

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 PANZA, a Washington nonprofit corporation,  
3 SELENA KILMOYER, ELIZABETH PENNY,  
4 RONNA SMITH and DONALD STERN,

5 Petitioner

6 v.

7 CITY OF LACEY,

8 Respondent.  
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**Case No. 08-2-0028**

**FINAL DECISION AND ORDER**

11  
12 **I. SYNOPSIS OF DECISION**

13 The Board finds that the Petitioners have sustained their burden by establishing that the  
14 action of the City of Lacey (City) was clearly erroneous in that the City adopted Ordinance  
15 No. 1307 ("Ordinance") in violation of the public participation requirements set forth in the  
16 Growth Management Act, including RCW 36.70A.035 and RCW 36.70A.020(11). The  
17 Ordinance was significantly different from the Planning Commission's draft ordinance that  
18 was advertised for public comment. The City Council held no public hearing on the  
19 Ordinance. Therefore the Ordinance's adoption process did not meet the requirements of  
20 RCW 36.70A.035(2)(b)(ii), which provide an exception to the requirements for additional  
21 review and comment. The Ordinance is remanded to the City of Lacey without a declaration  
22 of invalidity.  
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25 The Board does not address Issues No. 2 and No. 3 in that it has found a violation of the  
26 public participation requirements.  
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28 **II. PROCEDURAL HISTORY**

29 The Petitioners filed a Petition for Review (PFR) on May 23, 2008. The PFR challenges the  
30 adoption of Ordinance No. 1307 by the City of Lacey, an amendment to the City's zoning  
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1 code, which regulated and controlled how religious organizations might use their properties  
2 for housing the homeless.

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4 The City filed its response on June 13, 2008. On July 16, 2008, the City filed a Motion to  
5 Dismiss which the Board denied by Order dated August 1, 2008.

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7 The Hearing on the Merits (HOM) was held on October 8, 2008. The Petitioner's appeared  
8 through their attorney, Joseph A. Rehberger, of the Cascadia Law Group PLLC. The City  
9 appeared by its attorney, David S. Schneider. All three Board Members attended.

### 10 11 **III. BURDEN OF PROOF**

12 For purposes of Board review of the comprehensive plans and development regulations  
13 adopted by local government, the GMA establishes three major precepts: a presumption of  
14 validity; a "clearly erroneous" standard of review, and; a requirement of deference to the  
15 decisions of local government.  
16

17 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
18 amendments to them are presumed valid upon adoption:  
19

20       Except as provided in subsection (5) of this section, comprehensive plans and  
21       development regulations, and amendments thereto, adopted under this chapter are  
22       presumed valid upon adoption.

23  
24 That statute further provides that the standard of review shall be whether the challenged  
25 enactments are clearly erroneous:

26       The board shall find compliance unless it determines that the action by the state  
27       agency, county, or city is clearly erroneous in view of the entire record before the  
28       board and in light of the goals and requirements of this chapter.  
29 RCW 36.70A.320(3).

1 In order to find the City's action clearly erroneous, the Board must be "left with the firm and  
2 definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121  
3 Wn.2d 179, 201, 849 P.2d 646 (1993).

4  
5 Within the framework of state goals and requirements, the Boards must grant deference to  
6 local governments in how they plan for growth:

7       In recognition of the broad range of discretion that may be exercised by  
8 counties and cities in how they plan for growth, consistent with the  
9 requirements and goals of this chapter, the legislature intends for the boards  
10 to grant deference to the counties and cities in how they plan for growth,  
11 consistent with the requirements and goals of this chapter. Local  
12 comprehensive plans and development regulations require counties and cities  
13 to balance priorities and options for action in full consideration of local  
14 circumstances. The legislature finds that while this chapter requires local  
15 planning to take place within a framework of state goals and requirements,  
16 the ultimate burden and responsibility for planning, harmonizing the planning  
17 goals of this chapter, and implementing a county's or city's future rests with  
18 that community.

19 RCW 36.70A.3201 (in part).

20 In sum, the burden is on the Petitioners to overcome the presumption of validity and  
21 demonstrate that any action taken by the City is clearly erroneous in light of the goals and  
22 requirements of Ch. 36.70A. RCW (the Growth Management Act). RCW 36.70A.320(2).

23 Where not clearly erroneous and thus within the framework of state goals and requirements,  
24 the planning choices of local government must be granted deference.

#### 25 IV. ISSUES PRESENTED

26 **1. Whether the City of Lacey adopted Ordinance No.1307 in contravention of the**  
27 **procedural requirements of Chapter 36.70A RCW, specifically RCW 36.70A.020 (11),**  
28 **RCW 36.70A.035 and RCW 36.70A.140.**

29 **2. Whether the City of Lacey adopted Ordinance No. 1307 in contravention of the**  
30 **procedural requirements of the Lacey Municipal Code, Section 16.96, and City of**  
31 **Lacey Development Guidelines and Public Works Standards, Section IC, as**  
32 **referenced in Lacey Municipal Code, Section 16.96.**

1 **3. Whether the City of Lacey adopted Ordinance No. 1307 in violation of Chapter**  
2 **36.70A RCW by adopting the ordinance in contravention of the procedural**  
3 **requirements of Chapter 35A.63 RCW, specifically RCW 35A.63.070 and RCW**  
4 **35A.63.100.**

5 **4. Whether the City of Lacey's adoption of Ordinance No. 1307 is inconsistent with**  
6 **the goals set forth in Chapter 36.70A, specifically the stated goal of encouraging the**  
7 **involvement of citizens in the planning process as set forth in RCW 36.70A.020 (11).**

#### 8 **V. DISCUSSION OF THE ISSUES**

9 Issues No.1 and No.4 both involve challenges to the public participation opportunities  
10 provided for review of amendments to the City's zoning code pertaining to how religious  
11 organizations might use their properties for housing the homeless. Consequently, those two  
12 issues will be discussed together. Issues No. 2 and No. 3 address public hearing  
13 procedural requirements and, although related to the other issues, the Board will not  
14 consider them in light of the Board's ruling on Issues No. 1 and No. 4.  
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16 The Petitioners argue that the City's process of adoption of the Ordinance failed to provide  
17 for GMA required public participation. More specifically, Petitioners state that the City  
18 published notice that it was considering what was referred to as a "homeless encampment  
19 ordinance", that the Planning Commission held a public hearing on the "homeless  
20 encampment ordinance", and that subsequent posted notices referred to a "tent city"  
21 ordinance.<sup>1</sup> However, Petitioners argue that the City ultimately adopted an ordinance which  
22 only provided for temporary homeless shelters within church buildings and that the City did  
23 so without any notice, public hearing, or other opportunity for public review and comment.<sup>2</sup>  
24 In that regard, Petitioners assert the first known draft of the Homeless Shelter Ordinance  
25 was dated April 18, 2008, six (6) days prior to the City's adoption of the Ordinance, there  
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32 <sup>1</sup> Petitioner's Prehearing Brief at page 7.

<sup>2</sup> Id. at pg. 7.

1 was no notice published and no public hearings were held to allow for input on the  
2 ordinance ultimately adopted.<sup>3</sup>

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4 Petitioners further assert that even if the Board were to find the Ordinance was merely an  
5 alternative to or an amended version of the original proposed homeless encampment  
6 ordinance, the City violated RCW 36.70A.035(2) by failing to provide additional opportunity  
7 for review and comment as the Ordinance was not within the scope of alternatives available  
8 for public comment.<sup>4</sup>

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10 The City counters that it fully complied with all GMA public participation requirements.  
11 Multiple workshops were held by the Planning Commission followed by a public hearing for  
12 which notice was published.<sup>5</sup> The City points to the correspondence received and  
13 comments made throughout the process in support of its argument that meaningful  
14 opportunity for review and comment was provided.<sup>6</sup>

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17 The City further argues that the notices provided were adequate in that they were ". . .  
18 reasonably calculated to provide notice to the public . . . of the proposed amendments."<sup>7</sup>

19 The City states that the Planning Commission notice informed the public of a contemplated  
20 zoning code change that would possibly allow churches to temporarily host the homeless.<sup>8</sup>

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22 While the City acknowledges that neither the published notice nor the posted notices used  
23 the word "shelter" or stated that housing would be required within existing structures, it  
24 suggests that the notices were reasonably calculated to provide notice of a contemplated  
25 zoning change and that the public was notified of far more than the "nature and magnitude"  
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30 <sup>3</sup> Id. at pg. 8.

31 <sup>4</sup> Id. at pg. 14.

32 <sup>5</sup> Respondent's Prehearing Brief at pg. 6.

<sup>6</sup> Id. at pg. 6.

<sup>7</sup> Id. at pg. 7.

<sup>8</sup> Id. at pg. 7.

1 of the proposed amendments as required by the Central Board in *Orton Farms, LLC v.*  
2 *Pierce County*, CPSGMHB Case No. 04-3-007c, FDO of Aug. 2, 2004.

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4 Finally, the City contends that the changes made by the City Council to the ordinance as  
5 proposed by the Planning Commission were within the scope of the alternatives available  
6 for public comment.<sup>9</sup> That is, the goal of the proposal was to provide shelter for the  
7 homeless and whether or not that shelter would be provided inside or outside a structure  
8 was but a slight variation of the Ordinance' s overall effect or goal.<sup>10</sup>  
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10 The Board views the crux of the issue before it as whether or not the notice provided to the  
11 public was GMA compliant; whether the notice was reasonably calculated to advise the  
12 public of the nature and magnitude of the zoning code change under consideration. The  
13 underlying question is whether the change from "tent city" to "homeless shelter" made by  
14 the City Council required another opportunity for public comment or whether such a referral  
15 was covered by the exemption in RCW 36.70A.035(2)(b)(ii): that is, was the change "within  
16 the scope of the alternatives available for public comment"?  
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19 A complete review of the record is necessary in this instance to determine if the City's action  
20 was compliant with RCW 36.70A.035 and met the public participation goal of RCW  
21 36.70A.020(11). The record indicates that the Lacey City Council was presented with a  
22 petition on June 13, 2007, requesting that the Council "allow Lacey churches to host  
23 communities of homeless people on their grounds . . .".<sup>11</sup> The Council referred the matter to  
24 its Planning Commission.<sup>12</sup>  
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31 <sup>9</sup> Respondent's Pre-Hearing Brief at pg. 9.

32 <sup>10</sup> Id. at pg. 12.

<sup>11</sup> Exhibit 5.

<sup>12</sup> Exhibit 12.

1 The Planning Commission discussed the issue at numerous meetings held in September,  
2 October and November, 2007<sup>13</sup> and prepared a draft ordinance.<sup>14</sup> Revisions were made to  
3 the draft, and notice of a public hearing was published in the City's official newspaper on  
4 November 10, 2007 which indicated that a public hearing would be held on November 20,  
5 2007 to take input on the proposed ordinance.<sup>15</sup> The published public hearing notice  
6 referred to "temporary homeless encampments" and stated that the intent was to "provide  
7 temporary emergency shelter for the homeless in a tent encampment".<sup>16</sup>  
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10 The minutes of the Planning Commission meetings reflect that all discussions revolved  
11 around the preparation of what was referred to as a "homeless encampment" ordinance.<sup>17</sup> It  
12 is apparent from those minutes that "encampment" referred to housing the homeless in  
13 tents. Finally, the ordinance defined a "homeless encampment" as a ". . . temporary  
14 encampment of tents . . ." <sup>18</sup> Subsequent to the public hearing on November 20, 2007, the  
15 Planning Commission recommended a proposed "homeless encampment" ordinance and  
16 referred it to the Lacey City Council.<sup>19</sup>  
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18 Thereafter, a joint Lacey City Council/Planning Commission work session was held in  
19 January, 2008 and the City Council held a work session on February 7, 2008. The  
20 discussion at those sessions similarly involved a "tent city"/"homeless encampment"  
21 measure. At some point, apparently on or before April 18, 2008, the ordinance as  
22 recommended by the Planning Commission was redrafted to delete the definition of  
23 "homeless encampment" and a definition of "homeless shelters" was inserted.<sup>20</sup> Homeless  
24 shelters were defined as ". . . a permanent building existing as of the date of this ordinance  
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28 <sup>13</sup> Exhibits 13-15, 17-19, 21-23, 25-26, 32-33.

29 <sup>14</sup> Exhibit 27.

30 <sup>15</sup> Exhibit 206

31 <sup>16</sup> Exhibit 205.

32 <sup>17</sup> Exhibits 15, 19, 23, 26, 33, 43.

<sup>18</sup> Exhibit 99.

<sup>19</sup> Exhibit 43.

<sup>20</sup> Exhibit 93, pg. 4.

1 and used by a religious organization to provide temporary housing for homeless persons.”<sup>21</sup>  
2 The City Council adopted Ordinance No. 1307 at a regularly scheduled council meeting on  
3 April 24, 2008. No public hearing was held by the City Council.  
4

5 A fundamental requirement of the GMA is that the local jurisdiction provide “early and  
6 continuous public participation in the development and amendment of comprehensive land  
7 use plans and development regulations implementing such plans.”<sup>22</sup> The Act also provides  
8 that “Errors in exact compliance with the established program and procedures shall not  
9 render the comprehensive land use plan or development regulations invalid if the **spirit** of  
10 the program and procedures is observed.” (emphasis added). While the GMA does not  
11 dictate any particular procedures that must be adhered to in a public participation program,  
12 RCW 36.70A.035 does mandate that the public participation requirements of the Act shall  
13 include “notice procedures that are reasonably calculated to provide notice” to the public.  
14 RCW 36.70A.035 contains a further requirement that is relevant to this appeal that applies  
15 when a change is proposed to an amendment after the opportunity for review and comment  
16 of the original proposal has passed:  
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19 (2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body  
20 for a county or city chooses to consider a change to an amendment to a  
21 comprehensive plan or development regulation, and the change is proposed after  
22 the opportunity for review and comment has passed under the county's or city's  
23 procedures, an opportunity for review and comment on the proposed change shall  
24 be provided before the local legislative body votes on the proposed change.

25 In the Board's estimation, the entire focus of the process prior to April of 2008 was the  
26 consideration of a homeless encampment ordinance which would provide for housing the  
27 homeless in a "tent city". That was the stated intent of the published notice of November,  
28 2007, and that was the focus of all drafts of the ordinance considered until April, 2008. As  
29 referenced above, the Planning Commission drafts defined "Homeless Encampment" as  
30 ". . . a temporary encampment of tents, hosted by a religious organization that provides  
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32 <sup>21</sup> Id.

<sup>22</sup> RCW 36.70A.140.  
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1 temporary shelter for homeless persons." <sup>23</sup> Those drafts also set forth site criteria  
2 necessary for the accommodation of tents<sup>24</sup> There were also numerous other references  
3 throughout the draft ordinance to encampments and tents.

4  
5 A comparison of the Ordinance with the Planning Commission drafts is illustrative of the  
6 significant changes. All references to "encampments" and "tents" were deleted and  
7 replaced by the term "homeless shelters". "Homeless shelter" was defined as ". . . a  
8 permanent building existing as of the date of this ordinance . . .". <sup>25</sup>  
9

10 Public participation is indeed the keystone of the GMA, and it is incumbent upon  
11 jurisdictions to provide notice that is reasonably calculated to inform the public of the nature  
12 and magnitude of proposed changes to development regulations. In this instance, the  
13 failure to publish notice or otherwise notify the public of the changes that the City Council  
14 made in the Ordinance fell short of meeting that standard.  
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16  
17 The City takes the position that the change from "homeless encampment" to "tent city" falls  
18 within the exception to RCW 36.70A.035(2) set forth at paragraph (b)(ii):

19 An additional opportunity for public review and comment is not required under (a) of  
20 this subsection if:

21 (ii) The proposed change is within the scope of the alternatives available for public  
22 comment;

23 At the Hearing on the Merits, the City argued that the published notice informed the public  
24 that the City was considering zoning code changes to allow churches to provide temporary  
25 emergency shelter. It was suggested that the scope of possible zoning changes  
26 contemplated ran, at one end, from not allowing such a change to the other, allowing a "tent  
27 city". The Board cannot agree. The published notice did not include any such "scope" as  
28 that term is used in RCW 36.70A.035(2)(b)(ii). The public hearing notice specifically  
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31 <sup>23</sup> Exhibit 97, pg. 3.

32 <sup>24</sup> Exhibit 97, pg. 4.

<sup>25</sup> Exhibit 93.

1 referred to "tent encampments" <sup>26</sup> and did not contemplate any alternatives. The change  
2 was of such a magnitude as to require additional notice and a public hearing.

3  
4 It is also important to address the City's argument that the public knew of the proposed  
5 change in the ordinance.<sup>27</sup> While it may be true that some of the public who had participated  
6 before the Planning Commission were aware of a contemplated amendment, the public at  
7 large would not have been. The Board posed the following question in *Friends of Skagit*  
8 *County vs. Skagit County*: "How many more potential citizen participants were denied the  
9 opportunity to comment because of the County's failure to provide adequate notice . . . ?".<sup>28</sup>  
10

11 That question is equally relevant here.

12  
13 The Board concludes that Ordinance No. 1307 represented a significant change from the  
14 draft presented for review and comment at the Planning Commission public hearing. As  
15 such, it was incumbent upon the Lacey City Council to provide the public with an opportunity  
16 for additional review and comment pursuant to RCW 36.70A.035(2). That did not occur and  
17 that failure resulted in a violation of the public participation goals and requirements of the  
18 GMA.

19  
20 In their Petition for Review, the Petitioners requested that the Board declare invalidity of the  
21 Ordinance and repeated that request in their Prehearing and Reply Briefs<sup>29</sup>. The  
22 Petitioners failed to present any argument in support of this request. The Board finds that  
23 Petitioners failed to meet their burden of proof and consequently the Board will not declare  
24 the Ordinance invalid.  
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26  
27 As the Board has found a failure to comply with GMA public participation requirements and  
28 goals, a finding of noncompliance is appropriate. Further, as the public participation issue  
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31 <sup>26</sup> Exhibit 205.

<sup>27</sup> Respondents Brief at pg. 10.

<sup>28</sup> WWGMHB Case No. 95-2-0075 FDO (Jan. 22, 1996).

<sup>29</sup> Petitioners Prehearing Brief, at pg.1 and Reply Brief at pg. 2

1 disposes of the case, it is unnecessary for the Board to determine if other procedural  
2 violations existed. Consequently, Issues No. 2 and 3 will not be addressed.

### 3 4 **VI. FINDINGS OF FACT**

5 1. The City of Lacey is a city located west of the crest of the Cascade Mountains and is  
6 required to plan pursuant to RCW 36.70A.040.

7 2. The Petitioners filed a timely Petition for Review (PFR) on May 23, 2008.

8 3. The PFR challenges the adoption on April 24, 2008 of Ordinance No. 1307 (the  
9 Ordinance) by the City of Lacey (City), an amendment to the City's zoning code, which  
10 regulated and controlled how religious organizations might use their properties for housing  
11 the homeless.  
12

13 4. The City published notice on November 10, 2007 that it was considering what was  
14 referred to as a "homeless encampment ordinance" and the Planning Commission held a  
15 public hearing on the "homeless encampment ordinance" on November 20, 2007.

16 5. The published notice referred to "temporary homeless encampments" and stated that the  
17 intent was to "provide temporary emergency shelter for the homeless in a tent  
18 encampment".  
19

20 6. The ordinance defined a "homeless encampment" as a ". . . temporary encampment of  
21 tents . . ."

22 7. Subsequent to the public hearing on November 20, 2007, the Planning Commission  
23 recommended a proposed ordinance which provided for housing the homeless in tents and  
24 referred it to the Lacey City Council.  
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26 8. On or before April 18, 2008, the ordinance as recommended by the Planning  
27 Commission was redrafted to delete the definition of "homeless encampment" and a  
28 definition of "homeless shelters" was inserted in its place.

29 9. Homeless shelters were defined as ". . . a permanent building existing as of the date of  
30 this ordinance and used by a religious organization to provide temporary housing for  
31 homeless persons."  
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1 10. The City Council adopted Ordinance No. 1307 at a regularly scheduled council meeting  
2 on April 24, 2008. No public hearing was held by the City Council.

3 11. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.  
4

### 5 VII. CONCLUSIONS OF LAW

6 A. The Board has jurisdiction over the parties to this action.

7 B. The Board has jurisdiction over the subject matter of this action.

8 C. Petitioners have standing to raise the issues in this case.  
9

10 D. By adopting Ordinance 1307, an Ordinance that differed significantly from the Ordinance  
11 that was advertised for public comment without providing additional opportunities for further  
12 public comment, the City of Lacey failed to comply with RCW 36.70A.035(2) and RCW  
13 36.70A.020(11).

14 E. The Petitioners failed to meet their burden of proof in regards to their request for a  
15 declaration of invalidity.

16 F. Any Conclusion the Law later determined to be a Finding of Fact is adopted as such.  
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### 18 VIII. ORDER

19 The City of Lacey is ordered to achieve compliance with the Growth Management Act  
20 pursuant to this decision no later than April 22, 2009. The following schedule for  
21 compliance, briefing and hearing shall apply:  
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24 Item	Date Due
25 Compliance due	April 22, 2009
26 Compliance Report due	May 5, 2009
27 Objections to a Finding of Compliance due	May 19, 2009
28 Response to Objections due	June 2, 2009
<b>29 Compliance Hearing</b>	<b>June 11, 2009</b>
<b>Projected Date for Compliance Order</b>	<b>July 13, 2009</b>

30 DONE this 27th day of October, 2008

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William Roehl, Board Member

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Holly Gadbow, Board Member

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James McNamara, Board Member

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

**Reconsideration.** 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 served on all other parties of record. **Filing means actual receipt of the document at the Board office.** 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.

**Judicial Review.** 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 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).