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Division II  
State of Washington  
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Case No. 50847-8-II  
(Consolidated with Case No. 51745-1-II)

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

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CLARK COUNTY,  
Petitioner, Respondent Below,

And

FRIENDS OF CLARK COUNTY and FUTUREWISE,  
Cross-Petitioners, Petitioners and Intervenors Below,

And

CITY OF RIDGEFIELD, CITY OF LA CENTER, RDGB ROYAL  
ESTATE FARMS LLC, RDGK REST VIEW ESTATES LLC, RDGM  
RAWHIDE ESTATES LLC, RDGF RIVER VIEW ESTATES LLC,  
RDGS REAL VIEW LLC, and 3B NORTHWEST LLC,  
Petitioners, Intervenors Below,

v.

GROWTH MANAGEMENT HEARINGS BOARD,  
Respondent,

And

CLARK COUNTY CITIZENS UNITED, INC.,  
Petitioner, Petitioner and Intervenor Below,

And

CITY OF BATTLE GROUND, LAGLER REAL PROPERTY LLC,  
and ACKERLAND LLC,  
Intervenors below.

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**REPLY BRIEF OF RESPONDENTS/CROSS APPELLANTS  
FRIENDS OF CLARK COUNTY & FUTUREWISE**

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## I. INTRODUCTION

In this Reply Brief, the Friends of Clark County and Futurewise (FOCC) respond to the Clark County and 3B NW LCC (3B) arguments on the motion to dismiss in the Brief of Respondents/Cross Appellants Friends of Clark County & Futurewise (FOCC Opening Brief) in Part IVA and the County arguments on Part V of the FOCC Opening Brief.

Clark County and 3B failed to serve the Board because the Board did not “receive” the Petitions For Judicial Review (PFJRs) from either party as required by RCW 34.05.542(4) until after 30 days had passed. Thus, the County’s and 3B’s PFJRs should be dismissed due to lack of subject matter jurisdiction as they were not served on the Board by the deadline.

## II. ARGUMENT

### **A. Motion to dismiss Clark County’s and 3B Northwest LLC’s appeals of the Final Decision and Order (FDO) due to a lack of subject matter jurisdiction**

As the FOCC Opening Brief documented, on the 30<sup>th</sup> day after the Board served its final decision and order, Clark County mailed and emailed its PFJR to the Board and the Attorney General.<sup>1</sup> Also on the 30<sup>th</sup>

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<sup>1</sup> Administrative Record for the original appeal to the Court of Appeals in Case No. 50847-8-II (AR) 010558 – 59, *Clark County Citizens United, Inc. v. Clark County*, WWRGMHB Case No. 16-2-0005c, FDO Declaration of Service pp. 1 – 2 of 2; Clerk’s Papers (CP) 280 – 81, Clark County’s Petition For Judicial Review Certificate of Service pp. 8 – 9 Clark County Superior Court Case No. 17-2-00953-2.

day, 3B sent by Overnight Delivery via Fed Ex its PFJR to the Board and the Attorney General.<sup>2</sup> Neither Clark County nor 3B contest these facts.<sup>3</sup>

As the FOCC Opening Brief argued on pages eight through ten, to obtain judicial review of the Board’s Final Decision and Order (FDO), RCW 34.05.542(2) required Clark County and 3B to serve the Board “within thirty days after service of the final order.” RCW 34.05.542(4) required Clark County and 3B to serve the Board “by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency.” Delivery is the “act of delivering up or over: transfer of the body or substance of a thing ...”<sup>4</sup> Neither the County nor 3B delivered a copy of their PFJR to the Board’s principal office within 30 days of the date the Board mailed the FDO. Therefore, this Court does not have jurisdiction over their appeals and must dismiss them.

The Washington State Supreme Court’s *Stewart* decision supports this conclusion. As the court wrote:

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<sup>2</sup> AR 010558 – 59; CP 682 – 683, Clark County Superior Court Case No. 17-2-05151-2, 3B NW Petition For Judicial Review Declaration of Service pp. 10 – 11.

<sup>3</sup> Brief of Petitioner/Cross-Respondent Clark County pp. 10 – 11 (Nov. 5, 2018) hereinafter County Reply; Reply Brief of Intervenor 3B NW LCC p. 2 hereinafter 3B Reply.

<sup>4</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 597 (2002). When the legislature has not defined a term used in a statute, the courts “apply its common meaning, which may be determined by referring to a dictionary.” *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132, 1140 (2005). The Supreme Court cited to Webster’s Third New International Dictionary. *Id.*

¶ 8 Pursuant to the APA, in order to timely perfect her appeal, Stewart was required to serve her petition on [the Employment Security Department] ESD “within thirty days after the agency action.” RCW 34.05.542(3). The APA explicitly provides that “[s]ervice of the petition on the agency shall be by *delivery*.” RCW 34.05.542(4) (emphasis added [by the court]). “Delivery” for these purposes “shall be deemed to have been made when a copy of the petition for judicial review has been *received* by the Commissioner’s Office.”<sup>1</sup> WAC 192-04-210 (emphasis added [by the court]). It is undisputed that Stewart’s petition was not actually received by ESD until 1 day after the 30-day deadline expired. Therefore, in accordance with the APA, service was untimely.

<sup>1</sup> Service on the administrative agency is explicitly differentiated from service on the other parties and the attorney general. Those entities may be served by “mail,” and service is “deemed complete upon deposit in the United States mail, as evidenced by the postmark.” RCW 34.05.542(4); *see also* RCW 34.05.010(19). However, RCW 34.05.542(4) clearly provides that service on the agency must be by *delivery*. We therefore reject Stewart’s argument that WAC 192-04-210 invalidly conflicts with the APA.<sup>5</sup>

Stewart did not perfect her appeal because a copy of the appeal was not received by the state agency, ESD, whose action was being appealed within the 30-day appeal period. This conclusion was based in part on WAC 192-04-210 which provides that “[d]elivery” for these purposes “shall be deemed to have been made when a copy of the petition for judicial review has been *received* by the Commissioner’s Office.”<sup>6</sup>

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<sup>5</sup> *Stewart v. State, Dep’t of Employment Sec.*, 191 Wn.2d 42, 47, 419 P.3d 838, 840 (2018), as amended (Aug. 30, 2018).

<sup>6</sup> *Stewart*, 191 Wn.2d at 47, 419 P.3d at 840 emphasis in the original.

Stewart argued that WAC 192-04-210 invalidly conflicts with the APA. The state Supreme Court rejected this argument, writing that “RCW 34.05.542(4) clearly provides that service on the agency must be by *delivery*. We therefore reject Stewart’s argument that WAC 192-04-210 invalidly conflicts with the APA.”<sup>7</sup> Under *Stewart* like WAC 192-04-210, RCW 34.05.542(4) requires that a copy of the PFJR must be received at the Board’s office by the 30<sup>th</sup> day after the Board’s order was mailed in order to satisfy the “delivery” requirement. Since the County’s and 3B’s PFJRs were not received at the Board’s office within 30 days, their appeals have not been perfected and should be dismissed.

The County, on page 31 of its Reply, claims that “delivery” is ambiguous. The County does not cite to any authority or provide any legal analysis. In contrast to the County’s assertion, the court of appeals has concluded that “[t]he language describing the required service under the APA is not ambiguous” referring to RCW 34.05.010(19) and RCW 34.05.542(4).<sup>8</sup> The use of a dictionary to determine the ordinary meaning of an undefined term does not mean that the statute is ambiguous.<sup>9</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Ricketts v. Washington State Bd. of Accountancy*, 111 Wn. App. 113, 117 – 18, 43 P.3d 548, 550 (2002).

<sup>9</sup> *State v. Sunich*, 76 Wn. App. 202, 206, 884 P.2d 1, 2 – 3 (1994).

Contrary to the County Reply’s argument, the Board’s rules of practice and procedure do not authorize serving the Board with a PFJR by email.<sup>10</sup> WAC 242-03-230 only authorizes filing petitions for review appealing local and state government actions under the Growth Management Act (GMA), the Shoreline Management Act, and the State Environmental Policy Act with the Board by email and serving other parties by email.<sup>11</sup> WAC 242-03-240(1) authorizes that [a]ll pleadings and briefs shall be filed with the board by electronic mail ...”<sup>12</sup> WAC 242-03-240(2) provides that “[p]arties shall serve copies of all filings on all other named parties by electronic mail ....”<sup>13</sup> But the APA, in RCW 34.05.542(2), requires that “[a] petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.”<sup>14</sup> Neither WAC 242-03-240(1) nor (2) authorize “service” on the Board by electronic mail.

Indeed, WAC 242-03-030(18) defines “service” for the purposes of the Board’s rules of practice and procedure as “delivery of the document to the other parties to the appeal, as specified in WAC 242-03-230 (for the

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<sup>10</sup> WAC 242-03-230 – 240; WAC 242-03-970(1); (2).

<sup>11</sup> WAC 242-03-220.

<sup>12</sup> Emphasis added.

<sup>13</sup> Emphasis added.

<sup>14</sup> Emphasis added.

petition for review) or WAC 242-03-240 (for all other documents).” WAC 242-03-970 recognizes the distinction between filing and service providing in subsection (2) that “[t]he petition for review of a final decision of the board shall be served on the board . . . .”<sup>15</sup> The Board’s rules clearly make a distinction between filing and service. Although the Board’s rules authorize filing documents before the Board by electronic mail, the rules do not authorize service on the Board by electronic mail. Thus, the County’s argument that it timely served the Board by email fails.

To the extent that Clark County or 3B is arguing that they substantially complied with the APA’s service requirements, that argument also fails. In the *Skagit Surveyors* decision, a GMA appeal case, the Washington State Supreme Court held that “[s]ubstantial compliance with the service requirements of the APA is not sufficient to invoke the appellate, or subject matter, jurisdiction of the superior court.”<sup>16</sup>

3B argues on page 3 of its Reply that RCW 34.05.010(19) provides “that ‘service’ includes posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service and that service is complete upon deposit in the United States mail.” But 3B omits the first clause of RCW 34.05.010(19) which is “except as otherwise

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<sup>15</sup> Emphasis added.

<sup>16</sup> *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 556, 958 P.2d 962, 969 (1998).

provided in this chapter ...” As the court of appeals has concluded, “RCW 34.05.542(4) contains an exception ...” to the “general rule” in RCW 34.05.010(19).<sup>17</sup> “Service of the petition on the agency shall be by delivery ... to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency.’ RCW 34.05.542(4).”<sup>18</sup> 3B and the County did not deliver their PFJR’s to the Board’s principal office by the appeal deadline.<sup>19</sup> Their appeals of the FDO must be dismissed.

To be an attorney of record, an attorney must file a formal notice of appearance or represent the agency as an attorney in the administrative proceedings.<sup>20</sup> In this case the attorney general did not file a notice of appearance until May 9, 2017.<sup>21</sup> No attorney general had appeared for the Board or filed legal papers in the administrative proceedings.<sup>22</sup> So the attorney general’s office was not an attorney of record for the Board when

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<sup>17</sup> *Ricketts*, 111 Wn. App. at 117 – 18, 43 P.3d at 550.

<sup>18</sup> *Id.*

<sup>19</sup> AR 010558 – 59; CP 280 – 81, Clark County’s Petition For Judicial Review Certificate of Service pp. 8 – 9 Clark County Superior Court Case No. 17-2-00953-2; CP 682 – 683, Clark County Superior Court Case No. 17-2-05151-2, 3B NW Petition For Judicial Review Declaration of Service pp. 10 – 11.

<sup>20</sup> *Matter of Botany Unlimited Design & Supply, LLC*, 198 Wn. App. 90, 96–97, 391 P.3d 605, 608, *review denied*, 188 Wn.2d 1021, 398 P.3d 1143 (2017).

<sup>21</sup> CP 668 –69, Clark County Superior Court Case No. 17-2-00953-2, Notice of Appearance of Counsel for Growth Management Hearings Board pp. 1 – 2; CP 787 – 88, Clark County Superior Court Case No. 17-2-05151-2, Notice of Appearance of Counsel for Growth Management Hearings Board pp. 1 – 2.

<sup>22</sup> AR 010462, *Clark County Citizens United, Inc., Friends of Clark County, and Futurewise v. Clark County*, WWRGMHB Case No. 16-2-0005c, Final Decision and Order (March 23, 2017), at 6 of 101 hereinafter FDO.

the County emailed and mailed its PFJR to the attorney general's office on April 24, 2017, and 3B overnighted its PFJR to the attorney general on April 24, 2017.<sup>23</sup> Mailing, emailing, and overnighting the PFJR to the attorney general' office did not serve the Board.

**B. FOCC Issue 1: Did the Order on Compliance erroneously interpret or apply the GMA and fail to decide all issues requiring resolution when the Board concluded it did not have jurisdiction to consider whether the comprehensive plan and zoning provisions adopted to address Issues 11 and 13 did not comply with the GMA or that these issues were moot? (Assignment of Error 1.)**

As the FOCC Opening Brief documented, RCW 36.70A.330 provides that the "board shall ... issue a finding of compliance or noncompliance with the requirements of this chapter ..." for the amendments adopted in response to Issues 11 and 13. In Issue 11, the Board found that Clark County's adoption of the Agriculture 10 (AG-10) and Forest 20 (FR-20) zones violated the GMA because the provisions would not assure the conservation of agricultural and forest lands of long-term commercial significance.<sup>24</sup> In Issue 13, the Board also found that the County's adoption of a new Future Land Use Map (FLUM) as part of the comprehensive plan violated the GMA because it did not provide for a compliant variety of

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<sup>23</sup> CP 280 – 81, Clark County's Petition For Judicial Review Certificate of Service pp. 8 – 9 Clark County Superior Court Case No. 17-2-00953-2; CP 682 – 683, Clark County Superior Court Case No. 17-2-05151-2, 3B NW Petition For Judicial Review Declaration of Service pp. 10 – 11.

<sup>24</sup> AR 010499 – 508, FDO, at 43 – 53 of 101.

rural densities.<sup>25</sup> The Board did not determine whether the County's actions in response to the findings of noncompliance complied with the GMA, the Board instead concluded that Issues 11 and 13 were moot.<sup>26</sup> These issues are not moot since both the Board and the Courts can provide FOCC with effective relief.<sup>27</sup> The Board and Court can determine whether the amendments comply with the GMA. The Board's failure to decide whether the amendments complied with the GMA violated the court of appeal's holding in *LIHI*.<sup>28</sup>

In the *Lewis County* decision, which was an appeal of a Board decision on compliance, the Washington State Supreme Court concluded that the Board must review the County's latest designation of agricultural lands for compliance with the GMA using the correct legal standard and upheld Board determinations that the County's development regulations for ALLTCS violated the GMA.<sup>29</sup> The County Reply did not address RCW 36.70A.330 or the *Lewis County* decision. Instead, the County just claims

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<sup>25</sup> AR 010510 – 14, FDO, at 54 – 58 of 101.

<sup>26</sup> Administrative Record for the Order on Compliance appealed in Court of Appeals Case No. 51745-1-II (CAR) 001574 – 75, *Clark County Citizens United, Inc. v. Clark County*, WWRGMHB Case No. 16-2-0005c, Order on Compliance and Order on Motions to Modify Compliance Order, Rescind Invalidation, Stay Order, and Supplement the Record (Jan. 10, 2018), at 11 – 12 of 29. Hereinafter Order on Compliance.

<sup>27</sup> *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658, 659 (1983).

<sup>28</sup> *Low Income Hous. Inst. v. City of Lakewood (LIHI)*, 119 Wn. App. 110, 118 – 19, 77 P.3d 653, 657 (2003)

<sup>29</sup> *Lewis Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 495 – 510, 139 P.3d 1096, 1099 – 106 (2006).

the AG-20, FR-40, and FLUM are GMA compliant. But as will be discussed below, there is no legal or factual basis for this claim.<sup>30</sup>

The County attempts to show that the Board was correct in its conclusion that these issues were moot by citing to the *Friends of the San Juans* decision. In that decision, the Board found that a dedesignation of forest land violated the GMA. “The County repealed the challenged ordinance which de-designated the Thurman’s designated forest land. In this instance, a lack of compliance cannot be based upon a subsequently repealed ordinance.”<sup>31</sup>

In contrast, Clark County did not repeal Amended Ordinance 2016-06-12 which adopted the amendments found to violate the GMA, the County instead adopted amendments eliminating the AG-10 comprehensive plan designation and the AG-10 and FR-20 zones and then adopted the AG-20 designation and the AG-20 and FR-40 zones and a new FLUM.<sup>32</sup> FOCC challenged the new AG-20 designation, the new AG-20 and FR-40 zones,

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<sup>30</sup> *Karpinski v. Clark Cty.*, WWGMHB Case No. 07-2-0027, Final Decision and Order Amended for Clerical and Grammatical Errors June 3, 2008 (June 3, 2008), at 2 – 86 of 86, 2008 WL 2783671, at \*1 – 49; *Karpinski v. Clark County*, WWRGMHB Case No. 07-2-0027, Order Finding Compliance [Area WB] and Closing Case, (Sept. 4, 2014), at 1 – 3 of 3, 2014 WL 7505289, at \*1; *Achen v. Clark County*, WWGMHB Case No. 95-2-0067c, Order Finding Compliance and Closing Case (June 9, 2006), at 1 – 3 of 3, 2006 WL 1750314, at \*1.

<sup>31</sup> *Friends of the San Juans v. San Juan County*, WWRGMHB Case No. 16-2-0001, Order Finding Compliance and Closing Case (Feb. 21, 2017), at 3 of 5, 2017 WL 1057507, at \*2.

<sup>32</sup> CAR 000110 – 209.

and the new FLUM in the compliance phase of this case. But the Board failed to decide these challenges.<sup>33</sup> Since this was not just a repeal, but instead a repeal and adoption<sup>34</sup> the *Friends of the San Juans* decision is factually and legally distinguishable.

The County also cites to *Hazen*, but as FOCC's Opening Brief argued on pages 73 and 74, the part of *Hazen* found to be moot was a repealed provision without any subsequent adoption of new provisions.<sup>35</sup> Unlike *Hazen*, Clark County adopted new provisions.<sup>36</sup> So the requirements of RCW 36.70A.330 and *Lewis County* apply.<sup>37</sup>

In *Westerman v. Cary*, another case cited in vain by the County Reply, the Washington State Supreme Court concluded that the "issues regarding Judge Cary's order are moot because it has been replaced by another order. Therefore, no effective relief from the Order can be granted."<sup>38</sup> But Clark County Ordinance No. 2017-07-04 which adopted the AG-20 designation, the AG-20 and FR-40 zones, and the new FLUM has not been replaced by another ordinance so FOCC can obtain effective relief.<sup>39</sup>

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<sup>33</sup> CAR 001574 – 75, Order on Compliance pp. 11 – 12 of 29.

<sup>34</sup> CAR 000110 – 209.

<sup>35</sup> *Hazen v. Yakima County*, EWGMHB No. 08-1-0008c, Final Decision and Order (April 5, 2010), at 14 – 15 last accessed on Nov. 14, 2018 at:

<http://www.gmhb.wa.gov/Global/RenderPDF?source=casedocument&id=2007>

<sup>36</sup> CAR 000110 – 209.

<sup>37</sup> *Lewis Cty.*, 157 Wn.2d at 495 – 510, 139 P.3d at 1099 – 106.

<sup>38</sup> *Westerman v. Cary*, 125 Wn.2d 277, 287, 892 P.2d 1067, 1073 (1994).

<sup>39</sup> CAR 000110 – 209.

Contrary to pages 29 to 31 of the County Reply, the AG-20 and FR-40 provisions were not found GMA compliant in the appeals of the 2007 comprehensive plan or in 2014.<sup>40</sup> The County Reply cites to the 2014 *Karpinski* order but that order does not even mention the AG-20 or FR-40 provisions let alone find them GMA compliant.<sup>41</sup> The *Achen* order the County cites also did not find the AG-20 comprehensive plan designation and the AG-20 and FR-40 zones GMA compliant.<sup>42</sup> Instead, the Board issued an Order to Show Cause “providing that the parties must respond no later than May 22, 2006 or the case would be dismissed. No response was received from any party.”<sup>43</sup> Since there were no responses, the Board reasoned “that any compliance issues remaining in this case have most likely been resolved.”<sup>44</sup> So the Board found compliance “on the remaining

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<sup>40</sup> *Karpinski v. Clark County*, WWRGMHB Case No. 07-2-0027, Order Finding Compliance [Area WB] and Closing Case, (Sept. 4, 2014), at 1 – 3 of 3, 2014 WL 7505289, at \*1; *Karpinski v. Clark Cty.*, WWGMHB Case No. 07-2-0027, Final Decision and Order Amended for Clerical and Grammatical Errors June 3, 2008 (June 3, 2008), at 2 – 86 of 86, 2008 WL 2783671, at \*1 – 49. Nor did the courts find the AG-20 and FR-40 provisions GMA compliant. *Clark Cty. Washington v. W. Washington Growth Mgmt. Hearings Review Bd.*, 161 Wn. App. 204, 221 – 49, 254 P.3d 862, 869 – 83 (2011); *Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 143 – 49, 298 P.3d 704, 707 – 10 (2013).

<sup>41</sup> *Karpinski v. Clark County*, WWRGMHB Case No. 07-2-0027, Order Finding Compliance [Area WB] and Closing Case, (Sept. 4, 2014), at 1 – 3 of 3, 2014 WL 7505289, at \*1.

<sup>42</sup> *Achen v. Clark County*, WWGMHB Case No. 95-2-0067c, Order Finding Compliance and Closing Case (June 9, 2006), at 1 – 3 of 3, 2006 WL 1750314, at \*1.

<sup>43</sup> *Id.* at 1 of 3, 2006 WL 1750314, at \*1.

<sup>44</sup> *Id.* at 2 of 3, 2006 WL 1750314, at \*1 underlining added.

issues in this case ....”<sup>45</sup> The order does not say those issues had anything to do with the AG-20 and FR-40 provisions.<sup>46</sup>

In arguing that the AG-20 and FR-40 provisions were found complaint, the County has not argued that *res judicata* or *collateral estoppel* apply those decisions to this case. The party asserting these doctrines has the burden of showing that the elements are met.<sup>47</sup> Clark County has not even attempted to do so. Therefore, whether the AG-20 and FR-40 provisions were previously upheld is irrelevant. What is relevant is whether the newly adopted AG-20 and FR-40 provisions comply with the GMA.<sup>48</sup> This the Board did not determine and should have.<sup>49</sup>

The County argues that since the Board found that the reduced minimum parcel sizes violated the GMA, adopting the AG-20 comprehensive plan designation and the AG-20 and FR-40 zones cured the noncompliance and complied with the Board’s Final Decision and Order. But RCW 36.70A.330 provides that the “board shall ... issue a finding of

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1 – 3 of 3, 2006 WL 1750314, at \*1.

<sup>47</sup> *Stevens Cty. v. Futurewise*, 146 Wn. App. 493, 503, 192 P.3d 1, 6 (2008); *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn. 2d 299, 307, 96 P.3d 957, 961 (2004).

<sup>48</sup> RCW 36.70A.330.

<sup>49</sup> CAR 001574 – 75, Order on Compliance pp. 11 – 12 of 29.

compliance or noncompliance with the requirements of this chapter ...”  
not the FDO. And the Board did not find compliance with the FDO.<sup>50</sup>

The County Reply on page 29 asserts, without any citation to authority, that “what matters is that the noncompliance found by the FDO was fully addressed.” But Clark County has not fully addressed the noncompliance. As will be discussed in greater detail below as of April 26, 2017, 69 residential lots had vested on 667.9 acres zoned AG-10 and additional 37 acres zoned R-5 and R-10.<sup>51</sup> The County has done nothing to address this noncompliance. The County’s argument also ignores RCW 36.70A.330’s requirement that the “board shall ... issue a finding of compliance or noncompliance with the requirements of this chapter ...,” not the FDO.

In sum, the Board erred in concluding that Issues 11 and 13 were moot or that the Board did not have jurisdiction over the amendments the County adopted. Issues 11 and 13 should be remanded back to the Board to for a decision on whether the amendments comply with the GMA.

**C. FOCC Issue 2: Did the Order on Compliance err in making the finding of fact and conclusion that the challenge to the future land use map was “moot because the County re-adopted a previously GMA compliant variety of rural densities[?]”<sup>52</sup> (Assignment of Error 2.)**

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<sup>50</sup> CAR 001574 – 75, Order on Compliance pp. 11 – 12 of 29.

<sup>51</sup> CAR 000763 – 64; CAR 000813 – 930.

<sup>52</sup> CAR 001575, Order on Compliance, at 12 of 29.

FOCC’s Opening Brief documented that the FLUM adopted by Ordinance No. 2017-07-04 shows that the R-20 comprehensive plan designations and zones that were adjacent to Agriculture designations before the 2016 update were changed to R-10 designations and zones.<sup>53</sup> The County Reply on pages 36 and 37 concedes that the Board’s Compliance Order incorrectly concluded that the FLUM adopted by Ordinance No. 2017-07-04 was the same as the pre-2016 Update FLUM. This Court must reverse this finding because it is not support by substantial evidence.

The County Reply attempts to confuse the issue by claiming that “Clark County’s Plan designates a variety of rural densities that is the same as the Plan’s compliant variety of rural densities that were designated before the 2016 Plan Update ...”<sup>54</sup> But there is now less land designated and zoned R-20 than there was before the 2016 Plan Update.<sup>55</sup> It is not the “same.”

**D. FOCC Issue 3: Did the Order on Compliance erroneously interpret or apply the GMA, the order is not supported by substantial evidence, and the order failed to decide all issues**

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<sup>53</sup> AR 010412, 2007 County/UGA Comprehensive Plan Clark County Washington adopted by Ordinance Number 2007-09-13 as amended; AR 010414, 2007 County/UGA Zoning Map Clark County, Washington adopted by Ordinance Number 2007-09-13 as amended; CAR 000759, 2016 County/UGA Zoning Clark County, Washington adopted by Amended Ordinance No. 2016-06-12. A larger version of the 2016 County/UGA Zoning map is available at AR 010410. The record on a compliance appeal includes the documents submitted to the Board as part of the original appeal. WAC 242-03-980(1).

<sup>54</sup> County Reply p. 32. Also see page 37 of the County Reply for a similar claim.

<sup>55</sup> AR 010412; AR 010414; CAR 000759.

**requiring resolution when the order concluded that Clark County is in compliance with the GMA for Issues 11 and 13, the County did not have to address the developments that vested to the illegal AG-10 and FR-20 zones and the illegal FLUM, and that Issue 11 did not warrant a finding of invalidity? (Assignment of Error 3.)**

- 1. The adoption of the AG-20 and FR-40 zones while retaining the R-20 to R-10 rezones does not comply with the GMA because the minimum lot sizes and densities will not conserve natural resource lands and industries**

The FOCC Opening Brief, on pages 79 to 84, documented that the AG-20 comprehensive plan designation, AG-20 and FR-40 rezones, and the R-20 to R-10 rezones do not comply with the GMA because the minimum lot sizes and densities will not conserve natural resource lands and industries. Unlike the extensive evidence cited in the FOCC brief, the County Reply provides no evidence that the AG-20 and FR-40 rezones will conserve agricultural and forest lands. Neither did the Board's Order on Compliance.<sup>56</sup>

The County Reply argues that the new FLUM, which was based in part on the R-20 to R-10 rezones, is GMA compliant because the GMA only requires a variety of rural densities. But the rural element shall include measures “[p]rotecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.”<sup>57</sup> As the FOCC Opening Brief documented on pages 82 and

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<sup>56</sup> CAR 001572 – 75, Order on Compliance, at 9 – 12 of 29.

<sup>57</sup> RCW 36.70A.070(5)(c)(v).

83, the increased densities allowed by the R-20 to R-10 rezones do not protect agricultural land against conflicts. Further, RCW 36.70A.070 requires that the comprehensive plan “shall be an internally consistent document ....” The comprehensive plan requires that “[a] Rural 20 designation applies to rural areas where the lands act as a buffer to Natural Resource designated lands ....”<sup>58</sup> The R-20 to R-10 rezones and the FLUM based on those rezones are inconsistent with this comprehensive plan provision and, therefore, the GMA.

The County argues that the R-20 designation and zone did not go away, there is still well over 1,000 acres of the designation. But this is one percent, 0.98 percent, of the land designated R-5, R-10, and R-20.<sup>59</sup> More importantly it is not enough land to buffer the natural resource lands.<sup>60</sup>

The County Reply argues that under *Thurston County*, FOCC cannot challenge the AG-20 comprehensive plan designation and AG-20 and FR-40 rezones. In *Thurston County* the State Supreme Court held that:

¶ 26 If a county amends a comprehensive plan, the amendment must comply with the GMA and may be challenged within 60 days of publication of the amendment adoption notice. Former RCW 36.70A.030(1); former RCW 36.70A.130(1)(b); RCW 36.70A.290(2). 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

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<sup>58</sup> CAR 000108, County Ordinance 2017-07-04 comprehensive plan amendment p. 3.

<sup>59</sup> CAR 000411; Clark County Reply 7.

<sup>60</sup> CAR 000278 Clark County Amended Ordinance No. 2016-06-12 p. 7; CAR 000759.

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. In this case, the County's UGA boundaries were amended in 2004 and, consequently, are subject to challenge.<sup>61</sup>

The County amended its comprehensive plan and zoning to adopt a new AG-10 designation, AG-10 and FR-20 zones, and a new FLUM.<sup>62</sup> FOCC timely appealed these amendments.<sup>63</sup> After a finding of noncompliance, the County adopted a new AG-20 comprehensive plan amendment, AG-20 and FR-40 rezones, and a new FLUM that also adopted new Rural-5 (R-5), Rural-10 (R-10), and Rural-20 (R-20) comprehensive plan designations.<sup>64</sup> Like the partially amended UGAs in *Thurston County*, the Board had jurisdiction to hear the appeals and determine if the amended comprehensive plan provisions and zones comply with the GMA. The County's argument that *Thurston County* bars this appeal fails.

The County Reply, on page 39, claims that the AG-20 and FR-20 provisions were found GMA compliant in 2006 and 2014. As was documented earlier, that is not true.<sup>65</sup> More importantly, absent an

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<sup>61</sup> *Thurston Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38, 46 (2008).

<sup>62</sup> AR 000238 – 773, Clark County Amended Ordinance No. 2016-06-12 pp. 1 – \*535.

<sup>63</sup> AR 000249, 12; AR 000237.

<sup>64</sup> CAR 000408 – 509, Clark County Ordinance No. 2017-07-04 pp. 1 – 102.

<sup>65</sup> See *Karpinski v. Clark County*, WWRGMHB Case No. 07-2-0027, Order Finding Compliance [Area WB] and Closing Case, (Sept. 4, 2014), at 1 – 3 of 3, 2014 WL 7505289, at \*1; *Karpinski v. Clark Cty.*, WWGMHB Case No. 07-2-0027, Final Decision

argument that *res judicata* or *collateral estoppel* apply those decisions to this case, that the AG-20 and FR-20 provisions were found GMA compliant in some earlier proceeding is irrelevant. The party asserting these doctrines has the burden of showing that the elements are met.<sup>66</sup> Clark County has not even attempted to do so.

The County Reply argues that if it has to update its natural resource and rural comprehensive plan and zoning provisions to comply with the GMA it will be plunged into chaos for years. This is not necessary, the County only needs to comply with the GMA.

**2. The new AG-20 and FR-40 zones allow uses that do not conserve natural resource lands violating the GMA**

The FOCC Opening Brief, on pages 84 to 87, documented that the AG-20 and FR-40 zones do not comply with the GMA because the zones allow uses that do not conserve natural resource lands and industries. These uses violate the Washington Supreme Court's *Soccer Fields, Lewis County*, and *Kittitas County* decisions.<sup>67</sup>

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and Order Amended for Clerical and Grammatical Errors June 3, 2008 (June 3, 2008), at 2 – 86 of 86, 2008 WL 2783671, at \*1 – 49; *Achen v. Clark County*, WWGMHB Case No. 95-2-0067c, Order Finding Compliance and Closing Case (June 9, 2006), at 1 – 3 of 3, 2006 WL 1750314, at \*1.

<sup>66</sup> *Stevens Cty. v. Futurewise*, 146 Wn. App. 493, 503, 192 P.3d 1, 6 (2008); *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn. 2d 299, 307, 96 P.3d 957, 961 (2004).

<sup>67</sup> *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 560 – 562, 14 P.3d 133, 142 – 43 (2000); *Lewis Cty.*, 157 Wn.2d at 507, 509, 526 – 27; 139 P.3d at 1105 – 06, 1114 – 15;; *Kittitas Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 172, 256 P.3d 1193, 1206 (2011).

The County Reply on pages 41 to 44 does not argue the zones comply with these decisions, instead the County argues they only changed the zones to allow cluster subdivisions and so the uses cannot be challenged. In *Thurston County* only two UGAs had been amended, but those amendments opened all of the UGAs to an appeal.<sup>68</sup> Like *Thurston County*, by first deleting and then readopting the AG-20 and FR-40 zones along with the cluster subdivision use amendment, Clark County opened the AG-20 and FR-40 zones up to an appeal of the entirety of both zones.<sup>69</sup>

The County Reply on page 41, without any citation to authority, argues that challenging the AG-20, FR-40, and FLUM provisions is the “equivalent to reopening the litigation that followed their initial adoption.” This assertion ignores that fact that the provisions FOCC challenges were adopted in 2017 by Ordinance No. 2017-07-04.<sup>70</sup>

The FOCC Opening Brief, on pages 84 to 87, cited to evidence in the record showing that the AG-20 zoning does not conserve agricultural land.<sup>71</sup> The County Reply on pages 41 through 44 does not cite to any

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<sup>68</sup> *Thurston Cty.*, 164 Wn.2d at 347, 190 P.3d at 46.

<sup>69</sup> *Thurston Cty.*, 164 Wn.2d at 347, 190 P.3d at 46; CAR 000422 – 26, County Ordinance 2017-07-04 pp. 15 – 19.

<sup>70</sup> CAR 000408 – 509, Clark County Ordinance No. 2017-07-04 pp. 1 – 102.

<sup>71</sup> CAR 000649; CAR 000740; CAR 000278; CAR 000283.

evidence that the AG-20 zone will conserve agricultural land. Neither did the Board's Order on Compliance.<sup>72</sup>

The County repeatedly argues its comprehensive plan provisions and zones are GMA compliant, but never addresses the fact that the zones allow uses prohibited by Washington Supreme Court's *Soccer Fields*, *Lewis County*, and *Kittitas County* decisions because they pave over farmland for nonagricultural uses.<sup>73</sup> The harm in allowing these uses is confirmed by *Clark County Issue Paper 9* which documented that the AG-20 zone was not conserving agricultural land because it allowed "non-productive rural uses ...."<sup>74</sup> The newly adopted AG-20 and FR-40 zones are not GMA compliant.

The County Reply, on page 44, claims that the "cluster subdivision ... is the only sort of 'residential subdivision' allowed on AG-20 and FR-40 lands ...." This is not true, standard "[s]ubdivisions and short plats" can be used to create new lots, including residential lots, in the AG-20 and FR-40 zones and none of the measures that apply to cluster subdivisions apply to these subdivisions and short plats.<sup>75</sup> Contrary to the County's arguments,

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<sup>72</sup> CAR 001572 – 75, Order on Compliance, at 9 – 12 of 29.

<sup>73</sup> *Soccer Fields*, 142 Wn.2d at 560 – 562, 14 P.3d at 142 – 43; *Lewis Cty.*, 157 Wn.2d at 507, 509, 526 – 27; 139 P.3d at 1105 – 06, 1114 – 15;; *Kittitas Cty.*, 172 Wn.2d at 172, 256 P.3d at 1206.

<sup>74</sup> CAR 000740; CAR 000278; CAR 000283.

<sup>75</sup> AR 000266 – 67; CAR 000131.

these subdivisions and short plats do not include the “limiting criteria or standards” required by *Kittitas County*.<sup>76</sup>

**3. The repeal of the AG-10 and FR-20 zones did not cure the GMA violations because development vested at densities that violate the GMA and adversely impact natural resource lands**

The FOCC Opening Brief, on pages 87 to 89, documented that the County must correct the comprehensive plan and zoning amendments that violate the GMA.<sup>77</sup> After Clark County adopted the illegal AG-10 and FR-20 zones and rural zoning amendments, developments vested to those zones. By April 26, 2017, there were applications for 96 residential lots on 928.6 acres zoned AG-10 and an additional 47 acres zoned R-5 and R-10.<sup>78</sup> As of April 26, 2017, 69 residential lots had vested on 667.9 acres zoned AG-10 and additional 37 acres zoned R-5 and R-10.<sup>79</sup> There were applications for eight lots on 157 acres of land zoned FR-20.<sup>80</sup> As of April 26, 2017, two lots had vested to the FR-20 zone.<sup>81</sup>

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<sup>76</sup> *Kittitas Cty.*, 172 Wn.2d at 172, 256 P.3d at 1206 *affirming Kittitas County Conservation v. Kittitas County*, EWGMHB Case No. 07-1-0015, Final Decision Order (March 21, 2008), at 21, 2008 WL 1766717, at \*13.

<sup>77</sup> *Miotke v. Spokane Cty.*, 181 Wn. App. 369, 373, 325 P.3d 434, 436 – 37, *review denied*, 181 Wn.2d 1010, 335 P.3d 941 (2014).

<sup>78</sup> CAR 000763 – 64, CAR 000813 – 930. The FOCC Opening Brief, on pages 88 and 89, listed applications for 100 lots on 1,092.7 acres as having vested. As of April 26, 2017, those were applications along with the Sarkinen Short Plan application for an additional four lots on 40 acres. The above numbers correct the data on applications and vested applications. Futurewise apologizes for the error in the FOCC Opening Brief.

<sup>79</sup> CAR 000763 – 64; CAR 000813 – 930.

<sup>80</sup> CAR 000763 – 64; CAR 000813 – 930.

<sup>81</sup> CAR 864 – 65.

The County Reply argues that agricultural and forest land will be protected by the cluster subdivisions standards. But of the 19 subdivision applications, only eight were for cluster subdivisions.<sup>82</sup> For 58 percent of the applications, none of clustering standards apply.

As FOCC's Opening Brief documented on pages 87 through 89, this case is factually similar to the *Miotke v. Spokane County* decision.<sup>83</sup> The County Reply argues that its cluster subdivision provisions protect resource lands a fact distinguishing *Miotke*. But the county allows other types of subdivisions, not just cluster subdivisions and the standard subdivisions and short plats do not include the "limiting criteria or standards" required by *Kittitas County*.<sup>84</sup> Also, by rezoning the areas adjacent to agricultural land from R-20 to R-10, the County has weakened protections for natural resource lands.<sup>85</sup>

The County Reply argues that *Miotke* requires the County to take "some additional, unknown action" to address the vested developments. But Futurewise's June 6, 2017, letter to Clark County suggested a realistic method for addressing these vested developments.<sup>86</sup>

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<sup>82</sup> CAR 000763 – 64; CAR 000813 – 930.

<sup>83</sup> *Miotke*, 181 Wn. App. at 373, 325 P.3d at 436 – 37.

<sup>83</sup> *Id.*

<sup>84</sup> AR 000266 – 67; CAR 000131; *Kittitas Cty.*, 172 Wn.2d at 172, 256 P.3d at 1206.

<sup>85</sup> CAR 000720, FSEIS p. 6-11; CAR 000278 Clark County Amended Ordinance No. 2016-06-12 p. 7; CAR 000759 County/UGA Zoning Clark County, Washington adopted by Amended Ordinance No. 2016-06-12.

<sup>86</sup> CAR 000808 – 09.

**E. FOCC Issue 4: Did the Order on Compliance err in finding or concluding that the “agricultural and forestry parcel sizes and uses were previously found GMA compliant in the 2007”<sup>87</sup> comprehensive plan appeal because it erroneously interpreted or applied the law or is not supported by substantial evidence? (Assignment of Error 4.)**

The Board did not find those provisions GMA compliant as part of the appeals of the 2007 comprehensive plan.<sup>88</sup> Neither did the court of appeals or the Supreme Court.<sup>89</sup> The Board also did not find the AG-20 and FR-40 provision GMA compliant in 2006.<sup>90</sup>

Contrary to the arguments in the County Reply on pages 47 and 48, the County has not cited to any Board or court decision that found the AG-20 and FR-40 provisions GMA compliant or any evidence that these provisions were found to be GMA compliant.

The Board seems to have relied on the County’s Compliance Report which cited to “Karpinski v. Clark County, WWGMHB No. 07-2-0037,

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<sup>87</sup> CAR 001574 Order on Compliance, at 11 of 29.

<sup>88</sup> *Karpinski v. Clark Cty.*, WWGMHB Case No. 07-2-0027, Final Decision and Order Amended for Clerical and Grammatical Errors June 3, 2008 (June 3, 2008), at 2 – 86 of 86, 2008 WL 2783671, at \*1 – 49; *Karpinski v. Clark County*, WWGMHB Case No. 07-2-0027, Order Finding Compliance [Area WB] and Closing Case, (Sept. 4, 2014), at 1 – 3 of 3, 2014 WL 7505289, at \*1.

<sup>89</sup> *Clark Cty.*, 161 Wn. App. at 221 – 49, 254 P.3d at 869 – 83; *Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 143 – 49, 298 P.3d 704, 707 – 10 (2013).

<sup>90</sup> *Achen v. Clark County*, WWGMHB Case No. 95-2-0067c, Order Finding Compliance and Closing Case (June 9, 2006), at 1 – 3 of 3, 2006 WL 1750314, at \*1. See the discussion of this *Achen* order on page 14.

Order Finding Compliance and Closing Case (September 4, 2014).”<sup>91</sup> But the September 4, 2014, *Karpinski* order found that Clark County’s redesignation of a part of the county, Area WB, as agricultural land of long-term commercial significance (ALLTCS) complied with the GMA and closed the case.<sup>92</sup> The 2014 *Karpinski* order does not mention the AG-20 or FR-40 provisions or find them GMA compliant.<sup>93</sup> The Board erroneously interpreted or applied the law and its conclusion on this issue is not supported by substantial evidence.

### III. CONCLUSION

FOCC respectfully requests that this Court dismiss the County and 3B FDO appeals. The Court should also reverse the Board on the FOCC issues and remand these issues to the Board.

Dated: December 5, 2018, and respectfully submitted.



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Tim Trohimovich, WSBA No. 22367  
Attorney for Friends of Clark County & Futurewise

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<sup>91</sup> CAR 001573 – 74, Order on Compliance, at 10 – 11 of 29, quote from CAR 001573 fn. 45, Order on Compliance, at 10 of 29 fn. 45. There is no WWGMHB Case No. 07-2-0037, the *Karpinski* case is WWGMHB Case No. 07-2-0027.

<sup>92</sup> *Karpinski v. Clark County*, WWGMHB Case No. 07-2-0027, Order Finding Compliance [Area WB] and Closing Case, (Sept. 4, 2014), at 2 of 3, 2014 WL 7505289, at \*1.

<sup>93</sup> *Id.* at 1 – 3 of 3, 2014 WL 7505289, at \*1.

CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 5<sup>th</sup> day of December 2018, the undersigned caused the electronic original and true and correct electronic copies of the following document to be served on the persons listed below in the manner shown: **Reply Brief of Respondents/Cross Appellants Friends of Clark County & Futurewise** attached to this certificate in Case No. 50847-8-II Consolidated with Case No. 51745-1-II.

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	By Facsimile
	By Federal Express or Overnight Mail prepaid
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Signed and certified on this 5<sup>th</sup> day of December 2018,



Tim Trohimovich, WSBA No. 22367  
Attorney for the Friends of Clark County and Futurewise

# FUTUREWISE

December 05, 2018 - 9:44 AM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50847-8  
**Appellate Court Case Title:** Friends of Clark County and Futurewise, Appellants v Clark County, et al, Respondents  
**Superior Court Case Number:** 17-2-00929-0

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### Comments:

A certificate of service is enclosed with the reply brief. Please contact me if you require anything else.

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