Case No. 31941-5-III

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

SPOKANE COUNTY,

Respondent,

v.

FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION, and FUTUREWISE,

Appellants,

and

HARLEY C. DOUGLASS, INC.,

Respondent,

and

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondent

BRIEF OF RESPONDENT HARLEY C. DOUGLASS, INC.

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I. INTRODUCTION

The Growth Management Act, Chap. 36.70A RCW ("GMA") was enacted to encourage development in established urban areas and to reduce sprawling, low-density development. RCW 36.70A.010, -.020. Cities and counties planning under GMA have broad discretion to balance planning goals, and to make planning decisions based on local circumstances. RCW 36.70A.3201.

The adoption or amendment of comprehensive plans by local governments are subject to review by the Growth Management Hearings Board ("GMHB") to determine whether those planning decisions comply with GMA. RCW 36.70A.280(1). Local government planning decisions are presumed valid, and the GMHB is required to grant broad deference and uphold those decisions unless they are clearly erroneous in light of the goals of GMA. RCW 36.70A.320(3).

In this case, Spokane County ("County") made a legislative decision to amend the comprehensive plan designation for a small and unique parcel of property, owned by Douglass, inside the County's existing urban growth area. Recognizing that desired infill development of the property was not feasible under the existing designation of Low Density Residential ("LDR"), and that GMA requires a variety of housing options and residential densities, the County amended the designation to Medium Density Residential ("MDR"). This small increase in residential density on one small parcel of property based on unique

local circumstances was well within the County's broad discretion under GMA.

Unfortunately, far from granting broad deference to the County's planning decision, the GMHB substituted its own judgment for the County's interpretation and application of its own comprehensive plan policies, and invalidated the amendment. The GMHB engaged in unprecedented micro-management of local planning decisions in direct violation of the statutorily-required deference to local planning decisions. The superior court correctly reversed the GMHB.

II. RESPONSE TO STATEMENT OF THE CASE

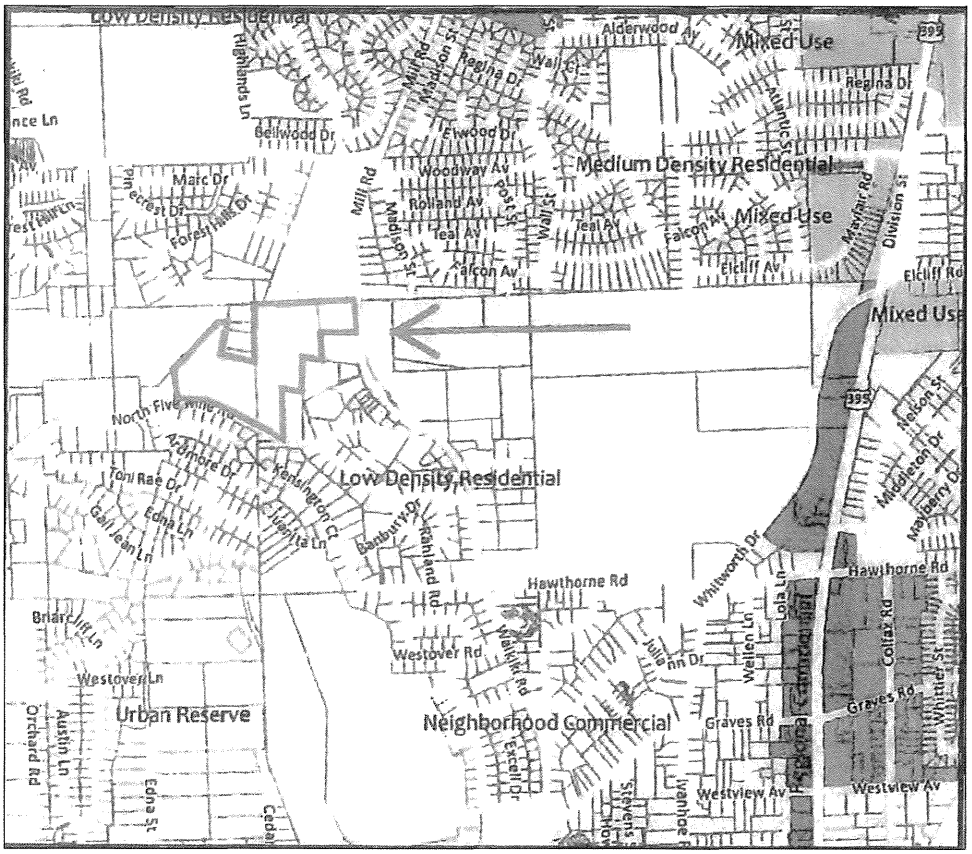
A. Background: The Douglass Property

Respondent Douglass owns approximately 22.3 acres of undeveloped land in unincorporated Spokane County ("Property"). The Property is within the Spokane County UGA (UGA)[1], and is currently designated LDR under the comprehensive plan and zoning code. The Property is hilly, topographically isolated, and consists of irregularly shaped parcels. The Property is encumbered by easements for electrical transmission lines and a natural gas pipeline. CR 013, 046, 218, 220, 226.[2] The Property is located west of Waikiki Road and north of

[1] The Urban Growth Area ("UGA") is the area designated by the County, planning under GMA, "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110(1); *see* RCW 36.70A.030(20).

[2] "CR ###" refers to the numbered Certified Record filed by Spokane County on December 17, 2012. *See* CP 126-128; *App. Br.* at 1 n.2.

Five Mile Road. Waikiki is classified as an Urban Principal Arterial. Five Mile is classified as an Urban Collector Arterial. Both serve larger residential areas. CR 193, 220. This figure shows the configuration of the Property (*see* CR 046):



The Property is surrounded by LDR zoned areas, but bordered on the north by a BPA easement. CR 220-221. The property is served by existing urban utilities. CR 224. Development of the property would be considered infill development, which is encouraged by GMA and County polices to contain urban growth and avoid costly expansions of urban services. CR 013, 222-223, 225.

Douglass plans to develop the Property for residential use. In March 2007, before the collapse of the housing market, the county hearing examiner approved a preliminary plat called "Redstone," which would have allowed the construction of 26 single family homes and 12 duplexes on the Property. CR 191, 220. After the Redstone plat was approved, economic conditions changed and the development of single family homes became unfeasible. CR 220.

B. Application for Amendment to Comprehensive Plan (11-CPA-05)

In March 2011, Douglass applied for an amendment to the Spokane County Comprehensive Plan and a concurrent amendment to the County's zoning map. Douglass asked the County to change both the comprehensive plan and zoning designations of the Property from LDR to MDR. CR 007-008, 016, 299.

C. County Approval

In December, 2011, the Board of County Commissioners ("BOCC") adopted Resolution 11-1191, approving the comprehensive plan amendment and concurrent rezone (amendment 11-CPA-05). CR 007-016, 046. In response to concerns of neighbors regarding the traffic impacts of development, the amendment was expressly conditioned upon construction of a direct access to Waikiki Road and other vehicle and pedestrian improvements. CR 013.

D. Growth Management Hearings Board (GMHB) Proceedings

Respondents Five Mile Prairie Neighborhood Association and Futurewise

("Futurewise") challenged the County's action by filing a petition for review with the GMHB. Futurewise alleged that Amendment 11-CPA-05 was inconsistent with several of the policies in the County's comprehensive plan. CR 001-006. Douglass moved to intervene in the GMHB proceedings to protect its interests as the underlying property owner. CR 070-073. No party objected, and the GMHB issued an order allowing intervention by Douglass. CR 077-078.

Futurewise also challenged the concurrent rezoning of the Property, arguing that the rezone did not comply with the County's criteria for zoning amendments. CR 177-180. The County explained that the GMHB lacked jurisdiction to consider Futurewise's arguments against the rezone. CR 306-311.

E. *Decision* of Growth Management Hearings Board (GMHB)

In August 2012, the GMHB issued its *Decision*, reversing the County's approval of amendment 11-CPA-05 and issuing a determination of invalidity. CR 1010-1036. The GMHB concluded that the amendment was inconsistent with three comprehensive plan policies relating to transportation (vehicle and pedestrian) and schools. CR 1022-1027. The GHMB rejected Futurewise's arguments regarding infill development and the location of multifamily housing. CR 1021, 1025. The GMHB also concluded that it had jurisdiction over the concurrent rezone, and that the rezone did not comply with the County's criteria for zoning amendments. CR 1017, 1029.

F. Superior Court Reversal

Douglass and the County both filed petitions for judicial review in the superior court, which were consolidated. CP 1-80; 111-124. The superior court reversed the GMHB, and remanded the matter to the GMHB to enter an order finding the County in compliance with GMA. CP 493-496.

III. STANDARD OF REVIEW

The superior court correctly reversed the GMHB, concluding that Amendment 11-CPA-05 was not "clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter." CP 494-495; *see* RCW 36.70A.320(3). Futurewise seeks to reverse the superior court and uphold the GMHB decision by applying the wrong standard of review. The *Brief of Appellant* never mentions RCW 36.70A.320(3) or the "clearly erroneous" test ***even once***. Instead, Futurewise erroneously argues that the GMHB decision is "supported by substantial evidence." *App. Br.* at 4, 29, 38, 49.

A. The Growth Management Act (GMA) requires the GMHB and reviewing courts to defer to local agency planning decisions by applying the "clearly erroneous" test to the record before the GMHB. The "substantial evidence" test normally used in appellate review of factual matters is *not* applicable to GMHB decisions.

The legislature created the GMHB in 1991. Laws of 1991, 1st Sp. Sess., ch. 32, § 5; *see* RCW 36.70A.250); *Skagit Surveyors and Engineers, LLC, v. Friends of Skagit County*, 135 Wn.2d 542, 548-549, 958 P.2d 962 (1998). The

1991 statute required the GMHB to issue written decisions with findings of fact in each case. Laws of 1991, 1st Sp. Sess., ch. 32, § 7; former RCW 36.70A.270. The 1991 statute also provided that, like a court or quasi-judicial tribunal, the GMHB would determine factual matters based on the "preponderance of the evidence," with the burden of proof on the party asserting that an agency was not in compliance with GMA. Laws of 1991, 1st Sp. Sess., ch. 32, § 13 (emphasis added); former RCW 36.70A.320. The "preponderance of the evidence" standard to be applied by the GMHB was consistent with the APA standard for judicial review of agency orders in adjudicative proceedings, which requires a reviewing court to determine whether an administrative tribunal's findings of fact are supported by substantial evidence. RCW 34.05.570(3)(e); *see DaVita, Inc. v. Dep't of Health*, 137 Wn. App. 174, 185, 151 P.3d 1095 (2007).

In 1997, the legislature amended RCW 36.70A.320(3) to eliminate the "preponderance of the evidence" test and require the GMHB boards to defer to the decisions of local governments under the "clearly erroneous" standard:

> (3) In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter... The board shall find compliance unless it determines that the action by the state agency, county, or city is **clearly erroneous in view of the entire record before the board** and in light of the goals and requirements of this chapter.

RCW 36.70A.320(3); Laws of 1997, ch. 429, § 20 (emphasis added).

The 1997 legislature clearly stated that it intended to require the GMHB to grant broad deference to local agencies' planning decisions:

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

RCW 36.70A.3201 (emphasis added); Laws of 1997, ch. 429, § 2.

The "substantial evidence" test of the APA conflicts with the highly deferential "clearly erroneous" test specifically required by RCW 36.70A.320(3). *See* RCW 36.70A.270(7) (APA applies to the extent it does not conflict with GMA). After the 1997 legislature eliminated the GMHB's authority to determine the facts under the "preponderance of the evidence" test, the usual "substantial evidence" test for judicial review of factual determinations under the APA was no longer applicable. Because the GMHB is required to defer to local agencies under the "clearly erroneous" test, a reviewing court must determine whether the

GMHB has correctly applied that test, ***not*** whether the GMHB's own findings are supported by substantial evidence. *See Farm Supply Dist., Inc. v. WUTC*, 83 Wn.2d 446, 447-450, 518 P.2d 1237 (1974). Futurewise consistently fails to apply the proper standard of review.

For example, Futurewise erroneously asserts that "the [GMHB's] conclusion that Amendment No. 11-CPA-05 is inconsistent with Policy UL.2.20 is supported by substantial evidence." *App. Br.* at 29. But under RCW 36.70A.320(3) and -.3201, the issue before the GMHB was whether the County's planning decision was "clearly erroneous in view of the entire record before the board," not whether the GMHB would have found otherwise if it were permitted to make its own findings of fact subject to judicial review under the "preponderance of the evidence" test.[3] The conflict between the ordinary "substantial evidence" test and the "clearly erroneous" test explicitly required by GMA is highlighted by the fact that Futurewise's brief ***never*** mentions RCW 36.70A.320(3), -.3201 or the "clearly erroneous" test.

The correct use of the "clearly erroneous" test is demonstrated in *City of Arlington v. CPSGMHB*, 164 Wn.2d 768, 193 P.3d 1077 (2008). In that case,

[3] The legislature has not eliminated the requirement, from the original 1991 statute, that the GMHB "shall make findings of fact and prepare a written decision in each case." *See* RCW 36.70A.270(6); Laws of 1991, 1st Sp. Sess., ch. 32, § 5; former RCW 36.70A.270(5). However, the 1997 amendment of the standard of review to the "clearly erroneous" test means that the GMHB findings serve only to explain the GMHB's decision.

Snohomish County amended its comprehensive plan again to designate 110 acres of agricultural land as commercial land, and included the land in the Arlington UGA. The GMHB reversed, concluding that the re-designation and UGA expansion were clearly erroneous, and the superior court affirmed. 164 Wn.2d at 776-778. The Court of Appeals reversed the GMHB, and the Supreme Court upheld the Court of Appeals decision and the County's actions. 164 Wn.2d at 773-774. The Court noted that the GMHB was required to apply the "clearly erroneous" test, and held that the GMHB erred in the application of that test:

> [The GMHB] erred in concluding the County committed clear error in determining the land in question has no long-term commercial significance for agricultural production. There is evidence in the record supporting the County's determination on this point, and the [GMHB] wrongly dismissed this evidence. Because this evidence supports the County's finding that the land at Island Crossing has no long-term commercial significance for agricultural production, the [GMHB] erred in not deferring to the County's decision to redesignate the land for urban commercial use.

164 Wn.2d at 782. In other words, the question before both the GMHB and the reviewing courts was whether the County's planning action was clearly erroneous in light of the record. If the GMHB were allowed to make findings of fact to be reviewed under the substantial evidence test of the APA then the Supreme Court would have ***upheld*** the GMHB's determination, which was supported by substantial evidence. *See* 164 Wn.2d at 783-785. But the court reversed the

GMHB because the record also supported the County's action, and the GMHB was required to defer to the County. 164 Wn.2d at 788. Other Supreme Court cases confirm that reviewing courts apply the "clearly erroneous" test and not the "substantial evidence" test normally used in APA cases.[4]

B. References to the "substantial evidence" test in existing GMA cases are erroneous dicta.

The legislature's adoption of the "clearly erroneous" standard in RCW 36.70A.320(3) and its statement of intent in RCW 36.70A.3201 could hardly be more clear. Unfortunately, erroneous dicta taken from APA cases and repeated in subsequent GMA cases creates confusion by suggesting that courts review GMHB decisions under the "substantial evidence" test.[5] A careful review of the case law reveals that the Washington Supreme Court has never actually used or approved of the "substantial evidence" test in GMA cases, and that no case has directly addressed the obvious conflict between that test and the highly deferential

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[4] *See Quadrant Corp. v. GMHB*, 154 Wn.2d 224, 237-238, 110 P.3d 1132 (2005); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-498, 139 P.3d 1096 (2006); *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 735, 222 P.3d 791 (2009).

[5] Indeed, the Supreme Court's opinion in *City of Arlington v. CPSGMHB*, 164 Wn.2d 768, 193 P.3d 1077 (2008), contains several references to "substantial evidence." The opinion mentions "substantial evidence" in (i) describing the superior court's decision in the prior appeal, (ii) quoting a prior Court of Appeals opinion which observed that substantial evidence might support a contrary result, (iii) in a boilerplate discussion of the APA standard of review, and (iv) in dicta addressing an issue of res judicata. 164 Wn.2d at 774, 776, 779-780, 783. Nonetheless, on the merits the *Arlington* court applied the "clearly erroneous" test and reversed the GMHB for "clear error" in failing to properly defer to the county's decision. 164 Wn.2d at 782.

"clearly erroneous" test required by RCW 36.70A.320(3).[6]

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[6] Erroneous references to the "substantial evidence" test began with *City of Redmond v. CPSGMHB*, 136 Wn.2d 38, 959 P.2d 1091 (1998), in which the court clarified and applied the definition of "agricultural lands" under GMA. Although the legislature had adopted the "clearly erroneous" test the previous year, the *Redmond* opinion never cited RCW 36.70A.320(3), -.3201 or the "clearly erroneous test." Instead, the court erroneously cited the APA and a non-GMA case under the APA for the substantial evidence test. 136 Wn.2d at 45-46 (citing *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997)). But these erroneous references to the substantial evidence test are dicta because the *Redmond* opinion never actually applied that test to any issue before the court. *See* 136 Wn.2d 38.

Two years later in *King County v. CPSGMHB*, 142 Wn.2d 543, 552-553, 14 P.3d 133 (2000), the court correctly recited the "clearly erroneous test required by RCW 36.70A.320(3) but also cited the APA and a non-GMA case (*Callecod, supra*) for the substantial evidence test. Again, the erroneous references to the substantial evidence test are dicta because the *King County* opinion never actually applied that test to any issue before the court. *See* 142 Wn.2d 543.

Two years later in *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002), the court upheld a determination of the GMHB that a county's proposed extension of a sewer line into a rural area violated RCW 36.70A.110(4). Again the court failed to cite either RCW 36.70A.320(3) or the "clearly erroneous" test, but cited the APA and the earlier *Redmond* case for the inapplicable substantial evidence test. 148 Wn.2d at 8. Again, the erroneous references to the substantial evidence test are dicta because the *Thurston County* opinion never actually applied that test to the legal issues before the court. *See* 148 Wn.2d 1.

Three years later in *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005), the court upheld a GMHB decision that the county failed to include best available science (BAS) in listing only two species as endangered, threatened, or sensitive. After noting that the GMHB correctly applied the "clearly erroneous" test, the court erroneously cited the APA and the erroneous dicta in *Redmond* for the "substantial evidence" test. 155 Wn.2d 833. The erroneous references to "substantial evidence" in *Ferry County* are dicta for two reasons. First, the court noted that it had granted review on only the issue of "whether substantial evidence supports the Board's finding" that the county did not use BAS. 155 Wn.2d at 831-832. The court never explained its starting assumption, borrowed from the Court of Appeals, that the "substantial evidence" test applied, and that assumption is not binding precedent. *In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996) (the literal wording of a court opinion is not controlling authority on an issue that the court did not consider). Second, it is clear that the court would have upheld the GMHB under the correct, "clearly erroneous" test anyway. 155 Wn.2d at 836.

Two years later in *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 166 P.3d 1198 (2007), the court upheld two compliance orders of the GMHB regarding watercourse protection measures. Again, the court recited the correct "clearly erroneous" standard but then repeated its erroneous dictum in *King County* for the "substantial evidence" test. 161 Wn.2d at 423-424. And again the erroneous references to the substantial evidence test are dicta because the

In sum, the legislature has directed the GMHB and reviewing courts to apply the "clearly erroneous" test to local agency planning decisions, and the "substantial evidence" test for judicial review of facts under the APA is incompatible with that test. RCW 36.70A.320(3); -.3201. Those supreme court cases that mention the APA "substantial evidence" test are erroneous dicta.[7]

Swinomish opinion never actually applied that test to the issue before the court. *See* 161 Wn.2d 415.

One year later in *Thurston County v. WWGMHB*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008), the court repeated its erroneous dictum in *Redmond* regarding the "substantial evidence" test. But the court never applied this test to the issues before the court. The first issue (GMHB jurisdiction over 7 and 10 year reviews of comprehensive plans) presented a legal question. 164 Wn.2d at 342-347. On the second issue (UGA size) and third issue (variety of rural densities) the court correctly used the "clearly erroneous" test. 164 Wn.2d at 353, 360.

Most recently, in *Kittitas County v. EWGMHB*, 172 Wn.2d 144, 154-155, 256 P.3d 1193 (2011), the court correctly cited RCW 36.70A.320(3) for the "clearly erroneous" standard but then repeated its erroneous dictum in *Redmond* regarding the "substantial evidence" test of the APA. Futurewise relies on *Kittitas County* for the standard of review. *App. Br.* at 9. But the references to the "substantial evidence" test in that case are all erroneous dicta. On the issue of the adequacy of the county's written record the court noted that the GMHB's orders were correct under any standard of review. 172 Wn.2d at 159. On the issue of rural densities the court noted that there was "substantial evidence" that three-acre rural densities are harmful, but remanded the issue to the GMHB. 172 Wn.2d at 171-162. The court also noted that there was "substantial evidence" that the county's comprehensive plan failed to assure a variety of rural densities and contained no protections for agricultural lands from harmful conditional uses. 172 Wn.2d at 170, 172. But the content of the comprehensive plan was not a question of fact, and the sufficiency of the plan was a legal issue. Again, the court held that the GMHB's decision was correct under any standard of review. 172 Wn.2d at 172.

[7] Erroneous dicta regarding the "substantial evidence" test also appears in various Court of Appeals cases. It is important to note that such dicta, erroneously derived from *Kittitas County*, *Redmond*, and the APA, also appears in this Court's recent decisions in *Spokane County v. EWGMHB*, 173 Wn. App. 310, 326, 293 P.3d 1248 (2013), and in *Spokane County v. EWGMHB ("Spokane County II")*, 176 Wn. App. 555, 565, 309 P.3d 673 (2013), *review denied*, 179 Wn.2d 1015 (2014).

IV. ARGUMENT

A. The GHMB erroneously concluded that it had subject matter jurisdiction over the concurrent rezone.

In both the GMHB and the trial court respondents argued that the GMHB lacked jurisdiction over the concurrent rezone. CR 306-311; 219-221, 288-294; 391-401. The trial court agreed. CP 495. However, in *Spokane County v. EWGMHB ("Spokane County II)*, 176 Wn. App. 555, 309 P.3d 673 (2013), *rev. denied*, 179 Wn.2d 1015 (2014), this Court held that a concurrent rezone is not a project permit subject to review under Chap. 36.70C RCW (LUPA) but an amendment to a development regulation subject to review by the GMHB.

Respondents respectfully disagree with this Court's opinion in *Spokane County II. Resp. Br. (County)* at 5. As explained in this section, respondents maintain that *Spokane County II* is erroneous, and that the GMHB lacked subject matter jurisdiction over the concurrent rezone in this case. Whether or not this Court is inclined to reconsider its decision in *Spokane County II*, respondents renew this argument for purposes of further review by the Supreme Court. This Court reviews the GMHB's exercise of jurisdiction de novo. *Spokane County II*, 176 Wn. App. at 569.

The Court does not need to revisit the jurisdiction issue if the Court agrees with respondents that, on the merits, the GMHB erroneously reversed the

concurrent rezone. As explained in Section (C), the GMHB erroneously concluded that the rezone did not comply with the County's criteria for zoning amendments. *See also, Resp. Br.* (County) at 24-26.

The GMHB has limited subject matter jurisdiction to adjudicate whether a comprehensive plan, development regulation or amendment complies with GMA. RCW 36.70A.280(1)(a), -.290(2); *Woods v. Kittitas County*, 162 Wn.2d 597, 609, 174 P.3d 25 (2007). The definition of "development regulation" excludes a "project permit" as defined in RCW 36.70B.020(4). RCW 36.70A.030(7). A "project permit" is defined as:

> [any land use permit], including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, **site-specific rezones authorized by a comprehensive plan** or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection. (Emphasis added).

RCW 36.70B.020(4). Accordingly, a site-specific rezone authorized by a comprehensive plan is *not* a development regulation over which the GMHB has jurisdiction. Such a rezone is a "project permit" that may only be challenged under LUPA. *Woods*, 162 Wn.2d at 616; *Feil v. EWGMHB*, 172 Wn.2d 367, 379, 259 P.3d 227 (2011). Although an amendment to a comprehensive plan and a rezone may be closely related, or even concurrently enacted, they are legally

distinct actions that must be challenged separately before the appropriate tribunals. *Coffey v. Walla Walla*, 145 Wn. App. 435, 442, 187 P.3d 272 (2008).

Spokane County II is based on the erroneous assumption that only a rezone authorized by an ***"existing"*** comprehensive plan is a project permit under RCW 36.70B.020(4). 173 Wn. App. at 562, 567-272. The word "existing" is not used in that statute. Rather, the word "existing" appeared in dicta in *Spokane County v. EWGMHB ("Spokane County I")*, 160 Wn. App. 274, 250 P.3d 1050, *rev. denied*, 171 Wn.2d 1034, 257 P.3d 662 (2011), which correctly rejected the owner's erroneous argument that the GMHB lacked any jurisdiction where comprehensive plan and zoning amendments are concurrently enacted. 160 Wn. App. at 284. The validity of the rezone was not at issue. This Court held only that the GMHB "had subject matter jurisdiction to consider the comprehensive plan amendment." 160 Wn. App. at 284. Unfortunately, dicta in *Spokane County I* inaccurately paraphrased RCW 36.70B.020(4) to include only site specific rezones "authorized by an ***existing*** comprehensive plan." 160 Wn. App. at 281. The Court subsequently repeated its erroneous characterization of RCW 36.70B.020(4) in both *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 51, 308 P.3d 745 (2013), and in *Spokane County II*, 173 Wn. App. at 567, 571.

By limiting the definition of "project permit" to rezones that are authorized by an "existing" (or "pre-existing") comprehensive plan, *Spokane*

County II creates additional jurisdictional problems and unresolved ambiguities. Like the GMHB decision, *Spokane County II* does not explain when or how an amended comprehensive plan becomes an "existing" comprehensive plan such that the GMHB no longer has jurisdiction. If a rezone is adopted one day after the concurrent amendment to a comprehensive plan, is the amended plan an "existing" plan? What if Futurewise had challenged the rezone in superior court under LUPA (as *Coffey* suggests)? Would the superior court have jurisdiction over the rezone unless and until Futurewise also filed a petition for review in the GMHB? If the GMHB upheld an amendment to a comprehensive plan, would the comprehensive plan, as amended, then become an "existing" comprehensive plan such that the concurrent rezone became "authorized" and therefore a "project permit" over which the GMHB lacked jurisdiction? Douglass has repeatedly raised these questions and Futurewise has provided no answers. *See* CP 395.[8]

Nor is an answer found in *Spokane County II*. The suggestion that RCW 36.70B.020(4) only applies to site-specific rezones authorized by an ***"existing"*** comprehensive plan is simply erroneous. A comprehensive plan amendment is "presumed valid upon adoption." RCW 36.70A.320(1). There is no later point in

[8] Futurewise also argues that the GMHB's exercise of jurisdiction is consistent with SCC 14.402.100. *App. Br.* at 15. The County has conceded that this part of its code may be erroneous. CR 311. Douglass has explained that the County's erroneous code cannot confer subject matter jurisdiction on the GMHB in violation of RCW 36.70A.280. CP 294, 401. Futurewise does not argue otherwise.

time at which that amendment becomes an 'existing' comprehensive plan. The concurrent rezone is "authorized by a comprehensive plan," RCW 36.70B.020(4), and therefore a project permit over which the GMHB had no jurisdiction.

B. Amendment 11-CPA-05 is not clearly erroneous in light of the entire record and the broad deference afforded to the County's planning decisions. The GMHB failed to afford proper deference to the County, and improperly substituted its judgment for the County's interpretation and application of its own comprehensive plan policies.

Futurewise challenged amendment 11-CPA-05 for alleged inconsistency with seven specific policies in the County's comprehensive plan. CR 002. The GMHB rejected the challenges based on four of those policies, noting that Futurewise had abandoned its arguments on two of the policies.[9] CR 1018, 1021.

The GMHB found that the amendment is consistent with comprehensive plan policies intended to ensure the availability of affordable housing. Policy H.3.2, relied on by Futurewise, states that the County should "Ensure that the design of infill development preserves the character of the neighborhood." CR 272. The GMHB concluded that the amendment is consistent with the policy. CR 1021. The GMHB also found that the amendment is consistent with Policy UL.2.17, which is intended to locate multifamily housing throughout the UGA. CR 247. The GMHB concluded that Futurewise had not demonstrated any

[9] Futurewise abandoned its arguments regarding comprehensive plan Policy CF.12.2 (fire protection) and UL.7.1 (designation of areas of residential use). CR 1018, 1021.

inconsistency with the existing scale and design of the community. CR 1025.

The GMHB agreed with Futurewise that the amendment was "inconsistent" with three policies in the comprehensive plan relating to transportation (vehicle and pedestrian) and schools: Policies UL.2.16, UL.2.20, and CF.3.1. CR 1022-1027. With respect to each of these policies, the GMHB failed to defer to the County's interpretation of its own comprehensive plan.[10]

It is undisputed that a comprehensive plan must be internally consistent, and that amendments must be consistent with the plan. CR 1019; *see* RCW 36.70A.070; RCW 36.70A.130(1). The BOCC specifically found that the amendment "is consistent" with the applicable policies. CR 013. Consequently, the interpretation of GMA is not at issue in this case, and the GMHB decision is not entitled to any deference.

With respect to whether the County correctly interpreted its own comprehensive plan policies and determined that the amendment was consistent with those policies, the GMHB is required to uphold local planning decisions unless those decisions are "clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [GMA]." RCW

[10] The BOCC decision specifically addressed Policies UL.2.16 and CF.3.1, but not Policy UL.2.20. CR 013. But there are dozens of potentially applicable policies in the comprehensive plan. CR 221-225, 243-281. The BOCC cannot be expected to specifically address every policy that might be raised in subsequent GMHB proceedings.

36.70A.320(3). The deference normally afforded to administrative agencies under the APA is superseded by the GMA's "clear legislative directive" that the GMHB must defer to local planning actions. *Quadrant Corp. v. CPSGMHB*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005); *see* RCW 36.70A.3201. In order to find that the County's actions are "clearly erroneous," the GMHB must have a " 'firm and definite conviction that a mistake has been committed.' " *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006) (quoting *Dep't of Ecology v. PUD No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

The GMHB decision acknowledges the highly deferential standard of review to be applied. CR 1011. Unfortunately, as explained more fully in the subsections that follow, the GMHB consistently failed to apply that standard.

1. The amendment is consistent with Policy UL.2.16: Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials.

The GMHB erroneously concluded that the amendment was inconsistent with Policy UL.2.16 because the Property "does not have good access to major arterials." CR 1024. This conclusion was based on the GMHB's mischaracterization of Waikiki Road, misinterpretation of the applicable policy, and misplaced concerns that some traffic from future development of the Property might use Five Mile Road. CR 1022-1024.

First, the GMHB erroneously characterized Waikiki Road as a "Minor Arterial." CR 1024. As the County has explained, Waikiki Road is an "Urban Principal Arterial," and that fact was correctly stated in the Hearing Examiner's approval of the Redstone Plat. CR 193. The GMHB simply repeated an error in the County's staff report, which erroneously referred to Waikiki Road as a "Minor Arterial," a classification that is not actually used in the County's Arterial Road Plan.[11] CR 222. Because Waikiki Road is an "Urban Principal Arterial," and the project will access directly on to Waikiki Road, the Property clearly has "good access to major arterials." Notwithstanding the incorrect nomenclature used by County staff, the BOCC correctly found that the Property has "good access to major arterials such as Waikiki Road." CR 013.

The GMHB also failed to note that the phrase "major arterials" in Policy UL.2.16 is not capitalized, and is not defined in the comprehensive plan. CR 247. The phrase "major arterials" is merely a descriptive term in the policy. BOCC correctly determined that this road was a "major arterial" for purposes of Policy

[11] The County's Arterial Road Plan is found at http://www.spokanecounty.org/data/engineers/traffic/arterialroadmap.pdf (last visited April 23, 2014. The County notes that that the Arterial Road Plan is a public document and asks the Court to take judicial notice of it. *Resp. Br. (County)* at 15 n.2; *see* CP 222-223. In the superior court Futurewise objected to this information. CP 326-328. Douglass ignored Futurewise's pointless objections because the existing record clearly states that Waikiki Road is an "Urban Principal Arterial." CR 193, 381.

UL.2.16.[12] The GMHB's erroneous understanding of the County's road classification system demonstrates why the GMHB should have deferred to the County's interpretation of its own comprehensive plan

Even if Waikiki Road were not a "major arterial" for purposes of Policy UL.2.16, the GMHB erroneously interpreted Policy UL.2.16. That policy seeks to "encourage" development with "good access to major arterials." The Policy does not require good access to arterials, and it does not require development to be adjacent to major arterials. Even if Waikiki Road were not a "major arterial," as the GMHB erroneously concluded, there are other major arterials less than a mile away. CR 1024. Futurewise has consistently ignored these points. CP 381.

Finally, the GMHB's concerns about the use of Five Mile Road are irrelevant, misplaced and patently erroneous. The GMHB stated:

> The record shows that a new access road to the development off of Waikiki Road would be feasible but the new residential units would be much closer to the existing Five Mile Road access point and ***may*** preferentially use Five Mile Road. There is substantial evidence in the record supporting a conclusion that the proposed development would be served by Five Mile Road, with significant safety and capacity concerns, and by a new access to Waikiki Road which is not designated as a Major Arterial.[13]

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[12] The GMHB purported to find that the BOCC Finding 23 was not "supported by substantial evidence." CR 1024. Once again, the GMHB applied the wrong standard of review.

[13] Note that the GMHB capitalized "Major Arterial" while that term is not capitalized or a defined term in the comprehensive plan.

CR 1024 (emphasis added).[14] (As explained above, Waikiki Road is, in fact, a "major arterial" for purposes of Policy UL.2.16). The observation that some residents might use Five Mile Road is irrelevant. Policy UL.2.16 does not prohibit access to roads other than major arterials. In fact, Policy UL.2.20 (below) encourages connecting streets rather than cul-de-sacs and closed road systems. Restricting access to Five Mile Road would violate that policy.

The GHMB failed to recognize that the construction of a new road from the Property to Waikiki Road, upon which the amendment is conditioned, will actually ***reduce*** the number of vehicles that would use Five Mile Road.

> 19. [The applicant] provided documentation that provision of a second access point from the site to Waikiki Road would reduce the number of vehicle trips using Five Mile Road and more specifically in the p.m. peak hours and less trips than the previously approved preliminary plat approved for the subject property (PN-1974-06: Redstone).

CR 012-013. This finding by the BOCC is supported by detailed analysis by a qualified traffic engineer. CR 753-756. This finding is not only supported by the

[14] The GMHB purported to find "substantial evidence" that proposed development of the Property would be served by Five Mile Road. Although it is undisputed that a small portion of residents would use Five Mile Road, this point is irrelevant. The relevant policy simply required "good access to major arterials," not that some portion of the residents of a future development might use some alternative routes. This point highlights the fact that once again the GMHB applied the wrong standard of review. The GMHB is supposed to affirm the BOCC's planning decisions unless those decisions are "clearly erroneous." RCW 36.70A.320(3); RCW 36.70A.3201.

evidence in the record, but there is also no contrary evidence in the record.[15]

Futurewise argues that development will also use Five Mile Road, and therefore the GMHB "was correct to consider the deficiencies of Five Mile Road" in determining whether the Property has good access to major arterials. *App. Br.* at 24-25; CP 328-329. Policy UL.2.16 does not prohibit access to roads other than major arterials, and Policy UL.2.20 (subsection B(2) below) encourages connections to other streets. Futurewise ignores these points. Contrary to Futurewise's argument, the GMHB's concerns about Five Mile Road do not affect the BOCC's finding that the Property has good access to Waikiki Road.

Finally, Futurewise argues that the Property is not near commercial areas or open space. *App. Br.* at 26; CP 324, 329-330. The GMHB did not accept or rely on these arguments. The GMHB's decision on Policy UL.2.16 was solely

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[15] The BOCC specifically addressed neighbors' concerns about traffic in its further findings:

> 21. Traffic impacts from the proposal will be mitigated for compliance with Spokane County Code and concurrency standards at the project level as specified by the Division of Engineering and Roads in their comments regarding the proposed amendment dated August 2, 2011.
>
> 22. Traffic impacts from the proposed amendment may be further mitigated by provision of a second access point to Waikiki Road, to be reviewed at the project level, which will reduce the number of vehicle trips on Five Mile Road as evidenced by the trip distribution letter submitted by the applicant on November 23, 2011.

CR 013. The GMHB simply ignored Finding 21. The Board recited Finding 22, but did not suggest that this finding was erroneous in any way. CR 1023.

based on the erroneous assertion that Waikiki Road was not a major arterial. CR 1024. Futurewise does not explain how close new development should be to commercial areas, and provides no support for its self-serving assumption that less than a mile is not close enough. Nor does Futurewise explain how close public open space should be. Nor does Futurewise acknowledge that the Policy does not *require* development near public open space but merely encourages such development. Nor does Futurewise acknowledge that the preference for open space in Policy UL.2.16 is just one of several competing goals that must be balanced in making local planning decisions. "The weighing of competing goals and policies is a fundamental planning responsibility of the local government." *Spokane County v. EWGMHB*, 173 Wn. App. 310, 333, 293 P.3d 1248 (2013). Futurewise's concerns about open space and commercial areas, which the GMHB did not accept, do not establish that the amendment was clearly erroneous in light of the record and the deference afforded to the County's planning decisions.

2. The amendment is consistent with Policy UL.2.20: Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus or car…

The GMHB erroneously concluded that the amendment was inconsistent with Policy UL.2.20 because of traffic on Five Mile Road, the steepness of the additional access road (to be constructed) to Waikiki Road, and what the GMHB

characterized as "the substandard transportation system" adjacent to the Property. CR 1025-26. The GMHB further stated:

> There is substantial evidence in the record demonstrating that it will not be easy to get around by foot, bicycle, bus, or car, and to some degree it may be unsafe for pedestrians or bicycles to access the proposed development from Five Mile Road and/or Waikiki Road.

CR 1026. This conclusion was based on the GMHB's erroneous interpretation of Policy UL.2.20 and the application of the wrong standard of review.

The plain language of Policy UL.2.20 is to encourage development with "connecting streets" rather than cul-de-sacs and closed road systems, "to allow people to get around easily by foot, bicycle, bus or car." CR 248; 1025. The amendment is consistent with this policy. The BOCC conditioned the amendment upon a new direct access from the Property to Waikiki Road. That access will be constructed to County road standards, with curbs, gutters and sidewalks. CR 013. In addition, the amendment ensures future connectivity by requiring a termination of the internal road at the West property line to access future development on adjoining properties. *Id.* The GMHB's determination that the amendment is "inconsistent" with Policy UL.2.20 is patently incorrect.

The GMHB acknowledged that the amendment was conditioned upon these circulation improvements, CR 1025, but somehow found that these improvements were not good enough. The GMHB substituted its judgment for

the County's discretion and expertise, and drew finicky, erroneous conclusions about what the GMHB felt was necessary to comply with Policy UL.2.20.

The GMHB found that "it will ***not be easy*** to get around by foot, bicycle, bus, or car" because the new access road—which will be built to County road standards—must traverse "steep terrain."[16] CR 1025 (emphasis added). Exactly what GMA standard did the GMHB think it was applying here when talking about whether it would not be "easy?" Is the GMHB suggesting that future development inside a UGA can only occur on flat terrain? If such an absurd policy were required, no new development would be permitted on major parts of the State's primary urban centers. The GHMB also opined that "to some degree" it may be unsafe for pedestrians or bicycles to access the Property. CR 1026 Again, what GMA standard was the GMHB applying? All travel by foot or bicycle is "to some degree" unsafe. The GMHB's comment, taken to its illogical extreme, would prohibit development anywhere that the conditions are not perfect. Requiring optimal conditions for future development is not in the portfolio of the GMHB.

[16] By purporting to find "substantial evidence" that "it will not be easy to get around" or that something may be unsafe "to some degree," the GMHB clearly applied the wrong standard of review. *See* note 14.

Futurewise argues that the amendment violates Policy UL.2.20 due to existing deficiencies in Five Mile Road. *App. Br.* at 27-29. The existing condition of Five Mile Road has nothing to do with Policy UL.2.20 which encourages connecting streets. Implementing that Policy requires a connection from the Property to Five Mile Road regardless of the condition of that road. Furthermore, the amendment is conditioned upon construction of a new access to Waikiki Road that will actually reduce traffic on Five Mile Road. CR 012-013, 753-756. Futurewise might desire improvements on Five Mile Road. But that unfulfilled wish does not make the amendment inconsistent with Policy UL.2.20.

Futurewise asserts that the surrounding area is not arranged in a pattern of connecting streets and blocks. *App. Br.* at 27. But those existing conditions do not cause the amendment to violate UL.2.20. The amendment actually alleviates the existing lack of connectivity by requiring new connections to Waikiki Road and to potential new development to the West.[17]

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[17] In the trial court Futurewise recycled a failed argument from the GMHB proceedings in which Futurewise argued that the amendment violates Policy UL.2.20 by failing to require ***internally*** connected streets and blocks. CP 332-334; CR 175, 999. Futurewise neglected to mention that the GMHB decision was ***not*** based on a determination that the amendment failed to provide for an **internal** connectivity. *See* CR 1025-1026. Futurewise's argument regarding internal connectivity fails for the simple reason that the amendment only changes the comprehensive plan designation and zoning for the Property. There is no specific development plan at this stage. That is undoubtedly why the GMHB ignored Futurewise's argument. Nothing is set in stone except for the additional connections to adjoining property upon which the amendment is conditioned. Those conditions implement Policy UL.2.20; they are not inconsistent with that Policy.

Futurewise's argument is directly disposed of by *Spokane County*, 173 Wn. App. 310 (2013). In that case, the BOCC approved a comprehensive plan map amendment and rezone for a 5-acre parcel. Just like this case, the neighbors argued that the amendment violated Policy UL.2.20, and the GMHB agreed. *Id.* at 321, 331. This Court reversed, correctly noting that the amendment did not cause the existing problems with connectivity, that the amendment dealt with external connectivity as much as possible, and that there was no specific development proposal that might violate Policy UL.2.20. *Id.* at 340-341. "Because the County was not required to address the policy at the map amendment stage, there was no basis for the growth board to find an invalidating inconsistency." *Id.* at 342.

Similarly, there is no development proposal in this case at this stage, and there was no basis for the GMHB to find inconsistency with Policy UL.2.20 with respect to future internal connectivity within a future development. Futurewise attempts to distinguish *Spokane County* (2013), asserting that "[i]n this case we know where the accesses will be located." *App. Br.* at 29. This argument conflates the external connections to the Property, which are adequately addressed by the new connections upon which the amendment is conditioned, with Futurewise's nonsensical objections to an alleged lack of internal connectivity

where this is no specific development proposal.[18]

3. The amendment is consistent with Policy CF.3.1: Development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards.

The GMHB erroneously concluded that the amendment was inconsistent with Policy CF.3.1 because the GMHB found "evidence" that area schools "are already at capacity," and that Five Mile Road would not be suitable for children to walk to school. CR 1026. Both conclusions are erroneous.

Douglass agrees with the County that the GMHB misunderstood Policy CF.3.1. *See* CR 323. That policy requires a determination of adequate public services before "development" occurs. **Neither the amendment of the Comprehensive Plan nor the rezone is a development.** *See Resp. Br. (County)* at 22-23. Policy CF.3.1 is implemented by the County's concurrency regulations. SCC Chapter 13.650. The question of whether those development regulations comply with GMA was **not** before the GMHB in this case. Those regulations are presumed valid. The application of those development regulations will be addressed if and when Douglass actually applies for development permits. The

[18] Futurewise also argues that the amendment is a "development" for purposes of Policy UL.2.20. App. Br. at 30. As explained in the next subsection, Futurewise's argument is meritless and directly contrary to *Spokane County*, 173 Wn. App. 310.

GMHB simply misunderstood policy CF.3.1. There is no inconsistency between the policy and the amendment at issue.

Futurewise's argument is fully disposed of by this Court's opinion in *Spokane County*, 173 Wn. App. 310 (2013). In that case, the GMHB determined that the amendment violated various comprehensive plan policies by failing to determine the adequacy of various public services. This Court disagreed, and the basis for its disagreement is clear. First, the court noted that the County had adopted both concurrency ordinances and a capital facilities element in the comprehensive plan. *Id.* at 328-329. The Court also noted that the plan and ordinances were deemed compliant with GMA and could not be collaterally attacked. *Id.* at 331. Then the Court explained, in response to the GMHB's determination that the amendment violated comprehensive plan policies that require "transportation improvements concurrent with new development," that the amendment was not a "development." *Id.* at 335. The Court unambiguously rejected the GMHB's erroneous conclusion that transportation and capital facilities must be addressed whenever the comprehensive plan is amended:

> We find no basis in the GMA for the conclusions of the growth board highlighted above and what can fairly be characterized as the board's rule of decision: that to avoid inconsistency, capital facility funding and scheduling issues must be evaluated and the results incorporated into the transportation and capital facilities elements of the comprehensive plan every time the comprehensive plan map is amended.

Id. at 337. The Court also noted that GMA authorizes development-stage concurrency determinations even though some planning decisions are made before that point:

> In requiring development-stage concurrency, [RCW 36.70A.070(6)(b)] contemplates that projects may reach the development stage having land use designations, zoning, and projected traffic impacts for which existing public facilities are inadequate.

173 Wn. App. at 338. The GMHB's decision in this case is erroneous for the same reasons. Policy CF.3.1 requires a determination of adequate public services before "development" occurs, and neither the amendment of the Comprehensive Plan nor the rezone is a development.[19]

Futurewise also argues that the term "development" in Policy CF.3.1 has a different, broader meaning than the same term in the policies at issue in *Spokane County*, and even suggests a dictionary definition that would support the GMHB's erroneous decision. *App. Br.* at 36-37. These arguments are inconsistent with *Spokane County*, 173 Wn. App. 310, which recognizes that a mere amendment to a comprehensive plan map is not a development. Futurewise's arguments also fail to recognize that the County is empowered to determine what the word

[19] Futurewise attempts to distinguish Spokane County, 173 Wn. App. 310, noting that the Court of Appeals did not directly address Policy CF.3.1. *App. Br.* at 37. But the analysis is exactly the same. Policy CF.3.1, like the policies at issue in *Spokane County*, refers to "development," not comprehensive plan map amendments or rezones. *Spokane County*, 173 Wn. App. at 334-335.

"development" in its own comprehensive plan means. Futurewise notes that the term "development" is not defined in the comprehensive plan. *App. Br.* at 36. Consequently, Futurewise's self-serving arguments for a different meaning to "development" do not establish that the County's interpretation is clearly erroneous in light of the broad deference that GMA affords to local planning decisions. RCW 36.70A.3201.

Futurewise also argues that the County's concurrency regulations do not provide for project-level review of some public services, including schools. *App. Br.* at 33-36. This argument amounts to an improper collateral attack on the adequacy of the County's comprehensive plan, concurrency regulations and/or capital facilities plan. *See Spokane County*, 173 Wn. App. at 331. More importantly, this argument does not alter the County's correct determination that CF.3.1 refers to "development" not mere map amendments. The law is clear that a map amendment cannot be inconsistent with a comprehensive plan policy that is only applicable at a later stage. *See* 173 Wn. App. at 342 ("Because the County was not required to address [Policy UL.2.20] at the map amendment stage, there was no basis for the growth board to find an invalidating inconsistency.")[20]

[20] Futurewise also ignores the fact that subsequent SEPA review of any development would include the population impacts of such development. *See* WAC 197-11-960; SCC 11.10.230 (SEPA Environmental Checklist: Questions 8(i) (approximate number of new residents), 9 (number and type of housing units), and 15 (impact on public services).

Furthermore, the "substantial evidence" cited by the GMHB for the proposition that local schools "are already at capacity" is sparse, anecdotal, obviously biased, and not supported by any reliable sources.[21]

But even assuming, *arguendo*, that the relevant schools are "at capacity" today, it does not mean they will be when an actual development is proposed and evaluated for concurrency. School district capacity is dynamic. New schools are built and old ones are remodeled and expanded. That is why concurrency is evaluated when an actual project is proposed. Moreover, the impact of a future development on the school district will vary greatly depending on the actual mix of unit sizes in the project. For example, if there are predominantly studio and one bedroom apartments, the likely impact on the school district will be much less than a complex with a large percentage of multi-bedroom units. This is an issue of concurrency, to be evaluated when an actual project is proposed.

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[21] First, the GMHB cited a letter from the Mead School District. CR 1026. That letter states that "The Mead School District believes that this request for a change in land use designation, if approved, could have an impact all schools. The District will respond with further remarks when the SEPA checklist is circulated for comment." CR 343. This vague comment—that the amendment "could have an impact"—does ***not*** support the GMHB's assertion that area schools are at capacity. In fact, the school district never actually responded to the amendment with further comments. CR 219. Second, the GMHB cited a letter from the Chair of respondent Five Mile Prairie Neighborhood Association who asserted "I can tell you that Prairie View Elementary is at capacity even with four portable classrooms." CR 327. This unsupported claim, from an obviously-biased opponent, is not "substantial evidence" of anything.

Finally, the GMHB's concerns about children walking on Five Mile Road are entirely misplaced.[22] Children in the nearby residential developments already use Five Mile Road to get to school, and that road has no sidewalks. CR 222. The GMHB must have presumed that future residents will refuse to use brand new sidewalks leading to Waikiki Road, and will go out of their way to use Five Mile Road. This type of speculation and micro-management is incompatible with the applicable standard of review and the very role of the GMHB.[23]

4. The amendment is consistent with Policy H.3.2: Ensure that the design of infill development preserves the character of the neighborhood.

The GMHB rejected Futurewise's argument that the amendment was inconsistent with Policy H.3.2. which states that the County should "Ensure that the design of infill development preserves the character of the neighborhood."

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[22] The GMHB also stated that "The Planning Commission's findings contain evidence that Five Mile Road would not be suitable for children to walk along to attend school." CR 1026. Although a divided Planning Commission did not recommend the amendment, that recommendation was not based on an alleged lack of school capacity or Policy CF.3.1. Rather, the Planning Commission merely noted that it had received public comments, and that "School capacity was noted by seven respondents." CR 770-771. This "evidence" does not establish that the amendment is inconsistent with Policy CF.3.1 or that the County's decision is clearly erroneous.

[23] In the trial court Futurewise noted that Five Mile Road is the walking route for some children attending Prairie View Elementary and that there are no plans to improve Five Mile Road. CP 343-344. Like the GMHB, Futurewise never explained how this existing situation shows that the amendment violates Policy CF.3.1. Futurewise simply ignored the fact that the amendment is conditioned upon a new access road with sidewalks to directly access Waikiki Road, which has sidewalks on both sides. CR 222. The suggestion that the amendment, with its requirement of new pedestrian improvements, is inconsistent with Policy CF.3.1 is absurd.

CR 272. The GMHB noted that a variety of residential densities is appropriate, that the neighborhood has no consistent design or development pattern, and that development of the property would be topographically isolated. CR 1021.

In the superior court Futurewise renewed its argument that the amendment is inconsistent with Policy H.3.2, and argued that the court could sustain the GMHB *Decision* based on a violation of Policy H.3.2, even though the GMHB did not find a violation of that policy. CP 353-359. In its reply memorandum, Douglass noted that Futurewise was correct, as a *procedural* matter but Futurewise had ignored the standard of review. CP 389. Futurewise's lengthy argument about Policy H.3.2 boils down to an observation that there are no existing areas of multi-family housing near the Property, and that the development of apartment buildings (which the amendment would permit) would be "out of character" with the existing single family homes in the area. CP 357.

The GMHB observed that the Property is unique, and has "unique buildability challenges" due to its topography and encumbrances from utilities. CR 1020. Futurewise ignored these considerations. The GMHB also stated:

> The Board notes that the proposed development would include higher residential densities as compared to surrounding uses. However, as stated by the Spokane County Commissioners, a variety of residential densities is appropriate and expected within an Urban Growth Area. Further, the neighborhood has no consistent design or development pattern, and development on this property would be topographically isolated. Petitioners allege that

> these higher densities do not preserve neighborhood character but Petitioners failed to come forward with actual evidence showing that neighborhood character would be harmed by this proposal.

CR 1021. Futurewise did not respond to the GMHB's points. Instead, Futurewise relied on its conclusory assertion that apartments are incompatible with single-family residences regardless of the particular circumstances. CP 354-357.

Futurewise neglects to mention that the GMHB also rejected Futurewise's arguments regarding Policy UL.2.17, which is intended to locate multifamily housing throughout the UGA. CR 247. The GMHB correctly concluded that Futurewise had not cited any evidence that the amendment was inconsistent with the existing scale and design of the community. CR 1025.

Policy UL.2.17, which seeks to locate multifamily housing throughout the UGA, is directly contrary to Futurewise's argument that multifamily housing is inherently incompatible with any existing single-family areas. This incompatibility highlights a fundamental flaw in Futurewise's arguments: land use planning requires local governments to exercise their discretion to weigh and reconcile competing or conflicting policies. As this Court recently observed:

> In identifying 13 goals to guide local comprehensive planning, the legislature itself cautioned that it was not listing goals in order of priority and that its identification of the goals "shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020. Goals considered by local governments in comprehensive planning may be mutually

> competitive at times. For that reason, if a map amendment meaningfully advances other comprehensive plan goals and policies, a finding by the growth board that it fails to advance another—if it fails to advance, for example, a goal of encouraging high density residential development on sites having good access to a major arterial—that alone cannot be an invalidating inconsistency. The weighing of competing goals and policies is a fundamental planning responsibility of the local government. (Citations omitted).

173 Wn. App. at 333. Rejecting the neighbors' arguments the Court also noted:

> The record before the county commissioners established that the map amendment advanced a number of plan policies and goals. Any policies or goals that it failed to advance were hortatory, not mandatory. The responsibility to weigh competing goals and policies was that of the county commissioners.

173 Wn. App. at 342. Likewise, the BOCC had the discretion to weigh the competing goals of preserving the character of existing neighborhoods and encouraging the development of affordable, multifamily housing throughout the UGA. Exercising that discretion, and considering all the circumstances, the BOCC determined that this unique Property was appropriate for multifamily use. The objections of nearby residents to apartment buildings do not establish that the amendment is clearly erroneous in light of the entire record and the broad deference afforded to the County's planning decisions. The superior court correctly rejected Futurewise's renewed argument on Policy H.3.2. CP 494.

On appeal, Futurewise has ***not*** renewed its argument regarding Policy H.3.2. Instead, Futurewise has deleted all references to Policy H.3.2 and "infill"

development, and moved the remaining argument text from its superior court memorandum to the rezone issue. *Compare* App. Br. at 40-44 with CP 353-359. The resulting new argument on the rezone issue is misleading because Futurewise fails to inform the Court that its argument relates to infill development and Policy H.3.2, and that the GMHB ruled against Futurewise on that issue. *See App. Br.* at 40-44. To make matters worse, Futurewise misleadingly implies that the GMHB agreed with Futurewise on this issue. *See App. Br.* at 45.

Futurewise has abandoned its argument regarding Policy H.3.2, and cannot renew that argument in its reply brief. *Cowiche Canyon Cons. v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 540 (1992). As explained in the next section, the Court should reject Futurewise's arguments regarding the rezone as well.

C. In the alternative, the GHMB erroneously concluded that the rezone did not comply with the County's criteria for zoning amendments.

SCC 14.402 sets forth the County's criteria for amendments to the zoning code, two of which are applicable to this case:

> The County may amend the Zoning Code when one of the following is found to apply:
>
> 1. The amendment is consistent with or implements the Comprehensive Plan and is not detrimental to the public welfare.
>
> 2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code…

The BOCC found that the concurrent rezone satisfied both criteria (1) and (2):

> 20. The proposed amendment is consistent with the criteria for a zone reclassification under Section 14.402.040 (1) and (2) of the Spokane County Zoning Code as the proposed amendment implements the goals and objectives of the Comprehensive Plan and the subject area has experienced a change of conditions as evidenced by development of duplex dwelling units in proximity to the subject property thereby creating a mix of land use types and densities in the Urban Growth Area boundary.

CR 013. The GMHB rejected both criteria. CR 1029. Even assuming, *arguendo*, that the GMHB had jurisdiction over the concurrent rezone, *see* section (A), the GMHB decision was erroneous for several reasons.[24]

The BOCC found that the rezone satisfied SCC 14.402.040(1) because it implemented the goals of the comprehensive plan. CR 013. The GMHB disagreed, based on its determination that the comprehensive plan amendment was inconsistent with Policies UL.2.16, UL 2.20, and CF 3.1. CR 1029. The GMHB's application of those policies was erroneous for the reasons set forth in section (B). Futurewise's challenge to the rezone is also based on an erroneous determination that the amendment violated those policies. *App. Br.* at 40

[24] The GHMB also opined that the planning commission's findings were supported by substantial evidence, and that the BOCC Finding No. 20 was not supported by such evidence. CR 1028-1029. These erroneous statements confirm, as set forth in Section B, that the GMHB applied an erroneous standard of review and failed to afford the County the broad deference required by RCW 36.70A. The GMHB was required to uphold the BOCC decision unless it determines that the BOCC action was clearly erroneous in view of the entire record. RCW 36.70A.320(3).

Futurewise argues that the amendment does not preserve neighborhood character. *App. Br.* at 40-44. As explained in section B(4), this text is taken from Futurewise's argument in the trial court that the amendment violated Policy H.3.2, which both the GMHB and the superior court rejected. CR 1021; CP 494.

The BOCC also found that the concurrent amendment satisfied SCC 14.402.040(2) because the subject area had experienced a change of conditions as shown by the nearby development of duplex residential units. CR 013. The GMHB disagreed, concluding that the development of duplexes was not a sufficient change in circumstances because the existing zoning already permitted duplexes. CR 1029. The GMHB further opined:

> Moreover, if zoning classifications could be readily changed whenever there are cyclical market fluctuations (as advocated by applicant's engineering consultant), then property owners could lose the reliance value of the zoning code and thereby frustrate the investment backed expectations of homeowners.

Id. In reaching this conclusion, the GMHB grossly exaggerated the effect of BOCC's determination that the circumstances had changed enough to rezone one unique piece of property inside the UGA to allow more diverse residential development. The GMHB also second-guessed the BOCC's determination of what constitutes a sufficient change of circumstances under SCC 14.402.040(2) rather than affording broad deference to the BOCC's decision on that issue as required by RCW 36.70A.320(3) and RCW 36.70A.3201.

Finally, the GMHB's ruling was not based on a determination that the BOCC decision violated any particular provision of GMA. The GMHB simply disagreed with the County's application of its own code to a particular piece of property. This gaffe confirms that the GMHB should not have addressed the rezone and/or the criteria in SCC 14.402.040 because it had no jurisdiction.[25]

In sum, the GMHB not only exceeded its limited, statutory jurisdiction, but erroneously applied the law by failing to give proper deference to the BOCC's decision. The superior court correctly reversed the GMHB. CP 495.

D. The GMHB erred in making a finding of invalidity with respect to 11-CPA-05. The amendment would not "substantially interfere" with the fulfillment of the goals of GMA

The GMHB cannot make a finding of invalidity unless, at a minimum, the GMHB properly finds that amendment 11-CPA-05 does not comply with GMA. RCW 36.70A.302(1)(a). Because the GMHB erroneously concluded that the amendment did not comply with GMA, the determination of invalidity is erroneous as well. In addition, in order to make a finding of invalidity, the

[25] In the superior court Futurewise argued that this part of Douglass' argument was a new "issue" that was not raised before the GMHB, and that Douglass could not raise it now because none of the exceptions in RCW 34.05.554(1) apply. CP 348-349. Douglass' argument (above) is not a separate "issue," as Futurewise creatively suggests. Douglass has ***not*** argued that the GMHB's failure to identify a particular violation of GMA is a separate basis for overturning the GMHB's *Decision*. Douglass merely noted that the GMHB's sloppy analysis "confirms" that the GMHB lacked jurisdiction over the concurrent rezone. That issue was raised before the GMHB. CR 306-311, 1012-1017.

GMHB must make a determination "that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of [GMA]." RCW 36.70A.302(1)(b).

In this case, the GMHB found that amendment 11-CPA-05 would substantially interfere with the GMA goals of ensuring adequate transportation and public services. CR 1033-1034. As explained in section B(3), however, the amendment addresses these concerns by requiring the new access road and pedestrian improvements, and the GMHB's unsupported concerns about public services are addressed by development and concurrency regulations that must be complied with when a specific project is proposed. Futurewise's arguments in support of invalidity are entirely based on its erroneous assumption that alleged "deficiencies" in roads, schools and pedestrian accommodations are not addressed by the County's concurrency regulations and the road and pedestrian improvements upon which the amendment is conditioned. Furthermore, it is absurd to suggest that the re-designation of one small, unique piece of property inside the UGA of a large county to the next level of residential density would "substantially interfere" with the goals of GMA.[26] The superior court correctly reversed the GMHB's unsupportable finding of invalidity. CP 495.

[26] In the superior court Futurewise argued that the finding of invalidity is not "absurd" because the amendment would potentially allow development of up to 200 dwelling units. CP 360-361.

E. The trial court correctly reversed the GMHB's erroneous dismissal of Douglass at the hearing on the merits.

Douglass intervened in the GMHB proceedings to protect its interests as the underlying property owner. CR 070-073. Douglass noted that it had participated in the entire County planning process. CR 071; *see* CR 663-667. No party objected to intervention or suggested that Douglass lacked standing. Douglass made it clear in its motion to intervene and at the prehearing conference that it would not be filing briefs or arguing unless it felt that its interests were not being adequately represented by the County, and the GMHB agreed to that approach in approving intervention. CR 070-072; 077-079.[27]

Douglass ultimately decided that it would rely on the County to explain why Futurewise's arguments lacked merit, and did not file its own brief. The reply brief filed by Futurewise did ***not*** comment on the fact that Douglass had not filed a brief, and did ***not*** ask that Douglass be dismissed. CR 983-1002. No party

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So what? If the GMHB erroneously required a showing of concurrency in public services prior to a specific development proposal, as the Court held in *Spokane County*, 173 Wn. App. 310, how does the mere re-designation of the Property to allow such future development (when that development must still run the gauntlet of concurrency) "substantially interfere" with GMA? Futurewise offers no explanation because there is none. If a future project does not meet concurrency, it will not be approved, regardless of the re-designation of the property.

[27] The GMHB's prehearing order stated that Douglass was governed by the same case schedule as the County, that Douglass could not raise new issues, and that Douglass would share argument time allocated to the County at the hearing. CR 077-079. Apart from a boilerplate admonishment that a party who fails to attend a GMHB hearing may be held in default, the order did not suggest that Douglass was required to file a brief or attend the hearing.

was prejudiced by Douglass' decision to rely on the County's briefing and argument. Nevertheless, at the hearing on the merits on July 19, 2012, the GMHB, without advance notice to Douglass, the GMHB dismissed Douglass, *sua sponte*, for failure to file a brief or to participate in the hearing. RP 75-76.

The trial court correctly reversed the GMHB's dismissal, holding that Douglass had complied with the GMHB's orders and the requirements for intervention before the GMHB. CP 494. Futurewise made no attempt to defend the GMHB's erroneous decision in either the trial court or in its opening brief. Instead, Futurewise argues that Douglass failed to exhaust its administrative remedies by not filing an objection to the dismissal after the GMHB had issued its *Decision* on the merits. The trial court correctly rejected that argument. CP 494.

1. The trial court correctly determined that the GMHB's dismissal of Douglass was erroneous. Futurewise has failed to brief that issue in either the trial court or its opening brief.

The GMHB's dismissal of Douglass without notice was an abuse of discretion and/or erroneous as a matter of law for several reasons. Futurewise has failed to respond to any of Douglass' arguments on this issue.

First, Douglass did not fail to comply with any rules or orders of the GMHB. Douglass made it clear when it intervened that it would (consistent with WAC 242-03-270(3)) monitor the proceedings and only file briefs or actively participate in the hearing if it felt that its interests were not adequately represented

by the County. The prehearing order issued by the GMHB did not actually require Douglass to file a brief or appear at the hearing; that order merely subjected Douglass to the same limits as the County. CR 077-082. Futurewise has never argued otherwise. *See* CP 376.

Second, as an intervenor who did not seek to raise new arguments, Douglass was not required to file separate briefing or present separate oral argument, and is in fact discouraged from doing so pursuant to WAC 242-03-270(3). Futurewise has never argued otherwise. *See* CP 376. Futurewise thereby concedes, *sub silentio*, that Douglass did not violate any rule or order of the GMHB, and that there was no valid reason for the GMHB to dismiss Douglass.

Third, there was no valid reason for the GMHB to dismiss Douglass. WAC 242-03-710(1) provides that a motion to dismiss a party for default "may" be brought. Similarly, the prehearing order states that a party "may" be held in default, and that an order of dismissal "may" be entered. CR 082. ***The rule does not require dismissal.*** Rather, the permissive term "may" indicates that the GMHB will exercise reasoned discretion in applying the rule if a motion to dismiss is brought. Like a court, the GMHB should exercise its discretion on reasonable grounds. *See State v. Larsen*, 160 Wn. App. 577, 586, 249 P.3d 669 (2011). There was no good reason for the GMHB to dismiss Douglass. No party had been prejudiced, and no party had asked Douglass to be dismissed.

Futurewise has never argued otherwise. *See* CP 376.[28]

Having failed to defend the GMHB's decision in the trial court Futurewise would not be permitted to address that issue for the first time on appeal, even if it had attempted to do so. RAP 2.5; *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006). Nor may Futurewise defend the GMHB decision for the first time in its reply brief. *Cowiche Canyon*, 118 Wn.2d at 809.

In addition, no written order of dismissal was issued, as required by WAC 242-03-710. That rule states that any order granting a motion for default "shall include a statement of the grounds for the order and shall be served upon all parties to the case." WAC 242-03-710(1). The GMHB *Decision* does not indicate why Douglass was dismissed, other than by reciting the bare facts that Douglass had not filed a brief or attended the hearing. But both of those events were recognized as likely to occur when Douglass' intervened. CR 1018.

Futurewise argues that the GMHB "included" the order of dismissal in its final Decision. *App. Br.* at 17. That argument is not consistent with the language of the *Decision*, which recites that the GMHB "entered an Order of Dismissal" at

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[28] The GMHB's dismissal of Douglass in the absence of any rule violation or prejudice was not consistent with the GMHB's treatment of parties in other cases. *See Connick et al. v. Lake Forest Park*, CPSGMHB No. 13-3-0004, Prehearing Order (May 23, 2013) (GHMB threatened to dismiss appeal, but did not actually do so, where petitioners who were both attorneys had failed to appear at schedule prehearing conference and repeatedly failed to comply with rules. Available online at http://www.gmhb.wa.gov/LoadDocument.aspx?did=3308 (last visited March 27, 2014).

some unspecified earlier point in time. CR 1018. The *Decision* purports to be a "Final Decision and Order," not an "order of dismissal." CR 1010.

Furthermore, the *Decision* also states that it is a "final order" of the GMHB, and that the parties may either seek reconsideration within ten (10) days pursuant to WAC 242-03-830(1) or seek judicial review. CR 1035. The Decision does ***not*** indicate that Douglass might file an objection to dismissal within seven (7) days pursuant to WAC 242-03-710(2). The GMHB did ***not*** issue a written order of dismissal as required by WAC 242-03-710(1).

2. Douglass was not required to file an "objection" to dismissal after the GMHB had issued its final *Decision* on the merits.

Rather than defend the GMHB's erroneous and arbitrary dismissal of Douglass, Futurewise argues that Douglass failed to exhaust its administrative remedies as required by RCW 34.05.534. *App. Br.* at 16-19. This argument erroneously assumes that an objection to dismissal under WAC 242-03-710(3) was an administrative remedy that Douglass was required to exhaust.[29]

A motion for reconsideration of a final agency decision is an optional

[29] Futurewise also argues that Douglass' brief in this Court should be stricken because, according to Futurewise, the trial court "should have" dismissed Douglass' petition for judicial review. *App. Br.* at 19. Futurewise made a similar argument in the trial court, and the court rejected it. CP 363, 494; RP 14. Because the trial court has reversed the erroneous *Decision* of the GMHB, Douglass is properly a ***respondent*** in this Court and entitled to defend the trial court decision in its brief. RAP 3.4; RAP 10.1(b). Futurewise cites no authority to support of its bizarre assumption that the Court may strike a respondent's brief based on the appellant's mere assertion that the trial court erred.

remedy that a party is ***not*** required to pursue. *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 218, 257 P.3d 641 (2011). An objection to dismissal under WAC 197-03-710(3) is akin to a motion for reconsideration. Like the Jefferson County reconsideration procedure at issue in *Mellish*, WAC 197-03-710(3) states that a party "***may***" file a written objection to an order of dismissal. "May" indicates that the remedy is optional. There is no legal requirement that Douglass file such an objection before seeking judicial review on the merits. That is particularly applicable where, as here, the GMHB first provided notice of the "dismissal" in its final decision, and did not actually issue a separate written order of dismissal.

As the *Decision* notes, any party could have filed a motion for reconsideration under WAC 242-03-830(1) within ten (10) days after the *Decision* was issued. *See* CR 1035. Both WAC 242-03-710(3) and WAC 242-03-830(1) state that a party "may file" an objection or motion for reconsideration respectively. Futurewise has not argued that the County failed to exhaust administrative remedies by failing to file a motion for reconsideration, and Futurewise has not explained why an objection under WAC 242-03-710(3) would be a mandatory administrative remedy while a motion for reconsideration is not.

Futurewise argues that an objection under WAC 242-03-710(3) would have been adequate and not futile. *App. Br.* at 18. But these arguments would apply equally to a motion for reconsideration under WAC 242-03-830(1).

Furthermore, an objection to the dismissal of Douglass after the *Decision* was issued would have been a futile, useless act. At best, an objection to dismissal under WAC 242-03-710(3) would have reversed the dismissal of Douglass without changing the outcome on the merits.

3. Futurewise's new argument—that the "issue" of dismissal was not "raised" before the GMHB—is both meritless and barred by RAP 2.5(a).

Futurewise also argues, for the first time on appeal, that the "issue" of whether Douglass should be dismissed was not "raised" before the GMHB for purposes of RCW 34.05.554(1). *App. Br.* at 19-21. This argument is entirely dependent upon Futurewise's erroneous assumption that Douglass was required to file an "objection" to dismissal even though the GMHB had already issued its *Decision* on the merits and an "objection" would have been a useless act. Ironically, Futurewise never asked the GMHB to dismiss Douglass and, therefore, Futurewise may not address that issue on review, based on Futurewise's own interpretation of RCW 34.05.554(1). Furthermore, because Futurewise did not make this argument in the trial court, *see App. Br.* at 59-61, it cannot make that argument for the first time on appeal. RAP 2.5(a). *Heg*, 157 Wn.2d at 162.

V. CONCLUSION

The superior court correctly reversed the *Decision* of the GMHB and upheld amendment 11-CPA-05. The superior court should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on April 30, 2014 a true and correct copy of the foregoing document to the counsel of record listed below, via the method indicated:

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