



**Central Washington
Home Builders Association**

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KITTITAS COUNTY BOARD OF COMMISSIONERS

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

Dear Chairman McClain:

October 31, 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.

We believe that the question over compliance steps for Issues 10 and 11 was resolved during the Board of County Commissioner Public Hearing on October 29, 2008. However we submit the following comments in support of the Board actions in order to insure that they are placed in the public record.

It seems to us that it was clear from the language of the EWGMHB decision on August 20, 2008 that they accepted the county's actions for Issues 10 and 11 specified in the SATC submitted in May. To quote the decision of the Eastern Washington Growth Management Hearing Board dated August 20, 2008, "As to the application of the court appeals and stay, the Board reads "all issues on appeal" as those appealed by Kittitas County and/or the Interveners-three-acre densities (Issue 1), Issue 10 (variety of rural densities), and Issue 11 (KC 16.09 and 17.36). Thus, the Board recognizes the Appeals and Stay filed in regards to Case No. 07-1-0004c in relationship to Legal Issues 1, 10, and 11, and shall note abeyance for the County in regards to compliance on those issues." (Reference First Order: Re-Compliance, pages 11 and 12.) The actions recommended in the staff narrative dated October 29, 2008 for Issues 10 and 11 are therefore not required.

As we stated in our comments of May 9, 2008, we believe that the best resolution is for the Board to take advantage of the twice granted Stay, once for case 07-1-0004c and again for case 07-1-0015 with respect to revisions to KC 16.09, and 17.36 (Issue 10) and Issue 11(Rural Land designations). We believe that the Stays granted allow the Commissioners to elect to retain the respective current existing portions of the Comprehensive Plan and Development Code until the judicial review is completed. The Hearing Board does not require the actions recommend by staff be taken pending the resolution of the court case. As we stated in previous communications, we hope the Board of County Commissioners will avoid taking action that may render moot our own

appeals of the FDOs rendered by the Eastern Washington Growth Management Hearing Boards in Cases 07-1-0004c and 07-1-0015. Attached are copies of a Memorandum dated May 5, 2008 and a subsequent letter dated May 8, 2008 submitted by our Attorney outlining our concern on this subject. We believe both are still relevant.

In the interim period, pending resolution of the court cases the revisions suggested by the Land Use Advisory Committee with respect to Chapter 8.3 of the Comprehensive Plan can remain available for review by the public in order to consider the significant changes proposed and the long-term implications for Kittitas County should the Board ultimately adopt them.



David K. Whitwill
Coordinator,
Kittitas County Government Affairs

Encl:
Memorandum dated May 5, 2008
Letter dated May 8, 2008



Building Industry Association of Washington

Post Office Box 1909 • Olympia, WA 98507 • 1-800-228-4229 • FAX (360) 352-5332 • www.biaw.com

May 8, 2008

Kittitas County Board of Commissioners
Honorable Alan A. Crankovich
Honorable Mark McClain
205 W. 5th Avenue, Suite 108
Ellensburg, WA 98926

Re: Proposed Compliance Drafts

Dear Commissioners:

The Central Washington Home Builders Association and Building Industry Association of Washington (Home Builders) have quickly reviewed the compliance draft documents posted by Community Development Services (CDS) in response to the May 6, 2008 public hearing. At that hearing, we understood the Commissioners directed CDS to revise its proposed amendments to the County's Comprehensive Plan and development regulations to reflect only those changes unaffected by the Superior Court stay orders.

Although it is once again not at all clear what is actually being proposed and why, we find it perplexing that the newly posted drafts still contain changes to issues that are stayed by both Kittitas County Superior Court orders. As one example, albeit significant, the County is apparently still proposing sweeping changes to its rural land planning in response to Issue 11 of the Growth Board's 2007 Final Determination and Order (FDO), even though Issue 11 is stayed by the Superior Court. See April 11 CDS Staff Narrative at p.5 (admitting that the rural land use changes are in response to Issue 11).

As explained in the Home Builders' May 5, 2008 memorandum, there is absolutely no reason to make any changes at this time to the Comprehensive Plan and development regulations in response to those issues stayed by the Kittitas County Superior Court. Any such changes could significantly affect the currently pending appeals. As previously explained, amending the Comprehensive Plan and development regulations at this time would moot those issues on appeal. Yet, the current proposals still contain numerous changes in response to the stayed issues, placing the Home Builders in the awkward position of protecting its rights against the County, a co-appellant in the litigation.

Further, it is only prudent to wait until the appeals run their course before considering any significant planning changes related to the issues. At that time, the County will have clear direction as to what is, and is not, permissible under the GMA. In the meantime, the Superior Court has made clear that the County is under no obligation to respond to the stayed issues under the Growth Board's 2007 and 2008 FDOs, such as Issue 11, and the applicable portions of the Growth Board's Compliance Schedules set forth in the FDOs.

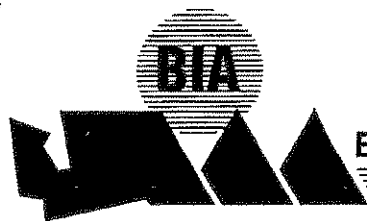
We respectfully suggest that the County Commissioners again direct the planning staff to prepare a red-lined proposal for public review and comment that only reflects changes to the Comprehensive Plan and development regulations that respond to issues of the FDOs not stayed by the Superior Court. In light of the underlying litigation and the extreme importance of the stays to the Home Builders and other parties, we would also ask for the CDS staff to prepare and post a narrative explaining what planning changes are being made, and to what issues they are intended to respond.

Thank you for your kind consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Cook", written over a horizontal line.

Andrew Cook
Legal Counsel



Building Industry Association of Washington

Post Office Box 1909 • Olympia, WA 98507 • 1-800-228-4229 • FAX (360) 352-5332 • www.biaw.com

MEMORANDUM

TO: Kittitas County Commissioners, Neil Caulkins, Darryl Piercy
FROM: Andrew Cook, BIAW Legal Counsel
RE: Eastern Washington Growth Hearings Board Compliance
DATE: May 5, 2008

This memorandum addresses the legal effect both stays issued by the Kittitas County Superior Court have on Kittitas County's compliance with the two decisions issued by the Eastern Washington Growth Management Hearings Board (Growth Board). While the purpose and consequential effect to the public of the May 6 hearing is not clear from the County's posted statements, it appears the County is proposing sweeping changes to its Comprehensive Plan and Development Code. As explained below, these changes are unnecessary and in direct contravention with the rights of parties in the underlying litigation.

Because the Kittitas County Superior Court issued a stay covering issues 1, 10, and 11 of the Growth Board's August 20, 2007 Final Decision and Order (No. 07-1-0004c) ("FDO"), Kittitas County does not need to make any changes to those three issues in order to comply with the Growth Board's decision. In fact, as recently stated by the Superior Court, "[e]ven though the Board's FDO on the County's Comprehensive Plan and other development regulations 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." *Cent. Wash. Home Builders Ass'n, et al v. E. Wash. Growth Mgmt. Hr'gs Bd., et al.*, No. 08-2-00195-7, slip op. at 8 (Kittitas County Superior Court, April 24, 2008) (emphasis added). Moreover, as the Court expressly acknowledged in its decision, the Central Washington Home Builders Association and Building Industry Association of Washington (hereinafter "Home Builders") will likely suffer irreparable injury should the County unnecessarily amend its Comprehensive Plan and Development Code prior to the conclusion of the underlying litigation.

In short, the County does not need to take any actions with issues 10 and 11. By enacting the proposed changes, the County will simply be giving in to the groups that challenged the Comprehensive Plan and development regulations when it has no legal obligation to do so. Further, the County will only unnecessarily create more litigation, as the Home Builders will be left in the uncomfortable position of having to file an injunction with the Kittitas County Superior Court to prevent the County from enacting the proposed Comprehensive Plan and development regulation changes affecting issues 10 and 11 while the case is on appeal.

Kittitas County Superior Court Stayed Issues 1, 10, and 11

As noted above, Kittitas County Superior Court has twice issued stays of the Growth Board's two adverse decisions. The first stay¹ was issued on November 13, 2007. (See Appendix A). That

¹ A second stay—which will be discussed in greater detail below—was issued by the Kittitas County Superior Court which covered largely the same issues.

order specifically stayed issues 1, 10, and 11 of the Growth Board's Final Decision and Order, No. 07-1-0004c.²

Despite this stay, Kittitas County has proposed sweeping changes to the Comprehensive Plan and development regulations that were expressly covered by the first (and second) stay. Specifically, the proposed Comprehensive Plan and development regulation changes would address issues 10 and 11.³ For example, the proposed changes to the Performance Based Cluster Platting ordinance (KCC 16.09) eliminate bonus densities for three-acre plots. The County's proposed changes are unnecessary at this time and will irreparably harm the Home Builders if enacted.

In addition, the County has issued proposed significant changes to the rural land use element through new, unprecedented types of rural designations that will cause severe disruptions to the judicially protected status quo. Again, the proposed changes to the Comprehensive Plan and development regulations are not only unnecessary, they irreparably harm the Home Builders and thus should not be enacted.⁴

Second Stay Issued by the Kittitas County Superior Court

On April 24, 2008, the Kittitas County Superior Court issued a second stay. (See Appendix B). This stay covered the Growth Board's second decision issued on March 21, 2008 (Case No. 07-1-0015). The issues in the second Growth Board decision were largely the same as the first case. Unlike the first stay, the judge in this case issued a nine-page memorandum decision explaining the need for the stay. The decision makes abundantly clear that the Court thinks that the Home Builders (and the County) are likely to prevail on the merits. The Court further found that both

² Issue 1 was whether Kittitas County's comprehensive plan fails to comply with the Growth Management Act because it allows rural densities greater than one dwelling unit per five acres. This issue also dealt with whether the comprehensive plan violated the GMA for failure to adopt policies and designations that protect natural resource lands from incompatible development, failure to define rural character and adopt provisions to protect rural character, inadequate or absent criteria for the designation of rural land use designations, failure to adopt a policy to prohibit urban governmental services outside the urban growth area, and failure to comply with GMA goals 1,2, 5, 8-10, and 12.

Issue 10 was similar to Issue 2. Issue 2 alleged that Kittitas County Code (KCC) 17.36, 16.09, 17.14, 17.20, 17.28, 17.28A, and 17.30 violated the GMA because it allowed densities greater than one dwelling unit per three acres.

Issue 11 was whether Kittitas County's comprehensive plan violated the GMA for failing to provide for a variety of rural densities and for failing to provide a sufficient specificity and guidance on rural densities to prevent a pattern of rural development that constitutes sprawl.

³ Kittitas County has not made any changes that would affect issue 1 of the Growth Board's August 20, 2007 decision (No. 07-1-0004c). The Home Builders appreciate that the County has not made any changes that would make issue 1 moot.

⁴ We also note that the current proposed hearing and associated posting on the County's website does not meet the County's obligations for meaningful public information and participation under the Growth Management Act. See, e.g., RCW 36.70A.020(11), RCW 36.70A.130(2), RCW 36.70A.035 and RCW 36.70A.140. For example, the County not asked for any public comments on the proposed changes, provided any meaningful information as to the actual proposal for public comment, or even how long the public has to comment.

the Home Builders and the County will suffer irreparable injury if the County enacts development regulations and Comprehensive Plan amendments to comply with the Growth Board's decision.

If the County goes forward and adopts these changes while the case is on appeal, there will no longer be a controversy. If there is no longer a controversy, the parties that appealed the Comprehensive Plan and development regulations will move to dismiss the case as moot. Thus, the County's proposed changes to comply with those issues stayed by the Kittitas County Superior Court will irreparably harm the Home Builders. If the County decides to enact that proposed changes affecting issues 10 and 11, the Home Builders would be in the unfortunate position of having to file an injunction asking the Court to prevent the County from enacting the changes while the case is on appeal. This would be a last resort action -- one that the Home Builders certainly do not want to take.

Conclusion

Kittitas County does not need to make the proposed sweeping changes affecting to the Comprehensive Plan to address the issues judicially stayed (i.e., issues 10 and 11 of the 2007 FDO) In fact, if the County does enact these changes, the Home Builders, and other parties in the case, will be irreparably harmed.⁵ Because of the Court's two stays, the County has legal protection from having to comply with those issues that were appealed by the Home Builders. Should the County proceed the Home Builders will unnecessarily be forced to protect its interests. Therefore, the Home Builders respectfully request that Kittitas County not enact the proposed changes for issues 10 and 11 of the Growth Board's decision, No. 07-1-0004c.

⁵ We also note the County is a co-appellant in the underlying litigation and advocate of both Superior Court. Given the County's interests in preserving the status quo under the stays until final resolution of the issues under appeal, the County's unnecessary rush to amend its Comprehensive Plan and development regulations is all the more perplexing.

EXHIBIT

A

EXHIBIT "A"

FILED
Hon. Scott R. Sparks
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KITTITAS COUNTY
SUPERIOR COURT CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KITTITAS COUNTY

CENTRAL WASHINGTON HOME BUILDERS
ASSOCIATION, *et al.*,

No. 07-2-00552-1

Petitioners/Intervenors,

Sm
~~PROPOSED~~ ORDER GRANTING
MOTION TO STAY THE
EASTERN WASHINGTON
GROWTH MANAGEMENT
HEARINGS BOARD'S FINAL
DECISION AND ORDER

v.

EASTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD, *et al.*

Defendants/Respondents.

This matter having been heard by the undersigned Judge of the above-titled Court based upon Petitioners/Intervenors' Central Washington Home Builders Association, Building Industry Association of Washington, and Mitchell F. Williams, d/b/a MF Williams Construction Co.'s motion to stay the Eastern Washington Growth Management Hearings Board's Final Decision and Order¹ as to those issues currently on appeal before this Court; and the Court having reviewed the files and records herein, including the following:

1. Central Washington Home Builders Association, *et al.*'s Motion for Stay of Compliance Proceedings;
2. Central Washington Home Builders Association, *et al.*'s Memorandum in Support of Motion for Stay of Compliance Proceedings;

¹ *Kittitas County Conservation, et al. v. Kittitas County, et al.*, EWGMHB Case No. 07-1⁰004c, Final Decision and Order (August, 2007).

1 - ORDER GRANTING
PETITIONERS'/INTERVENORS'
MOTION FOR STAY

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON
111 21ST Avenue SW
Olympia, WA 98507
Telephone (360) 352-7800

ANNEXED

33

- 1 3. Futurewise, Kittitas County Conservation, and Ridge's Brief in Opposition to
- 2 Intervenor/Petitioners' Motion for Stay of Compliance Proceedings;
- 3 4. Central Washington Home Builders Association, *et al.*'s Reply to Futurewise,
- 4 Kittitas County Conservation, and Ridge's Brief in Opposition to
- 5 Intervenor/Petitioners' Motion for Stay of Compliance Proceedings; and
- 6 5. Declaration of Andrew Cook and exhibits A and B.

7 The Court having heard oral argument and being otherwise fully advised, it is hereby:

8 ORDERED, ADJUDGED AND DECREED that pursuant to RCW 34.05.550 *et seq.*,

9 Petitioners/Intervenors' motion for stay of those issues on appeal from the Eastern

10 Washington Growth Management Hearings Board's Final Decision and Order,² is hereby

11 granted.

12 DONE IN OPEN COURT this 13 day of NOVEMBER, 2007.

13 

14 JUDGE SCOTT R. SPARKS

15 Presented by:

16 BUILDING INDUSTRY ASSOCIATION
17 OF WASHINGTON

18 Timothy M. Harris, WSBA No. 29906
19 Andrew C. Cook, WSBA No. 34004
20 *Attorneys for Petitioners/Intervenors*
21 111 21st Avenue SW
22 Olympia, WA 98507
23 (360) 352-7800 - Telephone
24 (360) 353-7801 - Facsimile
andyc@biaw.com

² *Kittitas County Conservation, et al. v. Kittitas County, et al.*, EWGMHB Case No. 07-1-004c, Final Decision and Order (August, 2007).

EXHIBIT

B

FILED

08 APR 24 AM 10: 53

KITTITAS COUNTY
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

CENTRAL WASHINGTON HOME)
BUILDERS ASSOCIATION, a Washing-)
ton 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 FUTURE-)
WISE,)

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.

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,⁴ 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).⁵

From a review of the Board's FDO it appears the Board relied on its decision in Board Case No. 07-1-0004⁶ 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.⁷ 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 County⁸ suggests the size of a lot to produce food or other agricultural products is greater than five acres, that three acre zoning throughout Kittitas

⁵ Moreover, Boards are to make informed decisions in a clear, consistent, timely and impartial manner that recognizes regional diversity. WAC 242-02-020(1).

⁶ Kittitas County Cause No. 07-2-00552-1.

⁷ See FDO, page 11.

⁸ 90 Wn.App. 1 (1997).

County fails to provide for a variety of rural densities, and that Goldstar Resorts v. Futurewise⁹ 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 Viking¹⁰ 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

⁹ 140 Wn.App. 378 (2007).

¹⁰ Viking Properties, Inc. v. Holm, 155 Wn.2d 112 (2005).

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

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.

¹² It is noted a five acre lot is "decidedly" rural in density. See Whidbey Envtl. Action v. Island County, 122 Wn.App. 1561, 169 (2004) and Skagit Surveyors v. Friends, 135 Wn.2d 542, 571 (1998). "Decided rural density" certainly infers small parcels can be considered rural.

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 4.¹³

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 case¹⁴ 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 moot¹⁵ 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

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.

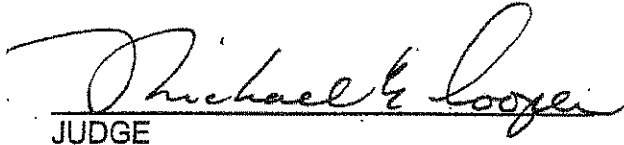
Futurewise's argument that it will be deprived of the fruits of its victory is not relevant. The issue to the court is whether the Board properly or adequately reviewed and decided the issues concerning the County's developmental regulations, not who won.

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 orders¹⁶ consistent with this decision.

DATED: April 24, 2008


JUDGE

¹⁶ Those 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.

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

Dear Chairman McClain:

October 31, 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.

To quote the decision of the Eastern Washington Growth Management Hearing Board dated August 20, 2008, "As to the application of the court appeals and stay, the Board reads "all issues on appeal" as those appealed by Kittitas County and/or the Interveners-three-acre densities (Issue 1), Issue 10 (variety of rural densities), and Issue 11 (KC 16.09 and 17.36). Thus, the Board recognizes the Appeals and Stay filed in regards to Case No. 07-1-0004c in relationship to Legal Issues 1, 10, and 11, and shall note abeyance for the County in regards to compliance on those issues." (Reference First Order: Re-Compliance pages 11 and 12.) The actions recommended in the staff narrative for Issues 10 and 11 are therefore not required.

As we stated in our comments of May 9, 2008, we believe that the best resolution is for the Board to take advantage of the twice granted Stay, once for case 07-1-0014c and again for case 07-1-0015 with respect to revisions to KC 16.09, and 17.36 and Issue 11, Rural Land designations. We believe that the Stays granted allow the Commissioners to elect to retain the respective current existing portions of the Comprehensive Plan and Development Code until the judicial review is completed. The Hearing Board does not require the actions recommend by staff be taken pending the resolution of the court case. As we stated in previous communications we hope the Board of County Commissioners will avoid taking actions which may render moot our own appeals of the FDOs rendered by the Eastern Washington Growth Management Hearing Boards. Attached is a copy of the letter submitted by our Attorney outlining our concern on this subject which we believe is still relevant.

In the interim period, the revisions suggested by the Land Use Advisory Committee with respect to Chapter 8.3 of the Comprehensive Plan can remain available for review by the public in order to consider the significant changes and long-term implications for Kittitas County should the Board ultimately adopt them.

David K. Whitwill
Coordinator,
Kittitas County Government Affairs

Encl: Letter dated May 5, 2008