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Supreme Court No. 80810-4 BY RONALD R. CARPENTER

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

GOLD STAR RESORTS, INC.,

Appellant,

v.

FUTUREWISE

Cross-Appellant / Respondent, and

WESTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD and WHATCOM COUNTY,

Respondents.

SUPPLEMENTAL BRIEF OF FUTUREWISE

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I. INTRODUCTION

Futurewise believes that the first legal issue presented in the Petition for Review from Gold Star Resorts, Inc. (“Gold Star”) and the first legal issue presented in the Answer from Futurewise have been resolved by this Court in *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 190 P.3d 38 (2008) (“*Thurston County*”). Specifically, this Court has addressed definitively the scope of challenges to amendments to Comprehensive Plans under RCW 36.70A.130, as well as the potential application of the doctrines of res judicata and collateral estoppel in such challenges. The Court has also made clear that there is no authority for a Growth Management Hearings Board (“GMHB”) to utilize “bright-line rules” in evaluating rural and urban densities, as decided originally in *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005) (“*Viking Properties*”).

However, two issues remain for this Court’s consideration. The first issue involves the proper legal analysis of Limited Areas of More Intense Rural Development (“LAMIRDs”) under a Comprehensive Plan, and the validity of the specific LAMIRDs adopted by Whatcom County in their 2005 Comprehensive Plan (“2005 WCCP”). The second issue involves whether “vested” projects can be considered as part of the

“existing” development that comprises the foundation for the designation of LAMIRDs under the Growth Management Act, Chapter 36.70A RCW (“GMA”). It is those issues that shall be addressed in greater detail *infra*.

II. ISSUES PRESENTED FOR REVIEW

The Petition for Review from Gold Star presented two issues:

- (1) Do the doctrines of res judicata and collateral estoppel apply in land use cases?

The answer to this broad question is “Yes.” However, the specific question in this case is whether the doctrines of res judicata and collateral estoppel apply to Futurewise’s legal challenge to Whatcom County’s LAMIRD designations in the 2005 WCCP. The answer to that specific question, as established by the *Thurston County* case, is “No.”

- (2) May a growth management hearings board impose a bright-line rule establishing permissible rural densities?

The answer to this question, as established by the *Thurston County* case, is “No.” However, in this specific case, the Board did not apply or use a “bright-line rule” in the review of the 2005 WCCP. Rather, the Board based its decision on the substantial evidence presented by Futurewise, on the failure of Whatcom County and Gold Star to provide or point to any conflicting evidence in the record, and on the concession by Whatcom County that it had not previously designated LAMIRDs under the GMA.

The Answer from Futurewise raises two separate issues:

- (1) Pursuant to the seven-year review requirements of RCW 36.70A.130, does a county or jurisdiction only need to review and amend its comprehensive plan in order to comply with GMA amendments that are enacted after adoption of the previous comprehensive plan?

The answer to this specific question, as established by the *Thurston County* case, is “Yes.”

- (2) Pursuant to RCW 36.70A.070(5)(d)(iv), must each Local Area of More Intense Rural Development (LAMIRD) be limited by the development existing as of July 1990, including “existing” vested development projects?

The answer to this specific question is “No.” Including vested development projects under the definition of “existing” development would dramatically expand the scope of LAMIRDs, in direct contravention to the fundamental goals and objectives of the GMA.

III. STATEMENT OF THE CASE

A. The Growth Management Act, Chapter 36.70A RCW

Land use planning under the GMA is a dynamic, not a static, process.¹ A city or county operating under the GMA must adopt, implement, and maintain a Comprehensive Plan. The GMA requires cities and counties to review and evaluate their Comprehensive Plans and

¹ *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, 382, 388, 166 P.3d 748 (2008) (citing *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 186-87, 149 P.3d 616, 627-28 (2006)).

development regulations on an ongoing basis, and to undertake a comprehensive review every seven years and (if needed) revise and update the Comprehensive Plans and development regulations to ensure continuing compliance with the GMA. RCW 36.70A.130(1)(a):

B. Limited Areas of More Intense Rural Development

Limited Areas of More Intense Rural Development (“LAMIRDs”) are located in rural areas where more intensive development (whether residential, commercial or mixed use) existed prior to the enactment of the GMA.² RCW 36.70A.070(5)(d). These specific areas contain development and densities that would otherwise be defined as urban in nature and not allowed in the rural areas.³ RCW 36.70A.020(18).

The GMA “grandfathers” LAMIRDs into Comprehensive Plans and allows counties to maintain these areas, but the GMA precludes any expansion of LAMIRDs in size or use in order to prevent pockets of urban sprawl in rural areas. RCW 36.70A.070(5)(d). These limited areas of pre-existing urban development in rural areas are allowed to continue and infill, but must be contained. As such, a LAMIRD must have a Logical

² LAMIRDs are often located, for example, at country crossroads where residential and commercial development is clustered around a service station, grocery store, feed store, or bank.

³ LAMIRDs are optional. RCW 36.70A.070(5)(d); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn. App. 615, 625-26, 53 P.3d 1011 (2002).

Outer Boundary (“LOB”) defined by the built environment “existing” as of July 1, 1990 in order to “minimize and contain” existing and more intensively developed areas and uses. RCW 36.70A.070(5)(d)(iv).

C. The 2005 Update and Amendment of the Whatcom County Comprehensive Plan

In 1997, Whatcom County adopted a comprehensive land use plan and associated regulations (“1997 WCCP”).⁴ Two months after the adoption of the 1997 WCCP, the Washington legislature for the first time authorized LAMIRDs and enacted new criteria for their designation and management.⁵ See RCW 36.70A.070(5)(d); 1997 Wash. Laws ch. 429, §§ 7, 53 (effective July 27, 1997).

In 2004-05, Whatcom County completed the required update of its comprehensive plan through the adoption of the 2005 WCCP.⁶ RCW 36.70A.130(1)(a); .130(4)(a). Whatcom County did not designate its LAMIRD areas under RCW 36.70A.070(5)(d) as part of the update.⁷

IV. ARGUMENT

A. Standard of Review

A comprehensive plan is presumed valid, and a GMHB shall find compliance “unless it determines that the action by the state agency,

⁴ *Gold Star Resorts, Inc.*, 140 Wn. App. at 382.

⁵ *Gold Star Resorts, Inc.*, 140 Wn. App. at 382.

⁶ *Gold Star Resorts, Inc.*, 140 Wn. App. at 382-83.

⁷ *Gold Star Resorts, Inc.*, 140 Wn. App. at 382-83; CP 115.

county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]”⁸ To find an action “clearly erroneous,” a GMHB must have a “firm and definite conviction that a mistake has been committed.”⁹

The Washington Supreme Court stands in the same position as the superior court when reviewing a decision from a GMHB under the Washington Administrative Procedure Act (“APA”), Chapter 34.05 RCW.¹⁰ Gold Star, as the party appealing the Board’s decision, has the burden of demonstrating the invalidity of the Board’s determination pursuant to the nine standards set forth under the APA.¹¹ In this case, Gold Star has alleged that the Board’s order is outside its authority, that the Board erroneously interpreted the law, and that the Board’s order is not supported by substantial evidence.¹²

Issues of law are reviewed de novo.¹³ Substantial weight is accorded to the Board in its interpretation of the GMA, though the court is not bound by the Board’s interpretations.¹⁴

⁸ RCW 36.70A.320(3); *Thurston County*, 164 Wn.2d at 340.

⁹ *Thurston County*, 164 Wn.2d at 340-41 (citations omitted).

¹⁰ *Thurston County*, 164 Wn.2d at 341 (citations omitted).

¹¹ RCW 34.05.570(1)(a); .570(3).

¹² *Gold Star Resorts Inc.*, 140 Wn. App. at 385-386; RCW 34.05.570(3)(b); .570(3)(d); .570(3)(e).

¹³ *Thurston County*, 164 Wn.2d at 341 (citations omitted).

¹⁴ *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136

For mixed questions of law and fact, the Court determines the law independently, and then applies the law to the facts as found by the agency.¹⁵ An order from a GMHB must be supported by substantial evidence, meaning there is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.”¹⁶

B. The Scope of the 7-Year Reviews for Comprehensive Plans under the GMA has been Resolved by the Washington Supreme Court. (Gold Star’s Issue 1)

In *Thurston County*, this Court held that “a party may challenge a county’s failure to revise a comprehensive plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous comprehensive plan was adopted or updated, following a seven year update.” *Thurston County*, 164 Wn.2d at 360-361. The Court issued the *Thurston County* decision during the time that Gold Star’s Petition for Review and Futurewise’s Answer were pending before this Court.

Wn.2d 38, 46, 959 P.2d 1091 (1998).

¹⁵ *Thurston County*, 164 Wn.2d at 341 (citations omitted).

¹⁶ *City of Redmond*, 136 Wn.2d at 46.

There is no dispute that the Washington Legislature first authorized and enacted new criteria for the designation and management of LAMIRDs after the adoption of the 1997 WCCP.¹⁷ See RCW 36.70A.070(5)(d). There is also no dispute that Whatcom County did not use RCW 36.70A.070(5)(d) to designate the LAMIRD areas in either the 1997 WCCP or the 2005 WCCP.¹⁸ Therefore, in light of the *Thurston County* decision, there can be no dispute that Futurewise had authority under the GMA to challenge Whatcom County's failure to designate LAMIRDs in the 2005 WCCP in compliance with RCW 36.70A.070(5)(d).¹⁹ *Thurston County*, 164 Wn.2d at 344-45.

The decision of this Court in *Thurston County* effectively resolves Gold Star's first issue presented for review. Gold Star's proposed application of the doctrines of res judicata and collateral estoppel cannot stand in light of the *Thurston County* decision.

¹⁷ *Gold Star Resorts, Inc.*, 140 Wn. App. at 382, 392; CP 1626-28, 1675.

¹⁸ *Gold Star Resorts, Inc.*, 140 Wn. App. at 382, 392; CP 1628, 1675.

¹⁹ The Court of Appeals applied this exact analysis in rejecting Gold Star's res judicata and collateral estoppel arguments, pointing out that the law (*i.e.* the GMA) had changed, the subject matter was related but not identical, and the issues were not the same. *Gold Star Resorts, Inc.*, 140 Wn. App. at 386-87.

C. The Board's Conclusions on LAMIRDs Were Supported by Substantial Evidence

1. The Board and the Court of Appeals Correctly Rejected Whatcom County's Attempt to Incorporate LAMIRD designations from the 1997 WCCP into the 2005 WCCP Without Complying With RCW 36.70A.070(5)(d).

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)” in its 1997 WCCP.²⁰ Whatcom County’s only “action” with regard to the LAMIRDs in the 2005 WCCP was to claim that its LAMIRD areas had not changed since the adoption of the 1997 WCCP. But LAMIRDs were not authorized at all under the GMA until two months after the adoption of the 1997 WCCP.²¹

At no point did Whatcom County acknowledge or even attempt to comply with the new legislative criteria for the designation of LAMIRDs in the 2005 WCCP.²² As such, the LAMIRD provisions of the 2005 WCCP were subject to appeal and review by the Board.²³ The challenge having been properly filed, the Board correctly determined that Whatcom

²⁰ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 1626-1628.

²¹ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93.

²² *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 1626-28, 1675.

²³ *Thurston County*, 164 Wn. 2d at 360-61; RCW 36.70A.130(1)(d); .280(1).

County had failed to amend the LAMIRDs in the 2005 WCCP in a manner that was consistent with the current criteria of the GMA.²⁴

2. The Board Correctly Determined that the LAMIRD Designation Descriptors in the 2005 WCCP Were Clearly Erroneous

Whatcom County included LAMIRD “Designation Descriptors” in the 2005 WCCP, which detailed categories of concentrated, high density development that would be permitted in rural areas.²⁵ Futurewise presented substantial evidence establishing deficiencies with five separate Designation Descriptors: (1) Small Towns–Rural; (2) Crossroads Commercial–Rural; (3) Suburban Enclave–Rural; (4) Resort / Recreational–Rural; and (5) Transportation Corridors–Rural.²⁶ The substantial evidence demonstrated that the Designation Descriptors failed to establish “logical outer boundaries” for LAMIRDs, failed to reference the built environment existing as of 1990, and failed to minimize and contain development.²⁷

Neither Whatcom County nor Gold Star presented any evidence or argument to establish that the Designation Descriptors complied with

²⁴ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93.

²⁵ *Gold Star Resorts, Inc.*, 140 Wn. App. at 394-95; CP 684-686, 1626.

²⁶ *Gold Star Resorts, Inc.*, 140 Wn. App. at 394-95; CP 684-686.

²⁷ *Gold Star Resorts, Inc.*, 140 Wn. App. at 394-95; CP 684-686, 740-834; 877, 894-895.

GMA requirements.²⁸ Whatcom County promised the Board that it would abide by the GMA, and then conceded that these five separate Designation Descriptors did not meet the LAMIRD criteria established in RCW 36.70A.070(5)(d).²⁹ Because substantial evidence, which was never rebutted or refuted, indicated that Whatcom County failed to comply with the GMA, the Board correctly determined that the Designation Descriptors were “clearly erroneous.”³⁰

3. **The Board Correctly Concluded that Whatcom County Could Not Designate LAMIRDs in the 2005 WCCP until the Adoption of Designation Descriptors that Complied with the GMA.**

Many of the LAMIRD Boundaries established by Whatcom County in the 2005 WCCP included vast amounts of open space and undeveloped property, and Whatcom County conceded this point for some of its developed rural areas.³¹ Futurewise submitted substantial evidence establishing that specific LAMIRD boundaries designated by Whatcom County in the 2005 WCCP (particularly those in Map Number 8) did not correspond to the built environment as of July 1, 1990, as required by

²⁸ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-95; CP 1080-1102, 1410-19, 1626.

²⁹ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 1626.

³⁰ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-95; CP 1556-62, 1576-77, 1626.

³¹ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 1556-62, 1576-77, 1626.

RCW 36.70A.070(5)(d)(v), and that Whatcom County had therefore failed to establish and maintain a properly defined LOB for its LAMIRDs.³²

Whatcom County and Gold Star never rebutted the substantial evidence submitted by Futurewise.³³ However, the Board concluded that it could not determine whether the LAMIRD boundaries complied with RCW 36.70A.070(5)(d) because the designations of LAMIRDs in the 2005 WCCP were based on invalid Designation Descriptors, and therefore the LAMIRD boundaries in the 2005 WCCP could not have been mapped in accordance with GMA requirements.³⁴ As such, the Board remanded the matter to Whatcom County to adopt GMA-compliant LAMIRD Designation Descriptors, and to then designate LAMIRDs.³⁵

³² *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 686-88, 766-79.

³³ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 1080-1102; 1410-1419. For example, Whatcom County or Gold Star could have presented evidence establishing that the LAMIRD boundaries were consistent with the presence of "underground utilities, structures not visible from the air, allowable in-fill or the like." *Panesko, et al. v. Lewis County, et al.*, WWGMHB Case No. 98-2-0011c (FD&O, March 5, 2001); CP 231, 1416. Yet neither Whatcom County nor Gold Star presented any evidence at all. *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 231, 1089-93, 1416.

³⁴ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 1562-64. Because the LAMIRD designations in the 2005 WCCP were not designated and drawn pursuant to the specific criteria set forth in RCW 36.70A.070(5)(d), the Board referred to them as "proto-LAMIRDs." See CP 1555 at fn. 3, 1562-64.

³⁵ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392-93; CP 1562-64.

D. The Court of Appeals Reached the Correct Conclusion as to the Designation of Rural Densities under the GMA. (Gold Star Issue #2)

1. Futurewise Submitted Substantial Evidence that Six Rural Zones in the 2005 WCCP Violated the GMA

Futurewise presented substantial evidence to the Board in support of its argument that Rural Densities in six rural zones established in the 2005 WCCP were violative of the goals and requirements of the GMA.³⁶

- the RR1 zone, which allows 1 dwelling unit per 1 acre in the rural area outside the LOBs of a LAMIRD;
- the RR2 zone, which allows 2 dwelling units per 1 acre in the rural area outside the LOBs of a LAMIRD;
- the RR3 zone, which allows 3 dwelling units per 1 acre in the rural areas outside the LOBs of a LAMIRD;
- the Eliza Island or EI zones, which allows 3 dwelling units per acre in the rural areas outside the LOBs of a LAMIRD;
- the R2A zone, which allows 1 dwelling unit per 2 acres in the rural designation); and
- the Rural Residential Island or RRI zone, which allows 1 dwelling unit per 3 acres in the rural designation outside areas mapped as aquifer recharge areas.

All six zones are considered “urban growth” under precedent from the Court of Appeals, and all six zones (except the RRI Zone) are considered “urban growth” under precedent from the Supreme Court.³⁷

³⁶ *Gold Star Resorts, Inc.*, 140 Wn. App. at 398; CP 689-693.

³⁷ *Diehl v. Mason County*, 94 Wn. App. 645, 655-657, 972 P.2d 543 (1999); *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn. 2d 224, 247, 110 P.3d 1132, 1137 (2005).

“A rural density is ‘not characterized by urban growth’ and is ‘consistent with rural character.’” *Thurston County*, 164 Wn.2d at 359. Rural character includes lands in which open space and natural vegetation predominate over the built environment, which foster traditional rural lifestyles, which provide traditional rural landscapes, which are compatible with the use of the land by wildlife and for fish and wildlife habitat, which reduce the inappropriate conversion of undeveloped land into sprawling, low density development, which generally do not require the extension of urban governmental services, and which protect natural surface and ground waters. RCW 36.70A.030(15); *Thurston County*, 164 Wn.2d at 360, fn. 23.

Futurewise presented substantial evidence to establish that allowing urban densities in these six challenged rural zones would impact rural character (including environmentally sensitive waterfronts and other fragile rural areas), increase the depletion of groundwater which adversely affects existing water rights holders and natural stream flows, and increase the likelihood of salt water intrusion into ground water sources of drinking water. Futurewise also presented substantial evidence to establish that allowing urban densities in the six challenged rural zones would increase impervious surfaces and require tree removal to an extent that water

quality and salmon habitat are imperiled.³⁸ Moreover, Futurewise presented substantial evidence to establish that continuous development at these increased Rural Densities would necessitate urban services that will be expensive to deliver to outlying rural areas. Simply put, Futurewise presented substantial evidence establishing that the challenged Rural Densities in the 2005 WCCP were destined to interfere with rural uses (such as hunting and fishing) and destroy rural character.³⁹

Whatcom County did not present any evidence to justify the six challenged Rural Densities. In fact, Whatcom County conceded, both in its Hearing Brief and at oral argument, that all of the challenged Rural Densities did not comply with the GMA.⁴⁰

Based on the substantial evidence presented by Futurewise and the concessions of Whatcom County, the Board correctly determined that the challenged provisions of the 2005 WCCP fostered and encouraged an increase in allowable density throughout Rural Areas in Whatcom County, and that the end result would be urban growth⁴¹ and a loss of rural

³⁸ Under the GMA, protection of the Rural Element means protection of "surface water and ground water resources." RCW 36.70A.070(5)(c)(iv).

³⁹ *Gold Star Resorts, Inc.*, 140 Wn. App. at 397-98; CP 689-93, 740-804.

⁴⁰ *Gold Star Resorts, Inc.*, 140 Wn. App. at 398; CP 1080-1102, 1698-99.

⁴¹ "Urban growth" encompasses growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces which is incompatible with the use of land for the production of food, the production of agricultural products, the extraction of mineral resources, or other rural uses and

character in violation of the goals and requirements of the GMA.⁴² The Board also correctly determined that the challenged provisions of the 2005 WCCP would increase development in Rural Areas without corresponding efforts to provide public facilities for this increased density.⁴³

2. The Board did Not Apply a “Bright-Line Rule”

Gold Star’s arguments regarding Rural Densities focus entirely on the *Viking Properties* case. This Court recently affirmed that the GMHBs lack the power to use “bright-line rules” regarding permissible densities. *Thurston County*, 164 Wn.2d at 359. This Court also held that a GMHB may not use a “bright-line rule” to delineate between urban and rural densities, and may not subject certain densities to increased scrutiny. *Id.*

But the Court’s rulings in *Viking Properties* and *Thurston County* do not change the fact that the substantial evidence presented by Futurewise established that the challenged Rural Densities in the 2005 WCCP violated the goals and requirements of the GMA.⁴⁴ The only evidence Gold Star presented in support of its argument that the Board had applied a “bright line” rule was the following statement in the Final Decision and Order:

developments. RCW 36.70A.030(17); *Quadrant Corp.*, 154 Wn.2d at 234.

⁴² *Gold Star Resorts, Inc.*, 140 Wn. App. at 398; RCW 36.70A.020(2); .030(17); .110(1); *Thurston County*, 164 Wn.2d 359-60; CP 1566-68.

⁴³ RCW 36.70A.020(12); .110(4); CP 1566-68.

⁴⁴ *Gold Star Resorts, Inc.*, 140 Wn. App. at 398.

While the GMA does not establish a maximum residential rural density, all three of the Boards have found that rural residential densities are not more intense than one dwelling unit per five acres.⁴⁵

A reference to prior GMHB decisions does not establish the Board has relied upon a “bright line” rule – it provides important context as to how the GMHBs have ruled on the issue.⁴⁶ Gold Star ignores the fact that the Board proceeded to evaluate the overwhelming substantive evidence in the record, and then issue its decision based on the substantial evidence presented rather than a “bright-line rule.”⁴⁷

The Court of Appeals correctly examined the *Viking Properties* decision and its application in the present case:

We do not, however, agree that the Board acted outside its authority, because Whatcom County explicitly embraced the one dwelling unit per five acre standard in its briefing, and confirmed this position at the hearing: “As far as the underlying zoning, the county does concede that outside of properly established LAMIRDs, the zoning must be based on board cases, or a density of no more than one unit per five acres.”

⁴⁵ *Gold Star Resorts, Inc.*, 140 Wn. App. at 396; CP 94, 1567.

⁴⁶ The GMHBs and the Courts continue to rely on such precedent for guidance on particular GMA issues. In one case decided after *Viking Properties*, the Washington Supreme Court cited four Growth Board decisions with approval. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 834-838, 123 P.3d 102 (2005).

⁴⁷ CP 1565-68. The careful analysis of the evidence undertaken by the Board would have been superfluous if the Board had truly applied a “bright-line rule” to resolve the issue. Instead, the Board considered the substantial evidence presented by Futurewise, as well as the concession by Whatcom County that the challenged rural densities in the 2005 WCCP violated GMA requirements.

The Board did not order any particular planning outcome or the application of any particular definition of rural density, but rather remanded to the county for further review. Upon that review, the principles of *Viking* should be considered.⁴⁸

The Court of Appeals correctly noted that neither Gold Star nor Whatcom County ever rebutted the substantial evidence in the record which established that all six challenged Rural Densities were inconsistent with GMA requirements to prohibit urban growth outside urban growth areas and to protect rural character.⁴⁹ Thus, neither the Board nor the Court of Appeals established a “bright-line” rule regarding the challenged Rural Densities in the 2005 WCCP. *Viking Properties*, 155 Wn.2d at 128-130; *Thurston County*, 164 Wn.2d at 360.⁵⁰

E. A LAMIRD Must Be Limited by the Development “Existing” as of July 1, 1990, Which Cannot Include Vested Development Projects (Futurewise Issue #2)

The Court of Appeals held correctly that LAMIRD boundaries are limited to development existing as of July 1, 1990.⁵¹ However, the Court of Appeals included a footnote stating that “existing” development includes vested projects, and referenced *Quadrant Corp. v. State Growth*

⁴⁸ *Gold Star Resorts, Inc.*, 140 Wn. App. at 397-98.

⁴⁹ *Gold Star Resorts, Inc.*, 140 Wn. App. at 397-98.

⁵⁰ Even if the Court were to disagree with this analysis, the remedy is not a determination that the challenged provisions of the WCCP are valid. Rather, the appropriate remedy would be a remand to the Board.

⁵¹ *Gold Star Resorts, Inc.*, 140 Wn. App. at 392.

Including vested projects under the definition of “existing” development represents a dramatic expansion of LAMIRDs, and directly contradicts the legislative mandate to “minimize and contain those areas.”⁵³ RCW 36.70A.070(5)(d)(iv). Moreover, unlike King County in *Quadrant*, Whatcom County has not made the decision “to consider vested applications” in determining LAMIRD boundaries. *Quadrant Corp.*, 154 Wn.2d at 240. As such, the deference due to counties under the GMA is not an issue.⁵⁴

1. CONCLUSION

The Court of Appeals’ statement in Footnote 41 of the *Gold Star Resorts Inc.* decision 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.

⁵³ The Western Washington GMHB found that vested development is not is the equivalent to the “built environment” under RCW 36.70A.070(5)(d). As such, the Board held that while vested projects can be built, property cannot be designated as a LAMIRD if it does not meet the criterion of being included in the “built environment” as of July 1, 1990. See *Anacortes v. Skagit County*, 00-2-0049c (Compliance Order, 1-31-02). Therefore, the Board held that vested rights do not constitute part of the “built environment” under RCW 36.70A.070(5)(d). *Anacortes v. Skagit County*, 00-2-0049c (FD&O, February 6, 2001). These determinations are to be accorded substantial weight by a reviewing court. *City of Redmond*, 136 Wn.2d at 46.

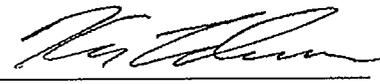
⁵⁴ RCW 36.70A.3201.

RESPECTFULLY SUBMITTED on this 29th day of January, 2009.

RIDDELL WILLIAMS P.S.

FUTUREWISE

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BY RONALD N. CARPENTER

PROOF OF SERVICE

Darla Holterman states as follows:

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.

CLERK

2. On the 29th day of January, 2009, I caused to be served a copy of the Supplemental Brief of Futurewise with this attached Proof of Service on counsel as follows:

Via Facsimile and U.S. Mail

Via Facsimile and U.S. Mail

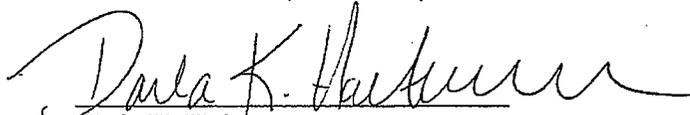
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 29th day of January, 2009, at Seattle, Washington.



Darla K. Holterman