

Supreme Court No. 80115-1

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**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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THURSTON COUNTY,  
Petitioner,

v.

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

&

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

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**SUPPLEMENTAL BRIEF OF RESPONDENT FUTUREWISE**

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## **I. Introduction**

This case hinges on the statutory interpretation of the Growth Management Act (GMA), chapter 36.70A RCW, and related statutes and the specific facts applicable to Thurston County. Futurewise's briefing in this case has shown that the Western Washington Growth Management Hearings Board (WWGMHB or Board) and Court of Appeals correctly interpreted and applied the law and that the Board and court decisions are based on substantial evidence. Further, Thurston County and the Intervenor failed to assign error in a timely manner to any of the Board's findings of fact, so they are verities on appeal.<sup>1</sup> Consequently, the Supreme Court should affirm the Board and Court of Appeals.

This Supplemental Brief builds on our earlier briefing with three arguments:

- In Part II(A), we amplify our argument that reading the GMA as a whole, counties and cities are required to review and, if necessary, revise their comprehensive plans and development regulations and

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<sup>1</sup> *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 488 – 89, 585 P.2d 71, 79 – 80 (1978); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn.App. 615, 628, 53 P.3d 1011, 1017 (2002) review denied *Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board*, 148 Wn.2d 1017, 64 P.3d 649 (2003).

that the county's and city's decisions whether to review and revise can be reviewed by the Boards and the courts.

- In Part II(B) we address the part of the Court of Appeals *Gold Star Resorts* decision relating to the comprehensive plan and development regulation provisions are subject to the GMA's requirement to review, and if needed, revise. Thurston County's statement of additional authorities citing to the *Gold Star Resorts* decision was filed after the other briefing in this case.
- In Part III(C) we show why urban growth areas must be sized to accommodate the State of Washington Office of Financial Management (OFM) population projection range and, if a county chooses to use one, a reasonable market factor.

## **II. Argument**

- A. Read together, RCW 36.70A.130 and RCW 36.70A.280 authorize appeals of seven and ten year periodic reviews of comprehensive plans, urban growth areas, and development regulations when filed within 60 days of the notice of adoption for those decisions. (Thurston County Issues 1 – 4)**

Thurston County argues that the GMA's periodic review requirements mandate review only when the law has changed. This

interpretation flies in the face of the plain language of the GMA. RCW

36.70A.130(1)(a) governs periodic reviews and provides in relevant part:

Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.

The meaning of a statute is inherently a question of law and this court's review is *de novo*.<sup>2</sup> The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose.<sup>3</sup> This court considers the statute as a whole in order to give effect to all that the legislature has said, and uses related statutes to help identify the legislative intent in the provision in question.<sup>4</sup>

Thurston County argues that RCW 36.70A.130 only requires the county to review and revise its comprehensive plan and development regulations if the GMA itself has been changed and that a failure to review and revise unchanged portions cannot be appealed. However, RCW

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<sup>2</sup> *Department of Labor and Industries v. Gongyin*, 154 Wn.2d 38, 44 – 45, 109 P.3d 816, 819 (2005).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 44 – 45, 109 P.3d at 819.

36.70A.130(1)(b) provides in relevant part that “[l]egislative action means the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefor.” RCW 36.70A.130(4)(a) set a December 1, 2004 deadline for Thurston County to update its comprehensive plan and development regulations for its first “periodic update.” So read together, RCW 36.70A.130 required Thurston County to adopt a resolution or ordinance reviewing and, if needed, revising its comprehensive plan and development regulations to comply with the GMA by December 1, 2004.

The Boards have authority to review a petition that the County has failed to bring its comprehensive plan and development regulations into compliance with the GMA during an RCW 36.70A.130 review. RCW 36.70A.280(1) provides in relevant part that “[a] growth management hearings board shall hear and determine only those petitions alleging ... [t]hat a ... county[] or city planning under this chapter is not in compliance with the requirements of this chapter ....” The Washington Supreme Court has held that RCW 36.70A.280(1) “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.”<sup>5</sup>  
RCW 36.70A.130(7) specifically provides that “[t]he requirements  
imposed on counties and cities under this section shall be considered  
‘requirements of this chapter’ ...”

Thurston County adopted Resolution No. 13234 and Ordinance  
No. 13235 on November 22, 2004.<sup>6</sup> These legislative enactments violate  
RCW 36.70A.130 because they fail to correct sections of the  
comprehensive plan and development regulations that violate the GMA.  
After the deadline in RCW 36.70A.130(4)(a) and within 60 days of the  
county’s notice that it adopted the 2004 periodic review, Futurewise filed  
an appeal of the resolution, ordinance, and Thurston County’s failure to  
review and revise its comprehensive plan and development regulations as  
required by RCW 36.70A.130.<sup>7</sup>

Thurston County argues in its Petition for Discretionary Review  
and briefing that this appeal violated the 60 day statute of limitations for  
filing appeals of the comprehensive plan and development regulations the

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<sup>5</sup> *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d  
542, 558 – 59, 958 P.2d 962, 970 (1998).

<sup>6</sup> Thurston County Resolution No. 13234 p. 12, AR 1 p. 000017; Thurston County  
Ordinance No. 13235 p. 19, AR 1 p. 000035.

<sup>7</sup> *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-  
0002 Order on Motions to Dismiss p. \*6 of 9 (April 21, 2005), AR 14, pp.  
000323.

county did not review and revise. But this argument misunderstands what Futurewise appealed. Futurewise did not appeal the original comprehensive plan and development regulations as part of our 2005 appeal; we appealed the resolution and ordinance required by RCW 36.70A.130(1) and the county's failure to "review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter ..."<sup>8</sup>

Thurston County and Intervenors and *Amici* make much of RCW 36.70A.320(1)'s presumption of validity. However, both the Board and, in reviewing the Board's decision, the Court of Appeals afforded Thurston County the presumption of validity for Resolution No. 13234, Ordinance No. 13235, and the amendments they adopted along with the un-amended comprehensive plan and development regulations at issue in this appeal.<sup>9</sup> The presumption of validity in RCW 36.70A.320(1) and the GMA as a

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<sup>8</sup> *Thurston County v. Western Washington Growth Management Hearings Bd.*, 137 Wn. App. 781, 799, 154 P.3d 959, 968 (2007); *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002 Order on Motion for Reconsideration p. \*3 of 8 (August 11, 2005), AR 42, p. 002601.

<sup>9</sup> *Thurston County v. Western Washington Growth Management Hearings Bd.*, 137 Wn. App. 781, 809, 154 P.3d 959, 972 (2007) (board must presume a county's comprehensive plans and development regulations are valid upon adoption, but did not do so on the use of "innovative techniques" to provide a variety of rural densities and which is outside the issues in the county's petition for review).

whole do not allow a county or city to ignore RCW 36.70A.130's mandate that the comprehensive plan and development regulations be reviewed and revised to ensure compliance with the GMA.

While the facts of this case show that the urban growth area was too large, under the county's legal theory if the urban growth area was too small the size of the urban growth area could not be challenged because the county had not amended it and because the legislation affecting the provision has not changed. But this argument is inconsistent with the GMA and its related statutes. RCW 43.62.035 requires that "[a]t least once every five years or upon the availability of decennial census data, whichever is later, the office of financial management shall prepare twenty-year growth management planning population projections required by RCW 36.70A.110 ...." RCW 36.70A.110(2) requires the urban growth area to be "[b]ased upon" these projections. RCW 36.70A.130(3)(a) requires each county to review its urban growth areas "at least every ten years...." RCW 36.70A.130(3)(b) provides that "[t]he county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county

for the succeeding twenty-year period.” The Thurston County update at issue in this case was both a seven-year comprehensive plan review and a ten-year urban growth area review.<sup>10</sup> RCW 36.70A.280(1)(a) authorizes the Board to decide petitions alleging that a county or city planning under the GMA is not in compliance with the requirements of chapter 36.70A RCW. So the county’s argument that a Board only has jurisdiction over provisions the county amends or which are affected by legislative amendments is not consistent with the requirements of the GMA, because, among other problems, it ignores Thurston County’s requirement to re-evaluate its urban growth areas in the light of the new population projections.

It is also fundamentally unfair. The county’s argument is essentially that persons who object to comprehensive plan provisions or development regulations should have appealed them when they were first adopted. But this does not recognize that counties and cities such as Thurston County are growing and changing. Since Thurston County adopted its Comprehensive Plan in 1995, Thurston County’s population

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<sup>10</sup> Thurston County’s Petition for Discretionary Review No. 78148-6 (C/A No. 34172-7-II) pp. 6 – 7 (May 2, 2007).

increased by 32,081 people.<sup>11</sup> This is almost as much as a new Lacey, the second largest city in the county.<sup>12</sup> This is an example of “the continual changes” that is one of the reasons the GMA requires periodic updates.<sup>13</sup>

Under Thurston County’s theory no matter how much the county changes or how many new citizens arrive, if the county does not amend its comprehensive plan or development regulations, these provisions cannot be appealed. This disenfranchises the 32,081 people who were not in Thurston County in 1995 and, if their needs are not met, they have no recourse to the legal remedy the legislature and governor have granted them.

The Board and Court of Appeals correctly interpreted and applied the law. The Supreme Court should affirm the Board and Court of Appeals decisions on Thurston County Issue 1.

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<sup>11</sup> 1000 Friends of Washington November 15, 2004 Letter to the Board of County Commissioners for Thurston County p. 2, AR 10 p. 000235.

<sup>12</sup> *Id.*

<sup>13</sup> 2005 Wash. Laws Chapter 294 § 1; .130(1); .130(4).

**B. The *Gold Star Resorts* decision’s conclusion that the requirement to revise a comprehensive plan and development regulation only applies to provisions affected by intervening legislative revisions is contrary to the plain language of RCW 36.70A.130. (Thurston County Issue 1)**

Thurston County filed a statement of additional authorities in this case citing to Division I of the Court of Appeals’ *Gold Star Resorts* decision.<sup>14</sup> While the *Gold Star Resorts* court did conclude that the requirement to revise a comprehensive plan and development regulation only applies to provisions affected by intervening legislative revisions, that conclusion is contrary to the plain language of RCW 36.70A.130. RCW 36.70A.130(1)(a) provides that a “a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.” Neither RCW 36.70A.130 nor any other provision of the GMA limits this requirement to comprehensive plan or development regulation amendments affected by later GMA amendments. The *Gold Star Resorts* decision does not cite to any part of

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<sup>14</sup> *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, 166 P.3d 748 (2007) petition for review filed Wn. Supreme Ct. No. 80104 (Oct. 26, 2007).

the GMA for this proposition.<sup>15</sup> The only authority *Gold Star Resorts* cites is *1000 Friends of Washington v. McFarland*:

We agree with the Board that the review statute requires cities and counties to bring their plans into compliance with intervening legislative amendments.<sup>FN26</sup>

FN26. See *1000 Friends of Washington*, 159 Wn.2d at 170, 149 P.3d 616 (seven year review properly included amendments to comply with substantive requirements added after plan initially adopted).<sup>16</sup>

But *1000 Friends of Washington v. McFarland* does not support the proposition that RCW 36.70A.130 review is limited to GMA amendments:

¶ 10 Planning is not a one time thing. King County originally adopted its Growth Management Comprehensive Plan in 1994. See King County Dep't of Development & Env'tl. Servs., <http://www.metrokc.gov/DDES/gmpc/index.shtm> (last visited Dec. 18, 2006). King County is required to review and, if needed, revise its comprehensive plan and implementing ordinances every seven years, most recently by December 1, 2004. RCW 36.70A.130(4)(a). Since King County originally began planning under the GMA, and since it has promulgated its first comprehensive plan, the legislature has added additional substantive requirements, including the explicit direction to use the "best available science" in planning. LAWS of 1995, ch. 347, § 105, *codified as* RCW 36.70A.172(1).<sup>17</sup>

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<sup>15</sup> *Id.*, 166 P.3d at 755.

<sup>16</sup> *Id.*, at 754 – 55.

<sup>17</sup> *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 169 – 70, 149 P.3d 616, 619 (2006) (Plurality Opinion).

While the Supreme Court did note that the law has changed since King County adopted its critical areas regulations, the decision did not limit the review and revise requirement to those circumstances. The prior sentence notes the requirement “to review and, if needed, revise its comprehensive plan and implementing ordinances every seven years.”<sup>18</sup> There is no language in *1000 Friends of Washington v. McFarland* limiting this requirement to amendments needed to comply with statutory changes.

The *Gold Star Resorts* ruling also raises significant procedural issues. The GMA has been amended every year since it was adopted. The sections of the GMA are also interrelated. So then what amendments trigger the review and revise requirement?

Requiring an inquiry into whether the GMA has changed will increase burdens on local governments, residents, and property owners. This will decrease, not increase, certainty for counties, cities, residents, property owners, and the development community. A county may try to rely on the fact that the requirements for the comprehensive plan have not changed since their last update, only to find that an amendment to a GMA

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

goal or other section of the GMA was sufficient to trigger the duty to review and revise, forcing the county to do the update over again. It will be better for all of the participants in the process to do the update once and do it right.

The *Gold Star Resorts* conclusion will also create a whole new set of jurisdictional reviews before the Boards. The Boards will first have to determine whether there had been a statutory amendment that triggered the duty to review and, if needed, revise the comprehensive plan and development regulations. Then the merits will need to be argued.

The potential for confusion and uncertainty is illustrated by the facts of this case. Thurston County argues that the duty to review and revise apparently does not apply because there had been no statutory changes applicable to the rural lands and urban growth areas.<sup>19</sup> However in 1997, two years after Thurston County's adopted its comprehensive plan, the legislature extensively amended the requirements for the rural element. These amendments included adopting definitions of rural

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<sup>19</sup> Thurston County's Petition for Discretionary Review No. 78148-6 (C/A No. 34172-7-II) p. 10 (May 2, 2007).

character and rural development.<sup>20</sup> The definition of rural development provides that:

“Rural development” refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.<sup>21</sup>

The 1997 rural element amendments also required the county to adopt measures containing or controlling rural development.<sup>22</sup> The amendments also included other requirements.<sup>23</sup>

All of these amendments would require Thurston County to amend the rural provisions at issue in this appeal, and the definition of rural development would require Thurston County to not include natural resource lands in its rural element. But given the county’s arguments, they apparently disagree. The 1997 amendments also adopted for the first time the requirement for counties and cities to “take action to review and, if

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<sup>20</sup> 1997 Wash. Laws Chapter 429 § 3(14); (15).

<sup>21</sup> 1997 Wash. Laws Chapter 429 § 3(15); RCW 36.70A.030(16).

<sup>22</sup> 1997 Wash. Laws Chapter 429 § 7(5)(c).

<sup>23</sup> 1997 Wash. Laws Chapter 429 § 7.

needed, revise its comprehensive land use plan and development regulations to ensure that the plan and regulations are complying with the ...” GMA.<sup>24</sup> Under the county’s legal theory, would this amendment alone have triggered the duty to review and revise the comprehensive plan and development regulations given that it is an amendment that occurred after the county adopted its comprehensive plan and development regulations?

In 2003, the legislature and governor amended the GMA to require that the “adoption of and amendments to [county and city] 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 ... consistent with the twenty-year population forecast from ...” OFM.<sup>25</sup> Under the county’s legal theory this would require a review and revision of the urban growth areas when Thurston County adopted the 2004 comprehensive plan update which adopted new growth targets. But again, Thurston County apparently disagrees. These amendments illustrate the difficulty in trying

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<sup>24</sup> 1997 Wash. Laws Chapter 429 § 10(1).

<sup>25</sup> 2003 Wash. Laws Chapter 333 § 1.

to decide whether a GMA amendment triggers the requirement to review and revise.

The *Gold Star Resorts* court erroneously interpreted this aspect of the GMA. That portion of the *Gold Star Resorts* decision was wrongly decided and should not be followed by the Supreme Court. As we have shown in Section II(A) above, the better interpretation is that the county must review and, if needed, revise its comprehensive plan and development regulations to comply with the GMA as part of the RCW 36.70A.130 updates.

**C. The plain language of RCW 36.70A.130 and the amendments to RCW 43.62.035 show that urban growth areas must be sized to conform to the OFM population projection range and, if a local government chooses to use one, a reasonable market factor. (Thurston County Issues 2 and 3)**

On pages 44 through 47 of Futurewise's Brief of Respondent, we show how the GMA limits the size of urban growth areas to the land area needed to accommodate the population projection chosen by the county within the range of the OFM forecasts and, if a county chooses to use it, a reasonable market factor. There are two additional arguments which support this position that the Supreme Court should consider.

RCW 43.62.035 requires that:

[a]t least once every five years or upon the availability of decennial census data, whichever is later, the office of financial management shall prepare twenty-year growth management planning population projections required by RCW 36.70A.110 for each county that adopts a comprehensive plan under RCW 36.70A.040 and shall review these projections with such counties and the cities in those counties before final adoption.”

RCW 36.70A.110(2) then provides that:

Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve.

Originally, OFM only made a single projection.<sup>26</sup> A 1995

amendment requires OFM to project a range bounded by a high and low projection:

Each projection shall be expressed as a reasonable range developed within the standard state high and low projection. The middle range shall represent the office’s estimate of the most likely population projection for the county.<sup>27</sup>

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<sup>26</sup> 1990 Wash. Laws 1<sup>st</sup> Ex. S. Chapter 17 § 32.

<sup>27</sup> 1995 Wash. Laws Chapter 162 § 1; RCW 43.62.035.

An article from the Gonzaga Law Review explains that this amendment strongly supports the argument that the population projections used to size the urban growth areas are to be bounded by the OFM range:

Semantically, this debate focused on the ambiguities inherent in the language of RCW 36.70A.110(2). By merely stating that UGA planning decisions must be somehow “based upon” OFM projections, the Act seemed to invite the interpretation that OFM projections were merely a starting point for determining the size and density of a UGA. In responding to this argument, however, the Central Board distinguished the noun “base” from the transitive verb “based upon,” holding that the Legislature’s use of the latter term constituted a clear instruction for counties to use OFM projections not merely as a starting point, but rather as a definitive parameter. Similarly, when opponents of OFM projections sought support for their position in the requirement that UGAs include “areas and densities sufficient” to accommodate projected growth, the Board held that in this context, the word “sufficient” was synonymous with “appropriate.” The Eastern Board reached the same conclusion, pointing out that the right to petition the growth boards for adjustment of OFM projections would have little practical value if those projections were not a mandatory planning constraint.

This position gained universal acceptance following adoption of the 1995 amendment requiring OFM to state its population forecasts as a range, which was seen as a sure signal that the Legislature intended local governments to plan their UGAs within the minimum and maximum endpoints of that range. At the same time, however, the 1995 amendments added the current language allowing counties to use a “market factor” in designating UGAs, thereby indicating that growth forecasts were not to be the sole determinant of final UGA boundaries. Thus, while it is now well settled that OFM population forecasts are a

mandatory element in UGA planning decisions, their precise role in determining the size and density of UGAs remains unanswered by the language of the Act.<sup>28</sup>

As part of the 1995 amendment, RCW 43.62.035 was amended to add: “A comprehensive plan adopted or amended before December 31, 1995, shall not be considered to be in noncompliance with the twenty-year growth management planning population projection if the projection used in the comprehensive plan is in compliance with the range later adopted under this section.”<sup>29</sup> Compliant comprehensive plans must use population projections within the OFM range for sizing their urban growth areas.

The Supreme Court and the Court of Appeals have recognized that the procedural criteria required by RCW 36.70A.190(4)(b) are helpful in interpreting the GMA.<sup>30</sup> As part of its analysis as to whether or not urban growth areas are limited in size to the OFM population projection range

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<sup>28</sup> Brent D. Lloyd, *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in Comprehensive Planning Under the Washington State Growth Management Act* 36 GONZ. L. REV. 73, 103 – 05 (2000/2001) (footnotes omitted).

<sup>29</sup> 1995 Wash. Laws Chapter 162 § 1.

<sup>30</sup> See for example *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25, 31 (2007); *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 835, 123 P.3d 102, 107 fn. 9 (2005); *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 841 – 42, 988 P.2d 27, 31 (1999) review denied *City of Des Moines v. Puget Sound Regional Council*, 140 Wn.2d 1027, 10 P.3d 403 (2000).

and a reasonable market factor, the Court of Appeals *Diehl* decision considered the procedural criteria. The Court of Appeals wrote:

And, further, WAC 365-195-335(3)(e)(v), which addresses requirements for setting UGAs, specifically states that the UGAs “should encompass a geographic area which *matches* the amount of land *necessary* to accommodate likely growth.” (Emphasis added [by the Court of Appeals].) Accordingly, the OFM projection places a cap on the amount of land a county may allocate to UGAs.”<sup>31</sup>

The Supreme Court should follow WAC 365-195-335(3)(e)(v) which was adopted in 1992 and the *Diehl* decision which has been good law in Washington State for over eight years.

In this case, the Board and Court of Appeals correctly interpreted and applied the GMA. The Supreme Court should uphold the decisions of the Board and Court of Appeals on Thurston County Issues 2 and 3.

### **III. Conclusion**

For the reasons argued in this supplemental brief, the Supreme Court should affirm the decision of the Board and Court of Appeals.

Respectfully submitted March 6, 2008

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Attorney for Futurewise, Respondent

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<sup>31</sup> *Diehl v. Mason County*, 94 Wn. App. 645, 653 – 54, 972 P.2d 543, 547 (1999).

Supreme Court No. 80115-1

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**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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THURSTON COUNTY,  
Petitioner,

v.

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

&

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

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**SUPPLEMENTAL BRIEF OF RESPONDENT FUTUREWISE**

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## **I. Introduction**

This case hinges on the statutory interpretation of the Growth Management Act (GMA), chapter 36.70A RCW, and related statutes and the specific facts applicable to Thurston County. Futurewise's briefing in this case has shown that the Western Washington Growth Management Hearings Board (WWGMHB or Board) and Court of Appeals correctly interpreted and applied the law and that the Board and court decisions are based on substantial evidence. Further, Thurston County and the Intervenor failed to assign error in a timely manner to any of the Board's findings of fact, so they are verities on appeal.<sup>1</sup> Consequently, the Supreme Court should affirm the Board and Court of Appeals.

This Supplemental Brief builds on our earlier briefing with three arguments:

- In Part II(A), we amplify our argument that reading the GMA as a whole, counties and cities are required to review and, if necessary, revise their comprehensive plans and development regulations and

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<sup>1</sup> *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 488 – 89, 585 P.2d 71, 79 – 80 (1978); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn.App. 615, 628, 53 P.3d 1011, 1017 (2002) review denied *Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board*, 148 Wn.2d 1017, 64 P.3d 649 (2003).

that the county's and city's decisions whether to review and revise can be reviewed by the Boards and the courts.

- In Part II(B) we address the part of the Court of Appeals *Gold Star Resorts* decision relating to the comprehensive plan and development regulation provisions are subject to the GMA's requirement to review, and if needed, revise. Thurston County's statement of additional authorities citing to the *Gold Star Resorts* decision was filed after the other briefing in this case.
- In Part III(C) we show why urban growth areas must be sized to accommodate the State of Washington Office of Financial Management (OFM) population projection range and, if a county chooses to use one, a reasonable market factor.

## II. Argument

- A. **Read together, RCW 36.70A.130 and RCW 36.70A.280 authorize appeals of seven and ten year periodic reviews of comprehensive plans, urban growth areas, and development regulations when filed within 60 days of the notice of adoption for those decisions. (Thurston County Issues 1 – 4)**

Thurston County argues that the GMA's periodic review requirements mandate review only when the law has changed. This

interpretation flies in the face of the plain language of the GMA. RCW

36.70A.130(1)(a) governs periodic reviews and provides in relevant part:

Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.

The meaning of a statute is inherently a question of law and this court's review is de novo.<sup>2</sup> The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose.<sup>3</sup> This court considers the statute as a whole in order to give effect to all that the legislature has said, and uses related statutes to help identify the legislative intent in the provision in question.<sup>4</sup>

Thurston County argues that RCW 36.70A.130 only requires the county to review and revise its comprehensive plan and development regulations if the GMA itself has been changed and that a failure to review and revise unchanged portions cannot be appealed. However, RCW

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<sup>2</sup> *Department of Labor and Industries v. Gongyin*, 154 Wn.2d 38, 44 – 45, 109 P.3d 816, 819 (2005).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 44 – 45, 109 P.3d at 819.

36.70A.130(1)(b) provides in relevant part that “[l]egislative action means the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefor.” RCW 36.70A.130(4)(a) set a December 1, 2004 deadline for Thurston County to update its comprehensive plan and development regulations for its first “periodic update.” So read together, RCW 36.70A.130 required Thurston County to adopt a resolution or ordinance reviewing and, if needed, revising its comprehensive plan and development regulations to comply with the GMA by December 1, 2004.

The Boards have authority to review a petition that the County has failed to bring its comprehensive plan and development regulations into compliance with the GMA during an RCW 36.70A.130 review. RCW 36.70A.280(1) provides in relevant part that “[a] growth management hearings board shall hear and determine only those petitions alleging ... [t]hat a ... county[] or city planning under this chapter is not in compliance with the requirements of this chapter ....” The Washington Supreme Court has held that RCW 36.70A.280(1) “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.”<sup>5</sup>  
RCW 36.70A.130(7) specifically provides that “[t]he requirements  
imposed on counties and cities under this section shall be considered  
‘requirements of this chapter’ ...”

Thurston County adopted Resolution No. 13234 and Ordinance  
No. 13235 on November 22, 2004.<sup>6</sup> These legislative enactments violate  
RCW 36.70A.130 because they fail to correct sections of the  
comprehensive plan and development regulations that violate the GMA.  
After the deadline in RCW 36.70A.130(4)(a) and within 60 days of the  
county’s notice that it adopted the 2004 periodic review, Futurewise filed  
an appeal of the resolution, ordinance, and Thurston County’s failure to  
review and revise its comprehensive plan and development regulations as  
required by RCW 36.70A.130.<sup>7</sup>

Thurston County argues in its Petition for Discretionary Review  
and briefing that this appeal violated the 60 day statute of limitations for  
filing appeals of the comprehensive plan and development regulations the

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<sup>5</sup> *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d  
542, 558 – 59, 958 P.2d 962, 970 (1998).

<sup>6</sup> Thurston County Resolution No. 13234 p. 12, AR 1 p. 000017; Thurston County  
Ordinance No. 13235 p. 19, AR 1 p. 000035.

<sup>7</sup> *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-  
0002 Order on Motions to Dismiss p. \*6 of 9 (April 21, 2005), AR 14, pp.  
000323.

county did not review and revise. But this argument misunderstands what Futurewise appealed. Futurewise did not appeal the original comprehensive plan and development regulations as part of our 2005 appeal; we appealed the resolution and ordinance required by RCW 36.70A.130(1) and the county's failure to "review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter ..."<sup>8</sup>

Thurston County and Intervenors and *Amici* make much of RCW 36.70A.320(1)'s presumption of validity. However, both the Board and, in reviewing the Board's decision, the Court of Appeals afforded Thurston County the presumption of validity for Resolution No. 13234, Ordinance No. 13235, and the amendments they adopted along with the un-amended comprehensive plan and development regulations at issue in this appeal.<sup>9</sup> The presumption of validity in RCW 36.70A.320(1) and the GMA as a

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<sup>8</sup> *Thurston County v. Western Washington Growth Management Hearings Bd.*, 137 Wn. App. 781, 799, 154 P.3d 959, 968 (2007); *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002 Order on Motion for Reconsideration p. \*3 of 8 (August 11, 2005), AR 42, p. 002601.

<sup>9</sup> *Thurston County v. Western Washington Growth Management Hearings Bd.*, 137 Wn. App. 781, 809, 154 P.3d 959, 972 (2007) (board must presume a county's comprehensive plans and development regulations are valid upon adoption, but did not do so on the use of "innovative techniques" to provide a variety of rural densities and which is outside the issues in the county's petition for review).

whole do not allow a county or city to ignore RCW 36.70A.130's mandate that the comprehensive plan and development regulations be reviewed and revised to ensure compliance with the GMA.

While the facts of this case show that the urban growth area was too large, under the county's legal theory if the urban growth area was too small the size of the urban growth area could not be challenged because the county had not amended it and because the legislation affecting the provision has not changed. But this argument is inconsistent with the GMA and its related statutes. RCW 43.62.035 requires that "[a]t least once every five years or upon the availability of decennial census data, whichever is later, the office of financial management shall prepare twenty-year growth management planning population projections required by RCW 36.70A.110 ...." RCW 36.70A.110(2) requires the urban growth area to be "[b]ased upon" these projections. RCW 36.70A.130(3)(a) requires each county to review its urban growth areas "at least every ten years...." RCW 36.70A.130(3)(b) provides that "[t]he county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county

for the succeeding twenty-year period.” The Thurston County update at issue in this case was both a seven-year comprehensive plan review and a ten-year urban growth area review.<sup>10</sup> RCW 36.70A.280(1)(a) authorizes the Board to decide petitions alleging that a county or city planning under the GMA is not in compliance with the requirements of chapter 36.70A RCW. So the county’s argument that a Board only has jurisdiction over provisions the county amends or which are affected by legislative amendments is not consistent with the requirements of the GMA, because, among other problems, it ignores Thurston County’s requirement to re-evaluate its urban growth areas in the light of the new population projections.

It is also fundamentally unfair. The county’s argument is essentially that persons who object to comprehensive plan provisions or development regulations should have appealed them when they were first adopted. But this does not recognize that counties and cities such as Thurston County are growing and changing. Since Thurston County adopted its Comprehensive Plan in 1995, Thurston County’s population

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<sup>10</sup> Thurston County’s Petition for Discretionary Review No. 78148-6 (C/A No. 34172-7-II) pp. 6 – 7 (May 2, 2007).

increased by 32,081 people.<sup>11</sup> This is almost as much as a new Lacey, the second largest city in the county.<sup>12</sup> This is an example of “the continual changes” that is one of the reasons the GMA requires periodic updates.<sup>13</sup>

Under Thurston County’s theory no matter how much the county changes or how many new citizens arrive, if the county does not amend its comprehensive plan or development regulations, these provisions cannot be appealed. This disenfranchises the 32,081 people who were not in Thurston County in 1995 and, if their needs are not met, they have no recourse to the legal remedy the legislature and governor have granted them.

The Board and Court of Appeals correctly interpreted and applied the law. The Supreme Court should affirm the Board and Court of Appeals decisions on Thurston County Issue 1.

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<sup>11</sup> 1000 Friends of Washington November 15, 2004 Letter to the Board of County Commissioners for Thurston County p. 2, AR 10 p. 000235.

<sup>12</sup> *Id.*

<sup>13</sup> 2005 Wash. Laws Chapter 294 § 1; .130(1); .130(4).

**B. The *Gold Star Resorts* decision’s conclusion that the requirement to revise a comprehensive plan and development regulation only applies to provisions affected by intervening legislative revisions is contrary to the plain language of RCW 36.70A.130. (Thurston County Issue 1)**

Thurston County filed a statement of additional authorities in this case citing to Division I of the Court of Appeals’ *Gold Star Resorts* decision.<sup>14</sup> While the *Gold Star Resorts* court did conclude that the requirement to revise a comprehensive plan and development regulation only applies to provisions affected by intervening legislative revisions, that conclusion is contrary to the plain language of RCW 36.70A.130. RCW 36.70A.130(1)(a) provides that a “a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.” Neither RCW 36.70A.130 nor any other provision of the GMA limits this requirement to comprehensive plan or development regulation amendments affected by later GMA amendments. The *Gold Star Resorts* decision does not cite to any part of

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<sup>14</sup> *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, 166 P.3d 748 (2007) petition for review filed Wn. Supreme Ct. No. 80104 (Oct. 26, 2007).

the GMA for this proposition.<sup>15</sup> The only authority *Gold Star Resorts* cites is *1000 Friends of Washington v. McFarland*:

We agree with the Board that the review statute requires cities and counties to bring their plans into compliance with intervening legislative amendments.<sup>FN26</sup>

FN26. *See 1000 Friends of Washington*, 159 Wn.2d at 170, 149 P.3d 616 (seven year review properly included amendments to comply with substantive requirements added after plan initially adopted).<sup>16</sup>

But *1000 Friends of Washington v. McFarland* does not support the proposition that RCW 36.70A.130 review is limited to GMA amendments:

¶ 10 Planning is not a one time thing. King County originally adopted its Growth Management Comprehensive Plan in 1994. *See* King County Dep't of Development & Env'tl. Servs., <http://www.metrokc.gov/DDES/gmpc/index.shtm> (last visited Dec. 18, 2006). King County is required to review and, if needed, revise its comprehensive plan and implementing ordinances every seven years, most recently by December 1, 2004. RCW 36.70A.130(4)(a). Since King County originally began planning under the GMA, and since it has promulgated its first comprehensive plan, the legislature has added additional substantive requirements, including the explicit direction to use the "best available science" in planning. LAWS of 1995, ch. 347, § 105, *codified as* RCW 36.70A.172(1).<sup>17</sup>

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<sup>15</sup> *Id.*, 166 P.3d at 755.

<sup>16</sup> *Id.*, at 754 – 55.

<sup>17</sup> *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 169 – 70, 149 P.3d 616, 619 (2006) (Plurality Opinion).

While the Supreme Court did note that the law has changed since King County adopted its critical areas regulations, the decision did not limit the review and revise requirement to those circumstances. The prior sentence notes the requirement “to review and, if needed, revise its comprehensive plan and implementing ordinances every seven years.”<sup>18</sup> There is no language in *1000 Friends of Washington v. McFarland* limiting this requirement to amendments needed to comply with statutory changes.

The *Gold Star Resorts* ruling also raises significant procedural issues. The GMA has been amended every year since it was adopted. The sections of the GMA are also interrelated. So then what amendments trigger the review and revise requirement?

Requiring an inquiry into whether the GMA has changed will increase burdens on local governments, residents, and property owners. This will decrease, not increase, certainty for counties, cities, residents, property owners, and the development community. A county may try to rely on the fact that the requirements for the comprehensive plan have not changed since their last update, only to find that an amendment to a GMA

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

goal or other section of the GMA was sufficient to trigger the duty to review and revise, forcing the county to do the update over again. It will be better for all of the participants in the process to do the update once and do it right.

The *Gold Star Resorts* conclusion will also create a whole new set of jurisdictional reviews before the Boards. The Boards will first have to determine whether there had been a statutory amendment that triggered the duty to review and, if needed, revise the comprehensive plan and development regulations. Then the merits will need to be argued.

The potential for confusion and uncertainty is illustrated by the facts of this case. Thurston County argues that the duty to review and revise apparently does not apply because there had been no statutory changes applicable to the rural lands and urban growth areas.<sup>19</sup> However in 1997, two years after Thurston County's adopted its comprehensive plan, the legislature extensively amended the requirements for the rural element. These amendments included adopting definitions of rural

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<sup>19</sup> Thurston County's Petition for Discretionary Review No. 78148-6 (C/A No. 34172-7-II) p. 10 (May 2, 2007).

character and rural development.<sup>20</sup> The definition of rural development provides that:

“Rural development” refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.<sup>21</sup>

The 1997 rural element amendments also required the county to adopt measures containing or controlling rural development.<sup>22</sup> The amendments also included other requirements.<sup>23</sup>

All of these amendments would require Thurston County to amend the rural provisions at issue in this appeal, and the definition of rural development would require Thurston County to not include natural resource lands in its rural element. But given the county’s arguments, they apparently disagree. The 1997 amendments also adopted for the first time the requirement for counties and cities to “take action to review and, if

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<sup>20</sup> 1997 Wash. Laws Chapter 429 § 3(14); (15).

<sup>21</sup> 1997 Wash. Laws Chapter 429 § 3(15); RCW 36.70A.030(16).

<sup>22</sup> 1997 Wash. Laws Chapter 429 § 7(5)(c).

<sup>23</sup> 1997 Wash. Laws Chapter 429 § 7.

needed, revise its comprehensive land use plan and development regulations to ensure that the plan and regulations are complying with the ...” GMA.<sup>24</sup> Under the county’s legal theory, would this amendment alone have triggered the duty to review and revise the comprehensive plan and development regulations given that it is an amendment that occurred after the county adopted its comprehensive plan and development regulations?

In 2003, the legislature and governor amended the GMA to require that the “adoption of and amendments to [county and city] 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 ... consistent with the twenty-year population forecast from ...” OFM.<sup>25</sup> Under the county’s legal theory this would require a review and revision of the urban growth areas when Thurston County adopted the 2004 comprehensive plan update which adopted new growth targets. But again, Thurston County apparently disagrees. These amendments illustrate the difficulty in trying

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<sup>24</sup> 1997 Wash. Laws Chapter 429 § 10(1).

<sup>25</sup> 2003 Wash. Laws Chapter 333 § 1.

to decide whether a GMA amendment triggers the requirement to review and revise.

The *Gold Star Resorts* court erroneously interpreted this aspect of the GMA. That portion of the *Gold Star Resorts* decision was wrongly decided and should not be followed by the Supreme Court. As we have shown in Section II(A) above, the better interpretation is that the county must review and, if needed, revise its comprehensive plan and development regulations to comply with the GMA as part of the RCW 36.70A.130 updates.

**C. The plain language of RCW 36.70A.130 and the amendments to RCW 43.62.035 show that urban growth areas must be sized to conform to the OFM population projection range and, if a local government chooses to use one, a reasonable market factor. (Thurston County Issues 2 and 3)**

On pages 44 through 47 of Futurewise's Brief of Respondent, we show how the GMA limits the size of urban growth areas to the land area needed to accommodate the population projection chosen by the county within the range of the OFM forecasts and, if a county chooses to use it, a reasonable market factor. There are two additional arguments which support this position that the Supreme Court should consider.

RCW 43.62.035 requires that:

[a]t least once every five years or upon the availability of decennial census data, whichever is later, the office of financial management shall prepare twenty-year growth management planning population projections required by RCW 36.70A.110 for each county that adopts a comprehensive plan under RCW 36.70A.040 and shall review these projections with such counties and the cities in those counties before final adoption.”

RCW 36.70A.110(2) then provides that:

Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve.

Originally, OFM only made a single projection.<sup>26</sup> A 1995

amendment requires OFM to project a range bounded by a high and low projection:

Each projection shall be expressed as a reasonable range developed within the standard state high and low projection. The middle range shall represent the office’s estimate of the most likely population projection for the county.<sup>27</sup>

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<sup>26</sup> 1990 Wash. Laws 1<sup>st</sup> Ex. S. Chapter 17 § 32.

<sup>27</sup> 1995 Wash. Laws Chapter 162 § 1; RCW 43.62.035.

An article from the Gonzaga Law Review explains that this amendment strongly supports the argument that the population projections used to size the urban growth areas are to be bounded by the OFM range:

Semantically, this debate focused on the ambiguities inherent in the language of RCW 36.70A.110(2). By merely stating that UGA planning decisions must be somehow “based upon” OFM projections, the Act seemed to invite the interpretation that OFM projections were merely a starting point for determining the size and density of a UGA. In responding to this argument, however, the Central Board distinguished the noun “base” from the transitive verb “based upon,” holding that the Legislature’s use of the latter term constituted a clear instruction for counties to use OFM projections not merely as a starting point, but rather as a definitive parameter. Similarly, when opponents of OFM projections sought support for their position in the requirement that UGAs include “areas and densities sufficient” to accommodate projected growth, the Board held that in this context, the word “sufficient” was synonymous with “appropriate.” The Eastern Board reached the same conclusion, pointing out that the right to petition the growth boards for adjustment of OFM projections would have little practical value if those projections were not a mandatory planning constraint.

This position gained universal acceptance following adoption of the 1995 amendment requiring OFM to state its population forecasts as a range, which was seen as a sure signal that the Legislature intended local governments to plan their UGAs within the minimum and maximum endpoints of that range. At the same time, however, the 1995 amendments added the current language allowing counties to use a “market factor” in designating UGAs, thereby indicating that growth forecasts were not to be the sole determinant of final UGA boundaries. Thus, while it is now well settled that OFM population forecasts are a

mandatory element in UGA planning decisions, their precise role in determining the size and density of UGAs remains unanswered by the language of the Act.<sup>28</sup>

As part of the 1995 amendment, RCW 43.62.035 was amended to add: “A comprehensive plan adopted or amended before December 31, 1995, shall not be considered to be in noncompliance with the twenty-year growth management planning population projection if the projection used in the comprehensive plan is in compliance with the range later adopted under this section.”<sup>29</sup> Compliant comprehensive plans must use population projections within the OFM range for sizing their urban growth areas.

The Supreme Court and the Court of Appeals have recognized that the procedural criteria required by RCW 36.70A.190(4)(b) are helpful in interpreting the GMA.<sup>30</sup> As part of its analysis as to whether or not urban growth areas are limited in size to the OFM population projection range

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<sup>28</sup> Brent D. Lloyd, *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in Comprehensive Planning Under the Washington State Growth Management Act* 36 GONZ. L. REV. 73, 103 – 05 (2000/2001) (footnotes omitted).

<sup>29</sup> 1995 Wash. Laws Chapter 162 § 1.

<sup>30</sup> See for example *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25, 31 (2007); *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 835, 123 P.3d 102, 107 fn. 9 (2005); *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 841 – 42, 988 P.2d 27, 31 (1999) review denied *City of Des Moines v. Puget Sound Regional Council*, 140 Wn.2d 1027, 10 P.3d 403 (2000).

and a reasonable market factor, the Court of Appeals *Diehl* decision considered the procedural criteria. The Court of Appeals wrote:

And, further, WAC 365-195-335(3)(e)(v), which addresses requirements for setting UGAs, specifically states that the UGAs “should encompass a geographic area which *matches* the amount of land *necessary* to accommodate likely growth.” (Emphasis added [by the Court of Appeals].) Accordingly, the OFM projection places a cap on the amount of land a county may allocate to UGAs.<sup>31</sup>

The Supreme Court should follow WAC 365-195-335(3)(e)(v) which was adopted in 1992 and the *Diehl* decision which has been good law in Washington State for over eight years.

In this case, the Board and Court of Appeals correctly interpreted and applied the GMA. The Supreme Court should uphold the decisions of the Board and Court of Appeals on Thurston County Issues 2 and 3.

### **III. Conclusion**

For the reasons argued in this supplemental brief, the Supreme Court should affirm the decision of the Board and Court of Appeals.

Respectfully submitted March 6, 2008

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Attorney for Futurewise, Respondent

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<sup>31</sup> *Diehl v. Mason County*, 94 Wn. App. 645, 653 – 54, 972 P.2d 543, 547 (1999).