

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

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

12 Petitioners,

13 v.

14 WHATCOM COUNTY,

15 Respondent.
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CASE Nos. 05-2-0013 and 11-2-0010c

**ORDER GRANTING MOTION FOR
RECONSIDERATION**

AND

**AMENDING
NOVEMBER 21, 2013 ORDER FINDING
COMPLIANCE**

18 **I. PROCEDURAL HISTORY**

19 On November 21, 2013, the Board issued its Order Finding Compliance in the above
20 captioned matter.¹ On December 2, 2013, Petitioner Futurewise, et al. (Futurewise) filed a
21 timely Motion for Reconsideration.² Petitioners moved for reconsideration because the
22 Board's November 21, 2013, Order did not decide the question about standards for limiting
23 units and requiring spacing between residential clusters in cluster subdivisions. Petitioners
24 asked the Board to decide the question of whether the amendment to Whatcom County
25 Code (WCC) 20.36.310(6) complied with the Growth Management Act (GMA).³ Whatcom
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29 ¹ GMHB Case Nos. 05-2-2-0013 and 11-2-0010c, *Futurewise v. Whatcom County (Governor's Point*
30 *Development Company)*. Order Finding Compliance Regarding Issues 1, 2, 3, 4 and 8 (November 21, 2013).

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

³ Whatcom County Ordinance 2013-028, Ex. B at 10 of 14 (strike through version). Whatcom County Code
20.36.310 "(6) Design Standard – In order to preserve rural character, no more than 16 residential lots shall be
permitted in one cluster and there shall be at least 500 feet of separation between any new clusters, except

1 County did not respond to the Motion. On December 18, 2013 the Board informed the
2 parties it would respond by January 23, 2014.

3 4 II. APPLICABLE LAW

5 In accordance with the Board's rules, the Board may reevaluate its decisions if a
6 party files reconsideration motions within ten days of a Board order and the motion must
7 meet at least one criterion for reconsideration.

8 9 **WAC 242-03-830 Post-decision motions -- Reconsideration**

10 (1) After issuance of a final decision any party may file a motion for
11 reconsideration with the board in accordance with subsection (2) of this
12 section. Such motion must be filed and served within ten days of service of
13 the final decision. Within ten days of filing the motion for reconsideration, a
14 party may file an answer to the motion for reconsideration without direction or
15 request from the board. The board may require an answer or additional
16 briefing from other parties.

17 (2) A motion for reconsideration shall be based on at least one of the
18 following grounds:

19 (a) Errors of procedure or misinterpretation of fact or law, material to the
20 party seeking reconsideration; or

21 (b) Irregularity in the hearing before the board by which such party was
22 prevented from having a fair hearing.

23 24 III. BOARD DISCUSSION

25 Futurewise's motion meets the criteria in the Board's rules on reconsideration by
26 alleging "an error of fact and law" in the Board's Order Finding Compliance. Futurewise
27 explains that because the Board was "silent on the issue of whether the amendments to
28 WCC 20.36.310(6) complied with the GMA"⁴ the Board erred in not deciding the question.
29 Petitioners cite *Low Income Housing Institute* and *Suquamish Tribe* holding that the Board
30 must resolve all issues as required in RCW 36.70A.290(1) and RCW 34.05.570(3)(f).⁵

31 when the cluster subdivision is located on a parcel or contiguous parcels in the same ownership, greater than
32 20 acres." (underline shows amendment by Whatcom County).

⁴ Futurewise Motion for Reconsideration at 2-3.

⁵ *Id.* at 3 *Low Income Housing Institute v. City of Lakewood*, 119 Wn. App. 110, 118-19, 77 P.3d 653, 657 (2003); *Suquamish Tribe v. CPSGMHB*, 156 Wn.App 743, 775-780, 235 P.3d 812 (2010).

1 The Board's Compliance Order found the County corrected provisions in WCC
2 20.36.300 to require enforceable language for cluster developments in rural zones and to
3 clarify the definition of and restricted uses in reserve areas.⁶ The Board found the County's
4 lot clustering code protected rural character insofar as having enforceable criteria and
5 dedicating reserve land in perpetuity.⁷ However, the Board did not address an amendment
6 to WCC 20.36.310(6) challenged in Issue 2. This amendment inserted an exception clause
7 in WCC 20.36.310(6) for cluster subdivisions Ordinance 2013-028. Specifically, the Board
8 failed to review the following underlined language in the County's cluster development code
9 which eliminated the cap on the number of lots in a cluster and removed the separation
10 between clusters except for the very smallest cluster (20 acres or less):
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12 **WCC 20.36.310(6)**

13 (6) In order to preserve rural character, no more than 16 residential lots shall
14 be permitted in one cluster and there shall be at least 500 feet of separation
15 between any new clusters, except when the cluster subdivision is located on
16 a parcel or contiguous parcels in the same ownership, greater than 20
17 acres.⁸

18 The Board has reviewed Petitioners' argument in their September 16, 2013,
19 Concurrence and Objections about the amendment language in WCC 20.36.310(6).
20 Petitioners cited to *Panesko*⁹ and other Board rulings concerning rural clusters. Petitioners
21 argued that the County's clustering provisions still violate RCW 36.70A.070(5)(c) "because it
22 would not reduce low density sprawl and did not minimize and contain rural development as
23 the GMA requires."¹⁰ Petitioners provided visual evidence of the intensity of rural clustering
24 at the Greens at Loomis Trail.¹¹
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26 ⁶ GMHB Compliance Order (November 21, 2013) at 12-14. See also Whatcom County Ordinance 2013-028,
27 Ex. B: WCC Title 20 Amendments at 9 of 14. <http://www.co.whatcom.wa.us/council/2013/ord/ord2013-028strike.pdf>

28 ⁷ *Id.* at 14.

29 ⁸ Whatcom County Code WCC 20.36.310 (Ord. 2013-057 § 1 Ex. A; 2013; Ord. 2013-028 § 2 Ex. B, 2013;
30 Ord. 2001-014 § 1, 2001; Ord. 90-45, 1990.

31 ⁹ *Vince Panesko v. Lewis County WWGMHB* Case No. 00-2-0031c, Final Decision and Order; *Eugene Butler*
32 *v. Lewis County, WWGMHB* Case No. 99-2-0027c, Compliance Order; and *Daniel Smith. v. Lewis County,*
33 *WWGMHB* No. 98-2-0011c Compliance Order (March 5, 2001), at 3 of 61 and 25.

¹⁰ Futurewise Concurrence with and Objections to Compliance Finding (September 19, 2013) at 12 "Further,
WCC 20.36.310(6) formerly limited clusters to 16 lots and formerly required a 500 foot separation between any

1 In their Motion for Reconsideration, Petitioners once again explain that the exemption
2 has the “effect of repealing two of the enforceable criteria applicable to rural cluster
3 subdivisions larger than 20 acres required by RCW 36.70A.070(5)(c)(i) and (iii).”¹² These
4 statutory provisions require jurisdictions to “contain or otherwise control rural development”
5 and “to reduce the inappropriate conversion of undeveloped land to sprawling, low-density
6 development in the rural area.” With the exemption in WCC 20.36.310(6), the Board finds
7 the County does not have a limit on the number of lots in a cluster larger than 20 acres or
8 standards by which to separate clustered subdivisions larger than 20 acres and thus fails to
9 “contain or otherwise control rural development.”¹³

11 In failing to rule on this issue, the Board overlooked its prior rulings on rural cluster
12 regulation, including decisions in Whatcom County.¹⁴ In its prior rulings, the Board looked to
13 RCW 36.70A.050(b) which provides in part:

14 To achieve a variety of rural densities and uses, counties may provide for
15 clustering ... and other innovative techniques ... that are not characterized by
16 urban growth and that are consistent with rural character.

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18 RCW 36.70A.030(19) defines “urban growth.”

19 “Urban growth” refers to growth that makes intensive use of land for the
20 location of buildings, structures, and impermeable surfaces to such a degree
21 as to be incompatible with the primary use of such land for production of
22 food, other agricultural products, or fiber or the extraction of mineral
23 resources, rural uses, rural development, and natural resource lands. . .

24
25 new cluster in all cluster subdivisions. However, Whatcom County Ordinance No. 2013-028 amended WCC
26 20.36.310(6) so now these limits only apply to cluster subdivisions located on a lot or lots 20 acres or smaller.
27 So cluster subdivisions proposed for a lot or lots larger than 20 acres, which would be most rural cluster
28 subdivisions, can have an unlimited number of lots in the cluster and they can be right next to another cluster.”

29 ¹¹ See, Auditor File No 2040305824 and Auditor File No. 2050804976, admitted by official notice. Compliance
30 Order (Jan. 23, 2014).

31 ¹² Motion for Reconsideration at 4.

32 ¹³ The Board notes under typical rural clustering provisions, a 20-acre parcel in R-5A zone would generally be
limited to a 4-unit cluster, and in R-2A would be limited to a 10-unit cluster. The Board queries whether a 16-
unit cap on a cluster in a 20-acre parcel has any effect.

¹⁴ *Whatcom Environmental Council v. Whatcom County*, WWGMHB Case No. 94-2-0009, Third Compliance
Order (March 29, 1996); *Whatcom Environmental Council v. Whatcom County*, WWGMHB Case No. 94-2-
0009, Order Re: Invalidity; and *C.U.S.T.E.R. Association v. Whatcom County*, WWGMHB Case No. 96-2-
0008, Order Re: Invalidity (July 25, 1997), at *8 of 7.

1 When allowed to spread over wide areas, urban growth typically requires
2 urban governmental services. . . .

3 The Board determined Whatcom County's 1997 rural clustering provisions "do not
4 have minimum lot sizes or a maximum number of lots per site and as such continues [sic] to
5 allow urban growth outside of properly established UGAs."¹⁵ Another Board decision found
6 Lewis County's unlimited clustering in essence would create new LAMIRDs and "would do
7 irreparable damage to the rural character," noting that "uncapped clusters characteristically
8 lead to a demand for urban governmental services."¹⁶ Similarly, a Mason County ordinance
9 allowing 40 homes on a 100-acre tract was remanded to the county "to cap the clustering in
10 rural areas so as to preclude sets of clusters of such magnitude that they demand urban
11 services."¹⁷

12 This analysis of rural clustering was underscored by the Court of Appeals in
13 *Suquamish Tribe*. The Court took issue with the Central Board's approval of "clusters of
14 clusters" for 5,000 acres of rural wooded land in Kitsap County. The Court questioned
15 Kitsap's regulation which allowed up to 25 units in a cluster and set a 150-foot separation
16 between clusters.¹⁸ The Court remanded the matter to the Board to consider "whether the
17 clusters or groups of clusters allowed by the program actually allow urban growth outside
18 the UGA."¹⁹ The Court was concerned the Kitsap provisions "could create clusters of a
19 significant size, allowing developers to site clusters relatively near to one another."²⁰ The
20 Court concluded rural character was not protected.

21 In the present case, Petitioners have the burden of proof to demonstrate that the
22 County's amended regulation on clustered residential developments will allow densities and
23 uses that are **characterized by urban growth** and are **not consistent with rural**
24 **character**. Upon reconsideration, in light of the provisions of the GMA and the case law

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¹⁵ *C.U.S.T.E.R.*, Order Re Invalidity, (July 25, 1997) p. 8

¹⁶ *Daniel Smith v. Lewis County*, WWGMHB Case No. 98-2-0011c (April 5, 1999) FDO, at 6-7 of 17.

¹⁷ *Dawes v. Mason County*, WWGMHB Case No. 96-2-0023, FDO (December 5, 1996).

¹⁸ *Suquamish Tribe*, 165 Wn.App. at 750-751.

¹⁹ *Suquamish Tribe*, 165 Wn.App. at 768, n. 20.

²⁰ *Id.* at 768.

1 cited by Petitioners, the Board finds the County's action amending WCC 20.36.310(6) to
2 remove limits on number of lots and remove spacing between clusters on all but the
3 smallest developments does not comply with the GMA. No maximum on the number of lots
4 and no minimum standards for separation of clusters constitutes urban growth and is
5 inconsistent with rural character. This exemption allows increased densities and uses that
6 are characterized by urban growth and are not consistent with rural character. The
7 exemption also violates the "patterns of land use and development" for rural areas as
8 defined by RCW 36.70A.030 (15).²¹ Further, this exemption does not contain or control
9 rural development, assure visual compatibility with the surrounding rural area, nor reduce
10 conversion of undeveloped land as required in RCW 36.70A.070(5)(c).²²

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12 Therefore, the Board finds and concludes that the exemption clause in WCC
13 20.36.310(6) for cluster subdivisions violates RCW 36.70A.070(5)(b) because it allows
14 densities and uses that are characterized by urban growth and are not consistent with rural
15 character. The exemption also violates RCW 36.70A.070(5)(c)(i) and (iii) because the rural
16 element fails to include measures that both contain rural development and reduce low-
17 density sprawl.

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19 The Compliance Order is amended as follows (additions shown in underline,
20 deletions shown in ~~strikethrough~~):
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23 _____
24 ²¹RCW 36.70A.030(15) "'Rural character' refers to the patterns of land use and development established by a
25 county in the rural element of its comprehensive plan: (a) In which open space, the natural landscape, and
26 vegetation predominate over the built environment; (b) That foster traditional rural lifestyles, rural-based
27 economies, and opportunities to both live and work in rural areas; (c) That provide visual landscapes that are
28 traditionally found in rural areas and communities; (d) That are compatible with the use of the land by wildlife
29 and for fish and wildlife habitat; (e) That reduce the inappropriate conversion of undeveloped land into
30 sprawling, low-density development; (f) That generally do not require the extension of urban governmental
31 services; and (g) That are consistent with the protection of natural surface water flows and groundwater and
32 surface water recharge and discharge areas."

²² RCW 36.70A.070(5)(c) "Measures governing rural development. The rural element shall include measures
that apply to rural development and protect the rural character of the area, as established by the county, by:
(i) Containing or otherwise controlling rural development; (ii) Assuring visual compatibility of rural development
with the surrounding rural area; (iii) Reducing the inappropriate conversion of undeveloped land into
sprawling, low-density development in the rural area; (iv) Protecting critical areas, as provided in RCW
36.70A.060, and surface water and groundwater resources; and (v) Protecting against conflicts with the use of
agricultural, forest, and mineral resource lands designated under RCW 36.70A.170."

1 **Page 2, lines 9-16**

2 On December 2, 2013, Petitioner Futurewise filed a timely Motion for
3 Reconsideration.²³ Petitioners moved for reconsideration asserting the Board’s
4 November 21, 2013 Order did not decide the question about standards limiting units
5 in rural clusters and requiring spacing between residential clusters in Whatcom
6 County Code (WCC) 20.36.310(6).²⁴ Whatcom County did not respond to the
7 Motion. On January 23, 2014, the Board issued this amended order finding
8 compliance for Issues 1, 2, 3, and 8 and non-compliance for WCC 20.36.310(6) of
9 Issue 2.

11 **Page 13, lines 15-21**

12 Petitioners also argue the amendment to WCC 20.36.310(6) creates an exemption
13 for clusters on lots 20 acres or larger which allows an “unlimited number of lots in the
14 cluster and they can be right next to another cluster.”²⁵ This exemption violates RCW
15 36.70A.070(5)(c) and is counter to previous Board decisions because it does not
16 include a limit on the number of lots allowed on the land included in the cluster and
17 does not apply standards for spacing between clusters.²⁶

18 **Page 14, lines 18-21**

19 Board Discussion and Conclusion

20 Upon review of the County’s action and Petitioners’ Motion for Reconsideration
21 regarding WCC 20.36.310(6), the Board finds the Petitioners have failed to carry their

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23 ²³ Futurewise Motion for Reconsideration, GMHB Case Nos. 05-2-0013 and 11-2-0010c, *Futurewise v.*
24 *Whatcom County (Governor’s Point Development Company)* (December 2, 2013).

25 ²⁴ Whatcom County Ordinance 2013-028, Ex. B at 10 of 14 (strike through version). Whatcom County Code
26 20.36.310: “(6) Design Standards – In order to preserve rural character, no more than 16 residential lots shall
27 be permitted in one cluster and there shall be at least 500 feet of separation between any new clusters, except
28 when the cluster subdivision is located on a parcel or contiguous parcels in the same ownership, greater than
29 20 acres. (underline shows amendment by Whatcom County).”

30 ²⁵ Futurewise Concurrence and Objections at 13.

31 ²⁶ *Whatcom Environmental Council v. Whatcom County*, WWGMHB Case No. 94-2-0009, Order Re: Invalidity
32 and *C.U.S.T.E.R. Association v. Whatcom County*, WWGMHB Case No. 96-2-0008, Order Re: Invalidity (July
25, 1997), at *6 of 7. *Vince Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c, Final Decision and
Order; *Eugene Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, Compliance Order, and *Daniel
Smith. v. Lewis County*, WWGMHB No. 98-2-0011c, Compliance Order (March 5, 2001) at 3 of 61 & 25.

1 burden of proof demonstrating the County continues to violate the GMA with respect
2 to WCC 20.36.305; portions of .310; .315; and .320.

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4 **Page 15, lines 19-28 and Page 15, lines 1-5**

5 **. . .With this action, the Board finds the County has met the requirements of**
6 **RCW 36.70A.070(5)(c)(i) and (ii) with respect to WCC 20.36.305; portions of**
7 **.310; .315; and .320.**

8 However, with respect to the amendment to WCC 20.36.310(6), the Board
9 finds the Petitioners have carried their burden of proof demonstrating the County
10 continues to fail to meet GMA rural element requirements by eliminating standards
11 capping cluster units and separating clusters on lots 20 acres or larger. Allowing this
12 exemption increases density and violates the “patterns of land use and development”
13 for rural areas as defined by RCW 36.70A.030(15).²⁷ Further, this exemption does
14 not contain or control rural development, assure visual compatibility with the
15 surrounding rural area, nor reduce conversion of undeveloped land as required in
16 RCW 36.70A.070(5)(c).²⁸ In its Order on Reconsideration, the Board addresses this
17 legal issue and provides its legal analysis.²⁹ The Board finds that WCC 20.36.310(6)
18 continues to violated RCW 36.70A.070(5)(c) and remands this matter to the County.
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23 ²⁷RCW 36.70A.030(15) "Rural character' refers to the patterns of land use and development established by a
24 county in the rural element of its comprehensive plan: (a) In which open space, the natural landscape, and
25 vegetation predominate over the built environment; (b) That foster traditional rural lifestyles, rural-based
26 economies, and opportunities to both live and work in rural areas; (c) That provide visual landscapes that are
27 traditionally found in rural areas and communities; (d) That are compatible with the use of the land by wildlife
28 and for fish and wildlife habitat; (e) That reduce the inappropriate conversion of undeveloped land into
29 sprawling, low-density development; (f) That generally do not require the extension of urban governmental
30 services; and (g) That are consistent with the protection of natural surface water flows and groundwater and
31 surface water recharge and discharge areas."

32 ²⁸ RCW 36.70A.070-(5)-(c) Measures governing rural development." The rural element shall include measures
that apply to rural development and protect the rural character of the area, as established by the county, by:
(i) Containing or otherwise controlling rural development; (ii) Assuring visual compatibility of rural development
with the surrounding rural area; (iii) Reducing the inappropriate conversion of undeveloped land into
sprawling, low-density development in the rural area; (iv) Protecting critical areas, as provided in RCW
36.70A.060, and surface water and groundwater resources; and (v) Protecting against conflicts with the use of
agricultural, forest, and mineral resource lands designated under RCW 36.70A.170."

²⁹ GMHB -Case No.11-2-0010c Order Granting Motion for Reconsideration (January 23, 2014) at 3-6.

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IV. ORDER

Having reviewed the November 21, 2013, Compliance Order, Futurewise’s Motion for Reconsideration, relevant provisions of the GMA and the Board’s Rules of Practice and Procedure, prior decisions of the Board and having deliberated the matter, the Board:

1. **GRANTS** the Motion for Reconsideration of Issue 2;
2. **AMENDS** the November 21, 2013, Order Finding Compliance to Order Finding Non-Compliance regarding WCC 20.36.310(6) in Issue 2 and sets a compliance schedule; and
3. **ORDERS COMPLIANCE** shall be achieved by the scheduled below.

Item	Date Due
Compliance Due on identified areas of noncompliance	March 24, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	April 7, 2014
Objections to a Finding of Compliance	April 21, 2014
Response to Objections	May 1, 2014
Telephonic Compliance Hearing Call 1 (800) 704-9804 and use pin code 7579646#	May 7, 2014 1:30 p.m.

Dated this 23rd day of January, 2014.

Nina Carter, Board Member

Margaret Pageler, Board Member

Raymond L. Paoella, Board Member

1 **Note: This is a final decision and order of the Growth Management Hearings Board**
2 **issued pursuant to RCW 36.70A.300.³⁰**
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31 ³⁰ A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty
32 days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth
Management Hearings Board is not authorized to provide legal advice.

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON
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5 FUTUREWISE, GOVERNORS POINT
6 DEVELOPMENT COMPANY, TRIPLE R.
7 RESIDENTIAL CONSTRUCTION, INC. AND
8 THE SAHLIN FAMILY, ERIC HIRST, LAURA
9 LEIGH BRAKKE, WENDY HARRIS AND
10 DAVID STALHEIM, AND CITY OF
11 BELLINGHAM,

12 Petitioners,

13 v.

14 WHATCOM COUNTY,

15 Respondent.
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17

CASE Nos. 05-2-0013 and 11-2-0010c

**ORDER FINDING COMPLIANCE
REGARDING¹ ISSUES 1, 2, 3, 4, AND 8.**

And

**FINDING NON-COMPLIANCE
REGARDING WCC 20.36.310(6)
IN ISSUE 2.**

**[Re: Ordinance Nos. 2013-028 and
2013-043]**

(AS AMENDED ON RECONSIDERATION)

18 THIS Matter came before the Board for hearing on November 1, 2013, following
19 submittal of Whatcom County's Compliance Report² filed in response to the Board's
20 January 4, 2013, Compliance Order and Order Following Remand on Issue of LAMIRDs
21 (Compliance Order). The Compliance Report summarized amendments to the County's
22 comprehensive plan and development regulations adopted in Ordinance Nos. 2013-028 and
23 2013-043. Intervenors Boulos, et al. (Boulos), Fort Hill, LLC, et al. (Fort Hill), and Douglas
24 Pullar (Pullar) filed responses in support of the Compliance Report on September 5, 2013.
25 Petitioners Futurewise, et al. (Futurewise) and Hirst, et al. (Hirst) each filed a Concurrence
26 with a Finding of Compliance in Part and Objection to a Finding of Compliance in Part on
27 September 19, 2013. Whatcom County, Fort Hill, Boulos and Pullar responded to
28 Petitioners' objections on September 26, 2013.³
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32 ¹ As amended by the Board's Order on Reconsideration (January 23, 2013).

² Whatcom County's Compliance Report filed September 5, 2013.

³ Whatcom County's Response to Objections to a Finding of Compliance (September 26, 2013). Fort Hill's Response to Objections filed by Hirst and Futurewise (September 26, 2013). Intervenor Boulos' s Response

1 The Compliance Hearing was held on November 1, 2013, at the Whatcom County
2 Courthouse in Bellingham and was attended by Board members Nina Carter, Margaret
3 Pageler, and Raymond Paoella, with Ms. Carter presiding. Petitioner Futurewise was
4 represented by Tim Trohimovich. Petitioners Hirst, et al. were represented by Jean Melious.
5 Whatcom County appeared through Whatcom County's Prosecuting Attorney Karen Frakes.
6 Intervenor Fort Hill, LLC, et al., Intervenor Marco A. Boulos, et al. and Intervenor Douglas
7 Pullar were represented by Bradley Swanson and Kristen Reid.

9 On December 2, 2013, Petitioner Futurewise filed a timely Motion for
10 Reconsideration.⁴ Petitioners moved for reconsideration asserting the Board's November
11 21, 2013, Order did not decide the question about standards limiting units in rural clusters
12 and requiring spacing between residential clusters in Whatcom County Code (WCC)
13 20.36.310(6).⁵ Whatcom County did not respond to the Motion. On January 23, 2014, the
14 Board issued this amended order finding compliance for Issues 1, 2, 3, and 8 and non-
15 compliance for WCC 20.36.310(6) of Issue 2.

17 I. PROCEDURAL BACKGROUND

18 Since 2005, Whatcom County has been in the process of updating its comprehensive
19 plan (CP) and development regulations (DRs) to comply with the Growth Management Act.
20 Over the past eight years, the County has made great strides in coming into compliance, but
21 remains partially out of compliance.⁶ After various appeals to Superior Court, Court of
22 Appeals and our state Supreme Court,⁷ the County has again amended its comprehensive
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27 to Objections filed by Hirst and Futurewise (September 26, 2013). Pullar's Response to Objections filed by
28 Hirst and Futurewise (September 26, 2013).

29 ⁴ Futurewise Motion for Reconsideration, GMHB Case Nos. 05-2-0013 and 11-2-0010c, *Futurewise v.*
Whatcom County (Governor's Point Development Company) (December 2, 2013).

30 ⁵ Whatcom County Ordinance 2013-028, Ex. B at 10 of 14 (strike through version). Whatcom County Code
31 20.36.310 "(6) Design Standards – In order to preserve rural character, no more than 16 residential lots shall
32 be permitted in one cluster and there shall be at least 500 feet of separation between any new clusters, except
when the cluster subdivision is located on a parcel or contiguous parcels in the same ownership, greater than
20 acres." (underline shows amendment by Whatcom County).

⁶ *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013, Final Decision/Order (September 20, 2005).

⁷ See *Gold Star Resorts, Inc., v. Futurewise*, 140 Wn. App. 378, 166 P.3d 748 (2007); *Gold Star Resorts, Inc., v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009).

1 plan, development regulations, and zoning map in response to the Board's latest
2 Compliance Order.⁸

3 In the January 4, 2013, Compliance Order, the Board found several issues stipulated
4 to be in compliance,⁹ four issues in compliance¹⁰ and these remaining eight issues to be
5 resolved.¹¹

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| 7 | Issue 1: | Variety of Rural Densities |
| 8 | Issue 2: | Lot Clustering |
| 9 | Issue 3: | Water Resources Measures for Lake Whatcom |
| 10 | Issue 4: | LAMIRDS: Rural Neighborhoods/RRDO Designation/Boundaries
<i>Fort Bellingham/Marietta, North Bellingham, and Welcome</i> |
| 11 | Issue 5: | Type I, II and III LAMIRDS "Exemptions" and "Small Scale Standards" |
| 12 | Issue 6: | Logical Outer Boundaries (LOB) – <i>Smith & Guide Meridian</i> |
| 13 | Issue 7: | Logical Outer Boundaries (LOB) – <i>Birch Bay/Lynden & Valley View</i> |
| 13 | Issue 8: | Water Transmission Lines |

14 In its January 4, 2013, Order, the Board imposed invalidity on the following:¹²

- 15
- 16 • County's development regulations relating to Type I LAMIRDs;
 - 17 • Logical outer boundaries of Birch Bay/Lynden/Valley View LAMIRD, Smith-Guide
18 Meridian LAMIRD, Fort Bellingham, North Bellingham and Welcome LAMIRDs;
 - 19 • Exceptions allowed in WCC 20.80.100(2), (3), and (4) for square footage, uses
20 and types of businesses for Type I and Type III LAMIRDs and exceptions to the
21 "small scale" requirement of Type II LAMIRDs¹³; and
 - 22 • Sections of the County's code referencing WCC 20.80.100(2), (3), and (4).

23 II. PRELIMINARY MATTERS

24 Request to take official notice

25 The County requested the Board to take official notice of Auditor File No.
26 2040305824 for the Greens at Loomis Trail Division 1 and Auditor File No. 2050804976 for

27 ⁸ GMHB Compliance Order and Order Following Remand on Issue of LAMIRDs (January 4, 2013).

28 ⁹ *Id.* at 11-14, Issues Stipulated by Parties to be in Compliance by Ordinance 2012-032.

29 ¹⁰ *Id.* at 85, Issues found in compliance by the Board: Structure of cross-referencing plan and rural lands
30 narrative; population allocation; visual compatibility; and critical areas measures for Chuckanut Wildlife
31 Corridor.

30 ¹¹ *Id.* at 85-88.

31 ¹² *Id.* at 88-93.

32 ¹³ *Id.* at 91: However, the County also adopted WCC 20.80.100(2), (3), and (4) allowing exceptions to the
square footage, uses, and types of businesses for Type I and Type III LAMIRDs that exceed what the statute
allows. WCC 20.80.100(2) also allows exceptions to the "small scale" requirement of Type II LAMIRDs. The
Board imposes invalidity on WCC 20.80.100(2), (3), and (4) until the County corrects its development
regulations to contain Type I, II, and III LAMIRDs within the confines of RCW 36.70A.070(5)(d)(i)(ii) and (iii).

1 the Greens at Loomis Trail Division 2.¹⁴ Upon review of these documents, the Board finds
2 that these documents assist the Board in making its compliance determination with respect
3 to rural cluster regulations. The Board takes official notice of the Auditor files.
4

5 **Intervenors' Participation**

6 Intervenor Fort Hill is a property owner in one of the Rural Neighborhoods considered
7 in Legal Issue 4. Fort Hill supports the County's action to achieve compliance. Petitioners
8 stipulated that the County's adoption of Ordinance 2013-028 complied with the GMA as set
9 forth in the January 4, 2013, Compliance Order. Because there was no dispute on this
10 matter, the Board did not hear oral argument from the parties or Intervenor Fort Hill.
11

12 Intervenor Pullar and Boulos are property owners in the vicinity of the LAMIRDs
13 considered in Legal Issues 6 and 7, respectively. The County acknowledges it has taken no
14 legislative action to achieve compliance with the January 4, 2013 Compliance Order as to
15 these LAMIRDs. Thus there is no CP or DR amendment before the Board for its
16 consideration at this time. Therefore the Board did not hear oral argument or consider
17 briefings and submittals of the parties, including Intervenor Pullar and Boulos.¹⁵
18

19 **Motion for Stay on Issues 5, 6, and 7**

20 Under RCW 34.05.467, a party may submit to the presiding or reviewing officer, as is
21 appropriate to the stage of the proceeding, a petition for stay of effectiveness of a final order
22 within ten days of its service unless otherwise provided by statute or stated in the final order.
23 In addition, pursuant to RCW 34.05.550(1), an agency "may grant a stay, in whole or in part,
24 or other temporary remedy." The Board's rules of procedure at WAC 242-03-860 set criteria
25 for issuance of a stay.
26

27 On October 15, 2013, Whatcom County and Intervenor submitted a Joint Motion
28 Requesting a Stay of Compliance Proceedings on Issues Raised in Petitions for Review.¹⁶
29 The County requested a stay for Issue 5 regarding LAMIRD development regulations and
30
31

32 ¹⁴ Whatcom County Response to Objections to Findings of Compliance (September 26, 2013) at 11.

¹⁵ See Order Finding Continuing Non-Compliance, Extending Invalidity, and Granting Stay of Compliance Schedule (November 8, 2013).

¹⁶ Filed October 15, 2013, by Whatcom County and Attorneys for Intervenors.

1 Issues 6 and 7 regarding boundaries for Birch Bay-Lynden Valley View LAMIRD and
2 Smith/Guide Meridian LAMIRD. Hirst opposed the motion.¹⁷

3 At the November 1, 2013, compliance hearing, the Board allowed oral argument on
4 the joint motion requesting a stay. At the compliance hearing, the County conceded it did
5 not take action on Issues 5, 6, and 7 to comply with the Board's January 4, 2013
6 Compliance Order. After deliberation, the Board issued an oral ruling and then on
7 November 8, 2013, issued a written order finding that Whatcom County had not taken action
8 to achieve compliance with the Board's January 4, 2013, Compliance Order concerning:
9

- 10 • LAMIRD DRs – Legal Issue 5 – Type I, II, and III LAMIRDs “Exemptions” and
11 “Small Scale Standards;” and
- 12 • LAMIRD LOBs – Legal Issue 6 – Logical Outer Boundaries (LOB) – *Smith &*
13 *Guide Meridian* and Legal Issue 7 – Logical Outer Boundaries – *Birch*
14 *Bay/Lynden & Valley View*.

15
16 The Board found the County in continuing non-compliance and made a continuing
17 determination of invalidity concerning the three issues. The Board's January 4, 2013 order
18 remains in effect until the County takes compliant action or the issues are resolved by a final
19 ruling of the court. The Board granted a stay of the compliance schedule for the County's
20 compliance actions concerning LAMIRD DRs and LAMIRD LOBs pending final
21 determination by the court.¹⁸
22

23 III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, 24 AND STANDARD OF REVIEW

25
26 After the Board has entered a finding of noncompliance, the local jurisdiction is given
27 a period of time to adopt legislation to achieve compliance.¹⁹ After the period for
28 compliance has expired, the Board is required to hold a hearing to determine whether the
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32 ¹⁷ Hirst Opposition to Joint Motion Requesting a Stay of Compliance Proceedings on Issues Raised in
Petitions for Review (October 21, 2013) at 3.

¹⁸ Order Finding Continuing Non-Compliance, Extending Invalidity, and Granting a Stay of Compliance
Schedule, Case No. 11-2-0010c and 05-2-0013 (November 8, 2013).

¹⁹ RCW 36.70A.300(3)(b).

1 local jurisdiction has achieved compliance.²⁰ For purposes of Board review of the
2 comprehensive plans and development regulations adopted by local governments in
3 response to a non-compliance finding, the presumption of validity applies and the burden is
4 on the challenger to establish that the new adoption is clearly erroneous in view of the entire
5 record before the board and in light of the goals and requirements of the GMA.²¹

6
7 In order to find the County's action clearly erroneous, the Board must be "left with the
8 firm and definite conviction that a mistake has been made."²² Within the framework of state
9 goals and requirements, the Board must grant deference to local governments in how they
10 plan for growth.²³ In sum, during compliance proceedings the burden remains on the
11 Petitioner to overcome the presumption of validity and demonstrate that **any action** taken
12 by the County is clearly erroneous in light of the goals and requirements of chapter 36.70A
13 RCW (the Growth Management Act).²⁴ Where not clearly erroneous and thus within the
14 framework of state goals and requirements, the planning choices of the local government
15 must be granted deference.
16

17 Petitioner Futurewise asserts in its brief that "the burden is initially on the County" as
18 to compliance.²⁵ The Board disagrees and finds no support in the GMA for this assertion.
19 Under RCW 36.70A.320(4), a county "subject to a determination of invalidity made under
20 RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or
21 resolution it has enacted in response to the determination of invalidity will no longer
22 substantially interfere with the fulfillment of the goals of" the GMA. The County's burden
23 under RCW 36.70A.320(4) is limited to **invalidity** determinations under the standard in
24 RCW 36.70A.302(1), and this burden of the County does not apply to **compliance**
25 determinations. As to **compliance**, the burden is always on the Petitioner to overcome the
26 presumption of validity and demonstrate that **any action** taken by the County in an attempt
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30 ²⁰ RCW 36.70A.330(1) and (2).

31 ²¹ RCW 36.70A.320(1), (2), and (3).

32 ²² *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

²³ RCW 36.70A.3201.

²⁴ RCW 36.70A.320(2).

²⁵ Futurewise's Concurrence with a Finding of Compliance in Part and Objection to a Finding of Compliance in Part, pp. 2, 15, and 16, September 19, 2013.

1 to achieve compliance is clearly erroneous in light of the goals and requirements of the
2 GMA.²⁶

4 IV. DISCUSSION AND ANALYSIS

5 Issue 1:

6 Variety of Rural Densities

7 In its January 4, 2013, Compliance Order the Board found “Ordinance 2012-032 still
8 contains no criteria differentiating R5 and R10 that would assure long-term continuance of
9 any rural lots larger than R5.”²⁷ In its conclusions, the Board found “The rural element of
10 Whatcom’s Plan as amended by Ordinance 2012-032 fails to provide a variety of rural
11 densities in that it lacks measures to protect rural character or contain rural development at
12 any lesser densities than 1du/5ac. Thus Ordinance 2012-032 fails to comply with RCW
13 36.70A.070(5)(b) and RCW 36.70A.070(5)(c)(i) and (ii).”²⁸

16 Applicable law:

17
18 RCW 36.70A.070(5)(b) Rural development. The rural element shall permit
19 rural development, forestry, and agriculture in rural areas. The rural element
20 shall provide for a variety of rural densities, uses, essential public facilities,
21 and rural governmental services needed to serve the permitted densities and
22 uses. To achieve a variety of rural densities and uses, counties may provide
23 for clustering, density transfer, design guidelines, conservation easements,
24 and other innovative techniques that will accommodate appropriate rural
25 densities and uses that are not characterized by urban growth and that are
26 consistent with rural character.

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

- 30 (i) Containing or otherwise controlling rural development;
- 31 (ii) Assuring visual compatibility of rural development with the surrounding
32 rural area;

²⁶ Where the jurisdiction has taken **no action** to cure the previously-determined non-compliance, the finding of non-compliance is continued and must be transmitted to the governor. RCW 36.70A.330(3).

²⁷ GMHB Compliance Order (January 4, 2013) at 31.

²⁸ *Id.* at 86.

1 **County Action and Petitioners' Response**

2 To comply with the GMA, the County adopted Ordinance 2013-028 containing new
3 criteria to ensure preservation of R10A zoning.²⁹ The County explained their action
4 addressed the Board's concern that 21.8% of the rural area, currently zoned for R10A,
5 could be rezoned to allow higher rural densities. The County amended its CP's introductory
6 section for rural areas³⁰ and changed Policy 2GG-3 to include criteria for rezone requests in
7 the R10A zone.³¹ These amendments only allow rezones for properties that are located, as
8 of 2013, adjacent to property with higher rural densities. The amendment prohibits rezones
9 for property in Urban Growth Area reserves or rural study areas.³² The County clarified that
10 if it "assum[ed] the highly unlikely scenario that every eligible acre was in fact rezoned, the
11 R10A acreage, currently comprising 21.8% of all rural lands, would never comprise less
12 than 20.6% of all rural lands."³³

14 Petitioner Futurewise made the following arguments: It appreciated the County's
15 addition of criteria for R10A rezones, but they believe the criteria continue to violate the
16 GMA. Hirst concurred with Futurewise's position.³⁴ Futurewise maintains the criteria still
17 violate GMA's definition of "rural character" because the rezoned properties, even if limited
18 to those in 2013 adjacent to denser rural properties, will become too dense compared to
19 existing densities in the rural area. Futurewise argued the criteria used to calculate
20 allowable density for proposed rezones should not reference adjacent existing LAMIRDs,
21 urban growth areas (UGA), small lots or 7.5-acre lots. By including these more dense areas
22 in calculating the number of lots for rezoned R10A properties, Futurewise claims the County
23 increases density beyond the existing rural character. Also according to Futurewise,
24 conversely to including the more dense properties, the County excluded larger "reserve
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29 ²⁹ Whatcom County Compliance Report at 2 and Ex. R-127.

30 ³⁰ *Id.* at 3. "Portions of the rural area that historically contain larger lots have been zoned for densities of one dwelling per ten acres. These areas provide for a variety of densities important to the rural character and shall be retained. Rezones from R10A to allow higher densities are limited to those R10A areas that are adjacent to established higher densities." Ex. R-127; Ex. A, p. 8.

31 ³¹ *Id.* at 3-4 and Ex. R-127; Ex. A, p. 8-9.

32 ³² *Id.* at 4.

³³ *Id.* at 4.

³⁴ Hirst Objections to Compliance (September 19, 2013) at 6.

1 areas” when calculating the average lot size.³⁵ Futurewise asserts the criteria for
2 calculating lots violates RCW 36.70A.070(5)(b) because rural densities cannot be
3 characterized by urban growth³⁶ and using small lots, LAMIRDs, and urban lots to calculate
4 rural densities is clearly erroneous.

5 Instead, Futurewise recommended the County use average developed density of
6 adjacent parcels to calculate density in proposed rezones, rather than average size of
7 adjacent parcels. Their assumption is that the rural area has many large, intact properties
8 which may have been subdivided, but not yet developed. By using the current built density
9 of developed and undeveloped properties, the County would be preserving current rural
10 character and the visual landscape as it exists in 2013. Futurewise supported the “staff’s
11 efforts to focus this criterion on built density because it is built density that actually changes
12 rural character.”³⁷ Using current density, rather than parcel size, would reflect the actual
13 built environment in the rural area, and retain visual compatibility, rather than increase rural
14 density based on yet-to-be developed lots in the rural area.³⁸

15
16
17 Lastly, Futurewise argues the County did not consider protecting rural character as
18 outlined in the County’s comprehensive plan³⁹ when it adopted criteria for rezoning R10A
19 parcels. They argue the comprehensive plan includes policy statements that the rural area
20 must be compatible with wildlife, protect ground and surface water, and reduce the
21 inappropriate conversion of undeveloped land.⁴⁰ The rezone criteria do not reflect the
22

23
24 ³⁵ Futurewise Concurrence with Objection to Compliance Finding at 6-7.

25 ³⁶ RCW 36.70A.070(5).

26 ³⁷ Futurewise Concurrence with Objection to Compliance Finding, Letter to Whatcom County Commissioners,
27 Ex. C-844 at 2.

28 ³⁸ *Id.* Ex. C-844 at 4.

29 ³⁹ *Whatcom County Comprehensive Plan Chapter Two: Land Use at 72; See Policy 2DD-2: “Protect the
30 character of the rural area through the County’s development regulations.* In addition to the policies of
31 this plan that provide measures governing rural development, the following County’s key development
32 regulations are incorporated into this plan by reference to assure that the plan contains measures to protect
rural character.”

⁴⁰ Futurewise Concurrence with Objection to Compliance at 8. *See also* Whatcom County’s *Comprehensive
Land Use Plan, Chapter 2, Land Use, Rural Character and Lifestyle at 2-72* “In the rural element of this
chapter, Whatcom County establishes policy consistent with the findings of the legislature and with the above
vision of rural character and lifestyle that will: Help preserve rural-based economies and tradition lifestyles;
Encourage the economic prosperity of rural residents; Foster opportunities for small-scale, rural-based
employment and self-employment; Permit the operation of rural-based agriculture, commercial, recreational,
and tourist businesses that are consistent with existing and planned land use patterns; Be compatible with the

1 County's policies for development compatible with wildlife habitat, water availability, or
2 inappropriate conversion of land to sprawling development. Futurewise concludes that a
3 decline from 21.8 percent to 20.6 percent means a decline in over two square miles of rural
4 areas from R10A to R5A.⁴¹

5 The County's reply to Petitioner is that the rezone criteria do not in and of themselves
6 create development; rezone criteria simply allow for the possibility of development.⁴² The
7 County asserts that only when the County receives an application for development should it
8 begin the process of analyzing wildlife or water requirements. At that time, the critical areas
9 ordinance and evidence of water availability will be applied to the applicant. The matter of
10 water sufficiency is on appeal through the Board's Case No. 12-2-0013. Finally, the County
11 explains that the Board is not in the position to make policy choices which should be left to
12 County elected officials. Rather, the Board must determine if the County met the GMA
13 requirements.
14

15 16 **Board Discussion and Conclusion**

17 The Board's concern in its January 4, 2013, Compliance Order was that the County
18 did not have a method by which to prevent all R10A parcels from becoming R5A, thus not
19 assuring a variety of rural densities. With the adoption of criteria in Ordinance 2013-028,
20 the County preserves some R10A parcels to maintain a variety of rural densities. Petitioner
21 argues that the criteria for calculating lots violates RCW 36.70A.070(5)(b) because rural
22 densities cannot be characterized by urban growth; however, this statute does not specify
23 how a County must calculate its density, merely that it must have a variety of rural densities
24 and uses that are not characterized by urban growth. Here the County has chosen to
25 impose criteria that keep at least 20% of its rural area in 10 acre parcels or larger in the rural
26 area. Petitioners have not carried their burden of proof by coming forward with substantial
27 evidence showing that the County has failed to provide for a variety of rural densities and
28 uses. Petitioners disagree with the percentage of the County in R10A as compared to R5A,
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32 use of the land by wildlife and for fish and wildlife habitat; Foster the private stewardship of the land and preservation of open space, and Enhance the rural sense of community and quality of life.”

⁴¹ Futurewise Concurrence with and Objection to Compliance Finding at 11.

⁴² Whatcom County's Response to Objections (September 26, 2013) at 9.

1 but failed to prove that the County's latest criteria will thwart the continuance of a **variety** of
2 rural densities. The Board cannot substitute its judgment for that of the County's elected
3 decision makers, and Petitioners have not pointed to substantial evidence that the County's
4 chosen mix of densities violates RCW 36.70A.070(5)(b).

5 As to Petitioner's argument about maintaining rural character through conserving
6 wildlife habitat, the Board notes that wildlife habitat protections, as listed in the County's
7 comprehensive plan Land Use Chapter, are targeted toward endangered and listed
8 species.⁴³ In addition, the County's Environmental Chapter includes Policy 11H-6 requiring
9 "Consider[ation of] sensitive fish, shellfish, and wildlife species and their habitats when
10 establishing zoning densities and patterns."⁴⁴ Thus, in spite of Petitioner's argument that
11 the Washington State Department of Fish and Wildlife's report demonstrates adverse effects
12 of development on wildlife and Petitioner's argument that the County should have wildlife
13 conservation planning to counter more density, the County does have land use and
14 environmental policies for threatened or endangered species and a consideration of habitat
15 when creating zoning densities. The Petitioners have not offered substantial evidence that
16 the County's policies violate RCW 36.70A.070.

17 In regard to water resources, the County noted this issue has been appealed through
18 GMHB Case No. 12-2-0013. The outcome of that case may determine the County's
19 response to Petitioner's claim that the County's rural density policies and regulations do not
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25 ⁴³ Whatcom County Comprehensive Plan, Chapter 2 *Land Use* at 2-17 **Goal 2M: "Protect and encourage**
26 **restoration of habitat for fish and wildlife populations.** Policy 2M-1: Ensure that new land uses do not
27 degrade habitat of ***threatened and endangered species***. Policy 2M-2: Ensure that existing land uses do not
28 cause further degradation of habitat for ***threatened and endangered species***. Policy 2M-3: Develop
29 educational tools and incentives to encourage existing land uses to restore degraded habitat to properly
30 functioning conditions, ***especially for threatened and endangered species***. Policy 2M-4: Place a note on all
31 permits issued by the County for clearing or development activity within ¼ mile of the documented habitat of
32 ***threatened or endangered species***, as shown on the county fish Distribution Map, alerting the property
owner to the presence of these species. Policy 2M-5: Require subdivisions and short plats to be designated in
a manner to protect fish habitat and water quality when a fish bearing stream or river passes through the
site." See also Chapter 11 *Environment* at 11-7 Policy 11A-9: "Cooperate with state and federal agencies and
neighboring jurisdictions to identify and ***protect threatened and endangered*** fish and wildlife species and
their habitats."

⁴⁴ Whatcom County Comprehensive Plan Chapter 11 at 11-22 Policy 11H-6: "**Consider** sensitive fish,
shellfish, and wildlife species and their habitats when establishing zoning densities and patterns."

1 properly consider water quality or availability. The Board defers ruling on those water
2 resource issues until the hearing in Case No. 12-2-0013.

3 The Board finds and concludes Ordinance 2012-028 has established criteria
4 differentiating R5A and R10A, and Petitioners failed to satisfy their burden to prove that
5 these new criteria will not achieve a variety of rural densities **under** RCW 36.70A.070(5)(b)
6 and RCW 36.70A.070(5)(c)(i) and (ii).
7

8 **Issue 2:**

9 **Lot Clustering**

10 The Board concluded in its January 4, 2013, Compliance Order that the County's
11 reliance on clustering as a measure to protect rural character was misplaced because (a)
12 the clustering provisions lack enforceable criteria, and (b) the resulting reserve tracts were
13 not permanently protected.⁴⁵ This failed to comply with RCW 36.70A.070(5)(c)(i) and (iii).
14 The Board's finding also relied on RCW 36.70A.070(5)(b) and WAC 365-196-425(5)(b).
15
16

17 **Applicable Law:**

18 RCW 36.70A.070(5)(c)(i) and (iii) Measures governing rural development.
19 The rural element shall include measures that apply to rural development
20 and protect the rural character of the area, as established by the county, by:
21 (i) Containing or otherwise controlling rural development;
22 . . .
23 (iii) Reducing the inappropriate conversion of undeveloped land into
24 sprawling, low-density development in the rural area;

25 RCW 36.70A.070(5)(b) Rural development. . . . To achieve a variety of rural
26 densities and uses, counties may provide for clustering . . . and other
27 innovative techniques that will accommodate appropriate rural densities and
28 uses that are not characterized by urban growth and that are consistent with
rural character.⁴⁶

29 **County Action and Petitioners' Response**

30 With the adoption of Ordinance 2013-028, the County amended its clustering
31 provisions from aspirational (should) to enforceable (shall) language in the Residential
32

⁴⁵ GMHB Compliance Order (January 4, 2013) at 33-39.

⁴⁶ Petitioners' briefs did not reference this statute, but it is directly applicable to the Board's decision.

1 Rural, Rural Residential Island and Rural zones and clarified the definition of and restricted
2 uses in reserve areas.⁴⁷ Petitioners responded that although the regulations have been
3 improved, they still violate RCW 36.70A.070(5)(c) because cluster development regulations
4 must “include a limit on the maximum number of lots allowed on the land included in the
5 cluster.”⁴⁸ In addition, Petitioners argues there are no limits on connections to public or
6 private water and sewer lines and no limits on building on residual land, or what Whatcom
7 calls reserve area or reserve tract.⁴⁹ Petitioner Hirst argues the County’s language in the
8 development regulations of “to the fullest extent possible” is another permissive phrase the
9 County did not correct when it changed “should” to “shall.” This permissive phrase must
10 also be removed otherwise the “shall” language has no force of law.⁵⁰ Furthermore, Hirst
11 argues open space continues to be reduced because the amendments create a new
12 definition of “reserve area” which may allow easements for the developments’ infrastructure
13 (such as stormwater ponds, on-site septic systems). Petitioners also argue the amendment
14 to WCC 20.36.310(6) creates an exemption for clusters on lots 20 acres or larger which
15 allows an “unlimited number of lots in the cluster and they can be right next to another
16 cluster.”⁵¹ This exemption violates RCW 36.70A.070(5)(c) and is counter to previous Board
17 decisions because it does not include a limit on the number of lots allowed on the land
18 included in the cluster and does not apply standards for spacing between clusters.⁵² Finally,
19 Petitioners argue the County reduced the percentage of land required to calculate the
20 reserve area depending on the zoning.⁵³

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23
24 In response the County maintained its development regulations responded directly to
25 the Board’s Compliance Order because the County removed permissive language and its
26 code “is consistent with the WAC [365-196-425(5)(b)] standard and the Board’s order,
27

28 ⁴⁷ Whatcom County Compliance Report (September 5, 2013), IR 127 Ordinance No. 2013-028, Ex. B at 2-20.
29 ⁴⁸ Futurewise Concurrence and Objections at 12.
30 ⁴⁹ *Id.* at 12.
31 ⁵⁰ Hirst Objection to Compliance at 7.
32 ⁵¹ Futurewise Concurrence and Objections at 13.
⁵² *Whatcom Environmental Council v. Whatcom County*, WWGMHB Case No. 94-2-0009 Order Re: Invalidity, and *C.U.S.T.E.R. Association v. Whatcom County*, WWGMHB Case No. 96-2-0008 Order Re: Invalidity (July 25, 1997), at *6 of 7. *Vince Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c, Final Decision and Order. *Eugene Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, Compliance Order, and *Daniel Smith v. Lewis County*, WWGMHB No. 98-2-0011c Compliance Order (March 5, 2001) at 3 of 61 & 25.
⁵³ *Id.* at 9; See Table 1 Reduction in Reserve Area Requirements.

1 because the “reserve area” is the *portion* of the parent parcel established as an easement
2 on the plat that runs in perpetuity as long as it is in the rural area.”⁵⁴ The County argues
3 Petitioners complaint is “inaccurate and misleading” because “the Board found that the
4 County did not have *any* portion of the original parcel held by an easement for open space.
5 With the amendments, the County does preserve open space in the reserve area. The
6 County responds to Petitioners by saying they may not agree with the percentage
7 preserved, but they do not cite statutory or code requirements for a specific amount that
8 must be preserved or “as to what percentage constitutes a “significant” area of the plat, or
9 explained why setting aside a majority of the original parcel cannot be deemed significant.”⁵⁵
10 The County replied to Petitioners’ complaints about permissive language by explaining that
11 it corrected all emphasized text as pointed out in the Board’s January 4, 2013, order. It also
12 explained that the language “to the fullest extent possible” “does not give the building official
13 leeway to approve anything less than what is physically possible.”⁵⁶
14
15

16 **Board Discussion and Conclusion**

17
18 Upon review of the County’s action and Petitioners’ Motion for Reconsideration
19 regarding WCC 20.36.310(6), the Board finds the Petitioners have failed to carry their
20 burden of proof demonstrating the County continues to violate the GMA with respect to
21 WCC 20.36.305; portions of .310; .315; and .320. Petitioners prefer the phrase “to the
22 fullest extent possible” be removed from the County’s ordinance, but that phrase gives the
23 County the ability to adjust its requirements depending on the physical constraints of the
24 site. The new language in WCC 20.32.310(2) Design Standards states:
25

26 Building lots shall be designed and located to the fullest extent possible to be
27 compatible with the valuable or unique natural features, as well as physical
28 constraints of the site.⁵⁷
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32 ⁵⁴ County Response to Objections at 13.

⁵⁵ *Id.* at 14.

⁵⁶ County Response at 16.

⁵⁷ Whatcom County Compliance Report, Ex. B at 3.

1 The County includes the concept of “the fullest” extent as compared to the “least
2 extent” and this will require the County to design and locate buildings so they are
3 compatible with the natural and physical features of the site.

4 Next, the County now has set aside a portion of the reserve area to be preserved in
5 perpetuity in WCC 20.32.315 with this proviso:

6 An easement on the subdivision plat shall establish a reserve area . . . that is
7 protected in perpetuity so long as it is not within an urban growth area. The
8 minimum percentage of the parent parcel required to be within a reserve
9 area is shown in WCC 20.32.253.⁵⁸

10 Although Petitioners do not agree with the table in WCC 20.32.253 requiring a
11 portion of parcel that may be set aside in perpetuity, they cite no authority requiring a
12 specific set-aside percentage. The Board remanded to the County to comply with the GMA’s
13 requirements to eliminate the possibility of no land being preserved. The Petitioners did not
14 carry their burden of proof demonstrating the County failed to comply with the GMA.

15 With the adoption of Ordinance 2013-028, the Board finds the County has
16 established enforceable criteria for lot clustering to protect rural character and has
17 established easements protected in perpetuity for reserve tracts. **With this action, the
18 Board finds the County has met the requirements of RCW 36.70A.070(5)(c)(i) and (ii)
19 with respect to WCC 20.36.305; portions of .310; .315; and .320.**

20 However, with respect to the amendment to WCC 20.36.310(6), the Board finds the
21 Petitioners have carried their burden of proof demonstrating the County continues to fail to
22 meet GMA rural element requirements by eliminating standards capping cluster units and
23 separating clusters on lots 20 acres or larger. Allowing this exemption increases density
24 and violates the “patterns of land use and development” for rural areas as defined by RCW
25 36.70A.030(15).⁵⁹ Further, this exemption does not contain or control rural development,
26
27
28

29 _____
30 ⁵⁸ *Id.* at Ex. B at 3.

31 ⁵⁹RCW 36.70A.030(15) “Rural character” refers to the patterns of land use and development established by a
32 county in the rural element of its comprehensive plan: (a) In which open space, the natural landscape, and
vegetation predominate over the built environment; (b) That foster traditional rural lifestyles, rural-based
economies, and opportunities to both live and work in rural areas; (c) That provide visual landscapes that are
traditionally found in rural areas and communities; (d) That are compatible with the use of the land by wildlife
and for fish and wildlife habitat; (e) That reduce the inappropriate conversion of undeveloped land into
sprawling, low-density development; (f) That generally do not require the extension of urban governmental

1 assure visual compatibility with the surrounding rural area, nor reduce conversion of
2 undeveloped land as required in RCW 36.70A.070(5)(c).⁶⁰ In its Order on Reconsideration,
3 the Board addresses this legal issue and provides its legal analysis.⁶¹ **The Board finds**
4 **that WCC 20.36.310(6) continues to violate RCW 36.70A.070(5)(b) and (c) and remands**
5 **this matter to the County.**
6

7 **Issue 3:**

8 **Water Resources Measures for Lake Whatcom**

9
10 For Lake Whatcom, the Board's January 4, 2013 Compliance Order found the
11 County's "measures to protect surface and ground water" did not comply with RCW
12 36.70A.070(5)(c)(iv) because the County had not adopted measures that protect Lake
13 Whatcom water quality, as instructed by Ecology.⁶²
14

15 **Applicable Law:**

16 RCW 36.70A.070(5)(c) Measures governing rural development. The rural
17 element shall include measures that apply to rural development and protect
18 the rural character of the area, as established by the county, by . . .
19 (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface
20 water and groundwater resources.

21 **County Action and Petitioners' Response**

22 In response to the Board's January 4, 2013 Order, the County adopted Ordinance
23 No. 2013-043 which included measures to protect rural character by protecting water
24

25
26 services; and (g) That are consistent with the protection of natural surface water flows and groundwater and
27 surface water recharge and discharge areas."

28 ⁶⁰ RCW 36.70A.070(5)(c) Measures governing rural development. "The rural element shall include measures
29 that apply to rural development and protect the rural character of the area, as established by the county, by:
30 (i) Containing or otherwise controlling rural development; (ii) Assuring visual compatibility of rural development
31 with the surrounding rural area; (iii) Reducing the inappropriate conversion of undeveloped land into
32 sprawling, low-density development in the rural area; (iv) Protecting critical areas, as provided in RCW
36.70A.060, and surface water and groundwater resources; and (v) Protecting against conflicts with the use of
agricultural, forest, and mineral resource lands designated under RCW 36.70A.170."

⁶¹ Order Granting Motion for Reconsideration (January 23, 2014) at 3-6.

⁶² GMHB Compliance Order (January 4, 2013) at 48-54. However, the Board noted Petitioners filed a new
challenge to Ordinance 2012-032, including the sufficiency of its measures to protect surface and groundwater
resources. The Board reserved decision on the County's measures to protect rural water resources beyond
the Lake Whatcom measures and addressed this issue in Case No. 12-2-0013.

1 resources of Lake Whatcom as instructed by the Department of Ecology. Whatcom's
2 comprehensive plan Policy 2DD-2(C)(3), (4), and (8)⁶³ now incorporates those measures.
3 The Department of Ecology acknowledged its approval of the new "zero phosphorus"
4 regulations in a letter to the Council dated July 19, 2013.⁶⁴ Petitioners Hirst and Futurewise
5 responded favorably and concurred that the County had met the requirements of the
6 Board's January 4, 2013, order to revise the County's development regulations to protect
7 water resources of Lake Whatcom.⁶⁵
8

9
10 **Board Discussion and Conclusion:**

11 The Board finds that with the adoption of Ordinance No. 2013-043, the County
12 acknowledged that Lake Whatcom is a drinking water source for almost half the residents in
13 the County and it recognized the need to address phosphorus loading into the Lake through
14 land use management. The Board also finds that the County amended its CP rural element
15 to protect rural character by protecting surface and groundwater in the Lake Whatcom
16 area.⁶⁶ The County amended its comprehensive plan and zoning code to protect Lake
17 Whatcom as shown in Exhibits A through D attached to Ordinance 2013-043.⁶⁷
18

19 The Board finds the County's action complies with RCW 36.70A.070(5)(c)(iv)
20 because the County has adopted measures to protect Lake Whatcom's water quality. **The**
21 **Board finds the County in compliance with the GMA in regard to Issue 3.**
22

23 **Issue 4:**

24 **LAMIRDS: Rural Neighborhoods/RRDO Designation/Boundaries**

25 The Board's January 4, 2013, Compliance Order found the boundaries of the Rural
26 Neighborhood designations for *Fort Bellingham/Marietta, North Bellingham, and Welcome*
27 were in violation of RCW 36.70A.070 (internal comprehensive plan consistency) and
28 remanded Ordinance 2012-032 to the County to achieve GMA compliance by reviewing the
29
30

31 ⁶³ County Compliance Report (September 5, 2013) Ex. R-152, Ex. D.

32 ⁶⁴ *Id.* Ex. C-834.

⁶⁵ Hirst Concurrence With and Objection to Compliance Finding (September 19, 2013), at 4, and Futurewise Concurrence With and Objection to Compliance Finding (September 19, 2013), at 4.

⁶⁶ County Compliance Report (September 5, 2013) Ex. R-152, Ordinance 2013-043 at 1 and 3.

⁶⁷ *Id.* Ex. R-152, Exs. A, B, C, and D.

1 Rural Neighborhood designation boundaries and considering conforming them to the
2 development pattern as of 2011, consistent with Policies 2-MM 1-4. The Board found non-
3 compliance, remanded, and extended invalidity until the County corrects the Rural
4 Neighborhood boundaries for Fort Bellingham, North Bellingham and Welcome to exclude
5 existing large lots.⁶⁸
6

7 **Applicable Law:**

8 RCW 36.70A.070 (internal comprehensive plan consistency)
9 . . . The plan shall be an internally consistent document and all elements
10 shall be consistent with the future land use map.
11

12 **County Action and Petitioners' Response**

13 In adopting Ordinance 2013-028, the County changed rural neighborhood
14 designations in the Fort Bellingham/Marietta and North Bellingham area by removing large
15 parcels and adjusting the boundaries; however, the rural residential density overlay was not
16 removed from these two areas.⁶⁹ The rural neighborhood designation and the residential
17 overlay were removed entirely in the Welcome area.⁷⁰ The new boundaries are in the
18 revised maps in the County's LAMIRD Report.⁷¹ Petitioners Hirst and Futurewise concurred
19 that the County had properly addressed Issue 4 to revise the rural neighborhood
20 designations for Fort Bellingham/Marietta, North Bellingham, and Welcome.⁷²
21
22

23 **Board Discussion and Conclusion:**

24 With the adoption of Ordinance 2013-028, the Board finds that the County has
25 complied with RCW 36.70A.070, the internal consistency requirements of GMA. This action
26 brings these areas into the same development pattern as of 2011 and they are now
27 consistent with Policies 2-MM 1 through 4. Through this ordinance, the County removed
28
29

30 ⁶⁸ Compliance Order (January 4, 2013) at 56 and 91.

31 ⁶⁹ County Compliance Report (September 5, 2013), Ex. R-128, p. 15. See New Zoning description in Ex. R-
130, pp. 86, 97.

32 ⁷⁰ *Id.* Ex. R-127, Ex. C at 3.

⁷¹ *Id.* Ex. R-130, p. 86 Fort Bellingham/Marietta, and p. 97 North Bellingham.

⁷² Hirst Concurrence with and Objection to Compliance Finding (September 19, 2013) at 4, and Futurewise
Concurrence With and Objection to Compliance Finding (September 19, 2013) at 15.

1 large parcels of property which were formerly included in the rural neighborhoods of Fort
2 Bellingham/Marietta, North Bellingham, and Welcome. The County removed the Rural
3 Residential Density Overlay (RRDO) for Welcome, but not for Fort Bellingham/Marietta,
4 North Bellingham. **The Board finds the County in compliance with the GMA in regards**
5 **to Issue 4. The Board lifts invalidity imposed on January 4, 2013, on the Fort**
6 **Bellingham/Marietta, North Bellingham, and Welcome neighborhoods.**

- 8 **Issue 5: Type I, II, and III LAMIRDS “Exemptions” and “Small Scale Standards”**
9 **Issue 6: Logical Outer Boundaries (LOB) -- *Smith & Guide Meridian***
10 **Issue 7: Logical Outer Boundaries (LOB) -- *Birch Bay/Lynden & Valley View***

11 Issues 5, 6, and 7 were addressed in the Board’s November 8, 2013 Order which
12 found continuing noncompliance, remanded, and acknowledged continuing invalidity and
13 granted a stay of the compliance schedule.⁷³

15 **Issue 8**
16 **Water Transmission Lines**

18 The Board’s January 4, 2013, Compliance Order found amendments to WCC
19 20.82.030(3) did not comply with RCW 36.70A.110(4) and created an internal inconsistency
20 with other regulations. The County’s requirements for water line extensions did not comply
21 with the GMA’s prohibition of extension of urban services into rural areas because the
22 County’s development codes permit water transmission lines outright without a conditional
23 use permit as long as the new water lines conformed to an approved water system and then
24 appeared to require rural hook-ups.⁷⁴ The Board’s order dealt with extension of large-
25 diameter “transmission lines” into rural areas with no clear definition of “transmission line” or
26 restriction on rural service connections.
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32 ⁷³ Case Nos. 11-2-0010c and 05-2-0013, Order Finding Continuing Non-Compliance, Extending Invalidity, and Granting Stay Of Compliance Schedule (November 8, 2013).

⁷⁴ Compliance Order and Order Following Remand On Issue Of LAMIRDS, Case Nos. 11-2-0010c and 05-2-0013 (January 4, 2013) at 78-85.

1 **Applicable Law:**

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

8 **County Action and Petitioners' Response**

9 With the adoption of Ordinance No. 2013-028, the County corrected its zoning code
10 to clarify the terminology. Amendments to the zoning code include a definition of "water
11 transmission lines" (WCC 20.97.452) which is identical to the definition in WAC 246-290-
12 010(267):
13

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

20 The County believes that these amendments fully respond to the Board's order on
21 these issues.⁷⁵ Petitioners Hirst and Futurewise concur that the County has corrected the
22 water transmission line deficiencies found in the Board's January 4, 2013 Order.
23

24 **Board Discussion and Conclusion:**

25 The Board finds that the new definition of "water transmission line" is identical to the
26 Washington Administrative Code 246-290-010(267) and thus clarifies how the County
27 manages extension of water lines. **The Board finds the County in compliance with the
28 GMA in regards to Issue 8.**
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⁷⁵ County Compliance Report (September 5, 2013) Ex. R-127; Ex. B, pp. 12-13.

1 **V. Invalidity**

2 The Board lifts invalidity imposed on January 4, 2013, on the Fort Bellingham/
3 Marietta, North Bellingham, and Welcome neighborhoods. **However, the Board finds the**
4 **determination of invalidity issued on January 4, 2013, continues in full force and**
5 **effect for Issue 5, 6, and 7.** See the Board’s November 8, 2013 Order.⁷⁶
6

7 **VI. ORDER**

8 The Board finds Whatcom County’s Issues 1, 2, 3, 4 and 8 in Case Nos. 11-2-0010c
9 and 05-2-0013 have achieved compliance with RCW 36.70A.070 and RCW 36.70A.110 as
10 set forth above, except that WCC 20.36.310(6) in Issue 2 is found **NON-COMPLIANT with**
11 **RCW 36.70A.070(5)(b) and (c)**, and the Board remands it to the County for compliance with
12 the GMA in accordance with the schedule below. The compliance schedule for Issues 5, 6
13 and 7 remains **STAYED in accordance with the Board’s November 8, 2013 Order.**
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15
16

Item	Date Due
Compliance Due on identified areas of noncompliance	March 24, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	April 7, 2014
Objections to a Finding of Compliance	April 21, 2014
Response to Objections	May 1, 2014
Telephonic Compliance Hearing Call 1 (800) 704-9804 and use pin code 7579646#	May 7, 2014 1:30 p.m.

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⁷⁶ Case Nos. 11-2-0010c and 05-2-0013, Order Finding Continuing Non-Compliance, Extending Invalidity, and Granting Stay Of Compliance Schedule (November 8, 2013).

1 Dated this 23rd day of January, 2014.

2
3 _____
4 Nina Carter, Board Member

5
6 _____
7 Margaret Pageler, Board Member

8
9 _____
10 Raymond L. Paolella, Board Member

11
12 **Note: This is a final decision and order of the Growth Management Hearings Board**
13 **issued pursuant to RCW 36.70A.300.⁷⁷**
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31 _____
32 ⁷⁷ Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.