BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

JACK PETREE, FUTUREWISE, DEAN HAVERSTRAW, CAITAC USA CORP. and ROBERT WIESEN, Petitioners, v. WHATCOM COUNTY, Respondent. and FUTUREWISE and DAN MCSHANE, Intervenors.	Case No. 08-2-0021c **ORDER ON MOTION FOR EXTENSION OF COMPLIANCE PERIOD** **AND** **ORDER ON FUTUREWISE'S MOTION FOR EXTENSION TO FILE OBJECTIONS**

THIS Matter comes before the Board upon two motions. First, a Joint Motion for Extension of Compliance Period filed by Petitioners and Whatcom County.[1] Various parties, the City of Blaine, Whatcom County Fire District No. 14, and the Cities of Ferndale, Sumas, and Nooksack, all of which seek participation status in these compliance proceedings, filed statements in support of this motion.[2] Second, a Motion for Extension to File Objections submitted by Futurewise.[3] Petitioners, although not objecting to the motion, request an opportunity to respond to Futurewise's objections.[4]

[1] Joint Motion for Extension of Compliance Period and Request for Expedited Decision on this Motion, filed January 27, 2010.
[2] City of Blaine's Statement in Support of Motion to Extend Compliance Period, filed January 29, 2010; Whatcom County Fire District No. 14's Statement in Support of Motion to Extend Compliance Period, filed January 29, 2010; Statement of Cities of Ferndale, Sumas, and Nooksack in Support of Joint Motion for Extension of Compliance Period, filed January 28, 2010.
[3] Futurewise's Motion for a One Working Day Time Extension to File an Objection to a Finding of Compliance, filed January 22, 2010.
[4] Petitioners' Response to Futurewise's Motion, filed January 22, 2010.

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Futurewise's Motion

Futurewise's motion seeks a one working day extension for filing its objections to a finding of compliance "due to several matters that have arisen and staff limitations."[5] On January 26, 2010, Futurewise filed its objections asserting that Whatcom County violated the Growth Management Act, RCW 36.70A (GMA) by including agricultural lands of long-term commercial significance within urban growth areas (UGAs).[6]

The Board does not need to rule on Futurewise's Motion for Extension as the Board finds its objections are beyond the scope of these compliance proceedings. As noted *infra,* the compliance issue before the Board is whether Whatcom County has complied with RCW 36.70A.130(3) in regards to the required 10-year UGA review deadline.

In addition, in the initial phase of this case, Futurewise filed a Petition for Review alleging Whatcom County had failed to revise various UGAs to accommodate the County's projected urban population growth and erroneously included land with extensive critical areas within its UGAs.[7] At the same time, Futurewise sought intervenor status in support of the County for those issues raised by Caitac and Wiesen; issues which did not relate to agricultural lands.[8] Thus, at no time in this matter has the issue of agricultural lands been raised and Futurewise is barred from bringing such issues forward for the first time during these compliance proceedings. Therefore, **the Board will disregard Futurewise's objections in their entirety.**

Since the Board will not consider the objections of Futurewise, there is no need to address Petitioners' request for an opportunity to submit a reply brief except to note that it is not the practice of this Board to permit Petitioners the opportunity to file reply briefs during compliance proceedings.

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[5] Futurewise's Motion at 1-2.
[6] Futurewise's Objection to a Finding of Compliance on the UGAs, filed January 25, 2010.
[7] Futurewise PFR, filed April 11, 2008. The merits of these issues where never briefed by Futurewise.
[8] Futurewise Motion to Intervene, filed April 22, 2008.

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Motion for Extension of Compliance Period

Whatcom County and Petitioners entitle their motion as one seeking extension of the compliance period. However, the compliance period in this matter expired on December 1, 2009, the deadline set by the Board within which Whatcom County had to complete its 10-year UGA review. With the adoption of Ordinance 2009-071 on November 24, 2009, Whatcom County states that it completed this mandated task. Thus, what the parties truly seek is a 90-day extension of the compliance briefing schedule and the hearing date.

The basis for this motion is that, in addition to concerns raised by Petitioners, various cities within the County have raised extensive objections and therefore an extension would allow the County more time to address the complexity of the matter.[9] The Board disagrees as it views the sole issue to be considered during these compliance proceedings as one grounded in a "failure to act" challenge: whether Whatcom County has cured this failure by completing the RCW 36.70A.130(3) 10-year review of its UGAs.

The County's failure to act by .130(3)'s deadline was before this Board in *Wiesen v. Whatcom County,* Case No. 07-2-0009, in which the County conceded that it had failed to meet the deadline and a finding of non-compliance was issued.[10] The compliance phase of Case No. 07-2-0009 was consolidated with Case No. 08-2-0021c.

Thus, the Board's finding of non-compliance which gave rise to the present compliance proceedings was in relationship to a **procedural "failure to act" challenge**. As this Board has previously stated, when non-compliance is based on a failure to act, compliance is cured when the necessary "procedural" action is complete. Any objection to the "substance" of that action requires a new Petition for Review.[11]

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[9] Motion for Extension, at 2-3.
[10] August 27, 2007 Order on Petitioner's Motion.
[11] *See, e.g. Panesko v. Lewis County,* Case No. 98-2-0004, Order on Motions (June 12, 1998); *Diehl v. Mason County,* Case No. 95-2-0073, Compliance Orders (Feb. 22, 1996 and Sept. 6, 1996). *See also our colleagues, CFFC v. Ferry County,* Case No. 97-1-0018, 4th Compliance Order (June 21, 2002); *Falgatter v. Sultan,* Coordinated Case Nos. 06-3-0003, 06-3-0034, 07-3-0017, Order (Nov. 10, 2008).

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The Board notes that eight new PFRs have been filed in regards to Whatcom County Ordinance 2009-071, all of which set forth allegations challenging the County's substantive compliance with various GMA provisions.[12] With these PFRs, the substantive compliance of Ordinance 2009-071 with the GMA will most certainly be addressed unless the parties enter into fruitful settlement negotiations.

Therefore, the Joint Motion for Extension of Compliance Period is DENIED. At the upcoming telephonic compliance hearing on March 2, 2010 the parties should be prepared to address whether Whatcom County has **procedurally** complied with the deadlines of RCW 36.70A.130(3) and cured the area of non-compliance, based on a failure to act, as set forth in the Board's July 2, 2008 Order.

ORDER

Based on the foregoing, the Board orders:

1. The objections of Futurewise are beyond the scope of the compliance issues in this matter and, therefore, the Board will disregard Futurewise's Objections to a Finding of Compliance filed on January 25, 2010.

2. The Joint Motion for Extension of the Compliance Period is DENIED.

Entered this 1st day of February, 2010.

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Nina Carter, Board Member

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William Roehl, Board

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James McNamara, Board Member

[12] Case 10-2-0001, Caitac, Petree, Wiesen, and Haverstraw (Jan. 25, 2010); Case No. 10-2-0002, Trillium Corp/Semiahmoo Community (Jan. 25, 2010); Case No. 10-2-0003 City of Blaine (Jan. 25, 2010); Case No. 10-2-0004, Whatcom County Fire District 14 (Jan. 26, 2010); Case No. 10-2-0005, Yew Street Assocs., et al (Jan. 26, 2010); Case No. 10-2-0006, Beachmont/Windward (Jan. 26, 2010); Case No. 10-2-0007, Anchor Manor (Jan. 26, 2010); and Case No. 10-2-0008, Cities of Ferndale, Sumas, and Nooksack (Jan. 28, 2010).

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