

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

Futurewise,)	Case No. 07-3-0014
)	
Petitioner,)	
)	<i>(Futurewise V)</i>
v.)	
)	
City of Bothell,)	FINAL DECISION and ORDER
)	
Respondent.)	
)	
)	

SYNOPSIS

*On December 12, 2006, the City of Bothell passed Ordinance 1973, the housing element of its updated comprehensive plan,... **Imagine Bothell....***

Futurewise challenged Ordinance 1973, alleging that the City of Bothell’s comprehensive plan amendment lacked sufficient mandatory provisions for housing affordable to all economic segments of the community, as required by the GMA. Futurewise also charged that Bothell had failed to identify sufficient land for affordable single family development. Bothell replied that its provisions met the minimum standards under the GMA by identifying a variety of housing types and providing the basis for market-driven development of affordable housing.

The Board dismissed the petition, finding that Futurewise failed to carry its burden of proof. The Board concluded that, using Petitioner’s assumptions about housing densities, Bothell’s housing element satisfied the minimum requirements under the GMA because it identified sufficient land zoned to accommodate affordable housing [RCW 36.70A.070(2)(c)]. The Board also concluded that the GMA does not require that Bothell include mandatory incentive programs for low-income housing development within its housing element [RCW 36.70A.070(2)(d)].

I. BACKGROUND

On February 6, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Futurewise (**Petitioner** or Futurewise). The matter was assigned Case No. 07-3-0014. Petitioner challenges the City of Bothell’s adoption of Ordinance 1973 (**Ordinance**) amending the Housing Element of Bothell’s Comprehensive Plan. The grounds for the challenge are noncompliance with several sections of the Growth Management Act (**GMA** or **Act**).

On February 13, 2007, the Board issued a Notice of Hearing; on March 5, 2007, the Board held the Prehearing conference; and on March 9, 2007, the Board issued its Prehearing Order (**PHO**) setting the schedule and legal issues for this case. On March 5, 2007, the Board received the City of Bothell's Index of Documents.

No motions were filed during the period for dispositive and supplementation motions.

The following briefs were timely filed presenting the parties' arguments on the merits:

- Petitioner's Prehearing Brief, with seven exhibits (**Futurewise PHB**)
- Respondent City of Bothell's Prehearing Brief, with 11 exhibits (**Bothell Response**)
- Petitioner's Reply Brief (**Futurewise Reply**)

On June 18, 2007, the Board held a hearing on the merits at the Attorney General's office, 20th Floor, 800 5th Avenue, Seattle, Washington. Board Members David Earling, Presiding Officer, Edward G. McGuire and Margaret Pageler were present for the Board. The Board's Law Clerk, Julie Taylor and Board extern, Linda Jenkins, were also present. Petitioner Futurewise was represented by Tim Trohimovich. Respondent City of Bothell was represented by Peter Eglick and Jane Kiker. Also attending were Gary Hasseler, Bill Wiselogle, Anna Franz, and Michael Weight.

The Hearing on the Merits afforded the Board the opportunity to ask a number of questions and develop a clear understanding of the City's plan and policies and the Petitioner's challenge. Court reporting services were provided by Barbara L. Brace of Byers and Anderson, Inc. The Board did not order a transcript of the hearing. The hearing convened at 10:00 a.m. and adjourned at approximately 12:00 noon.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions are in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). As articulated most recently by the Supreme Court, "the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance." *Lewis County v. Western Washington Growth Management Hearings Board (Lewis County)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

Legislative enactments adopted by a jurisdiction pursuant to the Act are presumed valid upon adoption. RCW 36.70A.320(1). The burden is on the Petitioners to demonstrate that the actions taken by a jurisdiction are not in compliance with the Act. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the actions taken by [a jurisdiction] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find the action of a jurisdiction clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to a jurisdiction in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The Supreme Court has stated: “We hold that deference to [a jurisdiction’s] planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a [jurisdiction’s] planning action is in fact a ‘clearly erroneous’ application of the GMA.” *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005). In *Lewis County*, the Court reaffirmed and clarified its holding in *Quadrant*, stating that: “... the GMA says that Board deference to [a jurisdiction’s] decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds.” 157 Wn. 2d at 506, fn. 16.¹

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to only those issues presented in a timely petition for review. RCW 36.70A.290(1).

III. BOARD JURISDICTION, ABANDONED ISSUES, AND PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that Futurewise’s PFR was timely filed, pursuant to RCW 36.70A.290(2); Futurewise has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amends the City of Bothell’s Comprehensive Plan, pursuant to RCW 36.70A.280(1)(a).

B. ABANDONED ISSUES

The Board’s Rules of Practice and Procedure provide:

¹ The *Lewis County* majority is in accord with prior rulings that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). See also, *Cooper Point Association v. Thurston County*, 108 Wash. App. 429, 444, 31 P.3d 28 (2001) (“notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent’ with the requirements and goals of the GMA”); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002).

A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue.* Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied).

Additionally, the Board's PHO in this matter states: "**Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits.**" PHO, at 6 (emphasis in original). See *City of Bremerton, et al., v. Kitsap County*, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5; and *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7.

Also, the Board has stated, "Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned." *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.

Futurewise makes only conclusory remarks about compliance with RCW 36.70A.110(2), 36.70A.115, and 36.70A.130; and it makes no mention of RCW 36.70A.090, other than in its Issue Statement. Futurewise PHB at 12, 14, 17. The Board, therefore, deems these sections abandoned.

C. PREFATORY NOTE

The Action Challenged:

There is only one Legal Issue presented in this matter for the Board to resolve. This case involves a challenge to the City of Bothell's compliance with various aspects of the GMA's goals and requirements for housing.

The Board notes that Bothell's Housing Element was the subject of a prior challenge by this Petitioner [*Futurewise IV v. City of Bothell*, CPSGMHB Case No. 05-3-0033]. As a result of that challenge, the City engaged in amendment of its Housing Element, enacting Ordinance No. 1973. The parties agreed that Ordinance 1973 rendered the prior challenge moot and stipulated to dismissal of that matter. See *Futurewise IV*, Order of Dismissal (Jan. 29, 2007). The present case is Futurewise's challenge to Ordinance 1973.

IV. LEGAL ISSUES AND DISCUSSION

The Board's March 9, 2007 PHO and the Petitioner's PFR state Legal Issue 1 as follows:

- 1. Does the Housing Element of the Imagine Bothell Comprehensive Plan violate RCW 36.70A.020(4), 36.70A.070(2), 36.70A.090, 36.70A.110(2), 36.70A.115, and 36.70A.130**

by failing to review capacity in residential small lots, and by failing to provide sufficient mandatory provisions for the preservation, improvement, and development of housing, including development incentives and/or regulations, to ensure adequate provisions for existing and projected needs of all economic segments of the community?

Applicable Law

Because of the Petitioner's abandonment of RCW 36.70A.090, .110(2), .115, and .130, the only provision of the GMA applicable to this matter is RCW 36.70A.070(2).

36.70A.070. Comprehensive plans--Mandatory elements

... Each comprehensive plan shall include a plan, scheme, or design for each of the following:

(2) A housing element ensuring the vitality and character of established residential neighborhoods that: (a) Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community.

RCW 36.70A.020(4) is the GMA Planning Goal concerning housing:

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

RCW 36.70A.540, enacted in 2006, sets out the requirements for housing incentive programs which cities or counties may adopt as development regulations in order to meet their affordable housing goals.

(1)(a) Any city or county planning under RCW 36.70A.040 *may* enact or expand affordable housing incentive programs providing for the development of low-income housing units through development regulations....

(Emphasis supplied). Incentive programs may include density bonuses, height and bulk bonuses, fee waivers, parking reductions, expedited permitting, and mixed use projects. The full text of RCW 36.70A.540 is provided in Appendix B.

Discussion

Position of the Parties:

Futurewise contends that the housing element in Bothell's comprehensive plan does not satisfy the GMA requirement to provide sufficient mandatory provisions for the development of housing affordable to all economic segments of the community. Futurewise PHB, at 1. Futurewise contends that Bothell has a duty to put policies and regulations in place that will aid in building more housing affordable to low-income, moderate-income, and median-income families. *Id.* at 4. Futurewise acknowledges that Bothell alone cannot supply sufficient affordable housing for all families in need, but it argues that the GMA requires Bothell to do its share. *Id.* at 4.

Futurewise cites the Board's decision in *Benaroya v. City of Redmond*, CPSGMHB Case No. 95-3-0072, Final Decision and Order, (Mar. 25, 1996) at 18-19, as stating that the GMA requires policies and regulations to encourage the availability of affordable housing by incorporating mandatory incentives and bonuses provided by the city. *Id.* at 11. Futurewise states that the Board has previously considered comprehensive plan provisions such as commitment of block grant funds, density bonuses, streamlined permitting, and working with lending institutions as sufficient to comply with the GMA's mandatory provisions requirement. *Id.* at 12-13, citing *City of Renton v. City of Newcastle*, CPSGMHB, Case No. 97-3-0026, Final Decision and Order (Feb. 12, 1998), at 6. Although Futurewise admits that the incentives and bonuses they cite from other Board decisions are not an exclusive list of the possible policies that Bothell could adopt, Futurewise argues that Bothell does not measure up to the standards set forth in these other cities' plans because Bothell's housing element does not contain any equivalent or better policies. *Id.* at 13.

Petitioner further argues that Bothell must create the capacity for affordable housing units by providing adequate land for single-family homes that are affordable to families earning the median income or below. *Id.* at 18. Futurewise notes that Bothell's high job growth has contributed to increased housing costs within the community. *Id.* at 3 (quoting *Imagine Bothell*, at HO-10). It argues that a total of 2,794 households will need affordable housing in Bothell by 2025, and this is 12 times the current supply of assisted housing in Bothell. *Id.* at 9. Futurewise cites to statistics showing that, given the high cost of land in Bothell, median income families cannot afford newly-constructed detached single-family homes in Bothell unless the new homes are built at a density of 15 dwelling units per acre (du/acre) or greater. *Id.* at 15 and 18. Petitioner asserts that currently, Bothell does not have any land set aside which can accommodate the equivalent of a 15 du/acre density for new small lot single-family housing. *Id.* at 11.

Futurewise acknowledges that Bothell cannot be required to build the affordable homes with the City's own funds, but it does argue that Bothell must first create the capacity for single-family homes affordable to families earning the median income or below, and then Bothell may rely on the market to supply the affordable units. *Id.* at 14 and 15.²

² Bothell is largely zoned at the lowest level of density that can be considered "urban." *Fuhrman II v. Bothell*, CPSGMHB, Case No. 05-3-0025c, Final Decision and Order (August 29, 2005). Bothell does not dispute Futurewise's contention that housing built at these lower densities will not be affordable to people of modest means.

In response, Bothell contends that the Board has never established “one true path” to compliance with the GMA’s housing element regarding affordable housing; accordingly, nothing in the GMA requires that a city adopt incentives or bonus programs and it would be inappropriate for the Board to establish such a requirement. Bothell Response, at 13. Bothell cites RCW 36.70A.540 in contending that the Legislature’s intent was to make local government incentive programs for affordable housing merely “optional,” and that any incentive programs should be consistent with local needs – not based on Futurewise’s interpretation of prior Orders of the Board. *Id.* at 2 and 34.³ Bothell asserts that its housing element represents reasoned decision-making that benefited from the participation of housing experts at A Regional Coalition for Housing [ARCH], and does in fact encourage affordable housing in numerous ways. *Id.* at 34. Bothell states that Futurewise has failed to meet its burden of showing that Bothell’s actions are clearly erroneous because the GMA does not require mandatory provisions to address affordable housing within the housing element. *Id.* at 34.

Although Bothell acknowledges that other cities use various incentive programs to fulfill their housing element requirements under the GMA, Bothell argues that no provision of the GMA requires mandatory incentives. *Id.* at 16 and 30. Bothell contends that each jurisdiction necessarily plans and words its plans differently. *Id.* at 28. Bothell argues that its housing element has ample provisions related to affordable housing, including: ARCH’s continued involvement, streamlined permitting for accessory dwelling units [ADUs], promoting the retention of mobile home parks, Specialized Senior Housing Overlay zones, and development opportunities around residential activity centers. *Id.* at 18 and 19.

Finally, Bothell asserts that the City conducted a detailed housing capacity analysis to confirm that adequate residential capacity exists to meet the City’s aggregate 2025 growth target.⁴ *Id.* at 32. In addition, Bothell notes that its population growth rate was only 3 percent from 2000 to 2005, and it argues that the record does not justify Futurewise’s contention that Bothell’s existing and future needs are 12 times the current supply of assisted housing. *Id.* at 20.

Further, Bothell asserts that it has sufficient capacity to provide a variety of housing types, including residential small lots. *Id.* at 6. However, Bothell states that Futurewise’s focus on small lots is misplaced, because factors affecting the cost of housing are numerous and there is no certainty that any one policy choice will result in more market-based affordable housing. *Id.* at 15, citing *Friends of San Juan v. San Juan County*, WWGMHB Case No. 06-2-0024c, Compliance Order (Feb. 12, 2007), at 25.

Board Discussion

RCW 36.70A.070(2) requires that Bothell’s comprehensive plan include a housing element that ensures the vitality and character of established residential neighborhoods. Specifically, RCW 36.70A.070(2) sets forth four required elements that must be included in the plan:

³ See Appendix B for full text of RCW 36.70A.540.

⁴ However, Bothell’s capacity analysis must comply with Snohomish County’s Buildable Lands Analysis. The Board does not address that requirement here.

- RCW 36.70A.070(2)(a) requires that Bothell include an inventory and analysis of existing and projected needs - Bothell provided this in its “Housing Statement: Analysis of Housing Capacity.” Bothell Response, Ex. 68.
- RCW 36.70A.070(2)(b) requires that Bothell include a statement of its goals, policies, objectives, and mandatory provisions for the development of housing – Bothell provided this throughout the “Housing Goals, Policies and Actions” section of the *Imagine Bothell... Comprehensive Plan*. Imagine Bothell, at HO-22 to HO-27
- RCW 36.70A.070(2)(c) requires that Bothell identify sufficient land for housing – Bothell contends that it provided this in its “Housing Statement and Analysis of Housing Capacity” Bothell Response, Ex. 68, but Futurewise disagrees. Futurewise PHB, at 15 and 17-19.
- RCW 36.70A.070(2)(d) requires that Bothell make adequate provisions for existing and projected needs of all economic segments of its community – Bothell states that it has done this within the framework of its *Imagine Bothell... Comprehensive Plan*, but Futurewise contends that mandatory incentive provisions are required. Futurewise PHB, at 11.

For the reasons discussed below, the Board concludes that Futurewise has not carried its burden of proving that Bothell’s housing element does not comply with the GMA requirements for affordable housing.

Affordable Housing Provisions

The GMA requires Bothell, in its Housing Element, to “make adequate provisions for existing and projected needs of all economic segments of its community.” RCW 36.70A.070(2)(d). Futurewise argues that, for housing provisions to be “adequate,” the Plan must include a funding source, incentives, bonuses, or inclusionary requirements – i.e., some sort of “mandatory provisions.” In its Prehearing Brief, Petitioner cites the Board’s past decisions regarding the housing elements of other cities as evidence of the standard by which a city or county’s housing element may meet the requirements of the GMA. Futurewise, PHB at 11 and 13, citing *Benaroya v. City of Redmond*, CPSGMHB Case No. 95-3-0072 FDO (Mar. 25, 1996) at 18-19, and *City of Renton v. City of Newcastle*, CPSGMHB, Case No. 97-3-0026, Final Decision and Order (Feb. 12, 1998), at 6. However, this reliance is misplaced, because these cases do not represent a list of “required elements” to satisfy the GMA’s requirements for housing plans. While other cities’ plans can be emulated and provide a basis for comparing different approaches and assessing their success or failure, such plans are not the source of “standards” for Board review. On the contrary, each housing element must be considered on its own merits under a fact-specific analysis, and each city or county necessarily plans and words its housing element differently in order to address local needs.⁵ The GMA is the measure of compliance.

Bothell’s housing element identifies several targeted affordable housing strategies based on the City’s assessment of local needs:

- Streamlined permitting process for ADUs. *Imagine Bothell*, Policy HO-P14, at HO-23.

⁵ “[T]he GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.” *Viking Properties v. Holmes, et al.*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005).

- Retention of mobile home parks, echoing our state’s requirement of protecting mobile home residents from displacement under RCW 59.22.010(2).⁶ *Imagine Bothell*, Policy HO-P10, at HO-23.
- Special zoning designation for Senior Housing, which already is providing 535 units in operation, under construction, or in permit review. *Imagine Bothell*, at HO-16.
- RAC zoning to encourage the development of housing in the central locations of the city, a traditional location for affordable housing, by providing opportunities for residential activity centers where the number of units is controlled by site and building envelope regulations rather than a density limit. *Imagine Bothell*, HO-9 and HO-20.

In addition, Bothell enlisted the input of ARCH, an organization created to preserve and increase the supply of housing for low and moderate income households in East King County. Reliance on ARCH’s involvement is well-founded because of its mission – affordable housing – and regional track record. Bothell Response, 4-5, *Imagine Bothell*, Action HO-A11, at HO-27.

Futurewise asserts that these provisions don’t go far enough, because the City’s projections identify the need to house 2,794 more low and median income households by 2025. Futurewise PHB, at 9, citing *Imagine Bothell*, Table HO-16 at HO-18. Citing RCW 36.70A.540, Petitioner argues that the absence of a clearly-defined incentive program is evidence of Bothell’s lack of “adequate provisions” to house all economic segments. The language in recently-passed RCW 36.70A.540 makes clear that the Legislature strongly encourages cities and counties to add such provisions to their development regulations.⁷ However, the Board notes that the legislature did not make affordable housing incentives mandatory under RCW 36.70A.540. The Board declines to make them mandatory through case-by-case decision making.

The Board also notes that Bothell’s plan speaks to incentive programs under Goal HO-P20 which provides: “Consider market incentives to encourage affordable housing to meet the needs of people who work and desire to live in Bothell.” Futurewise PHB at 9, *Imagine Bothell*, Policy HO-P20 at HO-25. The permissive language of RCW 36.70A.540 reflects the Legislature’s desire to encourage cities like Bothell to enact programs that address the housing needs of the “significant number of low-income households that cannot afford market-rate housing in Washington state” by adopting affordable-housing incentives. (Findings 2006 c 149) The Board assumes Bothell will give careful consideration to such programs.⁸

Land Capacity for Affordable Housing

The GMA requires Bothell to “identify sufficient land for housing, including ... housing for low income families.” RCW 36.70A.070(2)(c). Futurewise points to Bothell’s projected need for

⁶ RCW 59.22.010. Legislative findings ... (2) Therefore, it is the intent of the legislature, in order to maintain low-cost housing in mobile home parks to benefit the low income, elderly, poor and infirmed, to encourage and facilitate the conversion of mobile home parks to resident ownership, to protect low-income mobile home park residents from both physical and economic displacement, to obtain a high level of private financing for mobile home park conversions, and to help establish acceptance for resident-owned mobile home parks in the private market.

⁷ See Appendix B, full text of RCW 36.70A.540.

⁸ The Board notes that RCW 36.70A.540 establishes minimum standards for the programs it describes. Therefore, should Bothell decide to opt-in to any of the particular incentive programs defined in the statute, the requirements for such incentive programs are mandatory.

2,794 households and calculates that a density of 15 du/acre is necessary to produce single-family homes affordable to this population segment. Futurewise PHB, at 19. Futurewise calculates that Bothell must provide 66 acres zoned at 15 du/acre - an amount it considers necessary to establish that Bothell has identified sufficient lands for affordable housing under RCW 36.70A.070(2)(c). Futurewise PHB, at 15. Futurewise focuses on the lack of small-lot single family zoning and asserts that Bothell lacks adequate small-lot capacity and therefore the housing analysis is not complete, as it does not provide sufficient small-lot single-family housing for low to middle-income families. Futurewise PHB, at 15 and 17-19. However, Petitioner's assertions are not supported by the record. In Bothell's "Housing Element: Analysis of Housing Capacity," the designation R 2,800 roughly corresponds to 15 du/acre, and there are 104 acres designated as such. *Id.* at 15, Bothell Response, Ex. 68. Therefore, Petitioner's target number of acres has been met because Bothell has identified capacity even beyond the need asserted by Petitioner.

Furthermore, Petitioner's assertion that small lot single-family zoning is the key to providing affordable housing for low to middle-income families misses the mark. Futurewise, PHB at 19. Under RCW 36.70A.070(2)(c), Bothell must demonstrate that it has identified sufficient land for residential development, and it has done so in the record.⁹ *Id.* Ex. 68. Bothell has the discretion to determine the zoning required - whether small lot, duplex, townhome, multi-family, or mixed use - so long as the plan includes sufficient land for housing all economic segments of its community. Here, Bothell has done so, and Petitioner's analysis fails to consider other options beyond single-family detached houses built within zones of 15 du/acre. It is for Bothell to decide how to address the needs of housing the anticipated 2,794 low to moderate-income households in its community, and not for Petitioner to insist on single-family detached housing. If Bothell chooses to meet its affordable housing need through townhomes, apartments, or even horizontal condominiums, it may make that choice through its comprehensive plan and zoning.¹⁰

Conclusion

The Board finds that Petitioner has **failed to carry its burden** of proving that Bothell's housing element does not satisfy the minimum requirements under RCW 36.70A.070(2). Using Petitioner's density assumptions, the City has identified sufficient land for housing affordable to low and moderate-income households. RCW 36.70A.070(2)(c). In addition, although highly desirable, the GMA does not require that Bothell include mandatory incentive programs for affordable housing within its housing element. RCW 36.70A.070(2)(d).

⁹ See *Imagine Bothell*, at HO-19: "Comparing the capacity figures in Table HO-15 with the housing needs figures in HO-16, depending on the amount of housing development in the RAC Zones there is sufficient multifamily capacity to accommodate affordable housing needs resulting from projected growth."

¹⁰ Ironically, in an unrelated but concurrent case, Bothell has challenged Snohomish County for allowing high density detached single-family housing in Bothell's MUGA, arguing *inter alia*, that the designation is inconsistent with Bothell's plan for residential densities. *Bothell v. Snohomish County*, CPSGMHB, Case No. 07-3-0026c.

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, prior decisions of the Board and the courts, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- Petitioner has **failed to carry its burden of proving** that the City of Bothell's Housing Element does not satisfy the minimum requirements for affordable housing under RCW 36.70A.070(2).
- Futurewise's Petition for Review is **dismissed**.

So ORDERED this 2nd day of August, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Presiding Officer

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.¹¹

¹¹ Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on

APPENDIX A

Procedural Background

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On March 5, 2007, the Board held the Prehearing Conference. At the conference, the Board received Bothell's Index of Documents.

On March 6, 2007, the Board received Bothell's letter requesting further issue(s) clarification. On March 7, 2007, the Board received Futurewise's Amended Issue Statement, and "Petitioner's Response to City of Bothell's Request for Further Issue Clarification." On March 8, 2007, the Board received Bothell's letter Re: amended issue statement. On March 9, 2007, the Board issued a "Prehearing Order" setting the schedule and Legal Issues for this case.

No motions were filed by the parties during the time set for hearing of motions.

On May 23, 2007, the Board received "Petitioner's Prehearing Brief," with seven attached exhibits (**Futurewise PHB**).

On June 7, 2007, the Board received "Respondent City of Bothell's Prehearing Brief," with 11 attached exhibits" (**Bothell Response**).

On June 14, 2007, the Board received "Petitioner's Reply Brief" (**Futurewise Reply**).

On June 18, 2007, the Board held a Hearing on the Merits at the Attorney General's office, 20th Floor, 800 5th Avenue, Seattle, Washington. Board members David Earling, Presiding Officer, Edward G. McGuire and Margaret Pageler were present for the Board. The Board's Law Clerk, Julie Taylor, and Board Extern, Linda Jenkins, were also present. Petitioner Futurewise was represented by Tim Trohimovich. Respondent City of Bothell was represented by Peter Eglick and Jane Kiker. Also attending were: Gary Hasseler, Bill Wiselogle, Anna Franz, and Michael Weight. Court reporting services were provided by Barbara L. Brace of Byers and Anderson, Inc. The Board did not order a transcript of the hearing. The hearing convened at 10:00 a.m. and adjourned at approximately 12:00 noon.

the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

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

APPENDIX B

RCW 36.70A.540. Affordable housing incentive programs--Low-income housing units

(1)(a) Any city or county planning under RCW 36.70A.040 may enact or expand affordable housing incentive programs providing for the development of low-income housing units through development regulations. An affordable housing incentive program may include, but is not limited to:

- (i) Density bonuses within the urban growth area;
- (ii) Height and bulk bonuses;
- (iii) Fee waivers or exemptions;
- (iv) Parking reductions;
- (v) Expedited permitting, conditioned on provision of low-income housing units;
- or
- (vi) Mixed use projects.

(b) The city or county may enact or expand such programs whether or not the programs may impose a tax, fee, or charge on the development or construction of property.

(c) If a developer chooses not to participate in an optional affordable housing incentive program adopted and authorized under this section, a city, county, or town may not condition, deny, or delay the issuance of a permit or development approval that is consistent with zoning and development standards on the subject property absent incentive provisions of this program.

(2) Affordable housing incentive programs enacted or expanded under this section shall comply with the following:

(a) The incentives or bonuses shall provide for the construction of low-income housing units;

(b) Jurisdictions shall establish standards for low-income renter or owner occupancy housing, including income guidelines consistent with local housing needs, to assist low-income households that cannot afford market-rate housing. Low-income households are defined for renter and owner occupancy program purposes as follows:

- (i) Rental housing units to be developed shall be affordable to and occupied by households with an income of fifty percent or less of the county median family income, adjusted for family size; and
- (ii) Owner occupancy housing units shall be affordable to and occupied by households with an income of eighty percent or less of the county median family income, adjusted for family size. The legislative authority of a jurisdiction, after holding a public hearing, may establish lower income levels. The legislative authority of a jurisdiction, after holding a public hearing, may also establish higher income levels for rental housing or for owner occupancy housing upon finding that higher income levels are needed to address local housing market

conditions. The higher income level for rental housing may not exceed eighty percent of the county area median family income. The higher income level for owner occupancy housing may not exceed one hundred percent of the county area median family income. These established higher income levels must be considered "low-income" for the purposes of this section;

(c) The jurisdiction shall establish a maximum rent level or sales price for each low-income housing unit developed under the terms of a program and may adjust these levels or prices based on the average size of the household expected to occupy the unit. For renter-occupied housing units, the total housing costs, including basic utilities as determined by the jurisdiction, may not exceed thirty percent of the income limit for the low-income housing unit;

(d) Low-income housing units shall be provided in a range of sizes comparable to those units that are available to other residents. To the extent practicable, the number of bedrooms in low-income units must be in the same proportion as the number of bedrooms in units within the entire building. The low-income units shall generally be distributed throughout the building, except that units may be provided in an adjacent building. The low-income units shall have substantially the same functionality as the other units in the building or buildings;

(e) Low-income housing units developed under an affordable housing incentive program shall be committed to continuing affordability for at least fifty years. A local government, however, may accept payments in lieu of continuing affordability. The program shall include measures to enforce continuing affordability and income standards applicable to low-income units constructed under this section that may include, but are not limited to, covenants, options, or other agreements to be executed and recorded by owners and developers;

(f) Programs authorized under subsection (1) of this section may apply to part or all of a jurisdiction and different standards may be applied to different areas within a jurisdiction. Programs authorized under this section may be modified to meet local needs and may include provisions not expressly provided in this section or RCW 82.02.020; and

(g) Low-income housing units developed under an affordable housing incentive program are encouraged to be provided within market-rate housing developments for which a bonus or incentive is provided. However, programs may allow units to be provided in an adjacent building and may allow payments of money or property in lieu of low-income housing units if the payment equals the approximate cost of developing the same number and quality of housing units that would otherwise be developed. Any city or county shall use these funds or property to support the development of low-income housing, including support provided through loans or grants to public or private owners or developers of housing.

(3) Affordable housing incentive programs enacted or expanded under this section may be applied within the jurisdiction to address the need for increased residential development, consistent with local growth management and housing policies, as follows:

(a) The jurisdiction shall identify certain land use designations within a geographic area where increased residential development will assist in achieving local growth management and housing policies;

(b) The jurisdiction shall provide increased residential development capacity through zoning changes, bonus densities, height and bulk increases, parking reductions, or other regulatory changes or other incentives;

(c) The jurisdiction shall determine that increased residential development capacity or other incentives can be achieved within the identified area, subject to consideration of other regulatory controls on development; and

(d) The jurisdiction may establish a minimum amount of affordable housing that must be provided by all residential developments being built under the revised regulations, consistent with the requirements of this section.

eff. June 7, 2006.