

80810-4

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2007 OCT 24 A 9:53

BY RONALD R. GARREITER

Court of Appeals Case No. 58379-4-I

Supreme Court Case No.

CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GOLD STAR RESORTS, INC.,

Respondent / Cross-Appellant,

v.

FUTUREWISE

Appellant, and

WESTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD and WHATCOM COUNTY,

Respondents.

ANSWER RAISING NEW ISSUES FOR REVIEW BY THE
SUPREME COURT

RIDDELL WILLIAMS P.S.
Ken Lederman, WSBA No. 26515
1001 Fourth Avenue, Suite 4500
Seattle, Washington 98154-1065
Telephone: (206) 624-3600

FUTUREWISE
Tim Trohimovich, WSBA No. 22367
Keith Scully, WSBA No. 28677
814 Second Avenue, Suite 500
Seattle, Washington 98104

FILED
OCT 26 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON

FILED AS ATTACHMENT
TO E-MAIL

(206) 343-0681

TABLE OF CONTENTS

<u>Topic</u>	<u>Page Number</u>
I. IDENTITY OF CROSS-PETITIONERS.....	1
II. INTRODUCTION AND REQUEST FOR RELIEF	1
III. CITATION TO COURT OF APPEALS DECISION	1
IV. ISSUES PRESENTED FOR REVIEW	1
V. STATEMENT OF THE CASE	2
VI. ARGUMENT FOR FUTUREWISE ISSUES.....	6
A. The Supreme Court should grant review under RAP 13.4(b)(1) and 13.4(b)(2) because the Court of Appeals decision regarding the scope and extent of the seven-year review process for Comprehensive Plans under the GMA conflicts with decisions of the Washington Supreme Court and the Court of Appeals. (Issue 1).....	7
B. The Supreme Court should grant review under RAP 13.4(b)(4) because the question of the proper scope of the seven-year review requirement for Comprehensive Plans under the GMA presents an issue of substantial public interest. (Issue 1).....	9
C. The Supreme Court should grant review under RAP 13.4(b)(4) because the question regarding the proper delineation of a LAMIRD boundary presents an issue of substantial public interest. (Issue 2)	11
VII. ANSWER TO GOLD STAR'S PETITION FOR REVIEW.....	14

A. The Court of Appeals’ decision regarding the application of the doctrines of Res Judicata and Collateral Estoppel is consistent with recent decisions of the Court of Appeals, and does not present an issue of substantial public interest.14

B. The decision of the Court of Appeals regarding the application of “bright-line rules” under the GMA is consistent with recent decisions of the Supreme Court and Court of Appeals, and does not present an issue of substantial public interest.17

VIII. CONCLUSION20

APPENDIX A: Relevant Statutory Provisions.

TABLE OF AUTHORITIES

Cases

<i>1000 Friends of Washington v. McFarland</i> , 159 Wn.2d 165, 169, 149 P.3d 616, 619 – 19 (2006) (Plurality Opinion).....	7, 8
<i>1000 Friends of Washington v. Thurston County</i> , WWGMHB Case No. 05-2-0002 Final Decision and Order p.*10 of 37 (July 20, 2005).....	8
<i>Alishio v. Dep’t of Soc. & Health Servs.</i> , 122 Wn. App. 1, 7, 91 P.3d 893 (2004).....	14, 15
<i>Better Brinnon Coalition v. Jefferson County</i> , WWGMHB Case No. 03-2-0007 (Compliance Order, 6-23-04).	11
<i>Christensen v. Grant Co. Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 307, 96 P.3d 957 (2004).....	14
<i>Gold Star Resorts, Inc. v. Futurewise, et.al</i> , ___ Wn.App. ___, 166 P.3d 748, (2007).....	passim
<i>Hadley v. Maxwell</i> , 144 Wn.2d 306, 311-12, 27 P.3d 600 (2001);.....	15
<i>Panesko v. Lewis County</i> , WWGMHB Case No. 00-2-0031c (FD&O March 5, 2001)	11
<i>Quadrant Corp. v. State Growth Management Hearings Bd.</i> , 154 Wn. 2d 224, 234, 110 P.3d 1132, 1137 (2005).	12
<i>Skagit Surveyors and Engineers, LLC v. Friends of Skagit County</i> , 135 Wn.2d 542, 546-47, 958 P.2d 962, 964 (1998)	2
<i>Somsak v. Criton Technologies/Heath Tena, Inc.</i> , 113 Wn. App. 84, 92, 52 P.3d 43 (2002)	14
<i>State v. Drake</i> , 16 Wn. App. 559, 563–64, 558, P.2d 828 (1976)	15
<i>Thurston County v. Western Washington Growth Management Hearings Bd.</i> , 137 Wn. App. 781, 154 P.3d 959 (2007),	9, 15, 16
<i>Viking Properties v. Holm</i> , 155 Wn.2d 112	5, 16, 19

<i>Vines v. Jefferson County</i> , WWGMHB Case No. 98-2-0018 (FD&O April 5, 1999).....	11
<i>Wells v. Western Washington Growth Mgmt. Hearings Bd.</i> , 100 Wn. App. 657, 860 P.2d 1024 (2000).	13
<i>World Wide Video of Washington, Inc. v. City of Spokane</i> , 125 Wn. App. 289, 305, 103 P.3d 1265, review denied, 155 Wn.2d 1014 (2005)	15
Statutes	
36.70A.020(2);.....	18
RCW 36.70A.030(4).....	2
RCW 36.70A.070	passim
RCW 36.70A.130	passim

I. IDENTITY OF CROSS-PETITIONERS

Futurewise is a non-profit Washington State corporation whose members are concerned with effective implementation of the State's Growth Management Act. Futurewise was the Appellant before the Court of Appeals, the Respondent before the Whatcom County Superior Court, and the Petitioner before the Western Washington Growth Management Hearings Board in this matter.

II. INTRODUCTION AND REQUEST FOR RELIEF

Futurewise respectfully requests that this court deny review on the two issues presented in Gold Star's petition, but grant review on the issues described herein.

III. CITATION TO COURT OF APPEALS DECISION

Gold Star Resorts, Inc. (Gold Star) seeks review of the Court of Appeals published opinion in *Gold Star Resorts, Inc. v. Futurewise, et.al*, No. 58379-4-I dated August 27, 2007 in a Petition for Review dated September 25, 2007.¹

IV. ISSUES PRESENTED FOR REVIEW²

- (1) Pursuant to the seven-year review requirements of RCW 36.70A.130, does a county or city only need to review and amend its comprehensive plan in order to comply with GMA amendments

¹ Gold Star attached a copy of the slip opinion to its petition. Futurewise cites to the subsequently-released Pacific Reporter version throughout this answer.

² In addition to those raised by Gold Star.

that are enacted after adoption of the previous comprehensive plan?

- (2) Pursuant to RCW 36.70A.070(5)(d)(iv), must each Local Area of More Intensive Rural Development (LAMIRD) be limited by the development existing as of July 1990, excluding vested development projects?

V. STATEMENT OF THE CASE

In 1990-91, the Washington Legislature enacted the GMA in response to problems associated with increased population in Washington State.³ Designated cities and counties are now required to make planning determinations that comply with the goals and requirements of the GMA.

A city or county operating under the GMA must adopt, implement, and maintain a Comprehensive Plan. A Comprehensive Plan is a generalized and coordinated land use policy statement adopted by a City Council under the GMA. RCW 36.70A.030(4). The GMA requires cities and counties to review and evaluate their Comprehensive Plans and development regulations on an ongoing basis. RCW 36.70A.130(1)(a). Local jurisdictions must review their Comprehensive Plans and development regulations every seven (7) years and, if needed, revise and update the Comprehensive Plans and development regulations to ensure continuing compliance with the GMA:

³ These problems included traffic congestion, school overcrowding, urban sprawl, and loss of rural lands. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 546-47, 958 P.2d 962, 964 (1998).

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

RCW 36.70A.130(1)(a); *see* Appendix A.

RCW 36.70A.130(1)(a) thus requires review of the entire comprehensive plan and development regulations, not just those provisions a county or city chooses to update and not just those parts of the comprehensive plan or development regulations affected by amendments to the GMA.

In 1997, Whatcom County adopted a comprehensive land use plan and associated regulations (“WCCP”), which included the designation of areas similar to LAMIRDs.⁴ Two months later, the Washington legislature enacted its first ever criteria for the designation and management of LAMIRDs.⁵

Whatcom County was required to review and revise its Comprehensive Plan by December 1, 2004. RCW 36.70A.130(4)(a).

⁴ *Gold Star Resorts, Inc. v. Futurewise, et.al.*, ___ Wn.App. ___, 166 P.3d 748, (2007) at ¶ 2.

⁵ *Id.* at ¶ 2.

Whatcom County completed its review in January 2005, but made no changes to its LAMIRD criteria or LAMIRDs, despite the fact that the law governing LAMIRDs had changed in the period between initial enactment and the 2005 review.⁶

Futurewise appealed the updated comprehensive plan to the Western Washington Growth Management Hearings Board (Board), contending that in its periodic review Whatcom County should have revised its rural density designations, LAMIRDs, and LAMIRD policies to comply with the new rural element and LAMIRD requirements.⁷

Whatcom County moved to dismiss, arguing that the new LAMIRD criteria do not affect an existing comprehensive plan.⁸ The Board rejected this argument, adhering to its view expressed in an earlier decision involving Whatcom County and Futurewise that a LAMIRD must comply with the GMA as amended.⁹

Gold Star Resorts, Inc. was granted intervenor status before the Board.¹⁰ Gold Star owns approximately 76 acres of land which has been

⁶ *Id.* at ¶3.

⁷ Among other issues. *Id.* at ¶ 4.

⁸ *Id.* at ¶5.

⁹ *Id.* at ¶ 5.

¹⁰ *Id.* ¶ 6.

designated as a “transportation corridor,” one of the designations attacked in Futurewise’s petition.¹¹

After a hearing, the Board issued a Final Decision & Order. The Board ruled that Whatcom County’s LAMIRD designation criteria, LAMIRDs, and rural densities did not comply with the goals and requirements of the GMA, and remanded the matter back to Whatcom County for further review and revision of its comprehensive plan.¹²

Gold Star, but not Whatcom County, appealed to Whatcom County Superior Court, which reversed the majority of the Board’s rulings.¹³ Futurewise appealed to the Washington Court of Appeals, Division I. On August 27, 2007, the Court of Appeals reversed the decision of the Whatcom County Superior Court and reinstated the Final Decision & Order of the Board. In particular, the Court of Appeals correctly determined that the requirements for res judicata and collateral estoppel were not met in this case.¹⁴ Moreover, the Court of Appeals correctly determined that the Board did not impose a “bright-line rule” in the light of *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).¹⁵

¹¹ *Id.* at ¶ 6.

¹² *Id.* at ¶ 7. Other provisions of the comprehensive plan not the subject to this appeal were also found to violate the GMA.

¹³ *Id.* at ¶ 8.

¹⁴ *Id.* at ¶¶ 14-16.

¹⁵ *Id.* at ¶¶ 34-39.

However, the Court of Appeals made two discrete yet significant errors of law in its opinion. First, the Court of Appeals held that under the seven-year review requirement of RCW 36.70A.130, the only provisions of a comprehensive plan which need to be addressed in a seven-year review are those affected by intervening legislative revisions.¹⁶ In other words, the Court held that RCW 36.70A.130 only required Whatcom County to amend its comprehensive plan in 2004 as necessary to comply with GMA amendments that came after adoption of the original comprehensive plan in 1997, rather than addressing any inconsistencies with the GMA found within its review, or pointed out by members of the public during the mandatory public comment period.¹⁷

Second, the Court held correctly that none of the provisions of the 2005 WCCP limited the LAMIRD areas to development existing as of July 1990, as required by RCW 36.70A.070(5)(d)(iv).¹⁸ However, in a footnote, the Court held that the term “existing” applied to “vested” development projects as well as projects already constructed.¹⁹

VI. ARGUMENT FOR FUTUREWISE ISSUES

¹⁶ *Id.* at ¶ 23.

¹⁷ *Id.*

¹⁸ *Id.* at ¶¶ 25-31.

¹⁹ *Id.* at ¶30, n.41.

A. **The Supreme Court should grant review under RAP 13.4(b)(1) and 13.4(b)(2) because the Court of Appeals decision regarding the scope and extent of the seven-year review process for Comprehensive Plans under the GMA conflicts with decisions of the Washington Supreme Court and the Court of Appeals. (Issue 1)**

The GMA establishes specific requirements with regard to the long-term management of a Comprehensive Plan. Review is ongoing, and the County is required to review and revise its Comprehensive Plan every seven years. RCW 36.70A.130(4)(a); *see* Appendix A.

No language in the GMA establishes any limitations on the required seven-year review and revision of Comprehensive Plans. Yet the Court of Appeals effectively rewrote the statutory language in its determination that RCW 36.70A.130(1) only requires jurisdictions to review and amend those portions of their Comprehensive Plans that are affected by amendments adopted in intervening legislative sessions.²⁰ Tellingly, Division I cites to no provision of the GMA or any court decision to support its conclusion.

This holding of the Court of Appeals is in direct conflict with decision from the Washington Supreme Court. In *1000 Friends of Washington et al. v. McFarland*, the Washington Supreme Court held that the periodic review requirements of RCW 36.70A.130(1)(a) mean that

²⁰ *Id.* at ¶ 24.

every jurisdiction must review, revise, and update its Comprehensive Plan and any corresponding development regulations on a regular basis to ensure that GMA requirements are consistently achieved:

Planning is not a one time thing. 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).²¹

Limiting the required periodic review of RCW 36.70A.130 only to intervening legislative amendments dramatically subverts one of the most important aspects of the GMA—the requirement for a continuous and dynamic process which ensures that all of the provisions of local land use plans are kept current and effective.²² RCW 36.70A.130(1)(a). As noted by the Supreme Court:

[A] far more reasonable way to read the statutory schema as a whole is that the process creates (hopefully) ever improving management of growth, in light of all of the different legitimate concerns of the stakeholders in the system. Nor do we find any evidence of legislative intent to treat the original comprehensive plan so differently from revised comprehensive plans. Instead, the continual process of revising management of land is itself an integral part of the structure established by the GMA.

McFarland, 159 Wn.2d at 186, 149 P.3d at 627.

²¹ *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 169, 149 P.3d 616, 619 – 19 (2006) (Plurality Opinion).

²² RCW 36.70A.070(9) provides that “[i]t is the intent that new or amended elements required after January 1, 2002, be adopted concurrent with the scheduled update provided in RCW 36.70A.130.

The holding of the Court of Appeals, Division I, is also in direct conflict with a recent decision by the Court of Appeals, Division II. In *Thurston County v. Western Washington Growth Management Hearings Bd.*, both the Board and the Court of Appeals correctly held that RCW 36.70A.130(1)(a) required jurisdictions to review and, if necessary, revise any comprehensive plan or development regulation that is inconsistent with the GMA.²³

B. The Supreme Court should grant review under RAP 13.4(b)(4) because the question of the proper scope of the seven-year review requirement for Comprehensive Plans under the GMA presents an issue of substantial public interest. (Issue 1)

Each jurisdiction, including Whatcom County, has a duty to ensure that their updated Comprehensive Plans are consistent with the goals and requirements of the GMA. RCW 36.70A.130. If not, the non-compliant portions of the Comprehensive Plans are subject to review by the applicable Growth Board. RCW 36.70A.130(1)(d); .280(1). That is exactly what happened in this case.

²³ 137 Wn. App. 781, 794-95, 154 P.3d 959, 967-66 (2007); *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002 Final Decision and Order p.*10 of 37 (July 20, 2005).

In enacting RCW 36.70A.130, the Legislature ensured that comprehensive plans would be periodically reviewed and adapted to changing and developing communities. The Washington Legislature stated plainly that the County must “review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the [GMA],” and the Legislature did not set limitations on the areas that must be reviewed. RCW 36.70A.130; *see*

Appendix A. As the Court of Appeals, Division II, correctly noted:

.... [B]y 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.” H.B. 2171, 59th LEG., Reg. Sess. § 1 (Wash. 2005).

Thurston County, 137 Wn. App. at 794-95.

This legislative requirement for periodic review suits the enforcement mechanism of the GMA. With no State oversight, many inconsistencies between a particular plan and the GMA may pass public scrutiny in the first adoption of a comprehensive plan, only to become apparent as the years go by and the plan’s mandates are implemented. Allowing a county to maintain a noncompliant provision even after the public has brought it to the county’s attention during a review period frustrates the public involvement and oversight components of the GMA.

C. **The Supreme Court should grant review under RAP 13.4(b)(4) because the question regarding the proper delineation of a LAMIRD boundary presents an issue of substantial public interest. (Issue 2)**

Limited Areas of More Intensive Rural Development

("LAMIRDs") are generally located in rural areas where more intensive development (whether residential, commercial or mixed use) existed prior to the enactment of the GMA and prior to the adoption of a Comprehensive Plan. RCW 36.70A.070(5)(d). LAMIRDs are often located, for example, at country crossroads where residential and commercial development is clustered around a service station, grocery store, feed store, or bank. These specific areas contain development and densities that, if not included in a LAMIRD, would be defined as urban in nature and otherwise would not be allowed in the rural areas. RCW 36.70A.020(18).

The GMA precludes any expansion of LAMIRDs in size, although properly managed infilling is allowed. RCW 36.70A.070(5)(d). In other words, these limited areas of pre-existing urban development in rural areas are allowed to continue, but must be contained.

A type (i) LAMIRD must have a Logical Outer Boundary ("LOB") defined by the built environment existing as of July 1, 1990, in order to "minimize and contain" existing and more intensively developed areas and

uses. RCW 36.70A.070(5)(d)(iv).²⁴ The inclusion of vast areas of undeveloped property within a LAMIRD violates the goals and requirements of the GMA.²⁵

In its decision, the Court of Appeals held correctly that LAMIRD boundaries are limited to development existing as of July 1990.²⁶ However, the court included a footnote stating that “existing” development includes vested projects, relying on this court’s holding in *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn. 2d 224, 234, 110 P.3d 1132, 1137 (2005).²⁷

The Court of Appeals misinterpreted the holding of *Quadrant* in this case. Specifically, the court in *Quadrant* interpreted the meaning of RCW 36.70A.110(1), which provides that “[a]n urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth.” *Quadrant Corp. v. State*

²⁴ To contain development within the LAMIRD, a county must draw the LOB very tightly around the built environment. A county may take steps to balance the need to contain LAMIRD boundaries with the desire to prevent abnormally irregular boundaries. RCW 36.70A.070(5)(d). But, “[t]he delineation of such boundaries does not require a concentric circle or a squared-off block.” *Vines v. Jefferson County*, WWGMHB Case No. 98-2-0018 (FD&O April 5, 1999).

²⁵ *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c (FD&O March 5, 2001). LAMIRDs must “not extend [growth] from one LAMIRD to the next” by including large amounts of undeveloped land, even under the guise of promoting “infill” development. *Better Brinnon Coalition v. Jefferson County*, WWGMHB Case No. 03-2-0007 (Compliance Order, 6-23-04).

²⁶ *Gold Star Resorts, Inc. v. Futurewise, et.al.*, ___ Wn.App. ___, 166 P.3d 748 at ¶ 30.

²⁷ *Id.* at ¶ 30, n.41.

Growth Management Hearings Bd., 154 Wn. 2d at 234. The Supreme Court concluded that since vesting commits land to development, a jurisdiction has the discretion to include vested projects in determining whether the area was characterized by urban growth. *Quadrant Corp.*, 154 Wn.2d at 240-41.

However, LAMIRDs and urban growth areas are held to completely different standards. While urban growth areas may be designated based on land “characterized by urban growth” in the manner discussed by the Court in *Quadrant*, for type (i) LAMIRDs the LOB must be “clearly identifiable and contained and where there is a logical boundary delineated predominately by the ‘built environment’” existing as of July, 1990. RCW 36.70A.070(5)(d)(i);(iv). The Legislature chose different terms for the two sections, and this court’s holding in *Quadrant* should not be imported wholesale into inapplicable areas of the GMA.

This distinction has substantial public interest due to the large number of urban lots platted in rural areas but not built prior to the GMA’s enactment. Broad swathes of rural area will be restructured into LAMIRDs if the court’s ruling is to stand, frustrating the GMA’s goals of containing urban sprawl and providing adequate services to residential development.

**VII. ANSWER TO GOLD STAR'S PETITION FOR
REVIEW**

- A. The Court of Appeals' decision regarding the application of the doctrines of Res Judicata and Collateral Estoppel is consistent with recent decisions of the Court of Appeals, and does not present an issue of substantial public interest.**

Gold Star has argued before the Board, Superior Court, and Court of Appeals that the Board's decisions were precluded by the doctrines of res judicata and collateral estoppel. However, the Court of Appeals decision was not only correct in this regard, but also consistent with recent precedent from the Court of Appeals, Division II and the prior decisions of this court.

Gold Star bases its argument entirely on settled law, and factually on a prior decision regarding the 1998 WCCP, not the 2005 review and update process or the 2005 WCCP.²⁸ The *Wells* case arose from a challenge by a local citizen (not Futurewise) to the WCCP adopted by Whatcom County in 1998, and not in 2005.²⁹

Gold Star never argued—because it cannot argue—that the Superior Court or the Court of Appeals conclusively declared that Whatcom County's LAMIRDs in the 1998 WCCP were valid. The

²⁸ See *Wells v. Western Washington Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 860 P.2d 1024 (2000).

²⁹ *Id.*

Wells case was decided on procedural grounds, and thus the substantive issues addressed by the instant petition have never before been adjudicated.³⁰

Even if the *Wells* decision had involved the same parties and had addressed the merits of the claim, the doctrines of res judicata³¹ and collateral estoppel³² both require a final judgment on the merits, as well as identity of subject matter.³³ Because neither the LAMIRDs in the 1998 WCCP nor the 2005 WCCP have been subject to a final judgment on the merits, and because the subject matter in this case involves the 2005 WCCP rather than the 1998 WCCP, the requirements for the doctrines of collateral estoppel

³⁰ *Gold Star Resorts, Inc. v. Futurewise, et. al.*, ___ Wn.App. ___, 166 P.3d 748 at ¶ 14.

³¹ To establish that the doctrine of Res Judicata precludes re-litigation of a claim in a subsequent action, there must be a concurrence of identity in four respects: (1) subject-matter; (2) cause of action; (3) persons and parties; and (4) in the quality of the persons for or against whom the claim is made. *Somsak v. Criton Technologies/Heath Tena, Inc.*, 113 Wn. App. 84, 92, 52 P.3d 43 (2002). The party asserting res judicata must establish the concurrence of identity as to all four respects. *Alishio v. Dep't of Soc. and Health Servs.*, 122 Wn. App. 1, 7, 91 P.3d 893, 896 (2004).

³² The party seeking to apply the doctrine of Collateral Estoppel must show that: (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen v. Grant Co. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). As with res judicata, the party asserting collateral estoppel must establish the concurrence of identity as to the four elements. *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 305, 103 P.3d 1265, review denied, 155 Wn.2d 1014 (2005).

³³ See *State v. Drake*, 16 Wn. App. 559, 563-64, 558, P.2d 828 (1976).

and res judicata are not met in this case.³⁴

Furthermore, Gold Star has identified neither conflicts in the law nor matters of public interest regarding these doctrines. A recent case addressing very similar facts made it clear that both res judicata and collateral estoppel are settled law when the GMA is at issue. In *Thurston County v. Western Washington Growth Management Hearings Bd.*, 137 Wn. App. 781, 154 P.3d 959 (2007), the appellant argued res judicata and collateral estoppel applied in a manner nearly identical to the arguments of Gold Star. In rejecting the arguments, the Court held:

Futurewise was not a party to or in privity with a party to a prior challenge to the Thurston County Urban Growth Area (UGA), a requirement for application of the doctrines of res judicata and collateral estoppel. *Thurston County* at *15 (citing *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)). Additionally, a challenge to a 2004 update of a comprehensive plan is not the same as a challenge to the original 1994 enactment of a comprehensive plan.

Thurston County, 137 Wn. App. at 799. Thus, res judicata and collateral are settled law, and there is no public interest in taking yet another case involving similar facts and identical law.

³⁴ Additionally, with regard to persons or parties, Futurewise was not a party to the *Wells* appeal. Therefore, there is no identity of persons or parties. *Somsak*, 113 Wn. App. at 92.

B. The decision of the Court of Appeals regarding the application of “bright-line rules” under the GMA is consistent with recent decisions of the Supreme Court and Court of Appeals, and does not present an issue of substantial public interest.

Gold Star argues that the Board improperly applied a “bright line” rule in making its decision that Whatcom County allowed urban densities in its rural areas. Gold Star focuses entirely on the case of *Viking Properties v. Holm*, 155 Wn.2d 112, in which the Supreme Court held that:

[T]he GMA creates a general "framework" to guide local jurisdictions instead of "bright line" rules. See RCW 36.70A.320.

Viking Properties, 155 Wn.2d at 129.

Before the Board, Futurewise challenged several of the rural densities instituted by Whatcom County. Futurewise presented substantial evidence to establish that the densities allowed by Whatcom County in rural areas would impact environmentally sensitive waterfronts and other fragile rural areas, increase the depletion of groundwater which adversely affects existing water rights holders and stream flows, and increase the likelihood of salt water intrusion into drinking water aquifers. Futurewise also presented substantial evidence to establish that allowing these densities in these rural areas would increase impervious surfaces and

require tree removal to an extent that water quality and salmon habitat are imperiled.³⁵ Moreover, Futurewise presented substantial evidence to establish that continuous development at these increased densities would necessitate urban services that will be expensive to deliver to outlying rural areas.³⁶ Simply put, as the Court of Appeals found, Futurewise presented substantial evidence to establish that these Rural Densities in the 2005 WCCP were destined to damage rural lands, interfere with rural uses (such as hunting and fishing), rural development, and destroy rural character.

Whatcom County did not present any evidence to justify the challenged Rural Densities. In fact, Whatcom County conceded, both in its Hearing Brief and at oral argument, that the challenged rural densities did not comply with the GMA.³⁷

³⁵ Under the GMA, protection of the Rural Element means protection of “surface water and ground water resources.” RCW 36.70A.070(5)(c)(iv).

³⁶ The Costs of Sprawl - 2000, which was provided to Whatcom County during the process of drafting the Amendments to the WCCP, clearly documents how low density sprawl development of the type allowed by the designations and zones in the WCCP results in higher water, sewer, and road infrastructure costs, and increases travel costs for families when compared to more compact development.

³⁷ *Gold Star Resorts, Inc. v. Futurewise, et. al.*, ___ Wn.App. ___, 166 P.3d 748 at ¶ 40. In the recent case before the Court of Appeals, Division II, Thurston County also conceded at oral argument before the Board that densities greater than one dwelling unit per five acres are not rural densities unless they are part of a limited area of more intensive rural development (LAMIRD). *Thurston County*, 137 Wn. App. at 807. Like the Goldstar Court, the *Thurston County* court relied on that concession in determining a violation of the GMA.

Based on the evidence presented by Futurewise and the concessions of Whatcom County, the Board correctly determined that the challenged provisions of the 2005 WCCP fostered and encouraged an increase in allowable density throughout Rural Areas in Whatcom County, and that the end result would be urban growth³⁸ and development in Rural Areas that would not only constitute “sprawl,” but would also violate the specific planning goals and requirements of the GMA and result in urban growth in the rural area.³⁹ RCW 36.70A.020(2); .030(17); .070(5); .110(1).

The only evidence Gold Star presented in support of its argument that the Board had applied a “bright line” rule was the following statement in the Board’s Final Decision and Order:

While the GMA does not establish a maximum residential rural density, all three of the Boards have found that rural residential densities are not more intense than one dwelling unit per five acres.⁴⁰

³⁸ “Urban growth” encompasses growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces which is incompatible with the use of land for the production of food, the production of agricultural products, the extraction of mineral resources, or other rural uses and developments. RCW 36.70A.030(17); *Quadrant Corp.*, 154 Wn.2d at 234.

³⁹ The GMA is silent on the specific development densities which are consistent with the Rural Element. However, the Court of Appeals has held that densities of one dwelling unit per 2½ acres (or denser) are urban densities that are prohibited in the rural area. *Diehl*, 94 Wn. App. at 655-57. And the Supreme Court has separately held that vested one-acre lot subdivisions meet the definition of urban growth. *Quadrant Corp.*, 154 Wn.2d at 247.

⁴⁰ *Gold Star Resorts, Inc. v. Futurewise, et al.*, ___ Wn.App. ___, 166 P.3d 748. at ¶ 34.

This statement did not establish a “bright line” rule. To the contrary, the overwhelming substantive evidence in the record establishes that the Board made its decision based on the facts presented, and looked (appropriately) to prior decisions of the Growth Management Hearings Boards and courts for guidance.

The Court of Appeals correctly examined the *Viking Properties* decision and its application in the present case.⁴¹ Neither the Board nor the Court of Appeals established a “bright-line” rule regarding the Rural Densities in the 2005 WCCP. *Viking Properties*, 155 Wn.2d at 128-130. The Board examined the 2005 WCCP and the evidence presented, including the concession of Whatcom County and determined that specific rural densities established under the 2005 WCCP were inconsistent with the goals and requirements of the GMA. Further, the Court of Appeals correctly noted that the Board did not set any particular density for Whatcom County to follow, other than to apply the established goals and requirements of the GMA.

VIII. CONCLUSION

For the reasons argued herein, Futurewise respectfully requests that this court deny review of the two legal issues presented by intervenor Gold Star but grant review on the grounds described herein.

⁴¹ *Id.* at ¶¶ 34-39.

DATED this 24th day of October, 2007.

Respectfully submitted,

FUTUREWISE

By: _____
Keith Scully, WSBA No. 28677
Tim Trohimovich, WSBA No. 22367

Ken Lederman, WSBA No. 26515
RIDDELL WILLIAMS P.S.

DECLARATION OF SERVICE

I am a resident of the State of Washington, residing or employed in Seattle, Washington and employed as an attorney for Futurewise.

My business address is: Futurewise, 814 Second Avenue, Suite 500, Seattle, Washington 98104.

I am over 18 years of age, not a party to the above entitled action, and competent to be a witness herein.

On the date and in the manner indicated below, I caused true copies of the **ANSWER RAISING NEW ISSUES FOR REVIEW BY THE SUPREME COURT** in the above-entitled caption to be served on:

Jack O. Swanson
John C. Belcher
Belcher, Swanson, Lackey, Doran, Lewis
Battersby Field Professional Bldg.
900 Dupont Street
Bellingham, WA 98225-3105
(360) 734-6390
By U.S. Mail

Whatcom County Prosecuting Attorney
Attn: Karen N. Frakes
311 Grand Avenue
Bellingham, WA 98225
(360) 676-6784
By U.S. Mail

Martha P. Lantz
Assistant Attorney General
Attorney General of Washington
Licensing and Administrative Division
1125 Washington Street
P.O. Box 40110
Olympia, WA 98504-0110

(360) 753-2702
By U.S. Mail

I declare under penalty of perjury that the forgoing is true and correct and that this declaration was executed this 24th day of October, 2007 at Seattle, Washington.

Keith Scully, WSBA No. 28677

APPENDIX A

CITATIONS FROM GROWTH MANAGEMENT ACT

RCW 36.70A.070 - Comprehensive plans — Mandatory elements.

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

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

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

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

manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community.

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

(4) A utilities element consisting of the general location, proposed location, and capacity of all existing and proposed utilities, including, but not limited to, electrical lines, telecommunication lines, and natural gas lines.

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

(a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines,

conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and ground water resources; and

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

(d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:

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

(A) A commercial, industrial, residential, shoreline, or mixed-use area shall be subject to the requirements of (d)(iv) of this subsection, but shall not be subject to the requirements of (c)(ii) and (iii) of this subsection.

(B) Any development or redevelopment other than an industrial area or an industrial use within a mixed-use area or an industrial area under this

subsection (5)(d)(i) must be principally designed to serve the existing and projected rural population.

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

(ii) The intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development. A small-scale recreation or tourist use is not required to be principally designed to serve the existing and projected rural population. Public services and public facilities shall be limited to those necessary to serve the recreation or tourist use and shall be provided in a manner that does not permit low-density sprawl;

(iii) The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents. Rural counties may allow the expansion of small-scale businesses as long as those small-scale businesses conform with the rural character of the area as defined by the local government according to *RCW 36.70A.030(14). Rural counties may also allow new small-scale businesses to utilize a site previously occupied by an existing business as long as the new small-scale business conforms to the rural character of the area as defined by the local government according to *RCW 36.70A.030(14). Public services and public facilities shall be limited to those necessary to serve the isolated nonresidential use and shall be provided in a manner that does not permit low-density sprawl;

(iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing

areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl;

(v) For purposes of (d) of this subsection, an existing area or existing use is one that was in existence:

(A) On July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter;

(B) On the date the county adopted a resolution under RCW 36.70A.040(2), in a county that is planning under all of the provisions of this chapter under RCW 36.70A.040(2); or

(C) On the date the office of financial management certifies the county's population as provided in RCW 36.70A.040(5), in a county that is planning under all of the provisions of this chapter pursuant to RCW 36.70A.040(5).

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

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

(a) The transportation element shall include the following sub elements:

(i) Land use assumptions used in estimating travel;

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

(iii) Facilities and services needs, including:

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

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

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

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

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

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

(iv) Finance, including:

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

(B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year street, road, or transit program required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems. The multiyear financing plan should be coordinated with the six-year improvement program developed by the department of transportation as required by **RCW 47.05.030;

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

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

(vi) Demand-management strategies;

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

(b) After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation

improvements or strategies to accommodate the impacts of development are made concurrent with the development. These strategies may include increased public transportation service, ride sharing programs, demand management, and other transportation systems management strategies. For the purposes of this subsection (6) "concurrent with the development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

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

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

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

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

two years before local government must update comprehensive plans as required in RCW 36.70A.130.

RCW 36.70A.130 - Comprehensive plans — Review procedures and schedules — Amendments.

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

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

(c) The review and evaluation required by this subsection may be combined with the review required by subsection (3) of this section. The review and evaluation required by this subsection shall include, but is not limited to, consideration of critical area ordinances and, if planning under RCW 36.70A.040, an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management.

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

(2)(a) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the

comprehensive plan are considered by the governing body of the county or city no more frequently than once every year. "Updates" means to review and revise, if needed, according to subsection (1) of this section, and the time periods specified in subsection (4) of this section or in accordance with the provisions of subsections (5) and (8) of this section. Amendments may be considered more frequently than once per year under the following circumstances:

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

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

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

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

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

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

(3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban

growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas.

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

(4) The department shall establish a schedule for counties and cities to take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter. Except as provided in subsections (5) and (8) of this section, the schedule established by the department shall provide for the reviews and evaluations to be completed as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

guarantees from those accounts established in RCW 43.155.050 and 70.146.030.

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

OFFICE RECEPTIONIST, CLERK

To: Keith Scully

Subject: RE: Document for filing in Gold Star Resorts v. Futurewise, S.Ct. No. pending, COA 58379-4-I

rec. 10-24-07

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----

From: Keith Scully [mailto:Keith@futurewise.org]

Sent: Wednesday, October 24, 2007 9:47 AM

To: Supreme@courts.wa.gov.

Cc: Tim Trohimovich; Lederman, Ken; Lantz, Martha (ATG); kfrakes@co.whatcom.wa.us

Subject: Document for filing in Gold Star Resorts v. Futurewise, S.Ct. No. pending, COA 58379-4-I

Attached for filing please find Futurewise' Answer with additional issues to petition for review, including declaration of service and attachment, in Gold Star Resorts Inc. v. Futurewise, Supreme Court No. pending, COA No. 58379-4-I.

Paper copies will be served on the other parties via U.S. Mail today.

Thank you!

Keith Scully, WSBA # 28677

Legal Director

Futurewise

email: keith@futurewise.org

web: www.futurewise.org

814 Second Avenue, Suite 500

Seattle, WA 98104-1530

p 206 343-0681, ext. 114

f 206 709 8218

Our mission at Futurewise is to promote healthy communities

and cities while protecting shorelines, working farms and forests for this and future generations.