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No. 34172-7-II

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

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DIVISION II
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STATE OF WASHINGTON
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THURSTON COUNTY,
Petitioner,

&

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

v.

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

PETITION FOR REVIEW

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Environmental Policies*

ORIGINAL

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IDENTITY OF INTERVENORS

Petitioner-Intervenors Building Industry Association of Washington, Olympia Master Builders, and People for Responsible Environmental Policies ask this Court to accept review of the Court of Appeals' decision.

COURT OF APPEALS' DECISION

Petitioner-Intervenors seek review of the Published Opinion filed by Division II of the Washington State Court of Appeals on April 3, 2007. A copy of this decision is in the Appendix at pages A1 through A26. The underlying decision of the Western Washington Growth Management Hearings Board is included in the Appendix at pages B1 through B38 (July 20, 2005, Final Decision and Order).

ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals' decision conflicts with the Supreme Court's holding that Growth Boards do not have the authority to establish or apply "bright line" standards that do not appear in the Growth Management Act. *See Viking Properties, Inc. v. Holm*, 155 Wn.2d 112 (2005).

2. The Court of Appeals' decision conflicts with Supreme Court and Division I precedent requiring that the Growth Board review a County's designation with due deference and in light of the unique local circumstances

that justify the designation. See *Quadrant Corp. v. State Growth Management Hearings Board*, 154 Wn.2d 224, 233-34 (2005); *Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 167 (2004); *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 116 Wn. App. 48, 55 (2003).

STATEMENT OF THE CASE

In November, 2004, the Thurston County Commissioners amended the County's comprehensive plan and development regulations to comply with update requirements of the Growth Management Act (GMA). A3-4. Pertinent to this petition for review, the comprehensive plan and development regulations included updates to the County's rural elements. In this portion of the plan, the County allocated approximately 400,000 acres of land to rural use. A23. The plan designated six rural areas with varying densities. AR 778-83. However, approximately 5.5 percent of the total rural area permitted development at densities between 1 to 4 residences per acre based on existing development patterns in the specified areas. AR 780-82. The County also updated its Urban Growth Area boundaries to provide for projected growth through 2025. A19.

In January, 2005, 1000 Friends of Washington filed a petition for review with the Growth Board challenging, in relevant part, the updates to the

Rural and Urban Growth Area (UGA) elements of the comprehensive plan update. A4. Specifically, 1000 Friends challenged the County's rural element because it permitted densities greater than 1 dwelling per 5 acres (1:5 du/acre) on 5.5 percent of the County's approximately 400,000 acres of rural lands. A23. 1000 Friends challenged the County's designation of UGA boundaries because it designated more land than minimally necessary to accommodate for projected growth. A19-21.

The Growth Board concluded that 4 of the 5 Thurston County rural designations violated the GMA based solely on the fact that the designations permitted development at densities greater than 1:5 du/acre. B17 ("Rural densities . . . are generally no more intense than one dwelling unit per five acres."). As a result, the Board concluded that Thurston County's rural element failed to comply with the GMA. On direct appeal, Division II of the Court of Appeals affirmed the Board's conclusion invalidating as a matter of law all rural designations more intense than 1:5 du/acre. A23-24. In regard to the County's designation of UGA boundaries, the Growth Board concluded that the land supply provided by the new boundaries exceeded the amount of land necessary to accommodate projected growth through 2025 and concluded that the UGA designation failed to comply with the GMA. A19-21. Petitioner-Intervenors timely filed this petition for review.

ARGUMENT

The rural element of Thurston County's comprehensive plan designated several different rural areas with varying densities.¹ A23; B9. For each rural development designation, the County's comprehensive plan explained the purpose, local circumstances, definition, characteristics, and location guidelines. A21-26; B9-16. The plan also set forth various innovative development regulations intended to preserve rural character. A25-26.

On its petition before the Growth Board, 1000 Friends did not challenge the factual basis or local circumstances underlying the rural designations. *See* B9 (summary of Petitioner's position). Instead, 1000 Friends argued that the Growth Board had established a "bright line" maximum rural density standard that prohibited as a matter of law any designation of rural lots that permitted densities greater than 1:5 du/acre. B9.

Applying its "bright line" rural density standard, the Growth Board concluded that 4 of the 5 Thurston County rural designations *per se* violated the GMA based solely on this "bright line" maximum density standard. B8

¹ 1000 Friends conceded below that at least two of the areas—the "Rural Residential and Resource One Unit Per Five Acres" and "McCallister Geologically Sensitive Areas"—were rural in character. Respondent's Brief at 52.

(Issue Statement)²; B10 (citing cases establishing a “bright line” rural density standard); B17 (“Rural densities . . . are generally no more intense than one dwelling unit per five acres.”). The Growth Board’s conclusion was based on its improper application of its “bright line” standard—not a meaningful review of Thurston County’s discretion and unique local circumstances. RCW 36.70A.320; RCW 36.70A.3201. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233-34 (2005) (reviewing courts owe deference to local decisions based on local realities).

When determining whether to accept review, this Court also considers whether the Court of Appeals’ decision directly conflicts with previous Supreme Court decisions. *See* RAP 13.4(b). This criterion for granting review is met in this case because, as explained below, the Court of Appeals’ decision directly conflicts with this Court’s rulings in *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112 (2005), and *Quadrant*, 154 Wn.2d at 236. This Court will additionally consider whether the Court of Appeals’ decision is in conflict with another decision of the Court of Appeals. RAP 13.4(b). This criterion for granting review is also met because the Court of Appeals’

² The very issue statement formulated by the Board adopted its “bright line” rural density standard: “Does adoption of [the rural element] comply with [the GMA] when [it] allow[s] . . . densities greater than one unit per five acres when this board has determined that such densities fail to comply with the GMA?” B8 (Issue No. 1).

decision directly conflicts with Division I's rulings in *Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 167 (2004), and *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 116 Wn. App. 48, 55 (2003).

I

THE COURT OF APPEALS' DECISION AFFIRMING THE GROWTH BOARD'S MAXIMUM RURAL DENSITY STANDARD DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENT

Over the course of several years, the Growth Management Hearings Board for the Central Puget Sound has adopted "bright line" density standards to "fill in" areas of the Growth Management Act that the Legislature had intentionally left to the discretion of local governments. See *Sky Valley v. Snohomish County*, CPSGMHB No. 95-3-0068, 1996 WL 734917, at *4-*9 (Final Decision and Order, Mar. 12, 1996).³ The effect of these "bright line" standards is that the Growth Board has improperly established public policy regarding the maximum acceptable rural density for compliance with the GMA.

³ See also *Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008, 1995 WL 903209, at *56 (Final Decision and Order, Oct. 23, 1995); *City of Gig Harbor v. Pierce County*, CPSGMHB No. 95-3-0016, 1995 WL 903183, at *40 (Final Decision and Order, Oct. 31, 1995).

In *Sky Valley*, the Growth Board explained that it had established a maximum rural density “bright line” standard in order to “fill in the gap[s]” that the Legislature left in RCW 36.70A.070(5) (“Rural Element”). *Sky Valley*, 1996 WL 734917, at *8. The Board candidly stated that the purpose of such “bright line” standards was to limit the broad discretion the Legislature granted local governments under the GMA. *See City of Gig Harbor v. Pierce County*, CPSGMHB No. 95-3-0016, 1995 WL 903183, at *22 (Final Decision and Order, Oct. 31, 1995) (explaining circumstances where the Board has adopted “the device of a bright line to indicate to local governments the range within which discretion may be exercised” particularly regarding maximum rural density) (emphasis added).

As a result, the Board adopted the “bright line” standard that “any new land use pattern that consists of lots smaller than 10 acres is prohibited in rural areas.” *Sky Valley*, 1995 WL 903183, at *8-*9.

The Board holds that any residential pattern of 10-acre lots, or larger, is rural. *Any smaller rural lots will be subject to increased scrutiny by the Board*

Peninsula Neighborhood Ass’n v. Pierce County, CPSGMHB No. 95-3-0071, 1996 WL 650338, at *15 (Final Decision and Order, Mar. 20, 1996) (emphasis added); *see also Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008, 1995 WL 903209, at *70 (Final Decision and Order,

Oct. 23, 1995) (holding that any rural density less than one residence per 10 acres will be subjected to “*increased scrutiny*” and “*rarely approved*”) (emphasis added).

Washington’s Supreme Court has made clear, however, that the Growth Board does not have the authority to establish “bright line” standards and is instead required to review a challenge to a comprehensive plan in light of the presumption of validity and broad deference that was afforded to local government decisions by the GMA. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129 (2005); *see also Quadrant*, 154 Wn.2d at 236 (“[A] board’s ruling that fails to apply this ‘more deferential standard of review’ to a county’s action is not entitled to deference from this court.”); *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 116 Wn. App. 48, 55 (2003) (failure to apply the GMA’s presumption of validity and deferential standard of review is error is reversible error).

In *Viking Properties*, a developer argued that the GMA imposes a “bright line” rule of four dwelling units per acre within Urban Growth Areas. *Viking Properties*, 155 Wn.2d at 129. The developer cited to a 1995 Central Puget Sound Growth Board ruling that set out this so-called “bright line” density standard. *See Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039, 1995 WL 903165, *35 (Final Decision and Order, Oct. 6, 1995) (The Board “adopts as

a general rule a ‘bright line’ at four net dwelling units per acre.”). The *Viking Properties* Court rejected the developer’s argument, holding that the Growth Boards “do not have authority to make ‘public policy’ even within the limited scope of their jurisdictions, let alone make *statewide* public policy.” *Viking Properties*, 155 Wn.2d at 129 (emphasis in original). The Growth Boards are “quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute.” *Viking Properties*, 155 Wn.2d at 129 (citing RCW 36.70A.210(6), .280(1)); see also *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 565 (1998) (the GMA is not to be construed to confer upon a hearings board powers not expressly granted in the GMA).

Despite extensive briefing from the parties on *Viking Properties*, Division II of the Court of Appeals affirmed the Growth Board’s establishment and application of a “bright line” maximum rural density standard without any discussion of, or citation to, *Viking Properties*. In fact, more than affirming the Growth Board, if left alone, the Court of Appeals’ decision could be read to bolster a uniform “bright line” maximum rural density standard. A24 n.15.

The application of Growth Board-created “bright line” GMA standards is not isolated to this case and is likely to be repeated until this

Court takes review of this issue. Indeed, there is already a large body of Growth Board decisions cited above in which the Board has applied its “bright line” standards as legal precedents to impose *per se* rules pertaining to GMA compliance. Because these “bright line” standards conflict with the GMA and *Viking Properties*, this Court should grant review of this case.

II

THE COURT OF APPEALS’ DECISION DIRECTLY CONFLICTS WITH WELL-ESTABLISHED PRECEDENT REQUIRING DEFERENTIAL REVIEW OF COUNTY DEVELOPMENT REGULATIONS

A. Designation of Rural Densities

The GMA specifically provides broad discretion and ultimate responsibility and authority to local governments for determining how to apply the Act’s requirements to the particular circumstances of their communities:

- (1) . . . comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.
- (2) . . . the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.
- (3) . . . the board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record

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

RCW 36.70A.320 (emphasis added).

In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201; *see also Quadrant*, 154 Wn.2d at 236-38; *Viking Properties*, 155 Wn.2d at 130.⁴

This presumption of validity and deference may only be overcome if the petitioner bears its burden of demonstrating that the challenged development regulation is clearly erroneous under the GMA. *Quadrant*, 154 Wn.2d at 238; *see also Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 497-98 (2006) (to find an action clearly erroneous, the

⁴ Although some earlier opinions hold that courts defer to Growth Board interpretations of the GMA, this Court has clarified that deference to county GMA actions overrides deference that would otherwise be granted to administrative agencies. *See Quadrant*, 154 Wn.2d at 238 (“In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the requirements of the GMA, supersedes deference granted to the APA and courts to administrative bodies in general.”).

Growth Board must have a “firm and definite conviction that a mistake has been committed”). Imposing a Growth Board-created “bright line” standard to limit local government’s planning discretion under the GMA is erroneous because such a standard is contrary to the GMA’s emphasis on balancing the goals and local circumstances—it is this “balancing that the County is entitled to engage in with its local circumstances in mind; and a balancing to which the Board must give the County considerable deference.” *Clallam County v. W. Wash. Growth Mgmt. Hearings Bd.*, 130 Wn. App. 127, 139 (2005).

Indeed, Division I of the Court of Appeals has held that the GMA “does not require a particular methodology for providing a variety of densities.” *WEAN*, 122 Wn. App. at 167 (internal citations omitted); *see also Viking Properties*, 155 Wn.2d at 125-26 (“[T]he GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.”). The GMA instructs local governments to designate a rural area that is consistent with rural character to provide a variety of rural densities. RCW 36.70A.070(5)(b). Thus, the primary inquiry is not lot size, but whether the plan protects the County’s rural character and addresses the unique local circumstances. *WEAN*, 122 Wn. App. at 168-69.

According to *WEAN*, the Growth Board was required to presume that the rural element of the plan was valid and defer to the County's consideration of local circumstances (including existing rural development) that necessitated permitting development denser than 1:5 du/acre in a small portion of residential lands (5.5 percent of total rural area). *WEAN*, 122 Wn. App. at 169. The burden was on the petitioner to prove, in light of this presumption of validity, whether the County's action was clearly erroneous under the GMA based on a review of the facts and unique circumstances underlying the designations—not improper “bright line” standards. RCW 36.70A.320; RCW 36.70A.3201; *Quadrant*, 154 Wn.2d at 236-38; *City of Redmond*, 116 Wn. App. at 55. Because the Court of Appeals' decision affirmed a Growth Board decision to impose and apply a “bright line” maximum rural density standard instead of holding the petitioner to its burden of proving non-compliance, this Court should grant review of this case.

B. UGA Boundary Designation

The GMA mandates that local governments set the *minimum* size of its UGA large enough to accommodate projected growth for a 20-year horizon, but at the same time grants local governments broad discretion to determine the *maximum* size of its UGA.

Based on the growth management population projection made for the county by the office of financial management [OFM], the county and each city . . . shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or the city for the succeeding twenty-year period *An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.*

RCW 36.70A.110(2). In addition, the GMA requires that in providing sufficient land supply within UGAs to meet housing demands and employment growth, local government also ensure that its UGA provide sufficient land for housing and growth:

Counties and cities . . . shall ensure that, taken collectively, adoption of amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth”

RCW 36.70A.115. Combined, these GMA provisions demonstrate the Legislature’s intent that counties and cities required to designate UGAs must be given the requisite flexibility in order to provide sufficient land within their boundaries to accommodate housing demands and employment growth.

RCW 36.70A.320; RCW 36.70A.3201.

In this regard, *Viking Properties* and *Quadrant* make clear that the issue before the Growth Board was not whether the land supply provided for

by Thurston County's UGA boundaries met some "bright line" or numeric threshold. Instead, the issue was whether, in light of the presumption of validity and deference afforded to local government decisions, Thurston County's plan set forth reasonable analyses for utilizing market factors and local circumstances in setting its UGA boundaries.

Thurston County's UGA was adopted to address growth during the 20-year horizon from 2005 to 2025. A21. The Growth Board, however, used land supply figures from 2000 in order to arrive at a 38 percent "excess supply" calculation. A21. Based on its "excess supply" calculation alone, the Growth Board concluded that Thurston County had designated more land than was necessary and concluded that the UGA designation failed to comply with the GMA. The Board's narrow focus on its "excess supply" calculation was erroneous in two regards: (1) the Board's calculation overstated the land supply because it was based on a mathematical error⁵; and (2) by focusing on

⁵ The Court of Appeals declined to address the merits of Petitioner-Intervenors' substantive appeal from the Growth Board's flawed calculation of market factor by incorrectly concluding that Petitioner-Intervenors had failed to raise this issue before the Growth Board. A21. Generally, issues not raised before the Growth Board may not be raised on appeal. RCW 34.05.554. But this rule only applies to issues that *could have* been raised before the Growth Board. This rule does not apply here because the Growth Board had not announced its erroneous calculation of market factor prior to entering its Final Decision and Order. Therefore, the first opportunity to raise this issue was on appeal before Division II of the Court of Appeals.

gross “excess supply,” the Board failed to review the various local circumstances (including, but not limited to, existing oversized lots, undevelopable property, infrastructure limitations, the need to curtail escalating housing costs, and the need to preserve open spaces), which necessitated the UGA boundary designation.

The Growth Board’s mathematical error is clear from the record. The Buildable Lands Report, which provided the projected growth figures, was based on the 25-year horizon from 2000 to 2025. A21. By contrast, Thurston County’s designation of its UGA boundaries was for the 20-year horizon, 2005 to 2025. A21. The Board failed to deduct 5 year’s worth of development from the 2000 land supply figure before calculating land supply for the 2005 to 2025 period. A21. This resulted in an “excess supply” calculation that was incorrect and significantly overstated.

The Board compounded this error by refusing to take into account the local circumstances underlying Thurston County’s designation as required by the GMA and this Court’s decisions in *Viking Properties* and *Quadrant*. Indeed, it is well-established that the Board is not supposed to end its reasonable market factor analysis with a simple calculation of “excess supply.” In *Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008, 1995 WL 903209, at *12-*13 (Final Decision and Order, Oct. 23, 1995), the Board noted that simply dividing the total theoretical dwelling unit capacity by the

20-year forecasted demand does not necessarily result in an accurate calculation of excess land capacity. The calculus must take into account local circumstances to determine whether the county's designation of gross land supply for its UGAs complied with the goals of the GMA. *Vashon-Maury*, 1995 WL 903209, at *12-*13; *see also Viking Properties*, 155 Wn.2d at 127 (Focusing solely on urban density as the touchstone of GMA compliance "requires [the Court] to elevate the singular goal of urban density to the detriment of other equally important GMA goals. To do so would violate the legislature's express statement that the GMA's general goals are nonprioritized.").

The Growth Board's calculation of the 20-year land supply and demand was flawed and resulted in clear error. Based on this mathematical error alone, the Board determined that Thurston County's UGA designation failed to comply with the GMA without regard to the County's deference to consider local circumstances. Because the Court of Appeals' opinion affirmed the Growth Board's decision that is contrary to this Court's decisions in *Viking Properties* and *Quadrant*, review should be granted.

CONCLUSION

Thurston County designated several different rural densities and its UGA boundaries in its comprehensive plan update based on its unique local circumstances. According to the GMA, the Growth Board was required to

presume that the rural and UGA elements of the plan were valid and defer to the County's consideration of local circumstances that necessitated the designations. Unable to find the County's actions clearly erroneous, the Growth Board should have deferred to the County's findings based on the County's local circumstances. Instead, disregarding its standard of review under the GMA, the Growth Board inappropriately applied a "bright line" maximum density standard to "fill in the gaps" in the GMA's requirements. However, this Court has unequivocally held that the Growth Boards do not have the authority to establish such "bright line" standards. Because the Growth Board's Final Decision and Order, as affirmed by Division II's decision, conflicts with Supreme Court and Division I precedent, this Court should grant Petitioner-Intervenors' petition for review pursuant to RAP 13.4(b).

DATED: April 30th, 2007.

Respectfully submitted,

BRIAN T. HODGES
Pacific Legal Foundation

By Sonya Jones (WSBA 38293)

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WSBA No. 31976

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Building Industry Association of
Washington, Olympia Master
Builders, and People for Responsible
Environmental Policies*

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STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE

I, Brian T. Hodges, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington.

On this date, true copies of the foregoing **PETITION FOR REVIEW** were placed in envelopes addressed to the following persons via

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 30th day of April, 2007, at Bellevue, Washington.



SONYA D. JONES

APPENDIX A

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY: _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THURSTON COUNTY,

Appellant,

v.

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

Respondents,

And

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

Appellants-Intervenors.

No. 34172-7-II

PUBLISHED OPINION

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

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

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

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

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

the Board erred in concluding that the County's zoning designations did not provide for a variety of rural densities. Accordingly, we affirm in part and reverse in part.

FACTS.

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

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

Thurston County is required to plan under the Act. Its first update was due on or before December 1, 2004, with successive updates due every seven years thereafter. RCW 36.70A.130(4)(a). In November 2003, the County adopted a resolution amending its comprehensive plan's Natural Resource Lands and Natural Environment chapters, which

designate agricultural lands of long-term significance. The County adopted the update of its comprehensive plan and development regulations in November 2004.¹

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

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

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

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

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

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

ANALYSIS

I. STANDARD OF REVIEW

The Board adjudicates Act compliance and, when necessary, can invalidate noncompliant comprehensive plans and development regulations. RCW 36.70A.280, .302. The Board must presume that a county's comprehensive plans and development regulations are valid upon adoption. RCW 36.70A.320(1). A challenging petitioner bears the burden of demonstrating that a county's actions do not comply with the Act. RCW 36.70A.320(2). And the Board "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the Act]." RCW 36.70A.320(3). To find an action "clearly erroneous," the Board must be "left with the firm and definite conviction that a mistake has been committed." *King County v.*

Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 552, 14 P.3d 133 (2000) (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

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

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

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

We review the Board's factual findings for substantial supporting evidence, which is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *King County*, 142 Wn.2d at 553 (quoting *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

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

A. Standing Under the Act

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

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

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

Because Futurewise’s participation before the County related to the issues it presented to the Board, it had standing under the Act to petition the Board for review of the County’s

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 participate in standing under the Act.

decision.

B. Separation of Powers

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

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

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

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

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or a court. It merely elected, as part of delegating quasi-judicial functions to the Board, to offer litigants the choice of a judicial forum.

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

III. SCOPE OF BOARD REVIEW

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

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

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

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

⁶ Futurewise asserts that the County did not raise this issue before the Board and that, under RCW 34.05.554, we should not consider the issue. The County did make this argument with respect to the County's review of its urban growth areas. The Board ruled on this issue in its order on motions to dismiss. Thus, we address the issue. **APPENDIX A-9**

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

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

Moreover, the County’s interpretation would undermine the purpose of requiring periodic reviews. The County could avoid complying with the Act by showing that it had adopted its plan before the Act’s amendment. And while finality in land use decisions is important, by requiring review of comprehensive land use plans and development regulations every seven years, the legislature has determined that, in managing growth, the benefits to the public of keeping abreast of changes in the law outweigh the benefits of finality to landowners. In the purpose statement for an amendment authorizing more time for counties to complete updates, the legislature recognized that the update requirement involves significant compliance efforts by local governments, but added that it is “an acknowledgement of the continual changes that occur within the state, and the need to ensure that land use measures reflect the collective wishes of its citizenry.” H.B. 2171, 59TH LEG., Reg. Sess. § 1 (Wash. 2005).

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

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

B. Review of Recently Amended Provisions

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

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

RCW 36.70A.130(1)(a) requires counties to take "legislative action" to review and, if needed, revise their comprehensive plans and land use regulations according to the time periods specified in subsection (4). RCW 36.70A.130(1)(b) defines "legislative action" as "the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefor." The County's November 2003 resolution provided that its amendments brought the Natural Resources Lands chapter in compliance with the Act, but it did not refer to RCW 36.70A.130, did not make a finding that it was an "update"

within the meaning of that statute, and did not state the reasons it did not revise the agricultural lands designation criteria.⁷ Administrative Record (AR) at 1850.

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

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

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

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

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

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

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

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

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

C. Review of Urban Growth Areas Previously Upheld

The County also argues that the Board did not have authority to review the County’s UGAs because the Board upheld the Olympia UGA in 1995. The County asserts that the principles of *stare decisis*, *res judicata*, and collateral estoppel prevent “relitigation of County UGA policy choices made in 1994.” Br. of Appellant at 44.

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

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

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

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

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

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

IV. AGRICULTURAL LANDS OF LONG-TERM COMMERCIAL SIGNIFICANCE

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

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

Among its nine criteria for designating agricultural land of long-term significance, the County included (1) predominant parcel size, requiring that parcels be 20 acres or more, which "provides economic conditions sufficient for managing agricultural lands for long-term commercial production"; and (2) existing land use, requiring that "[d]esignated agricultural lands should include only [those] areas [that are] used for agriculture." AR at 436.

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

A. Parcel Size

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

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

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

The Board reasoned that "[u]sing predominant parcel size of 20 acres as a designation criterion may exclude viable farms in which the total acreage farmed is in excess of 20 acres in size but each of the parcels making up the farm is less than 20 acres." AR at 2567. While this may be possible, Futurewise did not prove that the County would exclude such land from a farming designation solely on the basis of parcel size. And Futurewise does not contest the

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County's claim that it uses eight other criteria from WAC 365-190-050(1) to designate farm land. Nor did Futurewise prove that the County's use of parcel size rather than total farm size would significantly change the amount of farm land the County designated. We conclude that the County's use of parcel size as one criteria for designating farm land falls easily within the bounds of the County's legislatively granted discretion.

The Board erred in invalidating the parcel size criterion.

B. Current Use

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

The *City of Redmond* majority stated: "We hold land is 'devoted to' agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production." *City of Redmond*, 136 Wn.2d at 53. It then stated, in a footnote responding to Justice Sanders's concurrence,¹¹ that this definition of agricultural land was not dicta and, as "a deliberate expression of the court upon the meaning of the statute' should not be disregarded." *City of Redmond*, 136 Wn.2d at 53 n.7 (quoting *State v. Nikolich*, 137 Wash. 62, 66, 241 P. 664 (1925)). The court has since relied on this rule. *Lewis County*,

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 (APPENDIX A-18).

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

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

V. INVALIDATION OF URBAN GROWTH AREAS

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

Counties must designate UGAs within which they can encourage urban growth and outside of which growth can occur only if it is not urban in nature. RCW 36.70A.110(1). Comprehensive plans must designate UGAs sufficient to permit the urban growth projected over the succeeding 20-year period. RCW 36.70A.110(2). A UGA "may include a reasonable land market supply factor. . . . In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth." RCW 36.70A.110(2).

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

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market factor to increase the amount of acreage needed to accommodate growth or explain or justify the use of a market factor.

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

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

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Diehl used oversize population projections and the County here used a large market factor, the result is the same.

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

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

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

VI. FAILURE TO PROVIDE FOR A VARIETY OF RURAL DENSITIES

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

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

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

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

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

¹⁴ “Rural character” means:

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

(a) In which open space, the natural landscape, and vegetation predominate over the built environment;

(b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;

(c) That provide visual landscapes that are traditionally found in rural areas and communities;

(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;

(e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;

(f) That generally do not require the extension of urban governmental services; and

(g) That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

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

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

A. Specific Zoning Densities

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

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

Next, the County and Intervenor assert that the County's designation of densities of one dwelling unit per two acres, one unit per acre, two units per acre, and four units per acre provide the requisite variety of rural densities. They contend that the Board exceeded its authority in imposing a "bright-line" rule that rural densities must be at least one dwelling unit per five

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

acres.¹⁷ Br. of Intervenors at 45. They essentially argue that densities ranging from one dwelling unit per two acres to four dwelling units per acre in the County's rural zone constitute a variety of rural densities.

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

Excluding densities in agricultural and forest lands and densities more intense than one dwelling unit per five acres, the only rural density the comprehensive plan and development

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

¹⁸ The County made this concession in the following exchange:

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

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

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

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

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

Mr. Miller: Right.

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

Mr. Miller: Right.

RP at 98-99.

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

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

B. Innovative Techniques

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

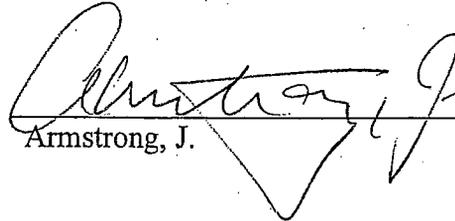
The Board stated that where a plan's rural designations and zones do not expressly provide for a variety of rural densities, the plan must demonstrate how innovative techniques create a variety of rural densities. The Board found that the County's comprehensive plan failed to make such a demonstration.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

The Act imposes a highly deferential standard for board review of comprehensive plans and development regulations. RCW 36.70A.3201. The Board must presume that a county's comprehensive plans and development regulations are valid upon adoption, RCW 36.70A.320(1), and must find compliance unless it determines that the plan or regulations are clearly erroneous. RCW 36.70A.320(3). But on this issue, the Board required the County to

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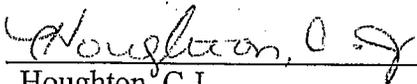
show that its plan and regulations were valid. In doing so, the Board failed to presume validity and failed to require Futurewise to prove invalidity. RCW 36.70A.320(2). Accordingly, the Board erred in finding that the County's comprehensive plan and development regulations fail to provide for a variety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

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

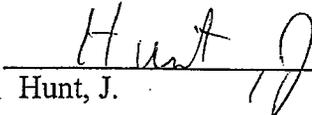


Armstrong, J.

We concur:



Houghton, C.J.



Hunt, J.

APPENDIX B

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 1000 FRIENDS OF WASHINGTON

3 Petitioners,

Case No. 05-2-0002

4 v.

5 THURSTON COUNTY,

FINAL DECISION AND ORDER

6 Respondent,

7 And,

8 WILLIAM AND GAIL BARNETT AND

9 ALPACAS OF AMERICA,

10 Intervenor.

11
12
13
14 I. SYNOPSIS OF DECISION

15 Thurston County was one of the first counties in this Board's jurisdiction to engage in
16 thorough and collaborative planning. Its commendable early efforts led to the adoption of a
17 comprehensive plan in 1995 on which the County has largely relied in meeting its update

18 requirements under RCW 36.70A.130. In 2002, the County adopted its Buildable Lands
19 Report, a thorough and well-documented analysis of land available for development and
20 projected demand for such lands through 2025. In 2004, Thurston County met its deadline
21 under RCW 36.70A.130(4) to timely conduct a review and, if needed, revision of its
22 comprehensive plan and development regulations to ensure compliance with the Growth
23 Management Act (GMA) (Chapter 36.70A RCW).

24
25
26 In this decision, the Board is asked to determine whether Thurston County's 2004 update of
27 its comprehensive plan and development regulations complies with the requirements of
28 RCW 36.70A.130 to "review and, if needed, revise its comprehensive plan policies and
29 development regulations to ensure the plan and regulations comply with the requirements of
30 this chapter." RCW 36.70A.130(1).

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

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

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

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

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

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

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

8 9 II. PROCEDURAL HISTORY

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

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

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

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

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

9 Order Denying Leave to File Motion, May 16, 2005.

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

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

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 Carrite, 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 III. ISSUES PRESENTED¹

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

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

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

10 IV. BURDEN OF PROOF

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

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

18
19 Except as provided in subsection (5) of this section, comprehensive plans and
20 development regulations, and amendments thereto, adopted under this chapter are
21 presumed valid upon adoption.

22 RCW 36.70A.320(1).

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

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

28 RCW 36.70A.320(3)

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

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

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

13 RCW 36.70A.3201 (in part).

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

19 V. DISCUSSION

20
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 Case
17 No. 00-2-0062c (Final Decision and Order, May 7, 2001); *Sky Valley v. King County*,
18 ~~CPSPGMHB 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*, CPSPGMHB 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.

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

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

26
27 The County's comprehensive plan policies reflect the County's intention to only apply the
28 statutory LAMIRD criteria to areas which have not yet been designated for high density rural
29 residential development, or when the existing high density rural areas are expanded:
30
31
32

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

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

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

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

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

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

19
20 Rural Land Use and Activities Policy 8 (CP at 2-43-44) sets criteria for designation and
21 expansion of "commercial centers" which do not incorporate the requirements of RCW
22 36.70A.070(5)(d):
23

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

31 CP 2-43 – 2-44 (in part)

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

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

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

19
20
21 Petitioner also argues that even the Rural Residential – One Dwelling Unit per Five Acres
22 (RR 1/5) zone exceeds a rural residential density level of one dwelling unit per five acres.
23 Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief
24 at 9. Petitioner points to T.C.C. 20.09.040(1)(a) to argue that the effective density for this
25 zone is actually a net minimum lot size of four acres for single family residences and eight
26 acres for duplexes. *Ibid.*
27

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

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

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

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

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

1 **Positions of the Parties**

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

9
10 The County responds that it provides densities of one dwelling unit per twenty acres, one to
11 forty and one to eight in non-urban zones. Respondent's Prehearing Brief at 14. The
12 County also cites to its provisions for the transfer of development rights, its open space tax
13 program, private conservation easements and public wildlife refuges and open spaces, and
14 parks. *Ibid* at 14-15.
15
16

17 **Board Analysis**

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

20
21 The rural element shall permit rural development, forestry, and agriculture in rural
22 areas. The rural element shall provide for a variety of rural densities, uses, essential
23 public facilities, and rural governmental services needed to serve the permitted
24 densities and uses. To achieve a variety of rural densities and uses, counties may
25 provide for clustering, density transfer, design guidelines, conservation easements,
26 and other innovative techniques that will accommodate rural densities and uses that
27 are not characterized by urban growth and that are consistent with rural character.

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

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

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

6
7 Rural densities, as we have discussed above, are generally no more intense than one
8 dwelling unit per five acres. The County has designated and zoned a variety of rural areas
9 with residential densities higher than this rural level: Residential – One Unit per Two Acres;
10 Residential – One Unit per One Acre; Residential – Two Units per One Acre; and
11 Residential – Four Units per Acre. The RR 1/5 zone, although stating that it limits
12 development density to one dwelling unit per five acres, has a net density of one single
13 family dwelling unit per four acres. T.C.C. 20.09.040(1)(a). None of these densities are
14 rural in nature and therefore cannot be used to establish a variety of rural densities.
15

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

16 Positions of the Parties

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

18 was therefore adopted for use in the Buildable Lands Report and, subsequently, the 2004
19 comprehensive plan update. *Ibid.*; Thurston County Comprehensive Plan (CP), Facts
20 Section and Land Use Chapter Table 2-1 at 2-11 – 2-12. That population forecast, in turn,
21 was used to determine demand for land within the UGAs through 2025. Thurston County
22 Comprehensive Plan (CP), Facts Section and Land Use Chapter Table 2-1 at 2-11 – 2-12.
23 We note first that the Buildable Lands Report for Thurston County is an impressive and
24 thorough analysis of land supply and demand in Thurston County. The land demand
25 analysis in that report is well-supported and clearly explained. The County's choice to rely
26 upon the land supply and demand analysis in the Buildable Lands Report for planning in the
27 2004 comprehensive plan update is a sound one.
28
29

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

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

11
12 The County responds that the disparity is due to a market factor. Respondent's Prehearing
13 Brief at 22.⁶ Petitioner argues that supply exceeds demand for residential land in the UGAs
14 by 62 percent, which is excessive even if it were a market factor. Petitioners Futurewise's
15 and League of Women Voters of Thurston County Prehearing Brief at 31. The County
16 responds that the "7,207 acres is the unconsumed land left in 2025 which is thirty-eight
17 percent (38%) of the total land supply of 18,799 acres." Respondent's Prehearing Brief at
18 20. A 38 percent market factor, according to the County, is not clearly erroneous in light of
19 the uncertainties about how much future land will be needed for growth in the cities and
20 towns of Thurston County. *Ibid* at 22.
21
22

23
24 The use of a "land market supply factor" is permissible under the statute to account for the
25 vagaries of the real estate market supply. RCW 36.70A.110(2). The Central Puget Sound
26 Growth Management Hearings Board describes the market factor as follows:
27

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

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

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

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

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

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

11
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
18 and produces a figure for net developable land based on development assumptions
19 established in light of the actual development trends in the area of the lands assessed.
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 Development assumptions were derived based on current comprehensive plans and
24 development codes, recent development trends and information provided by long-range
25 planners from jurisdictions throughout the County. *Ibid* at II – 10. The buildable lands
26 analysis assesses many of the potential market factors and incorporates them into the
27 figures for land supply and demand that it produces. This analysis appears to take the
28 place of a market factor.
29
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.
13
14

15
16 The County responds that land was taken out of, as well as added to, the Tenino UGA so
17 that the Tenino UGA was actually reduced by 6 acres. Respondent's Prehearing Brief at

18 19. The Intervenor points out that the addition of its property to the UGA is necessary to
19 finance a new sewer facility that will allow the City to encourage more intense urban
20 development than can now be adequately served with urban levels of governmental
21 services. Intervenor's Brief at 2-3.⁷ This will allow truly urban density levels of residential
22 development within the City limits. As to the Bucoda UGA, the County argues that
23 expansion of its boundaries adds sufficient developable lands for projected residential
24 growth if sewer becomes available, and reduces pressure on the existing aquifer from
25 residential development based on septic systems. Respondent's Prehearing Brief at 19-20.
26
27

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
16
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
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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.
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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

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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

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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.

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14
15 As a first step towards designating natural resource lands, the Minimum Guidelines to
16 Classify Agriculture, Forest, Mineral Lands and Critical Areas (Ch. 365-190 WAC)
17 ("*Minimum Guidelines*" hereafter) call for classification of natural resource land categories.

18 WAC 365-190-040(1). WAC 365-190-050 directs counties and cities to use the land-
19 capability classification system of the United States Department of Agriculture Soil
20 Conservation Service as defined in Agriculture Handbook No. 210.¹¹ The Petitioner faults
21 the County's classification of soils for inconsistency with the Agriculture Handbook No. 210.
22 However, Petitioner's very abbreviated argument simply does not demonstrate how the
23 County's classification system fails to follow Agriculture Handbook No. 210.

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27 ⁹At the hearing on the merits, Petitioner abandoned its argument that the County erred in using an out-dated
28 list of prime farmland soils, conceding that the list was not provided to the County in sufficient time to be
included in its 2004 update.

29 ¹⁰ The 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 ¹¹ Although 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

19 Our State Supreme Court has ruled on this point:

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.
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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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3 **VI. INVALIDITY**

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

11
12 The County responds that all of the provisions of Resolution 13234 and Ordinance 13235
13 are compliant with the GMA so a finding of invalidity may not be entered. Respondent's
14 Prehearing Brief at 25.

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

21
22
23 We have held that invalidity should be imposed if continued validity of the noncompliant
24 comprehensive plan provisions or development regulations would substantially interfere with
25 the local jurisdiction's ability to engage in GMA-compliant planning. See *Butler v. Lewis*
26 *County*, WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance and Imposing
27 Invalidity, February 13, 2004). On the record before us, we do not find that a remand with
28 an order to achieve compliance is insufficient to enable the County to pursue GMA-
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30
31 ¹² Petitioner also requests a finding of invalidity based on the lack of variety of rural densities but it is unclear
32 what portions of the resolution and ordinance could be found invalid to address this lack. *Ibid* at 31.

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

10 11 VII. FINDINGS OF FACT

- 12 1. Thurston County is a county located west of the crest of the Cascade Mountains
13 that is required to plan pursuant to RCW 36.70A.040.
- 14 2. Petitioner is a non-profit organization that participated in the adoption of Resolution
15 13234 and Ordinance 13235 in writing and orally. Petitioner raised the matters
16 addressed in its Petition for Review to the County in its participation below.
17
- 18 3. Intervenor is a property owner whose property was added to the Tenino UGA in the
19 County's adoption of Resolution 13234 and Ordinance 13235.
- 20 4. Resolution 13234 and Ordinance 13235 were adopted by the County on
21 November 22, 2004 and notice of adoption was published on November 24, 2004.
- 22 5. Petitioner filed its petition for review of Resolution 13234 and Ordinance 13235 on
23 January 21, 2005.
- 24 6. When the County adopted its comprehensive plan in 1995, it developed its own
25 criteria for determining how to contain existing areas of more intensive development
26 in the rural areas.
- 27 7. In 1997, the legislature adopted the provisions of RCW 36.70A.070(d) that set the
28 requirements for "limited areas of more intensive rural development" (LAMIRDs).
- 29 8. The County's comprehensive plan designates high density rural residential areas
30 which allow 4 dwelling units per acre (SR - 4/1) 2 dwelling units per acre (RR 2/1) 1
31 dwelling unit per acre (RR 1/1) and 1 dwelling unit per two acres (RR 1/2).
32

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2 9. Thurston County's zoning code contains development regulations setting residential
3 density levels in excess of one dwelling unit per five acres in rural areas: Rural
4 Residential – One Dwelling Unit per Two Acres (RR 1/2) (T.C.C. Ch. 20.10); Rural
5 Residential – One Dwelling Unit per Acre (RR 1/1) (T.C.C. Ch. 20.11); Rural
6 Residential – Two Dwelling Units per Acre (RR 2/1) (T.C.C. Chapter 20.13); and
7 Suburban Residential – Four Dwelling Units per Acre (SR 4/1) (T.C.C. Chapter
8 20.14).
- 8 10. All of these residential density levels constitute "more intensive rural development"
9 within the meaning of RCW 36.70A.070(5)(d).
- 10 11. 5.5 percent of rural lands in the county are designated for high intensity rural
11 residential uses, i.e. SR – 4/1; RR 2/1; RR 1/1; and RR 1/2.
- 12 12. In its 2004 update of its comprehensive plan and development regulations, the
13 County has not applied the statutory LAMIRD criteria to its existing areas of more
14 intensive development in the rural areas.
- 15 13. County comprehensive plan Housing and Residential Densities Policies 1 and 2,
16 and Rural Land Use and Activities Policy 8 exempt existing areas of high density
17 rural residential development from the statutory requirements for LAMIRDs.
-
- 18 14. The Thurston County Comprehensive Plan Land Use Element contains a
19 discussion of rural area designations. CP at 2-17 – 2-27. This discussion includes
20 the criteria for inclusion in any of the rural area designations, including the higher
21 density residential designations. CP at 2-24 – 2-27. None of the criteria include a
22 review of the existence of development as of July 1, 1990, nor do they establish
23 logical outer boundaries with reference to the statutory criteria. *Ibid.*
- 24 15. T.C.C. 20.09.040(1)(a) establishes a minimum lot size in the RR 1/5 zone as
25 follows: "Conventional subdivision lot (net) – four acres for single family, eight
26 acres for duplexes." This development regulation allows one single family dwelling
27 unit per four acres, rather than one dwelling unit per five acres, in the RR 1/5 zone.
- 28 16. 48.3 percent of the County's rural residential areas fall into the RR 1/5 category.
29 CP Table 2-1A at 2-18 – 2-19.
- 30 17. With such a large portion of the County's rural area designated as RR 1/5, the net
31 density level of one dwelling unit per four acres in the RR 1/5 zone increases the
32 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.
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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.

- 1
2 39. Using predominant parcel size of 20 acres as a designation criterion may exclude
3 viable farms in which the total acreage farmed is in excess of 20 acres in size but
4 each of the parcels making up the farm is less than 20 acres

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6 **VIII. CONCLUSIONS OF LAW**

- 7 A. This Board has jurisdiction over the parties to this action.
8 B. This Board has jurisdiction over the subject-matter of this action.
9 C. Petitioner has standing to raise the issues in its Petition for Review.
10 D. The petition for review in this case was timely filed.
11 E. The County's high density rural residential designations (SR – 4/1; RR 2/1; RR 1/1;
12 and RR 1/2); Housing and Residential Densities Policies 1 and 2, and Rural Land
13 Use and Activities Policy 8; and the County's development regulations
14 implementing these designations (T.C.C. Ch. 20.10; T.C.C. Ch. 20.11; T.C.C.
15 Chapter 20.13; and T.C.C. Chapter 20.14) fail to comply with RCW 36.70A.070(5).
16 F. T.C.C. 20.09.040(1)(a) fails to comply with RCW 36.70A.070(5)(c) and (d) by
17 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.
18
19 G. The County's comprehensive plan and development regulations fail to provide for a
20 variety of rural densities in the rural element as required by RCW 36.70A.070(5)(b).
21 H. The County's UGA designations and development regulations implementing them
22 fail to comply with RCW 36.70A.110 by creating UGA boundaries that significantly
23 exceed the projected demand for urban residential lands over the course of the 20-
24 year planning horizon.
25 I. Urban Growth Area Policy 8(b) fails to comply with RCW 36.70A.110(1) and (2).
26 J. Petitioner has failed to meet its burden of proof as to the County's classification
27 system for agricultural lands of long-term commercial significance and any
28 inconsistencies alleged between the comprehensive plan provisions concerning it.
29 Therefore, these provisions are compliant with the GMA.
30 K. Petitioner has failed to meet its burden of proof that the County's failure to consider
31 farmlands of statewide importance violates the goals and requirements of the GMA.
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L. Agricultural land designation criteria numbers 3 and 5 (Thurston County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4.) fail to comply with the requirements of the GMA to designate and conserve agricultural resource lands. RCW 36.70A.060 and 36.70A.170.

IX. ORDER

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

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

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

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

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

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

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

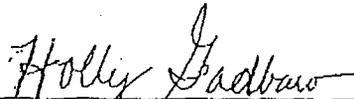
7 Enforcement. The petition for judicial review of this Order shall be filed with the
8 appropriate court and served on the Board, the Office of the Attorney General, and all
9 parties within thirty days after service of the final order, as provided in RCW
10 34.05.542. Service on the Board may be accomplished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

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

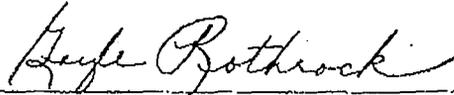
14 Entered this 20th day of July 2005.

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18 Margery Hite, Board Member

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22 Holly Gadbaw, Board Member

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26 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:
11

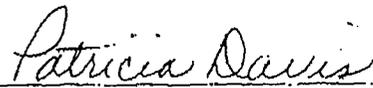
12 Tim Trohimovich
13 1000 Friends of Washington
14 1617 Boylston Avenue, Suite 200
Seattle, Washington 98122

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

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

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

18
19 DATED this 20th day of July 2005.

20
21 
22 PATRICIA DAVIS
EXECUTIVE ASSISTANT