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Supreme Court No. 80810-4

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IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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GOLD STAR RESORTS, INC.,

Appellant,

v.

FUTUREWISE

Cross-Appellant / Respondent, and

WESTERN WASHINGTON GROWTH MANAGEMENT  
HEARINGS BOARD and WHATCOM COUNTY,

Respondents.

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REPLY TO AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION

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## I. INTRODUCTION

The first argument from Pacific Legal Foundation (“PLF”) is irrelevant because Futurewise has never argued that the Growth Management Hearings Boards (“GMHB”) can create or enforce “bright-line rules.” Rather, Futurewise has argued consistently – and correctly – that they presented substantial evidence before the Western Washington Growth Management Hearings Board (“Board”), and that the Board relied upon this substantial evidence in reaching its decision without creating or relying on a “bright-line rule.” This issue has been addressed thoroughly and completely in Futurewise’s previously-submitted briefing.

The second argument from PLF regarding vested rights and the designation of Limited Areas of More Intensive Rural Development (“LAMIRD”) is erroneous because it provides a selective and self-serving interpretation of the Growth Management Act, Chapter 36.70 RCW (“GMA”). As established by the clear and unambiguous language of the GMA, the inclusion of vested development projects under the definitions of “existing” development or “built environment” would dramatically expand the scope of LAMIRDs in direct contravention to the fundamental goals and objectives of the GMA. *See* RCW 36.70A.010; .011; 020(1); .020(2).

## II. ISSUES PRESENTED

- (1) Did the Board establish or apply a bright-line rule establishing permissible rural densities under the 2005 Whatcom County Comprehensive Plan ("WCCP")? *The Answer is "No."*
- (2) Pursuant to RCW 36.70A.070(5)(d)(iv), can a LAMIRD be minimized and contained by the development existing as of July 1, 1990 if vested development projects are included as part of the LAMIRD designation process? *The Answer is "No."*

## III. ARGUMENT

### A. The Board Did Not Apply a "Bright-Line Rule"

By presenting previously-submitted arguments regarding the issue of "bright-line rules" issued by GMHBs, PLF completely ignores the fact that the Board based its decision on the substantial evidence presented by Futurewise. This substantial evidence includes, but is not limited to, the failure of Whatcom County and Gold Star to provide or point to any conflicting evidence in the record, and the concession by Whatcom County that it had not previously designated LAMIRDs under the GMA.<sup>1</sup>

PLF further ignores the fact that the Board remanded the matter back to Whatcom County for further consideration, with the understanding that the established principle of *Viking Properties* would need to be applied at that time. PLF provides no new authority on this issue, and the arguments provided previously by Futurewise to the Court of Appeals and

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<sup>1</sup> See CP 684-686, CP 740-834, CP 877, CP 894-895, CP 1080-1102, CP 1410-1419, CP 1556-1562, CP 1576-1577, CP 1626-1628, CP 1675.

to this Court in its Supplemental Brief do not require additional argument or analysis.

**B. A LAMIRD Must Be Limited by the Development "Existing" as of July 1, 1990, Which Cannot Include Vested Development Projects**

A LAMIRD is an optional designation under the GMA. *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn. App. 615, 625 – 626, 53 P.3d 1011 (2002). A planning jurisdiction is not required to designate LAMIRDs, but if it does so, then the jurisdiction must comply with the requirements of the GMA as set forth in RCW 36.70A.050(5)(d).

The GMA is clear with respect to the designation of boundaries for a LAMIRD if and when a jurisdiction chooses to designate one:

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. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways,

and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl;

RCW 36.70A.070(5)(d)(iv) (emphasis added). This clear and unambiguous statutory language establishes that vested projects are not part of the "built environment" as of July 1, 1990, and therefore should not be included within the designation of "existing" development for purposes of determining LAMIRD boundaries.

Allowing vested areas to be included within a designated LAMIRD effectively commits undeveloped rural land to high density rural growth, which directly contradicts the statutory mandate to "minimize and contain" such existing areas. RCW 36.70A.070(5)(d)(iv). And while the GMA provides some discretion in how "tight" the logical outer boundary of a LAMIRD should be drawn around the built environment, the GMA does not provide discretion as to the specific statutory requirements that a local jurisdiction must follow in order to minimize and contain LAMIRDs within the built environment existing as of July 1, 1990. PLF's proffered interpretation of RCW 36.70A.070(5)(d)(iv) would lead to the strained and absurd result of having undeveloped and unimproved land being included in a LAMIRD designation as part of the "existing" and "built environment," in contravention to basic principles of statutory

interpretation<sup>2</sup> as well as the fundamental goals and objectives of the GMA.

The policies adopted by Whatcom County in this case aptly demonstrate the danger of allowing local jurisdictions to engage in such uncontrolled and unlimited “discretionary” expansion of LAMIRD boundaries. Specifically, there is nothing contained in the policies adopted by Whatcom County in the 2005 WCCP requiring LAMIRDs in certain areas to be minimized and contained, or requiring LAMIRD boundaries to be drawn based on the built environment as of July 1, 1990. Including vested projects, as PLF suggests, within Whatcom County’s designated areas would only serve to worsen existing LAMIRD designations that are both factually and legally erroneous. That is especially true in this case because Whatcom County conceded before the Board that the County “did not consider [the GMA] criteria in defining its designations for developed rural areas and did not attempt to analyze the logical outer boundaries of LAMIRD areas under RCW 36.70A.070(5)(d).”<sup>3</sup> In short, Whatcom County has admitted that they never designated any LAMIRDs using the statutory criteria set forth under RCW 36.70A.070(5)(d).<sup>4</sup>

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<sup>2</sup> See *Tingey v. Haisch*, 159 Wn.2d 652, 663-664, 152 P.3d 1020 (2007).

<sup>3</sup> *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 1626 – 1628.

<sup>4</sup> *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93.

PLF ignores several considerations in making its arguments. First, PLF ignores the fact that the Board has already held that purely vested development should not be included as part of the "built environment" under RCW 36.70A.070(5)(d). Specifically, the Board has held that while vested projects can be constructed, the property associated with those vested rights cannot be designated as part of a LAMIRD if it does not meet the criterion of being part of the "built environment" as of July 1, 1990. *See Anacortes v. Skagit County*, 00-2-0049c (Compliance Order, 1-31-02). The Board considered the fact that vested rights are constitutionally-protected property rights, and then concluded correctly that "[v]esting is not a criterion in the LAMIRD analysis," and therefore that vested rights do not constitute part of the "built environment" under RCW 36.70A.070(5)(d). *Id.*; *see also Anacortes v. Skagit County*, 00-2-0049c (FD&O, February 6, 2001) (LAMIRD designations relying on vested rights fail to comply with RCW 36.70A.070(5)(d)(i)). This determination by the Board must be accorded substantial weight by this Court. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

The conclusion of the Board is consistent with the definitions of "built" and "environment." The terms "built" and "environment" are not

defined by the Growth Management Act. RCW 36.70A.030. As such, the Court must “apply [their] common meaning[s], which may be determined by referring to a dictionary.” *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). In the *Quadrant* decision, the Supreme Court used *Webster's Third New International Dictionary*, which should be utilized in this case as well. *Id.*

According to *Webster's* “built” is the past participle of the first definition of “build.” *Webster's Third New International Dictionary* 291-292 (2002). The first meaning of build is “a: to construct for a dwelling...” *Id.* The first definition of “built” is “formed, shaped, constructed, made ....” *Id.* The second first definition is “b: to form by ordering and uniting materials by gradual means into a composite whole ....” *Id.* By using the term “built,” the Washington Legislature established that the logical outer boundary must be based on existing and constructed buildings, structures, and facilities, and not those projects that are merely planned or vested. If the Legislature had intended to include vested projects within a LAMIRD designation, then it would have used terms such as “planned,” “projected,” or “under construction.” By using the explicit term “built,” the Legislature established that vested or

unfinished projects do not fall within the definition of "built environment" existing as of July 1, 1990.

Coupling "built" with "environment" further confirms that the Legislature meant to limit "built" to existing and constructed buildings and structures. The first definition of "environment" is "something that environs," that is encircles, and "surroundings." *Id.* at 760. It is axiomatic that planned structures cannot surround any area because they do not yet exist. So to qualify as the "built environment," structures must be built and not merely vested.

Additionally, PLF ignores the fact that its own arguments are irrelevant for Gold Star. The record does not demonstrate that Gold Star has ever submitted an application to develop its property, and the record also does not demonstrate that Gold Star maintains any "vested project" rights for its own property. *Contra* PLF Amicus Brief at 9. As such, Gold Star faces no danger of having any project relegated to "non-conforming status." *Id.*

But even if Gold Star maintained vested development rights for its property, the inclusion of any such vested rights under the definition of "existing" development and "built environment" would result in a dramatic expansion of any LAMIRD boundary, which would directly

contradict the GMA mandate to “minimize and contain those areas.” RCW 36.70A.070(5)(d)(iv). And since Whatcom County has not made any decision “to consider vested applications” in determining LAMIRD boundaries, there is no deference owed to the local jurisdiction on this issue. RCW 36.70A.3201.

#### IV. CONCLUSION

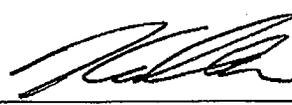
For the reasons stated herein, the amicus arguments of PLF should be rejected. As requested previously, the Court of Appeals’ statement in Footnote 41 of the underlying *Gold Star Resorts Inc.* decision (*i.e.* that vested projects qualify as part of “existing” development when designating LAMIRDS under the GMA) is erroneous as a matter of law and must be reversed. All remaining elements of the Court of Appeals’ decision should be affirmed.

RESPECTFULLY SUBMITTED on this 8<sup>th</sup> day of September, 2009.

RIDDELL WILLIAMS P.S.

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BY RONALD R. CARPENTER

Darla Holterman states as follows:

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1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-referenced action, and competent to be a witness to the matters set forth in this Proof of Service.

2. On September 8, 2009, I caused to be served a copy of Futurewise's REPLY TO AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION with this attached Proof of Service on counsel as follows:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 8<sup>th</sup> day of September, 2009, at Seattle, Washington.

  
Darla K. Holterman

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