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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

FUTUREWISE, KIAN BRADLEY, and
TREVOR REED,

Petitioners,

vs.

CITY OF MERCER ISLAND,

Respondent.

Case No. 25-3-0003

CITY OF MERCER ISLAND’S
RESPONSE BRIEF

I. INTRODUCTION

The City of Mercer Island (“City” or “Mercer Island”) and other cities in King County have five years from adoption to fully implement their comprehensive plan’s affordable housing goals and policies. Petitioners Futurewise, Kian Bradley, and Trevor Reed (together “Futurewise” or “Petitioners”) have chosen to ignore, intentionally or otherwise, 2022 legislation that amended the Growth Management Act (“GMA”), Chapter 36.70A RCW, to allow this time for study, analysis, public process, and implementation



1 of development regulations and other programs necessary to implement comprehensive
2 plans.

3 The record shows that Mercer Island’s Comprehensive Plan is consistent with the
4 GMA, the Multicounty Planning Policies (“MPPs”), and King County Countywide
5 Planning Policies (“CPPs”); and that it followed Washington State Department of
6 Commerce (“Commerce”) guidance to achieve this result. Futurewise submitted a
7 prehearing brief (“Petitioners’ Brief”) that evidences a fundamental disagreement with the
8 policy choices and methods used by the City’s elected City Council but fails to meet its
9 burden of proof to establish that the City’s Comprehensive Plan and development
10 regulations are “clearly erroneous.”
11

12 II. FACTS

13 The adoption of the City’s Comprehensive Plan periodic update and related
14 development regulations is the culmination of years of study, collaboration, and effort by
15 City staff, the public, Planning Commission, and City Council. Ex. 130 at 1-2.¹ In March
16 2022, the City Council approved a resolution adopting a public participation plan, scope of
17 work and schedule, and creating a Housing Work Group and Economic Development Work
18 Group for the Comprehensive Plan periodic update. Ex. 19. A month later, the City’s
19 Planning Commission commenced work on the periodic update, ultimately holding 23
20 meetings over the course of more than two years. Ex. 130 at 1. In July 2023, additional
21
22

23 _____
24 ¹ Citations in this Response Brief are to page numbers on the document rather than to pdf pages, unless
25 specifically stated otherwise in the citation.

1 scope was added to the work plan related to new legislation and guidance from Commerce
2 specifically related to the Housing Element and racially disparate impacts. Ex. 67.

3 The adoption of the Comprehensive Plan is well informed by studies performed by
4 the agency and public input throughout the process. The City’s land capacity analysis
5 includes the City of Mercer Island Housing Needs Assessment dated November 2022
6 (“HNA”), the Land Capacity Analysis Supplement dated December 2023 (“LCA
7 Supplement”), and the Emergency Housing Land Capacity Analysis (“Emergency Housing
8 LCA”) presented in September 2024. Ex. 130 at 223-288, 327-390; Ex. 100 at 30-31. To
9 identify housing policies that might have racially disparate impacts, the Racially Disparate
10 Impacts Evaluation dated December 2023 was performed (“RDI Evaluation”). Ex. 130 at
11 391-457. In May of 2024, the Planning Commission was given the results of a consistency
12 analysis performed to determine if the draft Comprehensive Plan was consistent within itself
13 and with the MPPs and CPPs. Ex. 241 at 77-311.²

14
15 After exhaustive work by the Planning Commission, the City Council considered
16 the Planning Commission’s recommendation on the Comprehensive Plan at three meetings
17 between July and September 2024. The Council then invited additional public comments on
18 the final draft for 30 days. Ex. 130 at 2. In November 2024, Council considered public
19 comments and adopted the Comprehensive Plan on November 19, 2024. Id. at 3.
20
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22
23 ² Pages 77–80 is the memorandum from consistency consultant Kimley-Horn. Pages 82–87 is the analysis
24 where policy gaps were found. Page 88-307 is the analysis of all the draft policies for consistency with the
25 MPPs and CPPs. Page 308-311 is the internal consistency analysis. Numbering for some goals and policies
26 changed between the Planning Commission recommendation and City Council adoption.

1 Simultaneously, work on implementing development regulations related to
2 affordable housing land capacity was in process. Ex. 128 at 1-4. On October 1, 2024, City
3 Council directed staff to prepare an interim ordinance to amend Mercer Island City Code
4 (“MICC”) Title 19 to increase multi-family and mixed-use development capacity in the
5 Town Center, increase the required percentage of affordable housing for new development
6 in Town Center, and to deepen the affordability component for affordable housing units
7 within new development in Town Center. Id. at 2. Ordinance 24C-18 accomplishing these
8 items was adopted on December 3, 2024. Ex. 135.
9

10 The facts related to goals, policies, and regulations for each issue raised by
11 Futurewise are provided in section IV of this brief. While the City may not have gone as far
12 or as fast on these issues as Futurewise would like, the record reflects that the City’s
13 Comprehensive Plan periodic update and related development regulations have been
14 carefully developed to meet the requirements of the law. As discussed within, Futurewise
15 failed to meet its burden of proof on all issues.
16

17 **III. LEGAL STANDARD**

18 **A. Adopted comprehensive plans and development regulations are presumed valid.**

19 Comprehensive plans and development regulations, and amendments thereto, are
20 presumed valid upon adoption. RCW 36.70A.320(1). This presumption establishes a high
21 threshold for challengers. The burden of proof lies squarely with Futurewise to
22 demonstrate that the City’s action in adopting Ordinance Nos. 24C-16 and 24C-18 were
23
24

1 not in compliance with the GMA. RCW 36.70A.320(2); *City of Redmond v. CPSGMHB*,
2 116 Wn.App. 48, 55-58, 65 P.3d 337 (2003).

3 For the Board to find that a challenged portion of the City’s Comprehensive Plan
4 or development regulations is noncompliant with the GMA, Futurewise must present
5 evidence meeting the clearly erroneous standard. Indeed, the Board “shall find compliance
6 unless it determines that the action taken by the City is clearly erroneous in view of the
7 entire record before the Board and in light of the goals and requirements of the GMA.”
8 RCW 36.70A.320; *Heritage Baptist Church v. CPSGMHB*, 2 Wn.App. 737, 746, 413 P.3d
9 590 (2018); *Thurston County v. WWGMHB*, 164 Wash.2d 329, 340, 190 P.3d 38 (2008).
10 It is insufficient for Petitioners to merely disagree with the City’s actions, or to identify
11 technical problems in the process leading up to the adoption of the challenged ordinances.
12 *Black Diamond Trees, Roads, Envmt., Engagement Team (BD TREE) v. Black Diamond*,
13 CPSGMHB Case No. 19-3-0013, Final Decision and Order (FDO) (Jan. 6, 2020), at 3.
14 Rather, an action is clearly erroneous **only** when the Board reviewing the record is “left
15 with a definite and firm conviction that a mistake has been committed.” *Dep’t of Ecology*
16 *v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993); *see also Quadrant v. GMHB*, 154
17 Wn.2d 224, 237-238, 110 P.3d 1132 (2005); *Anderson v. Pierce Cty.*, 86 Wn. App. 290,
18 301, 936 P.2d 432 (1997).
19
20

21 Mere assertions are not enough to meet Futurewise’s burden. *Friends of the San*
22 *Juans v. San Juan Cty.*, WWGMHB Case No. 13-2-0012c, FDO (September 6, 2013), at
23 19. “Petitioner, as the party with the burden of proof, cannot simply refer in general terms
24

1 to a statute or regulation as having been violated. Rather, Petitioner must come forward
2 with *evidence* and *specific legal arguments* relating to the statute or regulation in an
3 attempt to satisfy Petitioners’ burden of proof.” *Confederated Tribes and Bands of the*
4 *Yakama Nation v. Yakima Cty.*, EWGMHB Case No. 10-1-0011, FDO (April 4, 2011), at
5 26-27 (emphasis added).

6 The Courts have elaborated on the fact that the clearly erroneous standard affords
7 deference to counties and cities in planning matters.

8
9 This “clear error” standard reflects the legislature's intent that the board “grant
10 deference to counties and cities in how they plan for growth, *consistent*
11 *with the requirements and goals of this chapter.*” RCW 36.70A.3201
12 (emphasis added). In effecting this balance, the legislature intended for
13 “local planning to take place within a framework of state goals and
14 requirements, [but] the ultimate burden and responsibility for planning,
15 harmonizing the planning goals of this chapter, and implementing a
16 county's or city's future rests with that community.

17 *City of Airway Heights v. EWGMHB*, 193 Wn.App. 282, 376 P.3d 1112 (2016). It is within
18 this framework that Futurewise’s challenge in this proceeding must be examined. While it
19 is free to disagree with the City’s adopted policies and strategies, this is insufficient to meet
20 the burden of proof.

21 B. CPPs and MPPs are binding on cities within a county; at the same time
22 acknowledging the critical role and discretion afforded cities.

23 The City does not dispute that its Comprehensive Plan and development regulations
24 must be consistent with the CPPs and MPPs. RCW 36.70A.210; *Dragonslayer, Inc.*,
25 *Michels Development, LLC, Greg and Susan Gilbert, and Clark County v. City of La Center*,
26 WWGMHB No. 14-2-0003c, Corrected Final Decision and Order at p. 18 (October 24,

1 2014); *King County v. Central Puget Sound Growth Management Hearings Board*, 138
2 Wn.2d 161, 175-76, 979 P.2d 374 (1999). The development of countywide planning policies
3 sets the framework within which to ensure consistency of comprehensive plans of cities and
4 counties with regional issues. *City of Snoqualmie and City of Issaquah v. King County*
5 (*Snoqualmie*), CPSGPHB Case No. 923-004c, Final Decision and Order, (March 1, 1993)
6 at 8. Importantly, cities are not merely a pass through for the MPPs and CPPs; Vision 2050
7 and the CPPs both acknowledge the critical role cities play in the production and
8 preservation of local housing,³ and the monitoring established in Mercer Island’s
9 Comprehensive Plan, the CPPs, MPPs, and GMA will ensure evaluation of progress and
10 success throughout the planning horizon. Ex. 130 at 116 (Goal 6, tracking effectiveness);
11 Ex. 276 at 10 (FW-2), 25 (DP-15), 43 (H-7), 44 (H-8), 49 (H-27), (50 (H-29); Ex. 322 at 20
12 (MPP-RC-14), 21 (RC-Action-2, RC-Action-3), 89 (H-Action-3); RCW 36.70A.130(9)(a)
13 and (c).
14

15 C. Consistency within the context of RCW 36.70A.100 and .210 means compatibility.
16

17 A main theme of Petitioners’ Brief is that the two challenged ordinances lack
18 consistency with the CPPs and MPPs. Therefore, it is important to understand the meaning
19 of consistency in the GMA context. Consistency means that “provisions are compatible with
20 each other—that they fit together properly. In other words, one provision may not thwart
21 another.” *Chevron, USA, Inc. v. Central Puget Sound GMHB*, 123 Wn. App. 161, 167, 93
22 P.3d 880 (2004). Consistency also means one policy does not serve as a roadblock to
23

24 ³ Ex. 322 at 83, Ex. 276 at 37-38, 41-42.

1 another; and consistency ensures policies working together in a coordinated manner to reach
2 a common goal. *Lawrence Michael Invs, LLC v. Town of Woodway*, CPSGMHB No. 98-3-
3 0012, Final Decision and Order (Jan. 8, 1999).

4 With respect to consistency with CPPs and MPPs in particular, amendments to a
5 comprehensive plan may not cause the plan to be inconsistent with CPPs and MPPs.
6 *Lawrence Michael Invs, LLC v. Town of Woodway*, CPSGMHB No. 98-3-0012, Final
7 Decision and Order (Jan. 8, 1999). To determine consistency of city ordinances with the
8 CPPs and MPPs, the Board examines the challenged provisions to determine if the
9 provisions are facially inconsistent with the CPPs and MPPs. *Id.* If the challenged provisions
10 are facially consistent with the identified CPPs and MPPs, the challenge fails; if a challenged
11 provision is facially inconsistent, the Board examines the challenged provision in the
12 context of the entire plan or ordinance to determine if the provision causes the plan or
13 ordinance to be inconsistent with the CPPs and MPPs. *Id.*

14 15 **IV. ARGUMENT**

16
17 **Issue 1: Did the City fail to identify sufficient capacity of land for emergency shelters,
transitional housing, emergency housing, and permanent supportive housing? No.**

18 A. The City identified sufficient land capacity as a result of performing land
19 capacity analysis in compliance with the GMA and as guided by Commerce
20 and the CPPs.

21 Cities fully planning under the GMA, like Mercer Island, are required to identify
22 sufficient land capacity for future housing needs of all economic segments of the population.
23 RCW 36.70A.020(4). In 2021, the legislature added specificity by requiring fully planning
24 cities to “identif[y] sufficient capacity of land for housing including, but not limited to,

1 government-assisted housing, housing for moderate, low, very low, and extremely low-
2 income households, manufactured housing, multifamily housing, group homes, foster care
3 facilities, emergency housing, emergency shelters, permanent supportive housing,⁴ ... and
4 consideration of duplexes, triplexes, and townhomes. RCW 36.70A.070(2)(c). As defined
5 by Commerce, a Land Capacity Analysis (“LCA”) includes the following:

6 Counties and cities must conduct a Land Capacity Analysis (LCA) to
7 measure and document capacity for new housing development on vacant,
8 partially used or under-developed lands. This analysis considers the potential
9 for land within a community's boundaries to accommodate new housing
10 growth, given what is allowed under current zoning and development
regulations and what can reasonably be anticipated based on past
development and factors that may cause trends to change in the future.⁵

11 The start of the LCA process for the City was adoption of the housing needs it was
12 assigned in CPP H-1.⁶ The City’s assigned Housing Need numbers through the year 2044
13 are 1239 net new permanent dwellings and 237 assigned emergency housing and emergency
14 shelter beds (together “Emergency Housing”).⁷ As required by RCW 36.70A.070(2)(c) and
15 as guided by Commerce’s Guidance for Updating Your Housing Element dated August
16 2023 (“Book 2”),⁸ the City performed a land capacity analysis to determine if it has
17

19 _____
20 ⁴ Permanent Support Housing (“PSH”) is defined in GMA as subsidized, leased housing with no limit on
length of stay that prioritize people who need comprehensive support services to retain tenancy. PSH is
usually paired with voluntary support services for those with behavior health or physical health conditions.
RCW 36.70A.030(31).

21 ⁵ Ex. 282 at 17.

22 ⁶ Ex. 130 at 369, Ex. 276 at 38 - 41.

23 ⁷ Commerce STEP Model Ordinance, User Guide and Best Practices Report, July 2024 (“Commerce STEP
Guide”), Ex. 284 at 31 referring to Book 2.

24 ⁸ Ex. 282 is the August 2023 Book 2. Ex. 321 is the September 2024 Book 2 with clarifications (pg. 4). City
created exhibits in the record cite to Ex. 282 because Ex. 321 was issued so late in the City’s process.
Futurewise does not cite to specific clarifications in Ex. 321 that were allegedly not followed by the City.

1 sufficient capacity of land to accommodate the housing need numbers assigned in CPP H-
2 1.

3 The City’s land capacity analysis was done in stages and started with the HNA in
4 2022. Ex. 130 at 223-288. When the HNA was performed, the City had not yet been
5 assigned its housing needs numbers in CPP H-1. The HNA is informed by King County’s
6 2021 Urban Growth Capacity (“UGC”) Report, that uses a growth target of 1,239 new
7 housing units in Mercer Island by 2044 and finds that the City’s total housing unit capacity
8 is 1,607 new units. Id. at 236. The HNA includes a housing unit inventory and an analysis
9 of housing needs. The HNA describes the current housing stock in the City and how the
10 City’s Comprehensive Plan will accommodate the projected housing growth. Id. at 258-283.
11 The HNA helps Mercer Island’s understanding of its geographic, land use, and demographic
12 demands on future housing development. Id. at 239. The HNA notes that the City is
13 “classified as a high price but limited growth community due to its geographic constraints.”
14 Id. at 234. The HNA finds that the City has a small share of its population living in poverty.
15 Five percent of all Mercer Island residents live in poverty and three percent of its families
16 live in poverty. Id. at 252.

17
18
19 The City’s next step in its LCA was to take the 1239/237 assigned housing need and
20 determine what land capacity was available at the various assigned categories. To that end,
21 the City performed the LCA Supplement dated December 2023 using the guidance in
22 Commerce’s Book 2, Chapter 3, “Land capacity analysis.” Ex. 130 at 327–390, Ex. 282 at
23 16–24. For permanent housing (all but emergency housing), Book 2 provides steps for cities
24

1 to analyze and assess their capacity by income level. Ex. 282 at 18-19. Mercer Island’s LCA
2 Supplement follows these steps.

3 Table 2 in the LAC Supplement summarizes Mercer Island’s housing production by
4 zone using King County’s UGC. Ex. 130 at 338. Table 3 shows Mercer Island home sales
5 and median sale price by dwelling type using data from the Washington Center for Real
6 Estate Research. Ex. Id. at 339. Table 4 provides the average price per housing type. Id.
7 Table 5 includes the average monthly housing cost by zone category. Id. at 340. Table 6
8 shows income levels needed for various housing types as a percentage of Average Median
9 Income (“AMI”) and that to pay the average apartment rent in Mercer Island requires an
10 income of at least 69% of AMI. Id. Table 7 combines earlier tables and shows housing
11 capacity by zoning category and affordability level. Income of 69% - 112% of AMI is
12 needed for medium-low, medium-high, and high-density zoning categories. Id. at 341. Table
13 8 shows zone categories, housing types, and income level served. Id. at 343. Table 9
14 compares projected housing needs to capacity and finds a deficit of 143 units at medium-
15 low, medium-high, and high density. Id. at 344-345.

18 *1. The City’s LCA for Emergency Housing is based on current Commerce
19 guidance.*

20 Futurewise mistakenly faults the City’s Emergency Housing LCA for using
21 “outdated Commerce guidance” and fails to provide the Board with any analysis of how
22 updated Commerce guidance would produce different results. Petitioners’ Brief at 5. A
23 thorough review shows that Commerce’s two versions of Book 2 provide the same guidance
24 for Emergency Housing LCA. Ex. 282 at 41-48, Ex. 321 at 43-50. The Commerce STEP

1 Guide in turn refers to Book 2 for performing Emergency Housing LCA and adds
2 clarification that because LCA is required by the GMA, all fully planning GMA cities must
3 do Emergency Housing LCA even if the city does not have spacing and intensity
4 requirements. Ex. 284 at 31.

5 As explained above, the City’s land capacity analysis occurred in stages, and the
6 LCA Supplement cited by Futurewise was not the last stage. The City received comments
7 from PSRC and Commerce dated June 18, 2024, and July 25, 2024, respectively. Ex. 100
8 at 67–71 and 72-75. Regarding housing, Commerce commented as follows:
9

10 During our review of your draft housing element, we did not find supporting
11 documentation indicating sufficient land capacity for emergency housing
12 and emergency shelter as required by RCW 36.70A.070(2)(c). While
13 Commerce guidance indicates jurisdictions do not need to complete a land
14 capacity analysis (LCA) for emergency housing and emergency shelter *if*
15 *they allow these uses in all zones that allow hotels*, RCW 36.70A.070(2)(c)
expressly states jurisdictions must ensure sufficient capacity for all housing
types, including emergency housing and emergency shelter, is identified in
the housing element. Therefore, we recommend the city consider including
this information in the city’s final land capacity analysis.⁹

16 PSRC’s comment was similar. Ex. 100 at 69. In response to these comments, the City
17 completed additional analysis for Emergency Housing land capacity and included a
18 corresponding finding by the City Council in the adopted Comprehensive Plan.¹⁰ The City’s
19 Emergency Housing LCA follows the steps provided by Commerce and results in Table 2
20 that was provided to the City Council on September 3, 2024, in Exhibit 100.¹¹
21

23 ⁹ Ex. 100 at 73.

24 ¹⁰ Ex. 100 at 30 and Ex. 130 at 28.

24 ¹¹ Exhibit 100 at 1 and 30.

1 Table 2's Column A includes the net developable area in all zones that allow
2 Emergency Housing (Book 2 steps 1-3). Ex. 282 at 44 - 45. Column B and C incorporate
3 Option A from Book 2 step 5 to determine number of beds possible from existing zoning
4 density. Id. at 45-46. Column D incorporates an analysis of the largest spacing required
5 between Emergency Housing projects under MICC 19.06.080(B)(3) for social service
6 transitional housing¹² (Book 2 step 4), to determine the maximum number of Emergency
7 Housing facilities in each zone.¹³ Id. at 45. Last, Column E multiplies the number of beds
8 per facility (Column C) times the number of facilities (Column D) and gives the total
9 number of beds possible in each zone (Book 2 step 6). Id. at 46. The City's Table 2 shows
10 the total capacity of Emergency Housing beds is 1536, which exceeds 237 assigned in CPP
11 H-1 (Book 2 step 7). Id. This is the City's last stage of its LCA analysis, and it follows Book
12 2 Commerce guidance as well as the Commerce STEP guidance.
13

14 Additionally, the City Council made a finding in the adopted Comprehensive Plan
15 that explained the LCA Emergency Housing analysis in Table 2 was provided to the City
16 Council, and Council found that the City has adequate capacity to accommodate its assigned
17 Emergency Housing needs. Council also stated that as part of the implementation of the
18 Comprehensive Plan, the City will establish a permanent ordinance that allows similar
19
20

21 ¹² "RCW 35A.21.430 provides that occupancy, spacing, and intensity of use may not prevent the siting of a
22 sufficient number of permanent supportive, transitional housing, indoor emergency housing or indoor
23 emergency shelters necessary to accommodate each code city's projected need for such housing and shelter
24 under RCW 36.70A.070(2)(a)(ii). The restrictions on these must be to protect public health and safety." Ex.
25 282 at 118.

26 ¹³ In Ordinance 21C-23, Exhibit 7 at 2, Emergency Housing was included in the City's definition of social
service transitional housing, which is regulated under MICC 19.06.080(B).

1 levels of Emergency Housing. Ex. 130 at 28.

2 *2. The City’s LCA for permanent housing was also performed per Commerce*
3 *guidance and in conformance with GMA and the CPPs.*

4 Futurewise faults the City’s LCA Supplement because it aggregates housing needs
5 below 120% AMI for permanent housing (all but Emergency Housing). Petitioners’ Brief
6 at 5. The City’s LCA Supplement, however, was performed as guided by Commerce Book
7 2, which also aggregates LCA for affordability levels in its examples for cities. Ex. 282 at
8 33. Commerce explains that to “ensure capacity for all income segments, we need to make
9 assumptions about the types of housing each household is likely to occupy.” Id. at 31.
10 “Subsidized affordable housing projects are the most feasible to produce in low-rise or mid-
11 rise zones that allow for multi-unit housing production, such as apartment buildings.” Id. at
12 30. Commerce explains that housing types allowed in each zone need to be identified and
13 then related to affordability levels. Id. Zones may accommodate more than one income
14 level. Id. at 30 and 33.

15
16 Exhibit 13 from Commerce Book 2 is an “example of relating zone categories to
17 housing types and income levels served in higher-cost communities.” Id. at 33.¹⁴ It shows
18 that extremely low, very low, and low-income levels are all served by low-rise multifamily
19 and mid-rise multifamily homes. Table 8 in the LCA Supplement was done using
20 Commerce Book 2 Exhibit 13. Ex. 130 at 343. It shows extremely low, very low, and low-
21 income levels are served by medium-low, medium-high, and high-density multifamily
22

23
24 ¹⁴ Table 13 is the same in both Book 2 versions. Ex. 282 at 33, Ex. 321 at 35.

1 homes. It is important to note that Mercer Island has only a few zones that accommodate
2 development at densities that support affordable housing in general. Column 3 in Table 2
3 identifies four: TC, MF-2, MF-2L, and MF-3. Ex. 130 at 338. Based on factors in Mercer
4 Island, for these three multifamily density levels, the assumed affordability level used in
5 Table 8 is 0-120% AMI and PSH. Commerce explicitly recognizes that local conditions are
6 to be used in the analysis. Ex. 282 at 32. Even when aggregated, the City is still using the
7 land capacity needed for each income level to determine if there is sufficient land capacity.
8

9 To support its argument, Futurewise conflates LCA with removal of barriers and
10 gaps in funding. Petitioners' Brief at 5. Commerce has kept this analysis distinctly separate
11 as does the GMA in RCW 36.70A.070(2)(c) and 36.70A.070(2)(d)(ii). Futurewise also
12 misleads the Board by claiming that PSH is "subject to special locational restrictions."
13 Petitioners' Brief at 7-8. In fact, the MICC provides that "special needs group housing",
14 which includes PSH, has no spacing or intensity regulations. MICC 19.06.080(A). There
15 are also no spacing or intensity regulations in the MICC for income levels as allocated in
16 CPP H-1. Futurewise also misleads the Board by claiming that "transitional housing is a
17 land use that is allowed by conditional use permit in a majority of zones with one mile of
18 transit." Petitioners' Brief at 7. The full quote is "Social service transitional housing is a
19 land use that is allowed by conditional use permit in a majority of zones within one mile of
20 transit." Ex. 130 at 345. The full quote informs the Board that the LCA Supplement was
21 referring to "social service transitional housing," which is a defined term in the MICC and
22 does not include PSH. Ex. 7 at 2.
23
24

25 RESPONSE BRIEF - 15
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1 The City's LCA analysis is in accordance with current guidance from Commerce, is
2 in compliance with RCW 36.70A.020(4) and RCW 36.70A.070(2)(c), and is consistent with
3 CPP H-1. Futurewise has not provided a "corrected" LCA analysis for either the LCA
4 Supplement or Emergency Housing that would lead to substantially different land capacity
5 numbers. The City's LCA analysis has met the purpose and minimum requirements of RCW
6 36.70A.020(4) and 36.70A.070(2)(c).¹⁵ Additionally, Futurewise made no arguments in its
7 Petitioners' Brief regarding inconsistency with CPP H-3(a) under its Issue 1. Any such
8 argument should be considered abandoned under WAC 242-03-590(1).
9

10 **Issue 2. Did the City fail to document programs and actions needed to achieve housing**
11 **availability including gaps in local funding, barriers such as development regulations,**
12 **and other limitations and fail to adopt and implement policies to improve effectiveness**
13 **and address gaps in partnerships, policies, and dedicated resources to meet the City's**
14 **housing needs? No.**

15 A. In Table 2 of its Housing Element, the City documents programs and actions
16 to achieve housing availability after performing analysis in compliance with
17 the GMA and as guided by Commerce.

18 The City followed Commerce's Book 2 guide on how to make adequate provision
19 for all economic segments of the community by documenting programs and actions to
20 achieve housing availability. This included documenting gaps in local funding and barriers
21 to housing production. RCW 36.70A.070(2)(d)(ii), Ex. 130 at 104, Ex. 282 at 51-58.
22 Following this guidance resulted in Table 2 of Mercer Island's Housing Element. Ex. 130

23 ¹⁵ See, *Seattle-King County Association of Realtors v. King County*, CPSGMHB, No. 04-3-0028, Final
24 Decision and Order (May 31, 2005) at 11-12.

1 at 106.

2 Commerce Book 2 first required the City to review production trends to determine
3 if barriers exist. Ex. 282 at 51. Table 2's Columns 1–3, (housing type, share of existing
4 housing units, likelihood barrier exists) show the City's results. Ex. 130 at 106. Second, the
5 City gathered information to determine what kind of barriers exist (development
6 regulations, processes, environmental constraints, and gaps in local funding). Id. at
7 53–58. Column 4 in Table 2 lists potential barriers for each of the housing types listed in
8 Column 1 and includes funding gaps as a potential barrier for “income restricted units,
9 permanent supportive housing, and Emergency Housing” (together “Income Restricted
10 Units”). Ex. 130 at 106. Third, in Column 5 the City identified and documented appropriate
11 programs and actions to overcome each barrier identified. Ex. 282 at 61, Ex. 130 at 106.

13 Futurewise faults the City for listing “comply with statewide legislation” as an action
14 in Column 5 and incorrectly dismisses these concrete actions as “generic statements.”
15 Petitioners' Brief at 10. Table 2 lists the specific legislation passed and how it amended the
16 GMA in relation to providing adequate housing. Referring to the specific legislation
17 provides detail to Table 2 without duplicating the lengthy legislation. Also, contrary to
18 Futurewise's assertion,¹⁶ for Income Restricted Units, Table 2 lists eight other actions to be
19 taken in addition to statutory compliance.

21 The chart below lists the Table 2 actions and the corresponding Book 2 strategies to
22 overcome barriers. Ex. 282 at 62– 65.

23
24 _____
¹⁶ Petitioners' Brief at 10.

Table 2	Book 2/Exhibit 26
1. Increase land capacity to address capacity shortfall identified in the City’s LCA Supplement	Upzone to address limited land availability.
2. Maintain membership in ARCH and continue to contribute to ARCH Housing Trust Fund	Surplus land and other opportunities. [RCW 39.33.015] Partner with local housing providers. Coordinate with 5-year homelessness plans.
3. Evaluate potential local revenue sources for affordable housing	Local option taxes, fees and levies. [RCWs 82.14.530, 84.52.105, 82.46.035, 67.28.150-160, and 82.14.460]
4. Evaluate an affordable housing fee-in-lieu program	Alternative development standards for affordable housing.
5. Use incentives to reduce the per-unit cost for affordable housing	Strategic marketing of housing incentives. Fee waivers for affordable housing. [RCWs 82.02.060 and 36.70A.540] Density bonuses for affordable housing. Multifamily housing tax exemption. [Ch. 84.14 RCW]
6. Coordinate efforts with providers, developers, and government agencies	Partner with local housing providers.

Futurewise argues, without citation to the GMA or CPPs, that the City is in violation for not including details such as “establish funding levels necessary to meet projected housing needs.” Petitioners’ Brief at 10. The GMA requires cities to document “gaps in local funding.” RCW 36.70A.070(2)(d)(ii). It does not require cities to calculate funding levels to fill the gaps. Funding is an issue that is too large for one city. “Meeting housing needs

1 will require actions, including commitment of substantial financial resources, by a wide
2 range of private for-profit, nonprofit, and government entities.” Ex. 276 at 45. Cities are not
3 the main funding source for affordable housing; most affordable housing funding comes
4 from state and federal resources. Ex. 282 at 57. Cities need to document the gaps, not be the
5 source for detailed calculations. Commerce did include an “optional” method for calculating
6 a “rough estimate of funding gaps”, but did not include this in the recommended guidance.
7 Ex. 282 at 58–59.

8
9 Futurewise cites to Book 2’s checklist in Appendix B of “local option tools for
10 addressing affordable funding gaps” and incorrectly concludes Mercer Island failed to
11 consider these resources in its Comprehensive Plan.¹⁷ This checklist provides cities with the
12 statutory authority for taking actions to overcome barriers. Ex. 282 at 120 – 121. The City
13 has added the statutory authority to its chart above to show the City’s consideration in Table
14 2 of the statutory authority tools from the Commerce checklist.

15
16 **B. Ordinance No. 24C-18 fills a land capacity deficit and removes barriers to**
housing availability.

17
18 Having found a deficit of 143 units in multifamily and mixed-use zones where
19 affordable housing is most likely to be located,¹⁸ the City Council adopted Ordinance No.
20 24C-18. This ordinance took the following actions to fill the land capacity deficit, remove
21 barriers, and help achieve housing availability on Mercer Island:

22
23
24 ¹⁷ Petitioners’ Brief at 11.

¹⁸ Ex. 130 at 344-345.

- Increased multifamily and mixed-use development capacity in the Town Center by raising the maximum building height from five to seven stories in the TC-5 and TC-4 Plus subareas, and from four to five stories in the TC-4 subarea;
- Increased the required percentage of affordable housing in new development in Town Center from 10 percent to 15 percent; and
- Deepened the affordability requirement for affordable housing units in new development in Town Center from 60 percent to 50 percent of AMI for rental housing and from 90 percent to 80 percent of the AMI for ownership housing.

Ex. 134 at 3, Ex. 135.

Futurewise misinterprets Ordinance No. 24C-18 and states that the affordable housing incentive it amended in MICC 19.11.040 cannot be used for housing affordable to households earning 0-30% AMI. Petitioners' Brief at 13. This code provision, however, is inclusive of anything below the stated percentage of 50% AMI for rental units. For example, in the case of a 7-story building, under MICC 19.11.040(C) the maximum percentage of AMI is 50% for rental units. Units proposed for anything 0-50% AMI would meet the code's requirement and get the bonus floors. The threshold was lowered from 60% AMI to 50% AMI with the intent to increase the depth of affordable units in private development projects.

Futurewise argues that because Mercer Island has incentivized affordable housing only in the Town Center portion of the City it is violating "GMA's intent." Petitioners' Brief at 12. Futurewise provides no citation to RCWs or CPPs for this assertion, and the argument ignores that the City's assigned Housing Needs in the CPPs is 1239/237. Mercer Island is not Bellevue assigned 35,000/6,688 or even Shoreline assigned 13,330/2547.¹⁹ Mercer

¹⁹ Ex. 276 at 39-40.

1 Island’s assignment is to reach, by the year 2044, 1239/237, and it has documented that it
2 will fill the deficiency of 143 units by the methods adopted in Ordinance No. 24C-18.

3 Futurewise ignores that the City Council voted to place these affordable housing
4 incentives where they are most likely to be used in Mercer Island—Town Center—to
5 construct multi-unit housing, such as apartment buildings. Ex. 282 at 30. Commerce
6 guidance recognizes that “to be consistent with GMA goals, these increases in density and
7 housing types should **first** be focused around areas with jobs, transit, and infrastructure to
8 allow more people close access to these community services.” Emphasis added. Id. at 40.
9 Town Center is located on the north end of Mercer Island and includes residential, retail,
10 commercial, office, mixed-use and multifamily developments. Ex. 130 at 84. Town Center
11 is also near the high-capacity transit station (“transit station”) that is anticipated to open in
12 the future and easily serve Town Center residents. Ex. 130 at 140. Town Center is located
13 just south of the transit station. The ½ mile radius around the transit station includes nearly
14 the entire Town Center, and the ¼ mile radius includes the northern half of the Town
15 Center.²⁰
16
17

18 The upzoning in Ordinance 24C-18 was one early action of many to come. The City
19 explicitly recognizes the need to not isolate or segregate affordable housing. Housing
20 Element policies 1.7 and 1.8 address increasing class, race, and age integration by “fairly
21 disbursing affordable housing opportunities” and “discouraging neighborhood
22

23 _____
24 ²⁰ Ex. 130 at 102 shows Town Center in orange and abutting I-90. Ex. 320 at 5 shows the ¼ mile and ½ mile
25 radius around the transit station and I-90 running through same.

1 segregation.”²¹ The Comprehensive Plan’s goals and policies have a horizon year of 2044
2 and work to meet all the goals will continue, be monitored, and be revised until then.

3 C. The Comprehensive Plan is consistent with CPP H-12 and specifically the
4 suggested strategies in the CPPs for same.

5 The CPPs include “Suggested Strategies” for cities in response to CPP H-12. Ex.
6 276 at 90-91. Futurewise refers to these as “concrete actions.” Petitioners’ Brief at 11. The
7 City has included these concrete actions in its Housing Element policies. The following is a
8 chart that includes the suggested strategy for CPP H-12 and the corresponding policy in the
9 City’s Housing Element.

10 CPP Suggested Strategies for H-12	11 Housing Element’s Affordable Housing policies.²²
12 Reduce permit timelines and costs for 13 affordable housing	2.2.1 review to reduce permit review times and costs for housing affordability. 2.5.6 reduce or waive permit fees for affordable units.
15 Facilitate partnerships between community 16 based organizations and affordable 17 housing developers for affordable developments.	2.10 – 2.11 Continue to participate in ARCH and evaluate increased per capita contribution.
18 Retooling a Multifamily Tax Exemption	2.5.4 Multi-family Tax Exemption linked to substantial additional affordability requirements.
20 Shifting incentive programs to 21 accommodate different area median income levels	2.5.1 Affordable housing incentives that require units at varying income levels for new construction.

22
23
24 ²¹ Ex. 130 at 112.

²² Ex. 130 at 112-114.

1 D. Actions taken to “make adequate provisions” for housing needs may be taken
2 after the periodic update deadline unless they involve changes to development
3 regulations for meeting land capacity.

4 For Issue 2 and repeatedly thereafter, Futurewise erroneously asserts that the City
5 has violated the GMA and CPPs because it has not implemented all the actions that flow
6 from the Comprehensive Plan by the deadline for the periodic update, December 31, 2024.
7 Futurewise relies on RCW 36.70A.130(1) and (5)(a) for its December 2024 deadline
8 arguments. Petitioners’ Brief at 9, 16, 22, 25, 29, 31, 32.

9 The deadline in RCW 36.70A.130(1) tells cities to revise their comprehensive plans
10 and development regulations to “ensure the plan and regulations comply with the
11 requirements of this chapter according to deadlines in subsections (4) and (5) of this
12 section.” The deadlines in subsection 4 have passed. The deadline in subsection 5 for Mercer
13 Island was December 31, 2024. What Futurewise does not analyze in its Prehearing Brief is
14 that in 2022, subsection 9 was added to RCW 36.70A.130 by Engrossed Second Substitute
15 House Bill 1241 (“E2SHB 1241”).²³

16
17 Effective June 9, 2022,²⁴ RCW 36.70A.130(9)(a) gives larger counties and cities
18 within them “subject to planning deadlines established in subsection (5)” a longer period of
19 time to implement their comprehensive plans. These cities must provide Commerce with an
20 “implementation progress report detailing the progress they have achieved in implementing
21

22
23 ²³ Engrossed Second Substitute House Bill 1241, Chapter 192, Laws of 2022. The City requests the Board
24 take Official Notice of ESSHB 1241 pursuant to WAC 242-3-640(1)(b) (capable of immediate and accurate
25 demonstration from generally accepted authority).

26 ²⁴ Id. at 1.

1 their comprehensive plan five years after the review and revision of their comprehensive
2 plan.” RCW 36.70A.130(9)(a). The Implementation Progress Report must include
3 implementation of previously adopted changes to the housing element and any effect on
4 housing affordability and availability, permit processing timelines, and greenhouse gas
5 requirements. RCW 36.70A.130(b). If a city “has not implemented any specifically
6 identified regulations, zoning, and land use changes, or taken other legislative or
7 administrative action necessary to implement any changes in the most recent periodic update
8 in their comprehensive plan by the due date for the implementation progress report,” the
9 city must identify the need for such action in the implementation progress report, adopt a
10 work plan, and complete all work necessary within two years. RCW 36.70A.130(9)(c).

12 It is plain from its text that RCW 36.70A.130(9) creates a requirement for
13 Implementation Progress Reports, and that the first report is not due from Mercer Island
14 until December 2029. Contrary to Futurewise’s arguments, the City is not required to finish
15 implementing its entire Comprehensive Plan by December 31, 2024. The statute is not
16 ambiguous on this point; it is not subject to more than one reasonable interpretation. *Howard*
17 *v. Pinkerton*, 26 Wn. App. 2d 670, 675, 528 P.3d 396, 399 (2023), citing *City of Seattle v.*
18 *Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009). Statutes that are unambiguous are
19 not construed for their intent. *Whatcom Cnty. v. City of Bellingham*, 128 Wn. 2d 537, 546,
20 909 P.2d 1303, 1308 (1996).

22 Should, however, the Board find ambiguity, the goal is to give effect to the
23 legislature's intent by first looking at the statute’s plain language and ordinary meaning,
24

1 reviewing the GMA as a whole, and harmonizing the provisions by reading them in the
2 context of related provisions and GMA as a whole. *Quadrant Corp. v. State Growth Mgmt.*
3 *Hearings Bd.*, 154 Wn. 2d 224, 238–39, 110 P.3d 1132, 1139–40 (2005). “Statutes should
4 receive a sensible construction, such as will affect the legislative intention, and, if possible,
5 so as to avoid unjust or absurd consequences.” *Whitehead v. Dep’t of Soc. & Health Servs.*,
6 92 Wn. 2d 265, 269, 595 P.2d 926, 929 (1979), citing *State ex rel. Thorp v. Devin*, 26 Wn.2d
7 333, 173 P.2d 994 (1946). No portion of the statute should be rendered meaningless or
8 superfluous. *Howard*, 26 Wn. App. 2d at 675, citing *Spokane County v. Dep’t of Fish &*
9 *Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018).

11 Under RCW 36.70A.130(9), the City has at least five years to implement its
12 Comprehensive Plan. To interpret RCW 36.70A.130 otherwise makes meaningless the five-
13 year Implementation Progress Report. There is no reason to wait five years to check on
14 progress if comprehensive plans have to be fully implemented by December 31, 2024.

15 Commerce in Book 2 explains what must be implemented by the comprehensive
16 plan periodic update deadline and what may be implemented after pursuant to RCW
17 36.70A.130(9). Ex. 282 at 102-103. In short, implementing regulations to provide sufficient
18 land capacity must be adopted by the periodic update deadline and implementing regulations
19 to make adequate provision for all economic segments of the community may be adopted at
20 a later date.

22 The GMA requires counties and cities required or choosing to plan under
23 RCW 36.70A.040 to adopt a comprehensive plan including a housing
24 element that identifies sufficient capacity of land for all housing needs. RCW
25 36.70A.115 further clarifies that those fully planning jurisdictions shall

1 ensure that, taken collectively, the comprehensive plan and development
2 regulations provide sufficient land capacity to accommodate their allocated
3 housing need. Under RCW 36.70A.130(1)(a), comprehensive plans and
4 development regulations must be compliant with the GMA when they are
5 adopted at the periodic update.

6 ...

7 GMA also requires counties and cities to make adequate provisions for
8 existing and projected needs for all economic segments of the community

9

10 Therefore, while GMA-compliant comprehensive plans and implementing
11 development regulations (which must provide sufficient land capacity) must
12 be adopted by the periodic update deadline, actions taken to “make adequate
13 provisions for a jurisdiction’s housing needs that do not involve changes to
14 the implementing development regulations for meeting capacity may be
15 taken after the periodic update deadline. Types of actions falling under this
16 category include, for example implementing regulation changes to remove
17 barriers that may be contributing to market inactivity, or modifying
18 permitting or fee structures to incentivize certain housing types to meet
19 income needs.²⁵

20 Futurewise is incorrect when it asserts that December 31, 2024, was the deadline for
21 Mercer Island to update “its development regulations to remove barriers to housing
22 availability.”²⁶ Petitioners’ Brief at 13. Instead, GMA provides the City the time needed to
23 study and implement the necessary provisions to achieve the goals and policies in its
24 Comprehensive Plan.

25 **Issue 3. Was the City required to adopt a subarea plan for the Mercer Island transit
26 station area by December 31, 2024? No.**

A. The vast majority of the citations by Futurewise do not require a subarea plan
at all, much less by December 31, 2024.

Petitioners’ Brief cites to a number of CPPs, MPPs, and RCWs that do not

²⁵ Ex. 282 at 102 - 103.

1 require adoption of a subarea plan, by their plain language. Petitioners’ Brief at 16-18. The
2 gist of Petitioners’ argument is that the City was under an obligation to rezone the area north
3 of the transit station. Petitioners’ Brief at 16.²⁷ The law and the record simply does not
4 support Futurewise’s contention that this is required.

5 With respect to the CPPs cited by Petitioners, CPP H-3(i) requires an inventory and
6 analysis of housing development capacity within a half-mile watershed of high-
7 capacity/frequent transit service. Ex. 276 at 41- 42, Ex. 320 at 5. This CPP does not require
8 subarea plans—just that a city study the area around high-capacity/frequent transit service.
9 CPP H-16 requires jurisdictions to “expand the supply and range of housing types, including
10 affordable units, at densities sufficient to maximize the benefits of transit investments
11 throughout the county.” Ex. 276 at 46. Similarly, CPP H-17 requires jurisdictions to support
12 the development and preservation of income-restricted affordable housing within walking
13 distance to planned or existing high-capacity/frequent transit. *Id.* Neither of these CPPs
14 require a subarea plan by their plain language. The City’s Housing Element policy 2.1,
15 however, is consistent with H-16 and H-17 with its support of development of “income-
16 restricted housing within walking distance” of high-capacity transit. Ex. 130 at 112.
17 Futurewise also cites a white paper co-prepared by Petitioner *Futurewise* to support the
18 allegation that densities within a half-mile of the transit station should be at least 50 units
19 per acre. Petitioners’ Brief at 16, footnote 52. Unlike a CPP, the City is not required to adopt
20
21
22

23 ²⁷ Indeed, Futurewise alleges that rezone should have been to a density of 50 units per acre, but without any
24 citation to binding authority either in law or in the record. Instead, Futurewise cites to a Futurewise
25 sponsored white paper.

1 a comprehensive plan consistent with a Futurewise white paper. *See, Seattle-king County*
2 *Association of Realtors, Petitioner v. King County, Respondent, CPSGMHB, No. 04-3-*
3 *0028, Final Decision and Order (May 31, 2005) at 13.*

4 With respect to MPPs cited by Petitioners, all but one do not require adoption of a
5 subarea plan. MPP-DP-22 requires jurisdictions to “[p]lan for densities that maximize
6 benefits of transit investments in high-capacity transit station areas that are expected to
7 attract significant new population or employment growth.” Ex. 322 at 77. This MPP does
8 not mention subarea plans, but Housing Element policies 1.9 and 2.1 do seek to increase
9 housing choices in areas with access to high-capacity transit. Ex. 130 at 112. MPP-T-19 also
10 does not mention subarea plans. Rather, it requires jurisdictions to “[d]esign transportation
11 programs and projects to support local and regional growth centers and high-capacity transit
12 station areas.” Ex. 322 at 106. The City has indeed planned for this, as demonstrated within
13 Transportation Element Goal 4 that focuses on providing transportation choices through a
14 range of transportation facilities and services. Policy 4.1 includes maintaining convenient
15 transit connections to activity centers expanding demand-responsive transit. Ex. 130 at 120.
16 Further, Futurewise does not provide support for its allegation that improvements
17 connecting the western transit center entrance to areas within a half-mile of the station are
18 required. Petitioners’ Brief at 19. MPP-RSG-8 also does not require subarea planning, but
19 it does focus development near transit stations to achieve regional goals. Ex. 322 at 43.
20 Housing Element policy 2.1 is consistent with MPP-RSG-8. Ex. 130 at 112.
21
22
23
24

1 None of the GMA provisions cited by Petitioners (RCW 36.70A.020(3); RCW
2 36.70A.020(4); RCW 36.70A.070; RCW 36.70A.070(1); RCW 36.70A.070(6)(a); RCW
3 36.70A.100; RCW 36.70A.108; RCW 36.70A.120; RCW 36.70A.130(1) and (5)(a), RCW
4 36.70A.210, or RCW 36.70A.290(2)) expressly require adoption of a subarea plan around
5 light rail stations. Indeed, RCW 36.70A.020(3), 36.70A.020(4), RCW 36.70A.070, RCW
6 36.70A.108, and RCW 36.70A.120, while mentioned in Issue 3, are never briefed within
7 the discussion of Issue 3. Petitioners’ Brief at 15-21.

8
9 B. Only one MPP requires adoption of a subarea plan, but does not require action
by December 31, 2024.

10 Only MPP DP-Action 8 requires adoption of a subarea plan, but it does not state that
11 subareas must be in effect by December 31, 2024. Ex. 322 at 80. PSRC clearly knows how
12 to establish deadlines. Cf. MPP-DP-Action 2 (“In 2021, PSRC will convene a working
13 group...), Ex. 322 at 80; MPP-Ec-Action-5 (“Cities and counties will update (or adopt) their
14 economic development element...when conducting the expected 2024 comprehensive plan
15 update),” Ex. 322 at 97. As evidenced by its very title, VISION 2050 is a long-term planning
16 document—designed to be implemented over time.²⁸ The City previously analyzed for Issue
17 2.D that only regulations providing sufficient land capacity were required by December 31,
18 2024—other regulations making adequate provisions for housing needs may be taken *after*
19 the periodic update deadline.
20
21

22 PSRC’s lack of comment on a subarea plan also supports that no deadline has been
23

24 ²⁸ See e.g. Ex. 322 at 1-2.

1 breached by the City. PSRC provided thorough comments to the City regarding the draft
2 Comprehensive Plan, and with respect to MPP DP-Action 8 in particular, PSRC did not
3 mention a subarea plan:

4 The [City's comprehensive] plan should include policies to support
5 coordination between Town Center development and the light rail station,
6 which could be accomplished, for example, by updating the Town Center
7 Plan, providing additional policies associated with Land Use Goals 10 and
8 11, and/or including a Town Center/station area map.

9 Ex. 100 at p. 68. This is precisely what the City did in focusing its efforts on housing in the
10 Town Center and tying in transportation goals to maximize the light rail station. *See e.g.* Ex.
11 130 at 120 and Ex. 135 at 4-13.

12 C. Petitioners' Issue 3 is effectively moot due to recent legislation.

13 Finally, Issue 3 appears to be effectively moot, due to the enactment of 3SHB 1491
14 in the recently concluded 2025 legislative session.²⁹ This bill establishes *de facto* subarea
15 plans by providing a framework for growth around “station areas,” defined as a bus station
16 area or a rail station area. 3SHB 1491, Sec. 2.³⁰ Rail station areas are all lots wholly within
17 an urban growth area that are “[f]ully or partially within one-half mile walking distance of
18 an entrance to a train station with a stop on a light rail system...” *Id.* Within such rail station
19 areas, cities are required to permit the siting of multifamily housing where residential uses
20 are permitted. 3SHB 1491, Section 3. Further, within rail station areas, cities must allow
21 new residential and mixed-use development with a transit-oriented density of at least a 3.5
22

23 ²⁹ The City asks the Board to take Official Notice of 3SHB 1491 pursuant to WAC 242-03-640((1)(b)).

24 ³⁰ As of the drafting of this brief, many portions of 3SHB 1491 have not yet been codified, therefore the City
25 will reference the bill's section numbers for clarity of reference.

1 floor area ratio, on average. *Id.* In effect, 3SHB 1491 establishes *de facto* subarea plans
2 within rail station areas at exactly the same distance (half-mile walkshed) that Futurewise
3 advocates for. 3SHB 1491 achieves the policy goal sought by Futurewise in Issue 3 and sets
4 a deadline for Mercer Island to do so by December of 2029. 3SHB 1491 at Sec. 3(15). The
5 City does not believe Futurewise has met its burden of proof on Issue No. 3, but as a practical
6 matter, the City recognizes it must comply with 3SHB 1491.

7 **Issue 4. Was the Affordable Housing Committee’s refusal to review the City’s draft**
8 **comprehensive plan a violation of CPP H-26 by the City? No.**

9 Futurewise fails to meet its burden of proof that the Affordable Housing
10 Committee’s (“AHC”) refusal to review Mercer Island’s timely submitted draft
11 Comprehensive Plan constitutes a GMA violation on the part of the City. By its charter,
12 AHC is an advisory Committee that makes recommendations only. Ex. 300. CPP H-26
13 gave it review and comment authority: “The Growth Management Planning Council
14 [“GMPC”] or its designee [AHC] will conduct a housing-focused review of all King
15 County jurisdictions’ draft periodic comprehensive plan updates for alignment with the
16 Housing Chapter goals and policies prior to plan adoption and provide comments.” Ex.
17 276 at 48. The explanation of the purpose of AHC’s review in a) – d) provides no additional
18 authority to AHC. *Id.*

19
20
21 The City submitted its draft Housing Element to the AHC on March 15, 2024, well
22 in advance of the periodic update deadline. Ex. 272 at 2. AHC rejected the submittal
23 entirely demanding a number of other items from the City before AHC would even start
24 review and informed Mercer Island that once it submitted the additional material for

1 review, it would take AHC two to five months to send the City a comment letter. Ex. 272
2 at 1. Futurewise Executive Director and AHC Vice Chair Alex Brennan, stated that the
3 AHC expected cities to incorporate AHC feedback into their comprehensive plan drafts
4 before city council adoption,³¹ and, acknowledging the lengthy process, he recommended
5 cities breach the statutory deadline of December 31, 2024 for periodic updates, in favor of
6 submitting to the AHC process. Ex. 299 at pdf 55, 58, and 64. Additionally, the AHC took
7 the position that until AHC comments were incorporated, a city’s comprehensive plan
8 would be deemed noncompliant. Ex. 276 at pdf 1.
9

10 Faced with the conundrum of a looming statutory deadline, lengthy review by
11 AHC, and claims of required incorporation, the City took stock of its options. The City
12 inquired with its Sound Cities Association (“SCA”) contact, as SCA staff is assigned to
13 advise GMPC city representatives. Ex. 276 at pdf 1-2. The result of that inquiry was the
14 realization by the City that CPP H-26 does not clearly provide that cities must participate
15 in AHC’s review process, does not require cities to incorporate AHC’s feedback into
16 comprehensive plans prior to adoption, and does not give authority to AHC to waive
17 statutory deadlines. Ex. 276 at pdf 3-5, see also Ex. 277 at 1. Indeed, AHC staff guided the
18 City to the AHC’s Housing-focused Draft Comprehensive Review Guide,³² which
19 provides that “[a]ll King County jurisdictions *should* participate in the AHC’s housing-
20 focused comprehensive plan review program, as established by CPP H-26, which is
21
22

23
24 ³¹ Ex. 276 at pdf 1 and 3; Ex. 299 at pdf 24-25 and 64; Ex. 273 at 1.

25 ³² Ex. 272 at 1.

1 intended to support jurisdictions in strengthening alignment of their comprehensive plans
2 with the CPP Housing Chapter during the periodic update.” Ex. 276 at p. 4. Finally, any
3 mandatory obligation appears to be on AHC, as the CPP states that as GMPC’s designee,
4 **AHC** will review each jurisdiction’s comprehensive plan. Ex. 276 at p. 55. Again, Mercer
5 Island attempted to go through this review and AHC refused Mercer Island’s submission
6 twice. Ex. 272 at 1, Ex. 273, Ex. 275.

7
8 If the Board finds this was an error by the City, Futurewise is incorrect that it is a
9 substantive error, rather than a procedural one. Petitioners’ Brief at 23. The plain language
10 in CPP H-26 is unambiguous that the City is not required to adopt the AHC’s feedback
11 into its Comprehensive Plan. Petitioners’ Brief on this front is woefully short on actual
12 legal citations, relying instead upon conjectures about the potential results of an AHC
13 review that never occurred and the incorrect assumption that cities have to incorporate
14 AHC recommendations. Petitioners’ Brief at 23. Needless to say, unsupported conjecture
15 is insufficient to meet Futurewise’s high burden of proof in this case. *Black Diamond*
16 *Trees, Roads, Envmt., Engagement Team (BD TREE) v. Black Diamond*, CPSGMHB Case
17 No. 19-3-0013, Final Decision and Order (FDO) (Jan. 6, 2020), at 3 (it is insufficient for
18 Petitioners to merely disagree with the City’s actions, or to identify technical problems in
19 the process leading up to the adoption of the challenged ordinances).

20
21 Finally, the City notes that none of the statutory references by Futurewise with
22 respect to this issue—RCW 36.70A.020(4), RCW 36.70A.070, RCW 36.70A.070(2), RCW
23 36.70A.100, RCW 36.70A.120, RCW 36.70A.130(1) and (5)(a), RCW 36.70A.210, or

1 RCW 36.70A.290(2)—expressly require the City to submit its comprehensive plan to the
2 GMPC or designee AHC. Indeed, RCWs 36.70A.020(4), RCW 36.70A.070, RCW
3 36.70A.070(2), and RCW 36.70A.290(2) are listed in the issue statement, but not briefed at
4 all by Futurewise with respect to this issue.

5 As a practical matter, the City will continue to attempt to have its Comprehensive
6 Plan reviewed by AHC. Ex. 275. However, the fact that AHC refused to even consider the
7 draft materials the City submitted in March of 2024, or the adopted plan submitted in
8 January 2025, does not create a procedural, much less substantive error, on the City’s
9 behalf. Futurewise has not met its burden of proof on this issue.
10

11 **Issue 5: Are the City’s adopted Comprehensive Plan and development regulations**
12 **consistent with the eleven CPPs cited by Futurewise? Yes.**

13 A. The City’s Land Use and Housing Element prioritize the need for housing
14 affordable to households with zero to 30 percent of AMI consistent with CPP H-2.

15 CPP H-2 provides for cities to “[p]rioritize the need for housing affordable to
16 households less than or equal to 30 percent area median income (extremely low-income) by
17 implementing tools such as: Increasing capital, operations, and maintenance funding;
18 adopting complementary land use regulations; fostering welcoming communities, including
19 people with behavioral health needs; adopting supportive policies; and supporting
20 collaborative actions by all jurisdictions.” Ex. 276 at 41.

21 The City’s Land Use Element and Housing Element include policies and goals that
22 are consistent with CPP H-2. Many of these goals and policies generally support affordable
23 housing and are thus necessary for consistency with CPP H-2. Other goals and policies are
24

1 specifically directed at households with 0 – 30% AMI and are discussed below. Housing
2 Element policy 1.1 provides “[a]ccommodate the Mercer Island housing growth target and
3 housing needs shown in Table 1” Table 1³³ includes the Housing Needs assigned to the
4 City by income level pursuant to CPP H-1. Zero to 30% AMI make up 517 of the 1239 new
5 housing units needed by 2044. Housing Element policy 1.2.5³⁴ defines extremely low-
6 income households as being at or below 30% AMI, and policies 1.3.3.1 to 1.3.3.3³⁵ provide
7 specifically for implementation strategies to increase the supply of new income-restricted
8 units for extremely low-income households and PSH, and coordination efforts among
9 providers, developers, and government agencies. Housing Element Goal 2 is the Affordable
10 Housing goal.³⁶ The policies in 2.3, 2.5, 2.5.3, 2.8, and 2.10–2.13 are directed at households
11 with 0 to 30% AMI. Ex. 130 at 113-114. These policies focus on decreasing barriers and
12 promoting access to affordable homeownership, encouraging the construction of new
13 permanent income-restricted housing through approaches like incentives for the
14 development of housing units affordable to extremely low-income households, prioritizing
15 the use of local and regional resources for income-restricted housing for extremely low-
16 income households, and continuing to participate in A Regional Coalition for Housing
17 (ARCH) as a key strategy for addressing affordable housing needs.
18
19

20 These policies are directed at households with extremely low incomes and are
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³³ Ex. 130 at 103.

24 ³⁴ Id. at 111.

25 ³⁵ Id. at 111.

26 ³⁶ Id. at 112.

1 consistent with CPP H-2. Futurewise does not meet its burden of proof to show true
2 inconsistency, as defined under the applicable caselaw. Instead, Futurewise merely
3 disagrees with the strategies chosen by the City. This is insufficient to meet Futurewise’s
4 burden of proof.

5 B. The City’s Housing Element contains policies that include cooperation with
6 government and other entities to support achievement of the CPP Housing
7 Chapter pursuant to CPP H-7.

8 The City has included in its Housing Element, Goal 2 - Affordable Housing, policies
9 consistent with CPP-7. Policies 2.10 and 2.11 call out cooperation with ARCH,³⁷ which
10 includes King County and fifteen cities in east King County. ARCH members have a
11 common goal of ensuring availability of housing that meets the “needs of all income levels.”
12 Ex. 278 at 1. The explicit purpose of ARCH is to cooperatively formulate “affordable
13 housing goals and polices and to foster efforts to provide affordable housing by combining
14 public funding with private-sector resources.” Id at 1 – 2. ARCH is used by its cities to
15 support implementation of the GMA goals and CPPs relating to affordable housing. Id. at
16 1. The ARCH cities have determined that the “most efficient and expeditious way” for them
17 to address affordable housing needs “is through cooperative action” through ARCH. Id.
18

19 The Housing Element also includes policies 2.12 and 2.13³⁸ that specifically call for
20 the City to develop and foster partnerships with government agencies and housing service
21

22
23
24 ³⁷ Exhibit 130 at 113-114

³⁸ Ex. 130 at 114.

1 providers to address barriers to the production of affordable housing. Housing policy 6.3³⁹
2 also emphasizes partnering with state, regional, and countywide agencies to periodically
3 track policies in the Housing Element.

4 These Housing Element policies are consistent with CPP H-7, and Futurewise has
5 not met its burden of proof to show otherwise. Ex. 276 at 43.

6 C. Consistent with CPP H-8, the City’s Comprehensive Plan contains policies that
7 call for collaboration with populations most disproportionately impacted by
8 housing cost burdens.

9 The Comprehensive Plan recognizes that the eleventh statewide planning goal
10 includes “encouraging the involvement of citizens in the planning process, including the
11 participation of vulnerable populations and overburdened communities.” Ex. 130 at 13,
12 RCW 36.70A.020(11). The RDI Evaluation the City prepared as part of its Comprehensive
13 Plan planning process found that renting households are more cost-burdened than
14 homeowners by 20 percent, households of color are 8% more likely to be housing cost-
15 burdened, and Black or African American households in Mercer Island are cost-burdened
16 at double the rate of other racial groups. Ex. 130 at 107.

17
18 Acknowledging the facts from the RDI Evaluation, the City included targeted
19 collaboration and public outreach policies in the Comprehensive Plan. Housing Element
20 policy 3.1.5 calls for undoing racially disparate impacts by prioritizing actions that “include
21 intentional public outreach during the implementation of the Comprehensive Plan.” Ex. 130
22 at 114. Housing policy 3.3 through 3.5 likewise seeks partnerships with impacted
23

24 ³⁹ Ex. 130 at 116.

1 communities and prioritize the needs and solutions heard through those partnerships. Ex.
2 130 at 114. Again, Futurewise fails to meet its burden of proof with respect to this allegation
3 as the City’s policies are consistent with CPP H-8. Ex. 276 at 44.

4 D. Consistent with CPP H-9, the City’s Comprehensive Plan contain a goal and
5 policies that call for intentional, targeted actions to repair harm to Black,
6 Indigenous, and other People of Color households from past and current racially
7 exclusive and discriminatory land use and housing practices.

8 CPP H-9 seeks actions that repair harm from past exclusion and discriminatory land
9 use and housing practices. Id. Housing Element Goal 3, Racially Disparate Impacts, is
10 adopted to “undo identified racially disparate impacts, avoid displacement, and eliminate
11 exclusion in housing so that every person has the opportunity to thrive in Mercer Island
12 regardless of their race.” Ex. 130 at 114. Housing policies 3.1.1 through 3.1.5 prioritize
13 actions that will increase affordable housing, expand tenant protections, incentivize
14 construction of affordable housing, and include inclusive public outreach. Id.

15 Futurewise has not met its burden of proof. Housing Goal 3 and the above policies
16 are consistent with CPP H-9; they call for the same types of actions to be taken. The City
17 has previously supplied argument for the Board under Issue 2.D as to why these actions
18 did not have to be completed by December 31, 2024.

19 E. The City’s Housing Element Goal 2, Affordable Housing, and policies are
20 consistent with CPP H-10.

21 MICC 19.11.040(B), Affordable Housing, is consistent with CPP-10. Ex. 276 at
22 45. It is an incentive to increase affordable housing units (add floors in exchange for 15%
23
24

1 affordable housing units). CPP H-10 calls for an increase in the supply of income restricted
2 housing through incentives and other means. The code provision and CPP are consistent
3 with each other. MICC 19.11.040 is also not internally inconsistent with the City's
4 Housing Element Goal 2, Affordable Housing, and policies. The code provision by itself
5 does not carry out all of policies of Goal 2, but it is compatible with and does not thwart
6 any of these policies. *Chevron*, 123 Wn. App. at 167. Goal 2 and policies, along with MICC
7 19.11.040 are facially consistent with CPP H-10. Futurewise has failed to meet its burden
8 of proof.

9
10 F. The City's Housing Element Goal 2, Affordable Housing, and its policies are
11 consistent with CPP H-13.

12 CPP H-13 is directed at implementing strategies to overcome cost barriers to
13 affordable housing. Ex. 276 at 45. The City's Housing Element policy 2.2 provides for
14 implementation strategies to overcome cost barriers to housing affordability and includes a
15 list of strategies that should be included for implementation. Ex. 130 at 112. The City's
16 policy is consistent with CPP H-13.

17 Futurewise incorrectly argues that the City is inconsistent with CPP H-13 because
18 it has not already implemented policy 2.2. The City has previously provided argument for
19 the Board under Issue 2.D regarding why implementation did not have to be completed by
20 December 31, 2024.

21
22 G. The City's Land Use and Housing Element includes policies consistent with
23 CPP H-18 providing for planning tools and policies to increase the ability of all
24 residents to live in the neighborhood of their choice.

1 CPP H-18 focuses on the adoption of planning tools and policies that increase
2 the ability to live in your neighborhood of choice. Ex. 276 at 46-47. The City’s Land
3 Use Element provides policy 8.3 that promotes a range of housing opportunities. Ex.
4 130 at 95. The Housing Element in policies 1.7 and 1.8 strive to increase integration by
5 “fairly dispersing affordable housing opportunities,” and discouraging neighborhood
6 segregation. Ex. 130 at 112. Housing Element policy 5.2 also seeks to amend the MICC
7 to allow moderate density (duplexes, triplexes, and townhomes) in residential zones.
8 Id. at 115. These policies are consistent with CPP H-18.
9

10 H. Consistent with CPP H-19, the City’s Housing Element Goal 3, Racially
11 Disparate Impacts and its policies seek to lower barriers to and promote access
12 to affordable homeownership for extremely low- through low-income
13 households and Black, Indigenous, and People of Color communities.

14 Housing Element Goal 3, Racially Disparate Impacts, and its policies are singularly
15 dedicated to undoing identified racially disparate impacts in housing on Mercer Island. Ex.
16 130 at 114. Policy 3.1 to 3.5 are all working to “remedy” historical inequities in housing.
17 Id. Goal 3 and its policies are consistent with CPP H-19. Ex. 276 at 47. Futurewise
18 incorrectly argues that the City is inconsistent with CPP H-19 because it has not already
19 implemented the policies in Goal 3. The City has previously provided argument for the
20 Board under Issue 2.D regarding why implementation did not have to be completed by
21 December 31, 2024.
22

23 I. The City’s Housing Element includes policies and strategies that promote
24 equitable development and mitigate displacement risk, consistent with CPP
25 H-21.

1 Displacement occurs when an area develops, and existing residents do not return to the
2 area, usually because they are not able to afford to stay. Ex. 130 at 433. In Mercer Island,
3 lower income families and Black or African American households are at higher risk of
4 displacement. Id. Housing Element Goal 4, Anit-Displacement, and its policies are
5 concentrated on reducing and mitigating displacement risk as regulations change and
6 development occurs. Id. at 114–115. Housing policy 4.2 specifically provides for evaluating
7 and considering the implementation of tenant protections. Id. Goal 4 and its policies are
8 consistent with CPP H-21. Ex. 276 at 47.
9

10 Futurewise’s only complaint with Goal 4 is that the City has not implemented these
11 provisions yet. The City has previously provided argument for the Board under Issue 2.D
12 regarding why implementation did not have to be completed by December 31, 2024. Again,
13 Futurewise has failed to meet its burden of proof as its disagreement incorrectly focuses on
14 the timing of implementation.
15

16 J. The City’s Housing Element policy 1.4.11 is consistent with the fair housing
17 policies in CPP H-22.

18 The text of Housing Element policy 1.4.11 is almost identical to CPP H-22,⁴⁰ and is
19 certainly consistent with it. Again, Futurewise’s complaint is that the City has not
20 implemented these provisions yet. The City has previously provided argument for the Board
21 under Issue 2.D regarding why implementation did not have to be complete by December
22 31, 2024. Futurewise fails to meet its burden of proof as its disagreement incorrectly focuses
23

24 ⁴⁰ Ex. 130 at 112; Ex. 276 at 47.

1 on the timing of implementation.

2 K. The City's Housing Element policies 4.2, 4.3, and 4.4 addressing housing
3 stability for renters are consistent with CPP H-23.

4 Housing Element policies 4.2 through 4.4 expressly require evaluation of tenant
5 protections and the potential risk of displacement. Ex. 130 at 114-115. For proposed
6 projects, these policies also require “findings that displacement risks has been adequately
7 reduced and mitigated.” Id. 115. Housing Element policy 1.3 addresses increasing the
8 supply of income-restricted affordable housing. Id. at 111. Protection and support for
9 disabled renters is found in policies 1.4.11, 1.8, and 2.8. Permanent Supportive Housing
10 (PSH) by definition also includes persons with “disabling behavioral health or physical
11 health conditions.” RCW 36.70A.030(31). Policy 1.3.3.1 is aimed at increasing the supply
12 of housing units for PSH renters. Id. at 111.

14 Stability for renters on Mercer Island is also addressed by the City's Department
15 of Youth and Family Services (“YFS”). YFS is an existing tool using local City funds to
16 provide a comprehensive Emergency Assistance (“EA”) program to help income qualified
17 Mercer Island residents with stable housing, food security, and employment support. Ex.
18 303 at 1-2, Ex. 304 at 97. The City operates YFS with a full time Emergency Assistance
19 Coordinator and a professional social worker who work closely with community
20 organizations to coordinate a “collaborative service model towards achieving
21 individualized goals” such as residential/food security, financial autonomy, and linkage to
22 formal services for aging, disability, or legal support. Ex. 303 at 2. Income eligibility is set
23
24

1 at 80% AMI (pre-pandemic 70% AMI) and serves Mercer Island residents including
2 individuals and families experiencing homelessness on Mercer Island. Ex. 303 at 5, Ex.
3 304 at 101. EA clients may receive up to \$3,000 per year for rent, utilities, unexpected
4 expenses and food security enhancements. Ex. 303 at 5.

5 These Housing Element policies and the existing EA program through YFS are
6 tools addressing housing stability for renters consistent with CPP H-23. Ex. 276 at 47.

7 Futurewise’s complaint is that the City has not implemented these provisions yet.
8 The City has previously provided analysis for the Board under Issue 2.D regarding why
9 implementation did not have to be completed by December 31, 2024. Futurewise fails to
10 meet its burden of proof as its disagreement incorrectly focuses on the timing of
11 implementation.
12

13 **Issue Invalidity: The issue of invalidity has been abandoned.**

14 In the Prehearing Order dated March 4, 2025, the Board asked Futurewise “to brief
15 the request for invalidity as authorized by RCW 36.70A.302(1).” Prehearing Order at 2.
16 Futurewise’s Prehearing Brief did not ask for invalidity as relief and did not brief
17 invalidity. "A petitioner ... shall submit a brief addressing each legal issue it expects the
18 board to determine. Failure by such a party to brief an issue shall constitute abandonment
19 of the unbriefed issue." WAC 242-03-590(1). “An issue is briefed when legal argument is
20 provided; it is not sufficient for a petitioner to make conclusory statements, without
21 explaining how, as the law applies to the facts before the Board, a local government has
22 failed to comply with the Act”. *Whatcom County Association of Realtors, et. al. v. City of*
23
24

1 *Bellingham*, WWGMHB No. 17-2-0002, Final Decision and Order (July 17, 2017), at 3-
2 4. Because Futurewise failed to brief the issue of invalidity, pursuant to WAC 242-03-
3 590(1), invalidity as a remedy should be considered abandoned.

4 **V. CONCLUSION**

5 Futurewise has soundly failed to meet its burden of proof. For the foregoing reasons,
6 all five of the issues raised in the Petition for Review should be denied.

7
8 Dated this 28th day of May 2025.

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DECLARATION OF SERVICE

I, Reina McCauley declare and state as follows:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 28th of May 2025, I served a true copy of the foregoing **CITY OF MERCER ISLAND’S RESPONSE BRIEF** on the following counsel/parties of record using the method of service indicated below:

<p>Tim Trohimovich, WSBA #22367 Futurewise 1201 3rd Avenue, Suite 2200 Seattle, WA 98101 Telephone: (206) 343-0681</p> <p><i>Attorney for Petitioners Futurewise, Kian Bradley, and Trevor Reed</i></p>	<p><input type="checkbox"/> First Class U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail: tim@futurewise.org</p>
<p>Brooke Frickleton, WSBA #55580 Futurewise 13804 E. Indiana Avenue, Suite A #1020 Spokane Valley, WA 99216-5086 Telephone: (360) 747-7705</p> <p><i>Attorney for Petitioners Futurewise, Kian Bradley, and Trevor Reed</i></p>	<p><input type="checkbox"/> First Class U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-mail: brooke@futurewise.org</p>

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of May 2025, at Auburn, Washington.

/s/Reina McCauley
Reina McCauley