

NO. 39601-7-II

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

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II

CLALLAM COUNTY, WASHINGTON,

Respondent,

v.

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

Appellants.

**BRIEF OF APPELLANT FUTUREWISE**

09 DEC 10 PM 12: 04  
STATE OF WASHINGTON  
BY [Signature] DEPUTY

COURT OF APPEALS  
DIVISION II

Robert A. Beattey, WSBA # 41164  
Tim Trohimovich, WSBA # 22367  
Futurewise  
814 Second Ave., STE 500  
Seattle, Washington, 98104  
t: 206.343.0681  
f: 206.709.8218

Counsel for Appellant Futurewise

## TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities .....	ii
I. Introduction.....	1
II. Assignments of Error .....	2
III. Statement of the Case.....	4
IV. Argument .....	6
A. Standard of Review.....	6
B. The Growth Board had Jurisdiction to Consider the Carlsborg UGA and there is Substantial Evidence Supporting the Board’s Decision and Demonstrating the Board’s Deference to the County. ....	8
1. The Growth Board did not lack jurisdiction to rule that the Carlsborg CFP fails to comply with the GMA, even though the CFP was adopted in 2000 and no appeal was timely filed.....	8
2. There is substantial evidence supporting the Board’s Decision that the Carlsborg UGA is non-compliant. ....	16
C. The Growth Board correctly found the County’s R2 and RW2 densities are not rural. ....	24
1. There is substantial evidence supporting the conclusion that the Rural Moderate (R2) and Western Region Rural Moderate (RW2) zones and comprehensive plan designations of similar densities constitute urban growth.....	25
2. There is substantial evidence supporting the conclusion that the Rural Moderate (R2) and Western Region Rural Moderate (RW2) zones and comprehensive plan designations of similar densities are inconsistent with the County’s own definition of rural character. ....	27
3. Substantial Evidence supported the Board’s Finding. ....	35
V. Conclusion .....	40
Certificate of Service .....	1

## TABLE OF AUTHORITIES

### Cases

<i>Callecod v. Wash. State Patrol</i> , 84 Wn. App. 663, 673, 929 P.2d 510 (1997).....	7
<i>City of Moses Lake v. Grant County</i> , Eastern Washington Growth Management Hearings Board (EWGMHB) Case No. 99-1-0016 Final Decision and Order pp. *5 -- 6 of 11 (May 23, 2000) .....	35
<i>Diehl v. Mason County</i> , 94 Wn. App. 645, 655 – 57, 972 P.2d 543, 547 – 49 (1999).....	24, 27, 38
<i>Dry Creek Coalition v. Clallam County</i> , WWGMHB Case No. 07-2-0018c, Final Decision and Order (Apr. 23, 2008) .....	2, 21
<i>Futurewise v. Pend Oreille County</i> , Case No. 05-1-0011, Final Decision and Order (November 1, 2006), at 16. ....	36
<i>Futurewise v. Whatcom County</i> , WWGMHB Case No. 05-2-0013, Final Decision and Order (September 30, 2005), at 25.....	22
<i>Hamel v. Employment Sec. Dep’t</i> , 93 Wn. App. 140, 145, 966 P.2d 1282 (1998).....	8
<i>King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 142 Wn.2d 543, 552, 14 P.3d 133, 138 (2000).....	6, 7, 8
<i>Miotke v. Spokane County</i> , EWGMHB Case No. 05-1-0007, Final Decision and Order (February 14, 2006) .....	9, 10
<i>Sky Valley, et al., v. Snohomish County, et al.</i> , Central Puget Sound Growth Management Hearings Board (CPSGMHB) Consolidated Case No. 95-3-0068c Final Decision and Order p. *46, 1996 WL 734917 pp. 33 – 34, (March 12, 1996) .....	36
<i>Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 161 Wn.2d 415, 424, 166 P.3d 1198 (2007).....	6, 7

<i>Thurston County v. WWGMHB</i> , 164 Wn.2d 329, 344, 190 P.3d 38 (2008). .....	passim
<i>Tugwell v. Kittitas County</i> , 90 Wn. App. 1, 9, 951 P.2d 272 (1997).....	38
<i>Whidbey Envtl. Action Network (“WEAN”) v. Island County</i> , 122 Wn. App. 156, 168, 93 P.3d 885, 891 (2004).....	7
<i>Yanisch v. Lewis County</i> , Western Washington Growth Management Hearings Board (WWGMHB) Case No. 02-2-0007c Final Decision and Order p. *12 of 30 (December 11, 2002).....	35

**Statutes**

RCW 34.05.570 .....	6, 7, 8
RCW 36.70A.020.....	16, 18, 23
RCW 36.70A.030.....	18, 25, 39
RCW 36.70A.070.....	9, 16, 21, 24
RCW 36.70A.110.....	passim
RCW 36.70A.130.....	14, 17, 20
RCW 36.70A.170.....	25
SSHB 2697, 2002 ch. 154 § 2.....	11

**Other Authorities**

Ordinance 827 .....	4
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## I. INTRODUCTION

The proceeding below was an administrative appeal of the April 23, 2008, Final Decision and Order issued by the Western Washington Growth Management Hearings Board (“WWGMHB” or “Board”). The challenge at the Board concerned the Board of Clallam County Commissioners’ enactment of Resolution No. 77 and Ordinance 827, which amended some portions of the County-Wide Comprehensive Plan and designated some areas within the County as Limited Areas of More Intensive Rural Development (LAMIRDs) and established various densities of rural and urban areas within the County. Futurewise filed a timely Petition for Review, pursuant to RCW chapter 36.70A, with the Western Washington Growth Management Hearings Board asserting that these enactments left areas of the County’s comprehensive plan and development regulations noncompliant with the Growth Management Act. Futurewise’s petition was consolidated with a separate Petition for Review filed by Dry Creek Coalition.

The Board issued a Final Decision and Order (FDO) in which it found some LAMIRDs GMA compliant and others non-compliant. The Board also found portions of the County’s rural densities, urban densities, and capital facilities planning non-compliant. *Dry Creek Coalition v.*

*Clallam County*, WWGMHB Case No. 07-2-0018c, Final Decision and Order (Apr. 23, 2008) at 1-2.

Appeal was taken by the County from the Final Decision and Order of the Board to the Clallam County Superior Court. The Superior Court found that the Board had been without jurisdiction to consider issues in the Petition for Review related to the Carlsborg Urban Growth Area (UGA) and Capital Facilities Plan (CFP) and that the Board erred in finding the County's Comprehensive Plan noncompliant as it relates to the Plan's R2 and RW2 (i.e., rural) zoning.

Since this decision of the Superior Court is inconsistent with the Growth Management Act (GMA) and Washington Courts' decisions interpreting the GMA, and because the Board's decision was supported by substantial evidence in the record, Futurewise respectfully requests that the Court reverse the Superior Court and uphold the Final Decision and Order of the Growth Management Hearings Board.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court erred in concluding Clallam County's intent in adopting Resolution No. 77 and Ordinance 827 is relevant. (Finding of Fact and Conclusion of Law No. 2).

Issue: Does Clallam County's choice not to amend the Carlsborg UGA and CFP relieve it from its obligation to comply with the law?

2. The Superior Court erred in concluding that Futurewise's challenges of the densities and CFP for the Carlsborg non-municipal UGA and its argument that said violations substantially interfere with the goals of the GMA were untimely and that the Growth Board was without jurisdiction to review or rule thereupon. (Finding of Fact and Conclusion of Law Nos. 4 and 5).

Issue: Was Futurewise's petition to the WWGMHB timely and the Board's decision supported by substantial evidence?

3. The Superior Court erred in concluding that the record supports the County's allowance of rural densities of 1 du/2.4 acres. (Finding of Fact and Conclusion of Law No. 7).

Issue: Is Clallam County's designation of rural density at 1 du/2.4 acres compliant with the GMA?

4. The Superior Court erred in finding that the Growth Board decision did not point to facts supported by the Record which would demonstrate that the decision of the County Commissioners was based on an error of law or was clearly erroneous, or substantially interfered with the goals of the GMA. (Finding of Fact and Conclusion of Law No. 9).

Issue: Is there substantial evidence supporting the WWGMHB's decision?

5. The Superior Court erred in concluding that Clallam County had carried its burden of proof that the actions of the Board were "clearly erroneous." (Finding of Fact and Conclusion of Law No. 10).

Issue: Given the appropriate standard of review on appeal, which is not "clearly erroneous," did the County carry its burden of proof before the Superior Court?

### III. STATEMENT OF THE CASE

On August 28, 2007, the Board of Clallam County Commissioners enacted Resolution No. 77, entitled “Affirming that Clallam County has Reviewed and Updated its Countywide Comprehensive Plan, Regional Plans, and Development Regulations to Ensure Continued Compliance With Growth Management Act Standards and Policies”, amending some portions of the County-Wide Comprehensive Plan.<sup>1</sup> On the same date, the Board of Clallam County Commissioners enacted Ordinance 827, entitled “An Ordinance Amending Clallam County Code, Chapter 3 1.02, Countywide Comprehensive Plan, to Add a New Section to Formally Identify Certain Local Land Areas as Limited Areas of More Intensive Rural Development (LAMIRDs)”.<sup>2</sup>

Futurewise filed a Petition for Review pursuant to RCW chapter 36.70A with the Western Washington Growth Management Hearings Board asserting that these enactments left numerous areas of the County’s

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<sup>1</sup> The Record transmitted to the Superior Court by the Board and forwarded to this Court by the Superior Court is identified at Clerks Papers 484. The Record uses the original exhibit numbers to reference the record. Accordingly, all references to the Exhibits herein reference CP 484 and the original Index Numbers; the page numbers added by the Board are specifically referenced where available. CP 484, Administrative Record, IR 1, Tab “Res. 77.”

<sup>2</sup> CP 484, IR 1, Tab “Ord. 827.”

comprehensive plan and development regulations noncompliant with the Growth Management Act and were themselves noncompliant with the Act in many respects. Futurewise's petition was consolidated with a separate Petitioner for Review filed by the Dry Creek Coalition.

On April 23, 2008, the Western Board issued its Final Decision and Order in Case No. 07-2-0018c, finding, *inter alia*, that in certain respects the rural densities adopted by the County were non-compliant with the GMA and that in certain other respects the Carlsborg UGA was non-compliant with the GMA.

On July 8, 2008, Clallam County appealed from that decision to the Superior Court, identifying 8 issues on appeal. On June 26, 2009, the Superior Court issued a Memorandum Opinion. The Superior Court ruled that while the County did review the Carlsborg UGA and its Capital Facilities Plan as part of the periodic review which was challenged by Futurewise, the County's choice not to amend either the UGA boundary or its CFP renders the UGA and CFP beyond the jurisdiction of the WWGMHB.<sup>3</sup> This holding effectively means that GMA mandated periodic reviews can come and go and so long as a local jurisdiction

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<sup>3</sup> CP 123, Memorandum Opinion at 7.

doesn't make the mistake of actually updating a comprehensive plan during a required periodic review, it will be valid in perpetuity. Because this is neither the intent nor the letter of the law, Futurewise sought the instant review.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

A Growth Management Hearings Board

is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations. The Board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]. To find an action "clearly erroneous," the board must be left with the firm and definite conviction that a mistake has been committed.

*King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142

Wn.2d 543, 552, 14 P.3d 133, 138 (2000). (Hereinafter, "*King County*")

(internal citations and quotation marks omitted).

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." *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997).

The Court of Appeals does not weigh the evidence or substitute its view of the facts for that of the Board. *Callegod*, 84 Wn. App. at 676, n.9. Futurewise, the prevailing party before the Board, may argue any ground to support the Board's order which is supported by the record. *Whidbey Env'tl. Action Network ("WEAN") v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885 (2004).

The Supreme Court has made clear that the 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 415, 424, 166 P.3d 1198 (2007). Similarly, when reviewing of issues involving mixed questions of law and 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. The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a). Thus the burden of demonstrating the Board's decision was erroneous rests with Clallam County.

**B. THE GROWTH BOARD HAD JURISDICTION TO CONSIDER THE CARLSBORG UGA AND THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE BOARD'S DECISION AND DEMONSTRATING THE BOARD'S DEFERENCE TO THE COUNTY.**

- 1. The Growth Board did not lack jurisdiction to rule that the Carlsborg CFP fails to comply with the GMA, even though the CFP was adopted in 2000 and no appeal was timely filed.**

The Superior Court ruled that the Board lacked jurisdiction to decide issues related to the Carlsborg Urban Growth Area and its associated Capital Facilities Plan ("CFP").<sup>4</sup> An Urban Growth Area ("UGA") is an element of a jurisdiction's Comprehensive Plan designating an area "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110(1). A CFP is a required element of a jurisdiction's

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<sup>4</sup> CP 123, Memorandum Opinion at 15.

Comprehensive Plan that: contains an inventory of existing capital facilities, forecasts future needs and locations for capital facilities, identifies funding sources for future capital facilities, and requires reassessment of planning if funding gaps are identified. RCW 36.70A.070(3).

Key to the resolution of this case is the GMA requirement that a planning jurisdiction update its capital facilities and transportation plans when it adopts or expands its urban growth areas. When a local government is updating and reviewing a capital facility plan, it must include a forecast of future needs and costs for water, sewer, schools, fire, parks, and police capital facilities. As the Hearings Board has put it, “an amendment of a comprehensive plan to expand a UGA requires a new review of the jurisdiction’s CFP so the County is able to see that facilities and services are available for an area added to an UGA and how these facilities and services would be paid for.” *Miotke v. Spokane County*, EWGMHB Case No. 05-1-0007, Final Decision and Order (February 14, 2006), at 21.<sup>5</sup>

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<sup>5</sup> Appellant is unaware of any court having addressed this precise question or the holding of the Eastern Board.

The reason for a local jurisdiction to update its capital facilities and transportation plans when adopting or expanding urban growth areas or revising its comprehensive plan is clear: the intense urban land use inherent in an UGA occasions an increase in the demand on and for capital facilities and transportation resources. At “the heart of the GMA is the concept of looking ahead and planning for the future... and an updated capital facilities plan ensure[s] concurrency for public facilities and services in the future.” *Id.* at 16.

The Superior Court based its decision, in part, upon the decision in *Thurston County v. WWGMHB*, finding that the holding in that case deprived the Board of jurisdiction to hear Futurewise’s challenge related to the Carlsborg UGA and CFP because they were adopted in 2000 and no appeal of the Plan was filed at that time.<sup>6</sup> *Thurston County* established two instances in which a local jurisdiction’s actions under GMA are subject to challenge before the Growth Boards. First, “a party may challenge 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

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<sup>6</sup> CP 123, Memorandum Opinion at 7.

329, 344, 190 P.3d 38 (2008). The Superior Court concluded that based upon the above holding in *Thurston County*, the Carlsborg UGA was beyond challenge because there had not been amendments to relevant portions of the GMA between the time the Carlsborg UGA was originally adopted and the time the County reviewed, but chose not to amend, the UGA.

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. The Superior Court observed that the Board found the County’s CFP “as it related to park and recreational facilities was compliant with the GMA,”<sup>7</sup> but went on to find that *Thurston County* barred challenge to any part of the CFP except the park and recreation facilities.<sup>8</sup>

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<sup>7</sup> CP 123, Memorandum Opinion at 12.

<sup>8</sup> *Id.* at 13.

Even assuming the court below did not err with respect to the first basis for challenge established by *Thurston County*, the other basis for establishing a valid challenge identified in *Thurston County* clearly applies in this case; to wit, “a party may challenge a county’s revisions or failures to revise its UGA designations when there is a change in the population projection, if a petition is filed within 60 days after publication of the county’s 10 year update.” *Thurston County*, 164 Wn.2d at 336.

In this case, there was a change in the population projection after 2000 and prior to the County undertaking its 10 year update, which the County repeatedly acknowledges was a consideration in the relevant legislation.<sup>9</sup> That change in the OFM population projection makes a challenge to the Board proper under the holding in *Thurston County*. Thus as a jurisdictional question, the Board had the power to hear a challenge to the County’s revisions to or failure to revise its UGA. As a consequence of the County having undertaken a UGA revision, the County was also obliged to update its capital facilities and transportation plans. As a result, the Board properly reviewed the County’s changes to the Carlsborg UGA and properly addressed the non-compliant portions of the related CFP,

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<sup>9</sup> See, e.g., CP 482, IR 1, Tab 1, Res. 77 §§15, 16, 20, Index 12.

both because the CFP provisions of the GMA had been amended and because the CFP was a necessary component of the UGA update. Each of these circumstances independently created jurisdiction for the Board.

The Superior Court was certainly correct when it wrote that the *Thurston County* Court explicitly intended to limit the scope of challenges allowed when local jurisdictions undertake mandatory periodic reviews of their comprehensive plans.<sup>10</sup> But the Court erred in concluding that only the decision of the County not to amend its UGA boundary can be challenged, given the holding of *Thurston County*, not “application of specific Facilities Plan elements or Comprehensive Plan elements previously approved.”<sup>11</sup> This is essentially the argument rejected by the Supreme Court in *Thurston County*. As the Court wrote:

The County asserts Futurewise’s challenge was timely only as to the revisions to the Tenino and Bucoda UGAs and, thus, the size of the overall UGA in the county cannot be challenged because it was essentially unchanged in 2004. The County fails to recognize the changes to the two individual UGAs modified the overall UGA size and, *even if the overall UGA size was not changed, the population projection was updated.*

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<sup>10</sup> See CP 123, Memorandum Opinion at 13, quoting *Thurston County* at 344 (periodic reviews create “no open season for challenges previously decided or time barred.”).

<sup>11</sup> *Id.* at 14.

*Thurston County*, 164 Wn.2d at 347 (emphasis added). It is this last sentence that makes clear that the Court really did intend for the change in the OFM population projection to be an independent basis for challenging the designation of a UGA, even if the UGA was not changed. This is consistent with the fact that the ten-year UGA review requires more than considering the size of the urban growth area. RCW 36.70A.130(3) provides in full that:

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

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

So the county “shall revise” both its urban growth areas and densities to “accommodate the urban growth projected to occur in the county for the

succeeding twenty-year period” as part of the ten year urban growth area review. This subsection requires revisions not just to accommodate population growth, but revisions which are necessary to accommodate “urban growth.”

Such a review of an UGA designation and densities for compliance with the GMA requires consideration of capital facilities. RCW

36.70A.110(3) provides that

[u]rban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas.

and the only way to evaluate whether an UGA has “adequate existing public facility and service capacities” is to look to the jurisdiction’s CFP.

The Superior Court reached its decision in this case by narrowly reading *Thurston County* to limit challenges of a periodic review of an UGA to review of “designations of UGA’s,”<sup>12</sup> thereby divorcing the UGA boundary designation from its capital facilities planning. This holding

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<sup>12</sup> *Id.*

creates a situation in which a jurisdiction can completely escape the capital facilities planning required by GMA, so long as it simply ignores the CFP when it undertakes mandatory periodic reviews of its UGAs.

No question, *Thurston County* was a rebuke to the proposition that a mandatory periodic review opened a local jurisdiction's comprehensive plan to challenge *in toto*. But the GMA does require a local jurisdiction to adopt a capital facilities plan and connects that plan to UGA designation in RCW 36.70A.110(3), and the Superior Court's decision below errs in reading *Thurston County* to have written RCW 36.70A.070(3) out of GMA. This is completely antithetic to the whole point of the GMA, which explicitly states as one of its goals to:

Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.020(12).

**2. There is substantial evidence supporting the Board's Decision that the Carlsborg UGA is non-compliant.**

There is substantial evidence in the record demonstrating that the Carlsborg UGA is not compliant with the GMA.

The Capital Facilities Plan for the Carlsborg UGA, was adopted in 2000 through enactment of Ordinance 702.<sup>13</sup> By the terms of its own provisions, the CFP at issue in this case planned only through 2005, two years before the Carlsborg UGA was reviewed pursuant to RCW 36.70A.130, giving rise to this challenge.<sup>14</sup> Futurewise argued to the Board that this plan was non-compliant with GMA, as it only identified the then-current state of capital facilities in the area and failed to identify a plan with financing for providing the necessary facilities and services for an urban community. Futurewise also argued that the development density of 2 dwelling units per acre (“d.u./acre”) adopted by the County within that UGA did not constitute urban density and that the County’s failure to correct these deficiencies during the RCW 36.70A.130 required review violates the GMA and should be found to be non-compliant.

The record below revealed several problems with the 2000 CFP in addition to the fact that it was only a six year projection and therefore out of date, ending for many facilities and services in 2005. First, the Carlsborg UGA uses drainage ditches and culverts typical of a rural

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<sup>13</sup> CP 482, IR 22, Tab 702, Excerpts of Clallam County Ordinance 702 (2000).  
*See also* CP 484, IR 23.

<sup>14</sup> *Id.*

setting for handling storm water runoff, and the County has no plan or funding to address or alter these facilities.<sup>15</sup> RCW 36.70A.030(20) provides that “‘urban services’ include those public services and public facilities at an intensity historically and typically provided in cities, specifically including storm and sanitary sewer systems...” In contrast, RCW 36.70A.030(17) provides that “[r]ural services do not include storm or sanitary sewers, except as otherwise authorized by RCW 36.70A.110(4).” The capital facilities plan element’s reliance on rural services to serve the Carlsborg UGA is inadequate and violates the capital facilities and services goal in RCW 36.70A.020(12) which provides that the county must “[e]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.”

Second, the Plan identifies a current police response time of 15 to 20 minutes and notes that maintaining the response time will be difficult

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<sup>15</sup> CP 482, IR 22, Tab 702 at 5-1 and 5-2.

due to a trend in reduced funding for law enforcement.<sup>16</sup> The Plan does not address a solution with funding for the response time problem.

Third, the Plan acknowledges that 9.23 acres of parks and one recreational field will be needed within the 20 year planning horizon, but fails to identify possible locations or funding for the facilities.<sup>17</sup> As discussed *supra*, the 2002 amendment to the GMA provides that “[p]ark and recreation facilities shall be included in the capital facilities plan element.” RCW 36.70A.070(3).

The most significant area of non-compliance, however, is Clallam County’s plan to continue to use on-site septic systems instead of providing sewer service within the UGA. The County’s own study acknowledged that this would have a negative effect on ground water and require techniques to mitigate increased nitrate levels.<sup>18</sup> The study also acknowledged that as a consequence of the plan, the Carlsborg UGA would require minimum lot sizes of one-half acre.<sup>19</sup> This is the genesis of the 2 dwelling unit per acre (2 d.u./acre) controversy in this case and argued below.

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<sup>16</sup> CP 482, IR 22, Tab 702 at 8-1.

<sup>17</sup> CP 482, IR 22, Tab 702 at 7-3.

<sup>18</sup> CP 482, IR 22, Tab 702 at 3-1 to 3-8.

<sup>19</sup> CP 482, IR 22, Tab 702 at 3-3 to 3-4.

The continued use of septic systems in the UGA stands directly at odds with the stated goals and requirements of the GMA, as it does not encourage urban development and instead encourages sprawling low-density development, which is contrary to the purpose of the UGA. As a result of septic tank use, the UGA will only be allowed to grow to a density of 2 units per acre, a perfect example of the low-density sprawl the GMA was enacted to prevent. The Plan does not identify the need for future sewer service and therefore does not identify locations of facilities and the necessary funding.

The law requires that within an UGA, urban level growth is to be encouraged. RCW 36.70A.110(1). In addition, “[e]ach urban growth area shall permit urban densities.” RCW 36.70A.110(2). And the ten-year review of the urban growth area is required to review densities and “[t]he county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period.” RCW 36.70A.130(3). The GMA recognizes that to accomplish these ends, sufficient capital facilities must exist or be provided and planned for with an identified funding source

when a local government designates a UGA. RCW 36.70A.070(3). And as discussed above, the GMA defines “urban services” to include sewers and “rural services” to exclude sewers. RCW 36.70A.030(20); (17). The evidence below amply demonstrated that the County had neither the existing facilities to support the Carlsborg UGA nor a plan for how they would be provided in the future. As a result, the Board correctly found that:

The County concedes that UGAs need sewers. The County provides for development with only septic tanks, both individual and community, in the Carlsborg. The Board has found that septic tanks are not an urban level of service. The County has not adopted a capital facilities plan compliant with the provisions of RCW 36.70A.070(3) for providing sewers. The County cannot provide sewer service to enable urban development at the time of development. Therefore, CCC Section 33.20 which permits urban uses before the advent of sewers in the Carlsborg UGA, is non-compliant with RCW 36.70A.070(3), 36.70A.110(3), and substantially interferes with 36.70A.020(1), (2), and (12).<sup>20</sup>

It is upon this definition of urban level services that the Board based its finding that the Carlsborg UGA is non-compliant. Both the law and substantial evidence support this conclusion. The question of urban densities is tied to the Board’s consideration of the CFP for Carlsborg

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<sup>20</sup> *Dry Creek Coalition & Futurewise v. Clallam County*, WWGMHB Case No. 07-2-0018c, Final Decision and Order (4/23/08) (“FDO”) at 79-80. Sewers are an urban service and are not a rural service. RCW 36.70A.030(20); (17).

because the evidence showed that the existing capital facilities could support no greater density than 2 d.u./acre since necessary urban services, in this case sewers, were unavailable. It is also tied to the CFP since Clallam County was required to revise its densities to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period. RCW 36.70A.130(3)(b). This provision does not require the accommodation of population, but the accommodation of urban growth.

Under the GMA, densities within UGAs must be urban densities in order to avoid the negative impacts of sprawl. The GMA, in RCW 36.70A.110(2), provides that “[e]ach urban growth area shall permit urban densities ....” In *Futurewise v. Whatcom County*, the Western Board interpreted this requirement and concluded that permitting urban densities generally required an allowed density of at least four dwelling units per acre. *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013, Final Decision and Order (September 30, 2005), at 25. The Board found in that case that a Whatcom County zone permitting development at three units per acre, “without analysis or rationale” for not permitting urban residential densities, fails to comply with RCW 36.70A.110. *Id.* at 26.

Low densities within urban growth areas cause many problems, including increased costs for public infrastructure including water and

sewer systems, higher public operating costs, higher residential development costs, adverse public fiscal impacts, and higher aggregate land costs. Additionally, these low urban densities cause longer travel distances, increased ozone pollution, greater risk of fatal crashes, and depressed rates of walking and transit use.<sup>21</sup> These adverse impacts violate the GMA's goals to reduce sprawl since the low densities lead to sprawl, violate the goal of protecting natural resource industries since UGAs will have to be larger with low densities, the goal of retaining open space since more open land will have to be converted to low density development at low densities, and the goal of protecting the environment since increased air pollution is generated. RCW 36.70A.020(2); (8); (9); (10).

Because the evidence demonstrated that the County could only hope to achieve 2 d.u./acre in the Carlsborg UGA given the rural services in the County's capital facilities element and because that density is not urban in nature, that the county failed to update its densities for the Carlsborg UGA, and because the Board considered and relied upon the

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<sup>21</sup> CP 482, IR 14, Index # 345, Attached to Futurewise's Motion to Correct or Supplement the Record, Tab 23 Reid Ewing, Rolf Pendall, Don Chen, *Measuring Sprawl and its Impact* at 5.

County's own evidence in considering whether the County failed to update the County's CFP in a manner consistent with the GMA, the Superior Court erred in concluding that there was not substantial evidence supporting the Board's decision. Accordingly, the Superior Court should be reversed and the Board affirmed on the Carlsborg UGA issue.

**C. THE GROWTH BOARD CORRECTLY FOUND THE COUNTY'S R2 AND RW2 DENSITIES ARE NOT RURAL.**

Futurewise also challenged the County's failure to prohibit urban and non-rural densities of one dwelling unit per 2.4 acres in the Rural Moderate (R2) and Western Region Rural Moderate (RW2) zones outside of Limited Areas of More Intensive Rural Development (LAMIRDs) in Section 20(E) of the County's ordinance and failure to review and revise the comprehensive plan and development regulations to eliminate non-rural densities of one dwelling unit per 2.4 acres outside of LAMIRDs.

The GMA prohibits urban growth outside urban growth areas, including in rural areas. RCW 36.70A.070(5)(1); RCW 36.70A.110 *Diehl v. Mason County*, 94 Wn. App. 645, 655 – 57, 972 P.2d 543, 547 – 49 (1999)). 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. To prevail before the

Superior Court on the rural densities issue, Clallam County had to have shown that its rural comprehensive plan designations and zones are not characterized by urban growth and are consistent with rural character. This Clallam County did not do and the court below erred in reversing the Board absent such a showing. In fact, substantial evidence in record shows that the County comprehensive plan rural designations and zones both promote urban growth and are inconsistent with the county's own definition of rural character.

- 1. There is substantial evidence supporting the conclusion that the Rural Moderate (R2) and Western Region Rural Moderate (RW2) zones and comprehensive plan designations of similar densities constitute urban growth.**

Section 36.70A.030(17) 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. \* \* \* When allowed to spread over wide areas, urban growth typically requires urban governmental services.

Based upon the GMA's definition of urban growth, a pattern of parcels that are too small to farm constitutes urban growth. The United States Census of Agriculture shows that the average Clallam County farm

in 2002 totaled 49 acres.<sup>22</sup> The smallest category of farm included in the Census of Agriculture is farms from one to nine acres in size. In Clallam County in 2002 there were 134 farms in that category and they consisted of 656 acres.<sup>23</sup> The average size of these farms was 4.9 acres, more than double the size of the 2.4 acre lots allowed in the County's "rural" Rural Moderate (R2) and Western Region Rural Moderate (RW2) zones. This is confirmed by Clallam County's own data for the rural area.<sup>24</sup> The *Clallam County Rural Lands Report* contains data on farm sizes in the rural area, and shows that Clallam County's rural farms require more than five acres. For the county's approximately 1 d.u./2.4 acre zoning districts, the average farm size is 13.21 acres. For the approximately five-acre districts, the average farm size is 14.51 acres. For the Rural 20 acre zone the average farm size is 33.56 acres.<sup>25</sup>

Analysis based on this approach was in the Record before the County, and this approach is consistent with that used by the Court of

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<sup>22</sup> CP 482, IR 343, attached to Futurewise's Motion to Correct or Supplement the Record, Tab 15, U.S. Department of Agriculture National Agricultural Statistics Service, *2002 Census of Agriculture Washington State and County Data Volume 1, Geographic Area Series Part 47 AC-02-A-47* (June 2004) at 238.

<sup>23</sup> *Id.*

<sup>24</sup> CP 482, IR 22, Tab 65, Index # 65, Futurewise's Letter to the Clallam County Department of Community Development (May 18, 2007) at 12-13.

<sup>25</sup> CP 482, IR 23, Ex. 78, Appx. B.

Appeals in *Diehl v. Mason County*. In *Diehl*, the Court looked to the size of lots which were consistent with “primarily agricultural uses” and concluded that densities of one dwelling unit per 2.5 acres and greater densities in that case “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, 548 (1999).

**2. There is substantial evidence supporting the conclusion that the Rural Moderate (R2) and Western Region Rural Moderate (RW2) zones and comprehensive plan designations of similar densities are inconsistent with the County’s own definition of rural character.**

Clallam County has established rural character in a definition:

(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
- (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>26</sup>

Clallam County, as the party with the burden on appeal to the Superior Court, had to show that the Rural Moderate (R2) and Western Region Rural Moderate (RW2) zones with their densities of one dwelling unit per 2.4 acres are “consistent with rural character.” *Thurston County*, 164 Wn.2d at 359. That is, it had to demonstrate that there was not substantial evidence to the contrary on which the Board relied by showing that the challenged zones are consistent with all of the elements listed above. On the contrary, there is substantial evidence showing that the Rural Moderate (R2) and Western Region Rural Moderate (RW2) zones are inconsistent with the County’s own definition of rural character.

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<sup>26</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).

For example, the “existing patterns of land use” is part of the County’s definition of rural character. Table 1 below shows the percentages of land in existing lots in the county zones with densities of 1 d.u./2.4 acres.<sup>27</sup> The Rural Moderate (R2) Western Region Rural Moderate (RW2) zones both allow a maximum density of 1 d.u./2.4 acres.<sup>28</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. Table 2 includes the lot sizes for all of Clallam County’s rural areas. Depending on the planning region only 2.4 percent to 14.8 percent of the land is in lots 2.4 acres and smaller. 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

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<sup>27</sup> Source: 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 Angles 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). The index to the record shows this report was never finalized.

<sup>28</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.

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. 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.

Table 1: Percent Acres of Land Zoned R2 and RW2 by Parcel Size

	Percent of Acres of Land Zoned R2 and RW2 in parcels 2.4 acres or smaller	Percent of Acres of Land Zoned R2 and RW2 in parcels of 2.41 to 4.8 acres	Percent of Acres of Land Zoned R2 and RW2 in parcels of 4.81 to 9.6 acres	Percent of Acres of Land Zoned R2 and RW2 in parcels 9.61 acres or larger
Clallam County	25.3%	20.5%	32.2%	22.0%
Sequim Dungeness Planning Region	31.4%	20.4%	31%	17.2%
Port Angeles Planning Region	23.4%	28.3%	38.7%	9.6%
Straits Planning Region	10%	18.2%	37.3%	34.5%
Western Planning Region	4.4%	10.5%	26.3%	58.8%

Source: See supra note 27.

Table 2: Percent Acres of Total Rural Land by Parcel Size

	Percent Acres of Rural Land in parcels 2.4 acres or smaller	Percent Acres of Rural Land in parcels of 2.41 to 4.8 acres	Percent Acres of Rural Land in parcels of 4.81 to 9.6 acres	Percent Acres of Rural Land in parcels 9.61 acres or larger
Clallam County	9.7%	12.6%	30.1%	47.6%
Sequim Dungeness Planning Region	14.8%	12.8%	30.4%	42.0%
Port Angeles Planning Region	8.1%	15.3%	34.5%	42.1%
Straits Planning Region	3.8%	9.9%	26.2%	60.1%
Western Planning Region	2.4%	7.7%	24.2%	65.7%

Source: See supra note 27.

The definition of rural character in (31)(a) calls for “open fields and woodlots interspersed with homesteads” this is clearly not consistent with a patter of new 2.4 acre lots as the photographs in the *Clallam County Rural Lands Report* show.<sup>29</sup> The definition of rural character in (31)(b) calls for “low residential densities, which again would be consistent with densities on one dwelling unit per 4.81 acres or less. It also calls for “small-scale agriculture.” The *Clallam County Rural Lands Report* documents that for the county’s approximately one dwelling unit per 2.4

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<sup>29</sup> CP 482, IR 23, Ex. 78, Appx. B.

acre zoning districts the average farm size is 13.21 acres.<sup>30</sup> So new 2.4 acre lots are clearly inconsistent with this element of rural character and also the open fields called for in part 31(a) of the definition of rural character.

Clallam County's definition of rural character in (31)(f) includes "[a]reas that are compatible with the use of the land by wildlife and for fish and wildlife habitat." The Record shows that at densities of 1 d.u./2.4 acres or greater fish and wildlife habitats negatively affected. Research by the University of Washington in the Puget Sound lowlands has shown that when total impervious surfaces exceed five to 10 percent and forest cover declines below 65 percent of the basin, salmon habitat in streams and rivers is adversely affected.<sup>31</sup> So, impervious surfaces above ten percent adversely affect fish and wildlife habitats. Clallam County has all of these habitats.

Clallam County's dense rural zoning increases impervious surfaces above the level required to protect water quality. Densities of one housing

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<sup>30</sup> CP 482, IR 23, Ex. 78, Appx. B.

<sup>31</sup> CP 482, IR 14, Index 336, attached to Futurewise's Motion to Correct or Supplement the Record, Tab 7, Christopher W. May, Richard R. Horner, James R. Karr, Brian W. Mar, Eugene B. Welch. *The Cumulative Effects of Urbanization on Small Streams in the Puget Sound Lowland Ecoregion* at 17 (University of Washington, Seattle Washington) (emphasis in the original).

unit per acre have 13 percent of the lot in impervious surfaces.<sup>32</sup> Three to five acre lots have impervious surfaces of 8.3 percent.<sup>33</sup> One acre lots and 2.4 acre lots will exceed the five percent threshold that harms salmon habitat, in direct contradiction of the County's definition of rural character. In addition to salmon, high rural densities can harm other wildlife habitats.<sup>34</sup> Rural sprawl results in fish and wildlife habitat losses and habitat fragmentation, which is the separation of habitats by development.<sup>35</sup>

The record shows that high rural densities increases traffic because more people drive alone<sup>36</sup> and must drive longer distances to work and to meet the needs of their families.<sup>37</sup> This is inconsistent with the definition of rural character in (31)(b) which calls for low traffic volumes.

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<sup>32</sup> CP 482, IR 14, Index 344, attached to Futurewise's Motion to Correct or Supplement the Record, Tab 20, United States Environmental Protection Agency, *National Management Measures to Control Nonpoint Source Pollution from Urban Areas* p. I-9 (Publication Number EPA 841-B-05-004, November 2005).

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

<sup>34</sup> CP 482, IR 14, Index 332, attached to Futurewise's Motion to Correct or Supplement the Record, Tab 4, United States Environmental Protection Agency. *Our Built and Natural Environments: A Technical Review of the Interactions between Land Use, Transportation, and Environmental Quality* p. 19 (EPA 231-R-01-022 January 2001).

<sup>35</sup> *Id.*

<sup>36</sup> Ridesharing is difficult when residences and employment are dispersed.

<sup>37</sup> CP 482, IR 14, Tab 25, *The Costs of Sprawl—Revisited* at 62-63.

Clallam County's own comprehensive plan documents that the one acre and 2.4 acre densities are not consistent with the County's rural character. Indeed, the following quote shows that one, 2.4, and even five acre densities violate almost every element in Clallam County's definition of rural character:

Problems of rural sprawl commonly associated with portions of eastern Clallam County and other localities in the State are now becoming evident in the Port Angeles planning region. The potential for rural type sprawl exists in the Port Angeles planning region because current rural designations allow rural residential densities of one acre, 2.4 acre, and five (5) acre over large contiguous areas. These allowable densities are the same as rural lands in other parts of Washington where rural type sprawl has caused severe problems. The typical land use pattern resulting in areas developing under these allowable densities more closely resembles a series of large lot subdivisions characterized by uniform lot sizes, large lawns, and limited rural uses; rather than the former mixture of large and small lot sizes, woodlots, pastures and other rural type land uses.

One acre densities are not rural in character when spread over large areas as this density of development leads to demand for urban levels of service in terms of schools, roads, and emergency services and does not support efficient provision of urban services. While 2.4 and five (5) acre densities can appear rural in nature when mixed with larger open spaces and rural lot sizes, the repetition of 2.4 and five (5) acre lots in a gridlike pattern over large areas does not promote retention of rural character. Further development of this type over large areas will only diminish rural character over time, increase the costs for rural service provision and inhibit the function of natural

systems as development occurs in this artificial pattern across streams, wetlands, landslide hazard areas and erosion hazard areas.<sup>38</sup>

### **3. Substantial Evidence supported the Board's Finding.**

In the case at bar, the Western Board considered the evidence in the record to consider whether the County was preserving the rural character of its rural areas. The conclusion by the Superior Court that the decision by the Board resulted from clandestine application of a bright line rule by the Board is not supported by the record.

First, as demonstrated above, the Western Board's decision was consistent with the Washington State Supreme Court's rural density holdings in *Thurston County*. Clallam County, which had the burden at the Superior Court, never produced evidence to the contrary.

Second, it is true that all three Growth Boards have at various times concluded that rural zoning densities exceeding one dwelling unit per five acres outside of LAMIRDs did not preserve rural character.<sup>39</sup>

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<sup>38</sup> CP 482, IR 1, Tab 1, *Clallam County Port Angeles Regional Plan* Section 31.04.230 at 60-61.

<sup>39</sup> *City of Moses Lake v. Grant County*, Eastern Washington Growth Management Hearings Board (EWGMHB) Case No. 99-1-0016 Final Decision and Order pp. \*5 -- 6 of 11 (May 23, 2000), *Yanisch v. Lewis County*, Western Washington Growth Management Hearings Board (WWGMHB) Case No. 02-2-0007c Final Decision and Order p. \*12 of 30 (December 11, 2002), & *Sky Valley, et al., v.*

This does not, however, result from resort to a “bright line rule.” As the Eastern Board has explained:

This is not to say there is a “bright line” rule [of the kind disfavored in the Supreme Court’s *Viking Properties* decision] concerning rural lot sizes. 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 in the record.<sup>40</sup>

The County argued that the Western Board placed “undue emphasis on ‘farm size’ to determine the character of all ‘rural areas.’” No so: Clallam County’s definition of rural character in *Clallam County County-Wide Comprehensive Plan* Clallam County Code (CCC) 31.02.050(31) requires “open fields,” “small-scale agriculture,” “open space,” and “visual landscapes that are traditionally found in areas designated rural areas.” So the Board was required to accept these factors.

The Board did not over-emphasize these factors. The Board specifically addressed this issue and, essentially, ruled against Futurewise and Futurewise’s argument on farm size. The Board wrote:

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*Snohomish County, et al.*, Central Puget Sound Growth Management Hearings Board (CPSGMHB) Consolidated Case No. 95-3-0068c Final Decision and Order p. \*46, 1996 WL 734917 pp. 33 – 34, (March 12, 1996).

<sup>40</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.

With both *Diehl* and *Tugwell* and the County's own data, Futurewise is essentially arguing that if a lot is too small to farm then it is per se urban. To determine something is per se urban based on a single factor is to essentially establish the bright line that the *Viking* Court found inappropriate. Although the Board concedes that the average farm size relates strongly to the visual rural character of the area, the ability of land to viably produce agricultural products is not, in and of itself, the defining factor in regards to whether something is rural. The purpose of rural lands is not primarily the production of agricultural products as Futurewise asserts based on the GMA's definition of urban growth. As noted supra, rural areas provide much more than solely agricultural land. The ability of land to be productive is more appropriate in the context of agricultural lands.<sup>41</sup>

The Board then went on to consider existing land use patterns, surface and groundwaters, and "other factors" in addition to farm size arguments offered by Futurewise and concluded that Futurewise

adequately demonstrated that the rural character of Clallam County, specifically its visual landscape and farm-based economy, is dominated by lots of greater than five acres in size. With such a large percentage of the County's existing land use pattern at a parcel size of 4.81 acres and farms within the County averaging 25 acres, the existing rural landscape supports a finding that the rural character of Clallam County is a rural density of 1 du/5 acre.<sup>42</sup>

As set out in the discussion of the definition of urban development above, there is substantial evidence in the record supporting the Board's

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<sup>41</sup> FDO at 60.

<sup>42</sup> FDO at 63.

conclusion. Most strikingly, the *Clallam County Rural Lands Report* which documents that for the County's approximately one dwelling unit per 2.4 acre zoning districts the average farm size is 13.21 acres.<sup>43</sup>

In *Tugwell v. Kittitas County*, the Court of Appeals agreed that parcels of less than 20 acres, especially the very small lots allowed in Kittitas County's Agriculture-3 and Rural-3 zones, are too small to farm. *Tugwell v. Kittitas County*, 90 Wn. App. 1, 9, 951 P.2d 272 (1997). Clallam County's rural zones are even smaller than those in Kittitas County. These small lots are thus "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(18); *Diehl*, 94 Wn. App. at 656. Therefore, they allow urban growth in the rural area.

The record before the Board also included the State of Washington Department of Community, Trade, and Economic Development (now Commerce) recommendation against this type of sprawling, low-density development. CTED recommends rural residential densities of one

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<sup>43</sup> CP 482, IR 23, Ex. 78, Appx. B.

housing unit per 5 and 10 acres. For rural agricultural and forest uses outside agricultural and forest lands of long-term commercial significance, CTED recommends densities of one dwelling unit per 20 acres.<sup>44</sup>

Finally, in addition to the evidence showing that the county's rural densities violate Clallam County's definition of rural character, the GMA's definition considers additional factors. RCW 36.70A.030(17)(f) 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>45</sup> So the County's rural

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<sup>44</sup> CP 482, IR 14, Index 334, attached to Futurewise's Motion to Correct or Supplement the Record, Tab 6, Heather Ballash, *Keeping the Rural Vision: Protecting Rural Character and Planning for Rural Development* pp. 18-19 (Olympia, Washington: Washington State Department of Community, Trade and Economic Development, June 1999).

<sup>45</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.

densities violate both Clallam County's the and GMA definitions of rural character.

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

## V. CONCLUSION

For the foregoing reasons, and each of them, Futurewise requests the Court reverse the Superior Court, reinstate the Final Decision and Order of the Growth Management Hearings Board, and remand this Case for further proceedings.

Respectfully submitted,



Robert A. Beattey, WSBA # 41104  
Tim Trohimovich, WSBA # 22367  
Futurewise  
814 Second Ave, STE 500  
Seattle, WA 98104  
rob@futurewise.org

*Attorneys for Appellant Futurewise*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 9<sup>th</sup> day of December 2009 he caused the foregoing Brief of Appellant Futurewise to be served on the following parties by regular U.S. Mail, postage prepaid:

Jerry Anderson  
Assistant Attorney General  
PO Box 40110  
1125 SE Washington Street  
Olympia, Washington 98504

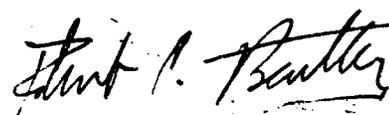
Mr. Douglas E. Jensen  
Chief Civil Deputy  
Clallam County Prosecuting Atty's Office  
223 East Fourth Street, STE 11  
Port Angeles, Washington 98362  
Attorney for Clallam County

Mr. Gerald Steel  
Attorney-at-Law  
7303 Young Road, NW  
Olympia, Washington 98502

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Dated 09 December 2009.



Robert A. Beattey, WSBA # 41104