BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Wristen-Mooney, et al., Petitioners, v. Lewis County, Respondent.	Case No. 05-2-0020 **ORDER ON COMPLIANCE**

THIS Matter comes before the Board upon a compliance hearing. Findings of noncompliance were entered in the Final Decision and Order entered March 23, 2006. The compliance issues before the Board involve Lewis County's procedures for the establishment of fully contained communities pursuant to RCW 36.70A.350 and master planned resorts pursuant to RCW 36.70A.360.

I. SYNOPSIS OF DECISION

In this decision, the Board finds that the repeal of LCC 17.20.052 (master planned resorts) has mooted the noncompliant features in LCC 17.20.052. As to Lewis County's provisions concerning fully contained communities (LCC 17.20.051), the Board finds that Ordinance 1179L properly incorporates the requirements for review of proposed fully contained communities as part of the annual comprehensive plan amendment process. The Board further finds that LCC 17.20.051 has been modified to remove the reference to a "master plan" that would constitute a subarea plan under LCC 17.20.020(2). Therefore, LCC 17.20.051 no longer creates a subarea plan for the project aspect of a fully contained community and is no longer noncompliant on those grounds.

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As a general matter, this Board previously approved the County's choice to have a coordinated process for both the project permit aspect of an application for a fully contained community and the comprehensive plan and development regulations required for an application for a fully contained community. Petitioners continue to challenge this decision but that challenge has already been decided. The Board will not revisit its compliance finding here.

However, the County has not satisfactorily addressed the requirement in RCW 36.70A.350 for a population allocation from a community reserve. While the County has created an urban reserve (which can be used to allocate urban population growth to new fully contained communities), there is nothing in the code which provides that the urban reserve will be utilized when a fully contained community is created. This is an express requirement of the GMA that is critical to the creation of a fully contained community. The failure to incorporate this requirement into the County's procedures (LCC 17.20.051) is noncompliant with RCW 36.70A.350.

The Board also finds that the codification of the flow chart results is confusing and inconsistent direction concerning SEPA appeals. However, both this and the urban population allocation compliance issue can be readily remedied and the County has indicated a willingness to make the corrections expeditiously.

II. PROCEDURAL HISTORY

The petition for review in this case challenged the adoption of Ordinance 1179J by the Lewis County Board of County Commissioners on August 8, 2005. Ordinance 1179J adopted amendments to the Lewis County Code, Ch. 17.20 LCC – provisions relating to the establishment of fully contained communities in LCC 17.20.051 and provisions relating to the establishment of master planned resorts in LCC 17.20.052. After briefing and a hearing on the merits, the Board entered findings of fact and conclusions of law that certain

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provisions of Ordinance 1179J failed to comply with RCW 36.70A.350 with respect to fully contained communities and RCW 36.70A.360 with respect to master planned resorts.

In response, the Board of County Commissioners (County Commissioners) adopted changes to the County code provisions for the establishment of fully contained communities (LCC 17.20.051) but rescinded the County code provisions for the establishment of master planned resorts (LCC 17.20.052).[1] This was accomplished with the adoption of Ordinance No. 1179L on October 9, 2006.[2]

Lewis County filed a motion for extension of the compliance deadline on September 19, 2006 when an oversight led to the failure to timely prepare and present an ordinance based on Planning Commission recommendations.[3] An extension was granted of the compliance deadline to October 9, 2006.[4] Ordinance 1179L was adopted on October 9, 2006 and the County filed its compliance report on October 11, 2006. Petitioners filed their objections to a finding of compliance on October 27, 2006.[5] Based on the compliance report and objections filed, the Board decided to hold the compliance hearing telephonically. [6] The parties had no objection to holding the hearing telephonically. Lewis County filed its response to the Petitioners' objections on November 13, 2006.[7]

The telephonic hearing was held November 16, 2006 beginning at 1:30 p.m. It was reported by court reporter Pam Dalthorp. Petitioners present for the hearing were June Wristen-Mooney, Eugene Butler, Richard Battin, Grover Harader, Pat Harader, Richard Curtis, Susan Roth and Richard Roth. Chief Civil Deputy Prosecuting Attorney Douglas

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[1] Lewis County's Compliance Report at 3.
[2] Exhibit 57 to Lewis County's Compliance Report
[3] Motion to Extend Compliance and Compliance Report Dates, September 19, 2006.
[4] Order Granting Extension of Compliance Period, October 3, 2006.
[5] Petitioners' Objection to Finding of Compliance, October 27, 2006.
[6] Letter from Presiding Officer to parties dated November 7, 2006.
[7] Lewis County's Response to Petitioners' Objections, November 13, 2006.

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Jensen represented the County, with the assistance of Community Development Director Robert Johnson. All three board members attended, Margery Hite presiding.

Shortly before the hearing date, Lewis County filed a motion to supplement the record with the declaration of planning staff member, Andre Stone.[8] Mr. Stone declares that "These documents were inadvertently omitted from the Ordinance 1179L-staff materials to be filed with the Compliance Report on October 13, 2006." Petitioners were allowed to submit a post hearing brief in response to these late materials and this was filed on November 29, 2006.[9] Lewis County then filed a response to the Petitioners' post-hearing brief, a pleading which the County acknowledges goes beyond the briefing allowed by the Board.[10] Lewis County's Response to Petitioners' Post Hearing Brief Re: Supplementing Compliance Report was an unauthorized brief and the Petitioners post-hearing brief was only necessitated because of the County's last minute supplementation of the record. The County's Response is therefore stricken.

III. COMPLIANCE ISSUES

F. LCC 17.20.051 fails to comply with RCW 36.70A.350 because there is no requirement in LCC 17.20.051 that there be an allocation of population from a community reserve to the new fully contained community. Issue 11.

G. LCC 17.20.051 also fails to comply with the requirement in RCW 36.70A.350(2) by failing to provide that the County will process applications for fully contained communities as part of the annual comprehensive plan amendment process. Issue 10.

H. LCC 17.20.051(7) creates inconsistencies between the hearing examiner's proceedings and the legislative decision-making process in the County code. It confuses the public participation opportunities as a result. This fails to comply with RCW 36.70A.040(4), 36.70A.070, and 36.70A.140. Issue 13.

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[8] Declaration of Andre Stone Certifying Documents as True Copies & In Support of Supplementation, November 13, 2006.
[9] Petitioners' Post Hearing Brief Re: Declaration of Andre Stone.
[10] Lewis County's Response to Petitioners' Post Hearing Brief Re: Supplementing Compliance Report at 2.

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K. LCC 17.20.052(7) creates inconsistencies between the hearing examiner's proceedings and the legislative decision-making process in the County code. It confuses the public participation opportunities as a result. This fails to comply with RCW 36.70A.040(4), 36.70A.070, and 36.70A.140. Issue 19.

M. The adoption of a subarea plan under the GMA is considered either part of the comprehensive plan (RCW 36.70A.080(2)) or a development regulation (RCW 36.70A.030(7)) unless it is a site-specific rezone authorized by the comprehensive plan or a subarea plan. RCW 36.70B.020(4). Since the County has determined that the site plan is a project level action, it may not be included in a subarea plan. Issues 16 and 21.

O. The County's comprehensive plan does not contain policies to "guide the development of master planned resorts" as required by RCW 36.70A.360(4)(a). Issue 23.

IV. BURDEN OF PROOF

Where a local jurisdiction takes legislative action in response to a noncompliance finding, that legislative action is presumed valid.

> Except as provided in subsection (5) of this section [relating to the Shoreline Management Act], comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

RCW 36.70A.320(1)

Because the legislation is presumed valid, the burden is on the petitioner to show noncompliance:

> Except as otherwise provided in subsection (4) of this section [where invalidity has been imposed], the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

RCW 36.70A.320(2)

In this case, there was no determination of invalidity as to Ordinance 1179J. Therefore, Ordinance 1179L is presumed valid and the burden is on Petitioners to show that the action

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by Lewis County is clearly erroneous in the view of the entire record and in light of the goals and requirements of the GMA. RCW 36.70A.320(3)

V. DISCUSSION

Positions of the Parties

The County Commissioners adopted Ordinance 1179L on October 9, 2006 to achieve compliance on LCC 17.20.051 (fully contained communities) and LCC 17.21.052 (master planned resorts).[11] Ordinance 1179L amends LCC 17.20.051 and rescinds LCC 17.21.052.[12]

Petitioners object to the amendments to LCC 17.20.051; they also argue that the repeal of LCC 17.20.052 was not properly noticed and therefore does not comply.[13] They argue that LCC 17.20.051 continues to create inconsistencies between a legislative enactment and a process that is partly legislative and partly quasi-judicial.[14] They further argue that the new ordinance retains inconsistent procedures for testimony before the Hearings Examiner and the Planning Commission.[15] Petitioners assert that the new ordinance fails to provide that the community reserve is to constitute an allocation from a reserved portion of the urban population projection and therefore LCC 17.20.051 continues to be noncompliant with RCW 36.70A.350(2).[16] Petitioners also argue that the flow chart was adopted without appropriate notice and that it improperly allocates SEPA appeals of comprehensive plan and development regulations to the hearings examiner.[17]

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[11] Lewis County's Compliance Report at 3.
[12] *Ibid.*
[13] Petitioners' Objection to Finding of Compliance at 1.
[14] *Ibid.*
[15] *Ibid* at 3.
[16] *Ibid* at 4.
[17] *Ibid* at 7.

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Lewis County responds that the Petitioners are asserting challenges to provisions that were not challenged previously or were challenged and upheld by the Board.[18] In particular, the County notes that the consolidated hearings process was found compliant by the Board with the exception of some clarification, which the County has undertaken.[19] The County also contests the Petitioners' assertion that the adoption of Ordinance 1179L and the flow chart does not comply with the County's own procedures.[20]

Board Discussion

Ordinance 1179L amends LCC 17.20.051 which applies to fully contained communities; and repeals LCC 17.20.052, which applies to master planned resorts. We will address the compliance issues applicable to fully contained communities first.

A. Fully contained communities (LCC 17.20.051). The compliance issues are:

> F. LCC 17.20.051 fails to comply with RCW 36.70A.350 because there is no requirement in LCC 17.20.051 that there be an allocation of population from a community reserve to the new fully contained community.
>
> G. LCC 17.20.051 also fails to comply with the requirement in RCW 36.70A.350(2) by failing to provide that the County will process applications for fully contained communities as part of the annual comprehensive plan amendment process.
>
> H. LCC 17.20.051(7) creates inconsistencies between the hearing examiner's proceedings and the legislative decision-making process in the County code. It confuses the public participation opportunities as a result. This fails to comply with RCW 36.70A.040(4), 36.70A.070, and 36.70A.140.
>
> M. The adoption of a subarea plan under the GMA is considered either part of the comprehensive plan (RCW 36.70A.080(2)) or a development regulation (RCW 36.70A.030(7)) unless it is a site-specific rezone authorized by the comprehensive plan or a subarea plan. RCW 36.70B.020(4). Since the County has determined that the site plan is a project level action, it may not be included in a subarea plan.

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[18] Lewis County's Response to Petitioners' Objections and Supplementing Compliance Report at 10.
[19] *Ibid* at 11-12.
[20] *Ibid* at 13.

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1. Population allocation from urban reserve. Conclusion of Law F in the March 23, 2005 Final Decision and Order reflects the absence of a provision in former LCC 17.20.051 specifying that the county must reserve and offset the twenty-year population projection allocated to urban growth areas with that population which is allocated to a new fully contained community. RCW 36.70A.350(2). LCC 17.20.051 has been amended to address the population allocation to a new fully contained community:

> An application for a Fully Contained Community (FCC) permit shall be processed in accordance with population allocations outside of established UGAs. FCC application reviews and hearing before the Hearings Examiner, Planning Commission and the Board of Commissioners shall be coordinated with the annual comprehensive plan and development regulation review under Ch. 17.165 LCC for purposes of such processing.

LCC 17.20.051(1)

Petitioners argue that this provision fails to distinguish between rural and urban population projections, and does not provide that an allocation will be made from a community reserve, reserved from urban growth area populations.[21] At the hearing on the merits, the County argued that the word "urban" is unnecessary and the amended language is sufficient to require a population allocation. Petitioners responded that by failing to specify that the population allocation must come from an urban reserve, it is possible that the population allocation to a new fully contained community would be taken from projected population growth allocated to rural areas.

The Board agrees with Petitioners. It is not necessary for the County to include "every syllable" from the GMA in incorporating its requirements (as the County argues) but it is surely necessary that a specific requirement of the GMA be accurately reflected in the County code implementing it. While the County has created an urban reserve (which can be used to allocate urban population growth to new fully contained communities), there is

[21] Petitioners' Objections to Finding of Compliance at 4.

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nothing in the code which provides that the urban reserve will be utilized when a fully contained community is created. This is an express requirement of the GMA:

> New fully contained communities may be approved outside established urban growth areas only if a county reserves a portion of the twenty-year population projection and offsets the urban growth area accordingly for allocation to new fully contained communities that meet the requirements of this chapter…The new community reserve shall be allocated on a project-by-project basis, only after specific project approval procedures have been adopted pursuant to this chapter as a development regulation. When a new community reserve is established, urban growth areas designated pursuant to this chapter shall accommodate the unreserved portion of the twenty-year population projection.

RCW 36.70A.350(2)(in pertinent part)

The lengthy direction in RCW 36.70A.350(2)concerning the creation of urban reserves, the allocation to fully contained communities, and the allocation of unreserved urban population to urban growth areas (UGAs) makes it clear that allocating a portion of the urban reserve to a new fully contained community is a significant requirement of the GMA. The point is that fully contained communities represent urban levels of development and projections for UGA populations must be offset in consequence. The urban reserve means that the urban population offset is created when the UGAs boundaries are drawn, and then it is allocated to new fully contained communities as they are approved. LCC 17.20.051(1) does not reflect this requirement and is still noncompliant as a result.

2. Processing fully contained community applications in annual comprehensive plan amendment cycle. LCC 17.20.051(1) now provides that the fully contained community application reviews and hearings "shall be coordinated with the annual comprehensive plan and development regulation review under Ch.17.165 LCC for purposes of such processing." It now complies with that requirement in RCW 36.70A.350(2).

3. Inconsistencies between Hearings Examiner process and legislative decision-making process. The County argues, and the Board agrees, that the Petitioners are attempting to re-litigate issues resolved against them as to the inconsistencies at issue. The Board found in the Final Decision and Order that the use of a coordinated process,

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whereby the hearings examiner handles the permit issues and the Planning Commission handles the comprehensive plan and development regulation issues, complies with the GMA:

> "[T]he County apparently intends to include the Planning Commission in the hearing and to provide recommendations to the Board of County Commissioners (BOCC) by coordinating the fully contained community approval process with the annual comprehensive amendment procedure. Illustrative Exhibit 1. This appears likely to resolve the consistency and public participation concerns of Issue 13 but until it is incorporated into LCC 17.20.051, LCC 17.20.051 is noncompliant on those bases. Using the hearings examiner alone to make recommendations about a legislative amendment is not consistent with the County code provisions regarding the role of the hearing examiner (Ch.2.25 LCC) and the role of the Planning Commission (Ch.2.11 LCC); nor is it consistent with the GMA's requirement that approval of the application for a fully contained community be a comprehensive plan amendment. RCW 36.70A.350(2)."

Final Decision and Order at 14-15.

However, the Board found that the code provisions needed to be clarified to provide for this division of authority. The amendments to LCC 17.20.051 now make it clear that there will be an apportionment of responsibility to the hearings examiner for permit issues and to the Planning Commission on the plan level. See LCC 17.20.051(7), (8) and (9). The amendments to LCC 17.20.051(7), (8) and (9) therefore cure the inconsistency and noncompliance found in the Final Decision and Order.

Petitioners also challenge the adoption of the flow chart as into LCC 17.20.051 It is unclear why the flow chart was adopted. The Board recognizes the difficulty in developing a flowchart with its abbreviations and short-hand, to accurately depict the County code. Nevertheless, the flow chart as it has been adopted is likely to confuse the reader. Petitioners have pointed out that the flow chart shows the SEPA appeal process as only going to the hearings examiner, in spite of the fact that a SEPA appeal of the comprehensive plan and development regulations portion of the fully contained community application would be appealable to the growth board. The County responds that the County code could not alter the Board's jurisdiction but that begs the compliance question.

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Adoption of an erroneous code provision is not considered compliant with the GMA just because the GMA's actual language should prevail over it. Compliance requires that the County's comprehensive plan and development regulations conform to the requirements of the GMA.

The fact that the flow chart does not properly diagram the entire SEPA appeal process would not be a compliance issue if the flow chart were not codified. By codifying it, the County has given it legal effect and it must therefore be accurate and consistent with the rest of the code provisions. While the County does not intend to re-assign SEPA appellate jurisdiction through the flow chart, it is at best confusing on this score. The public is entitled to consistent direction so that it may rely upon the County code, including the flow chart now codified in LCC 17.20.051. The Board finds that the flow chart fails to comply with RCW 36.70A.070 and 36.70A.280(1)(a).

4. Subarea plan. The inconsistency upon which this finding was based arose from LCC 17.20.020(2), which provides that the "master plan" shall become the subarea plan and and development code for "the property". This created an inconsistency between a subarea plan, which is by definition part of the comprehensive plan or development regulations (unless a site-specific rezone) and the project-level permit portion of the fully contained community process. For that reason, the Board found noncompliance in the Final Decision and Order.

Petitioners argue that compliance has not been achieved because LCC 17.20.020(2) has not been amended. However, LCC 17.20.051 has been amended to remove all reference to the "master plan". There is, therefore, no connection between LCC 17.20.051 and LCC 17.20.020(2), and no inconsistency created by those code provisions.

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B. Master Planned Resorts (LCC 17.20.052)

The County repealed LCC 17.20.052 in Ordinance 1179L. The noncompliance findings regarding master planned resorts were based on former LCC 17.20.052:

> K. LCC 17.20.052(7) creates inconsistencies between the hearing examiner's proceedings and the legislative decision-making process in the County code. It confuses the public participation opportunities as a result. This fails to comply with RCW 36.70A.040(4), 36.70A.070, and 36.70A.140.

O. The County's comprehensive plan does not contain policies to "guide the development of master planned resorts" as required by RCW 36.70A.360(4)(a).

Now that those have been repealed, the noncompliance of the repealed section is cured.

VI. FINDINGS OF FACT

1. Lewis County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.70A.040.
2. Petitioners challenged the adoption of Ordinance 1179J in the Petition for Review filed in this case.
3. The Final Decision and Order entered March 23, 2005 found that the adoption of certain amendments to LCC 17.20.051 for the creation of fully contained communities and LCC 17.20.052 for the creation of master planned resorts in Ordinance 1179J failed to comply with the requirement of the Growth Management Act, Ch. 36.70A RCW.
4. On October 9, 2006, the Lewis County Board of County Commissioners adopted Ordinance 1179L to achieve compliance in this case.
5. Ordinance 1179L amends LCC 17.20.051 and repeals LCC 17.20.052.
6. The amendments to LCC 17.20.051(1) now require that a permit for a fully contained community be processed "in accordance with population allocations outside of established UGAs".
7. The amendments to LCC 17.20.051 do not require that population be allocated to a new fully contained community from a reserve of urban population nor does it require

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that the urban reserve be offset against the unreserved urban population projected to be accommodated in the County's urban growth areas (UGAs).

8. The amendments to LCC 17.20.051(1) which require conformity with population allocations outside established UGAs do not distinguish between urban and rural population projections.
9. LCC 17.20.051(1) now provides that the fully contained community application reviews and hearings "shall be coordinated with the annual comprehensive plan and development regulation review under Ch.17.165 LCC for purposes of such processing."
10. The amendments to LCC 17.20.051(7), (8) and (9) now make it clear that there will be an apportionment of responsibility to the hearings examiner for permit issues and to the Planning Commission on the plan level.
11. Now that the language in LCC 17.20.051 reflects the County's intended process for handling applications for fully contained communities, the inclusion of the flow chart, with its abbreviations and short-hand, only confuses the reader.
12. The flow chart in LCC 17.20.051 directs all SEPA appeals to the Hearings Examiner instead of distinguishing SEPA appeals of the project permit from SEPA appeals of comprehensive plan and development regulations adopted for the new fully contained community..
13. LCC 17.20.051 has been amended to remove all reference to a "master plan" which becomes a subarea plan under LCC 17.20.020(2).
14. The noncompliance findings regarding master planned resorts were based on former LCC 17.20.052. The County repealed LCC 17.20.052 in Ordinance 1179L.
15. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby adopted as such.

VII. CONCLUSIONS OF LAW

A. This Board has jurisdiction over the parties and the subject-matter of this case.

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B. Ordinance 1179J was adopted by the Lewis County Commissioners to achieve compliance on those issues on which noncompliance was found in the Final Decision and Order issued in this case on March 23, 2005.

C. LCC 17.20.051 fails to comply with RCW 36.70A.350 because there is no requirement in LCC 17.20.051 that there be an allocation of population from an urban community reserve to the new fully contained community.

D. LCC 17.20.051 complies with the requirement in RCW 36.70A.350(2) by providing that the County will process applications for fully contained communities as part of the annual comprehensive plan amendment process.

E. The amendments to LCC 17.20.051(7),(8) and (9) comply with RCW 36.70A.040(4), 36.70A.070, and 36.70A.140 by clarifying the role of the hearings examiner and the Planning Commission in the coordinated hearing on applications for fully contained communities.

F. The removal of the term "master plan" from LCC 17.20.051 also removes the inconsistency between LCC 17.20.051 and LCC 17.20.020(2) regarding the creation of subarea plans in the permit process.

G. The adoption of the flow chart in LCC 17.20.051 fails to comply with RCW 36.70A.280 (growth board jurisdiction over certain SEPA appeals) and the consistency requirements of RCW 36.70A.040.

H. The repeal of LCC 17.20.052 removes noncompliance of those provisions related to master planned resorts found in the March 23, 2005 Final Decision and Order.

ORDER

Based on the foregoing, the County is ordered to bring LCC 17.20.051 into compliance with the Growth Management Act as set forth in this final decision and order. Because the remaining compliance issues can be easily remedied, the Board directs that compliance be accomplished within 90 days. The following schedule shall apply:

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Item	Date Due
Compliance Due	**April 3, 2007**
Compliance Report	April 10, 2007
Objections to a Finding of Compliance	May 1, 2007.
Response to Objections	May 15, 2007.
Compliance Hearing	May 22, 2007

Entered this 5th day of January, 2007.

_____
Margery Hite, Board Member

_____
Holly Gadbaw, Board Member

_____
James McNamara, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

<u>Reconsideration</u>. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. <u>Filing means actual receipt of the document at the Board office.</u> RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

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

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Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

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