BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

TARBOO RIDGE COALITION Petitioner, v. JEFFERSON COUNTY, Respondent.	NO. 19-2-0003c OPPOSITION TO RECONSIDERATION AND SUPPLEMENTATION OF RECORD

I. INTRODUCTION

The County's motion for reconsideration should be denied. The Board correctly determined, in its FDO, that the Title 8 ordinance was never reviewed under SEPA as required. The Board also correctly determined that the failure to conduct SEPA review prevented the County from analyzing the impacts of larger shooting ranges with more varied uses in natural resource lands, and also prevented the County from exploring alternatives to the Title 8 ordinance. Thus, the Board correctly determined that the adoption of the Title 8 ordinance substantially interfered with GMA Goal 10, and imposed invalidity. The Board also imposed invalidity on the Title 18 ordinance because, even though the Title 18 ordinance had undergone SEPA review, the Title 18 ordinance and the Title 8 ordinance were "inextricably linked." Thus, invalidation of the one required invalidation of the other. Nowhere

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in these determinations did the Board make any error of law or fact that would justify reconsideration, and, therefore, the motion for reconsideration should be denied.

Because the Board is already aware that the Title 18 ordinance underwent SEPA review, there is no need to supplement the record with the 280 pages of SEPA materials the County now proffers. Therefore, the motion to supplement should be denied.

II. STANDARD OF REVIEW

A motion for reconsideration shall be based on at least one of the following grounds:

> (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration; or
> (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing.

WAC 242-03-830(2).

The County is alleging errors of procedure, in that the Board allegedly decided an issue not before it (namely, whether Title 18 complied with SEPA); misinterpretations of fact, in that the Board allegedly believed Title 18 received no SEPA review and also misunderstood the gun range permitting scheme; and misinterpretations of law, in that the Board allegedly determined that the Title 18 DNS was insufficient SEPA review and that the Board did not specify which specific provisions of the code it was invalidating. *See* Mot. at 1–2.

However, the Board did not actually commit any of the errors the County alleges. It is the County that has misunderstood the FDO, not the Board that has misunderstood the facts or the law.

III. ARGUMENT

A. The County Does Not Challenge the Non-Compliance or Invalidity of the Title 8 Ordinance.

Nowhere in the County's motion does the County challenge the Board's finding that the Title 8 ordinance fails to comply with the GMA and with SEPA. Also, nowhere in the County's motion

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does the County challenge the Board's decision to invalidate the Title 8 ordinance on the basis of its substantial interference with GMA Goal 10.

Having declined to assign error to these decisions, the County is precluded from doing so now, and the Board must treat those decisions as verities. *Cf. City of Federal Way v. Town and Country Real Estate, LLC*, 161 Wn. App. 17, 33, 252 P.3d 382 (2011) (party challenged only two enumerated findings of fact; all others were verities on appeal). Thus, for purposes of this motion, there is no question that the Title 8 ordinance is non-compliant and also substantially interferes with GMA Goal 10. Consequently, for purposes of this motion, it is a given that invalidating Title 8 was an appropriate decision. Therefore, the only remaining question is whether the Board also acted appropriately in invalidating the Title 18 ordinance. As we will argue below, the Board's decision to invalidate the Title 18 ordinance was also correct.

B. The Board Never Ruled that the Title 18 Ordinance Failed to Undergo SEPA Review.

Most of the County's arguments are predicated on the County's belief that the Board determined that the Title 18 ordinance did not undergo SEPA review and that determination was wrong. "The Board misinterpreted a fact by incorrectly assuming that no SEPA review was done in connection with the Title 18 ordinance." Mot. at 9. *See also, e.g., id.* at 3 ("Title 18 SEPA noncompliance was not a legal issue before the Board") (emphasis in original); 5 ("The record did not contain all the documents that prove the Title 18 ordinance complied with SEPA"); 10 ("Title 18 SEPA review complied with RCW 43.21C.030").

All of this argument is irrelevant. The Board never ruled that the Title 18 ordinance failed to undergo SEPA review nor that the SEPA review of the Title 18 ordinance was inadequate. On the contrary, the Board explicitly found that the County issued a "Declaration of Non-significance for the

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Title 18 ordinance." FDO at 15. *See also* FDO at 17, finding no. 7 ("The County issued a Declaration of Non-Significance for Title 18").

The County erroneously believes that the Board issued a ruling on the existence and adequacy of the Title 18 SEPA DNS and that the Board should reconsider this ruling. This reflects a fundamental misunderstanding, on the County's part, of the FDO. The Board never made any such ruling. On the contrary, the FDO clearly and repeatedly acknowledges the existence of the Title 18 DNS and offers no opinion whatsoever as to the adequacy of the Title 18 DNS. Therefore, there is nothing for the Board to reconsider.

For the same reason, there is also no need to supplement the record with 280 pages of material relating to the Title 18 DNS. The Title 18 DNS is not relevant to the Board's decision.

The FDO is very clear that the Title 18 DNS is not the source of the County's noncompliance. The source of the County's noncompliance is the lack of SEPA review of Title 8.

C. The Board Correctly Ruled that SEPA Review of Title 8 Was Nonexistent and that the Lack of Environmental Review Caused Substantial Interference with GMA Goal 10.

The Board ruled that the Title 8 SEPA review was inadequate—inadequate because no review of Title 8 ever happened at all. *See* FDO at 17, finding no. 6; 18 ("The County failed to conduct a SEPA review of Title 8 as required by RCW 43.21C.030"). The County, in its motion, has not contested this ruling.

The Board further ruled that, because no SEPA review occurred at all, the adoption of the Title 8 ordinance substantially interfered with GMA Goal 10, which requires the protection of the environment. *See* FDO at 16 ("the County's actions in adopting amendments to both titles will allow

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larger shooting facilities[1] with more uses in natural resources lands than previously allowed … the County had virtually no information regarding the foreseeable environmental impacts…"). Again, the County has not contested this ruling. On the contrary, "the County concedes it should have complied with SEPA for Title 8." Mot. at 11.

Notwithstanding this concession, the County does raise, very briefly, an argument that the DNS for the Title 18 ordinance should be construed as a DNS for Title 8 as well. *See* Mot. at 11 ("The DNS for the Title 18 ordinance considered the impacts of the Title 8 ordinance"). This argument by the County should be rejected.

First, if the County wanted to argue that the Title 18 DNS applied as well to the Title 8 ordinance, it should have done so at the hearing on the merits. "The Board will not consider new arguments that should have been presented in a party's opening brief or at the hearing on the merits … Raising new arguments, or even making a more precise argument, in a motion for reconsideration should not be allowed and is not provided for in WAC 242-02-832(2)." *Brinnon Group v. Jefferson County*, WWGMHB No. 08-2-0014, Order on Reconsideration (Oct. 14, 2008), at 5, 6–7. Because the County did not raise this argument at the hearing, it is precluded from raising it now.

Second, it is simply not true that the Title 18 DNS analyzed the impacts of Title 8. The County cites page 14 of the Title 18 SEPA Checklist (proposed exhibit 2018-035, which is not in the record), but that page of the Checklist merely says that the County Commissioners are considering amendments to Title 8, in addition to the amendments to Title 18. *See* Mot. at 11. The rest of the Title 18 SEPA Checklist makes plain, almost *ad nauseam*, that the action whose impacts the Checklist analyzes is the amendment of Title 18, not the amendment of Title 8. *See, e.g.,* Checklist at 1 ("Name

[1] In fact, under the amendments, there appear to be no limits to the size of shooting range or number of firing points the County may authorize.

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of proposed project, if applicable – proposed amendments to UDC, Title 18…") (no mention of Title 8); pg. 2 ("Give brief, complete description of your proposal … updated definitions to the Unified Development Code, Jefferson County Code Title 18…") (no mention of Title 8); pg. 7 ("The project is to amend the Unified Development Code.") (no mention of Title 8); pp. 8 – 13 (over a dozen repetitions of the phrase, "The project is to amend the Unified Development Code.") (no mention of Title 8); pg. 14 ("The proposal includes updated definitions to the Unified Development Code…").

The Title 18 DNS itself (which is also not in the record; proffered by the County as proposed exhibit 2018-036) does not so much as mention in passing the existence of the Title 8 ordinance, much less declare that Title 8's environmental effects will be nonsignificant.

A bare reference, in the Title 18 SEPA Checklist but nowhere in the Title 18 DNS, to the existence of a proposed amendment to Title 8, does not constitute the kind of "environmental full disclose" and careful consideration of the "full range of probable impacts" of an action that the Board correctly demanded. FDO at 16 (citing *Moss v. Bellingham,* 109 Wn. App. 6 (2001) and WAC 197-11-060(4)(c)).

The County would have the Board approve a DNS for Title 8 that fails even to utter the words "Title 8," much less describe and consider the impacts of Title 8. The Board should not accept this argument. The Board should reject the County's belated, post-hearing attempt to argue that the Title 8 ordinance underwent environmental review by way of the Title 18 DNS. Not only is this argument offered too late; and not only is this argument inaccurate; the County has explicitly conceded that it should have conducted SEPA review of Title 8 but did not. Mot. at 11.

The Board's uncontested rulings regarding the environmental impact of Title 8 and the lack of SEPA review of Title 8 are sufficient grounds to invalidate the Title 8 ordinance. The County's motion does not ask the Board to reconsider the invalidation of the Title 8 ordinance. Thus, the only remaining

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question is whether the invalidation of the Title 8 ordinance requires the invalidation of the Title 18 ordinance. As we argue below, it does.

D. The Invalidation of the Title 8 Ordinance Requires the Invalidation of the Title 18 Ordinance Because They Are Inextricably Linked.

The Board was correct to invalidate the Title 18 ordinance once it determined that the Title 8 ordinance should be invalidated on the grounds of substantial interference with GMA Goal 10. The two ordinances are "inextricably intertwined." FDO at 16. As the Board notes, the two ordinances contain definitions that cross-reference one another. *Id* at 9 – 10. Also, the two ordinances require their respective permits (conditional use permit for Title 18; operating permit for Title 8) to be considered together by the hearing examiner. *Id.* at 9. In addition, Title 18 provides very little substantive regulation of gun ranges, "because those controls have been shifted to Title 8." *Id.* at 10. Appeal provisions under Title 8 are also tied to appeal provisions under Title 18, which provide a hearing examiner for appeals of "land use matters." *Id.*

Because of the intertwined nature of the ordinances, there is no means by which the Board could untangle Title 8 from Title 18, short of rewriting Title 18. But rewriting ordinances is the County's province, not the Board's, so the Board has no means to disentangle the ordinances. *See* WAC 242-03-900 ("[W]here the board, in a final order, has made a determination of noncompliance … the board shall remand the matter to the affected state agency, county, or city.") Therefore, the invalidation of one ordinance requires invalidation of the other.

The County's suggestion—to invalidate Title 8, but leave intact Title 18—would result in a land use code (Title 18) that repeatedly references provisions of law that are no longer valid (Title 8). Such a hobbled land use code would be unintelligible to the regulated community and unenforceable by the County. It would also likely constitute a fresh violation of the GMA, which requires

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development regulations that "are consistent with and implement the comprehensive plan." RCW 36.70A.040(3). An unintelligible, unenforceable Title 18 would be incapable of implementing the comprehensive plan. The Board acted wisely to avoid this outcome by invalidating both ordinances.

The County cannot point to any error of fact or law committed by the Board in invalidating both ordinances. Therefore, the invalidation should stand.

E. The Board Was Correct to Invalidate Both Ordinances in Their Entirety.

The County argues that the Board committed an error of law by invalidating both ordinances in their entirety. Mot. at 14. The County argues the Board should have specified only certain portions of the ordinances as invalid and explained the reasons for invalidating those specific portions. *Id*.

The County's argument is defeated by the very GMA provision it cites, RCW 36.70A.302(1), which provides:

> The board may determine that **part or all** of a comprehensive plan or development regulations are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
>
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

RCW 36.70A.302(1) (emphasis added).

The statute is explicit that the Board may invalidate either part of a regulation "or all" of a regulation. Here, the Board has chosen to invalidate all of a regulation—namely, all of the Title 8 and Title 18 ordinances.

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The County seizes on provision (1)(c) to argue that the Board must specify which "parts" of the ordinances it is invalidating and why. But there is no need, in this case, for the Board to spell out which parts are invalid, because every part is invalid. The Board has also stated the reason for invalidity: the complete lack of SEPA review of the Title 8 ordinance, upon which the Title 18 ordinance inextricably depends. *See, e.g.*, FDO at 18, conclusions C–F.

Having explained exactly what actions are invalid and exactly why they are invalid, the Board is not required to do anything more under RCW 36.70A.302(1).

IV. CONCLUSION

The County cannot demonstrate any error of fact or law committed by the Board that would justify reconsideration of the Board's decision. Therefore, the decision should stand.

Respectfully submitted this 7th of October, 2019,

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