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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 271234
Kittitas County Cause Nos. 08-2-00195-7; -8-2-00210-4; 08-2-00224-4; 08-2-00231-7; 08-2-00239-2
Consolidated under No. 08-2-00195-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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,

Respondents.

REPLY BRIEF OF KITTITAS COUNTY

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June 16th, 2009

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I. INTRODUCTION

Appellant Kittitas County, respondent before the Growth Management Hearings Board, submits this reply brief supporting its position that Kittitas County's (County) development regulations comport with the Growth Management Act (GMA) Ch. 36.70A RCW. The County replies to Futurewise's arguments to the contrary in three basic areas: (1) The FDO (AR 1193-1248) is not supported by substantial evidence, (2) The FDO liberally construes the GMA to require what it does not, and (3) *Stare Decisis* controls issues of residential density around the Bowers Field Airport.

II. ARGUMENT

A. Standard of Review

At page 3 of its brief, Futurewise cites *State v. Kindsvogel* as providing part of the appropriate standard of review in this matter. That is a possession of marijuana case that has no application in land use or the GMA. The appropriate standard of review of hearings board decisions is set forth in *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.* "A board's order must be supported by substantial evidence, meaning there is a sufficient quantity of evidence to persuade a

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fair-minded person of the truth or correctness of the order." 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). "The board shall base its decision on the record developed by the...county...and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision." RCW 36.70A.290(4). "Substantial weight is accorded to a board's interpretation of the GMA, but the court is not bound by the board's determinations...Finally, it should be noted from the beginning the GMA was riddled with politically necessary omissions, internal inconsistencies, and vague language. (internal citations omitted) The GMA was spawned by controversy, not consensus and, as a result, it is not to be liberally construed." *Thurston County v. WWGMHB,* 164 Wn.2d 329, 341, 342, 190 P.3d 38 (2008).

B. FDO Not Supported By Substantial Evidence

1. Three Preliminary matters

First, at page 15 of its brief, Futurewise seeks to cite to *Woodmansee* as support for its contention that the Hearings Board has previously allowed densities greater than one dwelling unit per five acres in rural areas, thereby not engaging in bright-line determinations. The

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problem with that is that the FDO in the challenge to Kittitas County's comprehensive plan at page 16 (in the record of the companion case linked to this matter before the Court of Appeals) limits *Woodmansee* to its facts and disfavors it by stating that the Hearings Board would not rule in that manner again.

Second, in footnote #2 of its brief, Futurewise states that it "was unable to move the Board to consolidate the two matters, and they thus are separate appeals with closely related issues." If one looks at the record in this case, which is summarized on page 4 of the FDO (AR 1196) in this matter, one will find it was actually the County that moved for consolidation and Futurewise successfully argued against it.

At page 14 of its brief, Futurewise cites to page 8 of the FDO in the comprehensive plan appeal (Hearings Board cause no. 07-1-0004c, which is also on appeal and linked to this matter) for the proposition that Roslyn faces "complete water shutoffs in drought years." Page 8 of the FDO in Hearings Board matter 07-1-0004c is the Hearings Boards' summary of the party's positions and it merely recites Futurewise's assertion about Rosylyn's water situation. There is no finding by the Hearings Board that this is true or even that there is evidence supporting it,

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merely the summary of the nature of Futurewise's assertion. Futurewise is essentially citing to themselves as authority for this.

2. Articles By Mr. Reeder and Mr. Daniels Do Not Support the FDO.

At page 9 of its brief, Futurewise asserts that "The Board's ruling is well-founded in the GMA and evidence in this case." To understand the evidentiary illegitimacy of the FDO, we first need to evaluate the only evidence that is part of the record-the articles by Mr. Reeder (AR 415-422) and Mr. Daniels (AR 424-427). The FDO at AR 1204 finds "that small urban-like lots affect water quality and quantity," citing to pages 9-11 of Futurewise's hearing on the merits brief. That section of their brief relies upon these articles by Reeder and Daniels.

The Reeder article defines "rural sprawl counties" as those that "had relatively high rates of population and housing growth (1980-90); a high percentage of housing not served by a public wastewater system in 1990; a high mean travel time to work in 1990; and a high percentage of commuters that drove alone in 1990." AR 415. Lot size is not a criterion, and is actually never discussed in the article at all. This article cannot therefore serve as the basis for a finding that "small urban-like lots affect

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water quality and quantity," as the Hearings Board did at page 12 of the FDO (AR 1204)(and Futurewise asserts is "well founded in the ...evidence in this case" at page 9 of its brief) when the author does not talk about lot size-small or otherwise.

Similarly, at AR 418, Mr. Reeder states that "Water-related environmental concerns tend to be most problematic where the environment is most sensitive to pollution problems, such as in Mason [County, WA] and Citrus [County, FL] (coastal areas), or in Western locations where water supply is more limited (Lyon [County, NV], Wise [County, TX], and Elbert [County, CO])." Kittitas County is not a coastal area, and with the Yakima River (a major tributary to the Columbia, which is one of the largest river systems in the world) flowing through it, it is not an area where "water is more limited." Again, this article cannot serve as a basis for a finding "that small urban-like lots affect water quality and quantity" because it does not discuss lot size and there is nothing establishing that Kittitas County is either a coastal county or one in an area where "water is more limited" such that this article would be relevant to Kittitas County at all.

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The article by Mr. Reeder is merely "phone interviews with local officials" that freely admits that "this kind of subjective, self-assessment approach has its limitations." AR 415. The document contains no information about Kittitas County, but only discusses Mason County, and never describes allowable densities in Mason County. AR 415-422. Instead of being the paragon of land use that Kittitas County should aspire to (Futurewise brief at 13), Reeder et al state at AR 419 and 421 that "In contrast, Mason was suffering from a legal moratorium on rural growth, while in Mason County's seat, the city of Shelton, has been stymied by inadequate infrastructure." This piece, though in the record, cannot be touted as evidence to support the FDO determination that Kittitas County's three-acre rural densities do not comply with the GMA.

The Hearings Board also relies upon an article in the record (AR 424-427) by Tom Daniels entitled "What to do about rural sprawl" as evidence that further supports the FDO decision that "small urban-like lots affect water quality and quantity" and therefore Kittitas County's three-acre densities in the rural areas violate the GMA. Besides the fact that this article contains no information about Kittitas County, or even anything about Washington at all, it contains language implying that all densities

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between 2 and 10 acres constitute sprawl. AR 424, 425. This would not support the notion that allowing densities greater than one dwelling unit per five acres (as the issue in this case is put) constitutes sprawl under the GMA because the author appears to contend that 5, and even 10 acre densities, constitute sprawl. Similarly, this article cannot serve as a basis for finding that "small urban-like lots affect water quality and quantity" because the author appears to imply that 5-10 acre lots also affect water, but nobody would assert that those lots are small or "urban-like." In fact implying that 5 to 10-acre lots are "urban-like" is the antithesis of Futurewise's position.

In contrast, at AR 426, the author lauds Oregon for creating rural residential zones that put 250,000 acres of the Willamette valley into zoning that "carr[ies] 3- to 5-acre minimum lot sizes" and asserts that this has kept sprawl from developing. In other words, the article applauds putting vast tracts of land in 3-acre density as a means of preventing sprawl. This document cannot, as Futurewise seeks at pages 9, 13, and 14 of its brief, be considered evidence upon which the Hearings Board could base a determination that "small urban-like lots affect water quality and

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quantity," and therefore Kittitas County's three-acre rural densities violate the GMA.

Contrary to Futurewise assertion at page 9 that the FDO is "well-founded in the ...evidence in this case" the FDO, at AR 1204, bases its determination of GMA non-compliance of the County's three-acre zoning upon the mistaken notion that *Tugwell v. Kittitas County* suggests the size of a lot to produce food or other agricultural products is greater than five acres." Contrary to the assertion of Futurewise (brief page 11), *Tugwell* did not find that three-acre farms are too small for farming, but rather that, due to the property being surrounded by lot sizes of three acres or less, "The difficulty of managing the farm has also been increased thereby" thus constituting a change of circumstances justifying a rezone. 90 Wn.App. 1, 9, 11, 951 P.2d 272 (1998). The case stands for what constitutes a change of circumstances to justify a rezone, not what are minimum lot sizes for viable agriculture.

Contrary to Futurewise's assertion that the FDO is "well-founded" the FDO, at AR 1203 and 1204, based its determination of GMA noncompliance of the County's three acre zoning on eight points. Points 1, 3, 4, and 5 are merely quotes to the GMA. Point 2 cannot be based

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upon the administrative record as discussed above regarding the articles by Reeder and Daniels. Point number 6 is a misinterpretation of *Tugwell* as described above. Point number 7 misquotes the FDO in 07-1-0004c. Page three (which is the citation reference supporting point 7) of the 07-1-0004c FDO merely says that Kittitas County failed to provide for a variety of rural densities, not that its provisions for three-acre densities did so, or that those densities could somehow be used "throughout" the county. That point is actually the subject of the County's related appeal. Point 8 is merely an observation about hearings board authority in light of *Gold Star Resorts* and *Viking Properties*. Given that there are only three of these points that could be termed "evidence" (points 2, 6, and 7); that point 7 is the subject of an appeal; that the statement about *Tugwell* is legally incorrect; and that point 2 is not supported by the administrative record, the FDO is not supported by substantial evidence.

At page 12 Futurewsie baldy asserts "Since an average of a little over 6 acres is the smallest size that supports agriculture" without citing to any authority for that proposition. Indeed there is none. Futurewise's use of farm size statistics on page 11 is nonsensical. One could just as well argue from their math that the average Kittitas County farm is 248 acres or

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5.68 acres, and that both are larger than the five-acre minimums they advocate here.[1]

At page 11 of its brief, Futurewise states that *Diehl* stands for the proposition "that residential densities of one housing unit, or more, per 2.5 acres would allow for urban-like development, not consistent with primarily agricultural uses." What *Diehl* actually says is that "Mason County's CP and DRs list the standard rural residential lot size as 5 acres, but they can be as small as 2.5 acres, a size the Board believes is urban. The [rural activity center] standard residential lot is .5 acres, but allows lots as small as .125 acres. These densities would allow for urban-like development, not consistent with primarily agricultural uses." 94 Wn.App. 645, 656, 972 P.2d 543 (1999). It appears clear that the Court

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1 At page 16 of its brief, Futurewise asserts the County's comprehensive plan does not harmonize the goals and requirements of the GMA. While that is an issue in the case linked to this one more than this matter, the County shall respond anyway. The County has explained in writing in its GPO's how three-acre zoning harmonizes the planning goals of the GMA. Specifically, goal #2 (Reduction of sprawl) is harmonized by GPO's 8.3, 8.5, 8.13, and 8.49. Goal #4 (Variety of residential densities) is harmonized in GPO 8.1 and 8.13. Goal #5 (Recognition of regional differences in economic development) is harmonized in GPO's 8.1 and 8.5. Goal #8 (Protection of resource industries such as agriculture and the preservation of agricultural land) is harmonized in GPO's 8.3, 8.5, 8.9, 8.27, 8.28, and 8.30. Goal #9 (Preservation of open space) is harmonized in GPO 8.5. Goal #10 (Protection of the environment) is harmonized in GPO's 8.1 and 8.5. Goal #12 (Public facilities and services) is harmonized in GPO's 8.3 and 8.49. The "other requirements" of the GMA are also harmonized in the County's GPO's. The Variety of densities and uses is harmonized at GPO's 8.1, 8.3, 8.5, and 8.49. The protection of rural character is harmonized at GPO's 8.1, 8.9, 8.27, 8.28, and 8.30.

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was saying that lots from .5 down to .125 acres were "urban-like," not that lots between 2.5 and 5 acres were.

Futurewise's argument regarding *City of Arlington* is fatally flawed. At pages 5 and 6 of its brief, Futurewise argues it was the misuse of the *City of Redmond* to justify dismissing relevant evidence that was the court's grounds for reversal. When the Supreme Court discussed the testimony of the prior owner as to the viability of the property for commercial agriculture, there was no mention of the *City of Redmond* or misuse of its notions around owner intent or interested sources of evidence. 164 Wn.2d at 782. All the Court said was

> There is evidence in the record supporting the County's determination on this point, and the Board wrongly dismissed this evidence. **Because this evidence supports the County's finding that the land at Island Crossing has no long-term commercial significance for agricultural production, the Board erred in not deferring to the County's decision to redesignate the land for urban commercial use.** *Id.* (emphasis added).

Contrary to Futurewise's position, the Court in *City of Arlington* held that failure to defer to a county decision supported by evidence in the record is error because, by virtue of there being evidence in the record before the county, that decision was not clear error. *Id.* And after explaining, at 164

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Wn.2d at 788, that hearings boards cannot use *City of Redmond* to get around this notion, the Court reiterated that concept when it said

> To the extent this evidence supports the County's conclusion that the land was not of long-term commercial significance to agricultural production, and we find that it does, **the Board would be required under the GMA to defer to the County and affirm its decision** redesignating the land urban commercial. *Id.* (emphasis added).

Futurewise at page 6 of its brief argues that, by ignoring the evidence and pretending that it does not exist, the Hearings Board did not actually dismiss that evidence and so the holding in the *City of Arlington* does not apply. This is not a credible argument because, at 164 Wn.2d page 774, the Supreme Court said that the fault committed by the hearings board was that it "failed to consider important evidence in the record." Whether that failure to consider was accomplished by not taking it seriously and dismissing it (as was done in *City of Arlington* at pages 782 and 788) or ignoring its existence as in this case makes no difference. It still amounts to a failure to consider evidence in the record. The Hearings Board cannot escape its obligation under the GMA to defer to County decisions supported by evidence in the record by ignoring that evidence.[2]

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2 At page 6 of its brief, Futurewise states that the Hearings Board actually "explicitly refers to the evidence" but does not cite to where that reference is found. That is understandable because there is no such explicit reference to any evidence in this case in

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Futurewise, at page 9 of its brief seeks to distinguish the recent *Thurston County* case based upon who framed the issue or who drafted the question presented. In *Thurston County v. Western Washington Growth Management Hearings Board,* at footnote 20, the Washington Supreme Court stated that "Although the Board did not explicitly adopt a five acre bright-line rule, such a rule was implicit in its decision because of the way the issue regarding rural densities was framed. The Board framed the issue as to whether the County's 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.'" 164 Wn.2d 329, 358, 190 P.3d 38 (2008). This is precisely what occurred in this case. There is no support in the *Thurston County* case for the notion that who framed the issue was relevant, but merely that it was framed and ruled on by the hearings board in a manner that required a bright line rule. Similarly, contrary to Futurewise's assertion on page 8 of its brief, the Supreme Court made no acknowledgment of the Eastern Board being free from bright-line rulings.

C. GMA Is To Be Strictly Construed

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the FDO.

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As the Supreme Court stated in *Thurston County v. WWGMHB,* "Finally, it should be noted from the beginning the GMA was riddled with politically necessary omissions, internal inconsistencies, and vague language. (internal citations omitted) The GMA was spawned by controversy, not consensus and, as a result, it is not to be liberally construed." 164 Wn.2d 329, 341, 342, 190 P.3d 38 (2008). In other words, the GMA is to be strictly construed.

1. One-time Lot Split Comports With GMA

RCW 36.70A.177(2) says that "Innovative zoning techniques a county or city may consider include, but are not limited to…"[3] However, the Hearings Board said that the County's one-time lot split provision was "not one of the listed innovative techniques in RCW 36.70A.177(2)(c)" and it creates non-conforming lots that exceed the permitted density. AR 1235. The GMA is to be strictly construed, and by limiting the list of innovations, when the statute says "include[ing], but not limited to," the Hearings Board is liberally construing the GMA to say something other than what the legislature clearly wrote.

3 Similarly RCW 36.70A.090 states that comprehensive plans can use innovative techniques "including but not limited to" those enumerated.

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As a rejoinder to Futurewise's arguments beginning at page 33 of its brief, the County merely reminds the Court that RCW 36.70A.177(2)(d) authorizes the creation of one-acre lots in the agricultural zone as an innovative zoning technique. Kittitas County's provisions will not create anything denser than two lots per eight or ten acres, depending upon the zoning. AR 65, 75.

2. Kittitas County Has Appropriate Rezone Criteria

Beginning on page 18 of its brief, Futurewise argues that the County lacks criteria to regulate its three-acre zoning. As the County pointed out, both to the Hearings Board and in arguing this appeal, to get land demarcated as three-acre zoning one needs to meet all seven rezone criteria found at KCC 17.98.020(7) and the amount of rural lands that can be in either the County's three or five-acre densities is limited by KCC 17.04.060. The problems with ignoring and discounting this evidence, as the Hearings Board has done, are two-fold.

First, by ignoring these code provisions, rather than deferring to the County decision made in reliance on them, the Hearings Board committed the same error committed by the Hearings Board in *City of Arlington*. Since there was evidence in the record supporting the GMA

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compliance of the County's three-acre densities, the Hearings Board was required under the GMA to defer to that decision. 164 Wn.2d at 782, 788.

Second, by finding that the GMA requires the County to do more in regulating its three-acre zoning than it does, when the GMA actually contains no such specific language, the Hearings Board is liberally construing the GMA to say something that the legislature did not write. The GMA is to be strictly construed (164 Wn.2d at 341, 342) and does not contain any more detailed requirement for regulating zoning in rural areas than what the County currently provides through its rezone process and its limitations on percentage of small-lot zoning in rural areas-respectively in KCC 17.98.020(7) and KCC 17.04.060. To require more, and fault the County for not providing for it, is to liberally construe the GMA to require more than the legislature provided.

3. Kittitas County's Conditional Use Permit Process Provides Appropriate Controls.

Beginning at page 20 of its brief, Futurewise argues that the Hearings Board's determination that the County's Conditional Use Permit (CUP) process had to be contained within the chapters regulating rural and agricultural uses was authorized under the GMA and that the Hearings

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Board's ignoring of the County's CUP regulation, because it was found elsewhere in the code, was proper. This creates the same two-fold problem described above related to the Hearings Board's determination about the County's rezone criteria.

First, by ignoring the County's CUP process and criteria, simply because it was not located in the code sections dealing with rural and agricultural use, the Hearings Board ignored evidence in the record that supported a County decision as being GMA compliant in the same manner criticized by the Supreme Court in *City of Arlington*. Instead, the Hearings Board was actually required under the GMA to defer to the County's decision to use its CUP process as a means of determining and authorizing GMA-compliant uses in its rural and agriculturally designated areas. 164 Wn.2d at 782, 788.

Second, the Hearings Board is liberally construing the GMA to require something that it does not require and to give a hearings board authority it does not have. The Hearings Board found the County out of compliance with the GMA because the County chose to house its CUP regulations in a different part of the code than where it housed its regulation of rural and agricultural land uses and cross-reference it, rather

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than have provisions for CUPs in rural and agricultural areas in the code chapters otherwise regulating rural and agricultural areas. AR 1212. Instead of looking in that other cross-referenced portion of the County code and making a determination based on the entire record before the board as the GMA requires (RCW 36.70A.320(3)), the Hearings Board ignored those sections of the code not found in the chapters on rural and agricultural lands; found the County to have violated the GMA; and required it to place those regulations in a different chapter of the County code. AR 1212. There is no GMA provision requiring regulations be in one chapter of the code or another, nor any authorization for hearings boards to dictate where counties place their code provisions. By finding the County to have violated the GMA simply because it placed its regulation of CUP's in a different portion of the code (a portion where the Hearings Board refused to look) and requiring these code sections be in the same place, the Hearings Board is liberally construing the GMA to require something it does not require and construing the GMA to grant hearings boards authority that they do not have.

4. Hearing Board's Determinations Regarding Land in Common Ownership and Water is Contrary To the Law.

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Contrary to Futurewise's arguments, beginning at page 29 of its brief, the Hearings Board's requirement that the County require disclosure of land in common ownership in land development applications is not authorized by the GMA and can have no effect upon the use of exempt wells.

Nowhere in the GMA is there a requirement that lands in common ownership be disclosed as part of development applications. The GMA is to be strictly construed. To find the County out of compliance with the GMA for not having such a requirement, and requiring that the County have one, is to liberally construe the GMA to require something it does not require and to grant authority to a hearings board that it does not have.

Such a requirement would do nothing to promote the GMA goal of protecting ground and surface water anyway. First, the recording statutes already are deemed to give us knowledge of who all property owners are, so the requirement of disclosing land in common ownership adds nothing new. RCW 65.08.030, 65.08.070. Second, the disclosing developer, under *Campbell & Gwinn,* would only be limited to one 5,000 gallon per day exempt withdrawal if (1) the disclosed lands met the criteria of "a development" **and** (2) the developer was making provision for water in

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the development, rather than merely creating lots and leaving water provision to the ultimate individual lot purchasers. *State of Washington v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1,3, 10, 12, 13, 14, 43 P.3d 4 (2002). Even if both criteria from *Campbell & Gwinn* are met, nothing keeps lot owners, otherwise served by water systems, from also drilling exempt wells. Hence, contrary to the arguments of Futurewise beginning at page 29 of its brief, the requirement of disclosing land in common ownership, even if allowed under the GMA (which it is not), would have no effect upon the use of exempt wells.

D. *Stare Decisis* Applies and County Regulates Density in Airport Overlay Zones.

Stare Decisis "means no more than the rule laid down in any particular case is applicable only to the facts in that particular case or to another case involving identical or substantially similar facts." *Floyd v. Department of L&I*, 4 Wn.2d 560, 565, 269 P.2d 563 (1954). At page 15 of the FDO in *Son Vida II v. Kittitas County,* EWGMHB 01-1-0017 (found at AR 989-1134), the Hearings Board stated "The densities of uses permitted under the Airport Overlay Zone are appropriate when placed in the context of location of the airport, the Countywide Planning Policies

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and the small percentage of the UGA that is impacted." Hence, the question of density (which by definition is dwelling units per acre, and so by definition contemplates residential uses) has already been litigated with the result being that three-acre densities were determined GMA-compliant.

Futurewise's argument, beginning at page 40 of its brief, that *stare decisis* does not apply under the first *Thurston County* case, is incorrect. Contrary to Futurewise's representation, the Court of Appeals held merely that "the County presented no authority to support its argument that the doctrine of *stare decisis* applies." 137 Wn.App. 781, 799, 154 P.3d 959 (2007). That is because the prior decision whose decision the county sought to argue had *stare decisis* effect upon the matter then before the court, concerned different UGA's and different OFM population projections-in other words it was factually completely different-rather than, as Futurewise appears to argue, that the doctrine of *stare decisis* does not apply to hearings board decisions. As explained in the preceding paragraph, the question of appropriate residential densities allowed around the Bowers Field airport has already been litigated before the Hearings Board, and it determined that the County's regulations complied with the

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GMA. Because the argument in the prior action was (1) the County contending its densities were GMA compliant, (2) Son Vida contending the densities needed to be denser, and (3) the Hearings Board determining that the densities were GMA compliant (AR 989-1134), Futurewise's argument that *stare decisis* does not apply now because they are contending that the densities are too dense (brief beginning at page 40),rather than too sparse, makes no sense. If the Bowers Field densities were determined GMA compliant, whether the challenge was that they needed to be denser or less dense, they were determined GMA compliant and *Stare Decisis* bars re-litigating the issue.

Futurewise continues to ignore the fact that the County does regulate residential density in the airport overlay zones and instead misrepresents to this Court that the County does not. Futurewise's brief beginning at page 45. As has been pointed out both to the Hearings Board and in briefing, KCC 17.58.040 states that the overlay zones are also governed by the underlying zoning, and in case of a conflict, the stricter controls. Hence, if the airport overlay zone is silent as to density, then the density provisions of the underlying zoning controls. So it is false to assert that there are no density controls in the County's airport overlay

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zone because there is always an underlying zoning designation whose density provisions govern.

III. CONCLUSION

Kittitas County provides for appropriate rural densities. The County's provisions for conditional uses provides the needed standards for the conditional uses possible in the difference zoning designations. The County does not violate the GMA's requirement to protect water resources by not requiring disclosure of land in common ownership in development application as such a requirement would not address the situation. Finally, the County's regulation in its airport overlay zone has already been determined GMA-compliant and the determination to the contrary ignores evidence in the record and fails to grant the level of deference owed to the County's regulation. For these reasons, the Hearings Board's Order should be reversed as it is not supported by substantial evidence, is a misapplication of the law, and is beyond the Hearings Board's authority.

Respectfully submitted this 10th day of June, 2009.

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