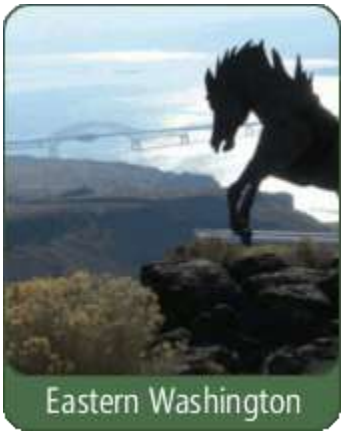

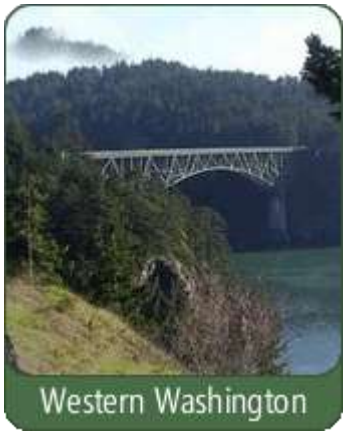

GROWTH MANAGEMENT HEARINGS BOARD

DIGEST OF DECISIONS

THIRD EDITION BY REGION
(July 1, 2010 to March 31, 2011)

Current Board Members:

Nina Carter, Western Washington Region
Dave Earling, Central Puget Sound Region
James McNamara, Western Washington Region
Joyce Mulliken, Eastern Washington Region
Margaret Pageler, Central Puget Sound Region
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Eastern Washington Region
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Counties and Cities West of the Crest of the Cascade Mountains that are not within the CPSGMHB's Jurisdictional Boundaries:
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King, Snohomish, Pierce, and Kitsap Counties:
Central Puget Sound Region
E-mail to: Central@cps.gmhb.wa.gov

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

EXECUTIVE SUMMARY

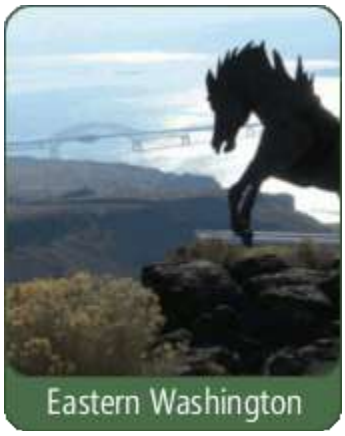
In 1990, the Legislature enacted the Growth Management Act, RCW 36.70A to create a state-wide method for comprehensive land use planning that would prevent uncoordinated and unplanned growth. Although the GMA permits direct review by the courts, rather than have GMA disputes proceed directly to the court, 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

- *Fenske v. Spokane County,* Case 10-1-0010 Order Finding Continuing Non-Compliance (March 17, 2011)[Reiterating that if a jurisdiction fails to take legislative action to achieve compliance, then a finding of continuing non-compliance is warranted; even if appeal is pending in court unless stay issued by Board or Court]

- *Futurewise v. Stevens County,* Case 05-1-0006,Third Compliance Order (February 4, 2011) [Board noted that County had not adopted permanent regulations, only interim regulations and, therefore, continuing non-compliance was warranted; and a request for the Governor to impose sanctions may be made by the Board at the request of the Petitioner]

- *DCCRG/Futurewise v. Douglas County,* Case 09-1-0011, Order Finding Compliance (Sept. 28, 2010) [Repeal of offending legislation achieved compliance]

- 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)

Compliance – Participant

- *KCC, et al v. Kittitas County,* Case 07-1-0004c, Order Allowing City of Kittitas to Participate (January 18, 2011)[Articulating that when it comes to compliance proceedings, the correct terminology is *participation* and not *intervention*]

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)

Final Decision and Order

- *Community Addressing Urban Sprawl Excess (CAUSE) v. Spokane County,* Case 10-1-0003, Order Lifting Invalidity and Vacating Final Decision and Order (March 8, 2011)[Board vacated FDO while matter pending before superior court due to withdrawal of petitioner]

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, <u>not</u> 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)

Notice - *see also* Public Participation

- [Although Board noted that individualized notice is not required by RCW 36.70A.035, with the county permitted to select methods of providing notice, the Board did state] This is not to say the County should not have provided notice to Futurewise given [that] Futurewise has been fully and actively litigating the matter before the Board and before the courts since the case arose in 2005. Mandated or not, such courtesy for even adversarial parties is a sign of professionalism and decorum. *Futurewise v. Stevens County,* Case 05-1-0006, Third Compliance Order, at 3-4 (February 4, 2011).

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).

Shoreline Management Act/Shoreline Master Programs

- [In regards to Shorelines of Statewide Significance] RCW 90.58.190(2)(c) limits the scope of GMHB review by providing that the Board shall uphold the decision by the Department of Ecology unless the Board, by clear and convincing evidence, determines that Ecology's decision is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines. *John R. Pilcher, et al v. City of Spokane/Dept. of Ecology,* Case 10-1-0012, Final Decision and Order, at 7 (March 22, 2011)

- [Based on RCW 90.58.190(2)(c), the Board found several issues and/or parts of issues presented by the petitioners outside of the scope of review granted by the SMA when the action is related to Shorelines of Statewide Significance; Board is precluded by statute from considering noncompliance based on GMA internal consistency when issue concerns a Shoreline of Statewide Significance]. *John R. Pilcher, et al v. City of Spokane/Dept. of Ecology,* Case 10-1-0012, Final Decision and Order at 5 (Issue 1); at 15-16 (Issues 3 and 4)(March 22, 2011)

- [Channel Migration Zones (CMZ) – Petitioner asserted Ecology justified a 200 foot buffer solely on the presence of the CMZ and presented competing science] The Department of Ecology made Findings of Fact that the proposed buffer is based on good science, and "[a] detailed review of the channel migration zone by Ecology's expert in fluvial geomorphology confirmed the channel migration zone and supports the originally proposed [200 foot] buffer." The narrow legal issue presented here by Petitioners is whether the SMP Channel Migration Zone and shoreline buffer comply with [the SMA Guidelines] ... [the Board found substantial evidence in the record to support Ecology's determination as to the CMZ and buffer, therefore] The City's and Ecology's decisions regarding the CMZ and 200 foot buffer are consistent with [the SMA and SMA guidelines]. *John R. Pilcher, et al v. City of Spokane/Dept. of Ecology,* Case 10-1-0012, Final Decision and Order at 13-15 (March 22, 2011)

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)

Stay

- *Fenske v. Spokane County,* Case 10-1-0010 Order Denying Stay (February 8, 2011)
- *Community Addressing Urban Sprawl Excess (CAUSE) v. Spokane County,* Case 10-1-0003, Order Granting Stay of Compliance Proceedings (February 4, 2011)

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 complied 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).

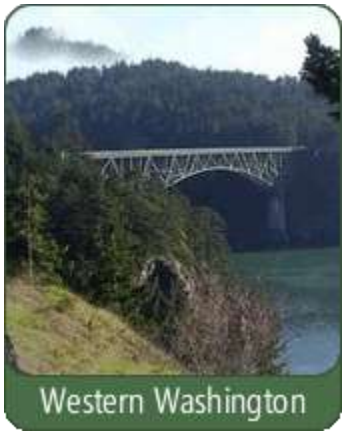
Urban Growth Area – Sizing

- [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

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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)

Briefs

- [Petitioner filed a hearing on the merits brief exceeding the page limit established in the Board's Prehearing Order. In denying a motion, the Board acknowledged the benefit of having full briefing and allowed the petitioners time to file a redacted brief, but noted] Petitioners … had notice for approximately two months of the page limitation. Yet, they did not file a timely motion for additional length, instead choosing to make that request within the brief, which was filed on the deadline … By bringing the motion in the hearing brief and on the date the brief was due, Petitioners present the Board with the difficult choice of granting the motion, and thus encouraging such disregard of the Board's Prehearing Order, or denying the motion and thus placing the Petitions at a disadvantage. Such behavior as Petitioners exhibit should not be encouraged. *Stalheim et al v. Whatcom County,* Case 10-2-0016c, Order on Motion, at 2 (January 21, 2011).

Burden of Proof

- Petitioners ask the Board to dismiss the case with an order declaring [the originally challenged Ordinance] was *void ab initio* … The Board cannot issue such an order … The burden is on a petitioner to demonstrate that legislation is not in compliance … [the basis of Petitioners' challenge was the height bonus which] no longer exists [due to repeal] … Consequently, Petitioners would not be able to meet their burden of proof … the Board is precluded from issuing advisory opinions. *Evans, et al v. City of Olympia,* Case 09-2-0003, Order on Motions, at 3-4 (January 18, 2011).

Consistency

- The language of RCW 36.70A.070(Preamble) is clearly directed at the requirement that a comprehensive plan be an internally consistent document. The requirements for development regulations to be consistent with and implement the comprehensive plan are found elsewhere ... [Petitioners may not] base a challenge of lack of consistency between comprehensive plan amendments and unamended development regulation son RCW 36.70A.070. *Stalheim et al v. Whatcom County,* Case 10-2-0016c, Order on Dispositive Motions, at 9-10 (January 7, 2011)

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).

Dispositive Motions

- *See Futurewise v. Pacific County,* Case No. 10-2-0021, Order on County's/Intervenor's Dispositive Motions (March 22, 2011)[Noting that with some issues, it may not be appropriate to address during the accelerated schedule associated with dispositive motions but, rather, allow for a Hearing on the Merits so as to full development the briefing]

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 – In General

- 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)

GMA Goals – Goal 6 (Property Rights)

- [I]in 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)

Intervention

- [Granting the motion to intervene, but noting]Traditionally, the Board has taken at face value the assertion by a private property owner seeking intervention that the local government may have different interests than a private property owner, in light of the essential differences between such entities and the use and development of land. *Stalheim et al v. Whatcom County,* Case 10-2-0016c, Order on Intervention (Anchor Manor LLC) at 2 (January 4, 2011)

- [Denying a motion to intervene, the Board stated] This Board has previously held that an allegation of property ownership is not sufficient to establish the necessary interest for intervention … [additional arguments would require witness/live testimony, which the Board does not take as it makes determinations on the Record.] *Futurewise v. Whatcom County,* Case 05-2-0013, Order Denying Intervention/Amicus, at 3 (January 31, 2011).

Invalidity

- [County sought reconsideration of a Determination of Invalidity issued by the Board in its December 2010 Order Extending Compliance and Imposing Invalidity, in granting the County's motion the Board noted] The Board is gravely concerned … that the County has failed to take final action to address the areas of non-compliance [having adopted interim regulations and moratoria] … In reviewing changes made by a local government in response to a determination of invalidity, the Board reviews those changes to determine if they continue to substantially interfere with the goals of the GMA … with these moratoria in place, the County has addressed the substantial interference with the goals … thereby justifying rescission of the earlier determination of invalidity. *Futurewise v. Whatcom County,* Case 05-2-0013, Order on Motion to Rescind Invalidity, at 5 (February 16, 2011)

- [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).

Jurisdiction

- The Board appreciates the zeal Petitioners bring … However, the Board is a creature of statute and must act within the confines of [the GMA, RCW 36.70A]. RCW 36.70A.280 authorizes the Board to hear and determine only those petitions alleging a lack of compliance with the GMA, SMA, and/or SEPA … [because of the adoption of repealing legislation the] … No justiciable issue remains for the Board's consideration. *Evans, et al v. City of Olympia,* Case 09-2-0003, Order on Motions, at 3-4 (January 18, 2011)

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)

Scope of Review

- [In granting the County's Motion to Dismiss in part] As this Board has stated…. "unchanged comprehensive plan regulations and development regulations may not be challenged in a petition for review of subsequent enactments." There is no evidence that the county has amended its development regulations … A change to such regulations would have had to have been brought within sixty days of such adoption or amendment. *Stalheim et al v. Whatcom County,* Case 10-2-0016c, Order on Dispositive Motions, at 5 (January 7, 2011)(*See also,* Order on Motion for Reconsideration (February 4, 2011) reinstating one issue related to agricultural lands premised on a failure to act challenge).

- Petitioners may not broaden the scope of this issue to allege other GMA provisions not pled. *Stalheim et al v. Whatcom County,* Case 10-2-0016c, Order on Dispositive Motions, at 10 (January 7, 2011).

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).

Supplemental Evidence

- [The County attached a listing of 221 documents to its motion, not the documents] It is normal Board practice to require the actual documents to be submitted with a motion to supplement in order for the Board to review them and determine if in fact they would be necessary or of substantial assistance to the Board in reach its decision. However, in this case it appears that the offered documents are in fact more in the nature of additions to the Index … relied upon by the County during its adoption of [the challenged resolution]. *Futurewise v. Pacific County,* Case 10-2-0021, Order on Motions to Supplement the Record, at 3 (March 10, 2011).

- The Board is not a fact-finding body [noting that review is on the record that was before the jurisdiction] and therefore declarations submitted have little, if any, value. *Futurewise v. Pacific County,* Case 10-2-0021, Order on Motions to Supplement the Record, at 3 (March 10, 2011).

- [Intervenor sought supplementation of the Record with declarations from its Planning Director and City Administrator. In denying the declarations, the Board stated] The GMA directs the Board to base its decision on the record that was before the jurisdiction when taking the challenged action but does permit supplementation … The Board is not a fact-finding body and therefore declarations submitted with a brief have little, if any, value. *Stalheim et al v. Whatcom County,* Case 10-2-0016c, Order on Joint Motion to Supplement, at 5 (February 17, 2011)

- *See also Stalheim et al v. Whatcom County,* Case 10-2-0016c, Order on Joint Motion to Supplement, at 4 (February 17, 2011)[Documents in draft form and not formally adopted, do not provide necessary or substantial assistance to the Board]

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.

Amicus Curiae

- *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order Granting Amicus (Tulalip Tribes), February 16, 2011.

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)

Compliance

- The Petitioners have additional and overlapping objections to [the compliance ordinances] which they have articulated in a new petition for review. While the Board believes all questions of compliance with [SEPA and the GMA Transportation Element requirements] might have been more appropriately raised and resolved in the compliance proceedings, the filing of a new PFR allowed for more thorough review and analysis. *Davidson Serles, et al v. City of Kirkland,* Case 09-3-0007c coordinated with *Davidson Serles, et al v. City of Kirkland,* Case 10-3-0012, Coordinated Compliance Order/FDO, at 10, Fn. 24; 13, Fn. 35 (February 2, 2011)

- The Board does not dictate to cities and counties the action they must take to bring their legislation into compliance with the GMA. Often, as here, there are alternatives to simple repeal of the offending amendments. The County has discretion in determining how to comply, so long as its action does not violate some other GMA requirement. [It was within the County's discretion to also delete the provision of the Comprehensive Plan dealing with "no net loss" for rural separators with which the amendment had been found inconsistent.] *North Clover Creek et al v. Pierce County,* Case No. 10-3-0003c, Order Finding Compliance, at 5 (January 18, 2011).

Consistency

- 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)

Essential Public Facilities

- If [the City's] process were found to comply with the GMA requirement for identifying and siting EPFs[,] any local jurisdiction, upon information that a previously-unidentified EPF was likely to locate in its boundaries, could declare a moratorium on project applications and undertake restrictive zoning to ensure that the selected site was no longer available. Such a process would soon undermine the GMA requirement not to preclude the siting of EPFs. *Sleeping Tiger LLC v. City of Tukwila,* Case 10-3-0008, Final Decision and Order, at 15 (January 4, 2011).

- A jurisdiction renders the siting of an EPF impracticable when, in response to an inquiry about a permit for a particular location allowed under its current zoning, the jurisdiction imposes a moratorium on permit applications while it amends its zoning to restrict such EPFs to a location other than the proponent's chosen site. Such a process does not comply with the GMA mandate of "a process for identifying and siting" EPFs [RCW 36.70A.200(1)]. *Sleeping Tiger LLC v. City of Tukwila,* Case 10-3-0008, Final Decision and Order, at 16-17 (January 4, 2011).

- [The City's designated zoning restricted crisis diversion facilities to limited area where just 7 properties, which may or may not have been viable sites, were identified as on the market. The project proponent, after reviewing the restrictive zoning, located a site in another city.] While the Board must defer to the City, the Board must find credible evidence in the record to support that deference. Here the City's restrictive zoning is simply not supported by substantial evidence indicating that siting a crisis diversion facility in the limited area is practicable. The City's limited zoning rendered siting the facility impracticable and precludes siting an EPF in violation of RCW 36.70A.200(5). *Sleeping Tiger LLC v. City of Tukwila,* Case 10-3-0008, Final Decision and Order, at 21 (January 4, 2011).

GMA Goals – Goal 7 (Permits)

- When the City learned of the proponent's interest in siting crisis diversion services on petitioner's property, the City launched an ad hoc process starting with moratoriums and resulting in changed zoning regulations. There was no way for [the proponent or property owner] to know what the process would be, how long it would take, or what requirements or restrictions might ultimately be imposed. In connection with EPF siting, such action by a city "results in an unfair and unpredictable permitting process contrary to [GMA Goal 7]." *Sleeping Tiger LLC v. City of Tukwila,* Case 10-3-0008, Final Decision and Order, at 24 (January 4, 2011).

Invalidity

- As provided in RCW 36.70A.302, invalidity is a discretionary remedy available to the Board when a city or county has taken an action which not only fails to comply with the [GMA], but substantially interferes with the goals of the GMA. *Toward Responsible Development, et al v City of Black Diamond,* Case No. 10-3-0014,Order Denying Reconsideration, at 2 (March 17, 2011)

- [A determination of invalidity was entered based on Goal 7 – Permits.] The Board determined that the City's failure to act consistently with the process for siting EPFs set forth in its Comprehensive Plan, followed by its subsequent revisions to its development regulations, resulted in a permit process that is not timely, fair, or predictable. The continued validity of [the ordinance] would continue to frustrate timeliness and predictability. *Sleeping Tiger LLC v. City of Tukwila,* Case 10-3-0008, Final Decision and Order, at 25-26 (January 4, 2011).

Jurisdiction – Subject Matter

- The Board has previously stated it generally does not have the authority to review denials of proposed amendments, exceptions to this rule do exist. Namely, the Board may review the denial of a comprehensive plan amendment when by such a denial the jurisdiction fails to fulfill an express explicit mandate either from the GMA or the City's own comprehensive plan. *Cainion v. City of Bainbridge Island,* Case 10-3-0013, Order on Motion to Dismiss, at 2 (January 7, 2011)

- [Petitioners argument was based on mandate established in comprehensive plan] The Board can find nothing in the record or in the comprehensive plan itself that gives a clear mandate and/or definitive timeline [to complete the Special Area Planning Process] ... [Thus the comprehensive plan] did not establish a duty upon which the alleged GMA violations could be founded. *Cainion v. City of Bainbridge Island,* Case 10-3-0013, Order on Motion to Dismiss, at 3 (January 7, 2011)

- The jurisdiction of the GMHB is statutorily established by RCW 36.70A.280(1) and .290(1), as reinforced by the exclusions from the LUPA process in RCW 36.70C.020, RCW 36.70C.030, and RCW 36.70B.020(4). The GMHB has jurisdiction to hear appeals of local decisions on comprehensive plans, including subarea plans, and on development regulations, including area-wide rezones. In contrast, the superior court hears appeals of project permit applications. *Toward Responsible Development, et al v City of Black Diamond,* Case No. 10-3-0014, Order on Motions, at 9 (February 15, 2011)

- The label applied to a city or county action does not determine the Board's jurisdiction. *Toward Responsible Development, et al v City of Black Diamond,* Case No. 10-3-0014, Order on Motions, at 12 (February 15, 2011) [Citing *Davidson Serles v. Kirkland* (design review guidelines), *Alexanderson v Clark County* (MOU), *Skagit County Growthwatch v Skagit County* (administrative interpretation), *Servais v. Bellingham* (City-University MOA) – all determined to be comp plan or development regulation amendments.]

- The MPD ordinances expressly displace any conflicting [Black Diamond Municipal Code] provisions…. The Board must conclude that the ordinances "control land use activities, per RCW 36.70A.030(7)." The Board does not see how provisions which supersede and replace city code provisions can be characterized as anything other than amendments to the City's development regulations. *Toward Responsible Development, et al v City of Black Diamond,* Case No. 10-3-0014, Order on Motions, at 15 (February 15, 2011)

- [These ordinances make] the first basic decisions regarding allowable land use and locations, a fundamental planning and regulatory function. Each ordinance here creates new land use categories – various residential zones, a mixed use district, and a commercial district. Each ordinance adopts a new land use plan map that assigns the land use categories to specific areas.

The ordinances adopt a multitude of regulatory controls. Each ordinance defers to a later process the adoption of height limits, specific densities, allowed, conditional and prohibited uses in each land use district, and similar regulations. [Thus] the ordinances are more similar to sub-area plans or to development regulations as defined in RCW 36.70A.030(7) than to project permits as defined in RCW 36.70B.020(4). The ordinances are not permits for project actions, but land use policies and "controls placed on development or land use activities." The Board concludes these ordinances constitute "the adoption or amendment of a comprehensive plan, subarea plan or development regulations" within the scope of GMA for which the Board has exclusive jurisdiction. *Toward Responsible Development, et al v City of Black Diamond,* Case No. 10-3-0014, Order on Motions, at 20 (February 15, 2011)

Jurisdiction - Timeliness

- Cainion disagrees with the original designation [of his land] but did not challenge that designation when originally enacted and cannot now challenge that designation collaterally by challenging the City's denial of Cainion's proposed amendment. The GMA's statutory appeal period expressly prohibits such an appeal. *Cainion v. City of Bainbridge Island,* Case 10-3-0013, Order on Motion to Dismiss, at 4 (January 7, 2011).

- [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.]

Notice – *see also* Public Participation

- [Finding no GMA violation, the Board stated:] A proposal may be modified during the course of public debate without necessarily requiring publication of a new notice …The text of Amendment 2A was provided to the public and the County received public comment [including from petitioners] prior to the close of its public hearing. *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order on Dispositive Motions, at 18 (January 18, 2011)

- [In reviewing the record the Board was not persuaded that the challenged amendments were beyond the scope of alternatives the public had an opportunity to review and noted that prior Board decisions] Establish that requirements for effective notice and fair public process do not mandate that the final language of the ordinance be available for public comment before it can be adopted. Rather, when a proposal is amended *after* the public process is closed, the Board must determine whether it was "within the scope of alternatives available for public comment" [RCW 36.70A.035(2)] or whether a new notice and opportunity for comment is required. *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order on Dispositive Motions, at 20 (January 18, 2011)

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)

Petition for Review – Amendments

- Although WAC 242-02-260 allows for amendments, RCW 36.70A.290's requirement for a petitioner to articulate its issues within 60 days prohibits the addition of issues beyond the statutory appeal period. Refinement and/or clarification of the issues can occur after the appeal period has elapsed, however, for the Board to allow new previously-unarticulated issues to be presented would simply amount to a PFR becoming an issue "placeholder" contrary to .290's requirement for a "detailed statement of the issues." *Toward Responsible Development, et al v City of Black Diamond,* Case No. 10-3-0014, Order on Motion to Amend Prehearing Order, at 3 (January 18, 2011)

Public Participation

- *Toward Responsible Development, et al v City of Black Diamond,* Case No. 10-3-0014, Order on Motions, at 24-25 (February 15, 2011) [Pursuant to WAC 242-02-530(6), Petitioner filed a dispositive motion on notice and public participation for which the Board found the City had wrongly characterized its action as a quasi-judicial permit application and, therefore, did not

follow its adopted GMA public participation process. Without addressing any other issue, the Board remanded the ordinances to the City for review under the appropriate public process.]

- 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)

Reconsideration

- [In denying reconsideration, the Board stated] Petitioner's argument for reconsideration introduces no additional authorities but simply reargues the case – zealously and forcefully – with Petitioner reaching a different conclusion than the Board in application of the governing statutory and case law to the facts at hand. *Cainion v. City of Bainbridge Island,* Case 10-3-0013, Order on Motion for Reconsideration, at 2 (January 26, 2011).

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)

Standing – State Environmental Policy Act (SEPA)

- [In dismissing a Petitioner's SEPA challenge, the Board held] One of SEPA's purposes is to ensure complete disclosure of the environmental consequences of a proposed action before a decision is taken. Participation and objection to the environmental analysis is therefore a prerequisite to review of agency SEPA compliance. … Pursuant to WAC 197-11-545(2) such lack of comment "shall be construed as lack of objection to the environmental analysis." *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order on Dispositive Motions, at 6-7 (January 18, 2011).

- [Prior] Board decisions stating "Failure to allege SEPA standing in the PFR is grounds for the Board to discuss a SEPA claim" [must be read in context]. In each case, the Board looked beyond the statement of standing in the petition for review and assessed whether the petitioner met the standing requirement adopted by the Board for SEPA cases. *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order on Dispositive Motions, at 7 (January 18, 2011).

- The Central Board's long-held position on SEPA standing is based on the statutory provisions in the State Environmental Policy Act which define the basis for appeal of a SEPA determination. RCW 43.21C.075(4), the controlling provision in SEPA regarding standing to challenge environmental review provides "… a person aggrieved by an agency action has the right to judicial appeal …" The Washington appellate courts have clarified the reach of the language. A "person aggrieved" who seeks judicial review of a SEPA determination must meet a two-part test to establish standing – the *Trepanier* test. *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order on Dispositive Motions, at 8-9 (January 18, 2011).

- The City of Shoreline claims … a direct impact on its planning and funding of transportation infrastructure, parks and other public services [due to the designation of an Urban Center]. Under the GMA, a county's amendment of its comprehensive plan and development regulations may create immediate obligations for an adjoining city to plan consistently, preparing the necessary infrastructure and service capacity. The Board finds the harms alleged by the City constitute injury-in-fact. *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-

3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order on Dispositive Motions, at 10-12 (January 18, 2011).

- [In a Concurring Opinion, Boardmember Roehl applies a different analysis to standing to pursue SEPA claims.] It is only when a petitioner relies on APA standing [RCW 36.70A.280(2)(d)] that the Board would appropriately apply the requirements of RCW 34.05.530, statutory conditions originating in federal case law incorporating the "zone of interest" and "injury in fact" requirements. *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order on Dispositive Motions, at 26 Concurring Opinion (January 18, 2011).

State Environmental Policy Act (SEPA)

- Having reviewed the alternatives analyzed in the 2010 FSEIS, the Board finds the City has satisfied the SEPA requirement to review reasonable alternatives, including off-site alternatives. [T]he parties have not cited, and the Board has not found, any authority requiring an alternative that is smaller or intermediate in size, only that alternatives have lower environmental cost. In the proper case, this requirement may be met by off-site alternatives that spread the proposed development across a larger footprint. *Davidson Serles, et al v. City of Kirkland,* Case 09-3-0007c coordinated with *Davidson Serles, et al v. City of Kirkland,* Case 10-3-0012, Coordinated Compliance Order/FDO, at (February 2, 2011).

- [The City's EIS alternatives were all based on the square footage of the mega-project which petitioners opposed. However, the FSEIS broke out the impacts related to development on the project site only, thus providing alternatives with lesser or differing environmental impacts.] In short, the City decision-makers had the information they needed to select a less intense alternative on the Parkplace site or even to choose to forego additional development off-site and to plan for development on the Parkplace site alone at one of the lesser intensities….The 2010 SEPA review, with its expanded number of alternatives and subset analysis for the Parkplace site only, provided City Council members with ample information for a reasoned decision among alternatives having different and lesser environmental impacts. *Davidson Serles, et al v. City of Kirkland,* Case 09-3-0007c coordinated with *Davidson Serles, et al v. City of Kirkland,* Case 10-3-0012, Coordinated Compliance Order/FDO, at 17 (February 2, 2011)

- [Petitioners contended changes in design of the project required additional SEPA analysis. Prior to the Board's hearing, the Design Review Board issued its decision.]The Design Review Board Decision demonstrates: the adopted design guidelines for Parkplace were not changed, no "major modification" to the guidelines was proposed, and the four "minor modifications" allowed were each ruled to be "consistent with the intent of the guideline and result[ing] in superior design" and "not result[ing] in any substantial detrimental effect on nearby properties or the neighborhood." On this record the Board cannot find there was a substantial change to the project that should have been noted and analyzed in the environmental review. *Davidson Serles, et al v. City of Kirkland,* Case 09-3-0007c coordinated with *Davidson Serles, et al v. City of Kirkland,* Case 10-3-0012, Coordinated Compliance Order/FDO, at 19 (February 2, 2011)

Supplemental Evidence

- [City sought to introduce and rely on ordinances underlying Board decisions in three prior unrelated cases. The Board declined to supplement the record or take official notice of the

ordinances.] The Board reviews each case based on the unique facts before it. [When prior decisions are cited] the findings and conclusions set forth in the Board's orders reflect the rationale for its holdings. *Toward Responsible Development, et al v City of Black Diamond,* Case No. 10-3-0014, Order on Motions, at 6 (February 15, 2011)

- [Petitioners contended changes in design of the project required additional SEPA analysis. Prior to the Board's hearing, the Design Review Board issued its decision and intervenor sought supplementation] The Board here only reviews the narrow question of whether the 2010 SEPA review was flawed because it failed to describe and analyze significant changes in the design of the proposal. The Board finds the supplemental documents … are "necessary or of substantial assistance" in deciding this question, though they were produced subsequent to the challenged action. The Board reasons that a significant amendment or major modification of the adopted design guidelines might arguably constitute new information for purposes of SEPA analysis. These documents are therefore admitted. *Davidson Serles, et al v. City of Kirkland,* Case 09-3-0007c coordinated with *Davidson Serles, et al v. City of Kirkland,* Case 10-3-0012, Coordinated Compliance Order/FDO, at 18-19 (February 2, 2011)

- [Aerial maps produced after adoption of the challenged action and annotated by Petitioners were admitted.] The Board views the aerial maps as illustrative exhibits, depicting areas of the County that are familiar to County decision-makers, and annotated with information readily available from public sources. These exhibits were not part of the paper file or content of meetings that informed the Council's adoption of the challenged ordinances. However, if relevant, they may assist the Board in understanding matters that were undoubtedly known to County officials. *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order on Motions to Supplement the Record and Motion for Site Visit, at 3 (January 14, 2011).

- [Petitioners requested that the Board conduct a site visit. The Board declined.] The paper record and supplemental documents – aerial photographs, topographical maps – appear to provide the additional area-specific information necessary to the Board's decision of the issues in this case. *City of Shoreline, et al v Snohomish County (Shoreline IV),* Case No. 10-3-0011c, coordinated with *City of Shoreline, et al v Snohomish County (Shoreline III)*, Case No. 09-3-0013c, Order on Motions to Supplement the Record and Motion for Site Visit, at 8 (January 14, 2011).

- [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)

Transportation Element

- [The City] amended the Capital Facilities Plan and the Transportation Element of the City's Comprehensive Plan to include and identify funding sources for all the improvements called for in the Planned Action Ordinance for the Touchstone project for a ten-year period, thereby curing the deficiencies identified in the FDO. [The City's compliance ordinance] meets the consistency requirements of RCW 36.70A.070 (preamble), .070(3), and .070(6) because it includes all necessary capital improvements and provides a "multi-year financing plan based on the [10-year transportation] needs identified in the comprehensive plan." *Davidson Serles, et al v. City of Kirkland,* Case 09-3-0007c coordinated with *Davidson Serles, et al v. City of Kirkland,* Case 10-3-0012, Coordinated Compliance Order/FDO, at 13 (February 2, 2011)

- Petitioners argue that [RCW 36.70A.070(6)(a)(iv)] requirement (A) - analysis of funding capability to judge needs against probable funding resources –entails more than simple identification of funding sources and projected dollar amounts for each source […but…] must address "the range of revenue reasonably expected, the assumptions and variables for the projected sums and the level of certainty for the projections." According to the Guideline [WAC 365-196-430(2)(k)(iv)], "analysis of funding capability" means determination of revenues "reasonably expected" based on existing sources and "a realistic estimate" of any new funding source. Many jurisdictions, including Kirkland, undoubtedly undertake a much more sophisticated financial forecast and risk assessment in their annual CFP reviews, but the Board does not find that the GMA requires the Comprehensive Plan transportation element to contain ranges, assumptions and variables, and levels of certainty for transportation funding sources. *Davidson Serles, et al v. City of Kirkland,* Case 09-3-0007c coordinated with *Davidson Serles, et al v. City of Kirkland,* Case 10-3-0012, Coordinated Compliance Order/FDO, at 21-23 (February 2, 2011)

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

2011

- **Court of Appeals, Division I**

Davidson Serles & Associates v. City of Kirkland, 159 Wn. App. 616 (2011)

- **Court of Appeals, Division II**

Brinnon Group v. Jefferson County, 159 Wn. App. 446 (2011)
Kitsap Alliance of Property Owners v. Central Puget Sound GMHB, 160 Wn. App. 250 (2011)

- **Court of Appeals, Division III**

Spokane County v. Eastern Washington GMHB, 150 Wn. App. 274 (2011)

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)