SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

In re:)
CLALLAM COUNTY,)
Plaintiff,) NO. 08-2-00646-1
v.)
) MEMORANDUM OPINION
WESTERN WASHINGTON GROWTH)
MANAGEMENT BOARD,)
)
Defendants.)
)

I. ISSUES:

Clallam County appeals from a Western Washington Growth Management Board determination that the Clallam County Comprehensive Plan and the Carlsborg Urban Growth Areas and its Capital Facilities Plan are noncompliant with the Growth Management Act of the State of Washington.

II. GENERAL FRAMEWORK:

At one time the axiom was that "a man's home is his castle." People who owned real property could do with it what they pleased. In the earlier part of the 20th century concerns began to arise that one's free exercise of property rights often unfairly impacted the neighbors. Gradually the concept of land use planning and zoning spread across the country. The State of Washington has been through various planning

enabling acts which ultimately led to land use rules and regulations which varied greatly from city to city and county to county.

The Washington Legislature enacted the Growth Management Act (GMA) in 1990 stating it was intended to combat "uncoordinated and unplanned growth" and was to promote cooperation among local governments and citizens in Comprehensive land use planning. RCW 36.70A.101. The GMA was enacted largely "in response to public concerns about rapid population growth and increasing development pressures in the state, especially in the Puget Sound region." King County v. CPSGMHB, 142 W. 2d 543, 546, 14 P.3d 133 (2000).

The Growth Management Act provides a "framework" of goals and requirements to guide local governments, who have "the ultimate burden and responsibility for planning." RCW 36.70A.3201. The Growth Management Act requires counties to develop a comprehensive plan "which is to set out the generalized coordinated land use policy statement" of the county's governing body. RCW 36.70A.030(4). Among other things the Comprehensive Plan must designate Urban Growth Areas (UGA's) "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110(1). The Comprehensive Plan also must include a rural element that provides for a variety of rural densities. RCW 36.70A.070(5)(b)(2004). The GMA recognizes regional differences and allows counties to consider local circumstances when designating rural

densities so long as the local government creates a written record explaining how the rural element harmonizes the GMA requirements and goals (see former RCW 36.70A.070(5)(a)).

Great deference is to be accorded the local government's decisions that are "consistent with the requirements and goals" of the GMA (RCW 36.70A.320(1)). The GMA's goals include encouraging development in urban areas and reducing rural sprawl. RCW 36.70A.020(1), (2).

The Legislature identified 13 planning goals in the GMA, but expressly refrained from imposing upon local jurisdictions any order or priority amongst these goals. RCW 36.70A.020 and Viking Properties v. Holm, 155 Wn. 2d 112 (2005) at page 127. Pursuant to the Growth Management Act the State has created Growth Management Hearing Boards to determine whether or not county comprehensive plans or development regulations are in compliance with the requirements of the act itself. The GMA provides that a Hearings Board "shall find compliance unless it determines the action by the state agency, county or city is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of this chapter." RCW 36.70A.320(3). The Legislature sets a standard in RCW 36.70A.320(1) for granting local entities the deference intended:

> "In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the Legislature intends for the boards to grant deference to counties and cities in how

> they plan for growth consistent with the requirements and goals of this chapter. Local Comprehensive Plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The Legislature finds that while this chapter requires local planning to take place within a framework of State goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future, rests with that community."

"To find an action 'clearly erroneous,' the Board must have a 'firm and definite conviction that a mistake has been committed.'" Thurston County v. W. Wash. Growth Mgmt. Hearings Bd., 164 Wn. 2d at 340-41 (quoting Lewis County v. W. Wash. Growth Mgmt. Hearings Bd., 157 Wn. 2d 488, 497, 139 P.3d 1096 (206)).

III. STANDARD OF REVIEW:

The Washington Administrative Procedures Act governs judicial review of challenges to Growth Board actions. Quadrant v. Central Puget Sound Management Growth Board, 154 Wn. 2d 224 (2005) at 233. Under the APA the burden of demonstrating the invalidity of agency action is upon the party who assets invalidity. RCW 34.05.570(1)(a).

The statute sets forth nine grounds for relief from an agency decision. In the County's "Corrected Opening Brief" the County asserts five grounds as its basis of appeal. They are as follows:

> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> (d) The agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; [or] . . .
> (i) The order is arbitrary or capricious. (RCW 34.05.570(3)).

Court's have noted that he GMA is to be strictly construed because it was controversial legislation. See Thurston County v. WWGMHB, 164 Wn. 2d 329 (2008) and Spokane County v. City of Spokane, 148 Wn. App. 120 (2009).

A reviewing court reviews errors of law de novo under the APA pursuant to RCW 34.05.570(3)(d).

"Substantial evidence" is defined as "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." RCW 34.05.570(3)(e). See City of Redmond v. Central Puget Sound Growth Management Board, 116 Wn. App. 48 (2003).

IV. PROCEDURAL HISTORY:

The Growth Management Act requires counties to review their designated Urban Growth Areas every ten years. It also requires that the County Comprehensive Plan be reviewed every seven years. Clallam County conducted its update reviews from 2004 through 2007. On August 28, 2007, the Board of Clallam County Commissioners enacted Resolution No. 77 entitled "Affirming that Clallam County has reviewed and updated its Countywide Comprehensive Plan, Regional Plans, and Development Regulations to ensure continued compliance with Growth Management Act Standards and Policies." Some portions of the countywide Comprehensive Plan were amended from the prior plan. On the same day the Board of Clallam County Commissioners enacted Ordinance 826 to add a section to the Comprehensive Plan dealing with "limited areas of more intensive rural development" (LAMIRDS) a new designation permitted under the Growth Management Act.

Futurewise, and others, filed a Petition for Review to the Western Washington Growth Management Hearings Board (WWGMHB) asserting that the County's enactments left numerous areas of the County's Comprehensive Plan and development regulations noncompliant with the Growth Management Act.

On April 23, 2008, the Growth Management Hearings Board issued its Final Decision and Order finding that in certain respects the rural densities adopted by Clallam County were noncompliant with the Growth Management Act and that in

certain respects the Carlsborg UGA was also noncompliant with the GMA. There were other issues raised to the Board, but before this Court are only those two general issues.

Regarding Carlsborg, the Board noted that Carlsborg was an unincorporated UGA in a rural county. Futurewise had charged that the most egregious violation as regards the Carlsborg UGA was the lack of sewers and any plan for building sewers in the future. The Board found that the Carslborg UGA and particularly Clallam County Code Section 33.20 which permitted urban uses within the Carlsborg UGA prior to the advent of sewers was noncompliant with RCW 36.70A.070(3) and RCW 36.70A.110(3) and substantially interfered with RCW 36.70A.020(1),(2), and (12). Final Decision and Order pages 79 and 80.

The provisions of the County Code relating to Carlsborg, and the Capital Facilities Plan relating to Carlsborg had been adopted by the County prior to the current review and no appeal had been taken from the initial adoption of those plans. The County chose not to amend the Carlsborg Urban Growth Area nor its Carlsborg Capital Facilities Plan as a part of the update and review which took place from 2004 to 2007. The County alleges that the Board had no jurisdiction to require the County to make changes at this time as the applicable appeal period ran years previously.

Futurewise argued that Clallam County's rural zoning districts which allowed densities of up to one residence (1/du) per 2.4 acres violated the Growth Management Act mandate because the density was not rural in nature. The Board, at page 63 of its

opinion, noted as a basis for its decision: "The existing rural landscape supports a finding that the rural character of Clallam County is a rural density of 1du/5 acre." The Board then found that "by authorizing densities that do not reflect the existing landscape or economy of the area, the County has failed to maintain the traditional rural lifestyles of the residents of Clallam County as required by the GMA." Final Decision and Order, *supra*, at page 63.

V. CARLSBORG JURISDICTIONAL ISSUES:

Paragraph 15 of Resolution No. 77 noted: "In connection with this update, Clallam County has performed a ten year review of its six Urban Growth Areas (UGAs) and has updated its UGA capacity analysis to include the most recent (2002) OFM county population projections for growth and in consideration of it's updated linear projections; . . ."

Under paragraph 20A, relating to Comprehensive Plan elements, the County noted:

> "As part of this update process, Clallam County has performed its ten year review of its six designated Urban Growth Areas (UGA's); Sequim UGA, Carlsborg UGA, Port Angeles UGA, Joyce UGA, Clallam Bay/Sekiu UGA, and Forks UGA. As part of the review, the County considered whether the UGA's have sufficient land and densities to permit the urban growth that is projected to occur in the county for the succeeding 20 year period (2005-2025) in accordance with RCW 36.70A.110(2) and 36.70A.130(3)." The County then determined that county has experienced population growth which has been accommodated by its comprehensive plan without requiring major amendment and that "the County's

> UGA's include adequate capacity to urban growth for the next 20 years . . ."
>
> The resolution cites to a report entitled *Clallam County's Urban Growth Area Analysis and Ten Year Review* of May 2007.

Paragraph 20C of the resolution states in part:

> "In 2000, the County adopted Ordinance 702, enacting a specific Capital Facilities Plan for the Carlsborg Urban Growth Area, which had been designated to resolve a GMA petition filed by the City of Sequim with the WWGMHB. The CFP is a 20-year plan with a 6-year financing element for construction and maintenance of the County's Capital Facilities.

In paragraph 21 relating to Urban Growth Areas the County noted in part:

> "In 1995 and in subsequent years the County designated UGA's that were intended to accommodate 20-year population projections. The County has performed its UGA update analysis as summarized in findings 20A and 20B of this resolution. In 2004, the Planning Commission recommended completion of the 10-year UGA review for the County's six UGA's to ensure GMA compliance. Based upon its review, the County determined that no revisions to existing UGA's are required to accommodate the projected 20-year growth and that it's UGA's comply with the GMA. Permitted densities allowed within each of the County's UGA's are evaluated in the UGA report."

The resolution goes on to specifically indicate urban density issues which have been raised in this proceeding.

The first issue which the Court must decide is whether or not the Western Washington Growth Management Hearings Board had jurisdiction to hear an appeal to the County's determination in Resolution No. 77 to neither enlarge nor reduce the

Carlsborg Urban Growth Area, and the County's decision not to modify the Capital Facilities Plan which applies to that Urban Growth Area, and to not revisit allowable densities within the Carlsborg UGA.

At page 85 of the final decision and order the Board noted:

> "Thus the question is: May the Board review the County's UGA's, reviewed pursuant to RCW 36.70A.130(3), even though the County determined not to amend those UGA's?"

RCW 36.70A.130(3) states in part, at sub paragraph (1)(a):

> "Each Comprehensive Land Use Plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. A county or city shall take legislative action to review and, if need, revise it's Comprehensive Land Use Plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time period specified in subsection (4) of this section . . ."
>
> Subsection 4 requires Clallam County to act on or before December 1, 2004, and every seven years thereafter.

Clallam County alleges that the Growth Board lacks jurisdiction to rule that the Carlsborg Capital Facilities Plan fails to comply with the Growth Management Act (GMA). Clallam County states the CFP was adopted in 2000 and no appeal was timely filed. Therefore existing plans and regulations have been deemed compliant with the GMA. Clallam County cites the Supreme Court's ruling in Thurston County v. WWGMHB, 164 Wn. 2d 329, 190 P. 3d 38 (2008) as authority. That case was decided after the Board's decision in this matter.

In Thurston County the Court said:

> "We hold that a party may challenge a county's failure to revise aspects of a Comprehensive Plan that are directly

> affected by new or recently amended GMA provisions if a petition is filed within 60 days after publication of the County's 7-year update. A party may challenge a county's revisions or failures to revise its UGA designations when there is a change in the population projection, if a petition is filed within 60 days after publication of the county's 10-year update." Thurston County, *supra*, at page 336.

Later in the opinion the Court rephrased the question as follows:

"When a Comprehensive Plan is updated either every seven years in accordance with former RCW 36.70A.130(1)(a) or when UGA's are reviewed every ten years in accordance with former RCW 36.70A.130(3), does a GMHB have jurisdiction to review the entire Comprehensive Plan?" Thurston County, *supra*, at page 342.

The Court in answering that question held: at page 343:

> "A party may challenge a county's failure to revise aspects of a Comprehensive Plan which are directly affected by new or recently amended GMA provisions following a seven year update."

Futurewise, who was the appellant in the Thurston County case argued that it should have been able to challenge all aspects of a Comprehensive Plan following a seven year update regardless of whether a Comprehensive Plan was revised. The Supreme Court disagreed noting that the statute did not explicitly define which aspects of a Comprehensive Plan must be updated nor delineate the scope of challenges that might be brought against a Comprehensive Plan. The Court noted:

> "The GMA clearly does not require a county to reenact a new Comprehensive Plan every seven years. It simply mandates a county review and, if needed, revise its Comprehensive Land Use Plan and development regulations."

The Court stated “we refuse to imply such an onerous requirement in the absence of an explicit GMA provision to the contrary.” Thurston County, *supra*, at page 344. The Court then went on to state:

> “We hold a party may challenge a county’s failure to revise a Comprehensive Plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended since the previous Comprehensive Plan was adopted or updated, following a seven year update. This rule provides a means to ensure a Comprehensive Plan complies with recent GMA amendments, recognizes the original plan was legally deemed compliant with the GMA, and preserves some degree of finality.” Thurston County, *supra*, at page 344. (emphasis added)

Clallam County argues that the only pertinent GMA amendment that would enable an update challenge was “solely to add park and recreation facilities to the Capital Facilities Plan requirement.”

The Board found that the Capital Facilities Plan as it related to park and recreational facilities was compliant with the GMA. Futurewise also notes that the newer statute added the requirement for park and recreation facilities consideration and required that be included in the Capital Facilities Plan element. Futurewise notes and argues in its opening brief at page 9: “In fact, one of Futurewise’s specific challenges at the Board was the CFP provision for parks and recreation facilities. Thus the amendment to the CFP, pursuant to Thurston County, gave Futurewise standing to challenge (and the Board jurisdiction to hear a challenge, to) the CFP, *in toto*.”

The language in Thurston County cannot be read that broad. It specifically limits the challenge to those “provisions related to mandatory elements of a Comprehensive Plan that had been adopted or substantively amended since the previous

Comprehensive Plan was adopted or updated . . ." Neither the language of the Thurston County opinion nor logical inferences from that language, would allow a challenge to a Comprehensive Plan "in toto" as argued by Futurewise. In fact, the Thurston County Court went on to note that their ruling created "no 'open season' for challenges previously decided or time barred." Thurston County, *supra*, at page 344.

Accordingly, this court finds that the challenges beyond the scope of new GMA legislation mandating changes to the Carlsborg Capital Facilities Plan are not justified related to a county's failure to revise a Comprehensive Plan on a periodic review.

The Thurston County case, however, also notes a second basis upon which a challenge may be made following a county's periodic update. At page 347 the Thurston County Court noted:

"A party may challenge a county's failure to revise its UGA designations during a ten year update only if the OFM population projection for the county changed." The Court noted: "if the Urban Growth Projection changes, a county must revise its Comprehensive Plan." Former RCW 36.70A.130(3). "If the county fails to revise its plan, a party may challenge whether the UGA accommodates the most recent OFM population projection."

The language seems somewhat inconsistent at first blush with the court's earlier ruling relating to the Comprehensive Plan update. Here, however, it is the UGA designation which is required to be reviewed rather than the comprehensive plan in full.

The Court noted that a Comprehensive Plan must designate a UGA "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110(1).

In Futurewise's responsive brief it argues at page 9: "The County completely fails to address (or even mention) the other key holding in Thurston County, which is that 'a party may challenge a county's revisions or failures to revise its UGA designations when there is a change in the population projection, if a petition is filed

within 60 days after publication of the county's ten-year update'." Thurston County, *supra,* at page 336.

Futurewise then states:

> "Thus as a jurisdictional question, the Board had the power to hear a challenge to the County's revisions to or failure to revise its UGA. As a consequence of the County having undertaking a UGA revision, the County was also obliged to update its Capital Facilities and Transportations Plans. As a result, the Board properly reviewed the County's changes to the Carlsborg UGA and properly addressed the noncompliant portions of the related CFP both because the CFP provisions of the GMA had been amended and because the CFP was a necessary component of the UGA update. Each of these circumstances independently created jurisdiction for the Board. " Futurewise responsive brief, pages 9 and 10.

The Thurston County case, however, indicates that what is to be reviewed are the designations of UGA's. The issue is whether or not the UGA accommodates the most recent OFM population projection. The County resolution states that its UGA's are sufficient to meet the OFM changing population projections for the next 20 years as is required. That is what an Urban Growth Area designation does. That decision could be challenged. The specifics of the application of specific Facilities Plan elements or Comprehensive Plan elements previously approved is not within the scope of a review of the appropriate designation of land as an UGA. To hold otherwise would simply negate the holding of the Supreme Court in Thurston County as it relates to challenges to Comprehensive Plan and development regulations issues. Clearly the Supreme Court did not intend that result nor would logic or the rational given for the Court's decision as to Comprehensive Plan Reviews warrant such an inconsistent finding as to UGA designations.

Here, the record discloses as to the Carlsborg UGA, that the County did not change the designation of the UGA, nor did the County change its Comprehensive Plan or Capital Facilities Plan in any manner which would have impacted the existing Carlsborg UGA plans as to the issues raised on appeal. Accordingly the only basis upon which an appeal could be granted would be either that the County should have modified the size of the Carlsborg UGA, or, that in light of the GMA requirements to add recreation and park facilities and other such newly legislated considerations, the County was incorrect in the manner in which it either did or did not handle that new requirement. The parks and similar new GMA issues were raised and decided and have not been appealed. Accordingly this Court and the WWGMHB are without authority to hear other challenges to the previously adopted Carlsborg UGA and Capital Facilities Plan. The Growth Management Hearings Board determination that it had authority to do so, and their subsequent finding that the plan was not in compliance with the GMA are reversed.

VI. RURAL DENSITIES ISSUES:

The argument may be appropriately framed as follows: The Growth Management Hearings Board and Futurewise argue that densities allowing a dwelling unit on parcels less than 5 acres are not rural densities and therefore do not conform to the Growth Management Act's policies and principles and are therefore noncompliant.

Since the statute requires the County's determination that such uses are rural in character to be deemed correct unless clearly erroneous, the standard of review for this court is to determine whether or not the Growth Management Hearings Board committed an error at law, or whether there is substantial evidence to support its finding

that the County was clearly erroneous in finding that 2.4 acre parcels could constitute rural character density within Clallam County.

This particular issue is analyzed and discussed in the Final Decision and Order beginning at page 53 of the opinion. The issue is phrased as:

> "Whether the County's failure to prohibit maximum rural densities of less than one dwelling unit per 5 acres outside of limited areas of more intensive rural development (Lamirds) in Section 20 (E), and failure to review and revise the Comprehensive Plan and development regulation to eliminate rural densities of less than one dwelling unit per 5 acres outside of limited areas of more intensive rural development (Lamirds) violates RCW 36.90A.020 . . ."

The Court notes that densities of 5 acres and two and a half acres constitute geometric divisions of land of these sizes only by virtue of land having initially been surveyed and platted in sections generations ago. The determination of a section and therefore the divisions of a section are mathematical calculations unrelated to topography, utility of the land to any particular use, environmental concerns, or population density by any measure based on scientific, socioeconomic, cultural or other grounds. They are arbitrary numbers generated arbitrarily from an arbitrary standard created hundreds of years previously. They are, however, the densities at issue. In part, this is because those designations of parcel sizes are what have been used for the division and subdivision and sale of land well before planning and zoning laws came into being and which division standards continue to exist to the present time. the

decision of the Western Washington Growth Management Hearing Board limits the question of rural density designations to those geometric considerations. No one is arguing, for example, that the best available science would result in a rural density being 3.872 acres in size as opposed to 5 or 2.5 which are the generally used acreages for the divisions and sale of sections of land.

The record reflects that the County, prior to the Growth Management Act, had adopted a Comprehensive Plan and zoning which created patterns of land use and division within the County. These have been downsized since 1995 and otherwise retained under the GMA according to the County. (See the 2006 Draft Rural Lands Report at page 1, number 6.) At page 63 of the Final Decision and Order the Board analyzed the rural density issue and found as follows:

> "The Board finds that Futurewise has adequately demonstrated that the rural character of Clallam County, specifically its visual landscape and farm-based economy, is dominated by lots of greater than 5 acres in size. With such a large percentage of the County's existing land use pattern at a parcel size of 4.81 acres and farms within the County averaging 25 acres, the existing rural landscape supports a finding that the rural character of Clallam County is a rural density of 1 du/5 acre."
>
> "The Board recognizes the GMA mandate for Clallam County to provide for a variety of rural densities and permits it discretion in making planning decisions. However, the densities the County selects must be rural in nature. The importance of rural lands and their character is specific, looking to land use patterns for establishing rural character and seeking to foster traditional rural lifestyles and economies that a County has historically

> provided. By authorizing densities that do not reflect the existing landscape or economy of the area, the County has failed to maintain the rural lifestyles of the residents of Clallam County as required by the GMA."

RCW 36.70A.020 sets forth the "planning goals" of the Growth Management Act. In listing the goals the statute states:

"The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." The 13 goals listed may be summarized as:

1. To encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
2. To reduce sprawl.
3. Transportation considerations.
4. To encourage the availability of affordable housing and to promote a variety of residential densities and housing types and to preserve existing housing stock.
5. Encourage development which specifically is to promote economic opportunity for all citizens and encourage growth in areas experiencing insufficient economic grown within the capacity of the state's natural resources, public services and public facilities.
6. Property rights preservation.
7. Permits issues.
8. Natural resources industries are to be encouraged.
9. Open space and recreation is to be retained and enhanced.
10. The environment is to be protected.

11. Citizen participation and coordination is encouraged.
12. Public facilities and services ensure that services necessary to support development shall be adequate at the time the development is available for occupancy without decreasing service levels below locally established minimum standards.
13. Historic preservation is encouraged.

The GMA discusses rural lands extensively. In RCW 36.70A.011 the Legislature noted that the Act was intended to recognize the importance of rural lands and rural character to Washington's economy, it's people, and its environment, while respecting regional differences. The final paragraph of that section of the Act reads:

> "Finally, the Legislature finds that in defining its rural element under RCW 36.70A.070(5), a county should foster land use patterns and develop a local vision of rural character that will: Help preserve rural based economies and traditional rural lifestyles; encourage the economic prosperity of rural residents; foster opportunities for small scale, rural based employment and self-employment; permit the operation of rural based agricultural, commercial, recreational, and tourist businesses that are consistent with existing and planned land use patterns; be compatible with the use of the land by wildlife and for fish and wildlife habitat; foster the private stewardship of the land and preservation of open space; and enhance the rural sense of community and quality of life."

RCW 36.70A.070(5) states: "Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources." Thereafter the Legislature sets forth provisions which shall apply

to the rural element. Part of the provisions of RCW 70A.070 in subsection (d)(iv) require that a county adopt measures to minimize and contain the existing areas of more intensive rural development. In many respects the position of the parties is predicated upon the Growth Management Act requiring the County to plan in accordance with its existing land uses and character on the date upon which the County adopted a Comprehensive Plan under the Growth Management Act.

In its existing Comprehensive Plan Clallam County has adopted a definition of "rural character", which incorporates the standards set forth in the Growth Management Act and includes some additional detail. Futurewise argues that it's the County's own Comprehensive Plan, previously approved and found to be compliant with the GMA, that precludes the County from adopting a 2.4 acre density as rural. The Clallam County Comprehensive Plan provides:

> "Rural character" means the existing and preferred patterns of land use and development established for lands designated as rural areas or lands under this comprehensive plan. Rural characteristics include, but are not limited to: (a) Open fields and woodlots interspersed with homesteads and service by small rural commercial clusters; and (b) low residential densities, small-scale agriculture, woodlot forestry, wildlife habitat, clean water, clean air, outdoor recreation, and low traffic volumes; and (c) Areas in which open space, the natural landscape, and vegetation predominate over the built environment; and (d) Lifestyles and economies common to areas designated as rural areas and lands under this Plan; and (e) Visual landscapes that are traditionally found in areas designated rural areas and lands under this Plan; and (f) Areas that are compatible with the use of the

> land by wildlife and for fish and wildlife habitat; and (g) Areas that reduce the inappropriate conversion of undeveloped land into sprawling, low-density development; and (h) Areas that generally do not require the extension of urban governmental services; and (i) Areas that are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas. (See CCC 31.02.050(31).)

Futurewise argues that under the County Plan, to be of rural character, property must meet all nine of the listed characteristics and that lots of 2.4 acres per dwelling unit cannot meet all nine rural characteristics listed in the County's own Comprehensive Plan and therefore are not rural.

Essentially, the argument as to density is as follows: Futurewise and the Growth Management Hearings Board argue that unless lots are 5 acres or greater, they cannot meet the rural character test to be rural densities. The County argues that having some lots planned for 2.4 acres within the County's rural areas, still meets the Growth Management intent to preserve the rural character in Clallam County and the GMA directive to have varying densities within rural lands.

The debate as to the minimum lot size for rural lands is not unique to Clallam County. In the Thurston County case the Court ultimately remanded the matter so that the regional Growth Management Hearings Board could determine whether it was clearly erroneous for Thurston County to include densities greater than one dwelling

unit per 5 acres in its rural element and whether County adequately provided for a variety of rural densities by the use of innovative zoning techniques.

The Thurston County Court noted that "since 1995, GMHBs have utilized bright line standards to distinguish between urban and rural densities." The Board had considered densities of not more than one dwelling unit per 5 acres to be rural. The Thurston County Court, at page 358 went on to note "the GMHB, as a quasi judicial agency, lacks the power to make bright line rules regarding maximum rural densities." Citing Viking Properties, *supra*, at page 129-30. The Thurston County Court thereafter at page 359 stated: "We hold a GMHB may not use a bright line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny."

The Court noted:

> "The Legislature did not specifically define what constitutes a rural density. Instead, it provided local governments with general guidelines for designating rural densities. A rural density is "not characterized by urban growth" and is "consistent with rural character." Former RCW 36.70A.070(5)(b). "Whether a particular density is rural in nature is a question of fact based upon the specific circumstances of each case." The Court then went on to say at page 360: "The Board should not have rejected these densities based on a bright line rule for maximum rural densities, but must, on remand, consider local circumstances and whether these densities are not characterized by urban growth and preserve rural character." Thurston County, *supra*, at page 360.

The Court also noted that the GMA also did not dictate a specific manner of achieving a variety of rural densities as required under the statute.

The Thurston County case was decided on August 14, 2008. The decision of the Growth Management Hearings Board in this case was issued on the 23rd of April 2008, well before the Thurston County opinion was issued.

The Clallam County 2006 Draft Rural Lands Report is the basis of both the County's argument that dwelling unit densities of 2.4 acres should be permitted in rural areas, and the Board's decision that dwelling units of 2.4 acres would constitute urban rather than rural character. The Board bases it's decision largely on an analysis of land use within the County overall, noting that the existing patterns of land use within the county have approximately 54% of lots within the challenged R2 and RW2 zoning districts being 4.81 acres or larger.

The Board noted that the County had eight rural zoning districts outside of LAMIRDS, with approximately 52% of all parcels within those zones being greater than 4.81 acres. The Board then noted that "more than half of the County's rural land is comprised of parcels greater than 4.81 acres each." Final Decision and Order page 61. At page 63 the Board then noted that:

> "The rural character of Clallam County, specifically its visual landscape and farm-based economy, is dominated by lots of greater than 5 acres in size. With such a large percentage of the County's existing land use pattern at a parcel size of 4.81 acres and farms within the county averaging 25 acres, the existing rural landscape supports a

> finding that the rural character of Clallam County is a rural density of 1 du/5 acre."

The Board went on to state "by authorizing densities that do not reflect the existing landscape or economy of the area, the County has failed to maintain the traditional rural lifestyle of the residents of Clallam County as required by the GMA." The GMA doesn't anywhere state that its purpose is to "maintain traditional rural lifestyles", rather, it addresses uses of land and defines rural land use characteristics.

If approximately 54% of the County's rural lands are parcels of 5 acres or larger, that necessarily means that 46% of the County's rural areas are parcels of less than 5 acres. At page 10 of the Rural Lands Report the County noted the following:

> "Only 9.2% of the County's lands are held in rural designations, with 1.1% of those to be designated as lamirds, leaving 8.1% (sic) the County's lands in true rural densities, ranging from 1 dwelling per 2.4 acres to 1 dwelling per 20 acres. Areas of the County where parcelization at densities of 1 dwelling per 2.4 acres had already occurred by 1994 under prior rural designations, were designated for in-fill development at that density (2% of the County). In areas of the County where such parcelization was not yet prevalent by 1995, but where prior rural designations created legitimate property expectations among landowners, were (sic) designated to allow clustered development at densities of 1 dwelling per 2.4 acres, with a base density of 1 dwelling per 5 acres or 1 dwelling per 10 acres, depending upon the existing surrounding circumstances. The total area of the County providing for these cluster density incentives involves 1.4% of the County. The remaining rural lands were designed at densities ranging from 1 dwelling per 4.8 acres to 1 dwelling per 20 acres."

The County also chose to divide itself into four planning regions based upon unique characteristics. These include a Sequim area designation, a Port Angeles area designation, a Forks area designation, and a designation of the property lying between Port Angeles and Forks (the Strait Planning Region). In each of these designations reasons for allowing 2.4 acres dwelling units in a rural zone were individually discussed. As noted in the report, in the Sequim planning area 84% of the rural area under the County's enacted Comprehensive Plan is zoned at densities of one dwelling per 4.8% acres or less. In the Port Angeles planning region the report notes: "In addition, excluding LAMIRDS, the PAPR's rural designations are consistent with maintaining an average rural density of 1 unit per 5 acres, but in a manner that accommodates a variety of lot sizes on the ground." In the area between Port Angeles and Forks, more than 80% of the rural area is zoned at 1 dwelling per 4.8 acres or less. Finally in the western planning region of Forks, the rural lands report notes that over 95% of the rural area is zoned at densities of 1 dwelling unit per 4.8 acres or less.

The County notes at page 15 "all rural zone designations prescribe allowed, conditional, and prohibited land uses as well as density, lot sizes, width to depth ratios, setbacks, and development restrictions which are consistent with the stated purposes of the respective zoning designations." Beginning at page 22 the County outlines in its rural lands report its analysis of each of the rural characteristics and how it applies to

the County's proposed Comprehensive Plan rural designations. The Rural Lands Report's review of the GMA rural characteristics and its discussion of their application to each of the four planning regions adopted by the County is neither simplistic nor formulaic. The question therefore is whether or not, in allowing for rural zoning designations of one dwelling unit per 2.4 acres or greater in some rural zones, when viewed from a totality of circumstances standpoint as required by the GMA, the County clearly got it wrong. (i.e. was "clearly erroneous".)

The Western Washington Growth Management Hearings Board says the County got it wrong because, with 54% of the County's rural lands presently being 5 acres or larger, provisions to allow rural designations of less than that would not "preserve" the rural character of the county. In the Futurewise responsive brief, page 19, it notes that within Clallam County in areas zoned R2 and RW2 25.3% of the rural land is presently zoned in parcels 2.4 acres or smaller. In the Sequim Planning Region that rises to 31.4%, in Port Angeles 23.4%. In the Straits Planning Region 10.1% and in the Western Planning Region 4.5%. The same chart also lists parcels which are between 2.41 acres to 4.8 acres in size. Coupled together, that would indicate that more than half of the properties zoned R2 or RW2 in the Sequim and Port Angeles planning regions are 4.8 acres or <u>less</u> in size. Futurewise argues that the designations of the R2 and RW2 zoning areas are inconsistent with rural character because they are not consistent with the existing patterns of land use. But certainly in the Sequim

Dungeness planning region and the Port Angeles planning regions rural use is "dominated" by parcels of less than 4.81 acres in size. If one applies the standard used here by the Growth Management Hearings Board, that would be sufficient analysis to declare that those areas of the county are "predominated" by lots smaller than 5 acres. (All be it only 52% of such lots.)

This Court believes that the Growth Management Act mandates a much more sophisticated analysis of planning than that contemplated by counting lots and declaring a winner. The tables in the rural lands report indicate that of all of the area within the Sequim/Dungeness Planning Region only 8.9% will be within the R2 zone. Similarly in the Port Angeles Planning Region only 6.1% will be in the R2 zone. In the Straits Planning Region 2.7% of the land would be in R2 area or RLM area designations and in the Western Planning Region only 1% of the area would be in RW2 area designations. The largest percentage of the land in each of the locations is in commercial forest and similar open space designations.

Under the GMA lands which are not natural resource lands, agricultural lands, forest lands, mineral resource lands of long-term significance, or Lamirds or Urban Growth Areas, are defined as "rural areas".

The Thurston County case and the GMA note that natural resource lands and agricultural land are not part of the County's rural element and are not to be considered in meeting the requirement of having a variety of rural densities within the meaning of

the Growth Management Act. Clallam County, however, indicates that the fact of the extensive resource and open space areas within the county adjacent to rural lands allows such adjacent areas to be considered a factor in determining appropriate rural density in light of the high percentage of the county which cannot be developed. Clallam County argues it is unique among counties in the sense of having massive forest resource and other open land within its boundaries.

The County's analysis and argument in support of its allowance of some rural densities of 1du/2.4 acres, includes reciting the goals which are listed among the 13 goals of the GMA. It is important to note again that these goals are not prioritized and one is not necessarily more important than another. Clallam County has concluded that it can meet the goals of the Growth Management Act, and comply with the definitions of rural character by having a portion of its rural lands with a density of one dwelling unit per 2.4 acres.

The Growth Management Act was intended to reduce rural sprawl and to promote urban growth in areas where efficient provision of public services to a larger population could be made. However, had the Legislature merely intended that all rural tracts would be five acres or larger they could have said so. They chose not to say that.

RCW 36.70.110(1), as previously noted, requires that in areas outside of urban growth areas (UGA's) "growth can occur only if it is not urban in nature."

> RCW 36.70A.030(18) defines "urban growth" as "growth that makes intensive use of land for the location of

> buildings, structures and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural produces, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d) is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth."

RCW 36.70A.070(5)(d) referred to in the definition of urban growth, relates to LAMIRDS.

RCW 36.70A.070(5) discusses considerations for the rural element of comprehensive plans. It states that counties are to include a rural element which includes lands that are not designated for urban growth, agriculture, forest, or mineral resources. Subsection (A) states in part; "because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter."

Subsection (B) states in part:

> "The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To

> achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character."

In Subsection (C) the rural element is required to include measures that will contain or otherwise control rural development; assure visual compatibility of rural development with the surrounding rural area; reduce inappropriate conversion of undeveloped land into sprawling, low density development in the rural area; protect critical areas and surface and groundwater resources; and protect against conflicts with the use of agricultural, forest, and mineral resource lands designated under the GMA.

In Quadrant Corporation v. State Growth Management Hearings Board, 154 Wn. 2d 224, 110 P. 4d 132 (2005), the Court stated at page 240: "Considering the discretion afforded counties to plan, 'in full consideration of local circumstances,' RCW 36.70A.3201, King County's decision to consider vested application and development rights to determine that the Bear Creek area 'already [was] characterized by urban growth' was not a clearly erroneous application of the GMA."

In Diehl vs. Mason County, 94 Wn. App. 645, 972 P.2d 543 (1999) the Court noted that the broad discretion allowed to local governments under the GMA to draft comprehensive plans and development regulations tailored to local circumstances was nonetheless limited by the requirement that the final plans and regulations be consistent

with the mandates and goals of the act. In Diehl the Court was concerned that the rational for the Mason County's determinations was not evident in the record and that the County had not pointed to a place in the record where its justifications for its Comprehensive Plan and regulations were made. Here, Clallam County prepared the "December 2006 draft Clallam County Rural Lands Report" which is specifically designed to convey the rational behind its determinations.

The Court has reviewed the rural lands report prepared by Clallam County in support of its Comprehensive Plan and land use designations. As noted, it is neither simplistic nor formulaic. The County, using the Growth Management Act as its guide, and factual and historical data particular to Clallam County, has adopted a comprehensive scheme and explained the rationale behind the plan. As it relates to rural densities of one dwelling unit per 2.4 acres the plan is justified on a number of bases.

The County has divided itself into four sub regions for planning purposes and discusses the factual reasons for the regionalization and the different land use planning issues raised for each region based on number of factors as diverse as average population age, economic downturns, and vested rights. It strikes this Court that that is exactly the type of planning the GMA envisioned.

To the contrary the WWGMHB's literally "one size fits all" approach to rural density seems contrary to the act and would even seem to give rise to constitutional taking and due process concerns if that were what the GMA actually stood for.

Under RCW 36.70A.320(3), the review is to be upon the entire record before the County. The decision of the Board relates only to densities and discusses in little or no detail the other goals of the GMA as they might apply to the County's rural density designations.

In the Viking Properties case, *supra*, the Court noted the 13 nonprioritized goals of the GMA. At page 127 that Court noted that to elevate the goal of density to the detriment of other important GMA goals would violate the Legislature's express statement that the goals are non-prioritized.

The Growth Management Hearings Boards have been criticized for attempting legislate a five acre minimum parcel size in rural areas of the state. (See Viking Properties, *supra,* at page 129) Clearly that is contrary to the concept of the GMA which strives to allow local jurisdictions to make locally appropriate land use plans. Clallam County notes that the ultimate impact of its plans would be to place rural land within the county in designations which result in an average parcel size of approximately five acres. Some parcels would be allowed only larger than that and some smaller, but none smaller than 2.4 acres, except in innovative zoning areas such as cluster zones and the like. The Court also notes that in connection with the Carlsborg

issue, the Board found that allowing lots larger than 4 dwelling units per acre could not be considered urban. A 2.4 acre lot is ten times less dense than what the Growth Management Hearing Board in this case found to constitute the minimum density for urban use. The act states that growth is to be discouraged outside of GMA's and is to occur "only if it is not urban in nature" RCW 36.78.001 (1). A permitted density ten times less dense than the lowest "urban" density seems to meet such a standard.

Therefore, the last issue is whether or not such lot sizes can never conform to the "rural characteristics" requirements.

In Webster's New Collegiate Dictionary, 1981, by G & C Merriam Co, has many definitions of "character". The one that appears to fit the best is "one of the attributes or features that make up and distinguish the individual."

No doubt each of the rural lands characteristics are important in assessing whether the land is rural or not. In the Rural Lands Report, the County discusses each of the characteristics listed and concludes that parcel designations of 2.4 acres, coupled together with other innovating zoning restrictions and considerations, and together with the totality of the unique circumstances found in and throughout Clallam County, meet each of the characteristics listed.

One suspects that the WWGMHB, while attempting not to say so, still believes and accordingly ruled that a bright line 5 acre minimum density in rural areas is required under the GMA. Nothing in the act directly supports such a conclusion. Here,

to the contrary, a great deal of analysis of circumstances and other factors has led Clallam County to conclude that a rural area in Clallam County may include some parcels of less than five acres and still be considered rural. This court finds that there is not substantial evidence in the record by which a court could find that the County's decision was clearly erroneous in that regard. Accordingly, the order of the Growth Management Hearing Board finding the County's Comprehensive Plan to be noncompliant as it relates to the R2 and RW2 zones is reversed.

DATED this _______ day of _____________, 2009.

Respectfully submitted,

KEN WILLIAMS
J U D G E