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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

BRODEUR/FUTURWISE, VINCE PANESKO
AND WASHINGTON STATE DEPARTMENT OF
COMMERCE,

Petitioner(s),

v.

BENTON COUNTY,

Respondent,

CITY OF WEST RICHLAND, THE ESTATE OF
THAYNE WISER, CLAYNE WISER, KURT
WISER, and TALON WISER,

Intervenor(s).

Case No. 09-1-0010c

**FINAL DECISION AND ORDER
[Resolution 09-162: Rural Lands]**

I. SYNOPSIS

With this Final Decision and Order (FDO), the Board addresses challenges raised by Petitioners relating to Benton County's adoption of Resolution 09-162, which re-designated approximately 1,120 acres of rural land from Rural One Dwelling Unit per Five Acres (RL-5) to Rural One Dwelling Unit per One Acre (RL-1) in the Richland – West Richland Rural Planning Area. With their Petitions for Reviews, Petitioners also challenged Benton County's separate adoption of Resolution 09-143, which expanded the West Richland Urban Growth Area; however the Board addresses those challenges to Resolution 09-143 in a separate FDO.¹

¹ As noted *infra*, three separate Petitions for Review challenging Resolutions 09-143 and 09-162 were filed and subsequently consolidated to form Case No. 09-1-0010c.

1 The Board concludes that Resolution 09-162 fails to comply with certain sections of the
2 GMA, Benton County Comprehensive Plan, and County-Wide Planning Policies. The Board
3 made a determination that particular parts of the Land Use Element of the Comprehensive
4 Plan are invalid.

5 **II. PROCEDURAL BACKGROUND**

6 Petitions for Review

7 On April 10, 2009, John Brodeur and Futurewise (Brodeur/Futurewise) filed a Petition for
8 Review (PFR) which was assigned Case No. 09-1-0008. On April 23, 2009, Vince Panesko
9 (Panesko) filed a PFR which was assigned Case No. 09-1-0009. On May 4, 2009, the State
10 of Washington Department of Commerce² (Commerce) filed a PFR which was assigned
11 Case No. 09-1-0010.

12 All of these PFRs challenged Benton County's adoption of Resolution 09-162 and,
13 therefore, as provided in RCW 36.70A.290(5), the Board consolidated these three PFRs as
14 *Brodeur/Futurewise, et al v. Benton County*, EWGMHB Case Number 09-1-0010c.

15 Intervention

16 The Estate of Thayne Wisser, Clayne Wise, Kurt Wisser, and Talon Wisser (collectively, Wisser
17 or Intervenors) sought and were granted intervention in support of Benton County's
18 adoption of Resolution 09-162, which re-designated land owned, in part, by the Wisers.³
19 As provided in WAC 242-02-270(3)(a), the Intervenors were limited to those issues in which
20 they had an interest.⁴

21 Hearing on the Merits

22 The Hearing on the Merits (HOM) was held on November 5, 2009, in Kennewick,
23 Washington. Board members John Roskelley, Joyce Mulliken, and Raymond Paolella, were

24 ² At the time of filing, this state agency was the Washington State Department of Commerce, Trade, and
25 Economic Development (CTED). However, with the passage of EHB 2242, CTED became the Washington
State Department of Commerce in July 2009.

³ Prehearing Order, at 2.

26 ⁴ Prehearing Order, at 10-11. The Intervenors' participation was limited to Issues 1 and 7 through 17.

1 present, Board Member Paoella presiding.⁵ Petitioners Brodeur/Futurewise were
2 represented by Robert Beattey of Futurewise; Commerce was represented by Dorothy
3 Jaffe; Vince Panesko appeared *pro se*. Benton County was represented by Ryan Brown.
4 Intervenor Wisner was represented by John Ziobro.

5 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF,
6 AND STANDARD OF REVIEW**

7 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and
8 amendments to them, are presumed valid upon adoption.⁶ This presumption creates a
9 high threshold for challengers as the burden is on the Petitioners to demonstrate that any
10 action taken by the Benton County is not in compliance with the GMA.⁷

11 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating
12 noncompliant plans and development regulations.⁸ The scope of the Board's review is
13 limited to determining whether Benton County has achieved compliance with the GMA only
14 with respect to those issues presented in a timely petition for review.⁹ The GMA directs that
15 the Board, after full consideration of the petition, shall determine whether there is
16 compliance with the requirements of the GMA.¹⁰ The Board shall find compliance unless it
17 determines that Benton County's actions are clearly erroneous in view of the entire record
18 before the Board and in light of the goals and requirements of the GMA.¹¹ In order to find

19 _____
20 ⁵ Due to a scheduling conflict, Board member Roskelley was only present for the Petitioners' presentation. A
21 copy of the transcript was made available for Mr. Roskelley to hear Benton County's and Intervenor's
22 arguments.

23 ⁶ RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable
24 development regulations] comprehensive plans and development regulations, and amendments thereto,
25 adopted under this chapter are presumed valid upon adoption.

26 ⁷ 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.

⁸ RCW 36.70A.280, RCW 36.70A.302.

⁹ RCW 36.70A.290(1).

¹⁰ RCW 36.70A.320(3).

¹¹ RCW 36.70A.320(3).

1 Benton County's actions clearly erroneous, the Board must be "left with the firm and definite
2 conviction that a mistake has been committed."¹²

3 In reviewing the planning decisions of cities and counties, the Board is instructed to
4 recognize "the broad range of discretion that may be exercised by counties and cities" and
5 to "grant deference to counties and cities in how they plan for growth."¹³ However, Benton
6 County's actions are not boundless; their actions must be consistent with the goals and
7 requirements of the GMA.¹⁴

8 Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate
9 that the challenged actions taken by Benton County are clearly erroneous in light of the
10 goals and requirements of the GMA.

11 IV. BOARD JURISDICTION

12 The Board finds that the Petitions for Review were timely filed, pursuant to RCW
13 36.70A.290(2). The Board finds that Petitioners have standing to appear before the Board,
14 pursuant to RCW 36.70A.280(2). The Board finds that it has jurisdiction over the subject
15 matter of the petitions pursuant to RCW 36.70A.280(1).

17
18 ¹² *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v.*
19 *PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993); See also, *Swinomish*
Tribe, et al v. WWGMHB, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157
20 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).

21 ¹³ RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be
22 exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the
23 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.

24 ¹⁴ *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the
25 goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the
26 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, Fn.8.

1 **V. PRELIMINARY MATTERS**

2 All parties agreed to a Stipulation and Order Regarding Contents of Index of Record
3 Number 230 which was presented to the Board at the HOM. The Board accepted this
4 Stipulation and entered the Order.

5 **VI. ISSUES AND DISCUSSION**

6 *The Challenged Action*

7 **Resolution 09-162 – The Re-Designation of Rural Lands**

8 In December 2006, Benton County received Comprehensive Plan Amendment 07-02 (CPA
9 07-02) which sought a re-designation of approximately 1,120 acres of rural land in the
10 Badger Canyon area of the Richland-West Richland Rural Planning Area from Rural Land
11 2.5 (RL-2.5) to Rural Land 1 (RL-1). The acreage encompassed by CPA 07-02 currently
12 contains two residential subdivisions – Cottonwood Springs and Cottonwood Creek, both of
13 which are developed with one-acre lots and were created by transferring the density from
14 RL-2.5 and clustering the lots, preserving the remaining undeveloped land as open space.
15 However, when these clustered developments were created, a note was placed on the plat
16 stating that the open space could not be developed until the density was changed. CPA 07-
02 is the subsequent request for the change so as to facilitate development.

17 Subsequent to the filing of CPA 07-02, Benton County updated its Comprehensive Plan and
18 replaced the RL-2.5 designation on this acreage with the land use designation of Rural
19 Lands 5 (RL-5). Despite this change, the applicants¹⁵ continued to pursue the RL-1
20 designation. Benton County Planning Staff recommended denial of the application, finding
21 that it was not consistent with the GMA and the County’s Comprehensive Plan. The
22 Benton County Planning Commission concurred with the Planning Staff’s recommendation
23 except to modify it to allow a RL-2.5 designation. But, on February 23, 2009, the Benton
24 County Board of County Commissioners (BOCC) rejected both recommendations and
25

26 ¹⁵ Applicants for CPA 07-02 are the Intervenors in this matter.

1 adopted Resolution 09-162, which approved CPA 07-02 as originally presented and re-
2 designated the acreage from RL-5 to RL-1.

3 The Board's Prehearing Order set forth 12 issues challenging Benton County's adoption of
4 Resolution 09-162.¹⁶ The Board will address these issues in the following format:

- 5 A. Rural Lands – Issues 1, 7, 8, 11, 12, 13, and 14
- 6 B. Clustering Agreement – Issue 9
- 7 C. Capital Facilities Planning/ County-Wide Planning Policies – Issues 15 and 16
- 8 D. Invalidity – Issues 10 and 17

9 **A. RURAL LANDS**

10 Issue 1. By allowing rural density of 1 dwelling unit per acre located
11 outside of Urban Growth Areas or Limited Area of More Intense
12 Rural Development has Benton County failed to comply with
13 RCW 36.70A.020(1-2, 9-10, 12), 36.70A.040,¹⁷ 36.70A.070,
14 36.70A.110, and 36.70A.115¹⁸?

15 Issue 7. Does Resolution 09-162 fail to meet the requirements of RCW
16 36.70A.070(b) and (c) for failing to provide rural densities and
17 uses on 1,120 acres?¹⁹

18 Issue 8. Does Resolution 09-162 fail to meet RCW 36.70A.120 for being
19 inconsistent with the requirements in the Benton County Comp
20 Plan which limit the density of rural land to 1 dwelling unit per 5
21 acres?

22 Issue 11. By amending its comprehensive plan to designate 1,120 acres in
23 the rural area at a residential density of one unit per acre, did

24 ¹⁶ The Board's Prehearing Order also limited Petitioners to arguing the issues set forth in their PFRs. As to
25 Rural Lands, Brodeur/Futurewise – Issue 1; Panesko – Issues 7, 8, 9, and 10; Commerce – Issues 11, 12, 13,
26 14, 15, 16, and 17.

¹⁷ The Board notes Brodeur/Futurewise presents no argument in relationship to RCW 36.70A.040 and, in fact,
deletes it from its issue statement (see Brodeur/Futurewise HOM Brief, at 5). Therefore, the Board finds that
the Brodeur/Futurewise has abandoned this provision in regards to Issue 1.

¹⁸ The Board also notes Brodeur/Futurewise presents no argument in relationship to RCW 36.70A.115 and, as
such, it is deemed abandoned in regards to Issue 1.

¹⁹ The Board notes the incorrect RCW citation in this issue statement. The correct provisions is RCW
36.70A.070(5)(b) and .070(5)(c).

1 Benton County allow growth that is urban in nature to occur
2 outside the urban growth area contrary to RCW 36.70A.110(1)?

3 Issue 12. By amending its comprehensive plan to designate 1,120 acres in
4 the rural area at one unit per acre did Benton County fail to
5 encourage development in urban areas where adequate public
6 facilities and services exist contrary to RCW 36.70A.020(1) and
7 fail to reduce the inappropriate conversion of undeveloped land
8 into sprawling low density development contrary to RCW
9 36.70A.020(2)?

10 Issue 13. By amending its comprehensive plan to designate 1,120 acres in
11 the rural area at one unit per acre, did Benton County fail to
12 protect the rural character of the area and allow the inappropriate
13 conversion of undeveloped rural land into sprawling, low-density
14 development contrary to RCW 36.70A.070(5) and RCW
15 36.70A.030(15) and (16)?

16 Issue 14. By amending its comprehensive plan to designate 1,120 acres in
17 the rural area at one unit per acre, did Benton County authorize
18 development in rural areas inconsistent with the county's
19 definition of rural character, contrary to RCW 36.70A.070
20 (preamble)?

21 Applicable Law

22 The GMA establishes a clear dichotomy between an Urban Growth Area (UGA) and a Rural
23 Area (RA). Urban Growth Areas have urban uses, urban densities, urban development, and
24 urban governmental services. In contrast, Rural Areas have rural uses, rural densities, rural
25 development, and rural governmental services. "Urban Growth Areas" and "Rural Areas" are
26 mutually exclusive concepts under the GMA.²⁰ Urban Growth Areas are formally designated
by a county after consulting and attempting to reach agreement with each city located within
that county.²¹

²⁰ RCW 36.70A.110; RCW 36.70A.030; RCW 36.70A.070.

²¹ RCW 36.70A.110. Urban Growth Area boundaries serve to contain "urban growth" within the designated UGA, thereby furthering the fundamental GMA policy to discourage urban sprawl. RCW 36.70A.020(2); *Thurston County et al. v. W. Wash. Growth Mgmt. Hearings Bd. et al.*, 164 Wn.2d 329, 351 (2008).

1 RCW 36.70A.110(1) provides that growth can occur outside of an Urban Growth Area “only
2 if it is not urban in nature.” Urban growth must occur within an Urban Growth Area,
3 particularly in portions of an Urban Growth Area already characterized by urban growth and
4 with existing or available public facilities and services.²² In general, cities are the units of
5 local government most appropriate to provide urban governmental services. It is not
6 appropriate that urban governmental services be extended to or expanded in Rural Areas
7 except in limited circumstances.²³

8 "Urban growth" refers to growth that makes intensive use of land for the location of
9 buildings, structures, and impermeable surfaces to such a degree as to be incompatible with
10 the primary use of land for the production of food, other agricultural products, or fiber, or the
11 extraction of mineral resources, rural uses, rural development, and natural resource lands
12 designated pursuant to RCW 36.70A.170.²⁴

13 "Characterized by urban growth" refers to land having urban growth located on it, or to land
14 located in relationship to an area with urban growth on it as to be appropriate for urban
15 growth.²⁵

16 "Urban governmental services" include those public services and public facilities at an
17 intensity historically and typically provided in cities, specifically including storm and sanitary
18 sewer systems, drastic water systems, street cleaning services, fire and police protection
19 services, public transit services, and other public utilities associated with urban areas and
20 normally not associated with rural areas.²⁶

21 Comprehensive Plans should be guided by the GMA planning goal to “encourage
22 development in urban areas where adequate public facilities and services exist or can be
23

24 ²² RCW 36.70A.110(3).

25 ²³ RCW 36.70A.110(4).

26 ²⁴ RCW 36.70A.030(18).

²⁵ RCW 36.70A.030(18).

²⁶ RCW 36.70A.030(20).

1 provided in an efficient manner.”²⁷ Outside of the UGA, Rural Area planning is governed by
2 different GMA provisions.

3 RCW 36.70A.070(5) requires counties to include in their Comprehensive Plan a “rural
4 element including lands that are not designated for urban growth, agriculture, forest, or
5 mineral resources.” Thus, all lands located outside of designated Urban Growth Areas must
6 be either Rural Areas or designated Natural Resource Lands.

7 RCW 36.70A.070(5)(a) recognizes that local circumstances vary from county to county. A
8 county may consider local circumstances in determining rural densities but must explain in
9 writing how the rural element harmonizes the RCW 36.70A.020 planning goals and meets
10 the GMA’s requirements.²⁸

11 RCW 36.70A.070(5)(b) states that “[t]he rural element shall provide for a variety of rural
12 densities, uses, essential public facilities, and rural governmental services needed to serve
13 the permitted densities and uses.”²⁹ To achieve a “variety of rural densities,” counties may
14 provide for clustering, density transfer, design guidelines, conservation easements, and
15 other innovative techniques that will accommodate appropriate rural densities and uses that
16 are not characterized by urban growth and that are consistent with rural character.³⁰ Thus,
17 a rural density is **“not characterized by urban growth”** and is **“consistent with rural
18 character.”**³¹

19 “Rural character” refers to the patterns of land use and development established by a
20 County in the rural element of its comprehensive plan:

21 _____
22 ²⁷ RCW 36.70A.020(1).

²⁸ RCW 36.70A.070(5)(a).

²⁹ Rural development, forestry, and agriculture are permitted in Rural Areas. RCW 36.70A.070(5)(b).

23 ³⁰ RCW 36.70A.070(5)(b). A county has a great amount of discretion to employ various techniques to achieve
24 a “variety of rural densities.” *Thurston County et al. v. W. Wash. Growth Mgmt. Hearings Bd. et al.*, 164 Wn.2d
329, 355 (2008).

25 ³¹ *Thurston County et al. v. W. Wash. Growth Mgmt. Hearings Bd. et al.*, 164 Wn.2d 329, 359 (2008). The
26 legislature did not specifically define what constitutes a rural density. Instead it provided local governments
with general guidelines for determining rural densities. Whether a particular density is rural in nature is a
question of fact based on the specific circumstances of each case. Id.

- in which open space, the natural landscape, and vegetation predominate over the built environment;
- that foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;
- that provide visual landscapes that are traditionally found in rural areas and communities;
- that are compatible with the use of the land by wildlife and for fish and wildlife habitat;
- that reduced the inappropriate conversion of undeveloped land into sprawling, low-density development;
- that generally do not require the extension of urban governmental services; and
- that are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.³²

RCW 36.70A.070(5)(c) provides that the rural element of a Comprehensive Plan shall include measures that apply to rural development and protect the rural character of the area by:

- containing or otherwise controlling rural development;
- assuring visual compatibility of rural development with the surrounding rural area;
- reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
- protecting critical areas and surface water and groundwater resources; and
- protecting against conflicts with the use of agricultural, forest, and mineral resource lands.³³

"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.³⁴ Comprehensive Plans should be guided by the GMA planning goal to "reduce the inappropriate conversion of undeveloped land into sprawling, low-density development."³⁵

³² RCW 36.70A.030(15).

³³ RCW 36.70A.070(5)(c).

³⁴ RCW 36.70A.030(17).

³⁵ RCW 36.70A.020(2).

1 RCW 36.70A.020, provides 13 GMA Planning Goals must be used for the purpose of
2 guiding the development of Comprehensive Plans and Development Regulations, including
3 the following pertinent goals:

- 4 RCW 36.70A.020(1) – Urban Growth
- 5 RCW 36.70A.020(2) – Reducing Sprawl
- 6 RCW 36.70A.020(8) – Natural Resource Industries
- 7 RCW 36.70A.020(9) – Open Space and Recreation
- 8 RCW 36.70A.020(10) - Environment
- 9 RCW 36.70A.020(12) – Public Facilities and Services

10 Positions of the Parties

11 Brodeur/Futurewise concede that the GMA does not establish a bright line minimum lot size
12 for rural areas, but they argue that there is evidence in the Record which shows densities of
13 1 du/acre are urban in nature and, as such, rural densities of greater than 1 du/5 acres
14 violate GMA. According to Brodeur/Futurewise, the RL-1 designation essentially allows
15 urban growth outside of an urban growth area (UGA).³⁶

16 Brodeur/Futurewise supports these assertions with the GMA definition of urban growth in
17 relationship to the capability of the land to produce food and with the average size of small
18 farms for the county, approximately 4.9 acres; thus, contending a one-acre lot is not
19 compatible for food production. This Petitioner also states RL-1 is not consistent with the
20 County's own definition of rural character, fails to foster traditional rural lifestyles, and
21 amounts to "rural sprawl." Brodeur/Futurewise go on to argue the RL-1 designation will
22 require the extension of urban services and adversely impact water resources and critical
23 areas. Lastly, Brodeur/Futurewise contend Benton County's local circumstances do not
24 support the designation, especially given the prior clustering that has occurred.³⁷

25 Panesko sets forth similar arguments, arguing the lots sizes within Badger Canyon vary
26 between 2.5 acres and 5 acres and that one-acre lots are both urban growth and
inconsistent with rural character, citing to the GMA's definition of rural character set forth in

³⁶ Brodeur/Futurewise HOM Brief, at 7-8.

³⁷ Brodeur/Futurewise HOM Brief, at 8-16.

1 RCW 36.70A.030(15). Panesko further contends the RL-1 designation is not only visually
2 incompatible but is not predominated by open space or natural landscape and fails to foster
3 traditional rural lifestyles and economies.³⁸

4 According to Panesko, the RL-1 designation is a classic example of the inappropriate
5 conversion of land into sprawling, low-density development and this is supported by both
6 the County Planning Staff and Planning Commission's own analysis contained in the
7 Record, both of which recommended denial of the RL-1 designation. Panesko cites to
8 various EWGMHB decisions which found a density of greater than 1 du/5 acres violated the
9 GMA and further argues that without a written record explaining how the RL-1 meets the
10 requirements of the GMA, the County fails to be in compliance.³⁹

11 Commerce's arguments parallel the other Petitioners in many regards. Like Brodeur/
12 Futurewise, Commerce acknowledges that there is no specific definition for rural density but
13 presents five reasons why Resolution 09-162 fails to comply with the GMA: (1) it allows
14 growth that is urban in nature to occur outside the UGA, (2) fails to encourage development
15 in urban areas when adequate public facilities and services exist, (3) fails to reduce the
16 inappropriate conversion of undeveloped land into sprawling low-density development, (4)
17 fails to protect rural character, (5) authorizes development in rural areas that is inconsistent
with the County's own definition of rural character.⁴⁰

18 Commerce, like Panesko, points out that the Record is devoid of any written evidence
19 demonstrating that local circumstances justify the increased density or that the RL-1 density
20 harmonizes the GMA's planning goals as required by RCW 36.70A.070(5)(a). Commerce
21 sets forth an analysis as to rural character – both in relationship to the GMA's definition and
22 the County's own definition – finding the RL-1 is inconsistent with both of these definitions.
23 Lastly, Commerce asserts that by allow growth which is urban in nature to occur outside the

24
25 ³⁸ Panesko HOM Brief, at 13-16

³⁹ Panesko HOM Brief, at 16-19

26 ⁴⁰ Commerce HOM Brief, at 6-7.

1 UGA, Benton County is, in fact, failing to focus that growth within the UGA as required by
2 the GMA.⁴¹

3 In response, Benton County argues that all of the Petitioners have failed to carry their
4 burden of proof, stating their briefs are comprised of “beliefs” and “opinions” which are not
5 sufficient to satisfy their burden of proof. Benton County contends Petitioners have
6 presented no evidence that a RL-1 designation is urban in nature or constitutes rural sprawl
7 nor that the County’s decision finding the designation would preserve rural character was
8 clearly erroneous.⁴²

9 In response, Intervenors point out that the GMA does not define rural density but leaves this
10 to the County based on the specific circumstances of each case. Intervenors contend that
11 the RL-1 designation for these 1,120 acres is consistent with the surrounding rural area and
12 will not adversely impact the visual character. Intervenors go on to state that, in this
13 location, one acre lots do not constitute sprawl but logical infill because it is adjacent to an
14 area already characterized by urban growth. Intervenors further argue that a one-acre
15 density is not urban because no city within Benton County provides for one acre lots.⁴³

16 Intervenors set forth argument in relationship to both the GMA’s and the County’s definition
17 of rural character, asserting the RL-1 designation is not adverse to either of these definitions
18 and that Petitioners have provided no evidence to the contrary.⁴⁴

19 In reply, all three Petitioners reiterate their previously presented arguments: (1) RL-1 is an
20 urban not a rural density, (2) this density does not preserve or protect rural character, (3)
21 this density does not foster traditional rural lifestyles, (4) the County’s own Record denotes
22
23

24 ⁴¹ Commerce HOM Brief, at 7-20.

25 ⁴² Benton County HOM Brief, at 4-5.

26 ⁴³ Intervenors’ HOM Brief, at 6-8, 12

⁴⁴ Intervenors’ HOM Brief, at 13-15.

1 one acre lots as urban in nature, and (5) RL-1 is sprawling, low-density development which
2 will demand urban facilities and services.⁴⁵

3 Board Analysis and Findings

4 Applicant John Sullins requested that Benton County change the Comprehensive Plan Land
5 Use Map affecting 1,120 acres of land located southwest of the Interstate 82 & Badger
6 Road interchange.⁴⁶ On March 2, 2009, the County Commission approved Resolution 09-
7 162 which changed the land use map designation from RL-5 (maximum density of one
8 dwelling unit per 5 acres) to RL-1 (maximum density of one dwelling unit per 1 acre).⁴⁷
9 Resolution 09-162 amended both the land use map and descriptive text within the CP Land
10 Use Element, but Resolution 09-162 did not amend any part of the CP Rural Element.

11 The Board must determine: whether this amendment to the Land Use Element enables
12 prohibited urban growth within a Rural Area⁴⁸; whether this amendment is inconsistent with
13 Rural Character/Rural Development; and if the County's Findings are supported by
14 substantial evidence in the Record.

15 Some of Petitioners' issues and arguments can be distilled down to a claim that by
16 approving this CPA, Benton County violated the GMA's substantive requirements for the CP
17 Rural Element, and in particular the requirement to provide in the Rural Element for a
18 "variety of rural densities" that are "not characterized by urban growth" but are "consistent
19 with rural character."⁴⁹ However, Benton County Resolution 09-162 does not purport to
20 amend any part of the **Rural Element**. On its face, Resolution 09-162 only amends the
21 descriptive text and land use map contained in the **Land Use Element**.

22 ⁴⁵ Brodeur/Futurewise Reply Brief, at 6-7; Panesko Reply Brief to Benton County; Panesko Reply Brief to
Intervenors; Commerce Reply Brief.

23 ⁴⁶ The subject 1,120 acres is located south of I-82 in a Rural Area and is not contiguous to any UGA, although
24 one property corner is next to the south side I-82. The Richard UGA lies to the Northeast of I-82. Commerce
HOM Brief, Tab 20.

25 ⁴⁷ Id.

26 ⁴⁸ The parties agree that this land area does not satisfy the criteria for a Limited Area of More Intensive Rural
Development (LAMIRD) under RCW 36.70A.070(5)(d). See Commerce HOM Brief p. 19 and Tab 8, p. 3.

⁴⁹ RCW 36.70A.070(5)(b).

1 It is difficult to find in the Rural Element a clear explanation of Benton County’s provision for
2 a “variety of rural densities,” and the statute contemplates that a definition of “rural
3 character” would be established in the County’s Rural Element.⁵⁰ However, the Rural
4 Element was not amended by challenged Resolution 09-162. Thus, there is no issue
5 properly presented to the Board at this time regarding the legal sufficiency of the Rural
6 Element. The Petitioners in this case did not appeal any County amendments to the text of
7 the Rural Element.

8 The Board’s review must then be focused on the amendments to the Land Use Element
9 map and text. These amendments are presumed valid and must be upheld unless
10 Petitioners carry their burden to prove that these amendments allow inappropriate urban
11 growth in a Rural Area and are incompatible with “rural character.”

12 Benton County’s Comprehensive Plan does to some extent define “rural character.” CP
13 page 4-41 states: “*Rural character*, as the residents living it perceive it, is different among
14 the various rural communities across the county.” CP page 4-42 states: “There are also
15 fundamental commonalities shared by residents in all of the rural areas; they are:

- 16 • low density;
- 17 • the ability to keep large animals;
- 18 • open spaces for recreation and wildlife;
- 19 • peace and quiet;
- 20 • no city;
- 21 • control growth;
- 22 • good roads;
- 23 • more police security/presence; and
- 24 • a clean up trash and junk.”

25 CP page 4-43 states: the perception of rural residents involved in the planning process, that
26 it is the amount of “open space” and low “overall densities” which are the basis of rural
27 character, not lot sizes per se.” CP page 5-27 states under the Quality of Life Goal for the
28 Richland-West Richland Rural Area: “Promote high quality rural life by preserving the rural

⁵⁰ RCW 36.70A.030(15).

1 character . . . Action: Rigid zoning: 2.5 acre minimum lots for single family, no
2 apartments.** In 2007, the Board of County Commissioners generally rejected designations
3 of less than RL 5 as inconsistent with the GMA.”

4 Resolution 09-162 made a significant change in the residential unit density for the subject
5 1,120 acres – from a previous, lower density of 1 unit per 5 acres to a new, higher density of
6 1 unit per each acre. This new density represents an increase in density of five times the
7 previous density. This density change clearly conflicts with the rural character definitions in
8 the Comprehensive Plan, particularly the “rigid zoning: 2.5 acre minimum lots” on CP page
9 5-27. The density change also is inconsistent with the CP language indicating that smaller
10 lot size designations have been generally rejected as inconsistent with the GMA.

11 The County Commission made a number of findings in Resolution 09-162, including among
12 others that “a one unit per acre density as proposed would preserve the open space or the
13 natural landscape and would be rural in character” and “the densities requested in this
14 application’s proposed location would be consistent with rural character as described in
15 RCW 36.70A.030(15).”⁵¹

16 While finding that “certain physical attributes will help preserve the natural landscape,” and
17 “the visual landscapes are essentially unaffected by this application,” the County
18 Commission made no specific finding as to whether open space, the natural landscape, and
19 vegetation predominate over the built environment per RCW 36.70A.030(15). Likewise no
20 findings were made that this would “reduce the inappropriate conversion of undeveloped
21 land into sprawling, low-density development,” nor that it was “consistent with the protection
22 of natural surface water flows and groundwater and surface water recharge and discharge
23 areas,” per RCW 36.70A.030(15). The Board notes that the findings of the County
24 Commission are cursory, non-specific, and did not particularly address the statutory criteria
25 for consistency with “rural character” set forth in RCW 36.70A.030(15).

26 ⁵¹ Commerce HOM Brief, Tab 20, p. 2.

1 In contrast, the Planning Commission methodically went through each of the RCW
2 36.70A.030(15) criteria for “rural character” and made much more specific findings of fact as
3 to each criterion, excerpted in relevant part as follows:

- 4 • a one unit per acre density as proposed did not preserve the open space or the
natural landscape and was not rural in character
- 5 • a density of one dwelling per acre did not foster traditional rural lifestyles and is
not intended for residential living for those who live and work in the rural area
- 6 • one acre density would create houses back to back and would not provide a rural
visual landscape
- 7 • one acre density would not be compatible with the wildlife in the area because a
8 one acre density would allow for very little or provide no wildlife habitat, the
habitat that exists would be developed into homes, lawns and impervious
9 surfaces
- 10 • one acre density does not reduce the conversion of undeveloped land but would
promote sprawling, low density development
- 11 • at the density of one dwelling per acre the discharge of surface water and ground
12 water would be increased due to more intense domestic uses, i.e., watering of
lawns and the creation of impervious areas. An increase in the number of homes
13 would require more urban type services such as sheriff, fire protection, schools,
and possibly water and sewer services⁵²

14 The Planning Commission also found in relevant part that:

- 15 • the proposal would be the first step in a process to urbanize Badger Canyon
- 16 • the proposed amendment for Rural Lands One acre would increase the density of
the Badger Canyon area from rural to urban and be in conflict with intent
17 expressed by a Goal for the Richland West Richland planning area
- 18 • the density of one dwelling unit per acre as proposed would not be compatible
with the adjacent properties that are currently found as large open spaces that are
19 currently being farmed
- 20 • it would add in excess of 6,000 vehicle trips to an area with significant access
restrictions
- 21 • a density of one dwelling per acre would not be consistent with the overall intent
of the Comprehensive Plan and its goals, but a density of one dwelling per 2.5
22 acres would be more consistent and would be more rural in character⁵³

23 The applicant for this CPA submitted into the county record photographs of adjacent
24 properties showing natural landscapes and vegetation that greatly predominate over the

25 ⁵² Commerce HOM Brief, Tab 9, pp. 2-4.

26 ⁵³ Id.

1 built environment.⁵⁴ These photographs provide evidence to contrast the rural status quo
2 ante for this locale with the proposed development, and support Petitioners' arguments that
3 the proposed housing development would substantially transform this current open space
4 into an urban-like community. The applicant also submitted evidence that there is a market
5 demand for one acre lots in this rural area. However, market demand is not a relevant factor
6 for determining "rural character" as defined in RCW 36.70A.030(15).

7 Moreover, there is no evidence in the record showing that Benton County considered local
8 circumstances in determining an appropriate density on the subject property, as per RCW
9 36.70A.070(5)(a). In fact, Benton County's attorney stated at the Hearing on the Merits: "If
10 you look at the record, nowhere does the County in its decision state it is relying on local
11 circumstances. . . . Let me be clear. The County is not arguing that the local
12 circumstances are the basis for this designation."⁵⁵

13 Based upon a careful review of the parties' briefs, arguments, and the evidence in the
14 record, the Board concludes that there is no substantial evidence in the record to support
15 the County's finding that this CP map amendment is consistent with "rural character." But
16 there is substantial evidence in the record to support a determination that this amendment
17 to the Land Use Element enables prohibited urban growth within a Rural Area. The land use
18 designation change for the subject property, adopted by Resolution 09-162, conflicts with
19 provisions of the Benton County CP Rural Element. Resolution 09-162 conflicts with RCW
20 36.70A.110(1) which provides that growth can occur outside of an Urban Growth Area only
21 if it is not urban in nature. Finally, Resolution 09-162 was not guided by and is not
22 consistent with the GMA Planning Goals 1, 2, 9, and 10 in RCW 36.70A.020.

23 Turning to related Issues 8 and 14, the applicable statutes and analysis are as follows:

24 RCW 36.70A.120 provides that "[e]ach county and city that is required or
25 chooses to plan under RCW 36.70A.040 shall perform its activities and make
26 capital budget decisions in conformity with its comprehensive plan."

⁵⁴ Commerce HOM Brief, Tab 23.

⁵⁵ Excerpt of Proceedings of EWGMHB Hearing on the Merits, Nov. 5, 2009, p. 14.

1 RCW 36.70A.130(1)(d) provides in pertinent part that “[a]ny amendment of or
2 revision to a comprehensive land use plan shall conform to this chapter.”

3 RCW 36.70A.070 provides in pertinent part that the comprehensive “plan
4 shall be an internally consistent document and all elements shall be
5 consistent with the future land use map.”

6 The Comprehensive Plan conformity requirement in RCW 36.70A.120 applies to both
7 planning activities⁵⁶ and capital budget decisions. Comprehensive Plan Amendments must
8 conform to all requirements and standards in the GMA and must not create internal plan
9 inconsistencies.

10 Benton County’s Rural Element (page 5-27) states under the Quality of Life Goal for the
11 Richland-West Richland Rural Area:

12 Promote high quality rural life by preserving the rural character . . . Action:
13 Rigid zoning: 2.5 acre minimum lots for single family, no apartments.** In
14 2007, the Board of County Commissioners generally rejected designations of
15 less than RL 5 as inconsistent with the GMA.

16 Resolution 09-162 made a significant change in the residential unit density for the subject
17 1,120 acres – from a previous, lower density of 1 unit per 5 acres to a new, higher density of
18 1 unit per acre. This significant density increase clearly conflicts with the rural character
19 definitions established by Benton County in the Comprehensive Plan, particularly the “rigid
20 zoning: 2.5 acre minimum lots” on CP page 5-27. A density of 1 unit per acre is clearly
21 inconsistent with a 2.5 acre minimum lot size.⁵⁷ The density change also is inconsistent with
22 the CP language indicating that designations smaller than RL 5 (i.e., designations that

23 ⁵⁶ Although this Board has not directly addressed this question, our colleagues at the Western Washington and
24 Central Puget Sound Boards have. See *Heikkila, et al v. Winlock*, WWGMHB Case No. 09-2-0013c, FDO at
25 12 (Oct. 8, 2009)(Holding that public participation activities where planning activities under 36.70A.120);
26 *Senior Housing Assistance Group (SHAG) v. Lynnwood*, CPSGMHB Case No. 01-3-0014, Order on Motions
(Aug. 3, 2001)(Finding that an amendment to a development regulation was a planning activity); *Compare with*
Friends of Guemes Island v. Skagit County, WWGMHB Case No. 07-2-0023, Order on Motions (Jan. 31,
2008)(Concluding that an a change in the ferry schedule did not amount to a planning activity)

⁵⁷ The County Commissioners made no specific findings regarding consistency with this planning area goal of
“Rigid zoning: 2.5 acre minimum lots” in the Rural Element. Commerce HOM Brief, Tab 20. However, the
County Planning Staff Report stated that the proposed CPA was not consistent with the Rural Element and
was in conflict with the planning goal. Panesko HOM Brief, Tab 10, p. 3.

1 increase density beyond 1 unit per 5 acres) have been generally rejected by the County
2 Commissioners as inconsistent with the GMA.

3 Thus, by amending the Future Land Use Map in the Land Use Element to allow for higher
4 density RL-1 contrary to the Rural Element provisions, Benton County's planning activities
5 did not conform with its Comprehensive Plan and created internal plan inconsistencies.

6 **Conclusion**

7 The Board concludes that Petitioners have carried their burden of proof in demonstrating
8 Benton County's adoption of Resolution 09-162 violates RCW 36.70A.110(1), RCW
9 36.70A.020, RCW 36.70A.070, RCW 36.70A.120, and conflicts with the Comprehensive
10 Plan Rural Element.

11 **B. CLUSTERING AGREEMENT**

12
13 Issue 9. Does Resolution 09-162 fail to enforce previous clustering
14 agreements made under RCW 36.70A.070(b) thereby failing to
15 achieve RCW 36.70A.070(b) requirements for accommodating
appropriate rural densities and uses that are not characterized
by urban growth and that are consistent with rural character?⁵⁸

16 **Applicable Law**

17 RCW 36.70A.070(5)(b) provides, in relevant part:

18 Rural development ... To achieve a variety of rural densities and uses,
19 counties may provide for clustering, density transfer, design guidelines,
20 conservation easements, and other innovative techniques that will
accommodate appropriate rural densities and uses that are not characterized
by urban growth and that are consistent with rural character.

21 **Positions of the Parties**

22 Panesko argues that the land re-designated with Resolution 09-162 was the subject of a
23 prior clustering agreement, which permitted the property owners to create one acre lots
24

25 ⁵⁸ The Board notes the erroneous citation within these issue statements. The correct citation is RCW
26 36.70A.070(5)(b).

1 while leaving a large lot for open space. Panesko cites to two EWGMHB decisions in
2 regards to the need for clustering to be limited so as to protect the rural character and
3 prevent urban-like development. Panesko contends that these 1,120 acres were intended
4 to remain open space as a consequence of the clustering and allowing their re-designation
5 is a clear violation of RCW 36.70A.070(5)(b).⁵⁹

6 Benton County set forth no argument on this issue.⁶⁰

7 Intervenor note that a re-designation of land from RL-5 to RL-1 does not constitute a
8 clustering agreement. Intervenor contend Panesko has cited to no authority which
9 demonstrates a clustering agreement cannot be altered or amended by a subsequent
10 legislative act.⁶¹

11 Board Analysis and Findings

12 RCW 36.70A.070(5)(b) authorizes clustering within the rural area subject to two
13 requirements - densities/uses are (1) not characterized by urban growth and (2) consistent
14 with rural character.

15 While authorized clustering obviously assumes that the property owner will protect the open
16 space for which a protection commitment was made, Panesko cites to no RCW provision,
17 Comprehensive Plan policy, Development Regulation, or language within the Clustering
18 Agreement itself which precludes future changes. In fact, the County's Land Use Element,
19 at Page 4-20, notes that the "reserved open space" should be designated so that they can
20 accommodate urban densities when the land is ultimately included within a UGA.

21 Intervenor stated that there was a note on the plat that says the open space cannot be
22 subdivided until the density changes.⁶²

23
24
25 ⁵⁹ Panesko HOM Brief, at 22-23; Panesko Reply Brief, at 3.

⁶⁰ Benton County's HOM Brief does not defer to, nor incorporate, Intervenor's HOM brief.

⁶¹ Intervenor's HOM Brief, at 10.

⁶² Panesko HOM Brief, Exhibit 6.

1 **Conclusion**

2 The Board concludes that Petitioner has failed to carry his burden of proof in demonstrating
3 Benton County's adoption of Resolution 09-162 violated RCW 36.70A.070(5)(b).

4 **C. CAPITAL FACILITIES PLANNING/COUNTYWIDE PLANNING POLICIES**

5 Issue 15. By amending its comprehensive plan to designate 1,120 acres in
6 the rural area at one unit per acre without adopting
7 corresponding changes to the capital facilities and transportation
8 elements showing how the county intended to provide adequate
9 public facilities to support the new designation, did Benton
County fail to comply with RCW 36.70A.070(3) and RCW
36.70A.020(12)?

10 Issue 16. By amending its comprehensive plan to designate 1,120 acres in
11 the rural area at one unit per acre, did Benton County fail to
12 implement and comply with directive County-wide Planning
13 Policies #1.1, 1.2, 1.6, and 1.10, in violation of RCW
14 36.70A.210(1) as interpreted in *King Cy. v. Cent. Puget Sound
Growth Mgmt. Hrgs. Bd.*, 138 Wn.2d 161, 175, 979 P.2d 374
(1999)?

15 **Applicable Law**

16 RCW 36.70A.020(12) provides:

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

20 RCW 36.70A.070(3) provides:

21 A capital facilities plan element consisting of:

- 22 (a) An inventory of existing capital facilities owned by public entities, showing
23 the locations and capacities of the capital facilities;
24 (b) a forecast of the future needs for such capital facilities;
25 (c) the proposed locations and capacities of expanded or new capital facilities;
26 (d) at least a six-year plan that will finance such capital facilities within
projected funding capacities and clearly identifies sources of public money for
such purposes; and

1 (e) a requirement to reassess the land use element if probable funding falls
2 short of meeting existing needs and to ensure that the land use element,
3 capital facilities plan element, and financing plan within the capital facilities
4 plan element are coordinated and consistent. Park and recreation facilities
5 shall be included in the capital facilities plan element.

6 RCW 36.70A.070(6) provides that the Transportation Element must implement, and be
7 consistent with, the Land Use Element and also provide for transportation improvements
8 concurrent with development. RCW 36.70A.120 provides that planning activities must
9 conform with the Comprehensive Plan. RCW 36.70A.130 provides that Comprehensive Plan
10 Amendments must conform with GMA's requirements. RCW 36.70A.070 provides in
11 pertinent part that the comprehensive "plan shall be an internally consistent document and
12 all elements shall be consistent with the future land use map."

13 RCW 36.70A.210(1) provides, in relevant part:

14 ... For the purposes of this section, a "countywide planning policy" is a written
15 policy statement or statements used solely for establishing a countywide
16 framework from which county and city comprehensive plans are developed
17 and adopted pursuant to this chapter. This framework shall ensure that city
18 and county comprehensive plans are consistent as required in RCW
19 36.70A.100. Nothing in this section shall be construed to alter the land-use
20 powers of cities.

21 Positions of the Parties

22 Commerce asserts that Benton County failed to adopt corresponding changes to its Capital
23 Facilities Element (CFE) showing how it intended to provide adequate public facilities to the
24 additional homes that would be created with a RL-1 designation. Commerce argues the
25 BOCC concluded, without any supporting evidence, that no additional public services were
26 required despite statements made by the applicant that services would be needed.⁶³

Commerce goes on to point out that the Record is devoid of any analysis as to the
cumulative impact of the RL-1 designation, including assessment of other service providers'

⁶³ Commerce HOM Brief, at 22-23.

1 needs due to additional demand. Commerce states that one-acre densities create a
2 demand for urban level services and specifically references emergency services (police,
3 fire, and ambulance), school, library, and water.⁶⁴

4 Benton County asserts that Commerce, without any supporting evidence, is arguing the
5 County's CFE is not in compliance with the GMA. The County states that it did not amend
6 its CFE with the adoption of Resolution 09-162, and it is therefore not subject to challenge.
7 The County further contends that its CFE is more than sufficient to account for the rural
8 density contemplated by the re-designation because it was based on the 1998
9 Comprehensive Plan which designated 3,158 acres as RL-1 and over 58,000 acres as RL-2
10 and those acreages were reduced by the 2006 Comprehensive Plan, resulting in an
11 intensity of rural residential uses that is significantly less than the one contemplated in the
12 CFE.⁶⁵

13 Intervenor's rely on the arguments presented with Issue 8, reiterating that the CFE is not the
14 subject of this appeal and that it is more than sufficient to accommodate the anticipated
15 growth.⁶⁶

16 In reply, Commerce contends that it is not arguing the CFE is non-compliant but rather it is
17 arguing that the County failed to conduct any analysis as to whether adequate public
18 facilities and services existing to support the additional homes that would be created as a
19 result of Resolution 09-162. Commerce further asserts that the County's failure to conduct
20 the analysis, especially given a 10-year old CFE, is further evidence of non-compliance with
21 RCW 36.70A.020(12) and .070(3).⁶⁷

22 Board Analysis and Findings

23
24 _____
25 ⁶⁴ Commerce HOM Brief, at 23-24.

26 ⁶⁵ Benton County HOM Brief, at 5-6

⁶⁶ Intervenor's HOM Brief, at 9, 16

⁶⁷ Commerce Reply Brief, at 10-11.

1 Benton County's Comprehensive Plan contains a requirement "to ensure that the land use
2 element, capital facilities plan element, and its financing plan, are coordinated and
3 consistent."⁶⁸ This mirrors the Capital Facilities Plan Element requirement in RCW
4 36.70A.070(3) and serves to further the key GMA Planning Goal 12 to ensure that public
5 facilities and services are adequate and available to serve the development at the time of
6 occupancy and use. Similarly, the Benton County CP provides a Transportation Element
7 Goal to "ensure that those public facilities and services necessary to support development
8 shall be adequate to serve the development at the time development is available for
9 occupancy and use without decreasing current service levels below locally established
10 minimum standards."⁶⁹ These Comprehensive Plan and GMA provisions all represent a
11 fundamental public policy to ensure that the availability of public facilities and services is
12 considered before new development approval is granted.

12 Moreover, Benton County-Wide Planning Policy #1(10) provides:

13 10. Public facilities and services. Ensure that those public facilities and
14 services necessary to support development shall be adequate to serve
15 development at the time the development is available for occupancy and
16 use without decreasing current service levels below locally established
17 minimum standards. With the exception of water, sewer, streets and power
services, which shall be available at the time of occupancy, the term
"adequate" shall be defined as either available at the time of occupancy, or
shown on the current C.I.P. as a funded project within six years.

18 In this case, the Benton County Commission found that "no additional public services are
19 required to serve the area within this application. There is no evidence in the record that
20 suggests an increase for Benton County Sheriff's services or any other urban governmental
21 services will be required."⁷⁰ However, the Board cannot locate any evidence in the record to
22 support this finding by the County Commission.

23
24
25 ⁶⁸ Benton County Comprehensive Land Use Plan, p. 9-1 (officially noticed per WAC 242-02-660(4)).

26 ⁶⁹ Id. at p. 8-1.

⁷⁰ Commerce HOM Brief, Tab 20, p.2.

1 To the contrary, the SEPA Checklist submitted by the applicant states that “Police, fire,
2 schools, and other services will be needed,” and “Public services and utilities will be needed
3 to sustain the growth and development.”⁷¹ Further, the Planning Commission Findings of
4 Fact state that the development “would add in excess of 6,000 daily vehicle trips to an area
5 with significant access restrictions” along with air quality and agricultural compatibility issues
6 that required a “detailed review.”⁷²

7 The evidence in the record clearly indicates that the proposed development will need a
8 variety of public facilities and services, but the County has not analyzed those needs.
9 Finally, there is no evidence that the County has made provisions for these public
10 facilities/services to be made available for the development at the appropriate time. Thus,
11 Resolution 09-162 conflicts with and is not consistent with the Comprehensive Plan, the
12 County-Wide Planning Policy, as well as RCW 36.70A.020(12) and RCW 36.70A.070.

12 **Conclusion**

13 The Board concludes that Petitioners have carried their burden of proof in demonstrating that
14 Benton County’s adoption of Resolution 09-162 violated RCW 36.70A.020(12), RCW
15 36.70A.070, and the Benton County Comprehensive Plan and County-Wide Planning
16 Policies.

17 **D. INVALIDITY**

18 Issue 10. Will development of the 1,120 acres during remand of Resolution
19 09-162 cause substantial interference with RCW 36.70A.020(1),
20 (2), (8), (9), (10), and (12) for failing to encourage development
21 in urban areas, for failing to reduce inappropriate conversion of
22 undeveloped land, for failing to conserve productive agricultural
23 lands, for failing to encourage the retention of open space, for
24 failing to protect the environment, and for failing to ensure that
25 adequate public facilities and services are available at the time
26 the development is available for occupancy?

71 Commerce HOM Brief, Tab 31, pp. 15, 17.

72 Commerce HOM Brief, Tab 9, p. 3.

1 Issue 17. By amending its comprehensive plan to designate 1,120 acres in
2 the rural area at one unit per acre, did Benton County
3 substantially interfere with the fulfillment of the goals of the
4 Growth Management Act such that the enactment at issue
5 should be held invalid pursuant to RCW 36.70A.302?

6 Applicable Law

7 RCW 36.70A.302, in relevant part, provides:

- 8 (1) A board may determine that part or all of a comprehensive plan or
9 development regulations are invalid if the board:
- 10 (a) Makes a finding of noncompliance and issues an order of remand under
11 RCW 36.70A.300;
 - 12 (b) Includes in the final order a determination, supported by findings of fact
13 and conclusions of law, that the continued validity of part or parts of the
14 plan or regulation would substantially interfere with the fulfillment of the
15 goals of this chapter; and
 - 16 (c) Specifies in the final order the particular part or parts of the plan or
17 regulation that are determined to be invalid, and the reasons for their
18 invalidity.

19 The following GMA Planning Goals are relevant to this issue:

- 20 RCW 36.70A.020(1) – Urban Growth
- 21 RCW 36.70A.020(2) – Reducing Sprawl
- 22 RCW 36.70A.020(8) – Natural Resource Industries
- 23 RCW 36.70A.020(9) – Open Space and Recreation
- 24 RCW 36.70A.020(10) - Environment
- 25 RCW 36.70A.020(12) – Public Facilities and Services

26 Positions of the Parties

Brodeur/Futurewise assert that the RL-1 designation substantially interferes with the GMA's goals as to reducing sprawl, preserving open space, encouraging natural resource industries, protecting the environment, and maintaining existing levels of public services.⁷³

⁷³Brodeur/Futurewise HOM Brief, at 16-17.

1 Panesko cites to the Record, specifically the Planning Department's and Planning
2 Commission's acknowledgement that the RL-1 designation was low-density urban sprawl, to
3 support a claim of substantial interference with Goals 1, 2, and 9. Panesko contends these
4 same documents demonstrate adequate services to support development are not available,
5 the designation fails to conserve productive agricultural land, and increased traffic will
6 adversely impact the environment, thus interfering with Goals, 12, 8, and 10.⁷⁴

7 Commerce asserts the RL-1 designation will permit urban-like development outside of the
8 UGA, thereby allowing permanent inappropriate conversion of undeveloped land into
9 sprawling low-density development which substantially interferes with the fulfillment of Goals
10 1 and 2. Commerce further argues that development at an urban scale without ensuring
11 adequate public facilities and services interferes with Goal 12.⁷⁵

12 *Board Analysis and Findings*

13 A determination of Invalidity may be entered when a Board makes a finding of
14 noncompliance and includes a determination, supported by findings of fact and conclusions
15 of law that the continued validity of part or parts of the plan or regulation would substantially
16 interfere with the fulfillment of the goals of this chapter.⁷⁶

17 Petitioners allege the RL-1 designation substantially interferes with the following goals of the
18 GMA: RCW 36.70A.020(1) – Urban Growth, 36.70A.020(2) Reduce Sprawl, 36.70A.020(8)
19 – Natural Resource Industries, 36.70A.020(9) – Open Space and Recreation,
20 36.70A.020(10) - Environment, and RCW 36.70A.020(12) – Public Facilities and Services.

21 **INVALIDITY FINDINGS OF FACT and CONCLUSIONS OF LAW (RCW 36.70A.302)**

22 With this Final Decision and Order, the Board makes a finding of non-compliance and
23 issues an order of remand under RCW 36.70A.300.

24 _____
25 ⁷⁴ Panesko HOM Brief, at 24-26.

26 ⁷⁵ Commerce HOM Brief, at 26-27.

⁷⁶ RCW 36.70A.302(1)

1 The Board finds that Benton County's adoption of Resolution 09-162 fails to comply with
2 certain sections of the GMA, specifically RCW 36.70A.020, RCW 36.70A.030, RCW
3 36.70A.070, RCW 36.70A.110, RCW 36.70A.120, RCW 36.70A.130, and Resolution 09-162
4 also fails to comply with Benton County-Wide Planning Policy #1(10) and fails to comply
5 with the Rural Element of the Benton County Comprehensive Plan.

6 The Board finds and determines that the continued validity of part of the text and part of the
7 future land use map contained within the Land Use Element of the Benton County
8 Comprehensive Plan would substantially interfere with the fulfillment of the goals of this
9 chapter, including GMA Planning Goals 1, 2, 9, 10, and 12 respectively codified in RCW
10 36.70A.020(1), .020(2), .020(9), .020(10), and .020(12).

11 The particular parts of the Comprehensive Plan that are determined to be invalid are the
12 2009 text amendments to the Land Use Element and the 2009 map amendments to the
13 Land Use Element that were adopted by Benton County Resolution 09-162.⁷⁷

14 The reasons for the invalidity of these particular parts of the text and the future land use
15 map contained within the Land Use Element are as follows: The development of this
16 property at a density of 1 du/acre will irreparably and irreversibly undermine the rural
17 character in this area and violate the mandates set forth in the GMA to preserve rural
18 character, to encourage urban growth within urban areas where facilities and services can
19 be efficiently provided, and to reduce sprawling, low-density development. In addition, there
20 is a potential for vesting during the period of remand of this case. Without this determination
21 of invalidity, vesting would likely make the remand process meaningless and render the
22 case moot.

23 VII. ORDER

24 Based on the foregoing, the Board concludes that Benton County's adoption of Resolution
25 09-162 fails to comply with the Growth Management Act. The Board determines that the

26 ⁷⁷ Resolution 09-162, p. 3, which is attached to the Petitions for Review filed in this consolidated case and also
is attached as Tab 20 to Commerce HOM Brief.

1 adoption of Benton County Resolution 09-162 is clearly erroneous in view of the entire
2 record before the Board and in light of the goals and requirements of the Growth
3 Management Act. Benton County is ordered to bring its Comprehensive Plan into
4 compliance with the Growth Management Act pursuant to this decision.

5 The Board issues a Determination of Invalidity as to the particular parts of the text and
6 future land use map contained within the Land Use Element that were adopted by Benton
7 County Resolution 09-162.

8 The following schedule for compliance, briefing and hearing shall apply:

Item	Date Due
Compliance Due on identified areas of noncompliance	May 24, 2010
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	June 7, 2010
Objections to a Finding of Compliance	June 28, 2010
Response to Objections	July 5, 2010
Compliance Hearing (Telephonic) Call 360 407-3780 use pin 415928#	July 13, 2010 @ 10:00 a.m.

15 If Benton County takes the required legislative action prior to the deadline set forth in this
16 Order, Benton County may file a motion with the Board requesting an adjustment to this
17 compliance schedule.

18 So ORDERED this 24th day of November, 2009.

21 _____
Raymond L. Paolella, Board Member

23 _____
John Roskelley, Board Member

24 Although I concur with my colleagues that Benton County's adoption of Resolution 09-162
25 violates the GMA's prohibition as to urban growth within the rural areas and is inconsistent
26

1 with the County's own definition of rural character, I do not believe invalidity is warranted
2 under the facts and circumstances of this matter. Therefore, I dissent in regards only to the
3 Determination of Invalidity entered in this FDO. On all other findings and conclusion set
4 forth in this FDO, I concur.

5
6

Joyce Mulliken, Board Member

7
8 Pursuant to RCW 36.70A.300 this is a final order of the Board.

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

15 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
16 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
17 judicial review may be instituted by filing a petition in superior court according to the
18 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
19 Enforcement. The petition for judicial review of this Order shall be filed with the
20 appropriate court and served on the Board, the Office of the Attorney General, and all
parties within thirty days after service of the final order, as provided in RCW
34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
but service on the Board means actual receipt of the document at the Board office
within thirty days after service of the final order.

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