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

FUTUREWISE, GOVERNORS POINT DEVELOPMENT COMPANY, TRIPLE R. RESIDENTIAL CONSTRUCTION, INC. AND THE SAHLIN FAMILY, ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS AND DAVID STALHEIM, AND CITY OF BELLINGHAM,

Petitioners,

v.

WHATCOM COUNTY

Respondent.

Case No.: 11-2-0010c

(GOVERNORS POINT DEVELOPMENT COMPANY, *et al.* v. WHATCOM COUNTY)

HIRST ET AL.'S CONCURRENCE IN PART WITH A FINDING OF COMPLIANCE AND OBJECTION TO A FINDING OF COMPLIANCE

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I. INTRODUCTION

Whatcom County has made some progress in complying with the Growth Management Hearings Board ("Board") Final Decision and Order ("FDO"). We concur that the County has complied with the following components of the FDO:

- Revision of Policy 2A-11's consideration of the development potential of contiguous lands in comment ownership as a basis for establishing LAMIRDs (FDO at 51-53).
- Revision of the policy allowing LAMIRD boundaries to be based on "parcels," rather than areas (FDO at 54-56). As discussed below, however, the County has inappropriately continued to designate LAMIRD boundaries based on parcels, rather than areas.
- Removal of the reference to past uses in Policy 2HH-2 (FDO at 57).
- Replacement of "should" with "shall" with respect to the isolation of Type III LAMIRDs (FDO at 60).
- Replacement of "should" with "shall" in restating the requirement for consistency with the size, scale, use, or intensity of development in Type I LAMIRDs (FDO at 62).
- Removal of the Rural Residential Development Overlay ("RRDO") in the Lake Whatcom watershed (FDO at 146-155), although the County has failed to adopt measures to protect Lake Whatcom, as discussed below.
- Revision of the Zoning Code's definition of "Rural Business" to make it consistent with the CP (FDO at 76-78).
- Revision of the LAMIRD boundaries for Eliza Island (FDO at 100-101), Van Wyck (FDO at 112-113), and Emerald Lake (FDO at 114-15).

In many fundamental respects, however, Ordinance 2012-032 ("Ordinance"),[1] and the Comprehensive Plan ("CP"),[2] Zoning Code,[3] and Map[4] provisions that it adopts, fail to comply with the FDO and violate the Growth Management Act ("GMA").

[1] R-075 (attached to the County's Compliance Report).
[2] R-075A (attached to the Compliance Report).
[3] R-075B (attached to the Compliance Report).
[4] R-075C (attached to the Compliance Report).

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We regret that so many issues remain in dispute, but the record establishes that we were diligent in our efforts to draw the County's attention to these problems and to resolve them during the administrative process. From February through August, Hirst et al. submitted more than 26 letters and e-mails, detailing our concerns with the County's proposals and suggesting revisions to help make the CP and Zoning Code compliant with the GMA. We supported our submissions with more than 100 exhibits. Many of these exhibits contain planning data that should have been useful to the County, including GIS work on Rural residential development capacity and the impacts of development on wells and watersheds. We continually expressed our willingness to work with the County to resolve its GMA issues.

Unfortunately, our efforts were unavailing, and the County's CP and development regulations remain noncompliant with the GMA for all of the reasons set forth below.

II. STANDARD OF REVIEW AND STANDING

With respect to the LAMIRD development regulations and boundaries as set forth in the FDO at pages 170-172, the County is subject to an order of invalidity and therefore has the burden of demonstrating that the action taken will no longer substantially interfere with the goals of the GMA.[5]

With respect to the remainder of the County's enactments, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous.[6] In order to find the County's action was clearly erroneous, the Board must be ""left with the firm and definite conviction that a mistake has been made."[7] However, deference to the County under the "clearly erroneous" standard "is neither unlimited nor does it approximate a

[5] RCW 36.70A.320(4).
[6] RCW 36.70A.320(1),(2) and (3).
[7] .*Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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1 rubber stamp. It requires the Board to give the County's actions a 'critical review' and is "more
2 intense standard of review' than the arbitrary and capricious standard."[8] The Board's deference
3 to the County "extends only as far as such decisions comply with GMA goals and
4 requirements."[9]

5 Hirst et al. was a petitioner in this case and has standing pursuant to RCW
6 36.70A.330(2).

7 **III. ARGUMENT**

8 To reduce the length of our briefing, we have coordinated with petititioner Futurewise
9 and will join Futurewise's arguments as indicated below.

10 **A. Rural Element "Protective Measures": (1) Measures to Contain or Otherwise**
11 **Control Rural Development, as required by RCW 36.70A.070(5)(c)(i) (FDO at 33-36); (2) Protective Measures to Assure Visual Compatibility With the**
12 **Surrounding Rural Area, as required by RCW 36.70A.070(5)(c)(ii) (FDO at 38-40); and Protective Measures to Reduce the Inappropriate Conversion of**
13 **Undeveloped Land into Sprawling, Low-Density Development in the Rural Area, as required by RCW 36.70A.070(5)(c)(iii) (FDO at 38-40).**

14 We adopt, and hereby incorporate by reference, Futurewise's arguments with respect to
15 RCW 36.70A.070(5)(c)(i), (ii), and (iii), addressing the County's failure to adopt measures that
16 apply to rural development and protect rural character. We additionally discuss the County's
17 failure to adopt measures to contain or otherwise control rural development, and to reduce
18 sprawl, in other portions of our brief, including the discussion of the County's failure to address
19 its excessive rural population allocation.

20 We would emphasize that the amendments to the Comprehensive Plan ("CP") rely
21 substantially on the incorporation by reference of development regulations to define rural

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[8] *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wash.2d 415, 435 n. 8, 166 P.3d 1198 (2006).
[9] *Lewis County v. WWGMHG*, 157 Wash.2d 488, 505 n.16, 139 P.3d 1096 (2006).

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character. As a result, the CP itself lacks an adequate definition of rural character, a deficiency which the incorporation by reference of development regulations does not cure.

The County appears to misread the FDO's requirement to adopt "measures" to contain or otherwise control rural development and to prevent sprawl. The Supreme Court did not create a new regulatory requirement in *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wash.2d 144, 256 P.3d 1193 (2011) ("*Kittitas*"), as the County claimed throughout its process. Rather, the court clarified the longstanding requirements of RCW 36.70A.070(5)(c), which states:

> The rural element **shall** include **measures** that apply to rural development and **protect the rural character** of the area, as established by the county, by:
>
> (i) Containing or otherwise controlling rural development;
>
> (ii) Assuring visual compatibility of rural development with the surrounding rural area;
>
> (iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
>
> (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and
>
> (v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

As the FDO states, this "clarifying ruling" applies the "clear language of RCW 36.70A.070(5)(c) and its requirement that the Rural Element shall include protective measures".[10] The FDO states that the Comprehensive Plan "is a blueprint or a guide – it is not a

[10] FDO at 32.

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regulation."[11] This "blueprint or guide" must "provide[] a framework that ensures compliance with the GMA and provide[] measures by which a jurisdiction will be held accountable."[12]

The GMA requires the County to adopt both a comprehensive plan and development regulations that are "consistent with and implement the comprehensive plan."[13] As the Washington Supreme Court recently reiterated,

> Counties required or choosing to plan under the Growth Management Act (GMA), ch. 36.70A RCW, must adopt a comprehensive plan and development regulations that implement the comprehensive plan. RCW 36.70A.040(3)(d), (4)(d). A county's comprehensive plan serves as "a 'guide' or 'blueprint' to be used when making land use decisions." *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 873, 947 P.2d 1208 (1997) (quoting *Barrie v. Kitsap County*, 93 Wash.2d 843, 849, 613 P.2d 1148 (1980)). " 'Development regulations' " are "controls placed on development or land use activities." RCW 36.70A.030(7); see *City of Seattle v. Yes for Seattle*, 122 Wash.App. 382, 391, 93 P.3d 176 (2004) (because the proposed ordinance "places controls on development and land use," it was held to be a development regulation).[14]

The Washington Administrative Code provides that "[e]ach county or city planning under the act should develop a strategy for implementing its comprehensive plan. The strategy should describe the regulatory and nonregulatory measures (including actions for acquiring and spending money) to be used to implement the comprehensive plan. The strategy should identify each of the development regulations needed."[15]

The proposal to use the County's development regulations as the County's "guide" or "blueprint" to land use policies puts the cart before the horse. Or perhaps it turns the cart into the horse. Rather than establishing the blueprint for "controls placed on development or land use

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[11] FDO at 30.
[12] *Id*.
[13] RCW 36.70A.040(3)(d).
[14] *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wash.2d 421, 427, 256 P.3d 295 (2011) (emphasis added).
[15] WAC 365-196-650.

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activities," the County takes its current controls and claims that they are the blueprint. The regulations thus implement --- themselves.

It is not clear what effect incorporation by reference will have on planning or the implementation of development controls in the future. The regulations are incorporated by reference by code section, with no date specified. If the County decides to revise its development regulations, it can do so with impunity and there will be no ability to challenge the revision based on inconsistency with the Comprehensive Plan – because the Plan incorporates the provisions by reference, so whatever the WCC provision says is also the governing Plan provision. This violates the GMA.

Perhaps the County will choose to amend the Plan when it amends development regulations. Clearly, the "implementing" regulations then would be driving the "blueprint." This is not the system created by the GMA or described by the Supreme Court. It will create planning problems and practical issues regarding GMA challenges and ability to comply with time limits set by state law and the WCC.

For all these reasons,[16] as well as the reasons set forth in Futurewise's briefing and incorporated herein, the County's adoption of its existing development regulations as "measures" in its CP violates the GMA.

B. Protecting Critical Areas, and Surface and Groundwater Resources, as required by RCW 36.70A.070(5)(c)(iv) (FDO at 40-45; FDO at 146-156).

The FDO addressed "whether the County's newly amended Rural Element complies with RCW 36.70A070(5)(c)(iv) in containing 'measures that apply to rural development' and protect

[16] This analysis was provided to the County in C-740 (Nossaman, 3/21/12) at 3-4.

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rural character by 'protecting critical areas ... and surface water and ground water resources.'"[17] The Board concluded that the County's measures did not comply with the GMA. The revised CP and development regulations still fail to protect these elements of rural character.

1. Critical Areas: Chuckanut Wildlife Corridor

The Chuckanut Wildlife Corridor is the last remaining area in Puget Sound with natural land cover extending from marine waters to upland forest. The County's Best Available Science review, as well as Bellingham's Wildlife and Habitat Assessment, documented the Corridor as having the greatest diversity of plants and animals in the County.[18]

In its determination that the County has failed to protect this critical area, the FDO states: "Measures to protect the habitat values of the Chuckanut corridor must address habitat fragmentation and degradation."[19] The Board found that it "cannot ignore the current WDFW report, Ecology bulletins, WRIA 1 assessment, Cascades-to-Chuckanut Conservation Plan, and other authoritative reports in the record."[20] The cited WDFW report shows that "maintaining the state's native wildlife species requires densities no greater than one dwelling unit per 20 acres, augmented by wildlife conservation planning measures."[21]

The Ordinance that designated the Chuckanut Wildlife Corridor as a "Locally Important Habitat Designation" under the Critical Areas Ordinance provides further standards to guide the County:

- Paragraph 12 states: "Pursuant to Whatcom County Comprehensive Plan Policy 11G-10, Whatcom County must develop and administer regulations and incentives such that there

[17] FDO at 40.
[18] C-703 (Harris, 6/10/12) at 3.
[19] FDO at 44.
[20] *Id.* at 43.
[21] *Id*. at 41.

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is no net loss of ecological functions and values of wetlands and fish and wildlife habitats."

- Paragraph 13 states: "The 2003 Critical Areas Assistance Handbook published by the Washington State Office of Community Trade and Economic Development (CTED) specifies that there must be "no net loss of structure, value and function of natural systems constituting critical areas."[22]

Without any discussion of this evidence, concern for Best Available Science, or effort to address the "ecological functions and values" of this critical area, the County simply applied R5A zoning to the affected area within the Chuckanut Wildlife Corridor. Five-acre zoning applies to almost two-thirds -- 65.6% -- of Rural lands,[23] and is not a standard that is protective of values of wildlife habitats, which requires 20-acre, not 5-acre, zoning. The County has not addressed habitat fragmentation and degradation, has not applied wildlife conservation planning measures, and has not shown any effort to ensure no net loss.[24] The CP and development regulations do not comply with the GMA.

The County's Compliance Report states that the Critical Areas Ordinance ("CAO") (WCC 16.16) includes "requirements" for the Wildlife Corridor,[25] but these "requirements" do not protect the Corridor as required by the GMA and the FDO. In the FDO, the Board explicitly recognized that the County has adopted critical area regulations and observed that these regulations were not subject to challenge. Rather, "the question here is whether the County's newly-amended Rural Element complies with RCW 36.70A.070(5)(c)(iv) in containing 'measures that apply to rural development' and protect rural character by 'protecting critical

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[22] C-813 (Nossaman, 3/19/12), letter at 4.
[23] *Id*.
[24] In the County's own words, the proposed R5A zoning is a "complete waste of time" with "not a whole lot of practical effect." C-685U (Transcripts of County Council Meetings) at 1-2, quoting staff (Davis) and the Council Chair (Kershner).
[25] Compliance Report at 10.

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areas. . '"[26] *See also Stevens County v. Eastern Washington Growth Management Hearings Bd.* 163 Wash.App. 680, 693-94, 262 P.3d 507 , *rev. denied*, 173 Wash.2d 1019, 272 P.3d 247 (2012) (held: a reference to the CAO does not automatically establish GMA compliance; development regulations that provide ancillary protection for critical areas must meet GMA requirements.)

In any case, the CAO does not alter the development allowed by the County's CP and development regulations. In fact, the CAO allows the alteration of critical areas when "[a]lteration is part of an essential element of an activity allowed by this chapter. . " WCC 16.16.225.B.4. The construction of houses is an "essential part" of development in the R5A zone, and the CAO will not override the Rural Element and development regulations applicable to the Wildlife Corridor.

The only standards directly applicable to the Wildlife Corridor, which is defined as a "locally important habitat designation," provide as follows:

> Alterations that occur within a locally important habitat area or that may affect a locally important species as defined herein shall be subject to review on a case-by-case basis. The technical administrator shall have the authority to require an assessment of the effects of the alteration on species or habitats and may require mitigation to ensure that adverse effects do not occur. This standard is intended to allow for flexibility and responsiveness with regard to locally important species and habitats.[27]

Nothing in the CAO Chapter prevents the development of residences in the wildlife corridor. The CAO thus allows alteration of the wildlife corridor as an "activity allowed by this chapter" and provides no protection, other than a statement that the technical administrator "has the authority" to "require an assessment" and "may" require mitigation. This does not address

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[26] FDO at 40.
[27] WCC 16.16.730, quoted in C-740 (Nossaman, 5/21/12) at 8.

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habitat fragmentation and degradation, and it certainly does not substitute for the GMA's requirement that the Rural Element must protect rural character.

We provided the County with detailed recommendations that would ensure protection of the Wildlife Corridor and compliance with the GMA. These recommendations range from the preservation and restoration of native habitat, to the regulation of lighting and domestic pets, to the development of a comprehensive wildlife conservation plan.[28] The County chose simply to ignore these recommendations and to disregard the requirements of its own Ordinance establishing the Wildlife Corridor, Best Available Science for the protection of the Corridor, the FDO and the GMA. The County continues to ignore evidence that residential and infrastructure development are a significant cause of fragmentation and habitat degradation[29].and remains out of compliance with RCW 36.70A.070(5)(c)(iv).

2. Surface and Groundwater Resources

In the prior proceeding, the County claimed that the "perceived" problems with small lot sizes raised by petitioners, "from surface water runoff to contaminated wells to failing septics," were merely "speculative" and unsupported by local data.[30] It claimed that the County's development regulations – many of which now have an elevated status, constituting CP policies as well as development regulations – protect the County from these so-called "speculative" problems.[31] The Board found, however, that Petitioners had provided "ample evidence about risks to water supply, water quality, and water resources for fish from rural development in

[28] C-694 (Harris, 6/19/12) at 1-2.
[29] FDO at 41, 43-44.
[30] *Id.* at 43.
[31] *Id*.

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Whatcom County."[32] Despite the significance of water resources to its economy and quality of life, however, the County has failed to protect water quality, water supply, and water resources for fish as required by the GMA.

a. Lake Whatcom: Failure to Adopt Regulations to Protect Water Quality

The FDO concluded that the County violated the GMA by failing to protect Lake Whatcom's water resources. In response, the County removed the RRDO from the watershed, preventing the creation of some number of additional small lots, and replaced the RRDO with R5A zoning, a zoning category which limits impervious surfaces to 10% in the Lake Whatcom watershed.[33] To put this zoning change in context, the 2012 Lake Whatcom Watershed Buildout Analysis shows a "developable capacity" (potential units) of 1,634 new units within the County's Rural watershed.[34] While the reduction of a few units is welcome and required by the FDO, it will not protect Lake Whatcom from phosphorus runoff in light of the remaining development capacity in the watershed.

The County also adopted existing Zoning Code provisions as its CP "measures" to protect Lake Whatcom.[35] The only CP measures that the County "added" specifically to protect Lake Whatcom are actually existing Zoning Code requirements (1) to limit phosphorus from the application of commercial fertilizers to residential lawns and public properties,[36] and (2) prohibiting illicit discharges to the county's stormwater collection system within the watershed.[37]

[32] *Id*.
[33] Compliance Report at 9. County staff told the County Council that the RR5A zoning change would only affect one lot. C-685U (Transcript) at 5.
[34] C-685H (Lake Whatcom Watershed Annual Buildout Analysis 2012) at 3, C-685 at 10.
[35] Compliance Report at 10.
[36] CP at 14, para. C.8.
[37] *Id.,* para. C.9.

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The irony of this approach, of course, is that these regulations have NOT protected Lake Whatcom, which is listed as an "impaired" water body. Fertilizers are a small part of the problem, and "illicit" discharges to stormwater certainly need to be controlled, but the record does not support the conclusion that these measures with protect Lake Whatcom.

As the FDO noted, the Department of Ecology has told Whatcom County that it needs to adopt "zero discharge" regulations for phosphorus, and the County has failed to do so. The FDO, as well as the Supreme Court's *Kittitas* decision, both emphasized the importance of the Department of Ecology's input in adopting measures to ensure that water resources are protected,[38] but the County has failed to adopt the protective regulations that it promised and that are required by the GMA.

The Board addressed Lake Whatcom development in two parts of the FDO. In the first discussion, on pages 40-45, the FDO concludes;

> In this case, the measures **necessary** to protect surface and groundwater resources in the Lake Whatcom area are clearly identified in the record. Incorporating them into the Rural Element, as **required** by RCW 36.70A.070(5)(c)(iv) as construed by the *Kittitas* Court, should be a straightforward task. For example, the Board notes the County Council considered an amendment to the Ordinance making application of the RRDO in the Lake Whatcom area contingent on adoption of "more protective development standards. In addition, Ecology's Steve Hood testified: "The easiest way to meet the phosphorus targets is to have no more than 10% of a site as impervious surface **and to disperse it into a forested area that covers 65% of the site**." **Zero-discharge development standards, 10% impervious surface limits, and perhaps restrictions that limit new wells must be considered**.[39]

In its second discussion (pages 146-156), the FDO states, "Express provisions in the GMA require planning and development regulations for the rural area to be protective of water

[38] FDO at 44, *Kittitas,* 172 Wn.2d 144, 180.
[39] *Id*., emphasis added.

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1 resources."[40] The Board found that "**The record in this case provides overwhelming evidence**
2 **that the primary threat to Lake Whatcom water quality is caused by phosphorus-laden**
3 **runoff resulting from development in the watershed.**"[41] The Board cited the fact that:

4 > Ecology indicated it was relying on a commitment from Whatcom County Executive Pete
5 > Kremen to adopt regulations **by close of 2011** to ensure **new development does not discharge any more phosphorus than a forested or native vegetated site**. Two
6 > methods are suggested: limitations on impervious surfaces **and** preservation of native vegetation, or, on smaller lots, a combination of rainwater storage, infiltration, water
7 > reuse, and treatment of discharged water.[42]

8 The FDO concluded that "Comprehensive Plan commitment to a zero-discharge policy
9 and expedited adoption of the necessary regulations is probably indicated."[43]

10 The CP did not adopt a zero discharge policy - or *any* policy responsive to Ecology's
11 concerns or protective of water quality. Nor did the County adopt any stormwater regulations,
12 and has no timeframe to adopt the regulations so clearly and urgently needed to protect the
13 drinking water source for more than half the County's population.[44]

14 The County's failure to protect this water resource does not stem from any sudden
15 improvement in the quality of the Lake. The most recent monitoring report for Lake Whatcom
16 indicates that the water quality of the Lake continues to decline. Some of the report's
17 conclusions state as follows:

18 > Low oxygen conditions are associated with a number of unappealing water quality
19 > problems in lakes, including loss of aquatic habitat; release of phosphorus from the sediments; increased rates of algal production due to release of phosphorus; unpleasant

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[40] FDO at 146.
[41] *Id*. at 149.
[42] *Id*. at 150-51, emphasis added.
[43] FDO at 156.
[44] C-685K (E-mail from County staff, confirming that the County had not acted and had no plans to act on stormwater regulations for Lake Whatcom: "The PC recommendation was introduced to the council on June 5, 2012. Neither a committee meeting nor a public hearing was scheduled at that time. Unfortunately, I do not know when that will happen either).; *see also* C-685, letter at 11.

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> odors during lake destratification; fish kills, particularly during lake destratification; release of metals and organics from the sediments; increased mercury methylation; increased drinking water treatment costs; increased taste and odor problems in drinking water; and increased risks associated with disinfection by-products created during the drinking water treatment process.

> As in previous years, Sites 1 and 2 developed severe hypolimnetic oxygen deficits by mid-summer. . . The levels of hypolimnetic oxygen have declined over time at Site 1, causing the lake to be listed by the Department of Ecology as an "impaired" waterbody (Pelletier, 1998). The increasing rate of oxygen loss is most apparent during July and August, after the lake develops a stable thermal stratification but before oxygen levels drops near zero.[45]

The Department of Ecology continues to tell the County that it needs to implement zero-discharge requirements. As Ecology's Steve Hood told the Planning Commission, "when you're in trouble and you're stuck in a hole, the first thing to do is stop digging."[46] The County has not stopped digging. It has not put down its shovel. It is digging itself into a deeper and deeper hole.

The County has not adopted protective regulations as required by the GMA and the FDO. It has not followed Ecology's input in adopting measures to ensure that water resources are protected. It remains out of compliance with the GMA.

b. Failure to Protect Water Quality, Water Quantity, and Water for Fish

Lake Whatcom is the largest and most visible polluted water resource in the County, but it is not the only important water resource in the County. Substantial evidence establishes that many County water bodies in Rural areas are not protected by CP measures or development regulations.

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[45] C-685Q (Lake Whatcom Monitoring Project 2010/2011 Report) at 6 (references to figures omitted).
[46] C-816 (Nossaman, 3/16/12), letter at 8. *See generally* C-816 at 5-10 (PDS staff and Ecology staff explaining the need for zero-discharge regulations).

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In June 2012, Washington Department of Ecology published the *Sumas-Blaine Aquifer Nitrate Contamination Summary* ("Aquifer Nitrate Report"). The aquifer is the "**major drinking water source for 18,000 to 27,000 residents**." Almost a third (29%) of sampled wells exceeded the nitrate maximum contaminant level (MCL), and 14% of wells had concentrations more than double the MCL.[47] Widespread nitrate contamination has been documented in groundwater over large areas of the SBA for over 40 years, and **"the aquifer has some of the most widespread and elevated groundwater nitrate concentrations in Washington State."**[48]

The aquifer is the primary source of drinking water for the majority of area residents. Residents in impacted areas who rely on private domestic wells may not have access to water which meets safe drinking water standards. **There are no readily available alternate sources**.[49]

We prepared, and submitted to the County, a map of "Rural Wells and the Sumas-Blaine Aquifer."[50] This map, which is based on County data, shows exempt wells drilled in (1) Rural areas, (2) within the Sumas-Blaine Aquifer. Most of the wells are "shallow" (less than 40' deep), which makes them more susceptible to nitrate pollution. Within the Sumas-Blaine aquifer, **721 wells have been drilled in the Rural area since 1997 (**when the "Rural" and LAMIRD amendments to the GMA became effective)**.** Of these 721 wells, at least 553 wells are shallow.[51]

In addition, the State Department of Health has determined that twelve community water systems in North Whatcom County, serving a combined population of over 1,606 people through 512 residential and non-residential connections, were **out of compliance with drinking water**

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[47] C-685O (Dept. of Ecology, Sumas-Blaine Aquifer Nitrate Contamination Summary, June 2012), report at 5. *See also* C-685 (Nossaman, 7/20/12) at 3.
[48] *Id*. at 7.
[49] C685N (Dept. of Ecology, Nitrate Contamination in the Sumas-Blaine Aquifer, Whatcom County, Washington, May 2011). *See also* C-685 (Nossaman, 7/20/12) at 3.
[50] C-685G (Rural Wells & Sumas-Blaine Aquifer). *See also* C-685 (Nossaman, 7/20/12) at 3.
[51] *Id*.

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standards because their ground water supplies exceed the MCL for nitrate and/or EDB's. No solution to this problem has been identified because of cost and water rights concerns.[52]

The pollution of the aquifer directly affects the rural residents who will drill exempt wells within the residential lots established by the County's CP and development regulations, and is thus directly related to the County's excessive rural population allocation. The excessive rural residential development allowed by the CP and development regulations also helps to cause this problem. While dairy is the major contributing source of nitrates (60%), approximately 23,000 area residents currently use on-site septic systems**.** These systems contribute an estimated load of 207,000 pounds of nitrogen/year to area groundwater.[53]

The County's CP and development regulations do not protect rural water quality. Whatcom County does not enforce septic tank inspection requirements outside of the Lake Whatcom and Drayton Harbor watersheds, and in other areas of the County, the compliance rate for septic tank inspection is 22 percent. In July 2012, County staff told the County Council that **"[q]uite routinely, we still do find failing systems with straight-line pipes that discharge**

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[52] *See generally* C685R (*North Whatcom County Regional Source Feasibility Study*, Public Utility District No.1 of Whatcom County, Feb. 28, 2010.) and C685S (associated maps). Some of the difficulties are summarized on page 4 (emphasis added):

> The 2007 Nitrate Study concluded in general that the most economically viable, sustainable solution would be to construct transmission mains that allow individual water systems to be serviced through inter-ties with the City of Lynden. However, Lynden and DOE have been unable to reach and agreement on the quantity of water that Lynden has available for distribution and therefore Lynden has been unwilling or unable to provide water to the neighboring utilities with nitrate contamination. Unfortunately, the alternative and more costly solution identified in the Nitrate Study was for each water system to build a treatment facility. **Even if the water treatment alternative were economically viable, it would further stress the already anemic technical, managerial, and financial capacity of these small rural water systems**.

[53] C-685N (Dept. of Ecology, *Nitrate Contamination in the Sumas-Blaine Aquifer, Whatcom County*, *Washington*, March 2011.)

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into roadside ditches."[54] The County's regulations allow the pollution of a major drinking water source for the rural residents of the County, violating the GMA.

Evidence from state agencies establishes that pollution of surface waters in the County is also significant and caused in part by the County's failure to adopt protective CP policies and regulations:

(1) <u>Drayton Harbor</u>: In June 2012, the Washington State Department of Health released a report on fecal coliform pollution in shellfish growing areas, showing that Drayton Harbor ranks second in the state for fecal coliform pollution.[55] In the previous year's study, Drayton Harbor was the most polluted shellfish growing area in the state.[56] Of the 29 shellfish growing areas significantly affected by fecal pollution in the state, Filucy Bay and Drayton Harbor "appear to be the shellfish growing areas most affected by fecal pollution in 2011"[57] Closures of the shellfish harvesting area have been estimated at $2.5 million for commercial oyster revenue and $870,000 for the Lummi Nation over a ten-year period.[58] A number of contaminant sources are linked to the pollution of Drayton Harbor, including septic tanks. Stormwater runoff has been identified as one of the top three significant sources.[59]

(2) <u>Birch Bay Shoreline of State Significance</u>: Birch Bay is a Shoreline of Statewide Significance, the only marine shoreline in Whatcom County with this designation. In 2003, the Washington State Department of Health (DOH) identified Birch Bay as a

[54] C-671M ("Whatcom County Council skeptical on need for tougher septic tank rules," 7/25/12) at 1.
[55] C-685L (*Status and Trends in Fecal Coliform Pollution in Puget Sound: Year 2011)* at 2-4.
[56] C-685M ("Status and Trends in Fecal Pollution in Puget Sound Shellfish Growing Areas Through 2010").
[57] *Id*. at 2, 4.
[58] C-685 at 16 (Excerpt from *Damages and Costs of Stormwater Runoff in the Puget Sound Region*, August 30, 2006; sponsored by Puget Sound Action Team).
[59] *Id*.

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"threatened" shellfish growing area due to water quality degradation. In 2005, DOH added Birch Bay to its list of shellfish areas threatened by fecal contamination. In October 2008, DOH closed a 670-yard radius around the mouth of Terrell Creek to commercial shellfish harvest. (DOH also recommends against recreational harvest at the site.) Development and septic tanks in the watershed have been identified as a significant source of pollution[60] The most recent publicly-available monitoring report shows numerous exceedances of fecal coliform standards throughout the watershed.[61]

(3) <u>Increase in Impaired Water Bodies</u>: The The *WRIA 1[62] 2010 State of the Watershed Report* ("Watershed Report") identifies **77 water bodies** on the Department of Ecology's 303(d) (impaired water body) list that have segments listed as "Category 5."[63] This is **up from 47 such water bodies in 2000**. In addition to the 77 water bodies that are impaired and require the preparation of a TMDL, or Total Maximum Daily Loads, there are currently 6 TMDLs in place or underway.[64] Although the Rural Element should incorporate standards and policies derived from these TMDLs in order to ensure

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[60] C-685J (Birch Bay Shellfish Growing Area Initial Closure Response Strategy – May 2009). Note that the discussion of the inspection of septic tanks on page 2 precedes the County's decision not to require mandatory inspection outside the Drayton Harbor and Lake Whatcom watersheds. These inspection requirements no longer apply, as discussed in C-671M. *See also* C-685 at 4-5.

[61] C-685I (Whatcom County Public Works –Natural Resources, Birch Bay/Terrell Creek Water Quality Monitoring Project) at 6-9, 13-14.

[62] "WRIA 1" refers to Nooksack Water Resources Inventory Area #1. WRIA 1 is largely, but not entirely, coterminous with the populated western portion of Whatcom County. It includes a small portion of Skagit County and extends slightly into British Columbia. A very small portion of the populated western part of the County is not in WRIA 1. Eastern Whatcom County, which is largely in federal ownership, is outside the boundaries of WRIA 1. Aside from the state Department of Ecology, all of the WRIA 1 Watershed Staff Team that developed the 2010 report were from entities located within Whatcom County's borders (the Lummi Nation and Nooksack Tribe, the County, the City of Bellingham, and PUD No. 1). C-685 at fn. 2.

[63] Ecology defines "Category 5" water bodies as "Polluted waters that require a TMDL: the traditional list of impaired water bodies traditionally known as the 303(d) list. Placement in this category means that Ecology has data showing that the water quality standards have been violated for one or more pollutants, and there is no TMDL or pollution control plan. TMDLs are required for the water bodies in this category." C-685 at 4, fn. 4.

[64] C-683A.14 (WRIA 1 State of the Watershed Report, 2010) at 7.

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that best management practices have been adopted,[65] it does not even mention or address these water pollution issues.

In addition to the pollution of its surface and groundwater resources, the County faces an extremely serious water supply problem. The Watershed Report establishes that **most of the surface waters in the County are closed to additional withdrawals on a year-round or partial basis**. As the Report states, "Some of the water sources are closed year round to any additional water withdrawals, some are closed part of the year (generally during the irrigation season), and some have minimum instream flows established (Figure 6)." Figure 6 shows that the affected watersheds cover almost the entire populated western portion of the County.[66]

We prepared, and submitted to the County, two maps that help to establish the significance of these closed watersheds. The map of "Rural Areas and Closed Surface Water Areas" overlays the County's Rural areas onto the closed watershed.[67] In addition to showing the considerable overlap, the map shows that the County has designated LAMIRDs within closed watersheds, allowing intense residential, commercial, and industrial development with no consideration of water availability. In *Butler v. Lewis County*,[68] this Board found that RCW 36.70A.070(1) was violated when "many industrial and other LAMIRD designations were found within the Chehalis River Basin, which is "closed" to further water rights. While such status was acknowledged in the CP, there were no adopted policies to deal with it." The Rural Element

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[65] *See Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, Final Decision and Order (June 20, 2000) at 56 of 73 . (County was aware of a DOE TDML Study with recommendations for water management practices but did not adopt any policies into the CP).
[66] C-683A.14 (WRIA 1 State of the Watershed Report, 2010) at 10. *See also* C-685 at 2-3.
[67] C-685A.
[68] *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, Final Decision and Order (June 20, 2000) at 56 of 73..

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does not even acknowledge the closed status of watersheds, much less adopted policies to address the issue.

We also prepared a map of "Rural Wells," which shows exempt wells drilled in the Rural Areas since 1997, with an overlay of the closed watersheds.[69] Since 1997, 1,652 wells have been drilled in areas with closed surface waters.[70]

The water supply issue has long been the elephant in Whatcom County's room[71] – everybody knows there is a problem, but it is such a large problem that nobody wants to face it. Recently, however, these issues have become acute that they are starting to surface. In July, the County's own agricultural planning effort emphasized uncertainty created by "increasing pressures from neighboring residential uses and legal questions of water use."[72] Whatcom Farm Friends recently published a summary of the significance of water availability to farmers, noting that most watersheds are closed, many farmers do not have secure water supplies, and the issue of water availability "was and remains the most significant threat to the future of all ag here."[73]

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[69] C-685F. The well log data supporting these maps is described in C-685 at 3, fn. 3.
[70] C-683 (Nossaman-Stalheim Comments, 7/23/12) at Stalheim letter, p. 6.
[71] The County's Comprehensive Water Resources Plan, last updated 12 years ago, states:

> The resultant official assertion is that WRIA #1 is over-allocated and that no new water is available. Additionally, there are a significant number of exempt wells that provide difficulties in estimating total water use. . .
>
> It is estimated that up to 60% of the Whatcom County farms and a large number of non-agricultural users are consuming water without benefit of an adequate claim, permit, or certificate. Almost 400 users have pending water right applications with the state that have not been processed to date. These unpermitted water users are at high risk for enforcement action and loss of their water use, particularly in light of impending ESA listings and other increasing pressure to act against unpermitted water use. These unpermitted water users constitute a very large proportion of the economic base of Whatcom County.

Whatcom County Comprehensive Water Resource Plan (Feb. 9, 1999) at 8, quoted in C671 at 6.
[72] C-671A (Whatcom County Agricultural Strategic Plan – Agricultural Overview, 7/12/12) at 2.
[73] C-671L (Whatcom Farm Friends April 2012 Newsletter: Why Water Issues Remain our Priority) at 2.

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In September 2011, the County approved an Economic Development Investment allocation to update its 12-year-old Coordinated Water System Plan and implement a Water Supply Planning Project. The reason for this project was summarized as follows:

> Land use decisions are made assuming sufficient water resources will be available to serve these land uses. In many areas of Whatcom County, **water supply is not sufficient to meet all the competing needs** whether it is because of water rights, water quality or water quantity.
>
> The availability of sufficient water supply to meet all 'planned' uses becomes an economic issue, a health issue, and an environmental issue. **Without the availability of water to meet the needs of cities, agriculture, industry, recreation, and to support our ecological systems, all our planning will be for nought**.[74]

The County's failure to plan to protect its groundwater resources, despite all of this evidence, violates the GMA. In *Butler v. Lewis County*,the Board stated that "there is no textual analysis concerning the impact of current and future development requiring rural water wells or systems on the Chehalis River Basin or on groundwater supplies outside of that area."[75] The Board found that Petitioners had met their burden to show that the GMA's requirement to protect water resources had not been met because there was "no analysis concerning groundwater quality and quantity contained in the CP as required by RCW 36.70A.070(1). There are no protections contained in the CP. . . ."[76] Similarly, the County's CP contains no analysis, and the County simply ignored the analysis and evidence provided to it during the administrative process. As was the case in *Butler v. Lewis Cou*nty, "The actual practice, as shown by the rural element section, is to ignore water quality and quantity for any planning purposes. Reaction

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[74] Agenda Bill 2011-281: Economic Development Investment Program – EDI Board recommendations (approved grant to update Coordinated Water System Plan and implement Water Supply Planning Project), Sept. 13, 2011, quoted in C-671 at 8.
[75] WWGMHB Case No. 99-2-0027c, Final Decision and Order (June 20, 2000) at 56 of 73.
[76] *Id*.

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planning through permit decisions is fundamentally contrary to GMA, and does not comply with the Act."[77] The County's failure to address groundwater issues violates the GMA.

Water supply and water quality issues combine to threaten the needs of wildlife in the County. The quality and quantity of Whatcom County's streams affect endangered salmon populations:

> Three Puget Sound species found in WRIA 1– chinook, bull trout, and steelhead– are listed as "threatened" under the Federal Endangered Species Act. Two chinook populations, which are the North/Middle Fork and South Fork Nooksack early chinook, are genetically unique and together make up one of five genetic diversity units in Puget Sound, and are the only two populations in the Strait of Georgia Region. These populations are considered to be essential to recovering Puget Sound Chinook.
>
> . . .
>
> Based on currently available population data, the natural origin (wild) North Fork population has continued to decline in abundance for three consecutive years– 2007 through 2010 (2010 Salmon Summit, Nooksack Natural Resources presentation). The population, however, has been stabilized through artificial propagation. Meanwhile, the South Fork early chinook population has reached critically low levels, prompting the implementation of a captive brood stock program. This is a measure that was not anticipated in 2005 when the WRIA 1 Salmonid Recovery Plan was prepared.[78]

Coho salmon are found throughout the rivers and creeks of the Nooksack Basin and are a candidate for listing under the Endangered Species Act.[79] A study conducted in six basins of the Puget Sound lowlands recently found that "[coho] spawner mortality was most closely and positively correlated with the relative proportion of local roads, impervious surfaces, and commercial property within a basin." The significance of this study was to "extend a large body of scientific information linking urbanization (broadly defined) and degraded water quality to a

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[77] *Id*.
[78] C-683A.14 (WRIA 1 State of the Watershed Report, 2010) at 11. *See also* C-685 at 5.
[79] C-685W (*Facts About Coho*, Whatcom County Water Resources, 2003.) See also C-685 at 5.

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loss of biological integrity and productivity in freshwater stream networks" The authors conclude that "suitable spawning and rearing habitat may not be supportive of coho salmon persistence when the surrounding landscape is urbanized. The linkages between increased impervious coverage within a basin, increased stormwater runoff, altered hydrologic processes, and ecological decline are well established."[80]

As the Watershed Report states, "[t]he water quantity, water quality, and instream flow and habitat problems characterized in this section of the report pose serious challenges for the community."[81] As the Birch Bay Shellifsh Closure Response Strategy states, "Future development may present concerns, as well. The County is considering various code and zoning changes as part of urban growth area review and the update to the Comprehensive Plan; any modifications should be made with water quality and shellfish concerns in mind."[82] The County has recognized that its "water supply is not sufficient to meet all the competing needs."[83]

In light of this clear evidence that water supply is a concern in Whatcom County's rural areas, water supply did not influence the County's Rural Element planning. As the Supreme Court emphasized in *Kittitas*:

> Several relevant statutes indicate that the County *must* regulate to some extent to assure that land use is not inconsistent with available water resources. The GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources. RCW 36.70A.070(1), (5)(c)(iv).[84]

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[80] C-685 at 5-6, quoting *Landscape Ecotoxicology of Coho Salmon Spawner Mortality in Urban Streams*, Blake E. Feist, Eric R. Buhle, Paul Arnold, Jay W. Davis, Nathaniel L. Scholz, PLOS ONE, Vol.: 6 Issue 8 (Aug. 17, 2011).
[81] C-683A.14 (WRIA 1 State of the Watershed Report, 2010) at 12.
[82] C-685J (Birch Bay Shellfish Growing Area Initial Closure Response Strategy – May 2009) at 2.
[83] Agenda Bill 2011-281: Economic Development Investment Program – EDI Board recommendations (approved grant to update Coordinated Water System Plan and implement Water Supply Planning Project), Sept. 13, 2011, quoted in C-671 at 8.
[84] *Kittitas*, supra, 172 Wn.2d at 178-79 (emphasis in original).

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We provided the County with ample evidence of the connection between its CP goals and development regulations and the County's water quality and water supply issues – evidence that also provides policy guidance. To protect shellfish growing areas, for example, failing on-site sewage systems and stormwater runoff need to be controlled. Higher percent coverage by impervious surfaces and lower percent cover by evergreen forests increase fecal coliform.[85] More broadly, the causes of water quality impairment identified in the Watershed Report include removal of riparian vegetation, reduced groundwater recharge during low flow periods, rural land use activities, malfunctioning septic tanks, and urbanization, including stormwater runoff.[86] Within Whatcom County's WRIA 1, the Puget Sound Partnership has found that "Residential and Commercial Development; Runoff from Built Environment (Unmanaged Runoff) " is a threat in *every watershed*.[87]

Nonetheless, the County did not adopt protective CP and Zoning Code provisions that would require septic tank inspection or that would maintain existing groundcover. CP Policy EDD-2.C[88] merely references existing provisions of the County Code which have demonstrably failed to protect water quality.

The County did not even adopt measures or regulations to impose limits on impervious surfaces for rural residential development. The FDO indicates that the Board was under the impression that the RR zone, which can be applied within any Type I LAMIRD and any "Rural Neighborhood," is limited to 20% impervious surfaces throughout Whatcom County.

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[85] C685V (US Geological Service, Shellfish Pollution Model, Jan. 2011) at 3. *See also* C-685 at 6.
[86] C-683A.14 (WRIA 1 State of the Watershed Report, 2010) at 8. *See also* C-685 at 6.
[87] C671I (Puget Sound Partnership, The Action Agenda in Whatcom County and WRIA 1) at 346 (p. 4 of the Exhibit). See also C-671 at 8.
[88] R-075A, CCP at 12-14.

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Expressing concern about critical areas and stormwater, the FDO stated that the RR-5A zone "allows 20% impervious surface, not 10%."[89]

In fact, the 20% limitation only applies in "Water Resource Protection Overlay Zones" applicable to Lake Whatcom, Lake Padden, and Lake Samish.[90] Outside specified watersheds, Whatcom County's RR (Rural Residential) development regulations impose **no limits on the amount of impervious surface that may cover rural residential lots.**

This failure to address impervious surfaces on Rural Residential lots was not an accident or a mistake; it was a decision focused solely, and in violation of the GMA, on ensuring that rural development can occur without constraints. Early in the process, PDS staff proposed that impervious surface limits should apply to rural residential lots to preserve water resources and ensure visual compatibility.[91] After many lengthy discussions focusing on the development wishes of property owners, the Council voted against imposing **any** limits on impervious surfaces in the RR zone.[92] There are, therefore, **no limits on the amount of impervious surface that can be developed in the RR zone**.

Nor is there any limit on the amount of impervious surface that can be developed in the "Rural" zone (WCC 20.36). "Rural" zoning is a permitted use in areas designated Rural or "Rural Neighborhood," where residential densities can be as high as one unit per 2 acres. Those small lots can be paved over entirely.

[89] FDO at 89 and 89 fn.178.

[90] WCC Ch. 20.71; see specifically WCC 20.71.021(1), 20.71.302(1).

[91] R-114 at 2-3 ("[I]n the Rural and Rural Residential zones, the lot coverage standard (maximum percentage of a lot covered by structures, in WCC 20.32.450 and 20.36.450) is proposed to be reduced, and **an open space requirement added (WCC 20.32.500 and 20.36.500) allowing a maximum of 20% of the lot to be covered** by impervious surface (including the structures). . . provide the regulations that are consistent with and carry out the Comprehensive Plan policy to provide open space that assures visual compatibility with rural areas and protects water resources.") See also R-088 (June 8, 2012: PDS Memorandum) at 2, "Issues 8, 10" (providing for 25% impervious surface in R and RR zones).

[92] C-685U [Transcripts of Whatcom County Council Committee Meetings on the Rural Element Council] at 4-5),

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Septic tanks are not subject to mandatory inspection in Whatcom County, and the record contains clear evidence of septic tank pollution. The claim that existing septic tank policies and regulations[93] adequately protect ground and surface waters is clearly contradicted by the record cited above.

Nor did the County take any steps to address its severe water supply problem as it affects instream, groundwater, or out-of-stream uses. Policy 2DD-2C.6[94] purports to limit water withdrawals resulting from land divisions by adopting by reference to WCC 21.04.090 and 21.05.080. Both of these sections allow the use of exempt wells, even in areas closed for the appropriation of groundwater. Policy 2DD-2C.7 adopts by reference WCC 24.11.050 to regulate ground water withdrawals. WCC 24.11.050 also allows the use of exempt wells even in areas closed to the appropriation of ground water.[95] These measures/regulations fail to meet the requirements of *Kittitas*, the GMA, and the FDO.

The CP claims that the County's Critical Areas Ordinance will protect ecological processes.[96] As discussed above, GMA compliance is not established by a reference to the CAO; the County's development regulations must provide the level of protection that meets GMA requirements.[97] The fact that critical areas *may* receive protection[98] does not ensure that the

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[93] CP at 12, policy 2DD-2.C.2.
[94] CP at 14.
[95] CP at 14, policy 2DD-2.C.7.
[96] R-075A, CP at 14, policy 2DD-2.C.9.
[97] *Stevens County, supra,* 163 Wash.App. 680, 693-94 (2012).
[98] This Board recently noted that it is "extremely concerned" with the County's "flagrant disregard" of the GMA's goals, as evidenced by its extension of permits (some dating back to the 1980s) that do *not* implement the CAO. *Stalheim v. Whatcom County*, WWGMHB Case No. 11-2-000, Compliance Order (June 21, 2012) at 4-5. The County has not taken any action to repeal those permits or to ensure that current CAO requirements will apply to them. The CAO applies to some parts of the Rural area, but even where it applies in theory, vested permits ensure that it often does not apply in fact.

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Rural area as a whole receives the protection that the GMA requires, and all of the evidence and effects cited above establishes that the Rural area is not protected.

The County also cites a CP policy/Zoning Code requirement prohibiting illicit discharges to the County's stormwater system within the Lake Whatcom watershed and the Phase II Municipal Stormwater permit area.[99] If discharges are "illicit," it seems that they would already be prohibited. If" illicit" discharges are not otherwise prohibited, this policy only prevents them from occurring within the City of Bellingham, the City of Ferndale, the urban growth and urbanized areas around them, the Birch Bay urban growth area, and the Lake Whatcom watershed.[100] This provision does not suffice to protect the County's Rural water resources.

The County's failure to protect ground and surface waters further creates an internal CP inconsistency, in violation of RCW 36.70A070 (preamble) and RCW 36.70A130(1). Policy 11E-5 of the CP requires the County to "[m]anage and prioritize water resources for multiple instream and out of stream beneficial uses **commensurate with instream flows set by the State Department of Ecology**."[101] The County has failed to do so, promoting residential development and LAMIRDs in closed watershed and in watershed with instream flows set by the Department of Ecology.

Petitioners provided the County with substantive recommendations regarding appropriate and effective implementing measures. Among petitioner Futurewise's recommendations are the following:

> Whatcom County should match its planned and allowed rural population to available water resources and to the densities needed to protect surface and ground water from pollution. This can be done by first stopping the creation of new high density rural lots. Second, the

[99] R-075A, CP Policy 2DD-2.C.9, CP at 14.
[100] C-670 (Futurewise letter, 8/6/12) at 5.
[101] R-075A, CP at 11-14:

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county could require and encourage the merger of substandard rural lots. The county should adopt an ordinance providing that substandard lots in a common ownership should be treated as one building lot until they exceed the required minimum lot size. Third, the county could adopt incentives to encourage substandard lots to be merged together, including eliminating fees to merge lots and providing open space taxation treatment for the merged lots.[102]

We reminded the County that Ecology sent information to the County regarding water adequacy determinations and methods to limit groundwater withdrawals. As Ecology stated in a letter to Snohomish County, which it forwarded to Whatcom County:

> When a building permit applicant indicates that their water supply will be obtained through a permit-exempt well, because they cannot provide a water right permit or a letter from a purveyor as evidence, the County could require the applicant to provide evidence of water supply in 'another form sufficient to verify the existence of an adequate water supply." [103]

These tools and options are a reminder that the GMA provides the County with tools it can use to act as a leader, not as an enabler of growth that takes water away from farmers and cripples the County's long-term economic well-being. The County's CP and development regulations will not serve that purpose and do not meet the GMA's requirement to protect rural character.

C. Development Regulations Fail to Prevent the Expansion of Urban Services Outside UGAs and LAMIRDs, In Violation of RCW 36.70A.110(4) (FDO at 73-75).

We join in, and hereby incorporate by reference, Futurewise's argument addressing WCC 20.82.030's failure to prevent the expansion of urban services outside urban growth areas and limited areas of more intense rural development in violation of RCW 36.70A.110(4).

We would emphasize that new Zoning Code provision WCC 20.82.030 (3)[104] permits outright the extension of water transmission lines of any diameter, anywhere in the County, including Rural and Natural Resource areas. The County may claim that it perceives a difference between water "transmission" lines and water "service" lines. The County Code does not define

[102] C-670 (Futurewise letter, 8/6/12) at 3.
[103] C-678 (County "Correspondence with DOE on Water," submitted by Stalheim, 7/24/12), Ecology letter at 5.
[104] R-075B (Zoning Code) at 89.

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water "transmission" lines or differentiate them from service lines, as the County is aware – because the issue was discussed, explicitly, during a meeting.[105]

In fact, WCC 24.11.050.C.3 specifically provides that property owners must connect to public water systems that are able and willing to serve when the system "has transmission lines adjacent to the property line of the applicant."[106] We alerted the County to the provision, and the County did not revise its development regulations, indicating that it intends to use water line extensions to serve rural growth. The proposed amendment violates the GMA's provision against extending urban services into rural areas except under limited and specified circumstances. RCW 36.70A.110(4).

The amendment further provides that water lines of any size may be extended to "Rural Neighborhoods," whether or not the water lines are "transmission" lines. The County has defended "Rural Neighborhoods" as neither urban nor LAMIRDs, claiming that they are consistent with rural character. The outright provision of urban-level water service to these areas is inconsistent with the pretense that they are actually "rural." If Rural Neighborhoods really were compatible with rural character, they would not need (and should not be provided with) urban services. If they need urban services, they should not be designated as "rural." Either way, this amendment violates the GMA.

The County may have believed that the statement that the extension of the water line must be "in conformance with a state approved water comprehensive plan and consistent with the Whatcom County Comprehensive Plan" provides meaningful guidance. As we discussed in

[105] C-671J (Transcript) at 2-3 (Council Member Weimer: "I guess I was wondering if 'transmission lines' are actually defined somewhere so as you can't hook up to them along the way, or if we're just calling them transmission lines in hopes that no one will hook up to them along the way." Davis [County PDS]: "I don't think we have a definition of transmission lines in our Code.")
[106] Quoted in C-671 (Nossaman, 8/6/12) at 5-7.

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our August 6 submission,[107] however, it is not clear what the term "state approved water comprehensive plan" means. Whatcom County has a Comprehensive Water Resources Plan. The Plan was adopted in 1999 and last updated in 2001. It does not appear that it was "state approved." This 11-year old plan does recognize that "up to 60% of the Whatcom County farms and a large number of non-agricultural users are consuming water without benefit of an adequate claim, permit, or certificate."[108]

Whatcom County also has a state Department of Health-approved Coordinated Water System Plan. It is likely that the new Zoning Code provision is referencing this plan, which wass approved in 2000. It is based on and refers explicitly to the 1997 Comprehensive Plan. In fact, the Water System Plan outlines the *Gold Star* litigation – leaving off at the then-current Superior Court decision to overrule the Board. It uses the then-current Urban Growth Area boundaries, when the UGAs have since been revised. In many instances, it will not be possible for water extensions to be consistent with both the Water System Plan and the CP because *the two plans are not consistent with each other.* The extension of urban-level water lines should not be justified because it conforms to a plan that is based on the 1997 Comprehensive Plan.

The provision of public water has extremely significant impacts within the County's zoning scheme. As set forth in the following section , the availability of public water determines (1) whether 1/3 to two-acre lots are allowed as a permitted use in LAMIRDs, and (2) whether lots as small as one acre will be allowed under the County's Rural Residential Development Overlay. Under RR zoning, the County Code allows up to 3 units per acre as a permitted use in Type I (Rural Community) LAMIRDs, and in "Rural Neighborhoods," when public water is

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[107] C-671 at 6-7.
[108] *Id*. at 6, quoting *Whatcom County Comprehensive Water Resource Plan* (Feb. 9, 1999, at 8

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supplied and stormwater facilities are provided.[109] . Furthermore, the availability of public water is a prerequisite to the application of the Rural Residential Development Overlay ("RRDO"), which allows residential lots as small as one acre in size outside LAMIRDS.[110] To quite a significant extent, therefore, the Zoning Code ensures that the GMA requirements to contain or control rural development, and to prevent sprawl, depend on whether public water is provided.

The extension of urban-sized water lines as a permitted use throughout the County violates RCW 36.70A.110(4).

D. CP Policies and LAMIRD Development Regulations Violate RCW 36.70A.050(d)(i-iv) (FDO at 78-94).

As the following discussion will demonstrate, one of the main problems with the County's system for establishing and regulating LAMIRDs is that it is almost impossible to tell what uses are allowed in any given LAMIRD, much less how large a development will be permitted. It is simply not possible to look at the County's CP and Zoning Code and predict what development may occur. Numerous judgments must be made, and almost all of these judgments are administrative. They will occur as negotiations between project applicants and planning staff, with no public notice and no oversight.

This might not be a problem if standards were clear and predictable, but they are not. Terms such as use "type" and "similar" abound, and unspecified "documentation" can provide an applicant with virtually any use and any sized building he or she may want. Rather than

[109] WCC 20.32.253; R-075B (Zoning Code) at 4-5.
[110] WCC 20.32.252(1)(A) (Rural Residential [RR] District); WCC 20.36.252(1)(A) (Rural [R] District). R-075B (Zoning Code) at 3-4, 7.

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minimizing, containing, and controlling rural development, the County's LAMIRD provisions will provide an incentive for enterprising property owners to develop outside urban areas.

1. Type I LAMIRDs

The County's proposed CP policies governing the development and redevelopment of Type I LAMIRDs violate the GMA. The proposed narrative in the third paragraph under "Rural Communities"[111] and proposed Policy 2JJ-6[112] misinterpret RCW 36.70A.070(5)(d)(i)(C). Both provide that an expansion must be consistent with the character of the Rural Community in 1990 in terms of use or intensity. That is contrary to the requirement that all four factors shall be considered in determining whether the development or redevelopment is consistent with the character of the existing areas. The narrative and policy should be revised to require consideration of all four factors.[113]

The County's development regulations governing Type I LAMIRDs also violate the GMA. The FDO found that "invalidity is warranted with regard to the amended provisions of the County's development regulations that permit development in Type I LAMIRDs without regard to the character of the existing area in terms of size, scale, use and intensity that was found within the LAMIRD on July 1, 1990, as required by the GMA."[114] The County now has the burden of demonstrating that the Ordinance will no longer substantially interfere with the fulfillment of the goals of the GMA.[115] The County has not met its burden. Its CP policies and development regulations fail to protect the environment, limit sprawl, or encourage development in urban rather than rural areas.

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[111] CP at 24.
[112] *Id*. at 25.
[113] *See* C-670 (8/6/12 Futurewise letter) at 8-9 (extended discussion of this GMA requirement).
[114] FDO at 170.
[115] RCW 36.70A.320(4).

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The Board found that the County's method to accommodate LAMIRDs was "laborious and convoluted."[116] The current method is even more so. Type I LAMIRDs are again called "Rural Communities."[117] As before, the County created a series of "Districts" in which it defines uses allowed in within the LAMIRDs, and LAMIRDs may contain more than one district. As before, the County has not defined the 1990 character of any Type I LAMIRD, but instead provides a long list of uses in each zoning category. These uses include uses that did not exist in the County in 1990; rather, the uses were taken from lists of uses allowed in urban areas.

As discussed further below, there is no requirement that residential development in LAMIRDs be consistent with existing character in Type I LAMIRDs. The non-residential uses allowed in any particular LAMIRD are not clearly stated in the Zoning Code. Each use determination will be made administratively, behind closed doors and with no notice to the public. A second administrative determination of building size, based on a provision that merges use "types," creates a system of extraordinary confusion and discretion. Uses, building size, and intensity are not governed by the requirement that Type I LAMIRDs must be "principally designed to serve the existing and projected rural population."[118]

The County simply ignored the Supreme Court's statement in the *Gold Star* remand, quoted in the FDO:

> LAMIRDs are not intended for continued use as a planning device; rather, they are "intended to be a one-time recognition of existing areas and uses and are **not intended to be used continuously to meet needs (real or perceived) for additional commercial and industrial lands.**[119]

[116] FDO at 88.
[117] FDO at 89.
[118] RCW 36.70A.070(5)(c)(i)(B).
[119] FDO at 94, citing *Gold Star*, 162 Wn.2d at 727 (emphasis added).

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The County's regulations will continuously add additional commercial and industrial lands, interfering with the goals of the GMA.

a. Residential Development in Type I LAMIRDs

Residential Rural ("RR") is a permitted use in Rural Communities.[120] With public water[121] and stormwater facilities, lots as small as 1/3 acre (R3) are a permitted use in all LAMIRDs, regardless of the character of the existing area and the intensity of use in 1990. The fact that there is no limit on impervious surfaces on these lots outside specific watersheds was established above in the discussion of water quality, demonstrating that these LAMIRD regulations do not protect rural character.

The existing Whatcom County Code allows a long list of conditional uses, including "Activity Centers" (WCC 20.32.157), "social and health rehabilitation centers" (WCC 20.32.154), and "religious training institutions" (WCC 20.32.153) to be be approved in the RR zone. Within LAMIRDs, these uses can be approved without any finding that the uses are consistent with existing character or that the uses are "principally designed to serve the existing and projected rural population," as required by RCW 36.70A.070(5)(i)(B). No size limits are imposed on these uses.

Because they fail to protect rural character, fail to ensure development or redevelopment consistent with existing character, and fail to ensure that Type I LAMIRDs are principally designed to serve the existing and projected rural population, the regulations of residential uses in LAMIRDS violates RCW 36.70.070(5)(c) and (d), as well as WAC 365-196-425 ("Uses,

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[120] R-075B (Zoning Code) at 1, WCC 20.32.010.
[121] Urban-sized public water lines can be extended to any LAMIRD, thereby encouraging small lot development. R-075B (Zoning Code) at 89, WCC 20.82.030(3).

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densities or intensities not normally allowed in a rural area may be allowed inside the logical outer boundary consistent with the existing character of the LAMIRD").

b. Commercial and Manufacturing Development in Type I LAMIRDs (RGC, NC, STC, GM and RIM)

As in the County's previous LAMIRD regulations, non-residential uses are allowed in any Type I LAMIRD. Commercial and manufacturing categories include Rural General Commercial (RGC) District (WCC 20.59), Neighborhood Commercial Center (NC) District (WCC 20.60), Small Town Commercial (STC) District (WCC 20.60), General Manufacturing (GM) District (WCC 20.67), and Rural Industrial-Manufacturing District (WCC 20.69).

Using the RGC zone as an example, the same long list of uses is set forth as in the previous ordinance. This time, however, a wide range of uses is lumped into a single category. The category "Retail and Office type uses," for example, merges six categories of uses, many of which already include a list of disparate uses. One use "type" heading, "Retail and Office Type Uses," encompasses all of the following uses:

> Mobile home and recreational vehicle sales; indoor commercial recreation facilities such as bowling alleys, skating rinks, indoor theaters and physical fitness centers; service establishment including but not limited to barber and beauty shops, laundries, dry cleaners, furniture repair, frozen food lockers, funeral parlors, animal hospitals, auction houses, financial institutions, fraternal organizations and professional offices; retail establishments including but not limited to grocery, liquor, drug, sundries, variety, building supplies, clothing, florist, nurseries, optical, sporting goods, appliance, music and pet stores; printing and publishing establishments; and mini-day care centers and day care centers.[122]

To determine what uses are allowed on a particular property, the Zoning Code states that "nonresidential uses listed below are permitted if a use of the same *type* existed in that same

[122] R-075B, Zoning Code at 10, WCC 29.051.

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Rural Community designation on July 1, 1990 per WCC 20.80.100(1).” This requires a three-step analysis:

Step One: Is the proposed use “of the same type”? If an animal hospital existed in the “designation” in 1990, this means that uses including grocery stores, professional offices, indoor theatres, and printing and publishing establishments must now be allowed. All of those uses are listed in WCC 29.051 as the same “type.”

Furthermore, an additional WCC provision, WCC 20.800.(1), expands the “use type” even further. The second step, if a use does not fall within WCC 29.051 (or the equivalent provision for the other non-residential categories), is to consult WCC 20.80.100(1)

Step Two: What permitted uses are established by WCC 20.80.100(1)? WCC 20.80.100(1) includes a table that establishes use “types” within each LAMIRD, as well as building size limits. WCC 20.80.100(1) adds restaurants and lodgings to the “Retail/Office” “use type.” Thus, if an animal hospital existed in a “designation,” a restaurant or lodging is permitted per WCC 20.800(1).

Step Three: Did that “type” exist “in that same Rural Community designation”? The term “designation” in the Whatcom County Code is not defined, but it is usually used to refer to zoning designations. Thus, this provision allows any of these use “types” if a use “type” existing in the RGC zone of any Rural Community, anywhere in the County.[123]

This expansive and confusing description is only the start, because this is the system governing *permitted* uses. WCC 20.80.100(2) further sets up a system of administrative

[123] We proposed to the County that the Zoning Code should state “within the boundary of that Rural Community,” if the County intended to impose a geographical limitation rather than referring to zoning designations. C-673 at 2. The County did not make this change and thus must have intended to include all uses in all similar zoning designations across the County.

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approval for "modifications to building sizes and uses in Rural Communities." This extraordinarily convoluted provision[124] allows a "use other than shown in WCC 10.70.100(1)"[125] if unspecified "documentation" states that the "same use" existed in 1990 **OR** if documentation states that "a larger building size or combined floor area existed for a use of the similar type in that area in 1990".

This provision creates the following inconsistencies with the GMA:

1. The provision allows "similar" uses to be approved based on the size of buildings "in the area." "Area" is undefined, "similar" uses are undefined, and there is no reason that the *size* of buildings – the existence of "larger building size or combined floor area" should allow additional *uses* to be permitted. All factors establishing rural character must be considered.
2. The provision allowing "similar" uses will ensure that uses that are utterly different from 1990 uses – even more different than a liquor store and a skating rink, which are classified as the same "use type" in the RGC zone – will be approved.
3. The type of "documentation" needed to establish the existence of these uses in "the area" (within a mile? Somewhere in Whatcom County?), is not specified. Because there is no standard or requirement that "documentation" be based on an official or verifiable source, the County will be required to accept any statement from any property owner, neighbor, agent, or relative as a basis for approving a "similar" use. The lack of standards will provide a strong incentive for imperfect human memories to recall uses that might have

[124] The provision allows the Zoning Administrator to "permit a use other than shown in 20.80.100(1) **and/or** building sizes greater than shown. . .if there is documentation that a use of the same type existed in 1990, **or** a larger building size or combined floor area existed for a use of the similar type in that area in 1990. . ."

[125] This provision establishes that the **merged** and **expanded** use categories in WCC 20.80.100(1), not the categories of uses contained in each zoning category (RGC, RIM, etc.), govern the permitted uses in Type I LAMIRDs.

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1 been constructed after 1990, that might have existed before (but not in) 1990, or that
2 might not have been located on that precise site. The most significant problem is that the
3 absence of standards or requirements leaves the County with no basis on which to deny a
4 request, because if any "documentation" is submitted, the terms of the regulation have
5 been met.

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7 Given that these negotiations will take place behind closed doors, with only County staff
8 and the property applicant aware of the decisions (no public notice is provided of administrative
9 decisions), this provision encourages the expansion of uses in LAMIRDs. It does not ensure that
10 existing uses will be minimized and contained, as required by RCW 36.70.070(5)(d)(iv). It also
11 fails to ensure that development and redevelopment will be consistent with the character of the
12 existing areas, as required by RCW 36.70.070(5)(d)(i)(C), or that development will be
13 principally designed to serve the existing and projected rural population.

14 The discussion so far only describes the system of determining uses within Type I
15 LAMIRDs. The determination of building size also violates RCW 36.70.070(5)(d)(iv) and RCW
16 36.70.070(5)(d)(i)(C), as well as RCW 36.70.070(5)(d)(i)(C), which requires development and
17 redevelopment to be principally designed to serve the existing and projected rural population, for
18 the following reasons:

19 1. The table in WCC 20.80.100(1) shows the "maximum floor area, in square feet"
20 (presumably per building), as well as "maximum combined floor area for all buildings."
21 These terms are not defined in this provision. It is necessary to go back to each
22 individual use category (RGC, RIM, and so forth) to find that the first figure refers to
23 building *size* while the second figure is intended to establish the intensity of
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development: "On a lot in a Rural Community designation, the combined floor area of all buildings shall not exceed that of a use of the same type that existed on a lot in that same Rural Community designation…"[126]

This provision does not establish intensity limits that comply with the GMA. A one acre lot is allowed to accommodate the same floor area as a five-acre lot in the same "designation," clearly permitting a significant intensification of development in Type I LAMIRDs. Indeed, the County is aware that this provision will simply encourage property owners to divide their lots in order to increase density and intensity of use. The County Council and staff discussed this issue on July 24th.[127]

Furthermore, the building size limitation for all "use types" set forth in the table in WCC 20.80.100(1) is based on the largest building of that "use type" – as merged in the table. As discussed in C-671 at 2-4, incorporated herein by reference, the largest "restaurant/lodging" use in Nugents Corners apparently was 2,400 square feet. The County "merged" this "use type" with the retail/office" type." The largest retail/office "type" use was 18,221 feet. Now, every use listed in the retail/office "type" can be 18,221 square feet, AND restaurant/lodging use "types" can be 18,221 square feet, despite the fact that no such use approached that size in 1990. This provision ensures that neither the existing rural character nor the 1990 character will be preserved, and the requirement to "minimize or contain" existing uses has been grossly violated.

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[126] *See* R-077 at 4 (July 20, 2012 PDS Memorandum), referring to WCC 20.59.501, 20.60.451, 20.61.501, 20.63.451, 20.67.451, and 20.69.451.
[127] C-671 (8/6/12 Nossaman letter) at 3; *see also* C-671J (Transcript of Whatcom County Council, Special Committee of the Whole Meeting, July 24th, 2012) at 3 (Noting that there is no minimum lot size in the RGC zone; "if I were in that situation and I wanted to do another building, I think I would just chop the lot up").

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2. WCC 20.80.100(2)(a) allows larger buildings with "documentation" that a use of the same type existed in 1990. Because the provision is so convoluted, and sprinkled with "ands," "ors," and "and/ors," a use determination alone can justify larger building sizes. Additional problems with WCC 20.80.100(2)(a), including the lack of standards for documentation and the use of the term "area," have been discussed with respect to the use determination.

3. WCC 20.80.100(2)(b) allows larger buildings, with no documentation requirement, if an administrative approval states that the parameters of building size, scale, use and intensity were considered. There is no requirement that any of the parameters be *met*; indeed, the Zoning Code specifically states that "the development or redevelopment need not meet every one of these parameters." Accordingly, if a property owner proposes a use that would be characterized as "similar" under the Zoning Code – say, a proposal for an office building in a Type I LAMIRD that had contained nothing but a small animal hospital in 1990, per WCC 29.051 – an administrative determination could approve a building of unlimited size under WCC 20.80.100(2)(b). The administrator would have "considered" the uses and found that it met the "similar use" parameter. There would be no requirement to limit size, scale, or intensity.

This system does not even function to apprise property owners of the uses that may be developed on their property – although diligent property owners will surely recognize that there are no effective constraints on development in Type I LAMIRDs, if they can manage to follow the regulations through from beginning to end. Nor can neighbors tell what uses will be allowed near them. The system fails to contain or control rural development and fails to protect existing character. As discussed above, it also fails to protect rural character, including the protection of

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water quality and quantity. It increases the CP internal inconsistency by allowing increased residential development in all Type I LAMIRDs, when the County has already provided for excessive rural population. For all of these reasons, these LAMIRD provisions violate the GMA.

c. Tourist and Resort Development (TC and RC)

Type I LAMIRDs can be zoned for Tourist Commercial (TC) Districts (WCC 20.63) and Resort Commercial (RC) Districts (WCC 20.64). These categories are an odd combination of tourism, commercial, and residential uses that are ill-suited to Type I LAMIRDs.

As with the commercial and manufacturing zoning categories discussed above, these Zoning Code provisions create broad categories of use "types." In both zones, the "Retail and office type uses" allow retail shops and professional offices, as well as other uses.[128] A single "Restaurant/lodging type use" category is created, merging restaurants and hotels and motels.[129]

The RC zone, in particular, is extraordinarily expansive. It allows residential uses, and if public water and sewer are provided, the permitted density is as high as 22 dwelling units per acre.[130] With a conditional use permit, a long list of uses is allowed if a use of that "type" existed in 1990; for example, a service station is permitted if an office or store existed on the site in 1990 (uses of the same "retail and office" type).[131] Furthermore, a conditional use permit can permit a hotel or motel of any size, and any number of time share condominiums, if a "use of the same type" existed in that "designation" in 1990. Thus, if a Type I LAMIRD contained a small

[128] TC: WCC 20.63.051 (Zoning Code, p. 38); RC: WCC 20.64.050 (Zoning Code at p. 45).
[129] TC: WCC 20.63.053 (Zoning Code, pp. 38-39); RC: WCC 20.64.053 (Zoning Code at 46).
[130] R-705B, Zoning Code at 55, WCC 20.64.271.
[131] R-705B, Zoning Code at 51, WCC 20.64.150(1).

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lodging or restaurant use (same "type"), a conditional use permit can allow a hotel or motel of any size.[132]

In determining use types and size, the County is only required to find that one parameter of 1990 rural character had been met: size, scale, use OR intensity.[133] Thus, if a Type I LAMIRD contained a professional office with a particular floor area ratio, the Zoning Code requires the County to approve a restaurant or hotel with the same floor area, because only one attribute of rural character (intensity) is required to be the same and there is no requirement to consider whether the use is consistent with rural character. Alternatively, if a small retail shop and a large hotel existed in a Type I LAMIRD, the County is now required to approve a retail shop with the same building size as the hotel, because building size (but not the use) is the same. This violates the GMA's requirements to ensure that existing character is preserved and to minimize and contain rural development.

Furthermore, there is no requirement to ensure that the facilities are principally designed to serve the existing and projected rural population," as required for Type I LAMIRDs under RCW 36.70A070(5)(c)(i)(B).[134] This requirement applies to ANY use in a Type I LAMIRD other than industrial, and it makes the County's effort to allow resort uses in Type I LAMIRDs particularly inappropriate.

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[132] WCC 20.64.202(1) (Zoning Code, p. 52).

[133] R-075B. TC: WCC 20.63.010 and 20.63.705 (Zoning Code, pp. 38 and 44); RC: WCC 20.64.010 (Zoning Code, pp. 44-45).

[134] The County was aware of this requirement, and it was aware that its regulations did not meet this requirement. It simply chose to violate the GMA. See C-685U (Transcript) at 17 (Council Member Crawford: "[D]**id we give the HE any guidance about, um, what it says under the GMA that it has to serve the existing rural population?** . . I guess I should leave that stone unturned if we haven't dealt with it because it's not part of the Hearings Board issue, and I probably shouldn't even be saying stuff on the record, but. " **Davis: "No, it's not in there." C**rawford: "OK, forget I said it."

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The laxity of these provisions is compounded by the applicability of WCC 20.80.100(2).[135] As discussed in the previous section, this provision allows *even larger* buildings with "documentation" or an administrative approval, neither of which establishes standards that meet the GMA's requirements to contain and control development, protect rural character, or ensure consistency with the existing character of the area in 1990.

2. Type II LAMIRDs

We join in Futurewise's briefing of this issue. As we stated in our comments,[136] CP policies and development regulations will permit Type II LAMIRDs as large as Semiahmoo, one of the largest resorts in Washington state. These provisions violate the GMA's requirement of "small scale" development in Type II LAMIRDs pursuant to RCW 36.70.070(5)(d)(ii).

3. Type III LAMIRDs

CP Policy 2LL-2 does not comply with the requirements for Type III LAMIRDs.[137] The GMA provision allowing Type III LAMIRDs, RCW 36.70A.070(5)(d)(iii), provides for three types of development: (1) "[t]he intensification of development on lots containing isolated nonresidential uses," (2) "new development of isolated cottage industries" and (3) "isolated small-scale businesses." "Intensification" is a term borrowed from and defined by Washington's law of nonconforming uses. As the Washington State Supreme Court has written:

> Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. *Jahnigen v. Staley*, 245 Md. 130, 137, 225 A.2d 277 (1967). The test is whether the intensified use is "different in kind" from the nonconforming use in existence when the zoning ordinance was adopted.[138]

[135] R-075B. TC: WCC 20.63.705 (Zoning Code at p. 44); RC: WCC 20.64.708 (Zoning Code at p. 63).
[136] C-685 at 8, 10.
[137] R-075A, CP at 25 of 33.
[138] *Keller v. City of Bellingham*, 92 Wn.2d 726, 731 – 32, 600 P.2d 1276, 1280 (1979).

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In the *Keller* case, a factory expanded the number of chemical manufacturing cells within an existing building by six cells to 32 cells. The Supreme Court held that this was a valid intensification because the building had been originally designated and constructed to hold 32 cells.[139] Intensification thus includes an increased use of "substantially the same facilities" when the nature and character of the use is unchanged.

CP Policy 2LL-2 provides that on "lots in a Rural Business area where businesses did not exist on July 1, 2012, the new businesses shall be "small-scale" as described in the development regulations. On lots where businesses existed on July 1, 2012, development regulations should not hold the business to a "small-scale" standard." This provision violates RCW 36.70A.070(5)(d)(iii), which only allows the three types of development listed previously and does not provide a July 1, 2012 "exception" for "large-scale" rural businesses. It violates the GMA because it allows businesses that are not isolated, and it violates the GMA because it does not limit businesses to those that are small-scale.

The development regulations further demonstrate the County's failure to comply with the GMA in its planning for Type III LAMIRDs. For these LAMIRDs, called "Rural Businesses," all uses in all of the LAMIRD nonresidential zoning categories are allowed.[140]

In three of the commercial and manufacturing zones, structures are allowed to cover 50% of the site, and 90% of the site may be covered by impermeable surfaces.[141] In the STC zone,

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[139] *Id.,* 92 Wn.2d at 732, 600 P.2d at 1280.
[140] *See* R-075B, WCC 20.59.050 (RGC) (Zoning Code at 10), 20.60.050 (NC) (Zoning Code at 17), 20.61.050 (STC) (Zoning Code at 24), 20.63.050 (TC) (Zoning Code at 38), 20.64.050 (RC) (Zoning Code at 45), 20.67.050 (GM) (Zoning Code at 53), 20.69.050 (RIM) (Zoning Code at 74).
[141] R-075B. RGC: WCC 20.59.052, 20.59.500 (Zoning Code at 15); GM: WCC 20.67.450, 20.67.500 (Zoning Code at 71); RIM: 20.69.450, 20.69.500 (Zoning Code at 83).

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structures may cover 70% of the site, with 90% impervious surfaces.[142] The NC zone allows 85%, impervious surfaces, with structural coverage of 30%.[143] The failure to provide for open space, vegetation, and wildlife habitat, as well as the extremely high impervious surface allowance, violate the GMA's requirement to protect rural character as previously discussed.

For all of the hundreds of permitted uses in Type III LAMIRDs, each zoning category establishes the maximum allowable floor area as 7,000 square feet, with no explanation as to why 7,000 square feet would be considered "small scale" for any particular use.[144]

These use limits are functionally irrelevant in any case, because WCC 20.80.100(3) establishes the following parameters for Type III LAMIRDs:

- 5,000 square feet for "new nonresidential uses";
- 12,000 square feet for new nonresidential uses in the Birch Bay-Lynden/I-5 "area" (which is undefined);
- 8,000 square feet for the expansion of "nonresidential uses that existed on July 1, 2012"; and
- 20,000 square feet for the expansion of "nonresidential uses that existed on July 1, 2012" in the Birch Bay-Lynden/I-5 "area."[145]

These provisions violate the GMA's requirement of small-scale, isolated development. This is particularly egregious in the case of the Birch Bay-Lynden/I-5 area, where the definition of "small scale" development is based on development in a "proto-LAMIRD' that *violated the GMA*. The fact that the County's planning violated the GMA's requirement of restricting rural development to "small scale" business in the past does not justify calling that development "small scale" now, as the County has done when it states that 12,000 square feet and 20,000

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[142] R-075B. WCC 20.61.50, 20.61.550 (Zoning Code at 35).
[143] W R-075B. CC 20.60.452, 20.60.500 (Zoning Code at 21).
[144] WCC 20.59.322, 20.60.302, 20.61.320, 20.63.705, 20.67.302, 20.69.300.
[145]. R-075B (Zoning Code at 87-88).

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1 square feet are "considered 'small scale' relative to existing uses in that area."[146] Nor does the
2 provision that allows any existing nonresidential building in the "area" to "expand" to 20,000
3 square feet, no matter how small the building is at present, a permissible "intensification" of use,
4 for the reasons discussed above with respect to CP policies.

5 Even these unsupported and unsupportable limits do not represent the maximum building
6 size in Type III LAMIRDs, however, because a CUP can be granted that allows buildings of
7 unlimited size.[147] The findings required for the CUP states, first, that a larger building is
8 permitted if "additional public facilities" are not required. This term is undefined, and there is no
9 standard for the Hearing Examiner to apply in determining whether "additional public facilities"
10 will be required. All uses require some "additional" public facilities because all uses require
11 police and fire service. Clearly, the provision cannot mean that any "additional" public facility
12 requirement will prevent issuance of a CUP, or the entire code section would be a nullity. In the
13 absence of an enforceable standard, this provision will not ensure that Type III LAMIRDs
14 comply with the GMA.

15 Second, the proposal has to be consistent with CP policies regarding the Rural Business
16 designation. As discussed above, the County's CP policies violate the GMA.

17 Finally, the proposed "small scale" business must "conform to the rural character of the
18 area." The existing "rural character" around Birch Bay Square, which is a "small scale" Type III
19 LAMIRD in a Rural area, includes a 66,336 square foot building in a development of 107,152
20 square feet.[148] Under the proposed provision, property owners around that I-5 intersection will
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[146] R-075B (Zoning Code at 87-88),WCC 20.80.100(3).
[147] W R-075B (Zoning Code at 88).CC 20.80.100(4).
[148] R-084E (Appendix G, 2012 Uses in Type III LAMIRDs).

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apply for “Rural Businesses” that meet that “rural character" of over 100,000 square feet. Presumably, property owners across the street from them will then be able to apply for the same “Rural” Business, because the rural character “of the area” is in fact urban-scale development.

Development standards in the County’s Rural areas are lower than in the cities, and Whatcom County charges no impact fees. Particularly in light of these facts, the provisions governing Type III LAMIRDs promote sprawl and are intended to compete with urban-scale developments in urban areas. They do not ensure that Type III LAMIRDs will be limited to “[t]he *intensification* of development on lots containing *isolated* nonresidential uses,” “new development of *isolated cottage industries*,” and “*isolated small-scale businesses*.”

E. LAMIRD Logical Outer Boundaries (“LOBs”) Violate the GMA.

1. Birch Bay- Lynden and Valley View (FDO at 97-101)

The Board found the outer boundary of the Birch Bay-Lynden Valley View LAMIRD did not comply with the GMA because the "third parcel…was not characterized by the built environment…"[149] In the FDO, the Board made two additional findings applicable to this LAMIRD. First, the Board concluded that "consideration of the development potential of contiguous lands in common ownership [is not]..a basis for establishing LAMIRDs."[150] Second, the Board concluded that the GMA uses the term "area" rather than parcel in determining whether the area is characterized by the built environment.[151]

[149] FDO at 100
[150] FDO at 53
[151] See FDO at pages 55-56.

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Nonetheless, the County failed to amend the LAMIRD boundary for Birch Bay-Lynden & Valley View, instead reporting to the Board that it had received "new" information showing "that the ***parcel*** was characterized by the built environment."[152]

The evidence cited by the County is from the "refreshed recollection" of the property owner and the owner's representative.[153] This newly-refreshed recollection responds to an aerial photo, which a declarant "understands" (but does not claim to have any firsthand knowledge) was photographed in 1991.[154] This "understanding" presumably is based on the fact that "1991" is hand-written (by someone, but we do not know when or by whom) on the photo. The source of the aerial photo is not identified.

Furthermore, the scale is not specified and the record contains no indication of parcel lines in relationship to the building. It appears that the "new" evidence of a building shows nothing more than the small outbuilding, a small part of which straddled the parcel line, shown on the aerial photograph that was before the Board when it prepared the FDO.[155]

Yet the County accepted, without question, this "refreshed" recollection of a property owner with a vested interest in the outcome as a basis for retaining the entire parcel in the LAMIRD and zoning the entire parcel, not just the small area with the "roofed structure," RGC.[156] RGC zoning allows "Retail/Office/Restaurant/Lodging"-type uses.[157] With no evidence that the "newly discovered" 900 square foot building involved any of these uses – as

[152] Compliance Report at 12 (emphasis added).
[153] C-724 at 2 and 3, County Compliance Report at 12.
[154] C-724 at 3
[155] See, e.g., R-084A (attached to the Compliance Report), "Birch Bay-Lynden and Valley View." See also R-077 (PDS Memo to County Council, 7/20/12) at 2 ("aerial imagery from 1986, 1991, and 2010 do show a second roofed structure of about 900 square feet"). There is no "roofed structure" currently, so the reference to 2010 appears to be a mistake.
[156] As we noted previously, by allowing uses based on unspecified "documentation," the County's LAMIRD development regulations provide a permanent, open invitation for "refreshed" recollections from property owners.
[157] R-075B. WCC 20.80.100 (Zoning Code at 85-86).

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staff stated, "[i]t is not clear what the function of this building was in 1990"[158] -- the LAMIRD designation and RGC zoning on the parcel will allow all of the following on the entire parcel:

> Mobile home and recreational vehicle sales, indoor commercial recreation facilities such as bowling alleys, skating rinks, indoor theaters and physical fitness centers, service establishment including but not limited to barber and beauty shops, laundries, dry cleaners, furniture repair, frozen food lockers, funeral parlors, animal hospitals, auction houses, financial institutions, fraternal organizations and professional offices, retail establishments including but not limited to grocery, liquor, drug, sundries, variety, building supplies, clothing, florist, nurseries, optical, sporting goods, appliance, music and pet stores, printing and publishing establishments, mini-day care centers and day care centers, and eating and drinking establishments.[159]

The building size will be not limited to anything in the range of the 900-foot "roofed structure." Building size will based on the combined use of all buildings, unless and until the County is informed of the property owner or agent's "recollection" of building sizes "in the area" for "similar" uses, as provided by WCC 20.80.100(2)(a).[160] As discussed above, this provision violates the GMA requirement to protect existing rural character based on 1990 development.

Even if there were a building in 1990 that the County's own aerial photos somehow failed to show, the County did not limit the LAMIRD designation to the area that was characterized by the built environment. Instead, without checking the parcel lines, the County included the entire parcel within the LOB. This is inconsistent with RCW 36.70A070(5)(d) and the Board's ruling and is clearly erroneous.

This LAMIRD is directly across the I-5 freeway from a large shopping center in a Type III LAMIRD that is also zoned RGC, providing for the development of an urban-density commercial node that is not appropriate for a rural area. The CP and development regulations

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[158] R-077 (PDS Memo to County Council, 7/20/12) at 2.
[159] R-075B, WCC20.59.051 and 20.59.053 (Zoning Code at 10-11).
[160] WCC 20.80.100(2)(a) provides that an administrative approval may be granted for a larger building than shown in the building size table "if there is documentation that . . .a larger building size or combined floor area existed for a use of the similar type in that area in 1990. . ." R-075B, Zoning Code at 87.

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governing this LAMIRD continue to interfere with Goal (1) of the GMA, by encouraging urban levels of development outside urban areas, and with Goal (2) by encouraging sprawl.[161]

Designation of the LAMIRD boundaries is clearly erroneous, the development regulations establishing the zoning for the LAMIRD are clearly erroneous, and the County has not met its burden of demonstrating that the LAMIRD will no longer interfere with the goals of the GMA.

2. Fort Bellingham/Marietta and North Bellingham (FDO at 101-104)

We join in Futurewise's argument, which is hereby incorporated by reference.

3. Smith and Guide Meridian (FDO at 109-111).

The Board found that the outer boundary of the Smith & Guide Meridian LAMIRD was clearly erroneous because "there was little evidence of significant development between the nodes of commercial and industrial development at the Smith Road and Axton Road intersections."[162]

The County amended the boundary and created two nodes along the Guide Meridian. One node is centered around Smith Road and the second node is centered around Axton Road. The outer boundary for the node centered around Smith Road, on the west side of the Guide Meridian, is inconsistent with the LOB criteria and is noncompliant.

On March 22, 2012, the County held a hearing on proposed changes to the Smith & Guide LOB. The staff proposal for that public hearing showed an outer boundary on the west

[161] RCW 36.70A.020(1) and (2); FDO at 171.
[162] FDO at 111

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side of the Guide Meridian that was consistent with GMA. The proposed LOB ended at the extent of the built environment that was evident in 1990.[163]

The LOB was amended, however, by extending the boundary feet to the north, including over 7 acres of undeveloped land[164] – land that was undeveloped in 1990 and is undeveloped now. The County's apparent justification for this boundary expansion is that a parcel less than one acre in size contained a 1,200 square foot building constructed in 1969. This one acre parcel is identified by the County as a "Vet office later became church."[165] The existence of one small building that may or may not have had a commercial use in 1990, separated from other development by a vacant expanse of seven acres, does not comprise "more intense" rural development. The expansion of the boundary north of the LOB shown in Exhibit R-113 fails to protect the existing (1990) character, promotes sprawl, and violates the GMA.

The Supreme Court has summarized the GMA's requirements for Type I LAMIRDs as follows:

> Counties must "adopt measures to minimize and contain the existing areas or uses of more intensive rural development" so that "[l]ands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl." Laws of 1997, ch. 429, § 7(d)(iv); RCW 36.70A.070(5)(d)(iv). For Whatcom County, "an existing area or existing use is one that was in existence ... [o]n July 1, 1990." RCW 36.70A.070(5)(d)(v), (A).
>
> A county must address several circumstances when establishing the "logical outer boundary" of a LAMIRD:
>
> > (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and

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[163163] R-113 (PDS Staff Proposal, 3.8/12), Issue 16, "Proposed Rezoning and CP Change."
[164] *See id*., aerial photo, clearly showing undeveloped property between the LAMIRD node and the isolated developed parcel. The revised boundary can be seen on aerial photos in R-084A (attached to the compliance report), both in "Smith & Guide Meridian" and at the bottom of "Axton & Guide Meridian."
[165] R-084D (*July 5, 2012 LAMIRD Report, Appendix F - 1990 Uses in Type I LAMIRDs*), Parcel number 390225510322 at 6.

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> highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl.

> RCW 36.70A.070(5)(d)(iv).

> LAMIRDs are not intended for continued use as a planning device, rather, they are "intended to be a one-time recognition of existing areas and uses and not intended to be used continuously to meet needs (real or perceived) for additional commercial and industrial lands." *People for a Liveable Comty. v. Jefferson County*, No. 03–2–0009c (Growth Mgmt. Hr'gs Bd. Final Dec. and Order Aug. 22, 2003). (In general, planning in rural zones must "protect the rural character of the area" and "contain[ ] or otherwise control[ ] rural development." RCW 36.70A.070(5)(c), (i)).

Gold Star Resorts v. Futurewise, 167 Wn.2d 723, 727-28, 222 P.3d 791 (2009).

Consistent with the Supreme Court's emphasis on minimizing and containing commercial and industrial uses in Type I LAMIRDs, this Board has found that "The Legislature imposed strict requirements on the area that may be included in (d)(i) LAMIRDs because residential LAMIRDs are commonly developed at densities that would otherwise constitute sprawl."[166] The Board concluded that expanding the boundaries of a Type I LAMIRD "across lands otherwise not eligible for inclusion to reach a smaller area of 'built environment' exceeds the proper scope of a logical outer boundary."[167]

The County's effort to expand the Smith and Guide Type I LAMIRD through undeveloped land in order to reach a small area of "built environment" similarly fails to meet the requirements of RCW36.70A.070(5)(d)(iv). As the Board stated in *1000 Friends* about the tests for the outer boundary of a Type I LAMIRD,

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[166] *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, Compliance Order (Nov. 30, 2007) at 1-2 In *1000 Friends*, the Board was addressing residential LAMIRDs. It subsequently referred to the restrictions that must be met when "a county elects to establish residential <u>or mixed-use LAMIRDs</u> pursuant to RCW 36.70A.070(5)(d)(i)" (id. at 10). Its analysis thus appears equally applicable to mixed-use Type I LAMIRDs such as the one at issue, especially in light of *Gold Star's* emphasis on the need to avoid the continuous expansion of commercial and industrial development through Type I LAMIRDs.

[167] *Id*. at 2.

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> The four factors to be considered in drawing a logical outer boundary for the residential LAMIRD must be applied within the limitations imposed RCW 36.70A.070(5)(c)(i) to contain or otherwise control rural development; and within the overall directive to "minimize and contain the existing areas or uses of more intensive rural development" found in RCW 36.70A.070(5)(d)(iv). That is, the factors are not to be construed as a basis for significantly expanding the area beyond the built environment, which must "predominate". . . . [A] chief concern is the creation of sprawl. The creation of a logical outer boundary is not a justification for adding rural lands when those lands significantly expand the potential for more intensive rural development because this would not "minimize and contain" more intensive rural development.[168]

The expanded boundary meets none of the criteria for a compliant LOB. It violates the existing (1990)[169] character of the neighborhood, because the expansion across undeveloped properties provides for substantially increased growth beyond the existing neighborhood. It was not based on any physical boundary. It did not prevent an abnormally irregular boundary; in fact, it made the boundary more irregular. Finally, by rezoning seven additional vacant acres for RGC development, the County has permitted low-density sprawl.

The County may be under the impression that one small building in an eight-acre expanse constitutes a "predominance" of "more intense" development, justifying the boundary expansion across undeveloped land. In *1000 Friends*, the Board reasoned that the phrase "more intensive rural development" in RCW 36.70A.070(5)(d) is used "in contrast to using either the term 'rural development'or the term 'urban growth.'"[170] Consequently, "[t]he pre-existing development that characterizes the built environment of a (d)(i) LAMIRD fits somewhere in the middle between a rural level of development and urban growth; it must be more intensive than rural development

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[168] *Id*. at 17-18 (citations omitted).
[169] The County and property owners along the Guide Meridian are prone to emphasize the sprawl that has developed since 1990 along this highway, which the County long planned and zoned for strip development from Bellingham to the Canadian border, as justification for allowing more intensive uses. As the Board stated in *1000 Friends*, however, "The Legislature set a firm date by which facilities and structures must have been constructed in order to qualify as part of the built environment of a LAMIRD. . . . The fact that the intervening development was lawful under the County's comprehensive plan does not alter that date." *Id*. at 11.
[170] *Id*. at 13.

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but not as intensive as urban development."[171] To make this determination, the Board stated that it can look at the County's own definition of "rural" development, to determine whether development is more intense than "rural" development.[172]

The County's description of "Rural Character and Lifestyle" establishes that a single small business does not represent development that is more intense than "rural" development. The CP's "Rural Character and Lifestyle" section describes "small unincorporated communities" where land uses are "more intensive" than in the surrounding rural area. "Even outside these settlements," however, the County emphasizes that "residents of the rural areas have established home occupations, cottage industries, and small-scale businesses that are an important part of the County's traditional economy."[173] According to the County's own definition of its rural character, a small-scale business seven acres away from "more intensive" development does not constitute more intense rural development. It certainly is not a "predominance" of the built environment.

This boundary expansion is not infill but "outfill."[174] It uses the excuse of a small non residential use to allow substantially increased development radiating away from a node of development that existed in 1990. The inclusion of the property other than that shown in R-113 violates the GMA.

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[171] *Id.*
[172] *Id.*
[173] R-075A, CP at 8 (emphasis added).
[174] *1000 Friends of Washington v. Thurston County, supra,* at 20.

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F. The County's CP Amendments and Development Regulations Permit a Population in the County's Rural Areas Far In Excess of the Allocation Elsewhere Provided For in the CP, Thereby Creating Plan Inconsistency In Violation of RCW 36.70A.070 (Preamble) and RCW 36.70A.130(1) (FDO at 118-121).

The County has failed utterly to address the rural population allocation issue that resulted in the Board's finding of "Plan inconsistency in violation of RCW 36.70A070 (preamble) and RCW 36.70A130(1)."[175] Instead of undertaking the GMA-compliant *planning* that the Board stated was required in order to "ensure that its comprehensive plan and development regulations, considered together, allocate rural population consistent with the Comprehensive Plan's population allocation,"[176] the County's adopted policy is one of *reaction*. As documented in both its CP and its Compliance Report, the County merely promises that it *will* plan at some point in the future, once it has already issued too many residential permits. This approach fails to cure the existing inconsistency. As this Board stated in *Butler v. Lewis County*, "[r]eaction planning through permit decisions is fundamentally contrary to GMA, and does not comply with the Act."[177]

The FDO found that the County's "Comprehensive Plan amendments and development regulations permit a population in the County rural areas far in excess of the allocation elsewhere provided for in the County Comprehensive Plan".[178] The FDO was based on unrebutted evidence that established a gross discrepancy:

> Table 4 [of the Comprehensive Plan] allocates 67,692 people to unincorporated rural Whatcom County. The 2010 population census shows there are 65,041 people in the County rural areas, thus allowing for only 2,651 additional people by 2029. **Hirst's unrebutted evidence demonstrates that vacant lots in existing rural areas can**

[175] FDO at 121.
[176] FDO at 120.
[177] WWGMHB Case No. 99-2-0027c, Final Decision and Order (June 20, 2000) at 56 of 73.
[178] FDO at 120.

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accommodate 33,696 additional people, where only 2,651 are expected and **the parcels created by the County's LAMIRD designations alone result in the potential for an increase in population of 4,512**. Hirst argues, and the Board agrees, that **the County has not planned to ensure that its comprehensive plan and development regulations, considered together, allocate rural population consistent with the Comprehensive Plan's population allocation.** The additional residential development allowed in the County LAMIRDs conflicts with the goal of locating most population increases in UGAs and encourages sprawl. . . .[179]

The County made no effort to show that its revised CP and development regulations cure this inconsistency. In fact, its revised CP policy 2DD-1 does nothing more than showcase its Plan inconsistency. The policy now states: "Concentrate growth in urban areas per the population projections in Chapter 1 of this plan."[180] The County failed to meet this policy, and its plan remains in violation of RCW 36.70A070 (preamble) and RCW 36.70A130(1).

Because the County failed to make any calculation of its rural residential development capacity under its newly-adopted CP and development regulations, Hirst did the work for the County, as set forth in the submissions in C-683 and the exhibits thereto. This unrebutted analysis provided the County with all of the data needed to conduct the necessary evaluation, even including the Whatcom County Assessor Parcel Database. We meticulously explained our methodology.[181] We used the County's July 5th LAMIRD report to determine the number of undeveloped rural parcels available for residential development.[182] We submitted a public records request to find out how many pending lots are vested in Rural residential areas, based on

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[179] *Id*.
[180] R-075A at 9.
[181] C-683 (Stalheim letter) at 1-6.
[182] For reasons that are unexplained, this report states that the number of vacant parcels in LAMIRD Study Areas is only 6,229, compared to the County's 2009 report, which showed that LAMIRD Studey Areas had 9,543 parcels. We used the lower number. *See id*. at p. 1 fn. 2.

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active or current permit applications for land divisions.[183] We used the most recent Census data, all of which we supplied to the County.[184] In short, we used publicly-available federal data and the County's own data, and where the County's data conflicted with itself, we used the most conservative figure.

This analysis establishes that that the County has provided for 51,297 additional people outside of UGAs, where only 2,651 have been planned for.[185] The development potential outside UGAs can accommodate at least 116,968 people, although the County has only allocated and planned for 67,692.[186]

Therefore, the record establishes conclusively that the County has not met the FDO's requirement to ensure that its CP and development regulations, considered together, allocate rural population consistent with the CP's population allocation. This FDO requirement is not equivocal, not conditional, and does not speak of a potential, future Plan inconsistency – the inconsistency exists *today*. *Currently*, this inconsistency "conflicts with the goal of locating most population increased in UGAs and encourages sprawl." *Id.*

The County's response, however, does not take a single step towards addressing this existing inconsistency. Instead, Policy 2DD-1 states that the County will "monitor[] residential development activity" outside the UGAs – presumably, based on permits that it has issued – and will "take action" if it is "apparent that growth occurring outside the urban growth areas is

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[183] C-683 (Stalheim letter) at 4-5. This count does not include parcels available for residential development in Natural Resource areas, although the CP population allocation table includes this population within the category of "Unincorporated Rural Whatcom County." CP at 3. Therefore, our calculation of population outside the UGAs is conservative.
[184] These data, as well as the Assessor's Parcel Database, were all provided to the County on the CD that accompanies C-683. This CD included all of the documents listed in our "Exhibits" list under "683A." Pending application data are contained in C-683A.9.
[185] C-683 (Stalheim letter) at p. 6.
[186] *Id.* at p. 1.

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inconsistent with adopted projections".[187] Once the County has already issued too many permits, **when will it take action to address the inconsistency identified in the FDO?** It "**may**" take action in **2016**, when the "comprehensive plan update" is mandated by RCW 36.70A.130(1) for the County.[188]

In short, the County has taken **no action** to address its ***current*** violation of the GMA. Its Compliance Report merely states an intent to "coordinate with the cities to begin the next UGA updates." [189] In the meantime, applications will continue to vest in the Rural area based on the County's invalid Plan and development regulations. Sprawl is still encouraged and population increases are still encouraged outside urban areas.

The County makes several ineffectual efforts to justify its failure to comply. It "includes," without "adopting," revised population estimates.[190] How this makes any planning or legal sense is unclear; the County "adopted" the CP revision, the CP revision contains the revised population estimates, and yet these revisions apparently are intended to have no effect. In fact, they create yet another internal inconsistency in the CP.

The County also claims that permit data showing "less population growth per year than projected," based on *permits issued* during three recession years (2009-2011), and with no consideration of vested applications and permit extensions, somehow excuses it from compliance with the FDO.[191] As we explained to the County repeatedly, however, the FDO was not based

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[187] R-075A, CP at 10, Policy 2DD-1.
[188] *Id.* ("Actions may include changing the allocation of the projected population growth during the comprehensive plan update required per RCW 36.70A.130(1), or changing development regulations to limit growth outside the urban growth areas.")
[189] Compliance Report at 22.
[190] Compliance Report at 21; R-075A (CP) at 2-4.
[191] Compliance Report at 22.

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on the County's growth *rate* in any given period. One of our earliest letters, in February 2012, explained the issue straightforwardly:

> The rural population allocation issue is not merely a matter of an excessive "percentage of growth" going to rural areas, as stated during the staff presentation. That is a symptom of the problem, but the Board's finding requires the County to address the cause.
>
> The cause of the problem is that fact that the County's Comprehensive Plan is based on a population allocation of 2,651 additional people in the rural area, yet the County has not adopted the necessary policies and development regulations to contain and control rural development in order to ensure that this planning goal has been met. Instead, the Comprehensive Plan and development regulations accommodate at least 49,440 people outside of UGAs. The County's entire 2029 growth allocation, including the population allocated to UGAs, is 46,615.
>
> Bearing in mind that the population of the City of Blaine is approximately 5,000, this means that the County has planned and zoned for around ten Blaines in its rural areas. The population of ten Blaines will rely on exempt wells, thereby depriving farmers of the water that they need to run their businesses. These ten Blaines will add to traffic, the need for schools, and needs for fire and police services, without paying any impact fees. Many of the Blaines will be built within five feet of agricultural land, putting further pressure on the County's shrinking agricultural land base.
>
> The further significance of the fact that the Comprehensive Plan is based on this population allocation is that the whole elaborate system of designating UGAs incorporates the assumption that only 2,651 more people will live in rural areas. Urban population growth, and the land allocated to urban population growth, is not based on the fact that the County has planned and zoned to accommodate 106% of its projected population increase outside of UGAs. . .
>
> This gross internal inconsistency results from numerous individual decisions over the years. Like a homeowner who has put off necessary tasks around the house, the County is now facing a significant backlog of deferred maintenance. And like the homeowner, the County has the choice of continuing to procrastinate, increasing its costs and merely putting off necessary decisions, or acting to make sure that its house is in order.[192]

[192] C-823 (Nossaman, 2/24/12) at 1-2. *See also* C-749 (Nossaman, 4/25/12) at 2 (chart explaining the rural population allocation issue).

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1 The County's next tactic was to attack its own data, which was the foundation of the
2 Board's ruling. The Compliance Report claims that it is "unclear how many vacant tax parcels
3 could be considered legally buildable lots,"[193] a statement also included in the revised CP.[194]
4 These vague comments are intended to cast doubt on the evidence of rural development capacity
5 that we submitted to the Board with our Petition. The County did not refute – and could not
6 refute -- this evidence before the Board, because it was based on the County's own data.[195] Now
7 the County is hinting that the Plan inconsistency does not really exist because the County's own
8 data are unreliable.
9 The County fails to mention, however, that we thoroughly refuted the County's claim that
10 its own data (on which our rural population allocation was based) consists of raw "tax parcels."
11 We explained to the County that the information from the County Assessor contains "fields" that
12 are used to query parcels for attributes including whether the parcels are tax exempt, whether
13 they have building improvements, and the market and appraised value of improvements on these
14 parcels.[196] We advised the County that its own GIS records are in a format that can be queried,
15 and filters can be applied to eliminate parcels that are not relevant.[197] We noted that, if the
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[193] Compliance Report at 22.
[194] CP at 2.
[195] As we explained in a submission dated June 18, 2012, "The calculation of rural residential development capacity, as submitted to the Hearings Board, was based on data generated by Whatcom County. The data, from the County's 'Review of Growth,' were included a table entitled 'Residential Development Potential in Rural Lands.' The data in the table were described as follows:

> The following tables identify potential residential development on existing vacant parcels in rural and resource lands. Also included in the tables are potential additional development rights based on an estimate of how many lots would be created based on existing zoning designations. The numbers within these tables do not include land division applications that have been received and have yet to receive final approval. The number of potential lots created by these vested applications is considerable.

C-699 (Nossaman, 6/18/12). The remainder of the submission explains GIS filters and the use of parcel data in planning. *See also* C-683 (Stalheim letter at 2-9).
[196] C-683, Stalheim letter at 3and 9.
[197] C-683, Stalheim letter at 3and 9.

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County's data are all invalid because they are based on raw "tax parcels," the County would simply be incapable of planning, because "[t]he analysis of existing parcels is an essential part of the planning process. Existing vacant parcel information was used within Whatcom County's LAMIRD Report, within the land capacity analysis for urban growth areas, and within special studies, like the Lake Whatcom Buildout Analysis and the Agricultural Parcel Reconfiguration Assessment."[198] The County cannot avoid its obligation to plan by casting vague, unfounded aspersions on its own data and its own GIS capabilities.

Most significantly, we explained the process that we used to show that the County's rural population allocation continues to violate the GMA.[199] The County did not refute our data and offers no evidence or analysis of its own regarding the County's rural residential development capacity. The statements regarding "vacant tax parcels" are a red herring and do not excuse the County's failure to comply with the FDO. .

The County may cite a comment letter from the Department of Commerce that states support for the County's approach to the rural population allocation.[200] Commerce is not a party to the action. There is no reasoning to support Commerce's statement and no evidence that the commentator is familiar with the full record. As the Eastern Board has stated, Commerce's letter is merely one submission, and "it is the Board that determines GMA compliance," not Commerce.[201]

In particular, it is unlikely that Commerce is aware of the significant *consequences* of the County's rural population allocation and the resultant Plan inconsistency. The function of the

[198] C-683, Stalheim letter at 2.
[199] C-683, Stalheim letter at 1-9.
[200] C-705 at 4.
[201] *Futurewise v. Stevens County*, EWGHB Case No. 05-1-0006, Compliance Order (Dec. 24, 2009) at 19.

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County's population allocation, as set forth in Table 4 of the CP,[202] is not only to distribute projected net growth. The population allocation is also used to determine the County's transportation plan, capital facilities plan, public services plan, water resource needs, and the land use plan. The County's current transportation planning is based on population figures and projections from 2004. By 2010, the Rural areas had already exceeded this allocation by 7,424 people.[203] Excessive rural population growth has resulted in significant increases in traffic, and the recently-adopted Whatcom Transportation Plan has noted the "disproportionate public cost" of serving rural residents.[204] As we established above, in the discussion of the County's failure to protect water resources, a substantial portion of the Rural area is located in basins that are closed for further surface water appropriation. Additional rural residential population will mean an addition to the 2,384 exempt wells drilled in these closed basins in Rural areas since 1967.[205]

The County's violation of the GMA thus is not merely a matter of numbers with no relationship to citizens' quality of life. It affects taxes and the economy, it affects the environment, and it is leaving a legacy of sprawl that will be difficult to reverse. It would be cheaper, more efficient, and of course more compliant with the GMA, to prevent this sprawl from occurring in the first place.

Because we understand that the County's task will require significant effort, we made every effort to work with the County[206] and to provide the County with information that would

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[202] R-075A at 2-3.
[203] C-788 (Stalheim letter) at 3-4.
[204] C-683, Stalheim letter at 7.
[205] C-683, Stalheim letter at 6; C-685A (Closed Basins and the "Rural" Area); C-685F (Closed basins and rural wells), C-678.
[206] We submitted at least a dozen submissions dealing entirely or in part with the rural population allocation issue, including C-685 (7/20/12); C-699 (6/18/12); C-723 (5/23/12); C-740 (5/21/12); C-753 (4/17/12); C-768 (4/11/12); C-772 (4/10/12); C-788 (3/22/12); C-813 (3/19/12); C-821 (3/7/12); C-823 (2/24/12); and C-825 (2/22/12).

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help it in its planning efforts. The task is not an impossible one. As we noted, "[t]he County's measures to contain and otherwise control rural growth, prevent sprawl, and assure visual compatibility, all required by the FDO, present an opportunity to address the rural population allocation issue concurrently."[207] We proposed actions to control and contain growth, including the adoption of transportation impact fees, lot consolidation, expiration of old plat applications that have not been recorded, setbacks from agricultural land, standards that limit clearing of native vegetation necessary for habitat, zoning changes to prohibit additional lot creation outside LAMIRDs, standards that protect Lake Whatcom, and requirements to demonstrate water availability and zero impact on agriculture.[208] The County failed to adopt any of these basic planning measures.

In an attachment to our first comment letter, dated February 7, 2012, we provided the County with an "excerpt from the EIS for the County's Ten-Year Review of UGAs, [which] includes a range of measures that the County could choose to adopt in order to ensure internal consistency."[209] The EIS's matrix of potential approaches ranges from decreasing rural densities by increasing minimum lot sizes to rural lot consolidation to limiting the use of exempt wells.[210] As we noted, "The County is not looking at a blank slate, and does not have to reinvent the wheel in its efforts to achieve internal consistency."[211] The point was, of course, to ensure that

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[207] C-823 at 1 (2/24/12).
[208] C-788 (3/22/12), Stalheim letter at 10.
[209] C-825 (2/22/12), cover email.
[210] C-825, attachment.
[211] C-825, letter at 3. As we reminded the County,

> The FDO explicitly connects the rural population issue with the County's failure to adopt "the necessary measures to reduce the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area." FDO at 40. When the County claimed that its Comprehensive Plan already contained sprawl-reducing measures, the Board disagreed, stating that the Comprehensive Plan "has not in fact constrained the County from adopting land use designations that provide capacity for **all** its projected population growth to occur in rural lands." FDO at 39 (emphasis in original).

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the County could start its planning work on this issue as quickly as possible in order to ensure compliance.

Instead of incorporating any or all of these approaches in its CP and development regulation revision, the County's Compliance Report merely references this matrix as "*potential* actions that *can* be taken to limit rural growth".[212] With no commitment to take any of these actions and no showing that it has ensured that the size and density levels of its rural areas are commensurate with its population allocations, the County remains out of compliance with the GMA.

G. Because the CP Fails to Contain Measures to "Contain and Control" Rural Residential Growth or to Protect Surface and Groundwater Resources, the Application of the Rural Residential Density Overlay Violates the GMA (FDO at 121-128).

The FDO concludes that the development regulations permitting the RRDO do not violate the GMA, provided that the CP contains GMA compliant measures to "contain and control" application of the RRDO and that surface and groundwater resources are protected.[213] The County has failed to fulfill this requirement.

The County has not cured its CP inconsistency based on allocating excessive rural population, and the RRDO merely adds to the inconsistency. Had the County "contained and controlled" its rural residential growth sufficiently to meet the consistency requirement, and the RRDO remained part of its rural residential planning, the RRDO would not be inconsistent with the GMA. It did not, and the County's decision to use the RRDO to provide for increased

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C-825, letter at 2-2.
[212] Compliance Report at 22, emphasis added.
[213] FDO at 128.

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residences conflicts with the population allocation set forth in Chapter One of the CP for all the reasons discussed in the previous section.

The FDO specifically ties measures to "contain and control" and to reduce sprawl to the rural population allocation. In the "sprawl" discussion, the Board states: "The Board notes Policy 2DD-1 -- 'Concentrate the majority of growth in urban areas' - has not in fact constrained the County from adopting land use designations that provide capacity for all its projected population growth to occur in rural areas. [Footnote ref to rural population allocation discussion.] . . . The Board assumes that when the County adopts appropriate measures in the compliance phase of this appeal those measures adopted to satisfy RCW 36.70A.070(5)(c)(i) [contain and control] and (ii) will at the same time serve to reduce sprawl development as required by (c)(iii)."[214]

The County revised Policy 2DD-1 to state "Concentrate growth in urban areas per the population projections in Chapter 1 of this plan," but it has not even complied with its own revised policy. Its land use designations *still* "provide capacity for all of its projected population growth to occur in rural areas." It has not adopted the necessary measures to contain and control, and as a result, its application of this zone as set forth in R-075C[215] violates the GMA.

IV. REMEDY

For all of the reasons set forth above, the provisions of the Ordinance, including all provisions and measures not identified as compliant in Section I of this Brief, fail to comply with the GMA and should be remanded back to the County for actions consistent with the GMA.

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[214] FDO at 39-40.
[215] Attached to the Compliance Report.

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In its FDO, the Board concluded "that the continued validity of the amended portions of WCC 20.59, 20.60, 20.61, 20.67 and 20.69 and the LOBs of certain LAMIRDs described [in the FDO] would substantially interfere with Goal 1 of the GMA."[216]

Petitioners request the Board to find that the continued validity of parts of the CP and development regulations will substantially interfere with the fulfillment Goal 1 of GMA, and further request that the invalidity order include other parts of the CP and development regulations for reasons set forth above. The basis for invalidation includes, without limitation, the fact that the County's CP amendments and development regulations continue to permit a population in rural areas far in excess of the provided in Chapter One of its Comprehensive Plan, despite the Board's previous finding that the additional residential development "conflicts with the goal of locating most population increases in UGAs and encourages sprawl."[217]

Petitioners request that the Board find that the continued application of the County's CP and development regulations will substantially interfere with the fulfillment of the following GMA goals:

> RCW 36.70A.020(1): Urban growth . Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> RCW 36.70A.020(2): Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
>
> RCW 36.70A.020(9): Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.
>
> RCW 36.70A.020(10): Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

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[216] FDO at. 171-172. The Board also found that development would also substantially interfere with "Goal 2, by encouraging sprawl." (FDO at 171, lines 27 and 28).
[217] FDO at 121.

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> RCW 36.70A.020(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

In determining invalidity, the Board found that allowing "these code provisions and LOBs to remain viable during the remand phase of this appeal would permit uses to vest in the LAMIRDs..that, if permitted..would substantially interfere with Goal 1 of the GMA,…and Goal 2, by encouraging sprawl."[218] Evidence has been presented that the extent of vesting in Whatcom County poses significant interference with Goals 1, 2, 9, 10 and 12.

In our Prehearing Brief, we provided the uncontested evidence of vesting, including the following:

> Evidence that the County is likely to process permits that will vest under these invalid provisions is set forth in an analysis of the vested permits that the County accepted during the five years that followed the Board's 2005 FDO. The record shows that there were 233 commercial building permits, 10 long plats and 85 short plats in the areas affected by the Board's decision.
>
> Evidence that the County is likely to process permits that will vest commercial and industrial zoning designations with uses inconsistent with GMA is shown in four short plat applications. As stated in the record of the Kendall Business Park Short Plat, "Given the uncertainty regarding zoning, my client is proceeding, in part, to vest uses under the existing zoning."[219]

In the present brief, evidence has been provided that Whatcom County has vested land division applications that would create an additional 3,693 lots in rural areas. [220] Evidence, establishes that there are 14,593 existing vacant parcels, with an additional 1,300 lots that could be developed in rural areas, allowing for 19,586 additional lots in areas outside UGAs. [221]

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[218] FDO, pg. 171
[219] Petitioners Hirst et al.'s Prehearing Brief, WWGMHB Case No.: 11-2-0010c (Oct. 6, 2011) at 91-92. See also Tab F-101 of Futurewise's brief.
[220] C-683A.9 (Pending Plat Applications).
[221] C-683l

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Evidence that Whatcom County extends permits dating back more than 20 years, even when these extensions have been found to violate the GMA, is demonstrated through the County's Permit Extension Ordinance, which was invalidated by this Board.[222] While the Board has determined that this past permit extension ordinance is no longer invalid because it was repealed, the permits (found to violate Best Available Science) remain in place. The fact that many of the extended permits had already been extended for decades demonstrates that vested applications in Whatcom County must be viewed as permanent. Furthermore, the County is not precluded from adopting additional permit extension ordinances that would vest uses under the invalid CP and development regulations described herein.

Evidence has been provided showing that 2,384 wells have been drilled in rural areas since GMA was amended in 1997 to allow LAMIRDs. More than two-thirds (69%) of those wells were drilled in basins that were closed for further surface water appropriation. Evidence was provided that Whatcom County has not adopted any measures to prohibit permit-exempt groundwater uses in these closed basins on the 19,586 vacant parcels in rural and resource lands.

Evidence was provided that no measures were adopted to ensure that water would be legally available for building permits on the 19,586 vacant parcels. Whatcom County's failure to adopt such measures is inconsistent with Goal 10 and Goal 12.

Evidence was provided that the population capacity of the vacant parcels, pending lots and potential new lots in rural areas could accommodate 51,927 additional people, where only 2,651 were allocated by the CP. Evidence was also provided that the current urban growth areas

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[222] Ordinance 2010-067was found invalid by this Board in *Stalheim v. Whatcom County*, (WWGMHB Case No. 11-2-0001, Final Decision and Order (August 2, 2011): "[T]he Board was struck by the examples of applications which could be renewed under the Ordinance. The original dates for many applications were from the 1990's into early 2000."

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could accommodate 12,032 more people than allocated to urban areas in the CP, resulting in land use plans and development regulations that accommodate 61,308 more people than allocated in the CP. The County's own Compliance Report, as well as its CP, state that the County may never address this violation or it may wait until 2016. There is clear and substantial risk that permit applications will vest under the County's GMA-noncompliant policies over the course of the next four years, even assuming that the County will take compliant action in 2016. Development under the current CP will substantially interfere with Goals 1, 2, 9, 10 and 12 of the GMA.

Invalidity Request

Petitioner respectfully requests that the Order of Invalidity include the following:

(a) A finding of noncompliance;

(b) An order remanding the matter to the County;

(c) A determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the ordinance would substantially interfere with the fulfillment of the Goals 1, 2, 9, 10 and 12 of the GMA; and

(d) A determination specifying the part or parts of the ordinance that are invalid and the reasons for invalidity.

Due to the substantial interference with the fulfillment of Goals 1, 2, 9, 10 and 12 of GMA, the Board is requested to determine that the CP policies and development regulations contested herein are invalid: The LAMIRD CP provisions and development regulations that provide excessive commercial and industrial development, and that continue to substantially interefere with the goals of the GMA, should remain invalid for all the reasons described above. These provisions have been identified in the body of our brief. Zoning Code provisions include, without limitation, the following:

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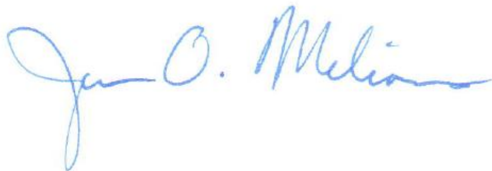
- Rural General Commercial zone (RGC, WCC 20.59)
- Neighborhood Commercial zone (NC, WCC 20.60)
- Small Town Commercial zone (STC, WCC 20.61)
- General Manufacturing zone (GM, WCC 20.67)
- Rural Industrial Manufacturing zone (RIM, WCC 20.69)
- CP and zoning maps, as set forth in Exhibit C to the Ordinance,[223] and specifically as follows: Birch Bay-Lynden & Valley View, Smith and Guide Meridian, Fort Bellingham/Marietta, North Bellingham.

Furthermore, all County development regulations and zoning maps that provide for Rural residential development should be declared invalid because they will continue to permit a population in the County rural areas well in excess of the allocation contained in Chapter 1, thereby substantially interfering with the above-referenced GMA goals. The County's "plan to plan" in the future, potentially in 2016, presents a clear likelihood of vesting, especially in light of the evidence set forth above.

RESPECTFULLY SUBMITTED AND DATED this 11th day of September, 2012,



Jean O. Melious, WSBA No. 34347
Attorney for Petitioners Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim

[223] R-075C.

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Index of Record: Clarification of Citations Used in the Brief

C-671M: Document Submitted to the County By E-mail as an Attachment to C-671, but Omitted from the Index of Record

John Stark, "Whatcom County Council skeptical on need for tougher septic tank rules," Bellingham Herald, July 25, 2012.

C-683A: Documents Submitted to the County on a Compact Disc

In the brief, these documents are referenced by the exhibit number (C-683A) and the document number – for example, C-683A-9.

1. Appendix A, Review of Growth, August 14, 2009 (c-079I)
2. Land Capacity Summary (UGAs), November 24, 2009
3. Staff Report, UGA Land Capacity Review (re: Birch Bay), July 2, 2010 (c-364)
4. Attachment A, Land Capacity Analysis Summary (re: Ferndale), April 25, 2011
5. Email, Gary Davis to David Stalheim, July 3, 2012
6. Whatcom Transportation Plan, May 2012
7. Whatcom Council of Governments, Traffic Count Manual, May 11, 2012
8. Whatcom County Parcel Reconfiguration Situation Assessment, May 31, 2012
9. Pending Plat Applications (PDR 2012-124) -- 2 Excel worksheets (original and rural only applications)
10. Plats (Whatcom County Auditor)
11. Whatcom County Development Capacity, five Excel worksheets (Rural Development Potential; UGGA-Rural Capacity; Appendix E (LAMIRD Report) Residential Only; Appendix E (LAMIRD Report) Residential Designated LAMIRDs Only)
12. Census 2010 (non-urban blocks)
13. Whatcom County Assessor Parcel Database, January 25, 2012
14. *WRIA 1 2010 State of the Watershed Report* ("Watershed Report"): available at http://wria1project.whatcomcounty.org/uploads/PDF/Studies%20and%20Reports/2010-State-of-Watershed-WRIA1_Final.pdf (Exhibit to C-685 that was too large for the County's e-mail server; submitted on CD with C-683)

C-788A: Documents Submitted to the County on a Compact Disc

U.S. Census

1. American FactFinder: http://factfinder2.census.gov/
2. Office of Financial Management: http://www.ofm.wa.gov/pop/default.asp

Whatcom County Ordinances, Resolutions & Plans

3. Chapter 1, Ordinance 2010-037: http://www.co.whatcom.wa.us/council/2010/ord/ord2010-037.pdf

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4. 1997 Comprehensive Plan: http://www.co.whatcom.wa.us/council/1997/ord/compplan/text.pdf
5. 2004 Comprehensive Plan, Chapter 1: http://www.co.whatcom.wa.us/council/2004/ord/ord2004-013.pdf
6. 2005 Comprehensive Plan, Chapter 4 - Capital Facilities and Chapter 6 – Transportation: http://www.co.whatcom.wa.us/council/2005/ord/ord2005-009.pdf
7. 2005 Comprehensive Plan, Appendix G, Transportation Impact Fee -- Background Information: http://www.co.whatcom.wa.us/council/2005/ord/ord2005-012.pdf
8. 2009 Comprehensive Plan, Chapter 4 - Capital Facilities and Chapter 6 – Transportation: http://www.co.whatcom.wa.us/council/2009/ord/ord2009-037.pdf
9. Whatcom County Comprehensive Plan, Appendix E, 20 - Year Capital Facilities Plan: http://www.co.whatcom.wa.us/pds/planning/comp_plan/pdf/20110101-appendix-e.pdf
10. North Whatcom Fire and Rescue, Capital Facilities Plan: Not on website.
11. Chapter 4, Capital Facilities Plan, Policy 4N-4 adopts by reference: http://www.co.whatcom.wa.us/pds/planning/comp_plan/pdf/Chapter4-CapitalFacilities.pdf
12. Resolution 2009-040, Agricultural Goals: http://www.co.whatcom.wa.us/council/2009/res/res2009-040.pdf

Whatcom Council of Governments

13. 2007 Regional Transportation Plan: http://resources.wcog.org/planning/plan_2007wtp.pdf
14. 2012 Traffic Count Manual: http://resources.wcog.org/planning/2012TrafficCountManual.pdf

Environmental Impact Statement

15. 2009. Draft Environmental Impact Statement. 10-Year Urban Growth Area Review. May
16. http://www.co.whatcom.wa.us/pds/2031/eis.jsp
17. Chapter 2, Alternatives: http://www.co.whatcom.wa.us/pds/2031/pdf/Ch2_Alternatives.pdf
18. Chapter 4-7, Population and Employment: http://www.co.whatcom.wa.us/pds/2031/pdf/Ch4-7_PopEmployment.pdf
19. Chapter 4-9, Transportation: http://www.co.whatcom.wa.us/pds/2031/pdf/Ch4-9_Transportation.pdf
20. 2009. Final Environmental Impact Statement. 10-Year Urban Growth Area Review. October: http://www.co.whatcom.wa.us/pds/2031/final_eis.jsp

Whatcom County Transportation Impact Fee Reports and Drafts:

21. County Website: http://www.co.whatcom.wa.us/pds/planning/tipconcurrency.jsp
22. Draft -- Whatcom County Code, Chapter 20.77 Transportation Impact Fees: http://www.co.whatcom.wa.us/pds/planning/pdf/WCC20.77TranspImpactFeesDraftSept1108.pdf

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23. Draft -- Whatcom County Code, Chapter 20.77 Transportation Impact Fees, Attachment A – Map : http://www.whatcomcounty.us/pds/pdf/AttachmentATSAs_Draft.pdf
24. Draft -- Whatcom County Code, Chapter 20.77 Transportation Impact Fees, Attachment B - Project List: http://www.co.whatcom.wa.us/pds/planning/pdf/AttachmentB-ProjectListSept1108Draft.pdf
25. Draft -- Whatcom County Code, Chapter 20.77 Transportation Impact Fees, Attachment C -- Impact Fee Schedule Summary Table: http://www.co.whatcom.wa.us/pds/planning/pdf/AttachmentCRateScheduleSept1108Draft.pdf
26. Transportation Impact Fees Study Report May 2008: http://www.whatcomcounty.us/pds/pdf/StudyReportMay2008.pdf
27. Transportation Impact Fees Program Development and Methodology Report May 2008: http://www.whatcomcounty.us/pds/pdf/planning/commission/prog_dev_report_map_2008.pdf

Agricultural Studies:

28. Agricultural Strategic Plan: http://www.co.whatcom.wa.us/pds/planning/pdf/ag-strategic-plan-endorsedwres-20110727.pdf
29. Agricultural Land Cover Analysis: http://www.co.whatcom.wa.us/pds/planning/pdf/ag-land-cover-mapping-report-20110928.pdf
30. Rural Land Study, A Collaborative Report Identifying Rural Areas of Agricultural Significance: http://www.co.whatcom.wa.us/pds/pdf/planning/projects/rural_land_study_report.pdf
31. Rural Land Study, Exhibit B, Critical Mass II Update: http://www.co.whatcom.wa.us/pds/pdf/planning/projects/rls_ex_b.pdf
32. Rural Land Study, Exhibit C, Area Summaries: http://www.co.whatcom.wa.us/pds/pdf/planning/EXHIBIT%20C%20-%20Area%20Summaries.pdf
33. Rural Land Study, Exhibit E, Rural Study Areas: http://www.co.whatcom.wa.us/pds/pdf/planning/rural_study_areas_letter.pdf
34. Purchase of Development Rights Assessment: http://www.co.whatcom.wa.us/pds/planning/pdf/purchase-development-rights-assessment20090202.pdf
35. USDA Census of Agriculture, 2002 and 2007: http://www.agcensus.usda.gov/index.php

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DECLARATION OF SERVICE

I, Jean Melious, declare under penalty of perjury and the laws of the State of Washington that, on September 11, 2012, I caused the following documents to be served on the persons listed below in the manner shown: **HIRST ET AL.'S CONCURRENCE IN PART WITH A FINDING OF COMPLIANCE AND OBJECTION TO A FINDING OF COMPLIANCE.**

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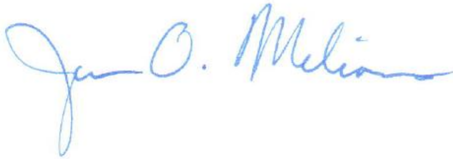
DATED this 11th day of September, 2012.



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