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No. 78148-6

SUPREME COURT
OF THE STATE OF WASHINGTON

THURSTON COUNTY,
Petitioner

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD and 1000 FRIENDS OF WASHINGTON,
Respondents,

And

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, OLYMPIA MASTER BUILDERS, and PEOPLE FOR RESPONSIBLE ENVIRONMENTAL POLICIES,
Petitioner-Intervenors

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THURSTON COUNTY'S REPLY BRIEF

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I. INTRODUCTION

This reply brief is submitted by Petitioner Thurston County to rebut the arguments in the Brief of Respondent 1000 Friends of Washington, now Futurewise ("1000 Friends").

Thurston County does agree with 1000 Friends on one fundamental point--the issues in this appeal ultimately depend on the meaning of RCW 36.70A.130, requiring periodic review and updates of comprehensive plans and development regulations. Br. of Resp. at 1. Just as Thurston County was a pioneer in growth management before the GMA was enacted, the County is currently blazing the GMA update trail which all GMA counties and cities in the state must follow. Since this is the first challenge of a GMA update to be litigated, this appeal provides a timely opportunity for the Supreme Court to interpret RCW 36.70A.130 and provide essential guidance to all of the local governments that must travel the GMA update trail and the Growth Management Hearings Boards and lower courts in their review of challenged updates.

The Board and 1000 Friends take the position that the local updates required by RCW 36.70A.130 subject not only revisions, but all preexisting provisions of plans and development regulations, to challenge and that such challenge may be based on any and all GMA requirements, including those that were in existence at the time the preexisting local

provisions were originally adopted. That is, the Board decided and 1000 Friends argues, in support, that preexisting provisions of local GMA plans and regulations that could have been, but were not, challenged within 60 days of their original adoption, or were challenged and upheld by the Board, nevertheless can be challenged years later, when an update is adopted, for noncompliance with GMA requirements that were in effect at the time of their original adoption! As the County has argued and will further explain below, this radically expansive and erroneous interpretation of RCW 36.70A.130 would destroy the repose and predictability provided by RCW 36.70A.290(2) and undermine our state's strong policy in favor of finality in land use decision-making. E.g., *Skamania County v. Gorge Comm'n,* 144 Wn.2d 30, 49, 26 P.3d 241 (2001).

All of the issues decided by the Board rest on the faulty foundation of its erroneous interpretation of RCW 36.70A.130. The two criteria for designation of agricultural resource lands of long-term commercial significance that the Board found noncompliant were preexisting provisions of the 1995 comprehensive plan and remained unchanged in the update. All of the density provisions for the County's rural areas that the Board deemed noncompliant were preexisting 1995 provisions unchanged by the update. The UGA designations that the Board ruled were too large

to accommodate projected growth were included in the 1995 plan with exception of the update's *de minimus* addition of 225 acres to the UGA's 63,102 acres (an increase of approximately one-third of one percent). (Since 1000 Friends did not challenge the lawfulness of the 225 acre addition, but rather, the resulting total acreage in the UGA, they were, in effect, allowed by the Board to challenge the lawfulness of the size of the UGA designated in 1995.)

In addition to relying on an erroneous interpretation of RCW 36.70A.130, 1000 Friends assumes that the Board has authority to impose its vision of wise land use policy, ignoring the broad discretion the County is accorded by GMA in making policy choices, based on local circumstances, to implement the Act's broad requirements at issue in this case. In effect, the Board's decision said to the County: "you made a fine effort, but, in several particulars, you did not get it quite right." But, as the Legislature has emphasized in a succession of GMA amendments[1] and, as this Court has made clear in recent decisions,[2] absent a specific GMA requirement mandating a specific policy choice, what is "quite right," is for the County to decide, not the Board. The Board has no authority to

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[1] RCW 36.70A.3201; RCW 36.70A.011; 36.70A.110(2).

[2] *Quadrant Corp. v. Hearings Bd.,* 154 Wn.2d 224, 236-38, 110 P.3d 1132 (2005); *Viking Props., Inc. v. Holm,* 155 Wn.2d 112, 125-126, 118 P.3d 322 (2005); *Lewis County v. Western WA Growth Mgmt. Hearings Board,* No. 76553-7, slip op. (Wn. Sup. Crt. Aug. 10, 2006).

make policies and substitute them for the judgment of the County. Yet, that is what the Board has done in this case.

On two of the three substantive issues decided, the Board has imposed detailed bright line rules, without any basis in statutory language, which this Court has unanimously held are beyond the Board's authority. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 129-130, 118 P.3d 322 (2005). The Board decided that the area of the County's UGA violated GMA because it exceeded projected demand over a 25 year period by more than 25 percent. The only specific statutory language relating to UGA size, added by a 2003 amendment, requires that UGAs be large enough to accommodate 20 years of projected growth and is silent on what might be too large. RCW 36.70A.115. Yet, the Board ruled that the UGA size, which was increased only slightly since 1995 (about one-third of one percent) violated the Act because it exceeded projected demand by over 25 percent and the GMA allows UGA land supply to exceed projected demand by only 25 percent. Similarly, the Board's ruling that the County violated the Act by failing to provide for a "variety of rural densities," RCW 36.70A.070(5)(b), was based on the bright line standard, with no basis in specific statutory language, that residential density in rural areas may not exceed one dwelling unit per five acres. On the third substantive

issue, the Board ruled that two of the County's nonexclusive criteria to be considered in designating agricultural resource land of long term commercial significance, adopted and unchallenged in 1995, and unchanged in the 2004 update, violated GMA requirements that existed in 1995. Even though these criteria were based on local circumstances and were merely among a longer list of factors to be considered, the Board imposed its vision of precisely which criteria were permissible and which were not under GMA's broad statutory language. In so ruling, the Board denied the County the discretion to which it is entitled, under a very recent decision of this Court,[3] to take into account local circumstances in determining which of the lands that are capable of being used for agricultural production are also of long-term commercial significance. Undoubtedly, the Board has had the best of intentions in filling GMA's statutory gaps with bright line rules and converting general GMA requirements to highly specific ones. However, the Legislature did not authorize the Board to make rules. The Board's role is quasi-judicial, not quasi-legislative. Absent a specific state mandate, counties have discretion to make local policy choices in light of local circumstances within the broad parameters of GMA requirements. Of course, the

[3] *Lewis County v. Western WA Growth Mgmt. Hearings Board*, No. 76553-7, slip op. (Wn. Sup. Crt. Aug. 10, 2006).

Legislature may decrease local discretion, if it wishes. But a succession of GMA amendments in the last decade each have increased not decreased local discretion. *See* footnote 1, above.

II. REBUTTAL OF PROCEDURAL ARGUMENTS

A. Thurston County Is In Compliance With RAP 10.3(g).

The County's appeal of the Board decision is based on legal, not factual errors, with minor exceptions. The County apologizes for failing to address these minor exceptions by identifying any challenged findings of facts, which are not actually conclusions of law, pursuant to RAP 10.3(g), in our opening brief.[4] However, this oversight is not fatal to the County's arguments involving any disputed findings of fact. In *Marriage of Stern*, 57 Wn. App. 707, 789 P.2d 807 (1990), *review denied*, 115 Wn.2d 1013 (1990), the court stated with regard to RAP 10.3(g):

> The intended purpose of these rules is to add order to and expedite appellate procedure by eliminating the laborious task of searching through the record for such matters as

[4] Many of the Board's Findings of Fact actually are conclusions of law. With two exceptions, set forth under the heading "Assignments of Error Contesting Findings of Fact," below, the County does not contest the Board's Findings of Fact that are not actually conclusion of law. Most of the actual findings are merely recitations from the record and are unobjectionable to the County. For example, at page 54 of Brief of Respondent, 1000 Friends cites to Finding of Fact #20 which provides, in part, that, "[w]here the rural designation and zones themselves do not include a variety of densities, the comprehensive plan and development regulation must demonstrate how the 'innovative techniques' create such varieties of densities in the rural area." This statement is not a factual statement, i.e., whether some event happened or condition existed. Rather, it is a legal statement: an interpretation of what the Growth Board believes GMA requires. RAP 10.3(g) does not require the County to assign error to a statement that isn't a finding of fact. Pursuant to RAP 10.3(a)(3), the County has set forth each error that it requests this Court to address.

> findings claimed to have been made in error. *See French*, at 100. While appellant did not set forth verbatim findings and conclusions in his opening brief, he cured this defect in his reply brief, obviating any potential inconvenience to this court. Moreover, Stern offers no evidence suggesting that she has been prejudiced in any way be appellant's error. Thus, in the exercise of this court's discretion, pursuant to RAP 1.2(b) and RAP 18.9, we will consider the appeal on the merits. Sanctions are not appropriate.

Id. at 710. *See also, Discipline of Vanderbeek*, 153 Wn.2d 64, 81, 101 P.3d 88 (2004); *Retired Persons v. Insurance Comm'r*, 120 Wn.2d 101, 116-117, 838 P.2d 680 (1992). Here, 1000 Friends clearly was not prejudiced because disputed Findings of Fact were included in the County's Appeal and Petition for Review of Administrative Action. CP 43.

Below are the County's assignments of error as they relate to the Findings of Fact. Disputed conclusions of law improperly included by the Board will not be addressed as such issues have already been included in assignments of error in the opening brief pursuant to RAP 10.3(a)(3).

Assignments of Error Contesting Findings of Fact.

1. The Growth Board erred when finding that the County's Comprehensive Plan does not describe how any innovative techniques have been used to provide a variety of rural densities. Finding of Fact 20.

2 The Growth Board erred when finding that the changes to the Tenino and Bucoda UGAs expanded the UGA boundaries beyond those lands needed to accommodate expected urban population growth. Finding of Fact 34.

B. All Issues Identified By Thurston County Are Properly Before This Court.

1000 Friends argues that the County raises two issues which were not raised before the Board. Br. of Resp't at 4. First, 1000 Friends claims that the County is arguing for the first time that the Board made an erroneous legal assumption that the periodic updates required by RCW 36.70A.130 make every provision of the reviewed comprehensive plan and development regulations subject to Board review, even preexisting provisions that remained unchanged in the update. Before the Board, the County did challenge the Board's jurisdiction to review preexisting provisions that were not amended in the update, and this issue was properly included in the County's opening brief in this appeal. AR 100-103; AR 2577-2580; RP 42-44. Moreover, it is well-established that a litigant may raise a court's or quasi-judicial agency's lack of subject matter jurisdiction at any time. RAP 2.5(a). *Skagit Surveyors v. Friends*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

Second, 1000 Friends contends that the County has improperly raised for the first time "the argument that "the GMA does not place a limit on the size of the urban growth area." This is incorrect. The County consistently argued before the Board that the size of the UGA, in relation to projected growth, did not violate any GMA requirement. AR 95-104

AR 606-613. If any new element of this argument first appeared in the opening brief it was merely the citation of additional authority, i.e., RCW 36.70A.115, for an argument clearly made before the Board. The rule that issues not raised before an agency may not be asserted for the first time on appeal is not a straight jacket that precludes a litigant from introducing any additional authority or buttressing arguments to show that the agency erred in its decision of an issue that clearly was raised. The rule merely requires that an issue must have been intelligibly raised before an agency to be asserted in court, *Wells v. Growth Mgmt. Hearings Bd.,* 100 Wn. App. 657, 683, 997 P.2d 405 (2000), not that every argument or authority in support of a litigant's position must have been raised before the agency. If the rule were as strict as 1000 Friends contends, no new briefing or argument whatsoever would be allowed on appeal and judicial review would be limited to the briefing before the agency.

III. SUBSTANTIVE ARGUMENTS

A. 1000 Friends Lacked Standing to Appeal Thurston County's Update to the Board.

1000 Friends did not have standing to appeal Thurston County's update to the Board. 1000 Friends apparently acknowledges that its members are not "aggrieved or adversely affected by" the challenged update and, thus, lack standing under RCW 36.70A.280(2)(d). The sole

basis for 1000 Friends' contention that it had standing was that it "participated orally or in writing before the county...regarding the matter on which a review is being requested." RCW 36.70A.280(2)(b).

1000 Friends has not identified any individual member with residency or a property interest in Thurston County who participated in the County's update. 1000 Friends makes the bald statement in its brief at page 12 that, "Futurewise staff and its members and local partners also testified in person" citing to AR 680-683. No where in the cited portion of the record does it identify anyone testifying, other than Tim Trohimovich, as being associated with 1000 Friends of Washington. Tim Trohimovich is the organization's Planning Director who lives in Seattle. Not one local person from or with a property interest in Thurston County testified in opposition to the County's position on the issues that went before the Board. AR 680-683.

1000 Friends cites *Thurston County v. Cooper Point Ass'n.*, 108 Wn. App. 429, 31 P.3d 28 (2001), as support for its standing in this matter. However, in that case, 1000 Friends was participating as an *amicus curiae*. *Thurston County*, 108 Wn. App. at 432. 1000 Friends was not a party required to have standing, nor was standing an issue.

In order for the standing provision of RCW 36.70A.280(2)(b) to be constitutionally valid, under the separation of powers requirement, it must

be interpreted to require 1000 Friends to show that a local member whose interests would suffer injury-in-fact participated before the County. 1000 Friends argues that the separation of powers principle that judicial power is limited to adjudicating actual cases and controversies at the request of a party who has a direct and tangible stake in the outcome applies only to courts and not quasi-judicial agencies even if they are, in effect, specialized courts. As we previously argued, Opening Br. at 34, because the Legislature has given both the Boards and the courts the interchangeable power to adjudicate challenges to local compliance with the GMA, RCW 36.70A.295, in this instance the separation of powers principles that limit standing in court, must also limit standing before the Board. 1000 Friends' only response is that the assignments of the same adjudicative function interchangeably to an agency with exclusively judicial functions and the courts "does not transmute that agency into a court." Br. of Resp. at 17. If that is so, what would prevent the Legislature from assigning many other or most or even all traditional judicial powers to administrative agencies and eliminating judicial standing requirements?

This issue has not arisen before in this state because the GMA's participation standing provision is rare and unique. For example, appeals to the Shorelines Hearings Board and other similar quasi-judicial agencies

are allowed only by aggrieved parties. RCW 90.58.180; *Kitsap County v. Natural Resources*, 99 Wn.2d 386, 392, 662 P.2d 381 (1983); *Snohomish County v. State*, 69 Wn. App. 655, 661, 850 P.2d 546 (1993). Where the Legislature assigns the power to exercise traditionally judicial power interchangeably to an exclusively quasi-judicial agency and the courts, that power remains judicial and remains subject to the limitations based on separation of powers. Otherwise, the Legislature could dilute and transmute the nature of the judicial function without limitation. Even if the Court were to decide that the Legislature may constitutionally allow participation standing before a quasi-judicial agency, a party to a proceeding before such an agency on the basis of only participation standing, may not constitutionally be a party in judicial review proceedings, either as a challenger or defender of the quasi-judicial decision. None of the cases cited in footnote 47 of the Respondent's Brief at page 18 addresses the issue of constitutional limitations on standing as raised by Thurston County in this case. 1000 Friends did not have standing to obtain Board review and certainly does not have standing to defend the Board's decision in court.

B. <u>The Cyclical Review Required By RCW 36.70A.130 Does Not Reopen All Preexisting Provisions of The County's Plan and Regulations to Board Review Every Seven Years</u>.

1000 Friends' claim that it is not challenging "past decisions" but

only "Thurston County's 2004 decisions to review, revise, and not revise" is a nonsensical and misleading distinction without a difference. Br. of Resp't at 21. Indeed, this representation is directly contradicted by the language of the Board's decision:

> This requirement [of RCW 3670A.130(1)] imposes a duty upon the County to bring its plan and development regulations into compliance with the GMA, including any changes in the GMA enacted since the County's adoption of its comprehensive plan and development regulations. While some provisions of the County's plan and development regulations may not have been subjected to timely challenge when originally adopted, a challenge to the legislative review required by RCW 36.70A.130(1) and (4) opens those matters that were raised by Petitioner in the update review process....It is not, therefore, sufficient for the County to assert that its provisions regarding rural densities have not been changed; those provisions themselves must comply with the GMA.

1000 Friends of Washington v. Thurston County , et al., WWGMHB No. 05-2-0002 (Final Decision and Order, July 20, 2005) (FDO) at 10.

The Board ruled that the County's update violated GMA on the basis of plan provisions relating to rural density and criteria for designating agricultural resource lands that were not changed at all in the update and UGA designations that remained unchanged except for *de minimus* revisions in the update.

In short, the Board and 1000 Friends in support of the Board's decision, take the position that all provisions of local GMA plans and

regulations, no matter how long ago they were adopted, and even though they were not challenged within 60 days of their adoption or, if challenged were upheld, are nevertheless subject to review whenever a seven-year update is adopted. They argue that RCW 36.70A.130 requires that such updates include revisions of existing provisions to the extent necessary to "ensure the plan and regulations comply with the requirements of [the GMA]..." Therefore, they argue, every existing provision is subject to scrutiny to determine whether it complies with any and all GMA requirements, those in existence when a provision was adopted and those adopted thereafter. This expansive interpretation of RCW 36.70A.130(1) is erroneous for several reasons and should be construed to allow Board review only of the revised or new provisions in the updates and not to preexisting provisions that remain unchanged in the update.

First, under this interpretation, the sixty-day limitation period for appealing local plan and regulation provisions to the Board, under RCW 36.70A.290(2), would, in effect, be lengthened to seven years plus sixty days from the date of update adoption. This would be a radical change in GMA's repose provision which the Legislature did not show any intention of changing. And this Court has rejected expansive interpretations, stressing that the GMA was the product of legislative compromise and contains no provision for liberal construction. *Skagit Surveyors v.*

Friends, 135 Wn.2d 542, 565, 958 P.2d 962 (1998).

Second, the Board's jurisdiction is limited to reviewing local GMA provisions that are appealed to the Board by petition within sixty days of the publication of their adoption. The Board does not have jurisdiction to review provisions of local plans and regulations that were not brought before the Board within sixty days. As this Court frequently has emphasized, the Board's jurisdiction is strictly limited and will not be expanded by implication. *See, e.g., Skagit Surveyors*, 135 Wn.2d at 565.

If this Court concludes that preexisting provisions are subject to Board review as a result of updates, the Board's jurisdiction should be limited to determining whether such preexisting provisions comply with stricter GMA requirements enacted after the adoption of the preexisting provisions. This interpretation also would be radically inconsistent with GMA's sixty-day repose provision, but would be more plausible than the much broader interpretation advocated by 1000 Friends. The Legislature conceivably might have intended that all local GMA provisions be subject to review by the Board under new GMA requirements. Even under this potential interpretation of RCW 36.70A.130, all of the Board's determinations of noncompliance in the instant case would be erroneous. The only post-1995 GMA provision relied upon by the Board was the authorization for local governments to have Limited Areas of More

Intense Rural Development (LAMIRD) in RCW 36.70A.070(5)(d), enacted in 1997. Laws of 1997, ch. 429 § 7. But this provision was not a stricter GMA requirement but a relaxation of the previous GMA requirement regarding permissible density in rural areas, and it explicitly applied only to prospective provisions for LAMIRDs.[5] It was not the Legislature's intent to open up every aspect of a County's comprehensive plan and development regulations every seven years. Such a policy would be radically contrary to GMA's repose provision and would cause chaos in local land use planning and development.

C. The Board Did Not Have Subject Matter Jurisdiction Over The County's Criteria for Designation of Agricultural Lands Of Long Term Commercial Significance Because That Part Of The Comprehensive Plan Was Adopted In November 2003 And No Appeal Occurred Within Sixty Days Of Publication Of Adoption.

1. RAP 2.5(a) Bars 1000 Friends' Objection To The Evidence Submitted To The Growth Board.

1000 Friends asks this Court to ignore a validly passed resolution and thereby nullify two years of work by the County, a CTED grant, and multiple public forums and hearings. (See facts relating to the adoption of Resolution 1039, Opening Br. at 6-8.)

[5] The LAMIRD provisions are not requirements but permissive authorizations that apply only where, after the enactment of the LAMIRD provisions, a county seeks to allow high densities permissible through the LAMIRD authorization. The challenged rural density provisions were adopted by the County before the enactment of the GMA provision authorizing LAMIRDs. The language of the LAMIRD provisions is prospective and does not purport to apply to preexisting rural density provisions.

1000 Friends argued to the Board that there is no evidence that the County published a Notice of Adoption for Resolution 13039. The County then provided the published Notice, and the Board included it in the record. Now 1000 Friends moves to strike it from the record. However, 1000 Friends failed to timely object to the evidence before the Board. Pursuant to RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). By not raising this issue before the Board, 1000 Friends is precluded from doing so now. It is not the role of the appellate court reviewing an administrative adjudication to second guess the way in which an administrative agency considered the evidence. *Bowers v. Pollution Control Hr'gs Bd.*, 103 Wn. App. 587, 610, 13 P.3d 1076 (2000), *review denied,* 144 Wn.2d 1005 (2001).

In this case, the trial court was the Board which is required to provide the "agency record" to the appellate court pursuant to RCW 34.05.566. The agency record includes documents considered by the Growth Board before its action and also, "any other material described in this chapter as the agency record." RCW 34.05.566(1). RCW 34.05.476 provides that the "agency record" "shall" include any "motions, pleadings, briefs ..." as well as "[e]vidence received **or** considered." RCW 34.05.476(2)(c-d). [Emphasis added.] Because RCW 34.05.476 requires

only that evidence be **received**, the Board properly included the Notice of Adoption as it was **received** by the Board and is relevant to the issue of whether 1000 Friends timely appealed Chapter Three of Thurston County's Comprehensive Plan. If 1000 Friends wished to object to the evidence **received by** the Board, it should have done so by a motion before the Board. RAP 2.5(a) precludes 1000 Friends' attempt to object to the record at this time.

2. Even If 1000 Friends Had Timely Objected To The Board, The Notice Of Adoption Is The Type Of Evidence That Would Have Been Allowed To Remain In The Record.

The Notice of Adoption is not the type of evidence that is disputable. It was either published in a newspaper or it was not. Under ER 201, a court is allowed to take judicial notice of certain facts. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). Clearly, the Board could have taken judicial notice of the fact that the Notice of Adoption was published in *The Olympian* and so may this Court. This fact is not subject to dispute and is capable of an accurate and ready determination by reviewing a copy of *The Olympian* for November 19,

2003.

3. The Notice Of Adoption Is The Type Of Evidence That Should Be Allowed In The Record By This Court.

RCW 36.70A.290 provides that a growth board's jurisdiction is initiated by filing a petition within 60 days after publication of a notice of adoption of a county's comprehensive plan amendment. RCW 36.70A.290(1) & (2)(a-b). Thus, the Board's jurisdiction is limited to petitions filed within 60 days, and the Board did not have jurisdiction over issues involving Chapter Three of the Comprehensive Plan as 1000 Friends did not appeal them within 60 days. It is axiomatic that subject matter jurisdiction may be raised any time by any party to an appeal. *Skagit Surveyors,* 135 Wn.2d at 556. Since the contested publication of the Notice of Adoption directly relates to a jurisdictional question, it is the type of evidence that should be considered by this Court in resolving the jurisdictional issue. If jurisdictional challenges are of such importance then evidence supporting such challenges should be readily admitted whenever it is essential to such challenges. Thurston County respectfully asks this Court to consider the evidence supporting the County's jurisdictional challenge related to the untimely appeal of Chapter Three of the Thurston County Comprehensive Plan.

4. 1000 Friends' Argument That Magic Words Must Be Used In A Resolution For It to Become A Legislative Action Elevates Form Over Substance.

Thurston County stands by the argument in its opening brief in response to 1000 Friends' mystifying argument that Resolution 13039 fails to qualify as part of a GMA update because the terms "review and evaluation" were not recited in the resolution. Rather than just including a conclusory boilerplate recitation that, "a review and evaluation took place," Thurston County included in Resolution 13039 detailed findings that described the review and evaluation process. Furthermore, 1000 Friends' strained, statutory construction principle that a very general second sentence in a subsection of a statute applies to other subsections, notwithstanding a very specific and limiting preceding sentence, has no basis in law and should be rejected.

D. The Board Exceeded Its Authority And Substantively Erred In Concluding That The County Could Not Use 20 Acre Parcel Size In Agricultural Use Designation Criteria For The Agricultural Lands Of Long Term Significance.

Even if the Board had subject matter jurisdiction over the challenged agricultural designation criteria, which remained unchanged since the 1995 plan, the Board exceeded its authority and substantively erred in concluding that the 20 acre parcel size criterion for designating agricultural lands of long term commercial significance violated GMA

requirements. The 20-acre criteria was not an absolute limitation but one of several criteria to be considered. AR 1857-1859. WAC 365-190-050(1)(e) specifically allows a County to use parcel size as a criterion and not farm size as the Board ruled. The Court's recent decision in *Lewis County v. Western WA Growth Mgmt Hearings Board*, No. 76553-7, slip op. (Wn. Sup. Crt. Aug. 10, 2006) held that the Growth Board failed to accord sufficient discretion to Lewis County's determinations, based on local circumstances, of criteria for designating agricultural lands of long term commercial significance. The Court noted with approval, *Manke Lumber Co. v. Diehl,* 91 Wn. App. 793, 959 P.2d 1173 (1998), where the Court of Appeals held that the Board erred by invalidating a 5000 acre minimum parcel size limitation for designation of Forest Resource Lands. The Court also held that the County properly relied on CTED regulations designed to guide local governments in designating agricultural and forest resource lands, including WAC 365-190-050, upon which Thurston County relied in formulating its parcel size and other criteria for designating agricultural lands. The Board's and 1000 Friends' argument that the County should have used farm size rather than parcel size demonstrates the absence of deference to the County's policy choice on a minor point over which reasonable people certainly may differ. The fact that several parcels may be farmed together at a given time provides no

assurance whatsoever that this will continue to be so. The parcels may be separately owned and the owners may decide not to farm together at any time. It was reasonable for the County to decide that agricultural designation should not depend on the cooperative behavior of multiple owners. Thurston County's policy choice to use parcel size as **one** of the designation criteria for agricultural lands of long term commercial significance was well within its discretion.

E. The Board Erred by Ruling that the UGA Was Too Large.

The Board's ruling that both the preexisting UGA and minor modifications of the UGA in the update violated the GMA (FDO at 3) ignored the special discretion that counties have "to make many choices about accommodating growth," RCW 36.70A.110(2), and the Legislature's intent "for the boards to grant deference to counties...in how they plan for growth." RCW 36.70A.3201. The Board also ignored common sense. In 1995, the County's UGA included 5 elements related to the Cities of Olympia, Lacey, Tumwater, Yelm, and Tenino. The total acreage of the UGA was 62,877. Only the Olympia UGA was challenged, and it was upheld by the Board in *Reading v. Thurston County*, WWGMHB 94-2-0019 (FDO, 03/23/95). The Board commended the County's UGA planning and inter-jurisdictional cooperation, even though "from a strictly numerical formula it was overly large." In the 2004

update, all of these UGA elements remained exactly the same except Tenino which was reduced by 30 acres. The only increase was a new GMA element for Bucoda, adding 255 acres, based on the uniquely local circumstance of providing sufficient development density to support sewers and avoid septic contamination of a sole source aquifer. AR 1767-1773, 1788. Thus, the UGA of 62,877 acres in 1995 was increased by 225 acres to 63,102 acres in 2004, an increase of about one-third of one-percent. Of course, much of the UGA designated in 1995 had been developed by nearly a decade of rapid growth. So the UGA designation in 2004 for the next 20 years of projected growth was far less than the designation in 1995 had been. If the 2004 UGA was excessive, the 1995 UGA was much more excessive. Yet, a major portion of that UGA, the Olympia element (the only UGA challenged), was upheld by the Board. *Reading, supra.*

While the 2004 UGA is much smaller in relation to projected growth than was the 1995 UGA, the GMA requirements related to UGA sizing are more permissive, as a result of recent amendments calling for greater board deference to local policy choices regarding growth, RCW 36.70A.110(2); 36.70A.3201, and stressing that UGAs must be **large enough "to accommodate their allocated housing and employment growth."** RCW 36.70A.115 (Emphasis added.)

There is no GMA language whatsoever limiting the maximum size of UGAs. The only statutory language relating to UGA size requires that they be sufficient in size to accommodate projected growth. RCW 36.70A.110(2); 36.70A.115. The Board and 1000 Friends argue that the mere permissive authorization of a "reasonable land market supply factor" imposed an upside limit on UGA size and required that any excess over UGA land supply and projected demand be explicitly justified by a market factor analysis. There is no basis for this argument in the plain language of the statute. The statute does not say that UGA land supply may not exceed projected demand. The statute does not define market factor. The statute does not say that if land supply exceeds demand, a market factor must be identified and explained. The reason for the language regarding market factor is not clear. But it may just be a reminder that in addition to the land expected to be needed to accommodate projected growth, a county may want to include some extra land to account for the vagaries of land availability, consumer locational preferences, uncertainty about whether land will be developed at the maximum densities allowed, avoiding scarcity-based high housing prices, and the like. That is, the market factor language may merely be a reminder that extra land should be included to ensure there is enough to accommodate projected growth.

Without any basis in statutory language, the Board and 1000

Friends attempt to convert the Legislature's concern that there be enough land designated in UGAs to a rigid maximum limitation on the amount designated and a contrived procedural requirement to justify any excess of UGA supply over demand. There is absolutely no statutory basis for the Board's bright line maximum of a 25 percent market factor, and, as this Court recently has stressed, the Board has no authority to establish such bright line rules. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 129-130, 118 P.3d 322 (2005).

The Board's ruling that the County's UGA violated GMA requirements has no basis in statutory language or common sense and should be reversed.

F. The Board Erred by Ruling that the County's Plan And Regulations Violated GMA Requirements by Failing to Provide For A Variety Of Rural Densities.

It is unnecessary for the Court to reach the merits of this issue because all of the provisions of the County's plan and regulations found noncompliant by the Board were preexisting 1995 provisions. Nothing was added or revised in the 2004 update and there are no post-1995 GMA requirements relevant to this issue. These provisions were not appealed to the Board in 1995 and, thus, they are conclusively compliant with GMA requirements. RCW 36.70A.130 does not give opponents and the Board a long-delayed "second bite at the apple." If the Court reaches this issue, the

County stands by the extensive arguments in its opening brief.

In a nutshell, the Board and 1000 Friends argue that the maximum density of one dwelling unit per five acres is the maximum density in the rural area. Thus, while acknowledging that the County provides for a gradation of other densities that are less than and varied from the one per five acre, these other densities are not regarded as rural densities because they are greater than one unit per five acres, the Board's bright line maximum rural density. Of course, this bright line standard is not based on any statutory language and exceeds Board authority under this Court's decision in *Viking Properties.* Moreover, if densities like one unit per 2 acres and one unit per acre are not rural densities, what are they? The Board also has set a bright line **minimum** density of four units per acre for UGAs which was discredited in *Viking.* The Board's position on bright line standards for urban and rural densities presents an interesting quandary: what are all of the densities in between four units per acre and one unit per 5 acres? The County, based on local circumstances and its broad policy discretion, decided that in some locations, densities greater than one unit per five acres were appropriate rural densities. If the Board has no authority to establish one unit per five acres as the maximum rural density, as the Board clearly does not under *Viking,* the County has provided for a variety of rural densities.

Furthermore, the Board completely ignored the clear language in RCW 36.70A.070(5)(b) which provides that the County may achieve a variety of rural densities by providing for clustering, density transfer, design guidelines, conservation easements and other innovative techniques. The County has done that. 1000 Friends has no basis to argue that the innovative techniques used by Thurston County do not achieve a variety of rural densities. The fact that the innovative techniques are specifically detailed in the development regulations and generally referenced in the comprehensive plan does not violate the GMA.

Contrary to 1000 Friends' groundless argument, Thurston County has not ignored the requirement to provide for a variety of rural densities within the Thurston County Comprehensive Plan. See AR 757, AR 1869. For example, the provisions dealing with innovative techniques for agricultural lands located within the Natural Resource Lands chapter (Chapter 3) are not limited to agricultural lands of long-term significance, but apply to all agricultural lands, most of which are located in the rural county. AR 1869.

The Board ignored the variety of rural densities created by the innovative techniques and the numeric variety from one unit per eighty acres to one unit per five acres and many different densities in between. Although this Court has not addressed that issue, these policies and

provisions in comprehensive plans were upheld in *WEAN v. Island County*, 122 Wn. App. 156, 168-169, 93 P.3d 885 (2004). Rather than according a presumption of validity and according deference to the County's policy choices for rural areas based on local circumstances, the Board, in effect, imposed the burden of proof on the County. The Board erred and exceeded its authority in ruling that the County was not compliant with the GMA by failing to provide for a variety of rural densities.

G. 1000 Friends' Assignment of Error.

1000 Friends has assigned error to Findings of Fact 11 and 16 related to calculations that include natural resource lands as a component of the County's rural areas. In doing so, 1000 Friends states, "[t]he GMA defines the rural area to exclude lands that are 'designated for urban growth, agriculture, forest, or mineral resources.'" Pg. 62 of Brief of Respondent. However, a complete reading of the language of RCW 36.70A.070(5) may explain why 1000 Friends has so carefully avoided some of the relevant statutory language and relied on the undefined term, "rural area" instead of the defined term, "rural element." The pertinent language of RCW 36.70A.070 provides as follows:

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

> rural element:
>
> . . .
>
> (b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas...

The term "including" as the dictionary defines it, is "the containment of something as a constituent, component, or subordinate part of a larger whole." Webster's Seventh New Collegiate Dictionary, 1971. Under that definition, counties are directed to include some land that is neither agricultural, forest, nor mineral resource land. The requirement that counties include in their rural element some land that is not resource land, does not preclude counties from including in the rural element some land that is resource land. This interpretation that would, at least, allow and arguably require counties to include their resource lands in the rural element, is also consistent with the statutory language that the rural element "shall permit rural development, forestry and agriculture in rural areas." RCW 36.70A.070(5). If 1000 Friends had their way, all agricultural lands would have to be "designated" lands of long term commercial significance, and designated agricultural lands would have to be excluded from the rural element. If that were so, counties would not be able to meet the requirement of RCW 36.70A.070(5) that a county must permit agriculture and forestry in the rural element.

The most practical interpretation of RCW 36.70A.070(5) would be

to use the dictionary definition of the term "including" and allow for resource parcels to be part of the rural element. Not only does this make good sense as resource parcels usually are interspersed with nonresource parcels in the rural county, it also would allow a county with large resource parcels to designate them, as such, and still meet the variety of rural densities requirement, even if the Board's bright line five acre minimum lot size requirement were valid. 1000 Friends' cross appeal has no basis in statutory language or common sense and should be denied.

DATED this 31st day of August, 2006.

Respectively Submitted:

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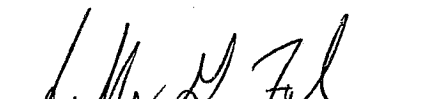

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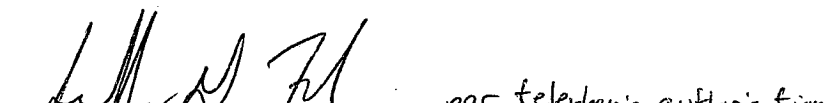

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CERTIFICATE OF SERVICE

A copy of this document was properly e-mailed, and addressed and mailed, postage prepaid, to the following individual(s) on August 31, 2006.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: August 31, 2006

Signature: [signature]