CP16#0209

O'Donnell, Mary Beth

From: Orjiako, Oliver
Sent: Tuesday, August 05, 2014 4.36 PM
To: O'Donnell, Mary Beth
Subject: FW· WWGMHB, US Supreme Court and Washington State Court decisions - For the public record

Follow Up Flag: Follow up
Flag Status: Flagged

For index! Thanks.

From: Cook, Christine
Sent: Tuesday, August 05, 2014 10:49 AM
To: Orjiako, Oliver; Euler, Gordon; Alvarez, Jose
Subject: FW: WWGMHB, US Supreme Court and Washington State Court decisions - For the public record

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From: LaRocque, Linnea **On Behalf Of** Barnes, Ed
Sent: Tuesday, August 05, 2014 10:47 AM
To: Cook, Christine
Subject: FW: WWGMHB, US Supreme Court and Washington State Court decisions - For the public record

Chris, (on behalf of Comm. Barnes)
this is the latest email Carol had send this morning and was noted by Comm. Barnes in the hearing.
Comm. Barnes had asked Carol to send to you, she may send along, but you have it now too.
Linnea

From: Carol Levanen [mailto:cnldental@yahoo.com]
Sent: Tuesday, August 05, 2014 12:17 AM
To: Madore, David; Mielke, Tom; Barnes, Ed; Carol Levanen; Susan Rasmussen; Leah Higgins; Rick Dunning; Rita Dietrich; Jerry Olson; Fred Pickering; Jim Malinowski; Frank White; Benjamin Moss; Lonnie Moss; Melinda Zamora; Nick Redinger; Curt Massie; Marcus Becker; Clark County Citizens United Inc.
Subject: WWGMHB, US Supreme Court and Washington State Court decisions - For the public record

This information is being submitted into the record by Clark County Citizens United, Inc.

Western Washington Growth Management Hearings Board
Washington State Courts - United States Supreme Court
1994-2010
Note* The following information is discussions and rulings of the WWGMHB and the courts. Consider each of these items as in quotations, which are taken from the reports

United State Supreme Court

The United States Supreme Court has explained that the primary purpose of the "takings clause" in the Constitution is to "bar government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole". In the case of King County, when they imposed limits, and claimed the new ordinance was necessary to better protect critical areas, including promoting healthy watersheds and protecting salmon, it was clearly a public use.

Washington State Court Rulings

Washington State Superior Court

Clark County Citizens United, Inc. Achen et al v. Western Washington Growth Management Board

#96-2-0080-2 April 4, 1997 - Honorable Edwin J. Poyfair

Conclusions of Law

3. **Statutory Mandate** - ....the board was required to comply with the statutory mandates and guidelines set forth in the GMA. The legislators created the Board in the GMA. The Board is not above the law which gave it it's existence....

agriforest Lands - The agriforest resource designation violates the GMA. Additionally, the failure to solicit meaningful public input....violated the public participation provisions of the GMA requiring early and continuous public participation in the development and adoption of the comprehensive plan.

6. **Comprehensive Plan EIS** - The comprehensive plan EIS issued by the county violates the State Environmental Polity Act. (SEPA), RCW Ch. 43.21C

Rural Land Densities

- The county's rural and resource development regulations are inconsistent with the GMA. The GMA requires counties to determine that planning goals are utilized and are part of the consideration supporting its decisions. One of the goals requires a variety of residential densities and housing types, which the Clark County Community Framework Plan met by identifying pre-existing small development patterns in rural areas.....

It is evident the rural land use density regulations were driven in part by earlier Growth management Hearings Board decision requiring urban population plus rural population to equal Office of Financial Management population forecasts.... This formulaic view of the GMA is fatally flawed. There is no requirement in the GMA that the OFM projections be used in any manner other than as a measure to ensure urban growth areas are adequately sized and infrastructure in those growth areas is provided for. This Board decision however, compelled the county to downzone substantial portions of the rural areas in

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order to meet the Board apparent requirements.

The only requirement for rural areas in the GMA is that growth in rural areas not be urban in character. While the GMA contain no restrictions in rural growth it does require a variety of densities. Through no fault of the county's, the board had an end in sight and disregarded the GMA's mandate in applying an unauthorized formula to the review of the Clark County Comprehensive Plan's land use densities. The boards interpretation was erroneous, and the county's decision to follow the Boards lead was unfortunate. The result is a plan that gives little regard for the realities of existing rural development, in direct contradiction of the terms of the GMA..

Washington State Court of Appeals - Division II

#22164-1-II Mar. 12, 1999

CCNRC et al. v. Clark County Citizens United, Inc.

Having designated urban growth areas, a county may not allow urban growth outside those areas (8). Urban growth is "growth that makes intensive use of land for the locations of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, *rural uses, rural development* and natural resource lands (9) ...

Notwithstanding the designation of urban growth areas, a county may allow non-urban or "rural" growth outside those areas (10). Non-urban or "rural" growth encompasses "a variety of uses and residential densities, including clustered residential development" (11) provided that such uses and densities are "not characterized by urban growth", and are "consistent with rural character". (12)

The county had based its planning on an average of 2 33 persons a household...

The Board ruled...that Clark county's plan did not adequately restrict rural growth (14). Legally the 'board rested its ruling on the premises allegedly drawn from the GMA:

1. that population projections and allocations....are not solely for use in urban areas, and 2. that the population projections for urban areas plus the population projections for no-urban areas must total the population projection for the entire county....Based on this view of the law and facts, the board ruled that the GMA precluded 5 acre lots in rural areas, and it ordered the county to "increase the minimum lot sizes" in such areas.
The GMA requires the county to consider OFM population projections when sizing urban growth areas. Nothing in the GMA provides that a county must use OFM's population projections for any other purpose. More particularly, nothing in the GMA provides that a county must use OFM's population as a cap or ceiling when planning non-urban growth....
The implications are 1. that the legislature considered how OFM's projections should be used; 2. that the legislature decided to require that counties use OFM's projections when planning for urban growth; and 3. that the legislature decided *not* to require that counties use OFM's projections when planning for non-urban growth.
Based on the foregoing we conclude that the GMA does not require counties to use
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OFM's projections as a cap on non-urban growth. The board exceeded it's authority and the trial court did not err by reversing the Board's ruling.

Redmond v. GMHB 136Wn.2d at 38 (1998) (Redmond)

Redmond was accepted by the court specifically to clarify the definition of "Agriculture land" The court noted that the statutory definition of agricultural lands found at RCW 36.70A 030 (2) involves the concepts of both "primarily devoted to" and "long term commercial significance". Long term commercial significance is further defined at RCW 36.70A. 030 (10) p. 54. The court held under the statutory definition of that term a local government "must evaluate growing capacity, productivity, and soil composition, proximity to population areas, and the possibility of more intensive uses of the land in question....

Washington State Supreme Court (PFL report 1-10-2010) Gold Star Resorts, Inc. v. Futurewise

Futurewise petitioned the growth management hearings boards....to force Whatcom County to adopt a uniform low density limit - no more than one dwelling per five acres - in the county's rural areas. Agreeing with the property owners, the Supreme Court unanimously help that, under its own precedents, state growth boards may not force counties to impose one size fits all, "bright" line density limits.

Washington State Court of Appeals

- unanimous decision that the states' GMA does not require the county's uncompensated restrictions on landowners use of their property.

The court held that the county's "set aside" rule violates a state law
prohibiting a "tax, fee or charge" on land use. This prohibition "applies to ordinances that may require developers to set aside land as a condition of development". None of the limited exceptions in the law apply, the court noted.
No one was compensated and no one was relieved from paying taxes on the portion of their property rendered useless . there was no evidence that the set-aside restrictions were necessary to protect the environment, health or safety of the community.

Other Court Actions

....counties must do more than simply catalog land that are physically suited to farming. They must consider development prospects ("the possibility of more intense uses") and determine if land has the enduring commercial quality needed to fit the agricultural land definition.

12-23-2004

- the superior court affirmed "the definition of long term significance refers to the growing capacity and productivity of the soil.

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If the county sought "to serve the farmers non-farm economic needs" (opening Br at 30) Serving the farmers "non-farm" economic needs is not a logistical or permissible consideration in designating

agricultural lands under the GMA. That is because it is a goal in and of itself, not a characteristic of farmland to be evaluated in determining whether such land has long term commercial significance. A farm's presumed needs for "non-farm" income does not necessarily relate to soil, productivity or growing capacity under RCW 36.70A 030 (10), not to proximity to population areas or the possibility of more intense use of the land. It has only to do with the farmers bottom line. And while we share Lewis County's concern for the struggle farmers often face, we note that the GMA is not intended to trap anyone in economic failure, as evidenced by the mandate to conserve only those farmlands with long term commercial significance. The problem with the county's approach is that any farmer could convert any five acres of farm land to more profitable uses, even if such conversion would remove perfectly viable fields from production.
Thus it was clearly erroneous for Lewis County to exclude from designated agricultural land up to 5 acres on every farm, without regard to soil, productivity or other specified factors in each farm area. In conclusion . .we reverse the Board's decision that Lewis county may not designate agricultural lands based on the local farm industry's projected land needs. If the state wants to conserve all land that is capable of being farmed without regard to it's commercial viability, it may buy the land We also remand the case for the Board to apply the correct definition of agricultural land, taking into account whether the county used permissible criteria. However, we affirm the Boards invalidation of the exclusion of farm homes and farm centers from designated agricultural lands because "serving the farmers on farm economic needs" is not a permissible consideration.
Author: Chief Justice Gerry Alexander with Justices Johnson, Madsen, Owens, Fairhurst, Bridge 8-10-2006. (www.courts.wa.gov/opinions.)
Superior Court of Washington - Clark County v WWGMHB #96-2-05498-8 - Horable John F. Nichols - Oct. 29, 1997 - Intervenors, Clark County Citizens United, Inc.
The Western Board October 1, 1996 and November 20, 1996 Orders are **vacated** in the following areas:
1. Its order finding that the county policies and development regulations relating to future adjustments to the urban Growth Areas fail to comply with GMA.
2. Its order finding that the county's designation of policies and development regulations designed to buffer resource and limit development in the rural and resource areas, including county provisions for lot reconfiguration and lack of provisions requiring aggregation of non-conforming lots fail to comply with GMA;
3. Its order finding that the county's establishment of a residential density of 1 unit per five acres in rural areas north of the East Fork of the Lewis River fails to comply with GMA;
4. This matter is remanded to the Western Board with directions to apply the
Page 5 of 10
....appropriate discretion and local deference. The board is directed not to substitute its own perceptions on those of another region in contradiction to those adopted by the lawful representatives of the county.....

Western Washington Growth Management Board

1. Where 61 separate petitions were filed by 85 different petitioners against Clark County and each of the cities within it and 44 separate parties were thereafter granted intervenor status, an order of consolidations issued immediately prior to the FDO in order to avoid each petition having to serve pleadings on over 100 other parties, was an appropriate method of consolidation. **Achen (Clark County Citizens United, Inc.) v Clark County**
95-2-0067 (FDO 9-20-95)
DUTIES
2. The rural character requirements of the RCW 36.70A.070 (5) (b) and (c) as well as RCW 36.70A.030 (14) involve more than just preservation of "natural" rural area. The county must assure that the "natural landscape" predominates, but also has a duty to foster "traditional rural lifestyles, rural based economies and opportunities" to live and work in the rural area. **Durland v San Juan County 00-2-0062 c (FDO 57-01)**

GOALS
3.
There is no requirement in the Act that the county show how it will balance the GMA goals in every comprehensive plan amendment; instead, the burden is on petitioners to show that the county's action in not in compliance. **Hood Canal et al. v Jefferson County 03-2-0006 (FDO 8-15-03)**
GMA PLANNING
4. Under the GMA, a county has an affirmative duty to disperse as much accurate information to as many people as it possibly can. Simply providing access does not satisfy that duty.
Mudge v Lewis County 01-2-0010 c (FDO 7-10-01)
5. The Board recognizes too, that the county is not obligated to add to the stock of low income housing but instead to set the framework in which the market can provide housing for all segments of the population. **Campbell v San Juan County Case # 09-2-0104** (FDO at 14 (Jan. 27, 2010)
HOUSING
6. In order to implement this goal (RCW 36.70A.020 (4)), cities and counties are directed to do the necessary planning to perform an inventory and analysis of existing and

projected needs, make adequate provisions for the needs of all economic segments of the community, and identify sufficient land for low income housing
Campbell v San Juan County Case # 09-2-0104 FDO at 15 (Jan. 27, 2010)
LAND CAPACITY ANALYSIS
(as to historic or ancient lots) ICAN fails to acknowledge that even legally created lots are not developable if substandard. (ICAN's) argument reveals a distinction between a legal lot and a developable lot In general a "legal lot" is any lot that was created by legal means. (IE. subdivision, testamentary devise, boundary adjustment) A "buildable" or "developable" lot is one that meets the zoning and health code requirements. In Dykstra (Dykstra v. Skagit County) the court noted that a legal lot may still be a non-conforming substandard lot because its land is insufficient to be a buildable site and that the legal lot status does not confer development rights. Here the county properly based its holding capacity analysis upon developable lots ICAN v **Jefferson County Case consideration at 6-7 (Sept. 11, 2009)**
.....RCW 36.70A 110 (2) also allows that "an urban growth area determination may include a reasonable land market supply factor" The Board read this to mean that while the county can provide for additional land over and above what the county's land capacity analysis says it actually needs to provide for sufficient land to accommodate its projected population, the use of a market factor is not required**.....**while a market factor is a useful tool in ensuring adequate land supply over the 20 year life of the plan, it is not required.....**Coordinative case: Lubwig, et al v San Juan County Case # 05-2-0019c (and others) Order on Compliance at 26-27 (Jan. 30, 2009)**
A Land Capacity Analysis' (LCA) is a requirement arising from RCW 36.70A 110 for all counties planning under GMA... .The LCA is a critical mechanism for the sizing of a UGA because it is utilized to determine how much urban land is needed. ...
Friends of Skagit County, et al v Skagit County Case # 07-2-0025c (Order on Reconsideration June 18, 2008) at 15
.... This is primarily because RCW 36.70A 110 goes to the establishment of an urban growth boundary and the ability of the area within the boundary to accommodate the allocated growth and to provide for urban facilities and services. **areas.....In other** words, the emphasis and focus as to capacity applies to the urban growth. The Board does not find that RCW 36.70A 115 mandates the same type of analysis for rural areas.
Dry Creek Coalition v Clallam County Case # 02-2-0033 Final Decision Order at 11 (June 12, 2009)
LIMITED AREAS OF MORE INTENSIVE DEVELOPMENT (LAMIRDS)
.....the county has not violated the GMA by failing to adopt parameters that define the

existing character of each LAMIRD where no such requirement is contained in the GMA. The county has the policies and zoning regulations in place to implement the requirements that new development and redevelopment are consistent with the 1990 existing areas **. Dry Creek Coalition v Clallam County Case # 02-2-0033 Final Decision Order at 11 (June 12, 2009)**

The designation of a LAMIRD involving 2 acre lot sizes is not an "intensive" rural development under the RCW 36.70A 070 (5) (d)**.....Durland v San Juan County 00-2-0062c (FDO 5-7-01)....**

However it is agreed that the determination of rural density is based on the specific circumstances of each case, it is not appropriate to dismiss a 1 du/2.4 acre density out of hand, but instead to apply the density, if at all, where it is consistent with existing rural development. In fact there are areas in Clallam County where a density of 1du/2.4 acres can be consistent with a rural environment when appropriately limited in a manner such as the county now provides**. Dry Creek coalition v. Clallam County Case # 07-2-0018c Compliance Order (Nov. 3, 2009)**

RURAL ELEMENT

A "variety of densities" requirement set forth in the GMA can be accomplished by existing and historical vested lot sizes, and need not be exacerbated in the CP.

Achen (Clark County Citizens United, Inc) v. Clark County 95-2-0067 (FDO 9-20-95)

RURAL DENSITIES

Rural densities of 1 dwelling unit per acre are not absolutely prohibited....A rural density of 1 dwelling unit per acre without proper analysis and appropriate rationale did not comply with the GMA

Port Townsend V. Jefferson County 94-2-0006 (FDO 8-10-94)

A recognition of growth that will occur outside IUGAs due to pre-existing lots in rural areas must not encourage growth in those areas but merely recognize it's existence.

CUSTER v. Whatcom County 96-2-0008 (FDO 9-12-96)

A clustering ordinance which prohibits urban service standards involves very limited numbers in sizing clusters requires affordable housing and applies only to limited areas outside of UGAs, complies with the Act.. .

Durland v. San Juan County 00-2-0062c (FDO 5-7-01)

A one unit of five acre density does not per se, constitute low density sprawl **. OEC v. Jefferson County 00-2-0019 (FDO 11-22-00)**

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While (petitioners) acknowledges that "whether a particular density is rural in nature is a question of fact based on the specific circumstances of each case"

5 acre lots in a rural area are not per se, a failure to comply with the GMA Smith v **Lewis County 98-2-0011 (FDO 4-5-99)**

the imposition of a 5 acre minimum lot size North of a designated "resource line" under the record of this case did not comply with the GMA

Even under the amendments contained in ESB **6094 more intensive development in the rural areas is limited to existing areas or uses and does not allow new patterns of** sprawl of commercial, industrial and residential uses. **Abenroth v Skagit County 97-2-0060 (FDO, 1-23-98)**

The 1997 amendments to the GMA found in ESB 6094 provide considerable guidance in reviewing challenges to the rural element of the CP.

Localized analysis in determining a rural density, statistical averaging of existing and projected average lot sizes has value primarily as a starting point for the analysis. Five acre lots are often a guideline to showing a rural density, but are not a bright line determination.

Durland v San Juan County 00-2-062c (FDO 5-7-01)

SPRAWL

A one unit to five acre density does not per se, constitute low density sprawl OECV **V Jefferson County 00-2-0019 (FDO 11-22-00)**

MARKET FACTOR

The use of an urban reserve area without defined standards of conversion to a UGA, in conjunction with a large market factor, did not comply with the GMA Achen,

Clark County Citizens United, Inc v Clark County 95-2-0067 (FDO 9-20-95)

MINIMUM GUIDELINES

The GMA does not dictate the use of a five tier classification system for waters of the state. 1000 Friends of Washington....v Skagit County 03-2-0017 (FDO 2-10-04)

NATURAL RESOURCE LANDS - IN GENERAL

Allowance of a 10 acre minimum lot size within agriculture RLs, with the associated possibility of 1du/per 5 acre densities in some areas as part of a clustering program,

complies with and does not substantially interfere with the goals of the Act.

Butler v. Lewis County 99-2-0027c (FDO 6-30-00)

Current use

in RL areas is not a determinative factor of the appropriateness of an RL designation. **Friday Harbor v San Juan County 99-2-0010c (R01-31-01)**

The use of an urban reserve areas instead of designation of the land as RL for planning for the post 2012 period did not comply with the GMA

If the land is RL, it must be designated and conserved until a proper analysis demonstrates a needed different designation **Achen v Clark County 95-2-0067 (Compliance Order, 10-1-96)**

The GMHB does have the authority to require aggregation of non-conforming lots. Achen v. Clark County 95-2-0067 (R011-20-96)

PUBLIC FACILITIES AND SERVICES

Compliance of the Act is achieved where a county develops LOS standards for rural and urban water services and precludes urban services into rural areas. **Evergreen v Skagit County 00-2-0046c (FDO, 26-01)**

Western Washington Growth Management Hearings Board - Compliance Order

Clark County Citizens United, Inc, Achen et al. v. Clark County #95-2-0067 (Poyfair Remand)

CCNRC's contention that 80% of the county was suitable for forest designation is simply too broad a sweep.

Final Order and Decision - page 17

Long Term Commercial Significance - CCCU and many of the individual petitioners contended that much of the agricultural resource land classified and designated by Clark County did not meet the definition of "long term commercial significance". Much of the support cited by petitioners for that contention came from a report (Ex 181) issued by the Farm Focus Group. This group was a subcommittee of the Resource Lands Citizens Advisory Committee. It issued a report that agree with the criteria used for initial agricultural land designations. However, a minority of the committee concluded that the commercially significant criterion could not be met in Clark County.

The 1980 Clark County comprehensive plan provided for "clustering" of residential development on resource land as long as approximately three fourths of the land remained for resource use. The record reveals that many different suggestions and recommendations were made as to appropriate minimum lot sizes for rural areas. The FSEIS alternative A involved 2 1/2 min lot size. Much public comment recommended

1 acre minimums.

Vacant Lands Analysis - In the assumption phase of the VLA the county used a market factor of 25% for residential areas and 50% for commercial and industrial areas.

The gorge Commission has the authority to establish densities at that location One residence for every 2 acres is the maximum allowed. Obviously, 1 du/2 acres is not an urban density. Until that density is changed, the GMA does not allow Clark County to impose an urban growth area there since it is not, nor could it be, urban.