

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 EVERGREEN ISLANDS, FUTUREWISE and
4 SKAGIT AUDUBON SOCIETY,

5 Petitioners,

6
7 v.

8 CITY OF ANACORTES,

9
10 Respondent.

Case No. 05-2-0016

**COMPLIANCE ORDER
(APRIL 2007)**

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12 **I. SYNOPSIS OF THE DECISION**

13 In this Compliance Order we find that the City's regulations for establishing wetland buffers
14 and exemptions to wetlands regulations now comply with RCW 36.70A.070 and RCW
15 36.70A.172. We also find that the City's recent adoption of Ordinance 2760 to include Best
16 Available Science (BAS) in its management strategies for species and habitat of local
17 importance complies with RCW 36.70A.172. Finally, we grant the City a stay while the
18 appeal to the Court of Appeals is pending. Although the Superior Court reversed the
19 Board's December 27, 2005 Final Decision and Order and directed that the City's
20 enactments of any provisions that apply to critical areas in shorelines jurisdiction should be
21 judged for compliance with the Growth Management Act (GMA) rather than with the
22 Shoreline Management Act (SMA), the Superior Court decision has been appealed. The
23 Board finds that the Rules on Appeal (RAP) apply when the Administrative Procedures Act
24 (APA) is silent regarding procedures that apply during appeals of growth hearings board
25 decisions. This means that the Superior Court decision is not effective until the appeal to
26 the Court of Appeals is resolved. Therefore, since the Board order has not been stayed by
27 order of any court, the Board's order remains in effect. Nevertheless the Board finds that
28 the Superior Court's reversal of its determination of noncompliance justifies the Board in
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1 staying its order under these circumstances. Therefore, the Board will not require the City
2 to take action to come into compliance on this issue until the appeals to court are resolved.

4 II. PROCEDURAL HISTORY

5 On December 27, 2005, the Board issued a Final Decision and Order in this case that found
6 that the City of Anacortes Ordinance 2702 did not comply with the requirements of the
7 Growth Management Act (GMA) in the following ways: (1) regulations for establishing
8 wetland buffers, (2) exemptions for wetlands of a certain size, (3) the specificity of its
9 adaptive management program, and (4) failure to include best available science (BAS) in its
10 comprehensive plan policy for designating species of local importance.

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13 Additionally, the Board found that the adoption of critical areas regulations adopted by
14 Ordinance 2702 that apply to critical areas in the shoreline constitute amendments to
15 Anacortes' Shoreline Master Program. For this reason, the Board found that those
16 amendments that applied to critical areas in the shoreline needed to be submitted by the
17 City to the Washington State Department of Ecology (Ecology) for review and approval
18 pursuant to RCW 90.58.090 and 36.70A.290(2)(c) before they were ripe for Board review.
19 Futurewise appealed the Final Decision and Order to the Thurston County Superior Court.
20 The Washington Departments of Community, Trade and Economic Development (CTED)
21 and Ecology intervened on the side of Futurewise, while the Washington Public Ports
22 Association intervened on the side of the City on the adoption of critical areas regulations in
23 shorelines. On November 17, 2006, the Thurston County Superior Court overturned the
24 Board's decision. The Court held that jurisdiction over shoreline critical area regulations is
25 transferred from the GMA to the Shoreline Management Act (SMA) when a county's or city's
26 Shoreline Master Program (SMP) update is approved by Ecology. Thus, the Court
27 concluded that since Ecology had not approved an update to the City's SMP, the city's
28 adoption of critical areas regulations regulating development in the shoreline did not
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1 constitute an amendment to the City's SMP and those amendments continued to be in the
2 jurisdiction of the Board.¹

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4 The City appealed this Court order to the Court of Appeals on December 16, 2006. To date,
5 the case has not been decided.

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7 The City adopted Ordinance 2743 that amended its wetland regulations to increase its
8 buffer widths and its criteria for wetland exemptions on August 7, 2006.

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10 The City filed its Compliance Report on December 21, 2006. Futurewise filed its objections
11 to a finding of compliance on January 10, 2007. The City of Anacortes' Compliance
12 Report Reply was filed on February 1, 2007.

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14 The Board held a telephonic hearing on February 13, 2007. Keith Scully represented
15 Futurewise, and City Attorney Ian Munce represented the City. All three Board members
16 attended.

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18 After the hearing, in response to Board questions, both the Futurewise and the City filed
19 post hearing briefs on February 26, 2007.

20 21 22 **III. BURDEN OF PROOF**

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

25 Except as provided in subsection (5) of this section [relating to the Shoreline
26 Management Act], comprehensive plans and development regulations, and amendments
27 thereto, adopted under this chapter are presumed valid upon adoption.
28 RCW 36.70A.320(1)

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32 ¹ Thurston County Superior Court Cause No. 06-2-00166-1, Final Judgment and Order (November 17, 2006)
at 3.

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

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

7 RCW 36.70A.320(2)

8 In this case, there was no determination of invalidity as to Ordinance 1179J. Therefore,
9 Ordinance 1179L is presumed valid and the burden is on Petitioners to show that the action
10 by the City of Anacortes is clearly erroneous in the view of the entire record and in light of
11 the goals and requirements of the GMA. RCW 36.70A.320(3).

14 IV. ISSUES TO BE DISCUSSED

- 15 1. Do the City's regulations for establishing wetland buffers and regulations exempting
16 certain size wetlands from protection comply with RCW 36.70A.060 or RCW
17 36.70A.172(1)?
- 18 2. Does the City's adaptive management program for wetlands comply with RCW
19 36.70A.060 and RCW 36.70A.172?
- 20 3. Does the City's development regulation that establishes a legislative process for
21 nominating and designating species of local importance for habitat conservation incorporate
22 best available science and comply with RCW 36.70A.172?
- 23 4. Has the City submitted its critical areas regulations that apply to shorelines to the
24 Washington Department of Ecology for review and are they ripe for this Board's review?

27 V. DISCUSSION OF THE ISSUES

28 Issues 1 and 2

29 We will discuss these issues together.

1 Board Discussion

2 The City states that it has increased its buffer widths, tailored its wetland buffer widths to
3 wetland functions and restricted exempted wetlands. The City maintains that these
4 revisions were made in partnership with Ecology and that Ecology has determined that
5 these revisions are consistent with best available science.²
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7 Futurewise has no objection to a finding of compliance regarding the City's regulations for
8 wetland buffering or exemptions.³ Futurewise makes no argument in regard to the City's
9 adaptive management program. Evidence in the record shows that Ecology finds that the
10 City's wetland regulations now are consistent with its guidance that is based on a synthesis
11 of the scientific literature⁴. In our Final Decision and Order, the Board found that Ecology's
12 guidance was based on BAS.⁵
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15 Conclusion: Therefore, based on Futurewise's lack of objection to the City's wetland
16 regulations and its statement that it considers the City's wetlands regulations in compliance
17 with the GMA; and further based on Ecology's statement that the City's regulations for
18 wetlands buffers and exemptions are consistent with its guidance that is based on BAS; we
19 find that the City's regulations for establishing wetland buffers and the exemptions to
20 wetland regulations now comply with RCW 36.70A.060 and RCW 36.70A.172. Further,
21 because the City has adopted precautionary measures based on BAS to protect wetlands,
22 we do not need to reach the issue of whether its adaptive management program complies
23 with RCW 36.70A.172.
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30 ² City of Anacortes' Compliance Report at 5.

31 ³ Objections to a Finding of Compliance at 5.

32 ⁴ April 13, 2006 Letter from Ecology Wetland Specialist Laura Casey to Ian Munce, Attachment 3 to City of Anacortes' Compliance Report.

⁵ Final Decision and Order at 17.

1 **Issue 3**

2 The City's failure to include BAS in its regulation for nominating and designating species of
3 local importance for habitat conservation (ACC X.60.010(A)(3)(v)) was found to be
4 noncompliant in the December 27, 2005 Final Decision and Order. On February 20, 2007,
5 after the compliance hearing, the City passed Ordinance 2760 that amended its process for
6 nominating and designating species of local importance including possible strategies for
7 management of those species and for protecting their habitat. The amendment now states
8 that these management strategies will be supported by BAS. In an e-mail on March 1,
9 2007, in response to an inquiry from the Board, Futurewise did not object to finding ACC
10 X.60.010(A)(3)(v), as amended by Ordinance 2760, compliant with RCW 36.70A.172.
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13 Conclusion: Based on the adoption of Ordinance 2760 that amends ACC
14 X.60.010(A)(3)(v)) to include BAS in the management strategies for species and habitat of
15 local importance, and there being no objection from Futurewise to this amendment, the
16 Board finds that City's process for nominating species of local importance, including
17 strategies for the management of these species and their habitat now includes BAS and
18 complies with RCW 36.70A.172.
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21 **Issue 4**

22 Futurewise argues that the Board's decision on this issue was reversed by the Thurston
23 County Superior Court and so the Board must act on the remand by the Superior Court.
24 The City argues that it should be granted a stay until its appeal of the Superior Court
25 decision is decided by the Court of Appeals. ⁶
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27 Board Discussion

28 Petitioners argue that the Thurston County Superior Court's order on review of the Board's
29 Final Decision and Order dated December 27, 2005 is effective despite the pending appeal
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32 ⁶ City of Anacortes' Supplemental Compliance Report, at 2.

1 to the Court of Appeals. The Superior Court reversed the Board's determination that the
2 City's amendments to its critical areas regulations applicable in the marine shorelines are
3 governed by the Shoreline Management Act (SMA) rather than the Growth Management Act
4 (GMA). Although the Superior Court decision has been appealed, it has not been stayed
5 and Petitioners argue that it is therefore binding upon the Board.⁷
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8 Because the Board found noncompliance on this issue based on the City's failure to comply
9 with the SMA, Futurewise is essentially arguing that the Board must make a new
10 determination of noncompliance. There has been no finding that the City has not complied
11 with the GMA at this point so any noncompliance finding on that basis would require a new
12 Board determination (the Superior Court did not itself find that the City's enactments were
13 noncompliant with the GMA). If Futurewise is correct and the Superior Court's decision is in
14 effect, then the Board would need to make a new determination while the Court of Appeals
15 is considering the appeal of the Superior Court decision. If, on the other hand, the Board's
16 decision remains in effect until the appeals have been finally resolved, then the question is
17 whether the Board should grant a stay as requested by the City until the appeals to court
18 have been resolved. .
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22 Petitioners argue that the Civil Rules (CR), not the Rules of Appellate Procedure (RAP),
23 apply when the Administrative Procedures Act (APA) is silent on a procedural matter.⁸
24 They argue that this is the case because the Civil Rules govern ancillary matters pursuant to
25 RCW 34.05.574 and the Rules of Appellate Procedure are applicable only to the Court of
26 Appeals and the Supreme Court. RAP 1.1(a).⁹ Because Civil Rule 62 provides that there is
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31 ⁷ Objections to a Finding of Compliance at 2.

32 ⁸ Petitioners' Post-Compliance Hearing Filing at 3.

⁹ *Ibid* at 2-3.

1 no automatic stay of a superior court decision, Petitioners argue that the Superior Court
2 decision is effective and may be enforced.¹⁰

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4 The Rules of Appellate Procedure, on the other hand, provide that the decision of the
5 appellate court is not effective until issuance of the mandate. RAP 12.2 A mandate is not
6 issued until there is a decision terminating review. RAP 12.5(a). If an appeal to a higher
7 court is still pending, there has not been a decision terminating review. Therefore, if an
8 appeal is filed from a lower court appellate decision, the mandate will not issue until the
9 higher court has decided the appeal. RAP 12.5(b).

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12 In sum, if the Civil Rules (CR) apply to the appeal of the Board's decision, then the Superior
13 Court decision is in effect. If the Rules of Appellate Procedure (RAP) apply, then the
14 Board's decision remains in effect until a final decision terminating appellate review is
15 entered, i.e. until the Court of Appeals decides the case. The key question then is: which
16 rules apply to the appeal of a growth board decision – the Civil Rules or the Rules of
17 Appellate Procedure?

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19 Appeals of growth board decisions are governed by the Administrative Procedures Act
20 (APA). RCW 36.70A.300(5). The APA does not address the situation here – it does not
21 state when the decision of an appellate court is effective and therefore takes the place of
22 the Board's decision. However, the Washington Supreme Court discussed the question of
23 what rules to apply in the event that the APA does not address a procedural matter. In a
24 case involving this Board, *Diehl v. Western Washington Growth Management Hrgs. Bd.*,¹⁵³
25 Wn.2d 207, 103 P.3d 193 (2004), the Court stated that the Civil Rules do not apply to
26 appeals under the APA except when specifically authorized.¹¹ The Court then went on to
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31 ¹⁰ *Ibid* at 3-4; Petitioners also argue that since the trial court decision is enforceable during the pendency of an
32 appeal, the superior court decision in this case is enforceable pending appeal to the Court of Appeal.

¹¹ The Court referred to the APA provision that provides that “ancillary procedural matters” such as
intervention, class actions, consolidation, joinder are governed by the civil rules.¹¹ *Diehl v. Western
Washington Growth Management Hrgs. Bd.*,¹⁵³ Wn.2d 207, 103 P.3d 193 (2004) at 216.

1 discuss the reason that the Civil Rules should not apply in general to appeals of growth
2 board decisions. The Court noted that the Civil Rules apply when the superior court sits as
3 a court of original jurisdiction, rather than as an appellate court:

4 Moreover, the civil rules are clearly intended to apply only to civil actions invoking the
5 general jurisdiction of the superior court; an administrative appeal invokes appellate,
6 not general or original, superior court jurisdiction.¹²

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8 Since the superior court reviews a growth board decision as an appellate court, the Court
9 observed, the Civil Rules are not appropriate. When the superior court is sitting as an
10 appellate court, the Court stated, it is appropriate to use the Rules of Appellate

11 Procedure:

12 In reviewing administrative appeals, Washington courts have stated that it was more
13 appropriate to look to the rules of appellate procedure, rather than the civil rules,
14 given the appellate jurisdiction of the trial court under the APA.¹³

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16 This was also the decision of the Court of Appeals (Division I) in *King County v. Central*
17 *Puget Sound Growth Management Hrgs. Bd.*, 91 Wn.App. 1 (1998):

18 The civil rules are clearly intended to apply only to civil actions invoking the general
19 jurisdiction of the superior courts. Instead we would analogize to the rules of
20 appellate procedure (RAP) given the appellate jurisdiction of trial courts under the
21 APA.¹⁴

22 Since the APA does not address the situation here, we must analogize to the Rules of
23 Appellate Procedure as the “gap-filling” rules¹⁵. If that analogy is drawn, the decision of the
24 Superior Court is like that of the appellate court under RAP 12.2 and the Superior Court
25 decision does not become effective until a mandate is issued terminating appellate review.
26 See also RAP 12.5. Because appellate review is still pending in the Court of Appeals, the
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31 ¹² *Ibid* at 217.

¹³ *Ibid*.

¹⁴ *King County v. Central Puget Sound Growth Management Hrgs. Bd.*, 91 Wn.App. 1 (1998) at 18-19.

¹⁵ *Ibid*.

1 mandate cannot issue until the Court of Appeals has made its decision. Therefore, the
2 Superior Court decision is not yet binding on all parties.

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4 As far as the effectiveness of the Board's order is concerned, we again analogize to the
5 Rules of Appellate Procedure. By analogy, the Board stands in the shoes of the court of
6 original jurisdiction (otherwise the trial court) during the appeal. RAP 7.2 allows any person
7 to enforce the trial court's decision in a civil case during the appeal. RAP 7.2. Therefore,
8 the Board has authority to enforce its decision during the appeal unless a stay has been
9 issued by a reviewing court. There has been no stay issued here so the Board's decision
10 remains in effect until a final decision terminating review is entered by the courts.

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13 At the same time, the Board acknowledges that the Superior Court has reversed its decision
14 and that it would be appropriate to stay the effectiveness of the Board's order until the
15 appeal can be resolved. RCW 34.05.550 allows the Board to enter a stay "unless precluded
16 by law". The City has asked the Board to stay the Board's order while its appeal is decided.
17 Since the decision of the Board has been reversed by the Thurston Superior Court, we find
18 that to be justification for the stay requested by the City here.

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20 Conclusion

21 Because the rules of appellate procedure should fill the gaps not addressed by the APA for
22 appeals of growth board decisions, we find that the Board's decision is still in effect.
23 However, in light of the fact that the Board's December 27, 2005 decision has been
24 reversed, we recognize that it is not appropriate to require the City to expend its limited
25 resources complying with the Board's order until this issue has been finally decided
26 Therefore, while we acknowledge that the Board's December 27, 2005 decision remains in
27 effect, we will not require further compliance action from the City until a final order is issued
28 terminating review by the courts.
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VI. FINDINGS OF FACT

1. The City of Anacortes is a city in Skagit County, which is located west of the crest of the Cascade Mountains. The cities of Skagit County are required to plan pursuant to RCW 36.70A.040.
2. Petitioners Evergreen Islands, Futurewise, and Skagit Audubon Society are nonprofit organizations that participated in the adoption of Ordinance 2702 in writing and orally. These Petitioners addressed the issues raised in their Petitions for Review in its participation below.
3. The Board issued a Final Decision and Order on December 27, 2005 that found that the City of Anacortes Ordinance 2702 did not comply with the requirements of the Growth Management Act (GMA) in the following ways: (1) regulations for establishing wetland buffers, (2) exemptions for wetlands of a certain size, (3) the specificity of its adaptive management program, and (4) failure to include best available science (BAS) in its comprehensive plan policy for designating species of local importance.
4. The Board also found that the adoption of critical areas regulations adopted by Ordinance 2702 that apply to critical areas in the shoreline constitute amendments to Anacortes' Shoreline Master Program. For this reason, the Board found that those amendments that applied to critical areas in the shoreline needed to be submitted by the City to the Washington State Department of Ecology (Ecology) for review and approval pursuant to RCW 90.58.090 and 36.70A.290(2)(c) before they were ripe for Board review.
5. The City adopted Ordinance 2743 that amended its wetland regulations to increase its buffer widths and its criteria for wetland exemptions on August 7, 2006.
6. Evidence in the record shows that Ecology finds that the City's wetland regulations now are consistent with its guidance that is based on a synthesis of the scientific literature. In our December 27, 2005 Final Decision and Order, the Board found that Ecology's guidance was based on BAS.
6. Futurewise has no objection to a finding of compliance regarding the City's regulations for wetland buffering or exemptions.
7. Futurewise makes no argument regarding the City's adaptive management program.
8. The City has adopted precautionary measures based on BAS to protect wetlands.

- 1 9. On February 20, 2007, the City adopted Ordinance 2760 that amended its process
2 for nominating and designating species of local importance including possible
3 strategies for management of those species or for protecting their habitat. (ACC
4 X.60.010(A)(3)(v)).
- 5 10. The amendment now states that these management strategies (ACC
6 X.60.010(A)(3)(v)) will be supported by BAS.
- 7 11. Futurewise does not object to finding ACC X.60.010(A)(3)(v), as amended by
8 Ordinance 2760, compliant with RCW 36.70A.172.
- 9 12. On November 17, 2006, the Thurston County Superior Court overturned the Board's
10 decision that the City's critical areas regulations affecting development in the
11 shorelines were subject to the Shoreline Management Act and needed to be
12 submitted to Ecology for review.
- 13 13. The City appealed the Superior Court decision to the Court of Appeals on December
14 16, 2006.
- 15 14. Neither the Superior Court nor the Court of Appeals stayed the Board's December
16 27, 2005 Order in the interim.
- 17 15. The City of Anacortes has requested a stay from the Board.
- 18 16. There has been no finding that the City has not complied with the GMA as to its
19 critical areas regulations applicable in the shorelines.
- 20 17. Appellate review of this case is still pending in the Court of Appeals.
- 21 18. Any Conclusion of Law hereafter determined to be a Finding of Fact is hereby
22 adopted as such.

23 VII. CONCLUSIONS OF LAW

- 24 A. The Board has jurisdiction over the parties and subject matter of this case.
- 25 B. Petitioner Futurewise has standing to raise objections to a finding of compliance in
26 this case.
- 27 C. The City's wetland regulations for buffering and granting exemptions to its wetland
28 regulations comply with RCW 36.70A. 060 and RCW 36.70A.172.
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- D. The City's process for nominating species of local importance, including strategies for the management of these species or their habitat (ACC X.60.010(A)(3)(v)) now includes BAS and complies with RCW 36.70A.172.
- E. The decision of the Thurston County Superior Court is not effective until a mandate is issued terminating appellate review. (RAP 12.5) Therefore, the Board's decision in this case is still in effect.
- F. Any Conclusion of Law hereafter determined to be a Finding of Fact is hereby adopted as such.

VIII. ORDER

Based on the Findings of Facts and Conclusions of Law above, the Board finds Ordinance 2743 and Ordinance 2760 cures the issues on noncompliance regarding the City of Anacortes wetland buffering and exemption requirements, and ACC X.60.010(A)(3)(v). The City's regulations for wetland buffers, exemptions, and ACC X.60.010(A)(3)(v) now comply with the GMA.

Further, based on RAP 1.2. and 12.5, the Board finds that its December 27, 2005 Final Decision and Order is still in effect, and because a decision from the Court of Appeals in this case is still pending, the Board grants the City of Anacortes a stay of its Final Decision and Order until the Court of Appeals issues its decision.

Entered this 9th day of April 2007.

Holly Gadbaw, Board Member

Margery Hite, Board Member

James McNamara, Board Member

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

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

11 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
12 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
13 judicial review may be instituted by filing a petition in superior court according to the
14 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
15 Enforcement. The petition for judicial review of this Order shall be filed with the
16 appropriate court and served on the Board, the Office of the Attorney General, and all
17 parties within thirty days after service of the final order, as provided in RCW
18 34.05.542. Service on the Board may be accomplished in person or by mail, but
19 service on the Board means **actual receipt of the document at the Board office** within
20 thirty days after service of the final order. A petition for judicial review may not be
21 served on the Board by fax or by electronic mail.

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