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

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, et al.,

Respondents.

BRIEF OF AMICUS CURIAE CITY OF ROSLYN IN SUPPORT OF RESPONDENTS KITTITAS COUNTY CONSERVATION, RIDGE AND FUTUREWISE

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I. INTRODUCTION

Amicus, the City of Roslyn ("Roslyn"), joins in and fully supports the arguments raised by Respondents Kittitas County Conservation, Ridge and Futurewise.

II. STATEMENT OF THE CASE

Roslyn adopts the statement of the case set forth in the brief of the Respondents Kittitas County Conservation, Ridge and Futurewise.

III. IDENTITY AND INTEREST OF AMICUS CURIAE

Roslyn is a small city, with a population of almost 1,000, located in northern Kittitas County ("County"). The City is a former coal mining community, nearly all of which has been designated as a National Historic District. The City is incorporated as an optional code city under Title 35A RCW, and it has prepared and is implementing a Comprehensive Plan in accordance with the provisions of the Washington State Growth Management Act, Ch. 36.70A RCW ("GMA").

As a municipality in Kittitas County, Roslyn is in a unique position to address the issues regarding GMA compliance as it relates to the requirements applicable to rural versus urban zoning. The City is required to plan for urban densities within the City and the City's UGA. The County's attempt to designate three-acre rural zones that allow unlimited cluster and planned unit developments constitutes "urban" rather than

rural growth, and will amount to a *de facto*, unilateral adjustment to the City's UGA. This is contrary not only to the GMA, but also to the assertion in the County's Comprehensive Plan that provides that cities are responsible for developing a final urban growth area boundary, and that cities are responsible for the future land use plans for the unincorporated portion of their respective urban growth areas and the provision of related services to that urban growth.

Additionally, the City of Roslyn is the only entity that is before this Court that has a Class A municipal water system that is subject to curtailment of its water supply.[1] The risk of curtailment makes it imperative that the County meet its obligations to provide for protection of surface and groundwater supplies, as well as its obligation to require new development in the County to demonstrate that the new development has an appropriate and adequate water supply and will not adversely affect existing water right holders. The County's failure to meet this obligation may result in the City being subject to a more frequent curtailment of its water supply as a result of improper and illegal use of water, which may in

[1] As used here, "curtailment" means the imposition of the Yakima County Superior Court's REVISED ORDER LIMITING POST-1905 DIVERSIONS DURING PERIODS OF SHORTAGE in *Department of Ecology v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5, dated Mar. 10, 2005, or if that order is not in force, other action that requires the reduction or cessation of Roslyn's diversion of water from Domerie Creek to protect Total Water Supply Available or a senior water right holder from impairment.

turn result in a more frequent call by senior water users. The City's unique position in this regard warrants additional briefing to this Court

IV. ARGUMENT

A. The Growth Board Correctly Ruled that Kittitas County's Rural Clusters and Planned Unit Developments Violate the Growth Management Act.

The Growth Board correctly ruled that Kittitas County's version of rural clusters and planned unit developments violate the Growth Management Act, Ch. 36.70A RCW ("GMA"), because they allow urban growth in the rural area. AR 1206, 1210-1212. The County's argument is essentially that the County possesses the legislative discretion to determine what level of growth constitutes "rural," and the Board must accept the County's decision. The County's argument is wrong as a matter of law. The Board need not defer to a legislative enactment that fails to comply with the GMA. *Thurston County v. Cooper Point Association,* 108 Wn. App. 429, 444, 31 P.3d 28, (2001). Because the County failed to support its zoning designation of Rural 3 with any facts in the record to support a conclusion that such a designation is consistent with the rural character of Kittitas County, the Board correctly ruled that the designation violated the GMA. The County's rural clusters and planned unit development ordinances not only increase density in the rural areas, they have no maximum limit on density, which means that it can

permit unbridled urban-level growth even in the rural, unincorporated parts of the County. Regardless of the amount of discretion that might be afforded to a county in the abstract, under the facts of this case, the Board correctly ruled that Kittitas County's development regulations violate the GMA.

RCW 36.70A.070(5)(b) expressly provides that "[t]he rural element [of a comprehensive plan] shall permit rural development, forestry, and agriculture in rural areas. . . ." (emphasis added.) Conversely, RCW 36.70A.110(1) calls for urban growth in urban areas:

> Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.

(emphasis added.) Taken together, these two GMA provisions illustrate the unremarkable proposition that a county may not plan for urban growth in the rural area. Yet, that is exactly what Kittitas County has done in this instance.

The County defends its Comprehensive Plan and development regulations by claiming, correctly, that it is entitled to utilize a variety of different densities, and that some of the development tools it has utilized - cluster development, for example - are expressly permitted by statute. It is true that a county has a great amount of discretion to employ various

techniques to achieve a variety of rural densities - including cluster development - and may consider local circumstances in determining rural densities. *Thurston County v. Western Washington Growth Board*, 164 Wn.2d 329, 355, 190 P.3d 38 (2008); RCW 36.70A.070(5)(b). Notwithstanding this flexibility, a county "must explain in writing how the rural element harmonizes the goals and meets the requirements of the GMA." *Id.* at 355. And, while it is true that the use of such planning tools does not in and of itself violate the GMA, where such tools allow unrestricted, urban-level growth - as they do here - they are correctly invalidated, as the Board did below here.

For example, Kittitas County's cluster development ordinances allow virtually unrestricted development at 1 d.u./1.5 acres and 1 d.u/2.5 acres in the rural areas. AR 1206, 1210-1212. In fact, under Kittitas County's zoning, a planned unit development ("PUD") has <u>no maximum density and no minimum requirements</u>. *See, e.g.*, Kittitas County Code ("KCC") Sections 17.36.030 and .040. <u>All</u> residential uses are permitted – <u>including</u> multi-family development – again, without any density limitation. *See* KCC 17.36.020(1). Also permitted without any density limitation whatsoever are manufactured home parks, hotels, motels, condominiums, restaurants, general commercial and retail, and any other "similar" use that the County planning commission might on a whim

decide to permit. KCC 17.36.020(2) – (8). Indeed, the County's code expressly acknowledges that this might result in an increase in density above that allowed by the underlying zone, in which case all an applicant need do is describe what, if any, transferable development rights the applicant might be provided along with its application. *See, e.g.*, KCC 17.36.030(5)(l) (" If the proposed PUD rezone will result in an increase in unit density over the existing zone, include a narrative of the transfer of development rights . . . ."). There is no requirement that increased density be accompanied by a transfer of development rights, no limit upon any increased density that may be permitted, and no limit upon the type, concentration, or impacts resulting from any proposed PUD uses.

Likewise, the County's so-called "performance cluster" development regulations also allows unregulated urban growth. Kittitas County's "performance cluster" regulations not only contain no density maximum, their only reference to a minimum lot size parallels only that which might be required by the Washington State Department of Health. *See, e.g.*, KCC 16.09.060 (size of "performance cluster" lot need only meet the minimum WA ST Department of Health requirements) Department of Health minimum requirements, however, are 12,500 square feet per lot – a density of nearly 4 units per acre. *See, e.g.*, WAC 246-272A-0320(d) (specifying minimum lot sizes for Method I and Method II

on-site septic system uses). Such "performance clusters" are permitted anywhere in the County, without regard to the rural character of their surrounding environment, and without regard to whether they may permit urban sprawl.

Making matters worse, "performance cluster" lots are awarded "urban points" leading to "bonus density" for their inclusion of "urban" development features. *See, e.g.*, KCC. 16.09.090 and examples and charts therein. As the Board observed, these regulations permit a doubling of density, and do not include a limit on the maximum number of lots allowed on the land included in the cluster; prohibit the number of connections to public and private water and sewer lines; and do not include requirements to limit development on the residual parcel. *Kittitas Conservation v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Final Decision and Order at 52. Because a property owner can seek a rezone to utilize a PUD and/or cluster development, and thereby gain access to virtually unlimited density, under these facts, the County simply cannot argue with a straight face that its R-3 zone is a "rural" zone. Indeed, the City of Roslyn has been forced to spend countless resources in the past two years objecting to PUD rezones that would have resulted in developments even more dense than the City of Roslyn itself – yet located in the unincorporated County, outside of any city's UGA. These

provisions – on their face – authorize urban development, and the Board's invalidation of them could be affirmed on that ground alone.

In *Thurston County v. Western Washington Growth Management Hearings Board*, this Court overturned a Growth Board and Court of Appeals decision that Thurston County's Comprehensive Plan allows urban growth in a rural area solely because it allowed growth in excess of one dwelling unit per five acres. In ordering a remand, this Court emphasized that Thurston County's strategies could not be thrown out without an analysis of their application to the particular circumstances in which Thurston County had applied them. *Thurston County,* 164 Wn.2d at 359-360. Here, the Eastern Board examined the record of Kittitas County's adoption, and concluded that:

> This Board and two Hearings Boards have studied rural lot sizes, effects of those lot sizes and measured these findings against the requirements of the GMA and its definitions. With this extensive research and having reviewed the Kittitas County Record, searching for the basis for the sizing of these Rural lots, this Board finds that the densities of lots the size allowed by these regulations, Agriculture-3 and Rural-3, are urban densities and this urban growth is prohibited in the Rural element.

Final Decision and Order at 16.

The Board also rejected Kittitas County's argument that the County's <u>previously</u>-enacted development regulations could somehow save the Comprehensive Plan designations:

> In a previous Board decision, Kittitas County was found to not have properly reviewed these pre-CP regulations for consistency or adopted the regulations properly as implementing the CP. "The Board finds there was clear and convincing evidence that the County failed to act when it failed to adopt regulations implementing its CP, review Agriculture-3 and Rural-3 regulations for consistency with its Comprehensive Plan, and provide for proper notice and public participation." *KCCC, et al. v. Kittitas County, et al.*, EWGMHB Case No. 06-1-0011, FDO, April 3, 2007. <u>While the County claims that these regulations were adopted to carry out local circumstances in establishing patterns of rural densities and uses, this would seem difficult to sustain where such regulations were improperly reviewed and adopted. Further, the County must "develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the [Act]." RCW 36.70A.070(5). They have not developed this written record</u>.

Id. at 16 (emphasis added). This is exactly what this Court held in *Thurston County* that a Growth Board should do. Therefore, on the facts here – the lack of a written record and reliance upon a previously-invalid set of development regulations – the Court must affirm the Board's holding that Kittitas County's Comprehensive Plan and development regulations fail to comply with the Growth Management Act.

As noted in the City's Motion for Leave to File Amicus Brief, the number of applications for urban development within the County are piling up, and the County is allowing those applications to advance notwithstanding the fact that the proposals seek approval for densities far exceeding that of the surrounding municipalities. The fact of these

proposals illustrates that this case does not present some hypothetical "environmentalists v. property rights advocates" dispute. Instead, this case represents the very real threats that unconstrained urban growth in rural areas represents – not just to the environment itself, but to surrounding municipalities that are required to plan for and pay for urban level services in compliance with the GMA. If local comprehensive plans providing for urban growth within urban areas as called for by the GMA are to be given any meaning, then Kittitas County's R-3 comprehensive plan designations, and the cluster and PUD provisions that the County uses to "implement" them, must be found to violate the GMA and be invalid.

B. The County's Failure to Protect Surface and Ground Water Resources as Required by RCW 36.70A.020 Provides an Independent Ground Upon Which This Court May Affirm the Growth Board.

Although the Board correctly concluded that the County's comprehensive plan and development regulations fail to comply with the GMA's requirements for planning in the rural area, the County's failure to protect surface and ground water as required by RCW 36.70A.020(10) and 36.70A.070(5)(c)(iv) provide an independent basis upon which this Court may affirm the Board. Kittitas Conservation, Ridge and Futurewise, as well as Ecology in its Amicus Curiae brief, correctly point out that the

County has a responsibility under the GMA to consider and protect water resources. The County's responses to this argument are weak, at best, and this Court should reject them.

First, the County argues that it has met its duty under RCW 36.70A.020(10) and .070(5)(c)(iv) to "protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water" because the County allegedly will limit development in "areas identified with fragile aquifers or easily susceptible to pollution when it is informed of such circumstances by agencies with jurisdiction during the SEPA comment period." County Response to DOE Amicus Brief at 8 (emphasis added). Accordingly, it appears to be the position of the County that notwithstanding the fact that it has absolutely no regulations or requirements in place to address the GMA mandate with respect to protection of the quality or quantity of water, the County nevertheless can comply with the GMA's mandate by simply offering to "limit development" if and when another agency notifies the County during the SEPA process that there is a fragile aquifer susceptible to pollution. Not surprisingly, the County cites to no authority, nor does it provide an explanation as to how such a position meets the GMA mandate. Waiting to address water quantity and water quality concerns only if they happen to be raised by another agency hardly constitutes

"[p]rotect[ing] the environment and . . . water quality, and the availability of water" as required by RCW 36.70A.020(10).

Perhaps realizing the flimsiness of its argument, the County attempts to bolster its position by arguing that it complies with GMA because it "enforces" the mandate set out in RCW 19.27.097 that an applicant must demonstrate that there is a potable source of water supply at the time of application for a building permit. It then concludes by asserting - again, without any citation to authority - that because "[RCW 19.27.097] specifically provides the means that GMA counties employ to protect water resources and comply with the GMA mandate to protect quality and quantity of water," Kittitas County is somehow in compliance with the GMA. If the County were correct, however, there would be no reason for the GMA mandate at all: the process of application and issuance of building permits under the state building code would be sufficient to address water quantity and quality concerns. Of course, that is not the case. The purpose of the GMA is not to look for compliance at the time of an application for a building permit, but rather to require the adoption of a comprehensive plan and development regulations that - at the outset - prescribe a plan for growth consistent with the GMA and that, objectively, will serve to protect critical water resources. The County has utterly failed in this regard, and its protests to the contrary only underscore

how little the County's development regulations do with respect to protection of water quantity and quality.

The County's fundamental misunderstanding of its GMA obligations is further underscored by the County's argument that its regulations provide compliance with the County's obligation under RCW 58.17.110 to make a "determination of adequacy" of water supply prior to approving any preliminary or final subdivision. The County's argument is, apparently, that because it requires "evidence from surrounding well logs that demonstrate that an adequate amount of water exists or is available in the area," the County meets the requirement of RCW 58.17.110 and, therefore, the requirements of the GMA. County Response to DOE Amicus Brief at 13, citing KCC 16.24.210, citing to Exhibit "B" attached to Brief. Even a cursory review of the County's Exhibit "B", however, shows that the County's argument is not credible. First, the code provision the County cites to actually addresses the requirement of the submittal of a "statement as to the <u>suitability of soils</u> for proposed on site sewage systems and public water supplies . . . ." The cited code section does nothing to require that an applicant make a showing that there is sufficient water available for a proposed project. Second, the fact that there is language stating that the applicant should provide a "well log and a four hour draw down" does not create any affirmative obligation to

demonstrate any particular quantity of water sufficient for the proposed project, nor does the County actually argue that it does create such a requirement. Instead, the County simply asserts that this requirement meets any obligation on the County's part to address either minimum water supply or the existence of legally valid water rights in sufficient quantity to support a proposed project. It does not. KCC 16.24.210 simply has nothing to do with proof that the proposed development has an "adequate water supply."

The weakness of the County's position is amplified by its reading of *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn2d 1, 43 P.3d 4 (2002). The County argues that footnote 4 of *Campbell & Gwinn* supports the County's position that, not only does the County not have to comply with the requirements of *Campbell& Gwinn* to determine whether proposed development constitutes a "master development," the County is in fact helpless and must approve any proposed subdivision – even one without an adequate water supply – because (in the County's view) a developer is legally entitled under *Campbell* to create new lots and leave water procurement to future lot owners. County Response to DOE Amicus Brief at 13. To reach such a conclusion, however, the County not only misreads footnote 4 of *Campbell & Gwinn*, but also the mandates of RCW 36.70A.020(1), .070(5)(c)(iv), and 58.17.110. The County's

reading of *Campbell & Gwinn* is patently absurd – it is a loophole that swallows the GMA and 58.17.110 whole. If a county may rely upon future lot owners to drill an exempt well, the county would be excused from undertaking any water quantity protection planning contemplated by the GMA and would also somehow be excused from making the evidentiary finding required by RCW 58.17.110. This was surely not this Court's intent in *Campbell & Gwinn.*

The reality of the situation is clear. Kittitas County has limited water resources. The County does not want to face up to this plain truth or, at the very least, does not want to be responsible for saying "no" to development applicants because of the lack of water. So, the County has adopted a comprehensive plan and development regulations that allow freewheeling, urban development in the rural area, and wishes to place the burden on third parties – the City of Roslyn, the Department of Ecology, Kittitas Conservation, to name a few – to come forward and object on a permit-by-permit or subdivision-by-subdivision basis. The GMA, however, does not grant Kittitas such a free pass. The County's comprehensive plan and development regulations failed to meet the County's GMA obligations to protect water quantity and water quality. The County's failure in this regard provides this Court an independent basis upon which to affirm the Growth Board.

V. CONCLUSION

For the reasons stated above, the City of Roslyn respectfully requests that this Court affirm the decision of the Eastern Washington Growth Management Hearings Board concluding that Kittitas County's Comprehensive Plan and development regulations do not comply with the GMA.

RESPECTFULLY SUBMITTED this 20th day of September, 2010.

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CERTIFICATE OF SERVICE

I, Kathy L. Sawyer declare and state:

1. I am ~~a citizen~~ of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 20 day of September, 2010, I served a true copy of the foregoing *City of Roslyn's Motion for Leave to File Amicus Brief in Support of Respondents Kittitas County Conservation, Ridge and Futurewise; and Brief of Amicus City of Roslyn* , on the following counsel of record using the method of service indicated below:

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Attys for Respondent Futurewise, Ridge and Kittitas County Conservation: Keith Patrick Scully Gendler & Mann LLP 1424 4th Ave Ste 715 Seattle WA 98101-2297	☒ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: keith@gendlermann.com

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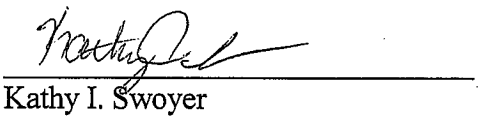
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20 September 2010, at Issaquah, Washington.



Kathy I. Swoyer