NO. 97719-4

SUPREME COURT OF THE STATE OF WASHINGTON

CLARK COUNTY,

Respondent,

FRIENDS OF CLARK COUNTY and FUTUREWISE,

Respondents,

and

CLARK COUNTY; CITY OF RIDGEFIELD; CITY OF LA CENTER; RDGB ROYAL ESTATE FARMS, LLC; RDGK REST VIEW ESTATES, LLC; RDGM RAWHIDE ESTATES, LCC; 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.

CLARK COUNTY'S REPLY TO NEW ISSUES RAISED IN ANSWER BY FUTUREWISE AND FRIENDS OF CLARK COUNTY

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I. IDENTITY OF PARTY FILING REPLY

This reply is filed by Clark County, respondent before the Court of Appeals, as to the issues newly raised by Futurewise and Friends of Clark County (together, "Futurewise") in their answer to the petition for review filed by Clark County Citizens United ("CCCU").

II. COURT OF APPEALS' DECISION

The Court of Appeals decision for which Futurewise seeks review is *Clark County v. Growth Mgmt. Hrgs. Bd.*, __ Wn. App. __, 448 P.3d 81 (August 20, 2019). A copy of the Slip Opinion is attached hereto as Appendix A. An order of the Court of Appeals dated September 25, 2019, denied a motion for reconsideration filed by Futurewise.

III. STATEMENT OF THE CASE

On June 28, 2016, Clark County adopted Amended Ordinance 2016-06-12[1] ("2016 plan update") as the culmination of the periodic review and update of its comprehensive plan and zoning ordinance pursuant to RCW 36.70A.130(1)(a).[2] Futurewise and CCCU petitioned the Growth Management Hearings Board ("GMHB" or "Board") for

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[1] AR 40690-40776. In this brief, references to the administrative record compiled in the first phase, culminating in the Board's Final Decision and Order ("FDO"), will be to "AR." References to the administrative record, leading up to the Board's Compliance Order, will be "CAR."

[2] Chapter 36.70A RCW is referred to herein as "GMA" or the "Growth Management Act." Statutes and regulations are attached in Appendix C.

review of the County's 2016 plan update claiming that the County had violated GMA.[3]

Among the appeal issues raised by Futurewise, one asserted that Clark County had improperly expanded the Urban Growth Areas ("UGAs") of the Cities of La Center and Ridgefield because the UGAs did not need additional land for development (Issue 5).[4] Futurewise Issue 10 asserted that Clark County had improperly revised the comprehensive plan designations of the lands that had been added to the UGAs, which had previously been agricultural lands of long-term commercial significance.[5] Before the parties briefed the issues to the Board, La Center and Ridgefield each annexed the land that had been added to its UGAs.

Futurewise Issues 11 and 13 concerned permissible density of development on the County's non-urban lands.[6]

The Board issued its Final Decision and Order on March 23, 2107 ("FDO"), affirming the County's 2016 plan update with respect to

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[3] The Board consolidated these reviews, along with *Futurewise v. Clark County*, as *Clark County Citizens United v. Clark County*, WWRGMHB Case No. 16-2-0005c. The Cities of Ridgefield, La Center, and Battle Ground, and the owners of certain properties intervened in the consolidated review. Battle Ground is no longer a participant in the appeals.
[4] Issue 5 is set forth in Appendix B; FDO at 18-19; CAR at 18-19.
[5] Issue 10 is set forth in Appendix B; FDO at 33; CAR at 33.
[6] Issues 11 and 13 are in Appendix B; FDO at 43, 54-55; CAR at 43, 54-55.

portions of the Futurewise issues and all of CCCU's issues.[7] Regarding issues 5, 10, 11 and 13, the Board determined that the 2016 plan update violated GMA, and ordered Clark County to come into compliance.[8]

Clark County and other parties sought review of the FDO before Clark County Superior Court, which consolidated the appeals. The Court of Appeals granted review as Case No. 50847-8-II.[9] Meanwhile, Clark County took compliance actions and reported its actions to the Board.[10]

The Board's Order on January 10, 2018 ("Compliance Order"), ruled that the County had established compliance with GMA as to Futurewise Issues 11 and 13, regarding permissible densities of development on non-urban lands.[11] As to the de-designation of agricultural resource lands that were added to the UGAs of the Cities of La Center and Ridgefield and the expansions of the UGAs, the Board held that the County's comprehensive plan remained noncompliant and invalid.[12] Clark County and certain of the intervenors petitioned the Clark County Superior

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[7] *CCCU v. Clark County*, W. Wash. Growth Mgmt. Hrgs. Bd., Final Decision and Order, Case No. 16-2-0005c (March 23, 2017) ("FDO"). AR 10457-557; CAR 1-101.
[8] *Id.*
[9] *Id.* at 5-6; Designation of Clerk's Papers, Item 20.
[10] *Id.* at 6; AR 10462.
[11] *CCCU v. Clark County*, W. Wash. Growth Mgmt. Hrgs. Bd., Case No. 16-2-0005c, Order on Compliance and Order on Motions to Modify Compliance Order, Rescind Invalidity, Stay Order, and Supplement the Record (January 10, 2018) ("Compliance Order") at 4, 9-12; CAR at 4, 9-12.
[12] Compliance Order, *Id.* at 13-21; CAR at 13-21.

Court for judicial review of the Compliance Order as it concerned the annexed lands. Futurewise cross-petitioned regarding Issues 11 and 13. Those appeals were consolidated and came to the Court of Appeals as Case No. 51745-1-II. The Court of Appeals consolidated the appeals.[13]

The Court of Appeals issued its Opinion, attached as Appendix A, on August 20, 2019. Futurewise did not prevail before the Court of Appeals as to its issues on cross-appeal,[14] and moved for reconsideration, which the court denied.[15] In addition, the Court of Appeals ruled that the issues related to the lands that had been placed within the La Center and Ridgefield UGAs, and then were annexed by those cities, were moot. In answering the petition by CCCU, Futurewise now seeks review of the Court of Appeals' rulings as to the annexed lands and non-urban densities.

IV. NEW ISSUES PRESENTED

New Issue 1: Whether the Supreme Court should deny review under RAP 13.4(b)(4) of a Court of Appeals' ruling that issues of Clark County's GMA compliance related to lands within city limits are moot because the County lacks jurisdiction to plan for those lands.

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[13] *Id.*
[14] The Court of Appeals' ruling on Issues 5 and 10 is in the published portions of the opinion, while the ruling on Issues 11 and 13 is set forth in the unpublished portions of the opinion. *Clark County v. Growth Mgmt. Hrgs. Bd, supra,* at 4.
[15] Order Denying Motion for Reconsideration (September 25, 2019).

New Issue 2: Whether the Supreme Court should deny review under RAP 13.4(b)(4) of a Court of Appeals' ruling that after Clark County had repealed noncompliant aspects of its plan update, issues claiming GMA noncompliance were resolved and moot, and the County was in compliance.

V. ARGUMENT

A. The Futurewise New Issues Do Not Satisfy the Considerations Governing Acceptance of Review Set Forth in RAP 13.4(b).

The question of whether a petitioner is entitled to review is controlled by RAP 13.4(b). To obtain review in this court, Futurewise must demonstrate that the Court of Appeals decision:

> (1) Conflicts with a decision of the Supreme Court; or
> (2) Is in conflict with a published decision of the Court of Appeals; or
> (3) Raises a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) Involves an issue of substantial public interest that should be determined by the Supreme Court.[16]

Here, the Petition for Review filed by Futurewise relies entirely on RAP 13.4(b)(4) asserting that it presents an issue of substantial public interest.[17] The question of whether a decision warrants review as an issue

[16] RAP 13.4(b).
[17] Futurewise Answer to the Clark County Citizens United, Inc., Petition for Review, p. 8 ("Futurewise Answer").

of substantial public interest may be satisfied when review will avoid unnecessary litigation and confusion on a common issue.[18]

Futurewise's Issues should be denied because the Court of Appeals' opinion provides clear and unequivocal guidance, therefore, obviating the need for additional clarification through further litigation. Put simply, the Court of Appeals' opinion clarified the issues by stating a single rule, consistent with existing law, rather than creating confusion. Moreover, to the extent Futurewise complains of any ongoing issue regarding the annexation of lands by cities, its only avenue for recourse lies with the legislature, as opposed to the courts.

B. The Court of Appeals' Decision Was Decided Correctly and Does Not Present a Question of Substantial Public Interest Because It Provides Clear and Unequivocal Guidance.

1. The Court Correctly Ruled That Clark County Has No GMA Planning Authority Over Lands Annexed by Cities.

The analysis provided by the Court of Appeals explains why neither the County nor the Board has authority to change the designation of the annexed land no longer within County control. This analysis begins with the recognition that the Board does not have authority to review cities' annexations.[19] The Board's authority is explicitly limited by GMA,

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[18] See, *In re Flippo*, 185 Wn. 2d 1032, 380 P.3d 413, (Mem)–414 (2016)(citing, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)).
[19] RCW 36.70A.280(1); RCW 36.70A.300(1).

which is strictly construed.[20] The Board may determine whether a respondent jurisdiction's comprehensive plan and development regulations, and amendments to them, are in compliance with, as relevant here, GMA.[21] GMA provides no authority for the Board to review annexations, GMA provides no authority for the Board to order a respondent to take actions assigned by law to other jurisdictions, and GMA provides no authority for the Board to order a jurisdiction that is not the respondent before it to take planning actions.

Futurewise mischaracterizes the question presented by the Court of Appeals' holding as "whether annexations immunize comprehensive plan amendments from Board appeals."[22] Futurewise notes that "nothing in the GMA provides that if land is annexed UGA expansions are immunized from appeals or the appeals are moot."[23] This statement is technically accurate, but without significance, because nothing in the GMA provides that a county may undertake planning for lands within city boundaries or that the Board may order a county to do so.

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[20] *Thurston County v. WWGMHB*, 164 Wn.2d 329, 342, 190 P.3d 38 (2008) *(internal quotation marks omitted)* (quoting, *Woods v. Kittitas County,* 162 Wn.2d 597, 612 n. 8, 174 P.3d 25 (2007)); *Save Our Scenic Area v. Skamania Cty.,* 183 Wn.2d 455, 463–64, 352 P.3d 177, 181 (2015).
[21] RCW 36.70A.280(1); RCW 36.70A.300(1). The Board also determines compliance with SEPA and the Shoreline Management Act. Neither of those is relevant to this case.
[22] Futurewise Answer at 8.
[23] *Id.* at 11.

It is significant that a comprehensive plan is presumed valid upon adoption.[24] Likewise, the Board's decision to invalidate plan adoption or amendment is not retroactive. RCW 36.70A.302(2) states, in part:

> ***A determination of invalidity is prospective in effect*** and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. *(Emphasis added.)*

The Court of Appeals noted that this statute is "clear and unequivocal." As a result, the Board's determination of invalidity is effective from the date of the order and cannot alter occurrences prior to the FDO.[25]

The Court of Appeals confirmed that lands annexed by a city are no longer within a county's jurisdiction for planning and growth management.[26] Specifically, the Washington Constitution[27] and statutes regarding municipalities[28] and code cities[29] provide that all land use jurisdiction over city lands is exercised by the city within whose incorporated limits they are located.

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[24] *Clark County v. Growth Mgmt. Hr'gs Bd.*, 448 P.3d 81 at 91 (citing, RCW 36.70A.320(1)); App. A at 17.
[25] *Id.* at 91; App. A at 18.
[26] *Id.* at 92; App. A at 19.
[27] Wash. Const. Art. XI, Sect.11, which states, "Any county, city, town or township may make and enforce ***within its limits*** all such local police, sanitary and other regulations as are not in conflict with general laws." *(Emphasis added.)*
[28] RCW 35.63.080. This general law authorizes a city council or board or commissioners to provide for preparation, adoption and enforcement of coordinates plans for the physical development of the municipality.
[29] RCW 35A.11.020. This general law authorizes code cities to regulate real property.

Here, both the Cities of Ridgefield and La Center lawfully annexed land within their respective UGAs into their incorporated limits. These annexations became effective prior to the Board's findings of noncompliance and invalidity. As a result, neither the County - nor the Board reviewing the County's planning - may interfere with the annexed lands.[30]

As described by the Court of Appeals, the foundation for this analysis is "clear and unequivocal."[31] Indeed, the Court observed that "all three regions of the growth management hearings board have examined this question and have held that after a city annexes land, that land is no longer within the county's jurisdiction."[32]

Furthermore, the Court noted that in *Clark County v. Western Washington Growth Management Hearings Board*,[33] the Supreme Court vacated on other grounds the decision of the Court of Appeals'[34] holding that a UGA expansion area that had been annexed by a city was still subject to Clark County's planning authority. Concurring with the

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[30] *Clark County v. Growth Mgmt. Hr'gs Bd.*, 448 P.3d 81 at 93; App. A at 23.
[31] *Id.* at 91; App A at 19.
[32] *Id.* at 92 (citing, *Panesko v. Lewis County*, WWGMHB No. 08-2-0007c, Compliance Order (July 27, 2009); *Futurewise v. Benton County*, EWGMHB Case No. 14-1-0003, Order Issuing Determination of Invalidity, January 15, 2015, note 2 ("The Board has no jurisdiction with respect to annexations."); *1000 Friends of Washington v. Snohomish County*, Cent. Puget Sound Growth Mgmt. Hr'gs Bd., Feb. 19, 2009); App. A at 19.
[33] 177 Wn.2d 136, 298 P.3d 704 (2013).
[34] *Clark County v. W. Wash. Growth Mgmt. Hrgs. Bd.,* 161 Wn. App. 204, 254 P.3d 862 (2011), *vacated in part,* 177 Wn.2d 136, 298 P.3d 704 (2013).

majority decision in *Clark County*, Justices Stephens and Wiggins stated that, with respect to land that had been annexed by the City of Camas, the dispute regarding its designation as agricultural land of long-term commercial significance was moot.[35] The concurrence concluded, on facts that are substantially similar to those at issue here,[36] as follows:

> The cities of Camas and Ridgefield have annexed the lands in question, and those annexations cannot be challenged in these proceedings. As a result, ***the question of whether the Board properly reviewed Clark County's prior designation of the annexed lands is moot. Dismissal should follow.***[37] *(Emphasis added; citations omitted.)*

Aside from the Board's rulings in this case, Futurewise has cited no authority contrary to the proposition set forth in the concurrence. The "clear and unequivocal" nature of the Court of Appeals' opinion in this matter precludes granting review pursuant to RAP 13.4(b)(4). The opinion in this matter does not present an issue of substantial public interest because review would do nothing to avoid unnecessary litigation or address confusion on a common issue. Indeed, the only "outliers" on this issue were the Board's FDO and Compliance Order, which have been overturned by this decision of the Court of Appeals. There is no longer

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[35] 177 Wn. 2d 136, at 148-49.
[36] Clark County had de-designated agricultural lands and included them within the UGAs of Camas and Ridgefield. The Cities proceeded to annex those lands while the Board's review was pending and before it issued its final decision and order invalidating the County's actions. See, *Clark County,* 161 Wn. App. 204.
[37] *Clark County,* 177 Wn. 2d at 149.

any confusion requiring an authoritative determination from this Court. As a result, review should be denied.

2. To the Extent a Problem Exists, the Only Remedy is Through the Legislature.

Futurewise concedes in its petition that UGAs "can only be included in county comprehensive plans, not city comprehensive plans"[38] and that it "recognizes that the Board does not have the authority to review the validity of La Center's and Ridgefield's annexation ordinances."[39]

As outlined more fully above, and confirmed by the Court of Appeals, the Board's role in this case is to determine whether the County is in compliance with the GMA.[40] Once land contiguous to a city has been annexed, it is within the city's sole jurisdiction for planning.[41] When the Cities annexed previously unincorporated land, the County lost its ability to plan for that land.[42] Therefore, the Board cannot compel the County to take action regarding that land.[43] The Court noted that "such compulsion is beyond the quasijudicial powers of the Board."[44]

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[38] Futurewise Answer at 12.
[39] *Id.* at 14.
[40] *Clark County v. Growth Mgmt. Hr'gs Bd.*, 448 P.3d 81 at 93 (citing, RCW 36.70A.300(1)); App. A at 23.
[41] *Id.*, (citing, Wash. Const. Art. XI, Sect.11; RCW 35.63.080).
[42] *Id.*, (citing, RCW 35.63.080; 35A.11.020).
[43] *Id.*
[44] *Id.* (citing, RCW 36.70A.300(1)).

Despite the "bright line" separating the roles and authority of the Board, County and Cities, Futurewise proposes that the Board order the County to comply with the GMA.[45] This would create a conundrum best evidenced by the ineffective relief that Futurewise suggests is available. It suggests that "the cities could" assist the County in compliance or that the County use its SEPA authority to condition the designation of new UGAs to require the conservation of agricultural land.[46]

The major flaw in these suggestions is that neither the Board nor the County has authority to compel the Cities to act as Futurewise would like. The Board cannot effectively order Clark County to alter the GMA designations of annexed lands, even if they were wrongly de-designated.

There is simply no action that Clark County can take that would return the annexed lands to their former designations outside urban growth boundaries – the only relief that could redress the noncompliance at issue, if the relief were actually available. In light of this reality, this Court is unable to provide effective relief with regard to Issues 5 and 10 and the annexed lands. When the ruling of a court can provide no effective relief, the case is moot[47] and should be dismissed.[48]

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[45] Futurewise Answer at 14.
[46] *Id.*
[47] See, *e.g., Orwick v. Seattle*, 103 Wn.2d, 249, 254, 692 P.2d 793 (1984); *Harbor Lands, LP, v. City of Blaine*, 146 Wn. App. 589, 191 P.3d 1282 (2008).

The Court of Appeals correctly observed that the Court is unable to provide a remedy to address what Futurewise describes as "egregious affronts to state law."[49] In doing so, the Court stated, "regardless of the validity of any questionable behavior, this is an issue for the legislature."[50]

The Supreme Court should consequently deny review of the Court of Appeals' decision as to this issue. No considerations of substantial public interest under RAP 13.4(b) support granting review.

C. The Court of Appeals Correctly Upheld the Board's Ruling That Clark County Had Repealed Noncompliant Planning Provisions, Which Brought the County Into Compliance as to Issues 11 and 13; Considerations of Substantial Public Interest Do Not Suggest That the Supreme Court Should Accept Review of The Court of Appeals' Decision.

1. The Board Held that the 2016 Update Violated GMA by Increasing Density on Resource Lands and By Failing to Include a Variety of Rural Densities in the Plan.

The ordinance adopted by Clark County during proceedings taken to comply with GMA addressed the FDO's holdings of noncompliance regarding the densities of Rural[51] and resource lands.[52] The FDO had held that the 2016 comprehensive plan update violated GMA by providing for

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[48] *Arnold v. Dep't of Retirement Sys.*, 74 Wn. App. 654, 659, 875 P.2d 665 (1994) (citing, *Harvest House Restaurant, Inc. v. City of Lynden*, 102 Wn.2d 369, 373, 685 P.2d 600 (1984)).
[49] Futurewise Answer at 15.
[50] *Clark County v. Growth Mgmt. Hr'gs Bd.*, 448 P.3d 81 at 94, n. 11; App. A at 24.
[51] Lands outside urban growth areas that are not designated as resource lands of long-term commercial significance are referred to as "Rural."
[52] Ord. 2017-07-04. *See* notes 64, 65, *infra.* CAR 1564-94.

increased density of development on its lands designated agricultural and forest lands of long-term commercial significance (respectively, "agricultural resource lands" and "forest resource lands") and by failing to provide for a variety of Rural densities.[53]

The 2016 update had doubled the allowed densities on much of the County's resource lands. The minimum lot size for agricultural resource lands was reduced from 20 to 10 acres, and the minimum on forest (Tier II) resource lands changed from 40 to 20 acres.[54] Futurewise Issue 11[55] complained of the increased densities. The Board sum-marized Issue 11, "Upzone AG/FR Land for More Density," as follows:

> The question before the Board is whether smaller parcel sizes for agriculture and forest resource lands will assure agricultural and forest land conservation as required by RCW 36.70A.060(1), whether these smaller parcel sizes will protect water quality and quantity as required by RCW 36.70A.070(1) and if the County has measures in place to protect the rural character of the area required by RCW 36.70A.070(5).[56]

The Board's analysis of Issue 11, thus addressed the impacts and legality of smaller resource parcels, primarily smaller agricultural resource

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[53] FDO at 43-52, 52, 54-58; CAR 1-101 at 43-52, 52, 54-58.
[54] Amended Ord. 2016-06-12 ("2016 Plan update"); AR 40690-40776; notes 64-65, *infra*.
[55] Futurewise Issue 11 broadly alleged violations of 13 separate provisions of GMA and Chapter 365-196 WAC, and is set forth in Appendix B, attached. The Board held that Futurewise had failed to brief claims based on 11 of the statutes and WACs, and had thereby abandoned them. FDO at 44; CAR at 44.
[56] FDO at 46; CAR at 46; App. B.

parcels.[57] The FDO found the new densities noncompliant for failure to conserve and protect agricultural and forest lands.[58]

The 2016 plan update also revised the County's designations of Rural lands, which had previously been Rural-5 (5-acre minimum lot size), Rural-10 (10-acre minimum) and Rural-20 (20-acre minimum). The update gave Rural lands a single comprehensive plan designation, Rural, and defined minimum lot sizes by zoning, as R-5, R-10, and R-20.[59]

In Issue 13, Futurewise argued that adoption of a single "Rural" comprehensive plan designation violated GMA by failing to provide for a variety of Rural densities.[60] The FDO agreed, holding that the plan update violated the requirement of RCW 36.70A.070(5)(B) that a county's comprehensive plan, itself, provide for a variety of Rural densities. The Board declined to impose invalidity under either Issue 11 or Issue 13.[61] Futurewise did not appeal the FDO.

2. Clark County Came Into Compliance by Repealing The Parts of Its 2016 Plan Update That Had Violated GMA.

In order to achieve compliance, Clark County first adopted a moratorium on accepting new applications in the Rural and resource

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[57] FDO at 43-52; CAR at 43-52.
[58] FDO at 52; CAR at 52.
[59] Comprehensive Plan Map, AR 41373; Zoning Map, AR 41374.
[60] Issue 13 in its entirety is set forth at Appendix B, attached. The Board held that Futurewise had failed to submit briefing regarding six of the statutory claims of noncompliance, and that those claims were abandoned. FDO at 55; CAR at 55.
[61] FDO at 56-58; CAR at 56-58.

zones.[62] The County then amended its plan and zoning designations, reversing the actions taken by the 2016 plan update that the FDO had held to be noncompliant.[63] In response to the FDO's holding on Issue 11, agricultural resource lands were changed back from AG-10 to AG-20[64] and Tier II forest lands were changed back from FR-20 to FR-40.[65] Responding to the FDO on Issue 13, the County repealed the single Rural plan designation that had been adopted by Amended Ord. 2016-06-12, and re-adopted the three plan designations that had applied to Rural lands pre-update, R-5, R-10, and R-20.[66] With this action, the County's plan again provided for a variety of rural designations. Nothing else was required of the County to resolve Issues 11 and 13, as the Compliance Order held.

3. The Board's Compliance Order Correctly Held That Clark County Had Achieved Compliance as to Issues 11 and 13; the Court of Appeals Correctly Held That the Board Had Not Erred.

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[62] CAR 216-19. The moratorium did not, and could not, affect prior vesting. RCW 36.70A.302(2).
[63] Ord. 2017-07-04. *See* notes 64, 65, *infra*.
[64] *Compare, e.g.,* AG-20 to AG-10 in Amended Ord. 2016-06-12 at 2, 21; AR 239, 258 *with* AG-10 to AG-20 in Ord. 2017-07-04 at 2, 5, 8-10, 15-19; CAR 111, 112, 115-117, 122-126.
[65] *Compare, e.g.,* FR-40 to FR-20 in Amended Ord. 2016-06-12 at 2, 21; AR 239, 258 *with* FR-20 to FR-40 in Ord. 2017-07-04 at 2, 5, 8-10, 15-19; CAR 111, 112, 115-117, 122-126.
[66] See plan map at https://www.clark.wa.gov/sites/default/files/dept/files/community-planning/comprehensive-plan/2016%20Comp%20Plan/Amendments/AdoptedComp_Plan_02122019.pdf.

Futurewise had the burden before the Board of proving that Clark County's compliance actions had been clearly erroneous under GMA.[67] Futurewise argued that Clark County should be required to do more to be considered compliant, but as the Compliance Order explained:

> "when a challenged provision has been amended or repealed, 'the amendment/repeal provides the relief requested by petitioner,' and the matter is moot.... Here, Clark County repealed the ordinance amendments challenged in Issue 11.... **[T]he Board finds and concludes that the County is now in compliance with RCW 36.70A.060 and RCW 36.70A.070 in regards to Issue 11.**"[68]

Similarly, regarding Issue 13, the Compliance Order stated:

> "Issue 13 is now moot because the County re-adopted a previously GMA-compliant variety of rural densities. **With the County amendments in Ordinance 2017-07-04 for Issue 13, the Board finds the County's action regarding a variety of rural densities achieves compliance with RCW 36.70A.070(5).**" *(Emphasis in original.)*[69]

Although Futurewise now contends that the Board improperly failed to determine whether the County had achieved compliance with GMA, the words of the Compliance Order itself refute that argument. Before the Court of Appeals, Futurewise bore the burden of showing the Board erred in its decision on these issues.[70] The Court of Appeals' opinion noted that the County had repealed the noncompliant provisions of

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[67] RCW 36.70A.320(2).
[68] Compliance Order at 11 *(citations omitted)*; CAR 1574.
[69] Compliance Order at 12 *(citations omitted);* CAR 1575.
[70] RCW 34.05.570(1)(a); *Clark County v. WWGMHB, supra* at 49-51; App. A.

the 2016 plan update and had readopted the pre-update provisions that had been found compliant in past appeals.[71] The Court of Appeals also distinguished[72] its prior decision in *Miotke v. Spokane County*.[73] The Court of Appeals echoed the Board's analysis, stating, "FOCC [Futurewise] has not met its burden" to show that the Board had erred when it concluded that Clark County had achieved compliance regarding Issues 11 and 13.[74]

4. No Considerations of Substantial Public Interest Suggest that the Supreme Court Should Accept Review of this Correct Decision.

RAP 13.4(b) states the four considerations governing the Supreme Court's acceptance of review, and Futurewise argues only that one of these considerations applies here. In relevant part, the rule states:

> A petition for review will be accepted by the Supreme Court only:
> ***
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.[75]

In this case, the Court of Appeals issued an unpublished ruling that was consistent with applicable law, clear, and straightforward: when a jurisdiction repeals plan provisions that are not compliant under GMA and reinstates its prior, compliant provisions, the petitioner has been given

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[71] *Clark County v. WWGMHB, supra* at 49-51; App. A at 49-51.
[72] *Id.*
[73] 181 Wn. App.369, 325 P.3d 434 (2014). In *Miotke*, in contrast to the dispute over Issues 11 and 13, the Board had imposed invalidity under GMA.
[74] *Clark County v. WWGMHB, supra* at 49-51; App. A at 49-51.
[75] RAP 13.4(b)(4).

relief, and the jurisdiction has achieved compliance. This decision is hardly novel; it is not a "watershed departure from prior practice that affects the greater public interest."[76]

The Court of Appeals' decision does not warrant review under RAP 13.4(b)(4), because, first, review would not avoid unnecessary litigation.[77] The Board has jurisdiction to hear and decide appeals asserting failure to comply, as relevant here, with GMA.[78] Nothing in GMA requires that Clark County do more to achieve compliance than to undo its noncompliant plan amendments, as the Board and the Court of Appeals properly held. Granting review of this decision would potentially spawn unnecessary litigation as parties might assert new grounds to extend and broaden appeals of actions taken in GMA compliance proceedings.

Second, review is not necessary to avoid confusion on a common issue.[79] Futurewise has not shown that a number of proceedings before the Board or the Court of Appeals would be affected by this decision. Further, even if this unpublished decision did have the potential to affect a number

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[76] *Contrast Matter of Arnold*, 189 Wn.2d 1023, 4083 P.3d 1091 (2017) (review appropriate under RAP 13.4(b)(4) because likely incorrect holding had removed entire class of sex offenders from registration requirements).
[77] *In re Flippo,* 185 Wn. 2d 1032, 380 P.3d 413 (2016).
[78] RCW 36.70A.280(1); RCW 36.70A.300(1).
[79] *In re Flippo*, 185 Wn. 2d 1032, 380 P.3d 413 (2016).

of GMA proceedings, its ruling is clear and consistent with existing law[80] and, thus, serves to clarify issues, rather than confusing them.

There are no considerations of substantial public interest in the Supreme Court's review of the Court of Appeals' correct ruling regarding Issues 11 and 13. Review is not warranted under RAP 13.4(b).

VI. CONCLUSION

For the foregoing reasons, Clark County respectfully requests that this Court deny review of both issues raised by Futurewise.

DATED this 18th day of November, 2019.

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[80] See *Thurston County v. W.Wash Growth Mgmt. Hrgs. Bd.*, 164 Wn.2d 329, 190 P.3d (2008) (Board jurisdiction limited to review of county's new adoptions); *Hazen v. Yakima County,* EWGMHB Case No. 07-2-0027c (April 5, 2010) (amendment provided relief requested by petitioner; matter is moot).

CERTIFICATE OF SERVICE

I, Thelma Kremer, hereby certify that I caused a copy of the foregoing *Clark County's Reply to New Issues Raised in Answer by Futurewise and Friends of Clark County* to be filed with the Clerk of the Court using the Washington State Appellate Courts' Portal, on this 18th day of November, 2019, which will send notification of such filing to the following:

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Thelma Kremer

Thelma Kremer, Legal Secretary

APPENDICES

Appendix A: *Part Published Opinion, Clark County v. Growth Mgmt. Hrgs. Bd.*, ___ Wn. App. ___, 448 P.3d 81 (August 20, 2019).

Appendix B: Issues 5, 10, 11 and 13, from *Final Decision and Order, Clark County Citizens United, Inc., et. al., v. Clark County, et. al.*, WWGMHB Case No. 16-2-0005c, dated March 23, 2017 (pp. 18-19, 33, 43 and 54-55).

Appendix C: Important Statutes

Revised Code of Washington

RCW 35.63.080	Restrictions on buildings – Use of land.
RCW 35A.11.020	Powers vested in legislative bodies of noncharter and charter code cities.
RCW 36.70A.060	Natural resource lands and critical areas – Development regulations.
RCW 36.70A.070(5)(B)	Comprehensive plans – Mandatory elements.
RCW 36.70A.130	Comprehensive plans – Review procedures and scheduled – Amendments.
RCW 36.70A.280	Growth management hearings board – Matters subject to review.
RCW 36.70A.300	Final orders.
RCW 36.70A.302	Growth management hearings board – Determination of invalidity – Vesting of development permits – Interim controls.
RCW 36.70A.320	Presumption of validity – Burden of proof – Plans and regulations.

Washington State Constitutional Provisions

Wash. Const. Art. XI, *County, City, and Township Organization*, Section 11 – *Police and Sanitary Regulations*

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

August 20, 2019

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; 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,

Petitioners,

and

CLARK COUNTY CITIZENS UNITED, INC.,

Petitioners,

v.

GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

No. 50847-8-II

(Consolidated)

No. 50847-8-II;
Cons. 51745-1-II

CLARK COUNTY,

Petitioner/Cross-Respondent,

FRIENDS OF CLARK COUNTY; FUTUREWISE,

Respondents/Cross Petitioners,

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,

Petitioners,

and

CLARK COUNTY CITIZENS UNITED, INC.,

Petitioners,

v.

GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

No. 51745-1-II

PART PUBLISHED OPINION

WORSWICK, J. — The Growth Management Act (GMA), chapter 36.70A RCW, requires Clark County to periodically update its comprehensive land use and zoning plan. Clark County updated its plan in 2016 (2016 Plan Update), making several changes to the County's comprehensive plan.

The Friends of Clark County and Futurewise (FOCC), as well as Clark County Citizens United (CCCU), petitioned the Growth Management Hearings Board (Board) to review the 2016 Plan Update for compliance with the GMA. The City of Ridgefield, City of La Center, 3B Northwest LLC (3B), and five other individual LLCs[1] intervened in that action.

The Board issued its Final Decision and Order (FDO), which concluded, in part, that the County did not comply with the GMA when it (1) dedesignated three areas of agricultural land and designated these lands as urban growth areas (UGA), (2) dedesignated agricultural land and designated this area as a rural industrial land bank (RILB), (3) reduced agricultural and forestland parcel sizes, and (4) adjusted rural densities. However, the Board concluded that the County complied with the procedural requirements of the GMA.

The County took some efforts to come into compliance, after which the Board issued a compliance order. The Board concluded that the County remained noncompliant regarding dedesignating agricultural land for two UGAs and the RILB but that it had complied regarding one UGA, the agricultural and forestland parcel sizes, and rural densities.

The parties appeal both the FDO and the compliance order. Additionally, FOCC moves to dismiss the County's and 3B's petitions for judicial review of the FDO for lack of appellate jurisdiction because they did not properly and timely serve their petitions for judicial review.

The County, La Center, Ridgefield, and the LLCs argue that the Board's finding of the County's noncompliance regarding the County's UGA designations are moot and that the Board acted arbitrarily and capriciously by requiring the County to take further action regarding these

[1] RDGB Royal Estate Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLC.

UGAs. The County also argues that the Board erroneously interpreted a rule regarding agricultural lands and erred when it concluded that the County violated the GMA by dedesignating agricultural lands for the RILB.

CCCU argues that the Board erred by concluding that the County complied with the GMA's procedural requirements regarding public participation, an issue paper, and source documents, and that the County complied with the GMA regarding designations of agricultural and forestlands, population projections, and private property considerations. CCCU further argues that the Board erred by concluding the County violated the GMA when the County reduced parcel sizes of agricultural and forestland.

FOCC argues that the compliance order erroneously declared issues to be moot regarding readopted forestland and rural density provision from the County's prior comprehensive plan.

We grant FOCC's motion to dismiss the County's and 3B's petitions for judicial review of the FDO, for lack of appellate jurisdiction. In the published portion of our opinion, we hold that issues regarding the annexed lands are moot. In the unpublished portion of this opinion, we hold that the Board did not err regarding the remaining issues raised by CCCU and FOCC, and remand to the Board for further proceedings in accordance with this opinion.

FACTS

The County adopted the 2016 Plan Update by Amended Ordinance No. 2016-06-12 on June 28, 2016. In this update, the County dedesignated three areas of agricultural land and designated these lands as UGAs, dedesignated an area of agricultural land and designated this land as RILB, reduced agricultural and forestland parcel sizes, and adjusted rural densities.

Two of the newly designated UGAs were adjacent to the cities of La Center and Ridgefield. Immediately following the 2016 Plan Update's passage, La Center and Ridgefield began the process of annexing these adjacent UGAs into their respective cities.

FOCC and CCCU petitioned the Board regarding the 2016 Plan Update. The Board consolidated these appeals. La Center, Ridgefield, 3B, and the LLCs intervened. Prior to the Board's decision, La Center passed an ordinance annexing its adjacent UGA, effective on August 29, 2016. Ridgefield passed an ordinance annexing its adjacent UGA, effective on October 14, 2016.

The Board issued its FDO on March 23, 2017. The Board determined some provisions invalid and found other provisions noncompliant.[2] The Board concluded, in part, that the County did not comply with the GMA when it (1) dedesignated agricultural land and designated the UGAs, (2) dedesignated agricultural land and designated the RILB, (3) reduced agricultural and forestland parcel sizes, and (4) adjusted rural densities. Further, the Board made determinations of invalidity regarding the County's UGA designations. The Board remanded the 2016 Plan Update to the County for the County to come into compliance with the GMA.

The County, Ridgefield, La Center, the LLCs, and CCCU filed petitions for review of the Board's FDO in superior court. Those petitions were consolidated by stipulation of the parties. FOCC sought direct review of the Board's FDO, and we granted review.

After the Board remanded the 2016 Plan Update, and while appeal of the FDO was pending, the County adopted new amendments to its comprehensive plan that returned the parcel

[2] The Board did not make separate findings of fact and conclusions of law for each issue it addressed. Rather, the Board conducted its analysis, citing evidence, and then usually stated, "The Board finds and concludes . . . ." *See, e.g.,* AR at 10499.

sizes and rural densities to their previous designations before the 2016 Plan Update amendments. The County also reversed one UGA designation during this period; however, the County did not take remedial action regarding the UGAs annexed by Ridgefield and La Center, arguing that it could not change the designation of land no longer within its control.

The Board issued a compliance order on January 10, 2018, concluding that the parcel sizes and rural density issues were moot and compliant because the County had adopted previously GMA-compliant provisions. The Board also concluded that the County was not in compliance regarding the UGAs annexed by La Center and Ridgefield.

Subsequently, Ridgefield, La Center, the County, the LLCs, 3B, and FOCC sought direct review of the Board's compliance order and consolidation with the review of the FDO. We accepted direct review of the compliance order and consolidated the appeals.

ANALYSIS

I. MOTION TO DISMISS

As an initial matter, we address FOCC's motion to dismiss the County's and 3B's petitions for judicial review of the Board's FDO. FOCC argues that this court lacks subject matter, or appellate, jurisdiction because the County and 3B failed to timely serve the Board with their respective petitions for judicial review as required by RCW 34.05.542, due to their failure to deliver their petitions for judicial review to the Board within 30 days. Thus, FOCC argues that the County's and 3B's failure to properly serve the Board deprives us of appellate jurisdiction.

We hold that service of the petition for judicial review by e-mail does not satisfy the service requirements of the Administrative Procedure Act (APA), chapter 34.05 RCW, and that

service on the agency is complete when the petition for review is delivered to the agency. As a result, we hold that the County's and 3B's petitions are untimely, and we grant FOCC's motion to dismiss Clark County's and 3B's petitions for judicial review of the FDO.

A. *Facts Pertaining to the Motion To Dismiss*

The Board issued its final decision to the parties on March 23, 2017. The deadline for filing petitions for judicial review was April 24. The County e-mailed its petition for judicial review to the Board and mailed its petition to both the Board and the attorney general's office using the United States Postal Service on April 24.[3] 3B sent its petition to the Board through FedEx overnight delivery on April 24. 3B concedes that its petition was received by the Board on April 25. The attorney general's office filed a notice of appearance, representing the Board, on May 11.

B. *Standard of Review*

We review de novo questions of a court's jurisdiction. *Ricketts v. Bd. of Accountancy*, 111 Wn. App. 113, 116, 43 P.3d 548 (2002). A party may raise a question of appellate, or subject matter, jurisdiction for the first time at any point in a proceeding. *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

We also review the meaning of a statute de novo. *Ricketts*, 111 Wn. App. at 116. Our fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, then we give effect to that plain meaning as an expression of legislative intent. *Pac. Marine Ins. Co. v. State ex rel. Dep't of Revenue*, 181 Wn. App. 730,

[3] The County does not contend that the physical copy arrived on or before April 24.

737, 329 P.3d 101 (2014). "Absent ambiguity, a statute's meaning must be derived from the wording of the statute itself without judicial construction or interpretation." *Fray v. Spokane County*, 134 Wn.2d 637, 649, 952 P.2d 601 (1998).

C. *Appeals From Decisions of the Board*

The APA governs appeals from decisions of the growth management hearings board. *Skagit Surveyors*, 135 Wn.2d at 555. A court does not obtain jurisdiction over an appeal from an agency decision unless the appealing party timely files and serves the petition for judicial review on the agency and all parties. *Skagit Surveyors*, 135 Wn.2d at 555. A petition for judicial review must be dismissed if the APA's service requirements are not met. *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 961, 235 P.3d 849 (2010). "Substantial compliance with the service requirements of the APA is not sufficient to invoke . . . appellate, or subject matter, jurisdiction."[4] *Skagit Surveyors*, 135 Wn.2d at 556.

Under the APA, a petition for judicial review of an agency order must be served on all parties of record within 30 days after service of the final order. RCW 34.05.542(2). The APA provides:

> "Service," *except as otherwise provided in this chapter*, means posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

RCW 34.05.010(19) (emphasis added).

[4] Like here, the agency appeal in *Skagit Surveyors* was initially heard by the court of appeals and not the superior court. *Skagit Surveyors*, 135 Wn.2d at 556 n.9.

But RCW 34.05.542(4) contains an exception to this definition. *Ricketts*, 111 Wn. App. at 117-18; *Stewart v. Dep't of Employment Sec.*, 191 Wn.2d 42, 47, 419 P.3d 838 (2018). Under that statute, the petitioner must serve the agency that issued the order by delivery to the director's office, the agency's principal office, or by serving the agency's attorney of record. RCW 34.05.542(4); *Stewart*, 191 Wn.2d at 47.

Service on the agency requires delivering the petition for judicial review to the agency within 30 days of the final order. RCW 34.05.542 (2), (3), (4). Here, the Board issued its final decision to the parties on March 23. Thirty days from March 23 was April 22, which was a Saturday. Therefore, the petition for judicial review was due April 24, the next business day.

1. *The County's Petition Was Untimely Served*

In response to FOCC's motion, the County argues that its petition for judicial review was timely served because it e-mailed the petition to the Board. The County does not argue that it timely served the Board by mailing the petition on April 24, but instead states that FOCC's challenge is "limited to the question of whether email service on an agency satisfies delivery pursuant to RCW 34.05.542(4)." Reply Br. of Clark County at 13. The County argues that service by e-mail satisfies the "delivery" requirement of RCW 34.05.542(4) because the Board has authorized service by electronic transmission in WAC 242-03-240(1). We hold that service by e-mail is insufficient to satisfy the requirements of RCW 34.05.542(4).

The Board is allowed to authorize service by electronic transmission. RCW 34.05.010(19). But it has not done so. The County relies on WAC 242-03-240. WAC 242-03-240 is titled, "Filing and service of all other papers," and provides that parties shall electronically file pleadings and briefs to the board, and electronically complete service to other parties. But

this rule is not applicable to appeals from the board's decision. WAC 242-03-240, and Title 242 of the Washington Administrative Code generally addresses practices and procedures for matters *in front of* the growth management hearings board. WAC 242-03-035. Appeals *from* the Board's final decision are governed by RCW 34.05.514 and RCW 34.05.542. RCW 36.70A.300; WAC 242-03-970.

Moreover, WAC 242-03-240 does not authorize service of any type of petition for judicial review by e-mail. WAC 242-03-240 refers to the "[f]iling and service of all other papers," meaning other than a petition for review to the Board. WAC 242-03-230 specifically addresses filing and service of the petition for review for cases appealed to the Board. Thus, the "all other papers" referred to in WAC 242-03-240 describes all papers except a petition for review. And the only petition for review addressed in WAC 240-03-230 is a petition filed at the board, not a petition for *judicial* review filed in superior court after the Board has made its decision.

Here, the County was required to serve the agency by "delivering" the petition for judicial review to the agency's office by April 24.[5] RCW 34.05.542(4).[6] Unless authorized by

[5] The County also mailed the petition to the attorney general's office using the United States mail on April 24. FOCC argues that mailing the petition to the attorney general does not adequately serve the Board because the attorney general had not appeared as the Board's attorney of record until May 11. The County does not argue that mailing the petition constitutes service on the Board, thus, we do not address this issue.

[6] "Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark." RCW 34.05.542(4).

the agency, electronic transmission, such as e-mail, is not a proper form of service. RCW 34.05.010(19). Although service on other parties of record is complete when the petition is deposited in the United States mail, service on the agency is complete only when it is "delivered" to the Board. RCW 34.05.542(4).

Here, the Board did not authorize service by electronic transmission. Because e-mail is not an authorized form of service, the County did not deliver its petition for review to the Board's office by April 24, 2017. The County did not timely serve its petition for judicial review, and we do not have appellate jurisdiction over its petition for review appealing the FDO. We grant FOCC's motion to dismiss the County's petition from the Board's FDO.[7]

2. *3B's Petition Was Untimely Served*

In response to FOCC's motion to dismiss, 3B argues that it properly served the Board by sending its petition for judicial review to the Board through FedEx and that its service of the petition was complete on April 24 when it delivered its petition to FedEx. We disagree.

As discussed above, RCW 34.05.542(4) provides an exception to the general rule that service is complete upon deposit in the United States mail. RCW 34.05.010(19); *Stewart*, 191 Wn.2d at 47; *Ricketts*, 111 Wn. App. at 117-18. Under the exception, service on the agency is not complete until the petition is actually delivered to the agency's office. RCW 34.05.542(4); *see Ricketts*, 111 Wn. App. at 118. Even assuming service through a commercial parcel delivery company like FedEx was proper, 3B did not timely serve the petition because the Board did not

[7] FOCC does not argue that the County's appeal from the Board's compliance order was untimely. Accordingly, we consider the County's arguments regarding the Board's compliance order below.

receive the petition until April 25. Because 3B's petition was due to the Board by April 24, 3B did not timely serve its petition for review and we do not have appellate jurisdiction over its petition for review appealing the FDO.[8] Thus, we grant FOCC's motion to dismiss 3B's petition for judicial review from the Board's FDO.[9]

II. BOARD DECISIONS — LEGAL PRINCIPLES

Washington's APA governs our review of the Board's decisions. RCW 34.05.570(3); *Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 186 Wn.2d 648, 666, 381 P.3d 1 (2016). Under the APA, we review the Board's legal conclusions de novo, but we give "substantial weight to the Board's interpretation of the GMA." *Whatcom County*, 186 Wn.2d at 667. RCW 34.05.570(3) provides nine enumerated ways to challenge an agency action through judicial review. The parties here challenge the Board's actions under five statutory sections: (1) the Board's order is outside its statutory authority or jurisdiction; (2) the Board erroneously interpreted or applied the law; (3) the Board engaged in unlawful procedure or decision making, or has failed to follow proscribed procedures; (4) the Board's actions are not support by substantial evidence; and (5) the Board's actions are arbitrary and capricious. RCW

[8] 3B also asserts that FedEx is a proper method of service because RCW 34.05.010(19) "acknowledges the potential for service by commercial parcel delivery company, such as FedEx." Reply Br. of 3B at 3 (footnote omitted). 3B is correct that agencies may, by rule, authorize service by commercial parcel delivery company. RCW 34.05.010(19). However 3B does not provide authority establishing that the Board authorized service of petitions for judicial review by commercial parcel delivery company. Moreover, 3B concedes that the Board did not receive its petition until April 25. We do not determine whether the Board authorized service by commercial parcel delivery company because 3B's service was untimely.

[9] In light of our holding that the dedesignation and designation of the annexed UGAs issue is moot, our decision to grant FOCC's motion to dismiss 3B's appeal from the FDO has no practical bearing on this case.

34.05.570(3)(b)-(e), (i). Here, the party challenging the Board's decision bears the burden of establishing that the decision is improper. RCW 34.05.570(1)(a), (3)(d); *Whatcom County*, 186 Wn.2d at 667.

On review from initial challenges and on review following a Board's remand for compliance, the Board determines whether a county's plan is compliant with the GMA. RCW 36.70A.300(3). The Board must find compliance with the GMA "unless it determines that the action by the . . . county . . . is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(1), (3). To find a county's action clearly erroneous, the Board must be "'left with the firm and definite conviction that a mistake has been committed.'" *Whatcom County*, 186 Wn.2d at 667 (internal quotation marks omitted) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Bd.*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000)).

Counties have discretion to make many choices about accommodating growth in their comprehensive plans and amendments. RCW 36.70A.110(2). County actions are presumed compliant and Boards must defer to local planning decisions. *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 154-55, 256 P.3d 1193 (2011). However, we do not afford counties deference in their interpretations of the GMA, and counties must comply with the requirements of the GMA. *Whatcom County*, 186 Wn.2d at 667; *King County*, 142 Wn.2d at 561. Deference to a county's planning decisions supersedes the general deference we give to the Board under the APA. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). It is under these guidelines that we review the correctness of the Board's determination regarding whether the County's actions were clearly

erroneous. *Concerned Friends of Ferry County v. Ferry County*, 191 Wn. App. 803, 813, 365 P.3d 207 (2015).

We review the Board's factual findings for substantial evidence. *Kittitas County*, 172 Wn.2d at 155. Evidence is substantial if "when viewed in light of the whole record," RCW 34.05.570(3)(e), there is "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness'" of the finding. *Kittitas County*, 172 Wn.2d at 155 (quoting *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008)). When reviewing mixed questions of law and fact, we determine the law independently and apply the law to the facts found by the Board. *Thurston County*, 164 Wn.2d at 341. We consider whether the Board's factual findings support its conclusions. *Kittitas County v. Kittitas County Conserv. Coal.*, 176 Wn. App. 38, 55 n.3, 308 P.3d 745 (2013).

We determine whether a Board's order is arbitrary and capricious by reviewing "whether the order represents 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Kittitas County*, 172 Wn.2d at 155 (internal quotation marks omitted) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46-47, 959 P.2d 1091 (1998)). "Issues not raised before [the Board] may not be raised on appeal." RCW 34.05.554(1). An exception exists if "[t]he interests of justice would be served by resolution of an issue arising from . . . [a]gency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency." RCW 34.05.554(1)(d)(ii).

We conduct statutory interpretation to determine and give effect to legislative intent. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014).

Legislative intent is primarily deprived from statutory language. *Town of Woodway*, 180 Wn.2d at 173-74. When the statutory language is unambiguous, we apply the plain meaning of the statute. *Town of Woodway*, 180 Wn.2d at 174. In the absence of legislative definitions, we give statutory terms their plain and ordinary meanings as defined in the dictionary. *Lockner v. Pierce County*, 190 Wn.2d 526, 537, 415 P.3d 246 (2018). When analyzing a statute's plain language, we consider the specific text of the relevant provision, the context of the entire statute, related provisions, and the statutory scheme as a whole. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). We do not liberally construe the GMA. *Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007).

III. MOOTNESS OF UGA DESIGNATIONS RESULTING FROM ANNEXATIONS

La Center, Ridgefield, and the LLCs argue that the Board's finding of the County's noncompliance regarding the County's UGA designations is moot. Specifically, they argue that the Board (1) erroneously failed to acknowledge that the County's action regarding the UGAs was rendered moot by the annexations and (2) arbitrarily and capriciously required the County to take action regarding land no longer within its control. We hold that arguments regarding the annexed lands are moot.

A. *Facts Pertaining to the Mootness of UGA Designations Resulting from Annexations*

In the County's 2016 Plan Update, the County dedesignated areas of agricultural land adjacent to the cities of La Center and Ridgefield and designated these lands as UGAs. Both La

Center and Ridgefield annexed these adjacent UGAs into their respective cities long before the Board's hearing in February 2017.[10]

The Board concluded, in part, that the County did not comply with the GMA when it dedesignated agricultural land and designated the UGAs. Further, the Board made determinations of invalidity regarding the County's UGA designations. The Board remanded the 2016 Plan Update to the County for the County to come into compliance with the GMA.

The County did not take remedial action regarding the UGAs relevant here, arguing that it could not change the designation of the annexed land no longer within its control. The Board concluded that the County was not in compliance regarding these UGAs.

B. *GMA Compliance Legal Principles*

The Board may review comprehensive plans and their amendments for compliance with the GMA. RCW 36.70A.280. However, the Board lacks the authority to determine many types of land-related disputes. Relevant here, the Board does not have authority to review cities' land annexations. *See* RCW 36.70A.280.

The Board determines whether a county's plan is in compliance with the GMA. RCW 36.70A.300(3). When the Board determines that a plan or its amendments are flawed, it may enter a finding of noncompliance or a determination of invalidity. RCW 36.70A.300, .302. When the Board finds that the plan or its amendments are noncompliant, the Board remands the matter back to the county with instructions to comply with the GMA. RCW 36.70A.300(3)(b).

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[10] Futurewise challenged the Ridgefield annexation. We affirmed the superior court's dismissal of the challenge. *Futurewise v. City of Ridgefield*, No. 50406-5-II, slip op. at 2 (Wash. Ct. App. Jan. 29, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/D2%2050406-5-II%20Unpublished%20Opinion.pdf.

A plan or its amendments remain valid during the remand period following the Board's noncompliance finding. RCW 36.70A.300(4); *Town of Woodway*, 180 Wn.2d at 174.

When the Board finds that the plan or its amendments are invalid, the Board must (1) find noncompliance and remand the plan back to the county and (2) enter a determination of invalidity supported by findings of fact and conclusions of law. RCW 36.70A.302(1)(a), (b). This invalidity determination must conclude that the flawed provision of the plan or its amendments substantially interfere with the goals of the GMA. RCW 36.70A.302(1)(b). "Upon a finding of invalidity, the underlying provision would be rendered void." *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 138 Wn.2d 161, 181, 979 P.2d 374 (1999).

Significantly, an updated plan is presumed to be valid upon adoption. RCW 36.70A.320(1). In addition, a finding of invalidity is "prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county." RCW 36.70A.302(2). A finding of invalidity does not apply to certain vested rights, namely development permit applications. RCW 36.70A.302(2)-(3).

C. *The Board's Final Decision Order Is Prospective*

Here, the Board made a determination of invalidity regarding the UGAs. The Board made related findings of fact and conclusions of law that the County's 2016 Plan Update did not comply with the GMA and determined that the UGAs for La Center, Ridgefield, and Battle Ground were invalid. This determination rendered the UGA provisions void. *King County*, 138 Wn.2d at 181.

The parties disagree as to the retroactivity of the determination of invalidity regarding the UGA provisions. FOCC argues that the UGA provisions are essentially "void ab initio," or "null

from the beginning," and thus, we should unwind Ridgefield's and La Center's annexations of the UGAs to return the lands to their prior designations and jurisdiction under the County. Br. of FOCC at 12. Conversely, the cities and the LLCs argue that the UGAs are void beginning from the date of the Board's order. We hold that the Board's order is prospective from the date of the order.

RCW 36.70A.302(2) plainly states that "[a] determination of invalidity is prospective in effect." Prospective means "concerned with or relating to the future: effective in the future." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1821 (2002). Here, the language of RCW 36.70A.302(2) is clear and unequivocal. A determination of invalidity is effective going forward from the date of the order. A determination of invalidity cannot alter whatever occurred prior to the Board's rendering of its decision.

D. *The County Lacks Authority Over the Annexed UGAs*

The cities and LLCs argue that given that a determination of invalidity is prospective only, the UGA issues are moot because the UGAs were annexed by the respective cities before the Board's determination of invalidity. Thus, the annexations deprived the Board and the County of authority to act, and consequently, the determination cannot have any legal effect. We agree.

1. *Mootness Following Annexation Legal Principles*

An issue is moot if the court can no longer provide effective relief. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010). "The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of

litigation have forestalled any occasion for meaningful relief." *SEIU Healthcare 775NW*, 168 Wn.2d at 602 (internal marks omitted).

After land contiguous to a city has been designated UGA, that city may annex that contiguous land. RCW 35.13.005, .010. Article XI, section 11 of the Washington Constitution states, "Any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." RCW 35.63.080 authorizes a city council, board, or commissioners to prepare, adopt, and enforce plans for the physical development of the municipality.

All three regions of the growth management hearings board have examined this question and have held that after a city annexes land, that land is no longer within the county's jurisdiction. For example, in *Panesko v. Lewis County*, Lewis County expanded a UGA to include certain rural lands. No. 08-2-0007c, 2009 WL 2981888, at *5 (W. Wash. Growth Mgmt. Hr'gs Bd. July 27, 2009). The City of Toledo successfully annexed this UGA land four months before the Board issued its FDO regarding Lewis County's compliance with the GMA. *Panesko*, at *1, *5-6. In reviewing Lewis County's compliance with the GMA following a remand period, the Board stated:

> It is unfortunate that the [UGA] was annexed in the midst of a proceeding to consider its designation as agricultural land of long term commercial significance. Nevertheless, the Board finds nothing egregious in the County's conduct. . . . The Board has no jurisdiction in the realm of municipal annexations. Further, now that the [UGA] has been annexed by the City of Toledo, the issue of whether this property should be included as part of the UGA is moot.
>
> *Conclusion*: The City of Toledo having annexed the [UGA], the land is no longer subject to the County's jurisdiction. The County having no ability to consider or alter the designation of this property as agricultural land of long term commercial significance, it need not take any further action in that regard.

Panesko, at *6 (footnotes omitted).

In *1000 Friends of Washington v. Snohomish County*, Snohomish County dedesignated an area called Island Crossing as agricultural and instead designated it as UGA. No. 03-3-0019c, 2009 WL 795934, at *1 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Feb. 19, 2009). The Board found these designations noncompliant with the GMA. *1000 Friends of Washington* at *1. After our Supreme Court reversed the Board's determination, the City of Arlington annexed the Island Crossing UGA. *1000 Friends of Washington*, at *2. On remand, the Board determined that "the sole question for the Board was whether the County had already taken steps to adjust its future land-use map and zoning designations in the Island Crossing area." *1000 Friends of Washington*, at *2. The Board concluded, "Given that the Island Crossing area has been annexed by the City of Arlington and is no longer within the jurisdiction of Snohomish County, the Board concludes that a remand back to the County would be an empty act. The 'urban' land in question is now the City of Arlington's to govern." *1000 Friends of Washington*, at *3.

In *Futurewise v. Benton County*, Futurewise argued that the Board should impose a determination of invalidity regarding Benton County's dedesignation of agricultural land that the County redesignated as UGA near the City of Kennewick. No. 14-1-0003, 2015 WL 999266, at *1-2 (E. Wash. Growth Mgmt. Hr'gs Bd. Jan. 15, 2015). In its FDO, the Board determined that these designations were not compliant with the GMA but did not issue a determination of invalidity. *Futurewise*, at *1. Futurewise argued that without a determination of invalidity, the UGA "could be quickly annexed to the City of Kennewick mooting the Board's Final Decision and Order." *Futurewise*, at *2. The Board stated that annexing the land would indeed

"effectively moot the Board's Final Decision and Order." *Futurewise*, at *3. In granting Futurewise's request for a determination of invalidity, the Board stated that it "heard concerns expressed at the hearing that a landowner-initiated annexation petition action might circumvent the GMA compliance process and render compliance actions moot. The Board notes that in the absence of an invalidity order, petitioners have little remedy if an annexation of this property was accomplished." *Futurewise*, at *4.

This is not the first time Clark County has created this circumstance. In 2007, Clark County dedesignated agricultural lands and redesignated these lands as UGA, including lands near the cities of Camas and Ridgefield. *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204, 214, 254 P.3d 862 (2011) *vacated in part by Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 177 Wn.2d 136, 142-43, 148, 298 P.3d 704 (2013). Challengers, including Futurewise, petitioned the Board to review the County's compliance with the GMA. *Clark County*, 161 Wn. App. at 214. Before the Board issued its FDO, Camas and Ridgefield passed ordinances annexing UGA lands. *Clark County*, 161 Wn. App. at 214. Without notice of the annexations, the Board determined that the County's designations of the annexed lands were noncompliant with the GMA and invalid. *Clark County*, 161 Wn. App. at 215. However, after learning of the annexations, the Board issued an order stating that it lacked jurisdiction over the annexed lands. *Clark County*, 161 Wn. App. at 220.

We held that because the County's comprehensive plan amendments were pending review, the amendments were not final and parties could not act in reliance on them. *Clark County*, 161 Wn. App. at 224-25. We further held that the legislature did not intend to allow a county to evade review of their planning decisions by making a UGA designation followed by an

immediate annexation. *Clark County*, 161 Wn. App. at 225. Accordingly, we held that the annexations did not preclude the Board's jurisdiction to review the validity of the County's actions regarding the annexed lands. *Clark County*, 161 Wn. App. at 225-26.

Our Supreme Court vacated our decision regarding the annexed lands. *Clark County*, 177 Wn.2d at 148. The Supreme Court held that because the parties had not appealed issues regarding the annexed lands and because the annexed lands had no bearing on the resolution of claims on appeal, it was error to address issues relating to the annexed lands. *Clark County*, 177 Wn.2d at 148. Moreover, Justice Stephens concurred in reversing our opinion, joined by Justice Wiggins, stating:

> I would dismiss the claims challenging the annexation as moot in the context of this proceeding. The claims in question originated in a petition to the [Board] challenging Clark County's designation of certain lands under the [GMA]. The cities of Camas and Ridgefield have annexed the lands in question, and those annexations cannot be challenged in these proceedings. As a result, the question of whether the Board properly reviewed Clark County's prior designation of the annexed lands is moot. Dismissal should follow. *See Seguin v. Barei*, 163 Wn. 702, 703, 299 P. 655 (1931) (dismissing appeal where underlying interest in disputed property was dissolved in separate proceeding).

Clark County, 177 Wn.2d at 149 (Stephens, J. concurring).

2. *Issues Regarding La Center's and Ridgefield's Annexed Lands Are Moot*

Issues regarding the annexed lands are moot because the Board can provide no effective relief. The Board's role is to determine whether the County is in compliance with the GMA. RCW 36.70A.300(1). However, after land contiguous to a city has been designated UGA, that city may annex that contiguous land. RCW 35.13.005, .010. Once that land has been annexed, it is within the city's sole jurisdiction. WASH. CONST. art. XI, § 11; RCW 35.63.080. As a result, when La Center and Ridgefield annexed previously unincorporated land into their municipalities,

the County lost its ability to plan for that land. RCW 35.63.080; 35A.11.020. The Board cannot compel the County to take action to come into compliance regarding land the County does not control. Such compulsion is beyond the quasijudicial powers of the Board. *See* RCW 36.70A.300(1).

FOCC compares this case to *Miotke v. Spokane County*, 181 Wn. App. 369, 325 P.3d 434 (2014). However, *Miotke* is distinguishable. In *Miotke*, Spokane County designated a UGA that was not subsequently annexed. *Miotke*, 181 Wn. App. at 373-75. While the Board reviewed the designation, development rights of property owners vested in the new UGA. *Miotke*, 181 Wn. App. at 373. The Board found the UGA designation noncompliant with the GMA. *Miotke*, 181 Wn. App. at 373. In an attempt to comply, Spokane County repealed the UGA designation and reverted the land to its prior designation. *Miotke*, 181 Wn. App. at 374.

On appeal, Spokane County argued that the vested urban development rights of the landowners in the former UGA prevented it from complying with the GMA. *Miotke*, 181 Wn. App. at 379. We held that the vested rights of property owners did not relieve Spokane County from its planning obligations under the GMA. *Miotke*, 181 Wn. App. at 379. Rather, it was Spokane County's designation of the UGA that created the opportunity for vested rights, and Spokane County was responsible for GMA compliance in its planning decisions. *Miotke*, 181 Wn. App. at 379-80.

Miotke is distinguishable because the disputed land *always* remained within the jurisdiction of Spokane County's comprehensive plan. *Miotke*, 181 Wn. App. at 373-75. Because of this, the Board retained the power to determine the county's compliance with the GMA. *Miotke*, 181 Wn. App. at 379-80.

Here, because of the prospective nature of the Board's determination of invalidity, the County cannot exercise authority over annexed land no longer within its control. As a result, issues regarding the annexed lands are moot.[11,12]

In this published portion of our opinion, we grant FOCC's motion to dismiss the County's and 3B's petitions for lack of appellate jurisdiction. Further, we hold that issues regarding the annexed lands are moot. In the unpublished portion of this opinion, we hold that the Board did not err regarding the remaining issues raised by CCCU and FOCC. We remand back to the Board for further proceedings in accordance with this opinion.

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 shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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[11] We note that the County and cities have previously engaged in a pattern of UGA designation followed by swift annexation. *Clark County*, 161 Wn. App. at 225. Moreover, at oral argument, FOCC showed us a map of the UGA annexed by La Center. Wash. Court of Appeals oral argument, *Friends of Clark County and Futurewise v. Clark County, et al*, No. 50847-8-II (July 3, 2019), at 21 min., 53 sec. (on file with court). The UGA had irregular borders that followed specific property lines. Additionally, in its compliance order, the Board noted the County's repeated evasion of GMA compliance review in previous instances where cities had rapidly annexed UGAs. Regardless of the validity of any questionable behavior, this is an issue for the legislature.

[12] FOCC argues that the prospectivity of RCW 36.70A.302(2) is confined to only vested rights. However, the plain language of RCW 36.70A.302(2) does not confine the prospective of a determination of invalidity to vested rights. Further, RCW 36.70A.302 provides guidance regarding the effects of determinations of invalidity on savings clauses, interim ordinances, as well as property rights. We reject FOCC's attempt to construe RCW 36.70A.302(2) more narrowly than the language provides.

IV. AGRICULTURAL DEDESIGNATION RESULTING FROM RILB DESIGNATION

The County argues that the Board misinterpreted and misapplied the law, and made decisions unsupported by substantial evidence, when it found the County's dedesignation of agricultural land to establish a RILB violated the GMA. The Board concluded that the County failed to comply with the GMA by not conducting a countywide or area-wide analysis of the economic viability of the agricultural industry of the county. The Board further determined that the RILB site met the agricultural resource land requirements.

The County is the only party that appeals these provisions of the FDO. As stated above, we grant FOCC's motion to dismiss the County's petition for judicial review of the FDO. Thus we do not address this argument.[13]

V. PUBLIC PARTICIPATION

CCCU argues[14] that the Board erred by dismissing its arguments that the County violated its public participation program when it (1) finalized Issue Paper 9, a document used to support the 2016 Plan Update, after voting to approve the plan amendment; (2) began the amendment process before adopting a public participation program by using reports adopted years before the

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[13] Even if we were to consider this argument, our review of the record here reveals that the Board did not err.

[14] CCCU's approach to assigning error is challenged by other parties. CCCU acknowledges that it does not assign error to any of the Board's findings of fact, stating that, "the Board did conclude most of its analyses of the various issues as the 'Board finds and concludes . . .' CCCU does not believe these are findings of fact, but are legal conclusions that do not require a separate assignment of error." Br. of CCCU at 1-2 n.2 (citation omitted). We agree and consider CCCU's arguments because there are no clear findings of fact contained in the FDO regarding the portions of the FDO that CCCU challenges.

amendment process; (3) did not adequately respond to public comments; and (4) excluded rural landowners from participating in the amendment process.[15] We hold that Board did not err when it dismissed CCCU's public participation arguments.

A. *Facts Pertaining to the County's Public Participation Efforts*

A county planning under the GMA must establish a "public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans." RCW 36.70A.140.

In response to this GMA mandate, the County enacted an ordinance codifying its general PPP for GMA actions requiring notice and public hearings for planning related actions. CLARK COUNTY CODE 40.510.040. At the time of this litigation, the general PPP provisions were last amended in 2007.

In 2014, the Clark County Council passed an additional ordinance detailing its 2016 Plan Update (Plan Update PPP). The Plan Update PPP detailed the steps the County intended to take to ensure public participation. The Plan Update PPP facilitated public participation through the use of public meetings and workshops, a notification system for planning meetings and events, utilization of a "robust website" containing planning documents and schedules, and strategies for contacting interested parties and stakeholders, neighborhood associations, and news outlets. AR at 4593. This "robust website" provided the public access to potential plan amendments and

[15] CCCU's briefing argues that the *County* violated the GMA regarding public participation, not that the Board erred when determining that the County complied with the GMA regarding public participation. *See, e.g.*, Br. of CCCU at 18, 24 ("The County violated the GMA." "The County completely failed to respond to public comments.") Here, CCCU has the obligation to argue how and why *the Board* erred. Where applicable, we reframe CCCU's arguments to correctly reflect CCCU's burden.

supporting documents, past and future meeting information, and surveys to solicit citizen responses.

During the 2016 Plan Update process, the County held over thirty public hearings regarding the 2016 Plan Update. The County also held ten open houses and public meetings throughout the county. Further, the County provided opportunity for public comment through multiple countywide online surveys. The County communicated with its citizens in person and through newspaper, e-mail, mail, and television. This communication included sessions with a CCCU member actively participating in conversations with the County. The County received more than 3,000 public responses during the 2016 Plan Update process, of which over 1,100 were from individuals or groups with interests in rural or resource lands.

One of CCCU's claims in its petition for review to the Board was that the County failed to adhere to its Plan Update PPP and the public participation requirements of the GMA. The Board dismissed all of CCCU's public participation arguments, and concluded that the County complied the GMA in this respect.

B. *Issue Paper 9*

CCCU argues that the County violated the GMA because Issue Paper 9[16] was finalized after the 2016 Plan Update was approved. Specifically, CCCU argues that Issue Paper 9 was completed on June 23, 2016, two days after the County adopted the 2016 Plan Update. CCCU contends that the June 21, 2016 adoption of the 2016 Plan Update precluded public participation

[16] Issue Paper 9 is "Clark County Agricultural and Forest Land Supplemental Mapping and Data Analysis." AR at 6916. Issue Paper 9 updated a 2012 rural lands study based on new information and reviewed literature regarding agricultural trends.

regarding Issue Paper 9. Because substantial evidence supports that the County did not adopt the 2016 Plan Update until June 28, 2016, we hold that the Board did not err when it dismissed these arguments.

We review the Board's factual findings for substantial evidence. *Kittitas County*, 172 Wn.2d at 155. Evidence is substantial if a quantity of evidence is sufficient to persuade a fair-minded person of the truth of the finding. *Kittitas County*, 172 Wn.2d at 155. The challenging party has the burden of showing that the Board's decision is unsupported by substantial evidence. RCW 34.05.570(1)(a).

When CCCU raised this argument below, the Board found that the County adopted the 2016 Plan Update (Amended Ordinance No. 2016-06-12) on June 28, 2016. Although the Board located an ordinance from June 21 in the administrative record, that ordinance was never signed into law. Rather, the record shows that the County adopted Amended Ordinance No. 2016-06-12 on June 28, 2016. The Board's finding that the County adopted the 2016 Plan Update on June 28, 2016, after Issue Paper 9 had been finalized, is supported by substantial evidence. Further, CCCU fails to show that the Board erred regarding the public's opportunity to comment on Issue Paper 9. Citizens had the opportunity to comment on Issue Paper 9 at a June 21, 2016 meeting, and at least one citizen commented on Issue Paper 9 by e-mail. We hold that the Board did not err in dismissing CCCU's argument that the County violated the GMA regarding Issue Paper 9.

C. *County's Use of Source Documents*

CCCU argues that the County violated the GMA when it began the 2016 Plan Update process by using source documents from 2009 to 2012 to support the 2016 Plan Update.[17] Specifically, CCCU argues that because these source documents precede the County's adoption of the Plan Update PPP in 2014, the use of the older reports violated the GMA's public participation requirements. We hold that the Board did not err when it dismissed these arguments.

As discussed above, county or city planning under the GMA must establish a public participation program. RCW 36.70A.140. The procedures identified in the PPP must provide for broad dissemination of proposals, opportunity for written comments, public meetings after effective notice, open discussion, communication programs, information services, and consideration of and response to public comments. RCW 36.70A.140. However, inexact compliance with the established public participation program and procedures does not invalidate a comprehensive plan "if the spirit of the program and procedures is observed." RCW 36.70A.140.

WAC 365-196-600 expands on the GMA's public participation requirements, and offers suggestions to cities and counties to best allow for public participation. Relevant here, this rule recommends, "Whenever a provision of the comprehensive plan . . . is based on factual data, a clear reference to its source should be made part of the adoption record." WAC 365-196-600(2)(a).

[17] CCCU cites the following documents: (1) Agriculture Preservation Strategies Report, (2) Clark County Bicycle and Pedestrian Plan, (3) Aging Readiness Plan, and (4) Growing Healthier Report.

The Board found that the County had not violated RCW 36.70A.140, because the County complied with the statute by adopting the Plan Update PPP. CCCU argues that the use of older source documents violates the GMA under RCW 36.70A.140 and the general principles that the GMA require public participation. The County argues that the use of these underlying source documents is based on WAC 365-196-600(2)'s citation for factual data suggestion, and that these older source documents were publicly reviewed and considered previously.

Although the GMA mandates that a county must make a public participation program, CCCU does not identify, and we could not find, any GMA provision that mandates the underlying source documents to be subject to a county's PPP. "'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 296-97, 381 P.3d 95 (2016) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Moreover, the public was provided with opportunity to comment on the source documents when commenting on the 2016 Plan Update. We hold that the Board did not err when dismissing CCCU's argument regarding source documents supporting the 2016 Plan Update.

D. *Record of and Response to Public Comments*

CCCU argues that the County "failed to respond to public comments and maintained an incomplete public record" during and after the planning process. Br. of CCCU at 24. We hold that the Board did not err in dismissing these arguments.

The public participation "procedures shall provide for . . . consideration of and response to public comments." RCW 36.70A.140. WAC 365-196-600(8) provides further guidance. The rule, in part, states:

> Consideration of and response to public comments. All public comments should be reviewed. Adequate time should be provided between the public hearing and the date of adoption for all or any part of the comprehensive plan to evaluate and respond to public comments. The county or city should provide a written summary of all public comments with a specific response and explanation for any subsequent action taken based on the public comments. This written summary should be included in the record of adoption for the plan.

WAC 365-196-600(8)(a).

Although chapter 365-196 WAC provides some procedural guidelines, compliance with these procedures "is not a prerequisite for compliance with the act." WAC 365-196-030(2). The Board's compliance determination must be based on a violation of the GMA itself. WAC 365-196-030(3). Chapter 365-196 WAC does not create a minimum list of criteria for procedural compliance with the GMA. Rather, counties "can achieve compliance . . . by adopting other approaches." WAC 365-196-030(2).

As used in chapter 365-196 WAC, "shall" means "a requirement for compliance with the act" and has the same meaning as "must." WAC 365-196-210(29). Conversely, "should" is "the advice of the department, but does not indicate a requirement for compliance with the act." WAC 365-196-210(30).

CCCU cites *Larson Beach Neighbors v. Stevens County*, No. 03-1-0003, 2004 WL 3404211, at *9 (E. Wash. Growth Mgmt. Hr'gs Bd. Feb. 10, 2004), and *Loon Lake Property Owners Ass'n v. Stevens County*, No. 03-1-0006c, 2004 WL 2624883 at *5 (E. Wash. Growth Mgmt. Hr'gs Bd. Oct. 15, 2004), for the proposition that in the GMA context, "should" conveys

a mandatory duty. CCCU misconstrues these Board decisions. *Larson* addresses language in a county's PPP that required review of all public comments but that the county "may" respond to comments in writing or verbally. *Larson*, at *8. The Board concluded that the county's PPP created a mandatory requirement to respond with an option of how to fulfill that requirement. *Larson*, at *9. Here, the County's lack of mandatory language in its 2016 Update PPP distinguishes *Larson*.

In *Loon Lake*, the Board found that the county failed to respond to public comments. At *5. After a compliance remand, a challenger wanted the Board to interpret its FDO to force the county to reopen the record to respond to public comments. *Loon Lake*, at *5. The Board stated that there was no reason to reopen to record, and that the county had created a "summary of public comments and the County's response thereto in accordance with the requirements of WAC 365-195-600." *Loon Lake*, at *6. Procedurally, *Loon Lake* addressed a Board's remedies during the period for remand and compliance. The Board referenced the county's previous actions regarding public comments to hold that the challenger did not show that reopening the record was necessary. *Loon Lake*, at *6. *Loon Lake* is distinguishable because here, CCCU's arguments are based on the FDO, not the compliance order. Neither of these Board decisions conflict with the explicit permissive language in chapter 365-196 WAC.

The Plan Update PPP provides a variety of methods and mediums the County was to use to provide the public with information and an opportunity to participate. The plain language of RCW 36.70A.140 states that a county's PPP shall provide for the response to public comment. Although the 2016 Plan Update PPP mentions public review and response to comments, it does not require the County to respond to all comments. Moreover, inexact compliance with the

established public participation program and procedures does not invalidate a comprehensive plan "if the spirit of the program and procedures is observed." RCW 36.70A.140.

The record shows that the County considered and responded to a large number of public comments. The County heard citizens at meetings and open houses, received e-mails, collected responses from surveys, and held meetings with various interested parties. The GMA does not require the County to formally consider and respond to all public comments.

CCCU also argues that the County maintained an incomplete record of the public comments it received during the 2016 Plan Update. Similarly, CCCU's argument is based on the permissive WAC 365-196-600(8)(a) rather than mandatory GMA provisions. The plain language of RCW 36.70A.140 does not require a county to index and maintain a record with every single comment offered during the planning process. We hold that the Board did not err when it dismissed CCCU's arguments that the County failed to respond to public comments and maintained an incomplete public record during and after the planning process.

E. *County's Use of Internet*

CCCU argues that the County's 2016 Plan Update PPP's reliance on internet communication excluded rural citizens, thus violating the GMA. The Board dismissed CCCU's argument. We hold that the Board did not err.

RCW 36.70A.035(1) mandates public participation requirements that are "reasonably calculated to provide notice to property owners and other affected and interested individuals." RCW 36.70A.035(1) lists specific examples of "reasonable notice provisions," including "[p]ublishing notice in a newspaper, [n]otifying public or private groups with known interest in a

certain proposal, and [p]ublishing notice in agency newsletters or sending notice to agency mailing lists." In addition, WAC 365-196-600(4)-(5) states:

> (4) Each county or city should try to involve a broad cross-section of the community, so groups not previously involved in planning become involved.
>
> (5) Counties and cities should take a broad view of public participation. The act contains no requirements or qualifications that an individual must meet in order to participate in the public process. If an individual or organization chooses to participate, it is an interested party for purposes of public participation.

CCCU argues that the County violated WAC 365-196-600(4)-(5) by failing to use noninternet based communication to include rural citizens in the 2016 Plan Update process. CCCU argues that rural citizens would be less likely to use the County's online portal that provided the public access to potential plan amendments and supporting documents, past and future meeting information, and surveys to solicit citizen responses.

In addition to the County's plan update website, the County disseminated information to its citizens through a number of mediums. The County communicated through e-mail, mail, newspaper, television. CCCU fails to show how the County's use of multiple mediums failed to include rural citizens. We hold that the Board did not err when it dismissed CCCU's argument that the County's Plan Update PPP's reliance on internet communication excluded rural citizens.

VI. Designation of Agricultural and Forestlands Capable of Long Term Commercial Production

CCCU argues that the County violated the GMA regarding its designation of agricultural and forestlands capable of long term commercial production. Specifically, CCCU argues that the County incorrectly relied on Issue Paper 9, which used "data layers" in addition to United States Department of Agriculture Natural Resources Conservation Service (NRCS) standards. CCCU

argues that the Board's acceptance of the County's Issue Paper 9 was arbitrary and capricious. We hold that Board did not err by dismissing this argument.[18]

In its comprehensive plan, a county designates eligible land as agricultural or forestlands capable of long term commercial production. RCW 36.70A.070(1). One factor counties consider when designating lands for these purposes is soil composition. WAC 365-190-050(3)(b)(ii). Counties are to use soil data from NRCS. WAC 365-190-050(3)(b)(ii).

In the designation process here, the County used soil data from NRCS as well as other data. The Board found and concluded, "The County used the NRCS layer and other data; nothing in the WAC precludes them from using other data, as long as they use NRCS data as well. CCCU's claim about data layers is dismissed." AR at 10510.

When considering land for designation as agricultural resource land, counties consider three factors, including the land's capability of use for agricultural production. WAC 365-190-050(3)(b). This includes using data from NRCS. WAC 365-190-050(3)(b)(ii) states:

> In determining whether lands are used or capable of being used for agricultural production, counties and cities shall use the land-capability classification system of [NRCS] as defined in relevant Field Office Technical Guides. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys, and are based on the growing capacity, productivity and soil composition of the land.

[18] Preliminarily, the County argues that this issue is not before the court because the County did not amend any part of the comprehensive plan to designate any agricultural or forest lands. Further, the County argues that any designations of agricultural or forest lands occurred in prior plan amendments, more than 60 days before CCCU filed its petition to the Board. In reply, CCCU cites to a different portion of the Board's FDO that analyzes the dedesignation of agricultural lands to support its contention that the County made agricultural and forest land designations. Although the County raised this argument to the Board, the Board did not address it; instead it reached the merits of CCCU's data layers argument. We address the merits of CCCU's argument in the interest of fairness.

Here, CCCU is not arguing that the County did not use the NRCS data. Rather, CCCU argues that the County's use of data in addition to the NRCS data violated the GMA and the rule.[19] But the rule does not prohibit a county's use of additional data to determine the agricultural capability of lands; the rule merely requires counties to use the NRCS data. CCCU acknowledges that the County indeed used the NRCS data. We hold that the Board did not err when concluding that WAC 365-190-050(3)(b)(ii) does not preclude the use of data in addition to the NRCS data.

VII. Reducing Minimal Parcel Sizes for Agricultural and Forestry Lands

CCCU argues that the Board erred in concluding the reduction of agricultural and forestland parcel sizes violated the GMA. Specifically, CCCU argues that the Board applied the incorrect legal standard. Further, CCCU argues that even if the Board applied the correct legal standard, its decision is not supported by substantial evidence. We disagree.

During the 2016 Plan Update, the County reduced agricultural land parcel sizes from 20 acres to 10 acres and forestry land from 40 acres to 20 acres. FOCC argued to the Board that these parcel size reductions violated the GMA. FOCC placed multiple peer-reviewed articles in the record. These articles conclude that the minimum parcel size necessary to conserve agricultural and forestlands must be at least 20 to 40 acre parcels. Further, the County's Issue

[19] CCCU references an e-mail where a County planner used the term "data layers" to argue that the NRCS classification system did not produce the result the County wanted, so the County used some unspecified "data layers" to come to a better result. However, CCCU does not cite to anything in the record to support its allegation that the County was using extra data sources to skew land designations, nor does CCCU show us how the alleged use of these "data layers" gave a result different than NRCS data.

Paper 9 stated that very small and small farms produce little income and are mostly supported by nonfarm income. The Board examined minimum parcel sizes in other regions of Washington and other states to conclude that allowing 20 acre parcels in Clark County would not preserve the agricultural industry. The Board found the County noncompliant regarding these parcel size reductions.

After a county designates land as agricultural or forestland, the GMA requires the adoption of regulations to assure the conservation of these lands. RCW 36.70A.060(1)(a). Specifically, a county shall adopt regulations "to assure the conservation of agricultural, forest, and mineral resource lands." RCW 36.70A.060(1)(a). These regulations shall "assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use . . . of these designated lands for the production of food, agricultural products, or timber." RCW 36.70A.060(1)(a). Counties have a duty to designate and conserve these agricultural and forestlands to assure the preservation and development of these industries. *King County*, 142 Wn.2d at 558.

CCCU argues that the Board used the "assure" language to improperly shift the burden to the County to prove it was conserving agricultural and forestlands. Instead, CCCU argues, the burden belonged to the challenger, FOCC, when FOCC contested the County's GMA compliance regarding parcel sizes.

CCCU's statement of the burden is correct. RCW 34.05.570(1)(a). However, the Board did not improperly shift the burden to the County to prove the 2016 Plan Update conserved agricultural and forestlands. Rather, the Board held that FOCC bore and met its burden of

showing that that the reduction of parcel sizes was clearly erroneous. We hold that the Board did not err in this regard.

Further, CCCU argues that the Board should have deferred to the County when it reduced the parcel sizes. Although we defer to a county for planning decisions, this deference must remain within the bounds of the GMA. *King County*, 142 Wn.2d at 561. FOCC's evidence overcame the deference to the County.

Alternatively, CCCU argues that the Board's decision is not supported by substantial evidence. CCCU bears the burden of showing that the Board's decision is unsupported. RCW 34.05.570(1)(a). In the 2016 Plan Update, the County reduced agricultural land parcel sizes from 20 acres to 10 acres and forestry land from 40 acres to 20 acres. FOCC argued to the Board that these parcel size reductions violated the GMA. The Board agreed and found the County noncompliant regarding these parcel size reductions. The Board examined the County's Issue Paper 9 as well as articles and studies submitted by FOCC. After reviewing the articles and Issue Paper 9, the Board found that FOCC carried its burden to prove that reducing parcel sizes was clearly erroneous.

We hold that there is sufficient evidence in the record to persuade a fair-minded person that the Board did not err when concluding that of the County's attempt to reduce agricultural and forestland parcel sizes was clearly erroneous under the GMA. The Board relied on multiple peer-reviewed articles to conclude that the minimum parcel size necessary to conserve agricultural and forestlands was at least 20 to 40 acre parcels. Further, the Board relied on the County's Issue Paper 9 that very small and small farms produce little income and are mostly supported by nonfarm income. The Board examined minimum parcel sizes in other regions to

conclude that reduced parcel sizes would not preserve the agricultural industry. Substantial evidence supports the Board's conclusion that reducing the parcel sizes for agricultural and forestry lands was clearly erroneous and violated the GMA. We hold that the Board did not err when it ruled that the reduction of parcel sizes was clearly erroneous.

VIII. Office of Financial Management Population Projection

CCCU argues that the "the County failed to plan for the likely population growth, by choosing a metric that is historically too low, when another [Office of Financial Management (OFM)] projection was readily available." Br. of CCCU at 34. We hold that the Board did not err when it dismissed this argument.

The GMA requires counties to use population projections from the OFM for their comprehensive plans and amendments. RCW 36.70A.110(2). For the 2016 Plan Update, the OFM offered three population projections: high (681,135), medium (562,207), and low (459,617). The County chose the medium population projection. In 2015 and during the update process, OFM released its annual population and growth rate for the County, estimating the County's 2014 population to be approximately 451,000 and growing at a rate higher than the 2016 Plan Update projected.

Counties are required to use twenty-year population projections from the OFM for their growth management comprehensive plans and amendments. RCW 36.70A.110(2). The legislature requires OFM to prepare the population projections and entrusts counties to plan based on these OFM projections. *Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 188 Wn. App. 467, 485, 353 P.3d 680 (2015). The OFM is required to provide counties with a high, middle, and low population projection number for their planning processes. RCW 43.62.035.

The middle projection represents the most likely population projection. RCW 43.62.035. Counties have discretion to make many choices about accommodating growth in their comprehensive plans and amendments. RCW 36.70A.110(2). Separately, the OFM is also required to provide counties with their annual population numbers and their growth rates for the preceding ten years. RCW 43.62.035.

Here, CCCU does not articulate specifically how it is challenging the Board's decision. Assuming that CCCU is arguing the Board erred in approving the County's selection because the middle projection was clearly erroneous, we disagree. The OFM offered three population projections: high (681,135), medium (562,207), and low (459,617). The County chose the medium population projection. Choosing any of the three offered OFM population projections was within the County's discretion under RCW 36.70A.110(2). *See Spokane County*, 188 Wn. App. at 485. As a result, the Board did not err when it concluded that the County did not violate the GMA when choosing a population projection.

Additionally, CCCU argues that the County failed to revise population projections when the OFM updated the County's annual population number in 2015. However, the annual population number is separate from the OFM's required twenty-year growth management projections. RCW 43.62.035. Because the County used the required population projections in its 2016 Plan Update, we hold that the Board did not err regarding the OFM population projections.

IX. Rural Growth Projections

CCCU argues that the County violated the GMA by using arbitrary and capricious population projections that impermissibly capped rural growth. The Board dismissed CCCU's arguments. We hold that the Board did not err.

To plan for rural growth in the 2016 Plan Update, the County made planning assumptions derived from a rural vacant buildable lands model. CCCU argued that this model "capped" rural growth or, stated another way, planned in a way that limited growth in rural lands. AR at 10515. The Board held that nothing prevented the County from using urban models to project rural growth.

RCW 36.70A.110(2) states, in part, "Based upon the growth management population projection made for the county by the office of financial management, the county . . . shall include areas and densities sufficient to permit the *urban* growth that is projected to occur in the county or city for the succeeding twenty-year period." (Emphasis added.)

CCCU cites extensively to *Clark County Citizens United, Inc. v. Clark County Natural Resource Council*, 94 Wn. App. 670, 972 P.2d 941 (1999) for the proposition that the GMA prohibits the use of population projection techniques developed for urban areas in rural areas. That case did not so hold. In *Clark County Citizens United*, we considered whether a county must use OFM's population projections as a cap on rural growth. 94 Wn. App. at 675. We held that, "nothing in the GMA provides that a county must use OFM's population projections as a cap or ceiling when planning for non-urban growth." *Clark County Citizens United*, 94 Wn. App. at 676. We noted, "Without so holding, we assume that the GMA *permits* a county to use OFM's population projections when planning for lands outside its urban growth areas. That

question is not presented by this appeal." *Clark County Citizens United*, 94 Wn. App. at 676 n.23.

CCCU argues that "it has been decisively settled that the use of population projections developed for urban area planning cannot lawfully be employed to project or plan for rural growth." Br. of CCCU at 37. As shown above, CCCU is incorrect.

In fact, CCCU does not identify any authority that prevents the use of OFM population projections for rural growth. Further, RCW 36.70A.110(2) regulates urban population projections, not rural. We hold that CCCU fails to show how the Board erred when determining that the County did not violate the GMA regarding its rural growth projections.

For the first time in its reply brief, CCCU contests the County's actions under RCW 36.70A.115. RCW 36.70A.115 requires counties to ensure there is sufficient land capacity for development. However, CCCU neither raised this issue to the Board nor in its opening brief. Because we do not address issues not raised to the Board, RCW 34.05.554(1), we decline to address this argument.

X. Rural Population Distribution and Growth Projection

CCCU argues that the Board erred when it dismissed CCCU's argument that the County violated the GMA when it failed to define rural character and also when it used a 90 percent urban, 10 percent rural population projection for the 2016 Plan Update. Specifically, CCCU argues that the County failed to define "rural character" in the 2016 Plan Update and that because the County did not define "rural character" it cannot justify the 90/10 population distribution. Br. of CCCU at 43. Below, the Board dismissed CCCU's argument. We hold that the Board did not err.

Counties should adopt a definition of rural character. WAC 365-196-425(2)(c). The 2016 Plan Update states:

> In Clark County, the rural area represents a lifestyle based on historical development patterns and resource-based industries such as commercial forestry, Christmas trees, dairies, berry farming, orchards and mining. Today much of the county's rural lands include a mix of resource, small commercial, recreational and residential uses.
>
> No single attribute describes the rural landscape. Instead combinations of characteristics which are found in rural settings impart the sense of what we commonly describe as rural. These factors are cumulative in nature and the more of these factors that are present influence feelings of whether a particular area is rural. In many cases these characteristics are subjective and frequently not all of them are found in each area. When describing rural conditions the public will often describe these areas in terms of a certain lifestyle. The factors listed below are those that usually describe "rural character."
>
> - the presence of large lots;
> - limited public services present (water, sewer, police, fire, roads, etc.);
> - different expectations of levels of services provided;
> - small scale resource activity;
> - undeveloped nature of the landscape;
> - wildlife and natural conditions predominate;
> - closer relationship between nature and residents;
> - personal open space;
> - a sense of separation from intense human activity;
> - a sense of self sufficiency; and
> - rural commercial supporting rural area population.

AR at 1411. The County also adopted a 90/10 urban to rural population distribution. The Board dismissed CCCU's arguments noting that the requirements of chapter 265-196 WAC are permissive and that the County has broad discretion to meet the GMA goals of encouraging development in urban areas and reducing sprawl.

Counties have broad discretion in how they plan for growth. RCW 36.70A.110(2). Among other goals, counties should encourage development in urban areas and reduce sprawl.

RCW 36.70A.020(1), (2). WAC 365-196-425 states that counties should include a rural element in their comprehensive plans. But the rule but does not mandate counties to define this term, stating, "Counties *should* adopt a locally appropriate definition of rural character." WAC 365-196-425(2)(c) (emphasis added). Further, the counties' "rural element should provide for a variety of densities that are consistent with the pattern of development established in its definition of rural character." WAC 365-196-425(3)(a).

Although chapter 365-196 WAC provides some procedural guidelines, compliance with these procedures "is not a prerequisite for compliance with the act." WAC 365-196-030(2). The Board's compliance determination must be based on a violation of the GMA itself. WAC 365-196-030(3). As stated above, chapter 365-196 WAC does not create a minimum list of criteria for procedural compliance with the GMA. Rather, counties "can achieve compliance . . . by adopting other approaches." WAC 365-196-030(2).

CCCU argues that the County failed to define "rural character." Br. of CCCU at 43. Although not strictly required, the County generally defined "rural character" in its 2016 Plan Update. The County detailed factors that it determined described "rural character," including large lots, different expectations for community services, and a sense of self-sufficiency. We hold that the Board did not err when dismissing CCCU's argument insofar as it is based on the County's failure to define rural character.

CCCU also argues that the 90/10 population distribution did not align with the actual 86/14 population distribution in the County. CCCU argues that this "90/10 distribution does not comply with the County's planning obligations under WAC 365-196-425(3)(a)." Br. of CCCU at 45. CCCU seems to argue that because the 90/10 goal distribution is not the same as the 86/14

current population distribution, the goal distribution is not consistent with the true rural character of the County. However, CCCU does not show how the goal distribution violates the GMA. First, chapter 365-196 WAC does not add procedural requirements for GMA compliance. WAC 365-196-030(2)-(3). CCCU's alleged violation of chapter 365-196 procedures alone does not support a GMA violation. Second, the County has broad discretion to plan for growth. RCW 36.70A.110(2). Here, CCCU fails to meet its burden to show that the Board erred. We hold that the Board did not err when dismissing CCCU's population distribution arguments.

XI. GMA Private Property Considerations

CCCU argues that the Board erred when it dismissed CCCU's argument that the County violated the GMA goal of adequately considering the impacts of the 2016 Plan Update on private property rights. We hold that CCCU's argument fails.

Protection of private property rights is enumerated at goal 6 in the GMA. RCW 36.70A.020(6). In the 2016 Plan Update, the County recited this goal, stating that it gave private property rights due consideration during the planning process. Further, the County had extensive contacts with private property owners, stated views regarding the impacts of the 2016 Plan Update on private property rights, and heard from landowners regarding their concerns about private property rights. Further, as exhibited by the County's 2016 Plan Update PPP, it heard from citizens and considered private property rights.

One of the GMA's 13 enumerated goals "used exclusively for the purpose of guiding the development of comprehensive plans" states: "Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of

landowners shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6).

WAC 365-196-725 further details:

> (1) Comprehensive plans and development regulations adopted under the act are subject to the supremacy principle of Article VI, United States Constitution and of Article XI, Section 11, Washington [S]tate Constitution.
>
> (2) Counties and cities planning under the act are required to use a process established by the state attorney general to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights. . . .

A party may challenge land use regulations as unconstitutional regulatory takings under article I, section 16 of the Washington Constitution. *Thun v. City of Bonney Lake*, 3 Wn. App. 2d 453, 459, 416 P.3d 743 (2018).

CCCU's argument is difficult to discern. CCCU argues broadly that the County made determinations about property that were contrary to facts, and that the County failed to implement the goal of protecting private property rights. However, CCCU does not explain anything further in its argument.

Specifically, CCCU argues, "Determining the development potential of property based on a population projection standard that has never been accurate is in disregard of all the facts and circumstances. Similarly, the County's decision to reject rezoning to smaller parcel sizes in the rural area is contrary to the actual facts and circumstances in Clark County." Br. of CCCU at 49. It appears that CCCU is rearguing that the population projection and the parcel sizing were arbitrary and capricious, an argument we rejected above. Further, CCCU argues that "the Board errs in concluding that [RCW 36.70A.020(6)] is actually implemented because there is a recitation in the ordinance that the County has given some rights 'due consideration.'" Br. of CCCU at 49-50 (quoting AR at 10472).

RCW 34.05.570(3) provides nine enumerated ways to challenge an agency action through judicial review. However, CCCU does not sufficiently explain to this court how it is challenging the Board's decision under that statute. Nor does CCCU invoke RCW 34.05.570(3)(a), which would have allowed us to review the Board's orders for constitutional violations. Rather, CCCU contends only that the Board acted arbitrarily and capriciously regarding the GMA private property goal. CCCU has failed to sufficiently explain to us how the Board erred and, thus, fails to carry its burden.

XII. BOARD'S COMPLIANCE ORDER

FOCC argues that the Board erred in its compliance order when it declared issues moot and found the County's readoption of prior provisions was compliant with the GMA. We hold that the Board did not err.

A. *Facts Regarding the Board's Compliance Order*

In its FDO, the Board found some provisions noncompliant and determined other provisions invalid. FOCC raises arguments for two County decisions the Board found noncompliant, Issues 11 and 13.

For Issue 11, the Board considered the County's creation of AG-10 and FR-20 districts, replacing AG-20 and FR-40 districts. In its FDO, the Board found and concluded that "reducing parcel sizes for agricultural and forestry lands will not meet requirements in RCW 36.70A.060 or .070 nor does it meet the standards established in *King County*." AR at 10552. To come into compliance, the County amended its 2016 Plan Update by passing Ordinance 2017-07-04, which changed back the AG-10 to AG-20 and FR-20 to FR-40.

For Issue 13, the Board considered the County's single rural density designation, replacing its varied rural densities provisions. In its FDO, the Board found and concluded that "the County did not comply with RCW 36.70A.070(5) regarding a variety of rural densities." AR at 10552. To come into compliance, the County adopted Ordinance 2017-07-04 which amended the single plan designation for rural lands and reestablished the prior varied rural densities.

In its compliance order, the Board noted that both provisions readopted by the County had previously been found GMA compliant. Issue 11's parcel sizes had been determined compliant in the County's 2007 Comprehensive Plan. CAR at 1573 (citing *Karpinski v. Clark County*, No. 07-2-0027 (W. Wash. Growth Mgmt. Hr'gs Bd. Sept. 4, 2014)). In the compliance order, the Board stated:

> Here, Clark County repealed the ordinance amendments challenged in Issue 11, the Issue 11 challenge is moot, and the County's action addressing the Issue 11 provisions must be found compliant. With the County amendments in Ordinance 2017-07-04 regarding agricultural and forest lands, the Board finds and concludes that the County is now in compliance with RCW 36.70A.060 and RCW 36.70A.070 in regards to Issue 11.

CAR at 1574 (emphasis omitted).

Further, the Board stated, "The challenge to Issue 13 is now moot because the County readopted a previously GMA-compliant variety of rural densities. With the County amendments in Ordinance 2017-07-04 for Issue 13, the Board finds the County's action regarding a variety of rural densities, achieves compliance with RCW 36.70A.070(5)." CAR at 1575 (emphasis omitted).

B. *Compliance Legal Principles*

Following a remand period to address noncompliant comprehensive plan provisions, the Board determines whether a county has achieved GMA compliance. RCW 36.70A.330(1)-(3). Parties may challenge the legislation enacted in response to the Board's final order. RCW 36.70A.330(2).

Although parties are not entitled to challenge any and all aspects of a county's comprehensive plan, a party may challenge amendments made in an updated comprehensive plan. *Thurston County*, 164 Wn.2d at 344, 347. When the Board finds noncompliance on an issue, the county's new comprehensive plan provisions are presumed valid, and the challenger bears the burden to establish that the new provisions are clearly erroneous under the GMA in view of the entire record before the Board. RCW 36.70A.320(1)-(2).

In *Hazen v. Yakima County*, challengers petitioned the Board regarding the compliance of certain plan provisions. No. 08-1-0008c, at 14 (E. Wash. Growth Mgmt. Hr'gs Bd. April 5, 2010). During the pendency of the Board's review, Yakima County amended some provisions, removing one provision outright and adjusting others. *Hazen*, at 14-15. The Board found that consideration of the repealed provision was moot, but that the amended provisions remained under the Board's compliance review. *Hazen*, at 15.

C. *The Board Did Not Err by Finding Compliance*

FOCC argues that the County did more than merely repeal noncompliant provisions and reinstate former plan provisions. We disagree.

Following the Board's noncompliance findings on Issues 11 and 13, the County reenacted the pre-2016 Plan Update plan provisions. The Board previously found these

provisions compliant with the GMA. Because of this, the Board determined that the issues regarding the now-repealed provisions were moot and found the County compliant regarding the reenacted provisions.

FOCC argues that this court's opinion in *Miotke* supports the proposition that even if the previous provisions had been determined compliant, their current compliance based on land use is subject to renewed scrutiny. Because *Miotke* is distinguishable, we disagree.

In *Miotke*, while the Board reviewed the county's updated UGA designation, development rights of property owners vested in the new UGA. *Miotke*, 181 Wn. App. at 373. The Board found this UGA designation noncompliant with the GMA and made a determination of invalidity. *Miotke*, 181 Wn. App. at 373. In an attempt to comply, Spokane County repealed the UGA designation and reverted the land to its prior designation. *Miotke*, 181 Wn. App. at 374. This court held that the vested rights of property owners did not relieve the county of its planning obligations under the GMA. *Miotke*, 181 Wn. App. at 379. Rather, because the UGA was subject to a determination of invalidity, the county was responsible for showing GMA compliance in its new planning decision. *Miotke*, 181 Wn. App. at 379-80.

In *Miotke*, the Board made a determination of invalidity, shifting the burden to the county to prove compliance. 181 Wn. App. at 379-80. Here, however, the Board found the County merely noncompliant regarding Issues 11 and 13. Without a determination of invalidity, the burden remains with the challenger, FOCC, to show the Board erred. Here, FOCC has not met its burden to show that the Board acted in a clearly erroneous manner when finding the County compliant for Issues 11 and 13 after it repealed the challenged provisions and readopted

previously compliant provisions. Accordingly, we hold the Board did not err when concluding that the County achieved compliance regarding Issues 11 and 13.

XIII. CONCLUSION

We grant FOCC's motion to dismiss the County's and 3B's petitions for judicial review of the FDO for lack of appellate jurisdiction. We hold that the Board's finding of the County's noncompliance regarding the County's UGAs designations are moot. Further, we hold that the Board did not err when rejecting all of CCCU's arguments. Finally, we hold that the Board did not err when it determined that the County was compliant regarding Issues 11 and 13. We remand to the Board for further proceedings in accordance with this opinion.

Worswick, J.

We concur:

Maxa, C.J.

Glasgow, J.

APPENDIX B

ISSUES 5, 10, 11 AND 13

Issue 5: UGA EXPANSION and BUILDABLE LANDS REPORT

Did the adoption of Amended Ordinance 2016-06-12 expanding the Battle Ground [sic], La Center, and Ridgefield urban growth areas violate RCW 36.70A.020(1), (2); RCW 36.70A.070 (internal consistency); RCW 36.70A.110(1), (2), (3); RCW 36.70A.115; RCW 36.70A.130(1), (3), (5); RCW 36.70A.210(1); or RCW 36.70A.215(1)9b) because the expansions were not needed to accommodate the planned growth and Buildable Lands reasonable measures were not adopted and implemented? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035* pp. 11-13, pp. 14-15, pp. 26-29, pp. 41-46, pp. 267-68, Figure 12, Figure 14, Figure 15, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]. [FOCC/FW No.1]. *FDO at pp. 18-19.*

Issue 10: AGRICULTURAL LAND DE-DESIGNATION.

Did the adoption of Amended Ordinance 2016-06-12 including the de-designation of 57 acres of agricultural land of long-term commercial significance in the La Center urban growth area expansion and 111 acres in the Ridgefield urban growth area expansion, violate RCW 36.70A.020(8); RCW 36.70A.030(2), (10); RCW 26.70A.050(3); RCW 36.70A.060(1)(a); RCW 36.70A.070 (internal consistency); RCW 36.70A.130(1), (3), (5); RCW 36.70A.170; RCW 36.70A.210(1); WAC 365-190-040(10)(b); or WAC 365-190-050 or is the de-designation inconsistent with the Clark County comprehensive plan? See Amended Ordinance 2016-06-12 and Exhibit *1 Clark County, Washington 20 Year Comprehensive Growth Management Plan*

2015-2035 pp. 10-12, pp. 14-15, pp. 43-44, pp. 84-86, pp. 94-95, Figure 14, Figure 15, Figure 22A, Figure 22B, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]. [FOCC/FW No. 2] *FDO at p. 33.*

Issue 11: UPZONE AG / FR LAND FOR MORE DENSITY

Did Amended Ordinance 2016-06-12's amendments to the comprehensive plan including the land use, rural, and capital facility plan elements, amendments to the Agriculture 20 (AG-20) District to create the Agriculture 10 (AG-10) District, amendments to the Forest 40 (FR-40) District to create the Forest 20 (FR-20) District, related rural rezones, or the allowed uses, densities, or development standards applicable to the AG-10 or FR-40 districts, including but not limited to CCC 40.210.010B and E, violate RCW 36.70A.020(8), (10); RCW36.70A.040(3); RCW 36.70A.050(3); RCW 36.70A.060(1)(a); RCW 36.70A.070 (internal consistency); RCW 36.70A.070(1), (3), (5); RCW 36.70A.130(1), (5), WAC 365-196-815 or WAC 365-196-825 because they fail to conserve farm and forest land, protect the quality and quantity of groundwater used for public water supplies, or are inconsistent with the comprehensive plan? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035* pp. 18-19, Chapter 1 Land Use Element, Chapter 3 Rural and Natural Resource Element, Chapter 6 Capital Facilities and Utilities Element, Figure 22A, Figure 22B, and Figure 24A; Exhibit 3 County/UGA Zoning Clark County, Washington [map]; Exhibit 5; Exhibit 6; Exhibit 7; Exhibit 8; Exhibit 9; Exhibit 25; Exhibit 26; Exhibit 28; Exhibit 30, Exhibit 31; Exhibit 32; Exhibit 33; Exhibit 34; Exhibit 35; Exhibit 36; Exhibit 37; Exhibit 38; and Exhibit 39. [FOCC/FW No.3] *FDO at p. 43.*

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Issue 13: NO "VARIETY" OF RURAL DENSITIES

Did Amended Ordinance 2016-06-12's adoption of a single "Rural," comprehensive plan designation, excluding limited areas of more intense rural development and similar categories, in the land use and rural elements and on Exhibit 2 the "County/UGA Comprehensive Plan Clark County, Washington" map, the county's future land use map, violate RCW 36.70A.020(2), (9), (10); RCW 36.70A.070 (preample), (1), (5); or RCW 36.70A.130(1), (5) because the rural element fails to provide for a variety of rural densities and rural uses? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035* p.10; pp. 14-16, p.31, pp.36-45, Chapter 3 Rural and Natural Resource Element, and Figure 24A; and Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]. [FOCC/FW No. 4] *FDO at pp. 54-55.*

APPENDIX C

RCW 35.63.080

Restrictions on buildings—Use of land.

(1) The council or board may provide for the preparation by its commission and the adoption and enforcement of coordinated plans for the physical development of the municipality. For this purpose the council or board, in such measure as is deemed reasonably necessary or requisite in the interest of health, safety, morals, and the general welfare, upon recommendation by its commission, by general ordinances of the city or general resolution of the board, may:

(a) Regulate and restrict:

(i) The location and the use of buildings, structures, and land for residence, trade, industrial, and other purposes;

(ii) The height, number of stories, size, construction, and design of buildings and other structures;

(iii) The size of yards, courts, and other open spaces on the lot or tract;

(iv) The density of population;

(v) The set-back of buildings along highways, parks, or public water frontages; and

(vi) The subdivision and development of land;

(b) Eliminate the minimum gross floor area requirements for single-family detached dwellings or reduce the requirements below the minimum performance standards and objectives contained in the state building code; and

(c) Encourage and protect access to direct sunlight for solar energy systems.

(2) The council of a city where ordinances adopted in accordance with this section are in effect may, on the recommendation of its commission, provide for the appointment of a board of adjustment to make, in appropriate cases and subject to appropriate conditions and safeguards established by ordinance, special exceptions in harmony with the general purposes and intent and in accordance with general or specific rules therein contained.

RCW 35A.11.020

Powers vested in legislative bodies of noncharter and charter code cities.

The legislative body of each code city shall have power to organize and regulate its internal affairs within the provisions of this title and its charter, if any; and to define the functions, powers, and duties of its officers and employees; within the limitations imposed by vested rights, to fix the compensation and working conditions of such officers and employees and establish and maintain civil service, or merit systems, retirement and pension systems not in conflict with the provisions of this title or of existing charter provisions until changed by the people: PROVIDED, That nothing in this section or in this title shall permit any city, whether a code city or otherwise, to enact any provisions establishing or respecting a merit system or system of civil service for firefighters and police officers which does not substantially accomplish the same purpose as provided by general law in chapter 41.08 RCW for firefighters and chapter 41.12 RCW for police officers now or as hereafter amended, or enact any provision establishing or respecting a pension or retirement system for firefighters or police officers which provides different pensions or retirement benefits than are provided by general law for such classes.

Such body may adopt and enforce ordinances of all kinds relating to and regulating its local or municipal affairs and appropriate to the good government of the city, and may impose penalties of fine not exceeding five thousand dollars or imprisonment for any term not exceeding one year, or both, for the violation of such ordinances, constituting a misdemeanor or gross misdemeanor as provided therein. However, the punishment for any criminal ordinance shall be the same as the punishment provided in state law for the same crime. Such a body alternatively may provide that violation of such ordinances constitutes a civil violation subject to monetary penalty, but no act which is a state crime may be made a civil violation.

The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. By way of illustration and not in limitation, such powers may be exercised in regard to the acquisition, sale, ownership, improvement, maintenance, protection, restoration, regulation, use, leasing, disposition, vacation, abandonment or beautification of public ways, real property of all kinds, waterways, structures, or any other improvement or use of real or personal property, in regard to all aspects of collective bargaining as provided for and subject to

the provisions of chapter 41.56 RCW, as now or hereafter amended, and in the rendering of local social, cultural, recreational, educational, governmental, or corporate services, including operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns.

In addition and not in limitation, the legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state before or after the enactment of this title, such authority to be exercised in the manner provided, if any, by the granting statute, when not in conflict with this title. Within constitutional limitations, legislative bodies of code cities shall have within their territorial limits all powers of taxation for local purposes except those which are expressly preempted by the state as provided in RCW 66.08.120, * 82.36.440, 48.14.020, and 48.14.080.

RCW 36.70A.060

Natural resource lands and critical areas—Development regulations.

(1)(a) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.040. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals. Any county located to the west of the crest of the Cascade mountains that has both a population of at least four hundred thousand and a border that touches another state, and any city in such county, may adopt development regulations to assure that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses.

(b) Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forestlands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forestlands, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. The notice for mineral resource lands shall also inform that an application might be made for mining-related activities, including mining, extraction, washing, crushing, stockpiling, blasting, transporting, and recycling of minerals.

(c) Each county that adopts a resolution of partial planning under RCW 36.70A.040(2)(b), and each city within such county, shall adopt development regulations within one year after the adoption of the resolution of partial planning to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection (1)(c) must comply with the requirements governing regulations adopted under (a) of this subsection.

(d)(i) A county that adopts a resolution of partial planning under RCW 36.70A.040(2)(b) and that is not in compliance with the planning requirements of this section, RCW 36.70A.040(4), 36.70A.070(5), 36.70A.170, and 36.70A.172 at the time the resolution is adopted must, by January 30, 2017, apply for a determination of compliance from the department finding that the county's development regulations, including development regulations adopted to protect critical areas, and comprehensive plans are in compliance with the requirements of this section, RCW 36.70A.040(4), 36.70A.070(5), 36.70A.170, and 36.70A.172. The department must approve or deny the application for a determination of compliance within one hundred twenty days of its receipt or by June 30, 2017, whichever date is earlier.

(ii) If the department denies an application under (d)(i) of this subsection, the county and each city within is obligated to comply with all requirements of this chapter and the resolution for partial planning adopted under RCW 36.70A.040(2)(b) is no longer in effect.

(iii) A petition for review of a determination of compliance under (d)(i) of this subsection may only be appealed to the growth management hearings board within sixty days of the issuance of the decision by the department.

(iv) In the event of a filing of a petition in accordance with (d)(iii) of this subsection, the county and the department must equally share the costs incurred by the department for defending an approval of determination of compliance that is before the growth management hearings board.

(v) The department may implement this subsection (1)(d) by adopting rules related to determinations of compliance. The rules may address, but are not limited to: The requirements for applications for a determination of compliance; charging of costs under (d)(iv) of this subsection; procedures for processing applications; criteria for the evaluation of applications; issuance and notice of department decisions; and applicable timelines.

(e) Any county that borders both the Cascade mountains and another country and has a population of less than fifty thousand people, and any city in such county, may adopt development regulations to assure that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses.

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted

on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

(3) Such counties and cities shall review these designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW 36.70A.120 and may alter such designations and development regulations to insure consistency.

(4) Forestland and agricultural land located within urban growth areas shall not be designated by a county or city as forestland or agricultural land of long-term commercial significance under RCW 36.70A.170 unless the city or county has enacted a program authorizing transfer or purchase of development rights.

RCW 36.70A.070(5)

Comprehensive plans—Mandatory elements.

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140. Each comprehensive plan shall include a plan, scheme, or design for each of the following:

[....]

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

(a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

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

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

(d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:

(i) Rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.

(A) A commercial, industrial, residential, shoreline, or mixed-use area are subject to the requirements of (d)(iv) of this subsection, but are not subject to the requirements of (c)(ii) and (iii) of this subsection.

(B) Any development or redevelopment other than an industrial area or an industrial use within a mixed-use area or an industrial area under this subsection (5)(d)(i) must be principally designed to serve the existing and projected rural population.

[....]

RCW 36.70A.130

Comprehensive plans—Review procedures and schedules—Amendments.

(1)(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the deadlines in subsections (4) and (5) of this section.

(b) Except as otherwise provided, a county or city not planning under RCW 36.70A.040 shall take action to review and, if needed, revise its policies and development regulations regarding critical areas and natural resource lands adopted according to this chapter to ensure these policies and regulations comply with the requirements of this chapter according to the deadlines in subsections (4) and (5) of this section. Legislative action means the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefor.

(c) The review and evaluation required by this subsection shall include, but is not limited to, consideration of critical area ordinances and, if planning under RCW 36.70A.040, an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management.

(d) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

(2)(a) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year, except that, until December 31, 2015, the program shall provide for consideration of amendments of an urban growth area in accordance with *RCW 36.70A.1301 once every year. "Updates" means to review and revise, if needed, according to subsection (1) of this section, and the deadlines in subsections (4) and (5) of this section or in accordance with the provisions of subsection (6) of

this section. Amendments may be considered more frequently than once per year under the following circumstances:

(i) The initial adoption of a subarea plan. Subarea plans adopted under this subsection (2)(a)(i) must clarify, supplement, or implement jurisdiction-wide comprehensive plan policies, and may only be adopted if the cumulative impacts of the proposed plan are addressed by appropriate environmental review under chapter 43.21C RCW;

(ii) The development of an initial subarea plan for economic development located outside of the one hundred year floodplain in a county that has completed a state-funded pilot project that is based on watershed characterization and local habitat assessment;

(iii) The adoption or amendment of a shoreline master program under the procedures set forth in chapter 90.58 RCW;

(iv) The amendment of the capital facilities element of a comprehensive plan that occurs concurrently with the adoption or amendment of a county or city budget; or

(v) The adoption of comprehensive plan amendments necessary to enact a planned action under **RCW 43.21C.031(2), provided that amendments are considered in accordance with the public participation program established by the county or city under this subsection (2)(a) and all persons who have requested notice of a comprehensive plan update are given notice of the amendments and an opportunity to comment.

(b) Except as otherwise provided in (a) of this subsection, all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with the growth management hearings board or with the court.

(3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, according to the schedules established in subsection (5) of this section, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas.

(b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the

comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period. The review required by this subsection may be combined with the review and evaluation required by RCW 36.70A.215.

(4) Except as provided in subsection (6) of this section, counties and cities shall take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter as follows:

(a) On or before December 1, 2004, for Clallam, Clark, Jefferson, King, Kitsap, Pierce, Snohomish, Thurston, and Whatcom counties and the cities within those counties;

(b) On or before December 1, 2005, for Cowlitz, Island, Lewis, Mason, San Juan, Skagit, and Skamania counties and the cities within those counties;

(c) On or before December 1, 2006, for Benton, Chelan, Douglas, Grant, Kittitas, Spokane, and Yakima counties and the cities within those counties; and

(d) On or before December 1, 2007, for Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grays Harbor, Klickitat, Lincoln, Okanogan, Pacific, Pend Oreille, Stevens, Wahkiakum, Walla Walla, and Whitman counties and the cities within those counties.

(5) Except as otherwise provided in subsections (6) and (8) of this section, following the review of comprehensive plans and development regulations required by subsection (4) of this section, counties and cities shall take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter as follows:

(a) On or before June 30, 2015, and every eight years thereafter, for King, Pierce, and Snohomish counties and the cities within those counties;

(b) On or before June 30, 2016, and every eight years thereafter, for Clallam, Clark, Island, Jefferson, Kitsap, Mason, San Juan, Skagit, Thurston, and Whatcom counties and the cities within those counties;

(c) On or before June 30, 2017, and every eight years thereafter, for Benton, Chelan, Cowlitz, Douglas, Kittitas, Lewis, Skamania, Spokane, and Yakima counties and the cities within those counties; and

(d) On or before June 30, 2018, and every eight years thereafter, for Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Grays Harbor, Klickitat, Lincoln, Okanogan, Pacific, Pend Oreille, Stevens,

Wahkiakum, Walla Walla, and Whitman counties and the cities within those counties.

(6)(a) Nothing in this section precludes a county or city from conducting the review and evaluation required by this section before the deadlines established in subsections (4) and (5) of this section. Counties and cities may begin this process early and may be eligible for grants from the department, subject to available funding, if they elect to do so.

(b) A county that is subject to a deadline established in subsection (4)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the thirty-six months following the deadline established in subsection (4) of this section: The county has a population of less than fifty thousand and has had its population increase by no more than seventeen percent in the ten years preceding the deadline established in subsection (4) of this section as of that date.

(c) A city that is subject to a deadline established in subsection (4)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the thirty-six months following the deadline established in subsection (4) of this section: The city has a population of no more than five thousand and has had its population increase by the greater of either no more than one hundred persons or no more than seventeen percent in the ten years preceding the deadline established in subsection (4) of this section as of that date.

(d) A county or city that is subject to a deadline established in subsection (4)(d) of this section and that meets the criteria established in (b) or (c) of this subsection may comply with the requirements of subsection (4)(d) of this section at any time within the thirty-six months after the extension provided in (b) or (c) of this subsection.

(e) A county that is subject to a deadline established in subsection (5)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the twenty-four months following the deadline established in subsection (5) of this section: The county has a population of less than fifty thousand and has had its population increase by no more than seventeen percent in the ten years preceding the deadline established in subsection (5) of this section as of that date.

(f) A city that is subject to a deadline established in subsection (5)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the twenty-four months following the deadline established in subsection (5) of

this section: The city has a population of no more than five thousand and has had its population increase by the greater of either no more than one hundred persons or no more than seventeen percent in the ten years preceding the deadline established in subsection (5) of this section as of that date.

(g) State agencies are encouraged to provide technical assistance to the counties and cities in the review of critical area ordinances, comprehensive plans, and development regulations.

(7)(a) The requirements imposed on counties and cities under this section shall be considered "requirements of this chapter" under the terms of RCW 36.70A.040(1). Only those counties and cities that meet the following criteria may receive grants, loans, pledges, or financial guarantees under chapter 43.155 or 70.146 RCW:

(i) Complying with the deadlines in this section;

(ii) Demonstrating substantial progress towards compliance with the schedules in this section for development regulations that protect critical areas; or

(iii) Complying with the extension provisions of subsection (6)(b), (c), or (d) of this section.

(b) A county or city that is fewer than twelve months out of compliance with the schedules in this section for development regulations that protect critical areas is making substantial progress towards compliance. Only those counties and cities in compliance with the schedules in this section may receive preference for grants or loans subject to the provisions of RCW 43.17.250.

(8)(a) Except as otherwise provided in (c) of this subsection, if a participating watershed is achieving benchmarks and goals for the protection of critical areas functions and values, the county is not required to update development regulations to protect critical areas as they specifically apply to agricultural activities in that watershed.

(b) A county that has made the election under RCW 36.70A.710(1) may only adopt or amend development regulations to protect critical areas as they specifically apply to agricultural activities in a participating watershed if:

(i) A work plan has been approved for that watershed in accordance with RCW 36.70A.725;

(ii) The local watershed group for that watershed has requested the county to adopt or amend development regulations as part of a work plan developed under RCW 36.70A.720;

(iii) The adoption or amendment of the development regulations is necessary to enable the county to respond to an order of the growth management hearings board or court;

(iv) The adoption or amendment of development regulations is necessary to address a threat to human health or safety; or

(v) Three or more years have elapsed since the receipt of funding.

(c) Beginning ten years from the date of receipt of funding, a county that has made the election under RCW 36.70A.710(1) must review and, if necessary, revise development regulations to protect critical areas as they specifically apply to agricultural activities in a participating watershed in accordance with the review and revision requirements and timeline in subsection (5) of this section. This subsection (8)(c) does not apply to a participating watershed that has determined under RCW 36.70A.720(2)(c)(ii) that the watershed's goals and benchmarks for protection have been met.

RCW 36.70A.280

Growth management hearings board—Matters subject to review. *(Effective until December 31, 2020.)*

(1) The growth management hearings board shall hear and determine only those petitions alleging either:

(a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. Nothing in this subsection authorizes the board to hear petitions alleging noncompliance with *RCW 36.70A.5801;

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted;

(c) That the approval of a work plan adopted under RCW 36.70A.735 (1)(a) is not in compliance with the requirements of the program established under RCW 36.70A.710;

(d) That regulations adopted under RCW 36.70A.735 (1)(b) are not regionally applicable and cannot be adopted, wholly or partially, by another jurisdiction;

(e) That a department certification under RCW 36.70A.735 (1)(c) is erroneous; or

(f) That a department determination under RCW 36.70A.060 (1)(d) is erroneous.

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

(3) For purposes of this section "person" means any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.

(4) To establish participation standing under subsection (2)(b) of this section, a person must show that his or her participation before the county or city was reasonably related to the person's issue as presented to the board.

(5) When considering a possible adjustment to a growth management planning population projection prepared by the office of financial management, the board shall consider the implications of any such adjustment to the population forecast for the entire state.

The rationale for any adjustment that is adopted by the board must be documented and filed with the office of financial management within ten working days after adoption.

If adjusted by the board, a county growth management planning population projection shall only be used for the planning purposes set forth in this chapter and shall be known as the "board adjusted population projection." None of these changes shall affect the official state and county population forecasts prepared by the office of financial management, which shall continue to be used for state budget and planning purposes.

RCW 36.70A.300

Final orders.

(1) The board shall issue a final order that shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW.

(2)(a) Except as provided in (b) of this subsection, the final order shall be issued within one hundred eighty days of receipt of the petition for review, or, if multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated.

(b) The board may extend the period of time for issuing a decision to enable the parties to settle the dispute if additional time is necessary to achieve a settlement, and (i) an extension is requested by all parties, or (ii) an extension is requested by the petitioner and respondent and the board determines that a negotiated settlement between the remaining parties could resolve significant issues in dispute. The request must be filed with the board not later than seven days before the date scheduled for the hearing on the merits of the petition. The board may authorize one or more extensions for up to ninety days each, subject to the requirements of this section.

(3) In the final order, the board shall either:

(a) Find that the state agency, county, or city is in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) Find that the state agency, county, or city is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW, in which case the board shall remand the matter to the affected state agency, county, or city. The board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board in cases of unusual scope or complexity, within which the state agency, county, or city shall comply with the requirements of this chapter. The board may require periodic reports to the board on the progress the jurisdiction is making towards compliance.

(4)(a) Unless the board makes a determination of invalidity under RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand.

(b) Unless the board makes a determination of invalidity, state agencies, commissions, and governing boards may not determine a county, city, or town to be ineligible or otherwise penalized in the acceptance of applications or the awarding of state agency grants or loans during the period of remand. This subsection (4)(b) applies only to counties, cities, and towns that have: (i) Delayed the initial effective date of the action subject to the petition before the board until after the board issues a final determination; or (ii) within thirty days of receiving notice of a petition for review by the board, delayed or suspended the effective date of the action subject to the petition before the board until after the board issues a final determination.

(5) Any party aggrieved by a final decision of the hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the board. Unless the board makes a determination of invalidity under RCW 36.70A.302, state agencies, commissions, or governing boards shall not penalize counties, cities, or towns during the pendency of an appeal as provided in RCW 43.17.250.

RCW 36.70A.302

Growth management hearings board—Determination of invalidity—Vesting of development permits—Interim controls.

(1) The board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;

(b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

(c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

(3)(a) Except as otherwise provided in subsection (2) of this section and (b) of this subsection, a development permit application not vested under state or local law before receipt of the board's order by the county or city vests to the local ordinance or resolution that is determined by the board not to substantially interfere with the fulfillment of the goals of this chapter.

(b) Even though the application is not vested under state or local law before receipt by the county or city of the board's order, a determination of invalidity does not apply to a development permit application for:

(i) A permit for construction by any owner, lessee, or contract purchaser of a single-family residence for his or her own use or for the use of his or her family on a lot existing before receipt by the county or city of the board's order, except as otherwise specifically provided in the board's order to protect the public health and safety;

(ii) A building permit and related construction permits for remodeling, tenant improvements, or expansion of an existing structure on a lot existing before receipt of the board's order by the county or city; and

(iii) A boundary line adjustment or a division of land that does not increase the number of buildable lots existing before receipt of the board's order by the county or city.

(4) If the ordinance that adopts a plan or development regulation under this chapter includes a savings clause intended to revive prior policies or regulations in the event the new plan or regulations are determined to be invalid, the board shall determine under subsection (1) of this section whether the prior policies or regulations are valid during the period of remand.

(5) A county or city subject to a determination of invalidity may adopt interim controls and other measures to be in effect until it adopts a comprehensive plan and development regulations that comply with the requirements of this chapter. A development permit application may vest under an interim control or measure upon determination by the board that the interim controls and other measures do not substantially interfere with the fulfillment of the goals of this chapter.

(6) A county or city subject to a determination of invalidity may file a motion requesting that the board clarify, modify, or rescind the order. The board shall expeditiously schedule a hearing on the motion. At the hearing on the motion, the parties may present information to the board to clarify the part or parts of the comprehensive plan or development regulations to which the final order applies. The board shall issue any supplemental order based on the information provided at the hearing not later than thirty days after the date of the hearing.

(7)(a) If a determination of invalidity has been made and the county or city has enacted an ordinance or resolution amending the invalidated part or parts of the plan or regulation or establishing interim controls on development affected by the order of invalidity, after a compliance hearing, the board shall modify or rescind the determination of invalidity if it determines under the standard in subsection (1) of this section that the plan or regulation, as amended or made subject to such interim controls, will no longer substantially interfere with the fulfillment of the goals of this chapter.

(b) If the board determines that part or parts of the plan or regulation are no longer invalid as provided in this subsection, but does not find that the plan or regulation is in compliance with all of the requirements of this chapter, the board, in its order, may require periodic reports to the board on the progress the jurisdiction is making towards compliance.

RCW 26.70A.320

Presumption of validity—Burden of proof—Plans and regulations.

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

(2) Except as otherwise provided in subsection (4) of this section, the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

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

(4) A county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1).

(5) The shoreline element of a comprehensive plan and the applicable development regulations adopted by a county or city shall take effect as provided in chapter 90.58 RCW.

CLARK COUNTY PROSECUTING ATTORNEY

November 18, 2019 - 4:01 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

The following documents have been uploaded:

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Clark County's Reply to New Issues Raised in Answer by Futurewise and Friends of Clark County

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