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No. 57253-9-I

**THE COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON**

CITY OF ARLINGTON, *et al.*

Petitioners,

v.

CENTRAL PUGET SOUND GROWTH MGT HRGS BRD, *et al.*,

Respondents.

**FUTUREWISE'S, AGRICULTURE FOR TOMORROW'S, &
PILCHUCK AUDUBON SOCIETY'S
RESPONSE BRIEF**

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I. INTRODUCTION

This *Growth Management Act* (GMA) case is an appeal by Snohomish County, City of Arlington, and Dwayne Lane of the *Final Decision and Order* and *Order Finding Continuing Invalidity and Imposing Gubernatorial Sanctions in Central Puget Sound Growth Management Hearings Board* (Hearings Board) Case No. 03-3-0019c. It is also the latest iteration of Snohomish County's attempt to redesignate the 110 acres of land at Island Crossing from agricultural and rural to urban in order to accommodate the request of a single landowner, regardless of the existing land-use character of Island Crossing.

Both the Central Puget Sound Growth Management Hearings Board and Snohomish County Superior Court Judge Linda Krese determined that the County's actions failed to comply with the RCW Chapter 36.70A (*Washington's Growth Management Act*) in two ways: First, the County's redesignation from *Riverway Commercial Farmland* to *Urban Commercial* failed to comply with the GMA because the record clearly showed that Island Crossing met the GMA statutory definition and criteria for designation as *agricultural land of long-term commercial significance*.

Second, the redesignation from *Riverway Commercial Farmland* and *Rural Freeway Service* to *Urban Commercial*, failed to comply with the GMA's requirement that, in order to protect existing land uses, urban growth must be located first in areas characterized by urban growth or adjacent to areas characterized by urban growth.

Appellant's Snohomish County, Dwayne Land and the City of Arlington appealed the Hearings Board's rulings to Snohomish County Superior Court. Snohomish County Superior Court Judge Linda Krese upheld the Hearings Board and also ruled that the County was barred from seeking judicial relief by the doctrines of *res judicata* and *equitable estoppel*.

This response brief filed by Futurewise¹, Agriculture for Tomorrow, and Pilchuck Audubon Society (hereinafter Futurewise) addresses only the first issue: whether there is substantial evidence in the record to support the Hearings Board's ruling that Island Crossing continues to meet the GMA definition for agricultural resource land of long-term commercial significance. Futurewise *et al.* adopts and incorporates the arguments presented by the two co-Respondents: The *Washington State Department of Community Trade and Economic*

¹Formerly called 1000 Friends of Washington.

Development (CTED) and the Stillaguamish Flood Control District (SFCD). The three groups of respondents have divided the issues for the sake of clarity and efficiency.² CTED has addressed the issue of whether or not the County's actions of converting Island Crossing farmland to an *urban growth area* meets the requirements of RCW 36.70A.110. In addition, CTED's brief discusses both the standard of review, the litigation history of this case and addresses some of the issues raised by appellants regarding re-designation of agricultural resource land of long-term commercial significance.

The brief submitted by SFCD addresses the issue of whether or not the County and Dwayne Lane are barred from availing themselves to a judicial remedy by the doctrines of *res judicata* and *collateral estoppel*. Futurewise and SFCD successfully argued to Superior Court that the Appellants are bound by several earlier rulings, including one by this Court, that the facts of Island Crossing do not justify changing the designation from farmland to urban. There have been no material changes in circumstances since these earlier rulings and the record developed by the County is substantially the same. Yet the County continues to attempt

² One of the agricultural land issues raised by the County and Lane has been addressed in CTED's brief on pp. 34-37. This issue is whether the Hearings Board created an *area-wide* analysis/test for designation of agricultural lands under the GMA.

to make a land use designation change for the economic benefit of a single or small group of landowners rather than making the land use designation based upon the character of the land, as the GMA requires.

This brief will first present facts relevant to de-designating Island Crossing as agricultural resource land. Then this brief will discuss the GMA's goals, requirements and Washington Supreme Court rulings for designating agricultural land of long-term significance. Finally, this brief will apply the law to the record and the Appellant's arguments in this case.

Three things should be clear from this brief. First, none of the appellants make any mention of the fact that the Washington State Supreme Court has determined that the GMA contains a *mandate* for the conservation of agricultural land of long-term commercial significance.³ Consideration of this mandate is absolutely necessary to put into context consideration of the statutory factors and *minimum guidelines* local governments must consider for resource land designation.

Second, the only comprehensive evidence in the record before the County that analyzed Island Crossing *in the context* GMA requirements was the *Draft Environmental Impact Statement* (DSEIS) prepared by the County's *Planning and Development Staff* (PDS). The DSEIS concluded

³ *King County v. CPSGMHB*, 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000).

that Island Crossing clearly met the criteria for designation as resource land and should remain farmland under the GMA.

The third thing is that the County's arguments stand the GMA and the agricultural conservation mandate on its head. If the Appellant's prevail, then any designated agricultural land of long-term commercial significance that is adjacent to or near an *urban growth area*, whether or not characterized by urban growth, can be de-designated and developed for more intensive uses. This would make it much easier to convert agricultural land to urban land and does away with the conservation mandate.

II. RELEVANT FACTS

At issue in this case are Snohomish County *Amended Ordinance* No. 03-063 and *Amended Emergency Ordinance* 04-057⁴. These ordinances changed the designations on 110.5 acres of Snohomish County land that is known as *Island Crossing*. The land is roughly triangular and is bounded on the west by Interstate 5 roughly on the north by State Highway 530 (a portion of the subject land extends north of Highway

⁴ See CTED brief for explanation of the relationship.

530), and on the east by Smokey Point Boulevard.⁵ The land abuts the City of Arlington's *urban growth area* (UGA) at the point in the south.⁶

Island Crossing is characterized primarily by open space, low density development and agricultural uses.⁷ The aerial photograph contained in the DSEIS prepared by Snohomish County's Department of Planning and Development Services (PDS) not only confirms the general agricultural character of Island Crossing, but just as important for this case confirms that the land surrounding Island Crossing is also primarily agricultural in character.⁸ The aerial photograph (from the year 2001) clearly shows an area predominated by tilled land and farm centers.

Amended Ordinance 03-063 redesignated 75.5 acres of Island Crossing that were designated *Riverway Farmland Commercial*. The DSEIS reflects that the *Riverway Farmland Commercial* area is actively farmed.⁹

In addition to the predominating agricultural character, the aerial photograph also shows the 35 acres of Island Crossing designated *Rural*

⁵ CP Sub 24, pp. 2125-2217, *Draft Supplemental Environmental Impact Statement*, February, 2003. To see 2 maps and an aerial photo, see figures 1-1, 1-2 and 1-3 (CP Sub 24, pp. 2134, 2136 and 2138. *A full copy of the DSEIS will be provided to the court.*

⁶ *Id.*

⁷ *Id.*, see also at 2142.

⁸ CP Sub 24, p. 2136 (Figure 1-2).

⁹ CP Sub 24, p. 2142 (p. 1-6), listing "hay harvesting" as an existing use.

Freeway Service.¹⁰ This area is located in the upper-left of center, directly east of the I-5 interchange with SR 530. This area, designated to primarily serve the rural community and freeway travelers, consists of three gas stations, three restaurants, a motel and espresso stand.¹¹ Both *Amended Ordinance 03-063* and *Emergency Ordinance 04-057* redesignated both of these areas to *Urban Commercial* and included it within the County's designated *urban growth area*.

The County's actions in redesignating these areas were in response to a request by Dwayne Lane, a well-known local landowner and automobile dealership owner. Mr. Lane would like to move his dealership from its current location within the City of Arlington to land he owns in Island Crossing and cannot do it without the land use designation change.¹²

The DSEIS indicates that the 75.5 acres of *Riverway Commercial Farmland* contain soils that are classified as *prime* by both the United States Department of Agriculture and by Snohomish County.

¹⁰ **Rural Freeway Service (RFS)**: This designation includes land that has previously been designated or zoned as Rural Commercial land at the rural Interstate 5 interchanges in north Snohomish County. The designation and implementing zones require rural development standards that make rural freeway service development compatible with adjacent rural residential uses. *Snohomish County GPP LU-62*.

¹¹ *Id.*

¹² CP Sub 24, p. 2132 (p. 1-1).

Analysis of the proposal conducted by PDS concludes that the portion of the site currently designated and zoned for agricultural uses continues to meet the criteria in the GPP¹³ for determination of agricultural land of long-term significance. This conclusion is based on the following:

- Prime farmland as defined by the U.S. Soil Conservation Service (SCS) and other Class III soils in the SCS capability classification: Soils in the proposal area are prime farmland soils as defined by the SCS and Snohomish County. According to the *Soil Survey of Snohomish County area, Washington*, prepared by SCS, the proposal area primarily consists of Puget silty clay loam. A small portion of proposal site (*sic*) consists of Puget fine sandy loam. The SCS and Snohomish County identify both of these soils types as prime farmland soils.¹⁴

The DSEIS goes on to note that the high productivity of the soils resulted in Island Crossing early on receiving an agricultural designation by the County:

The area is devoted to agriculture as indicated by its designation as Riverway Commercial Farmland in the GPP and is zoned A-10.¹⁵ The proposal site was identified as an agricultural area of primary importance in the 1982 agricultural lands inventory and was designated as Riverway Commercial Farmland in the *Snohomish County 1993 Interim Agricultural Conservation Plan*, which used 1990 aerial photo interpretation and 1991 field identification of land devoted to agriculture.¹⁶

¹³ *General Policy Plan*, the County's name for its comprehensive plan.

¹⁴ CP Sub 24, p. 2172 (p. 2-34).

¹⁵ *Agriculture-10*, meaning that development of allowed uses must be on parcels at least 10 acres in size.

¹⁶ CP Sub 24, pp. 2172 -- 73 (pp. 2-34 -- 2-35).

As this brief will discuss further below, along with soil quality and productivity, County's are required to consider long-term commercial significance and CTED's minimum guidelines recommend ten factors in determining whether or not land is properly designated as agricultural land of long-term significance. The DSEIS analyzed these factors, listed in *WAC 365-190-050* as follows:

- Availability of Public Facilities: Public water and sanitary sewer facilities are physically located in and adjacent to the proposed site. However, sanitary sewer service is restricted by the GPP to Urban Growth Areas. The shoreline substantial development permit for the existing sewer line restricts availability of sanitary sewer to the existing parcels zoned Rural Freeway Service.
- Tax Status: Several large parcels in the area (approximately 32% of the area) are classified as Farm and Agricultural Land by the Snohomish County Assessor and are valued at their current use rather than "highest and best use." The other parcels in the area, however, are valued and taxed at their "highest and best use."
- Availability of Public services: Public services such as public water and sanitary sewer service are physically located within and adjacent to the proposal site. However, sanitary sewer service is restricted by the GPP to UGAs. The existing sanitary sewer line is available by conditions in the shoreline substantial development permit to existing parcels zoned Rural Freeway Service.
- Relationship or proximity to UGAs: The proposal site is approximately 0.9 miles from the Arlington city limits and is functionally separated from the City because it is within the Stillaguamish River floodplain. The southern tip of the proposal site is adjacent to the Arlington UGA.

- Land Use Settlement Patterns and Compatibility with Agricultural Practices: Most of the proposal site is currently in farm use with interspersed residential and farm buildings.
- Predominant Parcel Size: Predominant parcel sizes are large and of a size typically found in areas designated as commercial farmland. Nine parcels are located within the 75.5 acres of the proposal site designated Riverway Commercial Farmland. Approximate sizes of these parcels are 20.7 acres, 15.8 acres, 14.6 acres, 8.1 acres, 2.9 acres and three smaller parcels.
- Intensity of Nearby Uses: More intense land uses and urban land developments are located within the Rural Freeway Commercial node at the I-5/SR 530 interchange that has existed essentially in its present configuration since 1968. Farmland is located immediately to the east, and, separated by I-5 to the west.
- History of Land Development Permits Issued Nearby: No urban development permits have been issued in the vicinity of the proposal site except for the substantial shoreline development permit issued for the sewer line that serves only freeway commercial uses.
- Land Values Under Alternative Uses: The area of the proposal site outside of Rural Freeway Service designation is in the floodway fringe area of the Stillaguamish River. Higher uses than farming would be difficult to locate in the area because of the floodplain constraints.
- Proximity to Markets: Markets within Arlington, Marysville, and Stanwood are located in close proximity to the site.¹⁷

Based on the soil characteristics and the analysis of factors listed above, the DSEIS concluded that:

¹⁷ CP Sub 24, p. 2171(p. 2-33).

Based on review of the site characteristics and the GMA criteria, the proposal area meets the criteria for an agricultural area of long-term commercial significance. It contains prime farmland soils, is not characterized by urban growth, and is adjoined by uses that are compatible with agricultural practices.¹⁸

Following the DSEIS and the PDS staff recommendation of denial of Dwayne Lane's request, the Snohomish County *Agricultural Advisory Board* issued a letter also recommending denial of the redesignation based on the conclusion that the land "is of long-term commercial significance for agricultural use."¹⁹ One of the reasons for the recommendation stated in the letter was the incompatibility of the planned future development with the surrounding farming operations:

The land is comprised of prime agriculture soil, well drained and highly fertile. Currently and historically farmed, it has long been identified by the County as 'agricultural land of primary importance.' All adjacent lands, except a small, freeway service zone, are predominately agricultural in use and indisputably non-urban in character. The existing 'development pattern,' cited as a hindrance to farming in the request itself, would be dwarfed by the one it proposes, with proportionate adverse impact.²⁰

¹⁸ *Id.* Note that the DSEIS is a neutral document and carries no formal recommendation. Based on the DSEIS, PDS prepared a recommendation that the request by Dwayne Lane be denied, citing the information in the DSEIS.

¹⁹ Letter from Jackie Macomber, Chair, Agricultural Advisory Board to the Snohomish County Planning Commission, February 21, 2003. Attached to board-petitioners' Superior Court brief at Tab 25. (Note that the Record does not include Futurewise Superior Court briefing. This is being remedied and Futurewise will provide this Court with proper citation when the brief is transferred from Superior Court).

²⁰ *Id.*

The County adopted 03-063 in spite of the analysis by PDS and recommendations for denial by both PDS and the *Snohomish County Agricultural Advisory Board*. The County relied instead on the testimony of Roberta Winter, who, along with her husband, had owned a dairy farm on or near Island Crossing in the 1950's and 1960's.²¹ Ms. Winter presented testimony in the context of a public hearing where citizens were invited to speak out in favor or against the redesignation. Ms. Winter testified in favor of re-designating Island Crossing to *urban commercial*, citing her family's difficulties in maintaining the dairy farm as the reason for her recommendation. Ms. Winter's testimony was presented without any meaningful cross examination or corroboration, as is usually the case in such a public hearing.

The County adopted the redesignation in October of 2003. Futurewise, (then 1000 Friends of Washington) Agriculture for Tomorrow, and Pilchuck Audubon Society, Stillaguamish Flood Control District and CTED filed three petitions for review with the *Central Puget Sound Growth Management Hearings Board* which were then consolidated.

²¹ CP Sub 36, Vol. II, App. B, Finding T, (03-063) and CP Sub 36, Vol. II, App. D, Finding Y ((04-057).

Evidence presented to the Hearings Board on the agricultural dedesignation issue included the PDS Staff report, DSEIS and the recommendation from the Agricultural Advisory Committee. Additional evidence included a letter to the County Council from Robert Lervick of Twin City Foods, located in Stanwood.²² Mr. Lervick wrote:

We currently contract with local growers in the Stillaguamish and Skagit valleys to raise peas for our plant in Stanwood. We have raised anywhere from 5000 acres to 10,000 acres of peas in this local area and we currently contract a portion of those acres in the Island Crossing area and have found it ideal for raising peas.²³

On March 22, 2004 the Hearings Board issued its *Final Decision and Order*. The Board found that the dedesignation of agricultural land at Island Crossing failed to comply with the goals and requirements of the GMA.²⁴ In addition, the Board found that the County's action *substantially interfered with the goals of the GMA* and ruled that it was therefore *invalid* pursuant to RCW 36.70A.302.²⁵

Significant to the Board was that the PDS report and *DSEIS* had conducted an in-depth analysis of the GMA definitions and WAC factors as applied to the land at Island Crossing, concluding that dedesignation

²² Letter from Roger O. Lervick to Snohomish County Council, July 9, 2003. A proper citation to this letter will be provided upon transfer of Futurewise brief from Superior Court. See fn. 16 above.

²³ *Id.*

²⁴ CP 2562, et seq. (Corrected Final Decision and Order (FDO)).

²⁵ CP 2599.

would not comply with the GMA. The County's action, on the other hand, was supported primarily by the testimony of Roberta Winters, which did not relate to the GMA and was characterized as anecdotal and opinion.

The County responded to the board's order by filing this appeal. At the same time the County Council, in an attempt to comply with the board's order, adopted *Emergency Ordinance 04-057*. This ordinance effected precisely the same redesignations at Island Crossing that the Hearings Board had just found non compliant and invalid. The record for Emergency Ordinance 04-057 was substantially the same as that for Amended Ordinance 03-063.

After a compliance hearing, the board ruled that 04-057 also failed to comply with the GMA, also *substantially interfered with the goals* of the GMA and was therefore also invalid. The Board also recommended that the Governor impose sanctions. The board's decision was essentially similar to the Final Decision and Order (FDO) issued earlier in that it found the County's evidence unpersuasive as compared to the thoroughness and GMA directedness of the PDS report and DSEIS. The County again appealed and the Hearings Board's ruling on 04-057 was consolidated at Superior Court with the County's appeal of 03-063.

III. ARGUMENT

A. Agricultural lands under the GMA

1. GMA Background

The *Growth Management Act* sets conservation of agricultural land as one of the 13 planning goals that must guide local governments:

Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.²⁶

Though the 13 planning goals are not listed in any priority order, as discussed below, the *Natural Resource Industries* goal's verbs are more mandatory than the wording of other goals.²⁷

The GMA contains a sequenced process whereby local governments are required to identify, designate and then protect

²⁶ RCW 36.70A.020(8).

²⁷ The County cites *Viking Properties v. Holm* (See *Snohomish County brief*, p. 11) for the proposition that GMA goals are all equal. But the court in *Viking* clearly acknowledges the primacy of the RCW 36.70A.020(8):

We are ever cognizant that this is a legislative prerogative and have prioritized the GMA's goals only under the narrowest of circumstances, where certain goals came into direct and irreconcilable conflict as applied to the facts of a specific case. See *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000). 155 Wn.2d 112, 127 – 28, 118 P.3d 322, 330 (2005).

As the Supreme Court wrote in the King County decision cited in *Viking Properties*: “Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry.” *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 558, 14 P.3d 133, 141 (2000).

agricultural land of long-term commercial significance. The sequence

begins with RCW 36.70A.170(1):

(1) On or before September 1, 1991, each county, and each city, *shall* designate where appropriate:

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;²⁸

Agricultural lands are defined in RCW 36.70A.030(2):

"Agricultural land" means land *primarily devoted* to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by *RCW 84.33.100 through 84.33.140, finfish in upland hatcheries, or livestock, and that has *long-term commercial significance for agricultural production*.²⁹

2. Primarily Devoted To

Whether land is *primarily devoted* to agriculture has been defined broadly by the Washington State Supreme Court. "We hold land is 'devoted to' agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production".³⁰ This definition will generally apply to any land that has

²⁸ Emphasis added.

²⁹ Emphasis added to highlight the two prongs.

³⁰ *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 53, 959 P.2d 1091, 1097 (1998).

historically been farmed, whether or not the land is currently being farmed.

Whether or not land is currently farmed is considered to be a manifestation of *landowner intent*. Because agricultural land conservation under the GMA transcends ownership and is based on the character of the land, landowner intent cannot serve as a controlling factor in determining whether land should be designated and thereby conserved. The Court in Redmond stated the sound reasoning for this:

Second, if landowner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably, in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture. Although some owners of agricultural land may wish to preserve it as such for personal reasons, most, like Benaroya and Cosmos, will seek to develop their land to maximize their return. If the designation of such land as agricultural depends on the intent of the landowner as to how he or she wishes to use it, the GMA is powerless to prevent the loss of natural resource land. All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the 'agricultural land' designation. Under the Board's interpretation, the controlling jurisdiction would have no choice but to do so, because the land is no longer being used for agricultural purposes.³¹

³¹*Id.*, 136 Wn.2d at pp. 52 -- 53, 959 P.2d at 1097.

Appellants in this case maintain that Island Crossing is *not* primarily devoted to agriculture. Neither denies that the area has been farmed in the past, which is a strong, if not dispositive indication that the land is *capable* of being farmed and therefore easily meets the *Redmond* standard. The County actually makes no argument as to whether the land is *primarily devoted* to agricultural production.³² This is telling because the County Council, upon adoption of both *Amended Ordinance* 03-063 and *Amended Emergency Ordinance* 04-057 concluded, all supporting evidence to the contrary, that Island Crossing was *not* primarily devoted to the production of agriculture.³³ Lane, in his brief, addresses only his parcel, acknowledges that it has been farmed in the past and then attempts to create his own definition of *primarily devoted to*, distinct from the Supreme Court's definition and one that better-serves Lane's purpose in this case.³⁴

The evidence is clear from the aerial photographs, DSEIS³⁵ and appellant's own acknowledgements that the land of Island Crossing is in an area that is either currently farmed or has been farmed in the recent past

³² See *County's brief*, p. 15.

³³ CP Sub 36, Vol II, App. D, Finding Y (04-057).

³⁴ *Brief of City of Arlington and Dwayne Lane*, pp. 29, 30.

³⁵ The DSEIS on p. 1-6 lists *hay harvesting* as an *existing* use. Note that hay cultivation is explicitly listed as an agricultural activity in the GMA definition cited herein at RCW 36.70A.030(2).

and is now capability of being farmed. Considering *Redmond*, the Hearings Board was therefore correct when it wrote in the *Final Decision and Order* on page 26:

1. Are the 75.5 Acres at Island Crossing “devoted to” agriculture”? The Board answers this question in the affirmative. A plain reading of the Supreme Court’s holdings suggests that if land has ever been used for agriculture or is capable of being used for agriculture, it meets the “devoted to” prong of the test. There does not appear to be a dispute regarding whether the 75.5 acres at Island Crossing have ever been farmed, so the Board arguably could end that part of its inquiry here.³⁶

Clearly the record in this case contains substantial evidence to support the conclusion that Island Crossing is *primarily devoted to* agriculture.

3. Long-term Commercial Significance

The second prong that makes up agricultural resource land is also defined by the GMA:

"Long-term commercial significance" includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land.³⁷

Sorting out the meaning of this definition is central to this case.

This Court should therefore first give significance to the use of the terms

³⁶ Internal cite omitted.

³⁷ RCW 36.70A.030(10).

“includes” and “in consideration with.” The clearest meaning is that *long-term commercial significance* doesn’t *include* the land’s proximity to population and the “possibility of more intense uses of the land,” but rather requires the latter term’s consideration. This also makes sense because *growing capacity, productivity and soil composition* are much more objective and measurable factors than last two factors that merit *consideration*, but not necessarily *inclusion*.

This distinction becomes extremely important when the statutory definition and *WAC* factors are considered in light of both the *conservation mandate* found by the Supreme Court and RCW 36.70A.060, which will be discussed below and *requires* local governments to conserve designated agricultural resource lands. The distinction between *includes* and *in consideration*, when considered with the conservation mandate, highlights both the flaw in the County’s consideration of the factors and the underpinnings of the Hearings Board’s ruling against the County.

4. Supreme Court’s Agriculture Conservation Mandate

Before moving on to the *WAC* factors, we first briefly discuss the Supreme Court’s conservation mandate and RCW 36.70A.060. The Supreme Court in *Redmond* discussed the importance of the conservation of agricultural lands to GMA compliance:

In seeking to address the problem of growth management in our state, the Legislature *paid particular attention to agricultural lands*. One of the 13 planning goals of the GMA addresses natural resource industries: ‘Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.’ RCW 36.70A.020(8). The purpose is to ‘assure the conservation’ of these lands. RCW 36.70A.060(1). A more recent indication of the Legislature's concern for preserving agricultural lands is a new section the Legislature added in its 1997 amendments to the GMA, RCW 36.70A.177, which urges employment of ‘innovative zoning techniques’ to conserve agricultural lands.³⁸

The subsequent case of *King County v. Central Puget Sound*

Growth Management Hearings Board explicitly ruled that RCW Chapter 36.70A creates a *mandate* for local governments to conserve agricultural lands: “When read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land.”³⁹

As noted above and by the Supreme Court, RCW 36.70A.060(1) also provides evidence that the GMA requires more specific action for agricultural resource lands:

(1)(a) Except as provided in RCW 36.70A.1701, each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, *shall* adopt development regulations on or

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

³⁹ *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000).

before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.040. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals.⁴⁰

This provision has two components that are important to this case.

First, once resource lands are designated, as is the case with Island Crossing, the County is *required* to adopt regulations to *assure* their conservation. Here of course the County has done just the opposite.

Second, the County's regulations adopted after designation must not only conserve a particular area of agriculture, but must also *assure* through regulation that land uses *adjacent* to designated agricultural land not interfere with continued use farming. In this case, the County cites high traffic as one justification for de-designating Island Crossing. As this brief notes and the DSEIS confirms, the land surrounding Island Crossing remains largely in agricultural designation and use. Yet if allowed to urbanize, according to the DSEIS, Island Crossing will soon be the home

⁴⁰ Emphasis added.

of a 43,000 square foot auto dealership, a 200 room hotel, 168,000 square feet of “specialty retail” and a 164,000 square foot “discount superstore.”⁴¹

The Hearings Board was therefore well-supported by both the record and RCW 36.70A.060(1) when it wrote at p. 29 of the *Final Decision and*

Order:

The Board also rejects the argument that off-site impacts of the County’s action are limited. If the limited commercial freeway service uses now at Island Crossing create ‘hazardous’ impacts for existing agricultural activities, how can those same impacts on surrounding areas be any less from the panoply of urban uses allows in the County’s ‘General Commercial’ zone? A review of the geometry and topography of this area shows that the County’s action would truly create an ‘urban island’ almost completely surrounded by resource lands.⁴²

5. WAC Minimum Guidelines

We now turn to *WAC* guidelines that list the factors the County is required to consider when making designation decisions on agricultural resource land.⁴³ WAC 365-190-050 states in relevant part:

⁴¹ CP Sub 24, p. 2132 (p. 1-6).

⁴² Internal cites omitted.

⁴³ RCW 36.70A.170(2) states that County’s “shall consider guidelines established pursuant to RCW 36.70A.050. RCW 36.70A.050 states that the guidelines, adopted by CTED:

shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines 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.

Agricultural lands. (1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service as defined in Agriculture Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

- (a) The availability of public facilities;
- (b) Tax status;
- (c) The availability of public services;
- (d) Relationship or proximity to urban growth areas;
- (e) Predominant parcel size;
- (f) Land use settlement patterns and their compatibility with agricultural practices;
- (g) Intensity of nearby land uses;
- (h) History of land development permits issued nearby;
- (i) Land values under alternative uses; and
- (j) Proximity of markets.

(2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to department of community development.⁴⁴

⁴⁴ *Washington Administrative Code* No. 365-190-050 (emphasis added).

As noted *infra*, the record in this case clearly shows that Island Crossing contains *prime* soils, and is primarily devoted to agriculture. Therefore the soils, growing capacity and productivity components included in the definition of *long-term commercial significance* do not justify de-designation. This brief also previously quoted the specific and directed findings and analysis of the DSEIS with respect to the ten factors (a)-(j). (*See pp. 7-8 above*). Before looking at the appellant's arguments on these factors, this Court should keep in mind three points.

First, the DSEIS is the only comprehensive and consolidated report in the record that specifically and comprehensively analyzes the Dwayne Lane Proposal in the context of the GMA's goals, requirements, Supreme Court case-law and the County's comprehensive plan policies. To the extent that the County otherwise considered the ten factors, it was largely after the board's initial ruling and were then included in the findings of *Amended Emergency Ordinance 04-057*. Because the "evidence" cited by the County was not part of a GMA directed analysis it compared poorly and, in the end, inadequately to the work of professional staff on the issue of GMA compliance. For example, on the factor of *tax status*, rather than look to its own records, the County instead cited that "testimony of John Henken shows that fallow farmland there is not taxed as agricultural

The County's reliance on anecdotal, parcel-focused witness testimony as the primary determining factor of LTCS [*long-term commercial significance*] has too narrow a focus – it misses the broad sweep of the natural resource goal, which is to maintain and enhance the agricultural resource *industry*, not simply agricultural operations on individual parcels of land. This breath of vision informs a proper reading of the Act's requirements for resource lands designation under .170 and conservation under .060. Reading these provisions as a whole, it is apparent that agricultural lands with "long-term commercial significance" are *area-wide patterns of land use*, not localized parcel ownerships.⁴⁷

B. The County Council failed to consider each of the ten WAC factors and failed to consider the GMA's agricultural conservation mandate.

Both appellants purport to analyze the ten factors of WAC 365-190-050. It is telling of the result-oriented nature of this exercise that neither party finds that application of any of the ten factors justifies keeping Island Crossing as agricultural land of long-term commercial significance.

There are two significant problems with the appellants' analysis of the ten factors. The first problem is that "findings" accompanying the ordinance that address the factors were not supported by the record itself. The DSEIS, combined with the PDS report and the recommendations by the Agricultural Advisory Board all overwhelmingly supported maintaining the agricultural designation. The "evidence" presented by the

⁴⁷ CP 2902.

land.”⁴⁵ As this brief will show, this lack of rigorous analysis on the part of the County is prevalent.

Second, as CTED points out, WAC 365-190-050 requires consideration of the factors, but doesn’t mandate any particular result or provide any internal guidance on how the factors should be considered. In order then for consideration of the factors to be meaningful, something must inform consideration of the factors. In this case, what should inform their consideration is the *agricultural conservation mandate* stated by the Supreme Court. Only then can consideration of the factors ever result in agricultural designation when in competition with other commercial or residential uses that will always bring greater economic gain and a higher tax base. This is particularly true of Island Crossing, where an undeveloped urban growth area putatively connects to Island Crossing to the south and a convenient freeway interchange makes it particularly desirous for economic development. In this situation, what is there to save Island Crossing from result-oriented political forces but the context and fact of the agricultural conservation mandate?

⁴⁵ Snohomish County’s brief, Appendix A(2), citing *Amended Emergency Ordinance 04-057*, Finding X(7).

Third, clearly the conservation mandate did *not* inform the County's "consideration" of the ten WAC factors. Neither appellant brief nor the County's findings accompanying the legislation at issue mention this mandate. It is simply ignored, as is the County's conservation obligation under RCW 36.70A.060. It was this lack of necessary context to the County's action that caused the Hearings Board to write at page 28 of its *Final Decision and Order*:

Further damaging to the credibility of the County's reasoning supporting its action is that nowhere do Respondent or Intervenor cite to credible, objective evidence to refute or reconcile the substantial record evidence (*i.e.*, the PDS report, the DSEIS, USDA soils survey) to the contrary. The Board acknowledges the County's assertion that the Council *considered* the contrary recommendations of the County Planning staff and Agriculture Advisory Board, as well as the guidelines in the GMA, CTED's procedural criteria, and reviewed all public testimony and comments before making its decision. To the extent that there is no dispute that this evidence was placed before the Council before it took action adopting Ordinance No. 03-063, it can be said that the legislative body "considered" that evidence. However, the only record support cited by the County and Intervenor in support of dedesignation are far less credible than the substantial contrary evidence in this record.⁴⁶

And on page 18 of the *Order Finding Continuing Noncompliance and Continuing Invalidity and Recommendation for Gubernatorial Sanctions*:

⁴⁶ CP 2589 (Internal cites omitted, emphasis original).

County to counter this evidence, by contrast, were primarily anecdotal statements and testimony from individual landowners, rather than a GMA focused analysis. The County clearly believes that the Hearings Board was required to rubber-stamp the legislative findings, whether supported or not and conclude the County had complied with the GMA. This is not the Hearings Board's function nor the function of the GMA, which requires land use decisions based on informed analysis of land use characteristics rather than result-oriented actions to specifically benefit a select few.

The second problem with the appellant's analysis that it amounts to result-oriented spin that is not informed by the obligation imposed on all GMA planning counties to conserve agricultural land, not convert it based upon a higher return or potential larger tax base.

We now turn to the County's argument and the County's Council's consideration of each of the ten WAC factors.

1. Availability of Public Facilities:

Both the DSEIS and the appellant's briefing note that water and sewer are "available" in the vicinity.⁴⁸ The County however, since it looks to develop rather than conserve the farmland, takes issue with the DSEIS

⁴⁸ Snohomish County's brief, pp.. 21-23.

description that extension of sewer services is restricted by current land use regulations from the non-urban designated Island Crossing.

Restriction of sewer extensions outside of urban growth areas, except in limited circumstances, is required by the GMA in order to prevent inappropriate development of rural and resource lands.⁴⁹

The County, by contrast, dismisses the sewer limitation by asserting that the regulations will just be changed to allow their extension. “Similarly, the restriction on extending sewer service to the *Rural Freeway Service* properties in the shoreline permit mentioned in the DSEIS is a temporary condition.⁵⁰ The legislative findings accompanying both ordinances goes even further, failing to even acknowledge that there is any limitation at all to sewer hook-up outside of the UGA: “Water and sanitary sewer lines running along the west side of Smokey Point Boulevard are available adjacent to the subject property.”⁵¹ This “finding” is one of several instances where the County makes it clear that it will make urbanization of Island Crossing a self-fulfilling prophecy, regardless of the GMA. “Snohomish County is growing rapidly and it is inevitable

⁴⁹ See RCW 36.70A.110.(4) & *Thurston County v. Cooper Point Association*, 148 Wn. 2d 1, 57 P.3d 1156 (2002).

⁵⁰ *Snohomish County Brief*, p. 22.

⁵¹ *Id.*, Appendix (A)1 excerpting Legislative Finding B.2

that sites like Island Crossing will be converted from agricultural uses to commercial uses.”⁵² These are not statements that acknowledge a mandate to conserve agricultural land. Nor do they recognize both the limitations in the GMA and the approved permit that prohibit the extension of sewer service to this area.⁵³

2. Tax Status:

The County accepts the DSEIS statement that 32% of the parcels in the area proposed the comprehensive plan designation an agricultural use tax status and taxed as farmland. This is a fairly high percentage given that some landowners want comprehensive plan and zoning changes that benefit from not being taxed as farmland. Choosing to take land out of this designation is clearly an expression of landowner intent, since a special agricultural tax status is voluntary and therefore cannot be a controlling factor in a designation decision.⁵⁴

3. Availability of Public Services:

The County correctly points out that the DSEIS reiterates the Public Facilities analysis discussed above. The County offers no further

⁵² CP Sub 36, Vol II App. B, Finding B.8. (03-063) and CP Sub 36, Vol II, App. D, Finding B.8 (04-057).

⁵³ CP Sub 24, p. 2171(p. 2-33).

⁵⁴ See *Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998).

evidence on this factor other than to state that the City of Arlington is willing to provide public services (fire and police protection, schools, e.g.).

4. Relationship or Proximity to Urban Growth Areas:

The County's argument regarding this factor is notable for two reasons. First, the County in its brief insists that the adjacency of Island Crossing to the Arlington UGA is dispositive of the issue of whether Island Crossing has long-term commercial significance for the production of agriculture. "That fact warrants a conclusion that it is not compatible for long-term agricultural production."⁵⁵ Clearly this mindset is not informed by the agricultural conservation mandate. It makes no mention of the observation in the DSEIS that Island Crossing is "approximately .9 miles from the Arlington city limits and is functionally separated from the City because it is within the Stillaguamish River floodplain."⁵⁶ The County also makes no mention of the fact that adjacency to the UGA is gerrymandered so as to only abut Island Crossing at the smallest possible

⁵⁵ Snohomish County's brief, p. 25.

⁵⁶ CP Sub 24, p. 2171 (p. 2-33).

point (literally) to the south. Instead, this barest touching of the undeveloped UGA, in the County's mind, justifies dedesignation.⁵⁷

The second notable aspect of the County's argument is that the County Council made no finding whatsoever on UGA proximity. There was therefore nothing for the Hearings Board to defer to on this factor.⁵⁸

5. Predominant Parcel Size:

According to the DSEIS, the nine parcels located in the *Riverway Commercial Farmland* portion of Island Crossing are 20.7 acres, 15.8 acres, 14.6 acres, 8.1 acres and 2.9 acres and 3 smaller parcels.⁵⁹ Again, on this factor the County Council made no such detailed "findings" supported by evidence to which the Hearings Board could defer over the DSEIS. Instead, the Council concluded, without any supporting evidence or analysis:

⁵⁷ Note that the County overreaches on p. 25 of its brief when it states that "[t]he DSEIS conclusion that the fact that the property is adjacent to the UGA militates in favor of it being designated as long-term agricultural resource land defies logic, is clearly erroneous, is not supported by substantial evidence in the record and cannot be supported under any credible analysis." The DSEIS made no such strong statement based on this factor alone.

⁵⁸ Compare by example the County's action in *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238 -- 41, 110 P.3d 1132, 1137 -- 41 (2005) In that case, the County made its own determination of the meaning of a term undefined in the GMA (characterized by urban development). The Supreme Court ruled that, because the term was undefined, the County's deliberative action was owed deference. In this case, there is no action or deliberation by the County on several of the minimum guideline factors.

⁵⁹ CP Sub 24, p. 2171 (p. 2-33).

Farming is no longer financially viable at Island Crossing. Busy highways, high assessed value, small parcel size and safety issues eliminate the viability of the Island Crossing Interchange site as agricultural land.⁶⁰

As to parcel size, the County's brief argues that de-designation is justified because only three out of nine parcels exceed 10 acres in this AG-10 zone. Again, since the County Council made no such analysis as detailed as the DSEIS, there was nothing for the Hearings Board to defer to.

Instead, the Hearings Board could look at the fact that 51.1 out of 75.5 acres are in large lot parcels (67%); that parcel size is not necessarily a barrier to farming more than one parcel; or that zoning the area for 10 acre minimum lots presumably reflects a determination that these sizes are acceptable for farming. That the County failed to make *any* such analysis on this factor is again indicative of a failure to be informed by the agricultural conservation mandate.

6. Land Use Settlement Patterns and Compatibility with Agricultural Practices:

In its brief, the County does little to counter the DSEIS statement that "Most of the proposal site is currently in farm use with interspersed

⁶⁰ CP Sub 36, Vol II, App. B and App. D, Finding B.7 (Ord. 03-063 and 04-057).

residential farm buildings.”⁶¹ In fact the aerial photograph included in the DSEIS confirms this statement. The County’s brief instead just reiterates its earlier position that tax status, traffic and the adjacent UGA justify the action.⁶² The County Council’s findings on this factor continue the pattern of providing little if anything in the way of supported evidence for the Hearings Board to offer deference. In this case, the findings merely reference the development of the *Rural Freeway Commercial* zone and note that some of the lots, according to landowner testimony, *could* be developed at greater density than is allowed.

7. Intensity of Nearby Land Uses:

The County’s argument on this factor, along with its general failure to be guided by the conservation mandate, is instructive. “The evidence *related to* this criterion *can be read* to support either the DSEIS or the County conclusion, though the County’s is more supportable.”⁶³ This is a conclusory statement based upon disparate parts of the record, some of which made it into the County Council’s findings and some which did not.

⁶¹ CP Sub 24, p. 2171 (p. 2-33).

⁶² *Snohomish County Brief*, p. 28.

⁶³ *Id.*, p. 29.

The Council's findings on this factor reference three things that have existed side by side compatibly with Island Crossing farming for years: I-5, SR 530, Smokey Point Boulevard and the commercial pocket of *Rural Freeway Service*.⁶⁴ Long-time pre-existing features should not justify de-designation of agricultural resource land, particularly if the County's process is informed by the conservation mandate. Notable also is that the DSEIS states that "Farmland is located immediately to the east, and, separated by I-5, to the west."⁶⁵ Neither the County's brief nor the Council's findings mention these adjacent agricultural lands and the County's obligation to protect them from incompatible uses pursuant to RCW 36.70A.060.

8. History of Land Development Permits Issued Nearby:

Again, the County Council makes no findings related to this factor, while the DSEIS states that: "No urban development permits have been issued in the vicinity of the proposal site except for the substantial shoreline development permit issued for the sewer line that serves only the freeway commercial uses."⁶⁶ There was therefore nothing for the

⁶⁴ CP Sub 36, Vol II, App. B, Findings B.3 and B.4 (03-063) and CP Sub 36, Vol II, App. D, Findings B.3, B.4 and X.6 (04-057).

⁶⁵ CP Sub 24, p. 2171 (p. 2-33).

⁶⁶ *Id.*

Hearings Board to defer to on this factor. The County's brief references "over 200 homes" recently developed "less than ½ mile from Island Crossing."⁶⁷ The County provides no analysis beyond conclusory statements that the ½ mile distance renders the development incompatible with agriculture production.

9. Land Values Under Alternative Uses:

Both the County in its brief and the County Council in its Findings suggest that Island Crossing would be more valuable with urban commercial uses. The DSEIS concluded that more intense uses would be difficult because of Island Crossing's floodplain constraints.⁶⁸ The County's brief doesn't dispute the floodplain constraint but only asserts that the DSEIS is unsupported by any analysis. The County Council provides no findings to which the Hearings Board could defer on the floodplain issue.

Failure to consider the floodplain constraint, failure to discuss Island Crossing's value as agricultural land and assuming that a potential higher value justifies conversion to an urban designation again suggests analysis uninformed by the agricultural conservation mandate. This is

⁶⁷ *Snohomish County's Brief*, p. 29.

⁶⁸ CP Sub 24, p. 2171 (p. 2-33).

particularly true with this factor, given that the *Redmond* decision explicitly warns against agricultural land dedesignation decisions based upon the economic value of the land:

[L]ocal jurisdictions would be powerless to reserve natural resource lands. Presumably, in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture.”⁶⁹

10. Proximity to Markets:

The DSEIS concluded that “[m]arkets within Arlington, Marysville, and Stanwood are located in close proximity to the site.”⁷⁰ Again, the County Council made no findings on this factor to which the Hearings Board could defer. Along with the statement from the DSEIS, the Hearings Board also had the letter from *Roger Lervick* indicating that his processing plant for peas obtained some peas from the Island Crossing area. On this factor the County’s brief only reiterates Island Crossing’s proximity to the (undeveloped) UGA.⁷¹

⁶⁹ *Redmond*, p.52.

⁷⁰ CP Sub 24, p. 2171 (p. 2-33).

⁷¹ Snohomish County’s Brief, p. 31.

- C. The Hearings Board's finding that Island Crossing has *long term commercial significance* is supported by substantial evidence in the record given that the DSEIS is the only comprehensive, GMA-focused analysis and the County's findings are incomplete, missing, lack relevance and fail to be guided by the agricultural protection mandate.**

In conclusion on the issue of whether the land at issue has *long-term commercial significance*, the Hearings Board had the statutory duty and authority to review the record that was before the Snohomish County Council at the time the two ordinances were adopted and determine whether or not its action complied with the goals and requirements of the GMA. The Hearings Board considered the two competing views and, more importantly, the evidence that supported each. The Hearings Board considered the GMA-based comprehensive analysis contained in the DSEIS, the PDS staff report recommending denial, statements urging denial of the Lane proposal from the Snohomish County Agriculture Advisory Board, a letter from a pea processor regarding productivity at Island Crossing. The Hearings Board also considered the findings and conclusions of the County Council, such as they were, and concluded that the findings were unsupported and/or of questionable relevance to a GMA analysis and therefore found the County's action *clearly erroneous*.

The Appellants attempt to characterize this case as one where the Hearings Board was presented with two competing but equally supported positions and, therefore, the Council's action should be upheld given the deference required. "Although the County's conclusions are better supported by the record than those in the DSEIS, at worst, a conclusion could be reached, based on an analysis of the ten factors under WAC 365-190-050, that the land either was of LTCS or was not of LTCS, i.e., the record supported either conclusion."⁷²

However, as we have shown, the County failed to make any findings at all on several of the ten WAC factors. When the County did make findings, most were either conclusory, ignored key facts, redundant or not in the context of a GMA analysis. Most importantly, the County's conclusions were clearly outcome-oriented and failed to consider the GMA's agricultural conservation mandate. There was therefore little to which the Hearings Board could defer compared with the GMA focused analysis, evidence and recommendations that supported keeping Island Crossing designated as agricultural land of long-term commercial significance. The Hearings Board was within its authority in finding that the County's action was clearly erroneous.

⁷² *Snohomish County Brief*, p. 34.

D. Because a matter of law was at issue and not the credibility of witnesses, the Hearings Board was within its authority to determine whether testimony of farmer/landowners supported determination of long-term commercial significance.

The argument that the board improperly re-evaluated credibility of witnesses is without merit for three reasons.⁷³ The first reason is that this is a case where the board is not required defer to the County's conclusions as to the testimony of the witnesses in question. The case cited by the County in support of its argument, *Port of Seattle v. Pollution Control Hearings Bd.*,⁷⁴ is a case where the Supreme Court on appeal refused to consider the credibility with respect to the factual testimony of witnesses that appeared before the Pollution Control Hearings Board: "We do not weigh the credibility of witnesses or substitute our judgment for the PCHB's with regard to findings of fact."⁷⁵ This deference is appropriate in a case where the PCHB was finder of fact and considered evidence through examined testimony and argument from parties on either side of the issue. Since the under the Washington Administrative Procedures Act the Growth Board is the finder of fact in this case,⁷⁶ *Port of Seattle* stands

⁷³ *Id.* p. 35-38.

⁷⁴ *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 90 P.3d 659, (2004).

⁷⁵ *Id.*, p. 589.

⁷⁶ *Wells v. Western Washington Growth Management Hearings Bd.*, 100 Wn. App. 657, 674, 997 P.2d 405, 415 (2000), *reconsideration denied* Nov 30, 2000.

for the proposition that the Superior Court should not substitute its judgment for that of the Growth Board.

In addition, the witnesses in this case before the Snohomish County Council were not involved in an adjudicative process. The witnesses were not subject to cross examination and no argument with respect to their testimony was entertained. The witnesses were not certified as having any expertise in the GMA, nor were they asked to comment on GMA goals and requirements.

These witnesses arguably were not witnesses at all, but were citizens that attended a public hearing held by the County Council for the purpose of placing their opinions with respect to Island Crossing onto the record. That the County Council then chose to elevate these opinions to the status of findings and ignore other more useful but contrary evidence does not mean that the Hearings Board must accept the findings as part of its duty of deference to the County's action. The Council, unlike the PCHB, was not acting in this case as an unbiased arbiter of two competing positions. *Port of Seattle* does not apply to this situation and the Hearings Board owed these findings no deference.

The second reason that the board was not required to defer to the County's findings regarding the witnesses is that the County relied on the

public testimony to establish matters of law, not fact. The public testimony offered, though anecdotal, was then used by the County to establish whether or not Island Crossing continues to meet the GMA factors and WAC guidelines for agricultural land of long-term commercial significance. This is a legal question that the Hearings Board is charged by statute to determine when the action by the local government is appealed. The Hearings Board therefore owed no deference to the County's conclusions on this legal issue.

The third reason the County's argument is without merit is that the board did not take issue with the credibility of the witnesses offering anecdotal opinions. The board instead found the testimony unhelpful, if not irrelevant, in determining whether Island Crossing continued to meet the definition of long-term commercial significance:

The County and Lane make much of the opinions expressed by Mrs. Winter, Mr. Barlund and Mr. Henken, three individuals whom the County characterizes as knowledgeable about "existing market realities" Mrs. Winter relates her experiences as a dairy farmer before her family sold the property to Dwayne Lane, yet asserted no particular expertise as a real estate or agricultural industry analyst, nor did the County point to any. Nor did she, Mr. Barlund or Mr. Henken address either the criteria listed at WAC 365-190-050 nor the issue of the long-term agricultural significance of the larger pattern of agricultural land of which the Island Crossing triangle is a part, *i.e.*, the Stillaguamish River Valley. With regard to Mr. Henken's remarks, the Board notes that he is a landowner within the Island Crossing triangle. Just as

the Supreme Court has clarified that “land owner intent” is not determinative of the “devoted to” prong of resource lands designations, the Board agrees with CTED that “land owner intent” alone cannot be conclusive in determining ALLTCS.⁷⁷

This reasoning by the board is consistent with its reasoning and basis for rejecting identical opinion evidence that supported Amended Ordinance 03-063:

The County relies upon its Finding T, set forth in Finding of Fact 3 *supra*, to support its conclusion that the Riverway Commercial Farmland no longer has long-term commercial significance. The “evidence” relied upon is testimony from an individual who operated a dairy farm in the vicinity fifty years ago who opined that she sold her farm “because the land could not be profitably farmed.” Ex. 111. Anecdotal testimony, particularly from an individual whose direct experience with the area is decades removed from the present and whose declared expertise was in dairy rather than crop farming, does not constitute credible evidence on which to support the County’s action. Also, as Petitioners noted, this “Finding” was contradicted by others with present-day experience in crop farming in the Stillaguamish Valley.⁷⁸

The County’s problem in this case is not that the board failed to grant its action and supporting findings the proper deference. The County’s problem is that the record contained no evidence that was substantive to the point of being useful to contradict the GMA-based PDS report and the other evidence. The County’s opening brief, moreover,

⁷⁷ CP 2900-2901, (*Order Finding Continuing Noncompliance*, pp. 16, 17)

⁷⁸ CP 2589 (*Final Decision and Order*, p. 28).

makes no attempt to characterize the public testimony of the three landowners as anything but anecdotal, based on opinion and lacking in any GMA expertise or basis. Instead the County insists the board is required to accept County's conclusion that the testimony amounts to GMA relevant evidence supports redesignation. This position has no basis in law when the board is charged with determining GMA compliance.

A similar analysis applies to the County's argument that the board "disregarded expert testimony because it decided it was prejudiced in Lane's favor."⁷⁹ The reality is that the board considered the evidence submitted by the Intervenor as a manifestation of landowner intent and is therefore not a controlling factor:⁸⁰

To the extent that the County and Intervenor rely upon the materials prepared by the consulting firm of Higa-Burkholder, the Board notes that this information was prepared at the behest of Mr. Dwayne Lane, prime sponsor of the "Dwayne Lane Proposal for 2003 Final Docket Amendments." Mr. Lane is one of the property owners in the Island Crossing area and has specific interests and intentions relative to the land use of his property. Therefore, the Board construes any record declarations or conclusions entered by Mr. Lane's consultants to be reflections, if not direct expressions, of "landowner intent" and assigns them the appropriate weight (*i.e.*, expressions of landowner intent, alone, are not determinative).⁸¹

⁷⁹ Snohomish County Brief, p. 37

⁸⁰ See *Redmond v. CPSGMHB*, 136 Wn.2d at 52 – 53.

⁸¹ CP 2589, 2590 (*Final Decision and Order*, p. 28, 29) (footnotes omitted)

The County's briefing makes no attempt to characterize the evidence from Mr. Lane's consultant as something other than an expression of landowner intent. Instead, the County insists that the board erred simply for not accepting this evidence without question.

Finally on this issue of deference, the County states that "[t]he Board failed to evaluate any of the CTED factors in WAC 365-190-050 related to the land's proximity to population areas and the possibility of more intense uses of the land."⁸² This is simply untrue. The Hearings Board's decision contains extensive analysis of the ten factors, as evidenced by this passage:

Lane asserts that Island Crossing is "urbanized in nature" due to the existing improvements, including freeway service structures (Lane Response, at 16) and utility lines (Lane Response, at 7-8) nearby. The Board rejects this reasoning. We agree with Petitioners that the commercial uses presently in Island Crossing are, as the County has correctly designated them for years, "Freeway Service" uses, not urban uses. As to the proximity of utility service, the Board notes that their availability is in dispute, in view of permit and Shoreline Master Program restrictions. Even if there were no such restrictions, the mere presence of utility lines does not mandate urbanization.⁸³

To conclude on this issue of deference and re-weighting evidence:

The County completely ignores that the board is required by statute to

⁸² Snohomish County's brief, p. 37.

⁸³ CP 2590 (FDO, p. 29).

independently determine whether the County's action complies with the GMA. The County would have this court believe that the board is required to defer to the County whether or not the County is in compliance with the GMA. This is not the case:

Consistent with *King County*, [142 Wn.2d at 461] and notwithstanding the "deference" language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a county's plan that is not "consistent with the requirements and goals" of the GMA.⁸⁴

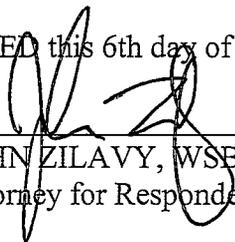
VI. CONCLUSION

As this brief and the briefs of CTED and SFCD have shown, the Court of Appeals owes deference to the Growth Board's interpretation of the law and board's findings of fact. However, little deference is needed. The Growth Board in this case closely followed the Growth Management Act and its interpretation by the Washington Supreme Court. The Growth Board carefully reviewed the record and correctly applied the law to the facts of this case. The Growth Board correctly held that the agricultural lands of long-term commercial significance at Island Crossing meet the Growth Management Act's criteria should remain agricultural lands of

⁸⁴ *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31 P.3d 28, 36 (2001), *affirmed Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002).

long-term commercial significance. Futurewise respectfully requests that this court uphold the Hearings Boards orders at issue in this case.

FILED this 6th day of April, 2006



JOHN ZILAVY, WSBA #19126
Attorney for Respondent Futurewise

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I am a resident of the State of Washington, residing or employed in Seattle, Washington and employed as an attorney for Futurewise.

My business address is: Futurewise, 1617 Boylston Avenue, Suite 200, Seattle, Washington 98122.

I am over 18 years of age, not a party to the above entitled action, and competent to be a witness herein.

On the April⁶, 2006 and in the manner indicated below, I caused true copies of the foregoing **FUTUREWISE RESPONSE BRIEF** to be served on:

Washington State Court of Appeals
Division I
One Union Square
600 University St
Seattle, WA 98101-1176
By hand delivery (2 copies)

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STATE OF WASHINGTON
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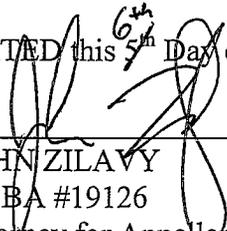
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I declare under penalty of perjury and the laws of the State of Washington that the foregoing is true and correct.

DATED this ^{6th} ~~5th~~ Day of April, 2006



JOHN ZILAVY
WSBA #19126
Attorney for Appellant