

# **FACTORS AND OBJECTIVES FOR BOUNDARY REVIEW BOARDS**

## **RCW 36.93.170 Factors to be considered by board.**

In reaching a decision on a proposal or an alternative, the Board shall consider the factors affecting such a proposal, which include, but not be limited to the following:

- 1) Population and Territory
  - Population density;
  - Land area and land uses;
  - Comprehensive plans and zoning as adopted under RCW 35.63, 35A.63 or 36.70;
  - Applicable service agreements entered into under RCW 36.115 or 39.34;
  - Applicable interlocal agreements between a county and its cities;
  - Per capita assessed valuation;
  - Topography, natural boundaries and drainage basins, proximity to other populated areas;
  - The existence and preservation of prime agricultural soils and productive agricultural uses;
  - The likelihood of significant growth in the area and in adjacent incorporated and unincorporated areas during the next ten years;
  - Location and most desirable future locations of community facilities;
- 2) Municipal Services
  - Need for municipal services;
  - Effect of ordinances, governmental codes, regulations, and resolutions on existing uses;
  - Present cost and adequacy of governmental services and controls in area;
  - Prospects of governmental services from other sources;
  - Probable future needs for such services and controls;
  - Probable effect of proposal or alternative on cost and adequacy of services and controls in area and adjacent area;
  - The effect on the finances, debt structure, and contractual obligations and rights of all affected governmental units; and
- 3) The effect of the proposal or alternative on adjacent areas, on mutual economic and social interests, and on the local government structure of the county.

## **RCW 36.93.180 Objectives of the boundary review board.**

The decisions of the Boundary Review Board shall attempt to achieve the following objectives:

- (1) Preservation of natural neighborhoods and communities;
- (2) Use of physical boundaries, including but not limited to bodies of water, highways and land contours;
- (3) Creation and preservation of logical service areas;
- (4) Prevention of abnormally irregular boundaries;
- (5) Discouragement of multiple incorporations of small cities and encouragement of incorporation of cities in excess of ten thousand population in heavily populated urban areas;
- (6) Dissolution of inactive special purpose districts;
- (7) Adjustment of impractical boundaries;
- (8) Incorporation as cities or towns or annexation to cities or towns of unincorporated areas which are urban in character; and
- (9) Protection of agricultural and rural lands which are designated for long term productive agricultural and resource use by a comprehensive plan adopted by the county legislative authority.

## **Planning Goals of the Growth Management Act RCW 36.70A.020**

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

**Urban Growth:** Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

**Reduce Sprawl:** Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

**Transportation:** Encourage efficient multi-modal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

**Housing:** Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

**Economic Development:** Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and disadvantaged persons, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

**Property Rights:** Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

**Permits:** Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

**Natural Resource Industries:** Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

**Open Space and Recreation:** Encourage the retention of open space and development of recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks.

**Environment:** Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

**Citizen Participation and Coordination:** Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

**Public Facilities and Services:** Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

**Historic Preservation:** Identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance.

## **Washington State Court Decisions – Annexation**

### **Interlake Sporting Ass'n v. Boundary Review Board, 158 Wn.2d 545 (2006)**

The state supreme court invalidated a boundary review board decision that, at the request of King County, expanded a proposed annexation by the city of Redmond to more than three times the size of the area represented in the annexation petition. The expanded area had previously voted at an election to reject annexation. The court, in a 5-4 decision, held that the review board violated RCW 35A.14.140, which authorizes a code city to "annex all or any portion of the proposed area but may not include in the annexation any property not described in the petition," and that the review board exceeded its authority under RCW 36.93.150 to modify the boundaries of a proposed annexation. The court also concluded that the review board's decision offended the due process rights of property owners in the annexation area.

### **Snohomish County Fire Protection District v. Wash. State Boundary Review Board, 121 Wn. App. 73 (2004)**

RCW 36.93.090 provides that a notice of intention must be filed with the boundary review board within 180 days of when the annexation is "proposed." The court of appeals interpreted this to mean that an annexation is "proposed" for purposes of this statute when the initiators of the annexation file their petition - in this case, a 75 percent petition - with the city. An annexation is not "proposed" for purposes of this statute when the initial notice of intention, sometimes referred to as the 10 percent petition, is filed with the city. The court also held that compliance with the 180-day filing deadline is a jurisdictional prerequisite to board review.

### **Grant County Fire Protection District v. City of Moses Lake - 150 Wn.2d 791 (2004)**

The state supreme court, upon reconsideration, reverses its earlier decision at 145 Wn.2d 702 (2002) and holds that the petition method of annexation is constitutional.

### **Dahl-Smyth, Inc. v. City of Walla Walla - 148 Wn.2d 835 (2003)**

RCW 35A.14.900 and RCW 35.13.280 provide that, when a city that annexes an area that is served by certain types of franchises, any such franchise is automatically cancelled and the city must issue a new franchise for a seven-year period (formerly five years), unless the city purchases or condemns the franchise. Under these statutes, if the city issues a new franchise for a seven-year period, it will still be liable to the franchisee for any "measurable damages" the franchisee suffers. The state supreme court, overruling the court of appeals, held that the city's liability under RCW 35A.14.900 for "measurable damages" is "to be calculated at the time of annexation by determining the difference in market value of the hauler's [WUTC-issued] certificate before and after annexation. In determining an award, the amount of damages must then be reduced by the benefit gained by the hauler from the five-year [now seven-year] extension of the franchise."

### **Grant County Fire Protection District v. City of Moses Lake - 145 Wn.2d 702 (2002)**

The state supreme court invalidated the petition method of annexation, holding that it violates the state constitution's privileges and immunities clause. (See later decision above overturning this decision.)

### **King County Water District v. Renton - 88 Wn. App. 214 (1997)**

In this case, the court of appeals held that, under RCW 28A.335.110, a public school district may petition to have school property annexed to a city only if the school property constitutes the whole of the property sought to be annexed. A public school district may not petition for annexation if the school property comprises only a fraction of the property sought to be annexed. This holding applies to code cities, as well as to other classes of cities.

### **Yakima County Fire Protection District No. 12 v. City of Yakima - 122 Wn.2d 371 (1993)**

Some cities in Washington utilize what is termed an outside utility agreement, in which property owners who reside outside the city limits are allowed to receive municipal utility services if they sign an agreement that they will sign a future annexation petition. This type of outside utility agreement was upheld in the case as a valid waiver of future rights. However, in view of the decision in the Grant County case, listed above, such agreements likely have no validity or binding value.

### **Johnson v. Spokane - 19 Wn. App. 722 (1978)**

In this case a city was held to have the authority to sign an annexation petition in the same manner as owners of taxable property. The fact that property owned by the city is tax exempt does not mean the city cannot sign the annexation petition.

Nancy Sloane, Assistant Attorney General  
State of Washington Attorney General's Office  
1116 West Riverside  
Spokane, WA 99201

Susan Winchell, Director  
Washington State Boundary Review Board for Spokane County  
1026 West Broadway  
Spokane, WA 99201

## **DISCUSSION OF STATUTORY REQUIREMENTS FOR DECISION-MAKING**

The following cases are those most consistently mentioned when courts discuss Boundary Review Board (BRB) statutory factors and objectives.

1. Spokane County Fire Protection District No. 8, Glenrose Preservation and Development Association v. Spokane County BRB, 27 Wn. App. 491, 618 P.2d 1326 (1980). In this case a voluntary nonprofit corporation appealed from a Superior Court decision affirming the BRB's approval of an annexation of 25 acres of vacant agricultural land to the City of Spokane. One issue was whether the BRB "failed to 'attempt to achieve' the objectives listed by RCW 36.93.180." Spokane Cy. Fire Dist. At 497. The court said:

The determination reached by the Board, supported by the record, demonstrates attention to the factors in RCW 36.93.170-180 and consideration of the environmental assessment. Although agency action may be reversed when the reviewing court is firmly convinced that a mistake has been committed, we are not convinced an error was made. Courts will not substitute their own judgment for that of an administrative agency acting within the sphere of its expertise. ...

Judgment of the Superior Court is affirmed.

Spokane Cy. At 498.

2. Spokane County Fire Protection District No. 9 v. Spokane County Boundary Review Board, 97 Wn.2d 922, 652 P.2d 1356 (1982). In this case the fire district challenged a decision of the BRB which approved an annexation proposed by the City of Spokane. The court said:

While on its face RCW 36.93.180 requires only that the Board 'attempt to achieve' these (statutory) objectives, they do provide a framework for evaluating the Board's decision. In addition, we construe the statutory objectives as more than merely aspirational - while a boundary review board need not achieve all or even most of them, a decision which advances none at all is reversible. ...

The decision of the Board is affirmed.

Fire Protec. at 926.

3. Richland v. BRB, 100 Wn. 2d 864 (1984). The City of Richland appealed from a decision of the Franklin County BRB which approved the City of Pasco's application to annex 4,500 acres of unincorporated territory. Richland contended the decision should be reversed based on an inadequate Environmental Impact Statement and procedural errors. The court said:

The record reveals the Review Board heard and considered testimony by many witnesses, . . . at the hearing on October 20, 1982. It entered its findings and conclusions after considering the statutory criteria. . . .

The Review Board and the Superior Court are affirmed.

Richland at 256.

4. Snohomish County v. Ray Hinds, 61 WnApp. 371, 10 P.2d 84 (1991). The BRB and City of Mill Creek appealed from a superior court's reversal of a decision by the BRB which denied a proposed annexation to the City of Everett. It claimed the court erred in that there was substantial evidence in the record to support the BRB's decision. The court said:

In light of the substantial evidence supporting the Board's conclusions that the annexation fails to meet the objectives of RCW 36.93.180, we reverse with instructions to dismiss Hinds' appeal and reinstate the Board's decision.

Snohomish at 384.

5. King County v. Washington State Boundary Review Board for King County, 122 Wn.2d 648, (1993). The BRB approved two annexations proposed by the City of Black Diamond. The Superior Court reversed the BRB's approval and held the decision was not supported by substantial evidence and was affected by error of law for failure to adequately consider the effects of the Growth Management Act. The Superior Court also held SEPA had been violated. On appeal the court affirmed the lower court's ruling concerning SEPA. It reversed with respect to the other matters. This case contains the best discussion of the statutory objectives. It also requires a balancing test for considering all the objectives. The court said:

To summarize, two of the applicable statutory objectives would be significantly furthered, three would neither be significantly furthered, nor hindered, and one would be somewhat set back by the proposed annexations. While substantial evidence review of boundary review board decisions is not merely an exercise in counting objectives, our review of the record and the statutory objectives convinces us there is sufficient evidence to convince a fair-minded person that overall the objectives of RCW 36.93.180 would be furthered rather than hindered by approval of the proposed annexations. The decision of the Board was therefore supported by substantial evidence.

King County at 680.

## BRB STATUTORY OBJECTIVES

Courts have discussed the specific BRB statutory objectives. Beneath each specific objective are quotes from various courts concerning these objectives.

RCW 36.93.180 (1) Preservation of natural neighborhoods and communities

The area to be annexed is currently undeveloped, however, contiguous areas are populated and this area is natural for the overflow of the Lincoln Heights residential area. . In the judgment of the Board, the subject area is part of a natural community of the City of Spokane and the Board decision tends to accomplish the objective of RCW 36.93.180(1).

Spokane Cy. At 497.

The annexation will, by including only half of a geographically distinct plateau, harm a natural neighborhood.

Fire Protec. at 927.

First, the Board determined that 'natural neighborhoods and communities' . . . would not be preserved by the annexation. The Supreme Court has held that this phrase may refer to socially identifiable or 'locationally distinct groups of residents.' . . . In the present case, many factual findings support the Board's conclusion regarding natural neighborhoods: the majority of residents identified their community interests with Snohomish County rather than with Everett; 700 persons identified as the greater Silver Lake Community opposed the proposal; and a preponderance of citizens opposing the annexation reside just outside its boundary.

Snohomish at 381.

The record also supports the conclusion that the first objective, preservation of natural neighborhoods, would be furthered by the proposed annexations. In Spokane Cy. Fire Protec. Dist. 9 v. Spokane Cy. Boundary Review Bd., 97 Wn.2d 922, 926, 652 P.2d 1356 (1982), we construed 'natural neighborhoods' to mean 'either distinct geographical areas or socially and locationally distinct groups of residents.' 97 Wn.2d at 927 n.2. The record supports the Board's conclusion that the areas are geographically part of the Black Diamond community. . . . For the most part, the annexations are contained within the Rock Creek Drainage Basin. Also, the testimony before the Board indicated that the Basin corresponds with a plateau which gently slopes down to the north toward Lake Sawyer, and the annexations are on this plateau.

King County at 676-677.

**RCW 36.93.180 (2) Use of physical boundaries, including but not limited to bodies of water, highways and land contours**

There was also significant, though not total, reliance upon physical boundaries. The inside of the 'L'-shaped annexation area was contiguous to the city limits. Of the remainder of the area's boundary, half to two-thirds relied upon existing roads and a bluff above the Spokane River, while the remainder was based largely on property lines. Hence, half to two-thirds of the noncontiguous boundary was based on physical.

Fire Protect. At 927.

'Physical' is defined as relating to natural or material things as opposed to things mental, oral, spiritual, or imaginary. Webster's Third New International Dictionary 1706 (1976). Legal boundaries are therefore not 'physical.'

Fire Protect. At 927, Footnote 1.

The Board's second conclusion was that the proposed annexation fails to use physical boundaries because the annexation south of 132nd Street follows lot lines rather than roads or physical features. It is clear from inspecting the map that the proposed boundary south of 132nd Street is determined by lot lines. As legal boundaries, lot lines are excluded from the definition of 'physical boundaries'. RCW 36.93.180(2). The proposed boundary also splits a drainage basin.

Snohomish County v. Hinds, 61 Wn. App. 371, 381, 810 P.2d 84 (1991).

. . . [T]here is no evidence to support the Board's conclusion that the second statutory objective, use of physical boundaries, would be furthered by the proposed annexations. . . . In Spokane, we held that '[l]egal boundaries are not . . . 'physical . . . 'for purposes of this objective. . . . As legal boundaries, lot lines are excluded from the definition of 'physical boundaries'. As is clear from the record, the proposed annexations in this case are based entirely upon legal boundaries by lot lines. The proposed annexations therefore would not further the second statutory objective.

King County at 677.

### **RCW 36.93.180 (3) Creation and preservation of logical service areas**

All relevant city departments were contacted in regard to this annexation, and all departments indicated that this annexation is within their logical service area. The decision of the Board tends to accomplish the objectives of RCW 36.93.180(3).

Spokane Cy. at 497.

Pasco had drawn up plans to service the entire annexation area for the next several decades and had demonstrated its capability to carry out the plan. Its plans were more ambitious and long term than were Richland's. In addition, Pasco's annexation would use the Columbia River as a boundary. Richland's plans were to annex a smaller area immediately across the Columbia River and to provide it with services by extending sewer and water lines across the river. Richland's proposal would extend its boundaries across the Columbia and into Franklin County. Richland argues that the land remaining between its newly created boundaries across the Columbia and Pasco could be annexed and serviced by Pasco.

From this, it is evident that Pasco was the most logical municipality to provide the entire annexation area with the needed services and to provide the soundest growth pattern for the area.

Richland at 871-2.

The Board's third conclusion was that the annexation does not preserve a logical service area. Many residents testified that they were satisfied with existing services. The Board found that 'a preponderance of the evidence indicates that municipal services (fire, police, water, other) are adequately provided in the annexation area,' and concluded that the annexation might create 'possible confusion in jurisdiction for fire and police response.'

Snohomish at 381.

### **RCW 36.93.180(4) Prevention of abnormally irregular boundaries**

The boundaries of the proposed annexation, while somewhat irregular, are not abnormally so.

Fire Protec. at 927.

And finally, the Board concluded that the flagpole shape of the annexation is abnormally irregular. Indeed, far from preventing 'abnormally irregular boundaries', this annexation would create one. While there may be some reasonable argument that other annexations of other cities are also irregular, the Board offered the following:

'[t]he annexation area includes only a 1,450 foot boundary with the city and then extends south approximately three quarters of a mile and almost exclusively avoids residential development, while including property along a highway corridor . . . with commercial development potential. . . .'

Snohomish at 381-382.

. . . [T]here is also no evidence to support the Board's conclusion that the proposed annexations would support the fourth statutory objective, prevention of abnormally irregular boundaries. The City's boundaries as they presently stand are reasonably compact, and any irregularity which exists would not be remedied by the addition of the proposed annexations.

The Board found the proposed annexations furthered this objective because the annexation boundaries followed existing boundary and lot lines. . . . The focus of this objective, however, is not on whether the annexation boundaries are straight or crooked, but rather whether a proposed annexation causes or prevents unnatural projections or odd, impractical shapes. . . . We also note that construing this objective to favor the use of straight boundary lines would subvert the application of the second objective, which mandates the use of physical boundaries. The mere fact that the annexation boundaries

are straight therefore does not support the Board's finding that the proposed annexations prevent 'irregular boundaries'.

King County at 677.

**RCW 36.93.180(5) Discouragement of multiple incorporations of small cities and encouragement of incorporation of cities in excess of ten thousand in heavily populated urban areas**

**RCW 36.93.180(6) Dissolution of inactive special purpose districts**

**RCW 36.93.180(7) Adjustment of impractical boundaries**

On August 11, 1980, Pasco applied to the Board for annexation of approximately 4,500 acres of southwest Franklin County. Pasco lies to the southeast of this property which extends from Pasco's northernmost boundary 5 miles until it reaches the Columbia River. Richland views this property from directly across the Columbia River. On August 28, 1980, it applied to the Board for approval of a Richland annexation which would extend its boundaries across the river and include a portion of the proposed Pasco annexation. . . .

Richland at 866.

Richland contends that Pasco's last minute 'modification' was politically motivated and inconsistent with the requirements of RCW 36.93.170. We have held that the intent behind the gerrymandering of boundaries is irrelevant when considering an annexation proposal. The Board's sole concern should be 'the objective result, to be measured against the goals set out in RCW 36.93.180.' . . . Under this analysis, only the annexation as a whole is considered. The appropriateness of its boundary delineation is merely one of several factors for the Board to consider in determining whether to approve the proposal.

Richland v. BRB, 100 Wn.2d 864, 870, (1984).

The Richland Court concluded:

The Pasco annexation achieved the statutory objectives. . . . It also prevented abnormally irregular boundaries.

Richland at 871.

**RCW 36.93.180(8) Incorporation as cities and towns or annexation to cities or towns of unincorporated areas which are urban in character**

The [Boundary Review] Board also concluded that area to be annexed would soon become urban in character; however, we attach little weight to this finding. The urban

character focused upon by RCW 36.93.180(8) above is present urban character. Future urbanization is of little relevance, for incorporation is unnecessary until urbanization has taken place or is at least an immediate prospect.

Fire Protec. at 927.

The sole reason the Board found this objective furthered was its conclusion that ‘the proposed annexation site is in the process of transition from rural to urban use.’ . . . However, the notion that the boundary review boards may rely on future urbanization was specifically rejected in Spokane . . . Spokane is consistent with the language of the objective, which addresses areas which ‘are’ urban in character, not those which are ‘becoming’ urban in character. . . .

King County at 678-679.

**RCW 36.93.180(9) Protection of agricultural and rural lands which are designated for long term productive agricultural and resource use by a comprehensive plan adopted by the county legislative authority**

Though there was testimony indicating that part of the area to be annexed was good farm land, other testimony indicated it was of marginal agricultural value.

Fire Protec. at 927.

. . . The record reveals that the time of the Board’s decision, the proposed annexations were then designated as rural by the King County Comprehensive Plan and for forestry use by the area plan developed under the county comprehensive plan, the Tahoma/Raven Heights Communities Plan. . . . The areas in question were therefore ‘rural lands’ which had been ‘designated for long term productive agricultural and resource use’ by a ‘comprehensive plan’

Appellants correctly point out that in determining the significance of the harm to this objective, however, the actual usefulness of the land for long-term agricultural and resource use is relevant. . . . There is substantial evidence in the record that the land involved here is unsuitable for long-term forestry use. . . . Given the evidence on this score, this objective is not significantly harmed by the proposed annexations.

King County at 679-680.

**DISCUSSION OF CERTAIN STATUTORY FACTORS THE BRB MUST CONSIDER**

**1. Land Use**

The BRB statute was created in 1967 to be the state’s first growth management legislation. One of the factors the BRB must consider is land use. One court’s discussion concerning this factor is:

Many of the factors the Board is directed to consider by RCW 36.93.170 relate to land use decisions. . . . The Board is specifically directed by RCW 36.93.170 (1) to consider ‘land area and land uses; comprehensive plans and zoning’. Far from prohibiting consideration

of land use issues, the statute mandates such consideration. Additionally, the statutory objectives to be achieved by a boundary review board necessarily include other land use considerations. . . . While we agree that '[t]he function of the boundary review board is to resolve competition among municipalities for unincorporated territory and not to make land use decisions', we find that here the Board acted within its authority. . . . Indeed, as the original applicant for annexation, the City of Everett introduced substantial evidence to show that it was not going to change the existing land use.

Snohomish County v. Hinds at 382-383.

## **2. Growth Management Act**

In 1991, the state legislature passed the Growth Management Act (GMA). In the 1992, the legislature passed a requirement that one of the factors the BRB must consider is the GMA. The law provides:

The decisions of a boundary review board located in a county that is required or chooses to plan under RCW 36.70A.040 (which sets out who must plan under the GMA) must be consistent with RCW 36.70A.020 (Planning Goals), 36.70A.110 (Comprehensive Plans - Urban Growth Areas), and 36.70A.210 (County-wide Planning Policies).

RCW 36.93.157. (Parentheses added).

The law also provides:

When a county and the cities and towns within the county have adopted a comprehensive plan and consistent development regulations pursuant to the provisions of chapter 36.70A RCW, the county may, at the discretion of the county legislative authority, disband the boundary review board in that county.

RCW 36.93.230.

The Court has said the following about the GMA:

Thus, the GMA explicitly contemplated the continued activity of the boards prior to the designation of the urban growth areas. This explicit provision indicates that the GMA was not intended to replace the BRB Act pending the designation of the urban growth areas.

Several of the 'factors' which the Board is required to consider under RCW 36.93.170 include legislative enactments like the GMA within their scope. See, e.g., RCW 36.93.170(1) ('comprehensive plans and zoning'); RCW 36.93.170(2) ('effect of ordinances, governmental codes, regulations and resolution on existing uses'). These factors indicate the Board should have considered the effect of the GMA in making its decision to approve the annexations. The Superior Court concluded that it was 'willful and unreasoning of the Board not to do so. . . .

Although the Board's decision does not itself discuss the GMA, the Board did consider the possible effect of the GMA. It heard testimony regarding the work program the county had put in place regarding the designation of the urban growth areas. . . . At least one Board member expressed the conclusion that the GMA would not affect the Board's

decision prior to the designation of the urban growth areas. . . . While perhaps the Board should have devoted more discussion to the impact of the proposed annexations on the planning process under the GMA, this flaw in the Board's decision making does not rise to the level of action taken 'willfully and in disregard of facts and circumstances'.

Given the presence of explicit reference in the GMA to the continued operation of the boundary review boards, and the Board's consideration of the GMA, we cannot say the Board's action was arbitrary or capricious.

King County v. BRB at 681-682.

BRBs cannot fully rely on this opinion of the King County court since the standard for review of BRB decisions is no longer arbitrary and capricious. In 1992, the legislature enacted the law quoted at the beginning of this section which requires the BRB to consider certain aspects of the GMA in its decision-making.

### **3. State Environmental Protection Act (SEPA)**

One of the factors the BRB must consider is the State Environmental Protection Act. Chapter 43.21C RCW.

"The provisions of SEPA apply to decisions by boundary review boards." Bellevue v. King Cy. Boundary Review Bd., 90 Wn.2d 856, 865-66, 586 P2d 470(1978), as cited in King County v. BRB at 659.

Because this area is so broad, time and space do not permit a complete discussion of this topic.

### **NEW STANDARD OF REVIEW OF CLEARLY ERRONEOUS**

The superior court, upon appeal of a BRB decision, may affirm, remand or reverse the decision if any substantial rights may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) In violation of constitutional provisions, or
- (b) In excess of the statutory authority or jurisdiction of the board, or
- (c) Made upon unlawful procedure, or
- (d) Affected by other error of law, or
- (e) Unsupported by material and substantial evidence in view of the entire record as submitted, or
- (f) Clearly erroneous.

The legislature adopted the clearly erroneous standard of review in 1994. It replaced the arbitrary and capricious standard. The definition of "clearly erroneous" is:

Findings when based upon substantial error in proceedings or misapplication of law, Kauk v. Anderson, C.C.A.N.D., 137 F.2d 331, 333; or when unsupported by substantial evidence, or contrary to clear weight of evidence or induced by erroneous view of the law. Gasifier Mfg. Co. v. General Motors Corp., C.C.A.Mo., 137 F.2d 197, 199; Smith v. Porter, C.C.A. Ark. 143 F. 2d 292, 294.

Black's Law Dictionary, Revised Fourth Edition, 1968, 318-319

Under Rule 52(a) of the Federal Rules of Civil Procedure, a finding by a federal district court may not be reversed if the district court's account of the evidence is plausible in light of the record viewed in its entirety, even though the reviewing court is convinced that had it been sitting as the trier of fact it would have weighed the evidence differently;

this is so even when the District Court's findings do not rest on credibility determinations but are based instead on physical or documentary evidence of inferences from other facts. Anderson v. Bessemer City 84 L. ed. 2d. 518, 105 S. Ct. 1504, later proceeding Anderson v. Bessemer City (1984, CA4) 762 F. 2d 347 and on remand Anderson v. Bessemer City (1985, CA4) 762 F.2d 347.

Our supreme court said:

A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Ancheta v. Daly, 77 Wn. 2d 255, 259-260, 461 P2d 531 (1969) quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 92 L. Ed. 746, 766, 68 S. Ct. 525, 542 (1948).

### HOW TO APPLY THE OBJECTIVES

A state Supreme Court decision in 1993 gave us this answer. The concept now is:

Before reviewing the decision of the Board, we must determine the proper analytic framework to be applied to 'substantial evidence' review of the objectives in RCW 36.93.180. Black Diamond argues a reviewing court is required to affirm a board decision which furthers at least one of the statutory objects. King County contends a reviewing court should engage in a comprehensive 'balancing' of the various objectives to determine whether the objectives were more advanced or harmed by a boundary review board's decision.

On the whole, the statute and the case law favor King County's position. Boundary review board decisions may be reversed when '[u]nsupported by material and substantial evidence in view of the entire record as submitted.' . . . The statute's reference to the 'entire record' supports the proposition that judicial review of the RCW 36.93.180 objectives is to involve examination of each of the objectives. It would be anomalous to interpret this provision as requiring a reviewing court to uphold a board decision based on the furtherance of only one objective when the remainder of the record manifestly displayed the hindrance of the other eight.

The 'one objective' approach proposed by appellants could also work to subvert the purposes of judicial review of boundary review board decisions. Under appellants' approach, boundary review boards would have little incentive to engage in complete and careful review of the evidence, since they could completely insulate their decisions from judicial review by considering only one of the RCW 36.93.180 objectives. A comprehensive approach, by way of contrast, would provide incentives for boundary review boards to consider each of the statutory objectives in detail, thus providing for better decision making in the long run.

King County v. BRB at 673-674.



## MEMORANDUM

TO: Boundary Review Board Members and Staff

FROM: Robert C. Kaufman, Special Assistant Attorney General

RE: Impact of Supreme Court Decision on Boundary Review Board Authority

The Washington State Supreme Court reversed the decision of the King County board expanding the proposed Rose Hill Annexation to the City of Redmond. In a 5-4 decision, the Supreme Court held, as a matter of law, that the Board had exceeded its authority by adding territory to the original annexation area. In so doing, the Court canceled the Board's power to expand proposed annexation areas that had been exercised by various Boards for nearly forty years. The Court also held that the Board lacked authority to impose the City of Redmond's pre-annexation indebtedness and pre-annexation zoning on property owners outside of the original annexation area.

The following are some of the few definitive statements in the decision:

1. For reasons indicated below, we hold that the proposed annexation is contrary to statutory property-owner consent and boundary modification provisions contained in chapters 35A.14 RCW and 36.93 RCW.
2. RCW 35A.14.140 prevents *any* new territory from being added at the final city ordinance. But a city can accept, reject, or geographically modify proposed annexation at earlier stages.
3. Here, because Redmond failed to propose to annexation proponents that the annexation area should be larger, the later increased area of annexation violates RCW 35A.14.140.
4. The authority of Boundary Review Boards under RCW 36.93.150 to "modify" or "adjust" boundaries is best understood to allow "adjusting" boundary changes that do not add to the total acreage.
5. This court will not amend the statute to add the word "expand" to the Boundary Review Board's statutory mandate adopted by the legislature.
6. We reject this effort to frustrate statutory provisions, which all require some form of property owner support for annexation. The direct petition method, in particular, specifies that the annexation petition must include the area proposed to be annexed, which is then subject to a vote by the city's legislative body.
7. The long established statutory scheme for annexation as a matter of agreement between Redmond and the new citizens does not give authority to the BRB to force annexation on unwilling property owners.
8. Interlake argues that the BRB cannot impose Redmond's pre-annexation indebtedness on property owners outside the petition area: "no taxation without representation." We agree with Interlake, holding that a Boundary Review Board cannot subject the property owners residing outside of the 58.96 acre area to taxation for such indebtedness.
9. The annexation petition here did contain provisions of the annexed properties accept their proportionate share of the city's indebtedness. Owners possessing at least 60% of the property value within the original 58.96 acre area assented by signing the petition. However, no owner outside of the original 58.96 acre area (but within the BRB's 184 annexation area) ever assented to be taxed for such indebtedness.

10. A Boundary Review Board has no power to subject unrepresented property owners to taxation for pre-annexation indebtedness or zoning under RCW 35A.14.120. Such liability requires an express provision in the petition under the plain terms of RCW 35A.14.120. The terms of that provision would be meaningless if indebtedness and zoning could be imposed upon property owners who were never afforded any opportunity to consider the petition.

The majority opinion, at first blush, seems to contain some inconsistent holdings. One portion of the opinion suggests that the Board may add territory that is not part of the original annexation area so long as the total acreage is not affected (“the authority of Boundary Review Board’s under RCW 36.93.150 to ‘modify’ or ‘adjust’ boundaries is best understood to allow ‘adjusting’ boundary changes that do not add to the total acreage.”) Later, however, the court later stated “a Boundary Review Board has no power to subject unrepresented property owners to taxation for pre-annexation indebtedness or zoning under RCW 35A.14.120”.

The method of annexation before the Court was the *petition* method under which there is no citizen participation after the Board acts on the annexation to add territory. The Court focused on the absence of citizen participation in support of its conclusion that “consent” must exist before citizens may be annexed. For this reason, an argument could be made that the reasoning of the Court and the constitutional prohibition it found to exist do not apply to the *election* method of annexation. Under the election method of annexation, the citizens make the ultimate decision as to whether they will annex, and the consent the voters, given in the form of an affirmative vote, should satisfy the Court’s findings that there must be citizen consent to annexation.

If a Board finds that the Supreme Court’s decision is limited to petition-method annexations and chooses to expand an election-method annexation in the appropriate case, it can reasonably expect a court challenge if there are objections to the expansion. This will not enhance the popularity of BRB’s among its detractors, but whether this should be a factor in reaching a decision is up to the individual members.