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COURT OF APPEALS  
DIVISION II

NO. 39547-9-II

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

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THURSTON COUNTY & CITY OF YELM,

Respondents,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD, FUTUREWISE, & ADAMS COVE GROUP,

Appellants.

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**BRIEF OF APPELLANT FUTUREWISE**

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## I. INTRODUCTION

This appeal arises out of amendments to a comprehensive plan jointly adopted by Thurston County and the City of Yelm. Thurston County adopted the amendments by Resolution No. 13734. In part, the amendments reduced the population projection used to size the Yelm Urban Growth Area (UGA), which includes both the City of Yelm and unincorporated areas adjacent to it, from 11,999 people to 10,560 people.<sup>1</sup>

The Washington State Supreme Court has held that “[i]f a county amends a comprehensive plan, the amendment must comply with the GMA and may be challenged within 60 days of publication of the amendment adoption notice.” *Thurston County v. Western Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38 (2008). The Supreme Court has also held that “a county’s UGA designation cannot exceed the amount of land necessary to accommodate the urban growth projected by OFM, plus a reasonable land market supply factor.”

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<sup>1</sup> The Record transmitted to the Superior Court by the Board and forwarded to this Court by the Superior Court is identified at Clerks Papers 54. The Record uses the original exhibit numbers to reference the record. Accordingly, all references to the Exhibits herein reference CP 54 and the original Index Numbers; the page numbers added by the Board are specifically referenced where available. CP 54, Administrative Record (AR), pp. 34 – 35, Thurston Co. Resolution No. 13734 Attachment (Att.) A: City of Yelm Comprehensive Plan Update 2006 p. III-5 – III-6.

*Id.*, 164 Wn.2d at 352. After adopting an OFM projection, the County must then allocate this projected population amongst each urban growth area, using the allocation to size the UGA. *Thurston County*, 164 Wn.2d at 349-52, fn.11.

The central issue in this case revolves around the failure of Thurston County to reduce the size of the Yelm urban growth area (“UGA”) to make the size of the UGA consistent with a newly reduced population projection adopted by the County. Because the Supreme Court has held that a UGA’s size cannot exceed the amount of land necessary to accommodate the urban growth projected and because the projections show the UGA at issue is much larger than necessary to accommodate the new population projection adopted by Thurston County, the Western Washington Growth Management Hearings Board (Western Board or WWGMHB) properly concluded that the amendments violated the Growth Management Act.<sup>2</sup> Since this conclusion is consistent with the Washington State Supreme Court’s holdings interpreting the Growth Management Act and is supported by substantial evidence in the record,

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<sup>2</sup> CP 54, AR pp. 676-702, *Adams Cove Group, and Futurewise v. Thurston County*, Western Washington Growth Management Hearings Board (WWGMHB) Case No. 07-2-0005, Final Decision and Order (July 28, 2008), at 1 – 25 of 26.

Futurewise respectfully requests that the Court reverse the Superior Court and uphold the Final Decision and Order of the Growth Management Hearings Board.

## II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in concluding Thurston County's intent in adopting Resolution No. 13734 is relevant. (Finding of Fact and Conclusion of Law No. 2).

Issue: Does Thurston County's intent in adopting Resolution No. 13734 relieve it from its obligation to comply with the law?

2. The Superior Court erred in concluding that Futurewise did not timely dispute the Yelm UGA. (Finding of Fact and Conclusion of Law Nos. 3 and 4).

Issue: Was Futurewise's petition to the WWGMHB timely?

3. The Superior Court erred in concluding that WWGMHB Case No. 05-2-0002 triggered the application of issue preclusion, barring Futurewise's challenge in the instant case. (Finding of Fact and Conclusion of Law Nos. 10 and 11).

Issue: Does issue preclusion bar Futurewise's challenge of Resolution No. 13734?

4. The Superior Court erred in concluding that there was not substantial evidence in the record supporting the WWGMHB's decision that the Yelm UGA is oversized. (Finding of Fact and Conclusion of Law No. 13).

Issue: Is there substantial evidence supporting the WWGMHB's decision?

5. The Superior Court erred in concluding that Futurewise had not carried its burden of proof that the actions of Thurston County

were not clearly erroneous. (Finding of Fact and Conclusion of Law No. 14).

Issue: Given the appropriate standard of review on appeal, did Futurewise carry its burden of proof before the WWGMHB?

### III. STATEMENT OF THE CASE

As stated in the Introduction, the substantive issue in this case revolves around the failure of Thurston County to reduce the size of the Yelm UGA to make the size of the UGA consistent with a newly reduced population projection adopted by the County.

The Western Board held that Thurston County's urban growth areas (UGAs) violated the Growth Management Act in July, 2005. *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, Final Decision and Order (July 20, 2005), at 19-26. As the Western Board wrote: "Since the supply of urban residential lands (18,789 acres) significantly exceeds the projected demand for such lands over the course of the 20-year planning horizon (11,582 acres), the County's UGAs fail to comply with RCW 36.70A.110." *Id.* at 26. This Court later affirmed the Western Board's holding. *Thurston County v. Western Washington Growth Mgmt. Hearings Bd.*, 137 Wn. App. 781, 803-805, 154 P.3d 959 (2007), affirmed in part and reversed in part, *Thurston County v. Western*

*Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 190 P.3d 38 (2008). The Washington State Supreme Court affirmed the Western Board’s holding that “a county’s UGA designation cannot exceed the amount of land necessary to accommodate the urban growth projected by OFM, plus a reasonable land market supply factor.” *Id.*, 164 Wn.2d at 352.

On December 20, 2006, Thurston County enacted Resolution No. 13734, which adopted the *Yelm Comprehensive Plan Update*. Thurston County Resolution No. 13734 adopted a new population projection for the Yelm urban growth area and new data on the capacity of the urban growth area for residential, commercial, and industrial uses.<sup>3</sup> The amendments adopted by Resolution No. 13734 reduced the population projections in the *Yelm Comprehensive Plan Update* from 11,999 people to 10,560 people, a 12 percent reduction.<sup>4</sup> The population projections and capacity data are official enactments of Thurston County and have not been amended or repealed. There were other amendments to the *Yelm*

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<sup>3</sup> CP 54, AR pp. 23, 33-37, and 61, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 pp. II-4, III-4 – III-8; Exhibit B p. B-4.

<sup>4</sup> CP 54, AR p. 34-35, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 p. III-5 – III-6.

*Comprehensive Plan Update* as well. While Resolution No. 13734 refers to the *Yelm/Thurston County Joint Plan*, the document itself is entitled the “*City of Yelm Comprehensive Plan Update 2006.*” To minimize confusion we will cite and refer to the *Yelm Comprehensive Plan Update*. The County and City both adopted the parts of the plan denoted with an asterisk in the comprehensive plan update, and which are at issue in this appeal.<sup>5</sup>

A number of procedural and legal issues have complicated the instant case. The County filed a Motion to Dismiss the Petition for Review which initiated the instant case before the WWGMHB on April 19, 2007. Futurewise filed a response to the motion on April 18, 2007. In its Order denying the County’s Motion, the Board summarized the County’s basic arguments:

The County brings this Motion to Dismiss on the basis that Petitioners had no right to appeal the size of City of Yelm’s Urban Growth Area (UGA) as (1) Resolution No. 13734 did not amend the Yelm UGA; (2) the action taken by Thurston County was not part of the seven year comprehensive plan review nor the ten year UGA review; and (3) the issue of the size of the

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<sup>5</sup> CP 54, AR at 15, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at I-1. Urban growth area designations shall be included in the county comprehensive plan. RCW 36.70A.110(6).

County's UGAs is currently before the Board pursuant to an earlier appeal.

*Adams Cove Group and Futurewise v. Thurston County*, WWGMHB Case No. 07-2-0005, Order on Motion to Dismiss (June 4, 2007) at 2.

In short, the County argued that Futurewise's appeal of the Yelm UGA sizing failed on the merits, was untimely, and was barred by operation of *res judicata* and/or issue preclusion principles. The Western Board disagreed.

Having taken appeal to the Superior Court, Thurston County renewed its arguments and the Superior Court found that Futurewise's challenge before the Board was not supported by substantial evidence, and was, anyway, untimely and barred not by *res judicata*, but by issue preclusion.<sup>6</sup>

Because there is substantial evidence in the record supporting the finding of the Western Board and because Futurewise's challenge was timely and not barred by issue preclusion, Futurewise sought review of this Court.

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<sup>6</sup> CP 174-178.

## IV. ARGUMENT

### A. STANDARD OF REVIEW

A Growth Management Hearings Board

is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations. The Board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]. To find an action “clearly erroneous,” the board must be left with the firm and definite conviction that a mistake has been committed.

*King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142

Wn.2d 543, 552, 14 P.3d 133, 138 (2000). (Hereinafter, “*King County*”)

(internal citations and quotation marks omitted).

When reviewing a Board’s decisions, this Court applies the standards of the Administrative Procedure Act, chapter 34.05 RCW.

*Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2007) (citing RCW 34.05.570(3)).

The Court reviews the Board's legal conclusions *de novo*, with deference to the Board's interpretation of the statute it administers. *Id.*, quoting *King County*, 142 Wn.2d at 553. The Board’s findings of fact are reviewed for substantial evidence. *Id.* In reviewing the agency’s findings of fact under RCW 34.05.570(3)(e), the test of substantial evidence is “a sufficient

quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997).

The Court of Appeals does not weigh the evidence or substitute its view of the facts for that of the Board. *Callecod*, 84 Wn. App. at 676, n.9. Futurewise, the prevailing party before the Board, may argue any ground to support the Board’s order which is supported by the record. *Whidbey Env’tl. Action Network (“WEAN”) v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885 (2004).

The Supreme Court has made clear that the reviewing court’s legal analysis, while *de novo*, should be one “giving substantial weight to the Board’s interpretation of the statute it administers.” *Swinomish Indian Tribal Cmty v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2007). Similarly, review of issues involving mixed questions of law and fact, courts determine the law independently, “giving substantial weight to the Boards’ interpretations,” then apply the law to the facts as found by the board. *Hamel v. Employment Sec. Dep’t*, 93 Wn. App. 140, 145, 966 P.2d 1282 (1998), *review denied*, 137 Wn.2d 1036, 980 P.2d 1283 (1999); *King County*, 142 Wn.2d at 552. The burden of demonstrating the invalidity of agency action is on the party asserting

invalidity. RCW 34.05.570(1)(a). Thus the burden of demonstrating the Board’s decision was erroneous rests with the County and the Intervenor City of Yelm.

**B. LAND SUPPLY WITHIN THE YELM UGA SUBSTANTIALLY EXCEEDS THE AMOUNT OF LAND NECESSARY TO ACCOMMODATE THE OFM PROJECTION ADOPTED IN THE YELM COMPREHENSIVE PLAN UPDATE.**

Table A demonstrates that the land supply within the Yelm urban growth area exceeds demand by 97 percent for residential uses, 116 percent for commercial uses, and 1,040 percent for industrial uses. In other words, the Yelm UGA grossly exceeds the size needed to accommodate its share of the County’s adopted twenty year population projection.

**Table A: Land Demand and Supply in the Yelm UGA 2000 to 2025**

Land Use Type	Supply 2000 (acres)	Demand 2000 – 2025 (acres)	Excess of Supply over Demand	
			Number	Percent
Residential	3,144	1,594	1,550	97.24%
Commercial	400	185	215	116.22%
Industrial	251	22	229	1040.91%

Source: CP 54, AR p. 36, Resolution No. 13734, Att. A: *City of Yelm Comprehensive Plan Update 2006* p. III-7 Table 2.

At the time the *Yelm Comprehensive Plan Update* was adopted, neither the Yelm UGA nor the Thurston County UGA incorporated a land market supply factor.<sup>7</sup> Nor does the *Yelm Comprehensive Plan Update* include a land market supply factor.<sup>8</sup> The data in Table A comes directly from the data that was adopted by both the City of Yelm and Thurston County.<sup>9</sup>

Table A, which is taken from a table published in the *Yelm Comprehensive Plan Update* only contains data through 2025 and the Plan's new growth targets are apparently for 2026 or 2030.<sup>10</sup> However, using the data in Tables 1 and 2 of the *Yelm Comprehensive Plan Update* and other data in the comprehensive plan, the Petitioners provided a similar table for 2026 and 2030. As shown in Table B, these numbers demonstrate a greater excess of supply over demand, given the adopted

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<sup>7</sup> CP 54, AR at 455, 457, Thurston Regional Planning Council, *Buildable Lands Report for Thurston County* p. II-22; p. II-37 (September 2002) & AR at 572-73, ECONorthwest, AHBL, & Mark Personius, *Evaluation of Thurston County Buildable Lands Program Assumptions* at 4-51 to 4-52 (Final Report September 15, 2006).

<sup>8</sup> CP 54, AR at 34-36, 59-66, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 pp. III-5 – III-7, Exhibit B at B-2 to B-9.

<sup>9</sup> CP 54, AR at 15, 17, 30, and 34-36, Thurston Co. Resolution 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at I-1; I-3, III-1; and III-5 to III-7.

<sup>10</sup> *Id.* at AR 35, III-6.

population projections. Again, the data was adopted by both the City of Yelm and Thurston County and applies to the entire UGA.<sup>11</sup>

**Table B: Residential Land Demand and Supply in the Yelm UGA 2000 to 2026 and 2030**

Comprehensive Plan Horizon Year	Supply 2000 (acres)	Demand 2000 – 2026 or 2030 (acres)	Excess of Supply over Demand	
			Number	Percent
Residential Demand in 2026	3,144	1,326	1,818	137.10%
Residential Demand in 2030	3,144	1,502	1,642	109.32%

Source: CP 54, AR at 35-36, 40, Thurston Co. Resolution No. 13734, Att. A: *City of Yelm Comprehensive Plan Update 2006* at III-6 Table 1; III-7 Table 2; and IV-3 Table 1. See CP 54, AR at 442, Appendix A of the Futurewise Prehearing Brief for the data derived from these tables and the steps used to calculate these figures.

There is a third way to look at capacity over demand. Table 1 of the *Yelm Comprehensive Plan Update* shows a need for 2,719 housing units to be built in the Yelm UGA between 2005 and 2026.<sup>12</sup> Table 1 also shows a need for 3,239 housing units to be built between 2005 and 2030.<sup>13</sup> Table 1 shows that 1,200 housing units have vested or been recently

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<sup>11</sup> *Id.* at AR p. 15, p. 17, p. 30, pp. 34 – 36, pp. 39 – 40, p. I-1, p. I-3, p. III-1, pp. III-5 – III-7, & pp. IV-2 – IV-3.

<sup>12</sup> *Id.* at AR p. 35, p. III-6.

<sup>13</sup> *Id.*

approved.<sup>14</sup> Another 5,000 to 6,000 housing units are in pre-submission review.<sup>15</sup> So the housing units that are vested, built, and in pre-submission review are 265 percent of the needed housing units between 2005 and 2025. For 2005 to 2030, they are 222 percent of the needed housing units. Again, this data was adopted by both the City of Yelm and Thurston County and applies to the entire UGA.<sup>16</sup>

**C. FUTUREWISE’S CHALLENGE OF THE YELM URBAN GROWTH AREA WAS TIMELY.**

Thurston County argued to the Superior Court, and that court agreed that Futurewise’s appeal to the Growth Board in this case was untimely since an appeal of the urban growth area should have been made in 1994, during the County’s ten-year UGA review. In so holding, the Superior Court erred.

The Washington State Supreme Court has held that “[i]f a county amends a comprehensive plan, the amendment must comply with the GMA and may be challenged within 60 days of publication of the amendment adoption notice.” *Thurston County*, 164 Wn.2d at 347. So

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* AR at 15, 17, 30, 34-36, I-1, I-3, III-1, III-5 to III-7.

there is no question that the amendments that Thurston County made to the *Yelm Comprehensive Plan Update* must comply with the Growth Management Act. This includes the GMA's provisions on sizing UGAs.

In *Thurston County*, the Supreme Court summarized the requirements for urban growth areas:

¶ 27 A comprehensive plan must designate a UGA “within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.” RCW 36.70A.110(1). A county's comprehensive plan may include a number of different UGAs, which must include all cities and “may include territory that is located outside of a city only if such territory already is characterized by urban growth.” *Id.* Additionally, the UGA must 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,” as determined by OFM's growth management population projection. RCW 36.70A.110(2). A UGA boundary may be expanded beyond the area sufficient to accommodate the projected population growth by a “reasonable land market supply factor.” *Id.* “In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.” *Id.* In designating a UGA, a county must consult with the cities located within its boundaries. *Id.* If a city and county cannot agree, the county may designate a UGA but must justify its decision in writing. *Id.*

¶ 28 UGA boundaries must be reviewed *at least every 10 years*. Former RCW 36.70A.130(3). The comprehensive plan must be “revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period.” *Id.*

*Thurston County*, 164 Wn.2d at 348.

The Supreme Court also held that there is both a minimum and maximum size to the urban growth area:

¶ 34 The size of a UGA must be “[b]ased upon” an OFM projection and a county must include “areas and densities sufficient to permit the urban growth” projected to occur over the next 20 years. RCW 36.70A.110(2). While the statute explicitly states the UGA must be large enough to accommodate the projected population increase, it does not specifically state the projected population limits the amount of land that may be designated as urban. In *Diehl*, the Court of Appeals held an OFM projection constitutes both the minimum and maximum size of a UGA. 94 Wn. App. at 653, 972 P.2d 543. The court reasoned that although the GMA does not explicitly restrict the size of a UGA, “[o]ne of the goals of the GMA is to ‘[r]educe the inappropriate conversion of undeveloped land into sprawling, low-density development.’ ”<sup>FN12</sup> *Id.* (second alteration in original) (quoting RCW 36.70.020(2)). If the size of a UGA is not limited, rural sprawl could abound.<sup>FN13</sup> *Id.* Thus, although the GMA does not explicitly limit the size of a UGA, to give meaning to the market supply factor provision and in light of the GMA goal of reducing sprawl, we hold a county’s UGA designation cannot exceed the amount of land necessary to accommodate the urban growth projected by OFM, plus a reasonable land market supply factor.

FN13. “Oversized UGAs are perhaps the most egregious affront to the fundamental GMA policy against urban sprawl, and it is this policy that the UGA requirements, more than any other substantive GMA mandate, are intended to further.” Lloyd, *supra*, at 105 [citing to Brent D. Lloyd, *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in*

*Comprehensive Planning under the Washington State Growth Management Act*, 36 GONZ. L. REV. 73 (2001)].

*Id.*, 164 Wn.2d at 351-52.

The Supreme Court explained that the Washington State Office of Financial Management (OFM) “projects a reasonable range of population growth for a county.” *Id.* A county, in consultation with its cities, selects a population projection from that range and allocates the population projection to the urban growth areas within the county. Each urban growth area is then sized based on the allocated population projection. *Id.* at 351-352.

The GMA, in RCW 36.70A.115, requires that:

Counties and cities that are required or choose to plan under RCW 36.70A.040 shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management.

Thurston County plans under RCW 36.70A.040. *Thurston County*, 164 Wn.2d at 337.

In this case, Thurston County substantially amended the *Yelm Comprehensive Plan Update*. Resolution No. 13734 adopted the

following amendments directly related to population and housing growth and sizing the urban growth area:

- The amendments increased the planning horizon from 20 years to 20 to 25 years, the time period covered by the comprehensive plan.<sup>17</sup>
- The amendments deleted the references to the 2015 population forecasts which ranged from a “Medium Growth Full Density” forecast of 11,999 people, to a “High Growth Current Trends Population” forecast of 12,731 people, to a “High Growth Full Density” forecast of 18,335 people.<sup>18</sup>
- The amendments added a 2026 population projection of 10,560 and a 2030 population projection of 11,480.<sup>19</sup>
- The amendments repealed a 2015 land needs assessment which was based on a 2015 population projection of 11,999 people and 3,247 housing units.<sup>20</sup>
- The amendments adopted a new land use needs assessment based on a 2026 population projection of 10,560 and 2,719 housing units.<sup>21</sup>
- The amendments adopted *Table 2 Analysis of Land Supply vs. Demand, 2000 – 2025 Yelm and Yelm Urban Growth Area (UGA)*, which provided that the urban growth area had a supply of 3,144 acres of residential land and a 2020 demand of 1,365 acres of

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<sup>17</sup> CP 54, AR at 15, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at I-1.

<sup>18</sup> CP 54, AR at 23, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at II-4.

<sup>19</sup> *Id.*

<sup>20</sup> CP 54, AR at 34, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at III-5.

<sup>21</sup> CP 54, AR at 35, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at III-6.

residential land and a 2025 demand of 1,594 acres of residential land.<sup>22</sup>

- According to the newly adopted Table 2, the commercial land supply was 400 acres and the 2025 demand was 185 acres.<sup>23</sup>
- According to the newly adopted Table 2, the industrial lands supply was 251 acres, but the 2025 demand was 22 acres.
- The amendments deleted an earlier Table 2.<sup>24</sup>

In short, the amendments increased the time frame of the land use projections from 2015 to 2025 and 2030 while decreasing the population and, for the 20 year time period used to size the urban growth area, the number of needed housing units. Thurston County and the City of Yelm acknowledge that they adopted new population projections and amended the data on buildable lands within the UGA.<sup>25</sup>

The repeal of the old population and housing projections and the adoption of the new population and housing projections and the size of the Yelm Urban Growth Area were specifically addressed in Thurston County Resolution No. 13734 in Finding 7:

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<sup>22</sup> CP 54, AR at 36, Thurston Co. Resolution 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at III-7.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> CP 61-90, Thurston County and City of Yelm's Opening Brief at 11 (March 20, 2009).

7. Yelm Joint Plan-Growth Management Act Planning Parameters Chapter: The chapter is updated to include the most recent 20-year population projections, including 2026 figures; and confirms Yelm and its UGA have sufficient area to accommodate projected growth consistent with RCW 36.70A.110(2).<sup>26</sup>

These are precisely the amendments by Thurston County that Futurewise challenged before the Western Board: Whether the Yelm UGA is properly sized and whether the County has complied with the GMA in amending the *Yelm Comprehensive Plan Update* and planning for the newly adopted 20-year population projections. Contrary to the Superior Court's holding, these population projections were not adopted in 1994 and Resolution No. 13734 did not determine that the UGA was properly sized for the 1994 population projection.

At the risk of stating the obvious, Futurewise could not have challenged the amendments in Thurston County Resolution No. 13734 in 2004 because the County did not make them until 2006. While the Superior Court found that "Thurston County's adoption of Resolution No. 13734 on December 20, 2006, was an annual Comprehensive Plan update and was never intended by Thurston county to be a 10-year review of

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<sup>26</sup> CP 54, AR at 7, Thurston Co. Resolution No. 13734 at 2.

Yelm's UGA as was done by the County in November of 2004,<sup>27</sup> the County's intent does not obviate the Supreme Court's holding that amendments must comply with GMA.

The amendments giving rise to Futurewise's challenge were made in 2006 and Futurewise timely challenged them at the time they were passed.<sup>28</sup> Consequently, this challenge is timely under RCW 36.70A.280(1)(a) and RCW 36.70A.290(2), and failure to challenge the amendments within 60 days of the notice of passage of Resolution No. 13734 would have forever barred review by the Western Board.

The population projection used to size the UGA must be a 20 year projection, in this case the 2026 projection. *Thurston County*, 164 Wn.2d at 351. What Thurston County and the City of Yelm achieve under the Superior Court's Order is the ability to size a UGA based upon adoption of higher population and housing projections, in this case a 2015 population projection of 11,999 people and 3,247 housing units, and then lower the population and housing projections, in this case a 2026 population projection of 10,560 and 2,719 housing units without resizing the UGA, and thereby escape the requirement that they reduce the size of

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<sup>27</sup> CP 175, Order at 2.

<sup>28</sup> CP 54, AR at 9, Thurston Co. Resolution No. 13734 at 4.

the urban growth area.<sup>29</sup> This clearly violates one of the holdings of *Thurston County*, “a county’s UGA designation cannot exceed the amount of land necessary to accommodate the urban growth projected by OFM, plus a reasonable land market supply factor.” *Thurston County*, 164 Wn.2d at 352. This would result in “[o]versized UGAs [that] are perhaps the most egregious affront to the fundamental GMA policy against urban sprawl, and it is this policy that the UGA requirements, more than any other substantive GMA mandate, are intended to further[]” which the Supreme Court identified in footnote 13 of the *Thurston County* decision. *Id.* at fn. 13.

The Supreme Court has held that UGAs are sized based on their population projections. The 2006 amendments challenged in this case reduced the population projections that must be used to size the Yelm UGA from 11,999 people to 10,560 people, a 12 percent reduction.<sup>30</sup> So the basis for the UGA changed. The Western Board properly applied the law in finding that the UGA was oversized. As a result, it was error for

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<sup>29</sup> CP 54, AR at 34-35, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at III-5 to III-6.

<sup>30</sup> CP 54, AR at 34-35, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at III-5 to III-6.

the Superior Court to find that the Western Board erroneously interpreted or applied the law.

**D. THURSTON COUNTY HELD THAT AMENDMENTS TO COMPREHENSIVE PLANS MUST COMPLY WITH THE GMA AND THURSTON COUNTY’S ARGUMENT THAT URBAN GROWTH AREAS MAY ONLY BE CHALLENGED DURING TEN YEAR UPDATES IS INCONSISTENT WITH THE SUPREME COURT’S DECISION.**

In *Thurston County*, the Supreme Court held that comprehensive plan urban growth areas designations could be appealed on two independent grounds:

¶ 25 A party may challenge a county’s failure to revise its UGA designations during a 10 year update only if there is a different OFM population projection for the county. At least every 10 years a county must review its UGA designations. Former RCW 36.70A.130(3). “The county comprehensive plan designating urban growth areas ... shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period.” *Id.* The OFM 20 year population projection is updated “[a]t least once every five years or upon the availability of decennial census data, whichever is later.” RCW 43.62.035. If the urban growth projection changes, a county must revise its comprehensive plan. Former RCW 36.70A.130(3). If the county fails to revise its plan, a party may challenge whether the UGA accommodates the most recent OFM population projection.

¶ 26 If a county amends a comprehensive plan, the amendment must comply with the GMA and may be challenged within 60 days of publication of the amendment adoption notice. Former RCW 36.70A.030(1); former RCW 36.70A.130(1)(b); RCW 36.70A.290(2). The County

asserts Futurewise's challenge was timely only as to the revisions to the Tenino and Bucoda UGAs and, thus, the size of the overall UGA in the county cannot be challenged because it was essentially unchanged in 2004. The County fails to recognize the changes to the two individual UGAs modified the overall UGA size and, even if the overall UGA size was not changed, the population projection was updated. In this case, the County's UGA boundaries were amended in 2004 and, consequently, are subject to challenge.

*Thurston County*, 164 Wn.2d at 347.

So if a county fails to conduct a ten year update, the urban growth area can be challenged provided OFM has issued a new set of population projections. But if the county amends its comprehensive plan in the mean time, the amendment may be challenged on the grounds that the amendment does not comply with the GMA. The Superior Court's Order in this case ignores that second basis for challenging amendments under *Thurston County*.

In this case, the 2006 amendments updated the County's population projection, reducing the total 20-year population projection by 12 percent.<sup>31</sup> As the Supreme Court held in *Thurston County*, this action is subject to challenge under the GMA.

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<sup>31</sup> CP 54, AR at 34-35, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at III-5-III-6.

The Superior Court appeared to adopt the County's argument below that the legislature only required the urban growth areas to be reviewed every ten years and so they can only be appealed every ten years. This is error. First, the GMA provides that a County shall review, "*at least every ten years, its designated urban growth area or areas...*" RCW 36.70A.130(3)(a) emphasis supplied. This clearly indicates that review is not limited to every ten years. Second, as discussed at length *supra*, all amendments to a comprehensive plan must comply with the GMA.

Beyond that, the legislature requires that

[c]ounties ... shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management.

RCW 36.70A.115. So all amendments must provide sufficient capacity, consistent with the OFM forecast, regardless of when they are adopted. And as the Supreme Court held, the failure of an amendment to comply with the GMA can be appealed to the Growth Management Hearings Boards. So the Western Board's decision is consistent with the law as

interpreted by the Supreme Court, and the Superior Court erred in reversing the Board.

**E. NEITHER RES JUDICATA NOR COLLATERAL ESTOPPEL APPLY IN THIS CASE, AND THE SUPERIOR COURT ERRED IN FINDING ISSUE PRECLUSION BARRED FUTUREWISE’S CLAIM.**

The Superior Court found that collateral estoppel barred Futurewise’s claims in this case. This is error in two respects. First, the County never argued that *res judicata* or collateral estoppel to the Western Board, so it was not properly raised for the first time on appeal to the Superior Court. Second, it fails because there is not a concurrence of cause of action in the case of *res judicata* or identical issues in the case of collateral estoppel.

As the Washington State Supreme Court has held:

The Washington Administrative Procedure Act, RCW 34.05, provides that on judicial review of administrative action, “[i]ssues not raised before the agency may not be raised on appeal....” RCW 34.05.554. *See also, Griffin v. Department of Social & Health Serv.*, 91 Wn.2d 616, 631, 590 P.2d 816 (1979); *Kitsap Cy. v. Department of Natural Resources*, 99 Wn.2d 386, 393, 662 P.2d 381 (1983). This rule is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking.

*King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 668-669, 860 P.2d 1024 (1993) (footnote 12 omitted).

In this case, neither Thurston County nor the City of Yelm argued before the Western Board that *res judicata* or collateral estoppel barred Futurewise's claims, so they were precluded from raising the issue for the first time on appeal to the Superior Court.<sup>32</sup> This issue, as it relates to an appeal of a Growth Board decision, was addressed in *Spokane County v. City of Spokane*, where the Court of Appeals held that "a challenge based on collateral estoppel is not proper here because the City raises the challenge for the first time on appeal." *Spokane County v. City of Spokane*, 148 Wn. App. 120, 124, 197 P.3d 1228 (2009), reconsideration denied Feb. 24, 2009, citing *Creech v. AGCO Corp.*, 133 Wn. App. 681, 687, 138 P.3d 623 (2006).

Even had the argument been proper before the Superior Court it fails on the merits. First, the County and City cannot show an identity of causes of action in the two cases, as is necessary for *res judicata* to apply. Under the doctrine of *res judicata*, or claim preclusion, "a prior judgment will bar litigation of a subsequent claim if the prior judgment has 'a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the

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<sup>32</sup> See CP 54, AR at 121-129; 554-565; AR 703-708.

persons for or against whom the claim is made.’ ” *In re Election Contest Filed by Coday*, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006) (alteration in original) (quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995)), *cert. denied*, 127 S.Ct. 444, 166 L.Ed.2d 309 (2006)). Futurewise agrees that the doctrine of *res judicata* is applicable to proceedings before the Growth Boards.

As the Superior Court rightly found, neither the subject matter nor the cause of action in this case existed when the Final Decision and Order was issued in WWGMHB Case No. 05-2-0002. The proper formulation of the test for determining identity of subject matter in the context of *res judicata* is that a second proceeding may be considered if there is a substantial change in circumstances or conditions relevant to the case or a substantial change in the case itself. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 26 Wn.2d 22, 32-33, 891 P.2d 29 (1995). Here the substantial change was adoption of a new ordinance.

This appeal and the prior appeal of the county’s urban growth area do not “arise out of the same transactional nucleus of facts.” This appeal arose out Thurston County’s 2006 adoption of the *Yelm Comprehensive Plan Update* which uses a population target of 2026 population projection of 10,560 and 2,719 housing units. To this day, this population has not

been amended and remains a part of the *Yelm Comprehensive Plan Update*. The new urban growth area was adopted in 2008 and uses a different population projection and includes a market factor. The challenge in the current case relied upon a cause of action tied to a distinct legislative action, Resolution No. 13734, which is: 1) independently required to comply with the GMA, 2) generated unique study and public participation (i.e. unique evidence), and 3) does not impair any legally cognizable interest established by the prior cases. *Res judicata* cannot apply here.

Neither does collateral estoppel. Application of the doctrine of collateral estoppel, or issue preclusion, requires “(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action.” *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.App. 1, 25, 154 P.3d 936 (2007), opinion adopted by *City of Arlington v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 193 P.3d 1077 (2009).

As the Court of Appeals has held in a nearly identical situation in a

GMA appeal:

collateral estoppel requires the City to show that “the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding.” *Christensen*, 152 Wn.2d at 307, 96 P.3d 957. The City has failed to satisfy this requirement. The issues here are not identical to those resolved in the parties’ 2002 case. In 2002, the City argued that the County’s original comprehensive plan did not comply with the GMA. Here, the City’s objection is that the County’s *amendment* to its comprehensive plan violates the GMA. The County, then, would not be collaterally estopped from appealing the Hearings Board’s final decision and order dated November 27, 2006.

*Spokane County*, 148 Wn. App. at 124 (emphasis original).

Futurewise’s petition to the Western Board in this case challenged the 2006 *amendment* contained in the *Yelm Comprehensive Plan Update*. The 2008 Western Board Order Finding Compliance for the County’s UGAs in Case No. 05-2-0002, which the County and City claimed (and the Superior Court found) collaterally estopped Futurewise’s challenge, was an appeal of the 2004 countywide comprehensive plan and the 2008 amendments to the countywide comprehensive plan. The *Yelm Comprehensive Plan Update* was not at issue in that case.<sup>33</sup> Neither the

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<sup>33</sup> See *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, Order Finding Compliance (UGAs), May 29, 2009.

2004 countywide comprehensive plan nor the 2008 amendments at issue in 05-2-0002 amended the provisions which were amended by the *Yelm Comprehensive Plan Update*. As in the case of *City of Spokane*, therefore, the issues in this case are not identical to the issues in any previous case.

The Superior Court's holding that collateral estoppel bars Futurewise's challenge effectively cloaks the County's amendment of the *Yelm Comprehensive Plan* from the review allowed by GMA. In this case, the *Yelm Comprehensive Plan Update* was not amended or repealed by the 2008 amendments and was therefore beyond challenge as part of the 2008 amendments. While the Superior Court found that the compliance proceedings in 05-2-0002 triggered issue preclusion, the question of the Yelm UGA sizing is collateral to any issues subject to adjudication in any other proceedings, including that one. This renders application of collateral estoppel improper. Not only was there no consideration of this issue in another proceeding, there could not have been.

**F. SUBSTANTIAL EVIDENCE SUPPORTS THE WESTERN BOARD'S DECISION.**

The Supreme Court has held that the OFM projection places a cap on the amount of land a county may allocate to UGAs. RCW 36.70A.110(2); *Thurston County*, 164 Wn.2d at 351-352. A "reasonable

market supply factor may” be included in sizing the UGA. *Id.* As the Supreme Court wrote:

“[A] market factor represents the estimated percentage of net developable acres contained within a UGA that, due to idiosyncratic market forces, is likely to remain undeveloped over the course of the twenty-year planning cycle.” Brent D. Lloyd, *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in Comprehensive Planning under the Washington State Growth Management Act*, 36 Gonz. L. Rev. 73, 118 (2001).

*Id.* The *Yelm Comprehensive Plan Update* does not include a market factor.<sup>34</sup> Neither the county nor the city claim that it does.

The Yelm UGA includes over capacities of 97 to 265 percent for residential uses depending on the data used, 116 percent for commercial uses, and 1,040 percent for industrial uses.<sup>35</sup> And nowhere in the county and city’s Opening Brief do they contest that this is what the projections and data in the *Yelm Comprehensive Plan Update* show. Clearly, the Yelm UGA is not limited to the OFM projections as the *Thurston County* decision requires.

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<sup>34</sup> CP 54, AR at 34-36, 59-66, Thurston Co. Resolution No. 13734 Att. A: City of Yelm Comprehensive Plan Update 2006 at III-5 to III-7, Exhibit B at B-2 to B-9.

<sup>35</sup> CP 54, AR at 35-36, 40, Thurston Co. Resolution No. 13734, Att. A: City of Yelm Comprehensive Plan Update 2006 at III-6 Table 1; III-7 Table 2; IV-3 Table 1.

If these over capacities were market factors, they would be much larger than the County's team of experts recommended. Thurston County hired a team of economists and planners to advise it on market factors and other issues. The County's consulting team considered the issue of a market factor and concluded that:

As a preliminary step, we recommend that TRPC utilize no higher than a 10% market factor for vacant lands and no higher than a 15% market factor for underutilized lands. These market factors reflect the differences in difficulty in developing vacant and underutilized lands.<sup>36</sup>

As Tables A and B and the other data in this brief show, the excess residential, commercial, and industrial capacity substantially exceeds the market factors recommended by the County's own consulting team. Those were ten percent for vacant land and 15 percent for redevelopment land. The numbers in Tables A and B are a melding of vacant and redevelopment land. The excess capacities range from 97 to 265 percent for residential uses depending on the data used, 116 percent for commercial uses, and 1,040 percent for industrial uses.<sup>37</sup>

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<sup>36</sup> CP 54, AR at 573, ECONorthwest, AHBL and Mark Personius, *Evaluation of Thurston County Buildable Lands Program Assumptions* at 4-52 (Prepared for Thurston County, Final Report: September 15, 2006).

<sup>37</sup> CP 54, AR at 35-36, Thurston Co. Resolution No. 13734, Att. A: *City of Yelm Comprehensive Plan Update 2006* at III-6 Table 1; III-7 Table 2.

As the evidence in this case demonstrates, the Yelm UGA simply has gobs of excess capacity. If the excesses of supply over demand were market factors, and they are not, the evidence further demonstrates that they would be much larger than the county's consultants' recommendations which took into account the County's local circumstances. The evidence related to the *Yelm Comprehensive Plan Update* includes nothing which would justify including such large areas of residential, commercial, and industrial land in the UGA. The Board's decision is supported by substantial evidence.

**G. FUTUREWISE CARRIED ITS BURDEN OF PROOF BEFORE THE BOARD.**

The population projection and capacity data relied upon by Futurewise before the Board were prepared and adopted by the City of Yelm and Thurston County.<sup>38</sup> These population projections were also the basis for Resolution 13734's finding that "Yelm and its UGA have sufficient area to accommodate projected growth consistent with RCW

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<sup>38</sup> CP 54, AR at 7, 34-37, 41, and 61; Thurston Co. Resolution No. 13734 at 2, 4; Att. A: City of Yelm Comprehensive Plan Update 2006 at III-5 to III-8, IV-4; Exhibit B at B-4.

36.70A.110(2).”<sup>39</sup> It is precisely this finding, along with the urban growth area size, that Futurewise challenged in its petition to the Western Board. The population projection was also the basis for the entire *Yelm Comprehensive Plan Update*.<sup>40</sup>

The population projections are not included in plans for the sake of the numbers. They are important because they are the basis for sizing urban growth areas, planning for transportation facilities and services, planning for capital facilities, and for other issues that depend on population. RCW 36.70A.110(2); *Thurston County*, 164 Wn.2d at 351; *Diehl v. Mason County*, 94 Wn. App. 645, 654, 972 P.2d 543 (1999). So the population projections are a key part of every comprehensive plan.

The County and City argued to the Superior Court that it was improper for the Board to base a finding of non-compliance on population projections and capacity data that have since been updated in another part of the comprehensive plan. But the County and City acknowledged that

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<sup>39</sup> CP 54, AR at 6, Thurston County Resolution No. 13734 at 2.

<sup>40</sup> See for example CP 54, AR at 7, 34-37, 41, and 61; Thurston Co. Resolution No. 13734 at 2, 4; Att. A: City of Yelm Comprehensive Plan Update 2006 at III-5 to III-8, IV-4; Exhibit B at B-4.

they had not amended or updated the *Yelm Comprehensive Plan Update*.<sup>41</sup>

The population projection and capacity data the Board relied upon continue to be a part of the *Yelm Comprehensive Plan Update* and this fact is uncontested.

Similarly uncontested is the fact that the population projection and capacity data the County and City included in their *Yelm Comprehensive Plan Update* show large excesses of land supply over demand. Also uncontested is the fact that the *Yelm Comprehensive Plan Update* did not incorporate a land market supply factor.

In short, the Board relied upon the numbers generated by the County and City—that is, the legally relevant numbers adopted by Thurston County Resolution No. 1373—to decide this appeal. Determining whether, given that evidence, the *Yelm Comprehensive Plan Update* complies with the GMA is the task with which the Board is charged. *Swinomish Indian Tribal Community v. Western Washington*

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<sup>41</sup> CP 54, AR at 705, Thurston County and City of Yelm Motion for Reconsideration p. 3 (August 6, 2008). See also AR at 563, Joint Prehearing Brief of Thurston County and the City of Yelm at 10 “Neither the County nor the City dispute the fact that Yelm’s Comprehensive Plan needs to be modified to conform to Thurston County’s plan ....”.

*Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).

As discussed *supra*, the County and City persuaded the Superior Court that because all of the County's UGAs, including the City of Yelm's were found to be in compliance in the countywide comprehensive plan case, WWGMHB Case No. 05-2-0002, it means that the Board erred here. But the *Yelm Comprehensive Plan Update* and its data were not before the Board in that case.<sup>42</sup> And the arguments Futurewise made to the Board in this case were not before the Board in that case either.

## V. CONCLUSION

For the foregoing reasons, and each of them, Futurewise requests the Board reverse the Superior Court, reinstate the Final Decision and Order of the Growth Management Hearings Board, and remand this Case for further proceedings.

Respectfully submitted,



Robert A. Beattey, WSBA # 41104

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<sup>42</sup> *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, Order Finding Compliance (UGAs) (May 29, 2008).

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 30<sup>th</sup> day of November 2009 he caused the foregoing Brief of Appellant Futurewise to be served on the following parties by regular U.S. Mail, postage prepaid:

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