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THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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KITTITAS COUNTY, a political subdivision of the State of Washington, BUILDING  
INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL  
WASHINGTON HOME BUILDERS (CWHBA), MITCHELL WILLIAMS d/b/a MF  
WILLIAMS CONSTRUCTION CO., TEANAWAY RIDGE, LLC., KITTITAS  
COUNTY FARM BUREAU, and SON VIDA II,

Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE. FUTUREWISE, and EASTERN  
WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

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BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, CENTRAL  
WASHINGTON HOME BUILDERS ASSOCIATION, AND MITCHELL WILLIAMS  
d/b/a MF WILLIAMS CONSTRUCTION CO.'s RESPONSE TO THE CITY OF  
ROSLYN'S BRIEF AMICUS CURIAE

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## Introduction

The Building Industry Association of Washington, Central Washington Home Builders Association and MF Williams Construction Inc. (collectively “BIAW”) hereby respond to the City of Roslyn’s (City) *Amicus Curiae* Brief in support of Kittitas County Conservation, Ridge, and Futurewise. This response will only cover those matters related to the City of Roslyn’s assertion that Kittitas County’s Rural Clusters and Planned Unit Developments (PUDs) violate the Growth Management Act (GMA). Issues related to water will be addressed by Kittitas County in a separate pleading.

## Argument

### 1. The City Misrepresents the Standard of Review

The City’s Brief *Amicus Curiae* is largely predicated on an unfortunate misstatement of the proper standard of review. The City states that “the Board need not defer to a legislative enactment that fails to comply with the GMA,” citing the Court of Appeals in *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, (2001) *aff’d Thurston County v. Cooper point Association*, 148 Wn.2d 1 (2002). The City then turns the deference standard on its head by stating: “[b]ecause the County failed to support its zoning designation of Rural 3 with any facts in the record to support a conclusion that such a designation is consistent with the rural

character of Kittitas County, the Board correctly ruled that the designation violated the GMA.” Brief of Amicus Curiae City of Roslyn at 3. However, the law is clear that the challenging party bears the burden of proving the County’s action fails to comply with the GMA. RCW 36.70A.320(2) (“the burden is on the petitioner to demonstrate that any action taken by a state agency, county or city under this chapter is not in compliance with the requirements of this chapter”).

The deferential standard of review is a pivotal issue in this case as the Board failed to appropriately defer to the County, despite the clear statutory and case law outlining the proper standard. The legislature was quite clear that it intended local jurisdictions have exceptional deference when planning under the GMA. The legislature even amended the original version of the GMA to highlight this point:

The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. 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 board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. 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. *See also Quadrant Corp. v. Growth Management Hearings Board*, 154 Wn.2d 224, 237 (2005) (stating that the legislature “took the unusual step of enacting into law its statement of intent in amending RCW 36.70A.320 to accord counties and cities planning under the GMA additional deference”).

The State Supreme Court is just as unequivocal in setting forth the deference standard owed local jurisdictions. According to *Thurston County v. Western Washington Growth Management Hearings Board*, “Great deference is accorded to a local government’s decisions that are ‘consistent with the requirements and goals’ of the GMA” 164 Wn.2d 323, 336 (2008). Further, “The GMA recognizes regional differences and allows counties to consider local circumstances when designating rural densities so long as the local government creates a written record explaining how the rural element harmonizes the GMA requirements and goals.” *Id.* At 337; *see also* RCW 36.70A.070(5)(a) (“[B]ecause circumstances vary from county to county, in establishing patterns of rural densities ... a county may consider local circumstances”); *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 125-26 (2005) (“the GMA acts exclusively through local governments and is to be

construed with the requisite flexibility to allow local governments to accommodate local needs.”)

The City has therefore erred in setting forth the standard of review. The party challenging the County’s determination must show that the County failed to comply with the GMA – the burden is not on the County to show compliance. The record here conclusively demonstrates that those challenging the County’s determinations cannot meet this burden.

## 2. Kittitas County’s Code Protects Rural Character

Amicus City of Roslyn hyperbolically asserts the proposed rural clusters and PUDs will permit “unbridled” and “unregulated” “urban-level growth” in rural parts of the County. Brief of Amicus Curiae City of Roslyn at 4, 6. The City also makes the unfounded claim that the code permits PUDs without any maximum density or any measures to ensure that the rural character of these designated ‘rural’ areas are protected. *Id.* at 5.

In fact, the County has a great amount of discretion to employ various techniques to achieve a variety of rural densities. *Thurston County*, 164 Wn.2d at 356. The PUD and Cluster ordinances cannot be read as stand alone provisions as the City has done. They are a part of the County’s entire planning code, represented in the comprehensive plan and the development regulations. Those regulations contemplate a variety of protections for rural

areas. While the city of Roslyn appears to have ideas of what is rural in nature and what it not, the City can't re-write the County's development regulations to its liking. In fact, the County's code complies with the GMA and the City's absurd fears are unfounded.

The record shows that the County has established protections for rural land. *See, E.g.*, KCC 16.09.010 Purpose and Intent: With the recognition of the value of retention of rural densities in rural lands, while protecting our critical areas, water resources and resource lands, and recognition that urban densities belong in urban designated lands, Kittitas County also recognizes the need for innovative planning tools to achieve these goals.”

Both BIAW and the County provided ample evidence before the Board to show how the cluster Ordinance (KCC ch.16.09) complies with the GMA – and that rural and agricultural character will be protected. For instance, the Cluster Ordinance addresses the GMA's requirement that agricultural lands are protected by requiring that all applicants be evaluated for impacts to adjacent agricultural areas. Further, the cluster ordinance provides that “[c]onditions may be placed on development proposals” to protect possible impacts related to incompatible uses because Residential parcel densities allowed in rural areas can have a significant impact on

agricultural, forestry and mineral resource uses. KCC 16.09.040(e). In fact, Kittitas County's ordinance provides myriad safeguards to protect rural character and agricultural land.

Kittitas County's cluster ordinance also limits development by requiring a minimum set-aside for open space for performance-based cluster plats. For instance, the minimum amount of open space set-aside (1) for land in Rural-3 and Agricultural-3 zones is nine acres (2) for land in Rural 5, the set aside is 15 acres; and (3) for areas zoned agricultural 20 and Forest and Range (one dwelling per 20 acres) the minimum set-aside is 30 acres. KCC 16.09.030.

The Kittitas County Cluster Ordinance also restricts the amount of clusters in area zoned rural and agricultural. For example, the density bonus, which allows more residential lots than would otherwise be allowed by the underlying zoning, is limited to a 100% bonus in rural designations within the Rural-3, Rural-5 and Agricultural-5 areas. KCC 16.09.030. The Ordinance also limits density bonuses in Agricultural-20 and Forest and Range-20 zones to 200%. *Id.* In contrast, there is no limit to density bonuses in Urban Growth Areas. *Id.*

The City's concerns about runaway development in rural areas are therefore entirely unfounded. The County's Code has myriad provisions for the protection of rural character.

#### Conclusion

The County is entitled to a presumption that its Cluster Development and PUD Codes comply with the GMA. The City's characterization of "unbridled" development that will result from enactment of the Cluster Development and PUD ordinances are unproductive and entirely unfounded. The County has endeavored to use innovative planning tools envisioned by the GMA to preserve rural character and provide a public benefit.

Respectfully submitted this 7<sup>th</sup> day of October, 2010.

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