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Division II
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Nos. 50847-8-11 and 51745-1-11 (Consolidated)
(Growth Management Hearings Board Case No. 16-2-0005c)

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

CLARK COUNTY,
Petitioner and 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 and Intervenors Below,

v.

GROWTH MANAGEMENT HEARINGS BOARD,
Respondent,

And

CLARK COUNTY CITIZENS UNITED, INC.,
Petitioners and Intervenors Below

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

CLARK COUNTY'S RESPONSE
TO CCCU'S OPENING BRIEF

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STATEMENT OF THE CASE¹

The Clark County Board of County Commissioners (“Council”)² in 2013 directed the County’s Department of Community Planning (“Planning”) to initiate the periodic review and update of the County’s comprehensive plan that is required by RCW 36.70A.130.³ As is customary before undertaking a significant project, Planning had appeared on July 17, 2013, in a public meeting of the Council, the County’s budget authority and legislative body, to present a broad overview of the project.⁴

On December 18, 2013, in a public meeting, Planning placed a proposed written Public Participation Plan (“PPP”) before the Council, which approved the PPP on January 21, 2014.⁵ The PPP calls for public outreach and wide dissemination of information by a variety of means, including keeping a project file for public review, publishing notices and issuing press releases, posting on County websites, televising Council

¹ This is a consolidated appeal from two decisions of the Growth Management Hearings Board (“Board”): The Final Decision and Order was issued March 23, 2017 (“FDO”) and the Order on Compliance and Order on Motions to Modify Compliance Order, Rescind Invalidity, Stay Order, and Supplement the Record (“Compliance Order”) was issued January 10, 2018. The Board has submitted two separately-indexed administrative records, one for each phase of the proceedings below. In this brief, references to the administrative record compiled in the first phase, culminating in the FDO, will be to “AR,” followed by the page number in the Board’s Index to the Certified Record submitted to the Court of Appeals on November 20, 2017. This brief does not refer to the record on compliance.

² The Board of County Commissioners is now known as the “Clark County Council” and is referred to throughout this brief as “Council.”

³ AR 8611-44.

⁴ *Id.*

⁵ AR 2254-55.

hearings, and holding neighborhood meetings and community open houses.⁶ In addition to the PPP, the County has codified its requirements for public notice and the opportunity to comment on the County's legislative processes, such as plan adoption and amendment.⁷

The comprehensive plan reports that during the 2016 Plan Update, the Council and the Planning Commission held a total of 38 public hearings on aspects of the Update, during all of which, interested parties could become informed and provide testimony.⁸ The County held ten duly noticed Open Houses and Public Meetings in various locations throughout the County.⁹ During the 2016 Update, 24 additional public meetings of the Council, 24 public work sessions of the Planning Commission, and one joint public work session of these bodies, also duly noticed, offered opportunities for the public to become informed about the Update.¹⁰

CCCU board members and other rural property owners met privately many times with certain Councilors and County staff to convey their views on the Update,¹¹ and sat at the table with the Council at certain public work sessions, speaking on the record.¹²

⁶ Public Participation Plan, "PPP", Appendix F Public Involvement, AR 2256-61.

⁷ Clark County Code 40.510.040. Appendix 4, attached hereto.

⁸ AR 2251-53.

⁹ AR 2251-53.

¹⁰ AR 2256-61.

¹¹ Declaration of Christine M. Cook, AR 8351-53 (attended and witnessed meetings).

Besides inviting attendance and testimony at public meetings, the County solicited from the public and accepted from 2013,¹³ at least through June 23, 2016,¹⁴ written testimony about the 2016 Plan Update, via email,¹⁵ US Postal Service, online posting, and hand delivery.¹⁶ Clark County also communicated with the public via newspaper and emailed notices,¹⁷ via a postcard survey of rural property owners¹⁸ and via a public access television channel which broadcasts Council hearings.¹⁹ Before the Council approved the 2016 Plan Update, hundreds of record submittals were made by individuals and groups from the public, including CCCU.²⁰

Out of 3,101 total record items, rural property owners and interest groups submitted at least 1,170 items in the written and electronic record.²¹ That number includes nearly 500 items submitted by CCCU, its

¹² Memo dated January 22, 2015, from Oliver Orjiako memorializing January 21, 2015, Council work session with Don McIsaac representing CCCU at Board table, AR 8686-89.

¹³ *See, e.g.*, Written communication from Carol Levanen to the Council, Request for Rezoning/Defining Rural/Resource Lands in Clark County, dated February 28, 2013, AR 8606-10.

¹⁴ *E.g.*, 2016 Comprehensive Plan Effective Date for Rural Element Divisions, emailed June 22, 2016, by Heidi Owens, to the Council, AR 9314.

¹⁵ *E.g.*, Rezoning Request for 3 Parcels, email dated June 25, 2014, by Troy Uskoski to the Council, with attachment from Troy Uskoski, Jay Vroman and Michael Tapani, AR 8671-72; Email dated September 24, 2014, from Carol Levanen to Council, CCCU and CCCU board regarding "Tuesday meeting with Commissioner Madore." AR 8678-79.

¹⁶ *See n. 11* for references about private meetings.

¹⁷ AR 8704.

¹⁸ *E.g.*, Submittal dated October 23, 2014, from Marge Nelson to online 2016 Comp Plan portal re postcard from rural census, AR 8684.

¹⁹ *See* <https://www.cvtv.org/program/clark-county-council>.

²⁰ AR 8706-09, from Friends of Clark Co.; AR 8868, from CCCU.

²¹ Cook Dec., at 3, AR 8352.

officers and board members, and their families.²² Council lawfully adopted the Update in a public hearing on June 28, 2016.²³

Friends of Clark County and Futurewise jointly petitioned the Growth Management Hearings Board, Western Region (“Board”) for review on July 22, 2016.²⁴ On August 25, 2016, Clark County Citizens United (“CCCU”) filed its petition for review with the Board.²⁵ The Board ultimately consolidated all of these reviews as Case No. 16-2-0005c.²⁶ The Board held a hearing on the merits and on March 23, 2017, issued its Final Decision and Order (“FDO”).²⁷ The Board issued a Compliance Order on January 10, 2018. The County, CCCU, and other parties filed petitions for review of the FDO and the Compliance Order. This Court has accepted discretionary review and consolidated the appeals.

STANDARD OF REVIEW

The Court reviews decisions by the Board pursuant to the Washington Administrative Procedures Act (“APA”) Ch. 34.05 RCW,²⁸ and looks to the record before the Board to determine whether it erred as

²² *Id.*

²³ AR 992.

²⁴ AR 1-45, 227-773.

²⁵ AR 976-1194.

²⁶ AR 966-75, 1221-30.

²⁷ AR 10457-59.

²⁸ *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005).

set forth in RCW 34.05.570(3).²⁹

The Growth Management Act (“GMA”) provides that adoptions and amendments to comprehensive plans, like Clark County’s 2016 Plan Update, are presumed valid upon adoption.³⁰ The burden of proof is on a challenger – here, CCCU – to demonstrate to the Board that the County’s actions did not comply with GMA.³¹ The Board was required to “find compliance unless it determines that the action by the . . . county . . . is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [GMA].”³² In order to prevail before the Board in challenging Clark County’s 2016 Plan Update, therefore, CCCU was required to prove that the County’s actions had been clearly erroneous.³³ The Board held, with respect to CCCU’s issues³⁴ against Clark County, that for several reasons, CCCU had not met its burden to prove that the County’s actions were clearly erroneous violations of GMA.

²⁹ *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

³⁰ RCW 36.70A.320(1).

³¹ RCW 36.70A.320(2).

³² RCW 36.70A.320(3).

³³ To determine that some aspect of the 2016 Plan Update was clearly erroneous, the Board must have been “left with the firm and definite conviction that a mistake [had] been committed.” *King County, supra*, 142 Wn.2d 543 at 552, quoting *Dep’t of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993))

³⁴ A list of the 25 Issues raised by the Petitioners before the Board, in the forms as approved by order of the Board “Board issues,” can be found at Appendix 1. CCCU raised Board Issues 1, 2, 3, 4, 8, 9, 12, 14, 15, 16, 24, and 25.

In this judicial review, the burden is again on CCCU to demonstrate the invalidity of the Board's actions.³⁵ In order to meet its burden, CCCU must demonstrate that, for each issue before the Court, the Board's FDO was deficient for one of the reasons set forth in RCW 34.05.570(3), and that CCCU was substantially prejudiced by the Board's order.³⁶ The three provisions of the APA that CCCU has stated³⁷ apply to this review are as follows:

RCW 34.05.570(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(d) The agency has erroneously interpreted or applied the law:

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(i) The order is arbitrary or capricious.

The Court reviews de novo issues of law under RCW 34.05.570 (3)(d).³⁸ Substantial weight is accorded to a Board's interpretation of

³⁵ RCW 34.05.570(1)(a).

³⁶ RCW 34.05.570(1)(d).

³⁷ CCCU Amended Opening Brief ("CCCU Brief") at 5-6.

³⁸ *Olympic Stewardship Foundation v. State Environmental and Land Use Hearings Office*, 199 Wn. App. 668, 686, 399 P.3d 562 (2017), *rev. den.*, 189 Wn.2d 1040 (2018); *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 190

GMA, because the Board has specialized expertise administering that statute, but the Court is not bound by the Board's interpretations.³⁹ The deference granted by the APA and the courts to the Board is also superseded by the deference that the Board was to grant to Clark County's planning actions pursuant to RCW 36.70A.3201.⁴⁰ If the Board had failed to defer to the County's policy choices in planning under GMA, the Court should rule that the Board's decision is erroneous under RCW 34.05.570 (3)(d),⁴¹ but that is not CCCU's posture in Argument Parts II, III, IV and VI.⁴² Instead, CCCU argues that the County's planning choices were not lawful, with little reference to the standards governing review of the Board's decisions on questions of law. CCCU's arguments fail.

The substantial evidence review standard of RCW 34.05.570(e) requires the Court to determine whether there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the Board's order.⁴³ The Court views the evidence "in the light most

³⁸ (cont.) P.3d 38 (2008), citing, *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006).

³⁹ *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

⁴⁰ *Quadrant Corp.*, *supra*, 154 Wn.2d at 237-38; *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 142 Wn.2d 144, 154, 256 P.3d 1193 (2011).

⁴¹ See *Quadrant Corp.*, *supra*, at 238; *Kittitas*, *supra*, at 154.

⁴² Clark County is not submitting argument regarding CCCU's Argument Part V.

⁴³ *Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 176 Wn. App. 555, 565, 309 P.3d 673 (2013), quoting, *City of Redmond*, *supra*, 136 Wn.2d at 46, quoting, *Callecod v. Wash. State Patrol*, 84 Wn.App. 663, 673, 929 P.2d 510, *rev. den.*, 132 Wn.2d 1004, 939 P.2d 215 (1997).

favorable to . . . ‘the party who prevailed in the highest forum that exercised fact-finding authority.’”⁴⁴ The Court consequently accepts the Board’s views regarding the weight to be given reasonable but competing inferences.⁴⁵ The County prevailed with respect to every evidentiary issue addressed in this response and the evidence should be viewed in the light most favorable to Clark County.

Several of CCCU’s contentions are either questions of fact or mixed questions of law and fact. When the Court reviews mixed questions of law and fact, it determines the law independently, and applies the law to the facts as found by the Board.⁴⁶

The arbitrary and capricious standard of RCW 34.05.570(3)(i) means agency action that is:

“willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. **Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may**

⁴⁴ *Spokane County, supra*, at 565, quoting, *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (quoting, *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

⁴⁵ *Id.*

⁴⁶ *Lewis County, supra*, 157 Wn.2d at 498, 139 P.3d 1096 (2006), quoting, *Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002).

believe it to be erroneous.”⁴⁷ (*Emphasis added; citation’s omitted.*)

CCCU’s opening brief is largely focused on the County’s actions, rather than the Board’s. It ignores the fundamental question of judicial review: based on the applicable standards of review set forth in RCW 34.05.570(3), did the agency that rendered the decision under review err in making that decision? CCCU has not demonstrated, with respect to its Argument Parts II, III, IV and VI, that the Board erred and, therefore, with respect to these arguments, the Court should affirm the Board’s decision.

ARGUMENT

Response to CCCU’s Argument, Part II: Clark County did not designate any agricultural or forest lands in its 2016 Plan Update; its unchanged designations have long been held to comply with GMA; the Board correctly dismissed CCCU’s issue (Board Issue 12).⁴⁸

This argument presents a mixed question of law and fact, is based upon Board Issue 12, which the Board dismissed.⁴⁹ CCCU argues that the 2016 Plan Update designated agricultural and forest land based on a consultant’s report that CCCU characterizes as flawed and erroneous.⁵⁰ Clark County, however, did not designate any agricultural or forest land in the 2016 Plan Update. The County argued that its resource lands

⁴⁷ *Olympic Stewardship Foundation v. State Environmental and Land Use Hearings Office through W. Wash. Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 686, 399 P.3d 562 (2017), *rev. den.*, 189 Wn.2d 1040 (2018).

⁴⁸ FDO at 52-54, AR 10508-10.

⁴⁹ FDO at 53-54, AR 10509-10.

⁵⁰ CCCU Brief at 10.

designations had long complied with GMA criteria, as evidenced by the Board's several Orders of Compliance over the years.⁵¹ The Board agreed, making the factual finding and legal conclusion that the County had used the NRCS data required by GMA, as well as other information in designating resource lands.⁵² The Court must affirm the Board's decision because it is based on sufficient evidence to persuade a fair-minded person that it is correct, and because it correctly applies the law to the facts.

CCCU contends that Clark County improperly designated agricultural and forest lands without regard to their capability for long term commercial production, as shown by NRCS data. Having found that the County had correctly applied NRCS data concerning commercial productivity of its resource lands, the Board dismissed the issue.⁵³

Only Clark County's 2016 Plan Update was within the Board's jurisdiction to review. The designations of agricultural and forest lands in the 2016 Plan Update had been given to those lands years earlier.⁵⁴ The

⁵¹ See County Prehearing Brief, at 31-34 AR ; *Karpinski v. Clark County*, WWGMHB Case No. 07-2-0037, Order Finding Compliance and Closing Case (September 4, 2014); *Building Association of Clark County v. Clark County*, WWGMHB Case No. 04-2-0038(c), Final Decision and Order (2005) (regarding 2004 Plan); *Achen v. Clark County*, WWGMHB Case No. 95-2-0067c, Order Finding Compliance and Closing Case (2006). A detailed history of proceedings spawned by approximately 60 appeals of Clark County's first plan under the GMA can be found in a letter dated September 4, 2015, from David T. McDonald to Oliver Orjiako. AR 8871-86.

⁵² FDO at 53-54, AR 10509-10.

⁵³ FDO at 54, AR 10510.

⁵⁴ In 2016, Clark County revised the zoning and minimum density of lands designated for agriculture and certain lands designated for forestry. Agriculture 20 (20-acre minimum

Board could have taken no action on Board Issue 12 except to dismiss it.

RCW 36.70A.280 is set forth in Appendix 2, hereto, and provides, in part:

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

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

(a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter

RCW 36.70A.290(2) further limits petitions that may be heard and decided by the Board to those filed within 60 days of a county's publication of notice of a comprehensive plan amendment. CCCU filed its petition for review with the Board on August 25, 2016.⁵⁵ That filing could hardly have invoked the Board's jurisdiction to determine whether the County's comprehensive plan enactments in the 1990's, in 2004, or in 2007, had complied with GMA. Those matters were settled years ago, when the Board determined that the County's comprehensive plan designations of resource lands complied with GMA's requirements.⁵⁶ Unless the designations themselves had changed fewer than 60 days prior

⁵⁴ (*cont.*) lot size) became Agriculture 10 (10-acre minimum lot size), and Forest 40 (40-acre minimum) became Forest 20 (20-acre minimum). In 2017, Clark County returned those lands to their prior minimums: Agriculture 20 and Forest 40. Throughout, however, no lands were designated for either resource use that had not previously been so.

⁵⁵ AR 976-89.

⁵⁶ See note 24, above.

to CCCU's 2016 petition for review, in a manner specified by the petition for review, the Board had nothing to hear and decide about them.⁵⁷ CCCU concedes, "tellingly, the County's designations are highly similar to those that were adopted more than 20 years ago in the 1994 comprehensive plan"⁵⁸ Indeed, they are. The Board correctly ruled that the current designations comply with GMA's requirements, just as they had for years.

Neither before the Board nor before this Court has CCCU identified any new or additional designation of resource lands that was made by the County's 2016 Plan Update.⁵⁹ Instead, it argues that the County "revisited" resource lands designations, "scouring for additional information . . . to justify the decisions it had already made."⁶⁰ CCCU complains that Clark County used as a foundation a report known as Issue Paper 9,⁶¹ which CCCU describes as containing errors in fact and misapplying information. CCCU does not, however, identify any errors or misapplied information.⁶² CCCU states that the County relied upon information other than Natural Resources Conservation Service ("NRCS") soils capability classifications to designate resource lands, and that the

⁵⁷ RCW 36.70A.280, 290(2); *Thurston County, supra*, 164 Wn.2d at 344-45.

⁵⁸ CCCU Brief at 13.

⁵⁹ CCCU Brief at 8-15; CCCU Prehearing Brief on the Merits to the Board at 23-26, AR 4481-84.

⁶⁰ CCCU Brief at 12. The decisions to designate resource lands, having been made in the 1990's, did not require justification, an explanation, or a showing of work in 2016.

⁶¹ Issue Paper 9 can be found at AR 10056-90.

⁶² CCCU Brief at 11, 8-15.

County failed to “show its work” regarding soils capabilities.⁶³ CCCU finally contends that the County failed to designate agricultural lands on a county-wide basis.⁶⁴ CCCU’s argument neither cites any parts of Amended Ordinance 2016-06-12 that it believes newly designated resource lands, nor identifies any lands it claims were improperly designated by that Ordinance.

CCCU claims that the Board ruled the County could use unspecified information (“data layers”) *instead of* the NRCS soils classes to designate agricultural lands as required by WAC 365-190-050.⁶⁵ That claim misstates the Board’s finding and conclusion, which reads as follows:

The County used the NRCS layer and other data; nothing in the WAC precludes them from using other data as long as they use NRCS data as well. CCCU’s claim about data layers is dismissed.”⁶⁶ (*Emphasis added.*)

The Board’s statement that the County had used NRCS data is based upon the fact of the long-compliant resource lands designations.⁶⁷ CCCU does not argue that the Board’s conclusion was not based upon substantial evidence. The Board concluded that WAC 365-190-050 did

⁶³ *Id.* at 12-13. No new designations were made by the 2016 Plan Update, and hence, no work needed to be shown regarding them.

⁶⁴ *Id.* at 13-14. The County certainly designated its agricultural lands on a county-wide basis, to the extent required, in 1994, when it first adopted a GMA comprehensive plan. The land designated in 2016 for agriculture had been designated in 1994 for agriculture.

⁶⁵ CCCU Brief at 12.

⁶⁶ FDO at 54, AR 10510.

⁶⁷ *See* note 24, *supra*.

not preclude the use of additional data as long as the NRCS data is used. CCCU does not explain how the Board's conclusion misinterprets or misapplies the law. CCCU does not address the deference owed by the Board to Clark County's planning and policy decisions,⁶⁸ one of which was to properly consider a number of factors in addition to NRCS soil types. CCCU misstates the weight owed the Board's legal conclusion regarding this matter, contending that deference is instead due the Department of Commerce, though the latter has no role in GMA review.⁶⁹

In summary, CCCU does not include any argument relevant to the Court's standard of review of the Board's decision in this matter, and provides no reason under the APA why the Board's decision should be overturned. Although CCCU concludes this argument by urging that the Board's decision be reversed,⁷⁰ it has not met its burden of proving that it is entitled to relief from the Board's decision under RCW 34.05.570 (3)(d), (e) or (i).⁷¹ The Court should affirm the Board's decision.

Response to CCCU Argument, Part III: Regarding Clark County's Compliance with GMA's Procedural Requirements, CCCU Fails to Demonstrate that the Board's Decision Was Invalid for any Reason set Forth in RCW 34.05.570(3); as in its Brief to the Board, CCCU

⁶⁸ RCW 36.70A.3201.

⁶⁹ CCCU Brief at 11.

⁷⁰ CCCU Brief at 15.

⁷¹ CCCU attempts to compare of Clark County's resource lands designations to designating land without sand or gravel for extraction of those materials, stating that it would be arbitrary and capricious. CCCU Brief at 9. CCCU does not make an argument that the Board's decision regarding designation of resource lands was arbitrary and capricious and, therefore, is not entitled to relief under RCW 34.05.570(3)(i).

Has Misstated the Facts and Misconstrued the Law Concerning the 2016 Comprehensive Plan Update Process. (Board Issues 1, 2, 4, 24).⁷²

A. Part III of CCCU's Argument fails to correctly state either the facts or the law that governed public involvement in the 2016 Plan Update, and should be rejected.

This set of issues concerns CCCU's complaints about the procedure by which Clark County conducted its comprehensive plan review and update. CCCU states that there is no factual dispute relevant to its procedural arguments and that the only questions remaining are, therefore, entirely legal questions to be reviewed by the Court de novo.⁷³ The County had argued before the Board that a number of CCCU's statements of fact were incorrect and the Board found in the County's favor on the factual disputes. Substantial evidence review is appropriate.

Before this Court, CCCU now repeats the same statements that the Board found to be counterfactual, but it has not made substantial evidence arguments, and it has not demonstrated that the Board's factual findings were not supported by substantial evidence.

The Court must view the evidence most favorably to the County, and must accept the facts found by the Board, because those facts were supported by substantial evidence in the record.⁷⁴ To the extent that its arguments regarding process depend on its confused and incorrect view of

⁷² FDO at 7-12, 16-18, 92-94, AR 10463-68, 10472-74, 10548-50.

⁷³ CCCU Brief at 17.

⁷⁴ *Spokane County, supra*, 176 Wn. App. at 565-66.

the facts, CCCU has not demonstrated that the Board erroneously interpreted or applied the law to the facts, as found by the Board. Even when CCCU has correctly stated the facts, it has failed to show that the Board erred in interpreting or applying the law.

B. The Board correctly found that Clark County had approved its 2016 Plan Update on June 28, 2016, and correctly concluded that GMA does not require that foundational documents be subject to revision in the course of a Plan Update.

One of CCCU's most egregious misstatements of fact is the repeated assertion that Clark County adopted and approved its 2016 Plan Update on June 21, 2016, rather than the actual date of adoption, which was June 28, 2016.⁷⁵ This misstatement appears in Part III of the Argument in CCCU's Brief, which rearranges and muddles together portions of Board Issues 1, 2, 4, and 24.⁷⁶

CCCU argues that Clark County violated GMA because a "foundational document,"⁷⁷ identified as Issue Paper 9, was finalized after the 2016 Plan Update was approved.⁷⁸ CCCU states, without citation:

Directly contrary to the GMA's mandate for early and continuous public participation, the County ... completed Issue Paper 9 two days **after** the Board of County Councilors approved the 2016 Plan Update...⁷⁹ (*Emphasis in original.*)

⁷⁵ CCCU Brief at 3, 18, 19, 20; CCCU Prehearing Brief at 16-18, AR 4474-76.

⁷⁶ See Appendix 1.

⁷⁷ "Foundational document" is CCCU's term. CCCU Brief at 18.

⁷⁸ CCCU Brief at 18-21.

⁷⁹ *Id.* at 18.

Again, without citation, CCCU states:

At issue here, a County consultant completed a specific document providing analysis and recommendations regarding the comprehensive plan, Issue Paper 9, on June 23, 2016 – **two days after the BOCC had voted on and adopted the 2016 Plan Update**, and five days before official adoption of the Ordinance.⁸⁰ (*Emphasis added.*)

At best, these statements are confused and confusing.⁸¹ Regardless, they are incorrect, and CCCU is well aware that the 2016 Plan Update was approved on June 28, 2016, and not on June 21, 2016. CCCU filed its Petition for Review to the Board on August 25, 2016,⁸² which would have been untimely if the approval had been on June 21, 2016.⁸³ Attached to its Petition for Review, as the appealed decision, was a copy of signed Amended Ordinance (Ord.) 2016-06-12, dated June 28, 2016.⁸⁴

In addition to citing the appealed ordinance, Clark County argued before the Board that verbatim minutes of the Council's hearing on June 28, 2016,⁸⁵ which included the vote taken to adopt and approve Amended Ord. 2016-06-12, established that the Update had been adopted that day.⁸⁶ The Board explicitly found that the County had adopted and signed into

⁸⁰ *Id.* at 19.

⁸¹ CCCU's Statement of the Case, at page 3, also states that the BOCC [Council] approved and updated the Comprehensive Plan on June 21, 2016.

⁸² AR 989.

⁸³ RCW 36.70A.290(2).

⁸⁴ AR 992-1003.

⁸⁵ The relevant hearing minutes from June 28 can be found at AR 10113-22.

⁸⁶ AR 10119 (Motion to approve Amended Ord. 2016-06-12); AR 10122 (Motion passed).

law Amended Ord. No. 2016-06-12, updating the Clark County Comprehensive Land Use Plan, on June 28, 2016, not on June 21, 2016.⁸⁷

CCCU's Brief makes no argument that this finding of the Board lacks support of substantial evidence. The evidence supporting the Board's conclusion is overwhelming. Because CCCU fails to challenge that finding, it is treated as a verity on appeal.⁸⁸ The Court should reject CCCU's request to invalidate the Board's decision because CCCU has not met the standard of RCW 34.05.570(3)(e) concerning this basic fact.

CCCU further claims:

“completion of Issue Paper 9 after the BOCC's approval of the 2016 Plan Update effectively deprived the public of *any* opportunity to review or comment on the Issue Paper's contents—let alone provide the meaningful, continuous public participation contemplated by both the PPP and the GMA.”⁸⁹ (*Emphasis in original.*)

CCCU has not refuted the Board's finding that the 2016 Plan Update was adopted on June 28, 2016, after Issue Paper 9 was published on June 23, 2016. Its contention that “late” publication deprived the public of the right to comment on the Issue Paper is wrong in two ways. The County provided evidence to the Board that Issue Paper 9 had been posted when public comment on the 2016 Plan Update was being accepted

⁸⁷ FDO at 18, AR 10474.

⁸⁸ *Kitsap County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. App. 863, 872, 158 P.3d 638 (2007); *Church of the Divine Earth v. City of Tacoma*, ___ Wn.App. ___, P.3d ___, slip op. at 14, n.5 (Sept. 5, 2018, Case No. 49854-5-II).

⁸⁹ CCCU Brief at 18.

by the County.⁹⁰ At the County Council’s public hearing on June 28, 2016, the Council Chair invited comment, before holding a vote on the amended ordinance.⁹¹

The Court views the evidence in favor of the party that prevailed before the Board,⁹² here, Clark County. In light of the evidence, the Board found as follows:

“Finally, CCCU’s claim the County did not give the public sufficient time to review the Issue Paper 9 is not a GMA violation. The County held a hearing on the Paper and took public comments and used its discretion to incorporate or not incorporate those comments into their Amended Ordinance 2016-06-12.”⁹³

CCCU has not effectively challenged the Board’s fact-based findings and legal conclusions in this regard.

First, CCCU has not raised arguments, based on RCW 34.05.570 (3)(e), against the finding that the County held a hearing on the 2016 Plan Update after publication of Issue Paper 9 and took public comment at the hearing. The Board’s decision to that effect must be treated as a verity.⁹⁴

The arguments at pages 18-21 of the CCCU Brief fail because they are

⁹⁰ Clark County Prehearing Brief on the Merits to the Board (“Prehearing Brief”), at AR 8291; Issue Paper 9, dated June 23, 2016, AR 10056-10090.

⁹¹ AR 10114.

⁹² *Spokane County, supra*, at 565, quoting, *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (quoting, *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

⁹³ FDO at 54, AR 10510.

⁹⁴ *Kitsap County, supra*, 138 Wn. App. at 872; *Church of the Divine Earth v. City of Tacoma, supra*, ___ Wn. App. ___, slip op. at 14, n.5 (Sept. 5, 2018, Case No. 49854-5-II).

based upon nonfactual assertions, not the substantial evidence standard.

Second, the Court reviews issues of law de novo, but gives substantial weight to the Board's conclusions of law.⁹⁵ The Board held that under the facts as found, and correctly allowing the County to exercise its discretion to make planning choices,⁹⁶ there was no violation of GMA. CCCU has presented no legal argument pursuant to RCW 34.05.570(3)(d) demonstrating the invalidity of the Board's legal conclusion in light of the facts.⁹⁷ Consequently, CCCU has not borne its burden of proof under RCW 34.06.570(1)(a) to demonstrate entitlement to relief from the Board's decision on the timing of Issue Paper 9, relative to the 2016 Plan Update adoption. The Court should affirm the Board's decision on this matter.

C. The Board's decision that Clark County had complied with GMA in timely adopting and using its Public Participation Plan properly interpreted and applied the law.

In Board Issue 1, CCCU argued that Clark County had violated RCW 36.70A.140 and WAC 365-196-600 because it adopted a Public Participation Plan in January, 2014, but used as resources for the 2016 Plan Update four documents that the County Council had publicly

⁹⁵ *King County, supra*, at 553; *City of Redmond, supra*, at 45.

⁹⁶ RCW 36.70A.3201.

⁹⁷ *Olympic Stewardship Foundation, supra*, at 687.

reviewed and considered previously.⁹⁸ CCCU repeats the claim here.

The Board disposed of CCCU's claim that the County had violated RCW 36.70A.140 by analyzing the fundamental requirement of that statute, which is that the County adopt a Public Participation Plan.⁹⁹ The County Council adopted the PPP in a public meeting two and one half years before adopting 2016 Plan Update.¹⁰⁰ The Board noted CCCU's acknowledgment that the County had done so.¹⁰¹ The Board further noted that the Clark County Code sets forth public participation requirements for legislative proceedings to implement GMA at Clark County Code 40.510.040.¹⁰² These code provisions were in effect when the County Council considered the resource documents called out by CCCU.¹⁰³

CCCU concedes that the resource documents were not made part of the Comprehensive Plan,¹⁰⁴ and that they were finalized between four and eight years before Clark County adopted the 2016 Plan Update.

CCCU does not identify any provision of GMA, SEPA, or their implementing WAC's that either: (1) requires the County to adopt a PPP

⁹⁸These documents, the Agriculture Preservation Strategies Report (2009), the Clark County Bicycle and Pedestrian Plan (2010), the Aging Readiness Plan (2012), and the Growing Healthier Report (2012), are listed in the Introduction to the Comprehensive Plan as "other plans." AR 1851.

⁹⁹ FDO at 10, AR 10466.

¹⁰⁰ AR 4589-96.

¹⁰¹ FDO at 10-11, AR 10466-67.

¹⁰² FDO at 11, n.35, AR 10467. Clark County Code 40.510.040 is set forth in Appendix 4 hereto.

¹⁰³ *Id.*

¹⁰⁴ CCCU Brief at 21-22.

before any work on resource documents occurs; (2) requires the County to reopen resource documents, at the time of a comprehensive plan update, when previously they had been reviewed with all due public process; or (3) requires the County to subject previously adopted and published resource documents to new public process each time the County adopts or revises its PPP. However, CCCU urges that the entire 2016 Plan Update be invalidated because these processes did not occur.¹⁰⁵

CCCU cites a Board decision, *Playfair v. City of Chewelah*, 2004 WL 311184, for the proposition that RCW 36.70A.140 requires adoption of a public participation plan before enacting a comprehensive plan or plan amendment.¹⁰⁶ *Playfair* is unlike this case for two reasons. In *Playfair*, the city had adopted no participation plan whatever prior to adopting its comprehensive plan, or amending it four years later;¹⁰⁷ Clark County, in contrast, had standing public participation provisions in its Code, and adopted in 2014 a public participation plan specifically for the 2016 Plan Update. Also, actual comprehensive plan enactments were at issue in *Playfair*,¹⁰⁸ not resource documents that were listed in a comprehensive plan, but never incorporated within it. The rule in *Playfair* does

¹⁰⁵ CCCU Brief at 24.

¹⁰⁶ CCCU Brief at 21-24, Argument III, Part C.

¹⁰⁷ *Playfair*, *supra*, at 3.

¹⁰⁸ *Playfair*, *supra*, at 3.

not apply to this case and it does not advance CCCU's position, as the Board properly held.

WAC 365-196-600(3)(a)(ii) provides that a county need not design an individual public participation plan for each GMA amendment. It stands to reason, as the Board held, that the County did not need to design, adopt, or apply a new public participation plan for documents that were not amendments under GMA. WAC 365-196-600(2)(a) does provide:

Whenever a provision of the comprehensive plan or development regulation is based on factual data, a clear reference to its source should be made part of the adoption record.

This rule advises that naming source documents in the comprehensive plan, as the County did, is entirely appropriate.¹⁰⁹ By doing so, the County made clear reference to the sources of information derived from those documents. The WAC's do not require that each information source be subject to revision as part of a comprehensive plan update. It is sufficient that the public have the opportunity to comment on these documents, as with the rest of the comprehensive plan proposed for adoption, and that the County Council can weigh all the information before it, and take action accordingly. This, in fact, occurred.¹¹⁰

¹⁰⁹ See AR 1851 (list of other plans).

¹¹⁰ See Minutes of June 28, 2016 Council hearing, AR 10113-22.

The Board correctly held that nothing in GMA required the County to adopt a Public Participation Plan before adopting resource documents that were not, themselves, part of the comprehensive plan or development regulations.¹¹¹ In so holding, the Board correctly interpreted and applied the law. The Court should affirm the Board's decisions regarding the Public Participation Plan and resource documents.

D. Clark County responded to public comments and carefully maintained the extensive record of its action on the 2016 Plan Update; the Board correctly held that CCCU had failed to demonstrate clear error in alleging otherwise.

Part III.D of CCCU's Argument claims that Clark County "completely" failed to respond to public comments made in the 2016 Plan Update, thereby violating RCW 36.70A.140 and WAC 365-196-600(8)(a). As this allegation is demonstrably incorrect, given the applicable law and the evidence in the record, the Court should reject this argument as failing to meet the standards of RCW 34.05.570(3)(d) and (e).

The Board correctly held, as a matter of law and in response to CCCU's contentions regarding this issue, that the County had complied with RCW 36.70A.140 by reason of compliance with its legislative code provisions and the adoption of its update-specific PPP.¹¹² The Court

¹¹¹ FDO at 7- 12, AR 10463-68.

¹¹² FDO at 10-11, AR 10466-67. Also see, *City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 133 Wn. App., 375, 386-87, 53 P.3d 102 (2002). RCW 36.70A.140

should affirm the Board's decision.

The Board also correctly ruled that the CCCU had not carried its burden of proof to demonstrate that Clark County had violated WAC 365-196-600.¹¹³ The Board stated that Chapter 365-196 WAC acts as guidance to counties, and that compliance with the procedural criteria of that chapter "is not a prerequisite for compliance with the GMA." FDO at 11, *quoting*, WAC 365-196-030.¹¹⁴ The Board reviewed the language of WAC 365-196-600(8)(a), which "suggests"¹¹⁵ to a county that it "**should** allow adequate time to hear public comments and **should** respond to public comments." (*Emphasis in original.*)¹¹⁶ The Board correctly held that the provisions of WAC 365-196-600(8) using the word "should" are not mandatory.¹¹⁷ The Board noted that it is well-settled that the public participation plan required by RCW 36.70A.140 and WAC 365-196-600(8) does not mandate that a jurisdiction provide a specific answer to

¹¹² (*cont.*) calls for counties to provide a number of means for early and continuous public participation in amending comprehensive plans, and also states:

Errors in exact compliance with the established procedures will not render the comprehensive land use plan ... invalid if the spirit of the program and procedures is observed.

¹¹³FDO at 12, AR 10468.

¹¹⁴ WAC 365-196-030(2) provides:

Compliance with the procedural criteria is not a prerequisite for compliance with the act [GMA]. This chapter makes recommendations for meeting the requirements of the act, it does not set a minimum list of actions or criteria that a county or city must take. Counties and cities can achieve compliance with the goals and requirements of the act by adopting other approaches.

¹¹⁵ FDO at 12, AR 10468.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

each public comment.¹¹⁸ Likewise, no summary of public comments and responses was required.

The Board's holding was consistent with Court of Appeals' precedents construing the word "should" when it appears in the same regulation as a mandatory term.¹¹⁹ In WAC 365-196-600(1), the word "must" states a requirement: "Each county. . . planning under the act must establish procedures for early and continuous public participation in the development and amendment of comprehensive plans. . . ." WAC 365-196-600(6)(b) also uses the mandatory term: "Counties and cities must provide effective notice."

In contrast, and as in *Tennant v. Roys*, 44 Wn. App. at 44, the word "should" as used in WAC 365-196-600, has a non-mandatory meaning. "Should" is an expression regarding actions that are permissive, proper, expedient, fit and advisable, but not required.¹²⁰

¹¹⁸ *Id.* at note 31, quoting, *Snohomish County Farm Bureau v. Snohomish County*, GMHB No. 12-3-0010 (Order on Motions, January 31, 2013); notes 31 and 32, citing, *Bremeron/Alpine v. Kitsap County*, CPSGMHB No. 95-03-0039c/98-3-0032c (Final Decision and Order, February 8, 1999) at 24; *Macangus Ranches, Michael Leung and Dennis Daley v. Snohomish County*, CPSGMHB No. 99-3-0017 (Final Decision and Order, March 23, 2000) at 12.

¹¹⁹ *Tennant v. Roys*, 44 Wn. App. 305, 314, 722 P.2d 848 (1996); cited in *State v. Barron*, 139 Wn. App. 266, 277, 160 P.3d 1077 (2007) (When both "should" and "shall," appear in same statute, Court presumes terms meant to be distinguished). See also, *Erection Co., Inc. v. Dep't of Labor and Industries*, 160 Wn. App. 194, 204-05, 248 P.3d 1085 (2011) (In inferring legal obligations, "should" cannot be read to mean "shall."), citing, *State v. Barron, supra*.

¹²⁰ *Tennant v. Roys, supra*, at 314.

When interpreting agency regulations, the same principles used to construe statutes are applied.¹²¹ The Board's interpretation of the administrative rule regarding responses to public comment analyzed and gave effect to the language in the rule as a whole and, thus, to the intent of the adopter of the rule.¹²² CCCU has failed to demonstrate pursuant to RCW 34.05.570(3)(d) that the Board misinterpreted or misapplied the law, and the Court should uphold the Board's interpretation.

CCCU has also failed to meet its burden of proof under the APA to demonstrate that the Board's decision regarding these public participation issues is unsupported by substantial evidence in the record.¹²³ Clark County submitted unrefuted evidence to the Board that during the 2016 Plan Update county staff and officials had responded to public comments via email, via conversation with members of the public, and via discussion at public meetings.¹²⁴ CCCU has not addressed that evidence, let alone demonstrated that it was insufficient to persuade a fair-minded person that that the County had responded to public comment. The Court should affirm the Board's decision in this regard.

CCCU also contends that Clark County failed to maintain the

¹²¹ *Puget Soundkeeper Alliance v. State of Washington, Department of Ecology*, ___ Wn.2d ___, ___ P.3d ___, Case No. 94293-5 (August 30, 2018).

¹²² *See, e.g., King County, supra*, 142 Wn.2d at 555 (statutory interpretation determines legislative intent).

¹²³ RCW 34.05.570(1), (3)(e).

¹²⁴ Statement of the Case, *supra*, at 2-4.

record of the County's Update, and that the County particularly failed to include "many of CCCU's comments in the record,"¹²⁵ thereby violating RCW 36.70A.140 and WAC 365-196-800(a). The evidence in the record does not support this claim, however, and the Board correctly held that the County had not committed clear error in record management.

The evidence before the Board showed that Clark County maintained, organized, and indexed¹²⁶ a total of 2,936 record items from the beginning of the update process to the time the County first filed its Index of Record with the Board.¹²⁷ In the course of the Board's review, various parties, including CCCU, requested record supplementation. Upon identification and receipt of missing materials, as provided in the Board's Rules of Procedure,¹²⁸ Clark County personnel, including the undersigned, assisted the other parties in adding items to the record. WAC 242-03-510 specifically contemplates that other parties might move the Board to add items to the record and that the County might correct the record by adding materials. WAC 242-03-565 contemplates the possibility of a dispute over record items and provides a mechanism and standards for the Board to resolve the dispute. That additions were made to the already extensive record, and that motions to supplement it were

¹²⁵ CCCU Brief at 28-29, and n. 9.

¹²⁶ AR 1767-1834.

¹²⁷ Tab A and Exhibit A-1 to Tab A of County's Prehearing Brief, AR 8351-8470.

¹²⁸ WAC 242-03-565.

filed and resolved, demonstrate that Clark County complied with RCW 36.70A.140 and WAC 365-196-600(8)(a), not the reverse.

Like WAC 365-196-600(8), subsection (2), regarding the record, is couched in terms of actions that the County **should** take. That rule is not mandatory.¹²⁹ Nonetheless, Clark County has taken the actions suggested by that WAC in keeping its record.¹³⁰ Further, exact compliance with Ch. 365-196 WAC and with the Public Participation Plan, in general, is not required.¹³¹

Ultimately, 3,101 items comprised the record, including more than 500 submittals from CCCU, its board and members, and their families.¹³² This well-maintained and extensive record is unrefuted evidence that Clark County's procedures ensured open and continuous public participation in the 2016 Plan Update, as required by RCW 36.70A.140.

The Board was correct in its view of the evidence before it, and its ruling that CCCU had not demonstrated that the County had violated

¹²⁹ See *Tennant v. Roys*, *supra*, at 314; RCW 36.70A.140; WAC 365-196-600(1)(c).

¹³⁰ WAC 365-196-600(2), Record of Process, states as follows:

(2) Record of process.

- (a) Whenever a provision of the comprehensive plan or development regulation is based on factual data, a clear reference to its source should be made part of the adoption record.
- (b) The record should show how the public participation requirement was met.
- (c) All public hearings should be recorded.

¹³¹ RCW 36.70A.140; WAC 365-196-030(2);

¹³² Tab A and Exhibit A-1 to Tab A of County's Prehearing Brief, AR 8351-8470.

RCW 36.70A.140 or WAC 365-196-800 properly interpreted and applied the law. Contrary to CCCU's Argument at Part III.D, the Court should affirm the Board's decision.

E. Substantial evidence in the record supports the Board's finding that a wide variety of the public participated in the 2016 Plan Update in a variety of formats and that CCCU did not demonstrate violations of RCW 36.70A.140 or WAC 365-196-600(4)-(5).

CCCU alleges, as it did in Board Issue 2, that the County "almost exclusively" relied upon the internet for submittal of public comments, and, thereby, excluded resource and rural landowners. More than 500 record submittals were made by CCCU and individuals associated with it,¹³³ more than 1,100 submittals were by resource and rural landowners,¹³⁴ and verbatim minutes in the record of public meetings show that rural and resource landowners were able to attend meetings and testify regarding the update.¹³⁵ The evidence in the record demonstrates that Clark County excluded neither CCCU nor non-urban property owners, in general, from avid and informed participation in the 2016 Plan Update.

CCCU's vague and unsupported suggestion that rural and resource landowners are "substantially less likely"¹³⁶ to be able to navigate the

¹³³ Note 132, *supra*.

¹³⁴ *Id.*

¹³⁵ *E.g.*, Verbatim minutes of October 20, 2015 Council hearing, AR 4788, 4793-98; Verbatim minutes of June 21, 2016 Council hearing, AR 9736-38, 9747-52.

¹³⁶ CCCU Brief at 30.

County's web portal does not refute the undeniable fact of robust involvement by these landowners. Nor has CCCU even attempted to refute the evidence that, in addition to internet based methods, the County offered information regarding the update to all parts of the County, and/or allowed the public to provide input to County decision-makers by means of newspapers, countywide television broadcasts, a mailing list, presentations to neighborhood associations, and approximately 60 open houses, public meetings, and public hearings.¹³⁷ The Court should uphold the Board's factual finding of broad public participation in the 2016 Plan Update through a variety of formats¹³⁸ because CCCU has not borne its burden of proof under RCW 34.05.570(3)(e).

As with most other provisions of WAC 365-196-600, subsections (4) and (5) are aspirational; they do not mandate that the County take particular actions.¹³⁹ The Board correctly interpreted and applied these provisions, as well as RCW 36.70A.140, in holding that CCCU had not proven that Clark County violated GMA. The Court should affirm the Board's decision on this issue because CCCU has not demonstrated error according to the standards of RCW 34.05.570(3)(d) and (e).

¹³⁷ Appendix F, Comprehensive Plan, Public Involvement, AR 2251-53.

¹³⁸ FDO at 11-12, AR 10467-68.

¹³⁹ See WAC 365-196-600(4), which states: "Each county or city **should** try to involve a broad cross-section of the community. . . ." (*Emphasis added.*)

Response to Argument, Part IV:¹⁴⁰ The Board correctly interpreted and applied the law to the facts, and acted reasonably, in holding that Clark County had properly exercised its discretion to make planning choices regarding the OFM population projections and the County's assumptions on the urban-rural split of population growth. (Board Issues 8, 14, 16)¹⁴¹

A. The Board reasonably and correctly upheld the County's lawful choice of the medium population projection by the State Office of Financial Management; CCCU has not demonstrated otherwise.

RCW 43.62.035¹⁴² requires the State Office of Financial Management ("OFM") to release annual population determinations for

¹⁴⁰ This argument begins at the CCCU Brief, page 31, and is misnumbered as III. The first Part III begins at page 15 of the CCCU Brief.

¹⁴¹ FDO at 31-33, 59-63, AR 10487-10489, 10515-10519.

¹⁴² See Appendix 1, attached hereto. RCW 43.62.035 provides, in part:

The office of financial management shall determine the population of each county of the state annually as of April 1st of each year and on or before July 1st of each year shall file a certificate with the secretary of state showing its determination of the population for each county. The office of financial management also shall determine the percentage increase in population for each county over the preceding ten-year period, as of April 1st, and shall file a certificate with the secretary of state by July 1st showing its determination. **At least once every five years or upon the availability of decennial census data, whichever is later, the office of financial management shall prepare twenty-year growth management planning population projections required by RCW 36.70A.110 for each county that adopts a comprehensive plan under RCW 36.70A.040** and shall review these projections with such counties and the cities in those counties before final adoption.

Each projection shall be expressed as a reasonable range developed within the standard state high and low projection. **The middle range shall represent the office's estimate of the most likely population projection for the county.** If any city or county believes that a projection will not accurately reflect actual population growth in a county, it may petition the office to revise the projection accordingly. (*Emphasis added.*)

counties every April 1 and to create **long-term (20-year) population projections** every five years for counties planning under GMA.

RCW 36.70A.110(2) states, in relevant part:

Based upon the **growth management population projection** made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period

Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

Clark County was required by RCW 36.70A.110(2) to use the long-term population projection made in 2012 by OFM, as mandated by RCW 43.62.035. The County has discretion to make choices in planning to accommodate growth,¹⁴³ and it chose the OFM medium population projection, which is defined by statute as the “most likely population projection for the county.”¹⁴⁴ CCCU asserts that the 2016 Plan Update violates GMA because the County failed to plan for the likely population growth, but as a matter of law, the County planned for the most likely population growth and was not obliged to make a different choice. The Board held that the County had properly exercised its responsibility and discretion in making that choice.¹⁴⁵ The Court should defer to the Board’s

¹⁴³ RCW 36.70A.3201; RCW 36.70A.110(2).

¹⁴⁴ RCW 43.62.035.

¹⁴⁵ FDO at 32-33, AR 10488-10489.

interpretation of the law in that holding.

CCCU does not provide legal argument challenging the Board's interpretation or application of the law authorizing the County to exercise discretion, nor does it make a substantial evidence argument,¹⁴⁶ nor advance a contention that the Board's decision was arbitrary and capricious. That OFM reported a higher annual population growth rate pursuant to RCW 43.62.035 is irrelevant, because that was not the long-term GMA projection called for by statute. Because CCCU has provided the Court with no reason under the APA to overturn the Board's decision based on the County's choice of a medium population projection, the Court should not consider CCCU's claims concerning the OFM projection.¹⁴⁷ Rather, it should uphold the Board's decision in that regard.

B. The Board properly and reasonably upheld Clark County's lawful choice of the medium population projection by the State Office of Financial Management.

Clark County incorporates its arguments from subpart IV.A, above. In this part of its argument, CCCU at least mentions the Board, but

¹⁴⁶ Although it did not explicitly address the substantial evidence standard of RCW 34.05.570(3)(e), CCCU cites written testimony by a proponent for "additional land," AR 4606-4608, presumably for urban growth area expansion. The cited document endorsed as a planning assumption a growth rate of 1.28%, AR 4607, which is extremely close to the number chosen by the County from the medium OFM range: a 1.26% growth rate. Clark County Comprehensive Plan 2015-2035 at 26, AR 1869.

¹⁴⁷ RAP 10.3(a)(6). *Olympic Stewardship Foundation, supra*, 199 Wn.App. at 687, citing, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

only to urge future actions by the Board.¹⁴⁸ CCCU does not address any of the criteria set forth at RCW 34.05.570(3)(d), (e), or (i), to argue why the Court should overturn the Board's existing decision.

In any event, it is clear that the County considered whether to increase the population growth rate in its planning assumption; in fact, it did so,¹⁴⁹ though not to the level that CCCU apparently would have preferred. The County's exercise of its discretion was authorized by law and was taken in consideration of the facts and circumstances surrounding it.¹⁵⁰ The Board correctly held that CCCU had failed to meet its burden of proof to show that the County's choice violated RCW 36.70A.110(2).¹⁵¹ The Court should affirm that holding as a correct interpretation and application of law. Even if the Court would have reached a different conclusion, CCCU has not demonstrated that the Board reached its decision without reasoned consideration of the facts and circumstances at issue. CCCU is not entitled to relief from the Court.¹⁵²

C. The Board properly held that Clark County had not violated RCW 36.70A.110(2) or WAC 365-196-425(2) in

¹⁴⁸ CCCU Brief at 35 (Board should declare that 2016 Plan Update violates GMA and issue determination of invalidity).

¹⁴⁹ The Council increased its initial growth rate assumption from 1.12% to 1.26%. AR 7065 (assumed annual growth rate of 1.12%); AR 1869 (adopted assumption is 1.26%)

¹⁵⁰ *Olympic Stewardship Foundation, supra*, 199 Wn. App. at 686.

¹⁵¹ The Board reviewed CCCU's arguments by construing the applicable law. CCCU does not argue that the Board reviewed the County's decision under the wrong standard.

¹⁵² RCW 34.05.570(3)(i); *Olympic Stewardship Foundation, supra*, 199 Wn. App. at 686.

**making planning assumptions; CCCU's arguments
misstated case law.**

CCCU complains that the 2016 Plan Update capped rural growth by using planning assumptions supposedly derived from a rural vacant buildable lands model (“RVBLM”).¹⁵³ This argument asserts that, in one of the appeals involving the County’s 1994 comprehensive plan, the Washington Court of Appeals held that counties may not use an RVBLM to cap rural growth.¹⁵⁴ That, however, was not what the Court held, and remarkably, CCCU quotes the Court in the same paragraph where it misstates the holding.¹⁵⁵ The Court of Appeals stated as follows:

GMA does not require counties to use OFM’s projections as a cap on non-urban growth.¹⁵⁶

“Does not require” is not equivalent to “does not permit,” which is how CCCU would have it. CCCU repeats in its Opening Brief, verbatim, the following statement from its Prehearing Brief¹⁵⁷ before the Board:

Thus, since 1999, it has been decisively settled that the use of population projections developed for urban area planning cannot lawfully be employed to project or plan for rural growth.¹⁵⁸

¹⁵³ CCCU Brief at 38.

¹⁵⁴ *Clark County Citizens United v. Clark County Natural Resources Council*, 94 Wn. App. 670, 972 P.12d 941 (1999).

¹⁵⁵ CCCU Prehearing Brief at 27, lines 22-26, AR 4485.

¹⁵⁶ *Clark County Citizens United v. Clark County Natural Resources Council*, 94 Wn. App. at 677.

¹⁵⁷ CCCU Prehearing Brief to the Board at 27, lines 25-26, AR 4485.

¹⁵⁸ CCCU Brief at 37-38.

Yet, the Court had stated that very question was not settled:

Without so holding, we assume that the GMA *permits* a county to use OFM's population projections when planning for lands outside its urban growth area. That question is not presented by this appeal.¹⁵⁹

CCCU cites no other legal authority¹⁶⁰ in support of its position that population projections have no role whatever in planning for urban lands, and the Court in *CCCU v. CCNRC* did not make the holding that CCCU claims it did. The Board noted that Clark County had "correct[ed] CCCU's misstatement of the holding" of this Court in that case.¹⁶¹ That CCCU's argument is still predicated upon the same misstatement is enough to show that CCCU has not met its burden of proving that the County had violated GMA or that the Board's holding was incorrect.

The choice of planning assumptions to use either in sizing an urban growth boundary, or to determine whether capacity for expected growth exists in the rural area, is an exercise of discretion by the County which the Board correctly upheld.¹⁶² In this respect, the Court should find that the Board correctly interpreted and applied the law.

Clark County does not agree or concede that CCCU's narrative on pages 38-41 of its Opening Brief accurately depicts occurrences of late

¹⁵⁹ *Clark County Citizens United v. Clark County Natural Resources Council*, 94 Wn. App. at 676, n.23.

¹⁶⁰ CCCU Brief at 35-42.

¹⁶¹ FDO at 59-60, AR 10515-10516.

¹⁶² RCW 36.70A.110(2); RCW 36.70A.3201.

2015 through early 2016. Regardless, that depiction is irrelevant to the question of compliance with GMA. The County exercised its discretion in selecting planning assumptions after much public and internal dispute. The use of planning assumptions does not violate RCW 36.70A.110(2), which does not address rural growth in any case.¹⁶³ The Board correctly held that the County had not violated WAC 365-196-425, which states a procedural guideline, like most provisions of Chapter 365-196 WAC.¹⁶⁴ CCCU has not shown that the Board erred in any respect under RCW 34.05.570(3) in determining that CCCU established no violation of GMA in the County's actions regarding planning assumptions or an RVBLM.

D. The Board correctly held that Clark County did not violate WAC 365-196-425 by assuming a 90% urban/10% rural split in population growth. (Board Issue 16.)¹⁶⁵

In Part IV.D of its Argument, CCCU asserts that “nowhere in its Comprehensive Plan” did Clark County adopt a definition of rural character.¹⁶⁶ Because of that failure, CCCU continues, the County could not adopt an aspirational 90% urban/10% rural population growth split. CCCU claims that the County has violated WAC 365-196-425 and that

¹⁶³ FDO at 60, AR 10516.

¹⁶⁴ WAC 365-196-030; FDO at 62, AR 10518.

¹⁶⁵ FDO at 61-63, 10517-19.

¹⁶⁶ CCCU Brief at 42.

“[t]he Board should have declared that this aspect of the 2016 Plan Update violates the GMA because the planning is divorced from reality.”

In reality, Clark County’s Comprehensive Plan does define rural character, as Futurewise pointed out to the Board in its Respondents’ Prehearing Brief on CCCU Issues.¹⁶⁷ CCCU’s argument is, therefore, factually and legally incorrect and the Board properly held so.

Additionally, the Board properly held that Chapter 365-196 WAC sets forth procedural guidelines and adds no requirements beyond provisions of Chapter 36.70A RCW (GMA). Consequently, the Board properly held that CCCU demonstrated no clearly erroneous violation of GMA in its arguments on Issue 16 regarding both the urban – rural split of population growth and rural character.

With respect to the assumed split of population growth, the Board reasoned that GMA Goals 1 and 2 are aspirational in that they call for encouraging urban growth and reducing sprawl.¹⁶⁸ The County’s aspirational population projection is, therefore, consistent with GMA in encouraging urban growth. The Board also correctly noted evidence in the record that CCCU’s references to a split equal to 86% urban/14% rural are comparisons of total population, and not population growth, and that the

¹⁶⁷ FOCC Respondents’ (“Futurewise”) Brief on CCCU Issues, page 9 and at note 46, AR 6990, citing *Clark County Comprehensive Growth Management Plan 2015-2035*, p. 81. AR 1923.

¹⁶⁸ FDO at 62, AR 10518.

actual numbers comparing population growth are much closer to 90% urban/10% rural.¹⁶⁹ CCCU ignores this evidence, and does not attempt to argue that it was not substantial.

The Board finally held, with regard to the County's choice of a 90/10 split, that RCW 36.70A.3201 provides jurisdictions a "broad range of discretion" in how they plan for growth. How the County chose to accomplish GMA's Goals 1 and 2 is within its discretion, and CCCU had not demonstrated that its choice was clearly erroneous under GMA.

For each part of this issue, the Court should give great weight to the Board's interpretation and application of the law. Legally, the Board's decision was correct, and its application of the law was supported by substantial evidence. Neither the County's actions nor the Board's decision were "divorced from reality," or without reason, considering the facts. CCCU's Argument IV.D fails because CCCU has not demonstrated, pursuant to RCW 34.05.570(d), (e), or (i) that the Board's decision should be overturned.

Response to CCCU's Argument, Part VI: The Board Correctly Held that the County Complied with GMA Goal 6 Regarding Property Rights. (Board Issues 3, 12)¹⁷⁰

A. CCCU has not preserved the argument that the County arbitrarily and discriminatorily impacted property rights.

¹⁶⁹ *Id.* at 62 and at note 206, AR 10518 (Evidence of number of issued building permits.)

¹⁷⁰ FDO at 13-16, AR 10469-72; FDO at 52-54, AR 10508-10.

The first hurdle regarding this issue that CCCU must overcome is its failure to preserve its current challenge at the Board level. A failure to raise issues during the course of an administrative hearing precludes the consideration of such issues on review.¹⁷¹

Here, the Board articulated that the correct issue before it was the following:

Does the 2106 Plan Update violate GMA goal number 6 when Clark County failed to adequately consider the property rights impacts the Ordinance would have on the rural and resource landowners. See RCW 36.70A.020(6) (GMA goal number 6: “Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions”).¹⁷² (Emphasis added.)

Board Issue 3 examined the County’s consideration of private property rights impacts. In its Prehearing Brief to the Board, CCCU rewrote Issue 3 and attempted to argue its new formulation, which alleged the County had violated GMA Goal 6 by arbitrarily and discriminatorily impacting property rights of rural and resource land owners.¹⁷³ The Board considered CCCU’s original Issue 3 from its Petition for Review, because

¹⁷¹ *Griffin v. Social & Health Servs.*, 91 Wn.2d 616, 631 (1979); see also, *Whaler v. Social & Health Servs.*, 20 Wn. App. 571, 576 (1978) (reviewing court cannot pass upon issues not actually decided by the administrative agency).

¹⁷² AR 10469.

¹⁷³ FDO at 13, n. 37, AR 10470; See County Prehearing Brief to the Board, AR 8299-300.

the Board had approved the original¹⁷⁴ and because the Board lacks jurisdiction to resolve constitutional violations.¹⁷⁵

RCW 36.70A.290(1) provides that a “board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order.” The formulation of the issue before this Court must, therefore, be as it was in Issue 3 and articulated by the Board in the FDO. Again, Issue 3, as approved by the Board, was whether the County “failed to adequately consider the property rights impacts” of the 2016 Plan Update on Rural and resource landowners.

In reviewing administrative land use decisions, this Court limits its review to the administrative record before the Hearings Board.¹⁷⁶ It is well established that issues not raised before an agency may not generally be raised on appeal.¹⁷⁷ Here, because the question of arbitrary and discriminatory impacts under Goal 6 was not properly before the Board, CCCU has waived its right to raise it before this Court.¹⁷⁸ The only question properly before this Court on appeal is whether the County

¹⁷⁴ *Id.* CCCU Petition for Review to Board, first issue K, at 12, AR 987.

¹⁷⁵ FDO at 15, AR 10472.

¹⁷⁶ *Peste v. Mason County*, 133 Wn. App. 456, 466, 136 P.3d 140 (2006).

¹⁷⁷ *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 668 (1993); RCW 34.05.554.

¹⁷⁸ Any argument from CCCU relying on RCW 36.70C.130(1)(f) as authorizing this Court to review an issue not properly before the Board fails as CCCU has not articulated a constitutional challenge. As noted on page 47 of its Brief before this Court, “This goal is divided into two sections. One references the right to just compensation for the taking of property, as required by Article I, Section 16 of the Washington Constitution and the

violated Goal 6 by failing to consider the property rights impacts the Update would have on Rural and resource land owners.

B. Clark County extensively considered the impacts of the 2016 Plan Update on the private property rights of rural and resource landowners, as required pursuant to Goal 6.

CCCU argues that the Board erred in deciding that the County complied with Goal 6. In doing so, it mischaracterizes both the evidence before the Board and the basis of the Board's decision. CCCU incorrectly asserts that the Board concluded the County was in compliance with Goal 6 based solely on "a recitation in the ordinance that the County has given some rights due consideration."¹⁷⁹ In reality, the Board's decision concluded that "the record in this case demonstrates that significant time and consideration were given to the potential for taking property rights throughout all levels of the decision-making process."¹⁸⁰

The Board cited "considerable evidence in Tables 1, 2 and 3¹⁸¹ of contacts with private property owners, either by letter or in public hearings, 'setting forth the author's views on private property rights impacts of the Update . . . oral testimony from landowners . . . verbatim

¹⁷⁸ (*cont.*) Fifth Amendment to the Federal Constitution. The other section articulates a goal to protect people from government action which is arbitrary and discriminatory." CCCU's present argument relies entirely on the second of these two sections.

¹⁷⁹ CCCU Brief at 48-49.

¹⁸⁰ AR 10471.

¹⁸¹ Tables 1-3 are in Clark County's Prehearing Brief to the Board, at AR 8301-04.

minutes of public hearings regarding private property rights.”¹⁸²

As correctly found by the Board, the record provides ample evidence that the County received extensive public input on the private property rights of non-urban landowners, and that the Councilors kept those views in mind as they balanced competing interests regarding the Update. Table 1 referenced in the Board’s decision noted 23 examples of correspondence in 2015 and 2016, in which the authors discussed their views on the private property rights impacts of the proposed Update.¹⁸³

The Board also reviewed evidence of public oral testimony about Rural and resource landowners’ property rights at public hearings conducted in 2015 and 2016. This evidence included 19 references to public testimony, outlined in Table 2.¹⁸⁴

The Board also reviewed evidence of the Councilors’ public statements on private property rights impacts in Rural and resource zones. This evidence referred to public meetings at which Councilors discussed input they had received, agreed that property rights required respect, and debated the best approaches to property rights within GMA’s constraints. Table 3 charts nine such public statements made in 2015 and 2016.¹⁸⁵

¹⁸² FDO at 16, *citing*, the County Prehearing Brief to the Board, 20-23. AR 10472.

¹⁸³ AR 8301-8302.

¹⁸⁴ AR 8302-8303.

¹⁸⁵ AR 8304.

Finally, the Board was presented with specific examples where, during the Council's considerations of the Update on June 21, 2016 and June 28, 2016, several discussions ensued regarding the impacts of their decisions on property owners in the Rural and resource areas. Verbatim minutes from June 21, 2016, relate how three councilors specifically addressed agricultural and forest landowners' rights to divide and use property as they chose, and how those rights had been affected by past, current and proposed comprehensive plan designations.¹⁸⁶

The Board's finding that "the record in this case demonstrates that significant time and consideration were given to the potential for taking property rights throughout all levels of the decision-making process" is a finding of fact which is reviewed for substantial evidence.¹⁸⁷ This factual review is deferential, requiring the Court to view all the evidence and reasonable inferences "in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority . . ."¹⁸⁸

It is clear that, as a matter of record, concerns about Rural and resource landowners' property rights were before the County. The Council

¹⁸⁶ See Verbatim Minutes of Public Hearing of the Council on June 21, 2016, AR 5632; Mielke comments at AR 5687, Madore comments at AR 5688-91 and 5733, and Stewart comments at AR 5692-93. See also, comments of Councilor Stewart on June 28, 2016 regarding private property rights, AR 10121-22.

¹⁸⁷ *Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740, 751-52 (2002).

¹⁸⁸ *Freeburg v. Seattle*, 71 Wn. App. 367, 371-72 (1993) (quoting, *State v. County of Pierce*, 65 Wn. App. 614, 618 (1992)).

considered property rights impacts and took them into account in deciding on the Update. The Board correctly held that CCCU did not carry its burden to prove¹⁸⁹ that the County had clearly erred in violation of Goal 6.

C. The Board properly held that Clark County’s 2016 Plan Update did not arbitrarily or discriminatorily impact the private property rights of Rural and resource landowners because RCW 36.70A.020(6) does not protect a right to subdivide land without a preliminary plat approval.

CCCU takes issue with Clark County’s “decision to reject rezoning to smaller parcel sizes.”¹⁹⁰ This argument necessarily assumes that zoning designation that would prohibit a landowner from subdividing, impacts a fundamental attribute of property ownership.

To understand why this argument fails, it is helpful to look at the case of *Peste v. Mason Cty.*, 133 Wn. App. 456, 136 P.3d 140 (2006). The *Peste* court addressed takings claims, stating that to support a facial takings claim, development regulations must destroy one of four fundamental attributes of property ownership.¹⁹¹ The Court noted that the regulatory takings case law focuses on whether the regulation destroys “the right to make some economically viable use of the property”¹⁹²

¹⁸⁹ CCCU made no substantial evidence argument under RCW 34.05.570(e).

¹⁹⁰ CCCU Brief at 49.

¹⁹¹ 133 Wn. App. at 471.

¹⁹² *Id.* at 471.

The Court then analyzed and rejected *Peste's* facial¹⁹³ and as applied¹⁹⁴ challenges, holding the exact opposite of what CCCU now claims: it held the regulations *did not* constitute a taking on their face because they *did not* destroy a fundamental attribute of property ownership, by denying the “owner all economically viable use of the property.”¹⁹⁵ CCCU’s Goal 6 arguments should be rejected by this Court because, as the *Peste* court held, not being able to develop property as you want to does not destroy a fundamental attribute of property ownership.

In *Bayfield Resources Company v. Thurston County*, as well, this Court rejected the argument that the “[t]he right to subdivide property free from unreasonable regulation is a right protected by the constitution and, therefore, is a right within the scope of the GMA’s Goal 6.”¹⁹⁶ The Court concluded that *Bayfield* had provided “no information about its specific plans, if any, to subdivide or to sell its property; nor does it detail how the

¹⁹³ “At most, *Peste* has demonstrated that Mason County’s [comprehensive plan] and [development regulations] and the Board’s land use decision prevent it from developing one of its parcels in the exact manner it wishes. Thus, *Peste’s* facial challenge to the validity of Mason County’s CP and DRs fails.” *Peste*, 133 Wn. App. at 472. Thus, the *Peste* court rejected the same claim being made by CCCU that the land use regulation prevents people from developing its parcels in the exact manner they wish.

¹⁹⁴ The as applied challenge was rejected because it was “not ripe” and because *Peste* did not show “that it would be futile to pursue other uses” for the property. *Peste*, 133 Wn. App. at 474.

¹⁹⁵ *Peste*, 133 Wn. App. at 472.

¹⁹⁶ *Bayfield Res. Co. v. W. Wash. Growth Mgmt. Hearings Bd.*, 158 Wn. App. 866, 891, 244 P.3d 412 (2010).

County's restrictions *prevent* a reasonable economic use of the land.”¹⁹⁷

The Court held that *Bayfield* had not shown that the Board erroneously interpreted and applied the law.¹⁹⁸

Likewise, in *HJS Development, Inc. v. Pierce County*, the Washington State Supreme Court concluded that the “right to subdivide land arises out of preliminary plat approval.”¹⁹⁹ Without establishing that CCCU members have preliminary plat approvals, CCCU has failed to show that its members have a right to subdivide. Like the developer in *Bayfield Resources*, CCCU has not established a violation of any legally-cognizable right recognized under GMA Goal 6.²⁰⁰ The Court should reject CCCU's Goal 6 argument.

D. The Board correctly rejected CCCU's challenge to the County's decision not to adopt AG-5, FR-10, R-1 and R-2.5 zones because the GMA does not require adoption of these zones and the County's decision is not arbitrary or capricious.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 158 Wn. App. at 892.

¹⁹⁹ *HJS Dev., Inc. v. Pierce Cty. ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 475, 61 P.3d 1141 (2003).

²⁰⁰ In the *Bayfield Resources* decision, the Board also concluded that the “right to have a particular zoning classification” has never recognized as being protected by Goal 6, nor is it discriminatory in the sense that it “it unduly burdens or unfairly impacts a single group without rationale.” *Bayfield Resource Company v. Thurston County*, Case No. 07-2-0017c, Final Decision and Order (April 17, 2008), at 29 of 36, *affirmed*, *Bayfield Res. Co. v. W. Washington Growth Mgmt. Hearings Bd.*, 158 Wn. App. 866 (2010). The Board noted that the regulations had a “rational basis” behind them (*i.e.*, provide additional open space, limit impervious space around environmentally sensitive areas and conserve wildlife habitat in the rural areas). *Id.* Similarly, here, Clark County's 2016 comprehensive plan update was adopted to “adequately protect resource lands” and to achieve certain GMA goals and requirements. *See* Amended Ord. 2016-06-12, pp. 2-7, AR 9219-24.

Clark County's 2016 Plan Update was its periodic comprehensive plan review and update required by RCW 36.70A.130(1)(a) and (5)(b). Periodic updates were the subject of the decision in *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 343-45, 190 P.3d 38 (2008). In the *Thurston County* decision, the Washington Supreme Court held that "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, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous comprehensive plan was adopted or updated, following a seven [now eight] year update."²⁰¹

CCCU did not identify to the Board any GMA "provisions related to mandatory elements of a comprehensive plan that were adopted or substantively amended since the previous comprehensive plan was adopted or updated"²⁰² that require the adoption of an AG-5, FR-10, R-1, or R-2.5 zone. Likewise, CCCU has not identified any GMA provision in its Opening Brief before this Court, which require the adoption of these proposed zones, because no such provision exists.²⁰³ As a matter of law,

²⁰¹ *Id.* at 164 Wn.2d at 344.

²⁰² *Id.*

²⁰³ *Id.*; chapter 36.70A RCW.

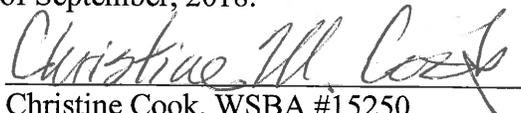
the Board correctly rejected CCCU's challenge to the County's decision to not adopt these zones because the County is not required to adopt them.²⁰⁴

A provision is not arbitrary if it complies with the applicable requirements.²⁰⁵ By challenging the development regulations, CCCU is challenging zoned density. Clark County was within its discretion to adopt the densities it chose,²⁰⁶ and CCCU has failed to meet its burden of proving that the Board erred in so deciding.²⁰⁷

CONCLUSION

For the reasons set forth above, Clark County respectfully requests that the Court affirm in all respects the aspects of the Board's decisions challenged by CCCU Argument, Parts II, III, IV and VI.

DATED this 14th day of September, 2018.



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²⁰⁴ FDO at 54, AR 10510; RCW 34.05.570(d).

²⁰⁵ *Puget Soundkeeper Alliance v. State, Dep't of Ecology*, 102 Wn. App. 783, 791 (2000).

²⁰⁶ RCW 36.70A.3201; WAC 365-196-050.

²⁰⁷ FDO at 54, AR 10510.

CERTIFICATE OF SERVICE

I, Thelma Kremer, hereby certify that on this 14th day of September, 2018, I electronically filed the foregoing **Clark County's Response to CCCU's Opening Brief** using the Washington State JIS Appellate Courts' Portal, which will send notification of such filing to the following:

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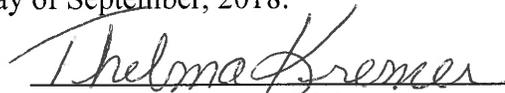
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DATED this 14th day of September, 2018.


Thelma Kremer, Legal Secretary

APPENDIX 1

000001

GMHB ISSUES

Public Participation and Process

1. Did the County's adoption of the 2016 Plan Update violate RCW 36.70A.020(11), RCW 36.70A.035, RCW 36.70A.106(3)(a), RCW 36.70A.130(2) and RCW 36.70A.140 and WAC 365-196-600 when the County began work on the 2016 Plan Update before the County adopted its public participation program in January 2014 and, subsequently, failed to provide open and timely access to the 2016 Plan Update process and underlying analysis? [CCCU No. A]
2. Does the 2016 Plan Update violate public participation requirements of the GMA (including RCW 36.70A.020(11), RCW 36.70A.035, RCW 36.70A.106(3)(a), RCW 36.70A.130(2) and RCW 36.70A.140 and WAC 365-196-600) in routinely and systematically excluding rural and resource landowners? [CCCU No. D]
3. Does the 2016 Plan Update violate GMA goal number 6 when Clark County failed to adequately consider the property rights impacts the Ordinance would have on the county's rural and resource landowners? *See* RCW 36.70A.020(6) (GMA goal number 6: "Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions"). [CCCU No. K1]
4. Did the County violate RCW 36.70A.106 and WAC 365-196-630 which it approved the 2016 Plan Update fewer than 60 days after forwarding the 2016 Plan Update to the Washington Department of Commerce? [CCCU No. L]

Urban Growth

5. Did the adoption of Amended Ordinance 2016-06-12 expanding the Battleground, La Center, and Ridgefield urban growth areas violate RCW 36.70A.020(1), (2); RCW 36.70A.070 (internal consistency); RCW 36.70A.110(1), (2), (3); RCW 36.70A.115; RCW 36.70A.130(1), (3), (5); RCW 36.70A.210(1); or RCW

36.70A.215(1)(b) because the expansions were not needed to accommodate the planned growth and Buildable Lands reasonable measures were not adopted and implemented? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*, pp. 11-13, pp. 14-15, pp. 26-29, pp. 41-46, pp. 267-68, Figure 12, Figure 14, Figure 15, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]. [FOCC/FW No. 1]

6. Did Amended Ordinance 2016-06-12's adoption of the Urban Reserve Overlay and the Urban Reserve-10 (UR-10) and Urban Reserve-20 (UR-20) zoning districts, the repeal of the Urban Reserve-40 (UR-40) zoning district, and the application of the overlay and districts to rural and natural resource lands violate RCW 36.70A.020(2) (8), (10); RCW 36.70A.040(3); RCW 36.70A.050(3); RCW 36.70A.060(1)(a); RCW 36.70A.070 (preamble), (1), (5); RCW 36.70A.110(1); RCW 36.70A.115; RCW 36.70A.130(1), (3), (5); or WAC 365-196-815 because the land is not needed to accommodate planned urban growth and the overlay and zoning does not conserve natural resource lands or comply with the requirements for rural areas? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*, pp. 12-13, pp. 36-38, pp. 96-97, p. 192, p. 228, p. 239, p. 365, Figure 12-18, Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]; Exhibit 5; Exhibit 6; Exhibit 8; and Exhibit 23. [FOCC/FW No. 5]
7. Does the annexation of land within an urban growth area expansion under appeal violate RCW 36.70A.020(1), (2), (8); RCW 36.70A.060(1)(a); RCW 36.70A.070 (internal consistency), (1); RCW 36.70A.110; RCW 36.70A.115; RCW 36.70A.130(1), (3), (5); RCW 36.70A.170; RCW 36.70A.215(1), (2), (3), (4); or any other applicable provision of state law? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*, pp. 11-13, pp. 14-15, pp. 26-29, pp. 41-46, pp. 267-68, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County,

Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]. [FOCC/FW No. 12]

8. Does the 2016 Plan Update violate RCW 36.70A.110 because the County unlawfully relied on population projections by the Office of Financial Management which do not take into account the population influences resulting from Clark County's proximity to the Portland, Oregon metropolitan area? [CCCU No. I]
9. Does the 2016 Plan Update violate RCW 36.70A.030(16), RCW 36.70A.070(5)(b), and RCW 36.70A.177 when historical remainder parcels in rural developments are included in urban growth areas as potentially developable? [CCCU No. J]

Rural and Resource Lands

Resource Lands:

10. Did the adoption of Amended Ordinance 2016-06-12 including the de-designation of 57 acres of agricultural land of long-term commercial significance in the La Center urban growth area expansion and 111 acres in the Ridgefield urban growth area expansion, violate RCW 36.70A.020(8); RCW 36.70A.030(2), (10); RCW 36.70A.050(3); RCW 36.70A.060(1)(a); RCW 36.70A.070 (internal consistency); RCW 36.70A.130(1), (3), (5); RCW 36.70A.170; RCW 36.70A.210(1); WAC 365-190-040(10)(b); or WAC 365-190-050 or is the de-designation inconsistent with the Clark County comprehensive plan? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*, pp. 10-12, pp. 14-15, pp. 43-44, pp. 84-86, pp. 94-95, Figure 14, Figure 15, Figure 22A, Figure 22B, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]. [FOCC/FW No. 2]
11. Did Amended Ordinance 2016-06-12's amendments to the comprehensive plan including the land use, rural, and capital facility plan elements, amendments to the Agriculture 20 (AG-20) District to create the Agriculture 10 (AG-10) District, amendments to the Forest 40 (FR-40) District to create the Forest 20 (FR-20)

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

12. Does the 2016 Plan Update violate WAC 365-195-050 and -060 in its designations of agriculture and forest lands, and in its amendment of resource-related development regulations and amended zoning maps, when the 2016 Plan Update relies on late-completed Clark County Issue Paper #9 which excluded meaningful public participation regarding soils considerations mandated by the GMA, when the findings and conclusions in Issue Paper #9 are not supported by fact, and when the 2016 Plan Update disregards and misapplies predominant parcel size, use capability, and long-term commercial significance? [CCCU No. E]

Rural Lands

13. Did Amended Ordinance 2016-06-12's adoption of a single "Rural," comprehensive plan designation, excluding limited areas of more intense rural development and similar categories, in the land use and rural elements and on Exhibit 2 the "County/UGA Comprehensive Plan Clark County, Washington" map, the county's future land use map, violate RCW 36.70A.020(2), (9), (10); RCW 36.70A.070 (preamble), (1), (5); or RCW

36.70A.130(1), (5) because the rural element fails to provide for a variety of rural densities and rural uses? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*, p. 10, pp. 14-15, p. 31, pp. 36-45, Chapter 3 Rural and Natural Resource Element, and Figure 24A; and Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]. [FOCC/FW No. 4]

14. Does the 2016 Plan Update violate the GMA and interpreting case law because the County unlawfully applied assumptions from a rural vacant buildable lands model (RVBLM) to cap rural growth projections? RCW 36.70A.110(2); WAC 365-196-425(2); *Clark County Natural Resources Council v. Clark County Citizens United, Inc.*, 94 Wn. App. 670, 675-77, 942 P.2d 941 (1999). [CCCU No. F]
15. Does the 2016 Plan Update violate WAC 365-196-425 in its designations of rural lands, and in its amendment of rural-related development regulations and zoning maps, when the 2016 Plan Update disregards and misapplies predominant parcel size and density and rural character? [CCCU No. G]
16. Does the 2016 Plan Update violate WAC 365-196-425(3)(a) and 365-196-210(27) because the County relied on a 90/10 urban to rural population split projection when the historical population allocation has averaged closer to an 85 urban / 15 rural split? [CCCU No. H]

Industrial Land Banks

17. Did the adoption of Amended Ordinance 2016-06-12 violate RCW 36.70A.367(6) and RCW 36.70A.130(1)(d) because the industrial land banks were designated after the deadline in RCW 70A.367(6) and RCW 36.70A.130(4)? See Amended Ordinance 2016-06-12 and Exhibit 1 Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035, p. 31, pp. 36-37, p. 97, p. 228, p.402, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]. [FOCC/FW No. 9]

18. Did the adoption of Amended Ordinance 2016-06-12 violated RCW 36.70A.130(1), (3), (5); RCW 36.70A.210(2), (3); the applicable provisions of RCW 36.70A.365(2); or RCW 36.70A.367(1), (2), (3), (4), (7) by failing to comply with the procedural and substantive requirements for industrial land banks? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*, p. 31, pp. 36-37, p. 97, p. 228, p. 402, Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]. [FOCC/FW No. 11]
19. Did the adoption of Amended Ordinance 2016-06-12 violate RCW 36.70A.020(8); RCW 36.70A.030(2), (10); RCW 36.70A.050(3); RCW 36.70A.060(1)(a); RCW 36.70A.070 (internal consistency); RCW 36.70A.130(1), (5); RCW 36.70A.170; WAC 365-190-040(10)(b); WAC 365-190-050; or is the ordinance inconsistent with Clark County comprehensive plan because it de-designated approximately 602.4 acres of agricultural lands of long-term commercial significance? See Amended Ordinance 2016-06-12 and Exhibit 1 Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035, pp. 10-12, pp. 14-15, p. 31, pp. 36-37, pp. 43-44, pp. 84-86, pp. 94-95, p. 97, p. 228, p. 402, Figure 22A, Figure 22B, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County Washington [map]. [FOCC/FW No. 10]

Challenges to Specific Elements of the 2016 Plan Update

20. Did Amended Ordinance 2016-06-12's adoption of the transportation element, including an admitted deficit of \$158,104,000 for the 20-year transportation facility plan,¹ violate RCW 36.70A.020(3), (12); RCW 36.70A.070 (preamble), (1), (6); or RCW 36.70A.130(1), (3), (5)? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*, Chapter 5 Transportation, Appendix A Transportation Issues, Appendix E

¹ Exhibit 1, *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*, Chapter 5, Transportation at 160.

Capital Facility Plans Review, Appendix G: Capital Facilities Financial Plan, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]. [FOCC/FW No. 6]

21. Did Amended Ordinance 2016-06-12's adoption of the capital facilities plan element violate RCW 36.70A.020(1), (12); RCW 36.70A.070 (preamble), (1), (3); or RCW 36.70A.130(1), (3), (5) because it does not comply with the requirements for capital facility plan elements? See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*, Chapter 6 Capital Facilities and Utilities Element, Appendix E Capital Facility Plans Review and Analysis, Appendix G: Capital Facilities Financial Plan, and Figure 24A; Exhibit 2 County/UGA Comprehensive Plan Clark County, Washington [map]; and Exhibit 3 County/UGA Zoning Clark County, Washington [map]. [FOCC/FW No. 7]
22. Does the 2016 Plan Update violate RCW 36.70A.100, RCW 36.70A.210, and WAC 365-196-305 because the 2016 Plan Update relies, in part, on amended countywide planning policies and an amended community framework plan, without the County first adopting a process to amend or update the CPPs or CFP that were incorporated in the 2016 Plan Update? [CCCU No. B]

Environmental Issues

23. Did Amended Ordinance 2016-06-12's adoption of the comprehensive plan's Chapter 4 Environmental Element and the failure to review and if necessary revise Subtitle 40.4 Clark County Code (CCC), Critical Areas and Shorelines, violated RCW 36.70A.020(9), (10); RCW 36.70A.040(3); RCW 36.70A.050(3); RCW 36.70A.060(2), (3); RCW 36.70A.130(1), (5), (7); RCW 36.70A.170; RCW 36.70A.172(1); WAC 365-190-080; WAC 365-190-090; WAC 365-190-100; WAC 365-190-110; WAC 365-190-120, WAC 365-190-130; WAC 365-195-905; WAC 365-195-915; WAC 365-196-485; or WAC 365-196-830 because they fail to adequately designate and protect critical areas, [sic] See Amended Ordinance 2016-06-12 and Exhibit 1 *Clark County, Washington 20 Year Comprehensive Growth Management Plan 2015-2035*

Chapter 4 Environmental Element and Figures 7 and 8.
[FOCC/FW No. 8]

24. Does the 2016 Plan Update violate RCW 43.21C.031 because the County never adopted or completed required review under the State Environmental Policy Act of the Growing Healthier Report, the Aging Readiness Plan, the Agriculture Preservation Strategies Report, and the Clark County Bicycle and Pedestrian Plan prior to relying on them in the 2016 Plan Update? [CCCU No. C]
25. Does the 2016 Plan Update violate RCW 43.21C.031 when the County failed to conduct environmental review under the State Environmental Policy Act on the remnants from approximately 36,000 square acres of land that were erroneously designated as agri-forst under the County's 1994 Comprehensive Plan? [CCCU No. K2]

APPENDIX 2

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RCW 34.05.570

Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34/05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

- (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;
- (iii) Arbitrary or capricious; or
- (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

RCW 36.70A.110(1) – (2)

Comprehensive plans—Urban growth areas.

(1) Each county that is required or chooses to plan under RCW 26.70.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350.

(2) Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve. As part of this planning process, each city within the county must include areas sufficient to accommodate the broad range of needs and uses that will accompany the projected urban growth including, as appropriate, medical, governmental, institutional, commercial, service, retail, and other nonresidential uses.

Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. In the case of urban growth areas contained totally within a national historical reserve, the city may restrict densities, intensities, and forms of urban growth as determined to be necessary and appropriate to protect the physical, cultural, or historic integrity of the reserve. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

Within one year of July 1, 1990, each county that as of June 1, 1991, was required or chose to plan under RCW 36.70A.040, shall begin consulting with each city located within its boundaries and each city shall propose the location of an urban growth area. Within sixty days of the date the county legislative authority of a county adopts its resolution of intention or of certification by the office of financial management, all other counties that are required or choose to plan under RCW 36.70A.040 shall begin this consultation with each city located within its boundaries. The county shall attempt to reach agreement with each city on the location of an urban growth area within which the city is located. If such an agreement is not reached with each city located within the urban growth area, the county shall justify in writing why it so designated the area an urban growth area. A city may object formally with the department over the designation of the urban growth area within which it is located. Where appropriate, the department shall attempt to resolve the conflicts, including the use of mediation services.

* * * *

RCW 36.70A.130(1); (5)(b)

**Comprehensive plans—Review procedures and schedules—
Amendments.**

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

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

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

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

* * * *

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

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

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

* * * *

RCW 36.70A.140

Comprehensive plans—Ensure public participation.

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

RCW 36.70A.280

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

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

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

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

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

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

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

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

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 35.05.530.

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

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

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

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

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

RCW 36.70A.290

Growth management hearings board—Petitions—Evidence.

(1) All requests for review to the growth management hearings board shall be initiated by filing a petition that includes a detailed statement of issues presented for resolution by the board. The board shall render written decisions articulating the basis for its holdings. The board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order.

(2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication as provided in (a) through (c) of this subsection.

(a) Except as provided in (c) of this subsection, the date of publication for a city shall be the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations, or amendment thereto, as is required to be published.

(b) Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

Except as provided in (c) of this subsection, for purposes of this section the date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

(c) For local governments planning under RCW 36.70A.040, promptly after approval or disapproval of a local government's shoreline master program or amendment thereto by the department of ecology as provided in RCW 90.58.090, the department of ecology shall publish a notice that the shoreline master program or amendment thereto has been approved or disapproved. For purposes of this section, the date of publication for the adoption or amendment of a shoreline master program is the date the department of ecology publishes notice that the shoreline master program or amendment thereto has been approved or disapproved.

(3) Unless the board dismisses the petition as frivolous or finds that the person filing the petition lacks standing, or the parties have filed an agreement to have the case heard in superior court as provided in RCW 36.70A.295, the board shall, within ten days of receipt of the petition, set a time for hearing the matter.

(4) The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

(5) The board, shall consolidate, when appropriate, all petitions involving the review of the same comprehensive plan or the same development regulation or regulations.

RCW 36.70A.320

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

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

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

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

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

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

RCW 36.70A.3201

Growth management hearings board—Legislative intent and finding.

The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 43.62.035

Determining population—Projections.

The office of financial management shall determine the population of each county of the state annually as of April 1st of each year and on or before July 1st of each year shall file a certificate with the secretary of state showing its determination of the population for each county. The office of financial management also shall determine the percentage increase in population for each county over the preceding ten-year period, as of April 1st, and shall file a certificate with the secretary of state by July 1st showing its determination. At least once every five years or upon the availability of decennial census data, whichever is later, the office of financial management shall prepare twenty-year growth management planning population projections required by RCW 36.70A.110 for each county that adopts a comprehensive plan under RCW 36.70A.040 and shall review these projections with such counties and the cities in those counties before final adoption. The county and its cities may provide to the office such information as they deem relevant to the office's projection, and the office shall consider and comment on such information before adoption. Each projection shall be expressed as a reasonable range developed within the standard state high and low projection. The middle range shall represent the office's estimate of the most likely population projection for the county. If any city or county believes that a projection will not accurately reflect actual population growth in a county, it may petition the office to revise the projection accordingly. The office shall complete the first set of ranges for every county by December 31, 1995.

A comprehensive plan adopted or amended before December 31, 1995, shall not be considered to be in noncompliance with the twenty-year growth management planning population projection if the projection used in the comprehensive plan is in compliance with the range later adopted under this section.

APPENDIX 3

WAC 242-03-510

Index of the record.

(1) Within thirty days of service of a petition for review, the respondent shall file with the board and serve a copy on the parties of an index listing all material used in taking the action which is the subject of the petition for review, including materials submitted in public comment. The index shall contain sufficient identifying information to enable unique documents to be distinguished.

(2) Concurrent with the filing of the index, the respondent shall make all documents in the index reasonably available to the petitioners for inspection and copying without the necessity for a public records request. In addition, the written or electronic record of the legislative proceedings where action was taken shall be available to the parties for inspection or transcription. Respondents may charge for the cost of copies of documents requested by other parties in accordance with RCW 42.56.120, as amended.

(3) Within seven days after the filing of the index, any other party may file a list of proposed additions to the index. To the extent such documents were submitted to the jurisdiction or a part of the jurisdiction's proceedings prior to the challenged action, they are presumed admissible subject to relevance. If the respondent objects to any proposed addition, the petitioner may bring a motion to supplement the record as provided in WAC 242-03-565.

(4) Respondent may file a corrected index to add, delete, or correct the listing of documents it considered, without the necessity for a motion to supplement the record, by no later than a week before the date for filing the petitioner's prehearing brief.

WAC 242-03-565

Motion to supplement the record.

Generally, the board will review only documents and exhibits taken from the record developed by the city, county, or state in taking the action that is the subject of review by the board and attached to the briefs of a party. A party by motion may request that the board allow the record to be supplemented with additional evidence.

(1) A motion to supplement the record shall be filed by the deadline established in the prehearing order, shall attach a copy of the document, and shall state the reasons why such evidence would be necessary or of substantial assistance to the board in reaching its decision, as specified in RCW 36.70A.290(4). The board may allow a later motion for supplementation on rebuttal or for other good cause shown.

(2) Evidence arising subsequent to adoption of the challenged legislation is rarely allowed except when supported by a motion to supplement showing the necessity of such evidence to the board's decision concerning invalidity.

(3) Exhibits attached to motions to supplement shall be cross-referenced in the briefs for the hearing on the merits, unless the presiding officer, in the order on motion to supplement, requires copies of supplemental exhibits to be attached also to the hearing on the merits brief.

WAC 365-196-425

Rural element.

Counties must include a rural element in their comprehensive plan. This element shall include lands that are not designated for urban growth, agriculture, forest, or mineral resources. The rural element shall permit land uses that are compatible with the rural character of such lands and provide for a variety of rural densities.

(1) Developing a written record. When developing the rural element, a county may consider local circumstances in establishing patterns of rural densities and uses, but must develop a written record explaining how the rural element harmonizes the planning goals in the act and meets the requirements of the act. This record should document local circumstances the county considered and the historic patterns of development in the rural areas.

(2) Establishing a definition of rural character.

(a) The rural element shall include measures that apply to rural development and protect rural character. Counties must define rural character to guide the development of the rural element and the implementing development regulations.

(b) The act identifies rural character as patterns of land use and development that:

(i) Allow open space, the natural landscape, and vegetation to predominate over the built environment;

(ii) Foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;

(iii) Provide visual landscapes that are traditionally found in rural areas and communities;

(iv) Are compatible with the use of land by wildlife and for fish and wildlife habitat;

(v) Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;

(vi) Generally do not require the extension of urban governmental services; and

(vii) Are consistent with protection of natural surface water flows and ground water and surface water recharge and discharge areas.

(c) Counties should adopt a locally appropriate definition of rural character. Rural areas are diverse in visual character and in density, across the state and across a particular county. Rural development may consist of a variety of densities and uses. It may, for example, include clustered residential development at levels consistent with the preservation of rural

character. Counties should define rural development both in terms of its visual character and in terms of the density and intensity of uses. Defining rural development in this way allows the county to use its definition of rural development both in its future land use designations and in its development regulations governing rural development.

(3) Rural densities.

(a) The rural element should provide for a variety of densities that are consistent with the pattern of development established in its definition of rural character. The rural comprehensive plan designations should be shown on the future land use map. Rural densities are a range of densities that:

- (i) Are compatible with the primary use of land for natural resource production;
- (ii) Do not make intensive use of the land;
- (iii) Allow open space, the natural landscape, and vegetation to predominate over the built environment;
- (iv) Foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;
- (v) Provide visual landscapes that are traditionally found in rural areas and communities;
- (vi) Are compatible with the use of the land by wildlife and for fish and wildlife habitat;
- (vii) Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;
- (viii) Generally do not require the extension of urban governmental services;
- (ix) Are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas; and
- (x) Do not create urban densities in rural areas or abrogate the county's responsibility to encourage new development in urban areas.

(b) Counties should perform a periodic analysis of development occurring in rural areas, to determine if patterns of rural development are protecting rural character and encouraging development in urban areas. This analysis should occur along with the urban growth area review required in RCW 36.70A.130(3)(a). The analysis may include the following:

- (i) Patterns of development occurring in rural areas.
- (ii) The percentage of new growth occurring in rural versus urban areas.
- (iii) Patterns of rural comprehensive plan or zoning amendments.

(iv) Numbers of permits issued in rural areas.
(v) Numbers of new approved wells and septic systems.
(vi) Growth in traffic levels on rural roads.
(vii) Growth in public facilities and public services costs in rural areas.

(viii) Changes in rural land values and rural employment.
(ix) Potential build-out at the allowed rural densities.
(x) The degree to which the growth that is occurring in the rural areas is consistent with patterns of rural land use and development established in the rural element.

(4) Rural governmental services.

(a) Rural governmental services are those public facilities and services historically and typically delivered at intensities usually found in rural areas, and may include the following:

(i) Domestic water system;
(ii) Fire and police protection;
(iii) Transportation and public transportation; and
(iv) Public utilities, such as electrical, telecommunications and natural gas lines.

(b) Rural services do not include storm or sanitary sewers. Urban governmental services that pass through rural areas when connecting urban areas do not constitute an extension of urban services into a rural area provided those public services are not provided in the rural area. Sanitary sewer service may be provided only if it:

(i) Is necessary to protect basic public health and safety and the environment;
(ii) Is financially supportable at rural densities; and
(iii) Does not permit urban development.

(c) When establishing levels of service in the capital facilities and transportation element, each county should establish rural levels of service, for those rural services that are necessary for development, to determine if it is providing adequate public facilities. Counties are not required to use a single level of service for the entire rural area and may establish varying levels of service for public services in different rural areas. Where private purveyors or other public entities provide rural services, counties should coordinate with them to establish and document appropriate levels of service.

(d) Rural areas typically rely on natural systems to adequately manage stormwater and typically rely on on-site sewage systems to treat wastewater. Development in rural areas also typically relies on individual wells, exempt wells or small water systems for water. Counties should

ensure the densities it establishes in rural areas do not overwhelm the ability of natural systems to provide these services without compromising either public health or the vitality of the surrounding ecosystem.

(e) Rural road systems are not typically designed to handle large traffic volumes. Local conditions may influence varying levels of service for rural road system, and level of service standards for rural arterials should be set accordingly. Generally, level of service standards should reflect the expectation that high levels of local traffic and the associated road improvements are not usually associated with rural areas.

(f) Levels of public services decrease, and corresponding costs increase when demand is spread over a large area. This is especially true for public safety services and both school and public transportation services. Counties should provide clear expectations to the public about the availability of rural public services. Counties should ensure the densities it establishes in rural areas do not overwhelm the capacity of rural public services.

(5) Innovative zoning techniques.

(a) Innovative zoning techniques allow greater flexibility in rural development regulations to create forms of development that are more consistent with rural character than forms of development generated by conventional large-lot zoning. Innovative zoning techniques may allow forms of rural development that:

(i) Result in rural development that is more visually compatible with the surrounding rural areas;

(ii) Maximize the availability of rural land for either resource use or wildlife habitat;

(iii) Increase the operational compatibility of the rural development with use of the land for resource production;

(iv) Decrease the impact of the rural development on the surrounding ecosystem;

(v) Does not allow urban growth; and

(vi) Does not require the extension of urban governmental services.

(b) Rural clusters. One common form of innovative zoning technique is the rural cluster. A rural cluster can create smaller individual lots than would normally be allowed in exchange for open space that preserves a significant portion of the original parcel.

(i) When calculating the density of development for zoning purposes, counties should calculate density based on the number of dwelling units over the entire development parcel, rather than the size of the individual lots created.

(ii) The open space portion of the original parcel should be held by an easement, parcel or tract for open space or resource use. This should be held in perpetuity, without an expiration date.

(iii) If a county allows bonus densities in a rural cluster, the resulting density after applying the bonus must be a rural density.

(iv) Rural clusters may not create a pattern of development that relies on or requires urban governmental services. Counties should establish a limit on the size of the residential cluster so that a cluster does not constitute urban growth in a rural area. A very large project may create multiple smaller clusters that are separated from each other and use a different access point to avoid creating a pattern of development that would constitute urban growth.

(v) Development regulations governing rural clusters should include design criteria that preserve rural visual character.

(6) Limited areas of more intense rural development. The act allows counties to plan for isolated pockets of more intense development in the rural area. These are referred to in the act as limited areas of more intense rural development or LAMIRDs.

(a) LAMIRDs serve the following purposes:

(i) To recognize existing areas of more intense rural development and to minimize and contain these areas to prevent low density sprawl;

(ii) To allow for small-scale commercial uses that rely on a rural location;

(iii) To allow for small-scale economic development and employment consistent with rural character; and

(iv) To allow for redevelopment of existing industrial areas within rural areas.

(b) An existing area or existing use is one that was in existence on the date the county became subject to all of the provisions of the act:

(i) For a county initially required to fully plan under the act, on July 1, 1990.

(ii) For a county that chooses to fully plan under the act, on the date the county adopted the resolution under RCW 36.70A.040(2).

(iii) For a county that becomes subject to all of the requirements of the act under RCW 36.70A.040(5), on the date the office of financial management certifies the county's population.

(c) Counties may allow for more intensive uses in a LAMIRD than would otherwise be allowed in rural areas and may allow public facilities and services that are appropriate and necessary to serve LAMIRDs subject to the following requirements:

(i) Type 1 LAMIRDs - Isolated areas of existing more intense development. Within these areas, rural development consists of infill, development, or redevelopment of existing areas. These areas may include a variety of uses including commercial, industrial, residential, or mixed-use areas. These may be also characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.

(A) Development or redevelopment in LAMIRDs may be both allowed and encouraged provided it is consistent with the character of the existing LAMIRD in terms of building size, scale, use, and intensity. Counties may allow new uses of property within a LAMIRD, including development of vacant land.

(B) When establishing a Type I LAMIRD, counties must establish a logical outer boundary. The purpose of the logical outer boundary is to minimize and contain the areas of more intensive rural development to the existing areas. Uses, densities or intensities not normally allowed in a rural area may be allowed inside the logical outer boundary consistent with the existing character of the LAMIRD. Appropriate and necessary levels of public facilities and services not otherwise provided in rural areas may be provided inside the logical outer boundary.

(C) The logical outer boundary must be delineated primarily by the built environment as it existed on the date the county became subject to the planning requirements of the act.

(I) Some vacant land may be included within the logical outer boundary provided it is limited and does not create a significant amount of new development within the LAMIRD.

(II) Construction that defines the built environment may include above or below ground improvements. The built environment does not include patterns of vesting or preexisting zoning, nor does it include roads, clearing, grading, or the inclusion within a sewer or water service area if no physical improvements are in place. Although vested lots and structures built after the county became subject to the act's requirements should not be considered when identifying the built environment, they may be included within the logical outer boundary as infill.

(III) The logical outer boundary is not required to strictly follow parcel boundaries. If a large parcel contains an existing structure, a county may include part of the parcel in the LAMIRD boundary without including the entire parcel, to avoid a significant increase in the amount of development allowed within the LAMIRD.

(D) The fundamental purpose of the logical outer boundary is to minimize and contain the LAMIRD. Counties should favor the configuration that best minimizes and contains the LAMIRD to the area of

existing development as of the date the county became subject to the planning requirements of the act. When evaluating alternative configurations of the logical outer boundary, counties should determine how much new growth will occur at build out and determine if this level of new growth is consistent with rural character and can be accommodated with the appropriate level of public facilities and public services. Counties should use the following criteria to evaluate various configurations when establishing the logical outer boundary:

(I) The need to preserve the character of existing natural neighborhoods and communities;

(II) Physical boundaries such as bodies of water, streets and highways, and land forms and contours;

(III) The prevention of abnormally irregular boundaries; and

(IV) The ability to provide public facilities and public services in a manner that does not permit low-density sprawl.

(E) Once a logical outer boundary has been adopted, counties may consider changes to the boundary in subsequent amendments. When doing so, the county must use the same criteria used when originally designating the boundary. Counties should avoid adding new undeveloped parcels as infill, especially if doing so would add to the capacity of the LAMIRD.

(ii) Type 2 LAMIRDs - Small-scale recreational uses. Counties may allow small-scale tourist or recreational uses in rural areas. Small-scale recreational or tourist uses rely on a rural location and setting and need not be principally designed to serve the existing and projected rural population.

(A) Counties may allow small-scale tourist or recreational uses through redevelopment of an existing site, intensification of an existing site, or new development on a previously undeveloped site, but not new residential development. Counties may allow public services and facilities that are limited to those necessary to serve the recreation or tourist uses and that do not permit low-density sprawl. Small-scale recreational or tourist uses may be added as accessory uses for resource-based industry. For accessory uses on agricultural lands of long-term commercial significance, see WAC 365-196-815.

(B) Counties are not required to designate Type 2 LAMIRDs on the future land use map and may allow them as a conditional use. If using a conditional use process, counties should include in their development regulations conditions that address all the statutory criteria for the location of a Type 2 LAMIRD. Conditions must assure that Type 2 LAMIRDs:

(I) Are isolated, both from urban areas and from each other.
Conditions should include spacing criteria to avoid creating a pattern of strip development;

(II) Are small in scale;

(III) Are consistent with rural character;

(IV) Rely on a rural location or a natural setting;

(V) Do not include new residential development;

(VI) Do not require services and facilities beyond what is available in the rural area; and

(VII) Are operationally compatible with surrounding resource-based industries.

(iii) Type 3 LAMIRDs - Small-scale businesses and cottage industries. Counties may allow isolated small-scale businesses and cottage industries that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents, through the intensification of development on existing lots or on undeveloped sites.

(A) Counties may allow the expansion of small-scale businesses in rural areas as long as those small-scale businesses are consistent with the rural character of the area as defined by the county in the rural element. Counties may also allow new small-scale businesses to use a site previously occupied by an existing business as long as the new small-scale business conforms to the rural character of the area. Any public services and public facilities provided to the cottage industry or small-scale business must be limited to those necessary to serve the isolated nonresidential use and shall be provided in a manner that does not permit low-density sprawl.

(B) Counties are not required to designate Type 3 LAMIRDs on the future land use map and may allow them as a conditional use. If using a conditional use process, counties should include in their development regulations conditions that address all the statutory criteria for the location of a Type 3 LAMIRD. Conditions must assure that Type 3 LAMIRDs:

(I) Are isolated, both from urban areas and from each other.

Conditions should include spacing criteria to avoid creating a pattern of strip development;

(II) Are small in scale;

(III) Are consistent with rural character;

(IV) Do not include new residential development;

(V) Do not require public services and facilities beyond what is available in the rural area; and

(VI) Are operationally compatible with surrounding resource-based industries.

(d) Major industrial developments and master planned resorts governed by other requirements. Counties may not use the provisions of RCW 36.70A.070(5)(d)(iii) to permit a major industrial development or a master planned resort. These types of development must comply with the requirements of RCW 36.70A.360 through 36.70A.368. For more information about major industrial developments, see WAC 365-196-465. For more information about master planned resorts, see WAC 365-196-460.

WAC 365-196-600

Public participation.

(1) Requirements.

(a) Each county and city planning under the act must establish procedures for early and continuous public participation in the development and amendment of comprehensive plans and development regulations. The procedures are not required to be reestablished for each set of amendments.

(b) The procedures must provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.

(c) Errors in exact compliance with the established procedures do not render the comprehensive plan or development regulations invalid if the spirit of the procedures is observed.

(2) Record of process.

(a) Whenever a provision of the comprehensive plan or development regulation is based on factual data, a clear reference to its source should be made part of the adoption record.

(b) The record should show how the public participation requirement was met.

(c) All public hearings should be recorded.

(3) Recommendations for meeting public participation requirements. These recommendations are a list of suggestions for meeting the public participation requirement.

(a) Designing the public participation program.

(i) Implementation of the act requires a series of interrelated steps, including: Development of the initial comprehensive plan, evaluating amendments as part of the docket cycle, conducting the periodic update and reviewing the urban growth boundaries, amending development regulations, and conducting subarea planning. Each of these has different levels of significance and different procedural requirements.

(ii) Counties and cities are not required to establish individual public participation programs for each individual amendment. Counties and cities may wish to consider establishing a public program for annual amendments, and establishing separate or updated programs for major periodic updates. When developing a public participation plan for a project not covered by the existing public participation plan, a county or city should develop a public participation plan tailored to the type of

action under consideration. This public participation plan should be focused on the type of public involvement appropriate for that type of action.

(iii) The public participation plan should identify which procedural requirements apply for the type of action under consideration and how the county or city intends to meet those requirements.

(iv) To avoid duplication of effort, counties and cities should integrate public involvement required by the State Environmental Policy Act, chapter 43.21C RCW, and rules adopted thereunder, into the overall public participation plan.

(v) Where a proposed amendment involves shorelines of the state, a county or city should integrate the public participation requirements of the Shoreline Management Act, chapter 90.58 RCW, into its public participation plan, as appropriate.

(vi) Once established, the public participation plan must be broadly disseminated.

(b) Visioning. When developing a new comprehensive plan or a significant update to an existing comprehensive plan, counties and cities should consider using a visioning process. The public should be involved, because the purpose of a visioning process is to gain public input on the desired features of the community. The comprehensive plan can then be designed to achieve these features.

(c) Planning commission. The public participation program should clearly describe the role of the planning commission, ensuring consistency with requirements of chapter 36.70, 35.63, or 35A.63 RCW.

(4) Each county or city should try to involve a broad cross-section of the community, so groups not previously involved in planning become involved.

(5) Counties and cities should take a broad view of public participation. The act contains no requirements or qualifications that an individual must meet in order to participate in the public process. If an individual or organization chooses to participate, it is an interested party for purposes of public participation.

(6) Providing adequate notice.

(a) Counties and cities are encouraged to consider a variety of opportunities to adequately communicate with the public. These methods of notification may include, but are not limited to, traditional forms of mailed notices, published announcements, electronic mail, and internet web sites to distribute informational brochures, meeting times, project timelines, and design and map proposals to provide an opportunity for the public to participate.

(b) Counties and cities must provide effective notice. In order to be effective, notice must be designed to accomplish the following:

(i) Notice must be timely, reasonably available and reasonably likely to reach interested persons. Notice of all events where public input is sought should be broadly disseminated at least one week in advance of any public hearing. Newspaper or online articles do not substitute for the requirement that jurisdictions publish the action taken. When appropriate, notices should announce the availability of relevant draft documents and how they may be obtained.

(ii) Broad dissemination means that a county or city has made the documents widely available and provided information on how to access the available documents and how to provide comments. Examples of methods of broad dissemination may include:

(A) Posting electronic copies of draft documents on the county and city official web site;

(B) Providing copies to local libraries;

(C) Providing copies as appropriate to other affected counties and cities, state and federal agencies;

(D) Providing notice to local newspapers; and

(E) Maintaining a list of individuals who have expressed an interest and providing them with notice when new materials are available.

(iii) Certain proposals may also require particularized notice to specific individuals if required by statute or adopted local policy.

(iv) The public notice must clearly specify the nature of the proposal under consideration and how the public may participate. Whenever public input is sought on proposals and alternatives, the relevant drafts should be available. The county or city must make available copies of the proposal that will be available prior to the public hearing so participants can comment appropriately. The notice should specify the range of alternatives considered or scope of alternatives available for public comment in accordance with RCW 36.70A.035(2)(b)(i) and (ii).

(7) Receiving public comment.

(a) Public meetings on draft comprehensive plans. Once a comprehensive plan amendment or other proposal is completed in draft form, or as parts of it are drafted, the county or city may consider holding a series of public meetings or workshops at various locations throughout the jurisdiction to obtain public comments and suggestions.

(b) Public hearings. When the final draft of the comprehensive plan is completed, at least one public hearing should be held prior to the

presentation of the final draft to the county or city legislative authority adopting it.

(c) Written comment. At each stage of the process when public input is sought, opportunity should be provided to make written comment.

(d) Attendance for all meetings and hearings to which the public is invited should be free and open. At hearings all persons desiring to speak should be allowed to do so. A county or city may establish a reasonable time limitation on spoken presentations during meetings or public hearings, particularly if written comments are allowed.

(8) Continuous public involvement.

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

(b) Ending the opportunity for comment prior to deliberation. After the end of public comment, the local government legislative body may hold additional meetings to deliberate on the information obtained in the public hearing.

(c) Additional meetings may be necessary if the public hearings provided the county or city with new evidence or information they wish to consider. If during deliberation, the county or city legislative body identifies new information for consideration after the record of adoption has been closed, then it must provide further opportunity for public comment so this information can be included in the record.

(9) Considering changes to an amendment after the opportunity for public review has closed.

(a) If the county or city legislative body considers a change to an amendment, and the opportunity for public review and comment has already closed, then the county or city must provide an opportunity for the public to review and comment on the proposed change before the legislative body takes action.

(b) The county or city may limit the opportunity for public comment to only the proposed change to the amendment.

(c) Although counties and cities are required to provide an opportunity for public comment, alternatives to a scheduled public hearing may suffice. Adequate notice must be provided indicating how the public may obtain information and offer comments.

(d) A county or city is not required to provide an additional opportunity for public comment under (a) of this subsection if one of the following exceptions applies (see RCW 36.70A.035(2)(a)):

(i) An environmental impact statement has been prepared under chapter 43.21C RCW, and the proposal falls within the range of alternatives considered in the environmental impact statement;

(ii) The proposed change is within the range of alternatives available for public comment. When initiating the public participation process, a county or city should consider defining the range of alternatives under consideration;

(iii) The proposed change only corrects typographical errors, corrects cross-references, makes address or name changes, or clarifies language of a proposed ordinance or resolution without changing its effect;

(iv) The proposed change is to a resolution or ordinance making a capital budget decision as provided in RCW 36.70A.120; or

(v) The proposed change is to an ordinance or resolution enacting a moratorium or interim control adopted in compliance with RCW 36.70A.390.

(e) If a county or city adopts an amendment without providing an additional opportunity for public comment as described under (a) of this subsection, the findings of the adopted ordinance or resolution should identify which exception under RCW 36.70A.035(2)(b) applies.

(10) Any amendment to the comprehensive plan or development regulation must follow the applicable procedural requirements and the county or city public participation plan. A county or city should not enter into an agreement that is a de facto amendment to the comprehensive plan accomplished without complying with the statutory public participation requirements. Examples of a de facto amendment include agreements that:

(a) Obligate the county or city, or authorizes another party, to act in a manner that is inconsistent with the comprehensive plan;

(b) Authorize an action the comprehensive plan prohibits; or

(c) Obligate the county or city to adopt a subsequent amendment to the comprehensive plan.

APPENDIX 4

CLARK COUNTY CODE 40.510.040
Type IV Process – Legislative Decisions

A. Procedure.

A Type IV procedure may require one (1) or more hearings before the planning commission and does require one (1) or more hearings before the board.

B. Public Notice.

At least fifteen (15) calendar days before the date of the first planning commission hearing for an application subject to Type IV review, the responsible official shall:

1. Prepare a notice of application that includes the following information:
 - a. The case file number(s);
 - b. A description and map of the area that will be affected by the application; if approved, which is reasonably sufficient to inform the reader of its location;
 - c. A summary of the proposed application(s);
 - d. The place, days and times where information about the application may be examined and the name and telephone number of the county representative to contact about the application;
 - e. A statement that the notice is intended to inform potentially interested parties about the hearing and to invite interested parties to appear orally or by written statement at the hearing;
 - f. The designation of the review authority, the date, time and place of the hearing, and a statement that the hearing will be conducted in accordance with the rules of procedure adopted by the review authority;
 - g. A statement that a staff report and, whenever possible, a consolidated SEPA review or integrated growth management document, will be available for inspection at no cost at least fifteen (15) calendar days before the hearing and will be provided at reasonable cost; and

- h. A general explanation of the requirements for submission of testimony and the procedure for the conduct of hearings.
2. Mail a copy of a notice prepared under Section 40.510.040(B)(1) to:
 - a. Parties who request notice of such matters;
 - b. The neighborhood association in whose area the property in question is situated, based on the list of county recognized neighborhood associations kept by the responsible official; and
 - c. To other people the responsible official believes may be affected by the proposed action;
3. Publish in a newspaper of general circulation a summary of the notice, including the date, time and place of the hearing and a summary of the subject of the Type IV process; and
4. Provide other notice deemed appropriate and necessary by the responsible official based on the subject of the Type IV process.

C. Staff Report.

At least fifteen (15) calendar days before the date of the first hearing, the responsible official shall issue a written staff report, SEPA evaluation and recommendation regarding the application(s), shall make available to the public a copy of the staff report and consolidated SEPA evaluation for review and inspection, and shall mail a copy of the consolidated recommendation to the review authority. The responsible official shall mail or provide a copy of the staff report at reasonable charge to other parties who request it.

D. Public Hearings.

1. Public hearings shall be conducted in accordance with the rules of procedure adopted by the review authority, except to the extent waived by the review authority. A public hearing shall be recorded electronically.
2. At the conclusion of a planning commission hearing, the planning commission shall announce one (1) of the following actions:
 - a. That the hearing is continued. If the hearing is continued to a place, date and time certain, then additional notice of the

continued hearing is not required to be mailed, published or posted. If the hearing is not continued to a place, date and time certain, then notice of the continued hearing shall be given as though it was the initial hearing before the planning commission; or

b. That the planning commission recommends against or in favor of approval of the application(s) with or without certain changes, or that the planning commission will recommend neither against nor for approval of the application(s), together with a brief summary of the basis for the recommendation.

3. At least fifteen (15) calendar days before the date of the first board hearing, the responsible official shall:

a. Prepare a notice that includes the information listed in Section 40.510.040(B)(1) except the notice shall be modified as needed:

(1) To reflect any changes made in the application(s) during the planning commission review,

(2) To reflect that the board will conduct the hearing and the place, date and time of the board hearing, and

(3) To state that the planning commission recommendation, staff report, and SEPA evaluation are available for inspection at no cost and copies will be provided at reasonable cost;

b. Mail a copy of that notice to the parties identified in Section 40.510.040(B)(2) and to parties who request it in writing;

c. Publish in a newspaper of general circulation a summary of the notice, including the date, time and place of the hearing and a summary of the subject of the Type IV process; and

d. Provide other notice deemed appropriate and necessary by the responsible official based on the subject of the Type IV process.

4. At the conclusion of its initial hearing, the board may continue the hearing or may adopt, modify or give no further consideration to the application or recommendations. If the hearing is continued to a place, date and time certain, then additional notice of the continued hearing is not required to be provided. If the hearing is not continued to a

place, date and time certain, then notice of the continued hearing shall be given as though it was the initial hearing before the board.

(Amended: Ord. 2007-11-13)

E. Appeal of Board's Decision.

The action of the board in approving or rejecting a recommendation of the planning commission shall be final and conclusive unless a land use petition is timely filed in superior court pursuant to RCW 36.70C.040 (Section 705 of Chapter 347, Laws of 1995); provided, that no person having actual prior notice of the proceedings of the planning commission or the board's hearings shall have standing to challenge the board's action unless such person was a party of record at the planning commission hearing.

CLARK COUNTY PROSECUTING ATTORNEY

September 14, 2018 - 9:40 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
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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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