

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 FUTUREWISE,

4 Petitioner,

Case No. 05-2-0013

5 v.

6  
7 WHATCOM COUNTY,

8 Respondent,

**FINAL DECISION  
AND  
ORDER**

9 And

10 GOLD STAR RESORTS, INC.

11  
12 Intervenor.

13  
14 **I. SYNOPSIS OF DECISION**

15 Whatcom County adopted its update of its comprehensive plan in Resolution 2005-006  
16 pursuant to RCW 36.70A.130(1) and (4) on January 25, 2005. In its update, the County  
17 primarily determined to retain its existing designations as established in its 1997  
18 comprehensive plan and apply new provisions of the GMA (Growth Management Act, Ch.  
19 36.70A RCW) to future designations only. Resolution 2005-006. In our Order on  
20 Dispositive Motions issued in this case on June 15, 2005, we determined that the update  
21 requirements of RCW 36.70A.130 impose an obligation upon the County to revise its  
22 comprehensive plan to comply with the GMA, and that the County may not refuse to revise  
23 noncompliant plan provisions on the basis that it adopted them some time ago.  
24

25  
26 Futurewise raises four major issues regarding the County's update: the failure to designate  
27 areas of more intensive rural development according to the statutory criteria; the allowable  
28 rural densities; the allowable urban densities; and the analysis of the Office of Financial  
29 Management (OFM) population allocation to the County. Petition for Review, March 26,  
30 2005.  
31  
32

1 In this decision, we find that the County has failed to update its comprehensive plan and  
2 revise the portions of its comprehensive plan that designate and map areas of more  
3 intensive rural development as required by RCW 36.70A.130 and RCW 36.70A.070(5)(d).  
4 We find that the County has allowed areas of more intensive development in the rural areas  
5 without limiting and containing them in compliance with RCW 36.70A.070(5)(d). However,  
6 we find that the decision on where to draw logical outer boundaries for those more intensive  
7 rural areas must be made by the County. Since the County has not yet exercised its  
8 discretion to adopt limited areas of more intensive rural development (LAMIRDs) using the  
9 statutory criteria, the Board cannot determine whether those boundaries are compliant with  
10 the statute. If the County decides to establish LAMIRDs, the record must show what  
11 choices the County made in drawing logical outer boundaries and otherwise ensuring that  
12 they will “minimize and contain” the more intensive rural development. RCW  
13 36.70A.070(5)(d)(iv).  
14  
15

16  
17 We find that the rural residential densities allowed in the RR1 zone (1 dwelling unit per  
18 acre); RR2 zone (2 dwelling units per acre); RR3 zone (3 dwelling units per acre); EI zone  
19 (3 dwelling units per acre); R2A zone (1 dwelling unit per 2 acres); and RRI zone (1 dwelling  
20 unit per 3 acres) are not rural densities but suburban densities encouraging sprawl. Except  
21 within properly designated LAMIRDs, such intensive residential densities in the rural area  
22 fail to comply with RCW 36.70A.070(5)(b) and 36.70A.020(2).  
23  
24

25 As to the challenge to the UR3 zone, we find that the County has properly reduced the  
26 urban residential densities in the Lake Whatcom Watershed due to environmental  
27 considerations. We also find that the use of the UR3 zone in the area adjoining the airport  
28 is a compliant rationale for reducing the urban residential density allowed in that area to 3  
29 dwelling units per acre. Apart from the Lake Whatcom Watershed and the UR3 zone shown  
30 on Map 2: Airport/Marine Drive Mixed Use in Exhibit 6, the County’s UR3 zoning  
31  
32

1 designations allow less-than-urban densities in urban areas without justification or rationale.  
2 As a result, they fail to comply with RCW 36.70A.110.

3  
4 We further find that Futurewise has not sustained its burden of proof relative to the  
5 population allocation analysis done by the County. The County's record demonstrates that  
6 it did conduct a population allocation analysis and Futurewise has failed to show why that  
7 analysis does not comply with the requirements of RCW 36.70A.130(1).  
8

## 9 10 **II. PROCEDURAL HISTORY**

11 In 2004, Futurewise<sup>1</sup> appealed the adoption of Whatcom County Ordinance 2004-017 to this  
12 Board. *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB  
13 Case No. 04-2-0010. The Board dismissed the Futurewise appeal because Ordinance  
14 2004-017 did not contain the required finding that a review and evaluation had occurred for  
15 purposes of RCW 36.70A.130(1) and the County still had until December of 2004 to  
16 complete its update pursuant to RCW 36.70A.130(4). *1000 Friends of Washington and Pro-*  
17 *Whatcom v. Whatcom County*, Order on Motions to Dismiss, August 2, 2004.  
18

19  
20 The petition for review in this case was filed on March 25, 2005. It appeals the adoption of  
21 Resolution 2005-006 by the Whatcom County Council on January 25, 2005. This resolution  
22 was approved by the Whatcom County Executive on January 28, 2005. Resolution 2005-  
23 006. The resolution recites that it is the update required by RCW 36.70A.130(1) and (4).  
24 Resolution 2005-006, Finding 1. The petition for review challenges the adoption of  
25 Resolution No. 2005-006, which references Ordinances No. 2005-03 through 2005-024.  
26 The petition for review also challenges the failure of the County to adequately review and  
27 revise several pre-existing land use designations, policies and zoning provisions, pursuant  
28 to RCW 36.70A.130.  
29  
30

31  
32 <sup>1</sup> At the time that the petition for review was filed in this case, 1000 Friends of Washington had changed its name to "Futurewise."

1 On April 22, 2005, Futurewise filed its First Amended Petition for Review, which added Pro-  
2 Whatcom as an additional petitioner in this case. On May 25, 2005, the County filed three  
3 motions to dismiss and a motion to strike the first amended petition for review.

4 Respondent's Dispositive Motions, May 25, 2005. Futurewise filed its response on June 8,  
5 2005. Response to Motions, June 8, 2005. The Board granted the County's motion to  
6 strike Futurewise's amended petition, and denied the other motions. Order on Dispositive  
7 Motions, June 15, 2005.  
8

9  
10 The County also filed two Motions to Supplement Record: one on May 25, 2005, and one on  
11 July 21, 2005. Futurewise did not oppose either motion and both were granted. Order  
12 Granting Motion to Supplement the Record and Additions to the Record, June 6, 2005;  
13 Second Order Granting Motions to Supplement the Record, August 2, 2005.  
14

15  
16 On July 21, 2005, Gold Star Resorts, Inc. (Gold Star) moved for intervention. Gold Star's  
17 Motion for Intervention. This motion was unopposed and intervention was granted on July  
18 29, 2005. Order Granting Intervention to Gold Star Resorts, Inc.  
19

20  
21 The hearing on the merits was held in Bellingham on August 16, 2005. The County was  
22 represented by deputy prosecuting attorney Karen Frakes. Futurewise was represented by  
23 attorney John Zilavy. Gold Star was represented by attorneys John and Scott Swanson.  
24 All three board members attended. Margery Hite presided at the hearing.  
25

### 26 27 **III. ISSUES PRESENTED**

- 28 1. Does the County's failure to review and revise the following:  
29  
30 a. comprehensive plan policies 2GG-2, 2GG-3, 2HH-3, 2JJ-5, 2LL-4 and 2NN-7;  
31 b. the comprehensive plan designation descriptors for the for Small Town,  
32 Crossroads Commercial, Suburban Enclave, Transportation Corridor and  
Resort/Recreational designations; and,

1 c. areas identified on Map Number 8: Comprehensive Plan Designations for  
2 these designations (except for Point Roberts),  
3 each adopted by *Amended Ordinance* 2004-017, fail to comply with RCWs  
4 36.70A.070, 36.70A.020(1), 36.70A.020(2), 36.70A.020(10), 36.70A.110 and  
5 36.70A.130 when the policies and designations allow the continuation and creation of  
6 LAMIRDs that do not have a logical outer boundary delineated primarily by the built  
7 environment, allow urban development outside the logical outer boundary and  
8 outside the urban growth areas and otherwise fail to comply with GMA provisions  
9 identified in this issue?

10 2. Does the County's failure to review and revise the *Rural-Rural [Residential]*  
11 Designation that allows a density of 1 du/ 2 acres, fail to comply with RCW  
12 36.70A.070(5), RCW 36.070.020(2), RCW 36.70A.110(1) and RCW 36.70A.130  
13 when this allowed density permits urban densities outside the urban growth areas  
14 and fails to protect and preserve rural lands and rural character?

15 3. Does the County's failure to review and revise the Comprehensive Land Use  
16 Chapter, Designations Map and implementing Zoning Map and regulations that  
17 allows:

- 18 a. the RR1 zone (allowing 1 du/1 acre in the rural area outside the logical outer  
19 boundaries of a LAMIRD),
- 20 b. the RR2<sup>2</sup> zone allowing 2du/1 acre in the rural area outside the logical outer  
21 boundaries of a LAMIRD,
- 22 c. the RR3 and Eliza Island or EI zones (allowing 3du/1 acre in the rural areas  
23 outside the logical outer boundaries of a LAMIRD)
- 24 d. the R2A zone (allowing 1du/2 acres in the rural designation); and,
- 25 e. the Rural Residential Island or RRI zone (allowing 1 du/3 acres in the rural  
26 designation),

27 fail to comply with RCW 36.70A.070(5), RCW 36.70A.020(1), RCW 36.070.020(2),  
28 RCW 36.70A.110(1) and RCW 36.70A.130 when the allowed densities fail to protect  
29 and preserve rural lands and rural character and allow urban growth in the rural  
30 area?

31 4. Does the County's failure to review and revise the Comprehensive Land Use  
32 Chapter and Designations Map, Zoning Map and implementing regulations that  
allow the UR3 zone within the urban growth area (allowing 3 du/ 1 acre in an urban  
designation) fail to comply with RCW 36.70A.110, RCW 36.70A.020(1) RCW

---

<sup>2</sup> Point Roberts contains both RR1 and RR2 zones, but is excluded from this challenge.

1 36.70A.020(2) and RCW 36.70A.130 when this density is too low to qualify as urban  
2 growth under the GMA?

3 5. Does the County's failure to include in its major update review and revision, an  
4 analysis of its urban growth areas and the population allocated to the county from the  
5 most recent ten-year population forecast by the office of financial management fail to  
6 comply with RCW 36.70A.130(1)(a).

7 6. Does the continued validity of the violations of RCW Title 36.70A (The Growth  
8 Management Act), described in numbers 1 through 5 above, substantially interfere  
9 with the fulfillment of the goals of the Growth Management Act such that the  
10 enactments at issue should be held invalid pursuant to RCW 36.70A.302?

#### 11 **IV. BURDEN OF PROOF**

12 For purposes of board review of the comprehensive plans and development regulations  
13 adopted by local government, the GMA establishes three major precepts: a presumption of  
14 validity; a "clearly erroneous" standard of review; and a requirement of deference to the  
15 decisions of local government.  
16

17 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
18 amendments to them are presumed valid upon adoption:  
19

20 Except as provided in subsection (5) of this section, comprehensive plans and  
21 development regulations, and amendments thereto, adopted under this chapter are  
22 presumed valid upon adoption.  
23 RCW 36.70A.320(1).  
24

25 The statute further provides that the standard of review shall be whether the challenged  
26 enactments are clearly erroneous:  
27

28 The board shall find compliance unless it determines that the action by the state  
29 agency, county, or city is clearly erroneous in view of the entire record before the  
30 board and in light of the goals and requirements of this chapter.  
31 RCW 36.70A.320(3).  
32

1 In order to find the County's action clearly erroneous, the Board must be "left with the firm  
2 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,  
3 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

4  
5 Within the framework of state goals and requirements, the boards must grant deference to  
6 local government in how they plan for growth:  
7

8 In recognition of the broad range of discretion that may be exercised by counties and  
9 cities in how they plan for growth, consistent with the requirements and goals of this  
10 chapter, the legislature intends for the boards to grant deference to the counties and  
11 cities in how they plan for growth, consistent with the requirements and goals of this  
12 chapter. Local comprehensive plans and development regulations require counties  
13 and cities to balance priorities and options for action in full consideration of local  
14 circumstances. The legislature finds that while this chapter requires local planning to  
15 take place within a framework of state goals and requirements, the ultimate burden  
16 and responsibility for planning, harmonizing the planning goals of this chapter, and  
17 implementing a county's or city's future rests with that community.  
18 RCW 36.70A.3201 (in part).

19 In sum, the burden is on the Petitioner to overcome the presumption of validity and  
20 demonstrate that any action taken by the County is clearly erroneous in light of the goals  
21 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).  
22 Where not clearly erroneous and thus within the framework of state goals and requirements,  
23 the planning choices of local government must be granted deference.

#### 24 IV. DISCUSSION

25 A. LAMIRDS

26  
27  
28 **Issue No. 1: Does the County's failure to review and revise the following:**

- 29 **a. comprehensive plan policies 2GG-2, 2GG-3, 2HH-3, 2JJ-5, 2LL-4 and**  
30 **2NN-7;**  
31 **b. the comprehensive plan designation descriptors for the for Small Town,**  
32 **Crossroads Commercial, Suburban Enclave, Transportation Corridor and**  
**Resort/Recreational designations; and,**

1           c.       **areas identified on Map Number 8: Comprehensive Plan Designations for**  
2                   **these designations (except for Point Roberts),**  
3           **each adopted by Amended Ordinance 2004-017, fail to comply with RCWs**  
4           **36.70A.070, 36.70A.020(1), 36.70A.020(2), 36.70A.020(10), 36.70A.110 and**  
5           **36.70A.130 when the policies and designations allow the continuation and**  
6           **creation of LAMIRDs that do not have a logical outer boundary delineated**  
7           **primarily by the built environment, allow urban development outside the logical**  
8           **outer boundary and outside the urban growth areas and otherwise fail to comply**  
9           **with GMA provisions identified in this issue?**

10 In the Order on Dispositive Motions issued in this case (June 15, 2005) and in the Order on  
11 Motions to Dismiss (August 2, 2005) issued in the predecessor case of *1000 Friends of*  
12 *Washington v. Whatcom County*, WWGMHB Case No. 04-2-0010, this Board addressed the  
13 arguments concerning the update requirements of RCW 36.70A.130. We concluded:

14           The County's designation and regulation of limited areas of more intensive rural  
15           development must accord with the criteria in RCW 36.70A.070(5)(d). While those  
16           criteria were not in effect at the time that the County's comprehensive plan was first  
17           adopted, the update requirement applies to incorporate any GMA amendments into  
18           the review and revision of comprehensive plans and development regulations under  
19           RCW 36.70A.130.

20 Order on Dispositive Motions, June 15, 2005.

21 Both orders are incorporated by reference into this decision.

## 22 **Positions of the Parties**

23 Futurewise argues that there are three ways in which the County has failed to update its  
24 plan to comply with the LAMIRD provisions of the GMA: the County has adopted six  
25 comprehensive plan policies that allow and encourage the expansion of LAMIRDs; the plan  
26 contains descriptors for areas of more intensive rural development that do not comport with  
27 the GMA; and the County has established five zoning designations shown on Map Number  
28 8 that apply beyond the logical outer boundaries of a valid LAMIRD. Pre-Hearing Brief of  
29 Futurewise at 10-16. We will discuss these arguments together since they all address the  
30 County's designations for more intensive rural development in the rural area.  
31  
32

1           **1) Comprehensive Plan Policies 2GG-2, 2GG-3, 2HH-3, 2JJ-5, 2LL-4 and 2NN-7**

2  
3           **Positions of the Parties – CP Policies**

4 Futurewise asserts that six comprehensive plan policies fail to comply with RCW  
5 36.70A.070(5)(d): policies 2GG-2, 2GG-3, 2HH-3, 2JJ-5, 2LL-4, and 2NN-7. Pre-Hearing  
6 Brief of Futurewise at 10-12. Futurewise argues that all these policies allow and encourage  
7 the expansion of LAMIRDs in violation of RCW 36.70A.070(5)(d). *Ibid at 10*. The County  
8 responds that the only expansion permitted by the challenged policies is “infill” within a  
9 logical outer boundary and is required to be in compliance with RCW 36.70A.070(5). Brief  
10 of Respondent at 3.  
11

12  
13           **Board Discussion of CP Policies**

14 Five of the six challenged policies provide that expansion “should only be approved if  
15 appropriate infilling is occurring and a logical outer boundary can be established in  
16 accordance with RCW 36.70A.070(5).” 2GG-3, 2HH-3, 2JJ-5, 2LL-4, and 2NN-7.  
17 Futurewise argues that these policies allow expansion after “infill” development has already  
18 begun and impermissibly allow for the expansion of logical outer boundaries of a LAMIRD.  
19 Pre-Hearing Brief of Futurewise at 11. The County replies that these policies explicitly  
20 require compliance with RCW 36.70A.070(5) so that any minor expansion would have to be  
21 within the “requisite” logical outer boundary of a LAMIRD. Brief of Respondent at 3.  
22  
23

24  
25 Policies 2GG-3, 2HH-3, 2JJ-5, 2LL-4, and 2NN-7 are part of the plan’s overall approach to  
26 its proto-LAMIRDs<sup>3</sup>: even though not presently designated according to the statutory  
27 LAMIRD criteria, the proto-LAMIRDs will conform to RCW 36.70A.070(5) in the event that  
28 future expansion is considered. As we have said, RCW 36.70A.130 requires that the proto-  
29 LAMIRDs be updated to comply with RCW 36.70A.070(5)(d). However, these challenged  
30

31  
32 <sup>3</sup> Because these designations were not drawn as LAMIRDs pursuant to RCW 36.70A.070(5)(d) but allow  
greater than rural densities and intensities, for purposes of this decision we will call them “proto-LAMIRDs.”

1 policies are not themselves designation criteria that fail to comply with the GMA. They  
2 provide that expansion of existing proto-LAMIRDs could only occur within logical outer  
3 boundaries established in compliance with RCW 36.70A.070(5).  
4

5  
6 Futurewise argues that logical outer boundaries are intended to be a one-time recognition of  
7 existing, more intensively developed areas and uses, citing *People for a Liveable*  
8 *Community*, WWGMHB Case No. 03-2-0009 (Final Decision and Order, August 22, 2003).

9 While this is the model method for establishing LAMIRDs, there is actually nothing in the  
10 GMA restricting counties from drawing the logical outer boundaries of LAMIRDs more than  
11 once provided the new logical outer boundaries also comply with RCW 36.70A.070(5)(d). In  
12 addition, the proto-LAMIRDs in Whatcom County were not established pursuant to the  
13 criteria in RCW 36.70A.070(5)(d), so the drawing of logical outer boundaries under these  
14 policies would be the first time that they were drawn. See *Leenstra v. Whatcom County*,  
15 WWGMHB Case No. 03-2-0011 (Final Decision and Order, September 26, 2004). We  
16 therefore find that policies 2GG-3, 2HH-3, 2JJ-5, 2LL-4, and 2NN-7 comply with RCW  
17 36.70A.070(5)(d).  
18  
19

20  
21 Policy 2GG-2, however, does more than provide that any expansion of existing LAMIRD  
22 designations will comply with RCW 36.70A.070(5). It states:

23         Designate approximate town boundaries based on the areas characterized by  
24         existing development and logical extensions of the present service areas.  
25 CP 2-73.

26  
27 Policy 2GG-2 does not comply with RCW 36.70A.070(5)(d) because it allows more intensive  
28 areas of rural development with “approximate” boundaries, drawn based on “existing  
29 development” which is not restricted to the built environment as of July 1990. Further, it  
30 allows a proto-LAMIRD to be based on logical extensions of present service areas, a criteria  
31 that exceeds the limitations of RCW 36.70A.070(5)(d); it does not minimize and contain  
32

1 intensive rural development but allows it to extend as far as service areas “logically” permit.  
2 This fails to comply with the requirement in RCW 36.70A.070(5)(d)(iv) that “Lands included  
3 in such existing areas or uses shall not extend beyond the logical outer boundary of the  
4 *existing area or use*, thereby allowing a new pattern of low-density sprawl.” (emphasis  
5 added).  
6

7 **2) *The comprehensive plan designation descriptors for the for Small Town,***  
8 ***Crossroads Commercial, Suburban Enclave, Transportation Corridor and***  
9 ***Resort/Recreational designations.***

10  
11 **Positions of the Parties – Proto-LAMIRD descriptors**

12 Futurewise challenges the “descriptors” for small towns and crossroads communities,  
13 crossroads commercial, resort and recreational subdivisions, suburban enclaves, and  
14 transportation corridors designations (CP 2-89 – 2-91) for failing to provide that they will be  
15 created in conformity with the statutory criteria for LAMIRDs. RCW 36.70A.070(5)(d). Pre-  
16 Hearing Brief of Futurewise at 12.  
17

18  
19 The County argues that the question is not whether the County criteria are the same as  
20 those in RCW 36.70A.070(5)(d), but whether the County’s designation descriptors are  
21 consistent with state law:

22           The issue is not whether the language in the designation descriptors mirrors state  
23 law, but, instead, it is whether it is somehow inconsistent with that law.  
24 Brief of Respondent at 4.  
25

26 The County contends that the descriptors are not inconsistent with state law. *Ibid.*

27 Intervenor argues that the County had no duty to review and revise its LAMIRD criteria and  
28 designations because they are not critical areas or urban growth areas.<sup>4</sup> Gold Star’s Pre-  
29

30 <sup>4</sup> The scope of the update requirements under RCW 36.70A.130 is addressed in the two orders referenced  
31 previously - Order on Dispositive Motions issued in this case (June 15, 2005) and Order on Motions to Dismiss  
32 (August 2, 2005) issued in the predecessor case of *1000 Friends of Washington v. Whatcom County*,  
WWGMHB Case No. 04-2-0010

1 Hearing Brief at 6. Intervenor asserts that Futurewise has not produced sufficient evidence  
2 that the LAMIRDs are noncompliant to rebut the presumption of validity. *Ibid at 7.*  
3 Intervenor further argues that it did not receive adequate notice to meet due process  
4 requirements for zoning changes. *Ibid at 8.*  
5  
6

### 7 **Board Discussion of Proto-LAMIRD Descriptors**

8 The Whatcom County Comprehensive Plan establishes five designations that allow more  
9 intensive development in the rural area: small towns and crossroads communities,  
10 crossroads commercial, resort and recreational subdivisions, suburban enclaves, and  
11 transportation corridors. CP at 2-71 – 2-82. RCW 36.70A.070(5)(d) provides that counties  
12 may establish limited areas of more intensive rural development under certain criteria:  
13

14 Limited areas of more intensive rural development. Subject to the requirements of this  
15 subsection and except as otherwise specifically provided in this subsection (5)(d), the rural  
16 element may allow for limited areas of more intensive rural development including  
17 necessary public facilities and public services to serve the limited area as follows:

- 18 (i) Rural development consisting of the infill, development, or redevelopment of  
19 existing commercial, industrial, residential, or mixed-use areas, whether  
20 characterized as shoreline development, villages, hamlets, rural activity  
21 centers, or crossroads development.
  - 22 (A) A commercial, industrial, residential, shoreline, or mixed-use area shall  
23 be subject to the requirements of (d)(iv) of this subsection, but shall not  
24 be subject to the requirements of (c)(ii) and (iii) of this subsection.
  - 25 (B) Any development or redevelopment other than an industrial area under  
26 this subsection (5)(d)(i) must be principally designed to serve the  
27 existing and projected rural population.
  - 28 (C) Any development or redevelopment in terms of building size, scale, use  
29 or intensity shall be consistent with the character of the existing areas.  
30 Development and redevelopment may include changes in use from  
31 vacant land or a previously existing use so long as the new use  
32 conforms to the requirements of this subsection (5);
- (ii) The intensification of development on lots containing, or new development of,  
small-scale recreational or tourist uses, including commercial facilities to serve  
those recreational or tourist uses, that rely on a rural location and setting, but  
that do not include new residential development. A small-scale recreation or

1 tourist use is not required to be principally designed to serve the existing and  
2 projected rural population. Public services and public facilities shall be limited  
3 to those necessary to serve the recreation or tourist use and shall be provided  
4 in a manner that does not permit low-density sprawl;

5 (iii) The intensification of development on lots containing isolated nonresidential  
6 uses or new development of isolated cottage industries and isolated small-  
7 scale businesses that are not principally designed to serve the existing and  
8 projected rural population and nonresidential uses, but do not provide job  
9 opportunities for rural residents. Rural counties may allow the expansion of  
10 small-scale businesses as long as those small-scale businesses conform with  
11 the rural character of the area as defined by the local government according to  
12 RCW 36.70A.030(14). Rural counties may also allow new small-scale  
13 businesses to utilize a site previously occupied by an existing business as long  
14 as the new small-scale business conforms to the rural character of the area as  
15 defined by the local government according to RCW 36.70A.030(14). Public  
16 services and public facilities shall be limited to those necessary to serve the  
17 isolated nonresidential use and shall be provided in a manner that does not  
18 permit low-density sprawl.

19 (iv) A county shall adopt measures to minimize and contain the existing areas or  
20 uses of more intensive rural development, as appropriate, authorized under  
21 this subsection. Lands included in such existing areas or uses shall not  
22 extend beyond the logical outer boundary of the existing area or use, thereby  
23 allowing a new pattern of low-density sprawl. Existing areas are those that are  
24 clearly identifiable and contained where there is a logical boundary delineated  
25 predominately by the built environment, but that may also include undeveloped  
26 lands if limited as provided in this subsection. The county shall establish the  
27 logical outer boundary of an area of more intensive rural development. In  
28 establishing the logical outer boundary the county shall address (A) the need  
29 to preserve the character of existing natural neighborhoods and communities,  
30 (B) physical boundaries such as bodies of water, streets and highways, and  
31 land forms and contours, (C) the prevention of abnormally irregular  
32 boundaries, and (D) the ability to provide public facilities and public services in  
a manner that does not permit low-density sprawl.

RCW 36.70A.070(5)(d)(i),(ii), (iii) and (iv).

These provisions of the GMA establish the circumstances under which a county may allow  
areas of more intensive development in rural areas. If a county wishes to allow areas of

1 greater than rural densities<sup>5</sup> or uses that are more intense than rural uses in the rural zones,  
2 then those areas and uses must conform to these provisions of the Act. RCW  
3 36.70A.070(5)(d)(i), (ii), (iii), and (iv).  
4

5  
6 The descriptors for the proto-LAMIRD designations in the Whatcom County plan - small  
7 towns and crossroads communities, crossroads commercial, resort and recreational  
8 subdivisions, suburban enclaves, and transportation corridors – do not incorporate the  
9 requirements of RCW 36.70A.070(5)(d). CP at 2-90 – 2-91. Indeed, there is no attempt to  
10 do so.  
11

12  
13 The plan provisions establishing LAMIRDs do not have to use all the same words as are  
14 used in the statute. However, LAMIRDs must be established according to the criteria in  
15 RCW 36.70A.070(5)(d). The “descriptors” in the comprehensive plan address each proto-  
16 LAMIRD designation and give the general criteria for establishing them. CP 2-89. The  
17 descriptors make it clear that, although these are all rural designations of higher than rural  
18 densities and intensities of use, they are not linked to the LAMIRD criteria of the GMA.<sup>6</sup>  
19 Small towns are defined as “small communities with mixed tourist commercial, residential,  
20 resort, or public land uses.” CP 2-90. Since these are mixed use areas, including  
21 residential uses, the only type of LAMIRD which would allow them is a type (d)(i) LAMIRD.  
22 The criteria go on to provide that the purpose of the small town designation is “to  
23 acknowledge locations remote from urban centers that support the local economy by  
24 providing goods and services to residents and tourists.” *Ibid.* This means that the criteria  
25  
26

27 <sup>5</sup> Rural residential densities are ordinarily no more intense than one dwelling unit per five acres. See  
28 discussion in Section B below.

29 <sup>6</sup> From the descriptions provided, all of the proto-LAMIRD designations established in the plan contain uses  
30 that are not allowed in either type (d)(ii) or (d)(iii) LAMIRDs and so are most likely to fall within the ambit of  
31 type (d)(i) LAMIRDs if the County chooses to consider them for designation as LAMIRDs. RCW  
32 36.70A.070(5)(d). Type (d)(i) LAMIRDs are subject to the logical outer boundary provisions of RCW  
36.70A.070(5)(d)(iv) and must be based upon the built environment as of July 1990. *Panesko v. Lewis  
County*, WWGMHB Case No. 00-2-0031c (Final Decision and Order, March 5, 2001).

1 allow development (other than industrial development) that is not designed principally to  
2 serve the existing and projected rural population, as required by RCW  
3 36.70A.070(5)(d)(i)(B). In addition, the “locational criteria” for small towns are: “Existing  
4 small community or resort centers with adequate services, including water and sewer which  
5 can be cost-effectively provided; near existing transportation routes; characterized by  
6 commercial uses and higher densities than surrounding rural areas.” *Ibid.* These criteria  
7 allow the designation of areas that may not have been developed in 1990 rather requiring a  
8 determination of the built environment as of July 1990 in drawing logical outer boundaries  
9 for this type of LAMIRD as required by RCW 36.70A.070(5)(d)(iv). Therefore, descriptors  
10 for the small town designation are not compliant with RCW 36.70A.070(5)(d).  
11  
12

13  
14 “Crossroads commercial” designation areas have the purpose of providing “commonly  
15 desired goods and services near unincorporated or small population centers.” CP 2-90.  
16 This is a proper use of a type (d)(i) LAMIRD. RCW 36.70A.070(5)(d)(i) and (i)(B). However,  
17 the descriptor criteria only require that they be “central to rural populations; commercial  
18 areas should be located near arterial routes and fulfill a need for goods and services in that  
19 area.” Without a limitation on the size of the crossroads commercial LAMIRDs based on the  
20 built environment in July 1990, these criteria allow intensive rural development beyond the  
21 limits of RCW 36.70A.070(5)(d)(iv). They fail to comply with RCW 36.70A.070(5)(d) for that  
22 reason.  
23

24  
25  
26 The descriptor for the resort and recreational subdivisions designation gives the following  
27 purpose: “Recognize the existing mixture of recreational and residential development of  
28 resort and recreational subdivisions and ensure that future growth can be serviced  
29 appropriately.” CP 2-90. It describes a residential LAMIRD, thus falling outside the ambit of  
30 the type (d)(ii) and (d)(iii) LAMIRDs. However, not only does it fail to establish a logical  
31 outer boundary within the meaning of RCW 36.70A.070(5)(d)(iv), this designation is  
32

1 established expressly for the purpose of servicing future growth. *Ibid.* LAMIRDs are not  
2 intended as an alternative to urban growth areas (UGAs) as a means of channeling growth.  
3 “They are designed to acknowledge existing intensive uses in the rural areas as of July  
4 1990 and to permit limited more intensive development within carefully constrained  
5 boundaries.” *Better Brinnon Coalition v. Jefferson County*, WWGMHB Case No. 03-2-0007  
6 (Amended Final Decision and Order, November 3, 2003). The descriptor for resort and  
7 recreational subdivision fails to comply with RCW 36.70A.070(5)(d).<sup>7</sup>  
8

9  
10  
11 The suburban enclave designation is designed for “suburban” densities: “The suburban  
12 enclaves are comprised of rural residential areas that are not urban or likely to develop into  
13 urban areas during the planning period.” CP 2-90. The “locational criteria” provide that  
14 these are “[a]reas characterized by development at densities averaging one unit per acre  
15 and served or partially served by public roads, sewer or water, or other public services or  
16 facilities.” CP 2-91. As a residential designation, the suburban enclave is limited to a type  
17 (d)(i) LAMIRD. Although infill is allowed in a type (d)(i) LAMIRD, this may only occur within  
18 the logical outer boundaries established based upon development existing as of July 1990.  
19 There is nothing in this descriptor to limit the size of a suburban enclave and to provide that  
20 the infill only develops in areas that contain and minimize it, and as a result it allows more  
21 intensive rural development beyond the limitations of RCW 36.70A.070(5)(d)(iv). The  
22 suburban enclave descriptor also fails to comply with RCW 36.70A.070(5)(d).  
23  
24

25  
26 The transportation corridor descriptor provides that it is “designed to alert the community to  
27 proposed transportation corridor related expansion and to guide developments accordingly.”  
28 CP 2-91. The locational criteria provide that the transportation corridors shall be in areas  
29 “characterized by existing transportation-related development” but again fails to limit such  
30 development to areas where there was a built environment in July 1990 and to create  
31

32  

---

<sup>7</sup> We note that the GMA provides for master planned resorts in RCW 36.70A.360 and 36.70A.362.

1 logical outer boundaries to contain and minimize development within the designated areas.  
2 RCW 36.70A.070(5)(d)(iv). The transportation corridor designation, notably the Guide  
3 Meridian, is designed to be expanded and thus encourages, rather than prevents, low-  
4 density sprawl, as required by RCW 36.70A.070(5)(d)(iv). CP 2-91. For these reasons, the  
5 transportation corridor descriptor also fails to comply with RCW 36.70A.070(5)(d).  
6

7  
8 **3) Areas identified on Map Number 8: Comprehensive Plan Designations for**  
9 **these designations**

10 **Positions of the Parties – Map 8 areas**

11 Futurewise also challenges the failure to review and revise “areas identified on Map  
12 Number 8: Comprehensive Plan Designations for these designations (except for Point  
13 Roberts).” The County responds that Futurewise has failed to meet its burden to prove that  
14 the County’s delineation of the boundaries of its LAMIRDs was clearly erroneous. Brief of  
15 Respondent at 4.  
16

17  
18 **Board Discussion of Map 8 areas**

19 The purpose of the comprehensive plan designations map (Map 8) is described in the Land  
20 Use Element:  
21

22 The Comprehensive Plan designations map (Map 8) is intended to provide direction  
23 for future land use decisions in Whatcom County. It is officially adopted as part of  
24 this document. Because of the scale of the map, specific boundaries are identified  
25 on maps in the County Planning and Development Services office.  
26 CP 2-89.

27 This Map includes small towns and crossroads communities, crossroads commercial, resort  
28 and recreational subdivisions, suburban enclaves, and transportation corridors. However,  
29 until the County has adopted compliant criteria for the designation of LAMIRDs and applied  
30 those criteria to draw the logical outer boundaries of its type (d)(i) LAMIRDs, it cannot map  
31 compliant LAMIRDs. This is because the comprehensive plan criteria are needed to  
32 establish a basis for the maps.

1 Further, the statute requires that the County utilize certain factors and address specified  
2 concerns when it determines what the logical outer boundaries of a LAMIRD shall be:

3  
4 The county shall establish the logical outer boundary of an area of more intensive  
5 rural development. In establishing the logical outer boundary the county shall  
6 address (A) the need to preserve the character of existing natural neighborhoods and  
7 communities, (B) physical boundaries such as bodies of water, streets and highways,  
8 and land forms and contours, (C) the prevention of abnormally irregular boundaries,  
9 and (D) the ability to provide public facilities and public services in a manner that  
10 does not permit low-density sprawl.

11 RCW 36.70A.070(5)(d)(iv) (in pertinent part).

12 Because the statute imposes the duty upon the County to undertake a specific analysis  
13 when it designates LAMIRDs, the record must show that analysis. If not, there would be no  
14 basis for reviewing compliance with its requirements. It is, therefore, analogous to the  
15 “show your work” requirement for the establishment of urban growth areas (UGAs). See  
16 *City of Tacoma v. Pierce County*, CPSGMHB Case No. 94-3-0001 (Final Decision and  
17 Order, July 5, 1994). Such a “show your work” requirement does not shift the burden of  
18 proof since the Petitioner must still show the designation decision was clearly erroneous.  
19 The County’s record in establishing its LAMIRDs must show that it has addressed the  
20 statutory considerations and the basis for its decisions. Since the LAMIRD logical outer  
21 boundary analysis is part of the designation decision, it must appear in the record. The  
22 obligation to establish logical outer boundaries for LAMIRDs falls on the County and the  
23 Board cannot review the compliance of particular LAMIRD boundaries with the GMA until  
24 the County has made the determinations that go into a decision of where to draw the logical  
25 outer boundaries.<sup>8</sup>  
26  
27

28  
29  
30 <sup>8</sup> Both the County and Futurewise have asked the Board to make determinations regarding specific existing  
31 proto-LAMIRDs. The Board is not able to make any determinations about the compliance of LAMIRD  
32 boundaries without a record of the decisions made by the County Council in establishing those LAMIRDs and  
their logical outer boundaries.

1 The Intervenor's arguments concerning due process are outside the bounds of the  
2 jurisdiction of the Board. The GMA does not confer upon boards the authority to determine  
3 constitutional claims. *Roth, et al. v. Lewis County*, WWGMHB Case No. 04-2-0014c (Order  
4 on Motions to Dismiss, September 10, 2004). We note, however, that Futurewise's  
5 challenge was to the sufficiency of the County's update. Upon remand, the County may  
6 elect to allow limited areas of more intensive areas of rural development pursuant to RCW  
7 36.70A.070(5)(d) and the County's public process will be open to the Intervenor on that  
8 subject. WCC 20.10.060, .090, and .100.  
9

10  
11 **LAMIRD Challenges Conclusion:** The designation criteria in the descriptors for small  
12 towns and crossroads communities, crossroads commercial, resort and recreational  
13 subdivisions, suburban enclaves, and transportation corridors allow the creation of more  
14 intensive areas of rural development that do not comply with RCW 36.70A.070(5)(d). The  
15 failure to revise those descriptors therefore fail to comply with RCW 36.70A.130. The failure  
16 of the County to revise the designations of proto-LAMIRDs on Map 8 in accordance with the  
17 LAMIRD criteria of RCW 36.70A.070(5)(d) also fails to comply with RCW 36.70A.130. The  
18 County's record of its LAMIRD designations must show the analysis used to arrive at the  
19 designation and mapping of them.  
20  
21

22  
23 Policy 2GG-2 allows the designation of towns and crossroads communities in areas that  
24 extend beyond the development and uses in existence in July 1990 and thus fails to comply  
25 with RCW 36.70A.070(5)(d).  
26

27  
28 However, policies 2GG-3, 2HH-3, 2JJ-5, 2LL-4, and 2NN-7 require compliance with the  
29 logical outer boundaries requirement of RCW 36.70A.070(5)(d) and therefore comply with  
30 the GMA.  
31  
32

1 B. Rural Densities

2  
3 ***Issue No. 2: Does the County's failure to review and revise the Rural-Rural***  
4 ***[Residential] Designation that allows a density of 1 du/ 2 acres, fail to comply with***  
5 ***RCW 36.70A.070(5), RCW 36.070.020(2), RCW 36.70A.110(1) and RCW 36.70A.130***  
6 ***when this allowed density permits urban densities outside the urban growth areas***  
7 ***and fails to protect and preserve rural lands and rural character?***

8 ***Issue No. 3: Does the County's failure to review and revise the Comprehensive Land***  
9 ***Use Chapter, Designations Map and implementing Zoning Map and regulations that***  
10 ***allows:***

- 11 a. ***the RR1 zone (allowing 1 du/1 acre in the rural area outside the logical***  
12 ***outer boundaries of a LAMIRD),***
- 13 b. ***the RR2<sup>9</sup> zone allowing 2du/1 acre in the rural area outside the logical***  
14 ***outer boundaries of a LAMIRD,***
- 15 c. ***the RR3 and Eliza Island or EI zones (allowing 3du/1 acre in the rural***  
16 ***areas outside the logical outer boundaries of a LAMIRD)***
- 17 d. ***the R2A zone (allowing 1du/2 acres in the rural designation); and,***
- 18 e. ***the Rural Residential Island or RRI zone (allowing 1 du/3 acres in the***  
19 ***rural designation)***

20 ***fail to comply with RCW 36.70A.070(5), RCW 36.70A.020(1), RCW 36.070.020(2), RCW***  
21 ***36.70A.110(1) and RCW 36.70A.130 when the allowed densities fail to protect and***  
22 ***preserve rural lands and rural character and allow urban growth in the rural area?***

23 **Positions of the Parties – Rural Densities**

24 Futurewise challenges the County's failure to revise a variety of rural zoning designations  
25 that implement some comprehensive plan designations, including those for proto-LAMIRDs.  
26 These rural designations allow residential densities in excess of one unit per five acres and  
27 Futurewise argues that such densities are not rural. Pre-Hearing Brief of Futurewise at 19.  
28 Futurewise challenges six rural zones that allow rural densities in excess of one dwelling  
29 unit per five acres: RR1 zone (1 dwelling unit per acre); RR2 zone (2 dwelling units per  
30 acre); RR3 zone (3 dwelling units per acre); EI zone (3 dwelling units per acre); R2A zone (1  
31 dwelling unit per 2 acres); and RRI zone (1 dwelling unit per 3 acres). *Ibid* at 20.

32 \_\_\_\_\_  
<sup>9</sup> Point Roberts contains both RR1 and RR2 zones, but is excluded from this challenge.

1 The County responds that this issue needs to be addressed only if the Board finds that the  
2 County's LAMIRDs are not compliant with the GMA. Brief of Respondent at 8. If not  
3 LAMIRDs, the County agrees, these zones allow residential densities that exceed rural  
4 levels and would not comply with the GMA. *Ibid* at 9.  
5  
6

### 7 **Board Discussion of Rural Densities**

8 These challenges are to certain zoning designations, which are development regulations  
9 implementing comprehensive plan designations. Ex. 5 is the Whatcom County Title 20  
10 Zoning and Comprehensive Plan Designations. It depicts both the comprehensive plan  
11 designation and the zoning designations applicable to the comprehensive plan  
12 designations. These zoning designations establish allowable residential densities and uses  
13 within the comprehensive plan designations. Ex. 5.  
14

15  
16 The challenged zoning designations include the following: RR1 zone (1 dwelling unit per  
17 acre); RR2 zone (2 dwelling units per acre); RR3 zone (3 dwelling units per acre); EI zone  
18 (3 dwelling units per acre); R2A zone (1 dwelling unit per 2 acres); and RRI zone (1 dwelling  
19 unit per 3 acres). We note that the challenged zoning designations do not all implement  
20 proto-LAMIRD designations; some of them apply to areas in the general "Rural"  
21 comprehensive plan designation. Ex. 5. Further, not all the zoning designations for proto-  
22 LAMIRDs have been challenged; notably, the "commercial" zoning designations have not  
23 been challenged although some of them implement the Crossroads Commercial and  
24 Transportation Corridor comprehensive plan designations. Therefore, this challenge is not  
25 the same thing as a challenge to the development regulations that implement the proto-  
26 LAMIRD plan designations; although it does address *some* of the development regulations  
27 implementing *some* of the proto-LAMIRD designations.  
28  
29

30  
31 Residential densities of greater than one dwelling unit per five acres are not considered  
32 rural densities. *Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c (Final

1 Decision and Order, May 7, 2001); *Sky Valley v. King County*, CPSGMHB Case No. 95-3-  
2 0068c (Final Decision and Order, March 12, 1996); *Yanisch v. Lewis County*, WWGMHB  
3 Case No. 02-2-0007c (Final Decision and Order, December 11, 2002); but see *Vashon-*  
4 *Maury v. King County*, CPSGMHB Case No. 95-3-0008c (Final Decision and Order,  
5 October 23, 1995); and *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016  
6 (Final Decision and Order, May 23, 2000) (holding that rural densities should be no greater  
7 than one dwelling unit per *ten* acres). While the GMA does not establish a maximum  
8 residential rural density, all three of the Boards have found that rural residential densities  
9 are no more intense than one dwelling unit per five acres. *Ibid.*

10  
11  
12 Densities that are not urban but are greater than one dwelling unit per five acres generally  
13 promote sprawl in violation of goal 2 of the GMA:

14           Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into  
15           sprawling, low-density development.  
16 RCW 36.70A.020(2).

17  
18 The exception to this principle is densities allowed in limited areas of more intensive rural  
19 development established pursuant to RCW 36.70A.070(5)(d). Under the criteria of RCW  
20 36.70A.070(5)(d), “the rural element may allow for limited areas of more intensive rural  
21 development, including necessary public facilities and public services to serve the limited  
22 area.” Under principles of statutory construction, the legislative creation of this exception for  
23 more intensive rural development indicates that more intensive rural development would not  
24 be allowed but for the exception:  
25

26           The exception of a particular thing from the operation of the general words of a  
27           statute shows that in the opinion of the law-maker the thing excepted would be within  
28           the general words had not the exception been made.  
29 2 Lewis’ Sutherland Statutory Construction (2<sup>nd</sup> ed.) 670, § 351 cited in McKenzie v.  
30 Mukilteo Water District, 4 Wn.2d 103, 155, 102 P.2d 251 (1940).

31  
32 Without meeting the LAMIRD criteria, more intensive rural development is not allowed.

1 As discussed in Section A above, the comprehensive plan has not established compliant  
2 LAMIRDs as comprehensive plan designations. RCW 36.70A.070(5)(d). The zoning  
3 designations for rural residential densities that are more intensive than one dwelling unit per  
4 acre are, therefore, not compliant residential densities in the rural area. RCW  
5 36.70A.070(5).  
6

7  
8 **Conclusion:** The rural zones: RR1 zone (1 dwelling unit per acre); RR2 zone (2 dwelling  
9 units per acre); RR3 zone (3 dwelling units per acre); EI zone (3 dwelling units per acre);  
10 R2A zone (1 dwelling unit per 2 acres); and RRI zone (1 dwelling unit per 3 acres); allow  
11 residential densities that are not rural in the rural areas that are not in limited areas of more  
12 intensive rural development pursuant to RCW 36.70A.070(5)(d). They do not, therefore,  
13 comply with RCW 36.70A.070(5). The County failed to revise these zones as required by  
14 RCW 36.70A.130.  
15

16  
17 C. Urban Densities  
18

19 ***Issue No. 4: Does the County's failure to review and revise the Comprehensive Land***  
20 ***Use Chapter and Designations Map, Zoning Map and implementing regulations that***  
21 ***allow the UR3 zone within the urban growth area (allowing 3 du/ 1 acre in an urban***  
22 ***designation) fail to comply with RCW 36.70A.110, RCW 36.70A.020(1) RCW***  
23 ***36.70A.020(2) and RCW 36.70A.130 when this density is too low to qualify as urban***  
24 ***growth under the GMA?***

25 **Positions of the Parties**

26 Futurewise argues that minimum urban residential densities are 4 dwelling units per acre  
27 and any new residential land use pattern within a UGA that is less dense constitutes urban  
28 sprawl. Pre-Hearing Brief of Futurewise at 22. For this reason, Futurewise argues that  
29 residential densities of 3 dwelling units per acre do not qualify as urban growth and allowing  
30 such urban densities fails to comply with RCW 36.70A.110, 36.70A.020(1) and (2). *Ibid* at  
31 23-4.  
32

1 The County responds that the UR3 zone allows 3 dwelling units per acre as a net density  
2 calculation. Brief of Respondent at 10. Because the UR3 zone addresses gross densities,  
3 the County argues, deductions for infrastructure and critical areas may lead to a net density  
4 of 3 dwelling units per acre in a given subdivision. *Ibid*. The County's planned unit  
5 development provisions also allow for greater density. *Ibid*. Moreover, the County argues  
6 that the comprehensive plan policies encourage even higher residential densities in urban  
7 areas and that these policies ensure consideration of higher densities in the platting  
8 process. *Ibid at 11*.

10  
11 Also, the County points to exceptions to the general rule of 4 dwelling units per acre in  
12 urban areas. In the Lake Whatcom Watershed, the County urges that the lesser density is  
13 necessary to protect water quality and availability. *Ibid at 12*. In the area south of the  
14 Bellingham International Airport, the County argues that lesser densities are needed to  
15 discourage incompatible land uses around public use airports. *Ibid*.

### 18 **Board Discussion**

19  
20 The growth boards have generally considered 4 dwelling units per acre to be a minimum  
21 urban residential density. The Central Puget Sound Growth Management Hearings Board  
22 has said that any residential pattern of four net dwelling units per acre (or higher) is compact  
23 urban development and satisfies the low end of the range required by the Act. *Bremerton,*  
24 *v. Kitsap County*, CPSGMHB Case No. 95-3-0039c (Final Decision and Order, October 6,  
25 1995). This Board has also adhered to this general principle. See *Berschauer v. Tumwater,*  
26 WWGMHB Case No. 94-2-0002 (Final Decision and Order, July 27, 1994); and *Klein v. San*  
27 *Juan County*, WWGMHB Case No. 02-2-0009 (Final Decision and Order, October 15,  
28 2002). ("The ratio of four dwelling units per acre as a minimum urban density level... more  
29 accurately reflects an urban level of density.")  
30  
31  
32

1 However, the boards have not held rigidly to this standard. The Central Board has stated  
2 that there may be other factors that justify residential densities under 4 dwelling units per  
3 acre in urban growth areas. *Benaroya, v. City of Redmond*, CPSGMHB Case No. 95-3-  
4 0072c (Final Decision and Order, March 25, 1996). This Board has also recognized that  
5 environmental factors may play a part in determining appropriate urban densities.  
6  
7 *Berschauer v. Tumwater*, WWGMHB Case No. 94-2-0002 (Compliance Order, December,  
8 17, 1994). Most recently, we held that environmental factors may be a basis for allowing  
9 residential densities of 3.5 dwelling units per acre in a non-municipal UGA. *Irondale*  
10 *Community Action Neighbors and Dorgan v. Jefferson County*, WWGMHB Case No. 04-2-  
11 022 (Final Decision and Order, May 31, 2005) and *Irondale Community Action Neighbors v.*  
12 *Jefferson County*, WWGMHB Case No. 03-2-0010 (Compliance Order, May 31, 2005).  
13

14  
15 The principle of 4 dwelling units per acre for urban growth is not to be seen as an inflexible  
16 requirement but as a general rule of thumb. Where there are reasons to deviate from it, the  
17 County's record should show what they are. Here, the County's plan demonstrates that the  
18 Lake Whatcom Watershed requires special treatment due to its importance as a source of  
19 water for the county overall. CP 2-83 – 87. The comprehensive plan also sets out policies  
20 to reduce densities as well as to adopt best management practices to preserve the  
21 resource. Policies 2PP-5, 2PP-6, 2PP-7, and 2PP-8. These provide a rationale for the UR3  
22 zone in the Lake Whatcom Watershed and are compliant with RCW 36.70A.110.  
23

24 Futurewise concedes that the Lake Whatcom Watershed is an environmentally sensitive  
25 area. Pre-Hearing Reply Brief of Futurewise at 9.  
26

27 The County also points to the use of the UR3 zone in the area south of the Bellingham  
28 International Airport. Brief of Respondent at 12. The purpose of the UR3 zone in that area  
29 is to discourage incompatible land uses around public use airports as required by CP Policy  
30 2D-7:  
31

32 Incompatible uses will be discouraged adjacent to general aviation airports to  
preserve the safety and efficient use of these airports.

1 Policy 2D-7 (in part); See also Exhibit 6, Urban Fringe Land Use Subarea Plan, pp. 38-40,  
2 Map 2 (Airport/Marine Drive Mixed Use).

3  
4 Futurewise concedes that “a small area directly to the south of the Bellingham Airport may  
5 be maintained at 3 du/acre.” Pre-Hearing Brief of Futurewise at 10. The County has done  
6 the analysis of the hazards in the area of the airport and the burden is on Futurewise to  
7 show that the County’s analysis is clearly erroneous. Futurewise has not met this burden  
8 and we find that the UR3 zone shown on Map 2 of Exhibit 6 complies with RCW  
9 36.70A.110, RCW 36.70A.020(1), RCW 36.70A.020(2), and RCW 36.70A.130.  
10

11  
12 The remaining areas of UR3 zone shown on Exhibit 5, Whatcom County Title 20 Zoning  
13 and Comprehensive Plan Designations, which do not fall within the Lake Whatcom  
14 Watershed or the Airport/Marine Drive Mixed Use areas, allow residential densities in the  
15 urban area that are not urban, that is, at least 4 dwelling units per acre. The prospect that  
16 final platting decisions might actually achieve greater densities does not alter the fact that  
17 the zone itself allows less than urban densities in urban areas. This fails to comply with  
18 RCW36.70A.110 and the failure to update the plan and development regulations fails to  
19 comply with RCW 36.70A.130.  
20

21  
22 **Conclusion:** The UR3 zone in the Lake Whatcom Watershed complies with RCW  
23 36.70A.110 because the County’s decision to allow lesser-than-urban densities in that  
24 location is based on the environmental sensitivity of the watershed. The UR3 zone shown  
25 on Map 2: Airport/Marine Drive Mixed Use in Exhibit 6 complies with RCW 36.70A.110  
26 because Futurewise has failed to show that the County’s analysis of the need for lesser  
27 densities in this area in proximity to a general aviation airport was clearly erroneous.  
28 However, the UR3 zone in all other urban areas fails to achieve urban residential densities  
29 without analysis or rationale and thus fails to comply with RCW 36.70A.110.  
30  
31  
32

1 D. Population Allocation Analysis

2  
3 ***Issue No. 5: Does the County's failure to include in its major update review and***  
4 ***revision, an analysis of its urban growth areas and the population allocated to the***  
5 ***county from the most recent ten-year population forecast by the office of financial***  
6 ***management fail to comply with RCW 36.70A.130(1)(a).***

7 **Positions of the Parties**

8 Futurewise argues that the County has failed to conduct an analysis of the population  
9 allocated to the County from the most recent ten-year population forecast by the Office of  
10 Financial Management (OFM) as required by RCW 36.70A.130(1)(a). Pre-Hearing Brief of  
11 Futurewise at 24-26. The County responds that it did do the required analysis and points to  
12 Exhibit 7 and Exhibit 8 as evidence of that fact.  
13

14  
15 **Board Discussion**

16 Exhibit 7 is a report done for the County by ECONorthwest in May 2002, entitled "Whatcom  
17 County Population and Economic Forecasts." This analysis included "recently adjusted  
18 OFM annual population estimates as the best indicator of annual changes in population in  
19 each study area." Ex. 7 at 3-2.  
20

21  
22 The comprehensive plan was then amended to reflect population allocation figures within  
23 the range provided by OFM. Ex. 8. This included consideration of the OFM population  
24 projections for Whatcom County and selection of a 2022 population projection figure within  
25 OFM's range. CP 1-9.  
26

27  
28 Clearly, the County performed an analysis of the population allocated to it by OFM.  
29 Futurewise has failed to show why this analysis does not comply with the requirements of  
30 RCW 36.70A.130(1)(a).  
31  
32

1 **Conclusion:** The County conducted an analysis of its OFM population allocation that  
2 complies with RCW 36.70A.130(1)(a).  
3

4 E. Request for a Finding of Invalidity  
5

6 **Issue No. 6: Does the continued validity of the violations of RCW Title 36.70A (The**  
7 **Growth Management Act), described in numbers 1 through 5 above, substantially**  
8 **interfere with the fulfillment of the goals of the Growth Management Act such that the**  
9 **enactments at issue should be held invalid pursuant to RCW 36.70A.302?**

10 **Positions of the Parties**

11 Futurewise requests that the Board enter a finding of invalidity on all the issues raised in this  
12 petition. Pre-Hearing Brief of Futurewise at 26-7. It argues that “the scope of these GMA  
13 violations justified this board finding that the County’s actions substantially interfere with the  
14 goals of the GMA.” *Ibid.*

15  
16  
17 The County responds that a finding of invalidity requires a showing of substantial  
18 interference with the goals of the GMA and that this is a higher burden than the clearly  
19 erroneous standard. Brief of Respondent at 14. The County argues that Futurewise has  
20 not met this greater burden. *Ibid.*  
21

22  
23 **Board Discussion**

24 A hearings board has the authority to impose a finding of invalidity upon those parts of a  
25 comprehensive plan or development regulations which it has found noncompliant if it finds  
26 that “the continued validity of part or parts of the plan or regulation would substantially  
27 interfere with the fulfillment of the goals of this chapter.” RCW 36.70A.302(1)(a) and (b).  
28 The board must then specify in the final order “the particular part or parts of the plan or  
29 regulation that are determined to be invalid and the reasons for their invalidity.” RCW  
30 36.70A.302(1)(c). A determination of invalidity has the effect of preventing the future  
31 vesting of most types of permit applications to the invalid comprehensive plan provisions  
32

1 and/or development regulations until the County adopts provisions which the board finds no  
2 longer substantially interfere with the goals of the GMA:

3       Except as otherwise provided in subsection (2) of this section and (b) of this  
4 subsection, a development permit application not vested under state or local law  
5 before receipt of the board's order by the county or city vests to the local ordinance or  
6 resolution that is determined by the board not to substantially interfere with the  
7 fulfillment of the goals of this chapter.

8 RCW 36.70A.302(3)(a).

9 The vesting doctrine is the legal principle which reaches Intervenor's concerns for certainty  
10 in planning for the use of private property. Changes in law do not affect applications that  
11 have already vested:  
12

13       The purpose of vesting is to provide a measure of certainty to developers, and to  
14 protect their expectation against fluctuating land use policy.

15 *Friends of the Law v. King County*, 123 Wn.2d 518, 520, 821 P.2d 539(1992)

16 Land use plans and regulations reflect policy concerns about the public good and are  
17 subject to revision and amendment as those concerns may also change. The reasonable  
18 property owner must expect changes to occur over the long term but can rely upon the laws  
19 in existence at the time of submission of a completed permit application if that permit  
20 application has vested. See *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d  
21 1379(1997).  
22

23  
24 A determination of "substantial interference with the goals of the [GMA]" requires a finding  
25 that continued application of the noncompliant provisions of the plan or development  
26 regulations would jeopardize fulfillment of one or more of the goals set out in RCW  
27 36.70A.020. When there is a reasonable risk that the continued validity of comprehensive  
28 plan provisions and/or development regulations that the Board has found noncompliant will  
29 make it difficult for the county or city to engage in proper planning within those goals, we  
30 have made a determination of invalidity. See *Vinatieri v. Lewis County*, WWGMHB Case  
31  
32

1 No. 03-2-0020c and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB  
2 Case No. 04-2-0011, as examples.

3  
4 Here, we have not been presented with evidence that permit applications will vest to such a  
5 degree that the County's work on remand to establish appropriate LAMIRDs and rural  
6 densities will be jeopardized. If such evidence is presented to the Board during the  
7 compliance period, the Board will schedule a compliance hearing to determine whether  
8 invalidity should be imposed. At this time, however, the Board declines to enter a  
9 determination of invalidity as to any of the plan provisions and development regulations that  
10 we have found noncompliant.  
11

#### 12 13 14 **VI. FINDINGS OF FACT**

- 15 1. Whatcom County is a county located west of the crest of the Cascade Mountains that  
16 is required to plan pursuant to RCW 36.70A.040.
- 17 2. Futurewise is a Washington nonprofit corporation.
- 18 3. The petition for review was filed in this case on March 25, 2005 and challenges  
19 Whatcom County Resolution No. 2005-006 and the ordinances adopted through it.  
20 (Ordinance 2005-03 – 2005-024 and Ordinances 2004-17 and 2003-17.)  
21
- 22 4. Resolution No. 2005-006 was adopted on January 25, 2005.
- 23 5. Futurewise participated orally and in writing in the adoption process for Resolution  
24 No. 2005-006 on the matters raised in this petition for review.
- 25 6. In 2004, Futurewise<sup>10</sup> appealed the adoption of Whatcom County Ordinance 2004-  
26 017 to this Board. *1000 Friends of Washington and Pro-Whatcom v. Whatcom*  
27 *County*, WWGMHB Case No. 04-2-0010. The Board dismissed the Futurewise  
28 appeal because Ordinance 2004-017 did not contain the required finding that a  
29 review and evaluation had occurred for purposes of RCW 36.70A.130(1) and the  
30

31  
32 

---

<sup>10</sup> 1000 Friends of Washington had changed its name to "Futurewise" at the time that the petition for review was filed in this case.

1 County still had until December 2004 to complete its update pursuant to RCW  
2 36.70A.130(4).

3 7. The resolution recites that it is the update required by RCW 36.70A.130(1) and (4).  
4 Resolution 2005-006, Finding 1.

5 8. Policies 2GG-3, 2HH-3, 2JJ-5, 2LL-4, and 2NN-7 are part of the plan's overall  
6 approach to its proto-LAMIRDs: even though not presently designated according to  
7 the statutory LAMIRD criteria, the proto-LAMIRDs will conform to RCW  
8 36.70A.070(5) in the event that future expansion is considered.

9 9. The named policies provide that expansion of existing proto-LAMIRDs could only  
10 occur within logical outer boundaries established in compliance with RCW  
11 36.70A.070(5).

12 10. Policy 2GG-2 allows more intensive areas of rural development with "approximate"  
13 boundaries, drawn based on "existing development" which is not restricted to the built  
14 environment as of July 1990. Further, it allows a proto-LAMIRD to be based on  
15 logical extensions of present service areas, a criteria that exceeds the limitations of  
16 RCW 36.70A.070(5)(d); it does not minimize and contain intensive rural development  
17 but allows it to extend as far as service areas "logically" permit thereby allowing a  
18 new pattern of low-density sprawl.

19 11. The Whatcom County Comprehensive Plan establishes five designations that allow  
20 more intensive development in the rural area: small towns and crossroads  
21 communities, crossroads commercial, resort and recreational subdivisions, suburban  
22 enclaves, and transportation corridors.

23 12. The "descriptors" in the comprehensive plan address each proto-LAMIRD  
24 designation and give the general criteria for establishing them. CP 2-89. The  
25 descriptors make it clear that these are all rural designations of higher than rural  
26  
27  
28  
29  
30  
31  
32

1 densities and intensities of use; they are not linked to the LAMIRD criteria of the  
2 GMA.<sup>11</sup>

3 13. Small towns are defined as “small communities with mixed tourist commercial,  
4 residential, resort, or public land uses.” The purpose of the small town designation is  
5 “to acknowledge locations remote from urban centers that support the local economy  
6 by providing goods and services to residents and tourists.”  
7

8 14. The criteria for the small town designation allow development (other than industrial  
9 development) that is not designed principally to serve the existing and projected rural  
10 population and allow the designation of areas that may not have been developed in  
11 1990 rather requiring a determination of the built environment as of July 1990 in  
12 drawing logical outer boundaries for the “small town” designation.

13 15. “Crossroads commercial” designation areas have the purpose of providing  
14 “commonly desired goods and services near unincorporated or small population  
15 centers.” The criteria for a crossroads commercial designation require that they be  
16 “central to rural populations; commercial areas should be located near arterial routes  
17 and fulfill a need for goods and services in that area.”  
18

19 16. The crossroads commercial designation fails to contain a limitation on the size of the  
20 areas so designated based on the built environment in July 1990.

21 17. The “resort and recreational subdivisions” designation: “Recognize the existing  
22 mixture of recreational and residential development of resort and recreational  
23 subdivisions and ensure that future growth can be serviced appropriately.”  
24

25 18. The “resort and recreational subdivision” designation does not establish a logical  
26 outer boundary and is further established expressly for the purpose of future growth.  
27

28  
29 <sup>11</sup> From the descriptions provided, all of the proto-LAMIRD designations established in the plan contain uses  
30 that are not allowed in either type (d)(ii) or (d)(iii) LAMIRDs and so are most likely to fall within the rubric of  
31 type (d)(i) LAMIRDs if the County chooses to consider them for designation as LAMIRDs. RCW  
32 36.70A.070(5)(d). Type (d)(i) LAMIRDs are subject to the logical outer boundary provisions of RCW  
36.70A.070(5)(d)(iv) and must be based upon the built environment as of July 1990. *Panesko v. Lewis  
County*, WWGMHB Case No. 00-2-0031c (Final Decision and Order, March 5, 2001).

- 1 19. The suburban enclave designation criteria state: “The suburban enclaves are  
2 comprised of rural residential areas that are not urban or likely to develop into urban  
3 areas during the planning period.” The suburban enclave designation is for “[a]reas  
4 characterized by development at densities averaging one unit per acre and served or  
5 partially served by public roads, sewer or water, or other public services or facilities.”  
6
- 7 20. There is nothing in this descriptor to limit the size of a suburban enclave and to  
8 provide that the infill only develops in areas that contain and minimize it, and as a  
9 result it allows more intensive rural development beyond the limitations of RCW  
10 36.70A.070(5)(d)(iv).
- 11 21. The transportation corridor descriptor provides that it is “designed to alert the  
12 community to proposed transportation corridor related expansion and to guide  
13 developments accordingly.” CP 2-91. The locational criteria provide that the  
14 transportation corridors shall be in areas “characterized by existing transportation-  
15 related development.”  
16
- 17 22. The descriptor establishing the criteria for transportation corridors fails to limit such  
18 development to areas where there was a built environment in July 1990 and to create  
19 logical outer boundaries to contain and minimize development within the designated  
20 areas. The transportation corridor designation, notably the Guide Meridian, is  
21 designed to be expanded and thus encourages, rather than prevents, low-density  
22 sprawl.  
23
- 24 23. Map Number 8: Comprehensive Plan Designations shows the boundaries of the  
25 small towns, crossroads commercial, suburban enclave, resort and recreational  
26 subdivision, and transportation corridor designations that have been designated in  
27 Whatcom County.  
28
- 29 24. The County has not designated LAMIRDs according to the statutory criteria. The  
30 County’s record does not demonstrate the choices that were made to map the areas  
31 of more intensive rural development in accordance with the statutory criteria. The  
32 Board cannot review (for compliance with the GMA) decisions which have not yet

- 1           been made by the County Council regarding where to place logical outer boundaries  
2           and how to contain and minimize intensive rural development.
- 3   25.   The County code and maps contain rural zones that exceed rural densities: RR1  
4           zone (1 dwelling unit per acre); RR2 zone (2 dwelling units per acre); RR3 zone (3  
5           dwelling units per acre); EI zone (3 dwelling units per acre); R2A zone (1 dwelling  
6           unit per 2 acres); and RRI zone (1 dwelling unit per 3 acres).
- 7
- 8   26.   Densities that are not urban but are greater than one dwelling unit per five acres  
9           generally promote sprawl.
- 10   27.   Unless in limited areas meeting the statutory LAMIRD criteria, zoning designations  
11           for rural residential densities that are more intensive than one dwelling unit per acre  
12           are not residential densities.
- 13
- 14   28.   The UR3 zone allows 3 dwelling units per acre in the urban areas.
- 15   29.   The Lake Whatcom Watershed requires special treatment due to its importance as a  
16           source of water for the county overall. The Lake Whatcom Watershed is an  
17           environmentally sensitive area. Allowing less than 4 dwelling units per acre in this  
18           environmentally sensitive area falls within the requirements for urban densities for  
19           urban areas of RCW 36.70A.110.
- 20   30.   The purpose of the UR3 zone in the area south of the Bellingham International  
21           Airport area is to discourage incompatible land uses around general aviation airports  
22           as required by CP Policy 2D-7:
- 23                           Incompatible uses will be discouraged adjacent to general aviation  
24                           airports to preserve the safety and efficient use of these airports.
- 25
- 26   31.   The UR3 zone shown on Map 2: Airport/Marine Drive Mixed Use in Exhibit 6 falls  
27           within the County's policy to discourage incompatible land uses around general  
28           aviation airports by decreasing allowable residential densities in that area.
- 29
- 30   32.   The UR3 zone in urban areas other than the Lake Whatcom Watershed and the  
31           Airport/Marine Drive Mixed Use area fails to achieve urban residential densities  
32           without analysis or rationale.

- 1 33. Whatcom County has performed an analysis of the most recent population allocation  
2 to it by OFM. This included consideration of the OFM population projections for  
3 Whatcom County and selection of a 2022 population projection figure within OFM's  
4 range.  
5  
6 34. No evidence has been presented that permit applications will vest to such a degree  
7 that the County's work on remand to establish appropriate LAMIRDs and rural  
8 densities will be jeopardized.  
9

## 10 VII. CONCLUSIONS OF LAW

- 11 A. This Board has jurisdiction over the parties and subject matter of this case.  
12 B. Futurewise has standing to bring this petition for review.  
13 C. Futurewise timely filed its petition for review.  
14 D. The descriptors for small towns, crossroads commercial, resort and recreational  
15 subdivisions, suburban enclaves and transportation corridors in the comprehensive  
16 plan fail to comply with RCW 36.70A.070(5).  
17  
18 E. The failure to revise the descriptors for small towns, crossroads commercial, resort  
19 and recreational subdivisions, suburban enclaves and transportation corridors in  
20 Resolution 02005-006 so that they comply with RCW 36.70A.070(5) fails to comply  
21 with RCW 36.70A.130.  
22  
23 F. Policies 2GG-3, 2HH-3, 2JJ-5, 2LL-4, and 2NN-7 comply with RCW 36.70A.070(5).  
24 G. Policy 2GG-2 fails to comply with RCW 36.70A.070(5)(d) and the failure to revise it  
25 fails to comply with RCW 36.70A.130.  
26  
27 H. The designations for small towns, crossroads commercial, resort and recreational  
28 subdivisions, suburban enclaves and transportation corridors shown on Map 8:  
29 Comprehensive Plan designations fail to comply with RCW 36.70A.070(5)(d) and the  
30 failure to revise them fails to comply with RCW 36.70A.130.  
31  
32 I. Zoning designations RR1 zone (1 dwelling unit per acre); RR2 zone (2 dwelling units  
per acre); RR3 zone (3 dwelling units per acre); EI zone (3 dwelling units per acre);

1 R2A zone (1 dwelling unit per 2 acres); and RRI zone (1 dwelling unit per 3 acres) fail  
2 to comply with RCW 36.70A.070(5) and the failure to revise them fails to comply with  
3 RCW 36.70A.130.

4 J. The UR3 zone shown on Map 2: Airport/Marine Drive Mixed Use in Exhibit 6 and the  
5 UR3 zone in the Lake Whatcom Watershed comply with RCW 36.70A.110.

6 K. The UR3 zone in urban areas other than the Lake Whatcom Watershed and the  
7 Airport/Marine Drive Mixed Use area fails to comply with RCW 36.70A.110 and the  
8 failure to revise this zone fails to comply with RCW 36.70A.130.

9 L. Whatcom County's analysis of the most recent population allocation to it by OFM  
10 complies with RCW 36.70A.130(1).  
11  
12

13 **VIII. ORDER**

14 The County is ordered to achieve compliance with the Growth Management Act pursuant to  
15 this decision no later than February 14, 2006. The following schedule for compliance,  
16 briefing and hearing shall apply unless the County requests additional time due to the scope  
17 and complexity of its compliance efforts (RCW 36.70A.300(3)(b)) within 10 days of the date  
18 of this order:  
19  
20

21

22 Compliance Due	February 14, 2006.
23 Compliance Report (County to file and serve on all parties)	February 21, 2006.
24 Any Objections to a Finding of Compliance Due	March 14, 2006.
25 County's Response Due	April 5, 2006
26 Compliance Hearing (location to be determined)	April 12, 2006

27  
28

29 The Board incorporates its Order on Dispositive Motions, June 15, 2005, by reference in this  
30 final decision and order. As part of this final decision and order, the Order on Dispositive  
31 Motions shall also become a final order upon entry of this decision.  
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 date  
3 of mailing of this Order to file a petition for reconsideration. The original and three  
4 copies of a motion for reconsideration, together with any argument in support  
5 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the  
6 original and three copies of the motion for reconsideration directly to the Board, with  
7 a copy to all other parties of record. **Filing means actual receipt of the document at**  
8 **the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing  
9 of a motion for reconsideration is not a prerequisite for filing a petition for judicial  
10 review.

11 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the  
12 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
13 judicial review may be instituted by filing a petition in superior court according to the  
14 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil  
15 Enforcement. The petition for judicial review of this Order shall be filed with the  
16 appropriate court and served on the Board, the Office of the Attorney General, and all  
17 parties within thirty days after service of the final order, as provided in RCW  
18 34.05.542. Service on the Board may be accomplished in person or by mail, but  
19 service on the Board means **actual receipt of the document at the Board office** within  
20 thirty days after service of the final order. A petition for judicial review may not be  
21 served on the Board by fax or by electronic mail.

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

24 Entered this 20<sup>th</sup> day of September 2005.

25 \_\_\_\_\_  
Margery Hite, Board Member

26 \_\_\_\_\_  
Holly Gadbow, Board Member

27 \_\_\_\_\_  
Gayle Rothrock, Board Member