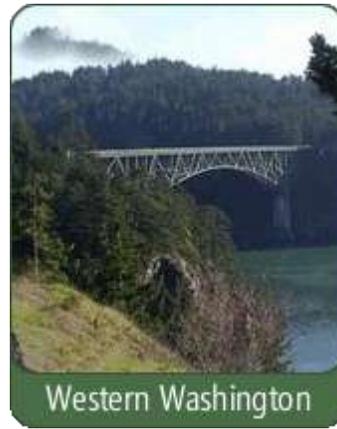




Eastern Washington



Western Washington



Central Puget Sound

GROWTH MANAGEMENT HEARINGS BOARD

DIGEST OF DECISIONS

SECOND EDITION BY REGION
(July 1, 2010 to December 31, 2010)



Washington State Growth Management Hearings Board

Current Board Members:

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EXECUTIVE SUMMARY

In 1990, the Legislature enacted the Growth Management Act, RCW 36.70A to create a state-wide method for comprehensive land use planning that would prevent uncoordinated and unplanned growth. Although the GMA permits direct review by the courts, rather than have GMA disputes proceed directly to the court, the Legislature subsequently established three independent Growth Management Hearings Boards – Eastern Washington, Western Washington, Central Puget Sound - and authorized that these boards “hear and determine” allegations that a city, county, or state agency has not complied with the goals and requirements of the GMA, and related provisions of the Shoreline Management Act (SMA), RCW 90.58, and the State Environmental Policy Act (SEPA), RCW 43.21C.

In an effort to streamline government and simplify Washington State’s environmental and land use appeal process, in 2010 the Legislature enacted two bills – House Bill 2935 and Senate Bill 6214. With Senate Bill 6214, the Legislature restructured the Growth Management Hearings Boards, eliminating the previous structure and establishing a single seven-member board to hear cases. The regional structure maintains the same geographic jurisdictions of the prior boards. This new structure became effective on July 1, 2010.

In previous years, each of the three boards issued a Digest of Decisions representing a historical synopsis of the substantive decisions issued by that particular board. These Digests are still available for review on the website. However, after the 2010 Legislative session it was determined that a single Digest of Decisions was better suited to reflect the newly established unified structure.

This Digest represents decisions, separated by region, starting on July 1, 2010. The Digest establishes a section for each region and provides a synopsis of substantive decisions by keyword. An additional section provides for information relevant to all regions, including GMA legislative history and court cases. A full copy of the decision, relevant case history, and statistical data is available via the “Case and Decision Search” Tab on the Board’s website at: www.gmhb.wa.gov.

For consistency, the historic case numbering system utilized by the three boards has been retained. The full case number (*e.g.* Case No. 10-1-0001c) indicates: the year the case was filed (first two digits); the geographic area where the case was filed (third digit – 1 Eastern Washington, 2 Western Washington, and 3 Central Puget Sound); the PFR number filed that year (last four digits); and whether the case was consolidated (c).



EASTERN WASHINGTON REGION

DIGEST OF DECISIONS

A full copy of the decision and relevant case history is available via the “Case and Decision Search” Tab on the Board’s website at: www.gmhb.wa.gov.

Capital Facilities

- One of the most fundamental policies of the Growth Management Act is to promote the public's interest in the conservation and wise use of our lands by requiring coordinated and comprehensive planning. Capital facilities planning, land use planning, and financial planning are inextricably linked and must be coordinated and consistent to ensure that necessary public facilities (including transportation) shall be adequate at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. In order to have adequate public facilities at the time the development is available for occupancy and use, capital facilities planning must be done well before the start of on-the-ground development activities. *Fenske, et al v. Spokane County*, Case 10-1-0010, Final Decision and Order at 8 (Sept. 3, 2010)
- By its very nature, capital facilities planning must be done at the PLAN approval stage as opposed to the PROJECT approval stage in order to effectively provide for the necessary lead time and identification of probable funding sources, and also to inform decision makers and the public as they consider the public infrastructure impacts of proposed comprehensive plan amendments. While specific project details will not necessarily be known at the Plan approval stage, some overall forecasting can be done based on reasonable planning assumptions and current development regulations. *Fenske, et al v. Spokane County*, Case 10-1-0010, Final Decision and Order at 8-9 (Sept. 3, 2010)
- Capital facility funding and scheduling issues need to be evaluated at the time the future land use map is amended. *Fenske, et al v. Spokane County*, Case 10-1-0010, Final Decision and Order, at 9 (Sept. 3, 2010)
- [Postponing review of capital facilities impacts until a site-specific proposal] does not comport with the GMA because it delays capital facilities planning until the time of a site-specific development application – after the land use map has been amended to facilitate the proposed project -- thereby depriving County decision makers from having important information to inform their land use mapping decision. *Fenske, et al v. Spokane County*, Case 10-1-0010, Final Decision and Order, at 11 (Sept. 3, 2010)

Compliance

- [Repeal of offending legislation achieved compliance] *DCCRG/Futurewise v. Douglas County*, Case 09-1-0011, Order Finding Compliance (Sept. 28, 2010)
- The Board received no communications from Ferry County prior to the [compliance] deadline nor did it receive any Statement of Actions Taken to Comply (SATC) or related briefing on the matter. At the compliance hearing, the County conceded it had taken no legislative action to achieve compliance in these proceedings. Therefore, with Ferry County conceding that it has taken no action, the Board can only conclude that the County remains non compliant with the GMA. *CFFC/Robinson v. Ferry County*, Case 06-1-0003, Order Finding Continuing Non-Compliance and Denying Motion for Extension at 2 (Sept. 10, 2010)
- [T]he Board is able to grant extensions in the compliance schedule that are received *prior* to the expiration of the compliance period. *CFFC/Robinson v. Ferry County*, Case 06-1-0003, Order Finding Continuing Non-Compliance and Denying Motion for Extension at 2 (Sept. 10, 2010)

- [Repeal of offending legislation achieved compliance] *Brodeur/Futurewise, et al v. Benton County, et al*, Case 09-1-0010c, Order Finding Compliance (Resolution 09-162 Rural Lands) (July 16, 2010)

Critical Areas

- [The] Yakima County map, together with the various performance standards, definitions, and policy statements in Yakima County Code Chapter 16C.06, constitutes Yakima County's designation of fish and wildlife habitat conservation areas for aquatic species located outside of SMA jurisdiction, as contemplated by the GMA and reflecting a consideration of the applicable Department of Commerce Guidelines. Petitioner offered no evidence that this multi-layered approach to habitat designation fails to satisfy the requirement in RCW 36.70A.170(1). *Confederated Tribes and Bands of the Yakama Nation v. Yakima County*, Case 10-1-0007, Final Decision and Order, at 9 (Aug 17, 2010).

Equitable Doctrines

- [County sought dismissal based on a Superior Court holding, asserting the Board was barred from hearing the matter, in response the Board stated] [The GMHB] is entirely a creature of statute that can hear and decide only those matters presented in accordance with RCW 36.70A.280 and RCW 36.70A.290. The GMHB cannot hear cases and cannot decide legal issues that fall outside the scope of statutory authority conferred by RCW Chapter 36.70A. The GMA does not expressly authorize this Board to make legal rulings regarding *res judicata/collateral estoppel* effects allegedly emanating from a superior court decision in a different, unrelated case ... These judicial doctrines may apply in some instances to litigants who seek to relitigate claims and issues in the courts, but the GMHB is an administrative tribunal, not a litigant. Spokane County cites no legal authority that *res judicata/collateral estoppel* can be asserted against a tribunal as opposed to being asserted against a litigant. And there is nothing in the Growth Management Act to support this novel theory advanced by the County. Accordingly, the Board declines to make legal rulings on the assertion of *res judicata/collateral estoppel* against the tribunal itself where the County cites no statutes to support its theory and there appears to be no such authority. *Futurewise v. Spokane County*, Case 10-1-0006, Order on Motion to Dismiss at 2-3 (July 6, 2010)
- *See also, Fenske, et al v. Spokane County*, Case 10-1-0010, Second Order on Motion to Dismiss (July 7, 2010)

Failure to Revise Challenge

- A "Failure to Revise" challenge (1) must be filed within 60 days after publication of the county's seven year update and (2) must concern aspects of a comprehensive plan that are directly affected by new or recently amended GMA provisions. Petitioner, as the party with the burden of proof, must show that both of these elements are satisfied in order to proceed to the merits of a Failure to Revise challenge. *Futurewise v. Douglas County*, Case 10-1-0004, Final Decision and Order, at 7 (Aug. 17, 2010)

Jurisdiction – Timeliness

- The question of whether a challenge has been timely filed is jurisdictional. *Futurewise v. Spokane County*, Case 10-1-0006, Final Decision and Order, at 12 (Aug. 17, 2010)
- A PFR must be filed within 60 days after publishing notice of adoption of the amendment, not within 60 days after publishing notice of a resolution that confirms or refers back in time to the actual amendment adoption. *Futurewise v. Douglas County*, Case 10-1-0004, Final Decision and Order, at 6 (Aug. 31, 2010)
- *See also, Fenske, et al v. Spokane County*, Case 10-1-0010, Final Decision and Order, at 7 (Sept. 3, 2010)(Challenge to adequacy of 2001 Housing Element barred)

Limited Area of More Intense Rural Development (LAMIRD)

- *See Futurewise v. Spokane County*, Case 10-1-0006, Final Decision and Order (Aug. 17, 2010)

Petition for Review

- [WA State Department of Ecology was added as a respondent party via an Amended Petition for Review] PFR amendments cannot be used to add new issues or enlarge the scope of review or satisfy a jurisdictional requirement once the 60 day appeal period has elapsed. But filing an amended petition is an appropriate way to add an additional party to the case so long as all jurisdictional requirements have been met within the 60 day appeal period. *Pilcher, et al v. City of Spokane & WA Dept. of Ecology*, Case 10-1-0012, Order Denying Motion to Dismiss, at 11 (Dec. 8, 2010)(Board member Roehl dissenting)

Practice before the Board

- [T]he Board expects local jurisdictions to comply with deadlines established not only for the taking of legislative action but also for the filing of briefs and reports. If the County has concerns about meeting these deadlines, it should promptly communicate these concerns to the Board so that appropriate modifications could be made. *CFFC/Robinson v. Ferry County*, Case 06-1-0003 Order Finding Continuing Non-Compliance and Denying Motion for Extension at 2 (Sept. 10, 2010)

Rural Development – Clustering

- [I]f a county chooses to allow Rural Cluster Development, the county must do so in a manner that is consistent with rural character and provides appropriate rural densities that are not characterized by urban growth. *Crowder, et al v. Spokane County*, Case 10-1-0008, Final Decision and Order, at 7 (Aug. 24, 2010)
- The rural cluster can create smaller individual lots than would normally be allowed in a Rural Area, but only so long as there is a significant area of compensating open space that is “permanently” protected or protected “in perpetuity.” The words “permanent” and “in perpetuity” have the same meaning in the context of rural cluster open space protection, i.e., the open space protection has no expiration date. *Crowder, et al v. Spokane County*, Case 10-1-0008, Final Decision and Order, at 7-8 (Aug. 24, 2010)
- Rural cluster development involves a *quid pro quo* in that smaller-than-normal individual lots are approved in exchange for the permanent/perpetual open space protection of the property residue. The resulting development is more compact but balanced by the adjoining perpetual

open space. Subsequent withdrawal of rural area open space protection would abrogate the rural cluster *quid pro quo* ... Counties must, therefore, ensure that this open space protection within rural cluster development areas is permanent, continues without expiration, and cannot be revoked so long as the area is governed by the Rural Element. *Crowder, et al v. Spokane County*, Case 10-1-0008, Final Decision and Order, at 8 (Aug. 24, 2010)

- The GMA does allow applications for amendments to the comprehensive plan and development regulations under RCW 36.70A.130. If, for example, the open space land met all applicable GMA requirements and was subsequently reclassified from Rural Land to Urban Growth Area, then “consistency with rural character” and “appropriate rural densities and uses” would no longer apply – urban subdivision and urban densities may be appropriate [subject to other GMA requirements]. *Crowder, et al v. Spokane County*, Case 10-1-0008, Final Decision and Order, at 12 (Aug. 24, 2010)

Service

- [The City of Spokane and WA State Department of Ecology both sought dismissal because Petitioner failed not only to name but to serve the Department of Ecology within the statutory time period] The Board must determine whether the statutes required Petitioners, as a jurisdictional requirement, to include Ecology in this appeal within the 60-day appeal period, as opposed to 71 days after start of the appeal period, as occurred in the present case. This requires consideration of the interplay between the appeal provisions of the SMA and GMA, i.e., the interplay between RCW 90.58.190 and RCW 36.70A.290. *Pilcher, et al v. City of Spokane & WA Dept. of Ecology*, Case 10-1-0012, Order Denying Motion to Dismiss, at 9 (Dec. 8, 2010)(Boardmember Roehl dissenting).
- [The GMA] is silent as to naming Ecology and serving the PFR on Ecology. Although Ecology has an integral and pervasive role as the final approval authority over all local master programs and amendments thereto across Washington State, and Ecology should appropriately be viewed as a necessary party to this case, the statutes [GMA and SMA] do not explicitly require naming Ecology and serving the PFR upon Ecology within the 60-day appeal period. Both RCW 90.58.190(2)(a) and RCW 36.70A.290(2) instruct petitioners to file the PFR with the GMHB within 60 days. These statutes do not say to serve anyone, and these statutes are silent as to who is a named respondent. *Pilcher, et al v. City of Spokane & WA Dept. of Ecology*, Case 10-1-0012, Order Denying Motion to Dismiss, at 9 (Dec. 8, 2010)(Boardmember Roehl dissenting).

Standing

- Futurewise does reference its methods for obtaining standing in its PFR, but provides no expressed evidence to support these assertions. However, contrary to the County’s and Intervenors contention, a PFR is not required to contain such evidence but rather once standing is challenged a petitioner is permitted to come forward with evidence to demonstrate they satisfy one of the standing requirements of the GMA. *Futurewise v. Spokane County*, Case 10-1-0006, Final Decision and Order, at 7-8 (Aug. 17, 2010)
- *Futurewise v. Spokane County*, Case 10-1-0006 Final Decision and Order, at 8 (Aug. 17, 2010)(Noting that generally comments received after an announced deadline cannot be utilized to demonstrate standing but the GMA’s intent for public participation and conflicting evidence allowed standing)

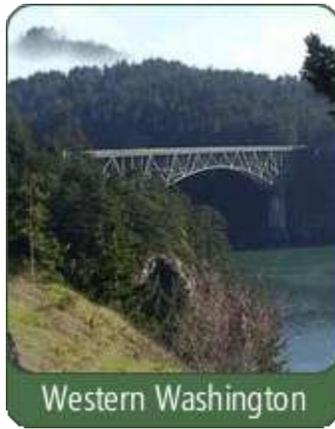
Supplemental Evidence

- [Noting that review is limited to the jurisdiction's record and that supplementation is allowed only in limited situations, the Board stated] In examining proposed supplemental evidence, we look to both the relevance of the proposed evidence and its reliability. The party offering the evidence must be able to show that the evidence will help illuminate the issues before the board. Second, the evidence must be of a nature that the board can rely on to be objective and trustworthy. Even if relevant to an issue before the board, evidence may not be admitted if it is mere opinion or argument. As a general proposition the Board rejects proffered supplemental evidence compiled after the decision of the local government has been made. *Pilcher, et al v. City of Spokane & WA Dept. of Ecology*, Case 10-1-0012, Order on Motion to Supplement, at 2 (Dec. 30, 2010).

Urban Growth Area – Sizing

- [RCW 36.70A.110 and 36.70A.115] were amended in 2009 to clarify that GMA planning should be expanded beyond land capacity for housing and employment growth to include land capacity for certain additional specified categories of facilities such as commercial and industrial facilities; however, the 2009 legislative amendments did not change the GMA's requirement that the size of a UGA must be based upon an OFM 20-year population projection. *Brodeur/Futurewise, et al v. Benton County, et al*, Case 09-1-0010c, Order Finding Continuing Non-Compliance at 4-5 (Sept. 24, 2010).
- While the Board is mindful of the City's desire to pursue economic development opportunities ... and the County's discretion to make local choices about accommodating urban growth, those considerations do not trump the specific requirements of the GMA for UGA sizing, including RCW 36.70A.110(2) and RCW 36.70A.115. Furthermore, if the County approves a UGA enlargement based only upon economic development opportunities, without regard to the amount of land actually needed to accommodate OFM-projected urban growth, then such growth will be uncontained and the fundamental GMA goal to reduce sprawl will be frustrated. *Brodeur/Futurewise, et al v. Benton County, et al*, Case 09-1-0010c, Order Finding Continuing Non-Compliance at 6 (Sept. 24, 2010).
- [I]t is a county's responsibility to establish UGAs and, in doing so, to ensure sufficient land capacity countywide to accommodate anticipated growth, consistent with the 20-year OFM population forecast. That capacity is then allocated to all of the county's UGAs. If it is the desire of Benton County to allow expansion of the West Richland UGA for commercial and industrial purposes, a reduction elsewhere to compensate for that expansion, based on the 20-year growth projection, may be needed. *Brodeur/Futurewise, et al v. Benton County, et al*, Case 09-1-0010c, Order Finding Continuing Non-Compliance at 7 (Sept. 24, 2010).
- [In response to the assertion that the purpose of the UGA expansion was to attract and accommodate economic development, not residential growth, the Board held] The GMA does not authorize UGA sizing based on something other than OFM-projected urban growth. *Brodeur/Futurewise, et al v. Benton County, et al*, Case 09-1-0010c, Order Finding Continuing Non-Compliance at 9 (Sept. 24, 2010).





WESTERN WASHINGTON REGION

DIGEST OF DECISIONS

A full copy of the decision and relevant case history is available via the “Case and Decision Search” Tab on the Board’s website at: www.gmhb.wa.gov.

Airports, including General Aviation Airports [see also Essential Public Facilities]

- [As to consideration of WA Department of Transportation – Aviation comments] As an agency division within the Department of Transportation, WSDOT Aviation has been granted general supervision over aeronautics in this state. It has developed specialized knowledge and thus its opinions should be given substantial weight as the Board stated in the FDO. *Port of Shelton v. City of Shelton*, Order on Reconsideration, at 8 (Dec. 8, 2010).
- [In addressing Incompatible Uses – RCW 36.70A.510; 36.70.547 - the Board stated that it] agrees that no "bright line" residential density limit should be applied within Sanderson Field's Zone 6, or to any other airport's safety zones for that matter ... a "one size does not fit all"; rather, the individual facts applicable to an airport, proposed uses in that airport's vicinity, and the record developed in each case are determinative. *Port of Shelton v. City of Shelton*, Case 10-2-0013, Final Decision and Order, at 10 (Oct. 27, 2010).
- RCW 36.70.547 requires cities and counties to "discourage the siting of incompatible uses." The term "incompatible" was not defined by the Legislature, but its common meaning refers to something that cannot subsist with something else. In terms of land uses and airport operations, the Board sees two types of potential incompatibility: those which arise or are created by impacts of the land use itself on airport operations and those which may arise or be created by the operation of the airport and affect surrounding uses. An example of land uses which could affect airport operations, including aircraft safety, would be the height or location of buildings, transmission lines, and the like. An example of airport activities which could negatively impact adjacent land uses is excessive noise. *Port of Shelton v. City of Shelton*, Case 10-2-0013, Final Decision and Order, at 12-13 (Oct. 27, 2010).
- It is not the role of this Board to determine at what specific DNL sound level compatibility with the continued operation of Sanderson Field would occur in relationship to the Property. However, it is appropriate for the Board to observe and find that incompatibility, as envisioned by RCW 36.70.547 and as applied to the Property on the Record before the Board, is a sound level below that which is harmful to human health... Consequently, the Board finds that the 65 DNL level cannot be considered to be *per se* compatible with residential uses of two units per gross acre on the Property. *Port of Shelton v. City of Shelton*, Case 10-2-0013, Final Decision and Order, at 19-20 (Oct. 27, 2010).
- The Board can only conclude from the Record that the 65 DNL sound level is that which is harmful to human health. Sound levels resulting in negative impacts to human health are greater than those that would result in incompatibility as envisioned by RCW 36.70.547. That conclusion is reached after reviewing the entire record and determining there is a lack of substantial evidence to support the City's conclusion regarding compatibility. *Port of Shelton v. City of Shelton*, Case 10-2-0013, Final Decision and Order, at 21-22 (Oct. 27, 2010).
- RCW 36.70.547 requires consultation with, among others, the Aviation Division. While [Shelton] was not required to comply with the Aviation Division suggestions, the Aviation Division has a level of technical competence to be given due weight. While it was not clear error to ignore the Aviation Division's guidance, it was clear error to make decisions based on a misinterpretation of the evidence in the Record. *Port of Shelton v. City of Shelton*, Case 10-2-0013, Final Decision and Order, at 21 (Oct. 27, 2010).

- [Petitioner asserted the City "failed to coordinate with the Aviation Division, the FAA, the Port (another municipal entity), and the community of pilots . . . to reconcile conflicts" as it "disregarded" the concerns of those entities and individuals. The Board stated] Ultimately, the GMA grants the legislative body of the jurisdiction with land-use planning authority the final decision on comprehensive plans, development regulations and amendments to them. "Ensuring coordination" as used in RCW 36.70A.020(11) and "consultation" as used in RCW 36.70. 547 do not shift the decision-making authority to others; in this instance, to the Port or WSDOT Aviation. Rather, it was incumbent upon the City to: 1) encourage public involvement in the planning process and actively consult with the entities/individuals listed in RCW 36.70.547 and; 2) substantively consider the comments it received. The Board concludes public comment was allowed, formal consultation took place, and the Record reflects the City considered the information and opinions it received. *Port of Shelton v. City of Shelton*, Case 10-2-0013, Final Decision and Order, at 32 (Oct. 27, 2010).

Amicus Curiae

- While it is not customary to allow oral argument for amicus, the Board will allow it at the discretion of the [supported party]. *Port of Shelton v. City of Shelton*, Case 10-2-0013 Order Granting Status as Amicus Curiae (Washington State Assoc. of Municipal Attorneys) at 3 (Sept. 9, 2010)
- [Amicus] argument shall be limited solely to the issues before the Board in this proceeding. That is, the Board will only consider the legal arguments raised by [Amicus] as they relate to the issues now before the Board, not argument related to issues beyond the record. *Port of Shelton v. City of Shelton*, Case 10-2-0013 Order Granting Status as Amicus Curiae (Washington State Assoc. of Municipal Attorneys) at 3-4 (Sept. 9, 2010)

Annexation

- [Comprehensive plan policy] criteria that make annexation contingent upon the availability of adequate municipal services ... is consistent with the GMA, in particular, RCW 36.70A.110(3). *Skagit D06 LLC v. City of Mt. Vernon*, Case 10-2-0011, Final Decision and Order, at 21 (Aug. 4, 2010)

County-Wide Planning Policies

- Only comprehensive plans are reviewed for consistency with CPPs, not development regulations. *Skagit D06 LLC v. City of Mt. Vernon*, Case 10-2-0011, Final Decision and Order, at 23 (Aug. 4, 2010)

Critical Areas

- [Petitioner and Intervenors contended San Juan County was failing in its GMA-mandated duty to protect critical areas by not only permitting the siting/expansion of EPFs within these areas, but by exempting their compliance from critical area regulations. In response, the Board found]: [T]he Legislative intent was first to protect what is on the ground, that is the site specific locations of critical areas, and second, EPFs should work around those critical areas with mitigation if the critical area is impacted. In addition, because the Legislature requires BAS when developing policies and regulations to protect the functions and values of critical areas, this would lead to the conclusion that critical areas warrant a higher level of analysis. However,

when siting an EPF a community has broader discretion and can negotiate their preferences for locating EPFs so that the facilities are in the proper site which harmonizes with surrounding areas and does not adversely impact the community character. Therefore, the Board believes the process for protecting critical areas is less flexible than that for siting EPFs. *Friends of the San Juans v. San Juan County*, Case 10-2-0012, Final Decision and Order, at 23 (Oct. 12, 2010).

Essential Public Facilities (EPFs)

- Airports, including general aviation airports, are essential public facilities. The Board agrees with Petitioner that allowing incompatible uses within close proximity of an airport may preclude use resulting from complaints of nearby residents or expansion of such a facility, either in size or volume of use. *Port of Shelton v. City of Shelton*, Case 10-2-0013, Final Decision and Order, at 23 (Oct 27, 2010).
- By their very nature, incompatible uses have the propensity to adversely impact an EPF by interfering with its continued operation or frustrating future expansion or improvement, resulting in a preclusive effect prohibited by RCW 36.70A.200(5). *Port of Shelton v. City of Shelton*, Case 10-2-0013, Final Decision and Order, at 23-24 (Oct 27, 2010).
- The GMA definition section (RCW 36.70A.030) does not include a definition for EPFs; rather, in RCW 36.70A.200, the Legislature provided definitional parameters for EPFs that are “those facilities that are typically difficult to site”. This GMA provision provides a non-exclusive listing of types of facilities that can be EPFs – airports, state education facilities and state/regional transportation facilities [RCW 47.06.140], state/local correctional facilities, solid waste handling facilities, and in-patient facilities ... guidance on identifying and siting EPFs can be found in Washington State Administrative codes (WAC)[WAC 365-196-550]. *Friends of the San Juans v. San Juan County*, Case 10-2-0012, Final Decision and Order, at 8-9 (Oct. 12, 2010).
- [Addressing duty of GMA for the protection of natural resource lands and critical areas in relationship to EPS] *Friends of the San Juans v. San Juan County*, Case 10-2-0012, Final Decision and Order (Oct. 12, 2010)
- [As to the County’s use of a conditional use permit process subject to hearing examiner review, the Board concluded]: [T]he hearing examiner may impose “reasonable” conditions of approval that do not render the EPF impractical. The Board has decided numerous cases that give discretion to an administrator provided the development regulations have set sufficient criteria to guide and limit the decision making process. The Board’s analysis is that the hearing examiner does not have clear guidance about what would constitute “reasonable” conditions. What standards would the hearing examiner apply to determining “reasonable”? Without clearer guidance about what constitutes “reasonable” and without requirements to fully mitigate impacts, the Board finds that a regulation which allows EPFs on sites which could contain critical areas and which could provide for less mitigation than otherwise required by BAS, fails to comply with GMA’s mandate to protect critical area functions and values ... Critical areas are the “natural infrastructure” and the foundation of a landscape and cannot be over-ruled or “trumped” by siting EPFs. *Friends of the San Juans v. San Juan County*, Case 10-2-0012, Final Decision and Order, at 23-24 (Oct. 12, 2010) [Note: similar language is presented in regards to the use of a conditional use permit process for natural resource lands – see *FDO* at 31-32].



GMA Goals

- The GMA goals are to be used “exclusively for the purpose of guiding the development of comprehensive plans and development regulations.” However, while the GMA goals “collectively convey some conceptual guidance for growth management,” the GMA “explicitly denies any order of priority among the thirteen goals” and it is evident that “some of them are mutually competitive.” The local jurisdiction is entitled to balance the goals of the GMA so long as in so doing it does not violate the goals. *Skagit D06 LLC v. City of Mt. Vernon*, Case 10-2-0011, Final Decision and Order, at 13-14 (Aug. 4, 2010)
- [I]n order for Petitioner to prevail in a challenge based on Goal 6, they must prove the action taken by a local jurisdiction is *both* arbitrary *and* discriminatory; showing only one is insufficient to overcome the presumption of validity accorded to local jurisdictions by the GMA. Additionally, the Petitioner must show the action has impacted a legally recognized right. Petitioner appears to base its Goal 6 claim upon a right to annexation or to sewer extension. Neither of these are the types of rights the Legislature intended to be protected under Goal 6. *Skagit D06 LLC v. City of Mt. Vernon*, Case 10-2-0011, Final Decision and Order, at 15 (Aug. 4, 2010)

Invalidity

- [The Board overruled its long-standing precedent that a petitioner needed to present invalidity as an issue statement within its Petition for Review] The Board concludes invalidity is a remedy. Nothing in the GMA obligates a Petitioner to frame invalidity as an issue ... In overruling prior holdings, the Board does not discount the foundation for the Board’s historic position in regards to invalidity as articulated in *Citizens for Mt. Vernon* - the burden of demonstrating the challenged action substantially interferes with the fulfillment of the GMA’s goals is still on the Petitioner. Therefore, although the Board will prospectively no longer require invalidity to be set forth as an issue within a PFR, this Board does require that a petitioner expressly request invalidity as a form of relief within the PFR and support that request within the briefing. *Friends of the San Juans v. San Juan County*, Case 10-2-0012, Final Decision and Order, at 34-35 (Oct. 12, 2010).

Limited Areas of More Intense Rural Development (LAMIRD)

- The requirements of RCW 36.70A.070(5)(d)(iii) are not relevant ... as the County was not establishing a LAMIRD. *Butler/Battin v. Lewis County*, Case 10-2-0010, Final Decision and Order, at 9 (July 22, 2010)
- Rural development is allowable throughout those areas which have been designated as rural by Lewis County as well as within LAMIRDs. However, for LAMIRDs, such development is governed, in part, by different rules. *Butler/Battin v. Lewis County*, Case 10-2-0010, Final Decision and Order, at 10 (July 22, 2010).

Major Industrial Developments (MID)

- MIDs (RCW 36.70A.365, .367) are an optional, not a mandatory, planning tool under the GMA. *Butler/Battin v. Lewis County*, Case 10-2-0010, Final Decision and Order, at 10 (July 22, 2010)

Moratorium

- [In finding that the challenged ordinances were not a moratorium or a *de facto* moratorium, within the meaning of RCW 36.70A.390, the Board quoted with approval Petitioner’s definition of a moratorium] As Petitioner itself states, “a moratorium exists where a city denies a property owner the ability to submit an application for an otherwise permissible use or activity under the governing zoning even if other uses are not barred.” *Skagit D06 LLC v. City of Mt. Vernon*, Case 10-2-0011, Final Decision and Order, at 7 (Aug. 4, 2010)
- The City amended its comprehensive plan and development regulations, apparently permanently. Thus, it cannot be said that the City is operating under a moratorium. It is instead operating under new, permanent regulations which do not provide for the extension of sewer outside the City limits and, therefore, RCW 36.70A.390 does not apply. *Skagit D06 LLC v. City of Mt. Vernon*, Case 10-2-0011, Final Decision and Order, at 8 (Aug. 4, 2010)

Natural Resource Lands

- [In regards to EPFs within natural resource lands] RCW 36.70A.200’s requirement that San Juan County not preclude EPFs within its borders does not lessen its duty in relationship to natural resource lands ... As with critical areas that must be designated using best available science, the Legislature gave clear direction that natural resource lands are a foundation around which other land uses must be adjusted. The natural resource lands functions have a priority over other functions on that land or even on adjacent lands ... the Board can only conclude that natural resource lands are at risk because the development regulations, as adopted in Ordinance 2-2010, only disfavor EPFs in natural resource lands and do not set forth specific language to guide or limit the siting of EPFs so as not to adversely impact the long term conservation of the land in order to maintain the natural resource industry that relies upon it. *Friends of the San Juans v. San Juan County*, Case No. 10-2-0012, Final Decision and Order, at 30-31 (Oct. 12, 2010).

Petition for Review – Issue Statements

- *Butler/Battin v. Lewis County*, Case 10-2-0010, Final Decision and Order, at 10 (July 22, 2010)(Noting that an argument asserting a violation of a RCW provision that was not alleged in the PFR will not be considered)

Public Participation

- *See Port of Shelton v. City of Shelton*, Case 10-2-0012, Final Decision and Order (Oct. 27, 2010)(Public participation in regards to General Aviation Airports)

Record - Supplemental Evidence

- Because the Board’s review is limited to the record before the County during the decision-making process, the Board does not generally permit supplementation of the record with exhibits produced after the adoption of the challenged ordinance. *Friends of the San Juans v. San Juan County*, Case 10-2-0012, Order on Motion to Supplement at 2 (July 8, 2010)
- *Port of Shelton v. City of Shelton*, Case 10-2-0013 Order on Motion to Supplement at 4-5 (July 22, 2010)(Holding that a Declaration which merely restates information and/or opinion contained in the Record is not necessary nor would it be of substantial assistance to the Board)

Rural Character



- Rural character as envisioned by RCW 36.70A.030(15) refers to patterns of land use and development. That is, it takes a broad approach - an area wide approach - rather than a site-specific one, which is evidenced by the use of words such as "patterns", "predominate", and "landscapes"... RCW 36.70A.070(5)(c), on the other hand, is more tightly focused. That section mandates the inclusion of measures within a jurisdiction's rural element that, among other things, assure the visual compatibility of rural development with the surrounding rural area. *Butler/Battin v. Lewis County*, Case 10-2-0010, Final Decision and Order, at 16-17 (July 22, 2010)

Rural Development

- [Per 36.70A.011 and .070(5)] The GMA does not prohibit business development in rural areas ... the rural element is to include provisions for rural development ... [and] Rural Development is defined at 36.70A.030(16) ... the parameters for allowable rural development ... include ensuring such uses are not characterized by urban growth and that they are consistent with Lewis County's rural character. *Butler/Battin v. Lewis County*, Case 10-2-0010, Final Decision and Order, at 11-12 (July 22, 2010)
- The entirety of that definition [Urban Growth RCW 36.70A.030(19)] also references an incompatibility with the primary use of the land for "rural uses and rural development" [not just agricultural production]. Rural development can consist of a variety of uses. All parcels in the rural area need not be capable of producing food, fiber or mineral resources ... Consequently, the Board concludes the referenced portion of the definition of urban growth ("makes intensive use of land") does not refer necessarily to the use on a single parcel. *Butler/Battin v. Lewis County*, Case 10-2-0010, Final Decision and Order, at 12-13 (July 22, 2010)

Settlement

- [Given the fact that this was the 7th extension requested, the Board stated] Further extensions will only be granted if the parties can assure the Board settlement is imminent. *Evans, et al v. City of Olympia*, Case 09-2-0003, Order Granting 7th Settlement Extension at 2 (Aug. 3, 2010)

Standard of Review

- [T]his case is not merely based on questions of fact but also on the interpretation of the GMA in regards to those facts. Factual determinations include the sound/noise level on the Property. Such a factual determination can only be disregarded if the Board is left with a firm conviction that the City made a mistake. Legal conclusions, on the other hand, include the meaning of the requirement contained in RCW 36.70.547 with which the City was required to comply ... it is the province of the Board and the courts to determine the meaning and intent of the law and to apply that determination to the facts. *Port of Shelton v. City of Shelton*, Order on Reconsideration, at 4 (Oct 27, 2010).
- [T]he Board is not a fact-finding body but rather acts in an appellate capacity. The Board's role is to review the Record that was before the local government, here the City of Shelton ... the Board's role is to determine whether the challenged action is a clearly erroneous violation of the GMA, not to substitute its judgment for that of the local government's decision-makers ... Thus, the Board's role is to determine if substantial evidence exists to support the City's action [the Board then articulates what is substantial evidence]. *Port of Shelton v. City of Shelton*, Case 10-2-0012, Final Decision and Order, at 11-12 (Oct. 27, 2010)

- The [GMA's] definitions serve to clarify the use of the defined words and terms used elsewhere in the GMA and do not, of themselves, create any duties. *Butler/Battin v. Lewis County*, Case 10-2-0010, Final Decision and Order, at 15 (July 22, 2010)

Stay

- *Swinomish Indian Tribal Community, et al v. Skagit County*, Case 02-2-0012c, Order Extending Stay (Sept. 15, 2010)(Acknowledged previously holding that Board had authority, pursuant to RCW 34.05.550(1), to issue a stay; extension of stay granted based on 2010 Legislation – SSB 6520).

Summary Judgment

- *Port of Shelton v. City of Shelton*, Case 10-2-0013, Orders on Motion to Dismiss and Motion for Summary Judgment at 5 (July 20, 2010)(Board concluded that when the issues necessarily involve a factual analysis, summary judgment is not appropriate).

Tiering

- The GMA envisions a hierarchy of development within the UGA – first in areas already characterized by urban growth which have adequate existing public facilities/services, second in areas characterized by urban growth, but that will be served by both existing and additionally needed facilities, and lastly in the remaining areas of the UGA. As the City correctly points out, “If a City were required to extend sewer service to every property in the unincorporated UGA, this would create chaotic, leap-frog development”. This Board has previously noted, in response to allegations similar to those of Petitioner that “[I]t is not unreasonable for those property owners on the periphery to wait to the end of the 20-year planning period to subdivide their property into lots smaller than five acres.” *Skagit D06 LLC v. City of Mt. Vernon*, Case 10-2-0011, Final Decision and Order at 10-11 (Aug. 4, 2010)

Urban Growth Areas

- RCW 36.70A.110 does not apply to development regulations. *Skagit D06 LLC v. City of Mt. Vernon*, Case 10-2-0011, Final Decision and Order at 19 (Aug. 4, 2010)



CENTRAL PUGET SOUND REGION

DIGEST OF DECISIONS

A full copy of the decision and relevant case history is available via the “Case and Decision Search” Tab on the Board’s website at: www.gmhb.wa.gov.

Anadromous Fisheries

- [Relying on the Supreme Court holding in *Swinomish Tribal Community v. WWGMHB*, 161 Wn.2d 415 (2007) the Board noted] RCW 36.70A.172(1) does not require the adoption of particular protective measures, only their consideration ... Thus, although there is a concerted effort underway to restore anadromous fisheries, the Legislature has only required the special *consideration* of measures, not the mandatory adoption of certain measures ... consideration is limited to those policies and regulations intended to protect critical areas. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 26 (Aug. 9, 2010)

Consistency - Internal

- Consistency means provisions are compatible with each other and one may not create a roadblock, with polices working together in a coordinated fashion to achieve a common goal. Consistency and coordination do not equate to a mirror image. And, internal consistency, which is what is required under .070, involves the consistency between the provisions of one document rather than between two different documents. As for functional plans, such as TIPS and Water System Plans, which are intended to fulfill, in whole or in part, GMA requirements, these too must be consistent with a comprehensive plan. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 90 (Aug 9, 2010)
- The burden rests on [Petitioner] to identify those provisions of the challenged comprehensive plan that are inconsistent and uncoordinated. To do this, Petitioner must identify the provision and explain how it is uncoordinated with or inconsistent with another provision. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 90-91 (Aug 9, 2010)

Critical Areas – Best Available Science

- RCW 36.70A.172(1) requires BAS to be utilized in the development of comprehensive plan policies that are to designate and protect critical areas. The GMA does not require BAS for any other type of comprehensive policy other than those related to critical areas. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 25 (Aug. 9, 2010)

Jurisdiction - Timeliness

- [Challenge to a comprehensive plan amendment was timely and within the Board’s jurisdiction when County amendment of its UGA expansion criteria was not narrowly limited to TDR implementation.] The T-6 Amendment was not part of a required update but was a policy initiative which considered an array of changes to the County’s UGA criteria and process. With this initiative, the County essentially reopened the consideration of its UGA Expansion Criteria for public input and amendment. In the context of this expansive review, in part to accommodate absorption of farm lands, compliance with the UGA requirements for protection of agricultural lands was clearly on the table. *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 36-37 (Aug. 2, 2010)

Land Capacity Analysis

- The City’s analysis uses an agreed methodology designed to ensure County-wide consistency in land capacity calculations. The methodology does not appear to be based on a “bright line” definition of urban or rural density. Rather, the methodology recognizes local zoning regulations, critical area buffers, household size, and other local variables ...The GMA promotes coordinated planning among cities and counties. For a county and its cities to develop an inter-

jurisdictional agreement concerning a land capacity methodology is consistent with the coordination contemplated by RCW 36.70A.210. Here the City joined in a negotiated agreement with other cities and Kitsap County to develop a uniform methodology for land capacity analysis. [The City's use of the methodology for its LCA] does not cede its land-use powers to the County. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 53-54 (Aug. 9, 2010)

Natural Resource Lands - Forestry

- *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 38-40 (Aug. 9, 2010). [Relying on a previous holding that current use classification is not the same as a GMA designation of natural resource lands of long-term commercial significance, the Board stated that the notice-to-title protections of the GMA do not apply to non-designated land.]

Open Space

- The Board notes the overlapping values of the designations for open space, habitat, and critical area buffers. For example, 'open space corridors' can serve a variety of purposes such as 'recreation, wildlife habitat, trails, and connection of critical areas.' [RCW 36.70A.160] Petitioners have not shown that a Comprehensive Plan map which simply aggregates various kinds of open spaces, from parks to trails to protected habitat, somehow diminishes or merges the different regulatory or access regulations that may apply. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 33 (Aug. 9, 2010)
- [T]here is no intrinsic flaw in allowing developers to count critical area buffers as part of their required open space dedication; the CAO still governs how such buffer areas must be protected. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 33 (Aug. 9, 2010)

Public Participation

- The Board finds that while the City erred at the beginning of the public participation process by not establishing a public participation plan for the duration of the development and passage of the Comprehensive Plan, it took corrective action at the beginning of Phase 2 with the passage of Resolution 2009-3 implementing a public participation plan. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 16 (Aug. 9, 2010)
- The Growth Management Act is not a citizen-decide process. The ultimate responsibility goes to the elected decision makers ... [just because] the City Council has not incorporated all of the citizen requested modifications, does not mean that a flawed public participation plan took place. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 18 (Aug. 9, 2010)
- *Wold, et al v. City of Poulsbo*, Case 10-3-0005, Final Decision and Order at 16-17 (Aug. 9, 2010)(GMA does not mandate the use of Citizen Advisory Group; GMA does not set forth a prescribed formula for public comment; GMA does not require individualized notice)

Rural Element

- Although legislative findings do not create independent obligations, they may provide important assistance to the Board and the parties in interpreting and applying the mandates of the statute. Thus the Board looks to Section .011 for guidance in the analysis of [legal issues concerning rural

character, but] allegations on non-compliance with Section .011 are dismissed. *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 8 (Aug. 2, 2010)

- Pierce County, in adopting the Graham Plan, has defined rural character for the Graham area. The GMA acknowledges the importance of local circumstances, and thus allowing each rural community to develop its unique vision of rural lifestyle, as Pierce County does through its community plans, is an appropriate way to implement the requirement for a rural element in the County Comprehensive Plan. *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 55 (Aug. 2, 2010)
- The Board has had few opportunities to assess the Rural Element requirements for preserving “visual landscapes” and assuring “visual compatibility.” In the present case [the Community Plan] gives definition to the visual elements of the rural character it seeks to preserve. *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 57 (Aug. 2, 2010)

Standard of Review

- The Board does not judge non-compliance based on mistakes or resistance along the way, but on the actual Ordinance adopted by the [local government]. *Wold, et al v. City of Poulsbo*, Case 10-3-0005, Final Decision and Order at 47 (Aug. 9, 2010)
- Although legislative findings [such as RCW 36.70A.011] do not create independent legal obligations, they may provide important assistance to the Board and the parties in interpreting and applying the mandates of the statute. Thus, the Board looks to Section .011 for *guidance* in the analysis of Legal Issues in this case... [and] Like the “intent” and “findings” sections, the definitions in the GMA do not create independent duties. The definitions *inform* the requirements of other sections of the statute ... The Board does not rule on compliance based on the definition, but based on the GMA *requirement* as informed by the definition. *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 8 (Aug. 2, 2010)

Supplemental Evidence

- [In allowing documents related to actions prior to moratoriums that were the subject of the DESC cases – Case 09-3-0014 and 10-3-0006 - the Board stated] The Board considers the controversy between the City and Sleeping Tiger prior to enactment of the moratorium to be relevant to the issue of essential-public-facility preclusion. Whether or not these particular documents were presented to the City Council in its deliberations, it defies credulity to suppose that the City staff failed to inform the Mayor and Council of DESC’s use of the RiverSide Residences [Sleeping Tiger’s property] and of the zoning dispute and hearing examiner appeal. The Board finds the proffered documents are part of the City’s record of the events that triggered the moratorium on siting crisis diversion facilities, resulting eventually in Ordinance 2287. *Sleeping Tiger LLC v. City of Tukwila*, Case 10-3-0008, Order on Motion to Supplement, at 3 (Oct. 4, 2010).

Tiering

- The statutory provision for growth phasing [or tiering] in RCW 36.70A.110(3) is advisory, but not meaningless. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 60 (Aug. 9, 2010)

- The City has undertaken a significant initiative for redevelopment in the heart of the City and has adopted or is planning other measures for first-tier infill. For development farther out in the annexed areas, while the City's plan relies largely on private developers for sewer system extensions ... the City has competent plans to provide urban infrastructure throughout the annexed areas in the 20-year planning horizon. In short, staged growth as advocated by Petitioners may well be a more prudent strategy, but it is not a GMA requirement so long as infrastructure concurrency is achieved. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 61 (Aug. 9, 2010)

Urban Growth Area – In General

- While cities and counties work cooperatively together to establish a City's Urban Growth Area, that property outside the municipal city limits remains under the jurisdiction of the County. *Wold, et al v. City of Poulsbo*, Case 10-3-0005c, Final Decision and Order at 40 (Aug. 9, 2010)

Urban Growth Area - Location

- [The subarea plan] calls for a clear distinction between urban and rural areas. Logical boundaries are an important determinant of such distinctions. [Deviation from arterial as UGA boundary was inconsistent with plan]. *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 15 (Aug. 2, 2010)

Urban Growth Area - Sizing

- In recognition of excess UGA capacity, the County has adopted Comprehensive Plan policies to forestall further urban sprawl [allowing companion applications to remove and add land to the UGA.] The [subarea] plan also has policies allowing UGA boundary adjustments while preventing sprawl [allowing a 'land swap' so long as there is no net loss of rural separator land.] The Amendment with companion applications makes a size-neutral and capacity-neutral boundary adjustment. *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 15 (Aug. 2, 2010)
- Board decisions have wrestled with the question of whether land that has better characteristics for a desired economic purpose can be added to a UGA that is already oversized. In each of these cases, the antisprawl/UGA sizing requirements of the GMA trump the economic development goals of the local jurisdiction. If the Town or County find that they have not planned adequately for all the non-residential needs of the UGA, the remedy is re-designation of excess residential land for industrial or other uses, not incremental expansion of the UGA. *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 46 (Aug. 2, 2010)
- There is simply no evidence in the record indicating need for more urban land in this area. With the UGA already substantially oversized, even marginal expansions violate the GMA requirement of RCW 36.70A.110(2) to size UGAs to accommodate forecasted growth and the GMA goal to reduce sprawl. [Citing *Thurston County* holding that "a UGA designation cannot exceed the amount of land necessary to accommodate the urban growth projected by OFM, plus a reasonable market factor."] *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 23 (Aug. 2, 2010)

WAC Provisions

- These provisions are the “procedural guidelines” adopted by the Department of Commerce (formerly CTED) as recommendations and guidance to cities and counties planning under the GMA. These guidelines are part of the technical assistance provided to local jurisdictions by Commerce. Compliance with the guidelines is not mandatory for cities and counties, as they may find other approaches to achieve compliance with the Act. The Board has long held that the procedural guidelines are advisory only and do not impose an obligation on a city or county. However, the Board is required to consider the procedural criteria in its review of a case ... Accordingly, the Board looks to the WAC Procedural Criteria for *guidance* in the analysis of Legal Issues in this case. *North Clover Creek, et al v. Pierce County*, Case 10-3-0003c, Final Decision and Order at 10-11 (Aug. 2, 2010)

APPENDIX

COURT DECISIONS – Published Decisions

2010

- **Court of Appeals, Division I**

Davidson Serles & Associates v. Central Puget Sound GMHB, 159 Wn. App. 148 (2010)

- **Court of Appeals, Division II**

Shaw Family LLC v. Advocates for Responsible Development, 157 Wn. App. 364 (2010)

Suquamish Tribe v. Central Puget Sound GMHB, 156 Wn. App. 743 (2010)

Thurston County v. Western Washington GMHB, 158 Wn. App. 263 (2010)

Bayfield Resources v. Western Washington GMHB, 158 Wn. App. 866 (2010)

Advocate for Responsible Development v. Western Washington GMHB, 155 Wn. App. 479 (2010)

- **Court of Appeals, Division III**

Spokane County v. Miotke, 158 Wn. App. 62 (2010)