O'Donnell, Mary Beth

CP16#0309

From: LaRocque, Linnea on behalf of Barnes, Ed
Sent: Tuesday, September 30, 2014 10 05 AM
To: Orjiako, Oliver
Cc: O'Donnell, Mary Beth, Tilton, Rebecca
Subject: FW. "consistent with existing and planned land use patterns "

for the file

From: Carol Levanen [mailto:cnldental@yahoo.com]
Sent: Monday, September 29, 2014 11:47 PM
To: Sillıman, Peter; Madore, David; Mielke, Tom; Barnes, Ed; Carol Levanen; Susan Rasmussen; Leah Higgins; Rick Dunning; Rita Dietrich; Jerry Olson; Fred Pickering; Jim Malinowski; Frank White; Benjamin Moss; Lonnie Moss; Melinda Zamora; Nick Redinger; Curt Massie; Marcus Becker; Clark County Citizens United Inc.
Subject: Fw: "consistent with existing and planned land use patterns."

bright line five acre rule rejection, existing rural parcel size recognition,

----- Forwarded Message -----
From: "sprazz@tds net" <sprazz@tds net>
To: cnldental@yahoo com
Sent: Monday, September 29, 2014 3 08 PM
Subject: "consistent with existing and planned land use patterns "

http.//www.courts wa gov/content/Briefs/A02/396017%20respondent's.pdf#search=failed%20to%20recoginize%20parcelization

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

NO. 39601-7-II

CLALLAM COUNTY,

Respondent,

vs.

WESTERN WASHINGTON GROWTH MANAGEMENT

HEARINGS BOARD, ET AL.,

Appellants.

Clallam County Superior Court Cause No. 08-2-00646-1

CLALLAM COUNTY'S AMENDED RESPONSE BRIEF

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   Issue: Does RCW 36.70A.130 allow Growth Board review of unamended portions of a Comprehensive Plan on non-mandatory updates of the Capital Facilities Plan within an unamended Urban Growth Area?

2. The Superior Court was correct that the Growth Board erred in finding that the County's current choice of 2/1 du. acre in the Carlborg non-municipal UGA, pending implementation of the sewer service element of the CFP, was non-compliant and invalid. [Futurewise's Assignment of Error No. 1]

   Issue: Do RCW 36.70A.070(3) and 36.70A.110 allow the Growth Board to prohibit septic system service for UGA designations and require full implementation of sewer service as an element in all UGA CFP's?

3. The Superior Court was correct that the Growth Board erred in declaring County's Rural Lands Report did not fully supports County's choice of R2 and RW2 densities as consistent with the County's rural character. [Futurewise's Assignment of Error No. 2]

   Issue: Do RCW 36.70A.020 and 36.70A.110 allow the Growth Board to substitute its analyses and interpretations for County's rural density analyses and decisions under County's Rural Lands Study and supporting documentation from public hearings before the County?

4. The Superior Court was correct in rejecting Futurewise's belated 'internal consistency' challenge of the County's comprehensive plan and development regulations for rural lands, where County's creation of R2/RW2 densities as consistent with its rural planning. [Futurewise's Assignment of Error Nos. 4 & 5)

   Issue: Can Futurewise for the first time on appeal raise new argument and challenges to County's rural density analyses and decisions under County's Rural Lands Study and supporting documentation from public hearings before the County?

II. COUNTER STATEMENT OF THE CASE

This case comes before the this Court pursuant to Clallam County's ("County's") successful Superior Court appeal of the Western Washington Growth Management Growth Board's ("Growth Board's") *Final Decision and Order ("FDO")* entered on April 23, 2008, and its *Order on ... Reconsideration ("Reconsideration")* entered on June 9, 2008.[1] Pursuant to those agency orders, County was found both 'invalid' and non-compliant with the Growth Management Act. On partial-appeal to the Superior Court, the Court overturned the Growth Board's decisions as to the Carlsborg non-municipal UGA and as to County rural lands zoning. [2]

The Growth Management Act (GMA) requires counties to review their designated urban growth areas ("UGAs") every ten years. RCW 36.70A.130(3). Clallam County conducted its update review in response to the foregoing GMA requirements from 2004 through 2007.[3] The County's review included: public hearings, analysis by the Clallam County

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[1] CP 482, IR 35, Final Decision & Order ("FDO") *Order on Reconsideration* addressed primarily LAMIRD issues of a non-participating party to this appeal.

[2] CP 123, *Memorandum Opinion*. Clallam County Superior Court (06/26/09), attached hereto as Appendix "A".

[3] CP 482, IR 35 *FDO*,pp. 3-5 (Procedural History); *County's Opening Brief*, CP 236

Department of Community Development ("DCD"), and other measures which led to the issuance of recommendations by the Clallam County Planning Commission; performance of an urban growth area review resulting in the publication of the report entitled Clallam County's Urban Growth Area Analysis and 10 Year Review, DCD (May 2007) ("UGA Report"); [4] and preparation of a detailed analysis of the County's rural land element and zoning and proposals for designating limited areas of more intensive rural development, published in the reports entitled Clallam County Rural Lands Report, DCD (2006 and Suppl. 2007) ("*Rural Lands Report*"),[5] and Clallam County LAMIRDs Report (Dec. 2006; Suppl. 2007) ("LAMIRD Report")[6].

The appellant herein, Seattle-based special interest group Futurewise, in its Petition for Review before the Growth Board had challenged the County's determination that its update review complied with the GMA. Futurewise argued that Clallam County zoning densities greater than one dwelling unit per five acres ("1/5 du./ac.") were not rural and this zoning generally had to be prohibited within rural areas.[7] Futurewise also challenged the sewerage and police planning policies of a non-municipal (unincorporated) UGA of Carlsborg, a commercial, retail and population center located on and about U.S. Hwy. 101, between the cities of Sequim

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[4] CP 228, Appx. "A".
[5] CP 228, Appx. "B".
[6] LAMIRDs are not part of this appeal.
[7] CP 482, IR 35 *FDO*, pp. 9-10, 53-54

and Port Angeles.[8]

County's briefing and hearing presentation before the Growth Board and Superior Court, introduced extensive evidence supporting its conclusion that its rural densities were consistent with Clallam County's rural character and the GMA. The County submitted a *Rural Lands Report*, noted above, which explained how the County's unique rural character, as expressed within its Comprehensive Plan polices (CPs) and Development Regulations (DRs) harmonized the GMA planning goals and requirements.[9] Nevertheless, by improperly framing its role as factual arbiter of "what is the appropriate density within the rural areas of Clallam County," the Growth Board concluded that the rural character in all areas of Clallam County should be no more than 1/5 du., and any rural zoning with a maximum density of less than 1 du per 5 acres was noncompliant with the GMA.[10] The Growth Board's decision gave no consideration and no deference to County's choice of facts, calculations or criteria in setting a variety of rural densities. Instead, the Growth Board obsessed over average, countywide farm sizes, existing countywide acreage numbers for a given zoning density, and other non-deferential and erroneous factors.[11]

In its briefing and hearing presentation on the Carlsborg non-municipal UGA before the Growth Board and Superior Court, County introduced extensive evidence regarding the history and planning of the community of

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[8] CP 482, IR 35 *FDO*, pp. 9-10, 71, 73.
[9] CP 228, Appdx "B"; CP 482, IR 23, Ex 78, Appnx. "B".
[10] CP 482, IR 35 *FDO*, p. 97, No. 30.
[11] CP 482, IR 35 *FDO*,pp. 59-61

Carlsborg—designated and zoned as a non-municipal UGA ten (10) years ago.[12] The Carlsborg Capital Facilities Plan ("CFP") for this UGA documented the planning for municipal sewer service, addressed engineering and financing strategies for providing sewer service to Carlsborg in the near term, and provided upgraded septic system requirements and density-limiting environmental regulations to 'bridge' the time span until the municipal sewer service became fully operational.[13] Specifically, the County adopted development regulations limiting density in the area to two dwelling units per acre ("2/1 du"), or a density that per se can be safely service individual septic systems while a municipal sewer plan is being implemented.[14] The Health Officer and Board of Health also upgraded septic system standards applicable to this area consistent with CFP policies.[15]

Importantly, since this case has gone before the courts, County chose to rescind RW2/R2 zoning of less than one dwelling unit per 2.4 acres outside of LAMIRDs, but subsequently adopted "innovative zoning" techniques to establish 2.4 acre zoning within specific rural areas of the County. Over the objections of Futurewise, these latest rezonings of rural lands were deemed in compliance with GMA by the Growth Board.[16]

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[12] CP 482, IR 22, Carlsborg CFP Sewer Study cited in CP 228 & CP 164

[13] CP 228, Appx. "C".

[14] *Id.*

[15] *Id.*, as cited in CP 228 & CP 164

[16] *Dry Creek Coalition and Futurewise v.Clallam County*, WWGMHB No. 07-2-0018c (*Compliance Order-LAMIRDs & Rural Lands*, November 3, 2009) attached hereto as Appendix "B".

RW2/R2 zoning remains a potential rural zoning pending the outcome of these appeals.

III. STANDARD OF REVIEW

A. Growth Management Act.

County begins with an overview of the Growth Management Act ("GMA") with a particular emphasis on the provisions of that statute pertaining to local deference. In 1990, the Washington State Legislature passed the Growth Management Act, Ch. 36.70A RCW. The Legislature found that "uncoordinated and unplanned growth" posed a threat to the "environment, sustainable economic development, and the health, safety and high quality of life enjoyed by residents of this state." RCW 36.70A.010. To address the negative consequences of "uncoordinated and unplanned growth," the Legislature required counties of certain populations to undertake land use planning. RCW 36.70A.040.

The GMA is implemented by local governments through the adoption of comprehensive plans and implementing regulations. The GMA planning process follows a 'bottom up' approach. WAC 365-195-060(2). Instead of creating a statewide zoning authority or planning board, as other states have done, the GMA left the implementation to local government. That process mandates public participation in the development of comprehensive plans and development regulations implementing those plans. RCW 36.70A.140. To guide local governments in the preparation of comprehensive plans and development regulations the Legislature

identified 13 planning goals, but expressly refrained from imposing any order or priority of goals upon the local jurisdictions. RCW 36.70A.020.

The Legislature recognized that local governments needed the flexibility to enact comprehensive plans and development regulations that both complied with the goals of the GMA and took into account the unique characteristics of a particular locality. This legislative intent is expressly set forth in the provisions of the GMA establishing Growth Boards. The growth boards were established to hear and determine petitions from appropriate persons alleging that a county's comprehensive plan or development regulations were not in compliance with requirements of the GMA. RCW 36.70A.250-.2301. Comprehensive plans, development regulations, and amendments thereto, are presumed valid upon adoption. RCW 36.70A.320. It is the challenger of County regulations who bears the burden of establishing non-compliance with the GMA—and not the County proving compliance. RCW 36.70A.320(2).

The Legislature originally provided for a standard of Growth Board review based on the preponderance of evidence standard. In 1997, however, it amended the GMA to provide that the "board shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter." RCW 36.70A.320(3). The Legislature expressly provided a statement of intent and finding for imposing upon the growth boards the "clearly erroneous" standard on review of local governmental actions under GMA.

> In amending RCW 36.70A.320(3) . . . *the legislature intends that the boards apply a more deferential standard of review* to actions of counties and cities than the preponderance of evidence standard provided for under existing law.

RCW 36.70A.3201 (emphasis added).

The Legislature went on to state the reasons why local governments planning for the growth of their communities are entitled to such deference.

> In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth consistent with the requirements and goals of this chapter. *Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances.* The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future, rests with that community.

Id. (emphasis added).

County submits that it has complied with the goals of the GMA in full consideration of the local circumstances in Clallam County. The Growth Board erroneously interpreted and applied the GMA and disregarded the Legislature's command to grant deference to County decisions in implementing GMA goals. Rather, the Growth Board has imposed its own view of the GMA upon County as to rural lands densities, and the densities and planning for urban services within the Carlsborg non-municipal UGA.

B. Standard of Review under Growth Management.

The Washington Administrative Procedures Act ("APA") governs judicial review of challenges to Growth Board actions.[17] Under the APA, the "burden of demonstrating the invalidity of agency action is wholly upon the party asserting invalidity."[18] The statute sets forth nine grounds for relief from an agency decision, of which County asserts five:

> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
>
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
>
> (d) The agency has erroneously interpreted or applied the law;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; [or] ...
>
> (i) The order is arbitrary or capricious.[19]

Appellantss bear the burden of establishing these grounds as the bases for remand, as identified and explained below:

First, agency jurisdiction is limited. "An agency may only do that which it is authorized to do by the Legislature."[20] Any agency attempt to

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[17] *Quadrant v Central Puget Sound Growth Management Growth Board*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005).

[18] RCW 34 05.570(1)(a).

[19] RCW 34.05.570(3).

[20] *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 226, 858 P.2d 232 (1993).

exercise authority outside its statutory grant is *ultra vires* and void.[21]

Second, the Growth Board's Rules of Practice and Procedure are set forth at Ch 242-02 WAC. The Growth Board's Rules include specific provisions that mirror language of the statute. Violations of those statutory provisions by the Growth Board also constitute 'reversible' violations of Growth Board Rules.

Third, this Court reviews errors of law under RCW 34.05.570(3)(d) *de novo*.[22] In doing so in APA appeals that originate from Growth Board decisions, this Court must accord deference to County planning decisions, rather than to Growth Board's decisions, as long as those local decisions are consistent with the goals and requirements of the GMA.[23] "[T]he GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs."[24] The Growth Board has defined consistency to mean that "provisions are compatible with each other – that they fit together properly. In other words, one provision may not thwart another."[25] In the context of the deference due to the County, this Court must defer to County decisions as long as those decisions do not thwart the GMA. This deference "supersedes deference granted by the APA and courts to

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[21] *McGuire v State*, 58 Wn App 195, 199, 791 P.2d 929 (1990), *cert denied*, 499 U.S. 906 (1991).
[22] *Quadrant*, 154 Wn.2d at 233.
[23] *Quadrant*, 154 Wn.2d at 237.
[24] *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).
[25] *Chevron U.S.A. v. CPSGMHB*, 123 Wn. App. 161, 167, 93 P.3d 880 (2004).

administrative bodies in general."[26] Growth Boards and parties disfavoring *Quadrant v. Central Puget Sound GMHB,* 154 Wn.2d 224, 110 P.3d 1132 (2005), for its local-deference *dicta* attempt to extract from *Lewis County v WWGMHB*, 157 Wn.2d 488, 498, 139 P.3d 1100 (2006) the single phrase that "...the [Growth] Board itself is entitled to deference...".[27] Having participated in briefing and presentation of *Lewis County*, undersigned counsel would respectfully disagree 'this' was the intended 'message' to the Growth Boards.[28] Rather, what those parties and the Boards have heard, but continue to fail to heed, is the message recently sent to the Eastern Growth Board by Division III, Court of Appeals, that:

> ...[Growth Boards] **must find compliance unless they determine a county action is "clearly erroneous in view of the entire record before the board** and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). An action is "clearly erroneous" if the board has a "'firm and definite conviction that a mistake has been committed.'" *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.,* 157 Wn.2d 488, 497, 139 P.3d 1096 (2006) (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993))....
>
> The parties disagree over the amount of deference owed to the County's decision...In *Quadrant Corp. v. Central Puget Sound Growth Management Hearings Board*, the Washington Supreme Court granted deference to the agency's interpretation of the law in

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[26] *Quadrant*, 154 Wn.2d at 238.

[27] *Futurewise's Response Brief*, at p. 5

[28] *Lewis County* is of far more significance as being one of a series of Supreme Court cases reigning-in arbitrary Growth Board 'edicts' on GMA regulations, which in the case of *Lewis County* involved overturning nearly six (6) years of WWGMHB decisions demanding that rural counties must "catalog" and set aside all 'prime soils' lands as agricultural lands of long term significance, regardless of market factors or development pressures (the "possibility of more intense uses") as determining whether it had enduring commercial qualities for farming. 157 Wn.2d at 501

cases where the agency had a specialized expertise in the subject area, but also determined that the courts were not bound by the agency's interpretation of a statute. 154 Wn.2d 224, 233, 110 P.3d 1132 (2005) (quoting *City of Redmond*, 136 Wn.2d at 46).

Specifically, in *Quadrant,* the Supreme Court held that "**deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general.**" *Id.* at 238. The court also held that **while "this deference ends when it is shown that a county's actions are in fact a 'clearly erroneous' application of the GMA, we should give effect to the legislature's explicitly stated intent to grant deference to county planning decisions.**" Id. [Emphasis added]

Yakima County vs. Eastern Wash. GMHB, 146 Wn. App. 679, 685-87, 192 P.3d 12 (2008). And as our Supreme Court most recently commented about the Growth Boards and GMA:

The GMA provides a "framework" of goals and requirements to guide local governments who have "the ultimate burden and responsibility for planning." RCW 36.70A.3201. Great deference is accorded to a local government's decisions that are "consistent with the requirements and goals" of the GMA....
...[and] that from the beginning the GMA was " 'riddled with politically necessary omissions, internal inconsistencies, and vague language.'" *Quadrant Corp.*, 154 Wn.2d at 232 (quoting Richard L. Settle, Revisiting the Growth Management Act: Washington's Growth Management Revolution Goes to Court, 23 Seattle U. L. Rev. 5, 8 (1999)). The "'GMA was spawned by controversy, not consensus'" and, as a result, it is not to be liberally construed. *Woods v. Kittitas County*, 162 Wn.2d 597, 612 n.8, 174 P.3d 25 (2007) (quoting Settle, supra, at 34).

Thurston County v. WWGMHB., 164 Wn.2d 329, 336, 341-2, 190 P.3d 38 (2008). See also, *Spokane County v. City of Spokane*, 148 Wn. App. 120, 125, 197 P.3d 1228 (2009):

"... we strictly construe the GMA because it was controversial legislation. [*Thurston County*]. It consequently includes some

language that is deliberately vague. Id. It also includes some intentional omissions and inconsistencies. *Id.*"

Fourth, substantial evidence under RCW 34.05.570(3)(e) is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order."[29] Growth Board disagreements with County choices in local planning being based on 'this' evidence and not 'that' evidence, and even disagreements as to how County weighed the evidence, are not grounds for finding error with County's approach.[30]

And **fifth,** as used in the APA, "arbitrary or capricious" means "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary or capricious even though a reviewing court may believe it to be erroneous."[31] The Court shall not defer to a Growth Board's interpretation of the GMA where that Board has misinterpreted the statute or exceeded its authority:

> Although a court will defer to an agency's interpretation when that it will help the court achieve a proper understanding of the statute, "it is ultimately for the court to determine the purpose and meaning

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[29] *City of Redmond v Central Puget Sound Growth Management Growth Board*, 116 Wn. App. 48, 54, 65 P.3d 337 (2003) (quoting *City of Redmond v. Central Puget Sound Growth Management Growth Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)).

[30] See, e.g., *City of Arlington v Cent Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 782, 193 P.3d 1077 (2008)("There is evidence in the record supporting the County's determination...and the [Hearings] Board wrongly dismissed this evidence. Because this evidence supports the County's finding...the Board erred in not deferring to the County's decision...The Board erroneously used City of Redmond [and the contrary claims of now, *Futurewise*]...to dismiss of an important piece of evidence that supported the County's position.")

[31] *Id*

> of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law."

Clark Cy. Nat'l Res. Council v. Clark Cy. Citizens United, Inc., 94 Wn. App. 670, 677, 972 P.2d 941, *rev den.*, 139 Wn.2d 1002 (1999) (FN and citations omitted). The Growth Board made erroneous interpretations, discussed below, in finding noncompliance and invalidity.

Futurewise miscites *Whidbey Envtl. Action Network ("WEAN") v. Island County*, 122 Wn.App. 156, 168, 93 P.2d 885 (2004) as holding a reviewing Court may alchemize a valid Growth Board decision from an otherwise clearly erroneous ruling. Such a review standard would undermine both the deference afforded to the Growth Board in interpreting general GMA standards and the deference and discretion afforded local governments in weighing and applying the factual record to the general policies and standards of the Boards (as discussed above). Rather, *WEAN* holds that one invalid basis for Board rulings on rural lands densities can be overcome with other, valid Board findings. As discussed below, there are no multiple bases for this Board's ruling on County rural lands densities—only the Board's substitute 'interpretion' of County's Rural Lands Study data which ignores local discretion and decision making.

Ironically, *WEAN* at page 168 is more readily known for the rural lands 'standard' espoused by the County, and ignored by the Growth Board:

> "The Act does not require a particular methodology for providing for a **variety of densities**." [*Citation omitted; emphasis added*] And RCW 36.70A.050 allows for **consideration of local conditions** and the use of unspecified "innovative techniques" to achieve rural densities and uses.

III. ARGUMENT

1. **The Superior Court was correct that the Growth Board lacked jurisdiction to rule that the Carlsborg CFP fails to comply with GMA, because the CFP was adopted in 2000, no appeal was timely filed, and GMA update requirements (e.g., UGAs) do not apply to County's prior enactments unless the controlling sections of the GMA have been amended in the interim.**

   Issue Response: RCW 36.70A.130 does not allow Growth Board review of unamended portions of a Comprehensive Plan on non-mandatory updates to the Capital Facilities Plan within an unamended Urban Growth Area.

The Superior Court was correct in ruling that the Growth Board lacked jurisdiction to rule that the Carlsborg CFP fails to comply with GMA, because the CFP was adopted in 2000, and no appeal was timely filed. Under *Thurston County vs. WWGMHB*, 164 Wn.2d 329, 344, 190 P.3d 38 (2008), this update requirement does not apply to a jurisdiction's prior enactments unless the controlling sections of the GMA have been amended in the interim, to wit:

> We hold a party may challenge a county's failure to revise a comprehensive plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous comprehensive plan was adopted or updated, following a seven year update.

In applying this test to the Carlsborg CFP, it appears that none of the cited and controlling sections of the GMA have been amended since this CFP was first adopted by Clallam County Ordinance in 2000 [32], to wit:

[32] Clallam County Ordinance No. 702 (2000), CP 484, IR 23, Appx. C.

Board Cited GMA Section	Section Amendments since 2000	Session Law Subject Matter	Applicable to Cited Subsection
36.70A.070(3)	ESSB 6186, 2005 ch 380 §2	An Act relating to increasing the physical activity of Washington citizens	Does not amend .070(3)
36.70A.070(3)	ESHB 2905, 2004 ch 196 §1	An Act relating to modifying provisions for limited areas of more intensive rural development	Not amending .070(3)
36.70A.070(3)	SSB 5786, 2003 ch 152 §1	An Act relating to rural development	Does not amend 070(3)
36.70A.070(3)	SHB 1395, 2002 ch 212 §2	An Act relating to job retention in rural counties	Does not amend 070(3)
36.70A.110(3)	SSB 6367, 2004 ch 206 §1	An Act relating to protecting the integrity of national historical reserves in the urban growth area planning process	Does not amend 110(3)
36.70A.110(3)	SHB 1755, 2003 ch 299 §5	An Act relating to creating alternative means for annexation of unincorporated island of territory	Does not amend .110(3)
36.70A.020 (1), (2) and (12)	SSHB 2697, 2002 ch 154 §§1 and 2	An Act relating to incorporating effective economic development planning into growth management planning	Does not amend goals (1), (2), or (12), added park and rec facility language to CFP provision, n/a to Board's ruling which relates to density and sewers

[Illustrative table from County's Superior Court *Corrected Opening Brief*, CP 218.]

The Growth Board's finding that the Carlsborg non-municipal UGA failed to comply with GMA is necessarily based upon a finding of non-compliance as to the Carlsborg Capital Facilities Plan or "CFP". The Board's ruling reads:

> Therefore, CCC section 33.20 which permits urban uses before the advent of sewers in the Carlsborg UGA, is non-compliant with RCW 36.70A.070(3), RCW 36.70A.110(3), and substantially interferes with 36.70A.020(1), (2), and (12). [33]

and

> Clallam County is at the beginning stages of planning for a Carlsborg UGA sewer system and still has no sewer capital facilities plan that meets the requirements of RCW 36.70A.070(3).[34]

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[33] CP 482, IR 35, Final Decision & Order ("FDO") at pp.79-80

[34] *Id.*, FDO, Finding 49, p. 99.

and

> By failing to provide for sewer service to the Carlsborg UGA, the County has not adopted a capital facilities plan that is compliant with the GMA".[35]

The Carlsborg UGA sewer provisions were not amended during the County's seven year update, so they cannot be appealed under RCW 36.70A.130(1)(d). Further, Clallam County Code ("CCC") Chapter 33.20 was adopted by Ordinance No. 701, (2000).[36] It implemented the recommendations of the concurrently adopted Carlsborg CFP. Ordinance No. 702 (2000) [37]. Neither Ch. 33.20 CCC nor the Carlsborg CFP were amended during the County's 2007 update.

Further, because RCW 36.70A.130(9) controlled as to whether or not the County was mandated to update/ or create a "Parks Plan", as relied upon by Futurewise, the Growth Board correctly noted that the existing, "dated" Carlsborg parks plan, incorporating and based on a "dated" 1994 county-wide CFP section, nevertheless fulfilled the requirements of RCW 36.70A.070(3).[38] Under *Thurston County*, 164 Wn.2d at 344-45, local enactments that are not amended in the local jurisdiction's GMA update under RCW 36.70A.130 do not trigger for Growth Board appeal:

> Finally, limiting failure to revise challenges to those aspects of a comprehensive plan directly affected by new or substantively amended GMA provisions serves the public policy of preserving the finality of land use decisions. Finality is important because "[i]f there were not finality, no owner of land would ever be safe in

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[35] *Id.*, FDO, Summary, p. 3.

[36] See, CP 482, IR 23, Appx. D: Ch. 33.20, codifiers SOURCE reference, in Title 33 CCC,

[37] CP 484, IR 23, Appx. C; Clallam County Ordinance No. 702 (2000)

[38] CP 482, IR 35, *FDO*, at pp.80-81.

> proceeding with development of his property." *Deschenes v King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974), overruled in part by *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 991 P.2d 1161 (2000). The legislature recognized the importance of finality in limiting the time period for challenging a comprehensive plan to 60 days. RCW 36.70A.290(2). If we were to allow a party to challenge every aspect of a comprehensive plan for GMA compliance every seven years, the floodgates of litigation initially closed by the 60-day appeal period would be reopened. Aspects of plans previously upheld on appeal could be subjected to a new barrage of challenges because a party could argue it is challenging a county's failure to update a provision, rather than reasserting its claim against the original plan. See, e.g., [*Thurston County v. WWGMHB*, 137 Wn. App. 781, 154 P.3d 959 (2007)] (allowing Futurewise's challenge to the County's UGA designations despite an earlier board decision upholding part of the County's UGA because the new challenge is based on the 2004 update). Because the legislature has not condoned such a result, we choose to limit challenges for failures to update comprehensive plans to those provisions that are directly affected by new or recently amended GMA provisions.

Contrary to Futurewise's application of this case, *Thurston County* severely limits a challenger's ability to appeal a 'non-revision' of a comprehensive plan during its update, and then to only those provisions that are directly affected by new or recently amended GMA provisions.[39] More specifically, GMA revisions that would enable an "update" challenge to 'non-revised' CP provisions or DRs were defined to mean those GMA provisions related to mandatory elements of a comprehensive plan that have been adopted or amended by the Legislature since the challenged CP or DR was adopted or updated.[40]

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[39] "...we choose to limit challenges for failures to update comprehensive plans to those provisions that are directly affected by new or recently amended GMA provisions." 164 Wn.2d 345

[40] *Id*

Here, the Growth Board found non-compliance for Ch. 33.20 CCC and the CFP, for failing to comply with specific GMA provisions, even though the Growth Board lacked jurisdiction over the 'non-revised', and 'unamended' Carlsborg portions of the CP and the Carlsborg CFP. Futurewise argues for expansion of *Thurston County* as triggering a more generalized 'reach back' review—where the merest potential for review with the County's comprehensive plan sections (even if theoretical, as with its argued OFM population, or parks and recreation discussions) unlocks *Pandora's Box*. Our state Supreme Court recently had the opportunity to expand the 'reach-back' rule beyond what was applied by this County's Superior Court, and it chose not to do so. *Gold Star Resorts v. Futurewise*, ___ Wn.2d. ___, ___ P.3d. ___ (Dec. 17, 2009).

As shown in the above Table of GMA amendments, there has been only one legislative amendment, to wit: RCW 36.70A.070(3) and that was solely to add park and recreation facilities to capital facilities planning, but which required State funding to become mandatory. Because no relevant GMA amendments support the Board's ruling regarding the Carlsborg Plan, the Board lacked jurisdiction over the Carlsborg CFP challenge.

2. **The Superior Court was correct that the Growth Board erred in finding that the County's current choice of 2/1 du. acre in the Carlborg non-municipal UGA, during implementation of the sewer service element of the CFP, was non-compliant and invalid.**

Issue Response: RCW 36.70A.070(3) and 36.70A.110 provide no authority for the Growth Board to prohibit septic system service for UGA designations and require full implementation of sewer service as an element in all UGA CFP's.

Futurewise also challenged the County's "failure to plan for sewer service to the Carlsborg urban growth area and appropriate urban densities" as violating RCW 36.70A.020(1-2, 12), -.040, -.070, -.110, & -.130.[41] The Growth Board agreed, even though GMA neither mandates full sewer service within a given time frame nor at any particular urban density. As previously argued by County, GMA merely requires CFP adoption by County to: 1) inventory existing public capital facilities; 2) forecast the "future needs" for such capital facilities; 3) identify the proposed locations and capacities of expanded or new capital facilities; 4) establish a 6-year financing plan that clearly identifies sources of public funds for such purposes; and 5) requires a reassessment of the land use element if probable funding falls short of meeting existing needs to ensure that the land use element, capital facilities plan element, and financing plan be coordinated and consistent. RCW 36.70A.070(3). That the County has done and is doing all of the above has not been disputed. Nevertheless, the Growth Board overrode County's decisions on the timing of capital facilities improvements within the Carlsborg UGA, and

[41] CP 482, IR 35, *FDO* at p.73 ("*Legal Issues No. 13 (Futurewise Issue 6)*")

mandated that County must both show that it has contemporaneously fully planned and funded the Carlsborg sewer system by the time the Board reviewed this existing non-municipal UGA at its periodic update—or that UGA is per se noncompliant and invalid under GMA.

The GMA language relied upon by the Growth Board merely states a requirement that County develop a CFP that is consistent with the UGA land use element. As previously argued by County before the Growth Board and Superior Court, continued use of on-site systems will adequately serve as a 'bridge', allowing for some land development and the protection of private property rights, until sewer planning, funding and build-out is complete under the Carlsborg UGA land use element.

In support of this sewer-mandate, the Growth Board and Futurewise misstate that increases in nitrate concentrations from on-site systems in Carlsborg groundwater demand an immediate 'sewer-only' response. This is incorrect. The Carlsborg CFP Sewer Study [42], County clearly establishes that as part of active planning for sewer, the County has imposed severe nitrate treatment requirements on new and repaired on-site systems.

In fact, County well monitoring shows levels of nitrate intrusion peaking about the time of the original CFP in 2000, and then falling and plateauing well below Federal drinking water limits.[43] It is not

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[42] *County's [Superior Court] Reply Brief,* CP 164; CP 484, IR 23, *County's [Growth Board] Response Brief,* CP 484, IR 23 at 003013-003176, *Appendices*

[43] Portions of Carlsborg CFP Sewer Study reproduced below were presented in *County's [Growth Board] Response Brief,* CP 484, IR 23, 003034-36, pp. 21-23:

> Federal drinking water standards require potable water to have less than 10mg/L of

scientifically possible to link nitrate levels to septic discharges in the Carlsborg area.[44] What these 'layperson' errors demonstrate is why drinking water and septage-public health issues in Carlsborg fall under Ch. 70.05 RCW (not Ch. 36.70A RCW), and the training and local knowledge of County health officers, and local and State Departments of Health.

To add to all of this, Futurewise champions yet another unproven mandate under GMA, that a lack of storm sewers within the Carlsborg non-municipal UGA remove this area from 'urban' consideration. In reality, many municipalities lack storm sewer and sewage system

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nitrates . Most public and private well in the area have recorded nitrate levels that are significant, thoug low single digit and well below the 10 mb/" [Federal] standard This includes the PUD well. This sampling record is summarized in Table 2

Table 2

Nitrate Sampling Results for PUD Carlsborg Well

Sample Date	Nitrate mg/L	
18 May 90	1 3	
28 Sep 94	1 6	
25 Jan 95	1 6	
7 Aug 96	1 5	
18 May 98	2 6	total nitrate/nitrite
7 Jun 99	2 5	
8 May 00	2 5	
9 May 01	1 9	
9 Apr 02	1 9	
3 Apr 03	1 9	
4 May 04	2 0	
3 May 05	2 1	
16 May 06	1 9	

The Table 2 records have shown an upward trend in nitrates levels over the years so that recent tests results are about a third higher than tests from 15 years ago, though lower than were recorded a few years ago These sampling results are shown graphically in Graph 1

[44] *Id*, Study at 003035. p. 2:

3.4 Groundwater and Aquifer Concerns

...it is not possible to establish with certainty how much of the increasing nitrate level is due to septic drainfield effluent; versus how much is from other human activities like lawns, pets, landscaping, or stormwater; and how much is from agricultural fertilizer, livestock wastes, wildlife, or other sources

improvements within significant portions their municipal boundaries—in addition to their UGAs. [45]

In support of overriding County discretion, the Growth Board referenced its own, prior decisions, without addressing the specific facts, in San Juan County, Mason County and Jefferson County [46] for what is clearly a 'brightline' standard for requiring immediate sewer planning and development for rural counties of this State within their non-municipal UGAs. Notably, Carlsborg UGA lies within a critical aquifer recharge area (CARA), a marine recovery area and shellfish protection zone[47], and may never 'densify' to the 'brightline' urban density touted by Futurewise[48] and restated by the Growth Board for the Carlsborg UGA.

It is this local public health decision making, which takes into account

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[45] Ironically, counsel's 'city' residences in both Centralia and Sequim, Washington lack storm sewer or runoff facilities; significant developed portions of both cities also lack sewer systems.

[46] The WWGMHB's penchant for citing its prior cases as definitive, legal authority for rejecting local discretion and decision making is reminiscent of the author of a municipal law treatises and a Washington law professor who respectively footnote their prior works as authority.

[47] CP 482, IR 23, 003013-003176, 'passim' discussions of critical area environment of UGA in Carlsborg CFP Sewer Study

[48] Futurewise has consistently relied upon unsuccessful, non-appealed matters to rebut County's arguments. What the Growth Board 'actually' stated was:

> In *Campbell v San Juan County*, [*Stephen Ludwig v. San Juan County*, WWGMHB Case No. 05-2-0019c (FDO, 6/20/06)], this Board concluded that when considering whether an area was "characterized by urban growth" for the purpose of determining the location of a UGA in accordance with RCW 36.70A 110(3), densities of 1 du/acre could be considered "characterized by urban growth". Nevertheless, the Board went on to say this about appropriate urban densities in UGAs:
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> > ...we said that circumstances such as the need to protect critical areas or to protect public health and safety make densities of less than four units an acre in UGAs a compliant way in which to harmonize the sprawl reduction goal with other GMA goals or requirements.

local conditions, which the Growth Board has overridden in its latest foray into GMA planning matters which require local deference.

3. The Superior Court was correct that the Growth Board erred in declaring County's Rural Lands Report did not fully supports County's choice of R2 and RW2 densities as consistent with the County's rural character.

Issue: Neither RCW 36.70A.020 and 36.70A.110 allow the Growth Board to substitute its analyses and interpretations for County's rural density analyses and decisions under County's Rural Lands Study and supporting documentation from public hearings before the County.

The Growth Board framed the compliance challenges before it as whether County's rural densities between 2.4 acres and 4.8 acres were rural.[49] The question the Growth Board should have answered was whether the County committed clear error when, in reviewing the evidence before it, that Clallam County determined that R2 and RW2 zoning, in one or more of its four (4) planning regions, and in certain areas of those planning regions, were a recognized part of County's rural environment. See, *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 782, 193 P.3d 1077 (2008). Where there was evidence in the record supporting the County's conclusion, the Growth Board should have deferred (but did not) to the County's zoning decisions. [50]

By so doing, the Growth Board undermined the County's authority to weigh a variety of different factors and facts in determining appropriate rural densities in any given area. The Growth Board did not, for example,

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[49] CP 482, IR 35, *FDO* at p.57 & 65.
[50] *Id*

acknowledge the County's power to address economic factors. [51] In fact, the FDO devotes only three, succinct sentences on the GMA goals applied by the County.[52] The Growth Board ignored the County's efforts to customize its rural zoning to the needs of each of County's planning regions discussed in it *Rural Lands Report*.[53] As noted by the Superior Court, the *Rural Lands Report* data ignored by the Growth Board included evidence of rural character within each study area (region) local circumstances, and the percentage of *lots* (rather than percentage of acres) with densities between 2.4 and 4.8 acres.[54] Simply stated, Growth Board's decision is not supported by evidence that is substantial. In fact, the Growth Board, purposefully or not, arbitrarily imposes a 'bright line' of 1/5 dwelling unit per acre (du./ac). See, discussion in *Thurston County*, 164 Wn.2d at 358-59:

> Since 1995, GMHBs have utilized bright-line standards to distinguish between urban and rural densities. [Fn.21] [Thurston County v.WWGMHB, 137 Wn. App. 781, 806, 154 P.3d 959, (2007)]("[t]he Board considers a density of not more than one dwelling unit per five acres to be rural"). [Fn. 22] The GMHB, as a quasi-judicial agency, lacks the power to make bright-line rules regarding maximum rural densities. Viking Props., 155 Wn.2d at 129-30. We hold a GMHB may not use a bright-line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny.
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> [Fn. 21: *See* Bremerton, 1995 GMHB LEXIS 384, at *102 (adopting a bright-line urban density of a minimum of four dwelling units per acre); Vashon-Maury v. King County, No. 95-3-

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[51] *Id*, *FDO* at p. 58 (citing RCW 36.70A.011 & RCW 36.70A.030(15) as defining Clallam County discretion.

[52] *Id*, *FDO* at p 55-56.

[53] CP 123, *Memorandum Opinion* at pp 23-30; CP 482, IR 23, Ex. 78, Appx. "B"

[54] CP 482, IR 35, *FDO*, pp. 29-30, Findings, p. 97

0008, 1995 GMHB LEXIS 428, at *149, 1995 WL 903209 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Final Dec. and Order Oct. 23, 1995) (holding densities of one dwelling unit per 10 acres or less is rural and greater densities are subject to increased scrutiny); Yanisch v. Lewis County, No. 02-2-0007c, 2002 GMHB LEXIS 66, at *9, 2002 WL 31863235 (W. Wash. Growth Mgmt. Hr'gs Bd. Final Dec. and Order Dec. 11, 2002) (densities greater than one dwelling unit per five acres are not rural). But see Citizens for Good Governance v. Walla Walla County, No. 05-1-0013, 2006 GMHB LEXIS 69, at *28, 2006 WL 2415825 (E. Wash. Growth Mgmt. Hr'gs Bd. Final Dec. and Order June 15, 2006) (noting bright-line factors may not be employed by a GMHB after Viking Properties.]

[Fn. 22: The Court of Appeals stated, "[t]he Supreme Court has referred to a density of one dwelling unit per five acres as 'a decidedly rural density.'" Thurston County, 137 Wn. App. at 806, n.15 (quoting [Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 571, 9, 958 P.2d 962 (1998)). This is incorrect. The cited provision is found in the dissenting opinion in Skagit Surveyors & Engineers, 135 Wn.2d at 571 (Talmadge, J., dissenting). To the contrary, we have rejected any bright-line rule delineating between urban and rural densities. Viking Props., 155 Wn.2d at 129-30.]

The Superior Court correctly rejected the Growth Board's undue emphasis on farming and 'farm size' (outside of County's agricultural resource lands) to establish the character of all 'rural areas'. The Growth Board, without citation or reliance on the record, had stated that County intended the *Rural Lands Report* to focus on farming in sustaining traditional rural lifestyles and rural based economies. [55] The Board's *FDO* found that the average size of operating farms throughout Clallam County should

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[55] *Id., FDO,* pp. 60 & 63 (referencing County's "farm-based economy") This imposition of 'arbitrary' benchmarks and standards for rural areas by the Growth Board, without statutory support, is particularly troublesome, where the "meatloaf" status (or 'unspecified' and 'undefined') statutory nature of rural lands has been acknowledged by the Western Board, to wit: *Port Townsend v Jefferson County*, WWGMHB No. 94-2-0006, p. 26 (FDO, 08/--/94): "Rural lands are the leftover meatloaf in the GMA refrigerator" [Attributed to William Nielsen, former Wstrn Wa. Growth Board Member]

determine the character of the County's rural area in any given area to a 1/5 du./ac. uniform, minimum rural density. However, as evidenced by the *Rural Lands Report*, farming is but one of many uses of rural lands activities within the County.

In addition to this unsupported methodology, the Growth Board overemphasized the total number of acres with a given density, ignoring the number of parcels with a given density within a given planning region—which ignored where the *Rural Lands Report* indentified parcels as being located.[56] In other words, the Board shrouded the County in a one-size-fits-all approach to rural lands in all of the 'subareas' of the County.

And while the Growth Board paid lip service its obligation to define County's rural land based upon County's studies of existing "land use patterns"[57] in defining "rural" densities, it then found County's density-designations of those land use patterns within distinct planning regions as non-compliant.[58] As discussed above (and by the Superior Court), the Growth Board's broad, homogonous brush stroke on County rural densities for these western, central and eastern subareas has failed "...to maintain the traditional rural lifestyles of the residents of Clallam County

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[56] *Id., FDO*, pp. 60-61; Finding 43 at pp. 98-99 (imposing a minimum, countywide rural density, and ignoring the percentage and location of parcels of greater densities than 1 du/4.8 acres)

[57] *Id, FDO*, p 61: "The GMA specifically references land use patterns as a defining feature with rural lands".

[58] *Id., FDO*, p 61; Conclusion 'O', p. 62-63,102.

as required by RCW 36.70A.070 and 36.70A.011." [59]

Futurewise's arguments before the Growth Board and Superior Court were also based upon a Futurewise-created "Table 1" as 'proof' that within County's R2 and RW2 zones "...most parcels are in the 4.81 acres or larger category".[60] Futurewise has misinterpreted and misapplied County's *Report* to create its "Table 1", which provides analysis of the "[p]ercent [a]cres of [l]and [z]oned R2 and RW2 by [p]arcel [s]ize" rather than the 'number of total parcels in these same size ranges' as contained in County's *Rural Lands Report* data. Futurewise's assertion that "within these zones *more parcels* [emphasis added] are in the 4.81 acres or larger category than any other lot size category" is a clear misstatement of fact.[61] The number of total parcels that are '2.4 acres and less' vs. the total number of parcels that are 'between 2.4 and 4.8 acres', is a wholly distinct and different statistical measure—and this 'integration' of statistical analyses by Futurewise does not bolster the Growth Board's decision.

In its briefing before this Court, Futurewise misstates and mischaracterizes the County's *Rural Lands Report*[62] as supporting the Growth Board 'bright line' on the five-acre minimum rural density. By example, in the Sequim Region, the *Rural Lands Report* [63] establishes that 70.5% of the 5,846 parcels within the R2 are 2.4 acres or less, with an

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[59] *Id.*
[60] CP 176, *Futurewise's Response Brief*, at pp. 18-19, and "Table 1"
[61] CP 176, *Futurewise's Response Brief*, at p.19, lns. 2-3
[62] CP 228, Appdx "B"; CP 482, IR 23, Ex. 78, Appnx. "B".
[63] CP 482, IR 23 *County's [Growth Board] Response Brief*, Appnx B, 001800, *Appendices.* Table SDPR-2

average parcel size of 2.2 acres.[64] By comparison, the *Report* shows that only approximately 14.2% of the 5,843 parcels within the Sequim Region have the potential to re-divide, and with 7.6% of these parcels already contain a fully developed, single-family residential use (and as such, these parcels *de facto* will never re-divide). This is part of County's analyses and decision making on rural lands overridden by the Growth Board. In fact, the average parcel size in R2-zoned land 'countywide' is 2.4 acres [65]. These and other statistical measures reported within the *Rural Lands Report* also 'characterize' rural land use patterns within the R2 zoning areas, within a given regional planning area, in County's opinion clearly demonstrated that R2 and RW2 were appropriate in those rural areas significantly fragmented by smaller parcels.

The Growth Board focused on "% acres of land by parcel size" for 'rural character' and erroneously discard all other aspects of rural development properly considered by County, including: land use patterns, rural character, and 'regional' differences within the County demonstrated by the *Rural Lands Report*—thus failing to accord County due deference in local planning decisions. By further example, the County in reliance on the *Rural Lands Report* considered factors such as geographic isolation, limited rural land availability (such as proximity to existing road infrastructure and services, economic conditions, etc...within a sparsely

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[64] *Id.* Table SDPR-3

[65] CP 482, IR 23 *County's [Growth Board] Response Brief*, Appnx B, *Appendices.* Table CC-2

populated and mostly unimproved areas) as considerations for the RW2 zoned portions within the Western (Forks) Planning Region.

Futurewise provided no evidence in the record before the County (or thereafter before the Growth Board) that *per se* refuted County's decisions on rural development, rural land use patterns, and/or rural character, as reported in County's *Rural Lands Report*. The Growth Board, in turn, cited neither authority nor factual justification, based upon this same record, for rejecting County's approach to rural development, rural land use patterns, and/or rural character, as set forth in the *Rural Lands Report*. It is precisely this scenario, where local discretion, interpretation and choices on evidence are erroneously and arbitrarily rejected by Growth Boards which triggered a judicial rebuke in *City of Arlington v. Cent. Puget Snd. GMHB.*, 164 Wn.2d 768, 782, 193 P.3d 1077 (2008):

> In sum, we hold the Board erred in finding the County committed clear error in concluding that the land at Island Crossing had no long term commercial significance to agricultural production. **The Board erred because it dismissed a key piece of evidence that supported the County's conclusion on this point. Because there is evidence in the record to support the County's conclusions, the Board should have deferred to the County.**
>
> Furthermore, we hold the Board erred in finding the County committed clear error in including the land at Island Crossing within the newly expanded Arlington UGA. **There are facts in the record to support the conclusions that the land in question is characterized by urban growth and/or adjacent to territory already characterized by urban growth.** [Emphasis added]

When evaluated as a whole, this Court must agree with the Superior Court

to uphold County's discretion to apply the *Rural Lands Report* for its 'rural character', and reject the mandated five acre and larger parcel-minimums imposed throughout the County by the Growth Board.

4. **The Superior Court was correct in rejecting Futurewise's belated 'internal consistency' challenge of the County's comprehensive plan and development regulations for rural lands, where County's creation of R2/RW2 densities as consistent with its rural planning.**

   Issue Response: Futurewise cannot for the first time on appeal raise new argument and challenges to County's rural density analyses and decisions under County's Rural Lands Study and supporting documentation from public hearings before the County.

Futurewise's original Assignments of Error Nos. 4 and 5 are, in fact, redundant and duplicative, both alleging similar, 'substantial' factual bases for the Growth Board declaring 1 du./5 ac. minimum, rural zoning and rejecting County's own findings and decisions on a variety of rural densities, and that the Board decision is collaterally supported by an 'internal inconsistency' argument. In addition, Futurewise's original Assignments of Error Nos. 4 and 5 are, in large part, interrelated and duplicative of its arguments under Assignment of Error No. 3. For the first time and belatedly before the Superior Court, Futurewise argued that County's rural character requirement in CCC 31.02.050(31)(a) calling for "open fields and woodlots interspersed with homesteads" is clearly not consistent with "a pattern of new 2.4 acre lots" in the *Rural Lands Report*.[66] Futurewise cannot explain what data or photos in the *Report*

[66] CP 176, *Futurewise's Response Brief*, at p.19, lns. 12-14.

clearly prove inconsistency with this element of rural character—even given the 'farming' focus of the Growth Board and Futurewise. Clearly, maps in each of the four planning regions from the *Report* contradict the 1/5 du./ac. as an overall rural character.[67] Specifically, photo-maps from the Sequim Region for R2 wood lots (SDPR-1), R2 open space lots (SDPR-2), commercial lavender patches needing as little as 1.6 acres (SPDR-3), and rural residential lands (SPDR-4), as well as the Straits Region images with organic farming needing as little as 2.6 acres (SPR-2) and R2 commercial woodlots (SPR-3).[68]

As noted supra, Futurewise has mistates *Whidbey Envtl. Action Network ("WEAN") v. Island County*, 122 Wn.App. 156, 168, 93 P.2d 885 (2004) to argue that it be allowed to 'shake-and-bake' the Growth Board record to repair what would otherwise be erroneous Growth Board bases for its ruling. Such a review standard would undermine both the deference afforded to the Growth Board in interpreting general GMA standards and the deference and discretion afforded local governments in weighing and applying the factual record to the general policies and standards of the Boards (as discussed above).

At best, *WEAN* holds that one invalid basis for Board rulings on rural lands densities can be overcome with other, valid Board findings. As discussed above, there are no multiple bases for this Board's ruling on County rural lands densities—only the Board's substitute 'interpretation'

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[67] CP 482, IR 23, *Clallam County's Response Brief*, , Appnx B, 001800, Appendices
[68] *Id.*

which ignores local discretion and decision making. Cognizant of this shortcoming, Futurewise belatedly (and impermissibly) argues for the first time on appeal that County's rural lands decisions are inconsistent (i.e., internal inconsistency) with its Comprehensive Plan.

In addition to Futurewise's selective references to elements of County rural lands definition under CCC 31.02.050(31), the County's "rural character' is primarily defined as "the existing and preferred patterns of land use and development established for lands designated as rural areas or lands under this comprehensive plan." [69] Under this definition, rural characteristics may include, "but are not limited to"... "open fields and woodlots"—but also include "life styles and economies common to the areas designated as rural areas and lands" under the County's planning.[70]

Futurewise re-asserts that this language from County's own comprehensive plan and studies establishes that 2.4 acre densities are not consistent with the county's rural character. However, Futurewise then avoids the following definition in County's CP, "Rural Development" at CCC 31.02.050(32) which reads as follows:

> "Rural development" means development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development **can consist of a variety of uses and residential densities**, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. **Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.**

(Emphasis added).

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[69] *Brief of Appellant Futurewise* at p. 27.
[70] *Id.*

Treating the County rural areas as homogonous (as did the Growth Board) or selectively excerpting statistics for one or more of the four regional comprehensive plans does not overcome the County's decision making or sole discretion to designate R2/RW2 in certain rural areas of the County.

As before the Growth Board and Superior Court, Futurewise lapses into a series of generalized, 'learned treatise' arguments, which the Growth Board, itself, summarily dismissed and criticized Futurewise as rotely arguing "...academic studies without providing a comparative analysis to the facts and circumstances that are reflected within Clallam County ...".[71]

Futurewise next attempts to reargue its failed 'fish and wildlife habitat' and 'impervious surfaces' challenges, rejected by both the Growth Board and Superior Court as a secondary bases for upholding the Growth Board non-compliance and invalidity rulings.[72] Similarly Futurewise reargues its failed 'traffic' issues of high rural densities increasing traffic "because more people drive alone and must drive longer distances to work and to meet the needs of their families" as *per se* sustaining the noncompliance finding since County's the definition of rural character includes a reference to low traffic volumes. Again, this argument was rejected by the Growth Board, which Futurewise does not disclose to this Court. Specifically, the Board noted Futurewise's challenge involved little more than a series of

[71] CP 482, IR 35, *FDO* at pp. 88 & 89
[72] *Id.*, at p. 62, lns. 1-21

conclusory references and statements without analysis of their applicability to or significance in Clallam County rural lands. [73] In fact, Futurewise did not provide *any* analyses of County driving distances to work or for families in R2/RW2 lands. It is, however, significant that most R2 lands are within close proximity to at least one of municipal UGA or LAMIRD.

Futurewise's remaining arguments are devoted to disclaiming the current existence of any 'bright line' rule of one dwelling unit per five acres standard coming from the Growth Boards—which 'bright line' existed with the Growth Boards until they were confronted by our Supreme Court in *Thurston County* for ignoring local discretion and arbitrarily imposing minimum parcel sizing on rural zoning. In addition, Futurewise cites the Growth Board discussion of County's "existing land use pattern" as support for the Board's 'un'-bright line, five acre minimum rural parcel size for County. However, the Board discussion was based upon Futurewise's flawed analyses of County's *Rural Lands Report*, discussed *supra*.[74]

Futurewise skews the purpose of this Court's review, claiming that because there is substantial evidence in the record to support both Futurewise's and Growth Board's choices of evidence and a 'given' application of those facts in determining County's 'rural character' (regardless of the Board's actual findings), that County's choices must

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[73] *Id*, at p. 62-63, lns. 25-29, 1-2
[74] CP 482, IR 35, *FDO* at p. 63

fail.[75] However, this is precisely the flawed perspective on Growth Board authority was criticized by our Supreme Court in *City of Arlington,* discussed *supra*, where 'Board' authority on factual matters (as opposed to legal interpretations of GMA goals) must yield to local discretion and choices in selecting and weighing facts and factors in local planning. As noted by in *Thurston County*,164 Wn.2d at 359-60:

> The legislature did not specifically define what constitutes a rural density. Instead, it provided local governments with general guidelines for designating rural densities. A rural density is "not characterized by urban growth" and is "consistent with rural character." . . .**Whether a particular density is rural in nature is a question of fact based on the specific circumstances of each case.**
>
> Finally, the GMA does not dictate a specific manner of achieving a variety of rural densities. [*Whidbey Envtl. Action Network v. Island Cy*, 122 Wn. App. 156, 167, 93 P.3d 885 (2004)]. **Local conditions may be considered and innovative zoning techniques employed to achieve a variety of rural densities.**

And finally, *Thurston County* reinforces the proposition that 'rural character' considerations of counties may include, but are not limited to, the factors listed in former RCW 36.70A.030(14). Under the rulings in *Thurston County* (issued after the Growth Board decision), Futurewise's (and Growth Board's) reliance on a 1997 discussion of rural character in Eastern Washington from *Tugwell v. Kittitas County*,[76] and a ten year old 'cubicle commentary' of a CTED[77] planner, renders all the more arbitrary,

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[75] *Futurewise's Response Brief*, at p 27.

[76] *Tugwell v Kittitas Count*, 90 Wn App 1, 951 P.2d 272 (1997)

[77] Notably, the June 1999, position paper on 'rural lands' touted as authority by Futurewise originates from its portfolio of minimal-value, "academic studies" dismissed by the Growth Board, and comes courtesy of the Washington State Department of

rather than more convincing, the Growth Board's compliance order.

V. CONCLUSION

For the foregoing reasons Clallam County respectfully requests that the Court uphold the decision of Superior Court overturning the decision of the Western Washington Growth Management Hearings Board and remanding this matter for further proceedings .

DATED this 8th day of February, 2010.

CLALLAM COUNTY PROSECUTING ATTY
Deborah S. Kelly, Prosecuting Attorney

Douglas E. Jensen, WSBA #20127
Chief Civil Deputy Prosecutor
Of attorneys for Respondent County

Community, Trade and Economic Development (now "Commerce")—for which the Legislature granted no 'statutory' powers, and merely an 'advisory' function.

APPENDIX A

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

In re:
CLALLAM COUNTY,
Plaintiff,
v.
WESTERN WASHINGTON GROWTH MANAGEMENT BOARD,
Defendants.

NO. 08-2-00646-1

MEMORANDUM OPINION

I. ISSUES:

Clallam County appeals from a Western Washington Growth Management Board determination that the Clallam County Comprehensive Plan and the Carlsborg Urban Growth Areas and its Capital Facilities Plan are noncompliant with the Growth Management Act of the State of Washington.

II. GENERAL FRAMEWORK:

At one time the axiom was that "a man's home is his castle." People who owned real property could do with it what they pleased. In the earlier part of the 20th century concerns began to arise that one's free exercise of property rights often unfairly impacted the neighbors. Gradually the concept of land use planning and zoning spread across the country. The State of Washington has been through various planning

enabling acts which ultimately led to land use rules and regulations which varied greatly from city to city and county to county.

The Washington Legislature enacted the Growth Management Act (GMA) in 1990 stating it was intended to combat "uncoordinated and unplanned growth" and was to promote cooperation among local governments and citizens in Comprehensive land use planning. RCW 36.70A.101. The GMA was enacted largely "in response to public concerns about rapid population growth and increasing development pressures in the state, especially in the Puget Sound region." King County v. CPSGMHB, 142 W. 2d 543, 546, 14 P.3d 133 (2000).

The Growth Management Act provides a "framework" of goals and requirements to guide local governments, who have "the ultimate burden and responsibility for planning." RCW 36.70A.3201. The Growth Management Act requires counties to develop a comprehensive plan "which is to set out the generalized coordinated land use policy statement" of the county's governing body. RCW 36.70A.030(4). Among other things the Comprehensive Plan must designate Urban Growth Areas (UGA's) "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110(1). The Comprehensive Plan also must include a rural element that provides for a variety of rural densities. RCW 36.70A.070(5)(b)(2004). The GMA recognizes regional differences and allows counties to consider local circumstances when designating rural

densities so long as the local government creates a written record explaining how the rural element harmonizes the GMA requirements and goals (see former RCW 36.70A.070(5)(a)).

Great deference is to be accorded the local government's decisions that are "consistent with the requirements and goals" of the GMA (RCW 36.70A.320(1)). The GMA's goals include encouraging development in urban areas and reducing rural sprawl. RCW 36.70A.020(1), (2).

The Legislature identified 13 planning goals in the GMA, but expressly refrained from imposing upon local jurisdictions any order or priority amongst these goals. RCW 36.70A.020 and Viking Properties v. Holm, 155 Wn. 2d 112 (2005) at page 127. Pursuant to the Growth Management Act the State has created Growth Management Hearing Boards to determine whether or not county comprehensive plans or development regulations are in compliance with the requirements of the act itself. The GMA provides that a Hearings Board "shall find compliance unless it determines the action by the state agency, county or city is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of this chapter." RCW 36.70A.320(3). The Legislature sets a standard in RCW 36.70A.320(1) for granting local entities the deference intended:

> "In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the Legislature intends for the boards to grant deference to counties and cities in how

> they plan for growth consistent with the requirements and goals of this chapter. Local Comprehensive Plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The Legislature finds that while this chapter requires local planning to take place within a framework of State goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future, rests with that community."

"To find an action 'clearly erroneous,' the Board must have a 'firm and definite conviction that a mistake has been committed.'" Thurston County v. W. Wash. Growth Mgmt. Hearings Bd., 164 Wn. 2d at 340-41 (quoting Lewis County v. W. Wash. Growth Mgmt. Hearings Bd., 157 Wn. 2d 488, 497, 139 P.3d 1096 (206)).

III. STANDARD OF REVIEW:

The Washington Administrative Procedures Act governs judicial review of challenges to Growth Board actions. Quadrant v. Central Puget Sound Management Growth Board, 154 Wn. 2d 224 (2005) at 233. Under the APA the burden of demonstrating the invalidity of agency action is upon the party who assets invalidity. RCW 34.05.570(1)(a).

The statute sets forth nine grounds for relief from an agency decision. In the County's "Corrected Opening Brief" the County asserts five grounds as its basis of appeal. They are as follows:

> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> (d) The agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; [or] . . .
> (i) The order is arbitrary or capricious. (RCW 34.05.570(3)).

Court's have noted that he GMA is to be strictly construed because it was controversial legislation. See Thurston County v. WWGMHB, 164 Wn. 2d 329 (2008) and Spokane County v. City of Spokane, 148 Wn. App. 120 (2009).

A reviewing court reviews errors of law de novo under the APA pursuant to RCW 34.05.570(3)(d).

"Substantial evidence" is defined as "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." RCW

34.05.570(3)(e). See City of Redmond v. Central Puget Sound Growth Management Board, 116 Wn. App. 48 (2003).

IV. PROCEDURAL HISTORY:

The Growth Management Act requires counties to review their designated Urban Growth Areas every ten years. It also requires that the County Comprehensive Plan be reviewed every seven years. Clallam County conducted its update reviews from 2004 through 2007. On August 28, 2007, the Board of Clallam County Commissioners enacted Resolution No. 77 entitled "Affirming that Clallam County has reviewed and updated its Countywide Comprehensive Plan, Regional Plans, and Development Regulations to ensure continued compliance with Growth Management Act Standards and Policies." Some portions of the countywide Comprehensive Plan were amended from the prior plan. On the same day the Board of Clallam County Commissioners enacted Ordinance 826 to add a section to the Comprehensive Plan dealing with "limited areas of more intensive rural development" (LAMIRDS) a new designation permitted under the Growth Management Act.

Futurewise, and others, filed a Petition for Review to the Western Washington Growth Management Hearings Board (WWGMHB) asserting that the County's enactments left numerous areas of the County's Comprehensive Plan and development regulations noncompliant with the Growth Management Act.

On April 23, 2008, the Growth Management Hearings Board issued its Final Decision and Order finding that in certain respects the rural densities adopted by Clallam County were noncompliant with the Growth Management Act and that in certain respects the Carlsborg UGA was also noncompliant with the GMA. There were other issues raised to the Board, but before this Court are only those two general issues.

Regarding Carlsborg, the Board noted that Carlsborg was an unincorporated UGA in a rural county. Futurewise had charged that the most egregious violation as regards the Carlsborg UGA was the lack of sewers and any plan for building sewers in the future. The Board found that the Carslborg UGA and particularly Clallam County Code Section 33.20 which permitted urban uses within the Carlsborg UGA prior to the advent of sewers was noncompliant with RCW 36.70A.070(3) and RCW 36.70A.110(3) and substantially interfered with RCW 36.70A.020(1),(2), and (12). Final Decision and Order pages 79 and 80.

The provisions of the County Code relating to Carlsborg, and the Capital Facilities Plan relating to Carlsborg had been adopted by the County prior to the current review and no appeal had been taken from the initial adoption of those plans. The County chose not to amend the Carlsborg Urban Growth Area nor its Carlsborg Capital Facilities Plan as a part of the update and review which took place from 2004 to 2007. The County alleges that the Board had no jurisdiction to require the County to make changes at this time as the applicable appeal period ran years previously.

Futurewise argued that Clallam County's rural zoning districts which allowed densities of up to one residence (1/du) per 2.4 acres violated the Growth Management Act mandate because the density was not rural in nature. The Board, at page 63 of its opinion, noted as a basis for its decision: "The existing rural landscape supports a finding that the rural character of Clallam County is a rural density of 1du/5 acre." The Board then found that "by authorizing densities that do not reflect the existing landscape or economy of the area, the County has failed to maintain the traditional rural lifestyles of the residents of Clallam County as required by the GMA." Final Decision and Order, *supra*, at page 63.

V. CARLSBORG JURISDICTIONAL ISSUES:

Paragraph 15 of Resolution No. 77 noted: "In connection with this update, Clallam County has performed a ten year review of its six Urban Growth Areas (UGAs) and has updated its UGA capacity analysis to include the most recent (2002) OFM county population projections for growth and in consideration of it's updated linear projections; . . ."

Under paragraph 20A, relating to Comprehensive Plan elements, the County noted:

> "As part of this update process, Clallam County has performed its ten year review of its six designated Urban Growth Areas (UGA's); Sequim UGA, Carlsborg UGA, Port Angeles UGA, Joyce UGA, Clallam Bay/Sekiu UGA, and Forks UGA. As part of the review, the County considered whether the UGA's have sufficient land and densities to permit the urban growth that is projected to

occur in the county for the succeeding 20 year period (2005-2025) in accordance with RCW 36.70A.110(2) and 36.70A.130(3)." The County then determined that county has experienced population growth which has been accommodated by its comprehensive plan without requiring major amendment and that "the County's UGA's include adequate capacity to urban growth for the next 20 years . . ."

The resolution cites to a report entitled *Clallam County's Urban Growth Area Analysis and Ten Year Review* of May 2007.

Paragraph 20C of the resolution states in part:

> "In 2000, the County adopted Ordinance 702, enacting a specific Capital Facilities Plan for the Carlsborg Urban Growth Area, which had been designated to resolve a GMA petition filed by the City of Sequim with the WWGMHB. The CFP is a 20-year plan with a 6-year financing element for construction and maintenance of the County's Capital Facilities.

In paragraph 21 relating to Urban Growth Areas the County noted in part:

> "In 1995 and in subsequent years the County designated UGA's that were intended to accommodate 20-year population projections. The County has performed its UGA update analysis as summarized in findings 20A and 20B of this resolution. In 2004, the Planning Commission recommended completion of the 10-year UGA review for the County's six UGA's to ensure GMA compliance. Based upon its review, the County determined that no revisions to existing UGA's are required to accommodate the projected 20-year growth and that it's UGA's comply with the GMA. Permitted densities allowed within each of the County's UGA's are evaluated in the UGA report."

The resolution goes on to specifically indicate urban density issues which have been raised in this proceeding.

The first issue which the Court must decide is whether or not the Western Washington Growth Management Hearings Board had jurisdiction to hear an appeal to the County's determination in Resolution No. 77 to neither enlarge nor reduce the Carlsborg Urban Growth Area, and the County's decision not to modify the Capital Facilities Plan which applies to that Urban Growth Area, and to not revisit allowable densities within the Carlsborg UGA.

At page 85 of the final decision and order the Board noted:

> "Thus the question is: May the Board review the County's UGA's, reviewed pursuant to RCW 36.70A.130(3), even though the County determined not to amend those UGA's?"

RCW 36.70A.130(3) states in part, at sub paragraph (1)(a):

> "Each Comprehensive Land Use Plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. A county or city shall take legislative action to review and, if need, revise it's Comprehensive Land Use Plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time period specified in subsection (4) of this section . . ."
>
> Subsection 4 requires Clallam County to act on or before December 1, 2004, and every seven years thereafter.

Clallam County alleges that the Growth Board lacks jurisdiction to rule that the Carlsborg Capital Facilities Plan fails to comply with the Growth Management Act (GMA). Clallam County states the CFP was adopted in 2000 and no appeal was timely filed. Therefore existing plans and regulations have been deemed compliant with the

GMA. Clallam County cites the Supreme Court's ruling in Thurston County v. WWGMHB, 164 Wn. 2d 329, 190 P. 3d 38 (2008) as authority. That case was decided after the Board's decision in this matter.

In Thurston County the Court said:

> "We hold that a party may challenge a county's failure to revise aspects of a Comprehensive Plan that are directly affected by new or recently amended GMA provisions if a petition is filed within 60 days after publication of the County's 7-year update. A party may challenge a county's revisions or failures to revise its UGA designations when there is a change in the population projection, if a petition is filed within 60 days after publication of the county's 10-year update." Thurston County, *supra*, at page 336.

Later in the opinion the Court rephrased the question as follows:

"When a Comprehensive Plan is updated either every seven years in accordance with former RCW 36.70A.130(1)(a) or when UGA's are reviewed every ten years in accordance with former RCW 36.70A.130(3), does a GMHB have jurisdiction to review the entire Comprehensive Plan?" Thurston County, *supra*, at page 342.

The Court in answering that question held: at page 343:

> "A party may challenge a county's failure to revise aspects of a Comprehensive Plan which are directly affected by new or recently amended GMA provisions following a seven year update."

Futurewise, who was the appellant in the Thurston County case argued that it should have been able to challenge all aspects of a Comprehensive Plan following a seven year update regardless of whether a Comprehensive Plan was revised. The Supreme Court disagreed noting that the statute did not explicitly define which aspects of a Comprehensive Plan must be updated nor delineate the scope of challenges that might be brought against a Comprehensive Plan. The Court noted:

> "The GMA clearly does not require a county to reenact a new Comprehensive Plan every seven years. It simply mandates a county review and, if needed, revise its Comprehensive Land Use Plan and development regulations."

The Court stated "we refuse to imply such an onerous requirement in the absence of an explicit GMA provision to the contrary." Thurston County, *supra*, at page 344. The Court then went on to state:

> "We hold a party may challenge a county's failure to revise a Comprehensive Plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous Comprehensive Plan was adopted or updated, following a seven year update. This rule provides a means to ensure a Comprehensive Plan complies with recent GMA amendments, recognizes the original plan was legally deemed compliant with the GMA, and preserves some degree of finality." Thurston County, *supra*, at page 344. (emphasis added)

Clallam County argues that the only pertinent GMA amendment that would enable an update challenge was "solely to add park and recreation facilities to the Capital Facilities Plan requirement."

The Board found that the Capital Facilities Plan as it related to park and recreational facilities was compliant with the GMA. Futurewise also notes that the newer statute added the requirement for park and recreation facilities consideration and required that be included in the Capital Facilities Plan element. Futurewise notes and argues in its opening brief at page 9: "In fact, one of Futurewise's specific challenges at the Board was the CFP provision for parks and recreation facilities. Thus the

amendment to the CFP, pursuant to Thurston County, gave Futurewise standing to challenge (and the Board jurisdiction to hear a challenge, to) the CFP, *in toto*."

The language in Thurston County cannot be read that broad. It specifically limits the challenge to those "provisions related to mandatory elements of a Comprehensive Plan that had been adopted or substantively amended since the previous Comprehensive Plan was adopted or updated . . ." Neither the language of the Thurston County opinion nor logical inferences from that language, would allow a challenge to a Comprehensive Plan "in toto" as argued by Futurewise. In fact, the Thurston County Court went on to note that their ruling created "no 'open season' for challenges previously decided or time barred." Thurston County, *supra*, at page 344.

Accordingly, this court finds that the challenges beyond the scope of new GMA legislation mandating changes to the Carlsborg Capital Facilities Plan are not justified related to a county's failure to revise a Comprehensive Plan on a periodic review.

The Thurston County case, however, also notes a second basis upon which a challenge may be made following a county's periodic update. At page 347 the Thurston County Court noted:

"A party may challenge a county's failure to revise its UGA designations during a ten year update only if the OFM population projection for the county changed." The Court noted: "if the Urban Growth Projection changes, a county must revise its Comprehensive Plan." Former RCW 36.70A.130(3). "If the county fails to revise its plan, a party may challenge whether the UGA accommodates the most recent OFM population projection."

The language seems somewhat inconsistent at first blush with the court's earlier ruling relating to the Comprehensive Plan update. Here, however, it is the UGA designation which is required to be reviewed rather than the comprehensive plan in full.

The Court noted that a Comprehensive Plan must designate a UGA "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110(1).

In Futurewise's responsive brief it argues at page 9: "The County completely fails to address (or even mention) the other key holding in Thurston County, which is that 'a party may challenge a county's revisions or failures to revise its UGA designations when there is a change in the population projection, if a petition is filed within 60 days after publication of the county's ten-year update'." Thurston County, *supra,* at page 336.

Futurewise then states:

> "Thus as a jurisdictional question, the Board had the power to hear a challenge to the County's revisions to or failure to revise its UGA. As a consequence of the County having undertaking a UGA revision, the County was also obliged to update its Capital Facilities and Transportations Plans. As a result, the Board properly reviewed the County's changes to the Carlsborg UGA and properly addressed the noncompliant portions of the related CFP both because the CFP provisions of the GMA had been amended and because the CFP was a necessary component of the UGA update. Each of these circumstances independently created jurisdiction for the Board. " Futurewise responsive brief, pages 9 and 10.

The Thurston County case, however, indicates that what is to be reviewed are the designations of UGA's. The issue is whether or not the UGA accommodates the most recent OFM population projection. The County resolution states that its UGA's are sufficient to meet the OFM changing population projections for the next 20 years as is required. That is what an Urban Growth Area designation does. That decision could be challenged. The specifics of the application of specific Facilities Plan elements or Comprehensive Plan elements previously approved is not within the scope of a review

of the appropriate designation of land as an UGA. To hold otherwise would simply negate the holding of the Supreme Court in Thurston County as it relates to challenges to Comprehensive Plan and development regulations issues. Clearly the Supreme Court did not intend that result nor would logic or the rational given for the Court's decision as to Comprehensive Plan Reviews warrant such an inconsistent finding as to UGA designations.

Here, the record discloses as to the Carlsborg UGA, that the County did not change the designation of the UGA, nor did the County change its Comprehensive Plan or Capital Facilities Plan in any manner which would have impacted the existing Carlsborg UGA plans as to the issues raised on appeal. Accordingly the only basis upon which an appeal could be granted would be either that the County should have modified the size of the Carlsborg UGA, or, that in light of the GMA requirements to add recreation and park facilities and other such newly legislated considerations, the County was incorrect in the manner in which it either did or did not handle that new requirement. The parks and similar new GMA issues were raised and decided and have not been appealed. Accordingly this Court and the WWGMHB are without authority to hear other challenges to the previously adopted Carlsborg UGA and Capital Facilities Plan. The Growth Management Hearings Board determination that it had authority to do so, and their subsequent finding that the plan was not in compliance with the GMA are reversed.

VI. RURAL DENSITIES ISSUES:

The argument may be appropriately framed as follows: The Growth Management Hearings Board and Futurewise argue that densities allowing a dwelling

unit on parcels less than 5 acres are not rural densities and therefore do not conform to the Growth Management Act's policies and principles and are therefore noncompliant.

Since the statute requires the County's determination that such uses are rural in character to be deemed correct unless clearly erroneous, the standard of review for this court is to determine whether or not the Growth Management Hearings Board committed an error at law, or whether there is substantial evidence to support its finding that the County was clearly erroneous in finding that 2.4 acre parcels could constitute rural character density within Clallam County.

This particular issue is analyzed and discussed in the Final Decision and Order beginning at page 53 of the opinion. The issue is phrased as:

> "Whether the County's failure to prohibit maximum rural densities of less than one dwelling unit per 5 acres outside of limited areas of more intensive rural development (Lamirds) in Section 20 (E), and failure to review and revise the Comprehensive Plan and development regulation to eliminate rural densities of less than one dwelling unit per 5 acres outside of limited areas of more intensive rural development (Lamirds) violates RCW 36.90A.020 . . ."

The Court notes that densities of 5 acres and two and a half acres constitute geometric divisions of land of these sizes only by virtue of land having initially been surveyed and platted in sections generations ago. The determination of a section and therefore the divisions of a section are mathematical calculations unrelated to

topography, utility of the land to any particular use, environmental concerns, or population density by any measure based on scientific, socioeconomic, cultural or other grounds. They are arbitrary numbers generated arbitrarily from an arbitrary standard created hundreds of years previously. They are, however, the densities at issue. In part, this is because those designations of parcel sizes are what have been used for the division and subdivision and sale of land well before planning and zoning laws came into being and which division standards continue to exist to the present time. the decision of the Western Washington Growth Management Hearing Board limits the question of rural density designations to those geometric considerations. No one is arguing, for example, that the best available science would result in a rural density being 3.872 acres in size as opposed to 5 or 2.5 which are the generally used acreages for the divisions and sale of sections of land.

The record reflects that the County, prior to the Growth Management Act, had adopted a Comprehensive Plan and zoning which created patterns of land use and division within the County. These have been downsized since 1995 and otherwise retained under the GMA according to the County. (See the 2006 Draft Rural Lands Report at page 1, number 6.) At page 63 of the Final Decision and Order the Board analyzed the rural density issue and found as follows:

> "The Board finds that Futurewise has adequately demonstrated that the rural character of Clallam County, specifically its visual landscape and farm-based economy, is dominated by lots of greater than 5 acres in size. With

such a large percentage of the County's existing land use pattern at a parcel size of 4.81 acres and farms within the County averaging 25 acres, the existing rural landscape supports a finding that the rural character of Clallam County is a rural density of 1 du/5 acre."

"The Board recognizes the GMA mandate for Clallam County to provide for a variety of rural densities and permits it discretion in making planning decisions. However, the densities the County selects must be rural in nature. The importance of rural lands and their character is specific, looking to land use patterns for establishing rural character and seeking to foster traditional rural lifestyles and economies that a County has historically provided. By authorizing densities that do not reflect the existing landscape or economy of the area, the County has failed to maintain the rural lifestyles of the residents of Clallam County as required by the GMA."

RCW 36.70A.020 sets forth the "planning goals" of the Growth Management Act. In listing the goals the statute states:

"The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." The 13 goals listed may be summarized as:

1. To encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
2. To reduce sprawl.
3. Transportation considerations.
4. To encourage the availability of affordable housing and to promote a variety of residential densities and housing types and to preserve existing housing stock.

5. Encourage development which specifically is to promote economic opportunity for all citizens and encourage growth in areas experiencing insufficient economic grown within the capacity of the state's natural resources, public services and public facilities.
6. Property rights preservation.
7. Permits issues.
8. Natural resources industries are to be encouraged.
9. Open space and recreation is to be retained and enhanced.
10. The environment is to be protected.
11. Citizen participation and coordination is encouraged.
12. Public facilities and services ensure that services necessary to support development shall be adequate at the time the development is available for occupancy without decreasing service levels below locally established minimum standards.
13. Historic preservation is encouraged.

The GMA discusses rural lands extensively. In RCW 36.70A.011 the Legislature noted that the Act was intended to recognize the importance of rural lands and rural character to Washington's economy, it's people, and its environment, while respecting regional differences. The final paragraph of that section of the Act reads:

> "Finally, the Legislature finds that in defining its rural element under RCW 36.70A.070(5), a county should foster land use patterns and develop a local vision of rural character that will: Help preserve rural based economies and traditional rural lifestyles; encourage the economic prosperity of rural residents; foster opportunities for small scale, rural based employment and self-employment;

> permit the operation of rural based agricultural, commercial, recreational, and tourist businesses that are consistent with existing and planned land use patterns; be compatible with the use of the land by wildlife and for fish and wildlife habitat; foster the private stewardship of the land and preservation of open space; and enhance the rural sense of community and quality of life."

RCW 36.70A.070(5) states: "Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources." Thereafter the Legislature sets forth provisions which shall apply to the rural element. Part of the provisions of RCW 70A.070 in subsection (d)(iv) require that a county adopt measures to minimize and contain the existing areas of more intensive rural development. In many respects the position of the parties is predicated upon the Growth Management Act requiring the County to plan in accordance with its existing land uses and character on the date upon which the County adopted a Comprehensive Plan under the Growth Management Act.

In its existing Comprehensive Plan Clallam County has adopted a definition of "rural character", which incorporates the standards set forth in the Growth Management Act and includes some additional detail. Futurewise argues that it's the County's own Comprehensive Plan, previously approved and found to be compliant with the GMA, that precludes the County from adopting a 2.4 acre density as rural. The Clallam County Comprehensive Plan provides:

> "Rural character" means the existing and preferred patterns of land use and development established for lands designated as rural areas or lands under this comprehensive plan. Rural characteristics include, but are not limited to: (a) Open fields and woodlots interspersed with homesteads and service by small rural commercial clusters; and (b) low residential densities, small-scale agriculture, woodlot forestry, wildlife habitat, clean water, clean air, outdoor recreation, and low traffic volumes; and (c) Areas in which open space, the natural landscape, and vegetation predominate over the built environment; and (d) Lifestyles and economies common to areas designated as rural areas and lands under this Plan; and (e) Visual landscapes that are traditionally found in areas designated rural areas and lands under this Plan; and (f) Areas that are compatible with the use of the land by wildlife and for fish and wildlife habitat; and (g) Areas that reduce the inappropriate conversion of undeveloped land into sprawling, low-density development; and (h) Areas that generally do not require the extension of urban governmental services; and (i) Areas that are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas. (See CCC 31.02.050(31).)

Futurewise argues that under the County Plan, to be of rural character, property must meet all nine of the listed characteristics and that lots of 2.4 acres per dwelling unit cannot meet all nine rural characteristics listed in the County's own Comprehensive Plan and therefore are not rural.

Essentially, the argument as to density is as follows: Futurewise and the Growth Management Hearings Board argue that unless lots are 5 acres or greater, they cannot meet the rural character test to be rural densities. The County argues that having some

lots planned for 2.4 acres within the County's rural areas, still meets the Growth Management intent to preserve the rural character in Clallam County and the GMA directive to have varying densities within rural lands.

The debate as to the minimum lot size for rural lands is not unique to Clallam County. In the Thurston County case the Court ultimately remanded the matter so that the regional Growth Management Hearings Board could determine whether it was clearly erroneous for Thurston County to include densities greater than one dwelling unit per 5 acres in its rural element and whether County adequately provided for a variety of rural densities by the use of innovative zoning techniques.

The Thurston County Court noted that "since 1995, GMHBs have utilized bright line standards to distinguish between urban and rural densities." The Board had considered densities of not more than one dwelling unit per 5 acres to be rural. The Thurston County Court, at page 358 went on to note "the GMHB, as a quasi judicial agency, lacks the power to make bright line rules regarding maximum rural densities." Citing Viking Properties, *supra*, at page 129-30. The Thurston County Court thereafter at page 359 stated: "We hold a GMHB may not use a bright line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny."

The Court noted:

> "The Legislature did not specifically define what constitutes a rural density. Instead, it provided local

> governments with general guidelines for designating rural densities. A rural density is "not characterized by urban growth" and is "consistent with rural character." Former RCW 36.70A.070(5)(b). "Whether a particular density is rural in nature is a question of fact based upon the specific circumstances of each case." The Court then went on to say at page 360: "The Board should not have rejected these densities based on a bright line rule for maximum rural densities, but must, on remand, consider local circumstances and whether these densities are not characterized by urban growth and preserve rural character." Thurston County, *supra*, at page 360.

The Court also noted that the GMA also did not dictate a specific manner of achieving a variety of rural densities as required under the statute.

The Thurston County case was decided on August 14, 2008. The decision of the Growth Management Hearings Board in this case was issued on the 23rd of April 2008, well before the Thurston County opinion was issued.

The Clallam County 2006 Draft Rural Lands Report is the basis of both the County's argument that dwelling unit densities of 2.4 acres should be permitted in rural areas, and the Board's decision that dwelling units of 2.4 acres would constitute urban rather than rural character. The Board bases it's decision largely on an analysis of land use within the County overall, noting that the existing patterns of land use within the county have approximately 54% of lots within the challenged R2 and RW2 zoning districts being 4.81 acres or larger.

The Board noted that the County had eight rural zoning districts outside of LAMIRDS, with approximately 52% of all parcels within those zones being greater than 4.81 acres. The Board then noted that "more than half of the County's rural land is comprised of parcels greater than 4.81 acres each." Final Decision and Order page 61. At page 63 the Board then noted that:

> "The rural character of Clallam County, specifically its visual landscape and farm-based economy, is dominated by lots of greater than 5 acres in size. With such a large percentage of the County's existing land use pattern at a parcel size of 4.81 acres and farms within the county averaging 25 acres, the existing rural landscape supports a finding that the rural character of Clallam County is a rural density of 1 du/5 acre."

The Board went on to state "by authorizing densities that do not reflect the existing landscape or economy of the area, the County has failed to maintain the traditional rural lifestyle of the residents of Clallam County as required by the GMA." The GMA doesn't anywhere state that its purpose is to "maintain traditional rural lifestyles", rather, it addresses uses of land and defines rural land use characteristics.

If approximately 54% of the County's rural lands are parcels of 5 acres or larger, that necessarily means that 46% of the County's rural areas are parcels of less than 5 acres. At page 10 of the Rural Lands Report the County noted the following:

> "Only 9.2% of the County's lands are held in rural designations, with 1.1% of those to be designated as lamirds, leaving 8.1% (sic) the County's lands in true rural densities, ranging from 1 dwelling per 2.4 acres to 1

> dwelling per 20 acres. Areas of the County where parcelization at densities of 1 dwelling per 2.4 acres had already occurred by 1994 under prior rural designations, were designated for in-fill development at that density (2% of the County). In areas of the County where such parcelization was not yet prevalent by 1995, but where prior rural designations created legitimate property expectations among landowners, were (sic) designated to allow clustered development at densities of 1 dwelling per 2.4 acres, with a base density of 1 dwelling per 5 acres or 1 dwelling per 10 acres, depending upon the existing surrounding circumstances. The total area of the County providing for these cluster density incentives involves 1.4% of the County. The remaining rural lands were designed at densities ranging from 1 dwelling per 4.8 acres to 1 dwelling per 20 acres."

The County also chose to divide itself into four planning regions based upon unique characteristics. These include a Sequim area designation, a Port Angeles area designation, a Forks area designation, and a designation of the property lying between Port Angeles and Forks (the Strait Planning Region). In each of these designations reasons for allowing 2.4 acres dwelling units in a rural zone were individually discussed. As noted in the report, in the Sequim planning area 84% of the rural area under the County's enacted Comprehensive Plan is zoned at densities of one dwelling per 4.8% acres or less. In the Port Angeles planning region the report notes: "In addition, excluding LAMIRDS, the PAPR's rural designations are consistent with maintaining an average rural density of 1 unit per 5 acres, but in a manner that accommodates a variety of lot sizes on the ground." In the area between Port Angeles

and Forks, more than 80% of the rural area is zoned at 1 dwelling per 4.8 acres or less. Finally in the western planning region of Forks, the rural lands report notes that over 95% of the rural area is zoned at densities of 1 dwelling unit per 4.8 acres or less.

The County notes at page 15 "all rural zone designations prescribe allowed, conditional, and prohibited land uses as well as density, lot sizes, width to depth ratios, setbacks, and development restrictions which are consistent with the stated purposes of the respective zoning designations." Beginning at page 22 the County outlines in its rural lands report its analysis of each of the rural characteristics and how it applies to the County's proposed Comprehensive Plan rural designations. The Rural Lands Report's review of the GMA rural characteristics and its discussion of their application to each of the four planning regions adopted by the County is neither simplistic nor formulaic. The question therefore is whether or not, in allowing for rural zoning designations of one dwelling unit per 2.4 acres or greater in some rural zones, when viewed from a totality of circumstances standpoint as required by the GMA, the County clearly got it wrong. (i.e. was "clearly erroneous".)

The Western Washington Growth Management Hearings Board says the County got it wrong because, with 54% of the County's rural lands presently being 5 acres or larger, provisions to allow rural designations of less than that would not "preserve" the rural character of the county. In the Futurewise responsive brief, page 19, it notes that within Clallam County in areas zoned R2 and RW2 25.3% of the rural land is presently

zoned in parcels 2.4 acres or smaller. In the Sequim Planning Region that rises to 31.4%, in Port Angeles 23.4%. In the Straits Planning Region 10.1% and in the Western Planning Region 4.5%. The same chart also lists parcels which are between 2.41 acres to 4.8 acres in size. Coupled together, that would indicate that more than half of the properties zoned R2 or RW2 in the Sequim and Port Angeles planning regions are 4.8 acres or less in size. Futurewise argues that the designations of the R2 and RW2 zoning areas are inconsistent with rural character because they are not consistent with the existing patterns of land use. But certainly in the Sequim Dungeness planning region and the Port Angeles planning regions rural use is "dominated" by parcels of less than 4.81 acres in size. If one applies the standard used here by the Growth Management Hearings Board, that would be sufficient analysis to declare that those areas of the county are "predominated" by lots smaller than 5 acres. (All be it only 52% of such lots.)

This Court believes that the Growth Management Act mandates a much more sophisticated analysis of planning than that contemplated by counting lots and declaring a winner. The tables in the rural lands report indicate that of all of the area within the Sequim/Dungeness Planning Region only 8.9% will be within the R2 zone. Similarly in the Port Angeles Planning Region only 6.1% will be in the R2 zone. In the Straits Planning Region 2.7% of the land would be in R2 area or RLM area designations and in the Western Planning Region only 1% of the area would be in RW2 area designations.

The largest percentage of the land in each of the locations is in commercial forest and similar open space designations.

Under the GMA lands which are not natural resource lands, agricultural lands, forest lands, mineral resource lands of long-term significance, or Lamirds or Urban Growth Areas, are defined as "rural areas".

The Thurston County case and the GMA note that natural resource lands and agricultural land are not part of the County's rural element and are not to be considered in meeting the requirement of having a variety of rural densities within the meaning of the Growth Management Act. Clallam County, however, indicates that the fact of the extensive resource and open space areas within the county adjacent to rural lands allows such adjacent areas to be considered a factor in determining appropriate rural density in light of the high percentage of the county which cannot be developed. Clallam County argues it is unique among counties in the sense of having massive forest resource and other open land within its boundaries.

The County's analysis and argument in support of its allowance of some rural densities of 1du/2.4 acres, includes reciting the goals which are listed among the 13 goals of the GMA. It is important to note again that these goals are not prioritized and one is not necessarily more important than another. Clallam County has concluded that it can meet the goals of the Growth Management Act, and comply with the definitions

of rural character by having a portion of its rural lands with a density of one dwelling unit per 2.4 acres.

The Growth Management Act was intended to reduce rural sprawl and to promote urban growth in areas where efficient provision of public services to a larger population could be made. However, had the Legislature merely intended that all rural tracts would be five acres or larger they could have said so. They chose not to say that.

RCW 36.70.110(1), as previously noted, requires that in areas outside of urban growth areas (UGA's) "growth can occur only if it is not urban in nature."

> RCW 36.70A.030(18) defines "urban growth" as "growth that makes intensive use of land for the location of buildings, structures and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural produces, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d) is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth."

RCW 36.70A.070(5)(d) referred to in the definition of urban growth, relates to LAMIRDS.

RCW 36.70A.070(5) discusses considerations for the rural element of comprehensive plans. It states that counties are to include a rural element which

includes lands that are not designated for urban growth, agriculture, forest, or mineral resources. Subsection (A) states in part; "because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but 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."

Subsection (B) states in part:

> "The rural element shall permit rural development, forestry, and agriculture in rural areas. 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."

In Subsection (C) the rural element is required to include measures that will contain or otherwise control rural development; assure visual compatibility of rural development with the surrounding rural area; reduce inappropriate conversion of undeveloped land into sprawling, low density development in the rural area; protect critical areas and surface and groundwater resources; and protect against conflicts with the use of agricultural, forest, and mineral resource lands designated under the GMA.

In Quadrant Corporation v. State Growth Management Hearings Board, 154 Wn. 2d 224, 110 P. 4d 132 (2005), the Court stated at page 240: "Considering the discretion afforded counties to plan, 'in full consideration of local circumstances,' RCW 36.70A.3201, King County's decision to consider vested application and development rights to determine that the Bear Creek area 'already [was] characterized by urban growth' was not a clearly erroneous application of the GMA."

In Diehl vs. Mason County, 94 Wn. App. 645, 972 P.2d 543 (1999) the Court noted that the broad discretion allowed to local governments under the GMA to draft comprehensive plans and development regulations tailored to local circumstances was nonetheless limited by the requirement that the final plans and regulations be consistent with the mandates and goals of the act. In Diehl the Court was concerned that the rational for the Mason County's determinations was not evident in the record and that the County had not pointed to a place in the record where its justifications for its Comprehensive Plan and regulations were made. Here, Clallam County prepared the "December 2006 draft Clallam County Rural Lands Report" which is specifically designed to convey the rational behind its determinations.

The Court has reviewed the rural lands report prepared by Clallam County in support of its Comprehensive Plan and land use designations. As noted, it is neither simplistic nor formulaic. The County, using the Growth Management Act as its guide, and factual and historical data particular to Clallam County, has adopted a

comprehensive scheme and explained the rationale behind the plan. As it relates to rural densities of one dwelling unit per 2.4 acres the plan is justified on a number of bases.

The County has divided itself into four sub regions for planning purposes and discusses the factual reasons for the regionalization and the different land use planning issues raised for each region based on number of factors as diverse as average population age, economic downturns, and vested rights. It strikes this Court that that is exactly the type of planning the GMA envisioned.

To the contrary the WWGMHB's literally "one size fits all" approach to rural density seems contrary to the act and would even seem to give rise to constitutional taking and due process concerns if that were what the GMA actually stood for.

Under RCW 36.70A.320(3), the review is to be upon the entire record before the County. The decision of the Board relates only to densities and discusses in little or no detail the other goals of the GMA as they might apply to the County's rural density designations.

In the Viking Properties case, *supra*, the Court noted the 13 nonprioritized goals of the GMA. At page 127 that Court noted that to elevate the goal of density to the detriment of other important GMA goals would violate the Legislature's express statement that the goals are non-prioritized.

The Growth Management Hearings Boards have been criticized for attempting legislate a five acre minimum parcel size in rural areas of the state. (See Viking Properties, *supra,* at page 129) Clearly that is contrary to the concept of the GMA which strives to allow local jurisdictions to make locally appropriate land use plans. Clallam County notes that the ultimate impact of its plans would be to place rural land within the county in designations which result in an average parcel size of approximately five acres. Some parcels would be allowed only larger than that and some smaller, but none smaller than 2.4 acres, except in innovative zoning areas such as cluster zones and the like. The Court also notes that in connection with the Carlsborg issue, the Board found that allowing lots larger than 4 dwelling units per acre could not be considered urban. A 2.4 acre lot is ten times less dense than what the Growth Management Hearing Board in this case found to constitute the minimum density for urban use. The act states that growth is to be discouraged outside of GMA's and is to occur "only if it is not urban in nature" RCW 36.78.001 (1). A permitted density ten times less dense than the lowest "urban" density seems to meet such a standard.

Therefore, the last issue is whether or not such lot sizes can never conform to the "rural characteristics" requirements.

In Webster's New Collegiate Dictionary, 1981, by G & C Merriam Co, has many definitions of "character". The one that appears to fit the best is "one of the attributes or features that make up and distinguish the individual."

No doubt each of the rural lands characteristics are important in assessing whether the land is rural or not. In the Rural Lands Report, the County discusses each of the characteristics listed and concludes that parcel designations of 2.4 acres, coupled together with other innovating zoning restrictions and considerations, and together with the totality of the unique circumstances found in and throughout Clallam County, meet each of the characteristics listed.

One suspects that the WWGMHB, while attempting not to say so, still believes and accordingly ruled that a bright line 5 acre minimum density in rural areas is required under the GMA. Nothing in the act directly supports such a conclusion. Here, to the contrary, a great deal of analysis of circumstances and other factors has led Clallam County to conclude that a rural area in Clallam County may include some parcels of less than five acres and still be considered rural. This court finds that there is not substantial evidence in the record by which a court could find that the County's decision was clearly erroneous in that regard. Accordingly, the order of the Growth Management Hearing Board finding the County's Comprehensive Plan to be noncompliant as it relates to the R2 and RW2 zones is reversed.

DATED this 26th day of June, 2009.

Respectfully submitted,

KEN WILLIAMS
JUDGE

APPENDIX B

BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

DRY CREEK COALITION and FUTUREWISE, Petitioners, v. CLALLAM COUNTY, Respondent.	CASE NO. 07-2-0018c **COMPLIANCE ORDER (LAMIRDs and RURAL LANDS)**

This matter came before the Board on September 17, 2009 for a Compliance Hearing following the submittal of two Clallam County Compliance Reports, one for Limited Areas of More Intensive Rural Development (LAMIRDs) and the other dealing with rural lands.[1] These Compliance Reports describe the actions Clallam County (the "County") has taken in response to the Board's April 23, 2008 Final Decision and Order (FDO)[2] as modified by the January 30, 2009 Compliance Order[3] and subsequent Orders on Reconsideration.[4]

The Board conducted a telephonic compliance hearing. Dry Creek Coalition (DCC) was represented by Gerald Steel. Futurewise was represented by Robert Beattey. Clallam County was represented by Doug Jensen. With Mr. Jensen were John Miller, Director of Community Development for Clallam County and Steve Gray, County Planning Director. Board Members Nina Carter, William Roehl and James McNamara were present, with Mr. McNamara presiding.

1. LAMIRDS

[1] LAMIRDs: Compliance Report for Partial Compliance, filed August 6, 2009 and Rural Lands: Compliance Report for Partial Compliance and Request for Partial Rescission of Invalidity, filed July 24, 2009.
[2] April 23, 2008 Final Decision and Order.
[3] January 30, 2009 Compliance Order.
[4] June 9, 2008 Order on Motion for Reconsideration ;February 20, 2009 Order on Motion for Reconsideration.

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In April 2008, this Board found twenty of the County's LAMIRDs failed to comply with the GMA.[5] In response, the County removed four LAMIRDs and adjusted the logical outer boundaries (LOBs) on the remaining sixteen. Despite this, in the Board's January 30, 2009 Order Finding Noncompliance, the Board found that the County remained noncompliant with GMA requirements relating to four remaining LAMIRDs.[6] The Board also found the County noncompliant in its use of the phrase "prior to" July 1, 1990 in its development regulations as the relevant timeframe for the purposes of evaluating existing areas and uses under RCW 36.70A.070(5)(d)(v).[7]

In order to the address the remaining LAMIRD compliance orders, the County, on June 23, 2009, adopted Ordinance No. 850 and Resolution No. 62, 2009.

Based on the original holdings of the Board set forth in the April 2008 FDO and the January 2009 Compliance Order, the compliance issues currently before the Board are:

1. The phrase "the uses that existed in the areas *prior to* or as of July 1, 1990 . . . " was clearly erroneous. [Conclusions of Law E-G];
2. Inclusion of the southeastern portion of the Dryke-West LAMIRD [aka Dryke-Sherbourne] was clearly erroneous. [Conclusion of Law L];
3. Inclusion of the 10 acre Northwestern portion of the Merrill & Ring site and the Peninsula Timber Company property [within the Laird's Corner-East LAMIRD], were clearly erroneous. [Conclusion of Law P and Q];
4. Inclusion of the Port Angeles Gun Club property in the Deer Park LAMIRD was clearly erroneous. [Conclusion of Law T]; and
5. The Lake Farm LAMIRD remained non-compliant. [Conclusion of Law U].

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[5] April 2008 FDO, Conclusion of Law M, at 101.
[6] January 30, 2009 Compliance Order, at 40-41 (Finding the Lake Farm LAMIRD, Laird's Corner East LAMIRD, Dryke-Sherbourne LAMIRD, and Deer Park LAMIRD still failed to comply with the GMA).
[7] January 30, 2009 Compliance Order, at 40.

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In response, the County took the following actions:

1. With regard to the County's use of the phrase "the uses that existed in the areas *prior to* or as of July 1, 1990 . . . ". and which the Board held was not consistent with RCW 36.70A.070(d)(v), the County changed its Code language to reference "an existing area or existing use that was in existence: (A) On July 1, 1990 . . . " All "prior to" language and the phrase "prior to or" were deleted throughout the relevant County's code sections to be consistent with the GMA statutory language.[8]
2. The Dryke/West LAMIRD (the western section) was amended to exclude the remainder of the eastern highway frontage parcel and the Comprehensive Plan Land Use and Zoning Map for this location updated from Rural Commercial (RC) to Rural Low (R5).[9]
3. The County notes that the 1990 aerial photograph of the Laird's Corner-East LAMIRD showed built environment existing on Peninsula Timber Short Plat Parcel "A" consisting of buildings used for commercial activities justifying its inclusion in the Lairds' Corner LAMIRD. Peninsula Timber Short Plat Parcel "B" was used for wood products wholesaling from 1970 to 1993. The County amended the Laird's Corner East LAMIRD to exclude the Peninsula Timber Short Plat Parcel "B" and Crown Pacific Survey Parcel "A" and rezone these portions from Rural Limited Commercial (RLC) to RCC3. The Peninsula Timber Short Plat Parcel "A" was retained as part of the LAMIRD.[10]
4. The Deer Park LAMIRD was amended to exclude the Port Angeles Gun Club property and the Comprehensive Plan Land Use and Zoning Map for this location was updated from Rural Commercial (RC) to Rural Low (R5).[11]

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[8] LAMIRDs Compliance report at 10-11.
[9] Id. at 5.
[10] Id. at 7.
[11] Id. at 6.

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5. The County initially considered redaction of the entire Lake Farm LAMIRD but received additional information from landowners and the Public Utility District (PUD) regarding the installation of public infrastructure as of July 1, 1990. Based on this new information, the County redrew the LAMIRD boundaries to reflect the extent to which the PUD water mains were installed and existed to service individual lots as of July 1, 1990.[12]

Both Petitioners Dry Creek Coalition and Futurewise have filed responses to the County's LAMIRD compliance report in which they state that they do not object to a finding of compliance with respect to the LAMIRD issues.[13] However, Futurewise raised objections to the new Solmar and Marine Drive LAMIRDs as too broadly drawn.[14]

As to the Marine Drive LAMIRD, the County pointed out that those parcels included within this LAMIRD to which Futurewise objected were redacted from the LAMIRD.[15] The Board finds no clear error in the Marine Drive LAMIRD.

With regard to the Solmar LAMIRD, Futurewise objected to "larger parcels along Highway 101 that were not developed in 1990 and are not developed now."[16] These four "larger parcels" range in size from 1.7 to 2.5 acres[17] and, as they cannot be further divided given the underlying zoning, are consistent with the proposed maximum density of 1du/2.4 acre for this area. The County has chosen to use Highway 101 as the southern border of the Logical Outer Boundary (LOB) for this LAMIRD. This is consistent with RCW

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[12] Id. at 8-9.
[13] Futurewise's Responses to LAMIRDs Compliance Report at 5; DCC Objections Regarding LAMIRDs at 2.
[14] Futurewise's Objection in Part to a Finding of Compliance at 13.
[15] County Response at 16. See, Resolution No. 67, 2009, Finding 11 a. describing areas removed from the LAMIRD LOB.
[16] Futurewise Objection at 13.
[17] County Response at 16. The Board notes that the May 12, 2009 County Memorandum to the Planning Commission describes the largest of the parcels as 3.8 acres. Exhibit 155 at 928.

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36.70A.070(5)(d)(iv) which provides that physical boundaries such as highways can be used to establish the LOB and the LOB may contain undeveloped lands if properly limited.[18]

In addition, while Futurewise alleges that two properties to the east of Rubens Road were not developed in 1990, this claim is contested by the County. The 1990 aerial photograph clearly shows this property to have been cleared. While the mere clearing of land may not be sufficient for its inclusion in a LAMIRD, this is a newly created LAMIRD and the burden is on Futurewise to demonstrate that these properties were included in error. Futurewise has not carried its burden in this regard.

The Board does not find that the County was clearly erroneous in establishing the LOB for the Solmar LAMIRD.

Conclusion: Based on the Board's review of the County's compliance efforts with regard to LAMIRDs, the Board concludes that the County has achieved compliance with the GMA as to those portions of the County's adoption found noncompliant in the January 2009 Compliance Order, Conclusions of Law E-G, L, Q, T and U. These revisions remove the basis for a finding of noncompliance from these LAMIRDs and the code sections in question. In addition the Board finds that Petitioner has not shown the County's actions in establishing the Marine Drive or Solmar LAMIRDs to be clearly erroneous.

2. Rural Lands

In the Board's April 23, 2008 FDO, the Board found that with such a large portion of the County's existing land use pattern characterized by a parcel size of 4.81 acres, zoning that

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[18] *See e.g.* RCW 36.70A.070(5)(d)(I) Rural development consisting of *infill*; *Dry Creek Coalition, et al v. Clallam County*, Case No. 07-2-0018c, FDO at 46-49 (Distinguishing between impermissible "outfill" as opposed to vacant lands establishing a LOB tied to a natural or manmade feature, such as Highway 101); *Friends of Skagit County v. Skagit County*, Case No. 07-2-0025c, FDO at 35 (May 12, 2008); *1000 Friends v. Thurston County*, Case No. 05-2-0002, Compliance Order at 18 (Nov. 30, 2007); *Panesko v. Lewis County*, Case No. 00-2-0031c, FDO (March 5, 2001).

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authorized lower densities failed to maintain the County's traditional rural lifestyles. The Board wrote that:

> ... [T]he rural character of Clallam County, specifically its visual landscape and farm-based economy, is dominated by lots of greater than five acres in size. With such a large percentage of the County's existing land use pattern at a parcel size of 4.81 acres and farms within the County averaging 25 acres, the existing rural landscape supports a finding that the rural character of Clallam County is a rural density of 1 du/5 acre.
>
> The Board recognizes the GMA mandate for Clallam County to provide for a variety of rural densities and permits it discretion in making planning decisions. However, the densities the County selects must be *rural* in nature. The importance of rural lands and their character is specific, looking to land use patterns for establishing rural character and seeking to foster traditional rural lifestyles and economies that a County has historically provided. By authorizing densities that do not reflect the existing landscape or economy of the area, the County has failed to maintain the traditional rural lifestyles of the residents of Clallam County as required by the GMA.
>
> ... the Board finds that the following rural zoning district within Clallam County violates RCW 36.70A.110, 36.70A.020(1) and, 36.70A.020(2) because these zoning districts permit urban, not rural, densities outside of an urban growth area:
>
> CCC 33.10.030 R2 zone: Permits 1 du/2.4 acres
> CCC 33.10.035 RW2 zone: Permits 1 du/2.4 acres [19]
>
> ...

Thus, the Board found that the R2 and RW2 zones effectively permitted urban, not rural, densities outside of an urban growth area.[20]

In order to achieve compliance, the County first enacted interim Rural Low (R5) zoning in place of the invalid R2 and RW2 zones. Then, with the adoption of Resolution No. 67, 2009

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[19] FDO at 63-64. This portion of the Board's FDO also found the County's R1 and RW1 zones non-compliant. However, these areas were addressed by the Board in its January 2009 Compliance Order which noted that Clallam County had provided clarification that R1/RW1 lands were confined to LAMIRD zones within the various planning regions identified by Futurewise and the R1/RW1 lands removed or excluded from the noncompliant LAMIRDs were rezoned under compliant rural zoning. Compliance Order, at 30-31.

[20] Id. at 63-64.

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and Ordinance No. 852 on July 21, 2009, the County replaced the R5 zoning on lands outside of LAMIRDs which were previously zoned R2 and RW2 with the following designations:[21]

1) Neighborhood conservation zoning and techniques were applied in and about developed lands;
2) Four new LAMIRDs were designated for some lands developed prior to July 1, 1990;
3) Federal, State and County park lands were re-designated as Public (P) zones;
4) State forest lands were re-designated as Commercial Forest (CF) zones;
5) 220 acres near the Forks UGA were re-designated with Western Region Rural Low (RW5) zoning; and
6) The Battelle site east of the Sequim UGA was re-designated with Rural Low (R5) zoning.

Since the County's action essentially established a rural density of five acres, at issue in this compliance proceeding is the County's newly adopted Rural Neighborhood Conservation (NC) zoning, with a base density of one dwelling unit per five acres, along with the associated Rural Neighborhood Conservation Overlay (NCO) and Rural Neighborhood Conservation Cluster (NCC) residential development alternatives. These amendments are contained under amended comprehensive plan sections and a newly created Clallam County Code (CCC) section 33.10.015.[22]

The newly adopted NCO provision addresses neighborhoods which are already substantially developed and characterized by densities greater than the underlying maximum NC zone density of 1 dwelling unit per 5 acres. As described in the County's Rural Land Policy 4,[23] infill is allowed "at a density consistent with the substantial residential development already existing" and that "will be consistent with the visual compatibility of rural development with the surrounding rural area". In order to qualify for a NCO

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[21] Compliance Report at 2.
[22] Id. at 4.
[23] CCC 31.04.230(2)(d)

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development, the surrounding neighborhood character must demonstrate that at least 70% of parcels within 500 of the property boundary are developed with an average lot size of less than 5 acres.[24] Developed lots located within LAMIRDs and urban growth areas are not included in calculating the average lot density.[25]

The County has also adopted a provision to allow clustering in the NC zone under the provisions of the Neighborhood Conservation Cluster (NCC). The stated intent of the NCC provision is "to encourage creative site designs of subdivisions to encourage keeping larger, contiguous rural lots and open space tracts, retain features of rural character associated with the land to be divided, and reduce the area of rural lands used for roads, utilities, driveways, and other pervious surfaces." [26]

As described by the County, while the NCO review looks at the surrounding neighborhood to ensure that future divisions of a subject parcel will be consistent and compatible with an existing, rural neighborhood, an NCC review examines the specified rural parcel to ensure that any division of that parcel maximizes the retention of a larger lot acreage and the preservation of open space.[27] Landowners who preserve open space by clustering receive density bonuses and reduced infrastructure costs. CCC 33.10.015 (10) provides for a maximum residential density of 1 dwelling unit per 2.4 acres and requires that a minimum of 70% of the gross acreage of the NCC development be retained as a large rural lot, set aside under a permanent open-space easement, or set aside as permanent open space owned and maintained by a homeowners' association.

While Futurewise acknowledges that "[W]hether a particular density is rural in nature is a question of fact based on the specific circumstances of each case."[28] it nevertheless

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[24] CCC 33.10.015(9)(b).
[25] Id.
[26] CCC 33.18.015(10).
[27] Compliance Report at 7.
[28] Thurston County v. Western Washington Growth Management Hearings Board, 164 Wn.2d 329, 358 (2008).

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maintains that a density of 1 dwelling unit per 2.4 acres is "characterized by urban growth"[29] and inconsistent with the density otherwise allowed in the rural zones. However, if it is agreed that the determination of rural density is based on the specific circumstances of each case, it is not appropriate to dismiss a 1du/2.4 acre density out-of-hand, but instead to apply the density, if at all, where it is consistent with existing rural development. In fact, there are areas in Clallam County where a density of 1du/2.4 acre can be consistent with a rural environment, when appropriately limited in a manner such as the County now provides.

In fact, this is the approach the County has taken. In the case of the NCO, densities of 1du/2.4 acre may be applied only where this density is "consistent with the developed neighborhood character and uses"[30]. Under the NCC provisions, the stated intent is to "encourage keeping larger, contiguous rural lots and open space tracts, retain features of rural character associated with the land to be divided, and reduce the area of rural lands used for roads, utilities, driveways, and other impervious surfaces."[31] In both cases, consistency with the existing rural development is the goal. Both techniques, therefore, address the flaw the Board previously found in the R2 and RW2 zones – that they authorized densities that did not reflect the *existing landscape of the area.*

Dry Creek Coalition ("DCC") notes that it does not object to the rezoning of some of the R2 lands to R5 (Battelle) and RW5 (Western Central 2 Neighborhood)[32] but it does object to the creation of the NCO overlay and the NCC options in the NC zone.[33] DCC argues that these allow urban growth outside urban areas and, therefore, discourage urban development in urban areas. DCC acknowledges that RCW 36.70A.070(5)(b) encourages clustering, density transfer, design guidelines, conservation easements and other innovative techniques that will accommodate appropriate rural densities, but maintains that these

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[29] Futurewise Objections at 8.
[30] CCC 33.10.015 (9)
[31] CCC 33.10.015(10)
[32] DCC Objections at 3.
[33] Id.

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techniques "cannot be used to increase density to a level that is inconsistent with the maximum density of 1 du/5 acres".[34]

To be clear, while this Board found that the rural character of Clallam County is a rural density of 1 du/5 acre,[35] the Board has not held that no variation from that density is allowed under any circumstances. In fact, the clear language of the GMA, which requires "a variety of rural densities,"[36] would not permit such a holding. Instead, the Board found that the visual landscape and farm-based economy of the County was dominated by lots of greater than five acres in size and that, by authorizing densities "that do not reflect the existing landscape or economy of the area, the County has failed to maintain the traditional rural lifestyles of the residents of Clallam County."[37] With either the NCC or the NCO technique, the base density in the NC zone is maintained at not greater than 1du/5 acres.

RCW 36.70A.070(5) provides that the rural element of a plan shall provide for a variety of rural densities through techniques that "are consistent with rural character." The County's NCO provision recognizes that, in Clallam County, there are areas where the pattern of rural development has occurred at densities below the average of 4.8 acres and limits the application of this overlay to areas so as to allow "infill at a density consistent with the substantial residential development already existing"[38]. In those areas where, as required by the County, 70% of the parcels within a neighborhood boundary of 500 feet are already developed at higher densities and contain mature infrastructure and services, it cannot be said that densities of 1 dwelling unit/ 2.4 acres are inconsistent with rural character of that area. In addition, because infill allowed by the NC overlay is limited to neighborhoods that have already been substantially developed, this will not lead to the "inappropriate

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[34] Id. at 4.
[35] FDO at 63.
[36] RCW 36.70A.070(5)(b).
[37] FDO at 63.
[38] CCC 31.04.230(2)(d).

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conversion of undeveloped lands into sprawling, low-density development"[39] as DCC suggests. In addition, as the County noted, the NCO and NCC address the rural character of existing NC neighborhoods and some NC parcels within a limited number of previously unchallenged and formerly GMA compliant R2 and RW2 areas, which were built out between the mid-1990's and the entry of the FDO.[40] NC parcels and parcels in other rural areas characterized by larger lot sizes would not qualify for NCO, and must meet the County's size limitations, site development criteria and open space requirements.

The County also points out that the former R2/RW2 zones comprise less than 25% of the County's total rural acres. The proposed NC zone lands account for only 2% of the County's total acreage.[41] Thus, the risk of "inappropriate conversion of undeveloped lands into sprawling, low-density development" is more imagined than real.

As to the hypothetical posed by DCC in which the NCO overlay would be applied to a cluster of 18 half acre developed residential lots within 500 feet of an undeveloped ten acre parcel, and 13 five acre developed residential lots, resulting in densities of 1du/2.4 acre, even though only 9 of the surrounding acres have higher density development, the Board need not rely on such hypotheticals but can instead defer to the County's assertion that clusters of one-half acre lots in this amount are presently contained in LAMIRDs or UGAs, which are specifically excluded from the calculations of the average lot size for determining an NC overlay density. The County points out that there are no such clusters within 500 feet of any proposed NC zone.

Conclusion: By eliminating the use of the R2 and RW2 zones the County has removed the basis for finding that these zones substantially interfere with Goals 1 and 2 of the GMA. The NCO and NCC provisions of the County Comprehensive Plan and development regulations

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[39] See, RCW 35.70A.070.020(2).
[40] County Response at 7.
[41] Id. at 10 fn. 14.

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contain adequate provisions to protect the existing rural landscape in those areas where they will be permitted.

ORDER

Based on the foregoing, the Board finds that the County has achieved compliance with the GMA as to those portions of the County's adoption found noncompliant in Conclusions of Law E-G, L, Q, T and U of the FDO. These revisions remove the basis for a finding of noncompliance from these LAMIRDs and invalidity from the code sections in question. In addition the Board finds that Petitioner has not shown the County's actions in establishing the Marine Drive or Solmar LAMIRDs to be clearly erroneous.

The Board rescinds its finding of invalidity as to lands formerly zoned R2 and RW2 and finds that the Petitioners have not demonstrated that the provisions of the Clallam County Comprehensive Plan and development regulations authorizing the NCC and NCO zones are clearly erroneous.

SO ORDERED this 3rd day of November, 2009.

James McNamara, Board Member

William Roehl, Board Member

Nina Carter, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

<u>Reconsideration</u>. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three

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copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

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WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Case No.: 07-2-0018c

Dry Creek Coalition & Futurewise v. Clallam County

DECLARATION OF SERVICE

I, PAULETTE YORKE, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Executive Assistant for the Western Washington Growth Management Hearings Board. On the date indicated below a copy of a COMPLIANCE ORDER (LAMIRDS and RURAL LANDS) in the above-entitled case was sent to the following through the United States postal mail service:

Tim Trohimovich
Futurewise
814 Second Ave Ste 500
Seattle, WA 98104

Gerald Steel
Attorney-At-Law
7303 Young Rd NW
Olympia, WA 98502

Dry Creek Coalition
c/o Harley Oien
215 Rife Rd.
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Clallam County Auditor
223 East Fourth St., Ste. 1
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Ann M. Gygi
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Perkins Coie LLP
1201 Third Avenue Suite 4800
Seattle, WA 98101-3099

DATED this 3rd day of November, 2009.

Paulette Yorke, Executive Assistant

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON - DIVISION II

CLALLAM COUNTY,

Respondent,

vs.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BD., ET AL.,

Appellants.

NO. 39601-7-II

AFFIDAVIT OF SERVICE BY MAIL

STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 8th day of February, 2010, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Response Brief of Respondent Clallam County, addressed as follows:

Mr. David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

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Tim Trohimovich
Robert A. Beatty
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814 2nd Ave Ste 500
Seattle, WA 98104-1543

Jackie Cooper

SUBSCRIBED AND SWORN TO before me this 8th day of February, 2010.

Ann Marie Monger

(PRINTED NAME:) Ann Marie Monger
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 10/21/2012

AFFIDAVIT OF SERVICE