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Court of Appeals No. 58379-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GOLD STAR RESORTS, INC.,
Respondent / Cross-Appellant,

v.

FUTUREWISE

Appellant, and

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD and WHATCOM COUNTY,

Respondents.

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APPEAL FROM THE SUPERIOR COURT FOR WHATCOM COUNTY
THE HONORABLE STEVEN J. MURA
Whatcom County Superior Court No. 05-2-02405-1

OPENING BRIEF OF FUTUREWISE

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I.
INTRODUCTION

On September 20, 2005, the Western Washington Growth Management Hearings Board (“Board”) held that certain provisions of the 2005 Whatcom County Comprehensive Plan (“2005 WCCP”) did not comply with Washington’s Growth Management Act, Chapter 36.70A RCW (“GMA”). Whatcom County did not appeal the Board’s Final Decision and Order (“FD&O”).

On October 18, 2005, Gold Star, Inc. (“Gold Star”), an intervenor in the Board adjudication, filed a Petition of Review with the Whatcom County Superior Court. On June 8, 2006, the Superior Court issued its ruling, reversing five of the Board’s conclusions of law.

The five determinations of the Board at issue in this case concern two critical aspects of the 2005 WCCP: (1) Conclusions of Law D, E, G, & H regarding Local Areas of More Intense Rural Development, also known as LAMIRDs; and (2) Conclusion of Law I regarding Rural Densities. Futurewise, the original Petitioner before the Board, respectfully submits that the Superior Court erred in its rulings on both procedural and substantive grounds.

Procedurally, Gold Star never raised the issue of Rural Densities before the Board. The Washington Administrative Procedure Act, Chapter

34.05 RCW, mandates that new issues may be raised on appeal only in specific circumstances, none of which are present in this case. RCW 34.05.554. As such, the Superior Court erred in permitting Gold Star to challenge the Rural Densities established in the 2005 WCCP.

Substantively, all of the Board's Findings of Fact were supported by substantial evidence. Moreover the Board's Conclusions of Law were consistent not only with the evidence, but also with the goals and objectives of the GMA. Gold Star failed to demonstrate that the Board's Findings of Fact and Conclusions of Law were invalid, and the Superior Court erred in ruling otherwise.

In sum, the Superior Court made three separate errors: (1) the Court erred in not ruling on, and therefore denying, Futurewise's motion to strike all of Gold Star's arguments regarding Rural Densities; (2) the Court erred in reversing the Board's Conclusions of Law D, E, G and H concerning LAMIRDs; and (3) the Court erred in reversing the Board's Conclusion of Law I concerning Rural Densities. Futurewise respectfully requests that this Court reverse the Order Granting Petition for Review and reinstate the Findings of Fact and Conclusions of Law issued by the Board.

II.
ASSIGNMENTS OF ERROR

1. Assignment of Error No. 1

The Superior Court erred in reversing the Board's Conclusions of Law D, E, G, and H concerning LAMIRDs.

Statement of Issues Pertaining to Assignment of Error No. 1:

- A. Did Futurewise present substantial evidence to support the Board's Conclusions of Law that provisions of the 2005 WCCP regarding LAMIRDs did not comply with the GMA?
- B. Did the Board act properly by remanding the 2005 WCCP back to Whatcom County, and ordering Whatcom County to review and revise any and all provisions of the 2005 WCCP regarding LAMIRDs that were not compliant with the GMA?

2. Assignment of Error No. 2

The Superior Court erred in denying Futurewise's motion to strike all of Gold Star's arguments regarding Rural Densities.

Statement of Issue Pertaining to Assignment of Error No. 2:

Should the Whatcom County Superior Court have precluded Gold Star from presenting any arguments concerning Rural Densities when the Administrative Procedure Act, RCW 34.05.554, does not permit a party to raise new issues in an administrative appeal?

3. Assignment of Error No. 3

The Superior Court erred in reversing the Board's Conclusion of Law I concerning Rural Densities.

Statement of Issues Pertaining to Assignment of Error No. 3:

- A. Did the Board apply a "bright-line rule" in its analysis of Rural Densities under the 2005 WCCP?
- B. Did Futurewise present substantial evidence to support the Board's Conclusion of Law that Rural Densities established by Whatcom County under the 2005 WCCP did not comply with the GMA?

III.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. The Growth Management Act, Chapter 36.70A RCW

In 1990-91, the Washington Legislature enacted the GMA in response to problems associated with increased population in Washington State, particularly in the Puget Sound area.¹ Designated cities and counties are now required to make planning determinations that comply with the goals and requirements of the GMA. *See* Chapter 36.70A RCW.

Planning under the GMA consists of six steps:

¹ 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).

- Step 1: Adopt county-wide planning policies to establish a countywide framework from which county and city Comprehensive Plans and development regulations are developed so that the documents are consistent.
- Step 2: Identify and adopt development regulations to protect critical areas and conserve agricultural lands, forest lands, and mineral resource lands.
- Step 3: Designate Urban Growth Areas.
- Step 4: Prepare and adopt Comprehensive Plans.
- Step 5: Adopt development regulations to carry out the Comprehensive Plan and other steps to implement and ensure consistency with the Comprehensive Plan.
- Step 6: Evaluate and update the Comprehensive Plan and development regulations according to a specific statutory schedule.

Counties and cities that must plan or choose to plan under the GMA are required to complete the steps in order and to comply with GMA goals and requirements for each step. RCW 36.70A.040(4); .130; .320(3).

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).

2. The Update and Amendment of the Whatcom County Comprehensive Plan

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:

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.

Each jurisdiction must perform the required review and revision of its Comprehensive Plan according to the schedule set forth in the GMA. RCW 36.70A.130(4). Whatcom County was required to review and revise its Comprehensive Plan by December 1, 2004. RCW 36.70A.130(4)(a).

B. PROCEDURAL BACKGROUND

1. Whatcom County Updates its Comprehensive Plan

In 2004-05, Whatcom County performed the required update of the Whatcom County Comprehensive Plan (“WCCP”). CP 73, 662; RCW 36.70A.130(4)(a). Futurewise submitted multiple comments to Whatcom County during the process of updating and amending the WCCP. CP 716-

834. Futurewise asserted that Whatcom County failed to revise several pre-existing land use designations, policies, and zoning provisions within the WCCP in a manner that complied with the GMA. CP 716-834.

Two specific areas of non-compliance addressed by Futurewise in its comments to Whatcom County were: (1) the failure to comply with GMA requirements regarding limited areas of more intensive rural development (“LAMIRDs”); and (2) the failure to comply with GMA requirements regarding Rural Densities. CP 716-727, 740-765, 805-808.

In particular:

- Futurewise asserted that Policies 2GG-2, 2GG-3, 2HH-3, 2JJ-5, 2LL-4 and 2NN-7 within the Comprehensive Plan would improperly allow and encourage the expansion of LAMIRDs.
- Futurewise asserted that Designation Descriptors for the Small Town, Crossroads Commercial, Suburban Enclave, Transportation Corridor, and Resort/Recreational areas did not incorporate the required LAMIRD criteria established in RCW 36.70A.070(5)(d).
- Futurewise asserted that Whatcom County had not properly designated the logical outer boundary (LOB) for a variety of proposed (LAMIRDs) on Map 8 of the 2005 WCCP (except for Point Roberts).
- Futurewise asserted that Whatcom County failed to protect rural lands and rural character by allowing densities of greater than one dwelling unit per five acres in rural areas.

CP 676-677; 740-834. However, Whatcom County did not amend its proposed update and amendments to the WCCP. CP 704-715; 835-917.

On January 28, 2005, Whatcom County enacted Resolution 2005-06, stating that it had completed its seven-year review, revised the Comprehensive Plan and associated development regulations (hereafter, “2005 WCCP”), and “addressed changed conditions and maintained continued compliance with the Growth Management Act.” CP 704-715; RCW 36.70A.130(1)(a). In addition, Whatcom County adopted 22 ordinances and asserted that each ordinance complied with GMA requirements. CP 704-715; 835-917.

2. **Futurewise Appeals the 2005 WCCP to the Growth Management Hearings Board**

On March 25, 2005, Futurewise filed a Petition for Review with the Western Washington Growth Management Hearings Board (“Board”). CP 277-284. Futurewise asserted, in relevant part, that provisions of the 2005 WCCP regarding LAMIRDs and Rural Densities did not comply with the goals and requirements of the GMA. CP 277-284.

On July 13, 2005, Futurewise submitted its Pre-Hearing Brief to the Board. CP 673-703. On July 21, 2005, Gold Star filed a Motion for Intervention, arguing that Futurewise’s appeal threatened Gold Star’s private property located within a LAMIRD established for the

Transportation Corridor of the Gateway Industrial Area. CP 920-932. Gold Star did not contest Futurewise's appeal of the designation of Rural Densities in the 2005 WCCP. CP 920-932. Futurewise and Whatcom County did not oppose Gold Star's Motion for Intervention. CP 1031-34.

On August 1, 2005, Whatcom County filed its Response Brief. CP 1080-1102. Whatcom County conceded that if Futurewise were to prevail on its arguments regarding the LAMIRDs designated in the 2005 WCCP, then certain Rural Densities designated in the 2005 WCCP would necessarily violate GMA goals and requirements. CP 1093-94.

On August 3, 2005, Gold Star filed its brief as Intervenor. CP 1410-1419. Consistent with its Motion for Intervention, Gold Star did not address the issue of Rural Densities in its brief. CP 1410-1419. On August 9, 2005, Futurewise submitted its Reply Brief. CP 1530-1544.

On August 18, 2005, the Washington Supreme Court issued its decision in *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005) (hereafter, "*Viking Properties*"). Neither Gold Star nor Whatcom County moved to supplement the record or to present additional argument regarding the *Viking Properties* decision. CP 1548-1549.

On September 20, 2005, the Board issued a Final Decision and Order ("FD&O"). CP 1546-1583. The Board held that Whatcom County

failed to review and revise the WCCP in compliance with RCW 36.70A.130. CP 1546-1583. The Board concluded, in relevant part, that:

- Whatcom County complied with the GMA in the adoption of Comprehensive Plan Policies 2GG-3, 2HH-3, 2JJ-5, 2LL-4, and 2NN-7.
- Whatcom County failed to comply with the GMA in the adoption of Comprehensive Plan Policy 2GG-2.
- Whatcom County failed to update and revise the Designation Descriptors in the 2005 WCCP, such that the LAMIRDs in the 2005 WCCP would not be limited and contained as required by RCW 36.70A.070(5)(d).

CP 1575-1581.

Because Whatcom County had failed to exercise its discretion and adopt LAMIRD Designation Descriptors that complied with the GMA, the Board could not determine whether the LAMIRD boundaries designated in Map 8 of the 2005 WCCP complied with the GMA.² CP 1562-1564. The Board remanded the 2005 WCCP back to Whatcom County to adopt compliant LAMIRD Designation Descriptors, and to utilize and apply GMA-compliant Designation Descriptors in the mapping of all LAMIRDs designated in the 2005 WCCP. CP 1562-1564. The Board also ordered

² GMA-compliant Designation Descriptors are needed to establish a basis for the LAMIRD boundaries in a Comprehensive Plan. The Board held that until Whatcom County adopted compliant criteria for the designation of LAMIRDs and applied those criteria to draw the logical outer boundaries, Whatcom County could not map compliant LAMIRDs. CP 1562-1564.

the County to establish a record and justify the choices made in the designation of LAMIRD boundaries in the 2005 WCCP, and to ensure that designated LAMIRDs will “minimize and contain” more intensive rural development.³ CP 1562-1564; RCW 36.70A.070(5)(d)(iv); .130(b).

Additionally, the Board held, based primarily on Whatcom County’s concession, that the Rural Densities established in the 2005 WCCP would not prevent sprawl and protect rural lands and rural character as required by the GMA. RCW 36.70A.020(2); .070(5)(b); .130. CP 1566-1568.⁴ As such, the Board concluded that Rural Densities in the 2005 WCCP did not comply with GMA requirements. CP 1566-1568.

3. Gold Star Appeals the Board’s Final Decision and Order to the Whatcom County Superior Court

On October 18, 2005, Gold Star filed a Petition for Review of the Board’s FD&O with the Superior Court pursuant to the Washington Administrative Procedures Act (“APA”), Chapter 34.05 RCW. CP 1709-1714. Whatcom County did not file a Petition for Review. CP 1584-85.

³ The Board analogized Whatcom County’s duty to the “show your work” requirement for the establishment of urban growth areas (UGAs). CP 1563; see *City of Tacoma v. Pierce County*, CPSGMHB Case No. 94-3-0001 (Final Decision and Order, July 5, 1994). Put another way, the Board held that Whatcom County must establish a record to show that it addressed the statutory considerations and the basis for its decisions in the 2005 WCCP. CP 1563; see RCW 36.70A.130(b).

⁴ The Board ruled against Futurewise on other issues, but Futurewise did not appeal those aspects of the Board’s decision. CP 1546-1583.

Gold Star submitted its Opening Memorandum on March 10, 2006. CP 218-273. Gold Star challenged the Board's Conclusions of Law regarding LAMIRDs. CP 226-233. Gold Star also challenged the Board's Conclusions of Law regarding Rural Densities, even though Gold Star did not challenge Rural Densities before the Board. CP 233-235.

On April 10, 2006, Futurewise filed its Opposition Memorandum, as well as a Motion to Strike all the arguments submitted by Gold Star regarding Rural Densities. CP 175-215. Futurewise argued that Gold Star could not raise new issues on appeal. RCW 34.05.554; CP 203-215.

In its Response to the Motion to Strike, Gold Star admitted that it did not address the issue of Rural Densities before the Board. CP 170. Yet despite ruling on a separate Motion to Strike, the Superior Court never issued a ruling on the Motion to Strike and allowed Gold Star to address the issue of Rural Densities. CP 114-117.

On June 8, 2006, the Superior Court issued its Order Granting Petition for Review. CP 114-117. The Court reversed the Board's conclusions of law D, E, G, and H concerning LAMIRDs, stating that these Conclusions of Law "constitute erroneous interpretations or applications of the law for purposes of RCW 34.05.570(3)(d)." CP 114-117. In particular, the Court ruled that:

- A. The LAMIRDs were the subject of prior litigation and were affirmed by this Court in 1998 and by the Court of Appeals in *Wells v. WWGMHB, et. al.*, 100 Wn. App. 657, 860 P.2d 1024 (2000).
- B. RCW 36.70A.130(1) does not require counties to start from scratch and justify everything in their comprehensive plans and development regulations every seven years. Rather, the statute requires that counties review and evaluate their comprehensive plans and development regulations “identifying the revisions made, or that a revision was not needed and the reasons therefore.” This statute gives counties considerable discretion to balance the need for finality in land use management with the need to ensure compliance with the purposes and goals of the Growth Management Act (RCW 36.70A).

CP 115.

Additionally, the Court reversed the Board’s Conclusion of Law I concerning Rural Densities, stating that this Conclusion of Law represented “an erroneous interpretation or application of the law for purposes of RCW 34.05.570(3)(d) and/or constitutes action outside the Board’s statutory authority or jurisdiction for purposes of RCW 34.05.570(3)(b). . . .” CP 116. The Court did not determine that the Rural Densities in the 2005 WCCP complied with GMA requirements; rather, the Court held that the Board imposed a “bright-line rule” in reaching its determination. CP 116.

On June 26, 2006, Futurewise filed a timely appeal. CP 67-68.

IV.
STANDARD OF REVIEW

A. Standard of Review for Growth Management Hearings Boards

The evaluation and enforcement of the GMA depends upon appeals to the three Growth Management Hearings Boards (“Growth Boards”), which hear and decide appeals alleging that Comprehensive Plans, development regulations, and/or shoreline master programs do not comply with GMA requirements. RCW 36.70A.280(1)(a). Appeals of GMA issues regarding Whatcom County and cities within Whatcom County are within the jurisdiction of the Western Washington Growth Management Hearings Board (“Board”). RCW 36.70A.250(1)(b).

Administrative bodies like the Board may exercise powers conferred by statute, either expressly or by necessary implication. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962, 964 (1998). The Board may exercise its independent judgment regarding whether a Comprehensive Plan and corresponding development regulations comply with the requirements of the GMA. *Diehl v. Mason County*, 94 Wn. App. 645, 660, 972 P.2d 543 (1999) (citing *Skagit Surveyors*, 135 Wn.2d at 558).

The Board is required “to grant deference to counties” in their

development plans and determinations. RCW 36.70A.3201. However, a local government's "discretion is bounded by the goals and requirements of the GMA." *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000); *Lewis County v. Western Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006); RCW 36.70A.3201. In other words, the Board acts properly when it foregoes deference to a Comprehensive Plan or development regulations that are inconsistent with the goals and requirements of the GMA. *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001), *aff'd*, 148 Wn.2d 1 (2002).

B. Standard of Review for a Comprehensive Plan

Comprehensive plans are presumed valid upon adoption. RCW 36.70A.320(1). Futurewise bore the burden of demonstrating that the 2005 WCCP did not comply with the GMA. RCW 36.70A.300; .320(2).

The GMA instructs the Board to find Comprehensive Plans valid unless the Board determines that an action undertaken by a county was "clearly erroneous"⁵ in light of the entire record before the Board and in light of the goals and requirements of the GMA. RCW 36.70A.320(3) (emphasis added). Accordingly, the Board was required to uphold the

⁵ An action is "clearly erroneous" if the Board is "left with the firm and definite conviction that a mistake has been made." *City of Burien v. Growth Mgmt. Hearings Bd.*, 113 Wn. App. 375, 387, 53 P.3d 1028 (2002) (citations omitted).

LAMIRDs and Rural Densities in the 2005 WCCP unless Futurewise demonstrated that they were “clearly erroneous.” RCW 36.70A.320(3).

C. Standard of Review for the Court of Appeals

The Board’s FD&O is an “agency action.” When reviewing a decision of the Board, the Court must therefore apply the standards of the Washington Administrative Procedure Act (APA), Chapter 34.05 RCW. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998).

The appellate court sits in the same position as the superior court and reviews the “agency action” based solely upon the record made before the Board. RCW 34.05.558; *City of Redmond*, 136 Wn.2d at 45. The burden of demonstrating the invalidity of the FD&O rests with Gold Star as the party asserting the invalidity. RCW 34.05.570(1)(a); *City of Redmond*, 136 Wn.2d at 45. To meet its burden, Gold Star must demonstrate that:

- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
[or]

.....

(i) The order is arbitrary or capricious.

RCW 34.05.570(3).

The Court reviews the Board's Findings of Fact for substantial evidence, which mandates a determination that there is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997). The Court reviews the Board's Conclusions of Law *de novo*, but the Court must give substantial weight to the Board's interpretation of the GMA. *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 801, 959 P.2d 1173 (1998). The Court must accord deference to the Board's interpretation of the GMA due to the Board's specialized expertise in dealing with growth management issues. *City of Redmond*, 136 Wn.2d at 46; *Lewis County*, 157 Wn.2d at 498.

V.
ARGUMENT

A. The Board's Conclusions of Law Regarding LAMIRDs Were Factually and Legally Supported by Substantial Evidence

Procedurally, the Board correctly determined that Whatcom County failed to review and revise the LAMIRD Designation Descriptors in the 2005 WCCP in a manner that complied with the goals and requirements of the GMA, and therefore, the Board properly remanded the matter back to Whatcom County for further action. Substantively, the Board correctly determined that certain LAMIRDs designated in the 2005 WCCP did not comply with the goals and requirements of the GMA, and were therefore "clearly erroneous." As such, the Superior Court erred in reversing the Board's Conclusions of Law D, E, G, and H.

1. Limited Areas of More Intense Rural Development

Limited Areas of More Intense 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). CP 679-683. 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. CP 679-683. 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); CP 679-683.

The GMA “grandfathers” LAMIRDs into Comprehensive Plans and allows counties to maintain these areas, but the GMA precludes any expansion of LAMIRDs in size or use, which would result in pockets of urban sprawl in rural areas. 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. CP 679-683.

A 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).⁶ When delineating a LOB, the county must be able to clearly justify its action.⁷ CP 679-683. The inclusion of vast areas of undeveloped property within a LAMIRD violates the policies and

⁶ 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).

⁷ *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case No. 01-1-0014cz and 01-1-0015c (FD&O May 1, 2002).

provisions of the GMA.⁸ CP 679-683.

2. **The Board Correctly Determined that the LAMIRD Designation Descriptors in the 2005 WCCP Were Clearly Erroneous.**

Whatcom County included LAMIRD “Designation Descriptors” in the 2005 WCCP, which detailed categories of concentrated, high density development that would be permitted in rural areas. CP 684-686, 1626. Futurewise presented substantial evidence that these Designation Descriptors did not incorporate or abide by the LAMIRD requirements established in RCW 36.70A.070(5)(d). CP 684-686. The Board correctly determined that the Designation Descriptors were “clearly erroneous.” CP 1556-1562, 1576-1577.

Futurewise presented specific evidence establishing deficiencies with regard to five (5) separate Designation Descriptors: (1) Small Towns – Rural; (2) Crossroads Commercial – Rural; (3) Suburban Enclave – Rural; (4) Resort / Recreational – Rural; and (5) Transportation Corridors – Rural. CP 684-686. The evidence demonstrated that the Designation Descriptors failed to establish “logical outer boundaries” for LAMIRDs, failed to reference the built environment existing as of 1990, and failed to

⁸ *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).

minimize and contain development. CP 684-686, 740-834.

Neither Whatcom County nor Gold Star presented any evidence or argument to establish that the Designation Descriptors complied with GMA requirements. CP 1080-1102, 1410-1419, 1626. Whatcom County promised the Board that it would abide by the GMA, and then conceded that these five separate Designation Descriptors did not meet the LAMIRD criteria established in RCW 36.70A.070(5)(d). CP 1626.

The Board held that Whatcom County must comply with the specific requirements of RCW 36.70A.070(5)(d) in the adoption of LAMIRD Designation Descriptors in the 2005 WCCP. CP 1556-1562, 1576-1577, 1626. Thus, the Board correctly determined that the LAMIRD Designation Descriptors in the 2005 WCCP were “clearly erroneous.” CP 1556-1562, 1576-1577.

3. **The Board Correctly Concluded that Whatcom County Could Not Map or Designate LAMIRDS in the 2005 WCCP until Whatcom County Established Designation Descriptors that Complied with the GMA**

Many of the LAMIRD Boundaries established by Whatcom County in the 2005 WCCP included vast amounts of open space and undeveloped property.⁹ Futurewise submitted substantial evidence

⁹ The Board focuses on two key inquiries in reviewing challenges to LAMIRD boundary designations: (1) what was the built environment in July 1, 1990; and (2) is the LOB properly defined as predominantly delineated by the built

establishing that specific LAMIRD boundaries designated in the 2005 WCCP, particularly those in Map Number 8, did not correspond to the built environment as of July 1, 1990, and therefore, that the County failed to establish and maintain a properly defined LOB for its LAMIRDs. CP 686-688, 766-779.¹⁰

Whatcom County and Gold Star submitted no evidence to rebut Futurewise's argument.¹¹ CP 1080-1102; 1410-1419. But rather than address the factual issue of whether the LAMIRD boundaries were properly drawn, the Board concluded that it could not determine whether the LAMIRD boundaries complied with RCW 36.70A.070(5)(d) because the designations of LAMIRDs in the 2005 WCCP were based on invalid Designation Descriptors. CP 1562-1564. In other words, the Board concluded that Whatcom County's failure to revise the LAMIRD

environment. *Anacortes v. Skagit County*, WWGMHB Case No. 00-2-0049c (Compliance Order, January 31, 2002).

¹⁰ The substantial evidence included fourteen (14) aerial photos of Whatcom County in 1991. CP 776-779. Each photograph showed (in red) the County's proposed LOB for specific LAMIRDs, establishing that these specific LAMIRD designations were grossly excessive when compared to the LOB delineated by the built environment. CP 776-779. Each photograph also contained a GMA-compliant LOB in yellow, as suggested by Futurewise. CP 776-779.

¹¹ Whatcom County and/or Gold Star could have presented evidence establishing that the built environment as of July 1, 1990 could not be determined from the aerial photographs, and that the LAMIRD boundaries were consistent with the presence of "underground utilities, structures not visible from the air, allowable in-fill or the like." *Panesko, et al. v. Lewis County, et al.*, WWGMHB Case No. 98-2-0011c (FD&O, March 5, 2001); CP 231, 1416. Yet neither Whatcom County nor Gold Star presented any evidence at all. CP 231, 1089-1093, 1416.

Designation Descriptors in compliance with RCW 36.70A.070(5)(d) necessarily meant that the LAMIRD boundaries in the 2005 WCCP could not have been mapped in accordance with GMA requirements.¹² CP 1562-1564. As such, the Board remanded the matter to Whatcom County to adopt GMA-compliant LAMIRD Designation Descriptors, and to then establish a record in support of the analysis and mapping of LAMIRD boundaries in the 2005 WCCP. CP 1562-1564.

The Board acted properly in remanding the matter back to Whatcom County to perform the required review and revision under RCW 36.70A.130, to establish Designation Descriptors that complied with RCW 36.70A.070(5)(d), and to establish a written record to show the basis for the designation of LAMIRD boundaries. CP 1562-1564. The Board showed proper deference to Whatcom County's duty to map the boundaries for its LAMIRDS, while ensuring that Whatcom County's decisions would comply with GMA requirements. Accordingly, the Board did not engage in an unlawful procedure or decision-making process, did not provide an erroneous interpretation or application of the law, and did not enter an order not supported by substantial evidence. RCW

¹² Because the LAMIRD designations in the 2005 WCCP were not drawn pursuant to the specific criteria set forth in RCW 36.70A.070(5)(d), the Board referred to the LAMIRD designations in the 2005 WCCP as "proto-LAMIRDS." CP 1555 at fn. 3.

34.05.570(3)(c); .570(3)(d); .570(3)(e). The Superior Court erred in holding otherwise.

B. The GMA Required Whatcom County to Review and Revise Non-Compliant Provisions of the WCCP

Rather than presenting substantive evidence, Gold Star presented two unsupported legal theories regarding the LAMIRD Designation Descriptors in the 2005 WCCP. Gold Star first argued that Whatcom County did not have to review and revise any of the LAMIRDs in the 2005 WCCP, despite the clear and unambiguous language of RCW 36.70A.130. CP 222-226. Gold Star also argued that the doctrines of res judicata and collateral estoppel precluded Whatcom County from reviewing and revising the LAMIRDs, even though the LAMIRDs in the 2005 WCCP had not previously been challenged or adjudicated on the merits. CP 227-233. The Superior Court erred in accepting these arguments, even in part, as the arguments are flawed as a matter of fact, as a matter of law, and as a matter of policy.

1. RCW 36.70A.130 Is Clear and Unambiguous.

The GMA establishes specific requirements for Whatcom County to follow with regard to the long-term management of its Comprehensive Plan. First, Whatcom County had to perform a review and analysis of the WCCP and implementing regulations to ensure continuing compliance

with the goals and requirements of the GMA. RCW 36.70A.130(1)(a). Second, Whatcom County had to complete its first review, evaluation, revision, and update of the WCCP by December 1, 2004. RCW 36.70A.130(4)(a). And third, Whatcom County had to review, evaluate, revise, and update the WCCP “every seven years thereafter.” RCW 36.70A.130(4)(a); *see* Appendix A.

The aforementioned statutory provisions of the GMA are clear and unambiguous. If any portion of the WCCP or any corresponding development regulations did not comply with the goals and requirements of the GMA, then Whatcom County had to revise and correct the non-compliant portion(s) in the 2005 WCCP. RCW 36.70A.130. If Whatcom County determined that portions of the WCCP and the corresponding development regulations were consistent with the goals and requirements of the GMA, then Whatcom County could reincorporate those provisions into the 2005 WCCP so long as Whatcom County “showed its work” and established compliance with GMA requirements. RCW 36.70A.130; *see* Appendix A.

Whatcom County had a duty to ensure that the entire 2005 WCCP was consistent with the goals and requirements of the GMA. RCW 36.70A.130. If not, any and all non-compliant portions of the 2005

WCCP would be subject to appeal and review by the applicable Growth Board. RCW 36.70A.130(1)(d); .280(1). That is exactly what happened in the present case. CP 660-668.

2. **Gold Star Misrepresented the Provisions of RCW 36.70A.130.**

Gold Star argued that Whatcom County was not required to revisit or revise LAMIRDs in the 2005 WCCP. To avoid the clear and unambiguous statutory mandate of RCW 36.70A.130(1)(a), Gold Star combined multiple sub-parts of the GMA in order to confuse and misrepresent the statutory language and intent. CP 222-226. In doing so, Gold Star provided, and the Superior Court adopted, a selective interpretation that eviscerated the requirements of RCW 36.70A.130(1)(a). CP 114-117, 222-226.

RCW 36.70A.130(1)(a) establishes that the continuing review and revision of Comprehensive Plans by local jurisdictions is absolute, and that Comprehensive Plan provisions must comply with the GMA. RCW 36.70A.130(1)(b), which does not apply to Whatcom County, emphasizes that counties not required to plan under RCW 36.70A.040 must nevertheless “review and, if needed, revise [their] policies and development regulations regarding critical areas and natural resource lands . . . to ensure these policies and regulations comply with the [GMA].”

RCW 36.70A.130(1)(c) further emphasizes that Critical Areas Ordinances and Population Allocation Analyses within Comprehensive Plans, including the 2005 WCCP, must be reviewed every seven years.¹³

Gold Star combined the language from subparts (a) through (c) to promote the following selective interpretation of RCW 36.70A.130:

RCW 36.70A.130(1) requires counties to review only: (1) critical areas and natural resource lands . . . ; (2) critical area ordinances and analyses of population with appropriate adjustment of UGA's . . . ; and (3) such other matters as the county or city feels are appropriate in light of changed circumstances.

CP 224.

No language in the GMA establishes any limitations on the required review and revisions of Comprehensive Plans. Yet the Superior Court effectively rewrote the statutory language in its determination that “RCW 36.70A.130(1) does not require counties to start from scratch and justify everything in their comprehensive plans and development regulations every seven years.” CP 114-117.

The decision of the Superior Court cannot stand in light of the clear and unambiguous statutory language of the GMA. The Washington Legislature stated plainly that the County must “review and, if needed,

¹³ RCW 36.70A.130(1)(c) explicitly states that the review and revision requirements are “not limited to” the two subject areas listed.

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.

The Board concluded correctly that Whatcom County’s failure to revise the LAMIRD Designation Descriptors in compliance with RCW 36.70A.070(5)(d) meant that the LAMIRD boundaries in the 2005 WCCP could not have been mapped in accordance with GMA requirements.¹⁴ CP 1562-1564. Accordingly, the Board acted properly in remanding the matter to Whatcom County to adopt GMA-compliant Designation Descriptors and to then designate GMA-compliant LAMIRD boundaries in the 2005 WCCP. CP 1562-1564. The Superior Court’s determination to the contrary ignored the clear language of the statute, and as such, the Order Granting Petition for Review must therefore be reversed.

3. **The Plain Meaning of the Statute is Consistent with the Legislative Goals Established Under the GMA.**

In addition to ignoring the plain language of the statute, Gold Star’s arguments ignored the legislative intent and sound policy which

¹⁴ The fact that Whatcom County claimed, without foundation, that the circumstances surrounding the defective LAMIRDs had not changed since 1998 is irrelevant. CP 115-116, 704-715. The Board correctly concluded that without GMA-compliant Designation Descriptors, the LAMIRDs in the 2005 WCCP could not comply with the goals and requirements of the GMA as a matter of law. CP 1562-1564; RCW 36.70A.130.

underlies RCW 36.70A.130. Gold Star's purported policy arguments regarding the "burden of compliance" and the "need for finality" were both inappropriate, both from a practical and legal perspective.

Even though Gold Star did not speak for Whatcom County, Gold Star argued that the Legislature could not have intended for Whatcom County to ensure that all aspects of the 2005 WCCP complied with GMA requirements. CP 114-117, 222-226. Gold Star claimed that the Board's FD&O required Whatcom County to "start from scratch" and justify everything in their comprehensive plans and development regulations every seven years. CP 222-226. Moreover, Gold Star asserted that the Board's "show your work" mandate would require counties to review and revise their entire comprehensive plans every seven years in anticipation that a party would challenge some element of the plan.¹⁵ CP 222-223.

Gold Star's reasoning is flawed in several respects. First, the Board did not declare that the "show your work" requirement applied to all aspects of comprehensive plans. The Board noted, correctly, that it would

¹⁵ Gold Star argued that the presumption of validity precluded the Board from requiring the County to show its work. CP 230-231. The Board, however, correctly noted that the GMA imposes a duty upon the County to undertake a specific analysis when it designates LAMIRDS, and that there would be no basis for reviewing compliance with GMA requirements if the County did not show its work. CP 1562-1564. The Board also noted that "a 'show your work' requirement does not shift the burden of proof, since a Petitioner must show the designation decision was clearly erroneous." CP 1562-1564.

not require Whatcom County to show its work unless the GMA “imposes the duty upon the County to undertake a specific analysis” with respect to a particular aspect of the plan. CP 1562-1564.

Second, Gold Star ignored the fact that the GMA has been amended every year since it was adopted. The seven-year periodic updates required by statute ensure that these statutory changes are acknowledged and addressed over a reasonable timeframe.¹⁶ RCW 36.70A.130.

Finally, Gold Star ignored the positive role the public plays in identifying and challenging non-compliant provisions of the Comprehensive Plan during each periodic review. Futurewise and other commentators are essential to documenting non-compliant portions of Comprehensive Plans and raising those issues before the local jurisdiction. The County may then either amend the Comprehensive Plan or uphold the provision so long as an adequate justification for the position is communicated. RCW 36.70A.130(b). The overall process ensures both short-term and long-term compliance with the GMA.

¹⁶ For example, the LAMIRD provisions at issue in this case were adopted in 1997. *See* 1997 Session Laws, Chapter 419 §7(5)(d). Rather than forcing counties to establish immediate compliance with these requirements (if they chose to maintain LAMIRDs), the Legislature allowed each jurisdiction to address the requirements under the statutory timeframe for review of their Comprehensive Plans. The GMA amendment which adopted the LAMIRD provisions also adopted the periodic update requirement. 1997 Session Laws, Chapter 429 §10(1); RCW 36.70A.130.

Futurewise never argued that Whatcom County was required to perform exhaustive searches for non-compliant provisions of the WCCP. Rather, Futurewise argued that Whatcom County was required to revisit and revise any provisions of the WCCP that did not comply with the goals and requirements of the GMA. RCW 36.70A.130(1)(a). Futurewise then presented substantial evidence establishing that Whatcom County failed to amend the LAMIRDs in the 2005 WCCP in a manner that was consistent with the GMA. CP 673-703, 716-834, 1530-1544.

Without the statutory protections provided by RCW 36.70A.130, local jurisdictions would retain provisions of Comprehensive Plans that were not compliant or consistent with the goals and requirements of the GMA. The dynamic process of continuing review provided by the Legislature ensures that counties will not be overburdened and that the public will benefit from Comprehensive Plans that promote sound and responsible land use planning. RCW 36.70A.130.

Gold Star then pandered to the Superior Court in arguing that the need for finality in all land use management decisions overrides the clear and unambiguous requirement for Whatcom County to revise any non-compliant provisions in the 2005 WCCP. CP 114-117. The plain language of the statute, as well as established public policy for land use

decisions, contradicts Gold Star's arguments.

For property owners who wish to obtain a degree of finality with respect to land use regulations, the Washington courts have developed the doctrine of vested rights. See *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 867-68, 872 P.2d 1090 (1994). As the Board noted:

The vesting doctrine is the legal principle which reaches Intervenor's concerns for certainty in planning for the use of private property. Changes in law do not affect applications that have already vested: "The purpose of vesting is to provide a measure of certainty to developers, and to protect their expectation against fluctuating land use policy." *Friends of the Law v. King County*, 123 Wn.2d 518, 520, 821 P.2d 539 (1992). Land use plans and regulations reflect policy concerns about the public good and are subject to revision and amendment as those concerns may also change. The reasonable property owner must expect changes to occur over the long term but can rely upon the laws in existence at the time of submission of a completed permit application if that permit application has vested. See *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1379 (1997).

CP 1574-1575.

While the doctrine of vested rights allows individual property owners to control individual property decisions, Comprehensive Plans are dynamic planning documents that require periodic review and updates to ensure that changing circumstances are accounted for and that compliance with the GMA is maintained. The plain language of RCW 36.70A.130 reflects this Legislative intent.

Moreover, the GMA authorizes appeals of decisions to review (or not to review) or revise (or not to revise) Comprehensive Plans, while prior decisions regarding previously-enacted Comprehensive Plans are not subject to challenge. RCW 36.70A.130; .280(1)(a). Futurewise challenged Whatcom County's decisions in 2005 to review, revise, and not to revise the WCCP. Futurewise never challenged previous decisions on either the WCCP or the development regulations.

In enacting RCW 36.70A.130, the Legislature ensured that comprehensive plans would be periodically reviewed and adapted to changing and developing communities. The Board did not exceed its authority in ruling that Whatcom County was statutorily required to review and revise the WCCP, and to ensure that the 2005 WCCP was consistent with the goals and requirements of the GMA. CP 660-668; RCW 34.05.570(3)(b); .570(3)(c). As such, the Board did not erroneously interpret the law in making its determination. RCW 34.05.570(3)(d).

4. The Doctrines of Res Judicata and Collateral Estoppel Do Not Apply in This Case.

Gold Star also argued that the Board's decisions are precluded by the doctrines of res judicata and collateral estoppel. Gold Star's arguments are flawed as a matter of fact and as a matter of law.

a. **The LAMIRDs in the 2005 WCCP Have Not Been Subject to a Final Judgment on the Merits.**

Gold Star bases its argument entirely on a prior decision regarding the 1998 WCCP, not the 2005 review and update process or the 2005 WCCP. See *Wells v. Western Washington Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 860 P.2d 1024 (2000). 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. *Id.*

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.¹⁷ In *Wells*, the Superior Court determined that the Board had erroneously assigned the burden of proof to the County in a challenge to the validity of the WCCP and development regulations. *Wells*, 100 Wn. App. at 660-61, 665-69. In reversing the Board’s decision, the Superior Court held only that the Board had failed procedurally to presume the validity of the Comprehensive Plan. *Wells*, 100 Wn. App. at 660-61, 665-70. In upholding the decision of the Superior Court, the Court of Appeals recognized that a party could submit a subsequent challenge to the WCCP and development regulations, and

¹⁷ Gold Star stated, without foundation, that “[t]he transportation corridors established by the WCCP were challenged and upheld by [the Superior Court] in 1998.” CP 227.

that the Board could find the WCCP and development regulations to be out of compliance with the GMA. *Wells*, 100 Wn. App. at 660-61, 665-70. Thus, neither the Superior Court nor this Court determined the validity, or even issued a substantive ruling on, the merits of the LAMIRDs designated in the 1998 WCCP.

The doctrines of res judicata and collateral estoppel both require a final judgment on the merits. *See State v. Drake*, 16 Wn. App. 559, 563-64, 558, P.2d 828 (1976). Because neither the LAMIRDs in the 1998 WCCP nor the 2005 WCCP have been subject to a final judgment on the merits, the doctrines of collateral estoppel and res judicata do not apply.

b. Res Judicata Does Not Apply in This Case.

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).

With regard to subject matter, the *Wells* case involved a challenge

by a local citizen (not Futurewise) against the WCCP adopted and established by Whatcom County in 1998. *Wells*, 100 Wn. App. at 659-663. This case addresses the 2005 WCCP, which was adopted and established by Whatcom County after updating the WCCP as required by statute. RCW 36.70A.130(1)(a). Each case involved challenges to different LAMIRD designations adopted at a different time under a different Comprehensive Plan. And Futurewise challenged Whatcom County's decision in 2005 not to revise the LAMIRDs, a decision that Whatcom County had not even considered in 1998. Therefore, there is no concurrence of subject matter.

With regard to cause of action, in determining whether causes of action are identical the court must consider: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second lawsuit; (2) whether substantially the same evidence is presented in the two suits; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 412, 54 P.3d 687 (2002). The *Wells* case arose out of Whatcom County's adoption of the WCCP in 1998, while this case arose nearly a decade later out of Whatcom County's update to the WCCP

in 2005. Moreover, this case addressed issues that were never addressed in the *Wells* case, such as LAMIRD Designation Descriptors, Rural Densities, and Population Allocation Analysis. CP 277-284. Therefore, there is no concurrence as to causes of action.

Finally, with regard to persons or parties, Futurewise was not a party to the *Wells* appeal.¹⁸ Therefore, there is no identity of persons or parties. In sum, none of the four elements of Res Judicata can be established in this matter.

c. **Collateral Estoppel Does Not Apply in This Case.**

The doctrine of collateral estoppel bars relitigation of an issue after the party estopped has had a full and fair opportunity to present its case. *Barr v. Day*, 124 Wn.2d 318, 324-25, 879 P.2d 912 (1994). The party seeking to apply the doctrine 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,

¹⁸ 1000 Friends of Washington became Futurewise in February of 2005, but neither 1000 Friends nor Futurewise was a party.

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). Gold Star failed to establish that the LAMIRDs designated by Whatcom County in the 2005 WCCP were subject to a final judgment on the merits. CP 227-230. And as previously established herein, there is no concurrence between the *Wells* case and the current case regarding the issues presented or the persons or parties involved.¹⁹

Moreover, the application of the doctrine of collateral estoppel here would work an injustice to Futurewise and its Whatcom County members. The *Wells* case addressed procedural matters regarding the WCCP adopted in 1998. To give the *Wells* decision preclusive effect against the 2005 WCCP would contradict the GMA requirement to review and revise Comprehensive Plans every seven years, and would preclude Futurewise, or any other party, from ensuring that Whatcom County complies with established principles of growth management. RCW 36.70A.130.

In sum, the doctrines of res judicata and collateral estoppel are not

¹⁹ Futurewise is also not in privity to the parties in the *Wells* case. See *Hackler v. Hackler*, 37 Wn. App. 791, 794, 683 P.2d 241 (1984).

applicable in this matter. Gold Star failed to establish that the elements of these doctrines apply, while Futurewise has shown affirmatively that the preconditions of each doctrine cannot be met. More importantly, the only case cited by Gold Star in support of their arguments is not on-point, either factually or legally. Therefore, the Board did not act outside its statutory authority, did not engage in an unlawful decision-making process, and did not erroneously interpret or apply the law. RCW 34.05.570(3).

C. The Superior Court Erred By Not Granting Futurewise's Motion to Strike All of Gold Star's Arguments Regarding Rural Densities.

The Superior Court erred by failing to grant, or even rule upon, Futurewise's motion to strike all of Gold Star's arguments regarding Rural Densities. Gold Star should have been held to the issues raised in its initial Motion for Intervention and its Brief before the Board.

The APA mandates that issues not raised before the agency (*i.e.* the Board) may not be raised on appeal except in very limited circumstances. RCW 34.05.554; *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 668-71, 860 P.2d 1024 (1993); *see* Appendix B. The only issues raised by Gold Star before the Board were:

1. Limitation of 7-Year Review under RCW 36.70A.130
2. Presumption of Validity of the WCCP

3. Insufficient Evidence Regarding LAMIRD Designations
4. Due Process

CP 1410-1419.

Gold Star never raised the issue of Rural Densities before the Board. CP 1410-1419. Gold Star decided to adopt Whatcom County's arguments on Rural Densities by reference, at which point Whatcom County conceded that the challenged Rural Densities designations under the 2005 WCCP were inconsistent with the GMA. CP 1410-1419, 1698-1699. Gold Star did not present any argument or offer any evidence to dispute Whatcom County's concession, and Gold Star did not offer any independent evidence or authority to controvert Whatcom County's admission. CP 1410-1419. And importantly, Whatcom County did not appeal the Board's decision. CP 1584-1585.

The Superior Court should not have permitted Gold Star to "bootstrap" an argument raised by Whatcom County into its appeal. RCW 34.05.554. Gold Star should have been constrained to the issues and arguments raised in its Motion for Intervention and its Brief as Intervenor. RCW 34.05.554. Consequently, the Superior Court should have struck all

of Gold Star's arguments regarding Rural Densities.²⁰

D. The Board's Conclusion of Law Regarding Rural Densities Was Factually and Legally Supported by Substantial Evidence.

The Board correctly determined that Rural Densities in the 2005 WCCP were not compliant with the GMA and were therefore clearly erroneous. Contrary to Gold Star's assertion, the Board did not apply a "bright line" rule in declaring that Rural Densities in the 2005 WCCP did not comply with the GMA. As such, the Board's conclusion of law concerning Rural Densities was not an erroneous interpretation or application of the law, nor did it constitute an action outside the Board's statutory authority or jurisdiction. RCW 34.05.570(3)(b); .570(3)(d).

1. The Board Correctly Determined that Rural Densities in the 2005 WCCP Violated the GMA and Were Therefore Clearly Erroneous.

Through the GMA, the Washington Legislature recognized the importance of Rural Lands and Rural Character to our economy, environment, and overall quality of life. RCW 36.70A.011. As such, the GMA demands protection of Rural Lands through development of a "Rural Element" in a Comprehensive Plan. A Rural Element fosters land use patterns and develops a local vision of Rural Character²¹ that will

²⁰ Alternatively, the Court should have remanded the issue back to the Board for additional consideration and determination. RCW 34.05.554(2).

²¹ Under the GMA, "rural character" is characterized by open spaces, natural

preserve rural-based economies and rural lifestyles, foster economic development, facilitate rural-based business opportunities, and “enhance the rural sense of community and quality of life.” RCW 36.70A.011; RCW 36.70A.070(5); RCW 36.70A.030(14).²²

In order to protect the Rural Element under a Comprehensive Plan, a county must control rural development, assure visual compatibility with the surrounding rural area, reduce inappropriate conversion of rural land into sprawl (*i.e.*, low-density development), protect critical areas, and prevent conflicts with the use of designated natural resource lands.²³ RCW 36.70A.070(5)(c). The rural character requirements of RCW 36.70A.070(5) and .030(14) must not only preserve the natural landscapes of the rural area, but must also foster traditional rural lifestyles, rural based economies, and opportunities to live and work in the rural area.²⁴

Counties and cities have an affirmative duty under the GMA to

landscapes, vegetation that predominates over the built environment, and developments that are compatible with the use of land by wildlife and for fish wildlife habitat. RCW 36.70A.030(14)(a)&(d).

²² Without this protection, “rural sprawl” can occur, which can have the same devastating effects as urban sprawl. *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (FD&O September 20, 1995). Legislative amendments to the GMA have more clearly defined the type of growth that is permissible in rural areas. RCW 36.70A.070.

²³ *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c (FD&O June 30, 2000).

²⁴ *Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c (FD&O May 7, 2001).

reduce or prevent the inappropriate conversion of rural land into low-density development or sprawl. *Diehl*, 94 Wn. App. at 655; RCW 36.70A.020(2). Since urban growth is prohibited outside the urban growth area, urban growth is therefore prohibited in the rural area and on resource lands. RCW 36.70A.070(5); .110(1).

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 2 ½ 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. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 241, 247, 110 P.3d 1132 (2005).

In the present case, Futurewise presented substantial evidence in support of its argument that six (6) rural zones established in the 2005 WCCP were violative of the goals and requirements of the GMA:

- the RR1 zone, which allows 1 dwelling unit per 1 acre in the rural area outside the LOBs of a LAMIRD;
- the RR2 zone, which allows 2 dwelling units per 1 acre in the rural area outside the LOBs of a LAMIRD;
- the RR3 zone, which allows 3 dwelling units per 1 acre in the rural areas outside the LOBs of a LAMIRD;

- the Eliza Island or EI zones, which allows 3 dwelling units per acre in the rural areas outside the LOBs of a LAMIRD;
- the R2A zone, which allows 1 dwelling unit per 2 acres in the rural designation); and
- the Rural Residential Island or RRI zone, which allows 1 dwelling unit per 3 acres in the rural designation outside areas mapped as aquifer recharge areas.

CP 689-693.

These six (6) zones covered over 15,000 acres in Whatcom County, a significant land area comprising almost half of Whatcom County's unincorporated UGA and 9.2 percent of the entire Rural Area. CP 689-693, 740-804. All six zones are considered "urban" under established precedent from the Court of Appeals, and all zones (except the RR1 Zone) are considered "urban" pursuant to established precedent from the Washington Supreme Court. *Diehl*, 94 Wn. App. at 655-57; *Quadrant Corp.*, 154 Wn.2d at 247.

In addition to the established precedent from the Washington Courts, Futurewise presented substantial evidence to establish that allowing urban densities in these 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. CP 689-693. Futurewise also presented substantial evidence to establish that allowing urban densities in these rural areas would increase impervious surfaces and require tree removal to an extent that water quality and salmon habitat are imperiled.²⁵ CP 689-693. 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.²⁶ CP 689-693. Simply put, 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. CP 689-693.

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. CP 1080-1102, 1698-1699.

²⁵ Under the GMA, protection of the Rural Element means protection of “surface water and ground water resources.” RCW 36.70A.070(5)(c)(iv).

²⁶ 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. CP 740-804.

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 growth²⁷ 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. CP 1566-1568; RCW 36.70A.020(2); .030(17); .110(1). Additionally, the Board correctly determined that the challenged provisions of the 2005 WCCP would increase development in Rural Areas without corresponding efforts to provide public facilities for this increased density. CP 1566-1568; RCW 36.70A.020(12); .110(4).

In sum, the Board correctly determined that the 2005 WCCP violated GMA requirements regarding Rural Densities, and was therefore “clearly erroneous.” CP 1566-1568. As such, the Board did not engage in an unlawful procedure or decision-making process, did not provide an erroneous interpretation or application of the law, and did not enter an order not supported by substantial evidence. RCW 34.05.570(3)(c);

²⁷ “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.

.570(3)(d); .570(3)(e).

2. **The Board Did Not Apply a “Bright Line” Rule.**

The burden of demonstrating the invalidity of the Board’s decision regarding Rural Densities rests with Gold Star as the party asserting the invalidity. RCW 34.05.570(1)(a); *City of Redmond*, 136 Wn.2d at 45. Gold Star did not argue that the Rural Densities in the 2005 WCCP were compliant with the GMA. Rather, Gold Star challenged the Board’s determination solely pursuant to the *Viking Properties* case.

Gold Star’s arguments were fundamentally flawed. First, Gold Star asserted that the decision of the Washington Supreme Court in the *Viking Properties* case represented a change in controlling law occurring after the Board’s decision in this case. RCW 34.05.554(1)(d)(i). However, the *Viking Properties* case was decided by the Washington Supreme Court on August 18, 2005, over 30 days prior to the date that the Board issued its FD&O. Thus, to the extent that *Viking Properties* represented controlling law, it is controlling law prior to and at the time of the Board’s issuance of the FD&O on September 20, 2005.²⁸ CP 1582.

Second, Gold Star argued that the Board improperly applied a “bright line” rule in making its decision. *Viking Properties*, 155 Wn.2d at

²⁸ Neither Whatcom County nor Gold Star moved to supplement the record with additional legal argument based on the *Viking Properties* case. CP 1548-1549.

129-130. 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 FD&O:

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.

CP 1567.

This statement does 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 for guidance. The substantial evidence included Whatcom County’s concession that the challenged Rural Densities in the 2005 WCCP violated GMA requirements.

The Board’s decision, which involved a thorough and comprehensive review of the entire record, is well-grounded in the law and facts of this case, a fact that neither Gold Star nor the County has refuted. The Board reviewed the substantial evidence presented by Futurewise and adopted Whatcom County’s concession that the challenged Rural Densities were inconsistent with GMA requirements to protect rural lands and rural character. CP 1565-1568.

Moreover, the *Viking Properties* case does not prohibit Growth Boards from interpreting the GMA or relying on prior Growth Board decisions for making these determinations. The Board, as well as the Washington Courts, continues to rely on Board precedent for guidance on particular GMA issues. In fact, one of the most recent GMA decisions by the Washington Supreme Court cited four Growth Board decisions with approval. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 834-838, 123 P.3d 102 (2005).²⁹

The Board did not set public policy or establish 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, and determined that specific Rural Densities established under the 2005 WCCP were inconsistent with the policies and provisions of the GMA. CP 1565-1568. Thus, the Board’s determination that the 2005 WCCP did not comply with the goals and requirements of the GMA did not represent an erroneous interpretation of the law or an action outside of the Board’s authority and jurisdiction. RCW 34.05.570(3); CP 1565-1568.

²⁹ The *Ferry County* case was decided on November 17, 2005. *Viking Properties* was decided August 18, 2005.

VI.
CONCLUSION

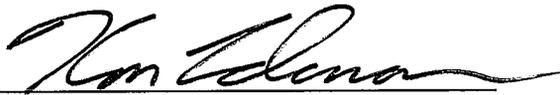
The Superior Court erred in: (1) denying Futurewise's motion to strike all of Gold Star's arguments regarding Rural Densities; (2) reversing the Board's Conclusions of Law concerning LAMIRDs; and (3) reversing the Board's Conclusion of Law concerning Rural Densities. The Order from the Superior Court should be overturned, and the FD&O from the Board should be reinstated in its entirety.

DATED this 9th day of November, 2006.

Respectfully submitted,

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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.

APPENDIX B

CITATIONS FROM ADMINISTRATIVE PROCEDURES ACT

RCW 34.05.554 - Limitation on new issues.

(1) Issues not raised before the agency may not be raised on appeal, except to the extent that:

(a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;

(b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;

(c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or

(d) The interests of justice would be served by resolution of an issue arising from:

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

(2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

291/548853.01

Court of Appeals No. 58379-4-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GOLD STAR RESORTS, INC.,

Respondent / Cross-Appellant,

v.

FUTUREWISE

Appellant, and

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD and WHATCOM COUNTY,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR WHATCOM COUNTY
THE HONORABLE STEVEN J. MURA
Whatcom County Superior Court No. 05-2-02405-1

CERTIFICATE OF SERVICE

RIDDELL WILLIAMS P.S.
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Co-Counsel for Futurewise

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2006 NOV -9 PM 4: 36

1 I, Darla Holterman, declare as follows:

2 1. I am over 18 years of age and a U.S. citizen. I am employed as a
3 legal secretary by the law firm of Riddell Williams P.S.

4 2. On November 9, 2006, I caused to be delivered true and accurate
5 copies of the following documents:
6

7 **1) Opening Brief of Futurewise; and**

8 **2) Declaration of Service**

9 on the following by service method indicated below:

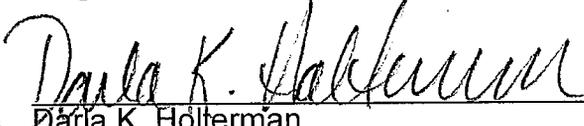
10 Jack O. Swanson
11 Belcher, Swanson, Lackey, Doran, Lewis
12 Battersby Field Professional Bldg.
13 900 Dupont Street
14 Bellingham, WA 98225-3105
15 **Via US Mail**

16 Whatcom County Prosecuting Attorney
17 Attn: Karen N. Frakes
18 311 Grand Avenue
19 Bellingham, WA 98225
20 **Via US Mail**

21 Martha P. Lantz
22 Assistant Attorney General
23 Attorney General of Washington
24 Licensing and Administrative Division
25 1125 Washington Street
26 P.O. Box 40110
Olympia, WA 98504-0110
Via US Mail

I declare under penalty of perjury of the laws of the State of Washington,
that the foregoing is true and correct.

DATED at Seattle, Washington on November 9, 2006.



Darla K. Holterman