

1 The Board held a Hearing on the Merits on January 10, 2008, in Waterville,
2 Washington, and heard arguments from the Petitioners' attorney and the County's attorney.
3 The Board studied the issues as presented and determined by the parties' arguments, the
4 record submitted as exhibits, past Hearings Boards' decisions, case law, and the
5 requirements set forth in the GMA, whether the County complied with the GMA as set for in
6 the Petitioners' issues. The Board finds that Petitioners failed to carry their burden of proof
7 on Issue Nos. 1, 2, 4 and 5, and have abandoned Issue No. 3.

8 **II. INVALIDITY**

9 Invalidity was not requested in this action.

10 **III. PROCEDURAL HISTORY**

11 On August 23, 2007, JOHN and KATHY HUMPHREY, by and through their
12 representative, J. Kevin Bromiley, filed a Petition for Review (PFR).

13 On September 13, 2007, the Board received Respondent's Motion to Dismiss Petition
14 for Lack of Service.

15 On September 14, 2007, the Board received Petitioners' Response to Respondent's
16 Motion to Dismiss, Declaration of J. Kevin Bromiley, Declaration of Becky Woods, and
17 Declaration of Danelle Trovato.

18 On September 18, 2007, the Board held a telephonic Prehearing conference. Present
19 were Joyce Mulliken, Presiding Officer, and Board Member, Dennis Dellwo. Board Member
20 John Roskelley was unavailable. Present for the Petitioners was Kevin Bromiley. Present for
21 the Respondents was Steve Clem. With the consent of the parties, the Motion to Dismiss
22 was considered at the prehearing conference and after considering the briefing and
23 arguments, the Board found that the County received actual notice of the Petition and was
24 not prejudiced by the Petitioners' failure to formally serve the Petition within the statutory
25 timeframe. The Motion to Dismiss was denied.

26 On September 21, 2007, the Board issued its Prehearing Order. Also on September
21, 2007, the Board issued its Order on Motion to Dismiss.

1 On December 7, 2007, the Board received "Petitioners' Hearing on the Merits Brief"
2 (Petitioners' HOM Brief).

3 On December 28, 2007, the Board received Douglas County's "Respondent's Hearing
4 on the Merits Brief" (County's Response).

5 On January 4, 2008, the Board received "Petitioners' Hearing on the Merits Reply
6 Brief" (Petitioners' Reply).

7 On January 10, 2008, the Board held its hearing on the merits. Present were Joyce
8 Mulliken, Presiding Officer, and Board Member, Dennis Dellwo and John Roskelley. Present
9 with the Petitioners was Kevin Bromiley. Present for the Respondents was Steve Clem.

10 **IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF 11 REVIEW**

12 Comprehensive plans and development regulations (and amendments thereto)
13 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
14 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to
15 demonstrate that any action taken by the respondent jurisdiction is not in compliance with
16 the Act. The Board ". . . shall find compliance unless it determines that the action by the .
17 . . County. . . is clearly erroneous in view of the entire record before the Board and in light
18 of the goals and requirements of [Growth Management Act]." RCW 36.70A.320. To find an
19 action clearly erroneous, the Board must be ". . . left with the firm and definite conviction
20 that a mistake has been committed." *Department of Ecology v. Central Puget Sound
21 Growth Management Hearings Board*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

22 The Board will grant deference to counties and cities in how they plan under Growth
23 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is
24 bounded, however, by the goals and requirements of the GMA." *King County v. Central
25 Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133
26 (2000). It has been further recognized that "[c]onsistent with *King County*, and
notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
when it foregoes deference to a . . . plan that is not 'consistent with the requirements and

1 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31
2 P.3d 28 (2001).

3 The Board finds that the Petitioners' PFR was timely filed, pursuant to RCW
4 36.70A.290(2); the Petitioners' have standing to appear before the Board, pursuant to RCW
5 36.70A.280(2); and the Board has jurisdiction over the subject matter of the challenged
6 Resolution, which amends Douglas County's Comprehensive Plan implementing
7 development regulations, pursuant to RCW 36.70A.280(1)(a).

8 **V. ISSUES AND DISCUSSION**

9 **The Challenged Action**

10 On June 26, 2007, Douglas County adopted Resolution No. TLS 07-3-26B which
11 amended DCC Title 17.04.020B. The stated basis for the amendments was due to
12 difficulties in administering and enforcing the previous version of DCC 17.04.020.B. The
13 amendment eliminated language requiring "exempt 20s" to satisfy mapping and road
14 standards but now requires that applicants of such parcels submit an affidavit confirming
15 easements for access and utilities have been established.

16 **Prefatory Note:**

17 The Board notes that Legal Issue 1 asserts an interference with the fulfillment of the
18 goals of the GMA and Legal Issues 2, 4, and 5 allege that the County has acted in a manner
19 which is inconsistent with the goals and policies of its own Comprehensive Plan. For this
20 reason, the Board will address Legal Issues 2, 4, and 5 together.

21 The Board further notes that the Petitioners failed to submit any argument in regards
22 to Legal Issue 3, which asserted a violation of the public participation and notice
23 requirements of the GMA. Therefore, the Board concludes that the Petitioners have
24 abandoned **Legal Issue 3 and it is dismissed.** *Woodmansee v. Ferry County*, EWGMHB
25 Case No. 00-1-0006, FDO (Sept. 7, 2000).

26 **Issue No. 1:**

*Does Resolution No. TLS 07-03-26-B substantially interferes with the
fulfillment of the goals of the Growth Management Act?*

1 **The Parties' Positions:**

2 **Petitioners:**

3 With Legal Issue 1, Petitioners concede that Douglas County's Plan adequately
4 provides for the policy considerations listed in the GMA. Petitioners' HOM Brief, at 2. What
5 Petitioners argue is that the County's development regulations, such as DCC Title 17, must
6 comply with the County's Plan – such as policies pertaining to transportation, rural
7 development, and geologically hazardous areas - in order for the regulations themselves to
8 comply with the GMA. *Id.* (citing RCW 36.70A.040 and various Plan policies). But it is the
9 amendment made to DCC 17.04.020.B by the challenged Resolution, specifically the
10 removal of language requiring compliance to platting and street requirements for "exempt
11 20s" for which, Petitioners contend, the County fails to comply with the requirements of its
12 own Plan. *Id.* at 3 (citing to DCC 17.16.180 and 17.20.060).

13 In addition, Petitioners present argument based on RCW 58.17.040 and assert that
14 the County is required to regulate "exempt" subdivisions more carefully which, with the
15 challenged Resolution, it does not do. *Id.*

16 **Respondent:**

17 In response, the County argues that the challenged Resolution did not amend any of
18 the County's rural density or intensity development regulations nor did it amend road
19 construction standards. County Response, at 5. According to the County, all Resolution 07-
20 3-26B did was change the requirements for the creation of "exempt 20s" and not the actual
21 development of those parcels. *Id.* at 6.

22 The County asserts that RCW 58.17.040 does not require heightened local scrutiny of
23 exempt parcels and that the Petitioners cite to no authority that the creation of "exempt
24 20s" constitutes "rural development" under the GMA. *Id.* Therefore, the County contends
25 that the Petitioners, who did not file any exhibits or cite authority for their conclusions, fail
26 to meet their burden of proof. *Id.*

1 **Petitioners' Reply:**

2 Petitioners' reiterate that the problem with the Resolution is that it relinquishes
3 County oversight in regards to "exempt 20s" and, in relinquishing this oversight, the
4 County's actions fail to be consistent with several Comprehensive Plan policies. Petitioners'
5 Reply, at 2. According to Petitioners, the relinquishment means that "exempt 20s" are not
6 required to provided adequate access to transportation or other services (Policy GLU G-9),
7 are not required to comply with County road standards (Policy T-4), are not required to
8 minimize potential adverse environment impacts (Policy RD-4), and are not required to
9 address potential geologic impacts (Policy CA-43). *Id.* at 3-5 Petitioners further assert that
10 RCW 58.17.040 cannot cure the County of non-compliance with the GMA. *Id.* at 6-7.

11 In addition, Petitioners argued that contrary to the County's assertion "exempt 20s"
12 are "development" by the County's own definition and by waiting to review these actions
13 until the submittal of development applications it "will be too late to undo what has already
14 been done." *Id.* at 3.

15 **Board Analysis:**

16 From the Legal Issue presented, the Petitioners should be presenting an argument
17 based on violations of the goals of the GMA – contained in RCW 36.70A.020. However,
18 what was presented to the Board was an argument asserting that the County's
19 development regulations do no implement its Comprehensive Plan – an assertion based on
20 RCW 36.70A.040 which requires development regulations to implement the comprehensive
21 plan. The Petitioners simply failed to support the Legal Issue as presented for the Board's
22 resolve.

23 The Board notes the Petitioners presented argument in regards to RCW 58.17, a
24 statute for which the Board has no jurisdiction and therefore will not address. *No. Cascades
25 Conservation Council/Washington Environmental Council v. Chelan County Board of
26 Adjustment*, EWGMHB Case No. 93-1-0001, Order on Motions (May 21, 1993).

1 **Conclusion:**

2 The Board finds and concludes the Petitioners failed to carry their burden of proof in
3 demonstrating that the County's action in adopting Resolution TLS-07-03-26B was clearly
4 erroneous and substantially interfered with the fulfillment of the goals of the GMA.

5 **Legal Issues 2, 4, and 5:**

6 *Legal Issue 2: Is Resolution No. TLS 07-3-26B inconsistent with the goals and
7 policies established by the rural element of the Douglas County Comprehensive Plan?*

8 *Legal Issue 4: Is Resolution No. TLS 07-3-26B inconsistent with the goals and
9 policies established by the transportation section of the Douglas County
10 Comprehensive Plan?*

11 *Legal Issue 5: Is Resolution No. TLS 07-3-26B inconsistent with the
12 geologically hazardous areas provision of the Douglas County Comprehensive Plan?*

13 **The Parties' Positions:**

14 **Petitioners:**

15 Petitioners argue that because of Resolution TLS-03-26B the County no longer
16 provides oversight or regulation of development activities so as to minimize adverse impacts
17 and protect critical areas. Petitioners' HOM Brief, at 4 (citing RD-4). Petitioners contend this
18 same lack of oversight will result in road construction that does not adequately provide
19 access for public services and emergency vehicles and may potentially cause environmental
20 damage or exacerbate erosion in geologically hazardous areas. *Id.* at 5-6. According to the
21 Petitioners, this lack of oversight creates inconsistency with the County's Plan. *Id.*

22 **Respondent:**

23 In response, the County contends the Petitioners are confusing the creation of
24 "exempt 20s" with the subsequent development of such parcels and the related permitting
25 process. County Response, at 7. The County notes the Petitioners have failed to file any
26 exhibits or cite legal authority for their assertions, nor, with Legal Issues 4 and 5 do the
Petitioners point to any policies of the County's Plan that are being violated. *Id.* at 7-8. In
addition, the County argues the Petitioners are making bare assertions that the

1 amendments made by the Resolution will result in environmental damage or inadequate
2 access to services without facts to support these assertions. *Id.*

3 **Petitioners' Reply:**

4 In reply, Petitioners point to several policies of the County's Plan to support their
5 argument – G-9, T-4, RD-4, and CA-43. Petitioners' Reply, at 2-4. According to Petitioners,
6 because the County removed language requiring "exempt 20s" from complying with
7 mapping and road requirements that had previously been mandated, the County has
8 created inconsistency by longer requiring that such parcels make provisions for or address
9 the concerns voiced in those policies. *Id.*

10 **Board Analysis:**

11 The Board reads the Resolution as permitting the exemption of land divisions of 20
12 acres or greater from DCC Title 17, the Subdivision Code. In the past, if an applicant had a
13 section of land that could be divided into five or more 20+ acre parcels, then DCC
14 17.04.020B required that this subdivision had to comply with mapping and road standards.
15 With the challenged amendment, the County effectively removed this requirement but
16 retained verbiage that requires the applicant to demonstrate that road and utility access is
17 capable of being provided.

18 The Board notes that much of the argument in regard to inconsistency for these
19 Legal Issues was provided in Legal Issue 1, but additional assertions were presented
20 individually with each issue. Petitioners basis for inconsistency stems from the County's
21 decision to exempt the creation of certain parcels – the "exempt 20s" – from the mapping
22 requirements of DCC 17.16.180 and the road standards of DCC 17.20.060. According to the
23 Petitioners, inconsistency was created because various policies within the County's Plan
24 state that development should provide facilities and services addressed within these code
25 provisions or be analyzed for environmental impacts based on these provisions.

26 The Board recognizes that DCC 14.98.220 includes "divisions of land" within the
definition of development, which the County's Plan incorporates, and Policies G-9, RD-4,
and CA-43 state that development should consider certain things – but this definition must

1 be examined within the context of the overall spirit and intent of the County's Plan which
2 addresses development more in terms of improvements – whether residential or commercial
3 – and the impacts of those improvements on the County. In this regard, the Board finds
4 that what is missing from the Petitioners argument is just how an exemption applicable to
5 the *creation* of “exempt 20s” relieves a developer from complying with complained of
6 requirements and standards set forth in other provisions of the DCC during the *permitting*
7 of actual development activities on an “exempt 20” parcel. In other words, where is the
8 inconsistency when an Applicant will eventually be required to ensure development
9 requirements and standards are being met at the time of project application? As the County
10 correctly notes, and the Petitioners conceded to at oral argument, the Resolution did not
11 amend permitting requirements and any subsequent attempts to develop the parcel would
12 be subject to the development regulations in effect at the time, with the County's Plan
13 contemplating this as well (*see* Policy T-18, CA-42, G-11 all referencing consideration of
14 impacts during the “review process”).

15 The Board further notes Policy RD-10, which provides: “Divisions of land that create
16 parcels 20 acres or greater in size should be exempt from the plat review process.” So in
17 this regard, the County's decision is consistent with its Plan.

18 **Conclusion:**

19 The Board finds and concludes that the Petitioners failed to carry their burden of
20 proof in demonstrating that the County's action in adopting Resolution TLS-07-03-26B was
21 clearly erroneous.

22 **VI. FINDINGS OF FACT**

- 23 1. Douglas County, is a county located East of the crest of the Cascade
24 Mountains and opted to plan under the GMA and is therefore required
25 to plan pursuant to RCW 36.70A.040.
- 26 2. Douglas County adopted Resolution No. TLS 07-03-26B on June 26,
2007. The Resolution amended Douglas County Code section
17.04.020.B.

1 **Judicial Review:**

2 Any party aggrieved by a final decision of the Board may appeal the decision to
3 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
4 review may be instituted by filing a petition in superior court according to the
5 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

6 **Enforcement:**

7 The petition for judicial review of this Order shall be filed with the appropriate
8 court and served on the Board, the Office of the Attorney General, and all parties
9 within thirty days after service of the final order, as provided in RCW 34.05.542.
10 Service on the Board may be accomplished in person or by mail. Service on the
11 Board means actual receipt of the document at the Board office within thirty
12 days after service of the final order.

13 **Service:**

14 This Order was served on you the day it was deposited in the United States mail.

15 RCW 34.05.010(19)

16 **SO ORDERED** this 15th day of February 2008.

17 EASTERN WASHINGTON GROWTH MANAGEMENT
18 HEARINGS BOARD

19 _____
20 Joyce Mulliken, Board Member

21 _____
22 Dennis Dellwo, Board Member

23 _____
24 John Roskelley, Board Member