IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DENNIS HADALLER, Appellant, v. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, Respondent, And LEWIS COUNTY and EUGENE BUTLER, Underlying Parties.	No. 41581-0-II UNPUBLISHED OPINION

Johanson, J. — Thurston County Superior Court affirmed the Western Washington Growth Management Hearings Board's (Board) dismissal of Dennis Hadaller's 2009 petition for review challenging Lewis County's designation of his property as agricultural resource lands (ARL). We affirm the superior court and the Board's dismissal because Hadaller's petition for

review was untimely.

FACTS

In November 2007, Lewis County adopted Ordinance No. 1197 and Resolution No. 07-306, which designated 43,485 acres as ARL, including 313 acres that Hadaller owned. In January 2008, Hadaller timely challenged the County's designation of his lands as ARL in a petition for review filed with the Board. The Board consolidated Hadaller's petition for review with two other previously filed petitions for review.[1] In this petition for review, Hadaller contended the County violated aspects of the Growth Management Act[2] (GMA) because it used improper methodology and criteria in designating his property as ARL. Specifically, he questioned the County's definition of agricultural land having "long-term commercial significance" and its selection and application of the designation criteria it used to classify ARLs. Clerks Papers (CP) at 119.

On July 7, 2008, the Board issued its final decision and order (FDO), approving the County's selection and application of ARL designation criteria in evaluating Hadaller's property and its ultimate ARL designation of Hadaller's property. Hadaller did not appeal the Board's FDO and thus, it became final. *See* RCW 36.70A.300(5) (allowing an aggrieved party to appeal a final decision of the Board within 30 days).

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[1] The Board consolidated Hadaller's claims (08-2-0004c) with those of Eugene Butler (99-2-0027c) and Vince Panesko (00-2-0031c). Unlike Hadaller, Butler and Panesko challenged the County's designations of ARL as underinclusive, as they contended that *more* land should have been considered for designation as ARL.

[2] Ch. 36.70A RCW.

Though the Board rejected Hadaller's claims and entered its FDO with regard to Hadaller's case, the Board accepted the arguments of co-petitioners Butler and Panesko and found the County's consideration of lands for designation as ARL underinclusive. Accepting Butler's and Panesko's arguments, the Board ruled the County's effort deficient in failing to consider ARL designation of other, additional lands.

Based on the County's failure to consider additional lands for ARL designation, the Board remanded the claims of Butler and Panesko with "Compliance Order[s]" and continued an existing 2004 invalidity order.[3] CP at 67 (capitalization omitted). On remand of these claims, the County addressed the issues cited by the Board and designated 48,459 additional acres as ARL. During these remand proceedings, Hadaller requested that the County revisit its 2007 designation of his 313 acres as ARL. Hadaller made presentations to the County's Planning Commission and Board of County Commissioners, but he persuaded neither group to reconsider the County's 2007 ARL designation of his property. On December 29, 2009, the Board issued its final compliance order and order rescinding invalidity. This order again rejected Hadaller's claims. It also held that Lewis County had appropriately addressed the areas of noncompliance identified in the Board's July 7, 2008 order and now fully complied with the GMA.[4]

Meanwhile, on October 14, 2009, Hadaller filed a second petition for review to the Board

[3] The prior invalidity order arose from a February 13, 2004 Board order on Butler's and Panesko's claims. In the order, the Board determined that the County had not removed substantial interference with Goal 8 of the GMA because the County had not yet eliminated nonresource uses of its resource lands.

[4] The order rescinded "**prior invalidity orders** based on past infirmities with the County's designation process and development regulations." CP at 323 (emphasis in original).

asking it to again review the County's development regulations and designated agriculture land rezones adopted under County Ordinance No. 1207 and Resolution No. 09-251. The County moved for the Board to dismiss Hadaller's petition invoking, inter alia, the res judicata and collateral estoppel doctrines. Hadaller argued that his petition should be allowed to proceed because the County had a different record before it in 2007 than it did in 2009.[5]

The Board granted the County's motion to dismiss, but not on res judicata or collateral estoppel grounds; instead, the Board understood the petition as an attempt to revisit the County's 2007 designation of Hadaller's lands as ARL, which the Board had already upheld in its July 7, 2008 order. The Board disposed of Hadaller's appeal as untimely.

Hadaller appealed the Board's decision to Thurston County Superior Court which, by judgment entered November 30, 2010, affirmed the Board's decision. Hadaller now appeals the judgment of the Thurston County Superior Court.

ANALYSIS

The Administrative Procedure Act[6] governs judicial review of growth board actions. *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 189 P.3d 38 (2008). Although we review growth board decisions de novo and accord substantial weight to a board's interpretation of the GMA, a board's interpretations do not bind us. *Thurston County*, 164 Wn.2d at 341; *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 116 Wn.

[5] Specifically, Hadaller claimed to have obtained, subsequent to the 2007 record being closed, site-specific information and expert opinion that his land had little ability to sustain an economically-viable crop.

[6] Ch. 34.05 RCW.

App. 48, 54, 65 P.3d 337, *review denied*, 150 Wn.2d 1007 (2003).

I. Finality of Decision

Hadaller argues that the Board did not intend its July 7, 2008 FDO to be final with regard to Hadaller's claim because the Board continued its 2004 invalidity order and found that Ordinance No. 1197—which allowed for the ARL designation on Hadaller's property—failed to comply with the GMA. We hold that the Board's July 7, 2008 FDO was indeed a final decision with regard to Hadaller's claims, and thus the Board had no obligation to consider Hadaller's record submittals during the 2009 remand period.

The GMA requires a growth board to issue its "final order" within 180 days of receipt of a petition for review. RCW 36.70A.300(1)-(2). A growth board's final order must state whether a county's comprehensive plan complies with the GMA, and if a county fails to comply with the GMA, then the growth board shall remand the matter back to the county until the county achieves compliance with the GMA. RCW 36.70A.300(3)(a)-(b). The GMA also requires a county to "designate critical areas, agricultural lands, forest lands, and mineral resource lands." RCW 36.70A.040(3).

But a growth board may determine that part or all of a county's comprehensive plan or development regulations are invalid under the GMA. RCW 36.70A.302(1). If a growth board makes a finding of invalidity, it must then determine—based on findings of fact and conclusions of law—whether the continued validity of the provision outlining the comprehensive plan or development scheme would substantially interfere with the fulfillment of the GMA goals. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 181, 979 P.2d 374

(1999). Upon such a finding of invalidity, then the underlying provisions would be rendered void. *King County*, 138 Wn.2d at 181.

Contrary to Hadaller's contentions, the Board's finding of invalidity with regard to Lewis County's ARL designations had no effect on the County's designation of *his* property as ARL. In its July 7, 2008 FDO, the Board declined to lift its 2004 finding of invalidity because the County had been underinclusive in its ARL designations and failed to consider additional lands for ARL designation. The 2008 FDO did not invalidate, reverse, or modify any of the County's 2007 ARL designations.

Therefore, because Hadaller's land did not fit within the land classifications to be considered for designation as ARL in the compliance process on remand, the Board issued its FDO in Hadaller's case on July 7, 2008. In contrast, the Board issued a "Compliance Order" in the claims of each of Hadaller's co-petitioners, Butler and Panesko. CP at 67 (capitalization omitted).[7] Both Butler and Panesko had challenged the County's designations as underinclusive, while Hadaller had essentially charged that the County had been overinclusive in the lands it considered for ARL designation. Consequently, while the Board sent the claims of Butler and

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[7] The July 7, 2008 FDO states:

> The issues of the parties were founded primarily in the GMA's mandate to conserve agricultural lands of long-term commercial significance and to maintain and enhance the agricultural industry. Additional issues were raised pertaining to public participation and private property rights. Because of the common thread between all three of these matters, the Board coordinated the proceedings, hearings, and issues a single decision which represents its Final Decision and Order in regards to Case No. 08-2-0004c [Hadaller's claim] and its Compliance Order in regards to Case Nos. 99-2-0027c [Butler's claim] and 00-2-0031c [Panesko's claim].

CP at 68-69.

Panesko back to the County on remand, it issued its final order as to Hadaller's case; so the Board's July 7, 2008 FDO in Hadaller's case rendered Hadaller's case final.

The Board did hold Ordinance No. 1197 and Resolution No. 07-306, which authorized the designation of Hadaller's property as ARL, noncompliant with the GMA. But again, the Board articulated that these enactments were noncompliant only as to their underinclusion of properties considered for ARL designation. Ultimately, the Board's 2008 FDO did not invalidate, reverse, or modify any of the County's 2007 ARL designations, including its designation of Hadaller's property.

II. Timeliness of Appeal

Hadaller asserts that, because the Board did not lift its 2004 order of invalidity until December 29, 2009, any ARLs designated before December 29, 2009 were invalid and not "final"; accordingly, with no valid ARL in effect at the time of Hadaller's petition for review, the Board erred in dismissing it as untimely. We hold that the 2004 order of invalidity did not invalidate the 2007 ARL designation of Hadaller's land. The Board affirmed the validity of these ARL designations in its July 7, 2008 FDO; therefore, Hadaller's 2009 petition seeking review of the 2007 ARL designation of his property was untimely.

A. Standard of Review

Washington law provides remedies for parties aggrieved by decisions of local governments and the growth boards. First, a party may petition a growth board relating to whether a county's adopted comprehensive plan, development regulation, or subsequent amendment complies with the goals and requirements of the GMA within 60 days from the date of publication by the

county's legislative body. Former WAC 242-02-220 (1997). Second, an aggrieved party may appeal a growth board's decision to superior court within 30 days of a growth board's final order. RCW 36.70A.300(5). Third, parties must file all petitions relating to whether an adopted comprehensive plan, development regulation, or permanent amendment to it, is in compliance with the GMA goals and requirements within 60 days after publication of the plan, regulation, or amendment. RCW 36.70A.290(2).

Where a landowner fails to timely appeal, courts will uphold the finality of an ARL designation. *See Torrance v. King County*, 136 Wn.2d 783, 792, 966 P.2d 891 (1998). *Torrance* involved King County property that had been zoned agricultural in 1941. *Torrance*, 136 Wn.2d at 785. Torrance acquired the property in the 1960s with hopes of developing it for commercial or industrial use. *Torrance*, 136 Wn.2d at 785. But, in 1994, King County, implementing the GMA, set out a comprehensive plan that designated Torrance's property as ARL, and Torrance did not appeal this ARL designation. *Torrance*, 136 Wn.2d at 785. A year later, King County enacted an ordinance adopting and implementing the 1994 comprehensive plan. *Torrance*, 136 Wn.2d at 785. Again, Torrance did not appeal the County's action. In 1996, Torrance requested King County rezone his property and remove the ARL designation, and the County denied his request, so he petitioned the Central Puget Sound Growth Management Hearings Board (CPSGMHB) to review the County's rejection. *Torrance*, 136 Wn.2d at 786. The CPSGMHB determined that it lacked jurisdiction to consider his petition because more than 60 days had elapsed since the County's 1994 and 1995 GMA actions. *Torrance*, 136 Wn.2d at 786. Torrance did not directly appeal the CPSGMHB's decision to superior court but instead filed a lawsuit in

December 1996 in King County Superior Court challenging the County's 1996 decision not to adopt his proposed amendments changing the ARL designation of his property.[8] *Torrance*, 136 Wn.2d at 786. Procedurally, Hadaller's situation resembles Torrance's.

[8] Ultimately, the superior court granted Torrance's constitutional writ of certiorari and found that Torrance's property was not agricultural land under the GMA. *Torrance*, 136 Wn.2d at 787. On appeal, the Supreme Court reversed, holding that Torrance should not have had a constitutional writ of certiorari available because he had adequate statutory remedies for appealing the CPSGMHB's decision to superior court. *Torrance*, 136 Wn.2d at 793.

B. Untimely Appeal

As in *Torrance*, Hadaller failed to timely appeal his matter. The Board, on July 7, 2008, reviewed and affirmed the County's 2007 designation of Hadaller's property as ARL in its FDO. Hadaller did not appeal this FDO to superior court, and the window for filing an appeal expired 30 days later. *See* RCW 36.70A.300(5). Then, during the 2009 remand period for Butler's and Panesko's claims, Hadaller again challenged the 2007 ARL designations of his property. He then filed his 2009 petition for review. Similar to *Torrance*, the Board determined that it lacked jurisdiction to consider Hadaller's untimely petition, as Hadaller filed it outside the 60-day window following the publication of a new comprehensive plan or regulation. Dismissal was proper as the Board correctly determined Hadaller's belated challenge to be untimely. *See* RCW 36.70A.300(5).

III. Reconsideration Obligations

Hadaller next asserts that the Board erred in denying his right of appeal under state law and that the Board improperly dismissed his petition for review without considering it on its merits because he brought different issues that the Board had not yet heard on the merits. We conclude that Hadaller had a full opportunity to exercise his right to participate in the designation process; but, he failed to timely appeal the Board's FDO and the County's denial of his request to supplement the record. Therefore, the Board, as we discussed *supra*, properly dismissed Hadaller's petition as untimely.

State law authorizes citizens the right to appeal a jurisdiction's comprehensive plan—including land use designations—development regulations, and amendments to them for

GMA compliance. RCW 36.70A.290(2). State law also requires growth boards to hear and determine those petitions alleging that a county is not in compliance with the GMA, in order to determine whether the county complies with GMA goals and criteria. RCW 36.70A.280(1)(a) and 36.70A .320(3).

Hadaller asserts that the claims in his 2009 petition differed significantly from those he brought in 2008. Accordingly, he claims the Board wrongfully barred his right to appeal when it dismissed his 2009 petition. Hadaller's thesis lacks merit.

First, as we indicated above, the Board lacked the legal capacity to revisit Hadaller's untimely 2009 challenge to the designation of his property as ARL, as well as the methodology reviewed and approved in the Board's July 7, 2008 FDO. Second, the Board already afforded Hadaller his full right to submit all evidence and raise any arguments in his initial case, 08-2-0004c. Third, Hadaller fully participated in the process that led to his property's ARL designation: he presented evidence, made arguments, and even appealed the 2007 Board of Commissioners' decision designating his property as ARL. Accordingly, the Board offered Hadaller ample opportunity to exercise his legal right under state law to raise an appeal.[9] Fourth, Hadaller could have brought his "new" 2009 claims—claims involving all Lewis County properties—in his 2008 petition, when he limited his claims strictly to his land. Therefore, Hadaller had ample opportunity to raise his claims, and the Board validly dismissed his 2009

[9] Hadaller also argues that the Board improperly precluded his 2009 petition under the res judicata or issue preclusion doctrines. But, the Board expressly stated in its dismissal order that, "the Board decides this motion [to dismiss Hadaller's 2009 petition] on a basis other than the doctrines of *res judicata* or collateral estoppel." CP at 246. Because the Board did not rest its decision on either of the preclusion doctrines, we decline to address them here.

petition.

IV. Ruling on Dispositive Motions

Hadaller next argues that the Board's dismissal of his 2009 petition did not comply with the legal standards for dispositive motions. The Board, however, applied the correct standard.[10]

Growth boards are to follow applicable Washington state law. Former WAC 242-02-660(2) (1997). Therefore, growth boards should evaluate motions to dismiss under CR 12 for deficiency in the presentation of a claim or CR 56 for summary judgment.

Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). We evaluate dismissals under CR 12 de novo. *Burton*, 153 Wn.2d at 422.

We review CR 56 summary judgment rulings de novo. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006, *cert. denied*, 510 U.S. 1047 (1993). We will affirm summary judgment when we find no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Here, the primary question before the Board in its review of Hadaller's 2009 petition was whether it had jurisdiction to reconsider the decision it reached in case 08-2-0004c, affirming the Lewis County Board of Commissioners' 2007 designation of Hadaller's property as ARL. Hadaller presented no evidence contesting the facts presented in the County's motion: that the Board of Commissioners designated Hadaller's property as ARL on November 5, 2007; that Hadaller appealed the designation in 2008; that the Board reviewed and approved the designation

[10] The Board did not state under what rule it dismissed Hadaller's case.

of Hadaller's property in its July 7, 2008 FDO; that the Board did not remand any of the issues raised in Hadaller's petition for review; and, that Hadaller never appealed the Board's July 7, 2008 FDO. CP at 241-46.

None of the parties disputed these facts, nor were there any issues of material fact involved. Indeed, the issue on which the Board dismissed Hadaller's 2009 petition for review was a question of law, not fact: Was Hadaller's 2009 petition barred as untimely? Therefore, with no genuine issues of material fact involved, dismissal was appropriate under either CR 12 or 56. *Burton*, 153 Wn.2d at 422; *Wilson*, 98 Wn.2d at 437.

ATTORNEY FEES

Both Hadaller and the County seek attorney fees in this case. State law provides that a court shall award a qualified party that prevails in a judicial review of an agency action reasonable attorney fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. RCW 4.84.350(1). As the prevailing party to this judicial review of Board action, the County is entitled to attorney fees.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Van Deren, J.

Worswick, A.C.J.