in AGLO 1973 No. 115 has no precedential value, and was rendered without any consideration of RCW 36.32.200. AGLO 1974 No. 15 actually supports the board's proposed action in the present matter, though the Attorney General cautioned about the possible effect of Melton.

While we recognize that we have authority, generally, to decline to approve a contract for special attorney services, we believe that it would be an inappropriate exercise of our discretion to do so in this case, where the contract is justified under the facts and no court has ever declared the statute to be unconstitutional.

Furthermore, we believe that a court of competent jurisdiction would likely decide that the statute is constitutional. The statute recognizes that situations will arise where the board needs to appoint special counsel to supplement the work undertaken by the prosecuting attorney. There are times when the prosecuting attorney and deputy prosecuting attorneys do not have the expertise, or the time or resources, needed to provide the requisite legal services, particularly where there are special projects requiring extraordinary legal work.

These realities are reflected in the fact that the board has, in fact, made use of RCW 36.32.200 in the past for specific projects. Budget Director Elaine Marlow has stated that the board has employed special counsel for solid waste contract hauler negotiations, development of the Clean Water Utility, tidal energy issues, bond and loan counsel, representation of an elected official in certain matters, and labor negotiations.

To our knowledge, the prosecutor has not objected to these uses of special counsel, and this is entirely understandable. It seems unlikely to us that the prosecutor's office has the expertise to provide representation as bond counsel, in labor negotiations, and the like. It also seems unlikely that the prosecutor's office has the time to properly devote to such matters in addition to the other routine duties of the office. Yet, if the prosecutor were successful in any lawsuit to declare the statute unconstitutional, his office would have to perform these services.

A private attorney could be hired as a special deputy prosecuting attorney to perform such specialized services. But only the prosecutor can hire a special deputy prosecutor, and it appears that Mr. Banks is unwilling to make such an appointment in the present matter. Furthermore, there are practical problems associated with appointing someone as a county employee, not the least of which is that the private attorney may refuse to accept any such appointment.

It is puzzling to us that the prosecuting attorney would object to the board's present proposal to hire special counsel, and go so far as to threaten a lawsuit challenging the constitutionality of RCW 36.32.200. Such special counsel will actually aid his own office in carrying out its duties, and is being appointed because, among other things, the prosecutor is apparently unwilling or

unable to provide some of the legal advice and services that the board is requesting, and has every right to request.

Among other things, the board wants ongoing strategic advice in order to avoid the errors of the past. The prosecutor apparently can't or won't provide the board with such advice. This is troubling, because at their best, legal services represent, figuratively speaking, not only the ambulance providing services to someone who has fallen off a cliff, but also the guardrail preventing someone from falling off the cliff in the first place.

Should there be a constitutional challenge to RCW 36.32.200, a court might place limitations on the scope of the statute. It might, for example, limit use of the statute to the kinds of special projects for which the board has used the statute in the past. But note that the statute already has safeguards built in to guard against its misuse. Any contract for outside counsel must be approved by the county's presiding judge, and any such contract must be limited to no more than two years duration.

We have always carried out our duty to ensure that any such contract for special counsel is being sought for a proper purpose. We have disapproved such contracts in the past where, for example, there were no proper provisions for cost containment. The present contract is being approved for a proper purpose, and has appropriate cost containment measures built into it.

We are approving the contract for special attorney services.

Very truly yours,


Vickie I. Churchill, Presiding Judge
Island County Superior Court



Alan R. Hancock, Judge
Island County Superior Court

Enclosure

✓ Copy: Hon. Gregory M. Banks

ISLAND COUNTY PROSECUTING ATTORNEY
GREGORY M. BANKS

Eric M. Dhirte, *Chief Criminal Deputy*
Daniel B. Mitchell, *Chief Civil Deputy*

Deputy Prosecutors
David E. Carman
Christopher A. Anderson
Adam R. Long
Michael W. Safstrom
Jacqueline S. Lawrence
Kathryn L. Ludwick

Jennifer Wallace, *Office Administrator*

ATTORNEY-CLIENT CONFIDENTIAL MEMORANDUM
ATTORNEY WORK PRODUCT
EXEMPT FROM PUBLIC DISCLOSURE/DO NOT DISSEMINATE

TO: Hon. Alan R. Hancock
Hon. Vickie I. Churchill

FROM: GREGORY M. BANKS

DATE: March 9, 2015

RE: *Our File No.: 15-0086*
May BOCC hire outside counsel over objection of Prosecuting Attorney

Background

On Friday, February 27 Commissioner Price Johnson advised me for the first time that she intended to hire outside legal counsel to represent the planning department in its 2016 Growth Management Act land use update. At that meeting, she told me that she had consulted with the court about the possibility of doing so. As you may recall, late last year Planning Director Dave Wechner had alerted me to the fact that Commissioner Price Johnson had approached him about the same idea. He told me that the Board had set aside some \$80,000 in the 2015 budget to do so. Mr. Wechner indicated that he had not requested the allocation, and, in fact, his office and my deputies have been intending to work together on this project. I have committed to devoting legal resources to his staff to the maximum extent possible, and acknowledged for him the importance of the GMA update.

I learned from Commissioner Price Johnson on the 27th that the Board had actually been setting aside money for outside legal counsel since the 2014 budget, and intended to include additional money in the 2016 budget, "shooting for a total of \$200,000 - \$250,000." She was not clear about whether the attorney would also represent the county in the ensuing litigation over the new comprehensive plan and code. I was never consulted by the Board about the need for, or the wisdom of, such a massive expenditure on this project.

On Tuesday, March 10, during the commissioner comment portion of the Board's regular meeting, Commissioner Price Johnson announced she was adding an item to the budget director's work session meeting the following day. The item dealt with GMA planning and

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Judges Hancock and Churchill
March 9, 2015
Page 2

"legal support." On March 11, the budget director announced that she had interviewed an unnamed attorney to represent the county, and was prepared to hire the attorney. The Board concurred that the matter should be brought to the Board on Tuesday, March 17. To my knowledge, the county's competitive solicitation process (ICC 2.29.030) was not followed, the Board has not vetted this attorney, and my office has not been asked to review any contract, as is also required under county code. ICC 2.29.050.

I am strongly opposed to the use of scarce county resources to hire outside counsel to do a job that my office is tasked with, and for which we are best situated to provide the county the advice and representation it needs. In the event that the Board submits a contract for the presiding judge to approve, pursuant to RCW 36.32.200, I request that you reject it. The reasons I ask this of you are the following:

1. The use of RCW 36.32.200 to hire outside counsel, over the objection of the county prosecuting attorney violates Const. art. 11, §§ 4-5.
2. Hiring outside counsel, at the high rates charged by private attorneys would be squandering scarce county resources.
3. The closed process by which this idea has been taking shape violates the spirit (and perhaps the letter) of the open meetings act, and decisions were made without input from those most knowledgeable (myself and the planning director).
4. This idea is reminiscent of the process used in the previous rounds of GMA planning, which resulted in poorly drafted code, and polarized factions that have kept the county embroiled in litigation ten years down the road.
5. To the extent my office is understaffed, the Board denied my requests for even modest increases in personnel (increasing half-time paralegal to full time), and publicly scolded me for asking to promote one of my criminal deputies (Carman), at a cost of \$4,000/year. While they asserted that my office was under-resourced as a justification for hiring outside counsel, their actions during the budget process suggest they believed the opposite.

My legal analysis regarding the constitutionality of RCW 36.32.200 is below.

Thank you for your attention to this matter. I hope I can count on your continued support to prevent a repeat of the GMA boondoggle of the 1990s and the 2005-2007 time frame. Please feel free to call me any time to discuss this.

The Role and Authority of the Prosecuting Attorney

The Washington Constitution vests the legal function for county governments in the constitutionally created, locally elected executive branch office of the prosecuting attorney.

Const. art. 11, §§ 4, 5. *State v. Campbell*, 103 Wn.2d 1, 25-26, 691 P.2d 929 (1984), cert. denied 471 U.S. 1094 (1985)(recognized prosecuting attorney as executive branch official).

The state constitution assigns the Legislature the task of determining the duties of the prosecuting attorney. See Const. art. 11, §5. The legislatively defined duties may not be reassigned to another officer or employee of a county. See Const. art. 11, § 4.¹

The duties of the prosecuting attorney are spelled out in Chapter 36.27 RCW. They include, among other duties, the following:

- (1) Be legal adviser of the legislative authority, giving it his or her written opinion when required by the legislative authority or the chairperson thereof touching any subject which the legislative authority may be called or required to act upon relating to the management of county affairs;
- (2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;
- (3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;
- (4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;

RCW 36.27.020.

¹ Const. art. 11, § 4 provides, in pertinent part:

Any home rule charter proposed as herein provided, may provide for such county officers as may be deemed necessary to carry out and perform all county functions as provided by charter or by general law, and for their compensation, *but shall not affect the election of the prosecuting attorney, the county superintendent of schools, the judges of the superior court, and the justices of the peace, or the jurisdiction of the courts. ...*

After the adoption of such charter, such county shall continue to have all the rights, powers, privileges and benefits then possessed or thereafter conferred by general law. *All the powers, authority and duties granted to and imposed on county officers by general law, except the prosecuting attorney, the county superintendent of schools, the judges of the superior court and the justices of the peace, shall be vested in the legislative authority of the county unless expressly vested in specific officers by the charter.* The legislative authority may by resolution delegate any of its executive or administrative powers, authority or duties not expressly vested in specific officers by the charter, to any county officer or officers or county employee or employees.

(italics added)

The volume of cases and variety of legal issues that will cross a prosecutor's desk in light of the duties set out in RCW 36.27.020 are more than a single person can handle. The Legislature has authorized the prosecuting attorney to deal with the volume by appointing "one or more deputies who shall have the same power in all respects as their principal." RCW 36.27.040. The Legislature has also authorized the prosecuting attorney to deal with the more esoteric legal issues by appointing "one or more special deputy prosecuting attorneys on a contract or fee basis whose authority shall be limited to the purposes stated in the writing signed by the prosecuting attorney and filed in the county auditor's office.." *Id.* Both regular and special deputy appointments may be revoked at will by the prosecuting attorney.

So long as the prosecuting attorney or one of his deputies is available to perform the statutory duties in RCW 36.27.020, a court may not appoint some other person to perform the prosecutor's duties. *See generally, State v. Heaton*, 21 Wash. 59 61-62, 56 P. 843 (1899) (the court may only appoint a special prosecutor as authorized by statute); *Osborn v. Grant Cnty. By & Through Grant Cnty. Comm'rs*, 130 Wn.2d 615, 624-25, 926 P.2d 911, 916 (1996) (The court can appoint a special prosecutor to represent a party only when the prosecutor has the authority and the duty to represent that party, and some disability prevents the prosecutor from fulfilling that duty). RCW 36.27.030 specifies the conditions that must exist before a court can appoint a special prosecuting attorney:

When from illness or other cause the prosecuting attorney is temporarily unable to perform his or her duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

Cases generally equate "other cause" to mean a conflict of interest. *See Westerman v. Cary*, 125 Wn. 2d 277, 301, 892 P.2d 1067 (1994); *State v. Stegner*, 111 Wn.2d 516, 760 P.2d 357 (1988). Whether a prosecutor has a conflict of interest can be determined by examining the Rules of Professional Conduct. Examples of rules discussing conflicts of interest for lawyers in general, and for prosecutors specifically, include: RCW 1.7, 1.8, 1.9, 1.10, 1.11, 1.13, 3.7, and 8.4(d).

Constitutional Restriction on the County Commissioners' Ability to Retain Outside Counsel

The county commissioners have wide ranging authority over many matters affecting government, and government-delivered services. Their authority, like that of the prosecuting attorney, is prescribed by statute. As the legislative authority, they control the purse strings, and they "[h]ave the care of the county property and the management of the county funds and business and in the name of the county prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law." RCW 36.32.120. But their powers generally do not extend to hiring an individual to perform the duty that the constitution and/or legislation vests in another elected officer. *See, e.g., Northwestern Improvement Co. v.*

McNeil, 100 Wash. 22 170, 170 P. 388 (1918)(county commissioners could not hire an expert to value property for purposes of taxation and usurp authority of assessor); *Smith v. Lamping*, 27 Wash. 624, 68 P. 195 (1902)(county commissioners may not contract for duties which the legislature has conferred upon the county auditor).

A statute does authorize the county commissioners to obtain outside counsel under certain specific circumstances:

It shall be unlawful for a county legislative authority to employ or contract with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of such attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law.

Any contract written pursuant to this section shall be limited to two years in duration.

RCW 36.32.200.

No appellate court case has interpreted RCW 36.32.200.

An Informal Attorney General's Letter Opinion, AGLO, in 1973 opined that a constitutional amendment would be required before a statute could authorize a county agency, without the approval of its prosecuting attorney, to retain other attorneys to counsel and represent them in civil matters. AGLO 1973 No. 115. That opinion was based on the Supreme Court case of *State ex rel Johnston v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937).

Melton involved the constitutionality of a duly enacted statute that authorized the prosecuting attorney to hire investigators with "the same authority as the sheriff of the county ..., but such investigators shall not be under the authority and direction of the sheriff, and shall only be under the authority and direction of the" prosecuting attorney. Laws 1937 Ch. 100, § 4.²

The Supreme Court in *Melton* first noted that Const. art. 1, §29 requiring all county officers to be elected is mandatory. *Melton*, 192 Wash. at 382. Going on, the Court stated:

[T]he powers [of the investigators] thus granted are powers which the people of the state expressly provided in the Constitution should be executed only by persons elected by themselves. The people are the source of all governmental power, and, in setting up a constitutional government, they provided that certain of their powers should be exercised through county governments, governments close to the people, and they further provided, in section 5 of article 11 of the

² The same statute also sought to rename the office of Prosecuting Attorney to "District Attorney." The renaming provision had already been found unconstitutional.

Constitution, that the powers to be thus exercised through county governments should be exercised only through officials elected by themselves. In section 5 of article 11, they named the officers whom they then though needful, county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and, being mindful that this is a world of continual development and change, they provided that the Legislature might create other county offices as public convenience might require.

State ex rel. Johnston v. Melton, 192 Wash. 379, 385-86, 73 P.2d 1334 (1937).

In finding the statute before them unconstitutional, the Court held:

The act under construction expressly provides that in each county of the state important powers and functions, which belonged to the sheriff at the time our Constitution was adopted, and 'from time immemorial,' may be exercised by persons not elected by the people but appointed by the prosecuting attorney. *If the Legislature has the power to do that, it can, by a similar law, provide that some other official may appoint persons to operate the county jail. It could also provide that the sheriff should appoint persons with 'the same authority as' the prosecuting attorney to prosecute criminals 'anywhere in the county,' and such enactments might be multiplied until a condition was brought about where the greater part of the governmental functions of the county would be executed by appointees.* This cannot be done. The people have the constitutional right to elect the persons who shall perform the county governmental functions.

State ex rel. Johnston v. Melton, 192 Wash. 379, 389, 73 P.2d 1334, 1338 (1937)(italics added).

That passage was the foundation for AGLO 1973 No. 115. In that letter to State Representative Richard King, the AAG states that, in considering *Melton* and an earlier AGLO:

[Y]ou will readily discern the nature of the problem confronting the legislature in any attempt to authorize the employment of attorneys by county agencies without a constitutional amendment. If these attorneys were to be vested with any of the present powers and functions of the prosecuting attorney as legal counsel for all county officers, then, in accordance with the court's reasoning in the *Melton* case, such legislation would in all probability be held to be in conflict with Article XI, §5.

The AAG goes on to point out that there are few, if any, conceivable functions an attorney could perform that are not already vested in the county prosecutor. He concludes that a constitutional amendment would be necessary before county commissioners could hire outside counsel over the objection of the prosecuting attorney.

Another Informal Attorney General's Letter Opinion addresses a question from a prosecuting attorney regarding the length of time an attorney employed by the county

Judges Hancock and Churchill

March 9, 2015

Page 7

commissioners could serve. AGLO 1974 No. 15. The AGLO assumed, for purposes of the question asked, that RCW 36.32.200 was constitutional. In so doing, the author explicitly noted that the long-standing policy of the AG's office is to presume statutes are constitutional until such time as a court determines otherwise. However, the author of the letter warned that the reader should proceed with caution in light of *State ex rel Johnston v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937) and the 1973 AGLO discussed above.

The reasoning under *Melton* is very persuasive. Just like the statute invalidated by the Supreme Court in that case, RCW 36.32.200 opens the door to the legislature granting to any county official the ability to hire employees to carry out the duties of other elected officials. Even a constitutionally authorized "Home Rule" county, which may reassign the duties of some elected county officials, may not alter the election or reassign the duties of the prosecuting attorney.

In my opinion, the only narrow circumstance under which RCW 36.32.200 could be constitutionally utilized is if the county prosecutor had a "disability," as described above. See RCW 36.27.030. Absent such a disability, a person who purported to contract for legal services with the county commissioners would, in my opinion, be subject to a removal by a *Quo Warranto* proceeding. RCW 7.56.010.

I trust this is of assistance to you.

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EXHIBIT H

**THURSTON COUNTY SUPERIOR COURT'S ORDER IN
CITY OF OAK HARBOR V. WWGMHB AND ISLAND COUNTY,
CAUSE NO. 12-2-00032-5**

**EXHIBIT H TO AFFIDAVIT OF GREGORY M. BANKS IN SUPPORT
OF PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT**

**PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363**

I certify to be true under penalty of perjury
Under the laws of the State of Washington that
I delivered/mailed a copy of this document to

2013 FILE SWANVILLE WA
Signed [Signature]

FILED
APR 29 2013
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY
CITY OF OAK HARBOR,
Plaintiff(s),
v.
WESTERN WASHINGTON GROWTH
MANAGEMENT ET AL,
Defendant(s).

NO. 12:2-00032-5

COURT'S OPINION

(CLERK'S ACTION REQUIRED)

This matter comes before the Court on Petitioners City of Oak Harbor's ("City")
Petition for Review challenging the Order of the Western Washington Growth Management
Board (Board), approving Respondent Island County's ("County") Growth Management
Update.

This case involves the County's 2005 Urban Growth Area Update ("Update"). The
County began the update process in 2003 and initially set the deadline for completion for
2005. However, for a variety of reasons well-briefed by the parties, the Update was not
finalized until April 11, 2011. Notwithstanding this significant delay, the Update used the
population projections, population growth rate, and growth allocations for the initial planning
horizon of 2005 through 2025.

On June 10, 2011, the City filed a Petition for Review with the Board setting forth
sixteen issues alleging the County violated the Growth Management Act ("GMA"). On
December 12, 2011, the Board issued its Final Decision and Order ("Order") upholding the

COURT'S OPINION - 1

THURSTON COUNTY SUPERIOR COURT
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Olympia, WA 98502
(360) 786-5360
Fax: (360) 754-2060

1 County's adoption of the Update. On January 6, 2012, the City filed its Appeal and Petition
2 for Review of Administrative Action before this Court challenging the Order by alleging thirty
3 (30) different assignments of error.

4 Standard of Review

5 Unlike the typical administrative matter, this case presents two layers of review, each
6 requiring some measure of deference to the initial decision by the County. First, under the
7 GMA, the Board was required to presume the County's action to be valid and to overturn the
8 action only if it was clearly erroneous, with a firm and definite conviction that a mistake was
9 committed. Second, under the Administrative Procedures Act, the law places the burden of
10 demonstrating invalidity on the challenger, here the City. This Court must also give
11 substantial weight to the Board's interpretation of the Growth Management Act; however, the
12 order must also be supported by "substantial evidence," meaning there is sufficient quantity of
13 evidence to persuade a fair-minded person of the truth or correctness of the Order.

14 Analysis

15 Although the City makes thirty separate assignments of error, these assignments can be
16 grouped into several larger categories. Resolution of the following categories, in the Court's
17 view, resolves all pertinent assignments of error.

18 i. "Succeeding 20 years" issues -- given the significant delay in the update process, was
19 the County's use of 2005 data (including the failure to include a 2007 NMUGA (Freeland))
20 and its adherence to the initial 2005-2025 planning horizon correct?

21 ii. Participation issues -- did the County sufficiently accommodate public participation
22 generally, and the City's participation specifically, including the need to attempt agreement
23 with the City and justify its decision in absence of agreement?

24 iii. Findings and Conclusions -- is the Board's Order legally sufficient with respect to
25 findings and conclusions?

26 1. "Succeeding twenty-year period" Issues. This category appears to drive the
27 majority of the City's allegations of error. In a nutshell, the City argues that when problems
28

1 caused the Update decision to be delayed from 2005 to 2011, the County should have updated
2 the data, the UGAs (and included Freeland NMUGA), and the overall planning horizon.
3 According to the City, the planning period should run from the date of the County's action, not
4 the County's initially declared deadline. City's Opening Brief at pp. 13-16; *see also* RCW
5 36.70A.130(S).

6 In rejecting the City's argument, the Board found that changing the planning horizon as
7 a result of the delay would "violate a legislative deadline of 2005 and would disrupt data
8 collection and planning schedules of all planning jurisdictions in the County." Board Order, p.
9 12 (004590).

10 Clearly, an update decision made with data that is, at best, aged, and, at worst, obsolete
11 is not optimal. However, the Court has found no authority, and none has been cited by the
12 parties, that directly requires a County to substantially revise data as a result of a delay. In the
13 absence of this authority, the Court believes it appropriate to give weight to the Board's
14 interpretation of the GMA's requirements on this issue. In so doing, the Court finds no error
15 in the treatment of this issue by the Board notwithstanding the troubling delay in the process
16 and its potential effect on the accuracy of the Update.

17 Once this threshold decision is made that the Board did not err by permitting the
18 County to proceed without updating information, many of the City's assignment of errors are
19 resolved in the County's favor, including 3.2.1, 3.2.2, 3.2.5,¹ 3.2.6, 3.2.9, 3.2.11, 3.2.15,
20 3.2.19, 3.2.20, 3.3.1, 3.3.2, 3.3.5 and 3.6.1.

21 2. Public & City Participation.

22 Next, the City challenges the County's provision of participation in the process by the
23 public generally, and the City specifically. Contrasted with a high level of cooperation
24 between the City and County during the initial phase of the Update process, the City complains
25

26 ¹ The Court includes the City's "70/30" arguments regarding the consistency of the comprehensive plan within
27 these issues in part because of the impact that the Freeland NMUGA has upon these ratios. *See* County's Brief
28 at pp. 22-23.

1 that the County became far less inclusive of the City during the latter phases. The record
2 supports this complaint.

3 However, the Board found the County made sufficient allowances for participation for
4 both the public and the City. First, the Board found the County was compliant with public
5 participation requirements, stating: "There is no doubt that the public or staff could understand
6 what the County was discussing at [the public] meetings. The City's argument is not
7 compelling when it claims the County did not inform the public about its action after 2007."
8 Board Order p. 19 (004597). Second, with respect to the City's participation, the Board
9 acknowledged that while the County did not necessarily respond to the City's concerns quickly
10 during the latter phases, the "County staff did meet with and correspond with the City,
11 however sporadically." Board Order p. 24 (004602).

12 The record supports the Board's conclusions on these issues. For the general public,
13 the County's solicitation of input appears to the Court to be adequate. As for the City, the
14 GMA, as pointed out by the parties, does require the County to engage the City in attempting
15 agreement. RCW 36.70A.110 (2). While that cooperation between the County and City
16 appeared to deteriorate somewhat over time, the Board's conclusion that the County met its
17 obligations under the GMA is supported, in the Court's view, by substantial evidence.

18 Like the Court's conclusion with respect to the "succeeding 20 years" issues, this
19 conclusion resolves numerous assignments of error, including 3.2.3, 3.2.4, 3.2.7, 3.2.8, 3.2.14,
20 3.2.16, 3.2.17, 3.5.1.

21 3. Sufficient Findings and Conclusions.

22 Finally, the City argues that the Board's December 2011 Order failed to satisfy the
23 GMA's requirement of setting forth findings and conclusions (assignment of error 3.2.13),
24 RCW 36.70A.270(6); see also RCW 34.05.461. The County responds that the GMA requires
25 no specific form and that the Order satisfies the substance of the requirement by sufficiently
26 explaining the bases for its decision.

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The Court agrees with the County. Although the Order may not be explicitly segregated into "findings" and "conclusions," the Order adequately explains its decisions and reasoning.

Accordingly, the Board's Order is affirmed.² The Court will sign an Order consistent with this ruling upon presentation.

Dated: April 29, 2013


Erik D. Price, Judge

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² To the extent any assignment of error is not specifically listed within this opinion, it was not considered pertinent to this appeal based on the Court's review of the pleadings and the arguments of the parties.

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EXHIBIT I
RESOLUTION OF BOARD OF ISLAND COUNTY COMMISSIONERS
AND EXECUTED CONTRACT

EXHIBIT I TO AFFIDAVIT OF GREGORY M. BANKS IN SUPPORT
OF PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

PROSECUTING ATTORNEY
OF ISLAND COUNTY
P.O. Box 5000
Coupeville, Washington 98239
360-679-7363

BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF ISLAND COUNTY, WASHINGTON

IN THE MATTER OF EMPLOYING)
SPECIAL COUNSEL TO ASSIST IN)
THE DEVELOPMENT AND ADOPTION) RESOLUTION C-48-16
OF THE COUNTY'S GROWTH)
MANAGEMENT ACT COMPREHENSIVE)
PLAN, DEVELOPMENT REGULATIONS,)
AND SUCH OTHER ACTIONS DEEMED)
APPROPRIATE TO ADDRESS THE GMA)

WHEREAS, the Board of County Commissioners of Island County is responsible for adopting the County's Growth Management Act required Comprehensive Plan and Development Regulations, and related legislation, pursuant to various state laws, including Wash. Const. Art. XI, § 11, Ch. 36.70A RCW, and Ch. 36.70 RCW; and,

WHEREAS, following the public review process, the Board of County Commissioners makes the final decision on whether to adopt revisions to the County's Comprehensive Plan and Development Regulations that serve the best interests of Island County citizens; and,

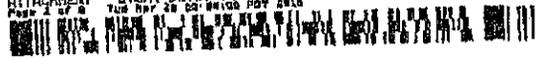
WHEREAS, recognizing this responsibility, the Board of County Commissioners desires successful, coherent, integrated and legally defensible GMA Comprehensive Plan policies and Development Regulations that serve the best interests of Island County citizens; and,

WHEREAS, since GMA's enactment, Island County has been involved in an unprecedented amount of litigation, particularly over GMA environmental and resource land issues; and,

WHEREAS, Island County desires an approach to GMA which, over the long term, not only results in the successful defense of County legislation, but ultimately reduces the litigious nature of such planning within the County, and serves the public's best interest, consistent with relevant legal requirements; and,

WHEREAS, in order to achieve these objectives, the Board of County Commissioners has a need for proactive legal strategy, advice, and assistance during the GMA update process to guide decisions and actions in the development and adoption of the County's Comprehensive Plan, Development Regulations, and other actions deemed appropriate to address the GMA; and,

WHEREAS, the County requires further assistance with proactively planning to address these challenges so that the Board of County Commissioners is fully informed as to the planning and legal challenges the County is facing; and,

ATTACHMENT Event Date: Tue Apr 26 09:00:00 PDT 2016
Page 1 of 2 Tue Apr 26 09:00:00 PDT 2016


WHEREAS, in land use matters, in which a county is planning not just for the moment but over the long term, through a twenty-year planning period, it is critical that policies and requirements be strategically developed in concert with sound legal input; and,

WHEREAS, the County wishes to avoid "crises-based" decision making, and instead engage in the methodical development of legislation to address future challenges; and,

WHEREAS, for long term policies and requirements to be soundly developed, those making the final policy decisions must be fully informed as to how proposed legislation fits within the relevant legal structure; and,

WHEREAS, developing a proactive approach, centered on the strategic development of a long range plan, will take significant up front resources and experience to address, particularly given the controversial and contested nature of the land use issues facing the County; and,

WHEREAS, the Board of County Commissioners has consulted extensively with the Prosecuting Attorney as to these objectives and the need for extensive and experienced legal support; and,

WHEREAS, at present, the Prosecuting Attorney's office is unable to provide said comprehensive and proactive legal strategy, advice and assistance. There are currently conflicts, resource constraints, and communication issues to resolve, as reflected in meetings between the Prosecuting Attorney and Board of County Commissioners; and,

WHEREAS, immediate assistance is required due to GMA's upcoming update deadline, and it is deemed necessary and advisable that legal counsel experienced in GMA and land use planning related matters be employed as special counsel; and,

WHEREAS, the County has identified special counsel (Law Offices of Susan Elizabeth Drummond, PLLC), a firm with significant experience in the field of GMA and with advising a variety of local jurisdictions throughout the state on the range of options available for developing a long term legal strategy on legislative land use matters; and,

WHEREAS, the Board of County Commissioners desires to resolve outstanding concerns and establish a cooperative working relationship with the Prosecutor's Office, the Planning and Community Development Department, along with special counsel, as that will best serve the public interest; and,

WHEREAS, to address its pressing need for assistance, RCW 86.32.200 authorizes the County's legislative body to employ experienced counsel on approval by the Superior Court Judge; and,

WHEREAS, the Board of County Commissioners in its budgeting authority has designated a fund balance in the Island County General Fund to support its state-



mandated 2016 Comprehensive Plan update, and a portion of this designated fund balance is available to fund special counsel and land use planning assistance; and,

WHEREAS, ICC 2.29.030(B)(12) allows a waiver from competitive bidding for service contracts on a case by case basis; and,

NOW, THEREFORE, BE IT HEREBY RESOLVED by the Board of County Commissioners of Island County, Washington, as follows:

Section 1. Special Counsel for GMA Legislation. The Law Offices of Susan Elizabeth Drummond, PLLC, shall be employed as special counsel to advise on GMA related legislative issues for up to a maximum period of two (2) years, and to perform the services identified as set forth in the attached terms of engagement. Per ICC 2.29.030(B)(12), the Board of County Commissioners waives competitive bidding. Compensation shall not exceed the maximum set forth in the Exhibit A - Terms of Engagement, unless approved in writing by the Board of County Commissioners and Presiding Judge of the Island County Superior Court.

Section 2. Terms of Engagement. The terms of engagement are set forth in Exhibit A and are hereby approved.

Section 3. Effective Date. This Resolution shall take effect on the last date signed below and following Superior Court approval.

ADOPTED by the Board of County Commissioners of Island County, Washington, on April 15, 2015.

ATTEST:

Debbie Thompson
Debbie Thompson
Clerk of the Board



**BOARD OF COUNTY COMMISSIONERS
ISLAND COUNTY, WASHINGTON**

Helen Price Johnson
Helen Price Johnson, Chair

Richard M. Hannold
Richard M. Hannold, Member

Jill Johnson
Jill Johnson, Member

Approved this 20th day of April, 2015.

Vickie I. Churchill
Vickie I. Churchill, Presiding Judge of the
Superior Court of the State of Washington
in and for the County of Island



EXHIBIT A -- TERMS OF ENGAGEMENT

These terms of engagement for professional services addresses legal services to be provided to Island County, Washington (County) by the Law Offices of Susan Elizabeth Drummond, PLLC (Service Provider).

SECTION 1 EFFECTIVE DATE AND TERM

This engagement will be effective upon approval in writing by the Island County Presiding Superior Court Judge, pursuant to RCW 36.32.200, and once all parties have signed this document. Any revision must be approved in writing by both the Board of County Commissioners and the Superior Court Judge.

The engagement shall terminate two (2) years from the effective date. The Board of Island County Commissioners may at any time terminate this engagement before its expiration with or without cause. Service Provider may terminate the engagement with sixty (60) days notice and compliance with the Rules of Professional Conduct.

SECTION 2 SERVICES TO BE PROVIDED

The Board of County Commissioners requires immediate legal input on developing a coherent strategy for planning for growth over its 20-year planning period. Land use issues have been heavily litigated in the County, and the County requires strategic assistance in developing an approach which can reduce litigation over the long term, while complying with relevant legal requirements, including Ch. 36.70A RCW, and serving the best interests of the public.

To accomplish these objectives, Service Provider shall provide legal services to the County in connection with development and adoption of the County's Growth Management Act Comprehensive Plan, Development Regulations, and such other legislative actions determined appropriate to address the GMA. Services shall include:

1. Advising the Board of County Commissioners on long-term legal strategy, relevant legal requirements, and the GMA framework for planning.
2. Coordinating and consulting with relevant County Departments on development of proposed legislation.
3. Advising on the anticipated review process and structure for considering proposed legislation.
4. Reviewing and advising on proposed legislation.
5. Defending adopted legislation or resolving disputes through other means, such as settlement, as directed.

Service Provider shall provide legal services in a manner consistent with the accepted practices for other similar services, performed within the time prescribed by, and pursuant to the direction of, the Board of County Commissioners. Service Provider shall coordinate with the County Planning and Community Development Department, the County Public Works Department, and with the County Prosecutor, so as to best assist the County.

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Page 3 of 6 for Apr 25 00:00:00 PDT 2018



SECTION 3 COMPENSATION AND METHOD OF PAYMENT

Payments for services shall be made following performance of such services. No payment shall be made for any services except as identified herein. Service Provider shall submit to the County each month an invoice for services rendered during the previous month. The County shall provide payment approximately thirty (30) days thereafter.

The County shall pay Service Provider for work performed under this engagement based on a \$4,000 per month flat fee plus reimbursable costs. Reimbursable costs incurred for this representation, such as travel, postage, or large copy projects, shall be billed at the actual cost incurred.

The maximum fees and charges in connection with this project shall not exceed \$120,000 without further authorization by the Board of Island County Commissioners and the Island County Superior Court Judge.

SECTION 4 INDEPENDENT CONTRACTOR RELATIONSHIP

Service Provider is an independent contractor with the authority to control and direct the performance of the details of the work; however, the results of the work contemplated herein must meet with County approval and are subject to the County's general rights of inspection to ensure satisfactory completion.

No Service Provider employee or representative shall be deemed to be a County employee or representative for any purpose, and Service Provider employees are not entitled to any benefits the County provides for its employees. Service Provider is solely responsible for its acts and for the acts of its agents or employees during performance of the engagement. As an independent contractor, Service Provider is responsible for the reporting and payment of all applicable local, state, and federal taxes.

SECTION 5 INSURANCE

Service Provider shall procure and maintain, for the duration of the engagement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with performance of the engagement.

Service Provider shall provide a Certificate of Insurance evidencing:

- (A) Commercial General Liability insurance written with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage.
- (B) Professional Liability insurance with limits of no less than \$1,000,000 per claim and \$1,000,000 policy aggregate limit.

The County shall be named as an additional insured on the commercial insurance policy, in respect to work performed by Service Provider. Any payment of deductible or self-insured retention is the Service Provider's sole responsibility. The County shall be given forty-five (45) days prior written notice of any cancellation, suspension or material change in coverage.

All insurance coverage required to be provided by Service Provider or any subcontractor, is

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intended to apply on a primary non-contributing basis in relation to any other insurance or self-insurance available to County.

SECTION 6 INDEMNIFICATION

(A) County agrees to indemnify, defend and hold Service Provider and its officers, employees, and agents harmless from claims and actions (including any costs and attorney fees) filed or authorized to be filed against Service Provider, which raise claims related to the authority which may be provided to the Board of County Commissioners by RCW 36.32.200, and this statute's implementation through this engagement. Should such an event occur, the Board of County Commissioners may elect to retain additional special counsel with Superior Court consent, and/or supplement the flat fee if necessary (with Superior Court consent) to defend such litigation. Paragraph 6(B) does not apply to Paragraph 6(A).

(B) Except as provided in Section 6(A): To the extent of its comparative liability, each party agrees to indemnify, defend and hold the other party, its elected and appointed officials, employees, agents and volunteers, harmless from and against any and all claims, damages, losses and expenses, including but not limited to court costs, attorney's fees and alternative dispute resolution costs, for any personal injury, for any bodily injury, sickness, disease or death and for any damage to or destruction of any property (including the loss of use resulting therefrom) which are caused by a negligent act, error, or omission, of its elected and appointed officials, employees, agents or volunteers, in the implementation of this engagement. In the event of any concurrent negligent act, error, or omission of the parties, each party shall pay its proportionate share of any damages awarded. The parties agree to maintain a consolidated defense to claims made against them and to reserve all indemnity claims against each other until after liability to the claimant and damages, if any, are adjudicated.

(C) The parties agree all indemnity obligations shall survive the completion, expiration or termination of this engagement.

SECTION 7 NONDISCRIMINATION

In performance of this engagement, Service Provider will not discriminate against any employee or applicant for employment on the grounds of race, religion, creed, color, national origin, sex, marital status, disability, sexual orientation, age or other basis prohibited by state or federal law; provided that the prohibition against discrimination in employment because of disability shall not apply if the particular disability prevents the proper performance of the particular work involved.

SECTION 8 ASSIGNMENT/SUBCONTRACTING

Service Provider shall not assign its performance under this engagement.

SECTION 9 JURISDICTION AND VENUE

This engagement shall be governed by laws of the State of Washington, both as to interpretation and performance. Any judicial proceeding related to this engagement shall be instituted and maintained in Island County Superior Court, State of Washington.

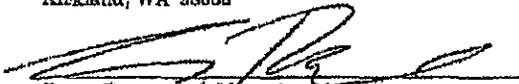
SECTION 10 SEVERABILITY



If any engagement term is held illegal or unenforceable by a court with jurisdiction, the validity of the remaining terms will not be affected, and this engagement shall be interpreted as if it did not contain the invalid provision. Further, if any engagement provision conflicts with Washington laws, said provision which may conflict therewith shall be deemed inoperative or modified to the extent necessary to avert the conflict.

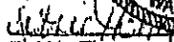
EXECUTION. The parties execute the engagement terms as follows, which may be accomplished in counterparts:

Law Offices of Susan Elizabeth Drummond, PLLC
5400 Carillon Point, Bldg. 5000, Ste. 476
Kirkland, WA 98033


Susan Drummond, Managing Member
Signed, April 22, 2015

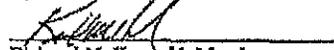
ACCEPTED by the Board of County Commissioners of Island County, Washington, on April 22, 2015.

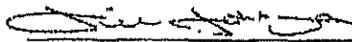


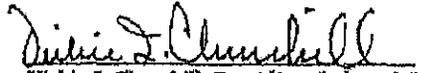
ATTEST

Debbie Thompson
Clerk of the Board

BOARD OF COUNTY COMMISSIONERS
ISLAND COUNTY, WASHINGTON


Helen Price Johnson, Chair


Richard M. Hannahold, Member


Jill Johnson, Member


Vickie I. Churchill, Presiding Judge of the
Superior Court of the State of Washington
in and for the County of Island

ATTACHMENT Event Date: Tue Apr 28 08:00:00 PDT 2015
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03/10/2015 DRAFT
AC'D to Agenda Item 20

SCOPE OF WORK AND SCHEDULE OF COMPENSATION

Susan Elizabeth Drummond and the Law Offices of Susan Elizabeth Drummond, PLLC will provide legal services to the Board of Island County Commissioners in connection with development and adoption of the County's Growth Management Act Comprehensive Plan, Development Regulations, and such other actions determined appropriate to address the GMA.

Estimated fees and costs for performance of work for 2 years \$120,000

2015 authorized fees \$ 4,000 per month retainer/flat fee

In addition to fees, Ms. Drummond will be compensated for actual out-of-pocket expenses such as photocopying, postage, and travel.

ATTACHMENT Event Date: Tue Mar 10 00:00:00 PDT 2015
Page 1 of 1 Tue Mar 10 00:00:00 PDT 2015





**ISLAND COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA BILL**

MEETING DATE: 4/28/15 #12

CONSENT AGENDA
 REGULAR AGENDA
 PUBLIC HEARING/MTG
 C-48-15
 RESOLUTION/ORDINANCE NO

DEPARTMENT: Commissioners	
DIVISION: <i>(if applicable)</i>	
STAFF CONTACT:	
AGENDA SUBJECT: Resolution C-48-15 Employing Special Counsel to Assist in the Development and Adoption of the County's Growth Management Act Comprehensive Plan and Development Regulations	
BACKGROUND/SUMMARY:	WORK SESSION DATE: <i>(if applicable)</i> 4/8 and 4/15/15
The proposed Resolution employs the Law Offices of Susan Drummond, LLC as special counsel to advise the Board of Commissioners in the development and adoption of the County's Comprehensive Plan, Development Regulations, and other actions deemed appropriate to address the GMA.	
FISCAL IMPACT/FUNDING SOURCE: Shall not exceed \$120,000 -- Funded by the GMA Reserve	
RECOMMENDED ACTION:	
<input checked="" type="checkbox"/> Approve/Adopt <input type="checkbox"/> Schedule Public Hearing/Meeting <input type="checkbox"/> Continue Public Hearing/Meeting <input type="checkbox"/> Information/Discussion <input type="checkbox"/> Other <i>(describe)</i> _____	
SUGGESTED MOTION:	

[BELOW TO BE COMPLETED BY CLERK OF BOARD]

BOCC ACTION:

- APPROVED
- DENIED
- TABLED/DEFERRED/NO ACTION TAKEN
- CONTINUED TO DATE: ____/____/____ TIME: _____
- OTHER _____

Form 01/2014

ATTACHMENT Event Date: Tue Apr 28 10:00:00 PDT 2015
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IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON, on the
Relation of Gregory M. Banks, Prosecuting
Attorney of Island County,

15-2-00465-9

Plaintiff,

Declaration of Gregory M. Banks in
Opposition to Defendants' Motion for
Summary Judgment

vs.

SUSAN E. DRUMMOND, and Law Offices of
Susan Elizabeth Drummond, PLLC;
Defendants; and

BOARD OF ISLAND COUNTY
COMMISSIONERS;
Intervenors.

Defendant[s]/Respondent[s].

I, Gregory M. Banks, declare the following:

1. I am the duly elected and qualified Island County Prosecuting Attorney. I have continuously held this office since January 1, 1999.
2. This declaration supplements my previously filed declarations and affidavits. My November 9, 2015, Declaration of Gregory M. Banks in Support of Plaintiff's Amended Motion for Summary Judgment, my October 13, 2015, Affidavit of Gregory Banks in Support of Reply to Response to Plaintiff's Motion for Preliminary Injunction, my September 22, 2015, Declaration of Gregory M. Banks, and my August 11, 2015, Affidavit of Gregory M. Banks in Support of Petition for Writ of Quo Warranto are all incorporated herein by this reference.

- 1 3. I have posted my public official bond for calendar year 2016. A copy of the bond may
2 be found in Exhibit 1 to this declaration.

3
4 **Prior Objections to Outside Counsel**

- 5 4. On two previous occasions, I have expressed an objection to the Island County Board
6 of Commissioners' (herein after "the Board") retention of outside counsel. Resolution
7 C-86-09 retained attorney Jon Ostlund for an estimated two hours of work with a
8 \$500.00 cap for "review of an Ordinance relating to the Adoption of Standards for
9 Public Defense Services." Resolution C-85-09 retained the law firm of Weed, Gafstra
10 and Benson for an estimated two hours of work with a \$500.00 cap to provide legal
11 services "in connection with contracts for the provision of legal public defense
12 services." True and correct copies of both resolutions may be found in Exhibit 2 to
13 this declaration.
- 14 5. I did not initiate legal action to oust Mr. Ostlund or Weed, Gafstra and Benson from
15 performing the duties of my office due to the limited length of the contracts and the
16 limited nature of the legal services to be provided. A quo warranto action could not
17 have realistically been initiated prior to the completion of the contracts. Moreover, the
18 disproportionate costs to stop such de minimis violations would not be accepted by the
19 public.
- 20 6. With regard to C-86-09, Mr. Ostlund arguably was not even contracted to provide
21 legal advice. He was hired to review proposed county public defense caseload
22 standards – i.e. the number of cases it is reasonable to expect a lawyer to handle in a
23 year. This was an area in which I had substantial expertise, since I served on the
24 WSBA Council on Public Defense (CPD) as did Mr. Ostlund. The CPD was the
25 primary driver of a then-proposed court rule setting forth maximum defense caseloads.
26 The rule has since been adopted by the Supreme Court. I submitted my own
27 unsolicited analysis of the County's pre-rule standards for review by the Board. It had
28 nothing to do with attempting to limit the ability of the county's public defenders, as
29 claimed by Commissioner Price Johnson in her Third Declaration (the public
30 defenders' caseloads are significantly lower than my deputies' caseloads). The issue

1 was one of how to best count caseloads, and then determine a reasonable number. I
2 was opposed to using an annual count, because it is a poor metric that is difficult to
3 administer. (What happens when a defender reaches his maximum number early in
4 the year? Must he or she stop working?) My work on the CPD was ultimately
5 responsible for the CPDs recommendation to allow for weighted caseload standards.
6 My decision not to initiate a quo warranto action was consistent with the prosecutorial
7 standards contained in RCW 9.94A.411(1)(c) and (f). While that statute concerns
8 criminal prosecution, it provides sound guidance on all discretionary decisions made
9 by public attorneys.

- 10 7. With regard to C-85-09, my objection concerned the Board's desire to avoid the
11 accountability inherent in public bidding laws and policies, by allowing a low-ball
12 bidder to increase the cost of his contract by 50% after it was awarded to him.
13 Initially, the Board had intended to use Jon Ostlund to review the public defense
14 contract. Ultimately, I recommended to the Board, if it insisted on using outside
15 counsel, that it should use a law firm with municipal law and contract experience, and
16 not a career public defender, since the work involved reviewing the contract with an
17 eye toward protecting the county's contractual rights. The Island County Superior
18 Court Judges indicated that they had no objection to that, and the Board agreed,
19 ultimately contracting with Weed, Gafstra, and Benson, a firm who provided
20 municipal legal services to two cities in Island County. This is reflected in the minutes
21 of the board meeting included in Exhibit 1 to Helen Price Johnson's Third Declaration.
22 Thus, my recommendation that a different law firm be hired was tantamount to my
23 withdrawing my objection. An objective description of the controversy over the
24 public defense contract is included in paragraph number 50 of this declaration.
25 Although Commissioner Price Johnson was involved in the meetings at the time, her
26 third declaration appears to completely misapprehend the nature of the dispute, and my
27 opposition to the procedures used by the Board.
- 28 8. Land use and environmental law is second only to criminal law as the subject matter to
29 which my office devotes the most of its legal service resources. The public interest in
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land use and environmental issues is high in Island County. It is safe to say that there is never a time when an attorney in my office is not performing work on a land use or GMA issue. Outside of criminal prosecution, land use law and the GMA are the Civil Division's "bread and butter." Significant harm was caused by the Commissioners' disenfranchising the voters' right to select its legal counselor in a pervasive subject matter such as land use. In my judgment, in the judgment of other public attorneys with whom I consulted, and in the exercise of my discretion as an elected county attorney, it warranted the filing of this lawsuit after the Commissioners and Superior Court Judges rejected my legal advice in the matter. Their provocative action left me with no choice but to try to prevent the unlawful usurpation of the office of prosecuting attorney in such a significant area of our practice.

The Board of County Commissioners' Restriction of the Prosecutors' Resources

- 9. In 2009, the Board reduced the number of staff in my office. These reductions came from the "criminal side" of my office. One criminal deputy prosecuting attorney (DPA) and a 0.75 FTE paralegal/receptionist position were eliminated by the Board. Prior to that, I employed 7 DPAs and 4.75 paralegals in our criminal division. The 0.75 FTE paralegal had originally been full time, but was reduced to half time during an earlier round of layoffs, and then increased to 0.75 FTE around 2006.
- 10. In 2010 the Board requested the elimination of another DPA and a criminal paralegal. In response, I eliminated the position of Chief Criminal Deputy in my office which achieved essentially the same budgetary result. I assigned all of the duties of the Chief Criminal Deputy position to myself. At that time, my staff was smaller than it was when I took office in 1999, and our felony caseload was nearly double what it was in 1998. A second DPA was supposed to have been laid off in the beginning of 2010, but I obtained a federal grant to maintain the position. Late in 2010, we were required to lay off another criminal DPA, which took place in September, 2010.

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- 11. During the 2011 budget cycle, the Board proposed eliminating another attorney and another paralegal from my office. I requested that the Board restore two DPA positions that had been cut. The request was denied.
- 12. During the 2012 budget cycle, the Board proposed additional cuts. In response, I requested that the Board add a half-time criminal DPA, because the pendency of two first degree murder cases was breaking the back of our office. In response to the requested cuts by the Board, I also proposed, among other options, committing one-half of the land use deputy to criminal cases, and elimination of other positions and caseloads. This was the first and only time I offered up resources from our Civil Division, as it was already so anemic, there was little to offer. The Board relented, in part because by the end of 2011, the office had three pending first degree murder cases, and a 3-victim vehicular homicide case, in addition to our regular heavy caseloads. I was authorized to hire a half-time criminal DPA. In response to repeated and urgent requests, the Board expanded the half-time DPA to full time in June, 2012, and reinstated a portion of the part-time paralegal who had been laid off in 2009.
- 13. In the 2013 budget cycle the Board and Budget Director Elaine Marlow, communicated to me that the full time DPA added in 2012 should revert to half-time, and the half time paralegal that was added should be eliminated. She explained that "one time money" had been used to fund those position. I understood that to mean that the funding came from reserves, and not anticipated property tax revenue. I successfully resisted those efforts during a contentious budget cycle.
- 14. In 2012, in preparation for the 2013 budget, the Island County Law and Justice Council recommended to the Board of County Commissioners that the Board place a criminal justice sales tax increase on the November, 2012 ballot to help restore the cuts made to law and justice agencies. The Board rejected the proposal.
- 15. In the 2013 budget, I proposed outsourcing my office's work as the County's Code Reviser, to publish a digital version of the code. The intent was to relieve some of the pressure on our civil paralegal and Chief Civil Deputy Prosecutor, without having to ask for additional staffing in the Civil Division. We implemented that system in 2015.

1 It has had some marginal benefits, but not enough to compensate for the ever
2 increasing demand on our Civil Division.

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4 16. In 2014 budget cycle, I was initially told that I should not request additional personnel.
5 In June, 2013, the Law and Justice Council passed a resolution calling on the Board of
6 Commissioners to place a property tax levy lid lift on the November, 2013 ballot. The
7 levy would pay for law and justice services, primarily in the Sheriff's Office, but also
8 in the Prosecutor's Office and other law and justice agencies. The Board approved
9 placing the measure on the ballot. Then, in August, 2013, Commissioner Jill Johnson
10 approached the Sheriff and me about pulling the measure from the ballot.
11 Commissioner Johnson convinced me that the county's financial picture had
12 brightened and the levy was not needed. In addition, it was clear that she was worried
13 about the negative political implications for her by backing the measure. I took her
14 proposal to pull the measure from the ballot to the Law and Justice Council. The
15 Council agreed, and recommended that the Board pull the ballot measure. The Board
16 rescinded the ballot measure, and restored a portion of the cuts that had been made to
17 the Prosecutor's office since 2009.

18 17. In 2013, I requested that the position of Chief Criminal Deputy be restored as part of
19 the 2014 budget. That request was granted. In addition to the improving revenue
20 picture, this was financially feasible, due to the retirement of my then Chief Civil
21 Deputy, who, after 30 years, was at the top of the pay scale and whose absence
22 resulted in a reduction in salary expenditures. My other request to reinstate a criminal
23 division paralegal to full time status was again denied.

24 18. Again, in the 2015 budget cycle, the same message of "no new personnel" was
25 conveyed by the Board and the Budget Director. I indicated that the demands on our
26 Civil Division were "near the capacity of our resources." However, my only requests
27 for additional personnel were to reinstate lost criminal capacity. In my judgment, the
28 damage to our criminal division was so serious that I had to focus on restoring it to
29 2008 staffing levels, before I could fix the rest of the office. A DPA was restored, but
30 the criminal paralegal position was once again rejected by the Board.

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19. With respect to the 2016 budget cycle, I requested four additions to my staff. Based on the numerous new positions that had been added to other county agencies in 2015, I concluded that the Board could afford to bring my staff to a level that would allow us to accomplish our duties with more adequate resources. I prioritized the requests, from high to low, as follows: (1) restore the criminal paralegal position from half time to a full time position (the same request that had been denied for three years in a row); (2) add an additional civil paralegal, due to demands that outstripped her ability to keep up; (3) add an additional civil DPA, to improve turnaround time in contract review and various legal assistance requests, and free up resources to provide more focus on land use issues; and (4) an in-house criminal investigator to perform follow-up investigation in criminal cases where law enforcement did not have the resources to promptly provide such investigation. Despite the Board's repeated contention that my office's civil capability is "maxed out," the Board granted my first request for a part time criminal paralegal, and denied both of my requests to add staff to the Civil Division.

20. During the 2016 budget discussions, Commissioner Jill Johnson contacted me privately about my proposal. She indicated that she was interested in funding the in-house investigator position. I pointed out to her that the position was my lowest priority, and that the addition of a civil paralegal and civil DPA were both high priority items. Commissioner Johnson stated that may be my priority, but it was not hers. She indicated that her priority was to try to get an investigator for my office. I told her that I believed I was in the best position to determine what my office priorities were. In the end, only the expansion of the part time criminal paralegal position was approved for my 2016 budget. The Board refused to increase personnel in our Civil Division, notwithstanding their recent refrain that my Civil Division is "maxed out."

21. To summarize the budget history of this office, and the reason for this section of my declaration: during the financial crisis that began in 2008, our ability to handle a very demanding criminal caseload was on life support. The Board, in response to greatly reduced revenues and its policy priorities, repeatedly discouraged me (and other

1 officials) from requesting additional personnel. Because of the threat to public safety
2 caused by an anemically-staffed Criminal Division, I necessarily focused on restoring
3 that area of our office. In a county where doing more with less is a badge of honor, I
4 did not press for more resources in our Civil Division until the economy had
5 recovered. As discussed in more detail below, no board member ever indicated to me
6 that he or she believed our Civil Division was in need of additional resources until my
7 February, 2015 meeting with Commissioner Price Johnson, when she disclosed the
8 Board's surreptitious allocating of funds to hire outside legal counsel. The putative
9 justification she gave was that it was intended to assist the prosecutor's office and
10 provide the office additional capacity. Oddly, the funds to improve my the
11 prosecutors' office's capacity were not placed in my budget, not disclosed to me.
12 Prior to that meeting, no board member had ever expressed to me that they were
13 considering hiring outside counsel, let alone that the Board had been secretly
14 budgeting to do the same for two years, while refusing to restore my office to pre-2009
15 staffing. No Board member, nor the Budget Director, ever contacted me about the
16 office's resources or capacity to handle our civil work. They asked no questions and
17 expressed no concerns to me about our Civil Division during years of budget
18 meetings, other than the February, 2015 meeting with Commissioner Price Johnson,
19 and Commissioner Johnson's desire to re-prioritize a criminal investigator over my
20 request for additional Civil Division resources. The only feedback I received from the
21 Board about my request to move the Civil Division toward adequate staffing was
22 Commissioner Johnson's statement that it was not her priority, and that she was more
23 interested in creating a new position of criminal investigator in my office.

- 24 22. The Board is responsible for setting the number of employees in my office and their
25 salaries. See, e.g., RCW 36.16.070 ("In all cases where the duties of any county office
26 are greater than can be performed by the person elected to fill it, the officer may
27 employ deputies and other necessary employees with the consent of the board of
28 county commissioners. The board shall fix their compensation . . ."). The Board may
29 not, however, participate in the selection or removal of deputy prosecuting attorneys.
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1 See generally *Osborn v. Grant County*, 130 Wn.2d 615 (1996); AGO 55-57, No. 48.
2 The Board regularly ignores this separation of powers. Examples of the Board's
3 overreaching include: (1) Commissioner Helen Price Johnson statement in paragraph
4 14 of her December 18, 2015, declaration that Mr. Banks could have rendered the quo
5 warranto action "unnecessary" by "appoint[ing] Ms. Drummond as a special deputy
6 prosecutor in his office as part of the action to retain her for the needed GMA work.";
7 and (2) Commissioner Jill Johnson's Declaration in Support of Island County Board of
8 Commissioners' Opposition to Plaintiff's Motion for Summary Judgment in which she
9 describes her meeting to express her dissatisfaction with Deputy Prosecuting Attorney
10 (DPA) Mitchell's legal work and her subsequent phone call with me. While
11 Commissioner Johnson accurately reports my statement to her that she was
12 overstepping her position by telling me who I should employ, she does not disclose
13 that in fact she demanded that I terminate DPA Mitchell's employment.

14 23. Commissioner Johnson called me on my direct line shortly after Mr. Mitchell's
15 promotion to Chief Civil Deputy. It was obvious from her tone that she was already
16 angry when I took the call. She explicitly demanded that I fire Mr. Mitchell because
17 she did not care for him or his communication style. I was taken aback, and responded
18 with the same tone that she had directed at me. I told her firmly, and probably loudly,
19 that she does not get to make personnel decisions in my office, and I hung up on her.
20 She later apologized to me. We both acknowledged that we are passionate about our
21 jobs, and since then have even enjoyed private lunches together and, other than the
22 friction caused by this lawsuit, have what I thought was a productive working
23 relationship.

24 24. Commissioner Johnson's declaration contains erroneous statements concerning facts
25 about which she had no personal knowledge. In ¶8 of her declaration she purports to
26 have knowledge of Chief Civil Deputy Mitchell's work load and priorities. Her
27 statements in that regard are flatly incorrect. My office was short staffed, especially
28 during the time that there was an unfilled civil DPA position. The fact that Mr.
29 Mitchell found himself doing the work of two full time attorneys, while also training
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1 Mr. Long, accounted for delays in turning around contract review. It was precisely
2 because contract review was a lower priority than our GMA work, that contract
3 matters were the work that intentionally was backlogged while we worked on higher
4 priority matters. Commissioner Johnson's uninformed assumption is the opposite of
5 the actual situation that then existed. It is frustrating that, even after the just concluded
6 budget process in which she exercised her authority to deny resources to our Civil
7 Division, she criticizes the division for not turning work around quickly enough.
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10 The Board's Criticism of Attorney Skills

- 11 25. The Board claims that the disparity in experience between my civil DPAs and Susan
12 Drummond justify their retention of Ms. Drummond's services. The Board, through
13 the setting of the salary for my DPAs, largely limits the possible applicant pool. In
14 2013, when I last hired a civil deputy prosecuting attorney, the Board provided a
15 salary range of \$4,363.69 a month to \$4,769.86 a month. A true and correct copy of
16 the August 15, 2013, Island County Job Posting may be found in Exhibit 4 to this
17 declaration. Only six applications were received. Of the four individuals I
18 interviewed in September of 2013, two were not yet admitted to practice law in
19 Washington and the other two candidates were admitted to practice law in Washington
20 on May 14, 2013, and on November 28, 2012.
- 21 26. Attached as Exhibit 5, is salary survey data collected by the Island County Human
22 Resources Director, Melanie Bacon in July, 2015. It shows the base annual salaries,
23 which are set by the Board of County Commissioners, for my senior criminal deputy
24 prosecutors (DPA II) as being nearly \$20,000 below the County's "target" salary for
25 those positions. Our senior civil deputy prosecutors are paid commensurately with our
26 criminal DPAs. The Board has established a salary system that incentivizes attorneys
27 to leave the county as soon as they develop any meaningful experience.
- 28 27. The successful candidate that I hired to fill the civil deputy prosecuting attorney
29 position in 2013 was Adam Long. Mr. Long possessed outstanding credentials and
30 experience. Mr. Long possessed a strong commitment to public sector work. Prior to

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graduation from law school, Mr. Long spent two years in the Pierce County Prosecutor's Office as both a Rule 9 paid intern and as a volunteer legal intern in the Civil Division. During his tenure with Pierce County, Mr. Long obtained significant courtroom experience and drafted numerous memorandums for deputy prosecutors. Between 2010 and 2012, Mr. Long served as a staff editor and a member of the executive board of the Seattle Journal of Environmental Law. This publication is a student-run environmental law journal whose primary function is to publish high quality articles on a variety of issues in natural resources law, environmental policy, law and economics, international environmental law, and other topics relating to law and the environment. Prior to graduating from law school, Mr. Long also organized a sustainability symposium, in partnership with the Washington Lawyers for Sustainability. Mr. Long's writing was exceptionally clear, and his analytical skills were strong.

28. During our interviews with Mr. Long and other candidates, a significant portion of the time was spent gauging their experience, knowledge, and desire to work in the land use arena.

29. We were lucky to get Mr. Long, especially considering the severe funding and salary restrictions placed on my office by the Board. One of the attributes that makes Mr. Long an excellent member of my office, like nearly all of my staff, is his commitment to representing the public over the potential for personal financial gain. However, in my experience, Mr. Long will soon be so far behind the pay scale of deputy prosecutors in surrounding counties that he too is at risk of leaving, after we have invested considerable training time.

30. Former Commissioner Michael Shelton submitted a declaration in support of the Board of Island County Commissioners in which he criticizes the deputy prosecutor who at one time performed all of the civil work of the office. That was the case during Commissioner Shelton's tenure because most of the budgets he approved only authorized a single civil deputy. He wrongly states that during my tenure, my office was responsible for the county's early GMA failures. In fact, before I was elected to

1 office, the County, under the leadership of former Commissioners Shelton and
2 McDowell, steadfastly refused to take any substantial steps to comply with the GMA.
3 This occurred during the period from 1993 – 1998, when both Shelton and William
4 McDowell were commissioners (and prior to my election). In 1996 after three years of
5 doing virtually nothing, Island County’s land use regulations were found to be invalid
6 by the Growth Management Hearings Board. WEAN v. Island County, Western WA
7 GMHB No. 95-2-0063. A finding of invalidity is extremely rare, and reserved for the
8 most egregious failures of government under the GMA. The WWGMHB was not kind
9 to Island County’s efforts under Shelton’s and McDowell’s leadership. The
10 WWGMHB had given the county repeated warnings that its refusal to plan under the
11 GMA does not comply with the GMA. The WWGMHB’s Order finding invalidity in
12 April, 1996 took the County to task for its years of thumbing its nose at the GMA.
13 Subsequently, Governor Mike Lowry visited Island County and expressed support for
14 the idea of punishing the County by withholding tax revenue from the County until it
15 complied with the GMA. I was present at the event where Governor Lowry made that
16 statement. Mr. Shelton’s revisionist history about his abject failure misses the mark by
17 a mile. Orders of Invalidity in the WWGMHB No. 95-2-0063 case are attached as
18 Exhibit 6.

19 31. Mr. Shelton’s attempt to lay that failure at the feet of retired Chief Civil Deputy
20 prosecutor Dave Jamieson is misplaced. Mr. Jamieson was highly knowledgeable of
21 the GMA, and was often praised by Mr. Shelton and Mr. McDowell for his sound
22 advice during their tenures. Their declarations to the contrary are astonishing. While
23 it is certainly conceivable that, in response to a client who was steadfastly opposed to
24 complying with the GMA, Mr. Jamieson may have exhorted his client to “follow the
25 law,” it is beyond belief that he “had no other advice or help for the Board because he
26 lacked a background in land use matters and GMA.” (Shelton’s declaration at ¶4.)

27 32. Former Commissioner William L. “Mac” McDowell has also submitted a declaration
28 riddled with misstatements. He is confused about the time during which I served as
29 the elected prosecutor. His declaration at ¶7 asserts that when he “took office in
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January of 1993 ... [he has] a distinct memory of Mr. Banks's (sic) office not having experience in GMA or much interest in assisting the Commissioners in implementing the statute." I did not take office until January, 1999. To the extent that the apocryphal story that both McDowell and Shelton share is true ("follow the law"), I can only conclude it was in response to their steadfast opposition to complying with the GMA prior to my taking office. The WWGMHB's Order of Invalidity makes clear where the problems lay in Island County during those years.

33. During Mr. McDowell's term as commissioner, I had very little personal contact with him, especially relative to the other two commissioners. Mr. McDowell's statement to the contrary in ¶6 of his declaration is simply untrue. Mr. McDowell asserts that he "frequently asked Mr. Banks" for guidance and strategy with regard to GMA. That is also categorically false. As a newly elected prosecutor, my initial focus was on modernizing an office rooted in the past, and the skyrocketing criminal caseloads that were pounding us. I had then 1.5 FTE attorneys performing Civil Division work, and relied heavily on them to handle the GMA work. I cannot recall Mr. McDowell once asking me for advice regarding GMA. He worked with Chief Deputy Jamieson on some GMA issues, but the Board mostly excluded the prosecutor's office, because of their use of Mr. Dearborn.

34. Mr. McDowell makes a sweeping generalization that I have "used the newspaper" to try to embarrass and/or go around" the Board. He offers no evidence of my attempt, or power to do so. The only newspaper article submitted by defendants in this matter is one which attempts to embarrass me over a 2007 unlawful employment termination claim. Of course it's not relevant to this action, and would require a lengthy declaration to establish the facts of that bogus claim.

35. Commissioner Shelton was well-known to my staff from the day that I took office, because he expressed his disdain for deputy prosecutors by saying they "are a dime a dozen" and asserting there was no reason to increase their pay to be comparable with surrounding counties, because we can always hire new ones.

The Board's Secrecy In Planning To Hire Outside Counsel

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3 36. As I have stated in previous declarations, Commissioner Helen Price Johnson told me
4 in our February, 2015 meeting that the Board had allocated funds to hire outside
5 counsel in the 2014 and 2015 budgets, and planned to do so again in the 2016 budget.
6 She explained that the total allocations would be about a quarter of a million dollars.
7 That was the first time I had ever heard of such an allocation. I have repeatedly
8 requested the Board and the Budget Director, Ms. Marlow, to point me to the open
9 public meetings where such allocations were made, or to budget documents where it
10 specifically indicates those allocations were made. They have refused to do so. I have
11 searched, and found no reference to such budgeting. County budgets are not supposed
12 to have hidden allocations, because the public has a right to know how their tax dollars
13 are being spent.

14 37. This secretive budgeting, sadly, is not an anomaly in how this Board operates. It is
15 very unfortunate, and it is not done without knowledge of their obligations under the
16 Open Public Meetings Act, the Public Records Act, and the principles of good
17 transparent governance that have been demanded by the public since the 1970s. These
18 are principles that I have too often had to remind this and past boards to follow. The
19 current Board of Commissioners and their Budget Director have a penchant for hiding
20 expenditures and funds that they believe, if known to the public, could have political
21 repercussions for them. I am a strong proponent of transparency in government, and
22 use my position as a public official and as the Board's legal advisor to try to get them
23 to be fully compliant with the OPMA. With chronically intransigent clients on these
24 issues, I must sometimes take a hard line to protect them from legal jeopardy. The
25 Board, regrettably, responds to those instances as if they are personal or political
26 attacks. My goal is to keep the Board out of trouble, by keeping it in compliance with
27 the law.

28 38. Commissioner Jill Johnson, in her December 4, 2015 declaration, asserts that I knew
29 or should have known that they were budgeting to hire outside counsel in 2013. She is
30 wrong.

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39. Mr. Mitchell discussed with me that Commissioner Johnson expressed her lack of confidence in him, but there was no mention made of budgeting or planning to hire outside counsel. Nor, according to Mr. Mitchell, was he told that the Board planned to hire outside counsel to perform our usual and substantial duties regarding the GMA update.

40. Commissioner Johnson assumes that, because I instruct other officials to comply with RCW 36.40.070, that I should have been aware of the Board's secretive plans to place money in a fund for subsequent expenditures on outside counsel. Jill Johnson Declaration at ¶ 9.c. RCW 36.40.070 requires each elected official and department head to be present at the Board's final public budget hearing, so that they may answer questions *from the public* about their budget proposals. Commissioner Johnson is correct that I send a reminder most years to the county's elected officials and appointed department heads that they should attend and be prepared to answer questions from the public. This is one of the ways in which the public's demand for accountable and transparent government is met. Commissioner Johnson asserts that by my doing that, I should have been aware that the Board had concealed funding for outside counsel in another department's budget. That statement by Commissioner Johnson is illogical and false.

41. Neither I, nor any other elected official or department head (other than the Board and the Budget Director), monitors the budgets of all other departments. Since the allocation for funding outside legal counsel was not placed in the office of the County's legal counsel, I had no practical way of knowing about it, and I did not know about it. The county's budget documents are notoriously obtuse, and it is virtually impossible to trace funding or spending priorities. In 2014, one of the County's unions was force to hire a forensic accountant to uncover how the county's budget concealed funds in the union's efforts to negotiate a new collective bargaining agreement.

42. The Board has yet to identify a document or public meeting where the allocation of funds to hire outside attorneys for GMA work is publicly available. More to the point,

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no Board member or budget director ever consulted with me about the need, or advised me of their plans, until my February, 2015 meeting with Commissioner Helen Price Johnson.

43. Had the Board, at a time when my budget was being strangled, openly allocated funds for the hiring of expensive private lawyers to perform the primary civil functions of this office I certainly would have mounted a thorough and forceful response. The Board's claims that I knew or should have known about their black box budgeting defies reason. One thing the Board members will probably agree on is that I am comfortable expressing differing opinions from theirs. I believe that is an essential attribute of any healthy democracy.

44. The Board's desire to maintain secrecy about the process by which they funded and ultimately hired Ms. Drummond continues to this day, as can be seen by their legally and ethically indefensible refusal to turn over correspondence concerning the hiring of Ms. Drummond in response to my attorney's discovery requests. Ms. Drummond's attorney has even threatened to quash a subpoena seeking emails between the Board, the Budget Director and the Superior Court. Strangely, Ms. Drummond also takes the position that communications between the judges and I violated ethical rules prohibiting lawyers and judges from having ex parte contact about a matter before the judges. I freely disclosed all of my correspondence and meetings with the judges, because they were not improper ex parte contact. Ms. Drummond believes my contact with the judges (and by implication, the judges' contact with me) was improper ex parte contact, but that the Board's contact with the judges was not improper. The defendants also believe their communication with the judges is confidential and secret.

45. Commissioner Johnson, in her December 4, 2015 declaration at ¶ 10 states that I should not have been surprised by the Board's desire to retain outside counsel because "[she] discussed her concerns with [me and Mr. Mitchell] on separate occasions." If she means that her demand that I fire Mr. Mitchell was "discussing her concerns," than her sworn statement is true. If she means that, prior to February of 2015 when the

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matter finally became public, she discussed with me the funding or the proposal to hire outside counsel, than her sworn statement is categorically false.

46. The most striking thing to me about the secrecy of the Board in planning to hire outside counsel is that the board members and I had regular contact about all manner of issues during 2012, 2013, and 2014. I often provided them with legal advice, in writing, over the phone and in person. I served on a number of county governance committees with board members, including the Courthouse Security Committee, the Law and Justice Council (which I chair), the County Technology Committee (I have a degree in engineering and prior professional experience as a software engineer), and other ad hoc groups. I regularly attended "roundtable" meetings with the Board. I had occasional informal lunches with Commissioner Johnson. And, of course, we had annual budget meetings. In none of those fora, did a board member ever once discuss with me their concerns about my office's ability to handle the GMA work. One would think, not just out of a desire for collegiality and good inter-office relations, but good management, that the Board would want to consult with the office affected by their decision before making it. That did not happen. The Board has yet to explain why it shielded the county's legal officer for over two years from members' discussion of the Board's plans to hire additional legal service providers outside of the prosecutor's office.

47. To the extent that the Board consulted with, David Wechner, the former Planning Director, about hiring outside counsel, they were apparently rebuffed. Mr. Wechner repeatedly told me that he did not ask for outside counsel, and that he told the Board he was happy with the legal services he received from my office. Mr. Wechner also told me that Commissioner Johnson told him in a private meeting that he should not "collude" with me. According to Mr. Wechner, Commissioner Johnson told him that if he continued to do so he would no longer "have her support." Mr. Wechner was abruptly fired this year, and the only reason that the Board gave for doing so, is that the Board desired to "go in a different direction." Citizens and employees of Mr.

1 Wechner openly criticized the Board at the board's October 13, 2015 public meeting
2 for its sudden termination of a highly valued and respected county leader.
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5 **The Relationship Between The Board and the Prosecutor**

6 48. I believed that this quo warranto lawsuit would be about a single binary legal question,
7 to wit: "Whether a Board of County Commissioners has the unfettered legal authority
8 to hire its own lawyer, so long as the written contract is approved by the presiding
9 Superior Court Judge, and is limited to two years in duration." The Board, both in its
10 statements to the media, and its filings in the case, have attempted to turn it into a
11 referendum on the likeability of the prosecuting attorney and the competency of his
12 office. Each round of declarations has become shriller than the last in their attacks on
13 my abilities, my ethics, and my record. This is an unfortunate development in a case
14 that, at bottom, presents a purely legal question concerning the bounds of a
15 government agency's authority to act.

16 49. The Board and Ms. Drummond have attempted to contaminate the record with
17 declarations concerning a couple of incidents that they try to use to tarnish my 17-year
18 career as the Island County Prosecutor. The inclusion of a newspaper article about a
19 disgruntled employee's lawsuit based on her 2006 firing is a prime example of their
20 strategy. Another is Commissioner Price Johnson's criticism of my principled
21 opposition to the Board's decision to undermine public bidding requirements in
22 renegotiating a public defense contract.

23 50. Commissioner Price Johnson misstates the basis for my opposition to the Board's
24 renegotiating the public defense contract in 2009, notwithstanding that it is clearly set
25 forth in the attachments to her third declaration. Price Johnson's Third Declaration at
26 ¶¶4-7. The materials she provided shows that the Board awarded a low bid contract to
27 one provider, and then, one year into a three year contract, agreed to give the provider
28 a 50% increase. I have publicly supported wage and caseload parity between the
29 prosecutor's office and the public defender's office. I served on the WSBA Council
30 on Public Defense precisely because I was interested in improving the plight of under-

1 resourced public defenders. Here, the issue was that the public was not receiving the
2 accountability they should get from public bidding laws, and was not a question of
3 how many attorneys worked for the public defender. My position was clear: the
4 Board should re-bid the contract to ensure its provider's new compensation demands
5 were fair and competitive. Awarding a publicly bid contract, even if it was for more
6 money than the contractor was requesting in the re-negotiation, was essential to
7 government accountability. Other than me, there was no one willing to speak on
8 behalf of the taxpayers against favoritism. As discussed above, the issues presented,
9 and the short-lived nature of the consultant contract, did not justify the expenditure
10 and effort of a quo warranto lawsuit. That was a discretionary decision that I made as
11 Prosecuting Attorney.

12 51. Yet another example of the Board's attempt to distract the court from the true nature of
13 this legal action is its burdensome and costly discovery demands for all of my emails
14 with a local newspaper editor over a ten year period. The text messages I shared with
15 the news editor were intended to be private. Neither she nor I expected that the Board
16 would want to dig into them as part of their defense of this lawsuit. I am embarrassed
17 by the content of some of those text messages with the editor, and embarrassed that
18 they have been made public. As a public official I acknowledge that they are public
19 records and had to be disclosed, though they clearly were intended as private
20 conversations.

21 52. What neither Commissioner Price Johnson nor Susan Drummond (who made the
22 demands for the emails and texts) acknowledge is the email and text messages have
23 been provided to this Court with no context in an obvious attempt to mislead the
24 Court. Frequently portions of email strings have been intentionally deleted from the
25 emails included in the attachments. The text messages have sections deleted as well.
26 As Commissioner Price Johnson admits, I was obligated to provide several thousand
27 emails to news reporters and editors over a long span of my career. The defense
28 combed through them, and came up with 15 emails that they contend support their
29 portrayal of me as difficult to work with, and not meeting my professional obligations
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to my clients. I determined that there are 15 emails by looking at the Bates numbers that we affixed on the bottom of each page. It is obvious that the email strings were edited for content because Ms. Drummond's counsel has provided disjointed excerpts.

53. The particular newspaper reporter/editor (whose name was redacted by the defense from all of the emails and text messages) is someone with whom I have a long professional relationship with. The intense nature of a prosecutor's work tends to breed a dark sense of humor to compensate for the personal tragedies that prosecutors must work around on a daily basis. The same is apparently true of newspaper reporters. We have developed a mutual trust that we can blow off steam in our correspondence with off color jokes and sometimes coarse language. These are text messages that we expect no one else will see. We expect that the other will not disclose the private conversation. We certainly never expected that Ms. Drummond and the Board would dig so deeply into those unrelated communications in a lawsuit focused on the dry issue of the legal authority of a board of county commissioners.

54. Commissioner Price Johnson, at ¶8 of her third declaration engages in a vague and demagogic diatribe about me, and my ethical standards. It is emblematic of the way the Board has treated me and other officials. It is bullying, and it is the source of most of the occasional difficulties in our relationship. In my experience, Commissioners Johnson and Price Johnson take any policy disagreement very personally. They are not inclined to consider that they may be mistaken, or reconsider their positions on the rare occasion when an official has the courage to challenge them. This litigation is a good example. Had they rationally considered my legal advice about the illegality of hiring outside counsel, and had the Board rationally considered properly staffing my office, this lawsuit and the attendant waste of scarce county revenues, would not have been necessary.

55. The Board has exaggerated a couple of incidents of healthy disagreements between us, and then has attempted to use them to characterize our relationship as one that is pervaded by conflict and strife. That has certainly not been my experience with this Board, or previous boards over the past 17 years. It saddens me that my experience of

1 a healthy and collegial relationship with the Board and its departments over many
2 years has been mischaracterized so badly.

3
4 56. Attached to this declaration as Exhibit 7 are two newspaper articles in which the Board
5 members publicly scolded two elected officials – the Treasurer and the Prosecutor. I
6 attach them not as evidence of the truth of the facts recited therein, but as an indication
7 of the how the Board’s actions are perceived by those who witness them. The
8 recordings of the Board meetings identified in the articles bear them out. The Board
9 members view themselves as the top of the County hierarchy, when they are actually
10 co-equal elected officials. The article describing a matter involving my office
11 concerned a deserving deputy prosecutor whose salary had been frozen for four years
12 due to budget constraints. A new assignment within my office clearly warranted his
13 getting a long-overdue promotion and raise. The price tag for the County was \$4,000.
14 The Board reacted to the figure as if it was a budget-busting amount. In trying to
15 diffuse their unexpected scolding I admitted that “I dropped the ball” for not
16 anticipating the promotion several months earlier when I had my budget meeting with
17 them.

18 57. In contrast to my deputy’s treatment, the Board several months later, without any
19 public discussion and outside of any budget hearings, planned to indemnify Ms.
20 Drummond, and then agreed to spend additional tens of thousands of dollars on their
21 own law firm. I cite these incidents to provide a reality check on the board members’
22 claims that I am the source of conflict. We have professional disagreements about
23 policy and about budgets from time to time. Those conflicts are to be expected in a
24 structurally divided government such as a Washington county.

25 58. Commissioner Price Johnson bemoans the inclusion of declarations from other
26 prosecutors that my attorney obtained. Price Johnson’s Third Declaration at ¶9. She
27 asserts that they are irrelevant. However, as she knows, they were sought only *after*
28 Commissioner Price Johnson solicited “letters” from County Commissioners around
29 the State, based on her mischaracterization of this lawsuit and our positions in it. Price
30 Johnson’s letter is attached to this declaration as Exhibit 8.

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59. Commissioner Price Johnson's concerns about my earlier appointment of a Snohomish County DPA to represent the Board are misplaced. She has omitted the timing of the appointment. There was no conflict in the appointment of a deputy prosecutor from another county for the purposes that Commissioner Price Johnson identified at the time, long before a declaration was obtained from the Snohomish County Prosecutor. Snohomish County Prosecutor Mark Roe's declaration was obtained very recently, and is simply a statement of facts in his county. An unknown future declaration could not give rise to an ethical conflict in appointing a special deputy prosecutor for the Board.

60. Defendant Drummond has submitted a declaration that appears to be based as much upon her sense of the dramatic, as on the facts of the case. I am dismayed that she, on several occasions refers to being "targeted personally" by me. I have repeatedly expressed my respect for her abilities and her professionalism. That expression is genuine. However, that has nothing to do with the importance of ensuring that the Board of Commissioners not exceed its lawful authority by subverting the right of the voters to select their county's attorney.

61. It is true that I stated in an email that I would like to withdraw the complimentary things I had said about Ms. Drummond. I made that somewhat emotional statement after being personally attacked by Drummond and her attorney the first time. All in all, it was fairly benign, compared to the language she has used.

62. Ms. Drummond clearly knew that she would be the subject of a quo warranto lawsuit to oust her from my office. She took steps to ensure that the County would indemnify her from any financial costs of defending her contract with the Board. Her use of loaded terms like "gunning for individuals" does nothing to shed light on the legal issue before the court, or the way in which we got here. She prosaically compares herself to a Victor Hugo character, and describes the mundane act of being served with a summons as a "tough moment." She complains that I "hastily scrawled" an email to convey the gravamen of the conflict she was creating. It makes a good read, but in the end is not helpful or objective.

1 63. I regret that this lawsuit has apparently taken a severe personal toll on Ms. Drummond.
2 She states that it is an "extreme situation," and that tensions are "heated." In so
3 saying, there is an implication that I forced this stress on her. As a long time
4 professional in a field often involving adversarial proceedings, Ms. Drummond must
5 accept responsibility for the consequences of her decisions. The fact that she may now
6 have buyer's remorse for knowingly forcing the issue has no bearing on the legal issue
7 to be resolved. She has unlawfully usurped the authority of an elected public official,
8 fully cognizant of the fact that the judicial branch of government would be called upon
9 to decide the issue.
10

11 **The Review of Drummond's Contract by Presiding Judge Churchill and Judge**
12 **Hancock**
13

14 64. Presiding Judge Churchill reviewed and approved the contract with Ms. Drummond, in
15 accordance with the administrative procedure set forth of RCW 36.32.200. Ms.
16 Drummond and the Board claim that I should have "appealed" that review.
17

18 65. I was not a party to any case or cause of action where that review occurred. I have not
19 been served with a summons or complaint.

20 66. To my knowledge, there never has been a case pending in the Superior Court
21 concerning the review of that contract, or the Board's authority to enter into that
22 contract, other than this quo warranto matter.

23 67. To my knowledge there were no public hearings in open court were held regarding
24 Board Resolution C-45-15.

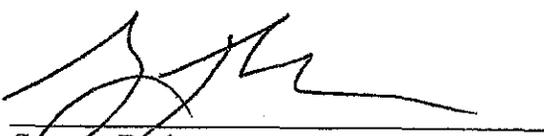
25 68. I was never served with notice of any superior court hearings regarding Resolution C-
26 45-15.

27 69. I have presented a consistent position throughout this quo warranto proceeding. I am
28 not asking for a declaration that RCW 36.32.200 is facially unconstitutional. I am,
29 however, claiming that Resolution C-48-15 was insufficient to confer a de jure right to
30 perform any of the duties of my office upon Ms. Drummond.

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I certify (or declare) under penalty of perjury of the laws of the State of Washington,
that the foregoing is true and correct to the best of my knowledge and belief.

Signed on January 4, 2016, at Coupeville, Washington



Gregory Banks

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Exhibit 1
2016 Public Official Bond of Gregory M. Banks
of
Declaration of Gregory M. Banks in Opposition to
Defendants' Motion for Summary Judgment



Liberty Mutual Surety
1001 4th Avenue, Suite 1700
Seattle, WA 98154

PUBLIC OFFICIAL BOND

Bond Number: 328202951 (6978289)

KNOW ALL MEN BY THESE PRESENTS, That we, GREGORY M BANKS
of COUPEVILLE in the State of
WASHINGTON as Principal, and American States Insurance Company, a corporation duly
organized and existing under and by virtue of the Laws of the State of Indiana, and authorized to become surety on
bonds in the State of Washington, as Surety, are held and firmly bound unto ISLAND
COUNTY, WA

in the State of _____,
in the full and just sum of Five Thousand Dollars And Zero Cents
(\$ 5,000.00) Dollars lawful money of the United States, for
payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and
assigns, jointly and severally, firmly by these presents.

SIGNED AND SEALED this 12TH day of NOVEMBER A.D. 2015

WHEREAS, the said GREGORY M BANKS
has been duly elected or appointed to the office of PROSECUTING ATTORNEY
for a term beginning on the 1ST day of JANUARY, 2016, and
ending on the 1ST day of JANUARY, 2017

NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the above principal
shall, during the aforesaid term, faithfully and truly perform all the duties of said office as required by law, then this
obligation to be void, otherwise to be and remain in full force and virtue.

IN WITNESS WHEREOF, the said Principal has hereunto set his hand and the said American States Insurance
Company has caused these presents to be signed by its Attorney-in-Fact, the day and year first above
written.

Tennisha Walker
WITNESS

GREGORY M BANKS
PRINCIPAL



American States Insurance Company
Shannon Ricketts
ATTORNEY-IN-FACT

STATE OF INDIANA
COUNTY OF MARION } SS.:

Before me, this 12TH day of NOVEMBER A.D., 2015
personally appeared the said SHANNON RICKETTS, to me known

and known to me to be the individual described in and who executed the foregoing bond, and he acknowledged to me
that _____ She executed the same

9-1013
(9-99)
S-4965/AS 3/99

MATTIE SATTERFIELD
NOTARY PUBLIC
SEAL
HAMILTON COUNTY, STATE OF INDIANA
MY COMMISSION EXPIRES: 08-09-2023

Mattie Satterfield
Notary Signature

THIS POWER OF ATTORNEY IS NOT VALID UNLESS IT IS PRINTED ON RED BACKGROUND.

This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated.

AMERICAN STATES INSURANCE COMPANY
INDIANAPOLIS, INDIANA
POWER OF ATTORNEY

7068670

KNOW ALL PERSONS BY THESE PRESENTS: That American States Insurance Company (the "Company"), an Indiana stock insurance company, pursuant to and by authority of the By-law and Authorization hereinafter set forth, does hereby name, constitute and appoint Almee Henard; Betty Mitchell; Caroline Nicholson; Carrie A. Allen; Cynthia Spellman; Deborah D. Menora; Jeannie L. Kendrick; Jenny Ford; Joann Eckman; Kim Jones; Matt Davis; Mattie Satterfield; Nicole Roth; Patricia M. Walker; Sally J. Tinkle; Sandy Gahimer; Shanel Breedlove; Shannon Ricketts; Sherri Smith; Tammy J. Hernandez; Walycia J. Williams

all of the city of Indianapolis state of IN, each individually if there be more than one named, its true and lawful attorney-in-fact to make, execute, seal, acknowledge and deliver, for and on its behalf as surety and as its act and deed, any and all undertakings, bonds, recognizances and other surety and the execution of such undertakings, bonds, recognizances and other surety obligations. In pursuance of these presents, shall be as binding upon the Company as if they had been duly signed by the president and attested by the secretary of the Company in their own proper persons.

That this power is made and executed pursuant to and by authority of the following By-law and Authorization:

ARTICLE IV - Officers: Section 12, Power of Attorney.

Any officer or other official of the Corporation authorized for that purpose in writing by the Chairman or the President, and subject to such limitations as the Chairman or the President may prescribe, shall appoint such attorneys-in-fact, as may be necessary to act in behalf of the Corporation to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact, subject to the limitations set forth in their respective powers of attorney, shall have full power to bind the Corporation by their signature and executed, such instruments shall be as binding as if signed by the president and attested by the secretary.

By the following instrument the chairman or the president has authorized the officer or other official named therein to appoint attorneys-in-fact:

Pursuant to Article IV, Section 12 of the By-laws, David M. Carey, Assistant Secretary of American States Insurance Company, is authorized to appoint such attorneys-in-fact as may be necessary to act in behalf of the Corporation to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations.

IN WITNESS WHEREOF, this Power of Attorney has been subscribed by an authorized officer or official of the Corporation and the corporate seal of American States Insurance Company has been affixed thereto in Plymouth Meeting, Pennsylvania this 24th day of July, 2015



AMERICAN STATES INSURANCE COMPANY

By David M. Carey
David M. Carey, Assistant Secretary

COMMONWEALTH OF PENNSYLVANIA ss
COUNTY OF MONTGOMERY

On this 24th day of July, 2015, before me, a Notary Public, personally came David M. Carey, to me known, and acknowledged that he is an Assistant Secretary of American States Insurance Company; that he knows the seal of said corporation; and that he executed the above Power of Attorney and affixed the corporate seal of American States Insurance Company thereto with the authority and at the direction of said corporation.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my notarial seal at Plymouth Meeting, Pennsylvania, on the day and year first above written.



COMMONWEALTH OF PENNSYLVANIA

Notarial Seal
Teresa Pastella, Notary Public
Plymouth Twp., Montgomery County
My Commission Expires March 28, 2017
Member, Pennsylvania Association of Notaries

By Teresa Pastella
Teresa Pastella, Notary Public

CERTIFICATE

I, Gregory W. Davenport, the undersigned, Assistant Secretary of American States Insurance Company, do hereby certify that the original power of attorney of which the foregoing is a full, true and correct copy, is in full force and effect on the date of this certificate; and I do further certify that the officer or official who executed the said power of attorney is an Officer specially authorized by the chairman or the president to appoint attorneys-in-fact as provided in Article IV, Section 12 of the By-laws of American States Insurance Company.

This certificate and the above power of attorney may be signed by facsimile or mechanically reproduced signatures under and by authority of the following vote of the board of directors of American States Insurance Company at a meeting duly called and held on the 18th day of September, 2009.

VOTED that the facsimile or mechanically reproduced signature of any assistant secretary of the company, wherever appearing upon a certified copy of any power of attorney issued by the company in connection with surety bonds, shall be valid and binding upon the company with the same force and effect as though manually affixed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said company, this 12th day of November, 2015.



By Gregory W. Davenport
Gregory W. Davenport, Assistant Secretary

Not valid for mortgage, note, loan, letter of credit, currency rate, interest rate or residual value guarantees.

To confirm the validity of this Power of Attorney call 1-610-832-8240 between 9:00 am and 4:30 pm EST on any business day.

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Exhibit 2
Resolution C-85-09
Resolution C-86-09
to
Declaration of Gregory M. Banks in Opposition to
Defendants' Motion for Summary Judgment

BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF ISLAND COUNTY, WASHINGTON

IN THE MATTER OF SPECIAL COUNSEL)
FOR REVIEW OF A CONTRACT FOR) RESOLUTION C-85-09
PUBLIC DEFENSE)

WHEREAS, it is the recommendation of the County's Superior Court Judges that a contract for provision of Legal Public Defense Services be reviewed by outside counsel; NOW, THEREFORE,

BE IT HEREBY RESOLVED by the Board of County Commissioners of Island County, Washington, as follows:

- (1) The law firm of Weed Graafstra & Benson, of Snohomish, Washington, be employed by the County as special counsel for up to a maximum period of thirty (30) days to perform the services described at the compensation set forth in the document entitled "Scope of Work" attached hereto as Exhibit A and incorporated herein by this reference. Compensation received by said attorney shall not exceed the maximum set forth in Exhibit A unless approved in writing by the Board of County Commissioners.
- (2) Any actions previously taken by officers or employees of the County and consistent with the provisions of this resolution are hereby ratified and confirmed.

ADOPTED on July 6, 2009.



BOARD OF COUNTY COMMISSIONERS
ISLAND COUNTY, WASHINGTON

John Dean
John Dean, Chairman

Helen Price Johnson
Helen Price Johnson, Member

Angie Homola
Angie Homola, Member

Attest:

Elaine Marlow
Elaine Marlow, Clerk of the Board

ATTACHMENT Event Date: Mon Jul 06 12:00:00 PDT 2009
 Page 1 of 6 Tue Jul 14 08:38:46 PDT 2009

EXHIBIT A

SCOPE OF WORK

The Law Firm of Weed Graafstra & Benson ("Special Counsel") will provide such legal services as the Island County Board of County Commissioners shall request in connection with contracts for provision of legal public defense services. These services will include, but not be limited to the following:

1. Advise and represent the County on contract issues that may arise.
2. Brief County Commissioners and other officials as necessary.
3. Perform such other tasks as are requested by the Board of County Commissioners that are relative to contracts for provision of legal public defense services.

SCHEDULE OF COMPENSATION

Total estimated hours for performance:	2
Hourly rate for performance of work:	\$185

In addition to fees, special counsel will be compensated for actual out-of-pocket expenses such as long distance calls, photocopying, and postage.

The maximum fees and charges in connection with this project shall not exceed \$500.00 without further authorization by the County.



Res. C-85-09

We accept employment as special counsel in accordance with the provisions of the foregoing resolution.

WEED GRAAFSTRA & BENSON

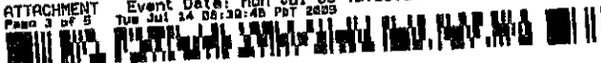
By: _____
Partner

Date: _____

The foregoing contract is approved this 2nd day of July, 2009.

Alan R. Hancock

Presiding Judge of the Superior Court of
the State of Washington in and for
Island County

ATTACHMENT Event Date: Mon Jul 06 12:00:00 PDT 2009
Page 3 of 5 Tue Jul 14 06:30:45 PDT 2009


PL/S

Res. C-85-09

EXHIBIT A

SCOPE OF WORK

The Law Firm of Weed Graafstra & Benson ("Special Counsel") will provide such legal services as the Island County Board of County Commissioners shall request in connection with contracts for provision of legal public defense services. These services will include, but not be limited to the following:

1. Advise and represent the County on contract issues that may arise.
2. Brief County Commissioners and other officials as necessary.
3. Perform such other tasks as are requested by the Board of County Commissioners that are relative to contracts for provision of legal public defense services.

SCHEDULE OF COMPENSATION

Total estimated hours for performance:

2

Hourly rate for performance of work:

\$180 185 *gef*

In addition to fees, special counsel will be compensated for actual out-of-pocket expenses such as long distance calls, photocopying, and postage.

The maximum fees and charges in connection with this project shall not exceed \$500.00 without further authorization by the County.



PS/S

Res. C-85-09

We accept employment as special counsel in accordance with the provisions of the foregoing resolution.

WEBB GRAAFSTRA & BENSON, INC. P.S. *gfb*

By: *George E. Benson*
Partner *George E. Benson Vice Pres.*
Date: *7/2/09* *gfb*

The foregoing contract is approved this _____ day of _____, 2009.

Presiding Judge of the Superior Court of
the State of Washington in and for
Island County

ATTACHMENT Event Date: Mon Jul 06 12:00:00 PDT 2009
Page 5 of 6 Tue Jul 14 00:20:42 PDT 2009


BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF ISLAND COUNTY, WASHINGTON

IN THE MATTER OF SPECIAL COUNSEL)
FOR REVIEW OF AN ORDINANCE)
RELATING TO THE ADOPTION OF)
STANDARDS FOR PUBLIC DEFENSE)
)

RESOLUTION C-86-09

WHEREAS, it is the recommendation of the County's Superior Court Judges that an Ordinance relating to the Adoption of Standards for Public Defense Services be reviewed by outside counsel; NOW, THEREFORE,

BE IT HEREBY RESOLVED by the Board of County Commissioners of Island County, Washington, as follows:

- (1) Jon Ostlund, be employed by the County as special counsel for up to a maximum period of thirty (30) days to perform the services described at the compensation set forth in the document entitled "Scope of Work" attached hereto as Exhibit A and incorporated herein by this reference. Compensation received by said attorney shall not exceed the maximum set forth in Exhibit A unless approved in writing by the Board of County Commissioners.
- (2) Any actions previously taken by officers or employees of the County and consistent with the provisions of this resolution are hereby ratified and confirmed.

ADOPTED on July 13, 2009.

BOARD OF COUNTY COMMISSIONERS
ISLAND COUNTY, WASHINGTON

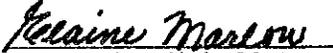



John Dean, Chairman


Helen Price Johnson, Member


Angie Homola, Member

Attest:


Elaine Marlow, Clerk of the Board

ATTACHMENT Event Date: Mon Jul 13 12:00:00 PDT 2009
Page 1 of 4 Tue Jul 14 10:46:22 PDT 2009



EXHIBIT A

SCOPE OF WORK

Jon Ostlund will provide such legal services as the Island County Board of County Commissioners shall request in connection with a review of an Ordinance relating to the Adoption of Standards for Public Defense Services. These services will include, but not be limited to the following:

1. Advise and represent the County on any issues that may arise relating to adoption of standards for Public Defense Services.
2. Brief County Commissioners and other officials as necessary.
3. Perform such other tasks as are requested by the Board of County Commissioners that are relative to the adoption of standards for Public Defense Services.

SCHEDULE OF COMPENSATION

Total estimated hours for performance: 2
Hourly rate for performance of work: \$65.00

In addition to fees, John Ostlund will be compensated for actual out-of-pocket expenses such as long distance calls, photocopying, and postage.

The maximum fees and charges in connection with this project shall not exceed \$500.00 without further authorization by the County.

ATTACHMENT Event Date: Mon Jul 13 12:00:00 PDT 2009
Page 2 of 4 Tue Jul 14 15:46:22 PDT 2009



I accept employment as special counsel in accordance with the provisions of the foregoing resolution.

John Ostlund

Date

The foregoing contract is approved this 8th day of July 2009.

Alan R. Hancock

Presiding Judge of the Superior Court of
the State of Washington in and for
Island County

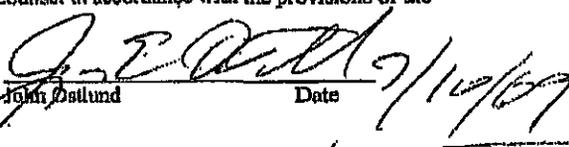
ATTACHMENT Event Date: Mon Jul 13 12:00:00 PDT 2009
Page 3 of 4 Tue Jul 14 15:48:22 PDT 2009


Jul 10 09 09:07a

P.3

Res. C-⁸⁶95-09

I accept employment as special counsel in accordance with the provisions of the foregoing resolution.


John Ostlund

Date

The foregoing contract is approved this _____ day of _____, 2009.

Presiding Judge of the Superior Court of
the State of Washington in and for
Island County

ATTACHMENT Event Date: Mon Jul 13 12:00:00 PDT 2009
Page 4 of 4 Tue Jul 14 15:46:22 PDT 2009

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Exhibit 3
August 15, 2013, Island County Job Posting
to
Declaration of Gregory M. Banks in Opposition to
Defendants' Motion for Summary Judgment



ISLAND COUNTY JOB POSTING

DATE:	AUGUST 15, 2013
PAA#:	PAA 071/13
POSITION#:	39127013 or 39127014 DOQ
PAY GRADE#:	DP-13 or DP-14

POSITION TITLE:	CIVIL DEPUTY PROSECUTING ATTORNEY	UNION REPRESENTED
DEPARTMENT:	PROSECUTING ATTORNEY	
SALARY:	ENTRY: DP 13 \$4,363.69/MO	BASE: \$4,429.15/MO
	ENTRY: DP 14 \$4,699.37/MO	BASE: \$4,769.86/MO
HOURS OF WORK:	8:00 A.M. – 4:30 P.M.	
CLOSING DATE:	AUGUST 29, 2013	

GENERAL STATEMENT:

SEE JOB DESCRIPTION

DESIRED QUALIFICATIONS:

SEE JOB DESCRIPTION

SPECIAL REQUIREMENTS:

SEE JOB DESCRIPTION

Filing of an Application: A completed original Island County Application form is required. A resume submitted in lieu of a completed application will not be processed. Applications are available in the Personnel Office, or on-line.

Applicants are responsible for supplying all information relative to their qualifications for the position.

Equal Employment Opportunity - Island County is an Equal Opportunity Employer and does not discriminate on the basis of political affiliation, age (40 or over), sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification; PROVIDED, that the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.

NOTE: This announcement is intended as a general descriptive recruitment guide and is subject to change. It does not constitute either an expressed or implied contract.

Department of Human Resources/Personnel
P.O. Box 5000
Coupeville, WA 98239-5000

Authorization No.:
Position No.:
Pay Grade:
Date:

ISLAND COUNTY SUMMARY JOB DESCRIPTION

POSITION:	CIVIL DEPUTY PROSECUTING ATTORNEY
POSITION NUMBER:	39127013
CURRENT EMPLOYEE:	
ANNUAL HOURS WORKED:	2080

1.0 MAJOR FUNCTION AND PURPOSE

- 1.1 Employee in this position is responsible for giving legal advice to County officials and department heads, drafting legal opinions, ordinances and contracts, reviewing legal documents for other County departments, providing legal representation in court and in administrative law bodies.

2.0 SUPERVISION RECEIVED

- 2.1 Employee in this position is given significant discretion in the routine performance of his/her duties within the scope of policy and regulations. Supervision and guidance are received from the Chief Civil Deputy Prosecuting Attorney and the elected Prosecuting Attorney.

3.0 SUPERVISION EXERCISED

- 3.1 Employee in this position supervises one or more support staff and helps direct other Deputy Prosecuting Attorneys as required.

4.0 SPECIFIC DUTIES AND RESPONSIBILITIES

- 4.1 Responsible for legal research and advising the Board of Island County Commissioners, the Island County Board of Health, all County and precinct officers and school directors on legal matters and interpretations.
- 4.2 Responsible for providing legal representation to Island County and to officials in the area of land use planning and other environmental issues.
- 4.3 Responsible for representing Island County and its officials (and by law all school districts within the County) and its officials in all civil proceedings in which the

Deputy Prosecuting Attorney/Civil-Land Use
Prosecuting Attorney
December 2000
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County may be a party, at the direction of the Chief Civil Deputy Prosecuting Attorney or the elected Prosecuting Attorney.

- 4.4 Responsible for drafting ordinances and contracts or reviewing the same for legal sufficiency and compliance with the law which are prepared by other persons at the request of County officials, at the direction of the Chief Civil Deputy Prosecuting Attorney or the elected Prosecuting Attorney.
- 4.5 Responsible for providing legal representation to the County in any area of civil litigation, in any tribunal, through all phases and stages of litigation.
- 4.6 Perform other tasks as directed.

5.0 DESIRABLE QUALIFICATIONS, KNOWLEDGE, SKILLS AND ABILITIES

- 5.1 Knowledge of legal and constitutional principles and their application. Knowledge of the principles, methods and practices of legal research and investigation.
- 5.2 Knowledge of all aspects of land use/environmental law and litigation in Washington and Island County, including growth management.
- 5.3 Basic knowledge of land use planning principles.
- 5.4 Knowledge of civil law and procedures in Washington. Knowledge of current issues in the field of civil law.
- 5.5 Knowledge of judicial procedures, administrative procedures and the rules of evidence.
- 5.6 Knowledge of Superior Court and Appellate Court rules, policies and procedures, including court rules of each level of court.
- 5.7 Ability to accurately analyze legal problems, documents and instruments and resolve legal questions by applying legal principles and practices. Skill in deductive and inductive reasoning, analysis and synthesis.
- 5.8 Ability to make difficult decisions based on sound judgment.
- 5.9 Ability to evaluate and organize facts in preparation of cases.
- 5.10 Ability to interview complainants, lay and professional witnesses.
- 5.11 Ability to work cooperatively with others.

- 5.12 Skill in managing large caseloads and maintaining appropriate records, logs and case files.
- 5.13 Ability to present statements of fact, law and argument clearly and logically in written and oral form. Skill in identifying and clearly articulating subtle differences, distinctions and nuances.
- 5.14 Skill in conducting legal research, analysis of data and determination of proper course of action.
- 5.15 Skill in preparing, presenting and conducting civil cases in court and before administrative bodies.
- 5.16 Skill in planning, preparing, presenting and conducting case strategies to present complex court cases.
- 5.17 Skill in interpreting and explaining abstract legal and constitutional principles, codes, statutes, ordinances and procedures to lay and professional persons.
- 5.18 Ability to negotiate settlements.
- 5.19 Ability to remain calm under stressful situations.

6.0 EDUCATION, EXPERIENCE AND CERTIFICATES

- 6.1 Bachelor of Arts or Science Degree.
- 6.2 Juris Doctor Degree from an accredited law school.
- 6.3 Successful passage of the Washington State Bar examination and current membership in the Washington State Bar Association, which requires 45 credits of continuing legal education every three years.
- 6.4 Specialized training or experience in the area of land use and environmental law.
- 6.5 Significant trial court experience is required.
- 6.6 Valid Washington driver's license and proof of auto insurance.

THIS JOB DESCRIPTION DOES NOT CONSTITUTE AN EMPLOYMENT AGREEMENT BETWEEN THE EMPLOYER AND EMPLOYEE, AND IS SUBJECT TO CHANGE AS THE NEEDS OF THE EMPLOYER AND REQUIREMENTS OF THE JOB CHANGE.

DATE

DEPARTMENT HEAD

DATE

EMPLOYEE

Deputy Prosecuting Attorney/Civil-Land Use
Prosecuting Attorney
December 2000
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Exhibit 4
July, 2015 Salary Survey Data Collected by Island County Human Resources Director
to
Declaration of Gregory M. Banks in Opposition to
Defendants' Motion for Summary Judgment



Help m.bacon@co.island.wa.us (Sign Out)
Island County Account

Project: Active Workforce Dashboard Your Workforce Market Data Strategy & Analytics

Dashboard > Market Data > Market Reports For Your Jobs > Detailed Report

Detailed Market Data Report

127014 - DEPUTY PROSECUTING ATTORNEY II, Island County--Coupeville

Report Rating:

Total Cash Compensation	
10th:	\$56,659
25th:	\$64,198
50th:	\$73,831 <i>Your Target</i>
75th:	\$85,548
90th:	\$99,136
Average:	\$74,352

Base Salary	
10th:	\$56,178
25th:	\$63,888
50th:	\$73,414 <i>Your Target</i>
75th:	\$84,444
90th:	\$96,326
Average:	\$73,790

100% Reported

Bonus	
10th:	\$458.08
25th:	\$1,152
50th:	\$3,154 <i>Your Target</i>
75th:	\$8,529
90th:	\$20,726
Average:	\$3,997

13% Reported

Profit Sharing	
10th:	-
25th:	\$1,106
50th:	\$2,195 <i>Your Target</i>
75th:	\$4,356
90th:	-
Average:	\$2,463

4% Reported

- Labor Market Survey
- Job Description Survey

Profiles last updated: 2015-05-08 | Date report run: 2015-07-01 | Algorithm version: 2015.06

Report Details

- Compensable Factors
- Market Trends
- Compensation Influencers:
 - Skills and Experience
 - Employer Settings
 - Training and Education
 - Performance
 - Location
- Benefits Summary

- Custom Report
- Summary Report
- ▶ Advanced Settings

Job Summary

Perform and prepare legal research and court documents to present in court. Ensure that criminals are punished for their crimes by convincing judges that the criminal is guilty. Typical years experience in field of 8 years. Typically holds Juris Doctor (JD), Master of Jurisprudence, or Master of Law (LLM).
Supervisory Role: No. Skills/Specialties Include Legal Compliance, Litigation Case Management. Practice Area: Criminal Law.

Answers to Compensable Factors

Ordered by matching precedence

1. PayScale Job Title: Prosecutor
2. Location: Coupeville, Washington
3. Certification/License: Skipped
4. Martindale-Hubbell Rating: -Not Specified-
5. Avg. Size of Competing Organizations: 400
6. Government Contractor: No
7. Practice Area: Criminal Law

- 8. Organization Type: Government - State & Local
- 9. Industry: County Government
- 10. Degree: Juris Doctor (JD), Master of Jurisprudence, or Master of Law (LLM)
- 11. Skill/Specialty: Legal Compliance, Litigation Case Management
- 12. Years Experience In Field/Career: 8
- 13. Supervisory Role: No

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2015 Salary Data – Counties

JOB TITLE: Criminal Deputy Prosecutor

JOB CODE: 760

Summary job description: Prepares criminal cases for trial; prosecutes offenders in superior, district and juvenile courts; reviews complaints filed by arresting officers. Reviews and examines evidence, interrogates witnesses, prepares trial briefs and completes trial preparation; investigates the scene of the crime. Researches legal problems. Typically requires a law degree from an accredited law school, 3-4 years experience, and membership in the Washington State Bar.

Jurisdiction	Local Title	Formal Salary Range		Flat Rate	Not Settled	Hours/Week	Number of Employees	Union Status	Job Match
		Low	High						
Adams County (19,410)	Deputy Prosecutor	4,147	6,284			40	3	NU	2
Benton County (188,590)	Deputy Prosecuting Attorney I	4,356	6,873			40	6	NU	2
Chelan County (75,030)	Deputy Prosecuting Attorney II/III	5,458	7,680			40	5	NU	2
Clallam County (72,650)	Chief Criminal Deputy Prosecutor			8,099		40	1	U	2
Clark County (451,820)	Deputy Prosecuting Attorney II	6,578	9,528			40	27	U	2
Columbia County (4,080)	Deputy Prosecuting Attorney	5,556	7,800			35	1	NU	2
Cowlitz County (104,280)	Deputy Prosecuting Attorney	4,350	8,075			37.5	13	NU	2
Douglas County (39,990)	Deputy Prosecutor	5,568	6,826			40	3	NU	2
Ferry County (7,710)	Deputy Prosecutor			5,833		40	1	NU	2
Franklin County (87,150)	Deputy Prosecutor II	5,288	7,087			40	6	NU	2
Grant County (93,930)	Prosecuting Attorney 1-3	5,166	6,695			40	9	NU	2
Grays Harbor County (73,110)	Criminal Deputy Prosecutor	3,740	5,695			40	6	NU	2
Island County (80,600)	Deputy Prosecuting Attorney	4,630	7,089			40	6	U	2
Jefferson County (30,880)	Deputy Prosecuting Attorney I/II/III	4,751	7,379			40	4	NU	2
Kitsap County (258,200)	Deputy Prosecutor 2/3	6,585	8,825			40	30	U	2
Kittitas County (42,670)	Deputy Prosecutor I/II/III	4,015	7,438			40	10	NU	2
Klickitat County (21,000)	Deputy Prosecuting Attorney I/II	4,265	5,899			40	2	NU	2
Lewis County (76,660)	Deputy Prosecutor	4,238	9,283			40	9	NU	2
Lincoln County (10,720)	Deputy Prosecuting Attorney	4,436	5,688			40	1	NU	2
Mason County (62,200)	Deputy Prosecuting Attorney I-III	6,565	7,796			40	6	U	2
Okanogan County (41,860)	Deputy Prosecutor	4,196	6,554			40	5	NU	2
Pacific County (21,210)	Chief Deputy Prosecutor	5,107	6,501			40	1	NU	2
Pend Oreille County (13,240)	Deputy Prosecutor	4,952	6,280			37.5	4	U	2
Pierce County (830,120)	County Attorney 2	6,157	8,310			35	29	U	2
San Juan County (16,180)	Criminal Deputy Prosecuting Attorney	4,960	6,439			40	1	NU	2
Skagit County (120,620)	Deputy Prosecutor II/III				NS	40	4	U	2
Skamania County (11,430)	Chief Deputy Prosecutor	5,792	6,872			40	1	NU	2
Snohomish County (757,600)	Criminal Deputy Prosecutor II				NS	40	25	U	2
Spokane County (488,310)	Attorney II	5,378	7,257			37.5	32	U	2
Stevens County (44,030)	Criminal Deputy Prosecutor	5,415	6,440			37.5	5	NU	2
Thurston County (267,410)	Deputy Prosecuting Attorney II	5,772	7,855			40	0	U	2
Wahkiakum County (3,980)	Deputy Prosecuting Attorney			7,435		40	1	NU	2
Walla Walla County (60,650)	Deputy Prosecutor	4,908	6,263			35	3	NU	2
Whatcom County (209,790)	Deputy II – Prosecuting Attorney	5,851	7,972			40	3	NU	2
Whitman County (47,250)	Deputy Prosecutor	3,696	4,781			40	2	NU	2

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Exhibit 5
Orders of Invalidity in the Western Washington Growth Management Hearings Board
Cause No. 95-2-0063
to
Declaration of Gregory M. Banks in Opposition to
Defendants' Motion for Summary Judgment

1996 WL 650319 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

Western Washington Growth Management Hearings Board

State of Washington

WHIDBEY ENVIRONMENTAL ACTION NETWORK, PETITIONER

v.

ISLAND COUNTY, RESPONDENT

No. 95-2-0063

April 10, 1996

SECOND COMPLIANCE HEARING ORDER AND FINDING OF INVALIDITY

*1 We issued this case's first compliance hearing order on December 19, 1995. In that order, we found the provisions of RCW 36.70A.330 provided us authority to review existing development regulations for invalidity regardless of whether those regulations were adopted pursuant to RCW 36.70A. We also found that Island County continued to be out of compliance with the Act. We reserved a decision on invalidity until after an additional compliance hearing scheduled for March 28, 1996.

The March 28th compliance hearing was held in the Island County Courthouse Annex. The three members of the Western Washington Growth Management Hearings Board (Board) and representatives of Island County and Whidbey Environmental Action Network (WEAN) were present. Also participating were representatives of the City of Langley, Skagit/Island County Builders Association, Island County Economic Development Council, Whidbey Audubon Society, Save the Woods on Saratoga, and William Applegate.

At the beginning of the hearing, we admitted all evidence requested by the parties. Island County reported that progress was being made on the comprehensive plan.

However, no interim steps had been taken to preclude new urban development outside IUGAs while this planning process was being completed. Thus, Island County remained out of compliance.

We have again reviewed our previous decision on jurisdiction to determine pre-existing non-GMA development regulations invalid. Having carefully evaluated all the arguments provided to us by the parties, we reaffirm that decision.

INVALIDITY

In considering potential invalidity, petitioner has the burden of showing that Island County's continued reliance on the sections of the Island County Code contested by WEAN substantially interferes with the fulfillment of the goals of RCW 36.70A (Act, GMA). This high standard is intended to focus on development regulations or plans whose continued implementation seriously threatens local governments' future ability to adopt planning legislation which complies with the Act.

As we begin our analysis, we review two of our previous decisions regarding new urban growth outside IUGAs. The *City of Port Townsend v. Jefferson County*, #94-2-0006, decision regarding the Legislature's intent for IUGA designation, we stated: " ... the trade-off for allowing an 18 month extension to complete the comprehensive plan was that the use of areas outside a designated urban growth area for new urban development and urban public facilities and services ended. This requirement from the Act does not mean that a moratorium on any further development must be adopted or that pre-existing and vested development cannot proceed. What it means is that the County has a responsibility to its residents to stop sprawl, commercial and industrial strip developments, and the corresponding tax bill that will become unnecessarily large because of poor planning.

As the CPS Board noted at p. 11 of *Tacoma v. Pierce County*, the consequence of existing urbanized areas outside cities not being included in an IUGA is simply that *new* urban development will not be permitted."

*2 More recently in *Whatcom Environmental Council v. Whatcom County*, #94-2-0009, (Third Compliance and Invalidation Order dated 3/29/96), (*Whatcom*), we stated:

"The fundamental statement of the anti-sprawl provisions of the GMA is found in RCW 36.70A.110. In subsection (1), the statute directs that urban growth areas be established by a county, "outside of which growth can occur *only* if it is *not urban* in nature" (italics supplied). While there are many goals found in RCW 36.70A.020 relating to the anti-sprawl concept, it is section .110(1) that provides the absolute prohibition of new urban growth in areas outside UGA or IUGA boundaries. While local governments have a wide variety of discretionary choices under the GMA, the language of .110(1) eliminates any discretion of local governments to allow new urban growth outside UGAs."

The Legislature directed local governments to adopt ordinances establishing IUGAs by October 1, 1993. These ordinances were to preclude new urban development outside IUGAs while local governments completed their homework on GMA comprehensive plans and implementing regulations. Local governments were required to adopt comprehensive plans meeting GMA standards by July 1, 1994. Since those deadlines, Island County has continued to make its land use decisions based on the Island County Code (ICC), Chapter 17.02. The record in this case clearly shows that the continued application of this pre-GMA code has resulted in urban-type development being approved and vested outside IUGAs.

The continued vesting of new urban development outside IUGAs substantially threatens the fulfillment of several GMA goals. As we have previously stated in *Whatcom*:

"The goals of the Act relating to prohibition of urban growth outside of properly established IUGA areas primarily involve RCW 36.70A.020(1), (2), (3), (8), (9), and (10) ... Urban growth in non-urban areas discourages development where adequate public facilities and service exist, encourages sprawl, does not allow for efficient multi-modal transportation systems, interferes with the maintenance and enhancement of natural resource-base industries, and discourages the retention of open space, conservation of fish and wildlife habitat. Such new urban growth also decreases access to natural resource lands and water, and fails to protect the environment and our State's high quality of life, including air and water quality and availability of water."

Goals 1 and 2 state:

"(1) Urban Growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce Sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development."

WEAN and the City of Langley contended that:

The amount and location of residential and commercial growth outside IUGAs that current development regulations allow is essentially unlimited.

*3 • Island County's Code allows new urban residential, new rezones, and other approvals for urban commercial and industrial uses outside IUGAs.

Residential sprawl and urban development continue to occur throughout the County.

This perpetuates patterns and intensities of development that are contrary to the GMA urban growth and sprawl reduction Goals 1 and 2.

- These circumstances “substantially interfere with the fulfillment of GMA planning goals” and therefore support a determination of invalidity.

This record showed that under the ICC, Island County is substantially overzoned. Exhibit J-1 (page entitled “Zoning Built-Out”) produced by Island County staff states:

“At current zoning, not including density bonuses, the County could accommodate an estimated 211,500 people” (emphasis added). Under GMA, Island County is required to plan for approximately 20,000 additional people, rather than the extra 130,000 allowed under current zoning with no density bonuses or rezones included. This, in itself, frustrates GMA goals of reducing sprawl and restraining urban development to areas where services can be efficiently provided.

We analyze the challenged sections of the ICC asking the question: Will continued validity of these sections substantially interfere with the fulfillment of the goals of the GMA?

ICC 17.02.060, Residential (R) Zone

The R Zone has a base density of 3.5 dwelling units (du)/acre (ac) outside IUGAs. The zoning code states: “The purpose of the residential zone is to provide for living opportunities at a suburban density.” (emphasis added.) The GMA makes no provisions for new suburban development. Urban growth is to be placed within UGAs, and areas outside UGAs are to have rural growth.

3.5 du/ac is clearly an urban density. The zoning maps reveal large areas of Island County outside IUGAs zoned R. Exhibit J-1 shows that those lands now zoned R could accommodate 139,800 people at base density. The County contended that Island County has shorelines and view property everywhere that need more dense zoning. We find nothing in the Act which would allow such a large exception to the general rule that urban growth is prohibited in rural areas.

We find that the continued validity of ICC 17.02.060 substantially interferes with the fulfillment of the goals of the GMA.

ICC 17.02.100, Non-Residential Floating Zone (NR)

NR allows commercial, industrial, and residential development at 6 du/ac in Rural Residential Zone (RR) (1 du/5 ac) outside IUGAs. ICC 17.02.050 (RR zone) declares:

“The Rural Residential Zone is the principal land use classification for Island County. Limitations on density and uses are designed to provide a rural lifestyle and ensure compatible uses.”

This stated purpose of the RR zone is in sync with GMA goals.

In his brief, Mr. Applegate contended that the NR Floating Zone is Island County Code's most egregious threat to the goals of the Act and the above-stated purpose of the RR zone. WEAN and other participants complained that:

*4 Criteria used in considering approval of NR rezones has no correlation to those required by GMA goals.

- In this record, the County Planning Commission has been instructed to ignore the GMA and only look for conformance with the criteria in the zoning ordinance.

Since 1993, the Board of County Commissioners has approved every NR request even when the planning staff and/or the Planning Commission have found them not to comply with the criteria of their own ordinance.

- NR zone allows location of commercial and industrial developments throughout unincorporated Island County, thus promoting development patterns that are in direct conflict with the goals of the Act.

As applied, the NR zone encourages new urban commercial and industrial development outside IUGAs.

- Because of the overly broad range of development allowed anywhere in the RR zone, the NR Floating Zone substantially interferes with GMA goals.

In its reply brief, the County accused us of not considering 1995 amendments to the GMA. It pointed out that the Central Puget Sound Board (CPS) determined that appropriate non-residential uses are allowed in the rural area of the county.

Our past decisions are consistent with the 1995 amendments to the GMA and CPS decisions. We have said that no new urban commercial or new urban industrial development can occur outside IUGAs. We have not precluded the placement of natural resource-based industries or rural commercial development outside IUGAs. The Act allows appropriate non-urban uses outside IUGAs. Non-residential uses outside IUGAs must, by their very nature, be dependent upon being in a rural area and must be compatible both functionally and visually with the rural area. The NR Floating Zone provides no controls to preclude urban development outside IUGAs. This zone would not meet the CPS standards referred to by the County. (*Peninsula Neighborhood Association v. Pierce County*, #95-3-0071).

The record in this case clearly supports the petitioner's contentions. We find that ICC 17.02.100 allows new urban commercial and new urban industrial development outside IUGAs and substantially interferes with the fulfillment of the goals of the GMA.

Density Bonuses in RR Zone (1 du/5 ac)

Contested sections include:

ICC 17.02.050 c.2. For a Planned Residential Development (PRD) over ten acres base density increased to 1 du/2 ac.

ICC 17.02.050 c.3. For a PRD over 20 acres where property has been established as Transfer of Development Rights (TDR) receiving property, base density increased to 1 du/1 ac.

ICC 17.02.050 c.4. For a PRD over 100 acres where property has been established as TDR receiving property, base density increased to 6 du/ac.

- ICC 17.02.170(c)(2)(a). Specifies number of TDRs that can be utilized on RR zoned property/provides that PRDs under 100 acres not to exceed 1 du/ac.

- ICC 17.02.170(c)(2)(b). Specifies number of TDRs that can be utilized on RR zoned property/provides that PRDs 100 acres or larger, not to exceed 6 du/ac.

*5 Petitioner contended that the above sections allow, facilitate, and encourage residential development at suburban and urban densities throughout the rural part of Island County. It further contended that continued reliance on these sections substantially interferes with Goals 1 and 2.

TDRs provide a tool for permanent preservation of sensitive lands and open space. PRDs or clustering, designed properly and limited as to scope, could also protect sensitive areas, riparian trails, and green space in the rural area. The GMA encourages local governments to consider using TDRs, PRDs, and clustering. If these TDR provisions designated receiving property inside

IUGAs or effectively limited the patterns, location, and size of such developments within rural lands so as not to constitute new urban growth, there would be no need for a declaration of invalidity.

Attachment D of the 1984 zoning code shows that PRDs are allowed to be placed virtually anywhere in the County. There are no limits on the total amount of development which may be built outside IUGAs at these increased densities. 17.02.050c.4. and 17.02.170(c)(2)(b) allow densities of 6 du/ac in RR zone. This density is clearly urban and is not required to meet criteria for fully contained communities or master planned resorts as defined in GMA.

As currently written, development at these increased densities constitutes sprawl and/or impermissible urban development outside IUGAs and substantially interferes with the goals of the Act.

Increased Density on Agricultural and Forest Land

ICC 17.02.080b.3.(a) and (b) and 17.02.080d.3. allow increased densities and cluster developments on agricultural lands. They make agricultural land TDR receiving property and require such lots to be smaller than 1 du/2.5 ac.

ICC 17.02.090b.3.(a) and (b) and 17.02.090d.3. allow increased densities and cluster developments on forest lands. They make forest land TDR receiving property and require such lots to be smaller than 1 du/2.5 ac.

ICC 17.02.170c.2.(c) designates agricultural and forest lands as receiving properties for TDRs thereby allowing increased development densities on those lands.

Petitioner contended that the above provisions substantially interfere with GMA's goal of encouraging the conservation of productive forest and agricultural lands and discouraging incompatible uses (Goal 8).

All natural resource lands (NRL) regardless of location within NRL blocks appear to be eligible for these increased densities. The greatest threat to long-term productive NRLs is nearby conflicting uses. *Olympic Environmental Council v. Jefferson County*, #94-2-0017, (OEC). As currently written, these provisions substantially interfere with Goal 8.

Reclassification of Resource Lands

ICC 17.02.210d.1(c) allows reclassification of Agricultural (AG) and Forest Management (FM) lands to RR (1 du/5 ac).

ICC 17.02.210d.6. allows reclassification of AG and FM lands to R (3.5 du/ac).

*6 These sections allow rezone of all resource lands on demand, except for agricultural lands with class II or III soils. Petitioner charged that no rezone of resource lands has been denied by Island County since the passage of GMA. This claim was not disputed by the County.

In OEC Compliance Hearing Order dated 8/17/95, we discussed at length the threat of automatic "opt out" provisions to Goal 8. That discussion pertained to forest management lands but would apply equally to agriculture lands. We stated that Goal 8 of the GMA relating to natural resource industries provides three prongs:
to maintain and enhance;

(1) to encourage conservation; and

(2) to discourage incompatible uses.

We concluded:

"Likewise, the automatic "opt-out" provisions of the ordinance violate all three prongs of Goal 8. The opt-out provision would allow a property owner to remove portions of a forest designation at any location, even within the central core of a block. As shown by this record the conversion of forest land to the incompatible uses allowed by the current ordinance seriously undermines, if not destroys, the economic viability of this resource-based industry. The ordinance substantially interferes with Goal 8, particularly by encouraging, rather than discouraging, incompatible uses not only along the fringe of the forest designation, but potentially in its very heart."

ICC 17.02.210d.1(c) and ICC 17.02.210d.6, as written and applied substantially interfere with Goal 8 of the GMA.

CONCLUSION

The record presented to us in this case clearly demonstrates that the continued validity of the above sections, as currently written and implemented, is resulting in and will continue to result in land use patterns that make it more difficult each day for the County to adopt a GMA comprehensive plan and implementing regulations that fulfill the goals of the Act.

We do not take this finding of invalidity lightly. Skagit/Island County Builders Association, Island County Economic Development Council, and Island County all pointed out the hardship that would be caused by a declaration of invalidity. We regret any such burden, but remind those participants that we have not caused this hardship. The County has had years to take action to preclude new urban development outside IUGAs and to protect natural resource lands from conflicting uses. Our December 19 decision provided Island County 90 additional days to take such interim action. The long-term costs to the citizens and taxpayers of Island County, due to this failure to adopt regulations which produce development patterns allowing the efficient and economical provision of services and the continued viability of natural resource lands, greatly outweigh any temporary hardships.

In order to limit the potential confusion about the impacts of this declaration of invalidity and clarify its intended effect, we point out that no finding of invalidity can preclude vested lots from consideration of eligibility for a building permit. Our declaration does not preclude house construction at base density in Rural Residential, Agricultural, and Forest Management zones. It does not preclude remodels or repairs. It will not affect any kind of construction within current IUGAs.

*7 RCW 36.70A.300(2) sets forth the standard for a finding of invalidity. Invalidity may be found only if a Board determines that continued validity of the regulations would substantially interfere with the fulfillment of the goals of the Act. We have found that to be the case. A Board must specify which particular parts of the regulation are determined to be invalid and the reasons therefore. We have done that in the text of this decision. We have also attached the findings of fact and conclusions of law required by section .300(2) as Appendix 1 and incorporate them herein.

Dated this 10th day of April, 1996.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Presiding Officer
W^m H. Nielsen
Board Member

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appendix I

Island County did not adopt a comprehensive plan by July 1, 1994, as required by the GMA. No implementing development regulations have been adopted.

Island County established interim urban growth areas. RCW 36.70A.110(1) prohibits urban growth outside of IUGAs. Development regulations were required under the GMA by October 1, 1993.

Since missing the deadlines, Island County has continued to make land use decisions based on the pre-GMA Island County Code (ICC), specifically Ch. 17.02.

1. The ICC allows new urban residential, new rezones and other approvals for urban commercial and industrial uses throughout the area outside IUGAs.
2. The patterns and intensities of development in areas outside of IUGAs since the missed deadlines are urban development under the definition provided in the GMA.
3. The residential zone found in ICC 17.02.060 provides for 3.5 du/ac outside of IUGAs. Such density is urban.

The use of the non-residential floating zone provided for in ICC 17.02.100 allows urban commercial, urban industrial, and urban residential (6 du/ac) development outside IUGAs.

Since 1993 the Board of County Commissioners has approved every non-residential floating zone request even when staff and/or the planning commission have recommended denial.

The use of planned residential developments, density bonuses and transfer of development rights with increased densities, without any limitations for areas outside the IUGAs, constitute urban growth.

The allowance of agricultural and/or forest lands to be transfer of development rights receiving properties, and thus be required to divide into lots smaller than 1 du/2.5 ac, discourages conservation of productive forest and agricultural lands and encourages incompatible uses.

4. The allowance of automatic reclassification of agricultural and forest management lands to either rural residential or residential zones does not encourage maintenance and enhancement of resource lands nor their conservation, and encourages incompatible uses.

The provisions of the ICC and their application by the County, as noted in findings 1-11, substantially interferes with the goals of the Growth Management Act, particularly goals 1, 2 and 8.

CONCLUSIONS OF LAW

*8 The Board has jurisdiction.

The provisions of ICC noted in this Order are invalid under the provisions of RCW 36.70A.330 and .300(2).

1996 WL 650319 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

1997 WL 652518 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

Western Washington Growth Management Hearings Board

State of Washington

WHIDBEY ENVIRONMENTAL ACTION NETWORK, PETITIONER

v.

ISLAND COUNTY, RESPONDENT

No. 95-2-0063

October 6, 1997

Additions are indicated by <<+ Text +>>; deletions by <<- Text ->>.

THIRD COMPLIANCE HEARING ORDER AND FINDING OF INVALIDITY

*1 We issued this case's second compliance hearing order on April 10, 1996. In that order, we found that Island County had not yet adopted a comprehensive plan and implementing regulations as required by the Growth Management Act (GMA, Act) and that no interim steps had been taken to preclude new urban development outside interim urban growth areas (IUGAs). Thus, Island County remained out of compliance. We also reviewed and reaffirmed our previous decision on jurisdiction to determine pre-GMA development regulations invalid. In that order, we determined invalid portions of the Island County Code (ICC) that substantially interfered with GMA's goals of restricting urban development to urban growth areas (UGAs) and conserving resource lands.

On July 6, 1997, Whidbey Environmental Action Network filed a new motion requesting that we determine additional portions of the ICC invalid. Challenged were standards for industrial, commercial, and mixed commercial-residential development as applied outside IUGAs and two provisions of Island County's wetlands ordinance.

Whidbey K.S.C., L.L.C. moved to intervene on August 4, 1997. Following a telephonic hearing on August 21, 1997, we granted their motion. The August 27, 1997, compliance hearing was held in Olympia. Present were the three members of the Western Washington Growth Management Hearings Board (Board). Representing Island County were David Jamieson, Jr., Deputy Civil Prosecutor, and Vincent Moore, Planning Director; representing Whidbey Environmental Action Network (WEAN) were Steve Erikson and Marianne Edain; representing participant Save the Woods on Saratoga (SWS) was David Bricklin; representing intervenor Whidbey K.S.C., L.L.C. was Matthew Turetsky. Also present was William Appelgate.

We separate our analysis into general legal issues, issues relating to the challenge to the ICC's development (industrial, commercial, and mixed-use) standards, and issues relating to the challenge to the critical area regulations. We then examine the specific challenged portions of the ICC to determine if their continued validity substantially interferes with the fulfillment of GMA's goals.

GENERAL LEGAL ISSUES

General legal arguments raised in opposition to WEAN's request for invalidity were:

1. The Board lacks jurisdiction to determine pre-GMA regulations invalid [Island County's response brief]. This is addressed as general legal issue 1.

2. Principles of claim preclusion, res judicata, and collateral estoppel preclude WEAN from asking for additional invalidation of provisions of the ICC. [Island County's response brief and Whidbey K.S.C., L.L.C. reply brief]. This is addressed as general legal issue 2.

3. The Board may not hold a compliance hearing upon motion of the petitioner. [Island County at the August 27th compliance hearing]. This is addressed as general legal issue 3.

***2 General Legal Issue 1: Does the Growth Management Hearings Board have jurisdiction to consider invalidity of pre-GMA regulations in a case that involves a finding of noncompliance due to "failure to timely act?"**

We initially ruled that the Board has jurisdiction to invalidate pre-GMA regulations in this particular case. [WWGMHB, Case No.95-2-0063, Second Compliance Hearing Order and Finding of Invalidity, at p. 1815 and 1820] We have upheld this ruling in two other cases [WWGMHB, Case No. 95-2-0065, Finding of Non-Compliance .., at p.1546; and Case No. 94-2-0009, Third Compliance Order, at p. 1785].

The County argued that the Board should reverse these previous rulings that it has jurisdiction to consider invalidity of pre-GMA regulations. In support, it submitted appeal briefs to the Court of Appeals and the Supreme Court from one of these cases. In response, SWS submitted a response brief submitted in the same case. Neither court has ruled on this issue yet. Many of the issues raised in these briefs are constitutional ones. The Growth Management Hearings Boards do not have jurisdiction over constitutional issues.

Conclusion: We have carefully reviewed the other arguments raised in these submissions and reaffirm our previous decision that the Board does have jurisdiction to consider invalidity of pre-GMA regulations.

General Legal Issue 2: Do principles of res judicata, collateral estoppel, and/or claim preclusion prevent WEAN from asking for invalidity of additional portions of the ICC?

The County argued:

"WEAN's claim that other portions of Island County's existing pre-GMA Zoning Ordinance are invalid should not be considered as the Board's prior decision is res judicata and WEAN is precluded from raising additional claims that it could have raised in the prior hearing." [Island County reply brief].

WEAN responded:

"Principles of collateral estoppel, res judicata, and claim preclusion do not prevent the Board from considering WEAN's motion for invalidity. Two previous decisions by the Central Puget Sound Growth Management Hearings Board concluded that the Hearings Boards lack jurisdiction to consider these arguments. Even if the Board had authority to consider arguments based on these principles, they are not applicable in this particular case, since the issues are different than those addressed in the previous compliance hearings. The County ignores the time dependent nature of the standard that triggers invalidity - substantial interference with the fulfillment of GMA's goals." [WEAN reply brief at 14.].

At the August 27th hearing, SWS also argued that WEAN was not precluded from seeking additional remedies to gain compliance with the Board's previous decision.

The County asserted that the Motion for Invalidity was barred by the principle of res judicata. We decline to rule on the County's assertion that the principle of res judicata applies because the facts here would not support its application.

*3 SWS responded to the County's argument by noting that the County had failed to cite any case which stands for the proposition that res judicata applies to preclude a party from seeking additional remedial orders from a court (or administrative agency) subsequent to obtaining an initial judgment. SWS distinguished this situation from one where an applicant is seeking to initiate a new lawsuit (or administrative appeal) raising new legal issues. As SWS correctly noted, this is a situation where the applicant has previously obtained the equivalent of a judgment in its favor and is now seeking to obtain additional remedial orders from the court to assure compliance by the wrongdoing party.

SWS noted that none of the cases cited by the County suggest that a party who has obtained an initial judgment in its favor is precluded from returning to the court (or administrative agency) on successive occasions to obtain additional court (or agency) orders necessary to compel compliance or otherwise obtain the fruits of its original judgment. The County had an opportunity to reply to this argument at the hearing and in post-hearing briefs but has failed to do so. The record is devoid of any legal authority to support the County's proposition that res judicata applies to preclude a party from seeking additional remedial orders.

Moreover, res judicata requires an identity of issues. That is necessarily lacking here. The determination of whether a regulation (or Comprehensive Plan provision) is invalid changes over time. At one time, it may appear that a regulation will be short lived (soon to be amended) and therefore will not cause substantial interference with the Act's goals. Subsequently, it may be evident that the regulation will remain in existence for a longer period of time causing a substantial interference with the Act's goals. Later, if the economy has picked up and numerous development applications are being filed, the likelihood that a noncompliant development regulation will cause substantial interference with the Act's goals increases.

Further, as a policy matter we are reluctant to apply the principle of res judicata because it may undermine efforts of citizens and elected officials to amicably resolve GMA disputes. Petitioners should not be forced to seek invalidation of every conceivable plan element and/or development regulation at the outset. Where there is a possibility for good faith discussions to resolve points of contention, petitioners should be allowed to forego immediately seeking invalidity to allow such efforts to bear fruit. A rule that broadly applied res judicata principles in the invalidity setting would provide a catalyst for petitioners to seek invalidity early in the process when it might be counter-productive to efforts to resolve disputes amicably.

Our decision is also consistent with that portion of the GMA which authorized the Board to schedule multiple compliance hearings. RCW 36.70A.330. Certainly, the Legislature anticipated that additional issues might be raised during the compliance/remand process.

*4 **Conclusion:** Since the County has yet to comply with our previous order in this case, WEAN is not precluded from seeking additional remedies to compel compliance and prevent continued implementation of development regulations which substantially interfere with the goals of the Act.

General Legal Issue 3: May the Board hold a hearing to consider invalidity upon motion of a petitioner?

At the compliance hearing on August 27th, Island County argued that RCW 36.70A.330(1) prevents the Board from holding a compliance hearing in response to a motion by a petitioner. WEAN responded that the Board could hold a compliance hearing when it chose, whether or not in response to a motion by a petitioner.

First we review the statute and its amendment in 1995:

RCW 36.70A.330 Noncompliance.

(1) After the time set for complying with the requirements of this chapter under RCW 36.70A.330(1)(b) has expired, <<+ or at an earlier time upon the motion of a county or city subject to a determination of invalidity under RCW 36.70A.300, +>> the

board, <<- on its own motion or motion of the petitioner ->> shall set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of this chapter. [Language added in 1995 is underlined; that deleted is struck through.]

Prior to the 1995 amendments, a county or city found to be out of compliance could not compel a Board to hold a compliance hearing earlier than a Board or petitioner motion. When the remedial invalidity enforcement scheme was added to GMA, concern was raised that .330(1) could have had the result of preventing the county or city from bringing responsive regulations before a Board for review prior to the compliance hearing set by a Board or motioned by the petitioner. The amendment now expressly allows such a motion by the affected county or city in these situations.

The first part of the section continues to allow a Board to set a compliance hearing when it chooses. Removed is the requirement that a compliance hearing be set upon motion of a petitioner. However, this in no way prohibits such a motion by a petitioner, it merely provides a Board discretion to decide whether or not to set a compliance hearing to consider the motion.

Conclusion: A Board can choose either to set or not to set an additional compliance hearing. In this case, we have chosen to hold another compliance hearing.

DEVELOPMENT STANDARDS

(INDUSTRIAL, COMMERCIAL, AND MIXED-USE) ISSUES

The ICC contains two non-residential (NR) zoning designations: the NR Floating zone [ICC 17.02.100] and the NR zone [ICC 17.02.105]. The same activities are allowed in, and the same standards apply to, both NR zones. The NR Floating zone could be sited on any rural residential lands in the County. We previously determined invalid Island County's NR Floating zone. (WWGMHB, Case No. 95-2-0063, Second Compliance Hearing Order and Finding of Invalidity, at p. 1817-18).

*5 The other NR zoning designation consists of specific parcels that were in commercial zoning designations prior to adoption in 1984 of the ICC. Upon adoption of the current zoning code, these parcels were given the NR zoning designation. At issue in this case is the application of the challenged provisions of the ICC to these parcels.

WEAN contended that:

1. Much of the land zoned NR is undeveloped rural land.
2. The type and scale of industrial, commercial, and mixed-use development allowed in these areas constitutes urban growth.
3. The challenged portions of the ICC which set standards for industrial, commercial, and mixed-use development on NR zoned lands outside of IUGAs violate and substantially interfere with GMA's sprawl reduction goal.

To illustrate its claim that continued validity of these provisions substantially interfered with the fulfillment of GMA's goals, WEAN submitted:

1. Excerpts from the findings of fact for the ICC adopted in 1984 which stated that many of these parcels were "not appropriate locations for commercial or industrial development."
2. Excerpts from the application for a major destination resort by Whidbey K.S.C., L.L.C.

Arguments raised in opposition to WEAN's request for invalidity were:

1. The challenged industrial and commercial provisions of the ICC only apply to the invalidated NR Floating zone and therefore we have no reason to determine these provisions invalid. [Island County Response Brief].
2. Residential use, as allowed in the mixed use provisions of the ICC, is more conforming to GMA's goals than commercial use. [Island County Response Brief].
3. Recent amendments to GMA pertaining to rural lands allow the types of development claimed by WEAN to substantially interfere with the fulfillment of GMA's goals. [Economic Development Council (EDC) response brief].
4. The destination resort, used by WEAN as an example, conforms to GMA's goals. [Whidbey K.S.C., L.L.C. motion to intervene and EDC response brief].

We address each of these issues in turn.

Development Issue 1: Do ICC 17.02.150 (h) and (i) apply to existing NR zoned parcels?

The Deputy Prosecutor argued that these provisions to the ICC applied only to the NR Floating zone and, since the NR Floating zone had already been determined to be invalid, there was no reason to address WEAN's request for invalidity. WEAN responded that the County Planning Department had not interpreted the challenged regulations this way and, if the Planning Department interpretation was correct, the regulation's continued validity would substantially interfere with the fulfillment of GMA's goals. If the Deputy Prosecutor's interpretation was correct, invalidating the challenged regulations would clear up any confusion as to the regulations' application to existing NR zoned parcels. At the August 27th hearing, neither the Deputy Prosecutor nor Planning Director addressed this specific question. WEAN's claim that different departments of Island County interpreted the application of these regulations differently went un rebutted.

*6 We note that ICC 17.02.105, which established the NR zone, invokes all other sections of the zoning ordinance, including the challenged regulations. Furthermore, whether a regulation interferes with GMA's goals depends both on its language and its actual application. The regulation's effect is inherently dependent on how it is interpreted by those administering it.

Conclusion: In deciding whether the challenged regulation meets GMA's substantial interference test, we will look to the regulation's language and also to its interpretation by those who administer its application.

Development Issue 2: Is residential use, as allowed in ICC 17.02.150 (k), more conforming to GMA's goals than commercial use?

The County, in its response brief, argued:

"Since Island County is not allowing any new zone changes to Non-Residential, allowing more conforming use, i.e. residential use, on existing Non-Residential zoned property does not interfere at all with the fulfillment of the goals of the GMA." [Island County reply brief].

We interpret this to suggest that residential use is always more conforming to GMA's goals than other (non-residential) uses. GMA, however, makes no such distinction in its definition of urban growth:

(14) "Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources. RCW 36.70A.030.

Thus, GMA does not, in its definition of urban growth, distinguish between residential and other types of urban growth. Either type of growth may constitute urban growth as defined in GMA. The key questions are whether the allowed growth is urban in nature and, if so, whether it occurs in an area suitable for and delineated by GMA for urban growth.

Conclusion: Residential development is not necessarily more conforming to GMA's goals than non-residential development.

Development Issue 3: Do the recent amendments to GMA pertaining to rural lands now allow the types of development which WEAN claims substantially interfere with the fulfillment of GMA's goals?

The EDC argued in its reply brief that the 1997 amendments to GMA allow the sort of development WEAN seeks to prevent and that:

"To approve their petition would be to ignore long standing, historic county commercial patterns, the amendments to GMA concerning rural development [implemented by ESB 6094], as well as create severe hardship regarding job opportunities and tax revenues." [EDC reply brief at 4.]

WEAN responded that:

"The recent GMA rural lands amendments do not open the floodgates to sprawl. They continue GMA's principle of placing intensive development first in areas of already existing intensive development. They narrowly circumscribe the qualifications for a rural area to be eligible for more intensive development. The area and its use must actually be pre-existing and be capable of being defined by a "logical" boundary based primarily on geographical factors. Undeveloped rural lands may be part, but not all, of an area meeting GMA's qualifications for eligibility as an area of more intensive rural development. Pre-GMA zoning is irrelevant to this determination." [WEAN reply brief at I. B. 5.]

*7 At the August 27th hearing, SWS argued that contrary to EDC's argument, the problem with the challenged provisions of the ICC was that they did continue "long standing, historic county commercial patterns."

Conclusion: The new amendments to GMA contained in RCW 36.70A.070(5) do not apply to County action taken before July 27, 1997. We will issue no advisory opinion on this issue.

Development Issue 4: Does the destination resort used by WEAN as an example show that ICC 17.02.150 (h), (i), and (k) substantially interfere with the fulfillment of GMA's goals?

WEAN argued:

"The proposed destination resort used by WEAN to illustrate how the continued validity of ICC 17.02.150. (h), (i), and (k) substantially interferes with the fulfillment of GMA's goals constitutes major new urban development. Neither the property nor the surrounding area meet GMA's tests for eligibility as a rural area suitable for more intensive development. The proposal massively contravenes numerous GMA goals." [WEAN reply brief at 8.]

Both EDC and Whidbey K.S.C., L.L.C. characterized the proposed development as a master planned resort and argued that as such, the proposed development does not and cannot interfere with GMA's goals, since GMA makes allowance for master planned resorts.

First, we consider whether the resort constitutes urban growth outside of an IUGA. Then we consider whether approval of such development illustrates interference with the fulfillment of GMA's goals, where the county has failed to adopt a comprehensive plan and implementing regulations as required by GMA.

The resort will include a:

"200 room lodge with food service, convention facilities, meeting rooms, theater, swimming pool, spa, game room, gift store, and related administrative and support spaces; 78 one and two bedroom cottages; two remote meeting rooms; an athletic club; outdoor recreation and sports courts; horse stable and rink; maintenance facilities, walking, biking and riding trails; parking areas [for over 450 cars]; a visitor center; convenience store and equipment rental area; and utility systems". [Attachment F]. At its peak capacity, the resort will have over 100,000 visitors per year and 250 full time equivalent employees, many of whom will be "navy wives" commuting from Oak Harbor on North Whidbey. [Oral report of John Hitt, Executive Director, Island County Economic Development Council, to the Langley City Council, 8/6/97, as heard by Steve Erickson]." [WEAN reply brief at 10. C.].

From the evidence submitted by all parties, at capacity the resort, if built, will have a population of nearly 1,000 people on parcels of land totaling about 160 acres. This many people in this small an area appears to be an urban density. When coupled with a 200 room lodge, 78 one and two bedroom residential cottages, parking for over 450 cars, and numerous other structures, the resort will "make intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources". RCW 36.70A.030(14). Thus, the resort appears to meet GMA's definition of urban growth. Due to its scale it will certainly require urban services and facilities. It is located several miles outside of Langley's IUGA.

*8 At the August 27th hearing we examined aerial photographs and zoning maps of the area of the resort proposal. [Exhibits L-1, M-1, N-1, and O-1]. This evidence shows the area as primarily forested, with a grass airstrip characterized by Whidbey K.S.C., L.L.C. as "abandoned" [Exhibit S]. It clearly does not appear to meet GMA's definition of being characterized by urban growth. RCW 36.70A.030(14).

The question then remains:

If a county has failed to adopt a comprehensive plan pursuant to GMA, or if the GMA plan fails to make specific allowance for master planned resorts, is a master planned resort outside of UGAs inconsistent with GMA's goals?

GMA prohibits siting master planned resorts and major industrial developments outside of UGAs unless a comprehensive plan makes specific allowance for them. Again, this indicates that these special exceptions to GMA's prohibition on new urban growth on undeveloped lands outside of UGAs must occur within the context of overall GMA planning requirements and goals. These include providing adequate supporting services and facilities, and making a conscious, reasoned choice following a process that includes public participation at the plan level where policy is formed. The siting of a master planned resort or major industrial development in a county which is over three years overdue in adopting a comprehensive plan must necessarily be outside of this context, and therefore the development cannot conform to GMA's goals. We express no opinion on whether the development is vested at the date of this order. If it is, nothing herein will affect its allowance. RCW 36.70A.300(3)(b).

Conclusion: The resort application used by WEAN as an example demonstrates that the continuing validity of ICC 17.02.150 (h), (i), and (k) substantially interferes with the fulfillment of GMA's goals. The resort would easily meet GMA's definition of urban growth; would certainly require urban services and facilities; and is located several miles outside of Langley's IUGA. The area meets neither GMA's definition of being "characterized by urban growth" nor that of being an "existing area or use" where more intensive rural development may be allowed. Because of the County's failure to adopt a GMA comprehensive plan with specific provisions for master planned resorts or major industrial development outside UGAs, a regulation which could allow the siting of a master planned resort or major industrial development outside of an IUGA must necessarily substantially interfere with the fulfillment of GMA's goals.

CRITICAL AREA ISSUES

WEAN has requested invalidation of two provisions of Island County's critical area ordinances regarding wetlands, arguing that because they fail to include the best available science and/or involve a complete exemption from regulation, they substantially interfere with GMA's critical areas protection goal. [WEAN motion to invalidate development regulations]. Island County responded that because WEAN did not challenge the ordinance within 60 days of its adoption, it may not do so now. [Island County reply brief].

*9 WEAN responded:

"Once the County is found in non-compliance, its regulations are no longer presumed valid. They may be invalidated, including previously adopted critical area regulations. GMA's new "best available science" standard postdates GMA's deadlines for adoption of protective critical area regulations. The regulations become subject to invalidation whether or not they are the cause of action leading to the County's being found in non-compliance. Otherwise, the County can avoid complying with the "best available science" standard forever, simply by failing to adopt a comprehensive plan pursuant to GMA and never amending the particular portion of the suspect development regulation." [WEAN reply brief, at 19.]

At the August 27th hearing, WEAN also argued that the exemption from regulation amounted to a failure to designate critical areas, and that the Board could determine invalid the challenged regulations because when the County failed to adopt the comprehensive plan in 1994, it also failed to review its critical area regulations as required by GMA.

Although we have previously found that we have jurisdiction to invalidate pre-GMA ordinances, we have no such authority for invalidating ordinances adopted under GMA and unchallenged within 60 days of publication of notice of adoption.

The County and WEAN supplied us with information which puts in question whether Island County's wetlands ordinances were actually adopted under GMA and whether publication was adequate. However, no petition has been filed appealing these issues. Even though we have concerns about the contested sections' noncompliance with GMA and potential interference with the goals of the Act, the ordinances are presumed valid.

If anyone wishes to pursue these and other alleged short-comings of Island County's procedures regarding adoption and review of critical areas ordinances, a petition must be filed. The County and others would thus be afforded the full petition process to respond to such claims.

INVALIDITY

In our December 19, 1995, ruling that we had jurisdiction to invalidate development regulations adopted prior to GMA, we noted that the challenged regulations appeared to substantially interfere with the fulfillment of GMA's goals. We provided the County with an additional three months to come into compliance or take interim steps to preclude new urban development outside IUGAs. The County failed to take any actions during that period.

In our second compliance hearing order and finding of invalidity, April 10, 1996, we noted that GMA directed the adoption of ordinances establishing IUGAs by October 1, 1993, that precluded new urban development outside IUGAs prior to adoption of comprehensive plans by July 1, 1994. Since missing those deadlines, Island County has continued to make land use decisions based on the ICC, Chapter 17.02. Island County has taken no steps to restrain urban development outside IUGAs while the County continues work on its comprehensive plan, now over three years late.

*10 In its reply brief at page 10 WEAN argued:

"As WEAN previously argued regarding the time dependent nature of the standard for imposing invalidity:

'The scheme's purpose is quite clear: to prevent the continued use of plans and regulations which result in substantial interference with the fulfillment of GMA's goals. In creating this standard, the legislature recognized a truism in planning and land management: actions today may foreclose options tomorrow.....Continual non-compliance with, and defiance of these

[GMA] goals, will inevitably, if carried on for a long enough time, make it impossible to ever fulfill those goals. Hence, the new scheme is clearly intended to prevent continued non-compliance and defiance from forever destroying the possibility of substantive compliance.' [WEAN's Brief of 11/13/95, cited in WWGMHB Case No. 95-2-0063 at p. 1145].

Hence, whether a development regulation meets GMA's test of substantial interference depends on three factors:

- a. The magnitude (or egregiousness) of the violation of GMA;
- b. How long the violation has occurred;
- c. How much longer it will likely occur absent invalidation.

These factors mean that while invalidation of a regulation which constitutes a violation over a brief period may not be justified, the same violation continued for longer, or even indefinitely, may easily meet the standard for invalidation. The nature of the County's continued non-compliance is indefinite, with adoption of a comprehensive plan and implementing regulations pursuant to GMA always just four months away. For this reason, we believe that the challenged portions of the ICC now meet the standards for invalidation, and we request that the Board conclude likewise." [WEAN reply brief at 15. C.].

We will keep this three-pronged test in mind as we examine each of the challenged regulations, ICC 17.02.150 (h), (i), and (k), set against the backdrop of Island County's long standing, continuing non-compliance.

ICC 17.02.150 (h)(1) (a), (c), and (d), Industrial Development Standards

The challenged section of the ICC "illustrates some typical industrial uses" allowed throughout the rural residential zone. [ICC 17.02.150 (h) (1)]. These are:

- (a) Boat building;
- (b) Saw mills;
- (c) Light fabrication, assembly or manufacturing;
- (d) Warehousing or storage.

WEAN argued that:

".....we recognize that if this regulation does apply to the grandfathered Non-Residential zone, some of the types of development permissible under it would not violate or interfere with GMA's goals. Given the regulation's construction, it is possible to invalidate those portions allowing the offending types of development, leaving only clearly resource dependent uses. However, we reiterate our previous request that the Board in its decision make clear that the use of "Sawmills" to illustrate the kinds of allowable development refers to their resource dependent nature. If the Board does not believe it can do this, then we request that all of ICC 17.02.150 (h) be invalidated." [WEAN reply brief at 17. E.].

*11 In determining if the challenged regulation meets GMA's substantial interference test, we use the three-pronged test.

1. The challenged regulations affect the entire Rural Residential zone, which is the predominant zone in Island County. Aerial photographs of the site of Whidbey K.S.C., L.L.C.'s master planned resort for example, show a large parcel of NR land that

is essentially undeveloped. [Exhibits L-1, M-1, N-1, and O-1; Board index No. 35, 36, 37, and 38]. On isolated, undeveloped lands such as this, siting of boat building, light fabrication, assembly or manufacturing, warehousing or storage as allowed by the ICC is clearly sprawl. Saw mills, if they support activities on natural resource lands, may be allowable outside of IUGAs.

2. These activities have been allowed by the ICC since its adoption in 1984. The result is:

"Island County has historically seen a development pattern of scattered and decentralized retail and industrial developments. These rural, unincorporated commercial and industrial areas account for nearly 50% of all county sales activities and over 50% of all county jobs, including our three incorporated cities." [Economic Development Council's reply brief at 2.; Board Index No. 4.].

3. Island County's continuing delays in complying with GMA's sprawl reduction goal are discussed elsewhere. Continuing to allow implementation of these sections of the ICC will only exacerbate the situation described by the EDC, where "scattered and decentralized" industrial, commercial, and retail developments sprawling throughout the rural areas of Island County make the efficient provision of services and facilities increasingly difficult and create permanent transportation inefficiencies.

We find that the continued validity of ICC 17.02.150 (h) (1) (a), (c), and (d), as applied outside IUGAs, substantially interferes with the fulfillment of the goals of the GMA.

ICC 17.02.150 (i), Commercial Development Standards

WEAN requested the invalidation of the entire section. The challenged section includes illustrations of some of the typical commercial uses allowed throughout the rural residential zone. [ICC 17.02.150 (i) (1)]. These are:

- (a) grocery stores and supermarkets;
- (b) hotels and motels;
- (c) restaurants;
- (d) bowling alleys;
- (e) office buildings;
- (f) home furnishings and appliances.

The same arguments were raised for and against the invalidation of this section as were raised regarding ICC 17.02.150 (h) (1) (a), (c) and (d). We make a similar ruling. These activities are clearly not resource supporting or dependent. Depending on the scale of the particular development, its location on undeveloped lands outside of IUGAs may constitute sprawl or urban growth. Allowing the continuing siting of such development outside of IUGAs frustrates GMA's goals for reducing sprawl and locating urban growth where services can be efficiently provided.

We find that the continued validity of ICC 17.02.150 (i), as applied outside IUGAs, substantially interferes with the fulfillment of the goals of the GMA.

***12 ICC 17.02.150 (k), Mixed-Use Development Standards**

This section of the ICC allows mixed commercial and residential development on all NR zoned lands, including lands which are currently undeveloped and isolated from developed areas. Because it allows the same type and scale of commercial development

as ICC 17.02.150 (i), it suffers from the same problems. Additionally, the challenged section contains no limits on the density of the residential uses associated with the commercial development. This is again a recipe for sprawl or urban growth outside of UGAs. This clearly frustrates GMA's goals of sprawl reduction and locating urban growth where services can be efficiently provided.

We find that the continued validity of ICC 17.02.150 (k), as applied outside IUGAs, substantially interferes with the fulfillment of the goals of the GMA.

We have attached findings of fact and conclusions of law supporting the above declarations of invalidity as Appendix 1 and incorporated them herein.

CONCLUSION

The record in this case clearly demonstrates that the continued validity of the above sections of the ICC, as currently written and implemented, is resulting in and will continue to result in land use development and patterns that make it more difficult every day for the County to adopt a GMA comprehensive plan and implementing regulations that fulfill the goals of the Act.

After the first compliance hearing, we gave the County over three additional months to either come into compliance or take interim steps to restrain sprawl and urban growth outside of IUGAs. The County took no action prior to the second hearing and finding of invalidity. The County has taken no voluntary action since. The only means to date by which development in Island County has been affected by GMA is through our previous invalidation of portions of the County's zoning code. Those parts of the code were invalidated because they egregiously violated and interfered with the most fundamental goals of the GMA. The parts of the code we invalidate today are likewise egregiously affecting those fundamental goals.

Urban growth outside of interim urban growth areas (with a few exceptions) is prohibited. This is the purpose of GMA's requirement to designate interim urban growth areas. The County has had nearly four years since GMA required it to do so to constrain urban growth and sprawl.

To compel compliance with GMA, we have only two powers: invalidating plans and regulations which substantially interfere with the fulfillment of GMA's goals and requesting the Governor to impose financial sanctions.

WEAN also requested that we recommend to the Governor that sanctions be imposed. Although sanctions may be justified at this time, we wish to give Island County one more opportunity to bring itself into compliance before we take such action.

An additional compliance hearing is scheduled for February 4, 1998. If Island County has not adopted a comprehensive plan by that date, we will consider recommending sanctions.

So ORDERED this 6th day of October, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

*13 Nan A. Henriksen

Board Member

Les Eldridge

Board Member

William H. Nielsen

Board Member

APPENDIX 1

FINDINGS OF FACT

1. Island County has failed to adopt a comprehensive plan by July 1, 1994, as required by the RCW 36.70A.040(3)(d). No implementing regulations have been adopted.
2. Island County has established interim urban growth areas. RCW 36.70A.110(1) prohibits urban growth outside of IUGAs.
3. After missing the deadlines for adoption of a comprehensive plan and implementing regulations, Island County has continued to make land use decisions based on the pre-GMA Island County Code (ICC), specifically Ch. 17.02.
4. On April 10, 1996, we determined invalid some provisions of the ICC that allowed urban growth outside of IUGAs. [WWGMHB, Case No. 95-2-0063, Second Compliance Hearing and Finding of Invalidity].
5. Since that finding of invalidity, Island County has continued to rely on the ICC to make land use decisions and has failed to take any interim steps to prevent urban growth outside of IUGAs prior to adoption of a comprehensive plan and implementing regulations as required by RCW 36.70A.110.
6. Provisions of the ICC not previously determined invalid allow approval of new commercial, industrial, and residential urban growth outside of IUGAs. These types of development include boat building; light fabrication, assembly or manufacturing; warehousing or storage; grocery stores and supermarkets; hotels and motels; restaurants; bowling alleys; office buildings; home furnishings and appliances; and residential development with no limitation on density or scale. These uses typically require urban public services and facilities.
7. ICC 17.02.150 (h) (1) (a), (c), and (d); 17.02.150 (i), and 17.02.150 (k) allow the uses listed above. There is nothing in the ICC to preclude these uses at a scale and intensity that avoids urban growth. When placed on isolated and undeveloped land, they constitute sprawl.
8. These uses are not consistent with the continued use of natural resource land.
9. Island County continues to accept and process under these provisions development applications which constitute urban growth, such as the application for a master planned resort to be sited outside of an IUGA.
10. The provisions of the ICC and their application by Island County outside of IUGAs, as noted in findings 1-9, substantially interferes with the fulfillment of the goals of the Growth Management Act, particularly goals 1, 2, and 8.

From the foregoing findings of fact we make the following:

CONCLUSIONS OF LAW

1. We have jurisdiction over the parties and subject matter.
2. The intensity and type of development allowed by the ICC are urban growth as defined in GMA. RCW 36.70A.030(14). Its location on undeveloped lands in rural areas constitutes sprawl.
- *14 3. The industrial development standards found in ICC 17.02.150 (h) (1) (a), (c), and (d). given as illustrations of typical industrial activities allowed by the ICC are urban industrial activities that do not support natural resource activities.

4. The commercial activities allowed under ICC 17.02.150 (i) are urban commercial growth.
5. The mixed commercial and residential activities allowed under ICC 17.02.150 (k) are urban commercial and residential growth.
6. The provisions of the ICC noted in this Order, as applied outside IUGAs, are invalid under the provisions of RCW 36.70A.330 and 300(2).

1997 WL 652518 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

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Exhibit 6
Whidbey News-Times Articles, dated March 6, 2014, and November 15, 2014
to
Declaration of Gregory M. Banks in Opposition to
Defendants' Motion for Summary Judgment

NEWS

County meeting turns into scold-fest

by JANIS REID, Whidbey News-Times Staff Reporter
Mar 6, 2014 at 9:00AM updated Mar 7, 2014 at 2:44PM

For publicly reprimanding Treasurer Ana Maria Nunez Monday, Island County Commissioner Jill Johnson drew fire from her fellow commissioners.

Commissioners scolded Johnson, saying she acted unprofessionally and made a "spectacular display" of the issue.

At the root of the issue was a difference in the appearance of 2014 tax statements mailed last month from those issued in 2013. Changes led some Camano residents to believe their taxes increased.

Nunez said that was a "misperception" and a clarification letter would be mailed this week.

While the issue turned out to be a miscommunication with the public, Johnson expressed displeasure with how Nunez handled the situation.

"I feel I'm standing in front of the principal, which I've never done," Nunez said.

The letter that was sent to printers last week from Nunez to the public appears to place blame on the county Assessor's Office, said Johnson.

"If you have any questions about the levy itself, please call the Assessor's office," the letter states.

Johnson first briefly questioned County Assessor Mary Engle, establishing that Engle gave the Nunez's office correct tax data for both 2013 and 2014.

Johnson then called up Nunez and scolded her for blaming the Assessor's Office.

In addition, Johnson, a Republican, was perturbed that Nunez waited five days to discuss the issue with her and Commissioner Kelly Emerson, also Republican, who represents Camano Island.

Nunez, a Democrat, was in contact with Commissioner Helen Price Johnson, a Democrat.

Johnson said the full board should have been notified as soon as the issue arose.

"I didn't attempt to hide anything or pass the blame onto anyone else," Nunez responded.

Sending approximately 12,000 clarification letters to Camano Island residents will cost the Treasurer's Office \$4,500 in postage alone, Nunez said.

Discussion began with Price Johnson suggesting the county commissioners share the cost of the extra mailing.

Johnson said she doesn't like the idea of Island taxpayers having to shoulder the cost of the treasurer's error.

The Stanwood-Camano School District and the assessors office received calls in recent weeks after tax statements were sent out with what appeared to be a rate increase in the school buildings maintenance and operations levy.

When the last levy was being proposed, Camano Island residents were told that, if the measure was approved, it would replace an expiring levy and not result in a tax increase.

Nunez said some taxpayers interpreted the erroneous higher amount for 2014 as the school district

12/29/2015

County meeting turns into scold-fest - Whidbey News-Times

"breaking faith" with the voters.

"I want to make sure the public understands that the school district kept their word," Nunez said.

Johnson said Price Johnson sent out an email prior to the meeting stating her intention to raise the issue at Monday's meeting.

During the meeting, however, both Price Johnson and Emerson said they did not support Johnson's decision to scold Nunez during "Commissioner Comments."

"This is inappropriate for a business meeting," Emerson said. "I'm going to have to ask you to stop."

Despite her disagreement with Johnson's approach, Emerson said she agrees that she also should have been notified immediately about taxpayer's concerns.

"I wish that would have been brought to me," Emerson said.

Price Johnson, who attended the meeting via phone from Washington D.C., suggested addressing the issue "in a more professional manner" when the three commissioners meet in person next.

Johnson said she raised the issue during Monday's meeting in response to Price Johnson's email.

Johnson said, the commissioners won't have a work session that all three can attend for three weeks, therefore the issue needed to be addressed immediately.

"We needed transparency and we needed to own the mistake," Johnson said.

"It was important that everyone knew what was going on."

Price Johnson said Tuesday that her was intention to bring the issue up more informally and "corroboratively" after "Commissioner Comments."

Price Johnson said she said she is sorry for the misunderstanding and the resulting conflict. She added that her communication with Nunez has been minimal due to her absence.

JANIS REID, Whidbey News-Times Staff Reporter
360-675-6611

Find this article at:

<http://www.whidbeynewstimes.com/news/248851821.html>

Check the box to include the list of links referenced in the article.

NEWS

Island County prosecutor scolded for post-budget funding request



Island County Prosecutor Greg Banks discusses a budget request with county commissioners Helen Price Johnson and Jill Johnson. — Image Credit: Janis Reid/Whidbey News-Times

by JANIS REID, Whidbey News-Times Staff Reporter
Nov 15, 2014 at 5:00AM updated Nov 18, 2014 at 9:19AM

Island County Prosecutor Greg Banks was scolded Wednesday by the board of commissioners after requesting additional money just one month after a 2015 budget was adopted.

The commissioners ultimately approved, in a 2-1 vote, Bank's request for an additional \$4,000 in wages for a deputy prosecutor but not before making their displeasure clear.

"I would have preferred to have this brought to our attention during the budget conversation," Commissioner Helen Price Johnson said.

"We should have anticipated this in the budget as a given.

"It's frustrating is what it is.

"I'm gonna move forward with it, but I don't want it to happen again. I don't know how to better communicate the need to anticipate those costs that are driven by contract."

After "scraping" together the 2015 budget and choosing to not fund some key positions, Commissioner Jill Johnson said she was not in favor of approving a request that should have been planned for.

Johnson cast the dissenting vote.

"We haven't even had this budget adopted for a month and now we're getting a request for a budget amendment," Johnson said. "I'm saying no, just so you know. I'm sorry for him, but this would have been a much easier conversation if it had been built into the budget, but it wasn't. And we were really clear and communicative about what our expectations were."

"Thank you for the scolding," Banks said.

"I obviously dropped the ball."

While the county commissioners oversee a large part of the county's services and staffing, elected officials such as the prosecutor, the sheriff, the auditor, the assessor and others are independently elected department heads who do not answer to the board.

Still, commissioners control the budget and elected officials must go before the board for monetary requests.

Commissioner Aubrey Vaughan, who, along with Price Johnson, approved the prosecutor's request, said he agreed with the other board members but didn't want Banks' error to impact the employee.

"I'm not going to penalize a worthy and deserving employee because it's a little bit of trouble for us and Greg didn't give us a good idea about what was coming up," Vaughan said.

Earlier this year, Sheriff Mark Brown opposed a county attempt to move sheriff's deputy files into the county's human resources office.

Banks assisted Brown in arguing that as independently elected leaders, they have the right to maintain and house their own personnel records.

Price Johnson raised that issue with Banks Wednesday, saying that if they are going to house their own personnel files, they should be maintaining them appropriately.

"You have asked repeatedly of us that you are the steward of these employees, you've advocated that personnel records should stay with elected officials, and yet, I'm at a loss as well," Price Johnson said.

"That should be something that all departments should be reviewing on a regular basis."

In a Friday telephone interview, Price Johnson said overall the elected officials work well together and that relationships have improved since she took office five years ago.

"When I was first elected, not many elected officials attended the roundtables," Price Johnson said, adding that attendance has markedly increased.

Still, as the county's fiduciary body, the board decisions can cause tensions over money.

"It must be frustrating to have the autonomy but not the budget authority," Price Johnson said.

Price Johnson pointed out that the state-designed leadership paradigm makes elected officials answerable to the voter, not the board of commissioners, allowing each to advocate freely for their departments.

Earlier this year, Ana Maria Nuñez, who served as treasurer until she was unseated this month by former chief deputy treasurer Wanda Grone, was also reprimanded by the board.

Camano Island's 2014 tax statements had gone out incorrectly, causing the county to be bombarded with concerned phone calls and emails.

The error led to the issuance of 12,000 clarification letters, costing the treasurer's office an additional \$4,500 in postage alone.

JANIS REID, Whidbey News-Times Staff Reporter
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Find this article at:

<http://www.whidbeynewstimes.com/news/282788241.html>

Check the box to include the list of links referenced in the article.

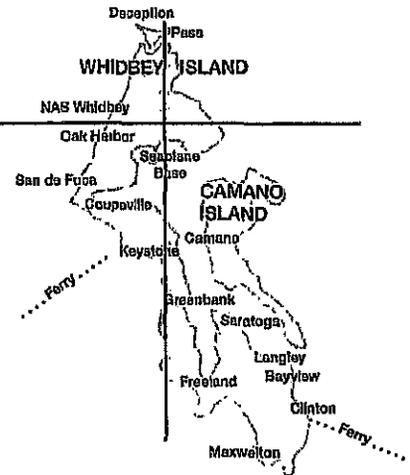
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Exhibit 7
December 2, 2015, letter from Commissioner Helen Price Johnson
to
Declaration of Gregory M. Banks in Opposition to
Defendants' Motion for Summary Judgment

Island County Board of Commissioners

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December 2, 2015

To: Washington's 39 County Councils and Boards of County Commissioners

Re: *State ex rel. Banks v. Susan Drummond et al., Island County Superior Court*

Dear Fellow Commissioner/Council Member:

I am writing to you on behalf of the Board of Island County Commissioners to make you aware of a pending legal action that threatens to overturn the longstanding right of County Boards of Commissioners to retain special counsel when needed to perform the business of their County.

Every County in Washington needs a wide range of legal services. While those needs are frequently served by the County Prosecutor's Office, there are times when a County legislative authority must retain qualified outside counsel to handle particular legal services on a temporary basis. The State Legislature recognized the importance of this to as far back as 1905, when it first enacted RCW 36.32.200:

Special attorneys, employment of.

It shall be unlawful for a county legislative authority to employ or contract with any attorney or counsel to perform any duty which any prosecuting attorney is authorized or required by law to perform, unless the contract of employment of such attorney or counsel has been first reduced to writing and approved by the presiding superior court judge of the county in writing endorsed thereon. This section shall not prohibit the appointment of deputy prosecuting attorneys in the manner provided by law. Any contract written pursuant to this section shall be limited to two years in duration.

This statute has been used by every County in the state at one time or another to appoint special counsel. The Island County Board of Commissioners used RCW 36.32.200 last spring to retain special counsel to provide necessary Growth Management Act-related services. As required by the statute, the contract was limited to two years and was approved by the Island County Superior Court.

Page 2
December 2, 2015

Unfortunately, the Island County Prosecutor wants to change this law, and thus filed a lawsuit challenging the Island County Board's action taken under the clear and longstanding authority of RCW 36.32.200. In the lawsuit, the Prosecutor claims that the Island County Board may only retain special counsel if the Prosecutor expressly consents to letting the Board do so. In short, the Prosecutor wants to control the Island County Board's access to outside legal

counsel when it is needed to perform the County's business. But that power is not granted by the plain language of the RCW 36.32.200, and has never been the law in Washington from either the State Constitution, the Legislature, the Courts, or the State Attorney General. An appropriate check and balance is already provided by the statute, with the required approval of the Superior Court Judge.

If the Island County Prosecutor's lawsuit is successful, it will contravene the authority of every County Board of Commissioners and Council in Washington to manage the business affairs of their county as required by law, will deprive County Boards of the right to legal services they occasionally need to ensure that county business is efficiently handled, and will impermissibly intrude on the legislative prerogative of every County Board. Those results are decidedly not in the interest of Washington's Counties, nor are they good policy nor good governance.

Accordingly, we are asking you to send a brief letter to us explaining the value of RCW 36.32.200 to your County legislative authority, with some examples of when you have used it. This is a matter of some urgency as we need to compile the information early in January. Please respond by January 1, 2016. Thank you for your help with this important issue.

Sincerely,



Helen Price Johnson
Chair, Island County Board of Commissioners