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**State of Washington  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON**

KITTITAS COUNTY CONSERVATION, et al.,

Case No. 06-1-0011

Petitioners,

ORDER ON MOTIONS

v.

KITTITAS COUNTY, a political sub-division  
of the State of Washington,

Respondent,

CENTRAL WASHINGTON HOME BUILDERS  
ASSOCIATION, MITCHELL F. WILLIAMS,  
d/b/a MF WILLIAMS CONSTRUCTION CO.  
INC, and BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON, a non-  
profit corporation, MISTY MOUNTAIN, LLC,  
PAT DENEEN,

Intervenors.

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**I. PROCEDURAL HISTORY**

On October 12, 2006, KITTITAS COUNTY CONSERVATION, PAULA J. THOMPSON, JAN SHARAR, DWAN DOUGLAS, MARGE BRANDSRUD, JOHN JENSEN, and ROGER OLSEN, by and through their representative, JAMES CARMODY, filed a Petition for Review.

On October 27, 2006, CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, (CWHBA), MITCHELL F. WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., INC. and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, (BIAW), filed a Motion to Intervene. Also on October 27, 2006, MISTY MOUNTAIN, LLC, filed a Motion to Intervene.

On October 31, 2006, PAT DENEEN, filed a Motion to Intervene.

1 On November 6, 2006, the Board received Petitioner's Memorandum in Opposition to  
2 Motions to Intervene.

3 On November 7, 2006, the Board received CWHBA, Declaration of Jerry T. Martens.

4 On November 7, 2006, prior to the Prehearing conference, the Board heard the  
5 Motions to Intervene. The Board granted all Motions to Intervene limiting the briefing to  
6 one coordinated brief filed by the Intervenors. The Intervenors are instructed to determine  
7 which attorney will argue which issue(s). An Intervenor with a separate and distinct  
8 argument for a particular issue shall include their argument in the coordinated brief and will  
9 be allowed to argue their issue at the Hearing on the Merits separately if necessary. The  
10 Board will accept one brief from Respondent and one additional coordinated brief from the  
11 Intervenors.

12 On November 7, 2006, the Board held a telephonic Prehearing conference. Present  
13 were, John Roskelley, Presiding Officer, and Board Members Judy Wall and Dennis Dellwo.  
14 Present for Petitioners was James Carmody. Present for Respondent was James Hurson.  
15 Present for Intervenors were Andrew Cook, William Crittenden, and Jeff Slothower.

16 On November 8, 2006, the Board issued its Prehearing Order.

17 On November 28, 2006, the Board received Intervenors' Motion to Dismiss and  
18 Declaration in Support.

19 On November 29, 2006, the Board received Respondent's Motion and Memorandum  
20 in Support of Motion to Dismiss.

21 On December 13, 2006, the Board received Petitioners' Memorandum in Opposition  
22 to Motion to Dismiss and Declaration in Support.

23 On December 20, 2006, the Board received Respondent's Reply Brief in Support of  
24 Motion to Dismiss. Also on December 20, the Board received Intervenors' Rebuttal on  
25 Motion to Dismiss.

26 January 3, 2007, the Board held a telephonic motion hearing. Present were, John  
Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Joyce Mulliken. Present

1 for Petitioners was James Carmody. Present for Respondent was James Hurson. Present for  
2 Intervenors were Andrew Cook, William Crittenden, and Jeff Slothower.

## 3 II. DISCUSSION

4 Kittitas County Conservation ("Kittitas County Conservation" or "Petitioner") filed a  
5 Petition for Review requesting review of two (2) separate matters: (1) Kittitas County's  
6 "failure to act" in failing to adopt development regulations that are consistent with and  
7 implement the adopted comprehensive plan; and (2) review of Ordinance No. 2006-36  
8 which amended the "Performance Based Cluster Platting" ordinance for Kittitas County,  
9 Washington.

10 Kittitas County and Intervenors (Central Washington Homebuilders Association,  
11 Mitchell F. Williams, d.b.a., M.F. Williams Construction Co., Inc., Building Industry  
12 Association of Washington, Misty Mountain, LLC and Pat Deneen) filed motions to dismiss  
13 the Petition for Review filed in this proceeding. Motions to Dismiss were supplemented by  
14 Declaration of Jerry T. Martens, Jeff Slothower, and Juli Kjorsvik. Petitioner supplemented  
15 its response with Declaration of Paula J. Thompson. Board heard oral argument on January  
16 3, 2007.

17 **2.1 Intervenor and Respondent Positions.** Intervenors asserted that the  
18 "failure to act" claim and challenges to Ordinance No. 2006-35 were untimely. Issues Nos.  
19 1-3 asserted that 2006 amendments to KCC Chapter 16.09 violate GMA by creating sprawl  
20 and failing to protect agricultural lands. Intervenors asserted that Issues 1-3 must be  
21 dismissed as untimely because the 2006 amendments to KCC 16.08 do not permit increased  
22 rural densities or decrease existing protections for agricultural lands. The substance of  
23 Petitioners' arguments on these issues relate to the 2005 adoption of KCC Chapter 16.09.  
24 As such, the challenge to the 2005 amendments were barred by the failure to file a petition  
25 with the Growth Hearing Board within sixty (60) days of the adoption of the prior ordinance  
26 provisions.

Kittitas County and Intervenors further argue that the "failure to act" claim does not  
have a basis in fact and that Kittitas County has acted with respect to the Ag-3 and Rural-3

1 zoning classifications. (Issue 6). Those zones have been repeatedly reviewed, updated, and  
2 incorporated into the County GMA and implementation process. Intervenors supplemented  
3 their argument by asserting that the pre-existing ordinances have been subsequently  
4 amended and review is governed by the applicable time tables related to such  
5 amendments.

6 The Respondent and Intervenors' argued that the challenge to Ordinance No. 2006-  
7 36, as it relates to "limited areas of more intense rural development", should be dismissed  
8 because the amendments did not create LAMIRDS under RCW 36.70A070(5)(d). (Issue 4)

9 **2.2 Petitioners' Position.** Dispositive motions are based upon a limited record  
10 and similar to motions for summary judgment in superior court or a motion on the merits in  
11 the appellate courts. WAC 242-02-543(4). Growth Hearing Boards have recognized the  
12 limited scope of dispositive motions and exercise caution in addressing substantive issues in  
13 a preliminary proceeding. Complex substantive issues should be resolved on a complete  
14 record at the hearing on the merits. *Irondale Community Action Neighbors v. Jefferson*  
15 *County*, WWGMHB No. 03-2-0010, Order on Motion Requesting Judgment of Noncompliance  
16 and Invoking Invalidity (March 2, 2005). Substantial issues and factual disputes exist with  
17 respect to both the failure to act claim and review of Ordinance No. 2006-36.

18 The motion to dismiss the "failure to act" claim fails for three (3) reasons: (1) the  
19 argument is actually an argument on the merits that should await the hearing on the  
20 merits; (2) the record submitted does not support the contention that Kittitas County did  
21 act and adopt development regulations; and (3) Kittitas County has failed to review pre-  
22 existing zoning ordinances (Agriculture-3 and Rural-3) for consistency with the adopted  
23 comprehensive plan. It is asserted that Kittitas County failed to adopt development  
24 regulations that are consistent with and implement the adopted comprehensive plan. RCW  
25 36.70A.040(4). The motion to dismiss the Petition for Review related to Ordinance 2006-36  
26 (performance based cluster platting) was filed in a timely manner. RCW 36.70A.290(2)  
provides that petitions relating to a permanent amendment of a development regulation  
must be filed within sixty (60) days after publication by the legislative body of the county.

1 Kittitas County Conservation filed its Petition for Review within the statutory time period.  
2 Ordinance No. 2005-35 was adopted on an interim basis with a moratorium imposed for  
3 review of the entire ordinance for compliance with the Growth Management Act (GMA). A  
4 review of Ordinance No. 2006-36 requires the review of all elements of the ordinance.

5 **2.3 Discussion.** Dispositive motions are limited in nature and similar to  
6 summary judgment proceedings in the Superior Court or a motion on the merits in the  
7 appellate courts. WAC 242-02-543(4) provides:

8 Dispositive motions on a limited record, similar to a motion for summary  
9 judgment in superior court or a motion on the merits in the appellate  
10 courts, are permitted. Timeframes for making and responding to such a  
11 motion shall be established by the presiding officer.

12 Growth Hearing Boards have recognized the limited scope of dispositive motions and  
13 exercised caution in addressing substantive issues in a preliminary proceeding. The Boards  
14 have adopted a rule, WAC 242-2-530(6), which provides for a motion to decide a challenge  
15 regarding public participation requirements:

16 (6) Any party may bring a motion for the board to decide a challenge to  
17 compliance with the notice or public participation requirements of the Act  
18 raised in the petition for review, provided that the evidence relevant to the  
19 challenge is limited. If such a motion is timely brought, the presiding officer  
20 or the board shall determine whether to decide the notice or public  
21 participation issue(s) on motion or whether to continue those issues to the  
22 hearing on the merits.

23 The purpose of this rule was to limit summary judgment type motions to simple issues  
24 based upon a simple record. Complex substantive issues should be resolved on a complete  
25 record at the hearing on the merits. This matter involves a complex record which was not  
26 completely developed for purposes of this hearing.

The record provided is incomplete with respect to various ordinances referenced by  
Kittitas County and Intervenors; is incomplete with respect to both the 2005 and 2006  
ordinances; and such determinations are most appropriate with the benefit of the full

1 record, complete briefing, and substantive legal argument upon the merits. This is not a  
2 case for summary disposition.

3 It is appropriate for this Board to consider Ordinance No. 2006-36. Issues 1, 2, and  
4 3 shall be considered at the hearing on the merits. Issue 6 related to "failure to act" will  
5 also be heard upon a more complete record at the hearing on the merits. Petitioner may  
6 also proceed with discussion of invalidation (Issue 5). The Board does believe, however,  
7 that Issue 4 (Does Kittitas County Ordinance No. 2006-36 allow for "limited areas of more  
8 intensive rural development" in violation of RCW 36.70A.070(5)(d) should be dismissed.

### 9 III. ORDER

10 Based upon the record, briefs and argument in this matter, the Board hereby enters  
11 the following Order:

- 12 1. Kittitas County and Intervenors' Motion to Dismiss is denied with  
13 respect to Issues 1-3 with respect to Ordinance No. 2006-36. Hearing  
14 on the merits shall be limited to issues associated with such ordinance  
15 and its adoption.
- 16 2. Kittitas County and Intervenors' Motion to Dismiss as to Issue 4  
17 (LAMIRDS) is granted.
- 18 3. Kittitas County and Intervenors' Motion to Dismiss as to Issue 6  
19 ("failure to act") is denied.
- 20 4. Kittitas County and Intervenors' Motion to Dismiss as to Issue 5  
21 (invalidation) is denied.

22 **SO ORDERED** this 5<sup>th</sup> day of February 2007.

23 EASTERN WASHINGTON GROWTH MANAGEMENT  
24 HEARINGS BOARD

25 \_\_\_\_\_  
26 John Roskelley, Board Member

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Dennis Dellwo, Board Member

1 I dissent from the Order entered by the majority of the Board. Petitioner failed to  
2 demonstrate the failure to act claim and it is recognized that Growth Management Act  
3 (GMA) provides for a bottom up planning process. Kittitas County allowed for public  
4 participation with respect to adoption of its comprehensive plan.

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Joyce Mulliken, Board Member