

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 FUTUREWISE,

3  
4 Petitioner,

5 v.

6  
7 WHATCOM COUNTY,

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9 Respondent,

10 and

11  
12 GOLD STAR RESORTS, INC,

13  
14 Intervenor

**No. 05-2-0013c**

**ORDER FINDING CONTINUING  
NONCOMPLIANCE, STAYING  
COMPLIANCE OBLIGATIONS  
REVERSED BY SUPERIOR  
COURT, AND SETTING NEW  
COMPLIANCE SCHEDULE**

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16 THIS Matter came before the Board on a compliance hearing held telephonically on May 17,  
17 2007. Karen Frakes, Deputy Prosecuting Attorney, appeared representing the County.  
18 Keith Scully represented Futurewise. All three board members attended.  
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20 **PROCEDURAL BACKGROUND**

21 The Petition for Review was filed in this case on March 25, 2005. On September 20, 2005,  
22 the Board entered its Final Decision and Order, finding that Resolution No. 2005-006 and  
23 the ordinances adopted through it failed to comply with the Growth Management Act with  
24 respect to the descriptors for and designations of small towns, crossroads commercial,  
25 resort and recreational subdivisions, suburban enclaves and transportation corridors  
26 (Conclusions of Law D, E and H); Policy 2GG-2 (Conclusion of Law G); zoning designations  
27 RR1, RR2, RR3, EI, R2A, and RRI (Conclusion of Law I); and UR 3 zone in urban areas  
28 other than the Lake Whatcom Watershed and the Airport/Marine Drive Mixed Use area  
29 (Conclusion of Law K).  
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1 The Board's decision with respect to Conclusions of Law D, E, G, H and I were appealed to  
2 the Whatcom County Superior Court. The Superior Court reversed the Board's decision on  
3 these issues. The decision of the Superior Court was, in turn, appealed to the Court of  
4 Appeals, Division I. No stays have been granted and oral argument is scheduled for May  
5 30, 2007.

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7 Conclusion of Law K has not been appealed.

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9 **CONTINUING NONCOMPLIANCE**

10 The County is working to achieve compliance on Conclusion of Law K and expects to take  
11 legislative action by the end of June. Until it takes such legislative action, the County  
12 concedes that it is in continuing noncompliance.

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15 Futurewise concurs that the County is in continuing noncompliance and has no objection to  
16 an extension of the compliance schedule to accommodate the County's adoption process.

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18 The County assumes that the decision of the Superior Court reversing the Board's  
19 Conclusions of Law D, E, G, H and I supersedes the Board's decision even though  
20 appellate review is not yet final. Although neither party has raised this question, the  
21 question of the effectiveness of the Board's Final Decision and Order is fundamental to any  
22 action the Board may take on compliance. After careful review of the court decisions on the  
23 rules applicable to an appeal of a growth board decision, this Board has determined that the  
24 Rules of Appellate Procedure (RAP) apply where the Administrative Procedures Act (APA)  
25 is silent.<sup>1</sup> This means that the Board's decision continues in effect unless stayed by order  
26 of a reviewing court until a final decision terminating appellate review is issued (unless a  
27 stay is issued by a reviewing court).  
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32 <sup>1</sup> Evergreen Islands, et al. v. City of Anacortes, WWGMHB Case No. 05-2-0016 (Compliance Order, March 2, 2007)

1 We repeat our analysis from the March 2, 2007 Compliance Order in Evergreen Islands et al  
2 v. City of Anacortes, WWGMHB Case No. 05-2-0017 here because it applies equally to  
3 these circumstances:

4 Appeals of growth board decisions are governed by the Administrative Procedures  
5 Act (APA). RCW 36.70A.300(5). The APA does not address the situation here – it  
6 does not state when the decision of an appellate court is effective and therefore  
7 takes the place of the Board’s decision. However, the Washington Supreme Court  
8 discussed the question of what rules to apply in the event that the APA does not  
9 address a procedural matter. In a case involving this Board, *Diehl v. Western*  
10 *Washington Growth Management Hrgs. Bd.*, 153 Wn.2d 207, 103 P.3d 193 (2004),  
11 the Court stated that the Civil Rules do not apply to appeals under the APA except  
12 when specifically authorized.<sup>2</sup> The Court then went on to discuss the reason that the  
13 Civil Rules should not apply in general to appeals of growth board decisions. The  
14 Court noted that the Civil Rules apply when the superior court sits as a court of  
15 original jurisdiction, rather than as an appellate court:

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Moreover, the civil rules are clearly intended to apply only to civil actions  
invoking the general jurisdiction of the superior court; an administrative appeal  
invokes appellate, not general or original, superior court jurisdiction.<sup>3</sup>

Since the superior court reviews a growth board decision as an appellate court, the  
Court observed, the Civil Rules are not appropriate. When the superior court is  
sitting as an appellate court, the Court stated, it is appropriate to use the Rules of  
Appellate Procedure:

In reviewing administrative appeals, Washington courts have stated that it was  
more appropriate to look to the rules of appellate procedure, rather than the  
civil rules, given the appellate jurisdiction of the trial court under the APA.<sup>4</sup>

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

The civil rules are clearly intended to apply only to civil actions invoking the  
general jurisdiction of the superior courts. Instead we would analogize to the

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<sup>2</sup> The Court referred to the APA provision that provides that “ancillary procedural matters” such as intervention,  
class actions, consolidation, joinder are governed by the civil rules.<sup>2</sup> *Diehl v. Western Washington Growth*  
*Management Hrgs. Bd.*, 153 Wn.2d 207, 103 P.3d 193 (2004) at 216.

<sup>3</sup> *Ibid* at 217.

<sup>4</sup> *Ibid*.

1 rules of appellate procedure (RAP) given the appellate jurisdiction of trial  
2 courts under the APA.<sup>5</sup>

3 Since the APA does not address the situation here, we must analogize to the Rules  
4 of Appellate Procedure as the “gap-filling” rules<sup>6</sup>. If that analogy is drawn, the  
5 decision of the Superior Court is like that of the appellate court under RAP 12.2 and  
6 the Superior Court decision does not become effective until a mandate is issued  
7 terminating appellate review. See also RAP 12.5. Because appellate review is still  
8 pending in the Court of Appeals, the mandate cannot issue until the Court of Appeals  
9 has made its decision. Therefore, the Superior Court decision is not yet binding on  
all parties.

10 As far as the effectiveness of the Board’s order is concerned, we again analogize to  
11 the Rules of Appellate Procedure. By analogy, the Board stands in the shoes of the  
12 court of original jurisdiction (otherwise the trial court) during the appeal. RAP 7.2  
13 allows any person to enforce the trial court’s decision in a civil case during the  
14 appeal. RAP 7.2(c). Therefore, the Board has authority to enforce its decision during  
15 the appeal unless a stay has been issued by a reviewing court. There has been no  
16 stay issued here so the Board’s decision remains in effect until a final decision  
terminating review is entered by the courts.<sup>7</sup>

17 Equally applicable, however, is our determination that these circumstances justify the Board  
18 in issuing a stay of the Board’s decision pending review by the appellate court. Therefore,  
19 in deference to the decision of the Superior Court, the Board will, pursuant to RCW  
20 34.05.550, stay the compliance obligations reversed by the Superior Court until a final  
21 decision terminating review and a mandate are issued.  
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### 23 ORDER

24 The Board hereby **STAYS** the requirement that the County achieve compliance with respect  
25 to Conclusions of Law D, E, G, H and I until a final decision terminating appellate review and  
26 a mandate are issued.  
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30 <sup>5</sup> *King County v. Central Puget Sound Growth Management Hrgs. Bd.*, 91 Wn.App. 1 (1998) at 18-19.

31 <sup>6</sup> *Ibid.*

32 <sup>7</sup> *Evergreen Islands, et al. v. City of Anacortes*, WWGMHB Case No. 05-2-0016 (Compliance Order, March 2, 2007)

1 The Board further finds **CONTINUING NONCOMPLIANCE** with respect to Conclusion of  
2 Law K and orders the County to achieve compliance in accordance with the following  
3 schedule:

4	5	6	7	8	9	10	11	12
		Compliance Due		June 29, 2007.				
		Compliance Report and Index Due		July 10, 2007.				
		Objections to a Finding of Compliance (if any) Due		July 17, 2007.				
		County Response to Objections Due		July 24, 2007.				
		Compliance Hearing		July 31, 2007.				

13 The compliance hearing is anticipated to be telephonic. It will begin at 10:00 a.m. The  
14 parties should call (360) 357-2903 and use PIN 17865# to be connected to the conference  
15 call.

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17 ENTERED this 18<sup>th</sup> day of May 2007.

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Margery Hite, Board Member

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Holly Gadbow, Board Member

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James McNamara, Board Member