Kittitas County Board of Commissioners
Kittitas County Courthouse
205 West 5th Suite 108
Ellensburg, Washington 98926

Dear Commissioner McClain:  May 6, 2008

The Central Washington Home Builders Association represents 789 member companies with approximately 10,000 employees throughout the counties of Central Washington. Approximately 1/3 of our member companies are located in Kittitas County.

The Building Industry Association of Washington, the Central Washington Home Builders Association, et al. requested judicial review of four elements of the EWGMHB Final Decision and Order for case 07-1-0015, dated March 21, 2008. As you know, this was an appeal of the Kittitas County Development Code and was closely tied to the appeal of the County Comprehensive Plan decided in case 07-1-0014c. The issues under judicial review and stay in 07-1-0015 are: issue 1, the use of 1 dwelling unit per 3 acres permitted in the rural land use zone by Chapters 16.09, 17.08, 17.12, 17.22, 17.24, 17.28, 17.30, and 17.56; issue 2, the uses and development permitted by Chapters 16.09, 17.12, 17.29, and 17.36; issue 3, uses permitted in Chapter 17.3 in designated agricultural lands of long term commercial significance; issue 4, the process in Chapter 16.04 by which land within a common ownership or scheme of development is subdivided. On April 24, 2008 the Superior Court issued an Order of Stay of the Final Decision and Order of the Hearing Board on these issues pending the judicial review.

In granting the stay the Court made four determinations required by law: 1. The CWHBA is likely to prevail on the merits, 2. Failure to grant a stay would result in irreparable injury to CWHBA, 3. Granting the Stay would not result in substantial harm to other parties or threaten public health, safety, or welfare.

It is particularly the second finding above that concerns our Association in the process before the Board of County Commissioners now. In the staff recommendations to meet compliance with the Final Decision and Order in case 07-1-0014c dated April 11, 2008, the Community Development Services staff once again, as it did in its initial recommendations in January, fails to acknowledge that the Stay granted covers not only issue 1, but issues 10 and 11 as well. As the Superior Court made clear in its discussion of irreparable harm to CWHBA, requiring Kittitas County to comply with changes to Chapter 16.09 and others can make the issues under appeal moot. We are requesting that the Board of County Commissioners treat issues 10 and 11 in the same manner as issue 1 and not move forward with the staff recommendations for issues 10 and 11 until the judicial appeal process has run its course.

David Whitwill  5/6/08
We believe there are important and valid reasons not to undermine the on-going appeal process. First, both the County and Interveners are provided by GMA with a judicial appeal process of decisions by an appointed Growth Management Hearing Board. We think that process should be allowed to run its course without the appellant county being intimidated into ceding the legal recourse provided in RCW 36.70A.300(5). Second, the Growth Management Act allows counties to integrate local conditions and characteristics into their Comprehensive Plan. We think it important to know if this is legal fact or political fiction. Third, land use planning is recognized in the Growth Management Act to be explicitly in the purview of elected County Commissioners. Fourth, the determination of the EWGM Hearing Board with respect to Chapter 16.04 completely undermines the recently completed Memorandum of Agreement between Kittitas County and Department of Ecology concerning permit-exempt wells.

It is our view that should the Board move forward with the recommendations the staff has proposed for item 10 there would be an immediate adverse consequence to the judicial review. This would amount to a request to the Court of Appeals to render moot our Petition for Review on the basis that the County will have adopted the changes required by the EWGMHB. Similarly, the proposals of the Land Use Advisory Committee completely revamp both the Comprehensive Plan and the Development Code with respect to the rural land classifications. Other changes jettison the current provisions of the Development Code that form a portion of our Petition for Review. One such change in the revised Title 17 of the Development Code would remove 17.04.060, Maximum Acreages. Yet this provision limits the amount of lands in the county that could become Ag-3 and -5 or R-3 and -5 and refutes the contention by CTED and others that the entire County could be rezoned to R-3. Since the change does not appear in the staff recommendations it is not clear what part of the Final Decision and Order it is intended to address.

In considering some of the details proposed in the staff recommendation we are concerned that they simply serve to bring back previous staff recommendations from 2007 already rejected by the Board of County Commissioners. As an example in Chapter 16.09 they propose to remove the PBRS points from the 3-acre zone. Given that the motivation for the Growth Management Act is to ameliorate both the rate of growth and the expansion of growth from the urban into the rural setting it seems logical to maximize the efficient land use of rural acres that are permitted residential development. To develop 100 homes in the 3-acre zone classes requires 300 acres compared to 500 acres in the 5-acre zone classes. In other words, the 3-acre zone classes are 40% more efficient than the 5-acre zone classes. Chapter 16.09.010 states that performance based cluster plating “…minimize (es) the impact of 'Rural Sprawl' in rural lands…” The use of cluster plating is also an attempt to address the rate, driven by market demand, at which acres are developed. Reducing the allowance from Performance Based Rating System in A-5 and R-5 from 100% to 60% is a significant reduction of both the economic incentive to use cluster plating and the efficiency in conserving open space. Following this logic, then, the disallowance of any Public Benefit Rating System (PBRS) points and any percentage gain for Agriculture-3 and Rural-3 appears contradictory to the objective of the Chapter.
Excluding A-3 and R-3 from any PBRS points and percentage gain will remove the economic incentive to make use of the 'cluster plat' tool. It is counter-intuitive to think that the public benefit accruing from uses for which points are allocated is in some way less in A-3/R-3 than in A-5/R-5. Indeed, the better planned and integrated such uses are the greater the mitigation benefit provided. Yet the disallowance of PBRS points in HA-3/HR-3 is a disincentive for such planning. We suggest that allocation of some PBRS points for HA-3/HR-3 would be appropriate.

Use of performance based cluster platting makes efficient land use of rural acres developed and should be encouraged. Allowance of some maximum percentage gain for the 3-acre zones would address the inconsistency with respect to recognition of public benefits, not allow any greater lot density than the 5-acre zone, and provide an economic rationale for undertaking the increased planning required to use performance based cluster platting.

We suggest that Kittitas County is provided by the Stays for case 07-1-0014c and 07-1-0015 with the latitude to defer any action on the staff recommendations for items 10 and 11 until the judicial review is completed. For items 1, 10 and 11, we suggest that the Board plainly acknowledge the existing stay. The extensive work of the Land Use Advisory Committee can continue to be available for review and comment through the interim. This would simply be advisable planning pending an uncertain legal outcome and would not impinge on the existing judicial review. It would also demonstrate to the appropriate parties how the County anticipates moving forward should the decision of the courts favor the EWGMHB.

Several items are attached to this document that serve as support for the comments we submit herein: a copy of the Petition for Review submitted April 3, 2008 to the Superior Court for Kittitas County and a copy of the Order dated April 24, 2008 Granting Motion to Stay The Eastern Washington Growth Management Hearings Board's Final Decision and Order for Case 07-1-0015 (dated March 21, 2008).

David K. Whitwill
Coordinator,
Kittitas County Government Affairs

2 attachments
- Petition for Review, Central Washington Home Builders Association et al.
- Order Granting Motion to Stay
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITTITAS COUNTY

CENTRAL WASHINGTON HOME BUILDERS  
ASSOCIATION, a Washington not-for-profit  
corporation, BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON, a  
Washington not-for-profit corporation, and  
MITCHELL F. WILLIAMS, d/b/a MF Williams  
Construction Co. Inc.,

Petitioners/Intervenors,

v.

EASTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD,  
KITTITAS COUNTY CONSERVATION  
COALITION, RIDGE, and FUTUREWISE.

Respondents,

and,

KITTITAS COUNTY, Washington, a Municipal  
Corporation,

Respondents.

I. INTRODUCTION

On March 21, 2008, the Eastern Washington Growth Management Hearings Board  
(hereinafter “Growth Board”) issued its Final Decision and Order, Case No. 07-1-0015. See  
Ex. A. The Growth Board found a number of provisions of Kittitas County Ordinance (KCC)  
building industry association of Washington  
111 21ST Avenue SW
No. 2007-22\(^1\) noncompliant and invalid under the Growth Management Act (GMA), RCW 36.70A et seq.

The Central Washington Home Builders Association, Building Industry Association of Washington, and Mitchell F. Williams (collectively, “Home Builders”), pursuant to RCW 36.70A.300(5), RCW 34.05.514, RCW 36.01.050, and WAC 242-02-898, hereby file this Petition for Review seeking reversal of Issues 1, 2, 3 and 4 of the Growth Board’s Final Decision and Order. *See Ex. A.*

**II. PETITIONERS**

Petitioners’ mailing addresses are:

Central Washington Home Builders Association  
3301 W. Nob Hill Blvd.  
Yakima, WA 98902

Building Industry Association of Washington  
111 21\(^{st}\) Avenue SW  
Olympia, WA 98507

Mitchell F. Williams, d/b/a M.F. Williams Construction  
P.O. Box 1702  
Ellensburg, WA 98926

Petitioners’ attorneys are:

Timothy M. Harris, WSBA No. 29906  
Andrew C. Cook, WSBA No. 34004  
Building Industry Association of Washington  
111 21\(^{st}\) Avenue SW  
Olympia, WA 98507  
(360) 352-7800 – Telephone  
(360) 352-7801 – Fax

**III. AGENCY WHOSE ACTIONS ARE AT ISSUE**

Eastern Washington Growth Management Hearings Board  
15 W. Yakima Avenue, Suite 102

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\(^1\) KCC 2007-22 was Kittitas County’s update to its development regulations, which is required under the GMA. *See RCW 36.70A.130.*

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON  
111 21\(^{st}\) Avenue SW
Yakima, WA 98902

IV. OTHER PARTIES IN THIS CASE

Kittitas County Conservation
P.O. Box 23
Thorp, WA 98946
Ridge
P.O. Box 927
Roslyn, WA 98941

Futurewise
814 2nd Ave., Ste. 500
Seattle, WA 98104
Kittitas County Board of Commissioners
205 W. 5th Avenue
Ellensburg, WA 98926

Kittitas County Farm Bureau
890 Kittitas Hwy.
Ellensburg, WA 98926
Son Vida, II
2000 124th Avenue, NE. Ste. B-100
Bellevue, WA 98005

Teanaway Ridge, LLC
P.O. Box 808
Cle Elum, WA 98922

V. FACTS AND IDENTIFICATION OF AGENCY ACTIONS AT ISSUE


On March 21, 2008, the Growth Board issued its Final Order and Decision, Case No. 07-1-0015. See Ex. A. The Board found Ordinance 2007-22 noncompliant with the GMA and ruled certain portions of Kittitas County’s Code invalid. Specifically, the Growth Board ruled that Kittitas County’s development regulations violated the GMA by allowing rural densities

2 The Growth Board entered a determination of invalidity for chapters KCC 16.09, KCC 17.08, KCC 17.22, KCC 17.28, KCC 17.30, KCC 17.56 of Ordinance 2007-22.
greater than one dwelling unit per five acres. (Issue 1 of the Growth Board’s Final Decision and Order). See Ex. A, p. 12 & 61 (ruling that densities of one home per three acres are urban in nature and thus noncompliance with the GMA).

The Growth Board further found Ordinance 2007-22 noncompliant and invalid for failing to prohibit urban uses and urban development in rural areas in chapters KCC 17.29 and 17.36. (Issue 2). See Ex. A., p. 20-21.

Last, the Growth Board found that Ordinance 2007-22 violated the GMA by failing to require that all land within a common ownership or scheme of development be included within one application for a division of land. (Issue 4). See Ex. A, p. 29-31. Specifically, the Growth Board ruled that this ordinance impermissibly allowed too many exempt wells under RCW 90.44.050 and thus violated the GMA.

VI. WHY RELIEF SHOULD BE GRANTED

Pursuant to RCW 34.05.570(3), the “court shall grant relief from an agency order in an adjudicative proceeding only if it determines” one of the following:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
(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;
(f) The agency has not decided all issues requiring resolution by the agency;
(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
(i) The order is arbitrary or capricious.
Based on the plain language of the GMA, and well-established case law, relief should be granted in this case based on the following: 1) the Growth Board’s decision is outside its statutory authority or jurisdiction, 2) the Growth Board erroneously interpreted or applied the law, 3) the Growth Board’s decision is not supported by the evidence that is substantial when viewed in light of the whole record before the court, and 4) its decision is arbitrary or capricious. RCW 34.05.570(3)(b),(d),(c) & (i).

A. The Growth Management Hearings Board Erroneously Applied the Law by Ruling that the Growth Management Act Does Not Allow Rural Densities of One Dwelling Unit Per Three Acres

The Growth Board struck down Kittitas County’s development regulations because the County allows rural densities of one dwelling unit per three acres in a small fraction of the County. See Ex. A, p. 14-15. According to the Growth Board, densities allowing one dwelling unit per three acres in areas zoned Rural-3 and Agriculture-3 are “urban” in nature and thus a violation of the GMA. Id. In so ruling, the Growth Board ignores the plain language of the GMA and well-established case law. See RCW 36.70A.020 (4, 5, 6, 8, & 9), RCW 36.70A.320; RCW 36.70A.3201; RCW 36.70.115, RCW 36.70.070(5)(a)-(b), RCW 36.70A.090; see also Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 129 (2005); see also Quadrant Corp. v. Growth Mgmt. Hearings Bd., 154 Wn.2d 224, 233-34 (2005).

The issue before the Growth Board was whether Kittitas County violated the GMA by failing “to eliminate densities greater than one dwelling unit per five acres in the rural areas outside of the urban growth areas and limited areas of more intensive rural development.” See Ex. A, p. 5. By ignoring Kittitas County’s local circumstances and evidence in the record, the Growth Board impermissibly imposed its own policy decisions over that of Kittitas County. In

3 Specifically, the Growth Board found KCC 17.28, 17.30, 16.09, 17.08, 17.12, 17.22, and 17.56 out of
addition, the Growth Board failed to properly grant the County discretion when planning under
the GMA by adopting a bright line test of one dwelling unit per five acres.

The Growth Board's decision is an erroneous application of the law. For example,
nowhere in the GMA is there provision setting a maximum rural density. Moreover, the
Washington Supreme Court ruled in Viking Properties that the GMA does not grant Growth
Boards the authority to make policy decisions or impose "bright line" rules regarding how
local governments are to comply with GMA obligations. See 155 Wn.2d at 129.

In addition, the Growth Boards are required to grant deference to local jurisdictions
when enacting their comprehensive plans and development regulations. See 36.70A.3201
("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."); see also, Quadrant, 154 Wn.2d at 233-34 (GMA grants local
jurisdictions broad discretion in adopting GMA requirements to local realities).

In striking down Kittitas County's development regulations, the Growth Board
erroneously applied and interpreted the law by ruling that densities of one dwelling unit per
three acres in the rural areas is "urban" development and thus a violation of the GMA. The
Growth Board also ignored the overwhelming evidence in the record explaining how the
development regulations are based on local circumstances. Therefore, this Court should
reverse and remand the case to the Growth Board.

B. The Growth Board's Decision Finding Kittitas County's Cluster Ordinance and
Planned Unit Development Ordinance Noncompliant and Invalid Is An Erroneous
Application of the Law and Is Arbitrary and Capricious

compliance with the GMA.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON
111 21ST Avenue SW
The Growth Board ruled that Kittitas County’s Cluster Ordinance (KCC 16.09) violated the GMA because it allowed “urban densities” in the rural areas. See Ex. A, p. 14. The Growth Board reached this conclusion despite the fact that the GMA expressly allows cluster development in rural areas. For example, RCW 36.70A.070(5)(b) provides in relevant part:

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 addition, the GMA allows cluster zoning on lands designated as agricultural lands of long-term commercial significance. See RCW 36.70A.177. The statute expressly provides that cluster zoning may occur if it “allows new development on one portion of the land, leaving the remainder in agricultural or open space uses.” RCW 36.70A.177. Moreover, the GMA explicitly grants local governments discretion when planning for growth and setting rural densities. See RCW 36.70A.3201; RCW 36.70A.070(5)(b).

Despite this clear mandate, the Growth Board once again failed to properly grant deference to Kittitas County when it ruled that the County’s Cluster Ordinance (KCC 16.09) violated the GMA. Although the County’s actions must be consistent with the goals and requirements of the GMA, King County v. Cent. Puget Sound Growth Mgmt. Hr‘gs Bd., 142 Wn.2d 543, 553 (2000), the Growth Boards are also required to grant local jurisdictions deference when planning under the Act. See RCW 36.70A.3201 (“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.”).
In striking down Kittitas County’ Cluster Ordinance (KCC 16.09) and the Planned Unit Development (KCC 17.36), the Growth Board failed to grant the proper deference owed to the County. The only analysis the Growth Board provided was that KCC 16.09 was found out of compliance in the Board’s previous decision, Case No. 07-1-0004c, and that the densities “are urban in nature.” Ex. A, p. 14.

Furthermore, the Growth Board’s order is not supported by evidence that is substantial when viewed in light of the whole record before the court. Nor did the Growth Board properly interpret or apply the law.

The Home Builders and Kittitas County explicitly provided ample evidence of how the Cluster Ordinance (KCC 16.09) complied with the GMA. For example, the Home Builders argued before the Growth Board that the Cluster Ordinance addressed the GMA’s requirement of protecting existing agricultural land by requiring that all applications be evaluated for impacts to adjacent agricultural uses. KCC 16.09.040(E). The Home Builders further explained that the Cluster Ordinance provides that “[c]onditions may be placed on development proposals” to “protect agricultural lands from possible impacts related to incompatible uses.” Id.

Despite the overwhelming evidence produced by the Home Builders that KCC 16.09 complies with the GMA, the Growth Board summarily found the ordinance noncompliant and issued a determination of invalidity.

Based on the foregoing, this Court should grant relief by reversing and remanding the case back to the Growth Board.

C. The Growth Board’s Decision Finding that KCC 16.04 Violates the GMA Because the Ordinance Allows Multiple Exempt Wells Is Outside the Board’s Jurisdiction, Is An Erroneous Application of the Law, and Is Arbitrary and Capricious
The Growth Board found KCC 16.04 – Kittitas County’s subdivision code - noncompliant and issued a determination of invalidity because the ordinance allows multiple subdivisions in common ownership to withdraw ground water through the use of exempt wells. According to the Growth Board, allowing multiple exempt wells in this manner violates the Washington Supreme Court’s decision, Dep’t of Ecology v. Campbell & Gwinn, 146 Wn.2d 1 (2002). Ex. A, p. 31. The Growth Board further ruled that it had jurisdiction to decide the issue under the GMA, and that KCC 16.09 violated RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv). See Ex. A at 29-31.

The Growth Board erred in reaching this decision. Withdrawal of ground water is regulated by the Department of Ecology under RCW 90.44.050. See Campbell & Gwinn, 146 Wn.2d at 7-8. The Growth Boards do not have statutory authority under the GMA to decide issues regarding exempt wells.

The GMA expressly provides which issues the Growth Boards have jurisdiction to decide. The GMA provides in relevant part:

A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.

RCW 36.70A.280(1)(a). The Growth Board’s decision finding KCC 16.04 noncompliant with the GMA and its determination of invalidity is outside the statutory authority or jurisdiction of the Growth Board, is an erroneous application of the law, and is arbitrary and capricious. RCW 34.05.570(3)(b)(d), & (i).
D. The Growth Board’s Determination of Invalidity Is Arbitrary and Capricious, Is Outside the Growth Board’s Authority, Is an Erroneous Application of the Law, and Is Not Supported by the Evidence

Under the GMA, a Growth Board may issue a determination of invalidity if: 1) the Growth Board determines that parts of – or all of – a county’s comprehensive plan or development regulations are noncompliant; 2) that continued validity of the development regulations would substantially interfere with the fulfillment of the GMA goals; and 3) the Growth Board specifies in the final order the particular parts of the comprehensive plan or development regulations that are determined to be invalid. RCW 36.70A.302(1)(a)-(c).

As outlined in sections A through C of this brief, supra, the Growth Board’s Final Order and Decision is outside of the Board’s statutory authority or jurisdiction, is an erroneous application and interpretation of the law, is not supported by the evidence that is substantial when viewed in light of the whole record before the court, and is arbitrary and capricious. See RCW 34.05.570(3)(b), (d), (e), & (i).

As a result, this Court should reverse the Growth Board’s determination of invalidity under RCW 36.70A.302.

VII. REQUEST FOR RELIEF

Based on the foregoing, BIAW requests that this Court reverse the Growth Board’s decision finding Kittitas County’s Ordinance 2007-22 noncompliant and determination of invalidity. Specifically, BIAW requests that this Court reverse Issues No. 1, 2, 3, 4, 6, 7, and 8 of the Growth Board’s Final Decision and Order. In addition, BIAW requests that this Court reverse the Growth Board’s determination of invalidity of the following development regulations: KCC 16.09, KCC 17.08, KCC 17.22, KCC 17.28, KCC 17.30, and KCC 17.56.
VIII. CONCLUSION

Based on the foregoing, this Court should grant Petitioners’ request for judicial review and grant the requested relief.

Respectfully submitted,

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, and MITCHELL F. WILLIAMS, d/b/a M.F. WILLIAMS CONSTRUCTION, CO.

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SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, a Washington not-for-profit corporation; BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, a Washington not-for-profit corporation; and MITCHELL F. WILLIAMS, d/b/a MF Williams Construction Co., Inc., Petitioners/Intervenors,

vs.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, KITTITAS COUNTY CONSERVATION COALITION, RIDGE, and FUTUREWISE, Respondents,

and

KITTITAS COUNTY, a Washington municipal corporation, Respondents.

No. 08 2 00195 7

MEMORANDUM DECISION AND ORDER OF STAY

INTRODUCTION

On March 21, 2008 the Eastern Washington Growth Management Hearings Board (Board) issued a Final Decision and Order (FDO) in its Case No. 07-1-0015,
ruling that Kittitas County Ordinance 2007-22 updating the County’s developmental regulations was non-compliant with the Growth Management Act (GMA), Chapter 36.70A RCW. The Board also issued a Determination of Invalidity for a number of Kittitas County’s development regulations, including Chapter 16.09 KCC (Performance Based Cluster Platting), Chapter 17.08 KCC (Definitions), Chapter 17.22 KCC (UR-Urban Residential Zone), Chapter 17.28 KCC (A-3-Agricultural 3 Zone), Chapter 17.30 KCC (R-3-Rural 3 Zone), and Chapter 17.56 KCC (F-R-Forest and Range Zone).1 The Board remanded Ordinance 2007-22 back to Kittitas County, directing the County to achieve compliance with the Growth Management Act no later than September 17, 2008 and scheduling a set of deadlines by which it would determine whether Kittitas County had taken the necessary actions to comply with the GMA.

On April 4, 2008 the intervenors (HomeBuilders) filed a Petition for Review seeking reversal of the Board’s FDO that pertained to issues2 1, 2, 3 and 4.3 HomeBuilders filed a motion to stay the Board’s FDO and compliance proceedings pending review by this court of the Board’s FDO. Respondents Kittitas County Conservation Coalition, Ridge, and Futurewise (collectively, Futurewise) oppose the motion to stay. The court heard oral argument on April 21, 2008.

STANDARDS FOR CONSIDERING STAY OF THE DECISION OF AN ADMINISTRATIVE AGENCY PENDING REVIEW

While the court does have the inherent power in appropriate cases to enter a stay of an administrative decision while an appeal is pending, Mentor v. Nelson, 31

1 KCC refers to the Kittitas County Code.
2 Issue No 1: Does Kittitas County’s failure to eliminate densities greater than one dwelling unit per five acres in rural areas outside of the urban growth areas and limited areas of more intensive rural development (LAMIRD) violate RCW 36.70A.020, .040, .070, .110 and .130?
Issue No. 2: Does Kittitas County’s failure to prohibit urban uses and urban development in rural areas and the failure to include standards to protect the rural area violate RCW 36.70A.020, .040, .070, .110 and .130?
Issue No. 3: Does Kittitas County’s failure to prohibit urban uses in designated agricultural lands of long term commercial significance violate RCW 36.70A.020, .040, .060, .070, .110, .130, and .177?
Issue No. 4: Does Kittitas County’s failure to require that all land within a common ownership or scheme of development be included within one application for a division of land violate RCW 36.70A.020, .040, .060, .070, .130 and .177?
3 Subsequently Kittitas County and others have filed their separate petitions for review.

MEMORANDUM DECISION, ORDER - 2
Wn.App. 615 (1982), the court is guided by the Administrative Procedures Act in particular in determining whether the stay sought is appropriate. Specifically, RCW 34.05.550(2) authorizes a party to seek a stay or other temporary remedy in the reviewing court after it has filed a petition for judicial review. HomeBuilders has filed that motion. However, because the judicial relief sought is for a stay or other temporary remedy from agency action based on public health, safety or welfare grounds, RCW 34.05.550(3) requires the court to deny the stay unless the court determines the applicant is likely to prevail when the court finally disposes of the matter; that without relief the applicant will suffer irreparable injury; that the grant of relief to the applicant will not substantially harm other parties to the proceedings; and that the threat to public health, safety or welfare is not sufficiently serious to justify the agency action in the circumstances.

As the Board’s FDO appears to have been based on public health, and safety and/or welfare grounds, the court must analyze HomeBuilders’ motion for stay in accordance with RCW 34.05.550(3) to determine whether it has met each of the four requirements; otherwise, the court must deny the motion.

ANALYSIS

1. Whether HomeBuilders are likely to prevail on the merits. Comprehensive plans and development regulations adopted pursuant to the GMA are presumed valid upon adoption by local government. RCW 36.70A.320. The burden rests with the complainant to demonstrate that any action taken by the local jurisdiction is not in compliance with the GMA. In reviewing a GMA decision and action of a local jurisdiction the Board must find compliance unless it determines the action taken by the local jurisdiction is clearly erroneous in view of the entire record before it and in light of the goals and requirements of the GMA. RCW 36.70A.320. In order to deem an action clearly erroneous, the Board must be “left with the firm and definite conviction a mistake

4 See RCW 36.70A.010.
has been committed.” Department of Ecology v. Public Utility District No. 1, 121 Wn.2d 179, 201 (1993).

While local governments have broad discretion to develop comprehensive plans and development regulations tailored to local circumstances, that local discretion is bounded by the goals and requirements of the GMA. So, in reviewing the planning decisions of local governments, the Board is instructed to recognize “the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter” and to “grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter.” RCW 36.70A.320(1).

From a review of the Board’s FDO it appears the Board relied on its decision in Board Case No. 07-1-0004 wherein:

“The Board finds that the densities allowed by regulations Agricultural-3 and Rural-3 are urban in rural element and not in compliance with the Growth Management Act and the County has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act.”

Critical also to the Board’s conclusion was the finding the County had not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the GMA. The Board accepted Futurewise’s argument that GMA requirements control over goals, that small urban-like lots affect water quality and quantity, that urban growth refers to growth which makes intensive use of land to such a degree as to be incompatible with the primary use of the land for agriculture, that the rural element shall provide densities consistent with rural character, that development regulations shall be consistent with a County’s comprehensive plan, that Tugwell v. Kittitas County suggests the size of a lot to produce food or other agricultural products is greater than five acres, that three acre zoning throughout Kittitas County.

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1 Moreover, Boards are to make informed decisions in a clear, consistent, timely and impartial manner that recognizes regional diversity. WAC 242-02-020(1).
2 Kittitas County Cause No. 07-2-00552-1.
3 See FDO, page 11.
County fails to provide for a variety of rural densities, and that Goldstar Resorts v. Futurewise holds that Growth Boards retain some discretion as to what is urban and what is rural based on local circumstances and the written record, as long as Viking is taken into account. The Board concluded that the densities allowed by the Ag-3 (KCC 17.28) and Rural-3 (KCC 17.30) are urban in the rural element and not in compliance with the GMA and that the County has not developed a written record explaining how the rural element harmonizes the plan and the GMA and meets the requirements of the GMA. The Board also concluded that KCC 16.09, 17.08, 17.12, 17.22, and 17.56 all allow urban-like densities in rural areas and are not in compliance with the GMA.

In reviewing the pleadings presented to the court it appears both the Board and Futurewise have completely ignored by at least what on its face can be considered a written record contemplated by RCW 36.70A.070(5)(a) wherein the County set forth in some detail in Paragraph 8.3 of its Comprehensive Plan a description of current land use patterns in rural Kittitas County as set forth on pages 159 and 160 of the Kittitas County Comprehensive Plan: December 2006, Volume 1. And, in hearing the arguments of Futurewise and reviewing the conclusions of the Board, it appears that each is fixated on the notion that just because a parcel of property may be too small to accommodate agriculture or farming it therefore becomes urban in nature. Moreover, relying on Tugwell, supra at 9 for the proposition that the creation of small parcels not large enough to accommodate agricultural activities demonstrates that the three acre zones are too small to farm and therefore are urban, the Board and Futurewise completely misconstrue Tugwell. Tugwell stood simply for the proposition that the County’s record on which it relied in establishing a rezone of certain property was supported by substantial evidence of change of circumstances to support the rezone. Tugwell did not stand for the proposition that three acre parcels are urban in nature.

Nor does the statistical analysis presented by Futurewise necessarily support the proposition parcels of five acres or less, because they may be smaller than the statistical average small farm, are therefore urban. Such a conclusion has no basis in fact. Both the Board and Futurewise completely ignore the broader guideline of RCW

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36.70A.070(5).

That subsection, while requiring counties to include a rural element including lands that are not designated for urban growth, agriculture, forest or mineral sources, recognizes that 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 Chapter 36.70A. RCW 36.70A.070(5)(b) requires that the rural element shall permit rural development, forestry, and agriculture in rural areas. That provision also provides that the rural element shall provide for a variety of rural densities, uses, essential public facilities, rural governmental services needed to serve the permitted densities and uses. And 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. The County’s written record appears to address all those concerns in its Comprehensive Plan at paragraph 8.3.

Rural character is defined in RCW 36.70A.030(15) as:

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

(a) in which open space, natural landscape and vegetation predominate over the built environment;
(b) that foster traditional rural lifestyles, rural based economies, and opportunities to both live and work in rural areas;
(c) that provide visual landscapes that are traditionally found in rural areas in communities;
(d) that are compatible with the use of the land by wildlife and for fish and wildlife habitat;
(e) that reduce the inappropriate conversion of undeveloped land into sprawling, low density development;
(f) that generally do not require the extension of urban governmental services;
and
(g) that are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas."

Rural development is defined in RCW 36.70A.030(16) as:
(16) "Rural development’ refers to development outside the urban growth area and outside agriculture, forest, and mineral resource lands designated pursuant to RCW 36.70A.17011. Rural development can consist of a variety of uses in residential densities, including cluster residential development, at levels that are consistent with preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas."

Finally, urban growth is defined in RCW 36.70A.030(18) as:

(18) "Urban growth’ refers to 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 products, 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.”

As can be gleaned by the above quoted definitions “rural character”, “rural development”, and “urban growth” do not necessarily refer to whether a particular parcel of property is farmable or not. Relying, therefore, on a statistical analysis that the average small farm in Kittitas County is 5.62 acres and that therefore anything less than that size is urban in nature belies the definitions and guidelines provided to the County for developing a comprehensive plan and development regulations in connection therewith to define its own rural character, rural development, and urban growth. In fact, the legislature has not defined what constitutes rural density and no case precedent establishes that any parcel less than five acres is necessarily urban in nature.12

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11 Agricultural, forest lands and mineral resource lands of long term significance for commercial production of food or other agricultural products, commercial production of timber or extraction of minerals, respectively.

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On its face, therefore, this court concludes that based on the matters presented, there is a likelihood that HomeBuilders could prevail on the merits on issues 1, 2, 3 and 4.  

2. Whether HomeBuilders will suffer irreparable injury if the stay is not granted. If the stay is not granted the County must comply with the Board's FDO concerning the development regulations. Even though the Board's FDO on the County's Comprehensive Plan and other development regulations in the other case is presently awaiting review with the Court of Appeals, the FDO in that case is stayed, thereby relieving the County of the requirement of amending its Comprehensive Plan. As the Comprehensive Plan is now in a state of abeyance pending review, the County now has FDO invalidated development regulations that may be inconsistent with that Comprehensive Plan. If the County, on the one hand, refuses to comply with the Board's FDO in this case, the County faces sanctions. If the County does comply with the Board's FDO while this case is on review the issues herein can become moot during the interim period of the court review process, including the appeal process, leaving property owners in limbo not being able to develop property under the current development regulations and not being able to develop property under any modified regulations should the County comply with the Board's FDO. Too much uncertainty will cause property owners represented by HomeBuilders' position irreparable harm.  

3. Whether granting the motion to stay will substantially harm other parties or threaten public health, safety, or welfare. As pointed out by HomeBuilders, the three acre zones in Kittitas County constitute less than 3% of the entire county. Maintaining the status quo until this case is resolved in conjunction with Kittitas County Cause No. 07-2-00552-1 presently awaiting review by the Court of Appeals and for which a stay is in existence, will not harm Futurewise. Rather, it will allow the orderly review of both

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13 While RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv) require the county to protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water, including protecting surface water and ground waters resources, ruling that Chapter 16.04 of the Kittitas County Code violates the GMA by allowing too many exempt wells appears to go beyond the authority of the review parameters of the Board. The Department of Ecology pursuant to Chapter 90.44 RCW regulates ground water, not a Growth Management Board.  
14 Again, Kittitas County Cause No. 07-2-00552-1.  
15 Even if the County enacts compliant development regulations with provisos should it prevail on appeal, the compliant development regulations are no longer in effect.
cases without causing irreparable harm to any of the parties. Moreover, there are adequate safeguards set forth in the development regulations to protect the health, safety, and welfare of the public pending final resolution of these matters.

Futurewise's argument that it will be deprived of the fruits of its victory is not relevant. The issue to the court is whether the Board properly or adequately reviewed and decided the issues concerning the County's developmental regulations, not who won.

4. **Conclusion.** Based on the foregoing, the court should grant Homebuilder's motion to stay the proceedings pending review. The court on its own motion will accelerate review to decide this case within the next 60 days on a schedule which should accommodate the parties hereto, unless the parties decide this review should await the outcome of the Court of Appeals' review of Kittitas County Cause No. 07-2-00552-1.

CONCLUSION

Homebuilder's motion to stay the proceedings is granted. The court's motion *sua sponte* to accelerate review is also granted. Please present supplemental orders\(^\text{16}\) consistent with this decision.

DATED: April 24, 2008

\[
\text{Judge}
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\(^{16}\) These contemplating a briefing schedule and a date for oral argument, or stipulation that the parties will await the outcome of the Court of Appeals' decision in Kittitas County Cause No. 07-2-00552-1.