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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 26547-1-III and 26548-0-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

84187-0

KITTITAS COUNTY,

Petitioner,

and

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, a
Washington not-for-profit corporation; BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON, a Washington not-for-profit
corporation; MITCHELL F. WILLIAMS, d/b/a/ MF WILLIAMS
CONSTRUCTION CO. INC.; TEANAWAY RIDGE, LLC; and
KITTITAS COUNTY FARM BUREAU,

Petitioners/Intervenors,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD; KITTITAS COUNTY CONSERVATION; RIDGE;
FUTUREWISE; and WASHINGTON STATE DEPARTMENT OF
COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT,

Respondents.

**RESPONSE BRIEF OF THE WASHINGTON DEPARTMENT OF
COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT**

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I. INTRODUCTION

In August 2007, the Eastern Washington Growth Management Hearings Board (Board) issued a Final Decision and Order in which it found that amendments to Kittitas County's Comprehensive Plan did not comply with the Growth Management Act (GMA), chapter 36.70A RCW. The Board identified and resolved fourteen issues raised by the parties challenging the amendments. Kittitas County and its supporters have appealed the Board's findings and conclusions addressing three of those issues (identified in the Final Decision and Order as Issues 1, 10, and 11). Of those three issues, the Department of Community, Trade and Economic Development (CTED) alleged and argued only the violations of the GMA set forth in Issue 11. In this brief, CTED therefore responds only to those arguments related to Issue 11.¹

II. STATEMENT OF ISSUES

Two issues are presented to this Court that relate to the Board's resolution of Issue 11:

¹ The Board stated Issue 11 as follows:

By amending its Comprehensive Plan without providing for a variety of rural densities, and without providing sufficient specificity and guidance on rural densities to prevent a pattern of rural development that constitutes sprawl, has Kittitas County failed to provide for a variety of rural densities, failed to protect rural character, [and] otherwise failed to comply with RCW 36.70A.070(5)?

Final Decision and Order at 54 (AR 2340).

1. Did the Board act within its statutory authority and apply the correct legal standards in determining that Kittitas County's amended Comprehensive Plan did not protect rural character and provide for a variety of rural densities in the rural area as required in RCW 36.70A.070(5)?

2. Was there substantial evidence in the record to support the Board's conclusion that Kittitas County's amended Comprehensive Plan did not protect rural character and provide for a variety of rural densities in the rural area as required in RCW 36.70A.070(5)?

III. STATEMENT OF THE CASE

In December 2006, the Kittitas County Board of Commissioners adopted Ordinance No. 2006-63, which updated its Comprehensive Plan to meet the review and update deadline established in RCW 36.70A.130(4)(c). AR 9-10,² CTED and others filed petitions with the Eastern Washington Growth Management Hearings Board (Board) challenging the Ordinance. AR 1-292, 293-537. The Board consolidated the petitions, set a briefing schedule, and conducted a full adjudicative hearing, after which it issued a Final Decision and Order on August 20, 2007. AR 2287-2373. The Board found the challengers had carried their burden of proving noncompliance with the GMA on twelve of the fourteen

² "AR" refers to the Administrative Record filed on September 5, 2008.

issues they raised, and set a deadline for Kittitas County to take legislative action to achieve compliance, as required in RCW 36.70A.300(3)(b).

Kittitas County and its supporters³ appealed the Final Decision and Order, but only as to those findings and conclusions resolving Issues 1, 10, and 11, which related to the rural element of the Comprehensive Plan. CP vol. 1, pp. 1-146; CP vol. 3, pp. 308-399.⁴ The County's obligation to take action to achieve compliance as to Issues 1, 10, and 11 was stayed by Kittitas County Superior Court in November 2007 pending resolution of this appeal. CP vol. 2, pp. 306-07. The remaining noncompliance issues are proceeding through the compliance process established in RCW 36.70A.330.⁵ Only the Board's decision addressing Issues 1, 10, and 11 is before this Court on appeal. CTED raised and argued Issue 11 to

³ Kittitas County is supported in its appeal by the Building Industry Association of Washington (BIAW), American Forest Land Company (AFLC), Teanaway Ridge, LLC, and the Kittitas County Farm Bureau. Kittitas County, BIAW, and AFLC filed substantive opening briefs on appeal. Teanaway adopted the arguments made by Kittitas County and BIAW. The Farm Bureau filed a joinder in Kittitas County's brief.

⁴ "CP" refers to the Clerk's Papers filed on March 3, 2008.

⁵ As of the date of this brief, the County has not achieved full compliance on the remaining issues. See *Kittitas Cy. Conservation v. Kittitas Cy.*, EWGMHB No. 07-1-007c, [partial second order finding continuing noncompliance as to Issues 2, 5, and 12] (Jan. 12, 2009) (available at <http://www.gmhb.wa.gov/eastern/decisions/2009/07-1-0004cKittitasCoConservationPartialSecondOrderREComplianceInvalidity1-12-09.pdf>); *id.*, [partial second order finding continuing noncompliance as to Issues 3, 4, 6, 7, 13, and 14] (Feb. 2, 2009) (available at <http://www.gmhb.wa.gov/eastern/decisions/2009/07-1-0004cKittitasCoConservationPartialSecondOrder2-4-09.pdf>) (Internet sites last visited May 13, 2009).

the Board, prevailing on that issue; this brief therefore responds only to arguments related to Issue 11.⁶

IV. SUMMARY OF ARGUMENT

The Growth Management Act establishes the framework and sets minimum requirements for comprehensive plans adopted under the GMA. While there is room under the GMA to accommodate local circumstances, an appeal to local circumstances cannot be used to avoid the GMA's requirements. The GMA requires that a county's comprehensive plan include a rural element that (1) permits rural development but not "sprawling low-density development"; (2) provides for a variety of "appropriate rural densities and uses" that are consistent with "rural character"; and (3) contains or otherwise controls rural development to protect the rural character of the rural area. RCW 36.70A.070(5)(b), (c). The rural element in Kittitas County's amended 2006 Comprehensive Plan does not include these required components.

The requirements in the rural element are implemented through development regulations, which must be consistent with the comprehensive plan and the GMA. RCW 36.70A.040, .130(1)(d). Most development regulations can be challenged for noncompliance with the

⁶ The Board's resolution of Issue 11 is found primarily at AR 2340-47. Findings of Fact 4 and 5 (AR 2367) and Conclusions of Law 10 and 11 (AR 2369) also respond to Issue 11. These pages of the Final Decision and Order are included in the Appendix attached to this brief.

GMA or the comprehensive plan at the time the development regulations are adopted. *See* RCW 36.70A.290. Site-specific rezones, however, are different: they must be challenged in superior court under the Land Use Petition Act (LUPA), rather than in a GMA petition to a Growth Management Hearings Board. *Woods v. Kittitas Cy.*, 162 Wn.2d 597, 610, ¶ 20, 174 P.3d 25 (2007) (*Woods II*). Because noncompliance with the GMA cannot be alleged in a LUPA petition, a site-specific rezone's compliance with the GMA is ensured only through its consistency with the comprehensive plan. *Id.*, 162 Wn.2d at 611, ¶ 23, 614, ¶ 28. The rural element of Kittitas County's amended Comprehensive Plan does not comply with the GMA because it imposes no meaningful limits on site-specific rezones. It fails to prevent sprawl, protect rural character, and provide for a variety of rural densities, as required in RCW 36.70A.070(5). The Board correctly found the rural element to be noncompliant with the GMA, and the Board's Final Decision and Order should be affirmed.

V. ARGUMENT

A. Standard Of Review

Growth Management Hearings Board decisions are reviewed under the Administrative Procedure Act (APA), chapter 34.05 RCW. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 161 Wn.2d

415, 424 ¶ 9, 166 P.3d 1198 (2007). The Court reviews the Board's decision, not that of the County. *Thurston Cy. v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002). The Court's review is based on the record made before the Board. *Lewis Cy. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 157 Wn.2d 488, 497 ¶ 7, 139 P.3d 1096 (2006). The burden of demonstrating the Board erred is on the parties challenging the Board's decision: in this case, that burden is on Kittitas County and its supporters. RCW 34.05.570(1); *Lewis Cy.*, 157 Wn.2d at 498, ¶ 9.

The APA sets forth nine bases for granting relief from the Board's decision in RCW 34.05.570(3), of which the County and BIAW allege four: subsections (b), (c), (d), (e). *See* Kittitas Cy. Br. at 1-2; BIAW Br. at 1-2.

Kittitas County and BIAW allege the Board acted outside of its statutory authority, used incorrect legal standards in reviewing the County's Comprehensive Plan, and engaged in unlawful decision-making. Those allegations are reviewed under RCW 34.05.570(3)(b), (c) and (d). The Court reviews the Board's statutory authority or jurisdiction de novo. *See Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cy.*, 122 Wn.2d 542, 557-68, 860 P.2d 963 (1998). Other legal conclusions also are reviewed de novo, but the Court gives substantial weight to the Board's interpretation of the GMA. *Thurston Cy. v. W. Wash. Growth*

Mgmt. Hrgs. Bd., 164 Wn.2d 329, 341, ¶ 15, 190 P.3d 38 (2008); *King Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). As explained below at pages 22-33, the Board's legal conclusions are not entitled to substantial weight if the Court concludes the Board failed to apply the appropriate standard of review when reviewing a local government's actions.

Kittitas County and its supporters also allege the Board's order was not supported by evidence that is substantial when viewed in light of the whole record before the Court. Those allegations are reviewed under RCW 34.05.570(3)(e). The record before this Court is the record that was before the Board. *Lewis Cy.*, 157 Wn.2d at 497 ¶ 7; *King Cy.*, 142 Wn.2d at 553. The Court reviews the entire record before the Board, not just the evidence cited by the County to support its position. *Swinomish*, 161 Wn.2d at 424, ¶ 9; *Lewis Cy.*, 157 Wn.2d at 497, ¶ 7. Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Thurston Cy.*, 164 Wn.2d at 341, ¶ 15 (citing *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, review denied, 132 Wn.2d 1004 (1997)). The reviewing Court does not weigh the evidence or substitute its view of the facts for that of the Board. See *Callecod*, 84 Wn. App. at 666 n.9. On mixed questions of law

and fact, the Court determines the law independently, then applies it to the facts as found by the Board. *Thurston Cy.*, 164 Wn.2d at 341, ¶ 15.

RCW 34.05.574 limits the relief available to the County and its supporters. The Court may affirm the Board's order, order the Board to take action or exercise discretion required by law, enjoin or stay the Board's decision, remand the matter for further proceedings, or enter a declaratory judgment order. RCW 34.05.574(1). "In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency." RCW 34.05.574(1). Accordingly, a reviewing court may set aside the Board's decision, but it lacks authority to find the County's ordinance complies with the GMA. *See Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 809-810, 959 P.2d 1173 (1998), *review denied*, 137 Wn.2d 1018 (1999).⁷

⁷ *But see Quadrant Corp. v. Growth Mgmt. Hrgs. Bd.*, 154 Wn.2d 224, 247-48, ¶ 40, 110 P.3d 1132 (2005) (where the only issue on remand is outside the Growth Management Hearings Board's subject matter jurisdiction, remand under RCW 34.05.574(1) is not required).

B. The Growth Management Hearings Board Correctly Determined That The Rural Element In Kittitas County's Amended Comprehensive Plan Did Not Comply With The GMA's Rural Areas Requirements

Each county that plans under the GMA must adopt a comprehensive plan that balances the goals in RCW 36.70A.020 and complies with explicit requirements in the GMA, including the requirements in RCW 36.70A.070, which specifies eight mandatory elements that must be included in the comprehensive plan. One mandated element is the "rural element," which includes lands "that are not designated for urban growth, agriculture, forest, or mineral resources." RCW 36.70A.070(5); *Thurston Cy.*, 164 Wn.2d at 355, ¶ 39. At issue here is the rural element in Kittitas County's Comprehensive Plan as amended by Ordinance No. 2006-63.

CTED argued to the Board that the County failed to comply with specific requirements in RCW 36.70A.070(5) when it adopted Ordinance No. 2006-63, and the Board agreed. RCW 36.70A.070(5) requires that the rural element contain the following:

(b) . . . The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not

characterized by urban growth and that are consistent with rural character.

(c) . . . The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

...

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

...

CTED argued that the rural element did not provide for a variety of rural densities and did not protect rural character, because it set no meaningful criteria to limit the use of site-specific rezones to create small lots and intense uses (i.e., “sprawling, low-density development”). AR 2344-45.⁸ As the Board accurately recognized, CTED was not advocating any Board-created bright-line rule or asserting that three-acre lots should never be allowed in the rural area. *See* AR 2340, 2343.

The Board, finding that CTED met its burden of proof under the clearly erroneous standard, ruled that the County had not provided “specificity and guidance on rural densities in its amended Comprehensive Plan” that would “prevent a pattern of rural development that constitutes sprawl [and] protect rural character.” AR 2347.

⁸ CTED’s brief to the Board, with attachments, is at AR 949-1226. CTED’s reply brief to the Board is at AR 2217-35.

RCW 36.70A.070(5)(a) recognizes that circumstances vary from county to county and authorizes counties to consider local circumstances in establishing patterns of rural densities and uses. However, a county doing so “shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.” RCW 36.70A.070(5)(a). CTED did not challenge Kittitas County’s authority to consider local circumstances, but argued it had failed to develop the required written record. AR 2345. The Board agreed. AR 2347.

1. The Amended Comprehensive Plan Failed To Provide For A Variety Of Rural Densities And Uses In The Rural Area

The Board correctly ruled that the amended Comprehensive Plan did not include “specific, directive policies that maintain a compliant mix of rural densities and set enforceable criteria for determining when and where rezone applications should be approved.” AR 2346. As the Board noted, “the problem is not one of disagreement between CTED and Kittitas County as to rural policy choices; it is a failure of the [Comprehensive Plan] to comply with the GMA’s requirements to include specific, enforceable policies as to the future of rural lands in the County.” AR 2344.

The rural element “shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses.” RCW 36.70A.070(5)(b) (emphasis added); *Thurston Cy.*, 164 Wn.2d at 355, ¶39. To achieve a variety of rural densities and uses, the rural element “may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.” RCW 36.70A.070(5)(b) (emphasis added); *Thurston Cy.*, 164 Wn.2d at 355, ¶39.

As amended, the Kittitas County Comprehensive Plan did not provide for a variety of rural densities. Indeed, it did not address rural densities at all. Instead, it relied on the underlying zoning to assign density. AR 60. The Land Use Chapter provided a table listing the current zoning classifications, at least six of which are applied in the rural area: Agriculture-3, Agriculture-5, Agriculture-20, Rural-3, Rural-5, and Forest and Range-20. AR 61.⁹

⁹ CTED believes, but has been unable to confirm, that other designations with smaller lot sizes, including Suburban and Suburban-II, may be permitted in the rural area under the Comprehensive Plan. In addition, the zoning code seems to allow rural densities as small one acre in some circumstances, such as planned unit developments.

a. The Amended Comprehensive Plan Imposes No Meaningful Or Enforceable Constraints On The Use Of Site-Specific Rezones To Create Small Lots In The Rural Area

The amended Comprehensive Plan sets no meaningful criteria to limit the number or location of site-specific rezones to smaller lots and more intense uses that may occur in the rural area, and it sets no meaningful limit on the County's discretion to grant rezone applications. Under the rural element of the Comprehensive Plan, there is only a single land use category: "rural land." There are no standards in the rural element or elsewhere in the Comprehensive Plan that can be used to resolve or minimize conflicts between land uses in adjacent zones, or that guide which lands in the rural area should be assigned to each zoning classification. There are no criteria that limit which rural lands can be rezoned, how many rezones can occur on a given rural parcel, or in a given portion of the rural area, or how often rezones can occur in the rural area. There is nothing in the Comprehensive Plan that precludes three-acre parcels—or parcels smaller than three acres—from being created in the rural area through site-specific rezones, and nothing that would prevent all or most of the existing variety of rural densities (and the rural character supported by that variety of densities) from being lost.

BIAW argues that the County had specific criteria in its zoning code that limited rezones, citing former Kittitas County Code 17.98.020(5). BIAW Br. at 14-15. As explained below at page 44, those criteria were not before the Board and are not in the record. *See King Cy.*, 142 Wn.2d at 553 (“judicial review of the Board’s decision is based on the record made before the Board” (quoting *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994))).

Even had they been presented to the Board, their existence would not have made the rural element compliant with RCW 36.70A.070(5)(b), for at least two reasons. First, it is the rural element itself—in the Comprehensive Plan—that must provide for a variety of rural densities. RCW 36.70A.070(5)(b). It does not do so. Second, none of the criteria in former KCC 17.98.020(5) imposes any meaningful or enforceable standard or constraint that would provide for a variety of rural densities.

In short, there are no standards in the Comprehensive Plan that provide for a variety of rural densities or that limit site-specific rezones anywhere in the rural area. The absence of such standards violates RCW 36.70A.070(5)(b). There is no meaningful constraint on site-specific rezones in the rural area in Kittitas County, since the requirements of the GMA cannot be applied directly to site-specific rezones. *Woods II*, 162 Wn.2d at 613-14, ¶¶ 27, 28 (site-specific rezones are evaluated solely

for consistency with applicable development regulations or comprehensive plans, not directly for compliance with the GMA).

b. The Decisions In *Woods II* And *Henderson* Illustrate How The Amended Comprehensive Plan Allows The Creation Of Small Lots In The Rural Area Through Site-Specific Rezoning

Both Kittitas County and BIAW incorrectly rely on the Supreme Court's decision in *Woods II* and this Court's decision in *Henderson v. Kittitas Cy.*, 124 Wn. App. 747, 100 P.3d 842 (2004), as having approved three-acre lots in the rural area, at least by implication, as compliant with the GMA. *Kittitas Cy. Br.* at 17 n.6, 28-29; *BIAW Br.* at 17-18. GMA compliance was not at issue in those cases, since both cases involved appeals of site-specific rezones of rural parcels in Kittitas County that were challenged in superior court under LUPA, chapter 36.70C RCW. Moreover, the question whether the GMA permits three-acre lots in the rural area is not part of Issue 11, either in CTED's arguments to the Board or in the Board's resolution of Issue 11.

In *Woods II*, the Court held that site-specific rezones cannot be challenged for compliance with the GMA in a LUPA action and that a superior court lacks jurisdiction even to consider GMA compliance in a LUPA action. *Woods II*, 162 Wn.2d at 614, ¶ 28, 615, ¶ 31. GMA compliance therefore was not at issue in *Woods II*; rather, "the only issue

before us is whether the county's comprehensive plan permits the R-3 zone to be used in rural areas.” *Id.* at 624, ¶ 44. The Court held that it did. *Id.* at 622, ¶ 48.

In *Henderson*, another LUPA action, the validity of small-lot zoning under the GMA similarly was not at issue. Rather, the Court was asked to determine whether a proposed site-specific rezone of more than 100 acres of rural land to three-acre lots was consistent with Kittitas County’s Comprehensive Plan and zoning code. *Henderson*, 124 Wn. App. at 750. In holding that the site-specific rezone was allowed, the Court simply read the Comprehensive Plan to determine that the rezone was consistent with it. *Id.* at 755-56. The GMA is not even referenced or cited in *Henderson*.

In other words, both *Woods II* and *Henderson* held that site-specific rezones to small lots in the rural area in Kittitas County were consistent with the Comprehensive Plan. Neither Court found the Comprehensive Plan to contain any substantive constraint on rezones.

That remains the situation under the amended Comprehensive Plan—rezones to three-acre lots (or smaller) are consistent with the Comprehensive Plan anywhere in the rural area, without any limit in the Plan itself. Accordingly, the Comprehensive Plan does not provide for a variety of rural densities as required by the GMA. Rather, it allows

landowners to rezone to small lots with no criteria in the Comprehensive Plan that can be used to guide or limit the consideration of a rezone application.

There is nothing in the Comprehensive Plan that limits the ability of any landowner in the rural area of Kittitas County to apply successfully to rezone his or her land to small lots, and there is nothing that prevents the creation of small lots across substantial portions of the rural area. Those omissions constitute a violation of the GMA's requirement to affirmatively provide for a variety of rural densities. RCW 36.70A.070(5)(b).

c. Allegations Regarding The Use Of A “Bright-Line Rule” Are Not Germane To The Board’s Resolution Of CTED’s Issue 11

Kittitas County and its supporters maintain the Board issued a bright-line rule as to rural densities, which exceeded the Board’s authority because it lacks authority to make public policy. Kittitas Cy. Br. at 23; BIAW Br. at 10-13; AFLC Br. at 4-6. This argument is developed primarily by BIAW, in reliance on *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), and *Thurston Cy.*, 164 Wn.2d 329.

At issue in *Viking Props.* was a neighborhood restrictive covenant drafted in the 1930s that contained two racial restrictions and a density restriction. A developer who sought to build multifamily housing in the

neighborhood sued to invalidate the density restriction. The Supreme Court accepted direct review.

The Court first severed the density restriction from the invalid racial restrictions. It then rejected the developer's argument that the density restriction was invalid because it conflicted with the public policy reflected in a "bright-line rule" defining urban density, used by the Boards since 1995. The Court held the Boards "do not have authority to make 'public policy' even within the limited scope of their jurisdictions, let alone to make *statewide* public policy." *Viking Props.*, 155 Wn.2d at 129, ¶ 40. Rather, the Boards are "quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute." *Id.*

In *Thurston Cy.*, a citizens group challenged the County's updated comprehensive plan and development regulations on a number of theories, including a challenge involving rural densities. The Growth Management Hearings Board ruled, *inter alia*, that it would not consider densities greater than one dwelling unit per five acres to be rural densities (unless designated as limited areas of more intensive rural development under RCW 36.70A.070(5)(d), which they were not). *Thurston Cy.*, 164 Wn.2d at 356, ¶ 41. The Supreme Court reversed:

The [Board], as a quasi-judicial agency, lacks the power to make bright-line rules regarding maximum rural densities. We hold a [Board] may not use a bright-line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny.

Id. at 358-59, ¶ 45 (citation omitted).

The Court admitted that the Board did not explicitly adopt a five-acre bright-line rule in that case, but found such a rule was implicit in its decision because of the way the Board framed the issue regarding rural densities: whether the comprehensive plan failed to comply with the GMA by allowing “development at densities of greater than one unit per five acres when this board has determined that such densities fail to comply with the GMA.” *Id.* at 358 n.20.

Kittitas County and BIAW attack the Board’s framing of Issue 1.¹⁰ Kittitas Cy. Br. at 22; BIAW Br. at 12-13. They do not attack the way the Board framed the issue raised by CTED, Issue 11, nor could they fairly do

¹⁰ Issue 1 includes the following language: “Does Kittitas County’s failure to review and revise the comprehensive plan to eliminate densities greater than one dwelling unit per five acres in the rural area . . . violate [the GMA]?” Even though the Board considered Issue 1 to be related to Issue 11, CTED did not address Issue 1 before the Board. CTED observes, however, that the petitioners who raised Issue 1 did not argue simply that three-acre lots fell below a “bright line”; instead, they argued GMA noncompliance based on the requirements in RCW 36.70A.070(5), the rural element definitions in RCW 36.70A.030(18) (defining “urban growth”), and evidence relating to water quality, the use of septic systems, and minimum lot sizes necessary to support agriculture in Kittitas County. See AR 2292-96, 2299-2301 (Board’s summary of petitioners’ arguments); AR 648-948 (opening brief of Kittitas County Conservation et al. and attachments thereto); AR 2217-35 (reply brief of Kittitas County Conservation et al.).

so, since that issue statement made no reference to any specific rural density as a standard for comparison:

By amending its Comprehensive Plan without providing for a variety of rural densities, and without providing sufficient specificity and guidance on rural densities to prevent a pattern of rural development that constitutes sprawl, has Kittitas County failed to provide for a variety of rural densities, failed to protect rural character, [and] otherwise failed to comply with RCW 36.70A.070(5)?

AR 2340.

Kittitas County and AFLC nevertheless appear to argue that the Board applied a bright-line rule in deciding Issue 11 because it focused on prior Board decisions regarding rural density rather than the local justifications found in the record and the rural element itself, and because of words one Board member used in a short, four-sentence concurrence. Kittitas Cy. Br. at 22-23; AFLC Br. at 5-6.¹¹ In fact, apart from the concurrence, the Board's only explicit reference to a bright-line rule in discussing Issue 11 was to quote a passage in CTED's brief stating that there is no bright line established by the GMA. AR 2340. Nor did the Board improperly "focus" on its own prior decisions—indeed, the Board's analysis and conclusion regarding Issue 11 does not cite a single prior Board decision.

¹¹ The concurrence is at AR 2346. Of course, a concurrence by one member of a three-member quasi-judicial board does not constitute a decision of that board.

More fundamentally, however, no bright-line rule is implicated because Issue 11 does not involve a challenge to any specific density. Rather, the challenge is to the failure to adopt criteria or standards that ensure a continuing variety of rural densities over time. In that context, the issue is not whether three-acre lots constitute rural density—the issue is whether the amended Comprehensive Plan contains provisions that would prevent large sections of the rural area from being converted through site-specific rezones to a single density. Historically, site-specific rezones typically result in smaller lots. The smaller the lot the more likely it possesses urban characteristics, which could result in violations of multiple sections of the GMA if allowed to propagate in the rural area. But a uniform pattern of large lots would violate the statutory mandate to provide for a variety of rural densities just as surely as a uniform pattern of small lots. It is that statutory mandate which is at issue here.

CTED agrees that Boards are not authorized to establish bright-line rules regarding rural densities, in the wake of the Supreme Court's decisions in *Viking Props.* and *Thurston Cy.* But this Board neither relied on any bright line as to rural density nor did it attempt to establish any bright-line rural density in resolving Issue 11. Rather, the Board decided the specific case that was before it, consistent with the authority granted in RCW 36.70A.280 through .330, and consistent with both *Viking Props.*

and *Thurston Cy.* Kittitas County and BIAW have not met their burden under RCW 34.05.570(3)(b) of demonstrating that the Board's resolution of Issue 11 is outside its statutory authority or jurisdiction.

2. The Amended Comprehensive Plan Fails To Protect Rural Character In The Rural Area

The Board correctly ruled that the amended Comprehensive Plan failed to protect rural character because it “failed to provide specificity and guidance on rural densities in its amended Comprehensive Plan to prevent a pattern of rural development that constitutes sprawl.” AR 2347.

The rural element “shall include measures that apply to rural development and protect the rural character of the area, as established by the county.” RCW 36.70A.070(5)(c) (emphasis added). The measures a county adopts to protect rural character must contain or control rural development and reduce the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area. RCW 36.70A.070(5)(c)(i), (iii).

In addition, the rural element must be guided by the definition of “rural character” in RCW 36.70A.030(15):

“Rural character” refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

(a) In which open space, the natural landscape, and vegetation predominate over the built environment;

(b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;

(c) That provide visual landscapes that are traditionally found in rural areas and communities;

(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;

(e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;

(f) That generally do not require the extension of urban governmental services; and

(g) That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

This definition complements the requirements set out in RCW 36.70A.070(5)(c).

Kittitas County's amended Comprehensive Plan contains few substantive provisions that circumscribe rural development. As already mentioned, there are no criteria in the Plan that govern rezone applications or provide for a variety of rural densities within the rural area. Neither the land use element nor the rural element contain provisions that effectively contain or control rural development, except to define the overall boundaries of the rural area.

a. The Amended Comprehensive Plan Does Not Ensure That Small-Lot Zoning In The Rural Area Protects Agriculture

Kittitas County and BIAW nevertheless contend the Comprehensive Plan protects rural character. Kittitas County argues that

three-acre zoning preserves rural character and promotes agriculture by allowing farmers to sell off the “smallest portion of agriculturally marginal land possible” during low irrigation years to provide income that allows them to retain the “greatest amount of productive farm land.” Kittitas Cy. Br. at 5, 16, 17.

This argument fails here because there are no provisions in the rural element that address this objective. No provision limits any site-specific rezone to agriculturally marginal land or to the smallest portion of a parcel. No provision ties site-specific rezones to the availability of irrigation water, agricultural income, or agricultural production.

Kittitas County and BIAW identify several provisions in the rural element that they claim promote rural character. Kittitas Cy. Br. at 7, 9, 18; BIAW Br. at 4-5. Kittitas County first cites GPO 8.9,¹² which “encourages” projects or developments that “result in the significant conservation of rural lands or rural character.” AR 217; Kittitas Cy. Br. at 7, 18. But GPO 8.9 provides no criteria for determining whether a particular project or development conserves rural lands or rural character. Nor does that provision or any complementary provision in the rural element discourage or constrain site-specific rezones that result in the loss of rural lands or rural character.

¹² “GPO” apparently stands for “goal, policy, or objective.”

Kittitas County then argues that GPOs 8.1, 8.9, 8.13, 8.27, 8.28, and 8.30 protect rural character and harmonize that protection with the GMA's goals in RCW 36.70A.020. Kittitas Cy. Br. at 18. The cited provisions do not do what Kittitas County claims.

The County's reference to "GPO 8.1" apparently refers to the first two sentences of section 8.1 in the rural element (rather than the provision labeled "GPO.8.1" at AR 215). Those sentences list uses currently existing in the rural area and describe the County's rural land use designation as "a balance of differing natural features, landscape types and land uses." AR 213. Those sentences are descriptive of the present, not prescriptive for the future.

GPO 8.9 was discussed above. It offers encouragement without criteria to measure results or ensure consistency.

GPO 8.13 provides that "[m]ethods other than large lot zoning to reduce densities and prevent sprawl should be investigated." AR 217. Presumably, this provision refers to the innovative techniques called out in RCW 36.70A.070(5)(b), which is commendable. But it is purely exhortatory and offers nothing to guide or limit small-lot zoning resulting from site-specific rezones.

GPO 8.27 states that the County "should cooperate in sound voluntary farm conservation or preservation plans." AR 218. While the

conservation of farms and farmland is to be lauded and supported, there are no criteria to guide which plans will merit the County's cooperation and nothing that relates either farm plans or County cooperation to land use designation or to site-specific rezones. There are no criteria in GPO 8.27 that can be used to limit the loss of productive farmland through site-specific rezones creating small-lot zoning.

GPO 8.28 states that non-farmers in agricultural areas should be encouraged to meet "commonly accepted farm standards." AR 218. The phrase "commonly accepted farm standards" is a phrase without a meaning. What standards are referenced? Productivity standards? Cleanliness standards? Where does a landowner find a list of standards that are "commonly accepted"? There is none. In short, GPO 8.28 provides no intelligible or enforceable criteria that promote or maintain agriculture or rural character, or that guide or limit the creation of small-lot zoning through site-specific rezones.

GPO 8.30 merely recognizes a problem ("needing to sell house lots without selling farm ground") and states that the County will "[l]ook at solutions." AR 218. Again, there are no criteria or standards, just a vague commitment to study the problem.

Finally, Kittitas County cites "GPO 8.3." Kittitas Cy. Br. at 18. This citation apparently references the first three sentences in the second

paragraph in section 8.3 of the rural element at AR 215 (rather than the provision labeled “GPO.8.3” at AR 216). Those sentences describe the current mix of rural densities and uses as having created a “successful landscape which contributes to an attractive rural lifestyle,” except “where individuals have had to acquire larger lots than desired in order to obtain a building site,” leading to “rural sprawl.” AR 215. Assuming, without conceding, that “rural sprawl” (as defined by the County) is an evil to be avoided, there is only one provision in the rural element that addresses that evil: GPO 8.13, discussed above, which says only that alternatives to large lot zoning “should be investigated.”

Read individually or together, these provisions do not provide the measures RCW 36.70A.070(5)(c) requires to protect rural character. These provisions do not provide standards or criteria that will contain or control rural development or reduce the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area, as required in RCW 36.70A.070(5)(c). The rural element of Kittitas County’s amended Comprehensive Plan does not protect rural character, as the Board correctly determined.

b. This Court Did Not Hold, In *Henderson V. Kittitas County*, That Site-Specific Rezones To Small Lots Protect Rural Character

BIAW cites this Court's decision in *Henderson*, 124 Wn. App. at 756, as having held that a contested rezone to three-acre lots accomplished the goal of retaining rural character. BIAW Br. at 18. What this Court actually held, as explained above at page 16, was only that the challenged rezone was consistent with the Comprehensive Plan. The Court did not address whether rural character was protected either by the site-specific rezone at issue or by the provisions in the Comprehensive Plan that allowed it to go forward. In fact, except for the somewhat equivocal use of the phrase "rural character" in a passage quoted from the prior Comprehensive Plan,¹³ the *Henderson* decision did not use the term or otherwise discuss it.

Even if the quoted passage is correct—that small-lot zoning "with conservation easements for agriculture, timber, or open space" may better protect rural character than "wasteful" large zoning—there is no provision in the amended Comprehensive Plan that mentions a conservation

¹³ The quoted passage reads as follows: "Small lot zoning with conservation easements for agriculture, timber, or open space may be preferable to the wasteful 'sprawl' developments of large lot zoning and could be more conducive to retaining rural character." *Henderson*, 124 Wn.2d at 755-56 (emphasis added). The passage is not found in the amended Comprehensive Plan that the Board reviewed in the present case.

easement as a condition of a site-specific rezone.¹⁴ Thus, the only tool for protecting rural character referenced in the quoted passage from *Henderson*—small-lot zoning together with conservation easements—is not provided in the amended Comprehensive Plan.

c. In Resolving Issue 11, The Board Did Not Rule That “Blanket Minimum-Acre-Per-Lot Rules” Are The Only Way To Retain Rural Character

BIAW also argues that “blanket minimum-acre-per-lot rules” are not the only way to protect rural character. BIAW Br. at 17. BIAW is correct: the GMA provides for and encourages the use of “innovative techniques” in rural areas to provide a variety of rural densities and uses “that are not characterized by urban growth and that are consistent with rural character.” RCW 36.70A.070(5)(b).¹⁵ However, the argument is not relevant to the Board’s resolution of Issue 11.

In arguing Issue 11 to the Board, CTED did not contend that “blanket minimum-acre-per-lot rules” are required to protect rural

¹⁴ The only explicit reference to conservation easements in the amended Comprehensive Plan is GPO 2.121 in the Land Use Element, which reads: “Cooperate in sound voluntary farm conservation or preservation plans (i.e., be recipients and overseers for conservation easements and/or assist with transferable development rights programs).” GPO 8.27, which states that the County “should cooperate in sound voluntary farm conservation or preservation plans,” can be understood to tacitly reference GPO 2.121, but neither provision is tied to site-specific rezones or the creation of small rural lots.

¹⁵ BIAW also cites RCW 36.70A.177, which applies only to agricultural lands of long-term commercial significance designated under RCW 36.70A.170. *See* RCW 36.70A.177(1). By definition, such lands are not part of the rural area and are not included in the rural element of a comprehensive plan. RCW 36.70A.070(5); *Thurston Cy.*, 164 Wn.2d at 357, ¶ 43.

character, nor did the Board make any such ruling in responding to that issue.¹⁶ As explained above, CTED's concern was that the County satisfy the requirement in RCW 36.70A.070(5)(b) that the rural element provide for a variety of rural densities, not a "blanket minimum." Indeed, CTED has supported the use of innovative techniques in Kittitas County and elsewhere to provide a variety of rural densities and uses in the rural area, including performance-based cluster plats and other techniques.¹⁷

C. The Growth Management Hearings Board Applied The Proper Legal Standards In Determining That Kittitas County's Amended Comprehensive Plan Did Not Protect Rural Character And Provide For A Variety Of Rural Densities

The 1997 Legislature amended RCW 36.70A.320, changing the standard of review used by the Growth Management Hearings Boards from the "preponderance of the evidence" standard to the "clearly erroneous" standard. Laws of 1997, ch. 429, § 20. The Legislature explained in RCW 36.70A.3201 that the "clearly erroneous" standard was

¹⁶ As noted above at page 20, the single sentence appearing to acknowledge a five-acre "rule" in a concurrence is not a statement of the Board's ruling or legal reasoning as to Issue 11.

¹⁷ Although not in the record before the Board, one of the documents CTED has provided since 1999 as part of its technical assistance program under RCW.36.70A.190 is a booklet called *Keeping the Rural Vision: Protecting Rural Character & Planning for Rural Development*. That booklet includes a chapter called "Optional Tools for More Intense Development" that includes a discussion of clustering, density transfer, and other innovative techniques. The document is referenced here only to illustrate that CTED does not and has not advised counties that "blanket minimum-acre-per-lot rules" are the only way to protect rural character. The document is available electronically at http://www.cted.wa.gov/portal/alias_CTED/lang_en/tabID_400/DesktopDefault.aspx (last visited May 13, 2009).

enacted to ensure the Boards “grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter.” Consistent with that legislative intent, the Supreme Court has explained repeatedly that deference is granted to local planning decisions only if they are consistent with the GMA’s goals and requirements. See *Swinomish*, 161 Wn.2d at 424, ¶ 8; *Lewis Cy.*, 57 Wn.2d at 498, ¶ 8 and n.7; *Quadrant*, , 154 Wn.2d 224, 238, ¶ 23, *Thurston Cy.*, 148 Wn.2d at 14; *King Cy.*, 142 Wn.2d at 553. The amount of deference the Board is to give under this standard “is neither unlimited nor does it approximate a rubber stamp”; the clearly erroneous standard “requires the Board to give the County’s actions a “critical review.” *Swinomish*, 161 Wn.2d at 435 n.8. “[W]hile the Board must defer to [a county’s] choices that are consistent with the GMA, the Board itself is entitled to deference in determining what the GMA requires. This court gives “substantial weight” to the Board’s interpretation of the GMA.” *Lewis*, 157 Wn.2d at 498, ¶ 8 (citing *King Cy.*, 142 Wn.2d at 553).

In short, while the GMA requires local governments to adopt comprehensive plans and development regulations that comply with the GMA, thereby placing on local governments the primary responsibility to implement the Act, the GMA does not leave it to local governments to decide their own compliance with the Act—that duty unambiguously is

assigned to the Growth Management Hearings Boards. See RCW 36.70A.280(1)(a), .290(2), .300(1), .300(3)(a); .320(3), .330(1). The Boards are not required to defer to a local action rooted in an interpretation of the GMA that is inconsistent with the statute. *Thurston Cy.*, 148 Wn.2d at 14. *Accord Quadrant*, 154 Wn.2d at 240 n.8.

The notion of “deference” is a shorthand reference to the presumption of compliance inherent in all standards of review. *Swinomish*, 161 Wn.2d at 435 n.8. A local planning action is presumed to comply with the GMA unless and until a petitioner brings forth evidence from the record and persuades a Board that the action is clearly erroneous in light of the goals and requirements of the GMA, as required in RCW 36.70A.320(3). If the petitioner does not meet that burden, the presumption is not overcome and the Board may not second-guess the local government, even though the Board may have preferred a different action. Similarly, if the Board were to fail to apply the clearly erroneous standard and instead used some less deferential standard (like the preponderance of the evidence standard that controlled until 1997), it would have no legally permissible basis for determining that the presumption of compliance had been overcome, and again it would not be authorized to second-guess the local government.

However, “deference ends when it is shown that a county’s actions are in fact a ‘clearly erroneous’ application of the GMA.” *Quadrant*, 154 Wn.2d at 238, ¶ 23. In other words, if the Board applies the clearly erroneous standard and the petitioner meets that burden by identifying evidence in the record and presenting legal argument, then the presumption of compliance has been overcome and the Board is authorized to conclude that the local government has not complied with the GMA. *Accord Swinomish*, 161 Wn.2d at 424, ¶ 8; *Lewis Cy.*, 157 Wn.2d at 508 n.17; *Thurston Cy.*, 148 Wn.2d at 14; *King Cy.*, 142 Wn.2d at 561.

In this case, the Board correctly applied the clearly erroneous standard of review and properly placed the burden of proof on CTED and the other petitioners. AR 2291-92. Applying that standard, as detailed above, the Board concluded CTED carried its burden of proof as to Issue 11.

Kittitas County and its supporters nevertheless contend the Board did not give appropriate deference to local decisions made under the GMA. They raise two arguments. First, they contend the Board did not defer to the County’s consideration of local circumstances and its harmonizing of the GMA’s planning goals. *Kittitas Cy. Br.* at 14-16, 19, 27-29; *BIAW Br.* at 8-9. Second, Kittitas County argues that the Board

must defer to the County if there is any evidence in the record that supports the County's decision. Kittitas Cy. Br. at 25-27.

1. An Appeal To Local Circumstances Does Not Excuse Compliance With RCW 36.70A.070(5)

A county may consider local circumstances in establishing patterns of rural densities and uses, but if it does so it “shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA].” RCW 36.70A.070(5)(a) (emphasis added); *Thurston Cy.*, 164 Wn.2d at 355, ¶ 39. The Board concluded the County failed to develop the written record required in RCW 36.70A.070(5)(a). AR 2346-47.

Kittitas County and BIAW argue that the Board erred by not deferring to the County's accommodation of local circumstances. Kittitas Cy. Br. at 14-16, 19, 27-29; BIAW Br. at 8-9. The County contends the Board “ignored” the comprehensive plan provisions that explained how its decision to allow three-acre densities in the rural area harmonizes the GMA goals. Kittitas Cy. Br. at 11. It supports its contention by suggesting how several “GPOs” in the rural element correspond to particular GMA goals. *Id.* at 8-9. This short description, which is set out in approximately one page of the County's brief, is no more than a list of GPOs and the goals with which they allegedly correspond. Ironically,

even though the listing in the County's brief still does not provide the explanation required in RCW 36.70A.070(5)(a), it is a more complete "harmonizing" of the planning goals than is found anywhere in the rural element of the amended Comprehensive Plan.

The sole reference to GMA goals in the rural element is found in the opening sentence of section 8.5:

The following goals, policies and objectives for Rural Lands are established in an attempt to prevent sprawl, direct growth toward the Urban Growth Areas and Nodes, provide for a variety of densities and uses, respect private property rights, provide for residences, recreation, and economic development opportunities, support farming, forestry and mining activities, show concern for shorelines, critical areas, habitat, scenic areas, and open space while keeping with good governance and the wishes of the people of Kittitas County and to comply with the GMA and other planning mandates.

AR 216. How the GPOs correspond to the GMA goals, which are not separately referenced in the rural element, was not elucidated at all until the short description provided in the County's brief. The County did not "develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA]," as required in RCW 36.70A.070(5)(a). *Thurston Cy.*, 164 Wn.2d at 355, ¶ 39.

The comprehensive plan must be consistent with the goals and requirements of the GMA. *Swinomish*, 161 Wn.2d at 424, ¶ 8. *See also*

King Cy., 142 Wn.2d at 561 (while a county has broad discretion to develop a comprehensive plan and development regulations that are suited to local circumstances, its exercise of discretion must comply with the GMA's goals and requirements). The GMA's goals are in tension, and a county has a duty to harmonize the goals. See *Swinomish*, 161 Wn.2d at 424-26, ¶¶ 10-13. That duty is explicit where a county relies on local circumstances to adopt provisions in the rural element that otherwise might not comply with the GMA's goals and requirements. RCW 36.70A.070(5)(a). *Thurston Cy.*, 164 Wn.2d at 337, ¶ 4; *Woods II*, 162 Wn.2d at 609, ¶ 17. For example, a county that had a historic pattern of small rural lots at the time the GMA was enacted (such as Island County or Kitsap County) reasonably might be able to justify a smaller range of rural densities—or more dense rural development—than a county that has had a historic pattern of large rural lots (like Kittitas County or Grant County). Similarly, a county that is predominantly rural or resource-based (like Stevens County or Pend Oreille County) reasonably could implement less prescriptive measures for ensuring rural character than a county experiencing strong pressures for urban expansion (such as Clark County). While the GMA provides planning flexibility for these types of local conditions, it also imposes a responsibility to explain in writing how the

rural element harmonizes the GMA's goals and meets the GMA's requirements.

The courts have not explained what it means to harmonize the planning goals in this context.¹⁸ However, the Growth Management Hearings Boards have provided some guidance:

- The GMA generally does not permit the elevation of a single goal to the detriment of other equally important GMA goals, but a county may differentially emphasize the GMA goals to address local needs.¹⁹ However, one goal may not be disregarded in favor of another without a showing on the record that both goals cannot be achieved.²⁰
- The “written record” mandate in RCW 36.70A.070(5)(a) does not require preparation of a discrete document.²¹ The

¹⁸ When harmonizing provisions in the GMA generally, courts attempt to give effect to all language used and consider the provisions in relation to each other. *See, e.g., King Cy.*, 142 Wn.2d at 560.

¹⁹ *See, e.g., City of Wenatchee v. Chelan Cy.*, EWGMHB No. 08-1-0015, Final Decision and Order at 25 (Mar. 6, 2009) (available at <http://www.gmhb.wa.gov/eastern/decisions/2009/08-1-0015WenatcheeFDO3-6-09.pdf>, last visited May 13, 2009). While there is no general requirement that the balancing of GMA goals be supported by a written analysis (*id.* at 26-27, citing *Manke*, 113 Wn. App. 615), there is a specific requirement for a written explanation in RCW 36.70A.070(5)(a) where local circumstances are considered in the rural element.

²⁰ *Id.* at 27.

²¹ *See, e.g., Bayfield Resource Co. v. Thurston Cy.*, WWGMHB No. 07-2-0017c, Final Decision and Order at 19 (Apr. 17, 2008) (available at <http://www.gmhb.wa.gov/western/decisions/2007/07-2-0017cBayfieldFinalDecisionandOrder20080417.pdf>, last visited May 13, 2009).

explanation required in RCW 36.70A.070(5)(a) may be found as part of another document or documents.²² A discrete document is not necessary if the comprehensive plan is clear in its description of how its amendments harmonize with the GMA goals.²³

- RCW 36.70A.070(5)(a) requires more than a list of provisions in the rural element—it requires an explanation of how the rural element harmonizes the GMA goals.²⁴

Applying these principles to the rural element in Kittitas County’s amended Comprehensive Plan, it is apparent that there was not a written record for the Board to “ignore.” The sole language in the rural element that could be construed as an explanation of how the rural element harmonizes the GMA goals and meets the planning requirements is the first sentence in section 8.5, which is quoted above. That sentence,

²² See, e.g., *Suquamish Tribe v. Kitsap Cy.*, CPSGMHB No. 07-3-0019c, Final Decision and Order at 43 (Aug. 15, 2007) (looking to entire record) (available at <http://www.gmhb.wa.gov/central/decisions/2007/07-3-0019cSuquamishIIFDO20070815.pdf>, last visited May 13, 2009); *Futurewise v. Pend Oreille Cy.*, EWGMHB No. 05-1-0011, Final Decision and Order at 20-21 (Nov. 1, 2006) (same) (available at <http://www.gmhb.wa.gov/eastern/decisions/2006/05-1-0011FuturewiseFDO11-1-06.pdf>, last visited May 13, 2009).

²³ *Bayfield* at 19.

²⁴ *Citizens for Good Governance v. Walla Walla Cy.*, EWGMHB Nos. 01-1-0015c, 01-1-0014cz, Final Decisions and Order (May 1, 2002) (available at <http://www.gmhb.wa.gov/eastern/decisions/2002/01-1-0014cz-01-1-0015cCITIZENSFORGOODGOVERNANCEFDO5-1-02.htm>, last visited May 13, 2009) (page numbers not available; see discussion of Issue 1).

however, does no more than simply list some of the GMA's goals in abbreviated form, without providing an explanation as to how any of the subsequent "GPOs" address any particular goal or goals, how the goals are balanced or harmonized in light of local circumstances, or whether one or more goals have been given increased emphasis and, if so, why. See AR 216.

In other words, this is not a case in which the Board ignored the County's explanation or rejected it in favor of some preferred analysis—there simply was no explanation in the rural element or elsewhere in the record that complies with the explicit requirement RCW 36.70A.070(5)(a). The Board owes no deference where a county has simply failed to comply with a specific GMA requirement. *Swinomish*, 161 Wn.2d at 424, ¶ 8; *Lewis Cy.*, 57 Wn.2d at 498, ¶ 8 and n.7; *Quadrant*, 154 Wn.2d at 238, ¶ 23; *Thurston Cy.*, 148 Wn.2d at 14; *King Cy.*, 142 Wn.2d at 553.

2. The Board Did Not Erroneously Dismiss Evidence In The Record

Kittitas County argues that it received testimony from three persons stating that three-acre zoning preserves the rural character and promotes agriculture "by allowing farmers to sell off the smallest portion of agriculturally marginal land possible for cash flow purposes in low-

irrigation years” in order to remain economically competitive on the remaining land. Kittitas Cy. Br. at 5. The County contends the Board ignored this evidence. *Id.* at 20, 23, 27. Relying on *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 164 Wn.2d 768, 193 P.3d 1077 (2008), the County argues that the Board must defer to the County’s decision if it is supported by any evidence in the record. Kittitas Cy. Br. at 25-27. Kittitas County misreads the *City of Arlington* decision.

In *City of Arlington*, the county redesignated certain agricultural land of long-term commercial significance for inclusion in an urban growth area. The Growth Management Hearings Board found that the redesignation was not supported by the evidence in the record. The Court of Appeals reversed, because it found the Board committed legal error: “The Board erroneously used *Redmond* as a tool with which to dismiss an important piece of evidence that supported the County’s position.” *City of Arlington*, 164 Wn.2d at 788 (citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998)). The issue decided was not whether the Board’s order was supported by evidence that is substantial when viewed in light of the whole record, but whether the Board committed a legal error in dismissing relevant evidence. Because the Board committed legal error by dismissing relevant evidence that supported the county’s action, the Board therefore

committed legal error by finding the county's action to be noncompliant with the GMA. The *City of Arlington* decision does not stand for the proposition that the Board must defer to a county if there is any evidence in the record supporting the county's decision.

Kittitas County and its supporters have not pointed to any language in the Final Decision and Order in which the Board "dismissed" any evidence. Instead, the core of their argument is that the Board reached a different result than advocated in three documents in the record; ergo, the Board "dismissed" the evidence in those three documents. Their argument fails for two primary reasons.

First, the Board's findings are consistent with two of the three documents advanced by the County.²⁵ The letter from Lila Hanson acknowledges that there had been problems associated with allowing unconstrained small-lot zoning in the rural area; she noted that the County's use of three-acre zoning in the rural area "has left much to be desired" and asserted that small-lot agricultural zoning should be "more carefully described so that it works for farm retention and not as an incentive for hasty land speculation." AR 1746. The PowerPoint presentation by Pat Deneen appears to advocate for clustered smaller lots

²⁵ The three documents are attached as Exhibit A to Kittitas County's brief.

rather than dispersed larger lots in the rural area as a tool to preserve agricultural land.

Consistent with Ms. Hanson's letter, the Board found that the rural element still does not include criteria that limit the use and extent of small-lot zoning in the rural area. AR 2346. The Board's finding also gives voice to Mr. Deneen's concern that a pattern of small-lot zoning without clustering leads to the loss of agricultural lands. Because the rural element contains no provision to ensure clustering to protect agricultural uses in the rural area, it allows precisely the pattern of small-lot zoning Mr. Deneen warned against. See pages 13-27, above.

Second, the Board is not obliged to simply defer to an opinion offered in a document presented to the County. The letter from Urban Eberhart advocates for small-lot zoning without limit, on the premise that the smaller the lot size, the more agricultural land is preserved. The Board reasonably may disagree with Mr. Eberhart and conclude that his opinion conflicts with the statutory mandates in RCW 36.70A.070(5), without impermissibly "dismissing" evidence as described in *City of Arlington*. Were it otherwise, any Board decision that reaches a conclusion different from some piece of evidence in the record could be alleged to have "dismissed" that evidence. That cannot be the law, and it was not the holding in *City of Arlington*.

If it is Kittitas County's argument that the Board must explicitly list or cite each document in the record to show that it has considered the document, that argument should be rejected. Neither the GMA nor the Administrative Procedure Act imposes such a formalistic requirement. *See* RCW 36.70A.300 ("Final Orders"); RCW 34.05.461 ("Entry of Orders). Nor does the *City of Arlington* decision compel that requirement. The Court in *City of Arlington* simply held that evidence in the record may not be rejected for an impermissible legal reason. *City of Arlington*, 164 Wn.2d at 788. That is not what happened here. Applying the clearly erroneous standard, the Board reviewed the evidence in the record and found the weight of the evidence supported CTED's legal arguments. The normal weighing of evidence does not contravene *City of Arlington*.

Finally, BIAW argues that the Board ignored specific criteria in the County's zoning code that limit rezones. BIAW Br. at 14-15 (citing former Kittitas County Code 17.98.020(5)). BIAW does not state where in the record that "evidence" is found. *See King Cy.*, 142 Wn.2d at 553 ("judicial review of the Board's decision is based on the record made before the Board" (quoting *Buechel*, 125 Wn.2d at 202)). That zoning code provision is not cited in Kittitas County's briefing to the Board (*see* AR 1720-43) or in BIAW's briefing to the Board (*see* AR 1252-85). Nor was

it attached to either brief as required by the Board's procedural rules.²⁶

There is no indication the provision was in the record provided to the Board.

Assuming, without conceding, that the zoning code provision BIAW cites was in the record presented to the Board, BIAW does not explain how those criteria limit site-specific rezones in the rural area of Kittitas County. In light of the facts and conclusions in *Henderson* and *Woods II*, as noted above at pages 15-16, it appears those criteria have not imposed any real limit on site-specific rezones. Presumably, the Board was aware of the fact that Kittitas County effectively permitted small-lot zoning anywhere in the rural area, since CTED briefed that argument and cited *Henderson* and *Woods I*.²⁷ Consequently, even if Kittitas County Code 17.98.020(5) had been in the record, and even if BIAW had argued that it effectively limited site-specific rezones in the rural area, the Board also had before it contrary evidence, which it was free to weigh.

²⁶ "Except as otherwise provided in these rules, the evidence in a case shall consist of the exhibits cited in the briefs and attached thereto. . . ." Former WAC 242-02-52001(1) (2004). This requirement was unchanged by a 2008 amendment to the rule. See Wash. St. Reg. 08-10-029 (effective May 29, 2008).

²⁷ See *Henderson*, 124 Wn. App. at 755 (having concluded the site-specific rezone complied with the Comprehensive Plan, that "this fact alone would justify the rezone" (emphasis added)); *Woods v. Kittitas Cy.*, 130 Wn. App. 573, 585-86, ¶ 22, 123 P.3d 883 (2005) (*Woods I*), *aff'd*, 162 Wn.2d 597, 174 P.3d 25 (2007). Only the Court of Appeals decision in *Woods* had issued at the time of the hearing on the merits before the Board.

The Board did not impermissibly “dismiss” evidence in the record presented to it. It did not commit the legal error condemned in *City of Arlington*. Kittitas County and BIAW do not otherwise challenge the sufficiency of the evidence supporting the Board’s decision. They have failed to demonstrate that the Board’s order is not supported by evidence that is substantial in light of the entire record before the Board.

D. This Court Should Vacate The Stay Imposed By The Superior Court

In November 2007, Kittitas County Superior Court granted the County’s motion to stay that portion of the Board’s order requiring the County to take action to achieve compliance as to Issues 1, 10, and 11. CP vol. 2, pp. 306-07. The stay was imposed to maintain the status quo pending appeal. *Id.* Assuming this Court affirms the Board’s Final Decision and Order as to Issue 11, CTED respectfully asks that the Court vacate the stay as it applies to Issue 11.

VI. CONCLUSION

The Eastern Growth Management Hearings Board correctly resolved the challenge to Kittitas County’s amended Comprehensive Plan set forth in Issue 11 of the Final Decision and Order. With regard to Issue 11, therefore, this Court should affirm the Board, remand to the Board for

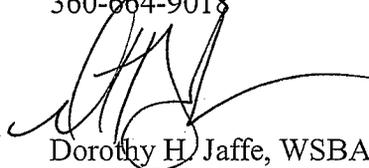
compliance proceedings, and vacate the stay imposed by the Superior Court.

RESPECTFULLY SUBMITTED this 14th day of May, 2009.

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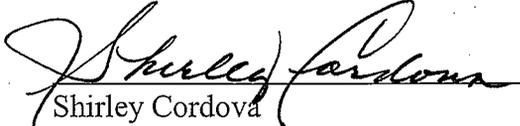
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of May, 2009, at Olympia, Washington.


Shirley Cordova

APPENDIX

1 Regulations; and KCC 17.20, S Suburban Zone and KCC 17.22, S-II Suburban-II
2 Zone.

3 **Issue No. 11:**

4 By amending its Comprehensive Plan without providing for a variety of rural
5 densities, and without providing sufficient specificity and guidance on rural densities to
6 prevent a pattern of rural development that constitutes sprawl, has Kittitas County failed to
7 provide for a variety of rural densities, failed to protect rural character, an otherwise failed
8 to comply with RCW 36.70A.070(5)? (Related to Issue 1 [KCC])

8 **The Parties' Position:**

9 **Petitioner CTED:**

10 The Petitioner contends Kittitas County Ordinance 2006-63, as amended, fails to
11 provide for a variety of rural densities, contrary to RCW 36.70A.070(5)(b). A county may
12 consider local circumstances in establishing patterns of rural densities and uses, but if it
13 does so it "shall develop a written record explaining how the rural element harmonizes the
14 planning goals in RCW 36.70A.020 and meets the requirements of the GMA." RCW
15 36.70A.070(5)(a). According to the Petitioner, the densities provided for in the rural
16 element must be rural densities. "There is no bright line established by the GMA, but with
17 one narrow exception, this Board consistently has found that a pattern of lots smaller than
18 5 acres in size is urban, rather than rural." CTED HOM brief at 5.

18 The Petitioner further contends the County's Comprehensive Plan (CP) relies on the
19 underlying zoning [regulations] to assign density, at least six of which are applied in the
20 rural areas; Agriculture-3, Agriculture-5, Agriculture-20, Rural-3, Rural-5, and Forest and
21 Range-20. CTED understands the County has recently adopted updated zoning regulations
22 in an effort to comply with RCW 36.70A.130.

22 The Petitioner contends the County's Comprehensive Plan does not set meaningful
23 criteria to limit the ability of landowners in the rural area to obtain rezones to smaller lots
24 and more intense uses, and there are no meaningful limits on the discretion of County staff
25 to grant rezone applications. The County appears to believe lots larger than three acres in
26

1 the rural area lead to "rural sprawl." Kittitas Comprehensive Plan, pg. 160. The Petitioner
2 argues that even in locations adjacent to designated natural resource lands, there are no
3 criteria in the rural element that address lot size or limit rezones. The County's
4 Comprehensive Plan, rather than provide for a variety of rural densities, allows a variety, so
5 long as landowners are satisfied with their present lot size, but it also allows them to rezone
6 to three acre lots with no criteria to guide or limit the consideration of a rezone application.
7 The omission of criteria in the Comprehensive Plan to limit applications for rezones to
8 Agriculture-3 or Rural-3 constitutes a violation of the GMA's requirement to affirmatively
9 provide for a variety of rural densities.

10 The Petitioner contends Kittitas County Ordinance 2006-63 fails to protect rural
11 character and is contrary to RCW 36.70A.070(5)(c). The Petitioner argues the measures a
12 county uses to protect rural character must do the following: (i) contain or control rural
13 development; (ii) assure visual compatibility of rural development with the surrounding rural
14 area; (iii) reduce the inappropriate conversion of undeveloped land into sprawling, low-
15 density development in the rural area; (iv) protect critical areas, surface water, and ground
16 water; and (v) protect against conflicts with the use of agricultural, forest, and mineral
17 resource lands designated under the [Act]. RCW 36.70A.070(5)(c).

18 The Petitioner argues the County's Comprehensive Plan fails to provide provisions
19 governing rezone applications to convert lands useful for agriculture or forestry in the rural
20 area to three acre lots for residential development, apart from the most general limitations
21 on rezones, identified in *Woods v. Kittitas County*, 130 Wn. App. 573, 581, 123 P.3d 883
22 (2006). In addition, there are no substantive criteria that could be used to resolve or
23 minimize conflicts between land uses in adjacent zones; no criteria to guide which lands in
24 the rural area should be assigned to each zoning classification; and no criteria that would
25 prevent all or most of the existing variety of rural densities, and the rural character
26 supported by that variety of densities, to be lost.

The Petitioner contends Kittitas County Ordinance 2006-63 continues to allow low-
density sprawl throughout much of the rural area and is contrary to RCW 36.70A.070(5).

1 The Petitioner argues the rural element cannot permit urban development or a pattern of
2 low density sprawl in the rural area, but it may allow for limited areas of more intensive
3 rural development (LAMIRD). RCW 36.70A.070(5)(d), .030(15)(e). They further argue the
4 rural element may use "innovative techniques" to provide for a variety of rural densities and
5 uses, but these too must be consistent with rural character and cannot be characterized by
6 urban growth. RCW 36.70A.070(5)(b); *Citizens for Good Governance v. Walla Walla Cy.*,
7 EWGMHB Nos. 01-1-0015c and 01-1-0014cz, Final Decision and Order at 17 (May 1, 2002).
8 The Petitioner points to RCW 36.70A.020(1), (2); .110(1), which prohibit urban growth
9 outside designated UGAs.

10 The Petitioner contends patterns of smaller lots in the rural area result in
11 uncoordinated use of ground water (individual wells) and greater likelihood of groundwater
12 contamination (individual septic systems), as articulated by the Department of Ecology and
13 Petitioners Kittitas County Conservation, et al. The Kittitas County Conservation, et al. also
14 cited additional scholarly evidence regarding the adverse effects on agriculture and other
15 rural services and values of allowing residential development of two acre to ten acre lots in
16 the rural area.

17 The Petitioners argue it is not the primary purpose of the rural area to accommodate
18 growth. That is the function of urban areas. They also argue the County's continuing to
19 allow patterns of smaller lots in rural areas, such as three-acre lots and is what the GMA is
20 trying to prevent: "the inappropriate conversion of undeveloped land into sprawling, low-
21 density development." RCW 36.70A.020(2). *Moses Lake v. Grant County*, EWGMHB No. 99-
22 1-0016, Order on Remand. The Petitioner further argues the long-term result will be a
23 homogenized rural landscape lacking the diversity and character the GMA seeks to preserve
24 in the rural area, and a violation of the explicit requirements for the rural element mandated
25 in RCW 36.70A.070(5).

26 **Respondent Kittitas County:**

Respondent Kittitas County provided briefing on this issue under Issue No. 1.

1 **Intervenors BIAW, et al.:**

2 The Intervenors contend CTED and KCCC, et al., are unlawfully transferring the
3 burden of proving a variety of rural densities through innovative techniques to Kittitas
4 County. The Intervenors cite a recent Court of Appeals case, *Thurston County v. WWGMHB*,
5 154 P.3d 959 (2007), where the Board ruled against Thurston County because the County
6 failed to demonstrate how innovative techniques create a variety of rural densities. The
7 Court found that the Western Board failed to presume validity and failed to require the
8 Petitioner to prove invalidity. Thus, the Board erred in finding that the Thurston County's
9 Comprehensive Plan and development regulations fail to provide for a variety of rural
10 densities through innovative techniques. The Intervenors argue the Petitioners are
11 repeating the same mistake here by placing the burden on Kittitas County and fail to point
12 to actual violations of the GMA. Moreover, the burden Futurewise and CTED must overcome
13 is the heightened "clearly erroneous" standard. RCW 36.70A.320(3).

13 **Petitioner CTED HOM Reply:**

14 The Petitioners maintain Kittitas County's Comprehensive Plan does not provide for a
15 variety of rural densities, does not protect rural character, and continues to allow low-
16 density sprawl throughout much of the rural area, all contrary to the specific requirements
17 in RCW 36.70A.070(5). The County relies on the zoning code to assign density. That
18 reliance defeats the purpose of the Comprehensive Plan, which is to act as the "central
19 nervous system" of the Growth Management Act's planning requirements, containing data
20 and detailed policies to guide the development of land, consistent with the GMA's goals and
21 requirements.

21 The Petitioners contend the policies governing rural lands are found in section 8.5 of
22 the Rural Element. Only two policies are specific enough to guide the locations and extent
23 of land use designations adopted in the zoning code. There are no other specific, directive
24 policies that address rural density.

25 The Petitioners argue it is not challenging the current mix of rural densities existing
26 in Kittitas County nor that three-acre lots are never allowed in the rural area. The County

1 must follow the requirements in RCW 36.70A.070(5) and the definitions in RCW
2 36.70A.030(15) and (16) to assess whether a particular density or pattern of densities is
3 permissible. RCW 36.70A.020, Goals 1 and 2 fundamentally distinguish the rural area from
4 the urban area by directing that population growth is to be encouraged in urban growth
5 areas, rather than rural areas to avoid sprawling, low-density development and the loss of
6 rural character.

7 The problem is the County's failure to provide specific, directive policies in the CP as
8 required by RCW 36.70A.040 and .070 to guide the development (or amendment) of the
9 zoning code and other development regulations that are to implement the Comprehensive
10 Plan and which must be consistent with it. Therefore, the problem is not one of
11 disagreement between CTED and Kittitas County as to rural policy choices; it is a failure of
12 the CP to comply with the GMA's requirements to include specific, enforceable policies as to
13 the future of rural lands in the County.

14 The County argues its existing rural densities have been approved by the courts.
15 However, the Petitioner disagrees with the County's interpretation of the three Court of
16 Appeals decisions it cites, all three of which were brought under the Land Use Petition Act
17 (LUPA), RCW 36.70C, rather than the GMA. In *Tugwell v. Kittitas County*, *Henderson v.*
18 *Kittitas County*, 90 Wn. App. 1, 951 P.2d 272 (1998) and *Henderson v. Kittitas County*, 124
19 Wn. App. 747, 100 P.3d 842 (2004) *review denied*, 154 Wn.2d 1028 (2005), the Court of
20 Appeals looked at whether Agriculture-3 zoning was consistent with the County's
21 Comprehensive Plan, but the plan's compliance with the GMA was not at issue and was not
22 addressed by the Court. In *Woods v. Kittitas County*, 130 Wn. App. 573, 123 P.3d 883
23 (2005), the Superior Court ruled the rezone to three-acre zoning was inconsistent with the
24 GMA. The Court of Appeals reversed, holding that consistency with a comprehensive plan is
25 properly determined in a LUPA petition, but compliance with the GMA is not.

26 The Petitioners argue even if Kittitas County were to have a current mix of rural
densities that complies with the GMA, the County has failed to comply with RCW
36.70A.070(5)(b) by its failure to adopt specific, directive policies that prospectively

1 maintain a compliant mix of rural densities and set enforceable criteria for determining
2 when and where rezone applications should be approved.

3 In addition, the Petitioners contend the County's Rural Element must include
4 measures that protect rural character by "[c]ontaining or otherwise controlling rural
5 development" and "[r]educing the inappropriate conversion of undeveloped land into
6 sprawling, low-density development in the rural area." RCW 36.70A.070(5)(c). The
7 Petitioners argue that because the County's Rural Element contains an almost complete lack
8 of controls on rural densities, provides no specific, enforceable guidance that can be used
9 meaningfully to assess whether a rezone application or an amendment to the zoning code
10 implements and complies with the Comprehensive Plan, the Rural Element of the Plan fails
11 to comply with RCW 36.70A.070(5)(c).

12 The County also failed to develop a written record explaining how the rural element
13 harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the GMA.
14 The Petitioners do not challenge the County's authority to consider local circumstances in
15 establishing patterns of rural densities and uses, however the County must "develop a
16 written record explaining how the rural element harmonizes the planning goals in RCW
17 36.70A.020 and meets the requirements of the [Act]."

18 **Board Analysis:**

19 The Board agrees with the Petitioners. RCW 36.70A.070(5) Rural element, is a
20 mandatory element of the GMA. The rural element must "provide for a variety of rural
21 densities, uses, essential public facilities, and rural governmental services needed to serve
22 the permitted densities and uses." RCW 36.70A.070(5)(b). This Board agrees there is no
23 bright line as to the size of rural lots, however, densities provided for in the rural element
24 must be rural densities, and not urban in nature.

25 The Petitioners contend the County's Comprehensive Plan fails to protect rural
26 character; fails to provide specific, enforceable guidance to assess whether a rezone
27 complies with the County's Comprehensive Plan; fails to provide provisions in its
28 Comprehensive Plan governing rezone applications to convert lands useful for agriculture or

1 forestry in the rural area to three acre lots for residential development, apart from the most
2 general limitations on rezones; fails to provide specific, directive policies that address rural
3 density; fails to provide for a variety of rural densities; fails to protect the quality and
4 quantity of groundwater; continues to allow low-density sprawl throughout much of the
5 rural area, contrary to the specific requirements in RCW 36.70A.070(5); and relies on the
6 zoning code to assign density.

7 The County has failed to adopt specific, directive policies that maintain a compliant
8 mix of rural densities and set enforceable criteria for determining when and where rezone
9 applications should be approved. Urban-like development in the rural areas also has an
10 adverse effect on agriculture and other rural services and values.

11 The Board recognizes a county may consider local circumstances in establishing
12 patterns of rural densities and uses, but if it does so it must develop a written record
13 explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and
14 meets the requirements of the Growth Management Act. The GMA requires, in part, that
15 counties develop a written record explaining how the rural element harmonizes the planning
16 goals, RCW 36.70A.070(5)(a); that counties provide a variety of rural densities [.070(5)(b)];
17 that counties protect rural character, [.070(5)(c)], and, in particular protect against conflicts
18 with the use of agricultural, forest, and mineral resource lands designated under the Act,
19 [.070(5)(c)(v)].

20 **Hearings Board Member Roskelley** separately believes the following argument
21 presented by the Petitioner is important. His addition, although not supported by the entire
22 Board, is for clarity and not a dissent."

23 Patterns of smaller lots in the rural area result in uncoordinated use of ground water
24 (individual wells) and greater likelihood of groundwater contamination (individual septic
25 systems). Furthermore, this Board has consistently found and the courts have held, as the
26 Petitioners have shown, that a pattern of lots smaller than five acres is urban in nature,
rather than rural.

1 **Hearings Board Member, Mulliken** offers the following statement for clarity, not
2 for dissent, and agrees with the Board's Order finding Kittitas County's CP out of compliance
3 regarding Issue 11, "... Kittitas County failed to provide for a variety of rural densities, failed
4 to protect rural character, and otherwise failed to comply with RCW 36.70A.070(5) (CTED
5 HOM Brief), CTED's Petition for Review does not challenge the current mix of rural densities
6 existing in Kittitas County's zoning code, "This problem is not one of disagreement between
7 CTED and Kittitas County as to rural policy choices; it is a failure of the CP to comply with
8 the GMA's requirements to include specific, enforceable policies as to the future of rural
9 lands in the County." P.6 CTED's HOM Reply Brief.

10 However, by the County's failure to adopt specific, directive policies that maintain a
11 compliant mix of rural densities and set enforceable criteria for determining when and
12 where rezone applications should be approved, the County puts the future of the agriculture
13 industry at risk by allowing site specific development to occur at the whim of the developer
14 and the farmer. The County should continue to look at alternative methods to ensure
15 farmers' economic success and conserve designated agricultural lands of long-term
16 commercial significance. It is this Board member's opinion once the agriculture land is
17 allowed impervious development, the land will never be returned back to agriculture
18 production; and we have only to look at the mistakes made in King County which
19 perpetuated the demise of agriculture production in that County.

18 **Conclusion:**

19 The Petitioner (has carried its burden of proof in Issue No. 11 and the Board finds
20 the County's actions erroneous. The County failed to provide specificity and guidance on
21 rural densities in its amended Comprehensive Plan to prevent a pattern of rural
22 development that constitutes sprawl, protect rural character, and protect against conflicts
23 with the use of agricultural lands of long-term commercial significance. Further, the County
24 failed to develop a written record explaining how the rural element harmonizes the planning
25 goals and meets the requirements of the Act.

1 Accordingly, the Board enters a determination of invalidity and specifically finds each
2 of the four de-designations of Agricultural lands found out of compliance here and the
3 expansions of UGAs for the Cities of Ellensburg and Kittitas invalid and remands Ordinance
4 No. 2006-63 to Kittitas County to take legislative action consistent with this Order.

5 **Conclusion:**

6 The Board finds that a determination of invalidity is properly issued and actions
7 found out of compliance found in Issue Nos. 4 and 6 are invalid.

8 **VII. FINDINGS OF FACT**

- 9 1. Kittitas County is a county located East of the crest of the Cascade
10 Mountains and opted to plan under the GMA and is therefore required
11 to plan pursuant to RCW 36.70A.040.
- 12 2. The County adopted Kittitas County Ordinance No. 2006-63 on
13 December 11, 2006 in a document entitled "2006 Update of Title 20
14 Kittitas County Comprehensive Plan and 2006 Annual Amendment to
15 Title 20 Kittitas County Comprehensive Plan."
- 16 3. The County has failed to have a variety of rural densities that complies
17 with RCW 36.70A.070(5)(b).
- 18 4. The County has failed to adopt specific, directive policies in the CP that
19 prospectively maintain a compliant mix of rural densities and set
20 enforceable criteria to guide the development or amendment of the
21 zoning code or other regulations that are to implement the CP and for
22 determining when and where rezone applications should be approved.
- 23 5. The County does not protect its rural character and does permit low-
24 density sprawl throughout much of the rural area, all contrary to the
25 specific requirements in RCW 36.70A.070(5).
- 26 6. Kittitas County's Urban Growth Nodes are urban development outside
of a designated urban growth area contrary to RCW 36.70A.110.
7. Urban Growth Nodes are not urban growth areas or LAMIRDs.

- 1 8. The County de-designated certain agricultural lands to allow their
2 development for other uses without the analysis on the record as
3 required under RCW 36.70A.060 and .170.
- 4 9. The County expanded the Kittitas and Ellensburg UGAs without
5 conducting a land capacity analysis that shows more land is needed for
6 urban development and without developing a Capital Facilities Plan
7 addressing the expanded UGAs.
- 8 10. Gold Creek has failed to comply with the requirements for a master
9 planned resort and failed to comply with the rural areas requirements.
- 10 11. The County failed to include in its Comprehensive Plan an explanation
11 of how the criteria for the designation of Agricultural Resource Lands
12 are to be considered.
- 13 12. The County has not properly required that all plats, short plats,
14 development permits, and building permits issued for development
15 activities on, or within five hundred feet of lands designated as
16 resource lands contain a notice that the subject property is within or
17 near designated resource lands. Further, the specific notice required by
18 statute for mineral resource lands was not included in the required.

15 **VIII. CONCLUSIONS OF LAW**

- 16 1. This Board has jurisdiction over the parties to this action.
- 17 2. This Board has jurisdiction over the subject matter of this action.
- 18 3. Petitioners have standing to raise the issues raised in the Petition for
19 Review.
- 20 4. Petition for Review in this case was timely filed.
- 21 5. Kittitas County improperly enlarged the UGAs of the Cities of Ellensburg
22 and Kittitas and this action is found out of compliance with the GMA.
- 23 6. Kittitas County improperly de-designated four parcels of Agricultural
24 Resource Lands and this action is found out of compliance with the
25 GMA.
- 26 7. Kittitas County has not properly required that all plats, short plats,
development permits, and building permits issued for development

1 activities on, or within five hundred feet of lands designated as
2 resource lands contain a notice that the subject property is within or
3 near designated resource lands and this action is found out of
4 compliance with the GMA.

5 8. Kittitas County has not included in its Comprehensive Plan an
6 explanation of how the criteria for the designation of Agricultural
7 Resource Lands are to be considered and is out of compliance with the
8 GMA.

9 9. Kittitas County has allowed improper densities in the Rural element of
10 the County when it allowed UGNs, Gold Creek and zonings Agriculture-
11 3 and Rural-3.

12 10. Kittitas County failed to adopt specific, directive policies in the CP that
13 prospectively maintain a compliant mix of rural densities and set
14 enforceable criteria to guide the development or amendment of the
15 zoning code or other regulations that are to implement the CP and for
16 determining when and where rezone applications should be approved
17 and is out of compliance with the GMA.

18 11. Kittitas County has failed to have a variety of rural densities that
19 complies with RCW 36.70A.070(5)(b) and is out of compliance with the
20 GMA.

21 12. Kittitas County failed to revisit and revise its development regulations,
22 in particular KCC 16.09.030, Performance Based Cluster Platting; KCC
23 17.36, Planned Unit Development Zone; Title 16, Subdivision
24 Regulations; and KCC 17.20, S Suburban Zone and KCC 17.22, S-II
25 Suburban-II Zone and is therefore out of compliance with the GMA.

26 13. Kittitas County failed to conduct a proper area-wide or County-wide
analysis of Agricultural lands to comply with RCW 36.70A.060 and .170
and RCW 36.70A(2) and (10) and the criteria in WAC 365-190-050. The
de-designations of the four properties referred to in this Issue are
found out of compliance.

Any conclusion of Law herein after determined to be a Findings of Fact,
is hereby adopted as such.