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No. 271234, consolidated with
271242, 271251, 271269, 271277

Kittitas County Cause Nos. 08-2-00195-7; 08-2-00210-4; 08-2-00224-4;
08-2-00231-7; 08-2-00239-2
Consolidated Under No. 08-2-00195-7

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

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

Petitioners,

v.

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

Respondent.

REPLY BRIEF OF BIAW, CENTRAL WASHINTON HOME BUILDERS AND MF WILLIAMS CONSTRUCTION CO.

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I. INTRODUCTION

Appellants Central Washington Home Builders Association of Washington, the Building Industry Association of Washington and Mitchell F. Williams d/b/a MF Williams Construction Co. Inc. (collectively, "BIAW"), Intervenors/Petitioners before the Growth Management Hearings Board for Eastern Washington (hereinafter "Board") submits this Reply Brief in its appeal of the Final Decision and Order (FDO) issued by the Hearings Board on March 21, 2008. BIAW replies to the Brief of Respondents Kittitas County Conservation, Ridge and Futurewise (collectively, "Futurewise").

II. ARGUMENT

A. Futurewise continues to ignore proper deference owed to Kittitas County under the GMA

While Futurewise devotes more than two pages of briefing to the deference owed to the Board, they do not attempt to substantially address the deference owed to the County under the Growth Management Act itself. Brief of Futurewise at 3-4. This undercurrent runs throughout Futurewise's briefing as Respondents seek to take away the statutory deference owed to the county and replace it with prescriptive requirements that simply do not have a basis in the GMA. It appears Futurewise underestimates (at best) or denies (at worst) the extraordinary kind of deference owed to counties planning under the GMA.

The Legislature designed the GMA to be a "framework" for local planning, with the "ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rest[ing] with that community." RCW 36.70A.3201.

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The Legislature left no doubt what its intentions were when it came to the exceptional deference to be afforded to local governments planning under the GMA, even amending the original version of the GMA to reflect this point:

> In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201(emphasis added).

The court in *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.* even noted that the Legislature "took the unusual additional step of enacting into law its statement of intent in amending RCW 36.70A.320 to accord counties and cities planning under the GMA additional deference." *Quadrant,* 154 Wn.2d 224, 237, 110 P.3d 1132 (2005). BIAW raises the issue of deference once again because the Board did not give the appropriate deference to the County and Futurewise dismiss the point in their briefing, despite the explicit direction in the GMA and further direction by the courts of this state. See RCW 36.70A.320 & 36.70A.3201; *Quadrant,* 154 Wn.2d at 233, 110 P.3d 1132; *Manke Lumber Co., Inc. v. Central Puget Sound Growth Mgmt Hearings Bd.*, 113 Wn.App. 615, 626-27, 53 P.3d 1011 (2002), *Viking Properties, Inc. v. Holm*, 155 Wn.2d

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112, 125-126, 118 P.3d 322 (2005) ("GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.").

Most recently, the court in *Thurston* County v. *W. Wash. Growth Mgmt. Hearings Bd.* once again emphasized the point: "Great deference is accorded to a local government's decisions that are 'consistent with the requirements and goals' of the GMA" *Thurston County*, 164 Wn.2d 329, 337, 190 P.3d 38 (2008). The Board, therefore, can determine whether the County is acting consistently with the GMA but cannot (as it has in this case) impose bright line rules regarding rural density, set policy as to what is specifically required of "innovative techniques" or go beyond its authority and rule on exempt well issues, for example.

B. The Growth Board improperly applied a bright line rule in violation of *Thurston County* and *Viking Properties*

While Futurewise attempts to distinguish this case from the *Thurston County* case, the argument is not persuasive. Brief of Futurewise at p. 9.

The Court in *Thurston County* spelled out clearly what constitutes a bright line rule and the similarities between the two cases cannot be distinguished.

The *Thurston County* court clearly answered the question of whether Boards may impose bright-line rules defining rural densities, holding they may not. Similar to the case here, Thurston County allowed for the possibility of areas of higher densities – as high as two dwelling units per acre in certain areas. Here, the Board found that the

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County violated the GMA by allowing densities of one dwelling unit per three acres.[1] The Boar found that densities allowing one home per three acres in areas zoned Rural-3 and Agriculture-3 are "urban" in nature and thus a violation of the GMA. AR 1206. The Board incorporated by reference in its entirety the analysis set forth in a related case, EWGMHB case No. 07-1-0004c when it comes to the three acre zoning issue in Kittitas County. AR 1204.

The Growth Board in *Thurston County* concluded that densities greater than one dwelling unit per five acres are not rural densities, answering the question: "Whether a comprehensive plan provides for a variety of rural densities in accordance with former RCW 36.70A.070(5)(b) when resource lands and densities greater than one dwelling unit per five acres are included in the rural element." (emphasis added) *Thurston County*, 164 Wn.2d at 355, 190 P.3d at 50.

Futurewise argues that the Board itself states that it did not adopt a bright line rule, so, therefore, it did not adopt one. This awareness alone does not let the Board off the hook. The Court in *Thurston County* also explicitly addressed the unintentional adoption of a bright line rule. The Court in *Thurston County* also made clear that the Board's analysis <u>resulted</u> in a bright-line rule, even though the Board may not have explicitly adopted such a rule. Footnote 20 states:

> "Although the Board did not explicitly adopt a five acre bright-line rule, such a rule was implicit in its decision because of the way the issue regarding rural densities was framed. The Board framed the issue as to whether the County's comprehensive plan failed to comply with the GMA by allowing 'development at densities of greater than one unit per five

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[1] See also a different phrasing of the issue in Finding of Fact 3, AR 1253 ("The County adopted regulations which allow densities greater than 1 du/5 acres in the rural area interfering with RCW 36.70A.020(1).")

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> acres when this board has determined that such densities fail to comply with the GMA.'

Thurston County, 164 Wn.2d at 358, 190 P.3d 38.

Therefore, it is the result that matters, and the result in this case is the same: one dwelling unit per three acres equals a violation. That's a bright line rule.

The Washington Supreme Court has held clearly that Growth Boards do not have authority to apply and/or create bright line rules concerning densities: "We hold a GMHB may not use a bright line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny. . . [t]he legislature did not specifically define what constitutes a rural density. Instead it provided local governments with general guidelines for designating rural densities. A rural density is 'not characterized by urban growth' and is 'consistent with rural character.'" *Thurston County*, 164 Wn. 2d at 359, 190 P.3d 38. See also *Viking Properties*, 155 Wn.2d 112, 118 P.3d 322. ("[G]rowth management hearings boards do not have authority to make 'public policy' even within the limited scope of their jurisdictions, let alone to make statewide public policy.")

In arguing that the Board did not "resort to any 'bright line' rule in reaching its decision," Futurewise not only ignores the facts and holding in *Thurston County* but also ignores the fact that the Board adopted in its entirety the Board Analysis set forth in the related case, EWGMHB Case No. 07-1-0004 for three-acre zoning in Kittitas County. AR 1204. The Board clearly ruled in both decisions that the one dwelling unit per three acre zoning is urban in nature and thus in violation of the GMA. AR 1203.

It is worth noting that in their analysis of this issue, Futurewise cites to two articles on the subject of "rural sprawl," but neither article should be taken as persuasive authority. The first has some relation to *another* county in Washington state (a county in

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Western Washington with unique local circumstances that are undoubtedly different from Kittitas County's), but has no direct connection to Kittitas County's specific local circumstances. Brief of Futurewise at 12. The second article also appears to have no connection to Kittitas County. Brief of Futurewise at 13.

Last, Futurewise makes the statement that when it comes to bright line rules, "the County and BIAW's argument would result in a judicial repeal of the GMA." Brief of Futurewise at 17. This statement is untrue and reflects a clear misunderstanding of the structure and content of the GMA – that it is a bottom-up process, giving great deference to counties and relying heavily on unique – that the Board ignored and Futurewise continues to downplay. BIAW has always argued that – within the confines of the GMA itself – the Board ignored substantial evidence, failed to give appropriate deference to the County, and acted beyond its authority. BIAW has not argued in any of its briefing that the GMA should be repealed, as Futurewise absurdly suggests.

C. The Growth Board exceeded its authority by ruling on water quality and exempt wells under a *Campbell & Gwinn* analysis

Futurewise argues that the GMA directs Kittitas County to protect water and ground water resources and that that "Kittitas County's three acre and smaller rural zoning is incompatible with rural character because it may adversely impact water quality." Brief of Futurewise at 12, 15. It is true that the GMA includes general provisions to protect water resources – and Kittitas County's development regulations include many safeguards to protect the community's water resources. But Futurewise and the Board reach <u>beyond</u> this simple statement to matters beyond the Board's jurisdiction.

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While Futurewise backs away from a reliance on *Campbell & Gwinn* in their most recent briefing, Futurewise argued successfully to the Board that the County is allowing developers to structure subdivision applications in an attempt to "skirt" the holding of *Campbell & Gwinn*. AR 1219-1220. *Department of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 43 P.3d 4 (2002). The question is whether multiple exempt wells will be allowed for one subdivision. The Court in *Campbell & Gwinn* set the rule and the Department of Ecology has authority over this issue. *Campbell & Gwinn, LLC,* 146 Wn.2d 1, 43 P.3d 4. Futurewise is attempting to litigate the issue of exempt wells, a hot button legal and political issue in Eastern Washington especially: "The effect of this provision is to allow developers to skirt the GMA's mandate to preserve water quality by allowing multiple exempt wells for one residential subdivision." Brief of Futurewise at 31.

The Board does not have statutory authority under the GMA to decide issues regarding exempt wells, nor does it have authority to determine whether the County violates RCW 90.44.050 under *Campbell & Gwinn*.[2] Ground water withdrawals are regulated by the Department of Ecology under RCW 90.44.050. *See Campbell & Gwinn*, 146 Wn.2d at 7-8, 43 P.3d 4. As we have argued before, the Board exceeded its authority

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[2] RCW 36.70A.280 clearly lays out the subject matter jurisdiction of the Boards. the Boards only have subject matter jurisdiction over petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

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on this issue and KCC et al should be challenging this issue in Superior Court, not in front of the Board.

Further, Futurewise cites to the FDO in a related case in attempting to prove their point that Kittitas County is facing a severe water shortage. Brief of Futurewise at 14. This was not a finding of fact or conclusion by the Board in that case; it was part of a summary of Futurewise's arguments in that case. Futurewise's citation to its own earlier arguments is not "authority."

D. Kittitas County's PUDs and cluster developments are techniques specifically envisioned and compliant with the GMA

The GMA expressly allows and specifically invites "innovative techniques" such as Planned Unit Developments (PUDs) and cluster development in rural areas, stating that the rural element "shall provide for a variety of rural densities" and to achieve this mandate, "counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character." RCW 36.70A.070(5)(b) (emphasis added).

In arguing that both of these techniques Kittitas County has employed violate the GMA because they allow urban development in rural areas, Futurewise (and the Board in its decision) simply ignores the many safeguards that both ordinances include to protect rural character and agricultural land– including minimum open space set aside requirement and the responsible management of water resources.

Specifically, KCC Ch. 16 (Cluster Platting) seeks to protect the environment in rural areas by conserving water by minimizing the development of exempt wells and by

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encouraging group water systems. The Ordinance seeks to protect the public health by reducing the number of septic drain fields and, of course, reducing sprawl in general through the clustering of homes. KCC 16.09.010.

KCC 17.36, the County's Planned Unit Development (PUD) code, requires a detailed preliminary development plan requiring SEPA compliance, detailed plans outlining water supply, storage and distribution, sewage disposal/treatment plans and solid waste collection plan) prior to approval of a PUD and then a final plan (requires verification that water and sewer is available to accommodate the development as well as proof that the open spaces are permanent and will be maintained). KCC 17.36.030 and KCC 17.98.020. The code also specifically ensures that the overall density of any PUD "shall not exceed the density as allowed for in the underlying zone." KCC 17.36.025. Nothing in the GMA rejects density averages achieved by innovative techniques such as this one.

Futurewise again ignores the deference owed to the County in using these techniques, an idea recently affirmed by the Thurston County court which stated that a "county has a great amount of discretion to employ various techniques to achieve a variety of rural densities. *Thurston County*, 164 Wn.2d at 356, 190 P.3d 38., (quoting *Whidbey Envtl. Action Network v. Island County*, 122 Wn.App.156, 167, 93 P.3d 885 (2004).) The court in *Thurston County* specifically pointed out that planned residential developments (as well as clustering, as discussed above) are tools intended to promote flexibility in local land use planning. *Thurston County*, 164 Wn.2d at 356, 190 P.3d 38, footnote 16.

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Both the design and the language of the GMA make clear that counties should be creative in using techniques that provide an alternative to blanket minimum-acre-per-lot rules in their attempts to retain rural character. Kittitas County has done just that, but Futurewise argues that its not good enough, relying on implicit bright line rules and failing to give the County the deference it is entitled to under law.

E. The Board elevated two GMA goals above all others in its analysis and decision

Futurewise argues that the Board properly considered the goals of the GMA and properly found Kittitas County in violation of the GMA. But Futurewise and the Board both elevate what they view as "key" goals (reducing sprawl and encouraging urban development) over others.[3] Futurewise's briefing fails to give equal consideration to the other equally weighted GMA goals, such as protecting affordable housing,[4] economic development,[5] and property rights.[6]

This approach is not supported by precedent or statute. The GMA clearly states that the 13 goals are "not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations

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[3] "Controlling urban sprawl is one of the key goals of the GMA." Brief of Futurewise at 9.

[4] Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock. RCW 36.70A.020(4).

[5] Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities. RCW 36.70A.020(5).

[6] Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions. RCW 36.70A.020(6).

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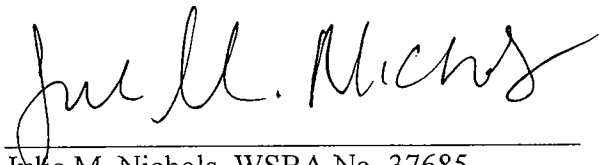
. . ." RCW 36.70A.020. Futurewise's arguments ask this court to elevate certain goals over others, which was specifically addressed in *Viking Properties*, where the court found fault in the same kind of argument: "Viking's public policy argument also fails to the extent that it implicitly requires us to elevate the singular goal of urban density to the detriment of other equally important GMA goals. To do so would violate the legislature's express statement that the GMA's general goals are nonprioritized." *Viking Properties*, 155 Wn.2d at 127-28, 118 P.3d 322 (citations omitted).

III. CONCLUSION

Futurewise seeks to prescribe a remedy for Kittitas County that includes rural density levels that they find appropriate – in rejection of the densities that the local facts and circumstances have led to Kittitas County finding appropriate for its own community. The County has not violated the GMA in its development regulations regarding one per three acre zoning, using "innovative techniques" or protecting water resources. Futurewise simply fails to allow the County the deference they are allowed under law when developing and writing comprehensive plans and development regulations.

The Board's FDO should be reversed for these reasons.

Respectfully submitted this 26th day of June, 2009.



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