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SHIRLEY FORSLOF  
WHATCOM COUNTY AUDITOR

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. 05-2-00013

ORDER FOLLOWING REMAND FROM  
THE SUPREME COURT

• **Procedural Background**

THIS Matter comes before the Board following remand from the Washington State Supreme Court of the Board's September 20, 2005 Final Decision and Order (FDO).

An appeal of the 2005 FDO decision was filed in Whatcom County Superior Court. As described by the Supreme Court:

Gold Star, but not the County, petitioned for review by Whatcom County Superior Court. The superior court held that the Board incorrectly required the County to revise its LAMIRDs and rural densities. The court concluded that the GMA does not require that comprehensive plans be amended to comply with current GMA requirements; rather, RCW 36.70A.130(1) "requires that counties review and evaluate their comprehensive plans and development regulations 'indentifying the revisions made, or that a revision was not needed and the reasons therefore.'" CP at 115. The court additionally ruled that "[t]he LAMIRDs were the subject of prior litigation and were affirmed by" both the superior court and the Court of Appeals in 1998. *Citations omitted*. Finally, the court held that the Board

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GRAND JURY

CRIMINAL JUSTICE CENTER

also improperly used a bright line rule of one residence per five acres when deciding the rural density challenge.

Futurewise appealed, and the Court of Appeals reversed. The Court of Appeals first rejected Gold Star's claim that *res judicata* or collateral estoppel principles barred Futurewise's challenge to the County's plan provisions regarding more intense development in the rural areas. The Court of Appeals then held that the GMA's review statute requires a county "to amend its comprehensive plan as necessary to comply with GMA amendments that came after adoption of the plan." Citation omitted The court affirmed the Board's holdings that the County had not applied proper criteria in establishing its areas of more intense rural development and that the County's comprehensive plan was not compliant with the GMA's LAMIRD provisions. The Court of Appeals also reversed the superior court's ruling on the "bright line rule" of rural density.<sup>1</sup>

Gold Star sought discretionary review by the State Supreme Court, which issued its decision on December 17, 2009. The Supreme Court affirmed the Court of Appeals' decision upholding the Board's holdings 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.

The Court reversed the Court of Appeals' holding that the Board did not improperly apply a bright line rule in addressing Futurewise's challenge to the rural density designations and held that the Board did in fact rely on a bright line rule of one residence per five acres in rural areas (other than LAMIRDs).

The Court remanded the case to the Board for reconsideration of Futurewise's challenges to the rural density designations without applying a bright line rule. In addition the Court found 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

<sup>1</sup> *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 732 (2009).

1 intensive rural development.

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3 An order from Whatcom County Superior Court was issued on May 4, 2010 mandating this  
4 matter to the Board for proceedings consistent with the Supreme Court's decision.

5  
6 Following the County's adoption of Ordinance 2011-013 to address the LAMIRD issues, four  
7 separate Petitions for Review were filed with the Board, challenging various aspects of that  
8 ordinance. As the Board noted in its letter of July 15, 2011 to the parties:

9       Based on the need to consider the new challenges to Ordinance 2011-0013,  
10 while also addressing it in the scope of a compliance proceeding, the Board has  
11 decided that the Compliance Hearing on the 26<sup>th</sup> will consider only the rural  
12 densities portion of the remand. The LAMIRD remand compliance proceedings  
13 will now be coordinated with appeal proceedings for the four PFRs challenging  
14 Ordinance 2011-0013 and the Board will issue a Compliance Order/FDO at that  
15 end of those proceedings.

16 On July 26, 2011 the Board conducted a Compliance Hearing on the remanded rural  
17 density issues. The hearing was held in Bellingham, Washington. Tim Trohimovich  
18 appeared for Futurewise. Karen Frakes appeared for Whatcom County and was  
19 accompanied by Gary Davis of the Planning Department. Board Members Nina Carter,  
20 William Roehl and James McNamara were present, with Mr. McNamara presiding.

21  
22       • **Rural Densities**

23       RR1, RR2 and RR3 zones

24 The "challenged densities" in this appeal are the RR1 (1 dwelling per acre), RR2 (2  
25 dwellings per acre), RR3 (3 dwellings per acre) and R2A zones (1 dwelling unit per 2  
26 acres)<sup>2</sup>. In the Board's 2005 FDO the Board had held that "Rural densities of greater than  
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32 <sup>2</sup> Futurewise notes that the RRI zone was reduced to one dwelling unit per acre in 2009, and it is no longer  
contesting that zone. Futurewise Objection at 9.

1 one dwelling unit per five acres are not considered rural densities. (citations omitted)”<sup>3</sup>  
2 Thus, the Board applied a bright line rule on rural densities of one dwelling unit per 5 acres.  
3  
4 As directed by the State Supreme Court, “this matter must be remanded to the Board to  
5 determine, without regard to the bright line rule of one residence per five acres, whether it  
6 was clearly erroneous for the County to include the challenged densities in its 2005  
7 comprehensive plan”.<sup>4</sup>  
8

9 Futurewise notes that it is challenging the use of RR1, RR2 and RR3 outside of properly  
10 designated Limited Areas of More Intense Rural Development (LAMIRDs).<sup>5</sup> In response,  
11 the County states that all of the remaining RR1, RR2 and RR3 zoning is located within  
12 LAMIRDs, under WCC 20.32.253 these zones are only allowed in Rural Communities (Type  
13 I LAMIRDs) and if any RR1, RR2 or RR3 property is found to fall outside a GMA compliant  
14 LAMIRD, the County zoning code requires that such property be rezoned.<sup>6</sup>  
15  
16

17 At the remand hearing, the County conceded that such zones were not rural densities.  
18 Therefore, based on the foregoing, the Board finds and concludes the County’s use of RR1,  
19 RR2 and RR3 zones outside of GMA compliant LAMIRDs was contrary to RCW  
20 36.70A.070(5)(d) but that this area of non-compliance has been cured by including such  
21 zones in LAMIRDs.  
22

23 Thus, the remaining issue is whether the County’s R2A zone provides for an appropriate  
24 rural density.  
25

26 R2A zone  
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31 <sup>3</sup> Futurewise v. Whatcom County, WWGMHB No. 05-2-0013. September 20, 2005 FDO at 21.

32 <sup>4</sup> *Gold Star Resorts v. Futurewise and Whatcom County*, 167 Wn.2d 723, 732 (2009).

<sup>5</sup> Futurewise Objection at 10.

<sup>6</sup> County Response at 2-3

1 Futurewise argues the R2A zone, with its allowance of one dwelling unit per 2 acres, allows  
2 urban growth within the rural area and fails to protect rural character. It notes RCW  
3 36.70A.110(1) prohibits urban growth outside of UGAs, and 36.70A.030(19) defines urban  
4 growth as “. . . growth that makes intensive use of land for the location of buildings,  
5 structures, and impermeable surfaces to such a degree as to be incompatible with the  
6 primary use of land for the production of food, other agricultural products, or fiber, or the  
7 extraction of mineral resources, rural uses, rural development, and natural resource lands  
8 designated pursuant to RCW 36.70A.170 . . . When allowed to spread over wide areas,  
9 urban growth typically requires urban governmental services.” Futurewise submits areas  
10 such as the Wiser Lake area with its R2A zoning allows lots too small to support the  
11 production of agricultural products, the extraction of mineral resources, and natural resource  
12 lands.<sup>7</sup>  
13

14  
15 In response, the County notes that there were 2,927 acres of R2A zoned land in the county  
16 but, with adoption of Ordinance 2011-013, 1475 acres were rezoned to R5A, 574 acres  
17 were in LAMIRDs leaving only 878 acres of R2A in rural lands outside of LAMIRDs.<sup>8</sup> The  
18 County emphasizes this leaves less than 1% of the County’s rural lands in Whatcom County  
19 in R2A zoning, located in seven discrete areas with parcel sizes (as of 2008) ranging from  
20 0.5 acres to 2.3 acres.<sup>9</sup> The County notes that a maximum of 64 new lots could be created  
21 in the entire R2A zone.  
22  
23

24 In determining densities that are consistent with rural character, the State Supreme Court in  
25 *Thurston County v. WWGMHB*, 164 Wn.2d 329, 359-60 (2008) stated:

26 The legislature did not specifically define what constitutes a rural density.  
27 Instead, it provided local governments with general guidelines for designating  
28 rural densities. A rural density is “not characterized by urban growth” and is  
29 “consistent with rural character.” Former RCW 36.70A.070(5)(b) Whether a  
30

31 <sup>7</sup> Futurewise Objections at 11-12.

32 <sup>8</sup> County Response at 1-2.

<sup>9</sup> County Response at 2.

1 particular density is rural in nature is a question of fact based on the specific  
2 circumstances of each case. In this case, the common rural residential density in  
3 the County is one dwelling unit or less per five acres according to the  
4 comprehensive plan. Higher densities may be present “where there are existing  
5 clusters of half-acre lots or in higher density resort-residential areas adjacent to  
6 water bodies.” AR at 774. Densities of four dwellings per acre are allowed only  
7 where such densities already exist. Only 5.5 percent of rural acreage is  
8 designated at densities higher than one dwelling per five acres. The  
9 comprehensive plan explains the purpose, definition, characteristics, and local  
10 guidelines for each zoning density. The Board should not have rejected these  
11 densities based on a bright-line rule for maximum rural densities, but must, on  
12 remand, consider local circumstances and whether these densities are not  
13 characterized by urban growth and preserve rural character.

14 The County points out that in *Dry Creek Coalition and Futurewise v. Clallam County*,  
15 WWGMHB No. 07-2-0018c (4/23/08) this Board found Neighborhood Conservation Overlay  
16 (NCO) provisions that allowed for densities of 1 du/2.4 acre compliant with the GMA where  
17 its application was consistent with existing rural development and would not lead to the  
18 “inappropriate conversion of undeveloped lands into sprawling, low-density development.”<sup>10</sup>

19 Quite recently, in *Kittitas County v. EWGMHB*, \_\_\_\_\_ Wn.2d \_\_\_\_\_ (2011), No. 84187, slip  
20 op. filed July 28, 2011, our State Supreme Court reiterated that questions of appropriate  
21 rural densities are fact specific to local communities and that the boards may not rely on  
22 bright line rules regarding density. In that light, the County and Futurewise have presented  
23 the Board with maps of the R2A areas of particular concern, but each draws different  
24 conclusions from that evidence.

25  
26 The County argues that its R2A lands, in that they comprise 0.7% of county rural lands and  
27 allow for a maximum of 64 new lots, would not lead to the “inappropriate conversion of  
28 undeveloped lands into sprawling, low-density development”. Futurewise, on the other  
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32 <sup>10</sup> See, RCW 36.70A.020(2).

1 hand, focuses on the assertion that allowing one dwelling unit per 2 acres fails to protect the  
2 rural character of the County.

3  
4 In considering whether the R2A lands are consistent with rural character, the Board must  
5 consider the County's own vision of its rural areas. Here, Futurewise directs the Board's  
6 attention to the 1994 EIS Existing Conditions Report which describes rural, agricultural  
7 Whatcom County as:

8         ... a landscape of tightly-knit dairies surrounded by fields, cropland and woodlots,  
9         and spread evenly through the flat Nooksack valley floor and on the uplands.  
10         Cultivated fields and minimal development along roads provide expansive views  
11         of mountains, woods and distant farms – all features of the landscape.  
12         Naturalness and openness are its basic qualities.<sup>11</sup>

13 Futurewise does not explain why it is appropriate to look to this 1994 EIS for the County's  
14 vision of its rural character. Instead, just as the Court directed in *Thurston County v.*  
15 *WWGMHB*<sup>12</sup>, the Board looks at the County's Comprehensive Plan for the County's vision  
16 of its rural areas. As to its rural areas, the County's CP states:

17  
18         This plan recognizes that each rural area or community has a unique character  
19         in terms of established development patterns. The majority of the rural area is  
20         characterized by the types of visual environment and land uses traditionally  
21         considered rural, while a portion has been developed with more intensive uses  
22         – with smaller-lot residential, light industrial, or business uses. . . . Lands  
23         designated as Rural include a wide variety of uses and densities.<sup>13</sup>

24         The County's Goals and Policies relating to its rural areas include:

25         **Goal 2GG: Designate Rural areas to contain a variety of uses and densities**  
26         **while retaining their traditional rural character.**

27         Policy 2GG-1: Provide a variety of residential choices at rural densities which are  
28         compatible with the character of each of the rural areas.

30  
31 <sup>11</sup> IR 212 Whatcom County Planning and Development Services, Environmental Impact Statement, Existing  
32 Conditions Report for the Whatcom County Comprehensive Plan, p. 73 (Sept. 1994).

<sup>12</sup> See, *Whatcom v. WWGMHB*, 164 Wn.2d 329, 359 (2008).

<sup>13</sup> Whatcom County Comprehensive Plan, Chapter 2, Land Use, "Rural Character and Lifestyle".

1 Policy 2GG-2: The Rural designation should include areas of traditional rural  
2 uses and densities. While the large majority of the Rural designation is  
3 characterized by densities at or below one unit per five acres, the Rural  
4 designation may also include rural residential areas where higher densities have  
5 been established. More intensive development<sup>14</sup> should be contained within  
6 Rural Community, Rural Tourism, or Rural Business designations, which are  
7 limited areas of more intensive rural development (LAMIRDs), unless  
8 justified by the existing rural character of the area.<sup>15</sup>

9 Following the adoption of Ordinance 2011-013, R2A in the rural areas is found in only seven  
10 areas: East Lynden, Hinotes Corner, Lake Samish East, Lake Whatcom, South Bay,  
11 Wickersham, and Wiser Lake East. The average parcel size in these R2A areas ranges  
12 from 0.5 acres (South Bay) to 2.3 acres (Wiser Lake East). The use of R2A zoning in those  
13 limited areas where it remains is consistent with the County's pattern of rural development  
14 and its vision of rural areas that includes a variety of rural densities including "areas where  
15 higher densities have been established."  
16

17 Futurewise argues that R2A zoning is inconsistent with the those elements of rural character  
18 described in RCW 36.70A.030(15):  
19

20 (15) "Rural character" refers to the patterns of land use and development  
21 established by a county in the rural element of its comprehensive plan:

22 (a) In which open space, the natural landscape, and vegetation predominate  
23 over the built environment;

24 (b) That foster traditional rural lifestyles, rural-based economies, and  
25 opportunities to both live and work in rural areas;

26 (c) That provide visual landscapes that are traditionally found in rural areas  
27 and communities;

28 (d) That are compatible with the use of the land by wildlife and for fish and  
29  
30

31 <sup>14</sup> The County's Comprehensive Plan describes more "more intensive uses" in the rural area as  
32 "commercial/industrial and residential areas with densities greater than one unit per acre".

<sup>15</sup> Id.

1 wildlife habitat;

2 (e) That reduce the inappropriate conversion of undeveloped land into  
3 sprawling, low-density development;

4 (f) That generally do not require the extension of urban governmental  
5 services; and  
6

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

9 While R2A zoning might be inconsistent with some of these elements of rural character if  
10 applied throughout the County's Rural areas, the record demonstrates that R2A areas are  
11 limited. The County points out that, while there were 2,927 acres of R2A zoned land in the  
12 County prior to the adoption of Ordinance 2011-013, following its adoption only 878 acres  
13 remained in the rural lands outside of LAMIRDs.<sup>16</sup> These 878 acres comprise approximately  
14 0.7% of the rural lands in Whatcom County.<sup>17</sup> The County further points out that a  
15 maximum of 64 new lots could potentially be created in the seven areas of R2A zoned  
16 lands, potentially less when restrictions such as critical areas and public water availability is  
17 taken into consideration.<sup>18</sup>  
18  
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20 Contained in this manner, the R2A does not pose a threat to the County's rural character,  
21 and forms a component of the variety of rural densities found in Whatcom County.  
22

### 23 ORDER

24 Based on the foregoing, and in response to the direction of the Supreme Court in its remand  
25 of this matter, the Board finds the County's RR1, RR2 and RR3 zones were not compliant  
26 with the GMA. However, as these zones are no longer present outside of LAMIRDs, there  
27 is no basis for finding the County to be currently out of compliance in this regard. As to the  
28 R2A zones, the Board finds this designation, in light of the County's existing rural  
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31 <sup>16</sup> County Response to Objections at 1-2, citing Ex. 243, LAMIRD Report, Appendices C-E.

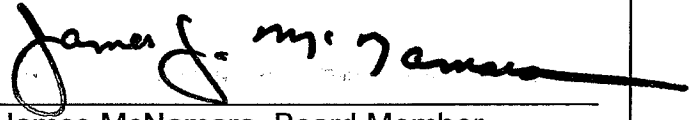
32 <sup>17</sup> Id.

<sup>18</sup> County Response to Objections at 2.

1 development patterns, and the limited presence and extent of this zone, does not violate  
2 RCW 36.70A.070(5), RCW 36.70A.020(2), RCW 36.70A.070(1), RCW 36.70A.110(1) or  
3 RCW 36.70A.130.

4  
5 Accordingly, the rural densities portion of this case is CLOSED.

6  
7 Entered this 9th day of September, 2011.



8  
9 James McNamara, Board Member



10  
11 William Roehl, Board Member



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13 Nina Carter, Board Member  
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