EASTERN WASHINGTON – Region 1

***KCC, et al v. Kittitas County*, Case 07-1-0004c**

- **Stay**

The Board notes neither the Growth Management Act, RCW Chapter 36.70A, or the Board's Rules of Practice and Procedure, WAC Chapter 242-02, contain a provision related to the issuance of a stay. However, the Board has issued a stay in limited situations… [Finding no applicable basis, motion for stay of compliance proceedings is denied.] *Kittitas County Conservation, et al v. Kittitas County, et al,* EW Region Case 07-1-0004c, Order Denying County's Motion for Stay at 3 (June 17, 2011)

***Savaria v Yakima County,* Case 11-1-0002 –** On County's dispositive motion, Board dismissed challenge to County's denial of petitioner's application to de-designate agricultural land.

- **Agricultural Lands of Long Term Commercial Significance – Innovative Zoning**

Savaria v. Yakima County, EW Region Case 11-1-0002, Order Granting Motion to Dismiss at 3 (May 4, 2011)(Board holding RCW 36.70A.177 uses the word "may," thus which innovative zoning techniques to be used is within the County's discretion.)

- **Definitions**

RCW 36.70A.030 provides statutory definitions of various terms used in the GMA and as such, does not prescribe GMA requirements. Thus, an alleged violation of RCW 36.70A.030 cannot by itself constitute GMA non-compliance, without coupling the definition with another section of the GMA containing a requirement. *Savaria v. Yakima County,* EW Region Case 11-1-0002, Order Granting Motion to Dismiss at 2 (May 4, 2011)

***Hazen v Yakima County*, Case Nos. 08-1-0008c and 09-1-0014**

- **Compliance**

[T]he compliance date established in the Board's FDO is the *deadline* by which the legislative action is to be taken. That is, an ordinance putting in place remedial policies or regulations must be formally adopted by the County by this deadline. Compliance is not achieved by taking steps; compliance is determined only after the jurisdiction has taken action through its governing body by adopting ordinances or resolutions which implement the GMA. *Hazen, et al v. Yakima County,* EW Region Coordinated Cases 08-1-0008c and 09-1-0014, Coordinated Compliance Order/Issuance of Stay at 6 (April 27, 2011)

[Petitioner's arguments are beyond the scope of the issue statements in the PFR] Accordingly, the Board cannot consider those specific arguments since to do so would be to issue an advisory opinion on issues not presented to the Board in the Statement of Issues, contrary to RCW 36.70A.290(1). Petitioner must file a new PFR to challenge new issues falling outside the scope of the original PFR. *Hazen, et al v. Yakima County,* EW Region Case 08-1-0008c, Partial Compliance Order at 6 (May 20, 2011)

- **Critical Aquifer Recharge Areas (CARAs)**

WAC 365-190-080(4) states that counties and cities should designate critical areas by using maps and performance standards, and counties and cities should clearly state that maps showing known critical areas are only for information or illustrative purposes … [during its compliance efforts, Yakima County's CARA map, which was based on older, superseded science, was not reviewed or revised to reflect updated best available science, thus] …Without a mapping update to include Best Available Science, the pre-existing CARA designation map does not comply with the GMA. *Hazen, et al v. Yakima County,* EW Region Coordinated Cases 08-1-0008c and 09-1-0014, Coordinated Compliance Order/Issuance of Stay at 10 (April 27, 2011)

- **Limited Areas of More Intensive Rural Development (LAMIRDs)**

Hazen, et al v. Yakima County, EW Region Case 08-1-0008c, Partial Compliance Order (May 20, 2011)(Finding that a pre-1990 water and sewer system constituted part of the "built environment" for a LAMIRD as referenced in RCW 36.70A.070(5)(d)(iv) and that the LOB followed the service boundary for these facilities)

- **Stay**

See Hazen, et al v. Yakima County, et al, EW Region Coordinated Cases 08-1-0008c and 09-1-0014, Coordinated Compliance Order and Issuance of Stay at 15 (April 27, 2011)(Granting stay of certain issues based on pendency of appeals before the courts)

Confederated Tribes and Bands of the Yakama Nation v Yakima County, **Case No. 10-1-0011**

- **Briefing**

Confederated Tribes and Bands of the Yakama Nation v. Yakima County, EW Region Case 10-1-0011, Final Decision and Order at 16 (April 4, 2011)[Issues not stated in the petition may not be raised for the first time in the opening brief]

- **Equitable Doctrines**

Confederated Tribes and Bands of the Yakama Nation v. Yakima County, EW Region Case 10-1-0011, Final Decision and Order at 8-11 (April 4, 2011)[In response to an assertion by Intervenor and Respondent, the Board addresses and applies *Collateral Estoppel* and *Res Judicata* but determines neither bars the matter]

- **Exhibits**

It is a party's obligation to submit for the Board's consideration those portions of the Record upon which it intends to rely. [WAC 242-02-52001] A physical copy of an exhibit is always required to be submitted except in extraordinary circumstances and, then, only upon approval by the Presiding Officer. [Provision of CD is not sufficient.] *Confederated Tribes and Bands of the Yakama Nation v. Yakima County,* EW Region Case 10-1-0011, Final Decision and Order at 6 (April 4, 2011)

- **Shoreline Management Act (SMA) – Standard of Review**

In appeals concerning a Shoreline of Statewide Significance, the Legislature has: (1) narrowed the scope of GMHB review by excluding Growth Management Act (GMA) internal consistency and State Environmental Policy Act (SEPA) as potential bases for compliance review, and (2) prescribed a high evidentiary standard – "clear and convincing evidence." Although the GMHB has been delegated general authority to find a state agency, county, or city either "in compliance" or "not in compliance"

with the requirements of the GMA or Chapter 90.58 as it relates to the adoption or amendment of shoreline master programs, that general review authority has been circumscribed by the specific provisions of RCW 90.58.190(2)(c) for appeals concerning a Shoreline of Statewide Significance. In contrast, for appeals concerning Shorelines, the GMHB has been delegated broader review authority that includes GMA internal consistency and SEPA compliance. *Confederated Tribes and Bands of the Yakama Nation v. Yakima County,* EW Region Case 10-1-0011, Final Decision and Order at 4 (April 4, 2011)

- **Shoreline Management Act (SMA)**

It is clear from both the statute [RCW 90.58.030(2)(d)] and the guidelines [WAC 173-22-040(3)] that inclusion of larger portions of the floodplain in the SMP is discretionary on the part of local government ... WAC 173-26-201(2)(c) provides that master programs shall contain policies and regulations that assure, at minimum, no net loss of ecological functions necessary to sustain shoreline natural resources, and SMPs shall also include polices that promote restoration of ecological functions when such functions have been impaired. But these guidelines do not refer to floodplains…. Further, Petitioner has not adduced evidence in support of its argument that the exclusion of large areas of flood plain from the SMP violates the "no net loss" standard. Without any legal authority requiring inclusion of larger areas of floodplain in the SMP, and in the absence of scientific evidence dictating such inclusion in the SMP, Petitioner cannot satisfy its burden of proof…. *Confederated Tribes and Bands of the Yakama Nation v. Yakima County,* EW Region Case 10-1-0011, Final Decision and Order at 14 (April 4, 2011)

Although RCW 36.70A.480 does bring in the goals and policies of the SMA in regards to GMA planning … it is the SMA that regulates development within the shorelines of the state, not the GMA. *Confederated Tribes and Bands of the Yakama Nation v. Yakima County,* EW Region Case 10-1-0011, Final Decision and Order at 17 (April 4, 2011)

The key to considering potential development within shoreline areas is to provide adequate protections to ensure no net loss of shoreline ecological functions and ecosystem-wide processes. Thus, the Board fails to see a violation of RCW 90.58.020 or the applicable guidelines by allowing denoted surface mining as a conditional use … so long as adequate safeguards are in place to assure no net loss of shoreline ecological functions and ecosystem-wide processes. *Confederated Tribes and Bands of the Yakama Nation v. Yakima County,* EW Region Case 10-1-0011, Final Decision and Order at 21 (April 4, 2011)

The burden is on the Yakama Nation to demonstrate the newly adopted SMP provisions [for floodplain mining within the Yakima River basin] fail to adequately protect the shorelines, and it has failed to satisfy that burden. By merely referring to past impacts without coming forward with current scientific evidence to demonstrate inadequate shoreline protections, Petitioner cannot satisfy its burden of proof. *Confederated Tribes and Bands of the Yakama Nation v. Yakima County,* EW Region Case 10-1-0011, Final Decision and Order at 22 (April 4, 2011)

[In finding Yakima County failed to prepare a comprehensive Cumulative Impact Analysis that evaluated, considered, and addressed reasonably foreseeable impacts, the Board stated] WAC 173-26-186(8) clearly contemplates that the SMP consider impacts from past actions … [and] WAC 173-26-186(8)(d) provides that analysis of cumulative impacts should consider "current circumstances affecting the shorelines" together with "reasonably foreseeable future development" … the term "cumulative impact" has been defined in case law as "the impact on the environment which results from the

incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Confederated Tribes and Bands of the Yakama Nation v. Yakima County,* EW Region Case 10-1-0011, Final Decision and Order at 22-24 (April 4, 2011)

Confederated Tribes and Bands of the Yakama Nation v. Yakima County, EW Region Case 10-1-0011, Final Decision and Order at 27-31 (April 4, 2011) [Petitioner alleged Yakima County's 100-foot "one-size-fits-all" buffers were inadequate to protect shorelines. In response the Board, relying on WAC 173-26-201(3)(d) and 173-2-6-221(5) and science in the Record, found for the County.]

[Citing provisions of WAC 173-26-251 – Optimum Implementation] The Shoreline Management Act calls for a higher level of effort in implementing its objectives on Shorelines of Statewide Significance … Development standards must be established that ensure the long-term protection of ecological resources of Statewide importance, such as anadromous fish habitat, forage fish spawning and rearing areas, and unique environments, and shall consider incremental and cumulative impacts of permitted development and include provisions to ensure no net loss of shoreline ecosystems and ecosystem-wide processes. *Confederated Tribes and Bands of the Yakama Nation v. Yakima County,* EW Region Case 10-1-0011, Final Decision and Order at 33 (April 4, 2011)

- **Standing**

[I]t is undisputed the Yakama Nation actively participated during the Regional SMP adoption process through its involvement in the SMP Roundtable and submittal of written comments about the Regional SMP. … However, participation standing is based on the "subject matter" of a party's participation and it is to that issues must be reasonably related. The issues Yakima County seeks dismissed are clearly related to two fundamental aspects of the SMA – the designation of the shoreline jurisdiction and the heightened protection afforded shorelines of state-wide significance – and fall within the scope of the Yakama Nation's generalized concerns as to the protection of shorelines in Yakima County, especially in the context of surface mining. Therefore, it cannot be said the County or Ecology were "blind-sided" by the Yakama Nation's appeal or by the fact the SMA requires SMPs to be consistent with and implement the goals, policies, and requirements of the SMA; as this applies to each and every SMP adoption or amendment. *Confederated Tribes and Bands of the Yakama Nation v. Yakima County,* EW Region Case 10-1-0011, Final Decision and Order at 7-8 (April 4, 2011)

***KCC/RIDGE/Futurewise v. Kittitas County*, Case No. 10-1-0014**

- **Comprehensive Plan Update – RCW 36.70A.130(1)**

In GMA parlance, the term "Update" (or "seven year update") refers to the requirement for local jurisdictions to "review and revise, if needed," their Comprehensive Plan and Development Regulations according to RCW 36.70A.130(1) and the deadlines established by the GMA. The update process provides the vehicle for bringing plans into compliance with recently enacted GMA requirements and for recognizing changes in land usage and population. *KCC/RIDGE/Futurewise v. Kittitas County,* EW Region Case 10-1-0014, Final Decision and Order at 5 (June 3, 2011)

- **Failure to Act**

[Petitioners asserted a "Failure to Act" claim since the County allegedly failed to take action to "Review and Revise" its critical areas ordinance to include BAS by the deadline in RCW 36.70A.130(4).] [Here,] the update deadline for including BAS in the critical areas ordinance was December 1, 2006 [RCW

36.70A.130(4)(c)], extended to December 1, 2007 under former RCW 36.70A.130(8). In light of the holding in *Thurston County v. WWGMHB* regarding "Review and Revise" update challenges, a "Failure to Act" claim cannot be made under the particular facts and circumstances of this case. *KCC/RIDGE/Futurewise v. Kittitas County,* EW Region Case 10-1-0014, Final Decision and Order at 7 (June 3, 2011)

- **Jurisdiction – Timeliness**

[Board dismissed "review and revise" challenge as untimely, based on the holding in *Thurston County v. WWGMHB* .] *KCC/RIDGE/Futurewise v. Kittitas County,* EW Region Case 10-1-0014, Final Decision and Order at 8 (June 3, 2011)

KCC/RIDGE/Futurewise v. Kittitas County, Case No. 10-1-0013

[Petitioners asserted a "Failure to Act" claim as to the County's Transportation Concurrency Regulations.] The GMA establishes a mandatory duty to "adopt and enforce" a transportation concurrency ordinance; therefore, based on the language of RCW 36.70A.040(4), Kittitas County had until December 27, 1994 to adopt a comprehensive plan and development regulations, including those related to transportation concurrency …Because the question posed in this appeal is whether the County *failed to act* to comply with the RCW 36.70A.070(6)(b) requirements to adopt a concurrency ordinance, the appeal is timely. The Board has jurisdiction under RCW 36.70A.290(a) to hear failure to act appeals to determine whether the County is in compliance with the GMA as it relates to the adoption of development regulations. *KCC/RIDGE/Futurewise v. Yakima County,* EW Region Case 10-1-0014, Final Decision and Order at 6 (June 3, 2011)

- **Invalidity**

KCC/RIDGE/Futurewise v. Kittitas County, EW Region Case 10-1-0014, Final Decision and Order at 9 (June 3, 2011)(Holding that by the very nature of a failure to act challenge there is no comprehensive plan or development regulation for the Board to invalidate).

- **Transportation Concurrency**

RCW 36.70A.070(6)(b) requires that local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan … "development" as contemplated by RCW 36.70A.070(6)(b) is not limited to the division of property. Many development activities that result in transportation impacts do not depend on land division … the County was unable to cite any provisions that would prohibit development approval, aside from subdivision approval, if the development causes the level of service to decline below the County's adopted standards. In the absence of such fundamental provisions, it cannot be said the County has adopted a transportation concurrency ordinance. *KCC/RIDGE/Futurewise v. Kittitas County,* EW Region Case 10-1-0014, Final Decision and Order at 7-8 (June 3, 2011)

Adopted LOS standards alone do not satisfy the requirement in RCW 36.70A.070(6)(b). *KCC/RIDGE/Futurewise v. Kittitas County,* EW Region Case 10-1-0014, Final Decision and Order at 8 (June 3, 2011)

***KCC/Futurewise v. Kittitas County,* Case 11-1-0001**

- **Invalidity**

KCC/Futurewise v. Kittitas County, EW Region Case 11-1-0001, Corrected Final Decision and Order – Partial (SEPA) (June 13, 2011)(Invalidity based on Goals 10 and 11 and due to the fact that compelling evidence in the record indicating a high risk for project vesting in this case, which would render GMA and SEPA planning procedures as ineffectual and moot -- if such project vesting were to occur, then the remand of this case to the County would be meaningless and there would be no practical way to address GMA and SEPA compliance)

- **Jurisdiction – Subject Matter**

[Citing to *Spokane County v. Eastern Washington Growth Management Hearings Board, 160 Wn. App. 274 (2011)* where the Court of Appeals held that a concurrent action (rezone with comprehensive plan amendment) was a "legislative" action as distinct from a "quasi-judicial" action, and the Board has exclusive subject matter jurisdiction over "legislative" actions such as amending a Comprehensive Plan, the Board found] Therefore, applying *Spokane County* to the facts in the present case, the Board has subject matter jurisdiction over Map Amendment 10-13 since it was a legislative action to concurrently amend the Kittitas County Comprehensive Plan land use map (Rural to Commercial) and to rezone property (Agriculture 20 to Commercial Highway). *KCC/Futurewise v. Kittitas County,* EW Region Case 11-1-0001, Corrected Final Decision and Order – Partial (SEPA) at 5 (June 13, 2011)

- **State Environmental Policy Act (SEPA)**

When a county or city amends its CP or changes zoning, a detailed and comprehensive SEPA environmental review is required. SEPA is to function "as an environmental full disclosure law", and the County must demonstrate environmental impacts were considered in a manner sufficient to show "compliance with the procedural requirements of SEPA." Although the County decision is afforded substantial weight, environmental documents prepared under SEPA require the consideration of environmental impacts with attention to impacts that are likely, not merely speculative, and "shall carefully consider the range of probable impacts, including short-term and long-term effects." *KCC/Futurewise v. Kittitas County,* EW Region Case 11-1-0001, Corrected Final Decision and Order – Partial (SEPA) at 6 (June 13, 2011).

Generally, the first step in the SEPA analysis is the preparation of an Environmental Checklist. The checklist provides information to the County about the proposal and its probable environmental effects on the natural and built environments. It is the County's responsibility to review the environmental checklist and any additional information available on a proposal to determine if there are any probable significant adverse impacts, to consider reasonable alternatives, and to identify potential mitigation. *KCC/Futurewise v. Kittitas County,* EW Region Case 11-1-0001, Corrected Final Decision and Order – Partial (SEPA) at 6-7 (June 13, 2011).

In order to adopt a pre-existing SEPA document, an agency must follow three essential steps as set forth in RCW 43.21C.034 and WAC 197-11-630 [which Kittitas County did not do]. *KCC/Futurewise v. Kittitas County,* EW Region Case 11-1-0001, Corrected Final Decision and Order – Partial (SEPA) at 9-10 (June 13, 2011).

A SEPA Threshold Determination is reviewed under the "clearly erroneous" standard -- when applying this standard, the Board must determine whether substantial evidence supports the decision, and the

Board must consider the public policy and environmental values of SEPA. The County must demonstrate that it actually considered relevant environmental factors before reaching a decision, and the record must demonstrate that the County adequately considered the environmental factors in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA. *KCC/Futurewise v. Kittitas County,* EW Region Case 11-1-0001, Corrected Final Decision and Order – Partial (SEPA) at 7 (June 13, 2011).

[Petitioners were not required to exhaust administrative remedies when (1) the DNS expressly stated there was no administrative appeal under the County Code, and (2) the County's SEPA official stated categorically that there are no such administrative remedies.] *KCC/Futurewise v. Kittitas County,* EW Region Case 11-1-0001, Corrected Final Decision and Order – Partial (SEPA) at 8 (June 13, 2011).

Petitioners could not have filed any [SEPA] administrative appeal because there is no evidence the County ever made a Threshold Determination … Therefore, Petitioners are not barred from challenging SEPA compliance. *KCC/Futurewise v. Kittitas County,* EW Region Case 11-1-0001, Corrected Final Decision and Order – Partial (SEPA) at 9 (June 13, 2011).

WESTERN WASHINGTON – Region 2

Futurewise v. Whatcom County, **Case 05-2-0013 -** This case has returned to the Board on a remand from the Washington State Supreme Court of the Board's September 20, 2005 Final Decision and Order (FDO) - *Gold Star Resorts Inc v. Futurewise, et al.,* 167 Wn.2d 723 (2009). The issues currently before the Board relate to rural density and LAMIRDs.

- **Compliance - Extension**

While the Board is able to grant extensions in the compliance schedule [RCW 36.70A.330(1)] … Because the County filed its request for an extension of the compliance period *after* the compliance period expired, the Board was statutorily required to conduct a compliance hearing. Therefore, [the] deadline could not be extended by motion. … Further, the Board notes that this matter was remanded from the Supreme Court [in 2009]. The County has had more than an adequate period of time to achieve compliance. The County is cautioned against further delay. *Futurewise v. Whatcom County,* WW Region Case 05-2-0013, Order Granting Extension of Compliance at 3 (April 15, 2011)

- **Compliance – Participation**

Futurewise v. Whatcom County, WW Region Case 05-2-0013, Order on Request for Reconsideration RE: Participation in Compliance Proceedings (May 10, 2011)(Granting four individuals participation because evidence was presented to substantiate standing)

- **Remand from Courts**

Futurewise v. Whatcom County, WW Region Case 05-2-0013, Order RE: Participation in Compliance Proceedings (April 15, 2011) and Order on Request for Reconsideration (May 10, 2011)(Denying four individuals participation in the portion of the case remanded to the Board by the appellate courts because the GMA does not contemplate participation in remand proceedings)

***Stalheim et al v. Whatcom County*, Case 10-2-0016c -** Whatcom County took actions as a result of settlement discussions in the still pending case of *Caitac, et al v. Whatcom County,* Case 10-2-0009c, and several petitions for review challenged the County's actions. Petitioners contended the County's expansion of two UGAs violated GMA provisions for UGA sizing, capital facilities planning, jurisdictional coordination, agricultural land, and internal consistency.

- **Agricultural Lands of Long Term Commercial Significance – Designation**

[County's Agricultural Protection Overlay (APO) designation is broader than Ag Lands of LTCS.] The APO designation … includes "all rural lands designated R-5A or R-10A on the official zoning map" outside a UGA and held in parcels of 20 acres or larger. Thus, the fact that the County removed the APO designation from land brought into the Ferndale UGA does not demonstrate that the County thereby "de-designated" Ag Lands of LTCS. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 24 (April 11, 2011)

The Board notes the GMA does not require that AG Land of LTCS remain designated in perpetuity. Furthermore, the GMA does not delineate how a County is to determine that lands once designated should then be de-designated. The analysis employed by the Boards and by the Washington Supreme Court has been to apply the same statutory criteria for purposes of de-designation used when designating such lands. However, despite Martin's assertion to the contrary, this process does not require a rigorous justification subject to heightened scrutiny. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 24-25 (April 11, 2011)

- **Failure to Act**

Stalheim, et al v. Whatcom County, WW Region Case 10-2-0016c, Final Decision and Order (April 11, 2011)[Finding based on prior Board and Court decisions that Whatcom County had designated its agricultural lands, thus the Petitioners "failure to act" challenge was dismissed]

- **GMA Goals**

[In addressing Goal 2 – Reduce Sprawl] While the GMA does not establish densities that constitute "sprawling, low-density development", the Board does not find that Petitioner has proven that densities of 4 dwelling units per acre would constitute sprawl. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 31 (April 11, 2011)

[Addressing Goal 1 and Goal 12, within the context of public facilities and services] In the absence of current capital facilities plans for sewer and fire, it cannot be said that the Ferndale UGA has "adequate existing public facility and service capacities to serve such development". Approving the Ferndale UGA expansion in the absence of adequate fire and sewer services is a violation of Goals 1 and 12. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 32 (April 11, 2011)

- **Internal consistency**

The internal consistency requirement of RCW 36.70A.070's preamble … does not establish a requirement for documents or plans outside of the comprehensive plan to be consistent with the comprehensive plan nor does it require development regulations to be consistent with the comprehensive plan [that requirement is found in 36.70A.040]. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 41 (April 11, 2011)

- **Interjurisdictional Coordination**

RCW 36.70A.100 requires coordination among the comprehensive plans of jurisdictions … However, under an RCW 36.70A.100 challenge, the burden is on Stalheim to identify not only the provisions in Whatcom County's Comprehensive Plan at issue but explain how it is uncoordinated or inconsistent with [identified] provisions in the City of Bellingham's Comprehensive Plan. Stalheim's fatal flaw is that he has failed to make a plan-to-plan comparison. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 45 (April 11, 2011)

The Board does not read RCW 36.70A.100's "coordinated with" as an expressed synonym for consultation. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 46 (April 11, 2011)

- **Invalidity**

Stalheim, et al v. Whatcom County, WW Region Case 10-2-0016c, Final Decision and Order at 57 (April 11, 2011)[Noting that this Board has previously held that it will declare invalid only the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act, thus invalidity was denied]

- **Official Notice**

[In denying a motion to take official notice after the Hearing on the Merits, the Board stated] Pursuant to Board rule, WAC 242-03-800, no post hearing evidence, documents, briefs, or motions will be accepted unless specifically requested or authorized by the Board. Further, RCW 36.70A.290(4) provides that the Board shall base its decision on the record developed by the County. The "record" consists of material used in taking the action which is the subject of the petitions for review, not material created or adopted after the fact. This is important because the Board determines if the action by the County was clearly erroneous based on the record that was available to the County *at the time of adoption of the ordinance under appeal*. If the County takes remedial action subsequent to the appeal, the adequacy of that action is a matter to be considered in compliance proceedings, subject to briefing by all parties and hearing by the Board. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0015c, Final Decision and Order at 7 (April 11, 2011)

- **Open Space Corridors**

RCW 36.70A.160 does not require that Whatcom County *designate* open space corridors, it requires that the County *identify* them. Given the GMA's use of *designate* in relationship to resource lands and critical areas, RCW 36.70A.170, and the enhanced protection applied to those lands/areas due to their designation, RCW 36.70A.060, the Board finds the term designate is distinct from identify within the GMA. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 38 (April 11, 2011)

- **Public Facilities and Services**

Under the GMA urban growth is to occur in areas where adequate public facilities and services exist … RCW 36.70A.110(3) suggests that "Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development". Likewise RCW 36.70A.020(1) sets forth as a goal that cities and counties should "Encourage development in urban areas where adequate public facilities and services exist or can be

provided in an efficient manner". The language of RCW 36.70A.020(12) is stronger, however. It does not use the term "should" or "encourage" but instead states that local jurisdictions are to: "Ensure that those public facilities and services necessary to support development shall be adequate to serve the development." *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 33-34 (April 11, 2011)

The existence of draft plans [sewer and fire] ... is not sufficient to demonstrate compliance with the GMA. … Because neither updated fire nor wastewater service plans were in place *at the time of the adoption* of Ordinance 2010-037, it cannot be said that adequate provision of public facilities had been provided for prior to the authorization of the Ferndale UGA. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 35-36 (April 11, 2011)

- **Public Participation**

RCW 36.70A.140 requires Whatcom County to adopt a public participation program (PPP). The challenge raised by the Petitioners was not based on the County's failure to establish such a program, as Stalheim concedes this has been done. Nor did they challenge the adequacy of the procedures contained within the PPP. Rather, the challenge raised alleges that the County failed to follow its adopted PPP. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 52 (April 11, 2011)

The Board has long held that the GMA is founded on public participation. But, as the County noted, the adoption of Ordinance 2010-037 must be seen as part of the process that began with the 2009 update process … [listing numerous meetings and hearings, involving petitioners and others] … where extensive public testimony was offered. Thus, the Record shows ample opportunities for the petitioners to observe the adoption process, to participate, to be informed, and to comment. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 54 (April 11, 2011)

- **SEPA**

Stalheim, et al v. Whatcom County, WW Region Case 10-2-0016c, Final Decision and Order at 27 (April 11, 2011)[Noting that regardless of the conclusions set forth in the environmental documents, SEPA is procedural and does not mandate a specific substantive result]

SEPA provides for the supplementation of existing environmental review via a Supplement EIS (SEIS). WAC 197-11-405(4) and 197-11-600 provide that a SEIS is required if there are either substantial changes that are likely to have significant adverse environmental impacts or new information is available indicating probable significant adverse impacts. The burden is on Martin to demonstrate the County's determination not to conduct additional environmental review was clearly erroneous and to provide the Board with substantial changes that would warrant the preparation of a SEIS. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 28 (April 11, 2011)

- **Urban Growth - phasing**

Under the GMA urban growth is to occur in areas where adequate public facilities and services exist … RCW 36.70A.110(3) suggests that "Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development". Likewise RCW 36.70A.020(1) sets forth as a goal that cities and counties should "Encourage development in urban areas where adequate public facilities and services exist or can be

provided in an efficient manner". The language of RCW 36.70A.020(12) is stronger, however. It does not use the term "should" or "encourage" but instead states that local jurisdictions are to: "Ensure that those public facilities and services necessary to support development shall be adequate to serve the development." *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 33-34 (April 11, 2011)

- **Urban Growth Area – Sizing**

[O]ur State Supreme Court has held that "a UGA designation cannot exceed the amount of land necessary to accommodate the urban growth projected by OFM, plus a reasonable land market supply factor."… The County's error in [regarding "local circumstances" is] that it failed to recognize that by employing the use of a market supply factor in its land capacity analysis it has already accounted for local circumstances. [The Supreme Court's holding in *Thurston County*] cannot be read to allow the "double counting" that would result from sizing a UGA based upon considerations of both a market supply factor and "local circumstances" … That a county may not rely upon *both* a market supply factor and "local circumstances" can be seen in the Court's discussion of how a Growth Management Hearings Board should scrutinize the use of the market supply factor … Thus, it is clear that where, as here, the County has chosen to use a market supply factor in its analysis, by so doing it has thereby considered local circumstances. It may not add additional land beyond what that analysis suggests, in the interests of other local circumstances. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 14-16 (April 11, 2011)

[In finding Whatcom County's action in sizing the Birch Bay UGA, which had a 10 acre surplus, was not clearly erroneous the Board noted] The GMA, and therefore the Board, does not recognize a *de minimis* exception. Nevertheless, it is an unrealistic expectation of any county, in creating the right combination of parcel sizes to accommodate the allocated population that every UGA must be exactly the right size (not too large and not too small) to accommodate only the number of people allocated to it. *Stalheim, et al v. Whatcom County,* WW Region Case 10-2-0016c, Final Decision and Order at 16 (April 11, 2011)

***Weyerhaeuser, et al v Thurston County*, Case No. 10-2-0020c** – Quarry and mining site owners challenged County's adoption of mineral resource land (MRL) designation criteria. Addressing both designation and conservation of mineral resource lands, including appropriate time to apply newly adopted designation criteria, the Board found noncompliance in several respects and remanded.

- **Critical Areas - Designation**

WAC 365-190-040(7) provides that the " . . . designation process may result in critical area designations that overlay . . . natural resource land classifications" and that " . . . if a critical area designation overlies a natural resource land designation, both designations apply". Additionally, WAC 365-190-020(7) provides " . . . that critical areas designations overlay other land uses including designated natural resource lands. For example, if both critical area and natural resource land use designations apply to a given parcel or a portion of a parcel, both or all designations must be made". Precluding designation of mineral resource sites that contain CARA 1, class I or 2 wetlands (and their buffers), certain habitat and species areas (and their buffers), as well as 100 year floodplains and geologically sensitive areas, may in fact be justifiable. However, the record fails to provide that justification. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 29 (June 17, 2011)

[The challenged action, which precluded the designation of Mineral Resource Land within certain critical areas affects critical areas regulation. RCW 36.70A.172 mandates the application of BAS when "protecting critical areas," but the County failed to utilize BAS.] *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 51 (June 17, 2011)

- **GMA Goals**

[As to Goal 6 – Property Rights] Weyerhaeuser's argument … questions whether the adopted criteria, which restricted use [of mineral resource lands], were reasonably related to a legitimate governmental purpose or whether it conforms to nexus and proportionality rules. The Board has previously articulated that although Goal 6 opens with a statement related to the unconstitutional taking of property, it has no authority to determine constitutional issues. The language relied upon by Weyerhaeuser is grounded in holdings of the courts addressing constitutional issues [for which the Board lacks jurisdiction.] *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 56 (June 17, 2011)

Although the language of Goal 8 [36.70A.020(8)] makes no express reference to mineral resources, the language is non-exclusive and the mineral resource industry is indisputably a natural resource industry since its very existence relies upon the geological deposits it extracts from the land. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 58 (June 17, 2011)

- **Internal consistency**

[In dismissing claims based on 36.70A.070, the Board held this statute does not support a challenge to development regulations.] RCW 36.70A.070 requires the internal consistency of comprehensive plan policies, not consistency between a comprehensive plan and development regulations. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 14-15 (June 17, 2011)

- **Invalidity**

[In denying a Determination of Invalidity, the Board stated] Invalidity is a discretionary remedy available to the Board when it determines the continued validity of the challenged legislative enactment would substantially interfere with the fulfillment of the GMA goals. Although the Board concluded Thurston County's actions were not guided by Goal 8, this does not inevitably equate to substantial interference. Nothing was presented to the Board that during the pendency of the compliance period, mineral lands of long-term significance would be adversely impacted so as to result in a permanent loss of those minerals for future extraction thereby substantially interfering with the maintenance and enhancement of the industry. In addition, nothing was presented to the Board that the demand for mineral resources in and from Thurston County could not be satisfied by the mines currently in operation until such a time as the County adopts compliant legislation … [the basis of Weyerhaeuser's arguments] results in the County's actions substantially interfering with the fulfillment of Weyerhaeuser's business goals, not the GMA's, *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 60-61 (June 17, 2011)

- **Jurisdiction – subject matter**

RCW 36.70.430 is a provision of the [Planning Enabling Act] PEA. … The Board has not been granted jurisdiction to determine compliance with the PEA. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 9 (June 17, 2011)

- **Mineral Resource Lands**

RCW 36.70A.170(1) mandates the designation of MRL that have long-term significance. Minerals are defined to include gravel, sand, and valuable metallic substances. MRL are not defined by the GMA; nor does the GMA clarify the phrase "long-term significance for the extraction of minerals" [although "Long-term *commercial* significance" is defined] *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 21-22 (June 17, 2011)

The aforementioned and other GMA provisions establish the following requirements for the designation of MRL, the first five of which would similarly apply to crafting MRL designation criteria:

1. Lands that are not already characterized by urban growth;
2. Lands that have long-term significance for the extraction of minerals;
3. Consideration of the land's proximity to population areas;
4. Consideration of the possibility of more intense uses of the land;
5. Consideration of the mineral resource lands classification guidelines adopted by the Department of Commerce;
6. Consideration of data and information available from the Department of Natural Resources relating to mineral resource deposits.

Weyerhaeuser, et al v. Thurston County, WW Region Case 10-2-0020c, Amended Final Decision and Order at 22 (June 17, 2011)

[In considering whether forestry and mining were incompatible] "uncertainty" is an insufficient basis on which to reach a conclusion that the two natural resource land designations are incompatible under WAC 365-190-040(7)(b). *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 29 (June 17, 2011)

Although the language of Goal 8 [36.70A.020(8)] makes no express reference to mineral resources, the language is non-exclusive and the mineral resource industry is indisputably a natural resource industry since its very existence relies upon the geological deposits it extracts from the land. Therefore, when considering amendments to its criteria for the designation of mineral resource lands, Thurston County's actions were to be guided by this goal – with the applicable guiding principle being the maintenance and enhancement of the industry. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 58 (June 17, 2011)

- **Natural Resource Lands – Designation (*see also* specific type of resource land)**

[There are] three types of natural resource lands, together with critical areas, that the GMA requires cities and counties to designate and conserve. The designation and conservation of these natural resource lands prevents the irreversible loss of such lands to development. The importance of natural resource land designation is underscored by the fact designation of natural resource lands is the first imperative of the GMA. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 21 (June 17, 2011)

[T]he Minimum Guidelines are not requirements. RCW 36.70A.170(2) clearly states the Minimum Guidelines must be "considered". The Board agrees with the County that jurisdictions are not necessarily required to follow the Minimum Guidelines. However, RCW 36.70A.050 does provide the guidelines are the "minimum guidelines" that apply to all jurisdictions while also allowing "for regional differences that exist . . ." *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 22 (June 17, 2011)

[N]either the County's brief nor the record explain the extent to which Thurston County applied the specified WAC factors when crafting its MRL designation criteria. Furthermore, while it is clear the County included designation criteria not specifically tied to the WAC factors, the record contains no discussion, no analysis and no rationale for departing from the Minimum Guidelines. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 27 (June 17, 2011)

Basing [designation] decisions on "uncertainty" or on "unknown" results fails to provide sufficient justification for departure from the minimum guidelines, let alone the requirements of RCW 36.70A.170 to establish designation criteria that would lead to GMA compliant MRL designations. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 28 (June 17, 2011)

The County's argument that it was merely "balancing" the competing goals of the GMA is without merit in the context of [the GMA mandate to designate natural resource lands. RCW 36.70A.170.] Prior to reaching a stage in the planning process which necessitates a balancing of the GMA goals, jurisdictions must first comply with GMA requirements. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 30-31 (June 17, 2011)

- **Natural Resource Lands – Conservation**

[A]ny claim … alleging a failure to adopt regulations designed *to assure the conservation* [of Natural Resource Lands] would more appropriately be based on RCW 36.70A.040, not RCW 36.70A.060. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 37 (June 17, 2011)

Claims alleging a failure to assure that adjacent uses do not interfere with the continued use of MRL are properly raised under RCW 36.70A.060(1) as it is the provision of the GMA which imposes the requirement. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 37-38 (June 17, 2011)

- **Property Rights (*see also* GMA Goals – 36.70A.020(6))**

[In addressing Goal 6] The property right Weyerhaeuser argues has been impacted is the use of its land for the extraction of mineral resource for off-site commercial purposes. Similarly, Segale asserts a "use of land" argument but not just for itself but for undefined land owners. The Board is well aware that the ability of a property owner to use property has been recognized as a property right, although the Board knows of no cases finding that a property owner has the right to use property for any purpose it deems fit or which would result in the greatest economic return. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 56 (June 17, 2011)

- **Public Participation**

The issue clearly presented is whether or not the change from dual designation [of Forest Resource and Mineral Resource lands] to a preclusion of dual designation was within the scope of the alternatives available for public comment and therefore excused the County from providing an additional opportunity for comment under RCW 36.70A.035(2)(b)(ii). The County states that it was considering comprehensive plan and development regulation changes to its MRL designation criteria: "the scope of the proposal was the entire designation process." However, that argument would literally allow any change to the amendments proposed and presented for public hearing. It would be difficult to envision any situation where RCW 36.70A.035(2)(a) would apply … The Board simply cannot agree with that proposition. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 9-10 (June 17, 2011)

- **Washington Administrative Code (WAC) – Guidelines 365-190, -195, -196**

[RCW 36.70A.050] directs the Department of Community, Trade and Development (now Commerce) to adopt the Minimum Guidelines. That statute does not establish a duty with which local governments are required to comply. The duty placed on local governments in that regard arises from RCW 36.70A.170(2), the directive to consider those guidelines. *Weyerhaeuser, et al v. Thurston County,* WW Region Case 10-2-0020c, Amended Final Decision and Order at 16 (June 17, 2011)

Martin v Whatcom County, **Case No. 11-2-0002**

- **Dispositive Motions**

[Petitioner] objects to the County's overall motion on the ground that it seeks to dismiss legal issues without first allowing the Petitioners the opportunity to be the first party to present the scope and evidence on those issues … [however] in any motion the moving party by necessity bears the burden of supporting its motion with legal argument and necessary supporting evidence. To yield to [Petitioner's] objection would deprive respondents in proceedings before the Board from bringing dispositive motions, which would interfere with the efficient processing of appeals. *Martin v. Whatcom County,* WW Region 11-2-0002, Order on Dispositive Motion at 2 (May 11, 2011)

The County has placed at issue in this motion whether Petitioner may challenge an aspect of the County's Rural Element when that portion of the plan has not been amended. That question having been raised, it is insufficient for Petitioner to insist that he will demonstrate a *de facto* amendment of the Rural Element later, at the HOM. The time to produce evidence and supporting argument of such a *de facto* amendment is in response to the County's motion. *Martin v. Whatcom County,* WW Region 11-2-0002, Order on Dispositive Motion at 6 (May 11, 2011)

- **Official Notice**

Martin v. Whatcom County, WW Region 11-2-0002, Order on Motion to Supplement at 2 (June 6, 2011)(Taking official notice, per WAC 242-02-660, of certain documents but noting these documents may not contain any writings not found in the official records of the County)

- **Supplemental evidence**

The burden is on the party moving to supplement the record to sufficiently demonstrate to the Board in its motion … why the parties believe that the additional evidence would be necessary or of substantial

assistance to the Board [RCW 36.70A.290(4) and WAC 242-02-540]. *Martin v. Whatcom County,* WW Region 11-2-0002, Order on Motion to Supplement at 3 (June 6, 2011)

***Nilson, et al v Lewis County,* Case No. 11-2-0003**

- **Settlement**

[In response to a request by Petitioners for the Board to ban an intervenor from participating in settlement discussions] The Board encourages settlement efforts but views them as options to be decided upon by the parties. A decision to allow an intervenor to participate in such discussions is properly one for the jurisdiction (or a petitioner) itself and not a decision that should either be mandated or precluded by the Board. *Nilson, et al v. Lewis County,* WW Panel Case 11-2-0003, Order on Church/Nilson Motions, at 4 (April 27, 2011)

- **Supplemental Evidence**

Nilson, et al v. Lewis County, WW Region 11-2-0003, Order on Church/Nilson Motions (April 27, 2011)(Declining to conduct a site visit because it was not established that such a visit would be necessary or of substantial assistance)

CENTRAL PUGET SOUND – Region 3

***North Clover Creek II v. Pierce County*, Case No. 10-3-0015 -** Petitioners challenged County's action taken to achieve compliance with a prior Board order. The Board found compliance.

- **Abandoned Issues**

[An issue was abandoned when] other than repeating these statutes in the statement of Legal Issue 3, petitioners have made no argument tied to these provisions. WAC 242-02-570(1) provides in part "Failure to brief an issue shall constitute abandonment of the unbriefed issue." An issue is briefed when legal argument is provided. It is not enough to simply cite the statutory provision in the statement of the legal issue. *North Clover Creek II v. Pierce County,* CPS Region Case 10-3-0015, Final Decision and Order at 11 (May 18, 2011)

- **Compliance**

Nothing in the statute requires a county to limit its compliance response to the narrowest revisions that could resolve the matter. Indeed, the board has long held that a city or county has various options in most cases for complying with a board finding of non-compliance. A city may, within its discretion, choose to do more than the minimum necessary to comply with an order of the Board. The Board seldom restricts the jurisdiction to the narrowest compliance option, except where more complex strategies extend delays that frustrate fulfillment of GMA goals. *North Clover Creek II v. Pierce County,* CPS Region Case 10-3-0015, Final Decision and Order at 16 (May 18, 2011)

- **Comprehensive Plan Amendment**

[The County's action] was well within the scope of the limited exception to concurrent annual review provided by RCW 36.70A.130(2)(b). [The challenged action was an amendment to the comprehensive plan, was adopted with appropriate public participation, and was adopted to resolve an appeal to the

Board.] *North Clover Creek II v. Pierce County,* CPS Region Case 10-3-0015, Final Decision and Order at 6 (May 18, 2011)

- **GMA Goals**

[The County's motion to dismiss a legal issue challenging consistency with a GMA Goal] misreads the statute and case law. RCW 36.70A.290(2) gives the Board jurisdiction to decide petitions challenging "compliance with the goals and requirements" of the GMA. Except where a specific GMA requirement may set up a conflict with a GMA goal, the Board must review challenged actions "in light of the goals" as well as the requirements of the Act. [RCW 36.70A.320(3)] While the Board seldom finds a GMA violation based on a Planning goal viewed in isolation from a statutory requirement, the Board is mandated to assess the County's action in light of both the goals and requirements of the Act. *North Clover Creek II v. Pierce County,* CPS Region Case 10-3-0015, Final Decision and Order at 10 (May 18, 2011)

***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** Two municipalities and a citizen group challenged the County's comprehensive plan amendments creating an Urban Center at Point Wells (09-3-0013c); the property owner intervened. Subsequently the County adopted development regulations for the Point Wells Urban Center. The same petitioners challenged (10-3-0011c), and the cases were coordinated for hearing. With the FDO, the Board remanded to the County to take action to comply with SEPA and the GMA.

- **Compliance**

RCW 36.70A.300(3)(b) requires the Board to set a time for compliance "not in excess of one hundred eighty days, or such longer period as determined by the board in cases of unusual scope or complexity." The Board finds the present case presents unusual complexity, as compliance is likely to require negotiation of interlocal agreements and commitments from regional transportation and other service providers, in addition to revision of SEPA analysis. The Board therefore sets a one-year compliance schedule. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 71 (May 17, 2011)

- **Consistency – Internal**

RCW 36.70A.070 requires internal consistency in an adopted comprehensive plan, including its mandatory elements [but] this section … does not reference development regulations. Consistency of development regulations with comprehensive plans is mandated in other GMA provisions [RCW 36.70A.040 and .130.]. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 12 (May 17, 2011)

Shoreline III/IV v. Snohomish County, Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 14-15, 22 (May 17, 2011) [Board defers to the County's construction of its comprehensive plan language on Urban Center locational criteria but, considering the criteria in the context of the comprehensive plan Urban Centers policies, including PSRC Vision 2040 principles, concludes the designation of Point Wells as an urban center is internally inconsistent with the County's comprehensive plan land use policies.]

- **County-Wide Planning Policies (CPPs)**

Woodway does not allege inconsistency with CPPs or that a CPP has been violated. There is no inter-local agreement between Snohomish County and Woodway giving the Town a deciding voice as to redevelopment of Point Wells. [Although the County's Point Wells designation is "starkly different" from the scenarios in Woodway's plan,] Woodway has not demonstrated the county's action violates the CPPs which constitute the framework for consistency between a county and its cities. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 33 (May 17, 2011)

- **Goals - GMA**

[Responding to Goal 1 – Urban Growth and Goal 12 – Public Facilities and Services] The development regulations enacted by the County for the Point Wells Urban Center do not adopt a sufficient plan for infrastructure and services [as required within the GMA's 20-year horizon for coordinated land use and infrastructure planning]. Rather, the regulations establish a *process* for developing urban services commitments concurrently with approving project permit applications. …BSRE asserts that its promises to fund the building of [required infrastructure] stand in for the governmental commitment required by the GMA. BSRE and the County assert the facilities and services will be available when development is available for occupancy, as set forth in Goal 12. While the Board assumes good faith on the part of the County (and BSRE), good faith is not a substitute for identifying and providing for needed infrastructure and public services. "Trust us" is not a GMA plan. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 44-45 (May 17, 2011)

Shoreline III/IV v. Snohomish County, Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 48 (May 17, 2011) [Responding to Goal 3 - Transportation, the Board found the County's redesignation and development regulations ordinances for Point Wells do not provide efficient multi-modal transportation, are not based on regional priorities, and are not coordinated with city comprehensive plans.]

GMA Goals 1, 3, and 12 [Urban Growth, Transportation, Public Facilities and Services] are linked in their call for coordinated planning that ensures urban growth is efficiently served by multimodal transportation and other urban services. [Board determined the Urban Center designation for Point Wells substantially interfered with Goals 1, 3, and 12, and imposed invalidity.] *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 72-73 (May 17, 2011)

Goal 11 [Public Participation] is primarily concerned with the planning process, calling for citizen participation and interjurisdictional coordination. [T]he Goal uses … the word "ensure" [to] give greater emphasis to the coordination clause of the Goal – "*ensure* coordination between communities and jurisdictions to reconcile conflicts." However, Petitioners' attempt to turn "ensure" into a requirement that all interjurisdictional conflicts be successfully resolved is not supported by any authority. … Rather, the Board reads the second half of Goal 11 as requiring a planning city or county to make active outreach to affected communities and jurisdictions in the interest of coordination and conflict-resolution. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 50 (May 17, 2011)

- **Interjurisdictional Coordination**

RCW 36.70A.100 requires coordination and consistency of the *adopted comprehensive plans* of adjacent jurisdictions. This section does not reference development regulations. Amendments to development regulations are not properly the subject of a Section .100 challenge. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 28 (May 17, 2011)

The requirement of inter-jurisdictional coordination and consistency is a fundamental GMA objective. It is reflected in legislative findings stating "citizens, communities, local governments and the private sector [should] cooperate and coordinate" in land use planning [RCW 36.70A.010]. GMA Planning Goal 11 calls for cities and counties to "ensure coordination between communities and jurisdictions to reconcile conflicts" in developing their plans [RCW 36.70A.020(11)]. GMA requirements for adoption of County-wide Planning Policies (CPPs) are designed to provide a framework for city-county coordination [RCW 36.70A.210(1)]. The mandate of "coordination and consistency" in RCW 36.70A.100 must be construed in this context. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 28 (May 17, 2011)

The requirement for inter-jurisdictional coordination and consistency in RCW 36.70A.100 does not require Snohomish County to adopt land use designations or zoning regulations in the unincorporated UGA that are the same as or approved by an adjacent municipality. Inter-jurisdictional consistency does not give one municipality a veto over the plans of its neighbor. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 36 (May 17, 2011)

In the unique circumstances of this case, the County's action does not comply with RCW 36.70A.100. Here, substantial evidence in the record demonstrates the Point Wells Urban Center redesignation makes Shoreline's plan non-compliant with the GMA, as Shoreline has no plans or funding for the necessary road projects to maintain the level of service standards which it has adopted pursuant to GMA mandates…. The GMA requires capital facilities and transportation planning *at the same time* as land use designations. Where, as here, the capital planning of necessity involves adjacent jurisdictions, RCW 36.70A.100 mandates that the plans of those jurisdictions be consistent [referencing "interlocal agreements or other secure commitments" that can be incorporated in planning documents.] *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 36-37 (May 17, 2011)

- **SEPA**

Analysis of alternatives is central in nonproject SEPA review [citing WAC 197-11-442(2) (4)]. [While SEPA provides more flexible review for nonproject actions,] the "bookend" analysis of no-action and proposed-action in the present case fails to provide any information to allow decisions that might "approximate the proposal's objectives at a lower environmental cost" [WAC 197-11-786]. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 56-58 (May 17, 2011)

- **Standing – SEPA**

[County argued the City of Shoreline was foreclosed from objecting to lack of SEPA alternatives by not raising the issue during the EIS scoping process.] As additional authority, the County cites *Department of Transportation v Public Citizen*, 541 U.S. 752 (2004). [Reviewing *Public Citizen* on the County's motion

for reconsideration, the Board concluded the Petitioner's challenge was not foreclosed.] *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Order on Motion for Reconsideration at 7 (May 17, 2011)

- **Transformance of Governance**

RCW 36.70A.110(4) does not impose a mandate. It provides: "*In general*, cities are the units of government *most appropriate* to provide urban services." Petitioners have cited no authority for asserting the County is required to designate a city to provide urban services as a condition for a comprehensive plan amendment in the urban area. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 39 (May 17, 2011)

- **Urban Growth – Phasing**

It is well settled that the phased location of urban growth in RCW 36.70A.110(3) is advisory, not mandatory, as indicated by the word "should" rather than "shall." This statutory provision "*recommends* where urban growth should be located and who should provide governmental services to those areas." The Board has indicated growth phasing is an option which is available to address the need for infrastructure concurrency, but is not a mandate. *Shoreline III/IV v. Snohomish County,* Coordinated CPS Region Cases 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order at 38-39 (May 17, 2011)

***Sleeping Tiger LLC v. City of Tukwila*, Case 10-3-0008 -** A property owner challenged Tukwila's zoning code amendments related to Crisis Diversion Facilities. The Board ruled the City's action precluded siting of an Essential Public Facility (EPF) in violation of the GMA.

- **Compliance - Extension**

While cities and counties are allowed some choice in how they comply with mandates of the statute and orders of the Board, [the City's] choices here extend and exacerbate the very violations at issue: preclusion of siting an essential public facility and extending an unpredictable permit process. *Sleeping Tiger, LLC v. City of Tukwila,* CPS Region Case 10-3-0008, Order on Limited Extension of Compliance Schedule at 3 (April 11, 2011)

***Toward Responsible Development, et al v City of Black Diamond*, Case No. 10-3-0014 -** A citizen group challenged the City's approval of ordinances furthering a Master Planned Development. On cross-motions to determine whether the City's action was a quasi-judicial permit approval outside the Board's jurisdiction, as the City and developer contended, or an amendment of the comp plan and development regulations that should have been processed pursuant to the GMA, the Board found GMA jurisdiction but declined to enter a determination of invalidity. All parties appealed to court.

- **Certificate of Appealability**

Toward Responsible Development, et al v. City of Black Diamond, CPS Region Case 10-3-0014, Order Granting Certificate of Appealability [re: Jurisdiction] (April 21, 2011)

Toward Responsible Development, et al v. City of Black Diamond, CPS Region Case 10-3-0014, Order Denying Certificate of Appealability [re: Invalidity] (May 20, 2011)

- **Invalidity**

[I]nvalidity is a discretionary remedy available to the Board when a city or county takes action which not only fails to comply with the GMA but substantially interferes with the goals of the Act. The GMA [RCW 36.70A.302[1]] requires that invalidity be determined on a case-by-case basis. *Toward Responsible Development v. City of Black Diamond,* CPS Region Case 10-3-0014, Order Denying Certificate of Appealability at 4-6 (May 17, 2011)

Generally, when the Board issues a final decision and that decision is appealed, the Board no longer retains jurisdiction over the appealed issue, except for compliance actions where no stay has been issued. [Absent authorization from the superior court, the Board declines to rule on petitioners' motion for invalidity as to which an appeal is pending.] *Toward Responsible Development v. City of Black Diamond,* CPS Region Case 10-3-0014, Order on Motion for Invalidity Based on New Information at 6-7 (June 20, 2011)

- **Jurisdiction – Subject Matter**

The GMA is predicated on coordinated planning for urban growth and the necessary urban infrastructure and services under an open legislative process. It is in the public interest to have a prompt resolution of the dividing line between comprehensive GMA planning [within the jurisdiction of Board review] and the types of land use matters that may be decided by the City in a non-GMA quasi-judicial process. *Toward Responsible Development, et al v. City of Black Diamond,* CPS Region Case 10-3-0014, Certificate of Appealability at 4 (April 21, 2011)

GMA planning requirements for each city and county include "mandatory elements" for capital facilities, transportation, parks, and utilities that must be consistent with land use, housing, and economic development elements…[providing more detail]… These are some of the GMA planning mandates and goals that may not be meaningfully considered if area-wide planning is allowed to proceed through developer negotiations. *Toward Responsible Development, et al v. City of Black Diamond,* CPS Region Case 10-3-0014, Certificate of Appealability at 5 (April 21, 2011)

Fleishmann's Industrial Park, LLC v City of Sumner, **Case No. 11-3-0001 –** Owner of manufacturing plant challenged City's denial of application to include the property in the designated Manufacturing/Industrial Center.

- **Supplement**

Fleishmann's Industrial Park LLC v. City of Sumner, CPS Region Case 11-3-0001, Order on Motion to Supplement (April 15, 2011)[Noting that the proposed documents provided a historic perspective of actions taken by the City related to the Petitioner but denying supplementation because the issue is the legislative action taken, not the history of the relationship between the parties]

Edgar, et al v. City of Burien**, Case No. 11-3-0004 –** Citizen petitioners sought review of City denial of zoning designation amendment. The Board dismissed.

- **Jurisdiction – Subject matter**

The Board has repeatedly affirmed that an amendment offered and rejected by the legislative body is generally not appealable to the Board except in limited situations [not applicable in this matter] *Edgar, et al v. City of Burien,* CPS Region 11-3-0004, Order on Motions at 8 (May 12, 2011)

- **Jurisdiction - Timeliness**

[While the PFR was filed within 60 days of the City's denial of the proposed down-zoning amendment] it is clear the Petitioners are directly challenging the Moderate Density land use designation for the Lake Burien area, a legislative action that occurred in 1999. … The PFR, in challenging a 1999 land use designation, is untimely. *Edgar, et al v. City of Burien,* CPS Region 11-3-0004, Order on Motions at 4-5 (May 12, 2011)

Sleeping Tiger II v City of Tukwila, **Case No. 11-3-0005 –** Petitioner appealed City's application of a moratorium to deny permit application for EPF. The Board dismissed for lack of jurisdiction.

- **Jurisdiction – Subject matter**

[In this case] it is the City's interpretation and application of the moratorium to a site-specific project permit that underlies Sleeping Tiger's challenge … and it the processing of the permit that it seeks in redress. The Board cannot review applications for project permits; that is the province of the superior court under a LUPA appeal, which Sleeping Tiger currently has pending in King County Superior Court. *Sleeping Tiger LLC v. City of Tukwila,* CPS Region Case 11-3-0005, Order on Motions at 9 (May 6, 2011)

- **Standing**

Sleeping Tiger, LLC v. City of Tukwila, CPS Region Case 11-3-0005, Order on Motions (May 6, 2011)[While petitioner had not participated in the public process related to the City's enactment of the moratorium, the petitioner sufficiently demonstrated APA standing where its application for an unclassified use permit was denied due to the moratorium.]

***Tooley v City of Seattle*, Case No. 11-3-0006** – Petitioner's challenge to draft environmental review was dismissed as premature.

- **Jurisdiction – Subject matter**

Tooley v. City of Seattle, CPS Case 11-3-0006, Order of Dismissal (April 1,2011). [Noting Petitioner's failure to appear at prehearing conference, but dismissing *sua sponte* on grounds Petitioner challenged draft EIS; thus there was no final action ripe for review.]