

Schroeder, Kathy



From: Orjiako, Oliver
Sent: Wednesday, May 25, 2016 2:56 PM
To: Albrecht, Gary, Alvarez, Jose, Anderson, Colete, Euler, Gordon, Hermen, Matt, Kamp, Jacqueline, Lebowsky, Laurie, Lumbantobing, Sharon, Orjiako, Oliver, Schroeder, Kathy, Wisner, Sonja
Subject: FW: CCCU court actions - Poyfair Decision - supported by Court of Appeals - for the Public Record
Attachments: Carol Levanen Poyfair superior court april 4 1997 pdf, Carol Levanen Ladley order on reconsideration june 11 1997 pdf, Carol Levanen Nichols judgement April 8 1997 pdf, Carol Levanen Glen Amster petition for review CCCU pdf, Carol Levanen Glen Amster Petitioners opening brief CCCU 16_31 pdf, Carol Levanen Court appeals division 2 published opinion 1999 pdf, Carol Levanen Glen Amster Petitioners opening brief CCCU 1_15 pdf

FYI and for the record Sonja, please send to the PC. Thanks

From: Carol Levanen [<mailto:cnldental@yahoo.com>]
Sent: Wednesday, May 25, 2016 1:52 PM
To: DIJUP@FOSTER.COM; Stewart, Jeanne, Olson, Julie (Councilor), Mielke, Tom; Boldt, Marc; Madore, David, Orjiako, Oliver
Subject: Fw: CCCU court actions - Poyfair Decision - supported by Court of Appeals - for the Public Record

Dear Mr. DiJulio,

Please see the attached information regarding the Poyfair Decision and the Court of Appeals decision that you requested. Sorry I haven't sent this sooner, but we have been very busy with research in preparation for the possible appeal to the Clark County Comprehensive Plan 2016 update.

In particular, and of major concern, is on page six (6) of the ruling. The county continues to use this unauthorized formula in the Comprehensive Plan and did not make corrections to the Plan according to the ruling, in 1994. The WWGM Hearing Board ignored this very important piece of the remand.

The attachment master had been highlighted, so if there is any question as to the wording, please let me know, and I will send or deliver a hard copy to you. Thanks for your time and attention to this very important matter.

Best Regards, Carol Levanen, Exec. Secretary
Clark County Citizens United, Inc.
P.O. Box 2188
Battle Ground, Washington 98604

Page 6, Item 7, Rural Lands Densities

*(Top of page) The County's **rural and resource development regulations** are **inconsistent with the GMA**. One of the Planning goals requires a variety of residential densities and housing types, which the **Clark County Community Framework Plan** met by **identifying pre-existing small development patterns** in rural areas **and creating rural activity centers** with a variety of rural densities.*

*(Explanatory language can be found in the body of page) **This formulaic view of the GMA requirements is fatally flawed.***

(Bottom of page 6 and top of page 7) the Board had an **end in sight** and **disregarded the GMA's mandate** in applying an **unauthorized formula** to the review of the Clark County Comprehensive Plan's **land use densities**. The Board's interpretation **was erroneous**, and the **County's decision to follow** the Board's lead was unfortunate. The result is a plan that gives **little regard for the realities of existing rural development** in **direct contradiction** of the terms of the **GMA**.

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Honorable Edwin J Poyfair
PRESENTATION: Friday, April 4, 1997, at 10:30 AM

FILED

APR 04 1997

JoAnne Blum, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

CLARK COUNTY CITIZENS UNITED,)
INC.; MICHAEL ACHEN and)
CATHERINE ACHEN, husband and wife, et)
al.,)

Petitioners and)
Additional Parties of Record,)

v.)

WESTERN WASHINGTON GROWTH)
MANAGEMENT HEARINGS BOARD, a)
Washington agency,)
Respondent)

NO. 96-2-00080-2

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER came on for hearing before the above-entitled Court on October 16, 1996, upon the Petition for Review of Petitioners. Clark County Citizens United, Inc., Michael and Catherine Achen (collectively referred to herein as "Petitioners"), appearing by and through their attorneys of record, Lane Powell Spears Lubersky LLP and Glenn J. Amster, and Respondents, ~~Western Washington Growth Management Hearings Board~~ (hereinafter referred to as "WWGMHB"), appearing by and through the Office of the Attorney General and Marjorie T Smitch, Assistant Attorney General; Clark County, appearing by and through the Office of

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER - 1
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1 the Prosecuting Attorney, and Richard S. Lowry, Chief Civil Prosecuting Attorney; additional
2 parties of record Clark County Natural Resources Council, Vancouver Audubon Society, Loo-
3 Wit Group Sierra Club, Coalition for Environmental Responsibility and Economic Sustainability
4 and Native Footprints, appearing by and through their attorney, John S. Karpinski; David R.
5 Becker and Joan Becker, et al., appearing by and through their attorneys, Richard T. Howsley
6 and Lisa M. Graham; William W. Saunders and Clark County Home Builders Association,
7 appearing by and through their attorneys, Landerholm, Memovich, Lansverk & Whitesides, P.S.
8 and Randall B. Printz; Rural Clark County Preservation Association, appearing by and through
9 its representative Robert Yoesle, pro se; and W. Dale DeTour, appearing pro se; and the Court,
10 having considered the complete record before the WWGMHB, and the pleadings and exhibits
11 herein, having heard argument of counsel and taken the matter under advisement, and having
12 rendered an oral decision on February 21, 1997, now enters the following Findings of Fact,
13 Conclusions of Law and Order:

14 **FINDINGS OF FACT**

15 1. This case was brought before this Court on Petitioners' Petition for Review
16 pursuant to the Growth Management Act ("GMA"), RCW 36.70A.300. Petitioners challenged
17 several elements of the Clark County Comprehensive Plan, which was adopted by the Clark
18 County Board of County Commissioners in December 1994. Petitioners brought this appeal
19 following the Western Washington Growth Management Hearings Board's ("the Board") final
20 decision on December 6, 1995, denying Petitioners' claim that the Clark County Comprehensive
21 Plan violated the GMA.

22 2. Clark County began its comprehensive planning process, pursuant to the GMA,
23 RCW Ch. 36.70A, in 1991. The County adopted County-Wide Planning Policies, under RCW
24 36.70A 210, and then a Community Framework Plan, to form a vision of Clark County's future.
25 Following adoption of this Plan, the County formed a Rural and Natural Resource Committee
26 ("RNRAC"). This committee was delegated the task of identifying lands within the County to

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER - 2
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1 be designated natural resource lands, as required by RCW 36.70A.050. The designated resource
2 lands would become part of the County's 20-year growth plan, the Clark County Comprehensive
3 Plan

4 3. In addition to designating agricultural and forest resource lands, Comprehensive
5 Plan adopted by Clark County designated 36,000 acres of "agri-forest" resource land. This
6 classification was a hybrid of two GMA resource lands, agricultural and forest resource land
7 This hybrid resource category and the lands designated in this category were never considered
8 by RNRAC.

9 4. The agri-forest lands were also not a part of the County's environmental review
10 process completed in conjunction with the County's comprehensive planning. The County issued
11 an Environmental Impact Statement ("EIS") prior to the release of the draft Comprehensive Plan
12 in September 1994. However, ~~none of the alternatives~~ for planning addressed in the
13 environmental review document ~~discussed the~~ 36,000 acres of agri-forest resource land.

14 5. The adopted Plan also eliminated an element of the Community Framework Plan,
15 the concept of rural town centers, known as "villages" and "hamlets." These rural activity
16 centers were focussed on identified pre-existing development patterns and designed to maintain
17 the existing character of rural growth. The centers were eradicated and replaced with a county-
18 wide uniform lot density in the final Comprehensive Plan. Clark County issued a policy memo
19 stating that the reason the rural activity centers were removed from the plan was that previous
20 Growth Management Board decisions appeared to prevent the County from allowing any growth
21 in rural areas. Specifically, according to Board decisions, the sum of the urban and rural
22 population was required to equal the population projection developed by the State Office of
23 Financial Management (OFM). Given the population growth allocated to Clark County's urban
24 growth areas, the Plan would violate this requirement if virtually any growth was allowed in the
25 rural areas
26

1 is no substantial evidence in the record to support the designation of agri-forest lands as resource
2 lands under the GMA.

3 Additionally, the failure to solicit meaningful public input for the agri-forest resource
4 lands violated the public participation provisions of the GMA requiring early and continuous
5 public participation in the development and adoption of comprehensive plans.

6 5. Agricultural Resource Lands. There is ~~not~~ substantial evidence in the record to
7 support the County's designation of agricultural resource lands. ~~In particular, there is not~~
8 ~~substantial evidence to demonstrate how those lands designated satisfy the GMA definitional~~
9 ~~criteria, that is, that those lands are primarily devoted to agricultural production and are of long-~~
10 ~~term commercial significance for the production of agricultural products. The only explanation~~
11 ~~provided regarding the designation of agricultural resource lands is contained in a staff report~~
12 ~~prepared after the RNRAC had completed its work which states, "soils was a critical factor "~~
13 ~~This is not to suggest the County was incapable of analyzing the required statutory criteria: the~~
14 ~~County undertook a comprehensive analysis of resource land designations in urban reserve areas~~
15 ~~when it was compelled by the Board to re-examine these designations. The County should have~~
16 ~~undertaken a similar analysis before designating any agricultural resource lands.~~

17 Because there is not substantial evidence in the record that satisfies the GMA's
18 ~~definitional criteria, the agricultural resource land designations are invalid.~~

19 6. Comprehensive Plan EIS. The Comprehensive Plan EIS issued by the County
20 violates the State Environmental Policy Act ("SEPA"), RCW Ch. 43.21C. The agri-forest
21 resource land ~~designations were disclosed subsequent to the publication of the final Plan EIS and~~
22 ~~were not disclosed or discussed in any way in the EIS alternatives. The removal of rural activity~~
23 ~~centers also was not addressed in the EIS. The County did not require additional environmental~~
24 ~~review and did not solicit additional public comments. The County failed to comply with~~
25 ~~SEPA's requirement for additional environmental review when a proposal changes substantially~~
26 ~~from the one addressed in the initial EIS. The Board's decision to uphold the adequacy of the~~

1 EIS absent additional environmental analysis regarding the agri-forest designations and changes
2 to the pattern of rural development was clearly erroneous.

3 7. Rural Land Densities. The County's rural and resource development regulations
4 are inconsistent with the GMA. The GMA requires counties to determine that planning goals
5 are utilized and are a part of the consideration supporting its decisions. One of the planning
6 goals requires a variety of residential densities and housing types, which the Clark County
7 Community Framework Plan met by identifying pre-existing small development patterns in rural
8 areas and creating rural activity centers with a variety of rural densities. The eradication of the
9 centers and their replacement with a uniform lot density violates the planning goal requiring a
10 variety of residential densities.

11 It is evident the rural land use density regulations were driven in part by earlier Growth
12 Management Hearing Board decisions requiring urban population plus rural population to equal
13 Office of Financial Management population forecasts. See Exhibit 5, p. 15 to Petitioners'
14 Opening Brief, Box. No. 2 to Record, Clark County Exhibit No. 93. This formulaic view of
15 the GMA requirements is fatally flawed. There is no requirement in the GMA that the OFM
16 projections be used in any manner other than as a measure to ensure urban growth areas are
17 adequately sized and infrastructure in those growth areas is provided for. This Board decision,
18 however, compelled the County to ~~eliminate~~ substantial portions of the rural areas in order to
19 meet the Board's apparent requirements.

20 The only requirement for rural areas in the GMA is that growth in rural areas not be
21 urban in character. While the GMA contains no restrictions on rural growth, it does require a
22 variety of residential densities. By trying to comply with the Board's errant decision, the
23 County violated a GMA planning goal.

24 Through no fault of the County's, the Board had an end in sight and disregarded the
25 GMA's mandate in applying an unauthorized formula to the review of the Clark County
26 Comprehensive Plan's land use densities. The Board's interpretation was erroneous, and the

1991
Comprehensive Plan

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER - 6
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1 County's decision to follow the Board's lead was unfortunate. The result is a plan that gives
2 little regard for the realities of existing rural development in direct contradiction of the terms
3 of the GMA.

4 **ORDER**

5 Based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY:

6 ORDERED, ADJUDGED AND DECREED that the Clark County Comprehensive Plan
7 and Development Regulations adopted in Ordinance 1994-12-47 on December 20, 1994 are
8 remanded to the Western Washington Growth Management Hearings Board with direction to
9 enter a decision in accord with this Order mandating County action to correct the violations of
10 the GMA identified herein; ~~and IT IS HEREBY:~~

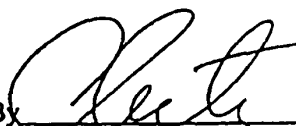
11 ~~FURTHER ORDERED, ADJUDGED AND DECREED that Petitioners shall be awarded~~
12 ~~costs against Respondent WWGMHB pursuant to RCW 34.05.566 and RCW 4.84.010 in the~~
13 ~~amount of \$468.50, pursuant to the Cost Bill filed herein.~~

14 DONE IN OPEN COURT this 4th day of April, 1997.

15
16 
17 The Honorable Edwin J. Poyfair
18 SUPERIOR COURT JUDGE

19 Presented by:

20 LANE POWELL SPEARS
21 LUBERSKY LLP

22
23 By 
24 Glenn J. Amster
25 WSBA No. 8372
26 Attorneys for Petitioner Clark
County Citizens United, Inc and
Michael and Catherine Achen

FINDINGS OF FACT.
CONCLUSIONS OF LAW AND ORDER - 7
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JUN 18 1997

The Honorable Edwin J. Poyfair

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JULY 11 1997

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

CLARK COUNTY CITIZENS UNITED,)
INC.; MICHAEL ACHEN and)
CATHERINE ACHEN, husband and wife, et)
al ,)

Petitioners and)
Additional Parties of Record,)

v.)

WESTERN WASHINGTON GROWTH)
MANAGEMENT HEARINGS BOARD, a)
Washington agency,)

Respondent)

NO. 96-2-00080-2

ORDER ON RECONSIDERATION

THIS MATTER came on for hearing before the above-entitled Court on May 30, 1997, upon CCNRC, et al.'s Motion for Reconsideration/Clarification. Four (4) days earlier, 1000 Friends of Washington ("1000 Friends" herein) filed a Motion to File Brief of Amicus Curiae Clark County Citizens United, Inc., Michael and Catherine Achen (collectively referred to herein as "CCCU"), appearing by and through their attorneys of record, Lane Powell Spears Lubersky LLP and Glenn J. Amster; and Respondents, Western Washington Growth

ORDER ON RECONSIDERATION - 1
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1 Management Hearings Board (hereinafter referred to as "WWGMHB"), appearing by and
2 through the Office of the Attorney General and Marjorie T. Smitch, Assistant Attorney General;
3 Clark County, appearing by and through the Office of the Prosecuting Attorney, and Richard
4 S. Lowry, Chief Civil Prosecuting Attorney; additional parties of record Clark County Natural
5 Resources Council, Vancouver Audubon Society, Loo-Wit Group Sierra Club, Coalition for
6 Environmental Responsibility and Economic Sustainability and Native Footprints, appearing by
7 and through their attorney, John S. Karpinski; and the Court, having once again considered the
8 record before the WWGMHB, and the pleadings and exhibits herein, and having entered
9 Findings of Fact, Conclusions of Law and Order on April 4, 1997, and having determined 1000
10 Friends' motion is untimely, and having rendered an oral decision on the pending motions
11 following argument;

12 IT IS HEREBY,

13 ORDERED, ADJUDGED AND DECREED that 1000 Friends of Washington's Motion
14 to File Brief of Amicus Curiae is DENIED; and

15 FURTHER ORDERED, ADJUDGED AND DECREED that CCNRC, et al.'s Motion
16 for Reconsideration/Clarification is DENIED; and

17 FURTHER ORDERED, ADJUDGED AND DECREED that the Findings of Fact,
18 Conclusions of Law and Order dated April 4, 1997 are confirmed, **except Conclusion No. 7** is
19 amended to read, in accordance with the parties' stipulation in open Court, as follows:

20
21 7. Rural Land Densities. The County's rural development regulations
22 are inconsistent with the GMA. The GMA requires counties to determine that
23 planning goals are utilized and are a part of the consideration supporting its
24 decisions. One of the planning goals requires a variety of residential densities
25 and housing types, which the Clark County Community Framework Plan met by
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identifying pre-existing small development patterns in rural areas and creating rural activity centers with a variety of rural densities. The eradication of the centers violates the planning goal requiring a variety of residential densities

It is evident the rural land use density regulations were driven in part by earlier Growth Management Hearing Board decisions requiring urban population plus rural population to equal Office of Financial Management population forecasts. See Exhibit 5, p. 15 to Petitioners' Opening Brief, Box. No. 2 to Record, Clark County Exhibit No. 93. This formulaic view of the GMA requirements is fatally flawed. There is no requirement in the GMA that the OFM projections be used in any manner other than as a measure to ensure urban growth areas are adequately sized and infrastructure in those growth areas is provided for. ~~The Board's requirement to, in essence, require a vacant buildable lands analysis for the rural area was erroneous.~~ This Board decision, however, compelled the County to downzone substantial portions of the rural areas in order to meet the Board's apparent requirements.

A central requirement for rural areas in the GMA is that growth in rural areas not be urban in character. By trying to comply with the Board's errant decision, the County violated a GMA planning goal.

Through no fault of the County's, the Board had an end in sight and disregarded the GMA's mandate in applying an unauthorized formula to the review of the Clark County Comprehensive Plan's land use densities. The Board's interpretation was erroneous, and the County's decision to follow the Board's lead was unfortunate. The result is a plan that gives little regard for the

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realities of existing rural development in direct contradiction of the terms of the
GMA.

DONE IN OPEN COURT this 11 day of June, 1997.

/s/ JAMES D. LADLEY
The Honorable ~~Edwin J. Poyhar~~
SUPERIOR COURT JUDGE

Presented by:

LANE POWELL SPEARS
LUBERSKY LLP

By 
Glenn V. Amster
WSBA No. 08372
Attorneys for Petitioners
Clark County Citizens United, Inc.
and Michael and Catherine Achen

*Michael
Admistr Hearing
9/29*

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY**

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CLARK COUNTY, a municipal
corporation,

Petitioner,

v

WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,

Respondent

Case No. 96-2-05498-8

JUDGMENT

THIS MATTER came on before the Honorable John F. Nichols on October 29, 1997 for hearing based on the administrative record produced by the Western Washington Growth Management Hearings Board, the parties being represented by counsel, and the court having considered the oral argument of counsel and having reviewed the administrative record, pleadings and papers filed herein and having considered the following documents.

- 1 **Clark County's Motion for Stay of Western Washington Growth Management Hearings Board Orders, dated April 8, 1997,**
- 2 Declaration of Richard S Lowry in Support of Clark County's Motion for Stay, dated April 8, 1997;
- 3 Clark County's Proposed Order Granting Clark County's Motion for Stay of Western Washington Growth Management Hearings Board Orders;
4. RCCPA's Memorandum in Opposition of Motion for Stay of WWGMHB Orders, dated August 8, 1997,

JUDGMENT - 1

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- 5 RCCPA's Motion to Dismiss, dated August 8, 1997,
- 6 CCNRC, et al.'s, Memorandum in Opposition to Request for Stay, dated August 8, 1997,
- 7 CCNRC's Motion to Dismiss 1995 Claims - Statute of Limitations, dated August 8, 1997,
- 8 Second Declaration of Richard S Lowry with Exhibits in Support of Petitioner Clark County's Reply Memorandum in Support of its Motion for Stay of Western GMA Board Orders and Response to Respondent's Motion to Dismiss, dated August 21, 1997,
- 9 Petitioner Clark County's Reply Memorandum in Support of its Stay of Western GMA Board Orders and Responses to Respondents' Motion to Dismiss, dated August 21, 1997,
- 10 CCNRC's Motion and Declaration to Dismiss all Claims - Failure to Serve all Parties, dated August 21, 1997,
- 11 CCNRC's Memorandum in Support of Motion to Dismiss, dated August 21, 1997,
- 12 Memorandum of Respondent Western Washington Growth Management Hearings Board in Response to Motion to Dismiss, dated August 25, 1997,
- 13 Clark County's Response to CCNRC's Motion to Dismiss, dated August 27, 1997,
- 14. Affidavit of Susan Rasmussen, dated August 27, 1997,
- 15 Affidavit of Glenn J Amster, dated August 27, 1997,
- 16 RCCPA's Supplemental Memorandum in Opposition of Motion for Stay of WWGMHB Orders, dated August 28, 1997,
- 17 Petitioner Clark County's Order Denying Motion to Dismiss by Judge Nichols,
- 18 Petitioner Clark County's Prehearing Opening Brief, dated September, 1997,

- 1 19. Response Memorandum of Western Washington Growth Management Hearings
2 Board, dated October 17, 1997.
3 20. RCCPA's Memorandum in Opposition of Motion for Stay of WWGMHB Orders,
4 dated October 20, 1997;
5 21 CCNRC, et. al.'s, Response Trial Brief, dated October 20, 1997;
6 22. Memorandum of Clark County Citizens United, Inc., dated October 22, 1997,
7 23 Petitioner Clark County's Reply Brief, dated October 27, 1997, and
8 24 Letter Ruling by Court, dated December 10, 1997.

9 And having reviewed the record and pleadings and papers herein, the Court hereby makes the
10 following findings of fact and conclusions of law

11 **FINDINGS OF FACT**

12
13 1 After conducting several years of planning and involvement of the public, Clark
14 County issued its comprehensive plan on December 20, 1994.

15 2 On September 20, 1995, following several appeals of the County Plan, the
16 Western Washington Growth Management Hearings Board (hereinafter "Western Board")
17 issued a final decision, finding portions of the County Plan out of compliance with GMA Clark
18 County did not timely appeal this decision.
19

20 3. Following additional public process and collection of new evidence, and review of
21 its existing Plan, the Board of County Commissioners (hereinafter "BOCC"), after
22 approximately a dozen hearings were conducted by the County Planning Commission,
23
24

JUDGMENT - 3

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1 adopted its amended Plan Drs (including resubmittals without changes) (hereinafter "Plan") on
2 May 3, 1996

3 4 After a compliance hearing on the amended Plan, the Western Board issued its
4 Compliance Order and Order of Invalidity (collectively referred to herein as "Compliance
5 Order") on October 1, 1996. The Compliance Order found the County's Plan, as amended, to
6 be in violation of GMA for many of the same reasons contained in the 1995 Order. The
7 Compliance Order also included an Order of Invalidity based on this noncompliance

9 5 At page 2 of the Compliance Order, the Western Board stated "the burden of
10 proof to show compliance was placed on the local government [Clark County]"

11 6 Clark County subsequently moved for reconsideration of the Compliance Order
12 and on November 20, 1996, the Western Board issued an "Order on Reconsideration,"
13 reaffirming in large part its Compliance Order and keeping in place its Declaration of Invalidity
14 The County did not request reconsideration on the burden of proof issues

16 7 This appeal was filed on December 19, 1996 by Clark County ("County Petition")
17 alleging various errors under the Administrative Procedures Act, RCW 34.05, with the
18 Compliance Order and related Declaration of Invalidity for both the 1995 and 1996 decisions

20 8 The County Petition appealed the following components of the "Compliance
21 Order and Order of Invalidity" entered by the Western Board on October 1, 1996 and the
22 "Order on Reconsideration" entered by the Board on November 20, 1996,
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- a. Its order finding that the County policies and development regulations relating to future adjustments to the County's Urban Growth Areas fail to comply with GMA,
- b. Its order finding that the County's designation of policies and development regulations designed to buffer resource lands and limit development in rural and resource areas, including County provisions for lot reconfiguration and lack of provisions requiring aggregation of nonconforming lots fail to comply with GMA;
- c. Its order finding that the County's establishment of a residential density of 1 unit per 5 acres in rural areas north of the East Fork of the Lewis River fails to comply with GMA;
- d. Its order finding that the County's designation of "non-prime" industrial lands in the designated urban reserve areas fails to comply with GMA, and
- e. Its order and declaration of invalidity finding that the following County development regulations and corresponding comprehensive plan policies failed to comply with and were invalid under GMA CCC 18.610, CCC 18 302, and CCC 18 305

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CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law

1 The review of the County's Petition is conducted under RCW 34 05 570(3)

Relief from the Western Board Order is granted only if it is

- a Unconstitutional,
- b Outside the Board's statutory authority,
- c The result of an unlawful procedure,
- d Erroneous interpretation or application of the law,
- e Not supported by the evidence, or
- f Arbitrary or capricious

2 Clark County's challenge to the 1995 decision is dismissed as untimely

3 Under RCW 36 70A 320, the County Plan, as amended and presented to the Board at the compliance hearing, is to be found in compliance with the GMA unless the Western Board determines, based on a preponderance of the evidence, that the County erroneously interpreted or applied the law This presumption of validity is further supported by WAC 242-02-630, 242-02-632, and 242-02-634 The legal standard before the Board at the compliance hearing was whether or not the County Plan, as amended, complied with the GMA, and not whether it complied with the earlier Board Order issued after the Final Decision and Order on the original County Comprehensive Plan appeal

1 4. The conclusion by the Western Board at page 2 of its "Compliance Order and
2 Order of Invalidity" that the burden of proof was on the County was an erroneous interpretation
3 of GMA.

4 5. Because the Western Board's Declaration of Invalidity was based upon this
5 fundamental flaw in assigning the burden of proof, the Declaration of Invalidity was issued
6 based upon an erroneous interpretation of the law and must at this time be set aside, effective
7 immediately. After applying the correct standard of review and giving proper deference to the
8 actions taken by the County on compliance, the Western Board is free to find compliance or
9 noncompliance, as authorized by the Act.

10 6. Clark County did not waive its right to raise the issue of the burden of proof
11 Waiver is essentially a matter of intention. Negligence, oversight or thoughtlessness does not
12 create it. Reynolds Metal Company v. Electric Smith Construction & Equipment Company, 4
13 Wn App. 695, 700, 483 P 2d 880 (1971). Under the facts of this case, there was no waiver.

14 7. Under GMA, the Board must grant deference to the GMA determinations of any
15 city or county. A county is presumed to have taken into consideration the regional preferences
16 and historical development and practices in formulating its comprehensive plan.

17 8. Under the facts of this case, the importance of this deference is reflected
18 especially in the area of rural minimum lot size. ~~In hopes of providing constructive guidance
19 and avoiding unnecessary future litigation, the Court encourages the Western Board to give~~

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JUDGMENT - 7

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033504

1 ~~full deference to the County determinations, along with the requisite presumption of~~
2 ~~compliance, upon remand~~

3 ORDER OF JUDGMENT

4 Based on the foregoing Findings of Fact and Conclusions of Law, and the Court having
5 considered the arguments of counsel, and being duly advised in the premises, it is hereby
6 ORDERED, ADJUDGED, AND DECREED that
7

8 1 The Western Board's October 1, 1996 and November 20, 1996 Orders are set
9 aside in the following areas.

- 10
- 11 a Its order finding that the County policies and development regulations
12 relating to future adjustments to the County's Urban Growth Areas fail to
13 comply with GMA,
 - 14 b Its order finding that the County's designation of policies and development
15 regulations designed to buffer resource lands and limit development in
16 rural and resource areas, including County provisions for lot
17 reconfiguration and lack of provisions requiring aggregation of
18 nonconforming lots fail to comply with GMA,
 - 19 c Its order finding that the County's establishment of a residential density of
20 1 unit per 5 acres in rural areas north of the East Fork of the Lewis River
21 fails to comply with GMA,
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d. Its order finding that the County's designation of "non-prime" industrial lands in the designated urban reserve areas fails to comply with GMA, and

e. Its order and declaration of invalidity finding that the County's declaration that the following development regulations and corresponding comprehensive plan policies were deemed invalid under GMA CCC 18 610, CCC 18 302 and CCC 18 305 fails to comply with GMA

2 The Western Board's Declaration of Invalidity is set aside, effective immediately

3. Judgment is entered in favor of Clark County setting aside the Western Board's decision and remanding to the Western Board in the areas included in the County Petition, based on its incorrect assignment of the burden of proof at the (compliance hearing)

4 This matter is remanded to the Western Board with directions to apply the correct burden of proof and accord the County Plan, as amended, appropriate discretion and local deference. ~~The Board is directed not to substitute its own perceptions or those of another region in contradiction to those adopted by the lawful representatives of the County, so long as there is compliance with the Act.~~ In the event the Board determines at some future

date to reinstate a Declaration of Invalidity, it is directed to precisely identify the GMA errors

5 Finally, the Board is directed to give full credence to the County's determinations, especially in the area of rural minimum lot size, as the County is presumed to have taken into

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consideration the regional preferences and historical development and practices in formulating its comprehensive plan. The Court expects and instructs that ~~significant~~ deference be given, along with the requisite presumption of compliance, to the County Plan upon remand.

ENTERED this 31 day of December, 1997.

***/s/* JOHN F. NICHOLS**

Judge John Nichols
Clark County Superior Court

Presented by
CLARK COUNTY PROSECUTING ATTORNEY

By */s/*
Richard S. Lowry, WSBA #4894
Chief Civil Deputy

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SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

CLARK COUNTY CITIZENS UNITED,)
INC ; MICHAEL ACHEN and CATHERINE)
ACHEN, husband and wife;)

Petitioners,)

v.)

WESTERN WASHINGTON GROWTH)
MANAGEMENT HEARINGS BOARD,)
a Washington agency,)

Respondent.)

NO.
**PETITION FOR
REVIEW**

COMES NOW Clark County Citizens United, Inc. and Michael and Catherine Achen ("Petitioners" herein), by and through their attorneys, Lane Powell Spears Lubersky, and for their Petition for Review, pursuant to RCW 36.70A.300, RCW 34.05.514 - 598, allege as follows

I.

IDENTIFICATION OF PARTIES

1.1 Petitioners' names and mailing addresses are:

Clark County Citizens United, Inc.
P O. Box 2188
Battle Ground, WA 98604

Michael and Catherine Achen
21604 NW Allworth Road
Battle Ground, WA 98604

1 1.2 Clark County Citizens United, Inc. ("CCCU" herein) is a Washington non-profit
2 corporation whose members own property, reside and work in Clark County, Washington.
3 CCCU and its members are directly affected by the land use plans, policies and regulations of
4 Clark County. CCCU and its members have appeared before the County regarding the
5 comprehensive plan and development regulations at issue and brought an appeal to the Growth
6 Management Hearings Board upon which this petition is based.

7 1.3 Michael and Catherine Achen ("Achen" herein) are residents and property owners
8 in Clark County, Washington. Petitioner Achen appeared before the County regarding the
9 comprehensive plan and development regulations at issue and brought an appeal to the Growth
10 Management Hearings Board upon which this petition is based

11 1.4 Petitioners are represented by.
12 Glenn J Amster
13 LANE POWELL SPEARS LUBERSKY
14 1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
(206) 223-7000

15 1.5 Defendant Western Washington Growth Management Hearings Board ("GMHB"
16 herein) is a Washington state agency created pursuant to the Growth Management Act ("GMA"
17 herein), RCW ch 36.70A, and located at

18 Western Washington Growth Management Hearings Board
19 McCleary Mansion, 111 West 21st Ave, Suite 1
P O. Box 40953
20 Olympia, WA 98504-0953

21 1.6 Venue in Clark County is proper pursuant to RCW 36.70A 300, RCW 34.05.514
22 and RCW 36.01.050, because property owned by CCCU's members and Achen and affected by
23 the decision is located in Clark County

24 II.

25 **AGENCY ACTION AND PARTIES TO ADJUDICATIVE PROCEEDING**

26 2.1 This appeal challenges the decision of the GMHB regarding the validity of the
Clark County Comprehensive Plan adopted on December 20, 1994 ("CCCP" herein) The

1 GMHB issued a Final Decision and Order on September 20, 1995. Several parties moved for
2 reconsideration. On December 6, 1995, the GMHB issued an Order on Reconsideration. The
3 December 6, 1995 Order on Reconsideration represents the final decision of the GMHB pursuant
4 to RCW 36.70A.300 and WAC 242-02-830. A true and correct copy of the September 20 and
5 December 6 decisions are attached hereto as Exhibit A and Exhibit B, respectively.

6 2.2. Petitioners and Clark County were parties to the proceedings below. In addition,
7 sixty-one (61) individual petitions challenging the CCCP were filed with the GMHB. The
8 GMHB issued its decision in response to all of the petitions which were not otherwise dismissed
9 There were numerous parties to the consolidated action in question. The GMHB issued an Order
10 on Consolidation on July 19, 1995. The various parties consolidated into this single action are
11 identified by name and case number in the Order on Consolidation, a copy of which is attached
12 hereto as Exhibit C.

13 III.

14 STANDING

15 3.1 Pursuant to RCW 36.70A 300, any "party aggrieved" has the right to obtain
16 judicial review of a hearings board final decision.

17 3.2 Petitioners have standing because they were parties to the consolidated action
18 before the GMHB, Case No 95-2-0067

19 3.3. Petitioner CCCU also has standing because it is a Washington corporation whose
20 members own property, reside and work in Clark County and who will be directly affected by
21 the GMHB decision. Petitioner Achen also has standing because they live in and own property
22 in Clark County and will be directly affected by the GMHB decision. As property owners in
23 Clark County, CCCU's members' and Achens' interests are among those Clark County was
24 required to consider in adopting its comprehensive plan pursuant to the GMA, RCW ch. 36.70A.
25 Furthermore, a judgment in Petitioners' favor would redress the prejudice to Petitioners caused
26 by the GMHB decision

PETITION FOR REVIEW - 3

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IV.

RELIEF SHOULD BE GRANTED

4.1 For the reasons set forth below in Section VII. of this Petition, the GMHB committed an error of law by failing to remand the CCCP to Clark County for violations of the GMA and the State Environmental Policy Act, RCW Ch. 43.21C ("SEPA").

V.

RELIEF REQUESTED

5.1 Petitioners respectfully request this Court issue an Order declaring the GMHB final decision issued on December 6, 1995 to be arbitrary, capricious, clearly erroneous, or otherwise based on an error of law

5.2 Petitioners further respectfully request this Court order the GMHB to remand the CCCP and development regulations to Clark County and order Clark County to

1. Comply with the procedural requirements of SEPA, including the preparation of a supplemental EIS, and
2. Review and revise its rural and resource land designations and rural and resource land development regulations to conform with all requirements of the GMA.

VI.

SUMMARY OF THE FACTS

6.1 Sometime in 1992, Clark County initiated a growth management planning process pursuant to the GMA. On July 22, 1992, the County adopted County-Wide Planning Policies ("CWPPs") pursuant to RCW 36.70A.210 to be "used solely for establishing a county-wide framework from which county and city comprehensive plans shall be developed" The CWPPs contained two (2) policies addressing resource lands. There are no policies for rural land planning.

6.2 Following adoption of the CWPPs, the County adopted a Community Framework Plan ("CFP"). The CFP envisioned future growth in Clark County occurring in centers, both urban and rural. Outside of urban growth areas, rural activity centers would provide the focus

1 for rural development activity. The CFP specifically encouraged clustering residential
2 development within the designated rural centers. Specific policies also addressed the overall plan
3 for non-resource lands in rural areas, for example:

4 **The County shall recognize existing development and provide lands which allow**
5 **rural development in areas which are developed or committed to development of**
6 **a rural character**

7 The CFP also specifically recognized that there may be small scale farming and forestry activities
8 in the rural areas which did not qualify for resource land designation under the GMA.

9 6.3 To assist in the identification and designation of resource lands pursuant to the
10 GMA, the County formed a Rural and Natural Resource Advisory Committee ("RNRAC"),
11 which was divided into three (3) focus groups, farm, forest and mineral. The focus groups were
12 charged with the task of identifying areas of the County that include resource lands.

13 6.4 In December 1993, the focus groups issued reports outlining their respective
14 recommendations. The farm focus group classified Clark County's agricultural lands. Outside
15 of one specific area, however, the farm focus group could not reach consensus on the designation
16 of agricultural resource lands. No further assessment of agricultural resource lands is
17 documented in the planning process.

18 6.5 In June 1994, the County issued a draft Environmental Impact Statement
19 ("DEIS"), which purports to describe and disclose the probable environmental impacts of the
20 County's anticipated adoption of a new growth management plan. The DEIS describes three (3)
21 plan alternatives, all of which contemplate maintaining the character of the rural areas and
22 allowing continued growth of existing rural commercial and residential centers.

23 6.6 The DEIS projects between 41,000 and 46,000 acres of agricultural resource
24 lands, depending upon the alternative selected. The DEIS asserts the designation of resource
25 lands is based on the recommendations of the focus groups. The DEIS does not mention that
26 the focus groups failed to reach consensus on these designations. Commenting on the EIS,

1 several writers requested additional analysis of the County's assessment of agricultural resource
2 lands

3 6.7 The County released the Final EIS ("FEIS") in September 1994. The range of
4 alternatives did not differ in any respect from those presented in the DEIS. The final EIS did
5 not provide a meaningful response to public comment on the agricultural resource land
6 designations

7 6.8 Upon issuance of the FEIS, the County announced the availability of the
8 recommended growth management plan. The first public hearings on the plan were specifically
9 intended to solicit comments from rural area residents, yet copies of the plan were not available
10 to the public until several days after public hearings had begun.

11 6.9 The recommended plan was substantially different from the alternatives described
12 in the EIS. Approximately 36,000 additional acres were to be designated as resource lands, in
13 a newly-created "agri-forest" resource classification. There had been no discussion of this
14 resource category in any of the environmental documents.

15 6.10 The recommended plan also eliminated the rural town centers, which had been the
16 focal point of rural area planning. Recommended minimum lot sizes were significantly larger
17 in rural areas than even the most environmentally preferable alternative in the EIS.

18 6.11 Hundreds of rural area residents reacted strongly to the proposed plan. In general,
19 the public complained that the proposed plan, including the designation of "agri-forest" resource
20 lands and rural land development standards, was not contemplated in any of the alternatives
21 considered in the EIS. Also, the public demanded to know how the County had designated
22 agricultural resource lands. No additional analysis of resource lands was ever conducted

23 6.12 Despite the protests of hundreds of rural area residents, the final plan adopted by
24 the County made virtually no changes to the land use designations from that recommended prior
25 to the commencement of public hearings

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PETITION FOR REVIEW - 6

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6.13 On December 20, 1994, the County adopted the final comprehensive plan and development regulations. The County published notice of adoption on January 2, 1995.

6.14 Petitioners sought review of the County's comprehensive plan and development regulations by the GMHB.

6.15 In June 1995, the GMHB held adjudicative hearings.

6.16 On September 20, 1995, the GMHB entered its Decision and Order, substantially rejecting Petitioners' legal arguments without substantive discussion.

6.17 Subsequently, the GMHB heard several motions for reconsideration and issued its final decision on December 6, 1995, denying substantially all of the motions related to issues pursued by CCCU.

VII.

CAUSES OF ACTION

7.1 Petitioners reallege and incorporate by this reference the allegations in Paragraph Nos I through VI above.

7.2 Clark County violated the GMA by improperly designating resource lands. The County failed to follow the framework for resource land designation under the GMA, failed to base its resource land designations on a deliberated, well-reasoned process and ultimately designated resource lands in an arbitrary and capricious manner. The "agri-forest" resource land designation created by Clark County is itself arbitrary and capricious. Furthermore, the designation of a majority of the agricultural resource lands is not supported by the evidence in the record. The GMHB committed error by failing to apply and interpret provisions of the GMA regarding the designated resource lands.

7.3 Clark County's land use policies and development regulations for rural and resource lands violate the GMA. Among other things, the County failed to balance the goals and policies of the GMA, failed to recognize the existing development pattern and failed to preserve and protect the rural character. Also, the plan fails to comply with the previously adopted CFP,

1 as required. The GMHB committed error by failing to address these and other inconsistencies
2 with the GMA

3 7.4 Clark County failed to comply with the substantial public participation
4 requirements of the GMA. The GMHB committed error by failing to apply and interpret the
5 GMA provisions regarding public participation in a meaningful manner.

6 7.5 Clark County failed to comply with SEPA. The County failed to disclose, discuss
7 and substantiate an adequate analysis of the environmental effects of the CCCP and development
8 regulations. The EIS failed to respond to public comments. The GMHB committed error by
9 refusing to allow additional evidence on the probable environmental impacts of the County's
10 action and by deciding in conclusory fashion, without analysis, that Clark County's EIS was
11 adequate

12 7.6 In general, Clark County's growth management plan and development regulations
13 for rural and resource areas do not evidence the deliberative and well-reasoned process required
14 by the GMA. The actions taken by the County in enacting the comprehensive plan and
15 development regulations were arbitrary, capricious and not supported by substantial evidence and
16 the law. The GMHB committed error when it accorded great weight to what Clark County had
17 accomplished but failed to apply and interpret the provisions and goals of the GMA to what
18 Clark County failed to accomplish.

19 IV.

20 PRAYER FOR RELIEF

21 Petitioners have exhausted their administrative remedies, and have no plain, speedy or
22 adequate remedy at law. It is necessary that all of the records of Clark County and the GMHB
23 which relate to the proceedings described above, including, but not limited to, all documents,
24 statements, exhibits, recordings, minutes, verbatim transcripts of all meetings and public hearings
25 in connection therewith, memoranda and written correspondence pertinent to the review of
26 Petitioners' applications be reproduced in order for the Court to review the County's action and

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the GMHB's decision and award Petitioners the relief sought herein, pursuant to RCW 34.05.566, within thirty (30) days of service of this petition.

WHEREFORE, Petitioners pray this Court, after hearing and review of the record and such other evidence as the Court deems appropriate, enter a judgment as follows:

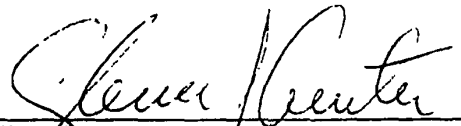
1. An Order requiring that the Board remand the CCCP and development regulations to Clark County with directions to comply with SEPA, including the preparation of a supplemental EIS;

2. An Order requiring the Board to direct Clark County to review and revise its rural and resource land designations and rural and resource land development regulations to conform with all requirements of the GMA; and

3 For such other and further relief as the Court deems just and equitable.

DATED this 4th day of January, 1996

LANE POWELL SPEARS LUBERSKY

By 
Glenn J. Amster
WSBA No. 8372
Pamela L. Krueger
WSBA No 24913
Attorneys for Petitioners
Clark County Citizens United, Inc.
and Michael and Catherine Achen

1 Whatcom County v Brisbane, 125 Wn.2d 345, 352, 884 P.2d 1326 (1994) (quoting State ex rel.
2 Port of Seattle v Dept. of Pub. Serv., 1 Wn.2d 102, 95 P.2d 1007 (1939)) In Brisbane, the
3 Court used this rule of statutory construction to find the lack of mention of referenda in the
4 GMA, coupled with the inclusion of a specific public participation process, meant the legislature
5 did not intend referendum rights to arise from the statute even though such rights are generally
6 matters of local governance, Id. at 351-52.

7 Similarly, the GMA provides definitions for specific classes of resource lands and an
8 inference should arise that all other potential classes of such lands were omitted intentionally
9 See RCW 36.70A.030, .060, .070. Moreover, other provisions of the GMA suggest that
10 resource lands are uniquely suited and devoted to the commercial production of a particular
11 resource. See RCW 36.70A.020(5), (8). Clark County's late designation of a hybrid of two
12 distinctly different types of resource land is simply not in conformance with the plain language
13 of the GMA. To qualify as resource lands under the GMA, "agri-forest" lands must be devoted
14 to the production of "agri-forest" products, a nonexistent commodity and, consequently, a
15 practical impossibility.

16 Clark County attempted to explain the "agri-forest" resource designation:

17 [I]t was found that there were a number of areas where farming activity was
18 occurring adjacent to forestry and vice versa or where parcels were not picked up
19 as both farming and forestry activity was occurring on the site, with neither being
20 the predominant use. Therefore, all the "edges" of the resource areas were
reevaluated. Through this process, the category of Agri-forest was developed
which recognizes that both or either resource activity may be occurring in this
area.

21 Exh. 20, p. 2

22 Even if this explanation were supported by the record, which it is not, it fails to justify
23 the creation of a new resource classification.⁸ Resource lands, according to the GMA, are

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25 ⁸See, e.g., Save Our Butte v Chelan Cy., EWGMHB No. 94-1-0015, at 553 (August 1994)
26 (holding exclusive utilization of Dept. of Agriculture's soil classifications to support a change
in the agricultural lands designated was an erroneous application of GMA).

1 "primarily devoted" to production.⁸ RCW 36 70A 030 "Agri-forest" lands, according to the
2 County, "may" have forest or agricultural "activities" occurring in the area. This explanation
3 mistakenly equates farming "activity" or a stand of trees on a site with the commercial
4 production of agricultural or timber products, a requisite element of resource land designation
5 under the GMA.

6 If an area of land has two possible classifications, the County should be required to
7 evaluate the land and determine which classification, if any, best fits the land. If the County
8 could simply designate hybrid resource categories, there would be no reason for the GMA to
9 direct counties to identify, classify, inventory, and designate the particularly defined resource
10 lands. See RCW 36.70A.060; WAC 365-190-040. The County's obligation to set a planning
11 policy framework and balance factors are stripped of their meaning unless the County actually
12 evaluates and applies those relative factors when determining how to classify resource lands.

13 The treatment of resource lands under the GMA requires a process designed to "assure
14 the conservation" of appropriate lands, in which the local government balances the statutory
15 planning goals, ensures internal consistency, and generally integrates the conservation of
16 productive resource lands into the overall framework of the adopted comprehensive plan.
17 RCW 36 70A.020, .060, .210. The County's creation of a hybrid resource category to justify
18 limitations on rural lands is inconsistent with its authority under the GMA and evidences a
19 blatant disregard of the Act's overall objectives. This Court should hold that an "agri-forest"
20 resource designation does not comply with the GMA.

21 3 Under the GMA, Designated Agricultural or Forest Resource Lands Must Be
22 Devoted to Economically Productive Use. The GMA provides mandatory definitions for
23 resource lands and resource land designation. RCW 36.70A.030, .170. The DCTED
24 Guidelines, promulgated pursuant to the GMA,⁹ require counties, at a minimum, to accept the
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26 ⁹RCW 36.70A.050.

1 requirements of the GMA pertaining to resource land and critical area designation and
2 regulation, especially the definitions of agricultural lands, forest lands, minerals, and long-term
3 commercial significance WAC 365-190-040(2)(b)(i)

4 The definitions of both agricultural and forest lands contain two primary elements, that
5 the land be "primarily devoted to" commercial production of agriculture or forestry and that it
6 has "long-term commercial significance" for agricultural or forestry production
7 RCW 36.70A.030(2), (8). Designating lands which fit the definition of agricultural and forest
8 lands as natural resource lands requires an additional element: that the lands are "not already
9 characterized by urban growth." RCW 36.70A.170(1)(a), (b) The final step of resource
10 designation occurs in the comprehensive planning process, in which counties are required to
11 review the designations for consistency with the overall plan and GMA.
12 RCW 36.70A.190(4)(b); WAC 365-195-400(1). Thus, the starting point for resource
13 designation lies in applying the GMA's terms of art In order to apply them, one must
14 understand their meaning.

15 Both elements of the resource definition ~~relate~~ relate to the commercial production of the
16 resource in question. The two elements of the definition, in fact, contain both an immediacy
17 and a future component of the commercial production of the resource. That is, the land must
18 be primarily devoted to the commercial production of the resource, as well as long-term
19 commercially significant for the production of that resource. Because the GMA defines the two
20 elements in ~~the conjunctive~~, rather than the disjunctive, the resource land must meet both
21 elements, not one or the other. See Ski Acres, Inc. v. Kittitas Cy., 118 Wn.2d 852, 855-56,
22 827 P.2d 1000 (1992).

23 The first question, then, is the meaning of the term "primarily devoted to." When
24 construing language in a statute, this Court should utilize the plain meaning of a term unless the
25 language of the statute is ambiguous. Plain meaning can be determined by utilizing the
26 dictionary definition. See Birch Bay Trailer Sales, Inc v Whatcom County, 65 Wn. App. 739,

1 829 P.2d 1109 (1992) (citing Bavarian Properties, Ltd. v. Ross, 104 Wn 2d 73, 700 P 2d 1161
2 (1985)) "Primarily," means principally or chiefly and "devote" means "to give or apply one's
3 time, attention or self entirely to a particular activity." The American Heritage Dictionary 1039,
4 361 (New College ed 1978) This, the first element can be met by showing one principally
5 gives one's time or attention to commercial production of the particular resource.

6 The next question is the meaning of the term "long-term commercial significance "
7 Long-term commercial significance is separately defined in the Growth Management Act

8 "Long-term commercial significance" includes the growing capacity, productivity,
9 and soil composition of the land for long-term commercial production, in
10 consideration with the land's proximity to population areas, and the possibility of
11 more intense uses of the land.

12 RCW 36.70A.030(11). This definition encompasses the physical attributes (growing capacity,
13 soil composition), economic potential (productivity, "long-term commercial production"), and
14 consideration of surrounding uses of the land (proximity to population areas, possibility of more
15 intense uses). Although this definition is helpful to the extent it provides an indication that many
16 factors are involved in meeting it, "long-term commercial production" is left undefined

17 In order to discern the plain meaning of this term, each word is pertinent Commercial
18 is defined as "of, pertaining to, or engaged in commerce," or "having profit, success or
19 immediate results as a chief aim." The American Heritage Dictionary 267 (New College ed
20 1978). Commerce is defined as "the buying and selling of goods, especially on a large scale."
21 Id. Production is defined as "the creation of value or wealth by producing goods or services."
22 Id. at 1044. "Long-term," is defined as "in effect, involving, or maturing after a number of
23 years." Id. at 769. Thus, long-term commercial production involves the concept of creating
24 value by producing goods for sale with the expectation of profit for a number of years. Lands
25 of long-term commercial significance, then, are lands that not only contain soil or other physical
26 characteristics which can grow and produce goods, but also that these goods can be sold for

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value over a number of years. Essentially, this GMA definition suggests that lands designated resource lands be economically viable for resource production.

Combining the two elements of the natural resource definition, one is left with the impression that the economic potential of the resource land in question is critical to its designation. That is, upon designation the owner of the land is principally giving his time and attention to commercial production of the resource and he expects to be able to produce goods over a number of years with the expectation of selling them for value.

On this point, the language in the GMA can be contrasted with the language of Initiative 547, which the legislature rejected:

"Agricultural land" means either (a) land that contains soils classified as prime or unique farm lands by the United States soil conservation service, or (b) land that has been i) primarily devoted to the production of livestock or agricultural commodities for commercial purposes, or ii) enrolled in the federal conservation reserve program or its successor. . .

[Emphasis added]. Initiative 547, § 3(1). The language of the Initiative diverges from the GMA. Unlike the GMA, agricultural land under the Initiative could either be physically suited to agriculture or already devoted to it.

The legislature's recent actions support a growing emphasis on economic viability criterion for resource designations. In its findings regarding RCW 36.70A.030, the legislature states:

[I]t is in the public interest to identify and provide long-term conservation of those *productive* natural resource lands that are *critical* to and can be managed *economically and practically* for long-term *commercial* production . . . [emphasis added].

1 RCW 36 70A 030 (1994) (historical and statutory notes)¹⁰ Thus, the language used in the
2 GMA to define agricultural and forest resource lands has a decidedly economic slant

3 Moreover, wherever resource lands are mentioned in other provisions of the GMA, there
4 is an emphasis on the value to the local jurisdiction of resource-based industry See
5 RCW 36 70A.010, .020(8). It follows that the classification and designation methodology
6 adopted by any jurisdiction to implement the GMA must reflect the application of an economic
7 analysis.

8 Surprisingly, the Board did not review whether the County performed an economic
9 analysis when designating resource ~~lands~~. In fact, Clark County and the Board have interpreted
10 the resource provisions of the GMA in such a way as to eradicate any "commercial" aspect
11 whatsoever¹¹ The Board states a county is not required to establish whether land is primarily
12 devoted to resource production as a first step, this being an overly restrictive reading of the
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16 ¹⁰Recent amendments to the GMA clarify the mineral resource definition and tie "long term
17 commercial significance" for minerals to the "mineral composition of the land for long-term
18 economically viable commercial production . . ." E.H.B. 1305, 54th Leg, Reg Sess, 1995
19 Wash. Laws 10, New Section 5. (Prior to the amendment, mineral lands could either be
20 devoted to the extraction of minerals or have potential for long term commercial significance for
21 the same). WAC 365-190-030(14). This amendment, like the legislative finding quoted in the
22 text, indicates a legislative emphasis on more than the mere physical attributes of the land for
23 designation purposes.

24 See also Ridge v. Kittitas Cy., EWGMHB No. 94-1-0017, at 768 (April 1995)
(amendment to forest definition means that land that cannot be economically or practically
25 managed for commercial forest production may be excluded from resource classification).

26 ¹¹Since then, Clark County was required to comply with the Board's order issued in this
case. Some of the County's actions demonstrate the frailty of the resource land designations
previously made. For example, the Board directed the County to eliminate resource lands from
urban reserve areas. Rather than changing the urban reserve areas, the County evaluated the
long term commercial significance of the parcels in the UR areas. Based on this analysis, the
County determined all but 646 of the 4,000 designated areas were not resource lands and
removed them from designation. Exh. 11, p. 1. The County should have undertaken the same
analysis prior to designating any resource lands in the Plan. There is no explanation for why
it failed to do so

1 GMA ¹² Exh 19, p 11 The Board then states that a county is not required to show that a
2 majority of the land in a designated resource area is devoted to current agricultural use Id at
3

4 This Court should not defer to the Board with regard to these conclusions. First, the
5 GMA *does* require designated resource land to be primarily devoted to resource production
6 Any other conclusion contradicts the unequivocal language of the GMA Second, the GMA
7 requires a principal, chief, or primary dedication of the land to resource production. Thus,
8 when the Board held that the County did not need to show that a majority of the land was
9 dedicated to commercial resource production, making a semantic distinction between "majority"
10 and "primarily," it contravened the implicit purpose of the resource definition The GMA does
11 require a county to support its designation with a showing that a substantial portion of the area
12 designated is under current commercial production. The Board's conclusions to the contrary are
13 plain error and should be ignored by this Court. Cf. Keene v. Bd. of Accountancy, 77 Wn
14 App. 849, 857, -- P.2d -- (1995) (holding appropriate to substitute court's judgment for
15 judgment of accountancy board in suspending CPA license)

16 The County, on the other hand, has stated it is appropriate to designate lands as
17 agricultural resource lands based solely on parcel size and the existence of quality soils, absent
18 consensus on economic viability. See Exh. 5; Exh. 6, at 6-7. It appears the County thought
19 it appropriate to analyze the physical attributes of the lands in question, but not to evaluate the
20 commercial aspect to support the designations. The County's utilization of only physical factors
21 for resource designation represents an erroneous interpretation and application of the GMA.

22 4. The Record Does Not Support the Agri-Forest and Agricultural Resource Land
23 Designations. The GMA requires counties designating resource lands to perform an analysis

24
25 ¹²There is noted divergence between the Growth Management Hearings Boards on this issue.
26 For example, the Central Puget Sound Board has concluded that a parcel specific analysis of
current agricultural production is required prior to resource designation. See Benarova v.
Redmond, CPSGMHB No. 95-3-0072, at 1759 (March 1996)

1 utilizing the information obtained through county-specific land use research RCW 36 70A.060,
2 WAC 365-190-050, -060. In this case, Clark County's own description of the designation of
3 36,000 acres of "Agri-forest" resource lands underscores the arbitrary nature of the County's
4 designation process

5 The "Agri-forest" resource designation first appeared in the September 23, 1994 staff
6 recommended plan Exh. 20, p. 1. In a memorandum to the Board of Commissioners and
7 Planning Commission, the staff attempted to explain its designation process:

8 The 20-year Plan map also includes a third combination designation, Agri-Forest,
9 which was initiated in part by the advisory committee but not resolved. A total
10 of 36,000 acres of Agri-Forest are indicated on the 20-year Plan map, of which
11 3,000 acres were recommended by the advisory committee under an earlier
12 Agriculture Tier III classification, 8,000 acres were identified without formal
13 recommendation by the committee as Agri-Forest, and the remaining 25,000 acres
14 were later identified by staff. This additional joint classification is recommended
15 in order to account for lands which were originally overlooked from consideration
16 for inclusion in either the agricultural or forest category because they exhibited
17 characteristics common to both, such as a property being used for both farm and
18 forest activities, or a parcel suited to farming located adjacent to a group of
19 forested lands

20 Exh 5, p 5 This explanation fails to justify the County's action

21 First, to suggest the advisory committee identified lands for "Agri-Forest" resource
22 classification is a gross overstatement. Someone apparently made the suggestion, and the
23 committee rejected it. Exh. 21, p. 6. Second, although the committee apparently did identify
24 approximately 3,000 acres of Agriculture Tier III lands, this classification was applied to lands
25 the Committee ultimately concluded did not meet the GMA resource lands definition. Exh 6,
26 pp 13-14, 22-23. Finally, there is no analysis whatsoever of the remaining 25,000 acres of land
"identified" by the staff. This superficial justification, even if it were true, does not evidence
the deliberative, well-reasoned process mandated by the GMA.

County staff reports, conveniently prepared at the same time as the last minute agri-forest
designations, purport to reference designation analysis. Exh. 5. In actuality, there are 4 items
in the entire record which describe some of the County's resource work but only tangentially

1 could be said to relate to the agri-forest designations They include a "Resource Document,"
2 a farm focus group report, a forest focus group report, and an "Agricultural Notebook "
3 Exhs. 6,7,9,10. Neither the staff reports nor the committee reports contain any evidence
4 supporting the economic elements of the agri-forest resource designations

5 First, the staff reports are misleading For example, a key staff report states "[t]hose
6 areas identified as agri-forest have high quality soils for the growing and harvesting of timber "
7 Exh 5, p. 3. But on the very preceding page, the staff report indicates nearly 80% of the soils
8 in Clark County are capable of growing trees. Id. In response to public testimony demanding
9 an explanation for the agricultural and "agri-forest" resource land designations, the staff again
10 identifies soils as the "critical" aspect. Id.

11 The staff goes on to explain that "Agri-forest" lands "have a mix of tree cover and
12 agricultural practices on the same or adjacent sites as determined by reviewing aerial
13 photographs." Id. Viewing aerial photographs, depending upon their quality and vintage, can
14 obviously provide some useful information. Aerial photographs, however, will not provide
15 evidence of the availability of public facilities, land values, proximity of markets for resource
16 production, local economic conditions, or parcel sizes, all elements of resource designation. See
17 WAC 365-190-050, -060, -070 Nor will the photographs indicate whether the land is in
18 commercial production.

19 When the County staff presented the recommended plan to the Board of Commissioners
20 and Planning Commission, it acknowledged rural and resource land planning presented the most
21 significant and controversial issues. Exh. 5, p. 4. The County had assigned the task of
22 classifying and recommending areas for resource designation to the Rural and Natural Resource
23 Committee, which had failed to agree on whether there was any economically viable agricultural
24 resource land in Clark County. Exh. 6, p. 7. Although the staff suggests the resource land
25 designations were the product of the Committee, the recommendation contains not the slightest
26

1 mention of the lack of consensus by the committee. Exh 5, pp 4-5 Thus, the staff's
2 recommendations have an unknown etiology

3 Petitioners are left with the difficult task of proving a negative, i e , what the County
4 failed to do Despite the obvious importance of economic factors, Clark County simply failed
5 to consider "long-term commercial significance" in its designation of agricultural/agri-forest
6 resource lands. Indeed, the record reveals the County's stubborn avoidance of the issue In the
7 FSEIS, for example, a comment letter seeks an explanation of the County's agricultural resource
8 land designations. In response, the County simply acknowledges the difficulty of resolving the
9 issue and states "[q]uality soils was a primary factor . . ." Exh 14, p. V-4.

10 Virtually the only discussion of economic factors and resource lands occurs in response
11 to a question about minimum lot sizes in resource areas Exh. 5, p 4. Though apparently not
12 considered in the County's designation process, the evidence is telling According to the 1992
13 agricultural census, 43% of all farm operators in Clark County report 200+ days of off-farm
14 work Id., p. 5. In other words, almost half of all of Clark County's farmers do not make a
15 living farming. Upon closer examination, this census data also reveals that more than 800 of
16 the approximately 1250 farms in Clark County had total sales of less than \$5,000. Exh 22

17 In response to these statistics, the County staff states:

18 Because a person is unable to make the entire livelihood from the farm or forest
19 management of the property does not translate into a reasonable expectation that
some level of entitlement to further land division is appropriate.

20 Exh. 5, p. 4. Entitlement to land division was not the issue faced by the County, but whether
21 or not the land was primarily devoted to commercial resource production and has long-term
22 commercial significance. This statement, therefore, highlights the County's misplaced reliance
23 on resource land designation as a means of restricting development on rural lands. At the same
24 time, it demonstrates the County's refusal to consider economic considerations in the designation
25 of resource lands in the first instance. Whether the existing rural lands do and can support
26 commercial resource production is critical to GMA resource designation. The County's

1 conclusory remarks, not borne out by its own majority agricultural committee report, do not
2 satisfy the County's responsibility to support its resource designations by data and analyzation
3 of the mandated statutory criteria ¹³

4 How the County determined the long-term commercial significance of agricultural and
5 "agri-forest" resource lands remains a mystery. By failing to document or discuss this key
6 component of resource lands designation, the County violated the GMA

7 The Board, in its opinion, asserts:

8 Regardless of the level of discussion by the resource lands subcommittees, the
9 agri-forest resource category was extensively discussed subsequent to presentation
10 to the Planning Commission/BOCC. Sufficient evidence is contained in this
11 extensive record to show that a wealth of information, discussion and written
12 evidence existed to support the decision of the BOCC

13 Exh. 19, p. 20:12 This statement is a mere conclusion. Although citing to no specific evidence
14 in the record to support this conclusion, the Board cites to evidence on the preceding page of
15 its decision which supports the opposite conclusion. For example, the Board states there was
16 a minimal amount of discussion about the agri-forest designation until the September 1994 staff
17 report, that the parcels designated were either used for both farm and forest activities or "suited
18 to" farming or forestry, and that neither farming or forest activity were the predominate use on
19 the lands Id. at 19

20 The Board erred when it failed to analyze how Clark County determined long term
21 commercial significance or current commercial production. Clark County erred because there
22 is not adequate evidence in the record to support the designation of the 36,000 acres of agri-
23 forest land at the end of the planning process nor the agricultural resource designations in
24 general. This Court should invalidate the County's agri-forest designations and reverse the
25 Board's decision.

26 ¹³Owing to this lack of evidence in the record and failed analysis, it is no surprise that a
sampling of 675 parcels designated for "Agri-forest" resource use indicates more than 90% are
now nonconforming, having previously been subdivided in accordance with the 2.5 or 5-acre
zoning in effect prior to adoption of the Growth Management Plan. Exh. 23.

1 **B. Clark County Erroneously Interpreted and Applied the GMA Planning Goals.**

2 1 **The County Was Required to Balance the Goals of the GMA When Developing**
3 **Its Comprehensive Plan** The GMA mandates that the planning goals contained in the GMA
4 "shall be used exclusively for the purpose of guiding the development of comprehensive plans "
5 RCW 36.70A.020. The GMHB's have also recognized the importance of showing compliance
6 with the goals. See, e.g., Gutschmidt v Mercer Island, CPSGMHB No 92-3-0006, at 90-91
7 (March 1993) (holding local jurisdictions must be able to show compliance with goals of the
8 Act) This means that each element of a comprehensive plan must be in compliance not only
9 with the more specific provisions of the GMA associated with that element, but also must be in
10 compliance with the planning goals of the GMA.

11 2. **The GMA Requires Counties to Maintain and Enhance Natural Resources for**
12 **Their Economic Value.** One of the goals of the GMA is to encourage the conservation of
13 commercially productive forest and agricultural lands RCW 36 70A 020(8) Resource land
14 designation and conservation is one component of the mandatory land use element for
15 comprehensive plans RCW 36 70A.070(1). These lands are designated and conserved, "not
16 for the sake of their ecological role, but to ensure the viability of the resource-based industries
17 that depend on them " Richard L. Settle & Charles G Gavigan, The Growth Management
18 Revolution in Washington. Past, Present and Future, 16 U. Puget Sound L. Rev 867, 907
19 (1991). See also RCW 36.70A 020(8) (GMA Goal entitled "Natural Resource Industries"),
20 WAC 365-195-825(1)(b) (meaning of "conservation" of resource lands). Thus, while
21 environmental protection efforts may play a central role in other Washington statutes, the
22 resource provisions of the GMA are not intended to be environmental protection measures
23 Clark County pays lip service to the natural resource goal of the GMA (Exh. 2, p. 8), but erred
24 by ignoring the productive commercial focus of that goal.

25 3. **The GMA Requires Counties to Encourage Economic Development Within the**
26 **Capacities of the State's Natural Resources. Not Independent of Them** Another planning goal

1 is to encourage economic development within the capacities of the state's natural resources
2 RCW 36.70A.020(5). The GMA priority on the conservation of resource lands for commercial
3 purposes is underscored by the Act's definition of terms See RCW 36 70A 030(2), (9) and
4 (11) The GMA also recognizes the potential incompatibility between resource lands, with their
5 attendant industrial activities, and other land uses. See RCW 36 70A 020(8),
6 RCW 36.70A.060(1). If resource land designations were simply a means of limiting
7 development in rural areas or creating open space, the commercial value of these lands and the
8 impacts of resource production would not be a factor Thus, as part and parcel of a local
9 jurisdiction's balancing of goals under the GMA, there is further emphasis on assuring that the
10 resource lands ~~designated~~ represent a source of economic industry for the State Clark County
11 reiterated but failed to balance the economic development goal of the GMA Exh 2, pp 8-9.
12 Clark County erroneously interpreted the GMA by ignoring the economic development goal of
13 the GMA in designating resource lands.

14 4 The GMA Requires Counties to Promote a Wide Variety of Residential Densities.
15 Not Accidental Variety by Default Another planning goal contained in the GMA is to promote
16 a variety of residential densities and housing types. RCW 36.70A.020(4). The GMA also
17 requires that all comprehensive plans contain a housing element which ensures the vitality and
18 character of established residential neighborhoods. RCW 36.70A.070(2). In rural Clark
19 County, the Framework Plan adopted at the beginning of the GMA planning process identified
20 pre-existing small development patterns around rural activity centers. Exh. 4, p. 4. The
21 County's Framework Plan policies were to lead to a plan which allowed for a diversity of
22 housing types in rural areas to reflect this existing diversity centrally focussed around rural
23 centers Exh. 4, pp. 7-8 The Comprehensive Plan, however, provided for a uniform lot
24 density throughout rural Clark County. Exh. 2, p. 7.

25 Using the GMA's prohibition against urban growth outside of urban growth areas as an
26 excuse, the County deleted planned development in rural activity centers and instead adopted a

1 uniform residential density in rural areas. Clark County's failure to comply with the land
2 density planning goal and mandatory housing was an erroneous application of the GMA

3 First, villages and hamlets, the core of Clark County's rural land use planning, do not
4 constitute impermissible urban growth¹⁴ They were not intended to make intensive use of the
5 land, but instead were designed to be compatible with surrounding farm and forest uses. See
6 RCW 36.70A.030(14) Furthermore, the GMA requires the County to ensure the vitality and
7 character of existing neighborhoods which is supported by the intended regional focus of all
8 GMA planning. See RCW 36.70A.070(2), .190(4)(b). The village and hamlet concept complied
9 with the GMA planning mandate.¹⁵ Without some rural development around these rural activity
10 centers, the Plan and development regulations eradicate the mandatory housing element of the
11 Clark County Comprehensive Plan. Thus, the villages and hamlets forming the focal point for
12 regional rural growth were required in order for the Plan to be consistent with the GMA

13
14
15 ¹⁴The County apparently decided to eliminate the villages and hamlets as a focus of regional
16 planning following a GMHB decision it believed held that any growth outside of urban growth
17 areas is impermissible under the GMA. Exh. 5, p 15. The County's reliance was misplaced

18 ¹⁵In the Clark County Framework Plan, the County had planned to provide for a hierarchy
19 of activity centers which preserved the existing character of development in Clark County
20 Exh. 4, pp. 5-6. The rural activity centers were to support rural lifestyles and not have a full
21 range of urban levels of services:

22 Villages are characterized by residential uses, rural commercial, post offices,
23 veterinary clinics, day care, existing commercial and industrial uses, schools,
24 package sanitary treatment, village greens and public water. . .

25 Hamlets are smaller than villages and have residential uses, community or public
26 water systems, and rural commercial development to support rural and natural
resource uses.

Id. at 22

Although rural land has been described as the leftover meatloaf in the GMA refrigerator,
there is no doubt that each county, to varying degrees, will have some land that is not
characterized by urban-type growth and not devoted to commercial resource production. While
it is appropriate to prevent urban-type growth from sprawling into these areas, the GMA does
not contain any provision requiring the elimination of growth appropriate for the support of rural
living. See RCW Ch. 36.70A

1 Second, the County's use of the population projections prepared by the Office of
2 Financial Management of the State of Washington ("OFM" herein) is misplaced. It appears
3 Clark County may have eliminated rural activity centers and provided for a uniform lot density
4 in its final plan because it believed this was the only way it could allocate adequate growth to
5 urban growth areas. Exh. 11, pp 7-10 RCW 36 70A 110(2) requires counties to use OFM
6 projections as a basis for planning to accommodate urban growth for the succeeding 20 years.
7 In complying with this provision of the GMA, counties review the OFM projections to determine
8 the size and shape of their urban growth boundaries. This provision of the GMA, however,
9 does not describe how the county is to allocate urban growth once boundaries are drawn.
10 Furthermore, it says nothing about the allocation of population growth in non-urban areas.

11 The Board held, in this case, that the "population allocations for urban areas plus the
12 population for non-urban areas must total the [OFM] population projection." Exh 19, p 10
13 The purpose of using the OFM population projections is to plan for urban growth, not to limit
14 appropriate rural growth. While such a formula may appear logical, it is not. The GMA does
15 not tell a city how much population it must accommodate once its urban growth boundaries are
16 established, but merely that urban-type growth only occur in designated urban growth areas.
17 See RCW 36 70A 110(1).

18 Additionally, the OFM projections may not take into account unusual migration patterns
19 which exist in many counties outside of the Central Puget Sound region. Port Townsend v
20 Jefferson Cy., WWGMHB No. 94-2-0006, at 570-71 (August 1994). Moreover, counties have
21 discretion in allocating urban growth among the cities and the GMHB's have held that cities can
22 plan for more urban growth than allocated. See RCW 36.70A.110(2); Aagaard v. Bothell,
23 CPSGMHB No. 94-3-0011, at 720 (January 1995) (holding, as long as allocation is established
24 in CWPP, counties can distribute population for urban growth to cities differently than projected
25 by OFM projections). Thus, the reason for using the OFM projections is to ensure that the
26 county not underestimate the rate of urban development over a twenty year period.

1 The GMA's reference to the use of OFM projections should be used to estimate a
2 maximum level of urban growth so counties can plan for that maximum by providing the
3 appropriate level of urban services. So long as the county does not allow for urban growth in
4 non-urban areas, it is not necessary for the rural growth to be based on the OFM projections.
5 ~~Thus~~, Clark County's refusal to provide for non-urban growth owing to its assumptions about
6 the OFM projections was an erroneous application of the GMA.

7 The County's Framework Plan policies, almost verbatim, purport to reflect the goals of
8 the GMA. It is difficult, if not impossible, for the County to explain how a uniform residential
9 density in rural areas "promote[s] a variety of residential densities and housing types," as called
10 for by the GMA planning goals. See RCW 36 70A.020(4). It also is difficult to explain how
11 a single residential density in rural areas "permit[s] land uses that are compatible with the rural
12 character of such lands and provide for a variety of rural densities," as required. See
13 RCW 36.70A.070(5)

14 The wholesale manipulation of rural land use densities, particularly in the rural centers,
15 also renders the plan internally inconsistent. The County's land use policies, for example, call
16 for maintaining the character of designated rural centers, which specifically include pre-existing
17 small lot development patterns. Exh. 2, pp. 28-29. Wholesale downzoning of these areas is
18 inconsistent with these goals and policies.

19 With regard to this subject, the Board stated that the "Act does not require a particular
20 methodology for providing for a variety of densities." Exh. 19, p. 10. According to the Board,
21 the evidence of already segregated rural parcels demonstrated the existence of a variety of
22 densities, as called for in the GMA. Id. The GMA, however, requires planned growth, not
23 accidental development. Instead, the County should be compelled to identify current
24 development patterns preserving the rural character. Providing for planned growth does not
25 translate into precluding all land divisions where a wide variety of parcelization currently exists.
26

1 Clark County erroneously interpreted and applied the GMA by eliminating villages and hamlets
2 from rural planning and by providing for a uniform rural lot density

3 Besides the Comprehensive Plan's restatement of the planning goals enumerated in the
4 GMA, there is no evidence in the record to suggest Clark County balanced all of the previously
5 stated GMA planning goals as required. This Court should reverse the Board and invalidate the
6 Clark County Comprehensive Plan for its failure to demonstrate the goals of the GMA were
7 balanced.

8 **C. Clark County Erroneously Interpreted and Applied the Public Participation**
9 **Requirements of the GMA.**

10 1 **The GMA Requires Public Participation Be Continuous and Consistent Throughout**
11 **the Planning Process.** The GMA contains a stringent public participation requirement

12 Each county shall establish and broadly disseminate to the public a public
13 participation program identifying procedures providing for early and continuous
14 public participation in the development and adoption of comprehensive land use
15 plans .. [emphasis added].

16 RCW 36.70A.140. Continuous participation, logically, means participation throughout the entire
17 planning process until the Comprehensive Plan is adopted.

18 2. **Singling Out Lands Previously Not the Subject of Public Comment for Resource**
19 **Designation Does Not Comply With the GMA's Public Participation Requirements.** Clark
20 County failed to comply with the public participation requirements during the time period
21 between the publication of the Draft Plan and the Final Plan with regard to the designation of
22 36,000 acres of resource land identified nowhere in the planning process prior to the draft plan.
23 Clark County singled out and put through a very different planning process, using lesser
24 objectives, principles, and standards, those lands designated for "agri-forest" resource use. The
25 GMA prohibits this haphazard and arbitrary action. See RCW 36.70A.140.

26 None of the alternatives in the Comprehensive Plan EIS discussed or analyzed the agri-
forest resource lands in the final plan and the resource advisory group did not identify the agri-

1 forest resource lands as commercially viable resource lands Exhs. 14-15 There simply was
2 no time for meaningful comment to occur during the three month period Copies of the
3 Comprehensive Plan were not available to the public until after hearings had already begun
4 Exh 17 The few remaining hearings which were dedicated to final comment on the entire plan
5 Id

6 The Board glossed over this failure by stating that the new designation "received
7 extensive discussion and public participation" during the three months between the draft and final
8 plan Exh. 19, p 22-9 To buttress this assertion of public participation, the Board asserted
9 "the entire concept of resource land designation classifications had been discussed since the
10 beginning of the GMA process." Id at 22 12. The conclusion that the designation received
11 extensive comments in the three month period is much ado about nothing, the comments
12 received during this period were that this designation was a sham. Exh 17 Moreover, the
13 comments were not given meaningful analysis, as evidenced by Planning Commission minutes
14 adopting the staff recommendations. Exh. 16. Indeed, the Planning Commission said they
15 couldn't possibly consider all comments and meet their deadlines. Exh. 16.

16 Whether or not "resource land designation" was generally discussed, which in the Clark
17 County record is sparsely evident, is not relevant to the public participation regarding the late
18 designation of agri-forest resource lands. This language by the Board should be treated as mere
19 surplusage as it does not comport with the GMA's continuous public participation requirement
20 and is a conclusory statement.

21 Clark County failed to meet the GMA's public participation requirements with regard to
22 the agri-forest resource designation. The Board erred when it held the public participation goals
23 of the GMA were met by this late, haphazard public comment process undermining the grass
24 roots slant of the GMA. This Court should invalidate the Clark County Comprehensive Plan
25 for the County's failure to comply with the GMA's public participation requirements
26

1 **D. Clark County's Failure to Prepare a Supplemental EIS Was Clearly Erroneous.**

2 Under the State Environmental Policy Act ("SEPA"), state regulations require additional
3 review beyond that which has been completed in an initial EIS when a proposal changes
4 substantially. WAC 197-11-600(4) states as follows

5 Existing documents may be used for a proposal by employing one or more of the
6 following methods: (c) An addendum, that adds analyses or information
7 about a proposal but does not substantially change the analysis of significant
8 impacts and alternatives in the existing environmental document. (d) Preparation
9 of a SEIS if there are: (i) Substantial changes so that the proposal is likely to have
10 significant adverse environmental impacts; .

11 A key element in environmental impact analysis under SEPA is the proposed land use
12 See King Cy. v. Boundary Review Bd., 122 Wn.2d 648, 647, 860 P.2d 1024 (1993)
13 Designating 36,000 acres of new "agri-forest" lands is a significant change in land use when the
14 original EIS proposed a maximum of 46,000 acres altogether. Additionally, the removal of a
15 development density strategy, rural activity centers, is also a significant change in land use
16 because it changes the character and patterns of land use. When combined, the creation of the
17 "agri-forest" resource category, the application of that classification to more than 36,000 acres
18 of land, and the elimination of existing rural town centers, represents substantial changes to the
19 proposal

20 These changes to the proposal are likely to have a significant adverse environmental
21 impact. At first blush, it might seem that the adoption of a growth management plan is a
22 programmatic, rather than project-specific, action and the anticipated impacts would normally
23 be beneficial, rather than adverse. The program here, however, is a virtual revolution in land
24 use planning for an entire county. For agricultural areas, in particular, there would be no
25 additional environmental analysis. In these circumstances, excusing environmental assessment
26 due to the nature of the action is unacceptable.

WAC 197-11-442(1) notes that SEPA grants an agency a certain amount of flexibility in
determining the level of detail appropriate for a non-project EIS. The rationale for this

1 flexibility, however, stems from the fact that "there is normally less detailed information
2 available on its environmental impacts than on any subsequent project proposals " WAC
3 197-11-442(1). This rationale, however, does not apply to the County's designation of vast
4 areas of resource lands. The environmental impacts of designating tens of thousands of acres
5 of land--in specified locations--for agricultural use can and should be discussed before the use
6 of this land is restricted for the next 20 years.

7 In Klickitat County, supra, 122 Wn.2d at 642-43, a proponent presented only limited
8 discussion of historical and cultural resources because of the nonproject nature of the proposed
9 action. Although subsequent discussion of the anticipated impacts was virtually certain to occur
10 when an actual project was proposed, the EIS was declared inadequate. Id. In this instance,
11 the environmental impact of new agricultural or forest practices on vast areas of the county will
12 likely never be measured in any site-specific review because plan implementation can occur
13 without any further SEPA-triggering action.

14 After all, the purpose of environmental review is to assure informed decision making.
15 When the SEPA process does not keep pace with the decisions under consideration, that purpose
16 is thwarted. It is evident the County chose to close its eyes to the need for additional
17 environmental analysis as planning deadlines approached. At the time the Supplemental Draft
18 EIS was released, existing County plans identified about 42,000 acres of agricultural land, a
19 designation permitting development on 20-acre parcels with allowance for increasing density if
20 homes were clustered on the site. Exh. 14, p. III-73, 74. The alternatives considered in the
21 environmental documents contemplate a plan designating at most 46,000 acres as agricultural
22 resource lands. Exh. 13, p. III-70.

23 The plan as finally presented, however, designated not only this maximum acreage, but
24 an additional 36,000 acres as "agri-forest" resource land. Exh. 5, p. 17. The permitted density
25 of development on virtually all this additional acreage is substantially less than what the EIS
26 discussed. The County failed to prepare any environmental analysis of this significant change

1 in the proposal ¹⁶ Just as importantly, there was no opportunity for public comment on the
2 County's failure to assess the environmental impacts of designating nearly twice the agricultural
3 resource land earlier proposed ¹⁷ Clark County erred by failing to prepare a supplemental EIS
4 discussing the changes to the Comprehensive Plan.

5 The Board held that the record convincingly disclosed that the agri-forest proposal did
6 not have any significant adverse environmental impacts. Exh 19, p 10.20 The record does
7 not support this conclusory statement and this Court should not defer to it, especially given the
8 Board's failure to analyze or point to the "convincing" evidence This Court should hold, as a
9 matter of law, that the modification of use of 36,000 acres of land in a nonproject proposal after
10 the EIS is published, along with the elimination of a planned development pattern, is likely to
11 have a significant adverse environmental impact requiring a supplemental EIS. This Court
12 should reverse the Board and find the County has failed to comply with SEPA

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22 ¹⁶At the very least, the County was required to prepare an addendum adding analyses or
information or both about the proposal. See WAC 197-11-600(4)(c). What the County could
23 not do was precisely what it did: To simply close its eyes to the adverse environmental impacts
of a proposal that had never been properly presented to, or discussed by, the public.

24 ¹⁷The County has contended that the "agri-forest" designation was put forward as mitigation,
but this discussion is nowhere to be found. In any event, the County fails to recognize this
25 proposed "mitigation" itself creates a set of substantial impacts. Cf. WAC 197-11-330(5)
(threshold determination whether to prepare EIS shall not balance whether beneficial aspects
26 outweigh adverse impacts).

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IV.

CONCLUSION

Petitioners respectfully request this Court reverse the decision of the Western Washington Growth Management Hearings Board and invalidate those portions of the Clark County Comprehensive Plan not in compliance with the GMA

RESPECTFULLY SUBMITTED this 25th day of August, 1996.

LANE POWELL SPEARS LUBERSKY
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APPENDIX TO PETITIONERS' BRIEF

PETITIONERS' EXHIBITS/AGENCY RECORD TRANSMITTAL CORRELATION TABLE

| Petitioners' Exhibit No. | Description of Document(s) | Box No. | Clark County Exhibit No. |
|---------------------------------|---|----------------|---------------------------------|
| 1 | Initiative 547 | NA | NA |
| 2 | Clark County Comprehensive Plan Excerpts | 2 | 219 |
| 3 | Clark County County-Wide Planning Policies | 1 | 1 |
| 4 | Clark County Framework Plan Excerpts | 1 | 2 |
| 5 | Clark County Staff Report Excerpts | 2 | 83, 85, 93 |
| 6 | Farm Focus Group Report | 2 | 181 |
| 7 | Forest Focus Group Report | 2 | 182 |
| 8 | Mineral Focus Group Report | 2 | 183 |
| 9 | Clark County Entitled "Resource Document" | 2 | 162 |
| 10 | Agricultural Notebook Excerpts | 2 | 191 |
| 11 | Clark County's Remand Brief - Excerpts | NA | NA |
| 12 | Framework EIS Excerpts | 1 | 77 |
| 13 | Comp Plan Draft EIS Excerpts | 1 | 78 |
| 14 | Comp Plan FSEIS, Volume 1 Excerpts | 1 | 79 |
| 15 | Comp Plan FSEIS, Volume 2 Excerpts | 1 | 80 |
| 16 | Commissioners' Proceedings Excerpts | 1 | 70 |
| 17 | Public Hearing Excerpts | 1,6 | 47-49, 55, 57-58 |
| 18 | Achen Correspondence | 6 | 1650-51 |
| 19 | Board's Decision, <u>Achen v Clark Cy.</u> , Excerpts | NA | NA |
| 20 | Clark County Draft Comprehensive Plan Excerpt | 2 | 219 |
| 21 | Planning Commission Minutes, Excerpts | 1 | 49-51, 55 |
| 22 | 1992 Agricultural Census Data | 4 | 729 |
| 23 | CCCU Correspondence | 5 | 1005 |

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CLARK COUNTY NATURAL RESOURCES
COUNCIL, VANCOUVER AUDUBON
SOCIETY, COALITION FOR
ENVIRONMENTAL RESPONSIBILITY
AND ECONOMIC SUSTAINABILITY
(CERES), RURAL CLARK COUNTY
PRESERVATION ASSOCIATION (RCCPA)
and LOO-WIT GROUP SIERRA CLUB,

Appellants,

v

CLARK COUNTY CITIZENS UNITED,
INC,

Respondents.

No. 22164-1-II

PUBLISHED OPINION

Filed

MAR 12 1999

MORGAN, J. – The Clark County Natural Resources appeals a superior court determination that the Growth Management Act does not empower the Western Washington Growth Management Board to order a county to use as a cap on non-urban growth, population projections made by the Office of Financial Management . We affirm

The Growth Management Act (GMA) is codified as RCW 36.70A It was enacted in 1990 It applies in many but not all counties ¹

A county subject to the GMA is required to adopt county-wide planning policies, development regulations and, in most cases, a comprehensive plan ² Such a county must

¹ See RCW 36 70A 040(1), (2).

² RCW 36 70A 040(3).

designate urban growth areas,³ as well as agricultural lands, forest lands mineral resource lands, and critical areas⁴ By operation of law, such a county designates as “rural” any land “not designated for urban growth, agriculture, forest, or mineral resources.”⁵

When designating urban growth areas, a county must include land and densities “sufficient to permit the urban growth that is projected to occur in the county . . . for the succeeding twenty-year period ”⁶ In doing this, a county must consider “the growth management population projection made for the county by the office of financial management [OFM].”⁷ OFM makes its projection pursuant to RCW 43.62 035

Having designated urban growth areas, a county may not allow urban growth outside those areas.⁸ “Urban” growth is “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 products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands”⁹

³ RCW 36 70A 040(3)(c), RCW 36 70A.110(1)

⁴ RCW 36 70A 040(3)(b), RCW 36.70A.170(1); RCW 36 70A 030(7), (5), (8), (11), (17), (18), (19), (20) In 1994, subsections 17-20 were numbered 14-17, respectively

⁵ RCW 36 70A 070(5).

⁶ RCW 36 70A 110(2), *see* RCW 43.62 035.

⁷ RCW 36 70A 110(2).

⁸ RCW 36 70A 110(1); RCW 36 70A 010(1), (2).

⁹ RCW 36 70A 030(17) In 1994, this subsection was numbered 14 rather than 17

Notwithstanding the designation of urban growth areas, a county may allow *non-urban* or “rural” growth outside those areas.¹⁰ “Non-urban” or “rural” growth encompasses “a variety of uses and residential densities, including clustered residential development,”¹¹ provided that such uses and densities are “not characterized by urban growth,” and are “consistent with rural character.”¹²

Clark County is subject to the GMA. It has about 500,000 acres, many of which are urban or suburban in character. In December 1994, it adopted a comprehensive plan that designated about 83,500 acres as rural. The plan stated “that *all* rural lands would have a minimum lot size of 5 acres.”¹³

Numerous parties appealed the plan to the Western Washington Growth Management Board (“the Board”), including the Clark County Natural Resources Council (CCNRC) and Clark County Citizens United, Inc (CCCU). CCNRC sought stricter controls on land use, while CCCU sought less strict controls on land use

~~In September 1995, after~~ weeks of hearings, the Board ruled, among other things, that Clark County’s plan did not adequately restrict rural growth.¹⁴ Legally, the Board

¹⁰ RCW 36.70A.110(1) (“Each county that is required or chooses to plan under RCW 36 70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature”).

¹¹ RCW 36 70A 030(15) We use this subsection as a present indicator of legislative intent, even though it was not enacted until 1997 See Wash. Laws 1997, ch 429, § 3

¹² RCW 36 70A.070(5)(b), as amended in 1997 In 1994, the GMA allowed “uses that are compatible with the rural character of such lands,” and “a variety of rural densities ” Former RCW 36.70A 070(5); Wash. Laws 1990, ch. 17, § 7.

¹³ Clerk’s Papers at 38.

¹⁴ The Board also made many other holdings that we are not asked to review

rested its ruling on two premises allegedly drawn from the GMA: (1) that population projections and allocations . . . are not solely for use in urban areas, and (2) that the population projections for urban areas plus the population projections for non-urban areas must total the population projection for the entire county. Factually, the Board observed (1) "that the County allocated 15,000 of the population projection number for non-urban growth;" (2) that the County had "an excess of 13,500 preexisting undeveloped tax lots;" and (3) that the County had based its planning on an average of 2.33 persons per household. As a result, according to the Board, "there would be more than twice the number of lots available to house the allocated 15,000 population projection, even without additional divisions of land that would likely occur over the next 20 years."¹⁵ Based on this view of the law and facts, the Board ruled that the GMA precluded 5-acre lots in rural areas, and it ordered the County to "increase the minimum lot sizes" in such areas.¹⁶

CCCU appealed to the Clark County Superior Court, which reversed the Board's order. The court ruled that the GMA did not require the County to use OFM's population projections as a fixed cap on non-urban growth, and that the Board had exceeded its authority by creating and imposing such a cap on the County.¹⁷

¹⁵ Clerk's Papers at 39-40

¹⁶ Clerk's Papers at 79

¹⁷ The superior court said in part

It is evident the rural land use density regulations were driven in part by earlier Growth Management Hearing Board decisions requiring urban population plus rural population to equal Office of Financial Management population forecasts. [Citation omitted.] This formulaic view of the GMA requirement is fatally flawed. There is no requirement

CCNRC now appeals to this court. Its primary contention is that the trial court “erroneously concluded OFM population projections are not a restraint/cap on rural growth.”¹⁸ This contention involves a question of law¹⁹ that we review without deference to the trial court,²⁰ but arguably with deference to the Board.²¹ According to CCCU, the question is whether “the GMA requires [that] the OFM population projections be used as the defining element in establishing land use densities in rural areas.”²² In simpler terms, the question is whether the GMA requires a county to use OFM’s population projections as a cap on non-urban growth.

The GMA requires a county to consider OFM population projections when sizing urban growth areas. Thus, RCW 36 70A.110 provides in pertinent part

in the GMA that the OFM projections be used in any manner other than as a measure to ensure urban growth areas are adequately sized and infrastructure in those growth areas is provided for. The Board’s requirement to, in essence, require a vacant buildable lands analysis for the rural area was erroneous. This Board decision, however, compelled the County to downzone substantial portions of the rural areas in order to meet the Board’s apparent requirements.

Clerk’s Papers at 739-740.

¹⁸ Appellant’s Brief at 11.

¹⁹ *City of Pasco v Public Employment Relations Comm’n*, 119 Wn.2d 504, 507, 833 P 2d 381 (1992) (construction of statute is question of law).

²⁰ *City of Redmond v Central Puget Sound Growth Management Hearings Board*, 136 Wn 2d 38, 46, 959 P 2d 1091 (1998) In other words, we review the trial court’s ruling “de novo.”

²¹ We discuss due deference to the Board later in this opinion

²² Respondent’s Brief at 22

(1) Each county that is required or chooses to plan under RCW 36 70A 040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. . .

(2) Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period

Nothing in the GMA provides that a county must use OFM's population projections for any other purpose. More particularly, nothing in the GMA provides that a county must use OFM's population projections as a cap or ceiling when planning for non-urban growth.²³ Construed according to its plain meaning, then, the GMA does not require counties to use OFM's population projections as a cap or ceiling on non-urban growth.

Attempting to forestall a holding based on the GMA's plain meaning, CCNRC argues that "the conclusion that the OFM population projection is a hard cap not to be exceeded is supported by a review of the Growth Management Act ('GMA') as a whole."²⁴ It is our view, however, that such a review tends to detract from, not support, CCNRC's position. As already observed, the GMA requires counties to use OFM's projections when planning for *urban* growth. It omits any reference to counties using OFM's projections when planning for *non-urban* growth. The implications are (1) that the legislature considered how OFM's projections should be used, ~~(2) that the legislature~~

²³ Without so holding, we assume that the GMA *permits* a county to use OFM's population projections when planning for lands outside its urban growth areas. That question is not presented by this appeal.

²⁴ Appellant's Brief at 19.

decided to require that counties use OFM's projections when planning for urban growth, and (3) that the legislature decided *not* to require that counties use OFM's projections when planning for non-urban growth²⁵

CCNRC argues that the trial court was required to defer to the Board's interpretation of the GMA, and that this court must also. Although a court will defer to an agency's interpretation when that will help the court achieve a proper understanding of the statute,²⁶ "it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law."²⁷ Here, in our view, the Board misread the statute and exceeded its authority. If we were to defer to its ruling, we would perpetuate, not correct, its error. Under these circumstances, we hold that ~~deference~~ **is not due.**

²⁵ *Snohomish County v Anderson*, 123 Wn 2d 151, 157, 868 P.2d 116 (1994), quoting *Washington Natural Gas Co v PUD 1*, 77 Wn 2d 94, 98, 459 P.2d 633 (1969) ("Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature"), *Bour v Johnson*, 122 Wn 2d 829, 836, 864 P 2d 380 (1993), *State v Roadhs*, 71 Wn 2d 705, 707, 430 P.2d 586 (1967)

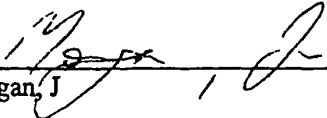
²⁶ *City of Redmond*, 136 Wn 2d at 46, *City of Pasco*, 119 Wn 2d at 507, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-14, 828 P 2d 549 (1992), *Overton v Economic Assistance Auth*, 96 Wn 2d 552, 555, 637 P 2d 652 (1981)

²⁷ *Overton*, 96 Wn 2d at 555 (citation omitted), *see also Cowiche*, 118 Wn 2d at 815

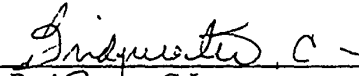
22164-1-II

Based on the foregoing, we conclude that the GMA does not require counties to use OFM's projections as a cap on non-urban growth. The Board exceeded its authority, and the trial court did not err by reversing the Board's ruling. ;

Affirmed.


Morgan, J

We concur


Bridgewater, C.J.



Reynolds, J. P.T.

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1 resource interests on working committees, and testified at public hearings For almost three
2 years, these Clark County citizens maintained their faith in the process and believed the County s
3 announced intention of maintaining the character of rural areas and the quality of life for all of
4 its citizens

5 As the planning process drew to a close, however, it became evident their faith in the
6 County's public pronouncements had been misplaced. **The rural character could not be**
7 **maintained, according to County planners, because the Growth Management Act dictated**
8 **otherwise.** Rural towns and villages, a fundamental component of the County's Framework Plan
9 for rural areas, were eliminated by the stroke of a pen Thousands of acres of rural lands were
10 deemed to be "commercially significant" resource lands when their only unique quality appeared
11 to be their vacant, undeveloped state. When County planners announced their recommendations,
12 more than 70% of the land in rural Clark County was destined to become nonconforming In
13 just a few short months, with the planning process spinning out of control, CCCU came to
14 represent more than 3,500 Clark County citizens.

15 This is a case of first impression in the State of Washington and presents significant
16 issues that affect thousands of people living in Clark County. The legal and factual issues
17 presented below arise in the context of a complex and relatively new law mandating land use
18 planning The results of this mandate are represented by the Clark County Comprehensive Plan
19 The Comprehensive Plan is intended to guide all development in Clark County for the next
20 twenty years Therefore, Clark County's responsibilities under the GMA should not be taken
21 lightly.

22 The GMA can only result in the managed growth which is its central purpose if each city
23 and county engaged in GMA planning complies with all of its provisions. Clark County has not
24 done so, nor has the Western Washington Growth Management Hearings Board ("the Board"
25 herein) fulfilled its responsibility to substantively review the actions of Clark County This
26

PETITIONERS' OPENING BRIEF - 2

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1 Court should prevent any further injustice and invalidate the Clark County Comprehensive Plan
2 in its current form.

3 **A. Legislative History of the GMA.**

4 The GMA was adopted in 1990, as an alternative to Initiative 547, known as the "Keep
5 Washington Livable" Initiative, 1990 Wash. Laws 1st ex.s. ch. 17. The GMA requires a
6 balanced approach to land use planning. The prefatory language of the GMA states

7 The legislature finds that uncoordinated and unplanned growth, together with a
8 lack of common goals expressing the public's interests in the conservation and
9 wise use of lands, pose a threat to the environment, sustainable economic
10 development, and the health, safety and high quality of life enjoyed by residents
11 of this state. It is in the public interest that citizens, communities, local
12 governments, and the private sector cooperate and coordinate with one another
13 in comprehensive land use planning. Further, the legislature finds that it is in the
14 public interest that economic development programs be shared with communities
15 experiencing economic growth.

16 RCW 36 70A.010. Implementation of the GMA requires local jurisdictions to balance a number
17 of goals, both implied from this purpose and set forth expressly in the GMA, such as
18 controlling patterns of urban growth, providing for capital facilities to meet projected growth,
19 encouraging economic development while maintaining natural resource-based industries, and
20 retaining open space and protecting the environment in terms of quality of life
21 RCW 36 70A 020.

22 Initiative 547, on the other hand, used the concept of "managed growth" as a euphemism
23 for no growth, particularly in rural areas.¹ Exh. 1, Initiative 547, I-1021/90 (filed March 27,
24 1990).¹ One example of the different emphasis between the GMA and I-547 is in planning for
25 "resource" lands. The GMA land use planning goal for natural resource industries states:
26

23 ¹Where referenced by "Exh " (exhibit), documents supporting this Brief are identified by an
24 assigned Exhibit and page number and attached to this Brief. Except where noted, Petitioners'
25 exhibits are items contained in the Clark County record, all of which have been transmitted to
26 this Court. Due to the size of some County documents, Petitioners' exhibits may contain only
the relevant excerpts. In order to assist this Court in accessing the complete agency documents,
a table entitled, "Petitioners' Exhibits/Agency Record Transmittal Correlation Table," is attached
as an Appendix to this Brief.

1 Maintain and enhance natural resource-based industries, including productive
2 timber, agricultural, and fisheries industries. Encourage the conservation of
3 productive forest lands and productive agricultural lands, and discourage
4 incompatible uses

5 RCW 36.70A.020(8) The emphasis in the GMA is productive resource-based industry
6 Initiative 547, on the other hand, sought conservation of agricultural and forest lands regardless
7 of use or impact on landowners. Exh. 1 § 2(1)(c), p. 5.

8 The Initiative failed in the 1990 general election by a wide margin (75-25%), with no
9 County electorate voting a majority in favor of the Initiative. Exh. 1, p. 17. Whatever aims
10 were sought by I-547 must be tempered by the different objectives of the GMA. Differences
11 in approach dictate differences in result.

12 **B. Factual Background of the Case.**

13 1 Preliminary Rural Land Planning Clark County, like all of the other jurisdictions
14 in the state required to comply with the planning mandates of the GMA, began the task of
15 revising its comprehensive plan and development regulations sometime in 1991. Exh. 2, p. 1.
16 As a first step in the process, Clark County adopted County-Wide Planning Policies (CWPP's),
17 pursuant to RCW 36.70A.210, to establish a county-wide framework from which county and city
18 comprehensive plans would be developed. Exh. 3. The CWPP's contain two policies
19 addressing resource lands ~~that are policies for rural land planning.~~ Exh. 3, pp. 5-6.

20 As it moved toward actual plan development, Clark County sought community input to
21 help form a vision of Clark County's future. Exh. 2, pp. 1-3. The Community Framework
22 Plan which emerged from this process reflected a preference for what was termed a
23 "Hometown" concept, which directed future growth in Clark County to occur in centers, both
24 urban and rural. Exh. 4, p. 10. Outside of urban growth areas, Villages and Hamlets would
25 provide the focus for rural development activity. Exh. 4, pp. 5-6. These rural activity centers
26 would be characterized by residential and rural commercial uses with rural levels of service, not
urban growth. Id.

1 The Framework Plan specifically envisioned "a diversity of housing types to enable
2 citizens from a wide range of economic levels and age groups to live within its boundaries and
3 to ensure an adequate supply of affordable and attainable housing." Exh. 4, pp. 7-8. The Plan
4 encouraged clustering residential development within designated rural centers. Exh. 4, p. 10.
5 Specific policies also addressed the overall plan for non-resource lands in rural areas:

6 **The County shall recognize existing development and provide lands which allow**
7 **rural development in areas which are developed or committed to development of**
8 **a rural character.**

9 Exh. 3, p. 9. In identifying rural areas, the Framework Plan recognized some areas provided
10 opportunities for small scale farming and forestry that did not qualify for resource land
11 designation. Id. These lands, therefore, were not chosen for designation in the Framework
12 Plan.

13 Following adoption of the Community Framework Plan, the County began to formulate
14 its Growth Management Plan. To assist in the identification and designation of resource lands,
15 the County formed a Rural and Natural Resource Advisory Committee ("RNRAC"), composed
16 of land owners, developers, environmentalists and agency personnel from the rural areas.
17 Exh. 5, p. 4. The RNRAC divided itself into three focus groups; farm, forest, and mineral.

18 The focus groups subsequently issued reports outlining their respective recommendations.
19 Exhs. 6-8. The farm focus group classified Clark County's agricultural lands, a significant
20 portion of which were located in the Vancouver Lake lowlands area. Exh. 6, p. 3. Outside the
21 Vancouver Lake lowlands, the farm focus group could not reach consensus on whether there
22 were any agricultural lands in Clark County fitting the requisite "long term commercial
23 significance" element of resource lands under the GMA. Exh. 6, p. 7. This result was
24 understandable. According to the available information,

25 Agriculture in Clark County has been characterized as part-time (used as second
26 income) and operating on small parcels. From 1982 to 1991 there has been no
indication that this trend has changed. In 1982, 56 percent of the farms made
less than \$2,500. In 1987, 50 percent made less than \$2,500. Additionally, in
1982, 52 percent of the farm operators reported working off the farm 200 days

1 or more per year (260 days is equivalent to a 5-day work week and 8-hour work
2 days over one year). In 1987, 45.5 percent of farm operators reported also
working off the farm. (footnotes omitted)

3 Exh 9, p 1.² Of the more than 1,400 farms in Clark County in 1987, only 274 produced
4 products worth more than \$10,000 on the market.³ The farm focus group ultimately could not
5 conclude that these essentially unproductive lands were agricultural lands as defined by the
6 GMA. Exh. 6, p 7. There is no additional documentation of the agricultural resource land
7 designation process.

8 2. SEPA Process. During the planning process, the County issued two
9 environmental impact statements ("EIS" herein); a Community Framework Plan EIS and a
10 Growth Management Plan EIS. Exhs 12-15. The Community Framework Plan EIS principally
11 discusses the available policy choices and the general nature of anticipated impacts. Exh. 12,
12 pp. 2-3. The Growth Management Plan Supplemental Draft ("DSEIS") and Final ("FSEIS") EIS
13 are more comprehensive than the Framework Plan EIS. Both documents describe three plan
14 alternatives, ranging from Alternative A, which is supposed to represent the minimum changes
15 to existing plans and regulations necessary to meet the requirements of the GMA, to
16 Alternative C, which proposes more intensive development in the Vancouver urban area than
17 historically has occurred and greater restrictions on growth and development in rural areas
18 Exhs. 13-15.

19
20
21 ²The screening of potential agricultural resource land areas is documented in the
22 "Agricultural Notebook," Exh. 10. According to county staff, each numbered area was
23 identified on maps. Rubber stamps on the pages of the notebook indicate areas were either
24 "approved" as candidate areas or "past due," which apparently means the area was not approved.
Unfortunately, though the notebooks pose a series of questions about each candidate area, the
information is scant. There is no other evidence in the record documenting the information
considered by the focus groups or how decisions were made.

25 ³According to the same sources, approximately 95,000 acres of farmland in 1987 produced
26 approximately \$37 million in agricultural products, or less than \$400 per acre. Exh. 9, Table
IV-1.

1 Residential densities in rural areas, for example, would range from 2½-acre minimum
2 lot sizes under Alternative A to 10-15 acre minimum lot sizes under Alternative C Exh 13,
3 pp 5-6 All of the alternatives for rural areas recognize the existing rural towns and villages
4 and the small-lot residential areas which help to create the character of these communities.
5 Exh. 13, pp 7-8. The DEIS includes a chart detailing the population and housing forecasts for
6 these "Hamlets and Villages" under each of the alternatives. Exh 13, p 14

7 The DEIS projects between 41,000 and 46,000 acres of agricultural resource lands,
8 depending upon the alternative selected. Exh. 13, pp. 2-4. The DEIS claims the designation
9 of resource lands is based on the recommendations of the focus groups, though the lack of
10 consensus on "commercially significant" agricultural lands is not mentioned Exh. 13, p. 5
11 Minimum lot sizes on resource lands would range from 10-40 acres under Alternative A to
12 20-80 acres under Alternative C Exh 13, pp. 8-11.

13 When the County released the FSEIS, the range of alternatives did not differ in any
14 respect from those presented in the DSEIS Exhs. 13-15. In response to comments about the
15 process of defining resource lands, the FSEIS recites only the following analysis of "long-term
16 commercial significance:"

17 . . . Many areas have had some history of cultivation for various agricultural
18 crops or pasture. Even though the County has had zoning and a comprehensive
19 plan in place for almost 20 years, these plans did not have protection of resource
20 lands as a goal. This means that, although there are physical soil properties and
21 climatic conditions to support commercial resource use, much of the area has
22 been subdivided into smaller parcels than typical for resource uses [sic] including
23 farm or forest use. Small-lot subdivisions are mixed in with larger resource uses.
24 [emphasis added].

25 Where these conditions are present, the County must make a choice based on
26 'economic viability.' Quality soils was a primary factor [emphasis added]

Exh. 14, p. 13.

3 Plan Adoption. Upon issuance of the FSEIS, the County announced the
4 availability of the recommended Growth Management Plan. Exh. 17, p 1. The first public
5 hearings on the plan were specifically intended to solicit comments from rural area residents,
6

1 but copies of the plan were not available to the public until several days after public hearings
2 had begun Exh 16

3 The recommended plan was substantially different from the alternatives described in the
4 FSEIS Approximately 36,000 additional acres were to be designated as resource lands, in a
5 newly created "agri-forest" resource classification. Exh. 2, p 4 There had been no discussion
6 of this hybrid resource category in any of the environmental documents The recommended plan
7 also eliminated the rural town centers, Villages and Hamlets, which had been the focal point of
8 rural area planning Exh. 2, pp. 5-6 Recommended minimum lot sizes were significantly
9 larger in rural areas than even the most environmentally preferable alternative in the FEIS
10 Exh. 2, p. 7; Exh. 14. The Plan also proposed a uniform minimum lot size for all of the rural
11 areas Exh. 2, p 7.

12 Hundreds of rural area residents reacted strongly to the proposed plan. Exh 17 Many
13 demanded to know how the County had analyzed the "commercial significance" of lands
14 designated agri-forest resource lands, as one speaker after another testified about the inability
15 of the land to support commercial farming Exh 17

16 The example of Petitioners Achen is illustrative of the affect of the designation on many
17 landowners Michael and Catherine Achen own 5 parcels of land in rural Clark County, near
18 the Battle Ground area but outside of urban service boundaries. Exh. 18, p. 1. The parcels are
19 divided into 4, 5, 6, 25, and 40 acres, respectively. Exh. 18, p. 1. Prior to the Comprehensive
20 Plan, they were zoned Rural Residential and the minimum lot size was 2 1/2 acres. Exh 18,
21 p. 1. Residential dwellings are located on the 4, 5, and 40 acre parcels Exh 18, p 2
22 Although trees can be found on the land, as is true in much of this region of Clark County, the
23 property has never been used for commercial foresting, nor has it supported any agricultural
24 production. Exh. 18, p. 2. With the new Comprehensive Plan, all of the land was zoned "Agri-
25 forest," with a 20 acre minimum lot size, creating 3 nonconforming lots. Exh. 18, p. 3.

26

PETITIONERS' OPENING BRIEF - 8

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1 Despite the protests of the Achens and hundreds of other rural area residents, the final
2 plan adopted in December 1994 by the Clark County Commissioners made virtually no changes
3 to the land use maps from those recommended in late September 1994 by the County staff. The
4 Commissioners did alter the allowable densities on rural and resource lands to more closely
5 conform to the alternatives discussed in the EIS, but the rural town centers were not revived and
6 Clark County could now lay claim to the only "agri-forest" resource lands in the State of
7 Washington.

8 The Western Washington Growth Management Hearings Board received over 60 petitions
9 for review challenging the Clark County Comprehensive Plan, many from rural area residents.
10 Exh. 19, p. 1. Seemingly overwhelmed from the outset, the Board entered a consolidation order
11 and assigned petitioners to groups for briefing and hearing. Exh. 19, pp. 2. The Board's
12 hearings were held in June 1995. The Board issued its decision first in September 1995, then
13 in December 1995, after considering several motions for reconsideration. Achen v. Clark Cy.,
14 WWGMHB No. 95-2-0067 (1995). In conclusory fashion, the Board rejected all of CCCU's
15 claims. See, e.g., Exh. 19, pp. 3-7. Petitioner Achen's claims, like those of most other
16 individual petitioners, were dismissed without discussion. Exh. 19, pp. 8.

17 **C. Standard of Review.**

18 In this case, this Court will review both questions of law and fact. The questions of law
19 relate to Clark County's erroneous interpretation and application of the GMA. The questions
20 of fact relate to the lack of substantial evidence in the record to support Clark County's actions
21 under the GMA.

22 This action was brought under the Washington Administrative Procedure Act ("WAPA"
23 herein), RCW Ch. 34.05, in accordance with the GMA. RCW 36.70A.300(5). The GMA
24 provides for review of GMA comprehensive plans by the Growth Management Hearings Boards
25 ("GMHBs"). RCW 36.70A.320(1). The WAPA provides for judicial review of the GMHB's
26 decision. RCW 34.05.570(3)(d). The scope of review with regard to questions of law is the

1 same under both Acts, i e , whether the agency in question has erroneously interpreted or
2 applied the law. RCW 36.70A.320(1); RCW 34 05.570(3)(d). Thus, the Board's task was to
3 determine whether Clark County erroneously interpreted or applied the GMA

4 Similarly, this Court's task is to determine whether "the agency," erroneously interpreted
5 or applied the law. Keene v. Bd of Accountancy, 77 Wn App. 849, 857, -- P 2d -- (1995)
6 (holding reviewing court substitutes its judgment for that of the administrative review authority
7 and engages in de novo review of an agency's interpretation and application of law); see also
8 Franklin Cy. Sheriff's Office v Sellers, 97 Wn.2d 317, 646 P.2d 113 (1982) Both Clark
9 County and the Board interpreted and applied the GMA. Thus, this Court reviews de novo
10 Clark County's and the Board's interpretation and application of the GMA

11 The legislature has vested Growth Management Hearings Boards with the responsibility
12 to review local government compliance with the GMA. RCW 36.70A.270, .320. However,
13 Clark County's Comprehensive Plan provisions must be supported by substantial evidence in the
14 Clark County record. WAC 365-195-640(1) Although the GMA provides that Comprehensive
15 Plans and development regulations are presumptively valid, the Board's finding of compliance
16 with the GMA must be supported by substantial evidence in the record, i e , evidence sufficient
17 to convince a fair minded person of the truth of the declared premises.⁴ See Sparks v. Douglas

18
19 ⁴It is interesting to note that the Board has adopted its own legal standard of review for
20 determining whether a local jurisdiction has complied with the provisions of the GMA.
21 Construing the requirements of the Act, the Board has determined growth plans must be the
22 result of a deliberated, well-reasoned process. Berschauer v. City of Tumwater, WWGMHB
23 94-02-0002, at 537 (July, 1994). They must be based on objectives, principles, and standards
24 Id. at 532.

25 To measure compliance with this mandate, the Board established a four question
26 analytical framework: (1) whether the area designation was the result of a "considered
application" of the requirements of the Act, (2) whether the process complied with the public
participation requirements of the Act, (3) whether the deliberation and decision making process
was reasoned and supported by a reasoned choice based upon appropriate factors actually
considered and contained in the record and inappropriate factors avoided, and (4) whether the
plan fell within the discretion granted to the decision maker. Id. at 531

(continued ..)

1 Cy., 127 Wn 2d 901, 910, -- P2d -- (1995) Any conclusions made by the Board without
2 evidence in the record to support them are arbitrary and should be rejected by this Court to the
3 extent they form the basis for the Board's validation of the Clark County Comprehensive Plan
4 See Mackie v Seattle, 19 Wn App 464, 471, 576 P.2d 414 (1978).

5 II.

6 **SUMMARY OF THE ARGUMENT**

7 Petitioners challenge the Board's decision not to invalidate portions of the Comprehensive
8 Plan and accompanying development regulations adopted by Clark County on December 20,
9 1994. The principal focus of this action is the County's actions related to resource and rural
10 lands and the County's failure to properly interpret and apply the GMA to the use of these lands.
11 First, Petitioners ask this Court to reverse the Board and invalidate the County's designation of
12 more than 36,000 acres of "agri-forest" resource lands. The GMA specifically defines resource
13 lands of commercial significance in the state of Washington. "Agri-forest" lands, whatever they
14 may be, are not resource lands under the GMA. The County's attempt to elevate what are
15 simply undeveloped rural lands to resource status is an erroneous interpretation and application
16 of the GMA. The Board's decision to uphold the County's agri-forest designation was an error
17 of law and should be reversed.

18 Second, the County's interpretation of GMA resource lands provisions is fatally flawed.
19 The County has elected to reject the requirement that the lands designated resource lands be
20 currently devoted to commercial resource production and have long-term commercial
21 significance for such production. In the thousands of pages of record exhibits and transcripts,
22 there is no analysis whatsoever of agricultural "commercial significance," a critical element of
23

24 _____
25 *(...continued)

26 As the Court will discover, the Board failed to utilize its own analytical framework in
reviewing the Clark County Comprehensive Plan.

1 resource land designation under the GMA. By ignoring the economic viability of resource lands,
2 Clark County's Comprehensive Plan conflicts with the GMA's substantive resource land
3 directives. This was error, as was the Board's failure to properly interpret these same GMA
4 provisions.

5 Third, the designation of "agri-forest" and agricultural resource lands is unsupportable.
6 There is virtually nothing in the record to demonstrate the County followed a reasoned process
7 or based its decision on "articulated goals, objectives, principles and standards," a standard
8 created by the Board itself. To the contrary, the record surrounding the designation of rural
9 lands demonstrates an utter disregard for the procedural requirements of the GMA. What started
10 out as an admirable effort slowly deteriorated into a haphazard exercise. Tremendous gaps in
11 the record leave one guessing at what analysis, if any, was undertaken to establish resource land
12 designations. While patting themselves on the back for involving local citizens in the resource
13 committees and focus groups, the County chose to ignore their recommendations. A majority
14 of the farm focus group, for example, concluded there was very little, if any, commercially
15 significant agricultural land in Clark County. There is not one shred of evidence in the record
16 to explain how the County reached a contrary conclusion. The Board furthered the County's
17 error when it held there was substantial evidence in the record to support the agricultural and
18 agri-forest land designations without reference to any such evidence.

19 Fourth, the County's rural and resource development regulations violate many of the
20 GMA's requirements and are not supported by the record in this case. As a result of the new
21 plan, more than 70% of rural Clark County has been down-zoned and is now nonconforming.
22 In all of Clark County, residential lots may not be created between 15,000 square feet (in the
23 City of Camas) and five acres (in rural areas) in size, leaving a tremendous void in the
24 opportunities for housing. Though the plan would allow development on pre-existing parcels,
25 the degree of nonconformity is glaring evidence of the County's failure to balance the goals of
26 the GMA.

1 Fifth, the County failed to comply with the public participation requirements of the GMA
2 by singling out the agri-forest resource lands at the end of the planning process without
3 meaningful public involvement. The Board's dismissive analysis of that failure compounded the
4 County's error.

5 Finally, Petitioners allege the County failed to comply with the requirements of the State
6 Environmental Policy Act, RCW Ch. 43.21C ("SEPA"). The adopted Comprehensive Plan is
7 markedly different from the alternatives described in the Comprehensive Plan EIS. In this
8 circumstance, SEPA requires the County to publish a supplemental EIS to describe and discuss
9 plan changes and the resulting environmental impacts. Even if a supplemental EIS were not
10 required, the County was obligated to analyze the new proposal and explain its decision not to
11 supplement the environmental documents. As planning deadlines approached, the County chose
12 to ignore its obligations under SEPA. This was error.

13 For all of these reasons, as more fully discussed below, Petitioners ask this Court to
14 reverse the decision of the Board and invalidate those portions of the Clark County
15 Comprehensive Plan which do not comply with the GMA.

16 **III.**

17 **ARGUMENT**

18 **A. Clark County Erroneously Interpreted and Applied the Resource Land Provisions**
19 **of the Growth Management Act.**

20 1. **Statutory Framework for Resource Land Planning.** The GMA is essentially a
21 planning enabling act with **substantive planning mandates**. RCW Ch. 36.70A. The GMA
22 contains provisions indicating which local governments are required to plan under these
23 mandates, the goals they must consider when planning, guidance on how to classify certain types
24 of land, the mandatory and optional elements of the plan, and the level of public participation
25 required during the planning process. RCW 36.70A.040, .020, .050, .070, .080, 140.

1 Deadlines for the completion of planning efforts were established by the GMA
2 RCW 36 70A 170 (1) During the interim between the effective date of the GMA and the date
3 the final plan was to be completed, local government's were required to classify and designate
4 certain resource lands. Id Interim development regulations were to maintain the status quo
5 while the local government fully developed their new GMA driven comprehensive plans
6 RCW 36.70A 060(1). The lands to be designated and "set aside," so to speak, included
7 statutorily defined agricultural lands, forest lands and mineral lands. RCW 36.70A.050. These
8 interim designations were designed to be overinclusive RCW 36.70A 060(3); WAC 365-195-
9 825(1)(d) When planning for 20 years' growth, as required, County's would necessarily
10 remove some of their interim resource lands ⁵ Id

11 Agricultural, forest and mineral resource lands under the GMA have a decidedly
12 economic component: lands so designated must have "long term commercial significance "
13 RCW 36 70A.030 (2), (8), (10) Moreover, the GMA states such lands must be "primarily
14 devoted to" commercial production of the resource in question. RCW 36.70A 030(2), (8) For
15 forest lands, the statute sets forth four factors to determine whether land is primarily devoted
16 to timber production.⁶ RCW 36.70A.030(8). Although the GMA itself does not provide
17 detailed guidance on how a local government proceeds with these designations, the Department
18 of Trade and Economic Development ("DCTED" herein) has published guidelines drawing from
19 the language of the GMA . See WAC 365-190-050, -060.

20
21
22
23 ⁵Of course, the true significance of the initial designations is somewhat academic in this case
24 because Clark County never made interim designations for resource lands or adopted
25 development regulations. Exh. 19, p. 9. This did not excuse the County from taking the same
26 steps for initial identification as the GMA envisioned and then reviewing those lands for resource
27 designation in the final plan

⁶This language became effective July 1, 1994.

1 The local government must not only adhere to the statutory definitions and regulatory
2 guidance, but must also analyze how the goals of the GMA are met and whether the plan is
3 internally consistent See RCW 36.70A.020, 030., .060, 210, WAC Ch. 365-190.

4 **2. The GMA Precludes an Agri-Forest Resource Designation** The GMA specifically
5 defines "resource" lands as agricultural, forest, and mineral lands of long-term commercial
6 significance ⁷ RCW 36.70A.030(2), (9), .170(1)(c). Clark County has created a hybrid
7 resource category, "agri-forest," and painted almost 36,000 acres of rural land with this new
8 label. The creation of this hybrid resource category violates the letter and spirit of the GMA
9 The Board held, without analysis, that this hybrid resource designation was within the discretion
10 afforded to local decisionmakers under the GMA. There is nothing in the GMA to support this
11 conclusion.

12 The County's authority to designate resource lands in their growth management plans is
13 derived solely from the GMA. RCW 36.70A.040. As a legislative delegation of authority, the
14 County has only the discretion committed to it by law. See Seattle v. Auto Sheet Metal Workers
15 Local 387, 27 Wn App 669, 685, 620 P.2d 119 (1980) (citing Lutz v Longview, 83 Wn.2d
16 566, 570, 520 P.2d 1374 (1974)) The discretion afforded the local decisionmaker to make
17 regional choices is not unfettered and should be, as the Board itself has held, within some
18 "reasonable range of available options that comply with the Act." Clark Cy. Natural Resources
19 Council v Clark Cy., WWGMHB 92-2-0001 at 9 (Nov. 1992).

20 Nothing contained in the language of the GMA suggests an undefined hybrid resource
21 category was intended by the legislature. The Washington Supreme Court has noted,

22 [w]here a statute specifically designates the things or classes of things upon which
23 it operates, an inference arises in law that all things or classes of things omitted
24 from it were intentionally omitted by the legislature. . .

25 ⁷The GMA also directs the Department of Community, Trade and Economic Development
26 ("DCTED" herein) to adopt guidelines for resource designations "subject to the definitions
provided." RCW 36.70A.050. In accordance with this directive, the Guidelines are patterned
after the definitions contained in the GMA. See WAC 365-190-030.