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SUPREME COURT OF THE STATE OF WASHINGTON

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THURSTON COUNTY

Petitioner

v.

WESTERN WASHINGTON GROWTH MANAGEMENT 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.

**THURSTON COUNTY'S SUPPLEMENTAL BRIEF
ON DISCRETIONARY REVIEW**

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1. INTRODUCTION

Thurston County files this Supplemental Brief to summarize and focus the County's arguments on the issues in the County's Petition for Discretionary Review. In doing so, this brief refers to more extensive relevant arguments in the County's Opening Brief and Reply Brief. Although this is an appeal of the Court of Appeals' decision in *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn. App. 781, 154 P.3d 959 (2007), attached as Appendix A, the Supreme Court directly reviews and applies the standards of RCW 34.05.570(3) to the decision of the Hearings Board, *1000 Friends of Washington v. Thurston County, et al*, WWGMHB No. 05-2-0002, (Final Decision and Order, July 20, 2005), attached as Appendix B. See *Redmond v. Growth Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998).

2. ISSUES PRESENTED FOR REVIEW

1. Whether the Western Washington Growth Management Hearings Board (Board) erred by holding that it 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 cyclical reviews required by RCW 36.70A.130, even though the challenged provisions were left unchanged, were not appealed within 60 days of

their original adoption, or, if appealed, were upheld in a previous board decision?

2. Whether the Board's decision violates RCW 36.70A.320, RCW 36.70A.3201, and RCW 36.70A.110(2) by ignoring the presumption of validity owed to the County's minor modifications of its Urban Growth Area (UGA), unlawfully imposing upon the County the burden to justify the size of its entire UGA, rather than recognizing that Petitioners had the burden to prove that the minor UGA modifications were clearly erroneous, and failing to defer to the County's discretion to plan for growth on the basis of local circumstances?
3. Whether the Board legally erred in deciding that resource lands interspersed within the rural area may not be considered in determining whether the County provided for a variety of rural densities and failing to defer to the County's discretion to characterize resource lands as a component of the County's rural lands?

3. STATEMENT OF THE CASE

3.1 Introduction.

This case involves a challenge by 1000 Friends of Washington, now known as Futurewise (hereinafter referred to as 1000 Friends), to Thurston County's seven-year Comprehensive Plan (Plan) review and ten-year UGA

review required by RCW 36.70A.130. With the exception of two minor UGA modifications, the challenged Plan provisions have been in place for years and remained unchanged after the 2004 review.

3.2 The History Of Thurston County's Comprehensive Plan, Population Growth, And UGA.

As one of the state's fastest growing counties since the 1960s, AR 755, Thurston County's population increased by over 40% in the 1960s, 61% in the 1970s, 30% in the 1980s and 29% in the 1990s. AR 2084. The County's population was about 214,800 in 2003 and is projected to exceed 330,000 by 2025, an increase of 35%. AR 755.

In 1983, seven years before the GMA was enacted, Thurston County and its cities of Olympia, Lacey and Tumwater pioneered growth management in Washington State by signing an Urban Growth Management Agreement, AR 760, limiting their expansion. AR 760. Following this initial agreement between the cities and the County, they continued to work together. In June of 1988, the County and the Cities entered into a "Memorandum of Understanding: An Urban Growth Management Agreement." AR 1660-1674. After the enactment of the GMA, the County adopted Resolution No. 10452 in 1993 designating interim UGAs for the cities of Lacey, Olympia and Tumwater. AR 1675-1679. In 1994, Thurston County adopted Resolution No. 10683

establishing a final UGA for the City of Olympia. This UGA was upheld by the Board in *Reading, et al., v Thurston County*, WWGMHB No. 94-2-0019 (Final Decision And Order, March 23, 1995)¹, attached as Appendix C. In 1994, the County also adopted its final UGAs for the cities of Tenino, Tumwater, Lacey and Yelm which were never challenged. AR 1684-1738.

The GMA requires that UGAs be sufficient for the urban development necessary to accommodate the population projected by the 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 development...to accommodate their allocated housing and employment growth” in accordance with OFM population forecasts. RCW 36.70A.115.

3.3 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

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 No. 94-2-0019 (Final Decision And Order, March 23, 1995), page 231 of the WWGMHB January 2005 digest update. See Appendix C.

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 required to conduct the prescribed seven-year review by the earliest specified date, “[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 seven-year Plan review. AR 688-690. After extensive public participation, Plan amendments were adopted in 2004 to ensure that land use measures continued to reflect changes in conditions and the collective preferences of the County’s citizens AR 689. The accompanying UGA review resulted in the *de minimus* addition of 225 acres to the UGA’s 63,102 acres designated 10 years earlier (an increase of approximately one-third of one percent). Only two areas of the UGA were affected. AR 697. Tenino’s UGA was reduced by a net 30 acres by removing land in a conservation trust and adding a smaller area of land that was suitable for urban uses. AR 1405-1407. A new UGA area of 255 acres was provided for Bucoda in order to protect a sensitive aquifer area by planning for sewers, which could not be done without the UGA designation. AR 1767-1773, 1788.

3.4 The Comprehensive Plan's Designations of Resource Land Within The County's Rural Area.

The Plan is based on the premise that the County's rural area consists of all lands outside the UGA. Within the rural area, the Plan designates agricultural and forest resource lands encompassing 156,775 acres, 39.3% of the land area of the County. AR 774. These resource lands, interspersed in the rural area, have maximum densities ranging from 1 unit per 20 acres to 1 unit per 80 acres. AR 775-777. Lands classified as rural resource and residential, with maximum density of 1 unit per 5 acres, comprise 192,708 acres, 48.3% of the County's land area. AR 775.

3.5 Procedural History.

On January 21, 2005, 1000 Friends filed its Petition for Review with the Growth Board, challenging rural densities, UGA size, and criteria for designating agricultural resource lands. AR 1-3. The Board issued its Final Decision And Order on July 20, 2005, concluding that the County 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 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*, 137 Wn. App. 781, 154 P.3d 959 (2007), affirming, in part, and reversing, in part, the Board's decision. *See* Appendix A.

4. SUMMARY OF ARGUMENT

The pivotal issue is whether the Board exceeded its jurisdiction by reviewing longstanding County provisions and basing its decision that the County violated GMA requirements solely on the basis of such longstanding, unchanged provisions. The Board erred by ruling that all preexisting provisions of the County's Plan and Regulations became subject to challenge anew on the occasion of the required periodic reviews even though they remained unchanged and they were not appealed to the Board within sixty days of their original adoption, as required by GMA's strict limitation period. RCW 36.70A.290(2). In so ruling, the Board ignored the absolutely clear and unequivocal language of RCW 36.70A.290(2) which requires that "[a]ll petitions [to the Board]...be filed within sixty days after publication..." 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.” RCW 36.70A.290(2)(b). The County did not publish any notice that it had adopted the provisions found noncompliant by the Board because these were preexisting provisions that the County did not amend or reenact. Notice of the adoption of these provisions was given many years before, commencing the running of the limitation period at that time. Thus, under RCW 36.70A.290(2), these provisions were not appealed within sixty days of publication and were not subject to Board review.

The Board and Court essentially reasoned that longstanding local GMA provisions, which were not challenged within sixty days of their adoption, might never be brought into compliance with GMA requirements unless they are subject to challenge and Board review, anew, on the occasion of the cyclical reviews and updates required by RCW 36.70A.130. However, this Court consistently has stressed from its first GMA case to its most recent one that the GMA was the product of intense legislative compromise, contains no provision for liberal construction, and, thus, gaps or loopholes may not be filled by the Board or the courts. *See, Skagit Surveyors v. Friends*, 135 Wn.2d 542, 565-67, 958 P.2d 962 (1998); *Woods v. Kittitas County*, 162 Wn.2d 597, 612-614, n.8, 174 P.3d 25 (2007). If

jurisdiction to enforce GMA requirements is not explicitly conferred, it does not exist. Id. Policy arguments that the Board should have plenary jurisdiction over all local GMA provisions on the occasion of the required reviews must be addressed to the Legislature

This foundational error infected the Board's substantive rulings that the overall size of the UGAs, criteria for agricultural resource land designation, and rural density provisions were noncompliant. Since all of these issues were based on longstanding County provisions that remained unchanged after the review and update, they were not subject to Board jurisdiction—at all. In addition, these substantive rulings were erroneous because they failed to accord required deference to local policy choices and were based on misinterpretations of GMA requirements.

5. ARGUMENT

5.1 Standard of Review.

The Supreme Court directly reviews and applies the standards of RCW 34.05.570(3) to the decision of the Growth Management Hearings Board, *1000 Friends of Washington v. Thurston County, et al, WWGMHB* No. 05-2-0002, (Final Decision And Order, July 20, 2005), attached as Appendix B. *Redmond v. Growth Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). These Administrative Procedure Act standards of review

and the more specific and directly relevant GMA amendments requiring deference by the Board to local GMA policy choices are fully explained in *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224, 236-38, 110 P.3d 1132 (2005) and are addressed in detail in Thurston County's Opening Brief at 25-30.

5.2 Local Discretion Prevails in Absence of Specific GMA Mandate.

In *Quadrant, supra*, this Court stressed GMA's strict requirements of Board deference to local policy choices in upholding local discretion to implement GMA requirements, on the basis of local circumstances, as long as local enactments do not violate specific GMA requirements. *Quadrant*, 154 Wn.2d at 240 n.8. In its decision, the Board distorted the message clearly sent by legislative amendments and this Court's holdings by minimizing the extent of local discretion and Board deference owed. The Board's implicit premise was that the Board has authority to determine the meaning of GMA's broadly stated goals and requirements, base GMA violations on these Board interpretations, and, therefore, decline to defer to local enactments. The Board's position contradicts this Court's consistent recognition since its first GMA decision, in *Skagit Surveyors*, that the GMA was the product of intense legislative controversy, contains no provision for liberal construction, and, thus, within the constraints of any relevant *specific*

GMA requirements, local governments, not the Boards, have broad discretion to determine the meaning of, and implement, GMA goals and requirements on the basis of local circumstances. *See, e.g., Woods*, 162 Wn.2d at 612-614, n.8; *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 125-26, 129-30, 118 P.3d 322 (2005); *Quadrant*, 154 Wn.2d at 232-33, 235-38. For a more detailed exposition of this argument, *see* Thurston County's Opening Brief at 27-30.

5.3 The Board Erroneously Interpreted RCW 36.70A.130 and 36.70A.290(2) by Reviewing Longstanding, Unchanged County GMA Implementation Provisions Merely Because The County Conducted the Required Periodic Review.

In its Petition to the Board, 1000 Friends challenged County provisions establishing criteria for the designation of agricultural resource lands, rural densities, and the designated Urban Growth Area (UGA). All of these provisions, except for *de minimus* modifications of the UGA, were longstanding County provisions that were not changed at all in the 2004 review and update. Moreover, the Board's noncompliance decision on the UGA related primarily to the total size of the UGA in relation to projected population growth and not to the minor modifications made in the 2004 update. *See* Final Decision And Order, attached as Appendix B, at 18-26. Only the 2004 modifications of the UGA were appealed within sixty days of publication of their adoption, as required by RCW 36.70A.290(2), and were

properly before the Board. Thus, the Board exceeded its legal authority in reviewing the entire UGA size and all of the other issues presented by the Petition.

This Court has clearly and repeatedly held that the Board's jurisdiction is strictly limited by GMA's statutory language which was the product of intense legislative controversy and compromise and contains no provision for liberal construction. *E.g.*, *Woods*, 162 Wn.2d at 612-614 n.8; *Skagit Surveyors*, 135 Wn.2d at 565-67. Under the plain, clear language of RCW 36.70A.290(2), the Board has jurisdiction over "petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of [GMA]" *only* if they are "filed within sixty days after publication by the legislative bodies of the county or city." And "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." RCW 36.70A.290(2)(b).

The County's published Resolution and Ordinance completing its review did not set forth any of the challenged provisions except the minor modifications of the UGA. AR 688-718. Thus, only these minor UGA amendments included in the County's published resolution were properly

appealed to the Board within sixty days of publication under RCW 36.70A.290(2).

Even though the longstanding, unchanged provisions challenged in 1000 Friends' Petition were not appealed within sixty days and, thus, were not subject to the Board's jurisdiction, the Board and lower Court essentially ignored the clear, unequivocal jurisdictional limitation of RCW 36.70A.290(2). The Board and Court reasoned that the purpose of the cyclical review requirements of RCW 36.70A.130(1) and (4) is to "ensure the plan and regulations comply with the requirements of [GMA]" and this purpose could not be achieved unless all provisions of local plans and regulations are subject to Board scrutiny on the occasion of the required cyclical reviews. Appendix B at 10; *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 137 Wn. App. at 793-96. The Court of Appeals expressly acknowledged that "[n]either 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 its comprehensive plan or development regulations during its periodic review violates the Act." *Id* at 794. However, the Court went on to rely upon quoted irrelevant *dicta* from the *Skagit Surveyors* case: "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.” *Id.*

In effect, the Board and Court reasoned that it would be good policy for the Board to have authority to enforce GMA requirements whenever the mandatory reviews and updates are done and, therefore, such authority should be inferred from RCW 36.70A.130 even though the Court acknowledged that RCW 36.70A.130 says no such thing. That is, contrary to this Court’s consistent holdings that the GMA must not be liberally construed, the Board and the Court liberally construed RCW 36.70A.130 to achieve what they regarded as its purpose. *See, Skagit Surveyors*, 135 Wn.2d at 567:

Even if we agreed with 1000 Friends that public policy would be better served if the board were granted stronger remedial powers, we are not in a position to create those powers. Our role is to interpret the statute as enacted by the Legislature, after the Legislature’s determination of what remedy best serves the public interest of this state; we will not rewrite the statute.

See also Woods v. Kittitas County, supra, 162 Wn.2d at 614:

Thus, if a project permit is consistent with a development regulation that was not initially challenged, there is the potential that both the permit and the regulation are inconsistent with the GMA. While this is problematic, the GMA does not explicitly apply to such project permits and the GMA is not to be liberally construed. *Skagit Surveyors*, 135 Wn.2d at 565. This court’s “role is to interpret the

statute as enacted by the Legislature...we will not rewrite the [GMA].” *Id.* at 567.

The Board and Court erred by rewriting RCW 36.70A.130 to achieve what they thought was its purpose. This Court has made clear that when the Board does so, it exceeds its statutory authority. *Skagit Surveyors, supra.*

However, even if liberal interpretation were permissible, it is not even clear that the purpose of RCW 36.70A.130 would be served by allowing Board review of all local GMA provisions whenever periodic review is done. The Legislature set forth its intent in adopting the periodic review requirement, and this statement of intent, which is codified with RCW 36.70A.130, indicates that the periodic review requirement is procedural in nature, as land use and environmental statutory requirements often are, such as SEPA’s environmental review requirements under RCW 43.21C.030(2). For example, “The legislature recognizes also that the [GMA] requires counties...to review and, if needed, revise their comprehensive plans and development regulations on a cyclical basis.” This statement does not say who is to decide whether revision is “needed.” It certainly does not say the Board has authority to decide whether revisions are “needed.” If this is a procedural requirement, it is up to local government, after hearing from its citizens, to decide through its political processes whether revisions are “needed.” The statement goes on to

recognize that “[t]hese 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.” Note that the stated intent of the requirement is that it “ensure that land use measures reflect the collective wishes of its citizenry.” Such an outcome is consistent with a procedural requirement designed to ensure that citizens have an opportunity to be fully heard regarding desired changes in the comprehensive plan or regulations. The remainder of the statement also indicates that the requirement is procedural by setting forth means of encouraging such reviews and providing subsidies or other rewards when they are carried out in a timely manner.

In summary, RCW 36.70A.130 does not authorize Board review of existing, unchanged provisions in the context of local periodic updates and does not amend RCW 36.70A.290(2) which allows Board review of comprehensive plan provisions and development regulations only if petitions are filed within sixty days of publication of such provisions. The GMA is not to be liberally construed. And even if liberal construction were permissible, the Legislature’s statement of intent, codified with RCW 36.70A.130, indicates that the purpose of the periodic review requirement is

procedural—to require counties and cities to conduct a review process, in which interested citizens have ample opportunities to participate, so that through this process, revisions will be made if the local legislative authority determines that they are needed. Any revisions would be subject to Board review through a timely petition to the Board.

Additional County argument on this issue is in the County's Opening Brief at 35-36, the County's Reply Brief at 12-16, and the County's Petition for Discretionary Review at 9-13.

5.4 The Board Failed to Presume the Validity of, Imposed the Burden of Justifying, and Did Not Accord Deference to the County's Minor UGA Modifications, in Violation of RCW 36.70A.110(2), RCW 36.70A.320, and RCW 36.70A.3201.

As argued in the previous subsection, only the minor modifications of the County's UGA were properly before the Board and not the total size of the UGA. The minor modifications added only 225 acres, less than one-third of one percent, to the 62,877 acre UGA a decade after the UGA was designated in 1995 and upheld by the Board in *Reading v. Thurston County*, WWGMHB No. 94-2-0019 (Final Decision And Order, March 23, 1995). See Appendix C.

The Board failed to presume the validity of this UGA amendment and to impose upon the petitioner the burden to demonstrate that the amendment was a clearly erroneous violation of the requirements of the

Act, as required by RCW 36.70A.320. Instead, the Board ruled that the County was noncompliant for failing to justify the size of its UGA. The Board also erred by failing to accord the County the broad discretion and deference to which it is entitled, under RCW 36.70A.3201, in “how [it] plan[s] for growth” and, under RCW 36.70A.110(2) (“Cities and counties have discretion in their comprehensive plans to make many choices about accommodating² growth.”)

The Court below correctly recognized the presumption of validity and the burden on petitioner to prove noncompliance in holding that the Board erred by requiring the County to prove that the GMA requirement of providing for a variety of rural densities would be achieved through provisions for clustering, density transfer, conservation easements, and other innovative techniques. *Thurston County*, 137 Wn. App. at 808-9. However, on the UGA issue, the Court inexplicably ignored the presumption of validity and upheld the Board’s requirement that the County prove that the size of its UGA was in compliance with RCW 36.70A.110.

² It is important to note that the RCW 36.70A.130(3), providing for the ten-year UGA update, requires counties to *accommodate* twenty-years of growth. 1000 Friends’ goal is to shrink the UGAs in one of the fastest growing counties in the state. Changing the boundaries of a UGA is not encouraged by the GMA. RCW 36.70A.215(1)(b).

Additional arguments on this issue are in the County's Opening Brief at 43-47, the County's Reply Brief at 22-25, and the County's Petition for Discretionary Review at 13-14.

5.5 The Board Failed to Defer and Accord Sufficient Discretion to the County's Policy Choice to Provide for a Variety of Rural Densities, in Part, Through Designated Agriculture and Forest Resource Lands Within the County's Rural Area.

Arguments on this issue are in the County's Opening Brief at 47-52, the County's Reply Brief at 25-30, and the County's Petition for Discretionary Review at 14-16.

On the basis of the arguments cited above, the County's characterization of all land outside of its UGA as Rural and its designated resource lands as included elements of the rural area was reasonable and well within the County's discretion under RCW 36.70A.3201 and 36.70A.011. Other Counties have similarly interpreted the operative language of RCW 36.70A.070(5) regarding the rural element of county comprehensive plans. *See, e.g., Woods, supra*, 162 Wn.2d at 629 (Becker, J., concurring), ("The [Kittitas County] comprehensive plan designated all lands outside the urban growth areas as rural.").

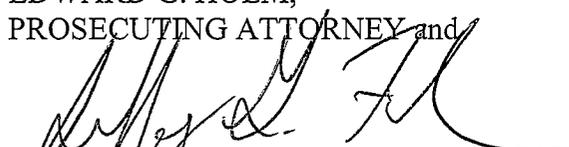
6. CONCLUSION

For the reasons set forth in the County's briefs, the County submits that the Board erred by: (1) assuming jurisdiction over existing, unchanged

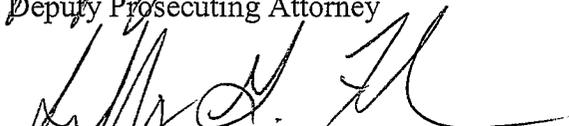
local GMA provisions that were not appealed within sixty days; (2) failing to presume the validity of the County's minor UGA amendments and imposing the burden upon the County to prove that the amended UGA was in compliance with RCW 36.70A.110; and (3) interpreting RCW 36.70A.070(5) to deny the County discretion to characterize as rural all land outside of its UGA and achieve a variety of rural densities, in part, through the very low density regulations applicable to timber and agricultural resource lands interspersed in the rural area. On the basis of these errors, the County respectfully requests the Court to reverse the Board's Final Decision And Order and remand to the Board for corrective action.

RESPECTFULLY SUBMITTED this 6 day of March, 2008.

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APPENDIX

- A. *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn. App. 781, 154 P.3d 959 (2007).
- B. *1000 Friends of Washington v. Thurston County*, WWGMHB No. 05-2-0002, (Final Decision And Order, July 20, 2005).
- C. *Reading v. Thurston County*, WWGMHB No. 94-2-0019 (Final Decision And Order, March 23, 1995).

A copy of this document was e-mailed and properly addressed and mailed, postage prepaid, to the following individual(s) on March 6, 2008.

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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:

March 6, 2008

Signature:

[Handwritten Signature]

[No. 34172-7-II. Division Two. April 3, 2007.]

THURSTON COUNTY, *Appellant*, v. THE WESTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD ET AL.,
Respondents, THE BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON ET AL.,
Appellants.

- [1] **Counties — Land Use Controls — Growth Management Act — Administrative Review — Growth Management Hearings Board — Local Compliance With Act — Clearly Erroneous Test.** A growth management hearings board may not invalidate a local comprehensive plan provision or development regulation under the clearly erroneous standard of RCW 36.70A.320(3) unless, in view of the entire record and the goals and requirements of the Growth Management Act (chapter 36.70A RCW), the board has a firm and definite conviction that a mistake was made.
- [2] **Counties — Land Use Controls — Growth Management Act — Hearings Board Decision — Judicial Review — Appellate Review — Board Record.** When reviewing a growth management hearings board decision, an appellate court applies the review standards of RCW 34.05.570(3) directly to the record before the board.
- [3] **Administrative Law — Judicial Review — Burden of Proof.** Under RCW 34.05.570(1)(a), the burden of demonstrating the invalidity of an agency action is on the party asserting invalidity.
- [4] **Counties — Land Use Controls — Growth Management Act — Hearings Board Decision — Judicial Review — Conclusions of Law — Standard of Review.** Conclusions of law entered by a growth management hearings board are reviewed by a court *de novo*.
- [5] **Counties — Land Use Controls — Growth Management Act — Hearings Board Decision — Judicial Review — Deference — County Planning Decisions.** A court reviewing a growth management hearings board decision may accord substantial weight to the board's interpretation of the Growth Management Act (chapter 36.70A RCW), but the act requires the court to give even greater deference to county planning decisions that are consistent with the act's goals. A court will not defer to a board ruling that fails to give considerable deference to a county's choices in adopting or revising its comprehensive plan, so long as the county's decision is not a clearly erroneous application of the act. An erroneous application of the act is not entitled to deference by the board.
- [6] **Counties — Land Use Controls — Growth Management Act — Hearings Board Decision — Judicial Review — Findings of Fact — Standard of Review.** When error is assigned thereto, a growth management hearings board's findings of fact are reviewed

by a court to determine whether they are supported by substantial evidence. Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the finding. Unchallenged findings of fact are verities before the court.

[7] **Counties — Land Use Controls — Growth Management Act — Administrative Review — Growth Management Hearings Board — Standing — “Participation” — What Constitutes.** Under RCW 36.70A.280, a person who has participated orally or in writing before a county in the adoption or amendment of a comprehensive plan provision or development regulation has standing to petition a growth management hearings board for review of the county’s decision if the person’s participation before the county and the issues the person seeks to have considered by the board are reasonably related.

[8] **Counties — Land Use Controls — Growth Management Act — Administrative Review — Growth Management Hearings Board — Standing — “Participation” — APA Standing — Necessity.** A person need not have standing under the Administrative Procedure Act (chapter 34.05 RCW) to have participation standing under RCW 36.70A.280 to petition a growth management hearings board for review of a local jurisdiction’s adoption or amendment of a comprehensive plan provision or development regulation.

[9] **Counties — Land Use Controls — Growth Management Act — Administrative Review — Growth Management Hearings Board — Jurisdiction — Legislative or Constitutional Agency — In General.** The growth management hearings boards are legislatively created agencies, not constitutional courts. As legislatively created agencies, the boards may act in a quasi-judicial capacity without violating separation of powers principles and may exercise all of the powers their enabling statute confers.

[10] **Counties — Land Use Controls — Growth Management Act — Administrative Review — Growth Management Hearings Board — Standing — Requirements — Source.** The requirements for standing to seek review before a growth management hearings board are defined by legislation, not by the constitution.

[11] **Counties — Land Use Controls — Growth Management Act — Administrative Review — Growth Management Hearings Board — Jurisdiction — Legislative or Constitutional Agency — Choice of Review — Effect.** The legislature did not transform the growth management hearings boards into courts by RCW 36.70A.295, which permits parties to bypass board review and seek review directly before a superior court.

[12] **Counties — Land Use Controls — Growth Management Act — Administrative Review — Growth Management Hearings Board — Local Compliance With Act — Periodic Update of Plan and Regulations — Review of Unrevised Provisions.** Under RCW 36.70A.280(1)(a) and 36.70A.130(1)(a), a growth management hearings board reviewing a local jurisdiction’s periodic update of its comprehensive plan and development regulations may review unrevised provisions of the plan and development regulations for compliance with the Growth Management Act (chapter 36.70A RCW).

[13] **Counties — Land Use Controls — Growth Management Act — Comprehensive Plan — Compliance — Periodic Update — “Legislative Action” — Applicability — Growth Management Planning Jurisdictions.** The RCW 36.70A.130(1)(b) definition of “legislative action” applies to jurisdictions that are required to engage in growth management planning under RCW 36.70A.040.

[14] **Counties — Land Use Controls — Growth Management Act — Comprehensive Plan — Compliance — Periodic Update — “Legislative Action” — Absence — Effect.** When a local jurisdiction amends or revises its comprehensive plan and development regulations without engaging in “legislative action” as defined by RCW 36.70A.130(1)(b), the amendments or revisions do not constitute a periodic update within the meaning of RCW 36.70A.130(1)(a) and they remain subject to review by a growth management hearings board upon review of a valid update subsequently made by “legislative action” under RCW 36.70A.130. RCW 36.70A.130(1)(a) requires a county or city to periodically take “legislative action” to review and, if needed, revise its comprehensive land use plan and development regulations to ensure that the plan and regulations comply with the requirements of Growth Management Act (chapter 36.70A RCW). RCW 36.70A.130(1)(b) defines “legislative action” as requiring 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 unneeded and the reasons therefor.

[15] **Judgment — Collateral Estoppel — Elements — Privity — Necessity.** The doctrine of collateral estoppel does not apply to bar a party from litigating an issue if the party was not a party or in privity with a party to prior litigation of the issue.

[16] **Judgment — Res Judicata — Identity of Persons and Parties — Necessity.** The doctrine of res judicata does not apply to bar a party from litigating a claim if the party was not a party or in privity with a party to prior litigation involving the claim.

[17] **Judgment — Collateral Estoppel — Elements — Identity of Issues — Necessity.** The doctrine of collateral estoppel does not compel a particular disposition of an issue sought to be adjudicated in a current proceeding if the issue is not identical to one adjudicated in a prior proceeding.

[18] **Judgment — Res Judicata — Identity of Subject Matter — Different Claims.** Res judicata does not bar parties from litigating a claim that has not previously been litigated.

[19] **Counties — Land Use Controls — Growth Management Act — Comprehensive Plan — Compliance — Periodic Update — Board Review — Prior Proceeding — Similarity of Claims and Issues.** A proceeding to determine whether a local jurisdiction's update of its comprehensive plan and development regulations under RCW 36.70A.130(1)(a) based on a particular set of population projections complies with the Growth Management Act (chapter 36.70A RCW) does not involve the same claim or issues for res judicata and collateral estoppel purposes as a proceeding to determine the validity of amendments made by the local jurisdiction to selected provisions of the plan and regulations based on a different set of population projections that was not undertaken as an update to the plan and regulations within the meaning of RCW 36.70A.130(1)(a).

[20] **Counties — Land Use Controls — Growth Management Act — Agricultural Land — Determination — Factors.** In determining whether land has long-term commercial significance for agricultural production and should be designated as "agricultural land" under RCW 36.70A.050 and .170(1)(a), a county may consider the development-related factors enumerated in WAC 365-190-050(1).

[21] **Counties — Land Use Controls — Growth Management Act — Agricultural Land — Designation — Factors — Parcel Size.** A county may consider parcel size as one of several criteria for determining whether land has long-term commercial significance for agricultural production and should be designated as "agricultural land" under RCW 36.70A.050 and .170(1)(a).

[22] **Counties — Land Use Controls — Growth Management Act — Agricultural Land — Determination — "Devoted to" Agricultural Use — What Constitutes.** For purposes of the RCW 36.70A.030(2) definition of "agricultural land," land is "devoted to" agricultural use if it is in an area where the land is actually used or capable of being used for agricultural production.

[23] **Counties — Land Use Controls — Growth Management Act — Urban Growth Area — Enlargement — Basis — Land Market Supply.** A county may not rely on a land market supply factor to enlarge an urban growth area absent an explanation of why the market factor is required or how it was reached.

[24] **Counties — Land Use Controls — Growth Management Act — Urban Growth Area — Enlargement — Validity — Inappropriate Conversion of Undeveloped Land.** Under the Growth Management Act (chapter 36.70A RCW), a county may not enlarge the size of an urban growth area if to do so would inappropriately convert undeveloped land into sprawling, low-density development.

[25] **Counties — Land Use Controls — Growth Management Act — Hearings Board Decision — Judicial Review — Issue Not Raised to Board.** A court reviewing a growth management hearings board decision may decline to consider an issue that was not raised before the board.

[26] **Counties — Land Use Controls — Growth Management Act — Rural Area Development — Allowable Density — Lands Considered — Agricultural Land — Forest Land.** Under RCW 36.70A.070(5), which expressly excludes agricultural lands and forest lands of long-term significance from the definition of rural lands, such lands may not be considered for purposes of determining rural densities.

[27] **Counties — Land Use Controls — Growth Management Act — Rural Area Development — Allowable Density — One Dwelling Per Five Acres — In General.** A density greater than one dwelling unit per five acres is not a rural density within the meaning of the Growth Management Act (chapter 36.70A RCW) if the area is not designated an area of more intensive rural development.

[28] **Counties — Land Use Controls — Growth Management Act — Rural Area Development — Innovative Techniques — Validity — Presumption.** A county's specification of innovative techniques to provide for a variety of rural densities is presumed to comply with the Growth Management Act (chapter 36.70A RCW) and may not be invalidated unless the techniques are proved to be invalid.

Nature of Action: A county sought judicial review of a growth management hearings board decision that the county's update of its comprehensive plan and development regulations, which amended the plan's natural resource lands and natural resource chapters and which designated agricultural lands of long-term significance, did not comply with the Growth Management Act.

Court of Appeals: On direct review, the court affirms the board in part, reverses it in part, and remands the case to the board for further proceedings, holding that a participant had standing to seek review by the board, that the board had jurisdiction to consider both revised and unrevised portions of the county's comprehensive plan and development regulations, that the board properly invalidated the county's current use criterion in designating farm land, that the board properly invalidated the county's

urban growth area designations, that the board should not have invalidated the county's parcel size criterion for designating agricultural lands of long-term significance, and that the board erred by finding that the county failed to provide for a variety of rural densities through the use of innovative techniques.

Allen T. Miller; Jeffrey G. Fancher; and Richard L. Settle (of Foster Pepper, P.L.L.C.), for appellant Thurston County.

Russell C. Brooks and Brian T. Hodges (of Pacific Legal Foundation), for appellants-intervenors Building Industry Association of Washington et al.

Robert M. McKenna, Attorney General, and Martha P. Lantz, Assistant, and Tim Trohimovich and John T. Zilavy (of Futurewise), for respondents.

LEXIS Publishing™ Research References

2007 Wash. App. LEXIS 586

Richard A. Finnigan et al., *Washington Administrative Law Practice Manual*

Annotated Revised Code of Washington by LexisNexis

¶1 ARMSTRONG, J. — Thurston County (County) appeals a Western Washington Growth Management Hearings Board (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 designated agricultural land of long-term significance, and failed to create a variety of densities in its rural areas.

¶2 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 (Act), chapter 36.70A RCW, allowed.

¶3 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.

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

FACTS

¶5 The legislature enacted the Act 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.

¶6 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).

¶7 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

¶8 The Thurston County Planning Commission (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.

¶9 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

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.

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 RCW 36.70A.060 and .170.

¶10 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

ANALYSIS

I. STANDARD OF REVIEW

¶11 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 *Dept of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

¶12 In reviewing decisions of the Board, we apply the standards of the Administrative Procedure Act (APA),

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.

chapter 34.05 RCW, 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.

¶13 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.

[4, 5] ¶14 We review the Board's legal conclusions 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.

[6] ¶15 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 *Callecod 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

¶16 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

[7] ¶17 The Act provides that a person who has participated orally or in writing before a county in the adoption or amendment of a comprehensive 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.

[8] ¶18 The County cites to a 1996 Central Puget Sound Growth Management Hearings Board decision that used the test from *Trepanier v. City of Everett*, 64 Wn. App. 380, 382-83, 824 P.2d 524 (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

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.

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 (Oct. 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.

¶19 Because Futurewise's participation before the County related to the issues it presented to the Board, it had standing under the Act to petition the Board for review of the County's decision.

B. Separation of Powers

¶20 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.

¶19-11] ¶21 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.

¶22 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").

¶23 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.

¶24 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

¶12] ¶25 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.

¶26 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

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.

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.3d 241 (2001).

¶27 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 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.

¶28 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.

¶29 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

The Board ruled on this issue in its order on motions to dismiss. Thus, we address the issue.

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 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." ENGROSSED SUBSTITUTE H.B. 2171, 59th Leg., Reg. Sess. § 1 (Wash. 2005).

¶30 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.

¶31 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

[13, 14] ¶32 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.

¶33 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.

¶34 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 R. (AR) at 1850.

¶35 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

¶36 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.

¶37 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 by the governing body." (Emphasis added.) To "update"

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."

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.

¶38 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.

¶39 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

¶40 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 Appellant at 44.

¶41 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. Wash. Growth Mgmt. Hearings Bd. Final Order (Mar. 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.

¶15, 16] ¶42 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. Dept'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.

¶17-19] ¶43 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.

¶44 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. 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.

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

IV. AGRICULTURAL LANDS OF LONG-TERM COMMERCIAL SIGNIFICANCE

¶46 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.

¶47 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 (Department). 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).

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

¶49 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

¶50 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.

¶51 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.

[20, 21] ¶52 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 intense 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).

¶53 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 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.

¶154 The Board erred in invalidating the parcel size criterion.

B. Current Use

¶155 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.

¶156 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, 66, 241 P. 664. (1925)). The court has since relied on this rule. *Lewis County*, 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).

¶157 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

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).

clearly erroneous and the Board did not err in invalidating it.

V. INVALIDATION OF URBAN GROWTH AREAS

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

¶159 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).

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

¶161 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 Lum-ber*, 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.

[24] ¶62 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]educe the inappropriate conversion of undeveloped land into sprawling, low-density development." *Diehl*, 94 Wn. App. at 653 (alteration in original) (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 result is the same.

¶63 The County and Intervenor 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

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

expansion of its UGAs failed to meet GMA goals. AR at 2573.

[25] ¶64 Finally, Intervenor argues 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.

¶65 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

¶66 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.

¶67 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 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

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;

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

A. Specific Zoning Densities

¶168 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.

¶169 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

(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.

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. Kindsvoegel*, 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).

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.

¶170 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 imposing a "bright-line" rule that rural densities must be at least one dwelling unit per five acres.¹⁷ Br. of Intervenor 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.

¶171 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 at 98-99. The County did not properly designate these areas as LAMIRDS. Therefore, the Board did not err in excluding these densities from

¹⁷ Futurewise asserts that neither the County nor Intervenor 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.

the rural densities in the County's comprehensive plan and development regulations.

¶72 Excluding densities in agricultural and forest lands and densities more intense than one 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's argument 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.

¶73 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

[28] ¶74 The County and Intervenor's 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.

¶75 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.

¶76 The Act imposes a highly deferential standard for board review of comprehensive plans and development

Mr. Miller: Right.

Report of Proceedings at 98-99.

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 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.

¶77 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 UGA 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.

HOUGHTON, C.J., and HUNT, J., concur.

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

7 Respondent,

8 And,

9 WILLIAM AND GAIL BARNETT AND

10 ALPACAS OF AMERICA,

11 Intervenors.

I. SYNOPSIS OF DECISION

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14
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
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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.
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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 Finally, the County has adopted designation criteria for agricultural resource lands that
14 exclude lands that otherwise meet the statutory criteria for designation. The first of these
15 excludes lands that are not currently being used for agriculture from designation as
16 agricultural resource lands. The Supreme Court has determined that the statutory definition
17 of agricultural lands is based on whether the lands are "in an area where the land is actually
18 used or capable of being used for agricultural production." *City of Redmond v. Central*
19 *Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 53, 959 P.2d 1091,
20 1998 Wash. LEXIS 575 (1998). The second challenged County agricultural lands
21 designation criterion requires a predominant parcel size of 20 acres or more. Regardless of
22 common ownership or use, farms consisting of more than one parcel of less than 20 acres
23 would not be conserved under this criterion. Since farm size is not equivalent to parcel size,
24 this criterion may exclude viable farms from conservation. For these reasons, both of these
25 policies fail to comply with RCW 36.70A.060, and 36.70A.170.
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29 Although Petitioner has requested a finding of invalidity as to the noncompliant provisions of
30 the rural and urban element (and their implementing development regulations), we decline
31 to enter an invalidity finding at this time. The record before the Board does not persuade us
32

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. Intervenor's 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

12 III. ISSUES PRESENTED¹

- 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
presumed valid upon adoption.

21 RCW 36.70A.320(1).
22

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

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
board and in light of the goals and requirements of this chapter.

28 RCW 36.70A.320(3)
29

30 In order to find the County's action clearly erroneous, the Board must be "left with the firm
31 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
32 121 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 requirement
18 the planning choices of local government must be granted deference.

20 V. DISCUSSION

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

27 Positions of the Parties

28 Petitioner argues that the County's comprehensive plan creates rural land use designations
29 that are neither rural in density nor compliant with the statutory provisions for limited areas
30 of more intensive rural development (LAMIRDs). Petitioners Futurewise's and League of
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 Petitioner urges that allowable residential densities on rural lands may not exceed one
10 dwelling unit per five acres unless the rural designation complies with the requirements for a
11 LAMIRD pursuant to RCW 36.70A.070(5)(d).
12
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 Ca:
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
(LAMIRD) as defined in the GMA.

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

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

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
30 ***Issue No. 2: Does the adoption of Resolution 13234 and Ordinance 13235 fail to***
31 ***comply with RCW 36.70A.070 and RCW 36.70A.130 when they fail to provide for a***
32 ***variety of rural densities, providing instead that the only GMA compliant rural***
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,
and other innovative techniques that will accommodate rural densities and uses that
are not characterized by urban growth and that are consistent with rural character.

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

27 The County concedes that it does predominately provide densities of one dwelling unit per
28 five acres in the rural zone. Respondent's Prehearing Brief at 14. However, the County
29 asserts that it has other designations that are less dense than one in five. *Ibid*. The
30 densities that the County cites as being less intense than one dwelling unit per five acres
31 include designations of natural resource lands. T.C.C. Chapter 20.08A applies to lands in
32 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 Respondent's Prehearing Brief at 12. However, it is not clear how or even if this zone
24 affects rural densities.⁵ A similar problem exists with its "clustering ordinance." *Ibid* at 14.
25 The County asserts that it "owns and funds conservation easements" but does so in the
26 same sentence in which it refers to its transfer of development rights program, which applies
27
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
6 **Conclusion:** The County's comprehensive plan and development regulations fail to provide
7 for a variety of rural densities as required by RCW 36.70A.070(5)(b).
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.*

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.
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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.

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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
24 less than one percent of those parcels developed between 1996 and 2000 in
25 residential and mixed use zoning categories.

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

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

30 The second problem with the County's assertion that the disparity between residential land
31 supply and projected demand is a result of a market factor is that there is no analysis
32 demonstrating the reason for the market factor. "Although a county may enlarge a UGA to
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.

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12
13 However, there is no explanation in the comprehensive plan for the use of a market factor,
14 perhaps because the buildable lands analysis appears to already account for many of the
15 market vagaries in its own assessment of land availability. The buildable lands analysis
16 provides an individualized look at the available land (generally on a parcel-by-parcel basis)
17 and produces a figure for net developable land based on development assumptions
18 established in light of the actual development trends in the area of the lands assessed.

19
20 Buildable Lands Report for Thurston County, September 2002. (Index No. 43). The
21 analysis includes a review of subdivision trends from 1995 to 1999 and residential building
22 permits from 1996 to 2000. Buildable Lands Report for Thurston County at 32-33.

23
24 Development assumptions were derived based on current comprehensive plans and
25 development codes, recent development trends and information provided by long-range
26 planners from jurisdictions throughout the County. *Ibid* at II – 10. The buildable lands
27 analysis assesses many of the potential market factors and incorporates them into the
28 figures for land supply and demand that it produces. This analysis appears to take the
29 place of a market factor.

30
31
32 Since the number used in the comprehensive plan update to determine residential land
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.
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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.

1
2 However, the fundamental problem identified by Petitioner is that the UGAs are much larger
3 than the growth projected to be accommodated in them. It may well be, as Intervenor
4 argues, that there are good reasons for increasing the size of the Tenino UGA. However, if
5 the County does this, it must "show its work"⁸ on the reasons for the expansion and also
6 increase its allocated population growth to the Tenino UGA and adjust its population
7 allocations elsewhere in the County's UGAs accordingly. Similarly, it may be reasonable for
8 the County to adjust the Bucoda UGA boundaries to accommodate additional growth in that
9 UGA (if that urban growth is provided with urban levels of services). However, if it does so,
10 the County must "show its work," allocate additional population growth to the Bucoda UGA,
11 and account for that re-allocation in the other land use designations in the county. The
12 OFM population allocation to the county is the basis upon which the UGAs may be sized;
13 the population growth allocations to each UGA must add up to comport with the overall
14 county urban growth population allocation.
15
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17
18 Urban Growth Area Policy 8(b) (CP at 2-50) provides for expansion of UGA boundaries for
19 reasons other than accommodation of projected urban population growth:

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

22 Urban Growth Area Policy 8(b), CP at 2-50.
23

24 This policy appears to confuse expansion of UGA boundaries with extension of urban levels
25 of service. Under RCW 36.70A.110(4), urban governmental services may not be extended
26 to rural areas "except in those limited circumstances shown to be necessary to protect basic
27 public health and safety and the environment and when such services are financially
28

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30 _____
31 ⁸ *Berschauer v. Tumwater*, WWGMHB Case No. 94-2-0002 (Final Decision and Order, July 27, 1994);
32 *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

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.

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.

25

26

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
included in its 2004 update.

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

31 ¹¹Although couched in mandatory terms, the Minimum Guidelines call for counties to "consider" the minimum
32 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 Therefore, agricultural lands designation criterion number three does not comply with the
29 GMA definitions of agricultural lands. RCW 36.70A.030(2) and (10).

30 The second designation criterion that fails to comply with the GMA is criteria number 5,
31 which requires that the predominant parcel size must be 20 acres or more. Thurston
32 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.

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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

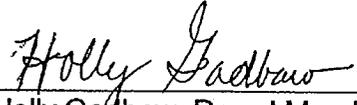
7 **Enforcement.** The petition for judicial review of this Order shall be filed with the
8 appropriate court and served on the Board, the Office of the Attorney General, and all
9 parties within thirty days after service of the final order, as provided in RCW
10 34.05.542. Service on the Board may be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

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

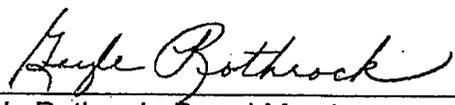
15 Entered this 20th day of July 2005.

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17 _____
18 Margery Hite, Board Member

19 

20 _____
21 Holly Gadbaw, Board Member

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23 _____
24 Gayle Rothrock, Board Member

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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:

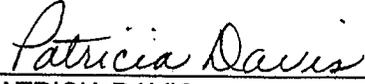
12 Tim Trohimovich
13 1000 Friends of Washington
14 1617 Boylston Avenue, Suite 200
Seattle, Washington 98122

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

19 DATED this 20th day of July 2005.

21 
22 PATRICIA DAVIS
23 EXECUTIVE ASSISTANT

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

F. WHITMORE READING, HAROLD P. DYGERT,)	
JOANNE MOORE-DYGERT, JOANN BLACK, J.R.)	
GONZALEZ, MARY JO ROGERS-GONZALEZ,)	No. 94-2-0019
CHRISTINE M. MASTERSON, LYNN M. SALERNO,)	
STEPHEN SCHRODER, STEPHEN LINDBERG and)	FINAL ORDER
DIANA RYDER, individually, and as members of)	
the SOUTH END NEIGHBORS DEFENSE FUND, a)	
non-profit association, & THEODORE MAHR,)	
RAYMOND A. and EMILY K. MAHR, GARY)	
PERKINS, HENRY STOCKBRIDGE and MEMBERS)	
OF SAVE ALLISON SPRINGS,)	
Petitioners,)	
vs.)	
THURSTON COUNTY and)	
CITY OF OLYMPIA,)	
Respondents,)	
and)	
GARY E. BRIGGS,)	
Intervenor.)	

On September 23, 1994, attorney Theodore A. Mahr, acting on his own behalf and on behalf of Raymond A. and Emily K. Mahr, Gary Perkins, Henry Stockbridge and the members of Save Allison Springs, (*Mahr*), filed a petition for review challenging the comprehensive plan for Olympia and the Olympia urban growth area. The plan covered both the municipal corporate limits and the urban growth area of Olympia, was denominated a "joint" comprehensive plan and was adopted by both the City of Olympia and Thurston County. On September 29, 1994, F. Whitmore Reading and others, individually, and as members of the South End Neighbors Defense Fund, (*Reading*), filed a petition challenging the same comprehensive plan. Where both *Mahr* and *Reading* presented the same argument they will be referred to as petitioners.

On October 5, 1994, Gary E. Briggs filed a motion to intervene. Following the prehearing conference on November 10, 1994, an order was entered November 16, 1994, which directed consolidation of the petitions and granted intervenor status to Mr. Briggs. The November 16, 1994, order also fixed deadlines for various motions and established the issues. For ease of reference, and since the arguments were jointly presented, the city, county and intervenor shall be referred to as respondents.

After the November 10, 1994, hearing, all parties filed motions to supplement the original index to the

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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

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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

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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)

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(*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

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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.

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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

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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.

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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.

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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.

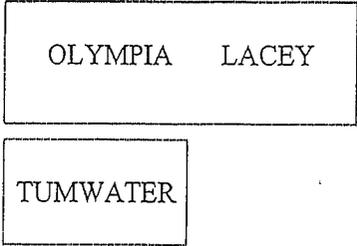
All of those kudo given, nonetheless we agree with petitioners that the area designated as the Olympia urban growth boundary is too large.

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:

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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

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