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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD WESTERN WASHINGTON REGION STATE OF WASHINGTON

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, DAVID STALHEIM, AND FUTUREWISE

Case No. 12-2-0013

Petitioners,

٧.

WHATCOM COUNTY,

Respondent.

FINAL DECISION AND ORDER

SYNOPSIS

Petitioners challenged Whatcom County Ordinance No. 2012-032 on rural land use planning. This case addresses whether the County Comprehensive Plan's Rural Element includes measures limiting rural development to protect rural character by protecting surface water and groundwater resources, as required by RCW 36.70A.070(5)(c)(iv). The case also addresses the consistency of the County's transportation planning with its rural land use planning.

The Board found the County's Rural Element, as amended by Ordinance No. 2012-032, does not include measures which protect the rural character. These policies fail to protect rural character because they either apply to limited areas of the County, and do not apply to the entire Rural Area, or are limited to subdivisions of land rather than all rural development. The Board finds the County does not have measures required in RCW 36.70A.070(5)(c)(iv) to protect rural character by protecting surface water and groundwater resources. The Board remands Issue 1 to the County.

Petitioners contend the County's Transportation Element conflicts with the Rural Element in the Comprehensive Plan, thus creating an inconsistency within the

Comprehensive plan in violation of RCW 36.70A.070(5) and .130. Petitioners did not successfully argue that the County's Rural Element amendments would preclude achieving policies in the Transportation Element. Petitioners failed to satisfy their burden to prove inconsistency between the Rural Element, as amended in Ordinance No. 2012-032, and the Transportation Element of the Comprehensive Plan. Issue 2 is dismissed.

I. PROCEDURAL BACKGROUND

On October 10, 2012, Eric Hirst, Laura Leigh Brakke, Wendy Harris, David Stalheim, and Futurewise filed a Petition for Review (PFR) with the Board challenging Whatcom County's adoption of Ordinance No. 2012-032 relating to rural land use planning.¹ This Ordinance was adopted by the County in response to the Board's January 9, 2012 Final Decision and Order and Order Following Remand on Issue of LAMIRDs (FDO on Remand) in *Futurewise v. Whatcom County*, Case Nos. 11-2-0010c and 05-2-0013, which found portions of the County's rural element out of compliance with the GMA. Upon compliance,² the Board found that while the County had made "significant progress in aligning its Comprehensive Plan's Rural Element with the GMA,³ it still failed to meet some GMA requirements.⁴ The Board noted in its Compliance Order that Petitioners had filed a new Petition for Review resulting in the present Case No. 12-2-0013. This case addresses whether the County's Rural Element includes measures governing rural development which protect surface and groundwater resources. In its Compliance Order, the Board reserved decision on the County's measures to protect rural water resources to allow the question to be thoroughly briefed and argued in the present Case No. 12-2-0013.⁵

Compliance Order, at 3 and 4.

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Adopted August 7, 2012.

² Case Nos. 11-2-0010c and 05-2-0013, Compliance Order and Order Following Remand on Issue of LAMIRDS (Compliance Order) (January 4, 2013).

³ *Id.* at 3.

⁴ The County is still under a compliance order and the next compliance hearing for Case No. 11-2-0010c is scheduled for August 21, 2013.

To begin with, the Board granted a settlement extension to allow the parties an opportunity to narrow the issues in the case.⁶ At the Prehearing Conference the parties confirmed that Issue 1 would be amended, Issues 2 and 3 deleted, but Issues 4 and 5 would remain the same. The Board's January 22, 2013 Prehearing Order confirmed three issues in the case.

The parties subsequently filed prehearing briefs and exhibits as follows:

- Petitioners' Prehearing Brief, March 22, 2013 (Petitioners' Brief)
- Whatcom County's Response Brief, April 5, 2013 (County's Brief)
- Petitioners' Reply Brief, April 19, 2013 (Petitioners' Reply Brief)

The Hearing on the Merits (HOM) was convened on April 26, 2013 at the Whatcom County Courthouse. Present for the hearing were Board Members Margaret Pageler, Raymond Paolella, and Nina Carter, presiding officer. Petitioners were represented by Jean Melious. The County was represented by Karen Frakes and Tadas Kisielius. The hearing provided the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.⁷ This presumption creates a high threshold for challengers as the burden is on the petitioners to demonstrate that any action taken by the local jurisdiction is not in compliance with the GMA.⁸

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⁶ Order Granting Settlement Extension and Amending Preliminary Schedule (November 2, 2012).

⁷ RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

⁸ RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

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The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations. The scope of the Board's review is limited to determining whether a local jurisdiction has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review. 10 The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA. The Board shall find compliance unless it determines that the local jurisdiction's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.¹² In order to find the local jurisdiction's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."13

In reviewing the planning decisions of local jurisdictions, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth." However, the County's actions are not boundless; their actions must be consistent with the goals and requirements of the GMA.¹⁵

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⁹ RCW 36.70A.280, RCW 36.70A.302.

¹⁰ RCW 36.70A.290(1).

¹¹ RCW 36.70A.320(3).

¹² RCW 36.70A.320(3).

¹³ City of Arlington v. CPSGMHB, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008) (Citing to Dept. of Ecology v. PUD District No. 1 of Jefferson County, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, Swinomish Tribe v. WWGMHB, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); Lewis County v. WWGMHB, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).

¹⁴ RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to 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 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.

¹⁵ King County v. CPSGMHB, 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the goals and requirements of the GMA). See also, Swinomish, 161 Wn.2d at 423-24. In Swinomish, as to the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. Id. at 435, n. 8.

Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate that the challenged action taken by the County is clearly erroneous in light of the goals and requirements of the GMA.

III. BOARD JURISDICTION

The Board finds that the Petition for Review was timely filed pursuant to RCW 36.70A.290(2). The Board finds that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2). The Board finds that it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1)(a).

IV. PRELIMINARY MATTERS

A. Petitioners' Motion to Supplement the Record

On February 4, 2013, Petitioners requested to supplement the record with two documents.¹⁶ No objections were filed by the County. On February 20, 2013, the Board issued an Order on Motion to Supplement the Record with documents submitted by Petitioners.¹⁷

B. County's Motion to Amend the Index or Take Official Notice or Supplement the Record

On April 5, 2013, the County submitted a Motion to Amend the Index or Take Official Notice or Supplement the Record with proposed Exhibits R-127, R-128, and R-129.¹⁸

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¹⁶ Petitioners' Motion to Supplement (February 4, 2013), *Ex. C-671-N* Bellingham Herald Article from July 25, 2012; *Exs. C-683-A* and *C-788-A* documents to clarify Index.

¹⁷ Order on Motion to Supplement the Record with C-671-N, C-683-A and C-788-A (February 20, 2013). ¹⁸ Whatcom County's Motion to Amend the Index (April 5, 2013), *Ex. R-127* Coordinated Water System Plan Map; *Ex. R-128* June 28, 2013 Delahunt Memorandum to Louws; *Ex. R-129* May 27, 2013 Davis Memo to Wholpers.

C. Petitioners' Opposition to Amend the Index; Opposition in Part to Motion to Supplement the Record, or Take Official Notice; Motion to Supplement the Record in Rebuttal and in Support of Invalidity¹⁹

Petitioners opposed the County's motion to amend the index because it was not timely filed. However, Petitioners did not oppose supplementing the record with the County's Exhibit R-127 (Water System Map), if Petitioners could also supplement the record with Exhibit R-150 which is Whatcom County's Coordinated Water System Plan.

Petitioners argued that the Board needed to see the Plan as well as the Map so both would be placed into context. The County had no objection to adding Exhibit R-150. Petitioners had no objection to supplementing the record with the County's Exhibits R-128 and R-129.²⁰

Petitioners requested Exhibit R-151 supplement the record to provide "useful current information about …water quality in the County" and to support their request for invalidity. ²¹ Exhibit R-151 is an April 12, 2013 article from the Bellingham Herald regarding Drayton Harbor and a March 20, 2013 website page from the Department of Ecology about Whatcom County's water program. At the HOM, the County objected to supplementing the record with Exhibit R-151 as both documents were not considered by the County Commissioners when adopting the challenged Ordinance.

Petitioners requested the Board take official notice of Exhibit R-152²² which is a form from the County Health Department to show water availability when obtaining a building permit. Petitioners request the Board take official notice and allow this exhibit in rebuttal in accordance with WAC 242-03-630(4) and -565(1). The County objected stating the form is neither a regulation nor a comprehensive plan and thus, should not be a deciding factor about the County's GMA compliance.

¹⁹ Filed April 15, 2013.

²⁰ *Id.* at 5.

²¹ *Id.* at 6.

²² Petitioners' Reply Brief at 7.

Petitioners' proposed Exhibit R-153²³ is an excerpt from a report by the Northwest Indian Fisheries Commission about the state of watersheds in Washington. Petitioners requested that it be admitted under WAC 242-03-630(4) and -565(1) in rebuttal and for invalidity. The County objected to admitting Exhibit R-153 because it is an advocacy piece from tribes for salmon recovery and was adopted after the County took action on the challenged Ordinance.²⁴

Petitioners' proposed Exhibit R-154 is a file accompanying the well logs used to make water maps. Petitioners requested the Board take official notice of this exhibit. The County did not respond.

D. Board Decision on Motions and Requests to Take Official Notice

The Board heard oral arguments at the Hearing on the Merits and makes the following decisions:

- The County's Motion to Amend the Index is denied because the County filed its motion 10 days after Petitioners' Prehearing Brief was due. This filing contradicts the Board's rules under WAC 242-03-510(4) Index of the Record:
 - (4) Respondent may file a corrected index to add, delete, or correct the listing of documents it considered, without the necessity for a motion to supplement the record, by no later than a week before the date for filing the petitioner's prehearing brief.
- The County's Motion to Supplement is granted and Exhibits R-127, R-128, and R-129²⁵ are admitted. The Board finds that the map, memorandum and Department of Health's regulation describing the County's septic system program will assist the Board in understanding the issues.²⁶ The three documents were before the County as it adopted the challenged Ordinance. The Board finds such

²³ *Id.* at 9. Petitioners' Reply Brief has a typographical error in Footnote 45; Petitioners request the Board take official notice of Ex. R-152 in the footnote when they actually meant Ex. R-153.

²⁴ Whatcom County's Objections to Petitioners' Proposed Exhibits (April 25, 2013) at 4.

²⁵ Whatcom County's Motion to Amend the Index (April 5, 2013).

²⁶ The Board notes the map – Ex. R-127 – shows the service territory boundaries for the various water districts. The map does not represent whether the districts have water available for new uses in the designated areas.

- evidence would be necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).
- Petitioners' Motion to Supplement the Record with Exhibit R-150 is granted and the County's Coordinated Water System Plan Update is admitted. The Board finds this exhibit assists the Board in understanding the full scope of the water issues and the information will be necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).
- Petitioners' motion to admit Exhibit R-151 is denied because these documents do not shed more light on the water quality and quantity problems already documented in Petitioners' Prehearing Brief.
- Petitioners' motion to admit Exhibit R-152 is granted and the County's Health Department form for water availability to obtain a building permit is admitted. The Board finds this form may provide information concerning the County's measures to protect surface and groundwater quantity. The form contains information necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).
- Petitioners' motion to admit Exhibit R-153 is granted and excerpts from the Northwest Indian Fisheries Commission State of Our Watersheds Report are admitted. The Board finds this information shows the extent of water withdrawals in Whatcom County and how tribal governments link this information with fish habitat and salmonid recovery. The report contains information necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).
- Petitioners' motion to admit Exhibit R-154 is granted and the water well log information is admitted. Similar to Exhibit R-152, the Board finds this information shows how the County's comprehensive plan and development regulations are

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administered and how data is maintained on water withdrawals. The form contains information necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).

- Petitioners' request to take official notice of Exhibit R-155, Ordinance No. 2003-012, which contains proposed amendments to the Transportation Chapter of the Whatcom County Comprehensive Plan, is granted.
- The Board takes official notice of The Puget Sound Partnership's 2012/2013 Action Agenda for Puget Sound (August 28, 2012) pursuant to WAC 242-03-630. The Action Agenda is a document adopted by a state agency the Puget Sound Partnership describing the work needed to protect and restore Puget Sound. The Board admits this Action Agenda as Supplemental Exhibit 1.
- The Board also takes official notice of The Washington State Department of
 Fish and Wildlife's document Knight, K (2009) Land Use Planning for Salmon,
 Steelhead and Trout pursuant to WAC 242-03-630. The Department's document
 is a science-based land use planner's guide to salmonid habitat protection and
 recovery. The Board admits this Report as Supplemental Exhibit 2.

E. Abandoned Issues

Petitioners' Prehearing Brief noted that Issue 3 will not be addressed. Legal Issue 3 is deemed **abandoned** and is **dismissed**.

V. THE CHALLENGED ACTION AND POSTURE OF THE CASE

On August 7, 2012, Whatcom County adopted Ordinance No. 2012-032 amending its comprehensive plan, zoning code and future land use map with respect to rural areas. Ordinance No. 2012-032 represented the County's response to a series of rulings from the Board and the Courts requiring that the County's rural plan and development regulations be brought into compliance with the GMA.

The matter goes back to January 25, 2005, when Whatcom County adopted its 2005 Comprehensive Plan (CP) Update in Resolution 2005-006 pursuant to RCW 36.70A.130(1) and (4). In the update, the County largely retained the rural land use designations in its 1997 comprehensive plan, including its LAMIRD criteria and boundaries. Futurewise challenged the rural element of the County's plan, alleging the County's LAMIRDs and allowances for densities greater than one dwelling unit per five acres violated the GMA.²⁷ In its Final Decision and Order issued September 20, 2005, the Board ruled that Whatcom County's LAMIRD designation criteria and higher rural densities failed to protect rural character.

On appeal, the Court of Appeals affirmed the Board on both issues.²⁸ However, the Supreme Court in *Gold Star Resorts, Inc. v. Futurewise* affirmed as to LAMIRDs, but disagreed as to rural densities.²⁹ The case was remanded for reconsideration on LAMIRDs, but without regard to a bright-line rule for rural densities.³⁰

Responding to the Court's *Gold Star* mandate, on May 5, 2011 Whatcom County adopted Ordinance No. 2011-013, amending its comprehensive plan and development regulations with respect to rural densities and LAMIRDs. Prior to the Compliance Hearing, four petitions for review were filed with the Board challenging various aspects of the amendments adopted by Ordinance No. 2011-13.³¹ The Board first heard and decided the

²⁷ Futurewise v. Whatcom County, Case No. 05-2-0013, Final Decision and Order (September 20, 2005) at 1. ²⁸ Gold Star Resorts, Inc., v. Futurewise, 140 Wn. App. 378, 161 P.3d 748 (2007). The FDO was appealed by Gold Star Resorts, Inc., owner of properties along I-5 in the Birch-Bay LAMIRD area and an intervenor in the case before the Board.

case before the Board.

²⁹ Gold Star Resorts, Inc., v. Futurewise, 167 Wn.2d 723, 222 P.3d 791 (2009).

^{30 167} Wn.2d at 732.

³¹ PFRs were filed as follows: Governors Point challenged the County's failure to designate its property in the Chuckanut area as a LAMIRD; City of Bellingham challenged (a) development allowances in the Lake Whatcom watershed likely to pose increasing threat to water quality for the region's primary urban water source and (b) LAMIRDs adjacent or near the Bellingham UGA not coordinated with or competing with the City's urban development and services; Hirst, et al. and Futurewise raised a number of objections concerning the LAMIRD provisions and designations, but also asserted noncompliance with the RCW 36.70.070(5)(c) requirement of measures to protect rural character and raised issues concerning extension of urban services and consistency of population allocations.

remanded issues concerning rural densities, concluding limited application of higher densities, when properly contained, did not violate the GMA.³²

The remaining issues in the four PFRs were consolidated as Case No. 11-2-0010c.³³ Briefing and argument were coordinated with Case No. 05-2-0013 Compliance Hearing on LAMIRDs. On January 9, 2012, the Board issued its FDO on Remand in Case Nos. 11-2-0010c and 05-2-0013.³⁴ Germane to the present matter, the FDO on Remand determined the County's Rural Element lacked "measures required to protect rural character" in several respects as required in RCW 36.70A.070(5)(c).

In response to the FDO on Remand, on August 7, 2012 Whatcom County adopted Ordinance No. 2012-032 which is the action challenged here. Petitioners Hirst, et al. and Futurewise filed objections to a finding of compliance. The Petitioners also filed a new PFR – Case No. 12-2-0013 – challenging various provisions of Ordinance No. 2012-032 as creating internal Plan inconsistencies or violating other provisions of the GMA.

Meanwhile, after briefing and a Compliance Hearing, on January 4, 2013 the Board issued its Compliance Order in Case Nos. 11-2-0010c and 05-2-0013. The Compliance Order found the County had made significant progress in aligning its Comprehensive Plan's Rural Element with the GMA, correcting certain rural density and LAMIRD provisions, and adopting various measures to protect rural character and contain development. However, the Board found the County's Rural Element still out of compliance with specific GMA provisions and remanded to the County for further amendment.³⁵

³² Case No. 05-2-0013, Order Following Remand from the Supreme Court (Rural Densities) (September 9, 2011).

³³ Governor's Point Development Co. v. Whatcom County, Case No. 11-2-0010c.

The FDO on Remand found some remaining inconsistencies between the County's rural plan and its land use element, as well as LAMIRD development regulations in violation of RCW 36.70A.070(5)(d).

³⁵ Compliance Order at 1-2: The Board found the County still violates GMA requirements by failing to provide a variety of rural densities, by lacking permanent provisions for lot clustering, by failing to provide required protection for Lake Whatcom water resources, by allowing exemptions for Type I, II and III LAMIRDs, by not establishing logical outer boundaries for some LAMIRDs or internally consistent boundaries for some Rural Neighborhoods, and by creating an internal inconsistency in its plans and regulations regarding water transmission lines.

In its January 4, 2013 Compliance Order, the Board also ruled on the County's measures to protect Lake Whatcom water resources. However, noting that Petitioners' new PFR challenging Ordinance No. 2012-032 included a challenge to the County's measures to protect surface and groundwater resources, the Board reserved decision on the broader question of the County's rural water resources protections, beyond Lake Whatcom. This present case, then, addresses whether the County's Rural Element contains measures limiting rural development to protect rural character by protecting surface water and groundwater resources, as required by RCW 36.70A.070(5)(c)(iv). The case also addresses the consistency of the County's transportation planning with its rural land use planning – a new issue in these proceedings.

VI. ISSUES AND DISCUSSION

Issue 1: Failure to protect surface and groundwater quality, failure to protect water availability, failure to protect water for fish and the comprehensive plan is internally inconsistent.

Detailed Statement of Issue 1 from Petition for Review:

Do the future land use map and related policies and development regulations, including the amendment to Chapter 1, Policies 2DD-1, 2DD-2, 2GG-2, the "Rural Communities" narrative in the Comprehensive Plan, 2JJ-6, 2LL-2, the "Rural Neighborhoods" narrative in the Comprehensive Plan, Goal 2MM and all policies thereunder (*i.e.*, all Policies 2MM), WCC Chapters 20.32, 20.36, 20.60, 20.61, 20.63, 20.64, 20.67 and 20.69, WCC 20.80.100 and WCC 20.82.030 violate RCW 36.70A.030(15) and (16), RCW 36.70A.040(3), RCW 36.70A.070, RCW 36.70A.130(1)(d), RCW 36.70A.070(5), RCW 36.70A.020(9) and (10), and case law because the enactments fail to protect water resources, including surface and groundwater quality and quantity?

Applicable Law

RCW 36.70A.020 Planning Goals.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and <u>water quality</u>, and the availability of water.

RCW 36.70A.030 Definitions.

- (15) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:
- (d) That are <u>compatible with the use of the land by wildlife and for fish and wildlife habitat; . . .</u>
- (g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.
- (16) "Rural development" refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.

RCW 36.70A.070 Comprehensive plans — Mandatory elements.

- (1) A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. The land use element shall include population densities, building intensities, and estimates of future population growth. The land use element shall provide for protection of the quality and quantity of groundwater used for public water supplies. Wherever possible, the land use element should consider utilizing urban planning approaches that promote physical activity. Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound . . .
- (5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources.

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- (c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by . . .
- (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and . . .

(Emphasis Added.)

RCW 36.70A.130 Comprehensive plans — Review procedures and schedules — Amendments.

(1)(d) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to <u>development regulations shall be consistent with and implement the</u> <u>comprehensive plan</u>. (Emphasis Added.)

Positions of the Parties

Petitioners' Allegations

Petitioners assert that the GMA requires local jurisdictions to ensure that development in non-urban, rural areas occurs "at levels consistent with preserving rural character..." RCW 36.70A.030(16). Preserving rural character requires "patterns of land use and development" compatible with habitat for fish and wildlife and with protections for surface water and groundwater. (See RCW 36.70A.030(15)(d) and (g)). All comprehensive plan measures adopted by the County must meet GMA requirements, be internally consistent, and must meet GMA goals. 37

Petitioners argue the County's water quality and quantity policies and regulations adopted by reference in Ordinance No. 2012-032 are flawed because County development regulations apply, too narrowly, to only some parts of the Rural Area. Further, the Rural Element does not contain "measures" governing rural development that protect surface and

³⁶ Petitioners' Prehearing Brief at 4.

³⁷ Petitioners' Prehearing Brief at 4. Petitioners' Footnotes 17-22 claim the following GMA provisions are violated by the County: RCW 36.70A.030(15) and (16); .040; .070 and specifically .070(5)(c)(vi); .130(1)(d); .020(9) and (10).

ground water resources in the Rural Area as required by the GMA.³⁸ Petitioners argue the County lacks "measures" to ensure that land uses are consistent with available water resources³⁹ and they claim the County is required under *Kittitas*⁴⁰ to plan for protection of water resources in its land use planning by adopting specific measures to ensure protection.⁴¹

Water Resources

Specifically, regarding water availability, Petitioners contend the County "does not assure that land use is consistent with available water resources." They cite our State Supreme Court's *Kittitas* decision which emphasizes that the "County must regulate to some extent to assure that land use is not inconsistent with available water resources ... The GMA requires that counties provide for the protection of groundwater resources and that county development regulations comply with the GMA." Petitioners support their argument by citing studies and reports demonstrating water resource limitations in Whatcom County. 44

Petitioners say the County's response to the lack of water, as shown in numerous reports, was merely to adopt Policy 2DD-2.C.6 and 7 as "measures" to protect ground and

Id. at 5 and 7.

³⁹ Petitioners' Prehearing Brief at 13.

⁴⁰ Kittitas County v. EWGMHB, 172 Wn.2d 144, 181, 256 P.3d 1193 (2011) "The GMA requires counties to protect water resources."

⁴¹ Petitioners' Prehearing Brief at 13, and Petitioners' Reply Brief at 6-9.

⁴² Petitioners' Prehearing Brief at 13.

⁴³ Kittitas County, 172 Wn.2d at 178-179.

Water resource limitation problems: *Ex. C-683-A.14* Whatcom County *WRIA 1 State of the Watershed Report* (2010) showing closed water basins; *Ex. C-671-G* Department of Ecology, *Focus on Water Availability: Nooksack Watershed, WRIA 1* at 1. *Note:* WRIA 1 comprises most of Whatcom County. *See* http://cfpub.epa.gov/surf/huc.cfm?huc_code=17110004 stating most water in the Nooksack Watershed is legally spoken for; 637 water right applications pending with the County as of March 2011 in Petitioners' Prehearing Brief at 13; *Ex. C-671-D* Whatcom County's *Water Resource Plan* (1999) stating the "difficulties for effective water resource management"; Whatcom County's *Comprehensive Plan Chapter 11: Environment* states water supply is over-allocated; no new water is available; significant number of exempt wells causes difficulties in estimating total water used; *Ex. C-671-C The Bertrand Creek Watershed Report* lists water problems and offers nine solutions; *Ex. C-671-B* September 6, 2011 resolution by Whatcom County approving fund for Water Supply Planning Project to address economic needs demonstrates the County recognizes the existing water problem; *Ex. C-678* Department of Ecology analysis of county responsibilities for water availability in land use planning.

surface water. However, Petitioners argue, these policies reference existing subdivision regulations and do not solve the problem of proliferation of individual exempt wells and thus do not contain adequate measures protecting water resources.⁴⁵ Petitioners contend the County has long been aware of its water supply problems, yet did not take action to address the issue when amending its Comprehensive Plan's Rural Element.

Water Quality

Similarly, Petitioners contend the County's surface and ground water quality is not protected as required in RCW 36.70A.070(5)(c)(iv). The County policies and development regulations either do not contain specific measures to protect water quality, or are limited to critical areas, urban areas or watershed overlay areas, and do not apply throughout the rural area. Further, Petitioners complain County programs such as septic tank self-inspections and low impact development are not successful or have not been implemented.

Petitioners support their arguments with data or reports from the Washington State Department of Ecology, Washington State Department of Health, Whatcom County Public Works Department, and Whatcom County Water Resources Program. Petitioners contend, as with water availability, the County's Rural Element does not contain "measures" protecting water quality because the policies merely incorporate existing development regulations which have demonstrably failed to control or prevent water pollution. Indeed, although the County's Comprehensive Plan contains policy statements about controlling or reducing water pollution, the implementing regulations have not done so, thus making the Comprehensive Plan inconsistent with the development regulations.

⁴⁷ Petitioners' Prehearing Brief at 12-13.

⁴⁵ Petitioners' Prehearing Brief at 16.

⁴⁶ Ex.C-685-I Whatcom County Public Works – Natural Resources Progress Report #3 (January-June 2011) Birch Bay/Terrell Creek Water Quality Monitoring Project; Ex. C-685-J Birch Bay Initial Closure Response Report, May 2009, Birch Bay Shellfish Growing Area; Ex. C-685-L Washington State Department of Health: Status and Trends in Fecal Coliform Pollution in Shellfish Growing Areas of Puget Sound: Year 2011; Ex. C-685-M Washington State Department of Health: Status and Trends in Fecal Pollution in Puget Sound Shellfish Growing Areas Through 2010; Ex. C-685-N Washington State Department of Ecology Nitrate Contamination in Sumas-Blaine Aquifer, Whatcom County, Washington; Ex. C-685-O Washington State Department of Ecology Sumas-Blaine Nitrate Contamination Summary (June 2012).

Fish and Wildlife Habitat

In regards to water quantity and quality for fish and wildlife, Petitioners argue that federal, state, and local studies show that endangered salmon use the creeks and rivers of Whatcom County. The watershed reports state that "water quantity, water quality and instream flows and habitat problems ... pose serious challenges for the community."48 Petitioners argue the County's Comprehensive Plan and development regulations do not protect the rural character by protecting fish and wildlife habitat as required by RCW 36.70A.060 and .070(5)(c)(iv).

County's Response to Allegations

The County argues Petitioners' claim is in an erroneous legal framework. They state this case is not about the extent of water pollution or the lack of water. Rather, it is about whether the County complies with the GMA's requirements to have a comprehensive plan implemented through development regulations. Adequacy of the regulations to prevent pollution or supply sufficient water is not the standard, but instead the standard is whether the County is compliant with the Rural Element requirements in the GMA.⁴⁹

Water Resources

The County contends the Supreme Court's decision in the Kittitas case was a narrower ruling than Petitioners imply. Kittitas focused on a county's role "to protect water resources in the context of development regulations governing land use approval." 50 Kittitas addressed how to prevent landowners from submitting multiple subdivision applications and segmenting their projects in order to qualify for multiple exempt domestic wells under RCW 90.44.050.⁵¹ Whatcom County's current subdivision regulations expressly require applicants to provide evidence of an adequate water supply prior to approval and require

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⁵¹ *Id.* at 4.

⁴⁸ *Id.* at 18-19.

⁴⁹ County's statement at the Hearing on the Merits, April 26, 2013.

⁵⁰ County's Brief at 3.

"contiguous parcels of land in the same ownership shall be included within the boundaries of any proposed ...subdivision." These subdivision regulations were adopted prior to the present case and therefore are not subject to appeal. Thus, the County concludes it has met the requirements of *Kittitas*.

The County claims Petitioners have not proved the County's development regulations are inconsistent with its Comprehensive Plan and Ecology's water regulations.⁵³ The County argues Petitioners are incorrect in suggesting new wells in closed basins are evidence the County failed to protect groundwater and surface water resources.⁵⁴ The County's subdivision regulations ensure that well locations for subdivisions or new construction do "not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist."55 The County explains Ecology's current 1985 administrative regulation established minimum instream flows for new surface water withdrawals, closed specific sub-basins, and encouraged groundwater withdrawals.⁵⁶ This administrative code does not regulate exempt wells, according to the County.⁵⁷ Further, even if Ecology regulated exempt wells, this would not limit rural development by the County because Ecology authorizes new surface water and groundwater withdrawals – even in closed basins – when the appropriator can demonstrate their water withdrawal "does not conflict with the intent of the basin closure" or if an applicant can purchase water rights, transfer water rights or mitigate the water use.⁵⁸ The County argues that water may be available, even if a basin is closed, depending on the specific facts of the case.⁵⁹ Thus, the County contends Petitioners' argument that numerous exempt wells in closed basins demonstrate

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⁵² *Id.* at 4, citing WCC 21.01.040.

⁵³ County's statement at the Hearing on the Merits, April 26, 2013.

⁵⁴ County's Brief at 7.

⁵⁵ *Id.* at 7.

⁵⁶ WAC 173-501.

⁵⁷ County's Brief at 8.

⁵⁸ *Id.* at 8 and 9. See also WAC 173-501-040(2) When a project (as described in WAC 173-501-030(5)) is proposed on a stream that is closed to further appropriations, the department shall deny the water right application unless the project proponent can adequately demonstrate that the project does not conflict with the intent of the closure.

⁵⁹ *Id.* at 9.

noncompliance with the GMA is without merit because the County complies with Ecology's water resource regulations. The County observed Ecology recently adopted rules regulating exempt wells in other counties, and suggested that if Petitioners want regulations for exempt wells in Whatcom County, they should petition Ecology to adopt such a rule.⁶⁰

Water Quality

In regards to water quality, the County contends its existing stormwater and on-site septic system regulations apply throughout the County and adequately address water quality protections for rural development.⁶¹ The County asserts Petitioners fail to present evidence that a uniform, county-wide impervious surface regulation is needed in addition to the many regulations governing stormwater.⁶²

The County complains that Petitioners' evidence was taken out of context or was misleading. For example, shellfish studies for Drayton Harbor and Birch Bay are from areas that already have strict regulations through the Stormwater Special Districts or Water Resource Management Areas. And, the federal listing of impaired water bodies does not support Petitioners' claims of noncompliance because meeting Total Maximum Daily Loads is a broader regulatory effort to address all water quality issues. Thus, according to the County, Petitioners' examples of water pollution do not offer sufficient evidence to require a County-wide impervious surface regulation.⁶³ If the County tried to impose such a

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⁶⁰ *Id.* at 10.

⁶¹ Stormwater regulations in WCC 20.80.630 and .636 apply throughout the County: small projects must employ Best Management Practices, large projects must have approved preliminary stormwater proposals, and in some cases, engineered stormwater design report or water quality treatment facilities to minimize runoff from impervious surfaces. More stringent stormwater controls are required in specific areas of the County -- such as urban areas listed in Phase II of the National Pollution Discharge Elimination System (NPDES) Stormwater Permit; lakes and watersheds listed as Stormwater Special Districts; watersheds for Lake Whatcom, Samish and Padden shown in the Watershed Protection Overlay. The County's zoning districts for Urban Residential, Urban Residential Medium Density and Residential Rural limit impervious surface to 20% and 10% in the Rural District.

Id. at 17-18.

regulation, it would run afoul of Constitutional issues and violate GMA Goal 6. Rather, the County properly tailored its restrictions to areas that needed them.⁶⁴

In response to Petitioners' complaint about homeowner self-inspection of septic systems, the County states the program was modeled after Washington State regulation WAC 246-272A, which was approved by the Washington State Department of Health and is consistent with state regulations and regulatory approaches by other jurisdictions. The program is enforced throughout the County and enforcement action is taken when violations are reported.

Lastly, the County argues Petitioners' inconsistency claims do not provide grounds for relief. When Petitioners cite Comprehensive Plan policies from the Environment Chapter, and then attempt to apply and compare these to the Rural Element Chapter, this does not make the County's plan inconsistent.⁶⁷

Fish and Wildlife Habitat

The County did not respond to Petitioners' arguments about the effect of water quantity or quality upon fish and wildlife.

Board Discussion

Statutory Provisions and Court Decisions on GMA and Water Resources

The GMA requires cities and counties to address water availability in comprehensive land use plans and development regulations. RCW 36.70A.020(10) states that local jurisdictions' plans shall be guided by fourteen goals. GMA Goal 10 says local jurisdictions must "Protect the environment and enhance the state's high quality of life, including air, and water quality, and the availability of water." (Emphasis added.)

Within each comprehensive plan, a county must plan for its rural or non-urban area. RCW 36.70A.030(15)(d) and (g) define "Rural Character" as patterns of land use and

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⁶⁴ *Id.* at 19.

⁶⁵ Ex. R-129 Letter of Approval from Washington State Department of Health.

⁶⁶ County's Brief at 20.

⁶⁷ County's Brief at 22.

development established by a county in the rural element of its comprehensive plan that are compatible with fish habitat and consistent with protection of natural surface water flows and groundwater recharge. RCW 36.70A.070(1) defines the mandatory elements of a comprehensive plan, and in this, it requires a Land Use element which "shall provide for protection of the quality and quantity of groundwater used for public water supplies." (Emphasis added.)

RCW 36.70A.070(1) further refines the duties of the County by stating the land use element "shall review drainage, flooding, and stormwater run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound." (Emphasis added.)

Finally, RCW 36.70A.070(5)(c)(iv) requires that "[t]he Rural Element shall include measures that apply to rural development and protect the rural character of the area...by: (iv) Protecting critical areas...and surface water and groundwater resources." (Emphasis added.)

Read together, these GMA provisions indicate that patterns of land use and development in rural areas must be consistent with protection of instream flows, groundwater recharge, and fish and wildlife habitat. A County's Comprehensive Plan rural lands provision must include measures governing rural development to protect water resources.

Other applicable GMA requirements pertinent to this case are the requirement that a County's <u>development regulations must be consistent with and implement the comprehensive plan.</u> Also, any amendment or revision to a comprehensive plan shall conform to the GMA chapter or, if any development regulation is amended, it shall be consistent with the comprehensive plan, including those mandatory elements of a

⁶⁸ RCW 36.70A.040(4)(d): "The county and each city that is located within the county shall adopted a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan..."

comprehensive plan that protect surface and groundwater resources.⁶⁹ Additional GMA provisions, codified at RCW 58.17.110 and RCW 19.27.097 require the county to assure availability of potable water prior to building permit or subdivision approval. The GMA is replete with requirements to protect ground and surface water and ensure land uses are compatible for fish and wildlife. Our Supreme Court has also recently addressed the GMA water requirements and how local governments must incorporate them in their plans.

In considering the above statutes relating to water quantity and quality, the Supreme Court in *Kittitas County*⁷⁰ held that local governments are required to ascertain that there will be adequate potable water supply before building permits and subdivision applications may be approved. That involved, according to the Court, ensuring the County's land use plan and regulations were not inconsistent with water availability.

Several relevant statutes indicate that the County <u>must</u> regulate to some extent to assure that land use is not inconsistent with available water resources. The GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources. RCW 36.70A.070(1), (5)(c)(iv). Additional GMA provisions, codified at RCW 19.27.097 and 58.17.110, require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications.⁷¹

The Supreme Court's reasoning in *Kittitas County* concerns water availability, but is equally applicable to water quality. Local land use plans and regulations must seek to avoid groundwater contamination as well as managing surface water runoff to prevent pollution of

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⁶⁹ RCW 36.70A.130(1)(d): "Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan."

⁷⁰ Kittitas County v. EWGMHB, 172 Wn.2d 144, 256 P.3d 1193 (2011).

⁷¹ Kittitas County, 172 Wn.2d at 178-179, emphasis in original. Note that the statutory provisions requiring a local jurisdiction to determine availability of potable water before approving a building permit or subdivision – RCW 19.27.097 and RCW 58.17.110 – were enacted as part of the GMA and construed by the *Kittitas* Court as GMA requirements though not codified in Chapter 36.70A RCW. See also *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011), a case decided under LUPA, where the Supreme Court explains the local jurisdiction's responsibility to determine availability of potable water for subdivisions.

Puget Sound.⁷² Ecology provides technical assistance and model regulations, but County land use plans and regulations are necessary to assure protection of rural character, including water resource protection. The *Kittitas* Court "recogniz[ed] the role of counties to plan for land use in a manner that is consistent with the laws providing protection of water resources and establishing a permitting process." Thus, the Court held that in making a land use decision that requires a finding that there is adequate water supply to support the proposed development, it is the local government – and not Ecology – that is responsible to make the decision on water adequacy as part of its land use decision, and in particular, with respect to exempt wells.⁷⁴ The question before the Board is whether Whatcom County has adopted measures that apply the GMA requirements about water under the local circumstances here. Further, the question is whether *Kittitas County* requires the County to change its other long-range planning (including residential density, LAMIRD designations, and other regulations such as lot coverage governing intensity of allowed usage) commensurate with water availability and water quality.

Evidence Showing Water Quantity and Water Quality Problems

The Board finds substantial evidence in the record about water availability limits and water pollution in rural Whatcom County. The record demonstrates the following in the County's Rural Area regarding surface and groundwater resources:

- Ecology's WRIA 1 State of the Watershed Report⁷⁵ shows year-round or seasonally closed watersheds account for a large portion of the County.
- Ecology's Focus on Water Availability report states "Most water in the Nooksack watershed is already legally spoken for."
 Instream flows for WRIA 1 were

⁷⁵ Ex. C-683-A.14 WRIA 1 State of the Watershed Report (2010).

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⁷² RCW 36.70A.070(1) "Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound."

⁷³ Idea 180

Id at 180.
 As evidence of water availability, the County will of course accept a water right granted by Ecology. RCW 19.27.097; RCW 58.17.110(2).

established in 1985 and codified at WAC 173-501. As a result of instream flow requirements, some of the water sources are closed year round to additional withdrawals and some are closed part of the year. ⁷⁷ The record indicates average minimum instream flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year. ⁷⁸

- In its 1999 Water Resource Plan, the County reported a proliferation of rural residential exempt wells already created "difficulties for effective water resource management" by drawing down underlying aquifers and reducing groundwater recharge of streams. Petitioners document 1,652 wells have been drilled within closed basins since 1997 and argue that despite basin closures, 637 water right applications were pending as of March 2011. The record does not disclose what portion of these exempt wells meet the criteria for legal availability of water.
- A 2012 Northwest Indian Fisheries Commission report⁸² shows that 77% of the increase in exempt wells in WRIA 1 has taken place in basins closed year round or seasonally to water withdrawal. The link between stream flows and groundwater withdrawals in the shallow Whatcom aquifers is well documented. "A number of studies indicate that shallow aquifers of the County are responsible for approximately 70% of base stream flow."

⁷⁶ Ex. C-671-G Department of Ecology, Focus on Water Availability: Nooksack Watershed, WRIA 1 at 1. Note: WRIA 1 comprises most of Whatcom County. See http://cfpub.epa.gov/surf/huc.cfm?huc_code=17110004

⁷⁷ Ex. C-683-A, Figure 6; Ex. C-671-G.

⁷⁸ Ex. C-761-G, at 3.

⁷⁹ Ex. C-671-D, Whatcom County Water Resource Plan, at 49.

See Petitioners' Prehearing Brief at 13-14 and extensive documentation from well logs and other data See RCW 90.44.050, RCW 19.27.097, WAC 35-196-825, and AGO 1992 No. 17. And see, *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 81, 90, 95, 11 P.3d 726 (2000): Where a development intends to utilize an exempt well, its right to water is junior to other ground and surface water withdrawals in the basin, and junior to instream flows. Where the proposed groundwater withdrawal is located within a basin that has been closed to new surface water appropriations, or where Ecology has set instream flows that are not consistently met, there is a presumption that no additional water is legally available.

⁸³ Ex. C-788-A.15, Whatcom County Draft EIS, 10-Year Urban Growth Area Review (2009), at 4.3-2 – 4.3-3

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- A 2008 Department of Ecology report documents nitrate contamination of a rural Whatcom aquifer.⁸⁴ The Sumas-Blaine aquifer is the only readily available drinking water source for 27,000 rural residents of Whatcom County. Nitrate contamination in the aquifer has been documented for over 40 years. In a recent study, 75% of sampled wells failed to meet drinking water standards for nitrates.⁸⁵ Groundwater withdrawals are not prohibited in the Sumas-Blaine aquifer.⁸⁶
- The County's most recent Water Resource Plan was adopted in 1999 and has not been updated.
- On September 6, 2011, the County Council unanimously approved a Resolution to fund a Water Supply Planning Project⁸⁷ to comply with RCW 70.116 to update water system plans. The County appropriated funds because "Counties should update their plans if there are major or significant changes to land use plans that would be impacted by water supply for potable purposes." The County Resolution states: "Land use decisions are made assuming sufficient water resources will be available to serve these land uses. In Whatcom County, water supply is not sufficient to meet all competing needs whether it is because of water rights, water quality or water quantity." (Emphasis added.)
- Whatcom County's Comprehensive Plan Chapter 11 Environment explains that "Surface and groundwater quality problems can be found in many areas of Whatcom County and are described in various chapters of the Comprehensive Plan. There are significant legal limitations in obtaining water. Management

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⁸⁴ Ex. C-685-N, Ecology, Nitrate contamination in Sumas-Blaine Aquifer (2008)

⁸⁵ *Id.* While the report indicates dairy manure and fertilizers are the primary nitrate pollutants, the report notes 23,000 residents use on-site sewage systems which contribute an estimated 207,000 pounds of nitrogen per year to area groundwater.

⁸⁶ See Ex. R-152, Whatcom County Health Department Water Availability Notification, at 3.

⁸⁷ Ex. C-671-B Whatcom County Council adoption of Economic Development Investment Program recommendation

⁸⁸ Ex. C-671-B Whatcom County Council Agenda, Economic Development Investment Board Request, September 6, 2011 at 1 of Water Supply Planning For Economic Certainty in Whatcom County (WRIA 1). ⁸⁹ Id. at 2.

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actions between and within jurisdictions are not always well coordinated or consistent. . . These problems and issues have already led to many impacts. . . includ[ing] health concerns associated with drinking contaminated water; fisheries depletion and closure of shellfish harvesting areas and other instream problems; a lack of adequate water storage and delivery systems to meet the requirements of growth and development; concerns with the availability of water to meet existing agricultural and public water supply demands; potential difficulties and additional costs associated with obtaining building permits and subdivision approvals; and other related increasing financial costs to the community. Long-term resolution of the numerous, complex and changing water issues requires actions in many areas."90

A 2012 Department of Ecology report on nitrate contamination for wells in the Sumas-Blaine Aguifer⁹¹ states 29% of wells in northwestern Whatcom County exceeded maximum nitrate contamination levels and 14% of wells had more than double the maximum allowed rate of contamination. Thirty-six percent (36%) of shallow wells (less than 40 feet in depth) exceed allowable nitrate contamination levels, while 20% of deeper wells also exceed the standard. 92 Ecology's report documents the percentage nitrate contribution from various sources and states the Sumas-Blaine Aquifer is "especially vulnerable to contamination from overlying land uses."93 Ecology recommends seven steps the County could take to address aquifer nitrate contamination.94

⁹⁰ Whatcom County Comprehensive Plan, Ch. 11 Environment at 11-14 and 15.

⁹¹ Ex. C-685-O Department of Ecology, Sumas-Blaine Aquifer Nitrate Contamination Summary (June 2012).

Id. at 5. Nitrate contamination is caused by shallow wells, limited thickness of the aquifer, heavy rainfall and intensive agricultural practices using manure. ³³ *Id.* at 22.

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- A 2012 Washington State Health Department study on fecal coliform pollution in Puget Sound⁹⁵ ranks Drayton Harbor as the second highest contaminated shellfish bed in Puget Sound. Drayton Harbor's shellfish beds had a fecal pollution index (FPI) between 1.50 and 2.00; FPIs above 1.0 indicates an area has "experienced significant fecal pollution."
- The Birch Bay Initial Closure Response Strategy (May 2009) describes increased fecal coliform pollution in Birch Bay from 2005 to 2008, another shellfish growing area in Whatcom County. ⁹⁷ In 2008, the Washington State Department of Health closed Birch Bay to commercial shellfish harvesting. Two sources of contamination were listed: wastewater collection/disposal and agricultural activities. The report recommended identifying ways to bring private sewer systems into compliance with the County's operating and maintenance standards. ⁹⁸
- In the 2006 Bertrand Creek: State of the Watershed Report, the County and other cooperating organizations documented land use changes in the Bertrand Creek Watershed which include "loss of water-retention capacity of wetlands and the increase in pavement, rooftops, and other hard surfaces resulting in a "flashy watershed." Such watersheds mean these areas reach flood stage quickly, have more pollution potential, and dwindle down to extremely low flow during the driest months. The Bertrand Creek report offers nine solutions ranging from water conservation, water "banking", importing water, protecting wetlands and "substituting groundwater sources for current surface water rights...only if there was no significant continuity between surface and groundwater, and if there were

⁹⁹ Ex. C-671-C Bertrand Creek: State of the Watershed Report (October 2006) at 3.

⁹⁵ *Id.* at 11, citing *Status and Trends of Fecal Coliform Pollution in Shellfish Growing Areas of Puget Sound: Year 2011*, Washington State Department of Health (June 2012).

⁶ Status and Trends of Fecal Coliform at 5.

⁹⁷ Petitioners' Brief at 11-12.

⁹⁸ Ex. C-685-J Birch Bay Shellfish Growing Area Initial Closure Response Strategy (May 2009) at 1-2.

- no serious water quality issues with the groundwater. Potential problems include high nitrates, iron, salts and low oxygen, in groundwater."¹⁰⁰
- Whatcom County is listed with "impaired water bodies" in the 2010 State of the Watershed Report¹⁰¹ which is the U.S. Environmental Protection Agency's report on the status of Section 303(d) of the Clean Water Act. 102 Since 2000, Whatcom County's "impaired water bodies" have increased from 47 to 77. Of those, only 6 water bodies have been analyzed and have had standards established for allowable total allowable pollution (Total Maximum Daily Loads (TMDLs)). The standards and policies derived from these TMDLs have not been adopted by reference as measures governing land use in the Rural Element and do not appear to be addressed in the development regulations for affected rural areas in the Ordinance No. 2012-032 amendments. In Butler v. Lewis County, 103 the Western Board found the County was aware of an Ecology TMDL Study with recommendations for water management practices. The Board ruled the County's failure to adopt any policies into its land use plan violated RCW 36.70A.070(1). While Butler was decided under the GMA's mandatory provisions for the land use element, 104 the requirements for "measures" in the Rural Element are no less specific.

¹⁰⁰ *Id.* at 6.

¹⁰¹ Ex. C-683-A.14 WRIA 1 State of the Watershed Report (2010). Note: WRIA 1 covers 1,410 square miles, is located in the northwest corner of Washington State and covers a significant portion of Whatcom County. ¹⁰² The term "303(d) list" is short for the list of impaired and threatened waters (stream/river segments, lakes) that the Federal Clean Water Act requires all states to submit for EPA approval every two years on even-numbered years. The states identify all waters where required pollution controls are not sufficient to attain or maintain applicable water quality standards, and establish priorities for development of TMDLs based on the severity of the pollution and the sensitivity of the uses to be made of the waters, among other factors (40C.F.R. §130.7(b)(4)). States then provide a long-term plan for completing TMDLs within 8 to 13 years from first listing.

¹⁰³ Case No. 99-2-0027c, Final Decision and Order (June 20, 2000) at 56.

[&]quot;The land use element shall provide for protection of the quality and quantity of groundwater used for public water supplies. ... Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area [and] provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state."

Water for Fish and Wildlife Habitat

Petitioners argue the County's Comprehensive Plan and regulations do not protect the availability of clean water for fish because impervious surfaces impair groundwater recharge areas, instream temperatures increase during summer low flows, and capacity to assimilate and dilute contaminants is lost. The County did not respond to Petitioners' complaints about the link between rural development and the altered hydrogeologic processes that may increase threats to fish and wildlife survival.

As indicated above, instream flows were established in 1985 for WRIA 1, but minimum flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year.¹⁰⁵ Rural development continues to draw groundwater from the shallow aquifers that are responsible for 70% of base flows.¹⁰⁶

RCW 36.70A.070(5)(c)(iv) requires that a County's Rural Element protects rural character. The Rural Element shall include measures to protect the rural character of the area by protecting surface water and groundwater resources. Rural character is defined as "patterns of land use and development . . . consistent with the use of the land by fish and wildlife [and] . . . consistent with the protection of surface water flows. . . ." Protecting surface and groundwater resources is an essential component of fish habitat protection and thus the County's rural element must have measures governing rural development to protect these resources.

Board Analysis of Evidence on Water Quantity and Quality Problems

The Board reviewed the parties' positions on the numerous reports of Whatcom County's water resource issue. It found that even where a basin has been "closed" by the Department of Ecology for surface water appropriations, the County might authorize water withdrawals for subdivisions under the 1985 administrative code if an applicant was not withdrawing surface water and could demonstrate no significant hydraulic continuity

¹⁰⁵ Ex. C-761-G at 3.

¹⁰⁶ Ex. R-152, Ex. C-788-A.15, at 4.3-2 – 4.3-3.

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between groundwater and surface water. 107 Applicants can also purchase existing water rights or obtain transferred water rights to a new place of use; each water use is factspecific. 108 In regards to water quality, the County argues it has codified stormwater regulations throughout the County and its regulations are tailored to meet the needs identified.

Conversely, the Board also read reports on contaminated groundwater and drinking water; 109 increase in shellfish contamination; 110 an increase in exempt wells for single residential use without required proof that the groundwater withdrawal will not impact stream flows; 111 governing regulations from the last century (1985 state administrative regulations and a 1999 County Water Resource Plan); 112 and the County's own resolution and Comprehensive Plan, stating its water resources are unknown and the future water uses are uncertain.113

The Board finds the link between land development and water resources is wellestablished. The Board notes three authoritative references, two of which deal specifically with Whatcom County, documenting the need for land use planning to be coordinated with water resource planning by local jurisdictions. The 2010 WRIA 1 State of the Watershed Report states that "Illand use information is important in describing WRIA 1 because it relates to how much water is needed for the different uses occurring on the land." Plus, this report states "[I]and use is also important in helping identify potential causes of water quality and habitat degradation." The report goes onto say the County should monitor

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¹⁰⁷ WAC 173-501 Instream Resources Protection Program — Nooksack WRIA 1.

¹⁰⁸ County's Brief at 9.

¹⁰⁹ Ex. C-684-N Ecology's Nitrate Contamination in the Sumas-Blaine Aquifer, Whatcom County, WA (2008).

¹¹⁰ Ex. C-685-V USGS Puget Sound Ecosystem Portfolio Model -- Shellfish Pollution Model

¹¹¹ The Board notes the County's Water Availability Notification form [Ex. R-152] has no requirement for a rural residential applicant to prove there is no hydraulic continuity, despite the fact that the County's Draft EIS states that "[a] number of studies indicate that shallow aquifers of the County are responsible for approximately 70% of base stream flow." [Ex. C-788-A.15 at 4.3-2- 4.3-3.]
112 WAC 173-501 Instream Resources Protection Program – Nooksack WRIA 1, and Ex. C-671-D Whatcom

County Water Resource Plan.

Ex. C-671-B and Whatcom County Comprehensive Plan, Chapter 11, Environment at 11-15.

¹¹⁴ Ex. C-683-A.14 at 5.

¹¹⁵ *Id.* at 5 and 6.

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1 2 water quality through Ecology's 303(d) List as a "useful indicator of the status of water quality because it represents lakes, rivers, streams, and bays that have sections that are falling short of water quality standards" and these indicators can identify potential causes of water quality impairment. 116

Specifically, for Whatcom County this report lists potential causes of water pollution for each watershed. The causes range from increasing urbanization, to malfunctioning septic systems, agricultural runoff, and removal of riparian vegetation. This report states the strategies to obtain sufficient and clean water in Whatcom County must include monitoring water quality and understanding "how watershed activities and land management practices may be influencing water quality."117 Strategies recommended in this report are better integration between salmon recovery and watershed management, funding and monitoring water quality and quantity data, and communicating results to the public.

Further information about land use planning and water resources, comes from the Washington State Department of Fish and Wildlife's (WDFW) report "Land Use Planning for Salmon, Steelhead and Trout." This guide recommends various land use planning strategies to assist local governments to meet salmon recovery and land use planning laws. Specifically, on urban and rural growth, the report explains:

> Development in rural and urban areas is often located in low-gradient areas.... Urban growth in these riparian environments can alter land surface, soil, vegetation and hydrology by increasing the area of impervious surface. Impervious surface area is strongly correlated with adverse impacts on stream conditions including extensive changes in basin hydrology, channel morphology, and physio-chemical water quality (May et al. 1996; Booth 2000; R2 Resource Consultants et al. 2000)....

Implementing land use planning for salmon, steelhead and trout can avoid many impacts associated with urban and rural growth by maintaining

Note: See page 132 summary of scientific and stakeholder review process

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¹¹⁶ *Id.* at 7.

¹¹⁷ *Id.* at 8.

¹¹⁸ The Board takes official notice of Knight, K. 2009. *Land Use Planning for Salmon, Steelhead and Trout.* Washington Department of Fish and Wildlife. Olympia, Washington, as Supplemental Exhibit 2. http://wdfw.wa.gov/publications/00033/wdfw00033.pdf

estuarine, wetland and riparian habitats, and adjacent upland habitats, among others. For example, limiting impervious surface in the watershed and locating development away from riparian systems (using native vegetation buffers) would improve salmonid habitat function and hence survival (May 2003; May 2009). ¹¹⁹

Further information on stormwater management shows the link between impervious surfaces and water quality degradation:

"Traditional urban and rural development practices remove forests, vegetation and topsoil, compact soils, and increase impervious surface areas, diminishing the land's ability to hold and infiltrate rainwater. The remaining water becomes stormwater runoff, rushing off impervious surfaces such as roofs, roads and compacted soils instead of infiltrating the soil column (Booth 2000). Runoff is of particular concern in regions of intense rainfall, such as glacial outwash regions surrounding Puget Sound, or limited vegetation and landscapes with thin soils, such as the arid and semiarid interior east of the Cascade Range (Booth 2000).

Recent research in western Washington has determined that measurable degradation to downstream aquatic habitat occurs where impervious cover exceeds 5-10% and native forest cover is reduced to less than 65% of watershed area (May et al. 1996; Booth 2000). Washington state agencies such as the Puget Sound Partnership and the State of Washington Department of Ecology, as well as the federal Environmental Protection Agency, have determined that stormwater runoff is the leading contributor to water quality pollution of urban waterways in western Washington State (http://www.psp.wa.gov/stormwater.php). Therefore, it is imperative that local governments manage stormwater with policies, regulations and incentive programs (e.g., Low Impact Development (LID) to reduce and treat stormwater runoff." (Emphasis added.)

Finally, the WDFW report touches on the causes of water pollution with the following analysis and suggestions:

While climate change may influence water quality over the long-term, <u>most</u> water quality degradation can be attributed to land use development practices. Development removes native vegetation, increases water

¹¹⁹ *Id.* at 22. ¹²⁰ *Id.* at 39-40.

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temperatures, and compromises water quality by causing excessive runoff and stormwater discharge which washes nutrients, contaminants, and toxic materials from impervious surfaces into waterways (R2 Resource Consultants et al. 2000). Though these changes are most noticeable in streams draining highly urbanized watersheds (May et al. 1996), <a href="mailto:smaller.

Other sources of water quality degradation include sewage and septic discharges, direct application of chemicals to tidelands, marine dumping, and airborne contaminants, and mis-application of pesticides and herbicides, all of which introduce toxic substances that may threaten salmonid survival." ¹²¹

Lastly, the Board takes official notice of the Puget Sound Partnership's most recent Action Plan for 2012/2013. In this plan, the Board found numerous examples of sources of water quality and quantity problems and how to address them. The Puget Sound Partnership works with local governments to identify problems and solutions. The Action Plan states:

"City and county governments will be the primary implementers of many of the priorities, strategies, and actions identified in the Action Agenda. Since 2008 with the development of the first Action Agenda, local areas have been working toward both a structure and an approach to implement, as well as integrate, local community efforts to advance the Action Agenda." ¹²³

The Partnership states the problems facing Puget Sound and lists options to address them:

"Land cover and land development are essential contributors to the health of both terrestrial and aquatic ecosystem processes and habitats. Due to land conversion from growth and development pressures, many Puget Sound habitats have been reduced in size, diminished in quality, and

The Board takes official notice of Puget Sound Partnership, 2012/2013 Action Agenda for Puget Sound Strategies and Actions to Recover Puget Sound to Health (August 28, 2012), as Supplemental Exhibit 1. http://www.psp.wa.gov/downloads/AA2011/083012_final/Action%20Agenda%20Book%202_Aug%2029%2020 12.pdf

¹²³ *ld.* at 28.

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¹²¹ *Id.* at 77.

fragmented, and the ecosystem processes (e.g., water quality, flow, and retention) that form and sustain these habitats have been degraded and disrupted." ¹²⁴

Specific to the GMA, the Partnership proposes these goals:

For avoiding development of ecologically important areas: Basin-wide, by 2020, loss of vegetation cover on indicator land base over a 5-year period does not exceed 0.15 percent of the 2011 baseline land area. For directing growth to urban growth areas: By 2020, the proportion of basin-wide growth occurring within Urban Growth Areas is at least 86.5 percent (equivalent to all counties exceeding goal by 3 percent) and all counties show an increase over their 2000-2010 percentage. 125

The Action Agenda has specific activities for Whatcom County developed in concert with local governments, businesses, and residents. Some recommendations from the Agenda are:¹²⁶

- Whatcom County has 15 identified "regional pressures" ranging from agriculture, wastewater discharges, run-off from the built environment to transportation.
- Limit forest and farm conversions to other uses such as residential, commercial, or industrial uses.¹²⁸
- Implement onsite sewage system operation and maintenance programs including continued inspections of on-site septic systems (OSS), community trainings, and low interest loan programs.¹²⁹

Thus, current science-based studies conclude that most water resource degradation in the Puget Sound region and Whatcom County in particular can be attributed to land use and land development practices. The GMA requires rural character to be protected by measures governing development that provide patterns of land use consistent with water resource protection. From the evidence in the record about the extent and persistence of

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¹²⁴ *Id.* at 37.

¹²⁵ *Id.* at 38.

¹²⁶ *Id.* at 343-356.

¹²⁷ *Id.* at 346.

¹²⁸ *Id.* at 347.

¹²⁹ *Id.* at 348.

¹³⁰ E.g., Supplemental Exhibit 2 at 77: "Most water quality degradation can be attributed to land use development practices."

water pollution and lack of water availability in Whatcom County, and the need to integrate land use and water resource planning, the Board finds the County has not employed effective land use planning that contains measures to protect water supply and water quality as required by the GMA.

Board Analysis of County's Comprehensive Plan Amendments

The Board's FDO on Remand concluded the rural element of Whatcom County's Plan was not in compliance with the RCW 36.70A.070(5)(c)(iv) requirement to adopt measures protecting surface and groundwater resources. In response, the County adopted Ordinance No. 2012-023, amending the Rural Element Policy 2DD-2.C incorporating water resource provisions. Amendments to Policy 2DD-2.C adopt by reference various preexisting County regulations.

The Board has reviewed the County's amendments to Policy 2DD-2.C in light of the GMA requirement for measures governing rural development that protect water quality and quantity. The Board concludes the existing development regulations adopted by reference in Policy 2DD-2.C, though generally representing important efforts, fail to limit rural development so as to protect rural surface and groundwater quantity or quality and do not meet the GMA mandates of RCW 36.70A.020(10), .030(15), .070(1), and (5)(c)(iv).

The proliferation of evidence in the record of continued water quality degradation resulting from land use and development activities underscores the need for protective measures for water resources. In 2011, the Washington Supreme Court ruled "the statutory language of the GMA is clear that protective measures *shall* be included in the [Comprehensive] Plan." The GMA requires measures to protect the Rural Character of the area by protecting critical areas and surface water and groundwater resources. ¹³²

In requiring these measures, the Legislature intended to prevent harm to the public interest resulting from "uncoordinated and unplanned growth," which the Legislature found

¹³² RCW 36.70A.070(5)(c)(iv).

¹³¹ Kittitas County v. Eastern Washington Growth Management Hearings Board, 172 Wn.2d 144, at 164 (2011).

 to "pose a threat to the environment, sustainable economic development, and the health safety, and high quality of life enjoyed by residents of this state." According to the *Kittitas* Court, the Rural Element must use directive language that ensures protection of rural areas. The measures must "limit development so it is consistent with rural character and not characterized by urban growth." 135

Whatcom County's amendments to the Rural Lands chapter in Ordinance No. 2012-032 adopt by reference the County's existing regulatory provisions as listed below, and the Board makes the following findings about each: 136

Policy 2DD-2.C.1. Protect the functions and values of critical areas (geologically hazardous areas, frequently flooded areas, critical aquifer recharge areas, wetlands, and habitat conservation areas) and the ecological processes that sustain them, through WCC 16.16 Critical Areas provisions, adopted herein by reference.

Although Policy 2DD-2.C.1 will be implemented through development regulation WCC 16.16, protections in this section of the code are limited to critical areas and will not apply throughout the Rural Area. This policy and its associated code comply with GMA protections for critical areas, as required in RCW 36.70A.060, but not for the totality of RCW 36.70A.070(5)(c)(iv) which broadly requires protection for surface and groundwater resources throughout the rural area. This rural element policy does not limit development so as to protect water resources.

Policy 2DD-2.C.2. Minimize the adverse effects of discharges from on-site sewage systems on ground and surface waters through WCC 24.05, adopted herein by reference.

This policy is implemented through WCC 24.05 with the purpose of protecting public health by minimizing public exposure to sewage.¹³⁷ The code allows private homeowners to

¹³³ RCW 36.70A.010.

¹³⁴ Kittitas County at 163.

¹³⁵ *Id.* at 167.

¹³⁶ County's Brief, Ex. R-075 at 11 and 12.

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inspect their own septic systems if they meet certain requirements. The County allows homeowners to inspect their own onsite septic tanks in Rural Areas, but the County requires professional inspections of onsite septic systems only in the Lake Whatcom and Drayton Harbor watersheds. 139 Petitioners argue the self-inspection program (as shown in Exhibit R-128) "reveals that of the few homeowners who "self-inspect", only 7.8% reported failure...compared to the 40.4% of professional inspections" which report failure. 140 Petitioners point out the self-inspection program for septic tanks in the rural area does not have the same compliance rates as the County documents from professionally inspected tanks in the Lake Whatcom and Drayton Harbor watersheds. 141

The Board found that the 2010 WRIA 1 State of the Watershed Report lists malfunctioning on-site septic systems as a potential cause of water quality failures in three of the County's seven watershed areas. 142 The Board finds other studies shown above document water quality contamination from faulty septic systems. The Board is led to conclude the current development regulation does not protect water quality in Whatcom County's rural areas. Policy 2DD-2.C.2 incorporating WCC 24.05 is not a measure limiting

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 $^{^{137}}$ WCC 24.05.010 A. The purpose of this chapter is to protect the public health by minimizing: 1. The potential for public exposure to sewage from on-site sewage systems; and 2. Adverse effects to public health that discharges from on-site sewage systems may have on ground and surface waters. B. This chapter regulates the location, design, installation, operation, maintenance, and monitoring of on-site sewage systems to: 1. Achieve long-term sewage treatment and effluent dispersal; and 2. Limit the discharge of contaminants to waters of the state.

¹³⁸ WCC 24.05.160 B. OSS owners may perform their own OSS evaluation in accordance with subsection C of this section except for the following: 1. OSS technologies that are listed as proprietary on the Washington State DOH list of registered on-site treatment and distribution products where the contract with the private proprietary manufacturer prohibits homeowner evaluations; 2. Community drainfields; 3. Nonconforming replacement systems that do not meet vertical and horizontal separation installed as a result of a system failure; 4. OSS serving food service establishments. C. OSS owners who choose to perform their own evaluations shall complete O&M homeowner training as approved by the health officer. Upon completion of training, OSS owners may perform their own evaluations until property transfer. In cases of hardship, the health officer may approve the homeowner's selection of a designee who has completed the appropriate class to perform the evaluation. If OSS owners are discovered to be noncompliant with this section, the health officer may proceed with legal remedies in accordance with Chapter 24.07 WCC.

¹³⁹ Petitioners' Brief at 6.

Petitioners' Reply Brief at 4.

¹⁴¹ Ex. R-128 at 2, Memorandum at p. 145, Health Department memorandum (June 28, 2012) proposing increased enforcement, particularly in the Lower Nooksack basin.

¹⁴² Ex. C-683-A.14, Table 3 "malfunctioning onsite septic systems".

 development to protect water resources as required in RCW 36.70A.070(5)(c)(iv). The Board does not find that this rural element policy is a measure that limits development to protect water resources; thus, this policy does not meet the requirements of RCW 36.70A.070(5)(c)(iv).

Policy 2DD-2.C.3. Preserve and protect unique and important water resources through development standards in WCC 20.71 Water Resource Protection Overlay District, adopted herein by reference.

Policy 2DD-2.C.3 references WCC 20.71.021, the water resource protection overlay district, but it only applies to a portion of the county's rural area: Lake Whatcom, Lake Samish, and Lake Padden Watersheds. The Board's January 4, 2013 Compliance Order addressed Lake Whatcom water quality issues. The Board finds that Policy 2DD-2.C.3 does create measures to limit development to protect water resources in these three lake areas. However, no measures exist to limit development to protect water resources in the remaining portions of the County's Rural Area. Thus, the County does not have measures to satisfy the requirements in RCW 36.70A.070(5)(c)(iv).

Policy 2DD-2.C.4. Protect surface and ground water resources through stormwater management standards established in the County's Development Standards per WCC 20.80.630 and 12.08.035 and referenced in the following Zoning Code provisions, adopted herein by reference.

As with the Water Resource Overlay Areas, County Policy 2DD-2.C.4 references development standards at WCC 20.80.630 which only apply to limited areas as defined in Ecology's NPDES Phase II permit boundaries; that is, only urban areas in Ferndale and Bellingham. Only those areas must use the most current and more stringent version of

¹⁴³ WCC 20.71.010 Purpose. The Water Resource Protection Overlay District is an overlay zone that is intended to impose additional controls to preserve and protect unique and important water resources within Whatcom County. This district is designed to protect the long-term viability of the Lake Whatcom, Lake Samish and Lake Padden watersheds while creating a regulatory framework to address the needs of these watersheds that are not otherwise provided for in the underlying zone districts.

Ecology's stormwater manual.¹⁴⁴ Ecology's stormwater manual only applies to urbanized areas and not to the remainder of the County's Rural Area. The Board finds Policy 2DD-2.C.4, which adopts by reference more restrictive stormwater management regulations, does not apply to the County's entire Rural Area and thus, the County's Stormwater Manual does not provide measures to protect groundwater throughout the County's Rural Area.

In addition, references to Title 20 Zoning in Policy 2DD-2.C.4 inadequately address stormwater because, even though it restricts <u>lot coverage</u> to 20%,¹⁴⁵ the definition of "lot coverage" is restricted to <u>structures and combination of structures</u> and does not include all impervious surfaces such as driveways, parking lots, or other covered areas which create stormwater runoff.¹⁴⁶

Policy 2DD-2.C.5. Assure that subdivisions meet requirements for critical areas, shoreline management, and stormwater management through the standards in the following Whatcom County Land Division regulations, adopted herein by reference:

- a. WCC 21.04.034 Application Procedures, Short Subdivisions
- b. WCC 21.05.037 Hearing Examiner Notice Hearing and Decision, Preliminary Long Subdivisions

Policy 2DD-2.C.6. Limit water withdrawals resulting from land division through the standards in the following Whatcom County Land Division regulations, adopted herein by reference:

¹⁴⁴ WCC 20.80.630 (3) Unless other county stormwater management provisions are more restrictive, all development activity *within NPDES Phase II area boundaries*, as delineated at the time that the county determines that the development application is complete, *shall comply with the most current editions of*: The Washington State Department of Ecology Stormwater Management Manual for Western Washington; and Appendix 1, Minimum Technical Requirements for New Development and Redevelopment, of the Western Washington Phase II Municipal Stormwater Permit; and Appendix 7, "Determining Construction Site Sediment Damage Potential," of the Western Washington Phase II Municipal Stormwater Permit. NOTE: 1.3. Whatcom County Regulated Area Regulated areas within Whatcom County can be found in *APPENDIX A*:

Mas of the Whatcom County NPDES Phase II Regulated Area on page 22.

¹⁴⁵ Each title references the same language: "All development activity within Whatcom County shall be subject to the stormwater management provisions of the Whatcom County Development Standards unless specifically exempted. No project permit shall be issued prior to meeting submittal requirements relating to stormwater management in the appropriate chapters of the Whatcom County Development Standards."

¹⁴⁶ WCC 20.32.450 Lot coverage. No structure or combination of structures shall occupy or cover more than 5,000 square feet or 20 percent, whichever is greater, of the total area, not to exceed 25,000 square feet. Buildings used for livestock or agricultural products shall be exempt from this lot coverage requirement.

- a. WCC 21.04.090 Water supply, Short Subdivisions
- b. WCC 21.05.080 Water supply, Preliminary Long Subdivisions.

Policy 2DD-2.C.5 and 2.C.6 address subdivision applications, 2.C.5 with respect to stormwater and 2.C.6 with respect to water availability. The County points out, and the Board agrees, that its subdivision regulations do not allow the "daisy-chaining" of plat applications that was the specific target of the Supreme Court's finding of noncompliance in the *Kittitas* case.¹⁴⁷ However, the water supply provisions referenced in 2DD-2.C.6 (WCC 21.04.090 and WCC 21.05.080) do not require the County to make a determination of the legal availability of groundwater in a basin where instream flows are not being met.

In *Postema v. Pollution Control Hearings Board*,¹⁴⁸ the Supreme Court made clear that where Ecology has administratively by adoption of rules closed a surface water body as in much of Whatcom County, and an applicant intends to rely on a new withdrawal from a hydraulically connected groundwater body, new water is no longer legally available for appropriation and the application must be denied. Likewise where Ecology has set minimum instream flow by rule, as in Nooksack WRIA 1, subsequent groundwater withdrawals may not contribute to the impairment of the flows.¹⁴⁹

Whatcom County's regulations only allow approval of a subdivision or building permit that relies on a private well when the proposed well site "does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist." This restriction falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals.

¹⁴⁷ County's Brief at 4, citing WCC 21.01.040.

^{148 142} Wn.2d 68, 90, 95, 11 P.3d 726 (2000).

¹⁴⁹ 142 Wn.2d at 81, 93. While a ground water withdrawal must be denied or otherwise not allowed if the groundwater is in continuity with a "closed" surface water, a ground water withdrawal in continuity with a surface water that has minimum instream flows must be denied or otherwise not allowed if other pertinent factors show that the continuity would cause impairment, such as number of days the instream flows are not met and whether it is upstream or downstream from or higher or lower than the surface water flow or level.

¹⁵⁰ WCC 24.11.090(B)(3); WCC 24.11.160(D)(3); WCC 24.11.170(E)(4).

This Board has previously held that exemption for private wells does not exempt the County from complying with the GMA's mandate to protect critical aquifers. Similarly, the exemption does not exempt Whatcom County from complying with the GMA rural element requirements. The GMA mandates comprehensive plan measures to protect rural character, defined as "patterns of land use and development ... consistent with the protection of natural surface water flows." Policy 2DD-2.C.6 does not govern development in a way that protects surface water flows and thus fails to meet the requirements of RCW 36.70A.070(5)(c)(iv).

Policy 2DD-2.D.7. Regulate groundwater withdrawals by requiring purveyors of public water systems and private water system applicants to comply with Washington State Department of Ecology ground water requirements per WCC 24.11.050, adopted herein by reference.

This policy and the referenced regulation address only water withdrawals by "water system" applicants, leaving a large ambiguity for a building permit applicant seeking to rely on an exempt well. The Board notes the water withdrawals allowed under Policy 2DD-2.C.6 and 2.C.7 adopt by reference three existing code sections all of which allow use of exempt wells except "where DOE has determined by rule that water for development does not exist." However, this is not the standard to determining legal availability of water. The Board finds the record contains a letter provided by Ecology explaining the effect of closed basins and instream flows on rural residential development. If Ecology has closed a

¹⁵¹ In *Olympic Environmental Council v. Jefferson County*, Case No. 01-2-0015, Final Decision and Order (January 10, 2002) at 14, the Western Board ruled the County must protect its groundwater from salt-water intrusion caused by the proliferation of exempt wells. "We are not persuaded by the County's argument that it has no authority to impose some form of water conservation measures, limiting the number of new wells allowed or other measures to reduce the withdrawal of groundwater from individual wells if that withdrawal would disrupt the seawater/freshwater balance and lead to greater seawater intrusion. The exemption of RCW 90.44.050 does not limit a local jurisdiction from complying with its mandate for protection of groundwater quality and quantity under the GMA."

¹⁵² RCW 36.70A.030(15)(g).

¹⁵³ See WCC 21.04.090, WCC 21.05.080, WCC 24.11.050.

¹⁵⁴ Ex. C-678, Department of Ecology, Maia Bellon letter to Clay White, Snohomish County Planning and Development services (December 19, 2011) at 7. While Snohomish County facts differ, the applicable legal principles are the same.

stream to additional withdrawals, it is unlawful to initiate a permit-exempt groundwater withdrawal that would impact the stream. Where the proposed groundwater withdrawal is located within a basin closed to new surface water appropriations, or where Ecology has set instream flows that are not consistently met, there is a presumption that no additional water is legally available. Under RCW 19.27.097 or RCW 58.17.110, it is the applicant's burden to "provide evidence" that water is available for a new building or subdivision. Thus, according to Ecology, the County must deny a permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows. The Board notes Whatcom County's regulations allow mitigations, purchase or transfer of water rights, and other appropriate strategies, but ultimately, a building permit for a private single-residential well does not require the applicant to demonstrate that groundwater withdrawal will not impair surface flows. The applicant to demonstrate that groundwater withdrawal will not impair surface flows.

The Board finds Policy 2DD-2.C.7 fails to limit rural development to protect ground or surface waters with respect to individual permit-exempt wells as required by RCW 36.70A.070(5)(c)(iv).

Policy 2DD-2.C.8. Limit phosphorus entering Lake Whatcom and Lake Samish due to the application of commercial fertilizers to residential lawns and public properties through WCC 16.32, adopted herein by reference.

¹⁵⁷ Ex. R-152.

¹⁵⁵ RCW 19.27.097 provides that a building permit applicant must provide evidence of an adequate water supply which "may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply." When a building permit applicant indicates that their water supply will be obtained through a permit-exempt well, because they cannot provide a water right permit or a letter from a purveyor as evidence, the County must require the applicant to provide evidence of the legal availability of water in another form or deny the application, according to Ecology. *Ex. C-678*.

The Board notes it has no jurisdiction over the issuance of building permits but only over development regulations. Pursuant to RCW 36.70A.320(3) the Board is required to consider the guidelines adopted by the Department of Commerce, codified at Chapter 365-196 WAC, when it decides whether a jurisdiction's actions comply with the GMA. These guidelines, at WAC 365-196-825, provide: "Each applicant for a building permit of a building needing potable water shall provide evidence of an adequate water supply for the intended use of the building. Local regulations should be designed to produce enough data to make such a determination, addressing both water quality and water quantity issues."

Policy 2DD-2.C.9. Protect vital drinking water, sensitive habitats, and recreational resources within the Department of Ecology's designated Western Washington Phase II Municipal Stormwater Permit area and the Lake Whatcom watershed by prohibiting illicit discharges to the county's stormwater collection system through WCC 16.36 Illicit Discharge Detection and Elimination Program, adopted herein by reference.

Policies 2DD-2.C.8 and 2.C.9 place limits on phosphorus discharges or illicit discharges to stormwater only in Lake Whatcom or Lake Padden watersheds or the cities of Bellingham and Ferndale; neither restriction applies to the entire Rural Area. These land use policies and associated development regulations are clearly valuable. However, they do not limit rural development to protect water quality throughout the rural area. Thus, they do not constitute measures to protect the Rural Area as required by limiting development activities to protect water resources and are not in compliance with RCW 36.70A.070(5)(c)(iv).

In sum, the County is left without Rural Element measures to protect rural character by ensuring land use and development patterns are consistent with protection of surface water and groundwater resources throughout its Rural Area. This is especially critical given the water supply limitations and water quality impairment documented in this case and the intensity of rural development allowed under the County's plan. The record shows that the County has many options for adopting measures to reverse water resource degradation in its Rural Area through land use controls. As is discussed by state agency reports and the County's own Comprehensive Plan, the County may limit growth in areas where water availability is limited or water quality is jeopardized by stormwater runoff. It may reduce densities or intensities of uses, limit impervious surfaces to maximize stream recharge, impose low impact development standards throughout the Rural Area, require water conservation and reuse, or develop mitigation options. The County may consider measures based on the strategies proposed in the Puget Sound Action Agenda, the WRIA 1 process, WDFW's Land Use Planning Guide, Ecology's TMDL or instream-flow assessments, or other ongoing efforts. It may direct growth to urban rather than rural areas.

In essence, the County's Rural Element, as amended by Ordinance No. 2012-032, in Policy 2DD-2.C.2, .3, .5, .6, .7, .8 and .9 does not include the measures needed to protect the rural character in the County's Rural Area by ensuring patterns of land use and development consistent with water resource protection. These policies fail to protect rural character because they either apply to limited areas of the County and do not apply to the entire Rural Area, or are limited to subdivisions of land rather than all rural development. The Board finds and concludes the County does not have measures as required in RCW 36.70A.070(5)(c)(iv) to protect surface water and groundwater resources.

Conclusion on Issue 1

The Board finds the Rural Element amendments adopted by Whatcom County in Ordinance No. 2012-032 and Policy 2DD-2.C do not constitute measures to protect rural character by protecting surface water and groundwater resources. The Petitioners have met their burden of demonstrating the County has failed to comply with RCW 36.70A.070(5)(c). The Board is left with a firm and definite conviction that a mistake has been made. Ordinance No. 2012-032 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.

Issue 2: Comprehensive Plan inconsistent with the Transportation Plan

Detailed Statement of Issue 2 from Petition for Review:

Do the "Rural" designation descriptor, future land use map, and related policies and development regulations, including the amendment to Chapter 1, the "Rural Character and Lifestyle" narrative in the Comprehensive Plan, Policies 2DD-1, 2DD-2, 2GG-2, 2GG-3, 2GG-7, the "Rural Communities" narrative in the Comprehensive Plan, Policy 2JJ-6, the "Rural Neighborhoods" narrative in the Comprehensive Plan, Goal 2MM and all policies thereunder (*i.e.*, all Policies 2MM), WCC Chapters 20.32. 20.36, 20.60, 20.61, 20.63, 20.64, 20.67 and 20.69, and WCC 20.80.100 violate RCW 36.70A.030(17), RCW 36.70A.040(3), RCW 36.70A.130(1)(d), RCW 36.70A.070, RCW 36.70A.070(5), RCW 36.70A.020(1), (2), (3) and (12), and case law because the enactments are inconsistent with and fail to carry out the County's Transportation Element?

Applicable Law

RCW 36.70A.020(1), (2), (3) and (12)

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
- (3) <u>Transportation</u>. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

. . .

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.030(17)

"Rural governmental services" or "rural services" include those public services and public facilities historically and typically delivered at an intensity usually found in rural areas, and may include domestic water systems, fire and police protection services, transportation and public transit services, and other public utilities associated with rural development and normally not associated with urban areas. Rural services do not include storm or sanitary sewers, except as otherwise authorized by RCW 36.70A.110(4).

RCW 36.70A.040(3)

Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a countywide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; (d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development

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regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, and if the county has a population of less than fifty thousand, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan by January 1, 1995, but if the governor makes written findings that a county with a population of less than fifty thousand or a city located within such a county is not making reasonable progress toward adopting a comprehensive plan and development regulations the governor may reduce this deadline for such actions to be taken by no more than one hundred eighty days. Any county or city subject to this subsection may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the *department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

RCW 36.70A.130(1)(d)

Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

RCW 36.70A.070 and .070(5)

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

. . .

- (5) 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...
- (6) A transportation element that implements, and is consistent with, the land use element.
- (a) The transportation element shall include the following sub-elements:
- (i) Land use assumptions used in estimating travel;
- (ii) Estimated traffic impacts to state-owned transportation facilities resulting from land use assumptions to assist the department of transportation in monitoring the performance of state facilities, to plan

improvements for the facilities, and to assess the impact of land-use decisions on state-owned transportation facilities;....

Positions of the Parties

Petitioners contend the County's Transportation Element conflicts with the Rural Element in the Comprehensive Plan. The conflict arises because in 2004 the County assumed rural population would increase by just over 11,000 residents; however, according to the actual 2010 Census data, rural population has increased by approximately 19,000 residents.¹⁵⁸ In addition, Petitioners say the County's Rural Element allows for "51,297 additional people in the Rural Area" instead of 11,000 residents as projected in the Transportation Element. 159 Petitioners argue this population discrepancy is different than the Board's finding in its Compliance Order which stated the County's annual review and adjustment of planned and actual population was GMA-compliant. 160 Petitioners' complaint, in this case, is that the Transportation Element is now inconsistent with the Rural Element because the latter already allows more residents than assumed in the Transportation Element and the County has not revised its Transportation Element to accommodate the actual population increases (as shown in the 2010 Census), nor to reconcile the population differences with the Rural Element. Petitioners point out the Board's January 4, 2013 Compliance Order did not apply to the Transportation Element, but only to the inconsistency between population projections in the Comprehensive Plan and capacity in the Development Regulations. Thus, inconsistency between the Rural and Transportation Elements remains to be resolved.

The County responds by stating Petitioners err in assuming the "transportation" planning in the Comprehensive Plan must be based on population at full build-out of the

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¹⁵⁸ Petitioners' Prehearing Brief at 23.

¹⁵⁹ *Id.* at 24.

¹⁶⁰ Compliance Order at 29: "The Board finds the County, by adoption of Ordinance 2012-032, has taken important steps toward reducing the overcapacity of its rural lands in order to contain and control rural development. The County's amended Plan acknowledges the overcapacity and adopts a mechanism to reconcile inconsistencies between its CP and DR through an annual review process. Given the posture of this case, the Board does not find Policy 2DD-1 to be clearly erroneous."

rural area" because the GMA does not require projections based on full build-out. The County does not need to revise its Transportation population projections until 2016. ¹⁶¹ Furthermore, Petitioners compare the County's Transportation population projections from 2004 with the actual 2010 Census figures. Again, the County argues it is not obligated to amend its population figures until 2016 during the next Comprehensive Plan update and does not need to update its current plan with 2010 Census information. Finally, the County critiques the Petitioners' use of Appendix G because this appendix was a model used to project transportation needs and possible impact fees from future development. This model was background information for a policy discussion about transportation impact fees, not a projection of all transportation needs in the Transportation Element. ¹⁶² Therefore, Petitioners' claim of a discrepancy between the Transportation and Rural elements is unfounded, according to the County. The County states it has reduced density in the rural area, will monitor its rural population growth, and will adjust its comprehensive plan as needed when it updates its plan. ¹⁶³

Board Discussion and Analysis

Petitioners' prehearing and reply briefs do not include clear legal arguments about GMA violations. Instead, their argument hinges on comparing actual population counts from the 2010 Census with the County's projected population from 2004 and potential population growth for the Rural Area. Petitioners reference RCW 36.70A.020(3) which encourages efficient multimodal transportation systems and states that counties should ensure that public facilities and services "shall be adequate to serve the development at the time the development is available for occupancy and use." (Emphasis added.)

RCW 36.70A.070 (preamble) provides that the Comprehensive Plan must be an internally consistent document and all elements shall be consistent with the future land use

¹⁶¹ County's Brief at 22-23.

¹⁶² *Id.* at 23.

¹⁶³ *Id.* at 25.

¹⁶⁴ RCW 36.70A.020(3) and (12).

map. "Consistency" means that "differing parts of the comprehensive plan must fit together so that no one feature precludes the achievement of any other." 165

The County's current Transportation Plan Goal 6D states it will support land use planning including land use types and densities reducing reliance on single occupancy vehicles. The County's development regulations require concurrency between transportation facilities and development in Whatcom County Code Ch. 20.78. Regarding population projections, the County's Transportation Plan Action Step #8 states that when the County updates its Comprehensive Plan, it will "ensure affected elements, transportation policies, and programs are also updated." The County has not yet started its 2016 update, but the County Rural Element Policy 2DD-1 states it will review population increases and adjust its Plan accordingly. 169

Petitioners did not point to any policy language in the recent Rural Element amendments that would preclude the achievement of policies in the pre-existing Transportation Element. Petitioners have failed to satisfy their burden to prove an inconsistency between the Rural Element, as amended in Ordinance No. 2012-032, and the Transportation Element of the Comprehensive Plan.

Conclusion on Issue 2

The Board finds and concludes Petitioners failed to carry their burden of demonstrating the County's Transportation Element and Rural Element of its Comprehensive Plan create an internal inconsistency which violates RCW 36.70A.070 (preamble) or RCW 36.70A.130.

¹⁶⁵ WAC 365-196-500(1).

¹⁶⁶ Ex. CP2 at 6-8.

¹⁶⁷ WCC 20.78.010 Purpose. The purpose of this chapter is to ensure that adequate transportation facilities are available or provided concurrent with development, in accordance with the Growth Management Act (RCW 36.70A.070) and consistent with WAC 365-195-510 and 365-195835. No development permit shall be issued except in accordance with this chapter. (Ord. 2009-047 § 1 (Ex. A), 2009). ¹⁶⁸ Ex. CP2 at 6-17.

¹⁶⁹ Compliance Order at 29.

VII. REQUEST FOR FINDING OF INVALIDITY

This Board has previously held that it will declare invalid only the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act. Although the Board finds areas of noncompliance with the GMA, Petitioners have not met the standard for a declaration of invalidity.

VIII. ORDER

Based on the foregoing, the Board determines that Whatcom County's adoption of Ordinance No. 2012-032 fails to comply with RCW 36.70A.070(5).

Petitioners failed to meet their burden of demonstrating the County's Rural Element amendments, adopted in Ordinance No. 2012-032, are inconsistent with the Transportation Element in violation of RCW 36.70A.030(17), RCW 36.70A.040(3), RCW 36.70A.130(1)(d), RCW 36.70A.070, RCW 36.70A.070(5), or RCW 36.70A.020(1), (2), (3) and (12).

The Ordinance is remanded to the County to take the necessary action to achieve compliance as set forth is this Order within 180 days. The following schedule shall apply:

Item	Date Due
Compliance Due on identified areas of noncompliance	December 4, 2013
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	December 18, 2013
Objections to a Finding of Compliance	January 2, 2014
Response to Objections	January 13, 2014
Compliance Hearing Location to be determined	January 21, 2014 9:00 a.m.

SO ORDERED this 7th day of June, 2013.

Nina Carter, Board Member	

Growth Management Hearings Board 1111 Israel Road SW, Suite 301 P.O. Box 40953 Olympia, WA 98504-0953 Phone: 360-664-9170 Fax: 360-586-2253

¹⁷⁰ Abenroth v. Skagit County, WWGMHB Case No. 97-2-0060c, Final Decision and Order (July 22, 1998).

upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings

Board is not authorized to provide legal advice.

June 7, 2013

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FINAL DECISION AND ORDER
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