

BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD

FUTUREWISE,

Petitioner,

No. 05-2-0013

v.

WHATCOM COUNTY,

Respondent,

WHATCOM COUNTY'S MOTION
FOR AN EXTENSION OF THE
COMPLIANCE DEADLINE

And

GOLD STAR RESORTS, INC.,

Intervenor.

I. RELIEF REQUESTED

Whatcom County seeks a continuance of the current compliance deadline from December 29, 2010 to March 29, 2010.

II. LEGAL AUTHORITY

RCW 36.70A.300(3)(b) authorizes the Board to extend the period for compliance beyond 180 days "in cases of unusual scope or complexity." Similarly, RCW 36.70A.330(2) provides that, after an order of noncompliance has been entered, the Board may "issue any order necessary to make adjustments to the compliance schedule" and set additional hearings as necessary. The facts set forth below demonstrate that these standards have been met and

that the County is seeking the minimum additional time necessary to complete the tasks before it.

III. FACTS SUPPORTING MOTION

A. History

In early 2005, Whatcom County completed the seven year review of its comprehensive plan and development regulations, and documented its action in Resolution No. 2005-006. Futurewise challenged this action by filing a petition for review with the Board. On September 20, 2005, the Board ruled that the County's comprehensive plan and zoning regulations did not comply with the Growth Management Act (GMA). In part, the Board's findings related to rural density and limited areas of more intense rural development (LAMIRDs). The Board set a date of February 14, 2006 for the County to achieve compliance. On October 14, 2005, the Board granted the County's request for an additional year to achieve compliance due to the scope and complexity of the issues. *Futurewise v. Whatcom County*, WWGMHB No. 05-2-0013, Order Extending Date for Compliance and Establishing Compliance Briefing and Hearing Schedule (10/14/05).

On October 18, 2005, Gold Star Resorts, Inc., an intervenor in the case, appealed the Board decision to the Whatcom County Superior Court. On June 8, 2006, the Superior Court reversed the Board's decision. Futurewise then appealed the Superior Court's decision to the Washington State Court of Appeals. On May 18, 2007, while the appeal was pending, the Board entered an order staying the requirement that the County achieve compliance with respect to the matters on appeal until a final decision terminating appellate review and a mandate were issued. *Id.*, Order Finding Continuing Noncompliance, Staying Compliance Obligations Reversed By Superior Court, and Setting New Compliance Schedule (5/18/07).

On December 17, 2009, a final decision in this matter was issued by the Washington Supreme Court. *Gold Star Resorts, Inc., v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009). The matter was then remanded to the Board for proceedings consistent with the Supreme Court's decision through an order entered by the Superior Court on May 4, 2010. On June 29, 2010, a telephonic prehearing conference was held to address scheduling issues. Thereafter,

the Board set a compliance deadline of December 29, 2010. *Id.*, Order Setting Briefing and Hearing Schedule Following Remand from the Supreme Court (7/6/10).

B. Steps Taken to Date

After the original finding of noncompliance, the County began its process to amend its comprehensive plan and zoning regulations to achieve compliance. Whatcom County Planning and Development Services (PDS) has estimated that the decision in this case affected more than 16,000 acres distributed over 40 separate areas throughout rural Whatcom County. Exhibit A, Acreage Chart. In 2006, PDS staff prepared the first draft amendments and discussed them with the Whatcom County Planning Commission in May and June of that year. The project was then placed on hold because of the reversal by the Superior Court.

Despite the ongoing existence of the stay of compliance, the County resumed work on the project after the Court of Appeals decision. In November, 2008, the County held several public workshops on these issues. In the next several months, eight public meetings were held at diverse locations around the county to inform the public and to gather input. In addition, the Planning Commission held two public hearings and conducted nine work sessions on the proposed amendments. Exhibit B, PDS website re Rural Element, Public Process, pp. 6-9. On October 8, 2009, still over two months prior to the Supreme Court's final decision, the Planning Commission issued its recommendation. Simultaneously with the Planning Commission process, PDS met with the County Council's Planning and Development Committee on April 28, 2009, to provide it with an overview and update of the amendment process. Exhibit B, p.8.

After the Planning Commission issued its recommendation in October, 2009, the County Council was working diligently to complete the ten year review of its urban growth areas to meet a December 31, 2009 deadline. Once that was completed, the Council, with three newly elected members, focused on the Rural Element. Months prior to having a compliance deadline, the 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. Exhibit B, pp. 6-7.

On July 13, 2010, its first meeting after the Board set a compliance deadline, the County Council Committee of the Whole gave PDS staff direction on several policy issues and asked staff to revise the amendments recommended by the Planning Commission accordingly. On September 7, 2010, PDS staff sent its extensive revisions to the Council. Exhibit C, Memo to Council from PDS Staff and Proposed Ordinance. Thereafter, the Council Committee of the Whole has spent numerous hours reviewing the revisions with meetings on September 14 and 28, October 12, and November 9 and 23, 2010. Exhibit B, pp. 6-7

C. Emergency Moratorium on Subdivisions

Concerned about the need to conduct a thorough review and the additional time it could take, on October 26, 2010, the County Council unanimously 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. Exhibit D, Emergency Interim Ordinance. This ordinance went into effect immediately and will remain in effect for sixty days. Council staff has subsequently prepared an interim ordinance to continue the moratorium for an additional 6 months. Exhibit E, Interim Ordinance. This ordinance was introduced on November 23, 2010 and is scheduled for a public hearing on December 7, 2010. Exhibit F, Notice of Public Hearing

IV. PRIOR BOARD CASES SUPPORT THIS REQUEST FOR AN EXTENSION

In an order entered on October 14, 2005, this Board specifically found that the compliance issues involved in this case are of unusual scope and complexity. *Futurewise v. Whatcom County*, WWGMHB No. 05-2-0013, Order Extending Date for Compliance and Establishing Compliance Briefing and Hearing Schedule (10/14/05). At that time, the County had requested and received an additional year to achieve compliance. As explained above, given the Superior Court's decision reversing the Board and the stay ultimately granted by the Board, the County barely began the process before it was put on hold.

Even though the stay remained in place and no compliance schedule existed, the County resumed working on compliance after the Court of Appeals reinstated the Board's decision and it has worked on it steadily since that time. After reviewing the requirements of

the GMA and relevant case law with staff during the first part of 2010, the Council opted to take a different course than the Planning Commission. With the issuance of the Supreme Court decision, affirming in part and reversing in part, the County Council, unlike the Planning Commission, had the benefit of knowing the ultimate outcome of the legal issues involved. Moreover, after the Planning Commission recommendation, the Board had also issued its decision in *Dry Creek/Futurewise v. Clallam Co.*, WWGMHB No. 07-2-0018c, Compliance Order (LAMIRDs and Rural Lands)(11/3/09) which significantly affects how counties may address rural density.

Upon receipt of staff's new proposed ordinance on September 7, 2010, the Council immediately began the process of reviewing this voluminous document, page by page, at specially scheduled Committee of the Whole meetings. Exhibit C. It should be mentioned that, while it has been working on this project and many other items of business, this part-time council has also spent many hours over the last several months working on adopting the County's biennial budget, a particularly difficult task in these economic times, addressing serious issues involving the operation of the Lummi Island ferry, and dealing with numerous challenges to its UGA review. In addition, a new council member took office on November 23, 2010. Furthermore, PDS, as well as every other county department, has lost many employees due to substantial budget cuts. Exhibit G, "Whatcom County leaders seek more layoffs, union concessions as revenues still low," Bellingham Herald, October 17, 2010. Two of the PDS employees that were laid off were assigned to the Rural Element project.

In other cases, this Board has allowed the extension of compliance periods for significant periods of time to allow jurisdictions to complete review of similarly difficult and complex issues like those in this case. In *Durland v. San Juan County*, WWGMHB No. 00-2-0062c, the Board issued a Final Decision and Order on May 7, 2001 finding that the County was not in compliance with the GMA with respect to the Lopez Village and Eastsound UGAs. The County adopted ordinances to comply with the initial finding of non-compliance, but that action was challenged, too. The two cases were consolidated. Approximately two years after the initial FDO, the County requested an extension of an additional 180 days. The Board issued an order providing for that extension. Thereafter, the County provided additional status

reports and the Board issued further extensions of the deadline. On November 8, 2004 (three and a half years after the initial FDO), the Board granted an additional 270 days. Order Granting Extension (2/4/05). In that case, the Board explained:

Pursuant to RCW 36.70A.300(3)(b) the Board has authority to establish compliance periods of more than 180 days for cases of unusual scope and complexity. We find that the requirements for creating compliant non-municipal UGAs on Lopez and Orcas Islands in these cases make them of unusual scope and complexity. In the more than three years that the County has been working on bringing the designated Eastsound and Lopez Island UGAs into compliance, the County has made slow, but steady progress in the expensive, time consuming, and complex process of developing transportation, stormwater, sewer, and water plans for these UGAs. The County has also put limitations on development to ensure that inappropriate development does not occur while it is completing its planning efforts. Because the history of this case shows that this planning process has been contentious, the County's suggested timeline necessarily and appropriately includes many opportunities for public participation, a critical part of this planning effort.

Id.

Likewise, in *Sedro Woolley v. Skagit County*, WWGMHB No. 03-2-0013c, Final Decision and Order (2/6/01), the Board initially determined in 2001 that the County had to adopt development regulations for the unincorporated UGAs around cities to assure that development in the unincorporated UGAs was consistent with the development plans and capital facility plans for those unincorporated UGAs after annexation. Initially, the County and the cities attempted to deal with this issue through a series of interlocal agreements. But, later, the county decided to adopt its own set of development regulations applicable throughout the unincorporated UGAs. Order Extending Period for Compliance (12/7/04). The Board granted the County an additional 180 days to comply, recognizing that the adoption of a single set of development regulations applicable throughout the unincorporated UGAs is a matter of unusual scope and complexity.

The previous acknowledgement from this Board that the issues involved in this case are of unusual scope and complexity, as well as the authority above, provide strong support for this motion for additional time. The County is making steady progress in revising its Rural Element to meet the GMA's goals and requirements. As it addresses the rural element, the

County will not only be adopting comprehensive plan policies regarding LAMIRDs, but will also be mapping LAMIRDs, and reviewing and revising rural densities outside of properly established LAMIRDs. Not only is this task time-consuming, it is also a very contentious matter. Building public support by allowing for thorough review of the issues and ample public participation is a critical component of adopting plans and regulations that will have lasting support and impact.

Moreover, like Skagit County and San Juan County, Whatcom County has taken steps to make certain that more intense development does not occur while the planning process is continuing. The emergency ordinance adopted on October 26, 2010, prevents the acceptance and vesting of applications for subdivisions and short subdivisions into parcels less than 10 acres in size in the areas designated for 10 acre zoning by the Planning Commission. Exhibit D.

V. PROCEDURAL MATTERS

Pursuant to WAC 242-02-530, Whatcom County requests that, if the Board desires oral argument, that it should reserve 20 minutes for the argument. Whatcom County believes that the oral argument can be undertaken by telephone conference call.

VI. CONCLUSION

For the foregoing reasons, Whatcom County requests that the Board extend the compliance deadline to March 29, 2010. Further, the two major issues in this case are inextricably intertwined. It would not make sense to extend the date for the adoption of comprehensive plan criteria and not extend the date for consideration of the rural densities. As mentioned previously, as it addresses the rural element, the County will not only be adopting comprehensive plan policies regarding LAMIRDs, but will also be mapping LAMIRDs, and reviewing and revising rural densities outside of properly established LAMIRDs. A review of the rural densities before the Council adopts changes to those rural densities in this process would be an inefficient use of the Board's limited time and resources.

DATED this _____ day of November, 2010.

Karen N. Frakes, WSBA #13600
Deputy Prosecuting Attorney
Attorney for Whatcom County
(360) 676-6784