

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 1000 FRIENDS OF WASHINGTON

4 Petitioners,

Case No. 05-2-0002

5
6
7 v.

**COMPLIANCE ORDER ON RURAL
DENSITIES AND AGRICULTURAL
LANDS ISSUES**

8
9 THURSTON COUNTY,

10 Respondent.

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13 **I. SYNOPSIS**

14 This case involves a portion of the Thurston County's compliance efforts in response to the
15 Board's July 20, 2005 Final Decision and Order. Because of the differing schedules for the
16 various compliance tasks on the County's work plan, this case only addresses the County's
17 compliance with the Board's findings concerning conservation of agricultural lands of long-
18 term commercial significance (also called "agricultural resource lands") and the requirement
19 for a variety of rural densities (RCW 36.70A.070(5)(b)).

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22 As a threshold matter, the Board finds that the Final Decision and Order is still in effect and
23 cannot be modified until the judicial appeals have been concluded. No judicial stay has
24 been ordered and the mandate has not been issued because further appeal is still pending
25 before the Washington Supreme Court. While the Court of Appeals reversed the Board's
26 decision with respect to the burden of proof to be applied to the variety of rural densities and
27 innovative techniques, the Board cannot act on the Court's direction without a mandate.

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30 Where the Board has been reversed on an issue but the judicial appeal is still pending, this
31 Board generally finds it appropriate to stay the compliance requirements on the issue until
32 the mandate has been received. Therefore, the issue of the County's compliance with the

1 rural densities requirement through innovative techniques is stayed until the mandate is
2 issued or further notice given by the Board.

3
4 The County took action to amend its designation criteria in response to the Board's Final
5 Decision and Order. The County did not amend Criterion Five, the parcel size criterion, but
6 Futurewise does not object to a finding of compliance on those grounds. Futurewise agrees
7 that the amendment to Criterion Three of the agricultural resource lands criteria, which now
8 includes lands capable of being used for agriculture, is now compliant with the GMA.
9 However, Futurewise argues that the County had a duty to apply the revised designation
10 criteria and did not do that.
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12
13 The Board finds that the County had a duty to apply the revised criterion (Criterion Three) to
14 lands which were not designated for conservation and protection previously, and not just to
15 adopt revised criteria. Designation criteria that are not applied to map or otherwise specify
16 the lands that are designated for conservation fail to meet the requirements of RCW
17 36.70A.060 and 36.70A.170(1)(a) to designate those lands. The record establishes that
18 the County did not review any lands except those already designated as agricultural lands
19 of long-term commercial significance to see if the change in Criterion Three would require
20 inclusion of additional lands for conservation. This fails to comply with RCW 36.70A.060
21 and 36.70A.170(1)(a).
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23 24 **II. PROCEDURAL HISTORY**

25 The petition for review in this case challenged Resolution No. 13234 and Ordinance No.
26 13235. They were adopted to comply with the requirement in RCW 36.70A.130 that the
27 County review and, if necessary, revise its comprehensive plan and development
28 regulations to ensure the plan and regulations comply with the Growth Management Act
29 (Ch. 36.70A RCW), no later than December 1, 2004. RCW 36.70A.130(4). Resolution No.
30 13234 amends the County's comprehensive plan. Ordinance No. 13235 amends the
31 County's development regulations. Resolution No. 13234 and Ordinance No. 13235 were
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1 adopted on November 22, 2004. Petitioner, 1000 Friends of Washington (now known as
2 “Futurewise”), filed a petition for review of these two adoptions on January 21, 2005.

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4 After briefing and hearing on the merits of the petition for review, the Board issued its Final
5 Decision and Order on July 20, 2005. That decision includes six conclusions of law that find
6 areas of non-compliance with the requirements and goals of the Growth Management Act
7 (GMA), Ch. 36.70A RCW. The County was ordered to achieve compliance by January 18,
8 2006. Subsequent to that order, the time for achieving compliance has been extended
9 three times.¹

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12 The County appealed the Final Decision and Order and the Court of Appeals, Division II,
13 accepted direct review. On April 3, 2007, the Court of Appeals issued its decision in
14 *Thurston County et al. v. Western Washington Growth Management Hearings Board et al.*,
15 *137 Wn. App. 781, 154 P. 3d 959 (2007)*. This decision affirmed the Board in part, and
16 reversed the Board in part. The County has petitioned for review by the Supreme Court but
17 that petition is still pending.

18
19 Based on the County’s work plan, the issues for compliance have been set on separate time
20 tables. The compliance issues related to the County’s urban growth areas (UGAs) are set
21 for hearing on January 17, 2008. The compliance issues related to limited areas of more
22 intensive rural development (LAMIRDs) and lot aggregation are set for hearing on October
23 15, 2007.

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26 The compliance issues related to the requirement for a variety of rural densities and to
27 conserve and protect agricultural lands of long-term commercial significance were heard on
28 September 21, 2007. To achieve compliance in this case, the Thurston County Board of
29 County Commissioners adopted Resolution No. 13815 on May 30, 2007. The compliance
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32 ¹ The latest extension, Third Order Granting Extension of Compliance Period and Setting Compliance
Schedules, was issued June 12, 2007.

1 hearing was held September 21, 2007 in the Board's offices in Olympia, Washington. The
2 compliance hearing was limited to the County's compliance with the agricultural lands'
3 issues; and the rural densities and innovative techniques' issues identified in the Board's
4 Final Decision and Order.² Deputy Prosecuting Attorney Jeffrey Fancher represented
5 Thurston County. Petitioner Futurewise (formerly 1000 Friends of Washington) was
6 represented by attorney Tim Trohimovich. All three board members attended, Margery Hite
7 presiding.
8

9 10 **III. ISSUES PRESENTED**

11 Issue No. 1: If the mandate from the Court of Appeals has not issued, may the Board act
12 upon the Court's decision reviewing the Board's final order?

13 Issue No. 2: Has the County achieved compliance with respect to Conclusion of Law G³:

14 G: The County's comprehensive plan and development regulations fail to provide
15 for a variety of rural densities in the rural element as required by RCW
16 36.70A.070(5)(b).

17 Issue No. 3: Has the County achieved compliance with respect to Conclusion of Law L:

18 L: Agricultural land designation criteria numbers 3 and 5 (Thurston County
19 Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4.) fail to
20 comply with the requirements of the GMA to designate and conserve agricultural
21 resource lands. RCW 36.70A.060 and 36.70A.170.
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23 Issue No. 4. : Did the County fail to comply with the public participation requirements of the
24 GMA when it made its decision not to re-designate agricultural lands of long-term
25 commercial significance?

26 Issue No. 5: Should the Board impose a determination of invalidity on the designations of
27 rural lands that should be designated as agricultural lands of long-term commercial
28 significance and should a determination of invalidity be made as to the failure to provide a
29 variety of rural densities?

30 ² Final Decision and Order, July 20, 2005.

31 ³ Conclusion of Law F also deals with intensity of rural densities: "T.C.C. 20.09.040(1)(a) fails to comply with
32 RCW 36.70A.070(5)(c) and (d) by effectively increasing the rural residential density in the RR 1/5 zone from
one dwelling unit per five acres to one single-family dwelling unit per four acres." However, the Board
assumes it will be addressed in the LAMIRD hearing.

1 **IV. BURDEN OF PROOF**

2 For purposes of board review of the comprehensive plans and development regulations
3 adopted by local government, the GMA establishes three major precepts: a presumption of
4 validity; a “clearly erroneous” standard of review; and a requirement of deference to the
5 decisions of local government.

6 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
7 amendments to them are presumed valid upon adoption:

8
9 Except as provided in subsection (5) of this section, comprehensive plans and
10 development regulations, and amendments thereto, adopted under this chapter are
11 presumed valid upon adoption.

12 RCW 36.70A.320(1).

13 This same presumption of validity applies when a local jurisdiction takes legislative action in
14 response to a noncompliance finding; that legislative action is presumed valid. The only
15 time that the burden of proof shifts to the County is when the County is subject to a
16 determination of invalidity.⁴ Here, no finding of invalidity was imposed so the burden
17 remains on the Petitioner.

18
19 The statute further provides that the standard of review is whether the challenged
20 enactments are clearly erroneous:

21 The board shall find compliance unless it determines that the action by the state
22 agency, county, or city is clearly erroneous in view of the entire record before the
23 board and in light of the goals and requirements of this chapter.

24 RCW 36.70A.320(3)

25 In order to find the County’s action clearly erroneous, the Board must be “left with the firm
26 and definite conviction that a mistake has been made.” *Department of Ecology v. PUD1*,
27 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

28
29 Within the framework of state goals and requirements, the boards must grant deference to
30 local governments in how they plan for growth:
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⁴ RCW 36.70A.320(2) and (4).
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1 In recognition of the broad range of discretion that may be exercised by counties and
2 cities in how they plan for growth, consistent with the requirements and goals of this
3 chapter, the legislature intends for the boards to grant deference to the counties and
4 cities in how they plan for growth, consistent with the requirements and goals of this
5 chapter. Local comprehensive plans and development regulations require counties and
6 cities to balance priorities and options for action in full consideration of local
7 circumstances. The legislature finds that while this chapter requires local planning to
8 take place within a framework of state goals and requirements, the ultimate burden and
9 responsibility for planning, harmonizing the planning goals of this chapter, and
10 implementing a county's or city's future rests with that community.
11 RCW 36.70A.3201 (in part).

12 In challenging the sufficiency of compliance efforts as well as in an initial petition for review,
13 the burden is on Petitioners to overcome the presumption of validity and demonstrate that
14 any action taken by the County is clearly erroneous in light of the goals and requirements of
15 Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2). Where not clearly
16 erroneous, and thus within the framework of state goals and requirements, the planning
17 choices of local government must be granted deference.

18 V. DISCUSSION

19 ***Issue No. 1: If the mandate from the Court of Appeals has not issued, may the Board***
20 ***act upon the Court's decision reviewing the Board's final order?***

21 **Positions of the Parties**

22 Futurewise urges that the remand of this case from the courts on appeal is not yet
23 effective.⁵ Citing to this Board's decision in *Evergreen Islands, Futurewise, and Skagit*
24 *Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016, Futurewise argues
25 that the Rules of Appellate Procedure (RAP 12.2) provide that the decision of the appellate
26 court is not effective until issuance of the mandate.⁶ If there is an appeal to a higher court
27 still pending, there has been no decision terminating review and thus no mandate may be
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32 ⁵ Objection to Finding of Compliance – Rural Lands and Agricultural Lands at 8.

⁶ *Ibid.*

1 issued pursuant to RAP 12.5(a) and (b),⁷ Therefore, the decision of the Court Appeals is not
2 in effect, according to Futurewise.

3
4 The County responds that Futurewise is asking the Board to ignore the published case
5 precedent “that directly overturned the WWGMHB’s decision and find that the County is still
6 out of compliance.”⁸ While the County has petitioned the Supreme Court for review on
7 several issues, the County states, the “variety of densities” issue is not one of them.⁹ Nor
8 has Futurewise petitioned for review on this issue.¹⁰ Therefore, the County urges, the
9 Board must follow the binding precedent of the Court of Appeals.¹¹
10

11 **Board Discussion**

12 Both parties cite to the Board’s decision in *Evergreen Islands, Futurewise, and Skagit*
13 *Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Compliance Order
14 (April 2007), April 9, 2007). In that decision, the Board analyzed the status of a growth
15 management hearings board case on appeal and found that, where no provision of the
16 Administrative Procedures Act (APA) is applicable, the Rules of Appellate Procedure apply.
17 Appeals of growth board decisions are governed by the Administrative Procedures Act
18 (APA). RCW 36.70A.300(5). The APA does not state when the decision of an appellate
19 court is effective and therefore takes the place of the Board’s decision. However, the
20 Washington Supreme Court discussed the question of what rules to apply in the event that
21 the APA does not address a procedural matter. In a case involving this Board, *Diehl v.*
22 *Western Washington Growth Management Hrgs. Bd.*, 153 Wn.2d 207, 103 P.3d 193 (2004),
23 the Court stated that it is appropriate to use the Rules of Appellate Procedure:
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30 ⁷ *Ibid.*

31 ⁸ Thurston County’s Response to Compliance Objections at 4.

32 ⁹ *Ibid* at 3.

¹⁰ *Ibid.*

¹¹ *Ibid* at 4.

1 In reviewing administrative appeals, Washington courts have stated that it was more
2 appropriate to look to the rules of appellate procedure, rather than the civil rules,
3 given the appellate jurisdiction of the trial court under the APA.¹²

4 This was also the decision of the Court of Appeals (Division I) in *King County v. Central*
5 *Puget Sound Growth Management Hrgs. Bd.*, 91 Wn.App. 1 (1998):

6 The civil rules are clearly intended to apply only to civil actions invoking the general
7 jurisdiction of the superior courts. Instead we would analogize to the rules of
8 appellate procedure (RAP) given the appellate jurisdiction of trial courts under the
9 APA.¹³

10 Since the APA does not address the situation here, the Board must analogize to the Rules
11 of Appellate Procedure. Under RAP 12.2, the Court of Appeals' decision does not become
12 effective until a mandate is issued after a decision terminating appellate review. See also
13 RAP 12.5. Because appellate review is still pending in the Supreme Court, the mandate
14 cannot issue until the Supreme Court has made its decision.

15 Again, analogizing to the Rules of Appellate Procedure, the Board stands in the shoes of
16 the court of original jurisdiction (usually the trial court) during the appeal. RAP 7.2 allows
17 any person to enforce the trial court's decision in a civil case during the appeal.¹⁴ The effect
18 of this rule is that the Board has authority to enforce its decision during the appeal unless a
19 stay has been issued by a reviewing court. There has been no stay issued by a court so the
20 Board's decision remains in effect until a final decision terminating review is entered. As a
21 result, we find that the Board's decision is still in effect and that a compliance hearing on
22 this issue is still appropriate.

23 The County does not argue that the Rules of Appellate Procedure do not apply; instead, the
24 County argues that the Court of Appeals' decision is "binding precedent". However, this
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31 ¹² *Ibid.*

32 ¹³ *King County v. Central Puget Sound Growth Management Hrgs. Bd.*, 91 Wn.App. 1 (1998) at 18-19.

¹⁴ RAP 7.2(c).

1 argument does not reach the question of whether the Board has jurisdiction to re-open a
2 decision that is on appeal. RAP 7.2(a) provides that the trial court (by analogy here the
3 Board) cannot act in a case except as provided in that rule:

4 After review is accepted by the appellate court, the trial court has authority to act in a
5 case only to the extent provided in this rule, unless the appellate court limits or
6 expands that authority as provided in rule 8.3.¹⁵

7 One of the ways that the trial court can act is to enforce its decision in civil cases:

8 In a civil case, except to the extent enforcement of a judgment or decision has been
9 stayed as provided in rules 8.1 or 8.3, the trial court has authority to enforce any
10 decision of the trial court and a party may execute on any judgment of the trial court.
11 Any person may take action premised on the validity of a trial court judgment or
12 decision until enforcement of the judgment or decision is stayed as provided in rules
13 8.1 or 8.3.¹⁶

14 The trial court, (by analogy in this instance, the Board), has the authority to modify its
15 decision upon timely “postjudgment” motions¹⁷ and “actions to change or modify a decision
16 that is subject to modification by the court that initially made the decision.”¹⁸ In addition:

17 If the trial court determination will change a decision then being reviewed by the
18 appellate court, the permission of the appellate court must be obtained prior to the
19 formal entry of the trial court decision.¹⁹

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21 Here, the County has not brought any postjudgment motions but resists the enforcement of
22 the Board’s decision regarding rural densities because, the County argues, it has been
23 reversed by the Court of Appeals and is not on appeal to the Supreme Court. The only
24 basis urged for modifying the Board’s decision on this issue is that it has been reversed.
25 However, the Court of Appeals’ decision is not final. Because review has not been
26 terminated, the Court of Appeals’ decision may itself be modified. That is why the Rules of
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31 ¹⁵ RAP 7.2(a)

32 ¹⁶ RAP 7.2(c)

¹⁷ RAP 7.2(e)(1)

¹⁸ RAP 7.2(e)(2)

¹⁹ RAP 7.2(3)

1 Appellate Procedure provide that the decision of the Court of Appeals is not effective until all
2 review has been terminated.

3
4 **Conclusion:** Until an order terminating review and a mandate is issued on the judicial
5 appeal, the Board does not have a basis for altering its decision. Therefore, since no stay
6 was issued by the reviewing courts. the Board's decision remains in effect.
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8 **Issue No. 2: Has the County achieved compliance with respect to Conclusion of Law**
9 **G:**

10 **G: The County's comprehensive plan and development regulations fail to**
11 **provide for a variety of rural densities in the rural element as required by**
12 **RCW 36.70A.070(5)(b).**

13 **Positions of the Parties**

14 The County has requested that the Board issue a stay of its decision if the Board
15 determines not to act on the Court of Appeals' decision until a mandate has issued.²⁰ The
16 County relies upon the rationale for the stay issued by this Board in *Evergreen Islands,*
17 *Futurewise, and Skagit Audubon Society v. City of Anacortes* where the Board found that
18 reversal by the Superior Court was a sufficient basis for a stay of enforcement of the
19 Board's decision pending review by the Court of Appeals.²¹ If the Board decides not to
20 recognize the binding precedent, the County asserts, the Board should grant a stay.
21 Relying on the *Evergreen Islands, Futurewise, and Skagit Audubon Society v. City of*
22 *Anacortes* case, the County argues that the reversal by the Court of Appeals on this issue is
23 justification for the stay requested here by the City.²²
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26 Futurewise responds that a stay may not be issued if it was not requested within 10 days of
27 the final decision pursuant to RCW 34.05.467.²³ Further, Futurewise notes that the Court of
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30 ²⁰ Thurston County's Response to Compliance Objections Involving Variety of Rural Densities and Agricultural
31 Lands of Long-Term Commercial Significance at 5-6.

32 ²¹ *Ibid* at 6.

²² *Ibid* at 6.

²³ Argument at Compliance Hearing.

1 Appeals has already decided that the factors for issuance of a stay enumerated in RCW
2 34.05.550 have not been met by the County in this case.²⁴
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4 **Board Discussion**

5 In the judicial appeal of this case, the Court of Appeals found that the Board had misapplied
6 the burden of proof and remanded the issue of whether the County's innovative techniques
7 achieve a variety of rural densities for the Board to apply the burden of proof correctly.²⁵
8

9 But on this issue, the Board required the County to show that its plan and regulations
10 were valid. In doing so, the Board failed to presume validity and failed to require
11 Futurewise to prove invalidity. RCW 36.70A.320(2). Accordingly, the Board erred in
12 finding that the County's comprehensive plan and development regulations fail to
13 provide for a variety of rural densities through innovative techniques.

14 The Board's finding on rural densities and innovative techniques was remanded to the
15 Board by the Court of Appeals and has not been appealed by any party. Since the Board
16 has not received the mandate, it cannot act to respond to the direction of the Court of
17 Appeals and make a determination whether the County's innovative techniques achieve a
18 variety of rural densities. The Board therefore finds that it is appropriate to issue a stay on
19 the requirement of the County to reach compliance on this issue pursuant to the Board's
20 authority under the Administrative Procedures Act (APA), RCW 34.05.550(1).
21

22 Futurewise argues that the Board cannot issue a stay because the applicable APA authority
23 for a stay arises under RCW 34.05.467 and the time periods for requesting a stay under that
24 rule have already passed. The Board analyzed but rejected this argument in its decision in
25 *Swinomish Indian Tribal Community et al. v. Skagit County, et al.*, WWGMHB Case No. 02-
26 2-0012c (Order Granting a Stay, July 9, 2007). The authority granted in RCW 34.05.550 is
27 not the authority to grant specific relief within 10 days of the issuance of a final order (as
28 granted in RCW 34.05.467) but a broad grant of authority to grant a stay if the agency finds
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31 ²⁴ Futurewise's Objection to Finding Compliance – Rural Lands and Agricultural Issues at 9.

32 ²⁵ *Thurston County et al. v. Western Washington Growth Management Hearings Board et al.*, 137 Wn. App.
781, 154 P. 3d 959 (2007).

1 in its discretion that it is appropriate and not otherwise prohibited. This Board has found
2 that a judicial reversal generally forms the basis for such an administrative stay since
3 enforcement of a Board decision in the face of a judicial reversal compels the jurisdiction to
4 take an action which a reviewing court has found not justified.
5

6 Futurewise argues also that the Court of Appeals has already determined that the factors for
7 issuance of a stay under RCW 34.05.550 have not been met in this case.²⁶ However,
8 Futurewise assumes that the factors listed in RCW 34.05.550(2) are applicable to
9 administrative stays issued under RCW 34.05.550(1). The factors listed in RCW
10 34.05.550(2) are the applicable factors for issuance of a *judicial* stay, not an administrative
11 stay. The Court of Appeals found that a judicial stay was not justified based upon the
12 factors in RCW 34.05.550(2) prior to issuance of its decision in this case. Now that the
13 Court of Appeals decision has been issued, the question for this Board is whether the Board
14 should stay the enforcement of an issue which was reversed and remanded for further
15 determinations until the mandate is issued. The Board finds that the broad grant of
16 discretionary authority to issue a temporary stay in RCW 34.05.550(1) was given to respond
17 to just this kind of situation
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21 However, there may be circumstances when, in the Board's discretion, a stay may not be
22 appropriate when an appeal is still pending even though there was a reversal at the first
23 level of judicial review. The Board acknowledges that there may be some circumstances in
24 which the Board would not grant such a stay or may lift such a stay, for example if the risk of
25 substantial interference with the goals of the GMA is well-demonstrated. In this case, the
26 Board finds that the judicial reversal is a basis for an administrative stay in this case.
27

28 **Conclusion:** Compliance with this issue is stayed by the Board pursuant to RCW
29 34.05.550(1).
30

31
32 ²⁶ Futurewise's Objection to Finding Compliance – Rural Lands and Agricultural Issues

1 **Issue No. 3: Has the County achieved compliance with respect to Conclusion of Law**
2 **L:**

3 **L: Agricultural land designation criteria numbers 3 and 5 (Thurston County**
4 **Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4.) fail to**
5 **comply with the requirements of the GMA to designate and conserve**
6 **agricultural resource lands. RCW 36.70A.060 and 36.70A.170.**

7 **Positions of the Parties**

8 Futurewise agrees that amended criteria 3 complies with the GMA.²⁷ However, Futurewise
9 argues that the County is required to apply “the legally required criteria to update its
10 designation of agricultural lands.”²⁸ Futurewise points out that the County has designated
11 12,692 acres of land as agricultural lands of long-term commercial significance but argues
12 that the County had 74,442 acres “in farms” in 2002. Thus, Futurewise argues, the County
13 has only designated and protected 17 percent of land in farms as agricultural lands of long-
14 term commercial significance.²⁹ Because the criteria were impermissible, Futurewise
15 argues, the designations were also improper and must be redone.³⁰

16
17 The County responds that Futurewise is attempting to relitigate issues decided by the Board
18 in favor of the County.³¹ The County argues that it amended its designation criteria to be
19 consistent with the Court of Appeals’ decision and that Futurewise must overcome the
20 presumption of validity to require the County to re-designate any additional lands of long-
21 term commercial significance.³²

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24 **Board Discussion**

25 Conclusion of Law L finds that two designation criteria for agricultural lands of long-term
26 commercial significance “fail to comply with the requirements of the GMA to designate and
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29 ²⁷ Futurewise’s Objection to a Finding of Compliance on the Rural Lands and Agricultural Issues at 10.

30 ²⁸ *Ibid* at 12.

31 ²⁹ *Ibid* at 12-3.

32 ³⁰ *Ibid* at 12.

³¹ Thurston County’s Response to Compliance Objections Involving Variety of Rural Densities and Agricultural
Lands of Long-Term Commercial Significance at 8-9.

³² *Ibid* at 7.

1 conserve agricultural resource lands. RCW 36.70A.060 and 36.70A.170.” The Court of
2 Appeals reversed the Board on its finding relating to parcel size, but upheld the Board’s
3 decision that Criterion 3 did not comply with the GMA. The County has amended Criterion
4 3³³ but decided that it does not need to use that criterion to designate any additional
5 agricultural lands. Because there is no objection to the revisions to the designation criteria,
6 the Board finds they are compliant.³⁴
7

8
9 On the other hand, there is a dispute as to whether the County has achieved compliance by
10 utilizing the designation criteria to actually designate the agricultural lands of long-term
11 commercial significance to be conserved. This is not just a question of whether the criteria
12 for designation are compliant; it also requires *application* of those criteria. Designation
13 criteria do not exist in a vacuum. Establishing designation criteria is the first step in
14 designating agricultural land. The purpose of designation criteria is to set the County’s
15 rules by which designations will be made. The second step in designating agricultural lands
16 of long-term commercial significance is using the designation criteria to map these
17 agricultural lands. Mapping is typically the way that specific lands are designated as
18 agricultural lands of long-term commercial significance. WAC 365-190-040(2)(b)(vii). To
19 simply amend a non-compliant designation criterion without utilizing it to make designation
20 decisions is a meaningless act and will not conserve agricultural resource lands. The
21 Board’s original conclusion on this point makes that abundantly clear – the purpose of the
22 designation criteria is to apply them to designate and conserve agricultural resource lands
23 as required by RCW 36.70A.060 and 36.70A.170. If a non-compliant designation criterion is
24 amended, it follows that it also must be used to make designation decisions.
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30 ³³ Resolution No. 13815

31 ³⁴ The County has taken action to achieve compliance on the designation criteria for agricultural lands of long-
32 term commercial significance by adopting Resolution 13815. While the County did not revise the parcel size
criterion (Criterion Five), Futurewise does not contest a finding of compliance as to the revised designation
criteria. Therefore, the Board’s decision here rests not on the finding of the Court of Appeals (since the
mandate has not issued) but upon the lack of an objection from the only party participating on this issue.

1 In adopting its revised designation criterion, the County only reviewed those lands it had
2 already determined to designate as agricultural resource lands :

3 WHEREAS, currently designated lands are consistent with this Resolution and reflect
4 the actual criteria used for original designation of agricultural lands of long term
5 commercial significance. The original designation criteria were guidelines and not
6 mandatory. This is evidenced by the fact that many parcels are smaller than 20
7 acres, are not in the open space tax program and/or do not have active agricultural
8 uses. Many parcels are used as large, rural home sites and remain designated for
9 agriculture due to their capability for agriculture based on location, soil type, and the
10 other designation criteria.³⁵

11 To come to that conclusion, the County Commissioners relied upon the two exhibits in the
12 record that address the application of the revised criterion: the Declaration of Jennifer
13 Hayes, then a Senior Planner with the County,³⁶ and the Summary of Land-Uses within
14 Designated Agricultural Lands of Long-Term Commercial Significance (2007).³⁷ Ms. Hayes
15 states:

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17 Currently designated lands are consistent with the proposed amended policies. It is
18 important to note that these amended policies will better reflect the actual criteria
19 used for the original designation of agricultural lands of long term commercial
20 significance. This is evidenced by the fact that there are many parcels designated for
21 agriculture that are smaller than 20 acres, and many parcels that are not enrolled in
22 the open space tax program for agriculture, one indicator of current use of property
23 for agriculture (see Exhibit 1). Many of the parcels are in fact used as large, rural
24 homesites and nonactive agriculture, but they remain designated for agriculture due
25 to their capability for agricultural use based on their location, soil type, and the other
26 designation criteria listed in the Comprehensive Plan. The proposed amendments to
27 designation criteria #3 and #5 for agricultural lands of long term commercial
28 significance in Thurston County complies with the GMA, and reflects the status of
29 *currently-designated* lands accurately.³⁸ (emphasis added)

30 The County also refers us to Exhibit H (Index No. 530), which is a summary of land-uses
31 within designated agricultural lands of long-term commercial significance (2007). Exhibit H

32 ³⁵ Resolution No. 13815 at 2.

³⁶ Exhibit G to Response of County (Index No. 529)

³⁷ Exhibit H to Response of County (Index No. 530)

³⁸ Exhibit G to Response of County (Index No. 529) at 3.

1 provides a breakdown of land-use types within the Long-Term Agricultural Lands zoning
2 district; in the Nisqually Agriculture zoning district; and in both zones together. These
3 describe the acreage and percentage of land devoted to hotel-motel, governmental uses,
4 business uses, current use agriculture, agriculture not current, and the like.³⁹ However, the
5 summary does not review lands to determine whether they comply with any of the County's
6 designation criteria.
7

8
9 From Resolution 13815 and from the two items in the record, it is clear that the County did
10 not apply its amended criterion outside of existing designated agricultural lands. That is, the
11 County did not review whether lands which had not been designated as agricultural lands
12 under a non-compliant criterion should, with the change in that criterion, now be designated
13 for conservation and protection.
14

15 The Board of County Commissioners only considered whether the revision to the
16 designation criterion would change the designation of lands that it had already designated
17 for conservation as agricultural lands of long-term commercial significance. This decision is
18 set out in the Declaration of Jennifer Hayes and the Resolution itself.⁴⁰ However, the
19 reason the original designation criterion (Criterion Three) was flawed was because it
20 excluded lands that were not currently being farmed, instead of considering lands "capable
21 of being farmed." Therefore, the lands that should be considered under the revised criterion
22 are not those which are already designated as agricultural lands of long-term commercial
23 significance; those lands were included because they are currently being farmed. Instead,
24 the County must apply its revised criterion to rural lands that have not yet been designated
25 because at the time the County designated commercially significant agricultural lands some
26 lands "capable of being used for production based on land characteristics" may not have
27 been considered because they might not have been in agricultural use. The County has
28 asserted that it reviewed the existing agricultural resource lands to determine if the change
29
30
31

32 ³⁹ Exhibit H to Response of County (Index No. 530)

⁴⁰ Exhibit G to Response of County (Index No. 529); Resolution 13815.

1 to Criterion 3 made any difference.⁴¹ The County did not review *other* lands to determine
2 whether the addition of those “capable of being used for production based on land
3 characteristics” would result in some additional lands being designated as long term
4 commercially significant agricultural lands. It has not, therefore, complied with the Board’s
5 order and the GMA.
6

7 The County argues that Futurewise should have to prove that other lands would be
8 designated if a review were conducted. The Board does not agree. The burden is on
9 Futurewise to show that the County’s adoption fails to comply with the GMA. Futurewise
10 has shown that the County did not take action to apply its revised designation criterion to
11 rural lands that had been excluded from consideration due to the fact that they might not
12 have been used as farms, when the County made its initial designation of long-term
13 commercially significant agricultural lands. That failure violates the GMA requirement to
14 designate and conserve agricultural lands of long-term commercial significance.⁴²
15

16 Therefore, Futurewise has met its burden of proof.
17

18 The County argues that only Criterion 3 is at issue and the Board agrees. However, the
19 County will need to determine whether the amendment to Criterion 3 makes some lands
20 appropriate for designation that were not designated under the prior non-compliant
21 designation criterion. This will require a review of rural lands that were not designated to
22 determine if the designation amendment changes their eligibility for designation.
23

24
25 **Conclusion:** The failure to apply the amended designation criterion (Criterion 3) to lands
26 that have not been designated as agricultural lands of long-term commercial significance
27 and to consider those lands for designation fails to comply with RCW 36.70A.060 and
28 36.70A.170.
29

30
31
32 ⁴¹ *Ibid.*

⁴² RCW 36.70A.170
Compliance Order – Agricultural and Rural Issues
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1 **Issue No. 4. : Did the County fail to comply with the public participation requirements**
2 **of the GMA when it made its decision not to re-designate agricultural lands of long-**
3 **term commercial significance?**

4 **Positions of the Parties**

5 Futurewise argues that the County provided no notice and opportunity to comment on the
6 county's decision not to re-designate agricultural lands of long-term commercial
7 significance.⁴³ Futurewise asserts that RCW 36.70A.020(11), 36.70A.035 and 36.70A.140
8 require such an opportunity for public comment even on remand.⁴⁴

9
10 The County responds that the Information Board used at the public hearing on May 7, 2007
11 expressly advised the public that the County is not designating more agricultural land "at
12 this time."⁴⁵ The County further argues that Futurewise's own comment letter urged the
13 County to designate more agricultural resource lands and provided the public with enough
14 information to comment on this issue.⁴⁶

15
16 **Board Discussion**

17 The Board finds in Issue No. 3 above that the County's failure to apply its revised
18 designation criterion violates the GMA requirements for designation and conservation of
19 resource lands. Futurewise's objections to compliance are founded on this failure. The
20 Board finds that Futurewise had the opportunity for and did raise its objections to this
21 decision in the County's public participation process. Therefore, there was no violation of
22 the GMA public participation goals and requirements.

23 **Conclusion:** There was adequate notice and opportunities for participation on the County's
24 decision not to further designate agricultural lands of long-term commercial significance
25 pursuant to the revised criterion for designation adopted in Resolution 13815. The Board
26
27
28

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31 ⁴³ Objection to Finding of Compliance – Rural Lands and Agricultural Lands at 15.

32 ⁴⁴ *Ibid* at 16.

⁴⁵ Exhibit E (IR 611)

⁴⁶ Thurston County's Response to Compliance Objections at 6-7; Exhibit C (IR 531).

1 finds no violation of the public participation goal and requirements of the GMA, RCW
2 36.70A.020(11), 36.70A.035 and 36.70A.140.

3
4 ***Issue No. 5: Should the Board impose a determination of invalidity on the***
5 ***designations of rural lands that should be designated as agricultural lands of long-***
6 ***term commercial significance and should a determination of invalidity be made as to***
7 ***the failure to provide a variety of rural densities?***

8 **Positions of the Parties**

9 Futurewise asks the Board to impose a finding of invalidity regarding the County's failure to
10 establish a variety of rural densities and its failure to designate portions of the rural area as
11 agricultural lands of long-term commercial significance.⁴⁷ Futurewise points to the Buildable
12 Lands Report for Thurston County to show that rural densities have been high in
13 comparison with the County's standard for of one dwelling unit per five acres.⁴⁸ Futurewise
14 points out that more housing units were permitted in the rural area than in any city in the
15 county.⁴⁹ As to agricultural lands, Futurewise argues that the County has only designated
16 17% of the lands in farming for conservation as agricultural lands of long-term commercial
17 significance and that this substantially interferes with the fulfillment of the natural resource
18 industries goal, RCW 36.70A.020(8).
19
20

21 The County responds that there has actually been an increase in the acres farmed in
22 Thurston County between 1997 and 2002. Under these circumstances, the County argues,
23 the County's plan to conserve natural resource lands does not substantially interfere with
24 Goal 8 of the GMA.⁵⁰ The County also argues that invalidity is inappropriate on the issue of
25 rural densities since the Board was reversed on that issue.⁵¹
26
27
28

29 _____
30 ⁴⁷ Objection to Finding of Compliance – Rural Lands and Agricultural Lands at 16-18.

31 ⁴⁸ IR 71, Thurston County Regional Planning Council, Buildable Lands Report for Thurston County 1996-2000
(September 2002); Objection to Finding of Compliance – Rural Lands and Agricultural Lands at 16-17.

32 ⁴⁹ *Ibid* at 16-17.

⁵⁰ Thurston County's Response to Compliance Objections at 10.

⁵¹ *Ibid* at 10.

1 **Board Discussion**

2 A finding of invalidity may be entered when a board makes a finding of noncompliance and
3 further includes a “determination, supported by findings of fact and conclusions of law that
4 the continued validity of part or parts of the plan or regulation would substantially interfere
5 with the fulfillment of the goals of this chapter.” RCW 36.70A.302(1) (in pertinent part).
6

7 We have held that invalidity should be imposed if continued validity of the noncompliant
8 comprehensive plan provisions or development regulations would substantially interfere with
9 the local jurisdiction’s ability to engage in GMA-compliant planning. See *Butler v. Lewis*
10 *County*, WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance and Imposing
11 Invalidation, February 13, 2004).
12

13
14 When we ordered invalidity as to certain rural designations in Lewis County for lands that
15 should be considered for designation as agricultural lands of long-term commercial
16 significance, we did so in light of a record and maps showing the lands that met two of the
17 most important considerations in the determination of lands to conserve: lands with prime
18 soils; and lands that were either currently being farmed or showed evidence of having been
19 recently farmed (as evidence that they were “capable of being farmed”).⁵² This
20 evidence allowed the Board to determine that the designation of certain rural lands should
21 be subject to invalidity until compliant designation criteria were adopted and applied.
22 Futurewise here presents us with no such evidence upon which to base a determination that
23 some rural designations substantially interfere with fulfillment of the natural resource
24 industries goal.⁵³
25
26
27
28
29

30 ⁵² *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c (Order on Reconsideration of Extent of Invalidation,
31 May 21, 2004).

32 ⁵³ Where Futurewise does not propose the portions of the comprehensive plan and/or maps which it believes should be found invalid, the Board does not have a basis for determining which policies or regulations should be considered for invalidity..

1 As to the lack of a variety of rural densities, again Futurewise does not indicate what portion
2 of the County comprehensive plan or development regulations should be held invalid. In
3 order to establish a basis for invalidity, the Board must make findings about which
4 provisions substantially interfere with the fulfillment of a GMA goal. That factual basis has
5 not been presented here.
6

7 **Conclusion:** Futurewise has not met its burden of showing that the continued validity of
8 some portion of the County's comprehensive plan or development regulations substantially
9 interferes with Goals 2 and 8 of the Growth Management Act. Therefore, the Board
10 declines to impose invalidity at this time.
11

12 **FINDINGS OF FACT**

- 14 1. Thurston County is a county located west of the crest of the Cascade Mountains
15 that is required to plan pursuant to RCW 36.70A.040.
- 16 2. Petitioner (Futurewise) is a non-profit organization that participated in the adoption
17 of Resolution 13234 and Ordinance 13235 in writing and orally. Petitioner also
18 participated in the adoption of Resolution 13815, the County's resolution adopted to
19 achieve compliance on the issues in this compliance hearing.
- 20 3. After a hearing on the Petition for Review filed concerning Resolution 13234 and
21 Ordinance 13235, the Board issued its Final Decision and Order on July 20, 2005.
- 22 4. Two of the conclusions of law in the Final Decision and Order are the subject of this
23 compliance hearing:
 - 24 a. Conclusion of Law G: The County's comprehensive plan and development
25 regulations fail to provide for a variety of rural densities in the rural element as
26 required by RCW 36.70A.070(5)(b); and
 - 27 b. Conclusion of Law L: Agricultural land designation criteria numbers 3 and 5
28 (Thurston County Comprehensive Plan, Chapter Three – Natural Resource
29 Lands, p. 3-4.) fail to comply with the requirements of the GMA to designate
and conserve agricultural resource lands. RCW 36.70A.060 and 36.70A.170.
- 30 5. The Board's decision in this case was appealed to Division II of the Court of Appeals,
31 who rendered a decision on April 3, 2007, *Thurston County et al. v. Western*
32 *Washington Growth Management Hearings Board et al.*, 137 Wn. App. 781, 154 P. 3d
959 (2007).

- 1 6. On the issue of the GMA requirement for a variety of rural densities in the
2 comprehensive plan, the Court of Appeals found that the Board had misapplied the
3 burden of proof and remanded the issue of whether the County's innovative
4 techniques achieve a variety of rural densities, stating:
5 But on this issue, the Board required the County to show that its plan and
6 regulations were valid. In doing so, the Board failed to presume validity and failed
7 to require Futurewise to prove invalidity. RCW 36.70A.320(2). Accordingly, the
8 Board erred in finding that the County's comprehensive plan and development
9 regulations fail to provide for a variety of rural densities through innovative
10 techniques.
11
12 7. Because the Court of Appeals' decision affirmed the Board on other issues, the
13 County has petitioned the Washington Supreme Court for review. No decision has
14 yet been received on the County's petition.
15
16 8. The Court of Appeals' decision also reversed the Board on the issue of whether the
17 County's parcel-size criterion for designation of agricultural lands of long-term
18 commercial significance complies with the Growth Management Act.
19
20 9. The Court of Appeals denied the County's motion for a stay of the Board's decision
21 prior to the issuance of the Court of Appeals' decision.
22
23 10. No judicial stay of the Board's decision has been granted and no mandate has yet
24 issued to the Board.
25
26 11. None of the innovative techniques adopted by the County for the rural zone provides
27 for rural densities less intense than one dwelling unit per five acres in the rural zones
28 – the County's own standard for a rural density.
29
30 12. The County has not presented the Board with any action taken to achieve
31 compliance as required by the Board's order on achieving a variety of rural densities
32 as required by RCW 36.70A.070(5).
33
34 13. The County has amended Criterion 3 of its designation criteria for agricultural lands
35 of long-term commercial significance to include land used "or capable of being used
36 for production based on land characteristics."
37
38 14. In adopting its revised designation criterion, the County only reviewed those lands it
39 had already determined to designate as agricultural resource lands. That is, it only
40 considered whether the revision to the designation criteria would change the
41 designation of lands that it had previously designated for conservation as agricultural
42 lands of long-term commercial significance.

- 1 15. The County did not apply its amended criterion outside of existing designated
2 agricultural lands of long-term commercial significance to determine whether any
3 lands that had been excluded from designation under the old criteria were now
4 eligible for designation based on the change in the criteria.
- 5 16. The County did not review its rural lands to determine whether the amendments to
6 the criterion for lands “capable of being used for production based on land
7 characteristics” would result in some additional lands being designated as long term
8 commercially significant agricultural lands.
- 9 17. There was adequate notice and opportunities for participation on the County’s
10 decision not to further designate agricultural lands of long-term commercial
11 significance pursuant to the revised criteria for designation adopted in Resolution
12 13815.
- 13 18. Futurewise presents the Board with no such evidence upon which to base a
14 determination that some rural designations substantially interfere with fulfillment of
15 the natural resource industries goal.
- 16 19. The factual basis for a determination that the continuing validity of a specific plan
17 policy or development regulation(s) substantially interferes with the goals of the
18 GMA has not been presented here.

19 **CONCLUSIONS OF LAW**

- 20
- 21 A. This Board has jurisdiction over the parties to this action.
- 22 B. This Board has jurisdiction over the subject-matter of this action.
- 23 C. Petitioner Futurewise has standing to raise the issues in this compliance case.
- 24 D. Since there has been no order terminating review, no mandate or stay issued, the
25 Board’s Final Decision and Order in this case remains in effect.
- 26 E. Because of the Court of Appeals’ decision reversing and remanding the Board’s
27 decision on the burden of proof applicable to the County’s innovative techniques to
28 achieve a variety of rural densities, an administrative stay is granted on that issue.
- 29 F. The failure to apply the amended designation criterion (Criterion 3) to lands that
30 have not been designated as agricultural lands of long-term commercial
31
32

1 significance and to consider those lands for designation fails to comply with RCW
2 36.70A.060 and 36.70A.170.

3 G. The notice and opportunities for participation on the County's decision not to further
4 designate agricultural lands of long-term commercial significance pursuant to the
5 revised criteria for designation adopted in Resolution 13815 comply with RCW
6 36.70A.020(11), 36.70A.035 and 36.70A.140.
7

8 **ORDER**

9
10 The County is ordered to achieve compliance with the goals and requirements of the GMA
11 in accordance with this order by February 19, 2008. The following compliance schedule is
12 adopted:

13 Compliance Due	February 19, 2008
14 Compliance Report and Index to the 15 Record Due	March 3, 2008
16 Any Objections to a Finding of 17 Compliance Due	March 24, 2008
18 County's Response Due	April 11, 2008
19 Compliance Hearing (location to be 20 determined)	April 18, 2008

21 Entered this 22nd day of October 2007.
22

23
24 _____
25 Margery Hite, Board Member

26
27 _____
28 Holly Gadbow, Board Member

29
30 _____
31 James McNamara, Board Member
32

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

2 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
3 mailing of this Order to file a petition for reconsideration. Petitions for
4 reconsideration shall follow the format set out in WAC 242-02-832. The original and
5 three copies of the petition for reconsideration, together with any argument in
6 support thereof, should be filed by mailing, faxing or delivering the document directly
7 to the Board, with a copy to all other parties of record and their representatives.
8 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6),
9 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
filing a petition for judicial review.

10 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
11 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
12 judicial review may be instituted by filing a petition in superior court according to the
13 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

14 **Enforcement.** The petition for judicial review of this Order shall be filed with the
15 appropriate court and served on the Board, the Office of the Attorney General, and all
16 parties within thirty days after service of the final order, as provided in RCW
17 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
18 but service on the Board means **actual receipt of the document at the Board office**
within thirty days after service of the final order.

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