

**To: Whatcom County Planning Commission**  
**From: Jean Melious**  
**Date: July 16, 2009**  
**Re: Whatcom County Rural Planning and Zoning Timeline; State Law Planning and Zoning**

I prepared these notes for my own use in for the work session on July 23 and thought that some of you might find them interesting or useful, so I'm passing them on. With two exceptions, I have only quoted the words of others, with sources identified so you can review them for accuracy and context if you want. The lawyers among us will notice that the cites are raggedy, but the essential information is there.

So you are forewarned, the exceptions to "only using the words of others" are: 1. Footnote 14, where I tried to figure out what the *Wells v. WWGMHB* decision actually meant (this only matters in relation to an issue before the Supreme Court relating to res judicata and collateral estoppel and can easily be skipped), and 2. The description of the issues before the Supreme Court, which I paraphrased. If you want to read the briefs submitted to the Supreme Court by Gold Star and Futurewise, they are available at [http://www.courts.wa.gov/appellate\\_trial\\_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08](http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08). Search for case number 80810-4.

I also copied and pasted the GMA's definition of "rural character," just so I'd have it handy.. We have this information in other materials from the County as well.

## **Whatcom County Rural Planning and Zoning Timeline**

### **1. 1994 INTERIM URBAN GROWTH AREA ORDINANCE (IUGA)**

On **May 24, 1994**, Whatcom County adopted an IUGA Ordinance. The deadline provided for by the GMA for adoption of the IUGA was October 1, 1993.<sup>1</sup>

On **November 9, 1994**, the Western Washington Growth Management Hearings Board (WWGMHB) held that the County's ordinance was not in compliance with the Growth Management Act (GMA). Part of the ordinance found not in compliance was the County's adoption of "existing zoning" to fulfill the GMA requirement to prohibit urban growth outside of properly established IUGA boundaries.<sup>2</sup>

In its "Third Compliance Order," dated **March 29, 1996**, the GMHB found, *inter alia*, that:

- "Whatcom County's allowance of new urban growth outside the IUGA boundaries does not comply with the GMA;

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<sup>1</sup> WWGMHB, Whatcom Env'tl. Council v. Whatcom County, Third Compliance Order, March 29, 1996 (<http://www.gmhb.wa.gov/western/decisions/1994/94-093rdcomporder.htm>)

<sup>2</sup> *Id.*

- “Under the record in this case, Whatcom County’s allowance of densities of 1 du/2 ac and higher (more intense) in areas outside properly established IUGAs substantially interferes with the goals of the GMA”; and
- “The allowance of new urban commercial and new urban industrial growth outside properly established IUGAs substantially interferes with the goals of the Act and is invalid. . .”<sup>3</sup>

2. **MAY 1997 COMPREHENSIVE PLAN AND DEVELOPMENT REGULATIONS**

“Whatcom County did not revise its interim ordinances and regulations in response to these determinations of invalidity. Rather, **in May 1997**, Whatcom County adopted a new comprehensive plan and ‘associated development regulations.’”<sup>4</sup>

The LAMIRD criteria were added to state law two months later:

“[The LAMIRD] criteria were added to the GMA two months after Whatcom County adopted its comprehensive plan in 1997. Whatcom County conceded before the Board that its terminology does not “mirror state law,” and that although it was aware of the pending legislative amendments, it did not consider these criteria in defining its designations for developed rural areas and did not attempt to analyze the logical outer boundaries of LAMIRD areas under RCW 36.70A.070(5)(d). The county conceded that some of its LAMIRD boundaries include “vast amounts of undeveloped land” . . . .”<sup>5</sup>

In **June 1997** –one month before the state adopted its LAMIRD criteria – the County “filed a motion requesting the Board to rescind the determinations of invalidity based on the new comprehensive plan and associated regulations. The Board modified but did not rescind its previous findings of invalidity.”<sup>6</sup>

The GMHB modification, issued on **July 25, 1997** (two days before the effective date of the LAMIRD provisions on July 27, 1997) stated that “As to the rural areas (94-2-0008), the changes that were made still allow new urban growth outside UGAs. As noted in our earlier order, RCW 36.70A.110 absolutely prohibits such urban growth.”<sup>7</sup> The Hearings Board addressed several areas specifically:

“The Guide Meridian and gateway industrial designations were changed to eliminate the IUGA designation and identify each as “regional transportation corridors.” The necessity of further study of these two areas was acknowledged.

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<sup>3</sup> Id.

<sup>4</sup> *Wells v. WWGMHB*, 100 Wash. App. 657, 663 (2000).

<sup>5</sup> *Gold Star Resorts v. Futurewise*, 140 Wash.App. 378, 392 (2007).

<sup>6</sup> *Wells v. WWGMHB*, 100 Wash. App. 657, 663 (2000).

<sup>7</sup> *Whatcom Environmental Council v. Whatcom County*, Order Re Invalidity (July 25, 1997) ([http://www.gmhb.wa.gov/western/decisions/1994/94-09\\_order\\_re\\_invalid.htm](http://www.gmhb.wa.gov/western/decisions/1994/94-09_order_re_invalid.htm)).

The allowance of more intense development was based upon the rationale of existing development. In the gateway industrial designation, examination of the maps in Exhibits J-1 through J-12 demonstrated that most of the proposed corridor was outside existing development. We have consistently said that existing development alone does not justify new urban growth outside of UGAs.”<sup>8</sup>

“In **July 1997**, the Board received petitions from four parties, including Wells, requesting review of the new comprehensive plan and development regulations. The Board consolidated these petitions into what we refer to as the “*Wells case*.”<sup>9</sup>

“After extensive briefing and a hearing, the Board issued a Final Decision and Order (**January 16, 1998**). The Board rescinded some of its earlier determinations of invalidity but continued to find three urban growth areas, all but two of the designated rural areas, and various zoning regulations invalid.”<sup>10</sup>

“Whatcom County, Birch Bay Water & Sewer District, and Whatcom County Water & Sewer District No. 13 each petitioned for review of the Board's final order in Whatcom County Superior Court.”<sup>11</sup>

“Following trial, the [Whatcom County Superior] court issued an order remanding the case to the Board. . . .The court remanded the case to the Board with instructions to reevaluate the standing of various parties and to apply a presumption of validity to the comprehensive plan and development regulations. It also issued an order lifting the Board's determinations of invalidity.”<sup>12</sup>

The state department of Commerce, Trade, and Economic Development (“CTED”), Nathan Kronenberg, and Sherilyn Wells appealed the Whatcom County Superior Court's order remanding the case.<sup>13</sup>

On **April 10, 2000**, in *Wells v. WWGMHB*, 100 Wash. App. 657 (2000) the Court of Appeals dismissed the petition for lack of standing. It affirmed the Whatcom County Superior Court's order reversing the Board's Final Decision and Order and remanding the case to the Board.<sup>14</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Wells v. WWGMHB*, 100 Wash. App. 657, 663 (2000).

<sup>10</sup> *Id.*, referring to *Wells v. Whatcom County* 97-2-0030 (Final Decision and Order, 1-16-98).

<sup>11</sup> *Wells v. WWGMHB*, 100 Wash. App. 657, 664-65 (2000).

<sup>12</sup> *Id.* at 665.

<sup>13</sup> *Id.* at 665-66.

<sup>14</sup> While the appellate court allowed the remand to stand because “no party has raised any persuasive challenge to the substantive portions of the decision,” the remand would not have had any effect in light of the remainder of the appellate court’s decision. The court stated that the Board’s finding of invalidity was not relevant to the proceedings “because Whatcom County adopted a new comprehensive plan and regulations. The new plan and regulations supercede the interim ordinances, thus **a new petition challenging the plan is necessary to obtain review by the Board**” *Id.* at 669-670 (emphasis added). It does not appear that there was any such “new petition” to review the 1997 ordinances. Therefore, the Superior Court’s requirement to “apply a presumption of validity” to the Hearings Boards’ examination of

Gold Star’s briefing before the Supreme Court states that “On remand to the Board, there was no further challenge to the LAMIRDs, and they were upheld by the Board,” citing “3/28/01 Order, *Whatcom County v. WWGMHB*, WWGMHB No. 97-2-0030.”<sup>15</sup> The referenced Order is not available on the WWGMHB’s web site.

### **3. JANUARY 2005 COMPREHENSIVE PLAN (7-YEAR REVIEW)**

“Whatcom County completed its [seven year review of the Comprehensive Plan] in **January 2005**, and found that its LAMIRD areas ‘have not experienced significant change, nor has additional information been obtained regarding such areas since the adoption of the 1997 Whatcom County Comprehensive Plan that warrant further review and update of the Comprehensive Plan.’ The county made no revisions to its LAMIRD criteria or to the mapped boundaries of the areas.”<sup>16</sup>

On **March 26, 2005**, Futurewise filed a Petition for Review with the WWGMHB. On **June 15, 2005**, the WWGMHB “determined that the update requirements of RCW 36.70A.130 impose an obligation upon the County to revise its comprehensive plan to comply with the GMA, and that the County may not refuse to revise noncompliant plan provisions on the basis that it adopted them some time ago.”<sup>17</sup>

In its **September 20, 2005** Final Order, the GMHB stated:

In this decision, we find that the County has failed to update its comprehensive plan and revise the portions of its comprehensive plan that designate and map areas of more intensive rural development as required by RCW 36.70A.130 and RCW 36.70A.070(5)(d). We find that the County has allowed areas of more intensive development in the rural areas without limiting and containing them in compliance with RCW 36.70A.070(5)(d). However, we find that the decision on where to draw logical outer boundaries for those more intensive rural areas must be made by the County. Since the County has not yet exercised its discretion to adopt limited areas of more intensive rural development (LAMIRDs) using the statutory criteria, the Board cannot determine whether those boundaries are compliant with the statute. If the County decides to establish LAMIRDs, the record must show what choices the County made in drawing logical outer boundaries and otherwise ensuring that they will “minimize and contain” the more intensive rural development. RCW 36.70A.070(5)(d)(iv).

We find that the rural residential densities allowed in the RR1 zone (1 dwelling unit per acre); RR2 zone (2 dwelling units per acre); RR3 zone (3 dwelling units

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validity would not have had any effect, because the 1997 plan and regulations were the relevant regulations and had not been challenged.

<sup>15</sup> *Futurewise v. Gold Star Resorts*, Supp. Brief of Petitioner Gold Star (Jan. 16, 2009), p. 4.

<sup>16</sup> *Gold Star Resorts v. Futurewise*, 140 Wash.App. 378, 383-84 (2007).

<sup>17</sup> *Futurewise v. Whatcom County*, WWGMHB (No. 05-2-0013), Final Decision and Order (Sept. 20, 2005) (<http://www.gmhb.wa.gov/western/decisions/2005/05-2-0013FuturewiseFDO20050920.pdf>).

per acre); EI zone (3 dwelling units per acre); R2A zone (1 dwelling unit per 2 acres); and RRI zone (1 dwelling unit per 3 acres) are not rural densities but suburban densities encouraging sprawl. Except within properly designated LAMIRDs, such intensive residential densities in the rural area fail to comply with RCW 36.70A.070(5)(b) and 36.70A.020(2).

As to the challenge to the UR3 zone, we find that the County has properly reduced the urban residential densities in the Lake Whatcom Watershed due to environmental considerations. We also find that the use of the UR3 zone in the area adjoining the airport is a compliant rationale for reducing the urban residential density allowed in that area to 3 dwelling units per acre. Apart from the Lake Whatcom Watershed and the UR3 zone shown on Map 2: Airport/Marine Drive Mixed Use in Exhibit 6, the County's UR3 zoning designations allow less-than-urban densities in urban areas without justification or rationale. As a result, they fail to comply with RCW 36.70A.110.<sup>18</sup>

“Gold Star, but not the county, appealed to superior court. [The County did not participate in any of the appeals of the GMGB ruling: Superior Court, Court of Appeals, or Supreme Court.] The superior court reversed the majority of the Board's rulings, holding that the review statute does not require that comprehensive plans be amended to comply with current GMA requirements, and also holding that the rural density issue had been decided by previous litigation in this court. The superior court also ruled that the Board exceeded its authority or erroneously applied the law by adopting a “bright line rule” in its analysis of the rural zoning challenge.”<sup>19</sup>

Futurewise appealed to the Court of Appeals. On **August 27, 2007**, the Court of Appeals reversed every holding of the Superior Court and affirmed the WWGMHB's remand to the County to consider state law governing LAMIRDs and rural zoning. With respect to the issue of whether the County's plan and zoning complied with state law, the court held:

“In short, the county's presentation to the Board confirmed that the county did not apply RCW 36.70A.070(5)(d) in drawing the boundaries for the LAMIRDs and that its process resulted in LAMIRD boundaries the statute does not allow. County action is entitled to a presumption of validity, but here the county admitted that its criteria did not match the statute nor produce compliant results. This alone is evidence sufficient to support the Board's remand for review of the LAMIRDs.

Additionally, the Board was plainly correct in finding the county provisions noncompliant. First, none limits the LAMIRD areas to development *existing* as of July 1990. Three provisions (including the one Gold Star seeks to preserve) specifically anticipate future development: . . .”<sup>20</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Gold Star Resorts v. Futurewise*, 140 Wash.App. 378, 84 (2007).

<sup>20</sup> *Id.* at 393-94.

On **September 25, 2007**, Gold Star petitioned the Washington State Supreme Court for review of the Court of Appeal's decision. On **November 6, 2008**, the Court agreed to review the two issues raised by Gold Star's petition and two issues raised by Futurewise's answer. The Court agreed to review:

- Whether the Whatcom County Superior Court's 1998 ruling, overturning the WWGMHB finding of invalidity, prevents Futurewise from litigating the issue of the County's compliance with the GMA (res judicata/collateral estoppel) (raised by Gold Star).
  - If the Court rules in Gold Star's favor, the County would never be subject to litigation if it chose not to revise its Comp Plan or zoning to comply with state law on LAMIRDs, and it could allow its current Comp Plan and zoning to stand (although it would have the discretion to revise the plan and zoning). If the Court holds that the 1998 ruling does not constitute res judicata and does not collaterally estop Futurewise's challenge, the challenge would be allowed to proceed.
- Whether the GMA's seven-year review requirements require local governments to review and amend comprehensive plans in order to comply with GMA provisions enacted after adoption of the previous comprehensive plan (raised by Futurewise).<sup>21</sup>
- Whether the WWGMHB's Order is invalid because it was based on "bright line" criteria for rural densities (raised by Goldstar);
- Whether "development as of July 1990," for purposes of establishing LAMIRDs, is limited to "development" or if it includes vested rights (raised by Futurewise).

#### **State Law Definition of Rural Character (RCW 36.70A.030(15))**

(15) "Rural character" refers to the patterns of land use and development established by a 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;

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<sup>21</sup> Futurewise originally contended that the 7-year review required local governments to amend any portion of the Plan that did not comply with the GMA. The State Supreme Court subsequently decided that only the portions of the plan that were affected by changes in state law were required to be revised during the review. *Thurston County v. WWGMHB*, 164 Wn.2d 329 (2008). Futurewise's argument then focused specifically on the changes in the law relating to LAMIRDs in its argument.

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