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IN THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

KITTITAS COUNTY and CENTRAL WASHINGTON HOME
BUILDERS ASSOCIATION, et al,

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD et al,

Respondents.

OPENING BRIEF OF BLAW

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I. INTRODUCTION

Appellants Central Washington Home Builders Association of Washington, the Building Industry Association of Washington and Mitchell F. Williams d/b/a MF Williams Construction Co. Inc. (collectively, "BIAW"), Intervenors/Petitioners before the Growth Management Hearings Board for Eastern Washington (hereinafter "Board") submits this Opening Brief in its appeal of the Final Decision and Order (FDO) issued by the Hearings Board on August 20, 2007.

II. ASSIGNMENTS OF ERROR

BIAW assigns the following errors in the Findings of Facts and/or Conclusions of Law in the FDO (AR 2367 - 2370):

- a. Finding of Fact 3, pertaining to whether the County has provided "a variety of rural densities" is a conclusion of law, and, regardless of its characterization, is not supported by the record before the Board
- b. Finding of Fact 4, pertaining to policies maintaining rural densities, is a conclusion of law, and, regardless of its characterization, is not supported by the record.
- c. Finding of Fact 5, pertaining to three-acre rural densities is a conclusion of law, and, regardless of its characterization, is not supported by the record.
- d. Conclusion of Law 9, pertaining to improper densities in the Rural element, is a misstatement and/or misrepresentation of the applicable law.
- e. Conclusion of Law 10, pertaining to Comprehensive Plan policies that maintain a mix of rural densities, is a misstatement and/or misrepresentation of the applicable law.

- f. Conclusion of Law 11, pertaining to rural densities, is a misstatement and/or misrepresentation of the applicable law.
- g. Conclusion of Law 12, pertaining to Performance Based Cluster Platting and Planned Unit Development Zone, is a misstatement and/or misrepresentation of the applicable law.
- h. The Hearings Board erroneously interpreted and applied the law and acted outside its authority in determining that densities greater than one dwelling unit per five acres are not rural in nature.

III. STATEMENT OF THE CASE

A. GMA policy requirements

The GMA requires that local governments include a rural element within its comprehensive plan that designates rural lands. RCW 36.70A.070(5). Rural lands are those lands “not designated for urban growth, agriculture, forest, or mineral resources.” RCW 36.70A.070(5). Recognizing that circumstances differ from county to county, the GMA explicitly allows local jurisdictions to consider local circumstances when establishing its pattern of rural densities. *See* RCW 36.70A.070(5)(a). In doing so, the county must provide a written record explaining how the rural element harmonizes the GMA planning goals and the requirements of the Act. *Id.*

In addition to permitting clustering in agricultural lands, the GMA requires counties planning for “rural development” to “provide for a variety of rural densities, uses, essential public facilities, and rural

governmental services needed to serve the permitted densities and uses.” RCW 36.70A.070(5). Local governments can achieve a variety of rural densities through “clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate densities and uses that are not characterized by urban growth and that are consistent with rural character.” *Id.*

B. Procedural History & Facts

On December 11, 2006, Kittitas County enacted Ordinance 2006-63, which amended the County’s existing Comprehensive Plan. On February 8, 2007, Futurewise, Kittitas County Conservation, Ridge (collectively, “Futurewise”) filed a petition for review with the Eastern Washington Growth Management Hearings Board. On February 21, 2007, the Washington State Department of Community Trade and Economic Development also filed a petition for review with the Board. On February 21, 2007, the Building Industry Association, Central Washington Home Builders Association and Mitchell F. Williams (collectively “BIAW”) filed a motion to intervene. On March 15, 2007, the Board consolidated the two petitions for review and granted BIAW’s motion to intervene.

On August 20, 2007, the Growth Management Hearings Board (“Board”) issued its Final Decision and Order (FDO), Case No. 08-1-0004c. AR 2287.

The Board ruled that a number of provisions in Kittitas County's Comprehensive Plan violated the Growth Management Act, RCW 36.70A *et seq.* Specifically, the Board ruled that Kittitas County's Comprehensive Plan violated the GMA for allowing rural densities of one home per three acres (Issue 1 of the FDO), by failing to provide a variety of rural densities (Issue 11) and by failing to revise the Cluster Platting Ordinance and Planned Unit Development Ordinance (Issue 10). See AR 2287-2373.

Kittitas County's Rural Lands Comprehensive Plan chapter is a detailed policy document that specifies at the outset that the County's rural land use designation "consists of a balance of different natural features, land use types and land uses. . . [t]he Rural Lands exhibit a vibrant and viable landscape where a diversity of land uses and housing densities are compatible with rural character." AR 213-14.

GPO 8.3 specifically contemplates the problem of "rural sprawl" and GPO 8.13 addresses the problem: "Methods other than large lot zoning to reduce densities and prevent sprawl should be investigated. Further, GPO 8.2 states "Projects and developments which result in the significant conservation of rural lands or rural character will be encouraged. AR 216-17. GPO 8.46 specifies that "[r]esidential development on rural lands must be in areas that can support adequate private water and sewer systems" and 8.49 states "[l]ot size should be

determined by provision for water and sewer.” AR 220-21. When it comes to “innovative techniques,” GPOs 8.48, 8.50 and 8.51 specify that PUDs and cluster developments are to be considered and also place safeguards for implementation of such techniques. AR 221 (For example, “[i]n the case of Planned Unit Developments (PUDs), only residential PUDs should be permitted outside of UGAs or UGNs.” Last, GPO 8.9 states that “[p]rojects or developments which result in the significant conservation of rural lands or rural character will be encouraged.” AR 217.

The foregoing satisfies the GMA’s requirement that the County create a written record providing explanation of how the rural element harmonizes with the goals of the GMA.

IV. ARGUMENT

A. Standard of Review: The GMA Grants Great Discretion to Counties When Planning for Growth

The Growth Management Act sets a presumption of validity for comprehensive plans. The GMA states that a Growth Management Hearings Board “shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” RCW 36.70A.320(3). Further, a GMHB is obligated to

defer to a local government's decisions that are consistent with the GMA. RCW 36.70A.320(1).

When appealing a Board decision, the Administrative Procedure Act controls, and the appealing party has the burden of proving invalidity of the board's actions. RCW 34.05.570(3). Further, "[a] Board's order must be supported by substantial evidence to persuade a fair-minded person the truth or correctness of the order." *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wash.2d 329, 341, 190 P.3d 38, 44 (2008) (secondary citations omitted). Issues of law are reviewed de novo and on mixed questions of law and fact, the court determines the law independently and then applies it to the facts as found by the Board. See *Thurston County*, 164 Wash.2d 329, 190 P.3d 38, see also *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wash.2d 488, 139 P.3d 1096 (2006).

The Legislature, in 1997, amended the GMA to include the highly deferential clearly erroneous standard and, in doing so, took the unusual step of codifying the statement of legislative intent:

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.320 (emphasis added).

Other provisions of the GMA confirm the broad discretion given to counties. For example, the GMA provides in pertinent part:

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

(2) Except as otherwise provided in subsection (4) of this section, the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

(3) In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A.190(4). The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.

RCW 36.70A.320 (emphasis added).

Numerous GMA cases also make clear that the Act grants local officials broad discretion and ultimate responsibility and authority for determining how to apply its requirements to the particular circumstances of their communities. RCW 36.70A.320 & 36.70A.3201; *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wash.2d 224, 233, 110 P.3d 1132 (2005); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Mgmt Hearings Bd.*, 113 Wash.App. 615, 626-27, 53 P.3d 1011 (2002). “Great deference is accorded to a local government’s decisions that are ‘consistent with the requirements and goals’ of the GMA.” *Thurston County*, 164 Wash.2d 329, 337, 190 P.3d 38. “The GMA recognizes regional differences and allows counties to consider local circumstances when designating rural densities so long as the local government creates a written record explaining how the rural element harmonizes the GMA requirements and goals.” *Id.*

The GMA also expressly grants local governments discretion in establishing the pattern of rural densities. *See* RCW 36.70A.070(5)(a) (“[B]ecause circumstances vary from county to county, in establishing patterns of rural densities ... a county may consider local circumstances.”). Counties must include a written record explaining how the rural element harmonizes the GMA’s goals and meets the statutory requirements. The Court in *Thurston County* re-iterated that “[t]he

legislature did not specifically define what constitutes a rural density. Instead, it provided local governments with general guidelines for designating rural densities. A rural density is ‘not characterized by urban growth’ and is ‘consistent with rural character.’ *Thurston County*, 164 Wash. 2d at 359, 190 P.3d 38.

Although some earlier decisions hold that courts defer to Board interpretations of the GMA, the Washington Supreme Court has clarified that deference to county GMA actions overrides deference that would otherwise be granted to administrative agencies. *See Quadrant*, 154 Wn.2d at 238, 110 P.3d 1132 (“In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the requirements of the GMA, supersedes deference granted to the APA and courts to administrative bodies in general.”).

Here, the Board ignored the clear legislative directive and case law that directs it to provide Kittitas County discretion when planning for its growth. Instead, the Board imposed a one-size-fits-all, bright line rule of five-acre minimum lots in the rural portions of the County. Moreover, the Board ignored the GMA’s clear language allowing local jurisdictions to achieve a variety of rural densities through innovative techniques.

B. The Growth Management Hearings Board Erred by Ruling that the Growth Management Act Does Not Allow Rural Densities of One Unit Per Three Acres

The Growth Board struck down Kittitas County's Comprehensive Plan because it allows rural densities of one home per three acres. AR 2303. In doing so, the Board ignored the plain language of the GMA and well-established case law. The Growth Board's 2007 decision is also in direct conflict with the unanimous 2008 decision in *Thurston County*, 164 Wash.2d 329, 190 P.3d 38.

The *Thurston County* case involved similar facts. *Id.* Thurston County's comprehensive plan stated that there may be areas of higher densities – as high as two dwelling units per acre in certain areas. The Growth Board in that case concluded (and the Court of Appeals confirmed) that densities greater than one dwelling unit per five acres are not rural densities. *Thurston County*, 137 Wash.App. at 806-08, 190 P.3d 38. Similarly, in this case, Kittitas County's "failure to review and revise the comprehensive plan to eliminate densities greater than one dwelling unit per five acres in the rural area" led to a violation of the GMA. *See* AR 2292. According to the Growth Board in the instant case, densities allowing one home per three acres in areas zoned Rural-3 and Agriculture-3 are "urban" in nature and thus a violation of the GMA. *See* AR 2303.

The Washington Supreme Court has repeatedly ruled that the Growth Boards do not have authority to create bright line rules, and in

particular, bright line rules concerning densities. See *Viking Properties v. Holm*, 155 Wash.2d 112, 118 P.3d 322 (2005). In *Viking Properties*, a developer wanted to build four units per acre, but a covenant running with the land limited development to two units per one acre. *Id.* at 117. The developer cited existing Growth Board decisions that created a “bright line” rule of a minimum four units per acre in urban areas to bolster his claim. *Id.* at 129. The Supreme Court dismissed this argument explaining that “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.” *Id.*

The Court in *Thurston County* once again cleared up any ambiguity that remained on the issue of bright-line rules. First noting that counties have “a great amount of discretion to employ various techniques to achieve a variety of rural densities,” the Court went on to strike down the bright line rule that the Growth Board and Court of Appeals applied:

The GMHB, as a quasi-judicial agency, lacks the power to make bright line rules regarding maximum rural densities. We hold a GMHB may not use a bright line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny.” (emphasis added) *Thurston County*, 164 Wash.2d at 358-59, 190 P.3d 38 (quoting *Viking Props.*, 155 Wash.2d at 129-30, 118 P.3d 322).

The Court in *Thurston County* then directly addressed specific Board decisions that have utilized bright line standards to distinguish between urban and rural. In a footnote, the Court said “[W]e have rejected any bright-line rule delineating between urban and rural densities.” *Thurston County*, 164 Wash.2d at 359, 190 P.3d 38 (footnote 22).

The Court in *Thurston County* also made clear that the way the question was framed resulted in a bright-line rule, even though the Board may not have intended to explicitly adopt such a rule. Footnote 20 states:

“Although the Board did not explicitly adopt a five acre bright-line rule, such a rule was implicit in its decision because of the way the issue regarding rural densities was framed. The Board framed the issue as to whether the County’s comprehensive plan failed to comply with the GMA by allowing ‘development at densities of greater than one unit per five acres when this board has determined that such densities fail to comply with the GMA.’ *Thurston County*, 164 Wash.2d at 358, 190 P.3d 38.

In the *Thurston County* case, the Board considered the question: “D. Whether a comprehensive plan provides for a variety of rural densities in accordance with former RCW 36.70A.070(5)(b) when resource lands and densities greater than one dwelling unit per five acres are included in the rural element.” (emphasis added) *Thurston County*, 164 Wash.2d at 355, 190 P.3d at 50.

Similarly, the specific issue before the Growth Board in the case here was: “Does Kittitas County’s failure to . . . eliminate densities

greater than one dwelling unit per five acres in the rural area...violate [the GMA]?" AR 2292 (emphasis added). The Growth Board ultimately ruled that Kittitas County's rural densities of one unit dwelling per three acres violated the GMA. *See* AR 2347.

The decisions in *Thurston County* and *Viking Properties* made clear that the GMA does not give Boards the authority to make policy or to impose "bright line" rules regarding how local governments are to comply with GMA obligations. *Thurston County*, 164 Wash.2d 329, 190 P.3d 38, *Viking Props.*, 155 Wash.2d 112, 118 P.3d 322. In addition, it is well-settled that an administrative agency has only those powers that are expressly or implicitly granted to it by statute. *Burlington Northern, Inc. v. Johnston*, 89 Wash.2d 321, 326, 572 P.2d 1085 (1977). Actions of an agency in excess of its statutory authority are void. *Port Townsend School Distr. No. 50 v. Brouillet*, 20 Wash. App. 646, 653, 587 P.2d 555 (1978); *see also, Marley v. Dep't of Labor & Indus.*, 125 Wash.2d 533, 539 866 P.2d 189 (1994). Petitioners are seeking that this Board base its decision on a "bright line" rule regarding minimum rural densities, when such bright line rule does not exist in the GMA.

C. The Growth Board Erred by Finding Kittitas County's Comprehensive Plan In Violation with the GMA for Failing to Provide for a Variety of Rural Densities

The GMA requires that local governments include a rural element within its comprehensive plan that designates rural lands. RCW 36.70A.070(5). The GMA explicitly allows local jurisdictions to consider local circumstances when establishing its pattern of rural densities. *See* RCW 36.70A.070(5)(a). In doing so, the county must provide a written record explaining how the rural element harmonizes the GMA planning goals and the requirements of the Act. *Id.*

Despite the fact that Kittitas County's comprehensive plan included six rural areas with varying densities, the Growth Board ruled that the County's comprehensive plan did not provide for a variety of rural densities. *See* AR 2340-2347. According to the Growth Board, Kittitas County failed to provide specific criteria for "determining when and where rezone applications should be approved." AR 2346. In reaching this decision, the Growth Board ignored evidence explaining that the County does have specific criteria limiting rezones. Specifically, KCC 17.98.020(5) provides in relevant part:

- a. The proposed amendment is compatible with the comprehensive plan; and
- b. The proposed amendment bears a substantial relation to the public health, safety or welfare; and
- c. The proposed amendment has merit and value for Kittitas County or a sub-area of the county; and
- d. The proposed amendment is appropriate because of changed circumstances or because of a need for additional property in the proposed zone or because the proposed zone

is appropriate for reasonable development of the subject property; and

e. The subject property is suitable for development in general conformance with zoning standards for the proposed zone; and

f. The proposed amendment will not be materially detrimental to the use of properties in the immediate vicinity of the subject property; and

g. The proposed changes in use of the subject property shall not adversely impact irrigation water deliveries to other properties.

Thus, contrary to the Growth Board's decision, Kittitas County indeed does provide meaningful criteria limiting rural rezones.

The Board also ignored the Comprehensive Plan's explanation of the local circumstances warranting a small fraction of the rural areas to be zoned at one dwelling unit per three acres. For example, the rural element contains numerous pages explaining the County's local circumstances and rural landscape and how it harmonizes with the GMA's goals and requirements. *See* KCC Ch. 8. Despite this in-depth discussion of the local circumstances, the Growth Board ignored the overwhelming evidence and instead inexplicably ruled that the County did not provide for a variety of rural densities. *See* AR 2346-2347. The Growth Board's decision on this issue was an erroneous application of the law, not supported by the evidence, and arbitrary and capricious.

D. The Growth Board Erred by Finding Kittitas County's Cluster Ordinance and Planned Unit Development Ordinance In Violation with the GMA

1. The Cluster Ordinance and PUD ordinance are techniques specifically envisioned in the GMA

The GMA expressly allows cluster development in rural areas. For example, RCW 36.70A.070(5)(b) provides in relevant part:

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.

In addition, the GMA allows cluster zoning on lands designated as agricultural lands of long-term commercial significance. RCW 37.70A.177(2)(b) expressly provides that cluster zoning may occur if it “allows new development on one portion of the land, leaving the remainder in agricultural or open space uses.” Moreover, the GMA explicitly grants local governments discretion when planning for growth and setting rural densities. *See* RCW 36.70A.3201; *see also* RCW 36.70A.070(5)(b).

The GMA provides in pertinent part:

- (1) A county or a city may use a variety of innovative zoning techniques in areas designated as agricultural lands of long-term commercial significance under RCW 36.70A.170. The innovative zoning techniques should be designed to conserve agricultural lands and encourage the agricultural economy. Except as provided in subsection (3) of this section, a county or city should encourage nonagricultural uses to be limited to lands with poor soils or otherwise not suitable for agricultural purposes.
- (2) Innovative zoning techniques a county or city may consider include, but are not limited to:
 - (b) Cluster zoning, which allows new development on one portion of the land, leaving the remainder in agricultural or open space uses.

RCW 36.70A.177.

Implicit in the GMA's invitation to use "innovative techniques" is an assumption that a blanket minimum-acre-per-lot rules are not the only way to retain rural character. Increasingly, Washington courts are recognizing that a local government's discretionary designation of rural areas should consider more than just the minimum number of acres per lot. For example, Washington courts have addressed the countervailing planning problem that occurs when large rural lots are converted from "farm lands into weed patches" as a result of a pattern of low density development in the County. *Woods v. Kittitas County*, 162 Wash.2d 597, 622, 174 P.3d 25 (2007). See also *Henderson v. Kittitas County*, 124 Wash.App. 747, 754, 100 P.3d 842 (2004), *review denied*, 154 Wash.2d 1028, 120 P.3d 73 (2005) and *Woods v. Kittitas County*, 130 Wash. App.

573, 123 P.3d 883 (2005), aff'd 162 Wash.2d 597, 174 P.3d 25 (2007). A solution to this problem is designating small rural lots with easements for agriculture, forest or open spaces, which may be "more conducive to retaining rural character" than "large lot zoning." *Henderson*, 124 Wash. App. at 756 (Land Use Petition Act (LUPA) appeal; holding that a re-zone from 20-acre to 3-acre rural lots accomplished goal of retaining rural character).

The cluster and PUD ordinances here are a solution to the problem of large rural lots turning into weed patches. The purpose of the cluster ordinance is to meet the affordable housing needs of Kittitas County citizens, while at the same time protecting the environment by requiring a significant portion of each property to be left as open space. *See* KCC 16.09.010; .030. Likewise, the PUD ordinance seeks to protect "open space" and "natural areas" while at the same time providing flexibility. *See* KCC 17.36

2. Kittitas County's Cluster Ordinance satisfies RCW 36.70A and protects existing agricultural land

The Growth Board erred by ruling that the Cluster Ordinance failed to protect agricultural land and by ruling that the ordinance: 1) does not include limitations on the maximum number of lots allowed, 2) does not limit the number of connections to public and private water and sewer

lines, and 3) does not contain requirements limiting development on the residual parcel. *See* AR 2338.

Despite the Board's unsubstantiated conclusion that Kittitas County's cluster platting ordinance "fall woefully short" of conserving agricultural land, the ordinance in fact includes many safeguards to achieve this goal. *See* AR 2339 and KCC Ch. 16. First, Kittitas County's Cluster Ordinance addresses the GMA's requirement of protecting existing agricultural land by requiring that all applications for cluster platting were to be evaluated for impacts to adjacent agricultural uses. KCC 16.09.040(E). The Cluster Ordinance further provides that "[c]onditions may be placed on development proposals" to "protect agricultural lands from possible impacts related to incompatible uses." *Id.* Next, the Cluster Ordinance limits how development may occur in the rural areas by setting a minimum acreage. For example, the minimum amount of open space that is required to be set aside in the Rural-3 and Agricultural-3 zones is nine acres. KCC 16.09.030. In order to be eligible for cluster platting in the Rural-5 and Agricultural zones, the property owner would have to set aside, at a minimum, 15 acres. *Id.* And for areas zoned Agriculture 20 and Forest and Range (one dwelling unit per 20 acres), the minimum open space set aside requirement is 30 acres. *Id.* Last, the Ordinance further restricts the amount of clusters in areas zoned

rural and agricultural. For example, the density bonus, allowing more residential lots than the underlying zoning allows, is limited to use in the rural designations with a 100% bonus in the Rural-3, Agricultural-3, Rural-5, and Agricultural-5 areas. KCC 16.09.030. The Ordinance limits density bonuses in the Agricultural-20 and Forest and Range-20 zones to 200%. *Id.*

In addition, the Ordinance seeks to protect the environment in rural areas by conserving water by minimizing the development of exempt wells and by encouraging group water systems. *See* KCC 16.09.010. Moreover, the Ordinance seeks to protect the public health by reducing the number of septic drain fields and reducing sprawl through the clustering of homes. *Id.*

3. The County's PUD ordinance satisfies RCW 36.70A

In addition, the Growth Board's decision regarding the County's Planned Unit Development Zone Ordinance (KCC 17.36) is arbitrary and capricious. The Growth Board failed to provide specific evidence or analysis explaining how or why KCC 17.36 violated the GMA. Instead, the Board simply concluded that the ordinance "further aggravates the problem of urban-like development in the rural and agricultural zones with the appropriate controls." *See* AR 2339. The PUD ordinance explicitly requires that the preliminary development plan include a "statement of the

developer’s intent with regard to providing landscaping and retention of open spaces.” KCC 17.36. The ordinance imposes “controls” at the Final Development Plan stage, including “Statement of intent including estimated cost for landscaping and restoration of natural areas despoiled by construction including tree planting” and “the location and total are of common open spaces” as well as a “storm drainage plan” – all requirements that contemplate a mix of development and natural vegetation to achieve the purpose and intent to provide for “flexibility” as outlined at the beginning of the PUD ordinance. KCC 17.36

Planned Residential Developments and cluster platting in rural areas were also considered by the court in *Thurston County*. In a footnote, the Court pointed out that both the planned residential development and clustering codes intended to promote “greater flexibility,” “open space,” and “imaginative design.” *Thurston County*, 164 Wash.2d at 356, 190 P.3d 38. The Court concluded that a “county has a great amount of discretion to employ various techniques to achieve a variety of rural densities. *Id.*, (quoting *Whidbey Envtl. Action Network v. Island County*, 122 Wash.App.156, 167, 93 P.3d 885 (2004).)

Despite the clear language in *Viking Properties and Thurston County*, the Board concluded that Kittitas County’s Cluster Platting Ordinance allows urban development in rural areas, invalidating the

ordinance based on a “bright line” rule that does not appear in the GMA. The Board does not have the authority to add language to the GMA. *See, e.g. State v. Delgado*, 148 Wash.2d 723, 727 (2004) (courts and Boards “cannot add words to unambiguous statute when the legislature has chosen not include that language.”). No such provision imposing a bright-line rule exists in the GMA. Moreover, Petitioners are asking this Court to ignore the deference owed to local jurisdictions when planning for growth.

E. The GMA does not allow elevating singular goals over the other non-prioritized goals

In applying the bright-line rule and finding that the County’s Cluster Ordinance and PUD Ordinance violate the GMA, the Board has effectively elevated the second GMA goal of reducing sprawl over all of the other non-prioritized goals, such as providing affordable housing, protecting property, and encouraging economic development. *See* RCW 36.70A.020(4)(5) & (6). The Board’s decision is remarkable in light of the Washington Supreme Court’s unambiguous statement in *Viking Properties* that the GMA’s goals are nonprioritized. The Supreme Court in *Viking Properties* dismissed the notion that any singular goal can be elevated over the other equally weighted GMA goals:

Viking’s public policy argument also fails to the extent that it implicitly requires us to elevate the singular goal of urban density to the detriment of other equally important GMA goals. To do so would violate the legislature’s express

statement that the GMA's general goals are nonprioritized. RCW 36.70A.020 (“The following goals are not listed in order of priority....”). We are ever cognizant that this is a legislative prerogative and have prioritized the GMA's goals only under the narrowest of circumstances, where certain goals came into direct and irreconcilable conflict as applied to the facts of a specific case. *See King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 558, 14 P.3d 133 (2000). We decline Viking's invitation to create an inflexible hierarchy of the GMA goals where such a hierarchy was explicitly rejected by the legislature.

Viking Properties, 155 Wash.2d at 127-28, 118 P.3d 322.

The Growth Board's decision finding Kittitas County's Cluster Ordinance and Planned Unit Development Ordinance in violation of the GMA was an erroneous application of the law and arbitrary and capricious.

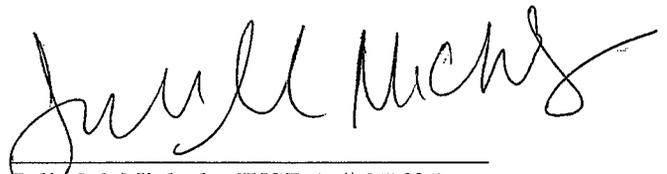
V. CONCLUSION

Based on the foregoing, Appellants request that this Court reverse the Board's decision finding Kittitas County's Comprehensive Plan out of compliance with the GMA because the County allows rural densities greater than one unit per five acres.

Appellants also request this Court reverse the Growth Board's decision finding that Kittitas County's Comprehensive Plan violates the GMA for failing to provide for a variety of rural densities.

In addition, Appellants request that this Court reverse the Growth Board's decision finding Kittitas County violated the GMA by failing to review and revise KCC 16.09 (Performance Based Cluster Platting) and KCC 17.36 (Planned Unit Development Zone).

Respectfully submitted this 16th day of March, 2009.



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