

34172-7-II

Supreme Court No. 78148-6

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THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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THURSTON COUNTY,  
Petitioner,

&

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON  
OLYMPIA MASTER BUILDERS, and PEOPLE FOR RESPONSIBLE  
ENVIRONMENTAL POLICIES,  
Petitioner-Intervenors,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD and 1000 FRIENDS OF WASHINGTON,  
Respondents.

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FUTUREWISE'S  
BRIEF OF RESPONDENT

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Tim Trohimovich, WSBA No. 22367  
Attorney for Futurewise

**Address and Telephone Number:**

Futurewise  
1617 Boylston Avenue, Suite 200  
Seattle, Washington 98122  
(206) 343-0681 (telephone)  
(206) 709-8218 (facsimile)  
[tim@futurewise.org](mailto:tim@futurewise.org) (e-mail)

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## **I. Introduction**

This appeal, at bottom, addresses the policy decision of the Legislature and Governor to require “cyclical” updates to comprehensive plans and development regulations.<sup>1</sup> The Legislature has recognized that periodic updates are needed to reflect “the continual changes that occur within the state, and the need to ensure that land use measures reflect the collective wishes of its citizenry.”<sup>2</sup> The Growth Management Act (GMA) relies on the citizenry, such as Futurewise, to enforce the policy decisions of the Legislature and Governor.<sup>3</sup> For this reason Futurewise is a respondent in this appeal defending the decisions of the Western Washington Growth Management Hearings Board (Board).

Futurewise, formerly known as 1000 Friends of Washington, is a Washington State nonprofit corporation that works statewide to promote healthy communities and cities while protecting working farms and forests for this and future generations. We have members throughout the state. Our Thurston County members are concerned residents and property owners who are adversely affected by Thurston County’s (County) decisions. Futurewise prevailed before the Board.

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<sup>1</sup> 2005 Session Laws, Chapter 294 § 1.

<sup>2</sup> *Id.*

<sup>3</sup> See *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn.2d 161, 175 – 77, 979 P.2d 374, 380 – 82 (1999).

This brief consists of five parts including this introduction. In Part II, Futurewise assigns error to two Board findings of fact. Part III includes our procedural arguments. Part IV includes our substantive arguments. The lettered headings, A through H, are the answers to issues and arguments presented by Thurston County in its Opening Brief. The letters match the County's organization of its issues and arguments. These sections also address the arguments made by the Building Industry Association of Washington, Olympia Master Builders, and People for Responsible Environmental Policies (Building Industry Intervenors or Intervenors). We conclude in Part V.

## **II. Additional Assignments of Error & Issue**

Futurewise presents the following assignments of error:

1. Board finding of fact 11 understates the percentage of rural lands designated for high density uses because the denominator included natural resource lands that are not rural.
2. Board finding of fact 16 understates the percentage of rural land with a density of one dwelling unit per five acres because the denominator included natural resource lands that are not rural.

We present this issue pertaining to the assignments of error:

1. Did the Board err by including natural resource lands in the denominator used to calculate findings of fact 11 and 16?

### **III. Procedural Arguments**

#### **A. Neither Thurston County nor the Building Industry Intervenors assigned error to any of the Board's findings of fact, so they are verities on appeal.**

Neither Thurston County nor the Intervenors assigned error to any of the Board's findings of fact.<sup>4</sup> “A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number’ (RAP 10.3(g)).”<sup>5</sup> Therefore, except for the two findings of fact to which Futurewise assigns error, the Board's findings of fact are verities on appeal and cannot be challenged by either the County or the Intervenors.<sup>6</sup>

#### **B. The County and Intervenors raise issues not raised before the Board in violation of RCW 34.05.554 and these issues cannot be considered by this Court.**

As the Washington State Supreme Court has held:

The Washington Administrative Procedure Act, RCW 34.05, provides that on judicial review of administrative action, “[i]ssues not raised before the agency may not be raised on appeal....” RCW 34.05.554. *See also, Griffin v. Department of Social & Health Serv.*, 91 Wn.2d 616, 631, 590 P.2d 816 (1979); *Kitsap Cy. v. Department of Natural*

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<sup>4</sup> Thurston County's Opening Brief pp. 1 – 5 & Petitioner-Intervenors' Opening Brief pp. 4 – 6.

<sup>5</sup> *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870, 872 (2003).

<sup>6</sup> *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 488 – 89, 585 P.2d 71, 79 – 80 (1978); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn.App. 615, 628, 53 P.3d 1011, 1017 (2002) *review denied Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board*, 148 Wn.2d 1017, 64 P.3d 649 (2003).

*Resources*, 99 Wn.2d 386, 393, 662 P.2d 381 (1983). This rule is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking.<sup>7</sup>

Thurston County raises two issues not raised before the Board.

First, the County contends that the Board made an erroneous legal assumption that the periodic updates required by RCW 36.70A.130 make every provision of the reviewed comprehensive plan and development regulations subject to board review even if they were not amended.<sup>8</sup>

Second, the County contends that the GMA does not place a limit on the size of the urban growth area.<sup>9</sup> Thurston County and the Intervenors below never raised these issues before the Board.<sup>10</sup>

The Building Industry Intervenors raise five issues not raised before the Board. First, that Futurewise's arguments as to the market

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<sup>7</sup> *King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 668 – 69, 860 P.2d 1024, 1035 (1993) (footnote 12 omitted).

<sup>8</sup> Thurston County's Opening Brief pp. 35 – 36.

<sup>9</sup> *Id.* at p. 46.

<sup>10</sup> Thurston County Motion to Dismiss or Limit Issues AR 7 pp. 000095 – 96; Thurston County Memorandum in Support of Respondent's Dispositive Motion to Dismiss or Limit Issues AR 8 pp. 000097 – 104; Thurston County Respondent's Prehearing Brief AR 23 pp. 00591 – 615; Thurston County Motion for Reconsideration and Brief in Support Thereof AR 40 pp. 002577 – 83; Barnett and Alpacas of America Intervenors' Brief AR 29 pp. 001899 – 1907; 1000 Friends of Washington v. Thurston Co., Western Washington Growth Management Hearings Board Case No. 05-2-0002 Certified Transcript of Hearing June 16, 2005 pp. 39 – 81, pp. 125 – 30, & p. 168, hereinafter "Transcript of Hearing."

factor were a bright line rule beyond the Board's authority.<sup>11</sup> Second, that the Board should have used the land available between 2005 and 2025, not the 2000 to 2025 figures used by Thurston County.<sup>12</sup> Third, rural residential comprehensive plan designations with densities of between one dwelling unit per two acres and four dwelling units per acre are GMA complaint rural densities. Fourth, that the county has designated GMA complaint limited areas of more intense rural development (LAMIRDs). Fifth, that the Board's holding as to rural densities is a "bright line rule" beyond the Board's authority.<sup>13</sup>

The Building Industry Intervenors did not raise these issues before the Board because they did not participate before the Board.<sup>14</sup> The County and the intervenors below did not raise these issues either.<sup>15</sup>

The Building Industry Intervenors may argue that because of the "bright line" rule language in the *Viking Properties* decision,<sup>16</sup> the

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<sup>11</sup> Petitioner-Intervenors' Opening Brief p. 19.

<sup>12</sup> *Id.* at pp. 28 – 35.

<sup>13</sup> Petitioner-Intervenors' Opening Brief pp. 37 – 42 & pp. 45 – 48.

<sup>14</sup> FDO pp. \*4 – 6 of 37, AR 39 pp. 002542 – 44.

<sup>15</sup> Thurston County Motion to Dismiss or Limit Issues AR 7 pp. 000095 – 96; Thurston County Memorandum in Support of Respondent's Dispositive Motion to Dismiss or Limit Issues AR 8 pp. 000097 – 104; Thurston County Respondent's Prehearing Brief AR 23 pp. 00591 – 615; Thurston County Motion for Reconsideration and Brief in Support Thereof AR 40 pp. 002577 – 83; Barnett and Alpacas of America Intervenors' Brief AR 29 pp. 001899 – 1907; Transcript of Hearing pp. 39 – 81.

<sup>16</sup> *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129 – 30, 118 P.3d 322, 331 (2005).

Intervenors two self styled “bright line” issues fall under the exception in RCW 34.05.554(1)(d)(i), change in controlling law. But *Viking Properties* is not controlling law as to these issues because the decision did not address market factors, the sizing of urban growth areas, or rural densities.<sup>17</sup> In addition as we show in Parts IV(G)(4) and IV(H)(5), the Board did not apply any bright line rules. Even if the Court concludes that any of these issues fall under one of the exceptions in RCW 34.05.554(1), “[t]he court shall remand to the [Board] for determination any issue that is properly raised ...” under RCW 34.05.554(1).<sup>18</sup> However, since we do not know the Court’s disposition of this argument, we also argue the substance of these issues in Part IV.

#### **IV. Substantive Arguments**

##### **A. Summary of Arguments.**

In Part IV(B) we show that Thurston County and the Building Industry Intervenors have the burden of demonstrating that the Board erroneously interpreted or applied the law or that the Board’s order is not supported by substantial evidence. As the later parts of this brief show, they have not met this burden.

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<sup>17</sup> *Id.* at 124 – 30, 118 P.3d at 329 – 31 (2005).

<sup>18</sup> RCW 34.05.554(2).

In Part IV(C) we show that Futurewise participated in the comprehensive plan update and therefore has participation standing under the GMA. We also show that since Boards are administrative agencies, standing rules based on the separation of powers do not apply.

In Part IV(D) we show that the GMA required Thurston County to review and revise its urban growth area to comply with the GMA. The GMA also authorized our appeal of the County's failure to properly conduct the update.

In Part IV(E) we show that the County's 2003 update as to agricultural lands of long-term commercial significance did not comply with the GMA's requirements for an update. Therefore, our appeal of these issues is not time barred.

In Part IV(F) we show that *res judicata* and *collateral estoppel* do not bar Futurewise's appeal of the urban growth areas (UGAs). In Part IV(G) we show Board's finding that the supply of land significantly exceeds projected demand based on the County's population projection both cannot be challenged and is supported by substantial evidence.

In Part IV(H) we show that Thurston County's comprehensive plan and development regulations do not provide the variety of rural densities required by the GMA. In Part IV(I) we show that two Board findings of fact understate are in error.

**B. Standard of Review.**

**1. Standard of Review under the APA.**

When reviewing a decision of the Board, we apply the standards of chapter 34.05 RCW, the Administrative Procedure Act (APA), and base our review upon the record made before the Board. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). Under the judicial review provision of the APA, the “burden of demonstrating the invalidity of [the Board's decision] is on the party asserting the invalidity.” RCW 34.05.570(1)(a). The validity of that decision shall be determined in accordance with the standards of review provided in RCW 34.05.570.<sup>19</sup>

RCW 34.05.570(3) sets forth nine bases for granting relief from the Board’s decision. The County and the Building Industry Petitioner-Intervenors’ claim five: that the statute on which the Board’s decision is based violates the constitution as applied, the decision is outside the Board’s authority, the decision is an erroneous interpretation of the law, the decision is not support by substantial evidence in the record, and the decision is arbitrary and capricious.<sup>20</sup> Despite the claim, the challengers do not argue the arbitrary and capricious grounds in their briefing.

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<sup>19</sup> *Thurston County v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7 – 8, 57 P.3d 1156, 1159 – 60 (2002).

<sup>20</sup> Thurston County’s Opening Brief pp. 26 – 27; Petitioner-Intervenors’ Opening Brief p. 15.

The Court reviews issues of law de novo.<sup>21</sup> The Court may give substantial weight to the Board's interpretation of the GMA, but it is not bound by the Board's interpretation.<sup>22</sup> If the Court concludes the Board failed to apply the appropriate standard of review when reviewing a local government's actions, the Board's legal conclusions are not entitled to substantial weight.<sup>23</sup>

“[S]ubstantial evidence is ‘a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.’ ” *Id.* (quoting *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, review denied, 132 Wash.2d 1004, 939 P.2d 215 (1997)). On mixed questions of law and fact, we determine the law independently, then apply it to the facts as found by the agency. *Hamel v. Employment Sec. Dep't*, 93 Wn. App. 140, 145, 966 P.2d 1282 (1998), review denied, 137 Wn.2d 1036, 980 P.2d 1283 (1999).<sup>24</sup>

The reviewing Court does not weigh the evidence or substitute its view of the facts for that of the Board.<sup>25</sup> Futurewise, the prevailing party

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<sup>21</sup> *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132, 1137 (2005).

<sup>22</sup> *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133, 139 (2000).

<sup>23</sup> *Quadrant Corp.*, 154 Wn.2d at 238, 110 P.3d at 1139.

<sup>24</sup> *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156, 1160 (2002).

<sup>25</sup> *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 676, 929 P.2d 510, 516 n.9 (1997).

below, may argue any ground to support the Board's order which is supported by the record.<sup>26</sup>

## 2. Statutory Interpretation.

¶ 9 The meaning of a statute is inherently a question of law and our review is de novo. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000); *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 352, 932 P.2d 158 (1997). The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004); *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question. *Campbell & Gwinn*, 146 Wn.2d at 11, 43 P.3d 4.<sup>27</sup>

If a statute does not define the terms at issue, the court turns “to a standard dictionary to ascertain their plain and ordinary meaning.”<sup>28</sup>

## 3. Deference to Local Governments.

Both the Thurston County and the Building Industry Intervenors argue that Thurston County's decisions under the GMA are entitled to deference. Futurewise agrees, but “this deference ends when it is shown

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<sup>26</sup> *Kindsvogel*, 149 Wn.2d at 481, 69 P.3d at 872; *Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 168, 93 P.3d 885, 891 (2004).

<sup>27</sup> *Department of Labor and Industries v. Gongyin*, 154 Wn.2d 38, 44 – 45, 109 P.3d 816, 819 (2005).

<sup>28</sup> *Id.* at 45, 109 P.3d at 819.

that a county's actions are in fact a 'clearly erroneous' application of the GMA ..."<sup>29</sup> Thurston County, on page 29 of its Opening Brief, argues that deference only ends "where a local enactment violates a 'specific statutory mandate[']'" based on footnote 8 of the *Quadrant Corp.* decision. While all of the violations found by the Board in this appeal are violations of specific statutory provisions, Thurston County's argument is contrary to the holding in *Quadrant Corp.* As the Supreme Court wrote: "In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general."<sup>30</sup>

**C. Futurewise had standing to appeal Thurston County's update to the Board. (Thurston County Assignment of Error 1, Issue 1, & Argument C)**

**1. Statement of the case applicable to this issue.**

While Thurston County delights in referring to Futurewise as "a Seattle based entity,"<sup>31</sup> Futurewise is a statewide organization that has been active in Thurston County for years.<sup>32</sup>

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<sup>29</sup> *Quadrant Corp.*, 154 Wn.2d at 238, 110 P.3d at 1139.

<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> Thurston County County's Opening Brief p. 2.

<sup>32</sup> See for example *The Cooper Point Ass'n v. Thurston County*, 108 Wn. App. 429, 432, 31 P.3d 28, 30 (2001).

Futurewise, its members, and local partners actively participated in Thurston County's comprehensive plan update. Futurewise wrote letters. Futurewise staff and its members and local partners also testified in person.<sup>33</sup> The letters and testimony addressed all of the issues raised in its appeal.<sup>34</sup> As our Petition for Review said:

Petitioner 1000 Friends of Washington is a Washington non-profit Corporation and a statewide organization devoted to the implementation of the Growth Management Act. The organization has members that are landowners and residents of Thurston County and who are affected by the county's adoption of *Ordinance* 13234 and the matters at issue in this petition. Staff members of 1000 Friends of Washington wrote letters to county officials and testified concerning all matters at issue in this petition and testified at the public hearing on the interim ordinance. 1000 Friends of Washington therefore alleges that it has participation standing to challenge the actions at issue pursuant to RCW 36.70A.280.<sup>35</sup>

**2. The GMA authorizes Futurewise's administrative appeal to the Board.**

RCW 36.70A.280(2)(b) authorizes "a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested ..." to file an appeal with

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<sup>33</sup> See Thurston County Planning Commission Minutes September 29, 2004 pp. 2 – 5, AR 23 pp. 000680 – 83.

<sup>34</sup> 1000 Friends of Washington November 15, 2004 Letter to the Board of County Commissioners for Thurston County, pp. 1 – 14, AR 10 pp. 000234 – 47.

<sup>35</sup> 1000 Friends of Washington Petition for Review *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002 p. 3 (January 21, 2005) AR 1 p. 000003.

the Board. "Person" is defined to include organizations.<sup>36</sup> Futurewise participated orally and in writing. RCW 36.70A.280(2)(b) authorizes our appeal to the Board.

On pages 31 and 32 of its Opening Brief Thurston County implies that the Central Board in *Hapsmith* and the Court of Appeals in *Wells* require a showing that a person must be within the zone of interests protected by the law and allege an injury in fact to have standing to file a Board appeal. Thurston County misreads both cases. In *Hapsmith*, the Central Board concluded that only those seeking to obtain standing to file a Board appeal under RCW 36.70A.280(2)(d), which the Board referred to as APA standing, must show they are aggrieved or adversely affected by the agency action.<sup>37</sup> For participation standing under RCW 36.70A.280(2)(b), the type of standing claimed by Futurewise in this case, the petitioner is not required to show he or she is aggrieved, is within the zone of interests protected by the statute, adversely affected, or will suffer an injury in fact.<sup>38</sup> The *Wells* decision

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<sup>36</sup> RCW 36.70A.280(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."

<sup>37</sup> *Hapsmith et al. v. City of Auburn*, CPSGMHB Case No. 95-3-0075c Final Decision and Order p. \*10 of 36, 1996 WL 650324 p. \*9 (May 10, 1996).

<sup>38</sup> *Id.* at pp. \*8 – 12 of 36, 1996 WL 650324 pp. \*7 – 10.

supports this conclusion. In *Wells*, the Court of Appeals discussed the legislative history of the GMA's standing rules:

The House had passed an amendment containing the following language:

The petitioner must demonstrate that it:  
Has participated in the public adoption process of the county or city regarding the matter on which a review is being requested; can demonstrate that each issue presented in the petition for review was presented by the petitioner on the record during the public adoption process; and can demonstrate the petitioner's interests will suffer specific and perceptible harm if the action of the county or city is not reviewed.[House Journal, 54th Wash. Leg., at 2165-66 (1996).]

But the Senate rejected this proposal,[Senate Journal, 54th Wash. Leg., at 1357-59 (1996)] ....<sup>39</sup>

So, as the Court of Appeals concluded in *Wells*, the Legislature specifically excluded the injury in fact requirement that Thurston County now urges the Court to write into RCW 36.70A.280(2)(a), (b), & (c). The plain language of RCW 36.70A.280(2) and the *Hapsmith* and *Wells* decisions all show Thurston County's interpretation is clearly erroneous and support the Board's conclusion on standing.

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<sup>39</sup> *Wells v. Western Washington Growth Management Hearings Bd.*, 100 Wn. App. 657, 672, 997 P.2d 405, 414 (2000) (emphasis added).

**3. The GMA does not violate the separation of powers.**

Thurston County concedes, on page 33 of its Opening Brief, that the plain language of RCW 36.70A.280(2)(b) authorizes participation standing and does not require a showing of an injury in fact. However, the County urges this Court to rewrite the statute on the grounds that it violates the separation of powers and is therefore unconstitutional.

Thurston County has not met its burden of proof. “A statute is presumed constitutional and the party challenging it has the burden to prove it is unconstitutional beyond a reasonable doubt.”<sup>40</sup>

Standing principles applicable in state court parallel the separation of powers provisions in the U.S. Constitution that apply to the federal courts.<sup>41</sup> Article III of U.S. Constitution and the federal separation of powers doctrine “applies only to the federal government, and does not control the functioning of our state government. [But the Washington courts] continue to rely on federal principles regarding the separation of powers doctrine in order to interpret our state constitution’s stand on this issue.”<sup>42</sup>

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<sup>40</sup> *Diversified Inv. Partnership v. Department of Social & Health Services*, 113 Wn.2d 19, 23, 775 P.2d 947, 949 (1989).

<sup>41</sup> *See Lujan v. Defenders of Wildlife*, 504 U.S. 55, 559 – 60 (1992).

<sup>42</sup> *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173, 177 n.1 (1994).

[The Growth] Board is an administrative agency created by the Legislature. *See Skagit Surveyors*, 135 Wn.2d at 558, 958 P.2d 962. And it is well established that such agencies can constitutionally act in a quasi-judicial capacity. *See ASARCO Inc. v. Air Quality Coalition*, 92 Wash.2d 685, 696, 601 P.2d 501 (1979). The Legislature may delegate administrative powers to agencies to determine facts and interpret the laws it is charged with administering. *See Barry & Barry, Inc. v. State Dep't of Motor Vehicles*, 81 Wash.2d 155, 159, 500 P.2d 540 (1972).<sup>43</sup>

On page 34 of its Opening Brief, Thurston County argues that the Boards are in effect specialized courts because the GMA grants the adjudication function interchangeably to the Boards and the courts. Therefore the “fundamental principle of standing, demonstrating ‘injury-in-fact’ must limit access to both and, under separation of powers, the legislature may not provide otherwise.”

As we have seen this is wrong, the Boards are administrative agencies not courts. Because the constitutional standing requirements apply to courts, not administrative agencies they do not apply to the Boards. The legislature was free to make policy choices as to who could file appeals with the Boards unconstrained by the separation of powers.

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<sup>43</sup> *Diehl v. Mason County*, 94 Wn. App. 645, 663, 972 P.2d 543, 551 – 52 (1999); *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962, 970 (1998) (Boards are administrative agencies).

Contrary to the County's arguments on pages 33 and 34 of its Opening Brief, RCW 36.70A.295 does not transmute an administrative agency into a court. RCW 36.70A.295, cited in the following quote by its session law citation, recognizes differences between the Boards and the courts:

The superior court, like the boards, has authority to declare a county regulation invalid if it finds the regulation would substantially interfere with the fulfillment of the goals of the Act. Laws of 1997, ch. 429, § 13(4). The superior courts also have the power to hold a county, or its board of commissioners, in contempt, if the county fails or refuses to comply with an order of the court. Laws of 1997, ch. 429, § 13(5).<sup>44</sup>

The Boards certainly do not have this inherent judicial power.<sup>45</sup>

None of the cases cited by Thurston County on pages 30 through 34 of their Opening Brief support a conclusion that judicial standing principles apply to the Boards. *Arlington Heights* and *Washington Legal Foundation* dealt with standing before the Article III federal courts, not

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<sup>44</sup> *Id.* at 567, 958 P.2d at 974 n.14.

<sup>45</sup> *Deskins v. Waldt*, 81 Wn.2d 1, 2 – 3, 499 P.2d 206, 207 (1972) (“we hold it is within the inherent power of the court to punish for contempt.”)

standing before an administrative agency such as the Boards.<sup>46</sup> The Washington State cases address standing before courts, agencies.<sup>47</sup>

The plain language of the GMA authorizes persons and organizations that participate before the local government to file appeals with the Boards. The GMA also provides that the Boards are not courts and the standing rules that apply to courts due to the separation of powers doctrine do not apply to the Boards. Thurston County has a heavy burden here; it must show unconstitutionality beyond a reasonable doubt. The County has not carried that burden.

**D. RCW 36.70A.130 and .280 authorize appeals of a county's action to review and revise its plan and regulations. (Thurston County Assignments of Error 2, 3, 4, Issues 2, 4, 5, 6, 8, 9 & Argument D)**

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<sup>46</sup> *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 258 – 265 (1977) & *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 847 (9<sup>th</sup> Cir. 2001) affirmed *Brown et al. v. Legal Found. of Wash. et al.* 538 U.S. 216 (2003).

<sup>47</sup> *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 865, 576 P.2d 401, 403 (1978); *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524, 525 (1992) review denied *Trepanier v. City of Everett*, 119 Wn.2d 1012, 833 P.2d 386 (1992); *Leavitt v. Jefferson County*, 74 Wn. App. 668, 678 – 79, 875 P.2d 681, 687 (1994); *Chelan County v. Nykreim*, 146 Wn.2d 904, 933 – 38, 52 P.3d 1, 15 – 17 (2002); *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 863 – 64, 103 P.3d 244, 246 – 47 (2004), review granted by *Biggers v. City of Bainbridge Island*, 156 Wn.2d 1005, 132 P.3d 146 (2006); *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52, 882 P.2d 807, 811 (1994) review denied *Snohomish County Property Rights Alliance v. Snohomish County*, 125 Wn.2d 1025, 890 P.2d 464 (1995); *Project for Informed Citizens v. Columbia County*, 92 Wn. App. 290, 295 – 97, 966 P.2d 338, 341 – 42 (1998) review denied *Project for Informed Citizens v. Columbia County*, 137 Wn.2d 1020, 980 P.2d 1281 (1999).

**1. Statement of the case applicable to this issue.**

Since Thurston County adopted its Comprehensive Plan in 1995, Thurston County's population increased by 32,081 people.<sup>48</sup> This is almost as much as a new Lacey, the second largest city in the county.<sup>49</sup> This is an example of "the continual changes" that is one of the reasons the GMA requires periodic updates.<sup>50</sup>

**2. The Legislature and Governor granted the Board subject matter jurisdiction over the County's decision not to revise its plan.**

RCW 36.70A.130(1)(a) provides in relevant part:

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 time periods specified in subsection (4) of this section.

RCW 36.70A.130(4)(a) set a December 1, 2004 deadline for Thurston County to update its plan and certain development regulations.

The plain language of RCW 36.70A.130(1)(a) requires Thurston to "review and, if needed, revise" its comprehensive plan and development regulations "to ensure the plan and regulations comply with

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<sup>48</sup> 1000 Friends of Washington November 15, 2004 Letter to the Board of County Commissioners for Thurston County p. 2, AR 10 p. 000235.

<sup>49</sup> *Id.*

<sup>50</sup> 2005 Session Laws, Chapter 294 § 1; .130(1); .130(4).

the requirements of this chapter ...” RCW 36.70A.130(7) provides in relevant part that “[t]he 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). RCW 36.70A.280(1)(a) authorizes the Boards to hear and decide petitions alleging “[t]hat a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter...” As the Washington Supreme Court wrote concerning RCW 36.70A.280(1): “The language of this statutory section authorizes a hearings board to determine whether actions—or failures to act—on the part of a county comply with the requirements of the Growth Management Act.”<sup>51</sup> So the plain language of RCW 36.70A.130 and RCW 36.70A.280(1)(a) authorize appeals of county and city decisions to review, revise, or not revise comprehensive and development regulations by the deadlines in RCW 36.70A.130.<sup>52</sup>

Thurston County on page 35 and 36 of its Opening Brief mischaracterizes the plain language of the GMA as an “open season” to challenge local comprehensive plan provisions and development

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<sup>51</sup> *Skagit Surveyors*, 135 Wn.2d at 558 – 59, 958 P.2d at 970.

<sup>52</sup> *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB Case No. 04-2-0010 Order on Motion to Dismiss p. \*7 & p. \*14 of 16, 2004 WL 2094936 p. \*5 – 6 & p. \*10 (August 2, 2004) & *FEARN, et al. v. City of Bothell*, CPSGMHB Case No. 04-3-0006c Order on Motions p. \*9 of 12, 2004 WL 3275226 p. \* 6 – 7 (May 20, 2004).

regulations every seven years no matter how long ago they were adopted, no matter that they were never appealed, or no matter that they have been previously upheld by the Board. This is not what RCW 36.70A.130 does. RCW 36.70A.130 and RCW 36.70A.280(1)(a) authorize appeals of decisions to review or not review and to revised or not to revise. Past decisions are not challenged. We challenged Thurston County's 2004 decisions to review, revise, and not revise.

The Legislature and Governor have made a policy decision to require Thurston County and other counties and cities to periodically update their comprehensive plans and development regulations.<sup>53</sup> As the Legislature wrote in the purpose statement for a 2005 amendment authorizing more time for the updates:

The legislature recognizes also that the growth management act requires counties and cities to review and, if needed, revise their comprehensive plans and development regulations on a cyclical basis. These requirements, which often require significant compliance efforts by local governments are, in part, an acknowledgment of the continual changes that occur within the state, and the need to ensure that land use measures reflect the collective wishes of its citizenry.<sup>54</sup>

Both of the cases cited by the county on page 35 of its Opening Brief dealt with whether appeal deadlines had been met and the proper forum

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<sup>53</sup> RCW 36.70A.130(4).

<sup>54</sup> 2005 Session Laws, Chapter 294 § 1.

chosen, not whether the Legislature could require periodic updates and authorize appeals for a failure to comply with those requirements.<sup>55</sup>

Thurston County contends on page 35 of its Opening Brief that RCW 36.70A.130's review and revise requirement is inconsistent with the requirement in RCW 36.70A.290(2) that appeals be filed within 60 days of the date the notice of adoption is published. It is not. An appeal of a decision to revise or not revise must still meet the filing deadlines in RCW 36.70A.290(2).

Contrary to Thurston County's claim on pages 35 and 36 of its Opening Brief, the Board did not "infer a radical change in GMA law from the requirement that local governments review their GMA plans in regulations every seven years."<sup>56</sup> As we have seen, the plain language of RCW 36.70A.130 provides that "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...." Thurston County's interpretation that you can only appeal the revisions made by the county means there would be no method of enforcing RCW 36.70A.130's

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<sup>55</sup> *Skamania County v. Columbia River Gorge Com'n*, 144 Wn.2d 30, 49, 26 P.3d 241, 250 – 51 (2001); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 180 – 81, 4 P.3d 123, 128 – 29 (2000).

<sup>56</sup> Thurston County's Opening Brief p. 35 emphasis added.

requirement to “revise” a comprehensive plan and development regulations to “ensure the plan and regulations comply with the requirements of this chapter.” A county or city could just refuse to revise the provisions that do not comply and that failure to act could not be appealed under the County’s interpretation. This writes the “revise” requirement out of RCW 36.70A.130. This interpretation also writes failure-to-act appeals out of RCW 36.70A.280(1). Thurston County’s interpretation of RCW 36.70A.130 is contrary to the plain language of the GMA and is clearly erroneous.

**E. The Legislature granted the Board jurisdiction over the County’s decision not to revise its agricultural criteria and designations and the Board correctly concluded they violated the GMA. (Thurston County Assignment of Error 4, 5, Issue 6, 7, & Argument E)**

**1. Statement of the case applicable to this issue.**

Thurston County reported that 14,000 acres were designated as agricultural lands of long-term commercial significance.<sup>57</sup> In 2002, Thurston County had 74,442 acres in farms, up from 66,341 acres in

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<sup>57</sup> *Questions and Answers on the Thurston County Planning Commission Recommendations for Agricultural Lands* p. 3, AR 37 p. 002529.

farms in 1997.<sup>58</sup> Thurston County has only designated and conserved 18.8 percent of the land in farms as agricultural lands.

**2. Resolution 13039 does not include the findings required by RCW 36.70A.130(1) and is not an RCW 36.70A.130 “update.”**

Thurston County argues on pages 38 through 41 of its Opening Brief first that Resolution 13039 includes the findings required by RCW 36.70A.130(1)(a) and second that the findings required by RCW 36.70A.130(1)(b) do not apply to Thurston County since these requirements only apply to counties and cities not fully planning under RCW 36.70A.040. As we will see, both arguments fail.

*i. Resolution 13039 does not include the findings required by RCW 36.70A.130(1).*

As we saw in Part IV(D) of this brief, RCW 36.70A.130(1)(a) required Thurston County to “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 [the GMA]. . . .” The Legislature and Governor have defined legislative action. “Legislative action means the adoption of a resolution or ordinance following notice and a public hearing indicating

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<sup>58</sup> U.S.D.A., *2002 Census of Agriculture Washington State and County Data Volume 1, Geographic Area Series* Part 47 p. 242 (June 2004) AR 16 p. 000489.

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.”<sup>59</sup>

The Board correctly concluded that Resolution 13039 does not include the required findings. First, there is no “finding that a review and evaluation has occurred.” The term “review and evaluation” is absent from the findings that the county reproduces on page 39 of its Opening Brief and absent from Resolution 13039 in its entirety.<sup>60</sup> The County argues that referencing that the resolution was “amending” the comprehensive plan is enough, but that is not what the plain language of RCW 36.70A.130(1)(a) and (b) when read together require. In addition, RCW 36.70A.130 distinguishes between comprehensive plan amendments and the updates required by RCW 36.70A.130(1). This can be most clearly seen in RCW 36.70A.130(2)(a) which defines updates as something different from amendments. This is the relevant part:

(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.

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<sup>59</sup> RCW 36.70A.130(1)(b).

<sup>60</sup> Thurston County Resolution No. 13039 AR 37 pp. 002495 – 504.

"Updates" means to review and revise, if needed, according to subsection (1) of this section, and the time periods specified in subsection (4) of this section or in accordance with the provisions of subsection (8) of this section.

Second, Resolution 13039 does not include a finding "that a revision was not needed and the reasons therefor."<sup>61</sup> The county says that is not required since revisions were made. However many revisions were not. For example, the County made no revisions to the designation policies for agricultural lands and did not revise its designations even though they only protect 18.8 percent of the working farms in the county. The County provides no explanation for these failures to revise. RCW 36.70A.130(1)(b) provides that these findings are the "minimum" that must be provided.

ii. *The definition of legislative action in RCW 36.70A.130(1)(b) applies to Thurston County.*

On page 40 of its Opening Brief the county argues that the definition of "legislative action" in RCW 36.70A.130(1)(b) only applies to counties and cities that do not fully plan under RCW 36.70A.040. RCW 36.70A.130(1)(b) provides in full:

(b) Except as otherwise provided, a county or city not planning under RCW 36.70A.040 shall take action to

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<sup>61</sup> *Id.*

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 time periods specified in subsection (4) 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.

RCW 36.70A.130(1)(a) requires Thurston County to take “legislative action to review and, if needed, revise ....”<sup>62</sup> The second sentence of RCW 36.70A.130(1)(b) defines the term “legislative action.” While the first sentence in RCW 36.70A.130(1)(b) does not apply to Thurston County since the county plans under RCW 36.70A.040, nothing in the first sentence says this limitation applies to the whole subsection. In addition, the definition of “legislation action” in the second sentence does not say that it only applies to counties and cities not planning under RCW 36.70A.040 or that it applies only to subsection RCW 36.70A.130(1)(b). For Thurston County’s argument that the second sentence does not apply to the County to be correct, you have to write one of those provisions into the second sentence. The first sentence shows that the legislature knows how to limit the application of

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<sup>62</sup> Thurston County agrees that it is required to plan under RCW 36.70A.040. Thurston County’s Opening Brief p. 40.

provisions to certain counties and cities. But the legislature did not do that for the definition of “legislation action.” The definition of “legislation action” in RCW 36.70A.130(1)(b) applies to Thurston County.

Thurston County’s interpretations of RCW 36.70A.130 are clearly erroneous while the Board’s are well grounded in the plain language of the GMA. The Board’s decision that it had subject matter jurisdiction over the agricultural lands designation criteria and designations was also supported by substantial evidence and should also be upheld.<sup>63</sup> Thurston County has not met its burden.

**3. Thurston County’s notice of adoption for its agricultural policies is not in the record.**

Thurston County argues on pages 36 through 38 of its Opening Brief that the county concluded an update of its agricultural lands criteria and designations on November 10, 2003 in Resolution 13039. The county also states they published notice of adoption of the resolution on November 19, 2003 and therefore our 2005 appeal was time barred. However, as we saw in Part IV(E)(2), Resolution 13039 does not include the findings required for an update.

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<sup>63</sup> Order on Motion for Reconsideration pp. \*3 – 4 of 8, AR 42 pp. 002601 – 02.

<sup>63</sup> WAC 242-02-832(3).

There are two other problems with the County's argument. First, the notice of adoption is not properly in the record. The notice was not in the Index of Record that Thurston County prepared listing the documents in the record before the County or in any of the motions to supplement the record by the County and the intervenors below.<sup>64</sup> The GMA, in RCW 36.70A.290(4) commands that the "board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision." Since this notice was not in the record before county, according to the county's own index of record, and was not in any additional supplement evidence approved by the Board, it is not properly in the record.

"Under Washington's [Administrative Procedure Act] APA, judicial review is limited to the agency record. [RCW 34.05.558.]"<sup>65</sup> RCW 34.05.566(1) provides in relevant part that:

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<sup>64</sup> Thurston County Index of Record and Certification AR 4 pp. 000051 – 79, Thurston County Motion to Supplement the Record AR 9 p. 000160, Thurston County Second Additions to the Index to the Record AR 12 pp. 000312 – 15, Barnett Intervenors Motion to Supplement the Record AR 30 pp. 001923 – 2125.

<sup>65</sup> *Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n*, 110 Wn. App. 498, 518, 41 P.3d 1212, 1222 (2002) *affirmed*

The record shall consist of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this chapter as the agency record for the type of agency action at issue, subject to the provisions of this section.

After the Board filed its final decision and order in this case, Thurston County filed a Motion for Reconsideration.<sup>66</sup> Futurewise filed an answer.<sup>67</sup> The Boards' Rules of Practice and Procedure authorize a motion and answer.<sup>68</sup>

On August 11, 2005, the Board signed and mailed its Order on Motion for Reconsideration.<sup>69</sup> On August 12, 2005, a day after the Board mailed its Order, Thurston County signed, e-mailed, and mailed a "Reply to Answer to Motion for Reconsideration" and a "Third Declaration of Allen T. Miller, Jr."<sup>70</sup>

Although the Board rules do not allow a reply for a motion for reconsideration, the Board listed Thurston County's Reply and Third Declaration as AR 43 and included in the documents in the record

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*Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n*, 149 Wn.2d 17, 65 P.3d 319 (2003).

<sup>66</sup> Order on Motion for Reconsideration p. \*1 of 8, AR 42 p. 002599.

<sup>67</sup> *Id.*

<sup>68</sup> WAC 242-02-832(1).

<sup>69</sup> Order on Motion for Reconsideration p. \*8 of 8, AR 42 p. 002606; Order on Motion for Reconsideration Declaration of Service p. \*1 of 1, AR 42 p. 002607.

<sup>70</sup> Thurston County Reply to Answer to Motion for Reconsideration AR 43 pp. 002608 – 13.

transmitted to Thurston County Superior Court.<sup>71</sup> A reply and declaration done a day after an order is issued does not qualify as a document “identified by the agency as having been considered by it before its action and used as a basis for its action.” “A board order on a motion for reconsideration is not subject to a motion for reconsideration.”<sup>72</sup> And a “decision in response to the petition for reconsideration shall constitute a final decision and order for purposes of judicial review.”<sup>73</sup> Consequently, Thurston County’s “Reply to Answer to Motion for Reconsideration” and “Third Declaration of Allen T. Miller, Jr.,” including the notice, are not in the record before the Court and cannot be considered by the Court.

**4. Thurston County’s challenged designation criteria for agricultural lands of long-term commercial significance and designations are clearly erroneous.**

The Washington State Supreme Court has analyzed the GMA and concluded that “[t]he County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the

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<sup>71</sup> Clerk’s Papers Index of the Record Filed November 10, 2005 p. 14.

<sup>72</sup> WAC 242-02-832(3).

<sup>73</sup> WAC 242-02-832(4).

agricultural industry.”<sup>74</sup> As we will see two of the county’s agricultural designation criteria do not fulfill this duty.

As to predominate parcel size, Thurston County’s one sentence argument is that WAC 365-190-050(1)(e) allows it to use parcel size as a criteria, not a farm size.<sup>75</sup> But that argument misses the Board’s reasoning and ruling. The GMA, in RCW 36.70A.030(10), provides that “‘long-term commercial significance’ includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land’s proximity to population areas, and the possibility of more intense uses of the land.” WAC 365-190-050(1) interprets this provision, providing that “[c]ounties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:” ten factors including “(e) [p]redominant parcel size[.]” So, the county is required to consider a combination of factors to determine long-term commercial significance.

The Board correctly concluded that Thurston County had not used predominate parcel size as a factor to ascertain the possibility of

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<sup>74</sup> *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 558, 14 P.3d 133, 141 (2000).

<sup>75</sup> Thurston County’s Opening Brief p. 42.

more intense use of the land, which it could do and which is what WAC 365-190-050(1) recommends.<sup>76</sup> Rather, what Thurston County had done was to equate 20 acre farms on a single parcel of land as economically viable farms.<sup>77</sup> The Board did not say the county could not determine an economically viable farm size.<sup>78</sup> However, as the Board wrote:

(and as the Eastern Board found in the Kittitas County case cited above) parcel size does not necessarily correlate to the size of a farm. Farms may consist of several parcels in common ownership or use (under lease for example), thus achieving the economies of scale the County appears to rely upon in restricting smaller farms from designation and conservation. While parcel size may be a factor in determining the possibility of more intense uses of the land, it is just one in many factors to consider on the question of the possibility of more intense uses of the land. WAC 365-190-050(e). Parcel size is not determinative of the size of a farm, which may consist of more than one parcel.<sup>79</sup>

In addition, as we argued before the Board, 29 percent of the farms in Thurston County, 334 farms, are nine acres or smaller in size.<sup>80</sup> More are larger than ten acres and smaller than twenty.<sup>81</sup> While the county can consider predominate parcel sizes in an area, it should not

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<sup>76</sup> FDO p. \*29 of 37, AR 39 pp. 2567.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> U.S.D.A., *2002 Census of Agriculture Washington State and County Data Volume 1, Geographic Area Series Part 47* p. 242 (June 2004) AR 16 p. 000489.

<sup>81</sup> *Id.*

exclude land just because it is smaller than 20-acres. That would exclude more than 29 percent of the county's farms from protection.

As to the criterion that agricultural land must actually be used for agriculture to be designated as agricultural lands of long-term commercial significance, the County defends on the grounds that the Supreme Court's *Redmond* majority opinion was dicta and that Justice Sanders' concurring opinion was more persuasively reasoned.<sup>82</sup>

As to this first argument, the *Redmond* majority opinion stated that its analysis and decision as to the definition of "agricultural land" was not dicta.<sup>83</sup> This holding and analysis is also cited as precedent.<sup>84</sup>

Second, the Majority's reasoning and holding is more persuasive:

Second, if land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably, in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture. Although some owners of agricultural land may wish to preserve it as such for personal reasons, most, like Benaroya and Cosmos, will seek to develop their land to maximize their return. If the designation of such land as agricultural depends on the intent of the land owner as to how he or she wishes to use it, the GMA is powerless to prevent the loss of natural resource land. All a land speculator would have to do is buy agricultural land, take

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<sup>82</sup> Thurston County's Opening Brief p. 42 – 43.

<sup>83</sup> *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091, 1098 n.7 (1998).

<sup>84</sup> See *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 559, 14 P.3d 133, 141 (2000).

it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the “agricultural land” designation. Under the Board’s interpretation, the controlling jurisdiction would have no choice but to do so, because the land is no longer being used for agricultural purposes.

A cardinal rule of statutory construction is to give effect to legislative intent. *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wash.2d 305, 312, 884 P.2d 920 (1994). A stated legislative intent of the GMA is to maintain and enhance agricultural land. RCW 36.70A.020(8). One cannot credibly maintain that interpreting the definition of “agricultural land” in a way that allows land owners to control its designation gives effect to the Legislature’s intent to maintain, enhance, and conserve such land. Indeed, the Board’s interpretation is likely to have exactly the opposite effect. We decline to interpret the GMA definition in a way that vitiates the stated intent of the statute.

We hold land is “devoted to” agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production.<sup>85</sup>

Thurston County’s two challenged criteria will fail to designate and conserve agricultural land. The Supreme Court has concluded that “[t]he County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry.”<sup>86</sup>

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<sup>85</sup> *Redmond*, 136 Wn.2d at 52 – 53, 959 P.2d at 1097 – 98.

<sup>86</sup> *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 558, 14 P.3d 133, 141 (2000).

The Board's decision should be upheld and County's clearly erroneous interpretations should be rejected.

**F. The Legislature and Governor, through RCW 36.70A.130 and .280, granted the Board authority over the County's UGAs. (Thurston County Assignments of Error 2, 3, Issues 2, 3, 4, 5, Argument F)**

**1. Statement of the case applicable to this issue.**

As part of the 2004 comprehensive plan update, Thurston County extended its planning horizon from 2015 to 2025 and increased its growth target from 319,329 to 334,261 people.<sup>87</sup> The County amended the UGAs, expanding Bucoda's and reconfiguring Tenino's.<sup>88</sup> Despite the wording of County argument F in its Opening Brief, "the Board did not enter a finding that the UGAs are too large, the Board's finding was that the supply of land significantly exceeds projected demand based on the County's allocation of population growth to the urban areas of the County. ... The determination of how to cure this non-compliance with the GMA rests with the County."<sup>89</sup>

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<sup>87</sup> Thurston County Resolution No. 13234, *Thurston County Comprehensive Plan* Land Use Chapter pp. 2-10 – 2-12, AR 16 pp. 000379 – 81. Hereinafter "Land Use Chapter."

<sup>88</sup> FDO pp. \*24 – 25 of 37, AR 39 pp. 2562 – 63.

<sup>89</sup> Order on Motion for Reconsideration p. \*7 of 8, AR 42 p. 2605.

**2. *Res judicata* and *collateral estoppel* do not apply to Futurewise's appeal before the Board and *stare decisis* does not bar our appeal.**

On pages 43 and 44 of its Opening Brief, Thurston County argues that the Board did not have authority review our appeal as it relates to the urban growth area due to the “fundamental principles of *stare decisis*, *res judicata*, and *collateral estoppel*....” All of these arguments fail.

The party asserting *res judicata* or *collateral estoppel*, in this case Thurston County, must establish the concurrence of identity as to all four of their elements.<sup>90</sup> Because the County did not so in its Opening Brief, its claims of *res judicata* and *collateral estoppel* must be denied.

Perhaps Thurston County did not establish the elements because they are not present. In our Response to Motion to Dismiss or Limit Issues before the Board, we showed that three out of four elements of both *res judicata* and *collateral estoppel* were not met.<sup>91</sup> We incorporate that argument and analysis by reference.

*Stare decisis* provides that when a court has decided a principle of law it will apply it in all cases where the facts are substantially the

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<sup>90</sup> *Alishio v. Department of Social and Health Services, State of Wash., & King County*, 122 Wn. App. 1, 7, 91 P.3d 893, 896 (2004) (*res judicata*); *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 305, 103 P.3d 1265, 1274 (2005) review denied *World Wide Video of Washington, Inc. v. City of Spokane*, 155 Wn.2d 1014, 122 P.3d 186 (2005) (*collateral estoppel*).

<sup>91</sup> Petitioner Futurewise's Response to Motion to Dismiss or Limit Issues pp. 8 – 13, AR 10 pp. 000169 – 74.

same even if the parties are different.<sup>92</sup> While the Boards are not courts, Futurewise agrees with the County that a doctrine analogous to *stare decisis* applies to Board decisions.<sup>93</sup> Futurewise is not asking the Court to overrule *Reading*.<sup>94</sup> Indeed, in *Reading* the Board found that the “area designated as the Olympia urban growth boundary is too large.”<sup>95</sup> We only seek to have the Court apply the principles in *Reading* and the subsequent decisions on UGAs to the County’s UGAs.

On page 44 of its Opening Brief the County cites *Mountlake Community Club* for the proposition that the Board erred in allowing relitigation of the County UGA. In *Mountlake*, the Court found that a subarea plan did not amend the city’s transportation element and so the concurrency provisions in the transportation element could not be challenged in an appeal of the subarea plan.<sup>96</sup> Here, as we showed above, the county did amend the land use element adopting a new population target and planning horizon year. More importantly, as we

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<sup>92</sup> *Black’s Law Dictionary* Fifth Edition p. 1261 (1979).

<sup>93</sup> *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council*, 131 Wn. App. 862, 879, 129 P.3d 838, 847 (2006).

<sup>94</sup> *Reading et al. v. Thurston County*, WWGMHB Case No. 94-2-0019 Final Order, 1995 WL 903152 (March 6, 1995).

<sup>95</sup> *Id.* at p. \*15 of 17, 1995 WL 903152 p. \*12. Thurston County included the *Reading* decision as Appendix E to its Opening Brief. The first page number listed cites to that version.

<sup>96</sup> *Montlake Community Club v. Central Puget Sound Growth Management Hearings Bd.*, 110 Wn. App. 731, 739 – 40, 43 P.3d 57, 62 (2002).

showed in Part IV(D)(2), RCW 36.70A.130 and RCW 36.70A.280 authorized our appeal of the county's failure to further revise the UGA. *Montlake* does not apply here since the subarea plan was not a RCW 36.70A.130 update.

In sum, *res judicata*, *collateral estoppel*, and *stare decisis* do not bar Futurewise's Board appeal. The County did not carry its burdens and the Board should be affirmed.

**G. The Board correctly applied the GMA to conclude the County's UGAs violated RCW 36.70A.110. (Thurston County Assignments of Error 2, 3, Issues 2, 3, 4, 5, & Argument G and Building Industry Assignment of Error 1 & Issues 1 & 2)**

**1. Statement of the case applicable to this issue.**

In contrast to rural and agricultural areas, which are designated for resource and low density uses, the urban growth area is to be designated and used for higher density uses characteristic of cities and towns. The Board of County Commissioners is required to designate UGAs "based upon" the Office of Financial Management's 20-year population projection range for the county.<sup>97</sup>

Thurston County Comprehensive Plan Land Use Chapter Table 2-1 identifies a 2025 residential land demand for the UGA of 11,583

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<sup>97</sup> RCW 36.70A.110(1).

acres.<sup>98</sup> The same table shows a residential land supply of 18,790 acres. The difference between supply and demand, the land that is not needed to accommodate the 2025 growth target, is 7,207 acres. This excess capacity is 62 percent of land needed to accommodate the projected 2025 population growth. The average urban density for new development in the unincorporated County UGA was 1.73 dwelling units per acre between 1996 and 2000.<sup>99</sup>

For commercial uses, the UGAs have 5,242 acres of available land and a 2025 demand of 1,889 acres.<sup>100</sup> This results in a surplus of supply over demand of 3,353 acres or 177.5 percent.

For industrial uses, the UGAs have 4,712 acres of available land and a 2025 demand of 325 acres.<sup>101</sup> This results in a surplus of supply over demand of 4,387 acres or 1,349.8 percent. Thurston County never included a market factor or identified why Thurston County needed such large surpluses within the UGAs.<sup>102</sup>

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<sup>98</sup> Land Use Chapter pp. 2-11 – 2-12, AR 16 pp. 000380 – 81.

<sup>99</sup> Land Use Chapter p. 2-12, AR 16 p. 000381.

<sup>100</sup> Thurston Regional Planning Council, *Buildable Land Report for Thurston County*, Table 13, 2000 Land Supply compared to 2025 Land Demand, Thurston County p.II-37 (September 2002) AR 37 p. 002410. Hereinafter “*Buildable Lands Report*.”

<sup>101</sup> *Id.*

<sup>102</sup> Thurston County Resolution No. 13234 pp. 1 –12, AR 1 pp. 000006 – 17; Land Use Chapter pp. 2-4 – 2-14, AR 16 pp. 000373 – 383.

**2. The Board correctly determined that Thurston County's urban growth area exceeded its population projection and that the county never used a market factor.**

RCW 36.70A.110(2) provides (in part) that “[a]n urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances.”

Thurston County, on pages 45 and 46 of its Opening Brief, and the Building Industry Intervenors, on pages 23 through 28 of their Opening Brief, argue that the Board erred in concluding that the county's urban growth was oversized because Thurston County used a “reasonable” 38 percent market factor which is well within range of discretion as to its choices for accommodating growth.

This argument misunderstands the Board's conclusion on this issue and its relevant findings of fact. As the Board found:

26. The County's allocation of residential urban lands (18,789 acres) exceeds its projected 2025 demand for such lands (11,582 acres) by 7,205 acres.
27. Nowhere in the County's comprehensive plan is it indicated that a 38 percent market factor was utilized to increase the amount of acreage that is needed to accommodate projected urban residential growth.<sup>103</sup>

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<sup>103</sup> FDO pp. \*33 – 34 of 37, AR 39 pp. 002571 – 72.

Neither Thurston County nor the Building Industry Intervenors assigned error to these findings of fact.<sup>104</sup> They are verities on appeal.<sup>105</sup> Finding of fact 27 negates all of the market factor arguments made by the County and the Intervenors.

Even if the findings were not verities, the County and Building Industry Intervenors have not met their burden to show these findings are not supported by substantial evidence. While the Thurston County claims in its brief that it used a 38 percent market factor in sizing the UGA, the county never cites to any part of record to show that the county used a market factor.<sup>106</sup> In oral argument before the Board, the County conceded: “I don’t think we considered a market factor.”<sup>107</sup> This was further explained:

Mr. [Thurston County Deputy Prosecuting Attorney]  
Miller: I think that’s just a percentage of –

Ms. Gadbaw [a Board Member]: Land that’s left over.

Mr. Miller: – land that’s left over. ....

Ms. Hite [a Board Member]: That’s in excess of what  
your demand indicates you need.

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<sup>104</sup> Thurston County’s Opening Brief pp. 1 – 2 & Building Industry Petitioner-Intervenors’ Opening Brief pp. 4 – 6.

<sup>105</sup> *Seattle School Dist. No. 1*, 90 Wn.2d at 488 – 89, 585 P.2d at 79 – 80; *Manke*, 113 Wn. App. at 628, 53 P.3d at 1017.

<sup>106</sup> Thurston County’s Opening Brief pp. 1 – 2.

<sup>107</sup> Transcript of Hearing p. 159.

Mr. Swensson [a Senior Planner with the Thurston Regional Planning Council the corporate author of the *Buildable Lands Report*]: Yes.<sup>108</sup>

The Building Industry Intervenors cite to the *Buildable Lands Report* as the source of the market factor. However, the report never uses the term “land market supply factor” or any similar term and never recommends that one be used.<sup>109</sup>

The *Buildable Lands Report* also shows us that the 38 percent was not a market factor. It and the other excesses of supply over demand are the “[p]ercent [r]emaining in 2025.”<sup>110</sup> This is consistent with Mr. Swensson’s answer at the Board’s Hearing. Rather than doing what the GMA requires, making a considered “determination” to include “a reasonable land market supply factor” in the UGA sizing calculations, the county just included whatever land was “left over,” whether that was another 62 percent of projected residential demand, 177.5 percent of commercial demand, or 1,349.8 percent of industrial demand. These are

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<sup>108</sup> Transcript of Hearing p. 2 & p. 159; *Buildable Land Report* AR 37 p. 002371.

<sup>109</sup> *Buildable Lands Report* pp. II-1 – II-46, AR 37 pp. 002374 – 419 & Thurston Regional Planning Council, *Buildable Lands Report for Thurston County: Technical Documentation* pp. 1 – 68 (September 2002) AR 37 pp. 002427 – 94.

<sup>110</sup> *Buildable Lands Report* p. II-22 & p. II-37, AR 37 p. 002395 & p. 002410. The 38 percent used by the county is the percentage of the total land supply, not the land needed to accommodate the county’s increased population based on the county’s adopted population projection, which will be vacant in 2025.

not reasonable land market supply factors, they are leftovers. This is exactly what the Board determined and it violates the GMA.<sup>111</sup>

### 3. The GMA limits the maximum size of the UGA.

In a two sentence argument on page on page 46 of its Opening Brief, Thurston County argues for the first time that the only sizing mandate for UGAs is that they must be large enough to accommodate the projected growth. As we noted in section III(2), this is a new issue and should not be considered by this Court.

In addition, it is wrong. As the Court of Appeals wrote:

Respondents cite to several previous Board decisions that held that the OFM projections are a cap on urban growth and that a UGA must not be larger than needed to support the OFM maximum population projection. Other provisions of the GMA and its WACs support this interpretation as well. One of the goals of the GMA is to "[r]educe the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70.020(2). If a county could enlarge UGAs to accommodate any population maximum it chose, then the result would likely be the urban sprawl the GMA is trying to avoid. And, further, WAC 365-195-335(3)(e)(v), which addresses requirements for setting UGAs, specifically states that the UGAs "should encompass a geographic area which *matches* the amount of land *necessary* to accommodate likely growth." (Emphasis added [by the court].) Accordingly, the OFM projection places a cap on the amount of land a county may allocate to UGAs.<sup>112</sup>

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<sup>111</sup> FDO p. 22, AR 39 p. 002560.

<sup>112</sup> *Diehl v. Mason County*, 94 Wn. App. 645, 654, 972 P.2d 543, 547 (1999).

Additional support for the Court of Appeal's holding can be found in several other sections of the GMA, including the following. The first sentence in RCW 36.70A.110(2) provides that UGAs are to be "[b]ased upon the growth management population projection made for the county by the office of financial management, the county and each city within 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 ...." In addition, an urban growth area may include "a reasonable land market supply factor ...." RCW 36.70A.350(2) provides that "[n]ew fully contained communities may be approved outside established urban growth areas only if a county reserves a portion of the twenty-year population projection and offsets the urban growth area accordingly for allocation to new fully contained communities that meet the requirements of this chapter."

Reading these provisions together we see that UGAs are to be based on the OFM forecast and be "sufficient," that is marked by a quantity to meet the demands of a situation,<sup>113</sup> to accommodate the OFM projection adopted by the county from the OFM range. A market factor is allowed to increase the size of the UGA. If there is no limit to the size

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<sup>113</sup> *Webster's Third New International Dictionary* p. 2284 (2002).

of UGAs, why provide that it must be sufficient? If UGAs had no maximum size, the legislature would not have needed to authorize market factors, counties could have just made the UGA larger to address the same uncertainties. That RCW 36.70A.350(2) requires an offset to the UGA for the population reserved for fully contained communities also demonstrates that UGAs are limited in size to the area needed to accommodate the population projection selected from within the OFM population projection range and a reasonable market factor if the county chooses to use one.

Both Thurston County and the Building Industry Intervenors argue that RCW 36.70A.115 stresses that UGAs are to be large enough.<sup>114</sup> However, they both omit, without ellipse or brackets, the underlined portion: “Counties and cities that are required or choose to plan under RCW 36.70A.040 shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year

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<sup>114</sup> Thurston County’s Opening Brief p. 46 & Building Industry Petitioner-Intervenors’ Opening Brief p. 4 – 6

population forecast from the office of financial management.” Again, UGAs are to be consistent with the chosen projection from the OFM forecast range. If UGAs have no maximum size, why include this phrase?”

The Intervenor's argue on pages 35 and 36 of their Opening Brief that Thurston County's situation is factually distinguished from the Court of Appeals *Diehl* decision because Thurston County did not use a projection outside the OFM range and that “Thurston County fully explained its market factor.” It is true Thurston County's population projections are within the OFM range, but nothing in *Diehl* limits its applicability to jurisdictions planning outside the range. And since Thurston County would have a much larger percentage of vacant land in the UGA at the end of the planning period, 61 percent compared to 50 percent in Mason County, it is a distinction without a difference. Finally, as the County conceded and the *Building Lands Report* and Mr. Swensson said, Thurston County never used a market factor much less explained it. *Diehl* is not distinguishable.

**4. The Board did not limit the Thurston County UGA to a 25 percent market factor.**

Both Thurston County and the Building Industry Intervenor's argue that the Board established a “bright-line” rule that market factors

cannot exceed 25 percent and that Thurston County's UGA was oversized because its market factor was larger. As we showed under section 2 above, the Board correctly concluded that the comprehensive plan did not include a market factor. Again, unchallenged Board Finding of Fact 27 is a verity and resolves this argument.

On pages 46 and 47 of its Opening Brief, Thurston County identifies the experience of Rainer, Yelm, and Tenino as examples of why it needs a broad range of discretion in sizing its UGA. However, Bucoda's surplus of residential land supply over demand is 170 percent, Tenino's is 43 percent, and Yelm's is 97 percent.<sup>115</sup> Even so, the County could have chosen to incorporate the information in its brief into a market factor, but as we documented above the county did not.

On pages 20 through 28 of their Opening Brief, the Building Industry Intervenors cite the *Buildable Lands Report* for a variety of factors that affect land capacity. Many of these factors are incorporated into the land supply figures in the *Buildable Lands Report*. For example, to account in part for the oversized legacy lots, the report methodology assumes that lots on a half acre or smaller (0.5 dwelling units per acre) with zoning of three to eight units per acre will not have additional

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<sup>115</sup> *Buildable Lands Report* p. II-22, AR 37 p. 002395.

homes built on them.<sup>116</sup> Other areas unsuited to building, such as critical areas, are deducted from the land supply.<sup>117</sup> The Board acknowledged that the county could have considered those factors not already taken into account by the *Buildable Lands Report* land supply figures as part of a market factor, but the County did not.<sup>118</sup>

On page 34 of their Opening Brief, the Intervenors claim that the Board phrased the issue as exceeding the capacity needed to accommodate OFM's forecast "even assuming a 25 percent market factor" as evidence of the application of a bright line rule. But the appellant frames the issues, not the Board.<sup>119</sup>

**5. The County not the Board erred in using the 2000 to 2025 time period for UGA sizing.**

On pages 28 through 35 of its Opening Brief, the Building Industry Intervenors contend that the UGA calculations should have been based on a 20-year time period and not 2000 through 2025. If the Court could take up this new issue, it would be yet another reason to remand the Thurston County UGAs back to the County for action consistent with the GMA. It was Thurston County that chose to use the

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<sup>116</sup> Thurston Regional Planning Council, *Buildable Lands Report for Thurston County: Technical Documentation* pp. 28 – 30 (September 2002) AR 37 pp. 002455 – 56.

<sup>117</sup> *Id.* at 34 – 37, AR 37 pp. 002460 – 63.

<sup>118</sup> FDO pp. 22 – 24, AR 39 pp. 002560 – 62.

<sup>119</sup> WAC 242-02-150(2)(c).

2000 to 2025 time period for its data and the projections used to size the UGA, not Futurewise or the Board.<sup>120</sup>

As part of the 20-year time period argument, the Intervenors contend the Board should have reduced the available land in the UGA by five years of growth based the projected average annual growth between 2000 and 2025 and then compared this reduced supply with demand.<sup>121</sup> However, both the supply and demand figures have a year 2000 base.<sup>122</sup> If supply is reduced by the land consumed by five years of growth (2000 to 2005), then the population projection must also be reduced by the five years of homes and businesses constructed on that land. But the Intevenors only reduce the land supply, not the projection and the demand it causes. If you reduce both land supply and demand by five years of average growth, the vacant land remaining in 2025 will still be 7,205 acres, 62 percent of demand.

For all of the issues related to the size of the UGA, neither the County nor the Intervenors have carried their burdens and the Board should be upheld. Indeed, since error was not assigned to the Board's findings of fact that the UGA was oversized, the Board must be upheld.

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<sup>120</sup> Land Use Chapter pp. 2-11 – 2-12, AR 16 pp. 000380 – 81.

<sup>121</sup> Petitioner-Intervenors' Opening Brief at pp. 33 – 35.

<sup>122</sup> *Buildable Lands Report* p. II-4 & p. II-22, AR 37 p. 002377 & p. 002395; FDO Finding of Fact 24 p. \*33 of 37, AR 39 p. 002571.

**H. Thurston County's comprehensive plan and development regulations do not provide a variety of rural densities. (Thurston County Assignment of Error 6, Issues 8, 9, & Argument H and Building Industry Assignment of Error 2 & Issues 3 & 4)**

**1. Statement of the case applicable to this issue.**

Rural lands are lands that remain after urban growth areas and resource lands are identified and designated.<sup>123</sup> Despite not ever designating a single limited area of more intense rural development (LAMIRD), the comprehensive plan designates 21,939 acres of rural land for densities equal to or greater than one dwelling unit per two acres.<sup>124</sup> This is nine percent of the rural area.<sup>125</sup> A LAMIRD is a part of the rural area with an existing built environment that is more concentrated than otherwise found in a rural area.<sup>126</sup> LAMIRDs are optional.<sup>127</sup> In part due to this high density zoning, the average net density for new rural development in Thurston County was one dwelling unit per 3.13 acres from 1996 to 2000.<sup>128</sup>

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<sup>123</sup> RCW 36.70A.070(5); *WEAN*, 122 Wn. App. at 166, 93 P.3d at 890.

<sup>124</sup> Thurston County Resolution No. 13234 Finding 23 p. 8, AR 1 p. 000013; Land Use Chapter Table 2-1A Percentage of Land Allocated for Rural Uses pp. 2-18 – 2-19, AR 16 pp. 000387 – 88.

<sup>125</sup> *Id.*

<sup>126</sup> RCW 36.70A.070(5)(d); (e).

<sup>127</sup> RCW 36.70A.070(5)(d); *Manke*, 113 Wn. App. at 625 – 26, 53 P.3d at 1016.

<sup>128</sup> Land Use Chapter at p. 2-12, AR 16 p. 000381.

Excluding the comprehensive plan designations in the rural area with densities of one dwelling unit per two acres and higher leaves only the “Rural Residential and Resource One Unit per Five Acres” comprehensive plan designation and the “McAllister Geologically Sensitive Areas” comprehensive plan designation. Both designations have a density of one dwelling unit per five acres.<sup>129</sup>

**2. Thurston County’s definition of rural area to include urban growth areas and resource lands is clearly erroneous.**

Thurston County, on pages 48 through 50 of its Opening Brief, argues that its rural element provides for a variety of rural densities through the use of “urban growth areas, rural density zoning, purchase of development rights and transfer of development rights programs, designation of forestry and agricultural lands, cluster development ... and other innovative programs.” However, rural lands do not include lands within the urban growth area and forestry and agricultural lands of long-term commercial significance.<sup>130</sup> The County’s attempt to define the rural area to include these areas, essentially all of the county, is contrary to the plan language of the GMA and clearly erroneous. It is

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<sup>129</sup> *Id.* at pp. 2-22 – 2-23, AR 16 pp. 000391 – 92.

<sup>130</sup> RCW 36.70A.070(5); *WEAN*, 122 Wn. App. at 166, 93 P.3d at 890; FDO Finding of Fact 19 p. \*33 of 37, AR 39 p. 002571.

also contrary to Board Finding of Fact 19, which cannot be challenged in this appeal. The densities within the urban growth areas, agricultural lands, such as the Nisqually Valley, and forest lands are not part of the rural area and do not provide for a variety of rural densities. The County also writes that natural resource lands are interspersed through its rural areas.<sup>131</sup> However the County's zoning map shows the natural resources lands are principally located east of the combined Olympia, Tumwater Lacey UGA and south and west of the rural areas.<sup>132</sup>

**3. Thurston County and Intervenors have not shown that the Board's decision that the County's other measures do not provide for a variety rural densities is clearly erroneous or not supported by substantial evidence.**

The rural element must provide for a variety of rural densities and uses. [RCW 36.70A.070(5)(b).] To achieve a variety of densities and uses, "counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character." [RCW 36.70A.070(5)(b).]<sup>133</sup>

Thurston County, on pages 49 through 52 of its Opening Brief, and the Building Industry Intervenors, on pages 42 through 45 their

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<sup>131</sup> Thurston County's Opening Brief p. 50, note no record citation for assertion.

<sup>132</sup> Official Zoning Map Thurston County, Washington AR 23 p. 001752.

<sup>133</sup> *WEAN*, 122 Wn. App. at 166, 93 P.3d at 890.

Opening Brief, argue that clustering, density transfers, design guidelines, buffers, conservation easements, and other innovative techniques, such as the open space taxation program, provide for a variety of rural densities. After analyzing the County's argument, the Board found that:

20. Where the rural designations and zones themselves do not include a variety of densities, the comprehensive plan and development regulations must demonstrate how the "innovative techniques" create such varieties of densities in the rural area. The County's comprehensive plan does not describe how any innovative techniques have been used to provide a variety of rural densities in the rural area.<sup>134</sup>

Because neither Thurston County nor the Intervenor assigned error to finding of fact 20, it is a verity on appeal. Since as the Board found, the County Comprehensive Plan does not describe how the innovative techniques it claims to have used provide a variety of rural densities, the Court must uphold the Board on this issue.<sup>135</sup>

Indeed, the County's rural element does not even mention most of the innovative techniques the County includes on pages 49 to 51 of its Opening Brief.<sup>136</sup> Only two are even alluded to. The Natural Shorelines Environment is mentioned only as one of the criteria for designating land

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<sup>134</sup> FDO p. \*33 of 37, AR 39 pp. 002571.

<sup>135</sup> Land Use Chapter pp. 2-1 – 2-62, AR 16 pp. 000370 – 431.

<sup>136</sup> *Id.* Comprehensive Plan Chapter Two – Land Use is both the land use and rural elements of the comprehensive plan. *Id.* at p. 2-1, AR 16 p. 000370.

as “Rural Residential and Resource,” which has a one dwelling unit per five acre density.<sup>137</sup> The other is the Public Parks, Trails, and Preserves comprehensive plan designation that has no maximum density.<sup>138</sup> As to density transfers, design guidelines, conservation easements, and open space tax programs, there is no mention of them in the rural element. And the County never cites to the record to show that the programs, parks, open spaces, and refuges are included in the rural element or even located in the rural area. The Capital Forest, for example, is designated as forest land of long-term commercial significance and so is not in the rural area.<sup>139</sup>

Even if they were documented, the County’s argument would still fail. The Shoreline Master Program Natural Shoreline Environment covers only 1.8 percent of the rural area.<sup>140</sup>

The Building Industry Intervenors, on pages 42 through 45 of their Opening Brief, and the County, on page 49 of its Opening Brief,

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<sup>137</sup> *Id.* at p. 2-22, AR 16 p. 000390.

<sup>138</sup> *Id.* at p. 2-28, AR 16 p. 000397.

<sup>139</sup> *Thurston County Comprehensive Plan* Chapter 3 Natural Resource Lands p. 3-10, AR 16 p. 000441. Hereinafter “Natural Resource Lands Chapter.”

<sup>140</sup> Thurston County Motion for Reconsideration and Brief in Support Thereof AR 40 p. 2603. Calculated by taking the 156,775 acres in resource lands designations, and consequently not part of the rural area and deducting it from the total of 399,264 in Table 2-1A. Land Use Chapter 2-18 – 2-19, AR 16 pp. 000387 – 88. The 4,450 acres in the Natural Shoreline Environment are then divided by the result, 242,489 acres, yielding 1.83 percent.

argue that the county's clustering regulations provide a variety of rural densities. But the cluster development density for the rural area is a uniform one housing unit per five acres.<sup>141</sup> Contrary to the Intervenor's Opening Brief on page 44, the clustering regulations no longer apply to the "Rural Residential – One Dwelling Unit per Two Acres" zone.<sup>142</sup> Chapter 20.30 Thurston County Code attached to the Intervenor's Opening Brief is out of date.

On pages 51 and 52 of its Opening Brief, Thurston County tries to use the *WEAN*<sup>143</sup> decision to argue the Board erred and exceeded its authority. However, the Board did not. Island County has a variety of rural zones including five acre zoning and Rural Forest (RF) and Rural Agriculture (RA) zones, both of which are rural zones and both of which have 10 acre minimum lot sizes.<sup>144</sup> As we will see in the next section, the zones that have a density of greater than one dwelling unit per two acres are improperly designated LAMIRDs. Thurston County's only GMA compliant rural comprehensive plan designations and zones have one dwelling unit per five acre densities and clearly do not comply with GMA as interpreted by the *WEAN* decision.

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<sup>141</sup> Thurston County Ordinance No. 13222 pp. 3 – 8, AR 23 pp. 001652 – 57.

<sup>142</sup> *Id.* at Section 7 p. 5, AR 23 p. 001654.

<sup>143</sup> *WEAN*, 122 Wn. App. 156, 93 P.3d 885 (2004).

<sup>144</sup> *Id.* at 168 – 69, 93 P.3d at 891 – 92 (2004).

On page 40 of its Opening Brief, the Intervenors argue that while some of the rural lots will be developed at densities of one dwelling unit per five acres, not all lots will be and some “could remain undeveloped” thereby protecting rural character. Again, we have no citation to the rural element showing provisions to keep rural lands undeveloped. Further, the GMA does not prohibit development in rural areas, rather it requires the rural element to “provide for a variety of rural densities [and] uses....”<sup>145</sup> The County has not complied with this requirement.

**4. The designations and zones with densities of one dwelling unit per two acres to four dwelling units per acre do not provide a variety of rural densities because they violate the GMA.**

The Building Industry Intervenors, on pages 39 through 42 of their Opening Brief, argue that the rural comprehensive plan designations with densities of one dwelling unit per two acres to four dwelling units per acre are in limited areas of more intense rural development (LAMIRDs). But the County adopting ordinance concedes the county has not designated any LAMIRDs.<sup>146</sup> Board findings of fact 8, 9, 10, and 12 find that while these density levels constitute more intense rural development within the meaning of RCW

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<sup>145</sup> RCW 36.70A.070(5)(b).

<sup>146</sup> Thurston County Resolution No. 13234 Finding 23 p. 8, AR 1 p. 000013.

36.70A.070(5)(d), the county never designated LAMIRDs in compliance with the GMA.<sup>147</sup> Since they are not valid LAMIRDs, they will not “accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character” that RCW 36.70A.070(5)(b) requires for rural densities.<sup>148</sup>

**5. The Building Industry Intervenors argument that the Board applied a bright line rule fails.**

On pages 45 through 48 of their Opening Brief, the Building Industry Intervenors argue that the Board applied a bright-line rule that rural densities cannot exceed one dwelling unit per five acres and that this rule violated the GMA and the Supreme Court’s *Viking Properties* decision. The premise of this argument, that the Board held that Thurston County’s one dwelling unit per two acre through four dwelling unit per acre rural zones violated the GMA because they are more dense than one dwelling unit per five acres, is wrong. While the Board did observe that many decisions of the Boards had held that densities of one dwelling unit per five acres or less are generally considered “rural” under the GMA, the County did “not argue that rural residential densities in

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<sup>147</sup> FDO p. \*32 of 37, AR 39 p. 002570.

<sup>148</sup> *WEAN*, 122 Wn. App. at 166, 93 P.3d at 890.

excess of one dwelling per five acres comply with the GMA.”<sup>149</sup> Indeed, at oral argument Thurston County conceded that rural densities greater than one dwelling unit per five acres do not comply with the GMA unless included in a LAMIRD.<sup>150</sup> The County also conceded it had never designated LAMIRDs in compliance with RCW 36.70A.070(5)(d).<sup>151</sup> What the Board actually found was that these higher density designations and zones were improperly designated LAMIRDs, findings the Intervenors have not assigned error to.<sup>152</sup>

If the issue had been raised, the Board would likely have wrote that RCW 36.70A.110(1) prohibits “urban growth” outside the urban growth areas. “Urban growth” is defined as:

“growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. [RCW 36.70A.030(17)].”<sup>153</sup>

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<sup>149</sup> FDO pp. \*4 – 6 of 37, AR 39 pp. 002542 – 44.

<sup>150</sup> Transcript of Hearing pp. 98 – 99.

<sup>151</sup> *Id.* at pp. 104 – 05.

<sup>152</sup> FDO p. \*32 of 37, AR 39 p. 002570.

<sup>153</sup> *Quadrant Corp.*, 154 Wn.2d at 234, 110 P.3d at 1137.

In 2002 the average Thurston County farm was 64 acres, up from 48 acres in 1997.<sup>154</sup> The smallest category size category of farm in the Census of Agriculture is farms one to nine acres in size. The average size of these farms is 5.2 acres.<sup>155</sup> For forest lands of long-term commercial significance, Thurston County determined that the predominate parcel size means parcels of 640 acres or larger.<sup>156</sup> For agricultural lands of long-term commercial significance, adjacent uses are limited to “rural densities of one unit per five acres.”<sup>157</sup> For forest lands of long-term commercial significance, compatible adjacent residential development is “generally at a rural density of one unit per five acres to limit land use conflicts with forestry operations....”<sup>158</sup> Mineral resource lands are to be “at least 1,000 feet from urban growth areas and rural residential areas with existing densities predominately one dwelling unit per five acres or higher, in order to minimize land use conflicts ....”<sup>159</sup> So there is substantial evidence that densities greater than one dwelling per five acres meets the definition of urban

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<sup>154</sup> U.S.D.A., *2002 Census of Agriculture Washington State and County Data Volume 1, Geographic Area Series Part 47* p. 242 (June 2004) AR 16 p. 000489.

<sup>155</sup> *Id.*

<sup>156</sup> Natural Resource Lands Chapter p. 3-10, AR 37 p. 002514.

<sup>157</sup> *Id.* at p. 3-4, AR 37 pp. 002508.

<sup>158</sup> *Id.* at p. 3-10, AR 37 pp. 002514.

<sup>159</sup> *Id.* at p. 3-13 AR 37 pp. 002517.

development in RCW 36.70A.030(17) because the lots are too small for farming, forestry, and mining uses and are incompatible with those uses.

This is why the Court of Appeals has held that densities of one dwelling unit per 2.5 acres or denser are urban densities and prohibited in the rural area.<sup>160</sup> The Supreme Court, in a consistent holding, has concluded that vested one-acre lot subdivisions meet the definition of urban growth.<sup>161</sup> Under these decisions, the one or more dwelling unit per two acre designations and zones violate the GMA.

In contrast, the Building Industry Intervenors cite no evidence or authority that rural densities of one dwelling unit per two acres or greater comply with the GMA. They clearly have not met their burden.

The only GMA complaint rural densities are one dwelling unit per five acres and the rural element does not include innovative measures to provide a variety of densities, so there is no variety of rural densities in the rural element of the comprehensive plan. The Board's findings of fact on this issue cannot be contested, the Board must be upheld.

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<sup>160</sup> *Diehl v. Mason County*, 94 Wn. App. 645, 655 – 57, 972 P.2d 543, 547 – 49 (1999).

<sup>161</sup> *Quadrant Corp.*, 154 Wn.2d at 241 – 47, 110 P.3d at 1141 – 44.

**I. Did the Board err by including natural resource lands in calculating findings of fact 11 & 16? (Futurewise Assignments of Error 1 & 2 & Issue 1)**

The Supreme Court has concluded that a prevailing party does not have to cross appeal to assign error to findings of fact made below.<sup>162</sup> The GMA defines the rural area to exclude lands that are “designated for urban growth, agriculture, forest, or mineral resources.”<sup>163</sup> However, Table 2-1A included 162,399 acres of natural resource lands (forest land, agricultural land, and mineral lands of long-term commercial significance).<sup>164</sup> The Board took the percentages for findings of fact 11 and 16 directly from this table and so these findings of fact are incorrect. Board finding of fact 11 should find that 9.05, not 5.5, percent of the rural lands in the County are designed for high intensity uses. This is calculated by taking the 156,775 acres in resource lands designations and deducting it from the total of 399,264 acres in Table 2-1A. The 21,939 acres in the high intensity uses are then divided by the result, 242,489 acres, yielding 9.05 percent. Board finding of fact 16 should find that 79.5, not 48.3, percent of the rural lands in the County fall into the RR 1/5 category. The 192,708 acres in the rural resource and residential

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<sup>162</sup> *Kindsvogel*, 149 Wn.2d at 480 – 81, 69 P.3d at 871 – 72.

<sup>163</sup> RCW 36.70A.070(5).

<sup>164</sup> Land Use Chapter Table 2-1A Percentage of Land Allocated for Rural Uses pp. 2-18 – 2-19, AR 16 pp. 000387 – 88.

designations, with a density of one dwelling unit per five acres, are then divided by 242,489 acres yielding 79.47 percent. This still understates the percentage since the only rural comprehensive plan designations that are not densities required to be in LAMIRDs have a density of one dwelling unit per five acres as we showed above.

**IV. Conclusion**

As we have seen, Thurston County and the Building Industry Intervenors have the burden of demonstrating that the Board erroneously interpreted or applied the law or that the Board's order is not supported by substantial evidence. As we have also seen, they have not met this burden. Futurewise participated before the county and had standing to appeal the issues it prevailed on before the Board. The Board's findings, with the exception of the two we challenged, are verities and are supported by substantial evidence. The Board's conclusions are well grounded in both the record and the law. The Court should uphold the Board's orders, with the exception of findings of fact 11 and 16.

Respectfully submitted July 10, 2006,



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Tim Trohimovich, WSBA No. 22367  
Attorney for Futurewise, Respondent

Appendix A:  
**Brief Summary of the  
Growth Management Act**

## **Appendix A: Brief Summary of the Growth Management Act.**

In 1990-91, the Washington Legislature enacted the Growth Management Act (“GMA”), Chapter 36.70A RCW, in response to the problems associated with an increase in population in this state, particularly in the Puget Sound area.<sup>1</sup> Cities and counties are now statutorily required to make planning determinations that comply with the goals and requirements of the GMA.

Planning under the GMA consists of six steps. Counties and cities that must plan or choose to plan under the GMA are required to complete the steps in the following order and to comply with GMA goals and requirements for each step.<sup>2</sup>

- Step 1:** Adopt county-wide planning policies to establish a countywide framework from which county and city comprehensive plans and development regulations are developed so that the documents are consistent.
  
- Step 2:** Identify and adopt development regulations to protect critical areas and conserve agricultural lands, forest lands, and mineral resource lands.
  
- Step 3:** Designate urban growth areas.

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<sup>1</sup> These problems included traffic congestion, school overcrowding, urban sprawl, and loss of rural lands. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 546-47, 958 P.2d 962, 964 (1998); see also Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867, 880 (1993).

<sup>2</sup> RCW 36.70A.040(4); .320(3).

- Step 4:** Prepare and adopt comprehensive plans.<sup>3</sup>
- Step 5:** Adopt development regulations to carry out the comprehensive plan and take other steps to implement and ensure consistency with the comprehensive plan.
- Step 6:** Evaluate and, if necessary, update the comprehensive plan and development regulations according to a specific statutory schedule.<sup>4</sup>

With regard to Step Number 6, cities and counties are required to review and evaluate their Comprehensive Plans and development regulations on an ongoing basis.<sup>5</sup> Local jurisdictions must review their Comprehensive Plans and development regulations every seven or ten years and, if needed, revise and update the Comprehensive Plans and development regulations to ensure continuing compliance with the GMA.<sup>6</sup> Local jurisdictions are also required to adopt a resolution or ordinance finding that the statutorily-mandated review and evaluation of their Comprehensive Plans and development regulations has occurred.<sup>7</sup>

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<sup>3</sup> A comprehensive plan is a generalized and coordinated land use policy statement adopted under the GMA by the legislative body of a city or county. RCW 36.70A.030(4).

<sup>4</sup> RCW 36.70A.040; .130.

<sup>5</sup> RCW 36.70A.130(1)(a).

<sup>6</sup> RCW 36.70A.130.

<sup>7</sup> RCW 36.70A.130(1).

Each jurisdiction must perform the required review and revision of its Comprehensive Plan according to the schedule set forth in the GMA.<sup>8</sup> Thurston County was required to review and revise its Comprehensive Plan by December 1, 2004.<sup>9</sup>

The GMA created three Growth Management Hearings Boards to hear and decide appeals alleging that the comprehensive plans, development regulations, and shoreline master programs are not in compliance with the GMA.<sup>10</sup> The Boards also have jurisdiction over whether the adoption or amendment of these documents complied with the Washington State Environmental Policy Act (SEPA), Chapter 43.21C RCW.<sup>11</sup>

“[T]he GMA does not require state administrative approval of local plans and regulations. Thus, local fidelity to GMA goals is not systematically enforced, but depends upon appeals to the Growth Boards and the courts.”<sup>12</sup> Under this system, citizen groups, such as Futurewise,

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<sup>8</sup> RCW 36.70A.130(4).

<sup>9</sup> RCW 36.70A.130(4)(a).

<sup>10</sup> RCW 36.70A.280(1)(a); *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 548 – 49, 958 P.2d 962, 965 (1998).

<sup>11</sup> *Id.*

<sup>12</sup> Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5, 48 – 49 (1999).

bear the brunt of assuring that city and county comprehensive plans and development regulations comply with the GMA. Futurewise was formed, in fact, to help effectively implement the GMA.

Thurston County is within the jurisdiction of the Western Washington Growth Management Hearings Board.<sup>13</sup> The members of the Board are appointed by the Governor to six year terms. They must meet the following qualifications.

Each growth management hearings board shall consist of three members qualified by experience or training in matters pertaining to land use planning and residing within the jurisdictional boundaries of the applicable board. At least one member of each board must be admitted to practice law in this state and at least one member must have been a city or county elected official. Each board shall be appointed by the governor and not more than two members at the time of appointment or during their term shall be members of the same political party. No more than two members at the time of appointment or during their term shall reside in the same county.<sup>14</sup>

Board decisions may be appealed in compliance with the GMA and APA. This is what Thurston County is seeking to do in this case.

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<sup>13</sup> RCW 36.70A.250(1)(c).

<sup>14</sup> RCW 36.70A.260(1).