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7 BEFORE THE
8 GROWTH MANAGEMENT HEARINGS BOARD
9 WESTERN WASHINGTON REGION
10 STATE OF WASHINGTON

11 FUTUREWISE, GOVERNORS POINT
12 DEVELOPMENT COMPANY, TRIPLE R.
13 RESIDENTIAL CONSTRUCTION, INC.
14 AND THE SAHLIN FAMILY, ERIC
15 HIRST, LAURA LEIGH BRAKKE,
16 WENDY HARRIS AND DAVID
17 STALEIM, AND CITY OF BELLINGHAM,

18 Petitioners,

19 v.

20 WHATCOM COUNTY,

21 Respondent.

Case No.: 11-2-0010c

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

**FUTUREWISE’S CONCURRENCE
WITH A FINDING OF COMPLIANCE
IN PART AND OBJECTION TO A
FINDING OF COMPLIANCE IN PART**

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816 Second Avenue, Suite 200
Seattle, Washington 98104
(206) 343-0681 Ext. 118
e-mail: tim@futurewise.org

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1 **I. Introduction**

2 Futurewise again appreciates that Whatcom County done much of the difficult work
3 necessary to update its comprehensive plan’s rural element, including the designation of limited
4 areas of more intense rural development (LAMIRDs), and development regulations to comply
5 with the Growth Management Hearings Board’s (Board) findings of noncompliance and the
6 Growth Management Act (GMA).¹ While many of these changes comply with the GMA, this
7 Prehearing Brief documents that Whatcom County’s Rural Comprehensive Plan Element and
8 implementing regulations adopted in response to the Board’s findings of noncompliance still
9 violate the GMA. To reduce duplicative briefing we have divided the issues with the Hirst
10 Petitioners and we adopt their arguments by reference.

11 **II. Standard of Review and Burden of Proof**

12 In analyzing the standard of review and burden of proof in cases where the Board has
13 made a finding of invalidity, the Western Board concluded:

14 Subsection (4) of [RCW 36.70A.320] states that a local government which is
15 subject to a determination of invalidity:

16 “...has the burden of demonstrating that the ordinance or resolution it has
17 enacted in response to the determination of invalidity will no longer
substantially interfere with the fulfillment of the goals of this chapter
under the standard in RCW 36.70A.302(1).”

18 The statute is clear that the burden is on the local government to show that it no
19 longer substantially interferes with fulfillment of the goals of the Act.

20 Thus, in this case, we hold that the County bears the burden of showing it no
longer substantially interferes with the goals of the Act as to the invalidity issue.

21
22

¹ *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013, Final Decision and Order (Sept. 20, 2005), at 7
23 – 19 of 37 *affirmed in part and reversed in part Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791
(2009).



1 Once, or if, that burden is met then the petitioner bears the burden of meeting the
2 clearly erroneous standard as to the compliance issue.²

3 So for the issues in this case where the Board has made a finding of invalidity, the burden
4 is initially on the County.³ Where the County meets this burden or for the issues where invalidity
5 was not found, the Washington Supreme Court has set the standards the Board applies to
6 Whatcom County's compliance efforts adopted by Whatcom County Ordinance No. 2012-032:

7 The Board is charged with adjudicating GMA compliance, and, when necessary,
8 with invalidating noncompliant comprehensive plans and development
9 regulations. The Board shall find compliance unless it determines that the action
10 by the state agency, county, or city is clearly erroneous in view of the entire
11 record before the board and in light of the goals and requirements of [the GMA].
12 To find an action "clearly erroneous," the Board must be left with the firm and
13 definite conviction that a mistake has been committed.⁴

14 The Whatcom County comprehensive plan and development regulation amendments that
15 are not subject to a finding of invalidity are presumed valid.⁵ The burden of proof for those
16 amendments is on Futurewise to demonstrate that the aspects of the comprehensive plan and
17 development regulations Futurewise challenges are not in compliance with the GMA.⁶ The
18 record and this objection will show that Futurewise has met its burden.

19 Whatcom County may argue that its policy choices are entitled to deference under the
20 GMA. The Supreme Court and Court of Appeals have addressed this issue and held that this
21 deference is not unbounded:

22 ² *Hudson and Huber v. Clallam County*, WWGMHB Case No 96-2-0031, Rescission of Invalidity and Finding of
23 Compliance (Dec. 11, 2007), at *2.

24 ³ RCW 36.70A.320(4). The findings of invalid can be found at *Futurewise et al. v. Whatcom County*, Case No. 11-2-
0010c, Final Decision and Order and Case No. 05-2-0013 Order Following Remand on Issue of LAMIRDS (Jan. 9,
2012), at 170 – 72 of 177.

⁴ *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133, 138 (2000).

⁵ RCW 36.70A.320(1); RCW 36.70A.320(4).

⁶ RCW 36.70A.320.

1 While the County is correct that RCW 36.70A.320(1) requires “boards to grant
2 deference to counties” in their development plans, such deference is not
unbounded. The GMA itself limits a county’s discretion. As our State Supreme
Court recently stated,

3 “Local governments have broad discretion in developing
4 [comprehensive plans] and [development regulations] tailored to
5 local circumstances.” *Diehl*, 94 Wn. App. at 651. Local discretion
is bounded, however, by the goals and requirements of the GMA.
6 In reviewing the planning decisions of local governments, the
Board is instructed to recognize “the broad range of discretion that
7 may be exercised by counties and cities *consistent with the*
requirements of this chapter” and to “grant deference to counties
8 and cities in how they plan for growth, *consistent with the*
requirements and goals of this chapter.” RCW 36.70A.3201
(emphasis in original).

9
10 *King County v. Cent. Puget Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 561, 14
P.3d 133 (2000).

11 Consistent with *King County*, the Board acts properly when it foregoes deference
12 to a county’s plan that is not “consistent with the requirements and goals” of the
GMA.⁷

13 Finally, the purpose of a compliance hearing is to determine compliance with the GMA.

14 As the Western Board wrote in the *OEC* Compliance Order, “RCW 36.70A.330 directs [the
15 Board] to hold a hearing after finding non-compliance ‘for the purpose of determining whether
16 the ... county ... is in compliance with the requirements of this chapter’ (the Act).”⁸

17 III. Concurrence in Compliance

18 Futurewise agrees that Whatcom County has achieved compliance for the following
19 amendments:

20
21 _____

22 ⁷ *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31 P.3d 28, 36 (2001), *affirmed Thurston*
County v. Cooper Point Ass’n, 148 Wn.2d 1, 5 P.3d 1156, 1158 (2002).

23 ⁸ *Olympic Environmental Council (OEC) et al. v. Jefferson County*, WWGMHB Case No. 94-2-0017, Compliance
Hearing Order (Aug. 17, 1995), at *2.

- 1 ■ Revising Policy 2A-11 so contiguous lands in common ownership is not a basis for
2 including additional land in Limited Areas of More Intense Rural Development (LAMIRDs)
3 and deleting the definition of common ownership that allowed UGA expansions in violation
4 of the GMA.⁹
- 5 ■ Revising Policy 2HH-1 so Type 1 LAMIRD boundaries are based on “areas” as the GMA
6 requires rather than “parcels.”¹⁰
- 7 ■ Removal of the reference to past uses in Policy 2HH-2 for Type III LAMIRD locations.¹¹
- 8 ■ Replacement of “should” with “shall” with respect to the isolation of Type III LAMIRDs.¹²
- 9 ■ Replacement of “should” with “shall” in restating the requirement for consistency with the
10 size, scale, use, or intensity of development in Type I LAMIRDs in Policy 2JJ-5.¹³
- 11 ■ Removal of the Rural Residential Development Overlay (“RRDO”) from lands within the
12 Lake Whatcom watershed, although the County has failed to adopt measures to protect Lake
13 Whatcom, as the Hirst Petitioners’ objections to a finding of compliance documents.¹⁴

15 ⁹ Index of Record No. (IR) R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A
16 Comprehensive Plan Amendments p. 6 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report;
Futurewise et al. v. Whatcom County, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
17 Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 51 – 53 of 177.

18 ¹⁰ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 22 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; *Futurewise et al. v. Whatcom*
County, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013 Order Following Remand on Issue
19 of LAMIRDs (Jan. 9, 2012), at 54 – 56 of 177.

20 ¹¹ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 23 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; *Futurewise et al. v. Whatcom*
County, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013 Order Following Remand on Issue
21 of LAMIRDs (Jan. 9, 2012), at 57 of 177.

22 ¹² IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 23 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; *Futurewise et al. v. Whatcom*
County, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013 Order Following Remand on Issue
23 of LAMIRDs (Jan. 9, 2012), at 60 of 177.

24 ¹³ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 25 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; *Futurewise et al. v. Whatcom*
County, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013 Order Following Remand on Issue
of LAMIRDs (Jan. 9, 2012), at 62 of 177.

- 1 ■ Revising the zoning regulation definition of “Rural Business” to make it consistent with the
- 2 GMA.¹⁵
- 3 ■ Eliminating the LAMIRD for Eliza Island and revising the Van Wyck and Emerald Lake
- 4 LAMIRDs.¹⁶

IV. Argument

6 **Issue 1. Does the comprehensive plan as amended by Ordinance No. 2011-**
 7 **013 and Ordinance No. 2012-032 Exhibits A: Comprehensive Plan**
 8 **Amendments and Exhibit C: Official Zoning Map and Comprehensive**
 9 **Plan Map Amendments violate RCW 36.70A.020(1), (2), (8), (9), and**
 10 **(10); RCW 36.70A.030(15); RCW 36.70A.060; RCW 36.70A.070; RCW**
 11 **36.70A.070(1); RCW 36.70A.070(5); RCW 36.70A.110; RCW**
 12 **36.70A.130(1) and (4); RCW 36.70A.360; and RCW 36.70A.362?**

13 **1a. Do the policies, narrative, and descriptors fail to include measures that**
 14 **apply to rural development and protect the rural character of the area as**
 15 **established by the county as required by RCW 36.70A.070 and RCW**
 16 **36.70A.070(5)(c) including the failure to revise the description of Rural**
 17 **Character and Lifestyle narrative and Policies 2DD-2 and 2GG-8?**

18 The Board found that the rural element of the Whatcom County Comprehensive Plan
 19 lacked measures that apply to rural development to protect the County’s rural character as
 20
 21
 22

23 ¹⁴ IR R-075 and R-075C, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
 24 Comprehensive Plan Map 8 Amendments Proposed Comprehensive Plan Change Maps for Lake Whatcom and
 South Bay in Tabs R-075 and R-075C of Whatcom County’s Compliance Report; *Futurewise et al. v. Whatcom*
County, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013 Order Following Remand on Issue
 of LAMIRDs (Jan. 9, 2012), at 146 – 55 of 177.

¹⁵ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments pp. 89 –
 90 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance Report; *Futurewise et al. v. Whatcom*
County, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013 Order Following Remand on Issue
 of LAMIRDs (Jan. 9, 2012), at 76 – 78 of 177.

¹⁶ IR 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 Eliza Island, Cain Lake,
 Lake Samish, Emerald Lake, and Van Wyck in Tabs R-075 and R-075C of Whatcom County’s Compliance Report;
Futurewise et al. v. Whatcom County, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
 Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 100 – 01, 112 – 13, and 114 – 15 of 177.



1 required by RCW 36.70A.070(5)(c)(i), (ii), and (iii).¹⁷ The Board also found that the rural
2 element lacked measures that apply to rural development and to protect the County’s rural
3 character as required by RCW 36.70A.070(5)(c)(iv) for the Chuckanut Wildlife and Corridor,
4 Lake Whatcom’s water resources, and surface and ground water resources in areas subject to the
5 Rural Residential Development Overlay (RRDO).¹⁸ As to RCW 36.70A.070(5)(c)(iv), we adopt
6 the arguments of the Hirst petitioners. For RCW 36.70A.070(5)(c)(i), (ii), and (iii), this
7 Concurrence will now show that the newly adopted measures fail to comply with the GMA.
8 RCW 36.70A.130(1)(d) provides that “[a]ny amendment of or revision to a comprehensive land
9 use plan shall conform to [the GMA.]” Whatcom County Ordinance No. 2012-032 amended the
10 narrative and measures required by RCW 36.70A.070(5)(c).¹⁹

11 **A. The amendments to the “Rural Character and Lifestyle” narrative fail to**
12 **comply with the GMA.**

13 RCW 36.70A.070(5)(b) requires in part that [t]he rural element shall provide for a variety
14 of rural densities [and] uses” Appropriate rural densities and uses “are not characterized by
15 urban growth and ... are consistent with rural character.”²⁰ For densities and uses to be consistent
16 with rural character the rural element must accurately describe the county’s rural character. In an
17 apparent response to the Board’s findings of noncompliance, Whatcom County has amended the
18 “Rural Character and Lifestyle Narrative.”²¹ However, the amendments to the “Rural Character
19 and Lifestyle” narrative fail to comply with RCW 36.70A.070. The Rural Character and

20 ¹⁷ *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
21 Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 33 – 40 of 177.

¹⁸ *Id.* at 40 – 45 of 177; *Id.* 128 of 177.

¹⁹ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
22 pp. 8 – 15 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

²⁰ RCW 36.70A.070(5)(b).

²¹ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
23 pp. 8 – 9 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

1 Lifestyle narrative states that “[w]hile agriculture and forestry are practiced in the rural areas, it
2 is generally on a smaller scale than in the resource areas that are set aside specifically for those
3 purposes.”²² The available information indicates that in many rural areas that is not the case. The
4 *Whatcom County Rural Land Study: A Collaborative Report Identifying Rural Areas of*
5 *Agricultural Significance* Exhibit C: Proposed Area Summaries shows that the type and scale of
6 the agricultural operations in the East Badger Road R10A area, Minaker Road R10A area, and
7 Lawrence Road R5A area are very similar to the agricultural operations on the nearby
8 agricultural lands of long-term commercial significance.²³ Because the narrative fails to
9 acknowledge that many rural agriculture operations are the same as on agricultural lands of long-
10 term commercial significance it violates RCW 36.70A.070.

11 Similarly, the narrative mentions 10 and 20 acre lots, but *Whatcom County Rural Land*
12 *Study: A Collaborative Report Identifying Rural Areas of Agricultural Significance* shows that
13 large areas in the rural area have lots 40 acres or larger.²⁴ The narrative should describe these
14 larger lots too.

15 The bullets on page 9 of 33 of amended Comprehensive Plan *Chapter Two: Land Use*
16 omit any mention of some of the elements for rural character in the definition on pages 7 and 8
17 of 33 of that chapter.²⁵ For example, there is no mention of protecting ground water resources
18 even though most rural residents and businesses rely on ground water for their drinking and
19

20 ²² IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
21 p. 8 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

22 ²³ C-726 in Tab C-726 of this Concurrence, Whatcom County Agricultural Advisory Committee, *Whatcom County*
Rural Land Study: A Collaborative Report Identifying Rural Areas of Agricultural Significance (February 2007)
23 Exhibit C: Proposed Area Summaries pp. 21 – 23-B.

24 ²⁴ *Id.* all of Exhibit C.

²⁵ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
pp. 7 – 8 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

1 potable water. Some of the county’s aquifers have already become polluted and many areas the
2 available surface and ground water is fully allocated.²⁶

3 **B. The measures governing rural development do not comply with RCW
4 36.70A.070(5)(c).**

5 Many of the adopted measures governing rural development are either not measures, fail
6 to comply with RCW 36.70A.070(5)(c), or fail to address some of the requirements in RCW
7 36.70A.070(5)(c). RCW 36.70A.070(5)(c) provides in full:

8 (c) Measures governing rural development. The rural element shall include
9 measures that apply to rural development and protect the rural character of the
10 area, as established by the county, by:

11 (i) Containing or otherwise controlling rural development;

12 (ii) Assuring visual compatibility of rural development with the
13 surrounding rural area;

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

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

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

20 In *Kittitas County v. Eastern Washington Growth Management Hearings Board*, the Washington
21 State Supreme Court held that the rural element of the comprehensive plan must include
22 measures that “require or assure” compliance with the requirements of the GMA.²⁷

23 ²⁶ IR C-671D in Tab C-671D of this Concurrence, Whatcom County, *Comprehensive Water Resource Plan* pp. 49 –
24 52 (Feb. 9, 1999); IR C-053 in Tab C-053 of this Concurrence, WRIA 1 Planning Unit, *WRIA 1 Watershed
Management Plan Phase 1 Section 2 Assessments, Problem Identification, and Findings* p. 58 of 160 (March 25,
2005).

²⁷ *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 162 – 63, 256 P.3d
1193, 1202 (2011).

1 The GMA does not define “measures.” Where the GMA has not specifically defined a
2 term, the courts “apply its common meaning, which may be determined by referring to a
3 dictionary.”²⁸ The courts frequently use WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY.²⁹
4 The most applicable definition from that dictionary is “to regulate or adjust by a rule or standard:
5 govern”³⁰ So measures must regulate by a rule or standard.

6 Whatcom County’s adoption of comprehensive plan policies and development
7 regulations as the measures governing rural development does both too much and too little. It
8 does too much because it may obligate the county to follow the requirements for comprehensive
9 plan amendments to amend these development regulations. If they are not amended through that
10 process, does that mean that the 2012 version of those regulations are a part of the
11 comprehensive plan, not the amended version? Or is the amended version part of the
12 comprehensive even though it did not exist in 2012? Over time this will create confusion,
13 uncertainty, and increase costs for the county and applicants. This violates RCW
14 36.70A.130(2)(d)’s requirement that “[a]ny amendment of or revision to development
15 regulations shall be consistent with and implement the comprehensive plan.” If the
16 comprehensive plan has adopted the 2012 version of the development regulation, an amendment
17 to that development regulation is inconsistent with the comprehensive plan.

18 The proposal does too little because it does not adequately address several elements of
19 rural character. The follow subsections of this concurrence address the measures intended to
20 comply with RCW 36.70A.070(5)(c)(i) through (iii).

22 ²⁸ *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132, 1140 (2005).

23 ²⁹ *Id.*

23 ³⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY p. 1400 (2002).

1 (i) **The measures fail to contain or otherwise control rural**
2 **development in compliance with the GMA.**

3 RCW 36.70A.070(5)(c)(i) requires the rural element to include measures that apply to
4 rural development and protect the rural character of the area, as established by the county, by ...
5 (i) [c]ontaining or otherwise controlling rural development[.]” In the Board’s order finding that
6 rural element lacked adequate measures to protect rural character, the Board upheld the county’s
7 policies as providing for a variety of rural densities, in part because of the belief that the
8 measures to protect rural character would address the distribution of rural densities.³¹ But none
9 of the measures in Policy 2DD-2 address a variety of rural densities. There are no measures
10 indicating which areas should be designated as Rural and zoned Residential Rural-5 or Rural-5A
11 or Residential Rural-10 or Rural-10A.³² Further, large areas of rural Whatcom County have lots
12 40 acres or larger.³³ There are no measures to prevent the subdivision of these large lots into five
13 or ten acre lots. So the potential to develop five acre lots through the rural area is not contained
14 as RCW 36.70A.070(5)(c)(i) requires.

15 This concern is magnified because currently only 21.8 percent of rural Whatcom County
16 is currently zoned R10A.³⁴ Sixty-nine percent of rural Whatcom County is zoned for five acre
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19 ³¹ *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
20 Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 73 of 177 “The Board agrees with the County that
21 these provisions, when brought into compliance by the adoption of appropriate “measures” as indicated above and in
22 the context of sub-area plans, assure a variety of rural densities.”

23 ³² IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
24 pp. 10 – 15 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

³³ C-726 in Tab C-726 of this Concurrence, Whatcom County Agricultural Advisory Committee, *Whatcom County
Rural Land Study: A Collaborative Report Identifying Rural Areas of Agricultural Significance* (February 2007) all
of Exhibit C.

³⁴ IR R-076 in Tab R-076 of this Concurrence, PDS Presentation to County Council Rural Element Update July 24,
2012 p. 5.

1 lots and almost nine percent of the rural area allows lots 2.5 acres in size or smaller.³⁵ So the lack
2 of a variety of rural densities is a serious problem.

3 As will be explained in the Hirst objection, Policies 2JJ-5 and 2JJ-6 do not limit
4 businesses in Type I LAMIRDs to those that are consistent the character of the area in 1990.³⁶
5 Yet Policy 2DD-2A.1 relies on Policies 2JJ-5 and 2JJ-6 to contain and control rural businesses.
6 This violates the GMA.

7 As will also be explained in the Hirst objection, Policy 2LL-2 does not limit businesses in
8 Type III LAMIRDs to those that are “small-scale” as the GMA requires.³⁷ Yet Policy 2DD-2A.1
9 relies Policy 2LL-2 to contain and control rural businesses. This violates the GMA.

10 The County may point to Policy 2A-8 as where some of these uses are contained. But
11 Policy 2A-8 only provides for including business/industry parks and tourist/resort areas, and
12 crossroads commercial areas within urban growth areas or limited areas of more intense rural
13 development.³⁸ It does not limit these developments to those areas.

14 Policy 2DD-2A.2 relies on the county’s existing clustering regulations “to reserve areas
15 of land suitable for agriculture, forestry, or open space”³⁹ But the clustering regulations do
16 not effectively reserve agricultural lands, forest lands, or open space. The clustering regulations
17 allow the reserve tract, or as some of the regulations refer to it the “conservation tract” to be a
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20 ³⁵ *Id.*

21 ³⁶ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 25 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; RCW 36.70A.070(5)(d)(i).

22 ³⁷ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
pp. 26 – 27 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; RCW 36.70A.070(5)(d)(ii).

23 ³⁸ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 5 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

24 ³⁹ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 10 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

1 building site.⁴⁰ The “conservation tracts” can be further subdivided if the property is entitled to
2 greater density under the regulations in effect when the cluster is created.⁴¹ For the Water
3 Resource Protection Overlay District, which covers a small part of rural Whatcom County, any
4 residential development of the open space reserve area must be outside the minimum area
5 required by the overlay, the only clustering provision that has this limitation.⁴² Reserve tracts and
6 “conservation tracts” can be further subdivided after the comprehensive Plan and zoning have
7 been updated provided certain conditions can be met.⁴³ There is no limit on the maximum
8 number of lots allowed in the cluster subdivision as the Western Board has previously held that
9 the GMA requires.⁴⁴ And with the singular exception of the Water Resource Protection Overlay
10 District, clustering is optional.⁴⁵ Clustering only applies where the land owner wants it to apply.
11 So the clustering regulations do not reserve areas for agriculture, forestry, or open space or
12 contain or control rural development. This is clearly erroneous and violates the GMA.

13 **(ii) The measures fail to assure visual compatibility of rural**
14 **development with the surrounding rural area in compliance**
15 **with the GMA**

16 RCW 36.70A.070(5)(c)(ii) requires the rural element to include measures that apply to
17 rural development and protect the rural character of the area, as established by the county, by ...

18 (ii) [a]ssuring visual compatibility of rural development with the surrounding rural area[.] Policy
19 2DD-2 contains no effective measures to assure visual compatibility.

20 ⁴⁰ WCC 20.32.320; WCC 20.34.320; WCC 20.36.320. The cited clustering regulations are in Tab Zoning of this
21 Concurrence.

22 ⁴¹ WCC 20.34.320.

23 ⁴² WCC 20.71.021; WCC 20.71.352(2)(e).

24 ⁴³ WCC 20.32.320.

⁴⁴ WCC 20.32.305, .310, & .320; WCC 20.34.305, .310, & .320; WCC 20.36.305, .310, & .320; WCC 20.71.351 &
22 .352; *Vince Panesko, et al., v. Lewis County, et al.*, WWGMHB Case No. 00-2-0031c, Final Decision and Order,
23 *Eugene Butler, et al. v. Lewis County*, WWGMHB Case No. 99-2-0027c, Compliance Order, & *Daniel Smith, et al.*
24 *v. Lewis County*, WWGMHB No. 98-2-0011c Compliance Order (March 5, 2001), at 3 of 61 & 25 of 61.

⁴⁵ WCC 20.71.351; WCC 20.32.305, .310, & .320; WCC 20.34.305, .310, & .320; WCC 20.36.305, .310, & .320.

1 Policy 2DD-2B.1 first relies on WCC 20.32.450 and WCC 20.36.450. These zoning
2 regulations prohibit structures and combinations of structures from occupying or covering more
3 than 2,500 square feet or 35 percent, whichever is greater, of the total area.⁴⁶ But this coverage
4 limit does not limit site clearing or impervious surfaces. The coverage limit allows the entire lot
5 to be cleared and paved over. Nor does it apply at all to the appearance of buildings or where
6 they are located on the property. There are no limits on impervious surfaces. WCC 20.32.450
7 and WCC 20.36.450 will not assure the visual compatibility of rural development with the
8 surrounding rural area.

9 Consider, for example, the wall of houses effect created by houses built close to the road
10 on long narrow lots built north and south of the lot marked with an “L” on page *3 of the aerial
11 images in the *Whatcom County Rural Element Lot Coverage and Open Space Estimates*.⁴⁷ Lot
12 “L” only has a lot coverage of eight percent.⁴⁸ Imagine the effect of a 35 percent building lot
13 coverage on this site. Or compare the lots labeled “N” “R” and “V” on pages *4 and *5 of the
14 *Whatcom County Rural Element Lot Coverage and Open Space Estimates* with lots that have
15 trees and other native vegetation such the lots labeled “B,” “C,” “D,” and “E” from page *2 of
16 the same document.⁴⁹ Lots “N” “R” and “V” have lot coverage ratios of 11, 10, and eight percent
17 respectively.⁵⁰ The more compatible lots, lots “B,” “C,” “D,” and “E”, have lot coverage ratios of
18 two and three percent, less than ten percent of what is allowed.⁵¹

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21 ⁴⁶ WCC 20.32.450; WCC 20.36.450 in the “Zoning” Tab of this Concurrence.

22 ⁴⁷ IR R-101 in Tab R-101 of this Concurrence, Whatcom County Planning and Development Services *Whatcom
County Rural Element Lot Coverage and Open Space Estimates* p. *3 (April 19, 2012).

23 ⁴⁸ *Id.* at p. *1.

24 ⁴⁹ *Id.* at pp. *2 – 5.

⁵⁰ *Id.*

⁵¹ *Id.* at p. *1.

1 This illustrates another problem with the 33 percent coverage ratio, it is higher than any
2 lot in the *Whatcom County Rural Element Lot Coverage and Open Space Estimates*. The highest
3 coverage ratio in that report is 11 percent.⁵² The 35 percent coverage ratio itself is not visually
4 compatible with the surrounding rural area in Whatcom County. So we see that Policy 2DD-2B.1
5 and WCC 20.32.450 and WCC 20.36.450 fail to assure visual compatibility.

6 Policy 2DD-2B.2 then relies again on the clustering regulations to “require that lots
7 developed under the clustering option be designed and located to be compatible with valuable or
8 unique natural resources as well as physical constraints of the site”⁵³ But again, with the
9 exception of the Water Resource Protection Overlay District, clustering is optional.⁵⁴ Further,
10 WCC 20.32.310(3), WCC 20.34.310(3), and WAC 20.36.310(3) do not require designs
11 compatible with the natural resources and physical constraints of the site. They provide that
12 “[w]here practical, the majority of building sites should be arranged” compatible with these
13 characteristics. Only WCC 20.71.351(7), with its limited applicability, actually requires building
14 lots to avoid disturbing valuable or unique natural resources and the physical constraints of the
15 site. These provisions are not measures that apply to rural development to “[a]ssur[e] [the] visual
16 compatibility of rural development with the surrounding rural area” as RCW
17 36.70A.070(5)(c)(ii) requires since clustering is optional and maintaining these features for most
18 rural areas is not required.

21 ⁵² *Id.*

22 ⁵³ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
pp. 11 – 12 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

23 ⁵⁴ WCC 20.71.351; WCC 20.32.305, .310, & .320; WCC 20.34.305, .310, & .320; WCC 20.36.305, .310, & .320.
All in the “Zoning” Tab of this Concurrence.

1 Policy 2DD-2B.3 adopts certain setbacks and landscaping requirements to protect
2 “aesthetic assets” and soften impacts.⁵⁵ However, the rural setbacks of 25 to 45 feet along
3 roadways will do little to protect the aesthetic assets as the wall of rural houses shows.⁵⁶ The
4 landscaping requirements do not apply to most rural uses such as farms and accessory uses;
5 single-family houses, duplexes, and their accessory uses unless developed as part of an overall
6 complex; and subdivisions, short subdivisions, and binding site plans.⁵⁷ In the rare occasion that
7 the landscaping requirements apply, retaining existing vegetation is encouraged but not
8 required.⁵⁸ WCC 20.80.345 does require buffers, “normally” 25 feet wide, when a proposed use
9 is in a commercial or industrial zone and is directly adjacent to and shares a common boundary
10 with property in a rural or residential zone which we do appreciate. But this and the other
11 landscaping requirements will not “assure visual compatibility of rural development with the
12 surrounding rural area” given their limited applicability to rural development.

13 Policy 2DD-2B.4 adopts by reference the Point Roberts regulations. While these
14 regulations do include some good tree retention and view corridor standards, they only apply to
15 2.3 percent of the Rural Area.⁵⁹ Applying them to the rural area as a whole would go a long way
16 to comply with the GMA.

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19 ⁵⁵ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 12 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

20 ⁵⁶ WCC 20.80.210(5)(b) in the Zoning Tab of this concurrence; IR R-101 in Tab R-101 of this Concurrence,
Whatcom County Planning and Development Services *Whatcom County Rural Element Lot Coverage and Open
Space Estimates* p. *3 (April 19, 2012).

21 ⁵⁷ WCC 20.80.315 in the Zoning Tab of this concurrence.

22 ⁵⁸ WCC 20.80.340(1) in the Zoning Tab of this Concurrence.

23 ⁵⁹ Whatcom County’s Rural Zones are applied to 121,567 acres of which 2,808 acres, 2.3 percent, are in the Point
24 Roberts zone. IR R-084D in Tab R-084D of Whatcom County’s Compliance Report, Whatcom County Rural
Element Update LAMIRD Report Appendix D: Acreage of Proposed Designations in Affected Areas p. *2 (July 5,
2012); IR R-076 in Tab R-076 of this Concurrence, PDS Presentation to County Council Rural Element Update July
24, 2012 p. 5.

1 RCW 36.70A.030(15)(a) includes in the definition of rural character that “open space, the
2 natural landscape, and vegetation predominate over the built environment” Policy 2DD-2,
3 outside of the Point Roberts tree retention requirements, does not require that the natural
4 landscape and vegetation predominate over the built environment as the definition of rural
5 character in the GMA and Whatcom County’s rural element requires.⁶⁰

6 **(iii) The measures fail to reduce the inappropriate conversion of**
7 **undeveloped land into sprawling, low-density development in**
8 **the rural area in compliance with the GMA**

8 RCW 36.70A.070(5)(c)(iii) requires the rural element to include measures that apply to
9 rural development and protect the rural character of the area, as established by the county, by ...
10 (iii) [r]educing the inappropriate conversion of undeveloped land into sprawling, low-density
11 development in the rural area[.] Policy 2DD-2 contains no effective measures to reduce the
12 inappropriate conversion of undeveloped land into sprawling low densities development.⁶¹ As we
13 showed in Part IV.1.B.(i) of this Concurrence, the measures in Policy 2DD-2 do not address a
14 variety of rural densities. This allows the expansion of the Rural 5A zoning, failing to control the
15 inappropriate conversion of undeveloped land into sprawling, low density development. As we
16 showed in Part IV.1.B.(i) of this Concurrence, the measures in Policy 2DD-2 do not effectively
17 control businesses within Type I and Type III LAMIRDs either. As we also showed in that
18 section, Whatcom County’s existing clustering regulations also fail to control the inappropriate
19 conversion of undeveloped land into sprawling, low density development.

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22 ⁶⁰ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 7 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

23 ⁶¹ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
pp. 9 – 15 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

1 Similarly, Type II LAMIRDs can be almost anywhere in rural Whatcom County and can
2 be as large as 20 acres.⁶² Whatcom County's policies and development regulations would allow a
3 Type II LAMIRD larger than the developed area of the Semiahmoo Resort in the City of Blaine,
4 Washington which is just a little over 19 acres in size.⁶³ The regulations would allow larger
5 buildings too. The Semiahmoo Resort; including its 198 hotel rooms, mezzanines, health club,
6 tennis club, and restaurants; has 204,005 square feet of floor area.⁶⁴ WCC 20.63.301 limits hotels
7 and motels to a floor area ratio (FAR) of 0.60 in the Tourist Commercial (TC) zone.⁶⁵ This zone
8 is applied to Type II LAMIRDs.⁶⁶ On a 20 acre site a FAR of 0.60 would allow a hotel or motel
9 of 522,720 square feet or 12 acres of building floor area. This is 2.6 times the size of Semiahmoo
10 Resort's floor area. Clearly the County's rural element does not reduce the inappropriate
11 conversion of undeveloped land into sprawling, low-density development in the rural area as the
12 GMA requires.

13 Policy 2DD-8 calls for reducing the inappropriate conversion of undeveloped land into
14 sprawling, low density development by establishing clearly defined boundaries for LAMIRDs.⁶⁷
15 Policy 2GG-2 also relies on LAMIRDs to reduce the inappropriate conversion of undeveloped
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17 ⁶² *Id.* at 22 of 33; IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code
18 Amendments Comprehensive Plan Amendments WWC 20.63.253 p. 41 of 90 in Tabs R-075 and R-075B of
Whatcom County's Compliance Report.

19 ⁶³ IR C-726 in Tab C-726A of this Concurrence, Aerial of Semiahmoo Resort with acreage calculation; IR C-670 in
Tab C-670 of this Concurrence, Futurewise Letter to the Whatcom County Council p. 8 (Aug. 6, 2012).

20 ⁶⁴ IR C-670A in Tab C-670A of this Concurrence, Whatcom County Assessor Calculator Cost Form for 5655
Semiahmo Parkway pp. *1 – 2.

21 ⁶⁵ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments p. 41 of 90 in Tabs R-075 and R-075B of Whatcom County's Compliance
Report.

22 ⁶⁶ *Id.* at pp. 38 – 46 of 90; IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A
Comprehensive Plan Amendments p. 22 of 33 in Tabs R-075 and R-075A of Whatcom County's Compliance
Report.

23 ⁶⁷ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 16 of 33 in Tabs R-075 and R-075A of Whatcom County's Compliance Report.

1 land into sprawling, low density development.⁶⁸ But the LAMIRD policies fail to establish
2 clearly defined boundaries. Those policies allow new isolated cottage industries and small scale
3 businesses anywhere in rural Whatcom County.⁶⁹ The location criteria for Type II LAMIRDs
4 require that it be a lot or lots, outside the UGA and outside natural resource lands, be either
5 characterized by the intensification or new development of small-scale recreational or tourist
6 uses, and no larger than 20 acres.⁷⁰ This can be any lot or lots in rural Whatcom County 20 acres
7 or smaller. The location criteria for Type III LAMIRDs require that it be a lot or a “small group
8 of lots,” outside the UGA and outside natural resource lands, either contain nonresidential uses
9 and be located within a commercial, manufacturing, or industrial zone when the LAMIRDs were
10 first designated or allow new isolated cottage industries or isolated small scale business and be
11 separated from other LAMIRDs by at least a half mile or be across a freeway, major road, or
12 stream from the LAMIRD.⁷¹ The allowance for new industries and businesses coupled with the
13 very limited regulations requiring a separation allow new development on many rural lots. There
14 are no clearly defined boundaries for new Type II and Type III LAMIRDs. So the inappropriate
15 conversion of undeveloped land into sprawling, low-density development is not reduced as the
16 GMA requires.

17 For Type I LAMIRDs, Policy 2JJ-6 allows LAMIRDs where businesses existed on July
18 19, 1990 to “expand beyond the size or scale of businesses of a similar type in that area ...”⁷²
19 These expansions do not reduce the inappropriate conversion of undeveloped land into
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21 ⁶⁸ *Id.* at p. 19 of 33.

22 ⁶⁹ *Id.* at p. 23 of 33.

23 ⁷⁰ *Id.* at p. 22 of 33.

⁷¹ *Id.* at p. 23 of 33.

⁷² *Id.* at p. 25 of 33.

1 sprawling, low-density development in the rural area as the GMA requires. In fact it allows the
2 businesses to sprawl in the rural area.

3 There is a similar problem for Type III LAMIRDs. Policy 2LL-2 provides that businesses
4 in Type III LAMIRDs that had an existing business on July 1, 2012 do not have to be small-
5 scale.⁷³ Again, this does not reduce the inappropriate conversion of undeveloped land into
6 sprawling, low-density development in the rural area as the GMA requires.

7 At bottom, Whatcom County’s rural element does not include the measures governing
8 rural development RCW 36.70A.070(5)(c)(i) – (iii) requires. This is clearly erroneous and
9 violates the GMA.

10 **1b. The policies and regulations for Type II LAMIRDs must limit development to**
11 **“small-scale” recreational or tourist uses as RCW 36.70A.070(5)(d)(ii)**
12 **requires**

13 RCW 36.70A.130(1)(d) provides that “[a]ny amendment of or revision to a
14 comprehensive land use plan shall conform to [the GMA.] Any amendment of or revision to
15 development regulations shall be consistent with and implement the comprehensive plan.”⁷⁴

16 Whatcom County Comprehensive Plan Policy 2KK-1 requires Type II LAMIRDs to comply
17 with RCW 36.70A.070(5)(d)(ii).⁷⁵ Whatcom County Ordinance No. 2012-032 amended the
18 policies and regulations applicable to the Type II LAMIRDs by allowing Type II LAMIRDs as
19 large as 20 acres.⁷⁶

20 RCW 36.70A.070(5)(d)(ii) provides in full as follows:

21 ⁷³ *Id.* at pp. 26 – 27 of 33.

⁷⁴ *Id.*

22 ⁷⁵ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 26 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

23 ⁷⁶ *Id.* at p. 22 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; IR R-075 and R-075B,
Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments Comprehensive Plan Amendments
p. 41 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance Report.

1 (ii) The intensification of development on lots containing, or new
2 development of, small-scale recreational or tourist uses, including commercial
3 facilities to serve those recreational or tourist uses, that rely on a rural location
4 and setting, but that do not include new residential development. A small-scale
5 recreation or tourist use is not required to be principally designed to serve the
6 existing and projected rural population. Public services and public facilities shall
7 be limited to those necessary to serve the recreation or tourist use and shall be
8 provided in a manner that does not permit low-density sprawl[.]

9 So RCW 36.70A.070(5)(d)(ii) only allows small-scale recreational or tourist uses.

10 However, Policy 2HH-2A.4 allows recreational or tourist uses up to 20 acres in size.⁷⁷ Similarly,
11 the Tourist Commercial (TC) zone, a zone that implements the Type II LAMIRD policies, in
12 WCC 20.63.253 also allows uses up to 20 acres in size.⁷⁸ Twenty acres is not small scale. The
13 developed area of the Semiahmoo Resort in the City of Blaine, Washington is just a little over 19
14 acres.⁷⁹ As you can see from the aerial image in Tab C-726A of this concurrence, this includes
15 the over water docks. The Semiahmoo Resort includes 198 guest rooms, three restaurants and a
16 cafe, a health club, tennis courts, and a full-service spa on less than 20 acres.⁸⁰ The Semiahmoo
17 Resort, which is located in an urban growth area and a city, is not small-scale. Yet its developed
18 area is smaller than is allowed by Policy 2HH-2A.4. So Policy 2HH-2A.4 violates RCW
19 36.70A.070(5)(d)(ii) which requires that the uses to be small-scale and RCW 36.70A.070 which
20 requires that the comprehensive plan must be internally consistent.

21 ⁷⁷ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
22 pp. 26 – 27 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

23 ⁷⁸ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
24 Comprehensive Plan Amendments p. 41 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

⁷⁹ IR C-726 in Tab C-726A of this Concurrence, Aerial of Semiahmoo Resort with acreage calculation; IR C-670 in
Tab C-670 of this Concurrence, Futurewise Letter to the Whatcom County Council p. 8 (Aug. 6, 2012).

⁸⁰ IR C-726 in Tab C-726A of this Concurrence, Aerial of Semiahmoo Resort with acreage calculation; IR C-726 in
Tab C-726A of this Concurrence, Semiahmoo webpages. The Semiahmoo Resort is separate from the marina,
marina buildings, and parking lot to the east. IR C-726 in Tab C-726 of this Concurrence, Semiahmoo Marina About
Us webpage.

1 Tourist Commercial (TC) zone, one of the zones that implements the Type II LAMIRD
2 policies, is inconsistent with both the GMA and the Whatcom County Comprehensive Plan
3 because the plan requires that uses in Type II LAMIRDs must be small-scale.⁸¹ So this regulation
4 violates the both RCW 36.70A.130, which requires consistency with the comprehensive plan,
5 and RCW 36.70A.070(5)(d)(ii) which requires that the uses be-small scale.

6 Allowing a 20 acre Type II LAMIRD renders the other limits on size and scale illusory.
7 For example, while the TC zone in WCC 20.63.301 limits hotels and motels to a floor area ratio
8 (FAR) of 0.60, on a 20 acre site a FAR of 0.60 would allow a hotel or motel of 522,720 square
9 feet or 12 acres of building floor area. This would be one of the largest hotels in the county and
10 could go anywhere in rural Whatcom County as we have documented above. As a comparison
11 the Semiahmoo Resort; including its 198 hotel rooms, mezzanines, health club, tennis club, and
12 restaurants; has 204,005 square feet of floor area.⁸² This is just under 40 percent of the floor area
13 allowed in a 20 acre Type II LAMIRD. WCC 20.63.400 allows a 40 foot height limit, so the
14 building could even be 4 stories just like the Semiahmoo Resort.⁸³ The lot coverage limits in
15 WCC 20.63.450 do not even apply in a Type II LAMIRD which has a “Rural Tourism”
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21 ⁸¹ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 20 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

22 ⁸² IR C-670A in Tab C-670A of this Concurrence, Whatcom County Assessor Calculator Cost Form for 5655
Semiahmo Parkway pp. *1 – 2.

23 ⁸³ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments p. 42 of 90 in Tabs R-075 and R-075A of Whatcom County’s Compliance
Report.

1 designation on the Future Land Use Map.⁸⁴ The only apply in “Rural Community” and “Rural
2 Business” designations.⁸⁵

3 Policy 2HH-2A.4 and the TC zone would allow urban scale resorts 2.6 times the size of
4 Semiahmoo Resort. This implies that these developments would have 495 guest rooms and many
5 restaurants and bars. These are not the “small-scale” recreational or tourist uses which are the
6 only uses, along with including commercial facilities to serve those recreational or tourist uses,
7 RCW 36.70A.070(5)(d)(ii) allows in Type II LAMIRDs. So Policy 2HH-2A.4 and the TC zone
8 violate the GMA.

9 **1c. The Rural Neighborhoods policies and comprehensive plan maps violate**
10 **RCW 36.70A.070(5) and RCW 36.70A.130**

11 RCW 36.70A.130(1)(d) provides that “[a]ny amendment of or revision to a
12 comprehensive land use plan shall conform to” the GMA. In the January 9, 2012 Final Decision
13 and Order in this case, the Board generally upheld the Rural Residential Density Overlay
14 (RRDO), but concluded the Comprehensive Plan provisions must contain measures to “contain
15 and control” the application of the RRDO and measures to protect surface and ground water
16 resources.⁸⁶ This section will address the measures to contain and control the application of
17 RRDO. We adopt the arguments of the Hirst Petitioners as to the measures to protect surface and
18 ground waters.

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20 ⁸⁴ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
21 Comprehensive Plan Amendments WWC 20.63.253 p. 42 of 90 in Tabs R-075 and R-075A of Whatcom County’s
22 Compliance Report; IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive
23 Plan Amendments p. 30 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

24 ⁸⁵ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments WWC 20.63.253 p. 42 of 90 in Tabs R-075 and R-075A of Whatcom County’s
Compliance Report.

⁸⁶ *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 128 of 177.

1 To address the Board’s findings of noncompliance, the County, in Whatcom County
2 Ordinance No. 2012-032, adopted the “Rural Neighborhoods” narrative, goal, and polices, and
3 mapped the Rural Neighborhoods on the county’s future land use map.⁸⁷ We appreciate many of
4 these provisions, particularly the commitment not to expand Rural Neighborhoods beyond those
5 adopted in 2012, although as will be documented below the Rural Neighborhoods were
6 substantially expanded in 2012 over 2011.

7 However, there is a significant difference between the Rural Neighborhoods criteria in
8 Policies 2MM-1 and 2MM-2 and the criteria in the Rural Residential Density Overlay, WCC
9 20.32.252 and 20.36.252.⁸⁸ WCC 20.32.252(1)(b) and WCC 20.36.252(1)(b) requires that “[a]t
10 least 70% of lots wholly or partially within 500 feet of the subject lot’s outer boundary must
11 have contained a residence and been under five acres in size on May 22, 2011.”⁸⁹ In contrast
12 Policy 2MM-2 provides in relevant part that “[t]he overlay shall limit eligibility of lots based on
13 the percentage of surrounding lots that were developed in 2011, and shall establish a maximum
14 density that may be achieved using the overlay.”⁹⁰ While we recognize that Policy 2MM-2 may
15 have been simplified because it is a policy, because Policy 2MM-2 does not set a minimum
16 percentage of lots that must have had a house in 2011, a relatively small area of small developed
17 residential lots could justify designating a large area of undeveloped lots. Because the density is

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19 ⁸⁷ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
20 p. 27 – 28 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; IR R-075 and R-075B,
21 Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments pp. 89 – 90 of 90 in Tabs R-075
22 and R-075B of Whatcom County’s Compliance Report.

21 ⁸⁸ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
22 pp. 27 – 28 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; IR R-075 and R-075B,
23 Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments pp. 3 – 4 & p. 7 of 90 in Tabs R-
24 075 and R-075B of Whatcom County’s Compliance Report.

22 ⁸⁹ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments pp. 3 –4
& p. 7 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance Report.

23 ⁹⁰ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
24 p. 27 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

1 set not based on the average of the lots in the area, but instead on the average, or mean, size of
2 the lots with residences the large lots could then be subdivided into small lots out of character
3 with the area.⁹¹ In addition, while we do not believe the policy was adopted to allow changes to
4 the development regulations in WCC 20.32.252 and WCC 20.36.252, because it is a general
5 standard it would allow changes that would reduce the 70 percent threshold. So Policies 2MM-1
6 and 2MM-2 will not protect the character of the rural area as RCW 36.70A.070(5)(c) requires.
7 Further, as will documented under Issue 3, the policies and regulations apparently allow Rural
8 Neighborhood designations that violate the GMA.

9 **1d. The Rural Business descriptor violates RCW 36.70A.070(5)(d)(iii) and RCW**
10 **36.70A.130**

11 RCW 36.70A.130(1)(d) provides that “[a]ny amendment of or revision to a
12 comprehensive land use plan shall conform to” the GMA. RCW 36.70A.070(5)(d)(iii) allows
13 three types of development: (1) “[t]he intensification of development on lots containing isolated
14 nonresidential uses,” (2) “new development of isolated cottage industries” and (3) expanded or
15 new “isolated small-scale businesses.” The “Rural Business” comprehensive plan designation
16 provides for Type III LAMIRDs.⁹² Whatcom County Ordinance No. 2012-032 amended the
17 Rural Business descriptor, but in a way that is not consistent with the GMA.⁹³ The amended
18 Rural Business descriptor does not limit development on lots containing isolated nonresidential
19 uses to the “intensification of development” on those lots as RCW 36.70A.070(5)(d)(iii)
20 requires. So the amendment violates the GMA.

21 ⁹¹ WCC 20.32.252(2) & WCC 20.36.252(2) in IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032
22 Exhibit B Zoning Code Amendments p. 4 and p. 7 of 90 in Tabs R-075 and R-075B of Whatcom County’s
Compliance Report.

23 ⁹² IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 30 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

24 ⁹³ *Id.*

1 **Issue 2. Do the development regulations as amended by Ordinance No. 2011-**
2 **013 Sections 2 and 3, and Ordinance No. 2012-032 Exhibit B: Zoning**
3 **Code Amendments, and Exhibit C: Official Zoning Map and**
4 **Comprehensive Plan Map Amendments violate RCW 36.70A.020(1),**
5 **(2), (8), (9), and (10); RCW 36.70A.030(15); RCW 36.70A.040; RCW**
6 **36.70A.060; RCW 36.70A.070; RCW 36.70A.070(1); RCW**
7 **36.70A.070(5); RCW 36.70A.110; and RCW 36.70A.130(1) and (4)?**

8 **2a. The Tourist Commercial (TC) Zoning District, Chapter 20.63 WCC, violates**
9 **the GMA.**

10 Like all of the LAMIRD zones, the Board found that the Tourist Commercial (TC)
11 Zoning District violated RCW 36.70A.070(5)(d).⁹⁴ Sadly the regulations still do. As we
12 documented in Part IV.1b of this Concurrence, the TC zone does not limit development to small-
13 scale recreation or tourist uses as RCW 36.70A.070(5)(d)(ii) and the Whatcom County
14 Comprehensive Plan requires in a Type II LAMIRD.

15 Somewhat amazingly, Whatcom County proposes to allow the TC zone in all three types
16 of LAMIRDs including Type I, Type II, and Type III LAMIRDs.⁹⁵ Not amazingly, this creates
17 violations of all three LAMIRD requirements. RCW 36.70A.130(1)(d) provides in relevant part
18 that “[a]ny amendment of or revision to development regulations shall be consistent with and
19 implement the comprehensive plan.” Whatcom County Ordinance No. 2012-032 amended the
20 TC zone and the original adoption TC zone was found to violate the GMA and this is its
21 compliance effort.⁹⁶ The Whatcom County Comprehensive Plan requires that LAMIRDs must

22 ⁹⁴ *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
23 Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 94 of 177.

24 ⁹⁵ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
pp. 30 – 31 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; IR R-075 and R-075B,
Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments Comprehensive Plan Amendments
p. 38 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance Report.

⁹⁶ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments pp. 37 – 44 of 90 & pp. 85 – 88 of 90 in Tabs R-075 and R-075B of Whatcom
County’s Compliance Report; *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order
and Case No. 05-2-0013 Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 94 of 177.

1 meet the requirements of RCW 36.70A.070(5)(d)(i), (ii), (iii), and (iv).⁹⁷ So the LAMIRD
2 regulations must comply with these provisions.

3 Starting first with the Type I LAMIRD violations. RCW 36.70A.070(5)(d)(i)(C) provides
4 in relevant part that “[a]ny development or redevelopment in terms of building size, scale, use, or
5 intensity shall be consistent with the character of the existing areas.” The TC Zone, in WCC
6 20.63.705 and other sections, limits the floor area of buildings in Type I LAMIRDs to that of a
7 use of the same type that existed in the same Rural Community in 1990 except as provided in
8 WCC 20.80.100(2).⁹⁸ WCC 20.63.705 also limits building size, scale, use, or intensity except as
9 provided WCC 20.80.100(2).⁹⁹ But WCC 20.80.100(2) allows staff to allow larger building sizes
10 and scales, different uses, or more intense uses if staff decides the proposal is consistent with the
11 character of the area, but the proposal is not required to “meet every one of those parameters” of
12 building size, scale, use, or intensity.¹⁰⁰ So in short, building sizes, scales, uses, or intensity do
13 not have to be consistent with the character of the area in 1990. This violates RCW
14 36.70A.070(5)(d)(i)(C). The Western Washington Growth Management Hearings Board has
15 concluded that all four of the characteristics listed in RCW 36.70A.070(5)(d)(i)(C): building
16 size, scale, use, and intensity, must “be evaluated with the primary evaluation based on
17 maintaining the ‘character of the existing areas.’”¹⁰¹ The Board’s interpretation is correct. A
18 careful reading of the first sentence in RCW 36.70A.070(5)(d)(i)(C) shows that the development

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20 ⁹⁷ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 23 & p. 25 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

21 ⁹⁸ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments pp. 38 – 44 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

22 ⁹⁹ *Id.* at p. 44 of 90.

23 ¹⁰⁰ *Id.* at 87 of 90.

24 ¹⁰¹ *Dry Creek Coalition and Futurewise v. Clallam County*, WWGMHB Case No. 07-2-0018c, Order on Dry Creek
Coalition’s Motion for Reconsideration and Motion to Amend Schedule (June 9, 2008) at 12 of 19.

1 or redevelopment “shall be consistent with the character of the existing areas.” All four of the
2 factors must be considered; that is why “in terms of” is included. Using “or” in the list of factors
3 to consider does not mean you only have to meet one factor. If only one, or two, or three of the
4 four factors is considered, then the development or redevelopment will not “be consistent with
5 the character of the existing areas.” For example, if only use is considered and there is no limit
6 on building size or scale, then high rise office buildings would be allowed in a rural limited area
7 of more intense rural development (LAMIRD) that had a single-story office in 1990. That would
8 not be consistent with the character of the existing areas. The use of “or” in RCW
9 36.70A.070(5)(d)(i)(C) means that each factor must be considered as part of the evaluation of
10 determining consistency with the character of the existing areas. So the TC zone is clearly
11 erroneous as to Type I LAMIRDs as it allows elements of rural character to be disregarded in
12 making decisions about what uses are allowed and the building sizes, scales, and intensities of
13 those uses.

14 The TC zone is also clearly erroneous as to Type II LAMIRDs. First, as we have seen in
15 Part IV.1.b of this concurrence, the 20 acres size limit allows uses that are not small-scale.
16 Second, RCW 36.70A.070(5)(d)(ii) limits uses in Type II LAMIRDs to “the intensification of
17 development on lots containing, or new development of, small-scale recreational or tourist uses,
18 including commercial facilities to serve those recreational or tourist uses, that rely on a rural
19 location and setting, but that do not include new residential development.” But offices are a
20 permitted use in TC zone.¹⁰² Boarding homes, post offices, adult family homes, mental health

22 ¹⁰² IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
23 Comprehensive Plan Amendments p. 38 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
24 Report.

1 facilities, and substance abuse facilities are conditional uses.¹⁰³ These uses do not comply with
2 RCW 36.70A.070(5)(d)(ii). The TC zone does provide that if the TC Zone is in a Rural Tourism
3 designation, the uses have to comply with the comprehensive plan policies governing uses in
4 Rural Tourism areas.¹⁰⁴ But the policies are vague. Policy 2KK-1 requires compliance with RCW
5 36.70A.070(5)(d)(ii).¹⁰⁵ But the uses that meet this requirement are not spelled out at all. This
6 will not effectively implement RCW 36.70A.070(5)(d)(ii) given the long lists of allowed uses.

7 The TC zone is also clearly erroneous as to Type III LAMIRDs. RCW
8 36.70A.070(5)(d)(iii) provides in relevant part that:

9 The intensification of development on lots containing isolated nonresidential uses
10 or new development of isolated cottage industries and isolated small-scale
11 businesses that are not principally designed to serve the existing and projected
12 rural population and nonresidential uses, but do provide job opportunities for rural
13 residents. Rural counties may allow the expansion of small-scale businesses as
14 long as those small-scale businesses conform with the rural character of the area
15 as defined by the local government according to RCW 36.70A.030(15). Rural
16 counties may also allow new small-scale businesses to utilize a site previously
17 occupied by an existing business as long as the new small-scale business
18 conforms to the rural character of the area as defined by the local government
19 according to RCW 36.70A.030(15).

20 The TC zone provides that for the “Rural Business” designation all uses are allowed.¹⁰⁶
21 The “Rural Business” designation is a Type III LAMIRD.¹⁰⁷ But the TC zone allows uses that do
22 not comply with RCW 36.70A.070(5)(d)(iii). For example, there is no requirement that the use
23 be the “intensification of development on lots containing isolated nonresidential uses.” The TC

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¹⁰³ *Id.* at p. 39 of 90.

¹⁰⁴ *Id.* at pp. 38 – 39 of 90.

¹⁰⁵ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 26 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

¹⁰⁶ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments pp. 38 – 41 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

¹⁰⁷ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
pp. 30 – 31 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

1 Zone also allows residential uses including boarding homes, adult family homes, mental health
2 facilities, and substance abuse facilities that are not allowed Type III LAMIRDs.¹⁰⁸ Only
3 “isolated nonresidential uses,” “isolated cottage industries,” and “isolated small-scale
4 businesses” as allowed in Type III LAMIRDs by RCW 36.70A.070(5)(d)(iii).

5 Measures to control and contain rural development and protect rural character are absent
6 from the TC Zone.¹⁰⁹ In the *Suquamish Tribe v. Central Puget Sound Growth Management*
7 *Hearings Board* decision, the Court of Appeals held that clustering development regulations
8 applicable to the rural area must include regulations to protect rural character as defined in RCW
9 36.70A.030(15) and to implement the measures governing rural development in RCW
10 36.70A.070(5)(c).¹¹⁰ The regulations must include enforceable limitations to protect rural
11 character and implement the measures governing rural development.¹¹¹ For example there is no
12 limit on impervious surfaces. There is no requirement to retain native vegetation. The failure to
13 include these standards will not provide a rural area “[i]n which open space, the natural
14 landscape, and vegetation predominate over the built environment” as RCW 36.70A.030(15)(a)
15 requires. WCC 20.63.651 does provide that the design of the proposed use outside the UGA shall
16 be consistent with the Comprehensive Plan rural land use chapter.¹¹² However, as we document

19 ¹⁰⁸ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
20 Comprehensive Plan Amendments p. 39 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
21 Report.

22 ¹⁰⁹ *Id.* at p. 41 – 44 of 90.

23 ¹¹⁰ *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Bd.*, 156 Wn. App. 743, 771 – 74, 235
24 P.3d 812, 827 – 29 (2010) review denied by *Suquamish Tribe v. Central Puget Sound Growth Management*
Hearings Bd., 170 Wn.2d 1019, 245 P.3d 773 (2011).

¹¹¹ *Suquamish Tribe*, 156 Wn. App. at 774, 235 P.3d at 828 – 29.

¹¹² IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments p. 43 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

1 under Issue 1, this chapter largely fails to protect the rural area and so this “measure” is largely
2 an illusion.

3 In short, the TC Zone continues to violate RCW 36.70A.070(5)(d). This is clearly
4 erroneous.

5 **2b. The Resort Commercial (RC) Zoning District, Chapter 20.64 WCC, violates**
6 **the GMA.**

7 Like all of the LAMIRD zones, the Board found that the Resort Commercial (RC)
8 Zoning District violated RCW 36.70A.070(5)(d).¹¹³ Sadly the regulations still do.

9 Whatcom County proposes to allow the RC zone in Type I and Type III LAMIRDs.¹¹⁴
10 This attempt to apply a zone to such different areas creates violations of both LAMIRD
11 requirements. RCW 36.70A.130(1)(d) provides in relevant part that “[a]ny amendment of or
12 revision to development regulations shall be consistent with and implement the comprehensive
13 plan.” Whatcom County Ordinance No. 2012-032 amended the RC zone and the original
14 adoption RC zone was found to violate the GMA and this is its compliance effort.¹¹⁵ The
15 Whatcom County Comprehensive Plan requires that Type I and III LAMIRDs must meet the
16 requirements of RCW 36.70A.070(5)(d)(i), (iii), and (iv).¹¹⁶ So the LAMIRD regulations must
17 comply with these provisions.

18 ¹¹³ *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
19 Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 94 of 177.

20 ¹¹⁴ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
21 pp. 30 – 31 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report; IR R-075 and R-075B,
22 Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments Comprehensive Plan Amendments
23 p. 38 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance Report.

24 ¹¹⁵ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments pp. 44 – 63 of 90 & pp. 85 – 88 of 90 in Tabs R-075 and R-075B of Whatcom
County’s Compliance Report; *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order
and Case No. 05-2-0013 Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 94 of 177.

¹¹⁶ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 23 & p. 25 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

1 We start first with the Type I LAMIRD violations. RCW 36.70A.070(5)(d)(i)(C)
2 provides in relevant part that “[a]ny development or redevelopment in terms of building size,
3 scale, use, or intensity shall be consistent with the character of the existing areas.” The RC Zone,
4 in WCC 20.64.010 and WCC 20.64.708, limits building size, scale, use, or intensity of the area
5 except as provided WCC 20.80.100(2).¹¹⁷ But WCC 20.80.100(2) allows staff to allow larger
6 building sizes and scales, different uses, or more intense uses if staff decides the proposal is
7 consistent with the character of the area, but the proposal is not required to “meet every one of
8 those parameters” of building size, scale, use, or intensity.¹¹⁸ So in short, building sizes, scales,
9 uses, or intensity do not have to be consistent with the character of the area in 1990. This violates
10 RCW 36.70A.070(5)(d)(i)(C). The Western Washington Growth Management Hearings Board
11 has concluded that all four of the characteristics listed in RCW 36.70A.070(5)(d)(i)(C), building
12 size, scale, use, and intensity, must “be evaluated with the primary evaluation based on
13 maintaining the ‘character of the existing areas.’”¹¹⁹ The Board’s interpretation is correct. A
14 careful reading of the first sentence in RCW 36.70A.070(5)(d)(i)(C) shows that the development
15 or redevelopment “shall be consistent with the character of the existing areas.” All four of the
16 factors must be considered; that is why “in terms of” is included. Using “or” in the list of factors
17 to consider does not mean you only have to meet one factor. If only one, or two, or three of the
18 four factors is considered, then the development or redevelopment will not “be consistent with
19 the character of the existing areas.” For example, if only use is considered and there is no limit

21 ¹¹⁷ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
22 Comprehensive Plan Amendments p. 44 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

23 ¹¹⁸ *Id.* at pp. 45 – 87 of 90.

24 ¹¹⁹ *Dry Creek Coalition and Futurewise v. Clallam County*, WWGMHB Case No. 07-2-0018c, Order on Dry Creek
Coalition’s Motion for Reconsideration and Motion to Amend Schedule (June 9, 2008) at 12 of 19.

1 on building size or scale, then high rise office buildings would be allowed in a rural limited area
2 of more intense rural development (LAMIRD) that had a single-story office in 1990. That would
3 not be consistent with the character of the existing areas. The use of “or” in RCW
4 36.70A.070(5)(d)(i)(C) means that each factor must be considered as part of the evaluation of
5 determining consistency with the character of the existing areas. So the RC zone is clearly
6 erroneous as to Type I LAMIRDs.

7 The RC zone is also clearly erroneous as to Type III LAMIRDs. RCW
8 36.70A.070(5)(d)(iii) provides in relevant part that:

9 The intensification of development on lots containing isolated nonresidential uses
10 or new development of isolated cottage industries and isolated small-scale
11 businesses that are not principally designed to serve the existing and projected
12 rural population and nonresidential uses, but do provide job opportunities for rural
13 residents. Rural counties may allow the expansion of small-scale businesses as
14 long as those small-scale businesses conform with the rural character of the area
15 as defined by the local government according to RCW 36.70A.030(15). Rural
16 counties may also allow new small-scale businesses to utilize a site previously
17 occupied by an existing business as long as the new small-scale business
18 conforms to the rural character of the area as defined by the local government
19 according to RCW 36.70A.030(15).

20 The RC zone provides that for “Rural Business” designation all uses are allowed.¹²⁰ The
21 “Rural Business” designation is a Type III LAMIRD.¹²¹ But the TC zone allows uses that do not
22 comply with RCW 36.70A.070(5)(d)(iii). For example, there is no requirement that the use be
23 the “intensification of development on lots containing isolated nonresidential uses.” The TC

24 ¹²⁰ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments pp. 45 – 53 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

¹²¹ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
pp. 30 – 31 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

1 Zone also allows as permitted uses residential uses; including single-family homes, duplexes,
2 and multifamily dwellings; that are not allowed Type III LAMIRDs.¹²²

3 Measures to control and contain rural development and protect rural character are absent
4 from the RC Zone. They are required under the *Suquamish Tribe v. Central Puget Sound Growth*
5 *Management Hearings Board* decision which held that clustering development regulations
6 applicable to the rural area must include regulations to protect rural character as defined in RCW
7 36.70A.030(15) and to implement the measures governing rural development in RCW
8 36.70A.070(5)(c).¹²³ The required measures to control and contain rural development and protect
9 rural character are absent from the RC District.¹²⁴ For example there is no limit on impervious
10 surfaces. There is no requirement to retain native vegetation. The failure to include these
11 standards will not provide a rural area “[i]n which open space, the natural landscape, and
12 vegetation predominate over the built environment” as RCW 36.70A.030(15)(a) and the
13 Whatcom County Comprehensive Plan requires.¹²⁵ WCC 20.64.651 does provide that the design
14 of the proposed use outside the UGA shall be consistent with the Comprehensive Plan rural land
15 use chapter.¹²⁶ However, as we document under Issue 1, this chapter largely fails to protect the
16 rural area and so this “measure” is largely an illusion.

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19 ¹²² IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments p. 46 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

20 ¹²³ *Suquamish Tribe*, 156 Wn. App. at 771 – 74, 235 P.3d at 827 – 29.

21 ¹²⁴ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments pp. 54 – 63 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

22 ¹²⁵ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 7 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

23 ¹²⁶ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments p. 60 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

1 In short, the RC Zone continues to violate RCW 36.70A.070(5)(d). This is clearly
2 erroneous.

3 **2c. Does WCC 20.82.030 fail to prevent the expansion of urban services**
4 **outside urban growth areas and limited areas of more intense rural**
5 **development in violation of RCW 36.70A.110(4)?**

6 RCW 36.70A.110(4) prohibits the extension or expansion of urban governmental services
7 outside urban growth areas unless certain requirements are met. As the Court of Appeals for
8 Washington State wrote:

9 The Board analyzed this statute as comprising the following components:

10 (1) Cities are the most appropriate providers of urban governmental
11 services;

12 (2) It is generally not appropriate to extend or expand urban governmental
13 services into rural areas;

14 (3) Limited occasions to extend or expand are allowed that are:

15 (4) Shown to be necessary to protect:

16 (a) basic public health and safety *and*

17 (b) the environment, but;

18 (5) Only when the urban governmental services are financially supportable
19 at rural densities; and

20 (6) Only when extension or expansion does not allow urban development.

21 AR at 945 (emphasis added [by the court]). The Board read the statute (which
22 includes the conjunctive “and” between subsections (4)(a) and (b)) to require that
23 both public health/safety and environment subcomponents of component (4) “
24 must be ‘shown to be necessary to protect’ to qualify as an exception against the
general prohibition against urban services in rural areas.” AR at 946.

The County contends that this reading is overly restrictive. We disagree.¹²⁷

¹²⁷ *The Cooper Point Ass'n v. Thurston County*, 108 Wn. App. 429, 439 – 40, 31 P.3d 28, 33 – 34 (2001).

1 RCW 36.70A.070(5)(d) does allow “necessary public facilities and public services to
2 serve the limited area” The Whatcom County Comprehensive Plan requires that LAMIRDs
3 must meet the requirements of RCW 36.70A.070(5) and RCW 36.70A.070(5)(d)(i), (ii), (iii), and
4 (iv).¹²⁸ Further, RCW 36.70A.110(4) applies to both comprehensive plans and development
5 regulations. So the County’s regulations must comply with these GMA provisions.

6 RCW 36.70A.030(18) defines “[u]rban governmental services’ or ‘urban services’
7 include those public services and public facilities at an intensity historically and typically
8 provided in cities, specifically including ... domestic water systems” So when water is
9 provided at an intensity that is historically and typically provided in cities it is an urban
10 governmental service.

11 Whatcom County Ordinance No. 2012-032 amended WCC 20.82.030 to allow the
12 extension of water lines greater than eight inches as a permitted use in LAMIRDs or Rural
13 Neighborhoods.¹²⁹ Eight inch or larger water lines are at an intensity historically and typically
14 provided in cities.¹³⁰ So they are an urban governmental service. Amended WCC 20.82.030
15 violates the GMA because it allows the extension water lines greater than eight inches in
16 diameter into LAMIRDs without requiring that the water line is necessary to serve the limited
17 area as RCW 36.70A.070(5)(d) requires. Further, for Type II LAMIRDs “[p]ublic services and
18 public facilities shall be limited to those necessary to serve the recreation or tourist use and shall
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21 ¹²⁸ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 6 of 33, p. 23 & p. 25 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

22 ¹²⁹ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments p. 89 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
Report.

23 ¹³⁰ IR 72B-28 in Tab 72B-28 of this Concurrence, Larz T. Anderson, *Planning the Built Environment* p. 39 (APA,
Chicago Ill.: 2000).

1 be provided in a manner that does not permit low-density sprawl[.]”¹³¹ Similarly for Type III
2 LAMIRDs “[p]ublic services and public facilities shall be limited to those necessary to serve the
3 isolated nonresidential use and shall be provided in a manner that does not permit low-density
4 sprawl[.]” WCC 20.82.030 does not require compliance with these requirements either.

5 Amended WCC 20.82.030 also violates the GMA because it allows the extension of
6 water lines larger than eight inches in diameter into Rural Neighborhoods without meeting the
7 requirements of RCW 36.70A.110(4). Rural Neighborhoods are not LAMIRDs.¹³²

8 The County may argue that since WCC 20.82.030(3) requires that the water lines must
9 consistent with the Whatcom County Comprehensive Plan that somehow the GMA requirements
10 are imported into WCC 20.82.030(3). But the Whatcom County Comprehensive Plan only limits
11 public facilities and services to those necessary to serve Rural Tourism, Type II LAMIRDs, and
12 then only in its additional locational criteria.¹³³ For Type I LAMIRDs, additional areas may be
13 added to the LAMIRDs if is consistent with the efficient provision of public facilities and
14 services, but does not limit the public facilities to those necessary to serve the LAMIRD.¹³⁴
15 Policy 2JJ-1 authorizes necessary public facilities and services in LAMIRDs, but does not limit
16 extensions of water lines into LAMIRDs to those necessary to serve the LAMIRD.¹³⁵ So these
17 policies do not save the regulations.

18 Similarly, Comprehensive Policy 5P-3 “[d]iscourages the extension of urban levels of
19 water service outside urban growth areas or “Rural Communities except in those limited

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21 ¹³¹ RCW 36.70A.070(5)(d)(ii).

¹³² IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 27 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

¹³³ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
pp. 22 – 23 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

¹³⁴ *Id.* at p. 22 of 33.

¹³⁵ *Id.* at p. 24 of 33.

1 circumstances shown to be necessary to protect basic public health and safety and the
2 environment and when such services are financially supportable at rural densities and do not
3 permit urban development.”¹³⁶ But does “discourage” mean that the requirements of RCW
4 36.70A.110(4) must be met before the permitted use is allowed? Comprehensive Policy 5P-3
5 does not require it. And nothing in Comprehensive Policy 5P-3 requires a showing that
6 LAMIRD requirements for public facilities and services must be met.

7 In short, newly amended WCC 20.82.030(3) allows the extension of water lines larger
8 than eight inches in diameter without complying with RCW 36.70A.110(4) and RCW
9 36.70A.070(5)(d). This violates the GMA. We do appreciate the amendments to RCW
10 36.70A.030(4) to add the requirements of RCW 36.70A.110(4) to that subsection.

11 **Issue 3. Do the Birch Bay Lynden & Valley View, Fort Bellingham / Marietta,**
12 **North Bellingham, and Welcome LAMIRDs violate RCW**
13 **36.70A.030(15); RCW 36.70A.040; RCW 36.70A.070(1); RCW**
14 **36.70A.070(5); RCW 36.70A.110; and RCW 36.70A.130(1) and (4)?**

15 In the *Gold Star Resorts, Inc.* decision, the Washington State Supreme Court concluded
16 that:

17 ¶ 5 LAMIRDs are not intended for continued use as a planning device, rather,
18 they are “intended to be a one-time recognition of existing areas and uses and not
19 intended to be used continuously to meet needs (real or perceived) for additional
20 commercial and industrial lands.” *People for a Liveable Comty. v. Jefferson*
21 *County*, No. 03–2–0009c (Growth Mgmt. Hr’gs Bd. Final Dec. and Order Aug.
22 22, 2003). (In general, planning in rural zones must “protect the rural character of
23 the area” and “contain[] or otherwise control[] rural development.” RCW
24 36.70A.070(5)(c), (i)).¹³⁷

25 Type I LAMIRDs, those authorized by RCW 36.70A.070(5)(d)(i), must “minimize and
26 contain the existing areas or uses of more intensive rural development, as appropriate, authorized

27 ¹³⁶ *Whatcom County Comprehensive Plan Chapter Five Utilities* p. 5-14 (June 2011) in Tab CP of this Concurrence.

28 ¹³⁷ *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 727 – 28, 222 P.3d 791, 793 (2009).

1 under this subsection. Lands included in such existing areas or uses shall not extend beyond the
2 logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density
3 sprawl.”¹³⁸ RCW 36.70A.070(5)(d)(vi) provides that “[e]xisting areas are those that are clearly
4 identifiable and contained and where there is a logical boundary delineated predominately by the
5 built environment, but that may also include undeveloped lands if limited as provided in this
6 subsection.”

7 In the January 9, 2012, Final Decision and Order, the Board found that the Birch Bay
8 Lynden Valley View (as to one parcel), Fort Bellingham/Marietta, and North Bellingham
9 LAMIRDs violated the GMA and found them to be invalid.¹³⁹ As this brief will document, they
10 continue to violate the GMA and should continue to be found invalid.

11 **A. Birch Bay Lynden & Valley View (Type I LAMIRD)**

12 This Birch Bay Lynden & Valley View Type I LAMIRD is located on the northeast
13 corner Valley View Road and Birch Bay – Lynden Road.¹⁴⁰ Since the parcel at issue in
14 compliance proceeding was found to substantially interfere with GMA Goal 1 and the Board
15 made a finding of invalidity, the burden is on Whatcom County to show that this LAMIRD no
16 longer substantially interferes with GMA Goal 1, RCW 36.70A.020(1).¹⁴¹ Whatcom County has
17 not met this burden, failing to even mention RCW 36.70A.020(1) in its Compliance Report

19 ¹³⁸ *Gold Star Resorts, Inc.*, 167 Wn.2d at 735 – 36, 222 P.3d at 797 – 98.

20 ¹³⁹ *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 171 – 72 of 177.

21 ¹⁴⁰ IR R-075 and R-075C, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
Comprehensive Plan Map 8 Amendments “Birch Bay-Lynden & Valley View” Proposed Comprehensive Plan Land
Use Changes map in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

22 ¹⁴¹ *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 171 – 72 of 177; *Hudson and Huber v. Clallam*
23 *County*, WWGMHB Case No 96-2-0031, Rescission of Invalidity and Finding of Compliance (Dec. 11, 2007), at
*2.

1 section on this LAMIRD.¹⁴² So the Board should continue to find this LAMIRD in violation of
2 the GMA and maintain its finding of invalidity.

3 The LAMIRD also continues to violate the GMA. The Type I LAMIRD designated for
4 Birch Bay-Lynden & Valley View includes a two-acre area, listed as tax parcel 400123027037,
5 and two larger lots, listed as tax parcels 400123036109 and 400123040065.¹⁴³ The two acre area
6 was neither “characterized predominately by the built environment”¹⁴⁴ as of July 1, 1990, nor
7 necessary to avoid an irregular boundary line; although parts of the two larger lots were
8 developed for commercial purposes prior to 1990 and are appropriately included in the
9 LAMIRD, significant areas on the eastern boundary of these two lots have never been developed
10 in any way. The Type I LAMIRD designation is not applied to entire parcels or lots, but rather to
11 areas of pre-existing development irrespective of parcel or lot borders.¹⁴⁵ The designation of a
12 Type I LAMIRD must “minimize and contain the existing areas or uses of more intensive rural
13 development” by following the logical outer boundary of development on July 1st, 1990.¹⁴⁶
14 Drawing the outer boundary for this LAMIRD to include all of the two-acre lot and the entirety
15 of the two other parcels fails to minimize or contain such development, and violates the GMA.

16 Because only the developed “areas” of Type I LAMIRDs can be designated as
17 LAMIRDs, only the small northern portion of the lot occupied by the building, driveway, and
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20 ¹⁴² Whatcom County Compliance Report p. 12 (Aug. 28, 2012).

21 ¹⁴³ IR R-084D in Tab IR R-084D of Whatcom County’s Compliance Report, *Whatcom County Rural Element
Update LAMIRD Report Appendix F – 1990 Uses in Type I LAMIRDs* p. 1.

22 ¹⁴⁴ *Panesko et al. v. Lewis County*, WWGMHB Case No. 08-2-0007c, Final Decision and Order (Aug 15, 2008), at
33 of 45 (rejecting the sufficiency of “mere clearing and grubbing of the land” to designate a Type I LAMIRD).

23 ¹⁴⁵ *Panesko et al. v. Lewis County*, WWGMHB Case No. 08-2-0007c, Final Decision and Order (Aug 15, 2008), at
33 of 45 the “designation of land as a Type 1 LAMIRD requires the areas included be delineated predominantly by
the built environment;” RCW 36.70A.070(5)(d)(i); RCW 36.70A.070(5)(d)(iv).

24 ¹⁴⁶ RCW 36.70A.070(5)(d)(i).

1 other developed area can be designated as part of a Type I LAMIRD.¹⁴⁷ The logical outer
2 boundary of a LAMIRD does not follow the edges of a parcel or lot – rather, the logical outer
3 boundary follows the edge of development on July 1, 1990.¹⁴⁸ The over-development of rural
4 land, one of the consequences of an over-large LAMIRD designation, is something the GMA
5 expressly seeks to prevent.¹⁴⁹

6 The lack of any subsequent development on the small 2-acre lot in the 20+ years since
7 the removal of the temporary building is illustrative of the actual effect of this inappropriately
8 large Type I LAMIRD designation: it is to permit *future* development in rural areas which have
9 not been predominately characterized by the built environment. This is in direct contradiction to
10 both the GMA and the state supreme court holding in *Gold Star Resorts, Inc. v. Futurewise*.¹⁵⁰
11 Including the entire parcel in the LAMIRD, as Whatcom County did, is clearly erroneous.

12 This LAMIRD is in an area closed to water appropriation.¹⁵¹ So expanding the LAMIRD
13 fails to protect the rural character by protecting surface and ground water as RCW
14 36.70A.070(5)(c)(iv) requires for Type I LAMIRDs. This is also clearly erroneous.

15 **B. Fort Bellingham / Marietta (formerly Type I LAMIRD now Rural 16 Neighborhood)**

17 The former Fort Bellingham / Marietta Type I LAMIRD is located adjacent to the
18 Bellingham urban growth area on the east and adjacent to Bellingham Bay on part of the south

19 ¹⁴⁷ RCW 36.70A.070(5)(d)(i).

20 ¹⁴⁸ *Panesko et al. v. Lewis County*, WWGMHB Case No. 08-2-0007c, Final Decision and Order (Aug 15, 2008), at
33 of 45 the “designation of land as a Type 1 LAMIRD requires the areas included be delineated predominantly by
the built environment;” RCW 36.70A.070(5)(d)(i); RCW 36.70A.070(5)(d)(iv).

21 ¹⁴⁹ RCW 36.70A.011.

22 ¹⁵⁰ 167 Wn.2d 723, 727 – 28, 222 P.3d 791 (2009).

23 ¹⁵¹ IR R-075 and R-075C, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
Comprehensive Plan Map 8 Amendments “Birch Bay-Lynden & Valley View” rezone map in Tabs R-075 and R-
075A of Whatcom County’s Compliance Report; C-053 in Tab C-053 of this Concurrence, WRIA 1 Planning Unit,
WRIA 1 Watershed Management Plan Phase 1 Section 2 Assessments, Problem Identification, and Findings p. 58 of
160 (March 25, 2005).

1 and the Nooksack River on the part of the west.¹⁵² This LAMIRD was found to substantially
2 interfere with GMA Goal 1 and the Board made a finding of invalidity, so the burden is on
3 Whatcom County to show that Fort Bellingham / Marietta Rural Neighborhood no longer
4 substantially interferes with GMA Goal 1, RCW 36.70A.020(1).¹⁵³ Whatcom County has not met
5 this burden, failing to even mention RCW 36.70A.020(1) in its Compliance Report for this
6 LAMIRD.¹⁵⁴ So the Board should continue to find this LAMIRD in violation of the GMA and
7 maintain its finding of invalidity.

8 This Concurrence will also show that the Rural Neighborhood violates the GMA. In
9 response to the Board’s rejection of a LAMIRD designation for the Fort Bellingham / Marietta
10 area in the Final Decision and Order of January 9, 2012, the County redesignated this area from
11 the RR-1 zone to the newly-created RR-2A zone with the Residential Rural Density Overlay
12 (RRDO).¹⁵⁵ The RR-2A zone with the RRDO allows densities as high as one dwelling unit per
13 acre.¹⁵⁶

18 ¹⁵² IR R-075 and R-075C, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
19 Comprehensive Plan Map 8 Amendments “Fort Bellingham / Marietta” Proposed Zoning Changes map in Tabs R-
20 075 and R-075A of Whatcom County’s Compliance Report; IR R-084D in Tab R-084D of Whatcom County’s
21 Compliance Report, Whatcom County Planning and Development Services, Whatcom County Rural Element
22 Update LAMIRD Report p. 6 (Updated July 5, 2012).

21 ¹⁵³ *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
22 Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 171 – 72 of 177; *Hudson and Huber v. Clallam*
23 *County*, WWGMHB Case No 96-2-0031, Rescission of Invalidity and Finding of Compliance (Dec. 11, 2007), at
24 *2.

¹⁵⁴ Whatcom County Compliance Report pp. 13 – 14 (Aug. 28, 2012).

¹⁵⁵ *Id.*

¹⁵⁶ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
Comprehensive Plan Amendments p. 5 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance Report.

1 The land within the all of the RRDOs increased from 1,723 acres in 2011 to 2,707 acres
2 in 2012.¹⁵⁷ And in 2011, 326 acres of the RRDO was in the North Bellingham / Marietta
3 LAMIRD, an area that is no longer a LAMIRD.¹⁵⁸

4 Despite the changes from a LAMIRD to the RRDO, the fundamental problems persist:
5 First, the area zoned as a Rural Neighborhood contains 24 lots larger than five acres.¹⁵⁹ Policy
6 2MM-3 provides that “Rural Neighborhoods are designated adjacent to Urban Growth Areas
7 only in areas where developed densities exceeded one dwelling per 2.5 acres in 2011 and there
8 is little potential for efficient urban development in the future.”¹⁶⁰ According to the Appendix E
9 of the LAMIRD Report, the average parcel size of the 2008 developed parcels in the RR-5A*
10 Overlay is 5 acres.¹⁶¹ The average parcel size of the 2008 developed parcels in the R-5A*
11 Overlay is 3.4 acres.¹⁶² Including these areas in a “Rural Neighborhood” violates Policy 2MM-3
12 and so violates RCW 36.70A.130(1)(d)’s requirement that “[a]ny amendment of or revision to
13 development regulations shall be consistent with and implement the comprehensive plan.”

14 Second, simply changing the designation from LAMIRD to a novel rural zoning does not
15 permit the County to evade the GMA’s requirements that rural development be contained or the
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18 ¹⁵⁷ IR R-076 in Tab R-076 of this Concurrence, PDS Presentation to County Council Rural Element Update July 24,
2012 pp. 4 – 5.

19 ¹⁵⁸ IR R-001B in Tab R-001B of this Concurrence, *Whatcom County Rural Element Update LAMIRD Report* (April
20 29, 2011) Appendix D: Acreage of Proposed Designations in Affected Areas p. *2.

21 ¹⁵⁹ IR R-125 in Tab R-125 of this Concurrence, Whatcom County Planning and Development Services, *Whatcom
22 County Rural Element Update Tax Parcels on May 22, 2011 in the Rural Residential Density Overlay* pp. 21 – 39 of
73 (Updated March 29, 2012).

23 ¹⁶⁰ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 28 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

24 ¹⁶¹ IR R-084D in Tab R-084D of Whatcom County’s Compliance Report, Whatcom County Planning and
Development Services, *Whatcom County Rural Element Update LAMIRD Report* Appendix E: Buildout Percentage
and Average Tax Parcel Size in Affected Areas p. *1 (June 22, 2012).

¹⁶² *Id.*

1 requirements for LAMIRDs.¹⁶³ In the *Gold Star Resorts* decision, the supreme court concluded
2 the LAMIRD provisions are “mandatory criteria.”¹⁶⁴ Perhaps the most extreme example is that
3 Type I LAMIRDs are based on the July 1, 1990 built environment.¹⁶⁵ But Rural Neighborhoods
4 are based on the 2011 built environment.¹⁶⁶ How can a county add 20 years to the GMA legally?
5 A county cannot legally evade these mandatory criteria by simply adopting some policies and
6 changing the name of the designation as Whatcom County has done here.

7 Third, the designation of a Rural Neighborhood containing these large lots creates the
8 conflict here. The County’s own Policy 2MM-2 states that “[t]he Rural Residential Density
9 Overlays shall not be created or expanded outside of Rural Neighborhoods *or into areas where*
10 *smaller-lot development has not occurred.*”¹⁶⁷ This policy appears to be in accord with the
11 GMA’s requirement that comprehensive plans contain or otherwise control rural
12 development.¹⁶⁸ The lots greater than five acres, of which there are two dozen located in the Fort
13 Bellingham / Marietta area,¹⁶⁹ represent areas where smaller-lot development has not occurred.
14 Yet the RR-2A and RR-5A zoning subject to the Rural Residential Density Overlay would
15 permit much smaller minimum lot sizes and development at densities of 1 dwelling unit per
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19 ¹⁶³ RCW 36.70A.070(5)(c)(i); RCW 36.70A.070(5)(d)(i).

20 ¹⁶⁴ *Gold Star Resorts, Inc.*, 167 Wn.2d at 736, 222 P.3d at 798.

21 ¹⁶⁵ RCW 36.70A.070(5)(d)(v)(a).

22 ¹⁶⁶ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
23 pp. 27 – 28 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

24 ¹⁶⁷ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
p. 27 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report (emphasis added).

¹⁶⁸ RCW 36.70A.070(5)(c)(i).

¹⁶⁹ IR R-125 in Tab R-125 of this Concurrence, *Whatcom County Planning and Development Services, Whatcom
County Rural Element Update Tax Parcels on May 22, 2011 in the Rural Residential Density Overlay* pp. 21 – 39
(Updated March 29, 2012).

1 acre¹⁷⁰ – a zoning which would appear to *promote* rather than contain or control rural
2 development, since the large lots included in the RR-2A and RR-5A zones could be subdivided
3 and developed into multiple residences.

4 The Fort Bellingham / Marietta Rural Neighborhood is located adjacent to the
5 Bellingham urban growth area.¹⁷¹ The Western Board prohibited a LAMIRD adjacent to an urban
6 growth area where there was no evaluation of suitability of allowed urban style development, no
7 evaluation of the need for urban services, and no evaluation of whether the area should have
8 been included an UGA.¹⁷² One of the problems with a LAMIRD next to an UGA is that the small
9 lots lock in the urban growth area and prevent a more efficient expansion of the UGA in to areas
10 that can be readily developed at urban densities. This LAMIRD abuts the UGA and the studies
11 required by the *City of Anacortes v. Skagit County* have not been done. The LAMIRD also has
12 large parcels adjacent to the UGA that do not meet the standard for more intensely used land.
13 Parcel 042190 is 35.31 acres in size and parcel 095165 is 7.72 acres in size and the two parcels
14 abut each other and so abut the UGA.¹⁷³ In fact there are two dozen lots greater than five acres in
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18 ¹⁷⁰ IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032 Exhibit B Zoning Code Amendments
19 Comprehensive Plan Amendments pp. 4 – 5 of 90 in Tabs R-075 and R-075B of Whatcom County’s Compliance
20 Report.

21 ¹⁷¹ IR R-075 and R-075C, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
22 Comprehensive Plan Map 8 Amendments “Fort Bellingham / Marietta” Proposed Comprehensive Plan Land Use
23 Changes map in Tabs R-075 and R-075C of Whatcom County’s Compliance Report; IR R-084D in Tab R-084D of
24 Whatcom County’s Compliance Report, Whatcom County Planning and Development Services, Whatcom County
Rural Element Update LAMIRD Report p. 6 (Updated July 5, 2012).

¹⁷² *City of Anacortes v. Skagit County*, WWGMHB Case No. 00-2-0049c, Final Decision and Order (C/I
Development Issues) (Feb. 6, 2001), at *18.

¹⁷³ IR R-125 in Tab R-125 of this Concurrence, Whatcom County Planning and Development Services, *Whatcom
County Rural Element Update Tax Parcels on May 22, 2011 in the Rural Residential Density Overlay* p. 23 & p. 28
(Updated March 29, 2012).

1 the Fort Bellingham / Marietta RRDO.¹⁷⁴ In 1990, only 433 acres of the 792.6 acres in the Rural
2 Neighborhood, just 55 percent, was developed.¹⁷⁵

3 Fourth, this Rural Neighborhood will allow urban development in the rural area in
4 violation of RCW 36.70A.070(5)(b). In an earlier decision in this case, Whatcom County
5 conceded that densities of one dwelling unit per acre constitute urban growth.¹⁷⁶ The county was
6 correct to make this concession. The Washington State Supreme Court has held that a GMA
7 complaint “rural density is ‘not characterized by urban growth’ and is ‘consistent with rural
8 character.’ Former RCW 36.70A.070(5)(b). Whether a particular density is rural in nature is a
9 question of fact based on the specific circumstances of each case.”¹⁷⁷ One element of Whatcom
10 County’s definition of rural character is that the pattern of land use and development is
11 “compatible with the use of the land by wildlife and for fish and wildlife habitat[.]”¹⁷⁸ A
12 Washington State Department of Fish and Wildlife report shows that at densities of one dwelling
13 unit per acre, even with conservation planning implemented, only 35 percent of the state’s
14 wildlife species can survive and without conservation planning only just over 20 percent of the
15 species can survive.¹⁷⁹ Wiping out 65 to 80 percent of the state’s wildlife is certainly not
16 compatible with the use of the land by wildlife which Whatcom County and the GMA require as

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18 ¹⁷⁴ *Id.* at pp. 21 – 39.

19 ¹⁷⁵ IR R-084D in Tab R-084D of Whatcom County’s Compliance Report, Whatcom County Planning and
Development Services, *Whatcom County Rural Element Update LAMIRD Report* Appendix E: Buildout Percentage
and Average Tax Parcel Size in Affected Areas p. *1 (June 22, 2012).

20 ¹⁷⁶ *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-00013, Order Following Remand from the Supreme
Court (Sept. 9, 2011), at pp. 3 – 4 of 10.

21 ¹⁷⁷ *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 359, 190 P.3d 38,
52 – 53 (2008) (footnote omitted).

22 ¹⁷⁸ IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A Comprehensive Plan Amendments
pp. 7 – 8 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report citing RCW 36.70A.030(15).

23 ¹⁷⁹ IR 72B-28 in Tab 72B-28 of this Concurrence, Washington State Department of Fish and Wildlife, *Landscape
Planning for Washington’s Wildlife: Managing for Wildlife in Developing Areas* p. 1-1 (Olympia, Washington: Dec.
2009).

1 part of the definition of rural character.¹⁸⁰ So densities of one dwelling unit per acre are not rural
2 densities. We could analyze all of the elements of rural character and show that one acre
3 densities fail them all, but we fear that long of brief would rightly vex all of the parties to this
4 case and the Board.

5 In sum, the county has not met its burden of proof on the Fort Bellingham / Marietta
6 Rural Neighborhood. If the Board disagrees, then the Fort Bellingham / Marietta Rural
7 Neighborhood violates the GMA for the four additional and independent reasons documented
8 above.

9 **C. North Bellingham (formerly Type I LAMIRD now Rural Neighborhood)**

10 The former North Bellingham Type I LAMIRD abuts and is east of the City of
11 Ferndale.¹⁸¹ This LAMIRD was found to substantially interfere with GMA Goal 1 and the Board
12 made a finding of invalidity, so the burden is on Whatcom County to show that the North
13 Bellingham Rural Neighborhood no longer substantially interferes with GMA Goal 1, RCW
14 36.70A.020(1).¹⁸² Whatcom County has not met this burden, failing to even mention RCW
15 36.70A.020(1) in its Compliance Report for this LAMIRD.¹⁸³ So the Board should continue to
16 find this LAMIRD in violation of the GMA and maintain its finding of invalidity.

18
19 ¹⁸⁰ RCW 36.70A.030(15); IR R-075 and R-075A, Whatcom County Ordinance No. 2012-032 Exhibit A
Comprehensive Plan Amendments p. 7 of 33 in Tabs R-075 and R-075A of Whatcom County’s Compliance Report.

20 ¹⁸¹ IR R-075 and R-075C, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
Comprehensive Plan Map 8 Amendments “North Bellingham” Proposed Comprehensive Plan Land Use Changes
map in Tabs R-075 and R-075C of Whatcom County’s Compliance Report; IR R-084D in Tab R-084D of Whatcom
21 County’s Compliance Report, Whatcom County Planning and Development Services, *Whatcom County Rural
Element Update LAMIRD Report* p. 6 (Updated July 5, 2012).

22 ¹⁸² *Futurewise et al. v. Whatcom County*, Case No. 11-2-0010c, Final Decision and Order and Case No. 05-2-0013
Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012), at 171 – 72 of 177; *Hudson and Huber v. Clallam
County*, WWGMHB Case No 96-2-0031, Rescission of Invalidity and Finding of Compliance (Dec. 11, 2007), at
23 *2.

¹⁸³ Whatcom County Compliance Report pp. 13 – 14 (Aug. 28, 2012).

1 The North Bellingham Rural Neighborhood suffers from similar defects to Fort
2 Bellingham / Marietta Rural Neighborhood. We do not repeat the arguments here as to why the
3 Rural Neighborhood is an illegal end run around the LAMIRD requirements, why, if it is not a
4 LAMIRD, its one acre densities allowed by the RR-2A and RR-5A zones with the RRDO allow
5 urban growth in the rural area in violation of the GMA,¹⁸⁴ and why locating a Rural
6 Neighborhood abutting a city violates the GMA.

7 In 1990, in the North Bellingham Rural Neighborhood in 1990, only 528.4 acres of the
8 971.1 acres in the Rural Neighborhood, just 54 percent, was developed.¹⁸⁵ Even now, large lots
9 are included in the Rural Neighborhood. Parcel 320333 is 8.23 acres and parcel 129183 is 18.42
10 acres.¹⁸⁶ Including so much vacant land in a LAMIRD or Rural Neighborhood violates the GMA.

11 So like the Fort Bellingham / Marietta Rural Neighborhood, the county has not met its
12 burden of proof on the North Bellingham Rural Neighborhood. If the Board disagrees, then the
13 North Bellingham Rural Neighborhood violates the GMA for four additional and independent
14 reasons.

19 ¹⁸⁴ IR R-075 and R-075C, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
20 Comprehensive Plan Map 8 Amendments “North Bellingham” Proposed Rezoning map in Tabs R-075 and R-075C
21 of Whatcom County’s Compliance Report; IR R-075 and R-075B, Whatcom County Ordinance No. 2012-032
22 Exhibit B Zoning Code Amendments Comprehensive Plan Amendments p. 5 of 90 in Tabs R-075 and R-075B of
23 Whatcom County’s Compliance Report.

24 ¹⁸⁵ IR R-084D in Tab R-084D of Whatcom County’s Compliance Report, Whatcom County Planning and
Development Services, *Whatcom County Rural Element Update LAMIRD Report* Appendix E: Buildout Percentage
and Average Tax Parcel Size in Affected Areas p. *1 (June 22, 2012).

¹⁸⁶ IR R-125 in Tab R-125 of this Concurrence, Whatcom County Planning and Development Services, *Whatcom
County Rural Element Update Tax Parcels on May 22, 2011 in the Rural Residential Density Overlay* p. 39, p. 40, p.
55, & p. 60 (Updated March 29, 2012).

1 **D. Welcome (formerly Type I LAMIRD now Rural Neighborhood)**

2 Welcome is located on the east side of the Mount Baker Highway north of the highway's
3 intersection with Mosquito Lake Road.¹⁸⁷ Welcome has a LAMIRD on the southwest part of the
4 area which we agree is GMA complaint. However the Welcome Rural Neighborhood suffers
5 from some of the same defects to the North Bellingham Rural Neighborhood and the Fort
6 Bellingham / Marietta Rural Neighborhood. We do not repeat the argument as to why the Rural
7 Neighborhood is an illegal end run around the LAMIRD requirements, although we renew it for
8 the Welcome Rural Neighborhood.

9 The Welcome Rural Neighborhood has 59.3 acres.¹⁸⁸ In 1990, only 27.1 acres of the 59.3
10 acres in the Rural Neighborhood, just 46 percent, was developed.¹⁸⁹ Even now, 48 percent of the
11 Rural Neighborhood is made up of lots larger than five acres.¹⁹⁰ Like the other Rural
12 Neighborhoods, the Welcome Rural Neighborhood violates the GMA.

13 **V. Request for Invalidity**

14 RCW 36.70A.302(1) provides that:

15 (1) The board may determine that part or all of a comprehensive plan or
16 development regulations are invalid if the board:

17 (a) Makes a finding of noncompliance and issues an order of remand
18 under RCW 36.70A.300;

19 _____
20 ¹⁸⁷ IR R-075 and R-075C, Whatcom County Ordinance No. 2012-032 Exhibit C Official Zoning Map and
Comprehensive Plan Map 8 Amendments "Welcome" Proposed Comprehensive Plan Land Use Change map in
Tabs R-075 and R-075C of Whatcom County's Compliance Report.

21 ¹⁸⁸ IR R-084D in Tab R-084D of Whatcom County's Compliance Report, Whatcom County Planning and
Development Services, *Whatcom County Rural Element Update LAMIRD Report* Appendix E: Buildout Percentage
and Average Tax Parcel Size in Affected Areas p. *2 (June 22, 2012).

22 ¹⁸⁹ *Id.*

23 ¹⁹⁰ IR R-125 in Tab R-125 of this Concurrence, Whatcom County Planning and Development Services, *Whatcom
County Rural Element Update Tax Parcels on May 22, 2011 in the Rural Residential Density Overlay* pp. 70 – 71
(Updated March 29, 2012).

1 (b) Includes in the final order a determination, supported by findings of
2 fact and conclusions of law, that the continued validity of part or parts of the plan
3 or regulation would substantially interfere with the fulfillment of the goals of this
4 chapter; and

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

7 For the reasons set out above, the Board should conclude the rural policies and
8 regulations Futurewise challenges are noncompliant with the GMA and remand them back to
9 Whatcom County. As the table *Whatcom County, Plat and Commercial Permits in Affected*
10 *Areas since 9/20/05* shows, there have been 85 application for short subdivisions in the parts of
11 the rural area subject to this appeal.¹⁹¹ There have also been 10 applications for long subdivisions
12 in the same areas.¹⁹² They result in the inappropriate conversion of rural lands into sprawling, low
13 densities development substantially interfering with Goal 1 in RCW 36.70A.020(1). While these
14 are low densities overall, the densities are high for the rural area. See for example LSS2008-0001
15 a division of four lots on eight acres and SSS2006-0202 a division of four lots on 7.08 acres.¹⁹³
16 These high rural densities also interfere with the fulfillment of RCW 36.70A.020(2), which calls
17 on the county to reduce sprawl.

18 In addition to the residential subdivisions, 47 permits have been approved for
19 commercial, office, and industrial buildings and changes of use within the challenged zones.
20 These 47 permits do not include building permits for tenant improvements, remodeling that does
21 not include a change in use, or the expansion of existing structures on existing lots which would

22 ¹⁹¹ IR F-101 in Tab F-101 of this Concurrence, *Whatcom County, Plat and Commercial Permits in Affected Areas*
23 *since 9/20/05* pp. 20 – 27 (7/9/2010).

¹⁹² *Id.* at pp. 19 – 20.

¹⁹³ *Id.* at p. 19, p. 21, p. 23.

1 be exempt from a determination of invalidity.¹⁹⁴ A permit was also issued for a four unit multi-
2 family building.¹⁹⁵ The location of 99 of the permits and subdivisions in is shown on the map
3 *Post GMHB Order Permits (2005-2010)* also in Tab F-101 of this Concurrence. The location of
4 other the permits and subdivisions is in the table. This high level of development justifies a
5 determination of invalidity.

6 RESPECTFULLY SUBMITTED on September 11, 2012,

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8

9 Tim Trohimovich, WSBA No. 22367
Attorney for Petitioner Futurewise

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23 ¹⁹⁴ *Id.* at pp. 1 –19.

24 ¹⁹⁵ *Id.* at p. 5.

Table of Attachments

Index of Record (IR) No.	Tab Number	Document
72B-28	72B-28	Washington State Department of Fish and Wildlife, <i>Landscape Planning for Washington's Wildlife: Managing for Wildlife in Developing Areas</i> (Olympia, Washington: Dec. 2009) cited pages.
72B-28	72B-28	Larz T. Anderson, <i>Planning the Built Environment</i> (APA, Chicago Ill.: 2000) cited pages.
C-053	C-053	WRIA 1 Planning Unit, <i>WRIA 1 Watershed Management Plan Phase 1 Section 2 Assessments, Problem Identification, and Findings</i> (March 25, 2005) cited pages.
C-670	C-670	Futurewise Letter to the Whatcom County Council (Aug. 6, 2012).
C-670A	C-670A	Whatcom County Assessor Calculator Cost Form for 5655 Semiahmo Parkway.
C-671D	C-671D	Whatcom County, <i>Comprehensive Water Resource Plan</i> (Feb. 9, 1999) cited pages.
C-726	C-726	Whatcom County Agricultural Advisory Committee, <i>Whatcom County Rural Land Study: A Collaborative Report Identifying Rural Areas of Agricultural Significance</i> (February 2007) Exhibit C: Proposed Area Summaries.
C-726	C-726A	Aerial of Semiahmoo Resort with acreage calculation
C-726	C-726A	Semiahmoo webpages.
C-726	C-726A	Semiahmoo Marina About Us webpage.
	CP	<i>Whatcom County Comprehensive Plan Chapter Five Utilities</i> cited pages.
F-101	F-101	Whatcom County, <i>Plat and Commercial Permits in Affected Areas since 9/20/05 (7/9/2010)</i> .
F-101	F-101	<i>Post GMHB Order Permits (2005-2010)</i> .
R-001B	R-001B	<i>Whatcom County Rural Element Update LAMIRD Report Appendix E: Buildout Percentage and Average Tax Parcel Size in Affected Areas</i> (April 29, 2011).
R-076	R-076	PDS Presentation to County Council Rural Element Update July 24, 2012 cited pages.
R-101	R-101	Whatcom County Planning and Development Services <i>Whatcom County Rural Element Lot Coverage and Open Space Estimates</i> (April 19, 2012).
R-125	R-125	Whatcom County Planning and Development Services, <i>Whatcom County Rural Element Update Tax Parcels on May 22, 2011 in the Rural Residential Density Overlay</i> (Updated March 29, 2012) cited pages.
	Zoning	Cited Development Regulations.

1 **Declaration of Service**

2 I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of
3 Washington that, on September 11, 2012, I caused the following documents to be served on the
4 persons listed below in the manner shown: Futurewise’s Concurrence with a Finding of
5 Compliance in Part and Objection to a Finding of Compliance in Part with attachments in
6 *Governors Point Development Company v. Whatcom County*, GMHBWWR Case No. 11-2-
7 0010c.

8 Growth Management Hearings Board
9 Western Washington Region
10 PO Box 40953
11 Olympia, Washington 98504-0953
12 Tel: 360-586-0260
13 *Original and thee copies*

Ms. Karen Frakes
Whatcom County
Prosecuting Attorney’s Office
Whatcom County Courthouse
311 Grant Avenue, Suite 201
Bellingham, Washington 98225
Attorney for Whatcom County

- 10 By United States Mail, postage prepaid and properly addressed
- 11 By Legal Messenger or Hand Delivery
- 12 By Facsimile
- 13 By Federal Express or Overnight Mail prepaid
- 14 By E-Mail: western@eluh.wa.gov

- 10 By United States Mail, postage prepaid and properly addressed
- 11 By Legal Messenger or Hand Delivery
- 12 By Facsimile
- 13 By Federal Express or Overnight Mail prepaid
- 14 By E-Mail: kfrakes@co.whatcom.wa.us

15 Ms. Lesa Starkenburg-Kroontje
16 Starkenburg-Kroontje Attorney at Law, PS
17 PO Box 231
18 313 4th Street
19 Lynden, WA 98264
20 Attorney for Whatcom County

Ms. Jean O. Melious
Nossaman LLP
1925 Lake Crest Drive
Bellingham, Washington 98229

- 21 By United States Mail, postage prepaid and properly addressed
- 22 By Legal Messenger or Hand Delivery
- 23 By Facsimile
- 24 By Federal Express or Overnight Mail prepaid
- 25 By E-Mail: starkenburgkroontje@msn.com

- 21 By United States Mail, postage prepaid and properly addressed
- 22 By Legal Messenger or Hand Delivery
- 23 By Facsimile
- 24 By Federal Express or Overnight Mail prepaid
- 25 By E-Mail only by agreement: jmelious@nossaman.com



1 Mr. Robert M. Tull
2 Ms. Dannon C. Traxler
3 Langabeer & Tull PS
4 709 Dupont Street
5 PO Box 1678
6 Bellingham, Washington 98227

<input checked="" type="checkbox"/>	By United States Mail, postage prepaid and properly addressed
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Facsimile
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By E-Mail: dtraxler@langabeertull.com ; rtull@langabeertull.com

Ms. Barbara Dykes
Mr. Tom Ehrlichman
Salish Law PLLC
909 Harris Avenue, Suite 201H
Bellingham, Washington 98225

<input checked="" type="checkbox"/>	By United States Mail, postage prepaid and properly addressed
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Facsimile
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By E-Mail: tom@salishlaw.com ; barbara@salishlaw.com

9 Mr. Alan Marriner
10 Assistant City Attorney
11 City of Bellingham
12 210 Lottie Street
13 Bellingham, Washington 98225

<input checked="" type="checkbox"/>	By United States Mail, postage prepaid and properly addressed
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
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<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By E-Mail: amarriner@cob.org

<input type="checkbox"/>	By United States Mail, postage prepaid and properly addressed
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<input type="checkbox"/>	By Facsimile
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input type="checkbox"/>	By E-Mail:

16 DATED this 11th day of September 2012,
17
18

19 _____
20 Tim Trohimovich
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22
23

24 Declaration of Service - 2



816 Second Avenue, Suite 200
Seattle, Washington 98104
(206) 343-0681 Ext. 118
e-mail: tim@futurewise.org