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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 377161 - II

**THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

FUTUREWISE,

Appellant,

vs.

**CENTRAL PUGET SOUND GROWTH MANAGEMENT
HEARINGS BOARD, an agency of the State of Washington, and
CITY OF BOTHELL**

Respondents.

APPELLANT'S REPLY BRIEF

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A. Futurewise Has Shown the Growth Board's Decision to Be Clearly Erroneous.

Even if the Growth Board's decision is given a high degree of deference, the Board's decision is still clearly erroneous as shown by:

(1) Bothell's own numbers related to the current unmet need for affordable housing,

(2) the projected need that will go unmet, and

(3) the fact that Bothell's plan relies almost entirely on the mere protection of a relatively small portion of the existing (and currently inadequate) supply of affordable housing in the form of mobile homes.

Bothell seems to argue that its plan is entitled to such a high degree of deference that it would need to be automatically approved by the Growth Board so long as the plan contained a suggestion that could be labeled as "promoting" the goal of affordable housing.

However, this emphasis on process and labels is not an accurate reflection of the cases explaining the degree of deference to be accorded to a plan under the GMA. It is also not a waiver of the requirement of "adequate provisions for existing and projected needs of all economic segments of the community" set forth in RCW 36.70A.070(2)(d) (attached as Appendix A).

B. Bothell Does Not Contest Its Own Numbers Showing The Need for a Dramatic Increase In Affordable Housing.

The King County and Snohomish County countywide planning policies establish affordable housing targets. (AR 26-27). Those targets for the City of Bothell were summarized in Bothell's Housing Element Table HO 16, showing that the existing need for affordable housing in Bothell called for 1,220 dwelling units, and that the projected need would more than double by 2025, to require 2,794 units of affordable housing. (AR 26).

Also in 2000, only about 6.6 percent of Bothell's rental housing was priced below \$500 a month and "may be affordable to some low-income families." (AR 19). However, the 17 percent of the Bothell households classified as low-income are competing for the 6.6 percent of rental units that those households may be able to afford. (AR 18). Of the low-income households in 2000, 72 percent paid more than 35 percent of their incomes for housing and 48 percent paid more than 50 percent of their incomes for housing. (AR 19). Bothell only has 231 units of assisted housing in the entire city, a number that has apparently not changed since 2000. (AR 21).

Futurewise does not argue that Bothell must supply assisted housing for its entire need for affordable housing. A wide range of

options could be implemented. The bottom line is that 17% of Bothell's families (the amount of low income households in Bothell) are fighting for only 6.6% of rental housing that "may be considered affordable to some low income families." (AR 60).

C. The Board Erred in Reaching the Legal Conclusion That The Requirements of RCW 36.70A.070(2) Are Purely Optional.

The Growth Management Act requires cities and counties to make adequate provisions for affordable housing. In determining whether a city or county's Housing Element complies with the GMA, the Board must consider both the goals and the specific requirements of the GMA. *LIHI v. City of Lakewood*, 119 Wn. App. 110, 116, 77 P.3rd 653, 655 (2003).

In *LIHI*, the City of Lakewood enacted a comprehensive plan where the Plan failed to contain "a housing element ensuring the vitality and character of established residential neighborhoods as required by RCW 36.70A.070(2)." *Id.* at 114. This Court held that comprehensive plan must comply with both the goals and specific requirements of the GMA. *Id.* The Court also held that the plan must make adequate provisions for existing and projected needs of all economic segments of the community, as required by RCW 36.70A.020(4):

Although here, the Board may have correctly ruled that *LIHI* did not prove that Lakewood failed to comply with a specific GMA requirement, it should also have addressed whether and how the Lakewood Plan "[e]ncourage[d] the

availability of affordable housing to all economic segments of the population... promote[d] a variety of residential densities and housing types, and encourage[d] preservation of existing housing stock” as required by the affordable housing goal set forth in RCW 36.70A.020(4).

Id. at 116.

The “adequate provisions” required by RCW 36.70A.070(2)(d) are therefore not optional. To hold otherwise would be to hold that the GMA may be fully satisfied by little more than abstract goal statements. Thus, the GMA would be effectively nullified on this issue and would become nothing more than a useless bureaucratic exercise.

D. Bothell Still Confuses the Development Regulations Addressed By RCW 36.70A.540 With The Broader Range of Options That May Be Implemented to Satisfy the Requirements of RCW 36.70A.070(2)(d).

In this case the Board erroneously interpreted RCW 36.70A.540(1)(a) to be the exclusive authority regarding all kinds of incentives to promote affordable housing, whether contained in development regulations or comprehensive plans in general. This was an erroneous interpretation of the law: RCW 36.70A.540(1)(a) applies only to optional *development regulation* incentive programs. The Board appears to have missed the distinction between development regulations and other types of support for affordable housing that may be included in a comprehensive plan. RCW 36.70A.540(1)(a) does not convert the

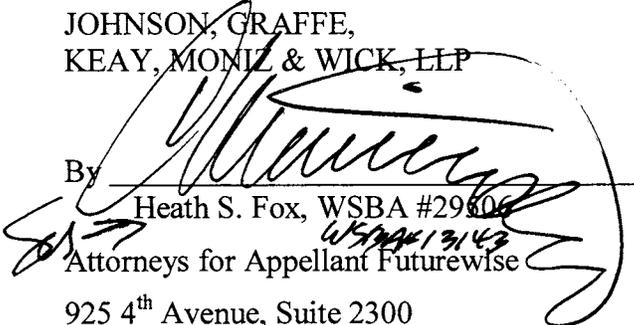
mandatory elements of RCW 36.70A.070(2) into optional elements. The Board's reasoning on this issue was a pure error of law.

CONCLUSION

For the reasons stated above, Futurewise respectfully asks the Court of Appeals to reverse the dismissal of appellant's Petition for Relief and remand this case to the Board with instructions to review Bothell's proposed housing element in light of RCW 36.70A.070(2)'s requirement for adequate provisions for existing and projected needs of all economic segments of the community.

RESPECTFULLY SUBMITTED this 10th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 10th day of October, 2008, I caused a true and correct copy of the foregoing document, "Appellant's Reply Brief," to be delivered by legal messenger, to the following counsel of record:

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DATED this 10th day of October, 2008, at Seattle, Washington.

JeannieBeth Asuncion

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➔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 ground water 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 storm water run-off 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.

(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 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 ground water 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 shall be subject to the requirements of (d)(iv) of this subsection, but shall not be 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(14). 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(14). 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 department of transportation's six-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 six-year improvement program developed by the department of transportation 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" shall mean 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.

(c) The transportation element described in this subsection (6), and the six-year plans required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, RCW 35.58.2795 for public transportation systems, and **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. The element shall include: (a) A summary of the local economy such as population, employment, payroll, sectors, businesses, sales, and other information as appropriate; (b) a summary of the strengths and weaknesses of the local economy defined as the commercial and industrial sectors and supporting factors such as land use, transportation, utilities, education, work force, housing, and natural/cultural resources; and (c) an identification of policies, programs, and projects to foster economic growth and development and to address future needs. 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.