Case No. 101542-9

SUPREME COURT

OF THE STATE OF WASHINGTON

FUTUREWISE,

Respondent,

v.

SPOKANE COUNTY,

Petitioner,

and

GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

# MOTION FOR DISCRETIONARY REVIEW



Jessica A. Pilgrim, WSBA #46562
1115 W. Broadway Avenue, 2nd Floor
Spokane, Washington 99260
509-477-5764
jpilgrim@spokanecounty.org
Attorney for Petitioner Spokane County

TABLE OF CONTENTS

## CASES



## STATUTES

## REGULATIONS



## LEGISLATIVE ACT



## OTHER AUTHORITIES

## A. IDENTITY OF PETITIONER

Petitioner Spokane County ("County") asks this court to accept review of the parts of the decision designated in Part B of this motion.

## B. DECISION

Petitioner Spokane County seeks review of the September 22, 2022, Court of Appeals, Division III opinion, published in part on the relevant issues. More specifically, the County seeks review of the Court's holding regarding the definition and scope of the term "Capital Facilities" in RCW 36.70A.070(3) addressed on pages 4–9 of the opinion in *Futurewise v. Spokane County and Growth Management Hearings Board*, 38657-1-III. A copy of this opinion appears in **Appendix A**. The County also seeks review of the November 15, 2022, denial of the County's motion for reconsideration of the same. A copy is attached as **Appendix B**.

## C. ISSUES PRESENTED FOR REVIEW

1. Whether the "Capital Facilities" mandated to be included in a CFP under RCW 36.70A.070(3) include at a minimum, as Division III held, the "public facilities" listed under RCW 36.70A.030(20) as well as fixed physical facilities that have been built constructed, or installed to perform a service, including but not limited to, those services listed under the definition of "public services" in RCW 36.70A.030(21), countywide, and without limitation on their necessity for development; or whether, instead, Capital Facilities are only those that meet the following test: (1) physical public facilities, fixed in location; (2) deemed by the jurisdiction as "necessary to support development," and (3) the facility, along with its location, are directly responsible for the delivery of, and meeting, the established level of service, such that the adequacy of the facility and its location necessarily satisfies the adequacy of the service delivered/provided.

2. Whether Division III's ruling that "nothing in the GMA empowers local jurisdictions to exclude capital facilities from the capital facility plan element because the locality deems the facility unnecessary for development" is in error, contrary to the GMA, and abrogates WAC 365-196-840(2); WAC 365-196-415(5) and WAC 365-196-425(4)(c); WAC 365-196-440(2)(g)(iii) without due consideration and deference.

## D. STATEMENT OF THE CASE

This case concerns the scope of the facilities mandated by the Growth Management Act that must be included in the CFP (CFP) under RCW 36.70A.070(3).

Spokane County requests discretionary review of the Appellate Court's holding with respect to the definition and scope of the term "Capital Facilities" as used in RCW 36.70A.070(3), including the Court's holding that the Growth Management Act

("GMA") does not empower Planning Municipalities to exclude capital facilities from the capital facility plan element where such facilities are not "necessary for development." The Court's ruling, when read as a whole and applied, is overbroad, inconsistent with the Growth Management Act, abrogates attendant Washington Administrative Code guidance without due deference and consideration.

Spokane County Resolution 20-0129 adopted the periodic, eight-year update to the Spokane County Comprehensive Plan, including a Capital Facility Plan, required under RCW 36.70A.130. CR 000019, Resolution 20-0129 p. 13. Futurewise challenged the CFP before the Growth Management Hearings Board (GMHB). The GMHB denied the appeal and upheld Spokane County's CFP. CR 001993-002014, *Futurewise v. Spokane County*, EWRGMHB Case No. 20-1-0007, Final Decision and Order (May 12, 2021) (hereinafter "FDO"). Futurewise directly appealed to the Court of Appeals pursuant RCW 34.05.518(1), bringing 11 challenges. CP 45–48; 55–56.

Relevant to the immediate matters are common issues that arose throughout the briefing, but were especially prevalent in issues 1, 2, and 3. Namely, Futurewise argued that Capital Facilities Plans under RCW 36.70A.070(3) must plan for not only "public facilities" such as schools, but also "public services" such as public transit—*i.e.* public bus services, including bus routes and vehicles. *See* Futurewise Petitioner's brief p. 16, 23, 26; *See also* CP 001767, 001771, 1872, FDO at CP 001998.[1] And additionally, Futurewise argued that the County's CFP only addressed the urban growth areas when it was instead required to address facilities countywide, including rural areas. Petitioner Futurewise's Appellate Brief at 18–27. In particular, Futurewise argued that the County failed to plan for schools, public transit, fire, emergency services,[2] and parks in the rural areas.[3]

[1] Futurewise made similar arguments regarding the services of fire protection, and emergency services elsewhere in its brief. Futurewise Petitioner's brief pp. 39, 43.
[2] Futurewise Petitioner's Brief p. 26.
[3] Futurewise Petitioner's Brief p. 26.

The County conceded that its CFP must plan countywide,[4] but argued it was not required to plan for "public services" in the Capital Facilities Element of its Comprehensive Plan because "services" are not "capital facilities" as contemplated by RCW 36.70A.070(3). County's Response Brief p. 9–22. Spokane County also argued that only those Capital Facilities identified by the County as "necessary for development" are mandated to be included in the CFP. County Response Brief p. 22. In its initial briefing, Futurewise appeared to acknowledge the "necessary for development" requirement of the GMA, stating: "The FDO correctly concluded that to 'comply with RCW 36.70A.070(3), the County must establish which public facilities and services are 'necessary to support development'. . ." Futurewise Petitioner's Brief p. 28.

On May 12, 2022, after initial briefing had been submitted, but before oral argument, the County, prompted by the passage of

[4] Spokane County Response Brief p. 48.

E.S.S.B. 5593, 67th Leg. , Reg. Sess. § (Wash.2022) (codified as amended at RCW 36.70A.130), moved to provide supplemental briefing which was granted by the Court the same day. In its supplemental briefing submitted on May 31, 2022, the County provided further support for the scope and limitations on which "capital facilities" were mandated to be included in its CFP under RCW 36.70A.070(3). The County proposed a three-pronged test for determining which capital facilities must be included in a CFP: they must be public facilities: (1) "Necessary to support development," (2) a physical facility, fixed in location; and (3) the facility, along with its location, are directly responsible for the delivery of, and meeting, the established level of service, such that the adequacy of the facility and its location necessarily satisfies the adequacy of the service delivered/provided. Spokane County's Supplemental Brief, at 5–6. The County's reasoning for such a multi-part test, as opposed to merely assigning a dictionary definition to "capital facilities," was that such a test was necessary to harmonize all provisions of the

GMA without rendering any superfluous. *Id*. at 7. The matter was set for oral argument and heard on June 7, 2022.

Division III's decision rendered on September 22, 2022, accepted Parties' concession that the CFP element must address facilities countywide. *Futurewise v. Spokane County*, ___ Wn. App. ___, 517 P.3d at 523; *see also* Slip. Op. at 24. The Court also agreed, in part, with Spokane County that the "Capital Facilities" must be a physical facility, fixed in location, that deliver a public service, but did not agree that the planning jurisdiction had the discretion to identify and address in its CFP only those facilities it deemed "necessary to support development." *Futurewise,* 517 P.3d at 524 (2022). The Court also did not limit "capital facilities" to those facilities listed in the "public facilities" and "public services" definitional section of RCW 36.70A.030. Instead, after reviewing the dictionary definitions of "capital" and "facility" for guidance, the Court held that based on those definitions:

> It follows that an asset or resource built, constructed, installed, or established to perform a particular function falls within the scope of a capital facility, as contemplated by RCW 36.70A.070(3). This would naturally include the narrower list of "public facilities" contained in RCW 36.70A.030(2), but would also extend to other facilities built or installed to perform some sort of service identifiable under the GMA, such as the "public services" in RCW 36.70A.030(21).

*Futurewise v. Spokane Cnty*., 517 P.3d at 523–524. The Court further summarized its definition of "capital facility" as:

> [A] "capital facility" as contemplated by RCW 36.70A.070(3) is a fixed, physical facility that has been built, constructed, or installed to perform a service relevant to the considerations at issue in the GMA, such as the "public services" listed in RCW 36.70A.030(21). Capital facilities include the "public facilities" listed in RCW 36.70A.030(20), but are not necessarily limited to facilities falling under the "public facilities" definition.

*Futurewise v. Spokane Cnty*., 517 P.3d at 524.

Pursuant to RAP 12.4, on October 5, 2022, the County moved for reconsideration of the Court's decision regarding the scope and definition "capital facilities." In its motion, the County argued the Court had failed to take into consideration the GMA

construed as a whole, inadvertently abrogated large parts of WAC 365-196, and also misapprehended that the ruling, when read as a whole and applied potentially prevents the distinction between planning in rural areas versus urban areas and requires jurisdictions to plan for all of those "capital facilities" defined under RCW 36.70A.030(20) and (21) countywide, without the discretion to exclude, or not plan for certain facilities in certain circumstances. *See generally* Spokane County's Brief on Motion for Reconsideration. Indeed, the County argued that a strict construction of the Court's holding requires jurisdictions to plan for some urban services contained within the definitional sections of RCW 36.70A.030(20) or (21) in rural areas—which is prohibited. *Id*. Upon the Court's Order, Futurewise filed a Response to the Motion for Reconsideration on October 27, 2022. On November 15, 2022, the Court summarily denied the County's Motion for Reconsideration.

Spokane County now timely brings this Motion for Discretionary Review pursuant to RAP 13.3(a) and 13.4.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Pursuant to Rule of Appellate Procedure (RAP) 13.4(b) the present case "involves an issue of substantial public interest that should be determined by the Supreme Court for the reasons outlined below.

### 1. The provision at issue affects at least 18 counties and their incorporated cities; clarity and guidance is needed.

RCW 36.70A.130 mandates that certain counties and their incorporated cities plan in accordance, and comply, with the Growth Management Act. Noncompliance with the GMA results in sanctions. *See, e.g.*, RCW 36.70A.330(3)(b) (GMHB can recommend the governor impose sanctions for continuing noncompliance); RCW 36.70A.340 (noncompliance and sanctions); RCW 36.70A.345 (sanctions); RCW 70A.135.070(2), WAC 242-03-960, WAC 173-98-710 (ineligibility for loans for water pollution control facilities for

GMA noncompliance); RCW 43.155.070 (ineligibility for certain funding passed through the public works board for GMA noncompliance).

The GMA mandates planning jurisdictions adopt a Comprehensive Plan. RCW 36.70A.040, RCW 36.70A.045, RCW 36.70A.130. The Comprehensive Plan, in turn, is mandated to include specific "elements." RCW 36.70A.070. Among these elements is the Capital Facilities Plan. RCW 36.70A.070. The CFP must also include specific elements. RCW 36.70A.070(3). Although RCW 36.70A.070(3) uses the term "capital facilities" five times in reference to what must be planned for, the Growth Management Act does not actually define "Capital Facilities." *See* RCW 36.70A.030; RCW 36.70A.070(3). Without a definition for "Capital Facilities," jurisdictions are left to guess what is *mandated* to be included in their CFP—the omission of which would result in noncompliance with the GMA, and what is *permissive*—the omission of which would *not* result in GMA noncompliance. *See*

WAC 365-196-415(2)(b)(ii)(C). WAC 365-196-415(2)(a)(ii) attempts to give guidance on this matter and suggests some recommendations for what *should* be included but recognizes that planning jurisdictions have the ultimate discretion to determine which Capital Facilities are "necessary for development." Indeed, the WAC guidance indicates it is only those facilities "necessary for development" that are *mandated* to be included in the CFP. WAC 365-196-415(2)(b)(ii)(B) and (C).

Further confusion exists because, while the GMA mandates jurisdictions to plan for "adequate *public facilities and services*," *See, e.g.*, RCW 36.70A.020(1), (12), RCW 36.70A.110(3) (emphasis added), the GMA also recognizes that such planning, where not specifically mandated and outlined by the Act, is within the discretion of the planning jurisdiction. *See* RCW 36.70A.3201. In other words, unless an express provision of the GMA *mandates* that the County plan for a certain thing in a certain way, the planning jurisdiction is free to plan however it wishes, so long as it doesn't offend the GMA. The GMA goal

requiring adequate *services* be provided under RCW 36.70A.020(1) and (12) without an express mandate for *how* to accomplish such a task, has led to jurisdictions' use of the CFP to plan for public services that often do not directly rely on the adequacy of capital *facilities* to deliver or meet an established level of service. This in turn has led to confusing and conflicting GMHB rulings.

Indeed, the scant GMHB administrative precedent on the subject reflects this struggle. For example, in *McVittie v. Snohomish County*, CPSGMHB Case No. 01-3-0002, pg. 15 (FDO, July 25, 2001),[5] the GMHB acknowledged that RCW 36.70A.020(12) discusses "public facilities and services," which are not defined together in the GMA, but rather separately, and then concluded that the CFP must include an LOS for "all facilities that meet the definition of "public facilities under RCW 36.70A.030[(20)]." However, in *Wilma v. Stevens County* Decision, No. 06-1-0009c, 2007 WL 1153336, at 15, the GMHB

[5] Included in Appendix A to Spokane County's Reply Brief, below.

expanded *McVittie* without explanation and held that "public services" as defined must also be included in the CFP.

This recurring issue requires clarification and guidance.

**2. The Appellate Court's current published opinion is overbroad, conflicts with certain tenants of the GMA, and abrogated several WACs without due deference or consideration.**

Division III did not analyze the GMA guidance provided in the WACs. Instead, the Court reviewed the Dictionary, RCW 36.70A.070(3), and the definitions located in RCW 36.70A.030(20) and (21) in isolation—without harmonizing the whole of the GMA, including the Planning Goals under RCW 36.70A.020(1) and (12)—and without due consideration of the GMA guidance in the attendant WACs. Because of this, the Court's holding is overbroad and abrogates several existing WACs without due consideration.

### a. The Court's holding is overbroad.

"It should be noted that from the beginning the GMA was 'riddle with politically necessary omissions, internal inconsistencies, and vague language.'" *Thurston County v. WWGMHB*, 164 Wn.2d 329, 342, 190 P.3d 38 (2008) (quoting *Quadrant Corp. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 232, 110 P.3d 1132 (2005) (quoting Richard L. Settle, Revisiting the Growth Management Act: *Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U.L.REV. 5, 8 (1999)). Because the "GMA was spawned by controversy, not consensus" it is not to be liberally construed. *Woods v. Kittitas County*, 162 Wn.2d 597, 612 n. 8, 174 P.3d 25 (2007) (quoting Settle, *supra*, at 34). A tribunal's role is to interpret the statute as enacted by the legislature, not to rewrite the GMA. *Woods*, 162 Wn.2d at 614. "There is no exclusive method for accomplishing the requirements of the [GMA]." WAC 365-196-020(1). "Counties and cities can achieve compliance with the

goals and requirements of the act by adopting other approaches [aside from those recommended by the WAC]." WAC 365-196-030(2).

"The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature." *Quadrant Corp.*, 154 Wn.2d at 238–39 (quoting *King Cnty. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000)). To discern legislative intent, "the court begins with the statute's plain language and ordinary meaning," but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole." *Id*. (quoting *King Cnty.*, 142 Wn.2d at 555, 560).

When Division III determined that the list of examples of "public facilities" and facilities that provide "public services" were a minimum list of mandates that must be addressed in the CFP without acknowledging that Counties could determine

which of those facilities were "necessary for development," it failed to consider all provisions of the GMA in relation to one another and harmonize all rather than rendering any superfluous. In so doing, the Court misapprehended that its decision was overbroad and failed to give jurisdictions the local discretion afforded to them in the GMA that are necessary to effectively plan.

The Court's holding, when read as a whole, requires that counties' CFPs address a set list of facilities that deliver services countywide, without any distinction between whether those facilities are appropriate or permitted in rural versus urban areas, or necessary for development versus not, thereby obligating Counties plan for a set list of facilities without any link to the goals in the GMA and the purpose behind the CFP.

Taken as a whole, the Court held:

1. The CFP must plan for "capital facilities" *countywide*;[6] and
2. The "capital facilities" (above) that must be planned for countywide under the CFP element in RCW 36.70A.070(3) include *at a minimum*: domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools,[7] as well as facilities built or installed to perform the services of fire protection and suppression, law enforcement, public health, education, recreation, environmental protection, and other governmental services;[8] and

---

[6] "The parties agree [the County's comprehensive Plan] failed to. . . include unincorporated rural areas. . ." *Futurewise*, 517 P.3d at 523. "Futurewise and Spokane County agree that. . . the [GMHB] failed to recognize that the capital facilities plan element must be performed county wide. . . We accept these concessions." *Futurewise*, Slip. Op. at 24 (unpublished portion).

[7] "[I]t appears the legislature intended the term "capital facilities" to *include*, *but not necessarily be limited by*, the term "public facilities." . . . The legislature has defined "public facilities" as including "streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools." RCW 36.70A.030(20). . ." Futurewise, 517 P.3d at 524 (emphasis added).

[8] "From the [dictionary definitions of "capital" and "facility"] it necessarily follows that an asset or resource built, constructed,

3. The planning jurisdiction does not have the discretion to exclude, or fail to plan, for any of the facilities listed in number 2 above.[9]

Contrary to the Court's holding, the Capital Facilities Element mandates only one specific facility be included in it: parks and recreation facilities. RCW 36.70A.070(3). Otherwise, the CFP is silent as to which capital facilities must be included in the capital facilities element. *Id*. As the Court found, the GMA does not define "capital facilities" but does define "public facilities," and "public services." RCW 36.70A.030(20) and (21) respectively.

---

installed, or established to perform a particular function falls within the scope of a capital facility, as contemplated by RCW 36.70A.070(3). This would naturally include the narrower list of "public facilities" contained in RCW 36.70A.030(20), but it *would also extend to other facilities* built or installed to perform some sort of service identifiable under the GMA, such the "public services" in RCW 36.70A.030(21)." Futurewise, 517 P.3d at 524 (emphasis added).

[9] "We disagree with the County that RCW 36.70A.020(12) modifies the definition of the term "capital facility." . . . *nothing in the GMA empowers local jurisdictions to exclude capital facilities from the capital facility plan element because the locality deems the facility unnecessary for development*. This is contrary to a strict reading of the statute." *Futurewise*, 517 P.3d at 524 (emphasis added).

The Court halted its analysis here and turned to the dictionary to obtain further clarity on the definition, rather than looking within the GMA, or to the associated WACs. Futurewise, 517 P.3d at 523–24.

However, it's important to recognize that in addition to the definitions considered by the Court, the Growth Management Act *also* includes and recognizes the more specific definitions for "urban services," and "rural services." RCW 36.70A.030(27) and (25). These definitions, and their import, were not considered by the Court. These additional definitions are important because, the facilities and services listed under the definitions of "public facilities," "public services," "urban services," and "rural services" do not perfectly overlap or fit together. This makes sense only if the lists in the four respective provisions are lists of *options from which to choose*, as opposed to *definitional mandates*. It makes further sense if one considers that some listed facilities or services may not be "necessary for development," depending on the unique characteristics of the local jurisdiction, or area—especially so for

rural areas. In other words: just because a facility is on one of the listed definitions, and the CFP must plan countywide, does not mean that *all* of the facilities on the lists, *must* be planned for, and planned countywide. A planning jurisdiction must have the discretion to determine which capital facilities are necessary for development not only in its jurisdiction, but also those that are necessary in urban areas, but perhaps not necessary in rural areas.

For example, a jurisdiction should be able to determine that "public water" is an "urban service" and necessary for development at urban densities, but perhaps for that jurisdiction public water is not necessary for development in rural areas, and can instead be provided privately by way of wells or other means.[10] And as such, the jurisdiction would not, and should not, be required to comply with the mandates of RCW 36.70A.070(3) for inventorying or providing the public service of water in rural areas. Indeed, some listed facilities under RCW 36.70A.030(20)—such

[10] Another example is "fire services" often provided by special districts formed based on public need and petition, and not always provided in all rural areas. *See* RCW 52.02.

as storm and sanitary sewer systems—are expressly *prohibited* from being planned for in the Rural Areas. RCW 36.70A.030(25); RCW 36.70A.110(4).

Indeed, the WAC and GMA acknowledge that there may be some services not provided for at all in the rural areas. *See* RCW 36.70A.030(25) and WAC 365-196-425(4) (stating the Rural Services "*may*" include the rural services listed)[11]; WAC 365-196-425(4)(f) (". . . Counties should provide clear expectations to the public about the *availability of rural public services*. . .")(emphasis added). However, with the current Court holding, Counties are not afforded the discretion *not* to plan for the listed public services in rural areas: the Courts holding read as a mandate to plan for all those facilities in the definition of "public facilities" as well as all those facilities that provide the services in the definition of "public

[11] *Compare* RCW 36.70A.030(25) (asserting that the list of services "*specifically include[e]"* an enumerated list of services) *with* RCW 36.70A.030(27) (which employs the discretionary "*may*" before the list of potential facilities to include).

services," countywide, without discretion or consideration of what is "necessary for development."

Furthermore, the WAC demonstrates the link of Capital Facilities in the CFP and their level of service to the facilities' *necessity* in terms of *growth* and *development*. Specifically, WAC 365-196-425(4)(c) states "[w]hen establishing levels of service *in the capital facilities [] element* each county should establish rural levels of services, for those rural services *necessary for development*, to determine if it is providing adequate public facilities. *Counties are not required to use a single level of service for the entire rural area and may establish varying levels of service for public services in different rural areas.*" This confirms that the planning for facilities is linked to, and dependent upon, the need. The need is linked to whether the facility is needed for *development*.

A County's ability to determine which facilities are necessary for development, especially development in rural areas, makes practical sense when one considers the GMA's focus on

concentrating and providing for urban densities in urban areas; discouraging sprawling residential development and the associated services and costs; and acknowledging the varied uses and densities that exist in rural areas. *See* RCW 36.70A.011; RCW 36.70A.020(1), (2), (12); RCW 36.70A.110; WAC 365-196-010.

**b. The Court's ruling abrogates WAC 365-196-840(2); WAC 365-196-415(5) and WAC 365-196-425(4)(c); WAC 365-196-440(2)(g)(iii) without due consideration or deference.** [12]

Division III did not analyze pertinent WACs before abrogating them with its ruling.

A reviewing Court is required to accord the proper weight to a properly promulgated regulation, "absent a compelling

[12] The County argued in its Supplemental Brief before the Court of Appeals that WAC 365-196-415 and WAC 365-415-840 expressly limited the facilities mandated to be in the comprehensive plan to those "necessary for development." Spokane County Supplemental brief p. 5, n. 2, and p. 8, n. 5; p. 9 n. 6. Futurewise's assertion in their reconsideration response that the County should have argued in earlier briefings that the Court's ruling—that did not yet exist—abrogated the WACs, is perplexing. It was the Court's misapprehension of the abrogation of the WACs that made the matter ripe for reconsideration under RAP 12.4(c).

indication' that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority." *See Silverstreak, Inc. v. Washington Dept. of Labor and Indust.*, 159 Wn.2d 868, 885, 154 P.3d 891 (2007). "When a statue is ambiguous. . . there is the well known rule of statutory interpretation that the construction placed upon a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling upon the courts, should be given great weight in determining legislative intent." *Hama Hama Co. v. Shorelines Hearings Bd*., 85 Wn.2d 441, 448, 536 P.2d 157(1975). Our Courts have acknowledged that such "considerable judicial deference should be accorded" because of "the special expertise of administrative agencies." *Id*. Indeed, the Court has acknowledged that, "[s]uch expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment," and in fact, "[i]t is likewise valid for an administrative agency to 'fill in the gaps' via statutory

construction—as long as the agency does not purport to 'amend' the statute." *Id*.

The Department of Commerce, charged with providing guidance to jurisdictions on carrying out the provisions of the GMA under the authority of RCW 36.70A.190(4)(b), has interpretated the GMA and provided guidance on which capital facilities must be addressed in the CFP in promulgated WACs. In so promulgating, the Department harmonized multiple provisions of the GMA, including its intent and purpose, and Counties' discretion to plan in accordance with local circumstances. RCW 36.70A.3201 (requiring the GMHB to recognize "*the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter and to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter*) (emphasis added); *King Cnty.*, 142 Wn.2d at

561[13]; *Diehl v. Mason Cnty.,* 94 Wn.App. 645, 651, 972 P.2d 543 (1999).[14]

When the Court held that "nothing in the GMA empowers local jurisdictions to exclude capital facilities from the capital facility plan element because the locality deems the facility unnecessary for development," it abrogated the following WACs without giving them due deference or consideration in error:

> WAC 365-196-415(2)(b)(ii)(B): "Counties and cities *should identify those improvements that are necessary for development*."
>
> WAC 365-196-415(2)(a)(ii): "Capital facilities involved *should*[15] include, a minimum, [a list of suggested facilities and services]".

---

[13] Agreeing that, "[l]ocal governments have broad discretion in developing [comprehensive plans] and [development regulations] tailored to local circumstances,'" but that "[l]ocal discretion is bounded . . . by the goals and requirements of the GMA," (citing RCW 36.70.3201) (quoting *Diehl,* 94 Wn.App. at 651).

[14]("Local governments have broad discretion in developing [comprehensive plans] and [development regulations] tailored to local circumstances.") (citing RCW 36.70A.3201)

[15] "'Should' as used in this chapter, indicates the advice of the department, but does not indicate a requirement for compliance with the act." WAC 365-196-210(30)

WAC 365-196-415(2)(b)(ii)(C): "Counties and cities *may* identify *any other improvements* desired to raise level of services above locally adopted minimum standards, to enhance the quality of life in the community or meet other community need *not related to growth* such as administrative offices, courts or jail facilities. Counties and cities are *not* required to set level of service standards *for facilities that are not necessary for development*. Because these facilities are *not necessary for development*, the failure to fund these facilities as planned would not require a reassessment of the land use element if funding falls short as required by RCW 36.70A.070(3)(e)."

WAC 365-196-415(2)(d)(i): "Counties and cities must reassess the land use element and other elements of the comprehensive plan if the probable funding falls short of meeting the need for facilities *that are determined by the county or city to be necessary for development*."

WAC 365-196-415(5)(a)(i), (ii), (iii); (b)(i) and (iii), all specify that the facilities are only those "*necessary for development*."

WAC 365-196-425(4)(c): "When establishing levels of service in the capital facilities and transportation element, each county should establish rural levels of service, for those rural services that are *necessary for development*, to determine if it is providing adequate public facilities."

WAC 365-196-840 asserts that concurrency is required for the transportation element but counties and cities "may adopt a concurrency mechanism for other facilities that are deemed *necessary for development*." (citing WAC 365-196-415(5)).

(emphases added).

## F. CONCLUSION

The County requests that this Court accept review of the Court of Appeals' ruling that nothing in the GMA empowers local jurisdictions to exclude capital facilities from the capital facility plan element because the locality deems the facility unnecessary for development, as well as its implicit holding that the CFP must therefore, at a minimum, address those facilities contained within the list of "public facilities" as defined in RCW 36.70A.030(20) and those facilities that provide the "public services" listed under RCW 36.70A.030(21), countywide. The County requests that this Court adopt the County's original proposed rule set forth in its Supplemental Brief to the Court of Appeals, supported by the reasoning contained therein, which was that Capital Facilities are:

> Public facilities:
>
> (1) "Necessary to support development,"
>
> (2) a physical facility, fixed in location, and

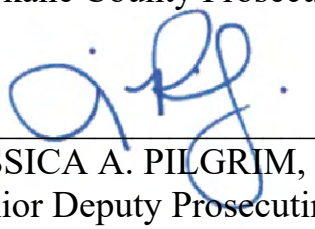
(3) The facility, along with its location, are directly responsible for the delivery of, and meeting, the established level of service, such that the adequacy of the facility and its location necessarily satisfies the adequacy of the service delivered/provided.

**RAP 18.17 Certification**

This document contains 4961 words, excluding the parts of the document exempted from the word count by RAP 18.17

Respectfully submitted this 14th day of December 2022.

LAWRENCE H. HASKELL
Spokane County Prosecuting Attorney

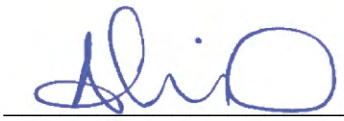


JESSICA A. PILGRIM, WSBA #46562
Senior Deputy Prosecuting Attorney
Attorney for Appellant, Spokane County

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2022, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Portal, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the Washington State Appellate Courts' Portal system. The NEF for the foregoing specifically identifies recipients of electronic notice.

Dated this 14th day of December 2022, in Spokane, Washington.



Ashley E. Musick

# APPENDIX A

**FILED**
**SEPTEMBER 22, 2022**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

| | | |
|---|---|---|
| FUTUREWISE,<br><br>Appellant,<br><br>v.<br><br>SPOKANE COUNTY and GROWTH MANAGEMENT HEARINGS BOARD,<br><br>Respondents. | ) | No. 38657-1-III<br><br><br><br>OPINION PUBLISHED IN PART |

PENNELL, J. — The Growth Management Act (GMA), chapter 36.70A RCW, requires counties of specified populations to produce and regularly update detailed comprehensive land use plans. One of the mandatory components of a comprehensive plan is a capital facilities plan element. The capital facilities element requires an inventory and assessment of public infrastructure with an eye toward development and growth.

In 2020, Spokane County (County) updated its comprehensive plan (Plan or Comprehensive Plan), including the capital facilities plan element. Futurewise challenges the Plan, citing numerous problems with the capital facilities element. The County concedes several of Futurewise's challenges and agrees this matter must be remanded for reassessment of the capital facilities element. Nevertheless, the parties dispute some of the finer points of what is required of a capital facilities element.

We accept the parties' agreement that remand is required and we further provide interpretive guidance on the capital facilities plan element for use on remand.

## BACKGROUND

This case turns largely on statutory interpretation. Our discussion of the facts and procedural background is therefore brief. On June 23, 2020, the Spokane County Board of Commissioners (Commissioners) passed Resolution No. 20-0129, adopting the statutorily required[1] eight-year[2] periodic update to the County's Comprehensive Plan, including an updated capital facilities plan element and associated developmental regulations.

Futurewise filed a petition for review of Resolution No. 20-0129 with the Growth Management Hearings Board (Board), contending the resolution violated various provisions of the GMA. The Board upheld the 2020 Comprehensive Plan over Futurewise's objections.

Futurewise then filed a petition for judicial review of the Board's final decision and order in Thurston County Superior Court. By agreement of the parties, the superior court certified the case under RCW 34.05.518(1)(a) to Division Two of this court for

[1] *See* RCW 36.70A.130(4); former RCW 36.70A.130(5) (2020).

[2] Spokane County's previous comprehensive plan had been adopted in 2007; however, no update to this plan was approved until 2020.

direct review. A Division Three panel considered this appeal with oral argument after receipt of an administrative transfer of the case from Division Two.

## ANALYSIS

*The GMA*

"The legislature enacted the GMA in 1990 and 1991 largely 'in response to public concerns about rapid population growth and increasing development pressures in the state.' " *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd*., 154 Wn.2d 224, 231, 110 P.3d 1132 (2005) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 546, 14 P.3d 133 (2000)). Unlike environmental measures such as the Shoreline Management Act of 1971, chapter 90.58 RCW, and the State Environmental Policy Act, chapter 43.21C RCW, "the GMA was spawned by controversy, not consensus." Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 SEA. U. L. REV. 5, 34 (1999). As a result, Washington courts have held the statute is "not to be liberally construed." *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 342, 190 P.3d 38 (2008). Strict (as opposed to liberal) construction means we will not rewrite the GMA even if the plain meaning of the statute might appear problematic. *Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007).

A major feature of the GMA is the requirement that counties with specified populations adopt comprehensive growth management plans. Former RCW 36.70A.040 (2014). "The comprehensive plan is the central nervous system of the GMA." Settle, *supra*, at 26. A jurisdiction's comprehensive plan "must contain data and detailed policies to guide the expansion and extension of public facilities and the use and development of land, as prescribed by the [GMA]." *Id*.

The Growth Management Hearings Board is empowered to adjudicate disputes over GMA compliance and "invalidate noncompliant comprehensive plans." *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d at 340. Judicial review of board actions is governed by the Administrative Procedures Act, chapter 34.05 RCW. *Id*. at 341. The Board's interpretation of the GMA is accorded substantial weight, but we nevertheless review issues of law de novo. *Id*.

*Capital facilities*

One of the mandatory components of any comprehensive plan under the GMA is the capital facilities plan element, which must consist 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.

RCW 36.70A.070(3).

The parties agree Spokane County's 2020 Comprehensive Plan failed to satisfy the required components of the capital facilities plan element. Specifically, they agree the Plan failed to address noncounty-owned public facilities such as schools and failed to include unincorporated rural areas. The parties further agree remand is required to address these deficiencies. However, the parties disagree as to some of the details regarding the capital facilities plan element. We address the areas of disagreement in turn.

*1. What is the definition of "capital facilities?"*

The parties dispute the foundational issue of what the legislature meant by "capital facilities," as that term is used in RCW 36.70A.070(3). This term is not defined in the GMA. *See* RCW 36.70A.030. Thus, we must engage in statutory interpretation. "Our goal in interpreting a statute is to ascertain and carry out the intent of the Legislature." *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Valley*, 135 Wn.2d 542, 564, 958 P.2d 962 (1998). "We look to the language of the statute, interpreting all provisions in relation to each other, to determine that intent." *Id*. Because the GMA is to be strictly construed, we

do not attempt to interpret the GMA in a manner favoring some sort of policy goal. If our legislature has not provided for something in the GMA, "we will not rewrite the statute." *Id*. at 567.

The Growth Management Hearings Board has recognized that "public facilities" as defined by RCW 36.70A.030(20) qualify as "capital facilities." *See Wilma v. Stevens County*, No. 06-1-0009c, 2007 WL 1153336, at *15 (E. Wash. Growth Mgmt. Hr'gs Bd. Mar. 12, 2007), codified at WAC 365-196-415(1)(a). While we accord substantial weight to the Board's interpretation of the GMA, its legal proclamations are not binding. *Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 176 Wn. App. 555, 565, 309 P.3d 673 (2013). Nevertheless, given the consensus that public facilities are capital facilities and the legislature's choice not to amend the GMA to state otherwise, it appears the legislature has acquiesced in this interpretation. *See Skagit Surveyors*, 135 Wn.2d at 542.

While it appears to be well established that "public facilities" as defined by RCW 36.70A.030(20) qualify as "capital facilities" as set forth in RCW 36.70A.070(3), any conclusion that the two terms are synonymous would require impermissible rewriting of the GMA. A well-established rule of statutory construction holds that when the legislature uses different terminology, it intends different definitions. *Densley v. Dep't of*

*Ret. Sys.,* 162 Wn.2d 210, 219, 173 P.3d 885 (2007). Thus, while we accept that all public facilities qualify as capital facilities, we cannot conclude that the reverse holds true.

Based on the different language used, it appears the legislature intended the term "capital facilities" to include, but not necessarily be limited by, the term "public facilities." We may consult dictionary definitions when a term is left undefined by the legislature. *Newton v. State*, 192 Wn. App. 931, 937, 369 P.3d 511 (2016). Thus, we discern the meaning of the term "capital facilities" by reviewing the definition of "public facilities" along with the dictionary definition applicable to "capital facilities."

The legislature has defined "public facilities" as including "streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools." RCW 36.70A.030(20).

Merriam-Webster defines "capital" as "accumulated assets, resources, sources of strength, or advantages utilized to aid in accomplishing an end or furthering a pursuit." WEBSTER'S THIRD NEW INT'L DICTIONARY 332 (1993). "Facility" is defined as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." *Id*. at 812-13.

From the foregoing definitions it necessarily follows that an asset or resource built, constructed, installed, or established to perform a particular function falls within the scope of a capital facility, as contemplated by RCW 36.70A.070(3). This would naturally include the narrower list of "public facilities" contained in RCW 36.70A.030(20), but it would also extend to other facilities built or installed to perform some sort of service identifiable under the GMA, such the "public services" in RCW 36.70A.030(21).[3]

The language of the capital facilities plan element also indicates the term "capital facilities" refers to fixed, physical assets or resources, not moveable or intangible property such as vehicles or school bus routes. Under RCW 36.70A.070(3)(a), an inventory of capital facilities must show the "locations" of all capital facilities. This requirement makes sense only if one understands the term "capital facility" to refer to a fixed facility that cannot change locations.

According to Spokane County, the definition of "capital facilities" must further be narrowed to include only those facilities "necessary to support development." The authority cited for the County's claim is RCW 36.70A.020(12), which lists the following as one of the GMA's 13 planning goals: "Ensure that those public facilities and services

[3] "Public services" are defined to "include fire protection and suppression, law enforcement, public health, education, recreation, environmental protection, and other governmental services." RCW 36.70A.030(21).

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 disagree with the County that RCW 36.70A.020(12) modifies the definition of the term "capital facility." The definition of a "capital facility" as set forth above contemplates that a facility is one that performs some sort of service. As noted above, it stands to reason that the service contemplated by a capital facility under the GMA must be GMA-related, such as the "public services" set forth in RCW 36.70A.030(21). But nothing in the GMA empowers local jurisdictions to exclude capital facilities from the capital facility plan element because the locality deems the facility unnecessary for development. This is contrary to a strict reading of the statute.

In summary, a "capital facility" as contemplated by RCW 36.70A.070(3) is a fixed, physical facility that has been built, constructed, or installed to perform a service relevant to the considerations at issue in the GMA, such the "public services" listed in RCW 36.70A.030(21). Capital facilities include the "public facilities" listed in RCW 36.70A.030(20), but are not necessarily limited to facilities falling under the "public facilities" definition.

### *2. Are transportation facilities included as capital facilities under RCW 36.70A.070(3)?*

The parties take different positions on whether transportation facilities qualify as capital facilities for purposes of RCW 36.70A.070(3). According to Futurewise, transportation facilities fall within the definition of "capital facilities" and thus must be included as part of the capital facilities plan element. The County disagrees.

Were we to view RCW 36.70A.070(3) in isolation, Futurewise's position would carry some weight. After all, an airport or a transit station is a fixed facility built or installed to provide a government service such as facilitating public transportation. But in interpreting the GMA, we must not look at statutory provisions in isolation. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d at 560. We therefore must assess whether interpreting the capital facilities plan element to include transportation facilities runs contrary to other portions of the GMA.

The GMA identifies a specific component of the comprehensive plan as the transportation element. RCW 36.70A.070(6). The transportation element requires an inventory of "air, water, and ground transportation facilities and services." RCW 36.70A.070(6)(a)(iii)(A). It also covers most if not all of the more general components contemplated by the capital facilities plan element contained in RCW 36.70A.070(3). A well-accepted rule of statutory construction is that a specific

statute will supersede a general one when both apply. *Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010). Given the well-established general-specific rule, it appears to be the legislature's intent that transportation facilities need be addressed only in the transportation element of a comprehensive plan (RCW 36.70A.070(6)), not both the transportation and capital facilities elements.

Had the legislature intended localities to address transportation facilities in both the capital facilities and transportation elements of a comprehensive plan, it would have said so more clearly. Take the example of park and recreation facilities. Like transportation facilities, park and recreation facilities fall under the definition of "capital facilities" as set forth above. Also, like transportation facilities, the legislature has specified that park and recreation facilities must be addressed in their own comprehensive plan element. RCW 36.70A.070(8). Pursuant to the general-specific rule referenced above, one might assume that park and recreation facilities need be addressed only in the park and recreation element. However, in apparent recognition of this assumption, the legislature specifically included park and recreation facilities in the capital facilities plan element. RCW 36.70A.070(3). This double reference makes plain the legislature's intent that park and recreation facilities must be addressed in both elements. In contrast, the legislature did not reference transportation facilities in its discussion of the capital

facilities plan element. This difference is significant and suggests the legislature did not intend transportation facilities to be given double treatment within a comprehensive plan. By its plain terms, the language used in RCW 36.70A.070 indicates transportation facilities need be addressed only in the detailed transportation element set forth in RCW 36.70A.070(6).

Recent amendments to the GMA reinforce our interpretation of the transportation element. Engrossed Senate Substitution Bill 5593, which became effective on June 9, 2022, added subsection (c) to RCW 36.70A.130(3), and permitted counties to revise an urban growth area (UGA) if, during regularly scheduled review, a county determines the patterns of development have created pressure in areas that exceed the available and developable lands within the UGA. *See* LAWS OF 2022, ch. 287. RCW 36.70A.130(3)(c) lists eight requirements that must be met before a county may revise a UGA. One of these requirements is "[t]he transportation element and capital facility plan element have identified the transportation facilities, and public facilities and services needed to serve the urban growth area and the funding to provide the transportation facilities and public facilities and services." RCW 36.70A.130(3)(c)(v). The structure of this sentence indicates the "transportation element" covers "transportation facilities" and the "capital facility plan element" encompasses "public facilities and services."

Futurewise has not assigned error to the adequacy of the County's transportation element under RCW 36.70A.070(6). Thus, our order on remand does not require reassessment of transportation facilities.

*3. What are the ownership requirements of capital facilities?*

As stated above, the capital facilities plan element must include "(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; [and] (c) the proposed locations and capacities of expanded or new capital facilities . . . ." RCW 36.70A.070(3).

Futurewise contends subsections (a) and (b) of RCW 36.70A.070(3) apply to all publicly owned facilities, regardless of whether the county preparing a comprehensive plan is the owner of such a facility. We agree with this interpretation of the statute. By its plain terms, subsection (a) refers broadly to all publicly owned facilities. If the legislature had intended to limit the scope of subsection (a) to facilities owned by the county, it would have said so more clearly. In addition, subsection (b) refers to "such capital facilities," i.e., the same scope of facilities set forth in the preceding sentence,

subsection (a). Given the wording of subsections (a) and (b),[4] the capital facilities plan element of a comprehensive plan must include facilities such as public schools that are not owned by a county but nevertheless fall under the category of a facility owned by a public entity.

But subsection (c) of RCW 36.70A.070(3) is worded differently from subsections (a) and (b). Subsection (c) refers simply to "capital facilities," not publicly owned facilities or "such capital facilities." The Growth Management Hearings Board has consistently interpreted RCW 36.70A.070(3)(c) to apply only to facilities "'owned and operated by the city or county'" as opposed to any public entity. *Wenatchee Valley Mall P'ship v. Douglas County*, Case No. 96-1-0009, 1996 WL 731191, at *16-17 (E. Wash. Growth Mgmt. Hr'gs Bd. Dec. 10, 1996); *Concerned Citizens for Sky Valley v. Snohomish County*, No. 95-3-0068c, 1996 WL 73491, at *49-50 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Mar. 12, 1996). No final enactment of the legislature has ever disturbed this longstanding interpretation.

[4] The parties agree RCW 36.70A.070(3)(b) implicitly requires Spokane County to set level of service standards for capital facilities in order to forecast future needs. We accept this agreement, and further note that as RCW 36.70A.070(3)(b) applies to all publicly owned capital facilities, on remand the County is required to set level of service standards for all such facilities.

There is a rational basis for treating subsection (c) of RCW 36.70A.070(3) differently from subsections (a) and (b). Spokane County has little ability to control the planning and development of other public entities. It makes sense that the County is not required to make plans for expanded or new capital facilities outside its control.

We adopt the Board's interpretation. Unlike subsections (a) and (b) of RCW 36.70A.070(3) that require an inventory of "existing capital facilities owned by public entities," subsection (c) requires only "the proposed locations and capacities of expanded or new capital facilities."

*4. Must the capital facilities element include not only the sources of public money, but also a breakdown of the amounts of money to be secured from each source?*

The capital facilities plan element must include "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." RCW 36.70A.070(3)(d). According to Futurewise, the capital facilities element contained in Spokane County's 2020 Comprehensive Plan fails to meet this requirement because it does not include a detailed itemization of the amounts of money to be derived from public sources.

The plain meaning of RCW 36.70A.070(3)(d) defeats Futurewise's argument. A capital facilities plan element requires a planner to clearly identify only "sources" of

public money. There is no requirement for a planning jurisdiction to provide additional information on the specific amounts of public money each source is to provide. To read such a requirement into the GMA would be to improperly add to it. We therefore affirm the Board's determination that Futurewise failed to demonstrate the 2020 Comprehensive Plan's treatment of sources of public money was inadequate.

We affirm in part, reverse in part, and remand to the Board with instructions that the following corrections be made to the Spokane County Comprehensive Plan:

- Schools and other publicly owned capital facilities other than transportation facilities must be included within the capital facilities plan element under RCW 36.70A.070(3)(a) and (b).

- The capital facilities plan element must cover Spokane County's entire planning area, not just UGAs, and cannot simply rely on prior capital facility plans without reanalyzing present validity.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

*Whether the capital facilities plan element is internally inconsistent*

Futurewise claims Spokane County's capital facilities plan element is internally inconsistent, in violation of RCW 36.70A.070(3)(e). Specifically, Futurewise points to an

implementation schedule in the capital facilities plan indicating there will be a capital facilities plan update every seven years. In contrast, budget forecasts by the County in the Plan cover only five-year or six-year increments. According to Futurewise, this creates a danger of a one-year or two-year gap during which a seven-year comprehensive plan will not have a corresponding budget.

Futurewise's claim of inconsistency fails. There is a difference between the length of time covered by a budget plan and the schedule for plan updates. At any point in time, Spokane County must have a six-year budget plan in place. RCW 36.70A.070(3)(d). But this does not mean the budget cannot or will not be updated before it expires. Spokane County anticipates updating its budget annually. *See* Admin. Record at 155. This expectation is consistent with regulatory goals that recommend six-year budget plans be updated "at least biennially so financial planning remains sufficiently ahead of the present." WAC 365-196-415(2)(c)(ii). So long as the County regularly updates its six-year budget forecast, the six-year forecast will constantly move forward in time and there will be no danger of a gap between an existing budget and a full update of its Comprehensive Plan.[5]

[5] The parties also make reference to a strategy set forth in the appendix to the Spokane County Comprehensive Plan, that mentions yearly updates to the capital facilities plan. The County claims this statement is a recommendation, not a directive.

*Public participation under Spokane's zoning code*

The GMA requires covered jurisdictions to allow for early and continuous participation in the development and amendment of comprehensive land use plans. RCW 36.70A.140. Futurewise contends portions of the Spokane County Zoning Code (Zoning Code)[6] fail to comport with this requirement because the provisions do not allow for early and continuous public comment when a proposed plan amendment is initiated by a private party. At issue are sections 14.402.080 and 14.402.100 of the Zoning Code.

At the time of the Growth Management Hearing Board's decision in this case, the relevant portions of the foregoing codes provided as follows:

1. Initiation of the Amendment:
   a. The Board[7] or Department of Building and Planning may initiate an amendment to the text of the Zoning Code.
   b. An interested party may request that the Board initiate a zoning text amendment by submitting a request to the Department which will then be forwarded to the Board for consideration. A request to initiate an amendment is subject to a nonrefundable review fee. If

---

We agree. *See* Spokane County Comprehensive Plan, App. A, at A-3, https://spokanecounty.org/DocumentCenter/View/36241/Comp-Plan-2020?bidId= (Implementation strategies are recommendations "that *may* be used by the County to facilitate accomplishing the goals and policies within the Comprehensive Plan.") (emphasis added).

[6] The Zoning Code is available in its entirety at https://www.spokanecounty.org/DocumentCenter/View/26429/2021-Zone-Code?bidId=.

[7] As used in the Zoning Code, "Board" refers to the Spokane County Board of Commissioners. Zoning Code 14.300.100.

initiated by the Board the request will be processed by the Department subject to formal application and applicable fees.

Zoning Code 14.402.080(1).

2. Initiation of Annual Comprehensive Plan Amendment by the Board, Department or Commission.
   The Board, at its discretion, may initiate annual Comprehensive Plan amendments by resolution, including consideration of requests from the Director or Commission. Requests from individuals shall be subject to the requirements under 14.402.100(3) below.

3. Individual Requests for Initiation of Annual Comprehensive Plan Amendment
   Individuals may request initiation of an annual Comprehensive Plan Amendment as follows:
   a. The individual shall submit a "Request for Initiation of Comprehensive Plan Amendment" subject to a nonrefundable review fee as determined by the Board. The request shall be submitted between November 1st and December 20th or the end of the last business day prior to December 20th, for amendments to be considered in the following year.
   b. Upon receipt of the initiation requests, the Department shall conduct a preliminary review of the proposal(s). The preliminary review shall then be forwarded to the Board for consideration in January or as soon as possible thereafter. After consideration by the Board, they may either deny the request or approve the request for consideration in the annual amendment cycle. If the request is denied there will [sic] no further consideration of the request during the amendment cycle. Requests that are approved for further consideration may proceed to the application phase of the process. The Board shall provide their decision by resolution which shall be forwarded to the Department.
   c. The Board shall have full sole authority in the determination of initiation and further review of Comprehensive Plan amendment requests.

Former Zoning Code 14.402.100(2)-(3) (2004).

As Futurewise asserts, the foregoing portions of the Spokane County Zoning Code allowed the Spokane County Board of Commissioners to consider an individual request for an amendment to a comprehensive plan without public input. This is contrary to the requirements of the GMA. However, while this matter was pending review, Spokane County amended Zoning Code 14.402.100 to read as follows:

> 2. Initiation of Annual Comprehensive Plan Amendment by the Board, Department or Commission.
> The Board, at its discretion, may initiate annual Comprehensive Plan amendments by resolution, including consideration of requests from the Director or Commission. Requests from individuals shall be subject to the requirements under 14.402.100(3) below.
>  a. Prior to initiation of a Comprehensive Plan Amendment under this subsection, the Planning Commission shall hold at least one duly noticed public hearing. The Planning Commission shall thereafter forward a recommendation to the Board on whether or not to initiate the requested amendment.
>  b. After receipt of the Commission's Recommendation, the Board shall hold a public meeting at which they may either approve or deny the initiation of the Comprehensive Plan Amendment.
>  c. If the request is denied there will [sic] no further consideration of the request during the amendment cycle. Requests that are approved for further consideration may proceed to the application phase of the process. The Board shall provide their decision by resolution which shall be forwarded to the Department.
>  d. The Board shall have full sole authority in the determination of initiation and further review of Comprehensive Plan amendment requests.

3. Individual Requests for Initiation of Annual Comprehensive Plan Amendment
   Individuals may request initiation of an annual Comprehensive Plan Amendment as follows:
   a. The individual shall submit a "Request for Initiation of a Comprehensive Plan Amendment" subject to a nonrefundable review fee as determined by the Board. The request shall be submitted between November 1st and December 20th or the end of the last business day prior to December 20th, for amendments to be considered in the following year.
   b. Upon receipt of the initiation requests, the Department shall conduct a preliminary review of the proposal(s). The preliminary review shall then be forwarded to the Planning Commission for consideration and recommendation at a duly noticed Public Hearing in March or as soon as possible thereafter. The Planning Commission will thereafter forward a recommendation to the Board on whether or not to initiate the proposed amendment.
   c. After receipt of the Commission's Recommendation, the Board shall hold a meeting at which they may either deny the request or approve the request for consideration in the annual amendment cycle. If the request is denied there will [sic] no further consideration of the request during the amendment cycle. Requests that are approved for further consideration may proceed to the application phase of the process. The Board shall provide their decision by resolution which shall be forwarded to the Department.
   d. The Board shall have full sole authority in the determination and initiation and further review of Comprehensive Plan amendment requests.

Zoning Code 14.402.100(2)-(3).[8]

[8] The amendments to the Spokane County Zoning Code have been appended as Attachment A to the County's second supplemental brief, filed on July 20, 2022.

According to Spokane County, the amendment to Zoning Code 14.402.100 moots Futurewise's concerns regarding the Zoning Code's failure to provide for early public participation regarding amendment proposals submitted by individuals. We agree. The amendments to Zoning Code 14.402.100(2) and (3) make plain a public hearing must take place regarding all proposed comprehensive plan amendments, regardless of whether the amendment is initiated by the County or an outside individual. Under Zoning Code 14.402.100(3)(b), all individual requests for amendments will be to the Spokane County Planning Commission for consideration at a public hearing. At the hearing, the Planning Commission will formulate a recommendation regarding the request and then forward the recommendation to the Spokane County Board of Commissioners. The Commissioners must then act on the Planning Commission's recommendation at a subsequent public hearing as set forth in Zoning Code 14.402.100(3)(c). This process allows for early and continuous public participation prior to any action accepting or rejecting the proposed amendment. This is fully consistent with the public participation requirements of the GMA.

Futurewise claims the amendments to the code are inadequate because they do not change Zoning Code 14.402.080(1). Futurewise appears to argue this section still allows the Commissioners to consider individual requests for amendments outside of a public

hearing process. We disagree. Zoning Code 14.402.080(1) does not allow for an end-run around the public participation process set forth in Zoning Code 14.402.100(3). All Zoning Code 14.402.080(1) does is identify the fact that proposals for amendments may be made internally by the Commissioners or the Spokane County Building and Planning Department or externally by an interested party. Zoning Code 14.402.080(1) does not address the process for how proposed amendments are considered. The process for consideration is set forth in Zoning Code 14.402.100(3), as set forth above.[9] Futurewise fails to specify how the process set forth in the amendments to Zoning Code 14.402.100(3) exclude public participation. We therefore agree with the County that this aspect of Futurewise's appeal is moot.

*Geiger Spur*

Futurewise and the County agree that disputes over the Geiger Spur are now moot. We therefore need not consider this aspect of Futurewise's challenge to the Plan.

[9] Similarly, the flow chart set forth in Zoning Code 14.402.140 does not provide a method for avoiding the public hearing requirements of Zoning Code 14.402.100(3). The flow chart must be read in conjunction with Zoning Code 14.402.100(3), which specifies public hearings must take place before any decisions are made regarding proposed plan amendments.

*Other conceded assignments of error*

Futurewise and Spokane County agree that, as to the majority of Futurewise's assignments of error, the Board failed to recognize that the capital facilities plan element must be performed county wide and cannot simply rely on prior assumptions or assessments. We accept these concessions.

ORDER ON REMAND

Pursuant to the foregoing analysis and the parties' agreement, we affirm in part, reverse in part, and remand to the Board with instructions that the following corrections be made to the Spokane County Comprehensive Plan:

- Schools and other publicly owned capital facilities other than transportation facilities must be included within the capital facilities plan element under RCW 36.70A.070(3)(a) and (b).

- The capital facilities plan element must cover Spokane County's entire planning area, not just UGAs, and cannot simply rely on prior capital facility plans without reanalyzing present validity.

Pennell, J.

WE CONCUR:

Siddoway, C.J.

Lawrence-Berrey, J.

# APPENDIX B

**FILED**
**NOVEMBER 15, 2022**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

| | | |
|---|---|---|
| FUTUREWISE,<br><br>Appellant,<br><br>v.<br><br>SPOKANE COUNTY and GROWTH MANAGEMENT HEARINGS BOARD,<br><br>Respondents. | ) | No. 38657-1-III<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

THE COURT has considered respondent Spokane County's motion for reconsideration of this court's September 22, 2022, opinion; the answer of appellant Futurewise; and the record and file herein.

IT IS ORDERED that the respondent's motion for reconsideration is denied.

PANEL: Judges Pennell, Siddoway and Lawrence-Berrey

FOR THE COURT:

LAUREL H. SIDDOWAY
Chief Judge

## SPOKANE COUNTY PROSECUTOR

## December 14, 2022 - 2:16 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division III |
| **Appellate Court Case Number:** | 38657-1 |
| **Appellate Court Case Title:** | Futurewise, Appellant v. Spokane County & G.M.H.B., Respondents |
| **Superior Court Case Number:** | 21-2-01060-5 |

**The following documents have been uploaded:**

- 386571_Petition_for_Review_20221214141054D3626577_8483.pdf
  This File Contains:
  Petition for Review
  *The Original File Name was 2022.12.14 Petition for Review to Supreme Court.pdf*

**A copy of the uploaded files will be sent to:**

- Lisa.Petersen@atg.wa.gov
- lalseaef@atg.wa.gov
- tim@futurewise.org

**Comments:**

---

Sender Name: Ashley Musick - Email: amusick@spokanecounty.org
**Filing on Behalf of:** Jessica Alice Pilgrim - Email: jpilgrim@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-3662

**Note: The Filing Id is 20221214141054D3626577**