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3 **State of Washington**
4 **GROWTH MANAGEMENT HEARINGS BOARD**
5 **FOR EASTERN WASHINGTON**
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7 KITTITAS COUNTY CONSERVATION,
8 RIDGE, FUTUREWISE,

9 Petitioners,

Case No. 07-1-0015

10 v.

ORDER ON MOTIONS

11 KITTITAS COUNTY,

12 Respondent,

13
14 SON VIDA II, TEANAWAY RIDGE, LLC,
15 BUILDING INDUSTRY ASSOCIATION OF
16 WASHINGTON (BIAW), CENTRAL
17 WASHINGTON HOME BUILDERS
18 ASSOCIATION (CWHBA), MITCHELL
19 WILLIAMS, d/b/a MF WILLIAMS
20 CONSTRUCTION CO., KITTITAS COUNTY
21 FARM BUREAU,

Intervenors.

22 **I. PROCEDURAL HISTORY**

23 On September 24, 2007, KITTITAS COUNTY CONSERVATION, RIDGE, and
24 FUTUREWISE, by and through their representative, Keith Scully, filed a Petition for Review.
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1 On October 9, 2007, the Board received SON VIDA II and TEANAWAY RIDGE, LLC's,
2 Motions to Intervene in EWGMHB Case No. 07-1-0015.

3 On October 15, 2007, the Board received BIAW's, CWHBA's, and MITCHELL
4 WILLIAMS', Motion to Intervene in EWGMHB Case No. 07-1-0015. Also on October 15,
5 2007, the Board received Kittitas County Farm Bureau, Inc., Motion to Intervene in
6 EWGMHB Case No. 07-1-0015.

7 On October 22, 2007, the Board heard the Motions to Intervene filed by the
8 aforementioned parties before the Prehearing conference. The Board grants Intervenor
9 status to Son Vida, II, Teanaway Ridge, LLC, BIAW, CWHBA, Mitchell Williams, and Kittitas
10 County Farm Bureau. The parties are intervening on behalf of the Respondent. The
11 Intervenor are instructed to file one consolidated hearing on the merits brief on the due
12 date provided in the schedule below.

13 On October 22, 2007, the Board held the telephonic Prehearing conference. Present
14 were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce
15 Mulliken. Present for the Petitioners were Keith Scully. Present for the Respondent was Neil
16 Caulkins. Present for Intervenor Son Vida, II, and Teanaway Ridge, LLC, was Jeff
17 Slothower. Present for Intervenor BIAW, Central Washington Home Builders Association,
18 and Mitchell Williams was Andrew Cook. Present for Intervenor Kittitas County Farm Bureau
19 was Gregory McElroy.

20 On October 22, 2007, the Board issued its Prehearing Order.

21 On November 13, 2007, the Board received Intervenor Son Vida II, and Teanaway
22 Ridge, LLC's Partial Motion to Dismiss/or in the Alternative Stay. The Board also received
23 Kittitas County's Motion to Consolidate or in the Alternative Stay or Dismiss.

24 On November 20, 2007, the Board received Petitioners' Response to Motions to
25 Dismiss, Consolidate, and/or Stay.

26 On November 30, 2007, the Board received Intervenor Son Vida's II Reply to
Petitioners' Response to Motions to Dismiss, Consolidate, and/or Stay and Declaration of
Jeff Slothower. The Board also received Respondent Kittitas County's Rebuttal in its Motion

1 to Consolidate, Stay, or Dismiss.

2 On December 14, 2007, the Board held a telephonic motion hearing. Present were
3 John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce Mulliken.
4 Present for the Petitioners were Keith Scully. Present for the Respondent was Neil Caulkins.
5 Present for Intervenors Son Vida, II, and Teanaway Ridge, LLC, was Jeff Slothower. Present
6 for Intervenors BIAW, Central Washington Home Builders Association, and Mitchell Williams
7 was Andrew Cook. Present for Intervenor Kittitas County Farm Bureau was Gregory
8 McElroy.

9 II. MOTION

10 On November 13, 2007, the Respondent, Kittitas County (County), filed a Motion to
11 Consolidate or in the Alternative Stay or Dismiss concerning Case No. 07-1-0015, and
12 requested the Eastern Washington Growth Management Hearings Board (Board) to: (1)
13 consolidate this case with Board Case No. 07-1-0004c; or (2) stay Case No. 07-1-0015
14 pending the outcome of Case No. 07-1-0004c; or (3) dismiss Case No. 07-1-0015 as moot
15 in light of Case No. 07-1-0004c. The Respondent also joined Son Vida II in their motion to
16 dismiss Issue No. 8.

17 The Intervenor, Son Vida II, filed a Motion to Dismiss or in the Alternative Stay, and
18 requested the Board dismiss Issue No. 8, or in the alternative, stay the issue pending the
19 outcome of Kittitas County Superior Court Cause No. 02-2-00163-0.

20 The Petitioners, Futurewise, et al., filed a Response to Motions to Dismiss,
21 Consolidate, and/or Stay on November 26, 2007, alleging: (1) Son Vida II's arguments
22 should be rejected because the legal issues between Case No. 01-1-0017 and Case No. 07-
23 1-0015, concerning Issue No. 8, the Airport Overlay Zone, are different; (2) *stare decisis*
24 does not apply to Board decisions, and does not permit dismissal of a case prior to hearing;
25 (3) *res judicata* does not bar this petition; (4) this petition is not barred by the doctrine of
26 collateral estoppel: (5) consolidation is inappropriate because the petitions do not involve
the review of the same comprehensive plan or development regulations; and (6) the Board
does not have the authority to stay this case beyond 180 days.

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III. DISCUSSION

After consideration of the arguments, both in the briefs and during the Hearing on the Motions, the Board denies the motions. The Board will take each motion request separately.

Stay:

The Board will grant a stay (extension) only under the criteria given in RCW 36.70A.300. As per RCW 36.70A.300(2)(a), the Board is required to issue a final order "within one hundred eighty days of receipt of the petition for review, or, if multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated." RCW 36.70A.300(2)(b) gives the Board the authority to extend the period of time, but only to enable the parties to settle the dispute if additional time is necessary to achieve a settlement, and only if (i) an extension is requested by both parties, or (ii) an extension is requested by the petitioner and respondent and the board determines that a negotiated settlement between the remaining parties could resolve significant issues in dispute. An extension of time or stay is not applicable to this case.

Consolidate:

The Board consolidates cases when the petitions are timely filed and directly related to the same legislation. In this case, the Respondent contends Case No. 07-1-0004c and Case No. 07-1-0015 concern the same legislation and RCW 36.70A.290 provides that "The board shall consolidate, when appropriate, all petitions involving the review of the same comprehensive plan or the same development regulation or regulations." The Respondent also argues that the compliance schedule for Case No. 07-1-0004c is already binding on the County and will result in GMA compliance ahead of what can be done in this second action.

The Petitioners disagree. They argue the two petitions do not involve the review of the same comprehensive plan or development regulations. The Petitioners contend this petition involves new and separate development regulations updated as Ordinance 2007-22.

The Board agrees with the Petitioner. The County adopted its Comprehensive Plan

1 separate from its new development regulations that are the subject of this petition. Thus,
2 RCW 36.70A.290(5) does not mandate or authorize consolidation of these two cases. In
3 addition, the Board rarely consolidates cases where the first case is in the compliance stage
4 and the second case is in the initial briefing stage. RCW 36.70A.020(11) encourages the
5 involvement of citizens in the planning process, which the Petitioners are engaged. To
6 dismiss the Petitioner's issues at this time would inhibit the purpose of Goal 11. The
7 Respondent's second reason, which is the possibility of the County coming into compliance
8 with the Board's order concerning Case No. 07-1-0004c, is not a basis for consideration
9 under the GMA. Furthermore, Case No. 07-1-0004c compliance requirements have now
10 been stayed and the matter consolidated with another case on appeal. It is uncertain when
the compliance process in Case No. 07-1-0004c will continue and be completed.

11 **Dismissal of Issue No. 8:**

12 The Intervenor, Son Vida II, and the County argue that Issue No. 8 should be
13 dismissed because the Board has already concluded in the Final Decision and Order (FDO)
14 in Case No. 01-1-0017 that the densities within the Airport Overlay Zone were in compliance
15 with the Growth Management Act. Son Vida II contends the Doctrine of *Stare Decisis*
16 requires the Board to dismiss Issue No. 8 because the Board is precluded from re-litigating
17 the Airport Overlay Zone density issue, which was decided in Case No. 01-1-0017, and is
currently on appeal to the Kittitas County Superior Court.

18 The Petitioners contend the legal issues are different. They argue the Board may not
19 issue advisory opinions on matters not included in petitions for review. The Petitioners claim
20 they pose a very different question in this case from the question posed by Son Vida II in
21 Case No. 01-1-0017. In addition, the Petitioners argue *stare decisis* does not apply to Board
22 decisions, nor can *stare decisis* result in a dismissal or stay. The Petitioners claim *stare*
23 *decisis* may control the result in a given case (FDO), but never mandate dismissal or a stay.

24 The Board will not dismiss Issue No. 8 based on the Doctrine of *Stare Decisis*, nor
25 will the Board stay this issue until the Court renders its decision. As quoted from *City of Cle*
26 *Elum v. Kittitas County* in Son Vida II's motion, "A motion must be based upon uncontested

1 material facts, and if there are disputes as to material facts the Board should not grant a
2 motion to dismiss." *City of Cle Elum v. Kittitas County*, EWGMHB Case No. 01-1-0003, Order
3 on Motions (April 19, 2001). Without a complete briefing of the issue, the Board cannot
4 determine whether there are disputes as to material facts.

5 The Doctrine of Stare Decisis was developed by the courts to accomplish stability in
6 court-made law, but is not an absolute impediment to change. The courts recognize that
7 stability is not perpetuity. In *Floyd v. Dept. of L&I*, 44 Wn.2d 560 (1954), the Supreme
8 Court stated "the doctrine means no more than that the rule laid down in a particular case
9 is applicable only to the facts in that particular case or to another case involving identical or
10 substantially similar facts. *Floyd* at 565. The issues in this case seem to be the same, but
11 are the material facts the same? The Board believes further briefing is necessary to make
12 that determination.

12 **Dismissal of other issues:**

13 After reviewing the arguments concerning dismissal of one or more of the Petitioners
14 issues, the Board agrees with the Petitioners that all the issues are still necessary to
15 challenge the new Kittitas County development regulations in Ordinance 2007-22 and to
16 preserve a timely filing. Case No. 07-1-0004c is currently under a stay of the Court (Cause
17 No. 07-2-00549-7) and this action can have a significant impact on the timing of compliance
18 in that case. If the County does bring itself into compliance with the Board's FDO in 07-1-
19 0004c as promised, then Issue Nos. 1, 4, and 5 in 07-1-0015 will be moot and dismissed, as
20 the Parties already agree these three issues cover the same subject matter. The Board
21 requires a showing of compliance by the passing of legislation in order for this Board to
22 dismiss a petitioner's issues, rather than claims in a brief or comments during a hearing.

22 ***Res Judicata and Collateral Estoppel:***

23 The Board agrees with the Petitioners and Son Vida II, these legal doctrines do not
24 apply in this case.

25 **III. ORDER**

26 The Respondent's Motion To Consolidate Or In The Alternative Stay Or Dismiss and

1 the Intervenor's Partial Motion To Dismiss Or In The Alternative Stay are denied.

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3 **SO ORDERED** this 19th day of December 2007.

4 EASTERN WASHINGTON GROWTH MANAGEMENT
5 HEARINGS BOARD

6 _____
7 John Roskelley, Board Member

8 _____
9 Joyce Mulliken, Board Member

10 _____
11 Dennis Dellwo, Board Member