

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
2 WESTERN WASHINGTON REGION  
3 STATE OF WASHINGTON  
4

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

11 Petitioners,

12 v.  
13

14 WHATCOM COUNTY,

15 Respondent,  
16

17 and

18 FORT HILL, LLC, ET AL., MARCO A.  
19 BOULOS, ET AL., AND DOUGLAS  
20 PULLAR,  
21

22 Intervenors.  
23

Case No. 11-2-0010c

Case No. 05-2-0013

ORDER FINDING COMPLIANCE

24 THIS Matter came before the Board at a hearing on May 7, 2014, following submittal  
25 of Whatcom County's (County) Compliance Report<sup>1</sup> filed in response to the Board's Order  
26 Finding Non-Compliance Regarding Issue 2.<sup>2</sup> Petitioners filed a Concurrence in a Finding  
27 of Compliance.<sup>3</sup>  
28

29 The compliance hearing was held telephonically and attended by Board members  
30 Margaret Pageler, Raymond Paoletta, and Nina Carter, with Ms. Carter presiding.  
31

32 <sup>1</sup> Filed April 7, 2014.

<sup>2</sup> GMHB Order As Amended on Reconsideration Finding Non-Compliance Regarding Issue 2, January 23, 2014.

<sup>3</sup> Petitioners' Concurrence in a Finding of Compliance, filed April 15, 2014.

1 Petitioners were represented by Tim Trohimovich. The County was represented by Karen  
2 Frakes. Intervenors were represented by Brad Swanson.

### 4 I. BURDEN OF PROOF

5 Following a finding of non-compliance, the jurisdiction is given a period of time to  
6 adopt legislation to achieve compliance.<sup>4</sup> After the period for compliance has expired, the  
7 Board is required to hold a hearing to determine whether the local jurisdiction has achieved  
8 compliance.<sup>5</sup> For purposes of Board review of the comprehensive plans and development  
9 regulations adopted by local governments in response to a non-compliance finding, the  
10 presumption of validity applies and the burden is on the challenger to establish the new  
11 adoption is clearly erroneous.<sup>6</sup>

13 In order to find the City's action clearly erroneous, the Board must be "left with the  
14 firm and definite conviction that a mistake has been made."<sup>7</sup> Within the framework of state  
15 goals and requirements, the Board must grant deference to local governments in how they  
16 plan for growth:

18 The legislature intends that the board applies a more deferential standard of  
19 review to actions of counties and cities than the preponderance of the  
20 evidence standard provided for under existing law. . . Local comprehensive  
21 plans and development regulations require counties and cities to balance  
22 priorities and options for action in full consideration of local circumstances.  
23 The legislature finds that while this chapter requires local planning to take  
24 place within a framework of state goals and requirements, the ultimate  
25 burden and responsibility for planning, harmonizing the planning goals of this  
26 chapter, and implementing a county's or city's future rests with that  
27 community.<sup>8</sup>

28 In sum, the burden is on the Petitioners to overcome the presumption of validity by  
29 demonstrating the action taken by the City is clearly erroneous in light of the goals and  
30 requirements of chapter 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).

31 <sup>4</sup> RCW 36.70A.300(3)(b).

32 <sup>5</sup> RCW 36.70A.330(1) and (2).

<sup>6</sup> RCW 36.70A.320(1), (2) and (3).

<sup>7</sup> *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, (1993).

<sup>8</sup> RCW 36.70A.3201, in part.

1 Where not clearly erroneous and thus within the framework of state goals and requirements,  
2 the planning choices of the local government must be granted deference.

## 3 4 **II. PROCEDURAL HISTORY**

5 The Petitioners' challenge involved the County's adoption of Ordinance No. 2013-  
6 028 and 2013-048 amending County development regulations regarding lot clustering.  
7 These Ordinances amended the County's clustering provisions from aspirational (should) to  
8 enforceable (shall) language in the Residential Rural, Rural Residential Island and Rural  
9 zones and clarified the definition of and restricted uses in reserve areas. However,  
10 Petitioners moved for reconsideration and responded that although the regulations have  
11 been improved, the County still violated RCW 36.70A.070(5)(c).<sup>9</sup> Upon the motion for  
12 reconsideration, the Board reviewed WCC 20.36.310(6) and found the County continued to  
13 fail to meet RCW 36.70A.070(5)(b) and (c) rural element requirements by eliminating  
14 standards capping cluster units and separating clusters on lots 20 acres or larger.<sup>10</sup>  
15  
16

## 17 **III. ISSUE TO BE DECIDED**

18 Whether the County's action in response to the Board's Amended Order on  
19 Reconsideration appropriately addresses the violations of RCW 36.70A.070(5)(b) and (c).  
20

## 21 **IV. DISCUSSION**

22 In reviewing the County's action in Ordinance 2014-023, the Board finds that the  
23 County did eliminate the exception for lots greater than 20 acres.<sup>11</sup> The action addresses  
24 the Board's concerns regarding lot clustering in its January 23, 2014 Order. The County  
25 has now preserved rural character by allowing no more than 16 residential lots in one  
26 cluster and at least 500 feet must separate clusters. Petitioners concur with the County's  
27 compliance action.  
28  
29

30  
31 <sup>9</sup> Futurewise Motion for Reconsideration, GMHB Case Nos. 05-2-0013 and 11-2-0010c, *Futurewise v.*  
32 *Whatcom County (Governor's Point Development Company)* (December 2, 2013) at 3.

<sup>10</sup> Case Nos. 05-2-0013 and 11-2-0010c Order Finding Compliance Regarding Issues 1, 2, 3, 4, and 8; Finding  
Non-Compliance Regarding WCC 20.36.310(6) In Issue 2. [Re: Ordinance Nos. 2013-028 and 2013-043] (As  
Amended On Reconsideration) at 15.

<sup>11</sup> Whatcom County Compliance Report on Issue 2 (Lot Clustering), April 7, 2014, Ex. A.

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**V. ORDER**

Based on the foregoing, the Board determines the County, through adoption of Ordinance No. 2014-023, has addressed the findings of noncompliance on Issue 2 in the Board's January 23, 2014 Order on Reconsideration. The Board finds and concludes Whatcom County is in COMPLIANCE with the Growth Management Act regarding Issue 2.

Dated this 14<sup>th</sup> day of May, 2014.

  
\_\_\_\_\_  
Nina Carter, Board Member

  
\_\_\_\_\_  
Margaret Pageler, Board Member

/not available for signature /  
\_\_\_\_\_  
Raymond Paoella, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>12</sup>**

<sup>12</sup> Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840. 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.

1                                   **BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD**  
2                                   **WESTERN WASHINGTON REGION**

3  
4                                   Case No. 11-2-0010c and 05-2-0013  
5                                   Governors Point Development Company, et al v. Whatcom County

6  
7                                   **DECLARATION OF SERVICE**

8                                   I, LYNN TRUONG, under penalty of perjury under the laws of the State of  
9 Washington, declare as follows:

10                                   I am the Office Assistant for the Growth Management Hearings Board. On the date  
11 indicated below a copy of the ORDER FINDING COMPLIANCE in the above-entitled case  
12 was sent to the following through the United States postal mail service:

13  
14                                   Tim Trohimovich  
15                                   Futurewise  
16                                   816 Second Ave, Ste. 200  
17                                   Seattle, WA 98104

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  Langabeer & Traxler, P.S.  
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18                                   Jean O. Melious  
19                                   Nossaman LLP  
20                                   1925 Lake Crest Drive  
21                                   Bellingham, WA 98229

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DATED this 14th day of May, 2014.

  
Lynn Truong, Office Assistant