

Supreme Court No. 80810-4

Court of Appeals No. 58379-4-I.

SUPREME COURT
OF THE STATE OF WASHINGTON

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Futurewise,

Respondent,

and

Western Washington Growth Management Hearings Board and
Whatcom County,

Co-respondents,

vs.

Gold Star Resorts, Inc.,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER GOLD STAR

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A. Identity of Party

Pursuant to RAP 13.7(d), petitioner Gold Star files this supplement brief.

B. Issues Accepted for Review.

This Court's 11/6/08 Order states that the issues raised in both Gold Star's petition and Futurewise's answer will be reviewed.

The issues raised in Gold Star's petition are:

Issue No. 1: Do the doctrines of *res judicata*/collateral estoppel apply in land use cases?

Issue No. 2: May a growth management hearings board impose a bright-line rule establishing permissible rural densities?

The issues raised in Futurewise's answer are:

(1) Pursuant to the seven-year review requirements of RCW 36.70A.130, does a county or city 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?

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

C. Argument

After Gold Star filed its petition, this Court decided Thurston County v. Western Washington Growth Management Hearings

Board, 164 Wn2d 329, 190 P3d 38 (2008). Thurston County bears on issues raised in Gold Star's petition and Futurewise's answer. Thurston County will be discussed in the context of those issues.

Scope of 7-Year Review. Both Gold Star and Futurewise have asked this Court to clarify the scope of a county's 7-year review under RCW 36.70A.130(1). Gold Star argues that the 1998 trial court decision upholding the LAMIRDs should not be collaterally attacked in the case at bar under the guise of a 7-year review.¹ On the other hand, Futurewise argues that everything in a county's comprehensive plan is subject to 7-year review.²

Thurston County speaks to both arguments:

We hold 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. ... Limiting the scope of failure to revise challenges recognizes the original comprehensive plan was legally deemed GMA compliant. A comprehensive plan is presumed valid upon adoption, RCW 36.70A.320(1), and is

¹ Petition for Review at 5-7 & B-1 through B-9.

² Answer Raising New Issues for Review by the Supreme Court at 6-8.

conclusively deemed legally compliant if it is not challenged within 60 days. The seven year update does not strip the original comprehensive plan of its legal status as GMA compliant, and we will not presume the legislature intended such a drastic measure in the absence of statutory language to that effect. If that laws have not changed, the comprehensive plan remains GMA compliant.

Finally, limiting failure to revise challenges to those aspects of a comprehensive plan directly affected by new or substantively amended GMA provisions serves the public policy of preserving the finality of land use decisions... If we were to allow a party to challenge every aspect of a comprehensive plan for GMA compliance every seven years, the floodgates of litigation initially closed by the 60-day appeal period would be reopened. Aspects of plans previously upheld on appeal could be subjected to a new barrage of challenges because a party could argue it is challenging a county's failure to update a provision, rather than reasserting its claim against the original plan... Because the legislature has not condoned such a result, we choose to limit challenges for failures to update comprehensive plans to those provisions that are directly affected by new or recently amended GMA provisions.³

Here, Futurewise's challenge to the LAMIRDs is the kind of attack disapproved of in Thurston County. The LAMIRDs were held to be out of compliance with the GMA by the Board. The

³ 164 Wn2d at 344-45, citations omitted, emphasis supplied.

Whatcom County Superior Court reversed in 1998, and this decision was affirmed in Wells v. WWGMHB, 100 WnApp 657, 860 P2d 1024 (2000). On remand to the Board, there was no further challenge to the LAMIRDs, and they were upheld by the Board.⁴ Now, under the guise of a 7-year review, Futurewise has again challenged the LAMIRDs. Under Thurston County, that challenge should not be permitted.

The Court of Appeals' decision minimizes the importance of the prior litigation challenging the LAMIRDs in two ways. First, the decision emphasizes the fact that the Whatcom County Comprehensive Plan (WCCP) was adopted two months prior to the effective date of the LAMIRD legislation, RCW 36.70A.070(5)(d). Second, the Court of Appeals characterizes its review of the challenge to the LAMIRDs in Wells v. WWGMHB as "entirely procedural."⁵

While the LAMIRD statute was not effective when the WCCP was adopted, the county anticipated this legislation. The Court of Appeals acknowledges this:

⁴ 3/28/01 Order, Whatcom County v. WWGMHB, WWGMHB No. 97-2-0030.

⁵ 140 WnApp at 387.

Whatcom County conceded before the Board that its terminology does not “mirror state law,” and that although it was aware of the pending legislative amendments, it did not consider these 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).⁶

Second, Wells did deal solely with procedural matters, but only because:

Significantly, no party has raised any persuasive challenge to the substantive portions of the decision of the Whatcom County Superior Court. Thus, we will not disturb the trial court's order remanding the case to the Western Washington Growth Management Hearings Board (hereinafter Board).⁷

As already mentioned, the Board dismissed the challenges to the WCCP on remand.

The point is that the LAMIRDs provided for in the 1997 WCCP have not been “directly affected by new or recently amended GMA provisions” for purposes of Thurston County. The county was aware of RCW 36.70A.070(5)(d) and attempted to comply with that statute. Further, the challenges to these LAMIRDs

⁶ 140 WnApp at 392.

⁷ 100 WnApp at 661, emphasis supplied.

were directly based on RCW 36.70A.070(5)(d), and both the trial court and the Court of Appeals rejected those challenges – albeit on procedural grounds. More important, on remand before the Board in 2001 substantive challenges that the LAMIRDs were out of compliance with RCW 36.70A.070(5)(d) could have been renewed, but were not. Under these circumstances, and consistent with Thurston County, these LAMIRDs should not “be subjected to a new barrage of challenges.” The LAMIRDs have previously been upheld on appeal and should not be subject to collateral attack here.

Rural Densities. The Board threw out Whatcom County’s rural densities greater than one dwelling per five acres on the basis of a bright line rule.

While the GMA does not establish a maximum residential rural density, all three of the Boards have found that rural residential densities are no more intense than one dwelling per five acres.⁸

The Court of Appeals, while recognizing the problem with bright line rules, nevertheless affirmed since Whatcom County conceded at a hearing before the Board that the Board’s one dwelling per five

⁸ CP 49.

acres standard was legally required.⁹

However, neither the Court of Appeals nor this Court is bound by the county's concession regarding the legal standard applicable to review of comprehensive plans. Thurston County made the same concession in Thurston County v. WWGMHB, and the concession was held not to be controlling:

The County conceded densities greater than one dwelling unit per five acres are not rural during oral argument before the Board. Whether a particular density is rural in nature is a question of fact based on the specific circumstances of each case. Whether a bright-line rule regarding what constitutes a rural density exists is a question of law. This court is not bound by a counsel's erroneous concession concerning a question of law.¹⁰

This Court held in Thurston County that the Board's bright line rule of one dwelling per five acres is improper and that rural densities should be judged based on local circumstances and on whether such densities preserve rural character.¹¹ Here, no evidence supports the Board's decision that the rural densities were not in compliance with the GMA.¹² Rather, the Board relied

⁹ 140 WnApp at 397-398.

¹⁰ 164 Wn2d at 358, footnote 19, citation omitted, emphasis supplied.

¹¹ 164 Wn2d at 359-360.

¹² See Brief of Respondent Gold Star at 25-26.

solely on its bright line rule. The Board's finding of noncompliance should be reversed.

Vested Projects Relevant. Relying upon Quadrant Corp. v. Hearings Board, 154 Wn2d 224, 110 P3d 1132 (2005), the Court of Appeals held that LAMIRD boundaries should include not only the built environment, but also projects vested as of July 1990.¹³ Futurewise disagrees, arguing that this is a misapplication of Quadrant since that case did not involve LAMIRDs and since RCW 36.70A.070(5)(d)(iv) requires the LOB of a LAMIRD to be "delineated predominately by the built environment."¹⁴ This is a strained reading of both Quadrant and the LAMIRD statute.

In Quadrant Corp v. Hearings Board, 119 WnApp 562, 81 P3d 918 (2003), the Court of Appeals deferred to the Board's interpretation of urban growth:

In so concluding, the Board decided that the term "characterized by urban growth" speaks to the built environment, and is used in the present tense. The Board thus rejected an interpretation that speaks to future land uses, even if such uses are probable... The Board's interpretations of the GMA lie within its expertise, and we conclude that they are

¹³ 140 WnApp at 394, footnote 41.

¹⁴ Answer Raising New Issues for Review at 11-13.

reasonable. We therefore adopt the Board's interpretations as our own.¹⁵

Judge Coleman dissented, and his dissent emphasized the relevance of the vested rights doctrine in the planning process:

Under the definition approved by the legislature, territory already committed to the process of growing in a manner incompatible with rural uses can be considered for an urban designation, and indeed it would be inconsistent with the goals of the GMA not to... While there is always a possibility that construction may never occur, an area of land already committed to urban development from the County's perspective bears characteristics of urban use that should not be ignored in the planning process.¹⁶

On review, this Court agreed with Judge Coleman and reversed:

Finally, the Board failed to take into account the legal consequences of vesting... Here the Board determined that counties may only consider the "built environment." The Court of Appeals agreed... The Board's decision unreasonably precludes local jurisdictions from considering vested rights to divide and develop the land and essentially forces counties, in adopting comprehensive plans, to ignore the likelihood of future development. The Board's failure to reconcile the statutory planning process with Washington's vested rights doctrine resulted in a strained interpretation

¹⁵ 119 WnApp at 572.

¹⁶ 119 WnApp at 580, emphasis supplied.

that does not further the legislature's intent in establishing the GMA.¹⁷

Thus, the holding in Quadrant regarding the need to take vested projects into consideration is much broader than Futurewise would have it.

Moreover, RCW 36.70A.050(5)(b)(iv) does not require LOBs to be delineated solely by the built environment. RCW 36.70A.070(5)(d)(iv) & (v)(A) read as follows:

(iv) 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

¹⁷ 154 Wn2d at 240-241, citations omitted, emphasis supplied.

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

(v) For purposes of (d) of this subsection, an existing area or existing use is one that was in existence:

(A) On July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter;

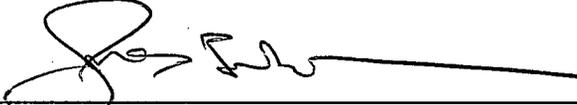
Note that the statute requires LOBs to be delineated “predominantly” by the built environment. The GMA “is not to be liberally construed,”¹⁸ and this language should not be read as restricting LOBs solely to the built environment.

Quadrant holds that vested projects may be considered in order to plan under the GMA, and the LAMIRD statute does not require local jurisdictions to ignore vested projects in delineating LOBs. Counties can take vested projects into account when delineating LAMIRDs, and the Court of Appeals was correct in saying so in this case.

¹⁸ Thurston County, 164 Wn2d at 342.

Respectfully submitted this 16th day of January, 2009.

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By 

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