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

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

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, et al.,

Respondents.

BRIEF OF RESPONDENTS
KITTITAS COUNTY CONSERVATION, RIDGE AND FUTUREWISE

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ORIGINAL

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I. INTRODUCTION

Kittitas County made great strides towards compliance with the Growth Management Act (GMA) as part of their 2006 Comprehensive Plan and Development Regulations updates. In certain key areas, however, the County failed to meet the GMA's mandates. The Eastern Washington Growth Management Hearings Board (Board) properly remanded portions of the Comprehensive Plan back to the County in this matter for correction. Because the Board committed no errors of law and substantial evidence supports its factual conclusions, this court should affirm the remand and allow Kittitas County to continue the process of correcting its ordinance.

II. STATEMENT OF THE CASE¹

On December 11, 2006, the Kittitas County Commissioners enacted a Kittitas County Comprehensive Plan Update as Ordinance 2006-63. Kittitas County Conservation (KCC), RIDGE, and Futurewise (KCC et al.) commented on the Comprehensive Plan through letters and testimony, and filed a timely appeal to the Board.² The Washington

¹ Respondents provide a procedural statement here. Because the facts are specific to each issue, additional facts are set forth in each argument section.

² After the enactment of the Comprehensive Plan, Kittitas County updated its Development Regulations. The Development Regulations are separate from the Comprehensive Plan, and implement the Comprehensive Plan's policy statements and

Department of Community, Trade, and Economic Development (CTED) filed a separate appeal, and the two matters were consolidated.

On August 20, 2007, the Board remanded portions of the Comprehensive Plan³ to Kittitas County as noncompliant with the GMA in a 78-page Final Decision and Order in Case No. 07-1-0004c. AR 2287-2376. The County and intervenors filed notices of appeal in Kittitas County Superior Court, and KCC et al. moved for direct review. On January 15, 2008, this court granted direct review.

III. ARGUMENT

A. Standard of Review

The Administrative Procedure Act (APA) governs judicial review of challenges to actions by the Board. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233 (2005). Under the judicial review provision of the APA, the “burden of demonstrating the invalidity of [the Board's decision] is on the party asserting the invalidity.” *Thurston*

principles. Because the two enactments were separate in time, KCC et al. filed a separate challenge to the Development Regulations, and the Board separately found those Development Regulations noncompliant in Case No. 07-1-0015. Kittitas County and intervenors also appealed that separate order, and this court granted review in Case No. 271234. These cases thus are separate appeals with closely related issues.

³ The Board also found noncompliant portions of the Development Regulations, and remanded those as well. The Development Regulations were then readopted by the County and considered anew by the Board in Case No. 07-1-0015, and again remanded. Where relevant, the Board’s ruling in this case regarding the Development Regulations is discussed here, although addressed more fully in the separate but related matter of Case No. 271234.

County v. Cooper Point Ass'n, 148 Wn.2d 1, 7-8, (2002) citing RCW 34.05.570(1)(a). KCC et al., the prevailing parties below, may argue any ground to support the Board's order which is supported by the record. *State v. Kindsvogel*, 149 Wn.2d 477, 481 (2003).

Appellants and intervenors allege that the Board's decision is not based on substantial evidence, and contains errors of law. Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552 (2000). The reviewing court does not weigh the evidence or substitute its view of the facts for that of the Board. *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 676 (1997). Issues of law under RCW 34.05.570(3)(d) are reviewed de novo, but the Board is entitled to deference. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 116 Wn. App. 48, 54 (2003). 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. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8 (2002).

Although the court is not bound by a board's decision, deference is accorded to agency interpretation of the law where the agency has special expertise in dealing with such issues. *City of Redmond v. Cent. Wash.*

Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 46, (1998). The Supreme Court recently addressed the deference to be granted to growth management hearings boards' decisions in *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498, (2006)(internal citations omitted):

[T]he Board itself is entitled to deference in determining what the GMA requires. This court gives "substantial weight" to the Board's interpretation of the GMA.^{FN7}

^{FN7.} The dissent wrongly summarizes the Board's role as merely this: "to ensure that the proper legislative bodies under the GMA are making the decisions mandated," as if *any* decisions will do. Actually, the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance. In other words, the Board is more than a deskbook dayminder telling counties what decisions are due.

In this case, substantial evidence supports the Board's findings, and there are no errors of law. Therefore, we respectfully request that the Court uphold the Board on the issues that the county and intervenors appealed.

B. Summary of the GMA

This section summarizes the key provisions of the GMA applicable to this case. More detail is given of provisions at issue in this case in subsequent subsections of the argument.

“The Legislature adopted the Growth Management Act (GMA) to control urban sprawl” *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 167 (1999). The GMA was enacted in two parts by the 1990 and 1991 legislatures.

The GMA includes goals and requirements. RCW 36.70A.320(3). These goals “shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.” RCW 36.70A.320(3). The GMA goals that most directly affect this appeal are:

- Urban Growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. RCW 36.70A.020(1).
- Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. RCW 36.70A.020(2).

These goals require both substantive and procedural compliance. RCW 36.70A.290(2) & *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 14 (2002).

The GMA mandates that Kittitas County have and update its comprehensive plan. A comprehensive plan is a generalized and coordinated land use policy statement adopted by a County under the GMA. RCW 36.70A.030(4). The GMA requires counties' comprehensive plans to include six elements, including a rural element. RCW 36.70A.070. (The term "element" refers to topic areas that must be included in the comprehensive plan.)

The GMA includes substantive and procedural requirements for all of the required elements and for conservation of agricultural resource lands. RCW 36.70A.070, RCW 36.70A.170, RCW 36.70A.050. For example, RCW 36.70A.070 describes the requirements of the rural element. They include:

The rural element shall include measures that apply to rural development and protect the rural character of the area as established by the county, by:

- (i) Containing or otherwise controlling rural development;
- (ii) Assuring visual compatibility of rural development with the surrounding rural area;
- (iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
- (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and ground water resources; and
- (v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

RCW 36.70A.070(5)(c).

In addition to protecting rural lands, the GMA mandates that a county provide for a variety of rural densities. RCW 36.70A.070(5)(b).

A county must also adopt “development regulations that are consistent with and implement the comprehensive plan” RCW 36.70A.040(3). Kittitas County must also periodically evaluate and update the comprehensive plan and development regulations. RCW 36.70A.130.

There is no state or local agency to oversee local government compliance with the goals and requirements of the Growth Management Act:

[T]he GMA does not require state administrative approval of local plans and regulations. Thus, local fidelity to GMA goals is not systematically enforced, but depends upon appeals to the Growth Boards and the courts.

Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5, 48 -- 49 (1999). Under this system citizen groups and plain citizens, such as Kittitas County Conservation, RIDGE, and Futurewise, bear the brunt of assuring that city and county comprehensive plans comply with the Growth Management Act. Futurewise was in fact formed to help effectively implement the GMA.

The GMA created three Growth Management Hearings Boards to hear and decide appeals alleging that the comprehensive plans, development regulations, and shoreline master programs are not in

compliance with the GMA. RCW 36.70A.280(1)(a). Kittitas County is within the jurisdiction of the Eastern Washington Growth Management Hearings Board. The members of the Board are appointed by the Governor to six year terms. They must meet the following qualifications.

Each growth management hearings board shall consist of three members qualified by experience or training in matters pertaining to land use planning and residing within the jurisdictional boundaries of the applicable board. At least one member of each board must be admitted to practice law in this state and at least one member must have been a city or county elected official. Each board shall be appointed by the governor and not more than two members at the time of appointment or during their term shall be members of the same political party. No more than two members at the time of appointment or during their term shall reside in the same county.

RCW 36.70A.250(1)(b). The boards operate under rules of practice and procedure adopted through notice and comment rule-making. RCW 36.70A.270(7).

In this case, the Board considered Kittitas County's RCW 36.70A.130 update to its comprehensive plan, affirmed some sections, and remanded others for correction. Kittitas County and intervenors challenge some portions of the Board's order.

C. The Growth Board Did Not Apply a Bright Line Rule in Finding that Three-acre Rural Densities are Noncompliant with the GMA Under the Unique Facts and Circumstances of Kittitas County.

The Growth Board properly found noncompliant Kittitas County's three-acre and denser rural zones. AR 2301-2303. Appellants argue that the Growth Board impermissibly relied on a "bright line rule" regarding rural densities. But the Growth Board did not apply a bright-line rule; instead, it carefully considered the evidence in the record, and specifically acknowledged that "[t]his Board agrees that there is no bright line as to the size of rural lots." AR 2345. The Board properly found that:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence that the action of the County, complained of herein, is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds that the densities allowed by regulations Agriculture-3 and Rural-3 are urban in the rural element and not in compliance with the Growth Management Act and the County has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act.

AR 2303 (emphasis added). A "bright-line rule" is when an agency applies a uniform standard, regardless of the facts of a particular case. Bright-line rules were most recently evaluated by the Washington State Supreme Court in *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329 (2008). In that decision, the Supreme Court rejected the use of brightline rules by the boards but recognized that the Eastern Board had already recognized that "bright-line factors may not be employed by a GMHB after *Viking Properties*" in the Board's *Citizens for*

Good Governance v. Walla Walla County. Thurston County v. Western Washington Growth Management Hearings Bd., 164 Wn.2d 329, 359, at fn. 21, 190 P.3d 38, 52 (2008). This decision predates the decisions appealed by Kittitas County and the intervenors by over a year. The Board in this case conducted exactly the kind of fact-specific, local finding based upon the language of the GMA called for the Supreme Court in its Thurston County decision.

1. The Eastern Washington Growth Management Hearings Board Has Never Applied Bright-Line Rules in Reviewing Rural Densities.

Evidence from other cases demonstrates that this Board does not apply bright line rules.⁴ In *Futurewise v. Pend Oreille County*, the Eastern Board explained:

This is not to say there is a “bright line” rule [of the kind disfavored in the Supreme Court’s *Viking Properties* decision] concerning rural lot sizes. Counties and cities do have some discretion based on local circumstances, but this discretion on rural lot sizes or density is limited by the GMA and must be justified in the record.⁵

Futurewise v. Pend Oreille County, Case No. 05-1-0011 Final Decision and Order p. *16 (November 1, 2006). Similarly, in *Gary D.*

⁴ Cases reversing Board decisions for bright-line rules have been from the Western or Central Puget Sound Growth Management Hearings Boards, not the Eastern Board, which decided this case.

⁵ *Futurewise v. Pend Oreille County*, Case No. 05-1-0011 Final Decision and Order p. *16 (November 1, 2006).

Woodmansee and Concerned Friends of Ferry County v. Ferry County, EWGMHB Case No. 95-1-0010 Final Decision and Order p. *5 of 12 (May 13, 1996), the Board upheld 2.5 acre rural densities under the unique circumstances of Ferry County. A substantial part of the Growth Board’s justification for the Ferry County decision was “circumstances unique to Ferry County[.]” *Id.* While Kittitas County had the ability to apply local circumstances to its rural element in deciding density, the record developed during the County’s deliberations must reveal how the rural element meets the requirements of the GMA. RCW 36.70A.070(5)(a); *Citizens For Good Governance, 1000 Friends of Washington and City of Walla Walla v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c and 01-1-0014cz, *4 – 5 of 40 (May 1, 2002). Merely listing the densities permitted is insufficient. *Id.*

2. The Board’s Ruling Regarding Three-Acre Rural Zoning in Kittitas County Is Founded on Specific Requirements in the Growth Management Act .

The Board’s ruling in this case that 3 acre and denser rural zoning is noncompliant is well-founded in the GMA and the evidence in this case. The GMA requires Kittitas County to select a variety of *rural* densities in its rural area. RCW 36.70A.070(5)(b). It flatly prohibits urban growth in the rural area. *Id.* The Washington State Supreme Court has held that “[a]

rural density is ‘not characterized by urban growth’ and is ‘consistent with rural character.’” *Thurston County*, 164 Wn.2d at 359. “Whether a particular density is rural in nature is a question of fact based on the specific circumstances of each case.” *Thurston County*, 164 Wn.2d at 358.

To prevail in this case on the rural densities issue, Kittitas County or the interveners must show that the board’s findings of fact that the rural zones we challenged, which range from densities of one dwelling unit per three acres, to one dwelling unit per acre and a half, to no maximum density in the case of the PUD zone, is not urban is not supported by substantial evidence. This Kittitas County and the intervenors have not done and cannot do. Substantial evidence in the record supports the Board’s decision.

Controlling urban sprawl is one of the key goals of the GMA. RCW 36.70A.020(1); (2).⁶ As the Supreme Court has noted: “[t]he Legislature adopted the Growth Management Act (GMA) to control urban sprawl” *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn.2d 161, 166-67 (1999), *as amended on denial of*

⁶ The Growth Board is required to consider both goals and the specific requirements in determining whether a plan complies with the GMA. *See Low Income Housing Institute v. City of Lakewood*, 119 Wn. App. 110, 115, 77 P.3d 653, 655 (2003).

reconsideration September 22, 1999. One of the most important tools to prevent urban sprawl is RCW 36.70A.070(5)'s prohibition on allowing urban growth in the rural area. RCW 36.70A.070(5)(b) provides in pertinent part:

The rural element shall provide . . . appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

(Emphasis added). RCW 36.70A.110(1) also prohibits urban growth outside urban growth areas.

The GMA, in RCW 36.70A.030(18), defines urban growth:

“Urban growth” refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170.

3. The Board’s Ruling Regarding Three-Acre Rural Zoning in Kittitas County Is Supported by Substantial Evidence in the Record.

In *Diehl v. Mason County*, the Court of Appeals looked at the size of the lot needed to produce food and other agricultural products in applying the definition of urban growth and concluded that residential

densities of one housing unit, or more, per 2.5 acres “would allow for urban-like development, not consistent with primarily agricultural uses.” *Diehl v. Mason County*, 94 Wn. App. 645, 656 (1999). Kittitas County itself recognizes that densities of one dwelling per three acres are incompatible with natural resource lands, including agricultural, forest, and mineral resource lands of long-term commercial significance, by giving them densities of one dwelling unit per 20 acres and per 80 acres. KCC 17.31.040 and KCC 17.57.040. Additional evidence is found in the United States Census of Agriculture. The Census of Agriculture shows that the average Kittitas County farm in 2002 totaled 248 acres. AR 796. The smallest category of farm reported by the Census of Agriculture is farms from one to nine acres in size. In Kittitas County in 2002, there were 120 farms in that category and they consisted of 682 acres, averaging 5.68 acres. *Id.* This is almost twice the size of the minimum density in the Agriculture 3 and Rural 3 zones. In *Tugwell v. Kittitas County*, the Court of Appeals agreed that parcels of less than 20 acres, especially the very small lots allowed in the Agriculture-3 and Rural-3 zones, are too small to farm. *Tugwell v. Kittitas County*, 90 Wn. App.1, 9 (1997). Since an average of a little over six acres is the smallest size that supports agriculture and lots that are too small to support agriculture are defined as

urban growth, densities of one dwelling unit per three acres are “incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170.” RCW 36.70A.030(18); *Diehl v. Mason County*, 94 Wn. App. 645, 656 (1999). Therefore they allow urban growth in the rural area, and are more than rural densities.

Further, Kittitas County’s three-acre and denser rural zoning is incompatible with rural character, rural uses, and natural resource uses because it may adversely impact water quality. “‘Rural character’ refers [in part] to the patterns of land use and development ... [t]hat are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas....” RCW 36.70A.030(15); .030(15)(g). In *Rural Sprawl: Problems and Policies in Eight Rural Counties*, Rick Reeder, Dennis Brown, and Kevin McReynolds of the United States Department of Agriculture’s Economic Research Service described the results of a telephone survey of eight fast growing rural counties, including Mason County, Washington. AR 798-805. Among the problems the study found relating to rural sprawl were water supply problems and pollution from septic tanks. AR 800-801. The

authors also concluded that one of the counties studied, Mason, had zoning regulations that “significantly contained rural sprawl.” AR 803. Outside of limited areas of more intense rural development and historic towns, Mason County’s highest density rural zone is one dwelling unit per five acres. Thus, Kittitas, like Mason, must eliminate three-acre rural zoning if it wants to protect its water quality.

Additional evidence in the record further supports the Board’s conclusion that Kittitas County’s three-acre zoning violated rural character, including that the land use patterns will not require the extension of urban services such as sewers, reduce the conversion of land to sprawling, low density development, will protect surface and ground water flows and recharge, and the GMA. RCW 36.70A.030(15).

Professor Tom Daniels wrote about the adverse impacts of “rural sprawl” in a paper entitled *What to Do About Rural Sprawl?* AR 826-829. He indicates that two to ten acre lots fit this definition. AR 826-827.

Professor Daniels wrote:

Rural sprawl creates a host of planning challenges. Rural residential sprawl usually occurs away from existing central sewer and water. Homeowners rely on on-site septic systems and on wells for water. Often, these systems are not properly sited or not properly maintained. For example, a 1998 study in Indiana reported that between 25

and 70 percent of the on-site septic systems in the state were failing.

When septic systems fail in large numbers, sewer and water lines must be extended into the countryside, often a mile or more. Public sewer is priced according to average cost pricing. This means that when sewer lines are extended, there is a strong incentive to encourage additional hook-ups along the line. So when a sewer line is extended a mile or more, development pressure increases along the line. This usually results in a sprawling pattern, like a hub and spoke from a village to the countryside.

AR 826. In Kittitas County, water is scarce. According to the Department of Ecology, some areas, like Roslyn, face complete water shutoffs in drought years. AR 870-871. As Ecology noted, the problem of small-lot overdevelopment is not an abstract concern. In August, 2006, Ecology received a memorandum noting that there had been 8,346.07 acres of land for which rezones had been requested. AR 870. As Ecology observed, the County's water supply may not be able to support that many wells. AR 870-871. Allowing rural sprawl in a county like Kittitas where the county's water is already allocated to other users virtually guarantees shortages for existing and prospective development, and violates the GMA because Goal 10 in RCW 36.70A.020 directs Kittitas County to "[p]rotect the environment and enhance the state's high quality of life, including air

and water quality, and the availability of water. Further, RCW 36.70A.070(5)(c)(vi) requires the Kittitas County rural element to “[p]rotect ... water and ground water resources[.]”

The above-described facts in the record support the Board’s finding and demonstrate that it did so by considering the local circumstances, rather than applying a bright-line rule.

4. The Board Properly Rejected The County’s Arguments That Three Opinion Letters Provided An Adequate Factual Record Justifying Three Acre Zoning.

In response to the Board’s conclusion that Kittitas County failed to provide evidence in the record justifying its decision to allow rural sprawl, Kittitas County provides a confusing smorgasbord of citations to the Comprehensive Plan and comment letters. First, the Comprehensive Plan is not evidence. It is the enactment. Second, and more importantly, the citations do nothing to disprove the Board’s factual conclusion that there was no reason to allow 3 acre zoning in Kittitas. Third, the comprehensive plan provisions the county cite were found by the Board to violate the GMA. One GMA violation cannot justify another.

The County first argues that comment letters in the record from a real estate developer and others support the conclusion that 3 acre lots preserve farmland. None of the documents cited by Kittitas County in

their Opening Brief address either whether the densities *KCC et al.* challenged are “‘not characterized by urban growth’ and were ‘consistent with rural character[.]’” as the *Thurston County* decision requires. *Thurston County*, 164 Wn.2d at 359. The County’s Opening Brief on page 5 asserts that the letters of Lila Nason, Pat Deneen, and Urban Ebert support a finding that allowing the sale of small pieces of farms provides cash flow for subsequent years, thereby preserving farming. But this both says nothing regarding whether rural character will be preserved, and is wrong. In the *Tugwell* decision, this court agreed that three acre parcels increased conflicts with neighboring farms and its operating costs making the farm poorly suited to agriculture. *Tugwell*, 90 Wn. App. at 10-11.

Selling off a few small lots in the midst of productive farmland will do nothing more than take farmland out of production and ensure conflicts between new residential lots and the remaining agricultural operations – with their pesticides, heavy equipment, noise, odors and dust. The danger these small lot sizes pose to agricultural lands was clearly identified by the Board in the Final Decision and Order in *Save our Butte v. Chelan County*. *Save our Butte v. Chelan County*, EWGMHB No. 94-1-0015, Final Decision and Order (August 8, 1994). The Board in that case considered the work of regional planning and policy expert Arthur C.

Nelson in his report entitled, *Economic Critique of U.S. Prime Farmland Preservation Policies*, *Journal of Rural Studies*, Vol. 6, No. 2, 1990.

Dr. Nelson, in describing such small-minimum lot zoning, stated: "The effect of such zoning ... is to remove farmland from production and allow non-farm development adjacent to viable farming operations everywhere."

Chelan at p. 9. Explaining further, the report states: "Allowing small acre development in agricultural resource lands fails to conserve these lands in two ways. First, the land used for the development is taken out of production, and second, the effects of non-compatible uses on existing farms weaken them." *Id.* Professor Daniels reached the same conclusion writing that:

Newcomers to the countryside often have little understanding of the business of farming or forestry. The conflicts between farmers and non-farm neighbors are well-known. Neighbors typically complain about farm odors, noise, dust, crop sprays, and slow moving farm machinery on local roads. Farmers point to crop theft, vandalism, trash dumping, and dogs and children trespassing and harassing livestock. In forested areas, the increase in residents bring a greater likelihood of fire. In short, farming and forestry are industrial uses. They should be kept as separate as possible from rural residential development.

AR 826. The danger of conflicts between residential development and farming is high in Kittitas County. These conflicts can result in the farm being shut down. See *Davis v. Taylor*, 132 Wn. App. 515 (2006) (Holding that use of a loud propane cannon on a cherry orchard next to a neighboring residential development may be enjoined, even where the farm predates the residences).

None of the testimony or documents cited by the county actually contends that small lots and agriculture are compatible. And agriculture is part of the rural based economy that is part of rural character. RCW 36.70A.030(15)(b).

Another problem with this justification is that the R-3 and A-3 zones are not agricultural zones, they are rural zones. KCC 17.28.010, KCC 17.30.010. The farms and ranches designated as agricultural lands of long-term commercial significance are zoned Commercial Agriculture. Chapter 17.31, KCC.

Moreover, the focus of conserving agricultural land in the GMA is on *long-term* commercial viability. Kittitas County contemplates allowing a farmer to sell off a parcel to increase productivity in lean years. Brief of Kittitas County at 7, 16. But what happens if the ensuing years are also lean, or the farmer merely decides he'd rather be in real estate than

agriculture? Kittitas County's theory that farmers will only sell off "small portions" of land in "years of low irrigation water," is wishful thinking unsupported by any limiting policies, and does not comply with the GMA's mandates related to rural lands. Brief of Kittitas County at 16. With three acre zoning, an entire farm would be nothing more than a collection of "small portions," all of which could be sold off en masse. The idea that farmers will slowly parcel out land is completely unsupported by development patterns in the County and completely unsupported by any policies or regulations requiring it to take place. Notably, in the same enactment, the County approved rezones which converted viable farmland en masse into subdivisions. AR 2353-2359. More importantly, even if Kittitas County's rosy picture of how farmers would sparingly use three acre zoning were realistic, the policy is ultimately self-defeating. At some point, selling off one three-acre parcel every drought year means the entire farm will be gone, irretrievably lost to subdivision.

None of the testimony addressed the acre and half and smaller lots that the Planned Unit Development (PUD) zone and Performance Based Cluster Platting allow. And finally, Mr. Deneen's PowerPoint slides attached to the Kittitas County's Opening Brief in Case No. 265471 do not

show that three acre lots are consistent with rural character, they show the opposite. They show that much of rural Kittitas County is characterized by large lots, as is consistent with rural character including development patterns in “which open space, the natural landscape, and vegetation predominate over the built environment” RCW 36.70A.030(15)(a). The three acre lots are inconsistent with this character. Thus, although the County may have intended to protect farmland in allowing sprawl, this policy was properly remanded for correction by the Board.

The County next cites to its Comprehensive Plan, and argues that large rural lot sizes have led to “rural sprawl.” Brief of Kittitas County at 6-7, 16-18. But 3 acre lots are rural sprawl. AR 826-827. While the County may have been well-intentioned in its plan to use three acre rural zoning to preserve agricultural land, the idea simply will not work. As the record demonstrates, three acre rural zoning leads to sprawling subdivisions, with massive traffic, inadequate sewer and well water, and conflicts with adjacent farmlands. AR 796, 798-805, 826-829, 870-871.

5. The County’s Citations To Authority Are Inapposite.

The County’s citation to *Thurston County v. Western Washington Growth Mgmt Hearings Board*, 164 Wn.2d 329 (2008) does not aid its argument. In *Thurston County*, the Board relied on a bright line rule.

Here, the Board expressly rejected the idea of a bright line rule, and instead evaluated the evidence in the record. Moreover, in Thurston County, the County's "innovative techniques" meant that the smaller lot sizes would protect rural character, farming, and the environment. Kittitas County cites to no innovative techniques it employed in its own planning efforts that would ameliorate the effects of three-acre zoning.

Finally, the *Thurston County* decision did not conclude that zoning of one dwelling unit per two acres complies with the GMA. Rather, the court remanded that issue back to the Western Board "to consider local circumstances and whether these densities are not characterized by urban growth and preserve rural character." *Thurston County*, 164 Wn.2d at 359-60.

Likewise, the County's reliance on *City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 164 Wn.2d 768 (2008), is misplaced. In *City of Arlington*, the Board considered an agricultural land de-designation, and weighed competing expert reports on statutory criteria. Here, there are no expert reports that address whether the three acre and denser lots are "'not characterized by urban growth' and [are] 'consistent with rural character.'" *Thurston County*, 164 Wn.2d at 359. Instead, the County must protect its rural lands, and the Board properly

found that it had failed to do so. The County's argument to the contrary – that when “there is evidence in the record supporting the county's decision, regardless of it being created by an interested party and regardless of the presence of contrary evidence, the hearings board must defer to the county's decision” would eviscerate the GMA. Brief of Kittitas County at 27. The Board reviews for clear error; the County's version of the Board's duty would be simply checking to see if there was any letter in the record, no matter who from and how crazy, supporting the County's decision. This would make the Board the “deskbook dayminder” the Supreme Court has expressly disapproved of. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d at 498. The error of the Board in *Arlington* was its refusal to consider a piece of evidence. Such an error is utterly absent from this case, as it is the County's own record that led the Board to its ultimate conclusion.

Similarly, the County's reference to *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 146 Wn.App. 679 (2008) adds little to the debate. In *Yakima County*, the court considered the factual evidence underlying the County's determination that a particular parcel did not have long term commercial significance for agriculture. Finding that there was “little evidence that the property is commercially productive farmland,”

the court reversed the Board's determination that the County had erroneously de-designated the parcel. *Id.* at 696. But in this case, the County was not weighing evidence to make a factual finding on a particular type of soil or whether land was actually farmed. It was mandated by the GMA to craft a comprehensive plan to protect its rural lands. The Board's factual finding that it failed to do so is supported by uncontroverted evidence regarding damage to the water supply, traffic, harm to farming, and damage to the rural character of the region. Contradicting this evidence is only non-expert opinion testimony that selling off some farmland might be a short-term fix to some farmers' economic woes in a drought year.⁷ The Board's factual findings are well-supported; its conclusion of law that the County has violated the GMA's mandate to leave rural land rural is correct.

6. The Board Has a Duty Under the GMA to Determine Whether a Challenged Rural Density Complies With RCW 36.70A.070(5).

Although unclear from the briefing, Kittitas County and BIAW may be arguing that the Growth Board may not ever hold a particular rural density is violative of the GMA without necessarily employing a bright-

⁷ Ironically, as the Department of Ecology has pointed out, allowing 3-acre zoning may make drought far, far worse. AR 870-871.

line rule. Under this theory, the County would always have discretion to decide what the density is: simply stating that three-acre zones do not comply is itself a bright line rule from the Growth Board. This argument is absurd. As an initial matter, the Growth Board did not establish any “bright line” rule in this case; it merely held that Kittitas County’s particular comprehensive plan was noncompliant with the GMA, and remanded the matter to the County for further action. AR 2371-2372. The County has numerous methods of coming into compliance with the GMA; while simply repealing the three-acre and other offending designations is the simplest, there are numerous combinations of legislative action that would make these designations compliant with the GMA.

More importantly, this argument would result in a judicial repeal of the GMA. While the BIAW has made no bones about their political interest in the repeal of the GMA, those are arguments they must make to the Legislature, not the courts. Under the GMA, the Growth Board has the authority to evaluate the County’s efforts to comply with the GMA, and remand it to the County for further action. RCW 36.70A.280; 300. The Board does not establish a “bright line rule” by holding that a particular designation is noncompliant.

The American Forest Land Conservancy adds little to the debate. Although their brief argues that the Board's "decision demonstrates a wholesale disregard for the County's 'studied' determination based on 'extensive research,'" it cites to absolutely no evidence whatsoever in the record; it is not even clear what they believe has been "studied" or where the "extensive research" can be found. Brief of American Forest Land Conservancy at 6.

D. Kittitas County Fails to Provide for a Variety of Rural Densities

The BIAW alone argues that the Board erred in finding that the County failed to provide for a variety of rural densities in its Comprehensive Plan. Brief of BIAW at 13. The Board found that although Kittitas County had six possible different comprehensive plan designations for the rural area, there were inadequate standards in the Comprehensive Plan governing where these designations could go and how property might be changed from one designation to another. The BIAW argues that the zoning code provides these guidelines in its "amendment" section. Brief of BIAW at 13-14.

But the Comprehensive Plan and zoning code play different and distinct roles in local planning. The Comprehensive Plan is the GMA-mandated document outlining the County's land use policies. RCW

36.70A.070. The zoning code is the development regulations which implement the policies expressed in the comprehensive plan. RCW 36.70A.040. As the Board correctly found, the flaws lay not in the zoning code but in the Comprehensive Plan. AR 2345-46. The section found noncompliant by the Growth Board is in the Comprehensive Plan. The zoning code is not a substitute for or remedy to a noncompliant comprehensive plan.⁸

E. The Growth Board Did Not Improperly Weight Goals

The BIAW argues that the Growth Board improperly weighted GMA goals in finding that three-acre rural designations violate the GMA. Brief of BIAW at 22-23. But the Board ruled based on the GMA's requirements, not goals. The goals are set forth in RCW 36.70A.020. All specifics in later sections are requirements, including RCW 36.70A.070's prohibition on urban growth in the rural area. As the Supreme Court has held, if a GMA goal and a specific GMA requirement conflict, the requirement controls. *Lewis County v. Western Washington Growth Management Hearings Bd.* 157 Wn.2d 488, 504 (2006). In *Lewis County*, 157 Wn.2d at 504, the Supreme Court evaluated Lewis County's attempt

⁸ The Comprehensive Plan is the governing document. One of the concerns with a failure to have guidelines in the Comprehensive Plan is that it arguably conflicts with the zoning code, leaving the County open to litigation from disgruntled applicants should the County deny a Comprehensive Plan designation change application by relying on the zoning code.

to rely on the goals of the GMA to evade the requirement that agricultural land be preserved, and held “when there is a conflict between the ‘general’ planning goals and more specific requirements of the GMA, the specific requirements control.” (Internal citation omitted). Goals are general statements of purpose, and may not be used to rewrite the GMA’s requirements by weighting one goal over another or “balancing” goals.

F. The Growth Board Correctly Ruled That Kittitas County’s Rural Clusters and Planned Unit Developments Violate the GMA⁹

The Growth Board ruled that Kittitas County’s particular version of rural clusters and planned unit developments was noncompliant with the GMA because it allowed urban growth in the rural area. AR 23337-2340. While the BIAW correctly notes that rural clusters and planned unit developments may be utilized under the GMA, they are only compliant if the GMA’s mandates regarding their use are met. Brief of BIAW at 17-18. But as the Board correctly ruled, Kittitas County’s ordinance does not meet the GMA’s mandates for either zoning tool, since it allows virtually unrestricted development at 1 d.u./1.5 acres and 1 d.u./2.5 acres in the

⁹ The Board ordered the County to revise these development regulations. Development regulations are different from the Comprehensive Plan, and the County did revise them as part of its later Development Regulations update. That update failed to correct the problems identified here, and was separately appealed and separately reversed by the Board. That separate order is on review here in Case No. 271234; more complete argument from all parties on this issue has been or will be filed in that case.

rural areas. AR 2338-2339. While there are certainly some rural cluster ordinances – those with protections in place on water supply, waste management, open space preservation, traffic, and preservation of rural character – that would be compliant with the GMA, Kittitas County’s version simply is not. There are no mandatory standards to KCC 16.09; the County’s point-based system would allow a developer to trash the water supply, destroy all wildlife habitat on a lot, and remove all open space by earning density points through adding amenities like a swimming pool and a tennis court. KCC 16.09.090. The same evidence supporting the Board’s conclusion that unrestricted rural zoning at 1 d.u. per 3 acres violates the GMA applies with even greater force to these higher densities.

Likewise, the Planned Unit Development ordinance (KCC 17.36) has no minimum lot sizes, and no restrictions in place on preserving rural character, protecting water and wildlife, and the other elements that make Kittitas County’s rural area rural. While the Board of County Commissioners has final authority to approve a particular Planned Unit Development, there are no mandatory restrictions on what must be done to qualify. KCC 17.36.040. This ordinance completely dissolves all the County’s Comprehensive Plan protections on rural land, and allows

virtually unbridled discretion to reign over an individual development proposal.

IV. CONCLUSION

For the reasons discussed herein, the Growth Board's Final Decision and Order should be affirmed.

DATED this 14th day of May, 2009.

Respectfully submitted,

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