

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

5 FUTUREWISE

6
7 Petitioner,

8 v.

9
10 WHATCOM COUNTY,

11 Respondent,

12 And

13
14 GOLD STAR RESORTS, INC.

15
16 Intervenor.
17

Case No. 05-2-0013

ORDER ON MOTION TO RESCIND
INVALIDITY

18
19 I. BACKGROUND

20 In response to a motion by Whatcom County ("County") to extend the compliance deadlines
21 in this case,¹ Futurewise requested that the Board make a finding of invalidity for the
22 County's non-compliant rural areas, including all "proto-LAMIRDs", high density rural zones,
23 and rezones to higher density rural zones and commercial zones in the rural areas of the
24 County.²
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27 Subsequently, the Board issued an order granting the requested extension of the
28 compliance deadline and imposed invalidity as to the County's LAMIRD designation
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31 ¹ Whatcom County's Motion For An Extension of the Compliance Deadline, filed December 1, 2010.

32 ² Petitioner's Response To Whatcom County's Motion For Extension of Compliance Deadline at 3, filed
December 9, 2010

1 criteria.³ The County has now moved to rescind the determination of invalidity.⁴ Pursuant
2 to RCW 36.70A.302(6) a county or city subject to a determination of invalidity may file a
3 motion requesting that the board clarify, modify, or rescind the order. The board shall
4 expeditiously schedule a hearing on the motion.
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6 A hearing on the County's motion to rescind invalidity was held telephonically on February
7 9, 2011. In attendance were Board members William Roehl, Nina Carter and James
8 McNamara. Whatcom County was represented by Karen Frakes. Futurewise was
9 represented by Jill Smith and Tim Trohimovich.
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11 II. DISCUSSION

12 The Board previously ruled in this case that:

13 "there appears to be no dispute that the County has allowed subdivision "in and
14 around" its LAMIRDs in the absence of compliant GMA criteria for the designation
15 of LAMIRDs."⁵
16

17 And that, therefore,

18 "the continued validity of designation criteria in the descriptors for small towns
19 and crossroads communities, crossroads commercial, resort and recreational
20 subdivisions, suburban enclaves, and transportation corridors and Policy 2GG-2
21 promote the inappropriate conversion of undeveloped land into sprawling low
22 density development and substantially interfere with the fulfillment of goal of the
23 GMA, RCW 36.70A.020(2)"⁶

24 Because a finding of invalidity has been entered, the burden is on the local jurisdiction to
25 demonstrate the ordinance or resolution it has enacted in response to the finding of
26 invalidity no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4).
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30 ³ Order Granting Extension Of Compliance Deadline and Imposing Invalidity dated December 22, 2010.

31 ⁴ Whatcom County's Motion to Rescind Determination of Invalidity filed January 18, 2011.

32 ⁵ Order Granting Extension Of Compliance Deadline and Imposing Invalidity at 7.

⁶ Id. at 7, 8.

1 In support of its motion to rescind invalidity, the County argues that on January 11, 2011 it
2 adopted Ordinance No. 2011-001, an emergency interim moratorium, which precludes
3 acceptance of new applications for subdivisions and short subdivisions for divisions of
4 property into parcels smaller than 10 acres within the boundaries of the LAMIRDS as
5 recommended by the Whatcom County Planning Commission on October 8, 2009.⁷ The
6 County further argues this emergency ordinance rectifies substantial interference with the
7 fulfillment of the goals of the GMA. It notes that in *Washington Environmental Council v.*
8 *Whatcom County*, the Board found the County's critical areas ordinance was invalid as it
9 substantially interfered with the goals of the GMA, but rescinded that order of invalidity when
10 the County readopted its earlier critical areas ordinance on an interim basis.⁸ The County
11 suggests that it likewise has made significant steps toward adopting a new ordinance in
12 response to the Board's 2005 finding of noncompliance and has adopted an ordinance to
13 eliminate allowing subdivisions within the boundary of LAMIRDS which was the announced
14 basis for the finding of invalidity.⁹ The County has also submitted a supplemental exhibit to
15 its motion to rescind, Ord. No. 2011-002, adopted by the County on January 25, 2011,
16 which extends the emergency ordinance for a period of 6 months. With the adoption of
17 these ordinances the County argues all property within the boundaries of the LAMIRDS
18 recommended by the Planning Commission has effectively been downzoned to allow
19 densities of no more than one unit per 10 acres, thus eliminating substantial interference
20 with RCW 36.70A.020(2).¹⁰ Furthermore, at oral argument on its motion to rescind
21 invalidity, the County pointed out that it adopted Ord. No. 2010-053 which imposes a
22 moratorium on the acceptance of new applications for subdivisions and short subdivisions
23 for divisions of property into parcels smaller than 10 acres within areas proposed for
24 rezoning to R - 10A or RR - 10A. As noted in the December 16, 2010 declaration of Gary
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30 ⁷ County Motion to Rescind at 2-3.

31 ⁸ Id. at 4, citing WEC v. Whatcom County, WWGMHB No. 95-2-0071 (Order Finding Continued Non-
Compliance and Rescinding a Finding of Invalidity, 7/1/97).

32 ⁹ Id.

¹⁰ Id. at 5.

1 Davis, Senior Planner with Whatcom County Planning and Development Services¹¹, with
2 the adoption of this moratorium all RR1, RR 2, RR 3, EI, or R2A zoning that remains in the
3 rural area is either within the boundaries of the Planning Commission recommended
4 LAMIRDs or has effectively been downzoned to allow no more than one unit per 10 acre
5 density.
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7 In response, Futurewise points out that the County's moratorium applies only to long and
8 short subdivisions and does not apply to subdivision of land authorized by binding site plan,
9 nor does it apply to building permits for such uses as multifamily, commercial, and
10 industrial.¹² However, it is important to note that the Board imposed invalidity in its
11 December 22, 2010 order not based upon evidence of issuance of building permits, but on
12 the subdivision activity occurring in rural areas in the absence of a GMA compliant LAMIRD
13 criteria.¹³ It is the County's response to that order, and the basis upon which it was founded,
14 that is at issue in the present motion. It is possible that allowing inappropriate development
15 through building permits in the rural areas, in or near LAMIRDs established without proper
16 criteria, could substantially interfere with the goals of the GMA. However, that is not the
17 issue presently before the Board; rather it is subdivision of land which the County admitted it
18 was permitting within the boundaries of LAMIRDs "recommended" by its Planning
19 Commission¹⁴ that was the evidence supporting invalidity in the Board's December 22, 2010
20 order.
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24 Further, the Board could not find sufficient evidence in the record to demonstrate that the
25 issuance of building permits in the absence of compliant LAMIRD criteria is substantially
26 interfering with the goals of the GMA. The Board's basis for a finding of invalidity and
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31 ¹¹ Filed with the Board on December 16, 2010.

¹² Futurewise Response at 2-3.

¹³ The County conceded such subdivision activity had occurred.

¹⁴ See, County's Response to Request for Invalidity at 5-6.

1 substantial interference with the goals of the GMA was the County's allowing subdivision;
2 and this has been halted by the County's moratoria.

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4 The Board is gravely concerned, however, that the County has failed to take final action to
5 address the areas of noncompliance as specifically set forth in the Board's Final Decision
6 and Order of December, 2005 and affirmed by the Washington State Supreme Court in
7 December, 2009.¹⁵

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9 As to the issue of whether the County's failure to include binding site plans within the scope
10 of its moratorium should preclude rescinding the finding of invalidity, the County indicated at
11 oral argument that under its regulatory scheme binding site plans would be encompassed
12 within the moratorium. Futurewise's bare assertion that binding site plans are not covered
13 by the County's moratorium does not provide sufficient grounds upon which to deny the
14 County's motion. Futurewise did not provide sufficient evidence that substantial interference
15 with the GMA goals resulted from binding site plans.

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18 In reviewing changes made by a local government in response to a determination of
19 invalidity, the Board reviews those changes to determine if they continue to substantially
20 interfere with the goals of the GMA. *Whatcom Environmental Council v. Whatcom County*,
21 No. 94-2-0009, Order Re: Finding of Invalidity (7/25/97). Here, the County prohibits the
22 acceptance of new applications for the subdivision of parcels of land which are 10 acres or
23 less in the rural areas of the County. Accordingly, with these moratoria in place, the County
24 has addressed the substantial interference with the goals of the GMA upon which the
25 Board's order of December 22, 2010 was based, thereby justifying rescission of the earlier
26 determination of invalidity.

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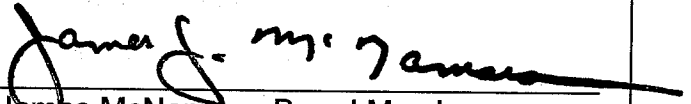
¹⁵ Gold Star Resorts v. Futurewise et al., 167.Wn. 2d 723 (2009).

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III. ORDER

Based on the foregoing, Whatcom County's motion to rescind the determination of invalidity is GRANTED.

Entered this 16th day of February, 2011.


James McNamara, Board Member


William Roehl, Board Member


Nina Carter, Board Member

1 **BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD**
2 **WESTERN WASHINGTON REGION**

3 Case No. 05-2-0013
4 Futurewise v. Whatcom County and Intervenors Gold Star Resorts, Inc.

5 **DECLARATION OF SERVICE**

6 I, PAULETTE YORKE, under penalty of perjury under the laws of the State of
7 Washington, declare as follows:

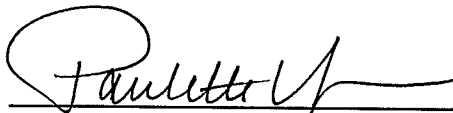
8 I am the Executive Assistant to the Growth Management Hearings Board. On the
9 date indicated below a copy of an ORDER ON MOTION TO RESCIND INVALIDITY in the
10 above-captioned case was sent to the following through the United States postal mail
11 service:
12

13 Tim Trohimovich
14 Futurewise
15 814 2nd Avenue, Suite 500
Seattle, WA 98104

Karen Frakes
Whatcom County Prosecutor's Office
311 Grand Avenue, Suite 201
Bellingham, WA 98225

16 John Belcher
17 Belcher, Swanson Law Firm, PLLC
18 900 Dupont Street
Bellingham, WA 98225-3105

19 DATED this 16th day of February, 2011.

20 

21 Paulette Yorke, Executive Assistant

