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DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CLALLAM COUNTY, WASHINGTON,

Respondent

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD, FUTUREWISE, & DRY CREEK COALITION,

Appellants.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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**REPLY BRIEF OF APPELLANT FUTUREWISE**

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## I. INTRODUCTION

Appellant Futurewise appeals the decision of the Clallam County Superior Court which reversed a decision of the Western Washington Growth Management Hearings Board (“Board”). Clallam County took appeal from the Board’s decision to the Superior Court. On review, the Superior Court found that while the County did review the Carlsborg UGA and its Capital Facilities Plan (“CFP”) as part of the periodic review which was challenged by Futurewise, the County’s choice not to amend either its UGA boundary or its CFP renders the UGA and CFP beyond the jurisdiction of the WWGMHB.<sup>1</sup>

Futurewise appealed to this Court arguing in its opening brief that because there was no evidence before the Superior Court that the Board’s Order was “not supported by evidence that is substantial when viewed in light of the whole record before the court,”<sup>2</sup> the Court erred in reversing the decision of the Board. Respondent filed a response brief to which Futurewise now replies.

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<sup>1</sup> CP 123, Memorandum Opinion at 7.

<sup>2</sup> RCW 34.05.570(3)(e).

## II. ARGUMENT IN REPLY

### A. STANDARDS OF REVIEW FOR THE BOARD AND COURT.

Clallam County (County) extensively briefs the standards of review applicable to the Growth Management Hearings Boards' original decision and, to a lesser extent, the standard applicable to the Superior Court and this Court on review. Futurewise cited the standard of review the Board was required to apply in its review, as stated in *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 14 P.3d 133 (2000), in its opening brief. *King County* holds that a Growth Management Hearings Board must find a legislative action in compliance with the Growth Management Act, unless the action is clearly erroneous in view of the entire record before the Board. *King County*, 142 Wn.2d at 552. Futurewise agrees that this is the standard of review the Board was required to apply.

The County correctly points out that in establishing the GMA planning process and choosing to have it implemented by local governments the Legislature identified 13 non-prioritized planning goals to guide local governments in preparing comprehensive plans and

development regulations.<sup>3</sup> See RCW 36.70A.020 for a list of the goals. The goals are “not ranked in priority, not meant to be exclusive, and are permitted to be given varying degrees of emphasis by local legislative bodies.” *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 511, 139 P.3d 1096 (2006); RCW 36.70A.020; WAC 365-195-070. All 13 goals, however, are still mandatory. In the instant case, there is no evidence in the record demonstrated that or how the County assigned weight to economic development or any other goal in its comprehensive plan. See CCC 31.20. Moreover, the County must meet the minimum GMA requirements and address each goal adequately, including encouraging urban growth in urban areas (Goal 1), reducing sprawl (Goal 2), and ensuring adequate public facilities (Goal 12).<sup>4</sup>

The County correctly states the burden of proof in this appeal as falling “wholly upon the party asserting invalidity” of the Board’s action.<sup>5</sup> Curiously, the County then states that Appellant Futurewise “bears the burden of establishing these grounds as the bases for remand...”<sup>6</sup> Futurewise agrees that a petitioner challenging comprehensive plans, development regulations, and respective amendments bears the burden of

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<sup>3</sup> Brief of Respondent Clallam County (“Response Brief:”) at 5.

<sup>4</sup> RCW 36.70A.020

<sup>5</sup> See Clallam County’s Response Brief at 9 and RCW 35.05.570(1)(a).

<sup>6</sup> Clallam County’s Response Brief at 9.

demonstrating non-compliance with the GMA in the first instance pursuant to RCW 36.70A.320(2);<sup>7</sup> but, on this appeal, the burden shifts to the party asserting error on the Board's part to show that the agency action was invalid. RCW 34.05.570(1)(a). Thus, the Respondent County bears the burden of establishing that the Board's Decision was not supported by substantial evidence or misapplied the law.

When reviewing a Board's decisions, this Court applies the standards of the Administrative Procedure Act, chapter 34.05 RCW. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2007) (citing RCW 34.05.570(3)). The Court reviews the Board's legal conclusions *de novo*, with deference to the Board's interpretation of the statute it administers. *Id.*, quoting *King County*, 142 Wn.2d at 553. The Board's findings of fact are reviewed for substantial evidence. *Id.* In reviewing the agency's findings of fact under RCW 34.05.570(3)(e), the test of substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)

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<sup>7</sup> Clallam County's Response Brief at 7, 9.

In its briefing, the County argues that Futurewise misinterprets *Whidbey Envtl. Action Network ("WEAN") v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885 (2004), which Futurewise cited for the proposition that the prevailing party before the Board, may argue any ground to support the Board's order which is supported by the record.<sup>8</sup> The Court of Appeals does not weigh the evidence or substitute its view of the facts for that of the Board. *Callecod*, 84 Wn. App. at 676, n.9. Under *WEAN*, "a correct judgment will not be reversed when it can be sustained on any theory, even though different from the one relied upon by the finder of fact." *Whidbey Envtl. Action Network ("WEAN") v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885 (2004); *LaMon v. Butler*, 112 Wash.2d 193, 200-01, 770 P.2d 1027 (1989). A ruling in favor of the County at the Superior Court does not limit or omit the facts in the record which establish clear error on the County's part in adopting its legislation.

The Supreme Court has made clear that a reviewing court's legal analysis, while *de novo*, should be one "giving substantial weight to the Board's interpretation of the statute it administers." *Swinomish Indian Tribal Cmty v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d at 424. Similarly, when reviewing issues involving mixed questions of law and

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<sup>8</sup> Clallam County's Response Brief at 14.

fact, courts determine the law independently, “giving substantial weight to the Boards’ interpretations,” then apply the law to the facts as found by the board. *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); *King County*, 142 Wn.2d at 552.

**B. THE BOARD HAS JURISDICTION TO CONSIDER THE CALSBORG UGA**

The County is incorrect in stating that the Growth Board lacked jurisdiction to rule on the Carlsborg CFP, because the CFP was adopted in 2000, and no appeal was timely filed.<sup>9</sup> The Growth Board has jurisdiction to consider the Carlsborg CFP through its jurisdiction over the Carlsborg UGA. The County misses a key point, which is that Futurewise is challenging Respondent’s Urban Growth Area (UGA), a necessary component of which is the CFP.<sup>10</sup> It is the relationship between the CFP and UGA that makes Futurewise’s challenge to the Growth Board timely. The Superior Court erroneously divorced one from the other, and the County asks this Court to perpetuate that error.

*Thurston County* identifies two instances in which a local jurisdiction’s actions relating to UGAs and CPs under the GMA are

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<sup>9</sup> Clallam County’s Response Brief at 15.

<sup>10</sup> Clallam County’s Response Brief at 16-17.

subject to failure to update challenges before the Growth Boards: 1) Challenges pertaining to a county's failure to revise a comprehensive plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions." *Thurston County v. WWGMHB*, 164 Wn.2d 329, 344, 190 P.3d 38 (2008); and 2) when there is a change in population projections if a petition is filed within 60 days after publication of the county's 10 year update." *Thurston County*, 164 Wn.2d at 336.

Respondent asserts that Futurewise cannot challenge the Carlsborg UGA, because there were no relevant amendments to the GMA within the timeframe allowed by *Thurston County*.<sup>11</sup> This conclusion is error, however, in that the 2002 adoption of SSHB 2697, 2002 ch. 154 § 2 added an entire requirement to the CFP; to wit, "[p]ark and recreation facilities shall be included in the capital facilities plan element." One of Futurewise's specific challenges at the Board was the CFP provisions for parks and recreation facilities. Thus, the amendment to the CFP, pursuant to *Thurston County*, gave Futurewise standing to challenge (and the Board jurisdiction to hear a challenge to) the CFP, at least as it related to parks.

The County resorts to *Gold Star Resorts v. Futurewise*, NO. 80810-4, 2009 WL 4844315 (Wash. Dec. 17, 2009), which does not further its

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<sup>11</sup> Clallam County's Response Brief at 17.

argument.<sup>12</sup> *Gold Star* simply restates the *Thurston County* holding that challenges to comprehensive plans can only be brought if they pertain to portions of plan that have been directly affected by new or recent GMA provisions. In *Gold Star*, after Whatcom County adopted its comprehensive plan, the GMA was amended to allow limited areas of more intensive rural development (LAMIRDs) to be included in the rural element of comprehensive plans. *Gold Star*, WL 4844315 at ¶ 3 .

Whatcom County had included “proto-LAMIRDS” in its comprehensive plan prior to the GMA provisions relating to LAMIRDs being adopted. What the *Gold Star* Court concluded was that even though the County decided not to modify its proto-LAMIRD designations, they were subject to challenge given the subsequently adopted LAMIRD provisions of GMA. In short, while the Whatcom County had gotten parts of the LAMIRD designation right, they had to review the designation to ensure they conformed with the GMA in all respects. If *Gold Star* has any bearing on the resolution of this case, it is that a County cannot selectively decline to update portions of its comprehensive plan and thereby avoid the ongoing obligation to comply with the GMA. In this case, Clallam County consciously avoided modifying a component of its comprehensive

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<sup>12</sup> Clallam County’s Response Brief at 19.

plan which the GMA requires to be current for purposes of UGA sizing, which the County did update. *Gold Star*, supports Futurewise's contention that a county's comprehensive plan must be comprehensively compliant with the GMA.

**C. THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE BOARD'S DECISION THAT THE CARLSBORG UGA IS NON-COMPLIANT**

The County insists that drinking water and septic system issues at play in this case are entirely regulated under RCW 70.05,<sup>13</sup> and are therefore not the concern of the instant challenge under GMA. This assertion completely misses the relationship between GMA and public health. Land use regulation is public health regulation. The very first case to review land use regulation (local zoning laws) in the United States Supreme Court recognized the regulation as valid based upon the police powers of local government. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). As the Supreme Court wrote, in deciding the challenge to Euclid's zoning ordinance, the "ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare." *Id.* at 387. The Washington Court of Appeals has recognized the fact that land-use planning is substantively related to public health on a number of

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<sup>13</sup> Clallam County's Response Brief at 22.

occasions. *See, e.g., Swinomish Indian Tribal Community v. Skagit County*, 138 Wn. App. 771, 777-778, 158 P.3d 1179 (2007). Public health is also an explicit land use planning objective under the Planning Enabling Act (PEA),<sup>14</sup> RCW 36.70, and a basis for the GMA. As the Washington State Supreme Court has held, the PEA and GMA are “two related statutes” which are meant to be “read together to determine a legislative purpose to achieve a harmonious total statutory scheme.” *Whatcom County v. Brisbane*, 125 Wn.2d 345, 354, 884 P.2d 1326, citing *Ellensburg v. State*, 188 Wn.2d 709, 713, 826 P.2d 1081 (1992).

The GMA has 13 planning goals to guide the development of comprehensive plans and counties’ development regulations. RCW 36.70A.020. Drinking water issues, which are environmental quality issues, fall under goal 10 of the GMA. Goal 10 is to “protect the environment and enhance the state’s high quality of life, including air and water quality, and the availability of water.” Goal 12, to “ensure that ...public facilities and services necessary to support development shall be

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<sup>14</sup> “The purpose and intent of this chapter is to provide the authority for, and the procedures to be followed in, guiding and regulating the physical development of a county or region through correlating both public and private projects and coordinating their execution with respect to all subject matters utilized in developing and servicing land, all to the end of assuring the highest standards of environment for living, and the operation of commerce, industry, agriculture and recreation, and assuring maximum economies and conserving the **highest degree of public health, safety, morals and welfare.**” RCW 36.70.010

adequate to serve the development at the time the development is available for occupancy...,” also applies.

Additionally, the County dismisses a clear GMA directive that UGAs must be ready to provide sewer systems, because sewers are urban services and an element of urban development.<sup>15</sup> RCW 36.70A.110(1). The issue is not whether the septic systems are sufficient; instead the issue is whether septic systems are urban level services. Essentially the CFP elements are driven by the urban or rural dichotomy established by GMA. GMA defines “urban services” to include sewers and “rural services” to exclude sewers. RCW 36.70A.030(20); (17). If a CFP cannot demonstrate how the county will provide urban level sewer systems, it cannot be designated a UGA.

As amply demonstrated by the evidence, the County had neither the existing facilities to support the Carlsborg UGA nor a plan for providing facilities in the future.

**D. THERE IS SUBSTANTIAL EVIDENCE THAT THE GROWTH BOARD CORRECTLY FOUND THE COUNTY’S R2 AND RW2 DENSITIES ARE NOT RURAL.**

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<sup>15</sup> Clallam County’s Response Brief at 22-23.

Respondent's assertion that the Board did not consider the proper rural densities issue is incorrect.<sup>16</sup> Although counties have a "broad range of discretion"<sup>17</sup> in choosing policy tools to carry out the GMA goals and requirements and a Board must show deference to the county's policy choices, "the deference ends when it is shown that the county's actions are in fact a 'clearly erroneous' application of the GMA." *Quadrant v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). The Board properly concluded that the County's application of the GMA was clearly erroneous.

The County clearly erred in adopting a plan allowing urban growth outside of urban growth areas and which fails to accord its comprehensive plan rural designations of R2 and RW2 densities with its own definition of rural character. Section 36.70A.030(19) of the RCW defines urban growth 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. \* \* \*

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<sup>16</sup> Clallam County's Response Brief at 24.

<sup>17</sup> *Quadrant v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 236, 110 P.3d 1132.

areas, urban growth typically requires urban governmental services.

The County takes issue with Futurewise's interpretation and application of farm data contained in *Clallam County's Rural Land Report* and analyzed in Futurewise's opening brief.<sup>18</sup> The data show that the average farm size of farms in the County's R2 and RW2 zones is over five times the size of the 2.4 acre minimum densities required in the County's R2 and RW2 zones.<sup>19</sup> A typical rural farm in the County consists of more than ten acres with average farm sizes ranging from 13.21 to 33.56, depending on the zoning district.<sup>20</sup>

The County argues that farming is only one of its rural uses, so farm size should not be the only determinant of rural character.<sup>21</sup> But, the definition of urban development in the GMA quoted above does rely on uses of the land that is incompatible farming to define urban growth. RCW 36.70A.030(17). The Washington Supreme Court has held that "[a] rural density is 'not characterized by urban growth' and is 'consistent with rural character.'" *Thurston County*, 164 Wn.2d at 359 In applying the definition, of urban growth in *Diehl v. Mason County*, in looking at lots consistent with "primarily agriculture uses" the court concluded densities

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<sup>18</sup> Clallam County's Response Brief at 28.

<sup>19</sup> CP 482, IR 23, Ex. 78, Appx. B.

<sup>20</sup> CP 482, IR 23, Ex. 78, Appx. B.

<sup>21</sup> Clallam County's Response Brief at 27.

of one dwelling unit per 2.5 acres and greater densities “would allow for urban-like development, not consistent with primarily agricultural uses.”

*Diehl v. Mason County*, 94 Wn. App. 645, 656, 972 P.2d 543 (1999).

The County also argues that Futurewise does not provide evidence for its assertion that the County’s plan is inconsistent with its own definition of rural character.<sup>22</sup> The County defines rural character as:

(31) “Rural character” means the existing and preferred patterns of land use and development established for lands designated as rural areas or lands under this comprehensive plan. Rural characteristics include, but are not limited to:

- (a) Open fields and woodlots interspersed with homesteads and serviced by small rural commercial clusters; and
- (b) Low residential densities, small-scale agriculture, woodlot forestry, wildlife habitat, clean water, clean air, outdoor recreation, and low traffic volumes; and
- (c) Areas in which open space, the natural landscape, and vegetation predominate over the built environment; and
- (d) Lifestyles and economies common to areas designated as rural areas and lands under this Plan; and
- (e) Visual landscapes that are traditionally found in areas designated rural areas and lands under this Plan; and
- (f) Areas that are compatible with the use of the land by wildlife and for fish and wildlife habitat; and

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<sup>22</sup> Clallam County’s Response Brief at 31.

- (g) Areas that reduce the inappropriate conversion of undeveloped land into sprawling, low-density development; and
- (h) Areas that generally do not require the extension of urban governmental services; and
- (i) Areas that are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.<sup>23</sup>

Based on the record, the County's Rural Moderate (R2) and Western Region Rural Moderate (RW2) zones are inconsistent with the above definition. For example, "existing patterns of land use" is part of the County's definition of rural character. In its opening brief, in table format, Futurewise summarized the County's land with densities of 1 d.u./2.4 acres, because the Rural Moderate (R2) Western Region Rural Moderate (RW2) zones both allow a maximum density of 1 d.u./2.4 acres.<sup>24</sup> Depending on the planning region, only between 4.4 to 31.4 percent of the land zoned R2 and RW2 are in parcels of 2.4 acres or smaller.<sup>25</sup> The lot sizes for all of Clallam County's rural areas were also

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<sup>23</sup> CP 482, IR 23, Tab CCC Title 31, excerpts from *Clallam County County-Wide Comprehensive Plan* Clallam County Code (CCC) 31.02.050(31).

<sup>24</sup> CP 482, IR 1, Futurewise's First Amended Petition for Review Tab 1, Clallam County Code (CCC) § 33.10.030(4) at 2; CCC § 33.10.035(4) at 2.

<sup>25</sup> CP 482, IR 23, Ex. 78, Appx. B, *Clallam County Rural Lands Report* (2/13/2007 Draft) Table CC-2: Current parcel sizes per zoning rural designation – Countywide, Table SDPR-2: Current parcel sizes per rural zoning designation – SDPR (Sequim Dungeness Planning Region), Table PAPR-2: Current parcel sizes per rural zoning designation – PAPR (Port Angeles Planning Region), Table SPR-2: Current parcel sizes per rural zoning designation – SPR (Straits Planning Region), & Table WPR-2: Current parcel sizes per rural zoning designation – WPR (Western Planning Region).

included in our opening brief. Depending on the planning region only 2.4 percent to 14.8 percent of the land is in lots 2.4 acres and smaller.<sup>26</sup> So the Rural Moderate (R2) Western Region Rural Moderate (RW2) comprehensive plan designations and zones cannot be justified on the grounds that they recognize the existing density of the areas to which they are applied or that they are consistent with rural character because they are not consistent with the existing patterns of land use. Indeed, within these zones and the rural area as a whole, more land is in the parcels of 4.81 acres or larger categories than any other lot size category. Based on the record, it is this density that is consistent with the county's existing patterns of use and the rural character and that the GMA requires the county to protect.

The County attacks this data in four ways. First, it focuses on a typographic error from Futurewise's *Superior Court* Response Brief, which stated more "parcels" are in 4.81 acre or larger categories, but ignores the fact that the typographic error was corrected in the brief to this Court, and does in fact demonstrate the larger point for which the statistic was stated.<sup>27</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> Clallam County's Response Brief at 26.

Second, the County writes that it primarily defines “ ‘rural character’ ” as “the existing and preferred patterns of land use and development established for lands designated as rural areas or lands under this comprehensive plan.” But as we have seen the existing pattern of land use in the rural areas is largely lands with densities higher than one dwelling unit per 2.4 acres. It is also not the preferred pattern of land use in the county comprehensive plan. As we quoted in our *Brief of Appellant Futurewise* on pages 34 and 35, Clallam County’s own comprehensive plan states that “the repetition of 2.4 and five (5) acre lots in a gridlike pattern over large areas does not promote retention of rural character.”<sup>28</sup> Our *Brief of Appellant Futurewise* on pages 29 through 33 also analyzed how these densities are inconsistent with many of the characteristics of rural character in the county’s definition.

Clallam County then points to its definition of rural development noting “rural development can consist of a variety of uses and residential densities”<sup>29</sup> But that same definition says that these densities must be “at levels that are consistent with the preservation of rural character ....” And as we have seen, those densities do not meet that standard. The County’s definition of “rural development” does not include agricultural or forestry

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<sup>28</sup> CP 482, IR 1, Tab 1, *Clallam County Port Angeles Regional Plan* Section 31.04.230 at 60-61.

<sup>29</sup> Clallam County’s Response Brief at 30.

activities. But rural densities, as the Washington Supreme Court has held, are “‘not characterized by urban growth’ and [are] ‘consistent with rural character.’” *Thurston County*, 164 Wn.2d at 359. The definition of “rural development” is not the relevant standard. Rather, it is the question of the County’s rural character that is relevant, as the county’s definition itself recognizes. And the County’s definition of rural character specifically includes “small-scale agriculture.”<sup>30</sup> Further, our rural character land area analysis included all rural lots, not just those used for farming.

Clallam County also focuses analysis on the percentage of parcels rather than the percentage of land. This is inconsistent with the County’s definition of rural character which focuses on the existing and preferred “patterns of land use and development” and “areas,” not existing lots.<sup>31</sup> The GMA definition of rural character in RCW 36.70A.030(15) also “refers to the patterns of land use and development ...”, not lots. The GMA definition of urban growth and characterized by urban growth in RCW 36.70A.030(19) also focuses land, not parcels.

(19) "Urban growth" refers to 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

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<sup>30</sup> CP 482, IR 23, Tab CCC Title 31, excerpts from *Clallam County County-Wide Comprehensive Plan* Clallam County Code (CCC) 31.02.050(31).

<sup>31</sup> CP 482, IR 23, Tab CCC Title 31, excerpts from *Clallam County County-Wide Comprehensive Plan* Clallam County Code (CCC) 31.02.050(31).

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. \* \* \* When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" **refers to land having urban growth located on it**, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.

Clallam County's focus on parcels rather than land area is a misapplication of the GMA which focuses on whether a rural is characterized by urban growth, not whether a small part of the land has small lots. Indeed, on page 25 of Clallam County's Response Brief, Clallam County recognizes that the Western Board had an "obligation to define [the] County's rural lands[] based on existing 'land use patterns'," the county's focus on parcels, not the area of rural land, is inconsistent with that assertion.

Even if the County's reliance on percentages of parcels were consistent with the county comprehensive plan and state law, it is less than reassuring. On page 27 of Clallam County's Response Brief, Clallam County argues, using data for its most developed area (the Sequim Region), that most of the R2 zone cannot be subdivided. But one of the same tables Clallam County relies on shows that the land in Sequim Region with "subdivision potential" can create 1,390 new "development

rights” through land subdivisions.<sup>32</sup> This would represent 24 percent of the 5,843 parcels that existed in the R2 zone in the Sequim Region when the *Rural Lands Report* was done.<sup>33</sup> The land with “subdivision potential” makes up 44.3 percent of the Sequim Region zoned R-2.<sup>34</sup> This is certainly not a trivial land area and not a trivial increase and hardly protects the rural character of the Sequim Region.

**E. THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE GROWTH BOARD’S FINDING**

Finally, the County claims that the Board applied one dwelling unit per five acre parcel size as a bright line rule for determining rural density.<sup>35</sup> The Board explicitly said that it was not applying a bright line rule, stating “while this Board found that the rural character of Clallam County is a rural density of 1 du/5 acre, the Board has not held that no variation from that density is allowed under any circumstances.”<sup>36</sup> In addition, the County argument makes the logical error of assuming that the absence of a bright line rule means that a Growth Board can never find 1du/2.4 acre parcel size to *not* be a rural density. The absence of a bright

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<sup>32</sup> CP 482, IR 23 Appendix B, Table SDPR-3.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Clallam County’s Response Brief at 35.

<sup>36</sup> *Dry Creek Coalition v. Clallam County*, GMHB Case No. 07-2-0018c, *Compliance Order* (November 3, 2009) at 10; *Final Decision and Order* (FDO) (July 30, 2009) at 63.

line rule does not mean that any type of parcel size is rural. Instead, as illustrated in *Goldstar*, where the Supreme Court remanded the case back to the Board for reconsideration “without applying a bright line rule,” it is the Board’s role to make a fact specific determination relevant to the circumstances at hand. *Gold Star*, WL 4844315 at ¶ 39. Ultimately the Board has the duty to weigh the evidence and make a fact determination when there is a dispute.

In this case, the Board considered all of the evidence in the record to make its determination that the adopted 2.4 acre lots are inconsistent with the County’s rural character. Such evidence included existing land use patterns, evidence on surface and groundwaters, and “other factors” in addition to farm-size evidence provided by Futurewise, as well as the *Clallam County Rural Lands Report*.<sup>37</sup> The Board also considered the State of Washington Department of Community, Trade, and Economic Development (now Commerce) recommendation against this type of sprawling, low-density development.

In addition to the evidence showing that the County’s rural densities violate Clallam County’s own definition of rural character, the GMA’s definition considers additional factors. RCW 36.70A.030 (17)(f)

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<sup>37</sup> FDO at 59-63

provides that rural character includes lands “[t]hat generally do not require the extension of urban governmental services ....” Evidence in the record shows that high rural densities increase costs to taxpayers by allowing land development that will require higher levels of public facilities and services where they will be expensive to provide.<sup>38</sup> So the County’s rural densities violate both Clallam County’s and GMA definitions of rural character.

As the Board in *Futurewise v. Pend Orielle County* summarized, “counties and cities do have some discretion based on local circumstances but this discretion on rural lot sizes or density is limited by the GMA and must be justified on the record.”<sup>39</sup> The County had the burden at the Superior Court but failed to produce evidence demonstrating the Board’s

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<sup>38</sup> CP 482, IR 14, Index # 347, attached to Futurewise’s Motion to Correct or Supplement the Record, Tab 25, Robert W. Burchell, Naveed A. Shad, David Listokin, Hilary Phillips, Anthony Downs, Samuel Seskin, Judy S. Davis, Terry Moore, David Helton, and Michelle Gall. *The Costs of Sprawl—Revisited* pp. 50 – 52 (Transit Cooperative Research Program Report 39, Transportation Research Board, National Research Council 1998), hereinafter *The Costs of Sprawl—Revisited*. See also CP 482, Index 367, attached to Futurewise’s Motion to Correct or Supplement the Record, Tab 33, Rick Reeder, Dennis Brown, and Kevin McReynolds. *Rural Sprawl: Problems and Policies in Eight Rural Counties* p. 200, Table 1 (United States Department of Agriculture’s Economic Research Service). The report documents the GMA’s success in combating these problems in Mason County compared to rural counties in other parts of the country.

<sup>39</sup> *Futurewise v. Pend Oreille County*, Case No. 05-1-0011, Final Decision and Order (November 1, 2006), at 16. Cf. RCW 36.70A.070(5)(a) requiring the county “develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements” of the GMA.

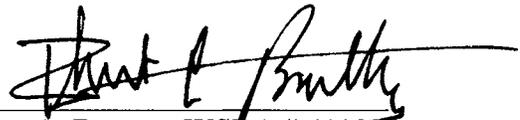
decision was not supported by substantial evidence in the record when viewed in the light of the GMA.

Because of the substantial evidence in the record supporting the Board's conclusions concerning the County's rural densities, the Superior Court erred in failing to affirm the decision of the Board.

### III. CONCLUSION

For the foregoing reasons, and each of them, Appellant Futurewise respectfully requests the Court affirm the decision of the Western Washington Growth Management Hearings Board, vacating the decision of the Superior Court.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 16<sup>th</sup> day of February, 2010 he caused the foregoing Brief of Appellant Futurewise to be served on the following parties by regular U.S. Mail, postage prepaid:

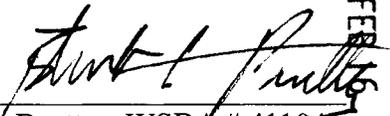
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