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

FUTUREWISE Petitioner, v. WHATCOM COUNTY, Respondent, And GOLD STAR RESORTS, INC. Intervenor.	**Case No. 05-2-0013** **ORDER GRANTING EXTENSION OF COMPLIANCE DEADLINE AND IMPOSING INVALIDITY**

THIS Matter comes before the Board on Whatcom County's Motion for an Extension of the Compliance Deadline, filed on December 1, 2010. On December 9, 2010, Futurewise filed a response to the Motion in which it moved for an imposition of an order of invalidity.

I. DISCUSSION

A. Extension of Compliance Period

The Growth Management Act (GMA), at RCW 36.70A.300(3), requires the Board to set a date for compliance if it makes a finding of noncompliance on any matter. This provision provides: (in relevant part, emphasis added)

> …
> (b)Find that the state agency, county, or city is not in compliance with the requirements of this chapter… as it relates to adoption of plans, development regulations, and amendments thereto, … in which case the board shall remand the matter to the affected state agency, county, or city.

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> **The board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board in cases of unusual scope or complexity, within which the state agency, county, or city shall comply with the requirements of this chapter.** The board may require periodic reports to the board on the progress the jurisdiction is making towards compliance.

Following remand from the Washington State Supreme Court of the Board's September 20, 2005 Final Decision and Order (FDO),[1] the Board held a status conference and set a compliance schedule.[2] Whatcom County states its motion demonstrates the issues in the case meet the standard of "cases of unusual scope or complexity" and that it needs an additional ninety (90) days to meet the compliance deadline.[3]

The Board has previously found that the compliance issues involved in this case – LAMIRDs and Rural Density - are of unusual scope and complexity.[4] The passage of time has not made the issues any less complex. Furthermore, since a final decision was issued by the Washington State Supreme Court in December 2009, the County has taken steps to amend its comprehensive plan and zoning regulations to achieve compliance with the GMA. The County reports that its Council's Planning and Development Committee held work sessions in January and March 2010, and thereafter held work sessions at every regular meeting from April through June 2010.[5] Following these meetings Planning and Development Services staff received Council direction on several policy issues and proposed revisions to the Planning Commission recommendations which the County Council Committee of the Whole have been reviewing and revising.[6] In light of the progress the County has made in revising its Rural Element to meet the requirements of the GMA, it is appropriate to grant the

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[1] *Gold Star Resorts Inc v. Futurewise, et al.,* 167 Wn.2d 723 (2009)
[2] Order Setting Briefing and Hearing Schedule Following Remand from Supreme Court (July 6, 2010)
[3] County Motion, at 1-2
[4] Order Extending Date for Compliance and Establishing Compliance Briefing and Hearing Schedule (Oct. 14, 2005).
[5] County Motion for Extension of Compliance Deadline at 3.
[6] Id. at 5.

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County additional time to complete this work, and the Board will grant the additional 90 days requested.

Futurewise, in its response to the County's Motion, stated that it would not oppose an extension of the compliance deadline if the briefing schedule is also extended.[7] As it would make little sense to extend the compliance deadline, but leave the current briefing schedule in place, the Board will extend both the compliance deadline and briefing schedule.

***Conclusion*:** Based on the foregoing, the Board finds that the rural densities and LAMIRD issues remaining are of unusual scope and complexity. In light of the progress the County has made in revising the Rural Lands section of its Land Use Element to meet the requirements of the GMA, it is appropriate to grant additional time to complete this work. Thus, the Board will grant the additional 90 days requested by Whatcom County. Since the deadline for compliance has been extended, the Board also grants Futurewise's motion for an extension of the briefing schedule to correspond with the compliance schedule.

B. Extension of Moratorium

Within its response, Futurewise requests the Board issue an order that the County's present moratorium on rural development be extended until such time as the County is found to be in compliance with the GMA and the moratorium be expanded to include all noncompliant rural areas.[8] Such an order is clearly outside the Board's authority and Futurewise's request will not be entertained.

C. Determination of Invalidity

RCW 36.70A.302 authorizes the Board, after a finding of noncompliance, to invalidate all or part of a comprehensive plan if it substantially interferes with the goals of the GMA. RCW

[7] Petitioner's Response to County Motion at 5.
[8] Id. at 2, 6

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36.70A.330(4) permits the Board, during compliance proceedings, to reconsider whether a Determination of Invalidity is then warranted even though it did not enter one in the FDO. In its response to the County's Motion, Futurewise renews its request for a Determination of Invalidity.[9] As Futurewise points out, the Board had previously indicated in the September 2005 FDO that while it would not impose invalidity at that time on those portions of the comprehensive plans found to be noncompliant, it was: [10]

> [B]ecause we have not been presented with evidence that permit applications will vest to such a degree that the County's work on remand to establish appropriate LAMIRDs and rural densities will be jeopardized.

The Board noted that it would reconsider this decision to not impose invalidity if evidence of such vesting were presented to the Board during the compliance period.[11]

While the County notes in its Motion that it adopted an emergency ordinance imposing a moratorium on the acceptance of new applications for subdivisions and short subdivisions into parcels smaller than 10 acres in the rural areas,[12] Futurewise responds that this moratorium applies only to properties that the Planning Commission has recommended be rezoned Rural-10 and does not apply to other parts of the GMA non-compliant proto-LAMIRDs or to the other GMA non-compliant provisions of the rural elements.[13]

A review of Exhibits D and E attached to the County Motion demonstrates that the County's moratorium applies only to "the acceptance of new applications for subdivisions and short subdivisions for divisions of property into parcels smaller than 10 acres within areas proposed for rezoning to R-10A or RR-10A under the October 8, 2009, recommendation of the Whatcom County Planning Commission."

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[9] Petitioner's Motion, at 2-5
[10] Final Decision and Order, at 30 (Sept. 20, 2005).
[11] Id.
[12] County Motion at 4.
[13] Petitioner's Response at 2-3.

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Futurewise has presented evidence of rural subdivisions that have vested since this case was originally decided by the Board in 2005.[14] It argues rural vesting is an issue that urgently needs to be addressed as these are in areas that are mostly not included in the County's moratorium. It argues further that this results in sprawling, low density development, interfering with the fulfillment of RCW 36.70A.020(2); loss of open space interfering with the fulfillment of RCW 36.70A.020(9); lack of protection of the environment and water quality interfering with the fulfillment of RCW 36.70A.020(10); and loss of protection of adjacent farmland interfering with the fulfillment of RCW 36.70A.020(8).

In its response the County argues that "the tightly drawn boundaries of the Planning Commission recommended LAMIRDs, together with the six-month moratorium on the subdivision of land in the areas with noncompliant zoning outside of these proposed LAMIRDs" make it impossible for Futurewise to meet the standard for the imposition of invalidity. [15]

The County further argues that, with its moratorium, the only areas left with noncompliant zoning are "within the boundaries of the LAMIRDs recommended by the Planning Commission".[16] In a challenge to the evidence that Futurewise relies upon to support the imposition of invalidity, the County points out that the list of subdivisions that have vested since 2005 is of doubtful merit because Futurewise has made no effort to show where these subdivisions occurred. This is a legitimate criticism and, absent evidence that these subdivisions fall outside the areas covered by the moratorium, Futurewise's request for invalidity with regard to rural subdivisions is unsupported.

However, by the County's own admission, "it is indisputable that these subdivisions occurred either in the area that is now covered by the moratorium *or within the boundaries*

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[14] See, Ex. A to Petitioner's Response.
[15] County's Response to Request for Invalidity at 4.
[16] Id.

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of the LAMIRDs recommended by the Planning Commission."[17] (emphasis added). The County also states that "two of these subdivision applications involved property in or around the Kendall LAMIRD and seven involved property within the Point Roberts LAMIRD."[18] This is a troubling admission as both this Board and our State Supreme Court have previously found the County's LAMIRD criteria to be noncompliant with the GMA.

In the Board's FDO in this case, the Board found:

> The designation criteria in the descriptors for small towns and crossroads communities, crossroads commercial, resort and recreational subdivisions, suburban enclaves, and transportation corridors allow the creation of more intensive areas of rural development that do not comply with RCW 36.70A.070(5)(d). The failure to revise those descriptors therefore fail to comply with RCW 36.70A.130. The failure of the County to revise the designations of proto-LAMIRDs on Map 8 in accordance with the LAMIRD criteria of RCW 36.70A.070(5)(d) also fails to comply with RCW 36.70A.130. The County's record of its LAMIRD designations must show the analysis used to arrive at the designation and mapping of them. Policy 2GG-2 allows the designation of towns and crossroads communities in areas that extend beyond the development and uses in existence in July 1990 and thus fails to comply with RCW 36.70A.070(5)(d).[19]

In the Supreme Court's decision in Gold Star Resorts, Inc. v. Futurewise, the Court noted:

> On their face, the County's existing descriptors do not include or reflect these mandatory criteria. Moreover, the County conceded that it did not consider the statutory LAMIRD criteria when defining its designations for more intensely developed rural areas and did not attempt to analyze the logical outer boundaries of the areas under RCW 36.70A.070(5)(d). The County also expressly acknowledged that some of the areas it designated include "vast amounts of undeveloped land" and that the County planned to review the boundaries of several of the areas later that year for compliance with the statutory LAMIRD requirements[20]

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[17] Id. at 5.
[18] Id. at 5-6.
[19] Futurewise v. Whatcom County, WWGMHB No. 05-2-0013, Final Decision and Order, at 19 (9/20/05).
[20] Gold Star v. Futurewise, 167 Wn.2d 723, 735 (2009)

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The Court finally concluded "that the County's comprehensive plan does not comply with the GMA's LAMIRD provisions and that the County was required, but failed, to revise the plan to include the LAMIRD criteria and then apply them in establishing areas of more intense rural development"[21]. The Court also held that the County "must revise its comprehensive plan to conform to the LAMIRD provisions of the GMA and then apply the statutory criteria to establish appropriate areas of more intensive rural development."[22]

Thus, there appears to be no dispute that the County has allowed subdivision "in and around" its LAMIRDs in the absence of compliant GMA criteria for the designation of LAMIRDs.

It avails the County nothing that it is allowing subdivision within LAMIRDs "recommended by the Planning Commission"[23] or that *Futurewise* "specifically supported the proposed LAMIRDs"[24] or that most LAMIRDs were "endorsed by Futurewise as compliant with the GMA".[25] The State Supreme Court has found the County's LAMIRD criteria to be noncompliant with the Growth Management Act. The County ought not to be allowing development within "recommended" LAMIRDs until it has adopted LAMIRD criteria found to comply with the Act.

The Board incorporates its relevant earlier findings and conclusions regarding LAMIRDs from the 2005 FDO into the present order.

***Conclusion*:** Based on the foregoing, the evidence submitted by Futurewise, and the concession by the County that it is approving subdivisions "within the boundaries of the LAMIRDs recommended by the Planning Commission", the Board finds and concludes that the continued validity of designation criteria in the descriptors for small towns and

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[21] Id. at 739.
[22] Id.
[23] County Response at 4.
[24] Id.
[25] Id. at 5.

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crossroads communities, crossroads commercial, resort and recreational subdivisions, suburban enclaves, and transportation corridors and Policy 2GG-2 promote the inappropriate conversion of undeveloped land into sprawling low density development and substantially interfere with the fulfillment of goal 2 of the GMA, RCW 36.70A.020(2) and are therefore invalid.

ORDER

The Board enters a Determination of Invalidity as to Whatcom County's LAMIRD designation criteria.

The Board finds that the rural densities and LAMIRD issues remaining in this case are of unusual scope and complexity and grants an additional ninety (90) days for compliance. The following schedule shall apply:

Compliance Due	March 29, 2011
Compliance Report and Index to Compliance Due Objections to a Finding of Compliance on Rural Densities Due	April 12, 2011
Objections to a Finding of Compliance on LAMIRDs Due Record Additions/Supplements Due County Response to Objections on Rural Densities Due	April 26, 2011
County's Response to Objections on LAMIIRDs Due*	May 3, 2011
Compliance Hearing (location to be determined)	May 11, 2011 @10:00 a.m.

* 30 page limit to pleadings, unless prior permission from Board is granted to exceed this limit.

Entered this 22nd day of December, 2010.

_____
James McNamara, Board Member

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William Roehl, Board Member

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Nina Carter, Board Member

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