

72132-1

No. 91475-3

72132-1

No. 72132-1-I

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

WHATCOM COUNTY,

Petitioner,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD,

Respondent.

OPENING BRIEF OF WHATCOM COUNTY

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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I. INTRODUCTION

This appeal is linked to Case No. 70796-5-I and involves the same legal issues raised in that case. In this case, however, Whatcom County (the “County”) asks the Court to apply its conclusions from Case No. 70796-5-I in the context of Whatcom County Ordinance No. 2014-002 (the “2014 Ordinance”), which reflects adopted recent amendments to the rural element of the County’s comprehensive plan and reflect the County’s most current rural measures protecting water resources.¹ As this Court has concluded, “the Court’s opinion in Case No. 70796-5-I would likely control the outcome of this case.”²

As explained in the briefing in case No. 70796-5-I, the County’s protective measures in the County’s comprehensive plan, in place prior to the adoption of the 2014 Ordinance, are sufficient to comply with the GMA. The 2014 Ordinance at issue in this case amended the rural

¹ Whatcom County Ordinance No. 2014-002 (the “2014 Ordinance”) is attached as **Appendix 1**. See AR 1647-1659. Citations to “AR” are to the Bates-stamped page numbers from the administrative record prepared by the Board. The Court issued its Ruling Granting Direct Review on August 13, 2014, which included the Court’s decision on the County’s request for consolidation and established the scope of the administrative record that would need to be prepared for the appeal. The County requested the record immediately thereafter. The Board transmitted the certified the record to the Skagit County Superior Court on September 15, 2014, but we understand that the Superior Court has not yet processed the record for transmittal to this Court. For the Court’s convenience, the Index to the Certified Record filed by the Board in Skagit County Case No. 14-2-00877-8 is attached as **Appendix 2**.

² Commissioner’s Ruling Granting Direct Review, Ordering Expedited Schedule, and Linking the Case with No. 70796-5-I, p. 2.

measures to more expressly incorporate by reference the full range of existing regulations upon which the County relies to satisfy GMA requirements. The County's briefing in case No. 70796-5-I explains and relies on the entirety of the County's regulatory program to protect water availability and water quality. But because Petitioners argued before the Board that aspects of the County's regulatory program upon which the County relied to satisfy its GMA obligations were not adequately referenced in its comprehensive plan, the County took action during the compliance period to address that alleged deficiency. Accordingly, the County adopted the 2014 Ordinance in an effort to expedite a finding of GMA compliance. With the adoption of the 2014 Ordinance, the County's comprehensive plan now specifically incorporates all of the County's protective measures designed to protect water availability and quality.

Thus, if the Court agrees that the County's prior comprehensive plan complied with the requirements of the Growth Management Act (GMA) to protect water availability and quality and rules in the County's favor in Case No. 70796-5-I, the Court should similarly conclude that the current comprehensive plan complies with those requirements. If, however, the Court finds that the references in the prior comprehensive plan were insufficient to incorporate the full range of the County's

regulatory measures upon which the County relies to satisfy GMA requirements, then this case resolves that issue and facilitates the Court's full review of the existing state of the County's rural measures.

For these reasons, which are explained below, the County asks the Court to reverse the Board's Second Compliance Order. The protective measures in the County's comprehensive plan are more than adequate to comply with the GMA's requirements to protect water availability and quality.

II. ASSIGNMENTS OF ERROR³

1. The Board erred when it concluded that the County's measures to protect surface and ground water availability, including the measures incorporated by the 2014 Ordinance, were clearly erroneous.

2. The Board erred when it concluded that the County's measures to protect surface and ground water quality, including the

³ The Board's decision contains no findings of fact. Moreover, even if it did, appellants in appeals of Board decisions are not required to specifically assign error to factual findings to preserve a factual challenge. *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 91 Wn. App. 1, 21, n.46, 951 P.2d 1151, 1162 (1998) *aff'd in part, rev'd in part on other grounds*, 138 Wn.2d 161, 979 P.2d 374 (1999). Nevertheless, because Petitioners have taken the position in case No. 70796-5-I that aspects of the County's arguments should not be allowed because of a purported failure to assign error to alleged findings of fact, the County seeks to eliminate that baseless argument. The assignments of error herein include any findings of fact inherent in pages 6-7 of the Board's Second Compliance Order, as well as any findings of fact inherent in pages 6-51 of the Board's FDO. *See* AR 1363-1414 (FDO), AR 1951-1959 (Second Compliance Order).

measures incorporated by the 2014 Ordinance, were clearly erroneous.

The following issues pertain to these assignments of error:

Issue 1. Did the Board err by ruling that the GMA requires the County, when making water availability determinations, to adopt a legal interpretation of the controlling water resources regulations that is independent of and inconsistent with Ecology's interpretation? (Assignment of Error 1).

Issue 2. Did the Board err by ruling that the County's measures to protect surface and ground water quality do not comply with the GMA on the basis of evidence of pre-existing water quality problems whose causes are multi-faceted and beyond the rural development that is the subject of the County's measures? (Assignment of Error 2).

III. STATEMENT OF THE CASE

The procedural history that led to the County's appeal of the FDO in Case No. 70796-5-I is fully described in the County's brief in that case.⁴ Even though the County appealed the FDO, the FDO required immediate County action and scheduled a subsequent compliance hearing. Accordingly, the County adopted the 2014 Ordinance to address the

⁴ Case No. 70796-5-I, County's Opening Brief, pp. 5-11.

Board's finding of non-compliance.⁵ The 2014 Ordinance amended the County's Comprehensive Plan to incorporate into the Comprehensive Plan additional existing development regulations related to water resources.⁶ Specifically, the 2014 Ordinance incorporated the following regulations addressing water availability:

- Whatcom County Code ("WCC") 24.11.060, which requires building permit applicants to provide evidence of adequate water supply prior to the County's issuance of building permits; and
- WCC 24.11.090., .100, .110, .120, .130, .160, and .170, which require the County to determine adequacy of water supply for building permit and subdivision applications proposing to use a well, spring, or surface water.⁷

The 2014 Ordinance also incorporated the following regulations addressing water quality:

- WCC 20.80.631 through .636, which impose general stormwater management requirements for all development projects, specific stormwater requirements for certain small and large development projects, and additional stormwater requirements for designated

⁵ 2014 Ordinance, p. 4, Conclusion 4 (AR 1651)

⁶ See 2014 Ordinance, p. Exhibit A (AR 1655-1659).

⁷ 2014 Ordinance, Exhibit A, p. 3 (AR 1658).

“stormwater special districts,” including the Drayton Harbor, Lake Samish, Birch Bay, and Lake Padden watersheds; and

- WCC 20.80.735, which establishes the Drayton Harbor, Lake Samish, Birch Bay, and Lake Padden watersheds as “water resource special management areas” and imposes limitations on clearing activities within these special management areas.⁸

In addition to the changes adopted in the 2014 Ordinance, the County staff included addenda explaining the import of these specific regulations.⁹ One staff memorandum describes the County’s measures and ongoing efforts to protect water quality by crafting a targeted approach that responds to specific water quality issues as they are identified.¹⁰ This effort includes the Lake Whatcom Management Program, the NPDES Phase II Municipal Stormwater program, the Birch Bay Watershed and Aquatic Resources Management District, and Shellfish Protection districts.¹¹

⁸ 2014 Ordinance, Exhibit A, pp. 2-3 (AR 1657-1658). In addition, the 2014 Ordinance revised the wording of several protective policies and corrected three typographical errors in the County’s comprehensive plan. 2014 Ordinance, Appendix A, pp. 3-4 (AR 1658-1659).

⁹ AR 1660 (Memorandum to Whatcom County Council dated January 6, 2014) (attached as **Appendix 3**).

¹⁰ AR 1661-1662 (Memorandum to Mark Personius dated January 6, 2014) (attached as **Appendix 4**).

¹¹ *Id.* These efforts are more fully described in the County’s opening brief in the

Additionally, the second staff memo describes the County's implementation of WCC 24.11.090(B)(3).¹² That existing county regulation includes review criteria for development that will rely on a permit-exempt well and requires County denial of an application if the development is in the boundaries of an area where Ecology has determined by rule that water for development does not exist.¹³ As explained in the memo, the County regularly seeks Ecology input on development proposals that rely on exempt withdrawals in closed basins.¹⁴ In its comments on such proposals, Ecology has never indicated to the County that water pursuant to the proposed permit-exempt withdrawal is not legally available due to the operation of the WRIA 1 basin rule.

In its Second Compliance Order, the Board reviewed the 2014 Ordinance and found the County in continuing non-compliance with the GMA for the following reasons:

Amendments in Ordinance 2014-002 did not change existing regulations found non-compliant by the Board's June 7, 2013, FDO. The existing regulations continue to apply water quality or quantity controls in limited areas of the County and do not

linked case no. 70796-5-I, at pages 30-38.

¹² AR 1663-1676 (Memorandum to Mark Personius dated January 3, 2014) (attached as **Appendix 5**).

¹³ This regulation is more fully briefed in the County's opening brief in the linked Case No. 70796-5-I, at pages 19-25, and in the County's reply brief at pages 5-20..

¹⁴ AR 1663-1676 (attached as **Appendix 5**).

apply measures to protect water quality or quantity throughout the Rural Area of the County. Further, the County made minor changes to Whatcom County policies such as changing “ground” water to water “rights” in reference to a Department of Ecology publication, referencing an existing development code requiring evidence of adequate water supply, and cross-referencing to a development code regarding land clearing activity in Water Resource Special Management Areas. None of these actions meet the GMA requirement to impose measures governing land use and development to protect rural character by protecting water quality and quantity throughout Whatcom County’s Rural Area.¹⁵

The County appealed the Second Compliance Order to Skagit County Superior Court and, after obtaining a Certificate of Appealability regarding the Second Compliance Order from the Board, the County asked this Court to accept direct review and consolidate this appeal with the County’s appeal of the FDO in Case No. 70796-5-I. The Court granted the County’s request for direct review and linked this case with Case No. 70796-5-I.

IV. ARGUMENT

A. Standard of Review.

In reviewing the Board’s Second Compliance Order under the Administrative Procedure Act (APA), this Court applies the same APA standards applied in reviewing the Board’s FDO, which are fully

¹⁵ See Second Compliance Order, p. 6. The Board’s Second Compliance Order (AR 1951-1959) is attached as **Appendix 6**.

described in the County's briefs in Case No. 70796-5-I.¹⁶ In short, the court reviews the Board's legal conclusions *de novo* under RCW 34.05.570(3)(d)¹⁷ and determines whether there is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order" under RCW 34.05.570(3)(e).¹⁸ The GMA "is not to be liberally construed,"¹⁹ and review of the County's action by the Board and the Court should be highly deferential to the County's local planning choices, including "local government determinations regarding what measures will best protect rural character" such as the protective measures at issue in this appeal.²⁰ If the Board fails to give appropriate deference to the County's planning choices, the Board's decision is not entitled to any deference from this Court.²¹

¹⁶ See County's Opening Brief, pp. 11-13, County's Reply Brief, pp. 4-5. As discussed in these briefs, relief from the Board's FDO is also appropriate under other subsections of RCW 34.05.570(3). For the same reasons, relief from the Board's Second Compliance Order is also appropriate under those subsections of RCW 34.05.570(3).

¹⁷ *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008).

¹⁸ *Kittitas County v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)) (internal quotation marks omitted).

¹⁹ *Kittitas County.*, 172 Wn.2d at 155 (citing *Thurston County*, 164 Wash.2d at 342).

²⁰ *Kittitas County*, 172 Wn.2d at 164.

²¹ *Quadrant Corporation v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132, 1139 (2005).

B. The 2014 Ordinance Confirms the County's Compliance with GMA Provisions for the Protection of Water Availability and Water Quality.

For the reasons explained by the County in Case No. 70796-5-I, the County believes that its comprehensive plan was already in compliance with the GMA prior to its adoption of the 2014 Ordinance. The 2014 Ordinance, however, includes a more specific incorporation by referencing the full range of the County's existing development regulations into the rural element of its comprehensive plan. The County has explained the protective effect of those particular measures in its briefing in Case No. 70796-5-I and will not repeat that explanation here.²²

Prior to the adoption of the 2014 Ordinance, however, Petitioners asserted before the Board that the County had not sufficiently included those specific protective measures in the County's rural element of its comprehensive plan. Based on *Kittitas County*,²³ Petitioners argued that that GMA compliance depends on the County's incorporation of those specific measures into the comprehensive plan. To the extent that a more specific reference in the Comprehensive Plan to those specific measures is required to meet GMA requirements for the protection of water

²² See County's Opening Brief, pp. 13-48.

²³ *Kittitas County*, 172 Wn.2d at 163-64.

availability and water quality, the County has now fully resolved that procedural issue by adopting the 2014 Ordinance.

C. The Additional Evidence Introduced by the County Confirms the County's Compliance with GMA Provisions for the Protection of Water Availability and Water Quality.

In addition to incorporating protective measures into its Comprehensive Plan, the County also introduced additional evidence in the compliance proceeding before the Board that provides further support for a finding of compliance with the GMA. In particular, the County provided additional evidence demonstrating that the Board erred by concluding that Ecology has historically taken a more restrictive approach towards permit-exempt withdrawals in Water Resource Inventory Area (WRIA) 1 than the approach taken by the County.²⁴ Specifically, the additional evidence demonstrates that the County regularly seeks Ecology input on development proposals that rely on exempt withdrawals in closed basins, and that Ecology has not indicated to the County that water

²⁴ See AR 149 (FDO, p. 42, n. 155) (“When a building permit applicant indicates that their water supply will be obtained through a permit-exempt well, because they cannot provide a water right permit or a letter from a purveyor as evidence, the County must require the applicant to provide evidence of the legal availability of water in another form or deny the application, according to Ecology.”) (emphasis added); *Id.* (FDO, p. 42) (“Thus, according to Ecology, the County must deny a permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows.”) (emphasis added).

pursuant to the proposed permit-exempt withdrawal is not legally available due to the operation of the WRIA 1 basin rule. The Board did not discuss or even mention this evidence in its Second Compliance Order. After the Board issued its Second Compliance Order, the Department of Ecology filed an Amicus Brief in Case No. 70796-5-I confirming Ecology's position that the Board misinterpreted the WRIA 1 rule, and that the Board erred when it found the County's measures to protect water availability noncompliant with the GMA.²⁵ The County staff memo further confirms Ecology's interpretation of its own rule, more fully described in Ecology's Amicus Brief.

The County also introduced additional evidence demonstrating the sufficiency of its measures to protect water quality. The Board did not mention this evidence in its Second Compliance Order. The County's additional evidence further confirms that the Board erred by finding the County out of compliance with the GMA.

V. CONCLUSION

For the reasons stated herein, the Court should reverse the Second Compliance Order, which repeated the same fundamental legal errors in the Board's FDO, failed to give appropriate weight to the additional

²⁵ See State of Washington, Department of Ecology's Amicus Curiae Brief.

protective measures in the 2014 Ordinance, and ignored the additional evidence offered by the County.

Respectfully submitted this 26th day of September, 2014.

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APPENDIX 1

WHATCOM COUNTY COUNCIL AGENDA BILL

NO. 2014-040

CLEARANCES	Initial	Date	Date Received in Council Office	Agenda Date	Assigned to:
Originator: Gary Davis	<i>GD</i>	1/1/14	RECEIVED JAN 07 2014 WHATCOM COUNTY COUNCIL	1/14/2014	Introduction
Division Head: Mark Personius	<i>MP</i>	1/7/14		1/28/2014	SCOTW/ Council
Dept. Head: Sam Ryan					
Prosecutor: Royce Buckingham	<i>RBT</i>	1/7/14			
Purchasing/Budget:					
Executive: Jack Louws	<i>JL</i>	1-7-14			

TITLE OF DOCUMENT:
Rural Element Water Resources

ATTACHMENTS:

1. Memorandum to County Council
2. Proposed Ordinance, including draft amendments and Findings of Fact and Reasons for Action
3. Staff Report and December 3, 2013 Staff Report Addendum
4. Findings of the Planning Commission
5. Memoranda from Public Works and Health on water resources protection in Whatcom County

SEPA review required? Yes NO
 SEPA review completed? Yes NO

Should Clerk schedule a hearing? Yes NO
 Requested Date

'The Council must hold a hearing if they want to take action that differs from the Planning Commission's recommendation [WCC 2.160.100(2)].

SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE: *(If this item is an ordinance or requires a public hearing, you must provide the language for use in the required public notice. Be specific and cite RCW or WCC as appropriate. Be clear in explaining the intent of the action.)*

A proposed ordinance to amend the Whatcom County Comprehensive plan to resolve an issue appealed to the Growth Management Hearings Board, adopting by reference existing County code provisions regarding water resources.

COMMITTEE ACTION:

COUNCIL ACTION:

1/14/2014: Introduced
 1/28/2014: Council Adopted 7-0
 Ord. 2014-002

Related County Contract #:

Related File Numbers:
 PLN2012-00012

Ordinance or Resolution Number:
 Ord. 2014-002

Please Note: *Once adopted and signed, ordinances and resolutions are available for viewing and printing on the County's website at: www.co.whatcom.wa.us/council.*

SPONSORED BY: Consent
PROPOSED BY: PDS
INTRODUCTION DATE: 1/28/2014

ORDINANCE NO. 2014-002

**ORDINANCE AMENDING THE WHATCOM COUNTY COMPREHENSIVE PLAN
AND MAPS, TO IMPLEMENT CHANGES RELATING TO RURAL LAND USE
PLANNING**

WHEREAS, the Washington State Growth Management Act (GMA) requires Whatcom County to include a rural element in its Comprehensive Plan that governs rural development; and

WHEREAS, GMA allows Comprehensive Plan revisions outside the annual concurrent review in order to resolve an appeal of a Comprehensive Plan filed with the Growth Management Hearings Board or with the court; and

WHEREAS, the recommended amendments have been considered by the Whatcom County Planning Commission, the Whatcom County Council Planning and Development Committee and the Whatcom County Council; and

WHEREAS, legal notice requirements have been met; and

WHEREAS, the County Council finds the Comprehensive Plan and zoning amendments in the interest of the public health, safety, and welfare, based on the following findings and conclusions:

FINDINGS OF FACT

- 1) Whatcom County proposes amendments to its Comprehensive Plan and Zoning Code in response to the Washington State Growth Management Hearings Board's June 7, 2013 Compliance Order (GMHB No. 12-2-0013).
- 2) An addendum to the May 1, 2009 determination of non-significance (DNS) was issued under the State Environmental Policy Act (SEPA) on December 20, 2013.
- 3) The proposed amendments were posted on the County website on September 30, 2013.
- 4) Notice that the proposal had been posted on the County website was sent to citizens, citizens groups, cities, service providers, media and other groups on the County's e-mail list on September 30, 2013.
- 5) Notice of the subject amendment was submitted to the Washington State Department of Commerce on September 30, 2013.

- 6) Notice of the Planning Commission hearings for the subject amendment was published in the Bellingham Herald on November 29, 2013.
- 7) Notice of the Planning Commission hearing for the subject amendment was posted on the County's website on November 27, 2013.
- 8) The Planning Commission held a public hearing on the subject amendment on December 12, 2013.

GMA Requirements

- 9) The Washington Growth Management Act (GMA) requires county comprehensive plans to include a rural element that protects the county's established rural character by containing or otherwise controlling rural development.
- 10) GMA (RCW 36.70A.070(5)(a)) allows counties to consider local circumstances in its rural element but requires counties to develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of RCW 36.70A. (See Conclusions 2 and 3 below).
- 11) GMA requires that the rural element of a county comprehensive plan provide measures governing rural development that protect the rural character by:
 - a) Containing or otherwise controlling rural development;
 - b) Assuring visual compatibility of rural development with the surrounding rural area;
 - c) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
 - d) Protecting critical areas, as provided in RCW 36.70A.060, and surface and ground water resources; and
 - e) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.
- 12) GMA requires local governments that are required or choose to plan under GMA to utilize a process established by the Washington State Attorney General to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property. (RCW 36.70A.370) The Whatcom County Prosecutor's office informed the County Council of this requirement and, in accordance with Attorney General's Advisory Memorandum, advised them regarding the proposed amendments with respect to avoiding unconstitutional taking of private property.

Growth Management Hearings Board Decisions: *Futurewise vs. Whatcom County*

- 13) The January 4, 2013 GMHB Compliance Order in *Futurewise et al v. Whatcom County* (#11-2-0010c) found some amendments adopted under Ordinance 2012-032 out of compliance with respect to several issues involving

Comprehensive Plan policies, LAMIRD boundaries and development regulations, and found invalidity on some of those issues.

- 14) In its June 7, 2013 Compliance Order in *Futurewise et al v. Whatcom County* (#12-2-0013) the Growth Management Hearings Board found the Whatcom County Comprehensive Plan's Rural Element did not contain measures to protect water quality.

Whatcom County Policy and Requirements

- 15) WCC 2.160.080 requires that, in order to approve the proposed comprehensive plan amendments the Planning Commission and County Council must find all of the following:
- a) The amendment conforms to the requirements of the Growth Management Act, is internally consistent with the county-wide planning policies and is consistent with any interlocal planning agreements.
 - b) Further studies made or accepted by the Department of Planning and Development Services indicate changed conditions that show need for the amendment.
 - c) The public interest will be served by approving the amendment. In determining whether the public interest will be served, factors including but not limited to the following shall be considered:
 - i) The anticipated effect upon the rate or distribution of population growth, employment growth, development, and conversion of land as envisioned in the comprehensive plan.
 - ii) The anticipated effect on the ability of the county and/or other service providers, such as cities, schools, water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and public facilities including transportation facilities.
 - iii) Anticipated impact upon designated agricultural, forest and mineral resource lands.
 - d) The amendment does not include or facilitate spot zoning.
 - e) Urban growth area amendments that propose the expansion of an urban growth area boundary are required to acquire development rights from a designated TDR sending area, with certain exceptions.
- 16) Whatcom County's County-wide Planning Policy N.2 states, "The Cities and the County in cooperation with other municipal corporations and tribal governments shall adopt zoning regulations and development standards to protect water resources. Where there are potential conflicts with designations

required by the Growth Management Act, such as natural resource lands and critical areas, water resource protection shall generally have priority.”

Public Participation

- 17) Whatcom County’s County-wide Planning Policies include policies related to citizen involvement:
 - a) County-wide Planning Policy A.2 states, “The county and the cities shall provide opportunities for citizens to become involved in the growth management planning process through various mechanisms, such as surveys, public workshops, meetings, hearings, and advisory committees.”
 - b) County-wide Planning Policy A.4 states, “Citizen comments and viewpoints shall be incorporated into the decision-making process in development of draft plans and regulations. Consideration of citizen comments shall be evident in the decision-making process.”
- 18) The Whatcom County Planning Commission held a public hearing on December 12, 2013. Since publication of the first draft amendments on September 30, 2013, the most current draft amendments have been continuously posted on the County’s web site, as have all documents presented to the Planning Commission and all written public comments.

CONCLUSIONS

- 1) The proposed amendments are consistent with the goals and requirements of the Washington Growth Management Act (GMA) and are in the public interest, and the proposed amendments to Whatcom County Code and the Official Zoning Maps are consistent with the Comprehensive Plan.
- 2) The rural element of the Comprehensive Plan harmonizes the GMA planning goals in RCW 36.70A.020, as described in Conclusion 2 of Ordinances 2013-028 and 2012-032, which are adopted herein by reference. The provisions of this ordinance further harmonize the GMA planning goals by adopting measures to protect water quality, consistent with GMA Goal 10 Environment by adding to Comprehensive Plan Policy 2DD-2.C additional measures to protect water resources.
- 3) The rural element of the Comprehensive Plan, as amended, meets the requirements of the Growth Management Act, RCW 36.70A by adding to WCC Title 20 Zoning, and Comprehensive Plan Policy 2DD-2.C additional measures to protect water resources, as required in RCW 36.70A.070(5)(c)(iv).
- 4) The amendments to the rural element of the Comprehensive Plan address the noncompliance finding of the June 7, 2013 GMHB Compliance Order in *Futurewise et al v. Whatcom County* (#12-2-003) by adding to Comprehensive Plan Policy 2DD-2.C additional measures to protect water resources, as required in RCW 36.70A.070(5)(c)(iv).

5) The subject comprehensive plan amendment complies with the approval criteria of WCC 2.160.080, which requires that the County must find the following criteria, are satisfied in order to approve the proposed comprehensive plan amendment.

a) The amendment conforms to the requirements of Growth Management Act, is internally consistent with the County-Wide Planning Policies and is consistent with any interlocal planning agreements.

i) Growth Management Act

The amendments are consistent with the Growth Management Act as described in Conclusions 3 and 4, above.

ii) County-Wide Planning Policies

County-wide Planning Policy N.2 states, "The Cities and the County in cooperation with other municipal corporations and tribal governments shall adopt zoning regulations and development standards to protect water resources. Where there are potential conflicts with designations required by the Growth Management Act, such as natural resource lands and critical areas, water resource protection shall generally have priority." The proposed changes to Comprehensive Plan Policy 2DD-2.C are consistent with this policy.

County-wide Planning Policies P.1 and P.2 reflect GMA Planning Goal (6) (RCW 36.70A.020(6)), which states private property shall not be taken for public uses without just compensation, and Whatcom County Charter Section 1.11, which states no regulation or ordinance shall be drafted and adopted without consideration of and provisions for compensation to those unduly burdened. The Comprehensive Plan amendments do not result in a taking of private property for public use without compensation. The Whatcom County Prosecuting Attorney's office has advised the County Council on the Attorney General's Advisory Memorandum on Avoiding Unconstitutional Takings of Private Property, per RCW 36.70A.370.

iii) Whatcom County Comprehensive Plan

The proposed Comprehensive Plan amendments are consistent with Comprehensive Plan Goal 11E, which states, "Protect and enhance water quality and promote sustainable and efficient use of water resources," and Goal 11F, which states, "Protect and enhance Whatcom County's surface water and groundwater quality for current and future generations."

iv) Interlocal Agreements

The interlocal agreements between Whatcom County and the cities require coordination on adopting population projections and reviewing UGAs. The amendments do not adopt new population projections without City-County coordination.

- b) *Further studies made or accepted by the department of planning and development services indicate changed conditions that show need for the comprehensive plan amendment.*

The need for this Comprehensive Plan amendment and accompanying Zoning Code and Zoning Map amendments is generated by the Growth Management Hearings Board's June 7, 2013 Compliance Order.

- c) *The public interest will be served by approving the comprehensive plan amendment. In determining whether the public interest will be served, factors including but not limited to the following shall be considered:*

- i) *The anticipated effect upon the rate or distribution of population growth, employment growth, development, and conversion of land as envisioned in the Comprehensive Plan.*

The proposed amendments would not increase growth rural Whatcom County beyond what is planned in the Comprehensive Plan.

- ii) *The anticipated effect on the ability of the County and/or other service providers, such as cities, schools, water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and public facilities including transportation facilities.*

No amendments are proposed that increase densities or intensity of uses or increase the demand for services and facilities beyond levels needed to serve development under existing zoning.

- iii) *Anticipated impact upon designated agricultural, forest and mineral resource lands.*

No amendments are proposed that increase adverse impacts on designated resource lands.

- d) *The amendment does not include or facilitate spot zoning.*

No rezonings are proposed.

- e) *Urban growth area amendments that propose the expansion of an urban growth area boundary shall be required to acquire development rights from a*

designated TDR sending area, unless one of the exceptions set forth in WCC 2.160.080(A)(5) applies to the amendment.

No urban growth area amendments are proposed.

NOW, THEREFORE, BE IT ORDAINED by the Whatcom County Council that:

Section 1. The Whatcom County Comprehensive Plan is hereby amended as shown on Exhibit A.

Section 2. Adjudication of invalidity of any of the sections, clauses, or provisions of this Ordinance shall not affect or impair the validity of the Ordinance as a whole or any part thereof other than the part so declared to be invalid.

ADOPTED this 28th day of January 2014.



Dana Brown-Daws, Council Clerk

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON



Carl Weimer, Council Chair

APPROVED as to form:



Karen H. Fahn
Civil Deputy Prosecutor

Approved () Denied



Jack Louws, Executive

Date: 1-30-14

EXHIBIT A

Comprehensive Plan Amendments

Chapter Two
LAND USE

.....

RURAL LANDS – INTRODUCTION

.....

GOAL 2DD: Retain the character and lifestyle of rural Whatcom County.

.....

Policy 2DD-2: Protect the character of the rural area through the County's development regulations. In addition to the policies of this plan that provide measures governing rural development, the following County's key development regulations are incorporated into this plan by reference to assure that the plan contains measures to protect rural character:

.....

- C. Measures to protect critical areas and surface and groundwater resources:
 - 1. Protect the functions and values of critical areas (geologically hazardous areas, frequently flooded areas, critical aquifer recharge areas, wetlands, and habitat conservation areas) and the ecological processes that sustain them, through WCC 16.16 Critical Areas provisions, adopted herein by reference.
 - 2. Minimize the adverse effects of discharges from on-site sewage systems on ground and surface waters through WCC 24.05, adopted herein by reference.
 - 3. Preserve and protect unique and important water resources through development standards in WCC 20.71 Water Resource Protection Overlay District and WCC 20.51 Lake Whatcom Watershed Overlay District, adopted herein by reference.

4. Protect surface and ground water resources through stormwater management standards established in the County's Development Standards per WCC 20.80.630 through .636, WCC 20.51, 12.08.035 and referenced in the following Zoning Code provisions, adopted herein by reference:
 - a. 20.32.656 Drainage, Residential Rural District;
 - b. 20.34.659 Drainage, Rural Residential-Island District;
 - c. 20.36.656 Drainage, Rural District;
 - d. 20.37.655 Drainage, Point Roberts Transitional District;
 - e. 20.44.652 Drainage, Recreation and Open Space District;
 - f. 20.59.704 Drainage, Rural General Commercial District;
 - g. 20.60.655 Drainage, Neighborhood Commercial District;
 - h. 20.61.704 Drainage, Small Town Commercial District;
 - i. 20.63.654 Drainage, Tourist Commercial District;
 - j. 20.64.655 Drainage, Resort Commercial District;
 - k. 20.67.653 Drainage, General Manufacturing District;
 - l. 20.69.655 Drainage, Rural Industrial and Manufacturing District.
5. Assure that subdivisions meet requirements for critical areas, shoreline management, and stormwater management through the standards in the following Whatcom County Land Division regulations, adopted herein by reference:
 - a. WCC 21.04.034 Application Procedures, Short Subdivisions
 - b. WCC 21.05.037 Hearing Examiner Notice Hearing and Decision, Preliminary Long Subdivisions
6. Limit water withdrawals resulting from land division through the standards in the following Whatcom County Land Division regulations, adopted herein by reference:
 - a. WCC 21.04.090 Water supply, Short Subdivisions
 - b. WCC 21.05.080 Water supply, Preliminary Long Subdivisions

7. Regulate groundwater withdrawals by requiring purveyors of public water systems and private water system applicants to comply with Washington State Department of Ecology ground-water right requirements per WCC 24.11.050, adopted herein by reference.

8. Require evidence of an adequate water supply prior to issuance of any building permit, per WCC 24.11.060, adopted herein by reference.

7-9. Determine adequacy of water supply for building permit applications proposing to use a well, spring, or surface water, per WCC 24.11.090, .100, .110, .120, .130, .160, and .170, adopted herein by reference.

8-10. Limit phosphorus entering Lake Whatcom through WCC 20.51 Lake Whatcom Watershed Overlay District and Lake Whatcom and Lake Samish due to the application of commercial fertilizers to residential lawns and public properties through WCC 16.32, adopted herein by reference.

11. Protect vital drinking water, sensitive habitats, and recreational resources within the Department of Ecology's designated Western Washington Phase II Municipal Stormwater Permit area and the Lake Whatcom watershed by prohibiting illicit discharges to the county's stormwater collection system through WCC 16.36 Illicit Discharge Detection and Elimination Program, adopted herein by reference.

9-12. Maintain standards for clearing activity in highly valued water resource areas, environmentally sensitive areas, or areas where natural conditions are so unstable that clearing activity in the areas can result in hazardous conditions per WCC 20.80.735 Water Resource Special Management Areas, adopted herein by reference.

D. Measures to protect against conflicts with the use of agricultural, forest, and mineral resource lands:

.....

3. Require that all discretionary project permits within one half mile of areas designated in this plan as Rural, Agriculture, Commercial Forestry, or Rural Forestry, or within 300 feet of areas designated as Mineral Resource Lands, be subject to disclosure practices in the in the following

Whatcom County Code provisions, adopted herein by reference:

- a. WCC 20.40.662 Use of Natural Resources, Agriculture District;
- b. WCC 20.42.652 Use of Natural Resources, Rural Forestry District;
- c. WCC 20.43.662 Use of Natural Resources, Commercial Forestry District;
- d. WCC ~~20~~.14.02 Right to Farm;
- e. WCC ~~20~~.14.04 Right to Practice Forestry;
- f. WCC ~~20~~.14.16 Mineral Resource Land Disclosure.

.....

APPENDIX 2

RECEIVED

SEP 17 2014

Van Ness Feldman, LLP

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SKAGIT COUNTY

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY
HARRIS, DAVID STALHEIM AND
FUTUREWISE,

Case No. 14-2-00877-8

CERTIFICATION OF THE RECORD

Petitioners,

(GMHB Case No. 12-2-0013)

v.

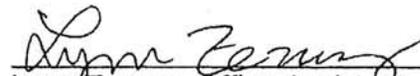
WHATCOM COUNTY,

Respondents.

I, Lynn Truong, under penalty of perjury under the laws of the State of Washington,
declare as follows:

I am the Office Assistant to the Growth Management Hearings Board. On the date
indicated below, the Certified Record in the above-captioned case was mailed to the Skagit
County Superior Court's Office. I certify that said record represents a true and correct copy
of the entire record maintained at the office of the Growth Management Hearings Board.
The record consists of a total of 1,972 bates numbered pages and 1 compact disc.
Additionally, I am transmitting the original transcript of the April 1, 2014, Telephonic
Compliance Hearing.

DATED this 15th day of September, 2014.


Lynn Truong, Office Assistant

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SKAGIT COUNTY**

**ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS,
DAVID STALHEIM, AND FUTUREWISE,**

Petitioner,

v.

WHATCOM COUNTY,

Respondents.

**Skagit County Case No.
14-2-00877-8**

(GMHB Case No. 12-2-0013)

**INDEX TO THE CERTIFIED
RECORD**

Date	Title	Exhibits/Attachments	By	Bates Nos.
10/10/12	Petition for Review; DOS	Whatcom County Ordinance No. 2012-032	Jean Melious; Tim Trohimovich	000001-000179
10/15/12	Notice of Appearance		Karen Frakes	000180
10/22/12	Memorandum dated October 22, 2012 re: Coordinating Issues from Case Nos. 11-2-0010c and 12-2-0013; Notice of Hearing and Preliminary Schedule; DOS		Nina Carter	000181-000188
10/30/12	Joint Motion for Extension for Settlement Purposes; COS		Karen Frakes; Jean Melious; Tim Trohimovich	000189-000192
11/2/12	Order Granting Settlement Extension and Amending Preliminary Schedule; DOS		Nina Carter	000193-000195
12/21/12	E-mail correspondence re: rescheduling Prehearing Conference		Vanessa Smith; Tim Trohimovich; Karen Frakes; Jean Melious	000196-000199
1/4/13	Index of Record; COS		Karen Frakes	000200-000212

Date	Title	Exhibits/Attachments	By	Bates Nos.
1/17/13	Notice of Association of Counsel; DOD		Tadas Kisielius	000213-000215
1/18/13	Revision of Issue 1 in Petition for Review; DOS		Jean Melious; Tim Trohimovich	000216-000219
1/22/13	Prehearing Order; DOS		Nina Carter	000220-000226
2/4/13	Motion to Supplement the Record; DOS		Jean Melious; Tim Trohimovich	000227-000235
2/14/13	Response to Petitioners' Motion to Supplement the Record; DOS		Tadas Kisielius; Karen Frakes	000236-000237
2/20/13	Order on Motion to Supplement; DOS		Nina Carter	000238-000240
3/22/13	Petitioners' Prehearing Brief	CD-Rom Exhibit 1RM-060	Jean Melious, Tim Trohimovich	000241-000828 Compact disc-000241
4/05/13	Whatcom County's Response Brief; Declaration of Delivery		Tadas Kisielius; Karen Frakes	000829-001169
4/05/13	Whatcom County's Motion to Amend the Index or, in the Alternative, Take Official Notice or to Supplement the Record; Declaration of Delivery		Tadas Kisielius; Karen Frakes	001170-001195
4/15/13	Opposition to Motion to Amend the Index: Opposition in Part to Motion to Supplement the Record in Rebuttal and In Support of Invalidity; DOS		Tim Trohimovich	001196-001240
4/19/13	Agenda for Hearing on the Merits; DOS		Nina Carter	001241-001243
4/19/13	Petitioners' Prehearing Brief; DOS ¹	<i>See Table of Exhibits, Page 12</i>	Jean Melious; Tim Trohimovich	001244-001335
4/25/13	Whatcom County's Objections to Petitioners' Proposed Exhibits; Declaration of		Tadas Kisielius; Karen Frakes	001336-001362

¹ This is Petitioner's Reply Brief, per Jean Melious e-mail of April 25, 2013, which is filed behind document. This Email is bates numbered 001335A and 001335B.

Date	Title	Exhibits/Attachments	By	Bates Nos.
	Delivery			
6/7/13	Final Decision and Order; DOS		Nina Carter; Raymond Paoella; Margaret Pageler	001363-001414
8/15/13	Certificate of Appealability. Thurston County Superior Court No. 13-2-01398-1; DOS		Nina Carter; Margaret Pageler; Raymond Paoella	001415-001423
8/15/13	Certificate of Appealability Skagit County Superior Court No. 13-2-01147-9; DOS		Nina Carter; Margaret Pageler; Raymond Paoella	001424-001432
11/15/13	Whatcom County's Motion for Continuance of Compliance Date; COS		Karen Frakes	001433-001436
11/25/13	Hirst, et al.'s Response to Whatcom County's Motion for Continuance of Compliance Date and Petition for Determination of Invalidity; DOS	<i>See List of Exhibits, page 11</i>	Jean Melious	001437-001495
12/2/13	Order Setting Hearing on Motion for Continuance of Compliance Period; DOS		Nina Carter	001496-001498
12/3/13	Whatcom County's Reply in Support of Motion for Continuance;		Duncan Greene; Karen Frakes	001499-001510
12/5/13	Letter dated December 5, 2013, to Presiding Officer Carter Re: Request to file Amended Reply Brief		Karen Frakes	001511-001512
12/6/13	E-mail from Vanessa Smith Re: Board's acceptance of County's Amended Reply Brief (Response to letter dated December 5)		Vanessa Smith	001513
12/10/13	Whatcom County's Amended Reply in support of Motion for		Duncan Greene; Karen	001514-001539

Date	Title	Exhibits/Attachments	By	Bates Nos.
	Continuance and Response to Petition for Invalidity; COS		Frakes	
12/11/13	Compliance Hearing Agenda; DOS		Nina Carter	001540-001542
12/13/13	Hirst, et al.'s Motion to Supplement the Record of Whatcom County's Motion for Continuance of Compliance Date and Petition for a Determination of Invalidity;	<i>See Table of Exhibits</i>	Jean Melious	001543-001571
12/13/13	Whatcom County's Initial Response to Motion to Supplement; COS		Karen Frakes	001572-001576
12/20/13	Additional Response To Motion To Supplement The Record; COS		Karen Frakes	001577-001587
12/20/13	Hirst et al.'s Supplement to the Petition for a Determination of Invalidity; DOS		Jean Melious	001588-001604
12/24/13	E-mail dated December 24, 2013, notifying parties of the anticipated date of issuance of Board's decision on pending motions		Vanessa Smith	001605
1/10/14	Compliance Order: Finding Continuing Noncompliance, Extending Compliance Schedule, Supplementing the Record and Denying Invalidity; DOS		Nina Carter; Raymond Paoletta; Margaret Pageler	001606-001615
1/21/14	Hirst et al.'s Motion for Reconsideration of Denial of Invalidity (Compliance Order, January 10, 2014); DOS		Jean Melious	001616-001620
1/23/14	Letter dated January 23, 2014, to Governor Inslee Re: Whatcom County's continuing noncompliance		Nina Carter	001621
01/30/14	Whatcom County's Response to Hirst Petitioner's Motion For Consideration, COS		Karen Frakes	001622-001626
2/7/14	Order Denying Motion for Reconsideration; DOS		Nina Carter; Raymond	001627-001630

Date	Title	Exhibits/Attachments	By	Bates Nos.
			Paolella; Margaret Pageler	
2/28/14	Compliance Report Or, In the Alternative, Request for Stay of Compliance Schedule; COS		Karen Frakes	001631- 001676
3/10/14	Hirst's & Futurewise's Objection to a Finding of Compliance; DOS	<i>See Table of Attachments, pages 15-16</i>	Jean Melious; Tim Trohimovich	001677- 001947
3/19/14	Compliance Hearing Agenda; DOS		Nina Carter	001948- 001950
4/15/14	Second Order on Compliance; DOS		Nina Carter; Raymond Paolella; Margaret Pageler	001951- 001959
5/21/14	Whatcom County's Motion for Stay of Second Compliance Order; COS		Duncan Greene; Karen Frakes	001960- 001967
6/10/14	Order Granting Stay; DOS		Nina Carter	001968- 001972

APPENDIX 3

WHATCOM COUNTY
Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226-9097
360-676-6907, TTY 800-833-6384
360-738-2525 Fax



J.E. "Sam" Ryan Director

M E M O R A N D U M

TO: Whatcom County Council

THROUGH: Mark Personius, AICP, Long Range Planning Manager *MP*

FROM: Gary Davis, AICP, Senior Planner *GD*

DATE: January 6, 2014

SUBJECT: Rural Element Water Resources

PDS is forwarding to the County Council the Planning Commission's recommendations and findings on Comprehensive Plan amendments related to water resources in rural areas. The amendments are scheduled for introduction on January 14, and for Planning and Development Committee and, if needed, a public hearing on January 28.

In 2011 and 2012 Whatcom County adopted changes to its Comprehensive Plan, Zoning Code, and zoning maps in response to the Growth Management Hearings Board's orders that found the County out of compliance with GMA's rural element requirements (Case No. 11-2-0010c). Two of the petitioners in that case filed a separate appeal (Case No. 12-2-0013) of the County's 2012 ordinance (No. 2012-032), focusing on whether that ordinance complies with RCW 36.70A.070(5)(c)(iv), which requires measures protecting surface and ground water resources. In its June 7, 2013 decision, the hearings board concluded the County's rural element, as amended by Ordinance 2012-032, does not contain such measures. The County has appealed that decision, and that appeal is ongoing. In the meantime, the County has been working to respond to that decision by proposing Comprehensive Plan amendments that adopt by reference existing code provisions. This would make the measures part of the Plan's rural element which must contain measures to protect water resources, per RCW 36.70A.070(5)(c)(iv). No changes to existing regulations are being proposed.

The agenda bill packet for this item contains the draft ordinance as well as the original September 30, 2013 staff report and the December 3, 2013 addendum to that staff report, which discusses the most recent proposed Comprehensive Plan amendments.

Also included in the packet are memoranda from the Whatcom County Public Works and Health outlining other current County practices protecting water resources. These memoranda are intended to give the Council additional background information on what is currently being done to protect water resources in Whatcom County. If you have questions, please contact me at extension 50246.

APPENDIX 4

WHATCOM COUNTY
PUBLIC WORKS DEPARTMENT

FRANK M. ABART
Director

[Handwritten signature]
1/11/2014



NATURAL RESOURCES

322 N. Commercial, Suite 110
Bellingham, WA 98225
Telephone: (360) 676-6876
FAX: (360) 738-2468
www.whatcomcounty.us

MEMORANDUM

TO: Mark Personius, PDS Division Manager

FROM: Gary Stoyka, Natural Resources Manager *MS*
Kirk Christensen, Stormwater Manager *KNC*

DATE: January 6, 2014

RE: Public Works Water Quality Programs

In ongoing proceedings before the Growth Management Hearings Board, several petitioners have challenged the sufficiency of the County's rural measures to protect ground and surface water resources, including protection of water quality. The County has appealed the most recent Board order on this issue and that appeal is ongoing. This memorandum provides more context and background related to the County's ongoing water quality protection efforts. Public Works provides technical and administrative support to several Whatcom County water quality programs including the Lake Whatcom Management Program, National Pollutant Discharge Elimination System (NPDES) Phase II Stormwater Program, Birch Bay Watershed and Aquatic Resources Management District (BBWARM) and the Shellfish Protection District Programs. Each of these programs includes monitoring, community outreach, and water quality improvement elements. Additionally, there are three primary Total Maximum Daily Load (TMDL) studies and plans the County participates in: Lake Whatcom, Lower Nooksack River, and Drayton Harbor.

The Lake Whatcom Management Program is a joint program with the City of Bellingham and Lake Whatcom Water and Sewer District. It was established by a joint resolution in 1992 and interlocal agreement in 1998. The management program operates under a five year work plan. The Lake Whatcom TMDL study has incorporated the five year work plan into the draft implementation plan. More information about the Lake Whatcom TMDL can be found at <http://www.ecy.wa.gov/programs/wq/tmdl/lkwhatcom/lkwhatcomtmdl.html>. Through the Lake Whatcom Management Plan development, development and stormwater regulations have been adopted for the watershed to help improve and protect water quality. Public Works also conducts water quality education and outreach activities and has a stormwater capital improvement program for the Lake Whatcom watershed.

The Washington State Department of Ecology issued Whatcom County the Western Washington Phase II Municipal Stormwater Permit beginning in 2007. This permit regulates discharges from Small Municipal Separate Storm Sewers, and is part of the National Pollutant Discharge and Elimination System (NPDES) and State Waste Discharge General Permit. Whatcom County is required to implement various stormwater management strategies to comply with this State permit. As part of the Permit, Whatcom County is required to develop a

Stormwater Management Program (SWMP) designed to reduce the discharge of pollutants from the stormwater sewer system into waters of the State. The SWMP document outlines activities, accomplishments, and future projects to comply with the requirements of the Permit. It is intended to be a planning and implementation document for the public, elected officials, and the departments of Whatcom County.

The Birch Bay Watershed and Aquatic Resources Management (BBWARM) District was created in 2007 in response to community concerns about water quality, flooding, and loss of aquatic habitat in the Birch Bay Watershed. BBWARM's stormwater program works to protect water quality and reduce stormwater impacts. BBWARM has a Citizen Advisory Committee with five members appointed by the Whatcom County Flood Control Zone District Board of Supervisors (County Council) for four-year terms. The Advisory Committee represents the Birch Bay community to ensure its interests are represented in BBWARM activities. The BBWARM stormwater program includes capital improvement projects, maintenance and operations, education and outreach, and water quality monitoring. BBWARM is described in Whatcom County Code Chapter 100.07.

The Revised Code of Washington (RCW) Chapter 90.72 requires that the county legislative authority create a shellfish protection district within 180 days after the Washington State Department of Health (DOH) closes or downgrades a shellfish growing area due to a degradation of water quality. There are three Shellfish Protection Districts that have been established in Whatcom County including Drayton Harbor (1995), Portage Bay (1998), and Birch Bay (2009). Each of these districts has a citizen's advisory committee and a shellfish recovery plan that outlines potential pollutant sources and strategies to identify and address water quality issues. The Shellfish Protection Districts are described in Whatcom County Code Chapter 16.20. The shellfish recovery plans have also been incorporated into the Lower Nooksack and Drayton Harbor TMDL studies and plans. More information about these TMDLs can be found at <http://www.ecy.wa.gov/programs/wq/tmdl/NooksackTMDL.html> and www.ecy.wa.gov/biblio/0803105.html. Implementation of the recovery plans includes a pollution identification and correction (PIC) program with water quality monitoring, ranking of priority drainages, community outreach, technical and financial assistance for landowners, and a regulatory backstop. The County is participating in the Whatcom Clean Waters Program, a partnership of federal, state, tribal, and local organizations through the Washington State Shellfish Initiative (<http://www.ecy.wa.gov/water/whatcomcleanwater.html>). Public Works conducts water quality monitoring, community outreach and engagement, and coordinates with other departments and agencies to share data and coordinate monitoring efforts, provide technical and financial assistance, and implement water quality improvement projects.

APPENDIX 5

WHATCOM COUNTY
Health Department
509 Girard Street
Bellingham, WA 98225



Regina A. Delahunt
Director

Environmental Health
Phone 676-6724

MEMORANDUM

TO: Mark Personius, Long Range Planning Manager

FROM: Kyle Dodd, Environmental Health Supervisor *KD*

RE: **Water Availability Review Process Supporting Documentation**

DATE: January 3, 2014

As stated in WCC 24.11.090(B)(3), and in other applicable sections, applications for water availability will only be approved in areas where the proposed well site does not fall within the boundaries of an area where DOE (Ecology) has determined by rule that water for development does not exist. The Growth Management Hearings Board, in its Final Decision and Order dated June 7, 2013, concluded that "Where the proposed groundwater withdrawal is located within a basin closed to new surface water appropriations, or where Ecology has set instream flows that are not consistently met, there is a presumption that no additional water is legally available."

As the local government agency tasked with approving water availability, the Whatcom County Health Department (WCHD) has been proactive in communicating with the Department of Ecology in an effort to ensure that we are making water availability decisions consistent with Ecology's interpretation of applicable water right rules and court interpretations. Since 2007, WCHD has routinely requested comments from Ecology related to water availability determinations and the legal use of exempt wells for development. Specifically, WCHD has requested Ecology feedback on proposed subdivisions that appeared to be one project in the context of the Campbell and Gwinn decision. In addition, Planning and Development Services has been requiring SEPA review for applicants of adjacent short plats. SEPA checklists are routed to Ecology for comments. Ecology has been helpful in providing water resource comments back, allowing WCHD to make water availability determinations based in part on Ecology guidance. The attached six exhibits (exhibits A-F) document water resource comments from Ecology in reference to the use of exempt wells for proposed projects in basins that are subject to the instream flows in WAC 173-501-030 and the surface water source limitations in WAC 173-501-040. The table below summarizes the projects referenced in the exhibits, the surface water drainage where they are located, and the status of that surface water source under WAC 173-501-040. There are no comments from Ecology in the attached exhibits indicating that water pursuant to the proposed permit-exempt withdrawal is not legally available due to the operation of Ecology's basin rule, or that WCHD should be requiring any additional information prior to approval of these sources.

Exhibit	Project	Surface water drainage	Status under WAC 173-501-040
A	Woodfern Cluster Long Plat	Anderson Creek	Partial year closure
B	Portal Way & Shen Industrial Plats	California Creek	Closed
C	Meridian Meadows Plat	Tenmile Creek	Closed
D	Seventh Heaven, West Hemmi Rd, and 3 rd Generation LLC's	Tenmile Creek	Closed
E	Jack & Trudy Lamoureaux	Tenmile Creek	Closed
F	Bertrand Creek Estates	Bertrand Creek	Closed

Attachments:

Ex. A, Ecology letter dated November, 21, 2007 RE: Woodfern Cluster Long Plat

Ex. B, Ecology letter dated February 19, 2009 RE: Portal Way and Shen Industrial Plats

Ex. C, Ecology letter dated July 15, 2010 RE: Jeffery Grove (Meridian Meadows Plat)

Ex. D, Ecology letter dated September 23, 2010 RE: Seventh Heaven LLC, West Hemmi Rd LLC, and 3rd Generation LLC

Ex. E, Ecology letter dated December 14, 2001 RE: Jack and Trudy Lamoureaux

Ex. F, Ecology letter dated March 8, 2011 RE: Bertrand Creek Estates

Ex. A



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Bellingham Field Office • 1440 10th Street, Ste 102 • Bellingham, WA 98225
(360) 715/5200 • FAX (360) 715-5225

November 21, 2007



Your address
is in the
Nooksack
watershed

Kyle Dodd
Whatcom Co. Department of Health
509 Girard St.
Bellingham, WA 98225

RE: **Project** Woodfern Cluster Long Plat
 Number LSS2006-00003

Dear Mr. Dodd:

Thank you for the opportunity to provide comments on the above referenced Long Plat.

Based on my review of the above referenced project and the information provided regarding the applicant's/owner's previous (2002) application materials for the original plat application for Sandy Ridge, we offer the following comments regarding water resources:

We consider the Woodfern Cluster Long Plat & the Sandy Ridge Long Plat to be a single project. As such, when calculating groundwater withdrawals, the proposed additional four homes (Woodfern Cluster) would be included with the existing six home (Sandy Ridge) project. RCW 90.44.050 allows for a total limit of 5,000 gallons per day for in-home use and no more than ½ acre of lawn or non-commercial garden per project. If the Sandy Ridge Long Plat has already utilized all water available under the groundwater exempted withdrawals (RCW 90.44.050), **no additional groundwater exempted withdrawals would be allowed.**

Any ground water development proposal that will withdraw water in excess of 5,000 gallons per day for single or **group domestic supply**, or for industrial purpose, **or for the irrigation of more than ½ acre of lawn or non commercial garden** (within the total project area) will require a permit from the Department of Ecology.

In Washington State, prospective water users must obtain authorization from the Department of Ecology before diverting surface water or withdrawing ground water, with several exceptions. Ground water withdrawals of up to 5,000 gallons per day used for single or group domestic supply, industrial purposes, stock watering or for the irrigation of up to one-half acre of lawn and garden are exempt from the permitting process. Water use under the RCW 90.44.050 exemption



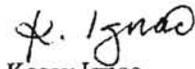
establishes a water right that is subject to the same privileges, restrictions, laws and regulations as a water right permit or certificate obtained directly from Ecology.

On March 28, 2002 the Washington State Supreme Court ruled that the RCW 90.44.050 permit exemption does not apply where a developer of a residential subdivision proposes multiple wells to serve each lot in the development if in combination, the withdrawal will exceed the exemption criteria.

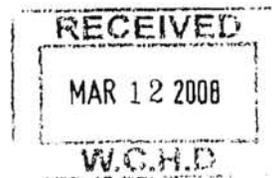
Use of water under the groundwater exemption has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. **The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn for domestic purposes exceeds 5,000 gallons per day or if a total of more than 0.5 acre of lawn and garden are irrigated.**

Thank you for considering these comments from the Department of Ecology. If you have questions please call me at (360) 715-5222.

Sincerely,


Kasey Ignac
Water Master

cc: BFO File



Ex. B



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
Bellingham Field Office • 1440 10th Street, Ste 102 • Bellingham, WA 98225
(360) 715-5200 • FAX (360) 715-5225

February 19, 2009



Your address is in the **Nooksack** watershed

Kyle Dodd
Whatcom Co. Department of Health
509 Girard St.
Bellingham, WA 98225

RE: **Projects** Portal Way Industrial Park Short Plat and Shen Industrial Park Short Plat
 Numbers Short Plats 2008-00022 and 2008-00023

Dear Mr. Dodd:

Thank you for the opportunity to comment on the above referenced Short Plats, as they pertain to water resources. Based on Ecology's review of the proposed projects, we consider the Portal Way Industrial Park Short Plat and the Shen Industrial Park Short Plat **to be a single project.** As such, all eight of the proposed parcels should be considered collectively when calculating groundwater withdrawals.

RCW 90.44.050 (the Groundwater Exemption) allows for unlimited water for livestock (no acreage or gallon per day limit), up to 1/2 acre of non-commercial lawn or garden a maximum, up to 5,000 gallons per day for single or group domestic supply, and up to 5,000 gallons per day for industrial purposes. Use of water under the Groundwater Exemption (RCW 90.44.050) has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn exceeds the Exemption limits. Therefore, if the proposed short plats will collectively withdraw in excess of the amounts allowed under the Exemption, an approved water right from the Department of Ecology will be required.



Thank you for considering these comments from the Department of Ecology. If you have questions, please contact me at (360) 715-5222 or at kign461@ecy.wa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Kasey Ignac". The signature is fluid and cursive, with the first name "Kasey" and last name "Ignac" clearly distinguishable.

Kasey Ignac
Water Master

cc: WR SEPA file

Ex. C

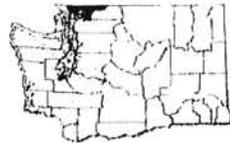


STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Bellingham Field Office • 1440 10th Street, Suite 102 • Bellingham, Washington 98225
(360) 715-5200 • FAX (360) 715-5225

July 15, 2010

Tyler Schroeder
Whatcom County Planning & Development Services
5280 Northwest Dr.
Bellingham, WA 98226



Your address
is in the
Nooksack
watershed

RE: **LA File# SEPA 2008-00087**
 DOE file# 201003621
 Applicant Jeffery Grove

Dear Mr. Schroeder:

Thank you for the opportunity to provide comments on the above referenced Determination of Nonsignificance. Based on review of the State Environmental Policy Act (SEPA) Checklist associated with this project we offer the following comments regarding **water resources**:

If water is from permitted source such as city water, water association, or an irrigation or reclamation district, then the water purveyor is responsible for ensuring that the proposed use(s) are within the limitations of its water rights. If the proposal's actions are different than the existing water right (source, purpose, the place of use, or period of use), then it is subject to approval from the Department of Ecology pursuant to Sections 90.03.380 RCW and 90.44.100 RCW.

RCW 90.44.050 (the Groundwater Exemption) allows for unlimited water for livestock (no acreage or gallon per day limit), the irrigation of up to ½ acre of non-commercial lawn or garden, up to 5,000 gallons per day for single or group domestic supply, and up to 5,000 gallons per day for industrial purposes. Use of water under the Groundwater Exemption has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn exceeds the Exemption limits.

Therefore, if the project intends to withdraw groundwater under the Groundwater Exemption, the entire project will be limited to withdrawing no more than 5,000 gallons of groundwater per day for domestic supply and to irrigating no more than ½ acre of non-

commercial lawn or garden within the total project area. If the project will withdraw groundwater amounts in excess of the amounts allowed under the Exemption, or if it will divert any amount of surface water, an approved water right from the Department of Ecology will be required.

Thank you for considering these comments from the Department of Ecology. If you have questions you can contact me at (360) 715-5222 or at kasey.ignac@ecy.wa.gov.

Sincerely,

Kasey Ignac
Water Master

Sent via email

ecc: Kyle Dodd, Whatcom County Department of Health
BFO WR SEPA File

Ex. D



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Bellingham Field Office • 1440 10th Street, Ste 102 • Bellingham, WA 98225
(360) 715-5200 • FAX (360) 715-5225

September 23, 2010

Marvin Van Mersbergen, Arlene DeYoung, Sherwin Van Mersbergen, Darrel Timmer,
Kenneth Stremler, & Lewis Stremler
c/o Sherwin Van Mersbergen
Seventh Heaven LLC, West Hemmi Rd LLC, 3rd Generation LLC
2110 Greenview Ln
Lynden WA 98264

Dear Marvin Van Mersbergen, Arlene DeYoung, Sherwin Van Mersbergen, Darrel Timmer,
Kenneth Stremler, and Lewis Stremler:

The Department of Ecology's Bellingham Field Office recently received 7 Notices of Intent (NOIs) notifying Ecology of your intention to drill 7 wells at an unnumbered property at West Laurel Rd, Whatcom County Assessor's parcel no. 390223 459440. According to information submitted on the NOIs and according to other information provided to Whatcom County Planning and Development Services, you intend for these wells to serve multiple to-be-developed residences at or adjacent to Whatcom County Assessor's parcel nos. 390223 459440, 390223 527440, 390224 017463, and 390224 048463. A search of Ecology's water right records found no water rights appurtenant to these properties.

Without a water right, you are limited to using water under the State's Groundwater Exemption, as defined in Washington's Water Code at RCW 90.44.050. There are four types of groundwater uses that are exempt from the state water right permitting requirements:

- Providing water for livestock (no gallon per day limit);
- Watering a non-commercial lawn or garden 1/2 acre in size or less (no gallon per day limit);
- Providing water for a single home or groups of homes (limited to 5,000 gallons per day); and
- Providing water for industrial purposes, *including commercial irrigation* (limited to 5,000 gallons per day).

If the you intend to serve all of the planned future residences with groundwater withdrawn under the state's Groundwater Exemption (RCW 90.44.050), any groundwater development proposal



that will withdraw water in excess of 5,000 gallons per day for single or group domestic supply, or for industrial purposes, or for the irrigation of more than ½ acre of lawn or non-commercial garden (within the total project area) will require a permit from the Department of Ecology.

Use of water under the Groundwater Exemption has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn exceeds the Exemption limits.

Without a water right, the total groundwater withdrawals for the *entire project area* is limited to that allowed under RCW 90.44.050, despite the number wells intended to provide water to the project. As such, all of the planned future residences cannot collectively withdraw more than 5,000 gallons of groundwater for group domestic use and the entire site cannot irrigate more than a total maximum area of ½ acre of lawn or non-commercial garden.

To legally use any amount of surface water or groundwater beyond that allowed under the Groundwater Exemption, a state water right is required. If you are irrigating without a legal water right or in excess of an existing right, you are violating Washington Water Code RCW 90.03.400 and/or 90.44.050 and will be notified to curtail this diversion of water. According to provisions of RCW 90.03.600, failure to comply with that request could result in the issuance of an Administrative Order, with possible fines of up to \$5,000 per day of illegal use.

I am requesting that you please contact me at 360-715-5222 within ten (10) days of receipt of this letter to discuss your intended water use. Your assistance in resolving this matter is greatly appreciated.

Sincerely,



Kasey Ignac
Water Master

Sent via Certified Mail: 7009 3410 0001 8281 8718

*ecc: Noel Philip, NWRO WR, Ecology
Kyle Dodd, Whatcom County Dept. of Health*

Ex. E



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Bellingham Field Office • 1440 10th Street, Suite 102 • Bellingham, Washington 98225
(360) 715-5200 • FAX (360) 715-5225

December 14, 2011



Your address
is in the
Nooksack
watershed

Craig Ostrom
Whatcom County Planning & Development Services
5280 Northwest Dr.
Bellingham, WA 98226

RE: LA File# SEPA 2011-00082
 DOE file# 201105906
 Proponent Jack & Trudy Lamoureaux (by Jaime White)

Dear Mr. Ostrom:

Thank you for the opportunity to provide comments on the above referenced State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS). Based on review of the SEPA checklist associated with this project we offer the following comments regarding **water resources**:

In the SEPA checklist, at Section B.3.b, the applicant also states that groundwater will be withdrawn from existing on-site wells.

If the applicant intends to serve the proposed developments (two 3-lot short plats) with groundwater withdrawn water under the state's Groundwater Permit Exemption (RCW 90.44.050), any groundwater development proposal that will withdraw water in excess of **5,000 gallons per day for single or group domestic supply**, or for industrial purposes, or for the irrigation of more than **½ acre of lawn or non-commercial garden within the total project area** will require a permit from the Department of Ecology.

Use of water under the Groundwater Permit Exemption has been interpreted in two Attorney General Opinions (AGO 1997 and AGO 2005) and by the Supreme Court in the Campbell & Gwinn decision. The 1997 AGO states that a group of wells drilled by the same person or group of persons, at or about the same time, in the same area, for the same purpose or project should be considered a single withdrawal and would not be

exempt from the permitting requirement contained in RCW 90.44.050, if the total amount withdrawn exceeds the Permit Exemption limits.

Without a water right, the total groundwater withdrawals are limited to that allowed under RCW 90.44.050, despite the number of wells, short plats, or parcels. As such, all homes developed under both proposed short plats cannot collectively withdraw more than 5,000 gallons of groundwater for domestic supply, and no more than ½ acre of lawn or non-commercial garden may be irrigated within the total 32.03 acres project area.

Thank you for considering these comments from the Department of Ecology. If you have questions you can contact me at (360) 715-5222 or at kasey.ignac@ecy.wa.gov.

Sincerely,

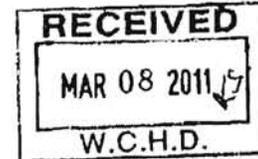


Kasey Ignac
Water Master

Sent via email



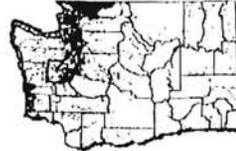
Ex. F



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Bellingham Field Office • 1440 10th Street, Suite 102 • Bellingham, Washington 98225
(360) 715-5200 • FAX (360) 715-5225

March 8, 2011



Your address
is in the
Nooksack
watershed

Kyle Dodd
Environmental Health Supervisor
Whatcom County Health Department
509 Girard Street
Bellingham WA 98225-4005

RE: **LA File# SEPA 2009-00034**
 DOE file# 201003155
 Applicant Bayes Brothers, LLC
 Project Bertrand Creek Estates Plat

Dear Mr. Dodd:

Thank you for the opportunity to provide additional information and clarification regarding **water resources** for the above-referenced project. The intent of this letter is to provide you with a written summary of the issues we have previously verbally discussed regarding the proposed Long Plat.

- As outlined in your 11/23/2010 letter to Nicole Terpstra (see enclosure), we have been informed that the Delta Water Association will supply water to one lot (one domestic connection) and the remaining nine lots will be withdrawing groundwater for domestic purposes under the Groundwater Exemption (RCW 90.44.050) from two wells. Under RCW 90.44.050, up to 5,000 gallons of groundwater may be withdrawn per day for single or group domestic supply¹.
- One Groundwater Exemption is allowed for any one 'project,' regardless of size. Based on the information provided to Ecology, including, but not limited to, development timelines, applicants, and property owners, it does **not** appear that Sunny Acres and Bertrand Creek Estates would be considered the same 'project.'
- Multiple wells may be used to withdraw Groundwater Exemption water, so long as the total withdrawal for the proposed project (Bertrand Creek Estates Plat) does not exceed the limits of 90.44.050.

- It appears that water right G1-22119C is appurtenant to the intended project site (see enclosure). G1-22119C is a groundwater right providing for the withdrawal of groundwater from a well at a maximum instantaneous rate (Q_i) of 72.0 gallons per minute (gpm) and an annual maximum limit (Q_A) of 16.6 acre-feet per year (afy) for irrigation purposes during the irrigation season. Use of water under G1-22119C must be consistent with the terms of the water right. Irrigation of lawn and garden is **not** considered **inconsistent** with a specified purpose of "irrigation."

Thank you for all of your efforts to coordinate on these water resources issues. If you have questions or need any additional information, please feel free to contact me at (360) 715-5222 or at kasey.ignac@ecy.wa.gov.

Sincerely,



Kasey Ignac
Water Master

Enclosure: Copy of water right G1-22119C
Copy of 11/23/2010 letter from Kyle Dodd to Nicole Terpstra

Hand Delivered 03/02/2011
KB1

ecc: Kyle Dodd
WR SEPA File (2011)

¹ The Groundwater Permit Exemption, RCW 90.44.050, allows the users of small quantities of groundwater to construct wells and develop their water supplies without first obtaining a water right permit from Ecology. The only exception to the permit requirement is for withdrawals of groundwater for:

- Providing water for livestock (no gallon per day limit).
- Watering a non-commercial lawn or garden one-half acre in size or less (no gallon per day limit, however limited to reasonable use).
- Providing water for a single home or groups of homes (limited to 5,000 gallons per day).
- Providing water for industrial purposes, including irrigation (limited to 5,000 gallons per day but no acre limit).

APPENDIX 6

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON
4

5 ERIC HIRST, LAURA LEIGH BRAKKE,
6 WENDY HARRIS, DAVID STALHEIM, AND
7 FUTUREWISE,

8 Petitioners,

9 v.
10

11 WHATCOM COUNTY,

12 Respondent.
13

Case No. 12-2-0013

SECOND ORDER ON COMPLIANCE

14
15 THIS MATTER came before the Board at a compliance hearing held April 1, 2014,
16 following submittal of Whatcom County's (County) Compliance Report or Request for Stay
17 of Compliance Schedule, filed February 28, 2014. The Compliance Report described the
18 County's response to the Board's June 7, 2013, Final Decision and Order. Petitioners Hirst,
19 et al. and Futurewise filed an Objection to a Finding of Compliance on March 10, 2014. On
20 April 1, 2014, a Compliance Hearing was held telephonically and was attended by Board
21 members Nina Carter, Raymond Paoella, and Margaret Pageler with Ms. Carter presiding.
22 Petitioners Hirst, et al. and Futurewise were represented by Jean O. Melious and Tim
23 Trohimovich. Whatcom County appeared through its attorney Karen Frakes.
24
25

26 **I. SYNOPSIS OF DECISION**

27 The Board found the County did not comply with the Growth Management Act. It
28 found continuing non-compliance and imposed an extended compliance schedule in view of
29 the complexity of the issues and the pendency of proceedings before the Court of Appeals.
30 A Board letter of continuing non-compliance was sent to the Governor in accordance with
31 RCW 36.70A.330(3).
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II. PROCEDURAL HISTORY

On June 7, 2013, the Board found Whatcom County's Ordinance 2012-032 did not comply with RCW 36.70A.070(5) because the County failed to include measures governing rural development in the Rural Element of its Comprehensive Plan protecting surface and groundwater quality, water availability, and water for fish and wildlife.¹ This Order established a compliance deadline of December 4, 2013, and set a compliance hearing for January 21, 2014. In November and December 2013, the County and Petitioners submitted motions requesting a compliance date extension, supplementation of the record, and a petition to impose invalidity. Following a December 18, 2013, Compliance Hearing, the Board found the County had not taken action to comply with the Growth Management Act, and thus, found the County in continuing non-compliance and extended the compliance schedule.² The Board also denied Petitioners' request for invalidity because the Board cannot impose invalidity on **pre-existing** regulations not challenged within 60 days of original adoption.³

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III. BURDEN OF PROOF

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.⁴ After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.⁵ For purposes of Board review of the comprehensive

¹ *Hirst v. Whatcom County*, Case No. 12-2-0013, Final Decision and Order (FDO) (June 7, 2013) at 12 and 37- 42.

² *Hirst v. Whatcom County*, Case No. 12-2-0013, Compliance Order (January 10, 2014) at 2-8 and 9.

³ GMHB Case No. 12-2-0013 Compliance Order (January 10, 2014) at 5: "From the evidence in the record, the Board found and concluded the County's Comprehensive Plan did not comply with RCW 36.70A.070(5) because the County failed to include measures in the rural element of its comprehensive plan protecting surface and groundwater quality, water availability, and water for fish and wildlife. The County must comply by strengthening its plan and development regulations to protect water quality, the supply of water resources, and conserving fish and wildlife habitat; **but the Board cannot impose invalidity on pre-existing development regulations. The Board's authority to invalidate adopted plans and regulations is strictly limited by statute (RCW 36.70A.302.)** Previously enacted regulations not challenged within sixty days are not within the Board's reach **but, if they are deficient, they do not constitute the measures** required by RCW 36.70A.070 (5)(c)(iv)." (emphasis added)

⁴ RCW 36.70A.300(3)(b).

⁵ RCW 36.70A.330(1) and (2).

1 plans and development regulations adopted by local governments in response to a non-
2 compliance finding, the presumption of validity applies and the burden is on the challenger
3 to establish that the new adoption is clearly erroneous in view of the entire record before the
4 board and in light of the goals and requirements of the GMA.⁶

5 In order to find the County's action clearly erroneous, the Board must be "left with the
6 firm and definite conviction that a mistake has been made."⁷ Within the framework of state
7 goals and requirements, the Board must grant deference to local governments in how they
8 plan for growth.⁸ In sum, during compliance proceedings the burden remains on the
9 Petitioner to overcome the presumption of validity and demonstrate that **any action** taken
10 by the County is clearly erroneous in light of the goals and requirements of chapter 36.70A
11 RCW (the Growth Management Act).⁹ Where not clearly erroneous and thus within the
12 framework of state goals and requirements, the planning choices of the local government
13 must be granted deference.
14

15 16 17 **IV. POSITIONS OF THE PARTIES**

18 In the Board's FDO, it found the County's Rural Element, as amended by Ordinance
19 No. 2012-032 and Policy 2DD-2.C, "does not include the measures needed to protect rural
20 character in the County's Rural Area by ensuring patterns of land use and development
21 consistent with water resource protection" as required by RCW 36.70A.070(5)(c)(iv). The
22 County's policies incorporating existing regulations failed to protect rural character because
23 the particular regulations either applied only to limited areas of the County and did not apply
24 to the entire Rural Area or were limited to subdivisions of land rather than all rural
25 development.¹⁰
26

27 In the County's Compliance Report and during the Compliance Hearing, the County
28 clarified that it had appealed the Board's FDO to the Court of Appeals Division I. However,
29

30 ⁶ RCW 36.70A.320(1), (2), and (3).

31 ⁷ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

32 ⁸ RCW 36.70A.3201.

⁹ RCW 36.70A.320(2).

¹⁰ GMHB Case No. 12-2-0013, Final Decision and Order (June 7, 2013) at 44, following discussion and analysis at 20-44.

1 on January 28, 2014, the County adopted Ordinance 2014-002 amending various land use
2 provisions in its Comprehensive Plan to cross-reference to existing Whatcom County Codes
3 related to water resources. In its compliance report and at the compliance hearing, the
4 County recognized that the Board might not find the County in compliance, and thus,
5 requested a stay of the compliance proceedings or an extension of the compliance actions
6 until the Court of Appeals issues a ruling.¹¹
7

8 Petitioners objected to the County's compliance efforts by pointing out that Ordinance
9 2014-002 did not change the Comprehensive Plan or development regulations to meet the
10 GMA's requirements in the June 7, 2013, FDO. Petitioners cite a memorandum from the
11 County's Long Range Planning Manager which contains the sentence: "No changes to
12 existing regulations are being proposed."¹² Rather than addressing the non-compliant
13 provisions, the County made "five minor amendments to its rural element" which addressed
14 a limited area of the County instead of the entire Rural Area.¹³ Petitioners then elaborate on
15 why each amendment in Ordinance 2014-002 does not meet the FDO requirements.¹⁴
16 Petitioners objected to the County's request for a stay of the compliance proceedings
17 because their request violated the Board's rules of practice in WAC 242-03-860. Petitioners
18 requested the Board deny the County's stay request.¹⁵ Finally, Petitioners requested the
19 Board impose invalidity on specific County policies which if left in effect would substantially
20 interfere with the fulfillment of the goals of GMA.¹⁶
21
22

23 V. BOARD DISCUSSION AND ANALYSIS

24 Relevant Authorities

25 **RCW 36.70A.300** Final orders.

26
27 (3) In the final order, the board shall either:
28

29 ¹¹ County Compliance Report (February 28, 2014) at 1.

30 ¹² Petitioner Futurewise's Concurrence with and Objections to Compliance Finding (March 10, 2014) at 1.

31 ¹³ *Id.* at 6-13.

32 ¹⁴ County Compliance Report (February 28, 2014), Ex. R-166.

¹⁵ Petitioner Futurewise's Concurrence with and Objections to Compliance Finding (March 10, 2014) at 14.

¹⁶ During the compliance hearing, Futurewise referred to Policies 2DD-2.C.8 & Policy 2DD-2.C.9 as those policies that should be declared invalid.

1 (a) Find that the state agency, county, or city is in compliance with the
2 requirements of this chapter, chapter 90.58 RCW as it relates to the adoption
3 or amendment of shoreline master programs, or chapter 43.21C RCW as it
4 relates to adoption of plans, development regulations, and amendments
5 thereto, under RCW 36.70A.040 or chapter 90.58 RCW; or

6 (b) Find that the state agency, county, or city is not in compliance with the
7 requirements of this chapter, chapter 90.58 RCW as it relates to the adoption
8 or amendment of shoreline master programs, or chapter 43.21C RCW as it
9 relates to adoption of plans, development regulations, and amendments
10 thereto, under RCW 36.70A.040 or chapter 90.58 RCW, in which case the
11 board shall remand the matter to the affected state agency, county, or city.
12 The board shall specify a reasonable time not in excess of one hundred
13 eighty days, or such longer period as determined by the board in cases of
14 unusual scope or complexity, within which the state agency, county, or city
15 shall comply with the requirements of this chapter. The board may require
16 periodic reports to the board on the progress the jurisdiction is making
17 towards compliance

18 **RCW 36.70A.302** Growth management hearings board — Determination of
19 invalidity — Vesting of development permits — Interim controls.

20 (1) The board may determine that part or all of a comprehensive plan or
21 development regulations are invalid if the board:

22 (a) Makes a finding of noncompliance and issues an order of remand
23 under RCW 36.70A.300;

24 (b) Includes in the final order a determination, supported by findings of
25 fact and conclusions of law, that the continued validity of part or parts of the
26 plan or regulation would substantially interfere with the fulfillment of the goals
27 of this chapter; and

28 (c) Specifies in the final order the particular part or parts of the plan or
29 regulation that are determined to be invalid, and the reasons for their
30 invalidity.

31 **WAC 242-03-860** Stay.

32 The presiding officer pursuant to RCW 34.05.467 or the board pursuant to
RCW 34.05.550(1) may stay the effectiveness of a final order upon motion
for stay filed within ten days of filing an appeal to a reviewing court.

A stay may be granted if the presiding officer or board finds:

(1) An appeal is pending in court, the outcome of which may render the case
moot; and

(2) Delay in application of the board's order will not substantially harm the
interest of other parties to the proceedings; and

1 (3)(a) Delay in application of the board's order is not likely to result in actions
2 that substantially interfere with the goals of the GMA, including the goals and
3 policies of the Shoreline Management Act; or

4 (b) The parties have agreed to halt implementation of the noncompliant
5 ordinance and undertake no irreversible actions regarding the subject matter
6 of the case during the pendency of the stay; and

7 (4) Delay in application of the board's order furthers the orderly
8 administration of justice.

9 The board's order granting a stay will contain appropriate findings and
10 conditions. A board order denying stay is not subject to judicial review.

11 During the compliance hearing, the County stated that while it did take legislative
12 action, it is not claiming it is or is not in compliance with GMA. The County appealed the
13 Board's June 7, 2013, FDO to the Court of Appeals and seeks the Court's decision on the
14 County's status regarding GMA compliance. Thus, the County requested a stay or an
15 extended compliance schedule. Petitioners raised numerous objections to the County's
16 legislative action, objected to the request to stay compliance proceedings, and asked the
17 Board to impose invalidity on certain County policies.

18 The Board reviewed the County's legislative action and found it in continuing non-
19 compliance for several reasons. Amendments in Ordinance 2014-002 did not change
20 existing regulations found non-compliant by the Board's June 7, 2013, FDO. The existing
21 regulations continue to apply water quality or quantity controls in **limited areas** of the
22 County and do not apply measures to protect water quality or quantity throughout the Rural
23 Area of the County. Further, the County made minor changes to Whatcom County policies
24 such as changing "ground" water to water "rights" in reference to a Department of Ecology
25 publication, referencing an existing development code requiring evidence of adequate water
26 supply, and cross-referencing to a development code regarding land clearing activity in
27 Water Resource Special Management Areas.¹⁷ None of these actions meet the GMA
28 requirement to impose measures governing land use and development to protect rural
29 character by protecting water quality and quantity throughout Whatcom County's Rural
30 Area. The Board finds the County **in continuing non-compliance**.
31
32

¹⁷ County Compliance Report (February 28, 2014) Ex. R-165; Ex. A, Chapter 2 Land Use at 1-4.

1 In regard to the County's request for a stay of compliance proceedings, the Board
2 finds the County has not met the requirements of WAC 242-03-860. This rule requires
3 parties to file a request for stay within ten days of filing an appeal with a reviewing court.
4 The County did not meet this requirement. More importantly, the rule provides a stay may
5 be granted only if delay will not substantially harm the interest of other parties to the
6 proceeding, for example, when implementation of the non-compliant ordinance has been
7 halted and no development will vest during pendency of the stay. These criteria are not met
8 in this case. The Board **denies** the County's request for a stay.

9
10 Alternatively, the County requested an extended compliance schedule pursuant to
11 RCW 36.70A.300(3)(b) which provides, in part:

12 The board shall specify a reasonable time not in excess of one hundred
13 eighty days, or such longer period as determined by the board in cases of
14 unusual scope and complexity, within which the [county] shall comply with
15 the requirements of this chapter.

16 The Board has previously determined that the issue of measures to protect water resources
17 in rural areas is a matter of unusual scope and complexity.¹⁸ Accordingly, the Board sets an
18 extended schedule for the County to come into compliance.

19 In regard to the Petitioner's request for invalidity on specific policies, the Board has
20 previously ruled on this request in its January 10, 2014, Compliance Order. In this order,
21 the Board once again reiterates it cannot retroactively impose invalidity on regulations that
22 were not timely appealed nor does imposing invalidity on Policies 2DD-2.C.8 and Policy
23 2DD-2.C.9 improve the compliance with GMA. Invalidity could in fact reduce protections as
24 can be seen in Policy 2DD-2. C.9: "Determine adequacy of water supply for building permit
25 applications proposing to use a well, spring, or surface water, per WCC 24.11.090, .100,
26 .110, .120, .130, .160, and .170, adopted herein by reference."¹⁹ The effect of imposing
27 invalidity on this policy would be to eliminate the requirement to determine the adequacy of
28 water supply. The Board **denies** the request to impose invalidity.
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¹⁸ See, Certificate of Appealability (Skagit County Superior Court), Case No. 12-2-0013, August 15, 2013.

¹⁹ *Id.* at Ex. 165; Ex. A at 3.

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VI. ORDER

Whatcom County is in **continuing non-compliance** with the Growth Management Act as found in the Board's June 7, 2013, FDO. This matter is remanded to the County to take action to comply with the Growth Management Act pursuant to the following schedule. The Board requires the County to file a status report in early October 2014 with compliance action to follow:

Compliance Status Report Due	October 1, 2014
Compliance Due	November 21, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	December 5, 2014
Objections to a Finding of Compliance	December 19, 2014
Response to Objections	December 29, 2014
Compliance Hearing – (Telephonic) Call 1-800-704-9804 and use pin 7579646#	January 6, 2015 10:00 a.m.

DATED this 15th day of April, 2014.

Nina Carter, Board Member

Raymond L. Paoella, Board Member

Margaret Pageler, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.²⁰

²⁰ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

No. 72132-1-I

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

WHATCOM COUNTY,

Petitioner,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD,

Respondent.

CERTIFICATE OF SERVICE

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I certify that I caused a copy of Whatcom County's Opening Brief to be served on all parties or their counsel of record on the date below as indicated.

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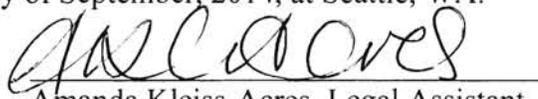
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26th day of September, 2014, at Seattle, WA.


Amanda Kleiss-Acres, Legal Assistant