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COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION ONE

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STATE OF WASHINGTON  
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Futurewise,

Appellant,

and

Western Washington Growth Management Hearings Board and  
Whatcom County,

Respondents,

vs.

Gold Star Resorts, Inc.,

Intervenor/Respondent.

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BRIEF OF RESPONDENT GOLD STAR

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## STATEMENT OF THE CASE

Gold Star owns 76 acres located in Whatcom County adjacent to I-5 near the Birch Bay-Lynden Road. Gold Star's property is in an area designated as a LAMIRD<sup>1</sup> under the Whatcom County Comprehensive Plan ("WCCP"), specifically a transportation corridor designated as the "Gateway Transportation Area" under the WCCP. Gold Star has owned most of this property since the early 1970's, and much of this area has been zoned industrial throughout this period. Gold Star has paid over \$1 million in property taxes in the time it has owned the property, in addition to hundreds of thousands of dollars on architecture, feasibility studies and the like.<sup>2</sup>

Prior to 1997, Whatcom County's comprehensive plan and development regulations were challenged before the Western Washington Growth Management Hearing Board ("WWGMHB" or "the Board"), and the Board found these planning ordinances, including the provisions regarding LAMIRDs, to be out of compliance with the GMA. In 1997, in response to the Board's ruling, the Whatcom County Council adopted the WCCP and

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<sup>1</sup> LAMIRD stands for "limited area of more intensive rural development" and is provided for by RCW 36.70A.070(5)(d).

<sup>2</sup> CP 928-930.

development regulations, and these planning ordinances were again challenged before the Board. The Board ruled on January 16, 1998, that these county ordinances were still out of compliance with the GMA, including the provisions dealing with LAMIRDs.<sup>3</sup> The Board's 1/16/98 Order was appealed to the Whatcom County Superior Court, and the trial court reversed and remanded the case back to the Board.<sup>4</sup> The trial court's decision was then appealed to this Court, which affirmed in Wells v. WWGMHB, et al., 100 Wn.App. 657, 860 P.2d 1024 (2000). On remand, the Board dismissed the appeal and allowed the WCCP and development regulations to stand.<sup>5</sup>

Over the next several years, Whatcom County reviewed its comprehensive plan and development regulations pursuant to RCW 36.70A, which requires counties to review planning ordinances on an ongoing basis. Hearings were held in 2003 and 2004 concerning this review, and the county left intact the

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<sup>3</sup> See Final Order dated January 16, 1998, in Whatcom County v. WWGMHB, WWGMHB No. 97-2-0030.

<sup>4</sup> Whatcom County v. WWGMHB, Whatcom County Superior Court Cause No. 98-2-00546-3, Order Remanding Case entered September 25, 1998, CP 1510-1529.

<sup>5</sup> Whatcom County v. WWGMHB, WWGMHB No. 97-2-0030, Order Taking Action Consistent With The Decision of the Whatcom County Superior Court in Case No. 98-2-00546-3 entered March 28, 2001. Copy in appendix.

provisions of its comprehensive plan and development regulations dealing with rural areas, including LAMIRDs and rural densities.<sup>6</sup>

On January 25, 2005, the Whatcom County Council held a public hearing regarding its seven-year review conducted pursuant to RCW 36.70A.130. At this hearing, Futurewise challenged parts of the WCCP and development regulations as being out of compliance with the GMA. Futurewise claimed (among other things) that the LAMIRDs were improperly designated and larger than necessary and that rural densities were too great. The Whatcom County Council rejected Futurewise's arguments and adopted Whatcom County Ordinance No. 2005-006 on January 28, 2005, which incorporated the various ordinances adopted during its review process.<sup>7</sup>

Futurewise then appealed to the Board, and the Board issued its Final Decision and Order on September 20, 2005 ("9/20/05 Order"), holding that Whatcom County Ordinance No. 2005-006 and those provisions of the WCCP and development regulations dealing with LAMIRDs and rural densities were out of

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<sup>6</sup> Whatcom County Ordinances 2004-017 & 2005-010. CP 310-314; CP 297-301. LAMIRDs discussed at CP 312 and rural densities discussed at CP 311-313.

<sup>7</sup> Whatcom County Ordinance 2005-006 (CP 285-290).

compliance with the GMA. From the 9/20/05 Order, Gold Star filed a petition for review to the Whatcom County Superior Court.

On June 8, 2006, the trial court (the Honorable Steven J. Mura) held that the 9/20/05 Order was incorrect insofar as it required the county to revise its LAMIRDs and rural densities. However, the trial court let stand the Board's decision requiring Whatcom County to state the reasons for refusing to revise the LAMIRDs.<sup>8</sup>

From the trial court's decision, Futurewise appealed, and Gold Star cross-appealed.<sup>9</sup>

#### **ASSIGNMENTS OF ERROR AND ISSUES**

Assignment of Error No. 1. Pursuant to RAP 10.3(h), Gold Star assigns error to Findings of Fact 8 through 22, 24, 25 & 27, as well as to Conclusions of Law D through I & K of the 9/20/05 Order and to the Order on Dispositive Motions entered June 15, 2005, by the Board. This assignment of error pertains to Issue No. 1 below.

Issue No. 1. Did the trial court err in reversing the Board's holding that the LAMIRD descriptors and LAMIRD maps were out of compliance with the GMA?

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<sup>8</sup> CP 17.

<sup>9</sup> CP 13.

Assignment of Error No. 2. Pursuant to RAP 10.3(h), Gold Star assigns error to Findings of Fact 25 through 27 & 32, as well as to Conclusions of Law I & K of the 9/20/05 Order, entered by the Board. This assignment of error pertains to Issue No. 2 below.

Issue No. 2. Did the trial court err in reversing the Board's holding that rural densities of less than one dwelling per five acres were out of compliance with the GMA?

Assignment of Error No. 3. With respect to Gold Star's cross-appeal, Gold Star assigns error to rulings of both the trial court and the Board.<sup>10</sup>

Trial Court. The trial court erred in entering its Order Granting Petition for Review filed June 8, 2006, as follows:  
(1) Paragraph 2.B. to the extent the ruling rejects Gold Star's contention that a 36.70A.130(1) seven-year review does not require counties to review and evaluate anything in their comprehensive plans and development regulations other than the two planning issues enumerated in the statute itself (i.e., critical areas and urban densities); and (2) The second sentence of paragraph 4 (which affirmed the Board's 9/20/05 Order to the extent it required

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<sup>10</sup> Gold Star has filed a cross-appeal with respect to this issue, although Futurewise addresses the issue in its brief. Futurewise's Opening Brief at 24-33.

Whatcom County to state its reasons for refusing to revise the LAMIRDs) on the ground that RCW 36.70A.130(1) does not require counties to review such planning issues at all.<sup>11</sup>

Board. Pursuant to RAP 10.3(h), Gold Star also assigns error to Conclusions of Law D-I & K of the 9/20/05 Order and to the Order on Dispositive Motions entered June 15, 2005, by the Board to the extent the Board misinterpreted RCW 36.70A.130(1).

These assignments of error pertain to Issue No. 3 below.

Issue No. 3. Does RCW 36.70A.130(1) require a county to plan anew every seven years?

### **STANDARD OF REVIEW**

This Court sits in the same position as the trial court and reviews an order of the WWGMHB based solely upon the record made before the Board. This appeal is governed by the Administrative Procedures Act ("APA"), RCW 34.05. RCW 34.05.570 reads in part:

**RCW 34.05.570**  
**Judicial review.**

- (1) Generally. Except to the extent that this chapter or another statute provides otherwise:
  - (a) The burden of demonstrating the invalidity of

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<sup>11</sup> CP 15-17.

agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

...

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(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;

...

(i) The order is arbitrary or capricious.

The Board is the "agency" and the 9/20/05 Order is the "agency action" under judicial review for purposes of this statute.

The usual deference granted by the APA to administrative bodies does not apply in a case where a county's planning decision is overturned or modified by a GMA hearings board. Quadrant Corporation v. State Growth Management Hearings Board, 154 Wn.2d 224, 110 P.3d 1132 (2005):

In the face of [RCW 36.70A.3201],<sup>12</sup> we now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general. While we are mindful that this deference ends when it is shown that a county's actions are in fact a "clearly erroneous" application of the GMA, we should give effect to the legislature's explicitly stated intent to grant deference to county planning decisions. Thus, a board's ruling that fails to apply this "more deferential

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<sup>12</sup> In discussing this statute a little earlier in the opinion, the supreme court said:

*In amending RCW 36.70A.320(3) ... the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.*

*RCW 36.70A.3201.*  
154 Wn.2d at 237 (italics in original).

standard of review" to a county's action is not entitled to deference from this court.<sup>13</sup>

## **ARGUMENT**

Issue No. 1. Did the trial court err in reversing the Board's holding that the LAMIRD descriptors and LAMIRD maps were out of compliance with the GMA?

Board's Decision. The Board held that the LAMIRD descriptors and LAMIRD maps contained in the county comprehensive plan were out of compliance with the GMA.

Trial Court Decision. The trial court reversed the Board's holding of non-compliance:

With regard to the LAMIRDs, the Board's conclusions of law D, E, G, & H constitute erroneous interpretations or applications of the law for purposes of RCW 34.05.570(3)(d). The basis for this ruling is 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

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<sup>13</sup> 154 Wn.2d at 238, citations omitted, emphasis supplied.

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).

C. Whatcom County conducted its seven year review pursuant to RCW 36.70A.130, including publishing notice and holding public hearings concerning the county's comprehensive plans and development regulations. With regard to the LAMIRDs, Whatcom County Ordinance No. 2005-006 enacted January 28, 2005, made specific findings (findings 23-25) that these areas "have not experienced significant change, nor has additional information been obtained regarding such areas since the adoption of the 1997 Whatcom County Comprehensive Plan that warrant further review and update of the Comprehensive Plan." These findings are entitled to a presumption of validity pursuant to RCW 36.70A.320 and *Quadrant Corp. v. State Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005).<sup>14</sup>

Discussion. The Board held that Whatcom County failed to properly designate LAMIRDs in 1997 and characterized the areas so labeled in the WCCP as "proto-LAMIRDs."<sup>15</sup> In doing so, the Board ignored (a) the *res judicata*/collateral estoppel effect of the prior appeal; (b) the presumption of validity required under RCW 36.70A.320(1) & (3); and (c) Quadrant Corporation v. State Growth Management Hearings Board, *supra*, and Whittaker v. Grant County, EWGMHB No. 99-1-001-9, Order on Compliance entered

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<sup>14</sup> CP 9-10.

<sup>15</sup> See the Board's discussion on ps. 12 & 19 of the 9/20/05 Order; CP 39 & 46.

on May 12, 2004, decided by the Eastern Washington Growth Management Hearings Board. These points will be discussed individually below.

A. *Res Judicata/Collateral Estoppel.* The transportation corridors established by the WCCP and development regulations were challenged and upheld by the Whatcom County Superior Court in 1998:

(5) Transportation corridors – Gateway and Guide Meridian.

Because the Board erroneously assigned the burden of proof to the County on this matters, the Board's determination of invalidity is reversed as to each of these matters. Because the Board assessed compliance only after determining validity, any determination of noncompliance as to these areas must also be reversed.<sup>16</sup>

...

The Legislature specifically authorized development in rural areas to occur based on historic development patterns or approvals or current needs and authorized such development to be served by public facilities. RCW 36.70A.070(5)(d)(i-v) and definitions at RCW 36.70A.030(14-17). The fact that there are "urban sized" lots, public facilities, or undeveloped lots in such areas does not render such areas "urban." The decision of the Board that small towns (except Deming), resort and recreational areas (except Pt. Roberts), suburban enclaves, and transportation corridors were "urban" is based on an error of law and lacks the support of substantial evidence in the record, and is reversed.<sup>17</sup>

...

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<sup>16</sup> 9/25/98 Order Remanding Case; CP 1516.

<sup>17</sup> Ibid at CP 1521, emphasis supplied.

Based on the decision above, it is hereby ORDERED, ADJUDGED, AND DECREED:

1. The decision of the Western Washington Growth Management Hearings Board is reversed as to:

a. The presumption of validity

(1) UGA – Geneva, Birch Bay LTPA

(2) Rural Area Issues – Small towns, cross road commercial areas, suburban enclaves, resort and recreation subdivisions, transportation corridors, including Guide Meridian and Gateway

(3) Development regulations identified in the decision

On remand, the comprehensive plan and implementing development regulations adopted by Whatcom county shall be presumed valid, and the Board shall find them in noncompliance with the GMA only under the standard articulated in RCW 36.70A.320(1) – (3)<sup>18</sup>

...

d. Rural Area Issues

The rural area items identified, small towns and cross road commercial areas, suburban enclaves, resort and recreation area subdivisions, and transportation corridors, including Gateway and Guide Meridian, are entitled to a presumption of validity and shall be considered on remand as conforming and valid unless and until a party below, with standing as identified above, is able to demonstrate, with respect to each matter properly raised that the County action was clearly erroneous as required by RCW 36.70A.320(3).<sup>19</sup>

The trial court's decision was affirmed on appeal in Wells v.

WWGMHB, et al, 100 Wn.App. 657, 860 P.2d 1024 (2000). On

remand in 2001, the Board held as follows:

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<sup>18</sup> Ibid at CP 1524-1525, emphasis supplied.

<sup>19</sup> Ibid at 18, emphasis supplied.

In its 1998 remand, #98-2-00546-3, Whatcom County Superior Court found that the record contained no substantial evidence supporting noncompliance or invalidity. In Wells v. WWGMHB, #43028-9, Division One, the Court of Appeals did not reverse this finding.

Absent any challenges by petitioners in the remand phase of this case, and in accordance with Superior Court instructions to take actions consistent with its order, we rescind our previous findings of invalidity and noncompliance regarding the remanded issues.<sup>20</sup>

In spite of this, the Board's 9/20/05 Order gave short shrift to these previously upheld designations, referring to them as "proto-LAMIRDS:"

The Whatcom County Comprehensive Plan establishes five designations that allow more intensive development in the rural area: small towns and crossroads communities, crossroads commercial, resort and recreational subdivisions, suburban enclaves, and transportation corridors ... RCW 36.70A.070(5)(d) provides that counties may establish limited areas of more intensive rural development under certain criteria [quoting statute].<sup>21</sup>

...

The descriptors for the proto-LAMIRD designations in the Whatcom County plan – small towns and crossroads communities, crossroads commercial, resort and recreational subdivisions, suburban enclaves, and transportation corridors – do not incorporate the requirements of RCW

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<sup>20</sup> 3/28/01 Order, Whatcom County v. WWGMHB, WWGMHB #97-2-0030. Copy of 3/28/01 Order in appendix.

<sup>21</sup> Board's 9/20/05 Order at 12 (CP 39), emphasis supplied.

36.70A.070(5)(d) ... Indeed, there is no attempt to do so.<sup>22</sup>

...

The transportation corridor descriptor provides that it is "designed to alert the community to proposed transportation corridor related expansion and to guide developments accordingly" ... The locational criteria provide that the transportation corridors shall be in areas "characterized by existing transportation-related development" but again fails to limit such development to areas where there was a built environment in July 1990 and to create logical outer boundaries to contain and minimize development within the designated areas. RCW

36.70A.070(5)(d)(iv). The transportation corridor designation, notably the Guide Meridian, is designed to be expanded and thus encourages, rather than prevents, low-density sprawl, as required by RCW 36.70A.070(5)(d)(iv) ... For these reasons, the transportation corridor descriptor also fails to comply with RCW 36.70A.070(5)(d).<sup>23</sup>

...

This Map includes small towns and crossroads communities, crossroads commercial, resort and recreational subdivisions, suburban enclaves, and transportation corridors. However, until the County has adopted compliant criteria for the designation of LAMIRDS and applied those criteria to draw the logical outer boundaries of its type (d)(i) LAMIRDS, it cannot map compliant LAMIRDS. This is because the comprehensive plan criteria are needed to establish a basis for the maps.<sup>24</sup>

The 9/20/05 Order goes on to state the basis for this decision:

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<sup>22</sup> Ibid at 14 (CP 41), emphasis supplied.

<sup>23</sup> Ibid at 16-17 (CP 43-44), emphasis supplied.

<sup>24</sup> Ibid at 17 (CP 44), emphasis supplied.

Because the statute imposes the duty upon the County to undertake a specific analysis when it designates LAMIRDs, the record must show that analysis. If not, there would be no basis for reviewing compliance with its requirements. It is, therefore, analogous to the “show your work” requirement for the establishment of urban growth areas (UGAs) ... The County’s record in establishing its LAMIRDs must show that it has addressed the statutory considerations and the basis for its decisions. Since the LAMIRD logical outer boundary analysis is part of the designation decision, it must appear in the record. The obligation to establish logical outer boundaries for LAMIRDs falls on the County and the Board cannot review the compliance of particular LAMIRD boundaries with the GMA until the County has made the determinations that go into a decision of where to draw the logical outer boundaries.<sup>25</sup>

...  
The designation criteria in the descriptors for small towns and crossroads communities, crossroads commercial, resort and recreational subdivisions, suburban enclaves, and transportation corridors allow the creation of more intensive areas of rural development that do not comply with RCW 36.70A.070(5)(d). The failure to revise those descriptors therefore fails to comply with RCW 36.70A.130. The failure of the County to revise the designations of proto-LAMIRDs on Map 8 in accordance with the LAMIRD criteria of RCW 36.70A.070(5)(d) also fails to comply with RCW 36.70A.130. The County’s record of its LAMIRD designations must show the analysis used to arrive at the designation and mapping of them.<sup>26</sup>

In other words, the county must start all over according to the 9/20/05 Order.

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<sup>25</sup> Ibid at 18 (CP 45), footnote omitted, emphasis supplied.

<sup>26</sup> Ibid at 18 (CP 45), emphasis supplied.

The 9/20/05 Order makes no reference to the prior challenge to these LAMIRDs, to the trial court's 1998 decision upholding the transportation corridors, to this Court's decision in 2000 affirming the trial court nor to its own 2001 order on remand. The Board simply ignored all this, in contravention of cases such as LeJeune v. Clallam County, 64 Wn.App. 257, 823 P.2d 1144 (1992) (Board of County Commissioners' 1985 decision denying plat application *res judicata* and county lacked power to reconsider its decision three years later) and Christensen v. Grant County Hospital, 152 Wn.2d 299, 96 P.3d 957 (2004) (Plaintiff collaterally estopped from raising same issues in court as adjudicated by Public Employment Relations Commission).

Futurewise argues that neither *res judicata* nor collateral estoppel applies since there is not complete identity of subject matter, cause of action and parties and since application of the doctrines would work an injustice.<sup>27</sup> As to the parties, the prior litigation and the case at bar involve two main parties – the Western Washington Growth Management Hearings Board and Whatcom County. Those have not changed. With regard to subject matter and cause of action, Futurewise's claim that the

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<sup>27</sup> Futurewise's Opening Brief at 33-39.

prior litigation involved a different version of the WCCP (the 1997 version as opposed to the 2005 version) is facile.<sup>28</sup> The LAMIRDs are the same in both versions (indeed, that is the whole point), and the 2005 Ordinance contains a specific finding that the LAMIRDs have not changed:

25. Areas designated as Small Towns, Suburban Enclaves, Crossroads Commercial, and Resort/Recreational Subdivisions have not experienced significant change, nor has additional information been obtained regarding such areas since the adoption of the 1997 Whatcom County Comprehensive Plan that warrant further review and update of the Comprehensive Plan.<sup>29</sup>

With respect to Futurewise's argument that applying collateral estoppel would work an injustice since the prior decisions turned solely on procedural matters,<sup>30</sup> Futurewise is mistaken. The trial court found in 1998 that the Board's decision that the transportation corridors were urban lacked the support of substantial evidence in the record.<sup>31</sup> Thus, the LAMIRDs were upheld based upon the merits and not solely on procedural grounds.

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<sup>28</sup> Futurewise's Opening Brief at 34.

<sup>29</sup> 1/25/05 Ordinance, Finding of Fact 25 (CP 289). NB: This finding refers only to "Small Towns, Suburban Enclaves, Crossroads Commercial, and Resort/Recreational Subdivisions," but the context shows that the council was referring to all the LAMIRDs.

<sup>30</sup> Futurewise's Opening Brief at 38.

<sup>31</sup> CP 1521. See p. 11 above where this part of the decision is quoted.

In ignoring the prior decisions of the trial court and this Court, the Board acted outside its statutory authority or jurisdiction, engaged in unlawful procedure or decision-making process and/or erroneously interpreted or applied the law for purposes of RCW 34.05.570(3)(b), (c) & (d), and the trial court correctly held this to be the case.

*B. Presumption of Validity.* Comprehensive plans and development regulations are presumed valid upon adoption. RCW 36.70A.320(1). When reviewing a challenge to any county action, a growth management hearings board shall find compliance unless it determines that the action by the county “is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” RCW 36.70A.320(3) provides that “the legislature intends for the Boards to grant deference to counties and cities and how they plan for growth ...” As already mentioned, the recent case of Quadrant Corp. v. State Growth Management Hearings Board, *supra*, has held that this legislative directive “supercedes deference granted by the APA and courts to administrative bodies in general.”<sup>32</sup>

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<sup>32</sup> 154 Wn.2d at 328.

However, instead of presuming that the WCCP and development regulations were valid (much less granting them deference), the Board required the county to justify its action in leaving in place provisions which had been in effect since 1997 and had previously withstood court challenges. In doing so, the Board ignored the presumption of validity, resulting in an erroneous interpretation or application of law for purposes of RCW 34.05.570(d), and the trial court was correct in so holding.

C. *Conflict with Quadrant Corporation and Sister Board.* Futurewise argues that:

Futurewise presented specific evidence establishing deficiencies with regard to five (5) separate Designation Descriptors ... CP 684-686. The evidence demonstrated that the Designation Descriptors failed to establish "logical outer boundaries" for LAMIRDs ... CP 684-686, 740-834.<sup>33</sup>

This is misleading. CP 684-686 consists of three pages from Futurewise's brief filed before the Board, and therefore constitutes argument, not evidence. CP 740-834 consists mainly of argument and publications of general application (i.e., not directed to

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<sup>33</sup> Futurewise's Opening Brief at 20-21.

Whatcom County) filed in 2004 with the Whatcom County Council.<sup>34</sup>

In fact, the only evidence submitted to the Whatcom County Council by Futurewise specific to the LAMIRDs consisted of aerial photographs (taken in 1992) purporting to show that the areas designated as LAMIRDs were undeveloped.<sup>35</sup> Futurewise argues that its 14 aerial photographs conclusively demonstrate that the LAMIRDs “did not correspond to the built environment as of July 1, 1990” and therefore were improperly designated.<sup>36</sup>

However, aerial photographs are by no means conclusive. There was no evidence regarding underground utilities, structures not visible from the air, allowable in-fill, vested projects or the like.

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<sup>34</sup> CP 740-765 is a 11/6/04 letter addressed to the Whatcom County Council by 1000 Friends of Washington – Futurewise’s former name. The letter contains extensive argument and attaches a report entitled “Costs of Sprawl 2000” published by the Transportation Research Board discussing sprawl in general (CP 780-804). CP 805-834 is a 11/23/04 letter addressed to the Whatcom County Council by 1000 Friends of Washington. The letter argues that Blaine’s urban growth area is oversized and encloses a study entitled “The Cumulative Effects of Urbanization on Small Streams in the Puget Sound Lowland Ecoregion.”

<sup>35</sup> CP 766-779; CP 1616. Futurewise also argues that “[n]either Whatcom County nor Gold Star presented any evidence or argument to establish that the designation descriptors complied with GMA requirements.” Futurewise’s Opening Memorandum at 21. This is misleading. Gold Star was not involved in this case at the county hearing level. Moreover, Whatcom County had no reason to discuss these aerial photographs at the 1/25/05 County Council meeting given the exhaustive process already undertaken which resulted in a finding that the areas designated as LAMIRDs in the 1997 WCCP had not changed since 1997.

<sup>36</sup> Futurewise’s Opening Brief at 22.

Futurewise had the burden of proving that the county's delineation of the LAMIRDs was clearly erroneous, yet Futurewise produced no direct evidence of what activities were being conducted on, or what projects were vested within, those LAMIRDs.<sup>37</sup> The presumption of validity is not overcome (much less shown to be clearly erroneous) by pointing to green areas on a photograph and asserting that those areas are undeveloped.

Quadrant Corporation v. State Growth Management Hearings Board, supra, presented an analogous situation. There, King County's designation of the Bear Creek area as a UGA was challenged before the Central Puget Sound Growth Management Hearings Board. The board ruled that the county had failed to justify its UGA designation because it interpreted the statutory requirement that the UGA be "characterized by urban growth" to mean that only the actual built environment could be considered (not vested development rights). The decision eventually reached the supreme court, which reversed that part of the board's decision invalidating the county's UGA designation. In doing so, the

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<sup>37</sup> Futurewise argues that it was the county's or Gold Star's obligation to present evidence of activities not visible from the air. Futurewise's Opening Brief at 22, Footnote 11. To the contrary, Futurewise bears the burden of proving that the boundaries of the LAMIRDs were "clearly erroneous in view of the entire record..." RCW 36.70A.320.

supreme court noted that the board's determination that counties may only consider the built environment unreasonably interfered with the county's ability to plan "in full consideration of local circumstances" as allowed by the GMA.<sup>38</sup> Moreover, "growth" is not defined in the GMA, so the county's consideration of vested development rights in the Bear Creek area was not a clearly erroneous application of the GMA. Since the legislature intended to grant counties deference in how they plan for growth, the board's restriction of a UGA to a built environment discouraged the "very type of planning and management the GMA endeavored to encourage."<sup>39</sup> As in Quadrant, Whatcom County is allowed to consider vested projects in delineating its LAMIRDs and (on this record) may well have done so here.

A similar situation arose in Whittaker v. Grant County, EWGMHB No. 99-1-001-9, Order on Compliance entered May 12, 2004, where the Eastern Washington Growth Management Hearings Board rejected challenges to a number of LAMIRDs on the basis of insufficiency of evidence:

[T]he Petitioner's objection that the LAMIRD includes some vacant platted parcels is not

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<sup>38</sup> RCW 36.70A.320(1)

<sup>39</sup> 154 Wn.2d at 240

enough. We must presume, without other evidence, that these are the "limited" undeveloped lands allowed as in-fill. The Petitioner has not shown otherwise.<sup>40</sup>

The county is presumed to have followed the law and allowed in-fill and reasonably limited the size of the LAMIRD ... [G]eneral assertions are insufficient.<sup>41</sup>

The Petitioner has not carried his burden of proof here. While a LAMIRD should limit the inclusion of undeveloped lands, the Petition[er] must show more than he has. In his brief/chart the Petitioner says only that "However, it appears to include undeveloped land on the south end of the lake." This is not enough to leave the Board with an abiding conviction that the County's actions are wrong.<sup>42</sup>

The Petitioner contends there is no "intense activity" going on in this area. That is not the requirement. The statute speaks of "areas of more intensive rural development." This area must be constrained within the logical outer boundary of the existing area of use. The County can consider the physical boundaries such as bodies of water, streets and highways and landforms and contours. Here the County contends it has properly limited this area to such boundaries and the Petitioner has not rebutted the presumption of validity found in the GMA for actions of the County.<sup>43</sup>

This LAMIRD includes the old town site of Ruff ... The inclusion of undeveloped lands was claimed to be only that needed for infill. The Petitioner contends it should be contracted to include only the built environment of 1991. This is not sufficient

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<sup>40</sup> 5/12/04 Order at 9.

<sup>41</sup> Ibid at 10.

<sup>42</sup> Ibid at 11.

<sup>43</sup> Ibid at 12.

to carry the burden placed upon the Petitioner. The actions of the County are presumed valid.<sup>44</sup>

As in Quadrant Corporation and Whittaker, Whatcom County is presumed to have limited the LAMIRDs appropriately, and this presumption cannot be rebutted by merely pointing to photographs. The trial court correctly reversed the Board's ruling to the contrary.

Issue No. 2. Did the trial court err in reversing the Board's holding that rural densities of less than one dwelling per five acres were out of compliance with the GMA?

Board's Decision. The Board rejected the comprehensive plan and development regulations allowing rural densities less than one dwelling per five acres.

Trial Court's Decision. The trial court reversed the Board:

With regard to the rural densities, the Board's conclusion of law I is 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) because the Board held the rural densities out of compliance on the basis of a bright-line rule:

While the GMA does not establish a maximum residential rural density, all three of the Boards

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<sup>44</sup> Ibid.

have found that rural residential densities are no more intense than one dwelling per five acres. Final Decision and Order at 22.

The imposition of a bright-line rule in this fashion was disapproved in *Viking Props, Inc., v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).

Discussion. Futurewise argues that the Board's 9/20/05 Order does not impose a bright-line rule.<sup>45</sup> Futurewise claims that the Board held that the rural densities were not in compliance with the GMA on the basis of evidence in the record:

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.<sup>46</sup>

CP 689-693 consists of five pages from Futurewise's prehearing brief submitted to the Board. This is argument, not evidence.<sup>47</sup> Moreover, contrary to Futurewise's contention, the Board's discussion of this issue makes no reference to evidence showing

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<sup>45</sup> Futurewise's Opening Brief at 47-49.

<sup>46</sup> Futurewise's Opening Brief at 45.

<sup>47</sup> Futurewise also relies upon the publication discussed in footnote 34 on page 20 above (*The Costs of Sprawl 2000*). However, this article talks only about sprawl in general, not Whatcom County or even the State of Washington. CP 780-804. While such evidence might support a bright-line rule, that is all it would support.

that the rural densities would cause damage to hunting, fishing and the like; rather, the Board held that rural densities must not be greater than one dwelling per five acres since all three boards said so.<sup>48</sup> That is a bright-line rule.

The imposition of a bright-line rule by growth management hearings boards was discussed in the recent case of Viking Props, Inc. v. Holm, 155 Wn.2d 112, 118 P.3d 322 (2005). There, plaintiffs challenged restrictive covenants on their property imposing density restrictions lower than those set forth in the GMA, the city's comprehensive plan and the zoning regulations. The trial court agreed and held the density restrictions unenforceable. On appeal, the supreme court reversed, holding that the GMA's goals were not violated by enforcing these covenants. In discussing this issue, the court said:

In addition to its general claims regarding public policy and the GMA, Viking also claims that the growth management hearings boards "have adopted a 'bright line' of a minimum four net dwelling units per acre as defining urban development." ... The City's comprehensive plan and zoning regulations also call for a minimum of four houses per acre ... As a result, Viking concludes that the covenant's density limitation "grossly contradict[s]" the provisions of the GMA, the City's comprehensive plan, and the City's zoning regulations and must be declared void ... This argument is unpersuasive for several reasons.

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<sup>48</sup> CP 93-95.

First, Viking's claim that the GMA imposes a "bright line" minimum of four dwellings per acre is erroneous. In making this claim, Viking relies upon a 1995 decision of the CPSGMHB ... However, the growth management hearings boards do not have authority to make "public policy" even within the limited scope of their jurisdictions, let alone to make statewide public policy. The hearings boards are quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to review of those matters specifically delegated by statute ...

Second, Viking's argument fails to account for the fact that the GMA creates a general "framework" to guide local jurisdictions instead of "bright line" rules ...<sup>49</sup>

As in Viking Props., the Board has imposed a "bright line" rule in the case at bar – rural densities cannot exceed one dwelling unit per five acres. In doing so, the Board acted outside its statutory authority or jurisdiction, engaged in unlawful procedure or decision making process and/or erroneously interpreted or applied the law for purposes of RCW 34.05.070(b), (c) & (d), and the trial court was correct in so holding.

Futurewise also argues that the Board's bright-line rule is supported by a decision of this Court, Diehl v. Mason County, 94 Wn.App. 645; 972 P.2d 543 (1999), and a decision of the supreme court, Quadrant Corporation, supra.<sup>50</sup> Diehl affirmed a WWGMHB

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<sup>49</sup> 155 Wn.2d at 129-130, underlining supplied, italics in original.

<sup>50</sup> Futurewise's Opening Brief at 43.

ruling that parts of Mason County's growth management plan, including rural density levels, were out of compliance with the GMA.

While the Diehl court affirmed the Board, nothing in the opinion implies that the decision turned upon application of a bright-line rule.<sup>51</sup> Similarly, nothing in the Quadrant decision implies that the decision turned upon imposition of a bright-line rule.<sup>52</sup>

Finally, Futurewise challenges Gold Star's standing to address rural densities since Gold Star did not raise the issue before the Board.<sup>53</sup> However, the APA allows review of an issue where "the interests of justice would be served

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<sup>51</sup> The decision was fact-intensive and turned upon Mason County's failure to mitigate the effects of higher rural densities:

Mason County's CP and DRs list the standard rural residential lot size as 5 acres, but they can be as small as 2.5 acres, a size the Board believes is urban. The RAC standard residential lot size is .5 acres, but allows lots as small as .125 acres ... Alternatively, Mason County argues that many DRs and planning policies will prevent the type of urban growth that concerned the Board ... However, as the Board found, these measures are phrased not as requirements or thresholds, but as considerations or suggestions ... The rationale for Mason County's determinations is not evident in the record, and Mason County does not point to a place in the record where its justifications are explained ... The Board's determination that the rural element of Mason County's CP is oversized and allows for urban growth in RACs is supported by the record.

94 Wn.App. at 656-657.

<sup>52</sup> See discussion of Quadrant above at ps. 21-22. As with Diehl, the Quadrant decision turned on the specific facts, and the supreme court declined to rule that the GMA placed "substantive limits on the location of [fully contained communities] ..."  
154 Wn.2d at 246.

<sup>53</sup> Futurewise's Opening Brief at 39-41.

by resolution of an issue arising from ... a change in controlling law occurring after the agency action ...” RCW 34.05.554 (1)(d)(i). Here, the Board entered its Order on Dispositive Motions on June 15, 2005, and the hearing before the Board was held on August 16, 2005.<sup>54</sup> Viking Properties was decided on August 18, 2005 – after the case was submitted to the Board. Thus, the trial court properly reached the issue pursuant to RCW 34.05.554(1)(d)(i).

In addition, an appellate court may affirm a trial court on a ground not raised below “if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a). See Plein v. Lackey, 149 Wn.2d 214, 67 P.3d 1061 (2003). Here, the record before the Board was sufficiently developed to address this issue, so this Court can reach this issue under the court rule. Under these circumstances, it is respectfully suggested that this Court should address the rural density issue.

Issue No. 3. Does RCW 36.70A.130(1) require a county to plan anew every seven years?

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<sup>54</sup> CP 76.

Board's Decision. The Board rejected Gold Star's argument that the seven-year review required under RCW 36.70A.130(1) is limited.<sup>55</sup> The 9/20/05 Order requires counties to virtually re-invent the wheel every seven years and start from scratch when faced with a challenge to any part of its comprehensive plan or development regulations.

Trial Court's Decision. The trial court held 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. 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).<sup>56</sup>

The trial court affirmed the Board's 9/20/05 order to the extent it required "the county to state the reasons for refusing to revise the LAMIRDs."<sup>57</sup>

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<sup>55</sup> The Board acknowledged Gold Star's argument on page 11 of the 9/20/05 decision, but did not address it *per se*. CP 83, footnote 4.

<sup>56</sup> CP 70.

<sup>57</sup> CP 71.

Effect of Cross-Appeal. Gold Star argued to the trial court that there was no reason to reach the issues regarding the LAMIRDs and rural densities since a seven-year review under RCW 36.70A.130(1) does not require a county to review such matters. The trial court disagreed, and Gold Star has cross-appealed on this issue. If this Court accepts Gold Star's interpretation of RCW 36.70A.130(1), the effect would be twofold: (1) This would constitute an alternative ground for affirming the trial court's decision holding that the LAMIRDs and rural densities were in compliance with the GMA; and (2) It would reverse the trial court's decision requiring Whatcom County to state its reasons for refusing to revise the LAMIRDs.

Discussion. RCW 36.70A.130(1) reads in part:

**RCW 36.70A.130**  
**Comprehensive plans -- Review --**  
**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. 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. 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 therefore. 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.

(b) 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 ...<sup>58</sup>

As the supreme court said in King Cty v. Growth Mgmt. Hrg.

Bd., 142 Wn.2d 543, 14 P.3d 133 (2000):

The court's interpretation of a statute is inherently a question of law, and the court reviews questions of law *de novo*. "The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature." In order to determine

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<sup>58</sup> 2002 Laws Ch. 320 §1. N.B. This statute was amended effective May 16, 2005, but this is the version of RCW 36.70A.130 applicable in this case. Emphasis supplied.

legislative intent, the court begins with the statute's plain language and ordinary meaning.<sup>59</sup>

The word “shall” may have either a mandatory or permissive meaning in a statute depending upon the legislative intent. Walters v. Hampton, 14 Wn.App. 548, 543 P.2d 648 (1975) (Statute providing that police chief “shall prosecute” all ordinance violations does not create a non-discretionary duty). The purpose for which a statute was enacted is of prime importance, and a statute should not be construed so as to thwart the legislative purpose. State v. Dalton, 13 Wn.App. 92, 533 P.2d 864 (1975). Statutes are construed so as to avoid absurd results. Mitchell v. John Doe, 41 Wn.App. 846, 706 P.2d 1100 (1985).

Applying these rules of statutory construction here, RCW 36.70A.130(1) requires counties to review only: (1) critical areas and natural resource lands (by counties and cities not planning under RCW 36.70A.040); (2) critical area ordinances and analyses of population with appropriate adjustment of UGAs (by counties and cities planning under RCW 36.70A.040, such as Whatcom County); and (3) such other matters as the county or city feels are appropriate in light of changed circumstances. The statute

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<sup>59</sup> 142 Wn.2d at 555, citations omitted, quotation from Nat'l Elec. Contractors Ass'n, 138 Wash.2d at 19.

requires<sup>60</sup> a seven-year review of two planning issues which change over time – critical areas (which are affected by climate change) and population. The review need not be limited to these two subjects, and the statute allows counties to review and change as necessary those parts of its comprehensive plan and development regulations affected by altered conditions.

However, RCW 36.70A.130(1) does not require a county to re-visit every provision in its comprehensive plan and development regulations every seven years just because someone challenges them. Thus, Whatcom County was not required to review its LAMIRDs and rural densities simply because Futurewise challenged them at the 1/25/05 hearing. Rather, Whatcom County was free under RCW 36.70A.130(1) to leave the LAMIRDs and rural densities in place and to decline to review them further.

Nevertheless, the Board imposed the requirement upon Whatcom County to reconsider its “proto-LAMIRDs” in view of Futurewise’s challenge. In addition, the Board held that the LAMIRD descriptors and rural densities do not comply with the GMA. This part of the Board’s 9/20/05 Order expands a RCW

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<sup>60</sup> “The review and evaluation required by this subsection *shall include*, but is not limited to, consideration of critical area ordinances and ... an analysis of the population allocated to [the] county ...”

36.70A.130(1) review into a collateral attack upon existing plans and regulations not dealing with critical area ordinances or urban growth areas.

After the GMA was enacted in 1990, counties spent years developing comprehensive plans and holding public hearings to refine those proposed plans. Even after this exhaustive public process, comprehensive plans were often challenged before GMA hearings boards. Boards then sometimes found the plans to be out of compliance with the GMA and remanded them back to the counties for revision. After these board-ordered revisions, the comprehensive plans were often challenged in court, and the court cases could last for years.

None of this was lost on the Legislature, which had to keep pushing back the due dates for counties to complete their planning under the GMA. The original 1990 act required counties to adopt comprehensive plans consistent with the GMA by July 1, 1993.<sup>61</sup> In 1993, the deadline was extended to July 1, 1994.<sup>62</sup> In 1995, the Legislature found that 29 counties and 208 cities were conducting comprehensive planning under the GMA, that comprehensive plans

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<sup>61</sup> 1990 1<sup>st</sup> ex.s. c 17 §4(3).

<sup>62</sup> 1993 sp.s. c 6 §1(3).

for many of the jurisdictions were due by July 1, 1994, that the “combined activities of comprehensive planning and the state environmental policy act present a serious fiscal burden upon local governments” and that the state would provide financial assistance to counties in order to complete the necessary plans and environmental analyses.<sup>63</sup>

Incidentally, Whatcom County is a poster-child for the difficulty, expense and imposition on the public process required in order to obtain approval of a final comprehensive plan required under the GMA. After years of planning, research, committee meetings, public hearings, board hearings and remands, the WCCP was finally upheld by the trial court in 1998 and affirmed by this Court in 2000.<sup>64</sup>

Given this background, it is inconceivable that the Legislature intended RCW 36.70A.130(1) to require counties to go through all this again every seven years. Rather, the statute requires that only two evolving planning issues – critical areas and population– be reviewed, evaluated and changed if necessary every seven years. In all other respects, RCW 36.70A.130(1)

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<sup>63</sup> 1995 c 347 §114.

<sup>64</sup> Wells, supra, 100 Wn.App. at 662-666.

allows counties to leave their comprehensive plans and development regulations in place unless, in the counties' discretion, changed circumstances dictate otherwise.

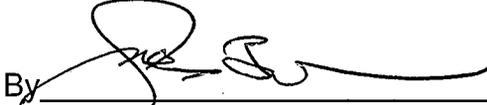
All this being so, the Board exceeded its authority for purposes of RCW 34.05.570(3)(b) and (c) and erroneously interpreted the law for purposes of RCW 34.05.570(3)(d) in holding that Whatcom County's seven-year review is out of compliance with the GMA because of deficiencies in the LAMIRDs or rural densities. RCW 36.70A.130(1) does not require Whatcom County to address LAMIRDs and rural densities at all, much less in the fashion ordered by the Board here, and the trial court erred in interpreting the statute otherwise.

### **CONCLUSION**

The trial court should be affirmed in part and reversed in part. The trial court's ruling that the LAMIRDs and rural densities are in compliance with the GMA should be affirmed. The trial court's ruling requiring Whatcom County to state its reasons for refusing to revise the LAMIRDs should be reversed.

Respectfully submitted this 12<sup>th</sup> day of February, 2007.

BELCHER SWANSON LAW FIRM, P.L.L.C.

By   
\_\_\_\_\_  
JOHN C. BELCHER, WSBA #5040  
Of Attorneys for Respondent Gold Star

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## APPENDIX

Westlaw

2001 WL 454598

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2001 WL 454598 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

(Cite as: 2001 WL 454598 (West.Wash.Growth.Mgmt.Hrgs.Bd.))

Western Washington Growth Management Hearings Board  
State of Washington

\*1 SHERILYN C. WELLS, ET AL., PETITIONERS

v.

WHATCOM COUNTY, RESPONDENT

AND

MICHAEL AND JEAN FREESTONE, ET AL., INTERVENORS

No. 97-2-0030c

March 28, 2001

ORDER TAKING ACTION CONSISTENT WITH THE DECISION OF WHATCOM COUNTY SUPERIOR  
COURT IN CASE # 98-2-00546-3

A pre-remand hearing conference was held telephonically on February 6, 2001. Present were Board members Les Eldridge and Bill Nielsen. Karen Frakes represented Respondent **Whatcom County**. Samuel Plauché represented Trillium Corporation. Bob Carmichael represented Intervenor Birch Bay Water and Sewer District. Kurt Denke represented Petitioners Barbara and Lee Denke. Dana David represented the City of Bellingham.

Mr. Denke noted that petitioners Denke had withdrawn from the case because their issue had been resolved. He remarked that this left no petitioners present for continued participation in the case. Neither **Whatcom** Resource Watch, represented by David Bricklin, nor Sherilyn **Wells** appeared at the pre-remand hearing conference. **Whatcom County** claimed that, absent petitioners with standing, the case should be dismissed.

In its 1998 remand, # 98-2-00546-3, **Whatcom County** Superior Court found that the record contained no substantial evidence supporting noncompliance or invalidity. In **Wells v. WWCMMHB**, # 43028-9-1, Division One, the Court of Appeals, did not reverse this finding.

Absent any challenges by petitioners in the remand phase of this case, and in accordance with Superior Court instructions to take actions consistent with its order, we rescind our previous findings of invalidity and noncompliance regarding the remanded issues.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

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2001 WL 454598 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

(Cite as: 2001 WL 454598 (West.Wash.Growth.Mgmt.Hrgs.Bd.))

So ORDERED this 28 superth day of March, 2001.

Western Washington Growth Management Hearings Board

Les Eldridge

Board Member

William H. Nielsen

Board Member

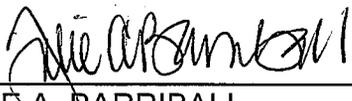
2001 WL 454598 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

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**DECLARATION OF MAILING/DELIVERY**

I, Julie A. Barriball, under penalty of perjury under the laws of the State of Washington, hereby certify and declare that on the below date, I mailed via U.S. First Class Mail, postage prepaid, a true copy of Brief of Respondent Gold Star to: (1) Ken Lederman, Riddell Williams, 1001 Fourth Avenue Plaza, Suite 4500, Seattle, WA 98154-1065; (2) Karen Frakes, Whatcom County Prosecutor's Office, 311 Grand Avenue, Bellingham, WA 98225; and (3) Martha Lantz, Office of the Attorney General, PO Box 40110, Olympia, WA 98504-0110..

DATED this 12 day of February, 2007, at Bellingham, Washington.

  
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JULIE A. BARRIBALL

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