

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

COMPLIANCE ORDER

and

CASE NO. 05-2-0013

**ORDER FOLLOWING REMAND ON
ISSUE OF LAMIRDS**

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1 Board reserves decision on the County's measures to protect rural water resources, beyond
2 the Lake Whatcom measures, to allow the question to be thoroughly briefed and argued in
3 Case No. 12-2-0013.

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5 **I. PROCEDURAL BACKGROUND**

6 THIS Matter came before the Board for hearing on October 1, 2012 following submittal of
7 Whatcom County's Compliance Report¹ filed in response to the Board's January 9, 2012
8 Final Decision and Order (FDO). Petitioner City of Bellingham filed a Notice to Not File
9 Objections to a Finding of Compliance on September 11, 2012. Petitioners Futurewise and
10 Hirst, et al. each filed a Concurrence in Part with a Finding of Compliance and Objection to
11 a Finding of Compliance on that same day. Whatcom County responded to Petitioners'
12 objections on September 21, 2012.²

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15 The Compliance Hearing was held in person at the Whatcom County Courthouse in
16 Bellingham and was attended by Board members Nina Carter and Raymond Paolella, with
17 Ms. Carter presiding.³ Petitioner Futurewise and Hirst, et al. were represented by Jean O.
18 Melious. The City of Bellingham and Governors Point Development Company did not
19 appear at the Compliance Hearing.
20

21 Case No. 05-2-0013 Whatcom County's 2005 Comprehensive Plan (CP) Update

22 On January 25, 2005, Whatcom County adopted its update of its comprehensive plan in
23 Resolution 2005-006 pursuant to RCW 36.70A.130(1) and (4). In the update, the County
24 largely retained the land use designations in its 1997 comprehensive plan and made no
25 revisions to its LAMIRD criteria or mapped LAMIRD boundaries.⁴ Futurewise challenged
26 the County's failure to revise its LAMIRD descriptors and mapping.⁵ Futurewise contended
27 the County was required to revise its LAMIRD designations to comply with the provisions of
28 the GMA that set out specific criteria for LAMIRDs.⁶ Futurewise also objected to the
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32 ¹ Filed August 28, 2012

² Whatcom County's Response to Objections to a Finding of Compliance

³ Board member Margaret Pageler did not attend due to illness but has read the hearing transcript. WAC 242-03-050(2).

1 County's failure to revise rural density allowances in excess of one unit per five acres,
2 pointing out that these higher densities were improperly applied beyond the logical
3 boundaries of valid LAMIRDs.⁷

4
5 In its Final Decision and Order issued September 20, 2005, the Board ruled that Whatcom
6 County's LAMIRD designation criteria did not comply with the GMA and that the rural
7 densities greater than 1du/5ac outside LAMIRD boundaries created low-density sprawl. The
8 Board remanded the matter to the County.
9

10 On appeal, the Court of Appeals affirmed the Board.⁸ The court ruled the RCW 36.70A.130
11 update requires counties to amend their plans and regulations as necessary to comply with
12 GMA amendments enacted since the plan and regulations were adopted. The court ruled
13 the Board correctly remanded the matter for review of LAMIRD descriptors and boundaries.
14 The court also affirmed the Board's ruling on rural densities disallowing rural densities
15 greater than 1du/5ac.
16

17
18 Upon further appeal, the Supreme Court in *Gold Star Resorts, Inc. v. Futurewise* affirmed as
19 to LAMIRDs, but disagreed as to rural densities.⁹ The Court concluded the Board
20 "improperly used a bright line rule of one residence per five acres when deciding the rural
21 density challenge" and remanded for reconsideration on LAMIRDs, but without regard to a
22 bright-line differentiation of urban and rural densities.¹⁰
23
24

25 ⁴ *Futurewise v. Whatcom County*, Case No. 05-2-0013, Final Decision and Order (Sept. 20, 2005), at 1.

26 ⁵ LAMIRDs are "limited areas of more intensive rural development" as defined in RCW 36.70A.070(5)(d).
27 Whatcom's limited areas of more intensive rural development were classified as small town, crossroads
28 commercial, suburban enclave, transportation corridor and resort/recreational.

29 ⁶ Laws of 1997, ch.429, § 3 and 7; RCW 36.70A.070(5)(d). These amendments were added to the GMA two
30 months after Whatcom adopted its 1997 comprehensive plan. *Gold Star*, 140 Wn. App. 378 at 392.

31 ⁷ These included an RR1 zone (1du/1ac), RR2 zone (2du/1ac), RR3 and Eliza Island (EI) zones (3du/1ac),
32 R2a zone (1du/2ac) and Rural Residential Island (RRI) zone (1du/3ac). *Futurewise*, FDO at 5, 21.

⁸ *Gold Star Resorts, Inc., v. Futurewise*, 140 Wn. App. 378, 161 P.3d 748 (2007). The FDO was appealed by
Gold Star Resorts, Inc., owner of properties along I-5 in the Birch-Bay LAMIRD area and an intervenor in the
case before the Board.

⁹ *Gold Star Resorts, Inc., v. Futurewise*, 167 Wn.2d 723 (2009).

¹⁰ 167 Wn.2d at 732.

1 Proceedings on Remand

2 Responding to the Court's *Gold Star* mandate, Whatcom County adopted Ordinance 2011-
3 013, amending its comprehensive plan and development regulations with respect to rural
4 densities and LAMIRDs. As to rural densities, the County restricted RR1, RR2, and RR3
5 zoning to properly designated LAMIRDs (WCC 20.32.253), and rezoned 1,475 of its 2,927
6 acres of R2A land to R5A.¹¹ As to LAMIRDs, new designation criteria were adopted and the
7 number and size of designated LAMIRDs was reduced. Prior to the Compliance Hearing,
8 four petitions for review were filed with the Board challenging various aspects of the
9 amendments adopted by Ordinance 2011-13.¹²

11
12 The Board first heard and decided the challenges to rural densities greater than 1du/5
13 acres. The Board concluded that when the County limited the application of R2A zoning in
14 seven discrete areas totaling 878 acres,¹³ the density in these areas was then consistent
15 with existing local development patterns and did not constitute sprawl. The Board's Order
16 stated: "**Contained in this manner**, the R2A does not pose a threat to the County's rural
17 character, and forms a component of the variety of rural densities found in Whatcom
18
19
20

21 ¹¹ Order Following Remand from Superior Court (Rural Densities), Case No. 05-2-0013 (August 31, 2011), at
22 4,5. "... there were 2,927 acres of R2A land in the county, but with Ord. 2011-013, 1475 acres were rezoned
23 to R5A, 574 acres were in LAMIRDs, leaving only 878 acres of R2A in rural lands outside LAMIRDs ... located
24 in seven discrete areas with parcel sizes (as of 2008) ranging from 0.5 acres to 2.3 acres." Order (Aug. 31,
25 2011) at 5.

26 ¹² PFRs were filed as follows: Governors Point challenged the County's failure to designate its property in the
27 Chuckanut area as a LAMIRD; City of Bellingham challenged (a) development allowances in the Lake
28 Whatcom watershed likely to pose increasing threat to water quality for the region's primary urban water
29 source and (b) LAMIRDs adjacent or near the Bellingham UGA not coordinated with or competing with the
30 City's urban development and services; Hirst, et al. and Futurewise raised a number of objections concerning
31 the LAMIRD provisions and designations, but also asserted non-compliance with the RCW 36.70.070(5)(c)
32 requirement of measures to protect rural character and raised issues concerning extension of urban services
and consistency of population allocations.

¹³ Order Following Remand from the Supreme Court (Rural Densities), GMHB Case No. 05-2-0013
(September 9, 2011) Page 6: "Following the adoption of Ordinance 2011-013, R2A in the rural areas is found
in only seven areas: East Lynden, Hinotes Corner, Lake Samish East, Lake Whatcom, South Bay,
Wickersham, and Wiser Lake East. The average parcel size in these R2A areas ranges from 0.5 acres (South
Bay) to 2.3 acres (Wiser Lake East). The use of R2A zoning in those limited areas where it remains is
consistent with the County's pattern of rural development and its vision of rural areas that includes a variety of
rural densities including "areas where higher densities have been established."

1 County.”¹⁴

2
3 The remaining issues in the four PFRs were consolidated as Case No. 11-2-0010c.¹⁵

4 Briefing and argument were coordinated with Case No. 05-2-0013 Compliance Hearing on
5 LAMIRDs.¹⁶ On January 9, 2012, the Board issued its Final Decision and Order in Case
6 No. 11-2-0010c and Order Following Remand on Issue of LAMIRDs in Case No. 05-2-0013
7 (FDO on Remand). Reviewing objections to specific LAMIRDs, the Board found six
8 LAMIRDS noncompliant.¹⁷ Furthermore, the Board concurred with Petitioners that the
9 County’s plan and regulations for rural lands continued to be noncompliant in three areas:
10

- 11 • the County’s Rural Element lacked “measures required to protect rural character” in
12 several respects (RCW 36.70A.070(5)(c));
- 13 • the zoned capacity of rural lands was inconsistent with comprehensive plan
14 population allocation (RCW 36.70A.070(preamble)); and
- 15 • the LAMIRD development regulations failed to properly limit the size, scale, use and
16 intensity of development in LAMIRDs (RCW 36.70A.070(5)(d)).
17
18

19 On compliance, Whatcom County adopted Ordinance No. 2012-032 amending its plan and
20 development regulations in response to the FDO on Remand. Petitioners Hirst, et al., and
21 Futurewise filed objections to a finding of compliance. Governor’s Point Development
22 Corporation (GPDC), et al. also filed a Petition for Review (PFR) against the County’s
23 adoption of Ordinance 2012-032 claiming the County inappropriately failed to designate a
24 LAMIRD along Chuckanut Drive. The GPDC petition, GMHB Case No. 12-2-0012, was
25 dismissed by stipulation of the parties December 7, 2012.
26
27

28 Hirst and Futurewise also filed a new PFR – Case No. 12-2-0013, challenging various
29

30 ¹⁴ Order, (Rural Densities), at 9 (emphasis added).

31 ¹⁵ *Governor’s Point Development Co., et al. v. Whatcom County*, Case No. 11-2-0010c.

32 ¹⁶ Final Decision and Order in Case No. 11-2-0010c and Order Following Remand on Issue of LAMIRDs in Case No. 05-2-0013 (Jan. 9, 2012), hereafter “FDO on Remand.”

¹⁷FDO on Remand found out of compliance: Birch Bay/Lynden/Valley View at 100; Eliza Island at 101; Fort Bellingham/Marietta and North Bellingham at 104; Smith/Axton Guide Meridian at 111; Van Wyck at 113; Emerald Lake at 115.

1 provisions of Ordinance No. 0012-032 as creating internal Plan inconsistencies or violating
2 other provisions of the GMA. Following a Joint Motion for Extension from the parties in this
3 case, the Board granted the motion and established a new case schedule for Case No. 12-
4 2-0013.

6 II. BURDEN OF PROOF

7 Following a finding of noncompliance, the jurisdiction is given a period of time to adopt
8 legislation to achieve compliance.¹⁸ After the period for compliance has expired, the Board
9 is required to hold a hearing to determine whether the local jurisdiction has achieved
10 compliance.¹⁹ For purposes of Board review of the comprehensive plans and development
11 regulations adopted by local governments in response to a noncompliance finding, the
12 presumption of validity applies and the burden is on the challenger to establish the new
13 adoption is clearly erroneous.²⁰

14
15
16 In order to find Whatcom County's action clearly erroneous, the Board must be "left with the
17 firm and definite conviction that a mistake has been made."²¹ Within the framework of state
18 goals and requirements, the Board must grant deference to local governments in how they
19 plan for growth:
20

21 The legislature intends that the board applies a more deferential standard of
22 review to actions of counties and cities than the preponderance of the
23 evidence standard provided for under existing law. . . Local comprehensive
24 plans and development regulations require counties and cities to balance
25 priorities and options for action in full consideration of local circumstances.
26 The legislature finds that while this chapter requires local planning to take
27 place within a framework of state goals and requirements, the ultimate burden
and responsibility for planning, harmonizing the planning goals of this chapter,
and implementing a county's or city's future rests with that community.²²

28 In sum, the burden is on the Petitioners to overcome the presumption of validity by
29
30

31 ¹⁸ RCW 36.70A.300(3)(b).

¹⁹ RCW 36.70A.330(1) and (2).

32 ²⁰ RCW 36.70A.320(1), (2) and (3).

²¹ *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, (1993).

²² RCW 36.70A.3201, in part.

1 demonstrating the action taken by the County is clearly erroneous in light of the goals and
2 requirements of chapter 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
3 Where not clearly erroneous and thus within the framework of state goals and requirements,
4 the planning choices of the local government must be granted deference.
5

6 III. PRELIMINARY MATTERS

7 Appeals to Court

8 Following issuance of the FDO on Remand, the parties appealed the Board's decision to
9 Whatcom County Superior Court (Nos. 12-2-00336-6, 12-2-00337-4, 12-2-00335-8, 12-2-
10 00350-1, and 12-2-00375-7.) No stay has been issued that affects these compliance
11 proceedings.
12

13 Order of Discussion

14 Recognizing that the Legal Issues in this case present significant overlaps and cannot be
15 resolved in isolation, the Board has grouped its discussion and analysis under three
16 headings:
17

18 Structure and narrative of the Rural Element – RCW 36.70A.070(5)

19 This section addresses Petitioners' challenges to (a) the County's use of cross-reference
20 between its plan and development regulations; and (b) the description of rural character.
21
22

23 Measures to protect Rural Character – RCW 36.70A.070(5)(c).

24 This section addresses the County's rural character and its adopted measures (a) to contain
25 rural development and prevent sprawl, including population allocation and assuring a variety
26 of rural densities, (b) to assure visual compatibility with a rural landscape, and (c) to protect
27 critical areas and water resources, particularly the Chuckanut Wildlife Corridor and Lake
28 Whatcom Watershed.
29

30 LAMIRD policies and regulations – RCW 36.70A.070(5)(d).

31 This section addresses County actions modifying its plan and development regulations in
32

1 response to the Board's FDO on Remand concerning LAMIRDS.

2
3 **IV. DISCUSSION AND ANALYSIS**

4 **A. Issues to be decided on Remand for Case No. 05-2-0013**

5 On remand from the Supreme Court in *Gold Star*, the Board was charged with reviewing
6 Futurewise's challenge to the County's rural designations that allowed densities greater
7 than 1du/acre without applying a bright line rule.²³ In its Order (Rural Densities), the Board
8 found the County's limited application of R2A designation in areas already developed at that
9 density was GMA compliant. This part of the Court's remand is satisfied.
10

11 The second portion of the Supreme Court remand concerned the GMA LAMIRD provisions
12 in RCW 36.70A.070(5)(d). The Court said: "The County must revise its comprehensive plan
13 to conform to the 1997 amendments to the GMA that set out criteria for establishing limited
14 areas of more intensive rural development and rural densities." The County then adopted
15 Ordinance 2011-013 revising the Rural Element and adopting LAMIRD criteria and
16 designations. The Board's January 9, 2012, FDO on Remand addressed the LAMIRD
17 amendments and identified several areas of non-compliance which were remanded to the
18 County. This Order is the Board's ruling on the County's action to comply with the January
19 9, 2012, FDO on Remand.
20
21

22
23 **B. Issues to be decided on compliance for Case No. 11-2-0010c**

24 Petitioners filed other challenges to Ordinance 2011-013 which were coordinated with the
25 *Gold Star* remand proceeding. The FDO on Remand found some aspects of the ordinance
26 in compliance. Specifically, the County was in compliance with respect to: public
27 participation,²⁴ SEPA,²⁵ measures to protect agricultural resources,²⁶ several LAMIRDS,²⁷
28
29

30 ²³ 167 Wn.2d at 740.

31 ²⁴ FDO at 22.

32 ²⁵ FDO at 27.

²⁶ FDO at 46, 50.

²⁷ FDO described LAMIRDS in compliance for Kendall at 106, Point Roberts at 108, Nugent at 109, Sudden Valley at 116, and Cain Lake at 118.

1 the required written record,²⁸ and Governors Point.²⁹

2
3 On the other hand, the Board's FDO on Remand found some of Whatcom County's
4 Ordinance No. 2011-013 out of compliance with the GMA:

- 5 • The Board found the County's Comprehensive Plan and development regulations
6 violated RCW 36.70A.070(5)(c)(i)-(iv) by failing to include adequate measures within
7 the Rural Element of its Comprehensive Plan to protect rural character.
- 8 • The Board found the County violated RCW 36.70A.070(5)(d) in that its development
9 regulations for LAMIRDs failed to provide that the development permitted in
10 LAMIRDs be based on the existing area or existing use as of July 1, 1990. The
11 Board found these provisions to be invalid.
- 12 • Some LAMIRDs were oversized or improperly established adjacent to a UGA and, as
13 development within these LAMIRDs would substantially interfere with the goals of the
14 GMA, they were also found to be invalid.
- 15 • The Board found the County created an inconsistency between the population
16 allocation to the rural areas allowed by the County's development regulations and the
17 allocation elsewhere provided for in the Comprehensive Plan.
- 18 • The Board found the County failed to properly coordinate with the City of Bellingham
19 and other service providers with respect to water service and fire protection services
20 required by the new rural land use provisions.
- 21 • Lastly, the Board found the application of the Rural Residential Density Overlay
22 (RRDO) in the Lake Whatcom Watershed was inconsistent with Plan Goal 2MM and
23 Policy 2MM-1 because it failed to minimize development in the Lake Whatcom area.
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28 Through the compliance proceedings and this order, the Board decides whether Whatcom
29 County's adoption of Ordinance No. 2012-032 on August 7, 2012 responds to the Board's
30 January 9, 2012, FDO on Remand by appropriately addressing various violations of RCW
31

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²⁸ FDO at 131.

²⁹ FDO at 158-169.

1 36.70A.

2
3 C. Issues Stipulated by Parties to be in Compliance by Ordinance 2012-032

4 At the October 1, 2012 Compliance Hearing and in their compliance briefs, the Petitioners
5 acknowledged the County's adoption of Ordinance 2012-032 brought it into compliance on a
6 number of the issues in the FDO on Remand. The Board requested the Parties file
7 stipulated issues upon which all parties could agree the County complied with GMA. On
8 October 8, 2012, Petitioners Futurewise and Hirst, as well as the County, stipulated to
9 issues in compliance with GMA by virtue of the Ordinance 2012-032 process and
10 amendments.³⁰ These issues are as follows:

- 12 • Policy 2A-11 is revised so that common ownership of contiguous lands is removed as
13 a basis for including additional land in Limited Areas of More Intense Rural
14 Development (LAMIRDs), removing an inconsistency with RCW
15 36.70A.070(5)(d)(iv).³¹
- 16 • Policy 2HH-1 is revised so that Type 1 LAMIRD boundaries are based on "areas"
17 rather than on "parcels," removing another inconsistency with RCW
18 36.70A.070(5)(d)(iv).³²
- 19 • Policy 2HH-3A.2.a is revised by removal of the reference to past uses in Policy 2HH-
20 2 for Type III LAMIRD locations, to ensure consistency with RCW
21 36.70A.070(5)(d)(iii).³³
- 22 • Policy 2HH-3.B.1 is revised by replacing "should" with "shall" with respect to the
23
24
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28 ³⁰ Joint Report on Issues for Which Futurewise and Hirst et al. Stipulate Compliance and How They Were
29 Resolved by the County's Actions, October 8, 2012. Also see Whatcom County's Report on Stipulated Issues,
30 October 8, 2012. Petitioners City of Bellingham and Governor's Point Development Company did not
31 participate in the compliance proceedings or file any objections or stipulations.

32 ³¹ Exs. R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan
Amendments p. 6 of 33; see FDO, at 51 – 53.

³² Exs. R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan
Amendments p. 22 of 33; see FDO, at 54 – 56.

³³ Exs. R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan
Amendments p. 23 of 33; see FDO, at 57.

1 isolation of Type III LAMIRDs, as required by RCW 36.70A.070(5)(d)(iii).³⁴

- 2 • Former Policy 2JJ-4, now Policy 2JJ-5, is revised by replacement of “should” with
- 3 “shall” in the requirement for consistency with the size, scale, use, or intensity of
- 4 1990 development in Type I LAMIRDs, in accord with RCW 36.70A.070(5)(d)(v).³⁵
- 5 • Policy 2B-2 is revised by deleting the exemption for “established resorts areas” from
- 6 the requirement that resorts outside urban growth areas should only be permitted as
- 7 master planned resorts, removing an inconsistency with RCW 36.70A.362.³⁶
- 8 • The Eliza Island LAMIRD designation is removed as required for compliance with
- 9 RCW 36.70A.070(5)(d)(i).³⁷
- 10 • The Van Wyck LAMIRD logical outer boundary (LOB) is corrected by removing a
- 11 parcel that was vacant in 1990, re-designation to Rural, and rezone to R5A, to
- 12 conform to the LOB requirements of RCW 36.70A.070(5)(d)(iv).³⁸
- 13 • The Emerald Lake LAMIRD LOB is corrected by removing lots south of the lake that
- 14 were largely undeveloped in 1990, re-designating to Rural and rezoning from RR2 to
- 15 RR5A, to conform to the LOB requirements of RCW 36.70A.070(5)(d)(iv).³⁹
- 16 • The Rural Residential Development Overlay (RRDO) is removed from lands within
- 17 the Lake Whatcom watershed, resolving an inconsistency with CP Goal 2MM and
- 18 Policy 2MM-1.⁴⁰
- 19 • The definition of Rural Business in WCC 20.97.356 is revised to make it consistent
- 20
- 21
- 22
- 23

24 ³⁴ *Exs. R-075 and R-075A*, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan
25 Amendments p. 23 of 33; see FDO, at 60.

26 ³⁵ *Exs. R-075 and R-075A*, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan
27 Amendments p. 25 of 33; see FDO, at 62.

28 ³⁶ *Exs. R-075 and R-075A*, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan
29 Amendments p. 6 of 33; see FDO, at 63.

30 ³⁷ *Exs. R-075 and R-075C*, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
31 Comprehensive Plan Map 8 Amendments Proposed Comprehensive Plan Change Maps for Eliza Island, Cain
32 Lake, Lake Samish, Emerald Lake, and Van Wyck; *Ex. R-075B*, p. 6 (WCC 20.35.250) changing minimum lot
size for Eliza Island Zoning District; see FDO, at 100-01, 112-13, and 114-15 of 177.

³⁸ *Id.*, see FDO, at 112-113.

³⁹ *Id.*, see FDO, at 114-115.

⁴⁰ *Exs. R-075 and R-075C*, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
Comprehensive Plan Map 8 Amendments Proposed Comprehensive Plan Change Maps for Lake Whatcom
and South Bay; see FDO, at 146-55.

1 with the Type III LAMIRD requirements of RCW 36.70A.070(5)(d)(iii) and the
2 Comprehensive Plan description of “Rural Business” LAMIRDS and the criteria of
3 Policy 2HH-3(A)(2).⁴¹

- 4 • In adopting Ordinance 2012-032, the County consulted and coordinated with water
5 and fire service providers as required by the GMA and County policies, curing the
6 noncompliance with RCW 36.70A.100 and violation of Goal 4H, Policy 4H-1, Policy
7 2EE-7 and Policy 2EE-8.⁴² The County’s Senior Planner met with the Whatcom
8 County Fire Chiefs’ Association on May 24, 2012, to indicate the proposed land use
9 changes.⁴³ The County individually notified each of the water districts of the land use
10 changes proposed for its service area, soliciting responses if “the proposed rezoning
11 creates a conflict for the utility.”⁴⁴

12
13
14 Upon review of the record cited by the parties, the Board finds the County in compliance on
15 these issues.

16
17 *D. Rural Element: Structure and Narrative*

18 The Board begins with two structural issues disputed by Petitioners: (a) cross-referencing
19 from the comprehensive plan to other policies or development regulations and (b) Whatcom
20 County’s narrative on rural lands.

21
22 *i. Structure of Cross-Referencing in Comprehensive Plan*

23 *Positions of the Parties*

24
25 First, in response to the Board’s FDO on Remand and the Supreme Court’s *Kittitas*⁴⁵
26 decision, the County’s Comprehensive Plan (CP) now cross-references to and incorporates
27

28 ⁴¹ *Exs. R-075 and R-075B*, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
29 pp. 89-90 of 90; see FDO, at 76-78.

30 ⁴² Compliance Report (August 28, 2012), at 20-21; see FDO, at 139 – 46. Ordinance 2012-032 also amended
31 Policy 4H-1 to remove “and interlocal agreements” as interlocal agreements may not be required with special
32 districts such as water and fire districts.

⁴³ *Ex. R-078*.

⁴⁴ *Ex. R-081*.

⁴⁵ *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d
1193 (2011). This decision requires measures in the plan to protect rural character.

1 other policies and development regulations (DR) to show measures to protect rural
2 character. To understand the full effect of the County's measures to protect rural character,
3 a reader must review several CP policies and DRs together. The County explains this
4 cross-referencing and incorporation structure addresses the need for measures required by
5 RCW 36.70A.070(7)(5)(c): "The rural element shall include measures that apply to rural
6 development and protect the rural character of the area...". It argues that the GMA does
7 not preclude a comprehensive plan from being too specific nor does it preclude cross
8 referencing between policies and regulations.⁴⁶ In response to Petitioners' objections, the
9 County states the "Petitioners failed to cite any actual violation of the GMA resulting from
10 Whatcom's approach."⁴⁷

11
12
13 Petitioner Hirst objects to the cross-referencing and incorporation structure claiming it
14 violates RCW 35.70A.040(3)(d).⁴⁸ Hirst claims this structure "creates planning problems
15 and practical issues regarding GMA challenges and ability to comply with time limits set by
16 state law and the WCC [Whatcom County Code]."⁴⁹

17
18 The regulations are incorporated by reference by code section, with no date
19 specified...If the County decides to revise its development regulations, it can
20 do so with impunity and there will be no challenge to revision based on
21 inconsistency with the Comprehensive Plan -- because the Plan incorporates
22 the provisions by reference, so whatever the WCC provision says is also the
governing Plan provision. This violates the GMA.⁵⁰

23 Along this same line of argument, Petitioner Futurewise claims a violation of RCW
24 36.70A.130(1)(d)⁵¹ and suggests "if the Comprehensive Plan has adopted the 2012 version
25 of the development regulation, an amendment to that development regulation will be
26

27
28 ⁴⁶ Whatcom County's Response to Objections, (County Response to Objections), September 21, 2012 at 13

⁴⁷ *Id.* at 14

29 ⁴⁸ RCW 36.70A.040(3)(d) requires: "if the county has a population of fifty thousand or more, the county and
30 each city located within the county shall adopt a comprehensive plan under this chapter and development
regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994."

31 ⁴⁹ Hirst Objections to Compliance, (Hirst Objections), September 11, 2012 at 11.

⁵⁰ *Id.* at 11.

32 ⁵¹ RCW 36.70A.130(1)(d): "Any amendment of or revision to a comprehensive land use plan shall conform to
this chapter. Any amendment of or revision to development regulations shall be consistent with and implement
the comprehensive plan."

1 inconsistent with the 2012 Comprehensive Plan.”⁵² The County response is that this is
2 speculative and the Petitioners do not cite any GMA violations regarding cross-referencing
3 structure.

4
5 *ii. Narrative of Rural Lands*

6 Positions of the Parties

7 Next, Petitioners raise objections to the narrative introduction to Rural Lands. In Ordinance
8 2012-032, the County amended its Rural Lands narrative describing “Rural Character and
9 Lifestyle” while addressing the need for measures to protect rural character as required by
10 RCW 36.70A.030(15)(a-g). Futurewise finds fault with this introduction because the County
11 did not include “40 acre” parcels in the narrative⁵³ and it did not replicate the entire list of
12 rural characteristics as found in RCW 36.70A.030(15). Futurewise argues the narrative
13 does not reflect present day status of rural lands because 40 acre parcels, as described by
14 the County’s Agricultural Advisory Committee, are omitted from the County’s description of
15 “rural character.” Futurewise claims the County must include 40 acre parcels in its narrative
16 to accurately reflect a “variety of rural densities.” If these parcels are recognized in the
17 narrative, then County policies, development regulations and measures to protect rural
18 character, will similarly need to recognize and protect 40 acre parcels. Furthermore,
19 Futurewise argues the County should amend its development regulations to prohibit
20 subdivision of the 40 acre parcels into 5 or 10 acre parcels. Without these changes, the
21 County risks losing a “variety of rural densities,” becoming a rural area of unvaried 5 acre
22 parcels.
23
24
25

26 The County responds that large parcel rezones are not before the Board, that future land
27 use decisions must be based on “local circumstances,” and that the “rural character” of the
28 area is decided by the County not by the petitioner.⁵⁴ If presented with a rezone request for
29

30
31 ⁵² Futurewise Concurrence with and Objections to Compliance Findings, (Futurewise Objections), September
11, 2012 at 9.

32 ⁵³ The 40-acre lot issue is addressed further in the section on measures to contain and control rural
development.

⁵⁴ County Response to Objections at 20.

1 such larger parcels, the County will decide on a case-by-case basis. Whatcom County
2 argues that the GMA does not require the County “to specifically provide a statement in its
3 CP or DRs that document the rural character. . . It is enough that the CP provides an
4 understanding of what rural character is defined as and a directive to retain that
5 character.”⁵⁵ The County argues it has built a record through its LAMIRD report, Rural
6 Lands Study, and subarea plans to define rural character. Thus, according to the County,
7 Petitioners’ continued arguments about preventing rezones of larger parcels and a lack of a
8 variety of rural densities must be ignored.
9

10
11 Finally, Futurewise argues the County’s narrative should have also listed the seven
12 requirements from RCW 36.70A.030(15)(a-g), the statutory definition of rural character, in
13 the County’s bullets on rural character and lifestyle.⁵⁶ Specifically, the County omitted (c)
14 provision of traditional rural visual landscapes and (g) protection of water resources.
15 Futurewise contends that by only including a few of these items in the bulleted list, which
16 focuses on economic and business opportunities, the County will not address natural
17 vegetation or groundwater protection. The County did not respond.
18

19 Applicable Law
20

21 The GMA requires a county’s Comprehensive Plan to contain a Rural Element.⁵⁷ The Rural
22 Element shall provide for a “variety of rural densities and uses,” accommodating
23 “appropriate rural densities and uses that are not characterized by urban growth and are
24 consistent with rural character.”⁵⁸ The GMA defines “rural character”:

25 **RCW 36.70A.030(15)** "Rural character" refers to the patterns of land use and
26 development established by a county in the rural element of its
27 comprehensive plan:

28 (a) In which open space, the natural landscape, and vegetation predominate
29 over the built environment;
30

31 _____
32 ⁵⁵ *Id.* at 21
⁵⁶ Futurewise Objections at 7, citing R-075, page 9.
⁵⁷ RCW 36.70A.070(5)
⁵⁸ RCW 36.70A.070(5)(b)

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

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

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

7
8 (e) That reduce the inappropriate conversion of undeveloped land into
9 sprawling, low-density development;

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

12 (g) That are consistent with the protection of natural surface water flows and
13 groundwater and surface water recharge and discharge areas.

14
15 Under RCW 36.70A.070(5)(c), the Rural Element of a County's plan must contain measures
16 to control rural development⁵⁹ and protect rural character:

17 Measures governing rural development. The rural element shall include
18 measures that apply to rural development and protect the rural character of
19 the area, as established by the county, by:

20 (i) Containing or otherwise controlling rural development;

21 (ii) Assuring visual compatibility of rural development with the surrounding
22 rural area;

23 (iii) Reducing the inappropriate conversion of undeveloped land into
24 sprawling, low-density development in the rural area;

25 (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface
26 water and groundwater resources; and

27 (v) Protecting against conflicts with the use of agricultural, forest, and mineral
28 resource lands designated under RCW 36.70A.170.

29
30 In *Kittitas County v. Eastern Washington Growth Management Hearings Board*, the

31
32 ⁵⁹ Rural development is defined in RCW 36.70A.030(16): "Rural development" refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.

1 Supreme Court held the “GMA requires that counties' comprehensive plans include
2 provisions that protect rural areas.”⁶⁰ The Court ruled that the presence of protective
3 measures in the zoning regulations does not satisfy the GMA requirements because:

4 [T]he statutory language of the GMA is clear that protective measures
5 **shall** be included in the Plan. *RCW 36.70A.070(5)(c)*. The GMA requires
6 deference to local government determinations regarding what measures will
7 best protect rural character but is clear that plans must actually include such
8 measures. The record before the Board establishes that the portions of the
9 Plan relating to the protection of rural areas almost exclusively consist of
10 aspirational principles, not imperatives. As such, the Plan violates the GMA
by failing to include required measures that protect rural areas.⁶¹

11 Two other GMA provisions – RCW 36.70A.040(3)(d) and RCW 36.70A.130(1)(d) point out
12 that development regulations must be “consistent with and implement the comprehensive
13 plan.”

14
15 The Legislature codified its intent with respect to planning for rural lands:

16
17 **RCW 36.70A.011 Findings — Rural lands.**

18 The legislature finds that this chapter is intended to recognize the
19 importance of rural lands and rural character to Washington's economy, its
20 people, and its environment, while respecting regional differences. Rural
21 lands and rural-based economies enhance the economic desirability of the
22 state, help to preserve traditional economic activities, and contribute to the
state's overall quality of life.

23 The legislature finds that to retain and enhance the job base in rural areas,
24 rural counties must have flexibility to create opportunities for business
25 development. Further, the legislature finds that rural counties must have the
26 flexibility to retain existing businesses and allow them to expand. The
27 legislature recognizes that not all business developments in rural counties
28 require an urban level of services; and that many businesses in rural areas
fit within the definition of rural character identified by the local planning unit.

29 Finally, the legislature finds that in defining its rural element under RCW
30 36.70A.070(5), a county should foster land use patterns and develop a local
31

32 ⁶⁰ *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn. 2d 144, at 162 (2011).

⁶¹ *Kittitas County*, 172 Wn.2d, at 164 (footnote omitted). (emphasis in original)

1 vision of rural character that will: Help preserve rural-based economies and
2 traditional rural lifestyles; encourage the economic prosperity of rural
3 residents; foster opportunities for small-scale, rural-based employment and
4 self-employment; permit the operation of rural-based agricultural,
5 commercial, recreational, and tourist businesses that are consistent with
6 existing and planned land use patterns; be compatible with the use of the
7 land by wildlife and for fish and wildlife habitat; foster the private
8 stewardship of the land and preservation of open space; and enhance the
9 rural sense of community and quality of life.

8 Board Discussion

9
10 Petitioners did not carry their burden of proof showing that cross-referencing and the rural
11 lands narrative violated the GMA. Neither the GMA nor the *Kittitas* Court specify how a
12 county should structure or describe “measures to protect rural character.” With the
13 structural cross-referencing, the Board finds the County’s Plan does in fact contain
14 measures the County employs to meet the requirements of RCW 36.70A.070(5)(c)(i-iv).⁶²
15 The regulations guide a reader through specific requirements which are detailed measures
16 regarding rural character. While the structure is cumbersome, in light of the unique posture
17 of this case the Board does not find the County’s approach clearly erroneous. Whether
18 particular measures meet GMA requirements is discussed further below. As to whether this
19 *structure* creates GMA inconsistencies, the Petitioners did not carry the burden of proof to
20 show a violation of GMA. Rather, the Board finds that when the County updates or amends
21 either their plan or regulations, they must cross-reference between both and provide notice
22 pursuant to RCW 36.70A.035 making clear to the public that both the plan and regulation
23 are under amendment because of the cross-reference.
24
25

26 As for the rural lands narrative, the GMA does not require specific parcel sizes to be
27 included in a rural lands description. The comprehensive plan consists of “a map or maps
28
29

30 ⁶² The Board read the comprehensive plan with its new structure to understand how the CP defined measurers
31 to protect rural character. Using this structure was cumbersome and time-consuming. The Board wonders
32 how the general public would navigate their way through the new structure. The only way to make it easier for
the public would be a web-version of the plan with web links between the comprehensive plan and cross-
referenced CP policies and WCC development regulations. Unfortunately, such an electronic version is not
available, but perhaps the County will make that available to the public

1 and **descriptive text** covering objectives, principles and standards used to develop the
2 comprehensive plan.” RCW 36.70A.070(preamble). It is the County’s choice whether to
3 include 40 acre parcels in its rural lands narrative. However, Futurewise’s objection will be
4 discussed further in the section on measures to protect rural character.
5

6 Finally, regarding the list of bulleted items on page nine of the County’s plan, which
7 Futurewise complains lacks reference to two of the elements of rural character as defined in
8 RCW 36.70A.030(15), the Board notes that the County’s Rural Element narrative sets forth
9 the full statutory definition and elements of “rural character” on page seven. The bulleted
10 list on page nine focuses more on the economic aspects of rural character, referencing “the
11 findings of the Legislature” – RCW 36.70A.011 – which recognize the need for economic
12 opportunity in rural areas.⁶³ The page nine bulleted list omits visual landscapes and
13 protection of water resources, but the preceding narrative describes a rural character with
14 “greater predominance of vegetation, wildlife habitat and open space,”⁶⁴ “where residents
15 enjoy views of a green landscape dotted by homes and barns, and have an appreciation of
16 clean water and air,” and where rural enterprises “do not detract from the overall sense of
17 openness and predominance of the landscape.”⁶⁵ Reading the rural lands introductory
18 element as a whole, the Board finds that Petitioners’ objection does not meet their burden of
19 demonstrating non-compliance with the GMA.
20
21
22

23 **Conclusion:** In light of the unique posture of this case, the County’s choice to cross-
24 reference development regulations as “measures” in its comprehensive plan is not clearly
25 erroneous. The Petitioners have not met their burden of demonstrating the County’s cross-
26 referencing structure violates RCW 36.70A.040(3)(d) or RCW 36.70A.130(1)(d). However,
27 the Board notes that the County must cross-reference both CP and DRs if it makes changes
28 to either. Similarly, Petitioners have not met their burden of showing the County’s Rural
29 Element narrative violates RCW 36.70A.030(15).
30
31

32 ⁶³ RCW 36.70A.011 Findings — Rural lands. Set forth in full above under Applicable Law.

⁶⁴ Ex. R-075, p. 8

⁶⁵ Ex. R-075, p. 9.

1 E. Measures Relating to Rural Development and Protecting Rural Character

2 In its FDO on Remand, the Board found the County lacked four of the five protective
3 measures required in the GMA. The statute requires the following:

4 **RCW 36.70A.070(5)(c)** Measures governing rural development. The rural
5 element shall include measures that apply to rural development and protect
6 the rural character of the area, as established by the county, by:

- 7 (i) Containing or otherwise controlling rural development;
8 (ii) Assuring visual compatibility of rural development with the surrounding
9 rural area;
10 (iii) Reducing the inappropriate conversion of undeveloped land into
11 sprawling, low-density development in the rural area;
12 (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface
13 water and groundwater resources; and
14 (v) Protecting against conflicts with the use of agricultural, forest, and mineral
15 resource lands designated under RCW 36.70A.170.

14 The FDO on Remand found the County complied with measure (v): protecting against
15 conflicts with agricultural resources, but found four measures lacking as required in RCW
16 36.70A.070(5)(c)(i-iv). Below are the County's compliance actions for the four remaining
17 measures, Petitioners objections, County responses and the Board's findings and
18 conclusions.
19

20
21 *i. Contain Development and Reduce Sprawl - Measures for RCW*
22 *36.70A.070(5)(c)(i) and (5)(c)(iii)*

23 **RCW 36.70A.070(5)(c)** Measures governing rural development. The rural
24 element shall include measures that apply to rural development and protect
25 the rural character of the area, as established by the county, by:

- 26 (i) Containing or otherwise controlling rural development. . .
27 [and]
28 (iii) Reducing the inappropriate conversion of undeveloped land into
29 sprawling, low-density development in the rural area. . . .

29 The FDO on Remand pointed out the County's Plan lacked measures to contain and control
30 rural development and prevent sprawl in that (a) the Plan allowed development capacity in
31 the rural area far in excess of population allocation; (b) the Plan failed to contain denser
32

1 development or restrict the spread of R2A designations (including the RRDO Overlay), and
2 (c) the County's LAMIRD provisions were noncompliant. The FDO upheld the policies as
3 "assuring a variety of rural densities" as required by RCW 36.70A.070(5)(b) on the condition
4 that the forthcoming measures to contain and control rural development would address the
5 distribution of rural densities.⁶⁶
6

7 To address the GMA requirement for the two measures shown above the County amended
8 its rural land goals and policies as shown in County Exhibit R-075. Beginning with Goal 2-
9 DD "Retain the character and lifestyle of rural Whatcom County,"⁶⁷ the County combined
10 measures (i) and (iii) into Policy 2-DD-1 and -2 and then cross-referenced other goals and
11 county codes. The Board reviews (1) the rural population allocation, (2) variety of rural
12 densities, and (3) rural clustering provisions of Goal 2-DD in this section, but will address
13 LAMIRDs and Rural Neighborhoods in a subsequent section of this order.
14
15

16 a. *Population Allocation - Policy 2DD-1*⁶⁸

17 *Positions of the Parties*

18 As a measure to contain and control rural development, the County adopted Policy 2DD-1
19 requiring an annual review of population growth in rural areas and, if there are
20 discrepancies between projected and actual population growth, the County is required to
21 adjust their plan and development regulations. Petitioners argue that Policy 2DD-1 does not
22 meet RCW 36.70A.070 or RCW 36.70A.130 to resolve plan inconsistencies. Petitioners
23 restate the FDO findings that the County's comprehensive plan amendments and
24 development regulations:
25

26 . . . **permit a population in the County rural areas far in excess of the**
27 **allocation elsewhere provided for in the County Comprehensive Plan,**
28 **thereby creating Plan inconsistency in violation of RCW 36.70A.070**
29 **(preamble) and RCW 36.70A.130(1).**⁶⁹ (emphasis added)
30

31 ⁶⁶ FDO at 73: "[T]hese provisions, *when brought into compliance by the adoption of appropriate 'measures' as*
32 *indicated above and in the context of sub-area plans, assure a variety of rural densities.*" (emphasis added)

⁶⁷ *Ex. R-075* at 9

⁶⁸ See *Ex. R-075* at 9-10.

⁶⁹ FDO at 121.

1 Petitioners complain that rather than planning ahead to reconcile inconsistencies between
2 the population increases and land available, the County will instead retroactively review
3 population and land discrepancies beginning in 2016. By example, Petitioner Hirst argues
4 the 2010 Census already shows a population increase of 6,000 new residents for which the
5 County has not planned. Next, Hirst used existing public information to project future
6 population increases and compared those increases with available non-urban lots.⁷⁰ Hirst
7 calculates existing and potential development outside UGAs can accommodate a population
8 up to 116,968, where only 67,692 rural residents are projected in Table 4 of the Plan.⁷¹
9 Accommodating this growth in the rural area not only violates GMA anti-sprawl principles
10 but increases costs to the County, Hirst argues. Hirst references Whatcom County's
11 Transportation Plan which states increasing population in rural areas will be more
12 expensive, bringing more traffic and higher rural home prices.⁷² With this knowledge,
13 Petitioner Hirst argues the County must not wait until 2016 to update its Comprehensive
14 Plan to address discrepancies in rural land densities, increases in population and the capital
15 costs which come with unplanned growth. The County's CP and DRs are inconsistent if the
16 CP projects one level of population growth, whereas the DRs and zoning allow much higher
17 population. This inconsistency violates RCW 36.70A.070 and .130, according to Hirst.
18
19
20

21 The County acknowledges that the population capacity of developable rural parcels
22 exceeds the population allocated to the non-UGA areas in the CP.⁷³ While disputing Hirst's
23 calculation of the discrepancy, the County responds that their annual review will address
24 any inconsistencies between actual and projected population and zoned capacity, whether
25 through changing development regulations to limit non-UGA growth or changing growth
26 projections.
27
28
29

30 ⁷⁰ Hirst Ex. C-683, Letter to County Executive and County Council, calculating non-UGA 2010 census
31 population of 65,041 and non-UGA land capacity for an additional 51,927, based on existing, pending
32 application and potential lots.

⁷¹ Hirst Objections at 60-69.

⁷² Hirst Ex. C-683 at 7 quoting Whatcom's Transportation Plan.

⁷³ County Response to Objections, at 64, Ex. R-075A, p. 2-3, Table 4.

1 Board Discussion

2 RCW 36.70A.070 (preamble) provides: “The comprehensive plan shall be an internally
3 consistent document and all elements shall be consistent with the future land use map.” The
4 first mandatory element of the Plan, the Land Use Element, “shall include population
5 densities, building intensities, and estimates of future population growth.” RCW
6 36.70A.070(1). Logically, thus, the population densities and building intensities must be
7 consistent with the estimates of future growth.
8

9
10 The GMA provides each county shall designate Urban Growth Areas (UGAs) “within which
11 urban growth shall be encouraged and outside of which growth can occur only if it is not
12 urban in nature.”⁷⁴ Each county shall include designations of UGAs in its comprehensive
13 plan (CP).⁷⁵ The GMA contemplates that cities and counties will work together and shall
14 attempt to reach agreement on the correct **size** for a UGA.⁷⁶ A county’s UGA designation
15 “cannot exceed the amount of land necessary to accommodate the urban growth projected
16 by OFM, plus a reasonable land market supply factor.”⁷⁷ Thus, the GMA is explicit about
17 capacity for **urban** growth. Based on OFM population projections, the County’s
18 Comprehensive Plan must ensure that Urban Growth Areas and cities “shall include areas
19 and densities sufficient to permit the **urban growth** that is projected to occur in the county
20 or city for the succeeding twenty-year period.”⁷⁸
21
22

23 The GMA is not explicit with respect to **rural** population, and the parties argue the GMA
24

25 _____
26 ⁷⁴ RCW 36.70A.110(1).

27 ⁷⁵ RCW 36.70A.110(6).

28 ⁷⁶ RCW 36.70A.110(2).

29 ⁷⁷ *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 352, 190 P.3d 38 (2008).

30 ⁷⁸ RCW 36.70A.110(2) Based upon the growth management population projection made for the county by the
31 office of financial management, the county and each city within the county shall include areas and densities
32 sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-
year period.

RCW 36.70A.115: “Counties and cities that are required or choose to plan under RCW 36.70A.040 shall
ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development
regulations provide sufficient capacity of land suitable for development within their jurisdictions to
accommodate their allocated housing and employment growth... consistent with the twenty-year population
forecast from the office of financial management.”

1 says nothing about rural allocations. This creates a dilemma and a real likelihood of rural
2 areas being over-zoned and creating sprawl.⁷⁹

3
4 While the Board appreciates the detailed population analysis by Petitioner Hirst, the
5 complaint hinges on whether the County's plan allows development capacity in *rural* areas
6 inconsistent with the Plan's adopted population projections. Reviewing the governing
7 statutes, the Board finds that RCW 36.70A.215(1) requires a population/land capacity
8 evaluation for counties and cities to establish "urban densities within urban growth areas"⁸⁰
9 and (2)(a) requires an "annual collection of data on urban and rural land uses...to determine
10 the quantity and type of land suitable for development." However, RCW 36.70A.215(7) limits
11 this evaluation to the "buildable lands" counties with the following:
12

13 The provisions of this section shall apply to counties, and the cities within
14 those counties, that were greater than one hundred fifty thousand in
15 population in 1995 as determined by office of financial management
16 population estimates and that are located west of the crest of the Cascade
17 mountain range. ***Any other county planning under RCW 36.70A.040 may***
18 ***carry out the review, evaluation, and amendment programs and***
19 ***procedures as provided in this section.*** (emphasis added)

19 Whatcom County was never designated by OFM as a buildable lands county.⁸¹ Given this
20

21 ⁷⁹ Brent D. Lloyd, *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in*
22 *Comprehensive Planning Under the Washington State Growth Management Act*, 36 Gonz. L.Rev. 73, at 141-
23 142

23 ⁸⁰RCW 36.70A.215 (1): "...The purpose of the review and evaluation program shall be to: (a) Determine
24 whether a county and its cities are achieving ***urban densities within urban growth areas*** by comparing
25 growth and development assumptions, targets, and objectives contained in the countywide planning policies
26 and the county and city comprehensive plans with actual growth and development that has occurred in the
27 county and its cities...."(emphasis added)

27 RCW 36.70A.215 (2): "The review and evaluation program shall: (a) Encompass land uses and activities both
28 within and outside of urban growth areas and provide for annual collection of data on urban and rural land
29 uses, development, critical areas, and capital facilities to the extent necessary to determine the quantity and
30 type of land suitable for development, both for residential and employment-based activities."

31 ⁸¹ The Commerce guidelines at WAC 365-196-315(2)(a) and (b) provide: "The following counties ... must
32 establish and maintain a buildable lands program as required by RCW 36.70A.215: Clark, King, Kitsap, Pierce,
33 Snohomish, and Thurston. If another county or city establishes a program containing features of the buildable
34 lands program, they are not obligated to meet the requirements of RCW 36.70A.215."

35 Department of Commerce Website: [http://www.commerce.wa.gov/Services/localgovernment/
36 GrowthManagement/Growth-Management-Planning-Topics/Pages/Buildable-Lands.aspx](http://www.commerce.wa.gov/Services/localgovernment/GrowthManagement/Growth-Management-Planning-Topics/Pages/Buildable-Lands.aspx): "The Buildable
37 Lands Program was adopted as an amendment to the GMA in 1997, (RCW 36.70A.215). It is a review and
38 evaluation program aimed at determining if ***six Western Washington counties - Snohomish, King, Kitsap,***

1 statutory parameter, for counties planning ahead to accommodate increased population, the
2 Board finds that because Whatcom County is not designated as a “buildable lands”
3 community, Whatcom County is not required to undertake the analysis required by .215.
4 However, Whatcom is still subject to the consistency requirement of RCW 36.70A.070
5 (preamble). There is inconsistency between the development capacity allowed in the
6 County’s rural areas and the population projections in the comprehensive plan. This was the
7 basis for noncompliance identified in the FDO on Remand.
8

9
10 With the adoption of Ordinance 2012-032, the Board finds, first, the County has taken
11 numerous actions to reduce over-capacity in its rural lands; second, the County has
12 amended its Plan provisions to acknowledge the over-capacity; and third, the County has
13 adopted an annual review process for monitoring and corrective action.
14

15 Since the *Gold Star* remand, Whatcom County has reduced its designated residential
16 capacity in rural areas. By adoption of Ordinance 2011-013 and 2012-032 the County:

- 17 • Downzoned rural lands to 1 unit per 5 acres or greater, with limited exceptions for R-
18 2A.
- 19 • Adopted Policy 2MM-1 restricting Rural Neighborhoods with R-2A designation to
20 areas containing smaller-lot development in 2011 so as to prohibit their expansion.
- 21 • Restricted RRDO to Rural Neighborhoods which shall not be expanded. 2MM-2.
- 22 • Reduced the number of LAMIRDS in Ordinance 2011-013.
- 23 • Adopted Policy 2DD-2.A.1 to prohibit expansion of LAMIRDS.
- 24 • Eliminated LAMIRDS for Eliza Island, Fort Bellingham and North Bellingham in
25 Ordinance No 2012-032.
- 26 • Decreased the size of Type I LAMIRDS to Logical Outer Boundaries.
- 27 • Downsized boundaries for Emerald Lake, Van Wyck, Smith/Axton in Ordinance 2012-
28 032.
- 29 • Downzoned areas overlapping the Chuckanut Wildlife Corridor in Cain Lake,
30 Chuckanut, Lake Samish, South Bay, and Wickersham (Rezone to R-5A and adjust
31 LAMIRD boundaries).
- 32 • Downzoned 504 acres in the Lake Whatcom Watershed to protect water quality.

Pierce, Thurston and Clark - and their cities have an adequate amount of residential, commercial, and industrial land to meet the growth needs adopted in their GMA comprehensive plans.” (emphasis added)

- Adopted Policy 2DD-A.3 to prohibit short subdivisions outside UGAs and LAMIRDs

Even with these actions, as Hirst persuasively documents, the County still can accommodate virtually all of its projected population increase in its rural lands, contrary to the GMA goal of promoting compact urban development and reducing sprawl.⁸² The County's revised Plan introductory section on Population Projections acknowledges the apparent discrepancy.⁸³ The Plan states:

Outside the UGAs there is [sic] a large number of undeveloped tax parcels. While it is not clear exactly how many of these tax parcels are legally buildable lots, the total number of potential new dwelling units could theoretically accommodate population growth in excess of the rural population projection. . . . Through the monitoring process described in Policies 2S-5 and 2DD-1 of this plan, the County will evaluate development activity in comparison with these urban and rural growth projections and take action as necessary to address discrepancies if any are identified.⁸⁴

Thus, the County has adopted an annual review process, allowed by the GMA as a discretionary action, to assess population growth and potential rural land discrepancies. The County has voluntarily undertaken this monitoring and response process as provided in RCW 36.70A.215(7): "Any other county planning under RCW 36.70A.040 may carry out the review, evaluation, and amendment programs and procedures as provided in this section."

Policy 2DD-1 of the rural element provides.⁸⁵

By February 1 of each year the department will publish a report that monitors residential development outside the urban growth areas during the previous year and compares that data with the adopted population growth projections for those areas. If it is apparent that growth occurring outside the urban growth areas is inconsistent with adopted projections, the County *shall take action* to address the discrepancy. 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.

⁸² RCW 36.70A.020(1) and (2).

⁸³ *Ex. R-075*, p. 2, text for Table 4: Whatcom County Population Projections and Distribution.

⁸⁴ *Id.*

⁸⁵ *Ex. R-075*, p. 10

1 The Board finds the County, by adoption of Ordinance 2012-032, has taken important steps
2 toward reducing the overcapacity of its rural lands in order to contain and control rural
3 development. The County's amended Plan acknowledges the overcapacity and adopts a
4 mechanism to reconcile inconsistencies between its CP and DR through an annual review
5 process. Given the posture of this case, the Board does not find Policy 2DD-1 to be clearly
6 erroneous.⁸⁶
7

8 **Conclusion:** The Board concludes the County's Policy 2DD-1 on population allocation
9 does not create an internal inconsistency which violates RCW 36.70A.070(preamble) or
10 RCW 36.70A.130. The annual review process undertaken in Policy 2DD-1 is a "measure to
11 contain and control rural development" that complies with RCW 36.70A.070(5)(c)(i).
12

13
14 *b. Variety of Rural Densities*

15 Among other required provisions in the Rural Element of a Comprehensive Plan, the GMA
16 states that "[t]he rural element shall provide for a variety of rural densities."⁸⁷ The Supreme
17 Court has held that "the Plan itself must include something to assure the provision of a
18 variety of rural densities . . . A comprehensive plan that is silent on the provision of a variety
19 of rural densities (and other protective measures for rural areas) effectively allows rezones
20 that circumvent the GMA."⁸⁸
21

22
23 Positions of the Parties

24 Futurewise asserts: "In the Board's order finding that the rural element lacked adequate
25 measures to protect rural character, the Board upheld the county's policies as providing for
26 a variety of rural densities, in part because of the belief that the measures to protect rural
27

28 ⁸⁶ The Board notes, however, that the 2010 Census population figures show an unplanned increase of 6,000
29 residents for Whatcom County and observes that if the County waits until 2016 to review its UGA updates (as
30 stated on page 2 of 33 in County *Ex. R-075*), then the County may miss opportunities to effectively plan for
31 inevitable increased rural population and the ensuing capital costs. Whereas, if the County began annual
32 population/land use reviews in 2013, it may benefit by knowing about increased demands on its capital
facilities and services.

⁸⁷ RCW 36.70A.070(5)(b).

⁸⁸ *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn. 2d 144, at 169
(2011).

1 character would address the distribution of rural densities.”⁸⁹ Futurewise claims the County
2 still lacks measures indicating which rural areas should be designated Residential Rural-5 or
3 Rural 5A or Residential Rural-10 or Rural 105A, thus defeating the goal of creating and
4 maintain a variety of rural densities. Specifically, Petitioners state there are large areas of
5 rural Whatcom County having lots 40 acres or larger, as discussed above in the “rural
6 narrative” section. ⁹⁰ Petitioners claim there are no measures preventing the subdivision of
7 these large parcels into 5 acre parcels. Petitioner Futurewise is concerned that eventually
8 the County’s rural lands could all become 5 acre parcels without any variety of densities.⁹¹
9

10
11 The County response is that the Board already found that the County complied with
12 providing a variety of rural densities and the FDO on Remand stated the Board wanted to
13 review the implementing “measures” to assess if the “variety of uses” were protected. With
14 its compliance action, the County has limited Rural Residential Development Overlays
15 (higher density) and R2A zoning to areas already now in existence.⁹² Additionally, the
16 County asserts it bases its re-zoning decisions on “local circumstances” and on the “rural
17 character as established by the County” – both in accordance with the GMA.
18

19 Board Discussion
20

21 On remand from the Supreme Court in *Gold Star*, the Board was required to determine,
22 without applying a bright-line rule, whether Whatcom County’s rural designations **at**
23 **densities higher than 1du/5a** complied with GMA provisions for appropriate rural densities
24 protective of rural character. In the Order (Rural Densities) the Board concluded that limited
25 application of an R2A designation did not violate the GMA. This only addressed the
26 question of whether any rural densities **greater** than 1du/5a would be allowed.
27

28
29 ⁸⁹ Citing FDO at 73: “The Board agrees with the County that these provisions, when brought into compliance
30 by the adoption of appropriate ‘measures,’ as indicated above and in the context of sub-area plans, assure a
31 variety of rural densities.”

31 ⁹⁰ *Ex. C-726*, Whatcom County Agricultural Advisory Committee, *Whatcom County Rural Land Study: A*
32 *Collaborative Report Identifying Rural Areas of Agricultural Significance* (February 2007) all of *Ex. C*, and p.
17A.

⁹¹ Futurewise Concurrence and Objections at 10.

⁹² County Response to Objections at 19.

1 When Whatcom County revised its Rural Element with adoption of Ordinance 2011-013,
2 Futurewise objected that the County had failed to provide a variety of rural densities
3 because the Plan made no distinction between R5 and R10, thus not assuring long-term
4 variety of densities **less than** 1du/5a. The Board's FDO on Remand ruled that the County's
5 provision of three designations – R2A, R5 or R5A, and R10 or R10A – “*when brought into*
6 *compliance by the appropriate ‘measures’ . . . assure a variety of rural densities.*”⁹³
7

8 Ordinance 2012-032 still contains no criteria differentiating R5 and R10 that would assure
9 long-term continuance of any rural lots larger than R5. None of the measures in Policy 2DD-
10 2 indicate which areas should be designated Residential Rural-5 or Rural-5A or Residential
11 Rural-10 or Rural-10A; in fact, WCC 20.32.253 states that “the RR-5A and RR-10A Districts
12 are allowed throughout the rural areas.”⁹⁴ There are no measures to prevent the subdivision
13 of **all** larger lots into five acre lots. So the potential to develop five acre lots throughout the
14 rural area is not contained as RCW 36.70A.070(5)(c)(i) requires, and the “variety of rural
15 densities” described in RCW 36.70A.070(5)(b) is effectively limited.
16
17

18 Futurewise points out only 21.8 percent of rural Whatcom County is currently zoned R10A.⁹⁵
19 Sixty-nine percent of rural Whatcom County is zoned for five acre lots and almost nine
20 percent of the rural area allows lots 2.5 acres in size or smaller.⁹⁶ The County did not
21 dispute these calculations.
22

23
24 The Supreme Court's *Kittitas County* comment is instructive:

25 The cap on higher density rural designations still allows the majority of the
26 County's rural area to be zoned at the highest densities [that is: three- and
27 five-acre densities] ... Carried out, over 66 percent of the rural area could be
28 zoned at the highest rural densities. Additionally, Petitioners' reference to the
29 County's rezoning criteria as a protective measure, in place of specific
30 protection in the Plan, is somewhat disingenuous. While there are other

31 ⁹³ FDO at 73. (emphasis added)

32 ⁹⁴ *Ex. R-075* pp 10-15. See for example **Residential Rural District 20.32.253 Maximum density and minimum lot size.** . . . *The RR-5A and RR-10A Districts are allowed throughout the rural areas*”

⁹⁵ *Ex. R-076*, PDS Presentation to County Council Rural Element Update July 24, 2012 p. 5.

⁹⁶ *Id.*

1 criteria with varying levels of specificity, the first criterion for a rezone is
2 compatibility with the Plan. Without protections for rural areas in the Plan, this
3 is a meaningless criterion.⁹⁷

4 The Board finds that compared to the 66% “highest density” designation decreed by the
5 Court in the Kittitas rural area, more than 78% of Whatcom’s rural area is already zoned at
6 densities of 1du/5a or denser. Further, the Board has found no criteria in the Plan providing
7 for the continuance of **any** rural areas less densely developed than 1du/5ac.⁹⁸ Even the
8 Agricultural Protection Overlay provisions are based on a clustering density of 1du/5ac.⁹⁹
9 Thus the Whatcom Plan lacks measures to protect rural character by assuring a variety of
10 rural densities.
11

12 The *Kittitas* Court concluded:

14 There is substantial evidence in the record that was before the Board that
15 nothing in the Plan directly and prospectively assures a variety of rural
16 densities [other than three and five acre densities]. We find that the County
17 must include something in its Plan that provides for a variety of rural
densities.¹⁰⁰

18 The Board is left with a firm and definite conviction that a mistake has been made.
19

20 **Conclusion:** The rural element of Whatcom’s Plan as amended by Ordinance 2012-032,
21 fails to provide a variety of rural densities in that it lacks measures to protect rural character
22 or contain rural development at any lesser densities than 1du/5ac. Thus Ordinance 2012-
23 032 fails to comply with RCW 36.70A.070(5)(b) and RCW 36.70A.070(5)(c)(i) and (ii).
24 Ordinance 2012-32, as it relates to providing a variety of rural densities, is clearly erroneous
25 in view of the entire record before the Board and in light of the goals and requirements of
26 the GMA.
27

28
29 ⁹⁷ *Kittitas County*, 172 Wn.2d at 164 n.5

30 ⁹⁸ Compare *Forster Woods Homeowners Assoc. v. King County*, CPSGMHB Case No. 01-3-0008c, Final
Decision and Order (Nov. 6. 2001), at 27, using predominant lot size over 10 acres as criteria for R10 zoning.

31 ⁹⁹ WCC Chapter 20.38 provides an Agricultural Protection Overlay applicable to some rural parcels 20 acres or
32 greater. These parcels may be subdivided under clustering provisions that allow 1du/5ac density but retain
reserved lot sizes of 15 acres. As indicated in the section that follows, the reserve acreage is subject to future
development.

¹⁰⁰ *Kittitas County*, 172 Wn. 2d at 170.

1 c. *Lot Clustering*

2
3 Positions of the Parties

4 In Ordinance 2012-032, Whatcom County adopted measures to contain and control rural
5 development and reduce inappropriate conversion of undeveloped land in their Rural
6 Residential District, Rural Residential Island District, Rural District and Water Resource
7 Overlay Districts¹⁰¹ by encouraging lot clustering and prohibiting short-plat subdivisions
8 outside urban growth areas. In an overarching argument opposing these Policies,
9 Petitioners disagree that the County meets GMA requirements simply by limiting lot
10 coverage, encourage clustering and prohibiting short plat subdivisions. More specifically,
11 Petitioner Futurewise argues the County's amendments to three of the four districts (the
12 exception is the Water Resources Overlay) do not *require* lot clustering; rather, the County's
13 design standards are optional.¹⁰²

14
15
16 The County responds that its Agricultural Protective Overlay covers 28,000 acres of Rural
17 land and clustering is a mandatory requirement for those lands. In addition to the voluntary
18 clustering under the provisions in the County's Ordinance 2012-032 to assure visual
19 compatibility, the County argues this will have "a real impact on preserving open space
20 tracts consistent with Whatcom County's description of their Rural area."¹⁰³

21
22
23 Board Discussion

24 **RCW 36.70A.070(5)(b)** provides:

25 To achieve a variety of rural densities and uses, counties may provide for
26 clustering, density transfer, design guidelines and other innovative techniques
27 that will accommodate appropriate rural densities and uses that are not
28 characterized by urban growth and that are consistent with rural character.

29 **RCW 36.70A.090** provides that:

30 "[a] comprehensive plan should provide for innovative land use management
31

32 ¹⁰¹ *Ex. R-075A* at 10-11, Policy 2 DD-2 A. 1, 2 and 3

¹⁰² *Id.* at 14.

¹⁰³ County Response to Objections at 24.

1 techniques, including, but not limited to, density bonuses, cluster housing,
2 planned unit development, and the transfer of development rights.”

3 **RCW 36.70A.320(3)** provides that in determining whether there is compliance with the
4 GMA, “the board shall consider the criteria adopted by the department under RCW
5 36.70A.190(4).” RCW 36.70A.190(4)(b) requires the Department of Commerce to adopt by
6 rule “procedural criteria” to assist counties in adopting comprehensive plans and
7 development regulations that meet the goals and requirements of the GMA.
8

9 **WAC 365-196-425(5)(b)** sets forth the Department of Commerce procedural criteria
10 applicable to rural cluster development as follows:
11

12 Rural clusters. One common form of innovative zoning technique is the rural
13 cluster. A rural cluster can create smaller individual lots than would normally
14 be allowed in exchange for open space that preserves a significant portion of
15 the original parcel.

16 (i) When calculating the density of development for zoning purposes,
17 counties should calculate density based on the number of dwelling units over
18 the entire development parcel, rather than the size of the individual lots
19 created.

20 (ii) The open space portion of the original parcel should be held by an
21 easement for open space or resource use. This should be held in perpetuity,
22 without an expiration date.

23 (iii) If a county allows bonus densities in a rural cluster, the resulting
24 density after applying the bonus must be a rural density.

25 (iv) Rural clusters may not create a pattern of development that relies on
26 or requires urban governmental services. Counties should establish a limit on
27 the size of the residential cluster so that a cluster does not constitute urban
28 growth in a rural area. A very large project may create multiple smaller
29 clusters that are separated from each other and use a different access point
30 to avoid creating a pattern of development that would constitute urban growth.

31 (v) Development regulations governing rural clusters should include design
32 criteria that preserve rural visual character.

1 In *Diehl v. Mason County*, 94 Wn. App. 645, 655 (1999), the Court of Appeals said: "The
2 GMA allows counties to use varying densities and cluster developments in rural areas, **as**
3 **long as the densities and clusters do not become urban** and do not require the
4 extension of urban services" (emphasis added).

5
6 The Court of Appeals in *Suquamish Tribe*¹⁰⁴ analyzed Kitsap County's clustering provisions
7 for rural wooded lands, and remanded to the Board, stating the record before the Board did
8 not demonstrate the clusters would protect rural character and not constitute urban growth.
9 The Court noted: "Many, if not most of the development standards related to rural character
10 use precatory language such as "encourage," "optimize," and "should." The Court said:
11 "Although the listed [criteria for clustering] may constitute aspirational design standards, the
12 failure of the ordinance to *require* the limitations . . . does not ensure that the resulting
13 developments will accord with the protections due rural areas under the GMA or the
14 County's good intentions."¹⁰⁵

15
16
17 In reading the above-quoted statutes, together with Court of Appeals analysis and the
18 Department of Commerce procedural criteria, a fundamental concept emerges regarding
19 Rural Cluster Development -- if a county chooses to allow Rural Cluster Development, the
20 county must do so in a permanent manner that is **consistent with rural character** and
21 provides **appropriate rural densities** that are **not characterized by urban growth**.¹⁰⁶

22
23 Thus, clustering regulations that give too much discretion to local building officials do not
24 adequately protect rural character. And the rural cluster can create smaller individual lots
25 than would normally be allowed in a Rural Area, but only so long as there is a significant
26 area of compensating open space that is permanently protected.

27
28 Whatcom's Policy 2DD-2.A.2. cross-references to existing Whatcom County Codes for
29

30 ¹⁰⁴ *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board*, 156 Wn. App. 743, 772,
31 235 P.3d 812 (2010).

¹⁰⁵ 156 Wn. App. at 774. (emphasis added)

32 ¹⁰⁶ "Rural character" is, generally, characterized by open spaces, natural landscapes, "vegetation predominate over the built environment," and developments that "are compatible with the use of land by wildlife and for fish and wildlife habitat" RCW 36.70A.030(15)(a), (d).

1 Rural Residential District, Rural Residential Island District, and Rural District ¹⁰⁷ and
2 provides alternatives for subdivisions by allowing lot clustering. However, clustering is not
3 mandatory, except, as the County explains, in the Agricultural Protection Overlay. In
4 Ordinance 2012-032, the County references WCC 20.32.305 which states: “The purpose of
5 lot clustering is to provide an **alternative** method of creating economical building lots with
6 spatially efficient sizes . . . The clustering **option** is also intended to help preserve open
7 space and the character of area”¹⁰⁸ Clustering is thus an optional tool for the County to
8 employ to contain and control land conversion in three districts: Rural Residential District,
9 Rural Residential Island District, and Rural District. The code provisions for these districts
10 contain permissive language, rather than mandatory, which make these measures largely
11 aspirational.¹⁰⁹ For example, in WCC 20.32.310 the County’s new codes are permissive
12 with the following language: “**Where practical**, the majority of building sites should be
13 arranged in a cluster or concentrated pattern to be compatible with physical site
14 features...”¹¹⁰ Again, in WCC 20.36.310, the Design Standards in Rural Districts are:

15
16
17
18 The creation of new building lots, pursuant to this section, **shall be** governed
19 by the following recommended design standards:

- 20 (1) Clustered building lots may be only created through the subdivision or
21 short subdivision process.
22 (2) Building lots **should be** designed and located to the fullest extent possible
23 to be compatible with valuable or unique natural features, as well as physical
24 constraints of the site.
25 (3) **Where practical**, the majority of building sites should be arranged in a
26 cluster or concentrated pattern to be compatible with physical site features,
27 allow for the efficient conversion of the “reserve tract” to other uses in the

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29
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32

¹⁰⁷ Ex. R-075A at 10-11, or refer to Whatcom County Website: <http://www.codepublishing.com/wa/whatcomcounty/>

¹⁰⁸ Ex. R-075-A at 10 Policy 2DD-2.A.2 See: **WCC 20.32.305 Lot clustering**. “(1) The purpose of lot clustering is to provide **an alternative method of creating economical building lots** with spatially efficient sizes. Clustering is intended to reduce development cost, increase energy efficiency and reserve areas of land which are suitable for agriculture, forestry, open space or possible future development. (2) The **clustering option** is also intended to help preserve open space and the character of areas and reduce total impervious surface area thereby reducing runoff while assuring continued viable undeveloped natural vegetated corridors for wildlife habitat, protection of watersheds, preservation of wetlands, preservation of aesthetic values including view corridors, and preservation of potential trail and recreation areas.” (emphasis added)

¹⁰⁹ WCC 20.32; WCC 20.34; and WCC 20.36.

¹¹⁰ WCC 20.32.310.

1 future, and have no more than two common encroachments on existing
2 county roads. The arrangement of clustered building lots is intended to
3 discourage development forms commonly known as linear, straight-line or
4 highway strip patterns.

5 (4) Common access to clustered building lots **should be** provided by short
6 length roads or loop roads. In addition, interior streets shall be designed to
7 allow access to the “reserve tract” for the purpose of future approved
8 development. (emphasis added)

9 The County did make clustering a mandatory requirement in WCC 20.71 for its Water
10 Resource Protection Overlay District with requirement as shown below, but it does not have
11 mandatory clustering requirements in other sections of Policy 2DD.2.A.

12 WCC 20.71.351 Cluster design standards

13 The creation of new building lots within Water Resource Protection Overlay
14 Districts **shall be subject to** the following design standards:

15 (1) Cluster subdivisions **shall be required** for all land divisions resulting in
16 lots less than five acres in size, with the exception of boundary line
17 adjustments....(emphasis added)

18 Thus, the Board finds the County contradicts itself when it states creation of new building
19 lots “shall be” governed by the guidelines, but then the guidelines are permissive with words
20 such as “should be” and “where practicable.” The Board has a firm and definite conviction
21 that Whatcom’s clustering regulations, like those of Kitsap County in the *Suquamish Tribe*
22 decision, fail to protect rural character by vesting too much discretion in the building officials
23 without enforceable criteria. The Board finds these DRs do not comply with RCW
24 36.70A.070(5)(c)(i) and (iii).

25
26
27 Additionally, the Board notes Whatcom County Code 20.32.320 defines a reserve tract as
28 the area of a “subdivision or short subdivision which is intended for agricultural, forestry,
29 open space **or future development purposes.**” The Commerce guidelines for rural
30 clusters provide: “The open space portion of the original parcel should be held by an
31 easement for **open space or resource use.** This should be held **in perpetuity**, without an
32

1 expiration date.”¹¹¹ If the County asserts clustering is a measure to contain development,
2 allowing future development of reserve tracts contradicts its own Policy 2-DD2 to protect the
3 rural area through County development regulations. If a “reserve tract” in a rural area is
4 intended to be part of the measure “to contain and control rural development” and “reduce
5 inappropriate conversion of undeveloped land”, then reserve tracts should be “reserved”
6 and not be allowed for future development. The reservation must be permanent. The words
7 “permanent” and “in perpetuity” have the same meaning in the context of rural cluster open
8 space protection, i.e., the open space protection has no expiration date.¹¹²
9

10
11 Rural cluster development involves a *quid pro quo* in that smaller-than-normal individual lots
12 are approved in exchange for the permanent/perpetual open space protection of the
13 property residue. The resulting development is more compact but balanced by the adjoining
14 perpetual open space. Subsequent withdrawal of rural area open space protection would
15 abrogate the rural cluster *quid pro quo* by allowing subdivision of the open space parcel and
16 enabling greater density that would be more consistent with urban growth and would not be
17 consistent with rural character.¹¹³ Counties must, therefore, ensure that this open space
18 protection within rural cluster development areas is **permanent**, continues **without**
19 **expiration**, and **cannot be revoked** so long as the area is governed by the Rural
20 Element.¹¹⁴ When Whatcom County allows reserve tracts to eventually be converted, then
21 the County is allowing “inappropriate conversion of undeveloped land.” Again, the Board is
22
23

24 ¹¹¹ WAC 365-196-425(5)(b)(ii) (emphasis added).

25 ¹¹² WAC 365-196-425(5)(b)(ii). In other land contexts, the terms “permanent” and “in perpetuity” have been
26 used synonymously. See, e.g., *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 398 (2005), wherein
27 Justice Madsen commented in a real estate case that “[t]he term ‘perpetual’ indicates permanent ownership.”
28 See also, Washington Recreation and Conservation Office Report on “Conservation Tools,”
29 <http://www.rco.wa.gov/documents/rco/ConservationTools.pdf>, ch. 2 at pp. 2-14 (“A perpetual easement
30 provides permanent protection against conversion of the property . . .”). Notification of permanent open
31 space protection can be achieved by recorded title notices, conservation easements, and deed/plat
32 restrictions.

¹¹³ Such a withdrawal would also be incompatible with GMA Goal 2 to “[r]educe the inappropriate conversion of
undeveloped land into sprawling, low-density development” and GMA Goal 9 to retain open space. RCW
36.70A.020.

¹¹⁴ The Rural Element will govern this area unless the Comprehensive Plan is subsequently amended to
reclassify the area as an Urban Growth Area (RCW 36.70A.110) or Natural Resource Lands (RCW
36.70A.170).

1 left with a firm and definite conviction that a mistake has been made.

2
3 **Conclusion:** The Board concludes the County's reliance on clustering as a measure to
4 protect rural character is misplaced because (a) the clustering provisions lack enforceable
5 criteria and (b) the resulting reserve tracts are not permanently protected. Ordinance 2012-
6 32, as it relates to clustering as a measure to protect rural character, is clearly erroneous in
7 view of the entire record before the Board and in light of the goals and requirements of the
8 GMA and specifically with RCW 36.70A.070(5)(c)(i) and (iii).

9
10 *ii. Visual Compatibility: Measures to ensure compliance with RCW*
11 *36.70A.070(5)(c)(ii)*

12 "…Assuring visual compatibility of rural development with the surrounding
13 area;"

14
15 *Positions of the Parties*

16 Whatcom County adopted Policy 2-DD-2 B. 1 and 2¹¹⁵ by cross-referencing to WCC
17 20.32.450 and WCC 20.36.450; the former applies to Rural Residential Districts, the latter to
18 Rural Districts. In both codes, the County argues it preserves visual compatibility through
19 the following: "No structure or combination of structures shall occupy or cover more than
20 5,000 square feet or 20 percent, whichever is greater, of the total area, not to exceed
21 25,000 square feet. Buildings used for livestock or agricultural products shall be exempt
22 from this lot coverage requirement."¹¹⁶ The County cross-referenced these two code
23 sections in its CP because the Board in its FDO said one example of "measures to protect"
24 might be to cross-reference the Design Policies in 2DD-2. The County claims it did just that
25 plus adopted restrictive codes and cross referenced to other policies to "retain a sense of
26
27
28

29
30 ¹¹⁵ Policy 2DD-B.1: "Ensure that the visual landscapes traditionally found in rural areas and communities are
31 preserved through limitations on structural coverage of lots [adopting by reference the standards in WCC
32 20.32.450 and 20.36.450]."

Policy 2DD-B.2: "Require that lots developed under the lot clustering option be designed and located to be
compatible with valuable or unique natural features as well as physical constraints of the site [adopting by
reference the standards in WCC 20.32.310, 20.34.310, 20.36.310, and 20.71.351.]"

¹¹⁶ WCC 20.32.450 and WCC 20.36.450

1 place,” require setbacks, and retain open space and natural areas.¹¹⁷ Also, the County
2 corrects the Petitioner’s complaint that the newly adopted codes incorrectly state lot
3 coverage will be 35%, when in fact, the codes only allow 20% coverage.

4
5 Futurewise still objects that the design policies and codes do not “limit site clearing or
6 impervious surfaces” nor do the codes control or limit “appearance of buildings or where
7 they are located on the property.”¹¹⁸ Petitioner argues the policy and codes on setbacks do
8 not prevent rows of houses from cutting off views of rural areas, do not apply to farm or
9 accessory uses, and are not required for single-family homes or duplexes unless part of an
10 overall complex. Futurewise views the County’s landscaping policies and codes as limited
11 and not “assuring visual compatibility of rural development with the surrounding rural
12 area”.¹¹⁹

13
14
15 Board Discussion

16 RCW 36.70A.030(15) defines “rural character” as the patterns of land use and development
17 established in a county’s rural element “(a) in which open space, the natural landscape, and
18 vegetation predominate over the built environment.” The GMA thus requires the rural
19 element of the plan to contain measures to assure that rural development is visually
20 compatible with a predominantly natural, open, and vegetated landscape.

21
22
23 The Petitioner failed to carry its burden of proof showing the County did not have measures
24 to protect visual compatibility. In the FDO on Remand, the Board was “struck by the
25 absence of measures to ensure continued predominance of the natural landscape over the
26 built environment or visual compatibility with those ‘images of fields and crops, farm
27 buildings, rolling hills ... and sense of small town community’ that define Whatcom’s rural
28 integrity”¹²⁰ and determined the County failed to provide the necessary measures to assure
29 visual compatibility as required by RCW 36.70A.070(5)(c)(ii). Upon compliance, in
30

31
32

¹¹⁷ County Response to Objections, at 22-23

¹¹⁸ Futurewise Objections to Compliance, at 13-14

¹¹⁹ *Id.*

¹²⁰ FDO at 38.

1 Ordinance 2012-032 the County first revised its Rural Lands narrative to recognize the
2 visual elements of rural character,¹²¹ drawing some of the language from the
3 Comprehensive Plan Design Chapter, Goal 10. Then the County adopted measures in
4 Policy 2DD-2B to ensure visual compatibility by limiting structural coverage, clustering
5 lots¹²² to be compatible with natural features, protecting aesthetic features through
6 landscape buffering and setbacks, and regulating visual aspects of development in Point
7 Roberts. Policy 2DD-2B is implemented through various Whatcom County Codes.

9
10 The Board reviewed the County codes for their specific reference to “assuring visual
11 compatibility with the surrounding area” as required in 36.70A.050(5)(c)(ii). We did not find
12 the reference to this concept, however, we found that WCC 20.32.450 does not allow lot
13 coverage of 35% – as Futurewise contends – this code only allows 20% coverage.¹²³ And,
14 the Board found the land clearing codes do not allow wholesale land clearing.¹²⁴ Also, the
15 County’s existing Design Chapter in Goal 10 calls for visual compatibility of rural
16 development. The County’s Plan now has measures to require landscaping and
17 development patterns to match the Rural Lands Narrative which attempts to describe “rural
18 character.” Given the amended Plan text and cross-references to Goal 10C, D and F and
19 the Design Chapter, the Board finds the County complies with RCW 36.70A.070(5)(c)(ii).
20

21
22 **Conclusion:** The Board finds the Petitioners have not carried their burden of proof
23 demonstrating the County’s policies fail to comply with RCW 36.70A.070(5)(c)(ii) regarding
24

25 ¹²¹ *Ex. R-075*, p. 9: “...views of a green landscape dotted by homes and barns....” “...Overall sense of
26 openness and predominance of the landscape in the rural area.”

27 ¹²² However, regarding clustering lots, as stated in the previous section, clustering provisions must be made to
28 comply with GMA.

29 ¹²³ WCC 20.32.450 “No structure or combination of structures shall occupy or cover more than 5,000 square
30 feet or 20 percent, whichever is greater, of the total area, not to exceed 25,000 square feet. Buildings used for
31 livestock or agricultural products shall be exempt from this lot coverage requirement.”

32 ¹²⁴ WCC 20.80.730 20.80.730 Land clearing and 20.80.731 Purpose. “The purpose of this section is **to avoid
or minimize impacts of clearing activity to adjacent and downstream public or private property and to
protect receiving water bodies**. The regulations contained in this section implement this goal by providing a
reasonable standard for clearing land in Whatcom County. It is also the purpose of this section to establish **a
county review process for larger clearing projects** to ensure these regulations are met. It is also the
purpose of this section to provide procedures and review criteria for clearing activity in connection with
conversion option harvest plans and implementing, exempting and removing development moratoria.”

1 visual compatibility of rural development with the surrounding area.

2
3 *iii. Critical Areas and Water Resources: Measures to ensure compliance with RCW*
4 *36.70A.070(5)(c)(iv).*

5 “...Protecting critical areas, as provided in RCW 36.70A.060, and surface and
6 groundwater resources; ...”

7 *a. Chuckanut Wildlife Corridor*

8 The Board’s FDO on Remand determined the County failed to adopt measures to protect
9 rural character by protecting the Chuckanut Wildlife Corridor and Lake Whatcom’s water
10 resources as required by RCW 36.70A.070(5)(c)(iv). The Board addresses first the
11 protection of the Chuckanut Wildlife Corridor.
12

13
14 *Measures to Protect Critical Areas – Chuckanut Wildlife Area – Positions of the Parties*

15 Petitioner Hirst argues the County was required to apply Best Available Science processes
16 as outlined in the County’s Critical Areas Ordinance¹²⁵ and was required to assess the
17 “ecological functions and values” of the wildlife area to determine the appropriate
18 development density for wildlife. Hirst cites to the County’s CP policy 11G-10 which
19 requires the County to “develop and administer regulations and incentives...for no net loss
20 of ecological functions and values of...wildlife habitats.”¹²⁶ Hirst contends the County has
21 not addressed habitat fragmentation and degradation by simply applying a 1du/5ac zoning
22 in the Chuckanut Wildlife Area. According to Hirst, this violates the County’s own Critical
23 Areas Ordinance requiring wildlife conservation planning. Petitioner Hirst complains that
24 merely referencing a CAO does not mean the County completed an analysis implementing
25 the ordinance. Hirst cites to *Stevens County v. Eastern Washington GMHB* to bolster his
26 case.¹²⁷
27
28
29

30 ¹²⁵ Whatcom County Chapter 16.16 Critical Area Ordinance.

31 ¹²⁶ Hirst Objections at 12-13

32 ¹²⁷ *Stevens County v. Eastern Washington Growth Management Hearings Board*, 163 Wash. App. 680, 693-94, 262 P.3d 50, rev denied, 173 Wn.2d 1019, 272 P.3d 24 (2012) (held: a reference to CAO does not automatically establish GMA compliance; development regulations that provide ancillary protection for critical areas must meet GMA requirements).

1 The County responds that the complaints about the Wildlife Area are Petitioner's attempt to
2 broaden the scope of the County's compliance actions. The County repeats the Board's
3 FDO stating "[t]he Board will not consider challenges based on portions of the County's
4 development regulations that were not amended."¹²⁸ Upon compliance, Whatcom County
5 states it changed R2A zoning, where it was present in the Chuckanut Wildlife Area, to one
6 house per 5 acres and cross-referenced its Critical Areas Ordinance in the CP for the
7 Chuckanut Wildlife Area. The downzone applied to 7% of the Corridor while the remaining
8 property is in commercial and rural forestry and open space. The County states it will apply
9 CAO protections to the Chuckanut Wildlife Area on a case-by-case review of development
10 proposals: thus, the County argues it "adequately protected this [wildlife] area."¹²⁹
11
12

13 Applicable Law

14 The relevant statutes for critical areas are:

15 **RCW 36.70A.050 Guidelines to classify agriculture, forest, and mineral** 16 **lands and critical areas**

17 (1) Subject to the definitions provided in RCW 36.70A.030, the department
18 [Commerce] shall adopt guidelines, under chapter 34.05 RCW, no later than
19 September 1, 1990, to guide the classification of: (a) Agricultural lands; (b)
20 forest lands; (c) mineral resource lands; and (d) critical areas...

21 (3) The guidelines under subsection (1) of this section shall be minimum
22 guidelines that apply to all jurisdictions, but also shall allow for regional
23 differences that exist in Washington state. The intent of these guidelines is to
24 assist counties and cities in designating the classification of agricultural lands,
25 forest lands, mineral resource lands, and critical areas under RCW
26 36.70A.170.

27 **RCW 36.70A.060(2) Natural resource lands and critical areas --** 28 **Development regulations.**

29 Each county and city shall adopt development regulations that protect critical
30 areas that are required to be designated under RCW 36.70A.170.
31
32

¹²⁸ County Response to Objections at 12

¹²⁹ Whatcom's Response to Objections at 28

1 **RCW 36.70A.170 Natural resource lands and critical areas --**

2 **Designations.**

3 (1) On or before September 1, 1991, each county, and each city, shall
4 designate where appropriate:

5 (a) Agricultural lands ...

6 (b) Forest lands...

7 (c) Mineral resource lands...; and

8 (d) Critical areas.

9 (2) In making the designations required by this section, counties and cities
10 shall consider the guidelines established pursuant to RCW 36.70A.050.

11 **RCW 36.70A.172 Critical areas — Designation and protection — Best**
12 available science to be used.

13 (1) In designating and protecting critical areas under this chapter, counties
14 and cities shall include the best available science in developing policies and
15 development regulations to protect the functions and values of critical areas.
16 In addition, counties and cities shall give special consideration to
17 conservation or protection measures necessary to preserve or enhance
18 anadromous fisheries.

19 **WAC 365-190-080 Critical Areas**

20 (2) Counties and cities must include the best available science as described
21 in chapter 365-195 WAC, when designating critical areas and when
22 developing policies and regulations that protect critical areas. Counties and
23 cities must give special consideration to conservation or protection measures
24 necessary to preserve or enhance anadromous fisheries. Counties and cities
25 are encouraged to also protect both surface and groundwater resources,
26 because these waters often recharge wetlands, streams and lakes.

27 **WAC 365-190-130 Fish and wildlife habitat conservation areas**

28 (1) "Fish and wildlife habitat conservation" means land management for
29 maintaining populations of species in suitable habitats within their natural
30 geographic distribution so that the habitat available is sufficient to support
31 viable populations over the long term and isolated subpopulations are not
32 created. This does not mean maintaining all individuals of all species at all
times, but it does mean not degrading or reducing populations or habitats so
that they are no longer viable over the long term. Counties and cities should
engage in cooperative planning and coordination to help assure long term
population viability.

1 Fish and wildlife habitat conservation areas contribute to the state's
2 biodiversity and occur on both publicly and privately owned lands.

3 Designating these areas is an important part of land use planning for
4 appropriate development densities, urban growth area boundaries, open
5 space corridors, and incentive-based land conservation and stewardship
6 programs.

7 (2) Fish and wildlife habitat conservation areas that must be considered for
8 classification and designation include:

9 (b) Habitats and species of local importance, as determined locally...

10 (3) When classifying and designating these areas, counties and cities must
11 include the best available science, as described in chapter 365-195 WAC.

12 (a) Counties and cities should consider the following:

13 (i) Creating a system of fish and wildlife habitat with connections between
14 larger habitat blocks and open spaces, integrating with open space corridor
15 planning where appropriate...

16 (ii) Level of human activity in such areas including presence of roads and
17 level of recreation type (passive or active recreation may be appropriate for
18 certain areas and habitats).

18 Board Discussion

19 Whatcom County's critical area ordinance designates the Chuckanut Wildlife Corridor as a
20 habitat conservation area which is "... identified as being of critical importance to the
21 maintenance of certain fish, wildlife, and/or plant species."¹³⁰ As defined by the County, this
22 area "extends east from Chuckanut Mountain including Lookout Mountain, Stewart
23 Mountain, and the northern portions of Anderson Mountain to Chuckanut Bay and the
24 adjacent marine waters and represents the last remaining place in the Puget Trough where
25 the natural land cover of the Cascades continues to the shore of Puget Sound."¹³¹ The
26 County's purpose in adopting their CAO and designating Chuckanut as a habitat
27 conservation area was to "regulate development so that ... habitat degradation and
28 fragmentation are avoided, especially along riparian corridors."¹³² Further, the County's
29 comprehensive plan policy is to ensure "no net loss of ecological functions for ... wildlife
30
31

32 ¹³⁰ WCC 16.16.710(a)

¹³¹ Whatcom Development Regulations Chapter 16.16.710 (10)(b)(iv)

¹³² WCC 16.16.700 Purpose.

1 habitats.”¹³³

2
3 The FDO on Remand clarified that the County’s compliance actions would not need to focus
4 on the CAO because it was not being challenged.¹³⁴ Instead the Board required the County
5 to “protect the habitat values” of the Chuckanut Corridor and do so by addressing habitat
6 fragmentation and degradation. “Measures to protect the habitat values of the Chuckanut
7 corridor must address habitat fragmentation and degradation. Incorporating these and other
8 measures into the Rural Element, as required by RCW 36.70A.070(5)(c)(iv) as construed by
9 the *Kittitas County Court*, should be a straightforward task.”¹³⁵
10

11 Petitioners did not satisfy their burden to show that the County failed to include Best
12 Available Science in protecting critical areas. Although Petitioners argue RCW 36.70A.172
13 requires critical areas protection through application of BAS when deciding policies or
14 regulations for critical areas and they cite RCW 36.70A.070(5)(c)(iv) requiring the County to
15 adopt measures in its comprehensive plan rural element to protect critical areas, they do not
16 provide evidence that the functions and values of the Corridor will be lost if the County
17 implements its GMA-compliant Critical Areas Ordinance. When the County changed the
18 R2A zoning to a 1du/5ac zoning it reduced the impact to habitat by reducing the number of
19 structures and extent of land clearing. The County states it completed a Corridor-wide BAS
20 analysis and the County’s critical area ordinance requires development proposals to be
21 reviewed on a case by case basis to protect habitat values. Under WCC 16.16.750,¹³⁶ the
22
23
24

25 ¹³³ Whatcom Comprehensive Plan Policy 11G-10: Develop and administer regulations and incentives such that
26 there is no net loss of ecological functions and values of wetlands and fish and wildlife
27 habitats.

28 ¹³⁴ FDO at 40.

29 ¹³⁵ FDO at 44.

30 ¹³⁶ **16.16.750 Review and reporting requirements.** “A. When county critical area maps or other sources of
31 credible information indicate that **a site proposed for development or alteration is more likely than not to**
32 **contain habitat conservation areas** or buffers, or could adversely affect a habitat area or buffer, **the**
technical administrator shall require a site evaluation (field investigation) by a qualified professional or
other measures to determine whether or not the species or habitat is present. If no habitat conservation areas
are present, then review will be considered complete. If the site evaluation determines that the species or
habitat is present, the technical administrator shall require a critical areas assessment report or habitat
management plan (HMP); provided, that no report or evaluation shall be required for developments outside of
buffers within the upland portions of shellfish conservation areas. The technical administrator shall have the

1 zoning administrator must require a site evaluation by a qualified professional when
2 development is proposed in the Corridor. Even the single-family-home exemption requires
3 an affirmative determination of non-disturbance of species and habitat features.

4
5 Thus the County has adopted measures to protect critical habitat in the Chuckanut Wildlife
6 Corridor by downzoning the R2A parcels and by applying WCC 16.16.750 CAO provisions.
7 Additionally, the Board notes the County's CP Action Plan for Chapter 11 Environment
8 contains an action to "develop geographically-based wildlife management plans for
9 important habitat conservation areas to consider the unique environmental qualities of the
10 area and this plan should be used to administer regulations." This action step would assist
11 the County in furthering its measures to protect critical areas such as the Chuckanut Wildlife
12 Corridor.¹³⁷ Petitioners failed to come forward with evidence that the County's zoning
13 change from R2A to one house per five acres violates RCW 36.70A.070(5)(c)(iv) or RCW
14 36.70A.172.
15
16

17 **Conclusion:** The Petitioners have not carried their burden of proof that the County failed to
18 include Best Available Science in protecting Critical Areas or failed to adopt measures
19 compliant with RCW 36.70A.070(5)(c)(iv) with respect to the Chuckanut Wildlife Corridor.
20
21
22
23

24 authority to waive the report requirement when he/she determines that the project is a single-family
25 development that involves less than one-half acre of clearing and/or vegetation removal and will not directly
26 disturb the species, or specific areas or habitat features that comprise the habitat conservation area (nest
27 trees, breeding sites, etc.) as indicated by a site plan or scaled drawing of the proposed development.
28 B. The assessment report/HMP shall describe the characteristics of the subject property and adjacent
29 areas. The assessment shall include determination of appropriate buffers as set forth in WCC 16.16.740.
30 The assessment shall also include field identification and/or delineation of habitat areas, analysis of
31 historical aerial photos, review of public records, and interviews with adjacent property owners as
32 necessary to determine potential effects of the development action on critical areas. Assessment reports
shall include the following site- and proposal-related information unless the technical administrator
determines that any portion of these requirements is unnecessary given the scope and/or scale of the
proposed development."

¹³⁷ "51. Develop geographically-based wildlife management plans for important habitat conservation areas.
These plans should take into full consideration the unique environmental qualities of the area as well as the
existing or planned surrounding land use activities and constraints. These plans should be utilized as a basis
for both the formulation and administration of regulations that address fish and wildlife protection."

1 *b. Lake Whatcom Surface Water and Groundwater Resources*

2 Positions of the Parties

3 The FDO on Remand found the County's Plan lacked measures to protect surface and
4 groundwater resources, particularly for the Lake Whatcom area. Lake Whatcom is the
5 primary source of municipal water supply in the county, serving 100,000 people. The Lake is
6 increasingly threatened by eutrophication.¹³⁸ The FDO on Remand found the County lacked
7 measures to protect the water of the Lake.
8

9
10 On compliance, in adopting Ordinance 2112-032, Whatcom County "removed the
11 application of RRDO entirely from the Lake Whatcom Watershed" and "downzoned the
12 R2A" zoning in Lake Whatcom.¹³⁹ Ordinance 2012-032 also amended the CP Rural
13 Element by adopting a new Policy 2-DD-2.C: "Measures to protect critical areas and surface
14 and groundwater resources." The policy incorporates by reference the County's existing
15 storm water, septic system, subdivision, and Water Resource Protection Overlay District
16 regulations. The policy also incorporates pre-existing prohibitions on commercial fertilizers
17 and illegal discharges in the Lake Whatcom watershed.¹⁴⁰ Apparently none of these
18 regulations were amended.
19

20
21 The City of Bellingham, which was the primary challenger of the County's prior action
22 concerning Lake Whatcom, filed no opposition to the County's adoption of Ordinance 2112-
23 032.¹⁴¹ The Hirst Petitioners, who raised broader issues of surface and groundwater supply
24 and quality in the prior proceedings, again challenge the County's action as inadequate.¹⁴²
25 Hirst repeats and amplifies assertions raised in the challenge to Ordinance 2011-013 about
26 the failure to enact measures protective of County water supply and quality throughout the
27 rural area.
28

29
30 ¹³⁸ FDO at 148-150.

31 ¹³⁹ County Response to Objections at 26.

32 ¹⁴⁰ Policy 2DD-2.C.8 and 9.

¹⁴¹ The City of Bellingham is the regional water supplier.

¹⁴² The FDO on Remand notes Hirst's evidence included the Lummi Peninsula, the WIRA 1 Watershed, and the Nooksack River Basin, as well as Lake Whatcom. FDO at 43.

1 For Lake Whatcom Watershed, Hirst welcomes the reduction of new lots through the down-
2 zoning, but argues there are still “1,634 potential new units within the County’s Rural
3 watershed”¹⁴³ and development of these lots will further contaminate Lake Whatcom with
4 phosphorus runoff. The County’s measures to protect the watershed do not increase
5 protections in the existing development regulations, Hirst asserts; the County has merely
6 decreased the number of new residential lots, but has not altered the discharge and runoff
7 impacts of the new units; and discharges are still allowed and not changed under current
8 CP and DRs.¹⁴⁴ Hirst lists the Department of Ecology’s requirement to adopt a “no
9 discharge” regulation for Lake Whatcom and states that such a regulation would have been
10 a measure to “ensure water resources were protected.”¹⁴⁵
11
12

13
14 The County contends the only issue before the Board on compliance is the application of
15 the RRDO, RR5A and R2A designations in the Lake Whatcom Watershed. The County
16 declines to respond to broader aspects of Lake Whatcom protection or protection of the
17 County’s rural water resources.
18

19 Applicable Law

20 Express provisions in the GMA require comprehensive plans and development regulations
21 to be protective of water resources, particularly in the rural area.
22

23 **Planning Goal 10 (RCW 36.70A.020(10))** encompasses water protection:

24 (10) Environment. Protect the environment and enhance the state’s high
25 quality of life, including air and water quality, and the availability of water.
26

27 The county’s land use plan must protect surface and groundwater:

28 The land use element shall provide for protection of the quality and quantity of
29 groundwater used for public water supplies. . . Where applicable, the land use
30 element shall review drainage, flooding, and storm water run-off in the area . .
31 . and provide guidance for corrective actions to mitigate or cleanse those

32 ¹⁴³ Hirst Objections at 16.

¹⁴⁴ Hirst Objections at 16-17.

¹⁴⁵ *Id.*

1 discharges that pollute waters of the state.¹⁴⁶

2 The GMA requires a county comprehensive plan to contain a Rural Element. The County
3 may establish the rural character of the area.
4

5 **RCW 36.70A.030(15)** defines rural character, providing in relevant part:

6 “Rural character” refers to the patterns of land use and development
7 established by a county in the rural element of its comprehensive plan:
8 . . .(g) that are consistent with the protection of natural surface water flows
9 and groundwater and surface water recharge and discharge areas.

10 **RCW 36.70A.070(5)(c)** requires that the Rural Element include measures governing rural
11 development:

12 Measures governing rural development. The rural element shall include
13 measures that apply to rural development and protect the rural character of
14 the area, as established by the county, by . . .

15 (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface
16 water and groundwater resources.
17

18 The Supreme Court’s *Kittitas County* decision underscores these provisions: “The GMA
19 includes requirements that counties consider and address water resource issues in land use
20 planning.”¹⁴⁷ The Court pointed out:

21 Several relevant statutes indicate that the County *must* regulate to some
22 extent to assure that land use is not inconsistent with available water
23 resources. The GMA directs that the rural and land use elements of a
24 county’s plan include measures that protect groundwater resources. RCW
25 36.70A.070(1), (5)(c)(iv).¹⁴⁸

26 The Court clarified that counties are “not precluded [by Ecology’s authority over water
27 resources] and, in fact, [are] required to plan for the protection of water resources in [their]
28 land use planning.”¹⁴⁹ The Court emphasized the importance of ensuring county plans to
29 protect water resources are guided by Ecology:
30

31 ¹⁴⁶ RCW 36.70A.070(1).

32 ¹⁴⁷ *Kittitas County v. EWGMHB*, 172 Wn.2d 144, 175 (2011).

¹⁴⁸ *Id.* at 178-179. (emphasis in original)

¹⁴⁹ *Id.* at 179.

1 In recognizing the role of counties to plan for land use in a manner that is
2 consistent with the laws regarding protection of water resources and
3 establishing a permitting process, we do not intend to minimize the role of
4 Ecology. Ecology maintains its role, as provided by statute, and ought to
5 assist counties in their land use planning to adequately protect water
6 resources. We note that the record demonstrates that Ecology in fact
7 communicated with the County about concerns regarding the availability of
8 water during its planning process.¹⁵⁰

8 Board Discussion

9 The FDO on Remand found Petitioners provided ample evidence about risks to water
10 supply, water quality, and water resources for fish resulting from rural development in
11 Whatcom County.¹⁵¹ The Board said:

12 The County's unsupported assertion that its regulations are adequate to
13 provide the needed protection rings hollow. The County provides no
14 information about the DRs that allegedly address these issues, but the current
15 report on Lake Whatcom water quality demonstrates that the **existing**
16 **regulations have not protected Lake Whatcom** and that the problems are
17 actual and proven, not speculative.¹⁵²

18 Focusing on Lake Whatcom, the Board found that the measures necessary to protect
19 surface water and groundwater "were clearly identified in the record."¹⁵³ The record
20 documents that Ecology has been advocating strict new stormwater regulations for the Lake
21 Whatcom area for several years.¹⁵⁴ With the change to R5A zoning, the County adopted
22 Ecology's recommendation for 10% impervious surface limitations for new development.
23 The County did not adopt zero-discharge standards or the other regulatory enhancements
24 Ecology has been requesting for several years.

26 The Board notes, first, the important steps the County has taken to control new
27 development in the Lake Whatcom watershed. In adopting Ordinance 2012-032, the County
28

29 ¹⁵⁰ *Id* at 180.

30 ¹⁵¹ FDO at 43, citing studies from Lummi Peninsula, Nooksack River Basin, and WRIA 1 Watershed.

31 ¹⁵² FDO at 44; (emphasis added); see p. 42, n.96: letter from County Executive to Ecology (Mar. 10, 2011)
32 promising "accelerated program" to achieve phosphorus protections for Lake Whatcom in County development
regulations" including "recommendations for code improvements supported by Ecology."

¹⁵³ *Id.*

¹⁵⁴ FDO at 42-44 and n.96 in FDO.

1 removed the application of RRDO entirely from the Lake Whatcom Watershed. The County
2 downzoned the remaining R2A areas in the Watershed, though they had been found
3 compliant with rural density requirements in the Order on Remand (Rural Densities). The
4 County rezoned all of the RR5A areas in the watershed to R5A, thus reducing the
5 impervious surface limits from 20% to 10%.¹⁵⁵ The County has also renewed a moratorium
6 on acceptance of new applications for divisions of land resulting in lots smaller than five
7 acres in the Lake Whatcom Watershed.¹⁵⁶

9
10 However, while the FDO on Remand ruled specifically on the application of RRDO, R2A and
11 RR5A, the Board's ruling concerning Lake Whatcom was broader, indicating that
12 compliance with the GMA would require comprehensive plan "measures" and heightened
13 regulatory provisions to protect the water quality of the Lake. Without telling the County what
14 it would have to do to comply, the Board said:

- 15 • "The existing regulations have not protected Lake Whatcom."¹⁵⁷
- 16 • "[M]inimizing creation of new lots solves only part of the problem as there are 500
17 already-platted lots where development could be 'minimized.'"¹⁵⁸
- 18 • "Comprehensive Plan commitment to a zero-discharge policy and expedited adoption
19 of the necessary regulations is probably indicated."¹⁵⁹
- 20 • "Zero-discharge development standards [and] 10% impervious surface limits ... must
21 be considered."¹⁶⁰

22
23
24 In the FDO on Remand, the Board noted that Ecology has advocated a zero-discharge
25 policy to ensure new development does not discharge any more phosphorus than a forested
26 or native vegetated site. Zero-discharge requires some combination of limitations on
27 impervious surface, preservation of native vegetation, reforestation, rainwater storage,
28

29
30 ¹⁵⁵ County Response to Objections to Finding of Compliance, at 26.

31 ¹⁵⁶ Pursuant to WAC 242-02-660, the Board takes official notice of Whatcom County Ordinance No. 2012-029.

32 ¹⁵⁷ FDO at 44.

¹⁵⁸ FDO at 154, n.344.

¹⁵⁹ FDO at 156.

¹⁶⁰ *Id.* at 44.

1 infiltration, water reuse, and treatment of discharged water. During the compliance process,
2 Ecology's Steve Hood participated in County Council and Planning Commission meetings,
3 advising the County on the measures required. Mr. Hood explained that Ecology's water-
4 quality criteria necessitate an 86% reduction in phosphorus loading from the developed
5 portion of the watershed in order to restore the health of Lake Whatcom and reduce
6 eutrophication.¹⁶¹ The 86% target already assumes no additional phosphorus run-off (zero
7 discharge) from new lots. Mr. Hood made it clear that to the extent new development was
8 *not* required to meet a zero-discharge standard, additional requirements (i.e., beyond 86%
9 reduction) would have to be imposed on *existing* developments in the watershed.¹⁶²
10 Ecology has made it clear that restricting new lot development is only part of the solution;
11 pollutants from existing development and from development of previously-platted parcels
12 must also be brought under control. Thus, the necessary measures to protect water quality
13 must go beyond down-zoning.
14

15
16 In the County's most recent compliance action it has taken steps to control discharges from
17 new development, but not that of existing development or previously platted parcels. The
18 stricter stormwater recommendations advocated by Ecology and promised by the former
19 County Executive, as the FDO on Remand pointed out, have not been adopted.¹⁶³ If the
20 County chooses to cross-reference its existing regulations as "measures" to protect water
21 resources, it cannot claim to be protecting Lake Whatcom when it has not yet adopted the
22 regulations Ecology states are necessary. The Board is left with a firm and definite
23 conviction that a mistake has been made.
24

25
26 In reviewing the County's action on Lake Whatcom, the Board finds the County's measures
27

28
29 _____
30 ¹⁶¹ FDO at 150, citing Ecology's 2008 TMDL Plan for Lake Whatcom, determining that reducing phosphorus
31 levels to restore dissolved oxygen levels would require "the equivalent of 85.5% fewer acres of 2003
32 development [than] allowed under 2003 zoning."

¹⁶² Planning Commission testimony, March 8, 2012, p. 7. Steve Hood: "So what I can say is, with confidence is
that if areas that have not yet developed add pollution, then the places that have already developed... they'll
have to reduce more.... So if we allow more [phosphorus run-off] from undeveloped areas, we will require
additional reductions from the existing development."

¹⁶³ FDO at 42, n.96; *Ex. C-685K*.

1 to protect surface and ground water do not comply with RCW 36.70A.070(5)(c)(iv) because
2 the County has not adopted measures that protect Lake Whatcom water quality, as
3 instructed by Ecology. The Board recognizes that all of the solution may not necessarily be
4 encapsulated in land use policies and regulations; some might be dealt with through other
5 programs and laws: off-setting dedications of public lands, capital investments in water
6 management, consumer incentive programs, voluntary stewardship campaigns and the like.
7 The Rural Element of the Plan should indicate the measures the County will commit to for
8 the protection of the Lake.
9

10
11 The Board looks next at the County's wholesale rewrite of its CP measures to protect
12 surface and groundwater resources - Policy 2.DD-2.C. Whatcom County objects that
13 Petitioners' "proper challenge to the RRDO and the RR5A zoning in the Lake Whatcom
14 Watershed . . . has . . . improperly morphed into a global challenge to the County's
15 protection of water resources throughout the county."¹⁶⁴ Citing WAC 242-03-940(5),¹⁶⁵ the
16 County declined to brief the broader water resource protection question posed by Hirst.
17

18 The Board notes Petitioners have filed a new PFR challenging Ordinance 2012-032,
19 including the sufficiency of its measures to protect surface and groundwater resources. The
20 Board **reserves decision** on the County's measures to protect rural water resources,
21 beyond the Lake Whatcom measures, to allow the question to be thoroughly briefed and
22 argued in Case No. 12-2-0013.
23

24
25 **Conclusion:** Petitioners have carried their burden of proof and the Board finds the County
26 does not have measures in place to protect rural character by protecting water resources of
27 Lake Whatcom as instructed by Ecology, and thus fails to comply with RCW
28 36.70A.070(5)(c)(iv).
29

30 Ordinance 2012-32, as it relates to protecting the water resources of Lake Whatcom, is
31

32 ¹⁶⁴ County Response to Objections to Finding of Compliance, at 25.

¹⁶⁵ "Issues not within the nature, scope, and statutory basis of the conclusions of noncompliance in the prior order will not be addressed in the compliance hearing but require the filing of a new petition for review."

1 clearly erroneous in view of the entire record before the Board and in light of the goals and
2 requirements of the GMA.

3
4 *iv. Summary of Conclusions for Measures in RCW 36.70A.070(5)(c)(i),(ii),(iii) and (iv)*

5 In sum, reviewing the Petitioners' particular challenges to Policy 2-DD2 and the County's
6 measures that govern rural development and protect rural character, the Board finds:

- 7 a) The County's actions in adopting Ordinance 2012-032 resolve the internal
8 inconsistency of rural population and development capacity identified in the FDO on
9 Remand;
10
11 b) Ordinance 2012-032 lacks criteria for rural designations less-dense than 1du/5ac and
12 thus fails to assure a variety of rural densities as required by RCW 36.70A.070(5)(b)
13 and fails to reduce conversion of undeveloped lands as required by RCW
14 36.70A.070(5)(c)(i) and (iii);
15
16 c) Clustering provisions incorporated by reference in Policy 2-DD2 fail to protect rural
17 character and reduce conversion of undeveloped land as required by RCW
18 36.70A.070(5)(c)(i) and (iii) because the clustering provisions are discretionary and
19 reservations of open space are not permanent;
20
21 d) County's policies comply with RCW 36.70A.070(5)(c)(ii) regarding visual compatibility
22 of rural development with the surrounding area;
23
24 e) The County has measures in place to protect the Chuckanut Wildlife Corridor as a
25 critical area as required in RCW 36.70A.070(5)(c)(iv);
26
27 f) For Lake Whatcom the County does not have measures in place to protect water
28 resources of Lake Whatcom as instructed by Ecology, and thus fails to comply with
29 RCW 36.70A.070(5)(c)(iv).

30 With the adoption of Ordinance 2012-032, Whatcom County has taken important steps
31 toward aligning the Rural Element of its Plan with the requirements of the GMA. However,
32 the Board concludes Policy 2-DD2 does not fully comply with RCW 36.70A.070(5)(c)(i),(iii)

1 and (iv) because it does not contain the requisite measures, and the County's Plan fails to
2 provide a variety of rural densities as required by RCW 36.70A.070(5)(b).

3
4 *F. LAMIRDS – Comprehensive Plan and Development Regulation Issues*

5 In adopting Ordinance 2012-032, Whatcom County made numerous amendments to its
6 comprehensive plan and development regulations concerning LAMIRDS. Together with
7 action previously take since remand from the Supreme Court in the *Gold Star* case, the
8 County has worked toward bringing its LAMIRD designations and LOBs into compliance
9 with the GMA. The County made corrections to its LAMIRDS by revising numerous policies
10 for consistency with RCW 36.70A.070(5)(d), removing LAMIRD designation for Eliza Island,
11 eliminating former policy language that allowed LAMIRD expansion, decreasing the LOBs of
12 Emerald Lake and Van Wyck, dividing the Smith/Acton commercial strip into two non-
13 contiguous LAMIRDS, de-designating Fort Bellingham/Marietta and North Bellingham
14 LAMIRDS adjacent to UGAs. Petitioners stipulated to compliance for a number of these
15 actions.
16

17
18 The remaining issues relate to (a) the re-designation of Fort Bellingham/Marietta, North
19 Bellingham, and Welcome as Rural Neighborhood; (b) specific criteria for LAMIRDS in the
20 County's policies or development regulations; (c) the LOBs for the Birch Bay/Lynden &
21 Valley View and Smith/Guide Meridian LAMIRDS, and (d) water transmission lines.
22

23
24 *i. Rural Neighborhoods*

25 *Position of the Parties*

26 The FDO on Remand ruled that LAMIRDS adjacent to the UGA were noncompliant with the
27 GMA.¹⁶⁶ In order to comply, Whatcom County removed the LAMIRD designation from two
28 areas:

- 29
- 30 • North Bellingham – 60 acres of subdivided rural land adjacent to the City of Ferndale,
 - 31 and

32

¹⁶⁶ FDO, at 96-97.

- Fort Bellingham/Marietta – 182 acres of mostly subdivided rural land adjacent to the Bellingham UGA.

The County then re-designated these two areas as Rural Neighborhood, allowing R2A zoning and an RRDO overlay for infill. Additionally, the County re-designated 59.3 acres of the Welcome LAMIRD as Rural Neighborhood.¹⁶⁷

To accomplish these changes, the County made the following amendments. Under Policy 2DD-2,¹⁶⁸ the County cross-referenced to Policy 2GG-2 which addresses the need for “a variety of rural uses and densities while retaining . . . rural character.” Policy 2GG-2 defines “rural designation” as “areas of traditional rural and gross residential densities at or below one unit per five acres.” The County’s amendments state that it wants to “reduce inappropriate conversion of undeveloped land into sprawling, low density development” and that “intensive development shall be contained within LAMIRDS . . . and *predominately residential areas with established densities greater than one unit per five acres shall be contained in Rural Neighborhoods.*”¹⁶⁹ The County added this provision to create and contain Rural Neighborhoods to address the Board’s concern that existing rural character could change if the County did not contain current higher-density residential areas.¹⁷⁰ In addition, the County amended its County codes¹⁷¹ allowing a Density Overlay in Rural Neighborhoods for lots in existence in 2011. In effect, the Overlay allows increased density within the Rural Neighborhoods; these changes are reflected on the County’s land use map.

Petitioner Futurewise takes exception to the creation of the North Bellingham and Fort Bellingham/Marietta Rural Neighborhoods and the overlay provisions for more density.¹⁷²

First, these Rural Neighborhoods now have 24 lots that are larger than 5 acres whereas the County says Rural Neighborhoods adjacent to UGA are only allowed where “developed

¹⁶⁷ Ex. R-075C, Map 8 and Ex. R-084D, Appendix E, p. 2

¹⁶⁸ See Ex. R-075 at 10.

¹⁶⁹ Ex. R-075, at 19 (emphasis added)

¹⁷⁰ County’s Response to Objections at 17.

¹⁷¹ Ex. R-074, Exhibit B Whatcom County Codes at 4 -- WCC 20.32.252 and .253.

¹⁷² Futurewise Objections at 23

1 densities exceeded one dwelling unit per 2.5 acres in 2011.” Similarly, Futurewise objects
2 that 48% of the Welcome Rural Neighborhood is made up of lots larger than 5 acres.

3
4 *Policy 2-MM 1-4* identifies and designates “Rural Neighborhoods.” The County’s CP
5 amendments identified areas already developed at a higher density than generally found in
6 rural areas such as 1du/5ac or 1du/10ac. Policies 2-MM 1-4 are designed to **contain**
7 **existing** densely populated neighborhoods in rural areas by establishing boundaries for
8 Rural Neighborhoods as they existed in 2011 – “where developed densities exceeded one
9 dwelling unit per 2.5 acres in 2011.” The County adopted those boundaries in this
10 compliance action in 2012.

11
12
13 In addition to the Rural Neighborhoods designation, the County allows a Rural Residential
14 Density Overlay in these neighborhoods to “infill development with lot sizes consistent with
15 those of surrounding lots, where public water is available.”¹⁷³ In the FDO on Remand the
16 Board did not find a GMA violation for development regulations permitting the Rural
17 Residential Density Overlay based on 2011 infill.¹⁷⁴ However, the Board found the CP
18 provisions must contain measures to “contain and control” application of the RRDO and
19 must contain measures to protect surface and groundwater resources.¹⁷⁵ The County
20 asserts the new Rural Neighborhood provisions contain and control rural development.¹⁷⁶

21
22
23 Petitioner Futurewise appreciated that the County drew boundaries around these more
24 densely populated areas, but agrees with Hirst’s argument that applying a Rural Residential
25 Density Overlay onto a Rural Neighborhood would ultimately allow more people in the rural
26 area than would be allowed if the County properly accounted for its population allocation in
27 rural areas. Hirst ties the argument from the faulty Chapter 1 population allocation to the
28 application of RRDO in Rural Neighborhoods claiming the effect is too many people in the
29

30
31 ¹⁷³ R-A750 at 27.

¹⁷⁴ FDO at 128.

32 ¹⁷⁵ The Board notes Petitioners have raised objections to Fort Bellingham/Marietta designation based on water
resource protections; those issues are **reserved** to the briefing and hearing on Case No. 12-2-0013.

¹⁷⁶ County Response to Objections at 18 and 34.

1 rural area. Futurewise further argues the criteria from Whatcom County Codes¹⁷⁷ are at
2 odds with the criteria in CP Policies 2-MM-1 and 2-MM-2. The codes require one standard
3 for lot coverage and the policies require another standard. The net result will be “a relatively
4 small area of small developed residential lots could justify designating a large area of
5 undeveloped lots.”¹⁷⁸ The County response is that “there is nothing in the GMA that
6 requires the CP to contain all of the details of the DRs.”¹⁷⁹
7

8 Board Discussion
9

10 Whatcom County’s Plan previously designated Fort Bellingham/Marietta and North
11 Bellingham as LAMIRDs, allowing significant additional density and development. Because
12 the areas are adjacent to and not within UGAs, they are not appropriately designated
13 LAMIRDs. However, the areas are largely subdivided already into 2-acre and smaller lots. In
14 order to comply, the County chose to use its R2A zoning. This small-lot rural designation
15 had been approved by the Board on a limited basis for seven small areas of the County
16 where higher densities have already been established. In its Order Following Remand
17 (Rural Densities), the Board found:
18

19 R2A in the rural areas is found in only seven areas . . . The average parcel
20 size in these R2A areas ranges from 0.5 acres (South Bay) to 2.3 acres
21 (Wiser Lake East). The use of R2A zoning **in those limited areas** where it
22 remains is consistent with the County’s pattern of rural development and its
23 vision of rural areas that includes a variety of rural densities including “**areas
where higher densities have been established.**”¹⁸⁰

24 The Order concluded, “Contained in this manner, the R2A does not pose a threat to the
25 County’s rural character and forms a component of the variety of rural densities found in
26 Whatcom County.”¹⁸¹
27

28
29 ¹⁷⁷ WCC 20.32.252 and WCC 20.36.252.

30 ¹⁷⁸ Futurewise Concurrence with and Objection to Compliance Finding at 23.

31 ¹⁷⁹ County Response to Objections at 34.

32 ¹⁸⁰ Order (Rural Densities) at 8: pointing out that Ordinance 2011-013 reduced R2A zoning in the County from 2927 to 878 acres.

¹⁸¹ Order (Rural Densities) at 10. The Board notes Ordinance 2012-032 further reduced the extent of these R2A areas by rezoning to R5A those areas that intrude into the Chuckanut Wildlife Corridor or are within the Lake Whatcom Watershed.

1 Given the unique posture of this case, Whatcom County needed to find a designation for the
2 noncompliant Fort Bellingham and North Bellingham LAMIRDs that would recognize the
3 existing small-lot development pattern without promoting the increased density and demand
4 for urban services that LAMIRD designation entails. The County's solution was Rural
5 Neighborhood designation with R2A zoning. As a measure to control and contain the Rural
6 Neighborhood designation, the County's Plan Policies 2MM 1-4 state the boundaries are
7 based on 2011 development patterns and that **no further R2A designations are allowed.**
8
9 Neither Hirst nor Futurewise has provided credible argument that R2A designation in these
10 two areas, even with the RRDO overlay, will accommodate more population than the prior
11 LAMIRD designations.
12

13 The Board notes, however, that Fort Bellingham/Marietta and, to a lesser extent, North
14 Bellingham, contain a number of large undivided parcels.¹⁸² Whether these are golf courses,
15 commercial greenhouses, or agricultural lands, the Board questions the application of the
16 small-lot "2011 development pattern" standard to these parcels. Within the next 20 years,
17 some or all of these parcels may be incorporated into UGAs or city boundaries, but until
18 then, there is no apparent basis for Rural Neighborhood designation or RRDO application.
19 Including large undivided parcels in the RN designation violates the internal consistency
20 requirement of RCW 36.70A.070 (preamble) because the RN designation is defined by a
21 2011 small-lot development pattern.
22
23

24 The Board remands Ordinance 2012-032 to the County to achieve GMA compliance by
25 reviewing the boundaries of the Fort Bellingham/Marietta and North Bellingham Rural
26 Neighborhoods and considering redrawing them to be more consistent with the small-lot
27 2011 development pattern. Similarly, the boundary of the Rural Neighborhood designation
28 for 59 acres formerly designated as part of the Welcome LAMIRD must be reconsidered in
29 that 48% of the Rural Neighborhood is made up of lots larger than 5 acres and does not
30
31
32

¹⁸² *Ex. R-084A*, pp. B-10, B-19.

1 meet the 2011 small-lot pattern.¹⁸³

2
3 **Conclusion:** The Board finds Petitioners have failed to carry their burden of proof
4 demonstrating Rural Neighborhood designation and RRDO overlay for the prior LAMIRDs is
5 noncompliant with the GMA. However, the Board finds that the boundaries of the Rural
6 Neighborhood designations for Fort Bellingham/Marietta, North Bellingham, and Welcome
7 are in violation of RCW 36.70A.070 (internal comprehensive plan consistency). Ordinance
8 2012-32, as it relates to these Rural Neighborhood designations, is clearly erroneous in
9 view of the entire record before the Board and in light of the goals and requirements of the
10 GMA.
11

12 The Board remands Ordinance 2012-032 to the County to achieve GMA compliance by
13 reviewing the Rural Neighborhood designation boundaries for Fort Bellingham/Marietta,
14 Lake Bellingham, and Welcome and considering conforming them to the development
15 pattern as of 2011, consistent with Policies 2-MM 1-4.
16

17 *ii. LAMIRD Type I, II and III Policy and Development Regulation Amendments*

18 In adopting Ordinance 2012-032, Whatcom County made a number of amendments to its
19 policies and regulations for LAMIRDs, seeking to comply with the GMA as required in the
20 FDO on Remand. Many of those amendments are listed in the introduction to this
21 Compliance Order and have been stipulated to by the parties as compliant. The Board will
22 not summarize all the amendments but will address provisions for Type I, Type II and Type
23 III LAMIRDs that are challenged by Petitioners.
24

25
26 *a. Type I and III LAMIRDS*

27 In its FDO on Remand the Board found that the County's approach to regulating LAMIRDS
28 was clearly erroneous¹⁸⁴ and imposed invalidity on the Logical Outer Boundaries of certain
29
30

31 ¹⁸³ *Ex. R-084D, Whatcom County Rural Element Update LAMIRD Report*, Appendix E: Buildout Percentage
32 and Average Tax Parcel Size in Affected Areas p.*2 (June 22, 2012); *Ex. R-125, Whatcom County Rural
Element Update Tax Parcels on May 22, 2011 in the Rural Residential Density Overlay*, pp. 70-71 (Updated
March 29, 2012).

¹⁸⁴ FDO on Remand at 88.

1 Type I LAMIRDs and Type III LAMIRDs.¹⁸⁵ The Board also imposed invalidity on LAMIRD
2 development regulations that failed to contain and control rural development and
3 substantially interfered with GMA Goals 1 and 2. The Board was concerned about how the
4 County defined the uses and calculated size of buildings within LAMIRDs.¹⁸⁶ The
5 fundamental problem of the County's approach was that its development regulations failed
6 to limit LAMIRDs in the manner required by the GMA. Rather than determining the size,
7 scale, use and intensity of uses that *existed in a particular area* to be designated as a
8 LAMIRD, and limiting future development in the LAMIRD on that basis, the County instead
9 allowed uses in a particular LAMIRD based on the zoning designation applied to a LAMIRD,
10 regardless of whether those uses were present in that LAMIRD on July 1, 1990.¹⁸⁷

11
12
13 Upon compliance, the County analyzed existing uses and sizes of buildings in each
14 LAMIRD and adopted a table in WCC 20.80.100(1) showing allowable uses and sizes of
15 buildings in each LAMIRD which reflect those existing in 1990. However, WCC
16 20.80.100(2), (3) and (4) add a series of exceptions so that a County Zoning Administrator
17 is allowed to approve other uses or larger buildings than shown in the table, if new
18 documentation shows such uses or sizes existed in 1990.¹⁸⁸ The County also allows
19 greater floor area than in the table in WCC 20.80.100(1), through an administrative approval
20 process subject to findings that the "development is consistent with the character of the area
21 in 1990" and meets some but not all of the GMA criteria.¹⁸⁹ New development regulation
22
23

24
25 ¹⁸⁵ *Id.* at 170.

26 ¹⁸⁶ *Id.* at 89-94.

27 ¹⁸⁷ *Id.* at 92.

28 ¹⁸⁸ WCC 20.80.100(2)(a)

29 ¹⁸⁹ WCC 20.80.100 (2) Modifications to Building Sizes and Uses in Rural Communities. "(a) Within a rural
30 community designation, the zoning administrator may permit a use other than shown in subsection (1) of this
31 section and/or building sizes greater than shown in subsection (1) of this section if there is documentation that
32 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, provided the proposed floor area does not exceed the documented floor area.
(b) Within a rural community designation, development or redevelopment with a per-building floor area or
combined floor area of all buildings greater than allowed per subsection (1) of this section, or development or
redevelopment of a use other than shown in subsection (1) of this section, may be permitted if approved
through an administrative approval process per WCC 20.84.235. The administrative approval is subject to a
finding that the development or redevelopment is consistent with the character of the area on July 1, 1990,

1 WCC 20.80.100(3) establishes building sizes for new nonresidential uses with exceptions
2 for Birch Bay. And WCC 20.80.100(4) uses the County's conditional use process to allow
3 larger buildings for new nonresidential development meeting certain criteria for public
4 facilities, CP policies, and conformity to the rural character of the area.

5
6 Position of the Parties

7 Petitioner Hirst argues County Policy 2JJ-6 for Type I LAMIRDS does not comply with GMA
8 because building expansion and uses are not governed by the four GMA factors for Type I
9 LAMIRDS nor did the County define the "existing character of the area".¹⁹⁰ Petitioner
10 complains the County's development regulations are simply a list of uses allowed in Type I
11 LAMIRDS some of which were urban in nature and many not found there in 1990.¹⁹¹ For
12 Type III LAMIRDS, Petitioner argues Policy 2LL-2 allows existing businesses in 2012 to
13 expand beyond the GMA requirement of "small scale."¹⁹² Petitioner critiques development
14 regulations WCC 20.80.100(3) and (4) which allow expansion of rural businesses in Type III
15 LAMIRDS beyond the GMA definition of "isolated non-residential uses or new development
16 of isolated cottage industries and isolated small-scale businesses." Petitioner argues that a
17 building size up to 20,000 square feet in WCC 20.80.100(3) and apparently an unlimited
18
19

20
21 considering the parameters listed below, though the development or redevelopment need not meet every one
22 of those parameters."

22 (i) Building size, referring to the floor area of the largest building; (ii) Scale, referring to the combined floor
23 area of all buildings; (iii) Use, referring to whether the proposed use is included in the type of use existing
24 on July 1, 1990, in the area; or (iv) Intensity, referring to potential adverse impacts on surrounding
25 properties that did not exist on July 1, 1990."

25 ¹⁹⁰ RCW 36.70A.070(5)(d)(i)(C) "Any development or redevelopment in terms of **building size, scale, use, or**
26 **intensity** shall be consistent with the character of the existing areas. Development and redevelopment may
27 include changes in use from vacant land or a previously existing use so long as the new use conforms to the
28 requirements of this subsection(5)."

27 ¹⁹¹ Hirst Objections at 38.

28 ¹⁹² RCW 36.70A.070(5)(d)(iii). "The intensification of development on lots containing isolated nonresidential
29 uses or new development of isolated cottage industries and isolated small-scale businesses that are not
30 principally designed to serve the existing and projected rural population and nonresidential uses, but do
31 provide job opportunities for rural residents. **Rural counties may allow the expansion of small-scale**
32 **businesses as long as those small-scale businesses conform with the rural character of the area as**
defined by the local government according to RCW 36.70A.030(15). Rural counties may also allow new
small-scale businesses to utilize a site previously occupied by an existing business as long as the new small-
scale business conforms to the rural character of the area as defined by the local government according to
RCW 36.70A.030(15). Public services and public facilities shall be limited to those necessary to serve the
isolated nonresidential use and shall be provided in a manner that does not permit low-density sprawl."

1 footage in WCC 20.80.100(4) is not in keeping with the law or recent court decisions.
2 Petitioner argues the County ignored the Supreme Court's *Gold Star* remand where the
3 Court stated LAMIRDS are to be seen as a one-time recognition of existing development
4 rather than an on-going planning tool.¹⁹³
5

6 The County claims LAMIRD expansion, in either size or uses, is allowed through RCW
7 36.70A.011 – Findings – Rural Lands:

8 The legislature finds that to retain and enhance the job base in rural areas,
9 rural counties must have flexibility to create opportunities for business
10 development. Further, the legislature finds that rural counties must have the
11 **flexibility to retain existing businesses and allow them to expand.** The
12 legislature recognizes that not all business developments in rural counties
13 require an urban level of services; and that many businesses in rural areas fit
14 within the definition of rural character identified by the local planning unit.

15 Through this legislative finding, the County asserts it is given the flexibility to retain existing
16 businesses and allow them to expand.¹⁹⁴ The County explains that Policy 2LL-2 governs
17 Type III rural businesses with requirements from the statute and specifically addresses
18 “intensification of development.” The County alleges the Board did not find Type III LAMIRD
19 *uses* noncompliant and so the County only addressed *size* of buildings in Type III LAMIRDS.
20 The County asserts its development regulations now allow new small-scale businesses up
21 to 7,000 square feet, except in Birch Bay where new small-scale businesses cannot exceed
22 12,000 square feet. Larger, small-scale businesses may be conditionally permitted. The
23 County responds to Petitioners complaints by stating GMA does not contain a definition of
24 small scale; it is up to the jurisdiction to determine the definition. Likewise, jurisdictions are
25 given authority to determine the character of LAMIRDS and the County has done that by
26 stating “Birch Bay Lynden & I-5 area is that of larger buildings on larger parcels.” And,
27 lastly, the County states there is “no “small-scale” requirement in the GMA in regards to
28 intensification of existing development.”¹⁹⁵
29
30
31

32 ¹⁹³ *Id.* at 38.

¹⁹⁴ County's Compliance Report at 18 and County Response to Objections at 43.

¹⁹⁵ County Response to Objections at 45.

1
2 Applicable Law

3 **RCW 36.70A.070(5)(d) Limited areas of more intensive rural**
4 **development.** . . . the rural element may allow for limited areas of more
5 intensive rural development, including necessary public facilities and public
6 services to serve the limited area as follows:

7 [Type I] (i) Rural development consisting of the infill, development, or
8 redevelopment of existing commercial, industrial, residential, or mixed-use
9 areas, whether characterized as shoreline development, villages, hamlets,
10 rural activity centers, or crossroads developments.

11 **(A) A commercial, industrial, residential, shoreline, or mixed-use area**
12 **shall be subject to the requirements of (d)(iv) of this subsection,** but
13 shall not be subject to the requirements of (c)(ii) and (iii) of this subsection.

14 (B) Any development or redevelopment other than an industrial area or an
15 industrial use within a mixed-use area or an industrial area under this
16 subsection (5)(d)(i) must be principally designed to serve the existing and
17 projected rural population.

18 **(C) Any development or redevelopment in terms of building size, scale,**
19 **use, or intensity shall be consistent with the character of the existing**
20 **areas.** Development and redevelopment may include changes in use from
21 vacant land or a previously existing use so long as the new use conforms to
22 the requirements of this subsection (5);

23 [Type II] (ii) The intensification of development on lots containing, or new
24 development of, small-scale recreational or tourist uses, including commercial
25 facilities to serve those recreational or tourist uses, that rely on a rural
26 location and setting, but that do not include new residential development. A
27 small-scale recreation or tourist use is not required to be principally designed
28 to serve the existing and projected rural population. Public services and public
29 facilities shall be limited to those necessary to serve the recreation or tourist
30 use and shall be provided in a manner that does not permit low-density
31 sprawl;

32 [Type III] (iii) The intensification of development on lots containing isolated
nonresidential uses or new development of isolated cottage industries and
isolated small-scale businesses that are not principally designed to serve the
existing and projected rural population and nonresidential uses, but do

1 provide job opportunities for rural residents. Rural counties may allow the
2 expansion of small-scale businesses as long as those small-scale businesses
3 conform with the rural character of the area as defined by the local
4 government according to RCW 36.70A.030(15). Rural counties may also
5 allow new small-scale businesses to utilize a site previously occupied by an
6 existing business as long as the new small-scale business conforms to the
7 rural character of the area as defined by the local government according to
8 RCW 36.70A.030(15). Public services and public facilities shall be limited to
9 those necessary to serve the isolated nonresidential use and shall be
10 provided in a manner that does not permit low-density sprawl;

11 **(iv) A county shall adopt measures to minimize and contain the existing
12 areas or uses** of more intensive rural development, as appropriate,
13 authorized under this subsection...

14 (v) For purposes of (d) of this subsection, an **existing area or existing use** is
15 one that was in existence:

16 (A) **On July 1, 1990**, in a county that was initially required to plan under all of
17 the provisions of this chapter. (emphasis added)

18 Board Discussion

19 At the outset the Board notes the FDO on Remand made findings of invalidity concerning
20 the County's LAMIRD development regulations, placing the burden on the County to
21 demonstrate the regulations no longer interfere with GMA Goals 1 and 2. The burden
22 remains with the Petitioners to demonstrate failure to comply.

23 In *Gold Star*, our Supreme Court recognized that RCW 36.70A.070(5)(d)(i) allowed areas of
24 a county to be designated as LAMIRDs, allowing for "infill, development, or redevelopment
25 of existing commercial, industrial, residential or mixed use areas."¹⁹⁶ Specifically for
26 Whatcom County, the Court stated that "an existing area or existing use is one that was in
27 existence ...[o]n July 1, 1990."¹⁹⁷ Further the Court stated "LAMIRDS are not intended for
28 continued use as a planning device, rather, they are 'intended to be a one-time recognition
29 of existing areas and uses and are not intended to be used continuously to meet needs (real
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¹⁹⁶ *Gold Star Resorts v. Futurewise*, 167 Wn.2d at 727.
¹⁹⁷ *Id.* and quoting RCW 36.70A.(5)(d)(v)(A).

1 or perceived) for additional commercial and industrial lands.”¹⁹⁸ The Court concluded the
2 County was required to bring its plan into conformance with LAMIRD amendments to the
3 GMA contained in RCW 36.70A.070(5)(d)(iv) (in relevant part):

4 (iv) A county **shall adopt measures to minimize and contain the existing**
5 **areas or uses** of more intensive rural development, as appropriate,
6 authorized under this subsection.... In establishing the logical outer boundary,
7 the county shall address (A) the need to preserve the character of **existing**
8 natural neighborhoods and communities, (B) physical boundaries, such as
9 bodies of water, streets and highways, and land forms and contours, (C) the
10 prevention of abnormally irregular boundaries, and (D) the ability to provide
11 public facilities and public services in a manner that does not permit low-
12 density sprawl;

13 (v) For purposes of (d) of this subsection, an **existing area or existing use** is
14 one that was in existence:

15 (A) **On July 1, 1990**, in a county that was initially required to plan under all of
16 the provisions of this chapter (emphasis added)

17 The County states its CP policy statement for Rural Communities (Type I LAMIRDs) is
18 based on legislative findings in RCW 36.70A.011,¹⁹⁹ i.e., that rural counties must have the
19 flexibility to retain existing businesses and allow them to expand. The Board notes that
20 legislative findings do not create legally binding obligations; rather, duties of compliance are
21 created by the substantive provisions of a statute.²⁰⁰ In the present matter, the law of the
22 case is unequivocally established by the Supreme Court, which remanded Whatcom
23 County’s LAMIRD provisions with the express instruction that the statutory criteria of RCW
24 36.70A.070(5)(d) must be applied, explaining: “LAMIRDs are not intended . . . to be used
25 continuously to meet needs . . . for additional commercial and industrial lands.” Applying this
26
27

28
29 ¹⁹⁸ *Id.* at 727-728, citing *People for a Livable Community v. Jefferson County*, WWGMHB 03-2-0009c, FDO
(Aug. 22, 2003).

30 ¹⁹⁹ *Ex. R-075A* at 24 and RCW 36.70A.011: “Further, the legislature finds that rural counties must have the
31 flexibility to retain existing businesses and allow them to expand. The legislature recognizes that not all
32 business developments in rural counties require an urban level of services; and that many businesses in rural
areas fit within the definition of rural character identified by the local planning unit.”

²⁰⁰ See, e.g., *Petso II v. City of Edmonds*, CPSGMHB 09-3-0005, FDO (Aug. 17, 2009), at 9, and cases cited
in n.6.

1 rule, the Board could find Whatcom County's introduction to Rural Communities²⁰¹ and its
2 policies in Goal 2JJ compatible with the GMA's requirements for Type I LAMIRDs²⁰² **if the**
3 **County did not allow exemptions.**

4
5 The Board found exemptions in policies and development regulations. County Policy 2JJ-6
6 states businesses may expand to sizes greater than existed in the area in 1990, provided
7 expansion is otherwise consistent with the character of the area in 1990 in terms of uses
8 and intensity.²⁰³ This does not comply with the statutory requirements for LAMIRDs nor the
9 Supreme Court's clear statement: "an existing area or existing use is one that was in
10 existence ...[o]n July 1, 1990."²⁰⁴ County Policy 2JJ-4, 2JJ-5 and 2JJ-6 reflect the GMA
11 constraints when expanding existing businesses in Type I LAMIRDs. For existing
12 businesses in a Type III LAMIRD, Policy 2LL-2 also rightfully allows expansion in
13 accordance with WCC 20.80.100(1); this development regulation allows use and size limited
14 to that which is consistent with 1990 limits in GMA.
15
16

17 WCC 20.80.100(1) as adopted by the County in Ordinance 2012-032 addressed the finding
18 in the FDO on Remand that combining square footage in one LAMIRD and applying it to
19 another LAMIRD violated the statutory LAMIRD criteria. The County in Ordinance 2012-032
20 corrected this error by analyzing uses and building sizes in 1990 and creating a table in
21 WCC 20.80.100(1) showing each LAMIRDs' floor area per building and per type of use.²⁰⁵
22 The table also contains a combined maximum floor area per type of use. This table
23 indicates the maximum square footage allowed for Type I LAMIRDs and for each type of
24 use (e.g. Acme LAMIRD allows a combination of uses for Retail/Office/Restaurant/Lodging
25 for a maximum square footage of 2,734 and for Public/Community a maximum of 21,869 sq.
26
27

28
29 ²⁰¹ Ex. R-075A at 24

30 ²⁰² As required in RCW 36.70A.070(5)(d)(i)(c)

31 ²⁰³ Ex. R-075 at 25

32 ²⁰⁴ *Gold Star Resorts v. Futurewise*, 167 Wn.2d at 727 (December 2009).

²⁰⁵ 20.80.100 LAMIRD requirements. "(1) Building Size in Rural Communities. Within areas designated in the Comprehensive Plan as rural community, which are limited areas of more intensive development as described in RCW 36.70A.070(5)(d)(i), permitted maximum building sizes shall be in accordance with building sizes that existed in each area on July 1, 1990, as shown in the following table."

1 ft.) The table is based on 1990 uses and building sizes. This helps define what is allowed
2 in each Type I LAMIRD in accordance with RCW 36.70A.070(5)(d)(i). WCC 20.80.100(1)
3 assists property owners in Type I LAMIRDs if they want to expand their business. The
4 Board finds this section meets RCW 36.70A.070(5)(d)(i) requirements.
5

6 However, the County stepped beyond GMA bounds (and beyond the bounds of the *Gold*
7 *Star* decision) when it adopted WCC 20.80.100(2), (3) and (4) because these sections
8 exempt Type I LAMIRDs from GMA requirements for existing character in 1990 and
9 exempts Type III LAMIRDs from requirements for size, scale, use and intensity. For Type I
10 LAMIRDs, WCC 20.80.100(2) allows the zoning administrator to approve other uses or
11 larger buildings than shown in the table. Through an administrative approval process,
12 building sizes or uses may be permitted that do not meet the “size, scale, use and intensity”
13 parameters of 1990 development. In short, WCC 20.80.100(2) allows exceptions that
14 swallow the rule.
15
16

17 Policy 2LL-2 grants an exemption for Rural Businesses which are “businesses existing on
18 July 1, 2012” from GMA’s “small-scale” requirement for Type III LAMIRDs. Further, WCC
19 20.80.100(3) limits **new** businesses to 5,000 square feet, but exempts Birch Bay businesses
20 from “small scale” and allows expansion to 20,000 square feet.²⁰⁶ Next, WCC 20.80.100(4)
21 is an exemption for larger buildings of undefined size as long as they meet three criteria in
22 WCC 20.80.100(4)(a, b and c).²⁰⁷ Both development regulations contradict the Supreme
23
24

25
26 ²⁰⁶ WCC 20.80.100(3) Within areas designated in the Comprehensive Plan as rural business, which are limited
27 areas of more intensive development as described in RCW 36.70A.070(5)(d)(iii), new nonresidential uses are
28 subject to a maximum building size of 5,000 square feet, except in the Birch Bay-Lynden/I-5 area where new
29 nonresidential uses are subject to a maximum building size of 12,000 square feet, which is considered “small-
30 scale” relative to existing uses in that area. For nonresidential uses that existed on July 1, 2012, building size
31 expansion to no greater than 8,000 square feet is permitted, except in the Birch Bay-Lynden/I-5 area, where
32 building size no greater than 20,000 square feet is permitted.

²⁰⁷ WCC 20.80.100 (4) Within a rural business designation, a larger building size for new nonresidential
development is permitted if a conditional use permit is granted per WCC 20.84.200. A conditional use permit
for a larger building size shall be subject to a finding that: (a) The larger building size will not cause the need
for additional public facilities to be provided in the area; (b) The proposal is consistent with the Comprehensive
Plan policies regarding the rural business designation; and (c) The proposed small-scale business conforms to
the rural character of the area.

1 Court's ruling that:

2 LAMIRDS are not intended for continued use as a planning device, rather,
3 they are "intended to be a one-time recognition of existing areas and uses
4 and are not intended to be used continuously to meet needs (real or
5 perceived) for additional commercial and industrial lands."²⁰⁸

6 Next, WCC 20.80.100(2), (3) and (4) do not comport with RCW 36.70A.070(5)(d)(iii). They
7 allow counties to expand small-scale businesses "as long as those small-scale businesses
8 conform with the rural character of the area as defined by the local government." In this
9 case, the County's Rural Character and Lifestyle section²⁰⁹ does not contain exemptions for
10 rural business to expand; the rural lifestyle section makes reference to businesses in
11 unincorporated communities as important contributors to the economy of Whatcom County
12 and the scale and intensity of businesses varies from home occupations to resource-based
13 industries with most large commercial and industrial development having been established
14 in the urban areas.²¹⁰ In addition, the Board notes the introduction to the Rural Business
15 Policies states "the Rural Business designation permits uses to continue while preventing
16 the spread of businesses in sprawl development patterns."²¹¹ The Board does not find
17 statements in the County's Rural Character description exempting rural businesses from
18 small-scale requirements of the GMA; it only finds an exemption in new Policy 2LL-2 and
19 the associated development regulations. Both the policy and development regulations
20 appear to be anticipating expansion of businesses by allowing them to increase by
21 conforming with criteria not referenced in the GMA LAMIRD provisions. With the Supreme
22 Court decision stating LAMIRDS are not designed to accommodate new growth and the
23 GMA requirement for LAMIRD Type III to conform to the rural character, the Board finds
24 clear error on the part of the County when it adopted CP Policy 2LL-2 and WCC
25 20.80.100(3) and (4) which exempts existing businesses in Type III LAMIRD from the
26
27
28
29

30 ²⁰⁸ *Gold Star*, 167 Wn. 2d. at 727-728. To the extent the County relies on the Board's orders in *Dry Creek*, (see
31 Whatcom Response, at 36), the Board notes the *Dry Creek* orders were issued before the Court's definitive
32 *Gold Star* decision.

²⁰⁹ *Ex. R-075A* at 8.

²¹⁰ *Id.* at 8-9

²¹¹ *Ex. R-075A* at 26.

1 “small-scale” requirement in RCW 36.70A.070(5)(d).

2
3 In sum, the County’s adoption of WCC 20.80.100(1) properly addressed the issue of
4 identifying size and uses in specific LAMIRDs in 1990, as required in the FDO on Remand.
5 However, in adopting WCC 20.80.100(2), (3), and (4), the County failed to comply with
6 RCW 36.70A.070(5)(d)(i) and (iii). The Board is left with the firm and definite conviction that
7 a mistake has been made.
8

9 **Conclusion:** Ordinance 2012-32, as it relates to Type I and Type III LAMIRDs, is clearly
10 erroneous in view of the entire record before the Board and in light of the goals and
11 requirements of the GMA.
12

13 *b. Type II LAMIRDs – Rural Tourism*

14 Positions of the Parties

15 In Ordinance 2012-032 Whatcom County made changes to its designation criteria for Type
16 II LAMIRDs, adding Policy 2HH-2A.4 specifying that Rural Tourism may be designated on
17 land that “does not exceed 20 acres.” Similarly, the development regulations defining
18 Tourist Commercial (TC) zoning, at WCC 20.63.253, allow uses up to 20 acres. In addition,
19 the County amended WCC 20.63.450 and .705 cross-referencing to WCC 20.80.100(2),(3)
20 and (4).²¹²
21
22

23 Futurewise argues that the CP and DR provisions for Rural Tourism and Rural Commercial
24 zoning, taken together, allow for large scale development, inconsistent with the limitation in
25 RCW 36.70A.070(5)(d)(ii).²¹³
26

27 **RCW 36.70A.070(5)(d)(ii)** provides the statutory basis for Type II LAMIRDs:

28 (ii) The intensification of development on lots containing, or new development
29 of, **small-scale recreational or tourist uses**, including commercial facilities
30 to serve those recreational or tourist uses, that rely on a rural location and
31

32 ²¹² Ex. R-075 at 42 and 44.

²¹³ Futurewise Concurrence and Objection, at 20-22, comparing the developed area of Semiahmoo Resort, an urban resort with a 19-acre footprint, if built out at the floor area ratio and height allowed in the TC zone.

1 setting, but that do not include new residential development. A **small-scale**
2 **recreation or tourist use** is not required to be principally designed to serve
3 the existing and projected rural population. Public services and public facilities
4 shall be limited to those necessary to serve the recreation or tourist use and
5 shall be provided in a manner that does not permit low-density sprawl[.]

6 Whatcom County CP Policy 2HH-2 provides the County’s designation criteria for Type II
7 LAMIRDs.²¹⁴

- 8 A. Locational Criteria. Rural tourism may be designated on land that:
- 9 1. Consists of one lot, or more than one lot, and
 - 10 2. Is not currently designated by the comprehensive plan as Urban Growth
11 Areas or Resource lands, and
 - 12 3. Is characterized by the intensification of development on lots containing,
13 or new development of, **small-scale recreational or tourist uses**,
14 including commercial facilities to serve those uses, that rely on a rural
15 location and setting, but that do not include new residential development,
16 other than a dwelling unit accessory to the business for use by the owner-
17 manager or caretaker.
 - 18 4. **Does not exceed 20 acres.**

19 Board Discussion

20 In order to establish a Rural Tourism designation, a property owner must seek a CP
21 amendment and meet the County criteria which mirror the GMA requirements for Type II
22 LAMIRDs, specifying the use must be “small-scale.” The property must also be rezoned
23 Tourist Commercial. The County points out, when TC zoning is located in an urban area, as
24 is Semiahmoo, it can fully develop to the levels allowed in the zoning district.²¹⁵ But new
25 tourist and recreational uses in the rural area, established through CP amendment and
26 concomitant rezoning, will be held to the small-scale standard, according to the County.

27 The first question before the Board is the County’s amendment of its Type II LAMIRD
28 criteria by adding “(4) does not exceed 20 acres.” The Board imagines a variety of tourist
29 and recreational uses might seek to locate in a county as rich in scenic and outdoor
30 opportunities as Whatcom – uses that rely on expanses of open land or waterfront with
31

32 ²¹⁴ Ex. R-075, pp. 22-23.

²¹⁵ County Response to Objections, at 32.

1 small-scale service facilities.²¹⁶ While Petitioner may fear a spread of casino-style resort
2 complexes, the CP provisions restrict the uses to “small scale” uses that are dependent on
3 “a rural location and setting.” The Petitioners have not carried their burden of demonstrating
4 the Policy 2HH-2A4 acreage maximum is inconsistent with RCW 36.70A.070(5)(d)(ii).

5
6 The second question is whether the County’s development regulations ensure that Rural
7 Tourism uses will be small-scale. The FDO on Remand issued a determination of invalidity
8 stating:

9
10 The TC District 20.63 contains no limit on building size, the number of
11 buildings or the size of a Type II LAMIRD, thus failing to ensure that the uses
12 are small-scale.²¹⁷

13 While the County has now restricted the acreage of a Type II LAMIRD and has imposed
14 building size restrictions through WCC 20.80.100(1) the County has the burden of
15 demonstrating its actions no longer substantially interfere with the goals of the GMA.

16
17 Petitioners have carried their burden to show noncompliance with respect to Tourist
18 Commercial regulations, for although the zoning criteria of WCC 20.63.010 call for “small-
19 scale” development, the building size exemptions in WCC 20.80.100(2),(3) and (4) are
20 written into the TC regulations at WCC 20.63.451 and .705.²¹⁸ The Board finds the County’s
21 development regulations for Type II LAMIRDs, specifically, the incorporation of the WCC
22 20.80.100(2) provisions into the WCC 20.63 provisions for rural Tourist Commercial uses,
23 does not comply with RCW 36.70A.070(5)(d)(ii).
24

25
26 ²¹⁶ The Board has found 20-acre Type II LAMIRDs compliant in site-specific cases: *Whitaker v. Grant County*,
27 EWGMHB No. 99-1-0012, Second Order on Compliance, (Nov. 1, 2004); *Better Brinnon Coalition v. Jefferson*
28 *County*, WWGMHB Case No. 03-3-0007, Amended FDO (Nov. 3, 2003).

29 ²¹⁷ FDO, at 170-171.

30 ²¹⁸ **WCC 20.63.450 Lot coverage. -- .451** “On a lot in a rural community designation, combined floor area of
31 all buildings shall not exceed that of a use of the same type that existed on a lot in that same rural community
32 designation on July 1, 1990, per WCC 20.80.100(1) except as provided in WCC 20.80.100(2).”
WCC 20.63.705 Proposed development or redevelopment in Tourist Commercial Zone Districts located within
a rural community designation will be consistent with the character of the area on July 1, 1990, in terms of
building size, scale, use, or intensity, per WCC 20.80.100(1), except as provided in WCC 20.80.100(2). In a
rural tourist designation, development or redevelopment shall be consistent with the Comprehensive Plan
policies for that designation. In a rural business designation, the maximum allowable floor area is 7,000 square
feet except as provided in WCC 20.80.100(3) and (4).

1 **Conclusion:** Petitioners have not met their burden of proving the County’s adoption of a
2 20-acre maximum size for Type II LAMIRDs violates GMA requirements. However, as to
3 requirements for “small-scale” standards for Type II LAMIRDs, the Board finds the County’s
4 incorporation of WCC 20.80.100(2), (3) and (4) into its TC regulations at WCC 20.63.451
5 and .705 does not comply with RCW 36.70A.070(5)(d)(ii). Ordinance 2012-32, as it relates
6 to requirements for “small-scale” standards for Type II LAMIRDs, is clearly erroneous in
7 view of the entire record before the Board and in light of the goals and requirements of the
8 GMA.
9

10
11 *iii. Logical Outer Boundaries (LOB)*

12 Positions of the Parties

13 In adopting Ordinance 2012-032, the County modified the boundaries of a number of its
14 designated LAMIRDs to comply with the GMA standard and in accordance with the FDO on
15 Remand. The parties have stipulated to the County’s compliance on most of these boundary
16 revisions.
17

18
19 Petitioners have continued objection to the LOBs for two Type I LAMIRDs – Smith/Guide
20 Meridian and Birch Bay Lynden/Valley View. In both cases, the FDO on Remand
21 determined the LOBs for the LAMIRDs at issue substantially interfered with GMA Goals 1
22 and 2, and made findings of invalidity.²¹⁹ The burden is on the County to demonstrate that
23 the LAMIRD LOBs established in Ordinance 2012-032 no longer thwart Goal 1, by allowing
24 urban development outside urban areas, or Goal 2, by encouraging sprawl.²²⁰
25
26

27 Applicable Law

28 The statutory provision for determining Type I LAMIRD LOBs is set forth in RCW
29 36.70A.070(5)(d)(iv and v):

30 (iv) A county shall adopt measures to minimize and contain the existing areas
31 or uses of more intensive rural development, as appropriate, authorized under
32

²¹⁹ FDO at 171.

²²⁰ RCW 36.70A.320(4); RCW 36.70A.020(1) and (2).

1 this subsection. Lands included in such existing areas or uses shall not
2 extend beyond the logical outer boundary of the existing area or use, thereby
3 allowing a new pattern of low-density sprawl. Existing areas are those that are
4 **clearly identifiable and contained** and where there is a **logical boundary**
5 **delineated predominately by the built environment**, but that may also
6 include undeveloped lands if limited as provided in this subsection. The
7 county shall establish the logical outer boundary of an area of more intensive
8 rural development. In establishing the logical outer boundary, the county shall
9 address (A) the need to preserve the character of existing natural
10 neighborhoods and communities, (B) physical boundaries, such as bodies of
11 water, streets and highways, and land forms and contours, (C) the prevention
12 of abnormally irregular boundaries, and (D) the ability to provide public
13 facilities and public services in a manner that does not permit low-density
14 sprawl;

15 (v) For purposes of (d) of this subsection, an existing area or existing use is
16 one that was in existence:

17 (A) On July 1, 1990, in a county that was initially required to plan under all of
18 the provisions of this chapter.

19 Board Discussion

20 The Supreme Court in *Gold Star* explains the law applicable in this case:

21 Counties must “adopt measures to **minimize and contain the existing areas**
22 or uses of more intensive rural development” so that “[l]ands included in such
23 existing areas or uses **shall not extend beyond the logical outer boundary**
24 **of the existing area** or use, thereby allowing a new pattern of low-density
25 sprawl.” Laws of 1997, ch.429, § 7(d)(iv); RCW 36.70A.070(5)(d)(iv). For
26 Whatcom County, “an existing area or existing use is one that was in
27 existence ... [o]n July 1, 1990.” RCW 36.70A.070(5)(d)(v)(A).²²¹

28 Smith/Guide Meridian LOB

29 In establishing a boundary for the LAMIRD at Smith/Guide Meridian, the County identified a
30 node of highway frontage centered around Smith Road on the west side of Guide Meridian.

31 The staff proposal showed a northern boundary where the developed area ended – as
32 shown in 1990 aerial photos and on the ground today.²²² The County then added a dog-leg,

²²¹ *Gold Star*, 167 Wn.2d at 727 (emphasis added).

²²² *Ex. R-113* (PDS Staff Proposal, 3/8/12), Issue 16, “Proposed Rezoning and CP Change” and aerial photo, showing undeveloped property between the LAMIRD node and the isolated developed parcel.

1 extending the LAMIRD boundary north across seven largely undeveloped off-highway acres
2 in order to capture a single small building on a one-acre parcel at the north end of the dog-
3 leg.²²³

4
5 The Board has previously ruled that expanding the boundaries of a Type I LAMIRD “across
6 lands otherwise not eligible for inclusion to reach a smaller area of ‘built environment’
7 exceeds the proper scope of a logical outer boundary.”²²⁴ Indeed, as *Gold Star* explained,
8 extension beyond the LOB of the existing developed area “allow[s] a new pattern of low-
9 density sprawl”²²⁵ in violation of GMA Goal 2 – “Reduce the inappropriate conversion of
10 undeveloped land into sprawling, low-density development.”

11
12 For the Smith & Guide Meridian LOB, the Board finds the existence of one small building
13 with a commercial use in 1990²²⁶ does not equate to an area of “more intense” rural
14 development when separated by seven acres from other development. The Board finds the
15 dog-leg does not create a boundary that is “clearly identified and contained,” as required by
16 the statute, nor is it a logical boundary “delineated predominately by the built environment.”
17 The County’s action does not comply with the Type I LAMIRD LOB requirements of RCW
18 36.70A.070(5)(d)(iv) and thwarts GMA Goal 2.
19
20

21 Birch Bay/Lynden/Valley View LOB

22 In the FDO on Remand, the Board considered LAMIRD designation for three parcels east of
23 the I-5 freeway interchange at Birch Bay/Lynden and Valley View Roads. A portion of the
24 two larger parcels had previously been developed with a recreational vehicle park. Over
25 Futurewise’s objection that the LOB on these parcels should be restricted to the area
26 actually developed commercially, the Board allowed the LOB to contain the whole of the two
27 larger parcels but not the third smaller parcel. However, the third included parcel, by
28
29

30
31 ²²³ *Ex. R—084A*, aerial photos, Smith & Guide Meridian and Axton & Guide Meridian.

32 ²²⁴ *1000 Friends of Washington v Thurston County*, WWGMHB No. 05-2-0002, Compliance Order (Nov. 30, 2007), at 1-2.

²²⁵ RCW 36.70A.070(5)(d)(iv)), cited in *Gold Star*, 167 Wn.2d at 727.

²²⁶ See *Ex. R-084D*, Parcel No. 390225510322 at 6 - “Vet office later became church.”

1 common agreement, was not characterized by the built environment in 1990. Considering
2 the configuration of the lots, extension of the LOB to include this property is not necessary
3 to avoid an irregular outer boundary.²²⁷

4
5 In the compliance process, the County accepted a recently-submitted aerial photo showing
6 a structure on the two-acre parcel which the property owner estimated to have been about
7 1,200 square feet.²²⁸ On the basis of the photo, the County in Ordinance 2012-032
8 continued to include the two-acre parcel in the LAMIRD.²²⁹

9
10 The *Gold Star* decision calls for Type I LAMIRDS to be “clearly identifiable and contained”
11 and not extended beyond the logical outer boundary of the (1990) existing use. The FDO
12 on Remand notes the Birch Bay/Lynden/Valley View LAMIRD designation is based on
13 evidence of a trailer court that occupied a portion of the two larger parcels some years
14 ago.²³⁰ It takes a stretch of legal reasoning to allow “more intensive rural development” on
15 the whole of these two properties based on that prior use, but the Board’s FDO allowed it. A
16 further two-acre extension of the LOB based on a one-time structure on an adjacent parcel
17 is a stretch too far.

18
19
20 The Board notes this Type I LAMIRD is directly east of an I-5 interchange with an extensive
21 Type III LAMIRD on the west. Understandably the property owners seek to develop a
22 commercial node on the east side of the interchange. Thus, the effect of the inappropriately-
23 large Type I LAMIRD will be to permit intense development in a rural area that has not been
24 predominantly characterized by the built environment, in violation of RCW 36.70A.070(5)(d)
25 and thwarting GMA Goal 2.

26
27
28 For the Birch Bay/Lynden & Valley View LOB, the Board finds the existence of one small
29

30 ²²⁷ FDO at 99

31 ²²⁸ C-724, at 2-3. Note: Petitioners raise questions about the authenticity of this evidence., which the Board
32 does not need to decide. Hirst, Objection at 53.

²²⁹ Compliance Report at 12.

²³⁰ *Exs.R-084A and R-084D*; see FDO at 54-56 discussing requirement that LOBs must be based on “areas” of
1990 more-intense development, not “parcels” or contiguous ownership.

1 building in 1990 does not equate to a two-acre addition of “more intense rural development.”
2 The Board finds the LOB adopted by the County does not create a boundary that is “clearly
3 identifiable and contained,” as required by the statute, nor is it a logical boundary
4 “delineated predominately by the built environment.” The County’s action does not comply
5 with the Type I LAMIRD LOB requirements of RCW 36.70A.070(5)(d)(iv) and frustrates the
6 fulfillment of GMA Goal 2.
7

8 **Conclusion:** The Board finds and concludes the County’s action in adopting the LOBs for
9 these two LAMIRDS was clearly erroneous in view of the entire record before the Board and
10 in light of the goals and requirements of the GMA. The boundaries adopted in Ordinance
11 2012-032 for the LAMIRDS at Smith & Guide Meridian and Birch Bay/Lynden & Valley View
12 do not comply with the requirements of RCW 36.70A.070(5)(d)(iv) and thwart GMA Goals 1
13 and 2.
14

15
16 G. Development Regulations –Water Transmission Lines WCC 20.82.030(3)

17 The Board now addresses those development regulations that were referenced in the CP
18 policies and challenged by Petitioners as noncompliant.
19

20 Positions of the Parties

21 In Futurewise’s challenge to Ordinance 2011-013, it alleged the County’s development
22 regulations allowed extensions of urban water and sewer service beyond the urban area.
23 The FDO on Remand referenced RCW 36.70A.110(4) and *Thurston County v Cooper Point*
24 *Association*²³¹ both providing that it is not appropriate for urban governmental services to be
25 extended or expanded in rural areas except in those limited circumstances shown to be
26 necessary to protect basic public health and safety and the environment.²³² The Board
27 found the County’s provision for sewer line extensions as a conditional use - WCC
28 20.82.030(4) - violated GMA because, even though the County argued some sewer lines
29 may need to cross through rural areas in order to service urban areas they can legally
30
31
32

²³¹ *Thurston County v. Cooper Point Association* ,148 Wn.2d 1,57 P.3d 1156 (2002).

²³² FDO at 74.

1 serve, this code section did not have appropriate limitation preventing connections to rural
2 lots.

3
4 Futurewise argued both the water lines regulation – WCC 20.82.030(3) – and the sewer
5 lines regulation – WCC 20.82.030(4) – were deficient. The Board ruled on the sewer
6 regulation only, as WCC 20.82.030(3) had not been listed in the PFR.²³³ On remand, in
7 Ordinance 2012-032, the County amended both regulations. WCC 20.82.030(4) was
8 revised by adding language prohibiting sewer service to rural lots.²³⁴ The parties agree that
9 the revision of the sewer line provision satisfies the FDO and complies with RCW
10 36.70A.110(4).
11

12
13 Ordinance 2012-032 also revised WCC 20.82.030(3) – the conditional use requirement for
14 water transmission lines – with the following:

15 (3) New water lines with an inside diameter greater than eight inches except
16 for new water lines in conformance with a state approved water
17 comprehensive plan and consistent with the Whatcom County
18 Comprehensive Plan, which shall be permitted outright so long as they are
19 **water transmission lines** or are located and installed by a public utility or
20 municipality within urban growth areas, LAMIRDS, or rural neighborhoods.
(emphasis added)

21 The County explained this amendment does not allow urban governmental services outside
22 UGAs except for water transmission lines which require a conditional use permit and must
23 conform to an approved water comprehensive plan. The County added LAMIRDS and
24 Rural Neighborhoods to eligible areas for such water lines. The County's new provision
25 requires that if water lines are outside the UGA, LAMIRD or Rural Neighborhood, they must
26 be water **transmission** lines.²³⁵ This amendment, the County argues, now addresses the
27 need for water purveyors to fulfill state approved comprehensive plans which allow water
28 transmission lines to carry water from source to treatment facility or storage unit.
29
30

31 ²³³ FDO at 73, n.144.

32 ²³⁴ *Ex. R-075*, p. 89 of 90: "Sewer lines shall not be extended to serve lots in rural areas unless such
extensions are shown to be necessary to protect basic public health and safety and the environment, and
when such services are financially supportable at rural densities and do not permit urban development."

²³⁵ County Response to Objections at 47.

1 Petitioners argue the County violates RCW 36.70A.110(4) for two reasons with this
2 amendment. First, when water transmission lines are permitted outright within a LAMIRD or
3 Rural Neighborhood, the County is extending high-capacity water service into rural areas.
4 This violates RCW 36.70A.110(4) which limits urban services to UGAs.
5

6
7 Second, Petitioners urge the County's amendment again violates RCW 36.70A.110(4)
8 because when the new amendment is read along with the County's Water Supply Code
9 (WCC 24.11.050), the County will always connect property to water transmission lines
10 regardless of the line's location.
11

12 WCC 24.11.050 General requirements.

13 C. The director shall evaluate the availability of a public water system prior to
14 approving the use of a private water system. If it is determined that a public
15 water system is available and willing to provide water, **the applicant must**
16 **connect to that public water system when:**

17 1. The applicant proposes to use surface water, spring water, rainwater, or
18 contaminated groundwater; or

19 2. The applicant proposes to build on a lot located in a short subdivision or
20 long subdivision that Whatcom County approved based on the availability of
21 public water; or

22 **3. The existing public water system has transmission lines adjacent to**
23 **the property line of the applicant; or**

24 4. The existing public water system has defined a "service area boundary" in
25 accordance with the Whatcom County Coordinated Water System Plan which
26 includes the property of the applicant.
27

28 Thus, as Petitioners read the regulations, taken together, they **require** a property owner in a
29 rural area (LAMIRD or Rural Neighborhood) to connect to public water transmissions lines if
30 their property was adjacent to the line. Petitioners understand transmission lines to carry
31 water to provide an urban level of service. They assert requiring connection to the
32 transmission line violates .110(4) if the property is not in a UGA.

In its response to objections, the County requests the Board to ignore Petitioner's
arguments on WCC 20.82.030(3) because they were not raised in the prior PFR and are

1 beyond the scope of the rulings in the FDO on Remand.²³⁶ The County asserts Petitioners'
2 challenge to the water line provisions requires a new PFR.²³⁷ The Board notes Petitioners
3 have in fact filed a new PFR. However, the matter was raised in the prior proceeding and
4 has been exhaustively briefed and argued here.²³⁸

5
6 Board Discussion

7 **RCW 36.70A.110(4)** states:

8 In general, it is not appropriate that urban governmental services be extended
9 to or expanded in rural areas except in those limited circumstances shown to
10 be necessary to protect public health and safety and the environment and
11 when such services are financially supportable at rural densities and do not
12 permit urban development.

13 For LAMIRDs, RCW 36.70A.070(5)(d) provides: "The rural element may allow for
14 [LAMIRDs], including necessary public facilities and services to serve the limited area. . . ."
15 Such services "shall be provided in a manner that does not permit low-density sprawl."²³⁹
16 WCC 24.11.050 requires an applicant to connect to a public water system when "the
17 existing public water system has transmission lines adjacent to the property line of the
18 applicant." WCC 20.82.030(3), requires a conditional use permit or major project permit for
19 "new water lines with an inside diameter greater than eight inches **except** for new water
20 lines in conformance with a state approved water comprehensive plan and consistent with
21 the Whatcom County Comprehensive Plan, which shall be permitted outright so long as they
22 are water transmission lines **or** are located and installed by a public utility or municipality
23 within urban growth areas, LAMIRDs, or rural neighborhoods."

24
25
26 It appears WCC 20.82.030(3) permits water transmission lines **outright** without a
27 conditional use permit as long as those new water lines conform to approved water system

28
29
30 _____
²³⁶ County Response to Objections, at 47.

31 ²³⁷ Citing WAC 242-3-940(5).

32 ²³⁸ County Response to Objections, pp. 46-56; Futurewise Concurrence and Objections, at 34-37; Hirst's
Concurrence and Hirst Objections, at 33-36.

²³⁹ Provision repeated in RCW 36.70A.070(5)(d)(ii) – for Type II LAMIRDs; RCW 36.70A.070(5)(d)(iii) – for
Type III LAMIRDs; and RCW 36.70A.070(5)(d)(iv) – for LOBs.

1 plans and are transmission lines or are installed by a PUD in a UGA, LAMIRD or Rural
2 Neighborhood. Then, WCC 24.11.050 requires a property owner to connect to a
3 transmission line if one is adjacent to his property and the water provider is willing to serve.
4 So, if a property owner is in a LAMIRD or Rural Neighborhood (none of which are in a city or
5 a UGA) or seeks to develop adjacent to a transmission line through the rural area, then they
6 must connect to the transmission line. This on its face appears to violate RCW
7 36.70A.110(4) and *Cooper Point v. Thurston County* which says no extension of urban
8 services outside UGA.
9

10
11 The County's brief points to the definition of "transmission line" in WAC 246-290-010:²⁴⁰

12 (267) "Transmission line" means pipes used to convey water from source,
13 storage, or treatment facilities to points of distribution or distribution mains,
14 and from source facilities to treatment or storage facilities. This also can
15 include transmission mains connecting one section of distribution system to
16 another section of distribution system as long as this transmission main is
17 clearly defined on the plans and ***no service connections are allowed along
the transmission main.***

18 This definition of transmission clearly does not allow service connections. Reading WCC
19 20.82.030(3) with "transmission line" defined to exclude service hook ups solves some of
20 the difficulty with the County's code provision. However, the General Requirements
21 provision of WCC 24.11.050(C) creates a contradiction, or at least, confusion, by requiring
22 hook up to a public water system that has transmission lines adjacent to the property.
23 The County urges that WCC 24.11.050(C) be read with a focus on the first clauses of
24 section:
25

26
27 **If it is determined that a public water system is available and willing to
28 provide water, the applicant must connect to that public water system
29 when ...**

30 **3. The existing public water system has transmission lines adjacent to the
31 property line of the applicant.**
32

²⁴⁰ Because the County Code does not define "transmission lines," the County states the applicable State regulatory definition applies. County Response to Objections at 49.

1 The County explains the public utility's "availability and willingness" necessitates its
2 compliance with Department of Health regulations requiring an approved water system plan
3 that demonstrates compliance with RCW 36.70A.110(4). According to the County, water
4 service will not be "available" in the rural area even if the transmission line is adjacent,
5 because the approved water system plan is required to comply with the prohibition of rural
6 service in RCW 36.70A.110.
7

8 Water districts are governed by Title 57 RCW which provides for the adoption of a water
9 district general comprehensive plan. Under RCW Chapter 57.16, water district general
10 comprehensive plans do not become effective unless approved by the legislative authority
11 of the county, and any cities included within the district, together with applicable state
12 agency approvals. RCW 57.16.010(7) requires that the "general comprehensive plan" of
13 the district "shall not provide for the extension or location of facilities that are inconsistent
14 with the requirements of RCW 36.70A.110." Furthermore, state agencies are required to
15 comply with GMA comprehensive plans and development regulations. RCW 36.70A.103.
16 Thus, there is a process in state law for ensuring that future water service extension
17 proposals are evaluated for compliance with the GMA.
18
19

20
21 Addressing the provision for public services in LAMIRDs, the Plan policies appear to follow
22 the statutory requirements: "The rural element may allow for [LAMIRDs], including
23 necessary public facilities and public services to serve the limited area," such services to be
24 "provided in a manner that does not permit low-density sprawl."²⁴¹ The Board notes the CP
25 requires that areas designated Rural Community (Type I LAMIRDs) already have public
26 services available, including water lines with a capacity to serve the LAMIRD.²⁴² For Rural
27 Tourism (Type II) LAMIRDs, Policy 2HH-2(B)(3) limits public services to those necessary to
28 serve recreation or tourist use in a manner that does not permit low-density sprawl.²⁴³ For
29 Rural Business (Type III) LAMIRDs, Policy 2LL-1 requires compliance with RCW
30

31
32 ²⁴¹ RCW 36.70A.070(5)(d).

²⁴² *Ex. R-075A*, pp. 21-22, Policy 2HH-1(B) and (C).

²⁴³ See RCW 36.70A.070(5)(d)(ii).

1 36.70A.070(5)(d)(iii) which states: "Public facilities and services shall be limited to those
2 necessary to serve the isolated nonresidential use and shall be provided in a manner that
3 does not permit low-density sprawl."
4

5 The Board finds a continuing tension between WCC 24.11.050 which requires connection to
6 water transmission lines²⁴⁴ and WCC 20.82.030(3) which requires connections to water
7 transmission lines within Rural Neighborhoods²⁴⁵ and RCW 36.70A.110(4)²⁴⁶ which states it
8 is not appropriate that urban governmental services be extended to or expanded in rural
9 areas.
10

11 The County's action can only be rationalized

- 12
- 13 a) if WCC 24.11.050 is read to condition service connection, not on mere adjacency of
 - 14 a transmission line, but on the availability of water pursuant to water plans that
 - 15 comply with RCW 36.70A.010(4), and the adjacency of distribution lines, and
 - 16 b) if WCC 20.82.030(3) is read to define "transmission lines" pursuant to WAC 246-290-
 - 17 10 (267) as lines to which no service connection is allowed.
18
19

20 _____
21 ²⁴⁴ WCC 24.11.050 General requirements. "A. Applicants must submit all required forms, letters and
22 documents to the director. B. The director will consider applications for water availability proposing to use
23 groundwater, spring water, surface water, sea water or rainwater. C. The director shall evaluate the
24 availability of a public water system prior to approving the use of a private water system. If it is determined that
25 a public water system is available and willing to provide water, the **applicant must connect to that public**
26 **water system when:** 1. The applicant proposes to use surface water, spring water, rainwater, or contaminated
27 groundwater; or 2. The applicant proposes to build on a lot located in a short subdivision or long subdivision
28 that Whatcom County approved based on the availability of public water; or **3. The existing public water**
29 **system has transmission lines adjacent to the property line of the applicant;** or 4. The existing public
30 water system has defined a "service area boundary" in accordance with the Whatcom County Coordinated
31 Water System Plan which includes the property of the applicant."

32 ²⁴⁵ (3) New water lines with an inside diameter greater than eight inches except for new water lines in
conformance with a state approved water comprehensive plan and consistent with the Whatcom County
Comprehensive Plan, which shall be permitted outright so long as they are **water transmission lines** or are
located and installed by a public utility or municipality within urban growth areas, LAMIRDS, or rural
neighborhoods.

²⁴⁶ RCW 36.70A.110.(4) "In general, cities are the units of local government most appropriate to provide urban
governmental services. In general, **it is not appropriate that urban governmental services be extended to**
or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic
public health and safety and the environment and when such services are financially supportable at rural
densities and do not permit urban development."

1 This invites misunderstanding and non-compliance. The Board has a firm and definite
2 conclusion that a mistake has been made.

3
4 The Board finds the County's amendment of WCC 20.82.030(3) fails to comply with RCW
5 36.70A.110(4) because "transmission lines" are allowed outright through the rural area
6 without "transmission" being defined as excluding service connection and in the context of
7 other regulations that require rural residents to connect to adjacent "transmission lines."²⁴⁷

8 The resulting extension of urban-level water service in the rural area is likely to increase
9 sprawl in violation of GMA Planning Goal 2.
10

11 **Conclusion:** The Board finds and concludes the amendments to WCC 20.82.030(3) do not
12 comply with RCW 36.70A.110(4) and create an internal inconsistency with other regulations.
13 Ordinance 2012-32, as it relates to the amendments to WCC 20.82.030(3), is clearly
14 erroneous in view of the entire record before the Board and in light of the goals and
15 requirements of the GMA.
16

17 18 **V. SUMMARY OF CONCLUSIONS**

19 **Stipulated issues:** Upon review of the record cited by the parties, the Board finds the
20 County in compliance on these issues.
21

22 **Structure of Cross-Referencing Plan and Rural Lands Narrative**

23 **Conclusion:** In light of the unique posture of this case, the County's choice to cross-
24 reference development regulations as "measures" in its comprehensive plan is not clearly
25 erroneous. The Petitioners have not met their burden of demonstrating the County's cross-
26 referencing structure violates RCW 36.70A.040(3)(d) or RCW 36.70A.130(1)(d). However,
27 the Board notes that the County must cross-reference both CP and DRs if it makes changes
28 to either. Similarly, Petitioners have not met their burden of showing the County's Rural
29 Element narrative violates RCW 36.70A.030(15).
30
31

32 ²⁴⁷ The County might consider amending WCC 24.11.050 to require connection to "distribution systems" rather than "a transmission line," and amending WCC 20.82.030(3) to include the prohibition on service connections to a transmission line.

1 **Population Allocation**

2
3 **Conclusion:** The Board concludes the County’s Policy 2DD-1 on population allocation
4 does not create an internal inconsistency that violates RCW 36.70A.070(preamble) or RCW
5 36.70A.130. The annual review process undertaken in Policy 2DD-1 is a “measure to
6 contain and control rural development” that complies with RCW 36.70A.070(5)(c)(i).
7

8 **Variety of Rural Densities**

9 **Conclusion:** The rural element of Whatcom’s Plan as amended by Ordinance 2012-032
10 fails to provide a variety of rural densities in that it lacks measures to protect rural character
11 or contain rural development at any lesser densities than 1du/5ac. Thus Ordinance 2012-
12 032 fails to comply with RCW 36.70A.070(5)(b) and RCW 36.70A.070(5)(c)(i) and (ii).
13

14 **Lot Clustering**

15 **Conclusion:** The Board concludes the County’s reliance on clustering as a measure to
16 protect rural character is misplaced because (a) the clustering provisions lack enforceable
17 criteria and (b) the resulting reserve tracts are not permanently protected. This fails to
18 comply with RCW 36.70A.070(5)(c)(i) and (iii).
19
20
21

22 **Visual Compatibility**

23 **Conclusion:** The Board finds the Petitioners have not carried their burden of proof
24 demonstrating the County’s policies fail to comply with RCW 36.70A.070(5)(c)(ii) regarding
25 visual compatibility of rural development with the surrounding area.
26

27 **Critical Area Measures for Chuckanut Wildlife Corridor**

28 **Conclusion:** The Petitioners have not carried their burden of proof that the County failed to
29 comply with RCW 36.70A.050(5)(c)(iv).
30
31
32

1 **Water Resources Measures for Lake Whatcom**

2 **Conclusion:** For Lake Whatcom, the Board finds the County’s “measures to protect surface
3 and ground water” do not comply with RCW 36.70A.070(5)(c)(iv) because the County has
4 not adopted measures that protect Lake Whatcom water quality, as instructed by Ecology.
5

6 The Board notes Petitioners have filed a new PFR challenging Ordinance 2012-032,
7 including the sufficiency of its measures to protect surface and groundwater resources. The
8 Board **reserves decision** on the County’s measures to protect rural water resources,
9 beyond the Lake Whatcom measures, to allow the question to be thoroughly briefed and
10 argued in Case No. 12-2-0013.
11

12 **LAMIRDS: Rural Neighborhoods/RRDO Designation and Boundaries**

13 **Conclusion:** The Board finds Petitioners have failed to carry their burden of proof
14 demonstrating Rural Neighborhood designation and RRDO overlay for the prior LAMIRDS is
15 noncompliant with the GMA. However, the Board finds that the boundaries of the Rural
16 Neighborhood designations for Fort Bellingham/Marietta, North Bellingham, and Welcome
17 are in violation of RCW 36.70A.070 (internal comprehensive plan consistency). The Board
18 remands Ordinance 2012-032 to the County to achieve GMA compliance by reviewing the
19 Rural Neighborhood designation boundaries for Fort Bellingham/Marietta, Lake Bellingham,
20 and Welcome and considering conforming them to the development pattern as of 2011,
21 consistent with Policies 2-MM 1-4. See invalidity section below.
22
23
24

25 **Type I and III LAMIRDS**

26 **Conclusion:** County’s adoption of WCC 20.80.100(1) properly addressed the issue of
27 identifying size and uses in specific LAMIRDS in 1990, as required in the FDO on Remand.
28 However, in adopting WCC 20.80.100(2), (3), and (4), the County failed to comply with
29 RCW 36.70A.070(5)(d)(i) and (iii). The Board is left with the firm and definite conviction that
30 a mistake has been made and that Ordinance 2012-32, as it relates to exemptions for Type
31 I and Type III LAMIRDS, is clearly erroneous in view of the entire record before the Board
32

1 and in light of the goals and requirements of the GMA. See invalidity section below.

2
3 **Type II LAMIRDs**

4 **Conclusion:** Petitioners have not met their burden of proving the County’s adoption of a
5 20-acre maximum size for Type II LAMIRDs violates GMA requirements. However, as to
6 requirements for “small-scale” standards for Type II LAMIRDs, the Board finds the County’s
7 incorporation of WCC 20.80.100(2), (3) and (4) into its TC regulations at WCC 20.63.451
8 and .705 does not comply with RCW 36.70A.070(5)(d)(ii). See invalidity section below.
9

10 **Logical Outer Boundaries (LOB)**

11 **Conclusion:** The boundaries adopted in Ordinance 2012-032 for the LAMIRDs at Smith &
12 Guide Meridian and Birch Bay/Lynden & Valley View do not comply with the requirements of
13 RCW 36.70A.070(5)(d)(iv) and thwart GMA Goals 1 and 2. See invalidity section below.
14

15 **Water Transmission Lines**

16 **Conclusion:** The Board finds and concludes the amendments to WCC 20.82.030(3) do not
17 comply with RCW 36.70A.110(4) and create an internal inconsistency with other regulations.
18
19

20 **VI. INVALIDITY**

21 Petitioners allege Whatcom County Ordinance No. 2012-032 adopted certain amendments
22 to the Comprehensive Plan and Development Regulations that substantially interfere with
23 GMA planning goals, and therefore, Petitioners request the Board make a Determination of
24 Invalidity.
25

26 **RCW 36.70A.302(1)** provides:

- 27 1) A board may determine that part or all of a comprehensive plan or
28 development regulations are invalid if the board:
29
30 (a) Makes a finding of noncompliance and issues an order of remand under
31 RCW 36.70A.300;
32
33 (b) Includes in the final order a determination, supported by findings of fact

1 and conclusions of law, that the continued validity of part or parts of the plan
2 or regulation would substantially interfere with the fulfillment of the goals of
3 this chapter; and

4 (c) Specifies in the final order the particular part or parts of the plan or
5 regulation that are determined to be invalid, and the reasons for their
6 invalidity.

7 A determination of invalidity can only be issued if the Board finds Ordinance No. 2012-032
8 fails to comply with the GMA and that its continued validity would substantially interfere with
9 the fulfillment of the GMA's goals. GMA Planning Goals 1, 2, 9, 10, and 12 in RCW
10 36.70A.020 state as follows:

11 (1) Urban growth. Encourage development in urban areas where adequate
12 public facilities and services exist or can be provided in an efficient manner.

13 (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land
14 into sprawling, low-density development...

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

18 (10) Environment. Protect the environment and enhance the state's high
19 quality of life, including air and water quality, and the availability of water...

20 (12) Public facilities and services. Ensure that those public facilities and
21 services necessary to support development shall be adequate to serve the
22 development at the time the development is available for occupancy and use
23 without decreasing current service levels below locally established minimum
24 standards.
25

26 The Board has determined that Whatcom County failed to comply with the GMA and has
27 remanded this matter to the County to achieve compliance under RCW 36.70A.300. The
28 Board hereby finds and concludes that the continued validity of certain parts of Ordinance
29 No. 2012-032 would substantially interfere with the fulfillment of the GMA Planning Goals 1,
30 2, 9, 10, and 12.
31
32

1 Moreover, there is evidence in the record of ongoing applications for subdivision approvals
2 and permits, indicating a high risk for project vesting during the pendency of this case, which
3 would render GMA planning procedures as ineffectual and moot -- if such project vesting
4 were to occur, then the remand of this case to the County would be meaningless and there
5 would be no practical way to address GMA compliance.
6

7 **Invalidity Removed**

- 8 • Eliza Island the County removed the LAMIRD designation and thus, the Board
9 rescinds invalidity.
- 10 • Acton LAMIRD was separated from Smith LAMIRD and thus, the Board rescinds
11 invalidity as to the Logical Outer Boundary.
- 12 • Van Wyck LAMIRD boundaries were adjusted, and thus the Board rescinds invalidity
13 as to the Logical Outer Boundary.
- 14 • Emerald Lake South LAMIRD boundaries were adjusted, thus the Board rescinds
15 invalidity as to the Logical Outer Boundary.
- 16 • In Policy 2HH-3(B)(1) the County replaced “should” with “shall” in regards to the
17 isolation criteria for Type III LAMIRDs and thus the Board found this action rescinds
18 invalidity for this aspect of the Type III LAMIRD policy.²⁴⁸
19
20
21

22 **Invalidity Imposed**

23 In this case, invalidity is warranted with regard to the amended provisions of the County’s
24 development regulations that permit development in Type I LAMIRDs without regard to the
25 character of the existing area in terms of size, scale, use and intensity that was found within
26 the LAMIRD on July 1, 1990, as required by the GMA. To allow these code provisions and
27 LOBs to remain viable during the remand phase of this appeal would permit uses to vest in
28 the LAMIRDs and create patterns of development wholly inconsistent with the existing areas
29 as of July 1, 1990. The Board finds that, if permitted, such development would substantially
30 interfere with Goal 1 of the GMA, by encouraging urban levels of development *outside*
31
32

²⁴⁸ County Compliance Report at 4.

1 urban areas and Goal 2, by encouraging sprawl.

2
3 The Board concludes that the continued validity of the amended portions of development
4 regulations and the LOBs of certain LAMIRDs described below would substantially interfere
5 with Goal 1 and 2 of the GMA and therefore finds them to be invalid.

6
7 The County made no changes to the LOB for Birch Bay/Lynden/Valley View following the
8 FDO on Remand, thus the Board continues to extend invalidity.

9
10 For the LOB Smith/Acton Guide Meridian the County separated Smith/Acton into two
11 LAMIRDS, however the Smith LOB is still noncompliant. Therefore, the Board rescinds
12 invalidity for Acton LAMIRD, but extends invalidity for Smith LAMIRD.

13
14 The County corrected the noncompliant LAMIRDs for Fort Bellingham and North
15 Bellingham, by removing the LAMIRD designation and replacing it with the Rural
16 Neighborhood designation. However, the Rural Neighborhood boundaries still incorporate
17 properties which are large undeveloped lots. The Board extends invalidity until the County
18 corrects the Rural Neighborhood boundaries for Fort Bellingham, North Bellingham and
19 Welcome to exclude existing large lots.

20
21
22 Upon compliance to define size and maximum floor area per building for Type I and Type III
23 LAMIRDs, the County created a table in WCC 20.80.100(1) which now guides the maximum
24 combined floor area allowed for all buildings. This table establishes specific square footage
25 for each identified LAMIRD. With this action, the County corrected the Board's concerns in
26 its FDO on Remand. However, the County also adopted WCC 20.80.100(2), (3) and (4)
27 allowing exceptions to the square footage, uses and types of businesses for Type I and
28 Type III LAMIRDs that exceed what the statute allows. WCC 20.80.100(2) also allows
29 exceptions to the "small scale" requirement of Type II LAMIRDs. The Board imposes
30 invalidity on WCC 20.80.100(2), (3) and (4) until the County corrects its development
31 regulations to contain Type I, II and III LAMIRDs within the confines of RCW
32

1 36.70A.070(5)(d)(i)(ii) and (iii).

2
3 The Board imposes invalidity for those sections of the following development regulations
4 referencing WCC 20.80.100(2), (3) or (4):

- 5
- 6 • Rural General Commercial District WCC 20.59.320 and .500 which reference WCC
 - 7 20.80.100(2),(3) and (4).
 - 8 • Neighborhood Commercial District WCC 20.60.300 and .450 which reference WCC
 - 9 20.80.100(2),(3) and (4).
 - 10 • Small Town Commercial District WCC 20.61.320 and .500 which reference WCC
 - 11 20.80.100(2),(3) and (4).
 - 12 • Tourism Commercial District WCC 20.63.450 and .705 which reference WCC
 - 13 20.80.100(2),(3) and (4).
 - 14 • Resort Commercial District WCC 20.64.708 which references WCC 20.80.100(2),(3)
 - 15 and (4).
 - 16 • General Manufacturing District WCC 20.67.300 and .450 which reference WCC
 - 17 20.80.100(2), (3) and (4).
 - 18 • Rural Industrial Manufacturing District WCC 20.69.300 and .450 which reference
 - 19 WCC 20.80.100(2), (3) and (4).
 - 20
 - 21
 - 22

23 **VII. ORDER**

24 The Board finds Whatcom County has achieved compliance on some issues and failed to
25 achieve compliance with RCW 36.70A.070 (preamble), RCW 36.70A.130(1)(d), and RCW
26 36.70A.070(5) and is in continuing noncompliance on the issues listed above. This case is
27 remanded to the County for compliance and the following compliance schedule shall apply:
28

29

Item	Date Due
Compliance Due on identified areas of noncompliance	July 3, 2013
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	July 17, 2013

30
31
32

1	Objections to a Finding of Compliance	July 31, 2013
2	Response to Objections	August 7, 2013
3	Compliance Hearing	August 21, 2013
4	Location to be determined	9:00 a.m.

5 Dated this 4th day of January, 2013.

6
7
8 _____
Nina Carter, Board Member

9
10 _____
Margaret Pageler, Board Member

11
12 _____
Raymond Paoella, Board Member

13
14
15 **Note: This is a final decision and order of the Growth Management Hearings Board**
16 **issued pursuant to RCW 36.70A.300.²⁴⁹**

17
18
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28
29
30 _____
31 ²⁴⁹ Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on
32 all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty
days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is
incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management
Hearings Board is not authorized to provide legal advice.