No. 97719-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLARK COUNTY,
Respondent,

And

FRIENDS OF CLARK COUNTY and FUTUREWISE,
Respondents,

And

CITY OF RIDGEFIELD, CITY OF LA CENTER, RDGB ROYAL ESTATE FARMS LLC, RDGK REST VIEW ESTATES LLC, RDGM RAWHIDE ESTATES LLC, RDGF RIVER VIEW ESTATES LLC, RDGS REAL VIEW LLC, and 3B NORTHWEST LLC,
Respondents,

And

CLARK COUNTY CITIZENS UNITED, INC.,
Petitioner,

v.

GROWTH MANAGEMENT HEARINGS BOARD,
Respondent.

FUTUREWISE'S AND THE FRIENDS OF CLARK COUNTY'S ANSWER, RAISING NEW ISSUES, TO THE CLARK COUNTY CITIZENS UNITED, INC. PETITION FOR REVIEW

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I. INTRODUCTION

This Court's *Lewis County* decision rejected the "primacy of soil characteristics" in designating agricultural lands of long-term commercial significance.[1] Instead, this Court concluded that

> based on the plain language of the [Growth Management Act] GMA and its interpretation in *Benaroya I*, we hold that agricultural land is land: (a) not already characterized by urban growth (b) that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, and (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses.[2]

In this case, the Growth Management Hearings Board (Board) and Court of Appeals followed the *Lewis County* approach in rejected the Clark County Citizens United, Inc. (CCCU) challenge to designation of forest and agricultural lands of long-term commercial significance.[3] Therefore, the *Lewis County* decision disposes of the legal aspects of CCCU's Issue Presented For Review.[4]

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[1] *Lewis Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 502 fn. 11, 139 P.3d 1096, 1102 fn. 11 (2006).
[2] *Lewis Cty.*, 157 Wn.2d at 502, 139 P.3d at 1103.
[3] *Clark County v. Growth Management Hearings Board*, Wash. Ct. App. No. 50847-8-II Slip Op. pp. 34 – 36, 448 P.3d 81, 94 (Aug. 20, 2019) published in part, this part of the opinion was unpublished; Administrative Record for the original appeal to the Court of Appeals in Case No. 50847-8-II (AR) 010508 – 510, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, WWRGMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), at 52 – 54 of 101, hereinafter FDO.
[4] Clark County Citizens United, Inc.'s (CCCU) Petition For Review p. 2.

However, the Board's and Court of Appeals' decisions do raise two issues of substantial public interest that should be determined by the Supreme Court. The first issue is whether annexations moot out ongoing Growth Management Hearings Board (Board) appeals. The second is whether the Board must review comprehensive plan and development regulation amendments adopted to correct violations of the Growth Management Act (GMA) to determine if the amendments comply with the GMA. These new issues are being raised in this answer by the Friends of Clark County and Futurewise, respondents and cross petitioners below. This answer refers to the organizations collectively as the FOCC. These issues will be identified below and discussed in the argument.

II. NEW ISSUES RAISED IN THIS ANSWER

Issue 1. Whether annexations immunize comprehensive plan amendments from Board appeals or moot out ongoing Board appeals?

Issue 2. Whether the Board must review comprehensive plan and development regulation amendments adopted to correct violations of the GMA to determine if the amendments comply with the GMA?

III. STATEMENT OF THE CASE

This case concerns appeals of part of the 2016 periodic update of the C*lark County Comprehensive Plan 2015-2035* adopted by Amended Ordinance No. 2016-06-12. As part of that update, a County report

concluded that the existing urban growth areas (UGAs) had a capacity for 136,820 more people and a 20-year projected increase of 128,596 people.[5] The report also concluded the existing UGAs had a capacity for 101,153 jobs and an updated target of 101,153 jobs.[6] The La Center and Ridgefield UGAs were expanded onto agricultural lands of long-term commercial significance.[7] The Board's FDO concluded the La Center and Ridgefield UGA expansions violated the Growth Management Act.[8]

The Board's FDO found that Clark County's adoption of the Agriculture 10 (AG-10) and Forest 20 (FR-20) zones violated the GMA because the provisions would not assure the conservation of agricultural and forest lands of long-term commercial significance.[9] This is Issue 11.[10] The Board also found that the County's adoption of a new Future Land Use Map (FLUM) as part of the comprehensive plan violated the GMA because it did not provide for a compliant variety of rural densities.[11] This is Issue 13.[12]

In partial response to the determinations of noncompliance in the FDO, Clark County adopted Ordinance No. 2017-07-04 amending the

[5] AR 002358; AR 007472; AR 007477.
[6] AR 002358; AR 007141; AR 002358.
[7] AR 010497 – 98, FDO, at 41—42 of 101.
[8] AR 010478 – 79 & AR 010493 – 99, FDO, at 22 – 23 & 37—43 of 101.
[9] AR 010499 – 508, FDO, at 43 – 53 of 101.
[10] AR 010499, FDO, at 43 of 101.
[11] AR 010510 – 14, FDO, at 54 – 58 of 101.
[12] AR 010510, FDO, at 54 of 101

comprehensive plan and zoning regulations.[13] RCW 36.70A.330 provides that the "board shall … issue a finding of compliance or noncompliance with the requirements of this chapter …" for the amendments adopted in response to Issues 11 and 13. The Board did not do so, concluding instead that Issues 11 and 13 were moot.[14]

The Court of Appeals concluded that the La Center's and Ridgefield's annexation of the UGA expansion mooted the UGA appeals.[15] The court also concluded that the Board correctly concluded compliance actions in Ordinance No. 2017-07-04 mooted the appeals of those issues.[16] FOCC filed a motion for reconsideration of this last legal conclusion which the court denied.[17]

IV. ARGUMENT

A. The *Lewis County* decision and the Clark County Comprehensive Plan resolve the issue raised by CCCU.

Rule of Appellate Procedure (RAP) 13.4(b)(4) provides that one of the reasons that a petition for review will be accepted by the Supreme Court is

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[13] Administrative Record for the Order on Compliance appealed in Court of Appeals Case No. 51745-1-II (CAR) 000408 – 14, Clark County Ordinance No. 2017-07-04 pp. 1 – 7.
[14] CAR 001574 – 75, Order on Compliance pp. 11 – 12 of 29.
[15] *Clark County v. Growth Management Hearings Board*, Wash. Ct. App. No. 50847-8-II Slip Op. pp. 22 – 24, 448 P.3d 81, 93 – 94 (Aug. 20, 2019). This part of the decision is published.
[16] *Id.* at 49 – 51, 448 P.3d at 94 from the unpublished part of the opinion.
[17] *Clark County v. Growth Management Hearings Board*, Wash. Ct. App. No. 50847-8-II Order Denying Motion For Reconsideration p. 1 (Sept. 25, 2019) in Appendix A of this answer.

"[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." CCCU argues that its issue meets this criterion. Because the legal question raised by CCCU's issue was decided by the *Lewis County* decision and the C*lark County Comprehensive Plan 2015-2035* disclosed how the County designated forest and agricultural lands of long-term commercial significance, CCCU does not raise an issue of substantial public interest that should be determined by the Supreme Court.

In the *Lewis County* decision, this Court concluded that

> based on the plain language of the GMA and its interpretation in *Benaroya I*, we hold that agricultural land is land: (a) not already characterized by urban growth (b) that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, and (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses. We further hold that counties may consider the development-related factors enumerated in WAC 365–190–050(1) in determining which lands have long-term commercial significance.[18]

This Court's *Lewis County* decision rejected the "primacy of soil characteristics" in designating agricultural lands of long-term commercial significance.[19] The *Lewis County* decision also found fault with Lewis

[18] *Lewis Cty.*, 157 Wn.2d at 502, 139 P.3d at 1103.
[19] *Lewis Cty.*, 157 Wn.2d at 502 fn. 11, 139 P.3d at 1102 fn. 11.

County's failure to designate "Christmas tree farms as agricultural land because they do not depend on a particular soil type …"[20] The supreme court wrote that it was not apparent from the county's briefing why Lewis County would exclude "productive tree farms from designated agricultural lands simply because they don't need the types of prime soil that other farm sectors need."[21] So at least in some circumstances agricultural lands designations can be based on factors other than soils.

The *Lewis County* decision also cited with approval the "approach used by the Court of Appeals in *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998), *review denied*, 137 Wn.2d 1018, 984 P.2d 1033 (1999)."[22] This case addressed the designation of forest lands of long-term commercial significance.[23] So, the *Lewis County* decision resolves the legal questions around the use of soils in designating agricultural and forest land of long-term commercial significance and the other factors that must or may be considered when making these designations.

The *Clark County Comprehensive Plan 2015-2035* documented how Clark County designated forest and agricultural lands of long-term

[20] *Lewis Cty.*, 157 Wn.2d at 504, 139 P.3d at 1104.
[21] *Id.*
[22] *Lewis Cty*., 157 Wn.2d at 501, 139 P.3d at 1102.
[23] *Id.*

commercial significance and discloses the information the County used.[24] This resolves the disclosure part of CCCU's issue.[25]

The data used to designate forest lands addressed the data and other considerations required by the GMA and recommended by the State of Washington Department of Commerce's former minimum guidelines to designate forest lands of long-term commercial significance.[26] This includes a map of the Forest Site Index Classifications, an indicator of the "productive quality of forest land."[27] The site indexes can then be translated into the land grades that the Washington State Department Commerce's minimum guidelines recommend as one factor in designating forest land of long-term commercial significance.[28]

The data used to designate agricultural lands also addressed the data and other considerations required by the GMA and recommended by the State of Washington Department of Commerce's former minimum guidelines to designate forest and agricultural lands of long-term

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[24] AR 000416 – 18, AR 000646 – 48, *Clark County Comprehensive Plan 2015-2035* pp. 84 – 86, Figures 21, 22A, and 22B. The prior comprehensive plan, the *Clark County Comprehensive Plan 2004-2024*, included a similar description. AR 001415 – 17.
[25] Clark County Citizens United, Inc.'s (CCCU) Petition For Review p. 2.
[26] AR 000416 – 17, AR 000646, *Clark County Comprehensive Plan 2015-2035* pp. 84 – 85, Figure 21; RCW 36.70A.030(10), (13); RCW 36.70A.170(1)(b); WAC 365-190-060 (4/15/91).
[27] AR 000646 *Clark County Comprehensive Plan 2015-2035* Figure 21. WAC 458-40-530(2).
[28] WAC 458-40-530(2); WAC 365-190-060(2)(c) (2/19/2010).

commercial significance.[29] This included maps showing both the U.S. Department of Agriculture's Land Capability Classification System soil ratings for farmland and the U.S. Department of Agriculture's Prime Farmland soils.[30] As the Department of Commerce's minimum guidelines recommend, the County used both sets of soils data and other factors to designate agricultural lands of long-term commercial significance.[31]

On page 5 of its Petition For Review, CCCU includes a quote purported to be from page 35 of the court of appeals decision stating that the county does not have to disclose the factors it considered in designating natural resource lands. That quote, which is repeated several times in the petition, is not from the court of appeals decision.[32] And as was documented above, the County comprehensive plan disclosed the factors the County used in designating natural resource lands.[33]

B. Whether annexations immunize comprehensive plan amendments from Board appeals or moot out ongoing Board appeals is an issue of substantial public interest that should be decided by the State Supreme Court. (FOCC Issue 1)

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[29] AR 000417 – 18, AR 000647 – 48, *Clark County Comprehensive Plan 2015-2035* pp. 85 – 86, Figures 22A and 22B; *Lewis Cty.*, 157 Wn.2d at 498 – 502, 139 P.3d at 1101 – 03.
[30] AR 000647 – 48, *Clark County Comprehensive Plan 2015-2035* Figures 22A and 22B.
[31] WAC 365-190-050(3)(b)(ii) and (c)(i)(2/19/2010); AR 000417 – 18, AR 000647 – 48, *Clark County Comprehensive Plan 2015-2035* pp. 85 – 86, Figures 22A and 22B.
[32] *Clark County v. Growth Management Hearings Board*, Wash. Ct. App. No. 50847-8-II Slip Op. p. 35, 448 P.3d 81, 94 (Aug. 20, 2019).
[33] AR 000416 – 18, *Clark County Comprehensive Plan 2015-2035* pp. 84 – 86.

RAP 13.4(b)(4) provides that one of the reasons that a petition for review will be accepted by the Supreme Court is "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Whether annexations immunize comprehensive plan amendments from Board appeals or moot out ongoing Board appeals is an issue of substantial public interest that should be decided by the State Supreme Court.

Appeals by citizens and citizen groups are the mechanism that the Governor and Legislature adopted to enforce the GMA.[34] Unlike some laws, such as Washington's Shoreline Management Act, there is no state agency that reviews and approves or disapproves GMA comprehensive plans and most development regulations.

In the *King County v. Central Puget Sound Growth Management Hearings Board* decision this Court had to decide whether an urban growth area (UGA) "designation was consequently immune from citizen challenge" where a countywide planning policy (CPP) required an area to be included in the UGA and the expanded UGA area was then "incorporated into the County's comprehensive plan."[35] The GMA does

[34] *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 175 – 77, 979 P.2d 374, 380 – 82 (1999).
[35] *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd*., 138 Wn.2d 161, 174, 979 P.2d 374, 380 (1999), *as amended on denial of reconsideration* (Sept. 22, 1999).

not allow public appeals of CPPs.[36] The GMA does allow appeals of UGAs because they must be included in county comprehensive plans and comprehensive plan amendments may be appealed to the Board.[37]

In the *King County* decision this Court reasoned that:

> Under the GMA, counties are required to "provid[e] for early and continuous public participation in the development and amendment of comprehensive land use plans...." RCW 36.70A.140. Any individual, partnership, corporation, or other entity with standing may appeal a provision of a county's plan to ensure that it is in compliance with the requirements of the GMA. RCW 36.70A.280(2)-(3). This appeal process benefits both those who seek to limit development and those who seek to protect their development rights. In contrast, the Board's approach shields from citizen appeal those provisions of a comprehensive plan that are adopted from directive CPPs. This approach creates a conflict between statutory provisions regarding the effect of the CPPs and the GMA's provisions for citizen involvement.
>
> Moreover, RCW 36.70A.110(5) provides that final UGAs shall be adopted "at the time" of comprehensive plan adoption. Applying the Board's interpretation would undermine the schedule for UGA adoption laid out in the GMA by effectively allowing UGAs to be adopted at the time that the CPPs are formulated.
>
> We conclude that a comprehensive plan provision is not immune from challenge merely because the County was required to adopt the provision by its CPPs. Even if a county must follow uncontested CPP directives, once those provisions are adopted into the comprehensive plan they become subject to citizen appeal. RCW 36.70A.280 allows provisions in comprehensive plans to be appealed by

[36] *King Cty*., 138 Wn.2d at 167, 979 P.2d at 377.
[37] RCW 36.70A.110(6); RCW 36.70A.280(1)(a); *Thurston Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38, 46 (2008).

> citizens and corporations. There is no statutory language immunizing provisions of the comprehensive plan from review on the grounds that those provisions are mandated by the CPPs. A UGA designation that blatantly violates GMA requirements should not stand simply because CPPs mandated its adoption. Rather, upon a determination that the provision violates the GMA, it should be stricken from both the comprehensive plan and the CPPs. This approach harmonizes RCW 36.70A.210's mandate that CPPs ensure comprehensive plan consistency, while respecting the appeal provisions of RCW 36.70A.280, .290.[38]

This case raises a similar issue, do city annexations immunize UGA appeals from Board review? The County, cities, and developers argue that the UGA issues are now moot because La Center and Ridgefield have annexed the UGA expansions. Like in the *King County* decision, nothing in the GMA provides that if land is annexed UGA expansions are immunized from appeals or the appeals are moot.[39]

In fact, the GMA indicates that annexations do not immunize or moot out UGA expansion appeals. In this case, the Board made a determination of invalidity for the La Center and Ridgefield agricultural land dedesignations and UGA expansions.[40] The Washington State Supreme Court has explained the effect of a determination of invalidity. "'Upon a finding of invalidity, the underlying provision would be rendered void.'

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[38] *King Cty*., 138 Wn.2d at 176 – 77, 979 P.2d at 380 – 82 footnote omitted.
[39] RCW 36.70A.280; RCW 36.70A.290.
[40] AR 010555, FDO, at 99 of 101.

King County, 138 Wn.2d at 181, 979 P.2d 374."[41] "'[V]oid' … means '[o]f no legal effect[,] null' …."[42]

The State Supreme Court's decision is consistent with the plain language of the GMA. After a Board determination of invalidity, the invalid policies or regulations have no legal effect except for certain limited permit applications.[43] Ending invalidity requires that a prior provision must be revived, new provisions must be "adopted" or "enacted" by "an ordinance or resolution," or the Board must decide to modify or rescind the order finding invalidity.[44] And the Board must determine that the standard in RCW 36.70A.302(1) is met.

Consequently, Clark County's agricultural lands dedesignations and UGA expansions for La Center and Ridgefield are void.[45] The two UGA expansions have no legal effect. It is the same as if Clark County had never adopted them. UGAs can only be included in county comprehensive plans, not city comprehensive plans.[46] So the County must adopt new

[41] *Town of Woodway v. Snohomish Cty.*, 180 Wn.2d 165, 175, 322 P.3d 1219, 1224 (2014).
[42] *Assocs. Hous. Fin. L.L.C. v. Stredwick*, 120 Wn. App. 52, 59, 83 P.3d 1032, 1036 (2004).
[43] RCW 36.70A.302(2), (3).
[44] RCW 36.70A.302(4), (5), (6), (7).
[45] AR 010555, FDO, at 99 of 101.
[46] RCW 36.70A.110(6) "[e]ach county shall include designations of urban growth areas in its comprehensive plan."

UGA designations for the expansions and the UGA designations must be GMA compliant.[47]

This case is also not moot since both the Board and this Court can provide FOCC with effective relief. As the State Supreme Court wrote:

> [A lawsuit] is not moot, however, if a court can still provide effective relief. *Pentagram Corp. v. Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981).
>
> Here, we can still provide effective relief. The judgments for appellants' fines were not erased by their incarceration and nothing in the record indicates that the fines do not remain outstanding. Moreover, while this court can no longer prevent appellants' incarceration, that incarceration probably has collateral consequences of sufficient moment to make its validity a matter of more than academic interest. *Cf. Pennsylvania v. Mimms*, 434 U.S. 106, 108 n. 3, 98 S.Ct. 330, 332 n. 3, 54 L.Ed.2d 331 (1977); *Sibron v. New York*, 392 U.S. 40, 53 – 54, 88 S.Ct. 1889, 1897, 20 L.Ed.2d 917 (1968). This court can therefore supply effective relief by relieving appellants of their liabilities and cleansing their records.[48]

The *Turner* court could not undo the appellants' incarceration, but the court could and did relieve the appellants of the collateral consequences of the incarceration. The court found that the court below lacked jurisdiction and so its order was void and the appellants contempt citations were reversed.[49] Here, FOCC recognizes that the Board does not have the authority to review the validity of La Center's and Ridgefield's annexation

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[47] RCW 36.70A.130(1)(d).
[48] *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658, 659 (1983).
[49] *Turner*, 98 Wn.2d at 739, 658 P.2d at 662.

ordinances, but the Board can still order the County to comply with the GMA. So can this Court. The Board and this Court can provide FOCC with effective relief.

La Center and Ridgefield can assist the County, either by de-annexing the land or designating it as agricultural lands of long-term commercial significance (ALLTCS).[50] City comprehensive plans and development regulations must comply with countywide planning policies (CPPs).[51] CPP 3.0.2 and CPP 4.1.2 provide in relevant part that "[t]he county and each municipality shall cooperate to ensure the preservation and protection of natural resources … within and near the urban area through adequate and compatible policies and regulations."[52] "[N]atural resources" include "farmland."[53] So the cities could comply with the CPPs and FOCC will be given adequate relief, the conservation of the annexed agricultural land. Or if the existing CPPs are not adequate, the County could adopt a new one. Or the County could use its SEPA authority to condition the designation of the new UGAs to require the conservation of the agricultural land.[54]

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[50] RCW 35A.16.080; RCW 35A.16.010; RCW 36.70A.170(1) "each county, and each city, shall designate where appropriate: … (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products …."
[51] *King Cty.*, 138 Wn.2d at 175 – 76, 979 P.2d at 380 *accord* RCW 36.70A.210(1).
[52] AR 000421 & AR 000446.
[53] AR 000416.
[54] *Dep't of Nat. Res. v. Thurston Cty.*, 92 Wn.2d 656, 664, 601 P.2d 494, 498 (1979) "*See* RCW 43.21C.060, a provision of SEPA recognizing the authority of the governmental

This is the second time that Clark County illegally expanded its UGAs onto agricultural lands and cities have annexed those lands.[55] In the 2007 comprehensive plan update it was Camas and Ridgefield.[56] In the 2016 update it was La Center and Ridgefield.[57] Other cities in other counties have also annexed land to avoid review of whether the UGAs complied with the GMA.[58] So this is an issue of substantial public interest.

In the *Thurston County* decision this Court quoted with approval a law review article which wrote that "[o]versized UGAs are perhaps the most egregious affront to the fundamental GMA policy against urban sprawl, and it is this policy that the UGA requirements, more than any other substantive GMA mandate, are intended to further."[59] If annexations immunize UGAs from appeals, these egregious affronts to state law will continue. Again, this shows this is an issue of substantial public interest and importance.

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decision-making body to condition or deny a request for action on the basis of specific adverse environmental impacts."

[55] *Clark Cty. Washington v. W. Washington Growth Mgmt. Hearings Review Bd.*, 161 Wn. App. 204, 245 – 46, 254 P.3d 862, 881 (2011), *vacated in part sub nom. Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 298 P.3d 704 (2013); AR 010477 – 79 & AR 010493 – 99, FDO, at 21—23 & 37 – 43 of 101.

[56] *Clark Cty.*, 161 Wn. App. at 245 – 46, 254 P.3d at 881.

[57] AR 010477 – 79 & AR 010493 – 99, FDO, at 21—23 & 37 – 43 of 101.

[58] *Clark County v. Growth Management Hearings Board*, Wash. Ct. App. No. 50847-8-II Slip Op. pp. 19 – 20, 448 P.3d 81, 448 P.3d 81, 91 – 92 (Aug. 20, 2019).

[59] *Thurston Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 352 fn. 13, 190 P.3d 38, 49 fn. 13 (2008).

As this Court concluded in *King County*, a "UGA designation that blatantly violates GMA requirements should not stand …"[60] This Court should take review of this case to decide the important issue of whether the goals and requirements of the GMA can be undermined by annexing illegal UGA expansions.

C. Whether the Board must review comprehensive plan and development regulation amendments adopted to correct violations of the GMA to determine if the amendments comply with the GMA is an issue of substantial public interest that should be decided by the State Supreme Court. (FOCC Issue 2)

RAP 13.4(b)(4) provides that one of the reasons that a petition for review will be accepted by the Supreme Court is "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Whether the Board must review comprehensive plan and development regulation amendments adopted to correction violations of the GMA to determine if the amendments comply with the GMA is an issue of substantial public interest that should be decided by the State Supreme Court.

RCW 36.70A.330 provides in relevant part that after the Board has made a finding of noncompliance and the time set by the Board for complying with the requirements of the GMA has expired, the "board

[60] *King Cty*., 138 Wn.2d at 177, 979 P.2d at 382.

shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter and with any compliance schedule established by the board in its final order." The Board "'shall find compliance' unless it determines that" the compliance actions are "'clearly erroneous in view of the entire record before the board and in light of the goals and requirements' of the GMA."[61]

The Board found that Clark County's adoption of the Agriculture 10 (AG-10) and Forest 20 (FR-20) zones violated the GMA because the provisions would not assure the conservation of agricultural and forest lands of long-term commercial significance.[62] The Board also found that the County's adoption of a new Future Land Use Map (FLUM) as part of the comprehensive plan violated the GMA because it did not provide for a compliant variety of rural densities.[63]

In partial response to the determinations of noncompliance in the FDO, Clark County adopted Ordinance No. 2017-07-04 amending the comprehensive plan and zoning regulations.[64] This ordinance amended the comprehensive plan and zoning regulations to change all of the AG-10 zones to AG-20 zones.[65] Ordinance No. 2017-07-04 amended the

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[61] *Lewis Cty.*, 157 Wn.2d at 497, 139 P.3d at 1100 citing RCW 36.70A.320(3).
[62] AR 010499 – 508, FDO, at 43 – 53 of 101.
[63] AR 010510 – 14, FDO, at 54 – 58 of 101.
[64] CAR 000408 – 14, Clark County Ordinance No. 2017-07-04 pp. 1 – 7.
[65] CAR 000409 – 514.

comprehensive plan and zoning regulations to change all of the FR-20 zones to FR-40 zones.[66] Ordinance No. 2017-07-04 amended the zoning map to replace the AG-10 zones with AG-20 zones and the FR-20 zones with FR-40 zones.[67] Ordinance No. 2017-07-04 also amended the comprehensive plan to adopt new Rural 5, Rural 10, and Rural 20 comprehensive plan designations and amended the FLUM to map these designations based on the zoning of the parcels.[68]

In addition to the adoption of the AG-10 zone, Amended Ordinance No. 2016-06-12, which adopted the 2016 comprehensive plan and development regulations, rezoned 291 parcels adjacent to the new AG-10 zones from Rural 20 (R-20) to Rural 10 (R-10).[69] The compliance ordinance, Clark County Ordinance No. 2017-07-04, did not rezone these properties back to R-20.[70] Ordinance No. 2017-07-04 then based the comprehensive plan designations and the FLUM on the existing zoning, including the properties that Amended Ordinance No. 2016-06-12 had rezoned from R-20 to R-10.[71] Because the R-20 to R-10 rezones adopted

[66] CAR 000409 – 514.
[67] CAR 000409.
[68] CAR 000409 – 10.
[69] AR 009360, Clark County Comprehensive Plan 2016 Update Summary – Issue Paper 8.1 p. 2; CAR 000720, FSEIS p. 6-11; CAR 000278 Clark County Amended Ordinance No. 2016-06-12 p. 7; CAR 000759 County/UGA Zoning Clark County, Washington adopted by Amended Ordinance No. 2016-06-12.
[70] CAR 000409 – 14, Clark County Ordinance No. 2017-07-04 pp. 2 – 7.
[71] CAR 000409, Clark County Ordinance No. 2017-07-04 p. 2; CAR 000278 Clark County Amended Ordinance No. 2016-06-12 p. 7.

by Amended Ordinance No. 2016-06-12 were carried forward by Ordinance No. 2017-07-04, the variety of rural densities in the current comprehensive plan and the current FLUM are different from and have higher rural densities than any variety of rural densities that had previously been upheld as GMA compliant before Amended Ordinance No. 2016-06-12 was adopted on June 28, 2016.[72]

RCW 36.70A.330 provides that the "board shall … issue a finding of compliance or noncompliance with the requirements of this chapter …" for the amendments adopted in response to the FDO. The Board did not do so, concluding instead that the issues were moot.[73]

This issue is not moot since both the Board and the Courts can provide FOCC with effective relief.[74] The Board and Court can determine whether the amendments comply with the GMA.

The question of whether the Board was required to find the compliance amendments complied with the GMA is an issue of substantial public interest that should be decided by the State Supreme Court.

V. CONCLUSION

In sum, the Supreme Court should not review the CCCU Issue as it has been resolved by the *Lewis County* decision and the comprehensive plan.

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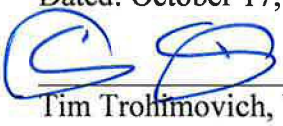
[72] CAR 000283, Clark County Amended Ordinance No. 2016-06-12 p. 12.
[73] CAR 001574 – 75, Order on Compliance pp. 11 – 12 of 29.
[74] *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658, 659 (1983).

However, the Court should take review of the two new issues raised in this answer.

Dated: October 17, 2019, and respectfully submitted,



Tim Trohimovich, WSBA No. 22367

CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 17th day of October 2019, the undersigned caused the electronic original and true and correct electronic copies of the following document to be served on the persons listed below in the manner shown: The Friends of Clark County's and Futurewise's Answer, Raising New Issues, to the CCCU Petition For Review attached to this certificate in Case No. 97719-4.

State of Washington Supreme Court PO Box 40929 Olympia, WA 98504-0929 Electronic Original	Ms. Christine Cook Mr. Curtis Burns Ms. Thelma Kremer Clark County Prosecutor's Office - Civil Division PO Box 5000 Vancouver WA 98666-5000 Tel: (360) 397-2478 Attorneys for Petitioner Clark County
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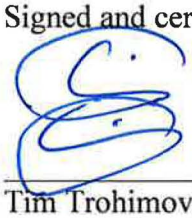
Signed and certified on this 17th day of October 2019,



Tim Trohimovich, WSBA No. 22367
Attorney for Futurewise and the Friends of Clark County

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CLARK COUNTY,

Petitioner/Cross Respondent,

FRIENDS OF CLARK COUNTY; FUTUREWISE,

Respondents/Cross Petitioners,

and

CITY OF RIDGEFIELD, et. al,
and
CLARK COUNTY CITIZENS UNITED, INC.,

Petitioners,

v.

GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

No. 50847-8-II

(Consolidated)
51745-1-II

Filed
Washington State
Court of Appeals
Division Two

September 25, 2019

ORDER DENYING
MOTION FOR RECONSIDERATION

Respondents/Cross Petitioners, Friends of Clark County and Futurewise, filed a motion for reconsideration of the opinion filed on August 20, 2019 in the above entitled matter. After consideration the Court denies respondents/cross petitioners' motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Worswick, Glasgow

FOR THE COURT:

Maxa, C.J.

CHIEF JUDGE

FUTUREWISE

October 17, 2019 - 3:06 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97719-4
Appellate Court Case Title:	Clark County Citizens United, Inc. v. Growth Management Hearings Board
Superior Court Case Number:	17-2-00929-0

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Comments:

The earlier version omitted Appendix A. Please use this version which includes Appendix A.

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