Washington’s Way II: The Burden of Enforcing Growth Management in the Crucible of the Courts and Hearings Boards

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I. INTRODUCTION

This Article continues the analysis and discussion of the conflicts and problems that beset a dispersed and decentralized growth management control system, as discussed in Washington’s Way: Dispersed Enforcement of Growth Management Controls and the Crucial Role of NGOs.1 That article explained how Washington politicians, in an effort to combat urban sprawl, created a dispersed, “bottom-up” approach to growth management by enacting the Washington Growth Management Act (GMA). The enforcement mechanism provided under the GMA, however, was not mandated to a single government entity; rather, it was left to citizens and non-governmental organizations (NGOs) acting at the local level.2 In order to ensure local legislative actions comply with the GMA, private citizens and NGOs must petition one of three quasi-adjudicative agencies known as growth management hearings boards.3

One of the most prominent NGOs in enforcing the GMA is Futurewise. Formerly known as 1000 Friends of Washington, Futurewise is the most notable NGO whose efforts have proven to be effective in protecting farms and forests while building vibrant urban areas in accord
with GMA goals and requirements.\textsuperscript{4} Organized by some of the GMA legislation’s framers, some of whom are still on its Board of Directors, Futurewise provides a means for ordinary citizens from all walks of life and occupations to actively participate in local land use matters identified in the GMA.\textsuperscript{5}

Despite Futurewise’s success, critics of Washington’s GMA enforcement mechanism argue that with no centralized state approval of local comprehensive plans and development regulations, relying upon citizens to petition hearings boards for review of local actions leads to sporadic and haphazard enforcement.\textsuperscript{6} The general population lacks the knowledge, time, and resources to enforce the GMA on a voluntary basis. NGOs must rely on contributions and creative fundraising to enforce the GMA.\textsuperscript{7} This reliance means that even the best-intentioned NGOs lack the wherewithal to investigate and litigate every county and city’s adoption or modification of its comprehensive plan and development regulations. Even if an NGO could do this, it probably would not fully represent the complete statutory intention of the Washington Legislature.

Whatever the pitfalls of Washington’s decentralized enforcement of the GMA, this Article has deeper concerns. Notwithstanding the self-evident handicaps of enforcement by volunteerism, many developers and local governments that are dependent on property and sales taxes for revenue\textsuperscript{8} argue for greater discretion in interpreting the GMA and higher standards of proof in order to insulate them from decisions adverse to their economic fortunes. If the decentralized enforcement is to continue to possess efficacy, the Washington State Department of Community Trade and Economic Development (CTED) must be able to create minimum guidelines that must be followed by local governments, and growth management hearings boards must be able to rely on precedent to establish general standards. Part II of this Article discusses the burdens of proof and standards of review required by the GMA, before describing in Part III the hearings boards’ ability to provide precedent for future decisions. Part IV concludes with suggestions on how to resolve these issues.

\textsuperscript{4} See McGee, \textit{supra} note 1, at 26-30.
\textsuperscript{5} \textit{Id.} at 23-26.
\textsuperscript{6} \textit{Id.} at 10-14.
\textsuperscript{7} \textit{See id.} at 33.
\textsuperscript{8} Washington does not have a state personal or corporate income tax. Local governments’ dependence on sales and property taxes often functions as an incentive for the municipalities to encourage development through other means, such as relaxed development regulations. \textit{See WASH. REV. CODE §§ 82, 84 (2006).}
II. BOARD DECISION-MAKING: BURDENS & STANDARDS

A thorough analysis of the burden of proof, quantum of proof, and standard of review under the GMA is necessary because the Act does not properly differentiate these burdens and standards. The murky waters of these burdens and standards have resulted in many boards, courts, and practitioners not clearly stating basic principles. This confusion has left the door open for developers and local governments to argue that, because comprehensive plans and development regulations are valid upon adoption and because local governments may consider “local circumstances,” hearings boards possess limited authority to find local actions noncompliant. Public interest groups, such as Futurewise, argue for less constrained interpretations. To clean up the quagmire, a better resolution of what the burdens and standards are is necessary.

A. General Principles of Burdens & Standards

The inquiry of the GMA’s burdens and standards begins by defining “burden of proof,” “quantum of proof,” and “standard of review.” Burden of proof and quantum of proof are evidentiary standards employed by the trier of fact. Burden of proof contains two separate components: the burdens of persuasion and production. The burdens of persuasion and production typically rest initially with the plaintiff or petitioner, although the legislature may alter the assignment.

The party that has the burden of persuasion must persuade the trier of fact of the correctness of its position. In the rare situation in which

9. See, e.g., infra Part II.B.2, regarding the shifting of the burden of production in a series of cases involving the City of Moses Lake and Grant County. Many other examples are provided throughout this Article.
10. See §§ 36.70A.070(5)(a), 110(2), 320(1), 3201.
11. City of Bremerton v. Kitsap County, Final Dec. & Order, GMHB No. 04-3-0009c, at 22 (Aug. 9, 2004). Decisions of the hearings boards are published on the boards’ website at http://www.gmhb.wa.gov and are available on Westlaw. The case number format is “XX-X-XXXX,” with the first two digits representing the year the petition was filed, the last four digits representing the order in which the petition was filed, and middle digit representing which board the case is before. The Eastern Board is “1,” the Western Board is “2,” and the Central Board is “3.” For the purposes of this Article, Board decisions are cited as follows: “abbreviated caption, GMHB No. XX-X-XXXX, Decision at xx (date).”
12. City of Bremerton, GMHB No. 04-3-0009c, at 22 (Aug. 9, 2004).
14. Id.
15. Id. at 33–34.
16. Id.
17. Id. at 34.
both parties’ positions are equally worthy, the finder of fact finds in favor of the party without the burden.\textsuperscript{18} The burden of persuasion stays with the same party throughout the fact-finding process, usually the petitioner.\textsuperscript{19}

While the burden of persuasion relates to the parties’ position on the facts or law, the burden of production relates to the parties’ production of evidence.\textsuperscript{20} The party with the burden of production must present sufficient evidence to prove each element of a claim.\textsuperscript{21} In many cases, the burden of production may necessarily shift to the opposing party to produce sufficient evidence to disprove each element.\textsuperscript{22} When the burden of production shifts to the respondent, the petitioner retains the burden of persuading the finder of fact that the respondent’s evidence is insufficient or irrelevant.\textsuperscript{23}

While the burden of production relates to the parties’ production of evidence for each element, quantum of proof relates to the amount of production necessary.\textsuperscript{24} The quantum of production is the amount of evidence necessary to have the court rule in the party’s favor when the party’s evidence is balanced against the opponent’s evidence.\textsuperscript{25} “Typical quantums of proof include ‘preponderance of evidence,’ ‘clear and convincing evidence,’ and ‘beyond a reasonable doubt.’”\textsuperscript{26}

Standard of review is a wholly different concept from burden of proof and quantum of proof. Whereas a trier of fact employs a burden of proof and a quantum of proof, only tribunals serving in an appellate capacity apply a standard of review.\textsuperscript{27} The standard of review is the amount of scrutiny with which “[an appellate] tribunal reviews the factual findings of a lower tribunal.”\textsuperscript{28}

The potential standards of review, from least deferential to greatest, include “de novo,” “substantial evidence,” “abuse of discretion,” “clearly

\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 33–34.
\textsuperscript{21} Id. at 33.
\textsuperscript{22} Id. at 34. For example, if a petitioner demonstrated that a local government zoned one density unit per acre in a rural area designation contrary to hearing board decisions, which generally hold that rural densities must be no more than one unit per four acres, the local government would have the burden of producing evidence that it either did not in fact zone at such density or had a valid reason based on local circumstances to zone at such density.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 34–35.
\textsuperscript{26} Id. at 35.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
erroneous,” and “arbitrary or capricious.” 29 As the standard of review becomes more deferential to the lower decision, the appellate tribunal will more likely affirm the decision. 30 Under the de novo standard, the appellate tribunal decides the facts “as new” with no deference to the lower court’s findings. 31 Under the “substantial evidence” standard, the appellate tribunal will uphold a lower tribunal’s findings “if a reasonable person could find the evidence sufficient to arrive at the [tribunal’s conclusion],” even if a different result is conceivable. 32 Under the “clearly erroneous” standard, the appellate tribunal will uphold a lower tribunal’s findings unless the appellate tribunal is “left with firm and definite conviction that a mistake has been committed.” 33 Finally, under the “arbitrary or capricious” standard, the appellate tribunal will not reverse unless the lower tribunal made a “willful and unreasonable decision . . . without consideration and in disregard of the facts and circumstances of the case.” 34

When the appellate tribunal applies the standard of review, the tribunal views the appealed decision in light of the requisite burden of proof and quantum of proof before the lower tribunal. 35 Burden of proof and quantum of proof are only evidentiary standards, but the standard of review is applicable to both findings of fact and law. 36 Usually, appellate tribunals apply the standard of review of de novo to findings of law. 37 When the agency or lower tribunal has specific expertise, appellate tribunals will give more deference to findings of law. 38

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30. Mayes, et al., supra note 13, at 36. The standards may apply to different situations. For example, “substantial evidence” is usually a standard for review of factual determinations; “clearly erroneous” usually a standard for review of legal determinations; and “arbitrary or capricious” usually a standard for review of discretionary decisions.
31. Id. at 35.
32. Id. at 35–36.
34. Sweitzer v. Indus. Ins. Comm. of Washington, 116 Wash. 398, 401, 199 P. 724, 725 (1921); see also Kunsch, supra note 29, at 41.
36. Id.
37. Id.
B. GMA's Burdens & Standards

Section 36.70A.320 of the Revised Code of Washington (RCW) provides the requisite burdens and standards for review applied by the Growth Management Hearings Boards. To the consternation of many practitioners before the hearings boards, and undoubtedly to many county commissioners, city council members, planners, and local participants as well, the Washington Legislature created in section 320 an incoherent linguistic rubric of the burdens and standards to be applied by the hearings boards. As a result, the burdens and standards have been subject to much debate. A 1997 amendment to section 320 provided no greater help. At the core of the problem is the legislature’s failure to understand basic general legal theory and application regarding burdens of proof and standards of review.

The first cause of the confusion is not the fault of the legislature. Rather, developers and local governments have frequently misunderstood or misrepresented the significance of subsection 320(1)’s presumption of validity for local legislative actions. Second, the legislature failed to properly label the burdens of proof, production, and persuasion in subsection 320(2). Third, the legislature failed to provide a quantum of proof. Fourth, the legislature misunderstood the relevance of a standard of review for board decisions. With these issues at hand, an analysis of what to make of the requisite burdens and standards under the GMA embarks. The analysis concludes, as often issues before hearings boards do, with an inquiry into what standard of review the courts apply on appeals from the boards’ decisions.

1. GMA’s Presumption of Validity

Since 1991, the GMA has applied a presumption of validity to local legislative actions. Subsection 320(1) provides that “comprehensive plans and development regulations, and amendments thereto, adopted under [the GMA] are presumed valid.” While some argue this presumption of validity affects the burdens and standards applicable to review by hearings boards, it does not. Instead, the presumption of

43. The hearings boards are sometimes confused as well. In Shulman, the Central Board concluded, “[s]howing either an arbitrary or discriminatory action is insufficient to overcome the presumption of validity that actions of cities and counties are granted by the Act.” Shulman v. City of Bellevue, Final Dec. & Order, GMHB No. 95-3-0076, at 12 (May 6, 1996). This statement clearly confuses the presumption of validity with the quantum of proof, discussed infra. See also Kent
validity is an attempt to avoid Oregon’s "top-down" approach and to set the stage for Washington’s special appellate process of local decisions.

In Oregon, decisions are not valid until approved by a state commission. This imposed a strong, top-down approach, an approach the Washington Legislature intended to avoid. Oregon’s approach also exposed local decisions to a window in which development rights may vest, which local governments avoided by imposing development moratoria.

The Washington Legislature wanted the local decisions to be enforceable by the municipality until found noncompliant or invalid, thereby preventing development rights from vesting in the interim under the old local land use regulations. This goal necessarily required specific statutory language providing for a presumption of validity. However, there is no basis to argue the GMA’s presumption of validity affects the burdens of proof before the hearings boards; thus, the legislative intent for decentralized enforcement with an effective petition and review procedure was the reason for the presumption of validity, not to affect the burdens or standards.

2. GMA’s Burden of Proof

To the distress of many GMA litigants, Subsection 320(2) provides that "the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter." This subsection does not delineate which burden the petitioner possesses: persuasion, production, or both. Presumably "demonstrate" means "persuade." As such, the burden of persuasion is assigned to the petitioner. The Washington Court of Appeals has found that this burden does not shift. In other words, the

44. OR. REV. STAT. § 197.090(2)(a) (2006).
45. McGee, supra note 1, at 10–14.
47. McGee, supra note 1, at 10–14.
48. The local governments act as a tribunal of first impression while hearings boards are the appellate tribunal. This has a strange effect. Usually the burden of proof is assigned at the first tribunal, but here the first tribunal is a legislative body. The local government has the burden of enacting a rational law that is compliant with the GMA. Since the local legislative action is presumed valid, the burden of ensuring compliance with the GMA does not arise until a petitioner with standing meets her burden and quantum of proof.
burden of persuasion always stays with the petitioner before the hearings board;\textsuperscript{51} undecided is whether the burden of production sticks as well.\textsuperscript{52}

Presumably "demonstrate" also means "produce." As such, the burden of production is also initially assigned to the petitioner.\textsuperscript{53} Local governments often argue that the "burden of proof" cannot shift from the petitioner to the respondent.\textsuperscript{54} If this were the case for both the burden of persuasion and burden of production, the result would defy logic. If the burden of production never shifted, the petitioner could never win. While courts have not explicitly addressed the issue of burden of production, logic dictates that the burden of production must shift at some point such that the respondent must refute the evidence proffered by the petitioner. For example, a county would be hard pressed to explain why it exclusively zoned skyscrapers to agricultural lands. Thus, the burden of production must shift.\textsuperscript{55}

Several cases indicate that the boards do shift the burden of production. There are three Eastern Board decisions, each of which captioned \textit{City of Moses Lake v. Grant County}, which demonstrate how the burden of production shifts. In Case No. 98-1-0003, Moses Lake petitioned the Board for review of Grant County's interim ordinance, which designated 2.5-acre densities in rural areas.\textsuperscript{56} The Eastern Board found that Moses Lake did not provide sufficient evidence that the designation was clearly erroneous.\textsuperscript{57} In Case No. 99-1-0016, Moses Lake petitioned the Board

\begin{itemize}
  \item \textsuperscript{51} Id.
  \item \textsuperscript{53} However, in cases concerning whether a city or county used best available science (BAS), the burden of production is initially assigned to the local government to prove it included BAS, then shifts to the petitioner to prove the used science was inadequate. See Ferry County v. Concerned Friends of Ferry County, 155 Wash. 2d 824, 834, 123 P.3d 102, 107 (2005); Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 96 Wash. App. 522, 532, 979 P.2d 864, 870–71 (1999).
  \item \textsuperscript{54} See Hensley v. Snohomish County, Final Dec. & Order, GMHB No. 03-3-0009c, at 25–26 (Sept. 22, 2003).
  \item \textsuperscript{55} See discussion, infra section II.B.3 (determining when the burden shifts is a question of the requisite "quantum of proof").
  \item \textsuperscript{56} City of Moses Lake v. Grant County, Final Dec. & Order, GMHB No. 98-1-0003 (Oct. 7, 1998).
  \item \textsuperscript{57} Id. The Board held the following: [W]e find no evidence the subject interim ordinance has had any effect other than that intended in its original enactment. Petitioners argue information is not available which would support their claim that urban sprawl is continuing in Grant County. The County, however, does provide information in the record that supports its contention that urban sprawl has been largely curtailed since enactment of the interim ordinance. Petitioners have not provided evidence which supports a decision that the County's action are clearly erroneous. With the absence of evidence supporting its claims, the Board must also conclude the County has complied with the SEPA requirements.
\end{itemize}
for review of Grant County’s Comprehensive Land Use Plan, which again designated 2.5-acre densities in rural areas. This time the Eastern Board found sufficient evidence and invalidated the designation. In Case No. 01-1-0010, Moses Lake petitioned the Board for review of Grant County’s interim ordinance, which again designated 5-acre densities in historically undeveloped rural areas. The Board found that Moses Lake did not provide sufficient evidence that the designation was clearly erroneous. Thus, the City of Moses Lake v. Grant County decisions, without explicitly analyzing the shift of the burden of production, clearly demonstrate that the Boards recognize that the burden of production must necessarily shift at some point.


59. Id. The Board stated the following: The Board takes specific notice of the parcels zoned at a density of 1 DU-2.5 acres. The area under scrutiny is 8,717 acres in rural areas. This approximately 15 square miles is spread throughout the unincorporated area of Grant County. The County designated these areas in addition to the 22 RAIDS, some of which allow residential development at similar or greater density. This creates an impermissible pattern of urban growth in the rural area. The Board cannot conclude that such a large area that would permit, as a matter of right, over 3,486 land-consumptive 2.5-acre lots, is anything other than classic low-density sprawl. While RCW 36.70A.070(5)(d) allows higher density in the rural area, the County did not establish these lot sizes under that exception or any other.

60. City of Moses Lake v. Grant County, Final Dec. & Order, GMHB No. 01-1-0010 (Nov. 20, 2001).

61. Id.

In support of this contention, the City notes that the Boards have previously held that 1 and 2.5 acre lots constitute urban growth and are prohibited in rural areas, whereas 10 acre residential lots are rural and, therefore, do not constitute urban growth. However, as to five acre lots, the City concedes that the Boards have held they are not a per se violation of the Growth Management Act. Rather, five acres lots require increased scrutiny to ensure that their number, location, and configuration do not constitute urban growth, do not present an undue threat to large scale natural resource lands and critical areas, will not thwart the long term flexibility to expand Urban Growth Areas, and will not otherwise be inconsistent with the goals and requirements of the GMA.

62. Id. "The City of Moses Lake has not presented evidence that leaves the Board with a firm and definite conviction that interim Ordinance No. 2001-49-CC permits the development of rural lots in such a pattern so as to constitute impermissible urban growth." Id.

63. Similarly, when a board makes a determination of invalidity in a subsequent compliance hearing, the County has the burden to prove they have corrected the non-compliant issues. Wells v. W. Wash. Growth Mgmt. Hearings Bd., Civ. No. 98-2-00546-3 (Order Remanding Case, Sept. 25, 1998).
3. GMA’s Quantum of Proof

The relevant portion of RCW section 36.70A.320(3) originally stated that “the board shall find compliance unless it finds by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied this chapter.” Thus, the original language provided the quantum of proof of “preponderance of the evidence.” It is possible that the standard of review was “erroneous interpretation,” but it is hard to see how such a standard would be helpful and, in reality, Boards never applied such a standard of review beyond the “quantum of proof.” The legislature amended this section in 1997. The relevant portion now provides that “the board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” So, the 1997 amendments removed the quantum of proof and better defined the meaning of “erroneous interpretation.”

In 1997, the legislature also adopted a section declaring the intent of the amendments, codified as section 3201. Section 3201 states, in part, that “the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law.” The legislature wanted to be more deferential to local decisions. However, in doing so, the legislature eliminated the quantum of proof. Apparently the legislature was confused in thinking “preponderance of the evidence” was a standard of review rather than the evidentiary standard of quantum of proof. Without a quantum of proof, the petitioners could never provide enough evidence to win because, technically, the boards could never weigh the presented evidence. So, in practice, the Boards must necessarily find and use another quantum. The legislature did provide a

65. Id.
66. “Erroneous interpretation” is not a recognized standard of proof used by courts. The phrase would need to be prefaced by an adjective for a court to determine the degree to which the appellant must prove her case.
68. Id.
69. Id. § 36.70A.3201.
70. Id.
71. For example, consider a balancing scale. If there is only a beam without a fulcrum to balance the beam, one could never determine the weight of any mass placed on the beam. The quantum of proof is much like the fulcrum: a tribunal cannot weigh the evidence without knowing when the evidence tips in favor of the petitioner's position.
standard of review. Although unusual, the standard of review acts as the quantum of proof.

4. GMA’s Standard of Review by Hearings Boards

RCW section 36.70A.320(3) plainly states that the standard of review applied by hearings boards is “clearly erroneous.” The Washington Supreme Court in King County held that “[t]o find an action ‘clearly erroneous,’ the growth management hearings board must be left with the firm and definite conviction that a mistake has been committed.” Recently, the Washington Supreme Court footnoted:

The relevant question is the degree of deference to be granted under the “clearly erroneous standard.” The amount is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the county’s actions a “critical review” and is a “more intense standard of review” than the arbitrary and capricious standard. . . . And even the more deferential “arbitrary and capricious standard” must not be used as a “rubber stamp” of administrative actions.

The definition of “clearly erroneous” is fairly transparent. Less clear is whether the clearly erroneous standard applies to the local legislative action, the local government’s findings of fact, or the local government’s findings of law. If the legislature simply provided a quantum of proof instead of a standard of review, this would not be a question; the hearings boards would make findings of fact, interpret the GMA goals and requirements, and then determine whether the local legislative action was clearly erroneous. But under a standard of review, the appellate tribunal reviews the lower tribunal’s findings of fact and law based on the standard, although the standards may be different for the questions of fact and the questions of law. Thus, if the latter approach were taken, hearings boards would have to ask whether a local government’s interpretation of the GMA was clearly erroneous. Applying the “clearly erroneous”

72. The legislature may have provided a standard of review instead of a quantum of proof in reflection of the fact that a lower tribunal exists—the local governmental legislature. This is a bit confusing since the judicial evidentiary standards do not apply to legislative action. While judicial evidentiary standards do not apply to legislative action, the GMA does provide some statutory evidentiary standards such as “show your work” requirements.


erroneous” standard of review to findings of law would provide much greater deference to local legislative actions.

Although the objective of the 1997 amendments was to provide greater deference to local governments, the extent of the legislature’s intent in granting deference still must be determined. Did the legislature mean to increase the quantum and give local governments the ability to be the primary interpreters of the GMA? At least one Washington Supreme Court justice seems to think this was exactly the purpose of the 1997 amendment. In Swinomish Indian Tribal Community, Justice James Johnson dissented, stating that “if there is a plausible argument that some other enforcement mechanism might further the goals of the GMA . . . , the County is free to consider any such proposal. The Board or a court may not make that decision for the County because neither possesses legislative powers.” In other words, Justice Johnson would willingly “rubber stamp” local actions so long as the local government could demonstrate a “plausible” reason for its action, even if the logical connection to the GMA’s goals and requirements was tenuous. Only Justice Richard Sanders joined Justice Johnson’s dissent.

The other five justices did not follow Justice Johnson. Although the majority did not engage in an in-depth rebuttal to Justice Johnson, preferring to respond in a footnote, ample reasons exist for finding that “clearly erroneous” means something more than rubber stamp approval of local decisions. If the legislature intended in 1997 to strip the Boards of the authority to interpret the GMA goals and requirements and apply the law to the facts, the legislature would have been much more explicit. Instead, subsection 320(3) states that “[t]he board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” Thus, the statute clearly separates the review of the local legislative action from interpretation of “the goals and requirements of the GMA.” Therefore, a Board will first interpret the GMA goals and requirements for it, and then apply this law when reviewing the local government’s action.

75. See McGee, supra note 1, at 10–14.
76. Swinomish, 161 Wash. 2d at 441, 166 P.3d at 1212 (Johnson, J., concurring in part, dissenting in part).
77. Apparently Justice Johnson would also like to decide the issue of whether the hearings boards are unconstitutional as well. Justice Johnson states in a footnote, “[t]his opinion does not reach the broader constitutional question of whether these sui generis unelected boards, appointed by the governor, may overrule county legislators and micromanage land use plans for counties.” Id. at n.1 (Johnson, J., concurring in part, dissenting in part).
78. Id. at 443–44, 166 P.3d at 1213.
79. Id. at 435 n.8, 166 P.3d at 1209 n.8.
Boards may yet still owe the clearly erroneous deference to local interpretations of law if local legislative "action" is read by courts to include both the local government's findings of fact and conclusions of law. This argument may be supported by the GMA's statutory language. Although "action" is not defined in the GMA's definitions section, subsection 130(1)(b) defines "legislative action" as "the adoption of a resolution or ordinances following notice and a public hearing." Subsection 320(1) also indicates that "action" refers to the legislative actions of "comprehensive plans and development regulations." Subsection 280(1), which limits the scope of the hearings boards' review, suggests that "action" refers to "plans, development regulations, or amendments." In enacting or amending comprehensive plans or development regulations, local governments are forced to interpret the GMA because the Legislature created the GMA with "politically necessary omissions, internal inconsistencies, and intentionally vague language." The question then arises, do the local government's interpretations of the inconsistent and vague GMA become part of its legislative action such that the hearings boards must uphold the action unless it is clearly erroneous?

According to the Washington Supreme Court, the answer is no. In King County v. Central Puget Sound Growth Management Hearings Board, the Washington Supreme Court held that courts must give "substantial weight to the Boards' interpretations..." because of their specific expertise in the GMA. Thus, if courts must defer to hearings boards' interpretations because of their specific expertise, it follows that local governments must follow as well. If boards granted deference to local interpretations by applying the clearly erroneous standard to questions of law, the boards' interpretations would be undermined and not worthy of deference by the courts. Thus, hearings boards must not defer to local interpretations of the GMA, but rely on their own specific expertise with the GMA.

5. Court Review of Board Decisions

When a board decision is appealed to a court, the court reviews the board decision, not the local legislative action. Therefore, the court applies a different standard of review from that applied by the board.

81. See § 36.70A.030.
The courts apply the standards of review as provided by the Washington Administrative Procedure Act (APA).85 Section 570(3) of the APA provides nine separate standards of review depending on what is being reviewed.86

First, paragraph 570(3)(a) states that a court shall grant relief from a quasi-adjudicative order if "the order is in violation of constitutional provisions on its face or as applied."87 No deference is given to the board’s decision under a claim concerning constitutionality; interpretation of the state constitution is the sole providence of the courts. At least four cases have unsuccessfully challenged board decisions or the GMA based on constitutionality, including Thurston County v. Western Washington Growth Management Hearings Board,88 Peste v. Mason County,89 Diehl v. Mason County,90 and Snohomish County v. Anderson.91

Second, paragraph 570(3)(b) states that a court shall grant relief from a quasi-judicial order if "the order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law."92 The courts afford no deference to the board’s decision regarding statutory authority and agency jurisdiction.

Third, paragraph 570(3)(c) states that a court shall grant relief from a quasi-judicial order if "the agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure."93 Again, the courts afford no deference to the board regarding such questions.

Fourth, paragraph 570(3)(d) states that a court shall grant relief from a quasi-judicial order if "the agency has erroneously

85. § 34.05.
86. § 34.05.570(3).
87. § 34.05.570(3)(a).
89. Peste v. Mason County, 133 Wash. App. 456, 471–73, 136 P.3d 140, 148–50 (2006) (holding Mason County’s comprehensive plan and development regulations did not constitute a taking under the Fifth Amendment or violate substantive due process because they were enacted pursuant to the GMA).
90. Diehl v. Mason County, 94 Wash. App. 645, 661–62, 972 P.2d 543, 551–52 (1999) (holding the GMA was not unconstitutionally vague and that the legislature’s delegation of review authority to hearings boards did not violate the separation of powers doctrine).
92. WASH. REV. CODE § 34.05.570(3)(b) (2006).
93. § 34.05.570(3)(c).
interpreted or applied the law." The Washington Supreme Court in *Redmond* stated that "[c]ourts] essentially review such questions de novo." Although courts "accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues," courts are the "final arbiter . . . concerning conclusions of state law . . . and conclusions of state law entered by an administrative agency or court . . . are not binding." The Washington Supreme Court has also held, "the Board's legal conclusions are reviewed 'de novo, giving substantial weight to the Board's interpretation of the statute it administers.' Thus, although courts receive a fresh look at any question of law concerning the GMA, because the hearings boards have special expertise in GMA while courts do not, courts will rely heavily on boards' conclusions of law.

Fifth, paragraph 570(3)(e) states that a court shall grant relief from a quasi-adjudicative order if "the order is not supported by evidence that is substantial when viewed in light of the whole record before the court." Under this "substantial evidence" standard, the Washington Supreme Court has stated that "[i]n reviewing the agency's findings of fact under RCW 34.05.570(3)(e), the test of substantial evidence is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.' Applying this standard is complex because the court must determine whether a board's evidentiary finding that a local action was clearly erroneous was supported by substantial evidence. On mixed questions of law and fact, courts determine the law independently, "giving substantial weight to the agency's view of the law it administers," then apply the law to the facts as found by the board.

94. § 34.05.570(3)(d).
96. *Id.* (citing Overton v. Wash. State Econ. Assistance Auth., 96 Wash. 2d 552, 555, 637 P.2d 652, 654 (1981)).
97. *Id.* (citing Leschi Improvement Council v. Wash. State Highway Comm'n, 84 Wash. 2d 271, 286, 525 P.2d 774, 804 (1974)).
99. WASH. REV. CODE § 34.05.570(3)(e)(2006).
100. *King County*, 142 Wash. 2d at 552, 14 P.3d at 139 (quoting Callecod v. Wash. State Patrol, 84 Wash. App. 663, 673, 929 P.2d 510, 515 (1997)).
101. Or, alternatively, the court must determine whether a board's evidentiary finding that a local action was not clearly erroneous was supported by substantial evidence.
102. Hamel v. Employment Sec. Dep't, 93 Wash. App. 140, 144, 966 P.2d 1282, 1285 (1998); see also *King County*, 142 Wash. 2d at 552, 14 P.3d at 138.
Sixth, paragraph 570(3)(f) states that a court shall grant relief from a quasi-adjudicative order if “the agency has not decided all issues requiring resolution by the agency.” Nevertheless, Boards will not address issues that a petitioner fails to properly set forth in the petition for review or fails to argue in the prehearing brief.

Seventh, paragraph 570(3)(g) states that a court shall grant relief from a quasi-adjudicative order if “a motion for disqualification under [sections] 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the granting of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion.” A disqualification typically only occurs when a hearings board member is biased or prejudicial. A court has never overturned a hearings board decision based on paragraph 570(3)(g).

Eighth, paragraph 570(3)(h) states that a court shall grant relief from a quasi-adjudicative order if “the order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency.” Because the hearings boards do not create rules, paragraph 530(h) is not applicable unless a petitioner argues that a board’s decision is inconsistent with CTED’s rules.

Ninth, paragraph 570(3)(i) states that a court shall grant relief from a quasi-adjudicative order if “the order is arbitrary or capricious.” Essentially this is a fallback standard because it affords the highest amount of deference to the Boards. Therefore, another standard of review would presumably be met before the “arbitrary and capricious” standard is satisfied.

103. WASH. REV. CODE § 34.05.570(3)(f).
105. WASH. REV. CODE § 34.05.570(3)(g).
106. See § 34.05.425(3).
107. § 34.05.570(3)(h).
108. § 34.05.570(3)(i).
Each level of court, whether superior court, court of appeals, or supreme court, must "apply the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court." The party appealing the Board’s decision retains the burden of persuasion at each level of court. The courts "review...the Board’s decision...based on the record made before the Board."

6. Conclusion of Burdens and Standards

When enacted, the GMA enforcement provisions were a balance between legislative goals that often compete against one another: creating well-planned communities and fostering local decision-making. The goal of well-planned communities is diminished as the burden of proof increases for local citizens and NGOs to prove that a local action is inconsistent with the GMA. Additionally, public participation in the process is also quashed as the effectiveness of the local citizens and NGOs in appealing a local action is diminished. When local governments are granted more deference, the legislative intent of the GMA is weakened while developers seek to profit and municipalities seek to increase the tax base. Thus, correctly interpreting the GMA burdens of proof and standards of review is imperative. Based on this section’s analysis, boards should defer to a local government’s findings of fact regarding their local circumstances unless the findings of fact are clearly erroneous. On the other hand, the boards should apply de novo review to a local government’s interpretations of law. Although the courts are the ultimate interpreter of the law, they should give "substantial weight" to hearings boards’ conclusions of law because the boards deal with GMA issues on a regular basis. Knowing the appropriate standards for boards to apply, we turn to the question of what extent the boards can base their legal conclusions on rules and prior decisions.

113. See generally McGee, supra note 1, at 1–2, 10–14; WASH. REV. CODE § 36.70A.020 (2006).
III. CTED GUIDELINES AND THE BOARDS’ BRIGHT LINES

In the face of the many petitions, the hearings boards rely both on their prior decisions and on the GMA guidelines written by the Washington Department of Community, Trade, and Economic Development (CTED) to create some uniformity in decision-making. Unfortunately, the effectiveness of both the CTED guidelines and boards’ precedents are questionable. This Part discusses current case law regarding the guidelines and precedents.

A. CTED Guidelines

Enforcement of growth management becomes more “top-down” and centralized when a state agency is given broad authority to interpret the statute. Providing a state agency more statutory interpretation authority reduces the local governments’ interpretation authority. If the local government has less authority, the developers will not likely be able to exercise undue influence over the adoption and amendment of comprehensive plans and development regulations at the local level. Instead, the battleground moves to the public participation processes of rulemaking. There, public interest groups are more likely to be able to aggregate resources to fight the statutory interpretive battles before a state agency.

The GMA requires the CTED to adopt “minimum guidelines” for the designation of agricultural lands, forestlands, mineral resource lands, and critical areas. The CTED also adopts guidelines that describe the “best available science” that should be used when designating critical areas. The GMA requires counties and cities to consider both of these guidelines when making designations. In addition, the CTED publishes parallel rules to the Growth Management Act in the Washington

114. Based on the authors’ tabulation of the petitions filed to the hearings boards, as posted to the boards’ websites, at least 1157 petitions were filed between 1992 and 2006. Washington State Growth Management Hearings Boards, http://www.gmhb.wa.gov, contains links for each regional board to the decision page for each.
115. See WASH. REV. CODE § 36.70A.190.
116. McGee, supra note 1, at 4-5.
117. Id.
118. Id.
119. Monitoring each county’s amendments to comprehensive plans and adoptions of development regulations is time consuming and costly. Reviewing and appealing rulemaking by a single agency would be much simpler.
121. WASH. REV. CODE § 36.70A.170, 190; WASH. ADMIN. CODE 365-195-905, 910, 915, 920.
122. WASH. REV. CODE § 36.70A.050(3); Dep’t of Ecology v. City of Kent, Final Dec. & Order, GMHB No. 05-3-0034, at 10 (Apr. 19, 2006).
Administrative Code. At times, these parallel rules refine the GMA requirements. However, the principal question is to what extent local governments must use the guidelines: not at all, merely consider, provide justification when not followed, or must always adhere.

Numerous decisions by the Hearings Boards, the Court of Appeals, and the Washington Supreme Court have held, or at least indicated, that local governments must, at a minimum, consider the CTED guidelines. The analysis of the degree to which local governments must use the guidelines necessarily starts with the first relevant Washington Supreme Court decision, City of Redmond v. Central Puget Sound Growth Management Hearings Board.

Redmond concerns the designation of agricultural land by King County. The GMA requires counties and cities to designate agricultural lands within their jurisdictions. Under the GMA, agricultural land is "land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees..., finfish in upland hatcheries, or livestock." In addition, "[t]he land must not be already characterized by urban development and that [has] long-term significance for the commercial production of food or other agricultural products." Additionally, the GMA specifically directs the local government to "consider the guidelines established pursuant to RCW 36.70A.050." RCW section 36.70A.050 is the section directing CTED to establish the guidelines and states in part:

The guidelines... shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington State. The intent of these guidelines is to assist

123. Compare WASH. REV. CODE § 36.70A.070(2) with WASH. ADMIN. CODE 365-195-310 (regarding the housing element).
127. Id.
128. Id. at 42–46, 959 P.2d at 1092–94.
130. § 36.70A.030(2).
131. § 36.70A.170(1)(a), .030(2).
132. § 36.70A.170(2).
counties and cities in designating the classification of agricultural lands, forestlands, mineral resource lands, and critical areas.  

In classifying agricultural lands of long-term significance, the CTED guidelines require local governments to consider “growing capacity, productivity and soil composition of the land.” The guidelines also require local governments to consider “the combined effects of proximity to population areas and the possibility of more intense uses of the land” as indicated by ten listed factors. Specifically, local governments are required to use the land-capability classification system of the United States Department of Agricultural Soil Conservation Service in making their assessment. Agricultural land designations should be based on the “prime” and “unique” classifications of the land-capability system. If the “prime” and “unique” classifications are not used, the local governments must report the rationale to CTED.

The boards and courts, not to mention local governments, have found parsing the agricultural land requirements difficult. The test for designating agricultural land is long and has multiple factors. Uncertainty leers at every bend; the meaning and weight of every factor in the analysis is vague. Most troublesome is the uncertainty as to what weight to give to the CTED guidelines.

In Redmond, the Washington Supreme Court defined the appropriate test for designating agricultural land as consisting of two parts: first, whether the land was “primarily devoted to” agricultural uses; and second, whether the land had “long-term significance for the commercial production of food or other agricultural products.” With regard to the second half of the test, the court suggested that the CTED guidelines must be at least considered. However, because the court first found that Central Board failed to properly apply the first half of the test, the court’s statements regarding the second half of the test were mere dicta.

133. § 36.70A.050(3).
135. Id.
136. Id. § 365-190-050(2).
137. Id.
139. Id., 959 P.2d at 1098.
140. Id., 959 P.2d at 1098.
Since Redmond, boards require local governments to provide a record showing that the CTED guidelines were considered.141 The Western Board also requires local governments to provide justification when they do not follow the guidelines.142 The Eastern Board and Central Board do not go nearly as far, only holding that the guidelines are “advisory rather than mandatory.”143

Increasingly, it is apparent that the CTED guidelines are mandatory guidelines which local governments must follow. In City of Des Moines v. Puget Sound Regional Council, the Court of Appeals relied on the CTED guidelines for interpreting the GMA’s regional planning process.144 The Court of Appeals justified leaning heavily on the CTED Guidelines when it stated:

[W]hen a statute is ambiguous—as in the instant case—there is the well known rule of statutory interpretation that the construction placed upon a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling upon the courts, should be given great weight in determining legislative intent.145

This Court of Appeal’s decision to follow the CTED guidelines contradicts the Eastern and Central Boards’ position that the guidelines are “advisory rather than mandatory.”146

Likewise, in Manke Lumber Co. v. Diehl, Mason County’s method of designating forestlands was challenged.147 The requirements for forestland designation are substantially similar to those of agricultural land designation.148 Mason County had required all forestland to be

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145. Id. at 934 n.20, 988 P.2d at 1001 n.20, (quoting Hama Hama Co. v. Shorelines Hearings Bd., 85 Wash. 2d 441, 448, 536 P.2d 157, 161 (1975)).
contiguous 5,000-acre tracts of land (improperly termed by the court as "parcels"). In finding the tract-size threshold met the GMA requirements, the Court of Appeals specifically stated that "[t]he GMA sets forth objectives and minimum guidelines that local governments must follow when classifying land." Thus, the Court of Appeals held the minimum guidelines were much more than advisory: the guidelines were mandatory.

In *Lewis County v. Western Washington Growth Management Hearings Board*, the Washington Supreme Court adopted the Court of Appeal’s approach in *Manke Lumber*. Lewis County had designated agricultural land by solely considering the agriculture industry’s anticipated land needs without regard for the CTED guidelines. The court first updated the Redmond two-part test by adding a third prong: whether the land was “already characterized by urban growth.” Then the court explicitly adopted Manke Timber’s approach: “While this court has not previously interpreted RCW 36.70A.030(10), we approve of the approach used by the Court of Appeals in *Manke Lumber Co. v. Diehl*.” The court then analyzed whether Lewis County’s approach satisfied the CTED guidelines defining “long-term commercial significance.” In its analysis, the court first merely stated that “counties may consider the . . . factors enumerated in WAC 365-190-050(1).” Then, it indicated that when considering the CTED guidelines, local governments can assign greater weight to certain factors but not to the exclusion of others:

Because the GMA does not dictate how much weight to assign each factor in determining which farmlands have long-term commercial significance, and because RCW 36.70A.030(10) includes the possibility of more intense uses among factors to consider, it was not “clearly erroneous” for Lewis County to weigh the industry’s anticipated land needs above all else.

However, we do not decide whether Lewis County, in focusing on the needs of the local agriculture industry, went beyond the

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150. *Id.* at 804–05, 959 P.2d at 1179–80.
152. *Id.* at 499, 139 P.3d at 1101.
153. *Id.* at 502, 139 P.3d at 1103. The phrase was actually already part of the statutory definition, but omitted from the prior Redmond test. See WASH. REV. CODE § 36.70A.170(1)(a).
154. *Lewis County*, 153 Wash. 2d 501, 139 P.3d at 1102.
155. *Id.* at 503, 139 P.3d 1102–04.
156. *Id.* at 503, 139 P.3d at 1103.
considerations permitted by WAC 365-190-050 and RCW 36.70A.030 in designating agricultural lands. Unfortunately, Lewis County’s briefs do not explain the extent to which the county applied the specified factors. 157

After Lewis County, at the very least, local governments “must do more than catalogue lands that are physically suited to farming in fulfilling their responsibilities under the GMA. They must also consider [the factors of the CTED guidelines] to decide whether land has enduring commercial quality for agricultural purposes.” 158 One likely impact of Lewis County is that the Central and Eastern Boards will adopt the Western Board’s position: local governments must consider each CTED guideline factor and, based on the evidence, justify any deviation from the guidelines. 159

There is one more impact of Lewis County. Although the Washington Supreme Court allowed “Lewis County to weigh the industry’s anticipated land needs above all else,” 160 the court believed that local governments must give at least some weight to each CTED guideline factor. The Supreme Court’s analysis of Lewis County’s agricultural land designation bears this out. The County used a threshold soil quality for designating agricultural lands. 161 In effect, this threshold, without any countervailing considerations, eliminated many acres of productive agricultural land from designation. The court opined that this single factor could not be determinatively used:

For example, in not designating Christmas tree farms as agricultural land because they do not depend on a particular soil type, the county could have been considering the soil composition factor listed in [RCW section] 36.70A.030(10). But in light of the Christmas tree industry’s relatively robust $19.8 million in annual sales, it is not apparent why Lewis County would “consider” soil in this way, excluding productive tree farms from designated agricultural lands simply because they don’t need the types of prime soil that other farm sectors need. 162

157. Id. (emphasis added).
160. Lewis County, 157 Wash. 2d at 503, 139 P.3d at 1103.
161. Lewis County would not designate any land as agricultural unless the soil was “prime” even though several significant crops, such as Christmas trees, successfully grew in soils of lesser quality. Id. at 494–96, 504,139 P.3d at 1099, 1104.
162. Id., 139 P.3d at 1104.
Thus, not only must local governments consider each factor in the CTED guidelines; the local governments must also give at least some weight to each factor. This weighing is important to ensure that the weighing of a single factor does not exclude all other factors.

Despite the holding of Lewis County, the GMA only requires local governments to consider the CTED minimum guidelines for designating resource lands and critical areas. Thus, CTED will continue to have little authority for interpreting the GMA outside of that context. The duty to interpret the GMA goals and requirements will remain with the local governments and the hearings boards. Therefore, in order to determine the success of enforcing the GMA requirements, it is important to create judicial tests, rely on precedents, and determine the boards' authority to interpret the GMA.

B. Boards' Bright Lines

As discussed above, the hearings boards are tasked with interpreting the GMA. Hearings boards sometimes elicit a judicial test or bright line that provides necessary "certainty and predictability [to create] a safe harbor in the tumultuous sea of GMA." Certainty is needed to provide Boards with easier and more consistent decision-making process, local governments with the knowledge of the GMA's bounds, and developers with the ability to calculate whether their projects net-out. “But there is constant tension between the need and desire for certainty

164. See supra Part II.
165. Kaleas v. Normandy Park, Final Dec. & Order, GMHB No. 05-3-0007c, at 16–17 (July 19, 2005). Joe Tovar explained how growth boards have attempted to provide guidelines and a framework in which local governments can work:

So we tried to write for a lay audience for the boards; we didn’t try to make people look like they were overly technical, loaded with legal jargon. We wrote for a broad audience and it’s interesting, some of the criticisms that I read were that, you guys are writing for more than just the parties in the case, you’re not just answering A wins, B loses. Well, we talked about that for a while and agreed with it. Yeah, we weren’t just writing for A and B, we were writing for anybody who wanted to look at that decision and a lot of things did go up. So if the judge wanted to look at what we were saying, we tried to lay out our reasoning for why we were saying what we were saying. Then I took on as a personal crusade to let planning practitioners know what the board had said on a subject so that before you planned again, you had the benefit of someone else’s experience on what has passed muster and what hasn’t.

Interview by Diane Wiatr with Joe Tovar, President, Wash., President, City Planning Directors, (July 17, 2005) available at http://www.secstate.wa.gov/oralhistory/pdf/OH833.pdf. Dick Ford also added that “[r]ight, wrong, or indifferent, they provided guidance to local planning agencies and the land use bar so they could understand what the ground rules were. And if people didn’t like that guidance, then they’d have to move into the court system or Legislature to get it changed.” Interview by Rita R. Robison with Dick Ford, chair (1989-90) of the Wash. State Growth Strategies Comm’n, CITY ST. (July 26, 2005), available at http://www.secstate.wa.gov/oralhistory/pdf/OH824.pdf.
and the need and desire for flexibility.\textsuperscript{166} Flexibility is often framed as allowing local governments to consider local circumstances. The necessity for flexibility may be due to a number of factors, including genuine desire to do innovative planning, pressure from business interests to allow additional development, or desire to expand the tax base. The more deference afforded to local governments correspondingly leads to less authority for hearings boards to interpret and enforce the GMA. Judicial tests are one means of ensuring certainty. Therefore, determining the bounds of boards’ authority is critical to the success of Futurewise and the GMA’s goal of well-planned communities.

The legislature chose to give CTED limited rulemaking authority and similarly limited the hearings boards’ authority to adjudicate. This limitation reflected the legislature’s desire for a “bottom-up” approach.\textsuperscript{167} Some developers and local governments have complained that hearing board decisions that create judicial bright line tests step over the bounds of the boards’ interpretive duties. There are three areas of concern when it comes to whether boards overstep their authority when creating judicial tests. First, when do hearings boards overstep their adjudicatory authority into the realm of legislation? Second, do bright lines infringe on local governments’ ability to consider local circumstances? Third, do bright lines change the petitioner’s burden of persuasion or the hearings boards’ standard of review? After answering these three questions, this section will analyze current case law on bright lines and propose a logical interpretation and application of bright lines and judicial tests.

1. Adjudicative or Legislative

The GMA provides no differentiation between the boundaries of adjudication and legislation. Therefore, in order to answer the question of whether “bright lines” impermissibly step over the line from adjudication to legislation, we look to the Washington Administrative Procedure Act (APA). The Washington Supreme Court in McGee Guest Home, Inc. v. Washington Department of Social & Health Services stated that “[w]hether an agency’s action is rule-making, despite bearing some other label, is determined under the APA.”\textsuperscript{168} Hearings boards are considered “agencies” under RCW section 34.05.010(2).\textsuperscript{169} Thus, it matters naught

\textsuperscript{166} Normandy Park, GMHB No. 05-3-0007c at 16–17.
\textsuperscript{167} McGee, supra note 1, at 10–14.
\textsuperscript{168} McGee Guest Home, Inc. v. Wash. Dep’t of Soc. & Health Servs., 142 Wash. 2d 316, 321, 12 P.3d 144, 147 (2000).
\textsuperscript{169} “Agency” is defined in the statute:
Agency means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings,
that the legislature created the hearings boards solely to adjudicate. If a hearings board steps over the line from adjudication into rulemaking, it oversteps its authority.

The APA defines an adjudication proceeding as “a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.” Rulemaking is defined as “the process for formulation and adoption of a rule.” The APA defines a rule as:

any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

Thus, if a hearing board establishes a bright line test, it is foreseeable that the test might create a standard which thereby makes a rule pursuant to three of the qualifiers, (a), (b), or (c). However, the hearings boards are supposed to base their decisions on the goals and requirements of the GMA. So long as the boards base their decisions on the goals and requirements of the GMA, they are not establishing new “requirement(s) relating to the enjoyment of benefits or privileges” and should not implicate (a) or (b). For this reason, bright line tests are not likely to be legislative in nature.

2. Impediment to Considering Local Circumstances

The second question, when must hearings boards defer to local governments’ interpretations, hinges on two claims by critics. First, some developers and local governments argue that judicial tests infringe upon the GMA’s decentralized framework in which hearings boards must defer to “local decisions” unless the decisions are clearly

except those in the legislative or judicial branches, the governor, or the attorney general, except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter 42.41 RCW.

WASH. REV. CODE § 34.05.010(2) (2006).
170. § 34.05.010.(1).
171. § 34.05.010(18).
172. § 34.05.010(16).
173. § 36.70A.320(3).
This argument suggests that “local decisions” include decisions regarding interpretation of the GMA. This ignores the fact that boards do not review “local decisions” but rather “local actions.” As already described, the fact that “local action” may necessarily require the local government to interpret the GMA, and the fact that the board is reviewing this action, does not preclude the hearings boards from interpreting the GMA themselves.

Critics also argue that even if hearings boards need not give deference to local decisions, the judicial bright line tests infringe upon local governments’ right to make decisions based on “local circumstances.” The GMA allows local governments to consider “local circumstances” in a few situations. These situations are discussed below regarding “bright lines in practice.”

a. Bright Lines in Practice: Densities

Hearings boards have established judicial bright line tests to determine whether a certain density is too dense for a rural or resource area or too dense for an urban area. The GMA has goals of reducing sprawl and encouraging urban growth, along with requirements to designate urban growth areas (UGAs), rural areas, natural resources lands, and critical environmental areas. It would seem strange that local governments could permit any level of density they desired.

For that reason, hearings boards established judicial bright line tests to ensure that densities in rural areas are rural in nature, densities in urban areas are urban in nature, and densities in agricultural and forestlands do not impede or infringe on farming and forestry practices. In City of Moses Lake v. Grant County, the Eastern Board stated: “[W]ith one narrow exception, this Board has consistently found that anything under 5-acre lots is urban. Clearly 2.5-acre lots are the clearest vehicle of sprawl.” In Vashon-Maury v. King County, the Central Board held, “Any residential pattern of 10 acre lots, or larger is rural. . . . Any smaller rural lots will be subject to increased scrutiny by the Board to assure that

175. WASH. REV. CODE § 36.70A.320(3).
176. See supra Part II.B.4.
177. Futurewise, GMHB No. 05-1-0011, at 8 (Nov. 1, 2006).
178. WASH. REV. CODE §§ 36.70A.070(5)(a), .110(2), .3201.
179. See infra notes 182–85.
180. See WASH. REV. CODE §§ 36.70A.020(1), .020(2), .030, .040, .050, .060, .110.
the pattern of such lots . . . will not . . . be inconsistent with the goals and requirements of the Act.” In Bremerton, the Central Board held, “[A]ny residential pattern of four net dwelling units per acre, or higher, is compact urban development and satisfies the low end of the range required by the Act. Any larger urban lots will be subject to increased scrutiny.” In LMI/Chevron, the Central Board held that “a future land use map designation for residential development that permits 4 du/ac [dwelling units per acre] within city limits (UGA) is an appropriate urban density [while] 1 du/2 ac within city limits (UGA) is not an appropriate urban density and constitutes sprawling low-density development.”

Thus, there are numerous examples of judicial bright line tests created for certainty and judicial economy.

Critics argue that these tests violate the GMA’s requirement that local governments be allowed to consider local circumstances. The GMA provides, “Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider

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182. Vashon-Maury v. King County, Final Dec. & Order, GMHB No. 95-3-0008c, at 79 (Oct. 23, 1995); see also City of Bremerton v. Kitsap County, Final Dec. & Order, GMHB No. 95-3-0039c (Oct. 6, 1995) (“A pattern of 1- and 2.5-acre lots meets the Act’s definition of urban growth. . . . However, a pattern of 1- or 2.5-acre lots is not an appropriate urban density either. . . . An urban land use pattern of 1- or 2.5-acre parcels would constitute sprawl; such a development pattern within the rural area would also constitute sprawl”); Sky Valley v. Snohomish County, Final Dec. & Order, GMHB No. 95-3-0068c, at 46 (Mar. 12, 1996) (“A pattern of 10 acre lots is clearly rural and the Board now holds that, as a general rule, a new land use pattern that consists of between 5- and 10-acre lots is an appropriate rural use . . . .”); 1000 Friends of Wash. v. Snohomish County, Final Dec. & Order, GMHB No. 04-3-0018 (Dec. 13, 2004) (“However, by adding manufactured homes on lots of less than 10 acres, the County permits a growth level in rural areas that the . . . Boards have consistently found to constitute sprawl.”); Diehl v. Mason County, 94 Wash. App. 645, 656, 972 P.2d 543, 548 (1999) (“Respondents cite to several Board decisions that have specifically stated that 1-acre to 2.5-acre lot sizes are per se urban densities, and rural densities should average 10 to 80 acre lots. . . . The Board’s determination that the rural element of Mason County’s CP is oversized and allows for urban growth in RACs is supported by the record.”).


184. Lawrence Michael Invs., LLC v. Town of Woodway, Final Dec. & Order, GMHB No. 98-3-0012, at 24 (Jan. 18, 1999); see also Forster Woods Homeowners’ Ass’n v. King County, Final Dec. & Order, GMHB No. 01-3-0008c, at 31 (Nov. 6, 2001) (“It is undisputed that four dwelling units per acre constitutes compact urban growth.”); Master Builders Ass’n of Pierce County v. Pierce County, Final Dec. & Order, GMHB No. 02-3-0010, at 15 (Feb. 4, 2002) (“It is generally accepted, and not disputed here, that 4 dwelling units per acre is an appropriate urban density.”); Kaleas v. Normandy Park, Final Dec. & Order, GMHB No. 05-3-0007c, at 16–17 (July 19, 2005) (“The Board’s formulation of the 4 du/acre density as an appropriate urban density has withstood the test of time. For a decade it has provided a basis for coordinated planning and the necessary certainty and predictability for GMA planning . . . .”); Fuhriman v. City of Bothell, Final Dec. & Order, GMHB No. 05-3-0025c, at 23–24 (Aug. 29, 2005) (“Once again it is not disputed by any of the parties that 4 du/ac is an appropriate urban residential density.”).

185. Futurewise v. Pend Orielle County, Final Dec. & Order, GMHB No. 05-1-0011, at 8 (Nov. 1, 2006).
local circumstances."186 This could have created a limit on hearings boards' authority to interpret the GMA, but the legislature added that local governments "shall develop a written record explaining how the rural element harmonizes the planning goals in [RCW section] 36.70A.020 and meets the requirements of this chapter."187 The requirement for a written record demonstrates that the legislature did not intend that the local governments be exempted from the goals and requirements. Indeed, because hearings boards supersede local governments' authority to interpret the GMA, hearings boards possess the authority to determine what constitutes adequate rural densities to fulfill the requirements of RCW section 36.70A.070(5) and the goals of encouraging urban development and reducing urban sprawl.188

Furthermore, facts can be so universal as to create a legal requirement.189 A bright line test for density is one such area of law. The question of what density is too dense for a community is often a factual one. But clearly some boundaries can be created without specificity to each county. A broad collection of social and economic data and studies can illuminate what generally will never be acceptable. As hearings boards increasingly make similar decisions based on these studies, a "pattern of decisions" will arise creating a legal boundary which even the most localized justification cannot cross.

b. Bright Lines in Practice: Market Factors

In sizing UGAs, counties must first select a twenty-year population projection to correctly size their UGAs for the estimated need for housing and employment.190 Counties may increase this size based on a "reasonable land market supply factor."191 However, the hearings boards must determine what is reasonable for a market factor.

The Central Board in Bremerton created a bright line test for determining market factors. "While it is difficult to draw an absolute limit beyond which a county may not go in using such a factor, the Board holds that a 'market factor bright line' will be drawn at the twenty-five

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187. Id.
188. § 36.70A.020(1)-(2).
189. See, e.g., WASH. R. EVID. § 201(b) (A court may take judicial notice of a fact if "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").
190. See WASH. REV. CODE § 36.70A.110(2).
191. Id.
percent threshold."

Effectively, this allowed up to a twenty-five percent excess capacity beyond that needed for the project population, employment, and housing. For anything beyond twenty-five percent, the board would ask three questions:

(1) What is the magnitude of the "land supply market factor" beyond the 25 percent bright line? . . .

(2) Is there other evidence to suggest that the land supply market factor is not reasonable? . . .

(3) Has the county also availed itself of other approaches, such as continuously monitoring land supply and making necessary adjustments over the life of the plans for the county and its cities?

Thus, the Central Board created a judicial bright line test of a twenty-five percent market factor threshold, beyond which the market factor would be subject to greater scrutiny.

Critics argue that this bright line test infringes upon local government's ability to consider "local circumstances." The GMA provides that "[i]n determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth." The critics' argument is improvident, however. While local governments may consider local circumstances and make many choices, their discretion is still bounded by the GMA goals and requirements. The section does not limit hearings boards' ability to interpret the GMA.

3. Changing the Standard of Review and Burden of Persuasion

What is of most concern regarding the bright lines is whether the hearings boards impermissibly change the standard of review or burden

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193. Id.
194. Futurewise v. Pend Orielle County, Final Dec. & Order, GMHB No. 05-1-0011, at 8 (Nov. 1, 2006).
196. Hearings boards must still allow local governments to "consider local circumstances" and "have discretion to make choices in their comprehensive plans to make many choices about accommodating growth." WASH. REV. CODE §§ 36.70A.070(5)(a); .110(2); .3201; .540. But the hearings boards must also determine when local circumstance becomes local happenstance of political winds and business pressure and when "many choices" becomes too many choices violating the GMA's goals and requirements. See § 36.70A.010.
of proof. RCW section 36.70A.320(3) provides that boards only weigh local actions based on the "clearly erroneous" standard of review. Additionally, the burden of persuasion cannot be changed from the original assignment, which section 36.70A.320(2) assigned to the petitioners. Changing these standards would be an impermissible legislative exercise by the boards, violating the non-delegation doctrine. This Section will analyze the market factor and density tests to determine whether the boards' "bright lines" impermissibly change the standard of review or shift the burden of persuasion.

The concern with Bremerton has less to do with the test than with the Central Board stating that "[t]he greater the degree the county's land supply exceeds the twenty-five percent bright line, the more closely the Board will scrutinize the record." "More closely scrutinize" may act to reduce the standard of review or shift the burden of persuasion. Although the Central Board may not have chosen its language wisely, the overall effect was that the Central Board was shifting the burden of production by requiring the county to provide more evidence and justification.

The difference between "more closely scrutinizing" and "shifting the burden of production" is simply a matter of perspective and therefore is of little consequence. If a board indicates that it will more closely scrutinize the record, the local government must produce more evidence and justification. On the flip side, if a board requires the local government to produce more evidence, the court will likely scrutinize the record more closely. Thus, scrutinizing more closely is synonymous with shifting the burden of production.

The market factor test does not impermissibly heighten the quantum of proof. Requiring more evidence is different than changing the quantum of proof. On the balancing scale of fact-finding, a petitioner must provide enough evidence to surmount the quantum of proof and the

197. But see § 36.70A.320(4) (providing an exception to subsection (2) when a local government is justifying an action to fix a previous action which the board found invalid).

198. 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8365 (2008); see also Diehl v. Mason County, 94 Wash. App. 645, 661–63, 972 P.2d 543, 551–52 (1999) (holding the GMA was not unconstitutionally vague and that the legislature's delegation of review authority to hearings boards did not violate the separation of powers doctrine); Snohomish County v. Anderson, 124 Wash. 2d 834, 838–41, 881 P.2d 240, 243–44 (1994) (holding constitutional claims that GMA violated separation of powers and granted an excessive delegation of power to the governor to impose penalties for noncompliant localities were not ripe for review).


200. Typically, the more a court scrutinizes a lower decision, the more likely the court may reverse it. Mayes, et al., supra note 13, at 34.
respondent’s evidence.\textsuperscript{201} Essentially, the Central Board in \textit{Bremerton} found that twenty-five percent equaled the weight of the clearly erroneous quantum. Each additional percentage point of a market factor is an additional grain of sand on the petitioner’s side of the fact-finding scale. Clearly, the test does not heighten the quantum of proof or standard of review, but merely reflects the evidentiary nature of market factors.

The market factor test also does not impermissibly shift the burden of persuasion. Even when a hearings board more closely scrutinizes a local action, requiring the respondent local government to produce more evidence, the petitioner still retains the burden of persuading the trier of fact that the evidence does not exculpate the respondent.

4. Viking Properties

\textit{Viking Properties, Inc. v. Holm} threw into question whether hearings boards can establish bright line rules.\textsuperscript{202} In July 2002, Viking bought a 1.46-acre lot located within a subdivision subject to a restrictive covenant.\textsuperscript{203} The relevant portion of the restrictive covenant is that it restricted development to “[one] single-family, detached private house on each half-acre [of the subdivision].”\textsuperscript{204} Three months after purchasing the lot, Viking’s president requested that the homeowners in the subdivision execute a release of the covenant, which all of the homeowners refused to do.\textsuperscript{205} Viking thereafter filed a declaratory judgment action in King County Superior Court.\textsuperscript{206} After discovery, Viking moved for partial summary judgment.\textsuperscript{207} One of Viking’s arguments was that the GMA, as interpreted by the hearings boards, created a public policy favoring higher densities and, thus, the density limitation covenant was against public policy and unenforceable.\textsuperscript{208} The trial court granted summary judgment.\textsuperscript{209} The homeowners moved for reconsideration, which was denied; they appealed directly to the Washington Supreme Court.\textsuperscript{210}

In the Supreme Court, Viking argued that the decision in \textit{Bremerton} imposed a “bright line” minimum, establishing a GMA public policy.\textsuperscript{211} The Supreme Court reversed, providing four reasons why the density limitation did not violate public policy: (1) the GMA did not impose

\textsuperscript{201} \textit{Id.}
\textsuperscript{202} Viking Props., Inc. v. Holm, 155 Wash. 2d 112, 118 P.3d 322 (2005).
\textsuperscript{203} \textit{Id.} at 15, 118 P.3d at 324.
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.} at 117, 118 P.3d at 325.
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.}
\textsuperscript{209} \textit{Id.}
\textsuperscript{210} \textit{Id.} at 118, 118 P.3d at 325–26.
\textsuperscript{211} \textit{Id.} at 129, 118 P.3d at 331.
“bright line” minimums; (2) “the GMA create[d] a general ‘framework’ to guide local jurisdictions instead of ‘bright line’ rules”; (3) the denser zoning regulations did not compel property owners to develop more densely; and (4) the city’s planning manager “determined that the covenant was not in irremediable conflict with city policy.”\(^\text{212}\) The first two reasons may serve to establish the precedent that hearings boards may not create bright lines to aid them in resolving cases.

It is questionable whether *Viking Properties* was intended to limit hearings boards’ abilities to use bright lines in their decisions. The court provides two sentences explaining its first reason in support of its conclusion that the GMA did not impose a bright line.\(^\text{213}\) The first sentence is, “The growth management hearings boards do not have authority to make ‘public policy’ even within the limited scope of their jurisdictions, let alone to make *statewide* public policy.”\(^\text{214}\) This is a reaction to Viking’s argument that the hearings boards’ decisions establish a public policy counter to the covenant.

It is certainly true that hearings boards have no discretion to create policy.\(^\text{215}\) However, bright lines should be construed not as public policy, but as zones of validity. Thus, the *Viking* court did not say that hearings boards cannot interpret the GMA, but rather (1) the zones do not establish “statewide public policy,” and (2) the hearings boards’ decisions have no force outside the scope of the GMA context.

Expounding on this latter logic, the court continued: “The hearings boards are quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute.”\(^\text{216}\) Here the court is saying that the decisions of the hearings boards have no weight outside of the GMA and the doctrine of servitutes. This is fundamentally different than saying hearings boards have no authority to interpret the GMA and establish judicial tests for decision-making.

The court’s second reason, that “the GMA create[d] a general ‘framework’ to guide local jurisdictions instead of ‘bright line’ rules,” is problematic.\(^\text{217}\) Again, the court is not likely saying that hearings boards cannot interpret the GMA and establish judicial tests, but rather that because their decisions are limited to within the GMA scope, only the

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212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.; see also* Futurewise v. Pend Orielle County, Final Dec. & Order, GMHB No. 05-1-0011, at 8 (Nov. 1, 2006).
216. *Viking Props.*, 155 Wash. 2d at 129, 118 P.3d at 331.
217. *Id.*
GMA itself can be considered as creating public policy. Because the GMA is a "general framework" without bright line rules, the restrictive covenant cannot violate a GMA bright line public policy.

The court provides an example attempting to explain this second reason: "[T]he existence of restrictive covenants that predate the enactment of the GMA and limit density within the urban growth areas are the type of 'local circumstances' accommodated by the GMA's grant of a 'broad range of discretion' for local planning." This, however, is a strange explanation. The existence of restrictive covenants has little to do with whether the GMA establishes a general framework or bright line rules. Rather, the court is making the statement that restrictive covenants are the equivalent of other local circumstances, such as the local topography, hydrology, economy, and community character. RCW section 36.70A.3201 provides that "local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances." The following question then arises: Did the court in Viking Properties mean that local governments' discretion of local circumstances should preempt all hearings boards' interpretations and tests of the GMA's goals and requirements? Evidently not, as the court cites to King County v. Central Puget Sound Growth Mgmt. Hearings Board, which held that "[l]ocal discretion is bounded, however, by the goals and requirements of the GMA." Reading the Viking Properties sentence independently does not yield the conclusion that the hearings boards cannot establish bright lines or judicial tests. Read in conjunction with the preceding sentence, it actually weakens the overall argument that the court meant to restrict hearings boards' exercise of judicial tests and creation of bright lines.

Finally, and most notably, the court never expressly overrules any of the hearings boards' decisions that establish bright lines and judicial tests. The court mentions Bremerton v. Kitsap County, which established the market factor bright line of twenty-five percent and a three-part test, but the court does not say that this was an invalid exercise of discretion by the Central Board. Instead, the court explained why the Bremerton bright line was inapplicable to the case at bar regarding restrictive covenants.

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218. Id.
221. Viking Props., 155 Wash. 2d 112, 129, 118 P.3d at 331 (citing Bremerton v. Kitsap County, Final Dec. & Order, GMHB No. 95-3-0039 (Oct. 6, 1995)).
222. Id. It is also indicative that Viking Properties was limited to the issue of invalidation of restrictive covenants due to public policy is the citations by law and restatements. Nearly all
5. Viking Properties’ Effect

Although the Washington Supreme Court apparently did not intend to restrict the hearings boards’ abilities to interpret the GMA, set bright lines, and create judicial tests, the effect of Viking Properties has been just that. Petitioners to hearings boards have been reluctant to cite to any bright lines created by the hearings boards.223 Hearings boards have been similarly reluctant to decide cases based on bright lines. One example is Kaleas v. City of Normandy Park. Normandy Park adopted a Comprehensive Plan that permitted low residential densities of 2.2, 2.9, and 3.5 dwelling units per acre.224 Futurewise and property owners John Kaleas and Bruce Horst petitioned the Central Board for review.225 The Central Board held that the designations were clearly erroneous given that they were less than the four units per acre bright line of Bremerton.226 Normandy Park appealed to King County Superior Court.227 The Superior Court held that Viking Properties established “that the Board does not have the authority to impose a “bright line” rule of a minimum four dwelling units per acre . . . as defining appropriate urban density.”228 The Superior Court also stated that “the Board erred in finding the City of Normandy Park’s comprehensive plan land use designations out of compliance with GMA.”229

On remand “for entry of an order consistent with this decision,”230 the Central Board had little choice but to enter an order of compliance.
Notably, one of the three board members dissented, saying that the Board, absent the ability to review based on previous bright lines, should pursue further inquiry into whether the designations comply with the GMA’s goals and requirements.\textsuperscript{231}

The Superior Court’s decision in \textit{Normandy Park} is troubling. First, the court provided no reasoning as to why \textit{Viking Properties} applied in this case. This case is outside the context of the Supreme Court’s analysis in \textit{Viking} regarding why hearings boards’ decisions are inapplicable to the establishment of a public policy invalidating restrictive covenants. Second, and more importantly, the decision seems to have changed how hearings boards view themselves. The Central Board’s decision on remand demonstrates that hearings boards believe \textit{Viking Properties} restricts their ability to interpret the GMA, and must concede to local governments’ decisions based on their “local circumstances.” However, as demonstrated by the above analysis of \textit{Viking Properties}, this reasoning is incorrect.

6. Post-\textit{Viking Properties}

\textit{a. Ferry County}

Two subsequent Supreme Court decisions suggest that \textit{Viking Properties} was not intended to have the effect that the Superior Court in \textit{Normandy Park} gave it. In \textit{Ferry County v. Concerned Friends of Ferry County},\textsuperscript{232} the court analyzed how to determine whether a county complied with the Best Available Science (BAS) requirement.\textsuperscript{233} The court held that the Court of Appeals was correct to use the Western Board’s test.\textsuperscript{234} The Western Board, although not establishing a clear definition or bright line for BAS, had established a three-part test\textsuperscript{235} Thus, the Supreme Court believes that the hearings boards have discretion to interpret the GMA and establish judicial tests. While the court did not explicitly approve the use of bright lines, there is a murky distinction between bright lines and judicial tests; it is unlikely the court will attempt to make a distinction.

\textsuperscript{231} Kaleas v. Normandy Park, Order on Remand, GMHB No. 05-3-0007c, at 7–10 (July 31, 2006) (McGuire, Bd. member, dissenting).

\textsuperscript{232} Ferry County v. Concerned Friends of Ferry County, 155 Wash. 2d 824, 123 P.3d 102 (2005).

\textsuperscript{233} WASH REV. CODE § 36.70A.172(1) (2003).

\textsuperscript{234} Ferry County, 155 Wash. 2d at 834–38, 123 P.3d at 107–09.

\textsuperscript{235} Id., 123 P.3d at 107.
b. Lewis County

In Lewis County v. Western Washington Growth Management Hearings Board, which concerns designating agricultural lands, Lewis County allowed each farm to have a five-acre “farm center” where rural commercial and industrial uses would be permitted.\textsuperscript{236} The Supreme Court upheld the Western Board’s invalidation of non-farm uses within an agricultural designation.\textsuperscript{237} In doing so, the court seemed to create a bright line of its own:

The problem with the county’s approach is that any farmer could convert any five acres of farmland to more profitable uses, even if such conversion would remove perfectly viable fields from production. Thus it was clearly erroneous to exclude from designation agricultural lands up to five acres on every farm, without regard to soil, productivity or other specified factors in each farm area.\textsuperscript{238}

Not only did the six-member majority never mention Viking Properties, the majority seemed to attack the dissent’s assertion of Viking Properties several times.\textsuperscript{239} The dissent led its opinion by stating that the GMA was not intended to be a top-down approach with state agencies (or GMA Boards) dictating requirements to local entities. Thus, in accordance with the legislative language of the act, we have held that the GMA does not prescribe a single approach to growth management. RCW 36.70A.3201; Viking Props. v. Holm, 155 Wash.2d 112, 125–26, 118 P.3d 322 (2005) (“the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county’s or city’s future rests with that community” (alteration in original) (quoting RCW 36.70A.3201)).

Thus, the GMA is implemented exclusively by city and county governments and is to be construed with the flexibility to allow local governments to accommodate local needs. Viking Props., 155 Wash.2d at 125–26, 118 P.3d 322.\textsuperscript{240}

The three-member dissent implied that because the GMA gives the sole authority of planning to local governments, local governments have the authority to interpret the GMA. The dissent made several leaps of

\textsuperscript{236} Lewis County v. Western Washington Growth Management Hearings Bd., 157 Wash. 2d 488, 495, 139 P.3d 1096, 1099 (2006).
\textsuperscript{237} Id. at 509, 139 P.3d at 1106.
\textsuperscript{238} Id. at 505, 139 P.3d at 1104 (emphasis added).
\textsuperscript{239} Id. at 494 n.1, 498 n.7, 506 n.16, 508 n.17, 139 P.3d at 1098 n.1, 1100 n.7, 1104 n.16, 1105 n.17.
\textsuperscript{240} Id. at 512, 139 P.3d at 1107 (J.M. Johnson, J., dissenting).
logic to reach this assertion. First, the dissent cited Quadrant to say that no deference is to be given to hearings boards’ decisions that do not properly defer to local decisions.\(^{241}\) The dissent then added that hearings boards are limited in their authority because they can only review petitions regarding natural resource and critical area designations, UGA designation, and comprehensive plans, development regulations, and shoreline master plans. In addition, the dissent implied that hearings boards cannot reach issues regarding the constitution, equity, or impact fees.\(^{242}\) Moreover, the dissent implied that hearings boards’ decisions are less credible because board members “are not judicial or legislative officers.”\(^{243}\) After making these statements, the dissent made a jump in logic, saying the county’s decisions should be upheld without stating how the Western Board misapplied its deference to local decisions.

The majority retorted, “[r]ather than apply the APA standard of review, the dissent simply offers bare assertions, i.e., ‘[l]he uses that the Board found noncompliant are actually consistent with the GMA’ to justify its conclusion that the Board erred. Dissent at 1111.”\(^{244}\) The Lewis County dissent was advocating a “bottom-up” approach without any “up.” The majority stated:

> It seems that the dissent would bypass the Board and allow counties to decide whether their own actions comply with the GMA. For example, the dissent complains that “unelected boards” may “micro-manage land use plans for counties.” Dissent at 1107 n.1. While bypassing the Board certainly would promote the dissent’s goal of “allowing the . . . local government to govern” it would contradict the intent of the legislature for a quasi-judicial body to evaluate GMA compliance. Dissent at 1109.\(^{245}\)

Not only was there no “up,” but the dissent forewent any deference to the Board’s decisions based on Quadrant, which provided that “a board’s

\(^{241}\) Id. at 513, 139 P.3d at 1108 (citing Quadrant Corp. v. State Growth Mgmt. Hearings Bd., 154 Wash. 2d 224, 238, 110 P.3d 1132, 1139 (2005)).

\(^{242}\) Id. Somehow the dissent failed to mention that Viking Properties held that hearings boards cannot make public policy either. See Viking Props., Inc. v. Holm, 155 Wash. 2d 112, 117, 118 P.3d 322, 325 (2005).

\(^{243}\) Lewis County, 157 Wash. 2d at 513, 139 P.3d at 1108 (J.M. Johnson, J., dissenting). The dissent failed to mention that the regionalization of the boards and the requirement for three members with local government and planning experience, one who must be a lawyer and one who must be a former elected local official, was a conscious decision by the legislature to provide regional differences and more expertise to decision-making. As described above in the history of the GMA, the legislature intended the boards to be a quicker and wiser review procedure than the court process. If anything, courts should give more deference to hearings board decisions.

\(^{244}\) Id. at 508 n.17, 139 P.3d at 1106 n.17.

\(^{245}\) Id. at 494 n.1, 139 P.3d at 1098 n.1 (majority opinion).
ruling that fails to apply this ‘more deferential standard of review’ to a county’s action is not entitled to deference from this court.”246

The dissent’s error is three-fold. First, as described above, the dissent did not say how the Western Board did not give deference to Lewis County. When multiple issues are before a hearings board, a board’s decision may fail to give proper deference to particular local actions but give proper deference to other actions. In these cases, a court should continue to defer to the portions of the board decisions that gave proper deference. Second, when the hearings board did not properly defer to local actions, the court still must apply the APA standards of review. Third, if the hearings board misapplied deference to local actions, the logical decision by a court would be to remand to the board for a decision pursuant to the proper standard of review, especially considering the legislature’s requirement that hearings boards have expertise and regionalization.

7. Reaching past Gold Star

Ferry County and Lewis County demonstrate that a majority did not intend for Viking Properties to prohibit bright line judicial tests or change the standard of review. As the Supreme Court changes membership, how the GMA is interpreted in light of Viking Properties will be of great importance. Unfortunately, the Court of Appeals has indicated some confusion as to how to proceed. In Gold Star Resorts, Inc. v. Futurewise,247 the court stated that

Viking is obviously distinguishable, involving as it does an effort to use Board rulings to invalidate a private covenant, but Gold Star’s point is well taken. In the absence of legislative guidance, the boards are left to adopt some consistent approach. But guidelines are one thing and bright line rules are another.

... ...

The Board did not order any particular planning outcome or the application of any particular definition of rural density, but rather remanded to the county for further review. Upon that review, the principles of Viking should be considered.248

246. Quadrant Corp., 154 Wash. 2d at 237, 110 P.3d at 1139 (quoting Lewis County, 157 Wash. 2d at 513, 139 P.3d at 1108 (J.M. Johnson, J., dissenting)).
248. Id. 166 P.3d at 758–59.
For those who fear that local decisions will be influenced by economic pressure to expand the tax base or by business pressure to allow unnecessary development, the Gold Star decision should be quite worrisome. The sooner the courts understand the inapplicability of Viking Properties to hearings board decisions, the sooner private citizens and petitioners will be able to resume their role as GMA enforcers.

The Gold Star concurring opinion laid out a clearer view of "bright line" rules and Viking Properties, although different than the zone of validity analysis that we propose below. In his concurring opinion, Judge Agid stated:

I write separately to clarify a misconception that has crept into the case law concerning the Growth Management Hearings Boards' (Boards) adoption of a "bright line rule" governing urban and rural densities under the Growth Management Act (GMA), chapter 36.70A RCW. While the Central Puget Sound Board did use that unfortunate term in its Bremerton v. Kitsap County decision, a cursory review of its decision establishes that it was really adopting a rebuttable presumption that certain proposed densities did not conform to the GMA's definitions of urban and rural areas.\(^\text{249}\)

As Judge Agid noted, hearings boards have generally not applied a "bright line" rule in the traditional manner of applying the rule without considering anything else. Instead, the hearings boards have generally used the "bright line" rule in the context of evaluating factual evidence in the record relating to that particular county. For example, in a pre-Viking Properties case, City of Moses Lake v. Grant County, the Eastern Board held that

[w]ith one narrow exception, this Board has consistently found that anything under 5-acre lots is urban. Clearly 2.5-acre lots are the clearest vehicle of sprawl. Scattering these small lots around cities would continue what the GMA is trying to stop. Services cannot be easily provided; each will have their own well, septic tank and other limited infrastructure. This size lot is one of the most difficult to bring into a city if annexed.\(^\text{250}\)

Thus, although other decisions had found the density adopted by Grant County to be urban, it was the local circumstances that governed the Eastern Board's decision: the need for urban services, the difficulty in annexation, and the sprawling nature of 2.5-acre lots.\(^\text{251}\)

\(^{249}\) Id. 166 P.3d at 759 (Agid, J., concurring).

\(^{250}\) City of Moses Lake v. Grant County, Order on Remand, GMHB No. 99-1-0016 (Apr. 17, 2002).

\(^{251}\) Id.
Similarly, in a post-Viking Properties case, the Eastern Board found Kittitas County’s rural densities noncompliant.\textsuperscript{252} Even though all three boards had previously held that one dwelling unit per three acres was not a rural density, the Eastern Board found Kittitas County’s densities non-compliant based upon evidence in the record, including the need to provide urban water and sewer service at that density, incompatibility with natural resource lands, and predominant farm size in the County.\textsuperscript{253}

It is unclear whether Judge Agrid’s “rebuttable presumption” is the approach other hearings boards have actually used to evaluate evidence before them. A rebuttable presumption would usually mean that the burden of persuasion shifts to the County once a petitioner points out that a given density is outside of the presumption.\textsuperscript{254} In particular, hearings boards have not handled petitions for review related to density in this way. Although other board decisions are referenced, each hearing board has generally held petitioners to the standard of producing factual evidence from the record to demonstrate that the County erred in adopting a particular density.\textsuperscript{255} Thus, it appears that the hearings boards have neither been applying bright line rules nor rebuttable presumptions when referencing prior decisions. Instead, the hearings boards have treated other decisions as merely advisory opinions, much as one trial court judge might consider another trial court judge’s ruling on similar facts.\textsuperscript{256}

8. Zone of Validity for Local Discretion

Regardless of the hearings boards’ approach to using bright lines in practice, there is a strong argument for the bright lines to stand on their own. Judicial bright line tests should always be considered valid when the tests create zones within which local actions are always permissible. For example, tests permit all densities below one unit per ten acres in rural areas,\textsuperscript{257} all densities above four residential units per acre in urban

\textsuperscript{252} Kittitas County Conservation v. Kittitas County, Final Dec. & Order, GMHB No. 07-1-0004c (Aug. 20, 2007).
\textsuperscript{253} Id. at 7–9, 15–16.
\textsuperscript{254} A rebuttable presumption is “an inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.” BLACK’S LAW DICTIONARY 1224 (8th ed. 2004). This is the updated definition.
\textsuperscript{255} E.g., Kittitas County Conservation v. Kittitas County, Final Dec. & Order, GMHB No. 07-1-0004c (Aug. 20, 2007).
\textsuperscript{256} The doctrine of stare decisis does not apply to Board decisions, although they are expected to follow some degree of uniformity in resolution. Vergeyle v. Employment Sec. Dept., 28 Wash. App. 399, 404, 623 P.2d 736, 739 (1981) (although stare decisis plays only a limited role in the administrative agency context, agencies should strive for equality of treatment), overruled on other grounds, Davis v. Employment Sec. Dep’t, 108 Wash. 2d 272, 737 P.2d 1262 (1987).
areas, and all market factors below twenty-five percent in sizing urban growth areas. These tests proscribe any petitioner’s claim that a density or market factor within these zones do not comply with the GMA.

Hearings boards should be able to rely on bright lines that were created either (1) based on scientific and academic evidence; (2) based on authority of prior case law; or (3) based on a negative argument. Once established, bright lines create zones in which local governments can rest assured that any designation will not be overturned by a petition to a hearings board. Providing this protection to local governments helps ensure efficient use of government resources and provides appropriate deference to local governments.

The Washington Supreme Court in Lewis County implicitly understood the importance of creating zones of local discretion. In Lewis County, the Western Board found that Lewis County’s allowance for five-acre “farm-centers” on each farm did not comply with the GMA. On appeal to the Supreme Court, Lewis County claimed that the Board had prescribed a “per se prohibition” on all nonagricultural uses in agricultural areas and the dissent similarly opined that the Board had “prescribe[d] a single approach to growth management.” The majority disagreed, stating that the board’s finding of noncompliance “is different from requiring a particular form of zoning or flatly prohibiting all nonfarm uses. In sum, Lewis County has not been stripped of the ability to use innovative zoning techniques pursuant to RCW 36.70A.177, as it contends.” Thus, although the Western Board prohibited five-acre farm-centers, the County still may take local action within a large zone of discretion.

258. Forster Woods Homeowners’ Ass’n v. King County, Final Dec. & Order, GMHB No. 01-3-0008c, at 31 (Nov. 6, 2001).
260. This, as described above, is essentially how the boards are approaching bright line questions. See Master Builders Ass’n of Pierce County v. Pierce County, Final Dec. & Order, GMHB No. 02-3-0010, at 15 (Feb. 4, 2002) (“It is generally accepted, and not disputed here, that 4 dwelling units per acre is an appropriate urban density.”)
261. E.g., a rural area cannot include urban growth. See City of Bremerton v. Kitsap County, Final Dec. & Order, GMHB No. 95-3-0039c, at 79 (Oct. 6, 1995) (“A pattern of 1- and 2.5-acre lots meets the Act’s definition of urban growth.... [S]uch a development pattern within the rural area would also constitute sprawl.”) (emphasis added).
262. Panesko v. Lewis County, Order Finding Noncompliance & Imposing Invalidity, GMHB No. 00-2-0031c, at 18-20 (Feb 13, 2004).
264. Id. at 511, 139 P.3d at 1107 (J.M. Johnson, J., dissenting).
265. Id. at 507, 139 P.3d at 1105 (majority opinion).
Based on Lewis County, boards should not be hindered from using judicial bright line tests. As long as the hearings board (1) only determines which actions are noncompliant based on the factual circumstances and (2) leaves a zone of choices within which local governments may exercise discretion, the hearings board decision is valid.

IV. CONCLUSION: SUGGESTIONS TO STRENGTHEN THE GMA

As the concluding article to a two-part series, we finish with a few thoughts. Based on the oral histories of key players in the creation of the GMA, the original legislatures in 1990 and 1991 clearly desired a “bottom-up” approach relying on decentralized enforcement through the efforts of private citizens. This two-part series has not made any serious effort to question that approach. Instead, this second article has emphasized that if the decentralized enforcement is to continue to possess efficacy, efforts must be doubled in gaining and protecting (1) the ability for CTED to create minimum guidelines that must be followed by local governments, and (2) the ability for growth management hearings boards to rely on precedent to establish general standards, even when called “bright lines.” We recommend the following courses of action to ensure that decentralized enforcement remains viable:

(1) Hearings boards and courts, or the Washington State Legislature, should better delineate among the burden of persuasion, burden of production, quantum of proof, and standard of review. This delineation would appropriately reflect how the burden of persuasion stays with the petitioner and how the burden of production shifts at a certain point. An understanding of this delineation would cut down on the common mistake made by boards and respondents in stating that the burden of proof cannot shift. As long as this confusion remains, the door remains open for a court to let the confusion adversely affect decentralized enforcement.

(2) The state legislature should establish the CTED guidelines as the minimum requirements to which all local governments must abide. In addition, CTED should be allowed to create rules that summarize hearings boards’ decisions and judicial bright line tests in order to promote judicial and administrative economy.

(3) Courts should embrace the hearings boards’ bright line tests. Bright line tests are an important function for judicial economy;

266. McGee, supra note 1, at 10–14, 26–30.
they create certainty for local governments and developers and allow hearings boards to exercise interpretive duties.

These three suggestions will carry out the Legislative intent for local participation and enforcement of the GMA goals and requirements, permitting decentralized management subject to general statewide baseline requirements.