

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR LEWIS COUNTY

OLYMPIA MASTER BUILDERS, a
Washington non-profit professional trade
association; THURSTON COUNTY
CHAMBER OF COMMERCE, a Washington
non-profit; and HINKLE PROPERTIES, INC.
d/b/a HINKLE HOMES, a Washington
corporation,

Plaintiffs,

v.

THURSTON COUNTY.

Defendant.

NO.

COMPLAINT FOR
DECLARATORY JUDGMENT,
WRIT OF MANDAMUS, WRIT OF
PROHIBITION, AND
INJUNCTIVE RELIEF

Plaintiffs, Olympia Master Builders, Thurston County Chamber of Commerce, and
Hinkle Properties, Inc. dba Hinkle Homes (collectively, "Plaintiffs"), allege as follows:

I. INTRODUCTION

In 2015, the Thurston County Board of County Commissioners, without motion, resolution,
or ordinance subject to public hearing or participation, modified Thurston County's Critical Area
Ordinance ("CAO") (Thurston County Code ("TCC") Title 24) by implicitly approving staff
implementation of guidance provided by the United States Fish and Wildlife Service ("USFWS")
for County review of local land use permit decisions involving potential impacts to Mazama pocket
gopher habitat, known as the "interim permitting process" ("2015 Interim Process") (**Exhibit A**).

1 The 2015 Interim Process differed significantly, both substantively and procedurally, from
2 provisions of the Thurston CAO directly regulating the identification and protection of Mazama
3 pocket gopher habitat.

4 The 2015 Interim Process was a reaction to the 2014 federal listing of four subspecies of
5 Mazama pocket gopher in Thurston and Pierce Counties as “threatened” under the Endangered
6 Species Act. *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for*
7 *Mazama Pocket Gophers*, 79 Fed. Reg. 19,712-01 (April 9, 2014); 16 U.S.C. § 1533(b)(2) (critical
8 habitat designation). However, unlike the tens of thousands of local jurisdictions nationwide that
9 continue to review and issue land use and development permits for non-federal projects following
10 the federal listing of a species, Thurston County functionally transferred its authority to issue local
11 permits to a federal agency without any public input, and in direct conflict with applicable local,
12 state, and federal law.

13 The County’s inappropriate and unlawful implementation of the 2015 Interim Process in
14 lieu of its lawfully adopted CAO has resulted in undeniable and continuing harm to Thurston
15 County property owners and citizens. The County’s actions have (1) created unprecedented levels
16 of uncertainty; (2) deprived property owners of the ability to develop their properties with intended
17 and legally permitted uses; (3) left property owners without any ability or process to challenge the
18 edict of a federal agency that should not directly regulate local land use permitting; and (4) created
19 months, if not years, of delay for the thousands of Thurston County residents seeking to sell or buy
20 property, make an addition to their home, build an additional structure on their property, rebuild an
21 existing structure, or build their dream or retirement home. The County’s actions are unlawful and
22 must be set aside.

23 **II. PARTIES AND STANDING**

24 2.1 Plaintiff Olympia Master Builders is a non-profit professional trade organization
25 representing over 400 member companies in construction and construction-related industries that
26 primarily do business in and/or develop projects within Thurston County. Olympia Master

1 Builders' purpose is to improve the construction industry and the business climate in which it
2 operates, and its members are dedicated to integrity, craftsmanship and respect for consumers,
3 the environment, and one another. Olympia Master Builders' primary goal is to provide
4 affordable housing for all economic segments of society. Olympia Master Builders and/or its
5 members participated in the development of the current CAO, and its members apply for local
6 land use permits from the County on a daily basis. Its members' land use and building permit
7 proposals have been delayed and been made uncertain by the 2015 Interim Process. Olympia
8 Master Builders and its members have been injured both by the 2015 Interim Process and the
9 County's failure to follow its duly adopted CAO. Thus, Olympia Master Builders has standing.

10 2.2 Plaintiff Thurston County Chamber of Commerce is a non-profit organization that
11 represents private businesses, non-profits, and government that conduct business in Thurston
12 County. The Chamber advocates for a prosperous healthy communication and works on behalf
13 of its members and community interests by participating in regional planning, economic
14 development, education, community health initiatives, workforce development, community
15 infrastructure, and environmental stewardship. The Chamber worked tirelessly on behalf of its
16 members to inform and educate the community about the potential impacts of a federal listing,
17 and opposed the federal listing on scientific grounds. The Chamber also participated in the
18 development of the County's current CAO, and its members are financially impacted by the
19 uncertainty associated with the 2015 Interim Process, the transition of businesses to adjacent
20 counties due to the unfavorable business climate, and the expense and delay associated with the
21 additional permit process. Its members' land use and building permit proposals have been
22 delayed and been made uncertain by the 2015 Interim Process. The Chamber and its members
23 have been injured both by the 2015 Interim Process and the County's failure to follow its duly
24 adopted CAO. Thus, the Chamber has standing.

25 2.3 Plaintiff Hinkle Properties, Inc. dba Hinkle Homes ("Hinkle Homes") is a
26 Washington corporation doing business in Thurston County. Specifically, Hinkle Homes is a

1 developer and builder of quality single-family residences in the South Sound region. Hinkle Homes
2 owns properties in Thurston County. Its land use and building permit proposals have been
3 delayed and been made uncertain by the 2015 Interim Process. Hinkle Homes has been injured
4 both by the 2015 Interim Process and the County's failure to follow its duly adopted CAO.
5 Thus, Hinkle Homes has standing.

6 2.4 Defendant, Thurston County, is described in RCW 36.04.340 and is a commission
7 county pursuant to Article II, Section 5 of the Washington Constitution.

8 III. JURISDICTION AND VENUE

9 3.1 Lewis County Superior Court has original jurisdiction of this action pursuant to its
10 original jurisdiction to hear all cases at law for which jurisdiction has not been vested by law
11 exclusively in some other court. Washington Constitution, Article IV, Section 6.

12 3.2 Venue is proper in Lewis County Superior Court pursuant to RCW 36.01.050
13 because an action against a county may be commenced in the superior court of either of the two
14 nearest judicial districts.

15 IV. FACTS

16 4.1 On April 9, 2014, USFWS published notice in the Federal Register that four
17 subspecies of the Mazama pocket gopher would be federally listed as threatened species under
18 the ESA. *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for*
19 *Mazama Pocket Gophers*, 79 Fed. Reg. 19,712-01 (April 9, 2014).

20 4.2 The federal listing decision was effective on May 9, 2014. *Id.*

21 4.3 The Mazama pocket gopher is a state-listed threatened species. *See* TCC 24.25,
22 App. 24.25-1.

23 4.4 On May 14, 2015, the Thurston County Board of County Commissioners received
24 a staff report and a briefing from representatives of the USFWS regarding the local land use
25 permitting process. A true and accurate copy of the staff report is attached to this complaint as
26

Exhibit A.

1 4.5 USFWS provided two memos to Thurston County regarding the Mazama pocket
2 gopher. The first, dated May 13, 2015, outlines the USFWS's proposal. A true and accurate
3 copy of the May 13, 2015 memo is attached to this complaint as **Exhibit B**.

4 4.6 The second memo, dated May 28, 2015, is almost identical to the May 13 memo.
5 A true and accurate copy of the May 28, 2015 memo is attached to this complaint as **Exhibit C**.
6 It differs substantively in one sentence, which states that use of third party surveyors "may not
7 meet USFWS needs; consequently such assessments will not substitute for the 2015 screening
8 approach" described in the remainder of the memo. **Exhibit C**, page 2.

9 4.7 The Thurston County Board of County Commissioners did not vote, propose a
10 motion, pass an ordinance or resolution, or even document their May 14, 2015 meeting in
11 minutes. The County's staff report, which outlines the 2015 Interim Process based upon the
12 USFWS guidance memo, was presented to the Board on May 14, 2015. **Exhibit A**.

13 4.8 The Thurston County Board of County Commissioners did not vote, propose a
14 motion, pass an ordinance or resolution, or discuss the 2015 Interim Process in their subsequent
15 meeting on May 19. A true and accurate copy of the Board of County Commissioners May 19,
16 2015 meeting minutes is attached to this complaint as **Exhibit D**.

17 4.9 The Thurston County Board of County Commissioners did not vote, propose a
18 motion, pass an ordinance or resolution, or discuss the 2015 Interim Process in the following
19 meeting on June 2. A true and accurate copy of the Board of County Commissioners June 2,
20 2015 meeting minutes is attached to this complaint as **Exhibit E**.

21 4.10 The Thurston County Board of County Commissioners did not vote, propose a
22 motion, pass an ordinance or resolution, or discuss the 2015 Interim Process during any of their
23 subsequent meetings during implementation of the 2015 Interim Process season (June 1 through
24 October 31, 2015).

25 4.11 Despite the lack of public process, Thurston County modified its approach to
26 processing local land use applications to incorporate the 2015 Interim Process beginning on June

1, 2015. **Exhibit G.**

1 4.12 Thurston County's "2015 Interim Process" was documented in the May 13 and
2 May 28 memos from the USFWS, a flow chart, the County's web page, a "FAQ" page, a news
3 release, and a fact sheet. A true and accurate copy of the flow chart and the County's 2015
4 Review Process as described on their website on September 18, 2015 is attached to this
5 complaint as **Exhibit F**. A true and accurate copy of the "FAQ" page is attached to this
6 complaint as **Exhibit G**. A true and accurate copy of the County's June 11, 2015 news release is
7 attached to this complaint as **Exhibit H**. A true and accurate copy of the fact sheet is attached to
8 this complaint as **Exhibit I**.

9
10 4.13 According to public accounts, beginning on or about August 3, 2015, Thurston
11 County accepted new land use applications, but has declined to process those applications until
12 approximately June 2016, in order to allow for gopher review under the 2015 Interim Process. A
13 true and accurate copy of the County's September 23, 2015 News Release is attached to this
14 complaint as **Exhibit J**.

15 4.14 Neither Thurston County nor the Thurston County Board of County
16 Commissioners initiated the process to institute a moratorium on land use applications in 2015 to
17 provide the public with notice or an opportunity to challenge the 10-month delay between
18 submitting an application (August 2015) and beginning the application review (June 2016).

19 4.15 The differences between Thurston County's Critical Area Ordinance, found in
20 Thurston County Code Chp. 24, and the 2015 Interim Process, are described in Plaintiffs'
21 concurrently filed challenge before the Growth Management Hearings Board. A true and
22 accurate copy of the Petition for Review (without exhibits) is attached to this Complaint as
23 **Exhibit L**.

24 4.16 In brief, the 2015 Interim Process disregards the adopted Critical Area Ordinance
25 in four significant ways. Prior to the federal listing of the gopher, the CAO required (1) a site
26 visit by the County Director; (2) preparation of a report by a professional if the site visit was

1 inconclusive; (3) County review of the report; and (4) site-specific management
2 recommendations, including buffers or on-site mitigation, from the Washington Department of
3 Fish and Wildlife. For the most recently published management recommendations from WDFW,
4 *see Exhibit K.*

5 4.17 In contrast, the 2015 Interim Process requires: (1) two to five site visits over the
6 course of one to three months by USFWS staff and County staff; and (2) issuance of either (a) a
7 “good to go” letter from the USFWS effective until October 31, 2016 and County processing of
8 the remainder of the land use application; or (b) issuance of a “take” letter from the USFWS
9 informing the applicant they must (i) receive federal approval via a Habitat Conservation Plan
10 (“HCP”), (ii) wait for Thurston County to receive federal approval via its anticipated HCP, or,
11 sometimes (iii) change their project. **Exhibit A**, page 4 (“Step 3: Site Visits Begin”); *see also*
12 **Exhibit I.**

13 4.18 Neither the “good to go” letter nor the “take” letter is an authorized regulatory
14 action under the ESA. *See generally* 16 U.S.C. § 1531 et seq.; *see also Marbled Murrelet v.*
15 *Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (concluding that USFWS had not “power to enforce
16 [conditions] other than its authority under section 9 of the ESA” when it sent letter to lumber
17 companies that had “conditions in mandatory language” to avoid “take” of norther spotted owl).

18 4.19 The 2015 Interim Process does not allow the applicant to review or challenge the
19 USFWS’s decision. The 2015 Interim Process also does not allow site-specific management.
20 Even a “good to go” letter, with its one year authorization period, is inconsistent with County
21 Code, which makes the report good for the length of the underlying permit, or three years. *See*
22 TCC 24.40.080.

23 4.20 The 2015 Interim Process disregards the Washington State Department of Fish
24 and Wildlife’s best management practices that are incorporated by reference into the County’s
25 CAO. *See Exhibit K.*

26 4.21 This process violates state law because, first, Thurston County improperly

1 delegated its decision-making authority for local land use applications to the USFWS. See
2 **Exhibits G and L.**¹

3 4.22 Second, Thurston County's soil maps and distances are not based on best
4 available science. For example, on the basis of the USFWS memo, Thurston County excluded all
5 prairie soils west of the Black River from initial screening. **Exhibit A**, page 3 ("Step 1: In Office
6 Screening"). Mima Prairie, which is managed by the State Department of Natural Resources as
7 prairie habitat, is one of Thurston County's largest remaining extant prairies and is found west of
8 and adjacent to the Black River. See *Mima Mounds Natural Area Preserve*, WASH. STATE DEP'T
9 OF NATURAL RESOURCES, available at [http://www.dnr.wa.gov/mima-mounds-natural-area-](http://www.dnr.wa.gov/mima-mounds-natural-area-preserve)
10 preserve.

11 4.23 Third, in making project permitting decisions, Thurston County is relying on a
12 decision by the USFWS, which cannot be challenged or refuted by the project applicant or
13 property owner.

14 4.24 Fourth, Thurston County is improperly shifting the risk of federal enforcement
15 action and the obligation of federal agencies onto the residents of Thurston County.

16 4.25 Fifth, Thurston County failed to provide notice to property owners affected by the
17 change in soil types between 2014 and 2015, as required by TCC Chp. 2.05 and 24.91.030.

18 4.26 Sixth, while Thurston County has the authority to amend its Critical Area
19 Ordinance, it did not comply with the required process to do so here and thereby exceeded its
20 authority to regulate private property. TCC 24.91.030.

21 4.27 Seventh, the 2015 Interim Process is irreconcilably inconsistent with and, thus,
22

23

¹ According to the County's "FAQ" page (**Exhibit G**), the 2015 Interim Process was
24 developed entirely by USFWS, not by the County's CAO process:

25 **Why wasn't I told about this process when I submitted my application?**

26 If you submitted a permit application before June 1, 2015, the county did not yet
have the guidance document from USFWS. USFWS staff have been developing
this process since late 2014. They provided guidance to the county on May 28.
County staff began implementing it on June 1.

violates the duly adopted CAO.

1 4.28 Each of the Plaintiffs has been and continues to be impacted by the uncertainty,
2 reduction in economic development, increased expense, and delays in permit review.

3 4.29 Because Thurston County informally adopted an unlawful gopher review process
4 in 2014, and an even more byzantine and restrictive process in 2015, Plaintiffs have a reasonable
5 concern that Thurston County will continue to impose a process not based in science or law until
6 its negotiations with the USFWS conclude over the proposed HCP—a process that can take
7 anywhere from two to 10 more years, if it is ever completed. During that time, property owners
8 in Thurston County, including Plaintiffs, will continue to be impacted by the uncertainty,
9 reduction in economic development, increased expense, and delays in permit review, all with no
10 scientific basis to show any benefit beyond the existing Code for the Mazama pocket gopher.

11 4.30 The Land Use Petition Act, chapter 36.70C RCW, does not apply to this
12 Complaint because Plaintiffs do not challenge herein any land use decisions, as defined in the
13 statute. Plaintiffs seek declaratory and injunctive relief, as well as relief under the writs of
14 mandamus and prohibition, regarding the County’s authority resulting solely from the federal
15 listing of the species. RCW 36.70C.030(1)(a)(i), (b).

16
17 **V. CAUSES OF ACTION**

18 **A. FIRST CAUSE OF ACTION: UNIFORM DECLARATORY JUDGMENTS ACT**

19 5.1 All preceding paragraphs are incorporated by reference as though fully set forth
20 herein.

21 5.2 Any interested person whose rights, status, or other legal relations are affected
22 may request the Court to determine the construction or validity of the County action, and obtain
23 a declaration of rights, status, or other legal relations.

24 5.3 Plaintiffs and the County are engaged in an actual, present, and existing dispute.
25 *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn. 2d 811, 814-15, 514 P.2d 137 (1973). Plaintiffs
26 and the County have genuine and opposing interests that are direct and substantial. *Id.* A

judicial determination of the dispute will be final and conclusive. *Id.*

1 5.4 This action is of substantial public import. *Superior Asphalt and Concrete Co.*
2 *Inc. v. Wash. Dep't of Labor and Indus.*, 121 Wash. App. 601, 605-06, 89 P.3d 316 (2004).

3 5.5 Plaintiffs request that Superior Court declare that the County lacks statutory
4 authority to independently enforce the federal ESA through local land use permitting.

5 5.6 Plaintiffs further request that the Court declare that the County cannot require
6 property owners to obtain a HCP from USFWS as a condition of local land use permit approval.

7 **B. SECOND CAUSE OF ACTION: WRIT OF MANDAMUS**

8 5.7 All preceding paragraphs are incorporated by reference as though fully set forth
9 herein.

10 5.8 A Superior Court may direct the Board of County Commissioners or Thurston
11 County to compel the performance of an act under a writ of mandamus. RCW 7.16.160.

12 5.9 A writ must be issued in any case where there is not a “plain, speedy and adequate
13 remedy in the ordinary course of law.” RCW 7.16.170. Further, the party subject to the writ
14 must have a clear duty to act and the applicant for the writ must be “beneficially interested.”
15 RCW 7.16.160, 7.16.170.

16 5.10 Plaintiffs are “beneficially interested” because they have an interest in the action
17 beyond other citizens. *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn. 2d 602,
18 616, 62 P.3d 470 (2003). As discussed in Section I, Plaintiffs have an extensive role in business
19 and development projects in Thurston County, demonstrating their unique interest in this action.
20 *See Eugster v. City of Spokane*, 118 Wash. App. 383, 403 (2003) (finding the “beneficially
21 interested” element involves the concept of standing).

22 5.11 Thurston County had a clear duty to act under the County Code. Mandamus is
23 appropriate to compel a government entity when that entity has a duty to act that is not
24 discretionary. *Id.* at 404-05. Mandamus requires the applicant to indicate the “precise thing to
25 be done,” not authorize the court to assume control of official acts. *Id.* at 404. Thurston
26

1 County's duty was not discretionary; the 2012 Critical Area Ordinance provides for a clear
2 permitting process, which the County has failed to follow in their adopting and applying the
3 2015 Interim Process. Plaintiffs request precisely that the Superior Court direct the County
4 follow its 2012 Critical Area Ordinance process, not the 2015 Interim Process.

5 5.12 Absent the Superior Court ordering Thurston County to follow their legally and
6 formally adopted 2012 Critical Area Ordinance under the writ of mandamus, Plaintiffs do not
7 have a speedy or adequate remedy at law.

8 5.13 Plaintiffs request that the Superior Court direct the Board of County
9 Commissioners and Thurston County to process land use applications consistent with the
10 County's adopted 2012 Critical Area Ordinance.

11 **C. THIRD CAUSE OF ACTION: WRIT OF PROHIBITION**

12 5.14 All preceding paragraphs are incorporated by reference as though fully set forth
13 herein.

14 5.15 A Superior Court may arrest the proceedings of the Board of County
15 Commissioners or Thurston County when those proceedings are without or are in excess of the
16 jurisdiction of the Board and County. RCW 7.16.290.

17 5.16 A writ of prohibition requires Plaintiffs to prove the same elements as a writ of
18 mandamus. RCW 7.16.320. As set forth in **Subsections 5.7-5.13**, Plaintiffs satisfy requirements
19 for application of writ of prohibition.

20 5.17 Plaintiffs request that the Superior Court order the Board of County
21 Commissioners and Thurston County to cease use of the 2015 Interim Process.

22 **D. FOURTH CAUSE OF ACTION: INJUNCTION**


23 5.18 All preceding paragraphs are incorporated by reference as though fully set forth
24 herein.

25 5.19 Plaintiffs are entitled to immediate and permanent injunctive relief, requesting the
26 Court to exercise its authority to stay the 2015 Interim Process and to restrain Thurston County

6.7 Award any other or further relief this Court deems just and proper.

Respectfully submitted this 24th day of November, 2015.

PHILLIPS BURGESS PLLC

By: 
Heather L. Burgess, WSBA #28477
Leslie C. Clark, WSBA #36164

724 Columbia Street NW, Suite 320
Olympia, Washington 98501
Telephone: 360-742-3500
Facsimile: 360-742-3519
Email: hburgess@phillipsburgesslaw.com
Email: lclark@phillipsburgesslaw.com

Attorneys for Plaintiffs