NO. 97719-4
Court of Appeals Nos. 50847-8-II and 51745-1-II, Consolidated

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SUPREME COURT OF THE STATE OF WASHINGTON

CLARK COUNTY,
Respondent,

FRIENDS OF CLARK COUNTY and FUTUREWISE,
Respondents,

and

CLARK COUNTY; CITY OF RIDGEFIELD; CITY OF LA CENTER; RDGB ROYAL ESTATE FARMS, LLC; RDGK REST VIEW ESTATES, LLC; RDGM RAWHIDE ESTATES, LCC; RDGF RIVER VIEW ESTATES, LLC; RDGS REAL VIEW, LLC; and 3B NORTHWEST, LLC,
Respondents,

and

CLARK COUNTY CITIZENS UNITED, INC.,
Petitioner,

v.

GROWTH MANAGEMENT HEARINGS BOARD,
Respondent.

CLARK COUNTY'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF PARTY FILING ANSWER

This answer is filed by Clark County, respondent before the Court of Appeals as to the petitioner's issue.

II. COURT OF APPEALS DECISION

The Court of Appeals decision for which petitioner seeks review is *Clark County v. Growth Mgmt. Hrgs. Bd.*, __ Wn. App. __, 448 P.3d 81 (August 20, 2019). A copy of the Slip Opinion is attached as Appendix A. An order dated September 25, 2019, denied a motion for reconsideration filed by Friends of Clark County and Futurewise (together, "Futurewise").

III. STATEMENT OF THE CASE

A. Procedure to Date.

On June 28, 2016, Clark County adopted Amended Ordinance 2016-06-12, as the culmination of the periodic review and update of its comprehensive plan and zoning ordinance pursuant to RCW 36.70A.130(1)(a).[1, 2] Clark County Citizens United ("CCCU") petitioned the Growth Management Hearings Board (the "Board") for review of the County's 2016 plan update, seeking rulings as to thirteen issues according

[1] Chapter 36.70A RCW is referred to herein as "GMA" or the "Growth Management Act." Statutes and regulations are attached in Appendix B.
[2] CCCU states that the plan update was adopted on June 21. Petition at 2. The Board and the Court of Appeals explicitly found and held otherwise. *Clark County v. Growth Mgmt. Hrgs. Bd.*, __ Wn. App. __, 448 P.3d 81 (August 20, 2019), Slip op. at 28, Appendix A. CCCU has not appealed that finding.

to which CCCU claimed the County had violated GMA.[3] The Board issued its Final Decision and Order on March 23, 2107 ("FDO"), affirming the County's 2016 plan update with respect to all of CCCU's thirteen issues.[4] The Board ordered Clark County to come into compliance with GMA regarding certain issues raised by Futurewise. [5]

CCCU, Clark County and other parties sought review of the FDO, which appeals were consolidated by the Superior Court. The Court of Appeals granted review as Case No. 50847-8-II.[6] Meanwhile, Clark County took compliance actions and reported to the Board.[7] The Board's order on January 10, 2018 ("Compliance Order"), ruled that the County had established compliance with parts of GMA, but not as to three Futurewise issues.[8] Clark County, and other parties, but not CCCU, appealed the Compliance Order. That appeal was also consolidated and came before the Court of Appeals as Case No. 51745-1-II. The Court of Appeals consolidated the appeals of the FDO and the Compliance Order.[9]

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[3] Two other parties, Futurewise and the Friends of Clark County (together, "Futurewise"), filed a joint petition for review, which the Board consolidated with the CCCU review. The Cities of Ridgefield, La Center, and Battle Ground, and the owners of certain properties intervened in the consolidated review.
[4] *CCCU v. Clark County*, Growth Mgmt. Hrgs. Bd., *Final Decision and Order*, Case No. 16-2-0005c, (March 23, 2017). AR 10457-557.
[5] *Id.*
[6] *Id.* at 5-6, Designation of Clerk's Papers, Item 20.
[7] *Id.* at 6, AR 10462.
[8] *Id.*
[9] *Id.*

The Court of Appeals issued its Opinion on August 20, 2019.[10] CCCU did not prevail on any of its issues before the Court of Appeals and now seeks review by the Washington Supreme Court.

B. Facts Relevant to CCCU's Claim That Resource Lands Were Improperly Designated and Reviewed.

1. Clark County Designated Lands for Long-Term Commercial Significance as Agricultural or Forest Lands in Its 1994 Plan, and has Designated No Additional Lands in Those Categories Since Then.

Clark County adopted its first comprehensive growth management plan pursuant to GMA in 1994.[11] Pursuant to RCW 36.70A.040, 36.70A.070 and 36.70A.170, Clark County designated agricultural and forest lands of long-term commercial significance ("agricultural resource lands" and "forest resource lands," respectively). Multi-party appellate proceedings ensued for more than ten years, resulting in decisions from the Board, Clark County Superior Court, and the Court of Appeals, and numerous County processes to achieve GMA compliance.[12]

Petitioner here, CCCU, was a party in that litigation, arguing as it does here, that Clark County had not properly designated resource lands.[13]

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[10] Appendix A.
[11] AR 336.
[12] *E.g., Clark County Natural Resources Council v. Clark County Citizens United*, 94 Wn. App. 670, 972 P.2d 941, *reconsid. denied* (1999); *Achen v. Clark County,* W. Wash. Growth Mgmt. Hrgs. Bd., Case No. 95-2-0067c, Final Decision and Order (Sept. 20, 1995).
[13] *Id.*

In 2006, the Board issued an order closing the case, and ruling that "compliance should be found" with respect to Clark County's 1994 plan.[14] No party appealed that order. From 2006 to 2016, Clark County did not add one acre to the lands designated as agricultural or forest resource lands, which had been found to comply with GMA in 2006.[15]

2. Clark County Did Not Designate Resource Lands in its 2016 Comprehensive Plan Review and Update.

In its 2016 periodic review and update under RCW 36.70A.130, Clark County designated exactly no lands of long-term commercial significance for agriculture or forestry under RCW 36.70A.170.[16] The County amended its comprehensive plan to de-designate less than 1,000 acres of agricultural land adjoining the cities of La Center and Ridgefield, and near Vancouver, but the Board ruled these de-designations had not

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[14] *Achen v. Clark County,* W. Wash. Growth Mgmt. Hrgs. Bd., Case No. 95-2-0067c, Order Finding Compliance and Closing Case, Slip op. (June 6, 2006).

[15] In 2007, pursuant to RCW 36.70A.130, Clark County updated its comprehensive plan and de-designated certain agricultural lands in order to allow urban or industrial uses. Appeals of the 2007 plan update were resolved in 2014, with an order from the Board concluding that the County had cured the final outstanding noncompliant designation by re-designating one last area for agriculture. *Karpinski v. Clark County,* W. Wash. Growth Mgmt. Hrgs. Bd., *Order Finding Compliance [Area WB] and Closing Case*, Case. No. 07-2-0027 (Sept. 4, 2014). No new lands were designated for agricultural or forest resource uses during the 2007 plan update or related proceedings through 2014. No party sought review of the Board's 2014 Compliance Order. Thousands of acres of agricultural lands designations and de-designations were at issue in the *Karpinski* appeal. For a more complete history of these appeals, *see, e.g., Karpinsksi, supra, Final Decision and Order* (June 3, 2008); *Clark County v. Growth Mgmt. Hrgs. Bd*, 177 Wn.2d 136, 298 P.3d 704 (2013).

[16] AR 992.

complied with GMA.[17] The County made no changes to its existing designations of forest resource lands.

The 2016 update did amend the *densities* of allowed development on lands designated Agriculture and Forest Tier II,[18] which are designations denoting resource lands of long-term commercial significance,[19] but did not alter the resource *designations* themselves. The Board determined that the new densities for Agriculture and Forest Tier II lands did not comply with GMA because they did not conserve the resource industries on those lands.[20] To achieve GMA compliance, Clark County adopted Ordinance 2017-07-04, which repealed the new densities and readopted the pre-update densities for the resource lands.[21] It did not newly adopt any designations of lands for long-term commercial significance.

CCCU did not present a position to the Board in the proceedings on compliance or seek review of the Compliance Order's holding that

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[17] AR 10551-552.

[18] Lands designated Agriculture had previously been subject to minimum-zoned density of 20 acres per lot, and the 2016 plan update increased density for Agriculture lands to a minimum of 10 acres per lot. Before the 2016 plan update, the minimum density for lands designated Forest Tier 2 had been 40 acres per lot, which density the update doubled to a minimum of 20 acres per lot. Amended Ordinance 2016-06-12 at 2. AR 993.

[19] Comprehensive Growth Management Plan 2015-2035 at 37; AR 1880.

[20] AR 10552.

[21] References to the administrative record compiled in the compliance phase, leading up to the Compliance Order, will be listed as "CAR" followed by the page number in the Board's Index to the Certified Record submitted to the Clark County Superior Court June 6, 2018. Ordinance 2017-07-04 is found at CAR 110-215.

Clark County's return to pre-update densities for lands designated Agriculture and Forest Tier II, respectively, had complied with GMA.[22]

CCCU now argues, that although Clark County designated no resource lands in the 2016 plan update, RCW 36.70A.130 required the County to review the designations of existing County resource lands.

IV. ISSUE

> Whether the Court of Appeals correctly ruled, that in its periodic review and update pursuant to RCW 36.70A.130, a county that does not newly designate any lands as agricultural and forest resource lands need not analyze existing resource lands in a manner not even required for the designation of agricultural and forest resource lands.

V. ARGUMENT

RAP 13.4(b) sets forth the following considerations governing the Court's acceptance of a petition for review:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

[22] CAR 1564-94.

The Court of Appeals has correctly decided the issues before it, and the public interest does not suggest that the Court should review the decision. Nor is the decision in conflict with other appellate decisions. The petition satisfies none of the considerations set forth in RAP 13.4(b), and the Court should accordingly deny review.

A. The Clark County 2016 Comprehensive Plan Update Designated No Resource Lands, and Did Not Offend the Resource Lands Designation Criteria; the Petition Does Not Involve an Issue of Substantial Public Interest Related to Review of Resource Lands Designations.

Because GMA is strictly construed,[23] it may not be read to impose upon counties unstated or inferred obligations that are simply desired by a petitioner, but are not requirements of GMA. The petition does not point to any authority that requires the County to review, in the course of a plan update, whether all of its unrevised, GMA-compliant comprehensive plan designations were correct. Even so, CCCU would have Clark County redo its entire initial comprehensive plan adoption process every eight years, in the guise of a plan review and update under RCW 36.70A.130.[24] No case of this Court has so held, and RCW 36.70A.130 imposes no such requirement.

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[23] *Thurston County v. WWGMHB*, 164 Wn.2d 329, 342, 190 P.3d 38 (2008) *(internal quotation marks omitted)* (quoting, *Woods v. Kittitas County,* 162 Wn.2d 597, 612 n. 8, 174 P.3d 25 (2007)); *Save Our Scenic Area v. Skamania Cty.,* 183 Wn.2d 455, 463–64, 352 P.3d 177, 181 (2015).

[24] CCCU disputes the designations of the lands that the County designated in 1994 for resource use with long-term commercial significance. Petition at 3.

Rather, the Court held just the opposite in *Thurston County v. W. Wash. Growth Mgmt. Hrgs. Board.*[25] In *Thurston County*, petitioners sought review of the county's periodic review and update pursuant to RCW 36.70A.130, making a claim almost identical to that made here by CCCU, that the unrevised designations of the county's agricultural lands of long-term commercial significance had been improper.[26] RCW 36.70A.130 then imposed the same obligation that the statute required in 2016: for counties to review and update their comprehensive plans, if needed. [27] The Court of Appeals held that when appealing a GMA periodic review and update, a petitioner could challenge aspects of a comprehensive plan that the update had not revised.[28]

The Supreme Court overturned that ruling.[29] The Court unequivocally held that, absent a revision to the governing provisions of GMA itself, the county's unrevised pre-update designations could not be revisited in an appeal of the update, stating:

> We hold a party may challenge a county's failure to revise a comprehensive plan only with respect to those provisions that are directly affected by new or recently amended GMA

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[25] *Thurston County v. WWGMHB*, 164 Wn.2d 329, 190 P.3d 38 (2008).
[26] *Thurston County v. WWGMHB*, 137 Wn. App. 781, 796–97, 154 P.3d 959 (2007), *reversed in part, Thurston County v. WWGMHB*, 164 Wn.2d 329, 190 P.3d 38 (2008).
[27] *Compare* ESSB 6427, Ch. 285, Laws of 2006, 59th Leg., Regular Sess. (2006) *with* currently effective RCW 36.70A.130(1) (text of statute unchanged).
[28] *Thurston County v. WWGMHB, 137 Wn. App. 781, supra.*
[29] *Thurston County v. WWGMHB*, 164 Wn.2d 329, 190 P.3d 38 (2008).

> provisions, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous comprehensive plan was adopted or updated, following a seven year update.[30] This rule provides a means to ensure a comprehensive plan complies with recent GMA amendments, recognizes the original plan was legally deemed compliant with the GMA, and preserves some degree of finality.[31]

In other words, the requirement to "review and update" existing plan designations set forth in RCW 36.70A.130 does not mean that a county must start anew to analyze and revise the designations, unless the provisions of GMA that govern designation have changed.[32] CCCU has not argued that relevant provisions of GMA have been amended.

The Board ruled in 2014 that Clark County's Comprehensive Growth Management Plan, which then designated for resource use every parcel of land still designated after the 2016 plan update, complied with GMA.[33] This Court has held that such a ruling on compliance is conclusive as to the legality of the plan to that date.[34] Absent a requirement that a county take a particular action in its periodic plan update, a petitioner may seek review only as to issues stated in detail in a petition for review filed within 60 days of publication of notice of the

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[30] Currently, the statute requires eight-year updates. RCW 36.70A.130(5)(b).
[31] *Thurston County v. WWGMHB*, 164 Wn.2d at 344.
[32] *Id.*
[33] *Karpinski v. Clark County,* GMHBWWR Case No. 07-2-0027c, *Order Finding Compliance and Closing Case* (September 4, 2014).
[34] *Thurston County, supra,* at 164 Wn.2d at 345.

actions taken in the plan update.[35] CCCU did not timely appeal the Board's 2014 order finding compliance, or the Board's 2006 order finding compliance, and cannot now assert that those orders were wrong.

In the 2016 plan update, Clark County analyzed the designations of lands in areas related to proposed de-designations, as required by WAC 365-190-050(1).[36] The County argued before the Board that it had conducted area-wide processes in de-designating the lands that were subsequently annexed by Ridgefield and La Center, and those that became rural industrial land banks, but the Board rejected those arguments.[37]

The issues concerning the designation revisions that did occur may soon be resolved. The Court of Appeals ruled that the Ridgefield and La Center de-designations are moot, and that the Board lacked jurisdiction to consider issues related to the annexed lands.[38] Those issues concerning designation are, thus, resolved, and CCCU did not participate in their litigation. The remaining question concerns the de-designated agricultural resource lands on which the rural industrial land bank was located.[39] No other review of resource lands designations occurred in the 2016 update.

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[35] RCW 36.70A.280-290, Appendix B; *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998).
[36] Slip op. at 34-36, Appendix A.
[37] AR 10552-553.
[38] *CCCU v. Clark County, supra,* Slip op. at 18-24. CCCU has raised no challenge regarding the de-designations.
[39] *Id.* at 25. CCCU did not argue this as an issue at any level.

CCCU appears to argue that Clark County's Issue Paper 9 was such a review, but its position is incorrect. Issue Paper 9 presented a consultant's updated research on rural lands, with the stated purpose of analyzing whether to adopt density revisions for lands outside urban areas.[40] In the context of density analysis, Issue Paper 9 does set forth NRCS soils data and descriptive information relevant to the other criteria for designation of both agricultural and forest resource lands.[41]

Issue Paper 9 did not analyze whether the designations were correct or should change, however, and it did not purport to reach a conclusion on those subjects, because that was not its purpose.[42] It was not adopted, either to support, or as part of, an amendment to the comprehensive plan's resource lands designations. Finally, evidence before the Board showed that the public had an opportunity for input on Issue Paper 9. The Board consequently ruled that CCCU's arguments concerning Issue Paper 9 did not prove that the 2016 plan update was clearly erroneous under GMA.[43]

B. The Court of Appeals Properly Declined to Find That the Board Decision Was Arbitrary and Capricious.

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[40] AR 1051.
[41] AR 1068-70; 1074-75.
[42] AR 1049-83.
[43] FDO at 54, AR 10510.

The Board denied the County's motion for summary judgment to dismiss CCCU's Issue 12 because the issue textually "invoked GMA planning goals and requirements."[44] As a petitioner to the Board, however, CCCU had the burden of demonstrating that the 2016 plan update was "clearly erroneous" in failing to comply with GMA, as alleged in its issues. Following briefing and a hearing on the merits, the FDO rejected CCCU's claims on this issue, concluding as follows:

> CCCU has not made clear arguments about which sections of RCW 36.70A [the County fails to comply with], but CCCU *** states their claim is based on WAC 365-190-050 and -060. In Issue 10 above, the Board explained process requirements for WAC 365-190-040 (overall process) and for WAC 365-190-050 (agricultural lands). In Issue 12, CCCU raised complaints that the County used data in addition to the NRCS data layer, the latter required in WAC 365-190-050(3)(B)(ii). The County used the NRCS layer and other data; nothing in the WAC precludes them from using other data, as long as they use NRCS data as well. CCCU's claim about data layers is dismissed.
>
> Next, CCCU argues the new resource land zones do not have as much development density as CCCU would like and that their proposal for more density was not adopted by the County. Nothing in the GMA or its implementing regulations requires the County to adopt a specific proposal by individuals or associations of individuals. The GMA gives the County broad discretion to adopt policies, plans and regulations that meet GMA requirements. Finally, CCCU's claim the County did not give the public sufficient time to review the Issue Paper 9 is not a GMA violation. *** The Board finds and concludes that CCCU has failed

[44] Order Denying Motions to Dismiss Issues, at 9-10. Available at: http://www.gmhb.wa.gov/Global/RenderPDF?source=casedocument&id=5329.

> to prove the County violated WAC 365-190-050 or .060. Issue 12 is dismissed.[45] *(Footnotes omitted; emphasis in original omitted.)*

Before the Court of Appeals, CCCU argued that the Board's decision on Issue 12 was arbitrary and capricious. To prevail on that claim, CCCU bore the burden of demonstrating that the decision represented willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.[46] As the quoted conclusion above demonstrates, the Board's decision on this issue (Issue 12) was not arbitrary and capricious, as the Court of Appeals correctly held.

CCCU contends in its petition for review that WAC 365-190-050 – 060 required the County to use soils data of the federal Natural Resources Conservation Service (NRCS) in designating resource lands.[47] WAC 365-190-050(3) provides three factors for counties considering lands for designation as agricultural resource lands, one of which requires use of NRCS soils classifications.[48] The third factor is split into eleven additional factors, which are explicitly non-exclusive.[49] Criteria for

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[45] FDO at 54, AR 10510.
[46] *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46-47, 959 P.2d 1091 (1998)).
[47] Petition at 3.
[48] WAC 365-190-050(3)(b)(ii), Appendix B.
[49] WAC 365-190-050(3)(c), Appendix B.

designating forest lands also set forth many factors beyond soils.[50]

CCCU concedes both that Clark County has used NRCS soils data and that, in designating resource lands, the County is permitted to use other information.[51] The essence of CCCU's claim is that in the County's review of resource lands, NRCS soils data were "overwhelmed" by "data layers" provided by Clark County's Geographic Information Service, and that the County did not disclose the information set forth in the data layers.[52] The Court of Appeals rightly noted, however, that CCCU did not point to any land designations by the County that were different from those that would have resulted from analysis limited to NRCS soils data.[53]

The Board held that use of other data did not violate GMA, as long as NRCS soils classification data were used, and found that the County had used both NRCS data and other data.[54] The Court of Appeals affirmed the Board's decision.[55] Both decisions are consistent with the plain language of WAC 365-190-050 and -060, which mandate the use of NRCS data and permit counties to consider other information, some of which is unspecified, in their resource lands designations.[56]

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[50] WAC 365-190-060, Appendix B.
[51] Petition at 11-12.
[52] Petition at 4.
[53] Slip op. at 36, note 19, Appendix A.
[54] FDO at 54, AR 10510.
[55] Slip op. at 34-36, Appendix A.
[56] Appendix B.

CCCU contends that the Board and the Court of Appeals both erred in their rejections of CCCU's issues faulting the County's resource lands designations. CCCU reasons that the designation of "vast amounts of land" for commercial resource use is a matter of substantial public interest, and so errors regarding resource designations should be taken up by this Court.[57] CCCU bolsters its argument by providing a quotation, which it attributes to page 35 of the Court of Appeals slip opinion:

> [A]s long as the County said that it used the soil data required by the regulation, **it does not matter** that it used other date, **that it refuses to disclose what that data was or how it was used.**[58]

The Court of Appeals did not make that statement, however, either on page 35 of the slip opinion or anywhere else in its opinion.[59] CCCU further discusses the errors it contends that the Board and the Court of Appeals made in failing to require the County to explain "data layers." The petition has the following description of the Court of Appeals' error:

> The Court of Appeals' outrageous conclusion is that "it does not matter that [the County] used other data, that it refuses to disclose what that data was or how it was used." Slip op. at 35.[60]

Again, this statement cannot be found in the Court of Appeals opinion. Outrageous or not, if it had been the Court of Appeals' actual conclusion,

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[57] Petition at 6.
[58] Petition at 5 (emphasis in original CCCU Petition).
[59] Appendix A.
[60] Petition at 7.

it is a fabrication, and it cannot support CCCU's position that there is a substantial public interest in the Court's acceptance of review. CCCU has not shown that the Court of Appeals decision erred in any way.

Finally, CCCU cites four seminal decisions of the Supreme Court as support for the unremarkable notion that the Court has considered the designations of agriculture and forest resource lands under GMA as "imbued with substantial public interest."[61] The Court does not, and should not accept review of every decision of the Court of Appeals relating to resource lands designation. This petition, in which CCCU misstates the facts, the applicable law, and the content of a valid Court of Appeals decision, is not a petition that the Court should accept for review.

C. The Court of Appeals Correctly Found That Clark County Considered NRCS Soils Classifications, and No Substantial Public Interest Suggests That the Court Should Accept Review of That Decision.

CCCU concedes both that Clark County has used NRCS soils data and that the County is permitted to use other information in designating resource lands.[62] The Board found the facts were that the County had considered NRCS soils classes and other data, and that WAC 365-190-

[61] *Id.* at 8.
[62] *Id.* at 12.

050 and -060 permitted these considerations.[63] The Board concluded that CCCU had not met its burden to prove that the County's actions had been clearly erroneous under GMA.[64] CCCU responded by seeking an appellate ruling that the Board's decision had been arbitrary and capricious.[65] The Court of Appeals echoed the Board's findings and conclusion that the County had considered NRCS soils classes and other data, that WAC 365-190-050(3)(b) does not preclude such consideration, and that CCCU had not proven that the Board erred by making an arbitrary and capricious ruling.[66]

The petition complains, regarding use of other data, that the County "never identified what that data was, how it was used or how it could turn soil that is incapable of commercial production of agricultural or forest products into productive land."[67] But the petition, like CCCU's arguments before the Board and the Court of Appeals, fails to point out one parcel of Clark County land incapable of commercial agricultural or forest production that the 2016 plan update *misdesignated* or *designated at all* because the County used data in addition to NRCS soils classification

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[63] AR 10511. ("The County used the NRCS layer and other data; nothing in the WAC precludes them from using other data as long as they use NRCS data as well.")
[64] *Id.* The clearly erroneous standard states the burden of a petitioner to the Board. FDO at 5, AR 10461.
[65] Slip op. at 34-35, Appendix A.
[66] Slip op. at 34-36, Appendix A.
[67] Petition at 12.

data.[68] The petition concludes that the Court of Appeals' decision makes the requirements of WAC 365-190-050(3)(b)(ii) "essentially meaning-less."[69] But even CCCU agrees that the County considered NRCS data, which, as the Court of Appeals held, is what the rule requires.

The petition argues that a correct decision of the Court of Appeals should be reviewed by the Court. Its argument is based upon misreading the facts, law, and the Court of Appeals decision itself. No consideration of the public interest would support the Court's acceptance of this petition, and the Court should reject it.

D. The Court of Appeals Decision Raises No Conflicts with Other Decisions of the Court of Appeals and Supreme Court Requiring a County to Show its Work in Designating Resource Lands.

The petition cites a decision of this Court and two decisions of the Court of Appeals in attempting to manufacture conflicts with this decision of the Court of Appeals. The attempt fails, because none of the cited appellate decisions examined actions analogous to Clark County's actions in its 2016 plan update. The previous sections of this answer have argued a review of the County's actions, pursuant to RCW 36.70A.130, is not equivalent to the review of actions taken when the County initially designated all its unincorporated lands. By the terms of the periodic

[68] AR 10511.
[69] Petition at 14.

review statute, the County was not required to revise the designations of its lands, and for the most part, it made no such revisions in 2016.[70]

All of the cases CCCU cites in support of its inconsistency arguments concern actual revision to comprehensive plan designations. In *Yakima County v. E. Wash. Growth Mgmt. Hrgs. Bd.*, the dispute concerned the de-designation of more than 1,000 acres of agricultural lands.[71] Compliance with criteria for a revision of that magnitude understandably involved analysis beyond that for a decision to make no change to pre-existing, GMA-compliant designations.

Ferry County v. Growth Mgmt. Hrgs. Bd. addressed a years-long dispute over initial designation of critical areas.[72] Ferry County amended its ordinance several times, and the legislature authorized rule-making to define "best available science" for critical areas designation.[73]

Lewis County v. W. Wash. Growth Mgmt. Hrgs. Bd., involved the initial designation of agricultural resource lands.[74] The "work," required to be shown in *Lewis County* was the work needed to support first-time

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[70] CCCU did not timely appeal to the Board or the Court of Appeals regarding the de-designations and cannot object to them now. RCW 36.70A.290(2), Appendix B.
[71] 146 Wn. App. 679, 684, 192 P.3d 12, 15 (2008).
[72] 184 Wn. App. 685, 229 P.3d 478 (2014).
[73] *Ferry County, supra,* 184 Wn. App. at 733.
[74] 157 Wn.2d 488, 139 P.3d 1096 (2006).

GMA comprehensive plan designations.[75] It is not an inconsistency among appellate decisions that the work in *Lewis County* was different from the work required in this case, to not make any revision at all.

Each of the decisions named by the petition as conflicting with the *Clark County* decision of the Court of Appeals is merely distinguishable from *Clark County*. The issues are different, the applicable law is different, and if the results are different, that is not a reason for the Court to accept review pursuant to RAP 13.4(b). Review should be denied.

VI. CONCLUSION

The petition fails to establish that the Supreme Court should accept review of the Court of Appeals decision based upon the considerations set forth in RAP 13.4(b). Clark County respectfully requests that the Court deny review.

DATED this 18th day of October, 2019.

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[75] *Lewis County, supra,* 157 Wn.2d at 503-04.

CERTIFICATE OF SERVICE

I, Thelma Kremer, hereby certify that I caused a copy of the foregoing Clark County's Answer to Petition for Review to be filed with the Clerk of the Court using the Washington State Appellate Courts' Portal, on this 17th day of October, 2019, which will send notification of such filing to the following:

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DATED this 17th day of October, 2019.

Thelma Kremer

Thelma Kremer, Legal Secretary

APPENDICES

Appendix A: *Part Published Opinion, Clark County v. Growth Mgmt. Hrgs. Bd.,* ___ Wn. App. ___, 449 P.3d 81 (August 20, 2019).

Appendix B: Important Statutes

Revised Code of Washington

RCW 36.70A.040	Who must plan – Summary of requirements – Resolution for partial planning – Development regulations must implement comprehensive plans.
RCW 36.70A.070	Comprehensive plans – Mandatory elements.
RCW 36.70A.130	Comprehensive plans – Review procedures and schedules – Amendments.
RCW 36.70A.170	Natural resource lands and critical areas – Designations.
RCW 36.70A.280	Growth management hearings board – Matters subject to review.
RCW 36.70A.290	Growth management hearings board – Petitions – Evidence.

Washington Administrative Code

WAC 365-190-050	Agricultural resource lands.
WAC 365-190-060	Forest resource lands.

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

August 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CLARK COUNTY,

Petitioner/Cross Respondent,

FRIENDS OF CLARK COUNTY; FUTUREWISE,

Respondents/Cross Petitioners,

and

CITY OF RIDGEFIELD; CITY OF LA CENTER; RDGB ROYAL ESTATE FARMS LLC; RDGK REST VIEW ESTATES LLC; RDGM RAWHIDE ESTATES LLC, RDGF RIVER VIEW ESTATES LLC, RDGS REAL VIEW LLC, and 3B NORTHWEST LLC,

Petitioners,

and

CLARK COUNTY CITIZENS UNITED, INC.,

Petitioners,

v.

GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

No. 50847-8-II

(Consolidated)

No. 50847-8-II;
Cons. 51745-1-II

CLARK COUNTY,

Petitioner/Cross-Respondent,

FRIENDS OF CLARK COUNTY; FUTUREWISE,

Respondents/Cross Petitioners,

and

CITY OF RIDGEFIELD; CITY OF LA CENTER; RDGB ROYAL ESTATE FARMS LLC; RDGK REST VIEW ESTATES LLC; RDGM RAWHIDE ESTATES LLC, RDGF RIVER VIEW ESTATES LLC, RDGS REAL VIEW LLC, and 3B NORTHWEST LLC,

Petitioners,

and

CLARK COUNTY CITIZENS UNITED, INC.,

Petitioners,

v.

GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

No. 51745-1-II

PART PUBLISHED OPINION

WORSWICK, J. — The Growth Management Act (GMA), chapter 36.70A RCW, requires Clark County to periodically update its comprehensive land use and zoning plan. Clark County updated its plan in 2016 (2016 Plan Update), making several changes to the County's comprehensive plan.

The Friends of Clark County and Futurewise (FOCC), as well as Clark County Citizens United (CCCU), petitioned the Growth Management Hearings Board (Board) to review the 2016 Plan Update for compliance with the GMA. The City of Ridgefield, City of La Center, 3B Northwest LLC (3B), and five other individual LLCs[1] intervened in that action.

The Board issued its Final Decision and Order (FDO), which concluded, in part, that the County did not comply with the GMA when it (1) dedesignated three areas of agricultural land and designated these lands as urban growth areas (UGA), (2) dedesignated agricultural land and designated this area as a rural industrial land bank (RILB), (3) reduced agricultural and forestland parcel sizes, and (4) adjusted rural densities. However, the Board concluded that the County complied with the procedural requirements of the GMA.

The County took some efforts to come into compliance, after which the Board issued a compliance order. The Board concluded that the County remained noncompliant regarding dedesignating agricultural land for two UGAs and the RILB but that it had complied regarding one UGA, the agricultural and forestland parcel sizes, and rural densities.

The parties appeal both the FDO and the compliance order. Additionally, FOCC moves to dismiss the County's and 3B's petitions for judicial review of the FDO for lack of appellate jurisdiction because they did not properly and timely serve their petitions for judicial review.

The County, La Center, Ridgefield, and the LLCs argue that the Board's finding of the County's noncompliance regarding the County's UGA designations are moot and that the Board acted arbitrarily and capriciously by requiring the County to take further action regarding these

[1] RDGB Royal Estate Farms LLC, RDGK Rest View Estates LLC, RDGM Rawhide Estates LLC, RDGF River View Estates LLC, and RDGS Real View LLC.

UGAs. The County also argues that the Board erroneously interpreted a rule regarding agricultural lands and erred when it concluded that the County violated the GMA by dedesignating agricultural lands for the RILB.

CCCU argues that the Board erred by concluding that the County complied with the GMA's procedural requirements regarding public participation, an issue paper, and source documents, and that the County complied with the GMA regarding designations of agricultural and forestlands, population projections, and private property considerations. CCCU further argues that the Board erred by concluding the County violated the GMA when the County reduced parcel sizes of agricultural and forestland.

FOCC argues that the compliance order erroneously declared issues to be moot regarding readopted forestland and rural density provision from the County's prior comprehensive plan.

We grant FOCC's motion to dismiss the County's and 3B's petitions for judicial review of the FDO, for lack of appellate jurisdiction. In the published portion of our opinion, we hold that issues regarding the annexed lands are moot. In the unpublished portion of this opinion, we hold that the Board did not err regarding the remaining issues raised by CCCU and FOCC, and remand to the Board for further proceedings in accordance with this opinion.

FACTS

The County adopted the 2016 Plan Update by Amended Ordinance No. 2016-06-12 on June 28, 2016. In this update, the County dedesignated three areas of agricultural land and designated these lands as UGAs, dedesignated an area of agricultural land and designated this land as RILB, reduced agricultural and forestland parcel sizes, and adjusted rural densities.

Two of the newly designated UGAs were adjacent to the cities of La Center and Ridgefield. Immediately following the 2016 Plan Update's passage, La Center and Ridgefield began the process of annexing these adjacent UGAs into their respective cities.

FOCC and CCCU petitioned the Board regarding the 2016 Plan Update. The Board consolidated these appeals. La Center, Ridgefield, 3B, and the LLCs intervened. Prior to the Board's decision, La Center passed an ordinance annexing its adjacent UGA, effective on August 29, 2016. Ridgefield passed an ordinance annexing its adjacent UGA, effective on October 14, 2016.

The Board issued its FDO on March 23, 2017. The Board determined some provisions invalid and found other provisions noncompliant.[2] The Board concluded, in part, that the County did not comply with the GMA when it (1) dedesignated agricultural land and designated the UGAs, (2) dedesignated agricultural land and designated the RILB, (3) reduced agricultural and forestland parcel sizes, and (4) adjusted rural densities. Further, the Board made determinations of invalidity regarding the County's UGA designations. The Board remanded the 2016 Plan Update to the County for the County to come into compliance with the GMA.

The County, Ridgefield, La Center, the LLCs, and CCCU filed petitions for review of the Board's FDO in superior court. Those petitions were consolidated by stipulation of the parties. FOCC sought direct review of the Board's FDO, and we granted review.

After the Board remanded the 2016 Plan Update, and while appeal of the FDO was pending, the County adopted new amendments to its comprehensive plan that returned the parcel

[2] The Board did not make separate findings of fact and conclusions of law for each issue it addressed. Rather, the Board conducted its analysis, citing evidence, and then usually stated, "The Board finds and concludes . . . ." *See, e.g.*, AR at 10499.

sizes and rural densities to their previous designations before the 2016 Plan Update amendments. The County also reversed one UGA designation during this period; however, the County did not take remedial action regarding the UGAs annexed by Ridgefield and La Center, arguing that it could not change the designation of land no longer within its control.

The Board issued a compliance order on January 10, 2018, concluding that the parcel sizes and rural density issues were moot and compliant because the County had adopted previously GMA-compliant provisions. The Board also concluded that the County was not in compliance regarding the UGAs annexed by La Center and Ridgefield.

Subsequently, Ridgefield, La Center, the County, the LLCs, 3B, and FOCC sought direct review of the Board's compliance order and consolidation with the review of the FDO. We accepted direct review of the compliance order and consolidated the appeals.

ANALYSIS

I. MOTION TO DISMISS

As an initial matter, we address FOCC's motion to dismiss the County's and 3B's petitions for judicial review of the Board's FDO. FOCC argues that this court lacks subject matter, or appellate, jurisdiction because the County and 3B failed to timely serve the Board with their respective petitions for judicial review as required by RCW 34.05.542, due to their failure to deliver their petitions for judicial review to the Board within 30 days. Thus, FOCC argues that the County's and 3B's failure to properly serve the Board deprives us of appellate jurisdiction.

We hold that service of the petition for judicial review by e-mail does not satisfy the service requirements of the Administrative Procedure Act (APA), chapter 34.05 RCW, and that

service on the agency is complete when the petition for review is delivered to the agency. As a result, we hold that the County's and 3B's petitions are untimely, and we grant FOCC's motion to dismiss Clark County's and 3B's petitions for judicial review of the FDO.

A. *Facts Pertaining to the Motion To Dismiss*

The Board issued its final decision to the parties on March 23, 2017. The deadline for filing petitions for judicial review was April 24. The County e-mailed its petition for judicial review to the Board and mailed its petition to both the Board and the attorney general's office using the United States Postal Service on April 24.[3] 3B sent its petition to the Board through FedEx overnight delivery on April 24. 3B concedes that its petition was received by the Board on April 25. The attorney general's office filed a notice of appearance, representing the Board, on May 11.

B. *Standard of Review*

We review de novo questions of a court's jurisdiction. *Ricketts v. Bd. of Accountancy*, 111 Wn. App. 113, 116, 43 P.3d 548 (2002). A party may raise a question of appellate, or subject matter, jurisdiction for the first time at any point in a proceeding. *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

We also review the meaning of a statute de novo. *Ricketts*, 111 Wn. App. at 116. Our fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, then we give effect to that plain meaning as an expression of legislative intent. *Pac. Marine Ins. Co. v. State ex rel. Dep't of Revenue*, 181 Wn. App. 730,

[3] The County does not contend that the physical copy arrived on or before April 24.

737, 329 P.3d 101 (2014). "Absent ambiguity, a statute's meaning must be derived from the wording of the statute itself without judicial construction or interpretation." *Fray v. Spokane County*, 134 Wn.2d 637, 649, 952 P.2d 601 (1998).

C. *Appeals From Decisions of the Board*

The APA governs appeals from decisions of the growth management hearings board. *Skagit Surveyors*, 135 Wn.2d at 555. A court does not obtain jurisdiction over an appeal from an agency decision unless the appealing party timely files and serves the petition for judicial review on the agency and all parties. *Skagit Surveyors*, 135 Wn.2d at 555. A petition for judicial review must be dismissed if the APA's service requirements are not met. *Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 961, 235 P.3d 849 (2010). "Substantial compliance with the service requirements of the APA is not sufficient to invoke . . . appellate, or subject matter, jurisdiction."[4] *Skagit Surveyors*, 135 Wn.2d at 556.

Under the APA, a petition for judicial review of an agency order must be served on all parties of record within 30 days after service of the final order. RCW 34.05.542(2). The APA provides:

> "Service," *except as otherwise provided in this chapter*, means posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

RCW 34.05.010(19) (emphasis added).

[4] Like here, the agency appeal in *Skagit Surveyors* was initially heard by the court of appeals and not the superior court. *Skagit Surveyors*, 135 Wn.2d at 556 n.9.

But RCW 34.05.542(4) contains an exception to this definition. *Ricketts*, 111 Wn. App. at 117-18; *Stewart v. Dep't of Employment Sec.*, 191 Wn.2d 42, 47, 419 P.3d 838 (2018). Under that statute, the petitioner must serve the agency that issued the order by delivery to the director's office, the agency's principal office, or by serving the agency's attorney of record. RCW 34.05.542(4); *Stewart*, 191 Wn.2d at 47.

Service on the agency requires delivering the petition for judicial review to the agency within 30 days of the final order. RCW 34.05.542 (2), (3), (4). Here, the Board issued its final decision to the parties on March 23. Thirty days from March 23 was April 22, which was a Saturday. Therefore, the petition for judicial review was due April 24, the next business day.

1. *The County's Petition Was Untimely Served*

In response to FOCC's motion, the County argues that its petition for judicial review was timely served because it e-mailed the petition to the Board. The County does not argue that it timely served the Board by mailing the petition on April 24, but instead states that FOCC's challenge is "limited to the question of whether email service on an agency satisfies delivery pursuant to RCW 34.05.542(4)." Reply Br. of Clark County at 13. The County argues that service by e-mail satisfies the "delivery" requirement of RCW 34.05.542(4) because the Board has authorized service by electronic transmission in WAC 242-03-240(1). We hold that service by e-mail is insufficient to satisfy the requirements of RCW 34.05.542(4).

The Board is allowed to authorize service by electronic transmission. RCW 34.05.010(19). But it has not done so. The County relies on WAC 242-03-240. WAC 242-03-240 is titled, "Filing and service of all other papers," and provides that parties shall electronically file pleadings and briefs to the board, and electronically complete service to other parties. But

this rule is not applicable to appeals from the board's decision. WAC 242-03-240, and Title 242 of the Washington Administrative Code generally addresses practices and procedures for matters *in front of* the growth management hearings board. WAC 242-03-035. Appeals *from* the Board's final decision are governed by RCW 34.05.514 and RCW 34.05.542. RCW 36.70A.300; WAC 242-03-970.

Moreover, WAC 242-03-240 does not authorize service of any type of petition for judicial review by e-mail. WAC 242-03-240 refers to the "[f]iling and service of all other papers," meaning other than a petition for review to the Board. WAC 242-03-230 specifically addresses filing and service of the petition for review for cases appealed to the Board. Thus, the "all other papers" referred to in WAC 242-03-240 describes all papers except a petition for review. And the only petition for review addressed in WAC 240-03-230 is a petition filed at the board, not a petition for *judicial* review filed in superior court after the Board has made its decision.

Here, the County was required to serve the agency by "delivering" the petition for judicial review to the agency's office by April 24.[5] RCW 34.05.542(4).[6] Unless authorized by

[5] The County also mailed the petition to the attorney general's office using the United States mail on April 24. FOCC argues that mailing the petition to the attorney general does not adequately serve the Board because the attorney general had not appeared as the Board's attorney of record until May 11. The County does not argue that mailing the petition constitutes service on the Board, thus, we do not address this issue.

[6] "Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark." RCW 34.05.542(4).

the agency, electronic transmission, such as e-mail, is not a proper form of service. RCW 34.05.010(19). Although service on other parties of record is complete when the petition is deposited in the United States mail, service on the agency is complete only when it is "delivered" to the Board. RCW 34.05.542(4).

Here, the Board did not authorize service by electronic transmission. Because e-mail is not an authorized form of service, the County did not deliver its petition for review to the Board's office by April 24, 2017. The County did not timely serve its petition for judicial review, and we do not have appellate jurisdiction over its petition for review appealing the FDO. We grant FOCC's motion to dismiss the County's petition from the Board's FDO.[7]

2. *3B's Petition Was Untimely Served*

In response to FOCC's motion to dismiss, 3B argues that it properly served the Board by sending its petition for judicial review to the Board through FedEx and that its service of the petition was complete on April 24 when it delivered its petition to FedEx. We disagree.

As discussed above, RCW 34.05.542(4) provides an exception to the general rule that service is complete upon deposit in the United States mail. RCW 34.05.010(19); *Stewart*, 191 Wn.2d at 47; *Ricketts*, 111 Wn. App. at 117-18. Under the exception, service on the agency is not complete until the petition is actually delivered to the agency's office. RCW 34.05.542(4); *see Ricketts*, 111 Wn. App. at 118. Even assuming service through a commercial parcel delivery company like FedEx was proper, 3B did not timely serve the petition because the Board did not

[7] FOCC does not argue that the County's appeal from the Board's compliance order was untimely. Accordingly, we consider the County's arguments regarding the Board's compliance order below.

receive the petition until April 25. Because 3B's petition was due to the Board by April 24, 3B did not timely serve its petition for review and we do not have appellate jurisdiction over its petition for review appealing the FDO.[8] Thus, we grant FOCC's motion to dismiss 3B's petition for judicial review from the Board's FDO.[9]

II. BOARD DECISIONS — LEGAL PRINCIPLES

Washington's APA governs our review of the Board's decisions. RCW 34.05.570(3); *Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 186 Wn.2d 648, 666, 381 P.3d 1 (2016). Under the APA, we review the Board's legal conclusions de novo, but we give "substantial weight to the Board's interpretation of the GMA." *Whatcom County*, 186 Wn.2d at 667. RCW 34.05.570(3) provides nine enumerated ways to challenge an agency action through judicial review. The parties here challenge the Board's actions under five statutory sections: (1) the Board's order is outside its statutory authority or jurisdiction; (2) the Board erroneously interpreted or applied the law; (3) the Board engaged in unlawful procedure or decision making, or has failed to follow proscribed procedures; (4) the Board's actions are not support by substantial evidence; and (5) the Board's actions are arbitrary and capricious. RCW

[8] 3B also asserts that FedEx is a proper method of service because RCW 34.05.010(19) "acknowledges the potential for service by commercial parcel delivery company, such as FedEx." Reply Br. of 3B at 3 (footnote omitted). 3B is correct that agencies may, by rule, authorize service by commercial parcel delivery company. RCW 34.05.010(19). However 3B does not provide authority establishing that the Board authorized service of petitions for judicial review by commercial parcel delivery company. Moreover, 3B concedes that the Board did not receive its petition until April 25. We do not determine whether the Board authorized service by commercial parcel delivery company because 3B's service was untimely.

[9] In light of our holding that the dedesignation and designation of the annexed UGAs issue is moot, our decision to grant FOCC's motion to dismiss 3B's appeal from the FDO has no practical bearing on this case.

34.05.570(3)(b)-(e), (i). Here, the party challenging the Board's decision bears the burden of establishing that the decision is improper. RCW 34.05.570(1)(a), (3)(d); *Whatcom County*, 186 Wn.2d at 667.

On review from initial challenges and on review following a Board's remand for compliance, the Board determines whether a county's plan is compliant with the GMA. RCW 36.70A.300(3). The Board must find compliance with the GMA "unless it determines that the action by the . . . county . . . is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(1), (3). To find a county's action clearly erroneous, the Board must be "'left with the firm and definite conviction that a mistake has been committed.'" *Whatcom County*, 186 Wn.2d at 667 (internal quotation marks omitted) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Bd.*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000)).

Counties have discretion to make many choices about accommodating growth in their comprehensive plans and amendments. RCW 36.70A.110(2). County actions are presumed compliant and Boards must defer to local planning decisions. *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 154-55, 256 P.3d 1193 (2011). However, we do not afford counties deference in their interpretations of the GMA, and counties must comply with the requirements of the GMA. *Whatcom County*, 186 Wn.2d at 667; *King County*, 142 Wn.2d at 561. Deference to a county's planning decisions supersedes the general deference we give to the Board under the APA. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). It is under these guidelines that we review the correctness of the Board's determination regarding whether the County's actions were clearly

erroneous. *Concerned Friends of Ferry County v. Ferry County*, 191 Wn. App. 803, 813, 365 P.3d 207 (2015).

We review the Board's factual findings for substantial evidence. *Kittitas County*, 172 Wn.2d at 155. Evidence is substantial if "when viewed in light of the whole record," RCW 34.05.570(3)(e), there is "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness'" of the finding. *Kittitas County*, 172 Wn.2d at 155 (quoting *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008)). When reviewing mixed questions of law and fact, we determine the law independently and apply the law to the facts found by the Board. *Thurston County*, 164 Wn.2d at 341. We consider whether the Board's factual findings support its conclusions. *Kittitas County v. Kittitas County Conserv. Coal.*, 176 Wn. App. 38, 55 n.3, 308 P.3d 745 (2013).

We determine whether a Board's order is arbitrary and capricious by reviewing "whether the order represents 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Kittitas County*, 172 Wn.2d at 155 (internal quotation marks omitted) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46-47, 959 P.2d 1091 (1998)). "Issues not raised before [the Board] may not be raised on appeal." RCW 34.05.554(1). An exception exists if "[t]he interests of justice would be served by resolution of an issue arising from . . . [a]gency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency." RCW 34.05.554(1)(d)(ii).

We conduct statutory interpretation to determine and give effect to legislative intent. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014).

Legislative intent is primarily deprived from statutory language. *Town of Woodway*, 180 Wn.2d at 173-74. When the statutory language is unambiguous, we apply the plain meaning of the statute. *Town of Woodway*, 180 Wn.2d at 174. In the absence of legislative definitions, we give statutory terms their plain and ordinary meanings as defined in the dictionary. *Lockner v. Pierce County*, 190 Wn.2d 526, 537, 415 P.3d 246 (2018). When analyzing a statute's plain language, we consider the specific text of the relevant provision, the context of the entire statute, related provisions, and the statutory scheme as a whole. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). We do not liberally construe the GMA. *Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007).

III. MOOTNESS OF UGA DESIGNATIONS RESULTING FROM ANNEXATIONS

La Center, Ridgefield, and the LLCs argue that the Board's finding of the County's noncompliance regarding the County's UGA designations is moot. Specifically, they argue that the Board (1) erroneously failed to acknowledge that the County's action regarding the UGAs was rendered moot by the annexations and (2) arbitrarily and capriciously required the County to take action regarding land no longer within its control. We hold that arguments regarding the annexed lands are moot.

A. *Facts Pertaining to the Mootness of UGA Designations Resulting from Annexations*

In the County's 2016 Plan Update, the County dedesignated areas of agricultural land adjacent to the cities of La Center and Ridgefield and designated these lands as UGAs. Both La

Center and Ridgefield annexed these adjacent UGAs into their respective cities long before the Board's hearing in February 2017.[10]

The Board concluded, in part, that the County did not comply with the GMA when it dedesignated agricultural land and designated the UGAs. Further, the Board made determinations of invalidity regarding the County's UGA designations. The Board remanded the 2016 Plan Update to the County for the County to come into compliance with the GMA.

The County did not take remedial action regarding the UGAs relevant here, arguing that it could not change the designation of the annexed land no longer within its control. The Board concluded that the County was not in compliance regarding these UGAs.

B. *GMA Compliance Legal Principles*

The Board may review comprehensive plans and their amendments for compliance with the GMA. RCW 36.70A.280. However, the Board lacks the authority to determine many types of land-related disputes. Relevant here, the Board does not have authority to review cities' land annexations. *See* RCW 36.70A.280.

The Board determines whether a county's plan is in compliance with the GMA. RCW 36.70A.300(3). When the Board determines that a plan or its amendments are flawed, it may enter a finding of noncompliance or a determination of invalidity. RCW 36.70A.300, .302. When the Board finds that the plan or its amendments are noncompliant, the Board remands the matter back to the county with instructions to comply with the GMA. RCW 36.70A.300(3)(b).

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[10] Futurewise challenged the Ridgefield annexation. We affirmed the superior court's dismissal of the challenge. *Futurewise v. City of Ridgefield*, No. 50406-5-II, slip op. at 2 (Wash. Ct. App. Jan. 29, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/D2%2050406-5-II%20Unpublished%20Opinion.pdf.

A plan or its amendments remain valid during the remand period following the Board's noncompliance finding. RCW 36.70A.300(4); *Town of Woodway*, 180 Wn.2d at 174.

When the Board finds that the plan or its amendments are invalid, the Board must (1) find noncompliance and remand the plan back to the county and (2) enter a determination of invalidity supported by findings of fact and conclusions of law. RCW 36.70A.302(1)(a), (b). This invalidity determination must conclude that the flawed provision of the plan or its amendments substantially interfere with the goals of the GMA. RCW 36.70A.302(1)(b). "Upon a finding of invalidity, the underlying provision would be rendered void." *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 138 Wn.2d 161, 181, 979 P.2d 374 (1999).

Significantly, an updated plan is presumed to be valid upon adoption. RCW 36.70A.320(1). In addition, a finding of invalidity is "prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county." RCW 36.70A.302(2). A finding of invalidity does not apply to certain vested rights, namely development permit applications. RCW 36.70A.302(2)-(3).

C. *The Board's Final Decision Order Is Prospective*

Here, the Board made a determination of invalidity regarding the UGAs. The Board made related findings of fact and conclusions of law that the County's 2016 Plan Update did not comply with the GMA and determined that the UGAs for La Center, Ridgefield, and Battle Ground were invalid. This determination rendered the UGA provisions void. *King County*, 138 Wn.2d at 181.

The parties disagree as to the retroactivity of the determination of invalidity regarding the UGA provisions. FOCC argues that the UGA provisions are essentially "void ab initio," or "null

from the beginning," and thus, we should unwind Ridgefield's and La Center's annexations of the UGAs to return the lands to their prior designations and jurisdiction under the County. Br. of FOCC at 12. Conversely, the cities and the LLCs argue that the UGAs are void beginning from the date of the Board's order. We hold that the Board's order is prospective from the date of the order.

RCW 36.70A.302(2) plainly states that "[a] determination of invalidity is prospective in effect." Prospective means "concerned with or relating to the future: effective in the future." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1821 (2002). Here, the language of RCW 36.70A.302(2) is clear and unequivocal. A determination of invalidity is effective going forward from the date of the order. A determination of invalidity cannot alter whatever occurred prior to the Board's rendering of its decision.

D. *The County Lacks Authority Over the Annexed UGAs*

The cities and LLCs argue that given that a determination of invalidity is prospective only, the UGA issues are moot because the UGAs were annexed by the respective cities before the Board's determination of invalidity. Thus, the annexations deprived the Board and the County of authority to act, and consequently, the determination cannot have any legal effect. We agree.

1. *Mootness Following Annexation Legal Principles*

An issue is moot if the court can no longer provide effective relief. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010). "The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of

litigation have forestalled any occasion for meaningful relief." *SEIU Healthcare 775NW*, 168 Wn.2d at 602 (internal marks omitted).

After land contiguous to a city has been designated UGA, that city may annex that contiguous land. RCW 35.13.005, .010. Article XI, section 11 of the Washington Constitution states, "Any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." RCW 35.63.080 authorizes a city council, board, or commissioners to prepare, adopt, and enforce plans for the physical development of the municipality.

All three regions of the growth management hearings board have examined this question and have held that after a city annexes land, that land is no longer within the county's jurisdiction. For example, in *Panesko v. Lewis County*, Lewis County expanded a UGA to include certain rural lands. No. 08-2-0007c, 2009 WL 2981888, at *5 (W. Wash. Growth Mgmt. Hr'gs Bd. July 27, 2009). The City of Toledo successfully annexed this UGA land four months before the Board issued its FDO regarding Lewis County's compliance with the GMA. *Panesko*, at *1, *5-6. In reviewing Lewis County's compliance with the GMA following a remand period, the Board stated:

> It is unfortunate that the [UGA] was annexed in the midst of a proceeding to consider its designation as agricultural land of long term commercial significance. Nevertheless, the Board finds nothing egregious in the County's conduct. . . . The Board has no jurisdiction in the realm of municipal annexations. Further, now that the [UGA] has been annexed by the City of Toledo, the issue of whether this property should be included as part of the UGA is moot.
>
> *Conclusion*: The City of Toledo having annexed the [UGA], the land is no longer subject to the County's jurisdiction. The County having no ability to consider or alter the designation of this property as agricultural land of long term commercial significance, it need not take any further action in that regard.

Panesko, at *6 (footnotes omitted).

In *1000 Friends of Washington v. Snohomish County*, Snohomish County dedesignated an area called Island Crossing as agricultural and instead designated it as UGA. No. 03-3-0019c, 2009 WL 795934, at *1 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Feb. 19, 2009). The Board found these designations noncompliant with the GMA. *1000 Friends of Washington* at *1. After our Supreme Court reversed the Board's determination, the City of Arlington annexed the Island Crossing UGA. *1000 Friends of Washington*, at *2. On remand, the Board determined that "the sole question for the Board was whether the County had already taken steps to adjust its future land-use map and zoning designations in the Island Crossing area." *1000 Friends of Washington*, at *2. The Board concluded, "Given that the Island Crossing area has been annexed by the City of Arlington and is no longer within the jurisdiction of Snohomish County, the Board concludes that a remand back to the County would be an empty act. The 'urban' land in question is now the City of Arlington's to govern." *1000 Friends of Washington*, at *3.

In *Futurewise v. Benton County*, Futurewise argued that the Board should impose a determination of invalidity regarding Benton County's dedesignation of agricultural land that the County redesignated as UGA near the City of Kennewick. No. 14-1-0003, 2015 WL 999266, at *1-2 (E. Wash. Growth Mgmt. Hr'gs Bd. Jan. 15, 2015). In its FDO, the Board determined that these designations were not compliant with the GMA but did not issue a determination of invalidity. *Futurewise*, at *1. Futurewise argued that without a determination of invalidity, the UGA "could be quickly annexed to the City of Kennewick mooting the Board's Final Decision and Order." *Futurewise*, at *2. The Board stated that annexing the land would indeed

"effectively moot the Board's Final Decision and Order." *Futurewise*, at *3. In granting Futurewise's request for a determination of invalidity, the Board stated that it "heard concerns expressed at the hearing that a landowner-initiated annexation petition action might circumvent the GMA compliance process and render compliance actions moot. The Board notes that in the absence of an invalidity order, petitioners have little remedy if an annexation of this property was accomplished." *Futurewise*, at *4.

This is not the first time Clark County has created this circumstance. In 2007, Clark County dedesignated agricultural lands and redesignated these lands as UGA, including lands near the cities of Camas and Ridgefield. *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204, 214, 254 P.3d 862 (2011) *vacated in part by Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 177 Wn.2d 136, 142-43, 148, 298 P.3d 704 (2013). Challengers, including Futurewise, petitioned the Board to review the County's compliance with the GMA. *Clark County*, 161 Wn. App. at 214. Before the Board issued its FDO, Camas and Ridgefield passed ordinances annexing UGA lands. *Clark County*, 161 Wn. App. at 214. Without notice of the annexations, the Board determined that the County's designations of the annexed lands were noncompliant with the GMA and invalid. *Clark County*, 161 Wn. App. at 215. However, after learning of the annexations, the Board issued an order stating that it lacked jurisdiction over the annexed lands. *Clark County*, 161 Wn. App. at 220.

We held that because the County's comprehensive plan amendments were pending review, the amendments were not final and parties could not act in reliance on them. *Clark County*, 161 Wn. App. at 224-25. We further held that the legislature did not intend to allow a county to evade review of their planning decisions by making a UGA designation followed by an

immediate annexation. *Clark County*, 161 Wn. App. at 225. Accordingly, we held that the annexations did not preclude the Board's jurisdiction to review the validity of the County's actions regarding the annexed lands. *Clark County*, 161 Wn. App. at 225-26.

Our Supreme Court vacated our decision regarding the annexed lands. *Clark County*, 177 Wn.2d at 148. The Supreme Court held that because the parties had not appealed issues regarding the annexed lands and because the annexed lands had no bearing on the resolution of claims on appeal, it was error to address issues relating to the annexed lands. *Clark County*, 177 Wn.2d at 148. Moreover, Justice Stephens concurred in reversing our opinion, joined by Justice Wiggins, stating:

> I would dismiss the claims challenging the annexation as moot in the context of this proceeding. The claims in question originated in a petition to the [Board] challenging Clark County's designation of certain lands under the [GMA]. The cities of Camas and Ridgefield have annexed the lands in question, and those annexations cannot be challenged in these proceedings. As a result, the question of whether the Board properly reviewed Clark County's prior designation of the annexed lands is moot. Dismissal should follow. *See Seguin v. Barei*, 163 Wn. 702, 703, 299 P. 655 (1931) (dismissing appeal where underlying interest in disputed property was dissolved in separate proceeding).

Clark County, 177 Wn.2d at 149 (Stephens, J. concurring).

2. *Issues Regarding La Center's and Ridgefield's Annexed Lands Are Moot*

Issues regarding the annexed lands are moot because the Board can provide no effective relief. The Board's role is to determine whether the County is in compliance with the GMA. RCW 36.70A.300(1). However, after land contiguous to a city has been designated UGA, that city may annex that contiguous land. RCW 35.13.005, .010. Once that land has been annexed, it is within the city's sole jurisdiction. WASH. CONST. art. XI, § 11; RCW 35.63.080. As a result, when La Center and Ridgefield annexed previously unincorporated land into their municipalities,

the County lost its ability to plan for that land. RCW 35.63.080; 35A.11.020. The Board cannot compel the County to take action to come into compliance regarding land the County does not control. Such compulsion is beyond the quasijudicial powers of the Board. *See* RCW 36.70A.300(1).

FOCC compares this case to *Miotke v. Spokane County*, 181 Wn. App. 369, 325 P.3d 434 (2014). However, *Miotke* is distinguishable. In *Miotke*, Spokane County designated a UGA that was not subsequently annexed. *Miotke*, 181 Wn. App. at 373-75. While the Board reviewed the designation, development rights of property owners vested in the new UGA. *Miotke*, 181 Wn. App. at 373. The Board found the UGA designation noncompliant with the GMA. *Miotke*, 181 Wn. App. at 373. In an attempt to comply, Spokane County repealed the UGA designation and reverted the land to its prior designation. *Miotke*, 181 Wn. App. at 374.

On appeal, Spokane County argued that the vested urban development rights of the landowners in the former UGA prevented it from complying with the GMA. *Miotke*, 181 Wn. App. at 379. We held that the vested rights of property owners did not relieve Spokane County from its planning obligations under the GMA. *Miotke*, 181 Wn. App. at 379. Rather, it was Spokane County's designation of the UGA that created the opportunity for vested rights, and Spokane County was responsible for GMA compliance in its planning decisions. *Miotke*, 181 Wn. App. at 379-80.

Miotke is distinguishable because the disputed land *always* remained within the jurisdiction of Spokane County's comprehensive plan. *Miotke*, 181 Wn. App. at 373-75. Because of this, the Board retained the power to determine the county's compliance with the GMA. *Miotke*, 181 Wn. App. at 379-80.

Here, because of the prospective nature of the Board's determination of invalidity, the County cannot exercise authority over annexed land no longer within its control. As a result, issues regarding the annexed lands are moot.[11,12]

In this published portion of our opinion, we grant FOCC's motion to dismiss the County's and 3B's petitions for lack of appellate jurisdiction. Further, we hold that issues regarding the annexed lands are moot. In the unpublished portion of this opinion, we hold that the Board did not err regarding the remaining issues raised by CCCU and FOCC. We remand back to the Board for further proceedings in accordance with this opinion.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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[11] We note that the County and cities have previously engaged in a pattern of UGA designation followed by swift annexation. *Clark County*, 161 Wn. App. at 225. Moreover, at oral argument, FOCC showed us a map of the UGA annexed by La Center. Wash. Court of Appeals oral argument, *Friends of Clark County and Futurewise v. Clark County, et al*, No. 50847-8-II (July 3, 2019), at 21 min., 53 sec. (on file with court). The UGA had irregular borders that followed specific property lines. Additionally, in its compliance order, the Board noted the County's repeated evasion of GMA compliance review in previous instances where cities had rapidly annexed UGAs. Regardless of the validity of any questionable behavior, this is an issue for the legislature.

[12] FOCC argues that the prospectivity of RCW 36.70A.302(2) is confined to only vested rights. However, the plain language of RCW 36.70A.302(2) does not confine the prospective of a determination of invalidity to vested rights. Further, RCW 36.70A.302 provides guidance regarding the effects of determinations of invalidity on savings clauses, interim ordinances, as well as property rights. We reject FOCC's attempt to construe RCW 36.70A.302(2) more narrowly than the language provides.

IV. AGRICULTURAL DEDESIGNATION RESULTING FROM RILB DESIGNATION

The County argues that the Board misinterpreted and misapplied the law, and made decisions unsupported by substantial evidence, when it found the County's dedesignation of agricultural land to establish a RILB violated the GMA. The Board concluded that the County failed to comply with the GMA by not conducting a countywide or area-wide analysis of the economic viability of the agricultural industry of the county. The Board further determined that the RILB site met the agricultural resource land requirements.

The County is the only party that appeals these provisions of the FDO. As stated above, we grant FOCC's motion to dismiss the County's petition for judicial review of the FDO. Thus we do not address this argument.[13]

V. PUBLIC PARTICIPATION

CCCU argues[14] that the Board erred by dismissing its arguments that the County violated its public participation program when it (1) finalized Issue Paper 9, a document used to support the 2016 Plan Update, after voting to approve the plan amendment; (2) began the amendment process before adopting a public participation program by using reports adopted years before the

[13] Even if we were to consider this argument, our review of the record here reveals that the Board did not err.

[14] CCCU's approach to assigning error is challenged by other parties. CCCU acknowledges that it does not assign error to any of the Board's findings of fact, stating that, "the Board did conclude most of its analyses of the various issues as the 'Board finds and concludes . . .' CCCU does not believe these are findings of fact, but are legal conclusions that do not require a separate assignment of error." Br. of CCCU at 1-2 n.2 (citation omitted). We agree and consider CCCU's arguments because there are no clear findings of fact contained in the FDO regarding the portions of the FDO that CCCU challenges.

amendment process; (3) did not adequately respond to public comments; and (4) excluded rural landowners from participating in the amendment process.[15] We hold that Board did not err when it dismissed CCCU's public participation arguments.

A. *Facts Pertaining to the County's Public Participation Efforts*

A county planning under the GMA must establish a "public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans." RCW 36.70A.140.

In response to this GMA mandate, the County enacted an ordinance codifying its general PPP for GMA actions requiring notice and public hearings for planning related actions. CLARK COUNTY CODE 40.510.040. At the time of this litigation, the general PPP provisions were last amended in 2007.

In 2014, the Clark County Council passed an additional ordinance detailing its 2016 Plan Update (Plan Update PPP). The Plan Update PPP detailed the steps the County intended to take to ensure public participation. The Plan Update PPP facilitated public participation through the use of public meetings and workshops, a notification system for planning meetings and events, utilization of a "robust website" containing planning documents and schedules, and strategies for contacting interested parties and stakeholders, neighborhood associations, and news outlets. AR at 4593. This "robust website" provided the public access to potential plan amendments and

[15] CCCU's briefing argues that the *County* violated the GMA regarding public participation, not that the Board erred when determining that the County complied with the GMA regarding public participation. *See, e.g.*, Br. of CCCU at 18, 24 ("The County violated the GMA." "The County completely failed to respond to public comments.") Here, CCCU has the obligation to argue how and why *the Board* erred. Where applicable, we reframe CCCU's arguments to correctly reflect CCCU's burden.

supporting documents, past and future meeting information, and surveys to solicit citizen responses.

During the 2016 Plan Update process, the County held over thirty public hearings regarding the 2016 Plan Update. The County also held ten open houses and public meetings throughout the county. Further, the County provided opportunity for public comment through multiple countywide online surveys. The County communicated with its citizens in person and through newspaper, e-mail, mail, and television. This communication included sessions with a CCCU member actively participating in conversations with the County. The County received more than 3,000 public responses during the 2016 Plan Update process, of which over 1,100 were from individuals or groups with interests in rural or resource lands.

One of CCCU's claims in its petition for review to the Board was that the County failed to adhere to its Plan Update PPP and the public participation requirements of the GMA. The Board dismissed all of CCCU's public participation arguments, and concluded that the County complied the GMA in this respect.

B. *Issue Paper 9*

CCCU argues that the County violated the GMA because Issue Paper 9[16] was finalized after the 2016 Plan Update was approved. Specifically, CCCU argues that Issue Paper 9 was completed on June 23, 2016, two days after the County adopted the 2016 Plan Update. CCCU contends that the June 21, 2016 adoption of the 2016 Plan Update precluded public participation

[16] Issue Paper 9 is "Clark County Agricultural and Forest Land Supplemental Mapping and Data Analysis." AR at 6916. Issue Paper 9 updated a 2012 rural lands study based on new information and reviewed literature regarding agricultural trends.

regarding Issue Paper 9. Because substantial evidence supports that the County did not adopt the 2016 Plan Update until June 28, 2016, we hold that the Board did not err when it dismissed these arguments.

We review the Board's factual findings for substantial evidence. *Kittitas County*, 172 Wn.2d at 155. Evidence is substantial if a quantity of evidence is sufficient to persuade a fair-minded person of the truth of the finding. *Kittitas County*, 172 Wn.2d at 155. The challenging party has the burden of showing that the Board's decision is unsupported by substantial evidence. RCW 34.05.570(1)(a).

When CCCU raised this argument below, the Board found that the County adopted the 2016 Plan Update (Amended Ordinance No. 2016-06-12) on June 28, 2016. Although the Board located an ordinance from June 21 in the administrative record, that ordinance was never signed into law. Rather, the record shows that the County adopted Amended Ordinance No. 2016-06-12 on June 28, 2016. The Board's finding that the County adopted the 2016 Plan Update on June 28, 2016, after Issue Paper 9 had been finalized, is supported by substantial evidence. Further, CCCU fails to show that the Board erred regarding the public's opportunity to comment on Issue Paper 9. Citizens had the opportunity to comment on Issue Paper 9 at a June 21, 2016 meeting, and at least one citizen commented on Issue Paper 9 by e-mail. We hold that the Board did not err in dismissing CCCU's argument that the County violated the GMA regarding Issue Paper 9.

C. *County's Use of Source Documents*

CCCU argues that the County violated the GMA when it began the 2016 Plan Update process by using source documents from 2009 to 2012 to support the 2016 Plan Update.[17] Specifically, CCCU argues that because these source documents precede the County's adoption of the Plan Update PPP in 2014, the use of the older reports violated the GMA's public participation requirements. We hold that the Board did not err when it dismissed these arguments.

As discussed above, county or city planning under the GMA must establish a public participation program. RCW 36.70A.140. The procedures identified in the PPP must provide for broad dissemination of proposals, opportunity for written comments, public meetings after effective notice, open discussion, communication programs, information services, and consideration of and response to public comments. RCW 36.70A.140. However, inexact compliance with the established public participation program and procedures does not invalidate a comprehensive plan "if the spirit of the program and procedures is observed." RCW 36.70A.140.

WAC 365-196-600 expands on the GMA's public participation requirements, and offers suggestions to cities and counties to best allow for public participation. Relevant here, this rule recommends, "Whenever a provision of the comprehensive plan . . . is based on factual data, a clear reference to its source should be made part of the adoption record." WAC 365-196-600(2)(a).

[17] CCCU cites the following documents: (1) Agriculture Preservation Strategies Report, (2) Clark County Bicycle and Pedestrian Plan, (3) Aging Readiness Plan, and (4) Growing Healthier Report.

The Board found that the County had not violated RCW 36.70A.140, because the County complied with the statute by adopting the Plan Update PPP. CCCU argues that the use of older source documents violates the GMA under RCW 36.70A.140 and the general principles that the GMA require public participation. The County argues that the use of these underlying source documents is based on WAC 365-196-600(2)'s citation for factual data suggestion, and that these older source documents were publicly reviewed and considered previously.

Although the GMA mandates that a county must make a public participation program, CCCU does not identify, and we could not find, any GMA provision that mandates the underlying source documents to be subject to a county's PPP. "'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 296-97, 381 P.3d 95 (2016) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Moreover, the public was provided with opportunity to comment on the source documents when commenting on the 2016 Plan Update. We hold that the Board did not err when dismissing CCCU's argument regarding source documents supporting the 2016 Plan Update.

D. *Record of and Response to Public Comments*

CCCU argues that the County "failed to respond to public comments and maintained an incomplete public record" during and after the planning process. Br. of CCCU at 24. We hold that the Board did not err in dismissing these arguments.

The public participation "procedures shall provide for . . . consideration of and response to public comments." RCW 36.70A.140. WAC 365-196-600(8) provides further guidance. The rule, in part, states:

> Consideration of and response to public comments. All public comments should be reviewed. Adequate time should be provided between the public hearing and the date of adoption for all or any part of the comprehensive plan to evaluate and respond to public comments. The county or city should provide a written summary of all public comments with a specific response and explanation for any subsequent action taken based on the public comments. This written summary should be included in the record of adoption for the plan.

WAC 365-196-600(8)(a).

Although chapter 365-196 WAC provides some procedural guidelines, compliance with these procedures "is not a prerequisite for compliance with the act." WAC 365-196-030(2). The Board's compliance determination must be based on a violation of the GMA itself. WAC 365-196-030(3). Chapter 365-196 WAC does not create a minimum list of criteria for procedural compliance with the GMA. Rather, counties "can achieve compliance . . . by adopting other approaches." WAC 365-196-030(2).

As used in chapter 365-196 WAC, "shall" means "a requirement for compliance with the act" and has the same meaning as "must." WAC 365-196-210(29). Conversely, "should" is "the advice of the department, but does not indicate a requirement for compliance with the act." WAC 365-196-210(30).

CCCU cites *Larson Beach Neighbors v. Stevens County*, No. 03-1-0003, 2004 WL 3404211, at *9 (E. Wash. Growth Mgmt. Hr'gs Bd. Feb. 10, 2004), and *Loon Lake Property Owners Ass'n v. Stevens County*, No. 03-1-0006c, 2004 WL 2624883 at *5 (E. Wash. Growth Mgmt. Hr'gs Bd. Oct. 15, 2004), for the proposition that in the GMA context, "should" conveys

a mandatory duty. CCCU misconstrues these Board decisions. *Larson* addresses language in a county's PPP that required review of all public comments but that the county "may" respond to comments in writing or verbally. *Larson*, at *8. The Board concluded that the county's PPP created a mandatory requirement to respond with an option of how to fulfill that requirement. *Larson*, at *9. Here, the County's lack of mandatory language in its 2016 Update PPP distinguishes *Larson*.

In *Loon Lake*, the Board found that the county failed to respond to public comments. At *5. After a compliance remand, a challenger wanted the Board to interpret its FDO to force the county to reopen the record to respond to public comments. *Loon Lake*, at *5. The Board stated that there was no reason to reopen to record, and that the county had created a "summary of public comments and the County's response thereto in accordance with the requirements of WAC 365-195-600." *Loon Lake*, at *6. Procedurally, *Loon Lake* addressed a Board's remedies during the period for remand and compliance. The Board referenced the county's previous actions regarding public comments to hold that the challenger did not show that reopening the record was necessary. *Loon Lake*, at *6. *Loon Lake* is distinguishable because here, CCCU's arguments are based on the FDO, not the compliance order. Neither of these Board decisions conflict with the explicit permissive language in chapter 365-196 WAC.

The Plan Update PPP provides a variety of methods and mediums the County was to use to provide the public with information and an opportunity to participate. The plain language of RCW 36.70A.140 states that a county's PPP shall provide for the response to public comment. Although the 2016 Plan Update PPP mentions public review and response to comments, it does not require the County to respond to all comments. Moreover, inexact compliance with the

established public participation program and procedures does not invalidate a comprehensive plan "if the spirit of the program and procedures is observed." RCW 36.70A.140.

The record shows that the County considered and responded to a large number of public comments. The County heard citizens at meetings and open houses, received e-mails, collected responses from surveys, and held meetings with various interested parties. The GMA does not require the County to formally consider and respond to all public comments.

CCCU also argues that the County maintained an incomplete record of the public comments it received during the 2016 Plan Update. Similarly, CCCU's argument is based on the permissive WAC 365-196-600(8)(a) rather than mandatory GMA provisions. The plain language of RCW 36.70A.140 does not require a county to index and maintain a record with every single comment offered during the planning process. We hold that the Board did not err when it dismissed CCCU's arguments that the County failed to respond to public comments and maintained an incomplete public record during and after the planning process.

E. *County's Use of Internet*

CCCU argues that the County's 2016 Plan Update PPP's reliance on internet communication excluded rural citizens, thus violating the GMA. The Board dismissed CCCU's argument. We hold that the Board did not err.

RCW 36.70A.035(1) mandates public participation requirements that are "reasonably calculated to provide notice to property owners and other affected and interested individuals." RCW 36.70A.035(1) lists specific examples of "reasonable notice provisions," including "[p]ublishing notice in a newspaper, [n]otifying public or private groups with known interest in a

certain proposal, and [p]ublishing notice in agency newsletters or sending notice to agency mailing lists." In addition, WAC 365-196-600(4)-(5) states:

> (4) Each county or city should try to involve a broad cross-section of the community, so groups not previously involved in planning become involved.
>
> (5) Counties and cities should take a broad view of public participation. The act contains no requirements or qualifications that an individual must meet in order to participate in the public process. If an individual or organization chooses to participate, it is an interested party for purposes of public participation.

CCCU argues that the County violated WAC 365-196-600(4)-(5) by failing to use noninternet based communication to include rural citizens in the 2016 Plan Update process. CCCU argues that rural citizens would be less likely to use the County's online portal that provided the public access to potential plan amendments and supporting documents, past and future meeting information, and surveys to solicit citizen responses.

In addition to the County's plan update website, the County disseminated information to its citizens through a number of mediums. The County communicated through e-mail, mail, newspaper, television. CCCU fails to show how the County's use of multiple mediums failed to include rural citizens. We hold that the Board did not err when it dismissed CCCU's argument that the County's Plan Update PPP's reliance on internet communication excluded rural citizens.

VI. Designation of Agricultural and Forestlands Capable of Long Term Commercial Production

CCCU argues that the County violated the GMA regarding its designation of agricultural and forestlands capable of long term commercial production. Specifically, CCCU argues that the County incorrectly relied on Issue Paper 9, which used "data layers" in addition to United States Department of Agriculture Natural Resources Conservation Service (NRCS) standards. CCCU

argues that the Board's acceptance of the County's Issue Paper 9 was arbitrary and capricious. We hold that Board did not err by dismissing this argument.[18]

In its comprehensive plan, a county designates eligible land as agricultural or forestlands capable of long term commercial production. RCW 36.70A.070(1). One factor counties consider when designating lands for these purposes is soil composition. WAC 365-190-050(3)(b)(ii). Counties are to use soil data from NRCS. WAC 365-190-050(3)(b)(ii).

In the designation process here, the County used soil data from NRCS as well as other data. The Board found and concluded, "The County used the NRCS layer and other data; nothing in the WAC precludes them from using other data, as long as they use NRCS data as well. CCCU's claim about data layers is dismissed." AR at 10510.

When considering land for designation as agricultural resource land, counties consider three factors, including the land's capability of use for agricultural production. WAC 365-190-050(3)(b). This includes using data from NRCS. WAC 365-190-050(3)(b)(ii) states:

> In determining whether lands are used or capable of being used for agricultural production, counties and cities shall use the land-capability classification system of [NRCS] as defined in relevant Field Office Technical Guides. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys, and are based on the growing capacity, productivity and soil composition of the land.

[18] Preliminarily, the County argues that this issue is not before the court because the County did not amend any part of the comprehensive plan to designate any agricultural or forest lands. Further, the County argues that any designations of agricultural or forest lands occurred in prior plan amendments, more than 60 days before CCCU filed its petition to the Board. In reply, CCCU cites to a different portion of the Board's FDO that analyzes the dedesignation of agricultural lands to support its contention that the County made agricultural and forest land designations. Although the County raised this argument to the Board, the Board did not address it; instead it reached the merits of CCCU's data layers argument. We address the merits of CCCU's argument in the interest of fairness.

Here, CCCU is not arguing that the County did not use the NRCS data. Rather, CCCU argues that the County's use of data in addition to the NRCS data violated the GMA and the rule.[19] But the rule does not prohibit a county's use of additional data to determine the agricultural capability of lands; the rule merely requires counties to use the NRCS data. CCCU acknowledges that the County indeed used the NRCS data. We hold that the Board did not err when concluding that WAC 365-190-050(3)(b)(ii) does not preclude the use of data in addition to the NRCS data.

VII. REDUCING MINIMAL PARCEL SIZES FOR AGRICULTURAL AND FORESTRY LANDS

CCCU argues that the Board erred in concluding the reduction of agricultural and forestland parcel sizes violated the GMA. Specifically, CCCU argues that the Board applied the incorrect legal standard. Further, CCCU argues that even if the Board applied the correct legal standard, its decision is not supported by substantial evidence. We disagree.

During the 2016 Plan Update, the County reduced agricultural land parcel sizes from 20 acres to 10 acres and forestry land from 40 acres to 20 acres. FOCC argued to the Board that these parcel size reductions violated the GMA. FOCC placed multiple peer-reviewed articles in the record. These articles conclude that the minimum parcel size necessary to conserve agricultural and forestlands must be at least 20 to 40 acre parcels. Further, the County's Issue

[19] CCCU references an e-mail where a County planner used the term "data layers" to argue that the NRCS classification system did not produce the result the County wanted, so the County used some unspecified "data layers" to come to a better result. However, CCCU does not cite to anything in the record to support its allegation that the County was using extra data sources to skew land designations, nor does CCCU show us how the alleged use of these "data layers" gave a result different than NRCS data.

Paper 9 stated that very small and small farms produce little income and are mostly supported by nonfarm income. The Board examined minimum parcel sizes in other regions of Washington and other states to conclude that allowing 20 acre parcels in Clark County would not preserve the agricultural industry. The Board found the County noncompliant regarding these parcel size reductions.

After a county designates land as agricultural or forestland, the GMA requires the adoption of regulations to assure the conservation of these lands. RCW 36.70A.060(1)(a). Specifically, a county shall adopt regulations "to assure the conservation of agricultural, forest, and mineral resource lands." RCW 36.70A.060(1)(a). These regulations shall "assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use . . . of these designated lands for the production of food, agricultural products, or timber." RCW 36.70A.060(1)(a). Counties have a duty to designate and conserve these agricultural and forestlands to assure the preservation and development of these industries. *King County*, 142 Wn.2d at 558.

CCCU argues that the Board used the "assure" language to improperly shift the burden to the County to prove it was conserving agricultural and forestlands. Instead, CCCU argues, the burden belonged to the challenger, FOCC, when FOCC contested the County's GMA compliance regarding parcel sizes.

CCCU's statement of the burden is correct. RCW 34.05.570(1)(a). However, the Board did not improperly shift the burden to the County to prove the 2016 Plan Update conserved agricultural and forestlands. Rather, the Board held that FOCC bore and met its burden of

showing that that the reduction of parcel sizes was clearly erroneous. We hold that the Board did not err in this regard.

Further, CCCU argues that the Board should have deferred to the County when it reduced the parcel sizes. Although we defer to a county for planning decisions, this deference must remain within the bounds of the GMA. *King County*, 142 Wn.2d at 561. FOCC's evidence overcame the deference to the County.

Alternatively, CCCU argues that the Board's decision is not supported by substantial evidence. CCCU bears the burden of showing that the Board's decision is unsupported. RCW 34.05.570(1)(a). In the 2016 Plan Update, the County reduced agricultural land parcel sizes from 20 acres to 10 acres and forestry land from 40 acres to 20 acres. FOCC argued to the Board that these parcel size reductions violated the GMA. The Board agreed and found the County noncompliant regarding these parcel size reductions. The Board examined the County's Issue Paper 9 as well as articles and studies submitted by FOCC. After reviewing the articles and Issue Paper 9, the Board found that FOCC carried its burden to prove that reducing parcel sizes was clearly erroneous.

We hold that there is sufficient evidence in the record to persuade a fair-minded person that the Board did not err when concluding that of the County's attempt to reduce agricultural and forestland parcel sizes was clearly erroneous under the GMA. The Board relied on multiple peer-reviewed articles to conclude that the minimum parcel size necessary to conserve agricultural and forestlands was at least 20 to 40 acre parcels. Further, the Board relied on the County's Issue Paper 9 that very small and small farms produce little income and are mostly supported by nonfarm income. The Board examined minimum parcel sizes in other regions to

conclude that reduced parcel sizes would not preserve the agricultural industry. Substantial evidence supports the Board's conclusion that reducing the parcel sizes for agricultural and forestry lands was clearly erroneous and violated the GMA. We hold that the Board did not err when it ruled that the reduction of parcel sizes was clearly erroneous.

VIII. Office of Financial Management Population Projection

CCCU argues that the "the County failed to plan for the likely population growth, by choosing a metric that is historically too low, when another [Office of Financial Management (OFM)] projection was readily available." Br. of CCCU at 34. We hold that the Board did not err when it dismissed this argument.

The GMA requires counties to use population projections from the OFM for their comprehensive plans and amendments. RCW 36.70A.110(2). For the 2016 Plan Update, the OFM offered three population projections: high (681,135), medium (562,207), and low (459,617). The County chose the medium population projection. In 2015 and during the update process, OFM released its annual population and growth rate for the County, estimating the County's 2014 population to be approximately 451,000 and growing at a rate higher than the 2016 Plan Update projected.

Counties are required to use twenty-year population projections from the OFM for their growth management comprehensive plans and amendments. RCW 36.70A.110(2). The legislature requires OFM to prepare the population projections and entrusts counties to plan based on these OFM projections. *Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 188 Wn. App. 467, 485, 353 P.3d 680 (2015). The OFM is required to provide counties with a high, middle, and low population projection number for their planning processes. RCW 43.62.035.

The middle projection represents the most likely population projection. RCW 43.62.035. Counties have discretion to make many choices about accommodating growth in their comprehensive plans and amendments. RCW 36.70A.110(2). Separately, the OFM is also required to provide counties with their annual population numbers and their growth rates for the preceding ten years. RCW 43.62.035.

Here, CCCU does not articulate specifically how it is challenging the Board's decision. Assuming that CCCU is arguing the Board erred in approving the County's selection because the middle projection was clearly erroneous, we disagree. The OFM offered three population projections: high (681,135), medium (562,207), and low (459,617). The County chose the medium population projection. Choosing any of the three offered OFM population projections was within the County's discretion under RCW 36.70A.110(2). *See Spokane County*, 188 Wn. App. at 485. As a result, the Board did not err when it concluded that the County did not violate the GMA when choosing a population projection.

Additionally, CCCU argues that the County failed to revise population projections when the OFM updated the County's annual population number in 2015. However, the annual population number is separate from the OFM's required twenty-year growth management projections. RCW 43.62.035. Because the County used the required population projections in its 2016 Plan Update, we hold that the Board did not err regarding the OFM population projections.

IX. Rural Growth Projections

CCCU argues that the County violated the GMA by using arbitrary and capricious population projections that impermissibly capped rural growth. The Board dismissed CCCU's arguments. We hold that the Board did not err.

To plan for rural growth in the 2016 Plan Update, the County made planning assumptions derived from a rural vacant buildable lands model. CCCU argued that this model "capped" rural growth or, stated another way, planned in a way that limited growth in rural lands. AR at 10515. The Board held that nothing prevented the County from using urban models to project rural growth.

RCW 36.70A.110(2) states, in part, "Based upon the growth management population projection made for the county by the office of financial management, the county . . . shall include areas and densities sufficient to permit the *urban* growth that is projected to occur in the county or city for the succeeding twenty-year period." (Emphasis added.)

CCCU cites extensively to *Clark County Citizens United, Inc. v. Clark County Natural Resource Council*, 94 Wn. App. 670, 972 P.2d 941 (1999) for the proposition that the GMA prohibits the use of population projection techniques developed for urban areas in rural areas. That case did not so hold. In *Clark County Citizens United*, we considered whether a county must use OFM's population projections as a cap on rural growth. 94 Wn. App. at 675. We held that, "nothing in the GMA provides that a county must use OFM's population projections as a cap or ceiling when planning for non-urban growth." *Clark County Citizens United*, 94 Wn. App. at 676. We noted, "Without so holding, we assume that the GMA *permits* a county to use OFM's population projections when planning for lands outside its urban growth areas. That

question is not presented by this appeal." *Clark County Citizens United*, 94 Wn. App. at 676 n.23.

CCCU argues that "it has been decisively settled that the use of population projections developed for urban area planning cannot lawfully be employed to project or plan for rural growth." Br. of CCCU at 37. As shown above, CCCU is incorrect.

In fact, CCCU does not identify any authority that prevents the use of OFM population projections for rural growth. Further, RCW 36.70A.110(2) regulates urban population projections, not rural. We hold that CCCU fails to show how the Board erred when determining that the County did not violate the GMA regarding its rural growth projections.

For the first time in its reply brief, CCCU contests the County's actions under RCW 36.70A.115. RCW 36.70A.115 requires counties to ensure there is sufficient land capacity for development. However, CCCU neither raised this issue to the Board nor in its opening brief. Because we do not address issues not raised to the Board, RCW 34.05.554(1), we decline to address this argument.

X. Rural Population Distribution and Growth Projection

CCCU argues that the Board erred when it dismissed CCCU's argument that the County violated the GMA when it failed to define rural character and also when it used a 90 percent urban, 10 percent rural population projection for the 2016 Plan Update. Specifically, CCCU argues that the County failed to define "rural character" in the 2016 Plan Update and that because the County did not define "rural character" it cannot justify the 90/10 population distribution. Br. of CCCU at 43. Below, the Board dismissed CCCU's argument. We hold that the Board did not err.

Counties should adopt a definition of rural character. WAC 365-196-425(2)(c). The 2016 Plan Update states:

> In Clark County, the rural area represents a lifestyle based on historical development patterns and resource-based industries such as commercial forestry, Christmas trees, dairies, berry farming, orchards and mining. Today much of the county's rural lands include a mix of resource, small commercial, recreational and residential uses.
>
> No single attribute describes the rural landscape. Instead combinations of characteristics which are found in rural settings impart the sense of what we commonly describe as rural. These factors are cumulative in nature and the more of these factors that are present influence feelings of whether a particular area is rural. In many cases these characteristics are subjective and frequently not all of them are found in each area. When describing rural conditions the public will often describe these areas in terms of a certain lifestyle. The factors listed below are those that usually describe "rural character."
>
> - the presence of large lots;
> - limited public services present (water, sewer, police, fire, roads, etc.);
> - different expectations of levels of services provided;
> - small scale resource activity;
> - undeveloped nature of the landscape;
> - wildlife and natural conditions predominate;
> - closer relationship between nature and residents;
> - personal open space;
> - a sense of separation from intense human activity;
> - a sense of self sufficiency; and
> - rural commercial supporting rural area population.

AR at 1411. The County also adopted a 90/10 urban to rural population distribution. The Board dismissed CCCU's arguments noting that the requirements of chapter 265-196 WAC are permissive and that the County has broad discretion to meet the GMA goals of encouraging development in urban areas and reducing sprawl.

Counties have broad discretion in how they plan for growth. RCW 36.70A.110(2). Among other goals, counties should encourage development in urban areas and reduce sprawl.

RCW 36.70A.020(1), (2). WAC 365-196-425 states that counties should include a rural element in their comprehensive plans. But the rule but does not mandate counties to define this term, stating, "Counties *should* adopt a locally appropriate definition of rural character." WAC 365-196-425(2)(c) (emphasis added). Further, the counties' "rural element should provide for a variety of densities that are consistent with the pattern of development established in its definition of rural character." WAC 365-196-425(3)(a).

Although chapter 365-196 WAC provides some procedural guidelines, compliance with these procedures "is not a prerequisite for compliance with the act." WAC 365-196-030(2). The Board's compliance determination must be based on a violation of the GMA itself. WAC 365-196-030(3). As stated above, chapter 365-196 WAC does not create a minimum list of criteria for procedural compliance with the GMA. Rather, counties "can achieve compliance . . . by adopting other approaches." WAC 365-196-030(2).

CCCU argues that the County failed to define "rural character." Br. of CCCU at 43. Although not strictly required, the County generally defined "rural character" in its 2016 Plan Update. The County detailed factors that it determined described "rural character," including large lots, different expectations for community services, and a sense of self-sufficiency. We hold that the Board did not err when dismissing CCCU's argument insofar as it is based on the County's failure to define rural character.

CCCU also argues that the 90/10 population distribution did not align with the actual 86/14 population distribution in the County. CCCU argues that this "90/10 distribution does not comply with the County's planning obligations under WAC 365-196-425(3)(a)." Br. of CCCU at 45. CCCU seems to argue that because the 90/10 goal distribution is not the same as the 86/14

current population distribution, the goal distribution is not consistent with the true rural character of the County. However, CCCU does not show how the goal distribution violates the GMA. First, chapter 365-196 WAC does not add procedural requirements for GMA compliance. WAC 365-196-030(2)-(3). CCCU's alleged violation of chapter 365-196 procedures alone does not support a GMA violation. Second, the County has broad discretion to plan for growth. RCW 36.70A.110(2). Here, CCCU fails to meet its burden to show that the Board erred. We hold that the Board did not err when dismissing CCCU's population distribution arguments.

XI. GMA PRIVATE PROPERTY CONSIDERATIONS

CCCU argues that the Board erred when it dismissed CCCU's argument that the County violated the GMA goal of adequately considering the impacts of the 2016 Plan Update on private property rights. We hold that CCCU's argument fails.

Protection of private property rights is enumerated at goal 6 in the GMA. RCW 36.70A.020(6). In the 2016 Plan Update, the County recited this goal, stating that it gave private property rights due consideration during the planning process. Further, the County had extensive contacts with private property owners, stated views regarding the impacts of the 2016 Plan Update on private property rights, and heard from landowners regarding their concerns about private property rights. Further, as exhibited by the County's 2016 Plan Update PPP, it heard from citizens and considered private property rights.

One of the GMA's 13 enumerated goals "used exclusively for the purpose of guiding the development of comprehensive plans" states: "Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of

landowners shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6).

WAC 365-196-725 further details:

> (1) Comprehensive plans and development regulations adopted under the act are subject to the supremacy principle of Article VI, United States Constitution and of Article XI, Section 11, Washington [S]tate Constitution.
>
> (2) Counties and cities planning under the act are required to use a process established by the state attorney general to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights. . . .

A party may challenge land use regulations as unconstitutional regulatory takings under article I, section 16 of the Washington Constitution. *Thun v. City of Bonney Lake*, 3 Wn. App. 2d 453, 459, 416 P.3d 743 (2018).

CCCU's argument is difficult to discern. CCCU argues broadly that the County made determinations about property that were contrary to facts, and that the County failed to implement the goal of protecting private property rights. However, CCCU does not explain anything further in its argument.

Specifically, CCCU argues, "Determining the development potential of property based on a population projection standard that has never been accurate is in disregard of all the facts and circumstances. Similarly, the County's decision to reject rezoning to smaller parcel sizes in the rural area is contrary to the actual facts and circumstances in Clark County." Br. of CCCU at 49. It appears that CCCU is rearguing that the population projection and the parcel sizing were arbitrary and capricious, an argument we rejected above. Further, CCCU argues that "the Board errs in concluding that [RCW 36.70A.020(6)] is actually implemented because there is a recitation in the ordinance that the County has given some rights 'due consideration.'" Br. of CCCU at 49-50 (quoting AR at 10472).

RCW 34.05.570(3) provides nine enumerated ways to challenge an agency action through judicial review. However, CCCU does not sufficiently explain to this court how it is challenging the Board's decision under that statute. Nor does CCCU invoke RCW 34.05.570(3)(a), which would have allowed us to review the Board's orders for constitutional violations. Rather, CCCU contends only that the Board acted arbitrarily and capriciously regarding the GMA private property goal. CCCU has failed to sufficiently explain to us how the Board erred and, thus, fails to carry its burden.

XII. BOARD'S COMPLIANCE ORDER

FOCC argues that the Board erred in its compliance order when it declared issues moot and found the County's readoption of prior provisions was compliant with the GMA. We hold that the Board did not err.

A. *Facts Regarding the Board's Compliance Order*

In its FDO, the Board found some provisions noncompliant and determined other provisions invalid. FOCC raises arguments for two County decisions the Board found noncompliant, Issues 11 and 13.

For Issue 11, the Board considered the County's creation of AG-10 and FR-20 districts, replacing AG-20 and FR-40 districts. In its FDO, the Board found and concluded that "reducing parcel sizes for agricultural and forestry lands will not meet requirements in RCW 36.70A.060 or .070 nor does it meet the standards established in *King County*." AR at 10552. To come into compliance, the County amended its 2016 Plan Update by passing Ordinance 2017-07-04, which changed back the AG-10 to AG-20 and FR-20 to FR-40.

For Issue 13, the Board considered the County's single rural density designation, replacing its varied rural densities provisions. In its FDO, the Board found and concluded that "the County did not comply with RCW 36.70A.070(5) regarding a variety of rural densities." AR at 10552. To come into compliance, the County adopted Ordinance 2017-07-04 which amended the single plan designation for rural lands and reestablished the prior varied rural densities.

In its compliance order, the Board noted that both provisions readopted by the County had previously been found GMA compliant. Issue 11's parcel sizes had been determined compliant in the County's 2007 Comprehensive Plan. CAR at 1573 (citing *Karpinski v. Clark County*, No. 07-2-0027 (W. Wash. Growth Mgmt. Hr'gs Bd. Sept. 4, 2014)). In the compliance order, the Board stated:

> Here, Clark County repealed the ordinance amendments challenged in Issue 11, the Issue 11 challenge is moot, and the County's action addressing the Issue 11 provisions must be found compliant. With the County amendments in Ordinance 2017-07-04 regarding agricultural and forest lands, the Board finds and concludes that the County is now in compliance with RCW 36.70A.060 and RCW 36.70A.070 in regards to Issue 11.

CAR at 1574 (emphasis omitted).

Further, the Board stated, "The challenge to Issue 13 is now moot because the County readopted a previously GMA-compliant variety of rural densities. With the County amendments in Ordinance 2017-07-04 for Issue 13, the Board finds the County's action regarding a variety of rural densities, achieves compliance with RCW 36.70A.070(5)." CAR at 1575 (emphasis omitted).

B. *Compliance Legal Principles*

Following a remand period to address noncompliant comprehensive plan provisions, the Board determines whether a county has achieved GMA compliance. RCW 36.70A.330(1)-(3). Parties may challenge the legislation enacted in response to the Board's final order. RCW 36.70A.330(2).

Although parties are not entitled to challenge any and all aspects of a county's comprehensive plan, a party may challenge amendments made in an updated comprehensive plan. *Thurston County*, 164 Wn.2d at 344, 347. When the Board finds noncompliance on an issue, the county's new comprehensive plan provisions are presumed valid, and the challenger bears the burden to establish that the new provisions are clearly erroneous under the GMA in view of the entire record before the Board. RCW 36.70A.320(1)-(2).

In *Hazen v. Yakima County*, challengers petitioned the Board regarding the compliance of certain plan provisions. No. 08-1-0008c, at 14 (E. Wash. Growth Mgmt. Hr'gs Bd. April 5, 2010). During the pendency of the Board's review, Yakima County amended some provisions, removing one provision outright and adjusting others. *Hazen*, at 14-15. The Board found that consideration of the repealed provision was moot, but that the amended provisions remained under the Board's compliance review. *Hazen*, at 15.

C. *The Board Did Not Err by Finding Compliance*

FOCC argues that the County did more than merely repeal noncompliant provisions and reinstate former plan provisions. We disagree.

Following the Board's noncompliance findings on Issues 11 and 13, the County reenacted the pre-2016 Plan Update plan provisions. The Board previously found these

provisions compliant with the GMA. Because of this, the Board determined that the issues regarding the now-repealed provisions were moot and found the County compliant regarding the reenacted provisions.

FOCC argues that this court's opinion in *Miotke* supports the proposition that even if the previous provisions had been determined compliant, their current compliance based on land use is subject to renewed scrutiny. Because *Miotke* is distinguishable, we disagree.

In *Miotke*, while the Board reviewed the county's updated UGA designation, development rights of property owners vested in the new UGA. *Miotke*, 181 Wn. App. at 373. The Board found this UGA designation noncompliant with the GMA and made a determination of invalidity. *Miotke*, 181 Wn. App. at 373. In an attempt to comply, Spokane County repealed the UGA designation and reverted the land to its prior designation. *Miotke*, 181 Wn. App. at 374. This court held that the vested rights of property owners did not relieve the county of its planning obligations under the GMA. *Miotke*, 181 Wn. App. at 379. Rather, because the UGA was subject to a determination of invalidity, the county was responsible for showing GMA compliance in its new planning decision. *Miotke*, 181 Wn. App. at 379-80.

In *Miotke*, the Board made a determination of invalidity, shifting the burden to the county to prove compliance. 181 Wn. App. at 379-80. Here, however, the Board found the County merely noncompliant regarding Issues 11 and 13. Without a determination of invalidity, the burden remains with the challenger, FOCC, to show the Board erred. Here, FOCC has not met its burden to show that the Board acted in a clearly erroneous manner when finding the County compliant for Issues 11 and 13 after it repealed the challenged provisions and readopted

previously compliant provisions. Accordingly, we hold the Board did not err when concluding that the County achieved compliance regarding Issues 11 and 13.

XIII. CONCLUSION

We grant FOCC's motion to dismiss the County's and 3B's petitions for judicial review of the FDO for lack of appellate jurisdiction. We hold that the Board's finding of the County's noncompliance regarding the County's UGAs designations are moot. Further, we hold that the Board did not err when rejecting all of CCCU's arguments. Finally, we hold that the Board did not err when it determined that the County was compliant regarding Issues 11 and 13. We remand to the Board for further proceedings in accordance with this opinion.

Worswick, J.

We concur:

Maxa, C.J.

Glasgow, J.

APPENDIX B

RCW 36.70A.040

Who must plan—Summary of requirements—Resolution for partial planning—Development regulations must implement comprehensive plans.

(1) Each county that has both a population of fifty thousand or more and, until May 16, 1995, has had its population increase by more than ten percent in the previous ten years or, on or after May 16, 1995, has had its population increase by more than seventeen percent in the previous ten years, and the cities located within such county, and any other county regardless of its population that has had its population increase by more than twenty percent in the previous ten years, and the cities located within such county, shall conform with all of the requirements of this chapter. However, the county legislative authority of such a county with a population of less than fifty thousand population may adopt a resolution removing the county, and the cities located within the county, from the requirements of adopting comprehensive land use plans and development regulations under this chapter if this resolution is adopted and filed with the department by December 31, 1990, for counties initially meeting this set of criteria, or within sixty days of the date the office of financial management certifies that a county meets this set of criteria under subsection (5) of this section. For the purposes of this subsection, a county not currently planning under this chapter is not required to include in its population count those persons confined in a correctional facility under the jurisdiction of the department of corrections that is located in the county.

Once a county meets either of these sets of criteria, the requirement to conform with all of the requirements of this chapter remains in effect, even if the county no longer meets one of these sets of criteria.

(2)(a) The county legislative authority of any county that does not meet either of the sets of criteria established under subsection (1) of this section may adopt a resolution indicating its intention to have subsection (1) of this section apply to the county. Each city, located in a county that chooses to plan under this subsection, shall conform with all of the requirements of this chapter. Once such a resolution has been adopted, the county and the cities located within the county remain subject to all of the requirements of this chapter, unless the county subsequently adopts a withdrawal resolution for partial planning pursuant to (b)(i) of this subsection.

(b)(i) Until December 31, 2015, the legislative authority of a county may adopt a resolution removing the county and the cities located within the county from the requirements to plan under this section if:

(A) The county has a population, as estimated by the office of financial management, of twenty thousand or fewer inhabitants at any time between April 1, 2010, and April 1, 2015;

(B) The county has previously adopted a resolution indicating its intention to have subsection (1) of this section apply to the county;

(C) At least sixty days prior to adopting a resolution for partial planning, the county provides written notification to the legislative body of each city within the county of its intent to consider adopting the resolution; and

(D) The legislative bodies of at least sixty percent of those cities having an aggregate population of at least seventy-five percent of the incorporated county population have not: Adopted resolutions opposing the action by the county; and provided written notification of the resolutions to the county.

(ii) Upon adoption of a resolution for partial planning under (b)(i) of this subsection:

(A) The county and the cities within the county are, except as provided otherwise, no longer obligated to plan under this section; and

(B) The county may not, for a minimum of ten years from the date of adoption of the resolution, adopt another resolution indicating its intention to have subsection (1) of this section apply to the county.

(c) The adoption of a resolution for partial planning under (b)(i) of this subsection does not nullify or otherwise modify the requirements for counties and cities established in RCW 36.70A.060, 36.70A.070(5) and associated development regulations, 36.70A.170, and 36.70A.172.

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a countywide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forestlands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forestlands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; [and] (d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and

development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, and if the county has a population of less than fifty thousand, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan by January 1, 1995, but if the governor makes written findings that a county with a population of less than fifty thousand or a city located within such a county is not making reasonable progress toward adopting a comprehensive plan and development regulations the governor may reduce this deadline for such actions to be taken by no more than one hundred eighty days. Any county or city subject to this subsection may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

(4) Any county or city that is required to conform with all the requirements of this chapter, as a result of the county legislative authority adopting its resolution of intention under subsection (2) of this section, shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city that is located within the county shall adopt development regulations conserving agricultural lands, forestlands, and mineral resource lands it designated under RCW 36.70A.060 within one year of the date the county legislative authority adopts its resolution of intention; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; and (d) the county and each city that is located within the county shall adopt a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan not later than four years from the date the county legislative authority adopts its resolution of intention, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

(5) If the office of financial management certifies that the population of a county that previously had not been required to plan under subsection (1) or (2) of this section has changed sufficiently to meet either of the sets of criteria specified under subsection (1) of this section, and where applicable, the county legislative authority has not adopted a resolution removing the county from these requirements as provided in subsection (1) of this section, the county and each city within such county

shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a countywide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall adopt development regulations under RCW 36.70A.060 conserving agricultural lands, forestlands, and mineral resource lands it designated within one year of the certification by the office of financial management; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; and (d) the county and each city located within the county shall adopt a comprehensive land use plan and development regulations that are consistent with and implement the comprehensive plan within four years of the certification by the office of financial management, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

(6) A copy of each document that is required under this section shall be submitted to the department at the time of its adoption.

(7) Cities and counties planning under this chapter must amend the transportation element of the comprehensive plan to be in compliance with this chapter and chapter 47.80 RCW no later than December 31, 2000.

RCW 36.70A.070

Comprehensive plans—Mandatory elements.

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140. Each comprehensive plan shall include a plan, scheme, or design for each of the following:

(1) A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. The land use element shall include population densities, building intensities, and estimates of future population growth. The land use element shall provide for protection of the quality and quantity of groundwater used for public water supplies. Wherever possible, the land use element should consider utilizing urban planning approaches that promote physical activity. Where applicable, the land use element shall review drainage, flooding, and stormwater runoff in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.

(2) A housing element ensuring the vitality and character of established residential neighborhoods that: (a) Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community. In counties and cities subject to the review and evaluation requirements of RCW 36.70A.215, any revision to the housing element shall include consideration of prior review and evaluation reports and any reasonable measures identified.

(3) A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

(4) A utilities element consisting of the general location, proposed location, and capacity of all existing and proposed utilities, including, but not limited to, electrical lines, telecommunication lines, and natural gas lines.

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

(a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural economic advancement, densities, and uses that are not characterized by urban growth and that are consistent with rural character.

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

(d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:

(i) Rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.

(A) A commercial, industrial, residential, shoreline, or mixed-use area are subject to the requirements of (d)(iv) of this subsection, but are not subject to the requirements of (c)(ii) and (iii) of this subsection.

(B) Any development or redevelopment other than an industrial area or an industrial use within a mixed-use area or an industrial area under this subsection (5)(d)(i) must be principally designed to serve the existing and projected rural population.

(C) Any development or redevelopment in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas. Development and redevelopment may include changes in use from vacant land or a previously existing use so long as the new use conforms to the requirements of this subsection (5);

(ii) The intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development. A small-scale recreation or tourist use is not required to be principally designed to serve the existing and projected rural population. Public services and public facilities shall be limited to those necessary to serve the recreation or tourist use and shall be provided in a manner that does not permit low-density sprawl;

(iii) The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve

the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents. Rural counties may allow the expansion of small-scale businesses as long as those small-scale businesses conform with the rural character of the area as defined by the local government according to *RCW 36.70A.030(16). Rural counties may also allow new small-scale businesses to utilize a site previously occupied by an existing business as long as the new small-scale business conforms to the rural character of the area as defined by the local government according to *RCW 36.70A.030(16). Public services and public facilities shall be limited to those necessary to serve the isolated nonresidential use and shall be provided in a manner that does not permit low-density sprawl;

(iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary, the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries, such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl;

(v) For purposes of (d) of this subsection, an existing area or existing use is one that was in existence:

(A) On July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter;

(B) On the date the county adopted a resolution under RCW 36.70A.040(2), in a county that is planning under all of the provisions of this chapter under RCW 36.70A.040(2); or

(C) On the date the office of financial management certifies the county's population as provided in RCW 36.70A.040(5), in a county that is planning under all of the provisions of this chapter pursuant to RCW 36.70A.040(5).

(e) Exception. This subsection shall not be interpreted to permit in the rural area a major industrial development or a master planned resort

unless otherwise specifically permitted under RCW 36.70A.360 and 36.70A.365.

(6) A transportation element that implements, and is consistent with, the land use element.

(a) The transportation element shall include the following subelements:

(i) Land use assumptions used in estimating travel;

(ii) Estimated traffic impacts to state-owned transportation facilities resulting from land use assumptions to assist the department of transportation in monitoring the performance of state facilities, to plan improvements for the facilities, and to assess the impact of land-use decisions on state-owned transportation facilities;

(iii) Facilities and services needs, including:

(A) An inventory of air, water, and ground transportation facilities and services, including transit alignments and general aviation airport facilities, to define existing capital facilities and travel levels as a basis for future planning. This inventory must include state-owned transportation facilities within the city or county's jurisdictional boundaries;

(B) Level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system. These standards should be regionally coordinated;

(C) For state-owned transportation facilities, level of service standards for highways, as prescribed in chapters 47.06 and 47.80 RCW, to gauge the performance of the system. The purposes of reflecting level of service standards for state highways in the local comprehensive plan are to monitor the performance of the system, to evaluate improvement strategies, and to facilitate coordination between the county's or city's six-year street, road, or transit program and the office of financial management's ten-year investment program. The concurrency requirements of (b) of this subsection do not apply to transportation facilities and services of statewide significance except for counties consisting of islands whose only connection to the mainland are state highways or ferry routes. In these island counties, state highways and ferry route capacity must be a factor in meeting the concurrency requirements in (b) of this subsection;

(D) Specific actions and requirements for bringing into compliance locally owned transportation facilities or services that are below an established level of service standard;

(E) Forecasts of traffic for at least ten years based on the adopted land use plan to provide information on the location, timing, and capacity needs of future growth;

(F) Identification of state and local system needs to meet current and future demands. Identified needs on state-owned transportation facilities must be consistent with the statewide multimodal transportation plan required under chapter 47.06 RCW;

(iv) Finance, including:

(A) An analysis of funding capability to judge needs against probable funding resources;

(B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year street, road, or transit program required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems. The multiyear financing plan should be coordinated with the ten-year investment program developed by the office of financial management as required by RCW 47.05.030;

(C) If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met;

(v) Intergovernmental coordination efforts, including an assessment of the impacts of the transportation plan and land use assumptions on the transportation systems of adjacent jurisdictions;

(vi) Demand-management strategies;

(vii) Pedestrian and bicycle component to include collaborative efforts to identify and designate planned improvements for pedestrian and bicycle facilities and corridors that address and encourage enhanced community access and promote healthy lifestyles.

(b) After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. These strategies may include increased public transportation service, ride-sharing programs, demand management, and other transportation systems management strategies. For the purposes of this subsection (6), "concurrent with the development" means that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years. If the collection of impact fees is delayed under RCW 82.02.050(3), the six-year

period required by this subsection (6)(b) must begin after full payment of all impact fees is due to the county or city.

(c) The transportation element described in this subsection (6), the six-year plans required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems, and the ten-year investment program required by RCW 47.05.030 for the state, must be consistent.

(7) An economic development element establishing local goals, policies, objectives, and provisions for economic growth and vitality and a high quality of life. A city that has chosen to be a residential community is exempt from the economic development element requirement of this subsection.

(8) A park and recreation element that implements, and is consistent with, the capital facilities plan element as it relates to park and recreation facilities. The element shall include: (a) Estimates of park and recreation demand for at least a ten-year period; (b) an evaluation of facilities and service needs; and (c) an evaluation of intergovernmental coordination opportunities to provide regional approaches for meeting park and recreational demand.

(9) It is the intent that new or amended elements required after January 1, 2002, be adopted concurrent with the scheduled update provided in RCW 36.70A.130. Requirements to incorporate any such new or amended elements shall be null and void until funds sufficient to cover applicable local government costs are appropriated and distributed by the state at least two years before local government must update comprehensive plans as required in RCW 36.70A.130.

RCW 36.70A.130

Comprehensive plans—Review procedures and schedules—Amendments.

(1)(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the deadlines in subsections (4) and (5) of this section.

(b) Except as otherwise provided, a county or city not planning under RCW 36.70A.040 shall take action to review and, if needed, revise its policies and development regulations regarding critical areas and natural resource lands adopted according to this chapter to ensure these policies and regulations comply with the requirements of this chapter according to the deadlines in subsections (4) and (5) of this section. Legislative action means the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefor.

(c) The review and evaluation required by this subsection shall include, but is not limited to, consideration of critical area ordinances and, if planning under RCW 36.70A.040, an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management.

(d) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

(2)(a) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year, except that, until December 31, 2015, the program shall provide for consideration of amendments of an urban growth area in accordance with *RCW 36.70A.1301 once every year. "Updates" means to review and revise, if needed, according to subsection (1) of this section, and the deadlines in subsections (4) and (5) of this section or in accordance with the provisions of subsection (6) of

this section. Amendments may be considered more frequently than once per year under the following circumstances:

(i) The initial adoption of a subarea plan. Subarea plans adopted under this subsection (2)(a)(i) must clarify, supplement, or implement jurisdiction-wide comprehensive plan policies, and may only be adopted if the cumulative impacts of the proposed plan are addressed by appropriate environmental review under chapter 43.21C RCW;

(ii) The development of an initial subarea plan for economic development located outside of the one hundred year floodplain in a county that has completed a state-funded pilot project that is based on watershed characterization and local habitat assessment;

(iii) The adoption or amendment of a shoreline master program under the procedures set forth in chapter 90.58 RCW;

(iv) The amendment of the capital facilities element of a comprehensive plan that occurs concurrently with the adoption or amendment of a county or city budget; or

(v) The adoption of comprehensive plan amendments necessary to enact a planned action under **RCW 43.21C.031(2), provided that amendments are considered in accordance with the public participation program established by the county or city under this subsection (2)(a) and all persons who have requested notice of a comprehensive plan update are given notice of the amendments and an opportunity to comment.

(b) Except as otherwise provided in (a) of this subsection, all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with the growth management hearings board or with the court.

(3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, according to the schedules established in subsection (5) of this section, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas.

(b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the

comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period. The review required by this subsection may be combined with the review and evaluation required by RCW 36.70A.215.

(4) Except as provided in subsection (6) of this section, counties and cities shall take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter as follows:

(a) On or before December 1, 2004, for Clallam, Clark, Jefferson, King, Kitsap, Pierce, Snohomish, Thurston, and Whatcom counties and the cities within those counties;

(b) On or before December 1, 2005, for Cowlitz, Island, Lewis, Mason, San Juan, Skagit, and Skamania counties and the cities within those counties;

(c) On or before December 1, 2006, for Benton, Chelan, Douglas, Grant, Kittitas, Spokane, and Yakima counties and the cities within those counties; and

(d) On or before December 1, 2007, for Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grays Harbor, Klickitat, Lincoln, Okanogan, Pacific, Pend Oreille, Stevens, Wahkiakum, Walla Walla, and Whitman counties and the cities within those counties.

(5) Except as otherwise provided in subsections (6) and (8) of this section, following the review of comprehensive plans and development regulations required by subsection (4) of this section, counties and cities shall take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter as follows:

(a) On or before June 30, 2015, and every eight years thereafter, for King, Pierce, and Snohomish counties and the cities within those counties;

(b) On or before June 30, 2016, and every eight years thereafter, for Clallam, Clark, Island, Jefferson, Kitsap, Mason, San Juan, Skagit, Thurston, and Whatcom counties and the cities within those counties;

(c) On or before June 30, 2017, and every eight years thereafter, for Benton, Chelan, Cowlitz, Douglas, Kittitas, Lewis, Skamania, Spokane, and Yakima counties and the cities within those counties; and

(d) On or before June 30, 2018, and every eight years thereafter, for Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Grays Harbor, Klickitat, Lincoln, Okanogan, Pacific, Pend Oreille, Stevens,

Wahkiakum, Walla Walla, and Whitman counties and the cities within those counties.

(6)(a) Nothing in this section precludes a county or city from conducting the review and evaluation required by this section before the deadlines established in subsections (4) and (5) of this section. Counties and cities may begin this process early and may be eligible for grants from the department, subject to available funding, if they elect to do so.

(b) A county that is subject to a deadline established in subsection (4)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the thirty-six months following the deadline established in subsection (4) of this section: The county has a population of less than fifty thousand and has had its population increase by no more than seventeen percent in the ten years preceding the deadline established in subsection (4) of this section as of that date.

(c) A city that is subject to a deadline established in subsection (4)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the thirty-six months following the deadline established in subsection (4) of this section: The city has a population of no more than five thousand and has had its population increase by the greater of either no more than one hundred persons or no more than seventeen percent in the ten years preceding the deadline established in subsection (4) of this section as of that date.

(d) A county or city that is subject to a deadline established in subsection (4)(d) of this section and that meets the criteria established in (b) or (c) of this subsection may comply with the requirements of subsection (4)(d) of this section at any time within the thirty-six months after the extension provided in (b) or (c) of this subsection.

(e) A county that is subject to a deadline established in subsection (5)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the twenty-four months following the deadline established in subsection (5) of this section: The county has a population of less than fifty thousand and has had its population increase by no more than seventeen percent in the ten years preceding the deadline established in subsection (5) of this section as of that date.

(f) A city that is subject to a deadline established in subsection (5)(b) through (d) of this section and meets the following criteria may comply with the requirements of this section at any time within the twenty-four months following the deadline established in subsection (5) of

this section: The city has a population of no more than five thousand and has had its population increase by the greater of either no more than one hundred persons or no more than seventeen percent in the ten years preceding the deadline established in subsection (5) of this section as of that date.

(g) State agencies are encouraged to provide technical assistance to the counties and cities in the review of critical area ordinances, comprehensive plans, and development regulations.

(7)(a) The requirements imposed on counties and cities under this section shall be considered "requirements of this chapter" under the terms of RCW 36.70A.040(1). Only those counties and cities that meet the following criteria may receive grants, loans, pledges, or financial guarantees under chapter 43.155 or 70.146 RCW:

(i) Complying with the deadlines in this section;

(ii) Demonstrating substantial progress towards compliance with the schedules in this section for development regulations that protect critical areas; or

(iii) Complying with the extension provisions of subsection (6)(b), (c), or (d) of this section.

(b) A county or city that is fewer than twelve months out of compliance with the schedules in this section for development regulations that protect critical areas is making substantial progress towards compliance. Only those counties and cities in compliance with the schedules in this section may receive preference for grants or loans subject to the provisions of RCW 43.17.250.

(8)(a) Except as otherwise provided in (c) of this subsection, if a participating watershed is achieving benchmarks and goals for the protection of critical areas functions and values, the county is not required to update development regulations to protect critical areas as they specifically apply to agricultural activities in that watershed.

(b) A county that has made the election under RCW 36.70A.710(1) may only adopt or amend development regulations to protect critical areas as they specifically apply to agricultural activities in a participating watershed if:

(i) A work plan has been approved for that watershed in accordance with RCW 36.70A.725;

(ii) The local watershed group for that watershed has requested the county to adopt or amend development regulations as part of a work plan developed under RCW 36.70A.720;

(iii) The adoption or amendment of the development regulations is necessary to enable the county to respond to an order of the growth management hearings board or court;

(iv) The adoption or amendment of development regulations is necessary to address a threat to human health or safety; or

(v) Three or more years have elapsed since the receipt of funding.

(c) Beginning ten years from the date of receipt of funding, a county that has made the election under RCW 36.70A.710(1) must review and, if necessary, revise development regulations to protect critical areas as they specifically apply to agricultural activities in a participating watershed in accordance with the review and revision requirements and timeline in subsection (5) of this section. This subsection (8)(c) does not apply to a participating watershed that has determined under RCW 36.70A.720(2)(c)(ii) that the watershed's goals and benchmarks for protection have been met.

RCW 36.70A.170

Natural resource lands and critical areas—Designations.

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;

(b) Forestlands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber;

(c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and

(d) Critical areas.

(2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.

RCW 36.70A.280

Growth management hearings board—Matters subject to review. *(Effective until December 31, 2020.)*

(1) The growth management hearings board shall hear and determine only those petitions alleging either:

(a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. Nothing in this subsection authorizes the board to hear petitions alleging noncompliance with *RCW 36.70A.5801;

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted;

(c) That the approval of a work plan adopted under RCW 36.70A.735(1)(a) is not in compliance with the requirements of the program established under RCW 36.70A.710;

(d) That regulations adopted under RCW 36.70A.735(1)(b) are not regionally applicable and cannot be adopted, wholly or partially, by another jurisdiction;

(e) That a department certification under RCW 36.70A.735(1)(c) is erroneous; or

(f) That a department determination under RCW 36.70A.060(1)(d) is erroneous.

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

(3) For purposes of this section "person" means any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.

(4) To establish participation standing under subsection (2)(b) of this section, a person must show that his or her participation before the county or city was reasonably related to the person's issue as presented to the board.

(5) When considering a possible adjustment to a growth management planning population projection prepared by the office of financial management, the board shall consider the implications of any such adjustment to the population forecast for the entire state.

The rationale for any adjustment that is adopted by the board must be documented and filed with the office of financial management within ten working days after adoption.

If adjusted by the board, a county growth management planning population projection shall only be used for the planning purposes set forth in this chapter and shall be known as the "board adjusted population projection." None of these changes shall affect the official state and county population forecasts prepared by the office of financial management, which shall continue to be used for state budget and planning purposes.

RCW 36.70A.290

Growth management hearings board—Petitions—Evidence.

(1) All requests for review to the growth management hearings board shall be initiated by filing a petition that includes a detailed statement of issues presented for resolution by the board. The board shall render written decisions articulating the basis for its holdings. The board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order.

(2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication as provided in (a) through (c) of this subsection.

(a) Except as provided in (c) of this subsection, the date of publication for a city shall be the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations, or amendment thereto, as is required to be published.

(b) Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

Except as provided in (c) of this subsection, for purposes of this section the date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

(c) For local governments planning under RCW 36.70A.040, promptly after approval or disapproval of a local government's shoreline master program or amendment thereto by the department of ecology as provided in RCW 90.58.090, the department of ecology shall publish a notice that the shoreline master program or amendment thereto has been approved or disapproved. For purposes of this section, the date of publication for the adoption or amendment of a shoreline master program is the date the department of ecology publishes notice that the shoreline master program or amendment thereto has been approved or disapproved.

(3) Unless the board dismisses the petition as frivolous or finds that the person filing the petition lacks standing, or the parties have filed an agreement to have the case heard in superior court as provided in RCW 36.70A.295, the board shall, within ten days of receipt of the petition, set a time for hearing the matter.

(4) The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

(5) The board, shall consolidate, when appropriate, all petitions involving the review of the same comprehensive plan or the same development regulation or regulations.

WAC 365-190-050

Agricultural resource lands.

(1) In classifying and designating agricultural resource lands, counties must approach the effort as a county-wide or area-wide process. Counties and cities should not review resource lands designations solely on a parcel-by-parcel process. Counties and cities must have a program for the transfer or purchase of development rights prior to designating agricultural resource lands in urban growth areas. Cities are encouraged to coordinate their agricultural resource lands designations with their county and any adjacent jurisdictions.

(2) Once lands are designated, counties and cities planning under the act must adopt development regulations that assure the conservation of agricultural resource lands. Recommendations for those regulations are found in WAC 365-196-815.

(3) Lands should be considered for designation as agricultural resource lands based on three factors:

(a) The land is not already characterized by urban growth. To evaluate this factor, counties and cities should use the criteria contained in WAC 365-196-310.

(b) The land is used or capable of being used for agricultural production. This factor evaluates whether lands are well suited to agricultural use based primarily on their physical and geographic characteristics. Some agricultural operations are less dependent on soil quality than others, including some livestock production operations.

(i) Lands that are currently used for agricultural production and lands that are capable of such use must be evaluated for designation. The intent of a landowner to use land for agriculture or to cease such use is not the controlling factor in determining if land is used or capable of being used for agricultural production. Land enrolled in federal conservation reserve programs is recommended for designation based on previous agricultural use, management requirements, and potential for reuse as agricultural land.

(ii) In determining whether lands are used or capable of being used for agricultural production, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Natural Resources Conservation Service as defined in relevant Field Office Technical Guides. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys, and are based on the growing capacity, productivity and soil composition of the land.

(c) The land has long-term commercial significance for agriculture. In determining this factor, counties and cities should consider the following nonexclusive criteria, as applicable:

(i) The classification of prime and unique farmland soils as mapped by the Natural Resources Conservation Service;

(ii) The availability of public facilities, including roads used in transporting agricultural products;

(iii) Tax status, including whether lands are enrolled under the current use tax assessment under chapter 84.34 RCW and whether the optional public benefit rating system is used locally, and whether there is the ability to purchase or transfer land development rights;

(iv) The availability of public services;

(v) Relationship or proximity to urban growth areas;

(vi) Predominant parcel size;

(vii) Land use settlement patterns and their compatibility with agricultural practices;

(viii) Intensity of nearby land uses;

(ix) History of land development permits issued nearby;

(x) Land values under alternative uses; and

(xi) Proximity to markets.

(4) When designating agricultural resource lands, counties and cities may consider food security issues, which may include providing local food supplies for food banks, schools and institutions, vocational training opportunities in agricultural operations, and preserving heritage or artisanal foods.

(5) When applying the criteria in subsection (3)(c) of this section, the process should result in designating an amount of agricultural resource lands sufficient to maintain and enhance the economic viability of the agricultural industry in the county over the long term; and to retain supporting agricultural businesses, such as processors, farm suppliers, and equipment maintenance and repair facilities.

(6) Counties and cities may further classify additional agricultural lands of local importance. Classifying additional agricultural lands of local importance should include, in addition to general public involvement, consultation with the board of the local conservation district and the local committee of the farm service agency. It may also be useful to consult with any existing local organizations marketing or using local produce, including the boards of local farmers markets, school districts, other large institutions, such as hospitals, correctional facilities, or existing food cooperatives.

These additional lands may include designated critical areas, such as bogs used to grow cranberries or farmed wetlands. Where these lands are also designated critical areas, counties and cities planning under the act must weigh the compatibility of adjacent land uses and development with the continuing need to protect the functions and values of critical areas and ecosystems.

WAC 365-190-060

Forest resource lands.

(1) In classifying and designating forest resource lands, counties must approach the effort as a county-wide or regional process. Cities are encouraged to coordinate their forest resource lands designations with their county and any adjacent jurisdictions. Counties and cities should not review forest resource lands designations solely on a parcel-by-parcel basis.

(2) Lands should be designated as forest resource lands of long-term commercial significance based on three factors:

(a) The land is not already characterized by urban growth. To evaluate this factor, counties and cities should use the criteria contained in WAC 365-196-310.

(b) The land is used or capable of being used for forestry production. To evaluate this factor, counties and cities should determine whether lands are well suited for forestry use based primarily on their physical and geographic characteristics.

Lands that are currently used for forestry production and lands that are capable of such use must be evaluated for designation. The landowner's intent to either use land for forestry or to cease such use is not the controlling factor in determining if land is used or capable of being used for forestry production.

(c) The land has long-term commercial significance. When determining whether lands are used or capable of being used for forestry production, counties and cities should determine which land grade constitutes forest land of long-term commercial significance, based on local physical, biological, economic, and land use considerations. Counties and cities should use the private forest land grades of the department of revenue (WAC 458-40-530). This system incorporates consideration of growing capacity, productivity, and soil composition of the land. Forest land of long-term commercial significance will generally have a predominance of the higher private forest land grades. However, the presence of lower private forest land grades within the areas of predominantly higher grades need not preclude designation as forest land.

(3) Counties and cities may also consider secondary benefits from retaining commercial forestry operations. Benefits from retaining commercial forestry may include protecting air and water quality, maintaining adequate aquifer recharge areas, reducing forest fire risks, supporting tourism and access to recreational opportunities, providing carbon sequestration benefits, and improving wildlife habitat and

connectivity for upland species. These are only potential secondary benefits from retaining commercial forestry operations, and should not be used alone as a basis for designating or dedesignating forest resource lands.

(4) Counties and cities must also consider the effects of proximity to population areas and the possibility of more intense uses of the land as indicated by the following criteria as applicable:

(a) The availability of public services and facilities conducive to the conversion of forest land;

(b) The proximity of forest land to urban and suburban areas and rural settlements: Forest lands of long-term commercial significance are located outside the urban and suburban areas and rural settlements;

(c) The size of the parcels: Forest lands consist of predominantly large parcels;

(d) The compatibility and intensity of adjacent and nearby land use and settlement patterns with forest lands of long-term commercial significance;

(e) Property tax classification: Property is assessed as open space or forest land pursuant to chapter 84.33 or 84.34 RCW;

(f) Local economic conditions which affect the ability to manage timberlands for long-term commercial production; and

(g) History of land development permits issued nearby.

(5) When applying the criteria in subsection (4) of this section, counties or cities should designate at least the minimum amount of forest resource lands needed to maintain economic viability for the forestry industry and to retain supporting forestry businesses, such as loggers, mills, forest product processors, equipment suppliers, and equipment maintenance and repair facilities. Economic viability in this context is that amount of designated forestry resource land needed to maintain economic viability of the forestry industry in the region over the long term.

CLARK COUNTY PROSECUTING ATTORNEY

October 18, 2019 - 3:42 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Clark County Citizens United, Inc. v. Growth Management Hearings Board
Superior Court Case Number:	17-2-00929-0

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