SUPREME COURT
OF THE STATE OF WASHINGTON

SPOKANE COUNTY, a political subdivision of the State of Washington, HARLEY C. DOUGLASS, INC.

Respondent,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, a statutory entity, FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION, AND FUTUREWISE, a Washington Non-Profit Organization,

Appellants,

PETITION FOR REVIEW

Dan Catt
Sr. Deputy Prosecuting Attorney
WSBA #11606
Spokane County Prosecuting Attorney
1115 West Broadway, 2nd Floor
Spokane, Washington 99260
Telephone: (509) 477-4509

David W. Hubert
Attorney at Law
WSBA #16488
20953 North 79th Drive
Peoria, Arizona 85382-4455
Telephone: (509) 998-1152

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I. IDENTITY OF PETITIONER

The County of Spokane, a political subdivision of the State of Washington, the Respondent before the Court of Appeals below (hereinafter referred to as "Spokane County" or "Petitioner"), brings this Petition for Review to the Supreme Court. Spokane County is also the Respondent in both the action before the Growth Management Hearings Board and before the Superior Court.

II. CITATION TO COURT OF APPEALS DECISION

The decision of the Court of Appeals for which review is sought is Court of Appeals, Division III, case number 31941-5-III, which decision was filed by the Court of Appeals on April 9, 2015. (A copy of the Court of Appeals decision accompanies this Petition as Appendix A). The decision of the Court of Appeals is the result of review by the Court of Appeals of a Final Decision and Order of the Eastern Washington Growth Management Hearings Board regarding case number 12-1-0002, dated August 23, 2012. (A copy of the Eastern Washington Growth Management Hearings Board, Final Decision and Order, Case No. 12-1-0002 accompanies this Petition as Appendix B).

III. ISSUES PRESENTED FOR REVIEW

The issues presented for review by this Court are:

1. Whether RCW 36.70A.3201 requires the Growth Management Hearings Board and Courts of Appeal to defer to local jurisdictions in how they plan under a comprehensive plan that is consistent with the requirements and goals of the Growth Management Act?

2. Whether a rezone that is adopted concurrently with a comprehensive plan amendment that authorizes the rezone, and is thus a development regulation, is subject to the local jurisdiction's zoning code?

3. Whether RCW 36.70A.280 authorizes the Growth Management Hearings Board's consideration of an allegation that a site specific rezone violates the local jurisdiction's zoning code?

IV. STATEMENT OF THE CASE

The decision of the Court of Appeals from which this Petition for Review is taken stems from an action of Spokane County in a property owner requested site-specific rezone of his property from Low Density Residential Zoning to Medium Density Residential zoning. Appendix C, p. 2. To accomplish the requested rezone of the property, the Spokane County Comprehensive Plan Map first needed to be amended to allow the requested change in zoning. Appendix C, p.2.

The requested site specific comprehensive plan amendment was considered along with several other proposed comprehensive plan amendments during the annual amendment process conducted by Spokane County and the amendment was adopted as requested. Appendix C, p. 4; Appendix D, p.6. Along with the comprehensive plan amendment, and during the amendment process, Spokane County also considered the requested rezone of the property as requested by its owner, and the rezone was adopted immediately following the adoption of the comprehensive plan amendment and was published in the same ordinance by which the comprehensive plan amendment was adopted. Appendix C, p. 4; Appendix D, p.6.

The adoption of the comprehensive plan and the rezone were challenged before the Growth Management Hearings Board pursuant to RCW 36.70A.280. The Petition for Review before the Growth Management Hearings Board cited only alleged inconsistencies between the amendment and rezone and the policies of the Spokane County Comprehensive Plan. The only alleged violation of the Growth Management Act (GMA) was that the amendment to the comprehensive plan map caused the comprehensive plan to be internally inconsistent. Appendix E, pp. 21 - 38. Allegations were also made that the site-specific rezone was not compliant with the Spokane County Zoning Code.

The Growth Management Hearings Board found that the amendment and the rezone were non-compliant with the GMA and with the Spokane County Zoning Code. Appendix B. The Spokane County Superior Court reversed the decision of the Growth Management Hearings Board and the Court of Appeals reversed in part and upheld in part the Growth Management Hearings Board decision. Appendix A. This matter now comes to this Court on a Petition for Review.

V. ARGUMENT

A. THE OPINION OF DIVISION III OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER COURT OF APPEALS DECISIONS.

1. The Court of Appeals' Decision Ignores the GMA Requirement that Local Jurisdictions be Given Broad Deference For Planning Actions that are Consistent With the GMA.

In *Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 237 – 238, 110 P.3d 1132 (2005), this Court recognized that "[i]n 1997 the legislature took the unusual additional step of enacting into law its statement of intent in amending RCW 36.70A.320 to accord counties and cities planning under the GMA additional deference." The Quadrant decision goes on to state:

> In the face of clear legislative directive, we now hold that deference to county planning actions, *that are consistent with the goals and requirements of the GMA*, supersedes

> deference granted by the APA and courts to administrative bodies in general.
> (*Id.* at 238; emphasis added)

The fatal error in the decision of the Court of Appeals, Division III, challenged by this petition for review, is that the Court of Appeals ignores the very heart of the required deference. The clear legislative directive referred to by this Court in *Quadrant* is found in RCW 36.70A.3201; "... the legislature intends for the board to grant deference to counties and cites in how they plan for growth, *consistent with the requirements and goals of this chapter.*" (Emphasis added) It is consistency with the requirements and goals of the Growth Management Act (GMA), Title 36, Chapter 70A, of the Revised Code of Washington, that the grant or denial of deference under RCW 36.70A.3201 is based, and only upon the consistency with the requirements and goals of the GMA. RCW 36.70A.3201 (Attached as Appendix I); *Quadrant Corporation v. Growth Management Hearings Board*, supra.

In conflict with the clear legislative directive referred to in *Quadrant*, the Court of Appeals' decision demands strict consistency with the policies of the Spokane County Comprehensive Plan rather than the requirements and goals of the GMA. Appendix A, pp. 34 – 52. The Court of Appeals decision does not refer to any requirement or goal of the GMA with which the adoption of 11-CPA-05 by Spokane County is inconsistent.

Appendix A. Likewise the Growth Management Hearings Board's Final Decision and Order does not cite inconsistency of 11-CPA-05 with any requirement or goal of the GMA. Appendix B. Appellants Five Mile Prairie Neighborhood Association and Futurewise's only claim of inconsistency with the GMA[1] is that, in their opinion, 11-CPA-05 is inconsistent with the policies of the Spokane County Comprehensive Plan thus the comprehensive plan is internally inconsistent. Appendix E, pp. 21 – 38.

To ignore the directive that deference must be given for actions that are consistent with the requirements and goals of the GMA is in conflict with *Quadrant Corporation v. Growth Management Hearings Board, supra*; *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 293 P.3d 1248 (2013); *Spokane County v. Eastern Washington Growth Management Hearings Board*, 176 Wn. App. 555, 309 P.3d 673 (2013); among many other cases that follow the legislature's directive.

This challenged decision of the Court of Appeals conflicts with its decision in *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 293 P.3d 1248 (2013) regarding the alleged lack of compliance with Spokane County Comprehensive Plan

[1] RCW 36.70A.070.

Policy UL.2.16, accessibility to a major arterial. At 173 Wn. App. 333, the Court of Appeals opines that "if a map amendment meaningfully advances other comprehensive plan goals and policies, a finding by the growth board that it fails to advance another – if it fails to advance, for example, a goal of encouraging high density residential development on sites having good access to a major arterial – that alone cannot be an invalidating inconsistency". In contrast, the Court of Appeals opinion in this case determines that inconsistency with Policy UL.2.16 by its self is sufficient to support a finding of non-compliance with the GMA. Appendix A, pp. 34 – 52, 58 – 63.

If the Court of Appeals' decision is allowed to stand it would at best cause confusion regarding the application of the mandate in RCW 36.70A.3201, and at worst be seen as diminishing the legislature's directive and this Court's decision in *Quadrant* that the Growth Management Hearings Board is to give broad discretion to planning decisions that are consistent with a GMA compliant comprehensive plan. Spokane County respectfully requests review by this Court for clarification regarding the meaning and application of RCW 36.70A.3201 and the family of cases relying upon it.

2. The Court of Appeals' Decision Demands that a Comprehensive Plan Amendment/Development Regulation Comply with the Zoning Code.

In *Spokane County v. Eastern Washington Growth Management Hearings Board*, 176 Wn. App. 555, 309 P.3d 673 (2013), the Court of Appeals states that, if a site-specific rezone implements a comprehensive plan amendment that is adopted concurrently with the rezone, the rezone is an amendment to a development regulation under the GMA and is therefore reviewable by the Growth Management Hearings Board. 176 Wn. App. 555, 571 – 572. This same rule is stated in *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 52, 308 P.3d 745 (2013) and again in the decision challenged by this petition.

In conflict with its opinion that a rezone adopted concurrently with the comprehensive plan map amendment that authorizes the rezone is reviewable by the Growth Management Hearings Board for compliance with the GMA, the Court of Appeals then opines that the Growth Management Hearings Board correctly considered whether the rezone was compliant with Spokane County Zoning Code 14.402.040. Spokane County Zoning Code 14.402.040 addresses when a rezone is appropriate independent of a comprehensive plan amendment. See Court of Appeals, Division III, Unpublished Opinion 31941-5-III, at pages 52 – 57. Notwithstanding its opinion that the Growth Management Hearings Board

had jurisdiction to consider compliance with the zoning code, just one page later the Court of Appeals opines that the Growth Management Hearings Board probably lacked jurisdiction over the challenge to the rezone under Spokane County Zoning Code 14.402.040. This latter opinion is most likely based upon well established law found in *Quadrant Corporation v. Growth Management Hearings Board*, supra, and *Wenatchee Sportsman Association v. Chelan County*, 141 Wn.2d 169, 178 – 183, 4 P.3d 123 (2000). See also RCW 36.70C.030 and *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). Development regulations, such as zoning codes, directly constrain site-specific land use decisions, which decisions are subject to the exclusive jurisdiction of the superior court for review. *Woods v. Kittitas County*, at 613 – 614.

If a rezone adopted concurrently with a comprehensive plan amendment is a development regulation, then it is subject to the jurisdiction of the Growth Management Hearings Board solely for a determination of compliance with the requirements and goals of the GMA, the rezone is not subject to review for compliance with the zoning code. RCW 36.70A.280; *Woods v. Kittitas County*, at 613 – 614. The Court of Appeals' decision conflicts with well established law and causes confusion regarding the interaction between the GMA and LUPA.

Spokane County respectfully requests that this Court accept review of the Court of Appeals decision on all issues raised in this petition.

B. THE DECISION OF THE COURT OF APPEALS HIGHLIGHTS ISSUES OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

1. The Deference Mandated by RCW 36.70A.3201 is an Issue of Substantial Public Interest.

The decision of the of the Court of Appeals in this matter and in the decision of *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 293 P.3d 1248 (2013) (*Headwaters* case) highlight the need for clarification of the deference to be given to local jurisdictions in planning under the GMA when challenged before the Growth Management Hearings Board. Both of those cases involve Spokane County's adoption of a comprehensive plan map amendment accompanied by a concurrent rezone of a specific parcel of property.

In both cases the owners of the respective properties requested that Spokane County rezone their property from Low Density Residential zoning to a higher density residential zone. Appendix C, pp. 2 – 4; Appendix F, p.1. A rezone of either of the properties required first that a comprehensive plan map amendment be adopted relative to the respective properties. Appendix C, pp. 2 – 4; Appendix F, p.1. Both properties are

within the UGA established by Spokane County, with public utilities and services at the property. Appendix D, p. 1. Each of the properties is unique in its location relative to the surrounding parcels, topography, and limitations upon development as other than residential properties. Appendix C, p. 2 – 4; *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 332 – 333. In the *Headwaters* case several of the issues raised before the Growth Management Hearings Board were the same or similar to the issues raised in the matter in this petition; the issues alleged Spokane County's failure to comply with policies of the Spokane County Comprehensive Plan as those policies were interpreted by the opponents to the amendment and rezone. Appendix B; 173 Wn. App. 310.

The issue, framed by the two decisions cited above, needing clarification from this Court is specifically at what point in the planning process is the deference required by RCW 36.70A.3201 intended to apply? It seems clear from the statute and from decisions of this Court that, when a local jurisdiction is planning within the requirements and goals of the GMA the jurisdiction has broad discretion to balance the local circumstances to develop a unique plan that addresses the local circumstances. The question remains, as is the case in this matter and the *Headwaters* case, if there are no allegations of non-compliance with a

specific requirement of the GMA and the local jurisdiction is applying its own comprehensive plan policies to a specific and unique property, does the Growth Management Hearings Board have authority to substitute its own judgment for that of the local jurisdiction in evaluating the challenged planning action?

Although the clear language of the GMA and of the numerous decisions of this Court and the Courts of Appeal appear to prohibit the Growth Management Hearings Board from substituting its judgment for that of the local jurisdiction in matters of applying GMA compliant comprehensive plan policies to specific properties, based upon unique local circumstances, that is exactly what the Growth Management Hearings Board does repeatedly. Guidance from this Court is necessary.

Spokane County respectfully requests that petition for review of this matter be granted.

2. The Court of Appeals Decision Creates Confusion Over When a Site Specific Rezone is Reviewable by the Growth Management Hearings Board and When it is Reviewable by the Superior Court.

This Court's decisions in *Wenatchee Sportsman Association v. Chelan County*, 141 Wn.2d 169, 178 – 183, 4 P.3d 123 (2000) and *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007) appear to make clear what is meant by the term "site specific rezone" and that a site

specific rezone is solely reviewable by the superior court under the jurisdiction of the Land Use Petition Act (LUPA).

In *Wenatchee Sportsman* this Court opines that a site-specific rezone that is authorized by a comprehensive plan is a "project permit application" that Growth Management Hearings Board lacks jurisdiction to review. 141 Wn.2d 179 – 180. The *Woods v. Kittitas County* decision draws a distinction between a site specific rezone, one that is requested by the property owner, and an area-wide rezone affecting more than a single parcel, which is a legislative act and presumably initiated by the local jurisdiction's governing body. *Woods v. Kittitas*, *supra* at 610 – 615. *Woods v. Kittitas* unequivocally states that a site specific rezone is not only a project permit application but is also not subject to review for compliance with the GMA; a site specific rezone is reviewable exclusively by the superior court under the LUPA. *Id.*

In contrast to what appears to be a clear statement of the law, Division III of the Court of Appeals has decided several cases that attempt to distinguish the *Wenatchee Sportsman Association* and *Woods* cases and appear to draw a different conclusion than does this Court regarding site specific rezones.

The first decision in the line of cases leading to the confusion complained of by Spokane County is *Coffey v. City of Walla Walla*, 145

Wn. App. 435, 187 P.3d 272 (2008), recognizes that it is not uncommon for those hoping to develop property to seek both a comprehensive plan amendment and a rezone of property in the same proceeding. 145 Wn. App. 437 – 438. The Court of Appeals goes on to opine that "[a]nyone seeking to challenge both aspects of a ruling granting both requests would by statute have to appeal to two entities: the GMHB for the comprehensive plan amendment and superior court for the rezone. While the two-front appeal process could be burdensome, we can imagine that trial courts would be inclined to stay proceedings pending the Board's determination of the comprehensive plan challenge". *Id.* The Court's decision in *Coffey* appears to follow the instruction from *Wenatchee Sportsman Association* and *Woods*.

In the cases of *Spokane County v. Eastern Washington Growth Management Hearings Board*, 176 Wn. App. 555, 309 P.3d 673 (2013) and *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 52, 308 P.3d 745 (2013) the Court of Appeals states that a site specific rezone adopted concurrently or immediately following a comprehensive plan amendment is a development regulation subject to the GMA, unless the rezone is "authorized by a *then* existing comprehensive plan" (emphasis added). Now in the decision in this current case, Court of Appeals, Division III, Case Number 31941-5-III, at 52 – 58, the Court opines that

notwithstanding the jurisdiction of the Growth Management Hearings Board to review the comprehensive plan amendment and the concurrent rezone as a development regulation, the Hearings Board is also authorized to review the rezone for compliance with the Spokane County Zoning Code. The relationship between the GMA and LUPA however is not parallel but is hierarchical, thus the Growth Management Hearings Board has no jurisdiction to determine whether a rezone that is a development regulation is in compliance with the zoning code, a development regulation its self. *Woods v. Kittitas*, supra at 615 – 616.

Clarification regarding to what tribunal a review of a site specific rezone action is to be taken, and the scope of the review by the Growth Management Hearings Board, when review there is appropriate, is a matter of substantial interest to all jurisdictions that plan under the GMA.

VI. CONCLUSION

The Court of Appeals opinion in this case diminishes if not overturns the directive of RCW 36.70A.3201 and that of the case of *Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005), that local jurisdictions must be given broad deference in how they plan within requirements and goals of the GMA. The decision will condone the Growth Management Hearings Boards substitution of its own judgment for that of the local jurisdictions regarding the interpretation

of the local comprehensive plan policies and planning for unique local circumstances.

Regarding the issue of whether a site-specific rezone is a development regulation subject to review by the Growth Management Hearings Board or is a project permit application subject to review by the Superior Court, this decision conflicts with this Court's decisions in *Wenatchee Sportsman Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000) and *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007) by inserting language that this Court chose not to include.

Finally, the decision goes beyond the language of the GMA and decisions of this Court by condoning the Growth Management Hearings Board's review of a site-specific rezone, and considering the rezone's compliance with the zoning code.

The Court of Appeals opinion in this case conflicts with decisions of this Court and of the Court of Appeals itself. The decision also points out the need for clarification from the Supreme Court regarding application and construction of the Growth Management Act. Spokane County respectfully requests that the Court accept review of this case on the grounds discussed above.

Respectfully submitted this 7 day of May, 2015.

STEVEN J. TUCKER
Spokane County Prosecutor

DAN CATT, WSBA #11606
Sr. Deputy Prosecuting Attorney
Attorneys for Spokane County

David W. Hubert
Attorney at Law

Telephonic approval 5/7/2015

DAVID W. HUBERT
WSBA #16488
Attorney for Spokane County

APPENDIX

A – Unpublished opinion of the Court of Appeals, Spokane County v. Eastern Washington Growth Management Hearings Board, Case No.: 31941-5-III, Filed April 9, 2015

B – Final Decision and Order of the Eastern Washington Growth Management Hearings Board, Case No.: 12-1-0002, Dated August 23, 2012

C – Brief of Respondent Harley C. Douglas, Inc., Court of Appeals, Division III, Case No.: 31941-5-III

D – Respondent Spokane County's Response Brief, Court of Appeals, Division III, Case No.: 31941-5-III

E – Brief of Appellants Five Mile Prairie Neighborhood Association and Futurewise

F – Final Decision and Order of the Eastern Washington Growth Management Hearings Board, Case No.: 10-1-0010

G – RCW 36.70A.070

H – RCW 36.70A.280

I – RCW 36.70A.3201

J – RCW 36.70C.030

K – Spokane County Zoning Code 14.402.040

PROOF OF SERVICE

I hereby declare under the penalty of perjury and the laws of the State of Washington that the following statements are true.

On the 8th day of May, 2015, I caused to be served a true and correct copy of the **PETITION FOR REVIEW** by the method indicated below, and addressed to the following:

Dionne Padilla-Huddleston Assistant Attorney General Office of the Attorney General 800 Fifth Avenue, Suite 2000 Mailstop TB14 Seattle, WA 98104	___ Personal Service ___ U.S. Mail ___ Hand-Delivered ___ Overnight Mail _X_ Electronic Mail
Growth Management Hearings Board P.O. Box 40953 Olympia, WA 98504-0953	___ Personal Service _X_ U.S. Mail ___ Hand-Delivered ___ Overnight Mail _X_ Electronic Mail
Tim Trohimovich, Esq. Futurewise 816 Second Avenue, Suite 200 Seattle, WA 98104	___ Personal Service _X_ U.S. Mail ___ Hand-Delivered ___ Overnight Mail _X_ Electronic Mail
William John Crittenden, Esq. Michael Murphy, Esq. Goff Murphy, PLLC 300 East Pine Street Seattle, WA 98122	___ Personal Service _X_ U.S. Mail ___ Hand-Delivered ___ Overnight Mail _X_ Electronic Mail

DATED this 8th day of May, 2015 in Spokane, Washington.

Tamara Baldwin

OFFICE RECEPTIONIST, CLERK

To: Baldwin, Tamara
Cc: 'dionnep@atg.wa.gov'; eastern@eluho.wa.gov; tim@futurewise.org; 'Mike Murphy'; wjcrittenden@comcast.net; zdeatley@groffmurphy.com; Catt, Dan; David Hubert (dhubert@dwhlawaz.com)
Subject: RE: Spokane County, et al. v. EWGMHB, Five Mile Prairie Neighborhood Association, et al.

Received 5/8/15

From: Baldwin, Tamara [mailto:TBALDWIN@spokanecounty.org]
Sent: Friday, May 08, 2015 10:39 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'dionnep@atg.wa.gov'; eastern@eluho.wa.gov; tim@futurewise.org; 'Mike Murphy'; wjcrittenden@comcast.net; zdeatley@groffmurphy.com; Catt, Dan; David Hubert (dhubert@dwhlawaz.com)
Subject: Spokane County, et al. v. EWGMHB, Five Mile Prairie Neighborhood Association, et al.

Dear Sir/Madam:

Please find attached Spokane County's Petition for Review. Due to the size of the Appendixes (264 pages) they are being mailed to the Court.

Should you have any questions regarding the attached Petition for Review, please do not hesitate to contact Dan Catt at (509) 477-5764.

Thank you for your assistances with this matter.

Tamara L. Baldwin, Secretary
Spokane County Prosecuting Attorney's Office
Civil Division
(509) 477-5764

APPENDIX
"A"

SPOKANE COUNTY, a political subdivision of the State of Washington, Respondent,
v.
EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, a statutory entity, Other,
FIVE MILE PRARIE NEIGHBORHOOD ASSOCIATION, and FUTUREWISE, a Washington Non-Profit Organization, Appellants,
HARLEY C. DOUGLAS, Inc., Respondent.
No. 31941-5-III
COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION THREE
April 9, 2015

UNPUBLISHED OPINION

††††††††FEARING, J. ó We address once again the compliance of Spokane County with Washington's intractable Growth Management Act (GMA), chapter 36.70A RCW, this

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time in the context of a comprehensive plan amendment that rezoned a parcel of land. The reviewing administrative agency, the Growth Management Hearings Board (GMHB), invalidated the amendment, and the superior court reversed. We reverse in part and affirm in part the decisions of the superior court and remand the case to the GMHB for further proceedings.

††††††††Our previous decision in *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 293 P.3d 1248 (2013) (*Spokane County I*), provides answers to some of the issues raised in this appeal, but this appeal asks many other questions. Like the dispute in *Spokane County J*, this dispute is fact specific and demands a thorough review of the Spokane County comprehensive plan and a zoning ordinance, an intimate evaluation of the record before the Spokane County Board of Commissioners and the GMHB, and an analysis of the GMA. We address both the merits of the challenge to the rezone and procedural issues under the GMA.

FACTS

††††††††Neighbors to 22.3 acres of undeveloped land and environmental groups challenged, before the GMHB, Spokane County's Resolution 11-1191. We refer to the challengers collectively as the "Neighborhood Association." The resolution adopted many changes to Spokane County's comprehensive plan. This appeal solely addresses a narrow portion of the resolution, the portion that adopted amendment 11-CPA-05 to the county's comprehensive plan and rezoned the 22.3 acres along N. Waikiki Road from

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low-density residential to medium-density residential. The amendment allows the placement of multifamily complexes on the land, whereas the former zoning allowed duplexes as the most intense use on the tract. The Neighborhood Association contends the rezone, in part, failed to recognize the lack of access and lack of available utilities to the site and thereby violated Spokane County's comprehensive plan, its zoning code, and the GMA.

††††††††Washington's GMA requires a county to adopt and maintain comprehensive plans and development regulations which, among other goals, provide for the public facilities and services needed to support new development and reasonably zone land within the county. The GMA demands that a

county yearly update the comprehensive plan. To help understand the dispute on appeal, we sketch critical fragments of the Spokane County comprehensive plan. The comprehensive plan conveniently divides itself into chapters by subject matter, with the first chapter being an introduction. The introductory chapter explores the nature of a comprehensive plan and outlines the demands of Washington's GMA.

††††††††Spokane County's comprehensive plan encompasses a set of goals, policies, maps, illustrations, and implementation strategies that outline acceptable methods of physical, social, and economic growth in the county. A central theme of the plan is the promotion of economic development that occurs in harmony with environmental protection and preservation of natural resources. The plan "establishes a pattern of land uses to shape

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the future in desirable ways." Admin. Record (AR) at 835. Map designations incorporate residential, commercial, industrial and mixed-use areas. Identifying and defining these land use categories ensures compatibility among uses, protection of property values, and efficient provision of infrastructure and services.

††††††††Chapter 2 of Spokane County's comprehensive plan addresses "urban land use" and its pages start with the letters "UL." AR at 843-44. The urban land use chapter provides policy guidance for the development of Spokane County's unincorporated urban areas. The chapter's policies strive to improve quality of life, provide opportunities for innovative approaches to land use, and protect the county's community character. The policies work in tandem with the comprehensive plan map, which illustrates the location of various land use categories.

††††††††Chapter 2 of the comprehensive plan outlines plan goals, with each goal separately numbered beginning with UL.1. One goal is to identify and designate land for residential use into the three categories of low-, medium-, and high-density areas. Policy UL.7.1. Low-density residential includes a density range of 1 to and including 6 dwelling units per acre; medium-density residential includes a range of greater than 6 to and including 15 dwelling units per acre; and high-density residential is greater than 15 dwelling units per acre. This appeal entails Spokane County's change of a tract of land from low-density residential to medium-density residential under the county's comprehensive plan and zoning ordinance.

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††††††††A number of goals in the comprehensive plan's Chapter 2 address the location of multifamily housing. The Neighborhood Association claims Spokane County's rezone violated some of these goals, in particular:

> UL.2.16 Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials.
> UL.2.17 Site multifamily homes throughout the Urban Growth Area as follows:
> a) Integrated into or next to neighborhood, community or urban activity centers.
> b) Integrated into small, scattered parcels throughout existing residential areas.
> New multi-family homes should be built to the scale and design of the community or

> neighborhood, while contributing to an area-wide density that supports transit and allows for a range of housing choices.

AR at 848. A third urban land use policy goal, UL.2.20 reads:

> UL.2.20 Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus or car. Cul-de-sacs or other closed street systems may be appropriate under certain circumstances including, but not limited to, topography and other physical limitations which make connecting systems impractical.

AR at 849

††††††††Chapter 7 of the Spokane County comprehensive plan addresses capital facilities and utilities. The chapter's pages begin with CF-1 and its goals begin with CF.1. According to the plan, public facilities and services are often taken for granted, but, without coordination and conscientious planning for future growth, facilities and services may be interrupted or inadequate. One fundamental tenet of the GMA is for local

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governments to ensure the availability of adequate public facilities and services to serve existing and future developments. Existing facilities and services must be able to support new development or provisions for improvements must be made where deficiencies exist. Capital facilities include roads, water, sewer, solid waste, parks, jails, police protection, and fire protection. Policy goal CF.3.1 reads:

> Development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards.

AR at 276. The capacity to serve is termed "concurrency," which "describes the situation in which adequate facilities are available when the impacts of development occur, or within a specified time thereafter." WAC 365-196-840(b).

††††††††The Neighborhood Association also contends Spokane County violated one of its zoning ordinances when rezoning the subject land. Spokane County Zoning Code (SCZC) section 14.402.040 provides:

> The County may amend the Zoning Code when one of the following is found to apply.
> 1. The amendment is consistent with or implements the Comprehensive Plan and is not detrimental to the public welfare.
> 2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code.
> 3. An amendment is necessary to correct an error in the Zoning Code.
> 4. An amendment is necessary to clarify the meaning or intent of the Zoning Code.
> 5. An amendment is necessary to provide for a use(s) that was not

previously addressed by the Zoning Code.

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6. An amendment is deemed necessary by the Commission and/or Board as being in the public interest.

AR at 1027.

††††††††Spokane County ordinances addressing concurrency also apply to our dispute. Spokane County Code section 13.650.102 reads:

> **13.650.102 - Concurrency facilities and services,**
> (1) The following facilities and services must be evaluated for concurrency:
> (a) Transportation;
> (b) Public water;
> (c) Public sewer;
> (d) Fire protection;
> (e) Police protection;
> (f) Parks and recreation;
> (g) Libraries;
> (h) Solid waste disposal;
> (i) Schools.
> (2) Direct Concurrency.
> Transportation, public water and public sewer shall be considered direct concurrency services. Concurrency requirements for public water and public sewer service are detailed in Section 13.650.112. Transportation facilities serving a development must be constructed, or a financial guarantee for required improvements must be in place prior to occupancy. Applicable permit/project applications shall required transportation concurrency review, described in Section 13.650.104. A Concurrency Certificate shall be issued to development proposals that pass the transportation concurrency review.
> (3) Indirect Concurrency.
> Fire protection, police protection, parks and recreation, libraries, solid waste disposal and schools shall be considered indirect concurrency services. Spokane County shall demonstrate the adequacy of indirect concurrency services through the Capital Facilities Plan (CFP). The CFP will be updated annually, at which time all indirect concurrency services will be evaluated for adequacy. The evaluation will include an analysis of population, level of service and land use trends in order to anticipate

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> demand for services and determine needed improvements. If any indirect concurrency services are found to be inadequate, the County shall adjust the land use element to lessen the demand for services, include a project in the CFP to address the deficiency, or adjust the Level of Service. To implement any of these methods an amendment to the Comprehensive Plan is required.

††††††††We turn now to the land in question. Harley C. Douglass, Inc.

(Douglass), owns 22.3 acres of undeveloped land, the property at issue in this appeal. The property lies within Spokane County's Urban Growth Area (UGA). An urban growth area is area "within which urban growth shall be encouraged, and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110. Existing urban utilities service the Douglass property. Spokane County Utilities provides sewer service, and Whitworth Water District supplies water service.

††††††††Before adoption of amendment 11-CPA-05, the Douglass property was zoned for low-density residential. All adjacent lands are also zoned for low-density residential. The county comprehensive plan identifies the nearest medium and high density residential areas as being a mile southeast of the site. The Douglass land is .9 miles from the nearest commercial area. The land is not near any public open space. According to the Regional Land Quantity Analysis for Spokane County Summary Report, redesignation of the Douglass parcel to medium density is unnecessary to meet projected growth in Spokane County.

††††††††The following map shows the property's irregular contour, with the property lying

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within the bold border:

††††††††Image materials not available for display.

AR at 228. The property abuts Waikiki Road to the east and North Five Mile Road to the south. According to the hearing examiner's findings of fact entered in support of a 2007 plat application, Spokane County's Arterial Road Plan designates Waikiki Road as an "Urban Principal Arterial," and North Five Mile Road as an "Urban Collector Arterial." AR at 511. Nevertheless, a Spokane County Building and Planning staff report and a letter from Douglass to the Spokane County Board of Commissioners identified Waikiki Road as an urban minor arterial.

††††††††Douglass' site generally slopes down from the northwest to the southeast, away

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from North Five Mile Road and toward Waikiki Road. Various utility easements extend through the site. Within the easements lie a high-voltage overhead transmission line, associated gravel access roads, and a high-pressure underground gas pipeline. Spokane County maintains that, because of the utility easements and the hilly and craggy topography of the land, Douglass may be able to develop only a small portion of its parcel, that portion being on the southern edge and the middle of the acreage.

††††††††Douglas previously sought to develop the property into 26 single-family homes and 12 duplexes. In 2007, a Spokane County hearing examiner approved a preliminary plat for the 38 structures in a subdivision called Redstone. The plat is pictured here:

††††††††Image materials not available for display.

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AR at 366. The northeast corner of the property would remain undeveloped under the plan.

††††††††During the Redstone preliminary plat public hearing, neighbors raised concerns about the subdivision's singular access to Five Mile Road and concerns about the safety along the steep road because of an overload of traffic and lack of pedestrian accommodations. In obtaining approval for the Redstone subdivision, Douglass claimed that extension of a paved road in the preliminary plat for general

vehicular access to Waikiki Road, meeting County standards, was not economically feasible. The Spokane County Engineering Department indicated that a road extension from the proposed subdivision to Waikiki Road would likely be difficult, due to the topography of the site. Nevertheless, Spokane County approved the Redstone plat conditioned, at Spokane County Fire District 9's request, on the construction of a second access road for fire vehicles to Waikiki Road.

††††††††Douglass thereafter changed plans for the site. On March 31, 2011, Douglass applied to amend Spokane County's comprehensive plan and rezone its property from low-density to medium-density residential. Douglass avowed that, because of changing economic conditions, a medium-density residential development best fit the location. Douglass hoped to build eight to ten apartment buildings, inclusive of 200 units, with parking lots surrounding the buildings. Douglass, however, has not disclosed a specific development plan or site plan or applied for a project permit. Spokane County labeled

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Douglass' application to amend the county's comprehensive plan and to rezone the property "Amendment 11-CPA-05" to its comprehensive plan.

††††††††Spokane County proceeded with public input and review by its Department of Building and Planning of Douglass' proposed zoning change. The department prepared a staff report, which read, in part:

> **PUBLIC COMMENT**
> One letter has been received which stated the proposal would lead to increased traffic on Five Mile Road, lower already low water pressure, increase stormwater runoff and lower property values.
> . . . .
> There are a number of duplex uses near this site, but no multi-family uses, Waikiki Road is designated as an Urban Minor Arterial by Spokane County's Arterial Road Plan, has sidewalks on both sides and has bus service from Spokane Transit Authority. Five Mile Road is not listed on the Arterial Road Plan, is steep and windy and does not have sidewalks.
> . . . .
> The Medium Density Residential designation allows multi-family residential development, among other uses. There are no multi-family developments adjacent to this site. Their inclusion would add variety to the area's housing mix.
> . . . .
> The Mead School District serves this site. They were provided with an agency circulation regarding this proposal for review and coordination purposes.
> . . . .
> **Summary:**
> Implementation of the Medium Density Residential designation at this site is consistent with the goals and objectives of the County's Comprehensive Plan. At the time of a specific development proposal, the site will be subject to County transportation concurrency regulations, as well as, other mitigation

> measures codified in County development codes.

AR at 220-26.

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††††††††After its review of Douglass' application, the Spokane County Engineer wrote the Department of Building and Planning with its conditions of approval:

> This proposed comprehensive plan amendment is not being requested for a specific development proposal or site plan at this time. At such time a site plan is submitted for review, the applicant shall submit detailed traffic information for review by the County Engineer to determine what traffic impacts, if any, that the development would have on surrounding infrastructure. The applicant is advised that mitigation may be required for off-site improvements.
>
> The County Engineer will review this project for transportation concurrency requirements at the time of review of a land Use Application, when the project is defined with a specific use.

AR at 235.

††††††††The Douglass parcel lies within the Mead School District, who received notice of the proposed zone change. The Mead School District tersely wrote to the Department of Building and Planning: "The Mead School District believes that this request for a change in land use designation, if approved, could have an impact on schools. The District will respond with further remarks when the SEPA [State Environmental Policy Act, chapter 43.21C RCW] checklist is circulated for comment." AR at 343.

††††††††Futurewise, the Five Mile Neighborhood Association, and neighbors to the property voiced opposition to Douglass' application to rezone the property for medium-density residential. Neighbor A. J. Prudente wrote:

> The new Prairie View Elementary school was completed and opened for the 2007-2008 school year. Upon opening during registration there were many potential students that had to be turned away due to over population. Prairie View has been overpopulated since its opening and we

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> just recently received 4 portable classrooms for the start of the 2010-2011 school year. Even with the new portables the school is still overpopulated. Zoning Five Mile Prairie for apartment buildings will only make this situation worse. Please keep Five Mile Prairie zoned only for single family housing.

AR at 91.

††††††††Kathy Miotke, on behalf of the Five Mile Neighborhood Association, wrote:

> The applicant states that this parcel has access to public transit and it does not. The only access and egress this parcel currently has is North

Five Mile Road which has no transit service. And there is no safe way to walk along North Five Mile Road to Waikiki to find a bus stop. The applicant has stated correctly that the current access is North Five Mile Road, then states that he is "proposing" Waikiki as an access point. However, during the appeal of the applicant's Redstone Project, the neighbors begged for an access/egress off of Waikiki instead of North Five Mile Road and we were told that it was impossible. That makes it hard for us to believe this "proposed" change would occur.

The applicant states that this is not a wild life habitat. I agree it isn't now but it was before this land was clear cut. In fact, one of the FMPNA members took video from his phone of approximately 40 herd of deer standing in the middle of the property the evening after it was clear cut.

What we have here is a geographical hazardous area with steep slopes and erodible soils located within a CARA with high susceptibility - stormwater problems abound for residents. Please read carefully the letter submitted by Colleen Little of the Spokane County Stormwater Department dated May 6, 2006. You should have seen the drainage ways she described in her 2006 letter in May of this year, you could grow cranberries in the bog. These drainage ways are extremely important as they connect to the Little Spokane Natural area and watershed.

. . . .

I can tell you that Prairie View Elementary is at capacity even with four portable classrooms. And because of the unsafe roads surrounding the school, including North Five Mile Road, parents are asked to keep their children from walking or riding their bikes. In fact, taxpayers are paying approximately $200,000 a year for bus service even within a mile of the school.

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The Staff report does not acknowledge that this is a geographical hazardous area which it clearly is. The pictures that are shown with this submission do not give you the full benefit of the topography with the steep slopes, the existing neighborhood and the twists and turns of our roadway. I don't believe these pictures were provided by staff as I don't believe Mr. Brock has seen the site. I wish every one of you would take a ride on the road and see the parcel and surrounding for yourself.

. . . .

To the east, to the west, to the north and to the south, all low density residential homes.

> This is not a center or corridor. This is not sited next to a neighborhood urban activity center. This does not connect to a commercial center. This does not connect to a public open space. It does not have good access to a major arterial.
> This doesn't even meet the definition of urban infill housing! Infill within an urban area is not 22.2 acres of land and urban infill respects the current character of the neighborhood which this zone change does not.
> There is no market analysis, no feasibility study, no environmental impact study. What is this? It is Spot Zoning which is not allowed by the Spokane Comprehensive Plan or GMA.
> This does not fit and I urge you to recommend denial of this comprehensive plan amendment.

AR at 237-38.

††††††††Brion and Rene Reighard, who live on Five Mile Road, believe a multifamily development will lower the value of their home. They wrote:

> The only person this development will help is the developer. There are plenty of new and used homes in the Five Mile Prairie Area that are currently unoccupied. We would prefer that Spokane County try and curb the urban sprawl that this development represents. The wildlife habitat that has been destroyed by the clear cut a few years ago is very noticeable, adding all these buildings will completely destroy it.

AR at 236.

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††††††††Spokane County's Planning Commission, in a four-two vote, recommended denying amendment 11-CPA-05. The Planning Commission found the amendment inconsistent with many of Spokane County's planning policies that relate to traffic:

> The Planning Commission finds this proposal to be inconsistent with the following Comprehensive Plan Goals and Policies: Goal: T2, Policies: T.2.2, 3 & 7. Significant residential development has occurred on and near the Five Mile Prairie and transportation improvements have not kept up. This site is adjacent to one of the Prairie's access points (North Five Mile Rd.). It does not appear that the transportation improvements in the area are consistent with the Land Use Plan.
> The Planning Commission also finds this proposal inconsistent with Comprehensive Plan Goal: T.3.e, Policy: T.3e.1 which speaks to pedestrian and bicycle access. This proposal fronts on North Five Mile Rd. which is steep, windy and has no accommodations for pedestrians or bicyclists.

> The Spokane County Engineering Department says there are no plans for improvements and the applicant, who says they plan to use this road as one of their access points, has not indicated they plan to make any improvements.
> The amendment does not meet the criteria for a zone reclassification as provided by Sections 14.402.040 of the Zoning Code and the Planning Commission felt the proposal was not in the public's interest.
> The Commission, in general, thought that the traffic issues in the area needed to be addressed comprehensively and that the site is properly designated as Low Density Residential.
> Public Comments: Thirty-seven (37) public comments were received related to this proposal. Four (submitted by the applicant's agent) were for the amendment and 24 were against.

AR at 770.

††††††††Douglass appealed to the Spokane County Board of Commissioners. In turn, Douglass wrote multiple letters to the Board of Commissioners. On November 21, 2011, relying on a 2007 traffic impact analysis performed for the Redstone plat, Douglass

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wrote:

> As the board is undoubtedly aware, conditions in the single family housing market have deteriorated significantly since 2007. For the foreseeable future, development of the Redstone plat is no longer feasible due to a surplus of single family residential lots and rising construction costs. In addition, the constraints on the site due to steep slopes and utility easements make the useable portions more suitable for multi-family development. Consequently, in March of 2011, Douglass submitted an application for a comprehensive plan map amendment from Low Density Residential to Medium Density Residential (11-CPA-05).
> The proposed change to medium density residential also creates an opportunity to address the neighboring property owners' concerns about traffic on North Five Mile Road. To accommodate development of the property for multifamily uses, Douglass proposes to construct a new access road Eastward across the property directly to Waikiki Road, an urban minor arterial. Exhibit C. The new access road is designed to County road standards. Douglass also proposes to construct a pedestrian access to the existing sidewalks on Waikiki Road. A secondary access onto North Five Mile Road would still be necessary, in part to accommodate access to the utility easements.
> . . .With the new primary

> access onto Waikiki Road, multi-family development would significantly reduce the amount of projected traffic on North Five Mile Road. In the worst case, with 30 percent of the traffic still using the access onto North Five Mile Road, a multi-family development of the property at this density would generate only 31 a.m. peak hour trips and 37 p.m. peak hour trips, far less than what was projected for and approved as a part of the Redstone plat. Even if the project were developed at the maximum density allowed, the trips distributed to North Five Mile would still be less than the traffic impacts projected for and approved as part of the Redstone plat.

AR at 664. Douglass drew its winding, hilly access road to Waikiki in this picture:

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††††††††Image materials not available for display.

AR at 673, 695.

††††††††On December 23, 2011, the Spokane County Board of County Commissioners adopted Resolution 11-1191 that approved amendment 11-CPA-05 to the county comprehensive plan. In other words, the Board of Commissioners rejected the recommendation of the County Planning Commission. Resolution 11-1191 covered many other subjects other than the zoning change to the Douglass property. Those portions of the resolution relevant to amendment 11-CPA-05 provided:

> WHEREAS, . . . In approving amendment 11-CPA-05, the Board does not concur with the recommendation of the Spokane County Planning Commission that the proposal is inconsistent with the Goals and Policies of the Spokane County Comprehensive Plan and the written and oral testimony alleging traffic impacts to Five Mile Road and Waikiki Road; and

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> **WHEREAS,** . . . recognizing compliance with the Growth Management Act.
>
> . . . .
>
> **NOW, THEREFORE, BE IT RESOLVED** by the Board that it does hereby enter the following Findings of Fact:
>
> . . . .
>
> **Findings number 17 through 25 below pertain specifically to proposed Comprehensive Plan Amendment No. 11-CPA-05:**
>
> 17. Testimony in opposition to proposed amendment No. 11-CPA-05 alleged potential impacts to Mead School District and the capacity of Prairie View Elementary School, traffic on Five Mile Road, intrusion of multi-family use and density into the surrounding neighborhood, traffic impacts to the intersection of Five Mile Road and Waikiki Road, and incompatibility of the

proposed amendment with Goals and Policies UL.2.16, UL.2.17, UL.7.1 and UL.7.2 of the Spokane County Comprehensive Plan.

18. Potential traffic impacts are properly addressed at project review level to be conducted pursuant to Spokane County Code as specified in Spokane County Division of Engineering and Road correspondence dated August 2, 2011 which advise the applicant that "at such time a site plan is submitted for review the applicant shall submit detailed traffic information for review by the County Engineer to determine what traffic impacts, if any, that the development would have on surrounding infrastructure. The applicant is advised that mitigation may be required for off-site improvements."

19. Subsequent to the public hearing on November 22, 2011 regarding 11-CPA-05, the applicant, at the Board's request, provided a trip generation/distribution letter dated November 23, 2011 that provided documentation that provision of a second access point from the site to Waikiki Road would reduce the number of vehicle trips using Five Mile Road and more specifically in the p.m. peak hours and less trips than the previously approved preliminary plat approved for the subject property (PN-1974-06: Redstone).

20. The proposed amendment is consistent with the criteria for a zone reclassification under Section 14.402.040 (1) and (2) of the Spokane County Zoning Code as the proposed amendment implements the goals and objectives of the Comprehensive Plan and the subject area has experienced a change of conditions as evidenced by development of duplex dwelling units in proximity to the subject property thereby creating a mix of land use

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types and densities in the Urban Growth Area boundary.

21. Traffic impacts from the proposal will be mitigated for compliance with Spokane County Code and concurrency standards at the project level as specified by the Division of Engineering and Roads in their comments regarding the proposed amendment dated August 2, 2011.

22. Traffic impacts from the proposed amendment may be further mitigated by provision of a second access point to Waikiki Road, to be reviewed at the project level, which will reduce the number of vehicle trips on Five Mile Road as evidenced by the trip distribution letter submitted by the applicant on November 23, 2011.

23. The proposed amendment is consistent with Spokane County Comprehensive Plan Goals and Policy UL.2.16 that encourage location of medium and high density residential categories with good access to major arterials such as Waikiki Road, which is designated as an Urban Minor Arterial.

24. The proposed amendment is consistent with the Spokane County Comprehensive Plan Goal and Policy UL.2.17 as the subject property is located inside the Urban Growth Area, is served with public utilities, provides a range of housing types and densities, is considered infill development of a site with development constraints due to site topography and proximity to existing transmission lines for electricity, an Avista Substation, and a natural gas pipeline.

25. The Board finds that the proposed amendment is consistent with the Spokane County Comprehensive Plan Goals and Objectives UL.7, UL.7.1, UL.7.2, UL.7.3, UL7.12, UL.8, UL.8.1, UL.9a, UL.9b, H.3a, CF.3.1 as the subject site is served with public utilities, is located in the Urban Growth Area, has adequate capacity for public sewer, will create an urban area with a variety of housing types and prices with a variety of residential densities, constitutes limited infill development, and is located in an area where adequate public facilities and services can be provided without decreasing levels of service.

26. Approval of the proposed amendment should be conditioned upon a development agreement between the proponent of the amendment and Spokane County requiring at a minimum that development upon the property will provide public access to and improvements to Waikiki Road including curbs, gutters, sidewalks and drainage as required by applicable codes, regulations and Spokane County Road standards based upon the development proposed upon the property and review of a detailed traffic analysis. The internal road within the development shall be constructed to

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Spokane County Road Standards, shall include sidewalks on both sides to facilitate a future pathway, shall be owned and maintained by the property owner until site development is complete at which time ownership and maintenance shall be transferred to Spokane County and provide a termination at the west property line to provide public access to adjoining properties with the intent of mitigation of vehicular

> traffic on Five Mile Road and provide access to Waikiki Road consistent with Spokane County Road standards.
>
> . . . .
>
> **BE IT FURTHER RESOLVED**, that approval of proposed amendment No. 11-CPA-05 and the concurrent zone reclassification thereto shall only be of effect upon execution of a Development Agreement pursuant to RCW 36.70B as described above in finding number 26.

AR at 9-14.

††††††††In paragraph 26 of Resolution 11-1191, the Spokane County Board of County Commissioners conditioned its approval of 11-CPA-05 on Douglass providing public access to and improvements to Waikiki Road including curbs, gutters, sidewalks, and drainage, and on the county and Douglass first entering a development agreement. The Board of County Commissioners reiterated that traffic concerns should be addressed later during the project review process.

PROCEDURE

††††††††On February 27, 2012, Five Mile Prairie Neighborhood Association and Futurewise petitioned the Growth Management Hearings Board for review of the approval of Spokane County comprehensive plan amendment 11-CPA-05 and another amendment found in Resolution 11-1191. Both organizations claimed that its members included landowners and residents of Spokane County who were aggrieved and adversely

affected by the county's adoption of the resolution.

††††††††On March 27, 2012, Douglass moved to intervene in the GMHB proceeding. On April 4, 2012, the GMHB allowed Douglass to intervene. The prehearing order and order granting intervention read, in part:

> A party who fails to attend or participate in any hearing or other stage of the adjudicative proceedings before the Board in this case may be held in default and an order of default or dismissal may be entered pursuant to WAC 242-03-710.

The GMHB served Douglass with this order.

††††††††Before the GMHB, the Neighborhood Association challenged amendment 11-CPA-05 as inconsistent with Spokane County's comprehensive plan and several of its development regulations. The Neighborhood Association also argued that the amendment did not satisfy Spokane County Code 14.402.040's criteria for amendments. Spokane County countered that the GMHB lacked jurisdiction to review amendment 11-CPA-05. The county casted the rezone as a project permit, appealable to superior court under the Land Use Petition Act (LUPA), chapter 36.70C RCW, and not a development regulation or comprehensive plan amendment appealable to the GMHB.

††††††††On July 19, 2012, the GMHB conducted a hearing on the merits. Douglass neither appeared at the hearing nor filed a brief. At the conclusion of the hearing, the GMHB moved to dismiss Douglass.

††††††††On August 23, 2012, the GMHB issued its final decision and order. The GMHB first ruled it had jurisdiction to

review the concurrent rezone. The GMHB then dismissed Douglass as a party, writing:

> Intervenor Harley C. Douglass, Inc. failed to file any brief and failed to attend the July 19, 2012 Hearing on the Merits. Pursuant to WAC 242-03-710, the Board on its own motion entered an **Order of Dismissal** of Harley C. Douglass, Inc. for failure to file any brief and failure to attend the Hearing on the Merits.

AR at 1018. The GMHB served this order on Douglass.

††††††††In its August 23 final decision, the GMHB concluded that Spokane County failed to comply with the Growth Management Act when it enacted Resolution 11-1191, as it relates to amendment 11-CPA-05. The GMHB began its analysis by recognizing the deference owed local governments:

> For the purposes of board review of the comprehensive plans and development regulations adopted by local government, the GMA establishes three major precepts: a presumption of validity; a "clearly erroneous" standard of review; and a requirement of deference to the decisions of local government.

AR at 1011.

††††††††In its final decision, the GMHB found amendment 11-CPA-05 consistent with Spokane County comprehensive plan policies to: "[e]nsure that the design of infill development preserves the character of the neighborhood," policy H.3.2; "[i]dentify and designate land areas for residential use, including categories for low-, medium-, and high-density areas," policy UL.7.1; and "[s]ite multifamily homes throughout the Urban

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Growth Area," policy UL.2.17. AR at 1020, 1021, 1024. The GMHB found the amendment inconsistent, however, with three of the policies in Spokane County's comprehensive plan: UL.2.16, UL.2.20, and CF.3.1. Under urban land use policy 2.16, Spokane County should: "Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials." AR at 247. The GMHB noted that much of the opposition to the proposed amendment to the comprehensive plan concerned access to Five Mile Road. The GMHB further observed that the Spokane County Planning Commission recommended denial of the proposed amendment due to outdated roads to the Douglass site. According to the GMHB, Five Mile Road is steep, windy, and lacks accommodations for pedestrians or bicyclists. Yet, Five Mile Road will be one of the access points for the proposed development despite neither the County nor the developer having any plans for transportation improvements to Five Mile Road.

††††††††In its final decision, the GMHB noted that, after the Planning Commission vote, Douglass submitted a letter to the county stating that "the development traffic is proposed to primarily use Waikiki Road to access the development with little to no need for the use of Five-Mile Road." AR at 693. Nevertheless, the GMHB observed that the potential road would wind across closely packed contour lines as it traverses steep terrain. The GMHB held that the County Commissioners findings of fact 22 and 23 were not based on substantial evidence.

Finding of fact 23 inconsistently stated there was good access to

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major arterials such as Waikiki Road but the record showed that Waikiki Road is a minor arterial not a major arterial. Five Mile Road is a steep, windy, two lane road that has no arterial designation. The GMHB further ruled that the site of the proposed development lacked good access to major arterials, and amendment 11-CPA-05 was inconsistent with and thwarts Spokane County comprehensive plan policy UL.2.16.

††††††††Under Spokane County comprehensive plan urban land use policy 2.20, Spokane County must encourage multifamily projects to be arranged in a pattern of connecting streets and blocks, but the policy also allows cul-de-sacs or other closed street systems under certain circumstances including, but not limited to, topography and other physical limitations which make connecting systems impractical. In its August 23, 2012 final decision, the GMHB held amendment 11-CPA-05 to contravene UL.2.20. In so ruling, the GMHB repeated its comments about poor access to the site. The GMHB focused on the inability of pedestrians and bicyclists to access the proposed development from either Five Mile Road or Waikiki Road.

††††††††Under Spokane County Capital Facilities and Utilities policy 3.1: "Development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards." AR at 276. The GMHB found that amendment 11-CPA-05 thwarted policy CF.3.1. The GMHB emphasized the Planning Commission's findings that Five Mile Road would not be suitable for children to walk along to attend school, and in recognition

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of the lack of any pedestrian facilities, the schools have incurred significantly increased costs to transport school children who live near Five Mile Road. The GMHB found that there was substantial evidence in the record showing that school facilities lack capacity to serve the proposed medium density development.

††††††††The GMHB also concluded that amendment 11-CPA-05 does not meet the criteria for a zone reclassification as mandated under SCZC section 14.402.040. The code section provides, in relevant part:

> The County may amend the Zoning Code when one of the following is found to apply.
> 1. The amendment is consistent with or implements the Comprehensive Plan and is not detrimental to the public welfare.
> 2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code.
> . . . .
> 6. An amendment is deemed necessary by the Commission and/or Board as being in the public interest.

AR at 177-78.

††††††††Douglass argued before the Spokane County Board of Commissioners and the GMHB that the previously approved Redstone plan was no longer feasible in this economy of surplus single family residential lots and rising construction costs. In its August 23 decision, the GMHB rejected this argument, reasoning:

> The development of duplex dwelling units in proximity

> to the subject property cannot constitute a change in circumstances under SCZC 14.402.040(2) since duplexes are already a permitted use in the "Low Density Residential" zone and so there is no need to change the zoning to accommodate duplexes.

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> Moreover, if zoning classifications could be readily changed whenever there are cyclical market fluctuations (as advocated by applicant's engineering consultant), then property owners could lose the reliance value of the zoning code and thereby frustrate the investment backed expectations of homeowners.

AR at 1029 (footnotes omitted).

††††††††Ultimately, the GMHB invalidated amendment 11-CPA-05 under RCW 36.70A.302. The GMHB concluded the amendment substantially interfered with GMA goals (1), (3), and (12) in RCW 36.70A.020, which read:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> . . . .
>
> (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.
>
> . . . .
>
> (12) 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.

††††††††The GMHB wrote:

> The Board has determined that Spokane County failed to comply with the GMA and has remanded this matter to the County to achieve compliance under RCW 36.70A.300. The Board hereby finds and concludes that the continued validity of Amendment 11-CPA-05 would substantially interfere with the fulfillment of GMA Planning Goals 1, 3, and 12.
>
> Moreover, there is evidence in the record indicating a risk for project vesting in this case, which would render GMA planning procedures as ineffectual and mootóif such project vesting would occur, then the remand

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> of this case to the County would be meaningless and there would be no practical way to address GMA compliance.
>
> ***Conclusion***
>
> Based upon the foregoing,

> the Board determines that the continued validity of Amendment 11-CPA-05 would substantially interfere with the fulfillment of RCW 36A.70A.020(1) [Urban Growth], .020(3) [Transportation], .020(12) [Public facilities and services]. Therefore, the Board issues a Determination of Invalidity as to Comprehensive Plan Amendment 11-CPA-05.

AR at 1034.

††††††††Douglass and Spokane County filed separate petitions with Spokane County Superior Court for review of the GMHB's final decision and order. The superior court consolidated the appeals. Before the superior court, Douglass and the county again argued that the GMHB lacked jurisdiction. Douglass also argued the GMHB erred when it dismissed it from the proceedings.

††††††††The superior court reversed the GMHB on all grounds. The court ruled that the GMHB lacked subject matter jurisdiction to review the concurrent rezone. The superior court reversed the GMHB's dismissal of Douglass "because Harley C. Douglass, Inc. complied with the GMHB's orders and the requirements for intervention before the GMHB so the GMHB erroneously interpreted or applied the law and/or abused its discretion." CP at 494. Last, the superior court reversed the GMHB's invalidation of amendment 11-CPA-05, because "the County's planning decision was not clearly erroneous in view of the entire record." CP at 494-95. The Spokane County Superior Court remanded to the GMHB with instructions to enter an order finding the county in

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compliance with GMA when adopting amendment 11-CPA-05.

LAW AND ANALYSIS

††††††††Issue 1: Whether the GMHB correctly dismissed Douglass from its proceeding?

††††††††Answer 1: We decline to resolve this issue, because its resolution does not impact the merits of the appeal.

††††††††Before addressing the merits of the Neighborhood Association's appeal, we must address two procedural questions. First, the GMHB dismissed Douglass from its proceeding because of Douglass' failure to file a brief and appear at the hearing. The Neighborhood Association assigns error to the trial court's reversal of this dismissal. The Neighborhood Association argues WAC 242-03-710 supports the GMHB's ruling. As a preliminary issue, the Neighborhood Association also contends that, because no party challenged Douglass' dismissal before the GMHB, the GMHB's action could not be challenged on appeal to the superior court or litigated in this court. In turn, Douglass contends that, regardless of its dismissal from the GMHB proceeding, it had standing, under the Administrative Procedure Act, chapter 34.05 RCW, to participate in the trial court proceeding and has standing for the same reason to participate in this appeal. Douglass emphasizes RCW 34.05.530, which gives standing to obtain judicial review of agency action to any person aggrieved or adversely affected by the agency action.

††††††††We decline to resolve the issue of Douglass' standing because its resolution does not impact our decision on the merits. Principles of judicial restraint dictate that if

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resolution of another issue effectively disposes of a case, we should resolve the case on that basis without reaching the first

issue presented. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007); *Hayden v. Mut. of Enumclaw Ins.* Co., 141 Wn.2d 55, 68, 1 P.3d 1167 (2000).

††††††††Even if we ruled that Douglass could not participate in this appeal, Spokane County would remain a party. Spokane County forwards the same arguments on the merits of the appeal as forwarded by Douglass. Dismissing Douglass would not narrow those arguments. Douglass raises some arguments about the GMHB's subject matter jurisdiction that the county does not raise. Nevertheless, as shown below, we reject those arguments.

††††††††Issue 2: Whether the GMHB held subject matter jurisdiction over the petition challenging Resolution 11-1191 and amendment 11-CPA-05 adopted concurrently by Spokane County?

††††††††Answer 2: Yes.

††††††††The second procedural question for us to address arises from the trial court's ruling that the GMHB lacked subject matter jurisdiction over the Neighborhood Association's petition. The Neighborhood Association assigns error to this ruling. If we affirmed this ruling by the trial court, we need not address the merits of the appeal. Nevertheless, we reverse the trial court's ruling on subject matter jurisdiction.

††††††††RCW 36.70A.280 bestows jurisdiction upon the GMHB over limited subject

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matters. The statute reads, in relevant part:

> (1) The growth management hearings board shall hear and determine only those petitions alleging either:
> (a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter . . . or chapter 43.21C RCW as it relates to *plans, development regulations, or amendments*, adopted under RCW 36.70A.040 or chapter 90.58 RCW.

(Emphasis added.)

††††††††The plans, to which RCW 36.70A.280 refers, are comprehensive plans. RCW 36.70A.040. The definition of "development regulation" includes "zoning ordinances," but excludes "approval of a project permit application" as defined in RCW 36.708.020(4). RCW 36.70A.030(7). RCW 36.70B.020(4) defines a "project permit application" as:

> any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, *site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan*, subarea plan, or development regulations except as otherwise specifically included in this subsection.

(Emphasis added.)

††††††††Resolution of subject matter jurisdiction in this appeal depends on whether we characterize amendment 11-CPA-05 to the county's comprehensive plan as a rezone, on the one hand, or a project permit or site-specific rezone authorized by a previously

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existing comprehensive plan, on the other hand. The resolution has characteristics of both. If the amendment is a rezone, the GMHB held subject matter jurisdiction. We hold the resolution and corresponding comprehensive plan amendment to be a rezone other than a site-specific rezone. We also note that Spokane County's argument that the amendment constituted a project permit contradicts its position on the merits that no relief should be granted the Neighborhood Association because its complaints about the proposed project can be heard at the permitting stage.

††††††††After the trial court's ruling, this court issued its opinion in *Spokane County v. Eastern Washington Growth Management Hearings Board*, 176 Wn. App. 555, 309 P.3d 673 (2013), *review denied*, 179 Wn.2d 1015 (2014) (*Spokane County II*). We deem *Spokane County II* controlling. In that case, as here, the Spokane County Board of Commissioners amended the county's comprehensive plan and rezoned certain property in one legislative action. We addressed whether the rezone was an amendment to a development regulation subject to challenge under the GMA or a project permit subject to review under LUPA. We held the GMHB had jurisdiction because the rezone was adopted at the same time as the comprehensive plan amendment:

> Considering all, we hold a site-specific rezone is a project permit approval under LUPA if it is authorized by a *then-existing* comprehensive plan and, by contrast, is an amendment to a development regulation under the GMA if it implements a comprehensive plan amendment. In sum, the hearings board had subject matter jurisdiction to review amendment 07-CPA-05's rezone for compliance with both the GMA and SEPA. *See* former RCW 36.70A.280(1)(a), .290(2).

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Spokane County II, 176 Wn. App. at 572 (emphasis added). Thus, if the county authority adopts the rezone concurrent with the amendment to the comprehensive plan, the GMHB can assume subject matter jurisdiction under the GMA.

††††††††In this appeal, Spokane County respectfully disagrees with our analysis in *Spokane County II*, but concedes its application. Douglass urges reversal of *Spokane County II*. Douglass argues *Spokane County II* failed to explain when and how a comprehensive plan becomes "existing," and then Douglass poses hypothetical questions in an attempt to belittle our holding.

††††††††Douglass first asks: if a county adopts a rezone one day after the authorizing amendment to a comprehensive plan, is the amended plan an "existing plan?" Stated differently, do the rezone and the amendment to the comprehensive plan retain concurrent status if not adopted on the same day? Or does the rezone implement an already existing comprehensive plan if the county adopts the rezone a day after the authorizing amendment to the comprehensive plan? Douglass presumably wishes to drive the point that a government

entity could avoid application of *Spokane County II* by always adopting a requested rezone one day, or perhaps even one hour, after amending the comprehensive plan, such that the two are no longer concurrent or subject to the GMHB's jurisdiction. Since no delay occurred in the adoption of the rezone here, however, we need not address Douglass' question.

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††††††††Douglass also asks the existential question: "If the GMHB upheld an amendment to a comprehensive plan, would the comprehensive plan, as amended, then become an 'existing' comprehensive plan such that the concurrent rezone became 'authorized' and therefore a 'project permit' over which the GMHB lacked jurisdiction?" Br. of Resp't Harley C. Douglass at 17. In other words, is the amendment in existence before approval by the GMHB? We believe the answer is no, since the upholding of an amendment is not itself a second amendment. Under RCW 36.70A.320(1), comprehensive plans and amendments thereto are presumed valid upon adoption.

††††††††In Washington, the doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004); *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Douglass has not met its burden of showing *Spokane County II* was incorrectly decided or that its holding is harmful.

††††††††Issue 3: Whether the GMHB erred when declaring amendment 11-CPA-05 to be inconsistent with Spokane County's comprehensive plan policy UL.2.16?

††††††††Answer 3: No.

††††††††We now begin our analysis of each of the alleged inconsistencies of the comprehensive plan amendment with the preexisting Spokane County comprehensive plan and the county zoning code. The GMHB found amendment 11-CPA-05 inconsistent with three of Spokane County's comprehensive plan policies: UL.2.16, UL.2.20, and

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CF.3.1. We address separately whether the plan amendment violated the respective polices. We later address whether any such violations compels the invalidation of amendment 11-CPA-05.

††††††††The central purpose of the Growth Management Act is to coordinate land use, zoning, subdivision, planning, development, natural resources, public facilities, and environmental laws into one scheme in order to concentrate new development in compact urban growth areas, while conserving environmentally critical land and valuable natural resources. Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867, 872-73 (1993). The GMA requires counties to compose comprehensive plans to responsibly manage their growth and to enact regulations to effectuate those plans. A comprehensive plan is a guide or blueprint to be used when making land use decisions. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997). Several GMA provisions impose requirements upon the comprehensive plan and plan amendments. RCW 36.70A.130(1)(d) dictates:

> Any amendment of or revision to a comprehensive land use plan shall conform to this chapter [the Growth Management Act]. Any amendment of or revision to development regulations shall be consistent with and

> implement the comprehensive plan.

RCW 36.70A.070 commands: "The plan shall be an internally consistent document."

††††††††Under the GMA, a newly adopted or amended development regulation must be

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"consistent with and implement the comprehensive plan." RCW 36.70A.040(3)(d), (4)(d), (5)(d); *See, e.g., Spokane County II*, 176 Wn. App. at 574-75. There need not be strict adherence, but any proposed land use decision must generally conform to the comprehensive plan. *Citizens for Mount Vernon*, 133 Wn.2d at 873; *Barrie v. Kitsap County*, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980). Ultimately, the comprehensive plan and any amendment to it must obey the GMA's clear mandates. *Spokane County II*, 176 Wn. App. at 575. The GMHB is charged with adjudicating GMA compliance and invalidating noncompliant comprehensive plans. RCW 36.70A.280; .302; *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 768, 778, 193 P.3d 1077 (2008).

††††††††Under Spokane County's comprehensive plan Urban Land Use (UL) policy 2.16, the county must: "Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials." AR at 247. The Spokane County Board of Commissioners found:

> 23. The proposed amendment is consistent with Spokane County Comprehensive Plan Goals and Policy UL.2.16 that encourage location of medium and high density residential categories with good access to major arterials such as Waikiki Road, *which is designated as an Urban Minor Arterial.*

AR at 13 (emphasis added). The County's findings of fact did not address whether the Douglass project would lie near commercial areas or public open spaces. The GMHB held that the finding of fact 23 was not based on substantial evidence. We agree.

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††††††††We first address whether the Douglass site is near commercial areas and public open spaces. The Spokane County Board of Commissioners entered no finding that the land lay near either. The Douglass land is .9 miles from the nearest commercial area.

††††††††Spokane County argues that the Neighborhood Association does not indicate what constitutes or what distance constitutes "near." Although we agree that the Neighborhood Association provides no help in measuring nearness in this context, the Spokane County Board of Commissioners also afforded us no assistance. Instead, the Board of Commissioners ignored the policy language. In its brief, Spokane County also fails to supply any definition for "near." We will therefore defer to the GMHB who did not consider .9 miles to be near the proposed development. Presumably the policy seeks to provide shopping areas within reasonable walking distance for the large number of residents of a medium density development. Although many people walk more than .9 miles each day, few people walk this distance for shopping purposes.

††††††††The county also contends policy UL.2.16 only "encourages" closeness and good access. It does not "demand" closeness or good access. Along these lines, the county argues that policy UL.2.16 is only one of competing goals to be balanced with other goals. The weighing of these goals, Spokane County argues, is for the local

government and not the GMHB. We might consider these arguments compelling had the Spokane County Board of Commissioners weighed, on the record, the various goals and polices of the GMA. It did not. We will return to these arguments and our response when we

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determine if amendment 11-CPA-05 should be declared invalid. Our decision in *Spokane County I*, 173 Wn. App. 310 (2013) addressed the use of the word "encourage" in the context of addressing the invalidity of the zoning amendment. 173 Wn. App. at 333. We note that in *Spokane County I*, this court held that the rezoning amendment passed muster under Spokane County's UL.2.16 because the high density project was adjacent to a shopping center and surrounding commercial development.

††††††††UL.2.16 also desires that the Douglass site benefit from good access to major arterials. Douglass' property abuts two roads: Five Mile Road and Waikiki Road. Five Mile Road is not a major arterial. For the first time on appeal, Spokane County argues that Waikiki Road is a major arterial. We must limit our response to the county's argument to the record before the GMHB. *Pierce County Sheriff v. Civil Serv. Comm'n for Sheriff's Emp. of Pierce County*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983). The record defeats the county's argument.

††††††††A hearing examiner addressing Douglass' Redstone application wrote that Waikiki Road is a minor principal arterial. Nevertheless, the examiner's finding is not a direct source for this information. Also, the examiner's use of the adjective "principal" rather than "major," lessens the credibility of the finding. "Minor" and "principal" are inconsistent terms.

††††††††The Department of Building and Planning staff report identified Waikiki as a "Minor Urban Arterial." Douglass' letter to the Board of Commissioners labels Waikiki

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Road as minor arterial. Spokane County's own internally inconsistent finding of fact 23 designates Waikiki Road as minor arterial.

††††††††Spokane County agrees that the record before the Board of Commissioners and the GMHB only labeled Waikiki Road as a minor arterial. Spokane County claims any identification of Waikiki Road as a minor arterial is an unfortunate error and asks this court to take judicial notice of Spokane County's Arterial Road Map, available at www.spokanecounty.org/data/engineers/traffic/arterialroadmap.pdf, which identifies Waikiki as an "urban principal arterial." We deny Spokane County's request.

††††††††ER 201 permits a court to take judicial notice of "adjudicative facts . . . not subject to reasonable dispute" in the sense that they are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Spokane County does not isolate which ground or grounds it forwards in asking us to take judicial notice. We do not consider the classification of Waikiki Road's status to be common knowledge within Spokane County, nor does the county argue such. We also know of no decision that recognizes an Internet web page to be a source whose accuracy cannot reasonably be questioned. In *In re Marriage of Meredith*, 148 Wn. App. 887, 904, 201 P.3d 1056 (2009), the husband asked this court to take judicial notice of information on internet sites of immigrant rights organizations in order to support his claim of judicial bias. This

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court reasoned, with double negatives, that information contained on the internet sites were not from a source whose accuracy cannot reasonably be questioned.

††††††††We recognize that Spokane County asks us to take judicial notice of information on a government entity website, rather than a website of questionable origin. Nevertheless, we will not take judicial notice of information on a government website that is inconsistent with all evidence before the government entity and contrary to the entity's own findings of fact.

††††††††The Spokane County Board of Commissioners also found that the Douglass land garnered good access to Waikiki Road. The GMHB correctly concluded that substantial evidence did not support this finding. A review of the record shows no evidence supported the finding. "Good access" is more of an opinion than a fact, because of the modifier "good." Spokane County failed to include in its finding any underlying facts upon which it found good access to Waikiki Road.

††††††††Unlike other policy goals couched in concurrency language, policy UL.2.16 seeks good access presently, as opposed to simply by completion of development. At the present, the site lacks direct access to Waikiki Road. Douglass' engineer included a map depicting a potential site road joining with Waikiki Road. This street would wind across closely packed contour lines as it traverses steep terrain. These characteristics are not hallmarks of good access. Finally, Douglass previously represented, when advocating the Redstone subdivision, that an access road to Waikiki Road was impossible.

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††††††††Spokane County may also rely on its conditioning of amendment 11-CPA-05 on the developer's entering a development agreement requiring access to Waikiki Road. This reliance is misplaced since UL.2.16 desires current, good access. The proposed street is neither current nor good.

††††††††Spokane County contends that policy UL.2.16 does not capitalize "major arterial" and the term is not defined in the comprehensive plan. So, argues the county, the definition of "major arterial" is not necessarily the same as found in the county classification system, and the Board of Commissioners was therefore free to conclude that Waikiki Road is a major arterial. Spokane County is using doublespeak. The county fails to provide us any other definition for "major arterial." The Board of Commissioners failed to include in its findings why Waikiki Road should be considered a major arterial when it is otherwise designated a minor arterial,

††††††††Spokane County relies on our decision in *Spokane County I*. In *Spokane County I*, we ruled that the county only needs to ensure sufficient facilities at time of development, not at the time of amending its comprehensive plan. Nevertheless, this ruling was not based on UL.2.16, but on the GMHB's use of RCW 36.70A.070(6)(b) to invalidate the zoning amendment. The statute demands concurrency. Concurrency does not exact sufficient utilities and roads until someone begins to live on the land. UL.2.16 encourages currency, which is sufficient roads in the present. Thus, the county's reliance

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is misplaced. *Spokane County I* did not address the question of whether the decision's proposed development enjoyed good access to a major arterial.

††††††††Spokane County may argue that, under policy UL 2.16, the acreage need not enjoy good access to major arterials, if the site remains near commercial areas. We do not read the policy as such since the policy employs the word "and" between

commercial areas and good access. We presume "and" functions conjunctively. *State v. Kozey*, 183 Wn. App. 692, 698, 334 P.3d 1170 (2014), *review denied*, 182 Wn.2d 1007 (2015). Also, nearness to a commercial area does not lessen the need for a major arterial. To the contrary, this closeness may increase the need.

††††††††We would be remiss to continue without now discussing the standards of review for the GMHB, the superior court, and this appellate court. The GMA directs the GMHB to grant Spokane County considerable deference in its planning decisions. RCW 36.70A.320(3) reads:

> In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A. 190(4). The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.

To find an action "clearly erroneous," the GMHB 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).

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††††††††The GMA contains a unique provision, adopted by the state legislature in 1997, presumably because the legislature concluded that the GMHB failed to give sufficient deference to local government planning decisions. RCW 36.70A.3201 reads:

> The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

This GMA provision shows the legislature's desire that the GMHB reluctantly declare a county action to be noncompliant or invalid. This deference is not unlimited, however. Our state high court observed:

> Without question, the "clearly erroneous" standard requires that the Board give deference to the county, but all standards of review require as much in the context of administrative action. The relevant question is the degree of deference to be granted under the "clearly erroneous" standard. The amount is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the county's actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard.

Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hr'gs Bd., 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007).

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††††††††Spokane County and Douglass lost before the GMHB. When a party appeals a GMHB decision to a court, the court reviews the board decision, not the local government action. RCW 36.70A.300(5). We do not defer to the Superior Court. *Spokane County II*, 176 Wn. App. at 564-65 (2013). On review, we stand in the same position as a superior court reviewing a board's decision. *Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006). The court, be it the superior court or an appeals court, applies a different standard of review from that of the GMHB as supplied by the Washington Administrative Procedure Act. RCW 34.05.570 reads, in pertinent part:

> (1) Generally. Except to the extent that this chapter or another statute provides otherwise:
>
> (a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
>
> . . . .
>
> (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> . . . .
>
> (d) The agency has erroneously interpreted or applied the law;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
>
> . . . .
>
> (i) The order is arbitrary or capricious.

††††††††Under the potpourri of rules, we afford the GMHB deference, while the GMHB grants the local government deference. Our job is easy if the GMHB affirms the local

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county, but becomes problematic, because of the rival review standards, if the GMHB reverses the local entity.

††††††††We conclude the GMHB gave Spokane County sufficient deference when it found amendment 11-CPA-05 noncompliant with policy UL.2.16. The Spokane County Board of Commissioners failed to inform anyone what constitutes "near" under its comprehensive plan policy that requires medium density housing to be

near open space or commercial zoning. The record revealed the absence of this desired nearness. The undisputed evidence showed that the Douglass land lacks good access to a major arterial. The Spokane County Board of Commissioners' action conflicted with its own planning commission's findings and recommendations. The GMHB's finding of noncompliance is supported by the evidence or lack thereof before it. The GMHB's order was neither arbitrary nor capricious. We reverse the trial court's ruling to the extent that the trial court reversed the GMHB's ruling concerning policy UL.2.16.

††††††††Issue 4; Whether the GMHB erred when ruling that amendment 11-CPA-05 is inconsistent with Spokane County's comprehensive plan policy UL.2.20?

††††††††Answer 4: Yes.

††††††††Spokane County's comprehensive plan urban land use policy 2.20 requires Spokane County to: "Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus or car. Cul-de-sacs or other closed street systems may be

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appropriate under certain circumstances including, but not limited to, topography and other physical limitations which make connecting systems impractical." AR at 248. The Spokane County Board of Commissioners failed to enter a finding of fact regarding compliance with policy UL.2.20.

††††††††In its findings and conclusions, the GMHB focused on the ability of pedestrians and bicyclists to access the proposed development from either Five Mile Road or Waikiki Road and the danger of Five Mile Road and the proposed internal access road to Waikiki Road. The GMHB thereby misapplied UL.2.20. The GMHB's concerns do not relate to UL.2.20. By its express terms, UL.2.20 addresses the internal arrangement of streets within a new development. The diagram that accompanies UL.2.20 bolsters this reading. The diagram focuses on internal arrangement.

††††††††The Neighborhood Association argues that the proposed comprehensive plan map amendment established that the site is not arranged in a pattern of connecting streets and blocks, rather it is arranged in a cul-de-sac pattern of unconnected streets disfavored by policy UL.2.20. This argument fails to note the second sentence of the policy, which permits cul-de-sacs under circumstances of difficult terrain. Furthermore, the GMHB either did not address this argument or, if it did, made no finding of a lack of connecting streets. The record does not even show the Neighborhood Association forwarding the argument to the GMHB. The GMHB did not hold amendment 11-CPA-05 to thwart policy UL.2.20 on this ground.

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††††††††Our review of an administrative decision is limited to a review of the record below. *Pierce County Sheriff v. Civil Serv. Comm'n for Sheriff's Emp. of Pierce County*, 98 Wn.2d at 693-94 (1983). A corollary to this rule is that we do not address arguments not raised below. We will not decide an appeal from an administrative agency when no argument or evidence was presented to the agency concerning the issue. *Int'l Ass'n of Firefighters, Local No. 469 v. Pub. Emp't Relations Comm'n*, 38 Wn. App. 572, 579, 686 P.2d 1122 (1984).

††††††††In *Spokane County I*, 173 Wn. App. at 341-342, we discussed UL.2.20 without holding that the policy applies only internally. Instead, our opinion includes a discussion about connections outside the development. We did not rest our decision, however, on such a reading of UL.2.20, but

rather held any violation of UL.2.20 was unimportant at the zoning amendment stage since transportation elements would be addressed at project permitting stage. This ruling is an additional reason for holding that amendment 11-CPA-05 does not violate Spokane County comprehensive plan policy UL.2.20. Douglass has yet to propose a plat.

††††††††We affirm the trial court to the extent the trial court reversed the GMHB's ruling that amendment 11-CPA-05 violated policy UL.2.20. The GMHB's ruling was likely based on an erroneous interpretation of the policy. Evidence does not support the GMHB's ruling.

††††††††Issue 5: Whether the GMHB committed error when it ruled that amendment 11-

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CPA-05 contravenes Spokane County comprehensive plan policy CF.3.1?

††††††††Answer 5: Yes.

††††††††Under Spokane County Comprehensive Plan Capital Facilities and Utilities (CF) policy 3.1: "Development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards." AR at 276. In its finding of fact 25, the Spokane County Board of Commissioners found the Douglass property rezone consistent with CF.3.1 because the property is located "in an area where adequate public facilities and services can be provided without decreasing levels of service." AR at 13. In ruling Resolution 11-1191 and amendment 11-CPA-05 inconsistent with policy CF.3.1, the GMHB focused on local schools being at capacity and the costs those schools would incur to bus children, who cannot safely walk along Five Mile Road.

††††††††We reverse this ruling of the GMHB for two reasons. First, adequacy of facilities under policy CF.3.1 is determined at the project permit stage. Second, there is a lack of evidence of decreasing education services below adopted standards. The GMHB's ruling is contrary to law and not supported by substantial evidence.

††††††††The GMHB ruling and the Neighborhood Association argument clashes with our decision in *Spokane County I*, 173 Wn. App. at 335. Comprehensive plan policy CF 3.1 regulates the conditions for "approval of a development." But a zoning "amendment is not a development proposal." *Spokane County I*, 173 Wn. App. at 335. The rezone did

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not authorize Douglass to develop the land. Without a specific project proposal, Spokane County cannot determine whether the proposed development would overextend extant public facilities and services.

††††††††*Spokane County I*, did not directly address Spokane County comprehensive plan policy CF.3.1, but rather addressed transportation goals and policies that required transportation system improvements concurrent with new development. Nevertheless, the decision's reasoning applies in the context of policy CF.3.1, since the policy refers to the time of development. We have held the time of development to be the project permitting stage not the time of a rezone. The Neighborhood Association seeks to distinguish *Spokane County I* from this appeal on the basis that CF.3.1 uses the word "shall," and the transportation policies addressed in *Spokane County I* lacked this imperative. Regardless, *Spokane County I* holds that development occurs at the permitting stage.

††††††††Moving to the second basis of our reversal, in finding the comprehensive plan

amendment violative of policy CF.3.1, the GMHB relied only on the lack of capacity of schools. Policy CF.3.1 demands that facilities have the capacity to serve the development without decreasing levels of service below adopted standards. Evidence supports the GMHB's finding that schools are at capacity and that schools incur additional busing costs due to Five Mile Road's current condition. Nevertheless, the GMHB did not find that the Douglass development would cause a decrease in the level of school services

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below adopted standards. The GMHB heard no evidence of any education standards, let alone a prospective breach of the standards. The school district's director of facilities wrote that Douglass' request for a change in land use would have "an impact on schools." AR at 343. But he did not elaborate on the anticipated impact. Likewise, while busing children is expensive, nothing in the record shows busing would drop below an adopted standard or the cost of busing would reduce other school standards.

††††††††The Neighborhood Association raises the legitimate concern that Spokane County concurrency regulations do not allow it the opportunity to complain about the adequacy of school, fire protection, and police services at the time that Douglass applies for a project development permit. In forwarding this argument, the Neighborhood Association moves beyond the GMHB ruling, which limited itself to school services, and worries about the potential adequacy of police services, fire protection services, and solid waste disposal, in addition to schools.

††††††††Concurrency is the prospective availability and adequacy of utilities, public facilities, and public services at the time when residents begin to occupy a new housing development. Spokane County Code (SCC) 13.650.102 distinguishes between direct and indirect concurrency. Direct concurrency requirements apply to transportation, public water, and public sewer facilities and demand that the developer show, when applying for a project permit, that such facilities will be adequate. SCC 13.650.102(2). Indirect concurrency requirements apply to fire protection, police protection, parks and recreation,

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libraries, solid waste disposal, and schools. SCC 13.650.102(3). Indirect concurrency is determined annually during the update of the county's capital facilities plan. SCC 13.650.102(3).

††††††††Despite these differences in concurrency evaluations, we find the Neighborhood Association's argument wanting. The Neighborhood Association fails to explain why it cannot register its concerns during the annual update of the capital facilities plan. More importantly, *Spokane County I*, held that "development" in this context means the time of permit application rather than a rezone. The Neighborhood Association has not shown this holding in *Spokane County I*, to be incorrect or harmful, as to overcome the principle of stare decisis.

††††††††The Neighborhood Association notes that the Spokane County comprehensive plan uses the term "development" to all stages of the process of developing. The Neighborhood Association also emphasizes that "development" is not defined in policy CF.3.1. From this observation, the Neighborhood Association argues that all potential problems with roads, schools, and other facilities should be resolved before the rezone and not await the building process. Here again, the Neighborhood Association goes beyond the ruling of the GMHB and even beyond its argument regarding indirect concurrency limitations. The Neighborhood Association also does not show that the term

"development" as used in CF.3.1 means a rezone or demands resolving facility questions before a rezone.

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††††††††The Spokane County Board of Commissioners found that the Douglass land "is located in an area where adequate public facilities and services can be provided without decreasing levels of service." AR at 750. The Neighborhood Association argues that this finding is different from a finding that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards as required by policy CF.3.1. The Neighborhood Association emphasizes the lack of planning to ensure a continued acceptable level of services. Nevertheless, the Neighborhood Association carried the burden before the GMHB to show a likely drop of services below accepted standards. The Neighborhood Association failed to present evidence of this drop, let alone the applicable standards.

††††††††Issue 6: Whether the GMHB committed error when ruling that amendment 11-CPA-05 disregards SCZC section 14.402.040?

††††††††Answer 6: No.

††††††††Spokane County Zoning Code [SCZC] 14.402.040 reads, in relevant part:

> The County may amend the Zoning Code when one of the following is found to apply.
> 1. The amendment is consistent with or implements the Comprehensive Plan and is not detrimental to the public welfare.
> 2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code.

Clerk's Papers (CP) at 521.

††††††††The Spokane County Board of Commissioners found:

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> 20. The proposed amendment [amendment 11-CPA-05] is consistent with the criteria for a zone reclassification under Section 14.402.040 (1) and (2) of the Spokane County Zoning Code as the proposed amendment implements the goals and objectives of the Comprehensive Plan and the subject area has experienced a change of conditions as evidenced by development of duplex dwelling units in proximity to the subject property thereby creating a mix of land use types and densities in the Urban Growth Area boundary.

CP at 522 (footnote omitted). In reversing Spokane County, the GMHB reasoned:

> The development of duplex dwelling units in proximity to the subject property cannot constitute a change in circumstances under SCZC 14.402.040(2) since duplexes are already a permitted use in the "Low Density Residential" zone and so there is no need to change the zoning to accommodate duplexes. Moreover, if zoning classifications could be

> readily changed whenever there are cyclical market fluctuations (as advocated by applicant's engineering consultant), then property owners could lose the reliance value of the zoning code and thereby frustrate the investment backed expectations of homeowners.

AR at 1029 (footnote omitted). We ask whether amendment 11-CPA-05 satisfies either clause 1 or 2 of the zoning code section, or at least whether the Spokane County Board of Commissioners reasonably found that the zoning change satisfied one of the clauses.

††††††††In its finding 20, the Board of Commissioners referred to the goals and objectives of the comprehensive plan. Nevertheless, the comprehensive plan contains no goals or objectives labeled as such. SCZC 14.402.000 requires consistency with the comprehensive plan, but does not mention any "goals" or "objectives" of the plan. We conclude that the Board of County Commissioners must have referred to the visions and policies of the comprehensive plan in its finding 20. As we analyzed above, amendment

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11-CPA-05 thwarts comprehensive plan policy UL.2.16.

††††††††We question whether one inconsistency with the many policies of the comprehensive plan is sufficient to declare the amendment as a whole disobedient to SCZC section 14.402.040(1) but we need not resolve this question. Under clause 1 of the code section, the zoning amendment must be consistent with the comprehensive plan and not detrimental to the public welfare. The Spokane County Board of Commissioners made no finding of an absence of a detriment. Strong evidence showed the zoning change harmed the public, particularly neighbors, and benefited only Douglass. The Spokane County Planning Commission found the zoning change to adversely impact the public interest, and the Board of Commissioners registered no disagreement. Therefore, amendment 11-CPA-05 does not satisfy SCZC section 14.402.040(1).

††††††††The Spokane County Board of Commissioners' finding 20 supports the conclusion that the Board of Commissioners found a sufficient change in land use conditions to warrant the zoning amendment. According to the Board of Commissioners, the subject area had experienced a change of conditions by reason of development of duplex dwelling units in proximity to the subject property thereby creating a mix of land use types and densities. Douglass had argued that changed economic circumstances warranted the amendment. The Board of Commissioners did not rely on any change in the economy.

††††††††We find ambiguity in the language of and confusion between the GMHB's and

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Board of Commissioners' respective interpretations of SCZC 14.402.040(2). The GMHB's ruling implied that the GMHB believed the change in land use conditions in the area referred to in SCZC 14.402.040(2) is a change consistent with the zoning change sought. In other words, Douglass or the Board of Commissioners, according to the GMHB, needed to show that the new land uses in adjoining lands were other medium density uses, not simply duplexes allowed in a low density zone. Although duplexes may have been recently built on the adjoining land, duplexes were always permitted, and, in fact, remain permitted on the Douglass property. SCZC 14.402.040(2) could also be read to require the change in conditions to occur inside the proposed

zoning change boundary, rather than outside the rezone as concluded by the Board of Commissioners. Finally, the section could be read to require the change in land use conditions are conditions in the adjoining land such as uses not already allowed in the neighborhood. In other words, the adjoining land also needed a zoning change.

††††††††We would defer to the Spokane County Board of Commissioners' reading of its own code section, but we do not consider the resolution of the various readings of SCZC 14.402.040(2) helpful. Regardless, Spokane County, the GMHB, and this court must still determine whether some change in land use conditions merits the rezone. We conclude SCZC 14.402.040(2) does not refer to any change in conditions, otherwise there would be no limit to the circumstances under which the code section permits a rezone. No matter how small or large the change, no matter how inconsistent or consistent to land uses in

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the rezoned area the change in adjoining land use may be, the county could justify the adopting of any change in zoning. For example, the section should not be read to include the planting of a garden on adjoining land, which theoretically is a change in land use conditions. We conclude a reasonable reading of SCZC 14.402.040(2) requires us to determine whether the change in land use conditions necessitates a rezone or the change in conditions is close in nature to the rezone uses such that the rezone is a natural extension of the change.

††††††††We find compelling the Neighborhood Association's argument that the building of duplexes in the neighborhood should not warrant the change in zoning the Douglass property from low density to medium density in neighboring property, because a multifamily project on the Douglass land significantly increases the number of dwellings per acre compared to duplexes. By way of illustration, under low density zoning, Douglass' Redstone plat contemplated 38 lots, 26 for single family dwellings and 12 for duplexes for a total of 50 dwelling units. Even if Douglass placed duplexes on each lot, the total units would be 78. On the other hand, proposed medium density zoning would allow 200 dwelling units, more than double the units in low density. The multifamily medium density project would also generate a significant increase in need for parking. The nearby duplexes therefore are not the type of land use change that generates a need for a rezone on the Douglass land. Multifamily units on the Douglass land are not a natural extension to the neighborhood duplexes. The rezone does not preserve the

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character of the extended neighborhood.

††††††††Spokane County argues that economic circumstances impacting the area in 2010 to 2011 rendered the property as zoned low density fiscally impractical. Nevertheless, the Board of Commissioners did not justify the rezone on economic changes. The County Board of Commissioners, rather than this appellate court, should be the body to make the original finding of changes in economic conditions meriting a rezone.

††††††††Spokane County may argue on appeal that the change in land use conditions that merits the rezone is the change that occurred by reason of the comprehensive plan map amendment, by which the county rezoned the Douglass property from low density to medium density use. Assuming the county forwards this argument, we reject it. The rezone and the comprehensive plan amendment were essentially the same action by the Board of Commissioners. One should not justify the other.

††††††††We conclude the GMHB gave Spokane County sufficient deference when

it found amendment 11-CPA-05 noncompliant or violative of SCZC 14.402.040(2). Substantial evidence failed to show a change in land use conditions meriting a rezone for the Douglass land. The Spokane County Board of Commissioners failed to address whether a zoning amendment furthers or harms the public welfare. The planning commission found the rezone detrimental. The GMHB's order was neither arbitrary nor capricious. We reverse the trial court's ruling to the extent that the trial court reversed the GMHB's ruling concerning SCZC 14.402.040(2).

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††††††††We question whether the GMHB holds power to rule a comprehensive plan amendment noncompliant with a county's zoning code. RCW 36.70A.300 grants authority to the GMHB to review a plan's compliance only with the GMA, the Shoreline Management Act, and the State Environmental Policy Act. RCW 36.70A.280 grants the GMHB authority to address whether a development regulation complies with the GMA and a zoning ordinance is a development regulation. This authority may not extend, however, to determining whether a county complies with its internal code when adopting a zoning change. Nevertheless, Spokane County has not argued that the GMHB may not find its plan amendment noncompliant with the county code, or that the GMHB can use such noncompliance to form the basis for a determination of invalidity of the plan amendment.

††††††††Issue 7: Whether the GMHB committed error when it ruled Spokane County amendment 11-CPA-05 invalid under the GMA?

††††††††Answer 7: We do not answer this question. Since we have both reversed and affirmed several determinations of noncompliance made by the GMHB, we remand to the GMHB to readdress whether amendment 11-CPA-05 should be invalidated.

††††††††We have reversed the GMHB on two of the four grounds upon which it invalidated amendment 11-CPA-05. We must now determine what remedy or remedies are appropriate. In particular, we must ask whether we should affirm the GMHB's declaration of invalidity of the plan amendment now that there are only two

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noncompliance grounds: UL.2.16 and SCZC section 14.402.040.

††††††††A number of GMA sections address remedies available to the GMHB. Those remedies include a two-step process. If the GMHB finds a county action to be noncompliant with the GMA, the GMHB will first enter an order of remand for the county to comply. Second, the GMHB will determine whether to invalidate the action such that the action lacks force during the time of remand. Presumably, the purpose of invalidity is to prevent owners and developers from gaining vested rights under the county action, such as a rezone, during the remand.

††††††††RCW 36.70A.300 reads, in relevant part:

> (1) The board shall issue a final order that shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter [the GMA], [the Shoreline Management Act, or the State Environmental Policy Act].
> . . . .
> (3) In the final order, the board shall either:
> (a) Find that the state

> agency, county, or city is in compliance with the requirements of this chapter.
> (b) Find that the state agency, county, or city is not in compliance with the requirements of this chapter . . . in which case the board shall remand the matter to the affected state agency, county, or city. The board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board in cases of unusual scope or complexity, within which the state agency, county, or city shall comply with the requirements of this chapter. The board may require periodic reports to the board on the progress the jurisdiction is making towards compliance.
> (4) (a) Unless the board makes a determination of invalidity under RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development

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> regulations during the period of remand.

††††††††RCW 36.70A.302(1) reads:

> (1) The board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

††††††††RCW 36.70A.302(1) refers to a "comprehensive plan" and "development regulations." At issue in this appeal is a plan amendment. The GMHB declared the plan amendment and not the underlying comprehensive plan to be invalid. The GMHB did not invalidate the entire Spokane County Resolution 11-1191, which contained comprehensive plan amendments, but only that portion of the resolution involving the rezone of the Douglass land. The GMHB's singling out of amendment 11-CPA-05 for invalidity, rather than declaring the underlying comprehensive plan invalid or the entire Resolution 11-1191, makes sense.

††††††††In this case, the GMHB invalidated amendment 11-CPA-05 for substantially interfering with GMA goals (1), (3), and (12), of the thirteen GMA goals found in RCW 36.70A.020. The relevant subsections reads:

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> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services

> exist or can be provided in an efficient manner.
>
> . . . .
>
> (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.
>
> . . . .
>
> (12) 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.

We agree with the GMHB that amendment 11-CPA-05 interferes with UL.2.16 and SCZC section 14.402.040. This agreement supports a conclusion that amendment 11-CPA-05 interferes with the identified goals of the GMA. Nonetheless, we disagree with the GMHB that amendment 11-CPA-05 contradicts comprehensive plan polices UL.2.20, and CF.3.1. This disagreement undercuts the GMHB's conclusion that amendment 11-CPA-05 interferes with the stated GMA goals.

†††††††††We wrote in *Spokane County I*:

> In identifying 13 goals to guide local comprehensive planning, the legislature itself cautioned that it was not listing goals in order of priority and that its identification of the goals "shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020. Goals considered by local governments in comprehensive planning may be mutually competitive at times. For that reason, if a map amendment meaningfully advances other comprehensive plan goals and policies, a finding by the growth board that it fails to advance anotheróif it fails to advance, for example, a goal of encouraging high density residential development on sites having good access to a major arterialóthat alone cannot be an invalidating

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> inconsistency. The weighing of competing goals and policies is a fundamental planning responsibility of the local government.

173 Wn. App. at 333 (citation omitted). Based on this passage in *Spokane County I*, we would defer to any reasonable weighing of the goals and policies conducted by the Spokane County Board of Commissioners. While the Board of Commissioners declared amendment 11-CPA-05 consistent with the goals of the GMA, the Board of Commissioners never provided any reasoning behind this declaration. More importantly, the Board of Commissioners never recognized the rezone's inconsistency with comprehensive plan amendment UL.2.16 or the violation of SCZC section 14.402.040. Thus, the Board of Commissioners never weighed whether countervailing goals and policies of the GMA trump the clash with GMA goals and

polices resulting from inconsistencies with comprehensive plan policy UL.2.16 or the violation of SCZC section 14.402.040.

††††††††RCW 34.05.574, a section of the Administrative Procedure Act, controls our review of the GMHB's decision. This statute reads:

> (1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, *remand the matter for further proceedings*, or enter a declaratory judgment order.
> . . . .
> (4) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, *the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action.*

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(Emphasis added.)

††††††††Based on our authority under RCW 34.05.574, we remand this ease to the GMHB for proceedings consistent with this opinion. The GMHB should reweigh the extent of the interference by amendment 11 -CPA-05 with the goals and policies of the GMA, based on the amendment's noncompliance with only comprehensive plan policy UL.2.16 and SCZC section 14.402.040,

††††††††We order that the GMHB's declaration of invalidity remain in effect during the additional review by the GMHB. Without this declaration of invalidity, Douglass might gain vested rights to develop its property within the limited strictures of medium density zoning. To preserve the interests of the parties, Douglass should not gain any vested rights during the additional review.

CONCLUSION

††††††††We hold the GMHB possessed subject matter jurisdiction to review the concurrent amendment and resolution. We affirm in part and reverse in part the superior court's substantive ruling that reverses the GMHB and reinstates Spokane County Comprehensive Plan amendment 11-CPA-05. We hold amendment 11-CPA-05 inconsistent with comprehensive plan policy UL.2.16 and SCZC section 14.402.040, but consistent with comprehensive plan policy UL.2.20 and CF.3.1. We remand to the GMHB for further proceedings consistent with this opinion.

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††††††††A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

††††††††/s/_____
††††††††Fearing, J.

WE CONCUR:

/s/_____
††††††††Brown, A.C.J.

/s/_____
††††††††Lawrence-Berrey, J.

APPENDIX
"B"

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

FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION & FUTUREWISE, Petitioners, v. SPOKANE COUNTY, Respondent, and HARLEY C. DOUGLASS, INC. Intervenor.	Case No. 12-1-0002 **FINAL DECISION AND ORDER**

I. SYNOPSIS

On December 23, 2011, the Spokane County Board of County Commissioners adopted Resolution 11-1191 amending the Spokane County Comprehensive Plan and Zoning Code. Five Mile Prairie Neighborhood Association & Futurewise filed a Petition for Review challenging Amendments 11-CPA-05 and 11-CPA-06. Petitioners alleged that Amendments 11-CPA-05 and 11-CPA-06 were inconsistent with the Comprehensive Plan and Development Regulations. The Board finds and concludes that Spokane County failed to comply with the Growth Management Act (GMA) when it enacted Resolution 11-1191, as it relates to Amendment 11-CPA-05. Resolution 11-1191 (as it relates to Amendment 11-CPA-05) is, therefore, remanded to Spokane County, and the County shall take further actions to come into compliance with the GMA.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

II. BURDEN OF PROOF

For the purposes of board review of the comprehensive plans and development regulations adopted by local government, the GMA establishes three major precepts: a presumption of validity; a "clearly erroneous" standard of review; and a requirement of deference to the decisions of local government.

Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and amendments to them are presumed valid upon adoption:

> Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

The statute further provides that the standard of review is whether the challenged enactments are clearly erroneous:[1]

> The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."[2]

Within the framework of state goals and requirements, the boards must grant deference to local governments in how they plan for growth.[3]

> In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements of this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

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[1] RCW 36.70A.320(3).
[2] *Dept. of Ecology v. PUD1*, 121 Wn.2d 179, 201 (1993).
[3] RCW 36.70A.3201.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The burden is on Petitioners to overcome the presumption of validity and demonstrate that any action taken by the County is clearly erroneous in light of the goals and requirements of Chapter 36.70A RCW (the Growth Management Act).[4] Where not clearly erroneous, and thus within the framework of state goals and requirements, the planning choices of local government must be granted deference.

III. JURISDICTION

Petitioners challenge two amendments adopted by the Spokane County Commissioners on December 23, 2011: Amendment 11-CPA-05, changing the Comprehensive Plan land use designation and the zoning classification for a 22.3 acre parcel, and Amendment 11-CPA-06, a text amendment to the Comprehensive Plan and Zoning Code to allow mining on sites 20 acres and smaller as a conditional use in all rural zones. The Board must determine whether these challenges are within its jurisdiction.

Applicable Law

The Growth Management Hearings Board (GMHB) has exclusive authority to rule on challenges alleging that a governmental agency is not in compliance with the requirements of the GMA. *See Spokane County, et al. v. Eastern Washington Growth Management Hearings Board,* 160 Wn. App. 274, 281, 250 P.3rd 1050, 1053 (2011), review denied, 171 Wn.2d 1034, 257 P.3rd 662 (2011).[5] The Board has jurisdiction to review petitions challenging whether a county's comprehensive plan, development regulations, and permanent amendments to the plan comply with the GMA.[6] *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 549 (1998)

Site-specific rezones authorized by an existing comprehensive plan are treated differently from amendments to comprehensive plans or development regulations. RCW 36.70B.020(4). The Land Use Petition Act (LUPA) (Chapter 36.70C RCW) governs site-

[4] RCW 36.70A.320(2).
[5] *See also Davidson Serles & Associates, et .al v. City of Kirkland et al.,* 159 Wn. App. 616 (2011).
[6] *See also Somers v. Snohomish County,* 105 Wn. App. 937, 942 (2001); RCW 36.70A.290(2).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

specific land use decisions and the Superior Court has exclusive jurisdiction over petitions that challenge site-specific land use decisions. *Spokane County*, 160 Wn. App. at 282.[7] However, "[t]he superior court may decide only whether a site-specific land use decision complies with a comprehensive plan and/or development regulation, not whether the rezone complies with the GMA." *Woods v. Kittitas County*, 162 Wn.2d 597, 603, 174 P.3d 25 (2007); *Spokane County*, 160 Wn. App. at 282.[8] LUPA does not apply to local land use decisions "that are subject to review by a quasi-judicial body created by state law, such as ... the growth management hearings board." RCW 36.70C.030(1)(a)(ii).[9]

The GMA sets up a basic dichotomy: review of political decisions regarding the broad nature of local area planning is by the GMHB, which is responsible for ensuring the decisions are consistent with the Growth Management Act; review of land use actions relating to specific property is by the superior court, which must confirm that statutory and constitutional processes have been followed.[10] The former category involves decisions that are essentially **legislative** in character; the procedural focus of the latter category is largely **judicial** in character. The division of authority between the GMHB and the courts reflects the different character of decisions being reviewed. *Coffey v. City of Walla Walla, et al.*, 145 Wn. App. 435, 440, 187 P.3d 272, 274 (2008). The Supreme Court recently reiterated the distinction between "legislative" amendments changing the designation of land (GMHB jurisdiction) and "quasi-judicial" decisions rezoning specific property (superior court jurisdiction).[11]

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[7] RCW 36.70C.030; *See also Somers*, 105 Wn. App. at 941-42.
[8] RCW 36.70A.030(7); RCW 36.70B.020(4).
[9] *See also Caswell v. Pierce County*, 99 Wn. App. 194, 198, 992 P.2d 534 (2000).
[10] A similar, parallel dichotomy is set up between local government processing of: [1] applications for comprehensive plan/development regulation amendments (RCW 36.70A.130), as distinct from [2] local project review of applications for project permits (RCW 36.70B.030). "Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review." RCW 36.70B.030(1). A proposed project's consistency with applicable development regulations must be decided by the local government during project review. RCW 36.70B.040.
[11] *Stafne v. Snohomish Co.*, 174 Wn.2d 24 (2012).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Thus, the GMHB has exclusive jurisdiction to decide whether a challenged *Development Regulation* complies with the GMA.[12] The term "Development Regulation" is defined as follows:

> "Development regulations" or "regulation" means the controls placed on development or land use activities by a county or city, including, but not limited to, **zoning ordinances**, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.[13]

In contrast, the Superior Court has exclusive jurisdiction under LUPA to decide whether a land use decision on an application for a *Project Permit* complies with a comprehensive plan and/or development regulation.[14] The term "land use decision" means *inter alia* a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination on an "application for a project permit", but excluding applications for legislative approvals such as area-wide rezones.[15]

The term "Project Permit" is defined as follows:

> "Project permit" or "project permit application" means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, **site-specific rezones authorized by a comprehensive plan** or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.[16]

If a rezone is **not** authorized by an existing comprehensive plan, then the rezone falls outside of the definition of "Project Permit" in RCW 36.70B.020(4). And if the rezone is not a

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[12] RCW 36.70A.290(2).
[13] RCW 36.70A.030(7) [Emphasis added].
[14] RCW 36.70C.030.
[15] RCW 36.70C.020(2). [Emphasis added].
[16] RCW 36.70B.020(4) [Emphasis added].

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

"Project Permit," then it is not a "land use decision" under RCW 36.70C.020(2)(a) and LUPA does not apply.

In 2011, the Court of Appeals, Division Three decided a case involving bundled comprehensive plan and rezone amendments.[17] Spokane County had taken final action to concurrently (1) amend its comprehensive plan land use designation and (2) amend its zoning map designation, both designations relating to a 4.2 acre tract of property.[18] The landowner argued that the Board lacked jurisdiction over the appeal of the comprehensive plan amendment because it was "site-specific."[19] The Court of Appeals disagreed:

> Site specific or not, the question is whether this is a change in the comprehensive plan. And clearly it is. The challenged action was in fact legislative; it involved an amendment to a comprehensive plan. . . . The Hearings Board had subject matter jurisdiction to consider the comprehensive plan amendment. The superior court erred by reversing the order of the Hearings Board for lack of jurisdiction.[20]

All Petitions for Review filed with the GMHB must include a detailed statement of the legal issues presented for resolution by the Board. RCW 36.70A.290(1). The Board must look to Petitioner's statement of issues to determine whether each legal issue falls within the Board's statutory subject matter jurisdiction. Site-specific rezones authorized by an **existing** comprehensive plan are treated differently from amendments to comprehensive plans or development regulations.[21]

If Petitioner's issue challenges the adoption or amendment of a **comprehensive plan, subarea plan, or development regulation**, then the GMHB has exclusive jurisdiction to decide whether the challenged action complies with the GMA.[22] If Petitioner's issue challenges a **site-specific rezone authorized by a comprehensive plan or subarea plan** (i.e., a "Project Permit"), then the Superior Court has exclusive jurisdiction to decide only

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[17] *Spokane County, et al. v. Eastern Washington Growth Management Hearings Board,* 160 Wn. App. 274, 250 P.3rd 1050 (2011), *review denied,* 171 Wn.2d 1034, 257 P.3rd 662 (2011).
[18] 160 Wn. App. at 278.
[19] 160 Wn. App. at 280.
[20] 160 Wn. App. at 284.
[21] *160 Wn. App. at 282.*
[22] RCW 36.70A.280, RCW 36.70A.290; RCW 36.70B.020(4); RCW 36.70C.030(1)(A)(ii).

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

whether a site-specific land use decision complies with a comprehensive plan and/or development regulation, not whether the rezone complies with the GMA.[23]

If Petitioner's issue challenges a rezone **not** authorized by an **existing comprehensive plan**[24] or subarea plan (i.e., NOT a "Project Permit") and the rezone falls within the statutory definition of a "development regulation" (e.g., the rezone is a "zoning ordinance"), then the Growth Management Hearings Board has exclusive jurisdiction to decide whether the challenged rezone complies with the GMA.[25]

Board Analysis and Findings

Amendment 11-CPA-05 changed the Comprehensive Plan land use designation for approximately 22.3 acres of land from "Low Density Residential" to "Medium Density Residential" and concurrently changed the zoning classification from "Low Density Residential" to "Medium Density Residential."[26]

Petitioners argue that the Board has jurisdiction over Amendment 11-CPA-05 because (a) the Comprehensive Plan was amended and (b) the change in zoning classification was not authorized by the pre-existing Comprehensive Plan and, therefore, this zoning change was a development regulation and not a project permit.

At the Hearing on the Merits, Spokane County's Deputy Prosecuting Attorney stated that this "rezone could not have taken place without amending the Comprehensive Plan and that is the interpretation of the Comprehensive Plan by the County."

It is clear from the record that the Comprehensive Plan had to be amended to enable the County to change the zoning classification for the subject property. The County chose to accomplish this by concurrently amending the Comprehensive Plan and zoning classification. This concurrent plan amendment/zoning change is similar to the action taken

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[23] RCW 36.70B.020(4); RCW 36.70C.030.
[24] *See Spokane County,* 160 Wn. App. at 282.
[25] RCW 36.70A.290(2); RCW 36.70A.030(7).
[26] Spokane County Resolution No. 11-1191, page 8 (December 23, 2011).

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P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

by Spokane County in *Spokane County, et al. v. Eastern Washington Growth Management Hearings Board,*[27] where the Court of Appeals held that the Board had jurisdiction to hear and decide that case.

Moreover, Spokane County's Zoning Code provides as follows:

> The action of the Board on a zoning map amendment under this section shall be final and conclusive unless appealed to the Growth Management Hearing Board, pursuant to chapter 36.70A RCW. A person with standing pursuant to RCW 36.70A.280 may file a petition within 60 calendar days after publication of the notice of adoption (4d of this section).[28]

The Board finds and concludes as follows: (1) this change in the zoning classification would not have been allowed without amending the Comprehensive Plan; (2) the change in the zoning classification was not authorized by the pre-existing Comprehensive Plan; (3) this change in the zoning classification was not a "project permit" but was instead an amendment to "development regulations"; and (4) pursuant to RCW 36.70A.280 and 36.70A.290, **the Board has jurisdiction to hear the appeal of Amendment 11-CPA-05**.

Amendment No. 11-CPA-06 is a text amendment to the Comprehensive Plan and Zoning Code to allow mining and rock crushing on sites 20 acres and smaller as a conditional use in all rural zones.[29] The Comprehensive Plan and Zoning Code were amended concurrently.

The Board finds and concludes as follows: (1) the text amendment to the zoning code (SCZC Chapter 14.618) was an amendment to the County's "development regulations"; and (2) pursuant to RCW 36.70A.280 and 36.70A.290, **the Board has jurisdiction to hear the appeal of Amendment 11-CPA-06**.

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[27] *Spokane County et al. v. Eastern Washington Growth Management Hearings Board,* 160 Wn. App. 274, 250 P.3rd 1050 (2011), *review denied,* 171 Wn.2d 1034, 257 P.3rd 662 (2011).
[28] Spokane County Zoning Code 14.402.100(7)(a).
[29] Spokane County Resolution No. 11-1191, page 8 (December 23, 2011).

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

IV. PROCEDURAL HISTORY

The Petition for Review was filed on February 27, 2012. The Prehearing Order and Order Granting Intervention of Harley C. Douglass, Inc. was issued on April 4, 2012. The Hearing on the Merits was held on July 19, 2012 in Spokane, Washington with the Eastern Washington Regional Panel comprised of Presiding Officer Raymond L. Paolella and Board Members Chuck Mosher and Margaret Pageler. Attending the Hearing on the Merits were attorney Tim Trohimovich, representing Petitioners Five Mile Prairie Neighborhood Association and Futurewise, and Deputy Prosecuting Attorney David W. Hubert, representing Respondent Spokane County.

Intervenor Harley C. Douglass, Inc. failed to file any brief and failed to attend the July 19, 2012 Hearing on the Merits. Pursuant to WAC 242-03-710, the Board on its own motion entered an **Order of Dismissal** of Harley C. Douglass, Inc. for failure to file any brief and failure to attend the Hearing on the Merits.

V. BOARD ANALYSIS AND DISCUSSION OF ISSUES

Issue 1 – Medium Density Residential Comp Plan/Zoning Amendment

> Does the approval of amendment 11-CPA-05 violate RCWs 36.70A.020(1), 36.70A.020(12), 36.70A.040, 36.70A.070, 36.70A.120, and 36.70A.130 and the County's Comprehensive Plan and development regulations including Comprehensive Plan Policies UL.2.16, UL.2.17, UL.2.20, UL.7.1, H.3.2, CF.3.1, and CF.12.2 because the proposed amendment is not located in areas consistent with the comprehensive plan, does not preserve the character of the neighborhood, and is not served by adequate public facilities and services whose design is consistent with the comprehensive plan policies, and otherwise fails to comply with the Growth Management Act (GMA) provisions identified in this issue?

The development regulations alleged to be violated are Spokane County Zoning Code (SCZC) Sections 14.402.040 and 14.402.100.[30]

[30] Petitioners failed to brief and therefore abandoned any arguments relating to Comprehensive Plan Policy CF.12.2 and Spokane County Zoning Code § 14.402.100. WAC 242-03-590(1).

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Applicable Law

RCW 36.70A.070 provides in pertinent part that the Comprehensive Plan "shall be an internally consistent document and all elements shall be consistent with the future land use map."

RCW 36.70A.070(2) provides in pertinent part that the Comprehensive Plan shall include:

> A housing element ensuring the vitality and character of established residential neighborhoods that: (a) Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community.

RCW 36.70A.120 requires Spokane County to "perform its activities and make capital budget decisions in conformity with its comprehensive plan."

RCW 36.70A.130(1)(d) requires: "Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan."

The term "Consistency" has been defined as follows: "Consistency means comprehensive plan provisions are compatible with each other. One provision may not thwart another."[31]

Analysis

Amendment 11-CPA-05 changed the Comprehensive Plan land use designation on approximately 22.3 acres of land from "Low Density Residential" to "Medium Density Residential" and concurrently changed the zoning classification from "Low Density

[31] *City of Spokane v. Spokane County*, EWGMHB Case No. 02-1-0001, Final Decision and Order (July 3, 2002), at 32.

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Residential" to "Medium Density Residential."[32] Petitioners allege this amendment was inconsistent with the six comprehensive plan policies discussed below. They also allege violation of provisions of the County Zoning Code.

- **Policy H.3.2: Ensure that the design of infill development preserves the character of the neighborhood.**

The 22-acre property is in a low-density area but has unique buildability challenges. First, it is largely encumbered by utilities, including a gas pipeline, sewer main, and electrical transmission corridor. Second, access to either of two road frontages is across steep terrain. A preliminary plat for the property under low-density classification had been approved in 2007, but the owner subsequently requested and received the zoning amendment allowing medium density development.[33]

Petitioners allege as follows: (a) the Hearings Examiner found that the "design, shape, size and orientation of lots in the preliminary plat [low density] are appropriate for the proposed use of such lots, and for the character of the area in which the lots are located, considering similar urban development located in the area ...;"[34] (b) the 200 unit development [medium density] with multi-family dwellings at densities of 8 to 10 dwelling units per acre and parking lots around the buildings would not ensure, or guarantee, that the design preserves the character of the neighborhood; (c) the densities are higher than the neighborhood character, so the building types are out of character; and (d) the comprehensive plan amendment and rezone do not "[e]nsure that the design of infill development preserves the character of the neighborhood."

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[32] Spokane County Resolution No. 11-1191, page 8 (December 23, 2011).
[33] Five Mile Prairie Neighborhood Association's and Futurewise's Prehearing Brief (May 29, 2012), *Tab 18 – Comprehensive Plan Annual Amendment Review Staff Report.*
[34] Five Mile Prairie Neighborhood Association's and Futurewise's Prehearing Brief (May 29, 2012), *Tab 9: Michael C. Dempsey, Spokane County Hearing Examiner, RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06 Findings of Fact, Conclusions of Law and Decision pages 22-23 (March 30, 2007).*

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
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Spokane County argues that the subject property is isolated topographically and the limited "sight lines" in the area also isolate this area so that the character of the larger neighborhood is preserved.

The Spokane County Commissioners, in Finding of Fact 25, found that the subject site is in the Urban Growth Area and the proposed development "will create an urban area with a variety of housing types and prices with a variety of residential densities."[35] The Board notes that the proposed development would include higher residential densities as compared to surrounding uses. However, as stated by the Spokane County Commissioners, a variety of residential densities is appropriate and expected within an Urban Growth Area. Further, the neighborhood has no consistent design or development pattern, and development on this property would be topographically isolated. Petitioners allege that these higher densities do not preserve neighborhood character but Petitioners failed to come forward with actual evidence showing that neighborhood character would be harmed by this proposal.

Therefore, the Board finds Petitioners failed to demonstrate that Amendment 11-CPA-05 is inconsistent with Spokane County Comprehensive Plan Policy H.3.2.

- **Policy UL.7.1: Identify and designate land areas for residential use, including categories for low-, medium- and high-density areas.**

While Policy UL.7.1 was cited in the issue statement, no argument was presented in Petitioners' Prehearing Brief on this particular subissue. Accordingly, the Board deems this subissue to have been abandoned under WAC 242-03-590(1).

- **Policy UL.2.16: Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials.**

[35] Spokane County Resolution No. 11-1191, page 7 (December 23, 2011).

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Petitioners argue as follows: (a) the 22.3 acres is not near commercial areas, but is 0.9 miles from the nearest commercial comprehensive plan designation, (b) the area is not near a public open space, and (c) the site does not have good access to a major arterial. The County states in its brief as follows:

> The maps and aerial photos indicate that the property is located on Waikiki Road, a minor urban arterial that intersects with Hawthorne Road, a major arterial within less than one mile. The property is within a mile of Whitworth College and the commercial center that is immediately to the east of the college. Holmberg Park and Conservation area is also within a mile to the south of the property on Waikiki Road.[36]

According to the maps attached to the Staff Report, the subject 22.3 acre property has a significant amount of frontage on North Five Mile Road and a smaller amount of frontage on Waikiki Road. The Staff Report also states, *inter alia*:

> Waikiki Road is designated as an Urban Minor Arterial by Spokane County's Arterial Road Plan, has sidewalks on both sides and has bus service from Spokane Transit Authority. Five Mile Road is not listed on the Arterial Road Plan, is steep and windy and does not have sidewalks. . . .
>
> One of the significant issues raised during this subdivision's public hearing was singular access to Five Mile Road and concerns from property owners that the road was already overloaded with traffic and dangerous due to its steepness and lack of any pedestrian accommodations.[37]

The Spokane County Planning Commission recommended denial of this proposed amendment by a vote of 4-2. The Planning Commission found that transportation improvements have not kept up with the residential development that has already occurred near the Five Mile Prairie, and the proposal fronts on Five Mile Road which is steep, windy and has no accommodations for pedestrians or bicyclists. Five Mile Road will be one of the access points for this proposed development but neither the County nor the developer has any plans for transportation improvements to Five Mile Road.[38]

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[36] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief, page 24 (June 19, 2012).
[37] Five Mile Prairie Neighborhood Association's and Futurewise's Prehearing Brief (May 29, 2012), *Tab 18 – Comprehensive Plan Annual Amendment Review Staff Report, pp. 3, 5.*
[38] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012), Attachment S – Planning Commission Findings of Fact and Recommendation (Oct. 7, 2011), p.9.

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Public comments before the Commission expressed concern for the capacity and safety of the intersection of Five Mile Road and Waikiki Road, and most of the 21 transportation comments thought that North Five Mile Road was steep, curvy, at its capacity, and dangerous during winter months.[39]

After the Planning Commission process concluded, the applicant's engineer submitted a letter to the County stating that "the development traffic is proposed to primarily use Waikiki Road to access the development with little to no need for the use of Five-Mile Road."[40] The applicant's engineer included a map depicting a potential road access for the development off of Waikiki Road – this new access road would wind across closely packed contour lines as it traverses steep terrain just above Waikiki Road.[41]

According to the County, the proposed development would have access roads from both Five Mile Road and Waikiki Road; however, "due to the geologic character of the property and the limitations on development of the site by utility easements the possible development will likely occur in the south and central area of the property" – closer to Five Mile Road and more distant from Waikiki Road.[42]

The County Commissioners made Findings of Fact 22 and 23 stating:

> 22. Traffic impacts from the proposed amendment may be further mitigated by provision of a second access point to Waikiki Road, to be reviewed at the project level, which will reduce the number of vehicle trips on Five Mile Road as evidenced by the trip distribution letter submitted by the applicant on November 23, 2011.
>
> 23. The proposed amendment is consistent with Spokane County Comprehensive Plan Goals and Policy UL.2.16 that encourage location of medium and high density residential categories with good access to major arterials such as Waikiki Road, which is designated as an Urban Minor Arterial.[43]

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[39] Id.
[40] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012), Attachment M – Letter to Spokane County Commissioners from Whipple Consulting Engineers, Inc. (Oct. 20, 2011).
[41] Id.
[42] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief, p. 25 (June 19, 2012).
[43] Spokane County Resolution No. 11-1191, page 7 (December 23, 2011).

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P.O. Box 40953
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Fax: 360-586-2253

The Board notes that Finding of Fact 23 inconsistently states there is good access to major arterials such as Waikiki Road but the record clearly shows that Waikiki Road is a Minor Arterial not a Major Arterial. The County's brief states that the nearest Major Arterial (Hawthorne Road) is less than a mile away. But it is clear from the record that the two county roads adjacent to the 22.3 acre site are not Major Arterials. In fact, Five Mile Road is a steep, windy two lane road that has no arterial designation. The Board finds and concludes that Finding of Fact 23 is not supported by substantial evidence in the record.

The record shows that a new access road to the development off of Waikiki Road would be feasible but the new residential units would be much closer to the existing Five Mile Road access point and may preferentially use Five Mile Road. There is substantial evidence in the record supporting a conclusion that the proposed development would be served by Five Mile Road, with significant safety and capacity concerns, and by a new access to Waikiki Road which is not designated as a Major Arterial.

Based on a review of the entire record, the Board finds and concludes that the site of the proposed development does not have good access to major arterials, and Amendment 11-CPA-05 is inconsistent with and thwarts Spokane County Comprehensive Plan Policy UL.2.16.

- **Policy UL.2.17: Site multifamily homes throughout the Urban Growth Area as follows:**
  a) Integrated into or next to neighborhood, community or urban activity centers.
  b) Integrated into small, scattered parcels throughout existing residential areas. New multi-family homes should be built to the scale and design of the community or neighborhood, while contributing to an area-wide density that supports transit and allows for a range of housing choices.

Petitioners argue that the "200 unit multi-family development at densities of 8 to 10 dwelling units per acre with parking lots around the building would not be built to scale and design of

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

the community or neighborhood."[44] But Petitioners fail to point to any evidence in the record demonstrating an inconsistency with the existing scale and design of the community. The county cited how this parcel is largely isolated from surrounding areas because of the topography of the site. Petitioners failed to come forward with actual evidence showing that neighborhood character would be harmed by this proposal. Regarding transit, the record shows that there is Spokane Transit Authority service along Waikiki Road, but there is no information as to the frequency of service. In view of the entire record in this case, the Board finds Petitioners failed to demonstrate that Amendment 11-CPA-05 is inconsistent with Spokane County Comprehensive Plan Policy UL.2.17.

- **Policy UL.2.20: Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus or car. Cul-de-sacs or other closed street systems may be appropriate under certain circumstances including, but not limited to, topography and other physical limitations which make connecting systems impractical.**

As discussed above, one of the significant issues raised during the Planning Commission public hearing was the preferred access to Five Mile Road and concerns from property owners that the road was already overloaded with traffic and dangerous due to its steepness, winter hazards, and lack of any pedestrian accommodations.[45] Furthermore, the steep terrain traversed by a future access route from Waikiki Road makes that potential route challenging for pedestrians and bicyclists and makes access to bus service on Waikiki Road problematic.

To address the originally single access to the site, the developer and the County have redesigned the site to provide for an additional access to Waikiki Road, including sidewalks and curbs and gutters, along with the building of the additional access road which must meet county standards. In addition, the County stated that this development will connect to surrounding properties as they are developed. While the additional access should help with

[44] Five Mile Prairie Neighborhood Association's and Futurewise's Prehearing Brief (May 29, 2012), p. 17.
[45] Five Mile Prairie Neighborhood Association's and Futurewise's Prehearing Brief (May 29, 2012), *Tab 18, pp. 3, 5.*

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

traffic circulation internal to the project site, external connections to public transportation infrastructure have not been upgraded, and the record shows that neither the County nor the project proponent plans to address the substandard transportation system adjacent to the project site.

There is substantial evidence in the record demonstrating that it will not be easy to get around by foot, bicycle, bus, or car, and to some degree it may be unsafe for pedestrians or bicycles to access the proposed development from Five Mile Road and/or Waikiki Road. Based on a review of the entire record in this case, the Board finds that Amendment 11-CPA-05 is inconsistent with and thwarts Spokane County Comprehensive Plan Policy UL.2.20.

- **Policy CF.3.1: Development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards.**

Petitioners point to evidence that this development will have an impact on local schools, which are already at capacity.[46]

Petitioners allege that schools are not reviewed through project level concurrency, and the annual Capital Facilities Plan update was not done as required by SCC 13.650.102. The alleged failure to update the County's Capital Facilities Plan was not appealed and is not before the Board.

The Planning Commission's findings contain evidence that Five Mile Road would not be suitable for children to walk along to attend school, and in recognition of the lack of any pedestrian facilities, the schools have incurred significantly increased costs to transport school children who live near Five Mile Road.[47] In addition to GMA planning principles, the

[46] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012), Attachment B (RN2) – Letter from Meade School District (March 14, 2011). Five Mile Prairie Neighborhood Association's and Futurewise's Prehearing Brief (May 29, 2012) Tab 34 – Letter to Spokane County from Kathy Miotke (September 14, 2011).

[47] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012), Attachment S – Planning Commission Findings of Fact and Recommendation (Oct. 7, 2011), pages 9-10; Spokane County

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1111 Israel Road SW, Suite 301
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Board notes that other state laws such as the subdivision statutes require local jurisdictions to make findings that appropriate provisions have been made for including sidewalks and other planning features that assure safe walking conditions for students walking to school.[48]

The Board finds and concludes that there is substantial evidence in the record showing that the school facilities lack capacity to serve the proposed medium density development and the school district already incurs expenses to bus area students using Five Mile Road because the substandard road is unsafe for children to walk along to attend school. Based on a review of the entire record in this case, the Board finds that Amendment 11-CPA-05 is inconsistent with and thwarts Spokane County Comprehensive Plan Policy CF.3.1.

- **Spokane County Zoning Code (SCZC) 14.402.040: The County may amend the Zoning Code when one of the following is found to apply.**
  1. **The amendment is consistent with or implements the Comprehensive Plan and is not detrimental to the public welfare.**
  2. **A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code.**
  3. **An amendment is necessary to correct an error in the Zoning Code.**
  4. **An amendment is necessary to clarify the meaning or intent of the Zoning Code.**
  5. **An amendment is necessary to provide for a use(s) that was not previously addressed by the Zoning Code.**
  6. **An amendment is deemed necessary by the Commission and/or Board as being in the public interest.**

Petitioners allege that none of these criteria for amending the zoning code apply. The applicant's engineer suggested that single family development "is no longer feasible in this economy of surplus single family residential lots and rising construction costs."[49] Spokane

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Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012) , Attachment B (RN2) – Letter from Meade School District (March 14, 2011). Five Mile Prairie Neighborhood Association's and Futurewise's Prehearing Brief (May 29, 2012) Tab 34 – Letter to Spokane County from Kathy Miotke (September 14, 2011).

[48] *See e.g.* RCW 58.17.110(2).

[49] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012), Attachment M – Letter to Spokane County Commissioners from Whipple Consulting Engineers, Inc. (Oct. 20, 2011).

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P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

County argues that SCZC 14.402.040(1) and (2) are both met based on changed economic conditions and a shift away from solely single family dwellings to a mix of duplexes.[50]

The Planning Commission found in pertinent part as follows:

> The Planning Commission finds this proposal to be inconsistent with the following Comprehensive Plan Goals and Policies: Goal: T2, Policies: T.2.2, 3 & 7. Significant residential development has occurred on and near the Five Mile Prairie and transportation improvements have not kept up. This site is adjacent to one of the Prairie's access points (North Five Mile Rd.). It does not appear that the transportation improvements in the area are consistent with the Land Use Plan.
>
> The Planning Commission also finds this proposal inconsistent with Comprehensive Plan Goal: T.3.e, Policy: T.3e.1 which speaks to pedestrian and bicycle access. This proposal fronts on North Five Mile Rd. which is steep, windy and has no accommodations for pedestrians or bicyclists. The Spokane County Engineering Department says there are no plans for improvements and the applicant, who says they plan to use this road as one of their access points, has not indicated they plan to make any improvements.
>
> The amendment does not meet the criteria for a zone reclassification as provided by Sections 14.402.040 of the Zoning Code and the Planning Commission felt the proposal was not in the public's interest.[51]

The County Commissioners found in pertinent part as follows:

> 20. The proposed amendment is consistent with the criteria for a zone reclassification under Section 14.402.040 (1) and (2) of the Spokane County Zoning Code as the proposed amendment implements the goals and objectives of the Comprehensive Plan and the subject area has experienced a change of conditions as evidenced by development of duplex dwelling units in proximity to the subject property thereby creating a mix of land use types and densities in the Urban Growth Area boundary.[52]

There is substantial evidence in the record to support the Planning Commission's findings that: (a) transportation improvements (including safe pedestrian and bicycle routes) are not consistent with the Land Use Plan, (b) Amendment 11-CPA-05 is inconsistent with the

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[50] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief, p. 27 (June 19, 2012).
[51] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012), Attachment S – Planning Commission Findings of Fact and Recommendation (Oct. 7, 2011), p. 9.
[52] Spokane County Resolution No. 11-1191, p. 7 (December 23, 2011).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Comprehensive Plan, (c) Amendment 11-CPA-05 does not meet the criteria for a zone reclassification in SCZC 14.402.040, and Amendment 11-CPA-05 is not in the public interest.

The Board has determined that Amendment 11-CPA-05 is not consistent with and does not implement Comprehensive Plan Policies UL.2.16, UL.2.20, and CF.3.1 relating to transportation, pedestrian/bicycle facilities, and school facilities.

The development of duplex dwelling units in proximity to the subject property cannot constitute a change in circumstances under SCZC 14.402.040(2) since duplexes are already a permitted use in the "Low Density Residential" zone and so there is no need to change the zoning to accommodate duplexes.[53] For example, the previously approved Redstone preliminary plat for this site included 12 duplex dwelling units.[54]

Moreover, if zoning classifications could be readily changed whenever there are cyclical market fluctuations (as advocated by applicant's engineering consultant), then property owners could lose the reliance value of the zoning code and thereby frustrate the investment backed expectations of homeowners.

The Board finds and concludes that Finding No. 20 in Resolution 11-1191 is not supported by substantial evidence in the record, and Amendment 11-CPA-05 does not meet the criteria for a zone reclassification as provided by Spokane County Zoning Code 14.402.040.

Conclusion

The Board finds and concludes as follows:

- Comprehensive Plan Amendment 11-CPA-05 is not consistent with and does not implement Comprehensive Plan Policies UL.2.16, UL.2.20, and CF.3.1.
- Amendment 11-CPA-05 is contrary to RCW 36.70A.070, RCW 36.70A.130(1)(d), and Spokane County Zoning Code 14.402.040.

[53] Spokane County Zoning Code 14.606.220.
[54] Five Mile Prairie Neighborhood Association's and Futurewise's Prehearing Brief (May 29, 2012), *Tab 18 – Comprehensive Plan Annual Amendment Review Staff Report, p.3.*

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- Spokane County's Findings pertaining to Amendment 11-CPA-05 are not supported by substantial evidence in the record.
- Amendment 11-CPA-05 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.

Issue 2 – Mining and Rock Crushing

> Does the approval of amendment 11-CPA-06 violate RCWs 36.70A.020(8), 36.70A.020(10), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.130, 36.70A.131, and 36.70A.170 and the County's Comprehensive Plan and development regulations including the Rural Residential-5, Rural Conservation, Urban Reserve, Rural Activity Centers, and the Mineral Lands categories and Policies RL.1.4, NR.1.7, NR.1.8, and NR.3.10 because it allows mining in areas where it is not authorized, does not include measures required by the GMA or comprehensive plan, and otherwise fails to comply with the GMA provisions identified in this issue?

The development regulations alleged to be violated are Spokane County Zoning Code (SCZC) Sections 14.402.040, 14.402.080, and 14.618.100.[55]

Applicable Law

RCW 36.70A.070(5)(b) provides:

> Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

RCW 36.70A.130(1)(d) requires: "Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan."

---

[55] Petitioners failed to brief and therefore abandoned any arguments relating to: RCWs 36.70A.050, 36.70A.060, 36.70A.131, and 36.70A.170; and Spokane County Zoning Code (SCZC) Sections 14.402.080 and 14.618.100.

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The term "Consistency" has been defined as follows: "Consistency means comprehensive plan provisions are compatible with each other. One provision may not thwart another."[56]

Analysis

Amendment 11-CPA-06 is a text amendment to the Comprehensive Plan and Zoning Code to allow mining and rock crushing on sites 20 acres and smaller as a conditional use in all rural zones.[57] Spokane County's zoning regulations previously prohibited mining, rock crushing, and asphalt plants in all rural zones.[58] RCW 36.70A.070(5)(b) does not require mining to be allowed in rural areas but at the same time does not prohibit mining in rural areas.

Petitioners allege that allowing mining in rural zones is inconsistent with the Comprehensive Plan because the "Rural Traditional" land use category does allow mining but the "Rural Residential-5," "Rural Conservation," "Urban Reserve," "Rural Activity Centers," and "Rural Development Areas" land use categories do not.[59]

However, these rural land use categories do not prohibit or discourage mining. Other than the "Rural Traditional" category, these listed land use categories in the Comprehensive Plan have explanatory language that is silent as to mining. Petitioners have not come forward with evidence to show how Text Amendment 11-CPA-06 allowing mining would thwart land use policies which are silent on mining.

Furthermore, other Comprehensive Plan policies explicitly provide that mining is allowed and appropriate in rural areas:

> Policy RL-11: Resource lands with long-term commercial significance are considered in the Natural Resource Lands Chapter. Rural lands may include, however, viable resource uses which do not fit the criteria for inclusion in the

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[56] *City of Spokane v. Spokane County*, EWGMHB Case No. 02-1-0001, Final Decision and Order (July 3, 2002, at 32.

[57] Id.

[58] Spokane County Resolution No. 11-1191, Attachment "A" -- Spokane County Zoning Code 14.618.220, Table 618-1, Rural Zones Matrix (December 23, 2011).

[59] Five Mile Prairie Neighborhood Association's and Futurewise's Prehearing Brief, p. 24 (May 29, 2012).

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resource land designation. Resource uses, including small scale agriculture, woodlots and mining, are appropriate in rural areas and certainly contribute to rural character. The maintenance and protection of these uses is one of the purposes of this section.

Policy NR.4.12: Mining shall be allowed on rural lands as well as lands designated as mineral and other natural resource lands if environmental protection and compatibility with adjacent land uses is assured.[60]

Assuring environmental protection and compatibility with adjacent land uses can be accomplished as part of the County's Conditional Use approval process.

Comprehensive Plan Policy RL.1.4 provides:

> Nonresidential and accessory uses appropriate for the rural area include farms, forestry, outdoor recreation, education and entertainment, sale of agricultural products produced on-site, home industries and home businesses. New churches and schools in the rural area are encouraged to locate in rural cities or rural activity centers, provided adequate services are available and the extension of urban services is not necessary.

While Policy RL.1.4 lists appropriate uses for the rural areas, this particular policy is silent as to mining. Petitioners have not come forward with evidence to show how Text Amendment 11-CPA-06 allowing mining would thwart Policy RL.1.4 when that policy is silent on mining.

Finally, Petitioners assert Text Amendment 11-CPA-06 violates the criteria for amending the zoning code set forth in Spokane County Zoning Code 14.402.040. Petitioners say that Resolution 11-119, Finding 8 does not address those zoning code criteria.

However, the County Commissioners adopted by reference the findings of the Planning Commission, excerpted in relevant part as follows:

> The Planning Commission found the proposed amendment is consistent with the Spokane County Comprehensive Plan, more specifically Policies NR.1.8, NR.4.14, NR.1.7 and the proposed text amendment would create two separate processes for review of mining operations in Spokane County. The first process would allow small scale (less than 20 acres) mining and rock

[60] Id. at Tab CP, pp. RL-11, NR-11.

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crushing in Rural Zones as a Conditional Use Permit with performance criteria.[61]

The Board has determined that Amendment 11-CPA-06 does not thwart the enumerated policies in the Comprehensive Plan.

The Board finds and concludes there is substantial evidence in the record supporting the County's findings that Amendment 11-CPA-06 is consistent with the Comprehensive Plan. Petitioners failed to satisfy their burden to demonstrate clearly erroneous action by Spokane County as to Amendment 11-CPA-06. Petitioners' Legal Issue 2 is **dismissed.**

VI. DETERMINATION OF INVALIDITY

RCW 36.70A.302(1) provides:

> 1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
>
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

A determination of invalidity can only be issued if the Board finds Spokane County's adoption of Comprehensive Plan Amendment 11-CPA-05 fails to comply with the GMA and that its continued validity would substantially interfere with the fulfillment of the GMA's goals. GMA Planning Goals 1, 3, and 12 in RCW 36.70A.020 are stated as follows:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

[61] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012), Attachment S – Planning Commission Findings of Fact and Recommendation (Oct. 7, 2011), p. 10.

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(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

(12) 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.

The Board has determined that Spokane County failed to comply with the GMA and has remanded this matter to the County to achieve compliance under RCW 36.70A.300. The Board hereby finds and concludes that the continued validity of Amendment 11-CPA-05 would substantially interfere with the fulfillment of the GMA Planning Goals 1, 3, and 12.

Moreover, there is evidence in the record indicating a risk for project vesting in this case, which would render GMA planning procedures as ineffectual and moot -- if such project vesting were to occur, then the remand of this case to the County would be meaningless and there would be no practical way to address GMA compliance.

Conclusion

Based upon the foregoing, the Board determines that the continued validity of Amendment 11-CPA-05 would substantially interfere with the fulfillment of RCW 36.70A.020(1) [Urban Growth], .020(3) [Transportation], and .020(12) [Public facilities and services]. Therefore, the Board issues a Determination of Invalidity as to Comprehensive Plan Amendment 11-CPA-05.

VII. ORDER

Based on the foregoing, the Board finds and concludes that Spokane County failed to comply with RCW 36.70A.070 and RCW 36.70A.130(1)(d) of the Growth Management Act and Spokane County Zoning Code 14.402.040 when it enacted Amendment 11-CPA-05. Spokane County's enactment of Amendment 11-CPA-05 was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.

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Resolution 11-1191, as it relates to Amendment 11-CPA-05, is remanded to Spokane County, and the County shall take further actions to come into compliance with the Growth Management Act consistent with this Final Decision and Order.

The following schedule for compliance, briefing and hearing shall apply:

Item	Date Due
Compliance Due	**February 19, 2013**
Compliance Report and Index to Compliance Record	March 5, 2013
Objections to a Finding of Compliance	March 19, 2013
Response to Objections	March 29, 2013
Compliance Hearing - Telephonic **Call 1-800-704-9804 and use pin 5721566#**	**April 9, 2013** **10:00 a.m.**

Entered this 23rd day of August, 2012.

Raymond L. Paolella, Board Member

Chuck Mosher, Board Member

Margaret Pageler, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.[62]

[62] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), -840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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APPENDIX
"C"

Case No. 31941-5-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

SPOKANE COUNTY,

Respondent,

v.

FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION, and FUTUREWISE,

Appellants,

and

HARLEY C. DOUGLASS, INC.,

Respondent,

and

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondent

BRIEF OF RESPONDENT HARLEY C. DOUGLASS, INC.

300 East Pine
Seattle, Washington 98122
(206) 628-9500
Facsimile: (206) 628-9506

GROFF MURPHY, PLLC

Michael J. Murphy, WSBA #11132
William J. Crittenden, WSBA #22033

Attorneys for Respondent

April 30, 2014

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I. INTRODUCTION

The Growth Management Act, Chap. 36.70A RCW ("GMA") was enacted to encourage development in established urban areas and to reduce sprawling, low-density development. RCW 36.70A.010, -.020. Cities and counties planning under GMA have broad discretion to balance planning goals, and to make planning decisions based on local circumstances. RCW 36.70A.3201.

The adoption or amendment of comprehensive plans by local governments are subject to review by the Growth Management Hearings Board ("GMHB") to determine whether those planning decisions comply with GMA. RCW 36.70A.280(1). Local government planning decisions are presumed valid, and the GMHB is required to grant broad deference and uphold those decisions unless they are clearly erroneous in light of the goals of GMA. RCW 36.70A.320(3).

In this case, Spokane County ("County") made a legislative decision to amend the comprehensive plan designation for a small and unique parcel of property, owned by Douglass, inside the County's existing urban growth area. Recognizing that desired infill development of the property was not feasible under the existing designation of Low Density Residential ("LDR"), and that GMA requires a variety of housing options and residential densities, the County amended the designation to Medium Density Residential ("MDR"). This small increase in residential density on one small parcel of property based on unique

local circumstances was well within the County's broad discretion under GMA.

Unfortunately, far from granting broad deference to the County's planning decision, the GMHB substituted its own judgment for the County's interpretation and application of its own comprehensive plan policies, and invalidated the amendment. The GMHB engaged in unprecedented micro-management of local planning decisions in direct violation of the statutorily-required deference to local planning decisions. The superior court correctly reversed the GMHB.

II. RESPONSE TO STATEMENT OF THE CASE

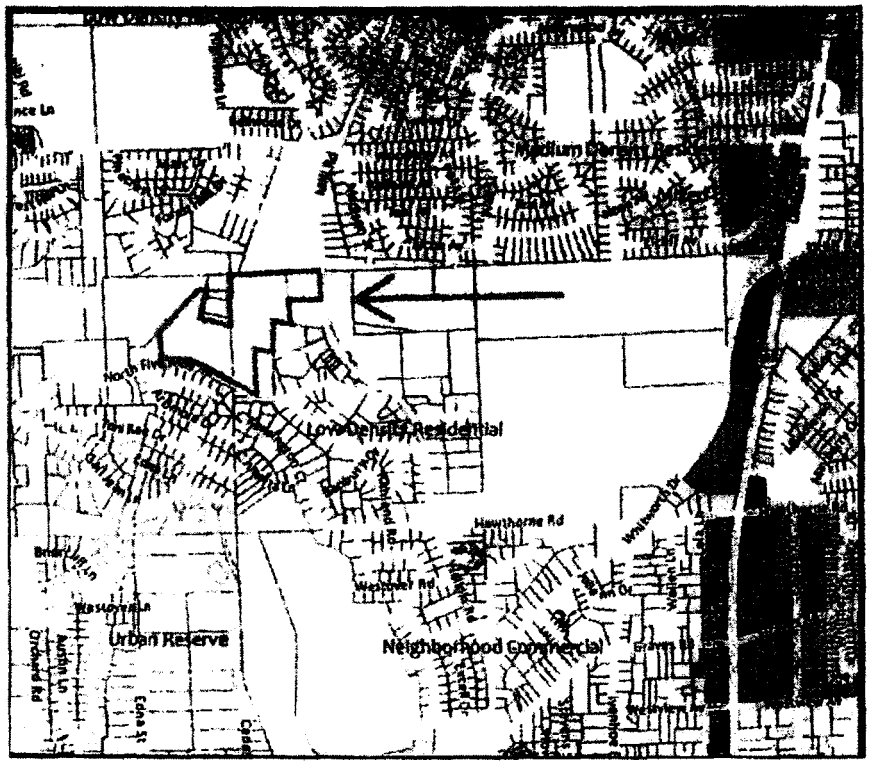
A. Background: The Douglass Property

Respondent Douglass owns approximately 22.3 acres of undeveloped land in unincorporated Spokane County ("Property"). The Property is within the Spokane County UGA (UGA)[1], and is currently designated LDR under the comprehensive plan and zoning code. The Property is hilly, topographically isolated, and consists of irregularly shaped parcels. The Property is encumbered by easements for electrical transmission lines and a natural gas pipeline. CR 013, 046, 218, 220, 226.[2] The Property is located west of Waikiki Road and north of

[1] The Urban Growth Area ("UGA") is the area designated by the County, planning under GMA, "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110(1); *see* RCW 36.70A.030(20).

[2] "CR ###" refers to the numbered Certified Record filed by Spokane County on December 17, 2012. *See* CP 126-128; *App. Br.* at 1 n.2.

Five Mile Road. Waikiki is classified as an Urban Principal Arterial. Five Mile is classified as an Urban Collector Arterial. Both serve larger residential areas. CR 193, 220. This figure shows the configuration of the Property (*see* CR 046):



The Property is surrounded by LDR zoned areas, but bordered on the north by a BPA easement. CR 220-221. The property is served by existing urban utilities. CR 224. Development of the property would be considered infill development, which is encouraged by GMA and County polices to contain urban growth and avoid costly expansions of urban services. CR 013, 222-223, 225.

Douglass plans to develop the Property for residential use. In March 2007, before the collapse of the housing market, the county hearing examiner approved a preliminary plat called "Redstone," which would have allowed the construction of 26 single family homes and 12 duplexes on the Property. CR 191, 220. After the Redstone plat was approved, economic conditions changed and the development of single family homes became unfeasible. CR 220.

B. Application for Amendment to Comprehensive Plan (11-CPA-05)

In March 2011, Douglass applied for an amendment to the Spokane County Comprehensive Plan and a concurrent amendment to the County's zoning map. Douglass asked the County to change both the comprehensive plan and zoning designations of the Property from LDR to MDR. CR 007-008, 016, 299.

C. County Approval

In December, 2011, the Board of County Commissioners ("BOCC") adopted Resolution 11-1191, approving the comprehensive plan amendment and concurrent rezone (amendment 11-CPA-05). CR 007-016, 046. In response to concerns of neighbors regarding the traffic impacts of development, the amendment was expressly conditioned upon construction of a direct access to Waikiki Road and other vehicle and pedestrian improvements. CR 013.

D. Growth Management Hearings Board (GMHB) Proceedings

Respondents Five Mile Prairie Neighborhood Association and Futurewise

("Futurewise") challenged the County's action by filing a petition for review with the GMHB. Futurewise alleged that Amendment 11-CPA-05 was inconsistent with several of the policies in the County's comprehensive plan. CR 001-006. Douglass moved to intervene in the GMHB proceedings to protect its interests as the underlying property owner. CR 070-073. No party objected, and the GMHB issued an order allowing intervention by Douglass. CR 077-078.

Futurewise also challenged the concurrent rezoning of the Property, arguing that the rezone did not comply with the County's criteria for zoning amendments. CR 177-180. The County explained that the GMHB lacked jurisdiction to consider Futurewise's arguments against the rezone. CR 306-311.

E. *Decision* of Growth Management Hearings Board (GMHB)

In August 2012, the GMHB issued its *Decision*, reversing the County's approval of amendment 11-CPA-05 and issuing a determination of invalidity. CR 1010-1036. The GMHB concluded that the amendment was inconsistent with three comprehensive plan policies relating to transportation (vehicle and pedestrian) and schools. CR 1022-1027. The GHMB rejected Futurewise's arguments regarding infill development and the location of multifamily housing. CR 1021, 1025. The GMHB also concluded that it had jurisdiction over the concurrent rezone, and that the rezone did not comply with the County's criteria for zoning amendments. CR 1017, 1029.

F. Superior Court Reversal

Douglass and the County both filed petitions for judicial review in the superior court, which were consolidated. CP 1-80; 111-124. The superior court reversed the GMHB, and remanded the matter to the GMHB to enter an order finding the County in compliance with GMA. CP 493-496.

III. STANDARD OF REVIEW

The superior court correctly reversed the GMHB, concluding that Amendment 11-CPA-05 was not "clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter." CP 494-495; *see* RCW 36.70A.320(3). Futurewise seeks to reverse the superior court and uphold the GMHB decision by applying the wrong standard of review. The *Brief of Appellant* never mentions RCW 36.70A.320(3) or the "clearly erroneous" test ***even once***. Instead, Futurewise erroneously argues that the GMHB decision is "supported by substantial evidence." *App. Br.* at 4, 29, 38, 49.

A. The Growth Management Act (GMA) requires the GMHB and reviewing courts to defer to local agency planning decisions by applying the "clearly erroneous" test to the record before the GMHB. The "substantial evidence" test normally used in appellate review of factual matters is *not* applicable to GMHB decisions.

The legislature created the GMHB in 1991. Laws of 1991, 1st Sp. Sess., ch. 32, § 5; *see* RCW 36.70A.250); *Skagit Surveyors and Engineers, LLC, v. Friends of Skagit County*, 135 Wn.2d 542, 548-549, 958 P.2d 962 (1998). The

1991 statute required the GMHB to issue written decisions with findings of fact in each case. Laws of 1991, 1st Sp. Sess., ch. 32, § 7; former RCW 36.70A.270. The 1991 statute also provided that, like a court or quasi-judicial tribunal, the GMHB would determine factual matters based on the "preponderance of the evidence," with the burden of proof on the party asserting that an agency was not in compliance with GMA. Laws of 1991, 1st Sp. Sess., ch. 32, § 13 (emphasis added); former RCW 36.70A.320. The "preponderance of the evidence" standard to be applied by the GMHB was consistent with the APA standard for judicial review of agency orders in adjudicative proceedings, which requires a reviewing court to determine whether an administrative tribunal's findings of fact are supported by substantial evidence. RCW 34.05.570(3)(e); *see DaVita, Inc. v. Dep't of Health*, 137 Wn. App. 174, 185, 151 P.3d 1095 (2007).

In 1997, the legislature amended RCW 36.70A.320(3) to eliminate the "preponderance of the evidence" test and require the GMHB boards to defer to the decisions of local governments under the "clearly erroneous" standard:

> (3) In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter... The board shall find compliance unless it determines that the action by the state agency, county, or city is **clearly erroneous in view of the entire record before the board** and in light of the goals and requirements of this chapter.

RCW 36.70A.320(3); Laws of 1997, ch. 429, § 20 (emphasis added).

The 1997 legislature clearly stated that it intended to require the GMHB to grant broad deference to local agencies' planning decisions:

> The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, **the legislature intends for the board to grant deference to counties and cities in how they plan for growth,** consistent with the requirements and goals of this chapter. **Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances.** The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201 (emphasis added); Laws of 1997, ch. 429, § 2.

The "substantial evidence" test of the APA conflicts with the highly deferential "clearly erroneous" test specifically required by RCW 36.70A.320(3). *See* RCW 36.70A.270(7) (APA applies to the extent it does not conflict with GMA). After the 1997 legislature eliminated the GMHB's authority to determine the facts under the "preponderance of the evidence" test, the usual "substantial evidence" test for judicial review of factual determinations under the APA was no longer applicable. Because the GMHB is required to defer to local agencies under the "clearly erroneous" test, a reviewing court must determine whether the

GMHB has correctly applied that test, ***not*** whether the GMHB's own findings are supported by substantial evidence. *See Farm Supply Dist., Inc. v. WUTC*, 83 Wn.2d 446, 447-450, 518 P.2d 1237 (1974). Futurewise consistently fails to apply the proper standard of review.

For example, Futurewise erroneously asserts that "the [GMHB's] conclusion that Amendment No. 11-CPA-05 is inconsistent with Policy UL.2.20 is supported by substantial evidence." *App. Br.* at 29. But under RCW 36.70A.320(3) and -.3201, the issue before the GMHB was whether the County's planning decision was "clearly erroneous in view of the entire record before the board," not whether the GMHB would have found otherwise if it were permitted to make its own findings of fact subject to judicial review under the "preponderance of the evidence" test.[3] The conflict between the ordinary "substantial evidence" test and the "clearly erroneous" test explicitly required by GMA is highlighted by the fact that Futurewise's brief ***never*** mentions RCW 36.70A.320(3), -.3201 or the "clearly erroneous" test.

The correct use of the "clearly erroneous" test is demonstrated in *City of Arlington v. CPSGMHB*, 164 Wn.2d 768, 193 P.3d 1077 (2008). In that case,

[3] The legislature has not eliminated the requirement, from the original 1991 statute, that the GMHB "shall make findings of fact and prepare a written decision in each case." *See* RCW 36.70A.270(6); Laws of 1991, 1st Sp. Sess., ch. 32, § 5; former RCW 36.70A.270(5). However, the 1997 amendment of the standard of review to the "clearly erroneous" test means that the GMHB findings serve only to explain the GMHB's decision.

Snohomish County amended its comprehensive plan again to designate 110 acres of agricultural land as commercial land, and included the land in the Arlington UGA. The GMHB reversed, concluding that the re-designation and UGA expansion were clearly erroneous, and the superior court affirmed. 164 Wn.2d at 776-778. The Court of Appeals reversed the GMHB, and the Supreme Court upheld the Court of Appeals decision and the County's actions. 164 Wn.2d at 773-774. The Court noted that the GMHB was required to apply the "clearly erroneous" test, and held that the GMHB erred in the application of that test:

> [The GMHB] erred in concluding the County committed clear error in determining the land in question has no long-term commercial significance for agricultural production. There is evidence in the record supporting the County's determination on this point, and the [GMHB] wrongly dismissed this evidence. Because this evidence supports the County's finding that the land at Island Crossing has no long-term commercial significance for agricultural production, the [GMHB] erred in not deferring to the County's decision to redesignate the land for urban commercial use.

164 Wn.2d at 782. In other words, the question before both the GMHB and the reviewing courts was whether the County's planning action was clearly erroneous in light of the record. If the GMHB were allowed to make findings of fact to be reviewed under the substantial evidence test of the APA then the Supreme Court would have ***upheld*** the GMHB's determination, which was supported by substantial evidence. *See* 164 Wn.2d at 783-785. But the court reversed the

GMHB because the record also supported the County's action, and the GMHB was required to defer to the County. 164 Wn.2d at 788. Other Supreme Court cases confirm that reviewing courts apply the "clearly erroneous" test and not the "substantial evidence" test normally used in APA cases.[4]

B. References to the "substantial evidence" test in existing GMA cases are erroneous dicta.

The legislature's adoption of the "clearly erroneous" standard in RCW 36.70A.320(3) and its statement of intent in RCW 36.70A.3201 could hardly be more clear. Unfortunately, erroneous dicta taken from APA cases and repeated in subsequent GMA cases creates confusion by suggesting that courts review GMHB decisions under the "substantial evidence" test.[5] A careful review of the case law reveals that the Washington Supreme Court has never actually used or approved of the "substantial evidence" test in GMA cases, and that no case has directly addressed the obvious conflict between that test and the highly deferential

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[4] *See Quadrant Corp. v. GMHB*, 154 Wn.2d 224, 237-238, 110 P.3d 1132 (2005); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-498, 139 P.3d 1096 (2006); *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 735, 222 P.3d 791 (2009).

[5] Indeed, the Supreme Court's opinion in *City of Arlington v. CPSGMHB*, 164 Wn.2d 768, 193 P.3d 1077 (2008), contains several references to "substantial evidence." The opinion mentions "substantial evidence" in (i) describing the superior court's decision in the prior appeal, (ii) quoting a prior Court of Appeals opinion which observed that substantial evidence might support a contrary result, (iii) in a boilerplate discussion of the APA standard of review, and (iv) in dicta addressing an issue of res judicata. 164 Wn.2d at 774, 776, 779-780, 783. Nonetheless, on the merits the *Arlington* court applied the "clearly erroneous" test and reversed the GMHB for "clear error" in failing to properly defer to the county's decision. 164 Wn.2d at 782.

"clearly erroneous" test required by RCW 36.70A.320(3).[6]

[6] Erroneous references to the "substantial evidence" test began with *City of Redmond v. CPSGMHB*, 136 Wn.2d 38, 959 P.2d 1091 (1998), in which the court clarified and applied the definition of "agricultural lands" under GMA. Although the legislature had adopted the "clearly erroneous" test the previous year, the *Redmond* opinion never cited RCW 36.70A.320(3), -.3201 or the "clearly erroneous test." Instead, the court erroneously cited the APA and a non-GMA case under the APA for the substantial evidence test. 136 Wn.2d at 45-46 (citing *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997)). But these erroneous references to the substantial evidence test are dicta because the *Redmond* opinion never actually applied that test to any issue before the court. *See* 136 Wn.2d 38.

Two years later in *King County v. CPSGMHB*, 142 Wn.2d 543, 552-553, 14 P.3d 133 (2000), the court correctly recited the "clearly erroneous test required by RCW 36.70A.320(3) but also cited the APA and a non-GMA case (*Callecod, supra*) for the substantial evidence test. Again, the erroneous references to the substantial evidence test are dicta because the *King County* opinion never actually applied that test to any issue before the court. *See* 142 Wn.2d 543.

Two years later in *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002), the court upheld a determination of the GMHB that a county's proposed extension of a sewer line into a rural area violated RCW 36.70A.110(4). Again the court failed to cite either RCW 36.70A.320(3) or the "clearly erroneous" test, but cited the APA and the earlier *Redmond* case for the inapplicable substantial evidence test. 148 Wn.2d at 8. Again, the erroneous references to the substantial evidence test are dicta because the *Thurston County* opinion never actually applied that test to the legal issues before the court. *See* 148 Wn.2d 1.

Three years later in *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005), the court upheld a GMHB decision that the county failed to include best available science (BAS) in listing only two species as endangered, threatened, or sensitive. After noting that the GMHB correctly applied the "clearly erroneous" test, the court erroneously cited the APA and the erroneous dicta in *Redmond* for the "substantial evidence" test. 155 Wn.2d 833. The erroneous references to "substantial evidence" in *Ferry County* are dicta for two reasons. First, the court noted that it had granted review on only the issue of "whether substantial evidence supports the Board's finding" that the county did not use BAS. 155 Wn.2d at 831-832. The court never explained its starting assumption, borrowed from the Court of Appeals, that the "substantial evidence" test applied, and that assumption is not binding precedent. *In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996) (the literal wording of a court opinion is not controlling authority on an issue that the court did not consider). Second, it is clear that the court would have upheld the GMHB under the correct, "clearly erroneous" test anyway. 155 Wn.2d at 836.

Two years later in *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 166 P.3d 1198 (2007), the court upheld two compliance orders of the GMHB regarding watercourse protection measures. Again, the court recited the correct "clearly erroneous" standard but then repeated its erroneous dictum in *King County* for the "substantial evidence" test. 161 Wn.2d at 423-424. And again the erroneous references to the substantial evidence test are dicta because the

In sum, the legislature has directed the GMHB and reviewing courts to apply the "clearly erroneous" test to local agency planning decisions, and the "substantial evidence" test for judicial review of facts under the APA is incompatible with that test. RCW 36.70A.320(3); -.3201. Those supreme court cases that mention the APA "substantial evidence" test are erroneous dicta.[7]

Swinomish opinion never actually applied that test to the issue before the court. *See* 161 Wn.2d 415.

One year later in *Thurston County v. WWGMHB*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008), the court repeated its erroneous dictum in *Redmond* regarding the "substantial evidence" test. But the court never applied this test to the issues before the court. The first issue (GMHB jurisdiction over 7 and 10 year reviews of comprehensive plans) presented a legal question. 164 Wn.2d at 342-347. On the second issue (UGA size) and third issue (variety of rural densities) the court correctly used the "clearly erroneous" test. 164 Wn.2d at 353, 360.

Most recently, in *Kittitas County v. EWGMHB*, 172 Wn.2d 144, 154-155, 256 P.3d 1193 (2011), the court correctly cited RCW 36.70A.320(3) for the "clearly erroneous" standard but then repeated its erroneous dictum in *Redmond* regarding the "substantial evidence" test of the APA. Futurewise relies on *Kittitas County* for the standard of review. *App. Br.* at 9. But the references to the "substantial evidence" test in that case are all erroneous dicta. On the issue of the adequacy of the county's written record the court noted that the GMHB's orders were correct under any standard of review. 172 Wn.2d at 159. On the issue of rural densities the court noted that there was "substantial evidence" that three-acre rural densities are harmful, but remanded the issue to the GMHB. 172 Wn.2d at 171-162. The court also noted that there was "substantial evidence" that the county's comprehensive plan failed to assure a variety of rural densities and contained no protections for agricultural lands from harmful conditional uses. 172 Wn.2d at 170, 172. But the content of the comprehensive plan was not a question of fact, and the sufficiency of the plan was a legal issue. Again, the court held that the GMHB's decision was correct under any standard of review. 172 Wn.2d at 172.

[7] Erroneous dicta regarding the "substantial evidence" test also appears in various Court of Appeals cases. It is important to note that such dicta, erroneously derived from *Kittitas County*, *Redmond*, and the APA, also appears in this Court's recent decisions in *Spokane County v. EWGMHB*, 173 Wn. App. 310, 326, 293 P.3d 1248 (2013), and in *Spokane County v. EWGMHB ("Spokane County II")*, 176 Wn. App. 555, 565, 309 P.3d 673 (2013), *review denied*, 179 Wn.2d 1015 (2014).

IV. ARGUMENT

A. The GHMB erroneously concluded that it had subject matter jurisdiction over the concurrent rezone.

In both the GMHB and the trial court respondents argued that the GMHB lacked jurisdiction over the concurrent rezone. CR 306-311; 219-221, 288-294; 391-401. The trial court agreed. CP 495. However, in *Spokane County v. EWGMHB ("Spokane County II)*, 176 Wn. App. 555, 309 P.3d 673 (2013), *rev. denied*, 179 Wn.2d 1015 (2014), this Court held that a concurrent rezone is not a project permit subject to review under Chap. 36.70C RCW (LUPA) but an amendment to a development regulation subject to review by the GMHB.

Respondents respectfully disagree with this Court's opinion in *Spokane County II. Resp. Br. (County)* at 5. As explained in this section, respondents maintain that *Spokane County II* is erroneous, and that the GMHB lacked subject matter jurisdiction over the concurrent rezone in this case. Whether or not this Court is inclined to reconsider its decision in *Spokane County II*, respondents renew this argument for purposes of further review by the Supreme Court. This Court reviews the GMHB's exercise of jurisdiction de novo. *Spokane County II*, 176 Wn. App. at 569.

The Court does not need to revisit the jurisdiction issue if the Court agrees with respondents that, on the merits, the GMHB erroneously reversed the

concurrent rezone. As explained in Section (C), the GMHB erroneously concluded that the rezone did not comply with the County's criteria for zoning amendments. *See also, Resp. Br.* (County) at 24-26.

The GMHB has limited subject matter jurisdiction to adjudicate whether a comprehensive plan, development regulation or amendment complies with GMA. RCW 36.70A.280(1)(a), -.290(2); *Woods v. Kittitas County*, 162 Wn.2d 597, 609, 174 P.3d 25 (2007). The definition of "development regulation" excludes a "project permit" as defined in RCW 36.70B.020(4). RCW 36.70A.030(7). A "project permit" is defined as:

> [any land use permit], including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, **site-specific rezones authorized by a comprehensive plan** or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection. (Emphasis added).

RCW 36.70B.020(4). Accordingly, a site-specific rezone authorized by a comprehensive plan is *not* a development regulation over which the GMHB has jurisdiction. Such a rezone is a "project permit" that may only be challenged under LUPA. *Woods*, 162 Wn.2d at 616; *Feil v. EWGMHB*, 172 Wn.2d 367, 379, 259 P.3d 227 (2011). Although an amendment to a comprehensive plan and a rezone may be closely related, or even concurrently enacted, they are legally

distinct actions that must be challenged separately before the appropriate tribunals. *Coffey v. Walla Walla*, 145 Wn. App. 435, 442, 187 P.3d 272 (2008).

Spokane County II is based on the erroneous assumption that only a rezone authorized by an ***"existing"*** comprehensive plan is a project permit under RCW 36.70B.020(4). 173 Wn. App. at 562, 567-272. The word "existing" is not used in that statute. Rather, the word "existing" appeared in dicta in *Spokane County v. EWGMHB ("Spokane County I")*, 160 Wn. App. 274, 250 P.3d 1050, *rev. denied*, 171 Wn.2d 1034, 257 P.3d 662 (2011), which correctly rejected the owner's erroneous argument that the GMHB lacked any jurisdiction where comprehensive plan and zoning amendments are concurrently enacted. 160 Wn. App. at 284. The validity of the rezone was not at issue. This Court held only that the GMHB "had subject matter jurisdiction to consider the comprehensive plan amendment." 160 Wn. App. at 284. Unfortunately, dicta in *Spokane County I* inaccurately paraphrased RCW 36.70B.020(4) to include only site specific rezones "authorized by an ***existing*** comprehensive plan." 160 Wn. App. at 281. The Court subsequently repeated its erroneous characterization of RCW 36.70B.020(4) in both *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 51, 308 P.3d 745 (2013), and in *Spokane County II*, 173 Wn. App. at 567, 571.

By limiting the definition of "project permit" to rezones that are authorized by an "existing" (or "pre-existing") comprehensive plan, *Spokane*

County II creates additional jurisdictional problems and unresolved ambiguities. Like the GMHB decision, *Spokane County II* does not explain when or how an amended comprehensive plan becomes an "existing" comprehensive plan such that the GMHB no longer has jurisdiction. If a rezone is adopted one day after the concurrent amendment to a comprehensive plan, is the amended plan an "existing" plan? What if Futurewise had challenged the rezone in superior court under LUPA (as *Coffey* suggests)? Would the superior court have jurisdiction over the rezone unless and until Futurewise also filed a petition for review in the GMHB? If the GMHB upheld an amendment to a comprehensive plan, would the comprehensive plan, as amended, then become an "existing" comprehensive plan such that the concurrent rezone became "authorized" and therefore a "project permit" over which the GMHB lacked jurisdiction? Douglass has repeatedly raised these questions and Futurewise has provided no answers. *See* CP 395.[8]

Nor is an answer found in *Spokane County II*. The suggestion that RCW 36.70B.020(4) only applies to site-specific rezones authorized by an ***"existing"*** comprehensive plan is simply erroneous. A comprehensive plan amendment is "presumed valid upon adoption." RCW 36.70A.320(1). There is no later point in

[8] Futurewise also argues that the GMHB's exercise of jurisdiction is consistent with SCC 14.402.100. *App. Br.* at 15. The County has conceded that this part of its code may be erroneous. CR 311. Douglass has explained that the County's erroneous code cannot confer subject matter jurisdiction on the GMHB in violation of RCW 36.70A.280. CP 294, 401. Futurewise does not argue otherwise.

time at which that amendment becomes an 'existing' comprehensive plan. The concurrent rezone is "authorized by a comprehensive plan," RCW 36.70B.020(4), and therefore a project permit over which the GMHB had no jurisdiction.

B. Amendment 11-CPA-05 is not clearly erroneous in light of the entire record and the broad deference afforded to the County's planning decisions. The GMHB failed to afford proper deference to the County, and improperly substituted its judgment for the County's interpretation and application of its own comprehensive plan policies.

Futurewise challenged amendment 11-CPA-05 for alleged inconsistency with seven specific policies in the County's comprehensive plan. CR 002. The GMHB rejected the challenges based on four of those policies, noting that Futurewise had abandoned its arguments on two of the policies.[9] CR 1018, 1021.

The GMHB found that the amendment is consistent with comprehensive plan policies intended to ensure the availability of affordable housing. Policy H.3.2, relied on by Futurewise, states that the County should "Ensure that the design of infill development preserves the character of the neighborhood." CR 272. The GMHB concluded that the amendment is consistent with the policy. CR 1021. The GMHB also found that the amendment is consistent with Policy UL.2.17, which is intended to locate multifamily housing throughout the UGA. CR 247. The GMHB concluded that Futurewise had not demonstrated any

[9] Futurewise abandoned its arguments regarding comprehensive plan Policy CF.12.2 (fire protection) and UL.7.1 (designation of areas of residential use). CR 1018, 1021.

inconsistency with the existing scale and design of the community. CR 1025.

The GMHB agreed with Futurewise that the amendment was "inconsistent" with three policies in the comprehensive plan relating to transportation (vehicle and pedestrian) and schools: Policies UL.2.16, UL.2.20, and CF.3.1. CR 1022-1027. With respect to each of these policies, the GMHB failed to defer to the County's interpretation of its own comprehensive plan.[10]

It is undisputed that a comprehensive plan must be internally consistent, and that amendments must be consistent with the plan. CR 1019; *see* RCW 36.70A.070; RCW 36.70A.130(1). The BOCC specifically found that the amendment "is consistent" with the applicable policies. CR 013. Consequently, the interpretation of GMA is not at issue in this case, and the GMHB decision is not entitled to any deference.

With respect to whether the County correctly interpreted its own comprehensive plan policies and determined that the amendment was consistent with those policies, the GMHB is required to uphold local planning decisions unless those decisions are "clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [GMA]." RCW

[10] The BOCC decision specifically addressed Policies UL.2.16 and CF.3.1, but not Policy UL.2.20. CR 013. But there are dozens of potentially applicable policies in the comprehensive plan. CR 221-225, 243-281. The BOCC cannot be expected to specifically address every policy that might be raised in subsequent GMHB proceedings.

36.70A.320(3). The deference normally afforded to administrative agencies under the APA is superseded by the GMA's "clear legislative directive" that the GMHB must defer to local planning actions. *Quadrant Corp. v. CPSGMHB*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005); *see* RCW 36.70A.3201. In order to find that the County's actions are "clearly erroneous," the GMHB must have a " 'firm and definite conviction that a mistake has been committed.' " *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006) (quoting *Dep't of Ecology v. PUD No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

The GMHB decision acknowledges the highly deferential standard of review to be applied. CR 1011. Unfortunately, as explained more fully in the subsections that follow, the GMHB consistently failed to apply that standard.

1. The amendment is consistent with Policy UL.2.16: Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials.

The GMHB erroneously concluded that the amendment was inconsistent with Policy UL.2.16 because the Property "does not have good access to major arterials." CR 1024. This conclusion was based on the GMHB's mischaracterization of Waikiki Road, misinterpretation of the applicable policy, and misplaced concerns that some traffic from future development of the Property might use Five Mile Road. CR 1022-1024.

First, the GMHB erroneously characterized Waikiki Road as a "Minor Arterial." CR 1024. As the County has explained, Waikiki Road is an "Urban Principal Arterial," and that fact was correctly stated in the Hearing Examiner's approval of the Redstone Plat. CR 193. The GMHB simply repeated an error in the County's staff report, which erroneously referred to Waikiki Road as a "Minor Arterial," a classification that is not actually used in the County's Arterial Road Plan.[11] CR 222. Because Waikiki Road is an "Urban Principal Arterial," and the project will access directly on to Waikiki Road, the Property clearly has "good access to major arterials." Notwithstanding the incorrect nomenclature used by County staff, the BOCC correctly found that the Property has "good access to major arterials such as Waikiki Road." CR 013.

The GMHB also failed to note that the phrase "major arterials" in Policy UL.2.16 is not capitalized, and is not defined in the comprehensive plan. CR 247. The phrase "major arterials" is merely a descriptive term in the policy. BOCC correctly determined that this road was a "major arterial" for purposes of Policy

[11] The County's Arterial Road Plan is found at http://www.spokanecounty.org/data/engineers/traffic/arterialroadmap.pdf (last visited April 23, 2014. The County notes that that the Arterial Road Plan is a public document and asks the Court to take judicial notice of it. *Resp. Br. (County)* at 15 n.2; *see* CP 222-223. In the superior court Futurewise objected to this information. CP 326-328. Douglass ignored Futurewise's pointless objections because the existing record clearly states that Waikiki Road is an "Urban Principal Arterial." CR 193, 381.

UL.2.16.[12] The GMHB's erroneous understanding of the County's road classification system demonstrates why the GMHB should have deferred to the County's interpretation of its own comprehensive plan

Even if Waikiki Road were not a "major arterial" for purposes of Policy UL.2.16, the GMHB erroneously interpreted Policy UL.2.16. That policy seeks to "encourage" development with "good access to major arterials." The Policy does not require good access to arterials, and it does not require development to be adjacent to major arterials. Even if Waikiki Road were not a "major arterial," as the GMHB erroneously concluded, there are other major arterials less than a mile away. CR 1024. Futurewise has consistently ignored these points. CP 381.

Finally, the GMHB's concerns about the use of Five Mile Road are irrelevant, misplaced and patently erroneous. The GMHB stated:

> The record shows that a new access road to the development off of Waikiki Road would be feasible but the new residential units would be much closer to the existing Five Mile Road access point and ***may*** preferentially use Five Mile Road. There is substantial evidence in the record supporting a conclusion that the proposed development would be served by Five Mile Road, with significant safety and capacity concerns, and by a new access to Waikiki Road which is not designated as a Major Arterial.[13]

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[12] The GMHB purported to find that the BOCC Finding 23 was not "supported by substantial evidence." CR 1024. Once again, the GMHB applied the wrong standard of review.

[13] Note that the GMHB capitalized "Major Arterial" while that term is not capitalized or a defined term in the comprehensive plan.

CR 1024 (emphasis added).[14] (As explained above, Waikiki Road is, in fact, a "major arterial" for purposes of Policy UL.2.16). The observation that some residents might use Five Mile Road is irrelevant. Policy UL.2.16 does not prohibit access to roads other than major arterials. In fact, Policy UL.2.20 (below) encourages connecting streets rather than cul-de-sacs and closed road systems. Restricting access to Five Mile Road would violate that policy.

The GHMB failed to recognize that the construction of a new road from the Property to Waikiki Road, upon which the amendment is conditioned, will actually ***reduce*** the number of vehicles that would use Five Mile Road.

> 19. [The applicant] provided documentation that provision of a second access point from the site to Waikiki Road would reduce the number of vehicle trips using Five Mile Road and more specifically in the p.m. peak hours and less trips than the previously approved preliminary plat approved for the subject property (PN-1974-06: Redstone).

CR 012-013. This finding by the BOCC is supported by detailed analysis by a qualified traffic engineer. CR 753-756. This finding is not only supported by the

[14] The GMHB purported to find "substantial evidence" that proposed development of the Property would be served by Five Mile Road. Although it is undisputed that a small portion of residents would use Five Mile Road, this point is irrelevant. The relevant policy simply required "good access to major arterials," not that some portion of the residents of a future development might use some alternative routes. This point highlights the fact that once again the GMHB applied the wrong standard of review. The GMHB is supposed to affirm the BOCC's planning decisions unless those decisions are "clearly erroneous." RCW 36.70A.320(3); RCW 36.70A.3201.

evidence in the record, but there is also no contrary evidence in the record.[15]

Futurewise argues that development will also use Five Mile Road, and therefore the GMHB "was correct to consider the deficiencies of Five Mile Road" in determining whether the Property has good access to major arterials. *App. Br.* at 24-25; CP 328-329. Policy UL.2.16 does not prohibit access to roads other than major arterials, and Policy UL.2.20 (subsection B(2) below) encourages connections to other streets. Futurewise ignores these points. Contrary to Futurewise's argument, the GMHB's concerns about Five Mile Road do not affect the BOCC's finding that the Property has good access to Waikiki Road.

Finally, Futurewise argues that the Property is not near commercial areas or open space. *App. Br.* at 26; CP 324, 329-330. The GMHB did not accept or rely on these arguments. The GMHB's decision on Policy UL.2.16 was solely

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[15] The BOCC specifically addressed neighbors' concerns about traffic in its further findings:

> 21. Traffic impacts from the proposal will be mitigated for compliance with Spokane County Code and concurrency standards at the project level as specified by the Division of Engineering and Roads in their comments regarding the proposed amendment dated August 2, 2011.
>
> 22. Traffic impacts from the proposed amendment may be further mitigated by provision of a second access point to Waikiki Road, to be reviewed at the project level, which will reduce the number of vehicle trips on Five Mile Road as evidenced by the trip distribution letter submitted by the applicant on November 23, 2011.

CR 013. The GMHB simply ignored Finding 21. The Board recited Finding 22, but did not suggest that this finding was erroneous in any way. CR 1023.

based on the erroneous assertion that Waikiki Road was not a major arterial. CR 1024. Futurewise does not explain how close new development should be to commercial areas, and provides no support for its self-serving assumption that less than a mile is not close enough. Nor does Futurewise explain how close public open space should be. Nor does Futurewise acknowledge that the Policy does not *require* development near public open space but merely encourages such development. Nor does Futurewise acknowledge that the preference for open space in Policy UL.2.16 is just one of several competing goals that must be balanced in making local planning decisions. "The weighing of competing goals and policies is a fundamental planning responsibility of the local government." *Spokane County v. EWGMHB*, 173 Wn. App. 310, 333, 293 P.3d 1248 (2013). Futurewise's concerns about open space and commercial areas, which the GMHB did not accept, do not establish that the amendment was clearly erroneous in light of the record and the deference afforded to the County's planning decisions.

2. The amendment is consistent with Policy UL.2.20: Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus or car...

The GMHB erroneously concluded that the amendment was inconsistent with Policy UL.2.20 because of traffic on Five Mile Road, the steepness of the additional access road (to be constructed) to Waikiki Road, and what the GMHB

characterized as "the substandard transportation system" adjacent to the Property. CR 1025-26. The GMHB further stated:

> There is substantial evidence in the record demonstrating that it will not be easy to get around by foot, bicycle, bus, or car, and to some degree it may be unsafe for pedestrians or bicycles to access the proposed development from Five Mile Road and/or Waikiki Road.

CR 1026. This conclusion was based on the GMHB's erroneous interpretation of Policy UL.2.20 and the application of the wrong standard of review.

The plain language of Policy UL.2.20 is to encourage development with "connecting streets" rather than cul-de-sacs and closed road systems, "to allow people to get around easily by foot, bicycle, bus or car." CR 248; 1025. The amendment is consistent with this policy. The BOCC conditioned the amendment upon a new direct access from the Property to Waikiki Road. That access will be constructed to County road standards, with curbs, gutters and sidewalks. CR 013. In addition, the amendment ensures future connectivity by requiring a termination of the internal road at the West property line to access future development on adjoining properties. *Id.* The GMHB's determination that the amendment is "inconsistent" with Policy UL.2.20 is patently incorrect.

The GMHB acknowledged that the amendment was conditioned upon these circulation improvements, CR 1025, but somehow found that these improvements were not good enough. The GMHB substituted its judgment for

the County's discretion and expertise, and drew finicky, erroneous conclusions about what the GMHB felt was necessary to comply with Policy UL.2.20.

The GMHB found that "it will ***not be easy*** to get around by foot, bicycle, bus, or car" because the new access road—which will be built to County road standards—must traverse "steep terrain."[16] CR 1025 (emphasis added). Exactly what GMA standard did the GMHB think it was applying here when talking about whether it would not be "easy?" Is the GMHB suggesting that future development inside a UGA can only occur on flat terrain? If such an absurd policy were required, no new development would be permitted on major parts of the State's primary urban centers. The GHMB also opined that "to some degree" it may be unsafe for pedestrians or bicycles to access the Property. CR 1026 Again, what GMA standard was the GMHB applying? All travel by foot or bicycle is "to some degree" unsafe. The GMHB's comment, taken to its illogical extreme, would prohibit development anywhere that the conditions are not perfect. Requiring optimal conditions for future development is not in the portfolio of the GMHB.

[16] By purporting to find "substantial evidence" that "it will not be easy to get around" or that something may be unsafe "to some degree," the GMHB clearly applied the wrong standard of review. *See* note 14.

Futurewise argues that the amendment violates Policy UL.2.20 due to existing deficiencies in Five Mile Road. *App. Br.* at 27-29. The existing condition of Five Mile Road has nothing to do with Policy UL.2.20 which encourages connecting streets. Implementing that Policy requires a connection from the Property to Five Mile Road regardless of the condition of that road. Furthermore, the amendment is conditioned upon construction of a new access to Waikiki Road that will actually reduce traffic on Five Mile Road. CR 012-013, 753-756. Futurewise might desire improvements on Five Mile Road. But that unfulfilled wish does not make the amendment inconsistent with Policy UL.2.20.

Futurewise asserts that the surrounding area is not arranged in a pattern of connecting streets and blocks. *App. Br.* at 27. But those existing conditions do not cause the amendment to violate UL.2.20. The amendment actually alleviates the existing lack of connectivity by requiring new connections to Waikiki Road and to potential new development to the West.[17]

[17] In the trial court Futurewise recycled a failed argument from the GMHB proceedings in which Futurewise argued that the amendment violates Policy UL.2.20 by failing to require ***internally*** connected streets and blocks. CP 332-334; CR 175, 999. Futurewise neglected to mention that the GMHB decision was ***not*** based on a determination that the amendment failed to provide for an **internal** connectivity. *See* CR 1025-1026. Futurewise's argument regarding internal connectivity fails for the simple reason that the amendment only changes the comprehensive plan designation and zoning for the Property. There is no specific development plan at this stage. That is undoubtedly why the GMHB ignored Futurewise's argument. Nothing is set in stone except for the additional connections to adjoining property upon which the amendment is conditioned. Those conditions implement Policy UL.2.20; they are not inconsistent with that Policy.

Futurewise's argument is directly disposed of by *Spokane County*, 173 Wn. App. 310 (2013). In that case, the BOCC approved a comprehensive plan map amendment and rezone for a 5-acre parcel. Just like this case, the neighbors argued that the amendment violated Policy UL.2.20, and the GMHB agreed. *Id.* at 321, 331. This Court reversed, correctly noting that the amendment did not cause the existing problems with connectivity, that the amendment dealt with external connectivity as much as possible, and that there was no specific development proposal that might violate Policy UL.2.20. *Id.* at 340-341. "Because the County was not required to address the policy at the map amendment stage, there was no basis for the growth board to find an invalidating inconsistency." *Id.* at 342.

Similarly, there is no development proposal in this case at this stage, and there was no basis for the GMHB to find inconsistency with Policy UL.2.20 with respect to future internal connectivity within a future development. Futurewise attempts to distinguish *Spokane County* (2013), asserting that "[i]n this case we know where the accesses will be located." *App. Br.* at 29. This argument conflates the external connections to the Property, which are adequately addressed by the new connections upon which the amendment is conditioned, with Futurewise's nonsensical objections to an alleged lack of internal connectivity

where this is no specific development proposal.[18]

3. The amendment is consistent with Policy CF.3.1: Development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards.

The GMHB erroneously concluded that the amendment was inconsistent with Policy CF.3.1 because the GMHB found "evidence" that area schools "are already at capacity," and that Five Mile Road would not be suitable for children to walk to school. CR 1026. Both conclusions are erroneous.

Douglass agrees with the County that the GMHB misunderstood Policy CF.3.1. *See* CR 323. That policy requires a determination of adequate public services before "development" occurs. **Neither the amendment of the Comprehensive Plan nor the rezone is a development.** *See Resp. Br. (County)* at 22-23. Policy CF.3.1 is implemented by the County's concurrency regulations. SCC Chapter 13.650. The question of whether those development regulations comply with GMA was **not** before the GMHB in this case. Those regulations are presumed valid. The application of those development regulations will be addressed if and when Douglass actually applies for development permits. The

[18] Futurewise also argues that the amendment is a "development" for purposes of Policy UL.2.20. App. Br. at 30. As explained in the next subsection, Futurewise's argument is meritless and directly contrary to *Spokane County*, 173 Wn. App. 310.

GMHB simply misunderstood policy CF.3.1. There is no inconsistency between the policy and the amendment at issue.

Futurewise's argument is fully disposed of by this Court's opinion in *Spokane County*, 173 Wn. App. 310 (2013). In that case, the GMHB determined that the amendment violated various comprehensive plan policies by failing to determine the adequacy of various public services. This Court disagreed, and the basis for its disagreement is clear. First, the court noted that the County had adopted both concurrency ordinances and a capital facilities element in the comprehensive plan. *Id.* at 328-329. The Court also noted that the plan and ordinances were deemed compliant with GMA and could not be collaterally attacked. *Id.* at 331. Then the Court explained, in response to the GMHB's determination that the amendment violated comprehensive plan policies that require "transportation improvements concurrent with new development," that the amendment was not a "development." *Id.* at 335. The Court unambiguously rejected the GMHB's erroneous conclusion that transportation and capital facilities must be addressed whenever the comprehensive plan is amended:

> We find no basis in the GMA for the conclusions of the growth board highlighted above and what can fairly be characterized as the board's rule of decision: that to avoid inconsistency, capital facility funding and scheduling issues must be evaluated and the results incorporated into the transportation and capital facilities elements of the comprehensive plan every time the comprehensive plan map is amended.

Id. at 337. The Court also noted that GMA authorizes development-stage concurrency determinations even though some planning decisions are made before that point:

> In requiring development-stage concurrency, [RCW 36.70A.070(6)(b)] contemplates that projects may reach the development stage having land use designations, zoning, and projected traffic impacts for which existing public facilities are inadequate.

173 Wn. App. at 338. The GMHB's decision in this case is erroneous for the same reasons. Policy CF.3.1 requires a determination of adequate public services before "development" occurs, and neither the amendment of the Comprehensive Plan nor the rezone is a development.[19]

Futurewise also argues that the term "development" in Policy CF.3.1 has a different, broader meaning than the same term in the policies at issue in *Spokane County*, and even suggests a dictionary definition that would support the GMHB's erroneous decision. *App. Br.* at 36-37. These arguments are inconsistent with *Spokane County*, 173 Wn. App. 310, which recognizes that a mere amendment to a comprehensive plan map is not a development. Futurewise's arguments also fail to recognize that the County is empowered to determine what the word

[19] Futurewise attempts to distinguish Spokane County, 173 Wn. App. 310, noting that the Court of Appeals did not directly address Policy CF.3.1. *App. Br.* at 37. But the analysis is exactly the same. Policy CF.3.1, like the policies at issue in *Spokane County*, refers to "development," not comprehensive plan map amendments or rezones. *Spokane County*, 173 Wn. App. at 334-335.

"development" in its own comprehensive plan means. Futurewise notes that the term "development" is not defined in the comprehensive plan. *App. Br.* at 36. Consequently, Futurewise's self-serving arguments for a different meaning to "development" do not establish that the County's interpretation is clearly erroneous in light of the broad deference that GMA affords to local planning decisions. RCW 36.70A.3201.

Futurewise also argues that the County's concurrency regulations do not provide for project-level review of some public services, including schools. *App. Br.* at 33-36. This argument amounts to an improper collateral attack on the adequacy of the County's comprehensive plan, concurrency regulations and/or capital facilities plan. *See Spokane County*, 173 Wn. App. at 331. More importantly, this argument does not alter the County's correct determination that CF.3.1 refers to "development" not mere map amendments. The law is clear that a map amendment cannot be inconsistent with a comprehensive plan policy that is only applicable at a later stage. *See* 173 Wn. App. at 342 ("Because the County was not required to address [Policy UL.2.20] at the map amendment stage, there was no basis for the growth board to find an invalidating inconsistency.")[20]

[20] Futurewise also ignores the fact that subsequent SEPA review of any development would include the population impacts of such development. *See* WAC 197-11-960; SCC 11.10.230 (SEPA Environmental Checklist: Questions 8(i) (approximate number of new residents), 9 (number and type of housing units), and 15 (impact on public services).

Furthermore, the "substantial evidence" cited by the GMHB for the proposition that local schools "are already at capacity" is sparse, anecdotal, obviously biased, and not supported by any reliable sources.[21]

But even assuming, *arguendo*, that the relevant schools are "at capacity" today, it does not mean they will be when an actual development is proposed and evaluated for concurrency. School district capacity is dynamic. New schools are built and old ones are remodeled and expanded. That is why concurrency is evaluated when an actual project is proposed. Moreover, the impact of a future development on the school district will vary greatly depending on the actual mix of unit sizes in the project. For example, if there are predominantly studio and one bedroom apartments, the likely impact on the school district will be much less than a complex with a large percentage of multi-bedroom units. This is an issue of concurrency, to be evaluated when an actual project is proposed.

[21] First, the GMHB cited a letter from the Mead School District. CR 1026. That letter states that "The Mead School District believes that this request for a change in land use designation, if approved, could have an impact all schools. The District will respond with further remarks when the SEPA checklist is circulated for comment." CR 343. This vague comment—that the amendment "could have an impact"—does ***not*** support the GMHB's assertion that area schools are at capacity. In fact, the school district never actually responded to the amendment with further comments. CR 219. Second, the GMHB cited a letter from the Chair of respondent Five Mile Prairie Neighborhood Association who asserted "I can tell you that Prairie View Elementary is at capacity even with four portable classrooms." CR 327. This unsupported claim, from an obviously-biased opponent, is not "substantial evidence" of anything.

Finally, the GMHB's concerns about children walking on Five Mile Road are entirely misplaced.[22] Children in the nearby residential developments already use Five Mile Road to get to school, and that road has no sidewalks. CR 222. The GMHB must have presumed that future residents will refuse to use brand new sidewalks leading to Waikiki Road, and will go out of their way to use Five Mile Road. This type of speculation and micro-management is incompatible with the applicable standard of review and the very role of the GMHB.[23]

4. The amendment is consistent with Policy H.3.2: Ensure that the design of infill development preserves the character of the neighborhood.

The GMHB rejected Futurewise's argument that the amendment was inconsistent with Policy H.3.2. which states that the County should "Ensure that the design of infill development preserves the character of the neighborhood."

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[22] The GMHB also stated that "The Planning Commission's findings contain evidence that Five Mile Road would not be suitable for children to walk along to attend school." CR 1026. Although a divided Planning Commission did not recommend the amendment, that recommendation was not based on an alleged lack of school capacity or Policy CF.3.1. Rather, the Planning Commission merely noted that it had received public comments, and that "School capacity was noted by seven respondents." CR 770-771. This "evidence" does not establish that the amendment is inconsistent with Policy CF.3.1 or that the County's decision is clearly erroneous.

[23] In the trial court Futurewise noted that Five Mile Road is the walking route for some children attending Prairie View Elementary and that there are no plans to improve Five Mile Road. CP 343-344. Like the GMHB, Futurewise never explained how this existing situation shows that the amendment violates Policy CF.3.1. Futurewise simply ignored the fact that the amendment is conditioned upon a new access road with sidewalks to directly access Waikiki Road, which has sidewalks on both sides. CR 222. The suggestion that the amendment, with its requirement of new pedestrian improvements, is inconsistent with Policy CF.3.1 is absurd.

CR 272. The GMHB noted that a variety of residential densities is appropriate, that the neighborhood has no consistent design or development pattern, and that development of the property would be topographically isolated. CR 1021.

In the superior court Futurewise renewed its argument that the amendment is inconsistent with Policy H.3.2, and argued that the court could sustain the GMHB *Decision* based on a violation of Policy H.3.2, even though the GMHB did not find a violation of that policy. CP 353-359. In its reply memorandum, Douglass noted that Futurewise was correct, as a *procedural* matter but Futurewise had ignored the standard of review. CP 389. Futurewise's lengthy argument about Policy H.3.2 boils down to an observation that there are no existing areas of multi-family housing near the Property, and that the development of apartment buildings (which the amendment would permit) would be "out of character" with the existing single family homes in the area. CP 357.

The GMHB observed that the Property is unique, and has "unique buildability challenges" due to its topography and encumbrances from utilities. CR 1020. Futurewise ignored these considerations. The GMHB also stated:

> The Board notes that the proposed development would include higher residential densities as compared to surrounding uses. However, as stated by the Spokane County Commissioners, a variety of residential densities is appropriate and expected within an Urban Growth Area. Further, the neighborhood has no consistent design or development pattern, and development on this property would be topographically isolated. Petitioners allege that

> these higher densities do not preserve neighborhood character but Petitioners failed to come forward with actual evidence showing that neighborhood character would be harmed by this proposal.

CR 1021. Futurewise did not respond to the GMHB's points. Instead, Futurewise relied on its conclusory assertion that apartments are incompatible with single-family residences regardless of the particular circumstances. CP 354-357.

Futurewise neglects to mention that the GMHB also rejected Futurewise's arguments regarding Policy UL.2.17, which is intended to locate multifamily housing throughout the UGA. CR 247. The GMHB correctly concluded that Futurewise had not cited any evidence that the amendment was inconsistent with the existing scale and design of the community. CR 1025.

Policy UL.2.17, which seeks to locate multifamily housing throughout the UGA, is directly contrary to Futurewise's argument that multifamily housing is inherently incompatible with any existing single-family areas. This incompatibility highlights a fundamental flaw in Futurewise's arguments: land use planning requires local governments to exercise their discretion to weigh and reconcile competing or conflicting policies. As this Court recently observed:

> In identifying 13 goals to guide local comprehensive planning, the legislature itself cautioned that it was not listing goals in order of priority and that its identification of the goals "shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020. Goals considered by local governments in comprehensive planning may be mutually

> competitive at times. For that reason, if a map amendment meaningfully advances other comprehensive plan goals and policies, a finding by the growth board that it fails to advance another—if it fails to advance, for example, a goal of encouraging high density residential development on sites having good access to a major arterial—that alone cannot be an invalidating inconsistency. The weighing of competing goals and policies is a fundamental planning responsibility of the local government. (Citations omitted).

173 Wn. App. at 333. Rejecting the neighbors' arguments the Court also noted:

> The record before the county commissioners established that the map amendment advanced a number of plan policies and goals. Any policies or goals that it failed to advance were hortatory, not mandatory. The responsibility to weigh competing goals and policies was that of the county commissioners.

173 Wn. App. at 342. Likewise, the BOCC had the discretion to weigh the competing goals of preserving the character of existing neighborhoods and encouraging the development of affordable, multifamily housing throughout the UGA. Exercising that discretion, and considering all the circumstances, the BOCC determined that this unique Property was appropriate for multifamily use. The objections of nearby residents to apartment buildings do not establish that the amendment is clearly erroneous in light of the entire record and the broad deference afforded to the County's planning decisions. The superior court correctly rejected Futurewise's renewed argument on Policy H.3.2. CP 494.

On appeal, Futurewise has ***not*** renewed its argument regarding Policy H.3.2. Instead, Futurewise has deleted all references to Policy H.3.2 and "infill"

development, and moved the remaining argument text from its superior court memorandum to the rezone issue. *Compare* App. Br. at 40-44 with CP 353-359. The resulting new argument on the rezone issue is misleading because Futurewise fails to inform the Court that its argument relates to infill development and Policy H.3.2, and that the GMHB ruled against Futurewise on that issue. *See App. Br.* at 40-44. To make matters worse, Futurewise misleadingly implies that the GMHB agreed with Futurewise on this issue. *See App. Br.* at 45.

Futurewise has abandoned its argument regarding Policy H.3.2, and cannot renew that argument in its reply brief. *Cowiche Canyon Cons. v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 540 (1992). As explained in the next section, the Court should reject Futurewise's arguments regarding the rezone as well.

C. In the alternative, the GHMB erroneously concluded that the rezone did not comply with the County's criteria for zoning amendments.

SCC 14.402 sets forth the County's criteria for amendments to the zoning code, two of which are applicable to this case:

> The County may amend the Zoning Code when one of the following is found to apply:
>
> 1. The amendment is consistent with or implements the Comprehensive Plan and is not detrimental to the public welfare.
>
> 2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code...

The BOCC found that the concurrent rezone satisfied both criteria (1) and (2):

> 20. The proposed amendment is consistent with the criteria for a zone reclassification under Section 14.402.040 (1) and (2) of the Spokane County Zoning Code as the proposed amendment implements the goals and objectives of the Comprehensive Plan and the subject area has experienced a change of conditions as evidenced by development of duplex dwelling units in proximity to the subject property thereby creating a mix of land use types and densities in the Urban Growth Area boundary.

CR 013. The GMHB rejected both criteria. CR 1029. Even assuming, *arguendo*, that the GMHB had jurisdiction over the concurrent rezone, *see* section (A), the GMHB decision was erroneous for several reasons.[24]

The BOCC found that the rezone satisfied SCC 14.402.040(1) because it implemented the goals of the comprehensive plan. CR 013. The GMHB disagreed, based on its determination that the comprehensive plan amendment was inconsistent with Policies UL.2.16, UL 2.20, and CF 3.1. CR 1029. The GMHB's application of those policies was erroneous for the reasons set forth in section (B). Futurewise's challenge to the rezone is also based on an erroneous determination that the amendment violated those policies. *App. Br.* at 40

[24] The GHMB also opined that the planning commission's findings were supported by substantial evidence, and that the BOCC Finding No. 20 was not supported by such evidence. CR 1028-1029. These erroneous statements confirm, as set forth in Section B, that the GMHB applied an erroneous standard of review and failed to afford the County the broad deference required by RCW 36.70A. The GMHB was required to uphold the BOCC decision unless it determines that the BOCC action was clearly erroneous in view of the entire record. RCW 36.70A.320(3).

Futurewise argues that the amendment does not preserve neighborhood character. *App. Br.* at 40-44. As explained in section B(4), this text is taken from Futurewise's argument in the trial court that the amendment violated Policy H.3.2, which both the GMHB and the superior court rejected. CR 1021; CP 494.

The BOCC also found that the concurrent amendment satisfied SCC 14.402.040(2) because the subject area had experienced a change of conditions as shown by the nearby development of duplex residential units. CR 013. The GMHB disagreed, concluding that the development of duplexes was not a sufficient change in circumstances because the existing zoning already permitted duplexes. CR 1029. The GMHB further opined:

> Moreover, if zoning classifications could be readily changed whenever there are cyclical market fluctuations (as advocated by applicant's engineering consultant), then property owners could lose the reliance value of the zoning code and thereby frustrate the investment backed expectations of homeowners.

Id. In reaching this conclusion, the GMHB grossly exaggerated the effect of BOCC's determination that the circumstances had changed enough to rezone one unique piece of property inside the UGA to allow more diverse residential development. The GMHB also second-guessed the BOCC's determination of what constitutes a sufficient change of circumstances under SCC 14.402.040(2) rather than affording broad deference to the BOCC's decision on that issue as required by RCW 36.70A.320(3) and RCW 36.70A.3201.

Finally, the GMHB's ruling was not based on a determination that the BOCC decision violated any particular provision of GMA. The GMHB simply disagreed with the County's application of its own code to a particular piece of property. This gaffe confirms that the GMHB should not have addressed the rezone and/or the criteria in SCC 14.402.040 because it had no jurisdiction.[25]

In sum, the GMHB not only exceeded its limited, statutory jurisdiction, but erroneously applied the law by failing to give proper deference to the BOCC's decision. The superior court correctly reversed the GMHB. CP 495.

D. The GMHB erred in making a finding of invalidity with respect to 11-CPA-05. The amendment would not "substantially interfere" with the fulfillment of the goals of GMA

The GMHB cannot make a finding of invalidity unless, at a minimum, the GMHB properly finds that amendment 11-CPA-05 does not comply with GMA. RCW 36.70A.302(1)(a). Because the GMHB erroneously concluded that the amendment did not comply with GMA, the determination of invalidity is erroneous as well. In addition, in order to make a finding of invalidity, the

[25] In the superior court Futurewise argued that this part of Douglass' argument was a new "issue" that was not raised before the GMHB, and that Douglass could not raise it now because none of the exceptions in RCW 34.05.554(1) apply. CP 348-349. Douglass' argument (above) is not a separate "issue," as Futurewise creatively suggests. Douglass has ***not*** argued that the GMHB's failure to identify a particular violation of GMA is a separate basis for overturning the GMHB's *Decision*. Douglass merely noted that the GMHB's sloppy analysis "confirms" that the GMHB lacked jurisdiction over the concurrent rezone. That issue was raised before the GMHB. CR 306-311, 1012-1017.

GMHB must make a determination "that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of [GMA]." RCW 36.70A.302(1)(b).

In this case, the GMHB found that amendment 11-CPA-05 would substantially interfere with the GMA goals of ensuring adequate transportation and public services. CR 1033-1034. As explained in section B(3), however, the amendment addresses these concerns by requiring the new access road and pedestrian improvements, and the GMHB's unsupported concerns about public services are addressed by development and concurrency regulations that must be complied with when a specific project is proposed. Futurewise's arguments in support of invalidity are entirely based on its erroneous assumption that alleged "deficiencies" in roads, schools and pedestrian accommodations are not addressed by the County's concurrency regulations and the road and pedestrian improvements upon which the amendment is conditioned. Furthermore, it is absurd to suggest that the re-designation of one small, unique piece of property inside the UGA of a large county to the next level of residential density would "substantially interfere" with the goals of GMA.[26] The superior court correctly reversed the GMHB's unsupportable finding of invalidity. CP 495.

[26] In the superior court Futurewise argued that the finding of invalidity is not "absurd" because the amendment would potentially allow development of up to 200 dwelling units. CP 360-361.

E. The trial court correctly reversed the GMHB's erroneous dismissal of Douglass at the hearing on the merits.

Douglass intervened in the GMHB proceedings to protect its interests as the underlying property owner. CR 070-073. Douglass noted that it had participated in the entire County planning process. CR 071; *see* CR 663-667. No party objected to intervention or suggested that Douglass lacked standing. Douglass made it clear in its motion to intervene and at the prehearing conference that it would not be filing briefs or arguing unless it felt that its interests were not being adequately represented by the County, and the GMHB agreed to that approach in approving intervention. CR 070-072; 077-079.[27]

Douglass ultimately decided that it would rely on the County to explain why Futurewise's arguments lacked merit, and did not file its own brief. The reply brief filed by Futurewise did ***not*** comment on the fact that Douglass had not filed a brief, and did ***not*** ask that Douglass be dismissed. CR 983-1002. No party

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So what? If the GMHB erroneously required a showing of concurrency in public services prior to a specific development proposal, as the Court held in *Spokane County*, 173 Wn. App. 310, how does the mere re-designation of the Property to allow such future development (when that development must still run the gauntlet of concurrency) "substantially interfere" with GMA? Futurewise offers no explanation because there is none. If a future project does not meet concurrency, it will not be approved, regardless of the re-designation of the property.

[27] The GMHB's prehearing order stated that Douglass was governed by the same case schedule as the County, that Douglass could not raise new issues, and that Douglass would share argument time allocated to the County at the hearing. CR 077-079. Apart from a boilerplate admonishment that a party who fails to attend a GMHB hearing may be held in default, the order did not suggest that Douglass was required to file a brief or attend the hearing.

was prejudiced by Douglass' decision to rely on the County's briefing and argument. Nevertheless, at the hearing on the merits on July 19, 2012, the GMHB, without advance notice to Douglass, the GMHB dismissed Douglass, *sua sponte*, for failure to file a brief or to participate in the hearing. RP 75-76.

The trial court correctly reversed the GMHB's dismissal, holding that Douglass had complied with the GMHB's orders and the requirements for intervention before the GMHB. CP 494. Futurewise made no attempt to defend the GMHB's erroneous decision in either the trial court or in its opening brief. Instead, Futurewise argues that Douglass failed to exhaust its administrative remedies by not filing an objection to the dismissal after the GMHB had issued its *Decision* on the merits. The trial court correctly rejected that argument. CP 494.

1. The trial court correctly determined that the GMHB's dismissal of Douglass was erroneous. Futurewise has failed to brief that issue in either the trial court or its opening brief.

The GMHB's dismissal of Douglass without notice was an abuse of discretion and/or erroneous as a matter of law for several reasons. Futurewise has failed to respond to any of Douglass' arguments on this issue.

First, Douglass did not fail to comply with any rules or orders of the GMHB. Douglass made it clear when it intervened that it would (consistent with WAC 242-03-270(3)) monitor the proceedings and only file briefs or actively participate in the hearing if it felt that its interests were not adequately represented

by the County. The prehearing order issued by the GMHB did not actually require Douglass to file a brief or appear at the hearing; that order merely subjected Douglass to the same limits as the County. CR 077-082. Futurewise has never argued otherwise. *See* CP 376.

Second, as an intervenor who did not seek to raise new arguments, Douglass was not required to file separate briefing or present separate oral argument, and is in fact discouraged from doing so pursuant to WAC 242-03-270(3). Futurewise has never argued otherwise. *See* CP 376. Futurewise thereby concedes, *sub silentio*, that Douglass did not violate any rule or order of the GMHB, and that there was no valid reason for the GMHB to dismiss Douglass.

Third, there was no valid reason for the GMHB to dismiss Douglass. WAC 242-03-710(1) provides that a motion to dismiss a party for default "may" be brought. Similarly, the prehearing order states that a party "may" be held in default, and that an order of dismissal "may" be entered. CR 082. ***The rule does not require dismissal.*** Rather, the permissive term "may" indicates that the GMHB will exercise reasoned discretion in applying the rule if a motion to dismiss is brought. Like a court, the GMHB should exercise its discretion on reasonable grounds. *See State v. Larsen*, 160 Wn. App. 577, 586, 249 P.3d 669 (2011). There was no good reason for the GMHB to dismiss Douglass. No party had been prejudiced, and no party had asked Douglass to be dismissed.

Futurewise has never argued otherwise. *See* CP 376.[28]

Having failed to defend the GMHB's decision in the trial court Futurewise would not be permitted to address that issue for the first time on appeal, even if it had attempted to do so. RAP 2.5; *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006). Nor may Futurewise defend the GMHB decision for the first time in its reply brief. *Cowiche Canyon*, 118 Wn.2d at 809.

In addition, no written order of dismissal was issued, as required by WAC 242-03-710. That rule states that any order granting a motion for default "shall include a statement of the grounds for the order and shall be served upon all parties to the case." WAC 242-03-710(1). The GMHB *Decision* does not indicate why Douglass was dismissed, other than by reciting the bare facts that Douglass had not filed a brief or attended the hearing. But both of those events were recognized as likely to occur when Douglass' intervened. CR 1018.

Futurewise argues that the GMHB "included" the order of dismissal in its final Decision. *App. Br.* at 17. That argument is not consistent with the language of the *Decision*, which recites that the GMHB "entered an Order of Dismissal" at

[28] The GMHB's dismissal of Douglass in the absence of any rule violation or prejudice was not consistent with the GMHB's treatment of parties in other cases. *See Connick et al. v. Lake Forest Park*, CPSGMHB No. 13-3-0004, Prehearing Order (May 23, 2013) (GHMB threatened to dismiss appeal, but did not actually do so, where petitioners who were both attorneys had failed to appear at schedule prehearing conference and repeatedly failed to comply with rules. Available online at http://www.gmhb.wa.gov/LoadDocument.aspx?did=3308 (last visited March 27, 2014).

some unspecified earlier point in time. CR 1018. The *Decision* purports to be a "Final Decision and Order," not an "order of dismissal." CR 1010.

Furthermore, the *Decision* also states that it is a "final order" of the GMHB, and that the parties may either seek reconsideration within ten (10) days pursuant to WAC 242-03-830(1) or seek judicial review. CR 1035. The Decision does ***not*** indicate that Douglass might file an objection to dismissal within seven (7) days pursuant to WAC 242-03-710(2). The GMHB did ***not*** issue a written order of dismissal as required by WAC 242-03-710(1).

2. Douglass was not required to file an "objection" to dismissal after the GMHB had issued its final *Decision* on the merits.

Rather than defend the GMHB's erroneous and arbitrary dismissal of Douglass, Futurewise argues that Douglass failed to exhaust its administrative remedies as required by RCW 34.05.534. *App. Br.* at 16-19. This argument erroneously assumes that an objection to dismissal under WAC 242-03-710(3) was an administrative remedy that Douglass was required to exhaust.[29]

A motion for reconsideration of a final agency decision is an optional

[29] Futurewise also argues that Douglass' brief in this Court should be stricken because, according to Futurewise, the trial court "should have" dismissed Douglass' petition for judicial review. *App. Br.* at 19. Futurewise made a similar argument in the trial court, and the court rejected it. CP 363, 494; RP 14. Because the trial court has reversed the erroneous *Decision* of the GMHB, Douglass is properly a ***respondent*** in this Court and entitled to defend the trial court decision in its brief. RAP 3.4; RAP 10.1(b). Futurewise cites no authority to support of its bizarre assumption that the Court may strike a respondent's brief based on the appellant's mere assertion that the trial court erred.

remedy that a party is ***not*** required to pursue. ***Mellish v. Frog Mountain Pet Care,*** 172 Wn.2d 208, 218, 257 P.3d 641 (2011). An objection to dismissal under WAC 197-03-710(3) is akin to a motion for reconsideration. Like the Jefferson County reconsideration procedure at issue in *Mellish*, WAC 197-03-710(3) states that a party "***may***" file a written objection to an order of dismissal. "May" indicates that the remedy is optional. There is no legal requirement that Douglass file such an objection before seeking judicial review on the merits. That is particularly applicable where, as here, the GMHB first provided notice of the "dismissal" in its final decision, and did not actually issue a separate written order of dismissal.

As the *Decision* notes, any party could have filed a motion for reconsideration under WAC 242-03-830(1) within ten (10) days after the *Decision* was issued. *See* CR 1035. Both WAC 242-03-710(3) and WAC 242-03-830(1) state that a party "may file" an objection or motion for reconsideration respectively. Futurewise has not argued that the County failed to exhaust administrative remedies by failing to file a motion for reconsideration, and Futurewise has not explained why an objection under WAC 242-03-710(3) would be a mandatory administrative remedy while a motion for reconsideration is not.

Futurewise argues that an objection under WAC 242-03-710(3) would have been adequate and not futile. *App. Br.* at 18. But these arguments would apply equally to a motion for reconsideration under WAC 242-03-830(1).

Furthermore, an objection to the dismissal of Douglass after the *Decision* was issued would have been a futile, useless act. At best, an objection to dismissal under WAC 242-03-710(3) would have reversed the dismissal of Douglass without changing the outcome on the merits.

3. Futurewise's new argument—that the "issue" of dismissal was not "raised" before the GMHB—is both meritless and barred by RAP 2.5(a).

Futurewise also argues, for the first time on appeal, that the "issue" of whether Douglass should be dismissed was not "raised" before the GMHB for purposes of RCW 34.05.554(1). *App. Br.* at 19-21. This argument is entirely dependent upon Futurewise's erroneous assumption that Douglass was required to file an "objection" to dismissal even though the GMHB had already issued its *Decision* on the merits and an "objection" would have been a useless act. Ironically, Futurewise never asked the GMHB to dismiss Douglass and, therefore, Futurewise may not address that issue on review, based on Futurewise's own interpretation of RCW 34.05.554(1). Furthermore, because Futurewise did not make this argument in the trial court, *see App. Br.* at 59-61, it cannot make that argument for the first time on appeal. RAP 2.5(a). *Heg*, 157 Wn.2d at 162.

V. CONCLUSION

The superior court correctly reversed the *Decision* of the GMHB and upheld amendment 11-CPA-05. The superior court should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of April, 2014.

GROFF MURPHY, PLLC

Michael J. Murphy, WSBA No. 11132
William J. Crittenden, WSBA No. 22033
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on April 30, 2014 a true and correct copy of the foregoing document to the counsel of record listed below, via the method indicated:

Ms. Renee S. Townsley Clerk/Administrator Court of Appeals of the State of Washington Division II 500 North Cedar Street Spokane, Washington 99201-1905	☐ ☒ ☐ ☐ ☐ ☐	Hand Delivery Via Messenger Service First Class Mail Federal Express Facsimile E-mail By JIS-Link e-filing system
Mr. Tim Trohmovich Futurewise 816 Second Avenue, Suite 200 Seattle, Washington 98104 E. tim@futurewise.org Counsel for Respondents ***Counsel for Five Mile Prairie Neighborhood Association and Futurewise***	☐ ☐ ☐ ☐ ☒	Hand Delivery Via Messenger Service First Class Mail Federal Express Facsimile E-mail
Mr. David W. Hubert Deputy Prosecuting Attorney Spokane County Prosecuting Attorney 1115 West Broadway Ave., 2nd Floor Spokane, WA 99260 E. DHubert@spokanecounty.org Counsel for Respondents ***Counsel for Spokane County***	☐ ☐ ☐ ☐ ☒	Hand Delivery Via Messenger Service First Class Mail Federal Express Facsimile E-mail

Ms. Diane L. McDaniel Senior Asst. Attorney General Attorney General of Washington Licensing & Administrative Law Division P. O. Box 40110 Olympia, WA 98504-0110 E. dianem@atg.wa.gov ***Counsel for the Growth Management Hearings Board***	☐ ☐ ☐ ☐ ☒	Hand Delivery Via Messenger Service First Class Mail Federal Express Facsimile E-mail

DATED: April 30, 2014.

Zaida DeAtley, Legal Secretary
Groff Murphy, PLLC
E. zdeatley@groffmurphy.com

APPENDIX
"D"

No. 31941-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SPOKANE COUNTY, a political subdivision of the State of Washington, HARELY C. DOUGLAS, Inc.,

Respondents,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, a statutory entity, FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION, and FUTUREWISE, a Washington Non-Profit Organization,

Appellants.

RESPONDENT SPOKANE COUNTY'S RESPONSE BRIEF

David W. Hubert
Deputy Prosecuting Attorney
WSBA # 16488
1115 West Broadway, 2nd Floor
Spokane, WA 99260
Telephone: (509) 477-4509
Facsimile: (509) 477-3672

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I. INTRODUCTION

This case comes to the court following the superior court's reversal of a Growth Management Hearings Board's decision on the Appellants' objection to a change in the Comprehensive Plan designation of an approximately 22.3 acre parcel of land from Low Density Residential to Medium Density Residential. Due to the topography of the property the parcel is physically separated from most of the surrounding properties and due to several permanent utility easements that encumber the property only a small portion of the parcel is available to any type of development at all. The property is located well within the Urban Growth Area boundary of Spokane County, is located at the foot of the hill that reaches up to the Five Mile area of Spokane County, is surrounded by residential development, and is less than one half mile from the Whitworth College campus and other commercial development.

Appellants' allege that Spokane County erred by adoption of the Comprehensive Plan amendment in only two specific points: (1) alleged inconsistency between the Comprehensive Plan map amendment and the Comprehensive Plan Policies, and (2) alleged violations of the development regulations found in the Spokane County Code.

The only violation of the GMA alleged by Appellants is that the Spokane County Comprehensive Plan is generally "internally inconsistent" as a result of the change in designation of this single parcel. The alleged

inconsistency with the Comprehensive Plan policies arises from Appellants' misinformed and irrational interpretation of the Comprehensive Plan policies.

Appellants' allege that the concurrent rezone of the parcel violates the development regulations of Spokane County by characterizing the rezone as a decision under the Spokane County development regulations. The error in Appellants' characterization and their argument is that the rezone is not a decision subject to the development regulations, but is an amendment to the development regulations, specifically the zoning map, because it was done concurrently with the Comprehensive Plan amendment and implemented the Comprehensive Plan amendment. *Spokane County v Eastern Washington Growth Management Hearings Bd.* (*Spokane County II*), 176 Wn. App. 555, 571, 309 P.3d 673 (2013). As an amendment to the zoning map done concurrently to implement the Comprehensive Plan amendment, the criteria in the Spokane County Code governing a rezone are not applicable. Id.

The record before the Growth Management Hearings Board contains substantial and unrefuted evidence that the complained of Comprehensive Plan map amendment is an action by Spokane County to implement the policies of the Comprehensive Plan based upon the unique circumstances and conditions that exist within Spokane County generally and at this specific parcel and the immediately surrounding area. When a governing body is applying the goals and policies of a GMA compliant comprehensive plan to a specific parcel of

property, such as this is, the Growth Management Hearings Board is bound to grant deference to the local jurisdiction in how it plans for and within the unique circumstances found in that local area. *Spokane County v Eastern Washington Growth Management Hearings Bd.* (hereinafter *Spokane County v EWGMHB*), 173 Wn. App. 310, 324, 333, 293 P.3d 1248 (2013) (Citing, *Quadrant Corp. v Cent. Puget Sound Growth mgmt. Hearings Bd.*, 154 Wn.2d 224, 236, 246, 110 P.3d 1132 (2005)).

Appellants' arguments regarding capital facilities and concurrency are merely a veiled attempt to require the adoption of a Comprehensive Plan map amendment to comply with development regulations governing development permits. The fallacy in Appellants' argument is that the development regulations are required by the GMA to implement the Comprehensive Plan not the other way around. See, RCW 36.70A.040(4)(d), *Spokane County v Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 574, 309 P.3d 673 (2013).

As will be seen from this responsive brief from Spokane County, Appellants' assertion of error is unfounded in fact or law. As was found by the Superior Court below, the Growth Management Hearings Board erred in several respects and thus reversal of the Growth Management Hearings Board's decision is appropriate and respectfully requested.

II. ASSIGNMENTS OF ERROR

Spokane County asserts that the Growth Management Hearings Board, Eastern Washington Panel's Final Decision and Order, dated September 3, 2010, Growth Board Case Number 10-1-0010 should be reversed on the grounds that:

1. The Growth Board has erroneously interpreted and/or applied the law; and

2. The Growth Board's Final Decision and Order is not supported by evidence that is substantial in light of the whole record before the court including the record from the Growth Board below.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

The issues pertaining to the assignments of error are as follows:

a. Whether the broad discretion granted by the legislature to local jurisdictions and the deference required to be granted by the Growth Management Hearings Board to local jurisdictions pursuant to RCW 36.70A.3201 controls when the local jurisdiction is challenged for its interpretation and application of its own GMA compliant Comprehensive Plan?

b. Whether the Growth Management Act requires that development regulations that are GMA compliant, that are consistent with the Comprehensive Plan, and that apply specifically to development proposals, be

applied to proposed Comprehensive Plan map amendments, even when such application is contrary to the local jurisdiction's interpretation of its own regulations and Comprehensive Plan?

c. Whether a Comprehensive Plan map amendment can be determined to be invalid when it is consistent with and implements a GMA compliant Comprehensive Plan?

Please note that in the trial court Spokane County (and Respondent Douglas) argued that the concurrent rezone was a "project permit" and not a "development regulation" under RCW 36.70A.0307), and that the GMHB lacked jurisdiction over the concurrent rezone. CP 219-221; 288-294. The trial court agreed. CP 495. However, on September 10, 2013, this Court issued its opinion in *Spokane County II*, 176 Wn. App. 555, 309 P.3d 673 (2013), review denied, 179 Wn.2d 1015 (2014), which held that a concurrent rezone is an amendment to a development regulation over which the GMHB has jurisdiction.

Spokane County respectfully disagrees with the Court's analysis of the GMHB jurisdiction in *Spokane County II*. In the interest of judicial economy, only Respondent Douglas will brief the jurisdictional issue, and Spokane County concurs in the arguments of Respondent Douglas on that issue. The arguments in this brief regarding the validity of the concurrent rezone assume, *arguendo*, that the *Spokane County II* decision is correct.

IV. STATEMENT OF THE CASE

By resolution number 11-1191, Spokane County adopted amendments to its Comprehensive Plan map and concurrently adopted rezoning designations of properties affected by the adopted Comprehensive Plan map amendments. CR 000007-000014[1], 000774-000751. Relative to Resolution number 11-1191, Appellants, Five Mile Neighborhood Association and Futurewise, challenged only one of the amendments to the Comprehensive Plan map and the concurrent rezone of the property, 11-CPA-05.

The property to which Amendment No. 11-CPA-05 to the Spokane County Comprehensive Land Use Plan map applies is a parcel 22.3 acres in size, of undeveloped land, within the Spokane County Urban Growth Area, located between Waikiki Road and North Five Mile Road. CR 000334–000338, 000046, 000190, 000199, 000220, 000227, 000228–000232, 000239–000242. The topography of the property is steep slopes and hilly with outcroppings of basalt rock, only a portion of the property is suitable for residential development. CR 000497–000539, 000555–000556 (Findings 22–26), 000589–000591, 000700-0000703. In addition to the irregular topography of the property, four utility easements encumber the property such that large areas of the property must remain undeveloped and open in a natural state. CR 000336

[1] In the body of this Brief reference to the record before the Growth Management Hearings Board will be made by "CR - #####" indicating the Certified Record and the corresponding page number(s).

(Traffic Impact Analysis for Redstone Plat, Site Plan. p. 35), CR 000560 (Findings 61 – 62).

A preliminary plat, known as Redstone, for single family urban density residential development of the property was approved in 2007. CR 000552-000587. Opposition to the proposed 2007 Redstone plat came from many of the same individuals who are Appellants in this matter and was largely centered upon the sole access for residents to and from the Redstone plat onto North Five Mile Road. CR 000559–000563 (Findings 58, 83 and 84). The Redstone plat was approved by the Spokane County Hearing Examiner without further appeal. CR 000552–000587. Shortly after the approval of the Redstone preliminary plat in 2007, the economy in Spokane County sharply declined, as did the entire country, and development of the Redstone subdivision as a single family development became economically infeasible. CR 000661–000691. Development of the property into medium density residential properties, which will be allowed by 11-CPA-05, is economically feasible in this current economy, and also allows for the primary access to and from the development to be on Waikiki Road along with sidewalks and a pedestrian path through the development. CR 000661–000691, 000693-000696. In addition to the primary access to the property from Waikiki Road, 11-CPA-05 also provides for a secondary access to the property from North Five Mile Road and for further through a third access to the west when surrounding properties are developed

in the future. CR 000661–000691, 000693-000696. The primary ingress and egress from the property to Waikiki Road will significantly reduce the traffic impact on North Five Mile Road. CR 0000497–000539, 000541–000550, 000661–000691, 000753-000758.

The Comprehensive Plan amendment allowing future medium density development of the property allows the most efficient development of the property while the topography of the property will act to separate the medium density development from the single family development in the area across North Five Mile Road and on several large acreage parcels on the north, east, and west, creating a buffer between the low density development in the area and medium density development. CR 000589–000591, 000635 (SEPA Checklist, pg. 10), CR 000642–000659, 000661-000691.

Approval of 11-CPA-05 is conditioned upon the property owner and Spokane County entering into a development agreement requiring at a minimum that development upon the property will provide public access to and pay for or construct improvements to Waikiki Road including curbs, gutters, sidewalks, and drainage as required by applicable codes, regulations, and Spokane County Road standards based upon the future development when proposed upon the property and review of a detailed traffic analysis. The development agreement is also required to include that the internal road within the development shall be constructed to Spokane County Road Standards, shall

include sidewalks on both sides to facilitate a future pathway, shall be owned and maintained by the property owner until site development is complete at which time ownership and maintenance shall be transferred to Spokane County and provide a termination at the west property line to provide public access to adjoining properties with the intent of mitigation of vehicular traffic on Five Mile Road and provide access to Waikiki Road that is compliant with the Spokane County Road Standards. CR 000750 (Finding 26). Neither the amendment to the comprehensive plan or the concurrent rezone of the property is of any effect until the required development agreement is completed and entered into between the property owner and Spokane County. CR 000751.

V. ARGUMENT

A. STANDARD OF REVIEW.

The standard of review by this Court of the Growth Board's Final Decision and Order ("FDO) in Case No. 10-1-0010, is found in Administrative Procedures Act (APA) at RCW 34.05.570(3):

> [T]he court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provision on its face or as applied;
>
> (b) the order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) the agency has engaged in unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(d) the agency has erroneously interpreted or applied the law;

(e) the order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) the agency has not decided all issues requiring resolution by the agency;

(g) a motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known or were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) the order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) the order is arbitrary or capricious.

As indicated above in the assignments of error, Spokane County asserts that the Growth Management Hearings Board erred in regard to RCW 34.05.570(3)(d) & (e).

B. "INTERNAL INCONSISTENCY" IS THE ONLY ALLEGATION OF NON-COMPLIANCE WITH THE GMA AND IS BASED SOLELY UPON AN UNREASONED INTERPRETATION OF THE COMPREHENSIVE PLAN.

The only allegation of error under the GMA raised before the Growth Management Hearings Board, or before this Court, regarding the

comprehensive plan map amendment adopted by Spokane County, 11-CPA-05, is that the change in the designation of the property, from Low Density Residential to Medium Density Residential, allegedly caused the comprehensive plan to be internally inconsistent. CR 001020: 1–3. The Growth Management Hearings Board's conclusion that the comprehensive plan is caused to be internally inconsistent is based solely upon the Board's unreasoned and unsupported interpretation of the Spokane County Comprehensive Plan by focusing on isolated clauses of the comprehensive plan taken out of context. CR 001018-001029.

As will be shown below, the adopted map amendment, 11-CPA-05, is consistent with the goals and policies of the Spokane County Comprehensive Plan and thus the comprehensive plan as amended is in compliance with the GMA.

C. THE GROWTH MANAGEMENT HEARINGS BOARD HAS LIBERALLY CONSTRUED THE GMA AND FAILED TO GRANT THE REQUIRED DEFERENCE TO SPOKANE COUNTY IN VIOLATION OF WELL ESTABLISHED LAW.

The Growth Board's authority is strictly limited to enforcing the clear and specific requirements of the GMA. *Thurston County v Western Washington Growth Management Hearings Board*, 162 Wn.2d 329, 341-342, 190 P.3d 38 (2008); *Woods v Kittitas County*, 162 Wn.2d 597, 612 n. 8, 174 P.3d 25 (2007); *Quadrant Corp. v Cent. Puget Sound Growth Mgmt. Hearing Bd.*, 154 Wn.2d 224,

240 n.8, 110, 110 P.3d 1132 (2005). As the product of intense legislative compromise the GMA contains no provision for liberal construction; the Growth Board has no authority to infer requirements not specifically stated in the GMA. *Quadrant Corp.*, supra at 245 n.12, citing, *Skagit Surveyors & Eng'rs, LLC v Friends of Skagit County*, 135 Wn.2d 542, 565, 958 P.2d 962 (1998).

The court in *Quadrant* stated that the Legislature, in amending the GMA in 1997, "took the unusual additional step of enacting into law its statement of intent in amending RCW 36.70A.320" to require greater deference to local enactments by changing the Growth Board's standard of review from "preponderance of the evidence" to "clearly erroneous." *Quadrant Corp.*, 154 Wn.2d at 236–237, 110 P.3d 1132 (2005); See also, RCW 36.70A.320(1), (2) and (3). The Court in *Quadrant Corp.* clearly instructs the Growth Management Hearings Board not to substitute its own judgment for that of local governments in how they implement their comprehensive plans that have been developed in compliance with the GMA. RCW 36.70A.3201; *Quadrant Corp. v State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005).

The Comprehensive Plan goals and policies are not strict requirements of the GMA. Rather the Comprehensive Plan is a statement of policies and goals that Spokane County has adopted in compliance with the

requirements of the GMA. The Comprehensive Plan serves as direction and guidance in creating and adopting development regulations and in specific land use decisions. RCW 36.70A.030(4); *Woods v Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25 (2007); *Feil v Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 367, 382, 259 P.3d 227 (2012). The concurrent rezone of the property, as a development regulation, need not strictly comply with the comprehensive plan, but must generally conform to it. *Spokane County II*, 176 Wn. App. 555, 574 - 575, 309 P.3d 673 (2013).

Referring to the deference that the Growth Management Hearings Board is to give to the local governments in planning under the GMA, RCW 36.70A.3201 reads in part:

> The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, *the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.* (Emphasis added.)

The Growth Management Hearings Board is bound by the mandate of the GMA to view the County's action as compliant with the GMA unless the Appellants establish that Spokane County's action was clearly erroneous, that the Board has a strong conviction that Spokane County's action was error, based upon evidence found in the record before the Growth Management Hearings Board that proves that there is no support at all for, or a specific prohibition against the County's action in the GMA by.

Quadrant Corp., 154 Wn.2d 224 at 240 n.8, 110 P.3d 1132 (2005); *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000) quoting, *Dep't of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993); *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112,129, 118 P.3d 322 (2005); *Manke Lumber Company, Inc. v. Central Puget Sound Growth Management Hearings Board*, 113 Wn. App. 615, 624, 53 P.3d 1011 (2002).

In this case before the Court, the Growth Management Hearings Board substituted its interpretation of the policies of the Spokane County Comprehensive Plan for that of Spokane County's interpretation, and then the Growth Management Hearings Board applied its interpretation as strict requirements of the GMA. To do so is a clear and fatal error by the Growth Management Hearings Board. RCW 36.70A.3201; *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 236–237, 110 P.3d 1132 (2005).

D. THE LAND USE MAP AMENDMENT IS CONSISTENT WITH THE SPOKANE COUNTY COMPREHENSIVE PLAN GOALS AND POLICIES.

1. 11-CPA-05 Is Consistent With Policy UL.2.16 of the Spokane County Comprehensive Plan.

The Growth Management Hearings Board's conclusion that 11-CPA-05 is inconsistent with Spokane County Comprehensive Plan policy UL.2.16 is based upon its unreasonable and unsubstantiated interpretation of the Spokane County Comprehensive Plan. CR 001021-001024.

Comprehensive Plan Policy UL.2.16 reads:

Mutlifamily Residential "Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials."

The subject property in this matter is located less than one half mile from Whitworth College. CR 0000227, 000651. The property is not only near a major arterial, but it touches a major arterial and will have its primary access to and from the property on Waikiki Road, a major arterial. See, Spokane County Arterial Road Plan[2]. The statement in the Staff Report identifying Waikiki Road as a minor arterial is an unfortunate error on the part of the Spokane County Planning Staff. CR 000222.

In addition to the proximity of the property to commercial development and to Waikiki Road, a major arterial, the property is encumbered by permanent utility easements that require that a majority of the property remain in open and undeveloped space. CR 000336 (Traffic Impact Analysis for Redstone Plat, Site Plan. p. 35), CR 000560 (Findings 61–62). The conclusion of the Growth Management Hearings Board finding the amendment inconsistent with policy UL.2.16 is without any basis in fact in the record.

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[2] The Spokane County Arterial Road Map is a public record, available to all via the internet at "www.spokanecounty.org/data/engineers/traffic/arterialroadmap.pdf" and in hard copy at the Spokane County Engineering Department. Spokane County respectfully asks the Court to take judicial notice of this information as it pertains to the character of Waikiki Road as an Urban Principal Arterial Road and to North Five Mile Road as an Urban Minor Collector.

The Growth Management Hearings Board's conclusion that the 11-CPA-05 is inconsistent with policy UL.2.16 is error in that its interpretation requires that the property be both adjacent to commercial development and a major arterial when the policy *encourages* medium and high density residential to be sited *near* commercial areas and on sites with *good access* to major arterials. The Growth Management Hearings Board completely ignores the clear language of the policy in its very narrow interpretation of the policy. The Growth Board's action is both a misinterpretation of the law and policy and is a failure to grant deference to Spokane County in the interpretation and application of its own Comprehensive Plan policy. RCW 36.70A.3201; *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 236–237, 110 P.3d 1132 (2005). The amendment clearly implements and is consistent with policy UL.2.16.

2. 1-CPA-05 Is Consistent With Policy UL.2.20 of the Spokane County Comprehensive Plan.

The Growth Management Hearings Board's conclusion that 11-CPA-05 is inconsistent with Spokane County Comprehensive Plan policy UL.2.20 is again based upon its unreasonable and unsubstantiated interpretation of the Spokane County Comprehensive Plan. CR 001025 - 001026.

Comprehensive Plan Policy UL.2.20 reads:

> **Traffic Patterns and Parking** "Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people

to get around easily by foot, bicycle, bus and car. *Cul-de-sacs or other closed street systems may be appropriate under certain circumstances including, but not limited to, topography and other physical limitation which make connecting systems impractical*".
(Emphasis added).

The Growth Management Hearings Board's first error regarding UL.2.20 is that the rather than looking to the requirements upon the future development of the site, that the property have at least two access points and a third future access be planned for and that the site be developed with roads meeting Spokane County Road Standards with sidewalks and pathways, the Board focused on the alleged issues with roadways outside of the property and future development. CR 001025-001026. This ignores the focus of the policy that the *new development* be arranged with interconnecting streets etc. Policy UL.2.20, supra.

Next the Growth Management Hearings Board completely ignored clear language in the second sentence of the policy that addresses exactly the circumstances at this property. The property is topographically isolated from the developments across Five Mile Road and to the Southwest. The property is also buffered from the properties to the west and north both topographically and by the expansive easements that encumber the property and prohibit development in the west and north regions of the property. CR 001025–001026; CR 000336 (Traffic Impact Analysis for Redstone Plat, Site Plan. p. 35), CR 000560 (Findings 61–62).

11-CPA-05 was approved by the Spokane County Board of County Commissioners subject to a development agreement binding upon the property being entered into by the owner/developer of the property. CR 000750 (Finding 26). The development agreement is to require that the property be developed with two access points, the primary access being on Waikiki Road and that a third access point be provided for in the event of future development to the west of the site. CR 000751. The construction of roads within the property must be in accord with Spokane County Road standards and must have sidewalks adjacent to the roads and a path way for residents to access the open space and Waikiki road. CR 000750 (Finding 26). The connectivity policy of UL.2.20 is clearly met.

Notwithstanding the requirements that two access points, sidewalks and pathways be incorporated into the development of the property, the fact that the property is topographically isolated from the surrounding properties is a specific consideration stated in the policy allowing some deviation from the "recommended" connectivity found in the policy. Appellants and the Growth Management Hearings Board choose to completely ignore the second clause of the policy.

Finally, the policy refers and applies to "development" or proposals for a project to be developed on the site and not to comprehensive plan map amendments such as 11-CPA-05. The Growth Management Hearing

Board's conclusion regarding UL.2.20 is without any basis in the law, the policy, or the substantial facts in the record.

3. The Comprehensive Plan Amendment is Consistent With All of the Applicable Comprehensive Plan Policies.

It is well established law that goals considered by local governments in comprehensive planning may be mutually competitive at times, and thus if a map amendment advances other comprehensive plan goals and policies, a finding by the Growth Management Hearings Board that it fails to advance another, that alone cannot be an invalidating inconsistency. *Spokane County v EWGMHB*, 173 Wn. App. 310, 333, 293, P.3d 1248 (2013).

As shown above 11-CPA-05 is consistent with the goals and policies of the Comprehensive Plan challenged by Appellants, and additionally the amendment is consistent with and furthers other policies of the Comprehensive Plan. The Board found the amendment to be consistent with Comprehensive Plan policies H.3.2 to ensure that the design of infill development preserves the character of the neighborhood (CR 001020 - 001021); UL.7.1 to identify and designate areas for residential uses including low, medium and high density (CR 001021); UL.2.17 to site multifamily homes throughout the Urban Growth Area such as to integrate them into small scattered parcels throughout existing residential areas and into or next to urban activity centers (CR 1024 – 001025). In addition to those policies with which the Growth Management Hearings Board found the amendment

to be consistent, Appellants ignore and do not challenge that 11-CPA-05 is also consistent with policy UL.9a, by creating "a variety of residential densities within the Urban Growth Area with an emphasis on compact and mixed-use developments in designated centers and corridors", and policies UL.7, UL.7.2, UL.7.3, UL.7.12, UL.8, UL.8.1, and UL.9b. See, unchallenged Finding of the Board of County Commissioners # 25, CR 000750.

The Growth Management Hearings Board's conclusion that 11-CPA-05 causes the Spokane County Comprehensive Plan to be internally inconsistent lacks any basis in law or in fact and illustrates the Board's misinterpretation and misapplication of the law and failure to grant the required deference to Spokane County in interpreting and applying the County's Comprehensive Plan policies to a specific parcel of property and the unique local circumstances found in this area.

4. The GMA Does Not Require Revision of the Capital Facilities Plan For an Amendment to the Land Use Map.

As has already been decided by this Court in the case of *Spokane County v EWGMHB.*, 173 Wn. App. 310, 293 P.3d 1248 (2013), there is no basis in the GMA to require that capital facility funding and scheduling issues be evaluated and the results incorporated into the transportation and capital facilities elements every time the comprehensive plan map is amended. Id., at 338. This Court goes on to say that the provisions of the GMA contemplate meaningful action regarding the capital facilities and transportation elements at

the project approval stage to ensure conformity with the comprehensive plan. Id., at 339. As is acknowledged in *Spokane County v E WGMHB*,173 Wn. App. 310, Spokane County has adopted concurrency regulations that are not challenged in this action and thus the Comprehensive Plan Amendment challenged in this action is consistent with and is in compliance with those development regulations.

The only alleged deficiencies in capital facilities raised by Appellants is alleged issues with the surrounding road infrastructure, which is addressed in the next section of this brief, and allege issues with the schools in the area. Appellants refer to a comment from Mead School District in support of their claim. They however misquote the comment. The entire comment is two sentences long and states:

> "**School District:** Applicant has been informed of the status of public school availability to the above location. Specific comments include: *The Mead School District believes that this request for a change in land use designation, if approved, could have an impact on schools. The District will respond with further remarks when the SEPA checklist is circulated for comment.*" (Emphasis in original).

CR 000343.

The Mead School District provided no other comments even after circulation of the SEPA checklist. In fact none of the providers of public services ever provided any comment that the public facilities would not be available to proposed development on the property as a result of the proposed amendment. CR 000224.

There is no dispute that the action objected to by Appellants and found to be non-complaint with the GMA in this case is the adoption of Comprehensive Plan map amendment 11-CPA-05 and the concurrent rezone are not a project permit or development proposal. See, *Spokane County II*, 176 Wn. App. 555, 309 P.3d 673 (2013). The alleged error of failure to update the capital facilities plan as a result of or concurrent with the adoption of 11-CPA-05 is without basis in the law or facts.

E. THE CONCURRENCY REGULATIONS ARE DEVELOPMENT REGULATIONS WHICH ARE INAPPLICABLE TO COMPREHENSIVE PLAN MAP AMENDMENTS - THE SPOKANE COUNTY ZONING CODE SUPPORTS THE CONCURRENT REZONE.

1. The Growth Management Hearings Board's Focus on Development Regulations is Inapposite and is Misplaced.

The Growth Management Hearings Board's decision is also in error by reliance on the alleged violation of development regulations because by definition the development regulations are designed to ensure meaningful review of development at the project approval stage and are not intended to guide the adoption or amendment of the comprehensive plan. See, *Spokane County v EWGMHB*, 173 Wn. App. 310, at 338–339; see also. RCW 36.70A.040(4)(d). Creation and amendment of the comprehensive plan is governed by the goals and policies of the GMA and not adopted development regulations. Id., RCW 36.70A.020. Appellants' assertion that the Comprehensive Plan map amendment and concurrent rezone are somehow

"development" as that term is used in the comprehensive plan flies in the face of the argument that they made to this Court and this Court's decision in *Spokane County II*, 176 Wn. App. 555, 309 P.3d 673 (2013).

Spokane County was mandated to begin planning under the Growth Management Act in 1993[3]. The goals and intent of the GMA are embodied in its planning goals, which 'guide the development and adoption of comprehensive plans and development regulations. RCW 36.70A.020.

Spokane County's unchallenged GMA Comprehensive Plan was adopted in in 2001[4] and was deemed compliant with the Growth Management Act, including all the goals and policies enumerated in RCW 36.70A.020. RCW 36.70A.320(1). Thereafter, Spokane County adopted numerous unchallenged development regulations (e.g. concurrency ordinance, zoning) which have been deemed compliant with the Growth Management Act, including all the goals and policies enumerated in RCW 36.70A.020. Id.

The "local planning" and "looking ahead and planning for the future" has already occurred through the adoption of the Comprehensive Plan in 2001 and implementing development regulations. Appellants are now barred from making an untimely collateral challenge to the County's Comprehensive Plan amendment process and Concurrency Ordinance, neither of which requires an

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[3] See, Comprehensive Plan Summary available at: http://www.spokanecounty.org/bp/data/CompPlanUpdate/MetroCompPlan Update/CompPlanSumm.pdf

[4] Id.

amendment to the Capital Facilities Plan or analysis of transportation impacts and/or conditions upon a Comprehensive Plan map amendment as in this case. RCW 36.70A.290(2), *Five Mile Prairie Neighborhood Association & Futurewise v Spokane County*, EWGMHB Case No. 12-1-0002 (Final Decision and Order, August 23, 2012). By adopting its Comprehensive Plan and development regulations Spokane County made the deliberate choice to have transportation infrastructure and traffic impacts studied *at the time of development*. This choice is embodied in the County's Concurrency Ordinance and the Spokane County Road Standards. Because Spokane County's development regulations clearly address the issues raised by the Appellants and strictly require compliance with the GMA goals and requirements at the time that development of the property is proposed, the land use map amendment challenged in this action is fully compliant with the GMA and consistent with the Comprehensive Plan.

The Growth Management Hearings Board's conclusion that 11-CPA-05 is inconsistent with the policies of the Comprehensive Plan and/or non-compliant with the GMA based upon the alleged lack of compliance with the Spokane County concurrency regulations is unfounded and not supported by law.

2. The Concurrent Rezone Complies with SCC 14.402.040.

In large part Appellants argue and the Growth Management Hearings Board concluded that the concurrent rezone of the subject property violated

the Spokane County Zoning Code. CR 001021-001030. As this Court has already decided, the concurrent rezone is an amendment to a development regulation that is mandated by the GMA that requires that the development regulations be consistent with the adopted comprehensive plan. *Spokane County II*, 176 Wn. App. 555, 571-573, 309 P.3d 673 (2013); RCW 36.70A.040(4)(d).

Spokane County Code section 14.402 in applicable part states:

> 14.402.000 Purpose and Intent.
> The purpose and intent of this chapter to provide procedures whereby the Zoning Code (Title 14), including the official text and maps, may be amended consistent with the Comprehensive Plan.
>
> 14.402.040 Criteria for Amendment.
> The County may amend the Zoning Code when one of the following is found to apply.
>
> 1. The amendment is consistent with or *implements* the Comprehensive Plan and is not detrimental to the public welfare.
> 2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code.

RCW 36.70A.040(4)(d) requires that Spokane County adopt a comprehensive plan *and development regulations that are consistent with and implement the comprehensive plan.* Consistent with RCW 36.70A.040(4)(d), SCC 14.402.040(1), and *Spokane County II*, (176 Wn. App. 555, 571–573), Spokane County adopted the rezone of the property concurrently with the Comprehensive Plan amendment that required the rezone. To do so is

neither a violation of the GMA or of the Spokane County Zoning Code. The Growth Board's conclusion otherwise is error and should be reversed.

In addition to the compliance with SCC 14.402.040(1), the rezone is also appropriate under SCC 14.402.040(2). As indicated in the record at CR 000661-000691 the economic circumstances impacting the area in 2010– 011 were such that the development of the property as then zoned was fiscally impractical, development as medium density residential property is not only fiscally feasible but also allows interconnectivity and consistency with several policies of the Spokane County Comprehensive Plan (H.3.2, UL.2.16, UL.2.20, UL.2.17, UL.7.1, UL.7.3, UL.7.12, UL.8, UL.8.1, UL.9a and UL.9b. CR 000750). The Growth Management Hearings Board's conclusion that the rezone was inconsistent with the Spokane County Zoning Code is without basis and should be reversed.

3. The Record Demonstrates that the Future Developer of the Property Will be Required to Mitigate Traffic Impacts and Make Required Improvements to Public Streets Impacted by Proposed Development.

In this case, provisions for adequate infrastructure are guaranteed by: (1) the County's Concurrency Ordinance; (2) the conditions of approval submitted by the County Engineer; and (3) the Spokane County Road Standards; therefore, there is no requirement that the Spokane County Capital Facilities Plan address 11-CPA-05.

The Findings of Fact adopted by the Spokane County Commissioners specifically address concurrency and mitigation commensurate with development. The Findings of Fact specifically state:

> 18. Potential traffic impacts are properly addressed at project level to be conducted pursuant to Spokane County Code as specified in Spokane County Division of Engineering and Road correspondence dated August 2, 2011 which adise the applicant that "at such time a site plan is submitted for review the applicant shall submit detailed traffic information for review by the County Engineer to determine what traffic impacts, if any, that the development would have on surrounding infrastructure. The applicant is advised that mitigation may be required for off-site improvements.
>
> 19. Subsequent to the public hearing on November 22, 2011 regarding 11-CPA-05, the applicant, at the Board's request, provided a trip generation/distribution letter dated November 23, 2011 that provided documentation that provision of a second access point from the site to Waikiki Road would reduce the number of vehicle trips using Five Mile Road and more specifically in the p.m. peak hours and less trips than the previously approved preliminary plat approved for the subject property (PN-1974-06: Redstone).
>
> 21. Traffic impacts from the proposal will be mitigated for compliance with Spokane County Code and concurrency standards at the project level as specified by the Division of Engineering and Roads in their comments regarding the proposed amendment dated August 2, 1011.
>
> 22. Traffic impacts from the proposed amendment may be further mitigated by provision of a second access point to Waikiki road, to be reviewed at the project level, which will reduce the number of vehicle trips on Five Mile Road as evidenced by the trip distribution letter submitted by the applicant on November 23, 2011.

CR 000749-000750.

The Spokane County Engineer specifically commented on the Amendment and indicated that traffic improvements may be required as follows:

> This proposed comprehensive plan amendment is not being requested for a specific development proposal or site plan at this time. At such time a site plan is submitted for review, the applicant shall submit detailed traffic information for review by the County Engineer to determine what traffic impacts, if any, that the development would have on surrounding infrastructure. The applicant is advised that mitigation maybe required for off-site improvements.

CR 00658.

The Growth Board has held conditions of approval are the appropriate remedy to ensure that development "cannot go forward unless and until the developer provides adequate streets, roads and other capital infrastructure necessary to support the development". *Panesko v Benton County*, EWGMHB Case No. 07-1-0002 (Final Decision and Order, July 27, 2007), at 14. In this case, not only do the conditions of approval submitted by the Spokane County Engineer require the developer to provide necessary infrastructure, but so does the Concurrency Ordinance adopted by Spokane County under chapter 13.650 as well as the Spokane County Road Standards.

As a matter of law, the developer is required to make street frontage improvements to Waikiki Road and/or Five Mile Road as necessitated by the proposed development. The adopted Spokane County Road Standards provide in pertinent part:

FRONTAGE IMPROVEMENT OBLIGATION

All commercial, industrial, institutional, and ***multi-family residential property development*** together with all plats, short plats, and binding site plans ***shall have the general obligation to bring any substandard and abutting County right(s)-of-way and County road(s) up to the current requirements of the arterial road plan and functioning classification of the road, respectively.*** Required roadway improvements must be completed prior to finalization of any non-residential binding site plan, short plat, or plat unless otherwise allowed by the County Engineer or their authorized agent. ***Additional road improvements or mitigation measures may also be required pursuant to the findings of the accepted traffic study or analysis required for that proposal.***

These obligations may be applied at the time of any land-actions involving subdivisions of land in conjunction with plats and short plats of residential properties and binding site plans of commercial/industrial properties, and to zone changes granting more traffic intensive uses.

In the cases where land-actions are not involved or when involved where deferment is deemed by the County Engineer, or their agent, in the public best interest, these obligations will be applied at the time of the "commercial" building permits. This refers to new property development, redevelopment, major expansion & modernization projects, building changes of use, and to any building permit where legal, non-conforming conditions are already present.

Spokane County Road Standards, p. 1-11 - 12. (See, Appendix "A")

The Spokane County Road Standards demonstrate as a matter of law that the developer will be required to improve Waikiki Road and/or Five

Mile Road up to the current requirements of the arterial road plan and functioning classification of the road, respectively.

The development regulations adopted by Spokane County, coupled with the Record before the Hearing Board, demonstrate that traffic was considered and the County found that traffic impacts will be reviewed during the site-specific land use approval process and traffic concurrency must be met. CR 000749-000750. It is very clear that no development can occur until all traffic impacts are mitigated and the Record clearly demonstrates that Spokane County considered traffic concurrency and adequacy of infrastructure in making its decision to approve the Amendment. CR 000749-000750. When the property is developed, a specific project will be submitted for review and approval and project specific impacts will be identified and mitigated at that time. CR 000749-000750. The Hearings Board's decision is not supported by the evidence in the record before it.

III. CONCLUSION

The decision of the Hearing Board must be reversed because its decision is an erroneous interpretation of law and is unsupported by substantial evidence.

The Hearing Board stepped into the shoes of Spokane County and substituted its judgment for that of the legislative body of Spokane County.

This is not the standard of review or the role of the Hearing Board under the GMA. In the absence of any specific requirement or prohibition of the GMA that has been actually violated, the Hearing Board must defer to the discretion of Spokane County in adopting the Amendment. The land use map amendment is consistent with the GMA compliant Spokane County Comprehensive Plan.

This Court has already decided that the Hearing Board erroneously interpreted the law when it found that the Capital Facilities Plan and Transportation Plan must be reviewed and updated for each amendment to a comprehensive plan; therefore, the Growth Management Hearings Board's decision in this matter must be reversed. Even assuming, *arguendo*, that the Board's interpretation of the law is correct, the Record contains substantial evidence that Spokane County has development regulations in effect which prohibit development unless adequate facilities are available at the time of development.

Finally, the Hearing Board erroneously found that the Amendment caused the Spokane County Comprehensive Plan to be invalid. The Comprehensive Plan and the Amendment are compliant with the requirements of the GMA. The Amendment being an amendment to the land use map and not to the GMA compliant language of the

Comprehensive Plan, the amendment cannot and does not cause the Comprehensive Plan to thwart any of the goals or requirements of the GMA.

There being no violation of the GMA or inconsistency with the Spokane County Comprehensive Plan, the Court should affirm the Superior Court's decision to reverse the Hearing Board's Final Decision and Order and remand to the Hearing Board with instruction that an order be entered finding the Spokane County Comprehensive Plan and the Amendment to be in compliance with the GMA.

Respectfully submitted this 15th day of April, 2014.

STEVEN J. TUCKER
Spokane County Prosecutor

DAVID W. HUBERT, WSBA # 16488
Deputy Prosecuting Attorney
Attorneys for Spokane County

PROOF OF SERVICE

I hereby declare under the penalty of perjury and the laws of the State of Washington that the following statements are true.

On the 16th day of April, 2014, I caused to be served a true and correct copy of the Respondent Spokane County's Response Brief by the method indicated below, and addressed to the following:

Diane L. McDaniel Sr. Assistant Attorney General Attorney General's Office 1125 Washington Street P.O. Box 40110 Olympia, WA 98504-0110	___ X ___ ___ ___	Personal Service U.S. Mail Hand-Delivered Overnight Mail Facsimile
Tim Trohimovich, Esq. Futurewise 816 Second Avenue, Suite 200 Seattle, WA 98104	___ X ___ ___ ___	Personal Service U.S. Mail Hand-Delivered Overnight Mail Facsimile
Michael Murphy, Esq. Groff Murphy, PLLC 300 East Pine Street Seattle, WA 98122	___ X ___ ___ ___	Personal Service U.S. Mail Hand-Delivered Overnight Mail Facsimile

DATED this 16th day of April, 2014 in Spokane, Washington.

Tamara L Baldwin

TAMARA BALDWIN

Appendix A

1. The County Engineer determines that the proposed development will generate enough peak hour trips to lower or aggravate the minimum acceptable LOS.
2. The County Engineer determines that driveways from the land development proposal have the potential to generate traffic safety problems on the adjacent public roadway or when driveways have the potential to create queue issues on public roads.
3. The County Engineer determines that an existing route with a history of traffic accidents will be further impacted by an increase in traffic from the proposal.
4. When project action would impact public roadway traffic circulation or access.

A specific scoping by the County Engineer may range from an in-depth analysis of site generated levels-of-service to a cursory review of safety issues. The County Engineer shall determine the specific project scope. The Sponsor shall submit a traffic report signed by a Professional Engineer, licensed in the State of Washington. The traffic impact study shall be performed in accordance with Technical Reference A of these Standards.

1.31 FRONTAGE IMPROVEMENT OBLIGATION

All commercial, industrial, institutional, and multi-family residential property development together with all plats, short plats, and binding site plans shall have the general obligation to bring any substandard and abutting County right(s)-of-way and County road(s) up to the current requirements of the arterial road plan and functioning classification of the road, respectively. Required roadway improvements must be completed prior to finalization of any non-residential binding site plan, short plat, or plat unless otherwise allowed by the County Engineer or their authorized agent. Additional road improvements or mitigation measures may also be required pursuant to the findings of the accepted traffic study or analysis required for that proposal.
These obligations may be applied at the time of any land-actions involving subdivisions of land in conjunction with plats and short plats of residential properties and binding site plans of commercial/industrial properties, and to zone changes granting more traffic intensive uses. In the cases where land-actions are not involved or when involved where deferment is deemed by the County Engineer, or their agent, in the public best interest, these obligations will be applied at the time of the "commercial" building permits. This refers to new property development, redevelopment, major expansion & modernization projects, building changes of use, and to any building permit where legal, non-conforming conditions are already present.

General right-of-way/easement obligations will be met in the following way, unless an alternative that best provides for the long-term public benefit has been accepted by the County Engineer or their authorized agent:

Dedication of additional County right(s)-of-way/public easements along the entire property frontage to the standard half-width including corner radii and end transitions for the road

classification and type together with the necessary abutting Border Easement for any accessory uses such as grading, drainage, sidewalks, and other accessory road needs.

General half-road improvement obligations will be met in the following way, unless an alternative that best provides for the long-term public benefit has been allowed and accepted by the County Engineer or their authorized agent:

Construction of standard or special section half-road improvements along the property frontage shall be required. The extent of the frontage improvements may be reduced at the discretion of the County Engineer or their agent should a certain or reasonable opportunity exist for the remainder of the improvements to be required at a later time. Half road improvements may not be limited to simple widening, but may include providing two valid travel lanes with any attenuate reconstruction and adequate construction materials.

1.32 CONNECTIVITY

The intent of urban connectivity design standards is to provide for a system of streets that offer multiple routes and connections allowing ease of movement for cars, bikes and pedestrians including frequent intersections and few closed end streets (cul-de-sacs). The design of projects within Spokane County's Urban Growth Areas shall adhere to the following urban connectivity design standards, unless otherwise approved by the Director of Planning and the Spokane County Engineer pursuant to 12.300.123(2) below:

1. Block length for local streets shall not exceed 660 feet, unless an exception is granted based on one or more of the following:
   a. Physical Conditions preclude a block length 660 feet or less. Such conditions may include, but are not limited to, topography natural resource areas, critical areas or shorelines.
   b. Buildings, train tracks or other existing development on adjacent lands physically preclude a block length 660 feet or less.
   c. An existing street or streets terminating at the boundary of the development site have a block length exceeding 660 feet, or are situated such that the extension of the street(s) into the development site would create a block length exceeding 660 feet.
2. The proposed development shall include street connections to any streets that abut, are adjacent, or terminate at the development site.
3. The proposed development shall include streets that extend to undeveloped or partially developed land that is adjacent to the development site. The streets will be in locations that will enable adjoining properties to connect to the proposed development's street system.
4. Permanent dead end streets or cul-de-sacs shall only be allowed when street connectivity can not be achieved due to barriers such as topography, natural features or existing development, e.g. train tracks. Cul-de-sacs that are allowed

APPENDIX "E"

Case No. 31941-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

SPOKANE COUNTY,

Respondent,

v.

FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION, and FUTUREWISE,

Appellants,

and

HARLEY C. DOUGLASS, INC.,

Respondent,

and

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

BRIEF OF APPELLANTS FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION & FUTUREWISE

Tim Trohimovich, WSBA No. 22367
Futurewise
816 Second Ave., Suite 200
Seattle, Washington, 98104
Telephone: 206-343-0681 Ext. 118,
tim@futurewise.org
Attorney for Five Mile Prairie
Neighborhood Association &
Futurewise

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I. INTRODUCTION

Washington State's Growth Management Act (GMA) requires counties and cities to adopt and maintain comprehensive plans and development regulations to provide the public facilities and services needed to support new development.[1] As this brief of appellants will show, the Growth Management Hearings Board (Hearings Board or Board) correctly determined that Spokane County Amendment No. 11-CPA-05 failed to comply with the *Spokane County Comprehensive Plan* policies that require adequate public facilities and services and include other standards for new development.

Petitioner Five Mile Prairie Neighborhood Association is a non-partisan organization that actively promotes quality of life issues for all Prairie residents. Open to all residents of the Prairie, our organization's representatives continually work with the City of Spokane and Spokane County on all issues related to growth, safety, and the character of our neighborhood. The organization has members that are landowners and residents of Spokane County.[2]

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[1] *See for example* RCW 36.70A.020(12) "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."

[2] Certified Administrative Record Page Number (CR) 000003, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, Growth Management Hearings Board Eastern Washington Region (GMHB) Case No. 12-1-0002, Petition for Review p. 3 (Feb. 7, 2012). The Certified Record Page Number refers to the six digit

Petitioner Futurewise is a Washington non-profit corporation and a statewide organization devoted to ensuring compliance with the Growth Management Act. The organization has members that are landowners and residents of Spokane County.[3]

This brief will first outline the key facts, assign errors to the superior court order, identify the standard of review, and show that the Hearings Board had jurisdiction over both the comprehensive plan amendment and rezone at issue in this case. The brief will then show that the Hearings Board correctly interpreted and applied the Growth Management Act (GMA) and Spokane County's Comprehensive Plan. This brief will also document that the Hearings Board's orders are supported by substantial evidence. Therefore, the Five Mile Prairie Neighborhood Association and Futurewise (Five Mile Prairie) Appellants respectfully request that this Court uphold the Hearings Board's order.

II. PROCEDURAL POSTURE

The Five Mile Prairie Appellants were petitioners before the Hearings Board and prevailed on the merits related to this appeal.[4]

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consecutive page numbers the Hearings Board affixed to the bottom of the documents in the Certified Record, other than the transcript.

[3] CR 000004, *Id.* at p. 4.

[4] CR 001029 – 30, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Final Decision and Order (Aug. 23, 2012), at 20 – 21 of 26. Hereinafter FDO.

Spokane County was the respondent before the Hearings Board. Harley C. Douglass, Inc. was an intervenor before the Hearings Board.

Spokane County and Harley C. Douglass, Inc. appealed the Hearings Board's Final Decision and Order to Spokane County Superior Court where they prevailed.[5] The Five Mile Prairie Appellants filed this appeal to the Court of Appeals.

III. ASSIGNMENTS OF ERROR, ISSUES, AND SHORT ANSWERS

Assignment of Error 1: The Hearings Board correctly concluded that it had subject matter jurisdiction over the comprehensive plan amendment and rezone at issue in this appeal and the superior court's conclusion to the contrary was an erroneous interpretation of the law.

Issue 1: Did the Hearings Board correctly interpret the law in concluding it had jurisdiction over the comprehensive plan amendment and rezone in Spokane County Amendment No. 11-CPA-05 and was its decision supported by substantial evidence? Yes.

Assignment of Error 2: The Hearings Board properly dismissed Harley C. Douglass, Inc. from the case before the Hearings Board. The

[5] Clerks Papers (CP) 493 – 96, *Spokane County and Harley C. Douglass, Inc. v. Eastern Washington Growth Management Hearings Board, Five Mile Prairie Neighborhood Association, and Futurewise,* Spokane County Superior Court Case No. 12-2-03759-5 consolidated with No. 12-2-03760-9, Order on Appeal from the Growth Management Hearings Board, Eastern Washington Region pp. 1 – 4 (Aug. 14, 2013).

superior court's conclusion to the contrary was an erroneous interpretation of the law and is not supported by substantial evidence.

Issue 2: Did the Hearings Board correctly interpret and apply the law in dismissed Harley C. Douglass, Inc. from the case before the Hearings Board and was the Hearings Board's decision supported by substantial evidence? Yes.

Assignment of Error 3: The Hearings Board correctly concluded that the Medium Density Residential comprehensive plan amendment and rezone in Spokane County Amendment No. 11-CPA-05 violated the GMA and was inconsistent with the *Spokane County Comprehensive Plan* and development regulations. The superior court's conclusions to the contrary were erroneous interpretations of the law and not supported by substantial evidence.

Issue 3: Did the Hearings Board correctly interpret the law in concluding that Spokane County Amendment No. 11-CPA-05 violated the GMA and was inconsistent with the *Spokane County Comprehensive Plan* and development regulations and were the Hearings Board's conclusions supported by substantial evidence? Yes.

Assignment of Error 4: The Hearings Board correctly made a determination of invalidity for Spokane County Amendment No. 11-CPA-

05 and the superior court conclusion to the contrary was an erroneous interpretation of the law and not supported by substantial evidence.

Issue 4: Did the Hearings Board correctly interpret the law in making a determination of invalidity for Spokane County Amendment No. 11-CPA-05 and was the Hearings Board's conclusion supported by substantial evidence? Yes.

IV. FACTS

As part of Spokane County's 2011 annual update, or amendments, to the *Spokane County Comprehensive Plan* and zoning regulations, the county adopted Amendment No. 11-CPA-05.[6] Amendment No. 11-CPA-05 re-designated 22.3 acres from "Low Density Residential" to "Medium Density Residential" and rezoned the 22.3 acres from "Low Density Residential" to "Medium Density Residential."[7] This land is vacant except for some utility structures.[8] A preliminary plat for the Redstone subdivision was approved for this site 2007. "The preliminary plat includes 38 lots, 26 for single family dwellings and 12 for duplexes for a

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[6] CR 000010 – 14, Spokane County Resolution 11-1191 In The Matter of the 2011 Annual Comprehensive Plan Map and Text Amendments, Zoning Amendments and Urban Growth Area Amendment, Files 11-CPA-01, 11-CPA-02, 11-CPA-03, 11-CPA-04, 11-CPA-05, 11-CPA-06, 11-CPA-07 and 10-CPA-05 Findings of Fact and Decision pp. 4 – 8 (December 23, 2011). Hereinafter Spokane County Resolution 11-1191.
[7] CR 000046, Spokane County Resolution 11-1191 "Proposed Comprehensive Plan Amendment and Zoning Map Change: 11-CPA-05."
[8] CR 000218, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 1 of 9.

total of 50 dwelling units."[9] The preliminary plat of the approved subdivision is attached to the *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05.*[10] According to the *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05*:

> The Comprehensive Plan and zoning designations in this area [around the comprehensive plan amendment and rezone] are as follows:
> To the north is Low Density Residential
> To the south is Low Density Residential
> To the east is Low Density Residential
> To the west is Low Density Residential[.][11]

The 22.3 acres the County designated Medium Density Residential and zoned Medium Density Residential is entirely surrounded by land with a comprehensive plan designation of Low Density Residential and Low Density Residential zoning.[12]

The Spokane County Hearings Examiner summarized the established residential neighborhood character as part of the findings of fact in the decision to approve the preliminary plat for the Redstone subdivision on the 22.3 acres re-designated by 11-CPA-05:

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[9] CR 000220, *Id.* at p. 3 of 9.
[10] CR 233, *Id.* at Preliminary Plat Redstone Exhibit D.
[11] CR 000220 – 21, *Id.* at pp. 3 – 4 of 9.
[12] CR 000220 – 21, *Id.* at pp. 3 – 4 of 9; CR 000046, Spokane County Resolution 11-1191 "Proposed Comprehensive Plan Amendment and Zoning Map Change: 11-CPA-05" map.

44. The land located near the site to the north and west is vacant and undeveloped; except for an electrical power substation, overhead transmission lines and a high-pressure underground gas pipeline; and except for some single-family homes on acreage parcels located west of the site along the north side of North Five Mile Road.

45. The land lying further to the north, and the land located northeast of the site, generally consists of single-family homes on more urban-sized lots; along with some duplexes located along the east side of Waikiki Road.

46. The land located near the site to the east consists of single-family homes on acreage parcels, and vacant land containing utility easements. Some single-family homes on urban-sized lots are located further to the east, along the west side of Waikiki Road. The land lying south of the site across North Five Mile Road generally consists of single-family homes on mostly urban-sized lots.[13]

There are no multi-family dwellings near this site.[14] Amendment No. 11-CPA-05 will authorize a 200 unit multi-family development at densities of 8 to 10 dwelling units per acre with parking lots around the buildings.[15] While there are no multi-family dwellings near the site, there are "Medium" and "High Density Residential" comprehensive plan

[13] CR 000192, Michael C. Dempsey, *Spokane County Hearing Examiner, RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06 Findings of Fact, Conclusions of Law and Decision* p. 7 (March 30, 2007).
[14] CR 000222, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9.
[15] CR 000239, Ex G Whipple Consulting Engineers, Inc. letter to the Spokane County Planning Commission p. 1 (Sept. 14, 2011).

designations a little over a mile southeast of the site.[16] So there is a variety of densities in this part of the urban growth area.

The *Regional Land Quantity Analysis for Spokane County Summary Report* concluded:

> The County's population projection expects the addition of 113,541 people in the County's UGA between the years 2010 and 2031. The current UGA has the capacity to include 117,800 additional people. This result shows that the increase in population can be accommodated within the current UGA and that there is an additional excess of capacity equaling 4,259 people.[17]

So the amendment is not required to accommodate the County's projected population growth.

There are no market studies in the record showing that the proposed Redstone subdivision is not feasible under current market conditions. Nor is there a market study in the record showing that a multi-family development at this site is feasible under current market conditions.

V. STANDARD OF REVIEW

In the *Kittitas County v. Eastern Washington Growth Management Hearings Board* decision, the Supreme Court of Washington State

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[16] Scaled from CR 000245, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* Spokane County Comprehensive Plan Map (2008 Printing).

[17] CR 000133, Planning Technical Advisory Committee, *Regional Land Quantity Analysis for Spokane County Summary Report* p. 1 (October, 2010 Amended May, 2011); CR 000097, Futurewise's Comment Letter to the Spokane County Planning Commission p. 3 (Sept. 14, 2011).

succinctly stated the standard of review for appeals of Hearings Board decisions:

> ¶ 14 Courts apply the standards of the Administrative Procedure Act [APA], chapter 34.05 RCW, and look directly to the record before the board. *Lewis County,* 157 Wn.2d at 497, 139 P.3d 1096; *Quadrant Corp.,* 154 Wn.2d at 233, 110 P.3d 1132. Specifically, courts review errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) *de novo. Thurston County,* 164 Wn.2d at 341, 190 P.3d 38. Courts review challenges under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence by determining whether there is " 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.' " *Id.* (internal quotation marks omitted) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)). Finally, courts review challenges that an order is arbitrary and capricious under RCW 34.05.570(3)(i) by determining whether the order represents " 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.' " *City of Redmond,* 136 Wn.2d at 46–47, 959 P.2d 1091 (internal quotation marks omitted) (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6,* 118 Wn.2d 1, 14, 820 P.2d 497 (1991)).[18]

"Under the judicial review provision of the APA, the 'burden of demonstrating the invalidity of [the Hearings Board's decision] is on the party asserting the invalidity.'"[19] In this case that is Spokane County and Harley C. Douglass, Inc. The Five Mile Prairie Appellants may argue and

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[18] *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193, 1198 (2011).

[19] *Thurston County v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7 – 8, 57 P.3d 1156, 1159 – 60 (2002) citing RCW 34.05.570(1)(a).

the appellate court may sustain the Hearings Board's order on any ground supported by the record even if the Hearings Board did not consider it.[20]

"Substantial weight is accorded to a board's interpretation of the GMA, but the court is not bound by the board's interpretations."[21] In interpreting the GMA, the courts do not give deference to local government interpretations of the law.[22] On mixed questions of law and fact, the court determines the law independently, and then applies it to the facts as found by the Hearings Board.[23] The reviewing court does not weigh the evidence or substitute its view of the facts for that of the Hearings Board.[24]

In considering this appeal, it is important to note that appeals by citizens and citizen groups are the mechanism that the Governor and Legislature adopted to enforce the GMA.[25] Unlike some laws, such as Washington's Shoreline Management Act, there is no state agency that reviews and approves or disapproves the non-transportation related provisions of GMA comprehensive plans and development regulations.

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[20] *Whidbey Envtl. Action Network ("WEAN") v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885, 891 (2004).
[21] *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008).
[22] *Kittitas County*, 172 Wn.2d at 156, 256 P.3d at 1199.
[23] *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156, 1160 (2002).
[24] *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676, 929 P.2d 510, 516 n.9 (1997) *review denied Callecod v. Wash. State Patrol*, 132 Wn.2d 1004, 939 P.2d 215 (1997).
[25] *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 175 – 77, 979 P.2d 374, 380 – 82 (1999).

The responsibility to appeal noncompliant comprehensive plans and development regulations to the Hearings Board is that of citizens and groups such as the Five Mile Prairie Appellants.

VI. ARGUMENT

A. The Hearings Board had subject matter jurisdiction over both the comprehensive plan amendment and rezone approved by Amendment No. 11-CPA-05 and those amendments violated the GMA and were inconsistent with the Spokane County Comprehensive. (Assignment of Error 1 and Issue 1)

1. The Hearings Board had subject matter jurisdiction over the comprehensive plan amendment in Amendment No. 11-CPA-05.

Following *Spokane County v. Eastern Washington Growth Management Hearings Board (McGlades)* and the other applicable appellate decisions, the Hearings Board correctly concluded it had jurisdiction to determine whether Spokane County's comprehensive plan amendment in Amendment No. 11-CPA-05 complied with the GMA.[26] As the Washington State Supreme Court has concluded, "[i]f a county amends a comprehensive plan, the amendment must comply with the GMA and may be challenged within 60 days of publication of the amendment adoption notice."[27] Amendment No. 11-CPA-05, the comprehensive plan amendment in this case, amended the *Spokane County*

[26] CR 001012 – 17, FDO at 3 – 8 of 26.
[27] *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38, 46 (2008).

Comprehensive Plan's Land Use Map[28] and the Five Mile Prairie Appellants appealed within 60 days of the filing of the notice of adoption. Therefore, the Hearings Board had subject matter jurisdiction over the comprehensive plan amendment in No. 11-CPA-05.

2. The Hearings Board had subject matter jurisdiction over the rezone in Amendment No. 11-CPA-05 because the Medium Density Residential rezone in this case is not a site-specific rezone authorized by a comprehensive plan.

Also following the applicable statutes and appellate decisions, the Hearings Board correctly concluded it had jurisdiction to determine whether Spokane County's rezone in Amendment No. 11-CPA-05 complied with the GMA and the *Spokane County Comprehensive Plan* and development regulations.[29] The Hearings Board correctly determined that the Medium Density Residential rezone was not "a site-specific rezone authorized by a comprehensive plan" and therefore the Hearings Board had jurisdiction to review the rezones.[30]

Since the Hearings Board and superior court made their decisions in this case, the Court of Appeals has issued two decisions that show that the Hearings Board was correct in concluding it had jurisdiction over the

[28] CR 000046, Spokane County Resolution 11-1191 Proposed Comprehensive Plan Amendment and Zoning Map Change: 11-CPA-05.
[29] CR 001012 – 17, FDO at 3 – 8 of 26.
[30] CR 001017, FDO at 8 of 26.

rezone.[31] In *Spokane County v. Eastern Washington Growth Management Hearings Board* this Court wrote:

> ¶ 18 Here, whether the hearings board had subject matter jurisdiction to review amendment 07–CPA–05's rezone depends on whether it is an amendment to a development regulation under the GMA or a project permit approval under LUPA. *Woods,* 162 Wn.2d at 610, 174 P.3d 25; *see* RCW 36.70A.030(7); RCW 36.70B.020(4). The rezone was certainly site specific. *See Woods,* 162 Wn.2d at 611 n. 7, 174 P.3d 25 (stating a site-specific rezone is a change in the zone designation of a " 'specific tract' " at the request of " 'specific parties' " (quoting *Cathcart–Maltby–Clearview Cmty. Council v. Snohomish County,* 96 Wn.2d 201, 212, 634 P.2d 853 (1981))). But the parties dispute whether the rezone was or needed to be "authorized by a comprehensive plan." RCW 36.70B.020(4).[FN2]
>
> [FN2]. We address the same dispute in a similar case with consistent reasoning. *See Kittitas County v. Kittitas County Conservation Coal.*, 176 Wn. App. 38, 308 P.3d 745 (2013).
>
> ¶ 19 Under RCW 36.70B.020(4), a site-specific rezone is a project permit approval solely if "authorized by a comprehensive plan"; otherwise, it is "the adoption or amendment of a ... development regulation[ ]." We must interpret this language so as to give it meaning, significance, and effect. *See In re Parentage of J.M.K.,* 155 Wn.2d 374, 393, 119 P.3d 840 (2005) (stating a court must not "simply ignore" express terms when interpreting a statute) ... As we noted in *Spokane County I,* to be "authorized by a comprehensive plan" within the meaning of RCW 36.70B.020(4), the rezone had to be "allowed by an *existing* comprehensive plan." 160 Wn. App. at 281–83,

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[31] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 570 – 72, 309 P.3d 673, 680 – 81 (2013) *review denied Spokane County v. Eastern Washington Growth Management Hearings Bd.*, ___ Wn.2d ___, 318 P.3d 279 (2014); *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 52, 308 P.3d 745, 751 (2013).

> 250 P.3d 1050 (emphasis added); *see also Woods,* 162 Wn.2d at 612 n. 7, 613, 174 P.3d 25; *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn.2d 169, 179–80, 4 P.3d 123 (2000).
>
> ... Notably, the County concedes the rezone required a comprehensive plan amendment to take effect. This inexorably intertwined the rezone and the comprehensive plan amendment, making them interdependent and putting them in the same basket for hearings board review. In other words, the rezone was premised on and carried out the comprehensive plan amendment. Therefore, the rezone is not a project permit approval under LUPA because the then-existing comprehensive plan did not authorize it. Instead the rezone is an amendment to a development regulation under the GMA because it implements the comprehensive plan amendment. Thus, the hearings board's decision is within its statutory authority. *See* RCW 34.05.570(3)(b).[32]

The facts for Amendment No. 11-CPA-05 are similar to the facts in *Spokane County*. The comprehensive plan designation for this site had to be amended from "Low Density Residential" to "Medium Density Residential" to allow the Medium Density Residential rezone.[33] As the Hearings Board noted Spokane County's Deputy Prosecuting Attorney said at the hearing on the merits, the rezone could not have taken place had the Comprehensive Plan not been amended.[34] Spokane County's

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[32] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 570 – 72, 309 P.3d 673, 680 – 81 (2013).)

[33] CR 000046, Spokane County Resolution 11-1191 "Proposed Comprehensive Plan Map Amendment and Zoning Map Change: 11-CPA-05."

[34] CR 001016, FDO at 7 of 26; *Five Mile Prairie v. Spokane County*, Growth Management Hearings Board Eastern Washington Region (GMHB) Case No. 12-1-0002 Transcript (July 19, 2012) p. 38, hereinafter Hearings Board Hearing on the Merits Transcript.

Deputy Prosecuting Attorney said that was Spokane County's interpretation.[35]

The *Spokane County* decision is also consistent with the Spokane County Zoning Code (SCZC). SCZC 14.402.100(1) provides that SCZC 14.402.100 applies to zoning map amendments adopted to implement comprehensive plan amendments.[36] SCZC 14.402.100(7)(a) states that "[t]he action of the Board on a zoning map amendment under this section shall be final and conclusive unless appealed to the Growth Management Hearing Board, pursuant to chapter 36.70A RCW. A person with standing pursuant to RCW 36.70A.280 may file a petition within 60 calendar days after publication of the notice of adoption (4d of this section)."[37] So Spokane County's development regulations provide that the Hearings Board has jurisdiction over the rezone in Amendment No. 11-CPA-05. So the like the rezone in *Spokane County*, the Medium Density Residential rezone at issue in this appeal is an amendment to the development regulations and the Hearings Board had jurisdiction over the rezone in Amendment No. 11-CPA-05.

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[35] CR 001016, FDO at 7 of 26; Hearings Board Hearing on the Board Merits Transcript pp. 39 – 40.
[36] CR 000202, SCZC 14.402.100 1 on page 402-3.
[37] CR 000203, SCZC 14.402.100 7.a on page 402-4.

B. The Hearings Board properly dismissed Harley C. Douglass, Inc. from the case. (Assignment of Error 2 and Issue 2)

WAC 242-03-710 provides in relevant part:

> (1) When a party to a proceeding has, after proper notice, failed to attend a hearing or any other matter before the board or presiding officer, or failed to file a prehearing brief, a motion for default or dismissal may be brought by any party to the case or raised by the board upon its own motion or by a presiding officer. Any order granting the motion shall include a statement of the grounds for the order and shall be served upon all parties to the case.
>
> ....
>
> (3) Within seven days after service of an order of dismissal, default or noncompliance under subsection (1) or (2) of this section, the party against whom the order was entered may file a written objection requesting that the order be vacated and stating the specific grounds relied upon. The board may, for good cause, set aside the order.

Harley C. Douglass, Inc. chose not to file a brief in the case before the Hearings Board, failed to attend the Hearings Board's oral argument, and failed to contact the Hearings Board or any party to indicate that the corporation was not planning to file a brief or attend the hearing on the merits.[38] Harley C. Douglass, Inc.'s attorney was sent the Prehearing Order and the agenda for the Hearings Board's hearing on the merits, so its attorney had notice of the hearing.[39] At the hearing on the merits, the

[38] CR 001018, FDO p. 9 of 26; Hearings Board Hearing on the Merits Transcript pp. 4 – 5, pp. 75 – 76.
[39] CR 000077 – 83, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Prehearing Order and Order Granting

Hearings Board moved to dismiss the corporation as the Hearings Board's rules allow. The Hearings Board included this order in its Final Decision and Order, included a statement of the grounds for dismissing Harley C. Douglass, Inc., that the company had failed to file a brief and failed to attend the Hearing on the Merits, and served the order on all parties.[40] So all of the requirements of WAC 242-03-710(1) were met.

Harley C. Douglass, Inc. could have filed an objection within seven days of receiving the Final Decision and Order as WAC 242-03-710(3) allows. Harley C. Douglass, Inc. did not do so and so failed to exhaust its administrative remedies. RCW 34.05.534 provides in full that:

> A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review, except:
>
> (1) A petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, have petitioned for its amendment or repeal, have petitioned the joint administrative rules review committee for its review, or have appealed a petition for amendment or repeal to the governor;

Intervention (April 4, 2012), at 1 – 5 and Declaration of Service (April 4, 2012), at 1 of 1; CR 001007 – 09, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Agenda for Hearing on the Merits (July 13, 2012), at 1 – 2 and Declaration of Service (April 4, 2012), at 1 of 1.

[40] CR 001018, FDO p. 9 of 26; CR 001036, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Declaration of Service (Aug. 23, 2012), at 1 of 1.

(2) A petitioner for judicial review need not exhaust administrative remedies to the extent that this chapter or any other statute states that exhaustion is not required; or

(3) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that:

(a) The remedies would be patently inadequate;

(b) The exhaustion of remedies would be futile; or

(c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies.

Harley C. Douglass, Inc. does not fit under any of the exceptions in RCW 34.05.534. Harley C. Douglass, Inc. is not challenging a rule, so RCW 34.05.534(1) does not apply. No statute provides that Harley C. Douglass, Inc. did not need to exhaust is administrative remedies. So RCW 34.05.534(2) does not apply. RCW 34.05.534(3) does not apply either. The remedy allowed under WAC 242-03-710(3) would have been adequate. There is no indication that exhaustion of remedies would be futile. Finally, there would be no grave irreparable harm to Harley C. Douglass, Inc.'s interests. If the County was sufficient to protect Harley C. Douglass, Inc.'s interests before the Hearings Board as the company

contends, surely the County can protect the corporation's interests in superior court and the court of appeals.[41]

So the Superior Court should have dismissed Harley C. Douglass, Inc.'s Petition for Review. Since the Petition for Review should have been dismissed, the Court must strike the Petitioner Harley C. Douglass, Inc.'s brief since the only reason that the corporation can file this brief is the Petition for Review it filed.

Further, no party raised before the Hearings Board the issue that Harley C. Douglass, Inc. should not have been dismissed.[42] RCW 34.05.554 provides in full that:

> (1) Issues not raised before the agency may not be raised on appeal, except to the extent that:
>
> (a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;
>
> (b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;
>
> (c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or
>
> (d) The interests of justice would be served by resolution of an issue arising from:

[41] CP 276; Brief of Petitioner Harley C. Douglas, Inc. p. 7.
[42] Hearings Board Hearing on the Merits Transcript pp. 4 – 5, pp. 75 – 76.

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

(2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

Since that issue was not raised before the Hearings Board, it cannot be raised in this judicial review. None of the exceptions to RCW 34.05.554 apply here.

Harley C. Douglass, Inc.'s attorney was served with the order dismissing the company, so the company could have raised this argument before the Hearings Board as WAC 242-03-710(3) allows.[43] Therefore Harley C. Douglass, Inc. could have reasonably discovered the facts giving rise to the issue. Again, this case is not a rule challenge so RCW 34.05.554(1)(b) does not apply. Harley C. Douglass, Inc.'s attorney was notified of the adjudicative proceeding on behalf of the company, so RCW 34.05.554(1)(c) does not apply.[44] There has been no change in controlling law related to Harley C. Douglass, Inc.'s dismissal after the agency action

[43] CR 001036, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Declaration of Service (Aug. 23, 2012), at 1 of 1.
[44] CR 000077 – 83, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Prehearing Order and Order Granting Intervention (April 4, 2012), at 1 – 5 and Declaration of Service (April 4, 2012), at 1 of 1; CR 001007 – 09, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Agenda for Hearing on the Merits (July 13, 2012), at 1 – 2 and Declaration of Service (April 4, 2012), at 1 of 1.

and as we documented above the agency action did not occur after the company exhausted its opportunity for relief. The company did not file the objection that WAC 242-03-710(3) allows. So RCW 34.05.554(1)(d) does not apply. So this Court and the superior court below cannot consider issues challenging the dismissal of Harley C. Douglass, Inc. from the Hearings Board's case.

This Court should affirm the Hearings Board's dismissal of Harley C. Douglass, Inc. for three reasons. First, the Hearings Board complied with WAC 242-03-710(1). Second, Harley C. Douglass, Inc. did not exhaust the administrative remedies available to it before the Hearings Board and so the company should never have filed its petition for review challenging the Hearings Board's order. Third, no party raised the issue of Harley C. Douglass, Inc.'s dismissal before the Hearings Board and it cannot be raised for the first time on appeal.

C. The Medium Density Residential comprehensive plan amendment and rezone in Amendment No. 11-CPA-05 violated the GMA and were inconsistent with the *Spokane County Comprehensive Plan*. (Assignment of Error 3 and Issue 3)

RCW 36.70A.130(1)(d) provides in full that "[a]ny amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan." This is consistent

with one of the Washington Supreme Court's holdings in the *Thurston County* decision: "If a county amends a comprehensive plan, the amendment must comply with the GMA and may be challenged within 60 days of publication of the amendment adoption notice."[45]

Another requirement of the GMA is that the comprehensive "plan shall be an internally consistent document ...."[46] "Consistency means comprehensive plan provisions are compatible with each other. One provision may not thwart another."[47] RCW 36.70A.040(5)(d) also provides that Spokane County must adopt "development regulations that are consistent with and implement the comprehensive plan ...." In addition,

> The Comprehensive Plan conformity requirement in RCW 36.70A.120 applies to both planning activities and capital budget decisions. Comprehensive Plan Amendments must conform to all requirements and standards in the GMA and must not create internal plan inconsistencies.[48]

The Washington State Supreme Court has concluded that "County development regulations must also comply with the requirements of the

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[45] *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38, 46 (2008).
[46] RCW 36.70A.070; *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 160 Wn. App. 274, 281, 250 P.3d 1050, 1053 (2011) *review denied Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 171 Wn.2d 1034, 257 P.3d 662 (2011).
[47] *City of Spokane v. Spokane County*, EWGMHB Case No. 02-1-0001, Final Decision and Order (July 3, 2002), at 32.
[48] *Brodeur/Futurewise, et al. v. Benton County*, EWGMHB Case No. 09-1-0010c, Final Decision and Order Resolution 09-162: Rural Lands (Nov. 24, 2009), at 19 (footnote omitted).

GMA. See RCW 36.70A.130(1)(a) ('a county or city shall ... ensure the plan and regulations comply with the requirements of this chapter')."[49]

This brief will show that these requirements were not met. Amendment No. 11-CPA-05's comprehensive plan amendment from "Low Density Residential" to "Medium Density Residential" is not consistent with the GMA or the *Spokane County Comprehensive Plan.* Similarly Amendment No. 11-CPA-05's zoning change from "Low Density Residential" to "Medium Density Residential" is not consistent with the GMA, the *Spokane County Comprehensive Plan*, or the Spokane County development regulations.

1. Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* Policy UL.2.16.

Spokane County Comprehensive Plan Policy UL.2.16 provides in full:

> UL.2.16 Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials.[50]

The Hearings Board was correct to conclude that Amendment No. 11-CPA-05 thwarts Policy UL.2.16.[51] The 22.3 acres is not near commercial areas, the site is 0.9 miles from the nearest commercial

[49] *Kittitas County*, 172 Wn.2d at 164 – 65, 256 P.3d at 1203.
[50] CR 000247, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-6 (2008 Printing).
[51] CR 001024, FDO at 15 of 26.

comprehensive plan designation.[52] The area is not near a public open space.[53] The site does not have good access to a major arterial. Accesses are proposed on Five Mile Road and Waikiki Road.[54] The Staff Report states that "Waikiki Road is designated as an Urban Minor Arterial by Spokane County's Arterial Road Plan .... Five Mile Road is not listed on the Arterial Road Plan ...."[55] Spokane County Resolution 11-1191 confirms that Waikiki Road is designated as an Urban Minor Arterial.[56] So this property does not have access to a major arterial, only to an Urban Minor Arterial. So this site does not meet any of the three conditions in Policy UL.2.16 that must be met to be an encouraged location for the "Medium Density Residential" comprehensive plan designation and zone.

The Hearings Board had other reasons to conclude that Amendment No. 11-CPA-05 violated Policy UL.2.16. As the Hearings Board wrote:

> The Spokane County Planning Commission recommended denial of this proposed amendment by a vote of 4-2. The Planning Commission found that transportation improvements have not kept up with the residential development that has already occurred near the Five Mile

[52] Scaled from CR 000245, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* Spokane County Comprehensive Plan Map (2008 Printing) and provided to the Board. CR 001022, FDO at p. 13 of 26.
[53] CR 000278, *Spokane County Comprehensive Plan Chapter 9 Parks and Open Space* "Open Space Corridors" map (2008 Printing).
[54] CR 000012 – 13, Spokane County Resolution 11-1191 pp. 6 – 7.
[55] CR 000222, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9.
[56] CR 000013, Spokane County Resolution 11-1191 p. 7.

> Prairie, and the proposal fronts on Five Mile Road which is steep, windy and has no accommodations for pedestrians or bicyclists. Five Mile Road will be one of the access points for this proposed development but neither the County nor the developer has any plans for transportation improvements to Five Mile Road.[38]
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> [38] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012), Attachment S- Planning Commission Findings of Fact and Recommendation (Oct. 7, 2011) [Attachment A], p.9 [CR 000770].[57]

While Spokane County Resolution 11-1191 requires a development agreement between Harley C. Douglass, Inc. and Spokane County, nothing in the requirements for the development agreement provide for any improvements to Five Mile Road.[58] None of this is contradicted by Board of County Commissioner findings.[59] So the Hearings Board was correct to consider the deficiencies of Five Mile Road in analyzing whether the site of the amendment had good access to major arterials based on Policy UL.2.16.

As to *Spokane County Comprehensive Plan* Policy UL.2.16, there is no evidence in the record showing that the Hearings Board was in error. The Hearings Board's order should be upheld.

The County, or developer, may argue that the Washington State Court of Appeals decision in *Spokane County v. Eastern Washington*

[57] CR 001022, FDO at 13 of 26.
[58] CR 0000013 – 14, Spokane County Resolution 11-1191 pp. 7 – 8 Finding 26.
[59] CR 0000012 – 13, Spokane County Resolution 11-1191 pp. 6 – 7.

Growth Management Hearings Board controls on the question of Policy UL.2.16.[60] It does not. The comprehensive plan map amendment at issue in that case was immediately adjacent to a shopping center and other commercial properties.[61] This site is 0.9 miles from the nearest commercial comprehensive plan designation.[62] This site is not near a public open space.[63] In addition, this area does not have good access to major arterials. Accesses are proposed on Five Mile Road and Waikiki Road.[64] The Staff Report states that "Waikiki Road is designated as an Urban Minor Arterial by Spokane County's Arterial Road Plan .... Five Mile Road is not listed on the Arterial Road Plan ...."[65] As we documented above, all of the evidence in the record before the Hearings Board supports this factual determination.

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[60] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 332 – 33, 293 P.3d 1248, 1259 – 60 (2013).
[61] *Id.* at 173 Wn. App. at 332, 293 P.3d at 1259.
[62] Scaled from CR 000245, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* Spokane County Comprehensive Plan Map (2008 Printing) and provided to the Board. CR 1022, FDO at p. 13 of 26.
[63] CR 000278, *Spokane County Comprehensive Plan Chapter 9 Parks and Open Space* "Open Space Corridors" map (2008 Printing).
[64] CR 000012 – 13, Spokane County Resolution 11-1191 pp. 6 – 7.
[65] CR 000222, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9.

2. Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* policies on the design and capacity of public facilities and services.

(a) Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* Policy UL.2.20.

Spokane County Comprehensive Plan Policy UL.2.20 provides in full:

> UL.2.20 Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus or car. Cul-de-sacs or other closed street systems may be appropriate under certain circumstances including, but not limited to, topography and other physical limitations which make connecting systems impractical.[66]

The "Proposed Comprehensive Plan Map Amendment" and "Zoning Map Change: 11-CPA-05" map shows that this area is not arranged in a pattern of connecting streets and blocks, rather it is arranged in a cul-de-sac pattern of unconnected streets disfavored by this policy and the illustration on page UL-7, CR 000248, of the *Spokane County Comprehensive Plan.*[67] Nothing in Spokane County Resolution 11-1191

[66] CR 000248, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-7 (2008 Printing).
[67] CR 000046, Spokane County Resolution 11-1191 "Proposed Comprehensive Plan Map Amendment and Zoning Map Change: 11-CPA-05" map.

requires a pattern of connecting streets and blocks on the site of the new multi-family housing development.[68]

According to the Staff Report, "Five Mile Road is not listed on the Arterial Road Plan, is steep and windy and does not have sidewalks."[69] The Staff Report also documents that "[o]ne of the significant issues raised during this subdivision's public hearing was singular access to Five Mile Road and concerns from property owners that the road was already overloaded with traffic and dangerous due to is steepness and lack of any pedestrian accommodations."[70] And these problems existed before the approved Redstone subdivision which will have 50 units.[71] Amendment No. 11-CPA-05 will authorize a 200 unit multi-family development on the same site.[72] The Planning Commission found that Five Mile Road is steep and has no accommodations for pedestrians or bicyclists.[73] The Planning Commission reported that the "Spokane County Engineering Department says there are no plans for improvements and the applicant, who says they plan to use this road as one of their access points, has not indicated they

[68] CR 000007 – 14, Spokane County Resolution 11-1191 pp. 1 – 8.
[69] CR 000222, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9.
[70] CR 000220, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 3 of 9.
[71] *Id.*
[72] CR 000239, Ex G Whipple Consulting Engineers, Inc. letter to the Spokane County Planning Commission p. 1 (Sept. 14, 2011).
[73] CR 000770, Spokane County Planning Commission Findings of Fact and Recommendation (Oct. 7, 2011) Attachment A p. 9.

plan to make any improvements."[74] While Spokane County Resolution 11-1191 requires a development agreement between Harley C. Douglass, Inc. and Spokane County, nothing in the requirements for the development agreement provide for any improvements to Five Mile Road.[75] The 200 unit multi-family development will still have an access on the unimproved Five Mile Road.[76] Given the lack of connecting streets and the other problems with pedestrian and bicycle access, the Hearings Board's conclusion that Amendment No. 11-CPA-05 is inconsistent with Policy UL.2.20 is supported by substantial evidence.[77]

The County, or the developer, may argue that the Washington State Court of Appeals decision in *Spokane County v. Eastern Washington Growth Management Hearings Board* controls on the question of Policy UL.2.20.[78] It does not. First, when the comprehensive plan map amendment at issue in that case was reviewed, there was "no project proposal identifying how ingress and egress to the apartment complex will be designed."[79] In this case we know where the accesses will be located.[80] Second, as is documented in the next section, the *Spokane County*

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[74] *Id.*
[75] CR 0000013 – 14, Spokane County Resolution 11-1191 pp. 7 – 8 Finding 26.
[76] CR 0000013 – 14, Spokane County Resolution 11-1191 pp. 7 – 8.
[77] CR 001026, FDO at 17 of 26.
[78] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 340 – 42, 293 P.3d 1248, 1263 – 64 (2013).
[79] *Id.* at 173 Wn. App. at 341, 293 P.3d at 1263.
[80] CR 0000013 – 14, Spokane County Resolution 11-1191 pp. 7 – 8.

Comprehensive Plan uses the term "development," which Policy UL.2.20 applies to, to refer to the comprehensive plan amendments as well as the other phases of the development process.[81] It does not seem that this argument was made to the Court of Appeals in that case.[82]

The Hearings Board did not misinterpret or misapply RCW 36.70A.070's requirement that the comprehensive plan shall be internally consistent or RCW 36.70A.130(1)(d)'s requirement that "any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan." The Hearings Board should be affirmed.

(b) Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* Policy CF.3.1.

Spokane County Comprehensive Plan Policy CF.3.1 provides in full:

> CF.3.1 Development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards.[83]

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[81] CR 000884 & CR 000887 – 88, *Spokane County Comprehensive Plan Chapter 3 Rural Land Use* p. RL-9 & RL-12 – RL-13 (2008 Printing).
[82] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 340 – 42, 293 P.3d 1248, 1263 – 64 (2013).
[83] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing).

Public facilities and services include public schools.[84] The evidence before the County was that Prairie View Elementary School, the school that would serve this development, is at capacity.[85] The Director of Facilities and Planning for the Mead School District also wrote that "[t]he Mead School District believes that this request for a change in land use designation, if approved, could have an impact on schools."[86]

In analyzing Amendment No. 11-CPA-05's compliance with Policy CF.3.1, the Staff Report states that:

> This proposal lies within an Urban Growth Area. Urban level services are typical available in such areas and, as of the writing of this staff report, we have not received any comments from service providers to indicate that services are not available to this site. Spokane County Utilities provides sewer service and Whitworth Water District provides water service to this site.[87]

But Policy CF.3.1 requires a determination that public and facilities will have the capacity to serve the development. The Staff Report did not make this determination for any public facilities and services. The Board of Commissioners considered compliance with Policy CF.3.1 in Finding of Fact 25, but did not determine that the schools could accommodate the

[84] CR 000274 – 275, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-5 – CF-6 (2008 Printing).
[85] CR 000237 – 38, Five Mile Prairie Neighborhood Council letter to the Spokane County Building and Planning Department p. *1 (Sept. 14, 2011); CR 000091, Email from AJ Prudente to the Commissioners' Office Commenting on proposed Amendment No. 11-CPA-05 p. 1 (Sept. 9, 2011).
[86] CR 000343, Mead School District Memo p. *1 (3/14/2011).
[87] CR 000224, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 7 of 9.

additional students from the proposed development.[88] Since the required determination was not made despite the evidence that the school does not have adequate capacity, Amendment No. 11-CPA-05 is inconsistent with Policy CF.3.1.

In addition, there is no determination that the following "public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards[:]"[89] law enforcement, parks, libraries, solid waste, street cleaning, public transit, and fire and emergency services.[90] Since these determinations have not been made, Amendment No. 11-CPA-05 violates policy CF.3.1.

The County and developer may argue that since the Board of County Commissioners found that this development "is located in an area where adequate public facilities and services can be provided without decreasing levels of service" Policy CF.3.1 is met. But Policy CF.3.1 requires that "[d]evelopment shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted

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[88] CR 000013, Spokane County Resolution 11-1191 p. 7.
[89] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing).
[90] CR 000275, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-6 (2008 Printing); CR 000012 – 14, Spokane County Resolution 11-1191 pp. 6 – 8.

standards."[91] This is different than finding that adequate public facilities and services can be provided in the urban growth area. It may be possible, for example, the serve school demand by redrawing school boundaries or building a new facility, but if there is no plan to do so then the public facilities will not have the capacity to serve the development. In such a case the public facilities and services that serve the area will not have the capacity to serve the development. Policy CF.3.1 requires a determination that public facilities and services will have the capacity to serve the development. This determination has not been made and so Amendment No. 11-CPA-05 violates policy CF.3.1.

Spokane County or Harley C. Douglass, Inc. may argue that the concurrency regulations will implement Policy CF.3.1 for this development. The problem with this argument is that the concurrency regulations only require project applications to be reviewed to determine if transportation, public water, and public sewer facilities are adequate.[92] SCC 13.650.102(c) provides for '[f]ire protection, police protection, parks and recreation, libraries, solid waste disposal and schools" development is not reviewed for concurrency.[93] Instead that review is required to be done

[91] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing) in Tab CP attached to this brief.
[92] CR 000923, SCC 13.650.102(b).
[93] CR 000196, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR)*

through an annual update to the capital facility plan and if the capital facilities "are found to be inadequate," the county "shall adjust its land use element to lessen the demand for services, include a project in the CFP to address the deficiency, or adjust the level of service. To implement any of these methods an amendment to the comprehensive plan is required."[94] So the review required by Policy CF.3.1 will not take place through the concurrency regulations for many public facilities and services including schools. This is confirmed by the Redstone Subdivision approval where the Spokane County Hearing Examiner wrote "[t]he Phase 2 Development Regulations do not require direct concurrency for parks, schools, law enforcement, fire, library services, etc. Accordingly the Examiner cannot condition or deny the project based on any deficiencies in parks, schools, etc. in the area."[95] The County did not determine that the public facilities and services needed to serve Amendment No. 11-CPA-05 that are not subject to direct concurrency review, such as schools, were adequate as part of the annual update to the comprehensive plan as we have shown.[96]

Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06 Findings of Fact, Conclusions of Law and Decision p. 22 (March 30, 2007); CR 000923, SCC 13.650.102(c).

[94] CR 000923, SCC 13.650.102(c). Enclosed as Appendix A in this Brief of Appellants.

[95] CR 000196, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 22 (March 30, 2007) in Appendix B of this Brief of Appellants.

[96] CR 000007 – 14, Spokane County Resolution 11-1191 pp. 1 – 8.

Nor has the County made this determination as part of an annual update to the capital facility plan which the concurrency regulations require.[97] The Five Mile Prairie Petitioners are not attempting to appeal the county's failure to update the capital facility plan; we are instead showing that the requirements of Policy CF.3.1 were not met for this development through the update of the capital facility plan.

This supports the conclusion that for Amendment No. 11-CPA-05 there should have been a determination that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards before approving the amendment as Policy CF.3.1 requires.[98] That is the only way the development would be reviewed for adequate school capacity and adequate fire protection, police protection, parks and recreation facilities, libraries, and solid waste disposal facilities and services. As, as this brief of appellants has documented, this review was not done.

It is also worth noting that the plain language of Policy CF.3.1 requires that "development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted

[97] CR 000923, SCC 13.650.102(c); CR 000007 – 14, Spokane County Resolution 11-1191 pp. 1 – 8.
[98] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing).

standards."[99] It does not limit that determination to compliance with Spokane County's concurrency regulations nor does it limit that determination to a particular time in the development review process.

The County or developer may argue that comprehensive plan amendments and rezones are not "development." "Development" is not defined by the *Spokane County Comprehensive Plan*.[100] Where a local government enactment does not define a term, a dictionary is used to determine the "plain and ordinary meaning" of the term.[101] The first definition of "development" is "the act, process, or result of developing: the state of being developed: a gradual unfolding by which something (as a plan or method, an image upon an image upon a photographic plate, a living body) is developed <a new ~ in poetry>: gradual advance or growth through progressive changes: evolution ..."[102] The comprehensive plan amendment and rezone approved by Amendment No. 11-CPA-05 is part of the act or process of developing. As Spokane County's Deputy Prosecuting Attorney said at the Hearings Board's hearing on the merits, the rezone could not have taken place had the Comprehensive Plan not

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[99] *Id.*
[100] CR 000282 – 92, *Spokane County Comprehensive Plan Glossary* pp. G-1 – G-11 (2008 Printing).
[101] *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 220, 840 P.2d 174, 184 (1992) (the court used WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY to define an exemption in a City of Seattle ordinance that was not defined in the ordinance).
[102] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY p. 618 (2002).

been amended.[103] And the proposed multi-family development could not be built without the comprehensive plan amendment and the rezone.[104]

The *Spokane County Comprehensive Plan* uses "development" to refer to all stages of the process of developing. For example, the comprehensive plan defines a fully contained community as a "development."[105] Fully contained communities are authorized by revisions, amendments, to the comprehensive plan.[106] The comprehensive plan also refers to another type of development that requires a comprehensive plan amendment as "development."[107] So the Hearings Board did not err in applying Policy CF.3.1 to Amendment No. 11-CPA-05 and finding that the amendment was inconsistent with the policy.

Policy CF.3.1 was not addressed by the court of appeals in *Spokane County v. Eastern Washington Growth Management Hearings Board.*[108] Unlike the non-transportation goals and policies at issue in *Spokane County,* Policy CF.3.1 uses the mandatory "shall."[109] And, unlike

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[103] CR 001016, FDO at 7 of 26; Hearings Board Hearing on the Merits Transcript p. 38.
[104] CR 000239, Ex G Whipple Consulting Engineers, Inc. letter to the Spokane County Planning Commission p. 1 (Sept. 14, 2011).
[105] CR 000884, *Spokane County Comprehensive Plan Chapter 3 Rural Land Use* p. RL-9 (2008 Printing).
[106] *Id.*
[107], *Spokane County Comprehensive Plan Chapter 3 Rural Land Use* p. RL-12 – 13 (2008 Printing).
[108] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 331 – 42, 293 P.3d 1248, 1258 – 64 (2013).
[109] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing); *Spokane County v. Eastern Washington Growth*

the transportation policies at issue in the *Spokane County* decision, as we have seen, there will be no future concurrency review for the schools and the other public facilities and services at issue in this case that do not require direct concurrency review.[110] And the concurrency regulations at issue in this case require an annual update to the capital facility plan, which is different than the transportation concurrency provisions at issue in *Spokane County*.[111]

In short, the Hearings Board did not misinterpret or misapply Policy CF.3.1 or the GMA provisions that require comprehensive plans to be internally consistent, for comprehensive plan amendments to be consistent with the GMA, or for development regulation amendments to be consistent with the comprehensive plan.[112] Substantial evidence supports the Hearings Board's determination that Amendment No. 11-CPA-05 violates Policy CF.3.1 and the GMA. The Hearings Board's order should be upheld.

Management Hearings Bd., 173 Wn. App. 310, 331 – 42, 293 P.3d 1248, 1259 – 64 (2013); *Save Our State Park v. Board of Clallam County Com'rs*, 74 Wn. App. 637, 641 fn. 3, 875 P.2d 673, 676 fn. 3 (1994) "The use of the word 'shall' generally imposes a mandatory duty."

[110] CR 000923, SCC 13.650.102(b) & (c).

[111] CR 000923, SCC 13.650.102(c); *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 331 – 42, 293 P.3d 1248, 1258 – 64 (2013).

[112] RCW 36.70A.070; RCW 36.70A.130(1)(d); RCW 36.70A.120.

3. Amendment No. 11-CPA-05 does not comply with Spokane County Code 14.402.040, Criteria for Amendments.

The amendment does not comply with Spokane County Zoning Code (SCZC) 14.402.040. The Criteria for Amendment, provide in full that:

> The County may amend the Zoning Code when one of the following is found to apply.
> 1. The amendment is consistent with or implements the Comprehensive Plan and is not detrimental to the public welfare.
> 2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code.
> 3. An amendment is necessary to correct an error in the Zoning Code.
> 4. An amendment is necessary to clarify the meaning or intent of the Zoning Code.
> 5. An amendment is necessary to provide for a use(s) that was not previously addressed by the Zoning Code.
> 6. An amendment is deemed necessary by the Commission and/or Board as being in the public interest.[113]

The Board of County Commissioners found that:

> 20. The proposed amendment is consistent with the criteria for a zone reclassification under Section 14.402.040 (1) and (2) of the Spokane County Zoning Code as the proposed amendment implements the goals and objectives of the Comprehensive Plan and the subject area has experienced a change of conditions as evidenced by development of duplex dwelling units in proximity to the subject property thereby

[113] CR 000200, SCZC 14.402.040 on page 402-1.

> creating a mix of land use types and densities in the Urban Growth Area boundary.[114]

However, as we have seen above, Amendment No. 11-CPA-05 does not implement the goals and policies of comprehensive plan. Since the *Spokane County Comprehensive Plan* does not have any objectives the Board of County Commissioners must have been referring to the visions and policies. As we showed above, Amendment No. 11-CPA-05 thwarts Policies UL.2.16, UL.2.20, and CF.3.1.

In addition, the Vision of the Housing element provides that "Spokane County is a community that provides the opportunity for a variety of housing types and development patterns for all incomes and lifestyles while preserving the environment and the character of existing neighborhoods."[115] While the 22.3 acres that were redesigned from "Low Density Residential" to "Medium Density Residential," are vacant,[116] this land is located in an established residential neighborhood with an existing character. The Spokane County Hearings Examiner summarized the established residential neighborhood character as part of the findings of fact in the decision to approve the preliminary plat for the Redstone

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[114] CR 000013, Spokane County Resolution 11-1191 p. 7.
[115] CR 000269, *Spokane County Comprehensive Plan Chapter 6 Housing* p. H-1 (2008 Printing).
[116] CR 000218, *Id.* p. 1 of 9.

subdivision on the 22.3 acres redesigned and rezoned by Amendment No. 11-CPA-05:

> 43. The site and nearby land are designated in the Low Density Residential category of the Comprehensive Plan, zoned Low Density Residential (LDR), and designated in the County Urban Growth Area (UGA).
>
> 44. The land located near the site to the north and west is vacant and undeveloped; except for an electrical power substation, overhead transmission lines and a high-pressure underground gas pipeline; and except for some single-family homes on acreage parcels located west of the site along the north side of North Five Mile Road.
>
> 45. The land lying further to the north, and the land located northeast of the site, generally consists of single-family homes on more urban-sized lots; along with some duplexes located along the east side of Waikiki Road.
>
> 46. The land located near the site to the east consists of single-family homes on acreage parcels, and vacant land containing utility easements. Some single-family homes on urban-sized lots are located further to the east, along the west side of Waikiki Road. The land lying south of the site across North Five Mile Road generally consists of single-family homes on mostly urban-sized lots.[117]

This existing character is confirmed by the Staff Report for Amendment No, 11-CPA-05.[118] This character can also be seen in "Figure 1 Site Location Map Redstone Subdivision" which shows the single-family

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[117] CR 000192, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 7 (March 30, 2007).

[118] CR 000220, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 3 of 9.

homes as small squares and the larger buildings as larger squares.[119] The character in the immediate vicinity can be seen in the aerial photograph identified as "Exhibit 1" in the administrative record.[120] It can also be seen in the "11-CPA-05 Zoning & Comprehensive Plan Maps" and "11-CPA-05 Air Photo" attached to the Staff Report.[121] Note the single-family homes south, east, and north of the site.

"A preliminary plat for a subdivision called Redstone (See file PN-1974-06) was approved for the site in 2007. The preliminary plat includes 38 lots, 26 for single family dwellings and 12 for duplexes for a total of 50 dwelling units."[122] The character of this subdivision is similar to the character of the area described by the Spokane County Hearings Examiner.

The comprehensive plan amendment and rezone will dramatically change the character of the area. As the project consultant for Harley C. Douglass, Inc. wrote:

> Under Low Density Residential (1-6 units per acre) the properties could be developed into 50 single family and duplex units and barely meets 2 units per acre density because of the amount of land that was rendered unusable

[119] CR 000190, Figure 1 Site Location Map Redstone Subdivision (Jan. 31, 2006).
[120] CR 000199, Exhibit 1 Subject Properties Five Mile Comp Plan Five Mile Road and N. Waikiki Road, Spokane County, Washington.
[121] CR 000228 – 29, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* "11-CPA-05 Zoning & Comprehensive Plan Maps" and "11-CPA-05 Air Photo."
[122] CR 000220, *Id.* at 3 of 9.

> by the utility easements and steep slopes. Under Medium Density Residential (6-15 units per acre) the development of the site may still barely be able to reach the 6 units per acre or approximately 134 units. We would expect to be in the 8 to 10 unit range or up to 200 +/-units.
>
> For development design, single family lots require a minimum sized lot (5,000 sf) and each lot must have access to a roadway. With a multifamily development the units are aggregated into the buildings themselves and the roadways and parking areas converge around them.[123]

The Hearing Examiner found that the Redstone subdivision would have a gross density of 2.3 dwelling units per acre and a net density (less the roads and apparently the utility easements) of 4.4 dwelling units per acre.[124] The Hearings Examiner also found that the "design, shape, size and orientation of lots in the preliminary plat are appropriate for the proposed use of such lots, and for the character of the area in which the lots are located; considering similar urban development located in the area, ..."[125] So the single-family homes and duplexes at these densities preserve the character of the neighborhood. The 200 unit development with multi-family dwellings at densities of 8 to 10 dwelling units per acre and parking lots around the buildings would not ensure, or guarantee, that the design

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[123] CR 000239, Ex G Whipple Consulting Engineers, Inc. letter to the Spokane County Planning Commission p. 1 (Sept. 14, 2011).
[124] CR 000194, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 9 (March 30, 2007).
[125] CR 000196 – 97, *Id.* at pp. 22 – 23.

preserves the character of the neighborhood. The densities are higher than the neighborhood character. As the Staff Report and Hearings Examiner documented, there are no multi-family uses near this site.[126] So the building types are out of character.

Amendment No. 11-CPA-05 does not preserve the character of the existing neighborhood; rather it will substantially change it. So the *Spokane County Comprehensive Plan* vision is not implemented.

Goal UL.10 calls on the county to "[e]ncourage the development of mixed-use neighborhood and community centers that maintain or improve neighborhood character and livability."[127] As this Brief of Appellant has shown, Amendment No. 11-CPA-05 does not maintain neighborhood character.

Goal CF.3 calls on the county to "[e]nsure that public facilities and services support proposed development at established Levels of Service."[128] As we have seen above, the county has not ensured that public facilities and services are adequate to support the development. There is evidence the schools are overcrowded. The capacities of many public

[126] CR 000222, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9; CR 000192, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 7 (March 30, 2007).
[127] CR 000251, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-13 (2008 Printing).
[128] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing).

facilities and services have not been considered. So Amendment No. 11-CPA-05 does not implement the goals and objectives of the comprehensive plan.

The Board of County Commissioner's found that the construction of duplexes in the vicinity of the rezone was a change of circumstances justifying the rezone under SCZC) 14.402.040(2).[129] However, duplexes are a permitted use in the "Low Density Residential" zone.[130] The Redstone preliminary plat includes 12 duplex dwelling units.[131] Since duplexes are a permitted use in "Low Density Residential" zone there is no need to change the zoning to accommodate them. So they cannot constitute a change in circumstance authorizing a rezone to the "Medium Density Residential" zone. So Amendment No. 11-CPA-05 does not comply with SCZC 14.402.040, Criteria for Amendment.

In short the Hearings Board did not misinterpret or misapply SCZC 14.402.040, the decision was not arbitrary or capricious, and substantial evidence supports the decision.[132] So the Hearings Board's order should be upheld on this issue.

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[129] CR 000013, Spokane County Resolution 11-1191 p. 7, Finding of Fact 20.
[130] CR 000206, SCZC 14.606.220 p. 606-3.
[131] CR 000220, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 3 of 9.
[132] CR 001027 – 30, FDO at 18 – 21.

D. The Hearings Board correctly found Amendment No. 11-CPA-05 invalid. (Assignment of Error 4 and Issue 4)

Invalidity is a remedy authorized by RCW 36.70A.302. As the Washington State Supreme Court explained:

> The GMA includes a review process for determining whether county comprehensive plans are in compliance with the requirements of the GMA. The GMA provides two distinct alternatives when a Growth Management Hearings Board finds that a local government's comprehensive plan or development regulation does not comply with the GMA: the first is a finding of noncompliance under RCW 36.70A.300(3)(b); the second is a finding of invalidity under RCW 36.70A.302.
>
> If the Board finds "noncompliance" it may remand the matter to the county and specify action to be taken and a time within which compliance must occur. County plans and regulations, which are presumed valid upon adoption pursuant to RCW 36.70A.320, remain valid during the remand period following a finding of noncompliance. RCW 36.70A.300(4) ("Unless the board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand.") Unlike a finding of noncompliance, a finding of invalidity requires the Board to make a determination, supported by findings of fact and conclusions of law, that the continued validity of the provision would substantially interfere with the fulfillment of the goals of the GMA. RCW 36.70A.302(b). Upon a finding of invalidity, the underlying provision would be rendered void.[133]

[133] *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn.2d 161, 181 – 82, 979 P.2d 374, 384 (1999) (footnote omitted).

The Hearings Board found and this brief has documented that Amendment No. 11-CPA-05 violates Comprehensive Plan Policies UL.2.16, UL.2.20, and CF.3.1.[134] So Amendment 11-CPA-05 is contrary to RCW 36.70A.070 and RCW 36.70A.130(1)(d) of the GMA. Therefore, the findings of noncompliance with the GMA necessary for a determination of invalidity have been found.[135]

The Hearings Board also remanded the matter to the County for the action in compliance with the GMA.[136] So that requirement for invalidity has also been met.

The Hearings Board also concluded that "the continued validity of Amendment 11-CPA-05 would substantially interfere with the fulfillment" of the goals in "RCW 36.70A.020(1) [Urban Growth], .020(3) [Transportation], and .020(12) [Public facilities and services]."[137] The GMA urban growth goal provides "[e]ncourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner."[138] Because of the public facility deficiencies at this site, Amendment 11-CPA-05 substantially interferes with this goal because there are not adequate public facilities at this site or

[134] CR 001020 – 29, FDO at 12 – 21 of 26.
[135] RCW 36.70A.302(1)(a).
[136] CR 001034, FDO at 26 of 26.
[137] CR 001032 – 33, FDO at 24 – 25 of 26.
[138] CR 001032, FDO at 24 of 26.

a plan to provide them. These deficiencies include traffic, a lack of any pedestrian accommodations on Five Mile Road, the inability of students to walk to school, and a lack of school capacity.[139]

The GMA transportation goal provides "[e]ncourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans."[140] Because of the transportation deficiencies at this site, Amendment 11-CPA-05 substantially interferes with this goal because there are not adequate transportation facilities that provide for an efficient multimodal system because Five Mile Road is operating at its capacity and lacks pedestrian accommodations.[141]

The GMA public facilities and services goal provides "[e]nsure 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."[142] evidence in the record showing that the school facilities lack capacity to serve the proposed medium density development and the school district already incurs expenses to bus area students using Five Mile Road because the

[139] CR 001023 – 25, FDO at 16 – 18 of 26.
[140] CR 001033, FDO at 25 of 26.
[141] CR 001023 – 25, FDO at 16 – 18 of 26.
[142] CR 001033, FDO at 25 of 26.

substandard road is unsafe for children to walk along to attend school."[143] Because of the public facility and service deficiencies at this site, Amendment 11-CPA-05 substantially interferes with the capital facilities and services goal.

VII. CONCLUSION

As we have seen, the Hearings Board had jurisdiction over the comprehensive plan amendment and rezone in Amendment 11-CPA- because the rezone was not authorized by the *Spokane County Comprehensive Plan*. Substantial evidence supports the Hearings Board's Final Decision and Order finding the comprehensive plan amendment and rezone violated the GMA and the *Spokane County Comprehensive Plan*. The Hearings Board also correctly interpreted and applied the law. We respectfully request that the Court uphold the Hearings Board's Final Decision and Order.

Respectfully submitted this 17th day of March 2014.

Tim Trohimovich, WSBA No. 22367
Futurewise
816 Second Ave., Suite 200
Seattle, WA 98104
(206) 343-0681 Ext. 118 (Phone)
Email: tim@futurewise.org
Attorney for Five Mile Prairie
Neighborhood Association and Futurewise

[143] CR 001025, FDO at 18 of 26.

CERTIFICATE OF SERVICE

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on March 17, 2014, I caused the electronic original and true and correct copies of the following document to be served on the persons listed below in the manner shown: Brief of Appellants Five Mile Prairie Neighborhood Association and Futurewise with Appendixes in Case No. 31941-5-III.

Ms. Renee S. Townsley, Clerk/Administrator Court of Appeals of the State of Washington Division II 500 North Cedar Street Spokane, Washington 99201-1905	Mr. David W. Hubert Deputy Prosecuting Attorney Spokane County Prosecuting Attorney 1115 West Broadway Avenue, 2nd Floor Spokane, WA 99260 Attorney for Spokane County
[ ] By United States Mail, postage prepaid and properly addressed	[X] By United States Mail, postage prepaid and properly addressed
[ ] By Legal Messenger or Hand Delivery	[ ] By Legal Messenger or Hand Delivery
[ ] By Facsimile	[ ] By Facsimile
[ ] By Federal Express or Overnight Mail prepaid	[ ] By Federal Express or Overnight Mail prepaid
[X] By JIS-Link e-filing system	[X] By E-Mail: DHubert@spokanecounty.org

Mr. Michael J. Murphy
Groff Murphy, PLLC
300 E. Pine St.
Seattle, WA 98122
(206) 628-9500
Attorney for Harley C. Douglass, Inc.

X	By United States Mail, postage prepaid and properly addressed
	By Legal Messenger or Hand Delivery
	By Facsimile
	By Federal Express or Overnight Mail prepaid
X	By E-Mail: mmurphy@groffmurphy.com

Ms. Diane L. McDaniel,
Senior Assistant Attorney General
Attorney General Of Washington
Licensing & Administrative Law Division
PO Box 40110
Olympia, WA 98504-0110
Tel: 360-753-2747
Attorney for the Growth Management Hearings Board

	By United States Mail, postage prepaid and properly addressed
	By Legal Messenger or Hand Delivery
	By Facsimile
	By Federal Express or Overnight Mail prepaid
X	By E-Mail (by agreement): dianem@atg.wa.gov

Certified and dated this 17th day of March 2014.

Tim Trohimovich, WSBA No. 22367

Appendix A

Spokane County Code (SCC) 13.650.102 (CR 000923)

Spokane County, Washington, Code of Ordinances >> Title 13 - PUBLIC WORKS APPLICATION REVIEW PROCEDURES FOR PROJECT PERMITS >> Chapter 13.650 - CONCURRENCY >>

Chapter 13.650 - CONCURRENCY

Sections:

13.650.102 - Concurrency facilities and services.

(a) The following facilities and services must be evaluated for concurrency:
- (1) Transportation;
- (2) Public water;
- (3) Public sewer;
- (4) Fire protection;
- (5) Police protection;
- (6) Parks and recreation;
- (7) Libraries;
- (8) Solid waste disposal;
- (9) Schools.

(b) Direct Concurrency. Transportation, public water and public sewer shall be considered direct concurrency services. Concurrency requirements for public water and public sewer service are detailed in Section 13.650.112. Transportation facilities serving a development must be constructed, or a financial guarantee for required improvements must be in place prior to occupancy. Applicable permit/project applications shall required transportation concurrency review, described in Section 13.650.104. A concurrency certificate shall be issued to development proposals that pass the transportation concurrency review.

(c) Indirect Concurrency. Fire protection, police protection, parks and recreation, libraries, solid waste disposal and schools shall be considered indirect concurrency services. Spokane County shall demonstrate the adequacy of indirect concurrency services through the Capital Facilities Plan (CFP). The CFP will be updated annually, at which time all indirect concurrency services will be evaluated for adequacy. The evaluation will include an analysis of population, level of service and land use trends in order to anticipate demand for services and determine needed improvements. If any indirect concurrency services are found to be inadequate, the county shall adjust the land use element to lessen the demand for services, include a project in the CFP to address the deficiency, or adjust the level of service. To implement any of these methods an amendment to the comprehensive plan is required.

(Res. 04-0461 § 3 (part), 2004)

Appendix B

Michael C. Dempsey, Spokane County Hearing Examiner, RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06 Findings of Fact, Conclusions of Law and Decision p. 22
(CR 000196)

performed, if the infiltration of groundwater is proposed in the final plat in soils that are not considered pre-approved by the County for such infiltration.

152. The conceptual drainage report submitted by the applicant indicates that the terrain in the project will be smoothed to reduce steep hills and direct runoff to a treatment and disposal area located on Tract F of the preliminary plat; but the general lay of the land will be maintained as overall drainage patterns and basins will not be overly modified. The preliminary plat preserves a natural drainage way that extends through a shallow ravine in the west end of the site.

153. County Engineering conditions of approval find the conceptual drainage plan submitted for the preliminary plat to be acceptable; but requires the applicant to submit a final drainage plan that complies with the drainage provisions contained in the County Code, the County Guidelines for Stormwater Management, and the County Road Standards.

154. County Engineering conditions of approval implement the drainage requirements for the preliminary plat contained in the CARA provisions of the County Critical Ordinance, by requiring the treatment of stormwater from impervious surfaces. The provision of public sewer for the proposal satisfies the sewage disposal requirements for the preliminary plat contained in the CARA provisions of the County Critical Areas Ordinance.

Public Sewer and Water Concurrency

155. The Spokane County Division of Utilities certified the availability of public sewer to the proposal. Whitworth Water District #2 certified the availability of public water to the proposal. The conditions of approval recommended by the Spokane Regional Health District, and County Utilities, require the proposal to be served with public sewer and water.

156. The proposal meets the sewer and water concurrency provisions of the County Phase 2 Development Regulations.

Other Concurrency Issues

157. The Phase 2 Development Regulations do not require direct concurrency for parks, schools, law enforcement, fire, library services, etc. Accordingly, the Examiner cannot condition or deny the project based on any deficiencies in parks, school, etc. in the area. Mead School District and County Parks and Recreation were contacted regarding the proposal, but did not submit any comments.

General Consistency of Preliminary Plat with Approval Criteria. SEPA Appeal

158. The Staff Report found the preliminary plat to be consistent with applicable policies of the Comprehensive Plan, the development standards of the LDR zone, and other relevant Zoning Code provisions. The Examiner agrees with such analysis, as supplemented herein.

159. The design, shape, size and orientation of lots in the preliminary plat are appropriate for the proposed use of such lots, and for the character of the area in which the lots are located;

APPENDIX
"F"

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

MICHAEL AND MARY FENSKE, DONALD LAFFERTY, LELAND AND DARLENE LESSIG, DAVID AND BOBBIE MASINTER, LAWRENCE MCGEE, DAVID AND BARBARA SIELDS, BERT WALKLEY AND ROBERT AND CAMILLE WATSON, Petitioners, v. SPOKANE COUNTY, Respondent. And, HEADWATERS DEVELOPMENT GROUP LLC AND RED MAPLE INVESTMENT GROUP LLC, Intervenors.	**Case No. 10-1-0010** **FINAL DECISION AND ORDER**

I. SYNOPSIS

Petitioners challenged Spokane County's adoption of a Comprehensive Plan Amendment that changed the future land use designation for approximately five acres of land within the unincorporated urban area from Low Density Residential to High Density Residential. The Board determined that the land use map amendment was not in compliance with the Growth Management Act because the amendment created an internal inconsistency within the Comprehensive Plan in violation of RCW 36.70A.070.

II. PROCEDURAL HISTORY

On March 8, 2010, Petitioners Fenske, et al. filed a Petition for Review (PFR) presenting three issues relating to a Comprehensive Plan future land use map amendment. The PFR

Growth Management Hearings Board
319 7th Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

was amended on April 7, 2010. On May 12, 2010, the Board issued the Amended Prehearing Order in this case with three issues. On May 27, 2010, the Board issued an Order on Motion to Dismiss. On July 6, 2010, the Board issued a Second Order on Motion to Dismiss. On August 9, 2010, the Board held the Hearing on the Merits (HOM). Board members Raymond L. Paolella, Joyce Mulliken, and Dave Earling comprised the regional panel for this proceeding, Board member Paolella presiding. Rick Eichstaedt presented argument on behalf of all Petitioners. Spokane County was represented by David W. Hubert. Intervenors were represented by Stacy Bjordahl.

III. PRELIMINARY MATTERS

Under WAC 242-02-540, Petitioners on August 30, 2010 and Respondent/Intervenors on August 31, 2010 respectively requested supplementation of the record with certain project application documents submitted to or prepared by the Spokane County Department of Building and Planning. The Board decided that the project application documents may be of substantial assistance to the Board in reaching its decision, and the Board would give the supplemental information whatever weight, if any, was deemed appropriate in this case. Accordingly, the Board granted the supplementation request as to all supplemental documents that relate to Intervenor's proposed development. In addition, pursuant to WAC 242-02-660(4) the Board officially noticed Spokane County's Comprehensive Plan and County-Wide Planning Policies.

IV. BURDEN OF PROOF AND JURISDICTION

Burden of Proof

Comprehensive plans and development regulations, as well as amendments, are presumed valid upon adoption.[1] This presumption creates a high threshold for challengers as the

[1] RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

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Phone: 360-586-0260
Fax: 360-664-8975

burden is on the Petitioners to demonstrate that action taken by the County is not in compliance with the GMA.[2]

The Board is charged with adjudicating GMA compliance and, when deemed appropriate, invalidating noncompliant plans and development regulations.[3] The scope of the Board's review is limited to determining whether the County has complied with the GMA only with respect to those issues presented in a timely petition for review.[4] The GMA directs the Board to determine compliance within the requirements of the GMA.[5] The Board shall find compliance unless it determines that the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[6] In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[7]

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth."[8] However, the

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[2] RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.
[3] RCW 36.70A.280, RCW 36.70A.302
[4] RCW 36.70A.290(1)
[5] RCW 36.70A.320(3)
[6] RCW 36.70A.320(3)
[7] *City of Arlington v. CPSGMHB,* 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County,* 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe, et al v. WWGMHB,* 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB,* 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).
[8] RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

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319 7th Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

jurisdiction's actions are not boundless; their actions must be consistent with the goals and requirements of the GMA.[9]

Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate that the action taken by the County is clearly erroneous in light of the goals and requirements of the GMA.

Jurisdiction

The Board finds that the Petition for Review was timely filed pursuant to RCW 36.70A.290(2); that Petitioners have standing to appear before the Board pursuant to RCW 36.70A.280(2), and; that the Board has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

V. STATEMENT OF THE ISSUES

1. Did Spokane County fail to implement and comply with the Growth Management Act, 36.70A RCW, when it approved 09-CPA-01 by creating a 5-acre High Density Residential land use area within the urban growth area that (a) was in conflict with the character of the neighborhood, as required by RCW 36.70A.070(2) and (b) was otherwise inconsistent with and failed to implement the goals of the GMA, including RCW 36.70A.020(1), (12)?
2. Did Spokane County violate RCW 36.70A.070 (internal consistency and other specific requirements for a Comp Plan), RCW 36.70A.210 (consistency with CPPs), and RCW 36.70A.020 (comprehensive plans to be guided by Act's goals) and fail to take action consistent with the requirements and provisions of the Spokane County Comprehensive Plan, including the goals and policies contained in sections UL.2, UL.7, T.1, and T.2, the Countywide Planning Policies, and other applicable County

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[9] *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish* the Supreme Court stated: The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. *Id.* at 435, Fn.8.

Growth Management Hearings Board
319 7th Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

development regulations when it approved 09-CPA-01 by creating a 5-acre area zoned as High Density Residential that: (a) altered the character of the neighborhood, (b) was isolated from similarly-zoned properties, (c) allowed expanded high-density residential development in the urban area without a demonstrated need, and (d) failed to provide adequate access and transportation services?

3. Does 09-CPA-01 substantially interfere with the fulfillment of the goals of the Growth Management Act, including RCW 36.70A.020(1), (12), such that the enactment at issue should be held invalid pursuant to RCW 36.70A.302?

IV. DISCUSSION OF THE ISSUES

- ***Statutes***

RCW 36.70A.070(2) requires that each comprehensive plan shall include a "housing element ensuring the vitality and character of established residential neighborhoods" and that includes *inter alia* "a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences."

RCW 36.70A.020 sets forth 13 planning goals that shall be used to guide the development of comprehensive plans and development regulations. Three of the planning goals pertinent here are as follows:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (4) 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.
>
> (12) 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.

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319 7th Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

RCW 36.70A.070 provides that the Comprehensive Plan "shall be an internally consistent document and all elements shall be consistent with the future land use map." "Consistency" means that no feature of a plan or regulation is incompatible with any other feature of a plan or regulation, and consistency is indicative of a capacity for orderly integration or operation with other elements in a system.[10] Differing parts of the Comprehensive Plan (CP) must fit together so that no one feature precludes the achievement of any other.[11] Under RCW 36.70A.070(6), the CP Transportation Element must implement, and be consistent with, the Land Use Element.

RCW 36.70A.210 provides in pertinent part as follows:

> a "county-wide planning policy" is a written policy statement or statements used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100.

RCW 36.70A.100 requires the comprehensive plan of each county or city to be coordinated with, and consistent with, the comprehensive plans of other counties or cities with which there are common borders or related regional issues.

RCW 36.70A.302(1) provides as follows:

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

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[10] Former WAC 365-195-210.
[11] WAC 365-196-500.

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P.O. Box 40953
Olympia, Washington 98504-0953
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Fax: 360-664-8975

(c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

- ***Issue 1***

Petitioners allege in this issue that the adoption of this Comprehensive Plan future land use map amendment (09-CPA-01) created a High Density Residential area that conflicts with the character of the neighborhood contrary to the requirement in RCW 36.70A.070(2) to include a Housing Element "ensuring the vitality and character of established residential neighborhoods." Petitioners further allege a failure to implement GMA's Planning Goals. Respondent and Intervenors argue that this is an attempt to litigate the adequacy of the County's Housing Element adopted in 2001 and as such represents an untimely collateral attack. Respondent/Intervenors further argue that this map amendment is consistent with the goals and provisions of the Housing Element.

RCW 36.70A.290(2) provides that Petitions for Review must be filed with the Growth Management Hearings Board within 60 days after publication of the County's legislative action. Moreover, the Board's jurisdiction is limited to issues presented in the Statement of Issues, as modified by any prehearing order.[12] Here, the sub-issue relating to GMA Goals compliance is addressed in the Issue 2 analysis below. Otherwise, Petitioner's Issue 1 is narrowly focused on the GMA requirements in RCW 36.70A.070(2) for including an adequate Housing Element in the Comprehensive Plan. Petitioners cannot challenge the adequacy of Spokane County's 2001 Housing Element at this time. Thus, Petitioners have not carried their burden of proof as to the Housing Element aspects of Issue 1.

- ***Issue 2:***

Petitioners assert that the County's adoption of Resolution 9-1148 (09-CPA-01) created an internal Comprehensive Plan inconsistency relating to inadequate access, connectivity, and traffic infrastructure. Spokane County and Intervenors argue that traffic impacts will be subsequently reviewed and mitigated during the site-specific land use approval process and

[12] RCW 36.70A.290(1).

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319 7th Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

will be required to meet traffic concurrency at that later point in time. That is all that the GMA requires, according to the County and Intervenors.

One of the most fundamental policies of the Growth Management Act is to promote the public's interest in the conservation and wise use of our lands by requiring coordinated and comprehensive planning.[13] Capital facilities planning, land use planning, and financial planning are inextricably linked and must be coordinated and consistent to ensure that necessary public facilities (including transportation) shall be adequate at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.[14]

In order to have adequate public facilities at the time the development is available for occupancy and use, capital facilities planning must be done well before the start of on-the-ground development activities. Advance planning identifies transportation improvements or strategies that must be made concurrent with the development to prevent levels of service from declining below standards.[15] The GMA requires counties to forecast capital facilities needs at least six years into the future with a plan that will finance capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes.[16] Moreover, Counties must reassess the land use element if probable funding falls short of meeting existing needs.[17] All proposed amendments to the future land use map must be evaluated for consistency with the capital facilities element and multi-year transportation financing plan.[18]

By its very nature, capital facilities planning must be done at the **PLAN** approval stage as opposed to the **PROJECT** approval stage in order to effectively provide for the necessary lead time and identification of probable funding sources, and also to inform decision makers

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[13] RCW 36.70A.010.
[14] RCW 36.70A.020(12); RCW 36.70A.030(12); RCW 36.70A.070.
[15] RCW 36.70A.070(6)(b).
[16] RCW 36.70A.070(3).
[17] RCW 36.70A.070(3)(e).
[18] RCW 36.70A.070 (preamble); RCW 36.70A.070(6)(a)(iv); RCW 36.70A.070(3)(e).

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Fax: 360-664-8975

and the public as they consider the public infrastructure impacts of proposed comprehensive plan amendments. While specific project details will not necessarily be known at the Plan approval stage, some overall forecasting can be done based on reasonable planning assumptions and current development regulations. Advance planning identifies the public facility needs which then become inputs to the multiyear financing plan required by RCW 36.70A.070(3) and .070(6). Thus, capital facility funding and scheduling issues need to be evaluated at the time the future land use map is amended. The cumulative effects must also be considered,[19] and map amendments must conform to all other GMA standards and requirements.[20]

Spokane County's Comprehensive Plan sets forth the following goals and policies relating to adequate public infrastructure to support new development:

Goal UL.7	Guide efficient development patterns by locating residential development in areas where facilities and services can be provided in a cost-effective and timely fashion.
Policy UL.2.11	Promote linkage of developments with open space, parks natural areas and street connections.
Policy UL.2.16	Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials.
Policy UL.2.20	Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus or car.
Goal T.2	Provide transportation system improvements concurrent with new development and consistent with adopted land

[19] RCW 36.70A.130(2)(b). Early consideration of cumulative effects is also consistent with legislation providing for SEPA/GMA integration and regulatory reform by streamlining project review and requiring a broad consideration of land use decision impacts at earlier points in the planning process. *See* RCW Chapter 43.21C and RCW Chapter 36.70B.

[20] RCW 36.70A.130(1)(d).

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319 7th Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

use and transportation plans.

Policy T.2.2 Transportation improvements needed to serve new development shall be in place at the time new development impacts occur. If this is not feasible, then a financial commitment, consistent with the capital facilities plan, shall be made to complete the improvement within six years.

Policy T.2.3 Transportation improvements shall be consistent with land use plans, capital funding and other planning elements.

In the present case, the challenged action is a future land use map amendment that reclassifies approximately five acres of land from Low Density Residential to High Density Residential.[21] This land use map amendment will facilitate the development of a 120 unit multi-family apartment complex.[22] Spokane County's Cumulative Impacts Analysis for urban transportation impacts states that there is a potential increase of 960 trips per day,[23] and a cursory roadway capacity evaluation indicated that the new apartment complex will generate up to 1,050 trips per day.[24] The sole access to this proposed development is on Dakota Street, a dead end, local access road serving a group of existing single-family and duplex residences.[25] Dakota Street has no sidewalks, and the narrow roadway is currently used by pedestrians, including children and a disabled resident in a wheelchair.[26]

There is no evidence in the record that Spokane County's Capital Facilities Plan or Transportation Improvement Plan has considered whether public facilities will be adequate at the time this proposed development is available for occupancy and use, as the GMA requires. Spokane County simply states that traffic impacts will be studied later, at the

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[21] Petitioners' Prehearing Brief, Exhibit A, Spokane County Findings of Fact and Decision (Resolution 9-1148, Dec. 31, 2009), page 13.
[22] Petitioners' Prehearing Brief, Exhibit C, Spokane County Staff Report for File No. 09-CPA-01, page 3.
[23] Petitioners' Prehearing Brief, Exhibit F, Cumulative Impacts Analysis for File No. 09-CPA-01, Table 5.
[24] Intervenors' Hearing on the Merits Brief, Attachment AR 000355, Intermountain Transportation Solutions, LLC Letter, (Dec. 8, 2009).
[25] Petitioners' Prehearing Brief, Exhibit C, Spokane County Staff Report for File No. 09-CPA-01, page 3. *Id.*, Exhibit I, Spokane County Planning Commission Findings of Fact and Recommendation, page 3.
[26] Petitioners' Prehearing Brief, Exhibit I, Spokane County Planning Commission Findings of Fact and Recommendation, page 3; *Id.*, Exhibit G public comment letters, page 11.

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project level review: "[w]hen a specific project is proposed, the County Engineering Department will require the applicant to submit a detailed traffic analysis so that a determination can be made as to what the appropriate mitigation measures may be."[27] But this approach does not comport with the GMA because it delays capital facilities planning until the time of a site-specific development application – after the land use map has been amended to facilitate the proposed project -- thereby depriving County decision makers from having important information to inform their land use mapping decision.

However, there is evidence in the record that public facilities, particularly transportation, will not be adequate to serve the proposed development.[28] The Spokane County Planning Commission voted unanimously to recommend denial of this land use map amendment due to inadequate transportation facilities and adverse impacts on the existing Dakota Street residents.[29] One planning commissioner stated that "access issues could be disastrous."[30] The Planning Commission specifically found that this proposal is inconsistent with Comprehensive Plan goals and policies UL.2.16, UL.7, T.2, and T.2.2.[31] The County Commissioners made no findings that overruled or rejected these specific inconsistency findings by the Planning Commission.

Moreover, there is no evidence in the record that the County evaluated the adequacy of necessary public facilities for the proposed development in accordance with RCW 36.70A.020(12). The County also failed to consider arrangements to allow people to get

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[27] Petitioners' Prehearing Brief, Exhibit A, Findings of Fact and Decision (Resolution 9-1148, Dec. 31, 2009), page 6; *Id.*, Exhibit C, Spokane County Staff Report for File No. 09-CPA-01, page 6.
[28] The Planning Commission also had some concerns about potential school overcrowding and impacts on the Mead School District. Petitioners' Prehearing Brief, Exhibit H, Spokane County Planning Commission Minutes (Oct. 15, 2009), page 3.
[29] Petitioners' Prehearing Brief, Exhibit I, Spokane County Planning Commission Findings of Fact and Recommendation, page 1, 3.
[30] Petitioners' Prehearing Brief, Exhibit H, Spokane County Planning Commission Minutes (Oct. 15, 2009), page 3.
[31] Petitioners' Prehearing Brief, Exhibit I, Spokane County Planning Commission Findings of Fact and Recommendation, page 3.

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Fax: 360-664-8975

around easily by foot, bicycle, bus or car as per Comprehensive Plan Policy UL.2.20.[32] There is an absence of evidence that the County considered County-Wide Planning Transportation Policy 11, which provides that the County shall address land use designations that are supportive of and compatible with public transportation such as pedestrian friendly and nonmotorized design.[33]

Thus, the decision of the County Commissioners to approve land use map amendment 09-CPA-01 is not supported by substantial evidence. The map amendment is incompatible with other features of the Comprehensive Plan and precludes achievement of other Comprehensive Plan Elements. The Board must conclude that the land use map amendment is not consistent with other elements of the Comprehensive Plan, in violation of RCW 36.70A.070. Further, the map amendment was not guided by GMA Planning Goal 12,[34] which is to ensure that necessary public facilities shall be adequate at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

Conclusion: Spokane County's adoption of land use map amendment 09-CPA-01 is inconsistent with the goals and policies of the Comprehensive Plan, including goals and policies UL.2.16, UL.7, T.2, and T.2.2, the Capital Facilities Element, and the Transportation Element. Therefore, the land use map amendment created an internal inconsistency within the Comprehensive Plan in violation of RCW 36.70A.070. The action by Spokane County to approve land use map amendment 09-CPA-01 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.

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[32] As a Transportation Sub-Element, the GMA requires consideration of "planned improvements for pedestrian and bicycle facilities and corridors that address and encourage enhanced community access and promote healthy lifestyles." RCW 36.70A.070(6)(a)(vii).

[33] County-Wide Planning Policies under RCW 36.70A.210 are binding on the County. *King County v. Central Puget Sound Growth Management Hearings Board et al., 138 Wn.2d 161, 175 (1999).*

[34] RCW 36.70A.020(12).

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Fax: 360-664-8975

- ***Issue 3***

Petitioners request entry of a determination of invalidity to preclude development vesting contrary to GMA's substantive planning requirements. Respondent/Intervenors argue there can be no invalidity because the County has complied and because continued validity will not substantially interfere with any GMA Goals.

The Board makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300. The Board makes findings of fact and conclusions of law as follows: There is a real risk of vesting of GMA non-compliant development contrary to GMA's policies, goals, and provisions in that land use map amendment 09-CPA-01 is inconsistent with the goals and policies of the Comprehensive Plan, including goals and policies UL.2.16, UL.7, T.2, and T.2.2, the Capital Facilities Element, and the Transportation Element. The Board finds, concludes, and determines that the continued validity of Comprehensive Plan Amendment 09-CPA-01 would substantially interfere with the fulfillment of the goals of the GMA, including but not limited to Goals 1, 3, 4, and 12 in RCW 36.70A.020, by promoting GMA non-compliant development that could unalterably impact the community without adequate provision of necessary public facilities and services affecting public health and safety, and therefore for the above-stated reasons, Comprehensive Plan Amendment 09-CPA-01 is determined to be invalid.

V. ORDER

Based on the foregoing, the Board determines that Spokane County's adoption of Comprehensive Plan Amendment 09-CPA-01 in Resolution 9-1148 was clearly erroneous and not in compliance with the Growth Management Act. The Board determines that the Spokane County land use map amendment adopted by 09-CPA-01 is invalid. This matter is remanded to Spokane County to take action to achieve compliance with the Growth Management Act.

The following schedule for compliance, briefing and hearing shall apply:

Growth Management Hearings Board
319 7th Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Item	Date Due
Compliance Due	January 3, 2011
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	January 10, 2011
Objections to a Finding of Compliance	January 20, 2011
Response to Objections	January 31, 2011
Compliance Hearing **360 407-3780 pin 102713#**	**February 8, 2011** **10:00 a.m.**

Entered this 3rd day of September, 2010.

Raymond L. Paolella, Board Member

Joyce Mulliken, Board Member

Dave Earling, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review. A response to a Motion for Reconsideration must be filed within 5 days of the filing of the motion.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person, by fax or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

Growth Management Hearings Board
319 7th Avenue SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

APPENDIX
"G"

RCW 36.70A.070
Comprehensive plans — Mandatory elements.

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

Each comprehensive plan shall include a plan, scheme, or design for each of the following:

(1) A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. The land use element shall include population densities, building intensities, and estimates of future population growth. The land use element shall provide for protection of the quality and quantity of groundwater used for public water supplies. Wherever possible, the land use element should consider utilizing urban planning approaches that promote physical activity. Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.

(2) A housing element ensuring the vitality and character of established residential neighborhoods that: (a) Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community.

(3) A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

(4) A utilities element consisting of the general location, proposed location, and capacity of all existing and proposed utilities, including, but not limited to, electrical lines, telecommunication lines, and natural gas lines.

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

(a) 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.

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

(d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:

(i) Rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.

(A) A commercial, industrial, residential, shoreline, or mixed-use area shall be subject to the requirements of (d)(iv) of this subsection, but shall not be subject to the requirements of (c)(ii) and (iii) of this subsection.

(B) Any development or redevelopment other than an industrial area or an industrial use within a mixed-use area or an industrial area under this subsection (5)(d)(i) must be principally designed to serve the existing and projected rural population.

(C) Any development or redevelopment in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas. Development and redevelopment may include changes in use from vacant land or a previously existing use so long as the new use conforms to the requirements of this subsection (5);

(ii) The intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development. A small-scale recreation or tourist use is not required to be principally designed to serve the existing and projected rural population. Public services and public facilities shall be limited to those necessary to serve the recreation or tourist use and shall be provided in a manner that does not permit low-density

sprawl;

(iii) The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents. Rural counties may allow the expansion of small-scale businesses as long as those small-scale businesses conform with the rural character of the area as defined by the local government according to RCW 36.70A.030(15). Rural counties may also allow new small-scale businesses to utilize a site previously occupied by an existing business as long as the new small-scale business conforms to the rural character of the area as defined by the local government according to RCW 36.70A.030(15). Public services and public facilities shall be limited to those necessary to serve the isolated nonresidential use and shall be provided in a manner that does not permit low-density sprawl;

(iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary, the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries, such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl;

(v) For purposes of (d) of this subsection, an existing area or existing use is one that was in existence:

(A) On July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter;

(B) On the date the county adopted a resolution under RCW 36.70A.040(2), in a county that is planning under all of the provisions of this chapter under RCW 36.70A.040(2); or

(C) On the date the office of financial management certifies the county's population as provided in RCW 36.70A.040(5), in a county that is planning under all of the provisions of this chapter pursuant to RCW 36.70A.040(5).

(e) Exception. This subsection shall not be interpreted to permit in the rural area a major industrial development or a master planned resort unless otherwise specifically permitted under RCW 36.70A.360 and 36.70A.365.

(6) A transportation element that implements, and is consistent with, the land use element.

(a) The transportation element shall include the following subelements:

(i) Land use assumptions used in estimating travel;

(ii) Estimated traffic impacts to state-owned transportation facilities resulting from land use assumptions to assist the department of transportation in monitoring the performance of state facilities, to plan improvements for the facilities, and to assess the impact of land-use decisions on state-owned transportation facilities;

(iii) Facilities and services needs, including:

(A) An inventory of air, water, and ground transportation facilities and services, including transit alignments and general aviation airport facilities, to define existing capital facilities and travel levels as a basis for future planning. This inventory must include state-owned transportation facilities within the city or county's jurisdictional boundaries;

(B) Level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system. These standards should be regionally coordinated;

(C) For state-owned transportation facilities, level of service standards for highways, as prescribed in chapters 47.06 and 47.80 RCW, to gauge the performance of the system. The purposes of reflecting level of service standards for state highways in the local comprehensive plan are to monitor the performance of the system, to evaluate improvement strategies, and to facilitate coordination between the county's or city's six-year street, road, or transit program and the office of financial management's ten-year investment program. The concurrency requirements of (b) of this subsection do not apply to transportation facilities and services of statewide significance except for counties consisting of islands whose only connection to the mainland are state highways or ferry routes. In these island counties, state highways and ferry route capacity must be a factor in meeting the concurrency requirements in (b) of this subsection;

(D) Specific actions and requirements for bringing into compliance locally owned transportation facilities or services that are below an established level of service standard;

(E) Forecasts of traffic for at least ten years based on the adopted land use plan to provide information on the location, timing, and capacity needs of future growth;

(F) Identification of state and local system needs to meet current and future demands. Identified needs on state-owned transportation facilities must be consistent with the statewide multimodal transportation plan required under chapter 47.06 RCW;

(iv) Finance, including:

(A) An analysis of funding capability to judge needs against probable funding resources;

(B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year street, road, or transit program required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems. The multiyear financing plan should be coordinated with the ten-year investment program developed by the office of financial management as required by RCW 47.05.030;

(C) If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met;

(v) Intergovernmental coordination efforts, including an assessment of the impacts of the transportation plan and land use assumptions on the transportation systems of adjacent jurisdictions;

(vi) Demand-management strategies;

(vii) Pedestrian and bicycle component to include collaborative efforts to identify and designate planned improvements for pedestrian and bicycle facilities and corridors that address and encourage enhanced community access and promote healthy lifestyles.

(b) After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. These strategies may include increased public transportation service, ride sharing programs, demand management, and other transportation systems management strategies. For the purposes of this subsection (6), "concurrent with the development" means that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

(c) The transportation element described in this subsection (6), the six-year plans required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems, and the ten-year investment program required by RCW 47.05.030 for the state, must be consistent.

(7) An economic development element establishing local goals, policies, objectives, and provisions for economic growth and vitality and a high quality of life. The element shall include: (a) A summary of the local economy such as population, employment, payroll, sectors, businesses, sales, and other information as appropriate; (b) a summary of the strengths and weaknesses of the local economy defined as the commercial and industrial sectors and supporting factors such as land use, transportation, utilities, education, workforce, housing, and natural/cultural resources; and (c) an identification of policies, programs, and projects to foster economic growth and development and to address future needs. A city that has chosen to be a residential community is exempt from the economic development element requirement of this subsection.

(8) A park and recreation element that implements, and is consistent with, the capital facilities plan element as it relates to park and recreation facilities. The element shall include: (a) Estimates of park and recreation demand for at least a ten-year period; (b) an evaluation of facilities and service needs; and (c) an evaluation of intergovernmental coordination opportunities to provide regional approaches for meeting park and recreational demand.

(9) It is the intent that new or amended elements required after January 1, 2002, be adopted concurrent with the scheduled update provided in RCW 36.70A.130. Requirements to incorporate any such new or amended elements shall be null and void until funds sufficient to cover applicable local government costs are appropriated and distributed by the state at least two years before local government must update comprehensive plans as required in RCW 36.70A.130.

[2010 1st sp.s. c 26 § 6; 2005 c 360 § 2; (2005 c 477 § 1 expired August 31, 2005); 2004 c 196 § 1; 2003 c 152 § 1. Prior: 2002 c 212 § 2; 2002 c 154 § 2; 1998 c 171 § 2; 1997 c 429 § 7; 1996 c 239 § 1; prior: 1995 c 400 § 3; 1995 c 377 § 1; 1990 1st ex.s. c 17 § 7.]

Notes:

Expiration date -- 2005 c 477 § 1: "Section 1 of this act expires August 31, 2005." [2005 c 477 § 3.]

Effective date -- 2005 c 477: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 13, 2005]." [2005 c 477 § 2.]

Findings -- Intent -- 2005 c 360: "The legislature finds that regular physical activity is essential to maintaining good health and reducing the rates of chronic disease. The legislature further finds that providing opportunities for walking, biking, horseback riding, and other regular forms of exercise is

best accomplished through collaboration between the private sector and local, state, and institutional policymakers. This collaboration can build communities where people find it easy and safe to be physically active. It is the intent of the legislature to promote policy and planning efforts that increase access to inexpensive or free opportunities for regular exercise in all communities around the state." [2005 c 360 § 1.]

Prospective application -- 1997 c 429 §§ 1-21: See note following RCW 36.70A.3201.

Severability -- 1997 c 429: See note following RCW 36.70A.3201.

Construction -- Application -- 1995 c 400: "A comprehensive plan adopted or amended before May 16, 1995, shall be considered to be in compliance with RCW 36.70A.070 or 36.70A.110, as in effect before their amendment by this act, if the comprehensive plan is in compliance with RCW 36.70A.070 and 36.70A.110 as amended by this act. This section shall not be construed to alter the relationship between a countywide planning policy and comprehensive plans as specified under RCW 36.70A.210.

As to any appeal relating to compliance with RCW 36.70A.070 or 36.70A.110 pending before a growth management hearings board on May 16, 1995, the board may take up to an additional ninety days to resolve such appeal. By mutual agreement of all parties to the appeal, this additional ninety-day period may be extended." [1995 c 400 § 4.]

Effective date -- 1995 c 400: See note following RCW 36.70A.040.

APPENDIX "H"

RCW 36.70A.280
Growth management hearings board — Matters subject to review.
(*Effective until December 31, 2020.*)

(1) The growth management hearings board shall hear and determine only those petitions alleging either:

(a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. Nothing in this subsection authorizes the board to hear petitions alleging noncompliance with *RCW 36.70A.5801;

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted;

(c) That the approval of a work plan adopted under RCW 36.70A.735(1)(a) is not in compliance with the requirements of the program established under RCW 36.70A.710;

(d) That regulations adopted under RCW 36.70A.735(1)(b) are not regionally applicable and cannot be adopted, wholly or partially, by another jurisdiction;

(e) That a department certification under RCW 36.70A.735(1)(c) is erroneous; or

(f) That a department determination under RCW 36.70A.060(1)(d) is erroneous.

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

(3) For purposes of this section "person" means any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.

(4) To establish participation standing under subsection (2)(b) of this section, a person must show that his or her participation before the county or city was reasonably related to the person's issue as presented to the board.

(5) When considering a possible adjustment to a growth management planning population projection prepared by the office of financial management, the board shall consider the implications of any such adjustment to the population forecast for the entire state.

The rationale for any adjustment that is adopted by the board must be documented and filed with the office of financial management within ten working days after adoption.

If adjusted by the board, a county growth management planning population projection shall only be used for the planning purposes set forth in this chapter and shall be known as the "board adjusted population projection." None of these changes shall affect the official state and county population forecasts prepared by the office of financial management, which shall continue to be used for state budget and planning purposes.

[2014 c 147 § 3; 2011 c 360 § 17; 2010 c 211 § 7; 2008 c 289 § 5; 2003 c 332 § 2; 1996 c 325 § 2; 1995 c 347 § 108; 1994 c 249 § 31; 1991 sp.s. c 32 § 9.]

Notes:

***Reviser's note:** RCW 36.70A.5801 expired January 1, 2011.

Expiration date -- 2014 c 147 § 3: "Section 3 of this act expires December 31, 2020." [2014 c 147 § 4.]

Effective date -- Transfer of power, duties, and functions -- 2010 c 211: See notes following RCW 36.70A.250.

Findings -- 2008 c 289: "(1) The legislature recognizes that the implications of a changed climate will affect the people, institutions, and economies of Washington. The legislature also recognizes that it is in the public interest to reduce the state's dependence upon foreign sources of carbon fuels that do not promote energy independence or the economic strength of the state. The legislature finds that the state, including its counties, cities, and residents, must engage in activities that reduce greenhouse gas emissions and dependence upon foreign oil.

(2) The legislature further recognizes that: (a) Patterns of land use development influence transportation-related greenhouse gas emissions and the need for foreign oil; (b) fossil fuel-based transportation is the largest source of greenhouse gas emissions in Washington; and (c) the state and its residents will not achieve emission reductions established in *RCW 80.80.020 without a significant decrease in transportation emissions.

(3) The legislature, therefore, finds that it is in the public interest of the state to provide appropriate legal authority, where required, and to aid in the development of policies, practices, and methodologies that may assist counties and cities in addressing challenges associated with greenhouse gas emissions and our state's dependence upon foreign oil." [2008 c 289 § 1.]

***Reviser's note:** RCW 80.80.020 was repealed by 2008 c 14 § 13.

Application -- 2008 c 289: "This act is not intended to amend or affect chapter 353, Laws of 2007." [2008 c 289 § 6.]

Intent -- 2003 c 332: "This act is intended to codify the Washington State Court of Appeals holding in *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657 (2000), by mandating that to establish participation standing under the growth management act, a person must show that his or her participation before the county or city was reasonably related to the person's issue as presented to the growth management hearings board." [2003 c 332 § 1.]

Severability -- Effective date -- 1996 c 325: See notes following RCW 36.70A.270.

Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347: See notes following RCW 36.70A.470.

Severability -- Application -- 1994 c 249: See notes following RCW 34.05.310.

Definitions: See RCW 36.70A.703.

RCW 36.70A.280

Growth management hearings board — Matters subject to review. (*Effective December 31, 2020.*)

(1) The growth management hearings board shall hear and determine only those petitions alleging either:

(a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. Nothing in this subsection authorizes the board to hear petitions alleging noncompliance with *RCW 36.70A.5801;

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted;

(c) That the approval of a work plan adopted under RCW 36.70A.735(1)(a) is not in compliance with the requirements of the program established under RCW 36.70A.710;

(d) That regulations adopted under RCW 36.70A.735(1)(b) are not regionally applicable and cannot be adopted, wholly or partially, by another jurisdiction; or

(e) That a department certification under RCW 36.70A.735(1)(c) is erroneous.

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

(3) For purposes of this section "person" means any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.

(4) To establish participation standing under subsection (2)(b) of this section, a person must show that his or her participation before the county or city was reasonably related to the person's issue as presented to the board.

(5) When considering a possible adjustment to a growth management planning population projection prepared by the office of financial management, the board shall consider the implications of any such adjustment to the population forecast for the entire state.

The rationale for any adjustment that is adopted by the board must be documented and filed with the office of financial management within ten working days after adoption.

If adjusted by the board, a county growth management planning population projection shall only be used for the planning purposes set forth in this chapter and shall be known as the "board adjusted population projection." None of these changes shall affect the official state and county population forecasts prepared by the office of financial management, which shall continue to be used for state budget and planning purposes.

[2011 c 360 § 17; 2010 c 211 § 7; 2008 c 289 § 5; 2003 c 332 § 2; 1996 c 325 § 2; 1995 c 347 § 108; 1994 c 249 § 31; 1991 sp.s. c 32 § 9.]

Notes:

***Reviser's note:** RCW 36.70A.5801 expired January 1, 2011.

Effective date -- Transfer of power, duties, and functions -- 2010 c 211: See notes following RCW 36.70A.250.

Findings -- 2008 c 289: "(1) The legislature recognizes that the implications of a changed climate will affect the people, institutions, and economies of Washington. The legislature also recognizes that it is in the public interest to reduce the state's dependence upon foreign sources of carbon fuels that do not promote energy independence or the economic strength of the state. The legislature finds that the state, including its counties, cities, and residents, must engage in activities that reduce greenhouse gas emissions and dependence upon foreign oil.

(2) The legislature further recognizes that: (a) Patterns of land use development influence transportation-related greenhouse gas emissions and the need for foreign oil; (b) fossil fuel-based transportation is the largest source of greenhouse gas emissions in Washington; and (c) the state and its residents will not achieve emission reductions established in *RCW 80.80.020 without a significant decrease in transportation emissions.

(3) The legislature, therefore, finds that it is in the public interest of the state to provide appropriate legal authority, where required, and to aid in the development of policies, practices, and methodologies that may assist counties and cities in addressing challenges associated with greenhouse gas emissions and our state's dependence upon foreign oil." [2008 c 289 § 1.]

***Reviser's note:** RCW 80.80.020 was repealed by 2008 c 14 § 13.

Application -- 2008 c 289: "This act is not intended to amend or affect chapter 353, Laws of 2007." [2008 c 289 § 6.]

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Severability -- Effective date -- 1996 c 325: See notes following RCW 36.70A.270.

Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347: See notes following RCW 36.70A.470.

Severability -- Application -- 1994 c 249: See notes following RCW 34.05.310.

Definitions: See RCW 36.70A.703.

APPENDIX "I"

RCW 36.70A.3201
Growth management hearings board — Legislative intent and finding.

The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

[2010 c 211 § 12; 1997 c 429 § 2.]

Notes:

Effective date -- Transfer of power, duties, and functions -- 2010 c 211: See notes following RCW 36.70A.250.

Prospective application -- 1997 c 429 §§ 1-21: "Except as otherwise specifically provided in RCW 36.70A.335, sections 1 through 21, chapter 429, Laws of 1997 are prospective in effect and shall not affect the validity of actions taken or decisions made before July 27, 1997." [1997 c 429 § 53.]

Severability -- 1997 c 429: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1997 c 429 § 54.]

APPENDIX
"J"

RCW 36.70C.030
Chapter exclusive means of judicial review of land use decisions — Exceptions.

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

[2010 1st sp.s. c 7 § 38; 2003 c 393 § 17; 1995 c 347 § 704.]

Notes:

Effective date -- 2010 1st sp.s. c 26; 2010 1st sp.s. c 7: See note following RCW 43.03.027.

APPENDIX
"K"

Chapter 14.402
Amendments

14.402.000 Purpose and Intent

The purpose and intent of this chapter to provide procedures whereby the Zoning Code (Title 14), including the official text and maps, may be amended consistent with the Comprehensive Plan.

14.402.040 Criteria for Amendment

The County may amend the Zoning Code when one of the following is found to apply.

1. The amendment is consistent with or implements the Comprehensive Plan and is not detrimental to the public welfare.
2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code.
3. An amendment is necessary to correct an error in the Zoning Code.
4. An amendment is necessary to clarify the meaning or intent of the Zoning Code.
5. An amendment is necessary to provide for a use(s) that was not previously addressed by the Zoning Code.
6. An amendment is deemed necessary by the Commission and/or Board as being in the public interest.

14.402.060 Amendment Procedures – Zoning Map, Site-Specific Zone Reclassification

1. Applicability:
   The procedures in this section shall apply to zoning map amendments consisting of a site-specific zone reclassification involving a specific parcel(s), and to change of conditions to a site specific zone reclassification. This section does not apply to zoning map amendments that implement a subarea or neighborhood plan.

2. Initiation:
   Site-specific zone reclassifications may be initiated by the owner(s) of the subject parcel(s), subject to such application fees as set by the Board.

3. Procedures:
   A site-specific zone reclassification is subject to the procedural requirements for a Type II project permit application as set forth in Title 13 (Application Review Procedures) of the Spokane County Code. A Type II permit requires a public hearing before the Hearing Examiner.

4. Limitations:
   No application for a site-specific zone reclassification or change of conditions that has been acted upon by the Hearing Examiner or Board shall be accepted for a similar reclassification or change of conditions for a period of 12 months from the final decision "Similar reclassification" for the purpose of this section is a site-specific zone reclassification for substantially the same land area, zone, land use and intensity of development as previously applied for. "Similar change of conditions" for the purpose of this section is a change of conditions for substantially the same alteration or addition to a condition of approval or site plan approved for a site-specific zone reclassification. The Director shall make the determination of similar reclassification or change of conditions as an administrative determination.

5. Criteria for approval
   A site-specific zone reclassification may be approved when all of the following criteria are met.
   a. The zone reclassification bears a substantial relationship to the public health, safety, or welfare.
   b. The zone reclassification implements the Comprehensive Plan, or a substantial change in circumstances has occurred since the subject parcel was last zoned.