No. 84187-0

CHAMBERS, J. (concurring in part and dissenting in part) — Each county is a canvas of its own shape and size and with its own unique features already embossed on its fabric. The Growth Management Act (GMA), chapter 36.70A RCW, provides brushes and paints and encourages each county to create its own image of its future, within guidelines established by the people through their state legislature. Each county should be given the opportunity to create its own vision; a masterpiece in its own eye. The rule of law should give guidance on such general concepts as form and perspective. But if the rule of law is permitted to dictate where and how all the lines are drawn, if conformity instead of creativity is imposed by the growth management boards and the courts, then the masterpieces will begin to look like perfunctory mechanical drawings. Because I think we are developing a rule of law that stifles creativity and coerces conformity of image, I concur in part and dissent in part.

To illustrate my views, I offer to the reader several visuals of Kittitas County. The first is of a conversation among three long time residents of the county. The scene of the fictional conversation is a small café.

Madge's jaw dropped and a look of disbelief washed across her face. Fred let out a low whistle of astonishment. Harry looked into his cup of black coffee and continued, "I know it is hard to believe, but they say Kittitas County hasn't done

enough to protect its rural character or 'rural element' as they put it."

"Says who?" Madge demanded.

"Something called the 'growth management board,' set up by the folks in Olympia, that's who," answered Harry matter of factly.

"If they don't think the county is rural enough, then they've never laid eyes on it," declared Fred.

"Pin brains," added Madge.

To understand the shock and astonishment of Madge and Fred at the thought that someone or something did not think that Kittitas County had done enough to protect its rural character, let me take the reader on a little tour of Kittitas County. The tour will be a simple scenic drive along Interstate 90 (I-90) from west to east. We will enter Kittitas County on a mountain pass and enter the Wenatchee National Forest. It is a rugged mountain area inhabited by few souls. We will continue east through heavily forested mountains on I-90 until we descend to the hamlets of Easton and Cle Elum, where the foothills covered with fir trees stretch north to Chelan County and south to Yakima County. Except for some largely abandoned little mining towns and vacation cabins nestled close to the freeway, there are few people in this area. Passing the old mining town of Cle Elum, we will get a stunning view of Mount Stuart, part of the rugged North Cascades. Further east is Elk Heights, where we may see as many as 100 elk grazing right next to the freeway. Then the freeway levels out onto Eastern Washington's high desert plateau. The plateau is nearly 2,000 feet high, arid and covered with rock left

behind by glaciers receding more than 10,000 years ago. Approaching Ellensburg, the only city of any size in Kittitas County with a population of about 18,000, we will see some cattle ranch land. However, after passing Ellensburg, we will see nothing but miles of the stark grandeur of a land where little but sagebrush and rocks seem to grow until finally the beautiful Columbia River will come into view. The mighty Columbia River marks the eastern boundary of Kittitas County.

Kittitas County, like most Washington counties, is very, very rural. The population of the county is about 40,000. The average density of its neighbor King County is 817 people per square mile. The average density of Kittitas County is only 14.5 people per square mile.[1] With this tour behind us we will rejoin the conversation.

Harry laughs at Madge, "No, they're not pin brains. They just believe that planning for the future is a good idea. You never know when we're gonna have a land rush."

"Yeah right, 'land rush,'" Madge snorts.

After a moment, Fred pipes up, "If those folks in Olympia had the wits of rabbits, they'd figure a way to move the people in the crowded areas over here. They should balance the population by getting businesses to build factories in Kittitas County or build a big airport or something over here. But making us

[1] These demographic facts are drawn from the Kittitas County web site and the United States Census Bureau. *See About the County,* Kittitas County, http://www.co.kittitas.wa.us/about/default.asp; State & County QuickFacts, U.S. Census Bureau http://quickfacts.census.gov/qfd/states/53/53033.html. The travel narrative is drawn from this Justice's frequent trips back to Eastern Washington. *See also* Kittitas County, Washington, Wikipedia, www.en.wikipedia.org/wiki/kittitas_County,_Washington.

preserve the rural character just seems wrongheaded to me."

"Well," Harry continues, "as I understand it, the state legislature had a good idea to push each county to develop its own plan. The whole scheme for growth and development is overseen by state boards; there is one board just for Eastern Washington. The idea was to plan from the bottom up. The rub is that the bottom up planning is administered from the top down."

Madge persists, "I still think they are pin brains if they think Kittitas County isn't rural enough. What this county needs is a few more jobs."

Harry lets the waitress warm up his coffee before continuing, " I think they mean well, they want each county to do its own planning but then they want to treat all counties equal, so they set up uniform standards and procedures for planning and documentation that don't always make a lot of sense when counties are so different. They say they don't want cookie cutter plans but all the plans must fit through the same cookie cutters. I think the real problem is they passed laws, then judges sometimes interpret those laws with one finger on the words of the law and one finger in the dictionary, and the rule of law takes over the rule of reason."

"Fred shakes his head, "So the good idea got lost in the details."

"Yep," Harry says, nodding to his coffee cup, "The devil is in the details."

The Growth Management Scheme

First, I disagree with Madge. The people who designed and administer the State's land use policies are far from pin brains. The legislature saw the benefit of

planned, coordinated growth. Growth and development benefit by coordinating infrastructure and services with development while preserving wilderness, wet, and agricultural lands. The legislature adopted the GMA in an effort to ensure appropriate planning. The GMA is not a model of clarity. When disputes arise, as they do, as to how to give effect to the legislature's intent, courts interpret the law. We read the legislation as a whole and interpret provisions in context. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). To give the words of legislation meaning, we may resort to dictionaries. *City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002) (citing *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183 (1994)). Generally speaking, local bodies are invited or required to develop plans, to periodically revise those plans, and to show their work. RCW 36.70A.020, .130, .215. The growth management boards review the growth management plans of counties and cities to ensure compliance with state law. RCW 36.70A.250. At least in concept, it is a good scheme.

Deference

Second, I generally agree with Fred and Justice J.M. Johnson's dissent[2] that the legislature acted with the belief that each county is in the best position to assess the challenges and needs unique to each county and to develop individualized plans tailored to its own county. *E.g.*, RCW 36.70A.3201. Deference to local governments is required, and the GMA sets a high standard before a local decision

[2] I recognize that Justice J.M. Johnson has, like me, concurred in part and dissented in part. For the ease of the reader, I refer to his opinion as the dissent.

is overturned. "The board shall find compliance unless it determines that the action by the . . . county . . . is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an action clearly erroneous, the board must be "'left with the firm and definite conviction that a mistake has been committed.'" *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000) (quoting *Dep't of Ecology v. Pub. Util. Dist. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)). Generally speaking, if the local government has made an earnest attempt to comply with the law, has followed the procedures, and explained why it did what it did, we should not meddle.

I also agree with Justice J.M. Johnson that the ultimate responsibility for planning and implementing a county's future rests with the county. Dissent at 7. I recognize that the Eastern Washington Growth Management Hearings Board works hard to interpret and enforce the law. However, in my view, the board often relies too heavily on court decisions that, instead of establishing broad principles, merely decide the case before the court. This approach risks unnecessarily imposing onto all counties rulings based upon the unique facts of one. *See, e.g.*, *Diehl v. Mason County,* 94 Wn. App. 645, 972 P.2d 543 (1999) (dealing with rural densities of one housing unit per 2.5 – 5 acres); *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009) (dealing with rural density of one unit of housing per 5 acres). Properly read, these cases do not set standards for density. They considered whether the work of the local governments and board met the statutory standards. I

specifically note that the board has elevated *Tugwell v. Kittitas County*, 90 Wn. App. 1, 951 P.2d 272 (1997), far beyond the actual holding of the case for the proposition that parcels of less than 20 acres are too small to farm. Final Decision and Order (*Kittitas County, Conservation v. Kittitas County*, No. 07-1-0004c, at 8 (E. Wash. Growth Mgmt. Hr'gs Bd. (Aug. 20, 2007))).[3] The board did not identify where in *Tugwell* such a holding appeared, and I cannot find it. Nor would it be appropriate for a court to hold as a matter of law what parcel of land is too small to farm.[4] That is a decision we should leave to those closer to the land.

There is nothing in the governing statutes that would prevent, for example, a county from allowing farmers to sell off marginal land for cash flow purposes where the county, after due consideration, found such policy would promote agriculture and preserve the rural character of the county. I also agree with the dissent that a comprehensive plan is '"a generalized coordinated land use *policy statement* of the governing body of a county or city that is adopted pursuant to this chapter."' Dissent at 17 (quoting RCW 36.70A.030(4)). The development regulations are ' "the *controls* placed on development or land use activities by a county or city,' and are what actually implement the plan." Dissent at 17 (quoting RCW

[3] *Available at* http://www.gmhb.wa.gov/LoadDocument.aspx?did=1057.

[4] *Tugwell* was a case about whether a county board of commissioners improperly approved a rezoning, not about when parcels of land are too small to farm. One of the issues was whether there had been enough change in the land use patterns to justify the rezone. The Court of Appeals noted in passing that "[t]he creation of small parcels, not large enough to accommodate agricultural activities, certainly demonstrates a trend toward residential development." *Tugwell*, 90 Wn. App. at 9. That is an observation about the evidence presented, not the stuff of a judicial holding. I remind my readers that not everything that appears in an opinion is a statement of law. Often, it is merely the application of the law to a particular set of facts. The whole opinion must be read to understand its holdings.

36.70A.030(7)).

Airport Zone and Conditional Use Permits

I agree with both the majority and the dissent on several issues. I agree with both that the board improperly found the county's airport zone was not in compliance. Majority at 27; dissent at 2. Further, I see nothing in the GMA that would necessarily prohibit a county from allowing conditional use permits and one-time lot splits. I read both the majority and the dissent as agreeing with my view. Majority at 18-19.[5]

Rural Character and Multiple Rural Densities

I must concede that Fred makes a persuasive point that it seems plain "wrongheaded" for the growth management board to require a county as vast and sparsely populated as Kittitas to waste too much time and process explaining its rural character.

The overall land use scheme is a good one but the devil lurks in the details. To conclude that "there simply is no written explanation that articulates how the County's rural element harmonizes the goals and meets the requirements of the GMA," majority at 11, is to exalt form and procedure over reason. To state that a county populated by forest and sagebrush but few people "[v]iolated the GMA by Failing To Protect Rural Character in Rural Areas," majority at 14, borders on the absurd. The board and the majority are critical of the county because the county's "A-20" agricultural zone violates the GMA by allowing for conditional use permits

[5] I recognize the opinion of my dissenting colleague does not specifically reach this issue. However, I read his opinion to be consistent with this view.

and one-time lot splits. Majority at 18-19. The board did allow that "some of the uses might be permissible in the rural area, such as kennels and agricultural-related auctions and museums." *Kittitas County Conservation v. Kittitas County*, No. 07-1-0015, 2008 WL 1766717, at *12 (E. Wash. Growth Mgmt. Hr'gs Bd. Mar. 21, 2008). Certainly, preserving the rural character of rural areas is of great importance in counties with bountiful populations and industry. But in counties where there are few people, fewer jobs, and the only hope is growth in nonagricultural businesses, to flatly deny the option of granting conditional use permits seems inflexible and inconsistent with the GMA's vision of allowing each county to develop plans tailored to its unique circumstances and goals.

That said, I agree with the majority and the board that the county must show its work and that the act requires a county's plan to include multiple densities. Majority at 9-11. RCW 36.70A.070(5)(a) provides:

> Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

Further, the act requires, "The rural element shall provide for a variety of rural densities." RCW 36.70A.070(5)(b). The record reflects that the county was in the process of adopting additional ordinances to satisfy these requirements. I agree with the board and majority that the county must produce a written record explaining how the rural element harmonizes with the planning goals in the GMA,

and the county must provide for multiple rural densities. But these requirements must be read within the scope and context of the overall growth management planning scheme. The planning is to be done locally and "in full consideration of local circumstances." RCW 36.70A.3201. The board must defer to the county unless it finds the comprehensive plan "clearly erroneous in view of the entire record." RCW 36.70A.320(3). In my view, there is nothing inconsistent with the application of the rule of law and local decision making under the law.

Water

Finally, I come to the issue of water. I agree wholly with the majority and the board that the county's subdivision regulations violate the GMA. Majority at 31-32. The preservation of both surface water and groundwater resources is of critical concern to our state, the nation, and the world. Water that collects in the mountains of Kittitas County is for the beneficial use of not only Kittitas County but those counties that share its aquifers and surface waters. The right to use water does not depend on where the rain or snow first fell, but rather on our statutory and common law system of riparian and groundwater rights, which turn on appropriation and beneficial use under the law. *See generally* Title 90 RCW; *Lummi Indian Nation v. State*, 170 Wn.2d 247, 252, 241 P.3d 1220 (2010) (quoting 1 Wells A. Hutchins, Water Rights Laws in the Nineteen Western States 440 (1971)). The GMA explicitly requires counties to grapple with the quality and availability of water when making their plans. RCW 36.70A.020(10), .070(1), (5)(c)(iv). We have tried over the decades to protect the public right to water without being so overbearing

that any time someone digs a hole down to the water table they have to get a permit. *See generally* RCW 90.44.050; *Campbell & Gwinn,* 146 Wn.2d 1. Developers, not unreasonably, have noticed that small projects do not always bear the regulatory burdens of big ones and have attempted, at least on paper, to structure their projects accordingly. *See* RCW 90.44.050 (exempting certain wells that take no more than 5,000 gallons a day of ground water); *Campbell & Gwinn,* 146 Wn.2d at 4 (upholding the Department of Ecology's decision to treat group multiple wells in a single development together for permitting purposes). The State, not unreasonably, has used a meaningful, rather than technical, approach when evaluating whether a development is really one big project imposing one big burden on the water supply or a series of small projects drawing small amounts. *Id.*, at 5-6. We have upheld this reasonable approach. *Id.* at 21. Given this history, I agree with the majority and the board that the Kittitas County Code, by design or by accident, makes it far too easy to evade meaningful review of the impact of large projects on the existing water rights of other users under chapter 90.44 RCW.

With these observations, I respectfully concur in part and dissent in part.

AUTHOR:
Justice Tom Chambers

WE CONCUR: