

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 1000 FRIENDS OF WASHINGTON  
4 Petitioners,

Case No. 05-2-0002

5  
6 **COMPLIANCE ORDER**  
7 **(Agricultural Resource Lands)**

8 v.

9 THURSTON COUNTY,  
10 Respondent.

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13 **I. PERTINENT PROCEDURAL HISTORY**

14 On July 20, 2005, the Western Washington Growth Management Hearings Board (Board)  
15 issued its Final Decision and Order (FDO) in the above-captioned matter. The FDO  
16 addressed several issues and, relevant to the present order, the Board considered whether  
17 the County's designation criteria for Agricultural Resource Lands (ARL)<sup>1</sup> complied with the  
18 Growth Management Act, RCW 36.70A (GMA). In answering this question, the Board  
19 determined two of the County's criteria for the designation of ARL did not comply with the  
20 GMA – Criterion No. 3 and Criterion No. 5.<sup>2</sup> The County was given until January 17, 2006,  
21 to take legislative action in response to the Board's FDO.  
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24 The Board granted several extensions of the compliance period<sup>3</sup> and on September 21,  
25 2007 held a Compliance Hearing to consider the County's compliance efforts regarding  
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29 <sup>1</sup> In the original proceedings, Thurston County uses the terminology of ARL to reflect the GMA's requirements  
30 pertaining to agricultural lands of long-term commercial significance as set forth in RCW 36.70A.170. During  
31 compliance proceedings the County uses the term Long-Term Agriculture (LTA). For the purpose of the  
32 decision, the resource land required to be designated by the GMA pursuant to .170 will be referenced as LTA.  
<sup>2</sup> FDO, at 26-29.

1 issues related to the designation criteria for LTA.<sup>4</sup> In the Compliance Order issued following  
2 that hearing, the Board determined that although the language of Criterion No. 3 complied  
3 with the GMA, the County had failed to properly apply the amended criterion.<sup>5</sup> The Board  
4 found that this failure was a violation of RCW 36.70A.060 and 36.70A.170 and gave the  
5 County until February 18, 2008 to perform the necessary review.  
6

7 The matter now comes before the Board following the submittal of Thurston County's  
8 Compliance Report for LTA.<sup>6</sup> The Compliance Report describes how the County  
9 reclassified certain lands from various rural land use designations and zoning districts to  
10 agricultural districts in response to the Board's October 22 Compliance Order (CO).  
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13 On March 10, 2009, the Board held a telephonic compliance hearing. Jeff Fancher  
14 represented the County. With Mr. Fancher was Vena Tabbutt and Pete Swensson of the  
15 Thurston County Regional Planning Staff. Futurewise was represented by Tim Trohimovich.  
16 Also attending was Brent Dille, City Attorney for the City of Yelm and Grant Beck, Yelm  
17 Community Development Director. Board members Nina Carter, William Roehl, and James  
18 McNamara attended with Mr. McNamara Presiding.  
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## 20 II. BURDEN OF PROOF

21 After a board has entered a finding of non-compliance, the local jurisdiction is given a period  
22 of time to adopt legislation to achieve compliance. RCW 36.70A.300(3)(b).  
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24 After the period for compliance has expired, the board is required to hold a hearing to  
25 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and  
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27 <sup>4</sup> During the compliance period, portions of the case were appealed to the courts. In *Thurston County v.*  
28 *WWGMHB*, 137 Wn. App. 781 (2007), *rvrs'd on other grounds*, 164 Wn.2d 329 (2008), the court determined  
29 Criterion No. 5 [Parcel Size] fell within the bounds of the County's legislatively granted discretion for  
30 compliance with the GMA. Thus, for the September 2007 Compliance Hearing, the only criterion remaining  
31 before the Board was Criterion No. 3.

<sup>5</sup> Oct. 22, 2007 CO, at 13-17.

<sup>6</sup> Thurston County's "Agricultural Lands of Long Term Commercial Significance Compliance Report," filed  
32 January 12, 2009.

1 (2). For purposes of board review of the comprehensive plans and development regulations  
2 adopted by local governments in response to a finding of non-compliance, the presumption  
3 of validity applies and the burden is on the challenger to establish that the new adoption is  
4 clearly erroneous. RCW 36.70A.320(1), (2) and (3).

5  
6 In order to find the City's action clearly erroneous, the Board must be "left with the firm  
7 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,  
8 121 Wn.2d 179, 201, 849 P.2d 646 (1993). Within the framework of state goals and  
9 requirements, the boards must grant deference to local governments in how they plan for  
10 growth:  
11

12 In recognition of the broad range of discretion that may be exercised by counties  
13 and cities in how they plan for growth, consistent with the requirements and goals  
14 of this chapter, the legislature intends for the boards to grant deference to the  
15 counties and cities in how they plan for growth, consistent with the requirements  
16 and goals of this chapter. Local comprehensive plans and development  
17 regulations require counties and cities to balance priorities and options for action  
in full consideration of local circumstances.

18 The legislature finds that while this chapter requires local planning to take place  
19 within a framework of state goals and requirements, the ultimate burden and  
20 responsibility for planning, harmonizing the planning goals of this chapter, and  
21 implementing a county's or city's future rests with that community.  
22 RCW 36.70A.3201 (in part).

23 In sum, the burden is on the Petitioner to overcome the presumption of validity and  
24 demonstrate that any action taken by Thurston County is clearly erroneous in light of the  
25 goals and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW  
26 36.70A.320(2).  
27

28 Where not clearly erroneous and thus within the framework of state goals and requirements,  
29 the planning choices of the local government must be granted deference. RCW 6.70A.3201.  
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1 III. DISCUSSION

2 The Board's October 22, 2007 Compliance Order found that in amending its agricultural  
3 resource lands criteria in response to the Final Decision and Order (FDO), the County  
4 amended Criterion Three to include consideration of lands capable of being used for  
5 agriculture as required by the GMA. However, the Board also found that the County had a  
6 duty to *apply* this revised criterion to lands which were not designated for conservation and  
7 protection previously and not merely to adopt revised criteria.<sup>7</sup> Specifically, the Board held:

8  
9 "Designation does not exist in a vacuum. Establishing designation criteria is the  
10 first step in designating agricultural land. The purpose of the designation criteria  
11 is to set the County's rules by which designations will be made. The second step  
12 in designating agricultural lands of long-term commercial significance is using the  
13 designation criteria to map these agricultural lands ... To simply amend a non-  
14 compliant designation criterion without utilizing it to make designation decisions  
15 is a meaningless act and will not conserve agricultural resource lands."<sup>8</sup>

16 In response, the County took a number of steps to achieve compliance with these statutes  
17 as reflected by the Board's Order, specifically:

- 18 • County staff implemented a geographic information systems analysis that applied all  
19 of the County's criteria, including the amended Criterion Three, to lands that had not  
20 yet been designated as agricultural lands of long term commercial significance (LTA).  
21 This analysis identified an additional 134 parcels of land, totaling approximately  
22 2,391.4 acres, for consideration as LTA.
- 23 • Identified properties have been rezoned from rural residential densities of 1 dwelling  
24 unit per 5 acres (1:5) or 1 dwelling unit per 10 acres (1:10) to the Long-Term  
25 Agricultural zoning density of 1 dwelling unit per 20 acres (1:20) or the Nisqually  
26 Agricultural zoning density of 1 dwelling unit per 40 acres (1:40).  
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31 <sup>7</sup> Oct. 22, 2007 Compliance Order at 14.

32 <sup>8</sup> Id.

- 1 • Resolution 14180 and Ordinance 14181 reclassified lands from various rural land  
2 designations to the agricultural district consistent with the Thurston County  
3 Comprehensive Plan.
- 4 • Language was added to allow further re-designation or defend the designation of  
5 LTA lands in the future should site specific soil conditions merit additional  
6 consideration.
- 7 • The County amended Chapter 3, Natural Resources Long Term Agriculture; Map M-  
8 15, the future land use map; Map M-42, the designated natural resources lands map;  
9 and the official Thurston County zoning map.<sup>9</sup>

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11  
12 In response, Futurewise alleges the County has still failed to designate as LTA, lands that  
13 qualify for designation. In addition, Futurewise objects to the County's use of agricultural  
14 lands designation criteria that the County has not adopted as part of its Comprehensive  
15 Plan and that are inconsistent with the criteria that the County has adopted.<sup>10</sup>

16  
17 A. Alleged Failure to Designate Lands that Meet the County's Criteria

18 Futurewise argues that while the County has designated an additional 2,391.4 acres of LTA,  
19 many areas remain undesignated. Futurewise compares the 12,677 acres currently  
20 designated as LTA by the County with the 74,442 acres in working farms reported by the  
21 2002 Census of Agriculture, and concludes that the County is protecting only 17% of the  
22 land in farms.<sup>11</sup> In response, the County asserts it applied all of its nine GMA-compliant  
23 designation criteria for LTA lands and Futurewise fails to show that Thurston County missed  
24 any land that meet these designation criteria.<sup>12</sup> In addition, Thurston County notes that the  
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30 <sup>9</sup> County Compliance Report, at 1-2.

31 <sup>10</sup> Futurewise Objections at 1-2.

32 <sup>11</sup> Futurewise Objections at 5.

<sup>12</sup> County Response at 13.

1 GMA does not require the County to designate every farm, just those farms that meet the  
2 County's designation criteria.<sup>13</sup>

3  
4 The Board agrees with the County. While Futurewise argues that it has provided "statistical  
5 evidence"<sup>14</sup> of a failure to appropriately designate LTA land, its reliance on the 2002 Census  
6 of Agriculture as the benchmark of commercially significant farmland in Thurston County is  
7 misplaced. As this Board noted in *Butler et al. v. Lewis County*, WWGMHB Nos. 99-2-  
8 0027c; 00-2-0031c and 08-2-0004c FDO (7/7/08):

9  
10 [T]he 2002 Census of Agriculture does not establish ARLs. If that were the  
11 case, the designation process would be a far simpler, and less litigious  
12 process. Instead, the Census identifies agricultural activities and acreages for  
13 those persons reporting gross farm income greater than \$ 1,000. . . . Although  
14 the Census of Agriculture is a tool that can be helpful in identifying farms that  
15 are currently being farmed and the amount of farmland eligible for designation,  
16 counties are not mandated to use it in the designation process."

17 Although the acreage of farmland contained in the 2002 Census of Agriculture may provide  
18 some guidance to the County, a comparison with designated LTA land does not necessarily  
19 result in a violation of the GMA. RCW 36.70A.170 does not require the designation of all  
20 lands being farmed; rather the GMA requires designation of only agricultural lands of *long-*  
21 *term commercial significance*. The mere fact the 2002 Census concluded a working farm  
22 was located on a parcel of land does not result in a determination that such a farm has long  
23 term commercial significance.

24  
25 Therefore, nothing can be concluded from a comparison of the acreage of farmland  
26 contained in the 2002 Census of Agriculture to the amount of land designated by the  
27 County.

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31 <sup>13</sup> Id. at 12

32 <sup>14</sup> Futurewise Objections at 5.

1 In addition, Futurewise offers that the 17-20% of LTA land the County is protecting is much  
2 lower than the 37.6% of LTA land that Lewis County designated and was still found to be in  
3 violation of the GMA. The County points out that through this comparison, Futurewise  
4 appears to be urging the Board to adopt some form of bright line rule for designation of  
5 farmland.<sup>15</sup> The Board concurs with the County's assessment and rejects Futurewise's  
6 argument in this regard. Not only does the Board lack the authority to establish a policy  
7 setting the appropriate percentage of land to be designated as ARL,<sup>16</sup> relying upon a  
8 different county's percentage of ARL designation as a *de facto* standard runs counter to the  
9 consideration of local circumstances recognized in the GMA.<sup>17</sup>

11  
12 Finally, Futurewise argues there is evidence in the record, citing Index No.136, that specific  
13 areas meet the County's criteria and should have been designated. Futurewise cites  
14 several examples to support this assertion, such as land east of the Bucoda Highway SE  
15 and south of 184<sup>th</sup> Avenue SE and the area along Northcraft Road SE and along  
16 Skookumchuck Road.<sup>18</sup> Futurewise merely cites an exhibit and makes no argument to  
17 demonstrate how these areas in fact meet the County's criteria and were, therefore,  
18 improperly excluded. It is Futurewise's duty, not the Board's, to demonstrate through  
19 evidence contained in the record how these areas satisfied the County's designation criteria  
20 for LTA. The bare assertion that there is evidence in the record to support Futurewise's  
21 argument fails to sustain their burden of proof

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24 B. Application of Un-Adopted Criteria  
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29 <sup>15</sup> County response at 12, fn. 5.

30 <sup>16</sup> See, *Thurston County v. Western Washington Growth Management Hearings Board*, 164 W.2d 329, 353  
(2008).

31 <sup>17</sup> See, RCW 36.70A.3201.

32 <sup>18</sup> Futurewise Objections at 6.

1 The Board notes that Thurston County has established criteria for the designation of LTA  
2 land within Chapter 3 of its Comprehensive Plan – Natural Resource Lands. According to  
3 the Comprehensive Plan, criteria used to designate LTA lands are based on:

- 4 1. The Washington State Supreme Court’s definition of agricultural land found in *Lewis*  
5 *County v. Hearings Board*, 157 Wn.2d 488 (2006);
- 6 2. The Washington State Department of Community, Trade, and Economic  
7 Development’s (CTED) guidelines for the classification and designation of resource  
8 lands;
- 9 3. Existing Thurston County policies; and
- 10 4. An analysis of local conditions.

11 From these underlying principles, the County’s criteria include the consideration of:

- 12 1. Soil Type<sup>19</sup>
- 13 2. Availability of Public Facilities and Services
- 14 3. Land Capability and Tax Status
- 15 4. Relationship or Proximity to Urban Growth Areas
- 16 5. Predominant Parcel Size
- 17 6. Land Use Settlement Patterns and their Compatibility with Agricultural Practices
- 18 7. Proximity to Markets
- 19 8. Agricultural Diversity
- 20 9. Environmental Considerations

21 Futurewise maintains that the County’s has utilized new criteria for designating LTA on the  
22 basis of slopes, wetlands, parcel size, and soil depth<sup>20</sup> which are not only unnecessary but  
23 are not included in the County’s Comprehensive Plan. They argue that the use of these  
24 “un-adopted” criteria resulted in the improper exclusion of 3,588 acres of LTA.<sup>21</sup>

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25 <sup>19</sup> Based on USDA Handbook 210 and list 29 “prime farmland soils” based on SCS’s Soil Survey of Thurston  
26 County (1990)

27 <sup>20</sup> Beyond arguing that the County used soils depth as an unadopted criterion for excluding land from farmland  
28 designation, Futurewise provides no additional argument on the nature and extent of the County’s use of this  
29 criterion. The County responds that it did not use soil depth to eliminate any land from designation  
30 consideration. County Response, at 14. It notes that while it did receive public and expert testimony on this  
31 topic, suggesting that at least 20 inches was necessary to consider soil prime, it decided not to use soil depth  
32 as a factor for prime soils. *Id.* Accordingly, the Board finds no merit in Futurewise’s argument that the County  
improperly used soil depth as a criterion.

<sup>21</sup> Futurewise Objections at 7.

1 *Slopes of Eight Percent or Greater*

2 Futurewise states the County does not consider lands with slopes greater than 8% for LTA  
3 designation despite the fact that the hazard of water erosion on such lands is slight.<sup>22</sup> Noting  
4 that the USDA soil survey for Thurston County defines a rating of “slight” as meaning that  
5 soil properties generally are favorable, and limitations are minor and can be easily  
6 overcome. Futurewise argues that because of this, the use of this criterion would be clearly  
7 erroneous even if included in the County’s Comprehensive Plan as a designation criterion.<sup>23</sup>  
8 Futurewise also points out there are prime farmland soils that include slopes of 8% or  
9 greater, demonstrating that the County mistakenly believed no prime soils have slopes over  
10 8%.  
11

12  
13 In response, the County states its Planning Commission heard testimony from a panel of  
14 experts<sup>24</sup> who were of the opinion that land with a slope greater than 8% is not considered  
15 suitable for designation as LTA due to the potential for soil erosion.<sup>25</sup> In addition, it  
16 requested a Certified Professional Soils Scientist, Lisa Palazzi, to perform additional  
17 analysis on slopes for the soils listed in the Thurston County Comprehensive Plan.  
18

19 Ms. Palazzi concluded that using 8% slope as a screening tool would still include all areas  
20 which could be broadly defined as prime farmland within a map unit.<sup>26</sup>  
21

22 Therefore, based on Ms. Palazzi’s analysis, it is apparent that the County used slope, not as  
23 an unadopted criterion, but as a means of determining whether a soil is prime. As the  
24 County points out, slope is such a critical component of whether a soil should be considered  
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28 <sup>22</sup> Futurewise Objections at 7.

29 <sup>23</sup> Futurewise Objections at 7-8.

30 <sup>24</sup> Chuck Natsuhara, Resource Soils Scientist with the United States Department of Agriculture, Natural  
31 Resources and Conservation Service; James Weatherford and Dave Nygard, Natural Resource Specialists;  
32 and Kathleen Whalen, Administrator for the Thurston County Conservation District. See, County Response at  
20.

<sup>25</sup> County Response at 20-21.

<sup>26</sup> County Response at 21, citing Exhibit M, IR 143, pp. 4-5.

1 prime that many of the soils contain a slope range following the map unit name.<sup>27</sup> This was  
2 therefore not an application of a new criterion, but of a criterion which has been determined  
3 to be compliant. The Board concludes, therefore, that the County's use of soil slope was  
4 consistent with its Comprehensive Plan and was not clearly erroneous.

5  
6 *Parcel Size*

7 Futurewise also argues that, while the County excludes from designation parcels less than  
8 20 acres which are not contiguous with other agricultural lands, the County has taken the  
9 contrary position in the Court of Appeals. According to Futurewise, the County asserted  
10 before the Court that it does not rely solely on parcel size, but uses eight other criteria when  
11 considering what land qualifies for LTA designation. Futurewise argues the table for the  
12 map of "Long Term Agricultural Designation Lands Analysis Proposed Parcels and Parcels  
13 Removed from Consideration"<sup>28</sup> demonstrates that the County, in fact, uses parcel size as  
14 an exclusionary criterion and, therefore this is inconsistent with the County's  
15 Comprehensive Plan which provides for additional factors to be considered.

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18 In reply, the County argues the Court of Appeals recognized that parcel size is a GMA  
19 compliant criterion. It notes the Court of Appeals recently held:

20  
21 Counties may consider the factors enumerated in WAC 365-190-050(1) in  
22 determining whether lands have long-term commercial significance. *Lewis*  
23 *County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 502,  
24 139 P.3d 1096 (2006). WAC 365-190-050(1)(e) specifically includes  
25 predominant parcel size as an indicator of the possibility of more intensive  
26 uses of land. . . . We conclude that the County's use of parcel size as one  
27 criteria for designating farmland falls easily within the bounds of the  
28 County's legislatively granted discretion. The Board erred in invalidating  
29 the parcel size criterion.<sup>29</sup>

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<sup>27</sup> IR 146. See also IR 141 at 3-4 describing Criterion 1 in the Comprehensive Plan.

<sup>28</sup> Futurewise requests that the Board take official notice of this document under WAC 242-02-6709(2), and the Board agrees to do so.

<sup>29</sup> *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn.App. 781, 801-802, 154 P.3d 959 (2007), *aff'd in part and rev'd in part*, 164 Wn.2d 329 (2008).

1  
2 The County argues that while it is appropriate for parcel size to be considered, it has not  
3 excluded all parcels less than 20 acres in size and points to Exhibit C, IR 141 as proof that  
4 of approximately 147 parcels proposed for designation, 91 parcels are under 20 acres.<sup>30</sup> As  
5 to parcel groups that met other designation criteria, the County excluded patches of parcels  
6 where the predominant parcel size was less than 20 acres.<sup>31</sup>  
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8 The Board notes that Criterion 5 in the County's Comprehensive Plan provides:  
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10 5. Predominant Parcel Size:

11 For Thurston County, the predominant parcel size is 20 acres or more, which, in  
12 conjunction with soil type, provides economic conditions sufficient for managing  
13 agricultural lands for long-term commercial production.<sup>32</sup>

14 Establishing a minimum parcel size was deemed appropriate in *Futurewise v. CPSGMHB*,  
15 where the Court stated:<sup>33</sup> (Emphasis Added)

16 Futurewise argues that a county may not set a minimum parcel size for  
17 agricultural lands. The County contends that because there is no legislative or  
18 agency prohibition on a county setting a minimum or maximum agricultural  
19 parcel size, it is free to set any minimum parcel limit it chooses. We reject  
20 Pierce County's assertion on appeal that it may set a minimum parcel size for  
21 any reason it chooses.

22 The absence of a specific legislative or agency prohibition does not grant  
23 counties unfettered discretion in setting parcel sizes. Our Supreme Court has  
24 held that **a county may designate a minimum parcel size for certain land  
25 type designations so long as the limitation is consistent with GMA** and  
26 with CTED principles, if the county chooses to apply WAC 365-190-050. *Lewis  
27 County*, 157 Wn.2d at 502 (citing with approval *Manke Lumber Co. v. Diehl*, 91  
28 Wn. App. 793, 807-08, 959 P.2d 1173 (1998) (holding that a county may set a  
29 minimum parcel size based on the factors in WAC 365-190-050), *review  
30 denied*, 137 Wn.2d 1018 (1999)).

31 <sup>30</sup> County Response at 15.

32 <sup>31</sup> Id.

<sup>32</sup> IR 141 at 3-5 to 3-6.

<sup>33</sup> 141 Wn.App. 202, 211-212 (2007).

1  
2 As interpreted by case law, a county may set a minimum or maximum  
3 parcel size if that result is warranted by a correct application of the GMA  
4 definitions set forth above. For example, in *Manke*, the Court of Appeals  
5 affirmed the setting of a minimum parcel size of 5,000 acres for long-term  
6 commercial forest land. 91 Wn. App. at 807-08. Based on two WAC 365-190-  
7 050 factors, predominant parcel size and tax status, Mason County had  
8 properly determined that forest land parcels smaller than 5,000 acres did not  
9 have “long-term commercial significance.” *Manke*, 91 Wn. App. at 807-08. A  
county's decision to set a minimum parcel size is valid only if the county  
correctly applied the GMA definition of “agriculture” and CTED regulations.

10 The Court of Appeals has previously found the County's criterion establishing a 20 acre  
11 parcel size to be compliant with the GMA.<sup>34</sup> Therefore, the County's decision in this regard  
12 was not clearly erroneous.

13  
14 Further, the record demonstrates that the County did not solely use parcel size as an  
15 exclusionary criterion, and in fact included numerous parcels under 20 acres.<sup>35</sup> Futurewise  
16 has not shown that the County's use of parcel size as a criterion for designation of  
17 agricultural land of long term commercial significance was clearly erroneous.  
18

19 *Wetlands*

20  
21 With regard to wetlands, the County argues that local circumstances require lands  
22 predominated by wetlands be excluded from consideration.<sup>36</sup> The County cites its Critical  
23 Areas Ordinance (CAO) that requires new agricultural uses to be set back 200 feet from a  
24 Class I wetland, 100 feet from a Class II wetland, and 50 feet from a Class III wetland.  
25 Based on public and expert testimony, it decided that a parcel not currently in agriculture  
26 which is encumbered by more than 51% of wetlands would be removed from consideration  
27 as LTA land. The County argues that Futurewise's approach would encourage the  
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30 <sup>34</sup> *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn.App. 781, 801-802  
(2007), *aff'd in part and rev'd in part*, 164 Wn.2d 329 (2008).

31 <sup>35</sup> IR 141, Attachment 4.

32 <sup>36</sup> County Response at 15.

1 conversion of wetlands to agricultural land, and that the degradation of wetlands is contrary  
2 to the GMA, the Thurston County Comprehensive Plan, and the Thurston County Code. The  
3 County argues that in protecting wetlands, it is not adding a new criterion, but following its  
4 current regulations and Comprehensive Plan.

5  
6 Within the County's Comprehensive Plan, under "Soil Type," certain soils are denoted with  
7 an asterisk. The asterisk is denoted as meaning:<sup>37</sup>

8           Large areas which are known to qualify as Class I wetlands, (wetlands with  
9           threatened or endangered species) and which are not already in agricultural  
10          use, should be excluded from designation.

11  
12 The Board finds that removing lands from consideration for designation based on the  
13 presence of 51% or more wetlands on a parcel was clearly erroneous. The County  
14 Comprehensive Plan clearly sets forth nine criteria for designating agricultural land of long-  
15 term commercial significance.<sup>38</sup> None of these mention the presence of wetlands. Although  
16 the ninth criterion for designation is "Environmental Considerations,"<sup>39</sup> the County stated at  
17 the Compliance Hearing that this criterion does not include consideration of the presence of  
18 wetlands but is limited to areas denoted as "Natural Shoreline Environments" under the  
19 County's Shoreline Master Program. Instead, the County chose to rely on the existence of  
20 its critical areas ordinance as a basis for this exclusion. While the County argues that it  
21 would not make sense to label such lands as having long-term significance for commercial  
22 agriculture, and that the degradation of wetlands is contrary to the GMA,<sup>40</sup> the designation  
23 of LTA land in no way impairs the operation of the County's CAO. The CAO's buffers would  
24 be enforced whether or not the land was designated LTA. Furthermore, failing to designate  
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28 <sup>37</sup> County Comprehensive Plan, Chapter 3 at 3-4 to 3-5.

29 <sup>38</sup> IR 141 at 3-4 to 3-7.

30 <sup>39</sup> The County's Comprehensive Plan sets forth Criteria No. 9 as follows:

31 Environmental Considerations: Designated agricultural lands should be outside of Natural Shoreline  
32 Environments if they are not already being used for agriculture. The Shoreline Master Program regulations  
severely limit the ability to convert such areas to agricultural uses, and from one agricultural use to another.

<sup>40</sup> County Response at 16.

1 an entire parcel due to the need to impose a buffer of up to 200 feet does not take into  
2 account the potential use of the remainder of the parcel. By way of example, the parcel  
3 identified as Map ID #3 in the County Staff Report<sup>41</sup> is 240 acres, and was removed from  
4 consideration solely based on the presence of wetlands on the site. Assuming that the site  
5 had 51% wetlands, the remaining 117.6 acres might be otherwise appropriate for LTA  
6 designation. Even with the exclusion of a portion of the land for a buffer as required for  
7 wetlands protection under the County's CAO, the remaining portion of the parcel is of  
8 significant size. This is not an isolated example. The Board notes that the County removed  
9 22 parcels from consideration for LTA designation solely on the basis of the presence of  
10 wetlands. Should the County wish to remove parcels from consideration on this basis it has  
11 the local discretion to do so. However, that would require an appropriate amendment to the  
12 current designation criteria contained in its Comprehensive Plan. Because the County  
13 removed 22 parcels from consideration on a basis other than its adopted designation  
14 criteria, the Board will remand this case to the County to examine those 22 parcels and  
15 determine if they qualify for LTA designation.  
16  
17

18  
19 C. Designation of All Prime Soils

20 Futurewise argues that the County used an out of date list of prime farmland soils in  
21 designating farmland soils. It alleges that the County based its list of prime soils on 1990  
22 data, thereby omitting 11 Thurston County soils currently classified as prime farmland.<sup>42</sup>  
23 Consequently, 75,405 acres of prime farmland soils which are represented by these 11 soil  
24 types were not considered for designation, according to Futurewise.<sup>43</sup>  
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31 <sup>41</sup> IR 141, Attachment 4 (identified as Map ID #4 in Futurewise's Brief, Attachment 1).

32 <sup>42</sup> Futurewise Objections at 11.

<sup>43</sup> Futurewise Objections, at 11.

1 In response, the County argues that under the compliance action currently before the  
2 Board, it was required only to apply the list of prime soils provided in its Comprehensive  
3 Plan.<sup>44</sup> The County notes that the Board has previously ruled that:

4 At the hearing on the merits, Petitioner abandoned its argument that the  
5 County erred in using an outdated list of prime farmland soils, conceding that  
6 the list was not provided to the County in sufficient time to be included in its  
7 2004 update.<sup>45</sup>

8 The County contends Futurewise is not able to raise an abandoned issue in this compliance  
9 action.<sup>46</sup> The Board agrees. The Board's October 22, 2007 Compliance Order remanded  
10 this matter to the County to "apply its revised criterion to rural lands that have not yet been  
11 designated".<sup>47</sup> The County was not required to otherwise amend its Comprehensive Plan.  
12 Therefore, there is no basis for challenging the County's list of prime soils in this compliance  
13 action.  
14

#### 15 IV. ORDER

16 The County's application of the nine criteria for the designation of agricultural lands of long  
17 term commercial significance, as stated in its Comprehensive Plan, is compliant with the  
18 GMA. However, removing lands from consideration for designation based on the presence  
19 of 51% or more wetlands on a parcel was clearly erroneous. Such a consideration was not  
20 adopted by the County in its Comprehensive Plan as one of its designation criteria. This  
21 matter is remanded to the County to determine if any of the parcels removed from  
22 consideration as agricultural lands of long-term commercial significance based upon the  
23 presence of 51% or more of wetlands qualify for LTA designation under the County's nine  
24 adopted criteria.  
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30 <sup>44</sup> County Response at 22.

31 <sup>45</sup> 1000 Friends of Washington v. Thurston County, WWGMHB, No. 05-2-0002, FDO at 27 (7/20/05).

32 <sup>46</sup> County Response at 22.

<sup>47</sup> Compliance Order at 16.

1 The following compliance schedule shall apply:

2 Compliance Due	July 21, 2009
3 Compliance Report and Index to the Record Due 4 (County to file and serve on all parties)	July 28, 2009
5 Any Objections to a Finding of Compliance Due	August 18, 2009
6 County's Response Due	September 1, 2009
7 Compliance Hearing (location to be determined)	September 8, 2009

8  
9 Entered this 22nd day of April 2009.

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11 \_\_\_\_\_  
12 James McNamara, Board Member

13  
14 \_\_\_\_\_  
15 William Roehl, Board Member

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17 \_\_\_\_\_  
18 Nina Carter, Board Member

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20  
21 Pursuant to RCW 36.70A.300 this is a final order of the Board.

22 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date  
23 of mailing of this Order to file a petition for reconsideration. The original and three  
24 copies of a motion for reconsideration, together with any argument in support  
25 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the  
26 original and three copies of the motion for reconsideration directly to the Board, with  
27 a copy to all other parties of record. **Filing means actual receipt of the document at**  
28 **the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing  
29 of a motion for reconsideration is not a prerequisite for filing a petition for judicial  
review.

30 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the  
31 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
32 judicial review may be instituted by filing a petition in superior court according to the

1 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil  
2 Enforcement. The petition for judicial review of this Order shall be filed with the  
3 appropriate court and served on the Board, the Office of the Attorney General, and all  
4 parties within thirty days after service of the final order, as provided in RCW  
5 34.05.542. Service on the Board may be accomplished in person or by mail, but  
6 service on the Board means actual receipt of the document at the Board office within  
7 thirty days after service of the final order. A petition for judicial review may not be  
8 served on the Board by fax or by electronic mail.

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