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FILED
COURT OF APPEALS
DIVISION II

No. 34172-7-II

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STATE OF WASHINGTON

BY _____
DEPUTY

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

THURSTON COUNTY,
Petitioners

v.

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

And

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

PETITION FOR DISCRETIONARY REVIEW

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STATE OF WASHINGTON
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I. IDENTITY OF PETITIONER

Thurston County (County), by and through its attorneys of record, Edward G. Holm, Prosecuting Attorney, Richard L. Settle, Special Deputy Prosecuting Attorney, and Jeffrey G. Fancher, Deputy Prosecuting Attorney.

II. DECISION BELOW

Thurston County v. Western Washington Growth Management Hearings Board, No. 34172-7-II, slip op. (Wash. Ct. App. April 3, 2007).

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the Western Washington Growth Management Hearings Board's (Board) decision that the Board has jurisdiction to review longstanding provisions in a county or city's Comprehensive Plan, many years after they were adopted, whenever a county or city performs the seven-year review of its plan and regulations or ten-year review of its urban growth area (UGA), required by RCW 36.70A.130, even though the challenged provisions were left unchanged in the seven-year or ten-year update, were not appealed within 60 days of their original adoption, or, if appealed, were upheld in a previous board decision?
2. Whether the Court of Appeals erred in affirming the Board's decision that ignored the presumption of validity owed to the County's minor modifications of its UGA and unlawfully imposed upon the County the burden to justify the size of its urban growth area rather than recognizing

that Petitioners had the burden to prove that the modifications of the UGAs were clearly erroneous under RCW 36.70A.320 and 3201 of the Growth Management Act (GMA)?

3. Whether the Court, in affirming the Board's decision that the County's UGAs were too large (even though they were only modestly modified as a result of the required ten-year review) and in requiring the County to justify the size of its UGA, contrary to GMA's presumption of validity and assignment of burden of proof, failed to defer to and accord the County sufficient discretion in deciding how to plan for growth, as required by RCW 36.70A.3201 and RCW 36.70A.110(2)?

4. Whether the Court erred in affirming the Board's decision that resource lands interspersed within the rural area may not be considered in determining whether the County provided for variety of rural densities and whether the Court and the Board failed to defer to and accord the County discretion to characterize resource lands as a component of the County's rural lands, as required by RCW 36.70A.320 and 36.70A.3201?

IV. STATEMENT OF THE CASE

A. Introduction.

Just as Thurston County was a pioneer in growth management before the GMA was enacted, the County is currently blazing the GMA update trail which all GMA counties and cities in the state must follow.

Since this is the first challenge of a GMA update to be litigated, this appeal provides a timely opportunity for the Supreme Court to interpret RCW 36.70A.130 and provide essential guidance to all of the local governments that must travel the GMA update trail, and to the Growth Boards and lower courts in their review of challenged updates.

This case involves 1000 Friends' challenge to Thurston County's seven-year Comprehensive Plan ("Plan") and ten-year UGA reviews required under RCW 36.70A.130. With the exception of two minor UGA modifications, the challenged Plan provisions have been in place for years and were not modified by the 2004 review. The Court of Appeals affirmed the Board's decision that it has jurisdiction to reach back and address these unmodified provisions no matter how long ago they were adopted under the GMA. In addition, the Court failed to recognize the broad discretion accorded to counties and cities by the GMA with regard to local policy choices for UGAs and rural lands.

B. The History Of Thurston County's Comprehensive Plan, Population Growth, And The Sizing Of The UGAs

Thurston County's initial Comprehensive Plan was adopted in 1975 and first overhauled in 1988. AR 752. Following the legislature's adoption of the GMA in 1990, Thurston County again updated its Plan to bring it into compliance with new GMA requirements. AR 752. Rather

than reviewing its Plan only once every seven years, as now required by RCW 36.70A.130, the County has reviewed and, if needed, amended, its Plan on an annual basis, AR 754, to keep pace with the changing conditions and needs of a growing county. AR 754.

Thurston County has been among the state's fastest growing counties since the 1960s. AR 755. The County experienced a population increase of over 40% in the 1960s, 61% in the 1970s, 30% in the 1980s and 29% in the 1990s. AR 2084. The County's population grew by over 46,000 between 1990 and 2000, with the majority of the growth occurring in the UGA. AR 755. In 2003, the County's population was approximately 214,800 and is projected to exceed 330,000 by 2025, an increase of 35% over the twenty-year period. AR 755.

In 1983, seven years before the GMA was enacted, Thurston County, along with the cities of Olympia, Lacey and Tumwater led the way for growth management in Washington State by signing an Urban Growth Management Agreement. AR 760. That early Agreement included an urban growth management boundary around the three cities to limit their expansion for 20 years. AR 760.

Following the initial agreement between the cities and the County, the municipalities continued to work together. In June of 1988, the County and the Cities of Lacey, Olympia and Tumwater entered into the

“Memorandum of Understanding: An Urban Growth Management Agreement.” AR 1660-1674. After the 1990 enactment of the GMA, Thurston County adopted Resolution No. 10452 in 1993 designating GMA compliant interim UGAs for the cities of Lacey, Olympia and Tumwater. AR 1675-1679. In 1994, Thurston County adopted Resolution No. 10683 which established a final UGA for the City of Olympia consistent with the GMA. This UGA was upheld by the Board in *Reading, et al., v Thurston County*, WWGMHB 94-2-0019 (Final Decision And Order 3/23/95)¹. In 1994, the Thurston County Board of County Commissioners also adopted final UGAs for the cities of Tenino, Tumwater, Lacey and Yelm, and these UGAs were never challenged. AR 1684-1738.

The GMA requires that the UGA be sufficient in size and permitted density to accommodate the urban development necessary to house and serve the population increase projected by the Washington State Office of Financial Management (“OFM”) for the succeeding twenty-year period. AR 765. RCW 36.70A.110(2). In 2003, the Legislature adopted a new GMA provision emphasizing that local plans and development regulations must “provide sufficient capacity of land suitable for

¹ “Where a unique three-city configuration coupled with excellent anti-sprawl goals, policies, and strategies are present in a comprehensive plan, the UGA boundary complied with the GMA even though from a strict numerical formula it was overly large.” *Reading v. Thurston County*, WWGMHB 94-2-0019 (Final Decision And Order 3/23/95, page 231 of the WWGMHB January 2005 digest update. See Appendix E.

development...to accommodate their allocated housing and employment growth” in accordance with OFM population forecasts. RCW 36.70A.115.

To ensure that there will be an adequate amount of land suitable for development in the UGAs, as required by RCW 36.70A.115, and in compliance with the review and evaluation program required by RCW 36.70A.215, the County has established a buildable lands program requiring jurisdictions to track their ability to accommodate population growth. AR 766. The County’s 2003 buildable lands report found that a sufficient residential land supply exists to accommodate 25 years of projected growth in all jurisdictions within Thurston County. AR 766.

C. The 2004 Review And Update Of County UGA designations.

In 1997, the Legislature amended RCW 36.70A.130 to require that each county and city subject to GMA planning requirements “review and, if needed, revise” its comprehensive plan and development regulations “on or before” specified dates and every seven years thereafter. RCW 36.70A.130(1)(a and 4). Counties also are required to review their UGAs every ten years. RCW 36.70A.130(3).

Thurston County was in the group of counties required to conduct the prescribed seven-year review by the earliest of the specified dates, “[o]n or before December 1, 2004...” RCW 36.70A.130(4)(a). The County elected to perform its ten-year UGA review concurrently with the

Comprehensive Plan seven-year review. AR 688-690. The combined review included updates to the County's UGA and Comprehensive Plan which included amendments to the joint comprehensive plans with several of the cities located within Thurston County. AR 670-671; AR 688-697.

The 2004 revisions of the Comprehensive Plan were made to ensure internal consistency and compliance with the GMA. AR 689. As for the ten-year review of the UGA, the 2004 review resulted in the *de minimus* addition of 225 acres to the UGA's 63,102 acres (an increase of approximately one-third of one percent). Only two UGAs were involved in this minor addition. AR 697. First, Tenino's UGA revision resulted in a reduction of 30 acres by taking property in a conservation trust out of the UGA and adding land that was suitable for urban uses. AR 1405-1407. Second, a new UGA designation was provided for the Town of Bucoda that totaled 255 acres. This was done to direct development away from a sensitive aquifer area. AR 1767-1773, 1788.

D. The Comprehensive Plan's Designations of Rural And Resource Land.

The Comprehensive Plan designates all lands outside of the County's UGA as rural. Within the rural area, the Plan designates agricultural and forest resource lands encompassing 156,775 acres or 39.3% of the land area of the County. AR 774. These designated resource

lands, interspersed in the rural area, have maximum densities that are much lower than 1 unit per 5 acres, including 1 unit per 20 acres, 1 unit per 40 acres, and 1 unit per 80 acres. AR 775-777. Lands classified as rural resource and residential within the rural area, with maximum density of 1 unit per 5 acres, comprise 192,708 acres or 48.3% of the County's land area. AR 775.

E. Procedural History

On January 21, 2005, 1000 Friends filed its Petition for Review with the Board. The Petition raised issues regarding rural densities, the size of UGAs, and the County's criteria for designating agricultural lands of long term commercial significance. AR 1-3. After a hearing on the merits, the Board issued its Final Decision And Order, concluding that the County's Plan was noncompliant with GMA requirements because: (1) the County failed to establish a variety of rural densities, as required by RCW 36.70A.070(5)(b); (2) the County's UGAs, by containing greater than 25% excess of supply over projected demand for urban lands through 2025, did not comply with RCW 36.70A.110; and (3) the County's criteria for designation of agricultural resource lands, which had been adopted a decade ago and reaffirmed in November, 2003, did not comply with RCW 36.70A.060 and 36.70A.170. *See* Appendix B.

The County filed a timely motion for reconsideration of the

Board's final order, reiterating the lack of standing of 1000 Friends and arguing that the Board did not have subject matter jurisdiction over the County's designation criteria for agricultural lands of long term commercial significance because that part of the Comprehensive Plan review and update had been adopted in November 2003 and was not appealed within 60 days. AR 2577-2583. The Board denied the motion for reconsideration by order dated August 11, 2005, but issued a Certificate of Appealability. AR 2599-2607. See Appendix C & D.

The County appealed the Board's decision. On April 3, 2007, the Court of Appeals issued its decision in *Thurston County v. Western Washington Growth Management Hearings Board*, No. 34172-7-II, slip op. (Wash. Ct. App. April 3, 2007). See Appendix A.

V. ARGUMENT

A. The Petition Raises Substantial Issues of Public Interest That Should Be Determined By The Supreme Court.

The GMA, as amended in recent years, requires counties and cities to review and, if needed, revise their comprehensive plans and development regulations by a specified date and every seven years thereafter. RCW 36.70A.130(1). Thurston County was required to complete this periodic review by the earliest specified date, December 1, 2004 and met this deadline. 1000 Friends of Washington, now known as

Futurewise, (1000 Friends) petitioned the Board, challenging a number of provisions of the County's Comprehensive Plan and Development Regulations. Most of the challenged provisions had been adopted years ago and were not changed in the periodic review.

The County argued that the Board lacked jurisdiction to review preexisting provisions of the County Plan and Regulations that were unchanged in the periodic review. The Board and Court of Appeals disagreed in sweeping rulings that all existing Plan provisions and Regulations become subject to Board review anew whenever a local periodic review is conducted, no matter how long ago the preexisting provisions were adopted and even though they were not appealed within the 60-day statute of limitation or, if appealed to the Board, were upheld. The Court also held that there are no limitations on the scope of such Board review, rejecting County arguments that even if the GMA were construed to allow such review, the scope of the review must be limited to changes in GMA requirements or changes in conditions that occurred since the adoption of the challenged Plan provisions or Regulations.

The Court's decision ignores and effectively nullifies GMA's strict 60-day limitation period for appeals of local GMA provisions to the Board, under RCW 36.70A.290(2), even though the Legislature, in adopting and amending RCW 36.70A.130, never indicated in any way that it intended to

affect the 60-day limitation period for appeals to the Board. Since, under RCW 36.70A.130, counties and cities must review their planning and regulatory provisions every seven years and their UGAs every ten years, and are explicitly authorized to conduct such reviews earlier, if they wish, local Plan provisions and Regulations are now appealable to the Board in perpetuity. Under the Court's holding, whenever a periodic review is conducted, all local land use provisions become appealable to the Board no matter how long ago they were adopted.

The Court's decision not only effectively nullifies the 60-day limitation period of RCW 36.70A.290(2), but flies in the face of the Supreme Court's frequent recognition of the state's strong public policy in favor of finality in land use decision-making. E.g. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001). Under the Decision of the Court of Appeals, if allowed to stand, locally adopted plans and regulations never will be final and always will be subject to challenge for noncompliance with GMA requirements even though such challenges could have been, but were not, raised many years earlier. Counties and cities will have no repose.

This issue is of immense importance to the public interest. This case is the first challenge of a local government's periodic review required by RCW 36.70A.130. These reviews by counties and cities are being

completed in ever-increasing numbers and will continuously occur in the various counties and cities throughout the state, given the staggered deadlines, explicit provisions for extensions, and seven-year periodic review requirement. Because of the Court's decision in this case, numerous appeals to the Board are likely. Authoritative guidance from the Supreme Court on the scope of Board review in such appeals is of urgent importance to clear the brooding cloud of uncertainty hanging over the counties and cities of the state.

Perhaps the greatest threat to the public interest inadvertently spawned by the Court's decision is the perverse incentives it creates. Landowners, who thought long-established policies, designations, and regulations governing use and development of their lands were final and unassailable, now will be plagued by uncertainty and fear that the Board may review such longstanding land use policies and regulations, find them noncompliant, and require that they be changed. Landowners can avoid such potential devastation of their reasonable expectations by prematurely developing their lands years before such development is needed to accommodate growth. For example, before the instant court decision, a purchaser of land in the UGA knew that the County was committed to eventual urban development of the land and knew that the UGA designation was final and not subject to Board review and consequently

could base rational development timing decisions on these reasonable assumptions. But as a result of this decision, if it is allowed to stand, no such reasonable expectations are available to landowners. Development potential may evaporate at any time as a result of Board review many years after GMA's now meaningless 60-day limitation period had run. Stripped of Washington's strong policy in favor of finality in land use decision-making, potential land uses and land values will be perpetually uncertain because, regardless of the consistent commitment of local government, the policies, designations, and regulations governing the land will be perpetually subject to state Board review.

This Petition also raises substantial issues of public interest regarding the extent of local discretion to determine the size and location of UGAs, given GMA's presumption of validity, burden of persuasion, and deference owed to local policy choices on how to accommodate growth. Several amendments to the GMA stress that the public policy of the State is that land use policy-making authority and discretion reside primarily in local governments. RCW 36.70A.320 (Local enactments are presumed valid, and petitioners to the Board have the burden to show that the challenged provisions are noncompliant with the goals and requirements of the Act.); RCW 36.70A.3201 (Legislature intends for boards to grant deference to counties in how they plan for growth; role of

counties and cities to balance priorities and options in full consideration of local circumstances; ultimate responsibility for planning, harmonizing GMA goals, and implementing a county's or city's future rests with that community.); RCW 36.70A.110(2) (Cities and counties have discretion to make many choices about accommodating growth.) This Court explained these GMA amendments at length and the Board deference to local policy-making that is required by these amendments in *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224, 236-38, 110 P.3d 1132 (2005). The Court failed to comply with these GMA provisions governing review of local compliance by upholding the Board's decision requiring the County to justify its minor modifications of its UGA rather than recognizing that the modifications were presumed to be valid and the burden was on Petitioner 1000 Friends to demonstrate that they were noncompliant with GMA requirements. In upholding the Board, the Court stated, "The Board concluded only that the County's UGA boundaries 'significantly exceed[ed]' the projected demand for urban residential lands, and that without designating the excess as market factor and explaining the need for it, the County's expansion of its UGAs failed to meet GMA goals." *Thurston County v. Western Washington Growth Management Hearings Board*, No. 34172-7-II, slip op. at 23 (Wash. Ct. App. April 3, 2007).

This Petition raises additional issues of first impression and

substantial public interest regarding whether a county has discretion to regard resource lands as a component of the County's rural lands. The Court of Appeals upheld the Board's decision that designated resource lands do not contribute to a variety of rural densities. The pertinent language of RCW 36.70A.070 provides as follows:

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

...

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas...

The term "including" as the dictionary defines it, is "the containment of something as a constituent, component, or subordinate part of a larger whole." Webster's Seventh New Collegiate Dictionary, 1971. For example, the word "fruit" includes apples. Under the common meaning of the words "include" and "including," the requirement that counties include in their rural element some "lands that are not designated for urban growth, agriculture, forest, or mineral resources" does not preclude counties from including in the rural element some land that is resource land. That is, RCW 36.70A.070(5) does not say that the rural element shall include only lands that are not designated for urban growth, agriculture, forest, or mineral resources. The requirement of "including" such lands, under the common meaning of that word, allows other lands

that are designated as resource lands to be included. This meaning of the initial provision of RCW 36.70A.070(5) would, at least, allow and arguably require counties to include their resource lands as a component of the rural element and is confirmed by a subsequent provision of this subsection requiring that the “rural element shall permit rural development, forestry, and agriculture in rural areas.” RCW 36.70A.070(5)(b). Under the plain meaning of this GMA language, counties at least have discretion to designate all land outside of the UGA as rural and recognize forest and agricultural resource lands as a component of the rural element. Thus, the Board and Court fundamentally erred by requiring the County to artificially separate rural land from interspersed resource lands and refusing to defer to the County’s reasonable policy choice that the requirement for a variety of rural densities was achieved, in part, by the much greater minimum lot sizes required in the interspersed agricultural and forest lands.

B. The Decision is in Conflict with Decisions of the Supreme Court.

The Court of Appeals decision is in conflict with several decisions of the Supreme Court. The holding that all existing plan provisions and regulations become reviewable by the Board whenever a required periodic review is appealed is in conflict with *Skagit Surveyors v. Friends*, 135 Wn.2d 542, 958 P.2d 962 (1998), which held that the Board did not have

authority to invalidate local planning and regulatory provisions that existed prior to the adoption of the GMA. In so holding, the Court stressed that the Board's jurisdiction is limited to reviewing local provisions that are appealed to the Board within sixty days of their adoption and that the Board's jurisdiction is strictly limited and will not be expanded by implication, *Id.*, 135 Wn.2d at 565. This Court rejected expansive interpretations of the Board's authority because the GMA was the product of legislative compromise and contains no provision for liberal construction. *Id.*

The Court of Appeals' holding failed to require the Board to defer to and respect the County's broad discretion in making minor modifications of the UGA and characterizing resource lands interspersed in the County's rural area as a component of the rural element and a means of achieving a variety of densities in the County's rural area. The Board's lack of deference was in conflict with this Court's decisions in *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224, 236-38, 110 P.3d 1132 (2005) and *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 125-130, 118 P.3d 322 (2005). In these decisions, this Court has stressed the narrow scope of Board authority and the broad scope of local discretion under the GMA.

The GMA enactments of local governments are presumed to be valid, and the Board must defer to local policy choices and find them

compliant unless a petitioner satisfies the burden of demonstrating that they are clearly erroneous. *Quadrant*, 154 Wn.2d at 236-37, This Court went on, in *Quadrant*, to explain that the Legislature, in 1997, “took the unusual additional step of enacting into law its statement of intent in amending RCW 36.70A.320” to require greater deference to local enactments, quoting most of RCW 36.70A.3201, with added emphasis. *Id.* at 237. The Court explained that deference may be declined by the Board only where a local enactment violates a “specific statutory mandate.” *Id.* at 240 n.8. And, in *Viking Properties, supra*, this Court held that the Board had no authority to convert broad discretionary GMA requirements into specific ones.

It appears that the Board fundamentally misunderstood GMA’s provisions for local discretion and Board deference, as explained by this Court in *Quadrant*. The Board started with the proposition that it was required to defer to County policy choices only when they comply with GMA requirements. The Board then erred by (1) transforming broad discretionary GMA requirements into specific ones, contrary to *Viking Properties*, (2) finding that the challenged provisions violated the Board-created specific mandates, and, therefore, (3) concluding that the County provisions were not entitled to deference. The Board’s misunderstanding of the concepts of discretion and deference effectively nullified them. The

required extent of discretion and deference must be determined at the outset of the Board's decision-making process on the basis of the relative generality or specificity of the relevant GMA requirements. Within the breadth of the relevant requirements, local discretion prevails and is entitled to Board deference. Thus, in *Quadrant*, this Court recognized that King County had broad discretion in making the challenged determination allowing urban growth because the County was within the scope of its discretion under the relevant requirements. In contrast, in *Thurston Cty. v. Cooper Point Ass'n*, 148 Wn.2d 1, 14, 57 P.3d 1156 (2002), this Court held that the County was constrained by a very specific GMA mandate that urban facilities not be extended outside of the UGA, and the Board was not required to defer to the County's policy choice.

In the instant case, the GMA requirements relating to UGA sizing and variety of rural densities are very generally stated, allowing broad local discretion. The Board has no authority to transform broad requirements into specific ones. *Viking Properties, supra; Lewis County v. Hearings Bd.*, 157 Wn.2d 488, 503, 139 P.3d 1096 (2006). The Board exceeded its authority by failing to defer to the County's policy choices that were within the broad parameters of the relevant GMA requirements.

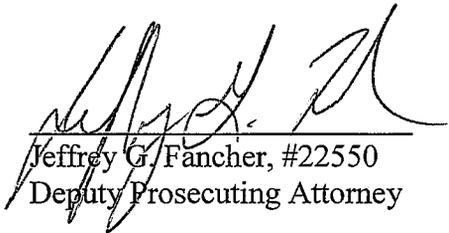
VI. CONCLUSION

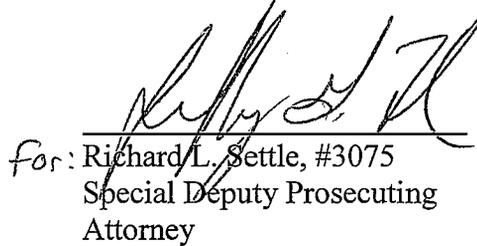
Based on the forgoing argument, Thurston County requests this Court to grant review of the issues presented in this Petition for Review.

DATED this 2 day of May 2007.

EDWARD G. HOLM
PROSECUTING ATTORNEY

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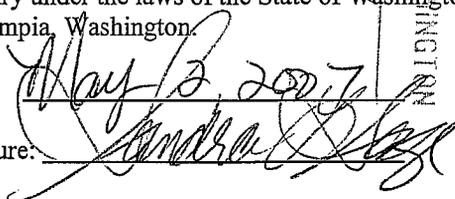
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: May 13, 2007
Signature: 

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APPENDIX

- A. *Thurston County v. Western Washington Growth Management Hearings Board*, No. 34172-7-II, slip op. (Wash. Ct. App. April 3, 2007).
- B. Final Decision And Order, *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, dated July 20, 2005.
- C. Order On Motion For Reconsideration, WWGMHB No. Case No. 05-2-0002, dated July 20, 2005.
- D. Certificate of Appealability w/o attached Final Decision (A. above), *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, dated July 20, 2005.
- E. *Reading, et al., v Thurston County*, WWGMHB 94-2-0019 (Final Decision And Order 3/23/95)
- F. Copies of the following statutes:
 - RCW 36.70A.060
 - RCW 36.70A.070
 - RCW 36.70A.110
 - RCW 36.70A.115
 - RCW 36.70A.130
 - RCW 36.70A.170
 - RCW 36.70A.215
 - RCW 36.70A.290
 - RCW 36.70A.320
 - RCW 36.70A.3201

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THURSTON COUNTY,

Appellant,

v.

WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD and
FUTUREWISE (formerly known as 1000
Friends of Washington),

Respondents,

And

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

Appellants-Intervenors.

No. 34172-7-II

PUBLISHED OPINION

ARMSTRONG, J. -- Thurston County appeals a Western Washington Growth Management Hearings Board decision that invalidated certain portions of the County's comprehensive plan and development regulations. The Board, acting on 1000 Friends of Washington's challenge to the County's periodic review, found that the County failed to explain why its urban growth areas exceeded projected population growth by 38 percent, improperly

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designated agricultural land of long-term significance, and failed to create a variety of densities in its rural areas.

The County argues that the Board wrongly decided these issues on the merits arguing that: (1) 1000 Friends of Washington (now Futurewise) did not have standing before the Board because it did not show that any member lived in or owned property in the county, (2) the Board lacked jurisdiction to review land use decisions the County made years earlier and did not revise in its recent update, and (3) the Board lacked jurisdiction to review the County's criteria for designating agricultural land of long-term significance because the County revised this part of its comprehensive plan early and Futurewise did not petition for review within the 60-day period the Growth Management Act allowed.

We conclude that Futurewise had standing before the Board because the legislature granted standing to a "participating" party at the county level and that the legislative grant of such standing does not violate the separation of powers doctrine. We further conclude that the Board had jurisdiction to consider those parts of the County's comprehensive plan that it had not revised in the mandated update, and the Board did not err in finding that the County failed to give sufficient notice of its early review of part of the comprehensive plan.

In addition, we hold that in reviewing the County's criteria for designating agricultural lands of long-term significance, the Board correctly determined that a criterion excluding lands not currently used for agriculture violated the Act, but it erred in concluding that predominant parcel size was an invalid criterion. In reviewing the County's urban growth areas (UGAs), the Board correctly determined that, without explanation from the County as to the rationale, the 38 percent excess land in the UGAs was too large. But in reviewing the County's rural densities, the Board erred in concluding that the County's

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zoning designations did not provide for a variety of rural densities. Accordingly, we affirm in part and reverse in part.

FACTS

The legislature enacted the Growth Management Act (Act), chapter 36.70A RCW, to minimize the threats that unplanned growth poses to the environment, economic development, and public welfare. RCW 36.70A.010; *Diehl v. Mason County*, 94 Wn. App. 645, 650, 972 P.2d 543 (1999). The Act encourages development in areas already characterized by urban development, reduction of urban sprawl, and conservation of productive agricultural lands. RCW 36.70A.020.

The Act requires counties with large populations or rapid growth to plan for future growth. RCW 36.70A.040(1). Each county planning under the Act must adopt a comprehensive land use plan and development regulations. RCW 36.70A.040(3). The Act requires counties to “take action to review and, if needed, revise their comprehensive plans and development regulations” in accordance with a set schedule. RCW 36.70A.130(4). Counties may conduct their required reviews before the established time periods and may receive grants if they elect to do so. RCW 36.70A.130(5)(a).

Thurston County is required to plan under the Act. Its first update was due on or before December 1, 2004, with successive updates due every seven years thereafter. RCW 36.70A.130(4)(a). In November 2003, the County adopted a resolution amending its comprehensive plan’s Natural Resource Lands and Natural Environment chapters, which designate agricultural lands of long-term significance. The County adopted the update of its comprehensive plan and development regulations in November 2004.¹

The Thurston County Planning

Commission provided for public comment on the update. Futurewise wrote the County regarding its concerns that the comprehensive plan did not provide for a variety of rural densities, contained urban growth areas that were too large, and did not properly classify agricultural lands. Tim Trohimovich² testified on behalf of Futurewise before the Commission about these concerns.

In January 2005, Futurewise petitioned the Board for review of the County's comprehensive plan update. The Board concluded that the plan did not comply with the Act because it failed to establish a variety of rural densities, the urban growth areas contained 38 percent more acres than projected demand required through 2025, and two of the County's criteria for designating agricultural resource lands did not comply with RCA 36.70A.060 and .170.

The County sought direct review of the Board's decision in the Supreme Court. The Building Industry Association of Washington, Olympia Master Builders, and People for Responsible Environmental Policies intervened. The Supreme Court transferred the case to this court.³

¹ At the time it filed its opening brief, the County had yet to complete the update of its critical areas ordinance.

² Trohimovich is apparently not a resident of or property owner in Thurston County.

³ The Board, designated as a party to this appeal because its decision is the subject of review, has not presented a brief or participated in the oral arguments presented to this court.

ANALYSIS

I. Standard of Review

The Board adjudicates Act compliance and, when necessary, can invalidate noncompliant comprehensive plans and development regulations. RCW 36.70A.280, .302. The Board must presume that a county's comprehensive plans and development regulations are valid upon adoption. RCW 36.70A.320(1). A challenging petitioner bears the burden of demonstrating that a county's actions do not comply with the Act. RCW 36.70A.320(2). And the Board "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the Act]." RCW 36.70A.320(3). To find an action "clearly erroneous," the Board must be "left with the firm and definite conviction that a mistake has been committed." *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000) (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

In reviewing decisions of the Board, we apply the standards of the Administrative Procedure Act (APA) directly to the record before it. *King County*, 142 Wn.2d at 553. The party asserting error, in this case the County, has the burden of demonstrating the invalidity of the Board's action. RCW 34.05.570(1)(a); *King County*, 142 Wn.2d at 553.

Under the APA, we will reverse an agency decision that is unconstitutional, exceeds the agency's statutory authority or jurisdiction, erroneously interprets or applies the law, is not based on substantial evidence, or is arbitrary or capricious. RCW 34.05.570(3). The County asserts it is entitled to relief under these five grounds.

We review the Board's legal conclusions

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de novo, giving substantial weight to the Board's interpretation of a statute it administers. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). But the Act requires us to give even greater deference to county planning decisions that are consistent with the Act's goals. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). Thus, we do not defer to a Board ruling that fails to give considerable deference to a county's choices in adopting or revising its comprehensive plan. *Quadrant Corp.*, 154 Wn.2d at 238. Nonetheless, the Board need not defer to a county decision that is clearly an erroneous application of the Act. *Quadrant Corp.*, 154 Wn.2d at 238.

We review the Board's factual findings for substantial supporting evidence, which is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *King County*, 142 Wn.2d at 553 (quoting *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). Where the agency's findings of fact are unchallenged, we consider them verities on appeal. *Manke Lumber Co. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 113 Wn. App. 615, 628, 53 P.3d 1011 (2002).

II. Standing of Futurewise

The County challenges Futurewise's standing to petition the Board for review of the County's growth management enactments. The County argues that Futurewise made no showing that Trohimovich or any other member is a resident of or property owner in Thurston County and, thus, did not show actual injury from the County's actions.

A. Standing Under the Act

The Act provides that a person who has participated orally or in writing before a county in the adoption or amendment of a comprehensive

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plan or development regulations may petition the Board for review of that matter.⁴ RCW 36.70A.280(2)(b). The person must show that his or her participation before the County was “reasonably related to the person’s issue[s] as presented to the board.” RCW 36.70A.280(4). Futurewise submitted a letter to the County, and Trohimovich testified before the County’s planning commission on behalf of Futurewise. Both the letter and testimony related to the issues Futurewise presented in its petition to the Board.

The County cites to a 1996 Central Puget Sound Growth Management Hearings Board decision that used the test from *Trepanier v. Everett*, 64 Wn. App. 380, 382-83, 824 P.2d 527 (1992), to determine whether a petitioner has standing under the Act. But that test is used to determine if a petitioner has APA standing, not participation standing.⁵ The Central Puget Sound Growth Management Hearings Board explicitly recognized what it termed “appearance standing” and concluded that one petitioner in that case had both appearance standing and APA standing. *Hapsmith v. City of Auburn*, No. 95-3-0075c, Cent. Puget Sound Growth Mgmt. Hearings Bd. (Final Decision and Order, October 10, 1996). Under the Act, participation standing and APA standing are distinct. RCW 36.70A.280(2)(b), (d). A person need not meet the requirements of APA standing to have participation standing before the Board.

Because Futurewise’s participation before the County related to the issues it presented to

⁴ RCW 36.70A.280(3) defines a “person” as “any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.”

⁵ RCW 36.70A.280(2)(d) provides that a person “qualified pursuant to RCW 34.05.530” has standing before a growth management hearings board. RCW 34.05.530, the APA’s standing provision, provides that a person who is “aggrieved or adversely affected by the . . . agency action” has standing and sets forth a definition of “aggrieved or adversely affected.” Thus, a person can have standing in the traditional APA sense *or* participation standing under the Act.

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the Board, it had standing under the Act to petition the Board for review of the County's

decision.

B. Separation of Powers

But the County argues that the legislature's grant of participation standing without a showing of injury-in-fact violates the separation of powers doctrine.

The County asserts that the Act "recognizes that the Board, in effect, is a specialized court," because RCW 36.70A.295 permits petitions for review to be filed with either the Board or the superior court. Br. of Appellant at 34. Thus, the County argues, because the constitution requires a showing of injury-in-fact for standing, *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866-68, 576 P.2d 401 (1978), we should imply an injury-in-fact requirement in RCW 36.70A.280(2) to preserve its constitutionality.

The Board, however, is not a constitutional court. The Washington Constitution authorizes a Supreme Court, Courts of Appeals, and superior courts. Wash. Const. art. IV, §§ 2, 5, 30. By contrast, the legislature created the growth management hearings boards. RCW 36.70A.250. Legislatively created agencies can act in a quasi-judicial capacity without violating separation of powers principles. *ASARCO Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 696, 601 P.2d 501 (1979) (noting that the separation of powers argument was "considered and rejected by most courts in the early days of administrative practice").

The Board, as a legislative creature, may exercise all the powers its enabling statute confers. *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). We need look only to the Act itself, not the constitution, to determine whether a person has standing to petition to the Board. *Skagit Surveyors*, 135 Wn.2d at 558. And RCW 36.70A.280(2)(b) clearly grants participation standing to Futurewise. The legislature did not transform the Board into a court by

allowing parties to file a petition in either the Board or a court. It merely elected, as part of delegating quasi-judicial functions to the Board, to offer litigants the choice of a judicial forum.

The Board did not err in finding that Futurewise had standing to petition it for review of the County's actions.

III. Scope of Board Review

A. Review of Unchanged Portions of Comprehensive Plan and Development Regulations

The County contends that the Board erred in reviewing the portions of its updated comprehensive plan and development regulations that the County did not amend in its periodic review. It asserts that permitting the Board to review all plan provisions and regulations regardless of whether the County amended them would create an "open season" to challenge comprehensive plans and development regulations every seven years. Br. of Appellant at 35.

The County reasons that Board review of unchanged provisions violates RCW 36.70A.290(2), which requires that all petitions challenging the adoption or amendment of a comprehensive plan or development regulation be filed within 60 days after the County publishes notice of adoption.⁶ Further, according to the County, allowing such reviews violates Washington's strong public policy in favor of finality in land use decisions. *See Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.2d 241 (2001).

RCW 36.70A.130(1)(a) requires the County to revise its land use plan and development regulations if necessary to "ensure the plan and regulations comply with the requirements of [the Act]." And RCW 36.70A.280(1)(a) provides that the Board can review petitions alleging that a

⁶ Futurewise asserts that the County did not raise this issue before the Board and that, under RCW 34.05.554, we should not consider the issue. The County did make this argument with respect to the County's review of its urban growth areas. The Board ruled on this issue in its order on motions to dismiss. Thus, we address the issue.

County “is not in compliance with the requirements of [the Act].” The Board held that RCW 36.70A.130(1)(a) imposes a duty on the County to bring its plan and regulations into compliance with the Act, including any amendments to the Act enacted since the County adopted the plan and regulations under review. The Board noted that the County had enacted its comprehensive plan before the 1997 amendments to the Act added requirements for limited areas of more intensive rural development and that Futurewise was challenging this component of the plan.

Neither RCW 36.70A.280(1) nor RCW 36.70A.130(1)(a) explicitly grants the Board authority to review petitions alleging that a county’s *failure* to amend a comprehensive plan or development regulations during its periodic review violates the Act. But the Supreme Court has said that RCW 36.70A.280 “authorizes a hearings board to determine whether actions—or failures to act—on the part of a county comply with the requirements of the Growth Management Act.” *Skagit Surveyors*, 135 Wn.2d at 558-59.

Moreover, the County’s interpretation would undermine the purpose of requiring periodic reviews. The County could avoid complying with the Act by showing that it had adopted its plan before the Act’s amendment. And while finality in land use decisions is important, by requiring review of comprehensive land use plans and development regulations every seven years, the legislature has determined that, in managing growth, the benefits to the public of keeping abreast of changes in the law outweigh the benefits of finality to landowners. In the purpose statement for an amendment authorizing more time for counties to complete updates, the legislature recognized that the update requirement involves significant compliance efforts by local governments, but added that it is “an acknowledgement of the continual changes that occur within the state, and the need to ensure that land use measures reflect the collective wishes of its citizenry.” H.B. 2171, 59th Leg., Reg. Sess. §

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1 (Wash. 2005).

In its reply brief, the County suggests that, if we conclude that the Board can review unchanged provisions of a county's comprehensive plan and development regulations, we should limit such review to those provisions that arguably do not comply with stricter Act requirements enacted after adoption of the challenged provisions. Under this rule, the Board would not have jurisdiction to review any of the unchanged provisions Futurewise challenged in this case because the legislature has not amended the underlying Act requirements since the County enacted the unchanged provisions.

The County's proposal would require the Board to determine whether an amendment to the Act made a requirement "stricter" or merely changed it. The County does not define "stricter." We presume that it would be an amendment to the Act that requires the County to more strictly regulate an owner's land use. If so, and the legislature amended the Act to mandate what might be arguably less strict land use controls, the County would not be obligated to revise its comprehensive plan in accordance with the amendment. Thus, a land owner could not challenge a county's failure to relax its land use controls under the Act's amendments. We doubt that the legislature intended such an uneven result. We also question whether the legislature intended to burden the Board with the threshold jurisdictional question of whether an Act amendment is stricter, less strict, or somewhere in between what the Act required before the amendment. Finally, the Board did not see fit to impose such a limitation on its review of periodic updates—an interpretation we give considerable deference. *City of Redmond*, 136 Wn.2d at 46. We conclude that the Board did not err in interpreting RCW 36.70A.130 to allow the Board to review unchanged portions of the County's comprehensive plan and development regulations.

B. Review of Recently Amended Provisions

In a related argument, the County argues that the Board did not have subject matter jurisdiction to review the County's criteria for designating agricultural lands of long-term significance because the County updated that portion of its comprehensive plan in 2003 and no person filed a petition challenging that part of the County's update within 60 days after its adoption. The County maintains that it elected to conduct an early review of the Natural Resource Lands and Natural Environment chapters of its comprehensive plan, containing the agricultural lands designation criteria, as permitted by RCW 36.70A.130(5)(a) and that this action met all the requirements of RCW 36.70A.130.

The Board found that the 2003 amendments were not part of the County's 2004 update because, in adopting the 2003 amendments, the County did not make a finding that a review and evaluation had occurred and did not state the reasons it decided not to revise the criteria as RCW 36.70A.130 required.

RCW 36.70A.130(1)(a) requires counties to take "legislative action" to review and, if needed, revise their comprehensive plans and land use regulations according to the time periods specified in subsection (4). RCW 36.70A.130(1)(b) defines "legislative action" as "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." The County's November 2003 resolution provided that its amendments brought the Natural Resources Lands chapter in compliance with the Act, but it did not refer to RCW 36.70A.130, did not make a finding that it was an "update" within the meaning of that statute, and did not state the reasons it did not revise the agricultural lands designation criteria.⁷ Administrative

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Record (AR) at 1850.

The County argues that the definition of “legislative action” in RCW 36.70A.130(1)(b) applies to counties not planning under RCW 36.70A.040, which does not include Thurston County.⁸

Subsection (1)(b)’s first sentence begins, “Except as otherwise provided, a county or city not planning under RCW 36.70A.040 shall take action. . . .” RCW 36.70A.130(1)(b). The second sentence contains the definition of legislative action. But the phrase “legislative action” appears only in subsection (1)(a),⁹ which applies to Thurston County and all other counties planning under RCW 36.70A.040, and the reference to “legislative action” in (1)(b) can apply only to (1)(a), not the first sentence in (1)(b). The Board correctly applied the subsection (1)(b) definition of legislative action to the County’s 2003 amendment.

The Board did not err in finding that the 2003 amendment was not part of the County’s periodic update. The Act distinguishes between required periodic reviews and other amendments to comprehensive plans and development regulations. RCW 36.70A.130(2) requires counties to create public participation programs that identify procedures and schedules “whereby updates, proposed amendments, *or* revisions of the comprehensive plan are considered

⁷ The parties disagree about whether the County properly published a notice of the resolution adopting the 2003 amendments and whether this notice is part of the record on appeal. However, because we hold that the 2003 amendments were not part of the County’s 2004 update, this dispute is not relevant to this issue.

⁸ Thurston County is required to plan under RCW 36.70A.040.

⁹ The first sentence of RCW 36.70A.130(1)(b) does not use the term “legislative action,” but does use the term “action.”

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by the governing body.” (Emphasis added.) To “update” means to “review and revise, if needed, according to subsection (1) of this section, and the time periods specified in subsection (4) of this section or in accordance with the provisions of subsections (5) or (8) of this section.” RCW 36.70A.130(2)(a). Subsection (1) contains the definition of legislative action. RCW 36.70A.130(1)(b). Subsection (4) requires updates every seven years. RCW 36.70A.130(4). An amendment that does not meet the requirements of both subsection (1) and subsection (4) is not an update. Otherwise, as the Board noted, a county could argue after the fact that an amendment was actually part of an update to its comprehensive plan and thereby circumvent review of a decision not to revise a plan or regulations.

In addition, Futurewise did not petition the Board for review of the 2003 resolution amending the agricultural lands criteria. Rather, it challenged the County’s 2004 update of its comprehensive plan, arguing that the County should have revised the agricultural lands designation criteria to comply with the Act. The Board stated that the County’s argument “confuses an appeal of the designation criteria adopted in November 2003 with an appeal of the County’s failure to revise those criteria as needed to comply with the Growth Management Act in its 2004 update.” AR at 2601.

Accordingly, the Board did not err in reviewing the County’s criteria for designating agricultural lands of long-term significance.

C. Review of Urban Growth Areas Previously Upheld

The County also argues that the Board did not have authority to review the County’s UGAs because the Board upheld the Olympia UGA in 1995. The County asserts that the principles of *stare decisis*, *res judicata*, and collateral estoppel prevent “relitigation of County UGA policy choices made in 1994.” Br. of

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Appellant at 44.

The Board reviewed a challenge to the UGA for the city of Olympia in 1995. In that case, the Board upheld the county's population projections through 2005 and its land capacity analysis. *Reading v. Thurston County*, No. 94-2-0019, W. Washington Growth Mgmt. Hearings Bd. (Final Order, March 23, 1995). Although it found that the Olympia UGA was too large, the Board declined to invalidate the Olympia UGA because the county had not yet adopted UGAs for Lacey or Tumwater, cities adjoining Olympia. *Reading*, No. 94-2-0019.

The County's argument is flawed for two reasons. First, as the Board noted, the County has not shown that it meets the requirements of any of the doctrines it invokes. Futurewise was not a party to or in privity with a party to the *Reading* case, a requirement for *res judicata* and collateral estoppel. See *Hadley v. Maxwell*, 144 Wn.2d 306, 311-12, 27 P.3d 600 (2001); *Alishio v. Dep't of Soc. & Health Servs.*, 122 Wn. App. 1, 7, 91 P.3d 893 (2004). And the County presented no authority to support its argument that the doctrine of *stare decisis* applies.

Second, Futurewise is challenging the County's actions in its 2004 update, not its original 1994 enactment. The *Reading* decision evaluated only the Olympia UGA, which it found to be too large. *Reading*, No. 94-2-0019. The County has adopted UGAs for Lacey, Tumwater, and other cities throughout the county over the past decade. It amended the Tenino and Bucoda UGAs as part of its 2004 update. And the *Reading* decision was based on population projections through 2015. *Reading*, No. 94-2-0019. The County's 2004 update used projections through 2025, a time period not contemplated at the time of the County's 1994 action.

The County cites *Montlake Community Club v. Central Puget Sound Growth Management Hearings Board*, 110 Wn. App. 731, 43 P.3d 57 (2002), for the proposition that the Board erred in reviewing the County's UGAs.

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In that case, Division One held that a petition for review of a city's subarea plan was untimely when the plan merely implemented, but did not amend, the city's comprehensive plan, enacted four years earlier. *Montlake Cmty. Club*, 110 Wn. App. at 739-40. But the case did not address an update under RCW 36.70A.130. And here, the County did not merely implement a plan already in place at the time of the *Reading* decision; rather, it updated its plan based on new population projections with a new planning horizon of 2025.

Accordingly, the Board did not err in reviewing the County's UGAs.

IV. Agricultural Lands of Long-Term Commercial Significance

The County asserts that, even if the Board had jurisdiction to review its designation criteria for agricultural lands of long-term commercial significance, the Board erred in invalidating two of its criteria.

RCW 36.70A.030(2) defines "agricultural land" as land "primarily devoted to" commercial production of various agricultural products. A comprehensive plan must designate agricultural lands of long-term commercial significance. RCW 36.70A.050, .170(1)(a). In making this designation, counties must consider guidelines established by the Department of Community, Trade, and Economic Development. RCW 36.70A.170(2). The Department has promulgated WAC 365-190-050, requiring counties to consider, among other things, the possibility of more intense uses of the land. This regulation provides 10 factors for counties to consider in evaluating that possibility. WAC 365-190-050(1)(a)-(j).

Among its nine criteria for designating agricultural land of long-term significance, the County included (1) predominant parcel size, requiring that parcels be 20 acres or more, which "provides economic conditions sufficient for managing agricultural lands for long-term commercial production"; and (2) existing land

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use, requiring that “[d]esignated agricultural lands should include only [those] areas [that are] used for agriculture.” AR at 436.

The Board concluded that these two criteria did not comply with the Act’s requirements for designating of agricultural lands of long-term commercial significance.

A. Parcel Size

The County first argues that the Board erred in invalidating its parcel size criterion because WAC 365-190-050(1)(e) permits the County to use parcel size as a criterion and there is no requirement that it use farm size.

The Board invalidated this criterion because parcel size does not necessarily correlate to farm size; an economically viable farm may consist of several smaller parcels under common ownership or use. The Board reasoned that parcel size “is just one in many factors to consider on the question of the possibility of more intense uses of the land.” AR at 2567.

Counties may consider the factors enumerated in WAC 365-190-050(1) in determining whether lands have long-term commercial significance. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 502, 139 P.3d 1096 (2006). WAC 365-190-050(1)(e) specifically includes predominant parcel size as an indicator of the possibility of more intensive uses of land. The Board itself stated that parcel size is a factor determining long-term commercial significance of land. The County maintains that it did not rely solely on parcel size; it uses eight other criteria for making this determination, many of them also drawn from WAC 365-190-050(1).

The Board reasoned that “[u]sing predominant parcel size of 20 acres as a designation criterion may exclude viable farms in which the total acreage farmed is in excess of 20 acres in size but each of the parcels making up the farm is less than 20 acres.” AR at 2567. While this may be possible, Futurewise did not prove that

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the County would exclude such land from a farming designation solely on the basis of parcel size. And Futurewise does not contest the County's claim that it uses eight other criteria from WAC 365-190-050(1) to designate farm land. Nor did Futurewise prove that the County's use of parcel size rather than total farm size would significantly change the amount of farm land the County designated. We conclude that the County's use of parcel size as one criteria for designating farm land falls easily within the bounds of the County's legislatively granted discretion.

The Board erred in invalidating the parcel size criterion.

B. Current Use

The County next argues that the Board erred in invalidating its actual land use criterion.¹⁰ Br. of Appellant at 42. The County asserts that the Board applied mere dicta from the Supreme Court majority opinion in *City of Redmond*, 136 Wn.2d at 53, and argues that Justice Sanders's concurring opinion that the plain language of RCW 36.70A.030 requires current use as a criterion is more persuasive.

The *City of Redmond* majority stated: "We hold land is 'devoted to' agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production." *City of Redmond*, 136 Wn.2d at 53. It then stated, in a footnote responding to Justice Sanders's concurrence,¹¹ that this definition of agricultural land was not dicta and, as "a deliberate expression of the court upon the meaning of the statute' should not be disregarded." *City of Redmond*, 136 Wn.2d at 53 n.7 (quoting *State v. Nikolich*, 137 Wash. 62,

¹⁰ Actual use is not one of the criteria for determining the possibility of more intense use of land set forth in WAC 365-190-050(1).

¹¹ Justice Sanders asserted that the majority's definition was not required to decide the case and was therefore dicta. *City of Redmond*, 136 Wn.2d at 59 (Sanders, J., concurring).

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66, 241 P. 664 (1925)). The court has since relied on this rule. *Lewis County,*

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157 Wn.2d at 502 (holding that agricultural land is land used or capable of being used for production); *King County*, 142 Wn.2d at 559 (noting *City of Redmond's* emphasis on maintaining and enhancing agricultural land).

The Board correctly applied the Supreme Court's definition of agricultural land. Under this definition, the County's actual land use criterion, without the additional "or capable of being used for agricultural production," was clearly erroneous and the Board did not err in invalidating it.

V. Invalidation of Urban Growth Areas

The County argues that, even if the Board had jurisdiction to review its UGAs, it erred in concluding that the UGAs are too large. Intervenors join the County's challenge to the Board's invalidation of the County's UGAs.

Counties must designate UGAs within which they can encourage urban growth and outside of which growth can occur only if it is not urban in nature. RCW 36.70A.110(1). Comprehensive plans must designate UGAs sufficient to permit the urban growth projected over the succeeding 20-year period. RCW 36.70A.110(2). A UGA "may include a reasonable land market supply factor. . . . 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." RCW 36.70A.110(2).

The County projected that demand for residential urban lands in 2025 would be 11,582 acres. It allocated 18,789 acres for this use. This projection leaves 7,205 acres, or approximately 38 percent of available residential lands, unused at the end of the current 20-year planning period. But the County did not state in its comprehensive plan that it used a 38 percent market factor to increase the amount of acreage needed to

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accommodate growth or explain or justify the use of a market factor.

The County asserts that its use of a 38 percent market factor was reasonable, that it based the factor on local circumstances, and that the factor was within the local discretion permitted by RCW 36.70A.110(2). Although this argument seems to bring the County's action within the "broad range of discretion" that the Act grants to counties in planning for growth, RCW 36.70A.3201, the argument fails. In *Diehl*, 94 Wn. App. at 654, we rejected another county's use of a 50 percent market factor in part because that county did not explain why this market factor was required or how the county reached it. Here, the Board found that the County did not state that it was using a market factor or provide the reasons why one was necessary. These unchallenged findings are verities on appeal. *Manke Lumber*, 113 Wn. App. at 628. While the County's market factor is smaller than the one we rejected in *Diehl*, the County nevertheless failed to meet the requirements for using a market factor.

The County further argues that the Act imposes no requirement regarding maximum size limitations on UGAs but requires only that UGAs be large enough to accommodate projected growth. Again, our *Diehl* decision controls. In *Diehl*, we considered a claim that the County had used population projections that exceeded the statutory range, resulting in UGAs that were too large. We pointed to one of the Act's goals, to "[r]educ[e] the inappropriate conversion of undeveloped land into sprawling, low-density development." *Diehl*, 94 Wn. App. at 653 (quoting RCW 36.70A.020(2)). Permitting counties to inflate the size of their UGAs would be contrary to this goal. *Diehl*, 94 Wn. App. at 653. And "[l]ocal discretion is bounded . . . by the goals and requirements of the [Act]." *King County*, 142 Wn.2d at 561. Although the County in *Diehl* used oversize population projections and the County here used a large market factor, the

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result is the same.

The County and Intervenors also argue that the Board exceeded its statutory authority by imposing a bright-line rule allowing only a 25 percent market factor. But the Board did not impose such a rule. The Board referred to a 25 percent market factor in explaining the parties' positions, citing to Futurewise's brief.¹² The Board concluded only that the County's UGA boundaries "significantly exceed[ed]" the projected demand for urban residential lands, and that without designating the excess as market factor and explaining the need for it, the County's expansion of its UGAs failed to meet GMA goals. AR at 2573.

Finally, Intervenors argue that the Board erred by using land use figures from 2000 to calculate projected growth over the 20-year period from 2005 to 2025. The Board based its findings on the County's own figures that it used in its comprehensive land use plan. Because no party raised this issue before the Board, we decline to review it. RCW 34.05.554.

Accordingly, the Board did not err in finding that the County's UGAs did not comply with RCW 36.70A.110(2).

VI. Failure to Provide for a Variety of Rural Densities

The County's final contention is that, even if the Board had jurisdiction to review its rural densities, the Board erred in concluding that the County did not provide for a variety of rural densities.

The Act requires counties to identify and protect rural lands not designated for urban growth, agriculture, forest, or mineral resources. RCW 36.70A.070(5). The rural element of a

¹² The 25 percent market factor also appears in the Board's issue statements, but these are taken verbatim from Futurewise's petition.

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comprehensive plan must permit rural development¹³ and provide for “a variety of rural densities.” RCW 36.70A.070(5)(b). Counties may provide for a variety of rural densities by means of “clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.”¹⁴ RCW 36.70A.070(5)(b). The Board considers a density of not more than one dwelling unit per five acres to be rural.¹⁵

¹³ “Rural development” means “development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170.” RCW 36.70A.030(16).

¹⁴ “Rural character” means:

the patterns of land use and development established by a county in the rural element of its comprehensive plan:

- (a) In which open space, the natural landscape, and vegetation predominate over the built environment;
- (b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;
- (c) That provide visual landscapes that are traditionally found in rural areas and communities;
- (d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;
- (e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;
- (f) That generally do not require the extension of urban governmental services; and
- (g) That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

RCW 36.70A.030(15)(a)-(g).

¹⁵ The Supreme Court has referred to a density of one dwelling unit per five acres as “a decidedly rural density.” *Skagit Surveyors*, 135 Wn.2d at 571.

A. Specific Zoning Densities

The County's comprehensive plan allocates almost 400,000 acres of land for "rural use." AR at 774-75. Of this, 39.3 percent is designated for resource use (densities from one dwelling unit per 20 acres to one dwelling unit per 80 acres), 48.3 percent for rural resource and residential (density of one dwelling unit per five acres), and 5.5 percent for rural and suburban residential (densities from one dwelling unit per two acres to four units per acre).¹⁶ The remainder is designated for public parks and trails, military and institutional use, and rural commercial and industrial use.

The County maintains that the densities in its resource use allocation provide a variety of rural densities. But the resource use allocation, although included in the plan's "rural use" section, includes the County's forest lands of long-term significance and agricultural lands of long-term significance. Yet rural lands are those lands "not designated for urban growth, agriculture, forest, or mineral resources." RCW 36.70A.070(5). Thus, the County erred by including these densities as rural densities. The Board did not err in finding that these densities do not contribute to a variety of rural densities.

Next, the County and Intervenor assert that the County's designation of densities of one dwelling unit per two acres, one unit per acre, two units per acre, and four units per acre provide the requisite variety of rural densities. They contend that the Board exceeded its authority in

¹⁶ Futurewise, without filing a cross-appeal, assigns error to the Board's findings of fact related to the percentages of rural lands zoned as certain densities. A prevailing party need not file a cross-appeal if it seeks no further affirmative relief and merely argues additional grounds to support the decision under review. *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003). Because Futurewise seeks affirmative relief by asking us to modify the decision under review, we decline to consider the issue. RAP 2.4(a).

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imposing a “bright-line” rule that rural densities must be at least one dwelling unit per five acres.¹⁷ Br. of Intervenors at 45. They essentially argue that densities ranging from one dwelling unit per two acres to four dwelling units per acre in the County’s rural zone constitute a variety of rural densities.

The County, however, conceded at oral argument before the Board that densities greater than one dwelling unit per five acres are not “rural densit[ies]” unless they are part of a limited area of more intensive rural development (LAMIRD).¹⁸ Report of Proceedings (RP) at 98-99. The County did not properly designate these areas as LAMIRDS. Therefore, the Board did not err in excluding these densities from the rural densities in the County’s comprehensive plan and development regulations.

Excluding densities in agricultural and forest lands and densities more intense than one

¹⁷ Futurewise asserts that neither the County nor Intervenors raised this issue before the Board and that, under RCW 34.05.554, this court should not consider the issue. The County did argue, in its prehearing brief, that densities less than one dwelling unit per five acres contributed to its variety of rural densities.

¹⁸ The County made this concession in the following exchange:

[Board Member] Ms. Hite: Well, would you agree that those densities [one dwelling unit per two acres, one unit per one acre, and two units per one acre] are more intense than a rural density?

[Counsel for the County] Mr. Miller: I think we would concede that, yes.

Ms. Hite: So the County’s not arguing that a minimum rural density -- I guess maximum rural density is 1:5, 1 dwelling unit per 5 acres.

Mr. Miller: We would concede that rural densities are -- that 1:5 is a rural density.

Ms. Hite: And that more intense than 1:5 is not a rural density, unless it was a more intense rural development.

Mr. Miller: Right.

Ms. Hite: Under 36.70A.070, Sub 5, Sub d, which is the LAMIRD provisions [sic] of the act.

Mr. Miller: Right.

RP at 98-99.

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dwelling unit per five acres, the only rural density the comprehensive plan and development regulations provide for, through specific zoning, is one dwelling unit per five acres. Intervenor argue that owners of land zoned as one unit per five acres may not actually develop their land, thus providing a variety of rural densities. But this argument relies on the choices of individual citizens, not planning under the Act.

The Board did not err in concluding that the County's plan and regulations do not provide a variety of rural densities through its zoning designations.

B. Innovative Techniques

The County and Intervenor also argue that the County has provided for a variety of rural densities through the use of "innovative techniques" as permitted by RCW 36.70A.070(5)(b). Br. of Appellant at 49; Br. of Intervenor at 42. The County asserts that it uses clustering, density transfer, design guidelines, conservation easements, and other techniques. The County cites two findings from its resolution adopting the 2004 update, both of which refer to a variety of rural densities and the use of various innovative techniques.

The Board stated that where a plan's rural designations and zones do not expressly provide for a variety of rural densities, the plan must demonstrate how innovative techniques create a variety of rural densities. The Board found that the County's comprehensive plan failed to make such a demonstration. It thus concluded that the plan did not provide for a variety of rural densities.

The Act imposes a highly deferential standard for board review of comprehensive plans and development regulations. RCW 36.70A.3201. The Board must presume that a county's comprehensive plans and development regulations are valid upon adoption, RCW 36.70A.320(1), and must find compliance unless it determines

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that the plan or regulations are clearly erroneous. RCW 36.70A.320(3). But on this issue, the Board required the County to show that its plan and regulations were valid. In doing so, the Board failed to presume validity and failed to require Futurewise to prove invalidity. RCW 36.70A.320(2). Accordingly, the Board erred in finding that the County's comprehensive plan and development regulations fail to provide for a variety of rural densities through innovative techniques.

In conclusion, we hold that Futurewise, as a participant before the County, had standing before the Board and that the Board had jurisdiction to consider both revised and unrevised portions of the County's comprehensive plan and regulations. We affirm the Board's decision invalidating the County's current use criterion in designating farm land and the Board's decision invalidating the County's urban growth area designations. But we reverse (1) the Board's invalidation of the County's parcel size criterion for designating agricultural lands of long-term significance and (2) the Board's finding that the County failed to provide for a variety of rural densities through the use of innovative techniques. We remand to the Board.

Armstrong, J.

We concur:

Houghton, C.J.

Hunt, J.

APPENDIX B

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 1000 FRIENDS OF WASHINGTON

3 Petitioners,

Case No. 05-2-0002

4 v.

5 THURSTON COUNTY,

FINAL DECISION AND ORDER

6 Respondent,

7 And,

8 WILLIAM AND GAIL BARNETT AND

9 ALPACAS OF AMERICA,

10 Intervenor.

11
12
13
14 **I. SYNOPSIS OF DECISION**

15 Thurston County was one of the first counties in this Board's jurisdiction to engage in
16 thorough and collaborative planning. Its commendable early efforts led to the adoption of a
17 comprehensive plan in 1995 on which the County has largely relied in meeting its update
18 requirements under RCW 36.70A.130. In 2002, the County adopted its Buildable Lands
19 Report, a thorough and well-documented analysis of land available for development and
20 projected demand for such lands through 2025. In 2004, Thurston County met its deadline
21 under RCW 36.70A.130(4) to timely conduct a review and, if needed, revision of its
22 comprehensive plan and development regulations to ensure compliance with the Growth
23 Management Act (GMA) (Chapter 36.70A RCW).
24

25
26 In this decision, the Board is asked to determine whether Thurston County's 2004 update of
27 its comprehensive plan and development regulations complies with the requirements of
28 RCW 36.70A.130 to "review and, if needed, revise its comprehensive plan policies and
29 development regulations to ensure the plan and regulations comply with the requirements of
30 this chapter." RCW 36.70A.130(1).
31
32

1 We observe that many elements of the County's comprehensive plan and development
2 regulations further the goals and requirements of the GMA in creative and impressive ways
3 and are compliant. However, we find there are several areas in which the County did not
4 meet its update requirements.
5

6
7 First, Thurston County has not revised its Rural Element as necessary to comply with the
8 GMA. It has relied upon its earlier plan provisions to continue a policy of allowing rural
9 residential development in high density zones -- Residential -- One Unit per Two Acres;
10 Residential -- One Unit per One Acre; Residential -- Two Units per One Acre; and
11 Residential -- Four Units per Acre -- without complying with the GMA requirements for
12 limited areas of more intensive rural development (LAMIRDs). It has also allowed rural
13 densities in its RR 1/5 zone to develop at densities of one dwelling unit per four acres.
14 While the County argues that it should not have to disturb policies it established years ago
15 for these areas, this argument fails to address the update requirement to revise existing
16 policies where necessary to ensure compliance with the GMA. RCW 36.70A.130. These
17 policies and regulations create intense rural residential densities without meeting GMA
18 requirements for limiting those areas and are therefore non-compliant. RCW
19 36.70A.070(5)(d). The County further has failed to establish a variety of rural densities in
20 the rural area as required by RCW 36.70A.070(5)(b) by establishing no rural designations or
21 zones that have less intense densities than one dwelling unit per five acres.
22
23
24

25 Second, the County's urban growth areas (UGAs) provide a significant excess of land
26 supply over projected demand for such urban lands through 2025. Both land supply and
27 projected land demand were reviewed for purposes of its buildable lands analysis in 2002.
28 Buildable Lands Report, September 2002. At that time, it was determined that there was
29 sufficient land in the UGAs to accommodate projected growth. However, the buildable lands
30 analysis also showed that there was a significant excess of available residential lands in the
31 urban areas over the projected demand for such lands through 2025. The UGA boundaries
32

1 established in the 2004 update continue to provide excess lands within the UGA boundaries
2 beyond the demand calculated on the basis of the OFM population projection chosen by the
3 County. This excess of urban land supply for the population allocated to (and therefore land
4 demand projected for) urban growth areas during the 20-year planning horizon fails to
5 comply with RCW 36.70A.110. In addition, two cities, Tenino and Bucoda, sought to have
6 their urban growth areas enlarged to accommodate development to support sewer systems
7 for those UGAs. The County concurred and expanded areas in the Tenino and Bucoda
8 UGAs, but did not adjust the population allocations to comport with the land supply the UGA
9 boundaries provide. This, too, fails to correlate demand for urban lands with the supply of
10 those lands as required by RCW 36.70A.110.
11
12

13
14 Finally, the County has adopted designation criteria for agricultural resource lands that
15 exclude lands that otherwise meet the statutory criteria for designation. The first of these
16 excludes lands that are not currently being used for agriculture from designation as
17 agricultural resource lands. The Supreme Court has determined that the statutory definition
18 of agricultural lands is based on whether the lands are "in an area where the land is actually
19 used or capable of being used for agricultural production." *City of Redmond v. Central*
20 *Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 53, 959 P.2d 1091,
21 1998 Wash. LEXIS 575 (1998). The second challenged County agricultural lands
22 designation criterion requires a predominant parcel size of 20 acres or more. Regardless of
23 common ownership or use, farms consisting of more than one parcel of less than 20 acres
24 would not be conserved under this criterion. Since farm size is not equivalent to parcel size,
25 this criterion may exclude viable farms from conservation. For these reasons, both of these
26 policies fail to comply with RCW 36.70A.060, and 36.70A.170.
27
28

29
30 Although Petitioner has requested a finding of invalidity as to the noncompliant provisions of
31 the rural and urban element (and their implementing development regulations), we decline
32 to enter an invalidity finding at this time. The record before the Board does not persuade us

1 that inconsistent development will occur during the remand period such that proper planning
2 cannot take place without the imposition of invalidity. However, if circumstances change
3 and Petitioner brings forward a basis for believing that substantial interference with the
4 goals of the GMA may be occurring during the remand period, we would consider setting a
5 compliance hearing to rule upon a properly supported motion to impose invalidity before the
6 compliance period expires. RCW 36.70A.330(4).
7

8 9 II. PROCEDURAL HISTORY

10 On November 22, 2004, the Thurston County Commissioners adopted Resolution No.
11 13234 and Ordinance No. 13235. Both legislative enactments, by their terms, were adopted
12 to comply with the requirement in RCW 36.70A.130 that the County review and, if
13 necessary, revise its comprehensive plan and development regulations to ensure the plan
14 and regulations comply with the Growth Management Act (Ch. 36.70A RCW), no later than
15 December 1, 2004. RCW 36.70A.130(4). Resolution No. 13234 amends the County's
16 comprehensive plan. Ordinance No. 13235 amends the County's development regulations.
17

18
19 Petitioner, 1000 Friends of Washington (now known as "Futurewise"), filed a petition for
20 review of these two adoptions on January 21, 2005. A prehearing conference was held on
21 February 17, 2005. On March 23, 2005, the County filed a Motion to Dismiss or Limit Issues
22 arguing that the Petitioner had failed to join cities as indispensable parties and that the
23 appeal of the urban growth areas (UGAs) was time barred. Petitioner opposed the motion,
24 Petitioner Futurewise's Response to Motion to Dismiss or Limit Issues, April 4, 2005. The
25 Board denied the County's motions. Order on Motions to Dismiss, April 21, 2005.
26
27

28
29 On April 27, 2005, Petitioner requested permission to file a motion to add the League of
30 Women Voters of Thurston County as a Petitioner. Request for Permission to File Motion
31 and Motion to Add the League of Women Voters of Thurston County as a Petitioner. The
32 County opposed the motion. Respondent's Opposition to Petitioner's Motion to Add the

1 League of Women Voters of Thurston County as a Petitioner, May 9, 2005. This motion
2 was denied:

3 There is no explanation provided in the Petitioner's request why this motion could not
4 have been brought within the timelines set in the Prehearing Order. Nor is any
5 excuse offered for the failure of the proposed petitioner to file a timely petition for
6 review itself. At this stage in the proceedings, it is unduly burdensome on the County
7 and the Board to be considering a new issue that apparently could have been raised
8 in the timeframe set by the Prehearing Order.
9 Order Denying Leave to File Motion, May 16, 2005.

10 On May 20, 2005, Intervenor William and Gail Barnett and Alpacas of America moved to
11 intervene in this case. Intervenor owns property that was added to the Tenino UGA in the
12 County's 2004 update of its comprehensive plan. Arguing that Intervenor had only recently
13 learned that this case "directly affects the Tenino UGA," Intervenor submitted the substance
14 of its brief with its motion. Motion to Intervene by William and Gail Barnett and Alpacas of
15 America, and Statement of Issues and Argument Concerning the Tenino UGA, May 20,
16 2005. The parties had no objection and intervention was granted subject to certain
17 conditions. Order Granting Intervention to William and Gail Barnett, and Alpacas of
18 America, June 3, 2005.

19
20
21 The County moved to supplement the Index to the Record with Index Nos. 466 – 528.
22 Motion to Supplement the Record, April 4, 2005. Petitioner had no objection and the Index
23 was supplemented as the County requested. Order on Motion to Supplement the Record,
24 May 5, 2005.

25
26
27 At the hearing on the merits, the Board allowed the parties to submit additional materials in
28 response to Board questions. As part of its post-hearing submission, the County provided
29 the Board with the Buildable Lands Report for Thurston County, September 2002 (Index
30 No. 43); the Population and Employment Forecast for Thurston County, Final Report (Index
31 No. 208); and the Population and Employment Forecast for Thurston County, Volume II:
32

1 Appendix (Index No. 209). The City of Tenino also asked and was granted leave to supply
2 the Board with answers to its questions concerning adopted updated development
3 regulations. This was submitted in the form of the Letter of Dan Camrite, Senior Planner, to
4 the Board, dated June 21, 2005. Intervenor submitted a blow-up of the Thurston County
5 buildable lands map and post-argument brief. Intervenors' Post-Hearing Brief, June 23,
6 2005. Petitioner objects and moves to strike the post-hearing brief submitted by Intervenor
7 as submitting additional argument. Petitioner Futurewise's Objection to Post-Hearing
8 Arguments. To the extent that the Intervenor's brief submits argument rather than
9 responsive materials, Petitioner's motion to strike is granted.
10

11 III. ISSUES PRESENTED¹

- 12
- 13 1. Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW
14 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.070, RCW 36.70A.110(1) and RCW
15 36.70A.130 when they allow, through several rural area designations totaling over
16 21,000 acres, development at densities of greater than one unit per five acres when this
17 board has determined that such densities fail to comply with the GMA?
 - 18 2. Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW
19 36.70A.070 and RCW 36.70A.130 when they fail to provide for a variety of rural
20 densities, providing instead that the only GMA compliant rural designations allow a
21 uniform one unit per five acres?
 - 22 3. Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW
23 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.110 and RCW 36.70A.130 when the
24 ordinances establish *urban growth areas* that substantially exceed the capacity
25 necessary to accommodate the Washington *Office of Financial Management* population
26 forecast adopted by the County, even assuming a 25 percent market factor? This issue
27 includes UGAs that preexisted these ordinances that were too large and a UGA
28 expansion effected by these ordinances.

29 ¹ Petitioner elected not to pursue Issue No. 5 of the Prehearing Order: "Does the adoption of Resolution 13234
30 and Ordinance 13235 fail to comply with RCW 36.70A.020(1), RCW 36.70A.110 and RCW 36.70A.130 when
31 they allow densities in unincorporated *urban growth areas* of less than 4 units per acre?" Petitioner's
32 Futurewise's and League of Women Voters Prehearing Brief at 29. An issue not addressed in petitioner's brief
is considered abandoned. *WEC v. Whatcom County*, WWGMHB Case No. 95-2-0071 (Final Decision and
Order, December 20, 1995).

- 1 4. Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW
2 36.70A.020(8), RCW 36.70A.060, RCW 36.70A.170, RCW 36.70A.050 and RCW
3 36.70A.130 when they fail to designate and conserve hundreds of acres of land that
4 meet the GMA criteria for agricultural lands of long term commercial significance?
5 5. Does the continued validity of the violations of RCW Title 36.70A in Section 7 of
6 Ordinance 13235 described above, substantially interfere with the fulfillment of the goals
7 of the Growth Management Act such that the enactments at issue should be held invalid
8 pursuant to RCW 36.70A.302?
9

10 IV. BURDEN OF PROOF

11 For purposes of board review of the comprehensive plans and development regulations
12 adopted by local government, the GMA establishes three major precepts: a presumption of
13 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
14 decisions of local government.
15

16 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
17 amendments to them are presumed valid upon adoption:
18

19 Except as provided in subsection (5) of this section, comprehensive plans and
20 development regulations, and amendments thereto, adopted under this chapter are
21 presumed valid upon adoption.
22

23 RCW 36.70A.320(1).

24 The statute further provides that the standard of review shall be whether the challenged
25 enactments are clearly erroneous:

26 The board shall find compliance unless it determines that the action by the state
27 agency, county, or city is clearly erroneous in view of the entire record before the
28 board and in light of the goals and requirements of this chapter.
29

30 RCW 36.70A.320(3)

31 In order to find the County's action clearly erroneous, the Board must be "left with the firm
32 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
121 Wn.2d 179, 201, 849 P.2d 646 (1993).

1 Within the framework of state goals and requirements, the boards must grant deference to
2 local government in how they plan for growth:

3 In recognition of the broad range of discretion that may be exercised by counties and
4 cities in how they plan for growth, consistent with the requirements and goals of this
5 chapter, the legislature intends for the boards to grant deference to the counties and
6 cities in how they plan for growth, consistent with the requirements and goals of this
7 chapter. Local comprehensive plans and development regulations require counties and
8 cities to balance priorities and options for action in full consideration of local
9 circumstances. The legislature finds that while this chapter requires local planning to
10 take place within a framework of state goals and requirements, the ultimate burden and
11 responsibility for planning, harmonizing the planning goals of this chapter, and
12 implementing a county's or city's future rests with that community.

13 RCW 36.70A.3201 (in part).

14 In sum, the burden is on the Petitioner to overcome the presumption of validity and
15 demonstrate that any action taken by the County is clearly erroneous in light of the goals
16 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
17 Where not clearly erroneous and thus within the framework of state goals and requirements,
18 the planning choices of local government must be granted deference.

19 V. DISCUSSION

20 *Issue No. 1: Does the adoption of Resolution 13234 and Ordinance 13235 fail to*
21 *comply with RCW 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.070, RCW*
22 *36.70A.110(1) and RCW 36.70A.130 when they allow, through several rural area*
23 *designations totaling over 21,000 acres, development at densities of greater than*
24 *one unit per five acres when this board has determined that such densities fail to*
25 *comply with the GMA?*

26 Positions of the Parties

27 Petitioner argues that the County's comprehensive plan creates rural land use designations
28 that are neither rural in density nor compliant with the statutory provisions for limited areas
29 of more intensive rural development (LAMIRDs). Petitioners Futurewise's and League of
30
31
32

1 Women Voters of Thurston County Prehearing Brief at 8-14.² Petitioner points to the
2 following designations of rural lands in the County's comprehensive plan: Residential – One
3 Unit per Two Acres; Residential – One Unit per One Acre; Residential – Two Units per One
4 Acre; and Residential – Four Units per Acre. Index No. 89, Land Use Chapter Attachment
5 Table 2-1A Percentage of Land Allocated for Rural Uses, p. 2-19. Petitioner then points to
6 the provisions in the County's development regulations (zoning code) that allow rural
7 residential densities greater than one dwelling unit per five acres. Petitioners Futurewise's
8 and League of Women Voters of Thurston County Prehearing Brief at 9; Index No. 64.
9
10 Petitioner urges that allowable residential densities on rural lands may not exceed one
11 dwelling unit per five acres unless the rural designation complies with the requirements for a
12 LAMIRD pursuant to RCW 36.70A.070(5)(d).
13

14
15 The County responds that the 2004 comprehensive plan update did not change the zoning
16 densities in the rural area "because these rural densities already comply with the Growth
17 Management Act." Respondent's Prehearing Brief at 8. The County references its criteria
18 for higher density rural zones and asserts that these criteria reflect local circumstances and
19 pre-existing development. *Ibid* at 10-11. The County asserts that new or expanded areas
20 of this zoning will not be allowed and no new areas will be designated for these densities
21 without going through a LAMIRD designation process. *Ibid* at 8-9.
22

23 24 **Board Analysis**

25 We first note that the update provisions of RCW 36.70A.130 require the County to review its
26 comprehensive plan and development regulations to ensure that they comply with the GMA:

27 A county or city shall take legislative action to review and, if needed, revise its
28 comprehensive land use plan and development regulations to ensure the plan and
29

30 ² The Petitioner's brief was submitted on April 27, 2005 before the Board had ruled that the League of Women
31 Voters of Thurston County could not be added as an additional petitioner. Order Denying Leave to File
32 Motion, May 16, 2005.

1 regulations comply with the requirements of this chapter according to the time
2 periods specified in subsection (4) of this section.
3 RCW 36.70A.130(1) (in pertinent part)

4 This requirement imposes a duty upon the County to bring its plan and development
5 regulations into compliance with the GMA, including any changes in the GMA enacted since
6 the County's adoption of its comprehensive plan and development regulations. While some
7 provisions of the County's plan and development regulations may not have been subjected
8 to timely challenge when originally adopted, a challenge to the legislative review required by
9 RCW 36.70A.130(1) and (4) opens those matters that were raised by Petitioner in the
10 update review process. See RCW 36.70A.280(2). It is not, therefore, sufficient for the
11 County to assert that its provisions regarding rural densities have not been changed; those
12 provisions must themselves comply with the GMA.
13
14

15 As Petitioner points out, densities that are no more than one dwelling unit per five acres are
16 generally considered "rural" under the GMA. *Durland v. San Juan County*, WWGMHB Cas
17 No. 00-2-0062c (Final Decision and Order, May 7, 2001); *Sky Valley v. King County*,
18 CPSGMHB Case No. 95-3-0068c (Final Decision and Order, March 12, 1996); *Yanisch v.*
19 *Lewis County*, WWGMHB Case No. 02-2-0007c (Final Decision and Order, December 11,
20 2002); but see *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008c (Final
21 Decision and Order, October 23, 1995); and *City of Moses Lake v. Grant County*, EWGMHB
22 Case No. 99-1-0016 (Final Decision and Order, May 23, 2000) (holding that rural densities
23 should be no greater than one dwelling unit per *ten* acres). Densities that are not urban but
24 are greater than one dwelling unit per five acres are generally deemed to promote sprawl in
25 violation of goal 2 of the GMA. RCW 36.70A.020(2).
26
27
28

29 The County does not argue that rural residential densities in excess of one dwelling per five
30 acres comply with the GMA. Instead, the County argues that its areas of higher rural
31 densities are compliant because they existed before the enactment of the GMA and contain
32

1 the areas where more intensive rural residential uses exist. Respondent's Prehearing Brief
2 at 10. Prior to the adoption of RCW 36.70A.070(5)(d) in 1997, there had been no legislative
3 guidance on how communities should deal with existing development in the rural areas that
4 was already more intensive than a rural level of development. When the County adopted its
5 comprehensive plan in 1995, it developed its own criteria for determining how to contain
6 such areas of more intensive development in the rural areas. In 1997, the legislature
7 adopted the provisions of RCW 36.70A.070(d) that set the requirements for "limited areas of
8 more intensive rural development" (LAMIRDs). ESB 6094 (1997). Now that there is
9 direction in the GMA on how to address areas of more intensive rural development, the
10 County's update must ensure that it complies with those terms. See *Futurewise v.*
11 *Whatcom County*, WWGMHB Case No. 05-2-0013 (Order on Dispositive Motions, June 15,
12 2005).
13
14

15
16 While the County's brief asserts that its areas of higher rural residential densities "existed
17 prior to the enactment of the Growth Management Act in 1990," the County does not argue
18 that its areas of higher rural residential densities comply with the requirements of RCW
19 36.70A.070(5)(d). The findings in Resolution 13234 similarly indicate that these areas are
20 not designations of limited areas of more intensive rural development (LAMIRDs).
21

22 Residential LAMIRDs are addressed in RCW 36.70A.070(5)(d)(i):³

23 Rural development consisting of the infill, development or redevelopment of existing
24 commercial, industrial, residential, or mixed-use areas, whether characterized as
25 shoreline development, villages, hamlets, rural activity centers, or crossroads
26 developments.

27 To comply with RCW 36.70A.070(5)(d)(i), there must be a determination of the "built
28 environment" as of July 1, 1990, (the date applicable to Thurston County)⁴ upon which the
29

30 ³ The other two types of LAMIRDs are recreational and tourist areas (RCW 36.70A.070(5)(d)(ii)) and small
31 business and cottage industry areas (RCW 36.70A.070(5)(d)(iii)) -- both non-residential LAMIRDs.

32 ⁴ Existing development, for purposes of creating the logical outer boundaries of a LAMIRD, is that which was
in existence on July 1, 1990. RCW 36.70A.070(5)(d)(v)(A).

1 establishment of logical outer boundaries for limited areas of more intensive rural
2 development (LAMIRDs) are based. RCW 36.70A.070(5)(d)(iv). Residential LAMIRDs
3 must be created within logical outer boundaries that contain the existing development, and
4 they may include only limited undeveloped lands that fit within those logical outer
5 boundaries:
6

7 A county shall adopt measures to minimize and contain the existing areas or uses of
8 more intensive rural development, as appropriate, authorized under this subsection.
9 Lands included in such existing areas or uses shall not extend beyond the logical
10 outer boundary of the existing area or use, thereby allowing a new pattern of low-
11 density sprawl. Existing areas are those that are clearly identifiable and contained
12 and where there is a logical boundary delineated predominately by the built
13 environment, but that may also include undeveloped lands if limited as provided in
14 this subsection. The county shall establish the logical outer boundary of an area of
15 more intensive rural development. In establishing the logical outer boundary the
16 county shall address (A) the need to preserve the character of existing natural
17 neighborhoods and communities, (B) physical boundaries such as bodies of water,
18 streets and highways, and land forms and contours, (C) the prevention of abnormally
19 irregular boundaries, and (D) the ability to provide public facilities and public services
20 in a manner that does not permit low-density sprawl.

21 RCW 36.70A.070(5)(d)(iv).

22 The Thurston County Comprehensive Plan Land Use Element contains a discussion of rural
23 area designations. CP at 2-17 – 2-27. This discussion includes the criteria for inclusion in
24 any of the rural area designations, including the higher density residential designations. CP
25 at 2-24 – 2-27. None of the criteria include a review of the existence of development as of
26 July 1, 1990, nor do they establish logical outer boundaries with reference to the statutory
27 criteria. *Ibid.*

28 The County's comprehensive plan policies reflect the County's intention to only apply the
29 statutory LAMIRD criteria to areas which have not yet been designated for high density rural
30 residential development, or when the existing high density rural areas are expanded:
31
32

1 One dwelling unit per five acres should be the common, minimum residential density
2 level in rural areas, except in areas already dominated by higher density
3 development.

4 Housing and Residential Densities Policy 1, CP at 2-46

5 Thus, this policy assumes that existing high density rural residential zones need not be
6 designated as LAMIRDs. Similarly, another comprehensive plan policy addresses existing
7 rural residential designations and provides that they may not expand unless they are
8 designated as LAMIRDs:
9

10 Thurston County should not expand or intensify rural residential land use
11 designations or zoning districts with densities greater than 1 unit per 5 acres unless
12 these areas are designated as a limited area of more intensive rural development
13 (LAMIRD) as defined in the GMA.

14 Housing and Residential Densities Policy 2, CP at 2-46

15 Again, this policy accepts existing high density rural residential areas without further
16 determination that they comply with the statutory LAMIRD criteria, and even discusses the
17 potential to expand LAMIRDs once they have been designated with logical outer
18 boundaries.
19

20 Rural Land Use and Activities Policy 8 (CP at 2-43-44) sets criteria for designation and
21 expansion of "commercial centers" which do not incorporate the requirements of RCW
22 36.70A.070(5)(d):
23

24 Rural commercial centers should be designated only for identified rural community
25 areas, like Rochester and Steamboat Island Road at Highway 101. These centers
26 should serve a larger rural community than neighborhood convenience and have a
27 greater variety of uses, while maintaining a rural character. Expansion of a
28 Commercial Center should only be considered if it will result in a more "logical outer
29 boundary", as defined in 36.70A.070(5) of the Growth Management Act, and if it is
30 needed to accommodate population growth in the rural community served...

31 CP 2-43 – 2-44 (in part)

32 As is true of the other policies, this policy only applies the LAMIRD criteria of RCW
36.70A.070(5)(d) in the event of "expansion" of an area of more intense rural development.

1 Rural Land Use and Activities Policy 8 does not accurately incorporate the statutory criteria
2 for LAMIRDs; logical outer boundaries may not be based on accommodating population
3 growth. RCW 36.70A.070(5)(d)(i) and (iv).
4

5
6 The policies with respect to more intensive rural development are further elaborated in the
7 zoning code as development regulations. Thurston County's zoning code contains
8 development regulations setting residential density levels in excess of one dwelling unit per
9 five acres in rural areas: Rural Residential – One Dwelling Unit per Two Acres (RR 1/2)
10 (T.C.C. Ch. 20.10); Rural Residential – One Dwelling Unit per Acre (RR 1/1) (T.C.C. Ch.
11 20.11); Rural Residential – Two Dwelling Units per Acre (RR 2/1) (T.C.C. Chapter 20.13);
12 and Suburban Residential – Four Dwelling Units per Acre (SR 4/1) (T.C.C. Chapter 20.14).
13 Index No. 64. These development regulations also fail to comply with the GMA because
14 they do not incorporate the statutory criteria for LAMIRDs. All of these residential density
15 levels constitute "more intensive rural development" within the meaning of RCW
16 36.70A.070(5)(d). If the County intends to allow them, they must conform to the statutory
17 requirements for residential LAMIRDs. RCW 36.70A.070(5)(d)(i).
18
19
20

21 Petitioner also argues that even the Rural Residential – One Dwelling Unit per Five Acres
22 (RR 1/5) zone exceeds a rural residential density level of one dwelling unit per five acres.
23 Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief
24 at 9. Petitioner points to T.C.C. 20.09.040(1)(a) to argue that the effective density for this
25 zone is actually a net minimum lot size of four acres for single family residences and eight
26 acres for duplexes. *Ibid.*
27

28
29 The cited zoning code provision, T.C.C. 20.09.040(1)(a), establishes a minimum lot size in
30 the RR 1/5 zone as follows: "Conventional subdivision lot (net) – four acres for single
31 family, eight acres for duplexes." The County does not contest that this development
32

1 regulation allows one single family dwelling unit per four acres, rather than one dwelling unit
2 per five acres, in the RR 1/5 zone.

3
4 This provision is of even greater concern because RR 1/5 is the *least* dense of the County's
5 rural residential designations. The determination of proper rural density levels depends in
6 large measure upon the GMA's strictures against promotion of sprawl. 48.3 percent of the
7 County's rural residential areas fall into the RR 1/5 category. CP Table 2-1A at 2-18 – 2-19.
8 With such a large portion of the County's rural area designated as RR 1/5, the net density
9 level of one dwelling unit per four acres in the RR 1/5 zone increases the "conversion of
10 undeveloped land into sprawling, low-density development in the rural area," in
11 contravention of RCW 36.70A.070(5)(c)(iii).
12
13

14
15 **Conclusion:** The County's high density rural residential designations (SR – 4/1; RR 2/1;
16 RR 1/1; and RR 1/2); Housing and Residential Densities Policies 1 and 2, and Rural Land
17 Use and Activities Policy 8; and the County's development regulations implementing these
18 designations (T.C.C. Ch. 20.10; T.C.C. Ch. 20.11; T.C.C. Chapter 20.13; and T.C.C.
19 Chapter 20.14) fail to comply with RCW 36.70A.070(5). The residential density levels
20 allowed in these designations are too intensive for rural areas unless they are designated as
21 limited areas of more intensive rural development (LAMIRDs) pursuant to RCW
22 36.70A.070(5)(d). If the County is to allow such areas of more intensive rural development,
23 it must establish them in accordance with RCW 36.70A.070(5)(d). T.C.C. 20.09.040(1)(a)
24 also fails to comply with RCW 36.70A.070(5)(c) and (d) by effectively increasing the rural
25 residential density in the RR 1/5 zone from one dwelling unit per five acres to one single-
26 family dwelling unit per four acres.
27
28

29 ***Issue No. 2: Does the adoption of Resolution 13234 and Ordinance 13235 fail to***
30 ***comply with RCW 36.70A.070 and RCW 36.70A.130 when they fail to provide for a***
31 ***variety of rural densities, providing instead that the only GMA compliant rural***
32 ***designations allow a uniform one unit per five acres?***

1 **Positions of the Parties**

2 Petitioner argues that the County's comprehensive plan fails to provide a variety of rural
3 densities as required by RCW 36.70A.070(5)(b). Petitioners Futurewise's and League of
4 Women Voters of Thurston County Prehearing Brief at 14. Petitioner claims that only two of
5 the rural area designations in the County's plan require densities of no more than one
6 dwelling unit per five acres - the Rural Residential Resource zone and the McAllister
7 Geologically Sensitive Area District. *Ibid* at 15.
8

9
10 The County responds that it provides densities of one dwelling unit per twenty acres, one to
11 forty and one to eight in non-urban zones. Respondent's Prehearing Brief at 14. The
12 County also cites to its provisions for the transfer of development rights, its open space tax
13 program, private conservation easements and public wildlife refuges and open spaces, and
14 parks. *Ibid* at 14-15.
15

16
17 **Board Analysis**

18 The GMA expressly requires "a variety of rural densities" in the rural element of the
19 comprehensive plan:
20

21 The rural element shall permit rural development, forestry, and agriculture in rural
22 areas. The rural element shall provide for a variety of rural densities, uses, essential
23 public facilities, and rural governmental services needed to serve the permitted
24 densities and uses. To achieve a variety of rural densities and uses, counties may
25 provide for clustering, density transfer, design guidelines, conservation easements,
26 and other innovative techniques that will accommodate rural densities and uses that
27 are not characterized by urban growth and that are consistent with rural character.

28 RCW 36.70A.070(5)(b)

29 The County concedes that it does predominately provide densities of one dwelling unit per
30 five acres in the rural zone. Respondent's Prehearing Brief at 14. However, the County
31 asserts that it has other designations that are less dense than one in five. *Ibid*. The
32 densities that the County cites as being less intense than one dwelling unit per five acres
include designations of natural resource lands. T.C.C. Chapter 20.08A applies to lands in
the long-term agricultural district; Ch. T.C.C.20.08D applies to lands in the long-term forestry

1 district; and T.C.C. Chapter 20.62 creates a program for transfer of development rights in
2 long-term commercially significant agricultural lands. Rural lands are lands "not designated
3 for urban growth, agriculture, forest, or mineral resources." RCW 36.70A.070(5). Thus, the
4 designations of low-intensity resource lands do not create a variety of rural densities.

5
6
7 Rural densities, as we have discussed above, are generally no more intense than one
8 dwelling unit per five acres. The County has designated and zoned a variety of rural areas
9 with residential densities higher than this rural level: Residential – One Unit per Two Acres;
10 Residential – One Unit per One Acre; Residential – Two Units per One Acre; and
11 Residential – Four Units per Acre. The RR 1/5 zone, although stating that it limits
12 development density to one dwelling unit per five acres, has a net density of one single
13 family dwelling unit per four acres. T.C.C. 20.09.040(1)(a). None of these densities are
14 rural in nature and therefore cannot be used to establish a variety of rural densities.

15
16
17 The GMA allows a county to achieve a variety of rural densities through innovative
18 techniques. RCW 36.70A.070(5)(b). However, where the rural designations and zones
19 themselves do not include a variety of rural densities, the comprehensive plan and
20 development regulations must demonstrate how the "innovative techniques" create such
21 varieties of densities in the rural area. The County argues that its natural shoreline
22 environment residential zone limits densities to a minimum lot area of ten acres.

23
24 Respondent's Prehearing Brief at 12. However, it is not clear how or even if this zone
25 affects rural densities.⁵ A similar problem exists with its "clustering ordinance." *Ibid* at 14.

26 The County asserts that it "owns and funds conservation easements" but does so in the
27 same sentence in which it refers to its transfer of development rights program, which applies
28

29
30
31 ⁵ Although the County references exhibits in its brief, the exhibits provided to the Board are not tabbed and an
32 order cannot be discerned. In some instances, it does not appear that the Board has actually been provided
the cited exhibit. If an exhibit has not been provided, it cannot be considered by the Board and thus will not be
part of the record. It would also aid the Board if the exhibits were clearly marked and organized for reference.

1 to agricultural lands rather than rural lands. *Ibid.* The Board is therefore unable to find that
2 the County has achieved a variety of rural densities and uses through innovative
3 techniques.

4
5 **Conclusion:** The County's comprehensive plan and development regulations fail to provide
6 for a variety of rural densities as required by RCW 36.70A.070(5)(b).
7

8
9 **Issue No. 3: Does the adoption of Resolution 13234 and Ordinance 13235 fail to**
10 **comply with RCW 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.110 and RCW**
11 **36.70A.130 when the ordinances establish urban growth areas that substantially**
12 **exceed the capacity necessary to accommodate the Washington Office of**
13 **Financial Management population forecast adopted by the County, even assuming**
14 **a 25 percent market factor? This issue includes UGAs that preexisted these**
15 **ordinances that were too large and a UGA expansion effected by these**
16 **ordinances.**

16 **Positions of the Parties**

17 Petitioner argues that the County's urban growth areas (UGAs) are 62 percent larger than
18 necessary to accommodate the County's growth target. Petitioners Futurewise's and
19 League of Women Voters of Thurston County Prehearing Brief at 16. This, Petitioner
20 argues, is well beyond the 25 percent market factor allowed under the GMA. *Ibid* at 17.
21 Petitioner argues that urban growth areas must be sized to accommodate the OFM
22 population projection chosen by the County and may not be "over-sized" without creating
23 sprawling growth. *Ibid* at 19. Petitioner also argues that the County's Urban Growth Area
24 Policy 8 (allowing expansion of urban growth areas if there is an overriding benefit to the
25 public health, safety, and welfare) fails to comply with the GMA. *Ibid.*
26
27

28
29 The County responds that it has worked with the cities and towns of Thurston County to
30 properly accommodate projected growth. Respondent's Prehearing Brief at 16-18. The
31 County disputes Petitioner's contention that its UGAs are 62 percent larger than needed to
32 accommodate projected growth; the County argues that it has allowed for 38 percent

1 excess capacity in its UGAs. *Ibid* at 20. The County argues that this is a statutorily
2 permissible market factor and a 38 percent market factor is not excessive. *Ibid*. The
3 County also argues that the Tenino UGA was actually reduced in size; and the Bucoda UGA
4 was expanded to deal with potential contamination of its aquifer. *Ibid* at 19-20.

5
6
7 Intervenor argues in support of the Tenino UGA expansion to include Intervenor's property.
8 Intervenor's Brief. Intervenor argues that Tenino changed but did not increase its UGA size
9 and that adding the Intervenor's property to the UGA will enable development needed to
10 support a planned sewer facility. Intervenor's Brief at 3-4. Intervenor also challenges the
11 sufficiency of the Petitioner's standing in this case because Petitioner did not participate in
12 the City of Tenino's adoption of its UGA. *Ibid* at 5-8. (See footnote 8.)
13

14 **Board Analysis**

15
16 The requirements for creating and sizing a UGA are set out in RCW 36.70A.110. This
17 section of the statute provides that UGAs must include areas and densities sufficient to
18 accommodate the 20-year population projections by the Office of Financial Management
19 (OFM):
20

21 Based upon the growth management population projections made for the county by
22 the office of financial management, the county and each city within the county shall
23 include areas and densities sufficient to permit the urban growth that is projected to
24 occur in the county or city for the succeeding twenty-year period, except for those
25 urban growth areas contained totally within a national historical reserve... An urban
26 growth area determination may include a reasonable land market supply factor and
27 shall permit a range of urban densities and uses. In determining this market factor,
28 cities and counties may consider local circumstances. Cities and counties have
29 discretion in their comprehensive plans to make many choices about accommodating
30 growth.

31 RCW 36.70A.110(2) (in pertinent part)

32 RCW 36.70A.110(2) provides that county UGAs shall include areas and densities sufficient
to permit the urban growth projected for the county by OFM. RCW 36.70A.110(2). This
provision has been interpreted to also limit the size of UGAs as well as to ensure that the

1 UGA boundaries are sufficient to accommodate projected growth, in light of the anti-sprawl
2 goal of the GMA. *Diehl v. Mason County*, 94 Wn.App. 645, 982 P.2d 543 (Div. II, 1999).
3 "... [T]he OFM projection places a cap on the amount of land a county may allocate to
4 UGAs." *Ibid* at 654. Thus, RCW 36.70A.110 requires that the UGAs be created to
5 accommodate the OFM population projection for the 20-year planning horizon and also
6 limits the size of UGAs to those lands needed to accommodate the urban population
7 projection utilized by the county.
8

9
10 In this case, the County has chosen a 2025 total population forecast figure of 334,261. CP
11 Table 2-1 at 2-12. The population forecast chosen was adopted in 1999 as a regional
12 forecast (Population and Employment Forecast for Thurston County, Final Report, October
13 1999, Index No. 208) and then compared to the OFM population projections for the County
14 in 2002. Buildable Lands Report for Thurston County, Technical Documentation, at 46
15 (Submitted post-hearing, Index No. 43). The medium scenario regional forecast was found
16 to fall within one percent of the new state medium range forecast (OFM's projection) and
17 was therefore adopted for use in the Buildable Lands Report and, subsequently, the 2004
18 comprehensive plan update. *Ibid.*; Thurston County Comprehensive Plan (CP), Facts
19 Section and Land Use Chapter Table 2-1 at 2-11 – 2-12. That population forecast, in turn,
20 was used to determine demand for land within the UGAs through 2025. Thurston County
21 Comprehensive Plan (CP), Facts Section and Land Use Chapter Table 2-1 at 2-11 – 2-12.
22 We note first that the Buildable Lands Report for Thurston County is an impressive and
23 thorough analysis of land supply and demand in Thurston County. The land demand
24 analysis in that report is well-supported and clearly explained. The County's choice to rely
25 upon the land supply and demand analysis in the Buildable Lands Report for planning in the
26 2004 comprehensive plan update is a sound one.
27
28
29

30
31 Petitioner does not fault the population forecast chosen by the County or claim that the land
32 supply projections are not compatible with the population projections provided by OFM.

1 Instead, Petitioner focuses on the amount of land included in the County's UGAs and
2 compares it to the projected demand for urban land. Petitioners Futurewise's and League
3 of Women Voters of Thurston County Prehearing Brief at 31. The County's comprehensive
4 plan acknowledges that in the urban area "approximately 38% of available residential land
5 in 2000 will remain in the year 2025, assuming the county experiences growth consistent
6 with state and regional forecasts, and zoning remains consistent." CP footnote 6 at 2-11.
7 On its face, then, the County's UGAs provide a significantly greater amount of land for
8 residential urban development than is likely to be needed to accommodate the projected
9 population growth allocated by the County to UGAs.
10
11

12 The County responds that the disparity is due to a market factor. Respondent's Prehearing
13 Brief at 22.⁶ Petitioner argues that supply exceeds demand for residential land in the UGAs
14 by 62 percent, which is excessive even if it were a market factor. Petitioners Futurewise's
15 and League of Women Voters of Thurston County Prehearing Brief at 31. The County
16 responds that the "7,207 acres is the unconsumed land left in 2025 which is thirty-eight
17 percent (38%) of the total land supply of 18,799 acres." Respondent's Prehearing Brief at
18 20. A 38 percent market factor, according to the County, is not clearly erroneous in light of
19 the uncertainties about how much future land will be needed for growth in the cities and
20 towns of Thurston County. *Ibid* at 22.
21
22

23
24 The use of a "land market supply factor" is permissible under the statute to account for the
25 vagaries of the real estate market supply. RCW 36.70A.110(2). The Central Puget Sound
26 Growth Management Hearings Board describes the market factor as follows:

27 In general, it accounts for the fact that not all vacant land will be built or all
28 redevelopable property redeveloped, because the property owners simply will not
29 take the necessary actions during the planning period.
30

31 ⁶ Since a market factor is used to increase the available land supply, it should be applied to the 2025 land
32 demand figure. As an example, if the projected land demand is 100 acres, a 25 percent market factor would
increase the needed land supply to 125 acres.

1 *City of Gig Harbor, et al. v. Pierce County*, CPSGMHB Case No. 95-3-0016c (Final Decision
2 and Order, October 31, 1995)

3
4 The first problem with the County's response is that nowhere in the County's comprehensive
5 plan is it indicated that a 38 percent market factor was utilized to increase the amount of
6 acreage that is needed to accommodate projected urban residential growth. While the
7 comprehensive plan acknowledges that 38 percent of urban residential land will remain
8 unconsumed in 2025, it does not claim that the reason for this was a market factor. CP
9 footnote 6 at 2-11.

10
11
12 At argument, the County claimed that the 38 percent market factor was based on overlays
13 of critical areas and shorelines. However, the Buildable Lands Report already accounted
14 for critical areas deductions:

15 Critical area and right-of-way exclusions can reduce net density in significant
16 amounts taken across all zoning districts as a whole, (note the difference in
17 deduction of those jurisdictions including all critical areas and rights-of-way versus
18 those that are much more selective, Table 12). In real terms, however, these
19 deductions play a relatively small role in the difference between net density
20 calculations once a parcel has been through the platting process. In addition, many
21 jurisdictions further protect critical areas from all development pressure by placing
22 them into Open Space or Institutional zoning categories. Overall, critical areas
23 deductions to net density, as applied by various jurisdictions, were found to comprise
less than one percent of those parcels developed between 1996 and 2000 in
residential and mixed use zoning categories.

24 Building Lands Report, Technical Documentation, (Index No. 43) at 35.

25 In fact, the disparity between land supply and demand in the urban areas does not appear
26 to be the result of a market factor at all, but appears instead to be an unavoidable
27 consequence of the urban growth boundaries chosen by the County.

28
29 The second problem with the County's assertion that the disparity between residential land
30 supply and projected demand is a result of a market factor is that there is no analysis
31 demonstrating the reason for the market factor. "Although a county may enlarge a UGA to
32 account for a 'reasonable land market supply factor,' it must also explain why this market

1 factor is required and how it was reached.” *Diehl v. Mason County*, 95 Wn. App. 645, 654,
2 982 P.2d 543 (Div. II, 1999).

3
4 The land supply analysis performed in the Buildable Lands Report concluded that the
5 supply of residential land as of 2000 for urban Thurston County will exceed demand for
6 urban residential land in 2025; it found a supply of 18,789 acres and a 2025 demand of 11,
7 582 acres. Buildable Lands Report for Thurston County, September 2002. (Index No. 43),
8 Figure II-1 at II-4. The 2004 update of the comprehensive plan accepts and utilizes these
9 figures for residential land supply and demand in urban areas. Thurston County
10 Comprehensive Plan (CP), Facts Section and Land Use Chapter Table 2-1 at 2-11 – 2-12.

11
12 However, there is no explanation in the comprehensive plan for the use of a market factor,
13 perhaps because the buildable lands analysis appears to already account for many of the
14 market vagaries in its own assessment of land availability. The buildable lands analysis
15 provides an individualized look at the available land (generally on a parcel-by-parcel basis)
16 and produces a figure for net developable land based on development assumptions
17 established in light of the actual development trends in the area of the lands assessed.
18 Buildable Lands Report for Thurston County, September 2002. (Index No. 43). The
19 analysis includes a review of subdivision trends from 1995 to 1999 and residential building
20 permits from 1996 to 2000. Buildable Lands Report for Thurston County at 32-33.
21 Development assumptions were derived based on current comprehensive plans and
22 development codes, recent development trends and information provided by long-range
23 planners from jurisdictions throughout the County. *Ibid* at II – 10. The buildable lands
24 analysis assesses many of the potential market factors and incorporates them into the
25 figures for land supply and demand that it produces. This analysis appears to take the
26 place of a market factor.
27
28
29
30

31 Since the number used in the comprehensive plan update to determine residential land
32 supply in the Thurston County urban growth areas was derived from the buildable lands

1 analysis, any market factor must be based on factors that were not already incorporated into
2 the determination of residential land supply.

3
4 Petitioners also challenge the expansion of two UGAs – the Tenino UGA and the Bucoda
5 UGA. Petitioners Futurewise's and League of Women Voters of Thurston County
6 Prehearing Brief at 17 – 18. Citing to Table 2-1 of the County's comprehensive plan,
7 Petitioner points out that the 2025 residential land demand for the Bucoda UGA is 30 acres
8 and the corresponding land supply is 81 acres. *Ibid.* Tenino's residential land demand in
9 2025 is projected to be 353 acres with a corresponding land supply of 505 acres. *Ibid.*
10 Petitioner further asserts that the County's Urban Growth Area Policy 8 (allowing expansion
11 of urban growth areas if there is an overriding benefit to the public health, safety, and
12 welfare) fails to comply with the GMA.
13
14

15
16 The County responds that land was taken out of, as well as added to, the Tenino UGA so
17 that the Tenino UGA was actually reduced by 6 acres. Respondent's Prehearing Brief at
18 19. The Intervenor points out that the addition of its property to the UGA is necessary to
19 finance a new sewer facility that will allow the City to encourage more intense urban
20 development than can now be adequately served with urban levels of governmental
21 services. Intervenor's Brief at 2-3.⁷ This will allow truly urban density levels of residential
22 development within the City limits. As to the Bucoda UGA, the County argues that
23 expansion of its boundaries adds sufficient developable lands for projected residential
24 growth if sewer becomes available, and reduces pressure on the existing aquifer from
25 residential development based on septic systems. Respondent's Prehearing Brief at 19-20.
26
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28
29 ⁷ Intervenor also challenges Petitioner's standing to raise challenges to the Tenino UGA because Petitioner did
30 not participate in the City's process in developing its comprehensive plan. However, Petitioner is not
31 challenging the City's adoption of its plan but rather the County's adoption of UGA boundaries. Adoption of
32 urban growth area boundaries is the responsibility of the County. RCW 36.70A.110. Petitioner participated in
the County's process in adopting those boundaries and raised its concerns at that time. RCW
36.70A.280(2)(b). Since the adoptions being challenged are the County's resolution and ordinance, Petitioner
has standing to bring this appeal.

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However, the fundamental problem identified by Petitioner is that the UGAs are much larger than the growth projected to be accommodated in them. It may well be, as Intervenor argues, that there are good reasons for increasing the size of the Tenino UGA. However, if the County does this, it must "show its work"⁸ on the reasons for the expansion and also increase its allocated population growth to the Tenino UGA and adjust its population allocations elsewhere in the County's UGAs accordingly. Similarly, it may be reasonable for the County to adjust the Bucoda UGA boundaries to accommodate additional growth in that UGA (if that urban growth is provided with urban levels of services). However, if it does so, the County must "show its work," allocate additional population growth to the Bucoda UGA, and account for that re-allocation in the other land use designations in the county. The OFM population allocation to the county is the basis upon which the UGAs may be sized; the population growth allocations to each UGA must add up to comport with the overall county urban growth population allocation.

Urban Growth Area Policy 8(b) (CP at 2-50) provides for expansion of UGA boundaries for reasons other than accommodation of projected urban population growth:

There can be shown an overriding public benefit to public health, safety and welfare by moving the urban growth boundary.

Urban Growth Area Policy 8(b), CP at 2-50.

This policy appears to confuse expansion of UGA boundaries with extension of urban levels of service. Under RCW 36.70A.110(4), urban governmental services may not be extended to rural areas "except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially

⁸ *Berschauer v. Tumwater*, WWGMHB Case No. 94-2-0002 (Final Decision and Order, July 27, 1994); *Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-1-0010 (Final Decision and Order, June 3, 1994).

1 supportable at rural densities and do not permit urban development.” However, this
2 exception does not apply to the extension of UGA boundaries. UGA boundaries are to be
3 set to accommodate projected urban population growth (RCW 36.70A.110(2)) and to
4 contain such urban growth. RCW 36.70A.110(1). Urban Growth Area Policy 8(b) allows the
5 extension of urban growth in violation of these provisions of the GMA and its anti-sprawl
6 goal, RCW 36.70A.020(2).
7

8
9 **Conclusion:** The size of any UGA must be based upon the projected population growth
10 allocated to that UGA. Since the supply of urban residential lands (18,789 acres)
11 significantly exceeds the projected demand for such lands over the course of the 20-year
12 planning horizon (11,582 acres), the County’s UGAs fail to comply with RCW 36.70A.110.
13 For the Tenino and Bucoda UGAs, the population projection allocations and the 2025 land
14 demand figures based on them are not consistent with the land supply for those urban
15 growth areas. This also fails to comply with RCW 36.70A.110.
16

17
18 ***Issue No. 4: Does the adoption of Resolution 13234 and Ordinance 13235 fail***
19 ***to comply with RCW 36.70A.020(8), RCW 36.70A.060, RCW 36.70A.170, RCW***
20 ***36.70A.050 and RCW 36.70A.130 when they fail to designate and conserve***
21 ***hundreds of acres of land that meet the GMA criteria for agricultural lands of***
22 ***long term commercial significance?***

23 Petitioner argues that Thurston County’s designation criteria are internally inconsistent
24 because the land capability classification system and prime farmland are not the same
25 systems, yet Thurston County’s designation criterion mixes them all together and ultimately
26 relies on prime farmland. Petitioners Futurewise’s and League of Women Voters of
27 Thurston County Prehearing Brief at 22-23. Petitioner also argues that County’s criteria for
28 designation of agricultural lands of long-term commercial significance are erroneous for
29 three reasons: they fail to consider farmlands of statewide importance; they require that land
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1 actually be used for agriculture; and they require a predominant parcel size of 20 acres.
2 *Ibid* at 24 – 29.⁹

3
4 The County responds that the Petitioner has not shown that the County's criteria for
5 designation of agricultural lands of long-term commercial significance are clearly
6 erroneous.¹⁰
7

8
9 The County's designation criteria for agricultural lands of long-term commercial significance
10 are found at Chapter Three – Natural Resources, pp. 3-3 – 3-7 of the County's
11 comprehensive plan. The County's comprehensive plan also states that almost 15 percent
12 of land in the county is used for local agriculture. *Ibid* at 3-1.
13

14
15 As a first step towards designating natural resource lands, the Minimum Guidelines to
16 Classify Agriculture, Forest, Mineral Lands and Critical Areas (Ch. 365-190 WAC)
17 ("Minimum Guidelines" hereafter) call for classification of natural resource land categories.
18 WAC 365-190-040(1). WAC 365-190-050 directs counties and cities to use the land-
19 capability classification system of the United States Department of Agriculture Soil
20 Conservation Service as defined in Agriculture Handbook No. 210.¹¹ The Petitioner faults
21 the County's classification of soils for inconsistency with the Agriculture Handbook No. 210.
22 However, Petitioner's very abbreviated argument simply does not demonstrate how the
23 County's classification system fails to follow Agriculture Handbook No. 210.
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27 ⁹At the hearing on the merits, Petitioner abandoned its argument that the County erred in using an out-dated
28 list of prime farmland soils, conceding that the list was not provided to the County in sufficient time to be
29 included in its 2004 update.

30 ¹⁰ The County devoted most of its argument in its Prehearing Brief to the Petitioner's claim that the County
31 should have included the newest list of prime farmland soils in its 2004 update. That claim was later
32 abandoned.

¹¹ Although couched in mandatory terms, the Minimum Guidelines call for counties to "consider" the minimum
guidelines. WAC 365-190-040(2)(b)(ii).

1 Petitioner also faults the County for failing to consider farmlands of statewide importance in
2 its classification scheme. For this argument, Petitioner relies upon the holding of the
3 Eastern Washington Growth Management Hearings Board in *Williams, et al. v. Kittitas*
4 *County*, EWGMHB Case No. 95-1-0009 (Order of Noncompliance, November 6, 1998).
5 However, in that decision, the Eastern Board did not hold that farmlands of statewide
6 importance must be considered in establishing a classification scheme. Again, Petitioner
7 has failed to meet its burden of proof on this point.
8

9
10 On the other hand, Petitioner points to two of the County's criteria for designation of
11 agricultural lands of long-term commercial significance that do not comply with the Growth
12 Management Act's directives to designate and conserve agricultural resource lands. RCW
13 36.70A.040 and 36.70A.170. The first is the requirement in Chapter 3 of the County
14 comprehensive plan that "Designated agricultural lands should include only areas that are
15 used for agriculture." Thurston County Comprehensive Plan, Chapter Three – Natural
16 Resource Lands, p. 3-4. Lands otherwise eligible for designation as agricultural lands of
17 long-term commercial significance may not be excluded simply on the basis of current use.
18 Our State Supreme Court has ruled on this point:
19

20
21 One cannot credibly maintain that interpreting the definition of "agricultural land" in a
22 way that allows land owners to control its designation gives effect to the Legislature's
23 intent to maintain, enhance, and conserve such land. . . We hold land is "devoted to"
24 agricultural use under RCW 36.70A.030 if it is in an area where the land is actually
25 used or capable of being used for agricultural production.

26 *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d
27 38, 53, 959 P.2d 1091, 1998 Wash. LEXIS 575 (1998).
28

29 Therefore, agricultural lands designation criterion number three does not comply with the
30 GMA definitions of agricultural lands. RCW 36.70A.030(2) and (10).
31

32 The second designation criterion that fails to comply with the GMA is criteria number 5,
which requires that the predominant parcel size must be 20 acres or more. Thurston
County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4. The

1 comprehensive plan explains that the reason for this parcel size limitation is it "provides
2 economic conditions sufficient for managing agriculture lands for long-term commercial
3 production." *Ibid.* However, as Petitioner points out (and as the Eastern Board found in the
4 Kittitas County case cited above) parcel size does not necessarily correlate to the size of a
5 farm. Farms may consist of several parcels in common ownership or use (under lease for
6 example), thus achieving the economies of scale the County appears to rely upon in
7 restricting smaller farms from designation and conservation. While parcel size may be a
8 factor in determining the possibility of more intense uses of the land, it is just one in many
9 factors to consider on the question of the possibility of more intense uses of the land. WAC
10 365-190-050(e). Parcel size is not determinative of the size of a farm, which may consist of
11 more than one parcel.
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15 Parcel size itself does not correspond to farm size because it is not indicative of the amount
16 of acreage that would be farmed together. Using predominant parcel size of 20 acres as a
17 designation criterion may exclude viable farms in which the total acreage farmed is in
18 excess of 20 acres in size but each of the parcels making up the farm is less than 20 acres.
19 If size is to be used as a factor in designating agricultural lands, farm size rather than parcel
20 size is the relevant consideration.
21

22
23 Agricultural land designation criteria no. 5 therefore fails to comply with RCW 36.70A.030,
24 RCW 36.70A.060 and 36.70A.170.
25

26 **Conclusion:** Petitioner has failed to meet its burden of proof as to the County's
27 classification system for agricultural lands of long-term commercial significance and any
28 inconsistencies alleged between the comprehensive plan provisions concerning it.
29 However, designation criteria numbers 3 and 5 fail to comply with the requirements of the
30 GMA to designate and conserve agricultural resource lands. RCW 36.70A.060 and
31 36.70A.170.
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VI. INVALIDITY

Petitioner asks the Board to enter a finding of invalidity as to the comprehensive plan designations and zones that allow rural densities greater than one dwelling unit per five acres in the rural area. Petitioner Futurewise's and Thurston County League of Women Voter Prehearing Brief at 29-30.¹² Petitioner also requests that the urban growth areas be found invalid because they have resulted in an average net residential density of 1.73 dwelling units per acre in the unincorporated urban growth areas and damage to Puget Sound. *Ibid* at 32.

The County responds that all of the provisions of Resolution 13234 and Ordinance 13235 are compliant with the GMA so a finding of invalidity may not be entered. Respondent's Prehearing Brief at 25.

A finding of invalidity may be entered when a board makes a finding of noncompliance and further includes a "determination, supported by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1) (in pertinent part).

We have held that invalidity should be imposed if continued validity of the noncompliant comprehensive plan provisions or development regulations would substantially interfere with the local jurisdiction's ability to engage in GMA-compliant planning. See *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance and Imposing Invalidity, February 13, 2004). On the record before us, we do not find that a remand with an order to achieve compliance is insufficient to enable the County to pursue GMA-

¹² Petitioner also requests a finding of invalidity based on the lack of variety of rural densities but it is unclear what portions of the resolution and ordinance could be found invalid to address this lack. *Ibid* at 31.

1 compliant planning. However, if circumstances change such that development applications
2 during the pendency of the County's compliance efforts are likely to vest in ways that will
3 substantially interfere with the achievement of the goals and requirements of the GMA, we
4 will entertain a motion to impose invalidity on provisions of Resolution 13234 and Ordinance
5 13235 that we have found noncompliant in this final decision and order. RCW
6 36.70A.330(4). Such a motion may be brought at any time until compliance has been found
7 but must be accompanied by documents indicating the conditions justifying a finding of
8 invalidity.
9

10 11 VII. FINDINGS OF FACT

- 12 1. Thurston County is a county located west of the crest of the Cascade Mountains
13 that is required to plan pursuant to RCW 36.70A.040.
- 14 2. Petitioner is a non-profit organization that participated in the adoption of Resolution
15 13234 and Ordinance 13235 in writing and orally. Petitioner raised the matters
16 addressed in its Petition for Review to the County in its participation below.
- 17 3. Intervenor is a property owner whose property was added to the Tenino UGA in the
18 County's adoption of Resolution 13234 and Ordinance 13235.
- 19 4. Resolution 13234 and Ordinance 13235 were adopted by the County on
20 November 22, 2004 and notice of adoption was published on November 24, 2004.
- 21 5. Petitioner filed its petition for review of Resolution 13234 and Ordinance 13235 on
22 January 21, 2005.
- 23 6. When the County adopted its comprehensive plan in 1995, it developed its own
24 criteria for determining how to contain existing areas of more intensive development
25 in the rural areas.
- 26 7. In 1997, the legislature adopted the provisions of RCW 36.70A.070(d) that set the
27 requirements for "limited areas of more intensive rural development" (LAMIRDs).
- 28 8. The County's comprehensive plan designates high density rural residential areas
29 which allow 4 dwelling units per acre (SR - 4/1) 2 dwelling units per acre (RR 2/1) 1
30 dwelling unit per acre (RR 1/1) and 1 dwelling unit per two acres (RR 1/2).
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9. Thurston County's zoning code contains development regulations setting residential density levels in excess of one dwelling unit per five acres in rural areas: Rural Residential – One Dwelling Unit per Two Acres (RR 1/2) (T.C.C. Ch. 20.10); Rural Residential – One Dwelling Unit per Acre (RR 1/1) (T.C.C. Ch. 20.11); Rural Residential – Two Dwelling Units per Acre (RR 2/1) (T.C.C. Chapter 20.13); and Suburban Residential – Four Dwelling Units per Acre (SR 4/1) (T.C.C. Chapter 20.14).
10. All of these residential density levels constitute "more intensive rural development" within the meaning of RCW 36.70A.070(5)(d).
11. 5.5 percent of rural lands in the county are designated for high intensity rural residential uses, i.e. SR – 4/1; RR 2/1; RR 1/1; and RR 1/2.
12. In its 2004 update of its comprehensive plan and development regulations, the County has not applied the statutory LAMIRD criteria to its existing areas of more intensive development in the rural areas.
13. County comprehensive plan Housing and Residential Densities Policies 1 and 2, and Rural Land Use and Activities Policy 8 exempt existing areas of high density rural residential development from the statutory requirements for LAMIRDs.
14. The Thurston County Comprehensive Plan Land Use Element contains a discussion of rural area designations. CP at 2-17 – 2-27. This discussion includes the criteria for inclusion in any of the rural area designations, including the higher density residential designations. CP at 2-24 – 2-27. None of the criteria include a review of the existence of development as of July 1, 1990, nor do they establish logical outer boundaries with reference to the statutory criteria. *Ibid.*
15. T.C.C. 20.09.040(1)(a) establishes a minimum lot size in the RR 1/5 zone as follows: "Conventional subdivision lot (net) – four acres for single family, eight acres for duplexes." This development regulation allows one single family dwelling unit per four acres, rather than one dwelling unit per five acres, in the RR 1/5 zone.
16. 48.3 percent of the County's rural residential areas fall into the RR 1/5 category. CP Table 2-1A at 2-18 – 2-19.
17. With such a large portion of the County's rural area designated as RR 1/5, the net density level of one dwelling unit per four acres in the RR 1/5 zone increases the conversion of undeveloped land into sprawling, low-density development in the rural area.

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18. T.C.C. Chapter 20.08A applies to lands in the long-term agricultural district; Ch. T.C.C. 20.08D applies to lands in the long-term forestry district; and T.C.C. Chapter 20.62 creates a program for transfer of development rights in long-term commercially significant agricultural lands. All of these designations are resource land designations.
19. Rural lands are lands "not designated for urban growth, agriculture, forest, or mineral resources." RCW 36.70A.070(5). Thus, the designations of agricultural and forest resource lands do not create a variety of *rural* densities.
20. Where the rural designations and zones themselves do not include a variety of densities, the comprehensive plan and development regulations must demonstrate how the "innovative techniques" create such varieties of densities in the rural area. The County's comprehensive plan does not describe how any innovative techniques have been used to provide a variety of rural densities in the rural area.
21. The County has chosen a 2025 total population forecast figure of 334,261. CP Table 2-1 at 2-12.
22. The OFM population forecast for the county forms the basis for the Buildable Lands Report determination of demand for urban lands in 2025.
23. The medium scenario regional forecast was found to fall within one percent of the new state medium range forecast (OFM's projection) and was therefore adopted for use in the Buildable Lands Report and, subsequently, the 2004 comprehensive plan update.
24. The County's buildable lands analysis concludes that the supply of residential land as of 2000 for urban Thurston County will exceed demand for urban residential land in 2025; it found a supply of 18,789 acres and a 2025 demand of 11, 582 acres. Buildable Lands Report for Thurston County, September 2002, Figure II-1 at II-4.
25. The 2004 update of the comprehensive plan accepts and utilizes the figures from the Buildable Lands Report for residential land supply and demand in urban areas. Thurston County Comprehensive Plan (CP), Facts Section and Land Use Chapter Table 2-1 at 2-11 – 2-12.
26. The County's allocation of residential urban lands (18,789 acres) exceeds its projected 2025 demand for such lands (11,582 acres) by 7,205 acres.

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- 27. Nowhere in the County's comprehensive plan is it indicated that a 38 percent market factor was utilized to increase the amount of acreage that is needed to accommodate projected urban residential growth.
- 28. The basis for the use of the urban residential land supply and demand figures is well grounded in the County's Buildable Lands Report.
- 29. The comprehensive plan does not include an explanation or justification for the use of a land supply market factor.
- 30. The Buildable Lands Report accounted for critical areas deductions in the net developable land available for urban residential development.
- 31. The County's comprehensive plan allocates a 2025 residential land demand of 30 acres and a corresponding land supply of 81 acres for the Bucoda UGA. CP Table 2-1.
- 32. The County's comprehensive plan allocates 353 acres for urban residential land demand in the Tenino UGA 2025 and projects a corresponding land supply of 505 acres. CP Table 2-1.
- 33. Urban Growth Area Policy 8(b) (CP at 2-50) provides for expansion of UGA boundaries when "There can be shown an overriding public benefit to public health, safety and welfare by moving the urban growth boundary."
- 34. Urban Growth Area Policy 8(b) and the expansion of the Tenino and Bucoda UGAs expand UGA boundaries beyond those lands needed to accommodate projected urban population growth.
- 35. Almost 15 percent of land in the County is used for local agriculture. CP Chapter Three – Natural Resources, pp. 3-3 – 3-7.
- 36. Petitioner's abbreviated argument simply does not demonstrate how the County's classification system fails to follow Agriculture Handbook No. 210.
- 37. Chapter 3 of the County comprehensive plan provides that "Designated agricultural lands should include only areas that are used for agriculture." Thurston County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4. This provision limits the designation (and thus conservation) of agricultural lands to those that are currently in use for agriculture.
- 38. County criteria number 5 for designation of agricultural resource lands requires that the predominant parcel size must be 20 acres or more. Thurston County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4.

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39. Using predominant parcel size of 20 acres as a designation criterion may exclude viable farms in which the total acreage farmed is in excess of 20 acres in size but each of the parcels making up the farm is less than 20 acres

VIII. CONCLUSIONS OF LAW

- A. This Board has jurisdiction over the parties to this action.
- B. This Board has jurisdiction over the subject-matter of this action.
- C. Petitioner has standing to raise the issues in its Petition for Review.
- D. The petition for review in this case was timely filed.
- E. The County's high density rural residential designations (SR – 4/1; RR 2/1; RR 1/1; and RR 1/2); Housing and Residential Densities Policies 1 and 2, and Rural Land Use and Activities Policy 8; and the County's development regulations implementing these designations (T.C.C. Ch. 20.10; T.C.C. Ch. 20.11; T.C.C. Chapter 20.13; and T.C.C. Chapter 20.14) fail to comply with RCW 36.70A.070(5).
- F. T.C.C. 20.09.040(1)(a) fails to comply with RCW 36.70A.070(5)(c) and (d) by effectively increasing the rural residential density in the RR 1/5 zone from one dwelling unit per five acres to one single-family dwelling unit per four acres.
- G. The County's comprehensive plan and development regulations fail to provide for a variety of rural densities in the rural element as required by RCW 36.70A.070(5)(b).
- H. The County's UGA designations and development regulations implementing them fail to comply with RCW 36.70A.110 by creating UGA boundaries that significantly exceed the projected demand for urban residential lands over the course of the 20-year planning horizon.
- I. Urban Growth Area Policy 8(b) fails to comply with RCW 36.70A.110(1) and (2).
- J. Petitioner has failed to meet its burden of proof as to the County's classification system for agricultural lands of long-term commercial significance and any inconsistencies alleged between the comprehensive plan provisions concerning it. Therefore, these provisions are compliant with the GMA.
- K. Petitioner has failed to meet its burden of proof that the County's failure to consider farmlands of statewide importance violates the goals and requirements of the GMA.

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L. Agricultural land designation criteria numbers 3 and 5 (Thurston County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4.) fail to comply with the requirements of the GMA to designate and conserve agricultural resource lands. RCW 36.70A.060 and 36.70A.170.

IX. ORDER

The County is ordered to achieve compliance with the Growth Management Act pursuant to this decision no later than January 18, 2006. The following schedule for compliance, briefing and hearing shall apply:

Compliance Due	January 17, 2006.
Compliance Report (County to file and serve on all parties)	January 24, 2006.
Any Objections to a Finding of Compliance Due	February 17, 2006.
County's Response Due	March 10, 2006
Compliance Hearing (location to be determined)	March 22, 2006

The Board incorporates the findings and conclusions of its Order Denying Motions To Dismiss, April 21, 2005, by reference in this final decision and order. As part of this final decision and order, the Order Denying Motions To Dismiss shall also become a final order upon entry of this decision.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. **Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),**

1 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
2 filing a petition for judicial review.

3 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the
4 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
5 judicial review may be instituted by filing a petition in superior court according to the
6 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

7 Enforcement. The petition for judicial review of this Order shall be filed with the
8 appropriate court and served on the Board, the Office of the Attorney General, and all
9 parties within thirty days after service of the final order, as provided in RCW
10 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
11 but service on the Board means actual receipt of the document at the Board office
within thirty days after service of the final order.

12 Service. This Order was served on you the day it was deposited in the United States
13 mail. RCW 34.05.010(19)

14
15 Entered this 20th day of July 2005.

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18 _____
Margery Hite, Board Member

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Holly Gadbaw, Board Member

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25 _____
Gayle Rothrock, Board Member

1 **WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD**

2 Case No. 05-2-0002

3 1000 Friends of Washington v. Thurston County and Intervenors William and Gail Barnett
4 and Alpacas of America

5 **DECLARATION OF SERVICE**

6 I, PATRICIA DAVIS, under penalty of perjury under the laws of the State of Washington, declare as
7 follows:

8 I am the Executive Assistant to the Board for the Western Washington Growth Management
9 Hearings Board. On the date indicated below a copy of a FINAL DECISION AND ORDER in the
10 above-captioned case was sent to the following through the United State postal mail service:
11

12 Tim Trohimovich
13 1000 Friends of Washington
14 1617 Boylston Avenue, Suite 200
Seattle, Washington 98122

Alexander Mackie
Perkins Coie
111 Market Street NE Suite 200
Olympia, Washington 98501-1008

15 Allen T. Miller, Jr.
16 Deputy Prosecuting Attorney
17 Civil Division
2424 Evergreen Park Dr., SW, Ste: 102
Olympia, Washington 98502

The Honorable Kim Wyman
Thurston County Auditor
2000 Lakeridge Drive SW
Olympia, WA 98502

18
19 DATED this 20th day of July 2005.

20
21 
22 PATRICIA DAVIS
23 EXECUTIVE ASSISTANT

APPENDIX C

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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3
4 1000 FRIENDS OF WASHINGTON

5
6 Petitioners,

Case No. 05-2-0002

7 v.

8 THURSTON COUNTY,

**ORDER ON MOTION FOR
RECONSIDERATION**

9 Respondent,

10 And,

11 WILLIAM AND GAIL BARNETT AND

12 ALPACAS OF AMERICA,

13
14 Intervenor.

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18 THIS Matter comes before the Board upon the County's motion for reconsideration of the
19 Board's Final Decision and Order dated July 20, 2005. Motion for Reconsideration and
20 Brief in Support Thereof (August 1, 2005). Petitioner Futurewise (formerly 1000 Friends of
21 Washington) filed its response on August 5, 2005. Petitioner Futurewise's Answer to
22 Thurston County's Motion for Reconsideration. The County's motion is based on the
23 grounds of errors of procedure or misinterpretation of fact or law material to the County
24 pursuant to WAC 242-02-832(2)(a). *Ibid.*

25
26
27 The County raises five issues for reconsideration: standing; subject-matter jurisdiction, high
28 density zones predating the GMA, rural densities, and sizing of UGAs (urban growth areas).
29 We find no grounds for reconsideration as to standing, subject-matter jurisdiction, rural
30 densities or sizing of UGAs. We grant reconsideration on TCC 20.09.040(1)(a) – Findings
31 of Fact 15 and 17, and Conclusion of Law F.
32

1 I. Standing

2 The County argues, again, that 1000 Friends of Washington does not have standing
3 because it is a Seattle-based corporation with no ties to Thurston County. Motion for
4 Reconsideration and Brief in Support Thereof at 2. The County argues that this means that
5 1000 Friends' interests are not within the zone of interests to be protected "by the
6 challenged action." *Ibid.*
7

8
9 A "zone of interests" analysis does not apply to participatory standing under the Growth
10 Management Act (GMA). The GMA establishes four types of standing. RCW
11 36.70A.280(2). Participatory standing allows petitions to be filed by those who "participated
12 orally or in writing before the county or city regarding the matter on which a review is being
13 requested" RCW 36.70A.280(2)(b). Another form of standing exists for persons "qualified
14 pursuant to RCW 34.05.530." RCW 36.70A.280(2)(d). This type of standing incorporates
15 the standing requirements under the Administrative Procedures Act (Ch. 34.05 RCW).
16 While a zone of interests challenge might be applicable to APA standing (RCW
17 34.05.530(2)), it does not apply to standing based on participation under the GMA. Here,
18 1000 Friends participated orally and in writing regarding the matters challenged in this
19 petition in the County's adoption of Resolution No. 13234 and Ordinance No. 13235.
20 Finding of Fact 2. Petitioner therefore has standing to bring the challenges in its petition for
21 review.
22
23

24
25 II. Subject-Matter Jurisdiction

26 The County again argues that the Board does not have subject-matter jurisdiction over the
27 designation criteria of agricultural lands of long-term commercial significance because that
28 part of the comprehensive plan was adopted in November 2003. Motion for
29 Reconsideration and Brief in Support Thereof at 3.
30
31
32

1 This argument confuses an appeal of the designation criteria adopted in November 2003
2 with an appeal of the County's failure to revise those criteria as needed to comply with the
3 Growth Management Act in its 2004 update. RCW 36.70A.130(1). If Petitioner had
4 appealed Resolution No. 13039 in its petition for review, then the appeal of that resolution
5 had to be brought within sixty days of publication of adoption. RCW 36.70A.290(2)(a).¹
6 However, Petitioner did not appeal Resolution No. 13039; instead, Petitioner appealed
7 Resolution No. 13234. Petition for Review (January 21, 2005). Resolution No. 13234 was
8 the County's update of its comprehensive plan pursuant to RCW 36.70A.130. Resolution
9 No. 13234 was adopted November 22, 2004, and notice of adoption was published on
10 November 24, 2004. The January 21, 2005, appeal of Resolution No. 13234 was within the
11 sixty-day period and therefore timely. Findings of Fact 4 and 5; Conclusion of Law D.
12
13

14
15 To the extent the County is arguing that Resolution No. 13039 was its update of its
16 designation criteria for agricultural resource lands pursuant to RCW 36.70A.130, that
17 resolution fails to contain the statutorily required finding that the adoption is a review and
18 evaluation pursuant to RCW 36.70A.130:

19 Legislative action means the adoption of a resolution or ordinance following notice
20 and a public hearing indicating at a minimum, a finding that a review and evaluation
21 has occurred and identifying the revisions made, or that a revision was not needed
22 and the reasons therefore.

23 RCW 36.70A.130(1) (in pertinent part).

24 As Petitioner points out, "Thurston County Resolution No. 13039 contains no citation of
25 RCW 36.70A.130(1)(a) or RCW 36.70A.130(4)(a). Thurston County Resolution No. 13039
26 contains no unambiguous statement that a review and evaluation has occurred. It also
27 includes no reasons for not revising either the County's policies for designating agricultural
28 lands of long-term commercial significance or the designations of agricultural lands of long-
29

30
31 ¹ Petitioner notes that no evidence of publication is in the record. Petitioner Futurewise's Answer to Thurston
32 County's Motion for Reconsideration at 5-6.

1 term commercial significance.” Petitioner Futurewise’s Answer to Thurston County’s Motion
2 for Reconsideration at 8. Such a finding is a necessary part of any legislative action to
3 comply with the update requirements of RCW 36.70A.130. *1000 Friends of Washington*
4 *and Pro-Whatcom v. Whatcom County*, WWGMHB Case No. 04-2-0010 (Order on Motion to
5 Dismiss, August 2, 2004). Without such a finding, the County cannot argue after the fact
6 that Resolution 13039 was the update of its comprehensive plan provisions applicable to
7 agricultural lands.
8

9
10 III. High Density Zones Predating the GMA

11 Although the County entitles this section “high density zones predating the GMA,” the
12 County actually only addresses the maximum density under the RR 1/5 zoning. Motion for
13 Reconsideration and Brief in Support Thereof at 4. The County argues that the Board
14 misreads TCC 20.09.040(1)(a) and that this provision does not allow overall densities of
15 more than one dwelling unit per five acres. *Ibid* at 4. The County urges that the Board
16 “should uphold this section of the development regulations as being compliant with rural
17 zoning under the GMA.” *Ibid*.
18

19
20 The County’s argument on this section of its code relates to Findings of Fact 15 and 17 and
21 Conclusion of Law F. Final Decision and Order (July 20, 2005):
22

23
24 **Findings of Fact**

25 15. T.C.C. 20.09.040(1)(a) establishes a minimum lot size in the RR 1/5 zone as
26 follows: “Conventional subdivision lot (net) – four acres for single family, eight
27 acres for duplexes.” This development regulation allows one single family
28 dwelling unit per four acres, rather than one dwelling unit per five acres, in the
29 RR 1/5 zone.

30 16. ...

31 17. With such a large portion of the County’s rural area designated as RR 1/5, the
32 net density level of one dwelling unit per four acres in the RR 1/5 zone increases
the conversion of undeveloped land into sprawling, low-density development in
the rural area.

1 **Conclusions of Law**

2 F. T.C.C. 20.09.040(1)(a) fails to comply with RCW 36.70A.070(5)(c) and (d) by
3 effectively increasing the rural residential density in the RR 1/5 zone from one
4 dwelling unit per five acres to one single-family dwelling unit per four acres.

5
6 The Board's decisions on this point were based upon the positions of the parties. In its
7 opening brief, Petitioner argues that TCC 20.09.040(1)(a) "purports to have a density of one
8 dwelling unit per five acres, [but] the actual net minimum lot size is four acres for single-
9 family residences and eight acres for duplexes." Petitioners Futurewise's and League of
10 Women Voters of Thurston County Prehearing Brief at 9. The County did not object to this
11 characterization of TCC 20.09.040(1)(a) in its response brief. Respondent's Prehearing
12 Brief at 8-12. For that reason, at the hearing on the merits, the Board asked counsel for the
13 County if Petitioner's claim that TCC 20.09.040(1)(a) allowed one dwelling unit per four acre
14 zoning was correct; and counsel replied that it was.

15
16
17 The County now asserts on reconsideration that the code only allows a maximum density of
18 one dwelling unit per five acres in the RR 1/5 zone, but "allows for flexibility in lot sizing
19 when creating a subdivision under TCC 20.09.040." Motion for Reconsideration and Brief in
20 Support Thereof at 4. As an example, the County states that a four-acre lot can only be
21 created in a RR 1/5 zone if it is part of a subdivision in which another lot compensates by
22 being at least 6 acres in size. *Ibid.*

23
24
25 The Board finds this reading of T.C.C. 20.09.040(1)(a) persuasive. Petitioner also
26 acknowledges that the County's reading may be the correct one. Petitioner Futurewise's
27 Answer to Thurston County's Motion for Reconsideration at 9.

28
29
30 While it would have been helpful to have heard this argument earlier, it is better to correct
31 the decision now than to fail to correct an error in it. Reconsideration will be granted and
32

1 Findings of Fact 15 and 17 and Conclusion of Law F will be deleted from the Final Decision
2 and Order.

3
4 IV. Rural Densities

5 The County argues first that its unique circumstances justify a uniform rural density of one
6 dwelling unit per five acres, and second that the comprehensive plan does provide a variety
7 of rural densities. Motion for Reconsideration and Brief in Support Thereof at 5. However,
8 the comprehensive plan does not set forth unique circumstances for a uniform rural density
9 of one dwelling unit per five acres, nor does it set out a variety of rural densities.
10

11
12 Second, the County continues to argue that low residential densities in resource lands
13 provide a variety of *rural* densities. This misses an essential point of the GMA requirement
14 for a variety of rural densities – to count as rural densities, the densities must be in rural
15 lands. RCW 36.70A.070(5)(b).
16

17
18 The County provides no new information that causes the Board to reconsider its decision as
19 to the plan's failure to provide a variety of rural densities.
20

21 V. Sizing UGAs

22 The County argues that the Board misapplied and misconstrued RCW 36.70A.110 in
23 concluding that the County's UGAs are too large. Motion for Reconsideration and Brief in
24 Support Thereof at 6.
25

26
27 The Board concluded that the urban lands included in UGAs significantly exceed the
28 demand for such lands based upon the population allocated by the County to UGAs. See
29 Findings of Fact 24 and 26 and Conclusion of Law H. The Board further found that there is
30 no indication that a market factor was used to determine additional needed urban lands and
31 no justification for using a market factor in the comprehensive plan. Findings of Fact 27
32

1 and 29. On reconsideration, the County does not contest the Board's finding that the plan
2 provides an excess supply of urban lands over projected demand in 2025. The County
3 offers no place in the comprehensive plan where a market factor is justified or even applied.
4 Therefore, the Board finds no grounds for reconsideration. We would note, however, that
5 the Board did not enter a finding that the UGAs are too large; the Board's finding was that
6 the supply of land significantly exceeds projected demand based upon the County's
7 allocation of population growth to urban areas of the County. Finding of Fact 26. The
8 determination of how to cure this non-compliance with the GMA rests with the County.
9

10
11
12 **ORDER**

13 Reconsideration of Findings of Fact 15 and 17 and Conclusion of Law F are hereby
14 GRANTED. Reconsideration on other grounds is hereby DENIED. The Final Decision and
15 Order dated July 20, 2005, is hereby AMENDED to delete Findings of Fact 15 and 17 and
16 Conclusion of Law F. All other terms and conditions of the Final Decision and Order shall
17 remain in full force and effect.
18

19
20 Pursuant to RCW 36.70A.300 this is a final order of the Board.

21
22 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
23 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
24 judicial review may be instituted by filing a petition in superior court according to the
25 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

26 **Enforcement.** The petition for judicial review of this Order shall be filed with the
27 appropriate court and served on the Board, the Office of the Attorney General, and all
28 parties within thirty days after service of the final order, as provided in RCW
29 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
30 but service on the Board means actual receipt of the document at the Board office
31 within thirty days after service of the final order.
32

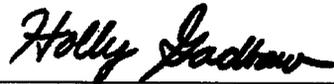
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Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

Entered this 11th day of August 2005.



Margery Hite, Board Member



Holly Gadbow, Board Member



Gayle Rothrock, Board Member

1 **WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD**

2 Case No. 05-2-0002

3 1000 Friends of Washington v. Thurston County and Intervenors William and Gail Barnett
4 and Alpacas of America

5 **DECLARATION OF SERVICE**

6 I, PATRICIA DAVIS, under penalty of perjury under the laws of the State of Washington, declare as
7 follows:

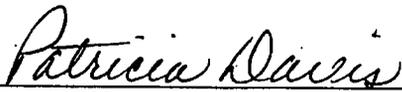
8 I am the Executive Assistant to the Board for the Western Washington Growth Management
9 Hearings Board. On the date indicated below a copy of an ORDER ON MOTION FOR
10 RECONSIDERATION in the above-captioned case was sent to the following through the United
11 State postal mail service:
12

13 Tim Trohimovich
14 1000 Friends of Washington
15 1617 Boylston Avenue, Suite 200
Seattle, Washington 98122

Alexander Mackie
Perkins Coie
111 Market Street NE Suite 200
Olympia, Washington 98501-1008

16 Allen T. Miller, Jr.
17 Deputy Prosecuting Attorney
18 Civil Division
2424 Evergreen Park Dr., SW, Ste. 102
Olympia, Washington 98502

19
20 DATED this 11th day of August 2005.

21
22 
23 PATRICIA DAVIS
24 EXECUTIVE ASSISTANT

APPENDIX D

1 After considering the requirements for a Certificate of Appealability pursuant to RCW
2 34.05.518, this Board finds that the criteria of the statute have been met with respect to the
3 Board's Final Decision and Order in *1000 Friends v. Thurston County*, WWGMHB Case No.
4 05-2-0002 (July 20, 2005) and issues the following Certificate of Appealability:
5

6
7 ***Certificate of Appealability***

8
9 **I. Delay in obtaining a final and prompt determination of the issues would be**
10 **detrimental to the parties and the public interest.**

11
12 Thurston County argues that there is a public interest in having an appellate decision
13 rendered first by a court of appeals because the County has adopted a moratorium
14 ordinance in response to the Board's order. Thurston County's Application for Direct
15 Review Pursuant to RCW 34.05.518. The County asserts that it is in the interests of all
16 parties and the public for the moratorium to be lifted as soon as possible. Ibid.
17

18
19 Thurston County's choice to enter a moratorium in response to the Board's order was a
20 responsible action taken by the Thurston County Commission, but it was not ordered by the
21 Board. The Board did not enter a moratorium (which it has no power to do) and it did not
22 enter a finding of invalidity as to any provision of the County's comprehensive plan or
23 development regulations (which it does have the power to do). The fact of the moratorium
24 is, instead, a County decision.
25

26
27 However, the Board finds that delay in obtaining a final and prompt determination of the
28 issues relating to the scope of the update obligation pursuant to RCW 36.70A.130 may be
29 detrimental to the public interest. The Growth Management Act requires all of Washington's
30 counties and cities to review and, if needed, complete the revision of their policies and
31 regulations to meet the requirements of the GMA. RCW 36.70A.130. The instant case
32 raises issues concerning the scope of this "update" requirement. The obligation to update

1 such regulations follows a staggered schedule beginning in December 2004. RCW
2 36.70A.130(4). This schedule for accomplishing the reviews and evaluations establishes a
3 deadline of December 1, 2004, for Clallam, Clark, Jefferson, King, Kitsap, Pierce,
4 Snohomish, Thurston, and Whatcom counties and the cities within those counties; and a
5 deadline of December 1, 2005, for Cowlitz, Island, Lewis, Mason, San Juan, Skagit, and
6 Skamania counties and the cities therein. RCW 36.70A.130(4)(a) and (b)¹. With these
7 pending update deadlines, it would be in the public interest for a definitive appellate court
8 decision regarding the scope of the update requirement to be issued.
9

10
11 **II. Fundamental and urgent statewide and regional issues are raised.**
12

13 As stated above, the Growth Management Act requires all of Washington's counties and
14 cities to review and, if needed, complete the revision of their policies and regulations to
15 meet the requirements of the GMA. RCW 36.70A.130. The update requirement applies to
16 counties and cities throughout the state. A decision by the Court of Appeals would provide
17 guidance to cities and counties across the state as they update their comprehensive plans
18 and development regulations.
19

20
21 **III. The proceeding is likely to have significant precedential value.**
22

23 As indicated above, the scope of the GMA requirements to update comprehensive plans
24 and development regulations is a subject that potentially affects many counties and cities
25 within the state. There is no judicial precedent to guide the boards at this point because the
26 first round of updates was due December 1, 2004. A decision by the Court of Appeals
27 would direct this Board for purposes of future decisions on these issues. It would also
28
29
30

31
32 ¹ Amendments to the GMA enacted in the last legislative session altered the effective date for the update of critical areas regulations but those are not at issue in this case.

1 provide guidance to the two other growth management hearings boards, as they, too, have
2 jurisdiction over counties and cities with update requirements.

3
4
5 **ORDER**
6

7 The application for Certificate of Appealability is hereby GRANTED and this Certificate of
8 Appealability is issued by the Board. A copy of the Board's Final Decision and Order in
9 *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (July 20, 2005) is
10 attached to this Certificate of Appealability.
11

12 Dated this 29th day of November 2005.
13

14 

15
16

Margery Hite, Board Member

17
18
19 

20

Holly Gadbaw, Board Member

21
22 

23

Gayle Rothrock, Board Member
24

25
26 Attachment:

27 *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and
28 Order, July 20, 2005)
29
30
31
32

APPENDIX E

record. *Mahr* filed a motion to amend his petition. Respondents did not object to the proposed amendment. A hearing on November 30, 1994, resulted in an amended prehearing order, entered December 6, 1994. The amended prehearing order added two issues as a result of the *Mahr* amended petition and established the index to the record through item number 230, except for numbers 40, 43 and 226. The initial prehearing order was also changed to reflect the agreement of the parties that everyone had the documents from the index in their respective possession and that the submission of the actual documents that would become our record was to be done in conjunction with the submission of the brief of each party.

During the time these procedural matters were being completed, both Olympia and Thurston County filed motions to dismiss the petitions as being untimely under RCW 36.70A.290(2). By order dated November 23, 1994, we denied those motions. Respondents' request for a writ from Thurston County Superior Court to dismiss this case was denied by Judge Casey on the grounds that RCW 34.05 required judicial review by appeal of a final decision rather than by extraordinary writ.

On December 6, 1994, respondents filed dispositive motions on all issues. On December 22, 1994, we entered an order granting the motion as to one issue, striking one sub-issue that was conceded by petitioners and denying the motions as to all other issues in the case. The hearing on the merits began at 9:00 a.m. January 19, 1995, and concluded at 4:00 p.m. January 20, 1995.

Obtaining the record for our review was a nightmare. Hereinafter the problems and the reasons for them.

THE RECORD

On January 6, 1995, respondents filed a motion to "supplement the record" by inclusion of items number 231-247. A few days before the commencement of the hearing on the merits each petitioner also filed a request to "supplement the record". These motions were filed despite the November 23, 1994, deadline for filing such motions established in the prehearing order and a full hearing that was held on November 30, 1994, to resolve *all* questions about the record.

We allowed argument on the motions the morning of January 19, 1995. Exhibits 231-246 were admitted because the documents were not "supplemental evidence" but should have been included in the original index list filed prior to November 30, 1994. Exhibit 248, materials submitted by *Reading* and found in a city file only after a public records request was made, was also admitted. Again, these items were not "supplemental evidence" because they were part of the original "record developed by the city, [or] county", RCW 36.70A.290(4).

The other exhibits, which included affidavits from expert witnesses, as well as respondents' computer model (Ex. 247) which had not previously been published were "supplemental" evidence. None of the requests were timely, WAC 242-02-540, nor were the exhibits "necessary or of substantial assistance", RCW 36.70A.290(4). We, therefore, denied admission.

Meanwhile, on December 22, 1994, petitioners each submitted a brief on the merits. Neither submitted the part of the record that he intended to rely upon as was required by the December 6, 1994, amended prehearing order. Approximately one week later *Reading* submitted the exhibits used in his brief. *Mahr* complained that submission of exhibits was the respondents' responsibility. *Mahr's* position was rejected because of the agreement at the November 30, 1994, hearing that a party would be responsible

for submission of the exhibits from the index that each relied upon in his brief.

On January 6, 1995, respondents filed their brief with an original and three copies of the exhibits from the record upon which they intended to rely. That filing, with the necessary copies, included *20 filing boxes(!)* of documents and two copies of 425 separate audio cassettes.

Given the high level of competence of counsel in all other facets of this case, we were astonished by the difficulty encountered in presenting the record. In light of that difficulty we take this opportunity to explain and clarify the items which are appropriate to be included in the record submitted for a board hearing.

RCW 36.70A.290(4) states:

"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."

Under the provisions of this section a board renders its decision in a case based upon the evidence contained in the record developed by the local government during the time of adoption of the challenged action except in rare instances where supplemental evidence is allowed.

In order to determine what that "record developed" by the local government is, WAC 252-02-520(1) requires that the respondent local government prepare and submit an index within thirty days after the filing of a petition. This index, which should include *all* materials in files that were used in the development of the action being challenged, is an exhaustive *list* of the "record developed" by the local government. It is from this list that the exhibits to be submitted to a board are to be garnered.

Under WAC 242-02-520(2) a preliminary list of the items from the index that will be used in the appeal is to be submitted by *each party* within 20 days after receiving the index. The admonition contained in this section concerns the necessity to actually review the list and be aware of both what is contained in the index list and also which of those items are important to the issues in the case. The admonition bears repeating:

"...in complying with the requirements of this subsection, parties *shall not simply designate every document* but shall carefully review the index, and designate *only* those documents that are *reasonably necessary* for a full and fair determination of the issues presented." (emphasis supplied)

It is the intent of this subsection to ensure that only the items which are reasonably necessary for a board decision go through the expense of submission of an original and three copies. In order to assure that the record before a board stays within the parameters set forth by the Act and by our rules, a practice has developed with all three boards that the submission of exhibits be done at the time a party's brief is filed. This avoids the problem of over-designation at the fiftieth day from petition deadline and keeps

the size of the board record to the relevant and necessary items.

The purpose of WAC 242-02-520(2) is to minimize the time-consuming preparation of the record by a local government. In the instant case the five filing boxes (which with copies amounted to twenty filing boxes) submitted by respondents were reviewed by us prior to the January 19, 1995, hearing on the merits. During that review we found major problems with the exhibits.

First, about 70% of the exhibits submitted had no relevance to the issues presented in this case. Respondents did not even reference this unnecessary material in their brief. Secondly, it was abundantly clear that respondents had not reviewed the exhibits prior to submission. As an example, the volumes of planning commission minutes of every meeting for more than a year, not only included the one or two pages that potentially had relevance to the case, but also contained another forty to fifty pages of materials such as draft minutes of the last meeting, agendas for the planning commissions' retreat, etc. Another example involved a memorandum entitled "Are we planning for 20-years growth-or 40?". While the memorandum was relevant there were at least seven different copies in various exhibits.

This lack of review by respondents is simply unacceptable. It is a responsibility of all counsel, but particularly local government counsel, to ensure that the record transmitted from the local government to a board is only that which is reasonably necessary for a decision. An incredible amount of human and natural resources were wasted in this case by the failure to adequately review the material prior to submitting it to us. Two copies of 425 different audio cassettes, of which no more than five were even referred to by respondents, involved massive unnecessary staff time. The simple act of xeroxing five file boxes of documents (of which at least three boxes were totally unnecessary under any view of the record) involved substantial and unnecessary cost.

The purpose of legislation providing for an administrative appeal process is to provide a more efficient and more cost effective mechanism for resolving disputes than that of Superior Court. That laudable purpose has been thwarted by the manner in which the respondents submitted their portion of the record. Much of the expense to the City of Olympia and Thurston County for defending this case was unnecessary, and lies at the feet of counsel for the respondents.

Once we were finally able to determine which parts of this record had relevancy, we were able to address the issues which were presented in the amended prehearing order. Generally, those issues fell into three broad categories; (1) a challenge to the adequacy of the final Environmental Impact Statement (SEPA issues); (2) a challenge to the transportation element; and (3) a challenge to the Olympia urban growth area (UGA) boundary adopted in the comprehensive plan.

SEPA ISSUES

As we noted in *Mahr v. Thurston County*, WWGMHB #94-2-0007, State Environmental Policy Act (SEPA) issues do not involve the four-question analysis we established in *Clark County Natural Resources Council v. Clark County*, WWGMHB #92-2-0001. While we have previously addressed the scope of our review of determinations of nonsignificance (DNS) by means of the "clearly erroneous" test, this is the first case involving a challenge to an EIS. Thus, the logical first step is to establish standards for, and the scope of, our review of an EIS challenge. We note that respondents did not contest petitioners' standing to challenge the adequacy of the EIS, nor any alleged failure by petitioners to exhaust administrative remedies.

In determining the appropriate standard of review we look first to the GMA. RCW 36.70A.280(a) provides the jurisdictional underpinnings for review of a SEPA document relating to GMA plans, regulations or amendments.

RCW 36.70A.320, applies the presumption of validity to comprehensive plans, development regulations and amendments only. We conclude that an EIS does not carry a presumption of validity (adequacy) under the Act, although the burden of proof of showing inadequacy is with a petitioner.

RCW 43.21C.090 states in part:

"In any action involving an attack on...the adequacy of a 'detailed statement', the decision of the governmental agency shall be accorded substantial weight."

Pursuant to RCW 43.21C.110 the Department of Ecology has adopted "rules of interpretation and implementation" in WAC 197-11. Under RCW 43.21C.095 those rules are to be "accorded substantial deference" in dealing with SEPA.

Under WAC 197-11-738 a "detailed statement" is a final EIS. WAC 197-11-714 defines an "agency" as the local government body authorized to make law, hear contested cases or is a local agency. WAC 197-11-762 defines "local agency" for purposes of this case as the Olympia City Council. Thus, the "substantial weight" requirement of RCW 43.21C.090 applies to the local government decision-maker. Petitioners' contention that the RCW 43.21C.090 deference does not apply to local governments is contrary to the language of the WACs. The fact that the Olympia City Council did not formally rule on the adequacy of the EIS is not significant since the record shows that the EIS was used in reaching the final decision on the comprehensive plan.

The EIS was a nonproject, phased review document under WAC 197-11, and appropriately so. It is from this foundation that we reviewed appellate cases to determine a proper standard of review for our use. Cases which dealt with a DNS or with a project EIS were less persuasive. Rather, we found most compelling those cases which involved nonproject, phased development situations, such as *Ullock v. Bremerton* 17 Wn. App. 573 (1977) (*Ullock*), and *Citizens v. Klickitat County* 122 Wn.2d 619 (1993)

(Citizens). *Cathcart v. Snohomish County* 96 Wn.2d 201 (1981) (*Cathcart*) was also instructive as a nonproject, phased EIS case, with a recognition that Justice Stafford's concurring opinion probably presented a sounder basis for the decision.

Generally those cases set forth the parameters which apply to court review of an EIS. Those rules can be summarized as follows:

1. The scope of review is *de novo*;
2. The adequacy of an EIS is determined by the "rule of reason";
3. The governmental agency's determination that an EIS is adequate is entitled to "substantial weight".

We adopt these rules as our foundation for EIS review.

In the context of a SEPA challenge under the GMA we must initially decide the scope of "*de novo*" review of the nonproject EIS. RCW 36.70A.290(4) provides that our review is to be based upon the "record developed by the city, [or] county". It follows from the cases emanating from *Leschi Improvement Council v. State Highway Comm'n*, 84 Wn.2d 271 (1974), viewed in conjunction with the GMA, that our scope of *de novo* review is restricted to examination of the record properly before us.

Section .290(4) of the Act also provides that supplemental evidence is allowable if necessary, or if it would be of substantial assistance in reaching our decision. In the instant case there was no timely request made to supplement the record, as required by WAC 242-02-540. The only request to supplement the record on SEPA issues was filed immediately prior to the hearing on the merits. That request involved documents that were developed after the comprehensive plan was adopted, and an affidavit. Even had the request been timely, the proposed supplemental evidence would not have been of substantial assistance nor necessary in reaching our decision. We leave for a future case the issue of what supplemental evidence, if any, would be appropriate for *de novo* review.

Within the context of a *de novo* review, wherein the council's determination of adequacy is afforded "substantial weight", we review the adequacy challenge under the "rule of reason". Not every remote or speculative consequence need be included in the EIS, *Cheney v. Mountlake Terrace*, 87 Wn.2d 338 (1976). A nonproject plan "need only analyze environmental impacts at a highly generalized level of detail," *Citizens*. An EIS is adequate in a nonproject plan "where the environmental consequences are discussed in terms of a maximum potential development of the property" *Ullock*.

Having determined the general principles announced by SEPA, WAC 197-11, and the courts, we turn to the specific claims in this case.

Mahr pointed out that the comprehensive plan provided that some type of widening of Mud Bay road in

west Olympia was scheduled to occur in approximately three years and that new roads of some type were directed to be in place in the Ken Lake area during the 20-year life of the plan. None of these eventualities were mentioned in the EIS.

Reading pointed out that the 130-acre site upon which the Briggs Nursery has been located for many years was designated by the comprehensive plan to be the only urban village in the Olympia area. A sophisticated draft proposal involving more than 900 housing units and at least 200,000 square feet of commercial floor space was presented. Much of the Briggs Nursery site is on a class II aquifer. In the 83 years that the site has been a nursery, pesticide application and other potential damage has likely occurred. No discussion of these matters was included in the EIS.

Respondents countered that phased review for a nonproject action does not involve the level of detail asserted by petitioners. The EIS and the comprehensive plan both pointed out that, depending on the scope of the project, a more detailed project-specific EIS would be appropriate at the time implementation became a reality. We agree with respondents.

WAC 197-11-442 deals with the content of a nonproject EIS. It states that a lead agency shall have more flexibility in the preparation of a nonproject EIS because normally less detailed information is available.

While the lead agency is to discuss impacts and alternatives, it is only required to do so "in the level of detail appropriate to the scope of the nonproject proposal." A portion of the WAC states as follows:

"(3) If the nonproject proposal concerns a specific geographic area, site specific analyses are not required, but may be included for areas of specific concern....

(4) The EIS's discussion of alternatives for a comprehensive plan,...shall be limited to a general discussion of the impacts of alternate proposals for policies contained in such plans,...and for implementation measures. The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures...."

WAC 197-11-443(2) points out that a phased review of a nonproject action is to be based on an assessment of broad impacts. When a particular project is later proposed, the EIS must then focus on impacts and alternatives including mitigation measures, specific to the subsequent project and which have not been previously analyzed.

In *Richland v. Boundary Review Board*, 100 Wn.2d 864 (1984) the court dealt with a nonproject EIS for a regional shopping center zoning classification. The court pointed out that no specific shopping center had been proposed, and affirmed the adequacy of the EIS. Citing *Cheney* the court held that a nonproject EIS was not required to include a discussion of "possible" future development of a particular site.

As pointed out in *Ullock* at 581, a nonproject land use action has no immediate or measurable environmental consequence, but is in fact a legislative action designed to accomplish permissible changes. In *Cathcart* the court noted that the EIS under consideration for the 25-year project was "bare bones" and "devoid of any quantitative discussion as to cumulative and secondary effects on surrounding areas." Nonetheless the court approved the adequacy of the EIS and said at 210:

"This project is an appropriate candidate for a piecemeal EIS presentation, for at this time it is extremely difficult to assess its full impact. Given the magnitude of the project, the length of time over which it will evolve, and the multiplicity of variables, staged EIS review appears to be an unavoidable necessity. At this point, an exhaustive EIS is impracticable in light of the difficulty of determining in the abstract, for a period of 25 years, such things as the rate at which the project will develop, the particular location of the housing units, the growth of the tax base which will support the needed public services, the evolution of transportation technologies, and the evolving socioeconomic interests of the prospective population."

Here the urban village concept at the Briggs Nursery site was no more than an idea. Development regulations to implement the comprehensive plan are even now being formulated. While a draft site plan was presented, it had no legal effect. The record showed that the timing of any environmental impacts from the Briggs site would have been speculative and based upon a variety of factors not the least of which is the transference of the nursery operation to Grays Harbor County over the next 20 years. While *Reading* complained that the traffic analysis that showed no significant impact on the

surrounding area was incorrect, he failed to sustain his burden of proof (see transportation element section). The 1988 Thurston County comprehensive plan designated the site as medium residential, 4-8 dwelling units per acre. There was not a significant change brought about by the redesignation to an urban village by the Joint Comprehensive Plan, such as might have been shown by a conversion of natural resource lands to residential.

Likewise, the potential roads in the Ken Lake area in west Olympia were so remote and speculative as to not even require mentioning in the EIS. While the Mud Bay road widening was scheduled to occur within three years, the specifics of when, where, number of lanes, pedestrian traffic, bicycle lanes, etc. were totally unknown. Any reference in the EIS to the potential widening project would have necessarily involved only speculative impacts.

Nor does WAC 365-195-760 direct a different result. While it is important to integrate SEPA analysis at the "front end" of the process, there is not yet a mandated requirement to do so under SEPA, a WAC, or GMA. Inclusion of some of the items claimed necessary by petitioners would have made this EIS better. The failure to include them, however, is not fatal.

Based on the record before us, the deference afforded under RCW 43.21C.090 and the lack of evidence to support petitioners' claims, we find the EIS adequate for this comprehensive plan.

Petitioners' remaining challenges to the transportation element of the Joint Comprehensive Plan and to the urban growth area are not directed toward the process used for adoption. Rather the complaints are to the substantive decisions of the Olympia City Council and Thurston County Board of County Commissioners. We therefore, analyze these non-SEPA challenges under our question 4 analysis:

"4. DOES THE COMPREHENSIVE PLAN FALL WITHIN THE DISCRETION GRANTED TO THE DECISION-MAKER TO CHOOSE FROM A RANGE OF REASONABLE OPTIONS?"

TRANSPORTATION ELEMENT

Under GMA the Thurston Regional Planning Council (TRPC) was designated as the Regional Transportation Planning Organization, RCW 47.80.020. The TRPC consists of representatives from Thurston County, various cities and towns, Intercity Transit, Port of Olympia, school districts, and the state capitol committee. Pursuant to RCW 47.80.040, a Transportation Policy Board was appointed. In conjunction with the TRPC, the Policy Board prepared a regional transportation plan that was adopted in March 1993, RCW 47.80.030. This transportation plan served as the foundation for, and was adopted into the transportation element of the Joint Comprehensive Plan. Many of the goals and policies of the transportation plan were also integrated throughout the comprehensive plan.

The Regional Transportation Plan (RTP) set forth a series of goals and policies designed to create "an affordable and balanced transportation system that works effectively and that people will want to use." The overall objective of the plan is stated as follows:

"The following goals, policies and strategies will contribute to *reducing the percent of people who drive alone*. This would be *measured* by reducing work trip drive alones to 60% in 20 years." (Emphasis supplied)

Those goals, policies and strategies included increasing densities in the urbanized area, high and medium density traffic corridors, a connected-streets policy, incentives for alternate modes of transportation including pedestrian-friendly access, and disincentives for single occupancy vehicles. The rate of drive-alone work trips for Thurston County in 1992 was 85% of the total work trips. The goal was to reduce drive-alones. The measuring device to determine if that goal was achieved is the drive alone work trip reduction to 60% in 20 years. The plan only directed this reduction to work trip commuting, not non-work related driving. The RTP also hedged somewhat by directing that the right-of-way acquisition projections were to be based upon a goal reduction of single occupancy vehicle work trips from 85% of the total work trips to 70%.

Petitioners challenged this "60% goal" as being unrealistic and unachievable. Their argument was that because of this unrealistic basic assumption in the RTP, the transportation element and the capital facilities element of the Joint Comprehensive Plan were doomed to failure.

Petitioners' argument fails on a number of grounds. Initially there is little or nothing in the record before us to support their claim that the reduction goal is unrealistic or unachievable. The only evidence presented in support of the claim was an affidavit from a traffic analyst submitted at the dispositive motion hearing. The affidavit was reintroduced at the hearing on the merits. We declined to admit the affidavit on both occasions. Rarely will we consider supplemental evidence that could have been, but was not, submitted to the local government decision-maker. A claim that petitioners here did not have the opportunity to gather, pay for and present this evidence to the local government decision-maker is unavailing. This is particularly so when the record reveals the process for the RTP and the Joint Comprehensive Plan involved some four years during which time many of the individual petitioners participated.

In reviewing the RTP and the Joint Comprehensive Plan, we note that the "goal" is to reduce "the percentage of people who drive alone." As stated in the RTP this goal is to be measured by the achievement of a reduction in *work* trip drive-alones to 60%. Even assuming the 60% reduction is a "goal", a goal is not a guarantee.

A comprehensive plan is not a static document. As things change, and they always do, the GMA envisions that updates and changes to conform with new information obtained over the life of the plan will be made. Petitioners have failed to overcome the presumption of validity that attaches to the Joint Comprehensive Plan. Even had we admitted the traffic analyst's affidavit, this result would not have changed.

In 1992 the City of Olympia adopted a "connected-streets policy" for future development. The policy directed that future subdivisions in the City were to be designed so that streets would not dead-end within the subdivision but rather connect-up to other streets. Cul-de-sacs and dead-ends were to be

discouraged. The purpose of the connected-streets policy was to provide better traffic flow, encourage alternative methods of travel and discourage auto-dependency. Petitioners claim that the Joint Comprehensive Plan, which adopted this connected-streets policy, failed to take into consideration RCW 36.70A.020(6) which states a goal of the Act to be that private property shall not be taken for public use without just compensation.

The connected-streets policy does not require that private property be taken so that existing streets would be connected, but only that future development incorporate the policy as a design feature. Petitioners' claim that the Joint Comprehensive Plan did not consider the financial impact of this alleged "taking" is without merit and not supported by evidence contained in this record.

Similarly the complaint that Level of Service (LOS) standards were not contained in the comprehensive plan as required by RCW 36.70A.070(6)(ii), is contrary to the record. The Regional Transportation Plan provided regional coordination and was adopted in the Joint Comprehensive Plan at chapter 6 page 3. The RTP discussed applicable LOS levels at high density and medium density corridors, transit services, etc. The Joint Comprehensive Plan transportation element identified intersection LOS's and the Capital Facilities Plan indicated the planned facilities necessary to accomplish the designated LOS.

Reading also contended that the Joint Comprehensive Plan failed to establish the requisite concurrency aspects for the proposed Briggs Nursery Urban Village. If *Reading's* argument was that RCW 36.70A.020(12), the concurrency goal, was not achieved in the Joint Comprehensive Plan the argument is contrary to the evidence revealed by this record. The Joint Comprehensive Plan provided an excellent presentation of ensuring that public facilities and services would be adequate to serve development "at the time the development is available for occupancy" without decreasing the LOS standards.

The concurrency goal of the Act is specifically directed to the transportation element by RCW 36.70A.070(e), which provides that *after* adoption of the comprehensive plan, development regulations must be adopted that prohibit the approval of a development which would cause a transportation facility LOS to decline below those designated in the comprehensive plan. Obviously, petitioners cannot claim at this point that this section of the Act has been violated since there are neither development regulations as yet, nor a development application for the Briggs Nursery site to be acted upon.

Finally, petitioners contended that the 10-year traffic forecast required by RCW 36.70A.070(6)(iv) was not included in the Joint Comprehensive Plan. Petitioners are correct in this assertion.

Respondents acknowledged that the forecast is neither in the Joint Comprehensive Plan nor the Regional Transportation Plan. Respondents have shown that the work was in fact done by means of a computer model (Ex. 247) and "was available to anyone who wanted to use it." The "availability" of this computer model does not comply with the Act.

RCW 36.70A.070(6) directs that the various transportation sub-elements "shall" be included in the plan. The point of requiring inclusion of these sub-elements is two-fold. First, the Legislature obviously wanted to ensure that the analyses and evidence were prepared. Secondly, and as importantly, the Legislature intended that those analyses be made readily available to both the local decision-maker and members of the public. This mandatory sub-element was not complied with by having a computer model available but not set forth in the plan as required.

Respondents proffered the computer model as an exhibit in this record (Ex. 247). Just as we are not disposed to allow petitioners to bring forth evidence not available to the local decision-makers, we are similarly not disposed to allow respondents to do the same thing.

URBAN GROWTH AREA

Petitioners challenged the adoption of the Olympia urban growth area. A number of challenges were made and superficially appeared to be directed to the City of Olympia's part of the Joint Comprehensive Plan. Nonetheless, it is clear under RCW 36.70A.110(1) that a county has the ultimate responsibility of determining population figures and urban growth boundaries. Obviously, any city involved in the location of the boundary would have a great deal of influence in the final decision by the county. Nevertheless, any challenge to the urban growth area must necessarily be leveled against the particular county involved.

The precise boundaries and population figures for the north county area were developed by the cities of Lacey, Olympia and Tumwater in conjunction with Thurston County by means of a 1988 interlocal agreement and participation in the Thurston Regional Planning Council. The Thurston County Board of Commissioners' adoption of the Joint Comprehensive Plan ratified the boundaries and population projections established by the TRPC.

Petitioners complained that the population projections were fundamentally flawed because the TRPC used a computer model called EMPFOR rather than the Office of Financial Management (OFM) projections. Additionally, the Joint Comprehensive Plan established a population projection for the year 2015 from the EMPFOR model rather than the year 2012 from the OFM projection. We do not find the use of these figures, nor the establishment of 2015 as the appropriate planning period, as being out of compliance.

RCW 36.78.110(2) provides, in part, that urban growth areas established in a comprehensive plan are to provide for the "urban growth that is projected to occur in the county for the succeeding 20 year period." In our jurisdiction, there are counties that are just now beginning the GMA process. It would seem disingenuous to require them to stop their planning at the year 2012 simply on the basis that OFM does

not have a more current population projection.

We hold that the use of the EMPFOR model under the evidence in this case, was within the discretion of the Board of County Commissioners. The EMPFOR model allowed a 20-year planning horizon to take place as well as provided for more current information such as the anticipated (although yet unrealized) influx of additional troops to Fort Lewis. The EMPFOR model was shown to be extremely accurate in comparison to historical population figures. The difference in future population projections between EMPFOR and the OFM model was slight. Under all the information contained in this record as to the population projections as they relate to the Olympia area, we find that Thurston County is in compliance with the Act.

Petitioners also contended that no matter which population projection was used, the urban growth area boundary was not based upon an adequate land capacity analysis, and was too large. After reviewing this record we are mystified by petitioners' claim that no land capacity analysis took place. The plan itself and the foundational material upon which it was based are replete with charts, maps, and information, showing the amount of land in the Olympia municipal limits and UGA, as well as existing and projected housing units, commercial areas, and industrial areas. This record contains an excellent land capacity analysis upon which local decision-makers could rely.

All of those kudois given, nonetheless we agree with petitioners that the area designated as the Olympia urban growth boundary is too large.

Respondents argued that pre-existing sewer, water and planning decisions made it impossible, or at least impractical, to designate a smaller UGA. We reiterate our previous statements that the GMA does not allow what now appear to be unfortunate historical planning decisions to be the basis for future planning decisions. It is time to leave that past behind.

Two reasons salvage this overly large UGA from being out of compliance with the Act. First is the exceptionally well-developed series of goals and policies of the Comprehensive Plan and the Regional Transportation Plan. The anti-sprawl, in-filling, minimum densities and compact development features of both plans, assuming proper development regulations are later adopted, complies with the omnipresent anti-sprawl foundation of the Act.

The second feature which mitigates against non-compliance is the unique configuration of the cities of Olympia, Lacey and Tumwater. Conceptually, the area of these virtually abutting cities can be described as a square or a rectangle with a part of the southeast quadrant eliminated. Visually, the overall area looks something like this:

OLYMPIA LACEY

TUMWATER

The interior boundary lines between the three cities are minimally significant for GMA purposes. It is the exterior boundaries that are important. At the time of the hearing, Thurston County had not adopted a comprehensive plan UGA for either Lacey or Tumwater. Given that scenario, and the evidence in this record, we are not persuaded that the presumption of validity which attaches to the county's adoption of the Olympia UGA has been overcome by petitioners. We will review all the exterior boundaries if future challenges are made to the completed UGAs as established by Thurston County.

The foundational characteristic of the Act is the avoidance of inefficiencies found in a sprawling development pattern. Were it not for the excellent anti-sprawl goals, policies and strategies of the Joint Comprehensive Plan *and* the unique configuration of the three cities, this UGA would not have been in compliance with the Act.

Petitioners' remaining claim that RCW 36.70A.020(10), the environment goal, was violated has no support in this record.

We find that the Joint Comprehensive Plan does comply with the Act, except for the failure to include the forecast required by RCW 36.70A.070(6)(iv).

In order to fully comply with the Act, that deficiency must be corrected within 120 days of this date.

This is a Final Order under RCW 36.70A.300 for purposes of appeal.

DATED this _____ day of March, 1995.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge

Board Member

Nan A. Henriksen
Board Member

APPENDIX F

Research References

Treatises and Practice Aids

24 Wash. Prac. Series § 18.5, Overview of the Local Planning Process.

36.70A.050. Guidelines to classify agriculture, forest, and mineral lands and critical areas

Research References

Treatises and Practice Aids

23 Wash. Prac. Series § 10.10, Wetlands Under the Growth Management Act.

Notes of Decisions

In general 1

methodology for providing a variety of densities, and in this instance the test for the existence of a variety of rural densities and uses was whether the county's rural element had provided for such densities and uses. Whidbey Environmental Action Network v. Island County (2004) 122 Wash.App. 156, 98 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning Act did not require a particular

1. In general

The imposition of a "significant blocks" test by growth management hearings board in order to determine whether a county was maintaining the required rural density as part of its comprehensive plan was an error of law; the Growth Management Act did not require a particular

36.70A.060. Natural resource lands and critical areas—Development regulations

(1)(a) Except as provided in RCW 36.70A.1701, each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.040. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals.

(b) Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. The notice for mineral resource lands shall also inform that an application might be made for mining-related activities, including mining, extraction, washing, crushing, stockpiling, blasting, transporting, and recycling of minerals.

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040,

such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

(3) Such counties and cities shall review these designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW 36.70A.120 and may alter such designations and development regulations to insure consistency.

(4) Forest land and agricultural land located within urban growth areas shall not be designated by a county or city as forest land or agricultural land of long-term commercial significance under RCW 36.70A.170 unless the city or county has enacted a program authorizing transfer or purchase of development rights.

[2005 c 423 § 3, eff. May 12, 2005; 1998 c 286 § 5; 1991 sp.s. c 32 § 21; 1990 1st ex.s. c 17 § 6.]

Historical and Statutory Notes

*Reviser's note: RCW 36.70A.1701 expired June 30, 2006.

Intent—Effective date—2005 c 423: See notes following RCW 36.70A.030.

Research References

Treatises and Practice Aids

Rathkopf's the Law of Zoning and Planning § 14.34, "Spot Planning".

23 Wash. Prac. Series § 10.10, Wetlands Under the Growth Management Act.

23 Wash. Prac. Series § 8.102, Water Resources and Growth Management.

24 Wash. Prac. Series § 18.4, Applicability of Growth Management Act Planning Requirements.

24 Wash. Prac. Series § 18.5, Overview of the Local Planning Process.

24 Wash. Prac. Series § 18.12, Designation of Natural Resource Lands.

24 Wash. Prac. Series § 18.13, Designation of Critical Areas.

24 Wash. Prac. Series § 18.21, Development Regulations.

24 Wash. Prac. Series § 18.23, Public Participation.

Notes of Decisions

Evidence 3

Wash.2d 1025, 110 P.3d 756. Zoning And Planning Act

Under Growth Management Act (GMA), county was not limited to exempting only designated agricultural resource land from full critical areas regulation; county could expand its exempt agricultural land to meet its local conditions, after balancing such expanded exemption with corresponding restrictions that would take into account the specific harms threatened by the expanded class of farm lands. Clallam County v. Western Washington Growth Management Hearings Bd. (2005) 121 P.3d 764. Zoning And Planning Act

Under Growth Management Act (GMA), preexisting agricultural uses were not exempt from county's critical areas regulation; plain language of GMA demonstrated legislature's intent that GMA counties exercise some measure of control over preexisting uses in critical areas, and reading a broad exemption into critical areas regulation for preexisting uses would have frustrated legislature's intent.

1. In general

County failed to establish that goal of protecting or preserving agricultural activities on rural residential (RR) lands was furthered by application of agricultural exemption to its critical areas ordinance; record contained no information as to how many acres were being farmed, where those were located, and what their cumulative impact may have been on critical areas; record showed that only 60 acres of land in the RR zone was in the agricultural tax program, and county provided none of this RR "agricultural" activity with Growth Management Act (GMA) protections such as notification to adjacent landowners or application of its nuisance protection regulation. Whidbey Environmental Action Network v. Island County (2004) 2004 WL 1153309, superseded 122 Wash.App. 156, 98 P.3d 885, reconsideration denied, review denied 153

Challam County v. Western Washington Growth Management Hearings Bd. (2005) 121 P.3d 764. Zoning And Planning ⇨ 279

"Agricultural land" means land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apinary, vegetable, or animal products or of berries, grain, hay, straw, turf, seeds, Christmas trees, finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production. Whidbey Environmental Action Network v. Island County (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 279

County's agricultural exemption to its critical areas ordinance, as part of its comprehensive plan, was overbroad; county included all R zone lands in its exemption, but county failed to support its claim that such a broad exemption was necessary to protect agricultural activities. Whidbey Environmental Action Network v. Island County (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 30

City ordinance that was invalidated by growth management hearings board never effectively designated properties as agricultural land, and thus subsequent ordinance designating the properties for urban recreational use did not constitute improper de-designation, although the Supreme Court had rejected board's definition of "agricultural land" on appeal, and first ordinance contained savings and revival clause, the purpose of which was to revive the agricultural designation if city's definition of "agricultural land" was upheld, where Supreme Court invalidated the agricultural designation on ground that city did not have a transfer in place of development rights (TDR) program in place before enacting the ordinance. City of Redmond v. Central Puget Sound Growth Management Hearings Bd., State of Wash. (2003) 116 Wash.App. 48, 65 P.3d 337, review denied 150 Wash.2d 1007, 77 P.3d 651. Zoning And Planning ⇨ 76; Zoning And Planning ⇨ 279

2. Notice

Statutory and regulatory notice requirements for designation of natural resource lands under the Growth Management Act (GMA) did not require county to give individual notice to developer whose property was designated forest resource land. Hol-

brook, Inc. v. Clark County (2002) 112 Wash.App. 354, 49 P.3d 142, review denied 148 Wash.2d 1017, 64 P.3d 649. Zoning And Planning ⇨ 359

Due process did not require that county give individual notice to developer whose property was designated forest resource land under Growth Management Act (GMA), even though classification significantly affected developer's ability to make use of its property, where designation was result of area-wide analysis, rather than a specific targeting of developer's property, and impact on developer was not unique or significantly greater than that imposed on most other landowners. Holbrook, Inc. v. Clark County (2002) 112 Wash.App. 354, 49 P.3d 142, review denied 148 Wash.2d 1017, 64 P.3d 649. Constitutional Law ⇨ 278.2(2); Zoning And Planning ⇨ 359

Rational basis supported county's decision to send individual notice of proceedings regarding designation of natural resource lands under the Growth Management Act (GMA) to county residents only, and thus there was no equal protection violation for county's failure to send individual notice to non-resident landowner whose property in county was designated forest resource land; land designation process was a county-by-county undertaking and it was rational to distinguish residents living in the county doing the planning from landowners residing in other counties. Holbrook, Inc. v. Clark County (2002) 112 Wash.App. 354, 49 P.3d 142, review denied 148 Wash.2d 1017, 64 P.3d 649. Constitutional Law ⇨ 228.2; Zoning And Planning ⇨ 359

3. Evidence

Growth management hearing board was free to choose from among competing evidence as to county's type 5 stream buffer regulations, and doing so was not arbitrary or capricious, given that testimony of certified wetlands scientist with a focus on soil and water interaction in forested wetlands was incomplete best available science (BAS), as it recommendations were formulated based on water quality functions, rather than looking at entirety of functions attributed to stream buffers, including the protection of wildlife species other than fish. Whidbey Environmental Action Network v. Island County (2004) 2004 WL 1158309, superseded 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 64

Scientific evidence in the record constituted substantial evidence to support growth management hearing board's finding that 25-foot buffer for type 5 streams, streams less than two feet wide that did not support salmon or other fish, did not comply with Growth Management Act (GMA) and county failed to establish unique local conditions justifying a depart-

36:70A.070. Comprehensive plans—Mandatory elements

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

Each comprehensive plan shall include a plan, scheme, or design for each of the following:

(1) A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. The land use element shall include population densities, building intensities, and estimates of future population growth. The land use element shall provide for protection of the quality and quantity of ground water used for public water supplies. Wherever possible, the land use element should consider utilizing urban planning approaches that promote physical activity. Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.

(2) A housing element ensuring the vitality and character of established residential neighborhoods that: (a) Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community.

(3) A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent.

ture downward from higher buffer width requirements outlined in scientific literature. Whidbey Environmental Action Network v. Island County (2004) 2004 WL 1158309, superseded 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 64

Park and recreation facilities shall be included in the capital facilities plan element.

- (4) A utilities element consisting of the general location, proposed location, and capacity of all existing and proposed utilities, including, but not limited to, electrical lines, telecommunication lines, and natural gas lines.
- (5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:
- (a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.
- (b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.
- (c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:
- (i) Containing or otherwise controlling rural development;
 - (ii) Assuring visual compatibility of rural development with the surrounding rural area;
 - (iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
 - (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and ground water resources; and
 - (v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.
- (d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:
- (i) Rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.
 - (A) A commercial, industrial, residential, shoreline, or mixed-use area shall be subject to the requirements of (d)(iv) of this subsection, but shall not be subject to the requirements of (c)(ii) and (iii) of this subsection.
 - (B) Any development or redevelopment other than an industrial area or an industrial use within a mixed-use area or an industrial area under this subsection (5)(d)(i) must be principally designed to serve the existing and projected rural population.

(C) Any development or redevelopment in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas. Development and redevelopment may include changes in use from vacant land or a previously existing use so long as the new use conforms to the requirements of this subsection (5);

- (ii) The intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development. A small-scale recreation or tourist use is not required to be principally designed to serve the existing and projected rural population. Public services and public facilities shall be limited to those necessary to serve the recreation or tourist use and shall be provided in a manner that does not permit low-density sprawl;
- (iii) The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents. Rural counties may allow the expansion of small-scale businesses as long as those small-scale businesses conform with the rural character of the area as defined by the local government according to *RCW 36.70A.030(14). Rural counties may also allow new small-scale businesses to utilize a site previously occupied by an existing business as long as the new small-scale business conforms to the rural character of the area as defined by the local government according to *RCW 36.70A.030(14). Public services and public facilities shall 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;
- (iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl;
- (v) For purposes of (d) of this subsection, an existing area or existing use is one that was in existence:
 - (A) On July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter;
 - (B) On the date the county adopted a resolution under RCW 36.70A.040(2), in a county that is planning under all of the provisions of this chapter under RCW 36.70A.040(2); or
 - (C) On the date the office of financial management certifies the county's population as provided in RCW 36.70A.040(5), in a county that is planning under all of the provisions of this chapter pursuant to RCW 36.70A.040(5).

(e) Exception. This subsection shall not be interpreted to permit in the rural area a major industrial development or a master planned resort unless otherwise specifically permitted under RCW 36.70A.360 and 36.70A.365.

(6) A transportation element that implements, and is consistent with, the land use element.

(a) The transportation element shall include the following subelements:

(i) Land use assumptions used in estimating travel;

(ii) Estimated traffic impacts to state-owned transportation facilities resulting from land use assumptions to assist the department of transportation in monitoring the performance of state facilities, to plan improvements for the facilities, and to assess the impact of land-use decisions on state-owned transportation facilities;

(iii) Facilities and services needs, including:

(A) An inventory of air, water, and ground transportation facilities and services, including transit alignments and general aviation airport facilities, to define existing capital facilities and travel levels as a basis for future planning. This inventory must include state-owned transportation facilities within the city or county's jurisdictional boundaries;

(B) Level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system. These standards should be regionally coordinated;

(C) For state-owned transportation facilities, level of service standards for highways, as prescribed in chapters 47.06 and 47.80 RCW, to gauge the performance of the system. The purposes of reflecting level of service standards for state highways in the local comprehensive plan are to monitor the performance of the system, to evaluate improvement strategies, and to facilitate coordination between the county's or city's six-year street, road, or transit program and the department of transportation's six-year investment program. The concurrency requirements of (b) of this subsection do not apply to transportation facilities and services of statewide significance except for counties consisting of islands whose only connection to the mainland are state highways or ferry routes. In these island counties, state highways and ferry route capacity must be a factor in meeting the concurrency requirements in (b) of this subsection;

(D) Specific actions and requirements for bringing into compliance locally owned transportation facilities or services that are below an established level of service standard;

(E) Forecasts of traffic for at least ten years based on the adopted land use plan to provide information on the location, timing, and capacity needs of future growth;

(F) Identification of state and local system needs to meet current and future demands. Identified needs on state-owned transportation facilities must be consistent with the statewide multimodal transportation plan required under chapter 47.06 RCW;

(iv) Finance, including:

(A) An analysis of funding capability to judge needs against probable funding resources;

(B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year street, road, or transit program required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems. The multiyear financing plan should be coordinated with the six-

year improvement program developed by the department of transportation as required by **RCW 47.05.030;

(C) If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met;

(v) Intergovernmental coordination efforts, including an assessment of the impacts of the transportation plan and land use assumptions on the transportation systems of adjacent jurisdictions;

(vi) Demand-management strategies;

(vii) Pedestrian and bicycle component to include collaborative efforts to identify and designate planned improvements for pedestrian and bicycle facilities and corridors that address and encourage enhanced community access and promote healthy lifestyles.

(b) After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. These strategies may include increased public transportation service, ride sharing programs, demand management, and other transportation systems management strategies. For the purposes of this subsection (6) "concurrent with the development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

(c) The transportation element described in this subsection (6), and the six-year plans required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, RCW 35.58.2795 for public transportation systems, and **RCW 47.05.030 for the state, must be consistent.

(7) An economic development element establishing local goals, policies, objectives, and provisions for economic growth and vitality and a high quality of life. The element shall include: (a) A summary of the local economy such as population, employment, payroll, sectors, businesses, sales, and other information as appropriate; (b) a summary of the strengths and weaknesses of the local economy defined as the commercial and industrial sectors and supporting factors such as land use, transportation, utilities, education, work force, housing, and natural/cultural resources; and (c) an identification of policies, programs, and projects to foster economic growth and development and to address future needs. A city that has chosen to be a residential community is exempt from the economic development element requirement of this subsection.

(8) A park and recreation element that implements, and is consistent with, the capital facilities plan element that relates to park and recreation facilities. The element shall include: (a) Estimates of park and recreation demand for at least a ten-year period; (b) an evaluation of facilities and service needs; and (c) an evaluation of intergovernmental coordination opportunities to provide regional approaches for meeting park and recreational demand.

(9) It is the intent that new or amended elements required after January 1, 2002, be adopted concurrent with the scheduled update provided in RCW 36.70A.130. Requirements to incorporate any such new or amended elements shall be null and void until funds sufficient to cover applicable local government costs are appropriated and distributed by the state at least two years

before local government must update comprehensive plans as required in RCW 36.70A.130. [2005 c 360 § 2, eff. July 24, 2005; (2005 c 477 § 1, eff. May 13, 2005, expired August 31, 2005); 2004 c 196 § 1, eff. June 10, 2004; 2003 c 152 § 1, eff. July 27, 2003. Prior: 2002 c 212 § 2; 2002 c 154 § 2; 1998 c 171 § 2; 1997 c 429 § 7; 1996 c 239 § 1; prior: 1995 c 400 § 3; 1995 c 377 § 1; 1990 1st ex.s. c 17 § 7.]

Historical and Statutory Notes

Reviser's note: *(1) RCW 36.70A.030 was amended by 2005 c 423 § 2, changing subsection (14) to subsection (15). ***(2) RCW 47.05.030 was amended by 2005 c 319 § 9, changing the six-year improvement program to a ten-year improvement program. Expiration date—2005 c 477 § 1: "Section 1 of this act expires August 31, 2005." [2005 c 477 § 3.] Effective date—2005 c 477: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 13, 2005]." [2005 c 477 § 2.]

Law Review and Journal Commentaries

Religious land use jurisprudence: the negative ramifications for religious activities in Washington after *Open-Door Baptist Church v. Clark County*. Beth Priev, 26 Seattle U.L.Rev. 365 (2002).

Research References

- ALR Library
1 ALR 5th 622, Validity of Zoning Laws Setting Minimum Lot Size Requirements.
Treatises and Practice Aids
Rathkopf's the Law of Zoning and Planning § 15:36, Regulating Public Facility Timing and Location—Control Over Utility Provision.
Rathkopf's the Law of Zoning and Planning § 36:24, Consistency of Local Plans and Regulations With State-wide and Regional Goals—Defining

Notes of Decisions

- Arbitrary and capricious action 7
Clearly erroneous action 8
Rural densities and uses 6
1. In general
Under Growth Management Act (GMA), a city cannot create exemptions to its

148, review denied 152 Wash.2d 1004, 101 P.3d 865. Zoning And Planning ⇨ 381.5
Growth management hearings board's ruling with regard to county's comprehensive plan, that 25-foot buffers on Category B wetlands were inadequate to provide protection for wildlife habitat in accordance with the Growth Management Act, was subject to reversal, where county had adopted separate regulations for wetlands and for fish and wildlife protections, and board invalidated the wetland buffers because they were inadequate to protect fish and wildlife. Whidbey Environmental Action Network v. Island County (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 64

Substantial evidence supported growth management hearings board's conclusion that county's comprehensive plan with regard to type 3 and 4 stream buffers complied with the Growth Management Act; the best available scientific evidence did not require a 100-foot minimum for all streams, but recommended 15 to 30 meter buffers for minimal maintenance of most functions, which was consistent with county's plan. Whidbey Environmental Action Network v. Island County (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 64; Zoning And Planning ⇨ 359

Growth management hearings board's finding that county's comprehensive plan with regard to type 5 stream buffers failed to comply with the Growth Management Act was not erroneously based on a preponderance of the evidence standard; although board referred to a majority of scientific studies that were contrary to county's position, that observation did not, of itself, constitute reliance on a preponderance of the evidence standard, and board went on to specify several other reasons for its decision. Whidbey Environmental Action Network v. Island County (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 64; Zoning And Planning ⇨ 359

Growth management hearings board's finding that county's comprehensive plan with regard to type 5 stream buffers failed to comply with the Growth Management Act was not erroneously based on a preponderance of the evidence standard; although board referred to a majority of scientific studies that were contrary to county's position, that observation did not, of itself, constitute reliance on a preponderance of the evidence standard, and board went on to specify several other reasons for its decision. Whidbey Environmental Action Network v. Island County (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 64; Zoning And Planning ⇨ 359

Growth management hearings board's finding that county's comprehensive plan with regard to type 5 stream buffers failed to comply with the Growth Management Act was not arbitrary and capricious, notwithstanding that county's expert witness, who was a certified wetlands scientist,

supported county's position; board did not willfully disregard the opinion of county's expert, but rather, disagreed with county based on the strength of other scientific evidence presented. Whidbey Environmental Action Network v. Island County (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 64; Zoning And Planning ⇨ 359

Statute governing mandatory elements of comprehensive zoning plans permitted, but did not mandate, county to zone rural shoreline for higher density development than other rural areas, and thus, county's decision to zone shoreline as interim rural forest with 20-acre minimum lot size was not abuse of discretion. Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd. (2002) 113 Wash.App. 615, 53 P.3d 1011, review denied 148 Wash.2d 1017, 64 P.3d 649. Zoning And Planning ⇨ 63

5. Conflicts with comprehensive plan
City ordinance that exempted shopping center redevelopment from city's concurrency requirements concerning transportation impacts was invalid as conflicting with the Growth Management Act (GMA), under which, concurrency was a requirement, not a goal. City of Bellevue v. East Bellevue Community Mun. Corp. (2003) 119 Wash.App. 405, 81 P.3d 148, review denied 152 Wash.2d 1004, 101 P.3d 865. Zoning And Planning ⇨ 14

6. Rural densities and uses
A comprehensive plan's use of a 5-acre lot size is not, of itself, in violation of the rural element portion of the Growth Management Act (GMA) because the 5-acre lot size is a decidedly rural density. Whidbey Environmental Action Network v. Island County (2004) 2004 WL 1153309, superseded 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 63

County's approach for addressing rural densities and uses, for purposes of Growth Management Act's (GMA) rural element requirement, was not clearly erroneous; county provided convincing reasons to depart from downzoning requirement on rural zoned lands, given unique local circumstances, and county adopted persuasive alternatives to protect rural character, including addressing visual compatibility, instituting 5% limit on building coverage, drafting planned residential development

24 Wash. Prac. Series § 18.3, State, Regional and Local Government Roles in Planning!

24 Wash. Prac. Series § 18.5, Overview of the Local Planning Process.

36.70A.108. Comprehensive plans—Transportation element—Multimodal transportation improvements and strategies

(1) The transportation element required by RCW 36.70A.070 may include, in addition to improvements or strategies to accommodate the impacts of development authorized under RCW 36.70A.070(6)(b), multimodal transportation improvements or strategies that are made concurrent with the development. These transportation improvements or strategies may include, but are not limited to, measures implementing or evaluating:

- (a) Multiple modes of transportation with peak and nonpeak hour capacity performance standards for locally owned transportation facilities; and
 - (b) Modal performance standards meeting the peak and nonpeak hour capacity performance standards.
- (2) Nothing in this section or RCW 36.70A.070(6)(b) shall be construed as prohibiting a county or city planning under RCW 36.70A.040 from exercising existing authority to develop multimodal improvements or strategies to satisfy the concurrency requirements of this chapter.

(3) Nothing in this section is intended to affect or otherwise modify the authority of jurisdictions planning under RCW 36.70A.040.

[2005 c 328 § 1, eff. July 24, 2005.]

36.70A.110. Comprehensive plans—Urban growth areas

(1) Each county that is required or chooses to plan under RCW 36.70A.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.

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.

(3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350.

(4) In general, cities are the units of local government most appropriate to provide urban governmental services. In general, it is not appropriate that urban governmental services be extended to or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.

(5) On or before October 1, 1998, each county that was initially required to plan under RCW 36.70A.040(1) shall adopt development regulations designating interim urban growth areas under this chapter. Within three years and three months 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 adopt development regulations designating interim urban growth areas under this chapter. Adoption of the interim urban growth areas may only occur after public notice, public hearing, and compliance with the state environmental policy act, chapter 43.21C RCW, and RCW 36.70A.110. Such action may be appealed to the appropriate growth management hearings board under RCW 36.70A.280. Final urban growth areas shall be adopted at the time of comprehensive plan adoption under this chapter.

(6) Each county shall include designations of urban growth areas in its comprehensive plan.

(7) An urban growth area designated in accordance with this section may include within its boundaries urban service areas or potential annexation areas designated for specific cities or towns within the county.

[2004 c 206 § 1, eff. June 10, 2004; 2003 c 299 § 5, eff. July 27, 2003; 1997 c 429 § 24; 1995 c 400 § 2; 1994 c 249 § 27; 1993 sp.s. c 6 § 2; 1991 sp.s. c 82 § 29; 1990 1st ex.s. c 17 § 11.]

Research References

- ity Timing and Location—Control Over Utility Provision.
- 1A Wash. Prac. Series § 60.27, Annexation—Growth Management Act.
- 1A Wash. Prac. Series § 60.29A, Annexation—Resolution Method.
- 24 Wash. Prac. Series § 18.3, State, Regional and Local Government Roles in Planning.
- 24 Wash. Prac. Series § 18.5, Overview of the Local Planning Process.
- 24 Wash. Prac. Series § 18.14, Designation of Urban Growth Areas.
- 24 Wash. Prac. Series § 18.21, Development Regulations.
- 24 Wash. Prac. Series § 18.41, Media-tion.

ALR Library

- 74 ALR 2nd 377, Zoning Regulations as Affecting Churches.
- 62 ALR 1011, Facts Warranting Extension or Reduction of Municipal Boundaries.
- Encyclopedias
- 37 Am. Jur. Proof of Facts 3d 383, Zoning Action Not in Accordance With a Comprehensive Plan.

Treatises and Practice Aids

- Rathkopf's the Law of Zoning and Planning § 15.35, Regulating Public Facilities.

Notes of Decisions

In general ⁷
Evidence 9

In general ⁷
Evidence 9

Upon Supreme Court's decision to uphold growth management hearings board's ruling that county had properly designated an area as a fully contained community (FCC) under the Growth Management Act (GMA), but to reverse board's ruling that county failed to justify its designation of the area as an urban growth area (UGA), it was not necessary to remand matter to the board; parties' continued dispute as to the UGA designation had no bearing on the area's FCC designation, which independently permitted urban growth and development, and board had determined that it lacked jurisdiction to determine whether specific development application had vested. Quadrant Corp. v. State Growth Management Hearings Bd. (2005) 154 Wash.2d 224, 110 P.3d 1132. Zoning And Planning ¶ 749

A growth management act (GMA) does not have site-specific effect at project level; instead, it establishes a general framework in which local governments are required to plan in accordance with certain guidelines. Timberlake Christian Fellowship v. King County (2002) 114 Wash.App. 174, 61 P.3d 332, review denied 149 Wash.2d 1013, 69 P.3d 874. Zoning And Planning ¶ 30

Decision of hearing examiner that 48,500-square-foot limitation on church was sufficient to promote goals of growth management act (GMA) and comprehensive plan was not an abuse of discretion in action challenging grant of conditional use permit (CUP) to build church, hearing examiner applied policy of county comprehensive plan providing that nonresidential uses may include those that provide convenient local services for nearby residents to church's proposal, and found that church as limited met local nexus requirement since 40 percent of its current attendees lived in same zip code in which church was to be located. Timberlake

Christian Fellowship v. King County (2002) 114 Wash.App. 174, 61 P.3d 332, review denied 149 Wash.2d 1013, 69 P.3d 874. Zoning And Planning ¶ 388

Hearing examiner properly considered size of nearby grocery store in determining how large a structure church was allowed to build, in action challenging grant of conditional use permit (CUP) to build church, first CUP criterion required deciding authority to consider existing nearby development in determining whether applicant had demonstrated that use was designed in manner compatible with appearance of existing development, and county and church took measures to ensure that rural nature of area was preserved, including vegetative buffering, and permanent conservation easement. Timberlake Christian Fellowship v. King County (2002) 114 Wash.App. 174, 61 P.3d 332, review denied 149 Wash.2d 1013, 69 P.3d 874. Zoning And Planning ¶ 388

36.70A.115. Comprehensive plans and development regulations must provide sufficient land capacity for development

Counties and cities that are required or choose to plan under RCW 36.70A.040 shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management. [2003 c 333 § 1, eff. July 27, 2003.]

36.70A.120. Planning activities and capital budget decisions—Implementation in conformity with comprehensive plan

ALR Library

- 18 ALR 2nd 1255, Proper Remedy or Procedure for Attacking Legality of Proceedings Annexing Territory to Municipal Corporation.
- 62 ALR 1011, Facts Warranting Extension or Reduction of Municipal Boundaries.

Research References

- Plans and Regulations With State-wide and Regional Goals.
- 24 Wash. Prac. Series § 18.3, State, Regional and Local Government Roles in Planning.
- 24 Wash. Prac. Series § 18.21, Development Regulations.

Treatises and Practice Aids

- Rathkopf's the Law of Zoning and Planning § 36.23, Consistency of Local

36.70A.130. 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

332, review denied 149 Wash.2d 1013, 69 P.3d 874. Zoning And Planning ¶ 388

Sufficient evidence supported hearing examiner's finding that church as conditioned was compatible with rural area, and thus, county's approval of project was not inconsistent with purposes of growth management act (GMA), in action challenging grant of conditional use permit (CUP) to build church; examiner took into account that 10-acre shopping center adjacent to proposed site was already busy arterial, county considered extensive evidence regarding visual impact of church on nearby residents, and hearing examiner imposed a number of conditions designed to mitigate visual impact of church on neighborhood. Timberlake Christian Fellowship v. King County (2002) 114 Wash.App. 174, 61 P.3d 332, review denied 149 Wash.2d 1013, 69 P.3d 874. Zoning And Planning ¶ 388

36.70A.115. Comprehensive plans and development regulations must provide sufficient land capacity for development

Counties and cities that are required or choose to plan under RCW 36.70A.040 shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management. [2003 c 333 § 1, eff. July 27, 2003.]

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- 24 Wash. Prac. Series § 18.3, State, Regional and Local Government Roles in Planning.
- 24 Wash. Prac. Series § 18.21, Development Regulations.

Treatises and Practice Aids

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36.70A.130. 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 time periods specified in subsection (4) 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 time periods specified in subsection (4) of this section. Legislative action means the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefor.

(c) The review and evaluation required by this subsection may be combined with the review required by subsection (3) of this section. 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.

(2)(a) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.085 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year. "Updates" means to review and revise, if needed, according to subsection (1) of this section, and the time periods specified in subsection (4) of this section or in accordance with the provisions of subsections (5) and (8) of this section. Amendments may be considered more frequently than once per year under the following circumstances:

(i) The initial adoption of a subarea plan that does not modify the comprehensive plan policies and designations applicable to the subarea;

(ii) The adoption or amendment of a shoreline master program under the procedures set forth in chapter 90.58 RCW;

(iii) The amendment of the capital facilities element of a comprehensive plan that occurs concurrently with the adoption or amendment of a county or city budget;

(iv) Until June 30, 2006, the designation of recreational lands under *RCW 36.70A.1701. A county amending its comprehensive plan pursuant to this subsection (2)(a)(iv) may not do so more frequently than every eighteen months; and

(v) The adoption of comprehensive plan amendments necessary to enact a planned action under RCW 43.21C.031(2), provided that amendments are considered in accordance with the public participation program established by the county or city under this subsection (2)(a) and all persons who have requested notice of a comprehensive plan update are given notice of the amendments and an opportunity to comment.

(b) Except as otherwise provided in (a) of this subsection, all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court.

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

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

(4) The department shall establish a schedule for counties and cities to 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. Except as provided in subsections (5) and (8) of this section, the schedule established by the department shall provide for the reviews and evaluations to be completed as follows:

(a) On or before December 1, 2004, and every seven years thereafter, for Clallam, Clark, Jefferson, King, Kitsap, Pierce, Snohomish, Thurston, and Whatcom counties and the cities within those counties;

(b) On or before December 1, 2005, and every seven years thereafter, for Cowlitz, Island, Lewis, Mason, San Juan, Skagit, and Skamania counties and the cities within those counties;

(c) On or before December 1, 2006, and every seven years thereafter, for Benton, Chelan, Douglas, Grant, Kittitas, Spokane, and Yakima counties and the cities within those counties; and

(d) On or before December 1, 2007, and every seven years thereafter, for Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grays Harbor, Klickitat, Lincoln, Okanogan, Pacific, Pend Oreille, Stevens, Wahkiakum, Walla Walla, and Whitman counties and the cities within those counties.

(5)(a) Nothing in this section precludes a county or city from conducting the review and evaluation required by this section before the time limits established in subsection (4) of this section. Counties and cities may begin this process early and may be eligible for grants from the department, subject to available funding, if they elect to do so.

(b) A county that is subject to a schedule established by the department under subsection (4)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the thirty-six months following the date established in the applicable schedule: The county has a population of less than fifty thousand and has had its population increase by no more than seventeen percent in the ten years preceding the date established in the applicable schedule as of that date.

(c) A city that is subject to a schedule established by the department under subsection (4)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the thirty-six months following the date established in the applicable schedule: The city has a population of no more than five thousand and has had its population increase by the greater of either no more than one hundred persons or no more than seventeen percent in the ten years preceding the date established in the applicable schedule as of that date.

(d) State agencies are encouraged to provide technical assistance to the counties and cities in the review of critical area ordinances, comprehensive plans, and development regulations.

(6) A county or city subject to the time periods in subsection (4)(a) of this section that, pursuant to an ordinance adopted by the county or city establishing a schedule for periodic review of its comprehensive plan and development regulations, has conducted a review and evaluation of its comprehensive plan and development regulations and, on or after January 1, 2001, has taken action in response to that review and evaluation shall be deemed to have conducted the first review required by subsection (4)(a) of this section. Subsequent review and evaluation by the county or city of its comprehensive plan and development regulations shall be conducted in accordance with the time periods established under subsection (4)(a) of this section.

(7) The requirements imposed on counties and cities under this section shall be considered "requirements of this chapter" under the terms of RCW 36.70A.040(1). Only those counties and cities: (a) Complying with the schedule in this section; (b) demonstrating substantial progress towards compliance with the schedules in this section for development regulations that protect critical areas; or (c) complying with the extension provisions of subsection (5)(b) or (c) of this section may receive grants, loans, pledges, or financial guarantees from those accounts established in RCW 43.155.050 and 70.146.030. A county or city that is fewer than twelve months out of compliance with the schedules in this section for development regulations that protect critical areas is making substantial progress towards compliance. Only those counties and cities in compliance with the schedules in this section may receive preference for grants or loans subject to the provisions of RCW 43.17.250.

(8) Except as provided in subsection (5)(b) and (c) of this section:

(a) Counties and cities required to satisfy the requirements of this section according to the schedule established by subsection (4)(b) through (d) of this section may comply with the requirements of this section for development regulations that protect critical areas one year after the dates established in subsection (4)(b) through (d) of this section;

(b) Counties and cities complying with the requirements of this section one year after the dates established in subsection (4)(b) through (d) of this section for development regulations that protect critical areas shall be deemed in compliance with the requirements of this section; and

(c) This subsection (8) applies only to the counties and cities specified in subsection (4)(b) through (d) of this section, and only to the requirements of this section for development regulations that protect critical areas that must be satisfied by December 1, 2005, December 1, 2006, and December 1, 2007.

(9) Notwithstanding subsection (8) of this section and the substantial progress provisions of subsections (7) and (10) of this section, only those counties and cities complying with the schedule in subsection (4) of this section, or the extension provisions of subsection (5)(b) or (c) of this section, may receive

preferences for grants, loans, pledges, or financial guarantees from those accounts established in RCW 43.155.050 and 70.146.030.

(10) Until December 1, 2005, and notwithstanding subsection (7) of this section, a county or city subject to the time periods in subsection (4)(a) of this section demonstrating substantial progress towards compliance with the schedules in this section for its comprehensive land use plan and development regulations may receive grants, loans, pledges, or financial guarantees from those accounts established in RCW 43.155.050 and 70.146.030. A county or city that is fewer than twelve months out of compliance with the schedules in this section for its comprehensive land use plan and development regulations is deemed to be making substantial progress towards compliance.

[2006 c 285 § 2, eff. June 7, 2006. Prior: 2005 c 423 § 6, eff. May 12, 2005; 2005 c 294 § 2, eff. May 5, 2005; 2002 c 320 § 1; 1997 c 429 § 10; 1995 c 347 § 106; 1990 1st exs. c 17 § 13.]

Historical and Statutory Notes

*Reviser's note: RCW 36.70A.1701 expired June 30, 2006.

Intent—2006 c 285: "There is a statewide interest in maintaining coordinated planning as called for in the legislative findings of the growth management act, RCW 36.70A.010. It is the intent of the legislature that smaller, slower-growing counties and cities be provided with flexibility in meeting the requirements to review local plans and development regulations in RCW 36.70A.130, while ensuring coordination and consistency with the plans of neighboring cities and counties." [2006 c 285 § 1.]

Intent—Effective date—2005 c 423: See notes following RCW 36.70A.030.

Intent—2005 c 294: "The legislature recognizes the importance of appropriate and meaningful land use measures and that such measures are critical to preserving and fostering the quality of life enjoyed by Washingtonians. The legislature recognizes also that the growth management act requires counties and cities to review and, if needed, revise their comprehensive plans and development regulations on a cyclical basis. These requirements, which often require significant compliance efforts by local governments are, in part, an acknowledgment of the continual changes that occur within the state, and the need to ensure that land use measures reflect the collective wishes of its citizenry."

The legislature acknowledges that only those jurisdictions in compliance with the review and revision schedules of the growth management act are eligible to receive funds from the public works assistance and water quality accounts in the state treasury. The legislature further recognizes that some jurisdictions that are not yet in compliance with these review and revision schedules have demonstrated substantial progress towards compliance.

The legislature, therefore, intends to grant jurisdictions that are not in compliance with requirements for development regulations that protect critical areas, but are demonstrating substantial progress towards compliance with these requirements, twelve months of additional eligibility to receive grants, loans, pledges, or financial guarantees from the public works assistance and water quality accounts in the state treasury. The legislature intends to specify, however, that only counties and cities in compliance with the review and revision schedules of the growth management act may receive preference for financial assistance from these accounts." [2005 c 294 § 1.]

Effective date—2005 c 294: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 5, 2005]." [2005 c 294 § 3.]

Cross References

local shoreline master plans, see § 79A.15.070.

Habitat conservation programs, acquisition priorities, projects that help local shoreline master plans, see § 79A.15.060.
State parks and local parks proposals, acquisition priorities, projects that help

Research References

Treatises and Practice Aids

Rathkopf's the Law of Zoning and Planning § 14.7, Varied Meaning in Different States.

Rathkopf's the Law of Zoning and Planning § 36.26, Procedural Requirements for Local Planning. 24 Wash. Prac. Series § 18.22, Amendments.

Notes of Decisions

1. Amendments

Growth management hearings boards lack the authority to remand a matter back to the relevant governmental unit for the purpose of amending a comprehensive plan or development regulations. The filing of a petition with a growth management board does not, however, divest the legislative authority of a city or county of its authority to make amendments at any time. Op. Atty. Gen. 2005, No. 11.

36.70A.131. Mineral resource lands—Review of related designations and development regulations

Notes of Decisions

In General 1

or physical conditions necessary for use"; mining operation as whole was "principal use", given property's land designation as unrestricted mineral resource land, consistent with county master program and Shoreline Management Act (SMA), and transporting minerals by barge was essential part of mining operation on small island. Preserve Our Islands v. Shorelines Hearings Bd. (2006) 133 Wash.App. 503, 137 P.3d 31. Navigable Waters ⇨ 43(3)

1. In General

Sand and gravel mining company's proposed barge-loading facility was permitted "water dependent use" within meaning of county shoreline code defining such use as "principal use which can only exist where the landwater interface provides biological

36.70A.140. Comprehensive plans—Ensure public participation

Research References

Treatises and Practice Aids

Rathkopf's the Law of Zoning and Planning § 36.26, Procedural Requirements for Local Planning.

24 Wash. Prac. Series § 18.5, Overview of the Local Planning Process. 24 Wash. Prac. Series § 18.23, Public Participation.

Notes of Decisions

2. Notice

Town's posting notice of comprehensive plan amendment designating parcel of unincorporated land as potential annexation area (PAA) in local newspaper provided sufficient notice to owner of land, and due process did not require town to give landowner individualized notice; landowner was unable to demonstrate actual effect to its property rights, which would implicate due process principles, since landowner continued to use land in same manner as it did prior to amendment, and land could not be annexed without owner's consent. Chevron U.S.A., Inc. v. Puget Sound Growth Management Hearings Bd. (2005) 156 Wash.2d 131, 124 P.3d 640. Constitutional Law ⇨ 195

Town's posting notice of plan amendment designating parcel of unincorporated land as potential annexation area (PAA) in local newspaper provided sufficient notice to owner of land, and due process did not require town to give landowner individualized notice. Chevron U.S.A., Inc. v. Central Puget Sound Growth Management Hearings Bd. (2004) 123 Wash.App. 161, 93 P.3d 880, review granted 153 Wash.2d 1023, 110 P.3d 213, affirmed 156 Wash.2d 131, 124 P.3d 640. Constitutional Law ⇨ 195

Statutory and regulatory notice requirements for designation of natural resource

lands under the Growth Management Act (GMA) did not require county to give individual notice to developer whose property was designated forest resource land. Holbrook, Inc. v. Clark County (2002) 112 Wash.App. 354, 49 P.3d 142, review denied 148 Wash.2d 1017, 64 P.3d 649. Zoning And Planning ⇨ 359

36.70A.150. Identification of lands useful for public purposes

Law Review and Journal Commentaries

Religious land use jurisprudence: the negative ramifications for religious activities in Washington after *Open Door Baptist Church v. Clark County*. Beth Prievé, 26 Seattle U.L.Rev. 365 (2002).

Research References

Treatises and Practice Aids

24 Wash. Prac. Series § 18.19, Comprehensive Plans—Additional Subjects.

36.70A.160. Identification of open space corridors—Purchase authorized

Research References

Treatises and Practice Aids

24 Wash. Prac. Series § 18.19, Comprehensive Plans—Additional Subjects.

36.70A.170. Natural resource lands and critical areas—Designations

Historical and Statutory Notes

2004 Legislation

Laws 2004, ch. 209, § 1 provides:

"(1) By December 1, 2004, the department of community, trade, and economic development shall provide to the house of representatives local government committee and the senate committee on land use and planning a report regarding the designation pursuant to RCW 36.70A.170(1)(a) of agricultural lands with long-term commercial significance in King, Chelan, Lewis, and Yakima counties.

"(2) The report shall address:

"(a) The amount of land designated as agricultural lands with long-term commercial significance;

"(b) The amount of land in agricultural production;

"(c) Changes in the amount of agricultural land since 1990;

"(d) Comparison with amounts of land in other uses;

"(e) Designation standards and procedures;

"(f) Effect of designation on tax revenue;

"(g) Contribution of agriculture to the local economy;

"(h) Threats to maintaining the agricultural land base;

"(i) Measures local governments should adopt to better maintain the agricultural land base and sustain and enhance the agricultural industry; and

"(j) Any other type of information that will help the committees to evaluate the implementation and effect of designation."

Research References

Treatises and Practice Aids

23 Wash. Prac. Series § 7.88, On-Site Sewage Systems (Septic Tanks)
23 Wash. Prac. Series § 8.102, Water Resources and Growth Management.

24 Wash. Prac. Series § 18.5, Overview of the Local Planning Process.

24 Wash. Prac. Series § 18.12, Designation of Natural Resource Lands.

Historical and Statutory Notes

Severability—1997 c 429: See note following RCW 36.70A.3201.

Library References

Adverse Possession §9.1.
 Counties §103, 106.
 WESTLAW Topic Nos. 20, 104.
 C.J.S. Adverse Possession § 214.
 C.J.S. Counties §§ 143, 147.

36.70A.170. Natural resource lands and critical areas—Designations

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

- (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;
 - (b) Forest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber;
 - (c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and
 - (d) Critical areas.
- (2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.
 [1990 1st ex.s. c 17 § 17.]

Library References

Environmental Law §43.
 Zoning and Planning §61.
 WESTLAW Topic Nos. 149E, 414.
 C.J.S. Zoning and Land Planning § 25, 48.
 Protection of lands, development agreements, mineral extraction, see Wash.Prac. vol. 24, Heller, Ehrman, White and McAuliffe, §§ 18.5, 18.12, 18.34.
 Water resources, see Wash.Prac. vol. 23, Heller, Ehrman, White and McAuliffe, § 8.102.

Notes of Decisions

county to give individual notice to developer whose property was designated forest resource land. Holbrook, Inc. v. Clark County (2002) 112 Wash.App. 354, 49 P.3d 142.

1. Notice
 Statutory and regulatory notice requirements for designation of natural resource lands under the Growth Management Act (GMA) did not require

oper whose property was designated forest resource land under Growth Management Act (GMA), even though classification significantly affected developer's ability to make use of its property, where designation was result of area-wide analysis, rather than a specific targeting of developer's property, and impact on developer was not unique or significantly greater than that imposed on most other landowners. Holbrook, Inc. v. Clark County (2002) 112 Wash.App. 354, 49 P.3d 142.

Rational basis supported county's decision to send individual notice of proceedings regarding designation of natu-

ral resource lands under the Growth Management Act (GMA) to county residents only, and thus there was no equal protection violation for county's failure to send individual notice to non-resident landowner whose property in county was designated forest resource land; land designation process was a county-by-county undertaking and it was rational to distinguish residents living in the county doing the planning from landowners residing in other counties. Holbrook, Inc. v. Clark County (2002) 112 Wash.App. 354, 49 P.3d 142.

36.70A.172. Critical areas—Designation and protection—Best available science to be used

- (1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.
- (2) If it determines that advice from scientific or other experts is necessary or will be of substantial assistance in reaching its decision, a growth management hearings board may retain scientific or other expert advice to assist in reviewing a petition under RCW 36.70A.290 that involves critical areas.
 [1995 c 347 § 105.]

Historical and Statutory Notes

Finding—Severability—Part headings and table of contents not law— 1995 c 347: See notes following RCW 36.70A.470.

Administrative Code References

Growth Management Act, best available science, see WAC 365-195-900 et seq.

Library References

Environmental Law §43, 45.
 Zoning and Planning §30.
 WESTLAW Topic Nos. 149E, 414.
 C.J.S. Zoning and Land Planning § 2, 5, 12, 39.

Designation of critical areas, see Wash.Prac. vol. 24, Heller, Ehrman, White and McAuliffe, § 18.13.

36.70A.210 Note 7

7. Civil rights

Allegation that state statute which mandated county-wide land use planning violated right guaranteed by county charter to petition for referendum did not state § 1983 civil rights claim in absence of allegation that federal law had been violated. *Snohomish County v. Anderson* (1994) 124 Wash.2d 834, 881 P.2d 240, reconsideration denied.

8. Referendum

County planning ordinance, adopted as required by state's Growth Management Act, was not subject to referendum permitted under county charter. *Snohomish County v. Anderson* (1994) 124 Wash.2d 834, 881 P.2d 240, reconsideration denied.

9. Standing

Plaintiff lacked standing to assert claim that statute would have practical effect of allowing counties to dictate cities' comprehensive plans, since he did not reside in one of the cities that he claimed would be prejudiced. *Postema v. Snohomish County* (1996) 83 Wash.

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App. 574, 922 P.2d 176, review denied 131 Wash.2d 1019, 936 P.2d 417.

Resident of rural region had standing to bring claim that he was underrepresented when city and county officials met to develop "a framework for the adoption of a county-wide planning policy" because, as a rural resident, he could not vote for any of the city representatives that attended the meeting, while city residents could vote for both county and city representatives. *Postema v. Snohomish County* (1996) 83 Wash.App. 574, 922 P.2d 176, review denied 131 Wash.2d 1019, 936 P.2d 417.

10. Certiorari review

County counsel's passing by ordinance county-wide planning policies was legislative, not quasi-judicial, action and, thus, its compliance with State Environmental Policy Act (SEPA) was not subject to review by statutory writ of certiorari. *Snohomish County Property Rights Alliance v. Snohomish County* (1994) 76 Wash.App. 44, 882 P.2d 807, review denied 125 Wash.2d 1025, 890 P.2d 464.

36.70A.215. Review and evaluation program

(1) Subject to the limitations in subsection (7) of this section, a county shall adopt, in consultation with its cities, county-wide planning policies to establish a review and evaluation program. This program shall be in addition to the requirements of RCW 36.70A.110, 36.70A.130, and 36.70A.210. In developing and implementing the review and evaluation program required by this section, the county and its cities shall consider information from other appropriate jurisdictions and sources. The purpose of the review and evaluation program shall be to:

(a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and

(b) Identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter.

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(2) The review and evaluation program shall:

(a) Encompass land uses and activities both within and outside of urban growth areas and provide for annual collection of data on urban and rural land uses, development, critical areas, and capital facilities to the extent necessary to determine the quantity and type of land suitable for development, both for residential and employment-based activities;

(b) Provide for evaluation of the data collected under (a) of this subsection every five years as provided in subsection (3) of this section. The first evaluation shall be completed not later than September 1, 2002. The county and its cities may establish in the county-wide planning policies indicators, benchmarks, and other similar criteria to use in conducting the evaluation;

(c) Provide for methods to resolve disputes among jurisdictions relating to the county-wide planning policies required by this section and procedures to resolve inconsistencies in collection and analysis of data; and

(d) Provide for the amendment of the county-wide policies and county and city comprehensive plans as needed to remedy an inconsistency identified through the evaluation required by this section, or to bring these policies into compliance with the requirements of this chapter.

(3) At a minimum, the evaluation component of the program required by subsection (1) of this section shall:

(a) Determine whether there is sufficient suitable land to accommodate the county-wide population projection established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and its cities and the requirements of RCW 36.70A.110;

(b) Determine the actual density of housing that has been constructed and the actual amount of land developed for commercial and industrial uses within the urban growth area since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) of this section; and

(c) Based on the actual density of development as determined under (b) of this subsection, review commercial, industrial, and housing needs by type and density range to determine the amount of land needed for commercial, industrial, and housing for the remaining portion of the twenty-year planning period used in the most recently adopted comprehensive plan.

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(4) If the evaluation required by subsection (3) of this section demonstrates an inconsistency between what has occurred since the adoption of the county-wide planning policies and the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans and the planning goals and the requirements of this chapter, as the inconsistency relates to the evaluation factors specified in subsection (3) of this section, the county and its cities shall adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period. If necessary, a county, in consultation with its cities as required by RCW 36.70A.210, shall adopt amendments to county-wide planning policies to increase consistency. The county and its cities shall annually monitor the measures adopted under this subsection to determine their effect and may revise or rescind them as appropriate.

(5)(a) Not later than July 1, 1998, the department shall prepare a list of methods used by counties and cities in carrying out the types of activities required by this section. The department shall provide this information and appropriate technical assistance to counties and cities required to or choosing to comply with the provisions of this section.

(b) By December 31, 2007, the department shall submit to the appropriate committees of the legislature a report analyzing the effectiveness of the activities described in this section in achieving the goals envisioned by the county-wide planning policies and the comprehensive plans and development regulations of the counties and cities.

(6) From funds appropriated by the legislature for this purpose, the department shall provide grants to counties, cities, and regional planning organizations required under subsection (7) of this section to conduct the review and perform the evaluation required by this section.

(7) The provisions of this section shall apply to counties, and the cities within those counties, that were greater than one hundred fifty thousand in population in 1995 as determined by office of financial management population estimates and that are located west of the crest of the Cascade mountain range. Any other county planning under RCW 36.70A.040 may carry out the review, evaluation, and amendment programs and procedures as provided in this section.

[1997 c 429 § 25.]

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Historical and Statutory Notes

Severability—1997 c 429: See note following RCW 36.70A.3201.

Library References

Zoning and Planning ☞30, 131, 133. C.J.S. Zoning and Land Planning §§ 2, 5, 12, 14, 16, 39. WESTLAW Topic No. 414.

36.70A.250. Growth management hearings boards

(1) There are hereby created three growth management hearings boards for the state of Washington. The boards shall be established as follows:

(a) An Eastern Washington board with jurisdictional boundaries including all counties that are required to or choose to plan under RCW 36.70A.040 and are located east of the crest of the Cascade mountains;

(b) A Central Puget Sound board with jurisdictional boundaries including King, Pierce, Snohomish, and Kitsap counties; and

(c) A Western Washington board with jurisdictional boundaries including all counties that are required or choose to plan under RCW 36.70A.040 and are located west of the crest of the Cascade mountains and are not included in the Central Puget Sound board jurisdictional boundaries. Skamania county, should it be required or choose to plan under RCW 36.70A.040, may elect to be included within the jurisdictional boundaries of either the Western or Eastern board.

(2) Each board shall only hear matters pertaining to the cities and counties located within its jurisdictional boundaries. [1994 c 249 § 29; 1991 sp.s. c 32 § 5.]

Historical and Statutory Notes

Severability—Application—1994 c 249: See notes following RCW 34.05.310.

Cross References

Administrative appeals, direct review of decisions by environmental boards, certification of appealability, see § 34.05.518.

Library References

Zoning and Planning ☞131, 351. C.J.S. Zoning and Land Planning §§ 12, 14, 16, 97, 177, 181 to 183, 185. WESTLAW Topic No. 414.

36.70A.280

Note 2

ulation was not in compliance with the GMA requirements regarding urban growth. Skagit Surveyors and Engineers, LLC v. Friends of Skagit County (1998) 135 Wash.2d 542, 958 P.2d 962.

City council's approval of land use project need not have been appealed to Growth Management Hearing Board, in order to exhaust administrative remedies; challenge to approval of development did not involve issue of whether council properly complied with Growth Management Act (GMA), but rather effect of comprehensive plan on specific land use decisions, an issue over which Board did not have jurisdiction. Citizens for Mount Vernon v. City of Mount Vernon (1997) 133 Wash.2d 861, 947 P.2d 1208, reconsideration denied.

Growth Management Act does not prohibit adoption of plans and regulations that may negatively affect particular private property interest; therefore, RCW 36.70A.280 does not authorize Growth Planning Hearings Boards to grant relief to specific property owner if plans and regulations have negative impact on owner's specific property and owner cannot challenge plans or regulations based solely on claim that plans or regulations result in negative impact on owner's property. Op.Atty.Gen. 1992, No. 23.

Growth Planning Hearings Boards have jurisdiction over petitions that allege that private property rights have not been considered or have been considered in arbitrary or discriminatory manner. Op.Atty.Gen. 1992, No. 23.

36.70A.290. Petitions to growth management hearings boards—Evidence

(1) All requests for review to a 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

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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 by the legislative bodies of the county or city.

(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 local government shall publish a notice that the shoreline master program or amendment thereto has been approved or disapproved by the department of ecology. For purposes of this section, the date of publication for the adoption or amendment of a shoreline master program is the date the local government publishes notice that the shoreline master program or amendment thereto has been approved or disapproved by the department of ecology.

(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.

[1997 c 429 § 12; 1995 c 347 § 109. Prior: 1994 c 257 § 2; 1994 c 249 § 26; 1991 sp.s. c 32 § 10.]

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R.C.A. 36.70A.280 authorizes Growth Planning Hearings Boards to hear petitions which allege that governments planning under Growth Management Act are not in compliance with requirements of Act as it relates to plans and regulations adopted pursuant to 36.70A.40. Op.Atty.Gen. 1992, No. 23.

3. Project permit applications

Site-specific rezone that is authorized by a comprehensive plan is a "project permit application" that growth management hearings board lacks jurisdiction to review, regardless of whether comprehensive plan was adopted under Growth Management Act (GMA). Wenatchee Sportsmen Ass'n v. Chelan County (2000) 141 Wash.2d 169, 4 P.3d 123.

4. Parties

Party participates orally or in writing before city regarding "matter" for which review is being requested by growth management hearings board, as is required to have standing to petition board for review under Growth Management Act (GMA), where party's participation is reasonably related to the petitioner's issue as presented to the board; party need not raise specific legal issues during local governmental planning process to have standing, but there must be a showing of some nexus between the party's participation in process, and issues raised by party before board. Wells v. Western Washington Growth Management Hearings Bd (2000) 100 Wash.App. 657, 997 P.2d 405, reconsideration denied.

Historical and Statutory Notes

Prospective application—1997 c 429 §§ 1-21: See note following RCW 36.70A.3201.

Severability—1997 c 429: See note following RCW 36.70A.3201.

Severability—Part headings and table of contents not law—1994 c 249: See notes following RCW 34.05.310.

Library References

Zoning and Planning *et seq.* 358.1, 360. WESTLAW Topic No. 414.
C.J.S. Zoning and Land Planning §§ 95, 189.

Petitions to growth management hearings boards, see Wash.Prac. vol. 24, Heller, Ehrman, White, and McAuliffe, §§ 18.42, 25.47.

Notes of Decisions**Jurisdiction 3****Notice 1**

Project permit applications 2
Timeliness of appeal 4

1. Notice

City or county that adopts plans or regulations pursuant to RCW 36.70A.040 is not required to give individual notice to each property owner whose property value may be negatively impacted as a result of plans or regulations. *Op.Atty.Gen.* 1992, No. 23.

2. Project permit applications

Site-specific rezoning that is authorized by a comprehensive plan is a "project permit application" that growth management hearings board lacks jurisdiction to review, regardless of whether comprehensive plan was adopted under Growth Management Act (GMA). *Wenatchee Sportsmen Ass'n v. Chelan County* (2000) 141 Wash.2d 169, 4 P.3d 123.

36.70A.295. Direct judicial review

(1) The superior court may directly review a petition for review filed under RCW 36.70A.290 if all parties to the proceeding before the board have agreed to direct review in the superior court. The agreement of the parties shall be in writing and signed by all of the parties to the proceeding or their designated representatives. The agreement shall include the parties' agreement to proper venue as provided in RCW 36.70A.300(5). The parties shall file their agree-

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ment with the board within ten days after the date the petition is filed, or if multiple petitions have been filed and the board has consolidated the petitions pursuant to RCW 36.70A.300, within ten days after the board serves its order of consolidation.

(2) Within ten days of receiving the timely and complete agreement of the parties, the board shall file a certificate of agreement with the designated superior court and shall serve the parties with copies of the certificate. The superior court shall obtain exclusive jurisdiction over a petition when it receives the certificate of agreement. With the certificate of agreement the board shall also file the petition for review, any orders entered by the board, all other documents in the board's files regarding the action, and the written agreement of the parties.

(3) For purposes of a petition that is subject to direct review, the superior court's subject matter jurisdiction shall be equivalent to that of the board. Consistent with the requirements of the superior court civil rules, the superior court may consolidate a petition subject to direct review under this section with a separate action filed in the superior court.

(4)(a) Except as otherwise provided in (b) and (c) of this subsection, the provisions of RCW 36.70A.280 through 36.70A.330, which specify the nature and extent of board review, shall apply to the superior court's review.

(b) The superior court:

(i) Shall not have jurisdiction to directly review or modify an office of financial management population projection;

(ii) Except as otherwise provided in RCW 36.70A.300(2)(b), shall render its decision on the petition within one hundred eighty days of receiving the certification of agreement; and

(iii) Shall give a compliance hearing under RCW 36.70A.330(2) the highest priority of all civil matters before the court.

(c) An aggrieved party may secure appellate review of a final judgment of the superior court under this section by the supreme court or the court of appeals. The review shall be secured in the manner provided by law for review of superior court decisions in other civil cases.

(5) If, following a compliance hearing, the court finds that the state agency, county, or city is not in compliance with the court's prior order, the court may use its remedial and contempt powers to enforce compliance.

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Notes of Decisions

Intervention 1

1. Intervention

Provision of Growth Management Act (GMA) authorizing State to request review by a growth management hearings board does not preclude Department of Community, Trade, and Economic Development (CTED) from intervening in judicial review process under GMA following appeal of board's decision; issue of intervention is procedural, and thus is governed by court rules. *Wells v. Western Washington Growth Management Hearings Bd.* (2000) 100 Wash. App. 657, 997 P.2d 405, reconsideration denied.

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.

[1997 c 429 § 20; 1995 c 347 § 111; 1991 sp.s. c 32 § 13.]

Historical and Statutory Notes

Prospective application—1997 c 429 §§ 1–21: See note following RCW 36.70A.3201.

Severability—1997 c 429: See note following RCW 36.70A.470.

Library References

Zoning and Planning ☞ 21, 360. WESTLAW Topic No. 414.

C.J.S. Zoning and Land Planning §§ 18, 19, 37, 95, 189.

Comprehensive plans and regulations, see Wash.Prac. vol. 24. Heller, Ehrman, White and McAuliffe, § 18.42.

Notes of Decisions

In general 1
Authority of board 3
Clearly erroneous 2

1. In general

City was not required to present specific and rigorous evidence subject to heightened scrutiny when defending validity of urban recreational designation of property previously zoned agricultural, as growth management act (GMA) required growth management hearings board to presume challenged ordinance was valid, challenger had burden of establishing invalidity, and property was inside city's urban growth area. *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.* (2002) 60 P.3d 629.

Urban recreational designation for property once zoned agricultural was valid, and was not an improper designation, as there was no agricultural designation in place for city to remove; growth management hearings board had originally invalidated agricultural designation of property, and city changed designation, on an interim basis, to urban recreational, with a revival clause to return original agricultural designation, but Supreme Court invalidated agricultural designation for lack of transfer of development rights (TDR) program, and thus ordinance was never effective to designate property for agricultural use. *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.* (2002) 60 P.3d 629.

Finding—Severability—Part headings and table of contents not law—1995 c 347: See notes following RCW 36.70A.470.

Under Growth Management Act (GMA), comprehensive plans, development regulations, and any amendments to them are deemed valid upon adoption, and if growth management hearings board finds on review that a comprehensive plan or development regulations would substantially interfere with the fulfillment of the goals of the GMA, it may determine that part or parts of the plan or regulation are invalid. *Wells v. Western Washington Growth Management Hearings Bd.* (2000) 100 Wash.App. 657, 997 P.2d 405, reconsideration denied.

Under Growth Management Act (GMA), comprehensive plans are generally valid upon adoption, with burden of proof on petitioner challenging plan where there is no prior determination of invalidity, but if there has been an invalidity determination concerning issues that are also included in the new plan, statutory exception shifts burden, on those provisions only, to the local government. *Wells v. Western Washington Growth Management Hearings Bd.* (2000) 100 Wash.App. 657, 997 P.2d 405, reconsideration denied.

Under Growth Management Act (GMA), county bore burden of proof with respect to those portions of its comprehensive plan and development regulations which were adopted in response to prior determination by growth management hearings board that portions of plan and regulations were invalid, but petitioners seeking review under GMA retained burden of proof with respect to remainder of plan,

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Note 1

which was presumed valid. *Wells v. Western Washington Growth Management Hearings Bd.* (2000) 100 Wash. App. 657, 997 P.2d 405, reconsideration denied.

2. Clearly erroneous

To find an action clearly erroneous, Growth Management Board must be left with firm and definite conviction that a mistake has been committed. *The Cooper Point Ass'n v. Thurston County* (2001) 108 Wash.App. 429, 31 P.3d 28, review granted 145 Wash.2d 1033, 43 P.3d 20, affirmed 57 P.3d 1156.

To find an action "clearly erroneous," the growth management hearings board must be left with the firm and definite

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conviction that a mistake has been committed. *King County v. Central Puget Sound Growth Management Hearings Bd.* (2000) 142 Wash.2d 543, 14 P.3d 133.

3. Authority of board

Authority of growth management hearings board is limited to determining whether the comprehensive land use plan (CP) and development regulations (DRs) violate the specific terms of the Growth Management Act (GMA) or substantially interfere with its stated goals; board does not have authority to reject a CP and DRs for any reason whatsoever. *Diehl v. Mason County* (1999) 94 Wash.App. 645, 972 P.2d 543.

36.70A.3201. Intent—Finding—1997 c 429 § 20(3)

In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends that the boards apply 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 boards 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.

[1997 c 429 § 2.]

Historical and Statutory Notes

Prospective application—1997 c 429
§§ 1-21: "Except as otherwise specifically provided in RCW 36.70A.335, sections 1 through 21, chapter 429, Laws of 1997 are prospective in effect and shall not affect the validity of actions taken or decisions made before July 27, 1997." [1997 c 429 § 53.]

Severability—1997 c 429: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1997 c 429 § 54.]

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Library References

Zoning and Planning ☞ 359, 360.
WESTLAW Topic No. 414.
C.J.S. Zoning and Land Planning
§§ 93, 95, 187 to 189.

Notes of Decisions

In general 1

Abuse of discretion 2

1. In general

Local governments have broad discretion in developing comprehensive plans and development regulations tailored to local circumstances; however, that discretion is bounded by goals and requirements of Growth Management Act. *The Cooper Point Ass'n v. Thurston County* (2001) 108 Wash.App. 429, 31 P.3d 28, review granted 145 Wash.2d 1033, 43 P.3d 20, affirmed 57 P.3d 1156.

Growth Management Board acts properly when it foregoes deference to a county's plan that is not consistent with requirements and goals of Growth Management Act. *The Cooper Point Ass'n v. Thurston County* (2001) 108 Wash.App. 429, 31 P.3d 28, review granted 145 Wash.2d 1033, 43 P.3d 20, affirmed 57 P.3d 1156.

Growth Management Board owed no deference to county's plan to extend sewer line from an urban treatment plant to a rural area, where county's

plan conflicted with Growth Management Act and with county's own comprehensive plan. *The Cooper Point Ass'n v. Thurston County* (2001) 108 Wash.App. 429, 31 P.3d 28, review granted 145 Wash.2d 1033, 43 P.3d 20, affirmed 57 P.3d 1156.

Local discretion in developing comprehensive plans and development regulations tailored to local circumstances is bounded by the goals and requirements of the Growth Management Act (GMA). *King County v. Central Puget Sound Growth Management Hearings Bd.* (2000) 142 Wash.2d 543, 14 P.3d 133.

2. Abuse of discretion

County did not abuse its discretion in not redesignating prior urban growth area (UGA) as an urban growth area in comprehensive plan, where area had only five acres unencumbered for expansion, and other UGAs better served county's needs. *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.* (2002) 113 Wash.App. 615, 53 P.3d 1011.

36.70A.330. Noncompliance

(1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(3)(b) has expired, or at an earlier time upon the motion of a county or city subject to a determination of invalidity under RCW 36.70A.300, the board shall set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of this chapter.

(2) The board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter and with any compliance schedule established by the board in its final order. A person with standing to challenge the legislation enacted in response to the board's final order may participate in the hearing along with the petitioner and the state agency, county, or city. A hearing under this subsection shall be given the highest

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