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STATE OF WASHINGTON

No. 43643-4-II

BY *cm*
DEPUTY

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

FUTUREWISE,

Appellant,

v.

GROWTH MANAGEMENT HEARINGS BOARD, an agency of the
State of Washington, and PACIFIC COUNTY, a political subdivision of
the State of Washington,

Respondents.

FUTUREWISE'S REPLY BRIEF

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I. INTRODUCTION

Futurewise respectfully submits this reply brief to address the arguments made in the Brief of Respondent, Pacific County. As this reply shows, Pacific County's arguments fail. This Court should reverse the part of the Growth Management Hearings Board's (Board) Final Decision and Order upholding Pacific County's amendments to the agricultural provisions of the *Pacific County Comprehensive Plan*.¹

II. ARGUMENT

- A. **Issue 1: Was the Board's conclusion that the Pacific County Comprehensive Plan did not adopt new designation and classification criteria for agricultural lands of long-term commercial significance and that the County was not required to update its designations of agricultural lands using the new criteria an erroneous interpretation or application of the Growth Management Act (GMA) and not support by substantial evidence? (Assignment of Error 1.)**
1. **Pacific County adopted new designation criteria for agricultural lands of long-term commercial significance.**

Pages 4 through 8 of Futurewise's Opening Brief documented that Pacific County extensively amended Section 3.5, Agricultural Resources, of the *2010 Comprehensive Plan*. The amendments included:

¹ Administrative Record (AR) 1686 – 91, *Futurewise v. Pacific County*, Case No. 10-2-0021, Final Decision and Order (June 22, 2011), at 8 – 13 of 28. Hereinafter FDO. The AR references are to the "Bates" numbers placed on the pages of the Administrative Record by the Growth Management Hearings Board.

- Section 3.5.1 was amended to incorporate the 2007 Census of Agriculture and to expand the explanation of why agriculture is an important part of the County economy.²
- For the first time, Section 3.5.2 referred to “Section 17 of the GMA” and “RCW 36.70A.170” which requires the designation of agricultural lands of long-term commercial significance.³ Section 17 is a reference to 1990 Washington Laws 1st Ex. S. Chapter 17 § 17, the provision from the 1990 GMA that adopted RCW 36.70A.170.⁴
- The definition of agricultural lands from RCW 36.70A.030(2) was added to the section and adopted for the first time.⁵
- The three part definition for designating agricultural lands of long-term commercial significance from the *Lewis County* decision and WAC 365-190-050 was adopted for the first time.⁶
- The long-term commercial significance factors from the then current version of WAC 365-190-050(3)(c) were adopted for the first time.⁷

² AR 165 – 166, *Pacific County Comprehensive Plan* pp. 3-3 – 3-4 (2010 – 2030); AR 531, *1998 Pacific County Comprehensive Plan* p. 3-4.

³ AR 166, *Pacific County Comprehensive Plan* p. 3-4 (2010 – 2030); AR 531, *1998 Pacific County Comprehensive Plan* p. 3-4.

⁴ AR 531, *1998 Pacific County Comprehensive Plan* p. 3-4.

⁵ AR 166, *Pacific County Comprehensive Plan* p. 3-4 (2010 – 2030); AR 531, *1998 Pacific County Comprehensive Plan* p. 3-4.

⁶ AR 166 – 167, *Pacific County Comprehensive Plan* pp. 3-4 – 3-5 (2010 – 2030); AR 531, *1998 Pacific County Comprehensive Plan* p. 3-4; *Lewis County v. Western Washington Growth Management Hearings Bd.*, 157 Wn.2d 433, 502, 139 P.3d 1096, 1103 (2006)..

- The provision providing that “[a]gricultural land areas shall be field located based on applicable criteria” was repealed.⁸
- A provision providing that “[a]gricultural lands are identified on the Pacific County Comprehensive Land Use Map as Rural Agriculture ...” was adopted for the first time.⁹

Pacific County also amended the Comprehensive Plan Land Use Maps.¹⁰ These amendments included removing some “cranberry bogs/agricultural lands” from the Seaview urban growth area.¹¹ Pacific County Finding of Fact 68 explains that that “these cranberry bogs are designated as agricultural lands of long-term commercial significance”¹²

On pages 10 through 16, the Brief of Respondent, Pacific County argues these were not substantive amendments to the comprehensive plan. The Brief of Respondent concedes, as it must, that the County amended its comprehensive plan to list the requirements of RCW 36.70A.170.¹³ RCW 36.70A.170 requires the designation of agricultural lands of long-term commercial significance and includes several of its key criteria. The Brief

⁷ AR 166 – 167, *Pacific County Comprehensive Plan* pp. 3-4 – 3-5 (2010 – 2030); AR 531, *1998 Pacific County Comprehensive Plan* p. 3-4.

⁸ AR 532, *1998 Pacific County Comprehensive Plan* p. 3-5.

⁹ AR 167, *Pacific County Comprehensive Plan* p. 3-5 (2010 – 2030); AR 532, *1998 Pacific County Comprehensive Plan* p. 3-5.

¹⁰ AR 503 – 508, *Pacific County Comprehensive Plan* pp. 2-24 – 2-29 (2010 – 2030); AR 533, Figure E-2 Land Use Map.

¹¹ AR 20, Findings of Fact and Conclusions of Law Pacific County Comprehensive Plan and SEPA p. 7, Finding of Fact 48.

¹² AR 23, *Id.* at p. 10 Finding of Fact 68.

¹³ Brief of Respondent, Pacific County p. 10.

of Respondent also concedes that the County did amend its comprehensive plan to refer to WAC 365-190-050 which are the minimum criteria for the designation of agricultural lands that the Washington State Department of Commerce is required to adopt.¹⁴ “The intent of these guidelines [the minimum criteria] is to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170.”¹⁵

But amending the designation criteria for agricultural lands was not Pacific County’s intent, the Brief of Respondent argues. Rather the County’s intent was to make “reference to the relevant statutory and regulatory provisions pertaining to ALLTCS [agricultural lands of long-term commercial significance].”¹⁶ There are two problems with this argument. First, these amendments were made to the part of the *Pacific County Comprehensive Plan’s* “Critical Areas and Resource Lands Element” entitled “3.5.2 Identifying and Classifying Agriculture Lands.”¹⁷ The comprehensive plan does not say that if you want to learn about the GMA requirements for designating agricultural lands of long-term commercial significance see these laws and regulations.¹⁸ Rather in the

¹⁴ Brief of Respondent, Pacific County p. 10; WAC 365-190-020(1); RCW 36.70A.050.

¹⁵ RCW 36.70A.050(3).

¹⁶ Brief of Respondent, Pacific County p. 10.

¹⁷ AR 166 – 67, *Pacific County Comprehensive Plan* pp. 3-4 – 3-5 (2010 – 2030).

¹⁸ AR 165 – 68, *Pacific County Comprehensive Plan* pp. 3-3 – 3-6 (2010 – 2030).

first sentence of the first paragraph of Section 3.5.2 the comprehensive plan states that “Section 17 of the GMA (RCW 36.70A.170) requires counties to identify agricultural lands of long-term commercial significance.”¹⁹ The first sentence in the second paragraph in Section 3.5.2 provides that “WAC 365-190-050 identifies a three part test for designating agricultural land of long-term commercial significance.”²⁰ The test is then set out.²¹ The amendments were not to a background report or a section of the plan labeled as having background information, they are in the part of the comprehensive plan that identifies and classifies agricultural land. The County does not cite to any evidence that these amendments are not a part of the comprehensive plan’s policies. And, frankly, there is none.

The second problem is that the *Pacific County Comprehensive Plan* is the county’s “generalized coordinated land use policy statement ...”²² It is not a reference book. RCW 36.70A.120 requires the county to “perform its activities and make capital budget decisions in conformity with its comprehensive plan.” Like all statutes, the GMA interpreted by reading it “as a whole, harmonizing its provisions by reading them in

¹⁹ AR 166, *Pacific County Comprehensive Plan* p. 3-4 (2010 – 2030).

²⁰ *Id.*

²¹ AR 166 – 67, *Pacific County Comprehensive Plan* pp. 3-4 – 3-5 (2010 – 2030).

²² RCW 36.70A.020(4).

context with related provisions”²³ When that is done here, we see that Pacific County amended its policies for designating agricultural lands.

The Brief of Respondent Pacific County then argues on page 11 that there are no findings of fact or other references in the record that would indicate the County intended to change its classification of agricultural lands of long-term commercial significance. But none are required to amend the comprehensive plan.²⁴

The Brief of Respondent Pacific County then argues there was no need to readdress the designation of agricultural land because it was put to rest in 1997. The brief then quotes from a record that was 13 years old when the 2010 comprehensive plan amendments were adopted.²⁵ There are two problems with this argument. First, as we have seen, Pacific County did amend its comprehensive plan policies for agricultural lands of long-term commercial significance. Second, RCW 36.70A.130 requires that comprehensive plans shall be reviewed and, if needed, revised every eight years. This case illustrates why. Since 1997 they have been significant changes in the agricultural industry in Pacific County. As the *Pacific County Comprehensive Plan* states in “1997 the total land in farms was 40,228 acres, while in 2007 the total land in farms was approximately

²³ *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238 – 39, 110 P.3d 1132, 1139 – 40 (2005).

²⁴ Chapter 36.70A RCW.

²⁵ The Brief of Respondent, Pacific County pp. 11 – 15.

61,749 acres.”²⁶ The “total number of farms in 1997 was 253 while the total number of farms in 2007 was 390.”²⁷ The “total market value of all agricultural products was \$16.9 million dollars in 1997 while the total market value of all agricultural products sold in 2007 was \$34.9 million dollars.”²⁸ That is why comprehensive plans must be periodically revised as Pacific County did in 2010.

Pacific County then argues that the comprehensive plan amendments Futurewise identified in its Opening Brief, other than the amendments relating to RCW 36.70A.170 and WAC 365-190-050, pertain to agricultural land in general, not to agricultural lands of long-term commercial significance.²⁹ While the data from the Census of Agriculture does apply to all of the agricultural industry that meets certain criteria set by the Census Bureau, the amendments to the policies were all made to the Pacific County “Critical Areas and Resource Lands Element.”³⁰ As the Washington Supreme Court wrote in the *City of Redmond* decision, “[t]he GMA set aside special land it refers to as ‘natural resource lands,’ which include agricultural, forest, and mineral resource lands.”³¹ The

²⁶ AR 166, *Pacific County Comprehensive Plan* p. 3-4 (2010 – 2030).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Brief of Respondent, Pacific County p. 10.

³⁰ AR 165 – 68, *Pacific County Comprehensive Plan* pp. 3-3 – 3-6 (2010 – 2030).

³¹ *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 47, 959 P.2d 1091, 1094 (1998).

amendments set out on pages 4 through 8 of Futurewise’s Opening Brief and summarized above are taken from the “Agricultural Resources” part of Section 3, the “Critical Areas and Resource Lands Element,” of the *Pacific County Comprehensive Plan*.³² An element can be thought of as a required or optional chapter of a comprehensive plan addressing land use policy topic.³³ The first page of the “Critical Areas and Resource Lands Element” provides in relevant part that:

This section of the Comprehensive Plan has been prepared in accordance with the Growth Management Act (GMA) to address conservation of critical areas and resource lands. Resource lands include agriculture, aquaculture, forest, and mineral resource activities.³⁴

So all of the policy amendments pertain to agricultural lands of long-term commercial significance.

The Brief of Respondent Pacific County on page 17 argues that the amendments were outside the ambit of Issue 1 before the Board. However, Issue 1 does reference the County’s comprehensive plan amendments and whether the County failed to “properly designate agricultural lands that have long-term significance for the commercial production of food or other agricultural products as required under RCW 36.70A.170(1)(a)?”³⁵

³² AR 165 – 68, *Pacific County Comprehensive Plan* pp. 3-3 – 3-6 (2010 – 2030).

³³ RCW 36.70A.070; .080.

³⁴ AR 163, *Pacific County Comprehensive Plan* p. 3-1 (2010 – 2030). The same page is also the first page, p. 3-1, of Appendix D of the Brief of Respondent, Pacific County.

³⁵ AR 1684, FDO at 6 of 28.

The amendments that are the basis of Futurewise's challenge all relate to the proper designation of agricultural land, such as whether it was proper to designate agricultural lands of long-term commercial as "Rural Agriculture." So Futurewise's challenge to the designation of agricultural lands is within the ambit of Issue 1.

The Board's conclusion that the County had not adopted the new criteria for designating agricultural lands of long-term commercial significance as part of the comprehensive plan is a misinterpretation of the GMA. It is also not supported by substantial evidence. So this Court must overturn that portion of the Board's Final Decision and Order.

2. Failing to apply the new designation criteria and failing to designate agricultural lands of long-term commercial as "Agriculture" on the future land use map violated the GMA.

The Brief of Respondent Pacific County, on pages 17 and 18, argues that if Futurewise wanted to challenge Pacific County's designation of agricultural lands Futurewise would have had to have done so back in 1997 or 1998. But Futurewise is not challenging the 1997 or 1998 designations, Futurewise is challenging Pacific County's failure to use the new agricultural policies adopted in 2010 to designate agricultural lands. As Futurewise argued on pages 17 through 21 of its Opening Brief, Pacific County's failure to do so violated the GMA.

Pacific County’s reliance on the *Clallam County* decision is misplaced because that decision addressed whether Futurewise could challenge an unamended capital facilities plan.³⁶ Here, as we have seen, there were many amendments to the policies for designating agricultural lands of long-term commercial significance and related agricultural policies.³⁷

While *Clallam County* does not apply, the *Thurston County* decision does. There the supreme court 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. Former RCW 36.70A.030(1); former RCW 36.70A.130(1)(b); RCW 36.70A.290(2).”³⁸ And that is what Futurewise did in this case.

Pacific County, on page 18 of its Brief of Respondent, argues that the 2010 comprehensive plan amendments only make reference to WAC 365-190-050 and did not adopt a new standard for designating agricultural lands of long-term commercial significance. But as was documented in Futurewise’s Opening Brief, the County actually adopted as part of the comprehensive plan the criteria for designating agricultural lands in WAC

³⁶ *Clallam County v. Dry Creek Coalition*, 161 Wn. App. 366, 373, 255 P.3d 709, 710 (2011).

³⁷ AR 165 – 68, *Pacific County Comprehensive Plan* pp. 3-3 – 3-6 (2010 – 2030).

³⁸ *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38, 46 (2008).

365-190-050 including the three part definition for designating agricultural lands of long-term commercial significance from the *Lewis County* decision.³⁹ These comprehensive plan amendments were not a citation or a cross reference.

Pacific County, on page 19 of its Brief of Respondent, argues that Futurewise has identified no authority that requires the county to map agricultural lands of long-term commercial significance. But the *Pacific County Comprehensive Plan's* "Critical Areas and Resource Lands Element" provides that "[a]gricultural lands are identified on the Pacific County Comprehensive Land Use Map as Rural Agriculture"⁴⁰ So Pacific County amended the comprehensive plan to map agricultural lands of long-term commercial significance. These maps, including the comprehensive plan designation in which the agricultural lands of long-term commercial significance are designated on the County's Comprehensive Plan Land Use maps, must comply with the GMA.⁴¹ Further, as Futurewise's Opening Brief argued on page 14, the *Lewis County* decision held that its definition of agricultural lands of long-term

³⁹ AR 166 – 67, *Pacific County Comprehensive Plan* pp. 3-4 – 3-5 (2010 – 2030); *Lewis County v. Western Washington Growth Management Hearings Bd.*, 157 Wn.2d 488, 502, 139 P.3d 1096, 1103 (2006).

⁴⁰ AR 167, *Pacific County Comprehensive Plan* p. 3-5 (2010 – 2030).

⁴¹ *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38, 46 (2008).

commercial significance must be used in “designating” and “mapping” agricultural lands of long-term commercial significance.⁴²

It is true as Pacific County writes that the Growth Management Hearings Board did conclude that Pacific County did not have to base its designation of agricultural lands criteria on the definition of agricultural land in the *Lewis County* decision. But in the face of the supreme court’s *Lewis County* holding, the Board misinterpreted the GMA.⁴³ Further, the Supreme Court of Washington based this definition on the plain language of the GMA in RCW 36.70A.170, RCW 36.70A.030(2), and the court’s earlier decision in *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091 (1998).⁴⁴ So the Board’s conclusion that Pacific County did not have to follow the *Lewis County* definition was an erroneous interpretation of the GMA. The Board’s decision that the County did not need to apply the new designation criteria to determine if it had correctly mapped agricultural lands was also an erroneous interpretation of the GMA. This court must reverse those parts of the Board’s Final Decision and Order.⁴⁵

⁴² *Lewis County*, 157 Wn.2d at 499 & 504, 139 P.3d at 1101 & 1103 – 04.

⁴³ *Id.*

⁴⁴ *Lewis County*, 157 Wn.2d at 499 – 01, 139 P.3d at 1101 – 02.

⁴⁵ AR 1688 – 90, FDO at 10 – 12 of 28.

B. Issue 2: Was the Board’s conclusion that the Pacific County Comprehensive Plan amendments complied with the GMA an erroneous interpretation or application of the GMA and not supported by substantial evidence? (Assignments of Error 2, 3, and 4.)

1. Parts of Comprehensive Plan Section 3.5.2 fail to comply with the GMA.

Futurewise’s Opening Brief, on pages 21 through 28, documented that the *Pacific County Comprehensive Plan*’s amended policies for agricultural lands of long-term commercial significance violate the GMA. The Brief of Respondent Pacific County does not argue that these violations do not exist, just that they are “form over substance” and “pedantry.” But these requirements do matter. As the Washington State Supreme Court has held that “[w]hen read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land.”⁴⁶ When these provisions are not followed, the industry is not given the protection it is due under the GMA.

On pages 24 and 25, the Brief of Respondent Pacific County takes issue with the accuracy of the data that Futurewise’s Opening Brief cites from the Census of Agriculture as to the increase in the land in farms in Pacific County and the growth in the value of the agricultural products sold. Those figures are quoted directly from the County’s 2010

⁴⁶ *King County v. Central Puget Sound Growth Management Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000) .

comprehensive plan amendments.⁴⁷ If they are so inaccurate, why did the County amend its comprehensive plan to include them?

2. Designating agricultural lands of long-term commercial significance “Rural Agricultural” is an erroneous interpretation of the GMA.

The Brief of Respondent Pacific County on page 16 states that: “Field location of agricultural land in general was deleted because the County now has a zoning map which identifies agricultural areas. However, this map does not delineate areas that comprise ALLTCS [agricultural lands of long-term commercial significance].” However, as Futurewise’s Opening Brief documented, Pacific County amended Section 3, the “Critical Areas and Resource Lands Element,” of the *Pacific County Comprehensive Plan* to provide that “Agricultural lands are identified on the Pacific County Comprehensive Land Use Map as Rural Agriculture while they are designated as Agriculture on the zoning maps.”⁴⁸ Since the Critical Areas and Resource Lands Element applies to agricultural lands of long-term commercial significance, those lands are now designated as “Rural Agriculture.” As Futurewise’s Opening Brief documented on pages 28 to 30, this violates the GMA because natural resource lands are not rural lands.

⁴⁷ AR 165 –66, *Pacific County Comprehensive Plan* pp. 3-3 – 3-4 (2010 – 2030); AR 531, *1998 Pacific County Comprehensive Plan* p. 3-4.

⁴⁸ AR 167, *Pacific County Comprehensive Plan* p. 3-5 (2010 – 2030).

The Brief of Respondent Pacific County on page 20 argues that “ALLTCS [agricultural lands of long-term commercial significance] is a category within a category.” The Brief of Respondent Pacific County on page 27 argues that “Rural Agriculture refers to all agriculture, i.e., agriculture that is of long-term commercial significance and agriculture that is not of long-term commercial significance” without any citation to authority or the record for either statement.

However, as Futurewise’s Opening Brief documented on pages 28 through 30, “Rural Agriculture” is a rural designation, it is not a designation for agricultural lands of long-term commercial significance. As the *Pacific County Comprehensive Plan* states the “Rural Agriculture” comprehensive plan designation “shall serve as a subset of the Rural Lands category”⁴⁹

The Brief of Respondent Pacific County, on pages 27 and 28, does get this right, writing that “ALLTCS [agricultural lands of long-term commercial significance] is a separate resource designation that is contained within the Critical Areas and Resource Lands Element of the Comprehensive Plan.” That is why it is Pacific County violated the GMA when it amended the “Critical Areas and Resource Lands Element” of the *Pacific County Comprehensive Plan* to designate agricultural lands of

⁴⁹ AR 509, *Pacific County Comprehensive Plan* p. 2-30 (2010 – 2030).

long-term commercial significance “Rural Agriculture.”⁵⁰ As the Washington State Supreme Court held “natural resource areas, including agricultural and forestry lands of long-term commercial significance, are not included in a rural element.”⁵¹

The Brief of Respondent Pacific County on page 20 argues the distinction does not matter. But it does. As the state Supreme Court held in the *Soccer Fields* decision, “[t]he County was required to assure the conservation of agricultural lands and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products.”⁵² These protections only apply to agricultural lands of long-term commercial significance, they do not apply to rural lands used for agriculture such as those designated as “Rural Agriculture.”⁵³

VI. CONCLUSION

Having amended its criteria for designating agricultural lands of long-term commercial significance and the Agricultural Resources policies of its comprehensive plan, Pacific County was required to ensure those amendments complied with the GMA. The Board’s conclusions that

⁵⁰ AR 167, *Pacific County Comprehensive Plan* p. 3-5 (2010 – 2030); AR 532, *1998 Pacific County Comprehensive Plan* p. 3-5.

⁵¹ *Thurston County*, 164 Wn.2d at 357, 190 P.3d at 51 citing RCW 36.70A.070(5).

⁵² *King County v. Central Puget Sound Growth Management Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 556, 14 P.3d 133, 140 (2000) emphasis in original.

⁵³ RCW 36.70A.060(1).

the *Pacific County Comprehensive Plan's* agricultural comprehensive plan provisions complied with the GMA are not supported by substantial evidence and rest on misinterpretations of the GMA. The Board's Final Decision and Order related to the agricultural policies and designations must be reversed by this Court.

Respectfully submitted this 16th day of November 2012.

A handwritten signature in black ink, consisting of several overlapping loops and curves, positioned above a horizontal line.

Tim Trohimovich, WSBA No. 22367
Attorney for Futurewise

2012 NOV 19 PM 1:22

CERTIFICATE OF SERVICE

STATE OF WASHINGTON

Under penalty of perjury, I certify that on the 16th day of BY *Cm*
DEPUTY

November 2012, I caused the following document to be served on the persons and organizations listed below in the manner and on the date shown: Futurewise's Reply Brief in *Futurewise v. Growth Management Hearings Board and Pacific County*, Court of Appeals Case No. 43643-4-

II.

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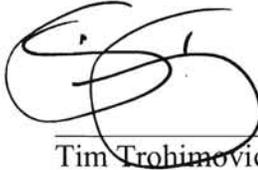
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addressed and email.

Signed and certified on this 16th day of November, 2012,

A handwritten signature in black ink, appearing to read 'Tim Trohimovich', is written over a horizontal line. The signature is stylized and somewhat cursive.

Tim Trohimovich