

No. 80810-4

SUPREME COURT
OF THE STATE OF WASHINGTON

GOLD STAR RESORTS, INC.,
Petitioner/Cross-Respondent,

v.

FUTUREWISE,
Respondent/Cross-Petitioner,

and

WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD and WHATCOM COUNTY,
Respondents.

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONER GOLD STAR RESORTS, INC.**

Brian T. Hodges
WSBA No. 31976
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Attorney for Amicus Curiae
Pacific Legal Foundation

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Pacific Legal Foundation respectfully submits this amicus brief in support of Petitioner Gold Star Resorts, Inc. In enacting the Growth Management Act (GMA), the Legislature gave cities and counties broad discretion to develop appropriate land use regulations based on their consideration and balancing of the goals and requirements of the Act with local circumstances. Here, the Growth Board deprived Whatcom County of this discretion by applying a bright-line density rule to invalidate any rural designation that permitted development of more than one dwelling per five acres. The Board's application of a bright-line rule was clearly erroneous and should be reversed.

In its cross-petition, Futurewise challenges the Court of Appeals' conclusion that the GMA requires local government to consider vested development rights as existing development when updating the rural element of its comprehensive plan. Futurewise proposes an interpretation of the GMA that would prohibit any consideration of vested rights when designating areas of more intense rural development. But under the plain language of the GMA and Supreme Court precedent, local government is obligated to consider vested development rights when updating its land use regulations. Futurewise's argument fails.

ISSUES ADDRESSED BY AMICUS

1. May a growth management hearings board impose a bright-line rule establishing a maximum permissible rural density? (Petitioner Gold Star Resorts' Issue 2.)

No. Growth Boards lack the authority to adopt and apply bright-line rules establishing the maximum allowable density. *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 358 (2008), and *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129 (2005).

2. Under RCW 36.70A.070(5)(d)(iv), must a local government's delineation of a Local Area of More Intensive Rural Development be limited to only those areas of development existing as of July 1990, excluding any consideration of vested development rights in the area? (Cross-Petitioner Futurewise's Issue 2.)

No. The GMA provides that local governments have discretion to consider local circumstances when developing a comprehensive plan. Moreover, the GMA requires that local government consider property rights, which includes vested development rights, during the planning process.

SUMMARY OF FACTS

The GMA requires that local governments periodically update their comprehensive plans to ensure that local regulations comply with amendments to the Act. In 1997, Whatcom County adopted a comprehensive plan that included several areas that were more intensely developed than those typically found in rural areas in its rural element. These areas of more intense development included resort and recreation areas, suburban enclaves, and transportation corridors.¹ Two months after Whatcom County adopted its plan, the Legislature amended the GMA, adding a new rural designation for "Limited Areas of More Intensive Rural Development" (LAMIRD) and adopting criteria for delineating such areas. RCW 36.70A.070(5)(d) (2007).

¹ The Court of Appeals' decision calls these 1997 designations "LAMIRDs." This language is imprecise because the GMA did not contain a "LAMIRD" designation prior to the 1997 amendments. *See* RCW 36.70A.070 (1996).

In *Wells v. Whatcom County*, property owners challenged the County's inclusion of various areas of more intense rural development. Applying the GMA's 1997 amendments, the Growth Board held that two of the County's areas of more intense rural development satisfied the criteria of RCW 36.70A.070(5)(d), but the remaining areas failed to comply with the LAMIRD criteria. See *Wells v. Whatcom County*, WWGMHB No. 97-2-0030c at Sec. V (Jan. 16, 1998, Final Decision and Order). The Superior Court reversed, holding that the Growth Board erred in its interpretation of RCW 36.70A.070(5)(d)(i)-(v).² Division I of the Court of Appeals affirmed the Superior Court's order and remanded the case for further proceedings in *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657 (2000). The petitioners abandoned their challenge on remand.³

In 2005, Whatcom County updated its comprehensive plan, and re-adopted its earlier designation of more intense rural development. Futurewise challenged the County's comprehensive plan update, arguing that Whatcom County was required to go through the LAMIRD designation process again. Futurewise asserted that if the County was required to undergo the LAMIRD designation process again, it could result in smaller

² *Whatcom County v. W. Wash. Growth Mgmt. Hearings Bd.*, Whatcom County Superior Court No. 98-2-00546-3 at 12 (Sept. 28, 1998, Order Remanding Case).

³ *Wells v. Whatcom County*, WWGMHB No. 00-2-0002 (Jan. 31, 2001, Order of Dismissal).

areas of more intense rural development. Gold Star Resorts, the owner of a vested development within one of the County's designated LAMIRDs, intervened in defense of the County's plan.

The Western Washington Growth Management Hearings Board found that portions of the County's rural element did not comply with the GMA, including the LAMIRD designations and various rural designations that allowed densities greater than one dwelling per five acres. The Growth Board's decision was upheld by Division I of the Court of Appeals. Gold Star filed a petition for review, and Futurewise filed a cross-petition for review.

ARGUMENT

I

THE GROWTH BOARD CANNOT ADOPT BRIGHT-LINE RULES

Twice in the past few years, this Court held that the Growth Boards lack authority to adopt and apply bright-line rules establishing maximum allowable densities. *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d at 358; *Viking Properties, Inc. v. Holm*, 155 Wn.2d at 129. In *Thurston County*, this Court was clear that it did not intend to simply invalidate the phrase "bright-line rule;" it intended to invalidate a Growth Board practice of adopting standards and imposing burdens not found in the GMA: "We hold a GMHB may not use a bright-line rule to delineate between urban and rural densities, nor may it subject certain densities to

increased scrutiny.” *Thurston County*, 164 Wn.2d at 359. Due to the pervasiveness of the Growth Boards’ application of bright-line rules, this issue is once again before the Court.

Here, in adopting a variety of densities for its rural element, Whatcom County made a policy choice to include six rural designations that allowed densities greater than one dwelling unit per five acres. *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, 396 (2007). Futurewise challenged these designations, arguing for an application of a bright-line maximum rural density rule:

All three Growth Management Hearings Boards have adopted an established rule of growth management that “. . . densities greater than one dwelling unit per five (5) acres are not rural densities” and are therefore prohibited in Rural Areas.

CP 691 (Futurewise’s Pre-Hearing Brief at 19); *see also* CP 1535-36 (Futurewise’s Reply Brief at 6-7). The Growth Board agreed with Futurewise and “applied a definition of rural density adopted in other Growth Management Hearings Board cases, to wit, one dwelling unit per five acres.” *Gold Star Resorts*, 140 Wn. App. at 396; *see also Futurewise v. Whatcom County*, WWGMHB No. 05-2-0013, at 34, finding of fact 26 (Sept. 20, 2005, Final Decision and Order) (“Densities that are not urban but are greater than one dwelling unit per five acres generally promote sprawl.”).⁴ “Applying this

⁴ In its Final Decision and Order, the Growth Board relied on prior decisions in which the Boards established the invalid bright-line rules. *Compare Thurston County*, 164 Wn.2d at 358 n.21, with *Futurewise*, WWGMHB (continued...)

rule, the Board concluded that six Whatcom County zones do not comply with the GMA.” *Gold Star Resorts*, 140 Wn. App. at 396. The Court of Appeals, however, declined to find error because Whatcom County’s prosecuting attorney conceded at oral argument that prior Growth Board cases had established a maximum rural density standard of one dwelling per five acres. *Id.* at 397-98. The Court of Appeals’ conclusion is erroneous and conflicts with *Thurston County*.

Courts are “not bound by a counsel’s erroneous concession concerning a question of law.” *Thurston County*, 164 Wn.2d at 358 n.19. “Whether a particular density is rural in nature is a question of fact based on the specific circumstances of each case.” *Id.* at 359. And this determination is subject to the presumption of validity and broad deference that was afforded to local government decisions by the GMA. RCW 36.70A.320; RCW 36.70A.3201. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233-34, 238 (2005). The Board’s application of its invalid bright-line rules to Whatcom County’s rural designations deprived the County of the proper standard of review and warrants a conclusion that the Board clearly erred.

⁴ (...continued)

No. 05-2-0013, at 21-22 (citing *Yanisch v. Lewis County*, WWGMHB No. 02-2-0007c (Dec. 11, 2002, Final Decision and Order); *Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008c (Oct. 23, 1995, Final Decision and Order)).

II

THE GMA REQUIRES LOCAL GOVERNMENT TO CONSIDER VESTED DEVELOPMENT RIGHTS DURING THE PLANNING PROCESS

Under the plain language of the GMA and Supreme Court precedent, local government not only has the *discretion* to consider vested development rights when updating its land use regulations, it is *obligated* to do so. *Quadrant*, 154 Wn.2d at 240; *Gold Star Resorts*, 140 Wn. App. at 394 n.41 (“Existing’ includes vested projects.”). Nonetheless, Futurewise proposes an interpretation of the GMA that would prohibit local government from considering vested rights when delineating its LAMIRD boundaries. Futurewise Cross-Petition at 11-12. This argument is incorrect and indistinguishable from the losing argument in *Quadrant*.

In *Quadrant*, a citizen action group challenged King County’s decision to consider vested development rights when it designated areas of urban development within the county’s rural area. Like Futurewise, the *Quadrant* citizen group argued that a GMA provision limiting the designation of urban areas to those areas “already . . . characterized by urban growth” required the County to only consider the built environment and not vested projects. *Quadrant*, 154 Wn.2d at 230-31; 235. The *Quadrant* Court held that the proposed interpretation was “not sustainable” in light of the GMA because:

1. The interpretation failed “to abide by the legislature’s mandated deference to county planning actions consistent with the GMA;”
2. The interpretation failed to adequately address the definition of pivotal terms used in the statute; and
3. The argument failed “to take into account the legal consequences of vesting.”

Id. at 235. Futurewise’s argument fails for the same reasons.

**A. Local Government Has the Discretion
To Consider the Impacts of Its Land Use
Regulations on Vested Development Rights**

Futurewise’s proposed interpretation of the LAMIRD provisions fails to acknowledge that the GMA specifically provides broad deference to locally appropriate planning decisions:

In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. . . . The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county’s or city’s future rests with that community.

RCW 36.70A.3201; *Quadrant*, 154 Wn.2d at 236-37 (Local government retains “broad discretion in adapting the requirements of the GMA to local realities.”). The GMA emphasizes local governments’ discretion to balance the planning goals and local circumstances—it is this “balancing that the County is entitled to engage in with its local circumstances in mind; and a balancing to which the Board must give the County considerable deference.”

Clallam County v. W. Wash. Growth Mgmt. Hearings Bd., 130 Wn. App. 127, 139 (2005). The failure to adhere to the GMA's deferential standard of review is error. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 116 Wn. App. 48, 55 (2003).

Under the GMA, a local government that is confronted with an undeveloped vested project like Gold Star's has two main policy choices: either include the vested development in a LAMIRD, or exclude the project thereby deeming it nonconforming. The decision to make a vested project conforming or nonconforming has significant, real-world impacts. Designating a vested project as a conforming use within a LAMIRD authorizes the property owner to use, develop, and re-develop the property. RCW 36.70A.070(5)(d). By contrast, excluding a vested development from the designation would result in nonconforming status, which makes financing and development difficult, if not impossible, due to the restrictions on non-compliant uses. *City of Anacortes v. Skagit County*, WWGMHB No. 00-2-0049c (Jan. 31, 2002, Compliance Order) (County argued that it had the discretion to consider adverse impacts of nonconforming status.). Indeed, the recognized goal of nonconforming status is to phase the development or use out of existence over time. *See Anderson v. Island County*, 81 Wn.2d 312, 323 (1972). These different impacts represent the very type of policy decisions that are subject to local government's "broad discretion in adapting the requirements of the GMA to local realities." *Quadrant*, 154 Wn.2d at 236-37; RCW 36.70A.3201.

**B. The Plain Language of the LAMIRD
Delineation Provisions Permits Local Government
To Include Vacant Land for New Development**

Futurewise's proposed interpretation of the LAMIRD provisions improperly focuses on select phrases taken out of context. *See* Futurewise Supp. Br. at 19 (Arguing that two phrases, "minimize and contain those areas" and "existing areas or uses," should be construed to prohibit consideration of vested rights.). When interpreting a statute, this Court reviews the provision in the context of the whole regulatory scheme, rather than looking at one phrase in isolation. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560 (2000) ("We are required to read legislation as a whole, and to determine intent from more than a single sentence. Effect should be given to all of the language used, and the provisions must be considered in relation to each other, and harmonized to ensure proper construction.") (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 91 Wn. App. 1, 16 (1998)).

Here, the plain language of the GMA allows for development of vacant land within a LAMIRD designation:

A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, *as appropriate*, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated *predominately* by the built environment, *but that may also include undeveloped lands if limited as provided in this subsection.*

RCW 36.70A.070(5)(d)(iv) (emphasis added). The Legislature’s inclusion of the language “may also include undeveloped lands,” “as appropriate,” and “predominately” refutes Futurewise’s proposed interpretation.

Indeed, the plain language of the LAMIRD provisions makes it clear that while the Legislature intended that areas of more intense rural development be minimized and contained, it did not intend to impose an outright prohibition on the inclusion of land that has not been developed yet within a LAMIRD designation. *See, e.g.*, RCW 36.70A.070(5)(d)(i) (Local government may allow infill development, redevelopment, and “*changes in use from vacant or previously existing use*” in a LAMIRD.) (emphasis added); RCW 36.70A.070(5)(d)(ii) (Local government may allow for “[t]he intensification of development on lots containing, *or new development of*, small-scale recreational or tourist uses” in a LAMIRD.) (emphasis added). Read in context, therefore, the relevant provisions of the GMA reaffirm local government’s discretion to set the LAMIRD boundary based on the balancing of the goals and requirements of the Act and local circumstances.

C. Local Government Is Obligated To Consider Vested Rights

Finally, Futurewise’s proposed interpretation fails because it does not take into account the legal consequences of vesting. The GMA mandates that local government consider vested rights—*which are constitutionally protected property rights*—during the planning process. RCW 36.70A.070(5)(a) (requiring that local government consider the GMA goals,

including protection of private property rights, when developing the rural element of its comprehensive plan); *see also Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 636 (1987); *Quadrant*, 154 Wn.2d at 240 (Changes to a comprehensive plan cannot affect vested rights.). As this Court noted in *Quadrant*, a local government's failure to consider vested rights during the planning process would result in the adoption of comprehensive plans that ignore the likelihood of future development. *Quadrant*, 154 Wn.2d at 241. And this result would be contrary to the Legislature's intent in establishing the GMA. *Id.* at 241; *see also Op. Att'y Gen. 23* (1992) (“[G]overnment entities are required to consider the impact of their actions upon private property rights. The failure to do so constitutes noncompliance with the requirements of the GMA”).

Futurewise's concern that consideration of vested rights may conflict with the goal of minimizing and containing more intensive rural development does not mean that vested rights must yield. Any conflict here is merely indicative of the GMA's inconsistent and sometimes competing obligations. *See Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424-25 (2007); Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 *Seattle U. L. Rev.* 5, 34 (1999).

The Legislature gave local government the authority to consider and balance the Act's various inconsistent goals and requirements. RCW 36.70A.3201. This discretionary balancing is presumably the method by which Whatcom County decided to include undeveloped land in its

designation of areas of more intense rural development in its 1997 and 2005 comprehensive plan updates. These designations, which were previously upheld on appeal, should not be summarily cast aside as Futurewise suggests. At a minimum, the County must be allowed to review the reasons it designated the undeveloped property as an area of more intense rural development in the first place, and decide whether those grounds justify continued inclusion of these areas as LAMIRDs. The Court of Appeals' conclusion that vested development rights are to be considered as existing development is consistent with the Legislature's mandate that local government must consider property rights when developing a comprehensive plan update and should be affirmed.

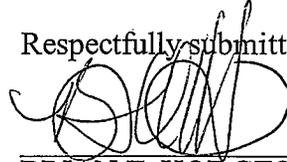
CONCLUSION

To preserve the GMA's grant of broad discretion to local government to plan based on local circumstances and realities, Amicus Pacific Legal

Foundation respectfully requests that this Court rule in favor of Gold Star's petition, and reverse in part and affirm in part the Court of Appeals' decision.

DATED: July 23 2009

Respectfully submitted,



BRIAN T. HODGES

WSBA No. 31976

Pacific Legal Foundation

10940 NE 33rd Place, Suite 210

Bellevue, Washington 98004

Telephone: (425) 576-0484

Facsimile: (425) 576-9565

Attorney for Amicus Curiae
Pacific Legal Foundation