

1 BEFORE THE EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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3 RIPARIAN OWNERS OF FERRY COUNTY AND  
4 STEVENS COUNTY FARM BUREAU,

5 Petitioners,

6 v.

7  
8 FERRY COUNTY,

9 Respondents.  
10  
11

Case No. 09-1-0012

**ORDER ON MOTION  
FOR SUMMARY JUDGMENT**

12 THIS Matter came before the Board on Riparian Owners of Ferry County and Stevens  
13 County Farm Bureau (collectively, Petitioners) Motion for Summary Judgment filed on  
14 December 15, 2009. Ferry County did file a response objecting to the Petitioner's motion,  
15 but the response was untimely and therefore was disregarded by the Board.<sup>1</sup>  
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18 **I. MOTION FOR SUMMARY JUDGMENT**

19 As set forth in the Board's November 25, 2009 Prehearing Order, this case pertains to a  
20 single issue:  
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22 Did Ferry County fail to comply with the requirements of RCW  
23 36.70A.480(3)(a) when it adopted Sec. 9.03<sup>2</sup> Of Ordinance #2009-05 without  
24 exempting there from lands lying within the jurisdiction of Ferry County's  
25 Shoreline Management Plan?

26 With their Motion, Petitioners contend there are only four relevant, pertinent facts in the case  
27 which are beyond dispute.<sup>3</sup> Petitioners argue summary judgment is warranted in such  
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30 <sup>1</sup> Pursuant to WAC 242-02-534, Ferry County's response to Petitioners' Motion for Summary Judgment was  
31 due on December 28, 2009. The Board did not receive the County's response until January 4, 2010.

32 <sup>2</sup> Petitioners did not provide a copy of Ordinance 2009-05. Rather, with their Petition for Review they filed  
"Section 9.03 Protection Requirements – Streams, Rivers, and Lakes". Thus Section 9.03 appears not to be  
a section of the Ordinance but a section of the County's development regulations.

<sup>3</sup> Petitioners' Motion, at 1-2.

1 situations and when argument supports a conclusion that the party seeking the motion  
2 would prevail at the hearing.<sup>4</sup>

3 Petitioners note the following relevant facts:<sup>5</sup>

- 4 1. RCW 36.70A.480(3)(a) became effective on July 27, 2003;
- 5 2. Ferry County had a Shoreline Master Program at that time;
- 6 3. Ferry County adopted Ordinance 2009-05 on August 24, 2009; and
- 7 4. Section 9.03 of Ordinance 2009-05 applies to land location within the jurisdiction of  
8 Ferry County's Shoreline Master Program.

9 Petitioners present the following to support their motion and contend that the analysis  
10 presented in these referenced documents demonstrate they would prevail at trial:<sup>6</sup>

- 11 1. *Futurewise v. WWGMHB*, 165 Wn.2d 242 (2008);
- 12 2. *Kitsap Alliance of Property Owners v. CPSGMHB*, 152 Wn. App. 190 (Division II,  
13 2009);
- 14 3. *Kailin v. Clallam County*, Court of Appeals – Division I, Docket 63901-3 (Nov. 9,  
15 2009); and
- 16 4. A November 23, 2009 Attorney General Opinion.

### 17 ***Board Discussion and Analysis***

18 Although Petitioners do not provide a basis for their motion, WAC 242-02-530(4) does  
19 permit “[D]ispositive motions on a limited record, similar to a motion for summary judgment  
20 in superior court or a motion on the merits in the appellate courts.” Summary judgment is  
21 appropriate only when, after reviewing all facts and reasonable inferences in the light most  
22 favorable to the non-moving party, there are no genuine issues of material fact and the  
23 moving party is entitled to judgment as a matter of law.<sup>7</sup> In essence, granting Petitioners’  
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26 <sup>4</sup> Petitioners’ Motion, at 1-2.

27 <sup>5</sup> Petitioners’ Motion, at 1; Petition for Review – Ordinance 2009-05.

28 <sup>6</sup> Petitioners’ Motion, at 2-8. With the exception of a “cut-n-paste” excerpt of the Court’s opinion in *Kitsap*  
29 *Alliance*, Petitioners do not provide the Board with a copy of any of the court cases they cite. The Board has  
30 never required this in the past and is not requiring it now. However, the Petitioners cite to “The AGO of  
31 November 23, 2009” which the Board interprets as a reference to an Attorney General’s Opinion. Such  
32 opinions can be utilized as persuasive argument, therefore, the Board attempted to locate the “AGO of  
November 23, 2009” cited by the Petitioner but could not find such an AGO on the Attorney General’s AGO  
website as of December 31, 2009. Thus, without the physical document the Board finds no credibility in  
statements presented from that document and any argument premised on it is disregarded.

<sup>7</sup> *Viking Props. Inc. v. Holm*, 155 Wn.2d 112, 119 (Wash. 2005). Petitioners set forth the basis for summary  
judgment differently than the courts and CR56, contending that granting such a motion is appropriate when

1 Motion in this case would result in a finding of non-compliance for Ferry County in  
2 relationship to the adoption of Ordinance 2009-05.

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4 There is no doubt that this case relates to critical areas and shorelines as the challenged  
5 action is the section of Ferry County's Critical Areas regulations related to streams, rivers,  
6 and lakes. However, this Board has previously held that motions for summary judgment  
7 are granted only in very limited circumstances and that complex issues are not appropriate  
8 for early dismissal as it may impact a full and fair consideration of the subject matter. For  
9 example, in *Wenatchee v. Chelan County*, the Intervenor sought dismissal of various claims  
10 raised by the City of Wenatchee against Chelan County. In denying the motion, the Board  
11 stated:<sup>8</sup>  
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13 When issues are complex, extensive review of the Record pertaining to the  
14 core of a case is required. Therefore, the parties require time and careful  
15 consideration of the facts and law in order to fully develop briefing. Due to the  
16 limited factual evidence and argument provided to the Board at this time, The  
17 Board concludes dismissal of the matter would not be appropriate as it is  
18 evident disputes remain as to the underlying facts and the interpretation and  
application of GMA provisions ...

19 Similarly, in *Miotke v. Spokane County*, the County sought dismissal of the case. The  
20 Board also denied the motion and explained:<sup>9</sup>

21 The Growth Boards have increasingly refused to consider dispositive motions  
22 that raise issues which are the "heart" of the case before the Board, involve  
23 issues of significant complexity, and/or involve issues of both law and facts.  
24 While this Board in the past has seen fit to rule on some complex dispositive  
25 motions, the three Boards have limited what they consider by motion. The  
26 Boards consider only those dispositive motions which involve a limited record  
27 and limited issues of law ... The Board finds that the issues raised by the  
28 Respondents in their Motion are complex and require the use of extensive

29 argument supports the conclusion the maker of the motion would prevail at trial. This, of course, is not the  
30 foundation of summary judgment as the moving party must be entitled to judgment *as a matter of law*.

31 <sup>8</sup> EWGMHB Case No. 08-1-0015, December 2, 2008 Order on Motions, at 8.

32 <sup>9</sup> EWGMHB Case No. 07-1-0005, June 11, 2007 Order on Motions, at 3; *See also, City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case 02-1-0001, Motion Order, at 2-3 (March 26, 2002)(Denying the City of Airway Height's motion for summary judgment, stating that the issues should proceed to the hearing on the merits and that genuine issues as to material facts remain so that the moving party was not entitled to judgment as a matter of law.)

1 parts of the record. The Board further finds that these issues are at the heart  
2 of the case before it and requires time and consideration, which will be  
3 available at the Hearing on the Merits.

4 This is not to say that a motion for summary judgment cannot, at times, be granted as this  
5 Board has done so on several occasions. In *City of Liberty Lake v. City of Spokane Valley*,  
6 the Petitioner sought summary judgment on an alleged violation of Spokane Valley's failure  
7 to comply with RCW 36.70A.106 and the Board concluded that the issue was proper to be  
8 resolved by a dispositive motion.<sup>10</sup> In *Loon Lake Property Owners Assoc., et al v. Stevens*  
9 *County*, Petitioners sought summary judgment on two issues – public participation and  
10 critical areas. The Board, in granting the Petitioners request, noted that there was no  
11 genuine issue of material fact and that Petitioners were entitled to judgment as a matter of  
12 law.<sup>11</sup> However, in both of these cases the Board only came to the conclusion that  
13 summary judgment was appropriate after a review of the Record and pleadings filed.  
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16 A concern for the Board when presented with a motion for summary judgment by a  
17 Petitioner is both the presumption of validity that is accorded a GMA enactment and the  
18 deference the Board is to grant Ferry County in its planning decisions.<sup>12</sup> In this matter, the  
19 Board, with the exception of Section 9.03 of Ferry County's CAO, has none of the Record  
20 utilized by the County in taking the challenged action and therefore, it is difficult to  
21 determine if Ferry County has, in fact, violated the GMA as set forth in Petitioners' issue  
22 statement. All that has been presented to the Board is citation to cases without any  
23 analysis by the Petitioners as to how these cases apply to the facts and circumstances of  
24 the present matter. Thus, granting summary judgment without consideration of the Record  
25 would distort the presumption of validity granted by the GMA.  
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28 With only one issue, this motion goes to the "heart" of the case and it is therefore, not  
29 appropriate for dismissal on a summary judgment motion but rather the Board would benefit  
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32 <sup>10</sup> EWGMHB Case 03-1-0009, Order on Motions (March 23, 2004); *See also, Coalition of Responsible Disabled v. City of Spokane*, EWGMHB Case 95-1-0001, Dispositive Motion and FDO (June 6, 1995).

<sup>11</sup> EWGMHB Case 03-1-0006c, Order on Motions (Feb. 6, 2004).

<sup>12</sup> RCW 36.70A.320(1); 36.70A.3201.

1 from development of full briefing and a thorough review of the Record prior to issuing a  
2 decision on such a complex issue as the interchange of the GMA and the SMA. There  
3 appears to be a genuine issue of material fact as to which lands are affected by the  
4 challenged ordinance and which lands potentially involve SMA jurisdiction. Thus, due to the  
5 limited evidence and argument provided to the Board at this time, the Board concludes  
6 dismissal of the matter would not be appropriate.  
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8 **II. ORDER**  
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10 Petitioners' Riparian Owners of Ferry County and Stevens County Farm Bureau's Motion for  
11 Summary Judgment is DENIED. This matter shall proceed to the Hearing on the Merits  
12 pursuant to the scheduled established by the Board in its November 25, 2009 Prehearing  
13 Order.  
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15 DATED this 4th day of January, 2010.  
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Joyce Mulliken, Board Member

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John Roskelley, Board Member

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Ray Paoella, Board Member  
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