BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

BAYFIELD RESOURCE COMPANY and FUTUREWISE, Petitioners, v. THURSTON COUNTY, Respondent	Case No. 07-2-0017c **FINAL DECISION AND ORDER**

I. SYNOPSIS

In this decision we find that Petitioners have not carried their burden of proof to demonstrate that Thurston County violated the Growth Management Act in adopting Ordinance No. 13884 and Resolution No. 13885.

The Board finds that with regard to the public participation challenges raised by Bayfield Resources (Bayfield) the final version of the adopted ordinance and resolution were within the range of alternatives presented to the public and available for comment prior to adoption. The fact that the County selected from this range of alternatives did not deprive the public of a meaningful opportunity to comment on the elements that were present in the final enactment.

With regard to the County's Innovative Technique and the rural element of the Comprehensive Plan, the County has met the written record requirement of RCW 36.70A.070(5)(a) within its Comprehensive Plan.

Bayfield has not established the arbitrary or discriminatory nature of the County's Critical Areas Innovative Technique or otherwise proven a violation of Goal 6 of the GMA.

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With regard to the issue raised by Futurewise, concerning whether the County provided a variety of rural densities, we previously held that issue was not properly before the Board in the present appeal.

Finding the County in compliance with the Growth Management Act, the Board denies the appeal.

II. PROCEDURAL HISTORY

On October 18, 2007, the Western Washington Growth Management Hearings Board (the Board) received a Petition for Review (PFR) from Futurewise (Futurewise). The matter was assigned Case No. 07-2-0016. With this PFR, Futurewise challenges Thurston County's (the County) adoption of Ordinance No. 13884, which amended certain provisions of the County's Development Regulations, and Resolution No. 13885, which amended certain goals and policies of the County's Comprehensive Plan. On October 23, 2007, the Board received a PFR from Bayfield Resources Company. The matter was assigned Case No. 07-2-0017. This PFR challenges the same legislative enactments objected to by Futurewise.

On October 26, 2007, because both PFRs challenged the same enactment, the Board issued its Order of Consolidation and Notice of Hearing and Preliminary Schedule consolidating the two PFRs into a single case, Consolidated Case No. 07-2-0017c.

On November 14, 2007, the Board received Futurewise's First Amended PFR (Amended PFR), adding the Adams Cove Group as a party to this matter.

On November 19, 2007, the Board received the County's Index of Record and Certification (Index).

On December 3, 2007, the Board issued its Prehearing Order in this matter which finalized the case schedule and the legal issues for this matter. Also on December 3, the Board received Bayfield's Additions to the Record with ten attachments. (Bayfield Supplement).

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On December 10, 2007, the Board received the County's Motion to Dismiss Futurewise's PFR. Futurewise's response to this motion was received on December 17, 2007. A telephonic motions hearing was held on January 10, 2008 and on January 17, 2008, the Board issued an Order on the County's Motion. In that Order, the Board denied the motion but stated the that scope of review in this appeal in regard to Futurewise was limited to the issue of whether the County's amendments complied with the GMA, presuming an underlying compliant comprehensive plan; rather than whether the comprehensive plan as amended complies with the GMA. Order on Motions, at 8.

During January and February 2008, the parties filed timely prehearing briefing, noted as follows and as used throughout this Order:

- Futurewise's Hearing on the Merits Brief (Futurewise HOM Brief) and a Motion to Supplement the Record (Futurewise Supplement). Thirteen exhibits were attached to this briefing.
- Bayfield's Prehearing Brief (Bayfield HOM Brief). Fourteen exhibits were attached to this briefing.
- Thurston County's Request for Permission to File Motion and Motion to Strike (Motion to Strike).
- Thurston County's Prehearing Brief (County Response). Thirty-six exhibits were attached to this briefing.
- Futurewise's Hearing on the Merits Reply Brief (Futurewise Reply).
- Bayfield's Prehearing Reply Brief (Bayfield Reply).

The Hearing on the Merits for this case was heard on February 28, 2008 at the Board Offices in Olympia, Washington. Petitioner Bayfield was represented by Eric Laschever and Jason Morgan. Petitioner Futurewise was represented by Keith Skully. Thurston County was represented by Jeff Fancher. Board members Holly Gadbaw and James McNamara

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attended, with Board Member Margery Hite presiding.[1] Margery Hite has since resigned from the Board. James McNamara is now this case's presiding officer.

III. PRELIMINARY MATTERS

Addition to and Supplementation of the Record

On December 3, 2007, Bayfield filed Additions to the Record, seeking admission of ten attachments.[2] The proposed additions include Public Comment Binders, Minutes of Proceedings before the County's Board of County Commissioners (BOCC), and correspondence from Bayfield to the BOCC.

As noted in the Procedural Background *supra,* on January 25, 2008, Futurewise filed a Motion to Supplement the Record. With this motion, Futurewise seeks admission of a letter to the County BOCC dated July 2, 2007 and several attachments.[3] Futurewise asserts that the correspondence was provided to the BOCC and should have been included within the Record for this matter.[4] In addition, Futurewise contends the attachments represent documents already contained in the Record developed by the County and that these documents will be of substantial assistance to the Board because this information, including information on critical areas, water quality, and construction trends, was before the BOCC during its deliberations.[5]

As for all of these documents, the Board questions why they were not included within the County's Index of the Record since they plainly concern the challenged actions. Bayfield seeks addition of three Public Comment Binders, correspondence from itself to the County, and minutes of proceedings before the BOCC – all dated from June 2006 to August 2007 –

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[1] Board Member Hite was designated as the Presiding Officer in this consolidated matter. On February 14, 2008, Board Member Hite notified the parties that she would be leaving the Board as of March 1, 2008, and Board Member McNamara would replace her as Presiding Officer. Although Board Member Hite presided at the HOM, she has not signed this Final Decision and Order.
[2] Bayfield Supplement, at 1-2
[3] Motion to Supplement, at 1-2.
[4] *Id.* at 2.
[5] *Id.* at 2-3.

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prior to the adoption of Ordinance 13884 and Resolution 13885. Futurewise seeks addition of correspondence from itself to the County with contained attachments of a report already contained within the Record.

Although the Board accepts the contents of the County's Index as a good faith effort to document the record of the proceedings and the materials used in taking the action, as Futurewise correctly noted, the Index is to "contain *all* materials … used in the development of the action being challenged."[6] From the date and context of the proposed exhibits, the Board concludes that this information was before the County and therefore should have been included within its Index. The County did not provide any basis for this Board to presume otherwise. Therefore, **the Board grants the Bayfield Supplement and the Futurewise Supplement. The documents will be referenced as proposed in the parties' motions with Bayfield's additions being Index Nos. 177 to 186 and Futurewise' addition being Index No. 187.**

Motion to Strike

Just prior to filing its Response Brief, the County filed two motions – one seeking permission to file a motion and the second moving to strike Futurewise HOM brief in its entirety (collectively, Motion to Strike).[7] Motion to Strike, at 1. The basis for the Motion to Strike was the Board's January 17, 2008 Order on Motion to Dismiss which the County contends limited the scope of Futurewise's briefing to whether the change made complies with the GMA and not to whether the underlying Comprehensive Plan was compliant as to the requirement for a variety of rural densities.[8] **The resolution of the County's Motion to Strike will be addressed *infra*, with the discussion of Futurewise Legal Issue 1 at Section VI(E).**

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[6] Motion to Supplement, at 2 (citing to *Reading v. Thurston County,* WWGMHB Case No. 94-2-0019, FDO at 4 (March 23, 1995)).
[7] At the HOM, Presiding Officer Hite orally granted the County's Motion for Permission.
[8] *Id.,* at 1-2.

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IV. BURDEN OF PROOF

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

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

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

RCW 36.70A.320(1).

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

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

RCW 36.70A.320(3)

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

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

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

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> circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201 (in part).

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

V. ISSUES PRESENTED

Bayfield Resources Company:

1. Did the County fail to comply with GMA Planning Goal 6 (RCW 36.70A.020(6)) and RCW 36.70A.070(5) by adopting "innovative techniques" intended to provide a variety of rural densities based solely on the presence of critical areas?
2. Did the County fail to comply with GMA Planning Goal 6 (RCW 36.70A.020(6)) by arbitrarily applying the critical area based "innovative techniques" only on lands zoned 1 dwelling unit per 5 acres?
3. Did the County fail to comply with RCW 36.70A.070 by failing to explain in writing how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of chapter 36.70A RCW?
4. Did the County fail to comply with RCW 36.70A.070 by adopting "innovative techniques" intended to provide a variety of rural densities which fail to protect or otherwise respond to rural character, fail to prevent the inappropriate conversion of undeveloped land, or are otherwise arbitrary, unreasonable and contrary to the GMA?
5. Did the County fail to comply with GMA Planning Goal 11 (RCW 36.70A.020(11)) or the public participation requirements of RCW 36.70A.035 and .140, by adopting a version of the Rural Rezone Amendments that was never produced or circulated for public comment, and which was only reduced to writing one business day prior to adoption?
6. Did the County fail to comply with the GMA Planning Goal 11(RCW 36.70A.020(11)) or the public participation requirements of RCW 36.70A.140, by

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limiting citizen access to the legislative process and by deciding important issues off the record, for the Rural Rezone Amendments to the Comprehensive Plan?

7. Does the County's lack of compliance with the GMA, as addressed in issues 1-6 warrant a determination of invalidity under RCW 36.70A.302 and WAC 242-02-831(2), with respect to all or part of the Rural Rezone Amendments?

Futurewise:

1. Does the adoption of Ordinance 13884 and Resolution 13885 fail to provide for a variety of rural densities by failing to designate sufficient lands at densities of less than 1 dwelling unit per 5 acres in the locations and quantities required by RCW 36.70A.020 (2, 8-10), 36.70A.040, 36.70A, and 36.70A130?

VI. DISCUSSION

On August 20, 2007, the County adopted Ordinance No. 13884, with the stated intent of providing for a greater variety of rural densities by adding three new County Code Chapters – Rural One Dwelling Unit Per 20 Acres (R-1/20), Rural One Dwelling Unit Per 10 acres (R-1/10), and Urban Reserve One Dwelling Unit Per Five Acres (UR-1/5) - and amending various sections of the County's development regulations including Section 17.15.335 of the County's critical areas ordinance.[9] In addition, the County also adopted Resolution No. 13885, amending the Thurston County Comprehensive Plan to add these new land use designations and revise related policies.[10]

Bayfield challenges the County's adoption of a Critical Areas Innovative Technique (CAIT) both in substance and in process. The CAIT was codified in TCC 17.15.335 which established the method for calculating residential density. With the adoption of Ordinance No. 13884, the County amended its methodology to provide that properties zoned Rural Residential Resource One Dwelling Unit Per Five Acres (RRR 1/5) and Rural Residential One Dwelling Unit Per Five Acres (RR 1/5) shall have the maximum number of dwelling

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[9] Index of the Record (IR) 109. Ordinance 13884 also amended various sections of the County's Zoning Code – TCC Title 20 – and the Official Zoning Map.

[10] IR 107

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units determined by subtracting from the parcel area documented critical areas, including wetlands, landslide hazard areas, and high groundwater hazard areas but not buffers for these types of areas, with the zoning density applied to the remainder of the parcel. Bayfield contends that the County failed to provide adequate public participation, protect private property rights, and comply with the requirements for the Rural Element as set forth in the GMA.

Futurewise challenges the County's action in regard to the adoption of three new comprehensive land use designations – R-1/20, R-1/10, and UR-1/5 – and the amendment of the County's Future Land Use Map and Zoning Map to reflect these new designations. The basis of Futurewise's challenge is in the GMA's requirement to provide for a variety of densities within the rural area.

A. Public Participation Challenges (Bayfield Legal Issues 5 and 6)

Issue No. 5: Did the County fail to comply with GMA Planning Goal 11 (RCW 36.70A.020(11)) or the public participation requirements of RCW 36.70A.035 and .140, by adopting a version of the Rural Rezone Amendments that was never produced or circulated for public comment, and which was only reduced to writing one business day prior to adoption?

Issue No. 6: Did the County fail to comply with the GMA Planning Goal 11(RCW 36.70A.020(11)) or the public participation requirements of RCW 36.70A.140, by limiting citizen access to the legislative process and by deciding important issues off the record, for the Rural Rezone Amendments to the Comprehensive Plan?

Positions of the Parties

Bayfield argues that the County failed to allow for the public to review and comment the Critical Areas Innovative Techniques (CAIT) after subsequent and significant changes had been made to the Planning Commission's proposal, with the BOCC making changes after the close of public comment on July 2, 2007.[11] The new proposal, Bayfield alleges, was effectively an entirely new proposal comprised of a different zoning map, different

[11] Bayfield HOM Brief at 16.

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development regulations, and different amendments to the comprehensive plan.[12] Bayfield contends that RCW 36.70A.035(2)(a) requires that these new changes warranted additional public comment and the County's failure to provide such an opportunity violated the GMA.[13]

Bayfield further argues that the BOCC unreasonably limited access to the County's legislative process by limiting oral testimony to three minutes and written comments in response to the original three proposals in July 2007.[14] Bayfield asserts "[T]he BOCC may have allowed 'early' participation, but it certainly did not allow 'continuous' participation."[15] Bayfield alleges that this failure violates RCW 36.70A.140 and 36.70A.020(11), the GMA's public participation goal.[16]

The County responds that it provided "amazing public involvement" and details multiple open houses, an online "virtual forum", four workshops, a public hearing before the Planning Commission, a public hearing before the County Commissioners, as well as "multiple public meetings and briefings."[17] According to the County, the draft made available to the public prior to the public hearing provided several variations of the CAIT, including the variation ultimately adopted by the County.[18] Furthermore, the County states written comments were accepted until the close of the public hearing, including a written comment by Bayfield.[19] Nothing in the GMA, argues the County, precludes extensive deliberations by the BOCC after the close of public comment.[20]

In reply, Bayfield concedes that the County did provide for "early" public participation but that the "continuous" nature of the participation was lacking, especially since the County

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[12] *Ibid.*
[13] *Ibid;* Bayfield cites to RCW 36.70A.020(2)(a), which does not exist. The Board presumes, based on their Issue Statement, Bayfield meant RCW 36.70A.035(2)(a).
[14] Bayfield HOM Brief at 18.
[15] *Ibid.*
[16] *Ibid*
[17] County Response Brief, at 22-23.
[18] *Ibid* at 23.
[19] *Ibid;* Exhibit JJ – Index to Record No. 179
[20] *Ibid* at 24.

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adopted the CAIT almost two months after the close of the public comment period.[21] Bayfield contends that the County did not choose one of the three proposals previously available for public comment, but that substantial changes were made warranting additional comment.[22]

Board Discussion

Applicable Law

RCW 36.70A.020(11) provides:

> Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

Further, RCW 36.70A.140 provides: (In relevant part, emphasis added)

> Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures *providing for early and continuous public participation* in the development and amendment of comprehensive land use plans and development regulations implementing such plans. …

In this case, Bayfield acknowledges that "the County expended significant effort in affording public participation during the *early* stages of the Rural Rezone project. The County's record of open houses, websites, and public hearings speaks for itself." (emphasis in the original)[23] Instead, Bayfield bases its claim of lack of public participation on the manner in which the final version adopted by the County was created. While noting that the public was presented with three stand alone options at the July 2, 2007 public hearing, Bayfield recognizes that "the final version adopted by the County was a compilation of the three, containing bits and pieces of all, and some new parts not included in any of the proposals." With the exception of the "new parts not included in any of the proposals", to be discussed below, it appears from the record that the range of alternatives from which the County

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[21] Bayfield Reply, at 12.
[22] *Ibid.*
[23] Ibid.

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selected the final version of Ordinance No. 13884 and Resolution No. 13885 were before the public during the County's extensive public participation process.

As the County points out, following this Board's decision of July 2005 regarding variety of rural densities under RCW 36.70A.070(5)(b), it took action to put into place a program to identify land for potential rezoning.[24] Among the criteria used for identifying lands to rezone were lands physically constrained or hazardous to develop, as well as lands of high habitat and/or environmental service value.[25] At this point, the County decided to forward all options for public review. Workshop groups prioritized lands for rural rezone; unbuildable lands consisting of unbuildable lands, hazardous lands, floodplains, riparian areas, wetlands, landslide areas, geologically sensitive areas and conservation areas being among the workshop participants' top priority for rezone. During two of the Planning Commission's public meetings, it discussed the idea of removing critical areas from density calculations.[26] Furthermore, the three variations of the innovative technique along with the rezone proposals were presented in the County's public outreach program prior to the Board of County Commissioners public hearing.[27] The rezoning amendments adopted by the County were made up of the variations presented to the public for review and comment at the open house and public hearing.

The record reflects that the County considered three "rural rezoning" proposals - the Majority Proposal, the Minority Proposal, and the Innovative Techniques Proposal.

With the Majority Proposal, certain lands would be rezoned (i.e. vulnerable aquifers, wellhead protection, sensitive wildlife habitat) from 1 du/5 acre to 1 du/10 acre and 1 du/20 acre. Land within a half mile of resource lands would be rezoned 1 du/10 acre but that the "preservation of rural character" alone would not justify a rezone. The total amount of land rezoned would be approximately 28 percent. There is no urban reserve zones, unbuildable

[24] IR 112.
[25] Ibid.
[26] IR 143; IR 145.
[27] IR 91; IR 100.

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lands are not included, and rural character and wildlife habitat lands are not rezoned unless they have specific characteristics (aquifer, 'at risk', etc). County Exhibit GG 100 (Purple, at 5 – Majority Proposal Key Characteristics); Exhibit GG 100 (Yellow – Majority Proposal); Bayfield Exhibit 1.

With the Minority Proposal, land would be rezoned based on the "top priorities" generated by the County's workshops which total approximately 40 percent. This proposal provides for urban reserves around cities, rezones unbuildable land, and rezones rural character/wildlife habitat lands as well as lands adjacent to resource lands to 1 du/20 acres. County Exhibit GG 100 (Purple, at 6 – Minority Proposal Key); Exhibit GG 100 (Green – Minority Proposal); Bayfield Exhibit 1.

The Innovative Techniques Proposal would not rezone land but exclude critical areas and, for some alternatives, their buffers, for the density calculation within the RRR 1/5 and RR 1/5 zoning district. County Exhibit GG 100 (Blue – Innovative Techniques); Bayfield Exhibit 1. Exhibit FF 99 addresses the different alternatives impacts in regard to the innovative technique proposal.

- Alternative 1: any acres encumbered by a critical area would be subtracted from the parcel acreage before calculating the allowed density.
- Alternative 2: any acres encumber by a critical area and half of their total buffer area would be subtracted from the parcel acreage before calculating the allowed density.
- Alternative 3: any acres encumbered by the critical area and their total buffer area would be subtracted from the parcel acreage before calculating the allowed density.

Bayfield contends that the resulting legislative action – the CAIT – was substantially different than any of the proposals presented for public review. Bayfield's allegation lies in the Innovative Technique Proposal – codified at TCC 17.15.335. The language adopted by the County with Ordinance 13884 essentially mirrors that provided in Exhibit GG 100 (Blue) but provides clear direction in regards to critical area buffers – by providing specific

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language that they are not to be included. On July 2, 2007, the final comment day, Bayfield submitted a letter to the County asserting the same issues it raises in its opening and Reply Brief – i.e. the CAIT "double penalizes" property owners; lowers density as opposed to increasing density; does not provide critical area protection which should be regulated under CAO; and limitation on testimony and direct access to County Commissioners unreasonable.

In light of the genesis of the final adopted version within the three variations earlier made available to the public, we do not find a public participation violation.

We note that RCW 36.70A.035 provides, in relevant part (emphasis added):

> (2)(a) *Except as otherwise provided in (b)* of this subsection, *if the legislative body for a county or city chooses to consider a change* to an amendment to a comprehensive plan or development regulation, and the change is proposed *after the opportunity for review and comment has passed* under the county's or city's procedures, *an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change*.
>
> (b) An additional opportunity for public review and comment is not required under (a) of this subsection if
> ***
> (ii) The proposed *change is within the scope of the alternatives* available for public comment; (emphasis added).
> ...

We find the CAIT adopted by the County was clearly within the scope of the previously discussed alternatives. These alternatives were available for discussion by the public during the County's public participation program. That the County selected from these alternatives in drafting the final enacted version did not deprive the public of a meaningful opportunity to comment.

As noted above, Bayfield also alleged that in addition to the provisions taken from the three proposals, the final version also included new parts not included in any of the proposals. In support of this point, it cites to a new amendment to the comprehensive plan RR5 and

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RRR5 provision that states "Innovative Techniques are used by the County to provide a variety of rural densities within this designation." Given the range of alternatives considered by the County, the addition of this language is not demonstrably outside the *"the scope of the alternatives available for public comment"* that it would require reopening the public participation process to consider this change.

With regard to Bayfield's argument that the County violated GMA goal 11 and RCW 36.70A.140 by "unreasonably limiting access to the County's legislative process" by allowing only three minutes of oral testimony and written submissions[28], Bayfield itself acknowledges that this Board has recognized that three minutes of testimony and written comments is sufficient access.[29] Instead, Bayfield argues that, under the facts of this case, the County violated its obligation to provide early and continuous public participation. Petitioner makes no allegation that the public was not given adequate opportunity to comment on the alternatives that ultimately comprised the final adopted version of the County's enactment. The record reflects that Bayfield was not limited in its submission of comments. Therefore, the Board concludes that under these facts Bayfield has not proven that the County violated GMA Goal 11 and RCW 36.70A.140 by "unreasonably limiting access to the County's legislative process".

Conclusion: Petitioners have not established that the County failed to comply with GMA Planning Goal 11 (RCW 36.70A.020(11)) or the notice and public participation requirements of RCW 36.70A.035 and .140 in its adoption of the Rural Rezone Amendments.

B. Critical Areas Innovative Technique and the Rural Element of the Comprehensive Plan (Bayfield Legal Issues 3 and 4)

[28] Bayfield's Prehearing Brief at 18.
[29] See, Achen v. Clark County, WWGMHB 95-2-0067, FDO, 9-20-95.

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Issue No. 3: Did the County fail to comply with RCW 36.70A.070 by failing to explain in writing how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of chapter 36.70A RCW?

Issue No. 4: Did the County fail to comply with RCW 36.70A.070 by adopting "innovative techniques" intended to provide a variety of rural densities which fail to protect or otherwise respond to rural character, fail to prevent the inappropriate conversion of undeveloped land, or are otherwise arbitrary, unreasonable and contrary to the GMA?

Positions of the Parties

Bayfield argues that the CAIT zoning technique creates neither appropriate rural densities nor densities consistent with rural character as required by RCW 36.70A.70.070(5).[30] Bayfield claims the Legislature intended that innovative zoning techniques are to create more density in the rural areas, not less density.[31]

Bayfield contends that the Legislature did not intend to permit the provision of appropriate rural densities solely on a single factor – presence of critical areas and a mathematical application – especially when those areas are protected elsewhere within the GMA.[32] Bayfield reiterates its assertion that this technique is not similar to those provided for in the GMA (i.e. clustering, density transfers, etc.) all of which encourage a kind of compact rural development while preserving rural character; rather what the CAIT does is reduce densities irrespective of other relevant characteristics of land or the surrounding area – it simply amounts to a "mechanical punitive technique."[33]

The County contends the CAIT does consider both rural character and appropriate rural density (citing to several Comprehensive Plan Policies), namely by providing less density around sensitive and hazardous lands while not amending allowed uses or impeding rural economics and by guiding development based on physical landscape.[34] As for

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[30] Bayfield HOM Brief at 8.
[31] *Ibid at 8-9*
[32] *Ibid* at 11.
[33] *Id.*
[34] County Response, at 14-15.

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"appropriate" rural density, the County argues the CAIT provides for densities less than one unit per five acres, which this Board determined to be the minimum appropriate rural density. The County also points out that the permitted density is evaluated by consideration of physical characteristics on a parcel-by-parcel basis thereby preventing an arbitrary application of the CAIT.[35] In addition, the County contends that Bayfield incorrectly states the GMA limits innovative techniques to those that result in compact rural development citing to conservation easements and density transfers as techniques that are intended not to permit compact development.[36]

In reply, Bayfield reiterates its argument in regards to the CAIT's random nature and its failure in regard to rural character and density.[37] Bayfield goes on to assert that the County's arguments that the CAIT is GMA-compliant is based on similar density reductions utilized within the UGA, citizen support, and post-hoc rationalization on the balancing of constituent concerns is simply irrelevant, unsupported, and not guided by RCW 36.70A.070(5) or 36.70A.011.[38] Bayfield goes on to argue that the GMA requires protection of critical areas based on best available science and not rural lands provisions so as to prevent restrictions on the use of property based on speculation and surmise. Bayfield maintains that CAIT inverts the process by protecting critical areas based on the Rural Element, which serves only to protect rural character and lifestyle, and the protection of critical areas is a function of RCW 36.70A.060 and .170.[39] Bayfield further asserts that innovative techniques are intended to allow greater rural density development and although some, such as conservation easements and density transfers, provide for less density that these methods do so without unnecessarily penalizing individual land owners.[40]

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[35] *Id.*
[36] *Ibid, at 16.*
[37] Bayfield Reply, at 2-3.
[38] *Id.* at 3-4.
[39] *Id.* at 5 (citing to *Wells v. Whatcom County,* WWGMHB Case No. 97-2-0030; *HEAL v. CPSGMHB,* 96 Wn. App. 522 (1999)).
[40] *Id. at 9*

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As to the GMA's requirement for a written record (RCW 36.70A.070(5)(a)), Bayfield argues the record is missing in regards to the CAIT and its impact on the actual pattern of development that will result or, how the CAIT harmonizes with the goals and requirements of the GMA.[41]

The County argues that the written record is only required when "a County is proposing a pattern of development that would not be considered rural, but is justified by local circumstances."[42] The County further contends that this Board has stated the required writing does not need to be a separate document but can be contained within the County's Comprehensive Plan and points to several provisions to demonstrate that this has been done.[43]

Bayfield asserts that the written record is required whenever a county modifies its Rural Element and that a post-hoc rationalization on how the CAIT "fits perfectly" with the County's Comprehensive Plan cure this failure.[44]

Board Discussion

Applicable Law

RCW 36.70A.070(5): (Emphasis added)

> Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:
>
> > (a) Growth Management Act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall *develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter*.

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[41] Bayfield HOM Brief, at 14.
[42] County Response, at 18 (citing to several Central Puget Sound Board cases)
[43] *Id.* at 19-22 (citing to *Friends of Skagit County v. Skagit County,* WWGMHB Case No. 99-2-0016, FDO (Sept. 7, 1999)
[44] Bayfield Reply, at 10-12.

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> (b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. *The rural element shall provide for a variety of rural densities*, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. *To achieve a variety of rural densities and uses*, counties *may provide* for clustering, density transfer, design guidelines, conservation easements, and *other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character*.

Discussion

1. The Written Record

As the parties correctly note, RCW 36.70A.070(5)(a) requires a written record explaining how the rural element harmonizes the planning goals in 36.70A.020 and meets the requirements of the GMA.

This Board has previously stated that a separate document is not required to satisfy the written record requirement. (*Vines v. Jefferson County, WWGMHB* Case No. 98-2-0018 (FDO, April 4, 1999) (holding that although a separate document or report which specifically addressed the issue would have clearly complied, given the limited scope of the challenge and the record, the County had not failed to comply by failing to provide a separate document). See also, *Woods v. Kittitas County,* 162 Wn.2d 597, 609 (2007) (Holding that the GMA recognizes that circumstances may vary by county and allows counties to *consider local circumstances when determining rural density and use patterns as long as they create a written record* explaining how the rural element harmonizes with the GMA planning goals) (Emphasis Added). In *Friends of Skagit v. Skagit County et al*, WWGMHB Case No. 99-2-0016 (FDO, September 7, 1999) we stated. "As we said in *Cotton v. Jefferson County*, #99-2-0017, it is not a requirement that the County develop a separate statement if its CP is clear in its description of how its amendments harmonize with the overall goals in Section 020."

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2. County's Definition of Rural Character

Here, the County's comprehensive plan provides the written record required by RCW 36.70A.070(5)(a).

Chapter 2 of the Thurston County Comprehensive Plan contains this explanation of the purpose of rural areas in the County:

> The purpose of rural areas as defined by the County in compliance with the GMA is:
>
> To support the rural aspects of Thurston County.
>
> To protect areas with environmental constraints and preserve and buffer natural resource areas of agriculture, forestry, aquaculture, mineral deposits and fish and wildlife habitats from encroachment by or irreversible conversion to more intense uses.
>
> To allow low intensity residential uses which do not require a high level of public services and facilities.

To protect "rural character" as defined in RCW 36.70A.030(14) as "the patterns of land use and development established by a county in the rural element of its comprehensive plan:

(a) In which open space, the natural landscape, and vegetation predominate over the built environment;

(b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;

(c) That provide visual landscapes that are traditionally found in rural areas and communities

(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;

(e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;

(f) That generally do not require the extension of urban governmental services; and

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(g) That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas."

Rural areas are characterized by a balance between the natural environment and human uses with low density residential dwellings, farms, forests, mining areas, outdoor recreation and other open space activities. Commercial uses will be small in scale and will provide convenience services to the rural neighborhood. Industrial uses will generally be those that are related to and dependent on natural resources such as agriculture, timber or minerals. Home-based occupations and industries will be allowed throughout the rural area provided they do not adversely affect the surrounding residential uses. Rural area residential densities will commonly be one dwelling unit or less per five acres. There may be areas with higher densities, some as high as two units per acre where there are existing clusters of half-acre lots or in higher density resort-residential areas adjacent to water bodies. Areas of four units per acre are located only in those locations where this density already exists. Specific densities for each area designated in the Comprehensive Plan are implemented through the County zoning ordinance and other development regulations, which must be consistent with this plan. Rural area lands are designated according to the land use guidelines above.[45]

Further, the plan in Chapter 2 describes the following goal, objective and policy for the rural areas:

GOAL 1: To provide for rural areas that:

- maintain a balance between human uses and the natural environment in order to protect rural character;

- maintain the land and water environments required by natural resource-based economic activities, fish and wildlife habitats, rural lifestyles, outdoor recreation, and other open space; and

- develop at low levels of intensity so that demands will not be created for high levels of public services and facilities.

OBJECTIVE A: **Rural Land Use and Activities -** County development requirements and programs provide for a balance between human uses and the natural environment in rural and resource areas, and for low levels of demand for public services and facilities.

POLICIES:

[45] Thurston County Plan, IR 100.

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1. Priority rural area land uses should be small scale farms, forestry and mining areas, outdoor recreation and other open space activities, scattered residences, and rural residential developments.

2. Residential development in rural areas should be provided on lands that can physically support it without requiring growth area service levels or impacting rural character. Densities should be low enough to discourage leapfrogging of growth area development, and not encroach on the natural environment or natural resource management.

Objective B and its related polices provides, in part:

> **OBJECTIVE B: Housing and Residential Densities in Rural Areas -** County requirements and programs for housing in rural areas should encourage residential development that is compatible with small scale farming, forestry, aquaculture, open space, outdoor recreation, rural service levels, and generally with the rural character where human use does not overbalance the natural environment.

POLICIES:

1. One dwelling unit per five acres should be the common, minimum residential density level in rural areas, except in areas already dominated by higher density development.

2. Thurston County should not expand or intensify rural residential land use designations or zoning districts with densities greater than 1 unit per 5 acres unless these areas are designated as a limited area of more intensive rural development (LAMIRD) as defined in the GMA.

We note that RCW 36.70A.070(5)(a) does not provide specific direction with regard the written record except to say that the County must explain "*how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter*." We find that the County has met that requirement.

Conclusion: The County has met the written record requirement of RCW 36.70A.070(5)(a) within its Comprehensive Plan.

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3. Variety of Rural Densities

With regard to Issue 4, the assertion that the County failed to comply with RCW 36.70A.070 by adopting "innovative techniques" intended to provide a variety of rural densities which fail to protect or otherwise respond to rural character, fail to prevent the inappropriate conversion of undeveloped land, or are otherwise arbitrary, unreasonable and contrary to the GMA, Bayfield's claim appears to lie in amendments to TCC 17.15.335(B) addressing the calculation of residential density for developments containing critical areas – which Bayfield terms the "critical areas innovative technique" (CAIT). Their argument rests on .335(B)(4)(a) which applies to RRR 1/5 and RR 1/5 zoning districts within unincorporated Thurston County and removes certain types of "documented" critical areas; shorelines up to the ordinary high water mark (streams, rivers, and marine); 100-year floodplains; and submerged land of lakes from the density calculation. Critical area buffers are not subtracted. In another words, density is calculated based on the "quasi-buildable" portion of the property.

For example, at its most simplistic application - a 20 acre parcel contains a delineated 3 acre wetland and a 1 acre buffer for that wetland. The site is zoned RR 1/5, allowing for 4 du/acre at a standard "gross acreage" density calculation. Under the new code provision, the "net acreage" is utilized for density and this figure is calculated by subtracting the 3 acre wetland from the total parcel acreage to arrive at 17 acres (20 – 3 = 17 acres). The RR 1/5 zoning permits 1 du per 5 acres so 3.4 du are permitted – which is rounded down to 3 units. Therefore application of the CAIT results in a loss of development potential of 1 unit.

Bayfield argues that the CAIT does not achieve a variety of rural densities that are both "appropriate and consistent" and is contrary to the Legislative intent for innovative techniques – that being a denser, more compact rural development – and reduces density irrespective of other relevant characteristics of the surrounding area or considering a balancing of components of the Rural Element. In reply, Bayfield moves away from this argument and points to the County's assertion that the CAIT is intended to provide

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protection to critical areas; a function that is for critical area regulations based on best available science (BAS) and not on rural land provisions.

As to the "appropriate and consistent" argument, Bayfield asserts that the mechanical application would result in a pattern of development that does not reflect appropriate rural densities or development that is consistent with rural character. Yet, Bayfield fails to assert just how a development regulation that results in lower density (3 dwelling units as opposed to 4) is not consistent with rural density or character. The fact that an area is zoned rural already denotes the rural character and a desire to maintain lower densities. Adjusting the number of units to achieve a density lower than that permitted by the underlying rural zoning would not, necessarily, create inappropriate or inconsistent rural development.

Bayfield's second argument stems from its interpretation of "innovative techniques," which limits those techniques that result in a denser rural development. However, GMA does not clearly support that interpretation. The various techniques listed in RCW 36.70A.070(5)(b) to achieve a variety of rural densities and uses may increase density (clustering) or reduce it (conservation easements). Some do not clearly increase or decrease density (eg. design guidelines).

Bayfield's third argument alleges that the County cannot protect critical areas using any type of regulation except for a critical areas regulation which has been based on BAS. Bayfield asserts that some type of lower rural development, such as raising cattle, actually impacts critical areas more than residential development. Bayfield alleges that the County misunderstands the GMA's division of responsibility, and that critical areas are protected under GMA via critical areas regulations, based on BAS.[46] We note that Bayfield has not raised the failure of the County to rely on BAS as an issue in this appeal and therefore will not consider whether the County's technique is supported by BAS. Critical areas must be protected with regulations that incorporate BAS. Here, the County has adopted a critical

[46] Bayfield's Prehearing Reply Brief at 5.

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areas ordinance as its primary means of protecting critical areas.[47] We do question, however, the underlying assumption that critical areas can *only* be protected via a jurisdiction's critical areas ordinance. No such provision is contained explicitly within the GMA, and Bayfield does not explain why an ordinance apart from a critical areas ordinance ought not to possess this secondary benefit.

We therefore conclude that Bayfield has not demonstrated that the County's innovative technique results in inappropriate rural densities and uses or that it will produce growth inconsistent with rural character.

Conclusion: Bayfield has failed to carry its burden of proof to demonstrate that the County's innovative technique results in inappropriate rural densities and uses or that it will produce growth inconsistent with rural character.

C. Critical Areas Innovative Technique and Property Rights (Bayfield Legal Issues 1 and 2)

Issue No. 1: Did the County fail to comply with GMA Planning Goal 6 (RCW 36.70A.020(6)) and RCW 36.70A.070(5) by adopting "innovative techniques" intended to provide a variety of rural densities based solely on the presence of critical areas?

Issue No. 2: Did the County fail to comply with GMA Planning Goal 6 (RCW 36.70A.020(6)) by arbitrarily applying the critical area based "innovative techniques" only on lands zoned 1 dwelling unit per 5 acres?

Positions of the Parties

Bayfield alleges that the critical area innovative technique does not protect property rights from arbitrary and discriminatory action.[48] Citing to this Board's decision in *Achen et al. v. Clark County*, WWGMHB Case No. 95-2-0067, Bayfield argues that the arbitrary nature of the CAIT is clearly demonstrated by the lack of support, explanation, discussion or reasoned consideration in the County's administrative record.[49] Further, Bayfield argues that the

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[47] Thurston County Code Chapter 17.15
[48] Bayfield HOM Brief, at 12.
[49] *Id.*

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County adopted the CAIT to achieve a variety of rural densities but that it fails to provide such a variety that is consistent with rural character, providing further evidence that the County's action lacked a reasoned justification.[50] Bayfield argues that the CAIT is discriminatory because its limited application to a single zoning district – one dwelling unit per five acres.[51]

The County contends that the GMA does not prioritize the goals and that all must be considered.[52] The County asserts it considered Goal 6 along with several other goals in addition to considering public comment and the buildable nature of critical areas, which resulted in a CAIT that would provide for open space, conserve wildlife habitat, and protect the environment.[53]

Bayfield asserts that the record is devoid of any evaluation of the "arbitrary double penalizing impact" of the CAIT which substantially burdens landowners based solely on speculative environmental benefits.[54] Bayfield further contends that any regulation must be roughly proportional to the burden imposed and the County must consider and justify the impact based on the other goals of the GMA.[55]

Board Discussion

Applicable Law

RCW 36.70A.020(6) provides:

> Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

RCW 36.70A.070(5) provides (Emphasis added):

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[50] *Ibid* at 13.
[51] *Ibid* at 14.
[52] County Response, at 17.
[53] *Ibid* at 17.
[54] Bayfield Reply, at 9-10.
[55] *Id.*

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> (b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties *may provide* for clustering, density transfer, design guidelines, conservation easements, and *other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character*.

Discussion

Bayfield raises issue only the second prong of 36.70A.020(6) – protection of property rights from arbitrary and discriminatory actions. The Board has previously stated that in order for petitioners to prevail in a challenge based on Goal 6, they must prove that the action taken by a local jurisdiction is *both* arbitrary *and* discriminatory; showing only one is insufficient to overcome the presumption of validity that is accorded to local jurisdictions by the GMA. Additionally, the Petitioner must show that the action has impacted a legally recognized right.[56]

The rights that Bayfield asserts that will be allegedly impacted by the CAIT would be the ability to "use or develop the critical areas or the associated buffers," "ability to subdivide," and a parcel's "development potential."[57] None of these are the types of rights for which the Legislature has intended to be protected under Goal 6. *See Achen,* WWGMHB Case No. 95-2-0067 (holding that the Legislature did not intend to protect unrecognized rights such as the right to subdivide or develop land for maximum personal financial gain but rather those which are legally recognized by statute, constitution, or court decision).

Even if Bayfield had provided a recognized property right, it must still show that the County's action was arbitrary and discriminatory. The Board has previously set forth the following definitions for these terms:

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[56] *Pt. Roberts Registered Voters Assoc. v. Whatcom County,* WWGMHB Case No. 00-2-0052 at 4 (FDO, April 6, 2001) (citing *Achen v. Clark County,* WWGMHB Case No. 95-2-0067 (FDO, Sept. 20, 1995)).
[57] Bayfield HOM, Exhibit 6 at 2 (IR 179); Exhibit 9 at 2 (IR179).

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Arbitrary: an ill-conceived, unreasoned, or ill-considered action

Discriminatory: to single out a particular person or class of persons for different treatment without a rational basis upon which to make the segregation[58]

Bayfield asserts that the arbitrary nature of the CAIT is demonstrated by the fact that the CAIT imposes an unjustified burden on landowners with no discernable benefit. [59]

Government action is not arbitrary unless it is completely baseless. *State v. Ford*, 100 Wn.2d 827, 830-31, 755 P.2d 806, 808 (1988) (holding an error in judgment is not arbitrary, the action essentially must be in disregard of the facts and circumstances involved). The County chose to apply a variation of the innovative technique that deducted the critical area but not the buffer as the other two variations required. In addition, the County took into consideration that the deducted portion was unbuildable land which a property owner would not have any reasonable expectation of developing. The County's approach provides additional open space and limits the amount of impervious surfaces surrounding sensitive areas, conserves wildlife habitat in the rural area and provides additional protection for the environment in the County's highest density rural district. With these considerations in mind, we do not conclude that, the County's action was baseless.

In determining if an action is discriminatory, the Board looks at the application of the regulation and whether it unduly burdens or unfairly impacts a single group without rationale. As we held in *Achen v. Clark County*[60], the "protection" prong of Goal 6 involves a requirement for protection of a legally recognized right of a landowner from being singled out for unreasoned and ill-conceived action. *Achen* further noted that "Such unrecognized "rights" as the right to divide portions of land for inheritance or financing, or "rights" involving local government never having the ability to change zoning, or "rights" to subdivide and develop land for maximum personal financial gain regardless of the cost to the general populace, are not included in the definition in this prong of Goal 6. Rather the "rights"

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[58] *Pt. Roberts,* at 4.
[59] Bayfield brief at 14.
[60] *Achen v. Clark County,* WWGMHB Case No. 95-2-0067 (FDO, Sept. 20, 1995).

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intended by the Legislature could only have been those which are legally recognized, e.g., statutory, constitutional, and/or by court decision."

All land use regulations discriminate in a literal sense because they apply only within certain zoning districts or to certain uses. Bayfield asserts the CAIT is discriminatory because it applies only to land zoned RRR 1/5 or RR 1/5 as opposed to all land.[61] But the "right" to have a particular zoning classification not treated differently from other classifications is not the type of "right" this Board or the courts has ever recognized as being protected by Goal 6 nor is it discriminatory in the sense that it "it unduly burdens or unfairly impacts a single group without rationale." In this case, it cannot be said that the Critical Areas Innovative Technique was adopted without rationale. The County adopted a technique that was based on removing from the density calculation that portion of a parcel that was unbuildable. At the same time, the technique was intended to provide additional open space, limit impervious space around environmentally sensitive areas, and conserve wildlife habitat in the rural areas. Such a technique cannot be said to be "without a rational basis".

Because the impact on a particular zoning classification is the foundation of Bayfield's argument of discriminatory impact, we find that Petitioner has not established the discriminatory nature of the County's innovative technique.

Conclusion: Bayfield has not established the arbitrary or discriminatory nature of the County's Critical Areas Innovative Technique or otherwise proven a violation of Goal 6 of the GMA.

D. Invalidity (Bayfield Legal Issue 7)

Issue No. 7: Does the County's lack of compliance with the GMA, as addressed in issues 1-6 warrant a determination of invalidity under RCW 36.70A.302 and WAC 242-02-831(2), with respect to all or part of the Rural Rezone Amendments?

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[61] Bayfield HOM, at 14.

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Board Discussion

Having reviewed Bayfield's Six Legal Issues and having found that Bayfield failed to carry the burden of proof in demonstrating that the County's action in adopting Ordinance No. 13884 and Resolution No. 13885 was clearly erroneous in light of the goals and requirements of the GMA, there is no basis for the Board to consider a determination of invalidity.

Conclusion: Absent a finding of noncompliance with any provision of the GMA, there is no basis for a determination of invalidity.

E. Variety of Rural Densities (Futurewise Legal Issue 1)

Legal Issue 1: Does the adoption of Ordinance 13884 and Resolution 13885 fail to provide for a variety of rural densities by failing to designate sufficient lands at densities of less than 1 dwelling unit per 5 acres in the locations and quantities required by RCW 36.70A.020 (2, 8-10), 36.70A.040, 36.70A, and 36.70A130?

Positions of the Parties

Futurewise argues that the County violates RCW 36.70A.070(5)(9)(b) through failing to have an adequate quantity of varied rural densities.[62] It notes that the County has designated 76.07% of the rural lands at a residential density of one dwelling unit per five acres and argues that this does not meet the GMA's requirement to have a variety of rural densities.[63] Futurewise also argues that the County's innovative zoning technique that excludes certain critical areas form the land used to calculate allowable density does not create the required variety of rural densities.[64] Futurewise notes first that the innovative technique is not in the rural element, and that even if it were in the rural element, it would not result in a density of one dwelling unit per 20 acres, which Futurewise argues is necessary to achieve the variety of rural densities.[65] Finally, Futurewise argues that the placement of the County's 1/10 and 1/20 acre rural comprehensive plan designations and zones fails to protect agricultural and

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[62] Futurewise HOM Brief, at 8.
[63] Id.
[64] Id. at 20-21.
[65] Id. at 21.

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forest lands of long term commercial significance because these designations are generally located far from agricultural and forest land. Placement of 5 acre rural comprehensive plan designations and zones immediately adjacent to agricultural and forest lands of long term commercial significance without buffers, guarantees conflict, it asserts.[66]

Just prior to filing its Response Brief, the County filed two motions – one seeking permission to file a motion and the second moving to strike Futurewise HOM brief in its entirety (collectively, Motion to Strike).[67] The basis for the Motion to Strike was the Board's January 17, 2008 Order on Motion to Dismiss which the County contends limited the scope of Futurewise's briefing to whether the change made complies with the GMA and not to whether the underlying Comprehensive Plan was compliant as to the requirement for a variety of rural densities.[68] The County asserts that Futurewise "completely ignored this ruling and submitted a prehearing brief which argues exactly what this Board has ruled is not within the scope of review."[69] The County argues it has been prejudiced by Futurewise's action because resources, both in briefing and in oral argument, had to be allocated to address an issue which was previously argued and stayed by the Board.[70]

Although the County, in its Response Brief, stated that it would not address any of the argument presented by Futurewise, the County did argue that Futurewise has not provided any evidence that the amendments adopted in Resolution13885 and Ordinance 13884 are not compliant with the GMA.[71] The County asserts that Futurewise has ignored the Board's January 17, 2008 Order on Motion to Dismiss, and rather than provide any evidence that the adopted amendments change the County's presumptively valid

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[66] Id. at 26.
[67] At the HOM, Presiding Officer Hite orally granted the County's Motion for Permission.
[68] County Motion to Strike, at 1-2.
[69] *Id.*
[70] *Id.*
[71] County Response, at 6 and 11.

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comprehensive plan into a non-compliant plan, Futurewise focuses on non-amended portions of the plans.[72]

In response, Futurewise asserts that its brief is within the scope set forth in the Board's January 17 Order on Motions, with briefing related to the challenged action not providing for a sufficient variety of rural densities and the other portions of the County's Comprehensive Plan not making up for this insufficiency.[73] Futurewise further asserts that it was necessary for them to brief these arguments jointly because a comprehensive plan must be looked at in the whole, not in isolation.[74]

At the HOM, the County stated that the Futurewise PFR has a single issue which the County reads as: does the challenged action fail to provide for a variety of rural densities. This, according to the County, is the very issue stayed by the Board until the Supreme Court issues its decision the sufficiency of rural densities within the County. The County noted that although the challenged actions may have started as a compliance action, once the Court of Appeals overruled this Board, the County no longer viewed the challenged ordinance/resolution as an action mandated to achieve compliance but rather a method for protecting critical areas.

Board Discussion

On January 17, 2008, the Board issued an Order on the County's Motion to Dismiss Futurewise's Petition for Review. In that order, the Board denied the motion but stated the that scope of review in this appeal was limited to the issue of whether the County's amendments complied with the GMA, presuming an underlying compliant comprehensive plan; rather than whether the comprehensive plan as amended complies with the GMA. The Board further stated that the Board would look at the changes the County made, including how the changes impact the remainder of the comprehensive plan. However, the

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[72] *Id.*, at 11.
[73] Futurewise Reply, at 1-2; HOM Argument of Futurewise.
[74] *Id.*

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Board stated it would not revisit the question of whether the underlying comprehensive plan was compliant as to the requirement for a variety of rural densities, as that question is part of the Board's decision upon which review has been requested by the County before the Washington Supreme Court in Thurston County v. Western Washington Growth Management Hearings Board, 137 Wn.App. 781, 793, 154 P.3d 959 (2007),

The Board agrees with the County that Futurewise has continued to focus on the variety of rural lands issue that we previously held was not properly before the Board in the present appeal. **Therefore, the County's Motion to Strike Futurewise's Hearing on the Merits Brief in its entirety is GRANTED.**

VI. FINDINGS OF FACT

1. Thurston County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.70A.040.
2. On August 20, 2007, the County adopted Ordinance No. 13884, with the stated intent of providing for a greater variety of rural densities by adding three new County Code Chapters – Rural One Dwelling Unit Per 20 Acres (R-1/20), Rural One Dwelling Unit Per 10 acres (R-1/10), and Urban Reserve One Dwelling Unit Per Five Acres (UR-1/5).
3. Ordinance No. 13884 also adopted a Critical Areas Innovative Technique (CAIT). The CAIT was codified in TCC 17.15.335 which established the method for calculating residential density.
4. With the adoption of Ordinance No. 13884, the County amended its methodology to provide that properties zoned Rural Residential Resource One Dwelling Unit Per Five Acres (RRR 1/5) and Rural Residential One Dwelling Unit Per Five Acres (RR 1/5) shall have the maximum number of dwelling units determined by subtracting from the parcel area documented critical areas, including wetlands, landslide hazard areas, and high groundwater hazard areas but not buffers for these types of areas, with the zoning density applied to the remainder of the parcel.

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5. The County also adopted Resolution No. 13885, amending the Thurston County Comprehensive Plan to add new land use designations and revise related policies.
6. Following this Board's decision of July 2005 regarding variety of rural densities under RCW 36.70A.070(5)(b), the County took action to put into place a program to identify land for potential rezoning. Among the criteria used for identifying lands to rezone were lands physically constrained or hazardous to develop, as well as lands of high habitat and/or environmental service value. The County forwarded all options for public review. During two of the Planning Commission's public meetings, it discussed the idea of removing critical areas from density calculations. The three variations of the innovative technique along with the rezone proposals were presented in the County's public outreach program prior to the Board of County Commissioners public hearing. The rezoning amendments adopted by the County were made up of the variations presented to the public for review and comment at the open house and public hearing.
7. The record reflects that the County considered three "rural rezoning" proposals - the Majority Proposal, the Minority Proposal, and the Innovative Techniques Proposal.
8. The language adopted by the County with Ordinance No. 13884 essentially mirrors that provided in the Innovative Techniques proposal.
9. The County's comprehensive plan provides the written record required by RCW 36.70A.070(5)(a).
10. The fact an area is zoned rural already denotes the rural character and a desire to maintain lower densities. Adjusting the number of units to achieve a density lower than that permitted by the underlying rural zoning would not, necessarily, create inappropriate or inconsistent rural development.
11. The County chose to apply a variation of the innovative technique that deducted the critical area but not the buffer as the other two variations required. In addition, the County took into consideration that the deducted portion was unbuildable land which a property owner would not have any reasonable expectation of developing. The County's approach provides additional open space and limits the amount of

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impervious surfaces surrounding sensitive areas, conserves wildlife habitat in the rural area and provides additional protection for the environment in the County's highest density rural district.

12. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.

VII. CONCLUSIONS OF LAW

A. The Board has jurisdiction over the parties to this case.

B. The Board has jurisdiction over the subject matter of this appeal.

C. Petitioners have standing to raise the issues in this case.

D. Petitioners have not established that the County failed to comply with GMA Planning Goal 11 (RCW 36.70A.020(11)) or the notice and public participation requirements of RCW 36.70A.035 and .140 in its adoption of the Rural Rezone Amendments.

E. The County has met the written record requirement of RCW 36.70A.070(5)(a) within its Comprehensive Plan.

F. Bayfield has failed to carry its burden of proof to demonstrate that the County's innovative technique results in inappropriate rural densities and uses or that it will produce growth inconsistent with rural character.

G. Bayfield has not established the arbitrary or discriminatory nature of the County's Critical Areas Innovative Technique or otherwise proven a violation of Goal 6 of the GMA.

H. Absence a finding of noncompliance with any provision of the GMA, there is no basis for a determination of invalidity.

I. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.

VIII. ORDER

Based upon the foregoing, the Board does not find any areas of noncompliance as alleged by Petitioners. Therefore the appeal is DENIED.

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Entered this 17th day of April 2008.

_____
James McNamara, Board Member

_____
Holly Gadbaw, Board Member

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

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

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

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

<u>Service</u>. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

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