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SUPREME COURT OF THE STATE OF WASHINGTON

THURSTON COUNTY,
Petitioner,

&

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

v.

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

REPLY BRIEF OF PETITIONER-INTERVENORS

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INTRODUCTION

Over the course of several years, the Growth Management Hearings Board for the Central Puget Sound has adopted "bright line" density standards to "fill in" areas of the Growth Management Act (GMA) that the Legislature had intentionally left to the discretion of local governments. The effect of these "bright line" standards is that the Board has improperly established public policy regarding minimum acceptable rural density and maximum market factors that local governments can consider in sizing their Urban Growth Areas.

In *Viking Properties* and *Quadrant*, this Court made clear, however, that the Board did not have the authority to establish "bright line" standards and was required to review a challenge to a comprehensive plan in light of the presumption of validity and broad deference that was afforded to local government decisions by the GMA. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005); *Quadrant Corp. v. State Growth Management Hearings Board*, 154 Wn.2d 224, 233-34, 238, 110 P.3d 1132 (2005). Applying these "bright line" standards below, the Board failed to grant Thurston County the discretion and deference required by the GMA and its decision should be reversed. *See Quadrant*, 154 Wn.2d at 233-34, 238.

Here, the record establishes that Thurston County, acting in accordance with the discretion granted under the GMA, designated a variety of rural densities based on local circumstances and incorporated innovative techniques to preserve rural character. Similarly, the record shows that Thurston County considered reasonable market factors and other local circumstances to establish the size of its UGAs. In doing so, the County engaged in a detailed analysis of how much land it needed to set aside to address various circumstances, including but not limited to existing oversized lots, undevelopable property, infrastructure limitations, the need to curtail escalating housing costs, and the need to preserve open spaces.

The Board failed to recognize the discretion that the Legislature granted Thurston County in planning for future growth. RCW 36.70A.320; RCW 36.70A.3201. As a result, Intervenors Building Industry Association of Washington, Olympia Master Builders, and People for Responsible Environmental Policies ask this Court to reverse the Growth Board's Final Decision and Order.

ARGUMENT AND AUTHORITIES

I

THURSTON COUNTY'S COMPREHENSIVE PLAN AND DEVELOPMENT REGULATIONS COMPLY WITH THE GMA

A. The Board's Decision Is Void Because It Improperly Established and Applied Bright Line Standards in Excess of Its Authority

The Board's Final Decision and Order is void because the Board improperly established and applied "bright line" standards in direct contravention of the Supreme Court's holding in *Viking Properties, Inc. v. Holm*, 155 Wn.2d at 129 (the GMA does not give Boards the authority to make policy or to impose "bright line" standards regarding how local governments are to comply with GMA obligations). Actions of an agency in excess of its statutory authority are void. *Marley v. Department of Labor and Indus. of State*, 125 Wn.2d 533, 539, 866 P.2d 189 (1994); *Port Townsend School Dist. No. 50 v. Brouillet*, 21 Wn. App. 646, 653, 587 P.2d 555 (1978).

1. The Board Improperly Applied a Maximum Rural Density "Bright Line" Standard

1000 Friends' argument that the Board did not apply a "bright line" standard establishing the maximum rural density permitted by the GMA is incorrect.[1] The Board has acknowledged that it established this "bright line" maximum rural density standard. *See Sky Valley v. Snohomish County*, CPSGMHB No. 95-3-0068, 1996 WL 734917, at *4-*9 (Final Decision and Order, Mar. 12, 1996).[2] In *Sky Valley*, the Board explained that it established a maximum rural density "bright line" standard in order to "fill in the gap[s]" that the Legislature left in RCW 36.70A.070(5) ("Rural Element"). *Sky Valley*, 1996 WL 734917, at *8. The Board candidly stated that the purpose of such "bright line" standards is to limit the broad discretion the Legislature granted local governments under the GMA. *See City of Gig Harbor v. Pierce County*, CPSGMHB No. 95-3-0016, 1995 WL 903183, at *22 (Final Decision and Order, Oct. 31, 1995) (explaining circumstances where the Board has adopted "the device of a bright line *to indicate to local*

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[1] In its pre-hearing brief below, 1000 Friends argued that the Board had established a bright line rule that rural lots less than 5 acres were prohibited by the GMA. AR 339 (1000 Friends' Pre-Hearing Brief at 8).

[2] *See also Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008, 1995 WL 903209, at *56 (Final Decision and Order, Oct. 23, 1995); *City of Gig Harbor v. Pierce County*, CPSGMHB No. 95-3-0016, 1995 WL 903183, at *40 (Final Decision and Order, Oct. 31, 1995).

governments the range within which discretion may be exercised" particularly regarding maximum rural density and market factor) (emphasis added).

As a result, the Board adopted the "bright line" standard that "any new land use pattern that consists of lots smaller than 10 acres is prohibited in rural areas." *Sky Valley*, 1995 WL 903183, at *8-*9.

> The Board holds that any residential pattern of 10-acre lots, or larger, is rural. *Any smaller rural lots will be subject to increased scrutiny by the Board* . . . .

Peninsula Neighborhood Ass'n v. Pierce County, CPSGMHB No. 95-3-0071, 1996 WL 650338, at *15 (Final Decision and Order, Mar. 20, 1996) (emphasis added); *see also Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008, 1995 WL 903209, at *70 (Final Decision and Order, Oct. 23, 1995) (holding that any rural density less than one residence per 10 acres will be subjected to "*increased scrutiny*" and "*rarely approved*") (emphasis added).

By improperly applying a "bright line" standard, the Board presumed that the rural element of the plan violated the GMA and failed to engage in a reasonable and thorough analysis of the necessity for the designated densities based upon the record and local circumstances to determine whether

the rural element was in compliance with the goals of the GMA.[3] The GMA does not authorize the Board to adopt any contrary presumptions or set "bright line" density requirements. RCW 36.70A.320, .3201; *Viking Properties*, 155 Wn.2d at 129; *see also Quadrant Corp. v. State Growth Management Hearings Board*, 154 Wn.2d at 236 ("[A] board's ruling that fails to apply this 'more deferential standard of review' to a county's action is not entitled to deference from this court."); *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 116 Wn. App. 48, 55, 65 P.3d 337 (2003) (failure to apply the GMA's presumption of validity and deferential standard of review is error). Because its decision was based on an improper "bright line" maximum rural density standard, the Board's final decision and order was outside of its statutory authority and jurisdiction and constituted an erroneous interpretation and application of the law.

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[3] The very issue statement formulated by the Board adopted its "bright line" rural density standard: "Does adoption of [the rural element] comply with [the GMA] when [it] allow[s] . . . densities greater than one unit per five acres when this board has determined that such densities fail to comply with the GMA?" AR 2546 (Issue No. 1).

2. The Board Improperly Applied a 25 Percent Market Factor Bright Line Standard

Disregarding the discretion afforded local governments to consider unique circumstances and market factors in sizing their UGAs, the Board also improperly established a 25 percent "market factor bright line"standard:[4]

> Where counties adopt a land supply market factor between 1 and 1.25 (i.e., [of] 25 percent), the Board will presume that the factor is reasonable. In evaluating allegations that a county has used an unreasonable land supply market factor, the *Board will give increased scrutiny to those cases where the [market] factor exceeds the 25 percent bright line*.

Gig Harbor, 1995 WL 903183, at *32 (emphasis added).[5]

As discussed above, the *Viking Properties* decision unequivocally held that the Board does not have the authority to establish or apply a "bright line" standard depriving local government of its statutory discretion. *Viking Properties*, 155 Wn.2d at 129. The Board's application of a "bright line" market factor standard was erroneous and should be reversed.

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[4] In its pre-hearing brief below, 1000 Friends argued for the application of a 25 percent market factor standard. AR 348 (pre-hearing brief at 17).

[5] *See also Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039, 1995 WL 903165, at *30 (Final Decision and Order, Oct. 6, 1995) (The Board will give increased scrutiny to those cases where the factor exceeds the 25 percent bright line.); *Vashon-Maury v. King County*, 1995 WL 903209, at *12; *City of Gig Harbor v. Pierce County*, 1995 WL 903183.

II

THURSTON COUNTY'S RURAL ELEMENT PROPERLY PROVIDES A VARIETY OF RURAL DENSITIES BASED ON LOCAL CIRCUMSTANCES

It is undisputed that the rural element of Thurston County's comprehensive plan designated at least five rural areas with varying densities.[6] AR 778-83. For each rural development designation, the County's comprehensive plan explained the purpose, unique circumstances, definition and characteristics, and location guidelines. AR 776-83. The plan also set forth various innovative development regulations intended to preserve rural character. AR 13; Petitioner-Intervenors' Opening Brief at 43-45.[7]

Applying its "bright line" rural density standard, however, the Board concluded that 4 of the 5 Thurston County's rural designations *per se* violated the GMA based solely on the fact that these designations permitted lots smaller than 5 acres. AR 2546 (Issue Statement); AR 2548 (citing cases

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[6] 1000 Friends concedes that at least two of the areas–the "Rural Residential and Resource One Unit per Five Acres" and "McCallister Geologically Sensitive Areas"–were rural in character. Respondent's Brief at 52.

[7] 1000 Friends erroneously claims that the plan did not adopt innovative techniques such as clustering. However, 1000 Friends only cites to a provision eliminating clustering in one of the four challenged rural areas. *See* Respondent's Brief at 56 (citing AR 23).

establishing rural density "bright line" standard). As a result, the Board also concluded that Thurston County's rural element failed to contribute to a variety of rural densities. AR 2555; 2573 (Conclusions of Law E, G); RCW 36.70A.070(5). But the Board's conclusions were based on its improper application of its "bright line" standard–not a meaningful review of Thurston County's discretion and unique local circumstances.

The GMA "'does not require a particular methodology for providing a variety of densities.'" *Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 167, 93 P.3d 885 (2004) (quoting *Achen v. Clark County*, WWGMHB No. 95-2-0067, 1995 WL 903178, at *17 (Final Decision and Order, Sept. 20, 1995)). In addition to designating areas of various densities, the GMA authorizes local governments to use innovative techniques that are consistent with rural character to provide a variety of rural densities. RCW 36.70A.070(5)(b). Thus, it is equally important to determine how alternative measures and innovative techniques adopted in the plan protect rural character and address the unique local circumstances. *WEAN*, 122 Wn. App. at 168-69, *see also Viking Properties*, 155 Wn.2d at 125-26 ("[T]he GMA acts exclusively though local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.").

In *WEAN*, for example, Island County designated four rural areas: Rural Residential (RR), Rural Agriculture (RA), Rural Forest (RF), and Rural (R). *WEAN*, 122 Wn. App. at 167. The RF and RA zones permitted one dwelling per 10 acres (but could be subdivided to 5 acres), whereas the residential zone (which constituted 40 percent of all rural land) permitted a uniform one dwelling per 5 acres. *WEAN*, 122 Wn. App. at 167; *Island County Citizens' Growth Management Coalition v. Island County (ICCGMC)*, WWGMHB No. 98-2-0023 (Compliance Order Oct. 12, 2000). The Court of Appeals affirmed the Board's conclusion that, considering Island County's local circumstances, a uniform rural residential density of one unit per 5 acres complied with the GMA. *WEAN*, 122 Wn. App. at 169; *ICCGMC*, WWGMHB No. 98-2-0023 (Compliance Order Oct. 12, 2000).

Increasingly, Washington courts are recognizing that a local government's discretionary designation of rural areas should consider more than just the minimum number of acres per lot. For example, Washington courts have addressed a countervailing planning problem that occurs when large rural lots are converted from "farm lands into weed patches" as a result of a pattern of low density development. *Wood v. Kittitas County*, 130 Wn. App. 573, 586, 123 P.3d 883 (2005) (citing *Henderson v. Kittitas County*, 124 Wn. App. 747, 755-56, 100 P.3d 842 (2004)). A solution to this problem

is designating small rural lots with easements for agriculture, forest or open spaces, which may be "more conducive to retaining rural character" than "large lot zoning." *Henderson*, 124 Wn. App. at 756 (Land Use Petition Act (LUPA) appeal; holding that a re-zone from 20-acre to 3-acre rural lots accomplished goal for retaining rural character); *Wood*, 130 Wn. App. at 588 (LUPA appeal; approving county's designation of 3-acre lots in rural zone).

According to *WEAN*, the Board was required to presume that the rural element of the plan was valid and defer to the county's consideration of local circumstances (including existing rural development) that necessitated permitting development denser than one unit per five acres in a small portion of residential lands (5.5 percent). *WEAN*, 122 Wn. App. at 169. The burden is on the petitioner to prove, in light of this presumption of validity, the county's action was clearly erroneous under the GMA. RCW 36.70A.320; *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 802, 959 P.2d 1173 (1998); *Redmond*, 116 Wn. App. at 55.

1000 Friends, however, did not present any evidence challenging the county's exercise of its discretion or the unique local circumstances underlying the rural designations. *See* AR 339-40 (Petitioner's Pre-hearing Brief). Instead, 1000 Friends argued that the Board's "bright line" maximum rural density standard prohibited the designation of any rural lots less than 5 acres as a matter of law. AR 339-40. Because it relied solely on an improper

"bright line" maximum density standard, 1000 Friends failed to meet its burden as a petitioner. RCW 36.70A.320; RCW 36.70A.3201; *Quadrant*, 154 Wn.2d at 233-34. (reviewing courts owe deference to local decisions based on local realities). And the Board should not have considered arguments or alternative bases to challenge the validity of Thurston County's plan that were not raised in 1000 Friends' pre-hearing brief. WAC 242-02-570(1) (failure of petitioner to brief an issue shall constitute abandonment of the unbriefed issue); *Sky Valley*, 1996 WL 734917, at *3. As a result, the Board's decision is unsupported by substance and evidence, is clearly erroneous, and should be reversed.

III

THURSTON COUNTY PROPERLY SET THE SIZE OF ITS UGAs BASED ON LOCAL CIRCUMSTANCES

The Board erred when it found that Thurston County did not properly include in its comprehensive plan and supporting documents any discussion of the market factors and local circumstances that it considered in setting the size of its UGAs. AR 2571-72 (Findings of Fact 26, 27, 29). As a result, the Board also erred in concluding that Thurston County's designation of its UGA boundaries failed to comply with RCW 36.70A.110(1) because it provided land supply in excess of the 20-year projected demand. AR 2573

(Conclusion of Law H). The Board's decision is unsupported by substantial evidence, is clearly erroneous, and should be reversed.

By its very terms, the GMA mandates that local governments set the *minimum* size of its UGA large enough to accommodate projected growth, but grants local governments broad discretion to determine the *maximum* size of its UGA. RCW 36.70A.110(2) ("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.").

A. Thurston County Included a Reasonable Land Market Supply Factor in Setting the Size of Its UGAs

1. The Board's Determination of Land Supply/Demand Was Based on Flawed Calculations

The Board's calculation of the 20-year land supply and demand was flawed and resulted in clear error. Thurston County's Comprehensive Plan was adopted to address growth during the 20-year horizon from 2005 through 2025. The Board, however, used land supply figures from 2000 in order to arrive at its 38 percent "excess supply" calculation. The Board's error in this regard is clear: it failed to deduct 5 years worth of development from the 2000 land supply figure before calculating land supply for the 2005-2025 period.

The Buildable Lands Report estimated that the projected annual demand for urban residential land was approximately 489 acres per year. AR 2395. Over the five-year period from 2000 through 2005, this means that approximately 2,445 acres from the 2000 land supply had been developed. Therefore, the correct figure for total urban land supply in 2005 was 16,344 available acres–not the 18,789-acre figure used by the Board. The proper starting point to analyze land supply was by subtracting the projected demand through 2025 (11,582 acres) from the residential acres *available in 2005* (16,344).[8]

While the correct figure for urban land supply in 2005 may seem at first blush to provide land supply in excess of the 20-year projected demand, the Board is not supposed to end its reasonable market factor analysis with this simple calculation. In *Vashon-Maury*, 1995 WL 903209, at *12-*13, the Board noted that simply dividing the total theoretical dwelling unit capacity by the 20-year forecasted demand does not necessarily result in an accurate calculation of excess land capacity. The calculus must take into account local circumstances to determine whether the county's designation of gross land supply for its UGAs complied with the goals of the GMA. *Vashon-Maury*,

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[8] By subtracting projected 2025 demand from the gross available acreage existing in 2000, the Board increased the land supply. (Compare the following calculations: 18,789 - 11,582 = 7,207; whereas 16,344 - 11,582 = 4,762).

1995 WL 903209, at *12-*13; *see also Viking Properties*, 155 Wn.2d at 127 (Focusing solely on urban density as the touchstone of GMA compliance "requires [the Court] to elevate the singular goal of urban density to the detriment of other equally important GMA goals. To do so would violate the legislature's express statement that the GMA's general goals are nonprioritized.").

As explained below, the Board failed to consider the local circumstances and market factors detailed Thurston County's comprehensive plan and supporting documents. These documented factors and circumstances demonstrate that Thurston County properly exercised its discretion in designating its UGA boundaries. Because the Board's calculations and analysis were fundamentally flawed, its decision is unsupported by substantial evidence, clearly erroneous, and should be reversed.

2. The Comprehensive Plan and Supporting Documents Provide Detailed Analysis of Market Factors and Local Circumstances Affecting the UGA Land Supply

There is absolutely no support for the Board's finding that Thurston County's comprehensive plan "does not include an explanation or justification for the use of a land supply market factor." AR 2572 (Finding of Fact 29). To the contrary, the comprehensive plan and its supporting

documents are replete with analyses of the market factors that the County used in designating its UGA boundaries.[9]

Thurston County's Buildable Lands Report provided a detailed analysis of the market factors and local circumstances that affected the total urban land supply for the 2005-2025 period.[10] AR 2571 (Finding of Fact 25, the Buildable Lands Report was incorporated into the comprehensive plan). The "buildable lands analysis assesses many of the potential market factors and incorporates them into the figures for land supply and demand that it produces. This analysis appears to take the place of a market factor." AR 2561; *see Gig Harbor*, 1995 WL 903183, at *46 (analysis of market factors

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[9] 1000 Friends' claim that Thurston County "conceded" that it did not use a market factor analysis in sizing its UGA is incorrect and relies on incomplete quotations from the record. *See* RP 156-61. In fact, Thurston County planner, Mr. Swensson, answered that the County did perform a market factor analysis that appears in the comprehensive plan's supporting documents. RP 156-58. And when asked about the market factors utilized by the County, the Intervenors' attorney specifically directed the Board to the joint plan. RP 141

[10] In fact, 1000 Friends did not argue on its petition that Thurston County's comprehensive plan failed to include discussion of market factors and local circumstances. AR 347-50 (Prehearing Brief); AR 571-79 (Reply Brief). Indeed, 1000 Friends recognized that Thurston County discussed several market factors in its comprehensive plan, such as the fact that a large portion of the available gross urban land supply in the Tenino UGA is an Alpaca farm and approximately 25 percent of the gross urban land supply in Bucoda is undevelopable. AR 337-38.

may be found in the comprehensive plan itself or in the supporting documentation incorporated by reference in the plan).

Viking Properties and *Quadrant* make clear that the issue before the Board was whether, in light of the presumption of validity and deference afforded to local government decisions by GMA, Thurston County's plan set forth reasonable analyses for utilizing market factors and local circumstances in setting its UGA boundaries. Applying the standard of review set forth in the GMA, 1000 Friends failed to meet its burden of proving that Thurston County's market factor analysis was clearly erroneous under the GMA.[11] RCW 36.70A.320; *Redmond*, 116 Wn. App. at 55. Accordingly, the Board's decision should be reversed.

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[11] 1000 Friends' petition for review only directly challenged the size of two of the eight Thurston County UGAs–the Bucoda and Tenino UGAs. AR 347-50 (Pre-Hearing Brief); AR 571-79 (Reply Brief). But limited this challenge to the size of the UGA without any discussion of the market factors or local circumstances underlying these designations. 1000 Friends did not cite any evidence or present any argument challenging Thurston County's discretion in setting the size of the remaining UGAs (Grand Mound, Lacey, Olympia, Rainier, Tumwater, Yelm). AR 347-50 (Pre-Hearing Brief); AR 571-79 (Reply Brief). Instead, 1000 Friends simply relied on its assertion that any market factor in excess of 25 percent is prohibited by the GMA as a matter of law.

The Board should not have issued a decision concerning any of the UGAs that 1000 Friends failed to address in its pre-hearing brief. WAC 242-02-570(1) (failure of petitioner to brief an issue shall constitute abandonment of the unbriefed issue).

a. Oversized Lots Market Factor

According to the Buildable Lands Report, approximately 24 percent of the available land supply in the UGAs was located on pre-existing oversized lots averaging 1 to 5 acres.[12] AR 2378, 2392. While these lots are theoretically amenable to subdivision, the Buildable Lands Report concluded that any future subdivision of these lots was unlikely based on historical development and market decisions. AR 2392 (only 2.8 percent of all development in urban areas occurred on pre-existing oversized lots), AR 2378. The report's determination of total land supply included all potentially developable property on these oversized lots. AR 2384; 2392.[13] Thus, the gross land capacity figure for 2005 (16,344 acres) does not indicate land that is readily available for development. Instead, it represents the total capacity in terms of acres within the UGA boundaries that could potentially accommodate future development.[14] AR 2383-84; AR 2100 ("Buildable land

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[12] Twenty-four percent of the total residential land supply in 2000 is approximately 4,510 acres.

[13] For example, the Report cites to a 2.4-acre "legacy lot." Using the existing zoning character, the Report determined that only 1/10 of the property was developed land. AR 2384. The remaining 9/10 was included in the gross land capacity calculation. AR 2384.

[14] In fact, the Buildable Lands Report concludes that if the historic market and development trends continue on the oversized lots, "then our supply of land that can be realistically expected to be available for further development will decrease at a far greater rate than anticipated." AR 2392.

includes both vacant land and the undeveloped portions of partially developed lands.").

Taking into account this 24 percent pre-existing oversized lot market factor, approximately 4,510 of the 16,344 acres available for urban development in 2005 would likely stay off the market. The Board's failure to consider this well-documented market factor was significant because application of this factor leaves an available supply of only 11,834 acres to meet the predicted 20-year demand for11,582 acres of urban residential land.

b. Infrastructure Market Factor

Yet another local circumstance reported in the Buildable Lands Report is that many of the UGAs in south Thurston County, Yelm, Ranier and Tenino lack the sewer and water infrastructures to support dense growth. AR 2389. Despite being amenable to denser development under the Comprehensive Plan, in these areas, there is an average density of one dwelling per 5 acres for both existing and forecasted development until such time as sufficient infrastructure is put in place. AR 2389; *see also* RP 140-41 (some of the buildable lands designated in the UGA are in areas where development is economically infeasible due to the cost of extending sewer lines). Thus, there are entire UGAs whose gross developable acreage is included in the land supply; however, due to current infrastructure limitations, the land cannot be developed to its maximum density.

c. Other Local Circumstances

The comprehensive plan and its supporting documents also explain the unique market factors and local circumstances used to set UGA boundaries within each individual city. Following is a partial list of examples of the County's discussion of market factor and local circumstances:

- Yelm - approximately 50 percent of the vacant, developable land designated in the UGA will not be marketed for development. AR 146; 1734.[15]

- Tenino - designating a 30 percent market factor reduction for conditions such as partially used land, underutilized land, and land not being placed on the market. AR 154.[16]

- Tenino - dense development within UGA limited by location of an aquifer and possible contamination by septic fields. AR 1395.

- Tenino - limited water allocation rights are a restraint on dense development within UGA. AR 1398.

- Development should be limited to preserve existing and historic character, scale, and identity of the city. AR 928; 945; 1010-16.

- Tumwater - percentage of available residential land is not developable due to steep slopes. AR 1112.

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[15] The Yelm UGA designated 3,144 acres for urban development with a projected demand of 1,594 acres. AR 2395. Applying this 50 percent market factor, the UGA provides approximately 1572 acres for future urban development.

[16] The Tenino UGA designated 505 acres for urban development with a projected demand of 353 acres. AR 2395. Applying this 30 percent market factor, the UGA provides 353 acres for future urban development.

- Tumwater - approximately 2.5 to 7.5 percent of buildable residential land will be developed into non-residential uses (such as churches, parks, day-cares, and schools). AR 1113.

- Tumwater - reporting a 30 percent market factor for partially used land, under utilized land, and land not being placed on the market. AR 1691.[17]
- Bucoda - approximately 25 percent of developable residential land is located on wetlands and steep slopes. AR 1510. Thirty percent of developable residential land owned by one person who will not sell the property. AR 1510.[18]

- Budoda - existing infill lots are too small to locate septic drainfields restricting denser development. AR 1510.

The record established that Thurston County set the size of its UGAs based on market factors and unique local circumstances. And 1000 Friends did not challenge the bases for any of these market factors or local circumstances. The Board's finding that Thurston County's comprehensive plan "does not include an explanation or justification for the use of a land supply market factor" is simply unsupported by the record and incorrect. As

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[17] The Tumwater UGA designated 4,459 acres for urban development with a projected demand of 2,340 acres. AR 2395. Applying the 30 percent market factor, the UGA provides 3121 acres for future urban development. Applying the non-residential uses market factor, the UGA provides only 2,786 acres.

[18] The Bucoda UGA designated 81 acres for urban development with a projected demand of 30 acres. AR 2395. Applying the 25 percent market factor for steep slopes, the UGA provides 60 acres for future urban development. Applying the 30 percent market factor for property that will not be on the market, the UGA provides only 45 acres.

a result, the Board's conclusion that the UGA boundaries violated the GMA is erroneous and the Board's decision should be reversed.

IV

PETITIONER-INTERVENORS' ASSIGNMENTS OF ERROR PUT RESPONDENTS ON SPECIFIC NOTICE OF THE FINDINGS AND CONCLUSIONS ON APPEAL

1000 Friends' response brief demonstrates that both Thurston County and Petitioner-Intervenors' Assignments of Error were specific enough to direct 1000 Friends to the exact findings and conclusions that are on appeal.[19] In a case

> where the nature of the appeal is clear and the relevant issues are argued in the body of the brief . . . so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error *or clearly disclosed in the associated issue pertaining thereto*." (emphasis added)).

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[19] On page 3 of its Response Brief, 1000 Friends claims that Thurston County and Intervenors failed to assign error with enough specificity under RAP 10.3(g).

1000 Friends has not shown any prejudice or difficulty in identifying the issues or formulating its response. As a result, this Court should reach the merits of this case, which raises important and complex legal and public policy issues under the GMA. *See Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709-10, 592 P.2d 631 (1979) (where the nature of the challenge is clear and the challenged findings are set forth in the appellate brief, the reviewing court will consider the merits of the challenge); RAP 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.").

V

1000 FRIENDS' "CROSS APPEAL" RAISES ISSUES NOT DESIGNATED IN ITS STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Pages 62-63 of 1000 Friends' response brief contains a "cross-appeal" which raises errors that it failed to designate in its statement of additional grounds for review. 1000 Friends argues that it is authorized to appeal from the Board's Final Decision and Order despite its failure to seek discretionary review of these issues. 1000 Friends is incorrect. Under RAP 5.1(d), "[a] party seeking cross review must file a notice of appeal or a notice for discretionary review within the time allowed." The only exception is that a prevailing party need not cross-appeal a trial court ruling if the party seeks no

further affirmative relief. *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003). In that limited circumstance, the prevailing party may argue alternative grounds that are supported by the record to support a court's order. *McGowan v. State*, 148 Wn.2d 278, 60 P.3d 67 (2002).

Here, 1000 Friends' cross appeal seeks affirmative relief: reversal of findings of fact 11 and 16. *See* Respondent's Brief at 62-63. Because 1000 Friends seeks affirmative relief, it was required to timely file a petition for discretionary review of these issues. 1000 Friends failed to do so. This Court should decline to address the "cross-appeal" raised in pages 62-63 of 1000 Friends' brief. *State v. Vanderpool*, 99 Wn. App. 709, 995 P.2d 104 (2000).

CONCLUSION

Thurston County's comprehensive plan properly designated and determined the size of its UGAs by including a reasonable land supply market factor and provided a variety of rural densities. Unable to find the County's actions clearly erroneous, the Board should have deferred to the County's findings based on the County's local circumstances. Instead, disregarding its standard of review under the GMA, the Board inappropriately applied "bright line" standards to "fill in the gaps" in the GMA's requirements. Based on

the foregoing, this Court should reverse the Growth Board's Final Decision and Order.

DATED: August 30, 2006.

Respectfully submitted,

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BY C.J. MERRITT
CLERK

CERTIFICATE OF SERVICE

I, Brian T. Hodges, declare as follows:

I am a resident of the State of Washington, residing ~~or employed in~~ Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington.

On this date, true copies of the foregoing **REPLY BRIEF OF PETITIONER-INTERVENORS** were placed in envelopes addressed to:

Allen T. Miller, Jr. Deputy Prosecuting Attorney 2424 Evergreen Park Dr. SW Suite 102 Olympia, Washington 98502	[ ] Via Facsimile (360) 754-3349 [✓] Via Overnight Delivery [ ] Via US Postal Service [ ] Via Electronic Mail
Rob McKenna, Attorney General Martha Lantz, Assistant Attorney General Licensing and Administrative Law Division P.O. Box 40110 Olympia, WA 98504-0110	[ ] Via Facsimile (360) 664-0228 [✓] Via Overnight Delivery [ ] Via US Postal Service [ ] Via Electronic Mail
John Zilavy Tim Trohimovich 1000 Friends of Washington (Futurewise) 1617 Boylston Avenue, Suite 200 Seattle, Washington 98122	[ ] Via Facsimile (206) 709-8218 [✓] Via Overnight Delivery [ ] Via US Postal Service [ ] Via Electronic Mail

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 30th day of August, 2006, at Bellevue, Washington.

BRIAN T. HODGES