

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 IRONDALE COMMUNITY ACTION
4 NEIGHBORS (ICAN),

5 Petitioners,

6 v.

7
8 JEFFERSON COUNTY,

9 Respondent.
10

Case No. 09-2-0012

ORDER ON MOTIONS TO STRIKE

11
12 THIS Matter comes before the Board on Jefferson County's (the County) Motion to Strike.¹
13 Irondale Community Action Neighbors (ICAN) filed a response objecting to the motion.²
14 ICAN's response included a motion to strike two documents attached to the County's
15 motion. The County's motion requests dismissal of ICAN's Petition for Review (PFR) in its
16 entirety or, alternatively, dismissal of those PFR issues which have been previously
17 determined following Board review.³
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20 This case is a continuation of a saga which began, at least in regards to Board involvement,
21 in 2003 with ICAN's PFR challenging the designation of a non-municipal Urban Growth Area
22 (UGA) encompassing the Port Hadlock/Irondale area.⁴ The FDO issued in that case found
23 the County noncompliant with the Growth Management Act (GMA) as the County failed to
24 adopt urban level of service standards, had included incomplete capital facilities planning,
25 and failed to adopt development regulations for application in the UGA.⁵
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28 Subsequent County compliance efforts included adoption of Ordinance No. 10-0823-04.
29 That ordinance was also challenged by ICAN, in Case No. 04-2-0022. In November 2004,

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31 ¹ Motion To Strike Petition For Review Based On Collateral Estoppel And Res Judicata, filed October 15, 2009.

² ICAN Response To County's Dispositive Motion and Motion To Strike, filed October 26, 2009

³ Motion To Strike at 1.

⁴ Case No. 03-2-0010.

⁵ FDO Conclusion of Law 3, August 22, 2003.

1 the Board and parties agreed that both cases would be "tracked" together, although not
2 consolidated. The Board issued a combined FDO and Compliance Order (CO) on May 31,
3 2005 and an Order on Reconsideration on July 29, 2005, which determined Ordinance
4 No.10-0823-04:

- 5 1.) Established a UGA which included areas where sewer would not be provided
6 within 20 years;
- 7 2.) Included development regulations allowing urban levels of development
8 without sewer;
- 9 3.) Allowed commercial and industrial development on interim septic tanks;
- 10 4.) Had other flaws regarding the capital facilities plan, the market factor
11 employed and the transportation element.

12 In September 2007, ICAN filed an additional PFR⁶ challenging the County's adoption of
13 Ordinance No. 04-0702-07, another attempt at achieving compliance. All three cases
14 continued to be tracked together until April 17, 2009, when the Board officially consolidated
15 the three cases under Case No. 07-2-0012c.
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17 The Board's Compliance Order issued on August 12, 2009 for the consolidated matter of
18 Case No 07-2-0012c found that the County had complied with all remaining issues but one:
19 in order to achieve compliance with RCW 36.70A.110 and RCW 36.70A.020(1) and (12) the
20 County had to clarify which rural development standards applied within the UGA prior to
21 sewer availability. The August 2009 Compliance Order specifically found: 1) the County's
22 adoption of its General Sewer Plan adequately demonstrated that sewer would be provided
23 in the Port Hadlock UGA within the 20-year planning horizon; 2) the general sewer plan met
24 the requirements of RCW 36.70A.070(3)(d) to have at least a six-year plan that would
25 finance capital facilities within projected funding capacities and clearly identified sources of
26 public money for such purposes, and; 3) the County's population holding capacity analysis
27 had not been shown to be clearly erroneous.⁷
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32 ⁶ Case No. 07-2-0012.

⁷ Case No. 07-2-0012c Compliance Order at 15.

1 I. BOARD FINDINGS AND CONCLUSIONS

2 ICAN's Motion

3 ICAN moved to strike from Board consideration two pleadings filed by ICAN in the prior, yet
4 related Case No. 07-2-0012c: 1) ICAN's Objection to Lifting Invalidity and Finding
5 Compliance and Request for Additional Invalidity, and 2) ICAN's Request for
6 Reconsideration of the 8/12/09 Compliance Order. ICAN's objection is based on the fact
7 that those pleadings are not in the record of the current case.⁸ The County did not choose to
8 respond to ICAN's motion.
9

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11 ICAN's motion appears to be premised on an assumption that those pleadings are
12 presented as evidence and the Board's consideration is limited solely to the record. The
13 Board does not view the County's submittals as evidence, but rather as argument. Viewed
14 in that light, imposition of a requirement such as suggested by ICAN would require that
15 copies of every cited board or court decision would need to be included in the record.
16

17 **Conclusion:** ICAN's motion is denied.
18

19 County Motion

20 The County in its Motion argues that the issues raised in the PFR now before the Board are
21 barred by *res judicata* and collateral estoppel in that the Petitioner seeks to re-litigate
22 matters previously determined by the Board.⁹ Specifically, the County references Issues 2,
23 6, 7, 8, 10 and 12, and either cites the Board's holding regarding that issue from the
24 Board's Compliance Order of August 12, 2009 or merely makes a conclusory statement
25 that the Board has already ruled to the contrary.¹⁰
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30 ⁸ ICAN's Response at 2.

31 ⁹ County's Motion at 5.

32 ¹⁰ County's Motion at 5, 6. The Board notes that the County utilizes the numbering system presented by ICAN in its PFR. The Issue Numbers referenced by the Board relate to the issues set forth in the Board's Prehearing Order issued on September 24, 2009

1 ICAN, on the other hand, states that there has never been a Growth Board decision
2 allowing the application of *res judicata* or collateral estoppel.¹¹

3
4 The County acknowledges there has been some reluctance to apply these principles to
5 matters before the board, but argues this case presents facts compelling application.¹² The
6 County distinguishes the Board's *Diehl vs. Mason County*¹³ decision in which the Board
7 opted not to apply equitable principles, suggesting, however, that the Board considered the
8 necessary factors for application but found that not all factors were present.¹⁴ In addition,
9 the County cites numerous appellate court decisions in support of its position stating that
10 the courts have held that findings made in quasi-judicial or administrative hearings are
11 binding in subsequent proceedings.¹⁵

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14 ICAN urges the Board to follow the direction of the Central Puget Sound Board in *Tacoma,*
15 *et al v. Pierce County*.¹⁶ In that decision, the Central Board found that RCW 36.70A.280(1)
16 provides that a Growth Board "shall hear and determine only those petitions alleging
17 (noncompliance with specified statutes . . .) and that RCW 36.70A.300(1) provides that a
18 board's final order is to be based solely on whether a jurisdiction is in compliance. ICAN
19 states that in *Tacoma*, the Central Board held the referenced statutes precluded application
20 of equitable principles and this Board should adopt a similar holding.¹⁷

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22
23 ICAN further argues that the Growth Management Hearings Boards are creatures of the
24 legislature and only have the powers granted by that body. Again citing the *Tacoma*
25 decision, ICAN states neither the GMA nor the APA grant "equitable jurisdiction".¹⁸

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28 ¹¹ ICAN's Response at 3.

29 ¹² Motion To Strike Petition For Review at 7.

30 ¹³ WWGMHB Case No. 07-2-0010, FDO (January 6, 2008).

31 ¹⁴ County's Motion at 7-8.

32 ¹⁵ County's Motion at 7.

¹⁶ ICAN Response at 3-7; (Citing CPSGMHB Case No. 94-3-0001, Order On Dispositive Motions (March 4, 1994).

¹⁷ ICAN Response at 3-4.

¹⁸ ICAN Response at 4-5.

1 Furthermore, ICAN states that the Washington State Constitution gives exclusive equity
2 jurisdiction to the superior and district courts.¹⁹ Finally, ICAN refers to numerous Eastern
3 and Western Board cases where those boards declined to apply the equitable principles of
4 *res judicata* and collateral estoppel.²⁰

5
6 The Board will first address the doctrines of *res judicata* and collateral estoppel themselves,
7 then whether the Board has the authority to apply them, and finally, if the Board has
8 authority, whether the facts of this case warrant application.
9

10 **RES JUDICATA AND COLLATERAL ESTOPPEL**

11 In addressing these doctrines, the United States Supreme Court stated:
12

13 A fundamental precept of common law adjudication, embodied in the related
14 doctrines of *collateral estoppel* and *res judicata*, is that a "right, question or fact
15 distinctly put in issue and directly determined by a court of competent jurisdiction .
16 . . cannot be disputed in a subsequent suit between the same parties or their
17 privies. . . ."

18 Under *res judicata*, a final judgment on the merits bars further claims by parties or
19 their privies based on the same cause of action. Under *collateral estoppel*, once
20 an issue is actually and necessarily determined by a court of competent
21 jurisdiction, that determination is conclusive in subsequent suits based on a
22 different cause of action involving a party to the prior litigation.. Application of both
23 doctrines is central to the purpose for which civil courts have been established,
24 the conclusive resolution of disputes within their jurisdictions. To preclude parties
25 from contesting matters that they have had a full and fair opportunity to litigate
26 protects their adversaries from the expense and vexation attending multiple
lawsuits, conserves judicial resources, and fosters reliance on judicial action by
minimizing the possibility of inconsistent decisions. (citations omitted)²¹

27 In the recent Supreme Court affirmation of the Court of Appeal's holding in the *City of*
28 *Arlington v. CPSGMHB*, the Court set forth the requirements for the doctrines of *res judicata*
29 and collateral estoppel. The Court stated:
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¹⁹ ICAN Response at 5-6.

²⁰ ICAN Response at 7-11.

²¹ *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

1 Resurrecting the same claim in a subsequent action is barred by res judicata.”
2 **Under the doctrine of res judicata, or claim preclusion,** “a prior judgment will
3 bar litigation of a subsequent claim if the prior judgment has ‘a concurrence of
4 identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3)
5 persons and parties, and (4) the quality of the persons for or against whom the
6 claim is made.”

7 When a subsequent action is on a different claim, yet depends on issues which
8 were determined in a prior action, the relitigation of those issues is barred by
9 collateral estoppel.” **Collateral estoppel, or issue preclusion, requires** (1)
10 identical issues; (2) a final judgment on the merits; (3) the party against whom
11 the plea is asserted must have been a party to or in privity with a party to the
12 prior adjudication; and (4) application of the doctrine must not work an injustice
13 on the party against whom the doctrine is to be applied.²²

14 *Stevens County v. Futurewise* provided further clarity as to *res judicata* and collateral
15 estoppel:

16 The equitable doctrine of res judicata, or claim preclusion, prevents the same
17 parties from relitigating a claim that was raised or could have been raised in an
18 earlier action. The doctrine is intended to prevent piecemeal litigation and to
19 ensure the finality of judgments.

20 Similar to res judicata, collateral estoppel prevents a party from relitigating issues
21 that have been raised and litigated by the party in a prior action. Unlike res
22 judicata, collateral estoppel is applicable when the claim is different but some of
23 the issues are the same. Important here, “collateral estoppel precludes only
24 those issues that have actually been litigated and determined.”(citations
25 deleted)²³

26 In *Clallam County v. WWGMHB*, the Court of Appeals, Division II, stated that both *res*
27 *judicata* and collateral estoppel apply to quasi-judicial administrative agency decisions.²⁴

28 This statement of the *Clallam County* Court was based on the case of *State v. Dupard*,²⁵ In
29 that case, the Supreme Court opined on whether the doctrines applied based on a holding
30 of the Board of Prison Terms and Parole and concluded:

31 ²² *City of Arlington v. CPSGMHB*, 164 Wn.2d. 768 (2008)(Internal citations omitted)
32 ²³ *Stevens County v. Futurewise*, 146 Wn. App. 493 (2008).
²⁴ 130 Wn. App. 127, 132 (2005),
²⁵ 93 Wn.2d 268 (1980).

1 Collateral estoppel, perhaps more descriptively denoted as issue preclusion, and
2 res judicata are doctrines having a common goal of judicial finality. The principles
3 underlying both doctrines are to prevent relitigation of already determined
4 causes, curtail multiplicity of actions, prevent harassment in the courts,
5 inconvenience to the litigants, and judicial economy.

6 Of the two doctrines, res judicata is the more comprehensive because it relates
7 to a prior judgment arising out of the same cause of action between the parties.
8 Collateral estoppel is less encompassing, barring relitigation of a particular issue
9 or determinate fact. Both doctrines require a large measure of identity as to
10 parties.

11 ...
12 It is reasonably well accepted that in appropriate circumstances estoppel can
13 prevent relitigation of issues determined by an administrative agency acting in a
14 judicial capacity:

15 When an administrative agency is acting in a judicial capacity and
16 resolves disputed issues of fact properly before it which the parties have
17 had an adequate opportunity to litigate, the courts have not hesitated to
18 apply *res judicata* to enforce repose.

19 There can be little doubt the Washington State Board of Prison Terms and
20 Paroles acts in at least a quasi-judicial capacity when it conducts a parole
21 revocation hearing. Procedures approximating judicial proceedings are mandated
22 statutorily and constitutionally.²⁶

23 Again considering application of the equitable doctrines by a court based on prior
24 administrative findings, the Washington Supreme Court holding in *Stevedoring Services v.*
25 *Eggert*,²⁷ establishes additional factors to be considered when deciding whether to apply
26 such principles based on an administrative determination:

27 Res judicata applies in the administrative setting only where the administrative
28 agency "resolves disputed issues of fact properly before it which the parties have
29 had an adequate opportunity to litigate." In Washington, other considerations are
30 also relevant when the prior adjudication took place in an administrative setting
31 including "(1) whether the agency acting within its competence made a factual

32 ²⁶ 93 Wn.2d 268, 274 (1980)

²⁷ 129 Wn.2d 17, 40 (1996).

1 decision; (2) agency and court procedural differences; and (3) policy
2 considerations."

3 Thus, it is clear from various court holdings that the equitable doctrines of *res judicata* and
4 collateral estoppel may be applied by the courts to the quasi-judicial decisions of
5 administrative bodies, such as the Growth Boards. The *Clallam County* decision referenced
6 above is similar to all of the decisions cited by the County in this matter. That is, it is clear
7 that the courts in certain situations can apply these equitable doctrines to decisions made
8 by administrative or quasi-judicial bodies. The question before this Board is somewhat
9 different: *whether the Growth Management Hearings Board, as an administrative agency*
10 *servicing in a quasi-judicial capacity, may apply these equitable doctrines as well.*
11

12 **GMHB APPLICATION OF RES JUDICATA AND COLLATERAL ESTOPPEL**

13 ICAN refers extensively to the Central Board *Tacoma* decision which clearly held that the
14 Board was without authority to apply these doctrines. The Central Board has upheld its
15 position on equitable doctrines, specifically *res judicata* and collateral estoppel, in
16 subsequent cases.²⁸
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19 However, contrary to ICAN's suggestion, the Eastern Board has in fact held that the
20 doctrines apply, has considered the application of them, and found issues barred by their
21 application as well as denied application when necessary elements were absent. In *Turtle*
22 *Rock HOA v. Chelan County*²⁹, the Eastern Board specifically stated that the doctrine of *res*
23 *judicata* applied in proceedings before the GMHB. That Board concluded that *res judicata*
24 did bar the Petitioners' SEPA claims because the Superior Court had already ruled on those
25 issues in a LUPA appeal but did not bar the County's re-designation of land. In *Loon Lake*
26 *Property Owners v. Stevens County*,³⁰ the Board found that the decision of a County
27 Hearing Examiner did not establish a *res judicata* bar to the Petitioners' SEPA challenge
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31 ²⁸ See *Penninsula Neighborhood Assoc. v. Pierce County*, CPSGMHB Case No. 95-3-0071 (Order, Jan. 9,
32 1996); *Hensley v. Snohomish County*, CPSGMHB Case No. 03-3-0010 (Order, Aug. 11, 2003).

²⁹ Case No. 07-1-0001 (FDO, July 17, 2007).

³⁰ Case No. 01-1-0002c (Order, April 23, 2001).

1 before the Board because the Petitioners were permitted to appeal that challenge to either
2 the Board or the Court. In *Futurewise v. Stevens County*,³¹ the County asserted the
3 doctrines of *res judicata* and collateral estoppel barred the appeal. In response, the Board
4 concluded that the matter was not barred by the doctrines because Futurewise was not
5 previously before the Board on the issue raised nor was the specific issue previously
6 determined by the Board.
7

8 Cases before the Western Board are varied, with earlier cases finding that the doctrine does
9 not apply but later cases analyzing application of the doctrines. In an Order on
10 Reconsideration for a Compliance Proceeding, *Mudge et al v. Lewis County*, in response to
11 Petitioners' assertion that the fundamental principles of *res judicata*, collateral estoppel, and
12 *stare decisis* should apply, the Board stated:
13

14 There is nothing in the GMA to suggest that a hearings board has the authority to
15 resolve equitable issues such as *res judicata* or collateral estoppel.³²
16

17 However, in the 2004 case of *Skagit County Growthwatch v. Skagit County*,³³ although the
18 Board noted the Petitioner's assertion that equitable remedies such as *res judicata* do not
19 apply to cases before the growth board, the Board appears to have changed its position
20 when it determined that *res judicata* did not bar the appeal based on a lack of identity of
21 parties and a determination that the cause of action was not the same. The basis for the
22 claim was a LUPA action before the Superior Court and the Western Board stated the
23 Court did not have jurisdiction to determine compliance with the GMA and therefore the
24 "cause of action" was not the same and privity did not result just because the same attorney
25 represented parties in both actions.
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³¹ Case No. 05-1-0006 (FDO, Jan.. 13, 2006).

³² Coordinated Cases 01-2-0010c, 00-2-0031c, 99-2-0027c, 98-2-0011c (Order, Aug. 19, 2002), at 4.

³³ Case No. 04-2-0004 (Order, June 2, 2004).

1 Likewise, in the 2005 case of *1000 Friends v. Thurston County*³⁴ the Board addressed the
2 elements of collateral estoppel and concluded that neither *res judicata*, *stare decisis*, nor
3 collateral estoppel barred the petition because there was no privity and the issue was not
4 previously litigated.

5
6 In the 2007 case of *ARD v. Mason County*, the Board considered the elements of the
7 doctrine of collateral estoppel, concluding that the doctrine was not applicable. In making
8 this determination, the Board stated:

9
10 Although the issue of the County's FDPO is once again before the board, there
11 the similarity of the issues ends. As the County correctly points out, Ordinance
12 81-07 is not Ordinance 77-93 (the latter being the ordinance at issue in the 1995
13 case). The new ordinance is entitled to the presumption of validity pursuant to
14 RCW 36.70A.320(1) and the question for the Board is whether the new
15 ordinance is clearly erroneous. The record before the Board in each case is
16 entirely different, most notably in that, in adopting each ordinance, the County
17 relied upon separate and distinct studies. The Board's inquiry is whether, based
18 on the record, the County's actions were clearly erroneous. Our review focuses
19 upon the record and decisions made in adopting Ordinance 81-07. Therefore,
20 collateral estoppel does not apply.³⁵

21 In 2008, in the case of *Friends of Skagit County v. Skagit County*,³⁶ the Board noted the
22 equitable nature of *res judicata* and collateral estoppel, cited previous holdings of all three
23 Boards as to limitations on jurisdiction and the application of these doctrines,³⁷ and denied
24 the Intervenor's motion to dismiss based on these doctrines. However, the Board now notes
25 that the three Western Board decisions it cited in *Friends of Skagit County* do not support
26 the conclusion of the Board in that case. *Yanisch* merely mentions equitable principles in
27 the discussion of that case's procedural history and cannot be interpreted to support the
28 conclusion denying application of equitable principles. Nor does *WEAN* support that

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30 ³⁴ Case No. 05-2-0002 (Order, April 21, 2005) Case No. 04-1-0010 (Order, Nov. 29, 2004).

31 ³⁵ Case No. 07-2-0010 (FDO, Jan. 16, 2008), at 4.

32 ³⁶ Case No. 07-2-0025c (FDO, May 12, 2008).

³⁷ The cited Western Board cases included *Yanisch v. Lewis County*, No. 02-2-0007c, FDO (Dec. 11, 2002);
WEAN v. Island County, No. 00-2-0001, FDO (June 26, 2000); and *ARD/Diehl v. Mason County*, FDO (Jan. 6,
2008).

1 conclusion: the language referenced in that decision was a statement of *WEAN's* position.
2 Finally, the *ARD/Diehl* case found that the factors required for application of collateral
3 estoppel were not present.

4
5 Another relevant decision in this analysis is *Longview Fiber v. Cowlitz County*.³⁸ In
6 determining that a tax refund was not due Longview Fiber because it failed to comply with
7 the formal protest requirements, the Court stated:

8 [W]e will not give relief on equitable grounds in contravention of a statutory
9 requirement. ... equitable principles cannot be asserted to establish equitable
10 relief in derogation of statutory mandates.³⁹

11 Therefore, it would appear from this holding that the Board is not precluded from applying
12 equitable doctrines so long as the application does not impair the GMA's mandates.

13
14 As stated above, the three Growth Management Hearings Boards have taken differing
15 positions throughout the years. The Central Board, as ICAN correctly points out, has held
16 that the GMA's grant of jurisdiction limits the Boards' ability solely to determining compliance
17 or non-compliance with the GMA and thus the Boards are precluded from applying equitable
18 doctrines. The Eastern Board has applied the doctrines while the Western Board has taken
19 inconsistent positions. Neither of the latter two boards has analyzed the underlying legal
20 issues but rather simply applied the principles (or declined to). No appellate court decisions
21 appear to have addressed the power of a growth management hearings board to directly
22 apply *res judicata* or collateral estoppel. Division III of the Court of Appeals has held that the
23 Pollution Control Hearings Board has the implied authority to consider and rule on a party's
24 equitable defense. The Court's analysis of that question is set forth below:⁴⁰

25
26 All cases in equity must be heard in the superior court because the Washington
27 Constitution expressly grants exclusive jurisdiction over all cases in equity to the
28 superior courts. By contrast, the Washington Constitution grants universal
29 original jurisdiction to superior courts over cases at law.
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32 ³⁸ 114 Wn.2d 691 (1990).

³⁹ 114 Wn.2d 691, 699 (1990).

⁴⁰ *Motley-Motley v. PCHB*. 127 Wn. App. 62 (2005).

1 Consequently, the legislature can establish inferior courts that have concurrent
2 original jurisdiction over cases at law.

3 Significantly, an equitable defense does not convert an action at law into an
4 action in equity. The action remains at law. Equitable estoppel is available only
5 as a shield, or defense; it is not available as a sword, or cause of action. If there
6 is any doubt about the character of the case, the action remains at law.

7 Did PCHB have the implied authority to hear Motley's equitable defense? An
8 agency may act only as it is authorized to act by the legislature. And, the extent
9 of the authorization depends upon the wording of the statute. Agencies may act if
10 the action is either expressly authorized by the statute or impliedly authorized
11 from the statutory delegation of authority. *An agency's implied authority is its
12 power to do those things that are necessary in order to carry out the statutory
13 delegation of authority.*

14 In the case of PCHB, the legislature created the agency in order to provide for a
15 more expeditious and efficient disposition of DOE appeals.. To that end, the
16 legislature granted PCHB the express authority to hear and decide appeals from
17 DOE.. *PCHB also has all of the powers granted to an agency for adjudicative
18 proceedings under the APA. From this statutory scheme, we conclude PCHB has
19 the implied authority to do everything lawful and necessary to provide for the
20 expeditious and efficient disposition of DOE appeals. This includes the right to
21 develop and shape remedies within the scope of its statutory authority.
22 Therefore, PCHB had the implied authority to hear Motley's equitable defense.*⁴¹

23 In *Motley*, the court relied on the PCHB's grant of "all of the powers" for adjudicative
24 proceedings under the APA. Under the PCHB's statutory authority, RCW 43.21B.160, it
25 states:

26 In all appeals, the hearings board *shall have all powers relating to administration
27 of oaths, issuance of subpoenas, and taking of depositions as are granted to
28 agencies in chapter 34.05 RCW, the Administrative Procedure Act. The hearings
29 board, and each member thereof, shall be subject to all duties imposed upon,
30 and shall have all powers granted to, an agency by those provisions of chapter
31 34.05 RCW relating to adjudicative proceedings.*

32

⁴¹ *Motley-Motley* at 73, 74.
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1 Under the GMA, at RCW 36.70A.270(4) and (7), the Board is authorized to perform all
2 powers and duties specified in the GMA "or as otherwise provided by law" and is granted the
3 authority to adopt rules for the practice and procedure before the Board including rules
4 regarding expeditious and summary disposition of appeals. In addition, and of greatest
5 significance, this section states that unless there is a conflict with a specific GMA provision,
6 the Administrative Procedures Act, Chapter 34.05 (APA) shall govern the practice and
7 procedures of the Boards. While the language of RCW 43.21B.160 and RCW
8 36.70A.270(7) is not identical, both statutes provide their respective boards with the
9 authority to apply provisions of the APA, providing in the case of the hearings boards there
10 is no conflict with the GMA.
11

12
13 And, in accord with the logic set forth by the court in *Motley*, the Growth Boards, being under
14 an obligation to render decisions within 180 days of the filing of a petition for review, have
15 the implied authority to "do everything lawful and necessary to provide for the expeditious
16 and efficient disposition" of matters. As the Court stated in *Motley*: "An agency's implied
17 authority is its power to do those things that are necessary in order to carry out the statutory
18 delegation of authority".⁴²
19

20
21 One of the arguments proffered by ICAN (and used by the Central Board to bolster its
22 decision in *Tacoma*) is that the APA does not confer equitable jurisdiction on the boards.
23 However, an equitable defense does not convert an action at law into an action in equity.
24 The action remains at law.⁴³
25

26 Another element of ICAN's argument, and one again employed by the Central Board, is that
27 RCW 36.70A.280(1) and .300(1) require the boards to determine only petitions alleging
28 noncompliance with specified statutes and that the boards' final orders are to be based
29 exclusively on whether the jurisdiction is compliant. However, application of *res judicata* or
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⁴² *Motley-Motley* at 74.

⁴³ *Motley-Motley* at 75.

1 collateral estoppel do not conflict with these statutory mandates. Rather, they supplement
2 and serve to expedite such a determination. If, in fact, a determination has previously been
3 made involving identical parties and issues, and the other factors required for application of
4 those principles are present, how can it be argued that the Board is doing anything other
5 than determining compliance or lack of same? Once a decision has been rendered, that
6 determination should not be re-examined time and time again. The boards' rules of practice
7 and procedure allow for reconsideration of decisions, but such a motion must be brought
8 within a specified time period. Allowing re-argument of an issue involving the same facts
9 and parties would be to potentially allow, in essence, reconsideration of the reconsideration.
10
11

12 WHETHER APPLICATION IS WARRANTED IN THIS MATTER

13 Having determined that the Board has implied authority in regards to doctrines such as *res*
14 *judicata* and collateral estoppel, the next step in the analysis is to determine whether the
15 specific facts of this case warrant application of the doctrines. First of all, the burden lies
16 with the party asserting the application of the doctrine to demonstrate that the required
17 elements have been met. *Res judicata* (claim preclusion) prevents the same parties from
18 relitigating a claim ***that was raised or could have been raised*** in an earlier action.⁴⁴ It is
19 designed to prevent piecemeal litigation and to ensure the finality of judgments.⁴⁵ The
20 doctrine will bar litigation of a subsequent claim if the prior judgment and the pending matter
21 include a concurrence of identity in: (1) subject matter, (2) cause of action, (3) persons and
22 parties, and (4) the quality of the persons for or against whom the claim is made.
23

24 Collateral estoppel (issue preclusion) applies when the subsequent action is on a different
25 claim yet relies on previously determined issues.⁴⁶ Relitigation of those issues is barred
26 when there are: (1) identical issues; (2) a final judgment on the merits; (3) the party against
27 whom the plea is asserted must have been a party to or in privity with a party to the prior
28
29

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31 ⁴⁴ *Stevens County v. Futurewise*, 146 Wn. App. 493 (2008).

32 ⁴⁵ The policy underlying *res judicata* is that every party should be afforded one, but not more than one, fair
adjudication of his or her claim. *Lejeune v. Clallam County*, 64 Wn. App.257.

⁴⁶ Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of
parties. *Clark v. Baines*, 150 Wn.2d 905, 913 (Wash. 2004).

1 adjudication; and (4) application of the doctrine must not work an injustice on the party
2 against whom the doctrine is to be applied.

3
4 As stated above, additional factors have been established by Washington State appellate
5 decisions for application when the prior claim was resolved in an administrative setting.

6 While those additional factors were set forth in the context of court application to
7 administrative decisions, consideration of one of them in this context is appropriate:
8

9 Whether the agency was acting within its competence in making factual
10 decisions.

11 Thus, the underlying purpose for the application of both doctrines is the prevention of the
12 relitigation of claims and/or issues for which a final judgment has been rendered.
13

14 **Final Judgment**

15 As noted elsewhere in this Order, the Board issued FDOs in the three cases that were
16 consolidated under Case No. 07-2-0012c. Several compliance orders together with related
17 orders on reconsideration have been issued in these proceedings with the most recent
18 being the Compliance Order of August 12, 2009 and the Order on Reconsideration issued
19 on September 11, 2009. All of these were final orders of the Board.
20
21

22 **Quality and Identity of Parties**

23 Both doctrines require that the same parties be involved in both matters. The parties before
24 the Board in the prior matter, Case No. 07-2-0012c, and the case now before the Board, are
25 identical in fact and in quality: ICAN and Jefferson County.
26

27 **Agency Acting Within Competence**

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1 The Board was obviously acting within its sphere of competence. The GMA established the
2 boards for the purpose of determining compliance with the requirements of the GMA and
3 the Board necessarily draws both factual and legal conclusions in rendering decisions.⁴⁷
4

5 **Subject Matter and Cause of Action**

6 The remaining questions are thus whether the subject matter and cause of action are
7 identical. Subject matter and cause of action are necessarily intertwined.⁴⁸ In that regard
8 the following repetition of a portion of the history of this case and its predecessors
9 (Consolidated Case No. 07-2-0012c) is relevant.
10

11
12 ICAN first filed a PFR in February 2003 challenging the County's attempts to address what
13 is now referred to as the Port Hadlock/Irondale UGA.⁴⁹ Thereafter, ICAN filed additional
14 challenges in October 2004⁵⁰ and in September 2007.⁵¹ As with the challenge now before
15 the Board, the prior challenges involved various aspects of planning for the Port
16 Hadlock/Irondale area including, but not limited to, transportation, population capacity
17 allocation and sewer facility planning and financing. Those three cases were consolidated
18 in 2009.
19

20
21 Most recently, on August 12, 2009, the Board issued a compliance order in the consolidated
22 case in which it set forth the following issues which remained for consideration from its prior
23 May 31, 2005 Final Decision and Order:
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27 ⁴⁷ RCW 36.70A.270(6) and RCW 36.70A.302(2)

28 ⁴⁸ "While it is admitted, there can be but one recovery upon the same cause of action, this does not mean the
29 subject-matter of a cause of action can be litigated but once. It may be litigated as often as an independent
30 cause of action arises which, because of its subsequent creation, could not have been litigated in the former
31 suit, as the right did not then exist. It follows from the very nature of things that a cause of action which did not
32 exist at the time of a former judgment could not have been the subject-matter of the action sustaining that
judgment". *Harsin v. Oman*, 68 Wash. 281

⁴⁹ Case No. 03-02-0010

⁵⁰ Case No. 04-02-0022

⁵¹ Case No. 07-02-0012

1 The creation of the Irondale and Port Hadlock UGA boundaries in Ordinance 10–
2 0823– 04 to include large areas for which no public sewer will be provided in the
3 20 year planning horizon does not comply with RCW 36.70A.110. [COL⁵² C];

4 The development regulations that allow new urban levels of development
5 without provision of public sanitary sewer fail to comply with RCW 36.70A.110,
6 RCW 36.70A.020(1) and (12). [COL D];

7 The development regulations that allow commercial and industrial development
8 on interim septic tanks without a defined and adopted capital facilities funding
9 mechanism fail to comply with RCW 36.70A.110(4) and 36.70A.020(2). [COL E];

10 The capital facilities plan of the County’s UGA Element for the Irondale and Port
11 Hadlock UGA fails to comply with RCW 36.70A.070(3)(a)(c) and (d), and
12 RCW 36.70A.210 (inconsistency with the Countywide Planning Policies). [COL
13 F];

14 The County’s use of a market factor to increase the OFM population range on
15 which planning is based in the Irondale and Port Hadlock UGA does not comply
16 with RCW 36.70A.110(2). [COL H].

17 The May 31, 2005 FDO was amended on reconsideration to provide Conclusions of Law in
18 regard to Invalidity:

19 Those policies in Jefferson County’s comprehensive plan that allow designation
20 of optional sewerred and non-sewerred areas in the Irondale and Port Hadlock
21 UGA substantially interfere with the fulfillment of goals 1 and 12 of the Act (RCW
22 36.70A.020(1) and (12)) and are therefore invalid. [COL M];

23 The development regulations entitled “Jefferson County, Irondale & Port Hadlock
24 UGA Implementing Development Regulations, Unified Development Code
25 Appendix D” adopted by Ordinance No. 10-823-04 (Index No. 13-32) allow urban
26 levels of development without corresponding urban levels of service. The
27 continued validity of these development regulations substantially interferes with
28 the County’s ability to fulfill goals 1, 2, and 12 of the Growth Management Act
29 (RCW 36.70A.020(1), (2) and (12)). Jefferson County, Irondale & Port Hadlock
30 UGA Implementing Development Regulations, Unified Development Code
31 Appendix D are therefore invalid. [COL N];
32

1 The Urban Residential designation on the Future Land Use Map (Figure 2-1) and
2 the designations allowing urban development outside of the Sewer Planning Area
3 in Figure 2-3 (the Irondale and Port Hadlock UGA – Sewer Service Areas Map
4 May 19, 2004) substantially interfere with Goals 1 and 12 of the GMA (RCW
5 36.70A.020(1) and (12)) and are therefore invalid. [COL O];

6 The Zoning map for the UGA (Figure D-1 in “Jefferson County, Irondale & Port
7 Hadlock UGA Implementing Development Regulations, Unified Development
8 Code Appendix D” - Index No. 13-31) establishes urban zoning areas for the
9 proposed UGA which substantially interfere with RCW 36.70A.020(1), (2) and
10 (12). The zoning map (Index No. 13-31) is therefore invalid.⁷ [COL P].

11 After listing those remaining issues, the Board observed that “. . . all other issues in the
12 consolidated cases have been resolved by the Board in subsequent compliance orders.”⁵³

13 The ordinance challenged in this case is Jefferson County Ordinance No. 03-0323-09,
14 adopted by the County on March 23, 2009. The Ordinance reviewed by the Board in Case
15 No. 07-02-0012c in its August 12, 2009 Compliance Order is the same ordinance, Jefferson
16 County Ordinance No. 03-0323-09. In both the prior case and the matter now before the
17 Board, ICAN challenged the County’s compliance with the GMA through its adoption of
18 Ordinance No. 03-0323-09. The general subject matter is therefore identical.⁵⁴

19 The Court in *Hayes v. City of Seattle* addressed the analysis for determining whether two
20 causes of action are the same. The court set forth four factors for consideration: 1) whether
21 rights or interests established in the prior judgment would be destroyed or impaired by
22 prosecution of the second action; 2) whether substantially the same evidence is presented
23 in the two actions; 3) whether the two suits involve infringement of the same right; and 4)
24 whether the two suits arise out of the same transactional nucleus of facts.⁵⁵ The second and
25 fourth factors are clearly present: the record is identical in both challenges and the claims
26 arise out of the same factual nucleus. The third factor is similarly present although the
27 phrase “infringement of the same right” is not directly applicable. The two challenges allege
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32 ⁵³ Compliance Order, August 12, 2009 at 3.

⁵⁴ See *Hayes v. City of Seattle*, 131. Wn. 2d 706, 712 (1997).

⁵⁵ *Hayes v. City of Seattle*, 131. Wn. 2d 706, 713 (1997).

1 lack of compliance with the GMA and involve the same GMA violations. Finally, rights or
2 interests of the County could be destroyed or impaired by potentially inconsistent rulings in
3 the two claims.

4
5 In that the subject matter, cause of action, persons and parties, and the quality of the
6 persons for or against whom the claim is made are identical, the Board concludes that it is
7 appropriate to apply the doctrine of *res judicata*. Therefore, any issues that were raised or
8 could have been raised in Case No. 07-02-0012c will not be allowed to be resurrected or
9 raised in the pending case. As stated, the Ordinance challenged in this case is the identical
10 Ordinance challenged by ICAN in Case No. 07-02-0012c. However, questions addressed by
11 the Board in its August 12, 2009 Compliance Order were compliance issues. The Board has
12 held on numerous occasions, including in Case No. 07-2-0012c, that it is not appropriate to
13 raise a new issue in a compliance proceeding that was not previously raised in a Petition for
14 Review.⁵⁶ That fact requires analysis of the current issues to determine if any of them are
15 beyond the Board's scope of review in the previous compliance proceeding. Those issues
16 are⁵⁷:

17
18
19 1. Does the Ordinance provide clear regulations to preclude residential building in the
20 UGA on one or more pre-July 1969 substandard lots when the resulting parcel would be
21 substandard pursuant to a maximum allowed urban residential density when urban
22 regulations are implemented, to be in compliance with RCW 36.70A.020(1), (2), (5), (6), (7),
23 (10), (11) and (12), -.040(3), -.070, -.110, -.115, -.130(1)(d), -.150, and -.210?

24 2. Whether the new Comprehensive Plan and Zoning Map, "Figure 2-1," along with the
25 other amendments to the Comprehensive and Development Regulations ("CP & DR") made
26 by Sections 1 to 5 of Ordinance No. 03-0323-09 ("Ordinance") result in an oversized UGA
27 and/or are not in compliance with RCW 36.70A.020(1), (2), (5), (6), (7), (10), and (12), -
28 .040(3), -.070, -.110, -.115, -.130(1)(d), -.150, and -.210?

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32 ⁵⁶ *ICAN v. Jefferson County*, Case No. 07-2-0012c, Compliance Order at 10 (Aug. 14, 2009).

⁵⁷ The issue numbers used in this Order refer to those used in the Board's Prehearing Order. In the County's Motion it referred to Issue numbers from ICAN's Petition For Review and Amendment To Petition For Review.

- 1 3. Whether prior to the implementation of urban regulations in the UGA the Ordinance
2 fails to allow or limit development in a manner that complies with RCW 36.70A.020(1), (2),
3 (5), (6), (7), (10), (11) and (12), -.040(3), -.070, -.110, -.115, -.130(1)(d), -.150, and -.210?
- 4 4. Whether the Ordinance's inclusion of Residential Area #3 in the UGA complies with
5 RCW 36.70A.020(1), (2), (5), (6), (7), (10), (11) and (12), -.040(3), -.070, -.110, -.115, -
6 .130(1)(d), -.150, and -.210?
- 7
- 8 5. Whether the CP & DR adopted by the Ordinance are consistent with the Countywide
9 Planning Policies including 1.3, 1.5, and 2.1 in violation of RCW 36.70A.020(1), (2), (5), (6),
10 (7), (10), and (12), -.040(3), -.130(1)(d), and -.210?
- 11 6. Whether the Port Hadlock UGA Sewer Facility Plan adopted into the Comprehensive
12 Plan by Section 3 of the Ordinance and related language adopted elsewhere in the CP &
13 DR complies with RCW 36.70A.020(1), (2), (5), (6), (7), (10), and (12), -.040(3), -.070, -.110,
14 -.115, -.130(1)(d), -.150, and -.210?
- 15
- 16 7. Whether the Ordinance provides for Urban sewer service in the UGA during the 20-
17 year life of the plan consistent with RCW 36.70A.020(1), (2), (5), (6), (7), (10), and (12), -
18 .040(3), -.070, -.110, -.115, -.130(1)(d), and -.210?
- 19 8. Whether the six-year capital facilities planning for the UGA and related language
20 adopted elsewhere in the CP & DR complies with RCW 36.70A.020(1), (2), (5), (6), (7), (10),
21 and (12), -.040(3), -.070, -.110, -.115, -.130(1)(d), and -.210?
- 22
- 23 9. Whether the new language and analysis adopted into the CP & DR by the Ordinance
24 uses a consistent 20-year planning period and population data consistent with that planning
25 period consistent with RCW 36.70A.020(1), (2), (5), (6), (7), (10), and (12), -.040(3), -.070, -
26 .110, -.115, -.130(1)(d), and -.210?
- 27 10. Whether the January 21, 2009 Dwelling Unit & Population Holding Capacity Analysis
28 adopted into the comprehensive plan by Section 4 of the Ordinance and related language
29 adopted elsewhere in the CP & DR complies with RCW 36.70A.020(1), (2), (5), (6), (7), (10),
30 and (12), -.040(3), -.070, -.110, -.115, -.130(1)(d), -.150, and -.210?
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1 11. Whether the Ordinance uses consistent numbers for people per household in its CP
2 & DR in compliance with RCW 36.70A.020(1), (2), (5), (6), (7), (10), and (12), -.040(3), -
3 .070, -.110, -.115, -.130(1)(d), and -.210?

4 12. Whether with the population growth allocated to the UGA and the pattern of existing
5 residential designated and zoned lots inside the UGA, the UGA under the proposed CP &
6 DR amendments is oversized in violation of RCW 36.70A.020(1), (2), (5), (6), (7), (10), and
7 (12), -.040(3), -.070, -.110, -.115, -.130(1)(d), -.150, and -.210.

8
9 13. Whether any portion of the Ordinance found not to comply with the Act in the Issues
10 above should also be found invalid under RCW 36.70A.302 for substantial interference with
11 the fulfillment of Goals 1, 2, 5, 6, 7, 10, 11, and/or 12?

12
13 The conclusions cited below clearly indicate the Board has previously ruled on many of the
14 issues now before the Board. ICAN's objections to a finding of compliance in Case No. 07-
15 2-0012c covered four areas: approximately one-third of the proposed UGA will remain
16 unsewered in the 20-year planning horizon; the County failed to adopt a six-year financing
17 plan; the County failed to adopt development regulations specifying rural densities and
18 standards; and the population holding capacity analysis for the UGA is fundamentally
19 flawed.⁵⁸ The Board addressed each of those issues:

20
21 *Conclusion A:* Jefferson County's adoption of its General Sewer Plan adequately
22 demonstrates that sewer will be available in the Port Hadlock UGA within the 20 year
23 planning horizon, as required by RCW 36.70A.110.⁵⁹

24 *Conclusion B:* The County's adopted General Sewer Plan identifies sources of
25 funding from grants, loans, bond issues, utility local improvement districts and connection
26 charges and lays out a repayment stream through 2018, meeting the requirements of RCW
27 36.70A.070(3)(d).⁶⁰
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32 ⁵⁸ Compliance Order, August 12, 2009 at 5, 6.

⁵⁹ Id. at 7

⁶⁰ Id. at 9

1 *Conclusion C:* The County's General Sewer Plan sufficiently provides the proposed
2 locations and capacities of expanded or new capital facilities, and therefore now complies
3 with RCW 36.70A.070(3)(c).⁶¹

4 *Conclusion D:* The County's population holding capacity analysis, which concluded
5 that the sizing of the UGA is large enough to accommodate the mid-range projections for
6 population growth and that there is an appropriate amount of urban land designated and
7 zoned to meet the 20 year projected growth allocation for the Irondale/Port Hadlock UGA
8 has not been shown to be clearly erroneous.⁶²

9
10 Those conclusions address most of the issues now raised by ICAN (or are sufficiently
11 related to the compliance issues that they could have been raised), including Issues 1, 2,
12 10,11 and 12 (Conclusion D regarding the size and holding capacity of the UGA); Issue 6
13 (Conclusions A, B and C regarding the sewer plan's facilities, timing and financing); Issue 7
14 (Conclusion A regarding provision of sewer service within the 20 year planning period);
15 Issue 8 (Conclusion B regarding six year sewer facilities funding).
16
17

18 There was but a single issue on which ICAN prevailed on challenges to compliance:
19 whether the County had adopted applicable development regulations specifying rural
20 densities and standards prior to the provision of sewer. The Board concluded that the
21 County remained out of compliance with RCW 36.70A.110 and .020(1) and (12) as the
22 County had not clarified what rural development standards applied prior to sewer
23 availability.⁶³ That lack of compliance finding appears to mirror ICAN's current Issue 3.
24
25

26 In responding to ICAN's Motion for Reconsideration of the Compliance Order, the Board
27 addressed ICAN's allegation that the County was unable to provide sewer to Residential
28 Area #3 during the 20 year planning horizon by clearly and succinctly stating that the Board
29
30

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32 _____
⁶¹ Id. at 10

⁶² Id. at 15

⁶³ Id. at 13

1 had previously rejected that argument in its August 2009 CO.⁶⁴ That determination clearly
2 addressed ICAN's current Issue 4. ICAN also asked for reconsideration of the Board's
3 holding regarding the County's population holding capacity analysis, revisiting either directly
4 or indirectly Issues 1, 2, 10 and 12. The Board held ICAN had failed to show any material
5 error of law or fact.⁶⁵
6

7 The only remaining Issues that must be addressed are Issues 5 and 9. Issue 5 alleges a
8 lack of compliance with County Wide Planning Policy 1.3 which establishes criteria for the
9 size and delineation of UGA boundaries, Policy 1.5 which sets forth two tiers for provision of
10 sewer service (areas served within either 6 or 20 years) and Policy 2.1 which requires the
11 provision of a full range of urban services within the 20 year planning period. Those issues
12 were either raised and addressed in the Compliance Order or could have been raised as
13 they were directly related to the issues on compliance. Issue 9 argues there is an
14 inconsistency between the County's population data and the 20 year planning period. That
15 Issue is directly related to the previously challenged county population holding capacity
16 analysis which was addressed in Conclusion D above. Thus it too is an issue that could
17 have been raised in the earlier proceeding.
18
19

20
21 It is clear from a review of the issues put forth by ICAN that all of the issues have either
22 been addressed by the Board, were capable of being raised by ICAN, or are being
23 addressed by the County. The County states there has never been a case that presents
24 such compelling facts for application of the principle of *res judicata*. While that may be an
25 overstatement, the Board agrees that the facts are compelling. The principle of *res judicata*
26 exists to bring conclusiveness to disputes. As the United States Supreme Court stated in
27 *Montana*: "To preclude parties from contesting matters that they have had a full and fair
28 opportunity to litigate protects their adversaries from the expense and vexation attending
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⁶⁴ Order On Petitioners' Motion For Reconsideration at 5.

⁶⁵ *Id.* at 7

1 multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by
2 minimizing the possibility of inconsistent decisions.”⁶⁶

3
4 In the context of the GMA, local governments should be protected from the “expense and
5 vexation” of multiple claims. Application of the doctrine of *res judicata* is warranted in this
6 case.

7 II. ORDER

8
9 The Board finds that the issues presented in this case are barred by the application of the
10 principal of *res judicata* and this case is dismissed. One issue remains before the County
11 on compliance: the County has not as yet adopted applicable development regulations
12 specifying rural densities and standards prior to the provision of sewer. The County has
13 been ordered to address that issue in Case No. 07-2-0012c.

14
15 Entered this 5th day of November, 2009.

16
17
18 _____
19 William Roehl, Board Member

20
21 _____
22 James McNamara, Board Member

23
24 _____
25 Nina Carter, Board Member

26
27 Pursuant to RCW 36.70A.300 this is a final order of the Board.

28 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
29 mailing of this Order to file a petition for reconsideration. Petitions for
30 reconsideration shall follow the format set out in WAC 242-02-832. The original and
31 three copies of the petition for reconsideration, together with any argument in

32 _____
⁶⁶ *Montana v. United States*, 440 U.S. 147, 153-54 (1979).
ORDER ON MOTIONS TO STRIKE
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November 5, 2009
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1 support thereof, should be filed by mailing, faxing or delivering the document directly
2 to the Board, with a copy to all other parties of record and their representatives.

3 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
4 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
5 filing a petition for judicial review.

6 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the
7 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
8 judicial review may be instituted by filing a petition in superior court according to the
9 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

10 Enforcement. The petition for judicial review of this Order shall be filed with the
11 appropriate court and served on the Board, the Office of the Attorney General, and all
12 parties within thirty days after service of the final order, as provided in RCW
13 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
14 but service on the Board means actual receipt of the document at the Board office
15 within thirty days after service of the final order.

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