

FILED  
COURT OF APPEALS  
DIVISION II

NO. 37716-1-II

09 SEP 10 AM 11:00

COURT OF APPEALS, DIVISION II,  
STATE OF WASHINGTON

STATE OF WASHINGTON  
DEPUTY  
*CM*

---

**FUTUREWISE,**

Appellant,

v.

**CENTRAL PUGET SOUND GROWTH MANAGEMENT  
HEARINGS BOARD and CITY OF BOTHELL,**

Respondents.

---

**RESPONDENT CITY OF BOTHELL'S BRIEF**

---

Peter J. Eglick, WSBA No. 8809  
Joshua A. Whited, WSBA No. 30509  
EGLICK KIKER WHITED PLLC  
1000 Second Avenue, Suite 3130  
Seattle, Washington 98121  
(206) 441-1069 phone  
(206) 441-1089 fax

Attorneys for Respondent  
City of Bothell

 ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. RESTATEMENT OF THE CASE.....2

    A. Bothell’s Housing Element Amendment .....2

    B. Abandoned Issues and Decisions Below .....6

III. RESTATEMENT OF ISSUES .....10

IV. ARGUMENT .....10

    A. Petitioner Has the Burden of Proof, The City’s Housing Element is Entitled to Broad Deference, and the Board’s Interpretation of the GMA is Entitled to Substantial Weight .....10

    B. Bothell’s Housing Element Complies with the GMA by Promoting and Encouraging Affordable Housing and Making Adequate Provision for the Existing and Projected Needs of the City of Bothell .....17

    C. The Legislature Made Incentives Optional in RCW 36.70A.540 .....36

V. CONCLUSION.....39

**TABLE OF AUTHORITIES**

**CASES**

*City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 116 Wn.App. 48, 65 P.3d 337 (Div. I 2003) .....13

*King County v. CPSGMHB*, 142 Wn.2d 543, 14 P.3d 133 (2000).....15, 16

*Lewis County v. Western Growth Management Hearings Board*, 157 Wn.2d 488, 139 P.3d 1096, 1100 (2006).....11

*LIHI v. Lakewood*, 119 Wn.App. 110, 77 P.3d 653 (Div. II 2003) .....19

*Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn.App. 615, 53 P.3d 1011 (Div. II 2002) .....19

*Quadrant Corp. v. Central Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005).....10, 11, 12, 14

*Smith v. Shannon*, 100 Wash.2d 26, 666 P.2d 351 (1983).....11

*State v. Scott*, 48 Wash.App. 561, 739 P.2d 742 (Div. I 1987).....11

*Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 31 P.3d 28 (Div. II 2001) .....15, 16

*Thurston County v. Western Washington Growth Management Hearings Bd.*, \_\_\_ Wn.2d \_\_\_, 190 P.3d 38 (2008).....15

*Viking Properties v. Holm, et al.*, 155 Wn.2d 112, 129-130, 118 P.3d 322 (2005).....14

**STATUTES**

RCW 34.05 .....10

RCW 34.05.570 .....8, 10, 11

RCW 36.70A.020.....17

RCW 36.70A.070.....17, 18, 36

RCW 36.70A.320.....11

RCW 36.70A.3201.....12

RCW 36.70A.540.....36, 37, 38, 39

RCW 43.63A.215.....20

## I. INTRODUCTION

Futurewise acknowledges that “Bothell has a range of options available to it to encourage affordable housing.” Appellant’s Brief (“Op.Br.”) at 24. However, it then ignores the many provisions Bothell has adopted to encourage affordable housing and attacks the City for not adopting the specific “options” which Futurewise prescribes.

The Growth Management Act (“GMA”) does not require the mandatory incentives upon which Futurewise insists. Consistent with the GMA, which provides local jurisdictions flexibility to meet local needs, the Legislature recently made clear that mandatory incentives are optional.

Bothell’s newly adopted Housing Element is the worthy product of a serious municipal initiative. It clearly complies with the GMA. The Central Puget Sound Growth Management Hearings Board (“Board,” “CPSGMHB”) properly dismissed Futurewise’s petition complaining that the City had failed to include sufficient “mandatory” provisions. The dismissal is supported by substantial evidence and, as a matter of law, was not clearly erroneous. Thurston County Superior Court Judge Richard Hicks correctly affirmed the Board’s decision. Accordingly, the City respectfully requests that this Court affirm both the decision of the Board and the decision of the lower court, and deny Futurewise’s appeal.

## II. RESTATEMENT OF THE CASE

### A. Bothell's Housing Element Amendment.

On October 3, 2005, the Bothell City Council formally initiated plan amendments to the Housing Element of the *Imagine Bothell*. . . Comprehensive Plan and referred the amendments to the Bothell Planning Commission for hearing, deliberation, and recommendation.<sup>1</sup>

The Planning Commission held public hearings on the Housing Element plan amendments on November 30, 2005, December 14, 2005, January 11, 2006, February 8, 2006, May 17, 2006, June 14, 2006, July 5, 2006, July 26, 2006, September 6, 2006, and September 20, 2006.<sup>2</sup>

On September 20, 2006, the Planning Commission adopted Findings, Conclusions and Recommendation on the Housing Element plan amendments, and forwarded them to the City Council.<sup>3</sup> The proposed amendments were also forwarded to the Washington State Department of Community, Trade and Economic Development (“DCTED”) for its review and comment on September 25, 2006.<sup>4</sup> No comments were received from DCTED or other agencies.<sup>5</sup>

---

<sup>1</sup> Administrative Record (“AR”) at 372 (City Council Findings, Conclusions and Actions).

<sup>2</sup> AR 374.

<sup>3</sup> AR 364 – 370 (Planning Commission Findings, Conclusions and Recommendation).

<sup>4</sup> AR 375.

<sup>5</sup> Id.

On October 17, November 7, and November 21, 2006, the City Council held public hearings on the proposed amendments to the Housing Element.<sup>6</sup> The City Council also held public meetings on December 5 and December 12, 2006.<sup>7</sup> The Bothell City Council adopted the 2006 updates to the *Imagine Bothell*. . . Comprehensive Plan, including the Housing Element amendment, on December 12, 2006 by Ordinance 1973.<sup>8</sup>

In amending its Housing Element, the City relied heavily on the expertise of A Regional Coalition for Housing (“ARCH”)<sup>9</sup> to develop a housing element that was balanced, specific to Bothell’s needs, and in compliance with the Growth Management Act (“GMA”):

As a prelude to proposed Plan amendments, the Planning Commission held a study session on October 19, 2005 and received a presentation from City staff and staff from A Regional Coalition for Housing (ARCH) as an introduction to the issue. It should be noted that ARCH staff worked closely with City staff on all aspects of the Housing Element.<sup>10</sup>

---

<sup>6</sup> AR 374.

<sup>7</sup> Id.

<sup>8</sup> See AR 278 – 335 (Ordinance 1973 with adopted Housing Element and Findings and Conclusions).

<sup>9</sup> ARCH is an organization created by Eastside cities and King County to preserve and increase the supply of housing for low and moderate income households in East King County. See [www.archhousing.org](http://www.archhousing.org). Bothell is a member of ARCH.

<sup>10</sup> AR 377 (emphasis added).

ARCH Program Manager Arthur Sullivan was substantially involved in the preparation of Bothell's Housing Element.<sup>11</sup> Because ARCH played such a pivotal role in the City's Housing Element update, the City even went so far as to specifically define the term staff, for purposes of its housing update, to include ARCH:

To work towards this, staff (for the purposes of the Housing Element Update the term "staff" will include ARCH) has been collecting, collating and analyzing data from a number of sources in an effort to provide a solid baseline of housing data for the Housing Element.<sup>12</sup>

The City, with assistance from ARCH, conducted a detailed housing capacity analysis utilizing, among other information, buildable lands data, to determine whether adequate residential capacity exists to meet the aggregate 2025 growth target for the City.<sup>13</sup> The results showed that the City's growth target can be met.<sup>14</sup> Moreover, in examining

---

<sup>11</sup> See, e.g., AR 398 (Memorandum from City staff dated 5/12/06) (Arthur Sullivan presented at the early study session and put forward a two part approach, including the formulation of a "Strategy Plan for providing affordable housing based on the needs . . ."); AR 341 (Planning Commission Minutes dated December 14, 2005) ("In addition to the organization component, Mr. Sullivan provided additional information regarding the needs assessment."); AR 345 (Planning Commission Minutes dated July 5, 2006) ("Planning Manager Hasseler introduced Arthur Sullivan who addressed the letter dated July 3, 2006, from Futurewise regarding the 2005-2006 Plan Amendment: Housing Element."); *Id.* ("Jane Lewine and Arthur Sullivan of ARCH, assisted by Planning Manager Hasseler, responded to questions."); AR 349 (Planning Commission Minutes dated September 20, 2006) ("Planning Manager Hasseler, assisted by Arthur Sullivan, responded to questions.").

<sup>12</sup> AR 399.

<sup>13</sup> AR 398 – 401; AR 402 – 404 (Spreadsheet Showing Residential Land Capacity).

<sup>14</sup> AR 401 (showing total 2025 growth target as less than total population capacities); see also AR 376 (Land Use Element Table LU-11 showing population and employment capacity surplus when compared to 2025 targets).

affordable housing targets, the City also concluded that such targets can be met based on residential capacity figures:<sup>15</sup>

. . . the [Snohomish County] guidelines encourage cities to meet their [affordable housing] needs through a range of strategies that result in development of new as well as preservation of existing housing. . . . [T]he guidelines state that at least for new development, affordable housing for low and moderate income households requires multifamily land that yields moderate to high densities. Comparing the capacity figures in Table HO-15 with the housing needs figures in HO-16, depending on the amount of housing development in the RAC Zones there is sufficient multifamily capacity to accommodate affordable housing needs resulting from projected growth.<sup>16</sup>

The Planning Commission Conclusions adopted by the City Council confirm that the amendments provide for a Housing Element that “Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth.”<sup>17</sup>

Futurewise did submit comment letters to the City and the City considered those comments. However, Futurewise’s assertion that its comments were “in large part recommended by Bothell’s Planning

---

<sup>15</sup> See AR 325 – 327. This confirmed previous Buildable Land Analyses conducted as part of the state-mandated buildable lands program, as well as analyses conducted as part of the City’s 2004 Comprehensive Plan update.

<sup>16</sup> AR 327.

<sup>17</sup> AR 379.

Manager,” is simply not supported by the record.<sup>18</sup> An impartial reading of the memo that Futurewise cites (AR 352-355) reflects that the memo was not an endorsement, but, rather, a model of diligent staff work: a discussion paper conveying in summary form various perspectives to assist the Planning Commission in its ongoing consideration of amendments to the Housing Element.<sup>19</sup> Nowhere in the memo did the Planning Manager “recommend” adoption of the policies urged by Futurewise.

B. Abandoned Issues and Decisions Below.

On February 6, 2007, Futurewise filed its Petition for Review with the CPSGMHB.<sup>20</sup> The issue presented to the CPSGMHB by Futurewise asked:

Does the Housing Element of the Imagine Bothell Comprehensive Plan violate RCW 36.70A.020(4), 36.70A.070(2), 36.70A.090, 36.70A.110(2), 36.70A.115, and 36.70A.130 by failing to review capacity in residential small lots, and by failing to provide sufficient mandatory provisions for the preservation, improvement, and development of housing, including development incentives and/or regulations, to ensure adequate provisions for

---

<sup>18</sup> Op.Br. at 6.

<sup>19</sup> See AR 352 (“The purpose of this memo is to provide background information to assist the Commission in the continued discussion of the Housing Element.”); AR 354 (“The following is provided to assist the Commission as you begin your discussion on Housing Element policy:”).

<sup>20</sup> AR 3, 5 – 34 (Futurewise Petition for Review to CPSGMHB including initial fax filing).

existing and projected needs of all economic segments of the community?

After reviewing the record and conducting a hearing on the merits on June 18, 2007,<sup>21</sup> the CPSGMHB issued its Final Decision and Order on August 2, 2007.<sup>22</sup> As a preliminary matter, the Board concluded that Futurewise had abandoned numerous portions of the legal issue it had insisted on including in the Prehearing Order, noting “Because of Petitioner’s abandonment of RCW 36.70A.090, .110(2), .115, and .130, the only provision applicable to this matter is RCW 36.70A.070(2).”<sup>23</sup> The Board then concluded that Futurewise’s petition should be dismissed, explaining:

*The Board dismissed the petition, finding that Futurewise failed to carry its burden of proof. The Board concluded that, using Petitioner’s assumptions about housing densities, Bothell’s housing element satisfied the minimum requirements under the GMA because it identifies sufficient land zoned to accommodate affordable housing [RCW 36.70A.070(2)(c)]. The Board also concluded that the GMA does not require that Bothell include mandatory incentive programs for low-income housing development within its housing element [RCW 36.70A.070(2)(d)].*<sup>24</sup>

On August 30, 2007, Futurewise filed its petition for judicial review of the CPSGMHB decision in Thurston County Superior Court. The case

---

<sup>21</sup> See AR 447 – 514 (Transcript of the Hearing on the Merits).

<sup>22</sup> See AR 430 – 445 (Final Decision and Order).

<sup>23</sup> AR 434.

<sup>24</sup> AR 430 (emphasis in original).

was assigned to the Honorable Richard D. Hicks. The petition expressly limited the scope of Futurewise's appeal to only one portion of the Board decision:

Futurewise appeals the portion of the order entitled "Affordable Housing Provision" and related sections. Futurewise is not seeking review of the portion of the order entitled "Land Capacity for Affordable Housing."<sup>25</sup>

And, although Futurewise's petition and briefing below cited as an afterthought RCW 34.05.570(3)(e) which requires that the Board's order be supported by substantial evidence, Futurewise failed to present and develop any argument in its briefing below as to why it believed the Board's decision was not supported by substantial evidence.<sup>26</sup>

The Honorable Richard D. Hicks heard oral argument on April 1, 2008 and on April 25, 2008 entered the Final Order Denying and Dismissing Futurewise's Petition for Review and Affirming Central Puget Sound Growth Management Hearings Board Decision Upholding City of Bothell's Housing Element.<sup>27</sup> The Court concluded:

---

<sup>25</sup> Futurewise's Petition for Judicial Review of an Administrative Decision dated August 29, 2007 at 3; Sub #4. This document has not yet been assigned an index number by the clerk, but has been listed for inclusion in the clerk's papers on the City's supplemental designation filed concurrently with this brief.

<sup>26</sup> See Petitioner's Brief dated February 27, 2008, Sub #18; and Petitioner's Reply dated March 14, 2008, Sub #20. These documents have not yet been assigned index numbers by the clerk, but have been listed for inclusion in the clerk's papers on the City's supplemental designation filed concurrently with this brief.

<sup>27</sup> CP 6-9.

1. In light of the deference given to the City of Bothell's planning actions under the Growth Management Act, Futurewise has not met its burden of proving that the Board's order is an erroneous interpretation or application of the law, that the Board's order is not supported by evidence that is substantial, or that the Board's order is inconsistent with a rule of the agency.
2. Futurewise has failed to prove that Bothell's Housing Element violates RCW 36.70A.070(2) by failing to make adequate provision for development of housing for all economic segments or by failing to contain certain mandatory provisions related to affordable housing.
3. The record here demonstrates that Bothell's Housing Element encourages the availability of affordable housing to all economic segments of the population, consistent with the GMA Housing Goal announced in RCW 36.70A.020(4).<sup>28</sup>

During his oral ruling, Judge Hicks also explained:

I cannot find with integrity that the legislature intended that there had to be funding incentives or bonuses that would require some translation into dollars in the Housing Element of a comprehensive plan as long as that plan took adequate steps to encourage affordable housing for all economic segments. I think the record here shows that at a minimum that standard has been met here.<sup>29</sup>

Judge Hicks also observed that Futurewise had not met its burden of proof because, in part, it had failed to show that the City's policies would prove insufficient.<sup>30</sup>

---

<sup>28</sup> CP 7-8.

<sup>29</sup> Report of Proceedings ("RP") at 38, ll.12-19.

<sup>30</sup> RP at 38-39 ("It is not possible to say on the evidence in the record one way or the other, and so for that reason I think Futurewise has not met their burden of proof, but I do not mean to be patronizing and I apologize if anybody in the courtroom finds that it is. I

### III. RESTATEMENT OF ISSUES

The four issues stated by Futurewise are so abstractly worded as to not be specific to or dispositive of this case. In other words, even if this Court ruled in favor of Futurewise on each of the four issues it has raised, the central issue presented in this case would still be left unresolved. The actual issue presented here is:

After applying the “more deferential” standard of review that applies to city planning actions under the GMA and giving “substantial weight” to the Board’s interpretation of the GMA, has Futurewise met its burden of proving that the Board was clearly erroneous in dismissing Futurewise’s claim that Bothell’s Housing Element violates the GMA by failing to contain sufficient mandatory provisions for affordable housing?

### IV. ARGUMENT

#### A. **Petitioner Has the Burden of Proof, The City’s Housing Element is Entitled to Broad Deference, and the Board’s Interpretation of the GMA is Entitled to Substantial Weight.**

The Administrative Procedure Act (“APA”), RCW Ch.34.05, governs judicial review of challenges to actions of the Growth Boards.<sup>31</sup> Under the APA, the “burden of demonstrating the invalidity of agency action is on the party asserting invalidity.”<sup>32</sup> A party is entitled to relief from an agency order if the order fails to meet any of the nine standards

---

think it is a very sophisticated argument that really should be made to the legislature and not the Court.”).

<sup>31</sup> Quadrant Corp. v. Central Growth Management Hearings Board, 154 Wn.2d 224, 110 P.3d 1132, 1137 (2005).

<sup>32</sup> RCW 34.05.570(1)(a).

delineated in RCW 34.05.570(3). Here, Futurewise argues that the Board erroneously applied the law.<sup>33</sup> While this Court reviews issues of law under RCW 34.05.570(3)(d) *de novo*,<sup>34</sup>

. . . the Board itself is entitled to deference in determining what the GMA requires. This Court gives “substantial weight” to the Board’s interpretation of the GMA.<sup>35</sup>

In addition, when the Growth Management Act was adopted in 1990 and 1991, the legislature directed that “broad deference” be afforded to determinations made by local jurisdictions and that comprehensive plans, development regulations and amendments would be “presumed valid upon adoption.”<sup>36</sup> The Legislature amended the statute in 1997 to emphasize this point, directing that the Growth Boards, “shall find compliance unless it is determined that the action by the state agency,

---

<sup>33</sup> As presented above, in its petition for review and brief below Futurewise cited to RCW 34.05.570(3)(e), the provision that requires the Board’s decision be supported by substantial evidence. However, Futurewise failed to present and develop any argument in its briefing below that the Board’s decision was not supported by substantial evidence and focused instead on its theory that the Board erroneously interpreted the law. *See* Petitioner’s Brief dated February 27, 2008, Sub# 18; and Petitioner’s Reply dated March 14, 2008, Sub #20. Accordingly, that issue (which Futurewise is now briefing for the first time on appeal) is not properly before this Court. *See, e.g. State v. Scott*, 48 Wash.App. 561, 568, 739 P.2d 742 (Div.I 1987) (citing *Smith v. Shannon*, 100 Wash.2d 26, 666 P.2d 351 (1983)) (“Generally, an appellant may not raise for the first time on appeal an issue not argued below.”); *see also* RAP 2.5. In any event, as the Argument which follows demonstrates, the Board’s decision (and thus the City’s action) were clearly supported by substantial evidence.

<sup>34</sup> *Quadrant*, 110 P.3d at 1137.

<sup>35</sup> *Lewis County v. Western Growth Management Hearings Board*, 157 Wn.2d 488, 139 P.3d 1096, 1100 (2006).

<sup>36</sup> RCW 36.70A.320.

county, or city is *clearly erroneous* in view of the entire record before the Board and in light of the goals and requirements of this chapter.”<sup>37</sup> In adopting this amendment, the Legislature took the unusual step of codifying in RCW 36.70A.3201 its statement of intent:

In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. *Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.* (emphasis added).

In Quadrant Corp. v. Central Growth Management Hearings Board, 154 Wn.2d 224, 110 P.3d 1132, 1139 (2005), the Supreme Court admonished:

While we are mindful that this deference ends when it is shown that a county's actions are in fact a “clearly erroneous application of the GMA, we should give effect

---

<sup>37</sup> Id. (emphasis added).

to the legislature's explicitly stated intent to grant deference to county planning decisions.

In City of Redmond v. CPSGMHB,<sup>38</sup> Division One of the Court of Appeals reversed a Board decision that had required "specific and rigorous" supporting documentation, which could withstand "heightened scrutiny," before previously designated agricultural resource lands could be "de-designated" :

Nothing in the GMA suggests a city must present "specific and rigorous" evidence subject to "heightened scrutiny" when defending a land use designation. Rather, the GMA requires the Board to presume a challenged ordinance is valid, and the challenger has the burden of establishing invalidity.

The GMA simply provides a "framework" for jurisdictions to weigh and balance the various goals of the Act, in light of local circumstances:

[T]he GMA creates a general "framework" to guide local jurisdictions instead of "bright line" rules. See RCW 36.70A.3201; Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U.L.REV. 5, 9 ("most GMA requirements are conceptual, not definitive, and often ambiguous"). Indeed, the existence of restrictive covenants that predate the enactment of the GMA and limit density within the urban growth areas are the type of "local circumstances" accommodated by the GMA's grant of a "broad range of discretion" for local planning. See RCW 36.70A.3201;

---

<sup>38</sup> City of Redmond v. Central Puget Sound Growth Management Hearings Bd., 116 Wn.App. 48, 65 P.3d 337, 341-342, (Div. I 2003), *rev. denied*, 77 P.3d 651, 150 Wn.2d 1007.

Cent. Puget Sound Hearings Bd., 142 Wash.2d at 561, 14 P.3d 133.<sup>39</sup>

The Viking Court further explained:

[T]he GMA does not prescribe a single approach to growth management. Instead, the legislature specified that “the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community.” RCW 36.70A.3201. Thus, the GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.<sup>40</sup>

And, in examining the deference to be given to local planning decisions, the Quadrant court unambiguously held:

In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general.<sup>41</sup>

In August of this year, the Washington Supreme Court emphasized:

Finally, it should be noted that from the beginning the GMA was “ ‘riddled with politically necessary omissions, internal inconsistencies, and vague language.’ ” Quadrant Corp., 154 Wash.2d at 232, 110 P.3d 1132 (quoting Richard L. Settle, Washington's Growth Management Revolution Goes to Court, 23 SEATTLE U.L.REV. 5, 8 (1999)). The “ ‘GMA was spawned by controversy, not consensus’ ” and, as a result, it is not to be liberally

---

<sup>39</sup> Viking Properties v. Holm, et al., 155 Wn.2d 112, 129-130, 118 P.3d 322 (2005).

<sup>40</sup> Id. at 125-26 (emphasis added).

<sup>41</sup> Quadrant, 110 P.3d at 1139.

construed. Woods v. Kittitas County, 162 Wash.2d 597, 612 n. 8, 174 P.3d 25 (2007) (quoting Settle, *supra*, at 34).<sup>42</sup>

Notably, our Supreme Court also went on to hold and emphasize (again) that the burden of proof in GMA cases cannot be shifted to local jurisdictions, whose plans are presumed valid upon adoption:

The Court of Appeals reasoned a county must explain its justifications for employing a land market supply factor and defend the reasonableness of such a factor in a comprehensive plan. Thurston County, 137 Wash.App. at 803-04, 154 P.3d 959; *see also* Diehl, 94 Wash.App. at 654, 972 P.2d 543. The GMA does not support this ruling. A comprehensive plan is presumed valid upon adoption, and the petitioner has the burden of demonstrating the plan fails to comply with the GMA. RCW 36.70A.320(1), (2). The GMA does not require a county to explicitly identify a land market supply factor or provide justifications for adopting such a factor in the comprehensive plan. A county is required to justify its UGA designations if it fails to reach an agreement with a city. RCW 36.70A.110(2). No analogous provision requiring a county to explicitly identify and justify a UGA boundary adopted in a joint plan with a city exists. To require a county to justify its use of a land market supply factor is to presume the UGA designation is invalid and to place the burden on a county to justify its actions.<sup>43</sup>

Petitioner's reliance on King County v. CPSGMHB, 142 Wn.2d 543, 14 P.3d 133 (2000) and Thurston County v. Cooper Point Association, 108 Wn.App. 429, 31 P.3d 28 (Div. II 2001), *affirmed* 148

---

<sup>42</sup> Thurston County v. Western Washington Growth Management Hearings Bd., \_\_\_ Wn.2d \_\_\_, 190 P.3d 38 (2008) at ¶15.

<sup>43</sup> Id. at ¶35. The Court also took the opportunity to emphasize that the GMA does not impose any bright line rules and that local circumstances vary. Id. at ¶37.

Wn.2d 1, 57 P.3d 1156 (2002) in an attempt to chip away at the holdings of these more recent cases is misplaced. In King County, the Court addressed a County enactment for recreational use of lands already designated as part of the County's Agricultural Production District (APD). The Court held as a matter of law, "After properly designating agricultural lands in the APD, the County may not then undermine the Act's agricultural conservation mandate by adopting 'innovative' amendments that allow the conversion of entire parcels of prime agricultural soils to an unrelated use."<sup>44</sup>

Similarly, in Thurston County v. Cooper Point Assoc., the County's plan to extend sewer connections through a designated rural area directly contradicted "an essential GMA goal of reducing urban growth into rural areas."

In contrast, the issues raised by Futurewise here involve subtle matters of judgment and discretion: there is no stark legal question involving invasion of agricultural lands mandated for protection or extension of growth-inducing sewer service to a designated rural area. Rather, there is disagreement over discretionary policy choices made by the City in addressing the issue of affordable housing. Such municipal choices are entitled to broad deference under the Act.

---

<sup>44</sup> Id. at 561.

**B. Bothell's Housing Element Complies with the GMA by Promoting and Encouraging Affordable Housing and Making Adequate Provision for the Existing and Projected Needs of the City of Bothell.**

RCW 36.70A.020(4) provides in relevant part:

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.<sup>45</sup>

RCW 36.70A.070(2) provides:

Each comprehensive plan shall include a plan, scheme, or design for each of the following:

(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

---

<sup>45</sup> RCW 36.70A.020(4) (emphasis added).

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.<sup>46</sup>

Although RCW 36.70A.070(2) calls for a Plan housing element to include identification of “sufficient land for housing”, including for low-income housing, there are no specific “affordable housing” requirements within the statute. In a subtle but significant distortion, Appellant states that “The GMA implements its housing goals through the mandatory provisions of the Housing Element laid out in RCW 36.70A.070(2).” Op.Br. at 20. However, RCW 36.70A.070 is entitled “Comprehensive Plans—Mandatory Elements.” Clearly, a housing element is a mandatory element of a comprehensive plan. While the GMA housing goals may be “implemented” through the mandatory housing element, there are no specific “mandatory provisions” which must be included within the element and no specific requirement that any such “mandatory provisions” must relate to affordable housing.

As the Board held in L.M.I. et al. v. Town of Woodway, CPSGMHB Case No. 98-3-0012, Final Decision and Order (January 8, 1999) at 22, “Goal 4 does not require that each and every land use

---

<sup>46</sup> RCW 36.70A.070(2).

designation of a jurisdiction provide for affordable housing.”<sup>47</sup> The GMA’s Housing Goal is “one of the less directive goals because it uses the verbs ‘encourage’ and ‘promote’ rather than more directive verbs like ‘ensure’ or ‘protect.’”<sup>48</sup>

This Court has itself emphasized: “The only requirement is for counties and cities to keep the goal of promoting affordable housing in mind (along with the other 12 goals) in developing their comprehensive plans.”<sup>49</sup>

In contrast, Futurewise reads too much into<sup>50</sup> LIHI v. Lakewood, 119 Wn.App. 110, 77 P.3d 653 (Div. II 2003). In LIHI, this court did not conclude that Lakewood’s comprehensive plan had actually failed to meet the GMA’s housing goal. Rather, it remanded the matter because the Board had not addressed “*whether* the Lakewood Plan furthered the GMA goal of encouraging the availability of affordable housing.”<sup>51</sup> LIHI stands

---

<sup>47</sup> Growth Board decisions are not binding upon this Court, but they are instructive; as highlighted above, due to their specialized expertise, Board interpretations of the GMA are accorded “substantial weight.” Futurewise has selectively featured only some of the relevant Growth Board cases in its briefing.

<sup>48</sup> The Children’s Alliance and Low Income Housing Institute v. City of Bellevue, CPSGMHB Case No. 95-3-0011, Final Decision and Order (July 25, 1995) at 4.

<sup>49</sup> Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd., 113 Wn.App. 615, 628-29, 53 P.3d 1011 (Div. II 2002) (emphasis added) (upholding Kitsap County 1998 Comprehensive Plan against affordable housing challenge where the County’s plan “devote[d] an entire chapter (Housing Chapter) and appendix (Housing Appendix) detailing the housing inventory, historical and current housing trends, availability of affordable housing, future housing needs, etc.”).

<sup>50</sup> Op.Br. at 18.

<sup>51</sup> LIHI at 115 (emphasis added).

for the straightforward proposition that, when evaluating local comprehensive plans, the GMA housing goal should be considered. LIHI does not change the fact that the plain language of the GMA housing goal purposefully utilizes verbs such as “promote” and “encourage” rather than directly mandatory terms.

In any event, the lower court here expressly held, “The record here demonstrates that Bothell’s Housing Element encourages the availability of affordable housing to all economic segments of the population, consistent with the GMA Housing Goal announced in RCW 36.70A.020(4).”<sup>52</sup> Notably, Futurewise did not assign error to this ruling by Judge Hicks.

The Western Board addressed the issue of affordable housing in Friends of San Juans v. San Juan County, WWGMGB Case No. 06-2-0024c, Compliance Order, Final Decision and Order (February 12, 2007), upholding San Juan County’s policy regarding accessory dwelling units (“ADUs”). In doing so, the Western Board held that ADUs “can be a source of affordable housing” and emphasized that the GMA’s housing

---

<sup>52</sup> CP 8.

and economic development goals “do not apply in isolation” and must be harmonized with other goals.<sup>53</sup> As the Board observed:

Encouraging affordable housing is one of the thorniest problems facing local jurisdictions today. The factors affecting the cost of housing are numerous and there is no certainty that any one policy choice will result in more market-based affordable housing.<sup>54</sup>

Futurewise highlights Benaroya et al. v. City of Redmond, CPSGMHB Case No. 95-3-0072, Final Decision and Order (March 25, 1996), upholding Redmond’s housing element, in which the Central Board noted that one of Redmond’s policies happened to provide for incentives and bonuses to encourage affordable housing.<sup>55</sup> However, in calling out that policy as an example of how Redmond was meeting its GMA obligations, the Board made no pretense that it was establishing “one true path.” In fact, the Benaroya Board remarked that local governments need not provide a detailed plan as to how their GMA policies will be achieved:

Nothing in the GMA or CPPs requires Redmond to show a detailed plan as to how these policies will be achieved. There is nothing in the Plan or in the record that suggests the affordable housing policies are not capable of being carried out.<sup>56</sup>

---

<sup>53</sup> Id. at 25. Accessory apartments are legislatively recognized as affordable housing tools. RCW 43.63A.215

<sup>54</sup> Id. at 25.

<sup>55</sup> Brief at 21-22.

<sup>56</sup> Id. at 20. This is very much in-line with Judge Hicks’ observation that Futurewise did not show that the Bothell’s policies were inadequate to meet the City’s needs.

Futurewise also cites to the Central Board's 1998 decision in City of Renton v. City of Newcastle, CPSGMHB Case No. 97-3-0026, Final Decision and Order (February 12, 1998), which was also decided before the more recent judicial decisions cited above. The Renton Board was very deferential to Newcastle's housing element in the face of a challenge by the neighboring jurisdiction. Renton had alleged that Newcastle's own data showed that it would not be able to meet its affordable housing target even if it was assumed that all multi-family and mixed use housing was affordable housing. According to Renton, the shortfall was 338 affordable units. And, because Newcastle did not indicate what portions if any of single family dwellings were marked for affordable housing, Renton argued that there was no indication the shortfall would be covered by affordable single family units.<sup>57</sup>

In rejecting Renton's challenge, the Board reasoned that all Renton had proven was that the number of affordable housing units could not be calculated based on the data in Newcastle's plan -- not enough for Renton to prevail:

Although Newcastle's Plan recognizes that multi-family housing is a significant source of affordable housing, nothing in the Plan supports Renton's supposition that all multi-family and mixed use development will be affordable housing. This analysis does not mean that

---

<sup>57</sup> Id. at 6.

Newcastle has not planned for 610 affordable housing units; it means only that the number of affordable housing units that will be provided cannot be calculated from Table LU-11.<sup>58</sup>

The Renton Board further concluded:

The Plan's housing policies show that Newcastle is encouraging the development of affordable housing. The Plan's housing policies make block grant funds available for affordable housing (HO-10); encourage coordination of affordable housing incentive programs with other cities and the County (HO-P11); allow density bonuses to single-family and multi-family developments that provide affordable units (HO-P12); require the City to review the permit process to reduce negative impacts on housing costs (HO-P13, HO-P17); and encourage the City to work with lending institutions to find solutions that reduce housing financing costs for builders and consumers (HO-P16). These are the types of policies and commitments necessary to meet the GMA's direction to attack the affordable housing issue; these are the types of policies and commitments that encourage availability of and make adequate provisions for affordable housing. **It is not fatal to Newcastle's Plan that specific units of affordable housing cannot be identified.**<sup>59</sup>

As it did before the Board and again before the Superior Court below, Futurewise again selectively excludes the important final sentence of this quotation from its briefing—a sentence which emphasizes that the GMA is not nearly as rigid as Futurewise urges.<sup>60</sup>

---

<sup>58</sup> Id. at 7.

<sup>59</sup> Id. (emphasis added) (internal footnote omitted).

<sup>60</sup> Op.Br. at 21.

In this case, the Board itself expressly recognized that its prior decisions do not stand for the propositions urged by Futurewise:

...Petitioner cites the Board's past decisions regarding the housing elements of other cities as evidence of the standard by which a city or county's housing element may meet the requirements of the GMA. Futurewise PHB at 11 and 13, citing *Benaroya v. City of Redmond*, CPSGMHB Case No. 95-3-0072 FDO (Mar. 25, 1996) at 18-19, and *City of Renton v. City of Newcastle*, CPSGMHB, Case No. 97-3-0026, Final Decision and Order (Feb. 12, 1998), at 6. However, this reliance is misplaced, because these cases do not represent a list of "required elements" to satisfy the GMA's requirements for housing plans. While other cities' plans can be emulated and provide a basis for comparing different approaches and assessing their success or failure, such plans are not the source of "standards" for Board review. On the contrary, each housing element must be considered on its own merits under a fact specific analysis, and each city or county necessarily plans and words its housing element differently in order to address local needs. The GMA is the measure of compliance.<sup>61</sup>

Nonetheless, Futurewise insists that Bothell's Housing Element must have more "mandatory" provisions. In doing so, it focuses on a few provisions of the City's Housing Element while glossing over the entirety. When viewed as whole, it was apparent to the Board that the City's Housing Element not only meets GMA requirements but exceeds them.

As its Housing Element points out, Bothell worked closely with ARCH:

---

<sup>61</sup> AR 437 (internal footnote omitted).

Updates of this element were prepared with assistance from A Regional Coalition for Housing (ARCH), a consortium of cities (including Bothell) who have agreed to pool resources to promote the preservation and construction of affordable housing.<sup>62</sup>

Bothell's Housing Element provides a detailed Background and Housing Needs Analysis which reviews the City's housing needs in four areas as follows:

*Housing Characteristics* presents a "community snapshot" of existing housing. *Population Characteristics* reviews housing related population data, and how changing demographics may affect both existing and future goals for housing. The *Housing Affordability* section looks at housing needs for people of all economic segments; while the *Special Needs* section looks at affordable housing for frail or disabled community members. This section concludes with Regional Coordination; a look at how planning for Bothell's housing needs coordinates with regional housing strategies.<sup>63</sup>

Using U.S. Census Bureau data, the City evaluated the types of housing within the City and the number of units per multi-family building. The data demonstrated that multi-family buildings had increased substantially and supported the conclusion that "As Bothell continues to develop, the percentage of multi-family homes is expected to increase."<sup>64</sup>

---

<sup>62</sup> AR 310.

<sup>63</sup> Id.

<sup>64</sup> AR 311. Denser housing is typically viewed as a potential means of promoting affordable housing.

The analysis summarizes housing units permitted by year and type of housing.<sup>65</sup> Per the analysis, the data demonstrate that “The rate of residential permit activity since 1995 would allow the City to achieve its original GMA overall housing targets.” And, if development occurs at a similar rate over the next 20 years, “the City would achieve its new 2025 growth targets.” The analysis goes on to observe that rental vacancy rates have been relatively high at 6.8% for 2005 and that one impact of the high vacancy rates “is that rent levels have remained stable and even decreased in some areas since 2000.”<sup>66</sup>

The analysis also reviews mobile homes within the City, concluding that mobile homes represented approximately 12% of the City’s housing in 2000.<sup>67</sup> Approximately half of the City’s mobile home community “are located within six parks that are specifically designated as Mobile Home Parks (MHP) on the Comprehensive Plan map. These parks have long been recognized as a source of affordable housing, hence the protective designation.”<sup>68</sup>

The City’s Housing Element examines in detail population demographics, including for example the aging of the “baby boom”

---

<sup>65</sup> See AR 312 – 313, including but not limited to Table HO-4.

<sup>66</sup> Id.

<sup>67</sup> AR 313.

<sup>68</sup> Id. Bothell is one of the very few (if not the only) jurisdiction(s) in the area with such a designation.

generation, and the potential impact of such demographics on existing and future housing needs.<sup>69</sup> Since 2000, the City’s population growth rate was a mere 3%—less than the growth rates for King County (4%), Snohomish County (8%) and the state (6%).<sup>70</sup> Between 1990 and 2000, housing types in Bothell were relatively stable, fluctuating by no more than 2% for any one type of housing.<sup>71</sup> Bothell’s average housing size increased by only .03 persons per household in the same period.<sup>72</sup>

In addressing forms of housings, Bothell’s Housing Element examined “housing needs for all segments of Bothell’s population.”<sup>73</sup> The Element observes that smaller lot single family detached homes have been well received in the City, pointing to the Northcreek and Pepperwood Grove housing projects in Bothell as successful examples and noting other City efforts to promote affordable housing and a variety of housing types:

These developments [Northcreek and Pepperwood Grove] were possible through a Comprehensive Plan designation established in 1994 and implemented through zoning classifications in 1996 which permitted detached housing on 5,400 square foot lots and attached housing at one dwelling unit per 5,400 square feet of net buildable area. Over the last decade the City has taken other actions to allow more diverse forms of housing. The City has revised regulations permitting accessory dwelling units

---

<sup>69</sup> AR 314.

<sup>70</sup> Id.

<sup>71</sup> AR 315-316, including but not limited to Figure HO-3.

<sup>72</sup> AR 316.

<sup>73</sup> AR 317.

(ADUs), created incentives for senior housing in the Specialized Senior Housing Overlay zone (SSHO); and have created residential activity centers (RAC) to encourage housing in the central locations of the city. The Bothell Housing Element incorporates a number of land use measures intended to preserve and expand housing choice opportunities in order to provide a range of housing alternatives for persons of varying incomes, needs and lifestyles.<sup>74</sup>

Futurewise’s own comment letter recognizes the City’s efforts. AR 357–358 (“strongly support[ing]” updated Housing Affordability section and recommendation to maintain Mobile Home Park designation; “applaud[ing]” the designation of the Residential-Activity Center zone; “appreciate[ing] and support[ing]” the recommendations for accessory dwelling units.”)

The City’s Housing Element devotes an entire five page section to Housing Affordability. It “looks at housing needs for people of all economic segments.”<sup>75</sup> The section begins by calling out both existing and future affordable housing opportunities within the City:

The Bothell Housing Element incorporates a number of land use measures intended to preserve and expand affordable housing for persons of varying incomes and needs. Existing housing opportunities affordable to moderate to median income households include downtown housing, senior housing, and manufactured housing communities; future housing opportunities affordable to lower and median income households

---

<sup>74</sup> Id.

<sup>75</sup> AR 317 – 321.

include an expanded accessory dwelling unit program and expanded residential development opportunities within and around Community and Regional Activity Centers.<sup>76</sup>

The section then goes on to provide a detailed breakdown of households based on income.<sup>77</sup> As is often the case in other jurisdictions as well, rental housing makes up a large part of the housing affordable to low and moderate income families within Bothell.<sup>78</sup> While average rents have remained stable between 2000 and 2005, median incomes rose by 18.4%.<sup>79</sup>

The Housing Element also examines in detail subsidized housing, special needs housing, and senior housing, typically viewed as subsets of affordable housing.<sup>80</sup> With respect to senior housing, the Housing Element explains:

Bothell has implemented a number of land use measures to address the general need for senior housing in the community. These include removing density limits for senior housing in multi-family and commercial zones and assigning a Specialized Senior Housing Overlay (SSHO) to the single family zoned area around the Northshore Senior Center. The market has responded to the SSHO, and as of 2006 five senior housing developments with 535 units were in operation, under construction, or in permit review in the overlay area. All of these properties provide a wide range of services to residents. This zoning has no explicit affordability provisions and all have been

---

<sup>76</sup> AR 317.

<sup>77</sup> AR 317 – 318.

<sup>78</sup> AR 319.

<sup>79</sup> Id.

<sup>80</sup> AR 321 – 324.

privately financed and are rented at market rent levels. The City surplused a site next to the SSHO area which provides 50 apartments of subsidized housing for low and moderate income seniors.<sup>81</sup>

In the Regional Coordination section of its Housing Element, Bothell examined how its housing needs coordinated with regional housing strategies, including affordable housing needs.<sup>82</sup> The data demonstrated that affordable housing targets could be met based on residential capacity figures, explaining:

. . . the [Snohomish County] guidelines encourage cities to meet their [affordable housing] needs through a range of strategies that result in development of new as well as preservation of existing housing. . . . [T]he guidelines state that at least for new development, affordable housing for low and moderate income households requires multifamily land that yields moderate to high densities. Comparing the capacity figures in Table HO-15 with the housing needs figures in HO-16, depending on the amount of housing development in the RAC Zones there is sufficient multifamily capacity to accommodate affordable housing needs resulting from projected growth.<sup>83</sup>

Based on the data and analyses and in light of existing regulations and policies already geared toward promoting affordable housing and ensuring adequate housing, the City Housing Element adopts 8 separate

---

<sup>81</sup> AR 324.

<sup>82</sup> AR 324 – 327.

<sup>83</sup> AR 327; *see also* AR353 (“As presented at the May 17, 2006 Planning Commission meeting, and as the table above shows, the 2006 housing capacity analysis confirms that Bothell has adequate residential capacity to meet 2025 targets and in which zones the capacity is located.”).

housing goals, 12 separate housing actions, and 36 separate housing policies for a total of 56 goals, actions, and policies. Of these, there are at least 40 housing goals, policies, and actions within the City's Housing Element that individually and/or collectively promote affordable housing (and, it is worth noting, several of these provisions contain "mandatory" language).<sup>84</sup>

In light of the above, the Board reasonably concluded that the City of Bothell is doing more than enough to meet its obligations under the GMA:

Bothell's housing element identifies several targeted affordable housing strategies based on the City's assessment of local needs:

- Streamlined permitting process for ADUs. *Imagine Bothell*, Policy HO-P14, at HO-23.
- Retention of mobile home parks, echoing our state's requirement of protecting mobile home residents from displacement under RCW 59.22.010(2). *Imagine Bothell*, Policy HO-P10, at HO-23.
- Special zoning designation for Senior Housing, which already is providing 535 units in operation, under construction, or in permit review. *Imagine Bothell*, at HO-16.

---

<sup>84</sup> Ultimately, it is the totality of the Housing Element that is at issue, not simply the isolated provisions seized upon by Futurewise as topics of complaint. Due to page limitations, all of the City's extensive Housing Element provisions cannot be quoted here. Instead, the City refers the Court to the following goals, actions and policies which can be found in its Housing Element at AR 330 – 335: HO-P1; HO-P2; HO-G4; HO-P10; HO-P11; HO-P12; HO-P13; HO-P14; HO-P15; HO-P16; HO-A5; HO-A6; HO-A7; HO-G5; HO-P17; HO-P18; HO-P19; HO-P20; HO-A8; HO-A9; HO-G6; HO-P21; HO-P22; HO-P23; HO-P24; HO-P25; HO-P26; HO-P27; HO-P30; HO-P31; HO-G7; HO-P32; HO-P33; HO-P34; HO-A10; HO-A11; HO-G8; HO-P35; HO-P36; HO-A12.

- RAC zoning to encourage the development of housing in the central locations of the city, a traditional location for affordable housing, by providing opportunities for residential activity centers where the number of units is controlled by site and building envelope regulations rather than a density limit. *Imagine Bothell*, HO-9 and HO-20.<sup>85</sup>

Futurewise generally discounts the Board’s decision and the City’s over-all corpus of provisions relating to affordable housing and points to a few provisions which it says should be strengthened because there is a “gap between the city’s housing needs and its supply of affordable housing.”<sup>86</sup> Futurewise, though, never actually demonstrates any “gap” between housing needs and affordable housing. Instead, it substitutes argument based on a gap between housing needs and “assisted housing” -- a distinct concept.<sup>87</sup> The GMA does not require that a jurisdiction’s affordable housing needs be met exclusively or even predominantly by “assisted housing.” Instead, the GMA allows local jurisdictions to choose among a wide variety of tools to meet their unique planning needs.<sup>88</sup>

---

<sup>85</sup> AR 437 – 438 (internal footnote omitted).

<sup>86</sup> Op.Br. at 19.

<sup>87</sup> *Id.*

<sup>88</sup> Futurewise asserts that it “does not argue that Bothell must supply assisted housing for its entire need for affordable housing. A wide range of options could be implemented.” Op.Br. at 19. However, Bothell has already adopted a “wide range” of policies to address its affordable housing needs and believes that its policies are adequate. It is clear that Futurewise is not talking about a wide range of options, but instead is demanding that the City adopt certain, specific mandatory incentive programs that require significant City funding/resources. *See, e.g.*, Op.Br. at 19 (arguing that “Bothell’s Housing Element fails these GMA goals through a lack of significant funding, controls, and/or incentives.”).

Futurewise also singles out purportedly mandatory provisions from other cities' housing elements,<sup>89</sup> apparently for the proposition that Bothell should emulate them. As a threshold matter, Bothell's Housing Element must stand or fall based on its own legal merits in relation to the requirements of the GMA, not based on what the housing elements of other cities provide. And, Futurewise has presented no authority that such information is legally relevant, let alone legally significant. GMA compliance was never intended to be a contest by comparison.<sup>90</sup> However, it is worth noting that some of the isolated housing provisions from other jurisdictions of which Futurewise approves are no more mandatory than those Bothell has adopted.

For example, Futurewise applauds throughout its briefing the policies adopted by Newcastle. But Newcastle HO-P11 and HO-P12 (2003) provide, in relevant part:

**HO-P11** The City of Newcastle should provide density bonuses and other incentives . . .

---

This is why Judge Hicks commented that Futurewise's issues were more appropriate for the Legislature than the Court.

<sup>89</sup> Op.Br. at 24 (citing to "mandatory provisions" in the housing elements of Bellevue Kirkland, Redmond and New Castle"). It is worth noting that Bothell's Housing Element is longer than the housing elements of Kirkland, Redmond and Newcastle combined. It is also longer than Bellevue's. While length alone is not a conclusive indicator of GMA compliance, it is indicative of the seriousness of purpose and depth of resources assigned by the City to its Housing Element.

<sup>90</sup> This is consistent with the strong emphasis on deferring to judgments by local governments and allowing them flexibility to accommodate their individualized local needs.

**HO-P12** The City of Newcastle shall evaluate the effectiveness of the development regulations applicable to vacant residential land and modify them to encourage residential developments that increase housing choice and affordability. . . .<sup>91</sup>

When one compares these Newcastle policies to Bothell's counterparts, it is obvious that any attempt to distinguish them is nothing more than an artificial exercise in semantics. Bothell's similar policies provide:

**HO-P16** Regularly monitor the number of housing units produced in all zones and the effectiveness of its regulations and incentives in achieving its housing objectives. If needed, regulations and strategies should be changed or new strategies developed if the desired amount of housing is not built or if there is insufficient choice in the style, size or cost of housing.

**HO-P20** Consider market incentives to encourage affordable housing to meet the needs of people who work and desire to live in Bothell.

**HO-P34** Strive to meet State, King County and Snohomish County housing targets and affordable housing targets through a combination of policies, incentives, regulations and programs. Affordable housing targets reflect the countywide income mix of all households.<sup>92</sup>

---

<sup>91</sup> AR 194, 195 (emphasis added).

<sup>92</sup> AR 332 – 333, 335.

Before Judge Hicks, Futurewise cited with approval two examples from Bellevue's housing element, specifically HO-23 and HO-28.<sup>93</sup> However, these provisions provide for little more than "review" of regulations and unspecified "incentives." Moreover, if one looks at other Bellevue policies, it is evident that Bellevue's housing element is not quite the mandatory model Futurewise conjures.<sup>94</sup> *See, e.g.*, AR 165 – 166 (Bellevue Policy HO-29: "Encourage the building of affordable housing Downtown;") Bellevue Policy HO-30: "Encourage preservation, maintenance, and improvements to existing affordable housing;" Bellevue Policy HO-31: "Encourage the development of long-term management strategies for affordable housing in cooperation with not-for profit housing organizations;" Bellevue Policy HO-32: "Explore all available federal, state, and local programs and private options for financing affordable housing;" Bellevue Policy HO-33: "Explore financial incentives to encourage affordable multifamily housing. . .").

Certainly, one can pick and choose policies and assert that one particular policy is better in isolation than another, but that is not what the GMA intends. The analysis here begins and ends with determining whether Bothell's Housing Element as a whole meets the GMA housing

---

<sup>93</sup> Petitioner's Brief dated February 27, 2008, Sub #18 at 19-20.

<sup>94</sup> The same is true for the Kirkland and Redmond housing elements.

goal of “encourage[ing] the availability of affordable housing” and contains the requisite segments enumerated in RCW 36.70A.070(2). Appellant’s arguments that Bothell must do more by adopting particular “mandatory” incentives or that Bothell must include specific provisions that are identical to ones of other jurisdictions are without merit. Such requirements are found nowhere in the GMA. In short, Futurewise has failed to meet its burden of showing that the Board’s decision was not supported by substantial evidence or was clearly erroneous.

**C. The Legislature Made Incentives Optional in RCW 36.70A.540.**

Futurewise argues that the Board’s decision was somehow flawed because the Board “appeared to presume that RCW 36.70A.540(1)(a) was the sole authority regarding incentives to promote affordable housing, whether contained in development regulations or comprehensive plans in general.”<sup>95</sup> Futurewise misunderstands the Board’s decision and the GMA itself.

RCW 36.70A.540, adopted in 2006,<sup>96</sup> provides in part:

(1)(a) Any city or county planning under RCW 36.70A.040 **may** enact or expand affordable housing incentive programs providing for the development of low-income housing units through development regulations. An affordable housing incentive program **may** include, but is not limited to:

---

<sup>95</sup> Op.Br. at 22.

<sup>96</sup> A copy of the statute and accompanying notes appears in the record at AR 337 – 338.

- area;
- (i) Density bonuses within the urban growth
- (ii) Height and bulk bonuses;
- (iii) Fee waivers or exemptions;
- (iv) Parking reductions;
- (v) Expedited permitting, conditioned on provision of low-income housing units; or
- (vi) Mixed use projects.<sup>97</sup>

Even where a jurisdiction chooses to enact such incentives through its “development regulations,” the regulations themselves must allow applicants to opt-out. *See* RCW 36.70A.540(1)(c) (emphasis added) (“If a developer chooses not to participate in an optional affordable housing incentive program adopted and authorized under this section, a city, county, or town may not condition, deny, or delay the issuance of a permit or development approval that is consistent with zoning and development standards on the subject property absent incentive provisions of this program.”).

The Legislature made clear that affordable housing incentive programs are entirely optional and should be “consistent with local needs:”

---

<sup>97</sup> RCW 36.70A.540(1)(a) (emphasis added). Density, height and parking reduction bonuses are what Futurewise is advocating for here. *See* Op.Br. at 24.

The legislature encourages cities, towns, and counties to enact or expand affordable housing incentive programs, including density bonuses and other incentives, to increase the availability of low-income housing for renter and owner occupancy that is located in largely market-rate housing developments throughout the community, consistent with local needs and adopted comprehensive plans. While this act establishes minimum standards for those cities, towns, and counties choosing to implement or expand upon an affordable housing incentive program, cities, towns, and counties are encouraged to enact programs that address local circumstances and conditions while simultaneously contributing to the statewide need for additional low-income housing.<sup>98</sup>

The optional nature of the statute was also confirmed by the Western Board. Friends of San Juans v. San Juan County, WWGMGB Case No. 06-2-0024c, Compliance Order, Final Decision and Order (February 12, 2007) at 23 (“there is no evidence that San Juan County has elected to create such a program and therefore this provision does not apply here”).

As noted in the Central Board’s decision here:

Bothell’s plan speaks to incentive programs under Goal HO-P20 which provides: “Consider market incentives to encourage affordable housing to meet the needs of people who work and desire to live in Bothell.”<sup>99</sup>

The Board’s decision also expressly recognizes that incentive programs are optional under RCW 36.70A.540.<sup>100</sup>

---

<sup>98</sup> AR 338 (RCW 36.70A.540, Notes: Findings—2006 c 149).

<sup>99</sup> AR 438.

<sup>100</sup> AR 434 (“sets out the requirements for housing incentive programs which cities or counties may adopt as development regulations”); AR 438 (“The permissive language of RCW 36.70A.540).

If the Legislature made incentive programs optional in the context of GMA development regulations, how could they possibly be required in the context of GMA comprehensive planning? Futurewise implicitly concedes this point, perhaps unintentionally: “The Board appears to have missed the distinction between development regulations and other types of mandatory support for affordable housing that may be included in a comprehensive plan.”<sup>101</sup> It is one thing to say that mandatory incentives may be included in comprehensive plans, it is quite another to dictate that, regardless of local needs, all jurisdictions must include mandatory incentives in their comprehensive plans.

In this case, the Board examined the City’s housing element on its own merits and concluded that it complied with GMA requirements. The GMA simply does not require inclusion of provisions mandating affordable housing incentives. The fact that the Legislature made incentive programs optional in RCW 36.70A.540 simply bolsters the Board’s conclusions.

## V. CONCLUSION

For all of the above reasons, the City of Bothell respectfully requests that Futurewise’s appeal be denied and this Court affirm the

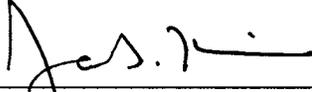
---

<sup>101</sup> Op.Br. at 26-27 (emphasis added).

decisions of both the Board and Judge Hicks dismissing Futurewise's challenge to the City of Bothell's Housing Element.

Dated this 9<sup>th</sup> day of September, 2008.

EGLICK KIKER WHITED PLLC

By  WSBA# 21586  
Peter J. Eglick, WSBA No. 8809  
for Joshua A. Whited, WSBA No. 30509  
Attorneys for City of Bothell

**CERTIFICATE OF SERVICE**

I, Fred Schmidt, certify that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

On September 9, 2008, I caused to be delivered, a true and correct copy of the foregoing **Respondent City of Bothell's Brief** in the manner described below:

Mr. Rob McKenna  
Attorney General  
Ms. Martha Lantz  
Assistant Attorney General  
Licensing & Administrative Law  
Division  
1125 Washington Street  
P.O. Box 40110  
Olympia, WA 98504-0110

Heath S. Fox  
Johnson, Graffe, Keay, Moniz &  
Wick, LLP  
925 Fourth Ave., Suite 2300  
Seattle, WA 98104  
(206) 223-4770 phone  
(206) 386-7344 fax  
Via First-class Mail

Via First-class Mail

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

DATED this 9th day of September, 2008 at Seattle, Washington.

  
Fred Schmidt, Legal Assistant  
Eglick Kiker Whited PLLC