EASTERN WASHINGTON

Growth Management Hearings Board

Digest of Decisions

FINAL EDITION – through June 30, 2010

Washington State Growth Management Hearings Boards

In 1990, the Legislature enacted the Growth Management Act, RCW 36.70A so as to create a state-wide method for comprehensive land use planning that would prevent uncoordinated and unplanned growth. 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.

During the 2010 Legislative session, 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 on a regional basis; this new structure became effective on July 1, 2010. **Therefore, this Digest of Decisions represents a historical synopsis by keyword of the substantive decisions issued <u>only</u> by the Western Washington Growth Management Hearings Board from its inception until June 30, 2010**. Decisions issued by the regional panels after July 1, 2010 are contained in a new Digest which will combine decisions of all three regions (Western, Eastern and Central Puget Sound). Historical synopsis of Board decisions from Eastern and Central Puget Sound issued prior to July 1, 2010 are contained in those Boards respective individual Digests of Decisions.

Along with a synopsis of substantive decisions, this Digest of Decisions provides a listing of petitioners and respondents with the associated case number, a glossary of acronyms, GMA legislative history, and relevant published court cases. **Users of this Digest are reminded that decisions of the Board are subject to a court appeal and thus some of the excerpted cases may have been impacted by subsequent court and/or Board holdings. It is the responsibility of the user to research the case thoroughly prior to relying on its holdings.**

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No. Cascades Conservation Council & Washington Environmental Council v. Chelan County, EWGMB Case No. 94-1-0014

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Kittitas County Audubon Society & Alpine Lake Trail Riders Chapter of Back County Horsemen Assoc. v. Kittitas County, EWGMHB Case No. 94-1-0017

[1] EWGMHB Cases 94-1-0003 through 94-1-0015 were consolidated and are captioned as *Save our Butte Save Our Basin Society, et al. v. Chelan County,* EWGMHB 94-1-0015c

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[2] Case numbers 95-1-0008 and 95-1-0009 were consolidated and are captioned as *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009c

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[3] Case numbers 96-1-0002, 96-1-0006, 96-1-0007, and 96-1-0009 were consolidated and are captioned as *Wenatchee Valley Mall Partnership, et al. v. Douglas County,* EWGMHB 96-1-0009c

[4] Case numbers 96-1-0013 and 96-1-0016 were consolidated and are captioned as *Easy, et al., v. Spokane County,* EWGMHB 96-1-0016c

[5] Case numbers 96-1-0012, 96-1-0014, 96-1-0015, and 96-1-0017 were consolidated and are captioned as *City of Ellensburg, Ridge, et al. v. Kittitas County,* EWGMHB 96-1-0017c

[6] Case numbers 97-1-0002 and 97-1-0004 were consolidated and are captioned as *Olympic Pipeline Co., et al. v. Kittitas County,* EWGMHB 97-1-0004c

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[7] Case numbers 97-1-0005, 97-1-0006, and 97-1-0008 through 97-1-0015 were consolidated and are captioned as *Knapp, et al. v. Spokane County*, EWGMHB 97-1-0015c

[8] Case numbers 98-1-0001 and 98-1-0004 were consolidated and are captioned as *Cascade Columbia Alliance v. Kittitas County*, EWGMHB 97-1-0004c

[9] Case numbers 98-1-0008 and 99-1-0001 were consolidated and are captioned as *Wilma, et al. v. Stevens County*, EWGMHB 99-1-0001c

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Woodmansee v. Ferry County, EWGMHB Case No. 00-1-0007

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[10] Case numbers 99-1-0006, 99-1-0007, and 99-1-0008 were consolidated and are captioned as *Bargmann, et al. v. City of Ephrata* EWGMHB 99-1-0008c

[11] Case numbers 99-1-0009 and 99-1-0010 were consolidated and are captioned as *Harrison, et al. v. Stevens County* EWGMHB 99-1-0010c

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[12]Case numbers 01-1-0001 and 01-1-0002 were consolidated and are captioned as *Loon Lake Property Owners Association, et al. v. Stevens County,* EWGMHB 01-1-0002c

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[13] Case numbers 02-1-0010, 02-1-0011, and 02-1-0012 were consolidated and are captioned as *City of Walla Walla, et al v. Walla Walla County,* EWGMHB 02-1-0012c

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[14] Case numbers 04-1-0006 and 04-1-0007 were consolidated and are captioned as *Concerned Friends of Ferry County, Robinson, Riparian Owners of Ferry County, & Shumate,* EWGMHB04-1-0007c

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Panesko v. City of Richland, EWGMHB Case No. 06-1-0001

City of Spokane v. Spokane County, EWGMHB Case No. 06-1-0002

Concerned Friends of Ferry County & Robinson v. Ferry County, EWGMHB Case No. 06-1-0003

Futurewise v. Douglas County, EWGMHB Case No. 06-1-0004

Hanson et al. v. Chelan County, EWGMHB Case No. 06-1-0005

Rush v. City of Spokane, EWGMHB Case No. 06-1-0006

Wilma & Berger v. Stevens County, EWGMHB Case No. 06-1-0007

Davis v. Stevens County, EWGMHB Case No. 06-1-0008

Larson Beach Neighbors & Wagenman v. Stevens County, EWGMHB Case No. 06-1-0009

Panesko v. City of Richland, EWGMHB Case No. 06-1-0010

Kittitas County Conservation et al. v. Kittitas County, EWGMHB Case No. 06-1-0011

Feil et al. v. Douglas County, EWGMHB Case No. 06-1-0012

2007 Cases

Hanson et al. v. Chelan County, EWGMHB Case No. 07-1-0001

Panesko v. Benton County, EWGMHB Case No. 07-1-0002

Kittitas County Conservation et al. v. Kittitas County, EWGMHB Case No. 07-1-0003

State of Washington - CTED v. Kittitas County, EWGMHB Case No. 07-1-0004[15]

Miotke, McHugh, Neighborhood Alliance of Spokane, & Palisades Neighborhood v. Spokane County, EWGMHB Case No. 07-1-0005

Broadeu & Futurewise v. Benton County, EWGMHB Case No. 07-1-0006

[15] Case numbers 07-1-0003 and 07-1-0004 were consolidated and are captions as *Kittitas County Conservation, et al. v. Kittitas County,* EWGMHB 07-1-0004c

Wynecoop & Neighborhood Alliance of Spokane v. Spokane County, EWGMHB Case No. 07-1-0007

9th Street Mobile Home Park Residents Assoc. v. City of Wenatchee, EWGMHB Case No. 07-1-0008

Dudek & Baguley v. Douglas County et al., EWGMHB Case No. 07-1-0009

Humphrey v. Douglas County, EWGMHB Case No. 07-1-0010

Futurewise v. Chelan County, EWGMHB Case No. 07-1-0011

Futurewise v. Stevens County, EWGMHB Case No. 07-1-0012

Larson Beach Neighbors & Jeanie Wagenman v. Stevens County, EWGMHB Case No. 07-1-0013

Davies, Loon Lake Property Owners' Assoc. & Loon lake Defense Fund v. Stevens County, EWGMHB Case No. 07-1-0014

Kittitas County Conservation et al. v. Kittitas County, EWGMHB Case No. 07-1-0015

Nickel & Bach v. City of Ellensburg, EWGMHB Case No. 07-1-0016

2008 Cases

City of Zillah v. Yakima County, EWGMHB Case No. 08-1-0001

DAN HENDERSON, ET AL. V. SPOKANE COUNTY, EWGMHB CASE NO. 08-1-0002

Isabel Campbell v. Yakima County, EWGMHG Case No. 08-1-0003

Sunnyside Division Board of Control v. Yakima County, EWGMHB Case No. 08-1-0004

Wes Hazen, et al. v. Yakima County, EWGMHB Case No. 08-1-0005

Yakima Valley Audubon Society v. Yakima County, EWGMHB Case No. 08-1-0006

Confederated Tribes & Bands of the Yakama Nation v. Yakima County, EWGMHB Case No. 08-1-0007

Washington Depts. of Fish & Wildlife and CTED v. Yakima County, EWGMHB Case No. 08-1-0008[16]

Yakima County Farm Bureau, et al. v. Yakima County, EWGMHB Case No. 08-1-0009

Moe v. Kittitas County, EWGMHB Case No. 08-1-0010

Fiel, et al v. Douglas County, et al, EWGMHB Case No. 08-1-0011

[16] Cases 08-1-0003, 08-1-0005, 08-1-0006, 08-1-0007, and 08-1-0008 consolidated under 08-1-0008c *Campbell, et al v. Yakima County*

City of Wenatchee v. Chelan County, EWGMHB Case No. 08-1-0012

Cove Heights Condominium Association v. Chelan County, EWGMHB Case No. 08-1-0013

Southgate Neighborhood Council, et al. v. City of Spokane, EWGMHB Case No. 08-1-0014

City of Wenatchee v. Chelan County, EWGMHB Case No. 08-1-0015

2009 Cases

Scott Simmons v. Ferry County, EWGMHB Case No. 09-1-0001

Riparian Owners of Ferry County, et al v. Ferry County, EWGMHB Case No. 09-1-0002

Futurewise v. Ferry County, EWGMHC Case No. 09-1-0003

Richard Foreman & Country Ridge HOA v. City of Richland, EWGMHB Case No. 09-1-0004

City of Spokane v. City of Airway Heights, EWGMHB Case No. 09-1-0005

Douglas County Coalition for Responsible Government/Futurewise v. Douglas County, EWGMHB Case No. 09-1-0006

City of Wenatchee v. Chelan County, EWGMHB Case No. 09-1-0007

John Broduer/Futurewise v. Benton County, EWGMHB Case No. 09-1-0008

Vince Panesko v. Benton County, EWGMHB Case No. 09-1-0009

Washington State Dept. of Community, Trade, and Economic Development (CTED) v. Benton County, EWGMHB Case No. 09-1-0010[17]

Douglas County Coalition for Responsible Government/Futurewise v. Douglas County, EWGMHB Case No. 09-1-0011

Riparian Property Owners of Ferry County v. Ferry County, EWGMHB Case No. 09-1-0012

Citizens for Good Governance v. Walla Walla County, EWGMHB Case No. 09-1-0013

Wes Hazen, Upper WENAS Preservation Association, and Futurewise v. Yakima County, EWGMHB Case No. 09-1-0014

Brodeur/Futurewise v. Benton County, EWGMHB Case No. 09-1-0015[18]

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[17] Case Nos. 09-1-0008, 09-1-0009, and 09-1-0010c were consolidated and are captioned as *Brodeur/Futurewise, et al v. Benton County,* EWGMHB Case No. 09-1-0010c. The City of West Richland was granted intervenor status.

[18] The portion of this case dealing with the Richland UGA was subsequently consolidated with Case No. 10-1-0001 and is captioned as *Brodeur, et al v. Benton County,* EWGMHB Case No. 10-1-0001c. The portion of this case dealing with the

2010 Cases

Panesko v. Benton County, EWGMHB Case No. 10-1-0001[19]

Panesko v. Benton County, EWGMHB Case No. 10-1-0002[20]

Community Addressing Urban Sprawl Excess (CAUSE) v. Spokane County, EWGMHB Case No. 10-1-0003

Futurewise v. Douglas County, EWGMHB Case No. 10-1-0004

City of Wenatchee v. Chelan County, EWGMHB Case No. 10-1-0005

Futurewise v. Spokane County, EWGMHB Case No. 10-1-0006

Confederated Tribes and Bands of the Yakama Nation v. Yakima County, EWGMHB Case No. 10-1-0007

Judy Crowder, et al v. Spokane County, EWGMHB Case No. 10-1-0008

City of Chelan v. Chelan County, EWGMHB Case No. 10-1-0009

Fenske, et al v. Spokane County, EWGMHB Case No. 10-1-0010

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

Benton City UGA was subsequently Consolidated with Case No. 10-1-0002 and is captioned as *Brodeur, et al v. Benton County*, EWGMHB Case No. 10-1-0002c.

[19] This case is captioned as Case No. 10-1-0001c as the portion dealing with the Richland UGA was consolidated with Case No. 09-1-0015.

[20] This case is captioned as Case No. 10-1-0002c as the portion dealing with the Benton City UGA was consolidated with Case No. 09-1-0015

180 Days

- The Hearings Board finds it necessary to order the City of Yakima to repeal Ordinance 2001-56. After the repeal of Ordinance 2001-56, the Board will then be able to find the City of Yakima in compliance with the GMA. The Board is aware of *Wildlife Habitat and Justice Prevention v. City of Covington*, CPSGMHB Case No. 00-3-0012 (Nov. 6, 2002) which recognizes the Board's authority to require such a repeal. The Board is further cognizant of a recent W*ashington State Supreme Court* case, *Rural Residents v. Kitsap County*, 141 Wn.2d 185, 192, 4 P.3d 115 (2000). The Supreme Court, in this Growth Management Case, found that a failure to take c*orrective action during the compliance period renders the noncompliant regulation ineffective an*d *void.* While the Board believes this decision would apply here, it is unnecessary to make this finding at this time. *NFRD v. City of Yakima, EWGMHB* Case No. 02-1-0009, 2nd Order on Compliance, at 4 (Nov. 15, 2004).

- The Board holds that there are five prerequisite conditions that must be met before it wi*ll consider granting a motion for continuance. First, the purpose, intent and principles of the Act must be p*reserved. Second, all the parties must jointly make the motion. Third, granting the motion will not ba*r or delay implementation of the Act with regard to other potential parties or interests. Fourth, any party may t*erminate the continuance, without cause, by filing as a pleading with the Board a "Notice Revoking Continuance." Fifth, all parties must agree that in the event this Board enters the requested order that this motion and the resulting order constitutes the law of the case and shall not be subject to challenge or attack in this or any subsequent appellate proceeding related to this petition for review. These qualifying conditions narrowly limit motions for continuance under RCW 36.70A.300(1). This tool should only be used in cases where implementation of the Act is furthered, where no other potential party or interest is hindered, and where the interests of the parties, including a party's right to proceed with the petition, are protected. *Kittitas County v. City of Ellensburg*, EWGMHB Case No. 95-1-0007, Order Granting Continuance (Jan. 18, 1996).

- The Board concludes that the legislature intended the word "shall," as used in RCW 36.70A.300(1), to be directory, thus allowing parties to waive their right to a decision within 180 days. *Kittitas County v. City of Ellensburg*, EWGMHB Case No. 95-1-0007, Order Granting Continuance (Jan. 18, 1996).

- The GMA was amended to allow 180 days "or such longer period as determined by the board in cases of unusual scope or complexity." This Board feels the amendment was for cases such as this. It would be foolish to require the duplicated effort of the designation of a new IUGA would cause if the Final UGA can be expeditiously completed. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO, at 13-14 (Dec. 24, 1997).

Accessory Dwelling Units (ADU)

- [Language adopted by the County achieved compliance with the GMA, the language provides] Accessory Dwelling Units shall count towards the maximum allow density of a parcel. *Loon Lake Property Owners, et al v. Stevens County*, EWGMHB Case No. 01-1-0002c, Compliance Order (May 30, 2008).

- All three Hearings Boards have discouraged detached accessory dwelling unit provisions without specific criteria to curtail indiscriminate increased density. *Loon Lake, et al. v. Stevens County*, EWGMHB Case No. 01-1-0002c, Order on Motions, at 10 (Oct. 25, 2007).

- RCW 36.70A.400 states that any local government that is planning under the Housing Policy Act shall comply with RCW 43.63A.215(3). The Board finds that RCW 43.63A.215, when read as a whole, requires local governments to adopt development regulations, zoning regulations or official controls that provide for accessory dwelling units in areas zoned for single-family residential use by Dec. 31, 1994. *Coalition of Responsible Disabled v. City of Spokane*, EWGMHB Case No. 95-1-0001, Dispositive and FDO, at 2 (June 6, 1995).

- A statutory interpretation that does not require the local governmental entity to adopt an ADU regulation or control runs against the legislature's stated intent. *Coalition of Responsible Disabled v. City of Spokane*, EWGMHB Case No. 95-1-0001, Dispositive and FDO, at 3 (June 6, 1995).

- The Housing Policy Act places a mandate on a city separate from, and additional to, the GMA, and requires every city with a population of twenty thousand or more to pass an ADU regulation or control by the end of 1994. *Coalition of Responsible Disabled v. City of Spokane*, EWGMHB Case No. 95-1-0001, Dispositive and FDO, at 3 (June 6, 1995).

Adoption

- [Citing to WAC 365-195-805(3), the Board concludes] While it may have been appropriate to adopt the development regulations more timely, the language in WAC 365-195-805(3) is directive only. Words *should* and *may* be do not have the same weight as words like *shall*. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 00-1-0001, FDO, at 5 (Emphasis in original) (July 6, 2000).

- [Citing to RCW 36.70A.040(4)(d), the Board concludes] The Respondent, having adopted its Comprehensive Plan in 1995, should have by that time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan. The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially, where, as to the RSAs, (Rural Service Areas) they stand alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. That was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision is needed to allow smaller lot sizes within the RSAs "to minimize and contain the existing areas or uses of more rural development". *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 00-1-0001, FDO, at 6-7 (July 6, 2001).

Affordable Housing

- This planning goal [Goal 4] uses the verbs "encourage" and "promote" which are permissive verbs, and thus this goal does not constitute an independent substantive requirement in isolation from a specific GMA requirement … Goal 4 must be considered together with the affirmative requirements for the Comp Plan Housing Element set forth in RCW 36.70A.070(2). *Ninth Street*

Mobile Home Park v. City of Wenatchee, EWGMHB Case No. 07-1-0008, FDO at 6 (March 16, 2009).

Agricultural Lands (*See also* Natural Resource Lands)

- The GMA itself makes no reference to prime or unique soils, only mentioning soils when defining long-term commercial significance. The WAC does reference these soil types with the newly revised WAC providing greater clarity in that soils go both to determining the capability of lands for agricultural production as well as its long-term viability for them to serve in that capacity. *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, 4th Compliance Order at 9 (May 26, 2010)

- The Board does note concern over the County's requirement that Ag Lands of LTCS "*shall* be prime and unique farmland soils" because in limiting designation based on the presence of these soils, Kittitas County may not be fully considering a key element of the GMA's definition for agricultural land – that although soils play a significant role in determining whether land is capable for cultivation, soils should not be used as an exclusive designation method since some types of agriculture are not soil dependent. Thus, the use of "shall" creates the potential for land which is capable of non-soil dependent commercial agriculture, such as grazing, from being designated as Ag Lands of LTCS within Kittitas County, thereby inappropriately narrowing the universe of land that was anticipated by the Legislature as being "capable" when it defined agricultural land. Kittitas County should consider revising this during its next amendment cycle. *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, 4th Compliance Order at 10 (May 26, 2010)

- General discussion of designating agricultural lands of long-term commercial significance. *CFFC/Robinson v. Ferry County*, Case No. 01-1-0019, 6th Compliance Order at 13-16 (March 23, 2010).

- Soils play a significant role in determining whether land is capable for agricultural use, however, soils are not an exclusive or dispositive method because some types of agriculture, such as husbandry and fish farming, are not soil dependent. It should also be remembered that "capable" does not equate to the economics of the property – economics is addressed in *long-term commercial* value. *CFFC/Robinson v. Ferry County*, Case No. 01-1-0019, 6th Compliance Order at 15 (March 23, 2010).

- If the property contains a soil type the USDA has determined suitable for agricultural production, then it qualifies for *potential* treatment as land with long-term commercial significance, *subject to* the considerations of development-related impacts. Although the presence of agricultural soils weighs heavily on the designation of agricultural land, soils alone do not mandate designation; the GMA requires an analysis of more than just soils to identify and designate agricultural lands. *CFFC/Robinson v. Ferry County*, Case No. 01-1-0019, 6th Compliance Order at 16 (March 23, 2010).

- [After a discussion of the "points" process Ferry County utilized in regards to agricultural lands, see *Order at 16-19*, the Board stated] After this very comprehensive and elaborate point system was developed; additional land use "factors" considered; an assigned threshold score determined; and an aggregate "block" size with specific and limiting dimensions established; the County concluded there are no agricultural lands of long-term commercial significance in Ferry County. This is not surprising given the Herculean, if not impossible, task the County's point system and

additional "local discretion" factors place on a piece of land to qualify as ALOLTCS. *CFFC/Robinson v. Ferry County*, Case No. 01-1-0019, 6th Compliance Order at 19 (March 23, 2010).

- [B]y including numerous factors outside the requirements of the GMA within its designation criteria and relying on these factors to designate ALOLTCS, the County has expanded the agricultural land designation parameters beyond those which were established by the Legislature and confirmed by the courts. The County's expanded parameters are in direct conflict with the GMA's mandates. *CFFC/Robinson v. Ferry County*, Case No. 01-1-0019, 6th Compliance Order at 20 (March 23, 2010).

- The County's potential for agricultural land of long-term commercial significance as defined by the GMA, the courts, and determined by WAC 365-190-050 is significant. The question is how could the County determine there are no agricultural lands of long-term commercial significance? The answer is in the County's point system, a system containing factors outside the parameters of the GMA and which specifically eliminate any potential agricultural land from designation. The bar to designate agricultural land as ALOLTCS is set so high, and the criteria so stringent that even [profitable farms] … failed to make the grade as ALOLTCS. *CFFC/Robinson v. Ferry County*, Case No. 01-1-0019, 6th Compliance Order at 22 (March 23, 2010).

- [In de-designating agricultural lands of long-term commercial significance] the County still has to follow a process and de-designate only those lands that no longer fit one or more of the criteria for Ag land. The Board has previously held that when de-designating Ag land, the jurisdiction shall consider the same criteria used to designate Ag land. *DCCRG/Futurewise v. Douglas County*, Case No. 09-1-0011, FDO at 15-16 (Jan. 19, 2010)

- Under RCW 36.70A.170(2), the GMA mandates that "in making the designations required by this section, counties <u>shall consider</u> the guidelines established pursuant to RCW 36.70A.050," which are those factors listed under WAC 365-190-050(1). *DCCRG/Futurewise v. Douglas County*, Case No. 09-1-0011, FDO at 19 (Jan. 19, 2010)

- The GMA does not assign or dictate how much weight to give each of the WAC factors. Therefore, a jurisdiction has discretion regarding how to apply them. But the jurisdictions are still required to consider the factors. *DCCRG/Futurewise v. Douglas County*, Case No. 09-1-0011, FDO at 16 (Jan. 19, 2010)

- The County's decision [to de-designated] was not supported by substantial evidence in the Record, and the County did not apply the correct definition of Ag land when de-designating ... Therefore, the County's decision to de-designate some of the parcels was clearly erroneous in light of the entire Record before the Board and in light of the goals and requirements of the GMA. *DCCRG/Futurewise v. Douglas County*, Case No. 09-1-0011, FDO at 23 (Jan. 19, 2010)

- In order to be designated, the County is to review land based on RCW 36.70A.170's designation standards and the definitions contained in RCW 36.70A.030. Review based on these RCW provisions is required as they encompass the foundational structure for designation: (1) land is not characterized by urban growth; (2) land is primarily devoted25 to the commercial production of agricultural products; and (3) land has long-term commercial significance for agricultural production.26 The inclusion of this foundation within the process, something that was previously missing from the County's criteria, is the County's first step towards compliance … In addition,

as this Board has previously pointed out for Kittitas County, once a county has found lands not characterized by urban growth and currently being used or capable of being used for agriculture, the final inquiry addresses the long-term commercial significance of the land and utilizes five elements related to the quality or capability of soils and the development-related impacts from the surrounding area. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 10-11 (Feb. 4, 2009)

- Handbook 210 establishes eight classifications ranging from soils suitable for cultivation due to very limited restrictions (Class I) to soils subject to severe restrictions which limit their use for any purpose (Class IV). Although the Board finds no error in a county's selection of Prime and Unique Farmland as a basis for designation, since these two categories represent land which has the best combination of physical and chemical characteristics for agricultural production, these categories are established within 7 CFR 657 and not Handbook 210. In addition, Prime and Unique Farmland are not types of soils but rather categories of land which satisfy several criteria including moisture and temperature regimes, pH levels, location of water tables, soil management horizons, erodibility factors, etc. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 11-12 (Feb. 4, 2009).

- [W]ithin the GMA the Legislature limited the use of Best Available Science (BAS) to the designation and protection of critical areas, not to the designation agricultural lands. RCW 36.70A.170 was adopted in 1990, RCW 36.70A.172 was adopted in 1995. If the Legislature had wanted BAS to be ..included within the designation process of NRLs it would have amended the GMA to reflect this. The Legislature did not amend the GMA in this regard and the Board will not expand the application of BAS beyond that explicitly intended by the Legislature … Thus, by including a provision within its designation criteria which states Best Available Science is to be utilized in the designation process for Ag Lands of LTCS, the County has expanded the NRL designation parameters beyond that established by the Legislature and in opposition to the GMA's mandates. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 12 (Feb. 4, 2009).

- Kittitas County states it *may further consider* the combined effects of proximity to population areas and the possibility of more intense uses of land as indicated by 14 factors … RCW 36.70A.170(2) is clear - when making NRL designations jurisdictions *shall consider* the WAC guidelines. Thus, the consideration of NRL's proximity to population and the possibility of more intense use is a mandatory consideration under the GMA, not a discretionary one. The wording utilized by Kittitas County – *may further consider* – is permissive as opposed to mandatory. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 12-13 (Feb. 4, 2009).

- [In regards to the designation criteria set forth in WAC 365-190]. Although the Board recognizes the factors are not weighted, jurisdictions are to consider all of the development-related factors enumerated in WAC 365-190-050(1). Thus, the County's use of "OR" fails to comply with the GMA, specifically RCW 36.70A.060(2) which requires complete consideration. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 14-15 (Feb. 4, 2009).

- [In addition to the four non-inclusive elements set forth in WAC 365-190-040(2)(g)] The County states when making a determination as to de-designate it *should* consider the criteria for designation. As with the use of the word "may" the use of the word "should" denotes permissive

discretion as opposed to a mandatory requirement. This Board has previously held when de-designating agricultural lands, the same criteria utilized to designate the land must be utilized to determine whether the land no longer qualifies for designation as Ag Land of LTCS. Under the County's criteria, Ag Land of LTCS could conceivably be de-designated based solely on one of the four listed elements without any consideration of the County's designation criteria. *Kittitas County Conservation, et al v. Kittitas County,* EWGMB Case No. 07-1-0004c, at 17 (Feb. 4, 2009).

- [Based on evidence from the Natural Resources Conservation Services, the Board held:] [T]he County is not required to consider "unique" farmland soils, if this category of soils does not exist in Ferry County. *CFFC/Robinson v. Ferry County,* EWGMHB Case No. 01-1-0019, Compliance Order at 11 (Feb 20, 2009).

- WAC 365-190-040(2)(g) is permissive in that "[D]esignation changes <u>should</u> be based on consistency <u>with one or more of the following criteria</u>:"21 The County's removal of "critical area status" from (iv) is unfortunate considering the GMA is a forward-looking document, but there is no requirement to incorporate all or part of the criteria. The criteria are in place to be considered when de-designating agricultural lands of long-term commercial significance. *CFFC/Robinson v. Ferry County,* EWGMHB Case No. 01-1-0019, Compliance Order, at 12 (Feb 20, 2009).

- The Board agrees with the Petitioners that the County needs to have written limitations on uses authorized by its development regulations in ALOLTCS, which is the County's Commercial Agricultural Zone. There are uses presently allowed by the County that may be appropriate for the ALOLTCS, if their scope and/or function are limited. Without specific criteria to limit inappropriate non-agricultural uses, the County's actions will substantially interfere with the GMA's mandate for conservation of ALOLTCS and have a negative impact on designated agricultural lands. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0015c, FDO at 25 (March 21, 2008).

- The County should include standards and criteria for use on a case-by-case basis to determine whether permitting a use will result in a negative impact to resource lands and activities, and whether the use will maintain and enhance the agricultural industry. The methodology to determine these two criteria should be in the County's development regulations. Under the current regulations, a wide variety of non-agricultural uses can be permitted with no such analysis. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0015c, FDO at 26 (March 21, 2008).

- General discussion of GMA agricultural land provisions. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0015c, FDO at 41-42 (March 21, 2008).

- General Discussion of Designation of Ag Land of LTCS. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order at 14-17 (Aug. 7, 2008).

- Although the ability to include outside criteria [for designation of Ag land] was addressed in the *Lewis County* case, the Court did note such considerations are within the mandates of the GMA and pertain to the characteristics of the agricultural land to be evaluated. The additional factors adopted by the County are not limited in this regard, but rather address the influences of the market on an individual farmer's ability to operate. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order at 19 (Aug. 7, 2008).

- The County has adopted a different set of criteria for the de-designation of agricultural land … Because these criteria rely on the foundational criteria to designate Ag Lands of LTCS which the Board has already concluded do not conform to the GMA's definition and, also include additional factors which are not consistent with the GMA's mandate to conserve lands in order to maintain and enhance the agricultural industry, the County's de-designation criteria are non-compliant with the GMA as well. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order at 19-20 (Aug. 7, 2008).

- The GMA's requirements for agricultural lands are clearly set forth in RCW 36.70A.020(8), .060, and .170 with definitions contained at RCW 36.70A.030(2) and .030(10). Guidelines for making the required determinations are provided in WAC 365-190. The Supreme Court has provided further guidance in the meaning and application of these provisions through a variety of cases cited in this decision and numerous holdings of this Board and our colleagues at the Western Washington and Central Puget Sound Boards provide assistance to jurisdictions in this regard as well … The County's criteria must encompasses all of the definitional elements for Ag Lands of LTCS and require the consideration of soils and development related factors when determining whether the land has enduring qualities so as to be designated as a resource land with long-term commercial significance, thereby ensuring the conservation of such lands for the maintenance and enhancement of the agricultural industry within Kittitas County. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order at 21 (Aug. 7, 2008).

- [In the FDO, when addressing certain applications de-designating agricultural land] the Board required the County to perform a county-wide or area-wide analysis of agricultural lands in conjunction with the challenged determination. Futurewise takes this statement one step further in contending the County was required to revisit its designation and de-designation criteria for Ag Lands of LTCS and apply these criteria to the past de-designations … The county-wide or area-wide analysis sought by the Board was limited to these de-designation actions and did not, as Futurewise contends, require the County to analyze all of its lands to determine if they are suitable for designation as Ag Lands of LTCS or to revisit unchallenged land that had been previously de-designated. The County is not exempt from conducting such an analysis if applications are resubmitted during the next comprehensive plan amendment process. Then, consideration shall be given to the GMA's definition of Ag Lands of LTCS, the designation criteria provided for in WAC 365-910-050, and the requisite county-wide or area-wide analysis in order to maintain the industry and conserve a quantity of resource land necessary to assure the continued existence of the agricultural support system - the suppliers, processors and marketing structures – all of which are required for continued viability of the agricultural industry in Kittitas County. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order at 29 (Aug. 7, 2008).

- The *same statutory requirements govern both* the determination whether particular agricultural lands of long-term commercial significance *should be designated* and whether particular lands *should no longer be designated*… [the] analysis *must reach beyond the specific parcels* at issue to *examine the county-wide or area-wide implications* of the decision to be made. (Emphasis added) *Kittitas Conservation v. Kittitas County,* EWGMHB 07-1-0004c, FDO, at 70 (Aug. 20, 2007) (citing to *Lewis County,* 157 Wn.2d 488, 139 P.3d 1096 (2006).

- While nothing in the GMA requires agricultural lands, once designated, to remain designated as such forever, and nothing in the GMA specifies precisely how a county may determine that designated agricultural lands no longer should be designated; logically, the only way to make such a determination consistent with the GMA is to apply the same statutory criteria to a proposed de-designation of agricultural lands as for a proposal to designate such lands. Any other approach defeats the GMA's requirements to designate and conserve agricultural lands of long-term commercial significance and is contrary to the GMA's goal of conserving agricultural land in Washington. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 71 (Aug. 20, 2007).

- [De-designation of agricultural land] The fact the land does not have a water right or the water right is secondary should not be an excluding factor. This is also true with the size of the parcels or current zoning. The size may be considered, but cannot be the excluding factor. The criteria are to include agricultural lands not exclude. The County criteria for the designation of agricultural lands of long-term significance fails to comply with the GMA due to the County's failure to include how parcel size, current zoning and the presence of adequate and dependable water supply is considered. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 27 (Aug. 20, 2007).

- [The de-designation of agricultural land requires] the proper *county-wide or area-wide* assessment of agricultural lands required under RCW 36.70A.060, and .170, applying the definitions in RCW 36.70A.030(2) and (10) and the criteria in WAC 365-190-050. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 33 (Aug. 20, 2007).

- There is no requirement in the GMA for counties and cities to adopt certain setbacks within agricultural lands, forests lands, or mineral resource lands, other than the requirement of a notice (contained in RCW 36.70A.060(1)(b). *Concerned Friends of Ferry County & Robinson v. Ferry County,* EWGMHB Case No. 06-1-0003, FDO (Oct. 2, 2006).

  The GMA is clear that the thirteen goals listed under RCW 36.70A.020 are all considered important and equal in the development and adoption of comprehensive plans and development regulations. [RCW 36.70A.020 provides:] "The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." *Citizens for Good Governance, v. Walla Walla County,* EWGMHB Case No. 05-1-0013, FDO at 30 (June 15, 2006).

- The Board recognizes the importance of the GMA goals, in particular Goal (8) Natural resource industries, which requires counties and cities to maintain and enhance natural resource-based industries, including agriculture and encourages the conservation of productive agricultural lands and discourage incompatible uses. Case No. 05-1-0013, FDO, (June 15, 2006). *Citizens for Good Governance v. Walla Walla County,* EWGMHB Case No. 05-1-0013, FDO at 30 (June 15, 2006).

- As summarized, once land is designated for agriculture, the GMA does not require that it be designated as such forever. But to de-designate agricultural lands, "[I]t logically follows that if the County is required to conduct an analysis based upon [the] GMA mandated criteria to designate agricultural resource lands of long-term commercial significance; it cannot simply adopt an Ordinance that undoes, undermines or contradicts the analysis performed to support the original designation decisions." (citing *Orton Farms et al. v. Pierce County et al*., CPSGMHB

Case No. 04-3-0007c, FDO at 36). *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0013, FDO at 30 (June 15, 2006).

- As mentioned above, a designation as 'agricultural land' does not prohibit its inclusion into an urban growth area. As noted in *Stewart v. Boundary Review Bd.*, "nothing in the GMA prohibits inclusion of agricultural lands in an urban growth area." The question is does the record support that the County went through a process or analysis to de-designate agricultural land of *long-term commercial signific*ance. *Citizens for Good Governance, v. Walla Walla County*, EWGMHB Case No. 05-1-0013, FDO at 31 (June 15, 2006).

- WAC 365-190-040 sets forth the regulato*ry standards and criteria for* land *map designation changes to resource lands. The regulatory directives were adopted by Grant County under GCC 25.12.030(g)(2)(E). Briefly, this policy states that "[A]*ny proposed resource land map designation changes shall recognize that resource land designations were intended to be long term designations…", then lists four provisions that must be met before a change can be made. They are:

  (i) A change in circumstances pertaining to the comprehensive plan or public policies;
  (ii) A change in circumstances beyond the control of the landowner pertaining to the subject property;
  (iii) An error in initial designation;
  (iv) New information on resource land or critical area status.

  Friends of Agriculture v. Grant County, EWGMHB Case No. 05-1-0010, FDO at 11 (March 14, 2006).

- The Washington Supreme Court has recognized that there are two elements of the statutory definition of agricultural lands: (1) that the land be primarily devoted to agricultural purposes; and (2) that the property has long-term commercial significance for agricultural production. The court in *Redmond* found "…land is 'devoted' to agricultural use under RCW 36.70A.030 if it is in an area where land is actually used or capable of being used for agricultural production …" (citing *City of Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998)). *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, at 9 (March 14, 2006).

- The GMA mandated the designation of agricultural lands with long-term commercial significance for commercial production of food or other agricultural produ*cts. RCW 36.70A.170(1)(a).* Once res*ource lands have been designated, they* must be further prot*ected u*nder RCW 36.70A.060(1). The court in *King County v. CPSGMHB*, 142 Wn.2d 543, 562 (2000) stated "…when read together, RCW's 36.70A.020(8), .060(1) and .170 evidence a legislative mandate for the conservation of agricultural land." *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, at 11 (March 14, 2006).

- Grant County, by adopting Resolution No. 05-267-CC and thus removing 35 acres of prime irrigated farmland from production, fails to conserve agricultural resource lands and is allowing for the conversion of agricultural lands in a manner that interferes with the continued use of designated lands for the production of food and/or agricultural products. As noted above, the subject property is the crème de la crème of agricultural land. It's flat, has irrigation rights and prime soils. Converting this property to urban development, campsites, commercial development

and a twelve-acre lake interferes with the primary purpose of prime irrigated farmland – food production. Not only does the state encourage the retention of such property, but also Grant County's own code and Comprehensive Plan does the same. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, at 11-12 (March 14, 2006).

- Clearly, there is some ambiguity in the statute's definition of a "Master Planned Resort", particularly in the terms, "significant natural amenities", "primary focus", and "… with a range of… ". Any one of these terms can be interpreted broadly by the courts and boards. One thing is clear, though, the statute differentiates between "natural amenities" and "developed on-site indoor or outdoor recreational facilities. Generally speaking, "natural amenities" brings to mind ocean beaches, natural lakes, rivers, mountains, deserts and wetlands. These are features formed through nature's actions. Even though farmland can be attractive and interesting, few would consider this landscape as a "significant natural amenity". Neither can a twelve-acre man-made lake be considered anything but a "developed outdoor recreational facility". Just by definition of "natural", it is not a "natural amenity", no more than a golf course or water park. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, at 17 (March 14, 2006).

- The proposal is an urban development outside the designated UGA, but the legislature recognized this in authorizing Master Planned Resorts. In *Gain v. Pierce County* [CPSGMHB Case No. 99-3-0019], the CPSGMHB wrote: "The legislature recognized that MPR's are urban growth outside of UGAs. The GMA permits the urban growth of an MPR if the County's regulations do not permit other urban or suburban growth in the vicinity of the MPR. [Urban growth in MPRs is recognized by, not prohibited by the Act.] *Gain* FDO, April 18, 2000. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO at 18 (March 14, 2006).

- If all the other requirements had been met, the urban development at the site would have been justified. Grant County does not permit other urban or suburban growth in the vicinity of the proposal. However, the proposal fails to have a "primary focus on destination resort facilities consisting of short-term visitor accommodations". The plan submitted to the County shows too few visitor accommodations in relationship to the permanent urban growth. Thus, the "primary focus" is on permanent housing, not short-term visitors. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, at 18 (March 14, 2006).

- The Laughlin "Master Planned Resort", as proposed, has limited services. Certainly the proposal has the capability of supplying the basics available at typical convenience stores, such as gas, milk, bread, picnic foods and even heated pre-made sandwiches, but groceries per se will be limited. The Eastern Board in *Ridge* indicated "sufficient services and needed places to shop". This is where the ambiguity in the language makes it difficult to determine just what is "self-contained", and whether a convenience store provides "sufficient service". "Self-contained" means that a "Master Planned Resort" should be a livable community that can supply the daily needs of those that visit and live there. A convenience store and pro-shop does not fulfill this requirement. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, at 18-19 (March 14, 2006).

- The designation of agricultural resource lands and agricultural lands of long-term significance is a GMA priority and one that should be given the County's full attention. The County has the capability through recorded property tax status to designate many of the agricultural resource lands and agricultural lands of long-term commercial significance in Ferry County, yet has failed

to do so. The Department of Community, Trade and Economic Development (CTED) provides guidelines for the classification of agricultural lands of long-term commercial significance. Counties and cities are required to use the land-capability classification system of the U. S. Department of Agriculture Soil Conservation Service. In addition, though, counties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by a list of ten criteria, including, (b) Tax status. *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance (June 14, 2006).

- The Board encourages the County to protect the agricultural resource lands it has already identified, while continuing to locate and designate additional agricultural resource lands and agricultural lands through soil surveys and other means at its disposal. According to the Respondent's attorney and the County's Planning Director, the County has in its possession the long-overdue, anticipated soil provisions from the Department of Agriculture, so that excuse is no longer a detriment to compliance. *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance (June 14, 2006).

- The County has already designated "Open Space/agricultural" lands and allows these lands a different tax status. With these criteria already available, designating agricultural lands via tax status should be straightforward and easy to accomplish. "The tax status of Open Space/agricultural is applied to lands in Ferry County that are above 20 acres and show income from agricultural practices. There are exceptions to the 20-acre minimum, if substantial income can be shown from less acreage. This provides substantial incentive to the landowner to keep land in Open Space/agriculture." (Ferry County RLCAO 2006-03.) *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance (June 14, 2006).

- [Citing to the holding in *City of Moses Lake v. Grant County,* EWGMHB Case No. 99-1-0016, Order on Reconsideration (Aug. 16, 2000) which found no requirement that the minimum lot size in agricultural resource lands be the average size of existing farms, the Board agreed] with the Petitioners that the crux of the issue is the 2.5-acre minimum lot size for agricultural resource lands. Although there is no "bright line" for sizing a minimum lot size in agricultural resource lands or agricultural lands of long-term commercial significance, 2.5-acres is generally considered urban in nature and too small for commercial production. *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance (June 14, 2006).

- This Board notes a pattern in these decisions and others by the Growth Boards. Five-acre lots are generally considered the minimum lot size in the rural/agricultural areas and only when a variety of larger lot sizes are available, while 2.5-acre lot sizes are more urban and promote sprawl. The most important criterion for establishing minimum lot sizing in agricultural resource lands is establishing a process. How did the county or city establish the lot size, is there a variety of lot sizes available and is the process outlined in the record? *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance (June 14, 2006).

- [Citing to *Save Our Butte Save Our Basin Society, et al. v. Chelan County,* EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994) which held that the process was important and that the County must have considered the factors for determining agricultural lands of long-term significance, the

Board concluded:] Clearly, there is nothing in the record established by Ferry County that indicates a process was followed by the County to determine that 2.5-acres is a justifiable lot size in the agricultural zone. *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance, (June 14, 2006).

- Regardless of how the County words its preamble, in *C.U.S.T.E.R.*, the Western Board found "cities and counties are both required to adhere to the county-wide planning policies." *C.U.S.T.E.R. v. Whatcom County*, 96-2-0008 (FDO, 9-12-96). The Eastern Board, in *James A. Whitaker v. Grant County*, Order on Reconsideration. (Aug. 7, 2000), agreed that, "Only those county-wide planning policies that are directive are mandatory." *Roberts/Taylor v. Benton County , et al.*, EWGMHB Case No. 05-1-0003, FDO (Sept. 20, 2005).

- The Washington State Supreme Court decision, *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543 (2000), finding the GMA's agricultural conservation mandate dealt with the specific issue of whether or not a recreational use on agricultural resource lands complied with RCW 36.70A.177. RCW 36.70A.177, is also at issue in this case. Specifically, whether or not the County's new policies and regulations allowing cluster development on agricultural resource lands of long term commercial significance complies with this statute. [Board sets forth the relevant part of RCW 36.70A.177 – Agricultural lands – Innovative zoning techniques – Accessory uses]. *Futurewise/Citizens for Good Governance v. Walla Walla County,* EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The Board has a serious concern about the potential impact of clusters on the viability of the remainder of agricultural land. If cluster development patterns are going to work, the density in the cluster cannot cause a drastic change in the character of the surrounding area and the remaining farmland has to be large enough to accommodate a true commercial farming operation. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- There are two key issues in this case with respect to compliance with this s*tatute and the overall GMA agriculture conservation mandate. The* first issue is whether the new cluster regulations and policies comply with the GMA when they make no reference to restricting or encouraging location of clustering to land with poor soil or lands otherwise unsuited for agriculture. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005.)

- The GMA, in RCW 36.70A.177(1), requires that non-agricultural uses be on poor soils or soils not suited for farming. In the County's newly adopted amendments allowing clustering on Agricultural Resource lands, the County makes no mention of the soils upon which the clusters would be located. It is clear clusters are non-agricultural uses and must be located upon poor soils. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- Residential clustering on the scale allowed by the new ordinances is clearly a non-agricultural use within the meaning of the statute. It is clear from Exhibit A of Ordinance No. 308, 17.31.060, Q and R, that clusters and their buildings are non-farm development, requiring buffers and setbacks. In order to comply with the GMA, clustering policies and regulations must encourage such clusters on land with poor soil. Walla Walla County regulations do not limit or

encourage the location of cluster development in such a manner. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The findings above adopted by the County in 2001, go much further than the clustering chapter, Chapter 17.31, added most recently. The County must direct the landowner to locate these clusters upon poor soils, the soil and location least productive and less likely to reduce the land available for farming. Clusters should not remove quality soils from agricultural uses. Because the County has failed to restrict clustering to poor soils, the County's action is clearly erroneous and has not *complied with the GMA. Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The second issue is whether cluster developments with a stated maximum of 12 units in two zones and no maximum in one zone complies with the statutory requirement that clustering must *conserve* agricultural land and *encourage* the agriculture economy. The Board has concerns about the potential in AR-10 for much higher than 12 dwelling units to be clustered on agricultural lands. The sizeable concentration of residences on agricultural lands creates impacts on agriculture and creates a demand for "urban-type services" that would conflict with the agricultural economy. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- RCW 36.70A.060(1) requires that adjacent uses will remain compatible with agriculture. The failure to limit the size of the clusters in Agriculture Residential-10 and failure to limit or prohibit the location of clusters adjacent to one another does not conserve agriculture. It raises the clear possibility of urban densities on Resource lands and violates the GMA. This is a failure to encourage the agricultural economy and conserve farmland. As the size of an agricultural development project increases, it takes on urban characteristics and increases the demand for urban governmental services. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005)..

- We find nothing in the GMA that would allow clustering in agricultural resource lands to the degree that it results in a village or LAMIRD. *See Smith v. Lewis County*, WWGMHB Case No. 98-2-0011c, FDO (April 5, 1999). Uncapped clusters characteristically lead to a demand for urban governmental services. The clusters need reasonable caps so as to preclude clusters of such magnitude that they demand urban services. Unreasonable clustering without limit occurs both for property zoned AR-10 and where there is no limit to the adjacent location of clusters. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005)..

- It is clear to the Board that having no limit on Agricultural Residential-10 clustering density or allowing the "clustering" of clusters is clearly erroneous. Until limits are placed upon all clusters and the "clustering" of clusters, the Board must find the County's actions clearly erroneous and out of compliance with the GMA. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The Growth Management Act (GMA) requires Walla Walla County to identify and designate agricultural lands not already characterized by urban growth and that has long-term significance for the commercial production of food or other agricultural products. (RCW 36.70A.170(1)(a)). *The County is required to assure the conservation of agricultural resource lands that have been*

so designated. *City of Walla Walla, et al. v. Walla Walla County* Case No. 02-1-0012c, 3rd Order on Compliance (March 10, 2005).

- The Board recognizes the effort Walla Walla County has made to comply with the Board's Order on Remand and the GMA. Many of the recreational and cultural uses now allowed under Ordinances 306 and 307 are accessory uses under RCW 36.70A.177(3)(a) and compatible with agriculture. Crop mazes, equestrian parks, hunting and fishing lodges, riding academies, and public and private stables are activities and facilities that can enhance the commercial value and economy of agricultural land. The Ordinances, as described, meet a definable public need and result in fewer non-agricultural uses on lands designated as *agricultural lands of long-term commercial significance.*

  Unfortunately, portions of the Ordinances do not comply with the GMA. They allow certain non-agricultural recreational uses on *agricultural lands of long-term commercial significance.* Two of the allowed recreational uses, golf courses and ATV parks, do not conserve agricultural lands or encourage the agricultural economy as required by RCW 36.70A.177. *City of Walla Walla, et al. v. Walla Walla County*, Case No. 02-1-0012c, 3rd Order on Compliance (March 10, 2005).

- RCW 36.70A.177 allows innovative zoning techniques to conserve agricultural lands and encourage the agricultural economy. That statute requires nonagricultural uses be limited to lands with poor soils or otherwise not suitable for agricultural purposes. (Citing to *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, at 561, 14 P.3d 133 (2000)). *City of Walla Walla, et al. v. Walla Walla County*, Case No. 02-1-0012c, 3rd Order on Compliance (March 10, 2005).

- A County's use of RCW 36.70A.177 has been reviewed by the Washington State Supreme Court. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, at 561, 14 P.3d 133 (2000) reviews a situation similar to the one before us here in Walla Walla County. In *King County, supra,* the County acquired several parcels of land for development of new athletic facilities. The properties contained prime agricultural soils that had been fallow for over 30 years. The County entered into a 30-year concession agreement with a youth soccer association for management of the new facilities on these lands. The agreement contained a provision to automatically extend the agreement to adjacent parcels for soccer use. *City of Walla Walla, et al. v. Walla Walla County,* Case No. 02-1-0012c, 3rd Order on Compliance, (March 10, 2005)

- Upon review of the statutory and case law, the Supreme Court found that, "Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry." *King County,* at 558. The later amendment of RCW 36.70A.020(9) does not change the Hearings Board's belief that the County continues to have the duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the industry. The Supreme Court found in *King County* at 558 that the County's interpretation failed to give effect to the Legislature's stated intent to conserve such lands in order to maintain and enhance the agricultural industry. *City of Walla Walla, et al. v. Walla Walla County,* Case No. 02-1-0012c, 3rd Order o*n Compliance* (March 10, 2005).

- The Court looked at RCW 36.70A.177, Innovative Zoning Techniques. The Court first defined "innovative zoning". The Court found that "in order to constitute an innovative zoning technique consistent with the overall meaning of the Act, a development r*egulation mu*st satisfy the Act's mandate to conserve agricultural lands for maintenance and enhancement of the agricultural industry." *King County,* at 560. The Court determined the trial court erroneously found the County's amendments qualified as an "innovative zoning technique" under RCW 36.70A.177. The trial court had foun[d] that it was "discretionary" rather than "mandatory" that the innovative techniques be limited "to lands with poor soils or otherwise not suitable for agricultural purposes." The Supreme Court found this interpretation to be misplaced discretion. The Court instead interpreted the language to properly read as: The discretion is applied to "encouraging nonagricultural uses," not to the land eligible for such encouraged uses. Read logically, this phrase means that the County may encourage nonagricultural uses where the soils are poor or the land is unsuitable for agricultural. It should not be read that the County may encourage nonagricultural uses whether or not the soils are poor or unsuitable for agriculture. The evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes. Therefore, the properties in this case do not qualify for "innovative zoning techniques." *King County at 560. City of Walla Walla, et al. v. Walla Walla County,* Case No. 02-1-0012c, 3rd Order on Compliance, (March 10, 2005).

- The Supreme Court in *King County* found that the County has broad discretion to develop a Comprehensive Plan and development regulations that are suited to its local circumstances:

> However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques. After properly designating agricultural lands in the APD, the County may not then undermine the Act's agricultural conservation mandate by adopting "innovative" amendments that allow the conversion of entire parcels of prime agricultural soils to an unrelated use. The Explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that <u>conserve</u> agricultural lands and <u>maintain</u> and <u>enhance</u> the agricultural industry. *King County* at 561. (Emphasis provided by Supreme Court).

Walla Walla County asks the Board here to limit the effect of this decision to "prime agricultural soils". The Board will not do this. The Supreme Court's decision dealt with agricultural resource lands that have been identified by the County as required by the GMA. The fact that King County's lands that were to be used for soccer fields were prime does not restrict the decision to lands having been designated prime by the County. Such a conclusion would ignore the bulk of the Supreme Court's decision in *King County.*

The Court went on to conclude that RCW 36.70A.177 allows for innovative zoning techniques, but "includes no provision for the recreational use designated here. Read as the County would read it, the amendment would work as a virtual abandonment of the APD designation." *King County* at 562. The Courts final conclusion holds that, "[N]nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture." *King County* at 562.

City of Walla Walla, et al. v. Walla Walla County, Case No. 02-1-0012c, 3rd Order on Compliance, (March 10, 2005).

- Yakima County is required to designate and conserve agricultural resource lands within their jurisdiction. [Board cites to RCW 36.70A.020(8), 36.70A.170(1)(a), 36.70A.060(a)] The Washington Supreme Court has summarized these three provisions as follows: [w]hen read together …[the provisions] evidence a legislative mandate for the conservation of agricultural land. (citing to *King County v. CPSGMHB*, 142 Wn.2d 543 (2000)). *Wenas Citizens Association et al., v. Yakima County,* EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005)

- The Supreme Court's summary in *King County*, was premised on a lengthy review of the plain language of the GMA and its legislative history.

  In seeking to address the problem of growth management in our state, the Legislature paid particular attention to agricultural lands. One of the 13 planning goals of the GMA addresses natural resource industries: "Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020(8). The purpose is to "assure the conservation" of these lands. RCW 36.70A.060(1). A more recent indication of the Legislature's concern for preserving agricultural lands is a new section the Legislature added in its 1997 amendments to the GMA, RCW 36.70A.177, which urges employment of "innovative zoning techniques" to conserve agricultural lands.

  The GMA set aside special lands it refers to as "natural resource lands," which include agricultural, forest, and mineral resource lands. "Natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry." (*City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 47-48 (1998) (internal citations omitted)).

  Wenas Citizens Association et al., v. Yakima County, EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005).

- There can be no dispute that the GMA mandates counties to take action to conserve their agricultural lands. As this Board has found before, local governments are required to "make efforts to include, rather than exclude, agricultural lands, preserving those parcels for future natural resource-based industries." *Grant County.* Supra. *Wenas Citizens Association et al., v. Yakima County, and Jim Caton,* EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005).

- With regard to the proper definition of "agricultural land," the Legislature specifically provided for two elements to the definition of "agricultural lands" under GMA. 1. Whether the land was "primarily devoted to" agricultural purposes, and 2. its "long-term commercial significance for agricultural production." Under the statutory definition of this second element, the Court found that the Board must evaluate growing capacity, productivity, and soil composition, proximity to population areas, and the possibility of more intense uses of the land in question before the area could be designated "agricultural land." *City of Redmond*, 136 Wn.2d at 53-54. *Wenas Citizens Association et al., v. Yakima County,* EWGMHB 02-1-0008, Order on Remand (April 20, 2005).

- Taken in part, the Board looks first at the evidence for 'growing capacity' of the Caton properties. The Petitioner provided evidence that the property: (1) has soils that can produce in the top 30 percent of county-wide rangeland production values (yield) during favorable precipitation years (1,200 lbs. per acre), and normal precipitation years (800 lbs. per acre), and within the top 19% of county-wide rangeland production values during unfavorable precipitation years (over 400 lbs. per acre). (PC71, CC5, CC6); Some of the soils on the Caton property ranked in the top 7.4% and top 1.5% in range land production. (Hazen testimony at 6); (2) has soils that have a high available water capacity and the effective rooting depth is 60 inches or more, which is ideal for agricultural production. (Soil Survey, CC16, pp. 29-31). *Wenas Citizens Association et al., v. Yakima County,* EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005).

- The Board notes the Caton property has been in the Conservation Reserve Program (CRP) from 1986 to 1997. This is through the Farm Service Agency with the USDA. The CRP is a voluntary program that offers annual payments, incentive payments and annual maintenance payments for certain activities, and cost-share assistance to establish approved cover on eligible cropland. The program encourages farmers to plant long-term resource-conserving covers to improve soil, water, and wildlife resources. To be eligible for placement in the CRP land must be:

  > *Cropland* that is planted or considered planted to an agricultural commodity 2 of the 5 most recent crop years (including field margins) and which is physically and legally capable of being planted in a normal manner to an agricultural commodity; *orMarginal pastureland* that is either: Certain acreage enrolled in the Water Bank Program; or Suitable for use as a riparian buffer to be planted to trees.

  Landowner's offers for CRP contracts are ranked according to the Environmental Benefits Index (EBI). Contrary to the Intervenors' contention, the fact that the property did not rank high enough on the environmental benefit index for re-enrollment in the CRP, does not support the argument that these are not agricultural resource lands. This ranking would only mean the land was not environmentally sensitive enough to meet the enrollment criteria. It could still be excellent farmland. The Board further notes this same land has been included under the beneficial taxation designation authorized under RCW 84.34.020. *Wenas Citizens Association et al., v. Yakima County,* EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005).

- Even though the Record provides evidence that the County <u>may</u> not have properly designated the Caton property and a correction may have been needed, the fact remains the property has been historically designated Exclusive Agriculture, then through the intensive Comprehensive Plan process in 1997, to Agricultural Resource. The PC minutes reflect that during the original process of developing the Comprehensive Plan, the Caton's property was considered for Rural Remote, which requires a 40 acre minimum, but the PC designated it Agricultural Resource to, "give(s) more of an option for the Kaytons (sic) if its Ag Resource land than it would be if it were Rural Remote." PC minutes, Tape 1, Side B, pp. 11-12. The Record does not show evidence of a change in the circumstances in the agricultural and local community. *Wenas Citizens Association et al., v. Yakima County,* EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005).

- Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 2004 WL 2750786 (Wash. Ct. App., Div. 3, 2004), found that in reviewing a municipality's actions, the Board must presume the comprehensive plan and ensuing regulations are valid. *City*

of Redmond v Central Puget Sound Growth Management Hearings Board, 116 Wn.App. 48, 55, 65 P.3d 337 review denied, 150 Wn.2d 1007 (2003). The party petitioning the Board has the burden to show noncompliance and the Board must find compliance unless the action is clearly erroneous. The Court found that the Board erred by shifting the burden of proof to the County and the Cantons. The Board was required to presume the Comprehensive Plan and ensuing regulations were valid. *Redmond*, 116 Wn.App. at 58. *Wenas Citizens Association et al., v. Yakima County,* EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005).

- The Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd*., 2004 WL 2750786 (Wash. Ct. App., Div. 3 2004), also found that the Board erred by applying "heightened scrutiny" to this case by citing a Central Puget Sound Hearings Board decision, which Division One of the Court of Appeals rejected. That Appeals Court found the Central Puget Sound Hearings Board was in error by applying "heightened scrutiny" to the decision to re-designate the land. *Redmond*, 116 Wn.App. at 58. *Wenas Citizens Association et al., v. Yakima County,* EWGMHB Case No. 02-1-0008, Order on Remand(April 20, 2005).

- In addition, the Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd*., 2004 WL 2750786 (Wash. Ct. App., Div. 32004), found that the Board failed to apply the particular facts in this case to the definition of 'agricultural land.' The Board's decision focused on the element of whether the land was 'primarily devoted to' agricultural purposes, and decided the petition solely on that element. Thus, it did not address the issue of 'long-term commercial significance for agricultural production.' The Board must evaluate the growing capacity, productivity and soil composition, proximity to population areas, and the possibility of more intense uses of the land in question before it decides the area must be designated 'agricultural land.' The Court also found that the Board had not analyzed the facts in relation to the criteria for the County amending Plan 2015. Because the Board made no factual findings regarding any of the criteria, the Board's conclusion is not supported, nor could it be sustained. The Board must analyze the facts in relation to the criteria for the County amending Plan 2015. *Wenas Citizens Association et al., v. Yakima County,* EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005).

- Finally, the Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd*., 2004 WL 2750786 (Wash. Ct. App., Div. 32004), decided that, "Whether the amendment complied with the GMA, however, is a matter within the Board's discretion. Accordingly, the Yakima County Superior Court should have remanded this matter to the Board, unless doing so is impracticable or would cause delay." Yakima, supra p. 4. *Wenas Citizens Association et al., v. Yakima County,* EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005).

- The Board was directed by the Court of Appeals to consider whether the Caton's property meets the statutory definition of agricultural land and complies with the GMA. The Board must properly apply the correct burden of proof and the presumption that the County's amendment is valid; analyze how the facts of this case apply to the two elements of the statutory definition of agricultural lands of long-term commercial significance; and, analyze the facts in relation to the criteria for the County amending Plan 20015. *Wenas Citizens Association et al., v. Yakima County,* EWGMHB Case No. 02-1-0008, Order on Remand (April 20, 2005).

- The Board agrees with the County's contentions regarding ten and twenty acre lots as part of the protected agricultural lands designation. If small lots were allowed throughout the agricultural

zones, clearly, the agricultural lands and industry would not be protected. However, small agricultural lots are of increasing importance in many areas of our State, including Walla Walla County. Agricultural activities found on small lots are definitely becoming more common and have long-term commercial significance and deserve protection. The Board recognizes that not all these parcels will be used for production, but their potential for future production purposes needs to be preserved. The Board complements the County for this foresight. *Citizens for Good Governance, et al., v. Walla Walla County*, EWGMHB 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- While "innovative zoning techniques" under RCW 36.70A.177 are applicable, they cannot be taken advantage of without the County having a clear method for the review of such parcels and their approval for conversion. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-1-0012c, Order on Remand (Dec. 16, 2003).

- The Superior Court of Walla Walla County remanded to this Board a portion of the FDO in *City of Walla Walla v. Walla Walla County*, No. 02-1-0012c. This Board was directed by the court to "make findings as to any legal or factual basis for not allowing use of Walla Walla County's CUP process in making such threshold determinations, including whether the mandated conservation, maintenance, and enhancement of the agricultural industry is being complied with, and whether any 'innovative zoning techniques' under RCW 36.70A.177 are applicable." (citing Walla Walla County Superior Court, *Walla Walla County v. Eastern Washington Growth Management Hearings Board*, No. 02-2-00784-9, April 21, 2003). The Board is to consider whether the County's use of its CUP process and its standards to make a "threshold" decision on the siting of these challenged uses, protects agricultural lands of long-term commercial significance such that the regulations comply with the GMA. The Board finds that it does not. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-1-0012c, Order on Remand (Dec 16, 2003).

- The CUP is written in general language and in no way directs that only lands with poor soil be considered for conversion to the above uses. The County asks the Board to recognize an affidavit submitted by their interim Director of Regional Planning for Walla Walla County as the County's "law" limiting the conversion only to lands with poor soil. That affidavit and its correction purport to establish the criteria for permitting conversion of these lands to non-agricultural uses. However, even the affidavit is unclear. Nowhere in the County's DRs, CP or CUP is there a requirement that such a non-agricultural use be on lands of poor soil or soil not suitable for agricultural purposes. The affidavit of Kenneth Kuhn, the acting Director of Regional Planning, also does not make it clear that applications will be rejected if the soil is not poor or unsuited for agricultural purposes. A person may infer that is the case, but it is unclear. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-1-0012c, Order on Remand (Dec. 16, 2003)..

- Each of these are documents that may show the intention of the County, but are not required by or contained in the County's Comprehensive Plan or the Development Regulations which authorize this conversion of Agricultural lands. The Regulations that do exist are those that authorize the change of use on all but Primary Significance or Unique farmlands. With no regulations to address the specific criteria of this conversion, the landowner is told only that the CUP process is to be used. That process makes no mention of agricultural lands nor does it include standards or criteria, which would limit or guide the landowner or the County. *City of*

Walla Walla, et al. v. Walla Walla County, EWGMHB Case No. 02-1-0012c, Order on Remand (Dec. 16, 2003).

- The actions of the County are non-reviewable by the Growth Management Hearings Boards unless they are found in the County's Comprehensive Plan or Development Regulations. RCW 36.70A.280(a). The Board looks at the development regulations developed by the County for review of the applications for non-agricultural development upon agricultural lands. The County has stated on the record that it is their intent to allow only non-productive or poor agricultural soil/lands to be converted in this manner. However, nowhere does this criteria or standard exist in their Comprehensive Plan or Development Regulations. *City of Walla Walla, et al. v. Walla Walla County*, Case No. 02-1-0012c, Order on Remand (Dec. 16, 2003).

- The Growth Management Act requires the County to identify and preserve Agricultural Lands of Long-term commercial Value. The County has identified a large portion of their lands as such, 92%. This is admirable. We recognize that such a whole scale designation was a precautionary step. It is quite possible that, upon detailed examination, some of these lands might not qualify as Agricultural Resource Lands. However, the County must have a compliant procedure allowing the consideration of other uses of this land if it were believed that particular lands were in fact not viable agricultural lands and compatible with the agricultural uses around it. If this is what the County desires to do, the County must adopt a procedure allowing the careful examination of the subject parcel and the redesignation of such parcel only if it is found to be poor soil and unsuited for agricultural use and compatible with the agricultural uses around it. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-1-0012c, Order on Remand (Dec. 16, 2003).

- The County has not gone far enough. The County allows the conversion of these lands yet establishes no criteria or standards giving the landowner an understanding of its application. The reference to "in conformance with the comprehensive plan." 17.40.020(A)(3) does not clarify the meaning of the statute or provide the criteria needed. The County's Comprehensive Plan requires the protection of agriculture resource lands, but gives no direction to the landowner as to how a change of use could take place. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-1-0012c, Order on Remand (Dec. 16, 2003).

- The Board agrees with the County's contentions regarding ten and twenty acre lots as part of the protected agricultural lands designation. If small lots were allowed throughout the agricultural zones, clearly, the agricultural lands and industry would not be protected. However, small agricultural lots are of increasing importance in many areas of our State, including Walla Walla County. Agricultural activities found on small lots are definitely becoming more common and have long-term commercial significance and deserve protection. The Board recognizes that not all these parcels will be used for production, but their potential for future production purposes needs to be preserved. The Board complements the County for this foresight. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case No. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The Board in the case *Wenatchee Valley Mall Partnership v. Douglas County*, EWGMHB Case No. 96-1-0009, has recognized clustering as an acceptable technique to preserve large-tract agricultural lands. The objective of preserving agricultural lands of long-term commercial significance does not mean homes cannot be built on these lands, only that the lands remain in parcels sizes, which enable agricultural production. Clustering of homes, along with relatively

large lot sizes for the underlying zone, certainly encourages preservation of large tracts for agricultural production. *Citizens for Good Governance, et al., v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

The Respondent does not contend that 2 ½ acre lots will protect agricultural lands, or in any way preserve these lands for agricultural use. Rather, they argue that tax incentives alone will keep these lands available for agricultural productions. The Board rejects that argument. Ferry County has an "affirmative duty" to protect designated agricultural lands. Allowing those lands to be divided into 2 ½ acre lots simply does not protect those lands for agricultural use. The tax incentives alone are insufficient to protect agricultural lands. The 2.5-acre minimum lot size as applied to agricultural resource lands in Ferry County, fails to comply with the affirmative duty to conserve and protect agricultural resource lands to assure the maintenance of the agricultural industry. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO (June 14, 2002).

- Yakima County is required to designate and conserve agricultural resource lands within their jurisdiction. Thus, there can be no dispute that the GMA mandates Counties to take action to conserve their agricultural lands. As this Board has found before, local governments are required to "make efforts to include, rather than exclude, agricultural lands, preserving those parcels for future natural resource-based industries." (Internal citations omitted). *Wenas Citizens Association et al., v. Yakima County*, EWGMHB Case No. 02-1-0008, FDO (Nov. 4, 2002).

- This Board has also found that agricultural lands are not "conserved" if they are not "maintained." *English v. Columbia County*, EWGMHB No. 93-1-0002 (FDO, Nov. 12, 1993, (defining "conservation" to mean "intended to maintain agricultural and forest resource lands.*"); Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB No. 94-1-0015 (FDO, Aug. 8, 1994.) *Wenas Citizens Association et al., v. Yakima County*, EWGMHB Case No. 02-1-0008, FDO (Nov. 4, 2002).

- The Board notes the Caton property has been in the Conservation Reserve Program (CRP) for the best part of the past 20 years. This is through the Farm Service Agency with the USDA. The CRP is a voluntary program that offers annual payments, incentive payments and annual maintenance payments for certain activities, and cost-share assistance to establish approved cover on eligible cropland. The program encourages farmers to plant long-term resource-conserving covers to improve soil, water, and wildlife resources. *Wenas Citizens Association et al., v. Yakima County*, EWGMHB Case No. 02-1-0008, FDO (Nov. 4, 2002).

- While any Reclamation water does not serve this land, this Board has found in several cases that agricultural land of long-term significance does not have to be irrigated lands. This Board has stated that junior water rights and non-irrigated lands can be as productive if not more productive than lands that are irrigated. *Wenas Citizens Association et al., v. Yakima County*, EWGMHB Case No. 02-1-0008, FDO (Nov. 4, 2002).

- The Board has carefully reviewed the Supreme Court decision in *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., Supra*. Because of that decision, the Board is compelled to find the County is out of compliance. King County, in that case, greatly limited the uses, prohibited all but a few structures and emphasized the temporary status of such uses. Yet the Supreme Court found that the County's proposed action to convert agricultural land to active recreation uses does not comply with the Act's mandate to preserve agricultural lands. The Court

found that the explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that conserve agricultural lands and maintain and enhance the agricultural industry.

> In the cited case, the court concludes that "in order to constitute an innovative zoning technique consistent with the overall meaning of he Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry." The Court further points out that "The statute encourages counties to limit innovative techniques 'to lands with poor soils or otherwise not suitable for agricultural purposes'" id p.142. The Court went on to say, "it should not be read that the County may encourage nonagricultural uses whether or not the soils are poor or unsuitable for agriculture." Such innovative zoning techniques are limited to lands with poor soils or otherwise not suitable for agricultural purposes. The Court pointed out that some of the land in their case was in fact Prime soils. This finding does not limit the decision to only Prime soils but rather was a statement that "The evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." Therefore, we are forced to conclude the properties in our case do not qualify for 'innovative zoning techniques.'" While the Walla Walla County development regulations are for Agricultural Resource Lands that are not Prime or Unique, the Courts ruling would still apply to the Walla Walla Ordinance provisions. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No.02-2-0012c, FDO (Nov. 26, 2002) (Internal citations omitted).

- The County's claims that other goals of the Act, namely the requirement to provide for recreational opportunities, could override the requirement to protect agricultural resource lands was also addressed by the Supreme Court. The Superior Court, in their review of the case, had ruled that under RCW 36.70A.177, the location of recreational uses on Agricultural Resource Lands was authorized as an innovative zoning technique. The Court of Appeals and Supreme Court reversed this interpretation. "However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques." …"Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture." As in the King County case above, we find here "the evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." While the Board recognizes the circumstances in Walla Walla County are different from King County, we cannot distinguish the Supreme Court ruling in *King County v. CPSGMHB, supra*, to permit the objected-to recreational uses allowed in the Walla Walla County Ordinance No. 269. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO (Nov. 26, 2002) (Internal citations omitted).

- The Board finds the Supreme Court ruling in *King County v. CPSGMHB*, 142 Wn.2d 543, 562 (2000) compelling: counties must preserve agricultural lands as directed by the Growth Management Act. Intervenor's arguments seem to overlook the fact that the County designated the subject property as agricultural land of long-term significance; the Board did not. The question addressed by the Board is "Was this de-designation of agricultural Resource Land appropriate?" The Board concluded the County was not correct in that de-designation, and did not establish an adequate basis for removing that designation. The County argues three factors as their justification for removing the land from protected status: 1) to correct an obvious mapping error; 2) to better implement the Comprehensive Plan; and 3) a need for more Rural Self-Sufficient zoned lands. The County and Intervenor fail to convince the Board in all three factors. The record does not support a need for more 5-acre lots in Yakima County. The Record holds no

support for an argument that dividing an existing farm into 5-acre lots better implements the Comprehensive Plan. Nor does the record establish any obvious mapping error in the original designation. *Wenas Citizens Association et al., v. Yakima County*, EWGMHB Case No. 02-1-0008, Order on Reconsideration (Dec. 2, 2002).

- The Growth Management Act, with further direction from the Supreme Court, mandates the preservation of farmlands. This mandate is not limited to flat land, or irrigated land, or prime or unique soils. The County has designated the subject land as agricultural land of long-term commercial significance. It has not established a basis to conclude that designation was in error. *Wenas Citizens Association et al., v. Yakima County*, EWGMHB Case No. 02-1-0008, Order on Reconsideration (Dec. 2, 2002).

- The Board in the case *Wenatchee Valley Mall Partnership v. Douglas County*, EWGMHB 96-1-0009 has recognized clustering as an acceptable technique to preserve large-tract agricultural lands. The objective of preserving agricultural lands of long-term commercial significance does not mean homes cannot be built on these lands, only that the lands remain in parcels sizes, which enable agricultural production. Clustering of homes, along with relatively large lot sizes for the underlying zone, certainly encourages preservation of large tracts for agricultural production. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002)..

- Clustering is only appropriate for lands not designated for agriculture, forest, or mineral resources. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- The Department of Community Development guidelines shall be minimum guidelines that apply to all jurisdictions in designating agricultural lands. While a county may incorporate additional criteria in its classification system, WAC 365-190-050(1) remains the standard by which the ordinance is measured. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO, (Nov. 12, 1993).

- While there is opportunity for the exercise of local judgment and it is obvious that the local community understands its agricultural lands better than anyone else, the conclusions reached must be the product of a valid process. The record must show that the county considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- The second edition of the Random House Dictionary of the English Language defines "conservation" as 1) "the act of conserving, prevention of injury, decay, waste or loss" and 4) "the careful utilization of a natural resource in order to prevent depletion." Thus, conservation prevents the loss or degradation of the resource. Using this definition, we hold "conservation" as used in RCW 36.70A.060 is intended to maintain agricultural and forest resource lands. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- Unlike a dry land wheat area, for instance, where all the land in a particular area may be dedicated to a particular crop or use, the orchard area in Chelan County is both diverse and complex. The land classifications change rapidly and often in the extreme. Blocking off whole

areas may be too blunt an agricultural-lands designation tool. Using appropriate performance criteria as an alternative designation tool would provide flexibility to deal with non-qualifying lands. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- While there is opportunity for the exercise of local judgment, the conclusions reached must be the product of a valid process. The record must show that the County considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- The Growth Management Act specifically differentiates between agricultural resource lands and rural lands. County residents who desire a rural lifestyle should have the opportunity to purchase rural home sites in rural areas that do not have long-term commercial value as agricultural land. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- All counties, whether planning or non-planning, must designate agricultural resource lands and critical areas. All counties must protect critical areas. These designations and protections provide the basis for further planning. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Compliance Hearing Order (Jan. 30, 1995).

- Planning Goal 8, the enhancement of natural resource-based industries, does not prevent productive agricultural lands from inclusion within an IUGA. There is no reason to believe that agricultural lands to the extent they are included within these IUGAs cannot continue to be successfully farmed. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- The basic requirements for designation of agricultural resource lands under RCW 36.70A.170(1) are provided in the definitions of the terms "agricultural land" and "long-term commercial significance." *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The question of compliance with RCW 36.70A.020(2) (sprawl) is not whether development should be precluded from agricultural resource lands, but the nature of the allowed development. Property developments, which support the agricultural industry, and these encompass a wide range of uses, are necessary for its future vitality. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- RCW 36.70A.020(8) establishes two standards against which an agricultural lands-related ordinance is to be tested. Does the Ordinance fulfill the minimum requirement of the Act to discourage incompatible uses of designated lands and does it meet the minimum requirement to maintain and enhance natural resource industries, in this case agriculture? *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- Parks, playgrounds, public schools, and libraries do not appear to be compatible with commercial agriculture. Additional uses that would not be compatible with commercial agriculture include hospitals, convalescent homes, and day care facilities. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The Board recognizes that there are many uses, which, if located in a designated agricultural area, would be detrimental to the agricultural industry. Indeed, many uses are simply incompatible with commercial agriculture, a hospital, for instance. It is important to note that production practices of commercial agriculture are not always bucolic, even though for large parts of the year they may seem to be. Commercial agriculture as practiced today is an industrial activity, often necessitating precise chemical applications and work regimes encompassing all hours of the day. When conflicts arise with other uses in an agricultural area, the agricultural viability of the area often goes down. Over time, the cumulative burden becomes unbearable for some producers, resulting in further conversion of agricultural lands and ever-greater burdens on the remaining producers. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The important concern is the non-agricultural impact of non-exclusive zoning, by which we mean the cumulative impact of non-agricultural related activities on the designated agricultural area. In many cases it is a proposed development's level of impact and purpose that is determinative of whether it should be allowed or not. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- In order to maintain the industry, it is necessary to designate and conserve a "critical mass" of the agricultural resource land. The Board defines "critical mass" as that quantity of resource land necessary to assure survival of the agricultural support system, the suppliers, processors and marketing structures, required for survival of the agricultural industry in the county. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- A county has a range of discretion in making this determination of the critical mass of agricultural land and the extent of any particular designation may vary from county to county depending on the level of protection above the minimum requirement they choose to grant the industry, but the baseline test is always whether the land is commercially significant over the long-term. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The term "long-term commercial significance" establishes criteria for agricultural land. It fundamentally concerns the land's growing capacity and productivity, as measured by the Soil Conservation Service land-capability classification system. The test is the land's ability to commercially produce crops, rather than the profitability of any crop or farm. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- While the GMA requires the conservation of agricultural lands of long-term commercial significance, it does not, and cannot, prohibit rezone actions. Any rezone, of course, would be subject to compliance with approved comprehensive plans, and the goals of the Growth Management Act. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- One of the purposes of the GMA is to encourage preservation of agricultural lands. If the landowner perceives a potential for a higher use allowable by the county, that perception itself will increase land prices to ensure the land is no longer economically viable for agricultural purposes. While this Board will not suggest what economic criteria should apply in permitting a landowner to opt out, that criteria must be based on something other than the landowner's perception of what is in his short-term economic interest, and on perceptions of what other uses

may be allowed on the land. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- Counties are required to designate agricultural lands that have long-term significance for the commercial production of food or other agricultural products. The requirement to adopt a comprehensive plan is in a separate section of the Act. The requirement to designate and conserve agricultural land is not an interim requirement, valid only until the local agency adopts a comprehensive plan. When the comprehensive plan is being adopted, the county is to review the designations and development regulations and insure they are consistent with the plan. The designations are separate requirements under the GMA and can be reviewed by the Board in a separate action. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, Order on Compliance - Agricultural Lands (May 27, 1997).

- RCW 36.70A.170, RCW 36.70A.030(2) and (11), WAC 365-190-050, legislative history, and the Supreme Court decision in *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38 (1998), direct the county to designate a critical mass of lands to preserve the agricultural industry, not just a few acres of land in token compliance. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- The county's agricultural lands designation criterion, that parcel size must be a minimum of twenty acres in size, is not appropriate. A more appropriate acreage criterion would consider ownership and management patterns, not simply assessor's parcel size. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- Current land use is not controlling in designating agricultural lands. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- In designating agricultural land, counties shall consider a multitude of factors and not decide solely on one element. Counties cannot use one element on the list of criteria to exclude, but must consider all elements. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- The Board has already found senior water rights were not a valid criterion in designating agricultural lands where the evidence did not show a significant difference in productivity. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- [Richard L. Settle & Charles G. Gavigan, in "*The Growth Management Revolution in Washington: Past, Present and Future*," 16 U Puget Sound L. Rev., p.67 at 907 (1993) states:] "…natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource based industries that depend on them. Allowing conversion or resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry."

  In *Redmond v. Central Puget Sound Growth Hearings Board*, 136 Wash. 2d 38 (1998), the Washington Supreme Court considered the issue of whether an owner's current or intended use of land was a conclusive factor in determining whether property is "agricultural land" under RCW 36.70A.030(2). The court found, in designating property as agricultural resource land under GMA, neither the current use nor the owner's intended use of the property is

determinative. The court noted if current uses were a criterion, GMA Comprehensive Plans would not be plans at all, but "mere inventories of current land uses."

The court further found, if the landowners intended use were a criterion, local jurisdictions would be powerless to preserve natural resource lands: "presumably, in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture". *Redmond*, supra, at 52. The Court found there are two elements of the statutory definition of agriculture land contained in RCW 36.70A.030: (1) that the land be primarily devoted to agricultural purposes; and (2) that the property has long-term commercial significance for agricultural production.

The *Redmond* court held "…land is 'devoted to' agricultural use under RCW 36.70A.030 if it is in an area where land is actually used or capable of being used for agricultural production…" The land in this case has long been zoned for agricultural use. While the land use on a particular parcel and the owner's intended uses for the land may be considered along with other factors in the determination of whether a parcel is in an area primarily devoted to commercial agricultural production, neither current use nor landowner intent of the particular parcel is conclusive for purposes of this element of the statutory definition. *Redmond*, supra at 53.

- The Belaire property has been used for hay and alfalfa production. It is bordered on two sides by land in active hop production. It has been zoned agricultural since 1982 and has been designated agricultural resource land since the beginning of Yakima County's GMA planning process. When considering these elements the County must balance interests and make value judgments. The County has found the Belaire property has some prime agricultural soil, that there are no public facilities available and very few public services. This is a case where the County could have chosen to designate this property as agricultural resource land or Rural Self-sufficient lands as the Petitioners requested. This Board will not substitute its judgment for that of the County. The Legislature and the courts have been very clear on this issue. *Belaire et. al. v. Yakima County*, EWGMHB Case No. 99-1-0003, FDO, (Aug. 23, 1999).

- [The Board sets for the CTED guidelines for agricultural contained in WAC 365-190-050] These GMA definitions and CTED guidelines create a standard for analyzing, classifying and designating agricultural lands of long-term commercial significance but do not compel any particular outcome or result. *Grant County Assoc. of Realtors v. Grant County*, EWGMHB Case No. 99-1-0018, FDO (May 23, 2000).

- That relatively poor soil properties of those lands and their current fallow state should prevent their classification as "agricultural" resource lands is incorrect and short sighted. If Respondent took no action to protect lands that could be benefited by a continuation of the Columbia Basin Project, there may not be sufficient suitable land left to efficiently and economically irrigate when Congress determines it is ready to finish what it started. As technology improves, the soils that are marginal today may become more than sufficient to support the crops of tomorrow. Respondent should be commended for its conservationist approach to the most economically important resource lands in its jurisdiction. *Grant County Assoc. of Realtors v. Grant County* EWGMHB Case No. 99-1-0018, FDO (May 23, 2000).

- The County has considerable discretion in carrying out its duties under the GMA. So long as a local governing body is not exploiting this discretion to a level that becomes "clearly erroneous," we will defer to the wisdom and judgment of the local decision-making process. When it comes

to implementing the CTED guidelines in reference to soil class and quality, we have approved local classifications of agricultural land when they err more toward the side of inclusion of lands, rather than exclusion. Respondent's actions meet this standard, taking the CTED guidelines as direction to consider including "at least" lands with prime and unique soils, not "at most" those lands. See WAC 365-190-050(3) allowing a county to classify "additional lands of local importance" beyond those classified after consideration of the factors specified in subsections (1) and (2), which include consideration of the Soil Conservation Service's published soil analysis). Grant *County Assoc. of Realtors v. Grant County*, EWGMHB Case No. 99-1-0018, FDO (May 23, 2000).

- There is no requirement that the minimum lot size in agriculture resource lands be the average size of farms existing there. The establishing of a 40-acre lot size minimum is not unreasonable and is an appropriate lot size in the County's effort to protect the farmland from loss or damage. *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016 Order on Reconsideration (Aug. 16, 2000).

Airports

- General discussion of GAAs and Airport Safety Zones. *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0015c, FDO at 48-55 (March 21, 2008).

- Given the potential seriousness of the consequences of not restricting residential use in Zones 1, 2 and 5, and the requirement of RCW 36.70A.510, … The development regulations adopted by the County fail to discourage the siting of incompatible uses, such as residential urban density, within close proximity and adjacent to its general aviation airports. WSDOT Aviation Division's recommendations for airport zones are based on best available fact, in-depth safety and flight studies, and case law. *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0015c, FDO at 54 (March 21, 2008).

- The GMA was amended in 1996, to recognize the inherent social and economic benefits of aviation and require that land use planning include consideration of general aviation airports. *McHugh, et al. v. Spokane County, et al.* EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- It is contended that the County notified the Spokane International Airport of the subject application and received a letter back, which is part of the Record. That letter made some suggestions regarding the handling of the development regarding the noise level. The County further stated that a letter was sent to the Department of Transportation, when asked if the Aviation Division of the DOT was contacted. The Record does not reflect other formal consultation with the Airport or the Aviation Division. The Record also reflects representatives of the developer meeting with a Spokane International Airport representative, together with a County planning staff. This is not enough. The Statute above requires formal consultation with airport owners and managers, operators, pilots and the Aviation Division of DOT. This was not done. The limited contact did reflect that the change in designation would affect a general aviation airport. The record clearly shows that the Petitioners carried their burden of proof and that the actions of the County are clearly erroneous in this portion of Issue 8. *McHugh, et al. v. Spokane County, et al.,* EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- The Growth Management Act (GMA) provides for the siting and protection of airports in the following statutes: [Board sets forth relevant provisions of RCW 36.70A.510 and 36.70A.547] *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO (March 14, 2002).

- The densities of uses permitted under the Airport Overlay Zone are appropriate when placed in the context of location of the airport, the Countywide Planning Policies and the small percentage of the UGA that is impacted. *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO (March 14, 2002).

- The County is required to consult with airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation. The siting of high-density residential development adjacent to the airport has been recognized by the hearings boards as inappropriate and incompatible. In *Abenroth v. Skagit Co*, Case No. 97-2-0060c (FDO, Jan. 23, 1998) the Western Board ruled that the large size of the Bayview UGA was unjustified because there was not a showing for such a larg*e* unincorporated residential UGA. *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO (March 14, 2002).

- The 13 goals of the GMA are not listed in order of priority. These goals are often in conflict with each oth*er. The Respondent gives as an* example, environmental protection (goal 10) and natural resource conservation (goal 8) can add cost to development, while housing (goal 4) strives to promote affordable housing. The Petitioner insists Kittitas County, in adopting the Airport Overlay Zone, has created different classes of property owners in the City of Ellensburg UGA. However all property owners in each of the Safety Zones are treated in the same manner. The County and the City have adopted zoning they believe will protect the Airport and the residents adjacent to it. This zoning was arrived at after extensive public input and review by the departments and individuals listed in statute RCW 36.70.547. *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO (March 14, 2002).

- The GMA was amended in 1996 to recognize the inherent social and economic benefits of aviation and require that land use planning include consideration of general aviation airports. [Board sets forth relevant provisions of RCW 36.70A.510] *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- Washington State Department of Transportation ("WSDOT") - Aviation Division was established under the GMA as an integral part of the land use planning process. RCW 36.70A.510 was enacted to address the exact course of conduct exercised in this case. WSDOT Aviation Division noted the historic planning problems associated with general aviation airports. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The statutory directive is clear and unambiguous: (1) the local jurisdiction must engage in formal consultation with airport owners and managers, and WSDOT Aviation Division prior to adoption of comprehensive plan amendments; and (2) file proposed plans with WSDOT Aviation Division within a reasonable time after release for public comment. The City of Yakima failed to meet either of the mandated requirements. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The purpose of technical assistance is to inform and guide the decision maker in consideration, review and determinations regarding adoption or amendments to comprehensive plans and development regulations. In this case, the decision makers had no information, input or assistance prior to the adoption of Ordinance No. 2001-56. An after-the-fact process is not an appropriate substitute for the clear directions established by Growth Management Act. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB 02-1-0009, FDO, (Dec. 5, 2002).

Allocation of Population

- As discussed in Issue No. 11, the BOCC revised the population allocation between the City and the County's comprehensive plan on the date it adopted the plan. While the analysis in the County's Capital Facilities Plan is based on the original population allocation for the County UGA of 53,370, the County has shown it has adequate service capacity for the additional population. Unless the City can demonstrate the County action is clearly erroneous, the action of the County is presumed valid.

  RCW 36.70A.070(3)(d) states in part: "that counties and cities provide "at least a six-year plan that will finance [planned for] capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB 02-1-0001, FDO, (July 3, 2002).

Amendment

- *See also Keyword:* **Comprehensive Plan**

- [T]he denial of a proposed amendment to a CP does not amount to an action for which the Board has jurisdiction *unless* the amendment is premised on a mandate articulated by the GMA. *City of Zillah v. Yakima County*, Case No. 08-1-0001 at 16 (Aug. 10, 2009)

- The Board recognizes that given the complexity and level of detailed required for comprehensive plan amendments, to conduct multiple public hearings in a single day is not what RCW 36.70A.130(2) requires nor does the Board expect any jurisdiction to engage in a marathon of public hearings. But the City's alleged violation of RCW 36.70A.130(2) does not stem from multiple public hearings but from the amendment of a comprehensive plan more than once in a given year, something that is explicitly prohibited … the County is not precluded from holding multiple public hearings but it may not amend its comprehensive plan before the conclusion of all public hearings thereby assuring the BOCC has all of the information needed to make a concurrent, reasoned, informed decision as to the cumulative effects of the various proposals. *City of Wenatchee v. Chelan County*, EWGMHB Case No. 08-1-0015, FDO at 35-36 (March 6, 2009).

- If it was the intent of the County to incorporate these [pre-GMA development regulations] into its GMA process and implementing its Comprehensive Plan, the County needed to do more. A jurisdiction cannot simply decide, without public hearing, that a non-GMA action has suddenly been "blessed" as meeting the requirements of the GMA. Instead, the local government's legislative body, when enacting a GMA regulation, must make a specific determination that the pre and non-GMA action complies with the GMA. This can only be done after permitting the public the opportunity to comment upon the proposal, to hold otherwise would mock the GMA's citizen participation goal at RCW 36.70A.020 (11) ... If the County intends to have non-GMA

ordinances or pre-Comprehensive Plan regulations meet the RCW 36.70A.040 requirement, procedurally it must do so by a legislative enactment that explicitly incorporates these specific pre-existing documents. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 06-1-0011, FDO, at 27-28 (Apr. 30, 2007).

- [Attempting to include pre-GMA development regulations] by way of a mere reference in the Comprehensive Plan or other regulations does not suffice. The County must review the regulations for consistency with the CP, give specific notice of its action to the public, and provide for public participation with full knowledge that the regulations would be re-adopted to implement the County's CP. The County must also give post-adoption notice as required by RCW 36.70A.290(2). Otherwise, until and unless such a legislative enactment either adopts new regulations or pre-existing (pre-GMA) regulations to comply with the requirements of RCW 36.70A.060, no action pursuant to the GMA has taken place. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 06-1-0011, FDO, at 28 (Apr. 30, 2007).

- Simply listing non-GMA and pre-GMA statutes and regulations does not comply with GMA requirements. The record must reflect how such regulations and laws were sufficient and reflect that public participation requirements had been completed in order to comply with the GMA. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 06-1-0011, FDO, at 28 (Apr. 30, 2007).

- There is no prohibition for the reapplication [of a proposed amendment] if applications are received as they are in this County on an annual or five year basis. *Turtle Rock HOA v. Chelan County,* EWGMHB Case No. 07-1-0001, FDO, at 21-22 (July 17, 2007).

- [T]he GMA requires local jurisdictions to review and revise their comprehensive plans in their entirety to ensure compliance with the GMA's mandates. In addition, this Board may review every portion of the County's updated Comprehensive Plan as per RCW 36.70A.130(1) and the Court of Appeals decision in *Thurston County v. WWGMHB*, Wn.App 154 P.3d 959, 965-66 (2007). *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 51 (Aug. 20, 2007).

- WAC 365-195-810(1) [permitting adoption of development regulations within 6 months of comp plan adoption] applies only to the initial adoption of the comprehensive plan, not the revision. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 51 (Aug. 20, 2007).

- Counties and cities must revisit and revise their comprehensive plans and development regulations per schedule as circumstances change within their jurisdictions**.** *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 52 (Aug. 20, 2007).

- It is well settled that Growth Boards do not have jurisdiction over decisions, which deny an application to amend a comprehensive plan or development regulation. The Central Puget Sound Board stated in *Kent C.A.R.E.S. v. City of Kent*, CPSGMHB Case No. 02-03-0015, Order on Motions (Nov. 27, 2002) as follows:

  > "It is well established through Board case law and the Washington Courts that the jurisdiction of (GMHBs) is limited to review of Comprehensive Plans and development

regulations *adopted, or amended,* pursuant to Chapter 36.70A RCW, for compliance with the GMA." (Emphasis added).

Chipman v. Chelan County, et al., EWGMHB Case No. 05-1-0002, Order of Dismissal (Jan. 31, 2006).

- Growth Board's have consistently held that they lack subject matter jurisdiction to review denials of proposed plan amendments. (Citing *Torrance v. King County*, CPSGMHB No. 96-3-0038, Order on Motion (March 31, 1997)) and finding "The Board holds that Petitioners cannot now challenge . . . the county's decision not to adopt Petitioner's proposed amendments"). *Chipman v. Chelan County, et al.,* EWGMHB Case No. 05-1-0002, Order of Dismissal (Jan. 31, 2006).

- Chelan County's denial of the proposed amendments to the comprehensive plan and zoning ordinance are not "actions" reviewable by this Board. Annual amendments to a comprehensive plan are allowed but not "required" by Growth Management Act (GMA). The consistent and uniform decisions of growth board's recognize that GMA does not provide jurisdiction for review of a local jurisdiction's denial of a proposed comprehensive plan amendment. *Chipman v. Chelan County, et al.,* EWGMHB Case No. 05-1-0002, Order of Dismissal (Jan. 31, 2006)..

- "This Board has always held that public participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c FDO at 6 (May 21, 1999). At a minimum, this means that the public must have an opportunity to comment on amendments prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). *Larson Beach Neighbors, et al. v. Stevens County*. EWGMHB Case No. 04-1-0010, FDO (Feb. 2, 2005).

- "Amendment," as it's used in RCW 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, which is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in 36.70A.140 that requires "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations . . ." *Larson Beach Neighbors, et al. v. Stevens County*. EWGMHB Case No. 04-1-0010, FDO (Feb. 2, 2005).

- The use of the word "proposal" in RCW 36.70A.035(2)(a) speaks to proposals by the County, not to the many and often unclear suggestions or objections made at the hearings by the public. If the County believes there is merit in a suggestion made at a hearing or in some other manner, the County may add that as one of the proposed changes they will consider and seek public input at a properly noticed public hearing. Without this, the public would have a moving target, there being no understanding of what they need to object to. The general public must be given notice of the changes they are asked to comment upon. If not, only those present at the hearing will discover all the potential changes or proposals that are being considered. A person believing the change advertised was appropriate and does not appear to testify, may discover later that an objectionable amendment was suggested at the hearing and adopted without further notice to the

public. This is not what is meant by the requirements of public participation. *Larson Beach Neighbors, et al. v. Stevens County*. EWGMHB Case No. 04-1-0010, FDO (Feb. 2, 2005).

- The Hearing Board finds that the amendment at issue here was an "amendment" to the Comprehensive Plan or Development Regulations under the meaning of RCW 36.70A.035(2)(a). This amendment was a "proposal" that was "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed change was required before adoption by the BOCC. RCW 36.70A.035(2)(a). Cities and counties have discretion under RCW 36.70A.035(2) on how to give notice and how to provide opportunities for public comment. The County's Public Participation Program outlines what they should have done, and they did not do it. . *Larson Beach Neighbors, et al. v. Stevens County*. EWGMHB Case No. 04-1-0010, FDO (Feb. 2, 2005).

- The fact that the County received comments from certain citizens requesting or discussing problems or changes that resulted in changes adopted later as amendments, does not demonstrate that the public received an opportunity to comment on the amendment later adopted by the County. The Growth Management Act requires that the public have the opportunity to contribute its voice to the development of comprehensive plans and development regulations. Preceding that opportunity must be effective notice, reasonably calculated to alert the public to the alternatives that may become part of the final comprehensive plan. There was nothing in either of the notices for the public hearings or in the text of the proposed draft of changes that would alert the general public that the adopted amendment at issue was on the table for consideration. Nor was there any public notice that the County had received requests for changes and inviting the public to review and comment on the changes being considered. We therefore find that the challenged amendment was not among the scope of alternatives available for public comment.. *Larson Beach Neighbors, et al. v. Stevens County*. EWGMHB Case No. 04-1-0010, FDO (Feb. 2, 2005).

- The County's contention that this requirement would cause the County to have unending hearings unless they have one, knowing full well that the suggestions will be ignored, is disingenuous. All counties under the GMA have these hearings. If the hearing raises credible problems or beneficial suggestions and the County believes the changes are appropriate, they could adopt them as their proposed language. A new hearing would be held. After all comments are heard, the county could prepare a draft with the appropriate language, have a final hearing and proceed. *Larson Beach Neighbors, et al. v. Stevens County*. EWGMHB Case No. 04-1-0010, FDO (Feb. 2, 2005).

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Assoc., et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0006c, Order on Motions on Cases Nos. 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- Petitioners LLPOA have the option of filing a separate petition for review of an amended development regulation or seeking intervention in an existing case. The existence of a pending Growth Management Hearings Board case involving a development regulation does not bar anyone from seeking review of the amendment of that development regulation through a separate petition for review. *Loon Lake Property Owners Association, et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0006c, Order on Motions on Cases Nos. 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- The GMA requires the City to have a process for receiving the public's suggested amendments to the Comprehensive Plan or its regulations. The GMA requires the City to entertain both general or specific *plan and regulation changes. The City's requirement that limits the pu*blic's suggestions to general goals and policies is too restrictive. A process for receiving both specific and general suggestions is necessary. *Wilma v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance (Aug. 12, 2003).

- Spokane County argues that the 21 textual amendments and 51 land use map amendments were not "substantial," and therefore the County is exempted from holding further public hearings on the amendments.

  The Board declines to accept this argument. First, RCW 36.70A.035(2) does *not require that the amendments be significant. RC*W 36.70A.035(2)(b)(iii) does provide an exemption to the requirement to provide an opportunity to review and comment on the amendments for correcting errors or clarifying language "without changing its effect."

  Second, all of the amendments challenged by Petitioner change a policy from the Planning Commission's Recommended Comprehensive Plan in a way that does not fall under any of the exemptions in RCW 36.70A.035(2)(b). For example, many of the textual amendments change "shall" to "should" and "require" to "encourage." This changes mandatory policies to discretionary policies. In some cases, policies were deleted altogether.

  The Board reaches a similar conclusion with respect to the 51 challenged amendments to the land use map. As Petitioners point out, just four of these map amendments re-designate over 1600 acres from the recommended Comprehensive Plan. The County asserts that the acreage involved is minimal when compared to the 1,128,832 acres within Spokane County and is therefore not a substantial change.

  We decline to accept this view. Again, there is no requirement that the changes must be substantial and no evidence the map amendments where merely correcting errors or otherwise fall under any of the exemptions in RCW 36.70A.035(2)(b). *1000 Friends of Washington, et al. v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO (June 4, 2002).

- The fact that the County received letters from certain citizens requesting or discussing language adopted later as amendments, does not demonstrate that the amendments were within the scope of alternatives available for public comment. The Growth Management Act requires that the public have the opportunity to contribute its voice to the development of comprehensive plans and development regulations. Preceding that opportunity must be effective notice, reasonably calculated to alert the public to the alternatives that may become part of the final comprehensive plan. There was nothing in either the notices for the three public hearings, or in the text of the Planning Commissions recommended Comprehensive Plan that was the subject of the hearings that would alert the general public that the adopted amendments at issue were on the table for

consideration. Nor was there any notice that the county had received letters requesting comprehensive plan changes and inviting the public to review the letters and comment on the changes being considered. We therefore find that the 72 challenged amendments were not among the scope of alternatives available for public comment. *1000 Friends of Washington, et al. v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO (June 4, 2002).

- Taken together, these three statutes clearly demonstrate the legislature intended that public participation be a high priority under the Growth Management Act. "This Board has always held that public participation was the very core of the Growth Management Act." (citing *Wilma et al. v. Stevens County*, EWGMHB Case No. 99-1-0001c FDO p. 6 of 16 (May 21, 1999)). This means, at a minimum, that the public must have an opportunity to comment on amendments to the Planning Commission recommendation prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO (July 3, 2002).

- The County's argument that the challenged Comprehensive Plan is an initial plan, not an amendment and therefore exempt from the public hearing requirement of 36.70A.035 is without merit. The adopting Resolution itself states in two places that this is an "update" of the Comprehensive Plan originally adopted in 1980**.** *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO (July 3, 2002)..

- As we held in *1000 Friends, et al. v. Spokane County, supra*, "amendment," as it's used in RCW 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, which is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in RCW 36.70A.140 that requires "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations…" *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO (July 3, 2002).

- We therefore *find that the changes at issue in this case were "amendments" to the Comprehensive* Plan within the meaning of RCW 36.70A.035(2)(a). These amendments were "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed changes was required before adoption by the BOCC. RCW 36.70A.035(2)(a). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO (July 3, 2002).

- The County contended that the amendments adopted were available for prior comment. This is not the case. The County seems confused on this point as well. The County first says this alternative was within the range of alternatives considered in the EIS. That alternative was "no action." Then the County contends the City got the majority of what it wanted when the UGA boundary was the city limits. This was not a concession to the City, as the GMA requires each city to be included within a UGA. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO (July 3, 2002).

- Based on the record before it, the Board finds the change resulting from the entry of the agreed order stipulated to by the County and a party is a permanent amendment to the County's comprehensive plan and as such may be reviewed by the Board upon the filing of a petition at any time but no later than 60 days after publication by the County of such action. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Motion (June 24, 1997).

- In the *a*bsence of information showing land capacity analysis, we are unable to determine if an IUGA is properly sized. The GMA was amended to allow 180 days "or such longer period as determined by the board in cases of unusual scope or complexity." This Board feels the amendment was for cases such as this. It would be foolish to require the duplicated effort of the designation of a new IUGA would cause if the Final UGA can be expeditiously completed. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

Anadromous Fisheries

- [In finding Yakima County had given "special consideration' to anadromous fisheries as provided in RCW 36.70A.172(2) and WAC 365-195-925, the Board noted:] The Supreme Court has addressed the need for special consideration as well, finding [in *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 429 (2007)]: "RCW 36.70A.172(1) requires counties to "give special consideration to … protection measures necessary to preserve or enhance anadromous fisheries … the requirement is to give "special consideration to" such measures, not necessarily to adopt them." Thus, although there is a concerted effort underway to restore anadromous fisheries, the Legislature has only required the *consideration* of measures, not the mandatory adoption ... [as to RCW 36.70A.172(1)] The Legislature drafted this provision only to require consideration and this is how our Supreme Court has interpreted as well; the Board declines to read more into this provision then was legislatively intended. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-008c, FDO at 59-60 (April 5, 2010)

Annexation

- Under the GMA, the comprehensive plan need not require annexation or incorporation of UGAs. *Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, FDO, at 28 (March 12, 2007).

- The Board recognizes it may be more expensive to provide urban services to 1-acre densities but it is not a hindrance for annexation. While it may be more expensive for the homeowner, it should not be more expensive for the City or County. One-acre lots in cities and Urban Growth Areas are not prohibited by the GMA. The County has discretion when establishing densities, as long as the Goals of the GMA are not frustrated. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

Appeal to Court

- The Board finds many of the arguments of the Respondent persuasive. These matters concern both Eastern Washington and the State of Washington. The legal issue is also of statewide interest, for expansion of the UGA has now become very common and if not properly done, will frustrate the GMA goals to limit sprawl and restrict urban growth within urban areas. Addressing this case promptly and timely before the Court of Appeals will ensure that planning and development will coincide with one another.

  This Board also agrees that the decision in this case will have significant precedential value. The enlarging of UGAs and the relationship to their Facilities Plans needs to be clearly stated and this

is the case where such a determination may be issued. It is hoped that the Court of Appeals would take this case early so that Counties and Cities and others will have proper direction. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, Order Granting Certificate of Appealability (April 25, 2006).

- The Board is bound by the criteria established in RCW 34.05.518(3)(b)(i-ii) in determining whether to issue a Certificate of Appealability. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, Certificate of Appealability (March 8, 2006).

- The Board finds that during the pendency of the subject appeal, the County will continue to process the permit application for the development in the expanded UGA. The decision by the courts will be ineffective once the permits vest. This would frustrate not only the goals of the GMA but would be detrimental to public policy. Decisions of the Growth Boards would be seriously weakened and violations of State Law would go on with little oversight. This result is occurring often and is of statewide interest. The legal issue is also of statewide interest, for expansion of the UGA has now become very common and if not properly done, will frustrate the GMA goals to limit sprawl and restrict urban growth within urban areas. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, Certificate of Appealability (March 8, 2006).

- The Act indicates that compliance-hearing findings should not be treated as final. While the FDO of a Board may be appealed under WAC 242-02-860(5) and WAC 242-02-892, no similar authorization exists to appeal a finding of noncompliance. This lack of any other type of judicial involvement indicates that the Board maintains control of the matter. Nor does the legislation ever use the word "final" in describing a finding of noncompliance as it does with a FDO. Therefore, the only body that can address a finding of noncompliance made under RCW 36.70A.330 until an ordinance complies is the Board. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

Best Available Science (BAS) – *See also Critical Areas*

- General discussion of appellate court cases addressing the BAS requirement. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 18-20 (April 5, 2010)

- [In response to Petitioner's allegation that the County relied on outdated science (a 1997 Ecology publication), the Board stated:] The GMA requires the best available science be used and, given the continual evolution of scientific knowledge, this naturally equates to the most current science – especially when a state agency publication has been expressly superseded [updated in 2005]. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 23 (April 5, 2010)

- The Board finds no inherent error in delegating such decision-making authority to the Administrator, such discretion cannot be so broad as to compromise regulations required by the GMA, thus, discretion must be within well-defined standards. Within the County's exemption review procedures, the Board finds no defined standards for the Administrator to base any decision on BAS or that any conditions placed on exempted activities will similarly be based on BAS. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 30 (April 5, 2010)

- [A]lthough the GMA's BAS provision does not mandate a particular outcome, it does require BAS to be utilized to guide the decision-making process. As the *Heal* Court noted, critical areas

are deemed critical because of their susceptibility to damage from development; with the nature and extent of this susceptibility being a uniquely scientific inquiry. Therefore, BAS is essential to an accurate decision as to the environmental effects of new development. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 30 (April 5, 2010)

- [Board found continuing non-compliance because the CAO listed agricultural activities as a low-intensity land use] If Ferry County chooses to deviate from the BAS in the Record, then its regulations must still serve the "protection" requirement of the GMA … the County failed to provide any scientific evidence or provide reasoned justification for its departure from BAS in the Record to deviate from the DOE's recommended uses in the Low Intensity Land Use. *CFFC/Robinson v. Ferry County,* Case No. 06-1-0003, 3rd Compliance Order at 12-13 (March 3, 2010).

- [Board found continuing non-compliance as to critical area designation] The GMA puts the duty of designating fish and wildlife habitat conservation areas on counties, not individuals or agencies. As the recipient of the BAS during development of its CAO, the County is the responsible party to include BAS in its decision making process and, if warranted, designate these "areas", which include habitats and species of local importance. The County can't transfer its duty to designate critical areas to a nomination process to take place at a later date when the only science included in the Record lists not only ETS habitats and species, but also Ferry County's habitats and species of local importance. These known habitats and species of local importance should be formally listed and designated to ensure citizens and agencies are aware of what fish and wildlife habitat conservation areas are designated "to support viable populations over the long term and isolated subpopulations are not created," and protect the functions and values of critical areas. *CFFC/Robinson v. Ferry County,* Case No. 06-1-0003, 3rd Compliance Order at 16 (March 3, 2010).

- [In citing to the Court of Appeals decisions in *HEAL* and *WEAN* and the Supreme Court's decision in *Ferry County,* the Board summarized the need for BAS in critical areas:] To reiterate from the HEAL and WEAN cases, the Court concluded:
  1. Evidence of BAS must be included in the record.
  2. BAS must be considered substantively during the development of critical areas regulations.
  3. Local governments may adopt critical areas regulations outside of the range of BAS.
  4. But if a regulation is outside of the range of BAS, then the local government must provide reasoned justification for departure from BAS and identify other GMA goals being implemented.
  5. Critical areas regulations must protect all the functions and values of designated critical areas.

  Concerned Friends of Ferry County/Robinson v. Ferry County, EWGMHB Case No. 06-1-0003, 2nd Compliance Order, at 19-21 (March 17, 2009).

- General discussion as to Best Available Science requirements of the GMA. *CFFC/Robinson, et al v. Ferry County,* EWGMHB Case No. 04-1-0007c, Compliance Order at 11-13 (March 10, 2009).

- [The GMA] establishes that the objective of including science is "to protect the functions and values of critical areas." Science plays a central role in delineating critical areas, identifying functions and values, and recommending strategies to protect their functions and values.

Scientifically valid information should help with an evaluation and discussion of the applicability, relevance, and limitation, if any, of the science that is contained in the record … WAC 365-195-905 states that scientific information can be produced only through a valid scientific process and to ensure that the best available science is being included, a county or city should consider the following "characteristics of a valid scientific process": (1) peer review; (2) methods; (3) logical conclusions and reasonable inferences; (4) quantitative analysis; (5) context; and (6) references. *CFFC/Robinson, et al v. Ferry County,* EWGMHB Case No. 04-1-0007c, Compliance Order at 13-14 (March 10, 2009).

- [*Affirming prior holding in Easy, et al. v. Spokane County,* EWGMHB Case No. 96-1-0016, FDO (April 10, 1998)] The Board identified factors it would review to determine whether BAS has been used in drafting ordinances to protect critical areas. They are: (1) the scientific evidence contained in the record; (2) whether the analysis by the local decision-makers of the scientific evidence and other factors involved a reasoned process; and (3) whether the decision made by the local government was within the parameters of the GMA as directed by the provisions of RCW 36.70A.172(1). *CFFC/Robinson v. Ferry County,* EWGMHB Case No. 97-1-0018, Compliance Order at 15 (Feb. 13, 2009)

- *See CFFC/Robinson v. Ferry County,* EWGMHB Case No. 06-1-0003, FDO, at 6-8 (Oct. 2, 2006) (*Re-affirming* prior holding that BAS must demonstrate deviation for recommendations).

- The record does not indicate Ferry County's planning staff or the Planning Commission made any attempt to document their decision based on scientific analysis. What the record shows is use of anecdotal information and observations, not part of an organized scientific effort. This is not an adequate substitution for scientific information, although it may be used to supplement scientific information. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 04-1-0007c, Compliance Order, at 17 (Sept. 22, 2006).

- Discretion is given to counties and cities for following the goals and requirements of the GMA and basing decisions on sound and proven best available science. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 04-1-0007c, Compliance Order, at 18 (Sept. 22, 2006).

- The problem with the provisions covering variances is the failure of the County to require that such variances be based upon best available science. The use of best available science will require a review of the affected parcel by an expert competent in the area. This is required by RCW 35.70A.170 and without it, critical areas are exposed to encroachment without adequate protections. A variance might very well be appropriate; yet, such variance must be based upon the conditions of that specific parcel, what the variance would do to the critical area and the science it is based upon. *Concerned Friends of Ferry County/Robinson v. Ferry County,* EWGMHB Case No. 04-1-007c, Order on Compliance (Sept. 22, 2006).

- Discretion is given to counties and cities for following the goals and requirements of the GMA and basing decision on sound and proven best available science. Ferry County has arbitrarily chosen to use reduced buffer widths for Type 1 and 2 streams without the required science to back up its decision. A critique of past scientific study and an arbitrary recommendation by the County's Planning Commission does not rise to the standard of best available science. *Concerned Friends of Ferry County/Robinson v. Ferry County,* EWGMHB Case No. 04-1-0007c, Order on Compliance (Sept. 22, 2006).

- Counties and cities that are obligated to plan under GMA must use best available science in formulating their ordinances and regulations, which designate and protect critical areas. A variance is a development regulation that modifies the protection of critical areas, as well as other land use. CTED's Model Ordinance contains suggested language for counties and cities. For instance, under B. Variance Criteria No. 6, CTED specifically recommends "The decision to grant the variance includes best available science…" The County deliberately left Variance Criteria No. 6 out of its ordinanc*e. The Board believes this is a blatant disregard of its FDO, its First Order on Compliance and its 2nd Order on Compliance*. *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance (June 14, 2006).

- There are many areas in Ferry County's Resource Lands and Critical Areas Ordinance that need reference to "best available science", not just on page 41, Section 11.04 RIPARIAN AREA PROTECTION. Referencing "best available science" is an indication that government will rely on something tangibl*e, such as science, to base its decisions, not arbitrary analysis of out*side factors. *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance (June 14, 2006).

- Although CTED's Model Ordinance leaves the door open for a local jurisdiction's discretion by using the word "should" in regards to public review, its Model Ordinance recommends that counties and cities provide public review and a public hearing process if proposals need a variance from critical areas regulations. In addition, CTED recommends that notices and hearings for a project should be consolidated and integrated with the environmental and permit review process. The County also chose not to include these suggestions from CTED. The Board finds this is not a fatal flaw because of the word "should", but it still leaves too much power and discretion to administrative decisions without public input. *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance (June 14, 2006).

- The County is required to make a "reasoned analysis on the record, including best available science and other local factors" in determining whether or not a habitat or species should be designated as Habitat or Species of Local Importance. *Island County Citizens Growth Management Coalition v. Island County (supra).* The Growth Management Act requires the record to include best available science in developing policies and development regulations to protect the functions and values of critical areas, which Habitats and Species of Local Importance are an important part. RCW 36.70A.172(1). *Loon Lake Property Owners Assoc., et al. v. Stevens County et al.*, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance (Dec. 21, 2005).

  Case law has made it perfectly clear that legislative bodies, such as counties and cities, must substantially consider best available science to support its findings concerning the nominations of Habitat of Local Importance and/or Species of Local Importance. In addition, a local jurisdiction is not constrained to adopt only the science recognized by state or federal agencies, but a variation from formally identified BAS must be supported in the record by evidence that also meets the BAS standard (see WAC 365-195-905).*Loon Lake Property Owners Assoc., et al. v. Stevens County et al.*, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance (Dec. 21, 2005).

- Local governments must "analyze the scientific evidence and other factors in a reasoned process." (citing *Easy v. Spokane Co.*, EWGMHB Case No. 96-1-0016). Legislative bodies must also be cautious about using their own science just to support their own agenda:

  > "Under *Heal v. CPSGMHB*, Court of Appeals, Cause #40939-1-1 (June 21, 1999), the County cannot choose its own science *over all other science and cannot use outdated science to support its ch*oice." (citing *Island Co. Citizens' Growth Management Coalition, et al, v. Island County, et al,* WWGMHB Case No. 98-2-0023c, Compliance Order, March 6, 2000).

  Loon Lake Property Owners Assoc., et al. v. Stevens County et al., EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance (Dec. 21, 2005).

- The role of the BAS standard has been interpreted by the courts to require more than mere "consideration" of science. BAS must substantively control the standard established and must be reflected in the record. *Loon Lake Property Owners Assoc., et al., v. Stevens County, et al.*, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- The Board must also recognize that the qualifications of the "experts" and their field(s) of expertise are important criteria in helping to determine which science is perhaps better than another:

  > "The information relied on by the county does not rise to the level of scientific information and, therefore, cannot possibly qualify as BAS. Although the dissent emphasizes Dr. McKnight's 30 years of experience working as a wildlife biologist in Alaska, nothing in Dr. McKnight's background indicates any familiarity with the wildlife of Ferry County." (citing *Ferry Co. v. Concerned Friends of Ferry Co., et al*, Supreme Court Case #75493-4 (Nov. 17, 2005)).

  Loon Lake Property Owners Assoc., et al., v. Stevens County, et al., EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- The Supreme Court, in the same Ferry County case, further held that an "expert" should compare their science with that of other experts, for instance state or federal agencies:

  > "Nor is there sufficient evidence of the county comparing science provided by Dr. McKnight to any other resources, such as science available from state or federal agencies or the Colville Tribe. As the Western Washington Growth Management Hearings Board correctly stated, a "(c)ounty cannot choose its own science over all other science and cannot use outdated science to support its choice." (citing *Island County Citizens' Growth Mgmt. Coalition v. Island County,* WWGMHB Case No. 98-2-0023c, (March 6, 2000)).

  Loon Lake Property Owners Assoc., et al., v. Stevens County, et al., EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- In addition, the Board takes note from *Clark County Natural Resources Council, et al. v. Clark County, et al.*, WWGMHB Case No. 96-2-0017, Compliance Order (Nov. 1997), that science determines what habitat and species should be designated Habitat and Species of Local

Importance, not whether the nominated habitat or species is listed by the WDFW as priority habitat and species. The Western Board held the following:

> "In the final order in this case, we noted that the overwhelming scientific evidence in the record virtually required establishment of the three FWHA's of local importance that were not otherwise previously designated by DFW as priority habitat and species areas."

Loon Lake Property Owners Assoc., et al., v. Stevens County, et al., EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Assoc., et al., v. Stevens County, et al.*, EWGMHB Case No. 03-1-0006c, Order on Motions on cases 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- The Board finds the absence of a qualified professional determination of required mitigation measures to be clearly erroneous. The only way to ensure that the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional.

  Title 13.20.020 provides: "The applicant, Planning Department, agencies with expertise and often times, a qualified professional <u>may</u> (emphasis added) be involved in the mitigation process." This provision is inadequate. Mitigation, to ensure protection, must be determined by a qualified professional.

  The Board finds that if a qualified professional were to determine the mitigation requirements when mitigation is called for, Petitioners would have failed to carry their burden on the other mitigation arguments. Ratios for replacement, enhancement, etc., if determined by a professional, can be expected to protect the critical area. Likewise, before a "reasonable use" exception is granted, a professional determination of any mitigation measures required ensures the protections necessary.

  The Board recognizes off-site mitigation compensation sometimes is necessary and appropriate if the functions and values of the affected critical area are maintained or enhanced. However, this determination also can be made only by a qualified professional. Petitioners have failed to carry their burden of proof with the exception of their argument for use of a qualified professional. By failing to require the use of a qualified professional in determining mitigation measures, Title 13 fails to protect critical areas, and is clearly erroneous. *Larson Beach Neighbors, et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO (Feb. 10, 2004).

- Recently the Court of Appeals decided a case similar to *HEAL, supra, Whidbey Environmental Action Network v. Island County, et al*, 118 Wn. App. 567; 76 P.3d 1215, (WEAN) and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN* the County

appealed the WWGMHB's decision finding a 25-foot buffer for type 5 streams failed to comply with the GMA for 5 steam buffers. The Court found the "County fails to point to any part of the record outlining the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *HEAL* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations… BAS does not support the use of a 25-foot buffer." (*WEAN, supra* at p. 584). *Larson Beach Neighbors , et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- RCW 36.70A.172(1) requires that best available science (BAS) shall be included "in developing policies and development regulations to protect the functions and values of critical areas." The Court of Appeals, Division I, held "that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations." (citing *HEAL v. CPSGMHB*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999)). *Larson Beach Neighbors, et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The County in *WEAN* contended the 25-foot buffer fell within the range of affirmed. The *WEAN* Court disagreed. "While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams." (*Supra* p. 585). The GMA requires the regulations for critical areas to protect the "functions and values" of those designated areas. This means all functions and values. *Larson Beach Neighbors, et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).The Stevens Co*unty* Planning Commission, after several public work sessions, and at leas*t th*ree public hearings, ultimately concurred with Mr. Kovalchik's recommendations with a minor exception of dropping the "+" sign from two categories. Those recommendations were forwarded to the Board of County Commissioners (BOCC). *Many* of Mr. Kovalchik's conclusions were included within the body of Title 13. However, with one exception, Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr. Kovalchik were rejected by the BOCC. The County, when asked about this, informed the Board that their expert said, "I can live with that", after his recommendations were not followed. If this was his response, we cannot consider such a response as the reasoned opinion of an expert. The County does not point to any science used to vary from the recommendations given by their expert or the other BAS reviewed as is required by the Court of Appeal decisions quoted above.

  The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. W*EAN, supra*, at 532.

  The Court of Appeals, *WEAN, supra,* requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors, et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Stevens County's contention that allowing such development activity is merely a balancing of conflicting goals of the GMA is not supportable. All property owners have a right to the use and enjoyment of their property without encroachment from neighbors who would degrade it. "Private property rights" gives no one the right to degrade critical areas, streams, or lakes. The County's actions are clearly erroneous, and in violation of the GMA. *Larson Beach Neighbors, et al. v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The activities the County has allowed as exempt in the Buffer areas are without clear limits. Without any limitation other than a direction that the mowing and chemical use should be minimized in buffers, these activities are exempted.

  The record is full of evidence that the listed exempted activities should be prohibited in buffers or at least carefully regulated. Title 13 requires no review or approval for what the landowner believes is necessary or minimal. From all the Record and reports from the experts, including the County's, it is clear that, to be beneficial, buffers must remain in their natural state. The values and functions of the Critical Areas all have to be protected. The Board, in Issue No. 3, CARAs, addressed the concerns regarding the exemption for agricultural activities. While mowing and use of chemicals are not always agriculturally related, the arguments for regulating agricultural practices in critical areas are the same. To exempt existing and ongoing agricultural practices in critical areas is clearly erroneous, and fails to protect critical areas from degradation.

  The Board finds the actions of the County clearly erroneous regarding exceptions without review and possible mitigation determined by an appropriately trained individual and fail to protect critical areas. *Larson Beach Neighbors, et al. v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- No science is found in the record that supports any construction within buffers or setbacks. The science clearly mandates that any development activity which occurs within a buffer must either be prohibited or mitigated, regardless of where neighboring structures are located (common-line setback provisions) or whether it involves expansion or replacement of an existing structure. The record does not support these provisions within Title 13 that allow development activity in critical areas without ensuring adequate protection for the affected area. *Larson Beach Neighbors, et al. v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Board recognizes expansion or replacement of non-conforming structures could be permitted under certain conditions. However, SCC 13.30.032 provides inadequate assurance any impacts will be mitigated. SCC 13.30.032 provides: "The outcome of the Administrative Review is <u>generally</u> one of the following:" (Emphasis added). That statement is no assurance that even the listed possible outcomes will be achieved. Those listed possible outcomes include an administrative determination by a person without professional expertise that the development within a critical area, perhaps even up to a shoreline, has no impact on the critical area. Such provisions are effectively no protection at all and are clearly erroneous. As in other "mitigation issues", the Board finds the absence of a qualified professional determination of re<u>quired mi</u>tigation measures to be clearly erroneous. The only way to ensure the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional. Provisions in Title 13 addressing common-line setbacks and non-conforming structures without mitigation determined by a qualified professional fail to protect critical areas and are clearly

erroneous. *Larson Beach Neighbors, et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best ava*ilable science in developing the Amendment. Further, the County has failed to explain its departure fr*om science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Assoc., et al. v. Stevens County, et al*, EWGMHB Case No. 03-1-0006c, Order on Motions on Cases Nos. 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors, et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is complying with and implementing its own ordinance.

  While the Stevens county ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with this no harm or degradation standard via BAS as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.

  Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors, et al. v. Stevens County*, EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- Regarding the adequacy of the development regulations to implement the listed goals of the comprehensive plan, the Board has a major concern: the development regulations must utilize best available science in protecting critical areas. Nothing in the record indicates best available science was included in these regulations. In fact, what evidence exists suggests that best available science has been rejected. RCW 36.70A.172 is specific. Best available science must be utilized in protecting critical areas. Ordinance 2001-09 is flawed by not "including the best available science in developing policies and development regulations to protect the functions and values of critical areas". (RCW 36.70A.172). We need not address each specific goal challenged

by the Petitioners. *Concerned Friends of Ferry County/ Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- Ferry County sought out advice from Kirk Cook, a hydrologist from the Department of Ecology and now working for the Department of Agriculture. Mr. Cook had drafted a document entitled Document for the Establishment of Critical Aquifer Recharge Area Ordinance. Ferry County used that document to guide them in adopting Ordinance No. 2002-06. The County corresponded with Mr. Cook many times throughout the process by phone, letters and e-mail. The County addressed all of Mr. Cooks' concerns. At the Hearing on the Merits Mr. Cook testified that the County had included Best Available Science, and had only one concern, that being the lack of a statement of the conditions, which will trigger a level two report. The Board in the past has recognized that Ferry County has very limited funds, minimal growth, and even less staff to do the job required to comply with the GMA. The Board is pleased with Ferry County's progress and while the County admits there is still work to be done, they now are found to be in compliance on the issue of protecting critical areas, and the use of Best Available Science in the adoption of Ordinance No. 2002-06. *Concerned Friends of Ferry County/ Robinson, v. Ferry County,* EWGMHB Case No. 02-1-0013, FDO (Dec. 23, 2002).

- We hold that the requirement that counties and cities use the best available science is a requirement of inclusion of BAS in a substantive way in both the designation and protection of critical areas. Counties and cities must analyze the scientific evidence and other factors in a reasoned process. They must take into account the practical and economic application of the scientific evidence to determine if it is the "best available." *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, FDO (Apr. 10, 1997).

- The County does not have to specifically refer to the Department of Ecology (DOE) "Washington State Wetlands Identification and Delineation Manual," Ecology Pub. #96-94, in its Comprehensive Plan to be in compliance with the requirement to consider and include the BAS. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Compliance, (Sept. 30, 1999).

- The County has not provided sufficient evidence that BAS was considered or included in its designation of priority species or habitat areas for priority species. The County provides no rationale for excluding species designated by DFW. The Board finds that Petitioners have met their burden of proof that Ferry County acted erroneously in the designation of priority species and habitat areas *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Compliance, (Sept 30, 1999).

- The Board finds the language chosen by the County does not in itself violate the legal requirement to include best available science in protecting wetlands. The Petitioners have not met their burden of proof. Clarification of the County's intent can be made in the Critical Areas Ordinance. *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Compliance, (Sept. 30, 1999).

- It is the County's obligation to include best available science in the designation and protection of frequently flooded areas. Ferry County, by its failure to demonstrate otherwise, forces this Board to conclude that best available science was not included in developing policies in the sections of the SCAP under review. The contention that the silence of the reviewing Department is considered approval and constitutes consideration and inclusion of best available science is not

correct. *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Reconsideration, (Nov. 24, 1999).

- This Board recognizes that one size buffer or riparian management area does not fit all. Yet the protection provided for critical areas must prevent adverse impacts or, at the very least, mitigate adverse impacts. However, before the parcel-by-parcel individual treatment should begin, buffers must be set at a width sufficiently wide to protect that stream and the fish and wildlife in the area. Then the individual landowner can bring his or her special needs or conditions to the Administrator in charge of the variances allowed under the law. *Save Our Butte, Save Our Basin Society, et. al., v. Chelan County***,** EWGMHB Case No. 94-1-0015, Compliance Order, (Apr. 8, 1999).

- The Board is not persuaded by the argument that the silence of a state department reviewing the Plan is approval, or the submission of a Plan for review constitutes consideration and inclusion of best available science in a plan's development. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Reconsideration, (Nov. 24, 1999).

- The Board recognizes the prerogative of Ferry County to not adopt the DFW recommendation, as long as that decision is based on a sound, reasoned process that includes best available science. The County consulted with a credentialed biologist, but the process he undertook to develop his recommendations was inadequate. There was no evidence in the record that the consultant coordinated his recommendation with any other scientists with expertise in Ferry County, such as the Colville tribe, U.S. Forest Service, or the DFW. There was no evidence that any on-site field observations were conducted. With specific reference to the Peregrine Falcon, his recommendation seems to conflict with activities of the Colville Tribe. Regarding Bull Trout, a sensitive species documented to exist in Ferry County, he makes no mention at all. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 97-1-00018, 2nd Order on Compliance (May 23, 2000).

- The Board recognizes financial limitations in Ferry County preclude the option of hiring consultants for scientific review. With this in mind, the Board recommended that Ferry County "consult with" appropriate experts within governmental agencies. Contrary to the contentions of Ferry County, the Board does not believe the County followed this advice. The County has provided no evidence in the record of any scientific review of the issues in this case. Even the one response received does not imply a scientific review. The Board does not accept "no comment" by state agencies as compliance with RCW 36.70A.172. The Board's recommendation was to consult with appropriate agencies to utilize their expertise. Simply mailing a proposed section of the comprehensive plan, without discussion or collaboration, without substantive response, is not compliance with either our order or with RCW 36.70A.172. The process must be collaborative, with the result being either incorporation of BAS recommendations in the final document, or a justification for not including those recommendations. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 97-1-0018, 3rd Order On Compliance (Jan. 26, 2001).

- RCW 36.70A.172(1) requires a jurisdiction enacting or re-enacting its critical areas ordinance and related development regulations to utilize "Best Available Science."

  In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special

consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

Saddle Mountain Minerals, et al v. City of Richland, EWGMHB Case No. 99-1-0005, Order Finding Partial Compliance (Apr. 18, 2001).

- The role of the BAS standard has been interpreted by the courts to require more than mere "consideration" of science. BAS must substantively control the standard established and must be reflected in the record:

> Whether scientific evidence is respectable and authoritative, challenged or unchallenged, controlling or of no consequence when balanced against other factors, goals and evidence to be considered, if first in the province of the city of county to decide. Then, if challenged, it is for the Growth Management Hearings Board to review. The Legislature has given great deference to the substantive outcome of that balancing process. We hold that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations. (citing *HEAL v. CPSGMHB,* 96 Wn.App. 522 at 532, 979 P.2d 864 at 870, (Wn. App. Div 1, 1999)).

Saddle Mountain Minerals, et al v. City of Richland, EWGMHB Case No. 99-1-0005, Order Finding Partial Compliance (Apr. 18, 2001).

- A local jurisdiction is not constrained to adopt only the science recognized by state or federal agencies, but variation from formally identified BAS must be supported in the record by evidence that also meets the BAS standard.

> The science the legislative body relies on must in fact be the best available to support its policy decisions. Under the cases and statutes cited above, it cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make. (citing *HEAL,* 96 Wn.App. at 534, 979 P.2d at 871 (footnotes deleted)).

Saddle Mountain Minerals, et al v. City of Richland, EWGMHB Case No. 99-1-0005, Order Finding Partial Compliance (Apr. 18, 2001)

- The BAS guidelines adopted by CTED at WAC 365-195-900 through 365-195-925 are intended to describe a process for utilization of scientific information in decision-making and to ease the burden on local governments by directing them to authoritative resources that have been certified by the agencies as meeting the BAS standard. [Board sets forth text of WAC 365-195-915]. *Saddle Mountain Minerals, et al v. City of Richland,* EWGMHB Case No. 99-1-0005, Order Finding Partial Compliance (Apr. 18, 2001).

- In regard to BAS, the City of Richland is correct that it can either independently develop expertise or rely on expertise of local, state, and federal agencies, but the process utilized by Richland failed to fully implement the BAS requirement. A process that is limited to "review and comment" by state agencies of existing ordinances is not sufficient to meet the sp*irit and intent of the CTED guidelines or RCW 36.70*A.172. If a local jurisdiction chooses to follow the agency assistance path, without independently developing its own science, actual discussions and collaboration must occur. It is not permissible to assume that agency silence is acquiescence and eliminates any further requirement that the science actually used be documented in the record and substantively used to guide the decision.

The Board specifically notes that a local jurisdiction is not required to follow without modification the recommendations or science of State agencies. When a local jurisdiction chooses to vary from recognized BAS, however, the science relied upon by the jurisdiction must be part of a reasoned process developed in the record providing the scientific support for the decision actually made. *Saddle Mountain Minerals, et al v. City of Richland*, EWGMHB Case No. 99-1-0005, Order Finding Partial Compliance (Apr. 18, 2001).

- The Board finds that the "Best Available Science" standard must be applied even to the process of re-evaluating and re-adopting existing ordinances to consider current science and to determine that the ordinances continue to reflect science that is the "best available." *Saddle Mountain Minerals, et al v. City of Richland*, EWGMHB Case No. 99-1-0005, Order Finding Partial Compliance (Apr. 18, 2001).

- The present sizing of buffers may or may not be appropriate. The County did not follow the recommendations of the State of Washington. However the record does not reflect other science supporting the different sizes. RCW 36.70A.172 requires the use of the best available science in the designation and protection of critical areas. There is no record this was done. *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB 00-1-0016 FDO, (July 13, 2001).

Boards (Including Rules of Procedures)

- [In denying the filing of a late brief from Futurewise, the Board noted:] WAC 242-02-534 … states, "(1) A party served with a motion shall have ten days from the date of receipt of the motion to respond to it…" But this WAC is not for reconsideration. WAC 242-02-832 … requires that "[W]ithin five days of filing the motion for reconsideration, a party may file an answer to the motion for reconsideration…" Certainly, some confusion exists within the WACs, but Futurewise is a practiced litigant in these matters and should be held to the legal standard. Futurewise's response is five days late; therefore, it will not be considered by the Board. *Futurewise v. Stevens County*, Case No. 05-1-0006, Order on Reconsideration at 1(Jan. 25, 2010)

- In order for the jurisdiction of this Board to attach, a petition must be filed in accordance with RCW 36.70A.290(2), which requires that a petition for review must be filed within 60 days of publication. The Board must base its decisions on the law. Nothing in RCW 36.70A.290(2) or other decisions of the Board grants authority to waive this statute of limitation. *Blue Mountain Audubon Society, et al. v. Walla Walla County*, EWGMHB Case No. 95-1-0006, Order of Dismissal (Oct. 17, 1995).

- Substantive compliance with the Act is the Board's first consideration. If it finds substantive compliance with the minimum requirements of the Act, its inquiry ends, except where the public participation process is at issue. If substantive compliance is arguable, the Board looks to evidence of procedural compliance. If the record shows valid consideration of the factors necessary for compliance, weight is given to the decision maker's position. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The county has asked this Board to advise them what the lands designation reverts to if the designations under their comprehensive plan are invalid. The Boards are to determine whether enactments of local governments comply with the GMA, and are not authorized to provide declaratory judgments or advisory opinions. The Boards cannot advise local governments what the land designations invalidated by the Board revert to. The courts have this authority, not the

Boards. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Motions (May 27, 1997).

- The Board has recognized, in this case, that conditions unique to Ferry County must be reflected in our standard of review. Ferry County, while having a land area approximately the same size as King County or Whitman County, has a local property tax base of only 0.2% of King County and 21% of Whitman County. Ferry County's entire road department budget is less than $250,000. Clearly, Ferry County is constrained by financial circumstances in how it can reasonably respond to the GMA. The Board views our responsibility under the GMA to recognize local circumstances in our decisions. Counties not similarly constrained should not expect the same latitude given to Ferry County. *Woodmansee, et al. v. Ferry County*, EWGMHB Case No. 95-1-0010, 2nd Order on Compliance (Aug. 22, 1997).

Buffers (*see also* Critical Areas)

- A buffer is neither prescribed by the GMA nor the only tool available to protect a critical area, [but] by adopting standardized buffers as its apparent primary mechanism for protecting the functions and values of its aquatic critical areas, it is the tool the County has selected. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-008c, FDO at 38 (April 5, 2010)

- [In response to Petitioner's complaint about a "one size fits all approach" of standardized buffers, the Board held] While a site-specific analysis of each and every stream is the preferred scientific approach, BAS also recognizes that a site-specific analysis is not always possible and thus standardized riparian buffer widths are usually endorsed. Thus, the Board finds no error in Yakima County's reliance on standardized buffers as this determination is supported by BAS. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-008c, FDO at 40-41 (April 5, 2010)

- [In looking at the County's own BAS recommendations and its determination to retain the 1994/1995 buffer widths] Yakima County's stream buffers, which range from 25 feet to 75 feet, fall below the mean buffer for *all* functions and below the range of buffer widths for *all* functions *except* temperature control and pollutant filtration … As was held by the *WEAN* court, Yakima County is required to protect *all* the functions and values, not just a single function or a select few. Thus its buffers are required, at the minimum, to protect the entirety of the functions attributed to these areas. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-008c, FDO at 42-43 (April 5, 2010)

- If science was lacking for Yakima County it was to adopt a more precautionary approach which, of course, would require establishing buffers at a mid to high-range width. The County itself acknowledges that it has established buffers at the lowest end of the spectrum. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-008c, FDO at 44 (April 5, 2010)

- [In finding the County's wetland buffers comported with BAS, the Board also noted] [A]lthough recommendations from agencies with expertise, such as Ecology, should be carefully considered by a jurisdiction, nothing in the GMA required Yakima County to adopt Ecology's recommendations [in regards to wetland buffers set forth in Wetlands in Washington Volume 2] … Volume 2 is not, in and of itself, BAS and its recommendations are selected from the "middle of the range" buffers, representing a moderate risk approach to determining buffer widths. However, these recommendations reflect BAS and if Yakima County chose to ignore Ecology's recommendations then it was still required to base its buffers on BAS so as to protect wetlands

within the County. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-008c, FDO at 47 (April 5, 2010)

- [As to Yakima County's CAO buffer reduction provisions, the Board held] Nowhere in YCC 16C.03.23 does the Board find any references to BAS supporting such a substantial reduction or the requirement for BAS to guide these administrative adjustments. Yakima County does not reference any BAS justifying a reduction in a standard buffer by any percentage, let alone up to 90 percent. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-008c, FDO at 49(April 5, 2010)

- Yakima County's allowance for substantial buffer reductions are in excess of any suggested by BAS and would reduce buffers to widths below those BAS would support to protect all of the functions and values of the critical area. Although the Board recognizes the need to adjust buffers on a site-specific basis to reflect an individual parcel's unique circumstances, such decisions must still be based on BAS so as to protect the critical areas that exists on the parcel. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-008c, FDO at 50 (April 5, 2010)

- Recently the Court of Appeals decided a case similar to *HEAL, supra, Whidbey Environmental Action Network v. Island County et al*, 118 Wn. App. 567; 76 P.3d 1215, (WEAN) and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN* the County appealed the WWGMHB's decision finding a 25-foot buffer for type 5 streams failed to comply with the GMA for 5 steam buffers. The Court found the "County fails to point to any part of the record outlining the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *HEAL* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations… BAS does not support the use of a 25-foot buffer." (*WEAN, supra* at p. 584). *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Stevens County's contention that allowing such development activity is merely a balancing of conflicting goals of the GMA is not supportable. All property owners have a right to the use and enjoyment of their property without encroachment from neighbors who would degrade it. "Private property rights" gives no one the right to degrade critical areas, streams, or lakes. The County's actions are clearly erroneous, and in violation of the GMA. *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Board recognizes expansion or replacement of non-conforming structures could be permitted under certain conditions. However, SCC 13.30.032 provides inadequate assurance any impacts will be mitigated. SCC 13.30.032 provides: "The outcome of the Administrative Review is <u>generally</u> one of the following:" (Emphasis added). That statement is no assurance that even the listed possible outcomes will be achieved. Those listed possible outcomes includes an administrative determination by a person without professional expertise that the development within a critical area, perhaps even up to a shoreline, has no impact on the critical area. Such provisions are effectively no protection at all and are clearly erroneous. As in other "mitigation issues", the Board finds the absence of a qualified professional determination of required mitigation measures to be clearly erroneous. The only way to ensure the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional.

Provisions in Title 13 addressing common-line setbacks and non-conforming structures without mitigation determined by a qualified professional fail to protect critical areas and are clearly erroneous. *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Court of Appeals in *WEAN, supra*, found the Superior Court erred when it reversed the Western Washington Growth Management Hearings Board's ruling that 25-foot buffers for type 5 streams were inadequate. In that case, the County had argued that substantial evidence did not support the Western Board's order, and that the Western Board failed to defer to the County's discretionary balancing of the best available science (BAS) with other factors. The County also argued that the Western Board erred when it ignored the testimony of the County's expert and determined that his expert opinion was not BAS. *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The County in *WEAN* contended the 25-foot buffer fell within the range of affirmed. The *WEAN* Court disagreed. "While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams." (*Supra* p. 585). The GMA requires the regulations for critical areas to protect the "functions and values" of those designated areas. This means all functions and values. *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Stevens County Planning Commission, after several public work sessions, and at least three public hearings, ultimately concurred with Mr. Kovalchik's recommendations with a minor exception of dropping the "+" sign from two categories. Those recommendations were forwarded to the Board of County Commissioners (BOCC). Many of Mr. Kovalchik's conclusions were included within the body of Title 13. However, with one exception, Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr. Kovalchik were rejected by the BOCC. The County, when asked about this, informed the Board that their expert said, "I can live with that", after his recommendations were not followed. If this was his response, we cannot consider such a response as the reasoned opinion of an expert. The County does not point to any science used to vary from the recommendations given by their expert or the other BAS reviewed as is required by the Court of Appeal decisions quoted above.

The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. W*EAN*, *supra*, at 532.

The Court of Appeals, *WEAN, supra*, requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based

the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The activities the County has allowed as exempt in the Buffer areas are without clear limits. Without any limitation other than a direction that the mowing and chemical use should be minimized in buffers, these activities are exempted.

  The record is full of evidence that the listed exempted activities should be prohibited in buffers or at least carefully regulated. Title 13 requires no review or approval for what the landowner believes is necessary or minimal. From all the Record and reports from the experts, including the County's, it is clear that, to be beneficial, buffers must remain in their natural state. The values and functions of the Critical Areas all have to be protected. The Board, in Issue No. 3, CARAs, addressed the concerns regarding the exemption for agricultural activities. While mowing and use of chemicals are not always agriculturally related, the arguments for regulating agricultural practices in critical areas are the same. To exempt existing and ongoing agricultural practices in critical areas is clearly erroneous, and fails to protect critical areas from degradation.

  The Board finds the actions of the County clearly erroneous regarding exceptions without review and possible mitigation determined by an appropriately trained individual and fail to protect critical areas. *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- No science is found in the record that supports any construction within buffers or setbacks. The science clearly mandates that any development activity which occurs within a buffer must either be prohibited or mitigated, regardless of where neighboring structures are located (common-line setback provisions) or whether it involves expansion or replacement of an existing structure. The record does not support these provisions within Title 13 that allow development activity in critical areas without ensuring adequate protection for the affected area. *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The county further has eliminated the buffer requirements in all cases unless otherwise required by law or is part of a site-specific management plan. The abandonment of a riparian buffer requirement and the essential functions it serves is unexplained. The heavy weight of scientific evidence favors riparian buffers and these buffers provide essential functions for fish and wildlife survival. The report of the county's expert recognized the need for minimal riparian and wetland buffers. Buffers are especially beneficial where the jurisdiction has limited resources and expertise to review each site individually. *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB Case No. 00-1-0016, Order on Compliance, (Nov. 13, 2003).

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is complying with and implementing its own ordinance.

  While the Stevens county ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with

this no harm or degradation standard via BAS as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.

Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003.)

- The present sizing of buffers may or may not be appropriate. The County did not follow the recommendations of the State of Washington. However the record does not reflect other science supporting the different sizes. RCW 36.70A.172 requires the use of the best available science in the designation and protection of critical areas. There is no record this was done. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, FDO, (July 13, 2001).

- The required level of protection of wetlands and riparian buffers must be reasonably based on relevant science; however, a county has a range of discretion as to how exactly that level is met. To the extent a county relies on other statutes as part of its protection scheme, they should be referenced in the ordinance. A citizen should be able to understand what protection elements exist by reading the ordinance. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- No one-size buffer or riparian management area fits all. However, criteria or standards must be specified for use when a site is reviewed and when an agreement is negotiated between the county and the landowner. There must also be notice to interested parties or to the State, so they might provide input on the management of the land. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-0015, Order on Compliance/Rescinding Invalidity (Sept. 2, 1998).

- This Board recognized that one size buffer or riparian management area does not fit all. Yet the protection provided for critical areas must prevent adverse impacts or, at the very least, mitigate adverse impacts. However, before the parcel-by-parcel individual treatment should begin, buffers must be set at a width sufficiently wide to protect that stream and the fish and wildlife in the area. Then the individual landowner can bring his or her special needs or conditions to the administrator in charge of the variances allowed under the law. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Compliance Order (Apr. 8, 1999).

- It is also the belief of this Board that the Comprehensive Plan and the buffers contained therein govern. The landowner must comply with the Comprehensive Plan of Ferry County and the implementing ordinances prior to development of lands within the subject area. The Timber Forest Practices Ordinance (TFPO) provides only a method, allowed by State law, to eliminate the 6-year moratorium at less cost. The passage of the TFPO, 99-01 by Ferry County, particularly Section 3.03, does not take the Comprehensive Plan out of compliance with the Growth Management Act. If the buffer width found therein were controlling and took precedence over those found in the ICAO, we would have a different result. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 99-1-0004, FDO, (Aug. 23, 1999).

- The TFPO is subject to existing ordinances, particularly the Comprehensive Plan and the implementing regulations, including the Interim Critical Areas Ordinance. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 99-1-0004, FDO, (Aug. 23, 1999).

- This Board recognized that one size buffer or riparian management area does not fit all. Yet the protection provided for critical areas must prevent adverse impacts or, at the very least, mitigate adverse impacts. However, before the parcel-by-parcel individual treatment should begin, buffers must be set at a width sufficiently wide to protect that stream and the fish and wildlife in the area. Then the individual landowner can bring his or her special needs or conditions to the Administrator in charge of the variances allowed under the law. *Save Our Butte, Save Our Basin Society, et al., v. Chelan County***,** EWGMHB Case No. 94-1-0015, Order on Compliance, (Apr. 8, 1999).

- Petitioners contend the term "setback" is not defined, and includes only structures, not limiting other development activity. The term "Buffer" is necessary to provide adequate protection for wetlands and fish and wildlife habitat conservation areas.

  The Board finds the language chosen by Ferry County is adequate for purposes of the broad policy as outlined in the SACP. The protection of wetlands and fish and wildlife habitat conservation areas will need further clarification and definition in the Critical Areas Ordinance. *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Compliance, (Nov. 30, 1999).

- Many of the same problems identified for Section 500, above, exist here. The standard buffer widths are too narrow. Any adjustments to these buffers must begin from a point where all the wetlands will be protected. The individual adjustments may then be considered. The best available science was not included here in a substantive way.

  The exemptions found in subsection 5, the Administrative Variance in subsection 12 and the notice and appeal provisions have the same problems here as identified above in Section 500. However, subsection 13, the Modification Provisions for Existing Lots, does not have the same defect found in the Fish and Wildlife ordinance, Section 500. This section limits the eligible lots to those existing prior to the passage of this ordinance. *Save Our Butte, Save Our Basin Society, et al., v. Chelan County***,** EWGMHB Case No. 94-1-0015, Order on Compliance, (Apr. 8, 1999).

- WAC 365-195-805(1) states [Board sets forth relevant portion]

  The words "setback" and "Buffer" may be used in different situations.

  The setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The critical area ordinances required by the GMA to be adopted are controlling. Adequate protection of critical areas must be found in that ordinance. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not place the County in noncompliance with the GMA. 00-1-0001: *Concerned Friends of Ferry County v. Ferry County;* FDO; (July 6, 2000)

Burden of Proof

- The GMA places the burden of proof squarely on the Petitioners to demonstrate Ferry County's adoption of Section 9.03 of Ordinance 2009-05 was clearly erroneous … The HOM Brief

amounts solely to case citations without any analysis conducted by the Petitioners as to how these cases apply to the facts and circumstances of the present matter … at the very minimum Petitioners need to start the comparative analysis of law and fact. *Riparian Owners, et al v. Ferry County,* EWGMHB Case No. 09-1-0012, FDO at 8-9 (April 25, 2010)

- [I]t is for the Petitioners to make and support their assertions the challenged action violates the cited GMA provisions; it is not the Board's responsibility to decipher and construct arguments from a party's brief. For Petitioners to state simply the challenged action does not comply with the GMA, without citing to the provision; stating what the provision requires, and setting forth argument comparing the requirement to the challenged action is conclusory and does not satisfy the burden of proof the Petitioners must carry in demonstrating the County's actions were clearly erroneous. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 37 (Oct. 6, 2008)

- Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd*., 2004 WL 2750786 (Wash. Ct. App., Div. 3, (2004)), found that in reviewing a municipality's actions, the Board must presume the comprehensive plan and ensuing regulations are valid. (citing to *Redmond v CPSGMHB,* 116 Wn.App. 48, 55, 65 P.3d 337 review denied, 150 Wn.2d 1007 (2003)). The party petitioning the Board has the burden to show noncompliance and the Board must find compliance unless the action is clearly erroneous. The Court found that the Board erred by shifting the burden of proof to the County and the Cantons. The Board was required to presume the Comprehensive Plan and ensuing regulations were valid. (citing to *Redmond*, 116 Wn.App. at 58). *Wenas Citizens Assoc. et al., v. Yakima County, et al.,* EWGMHB case No. 02-1-0008, Order on Remand, (April 20, 2005).

- The Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd*., 2004 WL 2750786 (Wash. Ct. App., Div. 3 (2004)), also found that the Board erred by applying "heightened scrutiny" to this case by citing a Central Puget Sound Hearings Board decision, which Division One of the Court of Appeals rejected. That Appeals Court found the Central Puget Sound Hearings Board was in error by applying "heightened scrutiny" to the decision to re-designate the land. (citing to *Redmond*, 116 Wn.App. at 58). *Wenas Citizens Assoc., et al., v. Yakima County, et al.,* EWGMHB Case No. 02-1-0008, Order on Remand, (April 20, 20050.

- In addition, the Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd*., 2004 WL 2750786 (Wash. Ct. App., Div. 3 (2004)), found that the Board failed to apply the particular facts in this case to the definition of 'agricultural land.' The Board's decision focused on the element of whether the land was 'primarily devoted to' agricultural purposes, and decided the petition solely on that element. Thus, it did not address the issue of 'long-term commercial significance for agricultural production.' The Board must evaluate the growing capacity, productivity and soil composition, proximity to population areas, and the possibility of more intense uses of the land in question before it decides the area must be designated 'agricultural land.' The Court also found that the Board had not analyzed the facts in relation to the criteria for the County amending Plan 2015. Because the Board made no factual findings regarding any of the criteria, the Board's conclusion is not supported, nor could it be sustained. The Board must analyze the facts in relation to the criteria for the County amending Plan 2015. *Wenas Citizens Assoc., et al., v. Yakima County, et al.,* EWGMHB Case No. 02-1-0008, Order on Remand, (April 20, 2005).

- Finally, the Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd*., 2004 WL 2750786 (Wash. Ct. App., Div. 3 (2004)), decided that, "Whether the amendment complied with the GMA, however, is a matter within the Board's discretion. Accordingly, the Yakima County Superior Court should have remanded this matter to the Board, unless doing so is impracticable or would cause delay." *Yakima*, supra at 4. *Wenas Citizens Assoc., et al., v. Yakima County, et al.,* EWGMHB Case No. 02-1-0008, Order on Remand, (April 20, 2005).

- The Board was directed by the Court of Appeals to consider whether the Caton's property meets the statutory definition of agricultural land and complies with the GMA. The Board must properly apply the correct burden of proof and the presumption that the County's amendment is valid; analyze how the facts of this case apply to the two elements of the statutory definition of agricultural lands of long-term commercial significance; and, analyze the facts in relation to the criteria for the County amending Plan 20015. *Wenas Citizens Assoc., et al., v. Yakima County, et al.,* EWGMHB Case No. 02-1-0008, Order on Remand, (April 20, 2005).

- The Board might not necessarily agree with the result the County reached when it designated the SRP site as Low Density Residential, yet the Board must presume the validity of the County's actions. The legislature has made it increasingly clear that the County should be given more deference in making GMA decisions. The decision-making in this case is the responsibility of the County, and the Board's function is to ensure that the County follows the law. The Board now finds the County did in-fact uniformly apply their criteria and shown their work. The Board is satisfied the Respondent has adequately analyzed the other mining sites in Spokane County and has treated them consistently with the Petitioner's site. *Spokane Rock Products, Inc. v. Spokane County,* EWGMHB Case No. 02-1-0003, Final Order on Compliance, (April 14, 2003).

- While the GMA requires the County to designate and conserve mineral resource lands, the Petitioner has the burden of demonstrating that any action taken by the County is not in compliance with the Act. The Board is required to find compliance with the Act, unless it determines that the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. *Spokane Rock Products, Inc. v. Spokane County,* EWGMHB Case No. 02-1-0003, Final Order on Compliance, (April 14, 2003).

- In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends the boards to apply more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of State goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals or this chapter, and implementing a county's or city's future rests with that community. [1997 c 429 sec. 2.] *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO (March 14, 2002).

- The legislature was very clear that each county was to be given a broad range of discretion when planning for growth and the boards are to grant deference to both the counties and cities in how

they plan for that growth. The Respondent has shown that they had input from the state, public, and airport authorities. Kittitas County and the City of Ellensburg in designating urban growth areas and develop regulations may not have satisfied all citizens in their jurisdiction, but the legislature in its finding was clear when they said the Boards must give cities and counties great deference. RCW 36.70A.320 in part states: "The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous." *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO (March 14, 2002).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- A petitioner has the burden of proving by a preponderance of the evidence that a plan does not comply with the Act. The initial burden of persuasion is met when a petitioner presents sufficient evidence which, standing alone, would overcome the presumption of validity. Once that level has been reached the burden of producing evidence to rebut the initial showing does shift to the respondent local government. Because the Board's review is "on the record," that rebuttal evidence must be contained in the record absent the rare instance of consideration of supplemental evidence. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- Where a finding of invalidity regarding forest lands designation has been entered, the GMA places on the respondent local jurisdiction the initial burden of proof to show its forest lands designation decision no longer substantially interferes with the GMA planning goals. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The Petitioners need not prove a negative, i.e., the lack of evidence. The Petitioners must demonstrate the failure of the County to include the best available science. It is then incumbent upon the County to point out the evidence in the record, showing they have complied with the GMA. The County did not do this and we have found nothing in the record demonstrating the inclusion of the best available science. This does not constitute a shift in the burden of proof. *Concerned Friends of Ferry County, v. Ferry County*, EWGMHB Case No. 97-1-0018, Order on Reconsideration, (Nov. 24, 1999).

- The County's choices regarding the manner in which they have designed the Comprehensive Plan (CP) is presumed to be correct, even if someone else believes it would have an effect different than stated. 99-1-0016; *City of Moses Lake v. Grant County*; Order on Reconsideration; (Aug. 16, 2000).

- The County adopted interim Ordinance 2001-49-CC in their process to insure compliance with the orders and directives of this Board. A local jurisdiction's legislative action to achieve compliance with a remand is presumed valid upon adoption and the burden is on the petitioner to prove that such action is not in compliance with the requirements of the GMA. RCW 36.70A.320; *Hapsmith v. City of Auburn*, CPSGMHB Case No. 95-3-007c, (Feb. 13, 1997) (FNC and Notice of 2nd Compliance Hearing). In challenging any GMA-related actions by a county, where the county is not subject to a determination of invalidity, the petitioner bears the burden to demonstrate noncompliance. RCW 36.70A.320(2). Here, Grant County is not subject to a determination of invalidity. The County adopted the subject interim zoning ordinance pursuant to the Board's finding of noncompliance with the GMA. Therefore, unless Moses Lake can demonstrate that the action taken by Grant County is "clearly erroneous," the Board must find compliance. RCW 36.70A.320(3). *City of Moses Lake v. Grant County*, EWGMHB Case No. 01-1-0010, FDO, (Nov. 20, 2001).

- In applying the "clearly erroneous" standard of review, this Board has recognized that it is much more deferential and creates a "greater burden of proof" than would a mere "preponderance of the evidence" standard. Given this substantial deference, the Board can only rule against a county when it is "left with the firm and definite conviction that a mistake has been made." Additionally, the Eastern Board views its responsibility under the GMA to recognize local circumstances, reflecting conditions unique to a county. *City of Moses Lake v. Grant County*, EWGMHB Case No. 01-1-0010, FDO, (Nov. 20, 2001) (Internal citations omitted).

- To carry its greater burden of proof in this case, the City of Moses Lake must specifically demonstrate how Grant County's interim zoning ordinance failed to comply with the GMA. Mere conclusory statements in a petition or Prehearing brief are insufficient to overcome the statutory presumption of validity. (citing *Island County Citizens' Growth Management Coalition, et al. v. Island County*, WWGMHB Case No. 98-2-0023c, FDO, at 38 (June 2, 1999) (finding that the Coalition's conclusory statement that the County's DRs do not implement the County's affordable housing policies is insufficient to meet the burden of showing that the County's actions fail to comply with the Act.)). *City of Moses Lake v. Grant County*, EWGMHB Case No. 01-1-0010, FDO, (Nov. 20, 2001).

Capital Facilities/Capital Facilities Element

- General discussion of Capital Facilities Planning under GMA. *Wilma, et al v. Stevens County*, Order on Reconsideration at 7-12 (June 25, 2008).

- General discussion of LOS in regards to capital facilities. *Wilma, et al v. Stevens County*, Order on Reconsideration at 12-14 (June 25, 2008).

- A basic tenet of GMA planning, is coordination and cooperation among jurisdictions, service providers, and agencies. Therefore, the Board is not saying the County must provide for capital facilities themselves, but they must plan for and assure that necessary capital facilities will be

available throughout the UGA within the 20-year planning horizon. *Wilma, et al v. Stevens County,* Order on Reconsideration at 8 (June 25, 2008).

- Stevens County, in establishing an unincorporated UGA, has a duty to plan for either providing the capital facilities to serve urban levels of development within the UGA on their own or by seeking assurances from outside purveyors for those capital facilities needed to accommodate the urban level growth projected to occur within the UGA over the 20-year planning horizon. This is a prospective analysis, not solely looking at the existing facilities, but also what is the demand for such facilities in the coming years. *Wilma, et al v. Stevens County,* Order on Reconsideration at 11-12 (June 25, 2008).

- The Board recognizes the discretion afforded Stevens County in determining which public facilities and services are necessary to support development. However, as the Western Board noted in the *Taxpayers for Responsible Government v. City of Oak Harbor* case, this discretion is not unfettered, but must be within the confines of the goals and requirements of GMA. Therefore, when determining what public facilities are "necessary to support development" a local government must consider all aspects of public facilities and public services and make a reasoned decision as to what facilities and services are necessary and how to subject those facilities and services to concurrency requirements. Thus, the CFE must include a LOS for those public facilities (capital facilities) and public services identified as necessary to support urban levels of development and, as noted supra, at a minimum such facilities include domestic water and sanitary sewer system. *Wilma, et al v. Stevens County,* Order on Reconsideration at 13-14 (June 25, 2008).

- [General Discussion of Capital Facilities Requirement] At a minimum, Stevens County's CFP must include the required elements set forth in .070(3)(a)-(e) – inventory of current facilities, forecast of future needs, proposed locations and capacities for expanded/new facilities, six year financing plan, and a reassessment requirement. *Wilma et al v. Stevens County,* EWGMHB Case No. 06-1-0009c, Compliance Order at 10-11 (May 22, 2008)(Mulliken Dissenting)

- The importance of capital facility planning, by all entities, when a County is setting UGA boundaries is paramount. The County must be sure that the areas within the UGAs will have adequate and available urban services provided over the 20-year planning period. The County has an obligation under the GMA to do more than it has in its CFP and FP for public facilities and services, which include sewer, water, and parks, with the five newly established UGAs. The County has a duty to clearly state which public facilities and services are "necessary to support development," providing minimum acceptable standards for those designated as necessary, and a duty to complete the requirements of RCW 36.70A.070(3) – Capital Facilities… *Wilma et al v. Stevens County,* EWGMHB Case No. 06-1-0009c, Compliance Order at 17 (May 22, 2008)(Mulliken Dissenting)

- To comply with RCW 36.70A.070(3), the County must establish which public facilities and services are "necessary to support development" and develop measureable levels of service for these facilities and services in the future. The County has chosen to designate densely populated areas of the County as UGAs, including by far the largest UGA in the County. By designating these areas as UGAs, the County is committing itself to providing urban services and facilities, whether they are police and fire protection, parks, streetlights or sidewalks adjacent to schools. Communities will request public facilities and services in the future, even if they are not available when an area is designated a UGA. Failure of the County to look 20 years ahead does

not comply with the GMA. *Wilma et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Compliance Order at 21-22 (May 22, 2008)(Mulliken Dissenting)

- Just because the County does not currently have certain types of facilities (such as sidewalks and parks) does not mean that it is exempt from analyzing its ability to provide these facilities or the projected needs of these facilities for its residents. *Wilma et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Compliance Order at 28 (May 22, 2008)(Mulliken Dissenting)

- Stevens County relies primarily on outside purveyors for many of the public facilities and services the GMA requires it provide, giving it limited authority to locate and finance needed infrastructure due to the fact that those aspects of capital facilities planning rests with special use districts (i.e. sewer/water district, school district, fire district), other jurisdictions (city, state, or federal governments), or private interests. Because of this reliance, when designating a UGA that is to be served by an outside purveyor, within its CFP, Stevens County should at least cite to, incorporate by reference, or otherwise indicate where the location and financing information can be found that supports the UGA designation and the GMA duty to ensure that adequate public facilities will be available within the area during the 20-year planning period. The County should have been more cautious in designated UGAs until assurances were obtained from such outside purveyors, so as to ensure the needed facilities and services would be both adequate and available because it is ultimately the County's responsibility to ensure that this is accomplished. *Wilma et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Compliance Order at 28 (May 22, 2008)(Mulliken Dissenting)

- The CFP is supposed to be a document that looks to the future and includes a forecast of future needs, not just an inventory of existing facilities. *Wilma et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Compliance Order at 29 (May 22, 2008)(Mulliken Dissenting)

- The Board cannot reiterate enough the importance of capital facility planning, by all entities, when a County is setting UGA boundaries. Kittitas County must ensure the areas within the entire UGAs, both existing and expansion areas, will have adequate and available urban facilities provided over the 20-year planning period. The area impacted by the proposed applications, Nos. 06-03 and 06-04, is not within the jurisdictional limits of the City of Kittitas, but is located in what would be deemed the unincorporated portion of the UGA. It is the County, not the City, that is responsible for ensuring capital facilities within this area … If the County wishes to rely on the City to satisfy this responsibility, it is still required to demonstrate to the Board that the necessary infrastructure to serve the UGA expansion area will be available during the 20-year planning horizon. As with the LCA, simply citing to the City's CP, without more, fails to demonstrate compliance. *Kittitas County Conservation, et al. v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Compliance Order at 34-35 (Aug. 7, 2008).

- [T]he Capital Facilities Element [is] to set forth the LOS standards for those public facilities and services Stevens County has determined are necessary to support development which, at a minimum, included domestic water and sanitary sewer service. The reasoning for including LOS standards within the C CP as opposed to the DRs is to prevent these standards from being modified more than once a year. *Larson Beach/Wagenman v. Stevens County*, EWGMHB Case No. 07-1-0013, FDO at 28 (Oct. 6. 2008).

- [E]stablishing a LOS is an objective way to measure the adequacy of a facility or service, but the GMA does not dictate what is inadequate; the setting of a LOS standard is a policy decision left

to the discretion of local elected officials. Nothing in the *Wilma* decision equates to requiring LOS standards to be set forth in *development regulations*. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 28 (Oct. 6. 2008).

- [U]nlike RCW 36.70A.070(6) which requires an action-forcing "concurrency orrdinance" which prohibits development approval if the development causes a decline below LOS standards for transportation facilities, Goal 12, in conjunction with RCW 36.70A.070(3), does not require the adoption of a specific "concurrency ordinance" that similarly prohibits approval if the development causes the LOS standard for a non-transportation public facility lor service (identified as being necessary to support development) to decline below the locally adopted minimum standards. However, a local jurisdiction clearly has discretion under RCW 36.70A.020(12) and .070(3) to adopt such an ordinance for non-transportation public facilities and services. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 29 (Oct. 6. 2008).

- For purposes of conducting the inventory required by RCW 36.70A.070(3)(a), "public facilities" as defined at RCW 36.70A.030(13) are synonymous with "capital facilities owned by public entities." *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 22 (March 12, 2007).

- Therefore, as defined by "public facilities", the County is required to have a capital facilities plan and financial plan for "streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools." In addition, the capital facilities plan and financial plan must also include "public services", defined as "fire protection and suppression, law enforcement, public health, education, recreation, environmental protection and other governmental services." *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 23 (internal citations omitted) (March 12, 2007).

- [If a jurisdiction is relying on another entity to provide services then the] capital facilities and financing plans adopted by special districts, other jurisdictions, and private providers should be incorporated into the County's CFP and financial plan. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 24-25 (March 12, 2007) (citing with approval to both Central Puget Sound and Western Board cases).

- Generalized statements in the [Capital Facilities and Utilities Element of the Comprehensive Plan] of what capital facilities the County has presently and may need in the future does not clearly identify what is needed to support the incorporated cities, let alone the new unincorporated UGAs, nor how much these public facilities and services will cost and sources of public money needed for such purposes. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 25 (March 12, 2007).

- It is not practical or possible for the County's Capital Facilities Plan to provide a master plan for all infrastructure within the expanded UGA when the vast majority of the land is in private ownership under a planned development. The Capability Analysis provides an inventory of existing streets and roads in and around the UGA, … determines what the street requirements in and around the UGA will be in the six and twenty year planning horizons, estimates the cost of such improvements, and determines how the expense will be paid. As such, it complies with the letter and purpose of RCW 36.70A.070(3). … The Capital Facilities Plan does identify necessary

arterial and collector roads and major sewer and water infrastructure expected to serve the area. However, the location of the "feeder" roads and water and sewer feeder lines within the PUD necessarily depends on the final design of the development. As conditions of the County's approval of the PUD, the developer is required to construct local access streets to County standards, pay for or construct transportation improvements necessary to mitigate the traffic impacts of the development and address any stormwater management concerns. Thus, the development cannot go forward unless and until the developer provides adequate streets, roads and other capital infrastructure necessary to support the development. *Panesko v. Benton County*, EWGMHB Case No. 07-1-0002, FDO, at 24 (internal citations omitted) (July 27, 2007).

- [Six-year financing plan] RCW 36.70A.070(3) requires that sources of public funds with a reasonable assurance of availability within the six-year period be clearly identified. … [the City]does this by showing that there will be revenue available, generated by sales taxes and real estate excise taxes, as a result of development within the expanded UGA. It does not matter that such revenue may go into the general fund, because the City can take into consideration the source of the funds when budgeting expenditures from the general fund for capital facilities. The purpose of RCW 36.70A.070(3)(d) is to make sure that there are sufficient sources of funding available to the City or County. Using this planning information, the City and County have the discretion to determine which funding sources to use and how much of each source to use. *Panesko v. Benton County*, EWGMHB Case No. 07-1-0002, FDO, at 24 (internal citations omitted) (July 27, 2007).

- There is no provision in RCW 36.70A.035, RCW 36.70A.130 or RCW 36.70A.140 that requires that the risks of public funding be explained in a CFP. Such disclosure would occur when and if bonds are issue or an LID is formed. *Panesko v. Benton County*, EWGMHB Case No. 07-1-0002, FDO, at 52 (July 27, 2007).

- The Capacities Analysis provides an inventory of existing streets and roads in and around the UGA, … determines what the street requirements in and around the UGA will be in the six and twenty year planning horizons, estimates the cost of such improvements, and determines how the expense will be paid. As such, it complies with the letter and purpose of RCW 36.70A.070(3). It is not necessary for the Capacities Analysis to contain any additional language evidencing [a commitment to provide public facilities necessary to support development within the UGA], nor is it necessary that the City or County have the present ability to fund such facilities. A cost and funding analysis is only required for capital facilities that are needed within the six year period. *Roberts/Taylor v. Benton County*, EWGMHB Case No. 05-1-0003, Compliance Order, at 25-26 (internal citations omitted) (April 4, 2007).

- RCW 36.70A.070(3) requires that sources of public funds with a reasonable assurance of availability within the six-year period be clearly identified… [the Records shows] that there will be revenue available, generated by sales taxes and real estate excise taxes, as a result of development within the expanded UGA. It does not matter that such revenue may go into the general fund because the City can take into consideration the source of the funds when budgeting expenditures from the general fund for capital facilities. The purpose of RCW 36.70A.070(3)(d) is to make sure that there are sufficient sources of funding available to the City or County. Using this planning information, the City and County have the discretion to determine which funding sources to use and how much of each source to use... there is no GMA requirement that the capital facilities plan include documentation or commitment from developers for developer contributions…If the developers are unwilling or unable to pay their portion through SEPA

mitigation, impact fees, utility fees, etc., within the six-year planning period, the City will not have to "pony up more", ... Rather, the projected development simply will not occur. *Roberts/Taylor v. Benton County*, EWGMHB Case No. 05-1-0003, Compliance Order, at 29 (internal citations omitted) (April 4, 2007).

- Mitigation and the right to develop private property, however, do not negate the County's responsibility to protect critical areas as required by the GMA, the County's CP, its CWPP's and adopted ordinances, such as its Critical Areas Ordinance. With ample evidence of problems or potential problems with storm water runoff, erodable soils and geological hazardous areas on Five Mile Prairie and shared jurisdiction with the City, the County is responsible to plan upfront to prevent problems from occurring, not after the permits are issued. In addition, the Comprehensive Plan must be internally consistent, even when adopting amendments to the CP, to protect critical areas. There is a requirement under WAC 365-195-315 to reassess the land use element, which requires provisions for protection of the quality and quantity of ground water used for public water supplies and, where applicable, a review of drainage, flooding, and storm water runoff in the area covered by the plan and nearby jurisdictions. The reassessment is required if the probable funding for capital facilities at any time is insufficient to meet existing needs. The plan should require that as a result of such reassessment appropriate action must be taken to ensure the internal consistency of the land use and capital facilities portions of the plan. *Moitke/ Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Under WAC 365-195-315 – Capital facilities element, (1), a CFP is a requirement of the GMA and shall contain a number of features including the following: [Board sets forth 315(d)]. One of the primary tenants of the GMA is RCW 36.70A.020-Planning goals. Under that statute, subsection (12) Public facilities and services, it provides: [Board sets forth Goal 12]. A county or city can't fulfill the requirements of Planning Goal #12 without a futuristic look at their community using an updated, detailed CFP. A county must have a current forecast of future capital facilities needs and a financing plan when considering adopting additional land into its UGA. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The GMA, under RCW 36.70A.070(3), requires a capital facilities plan element in a city or county's comprehensive plan. The legislature recognized that planning is forward looking, so mandated at a minimum a six-year capital facilities element to ensure financing or projected capital facilities and sources of public money are clearly identified. They also required a forecast of future needs for such capital facilities. The County has a six-year CFP for the period of 2000-2006, which hasn't been updated since its adoption, with the exception of its law enforcement element. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The minimum six-year CFP is a living document. It is to help cities and counties understand their current and future financial capabilities as they grow, how to pay for that growth and, in some respects, how to grow. They may find it more cost-effective to increase density within their present UGA to absorb their population allocation, rather than run expensive utilities into expanding territory. An up-to-date CFP is a tool that can provide strategic information. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Spokane County is required to plan under RCW 36.70.040. As such, RCW 36.70A.110 requires the County to designate an Urban Growth Area or Areas. Under RCW 36.70A.110(2), the County must "include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period." The projected growth is "based upon the growth management population projection made for the county by the Office of Financial Management". "The Office of Financial Management projection places a cap on the amount of land a county may allocate to UGAs" [*Diehl v. Mason County*, 94 Wn. App. 645, 654, 972 P.2d 543 (1999)]. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- In 2001, Spokane County, together with the towns and cities in the County, sized the County and City UGAs. The size was designed to receive the population projections made by the OFM. The Intervenors in 2003 approached the County with a variety of proposals, which would require the enlargement of the UGA north of the City of Spokane. There was no claim that there was not enough developable land within the UGA for their specific development, only that there was not enough land for the twenty-year population projection. The Intervenors then suggested that their six parcels be included in the UGA, thereby requiring the extension of the UGA boundaries. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- The GMA mandated that urban growth occur only within a UGA so that sprawl would be avoided (RCW 70A.030(17) and .070). The GMA established a careful procedure to identify the amount of land that is available within city limits for development at an urban density and what additional lands would be needed to handle the twenty-year population projection. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- Spokane County adopted a procedure for establishing boundaries for UGAs, which included a land quantity analysis methodology. (Adopted 10-31-95 and CWPP Urban #19, Urban Growth Area Revisions 9/30/97.) This methodology made no provision for a developer-provided land quantity analysis. The methodology did establish a careful method of reports, format and Technical and Steering Committees review. The County's methodology incorporated CTED's recommended process, modified to reflect local conditions. It is clear from the methodology adopted by Spokane County that the analysis provided by the proponent/developer is insufficient and unacceptable. (CWPPs Policy Topic 1 found in prior and amended versions of the Policies). It is clear from the 1998 and 2004 versions of the CWPPs that it is the local jurisdictions that are responsible for the preparation of land quantity and population analysis. (Policy Topic 1, #19 in 1998 and #16 and #17 in 2004). *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- The County has the responsibility to prepare a land quantity analysis prior to any modification of the existing UGAs. The recent expansions of the UGAs, adopted by the County, include changes in the Airway Heights area, north of the City of Spokane and southeast of the City of Spokane Valley. In each of these changes the proponents argue that more land is needed within the County's UGAs to accommodate the twenty-year projected population growth. There has been no comprehensive reexamination of the County's land quantity or what population changes are expected, as is required by the GMA and the CWPPs. Such enlargements of the UGAs of Spokane County violate its own policies and the GMA's requirements. (CWPP Urban #19, Urban Growth Area Revisions 9/30/97, RCW 36.70A.110(2) and RCW 36.70A.020(2)).

Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al., EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- The sizing requirements and locational criteria in RCW 36.70A.110 apply to UGA expansion as well as to the initial UGA designation. (*Bremerton v. Kitsap County,* CPSGMHB, 04-3-0009c, FDO Aug. 9, 2004). RCW 36.70A.110(1) specifically contemplates that UGA boundaries may expand over time to allow for additional urban development and it specifies the locational criteria that limit such expansion. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.,* EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

  In their other arguments on this issue, the Petitioners object to the enlargement of the UGA to include the subject land. A key argument here contends that there was no Capital Facilities Plan update prior to the enlargement of the UGA. As this Board has held before, (*Roberts & Taylor v. Benton County* EWGMHB 05-1-0003, FDO (Oct. 19, 2005)) the amendment of the Comprehensive Plan to expand the UGA requires a new review of the Capital Facilities Plan (CFP) so the County would see that services are available for the area added to the UGA and how they would be paid for. This was not done here. The Record shows that Spokane County prepared a 6-year CFP approximately 6 years ago and it does not cover the area that is the subject of this enlargement of the UGA. One of the primary tenants in the GMA is RCW 36.70A.020-Planning Goals. Under that statute, subsection (12) Public facilities and services, it provides: [Board sets forth Goal 12]. A county cannot fulfill the requirements of Planning Goal #12 without a futuristic look at its community using a detailed capital facilities plan element, among the other elements of its comprehensive plan. A county must have a forecast of future capital facilities needs. A new CFP needs to make the corresponding population revisions, if they exist, to the CFP whose present analytical foundations are derived from the old population allocations. Then there must be an analysis of the adequacy of capital facilities in the area. *McHugh, et al. v. Spokane County, et al.,* EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- The GMA, under RCW 36.70A.070(3), requires a capital facilities plan element in the City or County's Comprehensive Plan. The Legislature recognized that planning is forward looking, so mandated at a minimum a six-year Capital Facilities Element (CFE), to ensure financing of projected capital facilities and sources of public money were clearly identified. They also required a forecast of future needs for such capital facilities. The County has a six-year CFP, for the period of 2000-2006. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO (Dec. 16, 2005).

- The reference in the record, that the City of Spokane will be able to provide services to the area, does not eliminate the need to develop a CFP that determines what is needed, how much the infrastructure is going to cost and a financial mechanism to fund it. For the County to know if they can provide services at the time of development without the reduction of services to others they need to plan ahead and this has not been done for this expansion of the UGA. *McHugh, et al. v. Spokane County, et al.,* EWGMHB Case No. 05-1-0004, FDO (Dec. 16, 2005).

- The County did not update its CFE (RCW 36.70A.070(3), its utilities element (RCW 36.70A.070(4), or its transportation element (36.70A.070(6) prior to adopting Resolution 2005-0365. Considering the impacts this amendment will have to the citizens of Spokane County, an update of these comprehensive plan elements was essential to good planning required by the

GMA. *McHugh, et al. v. Spokane County, et al.,* EWGMHB Case No. 05-1-0004, FDO (Dec. 16, 2005).

- The minimum six-year CFP is a living document. It is supposed to help cities and counties understand their current and future financial capabilities as they grow, how to pay for that growth and, in some respects, how to grow. They may find it is more cost-effective to increase density within their present UGA to absorb their population allocation, rather than run expensive utilities into expanding territory. An up-to-date CFE is a tool that can do this. *McHugh, et al. v. Spokane County, et al.,* EWGMHB Case No. 05-1-0004, FDO (Dec. 16, 2005).

- The County had sufficient opportunity to update their CFE after determining a final boundary for its expanded UGA. In fact, the Badger Mountain Planned Development property, which was approved for urban-like development in January 2001, should have triggered an update because of the size and scope of the development. Seven years later, the Benton County CFE has not been updated to reflect the changes that have occurred within the original UGA or the proposed expansion to enlarge the UGA by 3322 acres. Good planning requires periodic updates and the GMA requires the County's CFE to be updated every six years. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.* EWGMHB Case No. 05-1-0003, Order on Reconsideration, (Oct. 19, 2005).

- The Board looks to RCW 36.70A.020(12) Planning Goals, RCW 36.70A.215 and RCW 36.70A.070(3), (4), & (6), the CWPP's and case law to determine whether the Petitioners have proven Resolution 05-057 fails to comply with the GMA when the land at issue is located in a rural area with limited utilities, transportation, and access. A county or city can't fulfill the requirements of Planning Goal #12 without a futuristic look at their community using a detailed capital facilities plan element, among other elements of their comprehensive plan. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- The GMA, under RCW 36.70A.070(3), requires a capital facilities plan element in the City or County's Comprehensive Plan. The Legislature recognized that planning is forward looking, so mandated at a minimum a six-year Capital Facilities Element (CFE), to ensure financing of projected capital facilities and sources of public money were clearly identified. They also required a forecast of future needs for such capital facilities. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- The GMA is planning for the future. Benton County and the City of Richland may have Capital Facilities Elements in their Comprehensive Plans, but, according to the written record and testimony by all the Parties at the Hearing on the Merits, not one that takes into consideration the additional sewer capacity, transportation facilities and other elements needed for the Badger Mountain PUD and additional UGA lands adopted in Reso*l*ution 05-057. In fact, in Table 3, "Consistency of the City of Richland Proposed UGA Expansion with the adopted CWPP, Relevant Provisions of the Benton County Comprehensive Plan Policies, and GMA RCW's", p. 11, the County staff in their comment section concerning RCW 36.70A.020(1) admits. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- There is a world of difference between increasing a UGA a few parcels or a few hundred acres compared to the current proposal of 3,322 acres, which includes a vested PUD with over 800 homes and businesses. *Perhaps the County's current six-year plan is usable for a small inclusion of land, but not for a major amendment, such as proposed here. The Badger Mountain PUD should have tr*iggered a County and City of Richland update of *t*heir six-year plans immediately upon the application for the amendment to change the UGA, if not when the PUD was vested. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- Under RCW 36.70A.215 Review and evaluation, the GMA is requiring some counties [see RCW 36.70A.215(7)] to adopt County-wide Planning Policies to est*ablish a review and evaluation program.* In (2)(a), the GMA asks those counties to:

  > "*encompass land uses and activities both within and outside of urban growth areas and provide* for annual collection of data on urban and rural land uses, development, critical areas, and capital facilities to the extent necessary to determine the quantity and typ*e of land suitable for development…*"

  *The GMA here is requiring an annual update of information to ensure a county or city has the information they need to make informed decisio*ns on growth. It can be simple or detailed, depending on the changes within the jurisdiction. While it does not apply in Benton County, this statute shows the Legislature sees this as a need in the future and expects counties and cities to be as up-to-date as possible, so their comprehensive plan reflects current conditions and agrees with their 20-year plan and six-year CFE. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- The minimum six-year CFE is a living document. It is supposed to help cities and counties understand their current and future financial capabilities as they grow, how to pay for that growth and, in some respects, how to grow. They may find it is more cost-effective to increase density within their present UGA to absorb their population allocation, rather than run expensive utilities into expanding territory. An up-to-date CFE is a tool that can do this. *.Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- Once an area is brought into an existing UGA, it will need infrastructure. The GMA requires a "forecast of the future needs" in the six-year plan. Neither Benton County nor the City of Richland updated their plans in anticipation of adopting Resolution 05-057. According to the Intervenor, "The GMA requires only that the County determine that urban services can be provided at the time of development. RCW 36.70A.110(3)."

  That's certainly when they can be provided, but planning for those services has to take place much earlier. RCW 36.70A.070(3)(b). *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005)..

- The County and the City of Richland did not update their CFE (RCW 36.70A.070(3), their utilities element (RCW 36.70A.070(4), or their transportation element (36.70A.070(6) prior to adopting Resolution 05-057. Considering the impacts this amendment will have to the citizens of Benton County and the City of Richland, an update of these comprehensive plan elements were essential to good planning required by the GMA. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- The County and City of Richland did show their work in regards to the formula in CWPP #4. Their calculations, without increasing density, using the high OFM population allocation and a substantial market factor of 25%, came out to 2,116 acres. The County did not show its work concerning capital facilities, utilities and transportation plans, which is a major step in planning for an expanded UGA. In *Diehl v. Mason County*, 95 Wn.App. 645, 654, a market factor is consistent with a jurisdiction's determination of their land supply, but they must demonstrate the reasons for the market factor. "Although a county may enlarge a UGA to account for a 'reasonable land market supply factor,' it must also explain why this market factor is required and how it was reached." *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.*, EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- The City of Liberty Lake included a discussion of possible annexation. This is appropriate and is the responsibility of planning for Cities. This does not make the CFP inconsistent with their Comprehensive Plan. The population allocated for Liberty Lake's UGA is properly considered and planned for. The consideration of additional population in potential annexation areas is appropriate and not inco*nsistent with the Com*prehensive Plan. *Chevron U.S.A. Inc. v. Hearings Board*, 123, Wn.App 161 (2004). The Record is clear that Liberty Lake's Comprehensive Plan considered population outside of their existing corporate limits. See Dec. of Doug Smith. The Capital Facilities Plan and the Comprehensive Plan are internally consistent. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 Order on Compliance, (March 18, 2005).

- The Board is very familiar with the case cited by the Respondent, *Wenatchee Valley Mall Partnership, et al v. Douglas County*, Case No. 97-1-0003. In *Wenatchee*, the Board quoted the Central Puget Sound Hearings Board in *Sky Valley V. Snohomish County, CPSGMHB Case No. 95-3-0068c at page* 1675 and cited with approval, the Central Board's interpretation of RCW 36.70A.070(3)c):

  > "… as if the phrase 'owned or operated by the city or county' existed at the end. This interpretation is required by necessary implication. To hold otherwise would re*quire a county government as the regional planning entity within a county, to conduct capital planning for all public facilities regardless of ownership…."

  *The Bo*ard continues to hold as they did in *Wenatchee supra*, that a county or a city need not do the work that is already done by special districts or entities not owned or operated by a city. Adoption by reference or attachment is sufficient. Here Liberty Lake has referenced the Capital Facilities Plan of Liberty Lake Sewer & Water District and adopted it by reference. Upon review of the record, it appears to comply with the GMA and the Petitioner and Intervenors have not carried their burden of proof. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004).

- This Board and the other Boards have consistently held that jurisdictions are required to adopt a six-year CFP. This CFP is Liberty Lake's first compliant Capital Facilities Plan and it is required by statute to be a six-year plan. The Petitioner had adopted a previous CFP, but it was in part limited to a period of less than six years. The Growth Management Act requires a six-year plan, beginning with its effective date. In this case, the Ordinance, including the CFP, was adopted Dec. 14, 2004, with an effective date of January 18, 2005. Even if Liberty Lake had adopted the CFP sometime in 2004, the plan would need to have covered a part of 2010. *City of*

Spokane Valley v. City of Liberty Lake, et al., EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004) (internal citations omitted).

- It is vital to follow the CWPP and document the data from the analysis performed. Liberty Lake must do this before proceeding to finalize the Comprehensive Plan. This clearly was not done. The Board finds nothing in the record supporting the City of Liberty Lake's contention that it followed the CWPP and the process outlined therein.

  It is clear that the City of Liberty Lake failed to prepare an adequate 6-year Capital Facilities Plan. Once the boundaries are set and the population allocation received, this must be done. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004).

- The Board acknowledges the City of Liberty Lake did conduct a land use analysis pursuant to CTED guidelines, but only determined how many houses could go on "x" number of acres. Spokane Valley asserted Liberty Lake failed to base its land capacity on urban The Board acknowledges the City of Liberty Lake did conduct a land use analysis pursuant to CTED governmental services and facilities.

  The Board finds that important information is missing as to whether governmental services and public facilities are available to serve the projected numbers. These projected numbers were not available and Liberty Lake did not execute a detailed 6-year Capital Facilities Plan. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004).

- RCW 36.70A.070(3)(d) provides, when planning for future growth and forecasting future capital facilities needs pursuant to RCW 36.70A.070(3)(b), the adequacy and availability of public facilities and services must be realistically evaluated. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The development regulations are adopted by the County to implement the Comprehensive Plan and Capital Facilities Plan. If a person does not feel the two plans comply with the GMA, a petition for review must be filed within 60 days of the publication of the notice of their passage. The only challenge properly raised concerning the development regulations is whether they properly implement the CP or C F P. *Harvard View Estates v. Spokane County*, EWGMHB Case No. 02-1-0005, Order on Motion, (May 31, 2002).

  > As discussed in Issue No. 11, the BOCC revised the population allocation between the City and the County's comprehensive plan on the date it adopted the plan. While the analysis in the County's Capital Facilities Plan is based on the original population allocation for the County UGA of 53,370, the County has shown it has adequate service capacity for the additional population. Unless the City can demonstrate the County action is clearly erroneous, the action of the County is presumed valid. RCW 36.70A.070(3)(d) states in part: "that counties and cities provide "at least a six-year plan that will finance [planned for] capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- [Citing *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039, Order Rescinding Invalidity] in Bremerton and FDO in Alpine found the requirements for a six-year financing plan

"is not an option or a priority to be balanced." The CPSGMHB, to emphasize the unequivocal intent of the GMA held, that the "six-year plan period begins with the date of the adopted Plan." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The County's Capital Facilities Plan was adopted in Nov. 2001; the included financing plan is for 2000 – 2006. Nearly two years of this financing plan had already passed upon the adoption of the Plan. There is a requirement of a 6-year Facilities Plan. The fact that an amendment can correct an error or omission does not bring the County into compliance now. The County's Capital Facilities Plan does not cover the requisite time period and is not in compliance with the GMA. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO,(July 3, 2002).

- RCW 36.70A.070(3)(d) provides, when planning for future growth and forecasting future capital facilities needs pursuant to RCW 36.70A.070(3)(b), the adequacy and availability of public facilities and services must be realistically evaluated. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- Because the County has designated large County UGAs, they have an even larger responsibility to insure that services will be there when developments are occupied. In Issue No. 13, the Board remanded the Capital Facilities Plan to be redrafted to include the time period as required by the GMA. During that process, the County will be required to again address the adequacy of the Plan to service needs. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The GMA requires a county to analyze some of the capital facility planning issues relevant to special districts, but we believe this should not be construed to require a county to do the detailed planning required of the special district itself. In fact it would be a fruitless effort to plan for the special district and tell them what they will do and how the money will be raised. This would be useless duplication and normally unenforceable. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- Counties must provide an inventory of existing capital facilities and forecast the future needs for such capital facilities. More than this is not needed for special districts or facilities not owned or operated by the county. We decide that RCW 36.70A.070(3)(c) be read as if the phrase "owned or operated by the city or county" existed at the end. This interpretation is required by necessary implication. To hold otherwise would require a county government as the regional planning entity within a county, to conduct capital planning for all public facilities regardless of ownership. To require this would be costly and in some cases, impossible. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

Clustering

- [Language adopted by the County limits clustered lots in groups of two, but no more than eight, and requires clusters to be located at least 300 feet apart; the Board, noting some concern with the administrative variance provisions, concluded …] the County has complied with the GMA to prevent urban-like growth in the rural and natural resource areas by sufficiently regulating

clustering. *Loon Lake Property Owners, et al v. Stevens County,* EWGMHB Case No. 01-1-0002c, Compliance Order (May 30, 2008).

- The Board recognizes the use of clustering provisions, as provided by RCW 36.70A.070(5)(b), appears denser when viewed in isolation, but because such developments are required to maintain the underlying density it is nonetheless a rural density when viewed in the context of the entire parcel; therefore, preserving rural character and open space. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 58 (Oct. 6, 2008)

- The Hearings Boards acknowledge that clustering is an allowed innovative zoning technique. (RCW 36.70A.090 and 177). If limited in scope, clustering and bonus density provisions are methods to retain open space and rural nature. If not limited, urban-like development can occur in the rural areas. *Loon Lake Property Owners Assoc., et al. v. Stevens County,* Order on Motions, at 13 (Oct. 25. 2007).

- The Washington State Supreme Court decision, *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 562 (2000), finding the GMA's agricultural conservation mandate dealt with the specific issue of whether or not a recreational use on agricultural resource lands complied with RCW 36.70A.177. RCW 36.70A.177 is also at issue in this case. Specifically, whether or not the County's new policies and regulations allowing cluster development on agricultural resource lands of long term commercial significance complies with this statute. [Board sets forth RCW 36.70A.177, in relevant part]. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The Board has a serious concern about the potential impact of clusters on the viability of the remainder of agricultural land. If cluster development patterns are going to work, the density in the cluster cannot cause a drastic change in the character of the surrounding area and the remaining farmland has to be large enough to accommodate a true commercial farming operation. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- There are two key issues in this case with respect to compliance with this statute and the overall GMA agriculture conservation mandate. The first issue is whether the new cluster regulations and policies comply with the GMA when they make no reference to restricting or encouraging location of clustering to land with poor soil or lands otherwise unsuited for agriculture. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The GMA, in RCW 36.70A.177(1), requires that non-agricultural uses be on poor soils or soils not suited for farming. In the County's newly adopted amendments allowing clustering on Agricultural Resource lands, the County makes no mention of the soils upon which the clusters would be located. It is clear clusters are non-agricultural uses and must be located upon poor soils. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- Residential clustering on the scale allowed by the new ordinances is clearly a non-agricultural use within the meaning of the statute. It is clear from Exhibit A of Ordinance No. 308, 17.31.060, Q and R, that clusters and their buildings are non-farm development, requiring buffers and setbacks. In order to comply with the GMA, clustering policies and regulations must

encourage such clusters on land with poor soil. Walla Walla County regulations do not limit or encourage the location of cluster development in such a manner. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The findings above adopted by the County in 2001, go much further than the clustering chapter, Chapter 17.31, added most recently. The County must direct the landowner to locate these clusters upon poor soils, the soil and location least productive and less likely to reduce the land available for farming. Clusters should not remove quality soils from agricultural uses. Because the County has failed to restrict clustering to poor soils, the County's action is clearly erroneous and has not complied with the GMA. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The second issue is whether cluster developments with a stated maximum of 12 units in two zones and no maximum in one zone complies with the statutory requirement that clustering must *conserve* agricultural land and *encourage* the agriculture economy. The Board has concerns about the potential in AR-10 for much higher than 12 dwelling units to be clustered on agricultural lands. The sizeable concentration of residences on agricultural lands creates impacts on agriculture and creates a demand for "urban-type services" that would conflict with the agricultural economy. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- RCW 36.70A.060(1) requires that adjacent uses will remain compatible with agriculture. The failure to limit the size of the clusters in Agriculture Residential-10 and failure to limit or prohibit the location of clusters adjacent to one another does not conserve agriculture. It raises the clear possibility of urban densities on Resource lands and violates the GMA. This is a failure to encourage the agricultural economy and conserve farmland. As the size of an agricultural development project increases, it takes on urban characteristics and increases the demand for urban governmental services. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- We find nothing in the GMA that would allow clustering in agricultural resource lands to the degree that it results in a village or LAMIRD. *See Smith v. Lewis County*, WWGMHB Case No. 98-2-0011c, FDO, April 5, 1999. Uncapped clusters characteristically lead to a demand for urban governmental services. The clusters need reasonable caps so as to preclude clusters of such magnitude that they demand urban services. Unreasonable clustering without limit occurs both for property zoned AR-10 and where there is no limit to the adjacent location of clusters. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- It is clear to the Board that having no limit on Agricultural Residential-10 clustering density or allowing the "clustering" of clusters is clearly erroneous. Until limits are placed upon all clusters and the "clustering" of clusters, the Board must find the County's actions clearly erroneous and out of compliance with the GMA. *Futurewise/Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The Board in the case *Wenatchee Valley Mall Partnership v. Douglas County*, EWGMHB 96-1-0009 has recognized clustering as an acceptable technique to preserve large-tract agricultural lands. The objective of preserving agricultural lands of long-term commercial significance does not mean homes cannot be built on these lands, only that the lands remain in parcels sizes, which

enable agricultural production. Clustering of homes, along with relatively large lot sizes for the underlying zone, certainly encourages preservation of large tracts for agricultural production. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case No. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Clustering is only appropriate for lands not designated for agriculture, forest, or mineral resources. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

Commerce, Department of (formerly Community, Trade, & Economic Development (CTED) [Editor's Note: In 2009, the Legislature changed the agency's name to Department of Commerce]

- In regards to RCW 36.70A.050, the County is correct that this provision is directed toward CTED, a state agency, and requires the "department" to adopt guidelines to classify agriculture, forest, and mineral lands, and critical areas. "Department" as used in RCW 36.70A is defined as the department of community, trade, and economic development under RCW 36.70A.030(6) … The County … it is not required to act under RCW 36.70A.050. *Riparian Property Owners, et al v. Ferry County*, Case No. 09-1-0002, Order on Motion to Dismiss, at 6-7 (April 22, 2009)

- General discussion of CTED's "enforcement" authority under the GMA. *City of Wenatchee v. Chelan County*, EWGMHB Case No. 08-1-0015, FDO at 38 (March 6, 2009).

- Although CTED's Model Ordinance leaves the door open for a local jurisdiction's discretion by using the word "should" in regards to public review, its Model Ordinance recommends that counties and cities provide public review and a public hearing process if proposals need a variance from critical areas regulations. In addition, CTED recommends that notices and hearings for a project should be consolidated and integrated with the environmental and permit review process. The County also chose not to include these suggestions from CTED. The Board finds this is not a fatal flaw because of the word "should", but it still leaves too much power and discretion to administrative decisions without public input. *Concerned Friends of Ferry County/Robinson, v. Ferry County*, EWGMHB Case No. 01-1-0019, 3rd Order on Compliance, (June 14, 2006).

- RCW 36.70A.106(3) provides that "any amendments for permanent changes to a comprehensive plan or development regulation that are proposed by a county or city to its adopted plan or regulations shall be submitted to CTED at least sixty days prior to its final adoption".

  RCW 36.70A.106 provides that notice of any proposed amendments for permanent changes to a county or city's development regulation shall be submitted to CTED "at least sixty days prior to final adoption" so that the department or other state agencies may provide comments. This notice must be sufficient to give CTED full notice of what the jurisdiction intends to do. This notice must be 60-days or more before the adoption. CTED is then allowed to participate as needed in the process. The adopted Ordinance must then be sent to the department within 10 days of adoption. This is not an unreasonable burden and is mandated so that CTED can provide the necessary help and advice available to them. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 Order on Compliance, (March 18, 2005).

- The Central Board has interpreted this requirement in the case of *Children's Alliance and Low Income Housing Institute v. City of Bellevue*, CPSGMHB Case No. 95-3-0011, FDO and *Home*

Builders Association of Kitsap County v. City of Bainbridge Island, Case No. 00-3-0014 FDO. In those decisions, the Board did not elaborate on what a jurisdiction must actually submit to CTED as "notice of its intent", but the Board recognized that CTED must be fully apprised and fully aware of the substance of any proposed amendment. A city or county's notice must describe *what* it is proposing to do.

The Central Board saw two aspects to the issue of notification of the Department of Community, Trade, and Economic Development: timeliness and sufficiency. Here, Liberty Lake admits that no notice was sent to CTED, relying upon the belief a notice was not needed. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 Order on Compliance, (March 18, 2005).

- The GMA provides that notice of any amendments for permanent changes to a comprehensive plan or development regulation "shall" be submitted "at least sixty days" prior to its final adoption. The record shows that this was not done. This is an error on the part of the City of Liberty Lake and is noncompliant with the provisions of section RCW 36.70A.106.

  The Legislature directed CTED to properly review the substance of all proposed amendments submitted by local government entities. The Board does not wish to undermine the statutorily mandated 60-day timeframe that CTED needs to carry out its duty under the GMA. The Board finds the updated Capital Facilities Policy is an amendment and it should have been sent to CTED for review. The Respondent failed to comply with the GMA. The fact that CTED gave confused directions, while unfortunate, does not excuse Liberty Lake from the requirement of the law. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 Order on Compliance, (March 18, 2005).

- There are no genuine issues as to any material facts in this matter. Therefore, the issue of whether Spokane Valley did not comply with the GMA by failing to provide sixty (60) notice to CTED prior to amending its Comprehensive Plan is properly resolved by Dispositive Motion. The GMA, under RCW 36.70A.106, requires that each city planning under GMA proposing amendments to its Comprehensive Plan shall notify CTED of its intent to amend at least sixty days prior to final adoption.

  Spokane Valley became a "city planning under the Growth Management Act" ("GMA") when it amended its Comprehensive Plan. The Board adopts the reasoning of *Wildlife Habitat Injustice Prevention, et. al. v. City of Covington*, CPSGMHB, 00-3-0012 (Order on Motions (Nov. 16, 2000)) and finds that Spokane Valley is a GMA planning jurisdiction and is subject to the goals and requirements of the GMA.

  Spokane Valley is out of compliance with GMA because it failed to notify CTED of its intent to amend the Comprehensive Plan at least sixty days prior to its adoption of Ordinance Nos. 03-0888 through 03-094. Such actions by Spokane Valley were clearly erroneous. *City of Liberty Lake v. City of Spokane Valley*, EWGMHB Case No. 03-1-0009, Order on Motions, (March 23, 2004).

- RCW 36.70A.110(2) in part provides that Counties must "attempt to reach agreement with each city on the location of an urban growth area within which the city is located." The GMA includes a process to resolve conflicts between cities and counties in designating UGAs: A city may object formally with the CTED over the designation of the urban growth area within which it is located. Where appropriate, CTED shall attempt to resolve the conflicts, including the use of

mediation services." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The City provided that documentation to a long list of agencies including CTED. This notice was sent on Dec. 15, 2000, almost at the same time the amendment was adopted.

  The letter was not sent 60 days prior to the passage of Ordinance 46-00, and it did not clearly state what changes were to be made. Such notice would be helpful to both the City and to the parties affected and should be given. This failure is not merely procedural. We do not have the authority to overlook a failure to comply with this notice. It is clear that if a Board finds a failure to comply, it must remand the matter to the City to cure the noncompliance. (citing *Cameron Woodard Homeowners Assoc. v. Island County*, WWGMHB 02-2-0004, Order on Dispositive Motion, at 2 (2002)).

  In order to comply with the GMA, the City must submit Ordinance 46-00 to CTED anew. It is not sufficient that the ordinance was submitted subsequent to its adoption in order to comply with this portion of the statute. This submission must be accompanied by a notice indicating that 60 days are available for review and that comments by "state agencies," including the department, will be considered as if final adoption had not yet occurred. *Bauder v. City of Richland*, EWGMHB Case No. 01-1-0005 FDO (Aug. 16, 2002).

Compliance

- *See also Keyword* - ***Invalidity***

- [During compliance proceedings, Futurewise asserted its issue was broader than the actually issue on compliance, the Board stated:] Kittitas County adopted its original Comprehensive Plan in 1996 at which time the County designated its resource lands … Futurewise's original (2007) issue and argument was premised on an allegation that the County's criteria was lacking and thus failed to comply with the GMA. The Board permitted review even though the challenged action did not amend the criteria because, at that time, court holdings stated unchanged portions of the County's Comprehensive Plan were open to challenge when a jurisdiction conducted an update pursuant to RCW 36.70A.130(1)(a). But this ability to challenge unchanged portions of a comprehensive plan was set forth by the Court of Appeals in 2007, a decision which has been subsequently reversed by the Supreme Court in 2008. In its holding, the Supreme Court limited challenges only to a county's failure to revise its comprehensive plan with respect to those provisions which were directly affected by new or recently amended GMA provisions. Thus, if Futurewise raised the same assertion today, the Supreme Court's holding in *Thurston County* may bar the challenge. *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, 4th Compliance Order at 12 (May 26, 2010)

- [Finding Stevens County in continuing non-compliance because] Interim regulations are not authorized by the GMA and fail to comply because an interim ordinance will expire in a set period of time. *Futurewise v. Stevens County*, Case No. 05-1-0006, 2nd Compliance Order at 5 (June 17, 2010)

- [Yakima County's "rural settlements" are LAMIRDs but were not evaluated pursuant to the GMA] It is evident from the County's own argument that no analysis has been conducted as to whether or not its Rural Settlements satisfy the GMA's criteria for LAMIRDs. Rather, this analysis is anticipated to be completed within two years. As this Board has previously stated,

planning to come into compliance is not compliance. *Hazen, et al v Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 70 (April 5, 2010)

- Discretion to the County's planning decisions holds true in this compliance proceeding just as it did in the underlying proceeding. *City of Zillah v. Yakima County,* Case No. 08-1-0001, Compliance Order at 6-7 (Jan. 4, 2010)

- How Kittitas County seeks to comply with the GMA is at the County's discretion and the Board will not dictate the steps the County should take. It is the final action taken to achieve compliance, not intermediary steps, which the Board will review. If Futurewise believes the steps being utilized by the County are in violation of the GMA it may file a new Petition for Review or it will have the opportunity to address the County's process and final action(s) in relationship to the compliance issues when Kittitas County files its Statement of Actions Taken to Comply. *Kittitas County Conservation, et al v. Kittitas County,* Case No. 07-1-0004c, Third Compliance Order at 6 (Sept. 18, 2009)

- *See Also, Kittitas County Conservation, et al v. Kittitas County,* Case No. 07-1-0004c, Third Compliance Order at 7 (Sept. 18, 2009) (Failure to take action prior to the compliance deadline warrants a finding of non-compliance. Compliance is not founding on working copies, draft proposals, or good faith).

- [In order to achieve compliance, Chelan County prepared supplemental findings and "re-adopted" some of the challenged comprehensive plan amendments. In response Wenatchee asserted the re-adoption does not "resolve the initial violation."] While it is true the Board found Chelan County had violated RCW 36.70A.130(2)'s limitation, the GMA provides for several exceptions to this amendment limitation - one of which specifically provides for an exception in order to resolve an appeal before the Board… [the rea-doption] comes under the exception of RCW 36.70A.130(2)(b) because Chelan County took these legislative actions in order to resolve the appeal and the GMA specifically provides for such an exception. Whether or not the action selected by the County actually resolves the appeal is another question and is for the Board to decide. *City of Wenatchee v. Chelan County,* Case No. 08-1-0014, Compliance Order, at 6-7 (Sept. 18, 2009)

- *See also, City of Wenatchee v. Chelan County,* Case No. 08-1-0015, Compliance Order at 4-5 (Sept. 18, 2009)(Holding that by repealing of the challenged resolutions, which result in the withdrawal of offending comprehensive plan amendments, the County has removed the basis for non-compliance).

- [T]he GMA permits amendments outside of the annual cycle in limited situations and this would necessarily grant exception to the concurrent review … The GMA desires concurrent review but the goal of this review is to ascertain the cumulative effects … With the review conducted by the County during these compliance proceedings, the BOCC had all of the information made available during the public hearing process to make their decision. *City of Wenatchee v. Chelan County,* Case No. 08-1-0014, Compliance Order, at 8 (Sept. 18, 2009)

- Compliance proceedings do not eliminate public participation; it is just as important when a jurisdiction is responding to an order of the Board as it is during the initial adoption of an ordinance or resolution. *City of Wenatchee v. Chelan County,* Case No. 08-1-0014, Compliance Order, at 9 (Sept. 18, 2009)

- *See also, Larson Beach Neighbors/Wagenman v. Stevens County,* Case No. 07-1-0013, Second Compliance Order at 2-3 (Oct. 6, 2009)(Noting that the County did not file a SATC or appear at the compliance hearing, the Board, in warning the County that such conduct will not be taken lightly, stated that it was particularly troublesome that Stevens County had, in effect, ignored the Board's directives; that the Board expects local jurisdictions to comply with deadlines established for the filing of SATCs and; that the Board expects professional conduct from persons appearing before it).

- [The County failed to file a SATC or a Remanded (Compliance) Index, the Board stated:] This oversight by the County is inexcusable. Whether the County took action to comply with the FDO or not, it has a responsibility to inform the Board and parties of any action taken, if only to acknowledge no action was taken and there is no Remanded Index forthcoming. *Henderson, et al v. Spokane County,* Case No. 08-1-0002, First Compliance Order at 7 (May 7, 2009).

- [Under RCW 36.70A.330] the Board is also required to conduct a hearing and issue a finding of compliance or noncompliance. This process is not an option as suggested by the Intervenor. *Henderson, et al v. Spokane County,* Case No. 08-1-0002, First Compliance Order at 11 (May 7, 2009).

- Upon receiving the Board's [FDO], the County and Intervenor … filed a timely petition for review with Superior Court. This does not constitute compliance. The Board's FDO still remains the law of the case unless a stay [or a final decision] is ordered by the Court. *Henderson, et al v. Spokane County,* Case No. 08-1-0002, First Compliance Order at 12 (May 7, 2009).

- The County must remember - compliance is based not just solely on a finding the County complied with the FDO but that its actions also comply with the GMA. *Larson Beach Neighbors/Wagenman v. Stevens County,* Case No. 07-1-0013 First Order on Compliance at 20 (April 16, 2009)

- [T]he Board acknowledges Stevens County does not have to amend its development regulations to conform to Petitioners' recommendations … nor is this Board empowered to require the County to adopt specific language *unless* such language is mandated in order to achieve compliance with the GMA. As such, although the Board envisioned methods and limitations, if the County was able to devise a regulation which would serve the same end result, then this is acceptable under the GMA. *Larson Beach Neighbors/Wagenman v. Stevens County,* Case No. 07-1-0013 First Order on Compliance at 21 (April 16, 2009)

- [In responding to the County's argument that both the WDFW and Department of Commerce concluded that the County's proposed changes appeared consistent with the requirements of the GMA] This is true, but their letters are only two submissions to the Record and it is the Board that determines GMA compliance, not WDFW or Commerce. *Futurewise v. Stevens County,* Case No. 05-1-0006, Compliance Order at 19 (Dec. 24, 2009)

- The County's compliance to the FDO is judged by all the changes it makes to the CAO, whether additions to or subtractions from the CAO, to bring itself into compliance. *Futurewise v. Stevens County,* Case No. 05-1-0006, Compliance Order at 23 (Dec. 24, 2009)

- Intervenor specifically appealed [three Legal Issues], the Board acknowledges the appeal, the subsequent issued stay … and, with this order, will issue an Order of Abeyance in regards to the compliance proceedings related to these Legal Issues. The Board will not, as Intervenors request, rescind the compliance for those issues appealed. The Stay issued by the Court does not bring the County into compliance on those issues under appeal; it means only that the County does not have to take any legislative action on those issues until such time as a decision is rendered by the Court. During the pendency of the court proceedings the County remains in a non-compliant status but, as Intervenors correctly note, are not required to take action in response to the Board's FDO. Therefore, abeyance of the compliance schedule, essentially a temporary suspension, is the more appropriate terminology. *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Compliance Order, at 9 (Aug. 7, 2008).

- Finding of continuing non-compliane is warranted when County is currently conducting the legislative process to amend its Comprehensive Plan but has not completed the work. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case Nos. 97-1-0018, 01-1-0019, 04-1-0007c, 06-1-0003, Compliance Orders (June 9, 20080.

- The finding of non-compliance or invalidity does not authorize the violation of other GMA provisions. *Miotke v. Spokane County*, EWGMHB Case No. 07-1-0005, FDO, at 14 (Sept. 14, 2007).

- [The Board] has the authority to look at substantive compliance in the context of a failure to act determination. The Board could choose to review the changes substantively if it determines that the circumstances are appropriate. The Board will consider its schedule, the number of parties in the case, the scope and nature of the legal issues before the Board, and whether new petitions have been timely filed challenging the substance of the remand amendment. In this case, the Board did not provide notice of its intention to review the substance of the changes or allowed time for the detailed briefing necessary. The issue is complex and involves several parties. *Kittitas Conservation v. Kittitas County*, EWGMHB Case NO. 06-1-0011, Compliance Order, at 6 (Sept 11, 2007).

- The Petitioners are precluded in the compliance hearing from attacking specific portions of the Comprehensive Plan which were not challenged by the Petitioners in connection with the original hearing on the merits before the Board. *Roberts/Taylor v. Benton County*, EWGMHB Case No. 05-1-0003, Compliance Order, at 11 (April 4, 2007).

- The question on compliance is whether the jurisdiction has met the requirements of the Growth Management Act, not whether it complied with the specific directives of the Board's last order. The Board does not have authority to order the County to take any particular actions to bring itself into compliance. Therefore, when the Board lists actions to be taken in any given case, that list must be viewed only as guidance and not as the standard against which compliance is measured. At a compliance hearing, the question is not whether the Board's direction was followed, but whether compliance was achieved. The task of a GMHB is to determine compliance with the GMA, not whether there could be better solutions followed by a local government. *McHugh v. Spokane County*, EWGMHB Case No. 05-1-0004, Compliance Order, at 5 (internal citations omitted) (March 5, 2007). *See also, Miotke v. Spokane County*, EWGMHB Case No. 05-1-0007, Compliance Order (March 5, 2007).

- It is not the role of a GMHB to "balance the equities" in deciding a case. The GMHB's role is to determine compliance. *McHugh v. Spokane County*, EWGMHB Case No. 05-1-0004, Compliance Order, at 5 (March 5, 2007).

- In compliance hearings where a determination of invalidity has not been entered, the burden of proof remains with the Petitioner. (See RCW 36.70A.320(2)). The Petitioner must convince the Board that the Respondent's efforts to comply are not in compliance with the requirements of the GMA. *Ridge v. Kittitas County, et al*. EWGMHB Case No. 00-1-0017, Compliance Order, (April 10, 2002).

- The Board concurs with Petitioners arguments that development regulations cannot be compliant when they implement non-compliant provisions of a Comprehensive Plan. Development regulations are to implement a Comprehensive Plan (RCW 36.70.040). In this case, the Board finds the objected-to regulations implement the noncompliant portions of the Comprehensive Plan and to that extent, they too are noncompliant. If the provisions are not compliant in the Comprehensive Plan, they are not compliant when found in corresponding provisions of the development regulations. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO, (Nov. 26, 2002).

- The provisions in the development regulations addressing the Rural Transition Zone implement the very Comprehensive Plan provisions previously found non-compliant. We find the Development Regulations implementing non-compliant Comprehensive Plan provisions to also be non-compliant. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO, (Nov. 26, 2002).

- Public participation is a fundamental concept and not to be taken lightly, but RCW 36.70A.330 (1) states that a compliance hearing is for the purpose of determining whether the local government "is in compliance with the requirements of this chapter." The question to be determined is whether the governmental action substantively meets the requirements of the Growth Management Act. The question of public participation would be considered as a factor, but it would not necessarily invalidate the governmental action, if the test of substantive compliance were met. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Compliance Order (Jan. 30, 1995).

- Unlike hearings on the merits, a compliance hearing presents no established set of issues. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

- RCW 36.70A.330 does not preclude the Board from holding multiple compliance hearings. If a county, for instance, is found at a compliance hearing to be in noncompliance but takes subsequent action to come into compliance, it must have an avenue to be found in compliance. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

- There is nothing in the language of RCW 36.70A.330, which suggests that the Board does not have continuing jurisdiction to determine whether a county has come into compliance at some date after an initial compliance hearing. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

- When a compliance hearing results in a finding of continued noncompliance, the Board's jurisdiction is not at an end. It retains jurisdiction to determine at a later date whether compliance has been achieved and to make orders relating to the original compliance order. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

- The Act indicates that compliance hearing findings should not be treated as final. While the FDO of a Board may be appealed under WAC 242-02-860(5) and WAC 242-02-892, no similar authorization exists to appeal a finding of noncompliance. This lack of any other type of judicial involvement indicates that the Board maintains control of the matter. Nor does the legislation ever use the word "final" in describing a finding of noncompliance as it does with a FDO. Therefore, the only body that can address a finding of noncompliance made under RCW 36.70A.330 is the Board. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

- Substantive compliance with the Act is the Board's first consideration. If it finds substantive compliance with the minimum requirements of the Act, its inquiry ends, except where the public participation process is at issue. If substantive compliance is arguable, the Board looks to evidence of procedural compliance. If the record shows valid consideration of the factors necessary for compliance, weight is given to the decision maker's position. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- In a compliance proceeding, petitioners are precluded from attacking specific portions of the comprehensive plan and interim development regulations, which were not raised or considered during petitioners' appeal before this Board. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 97-1-0003, Order on Compliance (May 20, 1997).

- Having been found out of compliance, the county must show it has done what is necessary to comply. *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, Order on Compliance (Sept. 23, 1997).

Comprehensive Plan

- *See also Keyword* - ***Amendment***

- [T]he denial of a proposed amendment to a CP does not amount to an action for which the Board has jurisdiction *unless* the amendment is premised on a mandate articulated by the GMA. *City of Zillah v. Yakima County*, Case No. 08-1-0001 at 16 (Aug. 10, 2009)

- The development regulations are adopted by the County to implement the Comprehensive Plan and Capital Facilities Plan. If a person does not feel the two plans comply with the GMA, a petition for review must be filed within 60 days of the publication of the notice of their passage. The only challenge properly raised concerning the development regulations is whether they properly implement the CP or C F P. *Harvard View Estates, v. Spokane County*, EWGMHB Case No. 02-1-0005, Order on Motion, (May 31, 2002).

- The Comprehensive Plan establishes the County's policy and goals for the management of growth and their compliance with the Growth Management Act. Development regulations are to be adopted to implement those policies and goals. These regulations must be consistent with the

Comprehensive Plan (RCW 36.70A.040). *Harvard View Estates, v. Spokane County*, EWGMHB Case No. 02-1-0005, FDO, (July 29, 2002).

- The balancing of various goals under the GMA occurs during development of the comprehensive plan. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- The Respondent, having adopted its Comprehensive Plan in 1995, should have by that time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

  The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially, where, as to the RSAs, (Rural Service Areas) they stand-alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. That was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision is needed to allow smaller lot sizes within the RSAs "to minimize and contain the existing areas or uses of more rural development". *Concerned Friends of Ferry County v. Ferry County* EWGMHB Case No. 00-1-0001, FDO (July 6, 2000).

- In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends the boards to apply more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of State goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals or this chapter, and implementing a county's or city's future rests with that community. [1997 c 429 sec. 2.] *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO (March 14, 2002).

- It is also the belief of this Board that the Comprehensive Plan and the buffers contained therein govern. The landowner must comply with the Comprehensive Plan of Ferry County and the implementing ordinances prior to development of lands within the subject area. The Timber Forest Practices Ordinance (TFPO) provides only a method, allowed by State law, to eliminate the 6-year moratorium at less cost. The passage of the TFPO, 99-01 by Ferry County, particularly Section 3.03, does not take the Comprehensive Plan out of compliance with the Growth Management Act. If the buffer width found therein were controlling and took precedence over those found in the ICAO, we would have a different result. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 99-1-0004, FDO, (Aug. 23, 1999).

- The TFPO is subject to existing ordinances, particularly the Comprehensive Plan and the implementing regulations, including the Interim Critical Areas Ordinance. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 99-1-0004, FDO, (Aug. 23, 1999).

- An interim designation is made to protect the resource. It recognizes that once resource lands are lost through inappropriate development, it is difficult, if not impossible to reverse the loss. At the comprehensive plan level, designations are reviewed and possibly modified in the light of newly developed information and the need to successfully integrate all the components of the plan. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case Mp/ 95-1-0009, FDO (May 7, 1996).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- Counties are required to designate agricultural lands that have long-term significance for the commercial production of food or other agricultural products. The requirement to adopt a comprehensive plan is in a separate section of the Act. The requirement to designate and conserve agricultural land is not an interim requirement, valid only until the local agency adopts a comprehensive plan. When the comprehensive plan is being adopted, the county is to review the designations and development regulations and insure they are consistent with the plan. The designations are separate requirements under the GMA and can be reviewed by the Board in a separate action. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, Order on Compliance (May 27, 1997).

- Because this Board has found it has the jurisdiction to review the Timber Forest Practices Ordinance's (TFPO) effect upon the County's compliance with the GMA, we must look at the County's Comprehensive Plan and how it is affected. At this time, there are gaps in the County's protection of streams and riparian areas. The County has assured us they will adopt appropriate development regulations to protect the unprotected streams and riparian areas. The fact that another ordinance, the TFPO, has included a 50-foot minimum setback in its language does not excuse the County from adopting development regulations to protect the resources as required by the GMA. The passage of the TFPO ordinance does not move them in or out of compliance. This ordinance places a buffer, although small, where none exist at this time.

  We do not find the TFPO causes Ferry County's Comprehensive Plan to be out of compliance. The Plan is still the final measure of compliance and the passage of the TFPO changes nothing in the plan or in the regulations that still must be adopted. Ferry County Ordinance 99-01 (TFPO). *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 99-1-0004, Order on Reconsideration, (Sept. 29, 1999).

- The GMA makes no provision for an "interim Comprehensive Plan". A Comprehensive Plan adopted by a County or a City, under the GMA, is a final plan, which may be amended as provided by law. *Bargmann/ Greenfield Estates Homeowners' Assn. v. City of Ephrata*, EWGMHB Case No. 99-1-0008c, FDO, (Dec. 22, 1999).

Concurrency

- *See Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, FDO, at 49-52 (March 12, 2007) (holding that the County needs a policy in its comprehensive plan to provide for concurrency and providing general discussion on concurrency).

- In (C.)(1.), the Petitioners argue that Spokane County violated RCW 36.70A.210 and its own Countywide Planning Policies that require County/City planning within UGAs to resolve conflicts and assure concurrency can be met for the proposed use within the UGA.

  "Concurrency" is defined by WAC 365-195-210 and means "adequate public facilities are available when the impacts of development occur." This definition includes two additional concepts: "adequate public facilities and "available public facilities". "Adequate public facilities" means facilities, which have the capacity to serve development without decreasing levels of service below locally established minimums. "Available public facilities" means that facilities or services are in place or that a financial commitment is in place to provide the facilities or services within a specified time. In the case of transportation, the specified time is six years from the time of development. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- WAC 365-195-070(3) further clarifies "concurrency" as not only having adequate facilities available when the impacts of development occur, but adds, "or within a specified time thereafter." The County's Comprehensive Plan, in particular Goal CF.3, Policies CF.3.1 and CF.3.5, promotes concurrency as stipulated by the GMA and requires implementation of a Concurrency Management System to ensure that adequate public facilities and services needed to support development are available, concurrent with the impacts of such development. Policy CF.3.5 also includes a list of facilities that must meet adopted levels of service standards and these include, police protection, public sewer, public water, transportation and schools, among others. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The Respondents are correct in that "[a] comprehensive plan amendment in and of itself does not require concurrency until the time of development", but the record indicates from numerous sources in the record, including the County's staff report, that there is inadequate planning to "ensure", as required by the GMA, that concurrency will take place at the time of development or within a specified time thereafter.

  > "The word 'ensure' found in RCW 36.70A.020(12) imposes a requirement on local governments to state what it plans to do and how that is to be accomplished in order to achieve concurrency compliance. More than a generalized policy statement is necessary to comply with the GMA." (citing *TRG v. Oak Harbor* WWGMHB Case No. 96-2-0002 (FDO, July, 16, 1996)).

  Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al., EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- The Respondents argue that, "the impacts of future development would be analyzed at the time of project permit…" and "…there is nothing in the record which suggests that concurrency cannot be met at that time."

  This statement ignores the underpinnings of the GMA – long-range planning. Our state's cities and counties have a history replete with examples of development first and planning second. That is why the legislature found that uncontrolled sprawl is costly and passed the GMA in 1990, to require cities and counties to do their planning up front, not after the fact. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Concurrency, which is essentially the confirmation that planning has been done in the CFP, would not be such an issue if the County had followed its own Capital Facilities Plan recommendation, which states:

  > "The Growth Management Act allows the County to update the CFP twice each year. At a minimum, the CFP should be updated annually prior to budget adoption. This will allow the County to incorporate the capital improvements from the updated CFP into the County's annual budget."

  Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al., EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- The County must meet the GMA goal of concurrency. They must ensure at the time of new development, public facilities and services are in place or are adequately planned. The word "ensure" found in this statute imposes a requirement on local governments to state what it plans to do and how that is to be accomplished in order to achieve concurrency compliance. The requirements found in the platting ordinances for adequate facilities are not what are required by the GMA. RCW 36.70A.020(12). Because the Comprehensive plan has not been adopted, the Board sees only a portion of the County's management of growth. When the Comprehensive plan is adopted, concurrency is to be measured by the adequacy of public facilities, including parks. Something more than a generalized policy statement is necessary to comply with the GMA. 01-1-0002c: *Loon Lake Property Owners Assoc., et al v. Stevens County;* Amended FDO (Oct. 26, 2001).

- A local government has both the duty and the right to determine the adequacy of public facilities and services. Such a determination requires the examination of current adequacy level and then a local government's future ability to add to those facilities and services. The County must establish an objective baseline to determine minimum level of services standards for public facilities and services.

  RCW 36.70A.020(12) requires local governments to adopt either policies or regulations or a combination thereof that provide reasonable assurances, but not absolute guarantees, that the locally defined public facilities and services necessary for future growth are adequate to serve that new growth, either at the time of occupancy and use or within an appropriately timed phasing of growth, connected to a clear and specific funding strategy. 01-1-0002c: *Loon Lake Property Owners Assoc., et al v. Stevens County*; Amended FDO (Oct. 26, 2001).

Consistency

- The Comprehensive Plan conformity requirement in RCW 36.70A.120 applies to both planning activities and capital budget decisions … Thus, by amending the Future Land Use Map in the Land Use Element to allow for higher density RL-1 contrary to the Rural Element provisions, Benton County's planning activities did not conform with its Comprehensive Plan and created internal plan inconsistencies. *Brodeur/Futurewise, et al v. Benton County,* Case No. 09-1-0010c "Rural Lands" FDO at 19-20 (Nov. 24, 2009) (Mulliken dissenting)

- General Discussion of interplay between Comprehensive Plan and Development Regulations, with more specific regulation controlling. *Southgate Neighborhood Council, et al. v. City of Spokane,* EWGMHB Case No. 08-1-0014, Order on Motions at 21-22 (Oct. 6, 2008).

- Alleging inconsistency without detailing substance, such as a difference in urban density regulations, is not enough for the Board to find the County non-compliant with RCW 36.70A.100 [requiring adjacent jurisdictions' plans to be coordinated]**.** *City of Spokane v. Spokane County,* EWGMHB Case No. 06-1-0002, FDO, at 17 (Nov. 27, 2006).

- The City of Liberty Lake included a discussion of possible annexation. This is appropriate and is the responsibility of planning for Cities. This does not make the CFP inconsistent with their Comprehensive Plan. The population allocated for Liberty Lake's UGA is properly considered and planned for. The consideration of additional population in potential annexation areas is appropriate and not inconsistent with the Comprehensive Plan. *Chevron U.S.A. Inc. v. Hearings Board,* 123 Wn.App 161 (2004). The Record is clear that Liberty Lake's Comprehensive Plan considered population outside of their existing corporate limits. The Capital Facilities Plan and the Comprehensive Plan are internally consistent. *City of Spokane Valley v. City of Liberty Lake, et al.,* EWGMHB Case No. 03-1-0007 Order on Compliance, (March 18, 2005).

- The Respondent does not argue that a review for consistency of the development regulations with the comprehensive plan was not done at this stage. Instead, they argue the law does not require such a review. The Board disagrees. Any review done prior to enactment of the comprehensive plan would be irrelevant to development regulations passed to implement the new comprehensive plan. This review for consistency must be done, and reflected in the record. However, the County will be required to make changes to these regulations. A review at this time would not be appropriate. After the Comprehensive Plan is found in compliance and new regulations are adopted, it is expected that the County will review the regulations and the Plan for consistency. *Concerned Friends of Ferry County/Robinson v. Ferry County,* EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- While it is true the Board did not find non-compliance for failure to require notice on plats and permits issued for development activity within 500 feet of designated resource lands, we noted in that decision that RCW 36.70A.060(1) would still be a requirement of the law. The language provided in Ordinance 2001-09 is non-specific, while the language in the ICAO, as noted by the County, is in specific contradiction to the statutory 500 feet. This contradiction must be corrected to conform to the statute. The distance is 500 feet as required by the above statutory language. *Concerned Friends of Ferry County/Robinson v. Ferry County,* EWGMHB Case No. 01-1-0019, FDO,(June 14, 2002).

- Consistency means comprehensive plan provisions are compatible with each other. One provision may not thwart another. (citing *West Seattle Defense Fund v. City of Seattle,* CPSGMHB Case No. 94-3-0016, FDO). *City of Spokane v. Spokane County and City of Airway Heights,* EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- This action incorporates a revised Road System Plan different than what had been in effect before. The City's contention that Ordinance 46-00 "resolved a conflict" is true to the extent that the then-existing Road System Plan for the subject area had not been previously incorporated into the Comprehensive Plan. Having said that, the fact that this amendment changes certain roadway plans does not in itself cause the City's Plan to be inconsistent. Many options for a road system plan could be very different, and still meet the goals of the GMA and policies of the Comprehensive Plan. Petitioners have failed to show how the option chosen is inconsistent with the Comprehensive Plan. The Petitioners have not carried their burden of proof. *Bauder v. City of Richland,* EWGMHB Case No. 01-1-0005, FDO, (Aug. 16, 2002).

- Ferry County claimed that they reviewed the Interim Critical Areas Ordinance for consistency and found it consistent. The petition herein was filed before this "review" took place. Ferry County provided, at the request of the Board, minutes of the Ferry County Planning commission meetings of June 14, 2000 and July 5, 2000, which discussion items included a review of the "interim critical areas ordinance". The Respondent also supplied minutes of the Ferry County Board of Commissioners of June 19 where the issue of review of the interim critical areas ordinance was discussed. No action was taken by the County, which reflected the results of the claimed review. *Concerned Friends of Ferry County v. Ferry County;* EWGMHB Case No. 00-1-0013, FDO (Nov. 2, 2000)

  The documentation provided was insufficient to convince the Board that a review of the CAO had been preformed which meets the requirements of the Growth Management Act. There was no record provided of any discussion comparing the requirements of the comprehensive plan with the regulations of the Critical Areas Ordinance. There was no record of a public participation process in the review, as required by RCW 36.70A.140. The County needs to review the CAO with public participation. This is especially true where the County has declared to this Board that a final CAO was to be developed and adopted to address the complaints raised in other petitions before this Board. *Concerned Friends of Ferry County v. Ferry County* EWGMHB Case No. 00-1-0013, FDO (Nov. 2, 2000)

- GMA requires that development regulations enacted by planning entities be consistent with the comprehensive plans of those entities, RCW 36.70A.040(4)(d). The zoning regulations adopted by Yakima County is not consistent with the land use designations established for the area by Plan 2015. *Bertelsen, et al. v. Yakima County, et al*, EWGMHB Case No. 00-1-0009, FDO (Nov. 2, 2000).

  Growth Management Act (GMA) also requires that development regulations "implement" the policies and provisions of the comprehensive plan. "Implement" has a more affirmative meaning than merely "consistent with." Implement connotes not only a lack of conflict but sufficient scope to carry out fully the goals, policies, standards and directions contained in the comprehensive plan. The R/ELDP zoning district does not implement Plan 2015's RSS land use designation. *Bertelsen, et al. v. Yakima County, et al*., EWGMHB Case No. 00-1-0009, FDO (Nov. 2, 2000).

- The provisions of any GMA enactment must be internally consistent. This includes the comprehensive plan and development regulations, both interim and final. RCW 36.70A.070. Internal consistency means provisions are compatible with each other and they fit together properly. In other words, one provision may not thwart another. A development regulation must be internally consistent and all development regulations must be consistent with each other. *Saddle Mountain Minerals, LLC, et al. v. City of Richland;* EWGMHB Case No. 99-1-0005, Order on Compliance, (June 21, 2000).

- RCW 36.70A.100 provides "the comprehensive plans of each county or city that is adopted pursuant to RCW 36.70A.040 shall be **coordinated with, and consistent with**, the comprehensive plans adopted pursuant to RCW 36.70A.040 of those counties or cities with which the county or city has in part . . . common borders or related regional issues." (Emphasis provided.) The Board has jurisdiction in this matter. Clearly the issue here is non-project specific, and must be addressed prior to any project-specific action. The statute requires coordination and consistency at this early stage of planning, not just as a part of a development

agreement. *Ridge v. Kittitas County, et. al.*; EWGMHB Case No. 00-1-0017, FDO (June 7, 2001). *Affirmed*, Yakima County Superior Court, Docket No. 00-2-02761-2.

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

Continuance

- The Growth Management Hearings Boards have only the authority the State Legislature granted it under the GMA. Where the parties do not agree to a continuance of the matter and other authority for such a continuance does not exist, a continuance beyond the 180 days is not appropriate. The matter is dismissed. *Husum Citizens Group v. Klickitat County*, EWGMHB Case No. 00-1-0004 Order of Dismissal, Jan. 11, 2002.

Coordination

- *See also Keyword:* ***Joint Planning***

- The statement of purpose found in RCW 36.70A.010, is enforceable. In fact, this Board dealt specifically with the County's obligations to coordinate with other jurisdictions and the obligation to do so under that provision. *Miotke v. Spokane County*, EWGMHB Case No. 07-1-0005, FDO, at 15 (*Affirming City of Spokane v. Spokane County*, Case No. 06-1-0002.) (Sept. 17, 2007).

- [U]nder RCW 36.70A.510 and RCW 36.70.547, [a jurisdiction is] to include consideration of general aviation airports. An amendment of comprehensive plan provisions and development regulations under this chapter affecting general aviation are subject to formal consultation with such airport personnel. *Miotke v. Spokane County*, EWGMHB Case No. 07-1-0005, FDO, at 15-16 (Sept 17. 2007).

- Three components are necessary for good planning under the GMA: an updated capital facilities plan, joint planning among local jurisdictions and concurrency of facilities and services at the time of development. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- At the heart of the GMA is the concept of looking ahead and planning for the future. Joint planning with other jurisdictions and an updated capital facilities plan ensure concurrency for public facilities and services in the future and are key components to implementing the goals and policies of the GMA. In the first section of the GMA, RCW 36.70A.010, the legislature found that <u>uncoordinated and unplanned growth</u> "pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state." Joint planning coordinates growth throughout the County, and a detailed, updated CFP is vital to good planning within a jurisdiction. (Board emphasis). *Moitke/Neighborhood*

Alliance of Spokane v. Spokane County, et al., EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- The initial section of the GMA is only the first reference to coordination between jurisdictions. RCW 36.70A.020(11) not only encourages citizen involvement, but also requires coordination between jurisdictions through the use of the word "ensure" defined earlier under Board Analysis. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- The County did not comply with RCW 36.70A.530, which requires the County to protect the land surrounding our military installations from incompatible development. This statute also requires the County to notify the commander of the military installation of the County's intent to amend its Comprehensive Plan or development regulations to address lands adjacent to military installations to ensure those lands are protected from incompatible development. While the statute provides that amendments adopted under that section shall be adopted concurrent with the scheduled updates provided in RCW 36.70A.130, the statute could be interpreted still as requiring counties to recognize the State of Washington's priority to protect the land surrounding our military installations from incompatible development. The language specifies that amendments to a plan or regulations should not allow development in the vicinity of a military installation which are incompatible with the installation's ability to carry out its mission requirements. The representative of the military base objected to the location of the new urban development, but this did not change the County's action. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- The Board sees that coordination has been occurring since our Order. The Board has no authority to order a particular result from that coordination, and is convinced that the City of Roslyn is "at the table" in matters that relate to its interests. Kittitas County has, as a condition of approval of the MPR, required ongoing coordination with Roslyn. This Board cannot and will not police this coordination. These two governments are working together and should continue to do so. *Ridge v. Kittitas County et al*. EWGMHB Case No. 00-1-0017, Compliance Order, (April 10, 2002).

- Clearly, the largest city in Eastern Washington should be an active participant in the planning for services in urban areas that abut its city limits. In fact, it is the County's failure to coordinate their planning with the City of Spokane that contributed to the findings of noncompliance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- RCW 36.70A.110(2) in part provides that Counties must "attempt to reach agreement with each city on the location of an urban growth area within which the city is located." The GMA includes a process to resolve conflicts between cities and counties in designating UGAs: A city may object formally with the CTED over the designation of the urban growth area within which it is located. Where appropriate, CTED shall attempt to resolve the conflicts, including the use of mediation services." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- RCW 36.70A.110(2) clearly states the Legislature's intent is that the City and County attempt to reach agreement. More effort was required than the County provided. While agreement is not mandatory, an attempt to agree is necessary. The Board finds the County's failure to enter into discussions with the City on the elimination of the City's UGA outside the City is clearly

erroneous. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The importance of coordination is first found in the legislative finding at the beginning of the GMA:

> The Legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and wise use of our lands, pose a threat to the environment, sustainable economic development, and health, safety and high quality of life enjoyed by residents of that state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning… *RCW 36.70A.010.*

The Supreme Court quoted these findings and explained that they:

> Reflect a legislative awareness that land is scarce, land use decisions are largely permanent, and particularly in urban areas, land use decisions affect not only the individual property owner or developer, but also entire communities. *Erickson & Assoc. v. McLerran*, 123 Wn.2d 864, 876 (1994).

Ridge v. Kittitas County, et. al., EWGMHB Case No. 00-1-0017 FDO; (June 7, 2001). *Affirmed,* Yakima County Superior Court, Docket No. 00-2-02761-2, (May 29, 2001)

County-wide Planning Policies (CPPs)

- [The Petitioner directly challenge a CWPP]. The GMA does not allow such an appeal. RCW 36.70A.210(6) allows cities and the governor to appeal county-wide planning policies to the Board within sixty days of adoption, but citizens have no such right. *Panesko v. Benton County*, EWGMHB Case No. 07-1-0002, FDO, at 7 (July 27, 2007).

- Two additional CWPP's reflect the importance of critical areas when adopting amendments to the UGA.

> Urban Policy #2: The location of critical areas and natural resource lands should be a prime consideration in delineating UGAs.
>
> Urban Policy #12: Jurisdictions should work together to protect…critical areas and open space within UGAs.

Both policies are to be considered by the County when determining whether an amendment to the UGA is justified. When six amendments in the same geographical area totaling 229 acres are being considered, both policies are necessary to ensure good planning. Nothing in the record, though, indicates the County and the City worked together to protect or even discuss the critical areas on Five Mile Prairie. For instance, the County's Storm water Utilities Department warned of storm water problems above Shawnee Canyon and that down stream facilities in the City are inadequate for accommodating the runoff that already drains to them. Even with this information available, there is no record of City/County discussions pertaining to this potential problem. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- The Countywide Planning Policies for Spokane County now clearly provide for the referral of any Urban Growth Area Revisions to the Steering Committee of Elected Officials. (Policies Urban 16 – 17.) It is also clear to the Board that upon remand, the changes of the UGA found herein must go through the Steering Committee as is provided by the County's CWPPs. The argument that the applications requesting changes to the size of a UGA must be processed under the policies in effect at the time the application is made and that not doing so would violate RCW 36.70A.020(6) (protection of private property), is without foundation. There is no basis for such an argument. The Respondent stated that the Board is only to consider the request for modification of the UGA boundary and not the development that may later be located upon the subject land. The question is whether the UGA was properly expanded. Property rights are not involved. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.,* EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- The Board looks to RCW 36.70A.020(12) Planning Goals, RCW 36.70A.215 and RCW 36.70A.070(3), (4), & (6), the CWPP's and case law to determine whether the Petitioners have proven Resolution 05-057 fails to comply with the GMA when the land at issue is located in a rural area with limited utilities, transportation, and access. A county or city can't fulfill the requirements of Planning Goal #12 without a futuristic look at their community using a detailed capital facilities plan element, among other elements of their comprehensive plan. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- Regardless of how the County words its preamble, in *C.U.S.T.E.R.*, the Western Board found "cities and counties are both required to adhere to the county-wide planning policies." *C.U.S.T.E.R. v. Whatcom County*, WWGMHB Case No. 96-2-0008 (FDO, 9-12-96). The Eastern Board, in *Whitaker v. Grant County*, Order on Reconsideration. (Aug. 7, 2000), agreed that, "Only those county-wide planning policies that are directive are mandatory." *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- It is vital to follow the CWPP and document the data *from the an*alysis performed. Liberty Lake must do this before proceeding to finalize the Comprehensive Plan. This clearly was *not done. The Board finds not*hing in the record supporting the City of Liberty Lake's contention *that it followed the CWPP and t*he process outlined therein.

  It is clear that the City of Liberty Lake failed to prepare an adequate 6-year Capital Facilities Plan. Once the boundaries are set and the population allocation received, this must be done. *City of Spokane Valley v. City of Liberty Lake, et al.,* EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004).

- The Board finds that Liberty Lake has not complied with Spokane County's CWPPs by their failure to receive a recommended population allocation from the Steering Committee and failure to received the population allocation from the Board of County Commissioners prior to Liberty Lake's adoption of its Comprehensive Plan through Ordinance No. 118. Liberty Lake cannot properly complete the reviews necessary and develop its Comprehensive Plan until the County allocated future population figures for the City. The Hearings Board cannot properly review the City's Comprehensive Plan until it knows the projected population of the City. Growth plans for a city depend upon the projected population. A final UGA can only be designated after a future

population allocation has been made. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004).

- The Board finds City of Airway Heights acted unilaterally to pre-empt a joint planning process required by the Countywide Planning Policies. The GMA requires coordination among affected jurisdictions. Airway Heights has clearly erred by circumventing the CPP. *Spokane County Fire District No. 10 v. City of Airway Heights, et al.*, EWGMHB Case No. 02-1-0019, FDO, (July 31, 2003).

- The Board concurs with Petitioner and Intervenor that the action is significant and is subject to the Growth Management Act, and therefore, the Countywide Planning Policies. Ordinance C-517 is an amendment to the City's Comprehensive plan and clearly must comply with the GMA. The City's attempt to explain the action under statutes authorizing annexations does not justify circumventing the GMA mandated process.

  The Washington State Supreme Court ruled in *King County v. CPSGMHB*, 138 Wn.2d, 161, 175 (1999), that Countywide planning policies are mandatory, stating in part, "If the CPPs served merely as a non-binding guide, municipalities would be at liberty to reject CPP provisions and the CPPs could not ensure consistency between local comprehensive plans." *Spokane County Fire District No. 10 v. City of Airway Heights, et al.*, EWGMHB Case No. 02-1-0019, FDO, (July 31, 2003).

- Substantive CPPs are binding on the county if they are directive also meets the following three criteria: 1. A policy must meet a legitimate regional objective, 2. It may not usurp a city's land use powers, and 3. It must be consistent with other relevant provisions in the GMA. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The City contends the County violated CPP 12.1, which requires that new land use designations be "cooperatively determined". Again, as referred to above, directive CPPs can be binding. Here, the County and City are directed to cooperate in the creation of new land use designations. Cooperation, while commendable, does not require mutual agreement on each issue. Here, where the County must make the final decisions, cooperation can mean discussion and disagreement and the County proceeding, as they deem appropriate. If the CPPs were drafted to require agreement of both parties prior to the adoption of a new land use designation, they could be directive and possibly binding. Here the County is not out of compliance. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- With regards to the siting of essential public facilities, the Board finds no provision in the law that would require the County to follow the Steering Committee's recommendation, regardless of what the CWPPs state. The CWPPs are to be followed by the County, but only to the extent allowable under existing law. The County cannot delegate its statutory responsibility to the Steering Committee. Therefore, its actions, retaining final authority for decision-making could not be found by this Board to be out of Compliance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The Act requires the adoption of a framework agreement between the cities and the County for the adoption of a countywide planning policy. *City of Ellensburg v. Kittitas County*, EWGMHB Case No. 95-1-0003, FDO (Aug. 22, 1995).

- Cities and the county are required to have a framework agreement for the adoption of countywide planning policies. They are free, however, to determine and negotiate the content of this agreement. It may or may not include a ratification provision, but once an agreement is adopted, the development and adoption of the countywide planning policy must be consistent with the agreement. *City of Ellensburg v. Kittitas County*, EWGMHB Case No. 95-1-0003, FDO (Aug. 22, 1995).

- Only those CPPs that are directive are mandatory. There is no question the language found in CPP 2B 1-D was directive. That CPP states as follows: "Urban densities are prohibited outside of established urban growth areas except for the establishment of master planned resorts and new fully contained communities consistent with the requirements for reserving a portion of the twenty (20) year county population projection." It could not be said any clearer. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, FDO; (May 23, 2000).

- The fact that Policy 14 of the CPPs, adopted as the preamble to the CPPs, states that it is understood the policies are meant as "general framework guidelines" for the county and each municipality and that flexibility must be maintained in order to adapt to different needs and conditions, does not change the mandatory nature of a directive CPP. The King County Court, supra, made it clear the CPPs do not serve as nonbinding guides. "If the CPPs served merely as a nonbinding guide, municipalities would be at liberty to reject CPP provisions and the CPPs would not ensure consistency between local comprehensive plans. The Board was therefore correct to conclude that the CPPs are binding on the County." P.175. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration. (Aug. 7, 2000)

  The CPPs need not list every possible way to locate urban densities outside UGAs in order to prohibit it. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Reconsideration (Aug. 7, 2000); *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, FDO (May 23, 2000). (*Affirmed*, Thurston County Superior Court, Docket No.00-2-01622-8).

- The Board finds that the GMA establishes the Countywide Planning Policies ("CPPs") as the mechanism for achieving consistencies between the comprehensive plans of a county and the cities within that county. RCW 36.70A.210(1) provides a CPP "shall ensure that city and county comprehensive plans are consistent as required by RCW 36.70A.100." The Board has already ruled that the MPR Policies are consistent with the CPPs. *City of Ellensburg v. Kittitas County*, EWGMHB No. 96-1-0017. The Board is not asked whether the Mountain Star Subarea Plan is consistent with the CPPs, but with the City of Roslyn. We find that if the Mountain Star Subarea Plan is consistent with the CPPs, it is inherently consistent with the comprehensive plan for the City of Roslyn. No one has challenged the consistency of the Roslyn Comprehensive Plan with the CPPs.

- Comprehensive plans must be consistent with countywide planning policies. However, countywide planning policies are not mandatory or binding on development regulations. Thus, development regulations are not required to be consistent with countywide planning policies. The subject interim zoning ordinance is a development regulation. As such, it need only be consistent with the Comprehensive Plan, not the countywide planning policies. *City of Moses Lake v. Grant County*, EWGMHB Case No. 01-1-0010, FDO, (Nov. 20, 2001) (internal citations omitted).

Critical Areas (*see also* Best Available Science and individual types of areas)

- Under the Growth Management Act, RCW 36.70A (GMA), there are essentially three types of land – urban, resource, and rural. But within each of these types of land there exists the possibility of critical areas which provide essential functions and values requiring protection from the adverse impacts of development. Yakima County's duty to designate and protect critical areas has been in the GMA since the beginning. RCW 36.70A.170(1)(d) requires the County to designate critical areas and RCW 36.70A.030(5) defines these areas and ecosystems. In addition, the requirement for regulatory protection is clearly articulated in RCW 36.70A.060(2) … Given the inherently scientific nature of understanding the natural processes underlying these functions and values, the Washington State Legislature mandated best available science (BAS) be utilized in the decision-making process to formulate policies and regulations related to a jurisdiction's critical areas. This requirement was not added until 1995 with the enactment of RCW 36.70A.172(1). *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 18 (April 5, 2010)

- WAC 365-190-040(5)(a) denotes that when designating critical areas, Yakima County was to provide for the general distribution, location, and extent of the critical area. WAC 365-190-040(5)(b) goes on to state in circumstances where critical areas cannot be readily identified, these areas should be designated by performance standards or definitions and WAC 365-190-040(5)(c) provides that designation could be satisfied by the adoption of a policy statement. It would appear to the Board that CARAs expressly fall within this realm because, unlike wetlands or streams which can be visually delineated, the underground nature of an aquifer provides for a more challenging determination as to their location and boundaries. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 22-23 (April 5, 2010)

- [The Board relying on the Court of Appeals holding in *WEAN v Island County, 122 Wn. App. 156 (2004)* stated] Although the Board has no doubt federal, state, and local regulations intended to protect aquifers are based on credible science, it is impossible for the Board to determine if these regulations where subject to the critical areas analysis required by the GMA … federal and state regulations do not replace local regulations because they cannot focus on local conditions in the way local governments can. If the County seeks to fulfill its duty by relying on existing regulations – whether they be federal, state, local, or tribal - then those regulations must be subject to the applicable critical areas analysis to ensure compliance with RCW 36.70A.172(1)'s requirement to include BAS. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 26 (April 5, 2010)

- [In responding to petitioner's issue contending CAO exemptions violated the GMA, the Board, relying on *Clallam County v. WWGMHB*, 130 Wn. App. 127, 140 (2005) held] Although exemptions are not prohibited under the GMA, all development regulations, even those for exempt activities, are to be based on BAS and tailored so as to reasonably ameliorate potential

harm and address cumulative impacts. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 29 (April 5, 2010)

- [In regards to CAO exemptions, the Board noted] The County contends the administrative review process of YCC 16C.03.06 will assure the functions and values of the critical area will be protected. However, it is not the review process but the inclusion of BAS that is imperative when it comes to critical areas. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 30 (April 5, 2010)

- *See, CFFC v. Ferry County,* Case No. 97-1-0018, 8th Compliance Order (Feb. 23, 2010)(Finding no reasoned justification for deviation from BAS in the Record, failure to designate FWHCAs, failure to protect functions and values of FWHCAs (specifically as to mapped polygon areas, and failure to adopt consistent language with Comprehensive Plan)

- [Contrary to the Petitioners' assertion that an identifiable threat to critical areas was needed, the Board stated:] The GMA does not require a threat to be established to the functions and values of critical areas for these areas to be designated and protected. The term "where appropriate," indicates all critical areas as defined by the GMA … Local jurisdictions have discretion as to how this will be accomplished, but not "where" if the critical area falls within the definition. *Riparian Property Owners, et al v. Ferry County,* Case No. 09-1-0002, Order on Motion to Dismiss at 5 (April 22, 2009)

- [T]he relevant standard under the GMA is for the functions and values of critical areas are to be *protected with further degradation of the area being prevented* … The GMA requires the County to enact development language which *protect* critical areas from adverse impacts, not *minimize* the effect of those impacts. *Larson Beach Neighbors/Wagenman v. Stevens County,* Case No. 07-1-0013 First Order on Compliance at 24 (April 16, 2009)

- The County adopted regulations which protect the functions and values of the critical areas and that means all the functions and values, including riparian habitat functions that protect all the ETS species found in Stevens County. The [previously adopted] 200-foot buffer covers most, but not all of the functions and values and is better than the County's standard riparian buffers found in SCC 13.10.034(1). Therefore, the County needs to use a reasoned process and must rely upon scientific information to remove the 200-foot buffer for ETS species and habitat. *Futurewise v. Stevens County,* Case No. 05-1-0006, Compliance Order at 23 (Dec. 24, 2009)

- One of the primary goals of the GMA is to protect the environment and enhance the state's high quality of life, including air and water quality and the availability of water. To accomplish this task, jurisdictions are required to adopt guidelines to classify critical areas … Jurisdictions which are required to plan or voluntarily opt to plan, like Ferry County, are also required to designate critical areas … and shall include BAS in developing policies and development regulations to protect the functions and values of critical areas. *Simmons, et al v. Ferry County,* Case No. 09-1-0002c, FDO at 10-11 (July 30, 2009)

- [In response to Petitioners' assertion that the data and maps to determine priority habitat areas and species observation points were insufficient or not available to the public, the Board noted:] [S]ensitive and restricted material concerning fish and wildlife information, including more detailed maps and species information, is exempt from public dissemination by RCW 42.56.210. *Simmons, et al v. Ferry County,* Case No. 09-1-0002c, FDO at 12 (July 30, 2009)

- The County is correct in that it has some local government discretion in adopting its regulations, but if the County departs from the science in the record or parameters of BAS, then it must include the BAS it used in order to prevent speculation and surmise in an area that is scientific in nature, identify other GMA goals which it is implementing, and provide reasoned justification when departing from BAS.34 Departure from BAS does not amount to a relinquishment of the duty to protect the functions and values of wetlands. *Concerned Friends of Ferry County/Robinson v. Ferry County,* EWGMHB Case No. 06-1-0003, 2nd Compliance Order at 16 (March 17, 2009).

- [To support limitations in its CAO in regards to agricultural activities, the County referenced legislation which enacted RCW 36.70A.560(1), allowing counties and cities to defer amending or adopting critical area ordinances under RCW 36.70A.060(2) as they specifically apply to agricultural activities for the time period stated. The Board noted:]. Under RCW 36.70A.560(3), "agricultural activities" means agricultural uses and practices currently existing or legally allowed on rural land or agricultural land designated under RCW 36.70.170. According to the definition above, the Board agrees this statute applies to Ferry County. *Concerned Friends of Ferry County/Robinson v. Ferry County,* EWGMHB Case No. 06-1-0003, 2nd Compliance Order at 15 (March 17, 2009).

- The County chose to protect wetlands using the DOE's Buffer Alternative 3, which is "[W]idth based on wetland category, intensity of impacts, and wetland functions or special characteristics."40 The intensity of impacts criteria, which are directly related to the frequency and duration of disturbance,41 is a key component of Alternative 3. By allowing high impact agricultural activities and residential use in its low intensity wetland areas, the County failed to protect the functions and values of wetlands, and failed to provide any reasoned justification, such as scientific-based information, to depart from the DOE's land use recommendations for Low Intensity Land Use. *Concerned Friends of Ferry County/Robinson v. Ferry County,* EWGMHB Case No. 06-1-0003, 2nd Compliance Order, at 19 (March 17, 2009).

- [In citing to the Court of Appeals decisions in *HEAL* and *WEAN* and the Supreme Court's decision in *Ferry County,* the Board summarized the need for BAS in critical areas:] To reiterate from the HEAL and WEAN cases, the Court concluded:
  1. Evidence of BAS must be included in the record.
  2. BAS must be considered substantively during the development of critical areas regulations.
  3. Local governments may adopt critical areas regulations outside of the range of BAS.
  4. But if a regulation is outside of the range of BAS, then the local government must provide reasoned justification for departure from BAS and identify other GMA goals being implemented.
  5. Critical areas regulations must protect all the functions and values of designated critical areas.
  Concerned Friends of Ferry County/Robinson v. Ferry County, EWGMHB Case No. 06-1-0003, 2nd Compliance Order, at 19-21 (March 17, 2009).

- General discussion as to designation of CAs and adoption of development regulations to protect, including consideration of BAS. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 42-44 (Oct. 6, 2008).

- The CAO provides various regulations intended to protect critical areas, including the classification of critical areas (i.e. category of wetlands or susceptibility of aquifers), with protections provided through the establishment on minimum buffers, building setbacks,

limitation on uses (CARAs only), report requirements (i.e. hydrogeologic site evaluation or wildlife habitat management plan), satisfaction of building or flood code provisions (i.e. structural requirements for geological hazard areas), enforcement and review/appeal provisions. However, as the Petitioners correctly note, the CAO does not assign zoning densities or uses (which the limited exception of some uses sets forth in provisions applicable to CARAs) or sets forth specific design standards (i.e. minimum lot sizes, lot coverage, etc) that may assist in providing protection for the functions and values of the critical areas. In contrast, SCC Title 3 is adopted pursuant to both the GMA and the County's authority granted by the Washington State Constitution and has many purposes in relationship to the development of land within the County … Title 3 provides the establishment of zoning districts, uses and densities, development and design standards (i.e. setbacks, road classifications, parking requirements), including special standards for certain types of development … Title 3 specifically sets forth Environmental Performance Standards. *Larson Beach/Wagenman v. Stevens County,* EWGMHC Case No. 07-1-0013, FDO at 47 (Oct. 6, 2008).

- The Board does not discount the County's use of a CAO to protect critical areas from adverse impacts and pursuant to SCC 3.04.020, all designated critical areas will be considered during development application review. However, as noted supra, RCW 36.70A.060(2) requires the adoption of DRs that protect designated critical areas and the Board does not see a CAO as the <u>only</u> regulation which serves to protect critical areas. DRs Title 3 can be utilized to amplify protections set forth in a jurisdiction's CAO by setting forth simple design standards, such as those suggested by the Petitioners – limitations on impervious coverage and consideration of storm water runoff. *Larson Beach/Wagenman v. Stevens County,* EWGMHC Case No. 07-1-0013, FDO at 49 (Oct. 6, 2008).

- With the exception of provisions relating to the expansion of non-conforming uses, the CAO does not address impervious surfaces, nor, with the exception of noting one of the beneficial functions of wetlands is storm water control, 128 does the CAO address storm water run-off itself. Therefore, these aspects of environmental protection are left to other DRs. *Larson Beach/Wagenman v. Stevens County,* EWGMHC Case No. 07-1-0013, FDO at 450 (Oct. 6, 2008).

- It is common knowledge storm water discharges, carrying both natural (silt, sediment, etc) and man-made (oils, chemicals, etc) pollutants can adversely impact the chemistry of a critical area. Although the Board recognizes the method of storm water control within the rural area will differ from that of the UGA, the consideration of storm water discharge resulting from a development proposal should, at a minimum, be considered within the development review process so as to ascertain whether increases in discharge resulting from the development would adversely impact critical areas. The Board further recognizes not all development proposals within areas outside of the UGAs would result in storm water issues; however, some types, such as cluster developments, may necessitate the provision of some type of controls given the compact nature of such developments. *Larson Beach/Wagenman v. Stevens County,* EWGMHC Case No. 07-1-0013, FDO at 50-51 (Oct. 6, 2008).
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- The Critical Areas Ordinance is the tool for carrying out the GMA requirement that all jurisdictions, whether or not they plan under GMA, must designate and protect critical areas. *CFFC/Robinson v. Ferry County,* EWGMHB Case No. 06-1-0003, FDO, at 15-16 (Oct. 2, 2006)

- While the GMA is specific as to what critical areas counties and cities must designate and protect using best available science, the Act is silent on what a county or city must do to enforce these requirements or punish violations of them. Enforcement of the Act through local comprehensive plan regulations and critical areas ordinances are where counties and cities are allowed to use their discretion [bounded by state law]. *CFFC/Robinson v. Ferry County,* EWGMHB Case No. 06-1-0003, FDO, at 16 (Oct. 2, 2006).

- The [CAO] is the tool for carrying out the GMA requirement that all jurisdictions, whether or not they plan under GMA, must designate and protect critical areas, which include wetlands, areas with a critical recharging effect on aquifers used for potable water, frequently flooded areas, geologically hazardous areas and fish and wildlife habitat conservation areas. In designating and protecting critical areas, counties and cities shall include the [BAS] in developing polices an development regulations to protect the functions and values of critical areas. RCW 36.70A.030(5), RCW 36.70A.170, and RCW 36.70A.172. *Concerned Friends of Ferry County/Robinson v. Ferry County,* EWGMHB Case No. 06-1-0003, FDO at 15-16 (Oct 2, 2006).

- While the GMA is specific as to what critical areas counties and cities must designate and protect using [BAS], the Act is silent on what a county or city must do to enforce these requirements or punish violations of the …counties and cities are allowed to use their discretion …The County has included a violation section, a penalty section, and a civil remedy section in its final RLCAO. It may not be the most comprehensive, but it provides a legal remedy and enforcement for violations of the [CAO]. The Board looks to theses sections and the State's enforcement capabilities [under RCW 90.58] to ensure that Ferry County's critical areas will be protected as required. *Concerned Friends of Ferry County/Robinson v. Ferry County,* EWGMHB Case No. 06-1-0003, FDO at 16-17 (Oct 2, 2006).

- Two additional CWPP's reflect the importance of critical areas when adopting amendments to the UGA.

  > Urban Policy #2: The location of critical areas and natural resource lands should be a prime consideration in delineating UGAs.
  >
  > Urban Policy #12: Jurisdictions should work together to protect…critical areas and open space within UGAs.

  Both policies are to be considered by the County when determining whether an amendment to the UGA is justified. When six amendments in the same geographical area totaling 229 acres are being considered, both policies are necessary to ensure good planning. Nothing in the record, though, indicates the County and the City worked together to protect or even discuss the critical areas on Five Mile Prairie. For instance, the County's Storm water Utilities Department warned of storm water problems above Shawnee Canyon and that down stream facilities in the City are inadequate for accommodating the runoff that already drains to them. Even with this information available, there is no record of City/County discussions pertaining to this potential problem. Ex. 14. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The record fails to show where Spokane County "considered", by any means or credible study, the cumulative effects of the six adopted amendments in this area as required by NE.10, nor did it pursue jurisdictional cooperation as recommended in CP Policies #2 and #12, or acknowledge the County's staff comments or Staff Report. The Staff Report for each amendment does contain

a Cumulative Impact Evaluation, but this segment of the report does not consider critical areas or storm water runoff in its evaluation. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* FDO, (Feb. 14, 2006).

- Clearly, the County has an obligation to determine the cumulative impact to an area's critical areas when the area's history reflects problems with storm water runoff, erodable soils and geologically hazardous areas. In fact, Five Mile Prairie is a "major storm water problem area," according to Spokane County. Five Mile Prairie, as with other problem areas throughout the County, is underlain by geology that does not readily absorb water; therefore, it tends to experience acute storm water problems just after a heavy rain or rapid snowmelt. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, Respondent, et al,* FDO, (Feb. 14, 2006).

- Mitigation and the right to develop private property, however, do not negate the County's responsibility to protect critical areas as required by the GMA, the County's CP, its CWPP's and adopted ordinances, such as its Critical Areas Ordinance. With ample evidence of problems or potential problems with storm water runoff, erodable soils and geological hazardous areas on Five Mile Prairie and shared jurisdiction with the City, the County is responsible to plan upfront to prevent problems from occurring, not after the permits are issued. In addition, the Comprehensive Plan must be internally consistent, even when adopting amendments to the CP, to protect critical areas. There is a requirement under WAC 365-195-315 to reassess the land use element, which requires provisions for protection of the quality and quantity of ground water used for public water supplies and, where applicable, a review of drainage, flooding, and storm water runoff in the area covered by the plan and nearby jurisdictions. The reassessment is required if the probable funding for capital facilities at any time is insufficient to meet existing needs. The plan should require that as a result of such reassessment appropriate action must be taken to ensure the internal consistency of the land use and capital facilities portions of the plan. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- As required by the GMA, the County must protect listed species and their habitat. Even though the County has protected five of the six listed species to some degree by protecting riparian areas, wetlands, lakes and waterways, it has not fully complied by protecting all fish and wildlife conservation areas for listed species using BAS. If the County had not added SCC 13.10.034(3)(C) and if they had referenced and adopted the use of the WDFWs Priority Habitats and Species Database maps, which include polygon habitat areas for species such as the lynx, as the County did with SCC 13.10.034(4) Mapped Point Species Observations, it would be in compliance. But the County did not. *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

- The Growth Management Act provides that: On or before Sept. 1, 1991, each county, and each city, shall designate where appropriate: (d) critical areas. RCW 36.70A.170(d).

  In designating and protecting critical areas under this chapter (36.70A.172(1), counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.

  RCW 36.70A.060(2) provides that every county shall adopt development regulations that protect critical areas. The definition of "critical areas" includes "fish and wildlife habitat conservation

areas" (FWHCA). RCW 36.70A.030(5)(c). *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

- In designating fish and wildlife habitat conservation areas, the County must at least designate "areas with which endangered, threatened, or sensitive species have a primary association and the designation" must be based on best available science as required by 36.70A.172. *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

- The County has done an admirable job of requiring pre-set buffers or alternative buffers set on a case by case basis, and requiring a report from a qualified professional to set management recommendations, if a development is within "a mapped critical habitat area" for ETS species. But the County falls short by defining "critical habitat" as "only those areas designated by a state or federal agency through a formal statutory or rule-making process. *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006.)

- If Stevens County does not designate fish and wildlife conservation areas for certain listed species using BAS and all the information available from WDFW, but neighboring counties, such as Ferry County and Pend Oreille County do, then there would be a disconnect in protection for the listed species and extinction a real possibility. To protect ETS species and their habitat, such as the lynx, which knows no country, state or county boundary, there must be intergovernmental cooperation and coordination, as stated in WAC 365-190-080(5). *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

- Simply put, the federal government can designate critical habitat for ETS species, but under a separate rule-making process and, for the most part, only for federal lands. Therefore, the U.S. Fish and Wildlife Service rule-making does not have an effect on most state or Stevens County lands. *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

- The Board asks the following question. If the state does not have the legislative authority to designate critical habitat for ETS species through a rule-making process and the federal government's rule-making for ETS species habitat is separate from its listed species, then what jurisdiction is responsible to protect the ETS species habitat? This question is answered by Mr. Kevin Robinette in his e-mail to Ms. Wagenman on July 28, 2004:

  > "Since Critical Areas are designated by Counties and Cities under the Growth Management Act (with input from WDFW and the public), the formal rule making process is that of the local municipalities."

  Futurewise v. Stevens County, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

- Since there is no "formal statutory or rule-making process for ETS species critical habitat", SCC 13.10.034(3)(C) fails to protect Fish and Wildlife Habitat Conservation Areas as required by the GMA. The protection measures are based on a specific "mapped critical habitat area". *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

- As required by the GMA, the County must protect listed species and their habitat. Even though the County has protected five of the six listed species to some degree by protecting riparian areas, wetlands, lakes and waterways, it has not fully complied by protecting all fish and wildlife conservation areas for listed species using BAS. If the County had not added SCC 13.10.034(3)(C) and if they had referenced and adopted the use of the WDFW's Priority Habitats

and Species Database maps, which include polygon habitat areas for species such as the lynx, as the County did with SCC 13.10.034(4) Mapped Point Species Observations, it would be in compliance. But the County did not. *Futurewise v. Stevens County,* EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

- The GMA requires all Counties, even those who are not fully planning under the GMA, to adopt development regulations that protect the functions and values of Critical Areas. RCW 36.70A.060(2) and (3) and RCW 36.70A.172. Critical Areas include: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. RCW 36.70A.030(5). *Concerned Friends of Ferry County, et al. v. Ferry County,* EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- RCW 36.70A.172(1) requires that Best Available Science (BAS) shall be included "in developing policies and development regulations to protect the functions and values of critical areas." The Court of Appeals, Division I, held "that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations. " (citing *HEAL v. CPSGMHB,* 96 Wn. App. 522, 532, 979 P.2d 864 (1999)). *Concerned Friends of Ferry County et al. v. Ferry County,* EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- Recently the Court of Appeals decided a case similar to HEAL, *supra*, *WEAN v. Island County, et al*, 118 Wn. App. 567; 76 P.3d 1215, and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN*, the County appealed the WWGMHB's decision finding a 25-foot buffer for Type 5 streams failed to comply with the GMA for Type 5 stream buffers. The Court found the "County fails to point to any part of the record outlining the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *HEAL* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations… BAS does not support the use of a 25-foot buffer." (*WEAN*, *supra* at p. 584). *Concerned Friends of Ferry County et al. v. Ferry County,* EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- The County in *WEAN* contended the 25-foot buffer fell within the range of some of the evidence given and therefore the County's decision should be affirmed. The *WEAN* Court disagreed. "While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to Type 5 streams." (*Supra* p. 585). The GMA requires the regulations for Critical Areas to protect the "functions and values" of those designated areas. This means all functions and values. *Concerned Friends of Ferry County et al. v. Ferry County,* EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- Here, Ferry County has no expert or scientific evidence in the record supporting the buffers adopted for their streams and wetlands or the evidence dealt with specific and narrow functions, rather than the entirety of functions of that stream. The Respondents' argument that BAS, including from their own expert, was considered in adopting the Ordinance, does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen for Type 1 and 2 waters or for the exceptions allowing reduction to 25 feet. *Concerned Friends of Ferry County et al. v. Ferry County,* EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- The buffers established for Type 1 and 2 waters in Ferry County are inadequate and do not comply with the Growth Management Act's requirements to protect Critical Areas and use Best Available Science in doing so. There is no science in the record that purports to support the buffer width established herein. *Concerned Friends of Ferry County et al. v. Ferry County*, EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- The Common-Line Setbacks and the Riparian Area Width Averaging, Sections 1.07 and 1.08, are also out of compliance to the extent that they would allow the buffer to be reduced below the 100 feet for Type 3 and 4 waters and 50 feet for Type 5 waters. These sections would also be out of compliance for any reduction to Type 1 and 2 waters. There is no science in the record supporting this reduction. The County is required to protect Critical Areas and use BAS in developing the protection. *Concerned Friends of Ferry County et al. v. Ferry County*, EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- WDFW submitted an amicus brief on the subject, in which it "agrees with the County that the GMA does not expressly require that priority habitats must be protected with measures above and beyond what is required for areas that are not priority habitats." The question for the Board, according to WDFW, is whether Title 13 protects functions and values in accordance with best available science.

  We agree with WDFW that GMA does not require additional protection for priority habitat, even priority habitat associated with listed species. In other words, priority habitat is subject, at most, to the protection requirements found necessary for the protection of that habitat. Ms. Wagenman does not contend that the protections in Title 13 for fish and wildlife habitat conservation areas fail to protect functions and values. Ms. Wagenman has not met the burden of showing that the County's action is clearly erroneous and that the priority habitat is not adequately protected. *Loon Lake Property Owners Assoc., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Compliance, (Oct. 15, 2004).

- Previously, the CARA (Critical Aquifer Recharge Areas) protection requirements in Title 13 were triggered only if certain disclosures were made in a checklist to be completed by project applicants. The Board found there was no appropriate trigger and was non-compliant with GMA because, in the Board's opinion, it did not adequately assure that the appropriate protection requirements would be imposed. The Board did not find the process for designating CARA to be noncompliant, nor did the Board find the protection requirements to be noncompliant, and the Board will not revisit those issues here. *Loon Lake Property Owners Assoc., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Compliance, (Oct. 15, 2004).

- In amending Title 13, the County implemented a process for assessing all development proposals using available scientific information, and requiring additional review for certain activities or where insufficient information exists to assess possible impacts. SCC 13.10.045. These steps remain in place unless or until CARA designations are completed. *Id*. As a result of this change, the submission of any development application triggers review by the County and project applicants are no longer the primary source of information regarding CARA susceptibility, resulting in more reliable application of the appropriate protection requirements. Petitioner Wagenman has failed to meet her burden of demonstrating that the County's action is clearly erroneous. *Loon Lake Property Owners Assoc., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Compliance, (Oct. 15, 2004).

- The Court of Appeals in *WEAN, supra*, found the Superior Court erred when it reversed the Western Washington Growth Management Hearings Board's ruling that 25-foot buffers for type 5 streams were inadequate. In that case, the County had argued that substantial evidence did not support the Western Board's order, and that the Western Board failed to defer to the County's discretionary balancing of the best available science (BAS) with other factors. The County also argued that the Western Board erred when it ignored the testimony of the County's expert and determined that his expert opinion was not BAS. *Larson Beach Neighbors/Wagenman v. Stevens County, et al*., EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Recently the Court of Appeals decided a case similar to *HEAL, supra, WEAN v. Island County et al*, 118 Wn. App. 567; 76 P.3d 1215, and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN* the County appealed the WWGMHB's decision finding a 25-foot buffer for type 5 streams failed to comply with the GMA for 5 steam buffers. The Court found the "County fails to point to any part of the record outlining the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *HEAL* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations… BAS does not support the use of a 25-foot buffer." (*WEAN, supra* at p. 584). *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Court of Appeals in *WEAN, supra*, found the Superior Court erred when it reversed the Western Washington Growth Management Hearings Board's ruling that 25-foot buffers for type 5 streams were inadequate. In that case, the County had argued that substantial evidence did not support the Western Board's order, and that the Western Board failed to defer to the County's discretionary balancing of the best available science (BAS) with other factors. The County also argued that the Western Board erred when it ignored the testimony of the County's expert and determined that his expert opinion was not BAS. *Larson Beach Neighbors/Wagenman, v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The County in *WEAN* contended the 25-foot buffer fell within the range of affirmed. The *WEAN* Court disagreed. "While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams." (*Supra* p. 585). The GMA requires the regulations for critical areas to protect the "functions and values" of those designated areas. This means all functions and values. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Stevens County Planning Commission, after several public work sessions, and at least three public hearings, ultimately concurred with Mr. Kovalchik's recommendations with a minor exception of dropping the "+" sign from two categories. Those recommendations were

forwarded to the Board of County Commissioners (BOCC). Many of Mr. Kovalchik's conclusions were included within the body of Title 13. However, with one exception, Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr. Kovalchik were rejected by the BOCC. The County, when asked about this, informed the Board that their expert said, "I can live with that", after his recommendations were not followed. If this was his response, we cannot consider such a response as the reasoned opinion of an expert. The County does not point to any science used to vary from the recommendations given by their expert or the other BAS reviewed as is required by the Court of Appeal decisions quoted above.

The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. W*EAN*, *supra*, at 532.

The Court of Appeals, *WEAN, supra*, requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Petitioners contend Stevens County assumes no responsibility for protection of CARAs. While the methodology for identifying CARAs recommended by the Department of Ecology is in the Ordinance, there is no assurance they or the protections will be used. There is not an adequate "trigger" bringing these provisions into play.

  The Board finds the County has erred in exempting existing and ongoing agricultural activities from the provisions of Title 13. Certain unregulated agricultural activities can have a devastating impact on critical areas, including CARAs. To exempt all existing and ongoing agricultural operations from regulation is clearly an error.

  The Board further finds the Petitioners have carried their burden of proof in showing the County failed, through Title 13, to adopt an appropriate trigger for when the methodology for identifying CARAs and the protective regulations will be used. Title 13 must include adequate provisions for initiating a review for the presence of a CARA before a development permit is issued. *Larson Beach Neighbors/Wagenman v. Stevens County, et al*., EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Assoc., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Motions on Cases Nos. 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- Further, laws can be so vague that they simply are unenforceable. That is the case here. Such an ordinance cannot satisfy GMA's duty to adopt enforceable "development regulations" to "protect" critical areas. A person should be able to determine what the law is by reading the published code. Ordinance No. 109-2003 (ICAO) relies on language too vague to create an enforceable standard and therefore cannot not operate to "control" land use activities and does not satisfy the county's GMA obligation to adopt "development regulations" to protect critical areas. The enforcement measures adopted by the county provide only for ad hoc enforcement. This does not constitute a reasoned adaptive management program, particularly where, as here, there is no provision for the monitoring of compliance. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (Nov. 13, 2003).

- In adopting development regulations, counties cannot rely on vague exhortations to do the right thing, but must develop specific protection measures that include requirements or standards sufficient to demonstrate that GMA mandates will be met. If the county wishes to rely on voluntary implementation of best management practices or BAS to protect critical areas, benchmarks, timeframes and monitoring must be developed and funding to ensure that these voluntary actions are working to achieve the needed protection. It is of particular importance to the success in providing adequate protection to fish and wildlife resources, that the program includes a rigorous monitoring program and adaptive management process. The program and process must be capable of detecting changes in the functions and values of habitat in a timely manner, and must include processes through which management techniques are reevaluated and modified as necessary in response to this information, to ensure that the goals of management are being met. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (Nov. 13, 2003).

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is complying with and implementing its own ordinance.

  While the Stevens county ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with this no harm or degradation standard via BAS as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.

  Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors/ Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- The county's new ICAO creates the illusion of protection by identifying a "no harm" standard. But the seemingly broad expanse of that term is undermined by the failure to define the terms and develop standards and criteria by which compliance may be measured and enforcement will be effective. The provision of the "no harm" standard is unworkable, and, ultimately, contrary to GMA requirements. *Larson Beach Neighbors/ Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- The county further has eliminated the buffer requirements in all cases unless otherwise required by law or is part of a site-specific management plan. The abandonment of a riparian buffer requirement and the essential functions it serves is unexplained. The heavy weight of scientific evidence favors riparian buffers and these buffers provide essential functions for fish and wildlife survival. The report of the county's expert recognized the need for minimal riparian and wetland buffers. Buffers are especially beneficial where the jurisdiction has limited resources and expertise to review each site individually. *Larson Beach Neighbors/ Wagenman v. Stevens County*, EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- The court of appeals, in A*nderson v. Issaquah*, 70 WN. App. 64. 851 P. 2d 744 (1993), rejected "*ad hoc* case-by-case policymaking" during design review as allowed by the city of Issaquah's design review ordinance. The court rejected the city's design review standards because they failed to contain sufficient standards or ascertainable criteria by which an applicant or the city could determine whether a given building design would pass muster under the code.. The court stated: "whenever a community adopts such standards, they can and must be drafted to give clear guidance to all parties concerned" and it is "unrea*sonable and deprivaT*ion of due process" to expect or allow a city to *create* standards on an ad hoc basis during project review.

  See also: *City of Seattle v. Crispin*, 149 Wn.2d 896, 905, 71 P.3d 208 (2003), which states in relevant part:

  > "however, as we recognized in *Dillingham*, the statute does not support the distinction the court of appeals draws between adjustments that are <u>minor</u> compared with <u>substantial</u>. Nor would such a rule *be w*orkable, and would perhaps be unconstitutional. <u>We have recognized that the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application."</u>

  Larson Beach Neighbors/ Wagenman v. Stevens County, EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003) (internal citations omitted).

- RCW 36.760a.030(5) and WAC 365-195-410 defines critical areas. Fish and Wildlife Habitat Conservation Areas are considered critical areas under the act. furthermore RCW 36.70A.170(2) states:

  > "In making the designations required by this section, counties and cities shall consider the guideline established pursuant to RCW 36.70a.050."

  Larson Beach Neighbors/ Wagenman v. Stevens County, EWGMHB Case No. 00-1-0016, 3rd Order on Compliance, Nov. 14, 2003.

- There is no statutory requirement for a written statement to be prepared saying how the County reviewed the critical areas and development regulations. RCW 36.70A.060(3) requires the review but does not require a specific method or manner for the review. The County is presumed to have complied with the GMA and the record reflects their claim to that effect. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Ferry County sought out advice from Kirk Cook, a hydrologist from the Department of Ecology and now working for the Department of Agriculture. Mr. Cook had drafted a document entitled Document for the Establishment of Critical Aquifer Recharge Area Ordinance. Ferry County used that document to guide them in adopting Ordinance No. 2002-06. The County corresponded with Mr. Cook many times throughout the process by phone, letters and e-mail. The County addressed all of Mr. Cooks concerns. At the Hearing on the Merits Mr. Cook testified that the County had included Best Available Science, and had only one concern, that being the lack of a statement of the conditions, which will trigger a level two report. The Board in the past has recognized that Ferry County has very limited funds, minimal growth, and even less staff to do the job required to comply with the GMA. The Board is pleased with Ferry County's progress and while the County admits there is still work to be done, they now are found to be in compliance on the issue of protecting critical areas, and the use of Best Available Science in the adoption of Ordinance No. 2002-06. *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 02-1-0013, FDO, (Dec. 23, 2002).

- [Board sets forth relevant portion of WAC 365-195-805(1)]. The words "setback" and "Buffer" may be used in different situations.

  The setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The critical area ordinances required by the GMA to be adopted are controlling. Adequate protection of critical areas must be found in that ordinance. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not place the County in noncompliance with the GMA. *Concerned Friends of Ferry County v. Ferry County;* EWGMHB Case No. 00-1-0001, FDO (July 6, 2000)

- We hold that the requirement that counties and cities use the best available science is a requirement of inclusion of BAS in a substantive way in both the designation and protection of critical areas. Counties and cities must analyze the scientific evidence and other factors in a reasoned process. They must take into account the practical and economic application of the scientific evidence to determine if it is the "best available." *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, FDO (Apr. 10, 1997).

- The County does not have to specifically refer to the Department of Ecology (DOE) "Washington State Wetlands Identification and Delineation Manual," Ecology Pub. #96-94, in its Comprehensive Plan to be in compliance with the requirement to consider and include the BAS. *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Compliance, (Sept. 30, 1999).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- Relying on unnamed regulations to enforce the protection of critical areas is inadequate. Also, the use of the standard "minimize impact" is inadequate. There must be a specific, objective standard for review in the ordinance that will protect with reasonable certainty. The required standard of protection should be to "prevent adverse impacts" or at the very minimum "mitigate adverse impacts." *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- The requirement for an interim ordinance has the sole purpose of protecting critical areas as a whole until the balancing with other goals and the inclusion of public and local judgments by local elected officials can be incorporated in the comprehensive plan. SEPA and "expanded SEPA" have exceptions and thresholds that do not provide the interim protection envisioned by the Act. Counties' critical areas ordinances must include a standard of interim protection in each category that all parties can rely on until the comprehensive plan can be adopted. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- Whether by use of mapping or through performance standards, the requirement of RCW 36.70A.170 is to provide sufficient specificity to adequately identify designated critical areas. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- If a county or city chooses to rely on other ordinances, maps or inventories to designate critical areas, as it may well do, it should reference the items upon which it relies in its resolution. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- Under RCW 36.70A.060(2), each county "shall adopt development regulations that protect critical areas," including fish and wildlife habitat conservation areas. The standard of protection previously enunciated by this Board is "prevent adverse impacts" or at the very minimum "mitigate adverse impacts." RCW 36.70A.020(9) concerns conservation of fish and wildlife habitat areas and for the purpose of this issue parallels RCW 36.70A.060(2). *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- All counties, whether planning or non-planning, must designate agricultural resource lands and critical areas. All counties must protect critical areas. These designations and protections provide the basis for further planning. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Compliance Order (Jan. 30, 1995).

- Designation of critical areas establishes the general distribution, location, and extent of critical areas. Land use designations must provide landowners and public service providers with the information necessary to make decisions. Their purpose is to identify the appropriate areas so that interested parties know where they are; the effectiveness and fairness of this process is dependent upon a user's ability to identify the designated critical areas. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- A local government's attempt to consolidate and streamline its critical area designation and protection requirements of these acts, the GMA, the Shoreline Management Act, and the Flood

Plain Management Act is desirable and fully consistent with the goals of the GMA. Regulatory process consolidation, however, cannot come at the expense of the substantive requirements of the laws being consolidated. In other words, successful integration demands compliance with the laws that govern each subject area being integrated. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- The test is whether the designation meets the substantive requirements of the Act's wetlands definition, RCW 36.70A.030(18). A county should exercise a high degree of local discretion, but their discretion cannot be employed to justify an ordinance that fails to rise to the minimum substantive requirements of the Act. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- Critical area designations as well as resource land designations are an important first step in the planning process. They provide the sideboards for further comprehensive plan development by pointing out either where development should not occur or where, at the least, there are significant developmental concerns. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- High quality and/or particularly vulnerable wetlands require greater protection that lowers quality or less vulnerable wetlands. In order to provide the minimum level of protection for high quality wetlands, one of two approaches is necessary. Either all wetlands must be protected at a level necessary to protect wetlands requiring the greatest level of protection or a rating system can be used to differentiate wetlands of various quality levels and then protections can be accorded in relation to the need of each particular quality level. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- The required level of protection of wetlands and riparian buffers must be reasonably based on relevant science; however, a County has a range of discretion as to how exactly that level is met. To the extent a County relies on other statutes as part of its protection scheme, they should be referenced in the ordinance. A citizen should be able to understand what protection elements exist by reading the ordinance. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- Counties may use the National Wetlands Inventory as an information source for determining the approximate distribution and extent of wetlands. Counties should consider using the methodology in the Federal Manual for identifying and delineating jurisdiction wetlands, cooperatively produced by the U.S. Army Corps of Engineers, United States Environmental Protection Agency, United States Department of Soil Conservation Service and the United States

Fish and Wildlife Service, that was issued in 1989, and Regulatory Guidance Letter 90-7 issued by the United States Corps of Engineers on Nov. 29, 1990 for regulatory delineations. *Moore v. Whitman County*, EWGMHB Case No. 95-1-0002, FDO (Aug. 16, 1995).

- Designation of critical areas means, at least, formal adoption of a policy statement and may include further legislative action. *Moore v. Whitman County*, EWGMHB Case No. 95-1-0002, FDO (Aug. 16, 1995).

- Performance standards are acceptable as a method to identify unknown critical areas. *Moore v. Whitman County*, EWGMHB Case No. 95-1-0002, FDO (Aug. 16, 1995).

- The GMA defines critical areas and requires the gathering of empirical facts to determine where and what type of critical areas is present with regard to specific parcels of land. However, the GMA does not require a specific method of gathering data for purposes of inventorying, designating or regulating critical areas. *Moore v. Whitman County*, EWGMHB Case No. 95-1-0002, FDO (Aug. 16, 1995).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- The standard for designating critical areas and forestlands is "land use designations must provide landowners and public service providers with the information needed to make decisions." Given the recognized deficiency in the maps in this case, it is necessary to follow up that designation with a process, which includes on-site inspections as permits are processed. *Woodmansee, et al. v. Ferry County*, EWGMHB Case No. 95-1-0010, Order on Compliance (Apr. 16, 1997).

- RCW 36.70A.060(2) requires that all lands designated under RCW 36.70A.170 be protected and lacks any qualifying language to suggest that regulated critical areas are a sub-set of all critical areas. All lands that are designated critical areas pursuant to RCW 36.70A.170 must be protected by critical area development regulations adopted pursuant to RCW 36.70A.060, and such lands may not be exempted or excluded from protection. However, not all critical areas must be protected in the same manner or to the same degree. *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, FDO (Apr. 10, 1997).

- The GMA directs counties to designate, classify and protect areas with a "critical recharging effect on aquifers used for potable water." It is necessary to determine the location of recharge areas as a first step in designating and protecting them. The county must provide criteria necessary to indicate when an area needs specific scientific analysis to determine whether it is a critical aquifer recharge area. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Compliance Order (Apr. 8, 1999).

- In Ferry County's unique circumstances, where adequate, accurate maps are not available, an on-site inspection at the time of permit application, coupled with existing maps and well-defined standards, meets the requirements of the GMA for designation of critical areas in Ferry County. *Woodmansee, et al. v. Ferry County*, EWGMHB Case No. 95-1-0010, 2nd Order on Compliance (Aug. 22, 1997).

- The Act requires protection of critical areas, and the county is given the opportunity to select the manner of that protection. Their choice is given great deference. *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, Order on Compliance (Sep. 23, 1997).

- RCW 36.70A.020 and Board decisions do not preclude all development in critical areas. The GMA and Board decisions do, however, require that critical areas be protected. As long as critical areas are protected, other non-critical portions of land can be developed as appropriate under the applicable land use designation and zoning requirements. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- This Board recognizes the County may provide for individual review of specific parcels of land for appropriate changes to the standard buffers. However, we found in our previous order that standards or criteria must be listed to ensure the protection of these critical areas required by the GMA. (FDO Sept. 1998). Subsection 11.3 lists these criteria, but only directs the Administrator to "consider" them. Also, 11.3(A) provide that the measures be "adequate to avoid <u>significant</u> degradation to the fish or wildlife habitat area." There is no definition of "significant." There should be no degradation of the habitat area. The criteria should be mandatory. *Save Our Butte, Save Our Basin Society, et. al., v. Chelan County***,** EWGMHB Case No. 94-1-0015, Compliance Order, (April 8, 1999).

- If the designation of the IUGA appears to include as buildable, lots near or part of Critical Areas, those potential encroachments upon Critical Areas would be subject to the protections and limitations already approved which protect such Areas. Such claimed inconsistency cannot now be said to modify the Critical Areas protections. *Knapp et. al., v. Spokane County*, EWGMHB Case No. 97-1-0015c, Order on Reconsideration, (Sept. 30, 1999).

- RCW 36.70A.020 and Board decisions do not preclude all development in critical areas. The GMA and Board decisions do, however, require that critical areas be protected. As long as critical areas are protected, "other, non-critical portions of land can be developed as appropriate under the applicable land use designation and zoning requirements." *Assoc. to Protect Anderson Creek, et al. v. Bremerton et al*. CPSGMHB Case No. 95-3-0053 (Dec 26, 1995).

- The County has shown their work and review of this work demonstrates that there are methods to maximize the development of lands within the City limits of Spokane while still protecting critical areas. While the Petitioners contend these methods will not generate sufficient area for the population allocated, they have not carried their burden of showing the choices made by the County are clearly erroneous. *Knapp et. al., v. Spokane County*, EWGMHB Case No. 97-1-0015c, Order on Reconsideration, (Sept. 30, 1999).

- RCW 36.70A.170(1)(d) requires, "where appropriate" to designate critical areas. Critical areas include "areas with a critical recharging effect on aquifers used for potable water." RCW 36.70A.030(5). The County must designate these critical areas and protect them from degradation. *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, Order on Reconsideration (Aug. 16, 2000)

- The purpose of the Comprehensive Plan is to provide policies and direction for the critical areas ordinance. The language needs to be internally consistent with other provisions in the Comprehensive Plan and provide the foundation for consistent development regulations. In the absence of a scientific foundation, evidence of analysis, or a reasoned process to justify its

rejection, the language recommended by the Dept. of Fish and Wildlife must be included. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 97-1-0018, 2nd Order on Compliance (May 23, 2000).

- RCW 36.70A.170 requires the County to designate critical areas. This Board's decision in *Save Our Butte et al v. Chelan County* (EWGMHB Case No. 94-1-0015) established that the designated areas must be readily identifiable. The County's most recent actions fail on both counts. The County presents no conclusive arguments, no evidence of a reasoned process, no scientific analysis, which justify the changes. This action is clearly erroneous. *Concerned Friends of Ferry County v. Ferry County;* EWGMHB Case No. 97-1-0018, 2nd Order on Compliance (May 23, 2000).

- RCW 36.70A.060 states that development regulations shall "…protect critical areas that are required to be designated under RCW 36.70A.170." Ferry County contends Ordinance 72-1 and 73-1 is not the last word on protection of critical areas. The County adopted its critical areas ordinance in 1993 and that ordinance was not before this Board. These platting ordinances should not be reviewed as critical areas ordinances and will not be treated as such. The County stated they are in the process of revisiting the Critical Areas Ordinance at this time and when the County adopts amendments to that ordinance, then will be the appropriate time to hear those issues. The County cites WAC 365-190-080(5)(b)(v) which is the requirements for critical areas. Buffer zones are elements of critical areas ordinances and regulations, but not required for subdivision ordinances. The critical areas ordinance is the controlling regulation, not the more general subdivision ordinances. The County also cites WAC 365-195-825(4)(b) which states "counties and cities may add other items related to public health, safety and general welfare to the [goals of subdivisions] such as protection of critical areas, conservation of natural resource lands and affordable housing…" However, this is not required.

- WAC 365-195-805(1) states: ". In determining the specific regulations to be adopted, jurisdictions may select from a wide variety of types of controls. The strategy should include consideration of: (a) the choice of substantive requirements, such as the delineation of use zones; general development limitations concerning lot size, setbacks, etc." The words "setback" and "Buffer" may be used in different situations. The use of "setbacks" in this case was not inappropriate. The setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The critical area ordinances required by the GMA to be adopted are controlling. Adequate protection of critical areas must be found in that ordinance. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not place the County in noncompliance with the GMA. *Concerned Friends of Ferry County v. Ferry County*; EWGMHB Case No. 00-1-0001, FDO (July 6, 2000).

- A review of the ordinance readily reveals a lack of any enforcement provisions. In *Easy v. Spokane County, 96*-1-0016, the Board stated: " The absence of penalties for violations of the CAO takes the teeth out of these important regulations." Clearly, without provisions for enforcement, the Critical Areas Regulations fail to protect the values and functions of critical areas. . *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB Case No. 00-1-0016 FDO, (July 13, 2001).

- There is no specific method the City is required to use for the identification of these Critical Areas. The areas must be identified and mapped in such a way to allow the landowner to know

where the critical areas are and what they must do. *Knapp, et al v. Spokane County, et al.* EWGMHB Case No. 97-1-0015c, Order on Remand, (Nov. 15, 2001).

- The City of Spokane has identified the critical areas and this identification is reflected in the maps prepared by the City and provided to the Board. These maps are part of the GIS system that clearly located the critical areas and is available to the landowner. The landowner is able to locate the critical areas. The ordinances adopted by the City clearly state what needs to be done by the landowner. The ordinances go further to define "Critical Areas" and provide that if they exist and are not yet identified, how they must be designated and properly protected. *Knapp, et al v. Spokane County, et al.* EWGMHB Case No. 97-1-0015c, Order on Remand, (Nov. 15, 2001).

Critical Aquifer Recharge Areas (*see also Best Available Science and Critical Areas)*

- General Discussion of requirements for designating critical areas, specifically as to CARAs. *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case 09-1-0013 Final Decision and Order at 3-5 (May 3, 2010)

- The record reveals that Walla Walla County relied exclusively upon pre-existing "Wellhead Protection Areas" as satisfying the GMA requirement to designate Critical Aquifer Recharge Areas. This approach is not supported by the science. The scientific information does not indicate that using wellhead protection areas alone is sufficient to protect the large Gravel Aquifer. Individual wellhead protection areas may protect some wells that constitute regulated public water systems, but there is no evidence in the record that this approach protects the large number of unregulated individual or exempt wells, nor is there any evidence that this approach is sufficient to protect the larger Gravel Aquifer which underlies a land area of about 190 square miles. *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case 09-1-0013 Final Decision and Order at 6-7 (May 3, 2010)

- The WAC 365-190-080 guidelines state that to determine the location of aquifer recharge areas, counties may using existing studies or may use existing soil and surficial geologic information. The record does not show that Walla Walla County made any such determinations as to the Gravel Aquifer recharge areas. In the absence of basic locational information on specific recharge areas, the County cannot effectively determine which areas are "critical" to preventing adverse impacts to the aquifer. Moreover, the record does not show a consideration of the WAC guidelines which prescribe (1) an evaluation of the threat of ground water contamination from existing land use activities, and (2) the designation of aquifer specific recharge areas based upon vulnerability of the aquifer to contamination. *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case 09-1-0013 Final Decision and Order at 7-8 (May 3, 2010)

- In order to protect public health and the environment, and to prevent contamination of potable drinking water supplies, the GMA requires the County to analyze the risk that existing land use activities could lead to ground water contamination. Such a risk analysis forms the basis for designation and protection of specific, science-based CARAs ... However, the record does not reflect a consideration of the extent to which these potential groundwater contamination sources might affect the shallow Gravel Aquifer or its recharge areas. *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case 09-1-0013 Final Decision and Order at 9 (May 3, 2010)

- [T]he County did not use best available scientific information about aquifer contamination threats to inform its CARA designation process, nor did it use a reasoned process to analyze best

available scientific information regarding identified recharge areas for the Gravel Aquifer. Because Walla Walla County has not properly designated CARAs for the Gravel Aquifer, it has not followed the GMA's requirement to protect the functions and values of this type of critical area. *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case 09-1-0013 Final Decision and Order at 10 (May 3, 2010)

- [T]he GMA does not necessarily require designation of the entire 190 square mile aquifer. Rather, the GMA requires designation and protection of "areas with a critical recharging effect on aquifers used for potable water." The extent of these designated critical recharge areas, as distinct from the underlying aquifer itself, is determined through a substantive consideration of Best Available Science, which has not yet occurred in Walla Walla County. *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case 09-1-0013 Final Decision and Order at 10 (May 3, 2010)

- The GMA includes CARAs under its definition of critical areas and defines these as being "areas with a critical recharging effect on aquifers used for potable water." An aquifer is an underground geologic formation of rock, soil, or sediment that is naturally saturated with water and serves as a water supply for wells. Recharge - the infiltration of water into the aquifer - is essential for the continued use of the aquifer. Thus, the key function and value of CARAs is to provide clean, safe, and available drinking water by protecting areas so as to permit recharge and preventing contamination of the aquifer. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 22 (April 5, 2010)

- WAC 365-190-040(5)(b) goes on to state in circumstances where critical areas cannot be readily identified, these areas should be designated by performance standards or definitions and WAC 365-190-040(5)(c) provides that designation could be satisfied by the adoption of a policy statement. It would appear to the Board that CARAs expressly fall within this realm because, unlike wetlands or streams which can be visually delineated, the underground nature of an aquifer provides for a more challenging determination as to their location and boundaries. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 22-23 (April 5, 2010)

- In amending Title 13, the County implemented a process for assessing all development proposals using available scientific information, and requiring additional review for certain activities or where insufficient information exists to assess possible impacts. SCC 13.10.045. These steps remain in place unless or until CARA designations are completed. *Id*. As a result of this change, the submission of any development application triggers review by the County and project applicants are no longer the primary source of information regarding CARA susceptibility, resulting in more reliable application of the appropriate protection requirements. Petitioner Wagenman has failed to meet her burden of demonstrating that the County's action is clearly erroneous. *Loon Lake Property Owners Assoc. et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Compliance, (Oct. 15, 2004).

- Previously, the CARA (Critical Aquifer Recharge Areas) protection requirements in Title 13 were triggered only if certain disclosures were made in a checklist to be completed by project applicants. The Board found there was no appropriate trigger and was non-compliant with GMA because, in the Board's opinion, it did not adequately assure that the appropriate protection requirements would be imposed. The Board did not find the process for designating CARA to be noncompliant, nor did the Board find the protection requirements to be noncompliant, and the

Board will not revisit those issues here. Loon Lake Property Owners Assoc. et al. v. Stevens County, EWGMHB Case No. 03-1-0006c, Order on Compliance, (Oct. 15, 2004).

- Title 13, while not designating CARAs, details a methodology for such a designation to be made. The Board recognizes that an adequate process for designation without mapping of CARAs can meet the requirements of RCW 36.70A.170. However, the Board finds nothing in the record or arguments of the Respondent to indicate when or if the adopted process will be "triggered". The Critical Areas checklist relies upon the applicant for a development permit to indicate the presence of a critical area on the subject property. There is no requirement found in Title 13 to ensure the noted "two-step" process would be used. With that missing, designation is unsure, and thus protection is unsure. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Petitioners contend Stevens County assumes no responsibility for protection of CARAs. While the methodology for identifying CARAs recommended by the Department of Ecology is in the Ordinance, there is no assurance they or the protections will be used. There is not an adequate "trigger" bringing these provisions into play.

  The Board finds the County has erred in exempting existing and ongoing agricultural activities from the provisions of Title 13. Certain unregulated agricultural activities can have a devastating impact on critical areas, including CARAs. To exempt all existing and ongoing agricultural operations from regulation is clearly an error.

  The Board further finds the Petitioners have carried their burden of proof in showing the County failed, through Title 13, to adopt an appropriate trigger for when the methodology for identifying CARAs and the protective regulations will be used. Title 13 must include adequate provisions for initiating a review for the presence of a CARA before a development permit is issued. *Larson Beach Neighbors/Wagenman v. Stevens County, et al*., EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Ferry County sought out advice from Kirk Cook, a hydrologist from the Department of Ecology and now working for the Department of Agriculture. Mr. Cook had drafted a document entitled Document for the Establishment of Critical Aquifer Recharge Area Ordinance. Ferry County used that document to guide them in adopting Ordinance No. 2002-06. The County corresponded with Mr. Cook many times throughout the process by phone, letters and e-mail. The County addressed all of Mr. Cooks concerns. At the Hearing on the Merits Mr. Cook testified that the County had included Best Available Science, and had only one concern, that being the lack of a statement of the conditions, which will trigger a level II report. The Board in the past has recognized that Ferry County has very limited funds, minimal growth, and even less staff to do the job required to comply with the GMA. The Board is pleased with Ferry County's progress and while the County admits there is still work to be done, they now are found to be in compliance on the issue of protecting critical areas, and the use of Best Available Science in the adoption of Ordinance No. 2002-06. *Concerned Friends of Ferry County/Robinson, v. Ferry County*, EWGMHB Case No. 02-1-0013, FDO (Dec. 23, 2002).

- The limitation of the area protected to the parcel where a wellhead is located is inappropriate. An aquifer recharge area could extend beyond the parcel. The County needs to develop aquifer recharge areas criteria, which would indicate when an area needs specific scientific analysis to

determine if it is a critical aquifer recharge area. *Save Our Butte, Save Our Basin Society, et al., v. Chelan County***,** EWGMHB Case No. 94-1-0015, Compliance Order, (April 8, 1999).

Declaratory Ruling

- The county has asked this Board to advise them what the lands designation reverts to if the designations under their comprehensive plan are invalid. The Boards are to determine whether enactments of local governments comply with the GMA, and are not authorized to provide declaratory judgments or advisory opinions. The Boards cannot advise local governments what the land designations invalidated by the Board revert to. The courts have this authority, not the Boards. *Ridge, et al. v. Kittitas County*, EWGMHB Case No.96-1-0017, Order on Reconsideration/Clarification (May 27, 1997).

- The Boards have held that five-acre lots in rural areas of a county will be subject to "increased scrutiny" by the Board to assure, among other things, that the number, location, and configuration do not constitute urban growth. *In the Matter of the Petition of Peter E. Overton for a Declaratory Ruling*, CPSGMHB Case No. PDR 96-3-0001, Feb. 36, 1996 (Notice of Decision Not to Issue Declaratory Ruling). But five-acre lots are not per se violative of the GMA. The subject interim ordinance limits both the number and the location of five-acre lots in rural areas and is interim in nature. The interim ordinance allows fully 88 percent of the rural area within the County to be zoned for lot sizes of twenty acres or larger. Further a moratorium on development is placed upon industrial and commercial development presently totaling 11,360 acres. *City of Moses Lake v. Grant County*, EWGMHB Case No. 01-1-0010, FDO (Nov. 20, 2001).

Deference

- While it is true the GMA requires the Board to grant deference to Spokane County in its planning decisions and the courts have recognized deference should also be given to a local government's interpretation of its own legislative enactments, both the GMA and the courts place limitations on this deference. The GMA's deference is constrained as it is bounded by the goals and requirements of the GMA. And, deference as to the County's interpretation of its own GMA policies is bounded by a requirement that the interpretation not be unreasonable or unrealistic, but that it also effectuates the objective or intent of the enacting body. *CAUSE v. Spokane County*, EWGMHB Case No. 10-1-0003, FDO at 22-23 (June 18, 2010)

- Deference to local government decisions, as required by RCW 36.70A.3201 …, is not a license for counties and cities to ignore the requirements and goals of the GMA. *Kittitas Conservation v. Kittitas County*, EWGMHB Case No. 07-1-0004c, FDO, at 52 (Aug. 20, 2007)

- The Legislature was very clear when they said the Board must give deference to local jurisdictions and only find non-compliance when an error was clearly made and the City's action is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA. *Vince Panesko v. City of Richland*, EWGMHB Case No. 06-1-0001, FDO, (July 19, 2006).

- The Board must give deference to the City in their decision making unless a clearly erroneous error has been made. The City has the authority to redesignate this property so it may be leased to a commercial operation. The procedure followed was correct and, while objected to by many of the citizens of Richland, the City's redesignation of the property is not clearly erroneous.

GMA. *Vince Panesko v. City of Richland*, EWGMHB Case No. 06-1-0001, FDO, (July 19, 2006).

- With regard to the "variance clause", the Board recognizes the necessity for administrative discretion. However, that discretion cannot be so broad as to greatly weaken the regulations required under the Growth Management Act. Any discretion allowed in administrative action must be within well-defined standards. Such standards are not evident here. The "variance clause", Section 12 of the ICAO, reenacted here, is non-compliant with the GMA. *Concerned Friends of Ferry County/ Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- *Achen v. Clark County, supra,* cited by the County, does not require the Board to approve the 2.5-acre lot in rural areas. In that case the Superior court did direct the Board to give deference to the County, especially with rural density. However, the Board decision was not reversed as to a similar size lot or did it give direction to accept a 2.5-acre lot size. What it did was tell the Board to give deference as the new legislation asked, and do so in that case. This Board does give great deference to the County decisions so long as they are in compliance with the GMA. The discretion given to the County is very broad, but must fall within the sideboards of the GMA. This density is outside those sideboards. *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, Order on Remand, (April 17, 2002).

- We disagree with the statement made by the County that "the GMA gives the County, … the authority to determine appropriate lot sizes and uses in rural areas," if that statement means that the County believes there is no role for the GMA in that decision. The GMA does limit the amount of previously unbridled discretion of local governments to "determine appropriate lot sizes and uses in rural areas." This is because of RCW 36.70A.060, .070, .170, and .020(8). *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, Order on Remand, (April 17, 2002).

- Within a framework of certain state mandates and regional policies, the GMA leaves broad discretion for locally adopted comprehensive plans to reflect local choices. In general, the Board is to defer to policy choices of local jurisdictions. However, the Board must determine if policy choices of the local jurisdictions conflict with the clear policy mandates that the legislature stated in the GMA. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- The Act requires protection of critical areas, and the county is given the opportunity to select the manner of that protection. Their choice is given great deference. *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, Order on Compliance (Sep. 23, 1997).

- The Board has been directed by the State Legislature to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of chapter 36.70A RCW. We take this seriously. The sizing of the UGA for the City of Kittitas is a prime example of where this deference is important. The City is unique. We see a small city with small and large city lots, farms and residences with horses and opportunity for industrial and residential expansion. The City planned for likely industrial development and its special needs, residential development inquiries, expectations of industrial development at the freeway interchange and continued farming on much of the industrial lands. *Cascade Columbia Alliance v. Kittitas County*, EWGMHB Case No. 98-1-0004, FDO (Dec. 21, 1998).

Density

- *See also Keywords* – ***Urban Density; Rural Density***

- The Rural-2.5 density is generally considered urban in nature, not rural. If the County chooses to use local circumstances to justify smaller density lots, the statute requires the County to provide a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirement of RCW 36.70A. *Futurewise v. Pend Oreille County*, EWGMHB Case No. 05-1-0011, FDO at 15 (Nov. 1, 2006).

- This is not to say there is a "bright line" rule concerning rural lot sizes. Counties and cities do have some discretion based on local circumstances, but this discretion on rural lot sizes or density is limited by the GMA and must be justified in the record. *Futurewise v. Pend Oreille County*, EWGMHB Case No. 05-1-0011, FDO at 16 (Nov. 1, 2006).

- A three du/acre density factor may be lower than the Petitioners would like to see and what the Central Board held in *Bremerton v. Kitsap County* as a "bright line" rule, however, the Supreme Court in *Viking Properties, Inc. v. Holm*, opened the door to a variety of densities based in part on local circumstances. *Citizens for Good Governance, et al. v. Walla Walla County, et al*, EWGMHB Case No. 05-1-0013, FDO, at 18 (June 15, 2006)

- While the Board does not condone a density less than four du/acre, it clearly understands that local governments have broad discretion in developing comprehensive plans and development regulations tailored to local circumstances, bounded of course by the goals and requirements of the GMA. In this case, the County and City of Walla Walla decided that a minimum three du/acre fits their twenty-year planning horizon, but will adjust this density upwards in the future if necessary. The Board recognizes that this figure is a minimum and the density in this zone can be as high as five du/acre. *Citizens for Good Governance, et al., v. Walla Walla County, et al.*, EWGMHB Case No. 05-1-0013, FDO, at 18 (June 15, 2006) .

- Few, if any, counties have established a minimum density. Usually counties set a maximum in the low-density urban zone. For instance, Spokane County established a maximum in the low-density urban zone of six du/acre, but no minimum. This type of density option opens the door to even lower densities than if a minimum is set, such as in Walla Walla County. *Citizens for Good Governance, et al. v. Walla Walla County, et al.*, EWGMHB Case No. 05-1-0013. FDO, at 18 (June 15, 2006).

- The densities of uses permitted under the Airport Overlay Zone are appropriate when placed in the context of location of the airport, the Countywide Planning Policies and the small percentage of the UGA that is impacted. . *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO. (March 14, 2002).

- The County is required to consult with airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation.

  The siting of high-density residential development adjacent to the airport has been recognized by the hearings boards as inappropriate and incompatible. In *Abenroth v. Skagit Co.*, WWGMHB No. 97-2-0060c (FDO, Jan. 23, 1998) the Western Board ruled that the large size of the Bayview UGA was unjustified because there was not a showing for such a

large unincorporated residential UGA. *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO. (March 14, 2002).

- RCW 36.70A.070 is very specific in its requirements. There must be maps, text-covering objectives, and principles and standards used to develop the plan. The land use element must designate the proposed general distribution and general location and extent of the uses of land, including commercial, industrial and residential areas. This section then makes a specific requirement that the land use element shall include population densities and building intensities. So vital is the need to know the specific distribution of the population that it is clearly a more specific density for population and building intensities is needed than the "low, medium or high" found in the County's Plan. *Bargmann/Greenfield Estates Homeowners' Assn. v. City of Ephrata*, EWGMHB Case No. 99-1-0008c FDO, (Dec. 22, 1999).

- The 13 goals of the GMA are not listed in order of priority. These goals are often in conflict with each other. The Respondent gives as an example, environmental protection (goal 10) and natural resource conservation (goal 8) can add cost to development, while housing (goal 4) strives to promote affordable housing. The Petitioner insists Kittitas County, in adopting the Airport Overlay Zone, has created different classes of property owners in the City of Ellensburg UGA. However all property owners in each of the Safety Zones are treated in the same manner. The County and the City have adopted zoning they believe will protect the Airport and the residents adjacent to it. This zoning was arrived at after extensive public input and review by the departments and individuals listed in statute RCW 36.70.547. *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO. (March 14, 2002).

- Generally 5-acre lots in rural areas would be more difficult to justify, especially if large number of such lots exist. Where the lot size is less than 10 acres in rural areas of a county, the Board must more carefully examine the number, location and configuration of those lots. It must determine whether such lots constitute urban growth; presents an undue threat to large-scale natural resource lands; thwarts the long-term flexibility to expand the UGA; or, will otherwise be inconsistent with the goals and requirements of the Act. *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, FDO (May 23, 2000); Order on Reconsideration (Aug. 16, 2000).

Development Regulations

- The use of the word "may" in YCC 16C.060(1), as opposed to "shall" or "will," makes this sentence permissive and provides for essentially unbounded discretion on the part of the Administrative Official. If it is determined that a development proposal could impact the UWHCA, then the Administrative Official may or may not require a habitat assessment, with no standards in the code to guide the exercise of this discretion. Such unbounded discretion does not satisfy the GMA's affirmative duty to protect designated critical areas under RCW 36.70A.060(2) and to include best available science to protect the functions and values of critical areas under RCW 36.70A.172(1). Property owners and citizens cannot ascertain under this County code section how or when the Administrative Official might exercise discretion to protect critical areas. *Hazen, et al v. Yakima County*, EWGMHB Case No. 09-1-0014, FDO at 25-26 (June 14, 2010)

- The Board finds no inherent error in delegating such decision-making authority to the Administrator, such discretion cannot be so broad as to compromise regulations required by the GMA, thus, discretion must be within well-defined standards. Within the County's exemption review procedures, the Board finds no defined standards for the Administrator to base any decision on BAS or that any conditions placed on exempted activities will similarly be based on BAS. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 30 (April 5, 2010)

- The Board recognizes the need to have development regulations which provide for clear, specific standards so as to prevent arbitrary and discretionary application … The new language does not establish technical design standards, maximum coverage limitations, or best management practices … The mystery of how the "effects" would be minimized is what creates a regulation which fails to comply with the GMA. *Larson Beach Neighbors/Wagenman v. Stevens County,* Case No. 07-1-0013 First Order on Compliance at 23 (April 16, 2009)

- The Board will not consider "whether and how the County is to enforce its land use regulations" or "attempt to usurp and undermine the police power of the County." Obviously, these actions are outside of the Board's authority. *Henderson, et al v. Spokane County,* Case No. 08-1-0002, First Compliance Order at 6 (May 7, 2009).

- If it was the intent of the County to incorporate these [pre-GMA development regulations] into its GMA process and implementing its Comprehensive Plan, the County needed to do more. A jurisdiction cannot simply decide, without public hearing, that a non-GMA action has suddenly been "blessed" as meeting the requirements of the GMA. Instead, the local government's legislative body, when enacting a GMA regulation, must make a specific determination that the pre and non-GMA action complies with the GMA. This can only be done after permitting the public the opportunity to comment upon the proposal, to hold otherwise would mock the GMA's citizen participation goal at RCW 36.70A.020 (11) ... If the County intends to have non-GMA ordinances or pre-Comprehensive Plan regulations meet the RCW 36.70A.040 requirement, procedurally it must do so by a legislative enactment that explicitly incorporates these specific pre-existing documents. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 06-1-0011, FDO, at 27-28 (Apr. 30, 2007).

- [Attempting to include pre-GMA development regulations] by way of a mere reference in the Comprehensive Plan or other regulations does not suffice. The County must review the regulations for consistency with the CP, give specific notice of its action to the public, and provide for public participation with full knowledge that the regulations would be re-adopted to implement the County's CP. The County must also give post-adoption notice as required by RCW 36.70A.290(2). Otherwise, until and unless such a legislative enactment either adopts new regulations or pre-existing (pre-GMA) regulations to comply with the requirements of RCW 36.70A.060, no action pursuant to the GMA has taken place. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 06-1-0011, FDO, at 28 (Apr. 30, 2007).

- Simply listing non-GMA and pre-GMA statutes and regulations does not comply with GMA requirements. The record must reflect how such regulations and laws were sufficient and reflect that public participation requirements had been completed in order to comply with the GMA. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 06-1-0011, FDO, at 28 (Apr. 30, 2007).

- The GMA's Goals are to "guide the development of comprehensive plans and development regulations." With regard to the legal issues in this case, the relevant Goals of RCW 36.70A.020 are: [Board sets forth Goals 1 and 10]. *Greenfield Estates Homeowners Association v. Grant County, et al.*, EWGMHB Case No. 04-1-0005, FDO, (Oct. 6, 2004).

- Petitioners LLPOA have the option of filing a separate petition for review of an amended development regulation or seeking intervention in an existing case. The existence of a pending Growth Management Hearings Board case involving a development regulation does not bar anyone from seeking review of the amendment of that development regulation through a separate petition for review. *Loon Lake Property Owners ., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Motions on Cases Nos. 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- In adopting development regulations, counties cannot rely on vague exhortations to do the right thing, but must develop specific protection measures that include requirements or standards sufficient to demonstrate that GMA mandates will be met. If the county wishes to rely on voluntary implementation of best management practices or BAS to protect critical areas, benchmarks, timeframes and monitoring must be developed and funding to ensure that these voluntary actions are working to achieve the needed protection. It is of particular importance to the success in providing adequate protection to fish and wildlife resources, that the program includes a rigorous monitoring program and adaptive management process. The program and process must be capable of detecting changes in the functions and values of habitat in a timely manner, and must include processes through which management techniques are reevaluated and modified as necessary in response to this information, to ensure that the goals of management are being met. *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB Case No. 00-1-0016, Order on Compliance, (Nov. 13, 2003).

- Regarding the adequacy of the development regulations to implement the listed goals of the comprehensive plan, the Board has a major concern: the development regulations must utilize best available science in protecting critical areas. Nothing in the record indicates best available science was included in these regulations. In fact, what evidence exists suggests that best available science has been rejected. RCW 36.70A.172 is specific. Best available science must be utilized in protecting critical areas. Ordinance 2001-09 is flawed by not "including the best available science in developing policies and development regulations to protect the functions and values of critical areas". (RCW 36.70A.172). We need not address each specific goal challenged by the Petitioners. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- The county further has eliminated the buffer requirements in all cases unless otherwise required by law or is part of a site-specific management plan. The abandonment of a riparian buffer requirement and the essential functions it serves is unexplained. The heavy weight of scientific evidence favors riparian buffers and these buffers provide essential functions for fish and wildlife survival. The report of the county's expert recognized the need for minimal riparian and wetland buffers. Buffers are especially beneficial where the jurisdiction has limited resources and expertise to review each site individually. *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB Case No. 00-1-0016, Order on Compliance, (Nov. 13, 2003).

- Further, laws can be so vague that they simply are unenforceable. That is the case here. Such an ordinance cannot satisfy GMA's duty to adopt enforceable "development regulations" to

"protect" critical areas. A person should be able to determine what the law is by reading the published code. Ordinance no. 109-2003 (ICAO) relies on language too vague to create an enforceable standard and therefore cannot not operate to "control" land use activities and does not satisfy the county's GMA obligation to adopt "development regulations" to protect critical areas. The enforcement measures adopted by the county provide only for ad hoc enforcement. This does not constitute a reasoned adaptive management program, particularly where, as here, there is no provision for the monitoring of compliance. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (Nov. 13, 2003).

- The county's new ICAO creates the illusion of protection by identifying a "no harm" standard. But the seemingly broad expanse of that term is undermined by the failure to define the terms and develop standards and criteria by which compliance may be measured and enforcement will be effective. The provision of the "no harm" standard is unworkable, and, ultimately, contrary to GMA requirements. L*arson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is co*mplying with and implementing its own ordinance.*

  *Whi*le the Stevens county ordinance prescribes that developers are to *d*o "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with this no harm or degradation standard via BAS as determining compliance should r*equire ongoing monitoring of water quality and/or prior deter*mination of background sediment levels.

  Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- The court of appeals, in A*nderson v. Issaquah,* 70 WN. App. 64. 851 P. 2d 744 (1993), rejected "*ad hoc* case-by-case policymaking" during design review as allowed by the city of Issaquah's design review ordinance. The court rejected the city's design review standards because they failed to contain sufficient standards or ascertainable criteria by which an applicant or the city could determine whether a given building design would pass muster under the code. The court stated: "whenever a community adopts such standards, they can and must be drafted to give clear guidance to all parties concerned" and it is "unreasonable and deprivation of due process" to expect or allow a city to create standards on an ad hoc basis during project review.

  See also: City of Seattle v. Crispin, 149 Wn.2d 896, 905, 71 P.3d 208 (2003), which states in relevant part:

  > "however, as we recognized in *Dillingham,* the statute does not support the distinction the court of appeals draws between adjustments that are <u>minor</u> compared with <u>substantial</u>. Nor would such a rule be workable, and would

> perhaps be unconstitutional. We have recognized that the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application."

Larson Beach Neighbors/Wagenman v. Stevens County, EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003) (internal citations omitted).

- The GMA requires the City to have a process for receiving the public's suggested amendments to the Comprehensive Plan or its regulations. The GMA requires the City to entertain both general or specific plan and regulation changes. The City's requirement that limits the public's suggestions to general goals and policies is too restrictive. A process for receiving both specific and general suggestions is necessary. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- The development regulations are adopted by the County to implement the Comprehensive Plan and Capital Facilities Plan. If a person does not feel the two plans comply with the GMA, a petition for review must be filed within 60 days of the publication of the notice of their passage. The only challenge properly raised concerning the development regulations is whether they properly implement the CP or C F P. *Harvard View Estates, v. Spokane County*, EWGMHB Case No. 02-1-0005, Order on Motion, (May 31, 2002).

- The Comprehensive Plan is a policy document, to be implemented by development regulations. The County's actions under review here are the development regulations, Ordinance No. 2001-09. That Ordinance incorporates the pre-GMA SMP. The County's Ordinance now brings their SMP before the Board for review because the SMP is the method adopted by the County to implement that portion of the CP. The Board will review the County's SMP to determine whether the provisions therein adequately implement the Comprehensive Plan and protect or regulate as therein provided. The Board does not review the SMP itself as to its validity, but rather its use to comply with the GMA. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- Development regulations must implement the comprehensive plan. The Ferry County Comprehensive Plan (FCCP) clearly provides for rural areas of more intense development, as authorized, and limited, by the cited statutes. While the CP authorizes such land uses, limiting or regulating those uses is properly left to the development regulations. The absence of those regulations in Ordinance 2001-09 is clearly an error. The County has failed to act by not adopting such regulations that would properly implement these policies of the Comprehensive Plan. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- In *West Seattle Defense Fund, et al. v. City of Seattle*, CPSGMHB Case No. 95-3-0040, Order on Motion, (June 16, 1995), a case cited by the City, the CPS Board made clear that a determination of whether development regulations comply with the GMA when they implement noncompliant portions of a Comprehensive Plan must be made on a case-by-case basis at the hearing on the merits:

> The Board concludes that when portions of a comprehensive plan have been remanded with instructions to bring those provisions into compliance with the Act,

> and when other portions of the plan have been found to comply with the Act, the Board must determine on a case-by-case basis whether the contested portions of implementing development regulations comply with the GMA. In such circumstances, the Board will not automatically conclude that, simply because portions of a comprehensive plan do not comply with the Act, all implementing development regulations necessarily also do not.

The Board finds the motion before us is similar to the case cited above. The Board concurs with CPSGMHB and finds that arguments on specific development regulations must be made on a case-by-case basis at the hearing on the merits. The Board does not have sufficient information before it to separate the compliant and non-compliant portions of these documents. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012, 2nd Motion Order, (July 29, 2002).

- The Comprehensive Plan establishes the County's policy and goals for the management of growth and their compliance with the Growth Management Act. Development regulations are to be adopted to implement those policies and goals. These regulations must be consistent with the Comprehensive Plan (RCW 36.70A.040). *Harvard View Estates, v. Spokane County*, EWGMHB Case No. 02-1-0005, FDO, (July 29, 2002).

- The Respondents' first motion seeks the dismissal of Petitioners Issue No. 4 on the grounds that the issue had been decided in Case No. 01-1-0015c and 01-1-0014cz. In those cases, the Board ruled the County had complied with SEPA regulations as they applied to the Comprehensive Plan. Respondent now argues that because development regulations must be consistent with the comprehensive plan, and must implement the comprehensive plan, by extension, the development regulations therefore would also comply with SEPA. Petitioners argue that the actions under consideration are different and there are undecided material facts to be determined and the dispositive motion cannot be granted. The Board denies Respondent's motion, and will hear arguments on SEPA compliance at the Hearing on the Merits. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, 2nd Motion Order, (Aug. 27, 2002).

- The Board finds that development regulations cannot be compliant when they implement non-compliant provisions of a Comprehensive Plan. Development regulations are to implement a Comprehensive Plan (RCW 36.70.040). In this case, the Board finds the objected-to regulations implement the noncompliant portions of the Comprehensive Plan and, to that extent, they too are noncompliant. If the provisions are not compliant in the Comprehensive Plan, they are not compliant when found in corresponding provisions of the development regulations. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO, (Nov. 26, 2002).

- The provisions in the development regulations addressing the Rural Transition Zone implement the very Comprehensive Plan provisions previously found non-compliant. We find the Development Regulations implementing non-compliant Comprehensive Plan provisions to also be non-compliant. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO, (Nov. 26, 2002).

- The Respondent, having adopted its Comprehensive Plan in 1995, should have by that time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially, where, as to the RSAs, (Rural Service Areas) they stand-alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. That was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision is needed to allow smaller lot sizes within the RSAs " to minimize and contain the existing areas or uses of more rural development". *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 00-1-0001, FDO (July 6, 2000).

- Under RCW 36.70A.060(2), each county "shall adopt development regulations that protect critical areas," including fish and wildlife habitat conservation areas. The standard of protection previously enunciated by this Board is "prevent adverse impacts" or at the very minimum "mitigate adverse impacts." RCW 36.70A.020(9) concerns conservation of fish and wildlife habitat areas and for the purpose of this issue parallels RCW 36.70A.060(2). *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- The planning goals are part of the compliance requirements of the Act and apply to development regulations under RCW 36.70A.060. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO, (Aug. 8, 1994).

- RCW 36.70A.060(2) requires that all lands designated under RCW 36.70A.170 be protected and lacks any qualifying language to suggest that regulated critical areas are a sub-set of all critical areas. All lands that are designated critical areas pursuant to RCW 36.70A.170 must be protected by critical area development regulations adopted pursuant to RCW 36.70A.060, and such lands may not be exempted or excluded from protection. However, not all critical areas must be protected in the same manner or to the same degree. *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, FDO, (Apr. 10, 1997).

- The lack of listed qualifications and the great discretion given the Administrator charged with individual review of requests to modify buffers must be balanced with a clear opportunity for concerned parties to seek review. *Save Our Butte, Save Our Basin Society, et al., v. Chelan County***,** EWGMHB Case No. 94-1-0015, Compliance Order, (April 8, 1999).

- The additional opportunity for a landowner to seek an administrative variance or reduction of the buffer with no showing of need and where the variance is not subject to any criteria moves the County out of compliance with the GMA. *Save Our Basin Society, et al., v. Chelan County***,** EWGMHB Case No. 94-1-0015, Compliance Order, (April 8, 1999).

- The Board is concerned with the 21 exemptions found in subsection 22 of the Critical Areas Ordinance. Extensive changes to the shoreline are allowed by these exemptions, without indication of need, use of criteria or notice to the State or other interested parties. Without more protections, this section is not in compliance with the GMA. *Save Our Basin Society, et al., v. Chelan County***,** EWGMHB Case No. 94-1-0015, Compliance Order, (April 8, 1999).

- Petitioners argue the City has not adopted development regulations as required by the GMA. They contend the City has delayed that step for several years by re-enacting pre-existing regulations. They contend this process avoids GMA requirements of consistency, public participation and best available science. The record provides no evidence of a review for

consistency, a use of best available science, or a process for citizen involvement in developing those regulations and the City is in non-compliance with the GMA. *Saddle Mountain Minerals/Maughan, v. City of Richland,* EWGMHB Case No. 99-1-0005, FDO, (Oct. 1, 1999).

- RCW 36.70A.060(1) in part states "…or for the extraction of minerals. Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or minerals resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration." Ferry County Ordinance 73-1 requires as follows: "45.33 A statement affixed to the plat: The subject property is within or near designated agricultural, forest, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development."

  Ferry County Ordinance 72-1 requires as follows: "08.33 A statement affixed to the plat: The subject property is within or near designated agricultural, forest, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development.

  The question was whether the notice was adequate and the county has met those criteria? The Ordinances require the specific notice be affixed on plats or permits "within or near" resource lands. The Growth Management Act requires that this notice be affixed on plats and permits, which affect lands on or within 500 feet of resource lands. The statute would prevail and the County Administrator dealing with these plats and permits must consider "within or near" the same as "on or within 500 feet of" resource lands. The Ordinances allow for this to happen. While having the "500 feet" in the ordinances would have been preferable, the County's wording was not a violation of the GMA.

  The County has complied with RCW 36.70A.060(1). The notice found in the Ordinances to be affixed upon plats and permits was word for word what the statute requires and that notice must, by law, be affixed to such plats or permits on or within 500 feet of resource lands. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 00-1-0001, FDO, (July 6, 2000).

- [Board sets forth WAC 365-195-805(3)] While it may have been appropriate to adopt the development regulations more timely, the Board finds the language in WAC 365-195-805(3) is directive only. Words "should" and "may" be do not have the same weight as words like "shall". *Concerned Friends of Ferry County v. Ferry County*; EWGMHB Case No. 00-1-0001, FDO, (July 6, 2000).

- RCW 36.70A.040(4)(d) states: ". the county and each city located within the county shall adopt a comprehensive land use plan and development regulations that are consistent with and implement the comprehensive plan within four years of the certification by the office of financial management, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations." (Emphasis added). The Respondent, having adopted its Comprehensive Plan in 1995, should have by this time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits

they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially where, as to the RSAs, they stand-alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. This was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision was needed to allow smaller lot sizes within the RSAs "to minimize and contain the existing areas or uses of more rural development". *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 00-1-0001, FDO, (July 6, 2000).

- It is also the belief of this Board that the Comprehensive Plan and the buffers contained therein govern. The landowner must comply with the Comprehensive Plan of Ferry County and the implementing ordinances prior to development of lands within the subject area. The Timber Forest Practices Ordinance (TFPO) provides only a method, allowed by State law, to eliminate the 6-year moratorium at less cost. The passage of the TFPO, 99-01 by Ferry County, particularly Section 3.03, does not take the Comprehensive Plan out of compliance with the Growth Management Act. If the buffer width found therein were controlling and took precedence over those found in the ICAO, we would have a different result. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 99-1-0004, FDO, (Aug. 23, 1999).

- The TFPO is subject to existing ordinances, particularly the Comprehensive Plan and the implementing regulations, including the Interim Critical Areas Ordinance. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 99-1-0004, FDO, (Aug. 23, 1999).

Discretion of Local Government

- The Board believes the County has the discretion to formulate its own policies and development regulations in regards to the WWCC, Chapter 17.14, within the parameters of the GMA. With the development regulations requirements under WWCC Chapter 17.14.030 and the Walla Walla zoning code requirements guiding development in the Pennbrook UGA, the County has documented an intention to regulate future development in this area. *Citizens for Good Governance et al. v. Walla Walla County, et al.,* EWGMHB Case No. 05-1-0013, FDO (June 15, 2003).

- While there is opportunity for the exercise of local judgment and it is obvious that the local community understands its agricultural lands better than anyone else, the conclusions reached must be the product of a valid process. The record must show that the county considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). *English/ Project for Informed Citizens v. Board of County Commissioners of Columbia County,* EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- Each community is both given discretion and encouraged to create its own "vision of urban development." This "community vision"" is constrained in two ways. First, a community must provide adequate public facilities and services. Implementation of its plan may not decrease current service levels below locally established minimum standards. Second, sprawl is to be discouraged. This is the essence of the growth management process – a community taking responsibility for its future, developing a consensus for its future development and checking to

ensure its plan is feasible. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO, (July 1, 1994).

- While there is opportunity for the exercise of local judgment, the conclusions reached must be the product of a valid process. The record must show that the County considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- This is a legislative process. The elected decision makers are free to communicate with constituents in ways normally associated with the legislative process, and be guided by the opinions formed as a result of these public and private contacts. This does not mean, however, that local governments are free from constraints imposed by the GMA. The Act sets minimum requirements that may not be overridden, and it requires that actions taken be consistent with the record. Local governments may choose from a wide array of alternatives, provided they employ a valid public process and the record substantively supports their decision. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- The test is whether the designation meets the substantive requirements of the Act's wetlands definition, RCW 36.70A.030(18). A county should exercise a high degree of local discretion, but their discretion cannot be employed to justify an ordinance that fails to rise to the minimum substantive requirements of the Act. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- A county has a range of discretion in making this determination and the extent of any particular designation may vary from county to county depending on the level of protection above the minimum requirement they choose to grant the industry, but the baseline test is always whether the land is commercially significant over the long-term. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB 95-1-0009, FDO (May 7, 1996).

- Within a framework of certain state mandates and regional policies, the GMA leaves broad discretion for locally adopted comprehensive plans to reflect local choices. In general, the Board is to defer to policy choices of local jurisdictions. However, the Board must determine if policy choices of the local jurisdictions conflict with the clear policy mandates that the legislature stated in the GMA. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB 96-1-0009, FDO (Dec. 10, 1996).

- The requirement to adopt IUGAs involves both mandatory and discretionary elements. Therefore, local legislative bodies must comply with the mandatory requirements of the Act, but also have a great deal of flexibility to make choices in complying. For example, the Act establishes population-planning projections upon which IUGAs must be based. These exclusive projections are made for each county by OFM; no discretion is permitted for local jurisdiction to use their own numbers. On the other hand, local jurisdictions have great discretion in deciding how to accommodate these projections in light of local circumstances and traditions. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- The Board will not substitute its judgment for that of the County. The Board must allow the County the discretion the Legislature intended and recognize and defer to the expertise of the

County in designating its resource lands. *Belaire et al. v. Yakima County,* EWGMHB Case No. 99-1-0003, FDO, (July 22, 1999).

- This Board is not the place to examine the motivation of the legislative bodies in their adoption of amendments. We do not have the authority to examine their motivations, just the results and process. The City's motivation is immaterial to our decisions. *Bargmann/Greenfield Estates Homeowners' Assn. v. City of Ephrata,* EWGMHB Case No. 99-1-0008c, FDO, (Dec. 22, 1999).

- We find the reasoning of the Washington Appellate Court in Diehl v. Mason County, 94 Wn.App. 645, 972 P.2d 543 (1999) persuasive: "Local governments have broad discretion in developing CPs and DRs tailored to local circumstances. But this discretion is limited by the requirement that the final CPs and DRs be consistent with the requirements and goals of the GMA." Id., 94 Wn.App. at 651 [quotations omitted]. A fundamental requirement of the GMA is that development regulations be consistent with and implement comprehensive plans, RCW 36.70A.040(4)(d), and we find that the development regulations that are the subject of this proceeding are neither consistent with nor implement Yakima County's comprehensive plan. *Bertelsen, et al. v. Yakima County, et al*., EWGMHB Case No. 00-1-0009, FDO (Nov. 2, 2000)

Dismissal

- [Parties sought dismissal of PFR based on "Board's agreement and acceptance" of the parties' stipulated agreement. If findings this would amount to an advisory opinion, the Board stated] If the parties have resolved the basis for the Petitioners filing of this matter before the Board, then the parties can file a motion to dismiss the matter in its entirety or Petitioners can simply withdraw their PFR, both of which would terminate the Board's review of this matter as there would no longer be a dispute for the Board to address. If there is still a dispute for which the parties seek the Board's assistance to resolve as to the merits of the issues, then the parties need to move forward with the new revised schedule for briefing and hearing date under the Order section for Issues 4.1 and 4.2. Unless the Board receives a Motion for Settlement Extension, the Board will continue the schedule as set forth below in order to complete the process, as per RCW 36.70A.300(2), with several adjusted dates for briefing and the Hearing on the Merits. *Yakima County Farm Bureau, et al v. Yakima County,* EWGMHB Case No. 08-1-0009, Order on Motions at 3 (Nov. 21, 2008).

- Under WAC 242-02-230 a GMHB has broad discretion on the issue of dismissal for failure to properly serve a local government. The substantial compliance test, as well as the absent of any legislative requirement in the GMA that mandates service on a local government, means that absent a showing of prejudice by the local government a GMHB has no basis upon which to grant dismissal for failure to serve the Respondent. *Humphrey v. Douglas County,* EWGMHB Case No. 07-1-0010, Order on Motion, at 3 (Sept. 21, 2007).

- The Growth Management Hearings Boards have only the authority the State Legislature granted it under the GMA. Where the parties do not agree to a continuance of the matter and other authority for such a continuance does not exist, a continuance beyond the 180 days is not appropriate. The matter is dismissed. *Husum Citizens Group v. Klickitat County,* EWGMHB Case No. 00-1-0004 Order of Dismissal (Jan. 11, 2002).

- The failure of the Petitioner to brief the issues for the final hearing on the merits was an abandonment of those issues and those issues may be dismisses. If all the issues are not briefed, the petition may be dismissed. *Woodmansee v. Ferry County,* EWGMHB Case No. 00-1-0006, FDO (Sept. 7, 2000)

Dispositive Motion (*See also* Summary Judgment)

- *See Riparian Owners of Ferry County, et al v. Ferry County,* Case No. 09-1-0012, Order on Motion for Summary Judgment (Jan. 4, 2010)

- WAC 242-02-530(4) permits the filing of a dispositive motion on a limited record. Such a motion is similar to a Motion for Summary Judgment before the Court and, therefore, the Board will grant such a motion only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law … When issues are complex, extensive review of the Record pertaining to the core of a case is required. Therefore, the parties require time and careful consideration of the facts and law in order to fully develop briefing. Due to the limited factual evidence and argument provided to the Board at this time, the Board concludes dismissal of the matter would not be appropriate as it is evident disputes remain as to the underlying facts and the interpretation and application of GMA provisions. *Wenatchee v. Chelan County,* EWGMHB Case No. 08-1-0015, Order on Motions at 7-8 (Dec. 2, 2008)

- The Growth Boards have increasingly refused to consider dispositive motions that raise issues which are the "heart" of the case before the Board, involve issues of significant complexity, and/or involve issues of both law and fact. While this Board in the past has seen fit to rule on some complex dispositive motions, the three Boards have limited what they will consider by motion. The Boards consider only those dispositive motions which involve a limited record and limited issues of law. The example given in the regulations adopted by the three Boards is a motion to decide a challenge to compliance with the public participation requirements of the Growth Management Act (GMA). WAC 242-02-530. *Miotke v. Spokane County,* EWGMHB Case No. 07-1-0005, Order on Motions, at 3 (June 11, 2007).

- The purpose of this rule (WAC 242-02-530(6)) was to limit summary judgment type motions to simple issues based upon a simple record. Complex substantive issues should be resolved on a complete record at the hearing on the merits. This matter involves a complex record which was not completely developed for purposes of this hearing … such determinations are most appropriate with the benefit of the full record, complete briefing, and substantive legal argument upon the merits. *Kittitas Conservation v. Kittitas County,* EWMGHB Case No. 06-1-0011, Order on Motions, at 5-6 (Feb. 5, 2007).

  There are no genuine issues as to any material facts in this matter. Therefore, the issue of whether Spokane Valley did not comply with the GMA by failing to provide sixty (60) notice to CTED prior to amending its Comprehensive Plan is properly resolved by Dispositive Motion. The GMA, under RCW 36.70A.106, requires that each city planning under GMA proposing amendments to its Comprehensive Plan shall notify CTED of its intent to amend at least sixty days prior to final adoption. Spokane Valley became a "city planning under the Growth Management Act" ("GMA") when it amended its Comprehensive Plan. The Board adopts the reasoning of *Wildlife Habitat Injustice Prevention, et. al. v. City of Covington,* CPSGMHB, 00-3-0012 (Order on Motions 11-16-00) and finds that Spokane Valley is a GMA planning jurisdiction and is subject to the goals and requirements of the GMA. Spokane Valley is out of

compliance with GMA because it failed to notify CTED of its intent to amend the Comprehensive Plan at least sixty days prior to its adoption of Ordinance Nos. 03-0888 through 03-094. Such actions by Spokane Valley were clearly erroneous. *City of Liberty Lake v. City of Spokane Valley*, EWGMHB Case No. 03-1-0009, Order on Motions, (March 23, 2004).

- The Board does not grant dispositive motions lightly. This case is fitting, however, for such a motion. No genuine issue of material fact exists and administrative efficiency is advanced. *Coalition of Responsible Disabled v. City of Spokane*, EWGMHB Case No. 95-1-0001, Dispositive Motion and FDO (June 6, 1995).

Equitable Doctrines

- *Confederated Tribes and Bands of the Yakama Nation v. Yakima County, Case No. 10-1-0007, Order on Motion to Dismiss (June 2, 2010)* Denying Respondent's Motion to dismiss the matter in its entirety based upon res judicata, collateral estoppel, and untimely appeal.

- This Board is required to make their decision based on the issues presented and the facts developed. The facts of each case stem from the Record, which represents the information before the legislative body when making its determination, the arguments made by the parties' in their briefs, and any supplemental evidence which the Board deemed necessary or of substantial assistance to them. In this regard, this Board looks to the rationale and analysis of their prior decisions and then decisions of the other Growth Boards when deliberating on a matter; however, because each case contains its own unique set of facts and circumstances, the analysis of a prior decision may not necessarily be applicable. Because of the unique facts and circumstances that are presented in this case, we conclude that the application of *Stare Decisis* is not appropriate. This is not to say that there may be a time when the facts before a legislative body are so similar to those of a prior matter that the doctrine would apply. But that is not the case in the current situation … *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0015c, FDO at 47-28 (March 21, 20080.

Essential Public Facilities

- With regards to the siting of essential public facilities, the Board finds no provision in the law that would require the County to follow the Steering Committee's recommendation, regardless of what the CWPPs state. The CWPPs are to be followed by the County, but only to the extent allowable u**n***der existing law. The County cannot delegate its statutory responsib*ility to the Steering Committee. Therefore, its actions, retaining final authority for decision-making could not be found by this Board to be out of Compliance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- While it is unclear, the Board need not find the County out of compliance on this issue for the County's failure to provide an opportunity for the Spokane County Stee*ring Committee of Elected Officials to consider changing the UGA boundary by this amendment. The CP*P requirement for submittal for review to the Steering Committee came into effect after the application was filed. The fact that when the application was received, the Countywide Planning Policy requiring submittal to the Steering Committee was not in affect, does not necessarily mean that the old policy prevails throughout the consideration. This is a GMA amendment to the UGA. Whether policies existing at the time an application were made for a Plan change remain in effect throughout the consideration of such an amendment is not clear and we need not decide this issue at this time. It is hoped that upon remand, the County will do as the GMA requires in RCW 36.70A.100 and 210 and involve the representatives of the jurisdictions within the County

and the established Steering Committee. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

Evidence/Exhibits (including Supplemental Evidence)

- [T]he Board generally does not accept subsequently compiled evidence as it has little relevance in determining whether the County's action complied with the GMA *at the time* the action under appeal was made. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-008c, FDO at 9-10 (April 5, 2010)

- [Some parties included exhibits with their briefing which were not part of the Index of the Record, in denying these submittals the Board stated:] Although the Board can easily take official notice of legislative enactments such as ordinances, the exhibits must be signed/dated versions and the party seeking their submittal must properly move to have these added to the Record. The Board's Rules of Practice and Procedure, specifically WAC 242-02-540, establishes a process for supplemental evidence and none of these parties complied with the Board's rules. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-008c, FDO at 11 (April 5, 2010)

- [In denying Petitioners' post-HOM submittal of documents, the Board noted] Post-hearing actions are explicitly limited as denoted by WAC 242-02-810. *Riparian Owners, et al v. Ferry County,* EWGMHB Case No. 09-1-0012, FDO at 4 (April 5, 2010)

- The Board generally denies motions to supplement the record without a strong showing that such additional evidence is necessary to the case or of substantial assistance to the Board. In the present case, the Petitioners' reason for the supplemental evidence is not clear or inadequate based on their motion. [However] …. The Board in this case will deny supplementing the Record, but because the material requested is either matter of law or material fact, the Board will take official notice of all the documents requested by the Petitioners and will give these documents the weight they deserve. *Crowder, et al v. Spokane County,* EWGMHB Case No. 1-0008, Order on Motion to Supplement at 3-4 (May 11, 2010)

- WAC 242-02-540 clearly gives the Board authority to "order, at any time, that new or supplemental evidence be provided." A party is not required to move that the Board supplement the record or assert that the disputed evidence is necessary, as implied by the County. In addition, WAC 242-02-522(12) gives the presiding officer authority to "rule on issues concerning the content of the record." *Futurewise v. Stevens County,* Case No. 05-1-0006, Order on Reconsideration at 2 (Jan. 25, 2010)

- Petitioners failed to file a motion to supplement the record with these documents, as required by WAC 242-02-540. The Board will not read a motion into the Petitioners' brief. It is the responsibility of a party to make such a motion and the Petitioners have failed to do so. Therefore, supplementation of the record with these attachments is not permitted. Even if supplementation had been sought, as the County correctly noted, with the exception of Attachment 7 these documents reflect settlement negotiations occurring between the parties and may not be utilized by the Petitioners to support their argument. *Larson Beach Neighbors/Wagenman,* EWGMHB Case No. 07-1-0013, Order on Motions at 5 (June 25, 2008).

- [Petitioner asserted the County was required to produce a written transcript of the Council meetings] WAC 242-02-520 requires the County to file with the Board and serve a copy on the parties an *index of all material* used in taking the action which is the subject of the petition for review within thirty days of service of the petition. The written or tape-recorded record of the legislative proceedings where action was taken shall also be *available to the parties for inspection*. The County sent legible/audible recordings in CD/DVD format to the Board and a courtesy copy to the parties of record. The County has made the record available to the parties for inspection as required by WAC 242-02-520. *Fiel, et al v. Douglas County, et al.*, Order on Motions at 7 (June 17, 2008).

- As set forth in the Pre-hearing Order, exhibits must be single-sided, clearly tabbed and accompanied by a table of attached exhibits naming and describing each exhibit. Naming the entire record as Exhibit A does not excuse the County from tabbing individual documents … Exhibit submittals in future cases that are not in compliance with the Board's Pre-Hearing Order will not be accepted. *Henderson, et al v. Spokane County*, EWGMHB Case No. 08-1-0002, Order on Motions at 5 (Aug. 12, 2008).

- Although the Board is permitted to supplement the Record with additional evidence, the Board must conclude such evidence is of "necessary or of substantial assistance to the board in reaching its decision ... Additional evidence in the form of a site visit places the Board in the awkward position of having more information to make our decision than the BOCC had to make theirs. This Board seldom approves motions to supplement the Record with documents and evidence, and has rarely, if ever, approved a site visit by the Board and parties. *Henderson, et al v. Spokane County*, EWGMHB Case No. 08-1-0002, Order on Motions at 5 (July 31, 2008).

- 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 will not be admitted if it is mere opinion or argument. As a general proposition we reject proffered supplemental evidence compiled after the decision of the local government has been made. Hearings Boards have on occasion allowed subsequently developed evidence to be admitted for issues involving invalidity but not for initial compliance determinations. Relevant supplemental evidence of materials available to a jurisdiction, often times developed by the jurisdiction, which were not specifically included in the record of deliberations during a jurisdiction's process, is sometimes allowed. We do not admit newspaper articles. *Southgate Neighborhood Council, et al v. City of Spokane*, Case No. 08-1-0014, Order on Reconsideration/Supplementation at 6-7 (Nov. 4, 2008).

- [T]he GMA requires the Board to base its decision on the Record that was before the County. The Petitioners seek to supplement the Record with *a document created* more than a year *after the adoption of the challenged legislative enactment*. Supplemental evidence compiled *after the decision* of the local government has been made is of little relevance in determining whether the County acted in compliance with the GMA *at the time it took the action under appeal*. *Larson Beach/Wagenman v. Stevens County*, EWGMHB Case No. 07-1-0013, FDO at 9 (Oct. 6, 2008).

- Although the purpose of this document was to respond to assertions made by the Petitioners, the County was required to seek supplementation of the Record prior to its use and explain to the Board why this document would be necessary or of substantial assistance to the Board in

rendering its decision. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 10 (Oct. 6, 2008).

- The Petitioners appear to mistakenly believe they may add, subtract, or modify the exhibits presented to the Board at any point in the process. Petitioners are required to develop their legal arguments and present those arguments along with the supporting evidence to the Board prior to the HOM, with the HOM providing Petitioners the opportunity to highlight and emphasize their arguments. Although the Board will allow for minor corrections to briefing via the filing of an Errata Brief or the Board may request post-hearing supplemental briefing and/or exhibits on a specific issue, Petitioners are not permitted to subsequently manipulate the evidence after briefing has been completed and oral arguments have been heard. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 11 (Oct. 6, 2008).

- Once an exhibit has been submitted by a party, either party may present argument based on that exhibit. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 11 (Oct. 6, 2008).

- The record is full of evidence that the listed exempted activities should be prohibited in buffers or at least carefully regulated. Title 13 requires no review or approval for what the landowner believes is necessary or minimal. From all the Record and reports from the experts, including the County's, it is clear that, to be beneficial, buffers must remain in their natural state. The values and functions of the Critical Areas all have to be protected. The Board, in Issue No. 3, CARAs, addressed the concerns regarding the exemption for agricultural activities. While mowing and use of chemicals are not always agriculturally related, the arguments for regulating agricultural practices in critical areas are the same. To exempt existing and ongoing agricultural practices in critical areas is clearly erroneous, and fails to protect critical areas from degradation.

  The Board finds the actions of the County clearly erroneous regarding exceptions without review and possible mitigation determined by an appropriately trained individual and fail to protect critical areas. *Larson Beach Neighbors/Wagenman v. Stevens County, et al*., EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- As in the King County case above, we find here "the evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." *Supra,* P.142.

- The Petitioners need not prove a negative, i.e., the lack of evidence. The Petitioners must demonstrate the failure of the County to include the best available science. It is then incumbent upon the County to point out the evidence in the record, showing they have complied with the GMA. The County did not do this and we have found nothing in the record demonstrating the inclusion of the best available science. This does not constitute a shift in the burden of proof.

Concerned Friends of Ferry County v. Ferry County, EWGMHB Case No. 97-1-0018, Order on Reconsideration, (Nov. 24, 1999).

- The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. W*EAN*, *supra*, at 532.

  The Court of Appeals, *WEAN, supra,* requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- We decline to accept this view. Again, there is no requirement that the changes must be substantial and no evidence the map amendments where merely correcting errors or otherwise fall under any of the exemptions in RCW 36.70A.035(2)(b). *1000 Friends of Washington et al. v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- In arguments before the Board, Respondent County posits that to restrict development and commercial uses as ordered by the Board is contrary to RCW 36.70A.020(6) and private property rights afforded by the U.S. Constitution. We disagree. We have been presented with no evidence that restricting uses of lands as ordered is in violation of any laws. In fact, not to restrict use is, in our opinion, often a violation of property rights of adjacent property owners, who have an equal right to enjoy their property without unsuitable development intrusion. Clearly, the GMA requires restrictions on development. Pertinent to this case, the GMA requires development of an urban nature be limited to urban growth areas or well-defined Rural Service Areas. *Woodmansee, et al. v. Ferry County*, EWGMHB Case No. 95-1-0010, 2nd Order on Compliance (Aug. 22, 1997).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- A petitioner has the burden of proving by a preponderance of the evidence that a plan does not comply with the Act. The initial burden of persuasion is met when a petitioner presents sufficient evidence which, standing alone, would overcome the presumption of validity. Once that level has been reached the burden of producing evidence to rebut the initial showing does shift to the respondent local government. Because the Board's review is "on the record," that rebuttal evidence must be contained in the record absent the rare instance of consideration of supplemental evidence. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

Pursuant to WAC 242-02-230(2), this Board may dismiss this case for failure to substantially comply with §(1) of this WAC. It is a proper exercise of the discretion granted this Board when ruling upon dispositive motions to make determinations as to the credibility and weight to be given the evidence presented. *Abercrombie v. Chelan County*; EWGMHB Case No. 00-1-0008, Order on Dispositive Motion (June 16, 2000).

Exhaustion

- [In finding that all Petitioners had standing, but that some failed to exhaust SEPA administrative remedies, the Board stated] Under SEPA, even if a party has standing to raise the issue, a party must still exhaust their administrative remedies prior to further review of administrative actions, and the County's own code provision similarly sets forth a process for exhaustion. *Southgate Neighborhood Council, et al v. City of Spokane,* Order on Motions at 11 (Oct. 6, 2008)

- [E]xhaustion of remedies doctrine is based on a number of legal policies. The doctrine: (1) avoids premature interruption of the administrative process; (2) provides for full development of the facts, and (3) allows the exercise of agency expertise. The exhaustion of administrative remedies also protects the autonomy of administrative agencies, such as the City Council, by giving them the opportunity to correct their own errors, and discourages litigants from ignoring administrative procedures by resort to the courts, while allowing the administrative review process to run its course. *Southgate Neighborhood Council, et al v. City of Spokane,* Order on Motions at 11 (Oct. 6, 2008).

- [In response to Petitioner's argument that *Knapp v. Spokane County* Case No. 97-1-0015c (1997) holds exhaustion is not required, the Board, noting the evolution of case law since *Knapp* was issue and other Boards' holdings, stated] Rather than re-affirm its holding in *Knapp* and not require exhaustion, the Board has decided petitioners need to raise State Environmental Policy Act (SEPA) claims following the appeal steps set forth in the jurisdiction's own SEPA code provisions. In other words, the SEPA appeal process is an important step and, rather than jump directly to the Board for resolution and eliminating the jurisdiction's ability to address specific petitioner's concerns, exhaustion of administrative remedies should be followed. If there isn't a jurisdictional avenue of appeal or the appeal procedures are not mandatory, then the Board can hear the appeal. This Board agrees with the Central Board's, Environmental Hearings Board, and even with the Western Board, decisions and believes preserving the integrity of a jurisdiction's adopted administrative process is important within GMA planning, given the public participation nature of the statute. *Southgate Neighborhood Council, et al. v. City of Spokane,* EWGMHB Case NO. 08-1-00014, Order on Reconsideration/Supplementation at 4-5 (Nov. 4, 2008).

- The County contended the Petitioner must exhaust their administrative remedies prior to the GMA challenge of the effect of an ordinance on critical areas. The Petitioner filed an appeal with the Ferry County Board of Commissioners shortly after the publishing of the notice of determination of non-significance. The County believed the Petitioner should not challenge the effect of the ordinance on critical areas through GMA review until they have received an answer from their SEPA appeal.

  The Petitioner contends the Petition for Review is a separate and distinct action from the SEPA appeal. They contend the County has provided no evidence that the two actions are similar or analogous in any manner. Both actions were generated by the Timber Forest Practices Ordinance, (TFPO), yet they each have their own characteristics. The Board has found it has separate subject matter jurisdiction to review the affects of this legislative action upon the

Comprehensive Plan. The Petitioner is not asking us to review compliance with the Timber and Forest Practices Regulation. Had the Petitioner waited until the SEPA appeal is resolved, the time would have passed for them to file a petition under the GMA.

This petition raises separate issues that can be decided by this Board under the GMA. It is not necessary for the Petitioner therefore to exhaust the administrative remedies under SEPA. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 99-1-0004, Order on Motion (Sept. 29, 1999).

Expert

- The Board finds the absence of a qualified professional determination of required mitigation measures to be clearly erroneous. The only way to ensure that the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional.

  Title 13.20.020 provides: "The applicant, Planning Department, agencies with expertise and often times, a qualified professional <u>may</u> (emphasis added) be involved in the mitigation process." This provision is inadequate. Mitigation, to ensure protection, must be determined by a qualified professional.

  The Board finds that if a qualified professional were to determine the mitigation requirements when mitigation is called for, Petitioners would have failed to carry their burden on the other mitigation arguments. Ratios for replacement, enhancement, etc., if determined by a professional, can be expected to protect the critical area. Likewise, before a "reasonable use" exception is granted, a professional determination of any mitigation measures required ensures the protections necessary.

  The Board recognizes off-site mitigation compensation sometimes is necessary and appropriate if the functions and values of the affected critical area are maintained or enhanced. However, only a qualified professional also can make this determination. Petitioners have failed to carry their burden of proof with the exception of their argument for use of a qualified professional. By failing to require the use of a qualified professional in determining mitigation measures, Title 13 fails to protect critical areas, and is clearly erroneous. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Stevens County Planning Commission, after several public work sessions, and at least three public hearings, ultimately concurred with Mr. Kovalchik's recommendations with a minor exception of dropping the "+" sign from two categories. Those recommendations were forwarded to the Board of County Commissioners (BOCC). Many of Mr. Kovalchik's conclusions were included within the body of Title 13. However, with one exception, Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr. Kovalchik were rejected by the BOCC. The County, when asked about this, informed the Board that their expert said, "I can live with that", after his recommendations were not followed. If this was his response, we cannot consider such a response as the reasoned opinion of an expert. The County does not point to any science used to vary from the recommendations given by their expert or the other BAS reviewed as is required by the Court of Appeal decisions quoted above.

  The Board is also unable to find any part of the record reflecting the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in the record and

must be considered substantively in the development of critical areas policies and regulations. W*EAN, supra*, at 532.

The Court of Appeals, *WEAN, supra,* requires that the County base the Critical Area Ordinance either on externally supplied science or on County supplied science. Stevens County has based the size of their buffers, with the exception of 200 feet for Category I wetlands, on no science found in the record. Best Available Science, however, does exist for larger buffer sizes. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

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- The activities the County has allowed as exempt in the Buffer areas are without clear limits. Without any limitation other than a direction that the mowing and chemical use should be minimized in buffers, these activities are exempted.

  The record is full of evidence that the listed exempted activities should be prohibited in buffers or at least carefully regulated. Title 13 requires no review or approval for what the landowner believes is necessary or minimal. From all the Record and reports from the experts, including the County's, it is clear that, to be beneficial, buffers must remain in their natural state. The values and functions of the Critical Areas all have to be protected. The Board, in Issue No. 3, CARAs, addressed the concerns regarding the exemption for agricultural activities. While mowing and use of chemicals are not always agriculturally related, the arguments for regulating agricultural practices in critical areas are the same. To exempt existing and ongoing agricultural practices in critical areas is clearly erroneous, and fails to protect critical areas from degradation.

The Board finds the actions of the County clearly erroneous regarding exceptions without review and possible mitigation determined by an appropriately trained individual and fail to protect critical areas. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Board recognizes expansion or replacement of non-conforming structures could be permitted under certain conditions. However, SCC 13.30.032 provides inadequate assurance any impacts will be mitigated. SCC 13.30.032 provides: "The outcome of the Administrative Review is generally one of the following:" (Emphasis added). That statement is no assurance that even the listed possible outcomes will be achieved. Those listed possible outcomes include an administrative determination by a person without professional expertise that the development within a critical area, perhaps even up to a shoreline, has no impact on the critical area. Such provisions are effectively no protection at all and are clearly erroneous. As in other "mitigation issues", the Board finds the absence of a qualified professional determination of required mitigation measures to be clearly erroneous. The only way to ensure the functions and values of critical areas are protected is to have those mitigation measures determined by BAS. The only way to ensure BAS on a site-specific development proposal is to engage a qualified professional. Provisions in Title 13 addressing common-line setbacks and non-conforming structures without mitigation determined by a qualified professional fail to protect critical areas and are clearly erroneous. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Assoc., et al., v. Stevens County, et al.*, EWGMHB Case No. 03-1-0006c, Order on Motions on Case Nos.. 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- Here, Stevens County has no articulated evidence in the record supporting the buffers adopted for their streams and wetlands. Their counsel's argument that the BAS, including from their own expert, was considered in adopting "other provisions of Title 13," does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence supporting the buffer widths chosen, with the exception of Wetland Category 1. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The county is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the county itself is complying with and implementing its own ordinance.

  While the Stevens county ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with

this no harm or degradation standard via BAS as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.

Given that the critical area ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm and given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the county or any concerned citizen to determine whether that land owner is causing harm. *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- Ferry County sought out advice from Kirk Cook, a hydrologist from the Department of Ecology and now working for the Department of Agriculture. Mr. Cook had drafted a document entitled Document for the Establishment of Critical Aquifer Recharge Area Ordinance. Ferry County used that document to guide them in adopting Ordinance No. 2002-06. The County corresponded with Mr. Cook many times throughout the process by phone, letters and e-mail. The County addressed all of Mr. Cooks concerns. At the Hearing on the Merits Mr. Cook testified that the County had included Best Available Science, and had only one concern, that being the lack of a statement of the conditions, which will trigger a level two report. The Board in the past has recognized that Ferry County has very limited funds, minimal growth, and even less staff to do the job required to comply with the GMA. The Board is pleased with Ferry County's progress and while the County admits there is still work to be done, they now are found to be in compliance on the issue of protecting critical areas, and the use of Best Available Science in the adoption of Ordinance No. 2002-06. *Concerned Friends of Ferry County/Robinson, v. Ferry County*, EWGMHB Case No. 02-1-0013, FDO, (Dec. 23, 2002).

- The Board recognizes the prerogative of Ferry County to not adopt the DFW recommendation, as long as that decision is based on a sound, reasoned process that includes best available science. The County consulted with a credentialed biologist, but the process he undertook to develop his recommendations was inadequate. There was no evidence in the record that the consultant coordinated his recommendation with any other scientists with expertise in Ferry County, such as the Colville tribe, U.S. Forest Service, or the DFW. There was no evidence that any on-site field observations were conducted. With specific reference to the Peregrine Falcon, his recommendation seems to conflict with activities of the Colville Tribe. Regarding Bull Trout, a sensitive species documented to exist in Ferry County, he makes no mention at all. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 97-1-0018, 2nd Order on Compliance (May 23, 2000).

- The Board recognizes financial limitations in Ferry County preclude the option of hiring consultants for scientific review. With this in mind, the Board recommended that Ferry County "consult with" appropriate experts within governmental agencies. Contrary to the contentions of Ferry County, the Board does not believe the County followed this advice. The County has provided no evidence in the record of any scientific review of the issues in this case. Even the one response received does not imply a scientific review. The Board does not accept "no comment" by state agencies as compliance with RCW 36.70A.172. The Board's recommendation was to consult with appropriate agencies to utilize their expertise. Simply mailing a proposed section of the comprehensive plan, without discussion or collaboration, without substantive response, is not compliance with either our order or with RCW 36.70A.172. The process must be collaborative, with the result being either incorporation of BAS recommendations in the final document, or a justification for not including those

recommendations. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 97-1-0018, 3rd Order On Compliance (Jan. 26, 2001).

Failure to Act

- [The Motion to Dismiss asserted the challenge was a "failure to act" challenge, to which the Board stated] Such a challenge is generally premised on an allegation that a jurisdiction has failed to enact specifically mandated GMA requirements within a statutory timeline. The Board's rules [WAC 242-02-220-(5)] indicate it will consider a PFR alleging a "failure to act" when a jurisdiction fails to take action by a deadline specified in the GMA … such a challenge requires not only that the GMA has imposed a mandatory duty but the GMA also established a deadline which has passed. *City of Chelan v. Chelan County,* EWGMHB Case No. 10-1-0009, Order on Motion to Dismiss at 2-3 (May 19, 2010)

- Review based upon a "failure to act" is authorized only where the jurisdiction fails to take an ". . . action by a deadline specified in the act." WAC 242-02-220(5). Jurisdictional requirements are supplemented by RCW 36.70A.290(2) which provides, in pertinent part, as follows: All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter. . . must be filed within sixty days after publication by the legislative bodies of the county or city. *Chipman v. Chelan County, et al.,* EWGMHB Case No. 05-1-0002, Order of Dismissal, (Jan. 31, 2006).
- The Board finds the earlier Compliance Order was a "failure to act" order. Thus, Ferry County, by adopting policies addressing aquifer recharge areas, has complied with the order. Any decision regarding substantive issues in that action can only be made after a new petition is filed and arguments heard. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 97-1-0018, 4th Order on Compliance, (June 21 2002).

- RCW 36.70A.280(2) does not limit standing to parties appearing before the county's legislative authority. Since the county has yet to hold a public hearing, such a narrow construction would effectively bar the petitioner from making its claim. Local governments may not evade the requirements of the GMA by failing to comply with the Act's deadlines. *No. Cascades Conservation Council/Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB Case No. 93-1-0001, Order on Dispositive Motions (May 21, 1993).

Fish and Wildlife Habitat Conservation Areas

- [As to the designation of Fish and Wildlife Habitat] Although the County could designate the entire Upper Wenas Valley as a UWHCA [Upland Wildlife Habitat Conservation Area] based on the BAS in the Record, the Board agrees with the County and Intervenor here that designation of the narrow strips of agricultural land not designated as UWHCA in the Upper Wenas Valley would contravene the agricultural moratorium set forth in RCW 36.70A.560. *Hazen, et al v. Yakima County,* EWGMHB Case No. 09-1-0014, FDO at 28 (June 14, 2010)

- [As to the designation of fish and wildlife habitat] The Board believes the BAS in the Record shows the Upper Wenas in its entirety should be designated and protected as an UWHCA [Upland Wildlife Habitat Conservation Area]. But the reality is the County has some discretion consistent with the requirements and goals of this chapter and within the parameters of the WACs as to designating critical areas based on its consideration of BAS. Here, the County has the legislature's moratorium, RCW 36.70A.560, which controls during the moratorium period

when agricultural lands and critical areas are in conflict. *Hazen, et al v. Yakima County*, EWGMHB Case No. 09-1-0014, FDO at 30-31 (June 14, 2010)

- [In regards to Ephemeral Streams] the GMA itself does not define fish and wildlife habitat. WAC 365-190-130(2)(f) states that "waters of the state" must be considered for designation as habitat. An ephemeral stream meets the definition of "waters of the state" and thus was required to be considered for designation. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-008c, FDO at 34 (April 5, 2010)

- [In finding the County's action in not designating ephemeral streams as a critical area failed to comply with the GMA, the Board noted] [F]or Yakima County, ephemeral and intermittent streams comprise a large portion of the County's watershed and contribute to the hydrological, biogeochemical, and ecological health of the watershed. Wes Hazen/Futurewise emphasizes the important role small streams play in the overall functioning of a stream corridor system, even those that have no fish influence because of their impact on downstream habitat quality, primary due to sediment flow regulation … The role of small streams is further supported by the County's own BAS. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-008c, FDO at 35-36 (April 5, 2010)

- A nomination process for habitats and species of local importance is necessary for listing those habitats and species which become candidates in the future, not as the sole process to protect those already in danger. It is not the responsibility of the WDFW or any other state agency, as suggested by the County, to petition the County to adopt a habitat, species or both. The GMA specifically requires the County to protect fish and wildlife conservation areas, thus ETS species and habitats and species of local importance. *CFFC/Robinson v. Ferry County*, EWGMHB Case No. 97-1-0018, Compliance Order, at 15 (Feb. 13, 2009).

- Polygon and point data are based on actual field surveys and observations of the species … WDFW claims if a habitat is mapped, then a species inhabits or has been known to inhabit that area … The Board has held that failing to protect both point and polygon data violates the GMA. *CFFC/Robinson v. Ferry County*, Compliance Order, at 18 (Feb 13, 2009).

- As to point and polygon validations in Section 9.04, the Board finds this section is out of compliance with RCW's 36.70A.060 and 36.70A.172 for failure to protect ETS species by requiring WDFW, a state agency without authority to enforce local CAO provisions (or any Ferry County code provisions, even if they relate to fish and wildlife), to validate point observations and polygon observations, which would only then trigger protection measures. *CFFC/Robinson v. Ferry County*, EWGMHB Case No. 97-1-0018, Compliance Order, at 18 (Feb 13, 2009).

- The County's reading of WAC 365-190-080(5) fails to consider that BAS is required to be included to justify its decision whether or not to protect and designate fish and wildlife habitat conservation areas, which include "habitats and species of local importance." The County needs to keep in mind WAC 365-190 is a guideline adopted by the State to guide the classification of critical areas, the intent of which is to assist counties and cities in designating the classification of critical areas under RCW 36.70A.170. In other words, the RCW's control. The optional/permissive "sources and methods" under WAC 365-190-080(5)(c) allows counties to use other sources for BAS "other than the WDFW PHS program," not completely ignore habitats and species of local importance, particularly if the County has the science available in the record

that shows certain habitat and species of local importance in the County are "candidates", a step from ETS listing. That science was submitted by the WDFW and not refuted by any other science in the record. To reiterate the key language, the County is required by RCW 36.70A.172 to include BAS in developing policies and development regulations to protect the functions and values of critical areas. If the County chooses to disagree with or ignore scientific recommendations and resources made by state agencies, which it may, then the County must unilaterally develop and obtain valid scientific information. Critical areas are, among other areas, fish and wildlife habitat areas, which include not only areas with which endangered, threatened, and sensitive species have a primary association, but habitats and species of local importance. If habitats and species of local importance weren't required elements to be protected, they would not have been listed under fish and wildlife Habitat areas. *CFFC/Robinson v. Ferry County,* EWGMHB Case No. 97-1-0018, Compliance Order at 13-14 (Feb. 13, 2009).

- Upon review of the arguments of the parties and review of the party's briefing and the determination that the ICAO, which this board found out of compliance, was not repealed or in any way modified, the Board determines the ICAO continues to be out of compliance with the Order of this Board and the GMA. The Board further finds that Title 13 is better reviewed in the case begun pursuant to the new petition, now filed under case Number 03-1-0003. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (Nov. 13, 2003).

- In adopting development regulations, counties cannot rely on vague exhortations to do the right thing, but must develop specific protection measures that include requirements or standards sufficient to demonstrate that GMA mandates will be met. If the county wishes to rely on voluntary implementation of best management practices or BAS to protect critical areas, benchmarks, timeframes and monitoring must be developed and funding to ensure that these voluntary actions are working to achieve the needed protection. It is of particular importance to the success in providing adequate protection to fish and wildlife resources, that the program includes a rigorous monitoring program and adaptive management process. The program and process must be capable of detecting changes in the functions and values of habitat in a timely manner, and must include processes through which management techniques are reevaluated and modified as necessary in response to this information, to ensure that the goals of management are being met. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (Nov. 13, 2003).

- The growth management act (GMA) requires a county's adoption of development regulations to protect the functions and values of critical areas, recognizing particularly fish and wildlife habitat conservation areas, and substantively considering BAS when adopting those regulations. RCW 36.70A.060(2), .020(8), WAC 365-195-825(2)(b) and .172(1). Development regulations are "controls" placed on development or land use activities. RCW 36.70A.030(7). The county must use BAS both to develop critical areas regulations and also to evaluate their effectiveness in providing the protection required under the GMA. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- The Board recognizes the prerogative of Ferry County to not adopt the DFW recommendation, as long as that decision was based on a sound, reasoned process that includes best available science. The County has consulted with a credentialed biologist, but the process he undertook to develop his recommendations was inadequate. There was no evidence in the record that the

consultant coordinated his recommendation with any other scientists with expertise in Ferry County, such as the Colville tribe, U.S. Forest Service, or the DFW. There was no evidence that any on-site field observations were conducted. With specific reference to the Peregrine Falcon, his recommendation seems to conflict with activities of the Colville Tribe. Regarding Bull Trout, a sensitive species documented to exist in Ferry County, he makes no mention at all. *Concerned Friends of Ferry County v. Ferry County,* EWGMHB Case No. 97-1-0018, 2nd Order on Compliance, (May 23, 2000).

- RCW 36.760A.030(5) and WAC 365-195-410 defines critical areas. Fish and Wildlife Habitat Conservation Areas are considered critical areas under the act. furthermore RCW 36.70A.170(2) states:

  > "In making the designations required by this section, counties and cities shall consider the guideline established pursuant to RCW 36.70A.050."

  Larson Beach Neighbors/aWagenman v. Stevens County, EWGMHB Case No. 00-1-0016, 3rd Order on Compliance, (Nov. 14, 2003).

- WAC 365-190-080(5) provides that a process must be in place to allow for the designation and protection of species of local importance. At the present time, there is no procedure for such designation.

  The Board is convinced that a lack of standards or criteria for determining "significance" of a development activity can and must be addressed. Petitioners identifies a letter in the record from the Department of Commerce Trade and Economic Development suggesting certain activities which should be regulated in habitat conservation areas.

  The County provides no basis for deviating from Department of Fish and Wildlife recommended buffers and setbacks to protect wild salmonid and other threatened endangered or sensitive species. The DFW guidelines must be followed in the absence of provisions for mitigation, or scientific evidence that supports a different buffer or setback. (citing *Friends of Ferry County v. Ferry County,* EWGMHB Case No. 97-1-0018). *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016 FDO, (July 13, 2001).

- Petitioners contend the term "setback" is not defined, and includes only structures, not limiting other development activity. The term "Buffer" is necessary to provide adequate protection for wetlands and fish and wildlife habitat conservation areas.

  The Board finds the language chosen by Ferry County is adequate for purposes of the broad policy as outlined in the SACP. The protection of wetlands and fish and wildlife habitat conservation areas will need further clarification and definition in the Critical Areas Ordinance. *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Compliance, (Nov. 30, 1999).

Forest Lands (*See also* Natural Resource Lands)

- The definition of LTCS Forest necessarily follows the template established by the Supreme Court for Ag Land of LTCS: (1) land is not characterized by urban growth, (2) land is primarily devoted to the growing of trees for long-term commercial timber production on land that can be economically and practically managed for such production, and (3) land has long-term significance for the commercial production of timber.57 However, unlike agriculture, the

Legislature has provided specific guidance to be used in determining the "primarily devoted" portion of the definition as RCW 36.70A.030(8), with language addressing the ability of the land to be "economically and practically managed."58 Therefore, the County's reference to the standards of RCW 36.70A.170 and the definitions of RCW 36.70A.030 for designation of Resource Lands includes the critical foundation for designation. The final consideration for designation of LTCS Forest is whether or not the land has long-term significance for commercial timber production. The definition of Long-Term Commercial Significance set forth in RCW 36.70A.030(10), in conjunction with the language of RCW 36.70A.030(8), guides the Board with the factors enumerated in WAC 365-190-060 to be considered in order to evaluate the combined effects of the proximity to population areas and the possibility of more intense uses of the land. *Kittitas County Conservation, et al. v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 21-22 (Feb. 4, 2009).

- In common with the County's agricultural criteria, is the use of the conjunction "OR" and the statement that the combined effects of proximity to population areas and the possibility of more intense uses "SHOULD" consider these aspects. As the Board stated supra, RCW 36.70A.170(2) mandates the consideration of the WAC guidelines. By using permissive, non-inclusive terminology the County fails to meet the requirements of 36.70A.170(2). *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 24 (Feb 4, 2009).

- General Discussion of Designation of Forest Lands of LTCS. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 22-24 (Aug. 7, 2008)

- The GMA requires, at a minimum, the County to include lands not characterized by urban growth and primarily devoted to the growing of trees as the initial land base for forest lands of long term commercial significance. Then, the County is to consider the factors set forth in WAC 365-190-060, to classify the forest lands so as to conserve the higher grades, and to consider development related impacts as indicated by WAC 365-190-060(1)-(7). The County's designation and de-designation process does not adequately encompasses these requirements and, as was found for agricultural lands, includes factors which are not respectful of the GMA's mandate to conserve lands and maintain and enhance the timber industry. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHG Case No. 07-1-0004c, Compliance Order at 26 (Aug. 7, 2008).

- The Board finds that if land meets the criteria for forestland designation under RCW 36.70A.170, it must be designated with one limited exception. Local discretion is retained to avoid clearly anomalous results. *Ridge, et al. v. Kittitas County,* EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- There are three factors for determination of "long-term commercial significance": (1) the growing capacity and productivity of the land, (2) the land's proximity to population areas, and (3) the possibility of more intense uses of the land. These criteria are not independent and must be evaluated in relation to each other. That these factors must be "considered with" each other necessarily requires the consideration of the relative significance of each factor. Physical proximity to population areas, in and of itself, does not preclude designation. The Growth Management Act places a high priority on conserving resource lands and reducing sprawl. Designation of resource lands was the first required task. Indeed, forestlands of long-term commercial significance may be located within urban growth areas in certain circumstances.

There must be good faith consideration and showing that the effects of proximity to population areas are significant and unduly burdensome to avoid designation. Similarly, consideration of the possibilities of more intense use of the land must be based in real possibilities, sufficiently quantified to be considered in good faith. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO, (July 28, 1994).

- If qualifying forestland is not proximate to population areas it should be designated. The reverse is not necessarily true. Forestlands of long-term commercial significance may, under limited conditions, be inside urban growth areas. The extent to which a population area impacts forestland is the determining factor. Thus, an 80-acre parcel that elsewhere in the state might be properly designated forestland, might not so qualify if it abutted the City of Seattle. It is the level of impact placed on the property, rather than its location that is determinative. It is the burden of increased management and other costs that disqualifies the property. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- Planning options are retained by initial designation of resource lands. In order to fulfill the Growth Management Act's mandate to conserve resource lands, the initial designation should err on the side of inclusion. As more information is developed, a county can easily make changes at the comprehensive plan stage – this is the logical place for a weighting of the competing goals of the Act. Further, nothing in the Act limits a county's authority to amend its ordinance as conditions warrant. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- For counties planning under the Act, the Board finds that forest land "designations" made pursuant to RCW 36.70A.170 are inseparable from the development regulations required for their protection under RCW 36.70A.060 and must be guided by the planning goals of RCW 36.70A.020. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- That U.S. Forest Service lands were designated forestlands by the county is not a significant point. While the Act derives its authority from the State of Washington and as such lacks authority over federal lands, nothing in the Act precludes such a designation for county purposes. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- Division of forestlands into parcels too small to be efficiently managed for commercial timber production removes these lands from forest production. Additionally, as an incompatible adjacent use, it hinders ongoing commercial timber production on adjacent unconverted lands. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- Lands encompassed within the "forest resource lands" definition are to be designated. Lands falling outside this definition are not designated. *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, Order of Non-Compliance (Apr. 3, 1995).

- If land cannot be economically or practically managed for commercial forest production, it may be excluded from the "forest resource land" classification. *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, Order of Non-Compliance (Apr. 3, 1995).

- A county can be found in noncompliance, based on an examination of the record below, if it failed to designate all lands that meet the definition of forestlands, unless these lands are located within a UGA. This Board has held in previous cases involving these same lands that RCW 36.70A.170(1)(b) requires counties and cities to designate all lands that met the definition of forest lands and RCW 36.70A.060(1) requires that counties and cities adopt development regulations to assure the conservation of all these designated forest lands. Within urban growth boundaries, these lands must be designated only if the city or county has enacted a program authorizing transfer or purchase of development rights. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, FDO (Mar. 28, 1997).

- The standard for designating critical areas and forestlands is "land use designations must provide landowners and public service providers with the information needed to make decisions." Given the recognized deficiency in the maps in this case, it is necessary to follow up that designation with a process, which includes on-site inspections as permits are processed. *Woodmansee, et al. v. Ferry County*, EWGMHB Case No. 95-1-0010, Order on Compliance (Apr. 16, 1997).

- RCW 36.70A.170(1)(b) requires cities and counties to designate forestlands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber. Counties are not required to designate lands that may be forested today but do not meet the requirements for lands of long-term commercial significance. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The legislative changes in the "forest land"" definition replaced "primarily useful for growing trees" with language mirroring that of "agricultural lands" by including "primarily devoted to." However the legislature went further. Four factors were added to the definition to use in determining whether the land was indeed "primarily devoted to" growing trees commercially. None of these four factors involves the landowner's intent. Further, additional factors were not added to the definition of "agricultural lands." *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

Frequently Flooded Areas

- It is the County's obligation to include best available science in the designation and protection of frequently flooded areas. Ferry County, by its failure to demonstrate otherwise, forces this Board to conclude that best available science was not included in developing policies in the sections of the SCAP under review. The contention that the silence of the reviewing Department is considered approval and constitutes consideration and inclusion of best available science is not correct. *Concerned Friends of Ferry County, v. Ferry County*, EWGMHB Case No. Case No. 97-1-0018, Order on Reconsideration, (Nov. 24, 1999).

General Aviation Airports

- [U]nder RCW 36.70A.510 and RCW 36.70.547, [a jurisdiction is] to include consideration of general aviation airports. An amendment of comprehensive plan provisions and development regulations under this chapter affecting general aviation are subject to formal consultation with such airport personnel. *Miotke v, Spokane County*, EWGMHB Case No. 07-1-0005, FDO, at 15-16 (Sept. 17, 2007).

Geologically Hazardous Areas

- Petitioners provide no supportive argument that Ordinance 2001-09 fails to protect Geologically Hazardous areas. The Board notes Section 4.00 of Ordinance 2001-09 addresses frequently flooded areas. Petitioners have offered no argument regarding the adequacy of that section. We must presume the validity of the County's action. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- RCW 36.70A.060(2) and (3) require the County to adopt development regulations that protect critical areas. Critical areas include: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. RCW 36.70A.030(5). *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

Goals

- The GMA sets forth 13 enumerated planning goals. These goals are to guide the development and adoption of comprehensive plan and development regulations. The goals are all created equal with no priority set forth by the Legislature and with no goal independently creating a substantive requirement. At times, this lack of priority becomes problematic when jurisdictions are faced with competing goals. Although the GMA does not permit the elevation of a single goal to the detriment of other equally important GMA goals, the GMA does permit local legislative bodies to give varying degrees of emphasis to the goals so as to allow them to make decisions based on local needs in order to harmonize and balance the goals. *City of Wenatchee v. Chelan County*, EWGMHB Case No. 08-1-0015, FDO at 25 (March 6, 2009).

- Re-affirming the Board's holding in *Save our Butte Save our Basin v. Chelan County*, Case No. 94-1-0001, in that the GMA does not require a local government to prepare a written analysis of the consideration it undertook in regards to the GMA's goals. *City of Wenatchee v. Chelan County*, EWGMHB Case No. 08-1-0015, FDO at 26-27 (March 6, 2009).

- General Discussion of GMA Goals – procedural and substantive components. *City of Wenatchee v. Chelan County*, EWGMHB Case No. 08-1-0015, FDO at 24-28 (March 6, 2009).

- The GMA is clear that the thirteen goals listed under RCW 36.70A.020 are all considered important and equal in the development and adoption of comprehensive plans and development regulations.

  > "The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020.

  Citizens for Good Governance, et al. v. Walla Walla County, et al., EWGMHB Case No. 05-1-0013, FDO (June 15, 2003).

- The Board recognizes the importance of the GMA goals, in particular Goal (8) Natural resource industries, which requires counties and cities to maintain and enhance natural resource-based industries, including agriculture and encourages the conservation of productive agricultural lands and discourage incompatible uses. *Citizens for Good Governance, et al. v. Walla Walla County, et al.*, EWGMHB Case No. 05-1-0013, FDO, (June 15, 2006).

- Goal 1 of the GMA, RCW 36.70A.020(1) provides that "Urban growth: Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner." Clearly, from our findings herein, the actions of the County have substantially interfered with this goal. The County has no Capital Facilities Plan that covers this area of the county and has few plans to address the overall impact of the expected development pursuant to these amendments. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Goal 2 of the GMA, RCW 36.70A.020(2) provides that reducing sprawl is a key goal of the Act: "Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development." Extending the UGA without properly preparing an updated Capital Facilities Plan and a land quantity analysis, as is required by the GMA, again substantially frustrates the County's ability to engage in GMA-compliant planning and substantially interferes with the goals of the GMA. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, Respondent, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Goal 3 of the GMA, RCW 36.70A.020(3) provides: "Transportation. Encourage efficient multimodal transportation systems that are based on region priorities and coordinated with county and city comprehensive plans." Goal 3 has clearly been frustrated. Without joint planning, a current Capital Facilities Plan and transportation concurrency, this goal is substantially interfered with. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Goal 12 of the GMA, RCW 36.70A.020(12) provides: "Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current services levels below locally established minimum standards." Without a current Capital Facilities Plan and the clear burden this expansion will place upon the resources of the City and County, this goal is frustrated. Looking at the above discussions and our conclusions leaves no doubt that Goal 12 is substantially interfered with and frustrates the County's ability to engage in GMA-compliant planning. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Three components are necessary for good planning under the GMA: an updated capital facilities plan, joint planning among local jurisdictions and concurrency of facilities and services at the time of development. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- At the heart of the GMA is the concept of looking ahead and planning for the future. Joint planning with other jurisdictions and an updated capital facilities plan ensure concurrency for public facilities and services in the future and are key components to implementing the goals and policies of the GMA. In the first section of the GMA, RCW 36.70A.010, the legislature found that <u>uncoordinated and unplanned growth</u> "pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state." Joint planning coordinates growth throughout the County, and a detailed, updated CFP is vital to good planning within a jurisdiction. (Board emphasis). *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The 13 goals of the GMA are not listed in order of priority. These goals are often in conflict with each other. The Respondent gives as an example, environmental protection (goal 10) and natural resource conservation (goal 8) can add cost to development, while housing (goal 4) strives to promote affordable housing. The Petitioner insists Kittitas County, in adopting the Airport Overlay Zone, has created different classes of property owners in the City of Ellensburg UGA. However all property owners in each of the Safety Zones are treated in the same manner. The County and the City have adopted zoning they believe will protect the Airport and the residents adjacent to it. This zoning was arrived at after extensive public input and review by the departments and individuals listed in statute RCW 36.70.547. *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO. (March 14, 2002).

- The balancing of various goals under GMA occurs during development of the comprehensive plan. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- The Board holds that there are both procedural and substantive aspects to compliance with the planning goals of RCW 36.70A.020. Procedurally, the county legislative authority must "consider" these goals when they adopt Interim Urban Growth Boundaries. What does "consider" mean procedurally? There is no requirement for a tangible procedural demonstration nor will the Board attempt to read the collective minds of the county's elected officials or staff to determine whether they considered the GMA's planning goals when adopting development regulations that designated Interim Urban Growth Areas. Instead, the ultimate test of consideration of the goals remains whether the county's actions were substantively guided by the goals – whether their actions are consistent with the planning goals. While this approach does not require written findings of consideration or a record that carefully considers the planning goals from a procedural view, such finding and/or valid consideration in the record of the relevant goals is useful, if not, essential to making a determination as to whether a county's adoption of its Interim Urban Growth Area was substantively guided by the planning goals. The advantage of this approach is that it deals with the heart of the question, the substantive element, instead of a possible pro forma procedural exercise. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- Without doubt, there is an inherent tension between some of the planning goals. All of the goals must be given effect to the extent possible. Thus, Planning Goal 5, economic development, may rightly be given high priority by a community. However, this does not sanction sprawl where there is no showing that both goals cannot be achieved. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- Planning Goal, Economic development, is conditioned by the requirement of Planning Goal 1 that it be "within the capabilities of the state's natural resources, public services, and public facilities." Similarly, Planning Goal 12 requires a showing that public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. The Board is not saying that "every T must be crossed and every I dotted" to meet this requirement, but a good faith valid discussion must take place. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- For counties planning under the Act, the Board finds that forestland designations made pursuant to RCW 36.70A.170 are inseparable from the development regulations required for their protection under RCW 36.70A.060 and must be guided by the planning goals of RCW 36.70A.020. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- The Act encourages the protection and development of natural resource industries while at the same time allowing economic growth. It, further, protects natural resources, including critical areas, to ensure "the high quality of life enjoyed by the citizens of this state." While achieving these goals is clearly possible, reconciling non-compatible land uses is never easy. The concerns and needs of real people, facing real problems, are involved. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- The planning goals are part of the compliance requirements of the Act and apply to development regulations under RCW 36.70A.060. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- The overriding purpose of the designation of resource lands is their conservation and protection. While the County may give high priority to other goals, there must be a showing that competing goals are mutually exclusive and cannot both be accommodated. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- Consideration of the planning goals in RCW 36.70A.020 is part of the comprehensive plan process. A local government selects and weighs these goals in the light of relevant information to achieve its desired plan. The plan should harmonize the goals, giving the greatest effect possible to each goal. In situations where goals conflict, the local government may make a reasoned determination. *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, Order of Non-Compliance (Apr. 3, 1995).

- Procedurally, the county legislative authority must "consider" these goals when they adopt IUGA boundaries. However, there is no requirement for a "tangible procedural demonstration." Instead, the ultimate test of consideration of the goals was whether the County's actions were substantively guided by the goals – whether their actions are consistent with the planning goals. The Board holds the substantive compliance test also applies to urban growth area designations under RCW 36.70A.110. However, written findings of consideration or a record that carefully considers the planning goals from a procedural view are useful, if not essential in some cases, to make a determination of substantive compliance. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- Planning Goal 8, the enhancement of natural resource-based industries, does not prevent productive agricultural lands from inclusion within an IUGA. There is no reason to believe that agricultural lands to the extent they are included within these IUGAs cannot continue to be successfully farmed. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- The question of compliance with RCW 36.70A.020(2) (sprawl) is not whether development should be precluded from agricultural resource lands, but the nature of the allowed development. Property developments, which support the agricultural industry, and these, encompass a wide

range of uses, are necessary for its future vitality. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- RCW 36.70A.020(8) establishes two standards against which an agricultural lands-related ordinance is to be tested. Does the Ordinance fulfill the minimum requirement of the Act to discourage incompatible uses of designated lands and does it meet the minimum requirement to maintain and enhance natural resource industries, in this case agriculture? *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The Board has consistently recognized that the planning goals may be at some point inconsistent. It has also found, in almost all cases, that potential inconsistencies may be successfully reconciled. Counties and cities have a duty to attempt to harmonize the goals. They must consider and show their work where they cannot. It is one thing to suggest that achieving the housing goal conflicts with the goal of reducing sprawl, it is quite another to show that these goals cannot both be achieved. Where a jurisdiction holds that one planning goal should be sacrificed at the expense of another, the record must show the decision making process. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- If a jurisdiction is unable to harmonize the planning goals, the record must show that the decision makers engaged in a valid process and considered the matter. This is the "show your work" standard. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- In arguments before the Board, Respondent County posits that to restrict development and commercial uses as ordered by the Board is contrary to RCW 36.70A.020(6) and private property rights afforded by the U.S. Constitution. We disagree. We have been presented with no evidence that restricting uses of lands as ordered is in violation of any laws. In fact, not to restrict use is, in our opinion, often a violation of property rights of adjacent property owners, who have an equal right to enjoy their property without unsuitable development intrusion. Clearly, the GMA requires restrictions on development. Pertinent to this case, the GMA requires development of an urban nature be limited to urban growth areas or well-defined Rural Service Areas. *Woodmansee, et al. v. Ferry County*, EWGMHB Case No. 95-1-0010, 2nd Order on Compliance (Aug. 22, 1997).

- As the County stated in their brief, performance standards are defined as land use regulations based upon application of specific standards, relating to actual impacts of a proposed development. The Board does recognize that performance standards can be used in successful growth planning. However, the standards must advance the goals of the GMA. The only "standard" that appears to be different from what would normally be required for a building lot is the required access to a paved road. This does not reduce urban growth in rural areas. It does allow extensive growth along the paved County roads. It encourages urban sprawl. *Loon Lake Property Owners Association, et al v. Stevens County;* EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

Greenbelts – *See Keyword* – Open Space

Habitat and Species of Local Importance

- *See also:* **Best Available Science**

- The County is required to make a "reasoned analysis on the record, including best available science and other local factors" in determining whether or not a habitat or species should be designated as Habitat or Species of Local Importance. *Island County Citizens Growth Management Coalition v. Island County (supra)*. The Growth Management Act requires the record to include best available science in developing policies and development regulations to protect the functions and values of critical areas, which Habitats and Species of Local Importance are an important part. RCW 36.70A.172(1). *Loon Lake Property Owners Assoc., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- Case law has made it perfectly clear that legislative bodies, such as counties and cities, must substantially consider best available science to support its findings concerning the nominations of Habitat of Local Importance and/or Species of Local Importance. In addition, a local jurisdiction is not constrained to adopt only the science recognized by state or federal agencies, but a variation from formally identified BAS must be supported in the record by evidence that also meets the BAS standard (see WAC 365-195-905). *Loon Lake Property Owners Assoc., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- Local governments must "analyze the scientific evidence and other factors in a reasoned process." *Easy v. Spokane Co.*, EWGMHB #96-1-0016, 1997 WL 191457, at 6. Legislative bodies must also be cautious about using their own science just to support their own agenda:

  > "Under *Heal v. CPSGMHB*, Court of Appeals, Cause #40939-1-1 (June 21, 1999), the County cannot choose its own science over all other science and cannot use outdated science to support its choice." *Island Co. Citizens' Growth Management Coalition, et al, v. Island County, et al*, WWGMHB Case No. 98-2-0023c, Compliance Order (March 6, 2000).

  Loon Lake Property Owners Assoc., et al. v. Stevens County, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- The role of the BAS standard has been interpreted by the courts to require more than mere "consideration" of science. BAS must substantively control the standard established and must be reflected in the record. *Loon Lake Property Owners Assoc., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- The Board must also recognize that the qualifications of the "experts" and their field(s) of expertise are important criteria in helping to determine which science is perhaps better than another:

  > "The information relied on by the county does not rise to the level of scientific information and, therefore, cannot possibly qualify as BAS. Although the dissent emphasizes Dr. McKnight's 30 years of experience working as a wildlife biologist in Alaska, nothing in Dr. McKnight's background indicates any familiarity with the wildlife of Ferry County." *Ferry Co. v. Concerned Friends of Ferry Co.*, et al, Supreme Court Case #75493-4 (Nov. 17, 2005).

  Loon Lake Property Owners Assoc., et al. v. Stevens County, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- The Supreme Court, in the same Ferry County case, further held that an "expert" should compare their science with that of other experts, for instance state or federal agencies:

  > "Nor is there sufficient evidence of the county comparing science provided by Dr. McKnight to any other resources, such as science available from state or federal agencies or the Colville Tribe. As the Western Washington Growth Management Hearings Board correctly stated, a "(c)ounty cannot choose its own science over all other science and cannot use outdated science to support its choice." *Island County Citizens' Growth Mgmt. Coalition v. Island County,* No. 98-2-0023c, 2000 WL 268939, at 7 (WWGMHB March 6, 2000).

  Loon Lake Property Owners Assoc., et al. v. Stevens County, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- In addition, the Board takes note from *Clark County Natural Resources Council, et al. v. Clark County, et al.*, WWGMHB Case #96-2-0017, Compliance Order (Nov., 1997), that science determines what habitat and species should be designated Habitat and Species of Local Importance, not whether the nominated habitat or species is listed by the WDFW as priority habitat and species. The Western Board held the following:

  > "In the final order in this case, we noted that the overwhelming scientific evidence in the record virtually required establishment of the three FWHAs of local importance that were not otherwise previously designated by DFW as priority habitat and species areas."

  Loon Lake Property Owners Assoc., et al v. Stevens County, EWGMHB Case No. 03-1-0006c, 3rd Order on Compliance, (Dec. 21, 2005).

- RCW 36.70A.060(2) provides that every county shall adopt development regulations that protect critical areas. The definition of "critical areas" includes "fish and wildlife habitat conservation areas" (FWHCA) RCW 36.70A.030(5)(c). WAC 365-190-080(5)(a)(ii) provides that FWHCA include "habitats and species of local importance." WAC 365-190-030(19) defines "species of local importance" [and] WAC 365-190-030(9) defines habitats of local importance [Board sets forth language of WAC provisions]. *Loon Lake Property Owners Assoc., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, 2nd Order on Compliance, (May 10, 2005).

- The County's obligation to its citizen's nominations of habitat and species of local importance does not end by simply going through the motions and responding with denial or acceptance. The County must make a "reasoned analysis on the record, including best available science and other local factors" in determining whether or not a habitat or species should be designat*ed as habitat or species of local importance. Island County Citizens Growth Management Coalition v. Island County (supra)*. The Growth Management Act requires counties to include best available science in developing policies and development regulations to protect the functions and values of critical areas, which habitats and species of local importance are an important part. RCW 36.70A.172(1). There is no merit to the County's argument that because the Board declined to rule on the issue of the Hearings Examiner brought forth by the County during the compliance hearing that the Board does not retain jurisdiction over the methodology used by the County to reach its decision. The Board's decision must be made with all the information available, which in this case was after the County made its final decision on the nominations. *Loon Lake Property Owners Assoc.,*

et al. v. Stevens County, EWGMHB Case No. 03-1-0006c, 2nd Order on Compliance, (May 10, 2005).

- A response needs to include an analysis as to the reasoning behind the decision. The Petitioners provided substantive science and scientific testimony as to why the Common Loon and Red-necked Grebe should be designated as species of local importance and why the wetlands at Loon Lake need additional protection as habitat of local importance. The County responded with Findings of Fact with no reference to best available science or that scientifically support their decision. The Petitioners followed the process outlined by the County to nominate habitats and species of local importance and supported their claim with overwhelming scientific evidence. The County failed to include best available science as required by RCW 36.70A.172(1).

  The role of the BAS standard has been interpreted by the courts to require more than mere "consideration" of science. BAS must substantively control the standard established and must be reflected in the record:

  > Whether scientific evidence is respectable and authoritative, challenged or unchallenged, controlling or of no consequence when balanced against other factors, goals and evidence to be considered, it's first in the province of the city or county to decide. Then, if challenged, it is for the Growth Management Hearings Board to review. The Legislature has given great deference to the substantive outcome of that balancing process. We hold that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations. *HEAL v. Central Puget Sound Growth Management Hearings Board;* 96 Wn.App. 522, 979 P.2d 864 at 870, (Wn. App. Div 1, 1999).

  In addition, a local jurisdiction is not constrained to adopt only the science recognized by state or federal agencies, but a variation from formally identified BAS must be supported in the record by evidence that also meets the BAS standard:

  > The science the legislative body relies on must in fact be the best available science to support its policy decisions. Under the cases and statutes cited above, it cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make. *Id.*, 96 Wn.App. at 534, 979 P.2d at 871.

  Loon Lake Property Owners Assoc., et al. v. Stevens County, EWGMHB Case No. 03-1-0006c, 2nd Order on Compliance, (May 10, 2005).

- Petitioners included in the record substantial evidence that the Common Loon and the Red-necked Grebe have a primary association with the Loon Lake wetlands. According to expert scientific evidence, the alteration of the nominated habitat will reduce the likelihood that the two species will be able to maintain themselves and reproduce. Detailed evidence was presented that these species inhabit the nominated wetlands. Detailed evidence by the Department of Ecology, which CTED shall consult with regarding guidelines for critical areas (RCW 36.70A.050(1)(d), confirms that these areas are wetlands. There was little or no evidence in the record to show that the Loon Lake wetlands are not breeding habitat, winter range and movement corridors (WAC 365-190-030(9) for the nominated species. With only 4% of the lake left as wetlands, the County's decision fails to protect the habitat according to the scientific information provided by

the Petitioners. *Loon Lake Property Owners Assoc., et al. v. Stevens County*, EWGMHB Case No. 03-1-0006c, 2nd Order on Compliance, (May 10, 2005).

- The GMA requires jurisdictions to use reasoned analysis in their decisions and inclusions of best available science when determining critical areas policies and regulations. Stevens County is required to protect habitats and species of local importance. Stevens County must show its work as to how it reached its conclusion, regardless of whether the response is a denial or acceptance. *Loon Lake Property Owners Assoc., et al. and Stevens County*, EWGMHB Case No. 03-1-0006c, 2nd Order on Compliance, (May 10, 2005).

- While the Board in its majority opinion, ruled that the County's nomination process is compliant, that is not to say that the County has designated and protected habitats and species of local importance. While at this point it is not possible for the Board to determine if the nominated species should be designated and protected, the County's failure to respond to nominations is clearly a failure to designate and protect. Stevens County must, as affirmed in *WEAN* make a reasoned analysis, on the record, including best available science and take official substantive action on nominations. To fail to respond is clearly erroneous, and a failure to designate and protect habitat and species of local importance. By failing to respond to nominations of species and habitat of local importance, Stevens County has failed to protect species and habitat of local importance. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The County has not provided sufficient evidence that BAS was considered or included in its designation of priority species or habitat areas for priority species. The County provides no rationale for excluding species designated by DFW. The Board finds that Petitioners have met their burden of proof that Ferry County acted erroneously in the designation of priority species and habitat areas *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Compliance, (Sept. 30, 1999).

Historical and Archeological Sites

- With the original ordinance, the County had developed an unrealistic designation of responsibility for the costs of the survey and mitigation plan. The original language of Ordinance #2004-01 provided that the costs for any archaeological survey and costs of mitigation and/or protection plan shall be born by the entity which claims that such a site exists. The effect of this language caused the laudable protections to be ineffective. This language was found out of compliance with the Growth Management Act. (See FDO herein). *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB No. 04-1-0004. Order on Compliance, (Jan. 3, 2006).

- To bring them into compliance, Ferry County struck the offending paragraph and inserted the following language:

> The applicant would only be responsible for the cost of the predetermination survey, if required. After notification of the predetermination survey, any interested party must respond within 30 days of notification as to the need of additional surveys. If additional surveys are performed by the interested party, they must be completed not to exceed 6 months. (Sic).

The Petitioners contend that this language shifts any further survey or mitigation costs to someone else, thus resulting in likely failure to protect archaeological sites and objects.

The County contends that such language does not shift the burden to others. The landowner/developers are responsible for the predetermination survey and mitigation plan costs. The County made it clear that the landowner/developer will pay for the predetermination survey if required and, if an archaeological object is discovered, work on the development will cease and Ferry County Planning Department and Office of Archaeology and Historic Preservation shall be notified and a permit will not be issued without an approved protection plan.

With the clarifications and corrections noted above, the County is found to be in compliance on this issue. The Petitioners have not carried their burden of proof. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 04-1-0004. Order on Compliance, (Jan. 3, 2006).

- Here, the County has taken excellent steps to comply with RCW 30.70A.020(13). That Goal requires the County to identify and encourage the preservation of lands, sites, and structures, which have historical or archaeological significance. The County has, however, made one glaring mistake.

  The Board cannot decide whether it would be better or more equitable to require the Federal or State government to bear the burden of preserving these valuable artifacts. The Board must only determine if the County has complied with the requirements of the GMA. Here the County has failed. The Board has taken judicial notice of State and Federal Law and has no difficulty in finding that, without specific authority, the County cannot require the State, Federal Government or a Tribe to pay the costs for the archaeological surveys and costs of mitigation of discovered historic or archaeological sites. This being true, the Board finds that the County Ordinance will not encourage the identification and preservation of these sites. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB No. 04-1-0004, FDO (Sept. 8, 2004).

- The State Office of Archaeology and Historic Preservation (OAHP) have stated in their testimony that they would not accept a plan if such plan requires the State to bear the costs. No development upon the land would be allowed to proceed if it impacts such site without the OAHP approval. The Colville Confederated Tribes objected to this language as well. Because 4 or 5 of the tribes that make up this Confederation have historic ties to Ferry County and half of their reservation is in Ferry County, it is expected that most of the historic sites be related to these tribes. There is no authority possessed by the County to require the Tribes to pay for such a plan or survey.

  The lack of authority of the County to require payment of the costs of such survey or plan causes the effectiveness of the Ordinance to be nonexistent. It would discourage the discovery of the sites due to the potential costs or delays, discourage others from reporting them and making it virtually impossible to comply with the existing state law, which requires an approved plan prior to the disturbance of such a site. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 04-1-0004, FDO (Sept. 8, 2004).

- While the Board must congratulate the County for the good work on the Ordinance, the provision relating to the bearing of the costs of the survey and mitigation plan ruins its effectiveness and causes it to not be in compliance with the GMA. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 04-1-0004, FDO (Sept. 8, 2004).

- The Board finds that the issue is timely, and in effect, a failure to act challenge. RCW 36.70A.020(13) provides counties must: "Identify and encourage the preservation of lands, sites, and structures, that have historical and archaeological significance." RCW 36.70A.040(4)(d) requires development regulations to implement the above stated GMA goal. Ordinance 2001-09, having failed to address historic and archeological issues, is non-compliant. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

Housing Element

- *See Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, FDO at 36-39 (March 12, 2007) (general discussion of requirements for the housing element).

Industrial Development

- RCW 36.70A.070(5)(d)(iii) contemplates the rural industrial uses permitted (but not required) by the County. However, the application of (5)(d)(iii) is limited by that paragraph's reiteration of the Act's prohibition of low-density sprawl and by (5)(d)(iv)'s requirements to minimize and contain any existing areas or uses of more intensive rural development. While the Board recognizes that (d)(iv) provides that "some accommodation may be made for infill of certain 'existing areas' of more intense development in the rural area, that infill is to be 'minimized' and 'contained' within a 'logical outer boundary.'" (citing to *Bremerton*, CPSGMHB Case No. 95-3-0039c (coordinated with Case No. 97-3-0024c), Finding of Noncompliance, at 24. *Whitaker v. Grant County;* EWGMHB Case No. 99-1-0019 FDO; (May 19, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, FDO; (May 23, 2000)

- RCW 36.70A.070(5)(d)(iv) requires the County to "adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical boundary or the existing area or use, thereby allowing a new pattern of low-density sprawl. (Emphasis added). Subparagraph (v) defines an existing area or existing use as one in existence on July 1, 1990. *City of Moses Lake v. Grant County;* EWGMHB Case No. 99-1-0016, Order on Reconsideration, (Aug. 7, 2000).

Innovative Techniques

- [In addressing Petitioners' claim that a comprehensive plan policy did not have limiting language required by RCW 36.70A.177, the Board recognized] The County's land use planning is not effectuated solely by its comprehensive plan, and the development regulations serve to implement the County's policies. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 68 (April 5, 2010)

  The County's claims that other goals of the Act, namely the requirement to provide for recreational opportunities, could override the requirement to protect agricultural resource lands was also addressed by the Supreme Court. The Superior Court, in their review of the case, had ruled that under RCW 36.70A.177, the location of recreational uses on Agricultural Resource Lands was authorized as an innovative zoning technique. The Court of Appeals and Supreme Court reversed this interpretation. "However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques. …Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture." As in the King County case above, we find here "the evidence does not support a finding that the subject properties have poor soils or are

otherwise not suitable for agricultural purposes." While the Board recognizes the circumstances in Walla Walla County are different from King County, we cannot distinguish the Supreme Court ruling in *King County v. CPSGMHB, supra*, to permit the objected-to recreational uses allowed in the Walla Walla County Ordinance No. 269. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO, (Nov. 26, 2002) (internal citations omitted).

Interim

- [Finding Stevens County in continuing non-compliance because] Interim regulations are not authorized by the GMA and fail to comply because an interim ordinance will expire in a set period of time. *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, 2nd Compliance Order at 5 (June 17, 2010)

- Relying on unnamed regulations to enforce the protection of critical areas is inadequate. Also, the use of the standard "minimize impact" is inadequate. There must be a specific, objective standard for review in the ordinance that will protect with reasonable certainty. The required standard of protection should be to "prevent adverse impacts" or at the very minimum "mitigate adverse impacts." *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- The requirement for an interim ordinance has the sole purpose of protecting critical areas as a whole until the balancing with other goals and the inclusion of public and local judgments by local elected officials can be incorporated in the comprehensive plan. SEPA and "expanded SEPA" have exceptions and thresholds that do not provide the interim protection envisioned by the Act. Counties' critical areas ordinances must include a standard of interim protection in each category that all parties can rely on until the comprehensive plan can be adopted. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

Interim Urban Growth Areas (IUGAs)

- RCW 36.70A.110 requires that counties, in consultation with the cities involved, establish Interim Urban Growth Areas based upon population projections submitted to planning counties by the Office of Financial Management and distributed within the various jurisdictions of the county by means devised by the county. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- The Board finds that the "based upon" language of RCW 36.70A.110 imposes an upper boundary to an Interim urban Growth Area's size for the following reasons. First, if the "based upon" language established only a "minimum," one of the underlying principles of the GMA, containment of urban sprawl, would be undermined. 2nd, if Counties were free to use population forecasts in excess of OFM's forecast, there would be little need for the specific appeal right granted to dispute OFM's forecast. 3rd, the GMA allows "new fully-contained communities" to be established outside of urban growth areas. But if a county chooses to do so, it must "reserve a portion of the twenty-year population projection and offset the urban growth area accordingly for allocation to new fully contained communities." If OFM's twenty-year population projections were just minimums, there would be no need to "offset" additional population to be housed in new fully contained communities. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- The Act requires designation of an IUGA "based upon" the expected population growth for the next twenty-year period; a city's service plans are independent of the designation. A city is free to plan for service levels as it chooses, but its planning choices are separate and independent from its obligation to comply with RCW 36.70A.110. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- A county cannot adopt an "expand now contract later" IUGA that allows unwarranted annexation, annexation which would not be allowed if the IUGA were properly sized. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- The inclusion of supportable land use factors grants substantial discretion to each jurisdiction designating an IUGA, yet provides a yardstick that ties and constrains the designation to the OFM population forecast. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- The State Legislature adopted separate public participation requirements when they adopted the direction to establish the IUGAs. If the Legislature had wanted the counties to meet the requirements of RCW 36.70A.140, it would have been easy for them to do so. It did not. The process of designating IUGAs does not require the same public participation required for the development and adoption of the comprehensive plan. *Howe v. Spokane County*, EWGMHB Case No. 97-1-0001, FDO (June 19, 1997).

- The requirement to adopt IUGAs involves both mandatory and discretionary elements. Therefore, local legislative bodies must comply with the mandatory requirements of the Act, but also have a great deal of flexibility to make choices in complying. For example, the Act establishes population-planning projections upon which IUGAs must be based. These exclusive projections are made for each county by OFM; no discretion is permitted for local jurisdiction to use their own numbers. On the other hand, local jurisdictions have great discretion in deciding how to accommodate these projections in light of local circumstances and traditions. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- In order for counties to make an informed choice as to the location of IUGAs, cities must first provide counties with detailed information about their size, population, population densities and zoning. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- It is imperative that counties base their IUGAs on OFM's twenty-year population projection, collect data and conduct analysis of that data to include sufficient areas and densities for that twenty-year period (including deductions for applicable lands designated as critical areas or natural resource lands, and open spaces and greenbelts), define urban and rural uses and development intensity in clear and unambiguous numeric terms, and specify the methods and assumptions used to support their IUGA designations. In essence, counties must "show their work" so that anyone reviewing a UGAs ordinance can ascertain precisely how they developed the regulations adopted. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- In the absence of information showing land capacity analysis, we are unable to determine if an IUGA is properly sized. The GMA was amended to allow 180 days "or such longer period as

determined by the board in cases of unusual scope or complexity." This Board feels the amendment was for cases such as this. It would be foolish to require the duplicated effort of the designation of a new IUGA would cause if the Final UGA can be expeditiously completed. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- The requirement to establish an Interim Urban Growth Area requirement was adopted by the Washington State Legislature as an amendment to the GMA. (1991) The IUGA is to be established early in the planning process and has the effect of limiting development outside such boundary unless it is later determined additional land is needed for the allocated of the real growth of that City. If the City/County is to err, it is hoped they err on the side of having too few buildable lots available in the IUGA and make any necessary corrections in the Final Urban Growth Area (FUGA). *Knapp et al., v. Spokane County*, EWGMHB Case No. 97-1-0015c, Order on Reconsideration, (Sept. 30, 1999).

Invalidity

- General Discussion of the Board's authority to impose Invalidity. *Wilma, et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Order on Motions at 10-11 (March 31, 2008).

- Growth Management Hearings Board does not have statutory authority to invalidate pre-GMA development regulations (citing *Skagit Surveyors v. Friends* 135 W.2d 542 (1998)). *Kittitas Conservation v. Kittitas County*, EWGMHB Case No. 06-1-0011, FDO, at 17-18 (Apr. 30, 2007).

- The Growth Management ACT in RCW 36.70A.320(4) changes the burden of proof [in a compliance hearing] in cases where the governmental agency's actions are found invalid. [At the compliance hearing] the burden of proof shifts from the Petitioner to the Respondent. The above statute requires the County, in this case, to demonstrate that the enactment in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of the GMA ... The County has carried its burden of proof … [if it shows] that its action no longer substantially interferes with the goals of the GMA. The burden of proof … [then] returns to the Petitioners. The actions of the County are presumed valid and the Petitioners must prove by clear cogent and convincing evidence that an error has been committed. *Miotke v. Spokane County*, EWGMHB Case No. 05-1-0007, Order on Reconsideration, at 3-4 (April 9, 2007).

- A concern in [land] re-designation cases is that a development proposal could vest during a period of remand. Hearings Boards have found that invalidation is appropriate in the context of re-designation cases. A potential for vesting under applicable subdivision laws are present in this matter and such vesting would be contrary to the purposes of the GMA. The development of this property will irreparably and irreversibly undermine the rural character in this area and violate the mandates for the establishment of LARMIDs. The potential for vesting is significant. The preservation and conservation of rural land use designations can be protected only through invalidation. *Hanson v. Chelan County*, EWGMHB Case No. 06-1-0005, FDO, at 18-19 (Dec. 14, 2006).

- A finding of invalidity may be entered only when a board makes a finding of non-compliance and further includes a "determination, supported by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1). The Board has also held that invalidity should be imposed if continued validity of the non-compliant Comprehensive Plan

provisions or development regulations would substantially interfere with the local jurisdiction's ability to engage in GMA-compliant planning. *Moitke/Neighborhood Alliance of Spokane v. Spokane County et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- In considering invalidity, the Board must consider whether the non-compliant provisions of Ordinance 75-2000 substantially interfere with the growth management act (GMA). (RCW 36.70a.330 (3). Further, the board may consider "the extended length of time that (a county) has been without a compliant ordinance… may well approach substantial interference with the act and be grounds for a finding of invalidity." *Diehl et al v. Mason county*, CPSGMHB 95-2-0073. The board also notes the western board decision in S*eaview Coast Conservation Coalition v. Pacific County*, CPSGMHB 95-2-0076:

  > "In making the decision regarding the scope of invalidity, we take into account the local government's compliance or non-compliance with the act along with current and past efforts to achieve compliance to meet the deadlines established by the legislature."

  Section 13.00.040, of title 13, provides that the more restrictive development regulation shall apply, if there is a conflict. Petitioners point out the new CAO (title 13) reduces buffer requirements for type 1 waters from 150 feet (high intensity uses) to 100 feet, and for type 5 waters from 50 feet (high intensity uses) to 25 feet. While the interim critical areas ordinance remains out of compliance, the finding of invalidity of the setback/buffer provisions contained therein will weaken protections while the county pursues their compliance with the GMA. The board therefore denies petitioners' request for a finding of invalidity. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- The Board finds no legal authority to declare invalid portions of a comprehensive plan where no order of non-compliance has been issued. Further, under the facts alleged by the Petitioner, the Board does not believe a finding of Invalidity should be issued. The determination of Invalidity requires a finding of non-compliance <u>and</u> a determination that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of the GMA. The Board does not find that this is the case. *Ridge v. Kittitas County et al*. EWGMHB Case No. 00-1-0017, Compliance Order, (April 10 2002).

- The Petitioners have a heavy burden when seeking invalidity of all or part of the comprehensive plan or development regulations. The Board must first find the County out of compliance and then find those noncompliant actions to substantially interfere with the goals of the GMA. This is not something the Board does lightly. *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Respondent's 2nd motion seeks the dismissal of Petitioners' Issue No. 5, Petitioners' request for a finding of Invalidity. The Respondent contends this issue has been addressed in our previous cases Walla Walla, Nos. 01-1-0014cz and 01-1-0015c. As above, Petitioners argue that subsequent events may have changed the facts surrounding the Boards earlier decision to not declare the Comprehensive Plan invalid. The Board recognizes that there are unresolved material facts and will hear arguments on the question of invalidity at the Hearing on the Merits. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, 2nd Motion Order, (Aug. 27, 2002).

- The Petitioners have requested a finding of invalidity relating to development regulations for the Blalock Area. The Board notes recent action by the County imposing a moratorium on development in that area. The moratorium accomplishes what an Order of Invalidity would. Therefore, because the County has protected these lands from development under the noncompliant provisions of the Comprehensive Plan or its regulations, a finding of Invalidity is not necessary at this time. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO, (Nov. 26, 2002).

- The Board rarely invokes invalidity. Invalidity can only be invoked when the Board finds the actions taken by a city or county seriously impair the goals of the GMA. In this case, we find such impairment exists. For the GMA planning process to work, citizens must have confidence in the planning process. The public must be heard before commitments are made. Here, they were not. The development and signing of the Memorandum of Understanding is a part of the development and enactment process of the amendment of the comprehensive plan in this case. The Board declares the actions taken by the City, in its amendments of the Comprehensive Plan, to be invalid. *Neighbors for Responsible Development v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- It is the combination of errors and process defects that leads us to issue our order of invalidity. This is a significant land use matter for the citizens of the community and their right to participate in a meaningful manner must be respected and protected. Growth Management Act provides this protection. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- An order of invalidity is appropriate where there is a "potential for vesting" of inappropriate land uses during a period of remand. *Vashon-Maury v. King County*, 1997 WL 1717577 *8 (1997). The Board in *Bennett v. City of Bellevue*, 2002 WL 31549122 *12(2002) recognized that invalidation was appropriate where the continued validity of the ordinance would potentially allow for vesting. The Board found:

  > Further, the Board finds that the continued validity of the Ordinance would allow additional vesting of permits to an inappropriate land use regulation . . .

  Neighbors for Responsible Development, v. City of Yakima, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- If it is determined that a comprehensive plan or development regulation "would substantially interfere with the fulfillment of the goals" of the GMA, the Board may invalidate that part or parts of the plan or regulation. *Wells v. Western Washington Growth Management Hearings Bd.*, 100 Wn.App. 657, 666, 997 P.2d 405 (2000). Invalidity is a matter of the Board's discretion to be determined on a case-by-case basis. (citing *King County v. Central Puget Sound Growth Management Hearing Board*, 138 Wn.2d at 181, citing *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 561-62, 958 P.2d 962 (1998)). *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The primary factor to be considered in the context of invalidation is whether continued validity of the plan amendment would substantially interfere with the goals of GMA. RCW 36.70A.320(1)(b). The City of Yakima cites *Whidbey Environmental Action Network v. Island*

County, 1997 WL 652518 (1997) as establishing a "three-part test" for analyzing the "substantial interference" standard of GMA. The Board indicated that it will "keep in mind" the following factors:

> Hence, whether a development regulation meets GMA's test of substantial interference depends on three factors:
>
> a. The magnitude (or egregiousness) of the violation of GMA;
> b. How long the violation has occurred;
> c. How much longer it will likely occur absent invalidation.

Neighbors for Responsible Development, v. City of Yakima, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The Petitioners need not prove a negative, i.e., the lack of evidence. The Petitioners must demonstrate the failure of the County to include the best available science. It is then incumbent upon the County to point out the evidence in the record, showing they have complied with the GMA. The County did not do this and we have found nothing in the record demonstrating the inclusion of the best available science. This does not constitute a shift in the burden of proof. *Concerned Friends of Ferry County, v. Ferry County*, EWGMHB Case No. 97-1-0018, Order on Reconsideration, (Nov. 24, 1999).

- Where a finding of invalidity regarding forest lands designation has been entered, the GMA places on the respondent local jurisdiction the initial burden of proof to show its forest lands designation decision no longer substantially interferes with the GMA planning goals. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- Because of the vast acreage involved (over 15,000 acres) and the imminence of harm, only a finding of invalidity can serve the GMA's core purpose of promoting land use planning according to the goals set out in the Act. Without a finding of invalidity, applications for the development of a major resort on land this Board has twice already found to be forestlands may be filed and vest. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, FDO (Mar. 28, 1997).

- The county has asked this Board to advise them what the lands designation reverts to if the designations under their comprehensive plan are invalid. The Boards are to determine whether enactments of local governments comply with the GMA, and are not authorized to provide declaratory judgments or advisory opinions. The Boards cannot advise local governments what the land designations invalidated by the Board revert to. The courts have this authority, not the Boards. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Reconsideration/Clarification (May 27, 1997).

- Where a finding of invalidity regarding forest lands designation has been entered, the GMA places on the respondent local jurisdiction the initial burden of proof to show its forest lands designation decision no longer substantially interferes with the GMA planning goals. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- This Board takes the issue of invalidity very seriously and finds invalidity only if a County has substantially interfered with the fulfillment of the goals of the Growth Management Act.

  While the Board holds that public participation is the heart of the Growth Management Act, the Petitioners have not shown that failure to comply with the public participation requirement substantially interfered with the goals of the GMA. *Wilma, et. al. v. Stevens County,* EWGMHB Case No. 99-1-0001c, FDO, (May 21, 1999).

- Stevens County Superior Court, 1999 2 002693 entered a decision on appeal from a final decision of the Eastern Growth Board. The Superior Court directed the Eastern Board to invalidate Stevens County's IUGAs *ab initio.* The Order entered by the Easter Board remanded the matter to the County with directions to take action consistent with the Courts Decision on Appeal. *Wilma et al. v Stevens County,* EWGMHB Case No. 99-1-0001c, FDO (May 21, 1999).

- Determination Of Invalidity: The Petitioners asked the Board to find the Ephrata UGA boundary invalid. The Petitioners believed the City would annex areas 4 and 5 because the Board found the City out of compliance without a finding of invalidity. The City, to a question from the Board, responded that it had no intention of annexing the property in the foreseeable future.

  The Board concluded that it was inappropriate to make a determination of invalidity. The Petitioners had not met their heavy burden of showing how the continued existence of the Ephrata UGA would substantially interfere with the fulfillment of the goals of the GMA. The fear of annexation does not reach that level. If, however, the City were to consider an annexation petition, the Board would look with favor upon a request for a finding of invalidity. The finding of Invalidity was not issued. *Bargmann v. Grant County,* EWGMHB Case No. 99-1-0013, FDO (May 19, 2000).

- The Board found that the Superior Court's invalidation of Stevens County Resolutions, 16-1997 and 149-1997, invalidating the interim IUGAs ab initio, causes the issues raised in this matter to be moot. *Harrison, et al. v. Stevens County*; EWGMHB Case No. 99-1-0010c, Order of Dismissal (Oct. 25, 2000)

- The Petitioners have asked the Board to find Stevens County's Titles 4 and 5 invalid under RCW 36.70A.302. The Board may determine all or part of a comprehensive plan or the development regulations are invalid if the board: (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300; (b) Finds that the continued validity of those parts of the regulations would substantially interfere with the fulfillment of the goals of the GMA; and (c) Specify the particular part of parts of the regulation that are determined to be invalid, and the reasons for their invalidity. RCW 36.70A.302(1). *Loon Lake Property Owners Association, et al v. Stevens County;* EWGMHB Case No. 01-1-0002c, Order on Reconsideration (Dec. 13, 2001).

- The Board is hesitant to make a finding of invalidity except in the most serious cases. The finding of invalidity is a very serious determination. The County can suffer serious burdens and cost resulting from such a finding. It is for these and other reasons that the Board rarely finds all or portions of a County's action invalid. It is also for these reasons that the Washington State Legislature, in 1997 amended the Growth Management Act (GMA) to further restrict the Board's ability to find invalidity and also empower Counties or Cities to seek clarification or removal of such a finding. (Chapter 429, Laws of 1997). *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Order on Reconsideration (Dec. 13, 2001).

- RCW 36.70A.302(6) now allows counties and cities to request a clarifying, modifying or rescinding a determination of invalidity. There is no time limit for the filing of such a request in the statute or in the rules adopted to implement that statute. It is clear from the Statute that the State Legislature intended to give the Cities and Counties this flexibility.

  Stevens County was not required to file their request for clarifying, modifying or rescinding the determination of invalidity within 10 days of the service of the final order. RCW 36.70A.302(6) and WAC 242-02-833 do not set a time for such filing. This Board has jurisdiction to hear the County's motion. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Order on Reconsideration (Dec. 13, 2001).

- RCW 36.70A.302(b and c) requires the Board to support its findings of invalidity by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter. That section also requires the Board to specify in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity. Nowhere is the Board required to give reasons why other sections of the plan or regulations are not found invalid. Upon review of the GMA and our original FDO the Board found there were many portions of Titles 4 & 5 that did not **substantially** interfere with the fulfillment of the goals of the GMA. Because the Board is required to specify the particular part or parts of the plan or regulation that are determined invalid, the Board limited the invalidity to those discrete sections that did substantially interfere and not whole titles. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Order on Reconsideration (Dec. 13, 2001).

Internally Consistent

- Mitigation and the right to develop private property, however, do not negate the County's responsibility to protect critical areas as required by the GMA, the County's CP, its CWPP's and adopted ordinances, such as its Critical Areas Ordinance. With ample evidence of problems or potential problems with storm water runoff, erodable soils and geological hazardous areas on Five Mile Prairie and shared jurisdiction with the City, the County is responsible to plan upfront to prevent problems from occurring, not after the permits are issued. In addition, the Comprehensive Plan must be internally consistent, even when adopting amendments to the CP, to protect critical areas. There is a requirement under WAC 365-195-315 to reassess the land use element, which requires provisions for protection of the quality and quantity of ground water used for public water supplies and, where applicable, a review of drainage, flooding, and storm water runoff in the area covered by the plan and nearby jurisdictions. The reassessment is required if the probable funding for capital facilities at any time is insufficient to meet existing needs. The plan should require that as a result of such reassessment appropriate action must be taken to ensure the internal consistency of the land use and capital facilities portions of the plan. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, , et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- WAC 365-195-300 – Mandatory elements, gives requirements for the comprehensive plan, one of which is the "plan shall be an internally consistent document and all elements shall be consistent with the future land use map". One of those required elements is (a)(i) A land use element. A land use element under WAC 365-195-305 – Land use element, requires under (1)(c) Provisions for protection of the quality and quantity of ground water used for public water supplies and, (1)(d) Where applicable, a review of drainage, flooding, and storm water runoff in

the area covered by the plan and nearby jurisdictions, and guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Under WAC 365-195-070 – Interpretations, the state defines and gives an example of "internally consistent", which is a requirement of a comprehensive plan.

  (7) Consistency. ..."This requirement appears to mean that the parts of the plan must fit together so that no one feature precludes the achievement of any other."

  Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- An example of internally consistent found in (7) is "the requirement that each comprehensive plan be consistent with other comprehensive plans of jurisdictions with common borders or related regional issues. The record shows this has not been done between the County and the City of Spokane within the area of the six amendments. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

Intervention

- [If a matter has been consolidated with other petitions, intervention by the parties of one matter to another matter is no longer necessary since] … once consolidation has occurred, the individual peti*tions for review are merged and lose their independent existence.* Therefore, all issues presented by any of the petitions are available to be argued by any party to the proceeding. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order, at 3 (Dec. 20, 2006).

- The Board finds that the failure of the Intervenors to list the issues they believed affected them and felt they should participate in, as required by the Prehearing Order, does not support their dismissal from the matter before us. The parties have not been inconvenienced or injured by such unintentional acts of the Intervenor. The Motion to dismiss the Intervenors is denied. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, Order on Motions, (Nov. 14, 2005).

- The Intervenors moved that the Petition of the Neighborhood Alliance of Spokane be dismissed because the person signing the petition was not an attorney and to allow a layperson to sign a petition for the Alliance would be unauthorized practice of law. The Board recognizes that the regulations found at WAC 242-02-110 allow a layperson or an attorney to represent an organization such as the Alliance. Further, the Board does not believe that it can rule on whether something is the unauthorized practice of law. Such a ruling is the responsibility of the Washington State Bar Association. The Board denies the Intervenors' motion to dismiss. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, Order on Motions, (Nov. 14, 2005).

- The Petitioners sought the dismissal of the Intervenors as parties, due to their failure to follow the Prehearing Order. That Order required the Intervenors to list the Issues they believed affected them and felt they should participate in. The Intervenors contend that the failure was inadvertent and they believed that they should participate in all issues. The County supported the Intervenors and contended that such a requirement was unusual and the Intervenors' should not be dismissed.

The Board finds that the failure of the Intervenors to respond as required by the Prehearing Order, does not support their dismissal from the matter before us. The parties have not been inconvenienced or injured by such unintentional acts of the Intervenor. The Motion to dismiss the Intervenors is denied. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, Order on Motion for Recusal, (Sept. 28, 2006).

Joint Planning

- *See also Keyword:* ***Coordination***

- Underlying the GMA is an acknowledgement that inter-jurisdictional coordination serves to prevent duplicative actions and aids in coordinated land use planning … Therefore Yakima County should consider other laws, and to be "adequately implemented" it is the provisions of these laws that are to be adopted as part of the local regulations … A generalized reference to "existing federal, state, local, or tribal laws" does not have the same effect as adopting or incorporating by reference these laws. *Hazen, et al v. Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 23-24 (April 5, 2010)

- Notification and due consideration are not the same as "joint planning". According to the Spokane County Countywide Planning Policies, under Policy Topic 2, Policy 2:

  > 2. Joint planning may be accomplished pursuant to an Interlocal agreement entered into between and/or among jurisdictions and/or special purpose districts."

  The record is void of any Interlocal agreement discussions or signed documents between Spokane County and the City of Spokane concerning the Five Mile Prairie area. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.,* EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

- Five of the amendments increasing the size of the UGA are located adjacent to the City of Spokane. The GMA contains numerous references and requirements for coordination and cooperation between potentially affected jurisdictions. The legislature expressed the concepts of multi-jurisdictional coordination and cooperation in its initial section, RCW 36.70A.010.

  In citing that statutory provision, the Washington Supreme Court said:

  > "…these findings reflect a legislative awareness that land is scarce, land use decisions are largely permanent, and, in particularly in urban areas, land use decisions affect not only the individual property owner or developer, but entire communities." *Erickson & Associates v. McLerran*, 123 Wn.2d 864 (WA. 1994).

  Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The initial section of the GMA is only the first reference to coordination between jurisdictions. RCW 36.70A.020(11) not only encourages citizen involvement, but also requires coordination between jurisdictions through the use of the word "ensure" defined earlier under Board Analysis. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

Jurisdiction

- ***See also*** *Keyword:* ***Subject Matter Jurisdiction***

- *CAUSE v. Spokane County*, EWGMHB Case No. 10-1-0003, FDO at 5 (June 18, 2010) [In response to County and Intervenor Motion to Dismiss for Lack of Subject Matter Jurisdiction set forth in the HOM briefing, the Board held that a superior court decision in unrelated case has no precedential value]

- Kittitas County adopted its original Comprehensive Plan in 1996 at which time the County designated its resource lands … Futurewise's original (2007) issue and argument was premised on an allegation that the County's criteria was lacking and thus failed to comply with the GMA. The Board permitted review even though the challenged action did not amend the criteria because, at that time, court holdings stated unchanged portions of the County's Comprehensive Plan were open to challenge when a jurisdiction conducted an update pursuant to RCW 36.70A.130(1)(a). But this ability to challenge unchanged portions of a comprehensive plan was set forth by the Court of Appeals in 2007, a decision which has been subsequently reversed by the Supreme Court in 2008. In its holding, the Supreme Court limited challenges only to a county's failure to revise its comprehensive plan with respect to those provisions which were directly affected by new or recently amended GMA provisions. Thus, if Futurewise raised the same assertion today, the Supreme Court's holding in *Thurston County* may bar the challenge. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, 4th Compliance Order at 12 (May 26, 2010)

- General discussion of Board's subject matter jurisdiction, in relationship to site-specific rezones. *Fiel, et al. v. Douglas County, et al.,* EWGMHB Case No. 08-1-0011, Order on Motions, at 13-17 (June 17, 2008).

- RCW 36.70A.290 provides that review by the Growth Management Hearings Board (GMHB) shall be initiated by: (1) filing a petition relating to whether or not an adopted comprehensive plan or development regulation is in compliance with the GMA (or RCW Chapters 43.21C or 90.58); (2) including a detailed statement of issues in the petition; and (3) filing the petition in the Growth Management Hearings Board office within 60 days after publication by the legislative body. The Board's jurisdiction is invoked when these statutory requirements are satisfied by a petitioner with standing under RCW 36.70A.280(2). *Cove Heights Condo Assoc. v. Chelan County,* EWGMHG Case No. 08-1-0013, Order on Motions, at 2 (Sept. 3, 2008)

- *Dudek/Baguley v. Douglas County,* EWGMHB Case No. 07-1-0009, Order on Motions, at 12 (Sept. 26, 2007) (reaffirming that the Board does not have jurisdiction to hear constitutional issues such as takings, substantive due process, and due process prohibitions).

- *Fiel v. Douglas County,* EWGMHB Case No. 06-1-0012, Order of Dismissal (Feb. 16, 2007) (Board determined that it did not have subject matter jurisdiction over a project permit action).

- The Board finds it has no jurisdiction over the County's docketing decisions. The Central Board decided:

  > When a local government includes a self-imposed duty in its plan, such as a deadline, the consistency requirements of RCW 36.70A.070 and .120 oblige it to meet that duty; <u>however, it retains the discretion to amend its plan, including the revision or deletion of such self-</u>

imposed duty, provided that it does so pursuant to the authority and requirements of RCW 36.70A.130. *COPAC-Preston Mill Inc. v. King County*, CPSGMHB Case No. 96-3-0013c, FDO (Aug. 21, 1996).

Citizens for Good Governance, et al. v. Walla Walla County, et al, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- Growth Hearing Boards have jurisdiction to hear all matters that contend a county is not in compliance with the requirements of the Growth Management Act (GMA). Many of those challenges have been to the propriety of site-specific de-designation of agricultural resource lands. *Wenas Citizens Association v. Yakima County*, EWGMHB No. 02-1-0008, FDO (Nov. 14, 2002); See also *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 116 Wn.App. 48, 65 P.3d 337 (2003); *Orton Farms, LLC v. Pierce County*, CPSGMHB No. 04-3-0007c, FDO (Aug. 2, 2004).

- A change in the comprehensive plan designation for a specific property is a matter subject to review by a Growth Hearings Board. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, Order on Motion to Dismiss, (Dec. 27, 2005).

- The Petitioners argument under this issue presents a slight dilemma for the Board because the Petitioners rely partially on the Planning Enabling Act, Chapter 36.70, to make their case. The Boards do not have jurisdiction of actions under this statute. The Western Board opined:

  "A GMHB does not have jurisdiction to determine compliance with the Planning Enabling Act, RCW 36.70." *Abenroth v. Skagit County*, WWGMHB Case No. 97-2-0060, MO (Oct. 16, 1997) *Citizens for Good Governance, et al., v. Walla Walla County, et al.*, EWGMHB Case No. 05-1-0001, FDO (Aug. 10, 2005).

- The Board has consistently held that it does not have the jurisdiction to determine the constitutionality of the GMA or actions of the County or City. (*Tracy v. City of Mercer Island*, CPSGMHB Case No. 92-3-0001, FDO, (Jan. 5, 1993) Gutschmidt *v. City of Mercer Island*, CPSGMHB Case No. 92-3-0006, (Mar. 16, 1993) and *Home Builders Association of Kitsap County v. City of Bainbridge Island*, Case No. 01-3-0019, 10/18/01 Order; NW Golf, 9314, 9/29/99 Order). In these cases, the Central Board concluded that it did not have jurisdiction to determine constitutional issues arising from the implementation of the GMA. The jurisdiction granted the Boards clearly list their parameters. The Petitioners contend that we could make such a finding by taking judicial notice of the County's actions and finding that such actions are unconstitutional. It cannot be viewed in any other way than the Board finding that it has the jurisdiction to determine that the complained action was unconstitutional. There has been no determination of constitutionality or unconstitutionality and the Board does not have the authority to make such a finding. *Superior Asphalt & Concrete Co. v. Yakima County, et al.*, EWGMHB Case No. 05-1-0012, Order on Dispositive Motions, (March 30, 2006).

- Growth Hearing Boards have jurisdiction to hear all matters that contend a county is not in compliance with the requirements of the Growth Management Act (GMA). Many of those challenges have been to the propriety of site-specific de-designation of agricultural resource lands. *Wenas Citizens Association v. Yakima County*, EWGMHB Case No. 02-1-0008, FDO (Nov. 14, 2002); See also *City of Redmond v. Central Puget Sound Growth Management*

Hearings Board, 116 Wn.App. 48, 65 P.3d 337 (2003); *Orton Farms, LLC v. Pierce County*, CPSGMHB No. 04-3-0007c, FDO (Aug. 2, 2004).

- A change in the comprehensive plan designation for a specific property is a matter subject to review by a Growth Hearings Board. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, Order on Motion to Dismiss, (Dec. 27, 2005).

- Friends of Agriculture was formed for the purpose of allowing individuals to associate themselves for purposes of filing a Petition for Review to this Board. Each of the named members (Barbara Lutz, Jean Mattson, Lee Bode, and Vera Walker) provided either written or oral testimony regarding the Laughlin Proposal. The Growth Management Act (GMA) recognizes "participation standing" as a jurisdictional basis for appeals to a Hearings Board. RCW 36.70A.280 provides, in part, as follows:

  > (2) A petition may be filed only by: (a) the state, or a county or city that plans under this chapter; (b) *a person who has participated orally or in writing before the county or city regarding the matter* in which a review is being requested; (c) a person who is certified by the governor within 60 days of filing a request with the board; (d) a person qualified pursuant to RCW 34.05.530. (Emphasis provided.)

  There is no question that Barbara Lutz, Jean Mattson, Lee Bode and Vera Walker provided either written or oral testimony during the administrative review of the Laughlin proposal. Each has established "participation standing". Those members were specifically identified in the Petition for Review as members of "Friends of Agriculture". *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, Order on Motion to Dismiss, (Dec. 27, 2005).

- The Board finds that the failure of the Intervenors to list the issues they believed affected them and felt they should participate in, as required by the Prehearing Order, does not support their dismissal from the matter before us. The parties have not been inconvenienced or injured by such unintentional acts of the Intervenor. The Motion to dismiss the Intervenors is denied. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, Order on Motions, (Nov. 14, 2005).

- The Intervenors moved that the Petition of the Neighborhood Alliance of Spokane be dismissed because the person signing the petition was not an attorney and to allow a layperson to sign a petition for the Alliance would be unauthorized practice of law. The Petitioners contend that the GMA regulations, WAC 242-02-110(1), authorize a layperson to sign documents on behalf of an organization such as the Alliance. They further point out that the regulations allow a layperson or an attorney to represent such an organization before the Hearings Board.

  The Board recognizes that the regulations found at WAC 242-02-110 allow a layperson or an attorney to represent an organization such as the Alliance. Further, the Board does not believe that it can rule on whether something is the unauthorized practice of law. Such a ruling, is the responsibility of the Washington State Bar Association. The Board denies the Intervenors' motion to dismiss. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, Order on Motion for Recusal, (Sept. 28, 2006).

- Grant County asserts that the property owner is an indispensable party to this proceeding. No legal authority is cited for this proposition. There are no provisions in the GMA for notice to or joinder of the property owner as an indispensable party. The Board's jurisdiction is over

comprehensive plan amendments. Those amendments are adopted by local jurisdictions (i.e., counties and cities).

The indispensable party rule has been rejected in other hearings board decisions. *Larson v. City of Sequim*, WWGMHB 01-2-0021, Order Denying Dispositive Motions (Dec. 3, 2001) ("There are no provisions in the GMA for notice to or joinder of the property owner as an indispensable party."); *Alberg v. King County,* CPSGMHB No. 95-3-0041, FDO (Sept. 13, 1995) ("The indispensable party rule is based on equitable and constitutional considerations. The Board does not have jurisdiction over either equitable doctrines or constitutional provisions."); *Association to Protect Anderson Creek v. City of Bremerton*, CPSGMHB No. 95-3-0053, Order on Bremerton's Dispositive Motions (Oct. 18, 1995) ("A Petition for Review will not be dismissed for failure to name an indispensable party. Petitioner's are not required to name parties other than the city, county, or state agency taking the underlying action."). *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, Order on Motions, (Nov. 14, 2005).

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- The Respondent devoted much of their brief to the argument that the Petitioner's claim is barred by the doctrine of res judicata and collateral estoppel. Petitioners, in their reply brief, responded with arguments that these doctrines do not apply in this case.

  The Board believes the evidence does not show that the Petitioner, Futurewise, was before us on this issue at an earlier date, nor does the Board believe the specific issue being decided in this case has been decided before in another case. The Board's decision will be made upon the facts presented and with the parties before us at this time. Neither res judicata nor collateral estoppel applies in this case. *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

- Growth Management Hearings Boards are vested with authority to review specific land use actions and determinations. RCW 36.70A.280(1) sets forth the primary jurisdictional perimeters as follows:

  > A Growth Management Hearings Board shall hear and determine only those petitions alleging either: (a) that a state agency, county or city planning under this chapter is not in compliance with the requirements of this chapter. . . .; or (b) that the twenty year growth management planning population projections adopted by the Office of Financial Management pursuant to RCW 43.62.035 should be adjusted.

  Chipman v. Chelan County, et al., EWGMHB Case No. 05-1-0002, Order of Dismissal, (Jan. 31, 2006).

- Review based upon a "failure to act" is authorized only where the jurisdiction fails to take an ". . . action by a deadline specified in the act." WAC 242-02-220(5). Jurisdictional requirements are supplemented by RCW 36.70A.290(2) which provides, in pertinent part, as follows:

  > All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter. . . must be filed within sixty days after publication by the legislative bodies of the county or city.

  Chipman v. Chelan County, et al, EWGMHB Case No. 05-1-0002, Order of Dismissal, (Jan. 31, 2006).

- It is well settled that Growth Boards do not have jurisdiction over decisions, which deny an application to amend a comprehensive plan or development regulation. The Central Puget Sound Board stated in *Kent C.A.R.E.S. v. City of Kent*, CPSGMHB Case No. 02-03-0015, Order on Motions (Nov. 27, 2002) as follows:

  > "It is well established through Board case law and the Washington Courts that the jurisdiction of (GMHBs) is limited to review of Comprehensive Plans and development regulations *adopted, or amended,* pursuant to Chapter 36.70A RCW, for compliance with the GMA." (Emphasis added).

  Chipman v. Chelan County, et al., EWGMHB Case No. 05-1-0002, Order of Dismissal, (Jan. 31, 2006).

- Growth Board's have consistently held that they lack subject matter jurisdiction to review denials of proposed plan amendments. *Torrance v. King County*, CPSGMHB No. 96-3-0038, Order Granting Dispositive Motion (March 31, 1997) ("The Board holds that Petitioners cannot now challenge . . . the county's decision not to adopt Petitioner's proposed amendments). *Chipman, v. Chelan County, et al.*, EWGMHB Case No. 05-1-0002, Order of Dismissal, (Jan. 31, 2006).

- Chelan County's denial of the proposed amendments to the comprehensive plan and zoning ordinance are not "actions" reviewable by this Board. Annual amendments to a comprehensive plan are allowed but not "required" by Growth Management Act (GMA). The consistent and uniform decisions of growth board's recognize that GMA does not provide jurisdiction for review of a local jurisdiction's denial of a proposed comprehensive plan amendment. *Chipman v. Chelan County, et al.*, EWGMHB Case No. 05-1-0002, Order of Dismissal, (Jan. 31, 2006).

- Growth Boards have also recognized the jurisdictional limits related to review of land use project permit decisions. Central Puget Sound Growth Board stated ". . . it is well settled that the Board's do not have jurisdiction to review land use project permit decisions." *Kent C.A.R.E.S. v. City of Kent*, CPSGMHB No. 02-3-0015, p.5, Order on Motions (Nov. 27, 2002). This Board adhered to the *Wenatchee Sportsmen* ruling in *Saundra Wilma v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO on Amended Petition for Review, (Dec. 5, 2002). *Chipman v. Chelan County, et al.*, EWGMHB Case No. 05-1-0002, Order of Dismissal, (Jan. 31, 2006).

- The Board does not have jurisdiction to review administrative actions of the Planning Director to the extent that it relates to fees or constitutional claims relating to equal protection. The issues raised in Issue 10 are not within the Board's jurisdiction and are therefore dismissed. *McHugh, et*

al. v. Spokane County, et al., EWGMHB Case No. 05-1-0004, Order on Motions, (Sept. 1, 2005).

- Public Participation is often an issue in petitions filed before this Board. When a party objects to a substantive portion of the Comprehensive Plan of the Jurisdiction, Public Participation is almost always another issue. The Board does not examine the motivation for raising such issues, but must decide legitimate issues when raised. The mentioning of a new issue in briefing will not cause that issue to be excluded from being properly raised in another petition. Comments that would encourage the Board or a party to consider a new issue to avoid a possible new petition do not prevent a separate issue from being raised in that new petition. Public Participation is a new independent issue that may be brought by a separate petition**,** even if the substantive issue is already decided. The deciding of one issue is, in most cases**,** not *res judicata* for the public participation issue that might be brought. *Larson Beach Neighbors/Wagenman v. Stevens County*. EWGMHB Case No. 04-1-0010, Order on Motions, (Nov. 29, 2004).

- The Board has jurisdiction to review compliance with RCW 43.21C as it relates to plans, development regulations or amendments to such plans or regulations. (RCW 36.70A.280(1)(a)). However, the impact at issue is not applicable here due to the fact that ongoing agricultural activities are exempt. The County will be reexamining the buffer size for many of the rivers and, if an EIS were required, we would expect it to be performed. *Concerned Friends of Ferry County, et al., v. Ferry County,* EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- The request for relief summarizes what the Petitioners are asking the Board to do. The Petitioners wish to be paid for their land and water rights. The Board does not have any authority to grant such relief. The Board can only determine whether the County is in compliance with the GMA or not. The arguments of the Petitioners in this issue do not raise any credible challenge to the Ordinance adopted by the County. The Petitioners have not carried their burden of proof. The Board is directed by the GMA to presume that the actions of the County are valid unless it is left with the firm and definite conviction that a mistake has been made. That is not the case here and the County is not found out of compliance on this issue. *Concerned Friends of Ferry County, et al. v. Ferry County,* EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- There are no genuine issues as to any material facts in this matter. Therefore, the issue of whether Spokane Valley did not comply with the GMA by failing to provide sixty (60) notice to CTED prior to amending its Comprehensive Plan is properly resolved by Dispositive Motion. The GMA, under RCW 36.70A.106, requires that each city planning under GMA proposing amendments to its Comprehensive Plan shall notify CTED of its intent to amend at least sixty days prior to final adoption.

  Spokane Valley became a "city planning under the Growth Management Act" ("GMA") when it amended its Comprehensive Plan. The Board adopts the reasoning of *Wildlife Habitat Injustice Prevention, et al. v. City of Covington,* CPSGMHB Case No. 00-3-0012 (Order on Motions, Nov. 16, 2000) and finds that Spokane Valley is a GMA planning jurisdiction and is subject to the goals and requirements of the GMA.

  Spokane Valley is out of compliance with GMA because it failed to notify CTED of its intent to amend the Comprehensive Plan at least sixty days prior to its adoption of Ordinance Nos. 03-0888 through 03-094. Such actions by Spokane Valley were clearly erroneous. *City of Liberty Lake v. City of Spokane Valley,* EWGMHB Case No. 03-1-0009, Order on Motions, (March 23, 2004).

- Any "person aggrieved" by a determination under the State Environmental Policy Act (SEPA) may obtain review. (RCW 43.21C.075(4)). The term "person aggrieved" includes anyone with standing to sue under existing law. Whether a person or entity has standing to challenge a State. *Spokane County Fire District No. 10, v. City of Airway Heights, et al.,* EWGMHB Case No. 02-1-0019, Order on Motion to Dismiss SEPA Issues, (July 31, 2003).

- The GMA recognizes a distinction between specific project review and comprehensive land use planning. "Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, not land use planning decisions." RCW 36.70A.470(1). The Legislature intended the above provision to provide for consideration of potential amendments to a local jurisdiction's GMA plan and regulations identified or discovered during project review. (citing *LMI v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, FDO (Jan. 8, 1999), at 10). *Wilma v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- The actions of the County are non-reviewable by the Growth Management Hearings Boards unless they are found in the County's Comprehensive Plan or Development Regulations. RCW 36.70A.280(a). The Board looks at the development regulations developed by the County for review of the applications for non-agricultural development upon agricultural lands. The County has stated on the record that it is their intent to allow only non-productive or poor agricultural soil/lands to be converted in this manner. However, nowhere does this criteria or standard exist in their Comprehensive Plan or Development Regulations. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-1-0012c Order on Remand, (Dec 16, 2003).

- The County needs to include in the Comprehensive Plan or in their Development Regulations, the standards and criteria for conversion from Agricultural to recreational/cultural. The Board would then have the ability to review this action and determine its compliance with the GMA. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-1-0012c Order on Remand, (Dec. 16, 2003).

- The County briefing for the Compliance hearing contained repeated assertions that the Petitioner had raised new issues, issues not dealt with in the FDO in this case. Further, in his oral argument, the County's attorney, Lloyd Nickel, informed the Board that the ICAO had not been repealed and the County may choose to repeal Title 13 and make corrections to the original Ordinance 75-2000… Upon review of the arguments of the parties and review of the party's briefing and the determination that the ICAO, which this board found out of compliance, was not repealed or in any way modified, the Board determines the ICAO continues to be out of compliance with the Order of this Board and the GMA. The Board further finds that Title 13 is better reviewed in the case begun pursuant to the new petition, now filed under case Number 03-1-0003. *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB Case No. 00-1-0016, Order on Compliance, (July 10, 2003).

- Upon review of Issue 12, the public participation issue, the Board finds this is not an issue this Board has jurisdiction to decide. The questions involve the design of the GMA, the burdens of proof, and the forum to address wrongs, and whether the process is too legal in form and rigid in nature. The Board is required to follow the GMA and not judge the manner it was drafted by the Legislature. *Harvard View Estates, v. Spokane County*, EWGMHB Case No. 02-1-0005, Order on Motion, (May 31, 2002).

- The Board will not consider the question of whether the City Council's dealing with the Appearance of Fairness Doctrine is appropriate. This is not within our jurisdiction. However, the Appearance of Fairness Doctrine cannot be allowed to reduce the public participation mandated under the GMA. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- The Comprehensive Plan Amendment changed one party's 6.5-acre plot from a residential to commercial designation. The amendment to the zoning of that area, challenged in the amended petition, implemented that Comprehensive Plan change. This is site specific. The Supreme Court of the State of Washington, in *Wenatchee Sportsmen Association v. Chelan County*, 141 Wash. 2nd 169, 4 P. 3d 123 (2000), held: "[A] site-specific rezone is not a development regulation under the GMA, and hence pursuant to RCW 36.70A.280 and .290, a GMHB does not have jurisdiction to hear a petition that does not involve a comprehensive plan or development regulation under the GMA." *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Amended FDO, (Dec. 5, 2002).

- In order for the jurisdiction of this Board to attach, a petition must be filed in accordance with RCW 36.70A.290(2), which requires that a petition for review must be filed within 60 days of publication. The Board must base its decisions on the law. Nothing in RCW 36.70A.290(2) or other decisions of the Board grants authority to waive this statute of limitation. *Blue Mountain Audubon Society, et al. v. Walla Walla County*, EWGMHB Case No. 95-1-0006, Order of Dismissal (Oct. 17, 1995).

- The Board does not have jurisdiction to review local government compliance with statutes other than the Growth Management Act and SEPA compliance on GMA plans and regulations. Similarly, the Board has no authority to impose a moratorium, to set aside permits, or to enjoin construction. RCW 36.70A.300 limits the type of relief a Board can grant to either finding a county in compliance or not in compliance with the Act. *No. Cascades Conservation Council/Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB Case No. 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- The Board finds that its jurisdiction extends only to matters specified in RCW 36.70A.280 (1). The Board lacks jurisdiction to determine whether a county violated other statutes. *No. Cascades Conservation Council/Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB Case No. 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- The general rule is that an administrative board does not have jurisdiction to hear constitutional issues. The Board is without jurisdiction to decide constitutional issues. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

- RCW 36.70A.330 does not preclude the Board from holding multiple compliance hearings. If a county, for instance, is found at a compliance hearing to be in noncompliance but takes subsequent action to come into compliance, it must have an avenue to be found in compliance. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case Mp/ 94-1-0015, Order on Motions" (Jan. 2, 1996).

- There is nothing in the language of RCW 36.70A.330, which suggests that the Board does not have continuing jurisdiction to determine whether a county has come into compliance at some

date after an initial compliance hearing. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

- When a compliance hearing results in a finding of continued noncompliance, the Board's jurisdiction is not at an end. It retains jurisdiction to determine at a later date whether compliance has been achieved and to make orders relating to the original compliance order. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

- The Board lacks jurisdiction to hear petitions regarding local service agreements under chapter 36.115 RCW. *Weaver, et al. v. Yakima County*, EWGMHB Case No. 97-1-0016, Order on Motions and FDO (Sep. 18, 1997).

- The Board has no jurisdiction to review constitutional issues. *Weaver, et al. v. Yakima County*, EWGMHB Case No. 97-1-0016, Order on Motions and FDO (Sep. 18, 1997).

- A Growth Management Hearings Board does not have the jurisdiction to review an action of a County pursuant to a non-GMA statute unless that statute was used to comply with the requirements of the GMA. However, the Board has jurisdiction to determine if a land use planning legislative action complies with the GMA, as long as there is a sufficient nexus between the action and the GMA. The Board's jurisdiction is not to determine whether the local government has properly enacted such law, but the effect of the law passed upon the County's compliance with the GMA.

  When we review the County's passage of an ordinance under the Washington Forest Practices Rules, WAC 222-20-050, we examine this action to determine whether the County remains in compliance with the GMA. To do otherwise would allow the myriad of other planning statutes to dramatically affect a County's Comprehensive Plan with no checks. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 99-1-0004, Order on Motion to Dismiss, (Sept. 29, 1999).

- The Board concluded that it has no jurisdiction to hear the issue concerning the Americans with Disabilities Act. Petitioner may have had recourse to file a petition for failure to enact a public participation program, or file a case in the proper venue for hearing issues regarding the Americans with Disability Act. The motion to dismiss this issue was granted. *Gary D. Woodmansee v. Ferry County;* EWGMHB Case No. 00-1-0012, Order on Motions; (July 28, 2000)

- The Board found from the arguments of the Petitioner that the issue was beyond the scope of the intent of the Growth Management Act. To argue that Respondent was over-protective of private property rights in violation of RCW 36.70A.040(6), Petitioner must identify the statutes, which have been violated as a result of the alleged over-zealous protection of private property rights. The Petition fails to do that, creating a lack of specificity. The motion for dismissal was granted. *Gary D. Woodmansee v. Ferry County;* EWGMHB Case No. 00-1-0012, Order on Motions; (July 28, 2000)

- RCW 36.70A.280(a) provides that "(a) growth management hearings board shall hear and determine only those petitions alleging ... (t) hat a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter." Petitioners challenge Yakima County's compliance with the GMA requirement that a county's development

regulations be consistent with and implement its comprehensive plan. In assessing Petitioners' challenge to Yakima County's GMA compliance, the Board first identifies the appropriate legal standards to be applied and allocate the burden of proof. By statute, this Board applies a clearly erroneous standard, RCW 36.70A.320(3), and allocates the burden of proof to Petitioner. RCW 36.70A.320(2). A Board may find non-compliance under the clearly erroneous standard when the Board is "left with the firm and definite conviction that a mistake has been made." *Bertelsen, et al. v. Yakima County, et al.*; EWGMHB Case No. 00-1-0009, FDO (Nov. 2, 2000) (internal citations omitted).

- The Board found that the amendment to the City's zoning was part of the process of moving towards compliance with the GMA and the adoption of a Comprehensive Plan. After the passage of the 1997 deadline for completion of their plan, we must presume all land-use planning by the City was part of the effort to come into compliance with the requirements of the GMA. The Board has jurisdiction to hear the Petition. *Latah Creek Neighborhood Council v. City of Spokane, et al.*; EWGMHB Case No. 99-1-0014. Order on Motion for Dismissal (Feb. 24,2000).

- The Board's original Order in this matter concluded that after the passage of the 1997 deadline for completion of their Plan, we must presume all land-use planning by the City was part of the effort to come into compliance with the requirements of the GMA. The Intervenor/Respondent's motion for reconsideration persuaded the Board that there remains a material question of fact that must be resolved: whether this amendment of the Zone Code was part of the process of moving into compliance with the GMA. As in a summary judgment under Cr 56, if there is a question of fact, the Board will not dismiss the Petition but will resolve the factual issue at the time of the final hearing. *Latah Creek Neighborhood Council v. City of Spokane, et al.*; EWGMHB Case No. 99-1-0014, Order on Motion to Reconsider (March 20, 2000).

- RCW 58.17.060 requires the County to adopt regulations for the summary approval of short plats and short subdivisions or alteration or vacation thereof. "Such regulations shall be adopted by ordinance and shall provide that a short plat and short subdivision may be approved only if written findings that are appropriate, as provided in RCW 58.17.110, are made by the administrative personnel…." (RCW 58.17.060(1). This clearly requires that the ordinance contain a requirement of written findings. The ordinances' reference to RCW 58.17.110(6) is not enough. That ordinance section only requires that "appropriate provisions are made within the proposed subdivision for the public health, safety and general welfare, as per Chapter 58.17.110 RCW." The County has failed to comply with RCW 58.17.060 by failing to include within Title 4 the requirement of written findings. However, this board does not have the jurisdiction to find non-compliance if the County has not followed these RCW provisions. The Board can only determine if the actions of the County comply with the GMA. Furthermore, the Board has already found these Titles 4 and 5 out of compliance. *Loon Lake Property Owners Association, et al v. Stevens County;* EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

Jurisdiction - (60 days)

- [In determining whether petitioner's challenge to a Rural Element policy was timely, the Board stated:] The GMA structure developed by the Legislature has given Spokane County the authority to set forth within its comprehensive plan "descriptive text covering objectives, principles, and standards used to develop the comprehensive plan" and this would necessarily include GMA-consistent criteria for the designation of a LAMIRD. If the adopted criteria violate the goals and requirements of the GMA, then the time to challenge the criteria was within

60 days of publication of its adoption. *CAUSE v. Spokane County*, EWGMHB Case No. 10-1-0003, FDO at 11 (June 18, 2010)

- The final noncompliant change made by the city is the apparent reduction of the period of filing an appeal to 21 days. (17.108.130(J)). To the extent that such section requires a petition to be filed before the Growth Management Hearings Board earlier than the statutory 60 days, the provision is non-compliant.

  > (2) All petitions relating to whether or not an adopted comprehensive plan, development regulations, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter… must be filed within sixty days after publication by the legislative bodies of the county or city. (RCW 36.70A.290(2)).

  The limitation of the filing of an appeal before the Growth Management Hearings Board to 21 days is out of compliance with the GMA. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- The County contends the key issue before this Board is the Ferry County Planning Department's determination of non-significance, published more than 60 days prior to the filing of the Petition by the Petitioners.

  The Petitioners contend the issue before the Board is the effects of the Timber Forest Protection Ordinance (TFPO), notice of which was published within 60 days of filing of the Petition. Because the issue before the Board is the effect of the TFPO on Ferry County's Comprehensive Plan and Development Regulations, and not the question of the proper enactment of the Ordinance under the Timber and Forest Practices Regulations. The Petitioners filed their petition within the time provided by statute. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 99-1-0004, Order on Motion to Dismiss, (Sept. 29, 1999).

- Pursuant to WAC 242-02-220, a petition for review must be filed within 60 days of publication of notice of adoption of the county ordinance. The sixtieth day fell upon a national holiday and therefore the following day or January 18 became the 60th day. *Gary D. Woodmansee v. Ferry County*; EWGMHB Case No. 00-1-0003, Order of Dismissal; (Feb. 8, 2000).

- The Growth Management Act clearly requires publication after the adoption of the comprehensive plan or development regulations, or amendment thereto. RCW 36.70A.290(2)(b). There is no requirement for publication of the County's review of the Ferry County Critical Areas Ordinance and the County's Comprehensive Plan. Had the County amended the CP or its regulations, the result would be different. The publication that did take place was not at the request of the County and is not the date at which we calculate the 60-days. The effective date of the action taken, and the start of the 60-day clock for filing a petition for review, is Feb. 5, 2001, the day the legislative action was taken. The petition in this matter was filed on April 12, 2001, beyond the 60 day allotted time. *Concerned Friends of Ferry County, et al. v. Ferry County*; EWGMHB Case No. 01-1-0008, Order of Dismissal; (June 8, 2001).

Land Capacity Analysis

- Typically, the appropriate size of a UGA is determined by preparing a "land capacity analysis" or a "land quantity analysis." That analysis determines how much land should be included within a UGA to accommodate expected urban development, based on the OFM population projections. Thus, the land capacity analysis seeks to balance the supply of developable land with the demand

for such land over the 20-year planning horizon. *Brodeur/Futurewise, et al v. Benton County*, Case No. 09-1-0010c "W. Richland UGA" FDO at 15 (Dec. 2, 2009) (Roskelley dissenting)

- A LCA [Land Capacity Analysis] is key to determining if an existing UGA has sufficient land to accommodate projected growth and, fundamental to this analysis, is a review of whether there is land available for development. When determining available land, review is not merely of vacant land, but also of land that is underutilized or partially used. This land base is then further reduced to reflect public needs and development limitations which make that land not suitable for development, such as the presence of critical areas which would prohibit any type of development. The GMA's permitted market factor supplements this analysis by recognizing that some of this land will not be made available for development within the 20 year planning period due to fluctuating market forces. *City of Zillah v. Yakima County,* Case No. 08-1-0001, FDO at 25 (Aug. 10, 2009)

- At the heart of the required analysis for determining the appropriate size of the UGA is a Land Capacity Analysis (LCA) in which the County determines if a UGA has sufficient capacity to absorb the projected growth. The LCA is a critical mechanism for the sizing of a UGA because it is utilized to determine how much urban land is needed. It is prospective – looking forward over the coming 20 years to see if there is enough land within the UGA to accommodate the growth allocated to the area. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order at 38-39 (Feb. 24, 2009).

- The question before the Board is whether the County's mere adoption of the City's LCA, without more, satisfies Kittitas County's duty under the GMA. As was noted above, the ultimate responsibility for sizing a UGA pursuant to the GMA's mandate lies with Kittitas County. Thus, merely adopting the City's LCA without reviewing that analysis to ensure it properly conformed to not only the GMA's goals and requirements but to the goals and policies of Kittitas County's existing CP does not satisfy this duty. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order at 39 (Feb 24, 2009).

- *See also Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 60-68 (March 12, 2007) (providing general discussion on need for land capacity analysis to support UGA sizing).

- The purpose of a land capacity analysis is to provide the information necessary to determine whether there is a need to expand an UGA. In the absence of a land capacity analysis, there is no demonstration of need and expansion is not justified. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 76 (Aug. 20, 2007).

- To determine the appropriate size and location of an UGA requires an appropriate analysis, variously called a "land capacity analysis" or a "land quantity analysis." That analysis includes two interrelated components: (1) counties first must determine how much land should be included within UGAs to accommodate expected urban development, based on the OFM population projections; (2) counties must determine which lands in particular should be included within UGAs, based on the "locational criteria" provided in RCW 36.70A110(1) and (3). *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 65 (Aug. 20, 2007).

- [When establishing UGAs] WAC 365-195-335 clearly spells out what a jurisdiction must do to designate UGAs. The WAC may not designate the steps as a "land quantity analysis" or "land

capacity analysis", but if a county or city performs the necessary tasks, that terminology certainly describes what must be accomplished to fulfill the requirements of the GMA. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order on Motions, at 20 (June 21, 2007).

- Counties can't just arbitrarily draw a line around the built or urban-like environments in the rural areas, add thousand of acres, and call them urban growth areas of LAMIRDs without justifying the action. [They first must] use the OFM population projection/ [then counties and cities are directed] to include areas and densities sufficient to permit the urban growth that is project to occur. In order to comply with these directors, jurisdictions must undertake some form of "land capacity analysis" to determine how much land is needed for project growth. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order on Motions, at 20-21 (June 21, 2007).

Level of Service (LOS)

See also Keyword – Capital Facilities Element, Transportation Element

- General discussion of Level of Service Standards in regards to capital facilities. *Wilma, et al. v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order on Reconsideration, at 12-14 (June 25, 2008).

- General Discussion of Level of Service Standards. *Wilma, et al v. Stevens County,* EWGMHB Case No. 06-1-0009c, Compliance Order at 12-15 (May 22, 2008)(Mulliken dissenting).

- When read together with RCW 36.70A.070(3), Goal 12 of the GMA (RCW 36.70A.020) requires Stevens County to ensure those public facilities and services necessary to support development will be available when needed and that any subsequent development will not cause the capability of these facilities and services to fall below accepted minimum standards. Determining which facilities and services are necessary is at the discretion of Stevens County based on the needs of its existing citizens and for the growth it anticipates. *Wilma, et al v. Stevens County,* EWGMHB Case No. 06-1-0009c, Compliance Order at 15 (May 22, 2008)(Mulliken dissenting).

- The GMA provides guidelines for jurisdictions in regard to Goal 12's requirements as RCW 36.70A.030(12) and .030(13) define "public facilities" and "public services." Jurisdictions planning under the GMA must explicitly state in their CFP which public facilities and services are determined necessary to support development with each having a correlating minimum standards to trigger reassessment if the service falls below this established standard.16 The GMA also requires the provision of urban governmental services within a UGA which includes, at the minimum, storm and sanitary sewer systems, domestic water systems, and fire and police services, as well as park and recreational facilities. RCW 36.70A.030(20); RCW 36.70A.070(8); RCW 36.70A.110. *Wilma, et al v. Stevens County,* EWGMHB Case No. 06-1-0009c, Compliance Order at 15 (May 22, 2008)(Mulliken dissenting).

LIMITED AREAS OF MORE INTENSE RURAL DEVLEOPMENT (LAMIRDs) (*see also RAID)*

- [Yakima County's "rural settlements" are LAMIRDs but were not evaluated pursuant to the GMA] It is evident from the County's own argument that no analysis has been conducted as to whether or not its Rural Settlements satisfy the GMA's criteria for LAMIRDs. Rather, this analysis is anticipated to be completed within two years. As this Board has previously stated,

planning to come into compliance is not compliance. *Hazen, et al v Yakima County,* EWGMHB Case No. 08-1-0008c, FDO at 70 (April 5, 2010)

- [T]he Board does not read the language in .070(5)(d)(iv) as permitting Spokane County to designate LAMIRDS as it wishes. While this interpretation would certainly relieve the County of the burden of complying with RCW 36.70A.070(5)(d), it also leaves the other provisions within this section superfluous. The Board reads the language in .070(5)(d)(iv) as permitting Spokane County to enact policies or regulations which serve to minimize and contain LAMIRDs once those areas have been designated pursuant to the parameters established by the Legislature within .070(5)(d) … With RCW 36.70A.070(5)(d)(i), .070(5)(d)(iv), and .070(5)(d)(v) the Legislature has expressly provided the requirements for the establishment of a Type 1 LAMIRD and [the County's] Amendment 09-CPA-07 must conform to these requirements. *CAUSE v. Spokane County,* EWGMHB Case No. 10-1-0003, FDO at 12 (June 18, 2010)

- Fundamental to the establishment of a LAMIRD is the requirement that it be based upon "existing" areas or uses of more intensive rural development ... Once the existing area or use determination has been made, then a logical outer boundary (LOB) is to be established, using the built environment to delineate it, which *contains and limits expansion* of the existing, more intensive area or use to appropriate development, redevelopment, or infill within the LOB. *CAUSE v. Spokane County,* EWGMHB Case No. 10-1-0003, FDO at 12-13 (June 18, 2010)(Mulliken dissenting as to Invalidity)

- [I]t is the area contained *within* the LAMIRD itself which must be "more intensive." *CAUSE v. Spokane County,* EWGMHB Case No. 10-1-0003, FDO at 13 (June 18, 2010)(Mulliken dissenting as to Invalidity)

- [A]lthough nothing precludes Spokane County from designating a single parcel as a LAMIRD and potentially utilizing the property lines to establish its LOB, it is the built environment of the LAMIRD itself which delineates the LOB not that of the surrounding community as Spokane County contends for justification. In addition, the LOB is intended to contain the "more intensive development" and here, as noted elsewhere in this FDO, the designation of the Lancaster parcel as a LAMIRD serves to exclude the areas that are developed at a higher level, in direct opposition to the GMA's requirements. *CAUSE v. Spokane County,* EWGMHB Case No. 10-1-0003, FDO at 13 (June 18, 2010)(Mulliken dissenting as to Invalidity)

- Petitioner's argument is premised on CWPP 13's language that rural lands are to have low densities and not require intensive levels of urban services. Although this is the general rule when it comes to rural lands, the Legislature adopted the LAMIRD provisions of the GMA to specifically provide an exception to that rule. The very intent and purpose of a LAMIRD is to recognize areas of higher density which may require public facilities and services necessary to serve this more intense development pattern. *CAUSE v. Spokane County,* EWGMHB Case No. 10-1-0003, FDO at 16 (June 18, 2010)(Mulliken dissenting as to Invalidity)

- In order to qualify as a LAMIRD, the first question is whether or not the Lancaster parcel amounts to an area of "existing" development within the rural area of Spokane County … [however] LAMIRDs do not just reflect existing areas or uses, thus the second question is whether or not the Lancaster parcel is "more intensive" than other development within the rural area as this is the specific purpose and function of a LAMIRD – to recognize those areas of more

intensive development. *CAUSE v. Spokane County*, EWGMHB Case No. 10-1-0003, FDO at 21-22 (June 18, 2010)(Mulliken dissenting as to Invalidity)

- LAMIRDs are not designated based on the surrounding neighborhood; they are based on the *more intensive development of the existing area* ... LOBs are delineated based on this more intensive development so as to contain it, not exclude it, as would be the case in this matter. *CAUSE v. Spokane County*, EWGMHB Case No. 10-1-0003, FDO at 22 (June 18, 2010)(Mulliken dissenting as to Invalidity)

- [J]ust like an UGA boundary is designed to contain urban growth and prevent it from encroaching into rural or natural resources lands, the LOB for a LAMIRD contains the existing more intensive rural development so as to preclude its extension into neighboring rural lands. *CAUSE v. Spokane County*, EWGMHB Case No. 10-1-0003, FDO at 24 (June 18, 2010)(Mulliken dissenting as to Invalidity)

- *Kittitas County Conservation, et al v Kittitas County*, Case No. 07-1-0004c, 4th Compliance Order at 26-28 (May 26, 2010) (LAMIRD Designations – Easton, Ronald, Thorp, and Vantage – General discussion of LAMIRD criteria)

- *Kittitas County Conservation, et al v Kittitas County*, Case No. 07-1-0004c, 4th Compliance Order at 33-41 (May 26, 2010) (Specific application of LAMIRD designation criteria to areas (Easton, Ronald, Thorp, Vantage)with Board finding compliance except in regards to Vantage LAMIRD (continued non-compliance and invalidity).

- [General discussion of LAMIRD requirements] *Wilma, et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Compliance Order at 37 (May 22, 2008)(Mulliken dissenting).

- [When determining the Built Environment] [S]ubdivided or platted land, although occurring prior to 1990, but which remain undeveloped, may not be considered part of the built environment, as the Legislature intended this term to relate to manmade structures. *Wilma, et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Compliance Order at 38 (May 22, 2008)(Mulliken dissenting).

- In many instances, a LOB [Logical Outer Boundary] is difficult to determine and becomes an exercise in judgment by a counties planning department. Fortunately, RCW 36.70A.070(5)(d)(iv) leaves little doubt that counties must err on the side of caution when drawing an LOB. *Wilma, et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Compliance Order at 39 (May 22, 2008)(Mulliken dissenting).

- LAMIRDs are not tools for encouraging development or creating opportunities for growth and their densities must be designated and restricted to the clearly identifiable areas of more intense development as of September 1993. Fundamental to the establishment of a LAMIRD is the requirement that it be based upon "existing areas and uses" as established by the built environment. *Wilma, et al v. Stevens County*, EWGMHB Case No. 06-1-0009c, Compliance Order at 39 (May 22, 2008)(Mulliken dissenting).

- RCW 36.70A.070(5))d)(iv)(D), requires the County to address its ability to provide public facilities and public services in a manner that does not permit low-density sprawl. The County's Capital Facilities Plan fails to address LAMIRDs in general and the Comprehensive Plan only

mentions their designation and size. Without addressing its ability to provide these facilities and services in a manner that does not permit low-density sprawl, the County has not fulfilled its duty under the GMA. *Wilma, et al v. Stevens County,* EWGMHB Case No. 06-1-0009c, Compliance Order at 40 (May 22, 2008)(Mulliken dissenting).

- General discussion as to the designation of LAMIRDS. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 23-24 (Sept 5. 2008)

- The County is essentially asking the Board to legitimize and affirm an expansion of a non-conforming use through the GMA LAMIRD process because a property owner desires to expand their business. That's not what is intended by the LAMIRD provisions of the GMA. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 26-27 (Sept 5. 2008)

- The expansion of the LDAC by amendment 07-CPU-05 would authorize a single parcel of land – a peninsula or "bunny tooth" – to intrude across Day-Mount Road and extend into the UR zone of residential development. The GMA wants boundaries clearly identified by the built environment. Here the amendment doesn't visually conform to the GMA standard. In addition, the amendment creates an "out-fill" type of expansion and the LAMRID provisions of the GMA are geared more to "infill" development – with this premise recently upheld in the GoldStar89 case before Court of Appeals. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 27-28(Sept 5. 2008)

- The Board agrees that individual parcels should not be split when adding land to a LAMIRD, but isolating individual parcels is not what the statute implies by a logical outer boundary. A logical outer boundary is delineated by "physical boundaries such as bodies of water, streets, highways, and land forms and contours,"91 not specific parcel boundaries. What the County has done is create an isolated peninsula outside of the logical outer boundary. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 28 (Sept 5. 2008)

- Expansion of the LDAC, as proposed by amendment 07-CPA-05, fails to comply with the requirements of RCW 36.70A.070(5)(d) by allowing urban-like growth within the rural area and outside of a designated UGA or, in this case, the logical outer boundary of the original LDAC (LAMIRD). LAMIRDs are not mini-UGAs and are not intended to accommodate growth, but [are] areas recognized by a county as more intensive rural development that was in place prior to entering into the GMA process as required by RCW 36.70A.040. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 34 (Sept 5. 2008)

- [In regards to LAMIRDs] The statutory directive is three-fold: (1) the County shall "minimize and contain the existing areas. . . of more intensive rural development"; (2) lands included in the LAMIRD shall not extend beyond the "logical outer boundary"; and (3) the logical outer boundary is delineated predominantly by the built environment. *Hanson v. Chelan County,* EWGMHB Case No. 06-1-0005, FDO, at 11 (Dec. 14, 2006).

- *See Hanson v. Chelan County,* EWGMHB Case No. 06-1-0005, FDO, at 12-14 (Dec. 14, 2006) (*Reaffirming* the Board's previous holding that the GMA prohibits expansion of a LAMIRD into surrounding undeveloped land even to accommodate a demand or need for commercial/residential development).

- An Urban Growth Node (UGN), as used by the County, is not a variant-UGA or LAMIRD. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 64-66 (Aug. 20, 2007).

- [When establishing the boundary for a LAMIRD] While a lot may be able to be included within a logical outer boundary, the GMA does not require the jurisdiction to include all development within that boundary, only that it cannot go beyond such logical outer boundary. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order on Motions, at 10 (June 21, 2007).

- The 1995 amendments to RCW 36.70A.070 created provisions for "limited areas of more intense rural develop*ment", generally referred* to as "LAMIRDs". LAMIRDs are permitted to be designated in rural lands where the county has adopted measures to "minimize and contain the existing areas or uses" of LAMIRDs. RCW 36.70A.070(5)(d). The statute provides for three types of LAMIRDs, each with different characteristics and different limitations. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, 2nd Order on Compliance, (Nov. 1, 2004).

- To qualify as a Type I LAMIRD, the LAMIRDs must consist of certain "existing areas" defined in RCW 36.70A. 070(5)(d)(v). The allowed uses and areas include commercial, industrial, residential or mixed-use areas "whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments." An "industrial area" is not required to be principally designed to serve the "existing and projected rural population." Thus, all other Type I LAMIRDs (commercial, residential, or mixed-use) must be principally designed to serve the "existing and projected rural population." In designating and establishing LAMIRDS under Type I, a county must "minimize and contain" ((d)(iv)) the existing area or existing use. A prohibition against including lands within the logical outer boundaries (LOB) that allows a "new pattern of low-density sprawl" for the existing area or existing use must be adopted ((d)(iv)). Type I LAMIRDS, being neither rural nor urban, allowing existing areas or existing uses, must always be "limited" i.e., minimized and contained. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, 2nd Order on Compliance, (Nov. 1, 2004).

- In establishing the LOB for an "existing area" (but not for existing uses) under RCW 36.70A.070(5)(d)(iv), a county is required to "clearly" identify and contain the LOB. That identification and containment must be "delineated predominately by the built environment," but may include "limited" undeveloped lands. We agree with the Western Growth Board and conclude that legislative intent, as determined from reading all parts of the GMA with particular emphasis on (5)(d), means the "built environment" only includes those facilities, which are "manmade," whether they are above or below ground. To comply with the restrictions found in (d), particularly (d)(v), the area included within the LOB must have manmade structures in place (built) on July 1, 1991. (*City of Anacortes v. Skagit County,* Compliance Order, WWGMHB No. 00-2-0049c, FDO, Feb. 6, 2001.) *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019 , 2nd Order on Compliance, (Nov. 1, 2004).

- To qualify as a Type II LAMIRD, they must meet the criteria of [RCW 36.70A.070 (5)(d)(ii)]. This chapter authorizes small-scale recreation or small-scale tourist LAMIRDs. Commercial facilities to serve those LAMIRDS are allowed. The intensification or creation of small-scale recreational or small-scale tourist uses must rely on a rural location and setting. Such LAMIRDS cannot include new residential development. The uses need not be principally designed to serve the "existing and projected rural population." "Public services and public facilities" must be limited to those "necessary to serve" only the LAMIRD. Such public services and public

facilities must be provided "in a manner that does not permit low-density sprawl." *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019 , 2nd Order on Compliance, (Nov. 1, 2004).

- Type III LAMIRDs do allow new development on "lots" rather than requiring the County to determine Logical Outer Boundaries for the LAMIRD as is provided for Type I LAMIRDs based on the pre-existing built environment as of July 1990. (RCW 36.70A.070(5)(d)(iv); *Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c (FDO, May 7, 2001)). However, the Type III LAMIRD must meet the requirements of RCW 36.70A.070(5)(d)(iii) and is not merely the same thing as a Type I LAMIRD without the requirement of a logical outer boundary established in accordance with the built environment as of July 1990. (Grant County is required to use July 1991, the year Grant County chose to plan under the Growth Management Act.). *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019 , 2nd Order on Compliance, (Nov. 1, 2004).

- For a Type III LAMIRD the Board must first determine whether the LAMIRD appropriately contains "isolated" cottage industry and small-scale businesses. This phrase does not require that the cottage industry and small-scale business to be located in an isolated part of the county. It is however required that the cottage industry and small-scale business itself be isolated from other similar uses. The location adjacent to other LAMIRDs or allowing similar uses within it causes a LAMIRD to not meet the requirement for "isolated" uses. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019 , 2nd Order on Compliance, (Nov. 1, 2004).

- It is also important that rural development be contained and inappropriate conversion of undeveloped land into sprawling, low-density development is reduced in the rural areas. RCW 36.70A.070(5)(c)(i) and (iii). Side-by-side LAMIRDs can hardly be said to contain and reduce sprawl and limit growth. *v. Grant County*, EWGMHB Case No. 99-1-0019, 2nd Order on Compliance, (Nov. 1, 2004).

- The Board also recalls its decision in *City of Walla Walla, et al v. Walla Walla County*, Case No. 02-1-0012c, (FDO, Nov. 26, 2002) and the Central Puget Sound Growth Management Hearings Board's holding that LAMIRDs must not be in too close proximity to UGA boundaries. Such location would promote the low-density sprawl that the LAMIRDs are required to avoid. (citing *City of Tacoma, et al., v. Pierce County*, CPSGMHB Case No. 99-3-0023c (FDO, June 26, 2000)).. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, 2nd Order on Compliance, (Nov. 1, 2004).

- The desire of Grant County to develop jobs in the region is certainly understandable and the Board agrees that the GMA includes a goal to encourage economic development. RCW 36.70A.020(5). However, economic development may not occur at the expense of creating low-density sprawl. If new Type III LAMIRDs could be created for commercial development abutting other LAMIRDs, it would be possible to create strip malls or other stretches of more intensive rural development throughout the rural areas. This would encourage sprawl in the rural areas rather than containing limited amounts of development in the rural zone as envisioned by the Act. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, 2nd Order on Compliance, (Nov. 1, 2004).

- While the Board presumes the validity of these County actions, the county must follow the laws articulated in the Growth Management Act. It is also true that, while the development regulations discussed herein were not contested, the Board must determine whether the placement of a Type I, II or III LAMIRD in a certain zoning district or land-use designation complies with the act and

limits the LAMIRD as required. A LAMIRD must be in a Rural Activity Centers Zoning District that is appropriate, thereby limiting the size, uses, and types of development. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, 2nd Order on Compliance, (Nov. 1, 2004).

- The designation of Type I LAMIRDs, as below, requires the County to determine the Logical Outer Boundaries (LOB) (RCW 36.70A.070(5)(d)(iv)). Where a County is required to designate such a boundary, using specific criteria, the Growth Management Hearings Boards cannot presume that these boundaries are correct without more than the bare assertion of their validity. The County needs in its record the information used to make such designation. This is the "show your work" requirement found in narrow circumstances such as this, where the local government is required by the GMA to review specific criteria and perform the appropriate analysis of GMA goals and requirements, more than mere consideration of them. (*Berschauer v. Tumwater* 94-2-0002 (FDO 7-27-94)). The County Commissioners are required by law to review such criteria, then make and articulate their decision for their location of the LOB. The Board is then able to review this action and determine if the boundary is appropriate. The Board rarely requires the County to show their work. The designation of Urban Growth Areas is one example; Logical Outer Boundary designation is another. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019 , 2nd Order on Compliance, (Nov. 1, 2004).

- While the actions of the County are presumed valid, the Board must be able to see the work by the County for their determination of LOBs. The GMA specifically outlines how the logical outer boundaries are to be designated for a Type I. (RCW 36.70A.070(5)(d)(iv)). The contention that the 8.07 acres, as was adopted by the County Commissioners, is within the logical outer boundaries and the growth and the uses will be contained, is not reflected in the record. The maps used do not show more than the area considered and no sign of built up areas. The record shows no more than a change from a Type III to a Type I and the claim that some structures existed prior to 1991. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019 , 2nd Order on Compliance, (Nov. 1, 2004).

- Designation of a LAMIRD is governed by RCW 36.70A.070(5)(d). That statute allows the County to designate an area as a Limited Development Area (commercial or industrial) if it is delineated primarily by the built environment. The County was within its authority to designate the approximately 25-acres of land to the west of the parcel in question and adjacent to Starr Road as a LAMIRD because that westernmost 25-acres is delineated primarily by the built environment. The southern and northern parts of that westernmost 25 acres of the entire Limited Development Area consist of pre-GMA industrial uses. Thus, even though the middle of that westernmost 25 acres is vacant or undeveloped, the entire westernmost 25 acres could properly be included in the LAMIRD as an area of potential infill due to preexisting built environment. The Board however rejects the County's contention that it can include the eastern 24.32 acres in this LAMIRD pursuant to RCW 36.70A.070(5)(d). In establishing the Logical Outer Boundary for an "existing area" (but not for existing uses) under (d)(iv) a county is required to "clearly" identify and contain the Logical Outer Boundary. That identification and containment must be "delineated predominately by the built environment," but may include "limited" undeveloped lands. The Board agrees with the Western Growth Board and concludes that legislative intent, as determined from reading all parts the GMA with particular emphasis on (5)(d), means the "built environment" only includes those facilities, which are "manmade," whether they are above or below ground. To comply with the restrictions found in (d), particularly (d)(v), the area included within the Logical Outer Boundary must have manmade structures in place (built) on July 1, 1991. (citing *City of Anacortes v. Skagit County,* Compliance Order, WWGMHB No. 00-2-

0049c, FDO, Feb. 6, 2001) *1000 Friends of Washington/ Glenrose Community Assn. v. Spokane County, et al.*, EWGMHB Case No. 03-1-0004, FDO (May 25, 2004).

- The Board finds that RCW 36.70A.070(5)(d) requires the property must have had a pre-existing intensive *use* and cannot simply have been a pre-existing industrial *zone* as a boundary for a LAMIRD. The Board does not interpret a "use" to include *zoning*. A use is clearly an actual use by a landowner such as commercial trucking, etc., i.e., the normal meaning of the word *use*. *1000 Friends of Washington/Glenrose Community Assn. v. Spokane County, et al.,* EWGMHB Case No. 03-1-0004 FDO (May 25, 2004).

- In 1997 the State Legislature amended the GMA to make accommodation for "infill, development or redevelopment" of "existing" areas of "more intensive rural development," however such a pattern of growth must be "minimized" and "contained" within a "logical outer boundary." This cautionary and restrictive language evidences a continuing legislative intent to protect rural areas from low-density sprawl. The County's inclusion of the eastern 24.32 acres in this LAMIRD does not comply with the type I LAMIRD. The inclusion of this vacant land cannot be interpreted as "infill". Here, the eastern parcel is completely undeveloped and is not delineated primarily by the built environment. Therefore, the County is not in compliance with respect to including the Rowan and Canal parcel inside the LAMIRD. *1000 Friends of Washington/Glenrose Community Assn. V. Spokane County, et al.,* EWGMHB Case No. 03-1-0004 FDO (May 25, 2004).

- Parker Springs and McConihe Shore LAMIRDs have a similar problem. Both, as Type I LAMIRDs must be contained within their Logical Outer Boundaries (LOB). RCW 36.70A (5)(d)iv. The statute allows infill, but with limits. RCW 36.70A.(5)(d)(iv) provides:

  > Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection.

  The inclusion of large pieces of undeveloped land, platted or not, is not infill. The Board interprets the above language to allow undeveloped land to be within the Logical Outer Boundary such as undeveloped lots or spaces between the structures that do exist. The exemption for Type I LAMIRDS is to allow existing more intensive uses to continue in a limited way and would allow infill of those limited areas. The undeveloped lands included in these two LAMIRDS are not what the Legislature intended. These two LAMIRDs continue to be out of compliance. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Reconsideration, (June 2, 2004).

- The Gorge LAMIRD cannot be considered in compliance in its present configuration. Had the County not added the 174 acres it would have been in compliance. Further, the inclusion of two types of LAMIRDS within the same designation makes it impossible to decide if they are in compliance. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Reconsideration, (June 2, 2004).

- Warden 2 remains out of compliance. This is not a Limited Area of More Intensive Rural Development. This is a large piece (169 acres) of land located dead center in irrigated agricultural lands. This is ostensibly for small cottage industry. Little if any development was

found on this property and does not meet the definitions of a LAMIRD. However, to be consistent with other portions of this order, this LAMIRD is found out of compliance but subject to a determination of compliance upon designation of this LAMIRD as a Type II or III LAMIRD and its compliance with the requirements of that designation. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Reconsideration, (June 2, 2004).

- McDonald Frontage 1 was listed as a Type I LAMIRD, Agricultural Service Center. It is comprised of eight parcels and a railroad siding. Existing development is largely related to agricultural use associated with the railroad, including farm equipment and supply. The Petitioner has given the Board no reason to believe that the boundaries are not along the logical lines of built up areas. This LAMIRD is found to be in compliance. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Reconsideration, (June 2, 2004).

- There are three types of LAMIRDs allowed under RCW 36.70A.070(5)(d)(i), (ii) and (iii). For simplicity, they will be referred to as Type I, II or III. In our previous orders we have referred to these as RAIDs. The Board now wishes to refer to these as LAMIRDs, as the Central and Western Hearings Boards have done. The previous acronym, RAIDs (Rural Areas of Intensive Development), left out the letters "L" and "M". The letter "L" which is for the word "limited" in "Limited Areas of More Intensive Rural Development" is a key part of this exception to rural development. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The GMA's key goal has been to direct urban development into urban growth areas and to protect the rural area from sprawl. In 1997 the State Legislature amended the GMA to make accommodation for "infill, development or redevelopment" of "existing" areas of "more intensive rural development," however such a pattern of growth must be "minimized" and "contained" within a "logical outer boundary." This cautionary and restrictive language evidences a continuing legislative intent to protect rural areas from low-density sprawl. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The provisions of (c)(ii) (visual compatibility) and (iii) (reduce low-density development) do not apply to those LAMIRDs designated under (d)(i). This section does not allow increased low-density development, but merely removes the reduction requirement. The logical outer boundary (LOB) provisions of (d)(iv) apply only to LAMIRDs designated under (d)(i) (Type I). Type II and III both allow "new development" and "intensification of development." Type I LAMIRDs do not allow "new development" except as it may be part of "infill, development, or redevelopment." *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- Type I LAMIRDs consist of certain "existing areas" defined in RCW 36.70A. 070(5)(d)(v). The allowed uses and areas include commercial, industrial, residential or mixed-use areas "whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments." An "industrial area" is not required to be principally designed to serve the "existing and projected rural population." Thus, all other Type I LAMIRDs (commercial, residential, or mixed-use) must be principally designed to serve the "existing and projected rural population." In designating and establishing LAMIRDs under Type I a county must "minimize and contain" ((d)(iv)) the existing area or existing use. A prohibition against including lands within the LOB that allows a "new pattern of low-density sprawl" for the

existing area or existing use must be adopted ((d)(iv)). Type I LAMIRDs, being neither rural nor urban, allowing existing areas or existing uses, must always be "limited" i.e., minimized and contained. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- In establishing the LOB for an "existing area" (but not for existing uses) under RCW 36.70A.070(5)(d)(iv) a county is required to "clearly" identify and contain the LOB. That identification and containment must be "delineated predominately by the built environment," but may include "limited" undeveloped lands. We agree with the Western Growth Board and conclude that legislative intent, as determined from reading all parts of the GMA with particular emphasis on (5)(d), means the "built environment" only includes those facilities, which are "manmade," whether they are above or below ground. To comply with the restrictions found in (d), particularly (d)(v), the area included within the LOB must have manmade structures in place (built) on July 1, 1991. (citing *City of Anacortes v. Skagit County,* Compliance Order, WWGMHB No. 00-2-0049c, FDO, Feb. 6, 2001.) *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The provisions of RCW 36.70A.070(5) (d)(v) (existing area or existing use as of July 1, 1990) apply to all LAMIRDs whether designed under (d)(i) (ii), or (iii). Thus, for any "intensification" allowed under Type II or Type III the designated use or area must have been in existence on July 1, 1990 (or later date under the provisions of (5)(B) or (C)). This restriction does not apply to "new development" authorized under Type II or Type III. Anytime the phrase "existing" is used to define an area or use, the provisions of RCW 36.70A.070(5) (v) (7-1-90 or as here, 7-91) modify that phrase. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- Under Type II, small-scale recreation or small-scale tourist LAMIRDs are authorized. Commercial facilities to serve those LAMIRDs are allowed. The intensification or creation of small-scale recreational or small-scale tourist uses must rely on a rural location and setting. Such LAMIRDS cannot include new residential development. The uses need not be principally designed to serve the "existing and projected rural population." "Public services and public facilities" must be limited to those "necessary to serve" only the LAMIRD. Such public services and public facilities must be provided "in a manner that does not permit low-density sprawl." *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The LAMIRDs allowed under Type III authorize intensification or creation of "isolated cottage industries and isolated small-scale businesses." These need not be principally designed to serve the "existing and projected rural population" and non-residential uses. They must provide job opportunities for rural residents. Public services and public facilities have the same constraints as those provided under Type II.

  The allowance of small-scale recreational and small-scale tourist uses, isolated cottage industries and isolated small-scale businesses are also subject to the provisions of RCW 36.70A.070(5)(a), (b), and (c), as well as the definitions contained in RCW 36.70A.030(14) and (15). *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The County designated 37 LAMIRDS as combinations of Type I, II and II. The County did not separate them and the Board must believe the County intends all three types to be included in each LAMIRD. The County contends the GMA does not require each LAMIRD be segregated

into a separate designation as a Type I, II or III. They further cite a Western Board decision, *City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c, as supporting this contention. This is not correct. The GMA identifies three types of Limited Areas of More Intensive Rural Development. The County must chose which LAMIRD is appropriate for the specific site. To hold otherwise would be to ignore the law and the cases that interpret the law. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The statute, RCW 36.70A.070 (5)(d) is the best place to start to find that the GMA established three separate LAMIRDS. The Statute talks of the rural element to "allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:"

  The argument that there are three separate types of LAMIRDS is clearly supported when you examine the three paragraphs that are set apart, listing the type of LAMIRD and the limitations for each type. To have all three types in the same space without boundaries between them would not only be confusing but virtually impossible. Type I is a mixed-use area that can have residential development infill. This must be bound by logical outer boundaries delineated predominately by the built environment. The same case cited by the County, *Skagit, Supra*, asserts that these limitations, RCW 36.70A. 070(5)(d)(iv), do not apply to Types II and III. Further, Types II and III can have new development, isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population contrary to Type I. Also Types II and III do not allow residential development. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The County cited dictum found in *City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c. This was dictum without legal argument and is not precedent for this Board. However, the Western Hearings Board later ordered Mason County to specify which of the three types of LAMIRDS theirs fit into. *Dawes, et al v. Mason County*, WWGMHB No. 96-2-0023c, Compliance Order, Aug., 14, 2002. That case made it clear that the Western Hearings Board felt this individual designation was needed to be able to determine if there is compliance. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997. The Legislature amended RCW 36.70A.030, adding a new subsection, which provides: RCW 36.70A.030(14) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The Legislature at the same time amended RCW 36.70A.070, which clarified the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without

such limitations and conditions, more intense rural development would constitute an impermissible pattern of urban growth in the rural area. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (iii), (iv), and RCW 36.70A.110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for a UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that, even the "innovative techniques" for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. RCW 36.70A.070(5)(d)(iii). *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- While the Board recognizes that RCW 36.70A.070(5) provides that "some accommodation may be made for infill of certain 'existing areas' of more intense development in the rural area, that infill is to be 'minimized' and 'contained' within a 'logical outer boundary.'" Bremerton CPSGMHB Case No. 95-3-0039c (coordinated with Case No. 97-3-0024c), Finding of Noncompliance, at 24. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The County argued that its decision to establish RAIDs is justified by its consideration of local circumstances, as permitted by RCW 36.70A.070(5)(a). This provision allows counties, in developing the rural element of the plan, to consider local circumstances "in establishing patterns of rural densities and uses." However the County provides no written record of the local circumstances identified. The quote referred to by the County in their brief, speaks of the Blalock area being characterized by land uses which include small-scale farms, single-family homes, limited commercial uses and open space. Very little more is found that might relate to the creation of the boundaries of the RAID and what is included therein. The County has failed to properly limit the area of the RAID. *Citizens for Good Governance, et al., v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- If the County used local circumstances to guide them in the development of the rural element, there must be "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA]." RCW 36.70A.070(5)(a). The County has made no attempt to explain in writing how the rural element harmonizes the planning goals. Absent the Act's mandated written explanation, the County has not complied with RCW 36.70A.070(5)(a). *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Further the County failed to give this Board any clear statement of the area existing at the time Walla Walla County opted into the GMA, Oct. 30, 1990. It is this date that is to be used to limit the boundaries of a RAID. The Findings of Fact adopted by the County contain no analysis of areas existing in the Blalock region by actual lot sizes due to common ownership of adjacent platted parcels and are devoid of findings regarding uses as of Oct. 30, 1990, relying instead solely upon historic platting and current uses to justify its "rural transition" region. *Citizens for*

Good Governance, et al. v. Walla Walla County, EWGMHB Case No.s 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The Blalock area now allows lots as small as ½ acre. This is urban density requiring urban services. The RAIDs were not to be rural UGAs. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- In addition to the County's failure to follow the steps found in the GMA for the designation of Rural Areas of More Intensive Development (RAID), the Board finds that the County erred due to the RAID's proximity to the City of Walla Walla. The Blalock area is up against the UGAs of both the City of Walla Walla and College Place. The 1997 Legislative amendment allowing RAIDS was clearly done to let the county do something with unincorporated concentrations of urban-like growth apart from existing cities. However, RCW 36.70A.110(3) provides that Urban Growth Areas should be first located in areas already characterized by urban growth that have adequate existing public facilities and service capacities to serve such development. Second, UGAs should include areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources. Here, Walla Walla County did not include the Blalock Orchards area within the City of Walla Walla's UGA. Instead, the County chose to place Blalock Orchard in a RAID up against the City of Walla Walla's UGA. *Citizens for Good Governance, et al., v. Walla Walla County*, EWGMHB Case No.s 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Because the County has not followed the GMA requirements for a RAID, has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA, has not adequately shown this Board data in the record of how the 1990 boundaries of the developed area were determined and have located this RAID virtually up against the City's UGA, the Board is compelled to find the Rural Transition zone out of compliance. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case No.s 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The Board finds that the Blalock Orchards Rural Transition zone as presently configured, constitutes an impermissible pattern of urban growth in a rural area. The Board determines this designation does not satisfy the exception to the prohibition of urban growth in rural areas provided by RCW 36.70A.070(5)(d). In addition, the County has failed to explain in writing how the Rural Transition zone harmonizes the planning goals of the GMA as required by RCW 36.70A.070(5)(a). *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Development regulations must implement the comprehensive plan. The Ferry County Comprehensive Plan (FCCP) clearly provides for rural areas of more intense development, as authorized, and limited, by the cited statutes. While the CP authorizes such land uses, limiting or regulating those uses is properly left to the development regulations. The absence of those regulations in Ordinance 2001-09 is clearly an error. The County has failed to act by not adopting such regulations that would properly implement these policies of the Comprehensive Plan. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- If the language was chosen before the statute was changed and we must look at what the parties meant at the time the language was drafted. However, the language found in Grant County's CPP 2B is different and speaks of "urban densities". The Committee adopting the CPPs has stated this prohibition two different ways. One way might be technically challenged and said to not prohibit RAIDs, but not so with 2B. It was clear the Countywide Planning Policies intended to prohibit urban densities outside urban growth areas and the later amendment of the GMA does not change this conclusion. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000)

- In a May 23, 2000, FDO the Board found the County RAIDs are out of compliance with the GMA because they violate the CPPs. This remains true. The County also was found to not have developed "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter." RCW 36.70A.070(5)(a). This still needs to be done. The written "Policy Plan" pointed to by the County does define the planning concepts and principles embodied in the Plan, but it was not what the GMA was seeking in this case. The requirement for a written record was added at the same time the option for RAIDs were given to the County. The Board finds the Legislature was seeking a written statement of how the Raids harmonize with the goals of the GMA. The County has not done this. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000) (*Affirmed*, Thurston County Superior Court, Docket 00-2-01622-8).

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997, amending RCW 36.70A.070(5), adding a new subsection allowing RAIDs Rural Areas of More Intensive Development. The statute now explicitly clarifies the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without such limitations and conditions more intense rural development would constitute an impermissible pattern of urban growth in the rural area. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000).

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (d)(iii), (d)(iv), and .110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that even the "innovative techniques" for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. [3] RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7,

2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000)

- RCW 36.70A.070(5)(d)(ii) applies to development that does "not include new residential development." The RAID designation clearly does not preclude new residential development (indeed, it permits it as a matter of right); thus, (5)(d)(ii) cannot be invoked by the County here – it does not apply. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000).

- RAIDs are justified by its consideration of local circumstances, as permitted by RCW 36.70A.070(5)(a). This provision allows counties, in developing the rural element of the plan, to consider local circumstances "in establishing patterns of rural densities and uses." When considering local circumstances, there must be "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA]." RCW 36.70A.070(5)(a). *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000).

- The fact that the GMA was amended, thus allowing the designation of *RAIDs by the County does no*t change the mandatory nature of t*he CPPs. The County did not have* to create the RAIDs. They were allowed to do so. If they wished to do so, the County had the option of requesting a change in the CPPs. This would give the local jurisdictions input, coordinate the plans as required by the GMA and make the change if desirable. This was not done. The Raids are contrary to directives of the County's CPPs. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000).

  RCW 36.70A.070(5)(d) does not prohibit the development of undeveloped lands within RAIDs, under certain conditions. We find that the conditions established in the Curlew Lake Sub-Area Plan fall within the limits found in RCW 36.70A(5)(d)(iv). *Woodmansee/Concerned Friends of Ferry Co. v. Ferry County;* EWGMHB Case No. 95-1-0010, Order on Remand (Oct. 24, 2000).

Maps

- [Board sets forth language from RCW 36.70A.070] The Growth Management Act requires a map or maps depicting land uses contemplated in the comprehensive plan. It can be assumed that the scale of the map must be sufficient to be useful for decision-making regarding specific parcels of property. *Woodmansee v. Ferry County;* EWGMHB Case No. 00-1-0007, FDO; (Aug. 18, 2000)

- In a perfect world, a landowner could look at a map and determine all the classifications, and therefore, regulations, which apply to his land. Ferry County Resolution 96-20 anticipated that Ferry County would develop a map including, but not limited to:

  1. Urban Growth Areas
  2. Rural Lands
  3. Agricultural Lands
  4. Forest Lands
  5. Mineral Lands
  6. Wetlands

7. Fish and Wildlife Areas
8. Geological Hazards Areas
9. Flood Hazard Areas
10. Shoreline Designations
11. Aquifer Recharge Areas

The Board recognized in *CFFC v. Ferry County* (97-1-0018) that existing maps were not adequate for designating wetlands and that a process in addition to the maps was necessary and appropriate for adequate designation. In that case, the County corrected the deficiency by providing for on-site visits to verify the existence of wetlands. However, here, the process depends upon the landowner's cooperation. The voluntary disclosure by the landowner of existing wetlands is inadequate without a site inspection or other enforcement provisions. An individual might not have the expertise or desire to identify wetland and such voluntary disclosure provides inadequate protection.

Voluntary disclosure of the presence of wetlands is inadequate for compliance with the requirements for identification and protection of wetlands. Conceivably, penalties in an enforcement section for failure to disclose the presence of a wetland may be adequate to ensure such disclosure. If the penalty is non-existent or inadequate, the County must provide for a different mechanism, such as on-site inspection before permit issuance, to ensure the protection of wetlands. *Larson Beach Neighbors/ Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016 FDO, (July 13, 2001).

Market Factor

- [A]market factor is used to represent the estimated percentage of net developable acres contained within a UGA that, due to idiosyncratic market forces, are likely to remain undeveloped and/or underdeveloped over the course of the twenty-year planning cycle. Thus, the market factor acknowledges not all developable land will be put to its maximum use because of such things as owner preference, cost, stability, quality, and location; jurisdictions may include within a UGA acreage to offset this fact; this offset percentage is reflected by a reasonable market factor. But, because the Legislature only provided for a market factor, to size the UGA in excess of the acreage required by OFM population based upon any other reduction factor is simply not authorized by the GMA. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order at 40-41 (Feb. 24, 2009)

Master Planned Resorts (MPRs)

- *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004, 4th Compliance Order at 42-48 (May 26, 2010) (MPR Designation – Snoqualmie Pass – General discussion and application of criteria with Board finding area designated as Snoqualmie Pass MPR did not meet the requirements of RCW 36.70A.362 (continued non-compliance and invalidity).

- Clearly, there is some ambiguity in the statute's definition of a "Master Planned Resort", particularly in the terms, "significant natural amenities", "primary focus", and "… with a range of… ". Any one of these terms can be interpreted broadly by the courts and boards. One thing is clear, though, the statute differentiates between "natural amenities" and "developed on-site indoor or outdoor recreational facilities.

Generally speaking, "natural amenities" brings to mind ocean beaches, natural lakes, rivers, mountains, deserts and wetlands. These are features formed through nature's actions. Even though farmland can be attractive and interesting, few would consider this landscape as a "significant natural amenity". Neither can a twelve-acre man-made lake be considered anything but a "developed outdoor recreational facility". Just by definition of "natural", it is not a "natural amenity", no more than a golf course or water park. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, (March 14, 2006).

- The proposal is an urban development outside the designated UGA, but the legislature recognized this in authorizing Master Planned Resorts. In *Gain v. Pierce County*, the CPSGMHB wrote:

  > "The legislature recognized that MPRs are urban growth outside of UGAs. The GMA permits the urban growth of an MPR if the County's regulations do not permit other urban or suburban growth in the vicinity of the MPR. [Urban growth in MPRs is recognized by, not prohibited by the Act.] *Gain v. Pierce Co*, CPSGMHB Case No. 99-3-0019 FDO (April 18, 2000).

  Friends of Agriculture v. Grant County, EWGMHB Case No. 05-1-0010, FDO, (March 14, 2006).

- If all the other requirements had been met, the urban development at the site would have been justified. Grant County does not permit other urban or suburban growth in the vicinity of the proposal. However, the proposal fails to have a "primary focus on destination resort facilities consisting of short-term visitor accommodations". The plan submitted to the County shows too few visitor accommodations in relationship to the permanent urban growth. Thus, the "primary focus" is on permanent housing, not short-term visitors. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, (March 14, 2006).

- The Laughlin "Master Planned Resort", as proposed, has limited services. Certainly the proposal has the capability of supplying the basics available at typical convenience stores, such as gas, milk, bread, picnic foods and even heated pre-made sandwiches, but groceries per se will be limited. The Eastern Board in *Ridge* indicated "sufficient services and needed places to shop". This is where the ambiguity in the language makes it difficult to determine just what is "self-contained", and whether a convenience store provides "sufficient service". "Self-contained" means that a "Master Planned Resort" should be a livable community that can supply the daily needs of those that visit and live there. A convenience store and pro-shop does not fulfill this requirement. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, (March 14, 2006).

- The State Legislature provided a specific exception, which allows new urban growth in the form of a Master Planned Resort (MPR) to exist outside Urban Growth Areas, if certain requirements are met. The MPRs are to be self- contained and not be the catalyst for further urban sprawl. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The GMA use of the phrase "self contained" does not require a MPR to contain everything it or the visitors need. This would be virtually impossible and would be too strict an interpretation of the language. The better interpretation would require the MPR to have sufficient services and needed places to shop for common needs to be met and avoid an adverse impact upon the

neighboring urban areas. The visitors and residences at the MPR should be able to meet their daily needs without being forced to go elsewhere. The fact others might shop there or visit does not put the County in violation of the "self contained" section of the Act. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The Act does not require the MPR to be any specific distance from UGAs, not 5 miles or 100 feet. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Compliance and Invalidity (Apr. 16, 1998).

- The Comprehensive Plan is where the MPR "policy" for the County is formulated. These policies serve little purpose unless there are development regulations to implement them. There is no specific statute that requires development regulations be written for MPRs, yet the County cannot proceed to permit MPRs without such regulations. Kittitas County has chosen to implement the MPR Policies by adopting a Zoning Code Amendment: Master Planned Resort Zone and a Master Planned Resort Subarea Plan. While these do not have many detailed regulations guiding siting of a MPR, a permitting procedure is developed. The specific details of each Resort are "hammered out" in the Development Agreements provided for in KCC 15A.11, Development Agreements, and RCW 36.70B.170 - .210. *Ridge v. Kittitas County, et al.*; EWGMHB Case No. 00-1-0017, FDO; (June 7, 2001)

- RCW 36.70A.360(1) defines a MPR as a type of "planned unit development." The County has a zoning ordinance for planned unit developments, KCC 17.08.445. A process is established therein for the assessment of a PUD application. Instead of using this process for siting a MPR, the County established a Subarea Plan and a MPR Zoning District, which includes the process for establishing a MPR. A MPR cannot be zoned under both the MPR Zoning District and the PUD provisions. Both are separate and distinct zoning districts under the Kittitas County Code. *Ridge v. Kittitas County, et al.;* EWGMHB Case No. 00-1-0017, FDO; (June 7, 2001).

- The phrase "Planned Unit Development" is "a generic term for a regulatory technique which allows a developer to be excused from otherwise applicable zoning regulations in exchange for submitting to detailed, tailored regulations. The technique is characterized by flexibility." *Schneider Homes, Inc. v. City of Kent*, 87 Wn. App. 774, 775-76, 942 P.2d 1096 (1997). A PUD is a type of property development intended "to achieve flexibility by permitting specific modifications of the customary zoning standards as applied to a particular parcel of land." *Barrie v. Kitsap Cy.*, 84 Wn.2d 579, 585, 527 P.2d 1377 (1975).

- The MPR statute pointed to as requiring permitting only through the PUD process does not appear to the Board as requiring such a limited interpretation. RCW 36.70A.360(1). The cited phrase rather describes the type of zoning treatment. How the County establishes the permitting process is relevant only in that it must assure that the GMA and MPR policies are complied with. *Ridge v. Kittitas County, et. al.;* EWGMHB Case No. 00-1-0017, FDO; (June 7, 2001). *Affirmed*, Yakima Superior Court, Docket 00-1-02761-2, (May 29,2001).

Mediation

- RCW 36.70A.110(2) in part provides that Counties must "attempt to reach agreement with each city on the location of an urban growth area within which the city is located." The GMA includes a process to resolve conflicts between cities and counties in designating UGAs: A city may object formally with the CTED over the designation of the urban growth area within which it is located. Where appropriate, CTED shall attempt to resolve the conflicts, including the use of

mediation services." *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

Mineral Resource Lands (*See also,* Natural Resource Lands)

- [T]he County's [notice] provision fails to include the final sentence in RCW 36.70A.060(1)(b). The County contends GPO 2.145 "plainly gives notice" and just because "every conceivable mining operation is not specifically listed does not render the notice defective." The County misses the point. The underlying purpose of the GMA's notice provision in regards to natural resource lands is to protect the industry from encroaching incompatible uses and to adequately advise future property owners of the activities that could occur on the site. Due to the volatile nature of mineral resource extraction, the importance of the final sentence in RCW 36.70A.060(1)(b) is heightened. By not including this single sentence, GPO 2.145 fails to comply with RCW 36.70A.060(1)(b), which clearly sets forth the mandatory language to be included within the notice provisions. *Kittitas County Conservation, et al v. Kittitas County*, Compliance Order at 27 (Aug. 7, 2008).

- General–Discussion as to the designation of Mineral Resource Lands. *Moe v. Kittitas County*, EWGMHB Case No. 08-1-0010, FDO at 6-9 (Aug. 26, 2008)

- Counties and cities must evaluate and address the standard of long-term significance before Natural Resource Lands can be designated because the GMA requires something more than just cataloging Natural Resource Lands – it seeks to designate only those lands which have long-term significance. *Moe v. Kittitas County*, EWGMHB Case No. 08-1-0010, FDO at 11 (Aug. 26, 2008).

- Fundamentally, the GMA requires Mineral Resource Lands designations and development regulations in order to assure the use of lands adjacent to qualified resource lands do not interfere with the continued use of the resource lands for its intended purpose. RCW 36.70A.030(10) and WAC 365-190-070 specify that consideration be given to the possibility of more intense uses of the land. This consideration certainly applies to the parcel of land proposed for MRL designation, but also should take into account the potential for nearby incompatible uses, such as encroaching residential or commercial development on adjacent lands. An MRL designation triggers the duty to also adopt resource protection rules. *Moe v. Kittitas County*, EWGMHB Case No. 08-1-0010, FDO at 12 (Aug. 26, 2008)

- RCW 36.70A.170(2) provides that in making Mineral Resource Lands designations, "counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050." RCW 36.70A.050 provides that these designation guidelines shall be adopted by CTED to "guide the classification" of Natural Resource Lands, including Mineral Resource Lands. Subject to the RCW 36.70A.030 definitions, the CTED guidelines "shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state." RCW 36.70A.050(3). *Moe v. Kittitas County*, EWGMHB Case No. 08-1-0010, FDO at 13 (Aug. 26, 2008).

- The CTED Mineral Resource Lands designation guidelines [WAC 365-190-070(d)] …These CTED designation factors implement the definitional elements of long-term commercial significance specified in RCW 36.70A.030(10). *Moe v. Kittitas County*, EWGMHB Case No. 08-1-0010, FDO at 13-14 (Aug. 26, 2008)

- While the County needs to explain the extent to which it applies the CTED Guidelines, the GMA does not dictate how much weight to assign to each factor in determining which lands have long-term commercial significance. Lewis County v. WWGMHB, 157 Wash. 2d 488, 503 (2006). Counties have broad discretion to make choices that are informed by local circumstances so long as they stay within GMA's confines. *Moe v. Kittitas County,* EWGMHB Case No. 08-1-0010, FDO at 14 (Aug. 26, 2008)

- The Kittitas County criteria [9 factors in comparison to the WAC's 13 factors] are not the same as the CTED designation factors, although there is some significant overlap ... To the extent that Kittitas County's designation criteria overlap with a number of the CTED designation factors, and were considered before adopting the ordinance, then Kittitas County did, in effect, consider some, but not all, of the CTED designation factors. *Moe v. Kittitas County,* EWGMHB Case No. 08-1-0010, FDO at 15-16 (Aug. 26, 2008)

- The Board might not necessarily agree with the result the County reached when it designated the SRP site as Low Density Residential, yet the Board must presume the validity of the County's actions. The legislature has made it increasingly clear that the County should be given more deference in making GMA decisions. The decision-making in this case is the responsibility of the County, and the Board's function is to ensure that the County follows the law. The Board now finds the County did in-fact uniformly apply their criteria and shown their work. The Board is satisfied the Respondent has adequately analyzed the other mining sites in Spokane County and has treated them consistently with the Petitioner's site. *Spokane Rock Products, Inc. v. Spokane County,* EWGMHB Case No. 02-1-0003, Final Order on Compliance, (April 14, 2003).

- While the GMA requires the County to designate and conserve mineral resource lands, the Petitioner has the burden of demonstrating that any action taken by the County is not in compliance with the Act. The Board is required to find compliance with the Act, unless it determines that the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. *Spokane Rock Products, Inc. v. Spokane County,* EWGMHB Case No. 02-1-0003, Final Order on Compliance, (April 14, 2003).

- Counties that are required to plan under the GMA must identify and conserve mineral resource lands. RCW 36.70A.060(1). In its July 19, 2002, FDO the Board found Spokane County failed to uniformly apply their mineral resource lands designation criteria. The Board further found the County failed to consider, analyze and properly apply the minimum guidelines and plan criteria to the Petitioner's site. *Spokane Rock Products, Inc. v. Spokane County,* EWGMHB Case No. 02-1-0003, Final Order on Compliance, (April 14, 2003).

- Under GMA, each county is required to assure the conservation of mineral resource lands. RCW. § 36.70A.060(1) (Supp. 2001). The development regulations adopted to implement the comprehensive plan "…**shall assure that the use of lands adjacent to**… **mineral resource lands shall not interfere with the continued use, in the accustomed manner** and in accordance with the best management practices, of these designated lands…for the extraction of minerals." RCW. § 36.70A.060(1) (Supp. 2001) (emphasis added). *Spokane Rock Products, Inc. v. Spokane County,* EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- The Growth Management Act "…places a high priority on the conservation and protection of resource lands." *Ridge v. Kittitas County,* EWGMHB Case No. 94-1-0017, at 8 (July 28, 1994). One critical reason for this fact is that mineral resource lands are non-renewable resources.

Mineral lands "…cannot be re-created if they are lost to urban development or mismanaged." (See Comprehensive Plan, at NR-1). In addition, "…mineral resources are site-specific and not subject to relocation." (See Comprehensive Plan, at NR-11). The location of these resources is critical the economic viability of mining operations. (See e.g. Comprehensive Plan, at NR 2 ("Mineral resources must meet criteria of quality, quantity, and accessibility for commercial viability. Location of mineral resources is important, since the cost of transporting them adds greatly to cost."). *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- The Spokane County Comprehensive Plan incorporates the GMA mandate for the protection of mineral lands. Thus, a primary objective of the Comprehensive Plan is to avoid the irrevocable loss of natural resource lands by protecting them for future generations. (See Comprehensive Plan, at NR-1)

  > In the past, urban development, especially in the Spokane River Valley, covered both high-quality agricultural land and large deposits of quality sands and gravels. Due to the urbanization, it is unlikely that these resources will be available for future generations. **Designating and protecting the County's remaining resource lands ensures that these remaining areas will not be lost to incompatible development**.

  (Emphasis added). The County recognized, in adopting mapping designations (among other matters), that the greatest threat to natural resource conservation was encroaching urbanization. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- The Board finds that the preservation and protection of known mineral resource lands is a primary objective of the Growth Management Act. Both the GMA and the adopted Comprehensive Plan mandate the protection of known and valuable mineral resources. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- To assist cities and counties in the designation of mineral lands pursuant to section 36.70A.170, the GMA required the department of community, trade, and economic development to adopt specific guidelines. RCW. § 36.70A.050(1) & (3) (1991). Those guidelines have been adopted and promulgated under WAC 365-190-010 ET seq. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- The minimum guidelines recognize the importance of designating natural resource land to assure their long-term conservation. WAC. § 365-190-020. Counties are required to identify and classify aggregate and mineral resource lands from which the extraction of minerals occurs, or can be anticipated, to insure future supply of aggregate and mineral resource material. WAC. § 365-190-070(1). Areas must be classified as mineral resource lands based on geologic, environment, and economic factors, existing land uses, and land ownership. WAC. § 365-190-070(2). Counties should classify lands with long-term commercial significance for extracting at least the following minerals: sand, gravel and valuable metallic substances. WAC. § 365-190-070(2)(a). *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- The County argued that designating the site as mineral lands was not compatible with the surrounding residential uses. However, we agree with Petitioner that physical proximity of

resource land to population areas "in and of itself, does not preclude designation." *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, at 5 (1994).

This Board has recognized the GMA calls for the protection of natural resources from urban development, not the other way around. Thus, in *Ridge*, we concluded: "The Board notes that RCW 36.70A.060 requires that resource lands be protected or 'buffered' from the influence of adjacent property, the opposite of the County's approach." *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, at 7 (1994).

To the extent that there is tension between the natural resource policies and those concerning urban uses, there must be an attempt to harmonize those competing interests. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, at 6 (July 6, 1994). The County is obligated to give effect to each of the goals to the extent possible. Id. In addition, "[t]he overriding purpose of the designation of resource lands is their conservation and protection. While the County may give high priority to other goals, there must be a showing that competing goals are mutually exclusive and cannot both be accommodated." *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017, at 8 (1994). *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- The County asserts that effective mitigation of the impacts of the Petitioner's mining operation would be difficult or impossible. The Board rejects this claim. The Board notes that there is nothing in the record to support the claim that mitigation cannot be achieved. Further, there was no evidence presented by the County to establish that inability to mitigate was a basis for the decision to designate the SRP site as low density residential. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- The Board finds that the County failed to uniformly apply the designation criteria. The criteria were not applied equally with other mining sites nearby, including the County's own site, which was designated as a mining site. The Board concludes that County is out of compliance due to the manner in which it applied the criteria for the designation of mineral resource lands. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- The County failed to consider, analyze and properly apply the minimum guidelines and plan criteria to the SRP site. Specifically, the Board finds that the County's criterion was not properly applied in denying the designation of the SRP site as mineral resource land. The County has not "shown its work" regarding application of the criteria to the SRP site or to other nearby sites which did receive designation as mineral resource lands. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- While a mineral lands designation may make reclamation of the site more practical, we find nothing in the GMA that would require the County to take that into consideration in its action. The Petitioner has not overcome the presumption of validity and has not carried its burden of proof on this issue. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- The thrust of the county's resolution regulating policies is to protect adjacent lands from the mineral resource lands. The Act requires the opposite, protection of the resource lands from encroachment from adjacent uses. Additionally, if the county chooses to rely on other ordinances to meet this requirement, they must be specifically referenced in the resolution. *Save*

Our Butte Save Our Basin Society, et al. v. Chelan County, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- The Growth Management Act does not prohibit a county from permitting rezone applications, which could allow the extraction of mineral resources in rural areas. The rezone application would be subject to the county hearing process to determine compliance with all applicable zoning regulations and state law. *Salnick, et al. v. Spokane County*, EWGMHB Case No. 97-1-0020, FDO (Mar. 25, 1998).

- While the Board believes the intent and spirit of the Growth Management Act is to designate where appropriate, all lands that have "long-term significance for the extraction of minerals" and have in place development regulations to protect those resource lands, we also believe the Respondent City has acted when it decides not to designate such lands. This matter is before us on a "Failure to Act" Petition. The Board may not agree with what the City of Richland has done, but the record shows they went through an extensive process and made a decision to not designate any lands as mineral resource lands.

  We recognize the concerns of the Petitioners and the dissenting opinion, however, because the legal question before us is a failure to act, we must find in favor of the City. The question of whether that GMA was correct is not before us at this time. *Saddle Mountain Minerals/Maughan, v. City of Richland*, EWGMHB Case No. 97-1-0022, FDO, (Oct 1, 1999).

- RCW 36.70A.060(1) in part states "…or for the extraction of minerals. Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or minerals resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration."

  The question was whether the notice was adequate and the county has met those criteria? The Ordinances require the specific notice be affixed on plats or permits "within or near" resource lands. The Growth Management Act requires that this notice be affixed on plats and permits, which affect lands on or within 500 feet of resource lands. The statute would prevail and the County Administrator dealing with these plats and permits must consider "within or near" the same as "on or within 500 feet of" resource lands. The Ordinances allow for this to happen. While having the "500 feet" in the ordinances would have been preferable, the County's wording was not a violation of the GMA. *Concerned Friends of Ferry County v. Ferry County*; EWGMHB Case No. 00-1-0001, FDO; (July 6, 2000).

- The GMA requires the County to designate "mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals." RCW 36.70A.170(1)(c). In making these designations, the County was to follow, at a minimum, the CTED guidelines as published in WAC 365-190. In those regulations, CTED notes that "there is no specific requirement for inventorying or mapping" natural resource lands, but that maps are a practical way to let the community know where those lands are. WAC 365-190-040(d). Upon adoption of a Comprehensive Plan, CTED notes that the GMA requires counties to "evaluate their designations and development regulations to assure they are consistent with and implement the Comprehensive Plan." WAC 365-190-040(f). The CTED regulations

are guidelines, not substantive standards. *Saddle Mountain Minerals, L.L.C., et al. v. Grant County;* EWGMHB Case No. 99-1-0015, FDO; (May 24, 2000).

- According to the CTED guidelines, mineral resource lands are "lands primarily devoted to the extraction of minerals or that have known or potential long-term commercial significance for the extraction of minerals." WAC 365-190-030(14).

  There is a specific CTED guideline for classifying and designating mineral resource lands, WAC 365-190-070. This guideline controls over more general CTED guidelines. Mineral resource lands are to be classified based on "geologic, environmental, and economic factors, existing land uses, and land ownership." WAC 365-190-070(2). CTED also recommends, "in classifying these areas, counties and cities should consider maps and information on location and extent of mineral deposits provided by the Washington state department of natural resources and the United States Bureau of Mines." WAC 365-190-070(2)(b). *Saddle Mountain Minerals, L.L.C., et al. v. Grant County*; EWGMHB Case No. 99-1-0015, FDO; (May 24, 2000)

Minimum Guidelines

- The Department of Community Development guidelines shall be minimum guidelines that apply to all jurisdictions in designating agricultural lands. While a county may incorporate additional criteria in its classification system, WAC 365-190-050(1) remains the standard by which the ordinance is measured. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- While there is opportunity for the exercise of local judgment and it is obvious that the local community understands its agricultural lands better than anyone else, the conclusions reached must be the product of a valid process. The record must show that the county considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- To aid in designating natural resource lands, the Act directs that the county give consideration to WAC 365-190, the Minimum Guidelines to Classify Agricultural, Forest, Mineral Lands and Critical Areas. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- The Minimum Guidelines adopted by CTED are advisory rather than mandatory. *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, FDO (Apr. 10, 1997).

Mootness

- [In finding not all of the cited issues were moot, the Board reiterated the requirements for mootness] This Board has frequently utilized the Doctrine of Mootness in cases that have come before it. Generally, an issue is moot if it presents "purely academic" questions and effective relief can no longer be provided; unless the issue involves matters of continuing and substantial public interest. If a challenged provision is significantly amended or repealed this may also render an issue moot because the issue becomes academic and the amendment/repeal potentially provides the relief requested by a petitioner. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-008c, FDO at 13-14 (April 5, 2010)

- The mere fact the County is working on a new ordinance it believes will remedy the Petitioners' concerns does not provide a basis for an issue to be moot. The issue is moot only if the Board can no longer provide effective relief … A proposal by the County to enact future legislation is irrelevant to the Petitioners' issues, which are not moot until compliant development regulations have been put in place. *Kittitas County Conservation, et al v. Kittitas County,* Case No. 07-1-0015c, FDO at 10 (March 21, 2008)

Motions

- The issues raised by the Respondent's motions will be considered because they are issues that can be decided on the record before us and are appropriately raised at this time. The issues basically involve the jurisdiction of the Board and the standing of the Petitioner before the Board. *Superior Asphalt & Concrete Co., v. Yakima County, et al.,* EWGMHB Case No. 05-1-0012, Order on Dispositive Motions, (March 30, 2006).

- The Board finds that the failure of the Intervenors to list the issues they believed affected them and felt they should participate in, as required by the Prehearing Order, does not support their dismissal from the matter before us. The parties have not been inconvenienced or injured by such unintentional acts of the Intervenor. The Motion to dismiss the Intervenors is denied. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, Order on Motions, (Nov. 14, 2005).

- The Board considered first the question of whether the motions were timely filed for consideration. The Respondent filed the motions after the times set by the Prehearing Order entered herein. Further, the Respondent did not seek permission to file such motions after the time set for motions. The Respondent did, at the time of the Hearing on the Motions, ask for permission to file such motions, however little argument was offered as to why permission should be given.

  The Board finds that it need not proceed further. The motions are not properly before the Board, as they are untimely, and the Board does not feel that the request for permission to file the motions should be granted. The Respondent did not provide the Board with sufficient reasons for allowing such discovery or show that the evidence expected to be produced by such discovery would aid the Board in its final decision. *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, Order on Motions, (Dec. 8, 2005).

- This Board does not grant a Dispositive motion of summary nature unless the motion relates directly to the legal issues set forth and have the potential to be resolved by the Board prior to the Hearing on the Merits. That is not the case here. The Intervenor asks for three issues to be dismissed, each of which do not deal just with joint planning and seek an advisory opinion.

- The Board finds after reviewing the briefs and hearing oral argument, these issues should proceed to the final Hearing on the Merits. There remain genuine issues as to material facts and the moving party is not entitled to a judgment as a matter of law. The Motion to Dismiss is denied. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, Motion Order, (March 26, 2002).

- The Respondents' first motion seeks the dismissal of Petitioners Issue No. 4 on the grounds that the issue had been decided in Case No. 01-1-0015c and 01-1-0014cz. In those cases, the Board ruled the County had complied with SEPA regulations as they applied to the Comprehensive

Plan. Respondent now argues that because development regulations must be consistent with the comprehensive plan, and must implement the comprehensive plan, by extension, the development regulations therefore would also comply with SEPA. Petitioners argue that the actions under consideration are different and there are undecided material facts to be determined and the dispositive motion cannot be granted. The Board denies Respondent's motion, and will hear arguments on SEPA compliance at the Hearing on the Merits. *City of Walla, et al., v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, 2nd Motion Order, (Aug. 27, 2002).

- Respondent's second motion seeks the dismissal of Petitioners' Issue No. 5, Petitioners' request for a finding of Invalidity. The Respondent contends this issue has been addressed in our previous cases Walla Walla, Nos. 01-1-0014cz and 01-1-0015c. As above, Petitioners argue that subsequent events may have changed the facts surrounding the Boards earlier decision to not declare the Comprehensive Plan invalid. The Board recognizes that there are unresolved material facts and will hear arguments on the question of invalidity at the Hearing on the Merits. *City of Walla, et al., v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, 2nd Motion Order, (Aug. 27, 2002).

- While the Board fully expects all parties to comply with the deadlines in the Prehearing order, they are not "drop dead" dates for which noncompliance is fatal. The late filing did not injure the Petitioner. *Woodmansee v. Ferry County*; EWGMHB Case No. 00-1-0006, Order on Motions; (July 31, 2000)

- The Board holds that there are five prerequisite conditions that must be met before it will consider granting a motion for continuance. First, the purpose, intent and principles of the Act must be preserved. Second, all the parties must jointly make the motion. Third, granting the motion will not bar or delay implementation of the Act with regard to other potential parties or interests. Fourth, any party may terminate the continuance, without cause, by filing as a pleading with the Board a "Notice Revoking Continuance." Fifth, all parties must agree that in the event this Board enters the requested order that this motion and the resulting order constitutes the law of the case and shall not be subject to challenge or attack in this or any subsequent appellate proceeding related to this petition for review. These qualifying conditions narrowly limit motions for continuance under RCW 36.70A.300(1). This tool should only be used in cases where implementation of the Act is furthered, where no other potential party or interest is hindered, and where the interests of the parties, including a party's right to proceed with the petition, are protected. *Kittitas County v. City of Ellensburg*, EWGMHB Case No. 95-1-0007, Motion Order Granting Continuance (Jan. 18, 1996).

Natural Resource Lands

- Despite the seemingly competing nature of these resource industries [mineral and agricultural], the GMA does not give preference to one natural resource use over another. RCW 36.70A.040, 36.70A.060(1) and 36.70A.170(1), creates a parallel duty for Yakima County to designate and conserve both types of land … Yakima County must balance competing resource uses. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 62 (April 5, 2010)

- The GMA, with RCW 36.70A.170, does not establish a hierarchy of resource lands; rather they are merely listed alphabetically and, therefore, agricultural lands do not take precedence over other resource lands. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 62-53 (April 5, 2010)

- WAC 365-190-020 contemplates that land designations may overlap as it states, in relevant part: "[I]f two or more land use designations apply to a given parcel or a portion of a parcel, both or all designations shall be made." Furthermore, although not in place at the time of Yakima County's decision, a newly enacted provision - WAC 365-190-040(7) - addresses overlapping designations as well. This provision recognizes that at times multiple designations may apply to the same land but that this overlap should not necessarily be considered inconsistent. Specifically in regards to natural resource lands, WAC 365-190-040(7)(b) states: "If two or more natural resource land designations apply, counties and cities must determine if these designations are incompatible. If they are incompatible, counties and cities should examine the criteria to determine which use has the greatest long-term commercial significance, and that resource use should be assigned to the lands being designated." Therefore, as with all land uses in planning the basic tenet of consistency and compatibility is part of the equation when multiple land use designations may apply. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 63 (April 5, 2010)

- [In addressing Yakima County's use of a mineral overlay, the Board stated] Yakima County has therefore struck a balance between two natural resource uses – selecting mineral extraction in the near term while retaining the very same land for agricultural production in the future as the land can be used after mining operations have ceased. *Hazen, et al v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO at 64 (April 5, 2010)

- The County is required to provide specific notice on documents pertaining to lands located within 500 feet of Resource Lands. *See (*RCW 36.70A.060) The notice posted must be on all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of lands designated as resource lands containing a notice that the subject property is within or near designated resource lands. *Kittitas Conservation v. Kittitas County*, EWGMHB Case No. 07-1-0004c, FDO, at 27-28 (Aug. 20, 2007)..

- There is no requirement in the GMA for counties and cities to adopt certain setbacks within agricultural lands, forests lands, or mineral resource lands, other than the requirement of a notice (contained in RCW 36.70A.060(1)(b). *Concerned Friends of Ferry County & Robinson v. Ferry County*, EWGMHB Case No. 06-1-0003, FDO (Oct. 2, 2006).

- The Department of Community Development guidelines shall be minimum guidelines that apply to all jurisdictions in designating agricultural lands. While a county may incorporate additional criteria in its classification system, WAC 365-190-050(1) remains the standard by which the ordinance is measured. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- While there is opportunity for the exercise of local judgment and it is obvious that the local community understands its agricultural lands better than anyone else, the conclusions reached must be the product of a valid process. The record must show that the county considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- The second edition of the Random House Dictionary of the English Language defines "conservation" as 1) "the act of conserving, prevention of injury, decay, waste or loss" and 4) "the careful utilization of a natural resource in order to prevent depletion." Thus, conservation

prevents the loss or degradation of the resource. Using this definition, we hold "conservation" as used in RCW 36.70A.060 is intended to maintain agricultural and forest resource lands. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- There are three factors for determination of "long-term commercial significance": (1) the growing capacity and productivity of the land, (2) the land's proximity to population areas, and (3) the possibility of more intense uses of the land. These criteria are not independent and must be evaluated in relation to each other. That these factors must be "considered with" each other necessarily requires the consideration of the relative significance of each factor. Physical proximity to population areas, in and of itself, does not preclude designation. The Growth Management Act places a high priority on conserving resource lands and reducing sprawl. Designation of resource lands was the first required task. Indeed, forestlands of long-term commercial significance may be located within urban growth areas in certain circumstances. There must be good faith consideration and showing that the effects of proximity to population areas are significant and unduly burdensome to avoid designation. Similarly, consideration of the possibilities of more intense use of the land must be based in real possibilities, sufficiently quantified to be considered in good faith. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- Planning options are retained by initial designation of resource lands. In order to fulfill the Growth Management Act's mandate to conserve resource lands, the initial designation should err on the side of inclusion. As more information is developed, a county can easily make changes at the comprehensive plan stage – this is the logical place for a weighting of the competing goals of the Act. Further, nothing in the Act limits a county's authority to amend its ordinance as conditions warrant. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- RCW 36.70A.170 mandates the designation of resource lands and critical areas by Sept. 1, 1991. RCW 36.70A.060 mandates adoption of development regulations by Sept. 1, 1991 to assure the conservation of agricultural, forest and mineral resource lands designated. No "deferral process" is recognized or authorized under GMA. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- The Growth Management Act requires those jurisdictions planning under the Act to encourage citizen participation and involvement in the process. Planning Goal 11 encourages citizen participation throughout the growth management planning process. RCW 36.70A.140 requires each planning jurisdiction to "establish procedures providing for the early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." No similar standard is given for the designation of agricultural, forest, mineral resource lands, or critical areas as required in RCW 36.70A.170. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- To protect the health of the agricultural, forest, and mineral resource industries, the Growth Management Act requires protection of natural resource lands. This is accomplished through identification and "designation" of these lands in RCW 36.70A.170 coupled with their protection through the adoption of development regulations pursuant to RCW 36.70A.060. The required level of protection is compromised if either insufficient lands are designated or if development

regulations fail to adequately protect these lands. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- The overriding purpose of the designation of resource lands is their conservation and protection. While the County may give high priority to other goals, there must be a showing that competing goals are mutually exclusive and cannot both be accommodated. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- Critical area designations as well as resource land designations are an important first step in the planning process. They provide the sideboards for further comprehensive plan development by pointing out either where development should not occur or where, at the least, there are significant developmental concerns. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- Planning Goal 8, the enhancement of natural resource-based industries, does not prevent productive agricultural lands from inclusion within an IUGA. There is no reason to believe that agricultural lands to the extent they are included within these IUGAs cannot continue to be successfully farmed. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- RCW 36.70A.020(8) establishes two standards against which an agricultural lands-related ordinance is to be tested. Does the ordinance fulfill the minimum requirement of the Act to discourage incompatible uses of designated lands and does it meet the minimum requirement to maintain and enhance natural resource industries, in this case agriculture? *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The designation and conservation of resource lands, including agricultural lands of long-term commercial significance, attempts to maintain and enhance the natural resource industries. The Act recognizes that these are important segments of our overall economy and that indiscriminate development of resource lands places burdens on these industries. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- An interim designation is made to protect the resource. It recognizes that once resource lands are lost through inappropriate development, it is difficult, if not impossible to reverse the loss. At the comprehensive plan level, designations are reviewed and possibly modified in the light of newly developed information and the need to successfully integrate all the components of the plan. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- RCW 36.70A.060(1) requires the County to assure conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. These provisions must also be consistent with the criteria used in the selection of the resource lands. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, FDO (Mar. 28, 1997).

- The Act requires counties to designate natural resource areas to protect agricultural uses; the cultivation of timber, and excavation of mineral resources on lands possessing long-term commercial significance for such uses. This requirement does not prohibit these same activities from occurring in rural areas. When the Act requires the designation of natural resources areas its intent is to protect those areas but not to exclude those activities from other areas. For example, a county could designate and protect large areas of agricultural land for the production of apples. That does not mean you cannot raise apples other than in those designated areas. *Salnick, et al. v. Spokane County*, EWGMHB Case No. 97-1-0020, FDO (Mar. 25, 1998).

- When a county sees the decline of industry to their area, the question is what do we do to save or protect the specific industry, not what do we do to eliminate or exclude that industry. Once that industry is gone, it is difficult to bring it back, in the case of agricultural land, it never will come back. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

Noncompliance

- The Act indicates that compliance-hearing findings should not be treated as final. While the FDO of a Board may be appealed under WAC 242-02-860(5) and WAC 242-02-892, no similar authorization exists to appeal a finding of noncompliance. This lack of any other type of judicial involvement indicates that the Board maintains control of the matter. Nor does the legislation ever use the word "final" in describing a finding of noncompliance as it does with a FDO. Therefore, the only body that can address a finding of noncompliance made under RCW 36.70A.330 until an ordinance complies is the Board. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Motions (Jan. 2, 1996).

Notice

- It has previously been determined that generalized notice, such as newspaper publication and website posting, are appropriate for legislative enactments and the GMA does not require individualized notice, it only requires reasonable notice. *Larson Beach Neighbors/Wagenman v. Stevens County*, Case No. 07-1-0013, First Compliance Order at 16 (April 16, 2009)

- There is no doubt in the Board's mind in order to ensure public participation sufficient notice is required … Noticeably absent from the GMA's listing of examples is a requirement to give individualized notice to a property owner ... The question of whether the GMA requires individualized notice was addressed by the Supreme Court in *Chevron USA, Inc. v. CPSGMHB, et al.* … [which concluded] "neither of these statutes [36.70A.035(1), 36.70A.140] specifically required individualized notice. *City of Zillah v. Yakima County*, Case No. 08-1-0001, FDO at 13-14 (Aug. 10, 2009)

- There are no genuine issues as to any material facts in this matter. Therefore, the issue of whether Spokane Valley did not comply with the GMA by failing to provide sixty (60) notice to CTED prior to amending its Comprehensive Plan is properly resolved by Dispositive Motion. The GMA, under RCW 36.70A.106, requires that each city planning under GMA proposing amendments to its Comprehensive Plan shall notify CTED of its intent to amend at least sixty days prior to final adoption.

  Spokane Valley became a "city planning under the Growth Management Act" ("GMA") when it amended its Comprehensive Plan. The Board adopts the reasoning of *Wildlife Habitat Injustice Prevention, et. al. v. City of Covington*, CPSGMHB, 00-3-0012 (Order on Motions 11-16-00)

and finds that Spokane Valley is a GMA planning jurisdiction and is subject to the goals and requirements of the GMA.

Spokane Valley is out of compliance with GMA because it failed to notify CTED of its intent to amend the Comprehensive Plan at least sixty days prior to its adoption of Ordinance Nos. 03-0888 through 03-094. Such actions by Spokane Valley were clearly erroneous. *City of Liberty Lake v. City of Spokane Valley*, EWGMHB Case No. 03-1-0009, Order on Motions, (March 23, 2004).

- Petitioners further challenge the adequacy of the notice given to the public regarding the proposed amendment. The published notice provided only a reference to a proposed comprehensive plan amendment, with no reference to expansion of a "planning area, or definition of a specific area of land involved.

  In *City of Burien v. CPSGMHB*, 53 P.3d 1028 (2002), the Court affirmed the local governments responsibility to notify the public: "In its order, the Board explained that while the requirement to consider public comment does not require elected official to agreed with or obey such comment, local government does have a duty to be clear and consistent in informing the public about the authority, scope and proposed planning enactments."

  The notice provided in this instance clearly does not meet that standard. Further, in response to a question during the hearing on the merits, Airway Heights acknowledged it has not adopted a GMA public participation plan. RCW 36.70A.130(2) requires local governments to establish a public participation process and procedure for plan amendments and broadly disseminate it to the public. The GMA further requires early and continuous public participation on proposed amendments of GMA plans and development regulations, RCW 36.70A.140. The failure to establish and follow a public participation plan is clearly erroneous. *Spokane County Fire District No. 10 v. City of Airway Heights, et al.*, EWGMHB Case No. 02-1-0019, FDO, (July 31, 2003).

- The City provided that documentation to a long list of agencies including CTED. This notice was sent on Dec. 15, 2000, almost at the same time the amendment was adopted.

  The letter was not sent 60 days prior to the passage of Ordinance 46-00, and it did not clearly state what changes were to be made. Such notice would be helpful to both the City and to the parties affected and should be given. This failure is not merely procedural. We do not have the authority to overlook a failure to comply with this notice. It is clear that if a Board finds a failure to comply, it must remand the matter to the City to cure the noncompliance. (See *Cameron Woodard Homeowners Ass. v. Island County*, 02-2-0004, Order on Dispositive Motion, p. 2, 2002.)

  In order to comply with the GMA, the City must submit Ordinance 46-00 to CTED anew. It is not sufficient that the ordinance was submitted subsequent to its adoption in order to comply with this portion of the statute. This submission must be accompanied by a notice indicating that 60 days are available for review and that comments by "state agencies," including the department, will be considered as if final adoption had not yet occurred. *Bauder v. City of Richland*, EWGMHB Case No. 01-1-0005, FDO (Aug. 16 2002).

- While it is true the Board did not find non-compliance for failure to require notice on plats and permits issued for development activity within 500 feet of designated resource lands, we noted in that decision that RCW 36.70A.060(1) would still be a requirement of the law. The language

provided in Ordinance 2001-09 is non-specific, while the language in the ICAO, as noted by the County, is in specific contradiction to the statutory 500 feet. This contradiction must be corrected to conform to the statute. The distance is 500 feet as required by the above statutory language. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- A post-adoption notice requires cities to publish a summary of the ordinance that includes major features or topical areas of the adopted action. The public notice by City of Yakima contained no summary of major features (e.g., description or mapping of changes and amendments); no disclosure of topical areas such as a listing of the five (5) site-specific applications that formed the basis of the annual amendments; no reference to Congdon Orchards; no reference to the date of public hearing; and no reference to the specific file and application description utilized in earlier notices. The publication simply failed to effectively advise the public or comply with statutory requirements. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, Order on Motion to Dismiss, (June 18, 2002).

- It is clear from a reading of the Growth Management Act (the GMA) that the legislature intended public participation be a high priority. *Wilma et al. v. Stevens County*, EWGMHB Case No. 99-1-0001c, FDO (May 21, 1999). Part of Public Participation is the Notice requirements under GMA. The City is required to give notice of their action by the publishing of a copy of the ordinance or a summary of that ordinance. The "summary" published by the City would give no reader sufficient information to know what action the City has taken. The GMA requires more. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, Order on Reconsideration, (July 15, 2002).

- The City provided that documentation to a long list of agencies including CTED. This notice was sent on Dec. 15, 2000, almost at the same time the amendment was adopted.

  The letter was not sent 60 days prior to the passage of Ordinance 46-00, and it did not clearly state what changes were to be made. Such notice would be helpful to both the City and to the parties affected and should be given. This failure is not merely procedural. We do not have the authority to overlook a failure to comply with this notice. It is clear that if a Board finds a failure to comply, it must remand the matter to the City to cure the noncompliance. (See *Cameron Woodard Homeowners Ass. v. Island County*, 02-2-0004, Order on Dispositive Motion, p. 2, 2002.)

  In order to comply with the GMA, the City must submit Ordinance 46-00 to CTED anew. It is not sufficient that the ordinance was submitted subsequent to its adoption in order to comply with this portion of the statute. This submission must be accompanied by a notice indicating that 60 days are available for review and that comments by "state agencies," including the department, will be considered as if final adoption had not yet occurred. *Bauder v. City of Richland*, EWGMHB Case No. 01-1-0005 FDO (Aug. 16 2002).

- Local government has a duty to be clear and consistent in the way it characterizes the authority, scope and purpose of proposed planning enactments. The court in *City of Burien v. Central Puget Sound Growth Management Hearing Board*, 53 P.3d 1028 (2002) set forth the general rule as follows:

  > In its order, the board explained that while the requirement to consider public comment does not require elected officials to agree with or obey such

> comment, local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning enactments**.** (Emphasis added.)

This duty has been historically recognized by Growth Hearings Boards. *Friends of the Law v. King County,* 1994 WL 907890 (1994) (describing notice as "truth in labeling" and stating "[t]he county must also take great care to use concise, clear and unambiguous language in its notices"; *City of Burien v. City of SeaTac,* 1998 WL 472511 *6 (1998); *West Seattle Defense Fund v. City of Seattle,* 1995 WL 903147 *51 (1995) ("local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning amendments"); and *Happy Valley v. King County,* 1993 WL 839722 (1993) ("meaningful public participation depends upon local government being clear and consistent in the way it characterizes the authority, scope and purpose of the proposed planning enactments"). *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The onus is not placed on the public to decipher ambiguous or misleading notices. *Vashon-Maury v. King County,* 2000 WL 1717577 (2000) ("To place the onus on the public to find out about the hearing, as the county suggests, misplaces the duty on the citizen rather than on government"). *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The duty to provide clear and consistent information on planning enactments includes the mandate to provide "effective notice." RCW 36.70A140 ("public meetings after effective notice."). Effective notice is central to the planning process and "is a necessary and essential ingredient in the public participation process." See, e.g., *WRECO v. City of Dupont,* 1999 WL 33100212 (1999) ("it is axiomatic that without effective notice the public does not have a reasonable opportunity to participate"); and *Vashon-Maury v. King County,* 2000 WL 1717577 *6 (2000) ("the foundation for plan making is public participation"). The issuance of "effective notice" prior to public hearing is the lynchpin of the public participation process. In the absence of "effective notice," the entire process fails to meet legislative mandates for public participation and citizen-based determinations with respect to land use planning. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO,(Dec. 5, 2002).

- The City of Yakima failed to provide the community with "effective notice" of the proposed planning enactments. The confusion was perpetuated throughout the process. Despite knowledge of the confusion regarding the proposal, no effort was made to correct the deficiencies and involve the community in this important proceeding. This cuts to the "very core" of GMA and cannot be excused as "minor errors" or "technical flaws." *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO,(Dec. 5, 2002).

- RCW 36.70A.035(1)(a)-(e) is the beginning point for analysis of notice procedures. The City of Yakima failed to engage in an acceptable process for notice to the public of the proposed planning enactment. The municipality did not post the property; publish notice in a newspaper of general circulation; provide notice to public or private groups with interests (e.g. WSDOT - Aviation Division, general aviation pilots, West Valley Community Council, etc.); circulate the proposal to government agencies, departments or schools; or place notice in regional, neighborhood or trade journals. The City of Yakima literally did nothing to encourage broad-

based public participation in the amendment process. The notification seeking public input was solely the distribution of the notice to adjacent property owners. The Central Puget Sound Board in *Weyerhaeuser Real Estate Company (WRECO) v. City of Dupont*, 1999 WL 33100212 *8 (1999) held that the requirements of RCW 36.70A.035(1) are not satisfied by only mailing notice to adjacent property owners. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The public notice for the Congdon Orchards' land use redesignation contained no alternatives or suggestions that alternative proposals would or could be adopted in the public hearing process. The fact that the map presented was a map of current land use designations, not future proposed designations under the proposed amendment, was disclosed to the Planning Commission and the few members of the public at the public hearing. The public that was not at the hearing was never notified or provided an opportunity to comment on the corrected/clarified proposal as required by RCW 36.70A.035(2)(b). In order to avail itself of the protection of RCW 36.70A.035(2)(b)(ii), the initial notice must specifically identify alternatives under consideration. This was not done in this case. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- A fundamental change in a map amendment or consideration of a different map cannot in all fairness be characterized as "minor and technical" correction pursuant to RCW 36.70A.035(2)(b)(iii). As noted by this Board in *1000 Friends of Washington v. Spokane County*, there is no requirement that the change be "substantial." The clarifying language of the statute also recognizes that such change is appropriate (without further opportunity for review and comment) only where the clarification of the proposal is made "without changing its affect." *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- While the County is required to notify CTED and provide them copies of the Resolutions, there is no remedy provided under RCW 36.70A for failure to notify CTED 60 days prior to final adoption, except for a finding of noncompliance. *Wilma, et al. v. Stevens County*, EWGMHB Case No. 99-1-0001c, FDO, (May 21, 1999).

- RCW 36.70A.106 requires the County to "notify the department of its intent to adopt such plan or regulations at least sixty days prior to final adoption." Surely this implies that the County "notify" the OCD rather than believe that the OCD was "aware of the proposed amendments." While this statute does not clearly state that the ordinances must be sent to the OCD, the meaning of the section is clear. The purpose of forwarding the ordinance to the OCD is to receive comments and help in its review for compliance with the GMA. However, the statute is not clear and the Board must presume that the County's actions were valid. The failure to notify OCD is not a significant omission in view of the other shortcomings in Titles 4 and 5. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

Official Notice

- These facts should be admitted pursuant to WAC 242-02-670(2) in that they are facts so generally and widely known to all properly informed persons as not to be subject to a reasonable dispute. Further, this information will be of assistance to the Board in making its decision. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012, 2nd Motion Order, (July 29, 2002).

- On Oct. 15, 2002, the County asked the Board to take official notice of three publications of the Department of Community, Trade and Economic Development (CTED). The three documents are: Keeping the Rural Vision: Protecting Rural Character for Rural Development, the Land Use Study Commission 1996 Annual Report, with Executive Summary and an Article entitled, "Designating areas of more intense rural development", by Keith Dearborn. These are either publications of State Government or part of the legislative history of the GMA amendments adopted by the State Legislature. The Board can take notice of these three documents. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, Order on Motion to Take Official Notice, (Oct. 18, 2002).

OFM Population Projection

- ***See also*** *Keywords –* ***Land Capacity Analysis, Urban Growth Areas***

- RCW 36.70A.110 requires that counties, in consultation with the cities involved, establish Interim Urban Growth Areas based upon population projections submitted to planning counties by the Office of Financial Management and distributed within the various jurisdictions of the county by means devised by the county. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- The Board finds that the "based upon" language of RCW 36.70A.110 imposes an upper boundary to an Interim urban Growth Area's size for the following reasons. First, if the "based upon" language established only a "minimum," one of the underlying principles of the GMA, containment of urban sprawl, would be undermined. Second, if Counties were free to use population forecasts in excess of OFM's forecast, there would be little need for the specific appeal right granted to dispute OFM's forecast. Third, the GMA allows "new fully-contained communities" to be established outside of urban growth areas. But if a county chooses to do so, it must "reserve a portion of the twenty-year population projection and offset the urban growth area accordingly for allocation to new fully contained communities." If OFM's twenty-year population projections were just minimums, there would be no need to "offset" additional population to be housed in new fully contained communities. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- The Board assumes that "population" for the purpose of the OFM's twenty-year growth management population projection means permanent or year-around population. Under this assumption, the need for recreation or vacation homes is not included in the OFM population projections. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- The Board reaffirms that the size of an urban growth area should equal the area required under the OFM growth projection plus the area required to realize a jurisdiction's "vision of urban development" that can be realized over the next twenty years. This definition allows a community to achieve its legitimate needs, while prohibiting sprawl. The Board holds that this is the meaning of RCW 36.70A.110(2). *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- The inclusion of supportable land use factors grants substantial discretion to each jurisdiction designating an IUGA yet provides a yardstick that ties and constrains the designation to the OFM population forecast. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- The requirement to adopt IUGAs involves both mandatory and discretionary elements. Therefore, local legislative bodies must comply with the mandatory requirements of the Act, but also have a great deal of flexibility to make choices in complying. For example, the Act establishes population-planning projections upon which IUGAs must be based. These exclusive projections are made for each county by OFM; no discretion is permitted for local jurisdiction to use their own numbers. On the other hand, local jurisdictions have great discretion in deciding how to accommodate these projections in light of local circumstances and traditions. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- It is imperative that counties base their IUGAs on OFM's twenty-year population projection, collect data and conduct analysis of that data to include sufficient areas and densities for that twenty-year period (including deductions for applicable lands designated as critical areas or natural resource lands, and open spaces and greenbelts), define urban and rural uses and development intensity in clear and unambiguous numeric terms, and specify the methods and assumptions used to support their IUGA designations. In essence, counties must "show their work" so that anyone reviewing a UGAs ordinance can ascertain precisely how they developed the regulations adopted. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

Open Space

- RCW 36.70A.160 requires counties and cities to identify open space corridors within and between urban growth areas and these corridors shall include lands useful for recreation, wildlife, trails and connection of critical areas … The most common method of such identification is by mapping and the scale must allow features, such as future trails and parks, to be accurately located. *Wilma et al. v. Stevens County*, EWGMHB Case No. 06-1-0009c, Compliance Order, at 18-19 (May 22, 2008).

- [T]he County is required to at least analyze the potential for greenbelt and open space within specific UGAs. The County can base its decision on a variety of criteria, including population, size, and need of the individual UGAs, factor that analysis into its planning and show designated greenbelts and open space in the County's maps. Some UGAs may not need greenbelts or open spaces, some may need both. Regardless, the County must include greenbelt and open space areas or show its work why greenbelts and open spaces are not necessary when it designates UGAs. *Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, FDO, at 30 (March 12, 2007).

- Parties. The Petitioner clearly demonstrated that their attorneys, Flowers and Andreotti, submitted comments upon the proposed application, clearly stating that the comments were submitted on behalf of Superior Asphalt and Concrete Co. Furthermore, that law firm appeared on behalf of Petitioner, Superior Asphalt and Concrete Co., at each and every hearing and public meeting in this case held by Yakima County where public comment was allowed. The attorneys representing the Petitioner participated in the proceedings and identified themselves as "representatives" of the Petitioner. *Superior Asphalt & Concrete Co., v. Yakima County, Respondent, and Columbia Ready-Mix, Inc., Intervenor*, EWGMHB Case No. 05-1-0012, Order on Dispositive Motions, (March 30, 2006).

- RCW 36.70A.280(2)(3) & (4) allows a petition to be filed only by "(b) a person who has participated orally or in writing before the count or city regarding the matter on which review is being requested..." The Petitioner is a corporation and therefore a "person" under the law. In

this case, that "corporate person" was unable to participate except through a representative. Clearly that Corporations' lawyer is qualified to represent the Petitioner before the County or City and is only required by common sense and Board case law to identify him or herself and give notice that they are acting in a representative capacity for that Corporation. This was done. Dismissal of the petition for lack of standing is denied. *Superior Asphalt & Concrete Co., v. Yakima County, Respondent, and Columbia Ready-Mix, Inc., Intervenor,* EWGMHB Case No. 05-1-0012, Order on Dispositive Motions, (March 30, 2006).

- Friends of Agriculture was formed for the purpose of allowing individuals to associate themselves for purposes of filing a Petition for Review to this Board. Each of the named members (Barbara Lutz, Jean Mattson, Lee Bode, and Vera Walker) provided either written or oral testimony regarding the Laughlin Proposal. The Growth Management Act (GMA) recognizes "participation standing" as a jurisdictional basis for appeals to a Hearings Board. RCW 36.70A.280 provides, in part, as follows:

  > (2) A petition may be filed only by: (a) the state, or a county or city that plans under this chapter; (b) *a person who has participated orally or in writing before the county or city regarding the matter* in which a review is being requested; (c) a person who is certified by the governor within 60 days of filing a request with the board; (d) a person qualified pursuant to RCW 34.05.530. (Emphasis provided.)

  There is no question that Barbara Lutz, Jean Mattson, Lee Bode and Vera Walker provided either written or oral testimony during the administrative review of the Laughlin proposal. Each has established "participation standing". Those members were specifically identified in the Petition for Review as members of "Friends of Agriculture". *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, Order on Motion to Dismiss, (Dec. 27, 2005).

- This Board has recognized informal associations of qualified individuals for purposes of presenting matters to this Board. Individuals with a common interest may seek review in any number of forums including an unincorporated association. *Save A Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978). The consolidation and coordination of individuals with established standing promotes judicial economy and efficiency in review of challenges under the Growth Management Act (GMA). Petitioner has established that each of the four (4) identified members possesses "participation standing" in this proceeding. The Board determines, however, that association members with an interest in this appeal shall be limited to those identified in the Petition and shall only include Barbara Lutz, Jean Mattson, Lee Bode and Vera Walker. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, Order on Motion to Dismiss, (Dec. 27, 2005).

- A change in the comprehensive plan designation for a specific property is a matter subject to review by a Growth Hearings Board. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, Order on Motion to Dismiss, (Dec. 27, 2005).

- Grant County asserts that the property owner is an indispensable party to this proceeding. No legal authority is cited for this proposition. There are no provisions in the GMA for notice to or joinder of the property owner as an indispensable party. The Board's jurisdiction is over comprehensive plan amendments. Those amendments are adopted by local jurisdictions (i.e., counties and cities).

The indispensable party rule has been rejected in other hearings board decisions. *Larson v. City of Sequim*, WWGMHB 01-2-0021, Order Denying Dispositive Motions (Dec. 3, 2001) ("There are no provisions in the GMA for notice to or joinder of the property owner as an indispensable party."); *Alberg v. King County*, CPSGMHB No. 95-3-0041, FDO (Sept. 13, 1995) ("The indispensable party rule is based on equitable and constitutional considerations. The Board does not have jurisdiction over either equitable doctrines or constitutional provisions."); *Association to Protect Anderson Creek v. City of Bremerton*, CPSGMHB No. 95-3-0053, Order on Bremerton's Dispositive Motions (Oct. 18, 1995) ("A Petition for Review will not be dismissed for failure to name an indispensable party. Petitioner's are not required to name parties other than the city, county, or state agency taking the underlying action."). *See also Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, Order on Motion to Dismiss, (Dec. 27, 2005).

- The Board finds the record is complete with oral and written testimony that the Laughlin property is either in agricultural production or has been in the past. According to the Petitioner, the Laughlin property is presently used for nursery stock. Testimony in the record from the present owner, Larry Laughlin, indicates the land has been in agricultural production, and Terry Mattson, whose family farmed the Laughlin property in the 1960's, 1970's and 1980's, testified that the land is "prime farmland". In addition, written records, including the Environmental Checklist (Exhibit F), confirm that the site has been used for agriculture. The record also confirms that all agricultural land within the area is farmed and/or capable of being used for agricultural production. Importantly, the property has been designated "Irrigated Agricultural Land", which is significant in the context of agriculture in Grant County as written in its Comprehensive Plan. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, (March 14, 2006).

- The Laughlin property was initially and appropriately designated "Agricultural Resource" by Grant County. In order to de-designate the property to "Master Planned Resort", the County needed to perform a reasoned evaluation and analysis the change in designation. Grant County did not do this procedure. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, (March 14, 2006).

- From the record before the Board, the adoption of Resolution No. 05-267-CC by the Grant County BOCC has substantially interfered with the fulfillment of this goal. The County chose to improperly remove prime irrigated farmland from the County's agricultural land of long-term commercial significance. The Laughlin acreage may only be 35 acres and a difficult shape to irrigate with other than rill irrigation, but the soil is prime soil and irrigated land is the most valuable land in the County. The County's goals and policies reflect the importance of such land and encourage commercial farmland owners to retain their lands in commercial farm production (Policy RE-1.8). Goal RE-1 states, "Agricultural land of long term commercial significance shall be preserved in order to encourage an adequate land base for long term farm use", and Policy RE-1.3 states, "Designated agricultural lands shall be protected and preserved as a nonrenewable resource to benefit present and future generations." With these goals and policies in mind, the County needs to reevaluate their decision to adopt Resolution No. 05-267-CC and encourage urban-like development in urban areas or on land that is not prime irrigated farmland. *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, FDO, (March 14, 2006).

- The Intervenors sought to intervene by motion. That motion was heard and granted at the Prehearing conference. WAC 242-02-270 provides for Intervention both by right and by permission. Here the Intervenors could qualify for intervention as of right. They claim an interest

in the property or transaction that is the subject of the action and believe their interests will not be adequately represented. They are also so intimately involved in the matter now before the Board. While there will be more parties and lawyers involved, this intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

The Intervenors Sales Agreement to purchase a portion of the subject property and status as applicants for the Comprehensive Plan amendment which is the subject of this action and the more recent purchase of part of the subject property is a sufficient interest in the property for such intervention. The interests of the County are very often different from the property owners or developers. The Intervenors involvement as parties is appropriate. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, Order on Motions, (Sept. 1, 2005).

- Growth Hearing Boards have jurisdiction to hear all matters that contend a county is not in compliance with the requirements of the Growth Management Act (GMA). Many of those challenges have been to the propriety of site-specific de-designation of agricultural resource lands. *Wenas Citizens Association v. Yakima County*, EWGMHB Case No. 02-1-0008, FDO (Nov. 14, 2002); See also *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 116 Wn.App. 48, 65 P.3d 337 (2003); *Orton Farms, LLC v. Pierce County*, CPSGMHB No. 04-3-0007c, FDO (Aug. 2, 2004).

- While the amended petition filed January 28, 2000, appears to add Mr. Robinson as a party, objection to this addition was not made by motion as directed and the Board will not consider the objection at the final hearing on the merits. However, with or without the amendment, Mr. Robinson could be allowed to participate in the hearing under RCW 36.70A.330(2), which states in part:

  A person with standing to challenge the legislation enacted in response to the Board's Final Order may participate in the hearing along with the Petitioner and the State Agency, County, and City.

  The Board recognizes David L. Robinson, as an individual petitioner in this case. *Concerned Friends of Ferry County v. Ferry County*; EWGMHB Case No. 00-1-0001, Order On Compliance; (Jan. 17, 2001)

- The Board holds that there are five prerequisite conditions that must be met before it will consider granting a motion for continuance. First, the purpose, intent and principles of the Act must be preserved. Second, all the parties must jointly make the motion. Third, granting the motion will not bar or delay implementation of the Act with regard to other potential parties or interests. Fourth, any party may terminate the continuance, without cause, by filing as a pleading with the Board a "Notice Revoking Continuance." Fifth, all parties must agree that in the event this Board enters the requested order that this motion and the resulting order constitutes the law of the case and shall not be subject to challenge or attack in this or any subsequent appellate proceeding related to this petition for review. These qualifying conditions narrowly limit motions for continuance under RCW 36.70A.300(1). This tool should only be used in cases where implementation of the Act is furthered, where no other potential party or interest is hindered, and where the interests of the parties, including a party's right to proceed with the petition, are protected. *Kittitas County v. City of Ellensburg*, EWGMHB Case No. 95-1-0007, Motion Order Granting Continuance (Jan. 18, 1996).

Petition for Review

- General discussion of filing requirements for PFR. *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHG Case No. 07-1-0013, Order on Motions at 6-10 (June 25, 2008).

- According to the County, the combination of the deficient statement of issues and the failure to include a copy of the applicable provisions results in the PFR failing to comply with the threshold filing requirements and must be dismissed. Although the County notes the Board may dismiss pursuant to WAC 242-02-720 for failure to follow governing rules, it specifically notes the deficiencies are jurisdictional and dismissal is required. The Board disagrees … with the exception of the phrase detailed statement of the issue, it is the Board's Administrative Rules, not the GMA, which set forth the content and form requirements for a PFR and require a PFR to substantially contain the listed components … the Petitioners have substantially complied with the GMA's and the Board's Rules for contents of a PFR and, the Board concurs with the Court of Appeals that a deficiency in the content or form requirements for a PFR does not divest the Board of jurisdiction over this matter. *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB Case No. 07-1-0013, Order on Motions at 7, 9-10 (June 25, 2008).

- Petitioners are effectively requesting they be permitted to amend the issues presented by the PFR approximately nine months after the original was filed. The Board recognizes that during this time the parties have been engaged in settlement negotiations, but finds that such a request is not supported by the facts and circumstances of this case. The purpose of settlement negotiations is to allow the parties to resolve some, or all, of their conflicts by facilitating discussions to clarify the concerns of Petitioners in relationship to the County's adoption of Resolution 2007-01. Although such negotiations would undoubtedly result in the abandonment or withdrawal of some issues by the Petitioners, it is still the issues that were presented in the original PFR, as permitted to be amended by the Board with the October 22, Revised PFR, that are to be resolved, not those crafted during settlement discussions. To allow for issue statements to be revised based on settlement negotiations occurring long after the filing of a PFR, is contrary to the GMA's mandate that a PFR be filed within 60 days of publication of the legislative enactment. *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB Case No. 07-1-0013, Order on Motions at 6 (June 25, 2008).

- From its argument, the County contends the City is required to set forth supporting facts within its issue statement. The County is incorrect. The Board recognizes one of the most vital elements of the PFR is the Statement of the Issues as this presents the questions a petitioner would like the Board to resolve. However, the legal issues are not the same as legal argument. The PFR is not the time or the place to present legal argument on the merits of the case. All parties will have this opportunity during their briefing on the merits. The structure of an issue statement is simple - issues are to be framed as a question and should be concise and to the point. Each legal issue should indicate the specific section of the GMA and the sections of the jurisdiction's actions that a petitioner alleges violate the GMA. If issue statements contained the facts supporting the allegation, these statements would be transformed from a single, questioning sentence to a multi-page briefing of the case. *Wenatchee v. Chelan County*, EWGMHB Case No. 08-1-0015, Order on Motions at 5-6 (Dec. 2, 2008).

- [P]etitioners challenge is untimely. The Board agrees with the Respondent and Intervenors that these three issues are a collateral attack on Ordinance 2005-35, which was adopted by the

Kittitas County BOCC on Nov. 2, 2005. Petitioners did not seek review of this ordinance within 60 days as required by RCW 36.70A.290(2) and, therefore, these three issues must be dismissed. *Kittitas Conservation v. Kittitas County*, EWGMHB Case No. 06-1-0011, FDO, at 13 (Apr. 30, 2007).

- WAC 242-02-260 the Intervenors moved that the Petition of the Neighborhood Alliance of Spokane be dismissed because the person signing the petition was not an attorney and to allow a lay person to sign a petition for the Alliance would be unauthorized practice of law. The Petitioners contend that the GMA regulations, WAC 242-02-110(1), authorize a layperson to sign documents on behalf of an organization such as the Alliance. They further point out that the regulations allow a layperson or an attorney to represent such an organization before the Hearings Board.

  The Board recognizes that the regulations found at WAC 242-02-110 allow a layperson or an attorney to represent an organization such as the Alliance. Further, the Board does not believe that it can rule on whether something is the unauthorized practice of law. Such a ruling, is the responsibility of the Washington State Bar Association. The Board denies the Intervenors' motion to dismiss. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, Order on Motion, (Nov. 14, 2006).

- Two reasons are give to deny a motion to amend: (1) … upon a showing by the adverse party (Nor Am Development) of unreasonable and unavoidable hardship, or (2) by a board's finding that granting the same would adversely impact the board's ability to meet the time requirements of RCW 36.70A.300 for issuing a final order.

  In considering the first reason, Nor Am has failed in their brief to show any "unreasonable and unavoidable hardship". Nor Am discusses in their Legal Analysis three cases. Two of those, *Sky Valley v. Snohomish County*, CPSGMHB No. 95-3-0068 and *Wildlife Habitat Injustice Prevention v. City of Covington*, CPSGMHB 01-3-0026, discuss statutory time limits. The third case, *Taxpayers for Responsible Government v. City of Oak Harbor*, WWGMHB 96-2-0002, argues what constitutes good cause for an amended petition. The cases referenced do not explain how the amended legal issue(s) will create "unreasonable and unavoidable hardship" for Nor Am.

  In considering the second reason, the board finds that granting the motion would not adversely impact the board's ability to meet the time requirements for issuing a final order. *Roberts/Taylor v. Benton County and Benton County Board of Commissionerset al.*, EWGMHB Case No. 05-1-0003. Order on Motions, (July 18, 2005)

- Public Participation is often an issue in petitions filed before this Board. When a party objects to a substantive portion of the Comprehensive Plan of the Jurisdiction, Public Participation is almost always another issue. The Board does not examine the motivation for raising such issues, but must decide legitimate issues when raised. The mentioning of a new issue in briefing will not cause that issue to be excluded from being properly raised in another petition. Comments that would encourage the Board or a party to consider a new issue to avoid a possible new petition do not prevent a separate issue from being raised in that new petition. Public Participation is a new independent issue that may be brought by a separate petition**,** even if the substantive issue is already decided. The deciding of one issue is, in most cases**,** not *res judicata* for the public participation issue that might be brought. *Larson Beach Neighbors/Wagenman v. Stevens County*. EWGMHB Case No. 04-1-0010, Order on Motions, (Nov. 29, 2004)

- The Board's jurisdiction over the Petitions for Review is limited to those issues that arise from amendments to the comprehensive plan or development regulations or to any new development regulations that were adopted in the ordinances and resolutions that were challenged in the petitions. *City of George, City of Royal, et al. v. Grant County* EWGMHB Case No 04-1-0003, Order on Motions, (Sept. 9, 2004).

- Petitioners LLPOA have the option of filing a separate petition for review of an amended development regulation or seeking intervention in an existing case. The existence of a pending Growth Management Hearings Board case involving a development regulation does not bar anyone from seeking review of the amendment of that development regulation through a separate petition for review. *Loon Lake Property Owners Assoc. et al. v. Stevens County, et al.*, EWGMHB Case No. 03-1-0006c, Order on Motions on cases nos. 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- Any "person aggrieved" by a determination under the State Environmental Policy Act (SEPA) may obtain review. (RCW 43.21C.075(4)). The term "person aggrieved" includes anyone with standing to sue under existing law. Whether a person or entity has standing to challenge a State. *Spokane County Fire District No. 10 v. City of Airway Heights, et al*, EWGMHB Case No. 02-1-0019, Order on Motion to Dismiss SEPA Issues, (July 31, 2003).

- The final noncompliant change made by the city is the apparent reduction of the period of filing an appeal to 21 days. (17.108.130(J)). To the extent that such section requires a petition to be filed before the Growth Management Hearings Board earlier than the statutory 60 days, the provision is non-compliant.

  > (2) All petitions relating to whether or not an adopted comprehensive plan, development regulations, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter… must be filed within sixty days after publication by the legislative bodies of the county or city. (RCW 36.70A.290(2)).

  The limitation of the filing of an appeal before the Growth Management Hearings Board to 21 days is out of compliance with the GMA. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- A post-adoption notice requires cities to publish a summary of the ordinance that includes major features or topical areas of the adopted action. The public notice by City of Yakima contained no summary of major features (e.g., description or mapping of changes and amendments); no disclosure of topical areas such as a listing of the five (5) site-specific applications that formed the basis of the annual amendments; no reference to Congdon Orchards; no reference to the date of public hearing; and no reference to the specific file and application description utilized in earlier notices. The publication simply failed to effectively advise the public or comply with statutory requirements. *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, Order on Motion to Dismiss, (June 18, 2002).

- In order for the jurisdiction of this Board to attach, a petition must be filed in accordance with RCW 36.70A.290(2), which requires that a petition for review must be filed within 60 days of publication. The Board must base its decisions on the law. Nothing in RCW 36.70A.290(2) or other decisions of the Board grants authority to waive this statute of limitation. *Blue Mountain Audubon Society, et al. v. Walla Walla County*, EWGMHB Case No. 95-1-0006, Order of Dismissal (Oct. 17, 1995).

- The question, which the Board will address, is procedural only. The Board has not been presented with sufficient arguments on the substance of existing development regulations to rule on substantive compliance. *Saddle Mountain Minerals/ Maughan, v. City of Richland*, EWGMHB Case No. 99-1-0005, FDO, (Oct. 1, 1999).

- The Petitioners must file a petition challenging a City action within 60 days after the publication of such legislative action. However, there is no statutory time limit for filing a "failure to act" petition. It is not our place to separate the issues, to decide whether part of the issue is a failure to act or compliance questions. The Petitioner must do that, and they have not done that here. Because of this, the Board must find that the time for challenge has passed. If the Petitioners are aware of an issue alleging failure to act, that can be separately considered that challenge could be brought at any time. *Bargmann/Greenfield Estates Homeowners' Assn. v. City of Ephrata*, EWGMHB Case No. 99-1-0008c, FDO, (Dec. 22, 1999).

- Based on the record before it, the Board finds the change resulting from the entry of the agreed order stipulated to by the County and a party is a permanent amendment to the County's comprehensive plan and as such may be reviewed by the Board upon the filing of a petition at any time but no later than 60 days after publication by the County of such action. *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 96-1-0017, Order on Motion (June 24, 1997).

- RCW 36.70A.290(2) provides in part that petitions need to be filed within 60 days after the publication of notice of adoption. At the Prehearing conference on Aug. 23, 2000, the Board indicated they would receive any new petitions through the 60-day timeframe.

  The important date to the Petitioner is the July 20, 2000 date as they have the option of making amendments anytime within the 30 days after that date. After the 30-day time period, the Petitioners must request by motion to amend their petition. If the 60-day time period (time for filing a petition) has not passed, Petitioner has the right to withdraw the original petition and file a new petition including any issues they feel appropriate

  WAC 242-02-260(1) states: "(1) A petition for review or answer may be amended as a matter of right until thirty days after its date of file. (2) Thereafter, any amendments shall be requested in writing by motion, and will be made only after approval by a board or presiding officer. *Larson Beach Neighbors/ Wagenman v. Stevens County*, EWGMHB Case No. 00-1-0016, Order on Motions, (May 16, 2001).

Platted Lands

- This goes a long way to cover the information required to be contained in the maps required by the GMA. *Woodmansee v. Ferry County*; EWGMHB Case No. 00-1-0007, FDO; (Aug. 18, 2000)

- RCW 36.70A.070 requires "a map or maps" and does not detail the land use to be depicted or if it has to be developed in full by the County. Clearly, utilization of more than one map and maps developed by other agencies, can meet the requirements of the GMA, if collectively, the maps are consistent, and internally consistent with all elements in the comprehensive plan. *Woodmansee v. Ferry County*; EWGMHB Case No. 00-1-0007, FDO; (Aug. 18, 2000)

  The Board concludes that (1) more than one map may be required, (2) that maps must be of a scale to be useful for decision making regarding individual parcels of land, and (3) that maps alone may not be adequate for decision making. Upon the completion of the final critical areas

ordinance and development regulations, the maps should be updated and be consistent with the Comprehensive Plan, and include all elements of the comprehensive plan and related ordinances using the best available data. *Woodmansee v. Ferry County*; EWGMHB Case No. 00-1-0007, FDO; (Aug. 18, 2000).

- The Respondent, having adopted its Comprehensive Plan in 1995, should have by that time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

  The Long and Short Plat Subdivision Ordinances are not where the County will adopt the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially, where, as to the RSAs, (Rural Service Areas) they stand alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. That was inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision is needed to allow smaller lot sizes within the RSAs "to minimize and contain the existing areas or uses of more rural development". *Concerned Friends of Ferry County v. Ferry County*; EWGMHB Case No. 00-1-0001, FDO; (July 6, 2000).

- [Board sets forth relevant portion of WAC 365-195-805(1)] The words "setback" and "Buffer" may be used in different situations. The setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The critical area ordinances required by the GMA to be adopted are controlling. Adequate protection of critical areas must be found in that ordinance. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not place the County in noncompliance with the GMA. *Concerned Friends of Ferry County v. Ferry County;*EWGMHB Case No. 00-1-0001, FDO; (July 6, 2000).

Precedent

- The County cited dictum found in *City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c. This was dictum without legal argument and is not precedent for this Board. However, the Western Hearings Board later ordered Mason County to specify which of the three types of LAMIRDS theirs fit into. *Dawes, et al v. Mason County*, WWGMHB No. 96-2-0023c, Compliance Order, Aug., 14, 2002. That case made it clear that the Western Hearings Board felt this individual designation was needed to be able to determine if there is compliance. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

Presumption of Validity

- *See also Keywords –* ***Burden of Proof; Deference; Standard of Review***

- [The presumption of validity] is a delicate balance between the City's legislative action and the requirements set forth in the Growth Management Act. *Rush v. City of Spokane*, EWGMHB Case No. 06-1-0006, FDO, at 11 (July 13, 2007)

- While the actions of the County are presumed valid, the Board must be able to see the work by the County for their determination of LOBs. The GMA specifically outlines how the logical outer boundaries are to be designated for a Type I. (RCW 36.70A.070(5)(d)(iv)). The contention

that the 8.07 acres, as was adopted by the County Commissioners, is within the logical outer boundaries and the growth and the uses will be contained, is not reflected in the record. The maps used do not show more than the area considered and no sign of built up areas. The record shows no more than a change from a Type III to a Type I and the claim that some structures existed prior to 1991. *James A. Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019 Order on Compliance, (Nov. 1, 2004).

- While the Board presumes the validity of these County actions, the county must follow the laws articulated in the Growth Management Act. It is also true that, while the development regulations discussed herein were not contested, the Board must determine whether the placement of a Type I, II or III LAMIRD in a certain zoning district or land-use designation complies with the act and limits the LAMIRD as required. A LAMIRD must be in a Rural Activity Centers Zoning District that is appropriate, thereby limiting the size, uses, and types of development. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (Nov. 1, 2004).

- Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 2004 WL 2750786 (Wash. Ct. App., Div. 32004), found that in reviewing a municipality's actions, the Board must presume the comprehensive plan and ensuing regulations are valid. *City of Redmond v Central Puget Sound Growth Management Hearings Board. 116* Wn.App. 48, 55, 65 P.3d 337 review denied, 150 Wn.2d 1007 (2003). The party petitioning the Board has the burden to show noncompliance and the Board must find compliance unless the action is clearly erroneous. The Court found that the Board erred by shifting the burden of proof to the County and the Cantons. The Board was required to presume the Comprehensive Plan and ensuing regulations were valid. City of Redmond, 116 Wn.App. at 58. *Wenas Citizens Association et al., v. Yakima County, et al.*, EWGMHB Case No. 02-1-0008, Order on Remand, (April 20, 2005).

- The Washington State Court of Appeals, in *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 2004 WL 2750786 (Wash. Ct. App., Div. 32004), also found that the Board erred by applying "heightened scrutiny" to this case by citing a Central Puget Sound Hearings Board decision, which Division One of the Court of Appeals rejected. That Appeals Court found the Central Puget Sound Hearings Board was in error by applying "heightened scrutiny" to the decision to re-designate the land. City of Redmond, 116 Wn.App. at 58. *Wenas Citizens Association et al., v. Yakima County, et al.*, EWGMHB Case No. 02-1-0008, Order on Remand, (April 20, 2005).

- Petitioners provide no supportive argument that Ordinance 2001-09 fails to protect Geologically Hazardous areas. The Board notes Section 4.00 of Ordinance 2001-09 addresses frequently flooded areas. Petitioners have offered no argument regarding the adequacy of that section. We must presume the validity of the County's action. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- RCW 36.70A.320 grants a presumption of validity to the critical areas ordinance (CAO) or other ordinance developed in furtherance of the goals and requirements of the GMA. A petitioner has the burden of proof to overcome this presumption; it must show by a preponderance of the evidence that the CAO fails to meet the minimum requirements of the GMA. The burden that the petitioner, or any other party challenging the CAO, bears is to show by a preponderance of the evidence that when the ordinance is applied to critical areas they are either inadequately designated or protected or both. When this burden is met, the presumption of validity no longer

exists. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- A petitioner has the burden of proving by a preponderance of the evidence that a plan does not comply with the Act. The initial burden of persuasion is met when a petitioner presents sufficient evidence which, standing alone, would overcome the presumption of validity. Once that level has been reached the burden of producing evidence to rebut the initial showing does shift to the respondent local government. Because the Board's review is "on the record," that rebuttal evidence must be contained in the record absent the rare instance of consideration of supplemental evidence. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

Property Rights

- [In regards to the actions taken by jurisdiction when designating land use] If these actions are done in an "orderly, consistent process", the county or city does not violate the statute in question. RCW 36.70A.370(1) (Protection of Private Property). *Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, FDO, at 36 (March 12, 2007).

- Stevens County's contention that allowing such development activity is merely a balancing of conflicting goals of the GMA is not supportable. All property owners have a right to the use and enjoyment of their property without encroachment from neighbors who would degrade it. "Private property rights" gives no one the right to degrade critical areas, streams, or lakes. The County's actions are clearly erroneous, and in violation of the GMA. Larson Beach Neighbors/Wagenman v. Stevens County, et al., EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- In arguments before the Board, Respondent County posits that to restrict development and commercial uses as ordered by the Board is contrary to RCW 36.70A.020(6) and private property rights afforded by the U.S. Constitution. We disagree. We have been presented with no evidence that restricting uses of lands as ordered is in violation of any laws. In fact, not to restrict use is, in our opinion, often a violation of property rights of adjacent property owners, who have an equal right to enjoy their property without unsuitable development intrusion. Clearly, the GMA requires restrictions on development. Pertinent to this case, the GMA requires development of an urban nature be limited to urban growth areas or well-defined Rural Service Areas. *Woodmansee, et al. v. Ferry County*, EWGMHB Case No. 95-1-0010, 2nd Order on Compliance (Aug. 22, 1997).

Public Facilities and Services

- *See also Keyword* – **Capital Facilities; Urban Services**

- For purposes of conducting the inventory required by RCW 36.70A.070(3)(a), "public facilities" as defined at RCW 36.70A.030(13) are synonymous with "capital facilities owned by public entities." *Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, FDO, at 22 (March 12, 2007).

- The Board is very familiar with the case cited by the Respondent, *Wenatchee Valley Mall Partnership, et al v. Douglas County*, Case No. 97-1-0003. In *Wenatchee*, the Board quoted the Central Puget Sound Hearings Board in *Sky Valley V. Snohomish County*, CPSGMHB Case No.

95-3-0068c at page 1675 and cited with approval, the Central Board's interpretation of RCW 36.70A.070(3)c):

> "… as if the phrase 'owned or operated by the city or county' existed at the end. This interpretation is required by necessary implication. To hold otherwise would require a county government as the regional planning entity within a county, to conduct capital planning for all public facilities regardless of ownership…."

The Board continues to hold as they did in *Wenatchee supra*, that a county or a city need not do the work that is already done by special districts or entities not owned or operated by a city. Adoption by reference or attachment is sufficient. Here Liberty Lake has referenced the Capital Facilities Plan of Liberty Lake Sewer & Water District and adopted it by reference. Upon review of the record, it appears to comply with the GMA and the Petitioner and Intervenors have not carried their burden of proof. . *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 Order on Compliance, (March 18, 2005).

- This Board and the other Boards have consistently held that jurisdictions are required to adopt a six-year CFP. *City of Spokane v. Spokane County*, EWGMHB No. 02-1-0001, FDO; *Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039, Order Rescinding Invalidity. This CFP is Liberty Lake's first compliant Capital Facilities Plan and it is required by statute to be a six-year plan. The Petitioner had adopted a previous CFP, but it was in part limited to a period of less than six years. The Growth Management Act requires a six-year plan, beginning with its effective date. In this case, the Ordinance, including the CFP, was adopted Dec. 14, 2004, with an effective date of January 18, 2005. Even if Liberty Lake had adopted the CFP sometime in 2004, the plan would need to have covered a part of 2010. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004).

- It is vital to follow the CWPP and document the data from the analysis performed. Liberty Lake must do this before proceeding to finalize the Comprehensive Plan. This clearly was not done. The Board finds nothing in the record supporting the City of Liberty Lake's contention that it followed the CWPP and the process outlined therein.

  It is clear that the City of Liberty Lake failed to prepare an adequate 6-year Capital Facilities Plan. Once the boundaries are set and the population allocation received, this must be done. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004).

- The Board acknowledges the City of Liberty Lake did conduct a land use analysis pursuant to CTED guidelines, but only determined how many houses could go on "x" number of acres. Spokane Valley asserted Liberty Lake failed to base its land capacity on urban. The Board acknowledges the City of Liberty Lake did conduct a land use analysis pursuant to CTED governmental services and facilities.

  The Board finds that important information is missing as to whether governmental services and public facilities are available to serve the projected numbers. These projected numbers were not available and Liberty Lake did not execute a detailed 6-year Capital Facilities Plan. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004).

- RCW 36.70A.070(3)(d) provides, when planning for future growth and forecasting future capital facilities needs pursuant to RCW 36.70A.070(3)(b), the adequacy and availability of public facilities and services must be realistically evaluated. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The GMA dos not require water, sewer, and other services to be in place until development occurs. We require the cities to provide these facilities and services at least concurrently with the projected growth. *Cascade Columbia Alliance v. Kittitas County*, EWGMHB Case No. 98-1-0004, FDO (Dec. 21, 1998).

- RCW 36.70A.070(1) requires each county to "designate the general distribution and general location and extent of the uses of land, where appropriate, for…recreation…" The County was not required to develop parks and recreational areas where not necessary. Here the County believes there are sufficient recreation resources available. *City of Moses Lake v. Grant County;* EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 16, 2000).

- For purposes of conducting the inventory required by RCW 36.70A.070(3)(a), "public facilities" as defined at RCW 36.70A.030(12) are synonymous with "capital facilities owned by public entities." (citing *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016, FDO (April 4, 1995), at 43). *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 16, 2000)

- Regarding RCW 36.70A.070(3)(c) and (d), it is recognized that if a county does not own or operate a facility, it should not be required to include the location or financing information in its Capital Facilities Element, since these decisions are beyond its authority. However, when the jurisdiction that owns and/or operates a specified capital facility cooperates with the county and discloses information pertaining to location and financing, the county should include such information in its Capital Facilities Element (per RCW 36.70A.070(3)(c) and (d)). Indeed, aside from being sound growth management and public policy, it may be a necessary prerequisite to access a new funding source - e.g., impact fees. *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 16, 2000).

Public Participation

- Compliance proceedings do not eliminate public participation; it is just as important when a jurisdiction is responding to an order of the Board as it is during the initial adoption of an ordinance or resolution. *City of Wenatchee v. Chelan County*, Case No. 08-1-0014, Compliance Order, at 9 (Sept. 18, 2009)

- RCW 36.70A.140 does allow for a deviation from the standard public participation program so long as the jurisdiction provides public participation that is appropriate and effective under the circumstances when responding to a Board decision related to invalidity … this deviation is not limitless. *Larson Beach Neighbors/Wagenman v. Stevens County*, Case No. 07-1-0013, First Compliance Order at 11, 13 (April 16, 2009)

- [In noting that the Planning Commission is an advisory board whose role is to make a recommendation, the Board stated:] [T]here is no authority for the proposition that the BOCC cannot depart from a planning commission recommendation or modify draft documents at the time of final enactment. County commissioners have broad powers authorized by RCW

36.32.120, which include the adoption of resolutions and ordinances not in conflict with state law. *Simmons, et al v. Ferry County,* Case No. 09-1-0002c, FDO at 13 (July 30, 2009)

- The GMA contains several provisions addressing citizen involvement in comprehensive land use planning, including RCW 36.70A.020(11), .035, and .140, all of which combine to create a strong foundation for public participation which cannot be compromised. The Board notes the purpose and intent of public participation is to provide the [County Commissioners] with comments so these can be considered and incorporated into the subsequent legislative enactment. The Board also acknowledges failure of the [County Commissioners] to specifically adopt suggested language does not amount to a violation of the GMA's mandates because public participation does not equate to citizens decide. The ultimate decision-makers in land use matters under the GMA are the elected officials of cities and counties. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 44 (Feb 4, 2009).

- [I]f the [Board of County Commissioners] BOCC wishes to make changes to the draft of a proposed comprehensive plan amendment that has presumably satisfied the GMA's public participation requirements; it has discretion to do so. However, if the changes the BOCC wishes to make are substantially different from the proposed language and are submitted after the opportunity for public review and comment has passed, RCW 36.70A.035(2) requires additional opportunity must be provided prior to the legislative body voting on the proposal unless, applicable to this situation, the proposed change is within the scope of alternatives available for public comment. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 44 (Feb. 4, 2009).

- *See also Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 9-13 (March 12, 2007) (finding "open discussion" does not entitle citizens to a face-to-face confrontation and verbal exchange with elected officials about the comprehensive plan).

- There is no provision in RCW 36.70A.035, RCW 36.70A.130 or RCW 36.70A.140 that requires that the risks of public funding be explained in a CFP. Such disclosure would occur when and if bonds are issue or an LID is formed. *Panesko v. Benton County,* EWGMHB Case No. 07-1-0002, FDO, at 52 (July 27, 2007).

- The Board considers public participation as the heart and soul of the GMA. There are a significant number of Growth Management Hearings Boards decisions encouraging or requiring counties and cities to provide their citizens with ample opportunity to participate in the process. *Citizens for Good Governance, et al. v. Walla Walla County, et al,* EWGMHB Case No. 05-1-0013, FDO (June 15, 2006).

- To determine if Walla Walla County complied with the GMA, the Board looks at the County's public participation plan and whether the County followed this plan during the amendment process. *Citizens for Good Governance, et al. v. Walla Walla County, et al.,* EWGMHB Case No. 05-1-0013, FDO (June 15, 2006).

- Public Participation is at the very heart of the GMA. The Board believes counties and cities should have a solid Public Participation Plan (PPP) based in part on the statutes and follow it. This will ensure broad dissemination of the jurisdictions intent and those who want to participate

in the GMA process can do so. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- When a County has been found out of compliance due to their failure to provide the public an opportunity to review an amendment and have an opportunity to comment, the County must provide that opportunity. RCW 36.70A.035(2) requires an additional opportunity for public review and comment if the county chooses to consider an amendment to a comprehensive plan or development regulations and the change is proposed after the opportunity for review and comment has passed. This is what the Board found in the FDO in this matter. The County has provided this hearing and has given adequate notice. *Larson Beach Neighbors/Wagenman v. Stevens County*. EWGMHB Case No. 04-1-0010, Order on Compliance, (Sept. 13, 2005).

- The County has developed its own Public Participation Program and it has been found compliant with the GMA. The County now is required to follow the plan. *Larson Beach Neighbors/Wagenman v. Stevens County*. EWGMHB Case No. 04-1-0010, FDO, (Feb. 2, 2005).

- "This Board has always held that public participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No. 99-1-0001c FDO at. 6 (May 21, 1999). At a minimum, this means that the public must have an opportunity to comment on amendments prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). . *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 04-1-0010, FDO, (Feb. 2, 2005).

- "Amendment," as it's used in RCW 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, which is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in 36.70A.140 that requires "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations . . ." *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 04-1-0010, FDO, (Feb. 2, 2005).

- The use of the word "proposal" in RCW 36.70A.035(2)(a) speaks to proposals by the County, not to the many and often unclear suggestions or objections made at the hearings by the public. If the County believes there is merit in a suggestion made at a hearing or in some other manner, the County may add that as one of the proposed changes they will consider and seek public input at a properly noticed public hearing. Without this, the public would have a moving target, there being no understanding of what they need to object to. The general public must be given notice of the changes they are asked to comment upon. If not, only those present at the hearing will discover all the potential changes or proposals that are being considered. A person believing the change advertised was appropriate and does not appear to testify, may discover later that an objectionable amendment was suggested at the hearing and adopted without further notice to the public. This is not what is meant by the requirements of public participation. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 04-1-0010, FDO, (Feb. 2, 2005).

- The Hearing Board finds that the amendment at issue here was an "amendment" to the Comprehensive Plan or Development Regulations under the meaning of RCW 36.70A.035(2)(a). This amendment was a "proposal" that was "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed change was required before adoption by the BOCC. RCW 36.70A.035(2)(a). Cities and counties have discretion under RCW 36.70A.035(2) on how to give notice and how to provide opportunities for public comment. The County's Public Participation Program outlines what they should have done, and they did not do it. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 04-1-0010, FDO, (Feb. 2, 2005).

- The fact that the County received comments from certain citizens requesting or discussing problems or changes that resulted in changes adopted later as amendments, does not demonstrate that the public received an opportunity to comment on the amendment later adopted by the County. The Growth Management Act requires that the public have the opportunity to contribute its voice to the development of comprehensive plans and development regulations. Preceding that opportunity must be effective notice, reasonably calculated to alert the public to the alternatives that may become part of the final comprehensive plan. There was nothing in either of the notices for the public hearings or in the text of the proposed draft of changes that would alert the general public that the adopted amendment at issue was on the table for consideration. Nor was there any public notice that the County had received requests for changes and inviting the public to review and comment on the changes being considered. We therefore find that the challenged amendment was not among the scope of alternatives available for public comment.. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 04-1-0010, FDO, (Feb. 2, 2005).

- The County's contention that this requirement would cause the County to have unending hearings unless they have one, knowing full well that the suggestions will be ignored, is disingenuous. All counties under the GMA have these hearings. If the hearing raises credible problems or beneficial suggestions and the County believes the changes are appropriate, they could adopt them as their proposed language. A new hearing would be held. After all comments are heard, the county could prepare a draft with the appropriate language, have a final hearing and proceed. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 04-1-0010, FDO, (Feb. 2, 2005).

- Public Participation is often an issue in petitions filed before this Board. When a party objects to a substantive portion of the Comprehensive Plan of the Jurisdiction, Public Participation is almost always another issue. The Board does not examine the motivation for raising such issues, but must decide legitimate issues when raised. The mentioning of a new issue in briefing will not cause that issue to be excluded from being properly raised in another petition. Comments that would encourage the Board or a party to consider a new issue to avoid a possible new petition do not prevent a separate issue from being raised in that new petition. Public Participation is a new independent issue that may be brought by a separate petition**,** even if the substantive issue is already decided. The deciding of one issue is, in most cases**,** not *res judicata* for the public participation issue that might be brought. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 04-1-0010, Order on Motions, (Nov. 29, 2004).

- The Hearings Board concludes that the City has the discretion to develop appropriate language in Policy D, Requirement 2, which would avoid the claimed burden mandatory language would impose. The City, under Policy E, Requirement 2, is able to develop innovative techniques, as

appropriate, thereby again avoiding the perceived burden such mandatory language would cause. *Playfair v. City of Chewelah*, EWGMHB Case No. 04-1-0009, Order on Reconsideration, (Feb. 15, 2005).

- The Board finds the City did well with most of the language, but finds there are places where mandatory language is required to fulfill the requirements of RCW 36.70A.140. The three Growth Boards have repeatedly said that if a plan or policy is a requirement then the language used for what that policy will require, has to have mandatory language such as the words "shall" and "will". Where the City listed requirement words, such as "should" and "may", they are at times not strong enough. "Use of the word "should" in a plan does not create a GMA duty; on the contrary, it provides for non-compulsory guidance, and establishes that a jurisdiction has some discretion in making decisions.] [Green Valley, 8308c FDO, at 11. CPSGMHB]." *Playfair v. City of Chewelah*, EWGMHB Case No. 04-1-0009, FDO, (Dec. 27, 2004).

- The City has a duty to reach out to all of the public that are interested. The City must actively involve people in addition by giving notice in the newspaper, posting on the website and using other techniques available to the City to encourage the public to be involved. *Playfair v. City of Chewelah*, EWGMHB Case No. 04-1-0009, FDO, (Dec. 27, 2004).

- The Board finds having the Record available for review at City Hall and charging a fee for the cost of reproducing the minutes or summaries is appropriate. Most local government entities do charge for the cost of reproduction. The Board has no authority to tell the City they may not charge for that service. Again the statutory requirement to broadly disseminate is what the challenge is here. Posting the record on the website is also a common practice today. Today most folks have access to the internet and those that don't, may use the public library. *Playfair v. City of Chewelah*, EWGMHB Case No. 04-1-0009, FDO, (Dec. 27, 2004).

- The Board finds the City, by posting the notice of meetings and hearings at City Hall, American West Bank, the Chewelah Post Office and on the Chewelah Website, has met the goals of the Act.

  The City's Public Participation Program requires the City follow the City Municipal Code by publishing a notice of application in the official City newspaper, mailing a notice to all property owners within 300 feet of application, and posting a sign on the property for site-specific proposals. The Board finds this is proper notice and meets the goals of the Act. The Board encourages the City to specify a standard size for the sign being posted on the property (i.e. 32 square feet in commercial areas), so that it is uniform for all postings and the public is apprised of its size. *Playfair v. City of Chewelah*, EWGMHB Case No. 04-1-0009, FDO, (Dec. 27, 2004).

- Allowing people to participate is not an option. If the time factor or other opportunities hinder a person from participating, there needs to be an option for written comments or a continuance of the meeting to allow more time. Rules of order being set forth clearly by the chair or facilitator are also not an option. The whole purpose and responsibility of a chair or facilitator is to assure that the meeting is run smoothly and that all in attendance have the important information, whether by being announced by the chair or facilitator or in written form. This is not just common sense, it is the core of public participation. The two words, "should", in this option, need to be changed to "shall" and this option needs to become a requirement. *Playfair v. City of Chewelah*, EWGMHB Case No. 04-1-0009, FDO, (Dec. 27, 2004).

- It is the duty of the facilitator or chair to clearly announce all pertinent and important information to the people at meetings or hearings. Again, this is just common sense. The Board finds this option needs to be moved to the requirement section, and the word "should" needs to be changed to "shall". *Playfair v. City of Chewelah*, EWGMHB Case No. 04-1-0009, FDO, (Dec. 27, 2004).

- There is no indication in RCW 36.70A.290(a) a city may pass their responsibility of publishing what they adopted to an outside source, such as a newspaper.

  RCW 35.23.221 also strengthens the Petitioners' case. The statute is not suggesting an article written by a reporter hired by the local newspaper substitutes for proper notification, as the Respondent would like us to believe. It is clearly saying the City shall publish a summary of the content of each ordinance in the City's official newspaper, not by the newspaper. *Playfair/ Savitz v. City of Chewelah*, EWGMHB Case No. 04-1-0008, FDO, (Dec. 27, 2004).

- The GMA relies on disseminating accurate public information. Cities and Counties, usually through their City Clerk or Clerk of the Board, provide notices and publication of ordinances adopting comprehensive plans, development regulations, or amendments thereto. This is what the GMA requires and it ensures proper and accurate notice of their actions. Newspaper articles are not substitutes for the requirement that the City publish the actions taken hereunder. *Playfair/Savitz v. City of Chewelah*, EWGMHB Case No. 04-1-0008, FDO, (Dec. 27, 2004).

- It is clear that the City is required to adopt a Public Participation Program and use it in the adoption of the Comprehensive Plan and amendments to it. The Board finds that a written plan for public participation prior to the process is required for the adoption of the Comprehensive Plan and amendments to it. The language cited by the City, contending that substantial compliance is sufficient, is misplaced. *Playfair/Savitz v. City of Chewelah*, EWGMHB Case No. 04-1-0008, FDO, (Dec. 27, 2004).

- The City of Liberty Lake is required to adopt a Public Participation Plan, which complies with the GMA. (RCW 36.70A.140). A Plan was adopted by Liberty Lake and was not challenged or found out of compliance. The City of Liberty Lake is required to follow their own Plan. The City will not be measured by what they should have adopted, but what they have adopted as their PPP.

  We must look at the City's public participation in this case and whether it complies with their PPP. In this case, Liberty Lake provided the public participation their plan required. While more could be wished for, Liberty Lake is not out of compliance.

  RCW 36.70A.140 also provides that "errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed." The spirit of the Public Participation Plan has been followed and is adequate under the GMA. *City of Spokane Valley v. City of Liberty Lake, et al.*, EWGMHB Case No. 03-1-0007 Order on Compliance, (March 18, 2005).

- While the Board need not address each of the issues raised by Petitioner, it is important to express our concern on some. The City's public participation was extensive and we are pleased with their efforts to include all in the process. While the Board does not find the City of Liberty Lake out of compliance on this issue, it is important to include as much as possible, all interested parties, including Spokane County, the City of Spokane Valley, and all special purpose districts

within their boundaries. *City of Spokane Valley v. City of Liberty Lake, et al.,* EWGMHB Case No. 03-1-0007 FDO, (May 24, 2004).

- The Board sees no practical purpose in ordering the County to reopen the record for the purpose of responding to public comments on an action that was taken more than a year ago. With respect to the amendment of Title 13, the County has prepared, for the record, a detailed summary of public comments and the County's response thereto in accordance with the requirements of WAC 365-195-600. The Petitioners have not met their burden of proof. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The GMA provides the County shall establish procedures to provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provisions for open discussion, communication programs, information services, and consideration of and response to public comments. RCW 36,70A.140. Very similar language exists in Steven County's Public Participation Policies but, to some extent, that language uses the words "may" or "should." *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The County's Public Participation Policy states its purpose as: "to exceed the minimum requirements of the Growth Management Act by providing early and continuous public participation opportunities equally to all residents of Stevens County at all stages…." (Chapter 1 Purpose, Attachment 1-B).

  The County seems to be contending that all of the provisions of the Program are discretionary. The first paragraph in their PPP, stating their Policy, reads: "The Planning Department shall review all written and oral comments received and may respond to the comment in writing or verbally during the public discussion." The County's Policy's statement that the Planning Department "may" respond to the comment in writing or verbally, gives the County the choice. The County will do one or the other. To interpret otherwise would ignore the GMA and the County's own statement of purpose. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- If the County believes their frequent use of "should" results in removing mandatory requirements from their Public Participation Policy, we need only look to the dictionary to see that "should" is mandatory and not discretionary. "Should, past tense of shall. 1. Used to express duty or obligation." Webster's II, New Riverside University Dictionary. 1984. Where the GMA specifically requires (shall) the Counties to establish procedures to consider and respond to public comment, we must believe the county's language is an effort to comply. To comply, the County is required to consider and respond to public comments. If there are choices offered by the County's Program, we can only find that the County shall choose one of them. Here the County did nothing. This lack of any response cannot be the interpretation of the County's Program adopted to comply with the GMA's mandate to consider and respond to public comment. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The County's own briefing and oral argument listed what was done in response to the Petitioner's approximately 30 letters provided at different times to the County as comment. The County attorney said: "The Record shows that the County has responded to Petitioner. In at least one instance, her suggestions led to adoption of changes she requested. In most of the other

instances, her public participation did not lead to results she wanted. That was the response." (Page 5, Respondent's Brief.) In this case the County did not respond other than refusing, silently, to adopt or consider the comments. This is not enough. The County, through its own Public Participation Program, is required to receive the comments of the public, consider them and respond to them. The record reflects no response to public comment, particularly to the comments of the Petitioners. [Board sets forth relevant portions of RCW 36.70A.020(11), RCW 36.70A.035(2), and RCW 36.70A.140].

These three statutes convince us that the legislature intended that public participation enjoy a high priority under the Growth Management Act. "This Board has always held that public participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c FDO p. 6 (May 21, 1999). At a minimum, this means that the public must have an opportunity to comment on amendments to the Planning Commission recommendation prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The amendments discussed herein were "considered" by the BOCC after the opportunity for public review and comment had passed. An additional opportunity for review and comment on the proposed changes was required before adoption by the BOCC. RCW 6.70A.035(2)(a). Cities and counties have discretion under RCW 36.70A.035(2) on how to give notice and how to provide opportunities for public comment. A hearing, for example, is not required in all cases although it should be considered where, as here, there are major changes covering the size of buffers. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Stevens County argues that the amendments were considered before and therefore the County is exempted from holding further public hearings on the amendments. The Board declines to accept this argument. First, RCW 36.70A.035(2) does provide an exemption to the requirement to provide an opportunity to review and comment on the amendments for correcting errors or clarifying language "without changing its effect." That is not the case here.

  Second, the amendments challenged by Petitioner change a policy from the Planning Commission's Recommended Critical Area Ordinance in a way that does not fall under any of the exemptions in RCW 36.70A.035(2)(b). The amendments change the size of buffers for Type one through five streams and Category two through four wetlands. These are substantial changes. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The fact that the County received letters from certain citizens requesting or discussing language adopted later as amendments, does not demonstrate that the amendments were within the scope of alternatives available for public comment. The Growth Management Act requires that the public have the opportunity to contribute its voice to the development of comprehensive plans and development regulations. Preceding that opportunity must be effective notice, reasonably calculated to alert the public to the alternatives that may become part of the final comprehensive plan. There was nothing in the notices for the public hearings, or in the text of the Planning Commissions recommended Critical Areas Ordinance that was the subject of the hearings that would alert the general public that the adopted amendments at issue were on the table for consideration. Nor was there any notice that the county had received letters requesting changes and inviting the public to review the letters and comment on the changes being considered.

The Board therefore finds that the changes to the CAO made at the time of final passage were not among the scope of alternatives available for public comment. The Board finds through clear and convincing evidence that the County has failed to follow its Public Participation Program and the Countywide Planning Policies and as a result is out of compliance with the GMA. *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- Petitioners further challenge the adequacy of the notice given to the public regarding the proposed amendment. The published notice provided only a reference to a proposed comprehensive plan amendment, with no reference to expansion of a "planning area, or definition of a specific area of land involved.

  In *City of Burien v. CPSGMHB*, 53 P.3d 1028 (2002), the Court affirmed the local government's responsibility to notify the public:

  > "In its order, the Board explained that while the requirement to consider public comment does not require elected official to agreed with or obey such comment, local government does have a duty to be clear and consistent in informing the public about the authority, scope and proposed planning enactments."

  The notice provided in this instance clearly does not meet that standard. Further, in response to a question during the hearing on the merits, Airway Heights acknowledged it has not adopted a GMA public participation plan. RCW 36.70A.130(2) requires local governments to establish a public participation process and procedure for plan amendments and broadly disseminate it to the public. The GMA further requires early and continuous public participation on proposed amendments of GMA plans and development regulations, RCW 36.70A.140. The failure to establish and follow a public participation plan is clearly erroneous. *Spokane County Fire District No. 10 v. City of Airway Heights, et al.*, EWGMHB Case No. 02-1-0019, FDO, (July 31, 2003).

- The GMA requires the City to have a process for receiving the public's suggested amendments to the Comprehensive Plan or its regulations. The GMA requires the City to entertain both general or specific plan and regulation changes. The City's requirement that limits the public's suggestions to general goals and policies is too restrictive. A process for receiving both specific and general suggestions is necessary. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003)

- The City's public participation policy limits GMA participation to amendments of the comprehensive plan and/or area-wide development regulations. (Ordinance No. 1286 N.S. Section 5). This is not adequate. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- The GMA requires public participation in the adoption or amendment of the City's comprehensive plan or the development regulations, which implement the plan. The amendment of development regulations requires public participation even when it affects a specific area. The Growth Board and the GMA, however, does not become involved in project review, permitting or project specific activities that are not the adoption of or amendment of the comprehensive plan or its development regulations. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- Many of the choices the Growth Management Act places before elected officials are essentially value driven, and hearing the opinions of citizens is an important duty for elected officials. Nevertheless, the Act also obliges local elected officials to be responsive to many other duties and it therefore does not follow that a local legislative enactment will always comport with popular public opinion. The Act's purposes are served when public participation is an interactive dialogue between local government and the public. Those purposes are not served by a soliloquy. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- The City's Growth Management Act public participation policy limits public participation in amendments of development regulations to only those that are area-wide. Because of such a limit, the City is out of compliance. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- Public participation in the development, adoption and amendment of a Comprehensive Plan and its Development Regulations is critical and mandatory under the GMA. Public participation is addressed in a variety of sections of the GMA. The GMA begins with public participation as one of its goals:

  > (11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts. RCW 36.70A.020.

  Wilma, v. City of Colville, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- The GMA recognizes a distinction between specific project review and comprehensive land use planning. "Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, not land use planning decisions." RCW 36.70A.470(1). The Legislature intended the above provision to provide for consideration of potential amendments to a local jurisdiction's GMA plan and regulations identified or discovered during project review. (citing *LMI v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, FDO (Jan. 8, 1999), at 10). *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Order on Compliance, (Aug. 12, 2003).

- Public participation issues may first be challenged when and if the county adopts a public participation program (PPP). Spokane County's PPP was reviewed in previous cases and found compliant. The only issue that could be now reviewed by this Board is whether the County is following their public participation program. The program itself cannot be challenged, only whether it is being followed. The Petitioner did not challenge whether the public participation was being followed. *Harvard View Estates v. Spokane County*, EWGMHB Case No. 02-1-0005, Order on Motion, (May 31, 2002).

- The County has developed its own Public Participation Plan and has been found compliant with the GMA. The County now is required to follow the plan. *1000 Friends of Washington/Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- These three statutes convince us that the legislature intended that public participation enjoy a high priority under the Growth Management Act. "This Board has always held that public

participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c FDO p. *6 of 16 (May 21, 1999). At a minimum, this means that the public must have an opportunity to comment on amendments to the Planning Commission recommendation prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). *1000 Friends of Washington/Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- The County contended that the amendments adopted were available for prior comment. This is not the case. The County seems confused on this point as well. The County first says this alternative was within the range of alternatives considered in the EIS. That alternative was "no action." Then the County contends the City got the majority of what it wanted when the UGA boundary was the city limits. This was not a concession to the City, as the GMA requires each city to be included within a UGA. *City of Spokane v. Spokane County and City of Airway Heights,* EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The County's argument that the challenged Comprehensive Plan is an initial plan, not an amendment and therefore exempt from the public hearing requirement of 36.70A.035 is without merit. The adopting Resolution itself states in two places that this is an "update" of the Comprehensive Plan originally adopted in 1980**.** *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- As we held in *1000 Friends and Neighborhood Alliance of Spokane, v. Spokane County, supra,* "amendment," as it's used in RCW 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, which is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in RCW 36.70A.140 that requires "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations…" *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The County's argument that the challenged Comprehensive Plan is an initial plan, not an amendment and therefore exempt from the public hearing requirement of 36.70A.035 is without merit. The adopting Resolution itself states in two places that this is an "update" of the Comprehensive Plan originally adopted in 1980. *1000 Friends of Washington/ Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- We agree with petitioners that "amendment," as it's used in 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, not exempted under RCW 36.70A.035(2)(b), requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in 36.70A.140 that requires "early and

continuous public participation in the development and amendment of comprehensive land use plans and development regulations . . ." *1000 Friends of Washington/Neighborhood Alliance of Spokane v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- These amendments were "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed change was required before adoption by the BOCC. RCW 36.70A.035(2)(a). Cities and counties have discretion under RCW 36.70A.035(2) on how to give notice and how to provide opportunities for public comment. A hearing, for example, is not required in all cases although it should be considered where, as here, there are many changes covering a wide variety of topics and geographic areas. *1000 Friends of Washington/Neighborhood Alliance of Spokane v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- Spokane County argues that the 21 textual amendments and 51 land use map amendments were not "substantial," and therefore the County is exempted from holding further public hearings on the amendments.

  The Board declines to accept this argument. First, RCW 36.70A.035(2) does not require that the amendments be significant. RCW 36.70A.035(2)(b)(iii) does provide an exemption to the requirement to provide an opportunity to review and comment on the amendments for correcting errors or clarifying language "without changing its effect."

  Second, all of the amendments challenged by Petitioner change a policy from the Planning Commission's Recommended Comprehensive Plan in a way that does not fall under any of the exemptions in RCW 36.70A.035(2)(b). For example, many of the textual amendments change "shall" to "should" and "require" to "encourage." This changes mandatory policies to discretionary policies. In some cases, policies were deleted altogether.

  The Board reaches a similar conclusion with respect to the 51 challenged amendments to the land use map. As Petitioners point out, just four of these map amendments re-designate over 1600 acres from the recommended Comprehensive Plan. The County asserts that the acreage involved is minimal when compared to the 1,128,832 acres within Spokane County and is therefore not a substantial change.

  We decline to accept this view. Again, there is no requirement that the changes must be substantial and no evidence the map amendments where merely correcting errors or otherwise fall under any of the exemptions in RCW 36.70A.035(2)(b). *1000 Friends of Washington/Neighborhood Alliance of Spokane v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- The fact that the County received letters from certain citizens requesting or discussing language adopted later as amendments, does not demonstrate that the amendments were within the scope of alternatives available for public comment. The Growth Management Act requires that the public have the opportunity to contribute its voice to the development of comprehensive plans and development regulations. Preceding that opportunity must be effective notice, reasonably calculated to alert the public to the alternatives that may become part of the final comprehensive plan. There was nothing in either the notices for the three public hearings, or in the text of the Planning Commissions recommended Comprehensive Plan that was the subject of the hearings that would alert the general public that the adopted amendments at issue were on the table for

consideration. Nor was there any notice that the county had received letters requesting comprehensive plan changes and inviting the public to review the letters and comment on the changes being considered. We therefore find that the 72 challenged amendments were not among the scope of alternatives available for public comment. *1000 Friends of Washington/Neighborhood Alliance of Spokane v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- Petitioners argue they had no opportunity to comment on the changes made to the development regulations subsequent to the Nov. 28, 2001, hearing. If, as Spokane County argues, the record was closed on Dec. 7, 2001, the public had no opportunity to comment on certain changes made. The Petitioners, as well as all citizens, are entitled to an opportunity to comment on amendments adopted by the County. *1000 Friends of Washington v. Spokane County*, EWGMHB Case No. 02-1-0006, Motion Order (June 7, 2002).

- Taken together, these three statutes clearly demonstrate the legislature intended that public participation be a high priority under the Growth Management Act. "This Board has always held that public participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c FDO p. 6 of 16 (May 21, 1999). This means, at a minimum, that the public must have an opportunity to comment on amendments to the Planning Commission recommendation prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The County's argument that the challenged Comprehensive Plan is an initial plan, not an amendment and therefore exempt from the public hearing requirement of 36.70A.035 is without merit. The adopting Resolution itself states in two places that this is an "update" of the Comprehensive Plan originally adopted in 1980**.** *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- We therefore find that the changes at issue in this case were "amendments" to the Comprehensive Plan within the meaning of RCW 36.70A.035(2)(a). These amendments were "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed changes was required before adoption by the BOCC. RCW 36.70A.035(2)(a). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case Mp/ 02-1-0001, FDO, (July 3, 2002).

- As we held in *1000 Friends and Neighborhood Alliance of Spokane, v. Spokane County supra*, "amendment," as it's used in RCW 36.70A.035(2)(a) refers to amendments or changes made to a planning document during the legislative body's consideration of the plan or development regulations. Each amendment or change made during this process, which is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in RCW 36.70A.140 that requires "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations…" *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- We therefore find that the changes at issue in this case were "amendments" to the Comprehensive Plan within the meaning of RCW 36.70A.035(2)(a). These amendments were "considered" after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed changes was required before adoption by the BOCC. RCW 36.70A.035(2)(a). *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The County contended that the amendments adopted were available for prior comment. This is not the case. The County seems confused on this point as well. The County first says this alternative was within the range of alternatives considered in the EIS. That alternative was "no action." Then the County contends the City got the majority of what it wanted when the UGA boundary was the city limits. This was not a concession to the City, as the GMA requires each city to be included within a UGA. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The GMA requires a fair opportunity for public comment before a final legislative decision is made. The County did not allow for the proper public participation required by the GMA. The public as well as the City of Spokane must have a reasonable opportunity to comment on the amendments to be considered by the County. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The City claims the County never consulted with the City of Spokane on the elimination of the UGA outside the city limits. The record reflects this fact. The Steering Committee reviewed the City's proposal and forwarded it to the County without recommendation. Index #24. The surprise removal of the unincorporated UGA from the City's proposal and total lack of discussion of this change flies in the face of the requirements of the above statute. The clear intent of this statute is to provide for discussion, disagreement and mediation services as sought by the City. The appearance of the subject amendments at the last minute without opportunity to explore agreement or mediation is a disappointment. The County clearly failed to comply with RCW 36.70A.110(2). The Board believes that the time needed for the additional public participation will allow for appropriate opportunity to explore agreement between the City and the County. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The GMA's provisions for public participation include both a goal and a number of requirements. The *relevant* public participation sections of the GMA are found in the following: *RCW 36.70A.020* Planning goals . . . Citizen participation and coordination; *RCW 36.70A.140* Comprehensive plans – Ensure public participation; *RCW 36.70A.035; RCW 36.70A.070; and RCW 36.70A.130*. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- RCW 36.70A.140 is the primary public participation requirement section of the Act. It directs local jurisdictions to provide early and continuous public participation in the development and amendment of comprehensive land use plans and implementing development regulations. Public participation is part of the development process preceding adoption, continues after adoption through the development of amendments, and again precedes adoption of amendments. This early and continuous [*enhanced*] public participation process applies to comprehensive plans *and* development regulations, as well as, *both* the initial development and adoption *and* amendment

of such plans and development regulations. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- *RCW 36.70A.035*_This 1997 amendatory section to the Act clarifies and emphasizes that effective notice is an essential and necessary part of the public participation requirements of the Act. It also applies to the entire GMA planning process. Effective notice precedes adoption. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- *RCW 36.70A.070*_This GMA section, which outlines the required elements for plans, emphasizes the importance of public participation in adopting and amending comprehensive plans. A plan cannot be adopted or amended without providing the opportunity for public participation. This section, which only addresses the requirements for contents of comprehensive plans, specifically emphasizes the application of RCW 36.70A.140 for adopting and amending comprehensive plans. This section of the Act does not apply to development regulations. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- *RCW 36.70A.130*, the GMA mandates that jurisdictions have a public participation program that outlines the procedures for consideration and adoption of proposed plan amendments. This process *amplifies* and *refines* the broader RCW 36.70A.140 public participation process that applies to the adoption and amendment of plans and development regulations. Providing the opportunity for public participation is a condition precedent to adoption or amendment of a plan. Here, a special process for amending plans is required. Although this section provides exceptions to the annual concurrent review limitation, none of these exceptions are excused from public participation requirements. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- The Board will not consider the question of whether the City Council's dealing with the Appearance of Fairness Doctrine is appropriate. This is not within our jurisdiction. However, the Appearance of Fairness Doctrine cannot be allowed to reduce the public participation mandated under the GMA. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- The Board has already found there was no compliant public participation plan and inadequate public participation in the amendment of the Comprehensive Plan. (FDO Sept. 4, 2002; 02-2-0007). City of Colville Resolution 13-01 is legislation that further restricts public input, i.e. $200 fee for suggested amendments. The City needs a process for the receipt of Comprehensive Plan suggestions other than through the submission of an amendment. The City needs to develop a process that gives the public an opportunity to be heard by the legislative body. To the extent that Resolution 13-01 frustrates public participation, it is out of compliance. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Amended FDO, (Dec. 5, 2002).

- A failure in the public participation process undermines the very core of the GMA and the legitimacy of adopted or amended comprehensive plan provisions and development regulations. The City must err on the side of involving the public in its GMA decisions. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, Amended FDO, (Dec. 5, 2002).

- A key objective of the Growth Management Act (GMA) is "to dramatically increase public participation in land use planning." *Wilma v. Stevens County*, 1999 WL 373802 *4 (1999). The foundation for public participation is built upon the statutory requirements of RCW 36.70A.020(11) (planning goal encouraging citizen involvement); RCW 36.70A.035 (notice

provisions); and RCW 36.70A.140 (participation programs). The GMA is a "bottom up" planning process designed to ensure that "citizens, communities, local governments, and the private sector coordinate with one another in comprehensive land use planning." *City of Des Moines v. Puget Sound Council,* 97 Wn.App. 920, 932, 988 P.2d 933 (1999). A failure in the public participation process undermines the "very core of the Growth Management Act" and the legitimacy of adopted comprehensive plan provisions and development regulations. The City of Yakima's process in this case is fatally flawed. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO,(Dec. 5, 2002).

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ocal government has a duty to be clear and consistent in the way it characterizes the authority, scope and purpose of proposed planning enactments. The court in *City of Burien v. Central Puget Sound Growth Management Hearing Board,* 53 P.3d 1028 (2002) set forth the general rule as follows: "In its order, the board explained that while the requirement to consider public comment does not require elected officials to agree with or obey such comment, local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning enactments." (Emphasis added.) This duty has been historically recognized by Growth Hearings Boards. *Friends of the Law v. King County,* 1994 WL 907890 (1994) (describing notice as "truth in labeling" and stating "[t]he county must also take great care to use concise, clear and unambiguous language in its notices"; *City of Burien v. City of SeaTac,* 1998 WL 472511 *6 (1998); *West Seattle Defense Fund v. City of Seattle,* 1995 WL 903147 *51 (1995) ("local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning amendments"); and *Happy Valley v. King County,* 1993 WL 839722 (1993) ("meaningful public participation depends upon local government being clear and consistent in the way it characterizes the authority, scope and purpose of the proposed planning enactments"). *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The onus is not placed on the public to decipher ambiguous or misleading notices. *Vashon-Maury v. King County,* 2000 WL 1717577 (2000) ("To place the onus on the public to find out about the hearing, as the county suggests, misplaces the duty on the citizen rather than on government"). *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The duty to provide clear and consistent information on planning enactments includes the mandate to provide "effective notice." RCW 36.70A140 ("public meetings after effective notice."). Effective notice is central to the planning process and "is a necessary and essential ingredient in the public participation process." See, e.g., *WRECO v. City of Dupont,* 1999 WL 33100212 (1999) ("it is axiomatic that without effective notice the public does not have a reasonable opportunity to participate"); and *Vashon-Maury v. King County,* 2000 WL 1717577 *6 (2000) ("the foundation for plan making is public participation"). The issuance of "effective notice" prior to public hearing is the lynchpin of the public participation process. In the absence of "effective notice," the entire process fails to meet legislative mandates for public participation and citizen-based determinations with respect to land use planning. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The City of Yakima failed to provide the community with "effective notice" of the proposed planning enactments. The confusion was perpetuated throughout the process. Despite

knowledge of confusion regarding the proposal, no effort was made to correct the deficiencies and involve the community in this important proceeding. This cuts to the "very core" of GMA and cannot be excused as "minor errors" or "technical flaws." *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- The implied commitment to an outcome impairs the subsequent public participation in the comprehensive plan process. Inherent in the concept of public participation is the necessity that decision makers exercise legislative authority in an independent and unencumbered manner. For the GMA process to work, the public must be heard before commitments are made by the local jurisdiction. Here, they were not. The development and signing of the Memorandum of Understanding was the first step in the development and enactment process for the comprehensive plan amendment. A true and independent public participation process cannot exist under the shadow of a nonpublic process carrying an implied commitment to a particular outcome. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- While the Board recognizes that a "Memorandum of Understanding" is important for a developer, those portions relating to the amendment to the Comprehensive Plan must be subject to the GMA public participation process. The vitality of public participation and independent decision-making cannot and should not be eviscerated by pre-existing, nonpublic contractual agreements. While arguably not a contractual obligation, the Memorandum of Understanding commits the City to a course of action and an implied outcome. If it did not do that, the developer would not commit the substantial sums of money necessary to proceed with the development. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County,* EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- Public opinion cannot be used to override a requirement of the GMA. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County,* EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- The Growth Management Act requires those jurisdictions planning under the Act to encourage citizen participation and involvement in the process.

  Planning Goal 11 encourages citizen participation throughout the growth management planning process. RCW 36.70A.140 requires each planning jurisdiction to "establish procedures providing for the early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." No similar standard is given for the designation of agricultural, forest, mineral resource lands, or critical areas as required in RCW 36.70A.170. *Ridge, et al. v. Kittitas County,* EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- Public participation is a fundamental concept and not to be taken lightly, but RCW 36.70A.330 (1) states that a compliance hearing is for the purpose of determining whether the local

government "is in compliance with the requirements of this chapter." The question to be determined is whether the governmental action substantively meets the requirements of the Growth Management Act. The question of public participation would be considered as a factor, but it would not necessarily invalidate the governmental action, if the test of substantive compliance were met. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Compliance Order (Jan. 30, 1995).

- The public participation process under review is a legislative process and as such is free of the constraints found when the same body serves in its quasi-judicial functions. The elected decision makers are free to communicate with constituents in ways normally associated with the legislative process, and be guided by the opinions formed as a result of these public or private contacts. This is the very essence of holding elected office. This does not mean, however, that local governments are free from constraints imposed by GMA. The legislative body is constrained in several ways by the Act. First, the Act removes the "no action alternative" and sets minimum standards for the ordinance. Second, the Act mandates that jurisdictions "encourage the involvement of citizens in the planning process," provided the public process may not override the requirements of the Act, or be contrary to the planning goals at RCW 36.70A.020 in any degree greater than necessary to resolve conflicts between the goals. "Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed." *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

- Public participation is a necessary and important element of the Act. "Public opinion cannot be used, however, to override a requirement of the Growth Management Act." *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- Public participation is a guiding concept of the Growth Management Act. It is through a viable, open public process that a county develops its plan. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 4-1-0015, FDO (Aug. 8, 1994).

- This is a legislative process. The elected decision makers are free to communicate with constituents in ways normally associated with the legislative process, and be guided by the opinions formed as a result of these public and private contacts. This does not mean, however, that the County is free from constraints imposed by the GMA. The Act sets minimum requirements that may not be overridden, and it requires that actions taken be consistent with the record. Local governments may choose from a wide array of alternatives, provided they employ a valid public process and the record substantively supports their decision. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- Public participation is a fundamental concept and not to be taken lightly, but RCW 36.70A.330 (1) states that a compliance hearing is for the purpose of determining whether the local government "is in compliance with the requirements of this chapter." The question to be determined is whether the governmental action substantively meets the requirements of the Growth Management Act. The question of public participation would be considered as a factor, but it would not necessarily invalidate the governmental action, if the test of substantive compliance were met. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Compliance Hearing Order (Jan. 30, 1995).

- The heart of the GMA's public participation requirement is RCW 36.70A.140 and .020(11). Local governments planning under GMA are mandated to establish procedures for early and continuous public participation in addition to any other existing statutory requirements. This Board has always held that public participation is the very core of the GMA. *Moore v. Whitman County*, EWGMHB Case No. 95-1-0002, FDO (Aug. 16, 1995).

- In addition to the public participation-planning goal, the public participation requirements and coordination requirements are expanded upon in subsequent sections of the Act, in particular RCW 36.70A.100, .110, .140 and .210. *City of Ellensburg v. Kittitas County*, EWGMHB Case No. 95-1-0003, FDO (Aug. 22, 1995).

- The RCW 36.70A.140 provision stating "errors in exact compliance with the_established procedures shall not render the comprehensive land use plan or development regulation invalid if the spirit of the procedures is observed" is addressing specific public participation concepts and citizen involvement in the GMA process. The language cited refers to the citizen involvement process addressed in Section 140. Neither does this language limit the requirements imposed by other sections of the Act, nor does it override the agreement into which the parties entered. *City of Ellensburg v. Kittitas County*, EWGMHB Case No. 95-1-0003, FDO (Aug. 22, 1995).

- Substantive compliance with the Act is the Board's first consideration. If it finds substantive compliance with the minimum requirements of the Act, its inquiry ends, except where the public participation process is at issue. If substantive compliance is arguable, the Board looks to evidence of procedural compliance. If the record shows valid consideration of the factors necessary for compliance, weight is given to the decision maker's position. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The Board finds that, while the Act requires that elected decision makers consider public opinion in formulating compliance with the GMA, public opinion cannot be used to override a requirement of the Act. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The Act does not prescribe how public participation shall occur, it provides only that there be extensive public participation. The County's division of the plan adoption process into the six geographical areas is a creative way to encourage comment from those affected and allows the plan to better coordinate the planning of such a diverse county. A single meeting or several meetings on a single plan might not have provided the same level of public comment. Such a complex and massive meeting might very well diminish the public input. We must look at the process and judge whether the spirit of the Act is carried out. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- The GMA does not require petitioners to concur or agree with the decisions made by the county. The Act requires a certain process be followed prior to the county making those decisions. If the county followed this process and the decisions are in compliance with the Act, they stand. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- RCW 36.70A.060(3) requires that interim resource lands and critical area designations and regulations be reviewed when adopting a comprehensive plan and implementing development regulations to insure consistency. Petitioners have the burden to show that the review was not

done and there are in fact inconsistencies. A public hearing is not required. This review is normally done by staff and reported to the legislative body. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- The State Legislature adopted separate public participation requirements when they adopted the direction to establish the IUGAs. If the Legislature had wanted the counties to meet the requirements of RCW 36.70A.140, it would have been easy for them to do so. It did not. The process of designating IUGAs does not require the same public participation required for the development and adoption of the comprehensive plan. *Howe v. Spokane County*, EWGMHB Case No. 97-1-0001, FDO (June 19, 1997).

- No one-size buffer or riparian management area fits all. However, criteria or standards must be specified for use when a site is reviewed and when an agreement is negotiated between the county and the landowner. There must also be no notice to interested parties or to the State, so they might provide input on the management of the land. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Compliance and Rescinding Invalidity Concerning Critical Areas (Sep. 2, 1998).

- The elected decision makers need not agree with all that participate or even with the majority of those speaking, as long as they comply with the GMA. They must, however, give the people of the county a chance to express their views on pending county action. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Order on Compliance and Rescinding Invalidity Concerning Critical Areas (Sep. 2, 1998).

- A key objective of the Growth Management Act is to dramatically increase public participation in land use planning. *Saundra Wilma, et al. v. Stevens County,* EWGMHB Case No. 99-1-0001c, FDO, (May 21, 1999).

- The Growth Management Act requires those jurisdictions planning under the GMA to encourage citizen participation and involvement in the process. Planning Goal 11 encourages citizen participation throughout the growth management planning process. RCW 36.70A.140 requires each planning jurisdiction to "establish procedures providing for the early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans."

  The GMA does not prescribe how public participation shall occur, it provides only that there be extensive public participation. The process must be examined to determine whether there is adequate public participation.

  This Board has always held that public participation was the very core of the Growth Management Act. Without it the legislative body cannot possibly know what its jurisdiction's needs are. *Saundra Wilma, et al. v. Stevens County,* EWGMHB Case No. 99-1-0001c, FDO, (May 21, 1999).

- The City contended they faced an emergency, yet the evidence before the Board demonstrates the claimed problem has been known for some time. The planning commission did not agree there was an emergency. The result of the process was a rushed-through change to the Comprehensive Plan with little public participation, little knowledge of the changes and their effects. There was not a public participation plan and little input.

Public participation is the flagship of the Growth Management Act and is jealously guarded by this Board. While there is a legitimate argument we do not have the jurisdiction to rule on the action by a City to declare an emergency, which is not the case here. The City claimed there was an emergency as provided for under RCW 36.70A.130 and as such they believed they could amend the Plan more often than every year and with less public participation. We do have the jurisdiction to review this situation. We find that an emergency did not exist which would allow the quick amendment of the Plan with less public participation than otherwise required. *Bargmann/Greenfield Estates Homeowners' Assn. v. City of Ephrata,* EWGMHB Case No. 99-1-0008c, FDO, (Dec. 22, 1999).

- The GMA requires that counties and cities "establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans…. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments." RCW 36.70A.140. Additionally, the GMA notes that "errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed. *Saddle Mountain Minerals, L.L.C., et al. v. Grant County;* EWGMHB Case No. 99-1-0015, FDO; (May 24, 2000).

- Public participation is a core of the Growth Management Act. RCW 36.70A.140 requires the development and wide dissemination of a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of the comprehensive land use plans and development regulations implementing such plans. The importance of the program cannot be minimized. This program must be not only developed but also widely disseminated to the public. A plan that is unknown to the public is not an adequate plan. *Wilma, et al v. Stevens County;* EWGMHB Case No. 99-1-0001c, 2nd Compliance Order (Mar. 14, 2001)

- The plan must also provide for early and continuous public participation. This means that the public must be involved at the beginning as well as throughout the process. The Comprehensive Plan and its development regulations are to be the result of the early and continual public input. The County's Program, while a good beginning, does not go far enough for the early and continual inclusion of the public in the process. *Wilma, et al v. Stevens County;* EWGMHB Case No. 99-1-0001c, 2nd Compliance Order (Mar. 14, 2001)

- Many cities and counties have used a variety of low-cost ways to include the public in the planning process. Examples include presentations of proposals in "town hall" style meetings throughout the County or at service club meetings, establishing a mailing list and mailing newsletters to interested parties, placing copies of proposals in public libraries or other public places, display advertisements or inserts in newspapers in the County, and encouraging media coverage of proposals. *Wilma, et al v. Stevens County;* EWGMHB Case No. 99-1-0001c, 2nd Compliance Order, (Mar. 14, 2001).

- The Board finds that the public participation requirements of RCW 36.70A apply to the adoption of Title 4 and 5. Titles 4 and 5 are subdivision ordinances. RCW 36.70A.030 includes subdivision ordinances as a development regulation. RCW 36.70A.140 provides for "early and

continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." The County has acknowledged that the subject titles are "the cornerstone of their comprehensive plan". (Dennis Sweeney, p. 2005 of County Record)

The County clearly intended that its own PPP apply. Paragraph 1 states (in part) "It applies to the adoption of …development regulations, …

While Titles 4 and 5 do not implement the comprehensive plan, they are in fact the "cornerstone" of that plan, and significantly impact the comprehensive plan and sub-area plans. To find that public participation was not required simply because the comprehensive plan had not been completed would defy the spirit and intent of the entire GMA. The Western GMHB states: "The goals and requirements of the GMA concerning public participation apply to all development regulations. Review of challenges to public participation involves a review of the entire record to determine if compliance with both the spirit of and strict adherence to RCW 36.70A.140 have been achieved" *CCNRC v. Clark County*, 92-2-0001 (FDO 9/23/98). *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

- RCW 36.70A.140 states, to ensure public participation, "procedures shall provide for …consideration of and response to public comments." (Emphasis added) The Board finds Stevens County's actions clearly erroneous in its failure to consider alternatives, and to respond to public comments, contrary to both County-wide Planning Policy #8 and RCW 36.70A. 140. While errors in exact compliance with the established program will not render the development regulations invalid, the County must provide for public participation that is appropriate and effective under the circumstances presented by the board's order. The County has taken almost two years in the effort to bring them into compliance. The County had adequate time for the public participation required in a situation such as this, but failed to do so. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

Publication

- RCW 36.70A.290(2)(b) requires counties to promptly publish notice of adoption of a Comprehensive Plan, development regulations, or amendment to either, after passage. The Central Growth Hearings Board, in *South Bellevue Partners Limited Partnership et al. v. City of Bellevue et al.*, No. 95-3-0055 (1995), held: "cities, like counties, must publish notice of adoption of a Comprehensive Plan or development regulation, or amendment to either, promptly after passage."

  A key purpose of the GMA is to provide certainty in the land use planning process. Promptness of publication promotes certainty. The publication of notice of adoption triggers the sixty-day period for filing petitions for review. Publication occurring over two years after passage of the Resolutions is not prompt and does not comply with the GMA's intent. *Wilma, et al. v. Stevens County*, EWGMHB Case No. 99-1-0001c, FDO, (May 21, 1999).

- RCW 36.70A.290(b) requires the County to "promptly after adoption, publish a notice that it has adopted the comprehensive plan or development regulation, or amendment thereto." This and other provisions referring to this required publication, does not prescribe the manner in which the

notice must be provided. The notice must, however, give notice to interested citizens that the comprehensive plan or development regulations, or amendments thereto, have been adopted. This publication marks the beginning of the 60-day period after which a petition challenging such adoption cannot be filed.

The reading of the "notice" or "minutes" published by Republic's only newspaper leaves this Board with the belief that a reader would understand that the challenged amendments were adopted. A petition challenging these amendments should have been filed before the passage of 60 days after such publication. The Growth Boards must presume that the actions of the County to comply with the GMA are valid. The Petitioner did not overcome this presumption. *Woodmansee v. Ferry County*; EWGMHB Case No. 00-1-0015, Order on Motions; (Sep. 8, 2000).

- The Growth Management Act clearly requires publication after the adoption of the comprehensive plan or development regulations, or amendment thereto. RCW 36.70A.290(2)(b). There is no requirement for publication of the County's review of the Ferry County Critical Areas Ordinance and the County's Comprehensive Plan. Had the County amended the CP or its regulations, the result would be different. The publication that did take place was not at the request of the County and is not the date at which we calculate the 60-days. The effective date of the action taken, and the start of the 60-day clock for filing a petition for review, is Feb. 5, 2001, the day the legislative action was taken. The petition in this matter was filed on April 12, 2001, beyond the 60 day allotted time. *Concerned Friends of Ferry County, et al. v. Ferry County*; EWGMHB Case No. 01-1-0008, Order of Dismissal; (June 8, 2001).

Quasi-Judicial

- The public participation process under review is a legislative process and as such is free of the constraints found when the same body serves in its quasi-judicial functions. The elected decision makers are free to communicate with constituents in ways normally associated with the legislative process, and be guided by the opinions formed as a result of these public or private contacts. This is the very essence of holding elected office. This does not mean, however, that local governments are free from constraints imposed by GMA. The legislative body is constrained in several ways by the Act. First, the Act removes the "no action alternative" and sets minimum standards for the ordinance. Second, the Act mandates that jurisdictions "encourage the involvement of citizens in the planning process," provided the public process may not override the requirements of the Act, or be contrary to the planning goals at RCW 36.70A.020 in any degree greater than necessary to resolve conflicts between the goals. "Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed." *Ridge, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0017, FDO (July 28, 1994).

Reconsideration

- The Board cannot address new arguments raised for the first time in a motion for reconsideration. *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Order on Petitioner's Motion for Reconsideration, at 4 (June 30, 2010)

- The County disagrees with the Board's decision, but there isn't an error in procedure or misinterpretation of fact or law as required by WAC 242-02-832(2). The Board weighed the evidence before it and determined the Record supported arguments presented ... *Futurewise v.*

Stevens County, EWGMHB Case No. 05-1-0006, Order on Reconsideration at 3-4 (Jan. 25, 2010)

- [T]he County's argument for reconsideration based on fact or law introduces no additional authorities but simply reargues the case, with the County reaching a different conclusion than the Board in application of the governing statutory and case law to the case at hand. However, despite this second attempt to convince the Board its development regulations will protect the critical areas … the Board is not persuaded that it erred in its application of the law or misinterpreted facts regarding critical areas under the GMA. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013 Order on Reconsideration at 6 (May 8, 2009)

- A Motion for Reconsideration/Clarification is not the time to present new evidence to the Board. Evidence supporting whether the County's action was compliant with the GMA was due prior to the issuance of the Board's Compliance Order, not after. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Order on Reconsideration at 4 (March 2, 2009).

- WAC 242-02-832 requires that a motion for reconsideration must be filed within 10 days of service of the Board's Order. As noted supra, the Board issued its decision in this matter on May 14, 2008, and the Intervenor's Motion for Reconsideration was received on July 11, 2008, almost 60 days after the Board issued its Order … [Intervenor] asserts a motion contesting jurisdiction may be raised at any time. While this is a true statement, the Intervenor is not seeking a Motion for Dimissal based on Subject Matter Jurisdiction; they are seeking reconsideration by the Board of an Order issued approximately two months ago. *Henderson, et al v. Spokane County,* EWGMHB Case No. 08-1-0002, Order on Motions at 4 (July 21, 2008)

- Even if the Board were to reconsider its decision, such a reconsideration is to be based upon the law in place at the time the Board issued its decision, not on a case issued months after the Board's decision. Intervenor's seek, with its citation to Coffey v. City of Walla Walla, application of an interpretation of the law that was not available for consideration at the time the Board made its decision and, thus, is irrelevant to the Board's determination on May 14, 2008. *Henderson, et al v. Spokane County,* EWGMHB Case No. 08-1-0002, Order on Motions at 4 (July 21, 2008).

- The Board views a hearing on a Motion for reconsideration as an opportunity for parties to point out factual or legal errors in the Board's decision. It is not an opportunity for the presentation of new evidence or re-arguing an issue. In their brief the County recognizes they can develop this record and have it considered at a later compliance hearing. The Board believes this is the proper way to develop the record and it would be inappropriate to grant the request to open the record for testimony and new evidence at the Motion for Reconsideration. *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Motion to Reconsider, (Sept. 29, 1999).

Record

- [T]he Index of the Record is taken as a good faith compilation of the documents considered by the County when taking the challenged action. The County is free to amend its Index [within reason] to accurately reflect these documents without seeking the Board's permission so long as

it is not supplementing with documents it did not considered during the adoption process. *City of Chelan v. Chelan County,* EWGMHB Case No. 10-1-0009, Order on Motion to Supplement at 5 (May 26, 2010)

- The Hearings Boards generally accept that a jurisdiction makes a good faith effort to document the proceedings and the materials used by the city or county in taking the GMA action. The Hearings Boards rely on counties and cities to include all relevant material into the record. With that said, the County can't sift through and select specific documents submitted through the public hearing process and essentially keep those it finds acceptable and either refuse to accept or return those documents it feels are not in its best interest (in this case, too lengthy or voluminous). *Futurewise v. Stevens County,* Case No. 05-1-0006, Compliance Order at 8 (Dec. 24, 2009)

- [The exhibit, a congratulatory letter from CTED, was a]post-adoption procedural component of the Record. These types of documents, such as a Notice of Adoption published in the official newspaper, are important parts of the Record although they were not *per se* considered by the County during the adoption process. *Larson Beach Neighbors/Wagenman v. Stevens County,* Case No. 07-1-0013, First Compliance Order at 6 (April 16, 2009)

- From the Record, parties draw the documents they are relying on to support their argument and attach these documents as exhibits to their briefs. Simply citing to a document listed in the Index of the Record does not bring the document into evidence before the Board. Nor does making general reference to documents previously filed with the Board. *Larson Beach Neighbors/Wagenman v. Stevens County,* Case No. 07-1-0013, First Compliance Order at 6 (April 16, 2009)

- [W]ebsite images are merely a "snapshot" of the information posted at a given time. And, for that reason, inherently unreliable as to their accuracy and generally not accepted as evidence. *Larson Beach Neighbors/Wagenman v. Stevens County,* Case No. 07-1-0013 Order on Motion to Supplement, at 3 (March 18, 2009)

- *See also, City of Zillah v. Yakima County,* Case No. 08-1-0001, FDO at 5-7 (August 10, 2009)(Explaining the Record and noting that arguments based on exhibits not properly before the Board will be left unsupported and that proper citation to the Record supporting arguments are needed).

- General discussion as to the Record and Index of the Record. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 7-8 (Oct. 6, 2008).

- In general, the *Record* is all of the documents considered by a jurisdiction in taking the challenged action. The Record generally includes minutes of meetings before commissions, committees, or councils, technical and scientific documents, correspondence, laws and regulations, and public comments (oral and written). The *Index to the Record* is simply a table of contents for the Record and serves as a listing of documents which may be offered into evidence without objection. The Index can be arranged chronologically or by topic and should sufficiently identify the information contained within the record. The Board does not direct the contents of the Record; rather it accepts it as a good faith effort by the jurisdiction to document the proceedings and the materials used by the County in taking the GMA action. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 8 (Oct. 6, 2008).

- [T]he GMA does not prohibit a petitioner from utilizing documents they have retained within their own files so long as those documents are included within the Record for the current proceeding. The reasoning behind this is that to require a petitioner to secure new copies would be both inefficient and a waste of resources. But, the parties are reminded the burden remains on the party representing these documents are, in fact, part of the Record, and to show not only that the documents are true and accurate copies of the documents contained within the Record, but to accurately reference those documents with the appropriate Index Number. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 9 (Oct. 6, 2008).

- Although the contents of the Record are the province of the County, this does not permit the County to amend the Record at will to incorporate documents which were irrefutably not before the County when making the decision under challenge. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 10 (Oct. 6, 2008).

- The County is required to file with the Board an index of all material used in taking the action which is the subject of the Petition for review. WAC 242-02-520. Not all of the documents included in such a Record are relevant to the issues raised in the Petition, yet they are part of the record required to be indexed. It would be difficult and time consuming to review each item in the Record and to determine its relevancy. It is much more efficient in such cases to review their relevancy or the weight of such evidence if and when that particular document is offered as evidence before the Board. *Miotke v. Spokane County,* EWGMHB Case No. 07-1-0005, Order on Motions, at 4 (June 11, 2007).

- The County is responsible for filing with the Board and [serving] a copy on the parties an "index of all material used in taking the action, which is the subject of the petition for review." WAC 242-02-520. The entire record contains all documents used in taking the action… if requested; this record is available at the County. The record provided to the Board … are those exhibits cited in the briefs and attached to them … The Board agrees with the Respondent that the Petitioners should have included any and all documents or portions thereof that were important to their case with their Hearing on the Merits brief. To request the County to include all documents in the record in support of [Petitioners] argument is not required by WAC 242-02-52001, which states, (1) Except as otherwise provided in these rules, the evidence in a case shall consist of the exhibits cited in the briefs and attached thereto. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order on Clarification, at 7 (April 30, 2007).

- The land capacity analysis required in RCW 36.70A.110(1) and (2) is a vital component of the work that must be shown. *CTED v. Snohomish County,* ***(CTED* I**), CPSGMHB Case No. 03-3-0017, FDO, (Mar. 8, 2004), at 20-22.

  The record before the Hearings Board clearly shows that the County did not perform any land quantity analysis. Resolution No. 2005-0365 makes no mention of an analysis or review of land quantity in its findings or decision. The County also conceded in the Hearing on the Merits that the County did no land quantity review. The developers/Intervenors supplied the only analysis alleging a need for additional land within the UGA for Spokane. This report was included in the Record without any verification of the claims contained therein. This is not enough. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- The County did nothing to verify whether or not the present UGA is sufficient for the existing or future population growth since it designated its original UGAs. The records reflect only the unverified contentions of the developer that additional lands are needed. The County did not show their work and in fact does not claim to have done anything itself to ascertain the need to expand the County's UGA. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- WAC 242-02-540 provides that the Board will review only the record developed by the County in taking the action that is the subject of review by the Board. A party by motion may request that a board allow such additional evidence as would be necessary or of substantial assistance to the board in reaching its decision, and shall state its reasons. WAC 242-02-610 allows testimony to be considered by a board, however, such testimony is rarely allowed. We have no motion to allow such testimony or new evidence. There is grave danger that much evidence outside the record will be solicited from the live witnesses that is unknown to the Board and would be disruptive to the hearing.

  The motions to require these people to attend for examination by the Petitioners are denied. The Petitioners are advised that they can develop the points raised in their briefing. Briefing is where arguments are made and interpretations are argued. Many of the points sought may be addressed in the brief of the parties. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, Order on Motions, (Sept. 1, 2005).

- The Board believes the record should incorporate, not only the exhibits presented during the Amendment process, but also the exhibits presented during the initial adoption of Title 13, which is the foundation for the Amendment. Those who wish to Petition or Intervene should not have to submit duplicative documents during an amendment process that were already submitted as part of an extensive record of the original ordinance. Title 13 and the Amendment to Title 13 are synonymous. *Simmons, v. Stevens County, et al.*, EWGMHB Case No. 04-1-0011, Order on Motions, (Dec. 10, 2004).

- According to the record, written documents were to be in June 25, 2004, by 4:30 PM. The public hearing held on July 6, 2004, by the BOCC was for public testimony only. There is a difference between written and oral testimony. Clarity is paramount in government instructions. If the Board of County Commissioners had intended to allow additional written documents on July 6, 2004, they should have indicated as such. Other citizens may have taken the directive given on June 25, 2004, as final and decided not to submit additional exhibits. Allowing these three exhibits is unfair to the citizens who followed the rules given on June 25, 2004. *Simmons v. Stevens County, et al.*, EWGMHB Case No. 04-1-0011, Order on Motions, (Dec. 10, 2004).

- Recently the Court of Appeals decided a case similar to *HEAL, supra, Whidbey Environmental Action Network v. Island County et al*, 118 Wn. App. 567; 76 P.3d 1215, (WEAN) and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN* the County appealed the WWGMHB's decision finding a 25-foot buffer for type 5 streams failed to comply with the GMA for 5 steam buffers. The Court found the "County fails to point to any part of the record outlining the applicability of unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature. *HEAL* requires that evidence of BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations… BAS does not support the use of a 25-

foot buffer." (*WEAN, supra* at p. 584). *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- RCW 36.70A.172(1) requires that best available science (BAS) shall be included "in developing policies and development regulations to protect the functions and values of critical areas." The Court of Appeals, Division I, held "that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations." (citing *HEAL v. CPSGMHB*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999)). *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Board errs on the side of inclusion rather than exclusion with exhibits existing prior to adoption. If the documents existed prior to the adoption of the Ordinance, it is often difficult to determine if they were in fact used. The County claims these exhibits were used.

  However, the Board is hesitant to supplement the record with items that did not exist at the time the County Commissioners adopted Ordinance #2001-10. Supplemental evidence will be admitted only if it is necessary or of substantial assistance to the board in reaching its decision. Exhibits such as the summaries, written arguments, or explanations prepared by staff are particularly problematic. The declaration by Connie Krueger, A.T.C.P., while helpful to the attorney for the Respondent, is clearly argumentative and the bulk of it should not be allowed to supplement the record. However, sections 10, 11, 12, and 13 of the Krueger declaration are helpful to the Board and should be admitted. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB 01-1-0015c, Order on Motion to Supplement (March 13, 2002).

- The Board notes the legal advertisement for consideration of the development regulations establishes a deadline of Nov. 28, 2001, for receipt of written and oral comments. At the public hearing on that date, the Board of Commissioners extended the time for receipt of written comments to Dec. 7, 2001. The absence of a deadline within a separate display advertisement does not change the officially established deadline. The Board must therefore conclude that the letter dated Dec. 26, 2001 was submitted after the time for comments was closed, and cannot now be used as a basis for the Petitioners standing. Petitioners have no basis for challenging the substance of the draft development regulations under consideration at the Nov. 28, 2001, hearing. *1000 Friends of Washington v. Spokane County*, EWGMHB Case No. 02-1-0006, Motion Order (June 7, 2002).

- This material may be admitted if it is part of the record or will be of substantial assistance to the Board in rendering its decision. The information that is old information now in a more usable format, should be admitted to supplement the record. The new information should be admitted to supplement the record but only to the extent it responds to new information offered by the Petitioners or concerns the Petitioners' request for a finding of invalidity. *City of Walla, et al., v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, Order on Motion to Take Official Notice, (Oct. 18, 2002).

- The Board finds there is no evidence in Yakima County's record to support a change in circumstances, nor any discussion in the findings and conclusions issued by the Planning Commission and the County Commissioners that identify adequate changed circumstances. See PC 82 (Planning Commission Findings and Conclusions); Ordinance 1-2002. The Board also finds there is no mapping error warranting a change. *Wenas Citizens Association et al., v. Yakima County, et al.*, EWGMHB Case No. 02-1-0008, FDO, (Nov. 4,2002).

- The GMA contemplates and requires a long-term planning process that is build upon public involvement and participation. The directive is for "early and continuous public participation in the development and amendment of comprehensive plans." RCW 36.70A.140. While the Board recognizes that a direct or implied commitment is important to a developer, such commitments cannot be made outside of the public participation process. *Neighbors for Responsible Development, v. City of Yakima,* EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- Because Board decisions must be based on the record, it is helpful to both the Boards and the citizens if local governments show their work and indicate the parts of the record upon which they have relied. The concept of "showing your work," is neither complex, nor burdensome. It involves a reasoned discussion of the issue in question, the selection of a choice that meets the minimum requirements established by the Growth Management Act, and is supported by the record. It need not require the use of consultants and outside experts, the local people and their government officials know their area. *Save Our Butte Save Our Basin Society, et al. v. Chelan County,* EWGMHB Case No. 94-1-0015, Compliance Order (Jan. 30, 1995).

- A petitioner has the burden of proving by a preponderance of the evidence that a plan does not comply with the Act. The initial burden of persuasion is met when a petitioner presents sufficient evidence which, standing alone, would overcome the presumption of validity. Once that level has been reached the burden of producing evidence to rebut the initial showing does shift to the respondent local government. Because the Board's review is "on the record," that rebuttal evidence must be contained in the record absent the rare instance of consideration of supplemental evidence. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- RCW 36.70A.290(4) mandates that the Board base its decision on the record developed by the county with one limited exception. The Board has consistently held to this mandate. It has not, nor does it now choose to enter into a de novo review. As the County suggests there may be problems with the record, but it is the record of this case. The Act requires the Board to make its decision on this record. *City of Ellensburg v. Kittitas County*, EWGMHB Case No. 95-1-0003, FDO (Aug. 22, 1995).

- The County must specify which documents are objectionable and must provide a list to Petitioner of the documents for which copies are requested. The Petitioner was ordered to resubmit a list of exhibits that was sequentially numbered for the case at hand. *Woodmansee v. Ferry County*; EWGMHB Case No. 00-1-0006, Order on Motions; (July 31, 2000).

Recusal

- The County makes no allegation that Mr. Roskelley would be bias or prejudice. They do contend, however, that, because he has already rendered a decision in his role as a County Commissioner, the County feels that he cannot be impartial in hearing and considering the subject appeal.

  The Board does not find that Mr. Roskelley has personal bias or prejudice signifying an attitude for or against a party in this matter. The fact that as a County Commissioner he has ruled on a previous application similar to this one, does not evidence a personal bias or prejudice against a party. Mr. Roskelley made a decision that may have indicated his leanings as a decision-maker with those particular facts, but there is no evidence of actual or potential bias to support an appearance of fairness claim. *State v. Post*, 118 Wn.2d 596, 619, 826 P. 2d 172 (1992). The

County Commissioners, without Mr. Roskelley, again considered the matter and a different determination was made. Mr. Roskelley will consider the evidence before this Board, apply it to the laws governing the GMA and make a determination based upon those facts and law. The evidence before the Board does not require John Roskelley's recusal. *Moitke/NEighborhood Alliance of Spokane v. Spokane County, et al.*, EWGMHB Case No. 05-1-0007, Order on Motion for Recusal, (Sept. 28, 2006).

- A thorough study of potential disqualification considerations was made. This included and was not limited to, bias, prejudice, interest, bias or prejudice concerning a party, personal knowledge of disputed facts, former lawyer or witness in the case, economic interest in the subject matter, whether he was an officer or trustee of a party, whether he was a spouse or family member residing in the household, and consideration of the Appearance of Fairness Doctrine. Mr. Roskelley has determined he has no prejudgment or bias in this case and can render a fair and impartial decision. *Futurewise v. Spokane County, et al.*, EWGMHB Case No. 05-1-0005, Order on Motion for Recusal, (Sept. 6, 2005).

- The Washington State Supreme Court in *Buell v. City of Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972) held that "A decision-maker may be challenged under this doctrine (Appearance of Fairness Doctrine) for "prejudgment concerning issues of fact about parties in a particular case…[or] partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy…". Prejudgment and bias are thus to be distinguished from the ideological or policy leanings of a decision-maker. A challenger must present evidence of actual or potential bias to support an appearance of fairness claim. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, amended, 837 P.2d 599 (1992). *Futurewise v. Spokane County, Respondent, et al.*, EWGMHB Case No. 05-1-0005, Order on Motion for Recusal, (Sept. 6, 2005).

- Mr. Roskelley's decision in 2002, concerning an "identical application" was the policy leanings of a decision-maker, not prejudice or bias concerning issues of fact about parties in a particular case or partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party. Thus, both he and the Board feel confident Mr. Roskelley can render a fair and impartial decision based on the facts of the case. *Futurewise v. Spokane County, et al.*, EWGMHB Case No. 05-1-0005, Order on Motion for Recusal, (Sept. 6, 2005).

Recreational Use

- The Washington State Supreme Court decision, *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 562 (2000), finding the GMA's agricultural conservation mandate dealt with the specific issue of whether or not a recreational use on agricultural resource lands complied with RCW 36.70A.177. RCW 36.70A.177, is also at issue in this case. Specifically, whether or not the County's new policies and regulations allowing cluster development on agricultural resource lands of long term commercial significance complies with this statute. [Board sets forth relevant portion of RCW 36.70A.177].

  Futurewise and Citizens for Good Governance v. Walla Walla County, EWGMHB Case No. 05-1-0001, FDO (2005).

- The Board has carefully reviewed the Supreme Court decision in *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., Supra*. Because of that decision, the Board is compelled to find the County is out of compliance. King County, in that case, greatly limited the uses,

prohibited all but a few structures and emphasized the temporary status of such uses. Yet the Supreme Court found that the County's proposed action to convert agricultural land to active recreation uses does not comply with the Act's mandate to preserve agricultural lands. The Court found that the explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that conserve agricultural lands and maintain and enhance the agricultural industry.

In the cited case, the court concludes that "in order to constitute an innovative zoning technique consistent with the overall meaning of the Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry." Id p. 142. The Court further points out that "The statute encourages counties to limit innovative techniques 'to lands with poor soils or otherwise not suitable for agricultural purposes'" id p.142. The Court went on to say, "it should not be read that the County may encourage nonagricultural uses whether or not the soils are poor or unsuitable for agriculture." Id p. 142. Such innovative zoning techniques are limited to lands with poor soils or otherwise not suitable for agricultural purposes. The Court pointed out that some of the land in their case was in fact Prime soils. This finding does not limit the decision to only Prime soils but rather was a statement that "The evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." Therefore, we are forced to conclude the properties in our case do not qualify for 'innovative zoning techniques.'" While the Walla Walla County development regulations are for Agricultural Resource Lands that are not Prime or Unique, the Courts ruling would still apply to the Walla Walla Ordinance provisions. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO, (Nov. 26, 2002).

The County's claims that other goals of the Act, namely the requirement to provide for recreational opportunities, could override the requirement to protect agricultural resource lands was also addressed by the Supreme Court. The Superior Court, in their review of the case, had ruled that under RCW 36.70A.177, the location of recreational uses on Agricultural Resource Lands was authorized as an innovative zoning technique. The Court of Appeals and Supreme Court reversed this interpretation. "However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques." …"Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture." As in the King County case above, we find here " the evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." While the Board recognizes the circumstances in Walla Walla County are different from King County, we cannot distinguish the Supreme Court ruling in *King County v. CPSGMHB, supra*, to permit the objected-to recreational uses allowed in the Walla Walla County Ordinance No. 269. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No.02-2-0012c, FDO, (Nov. 26, 2002).

- RCW 36.70A.070(1) requires each county to "designate the general distribution and general location and extent of the uses of land, where appropriate, for…recreation…" The County was not required to develop parks and recreational areas where not necessary. Here the County believes there are sufficient recreation resources available. *City of Moses Lake v. Grant County;* EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 16, 2000).

Remand

- Both the Superior Court and the Court of Appeals affirmed the Board's holding. Thus, upon termination of the review before the courts, Stevens County was required to take legislative action to achieve compliance with those provisions of the GMA noted in the Board's FDO. *Futurewise v. Stevens County,* Case No. 05-1-0006, Compliance Order at 11 (Dec. 24, 2009)

- *See also, Loon Lake Property Owners Assoc., et al v. Sevens County,* Case No. 03-1-0006c, Order on Remand (June 8, 2009)(Noting that it is the Board, not the court, which is charged with finding compliance or non-compliance with the GMA).

- In the event of a "not in compliance" finding, the Board is limited to remanding the matter to the county and specifying a reasonable time not in excess of one hundred and eighty days within which the county shall comply with the requirements of chapter 36.70A RCW. *No. Cascades Conservation Council/Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB Case No. 93-1-0001, Order on Dispositive Motions (May 21, 1993).

Res Judicata

- [T]he doctrine of res judicata may be applied in proceedings before the Growth Management Hearings Boards. *Turtle Rock HOA v. Chelan County,* EWGMHB Case No. 07-1-0001, FDO, at 8 (July 17, 2007).

- The Respondent devoted much of their brief to the argument that the Petitioner's claim is barred by the doctrine of *res judicata* and collateral estoppel. Petitioners, in their reply brief, responded with arguments that these doctrines do not apply in this case.

  The Board believes the evidence does not show that the Petitioner, Futurewise, was before us on this issue at an earlier date, nor does the Board believe the specific issue being decided in this case has been decided before in another case. The Board's decision will be made upon the facts presented and with the parties before us at this time. Neither res judicata nor collateral estoppel applies in this case. *Futurewise, v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO, (Jan. 13, 2006).

Resolutions

- The City of Chewelah adopted its Public Participation Plan by Resolution. The Petitioner objected and contended that such a document needs to be adopted by Ordinance. The City declared that an Ordinance and a Resolution have the same effect and are enforceable as the law. The Board finds that the Resolution adopting Chewelah's Public Participation Plan has the effect of law and the City has adopted a Plan as required by the Growth Management Act. Any objection to the substance of the Plan must be raised in a new petition. *Playfair v. City of Chewelah* EWGMHB Case No. 03-2-0005, Order of Dismissal (June 23, 2004)

- For the City of Colville, a resolution has the effect of law. In fact, the City used such a resolution to set the rules of proceedings for the City Council. The Public Participation Policy adopted by resolution here will have the effect of law and is proper. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- It has been recognized that an agreement that influences or dictates the form, substance or timing of amendments to a comprehensive plan is subject to Board jurisdiction and may be violative of GMA public participation requirements. (See *City of Burien v. Central Puget Sound Growth Management Hearings Board*, 113 Wn.App. 375, 384, 53 P.3d 1028 (2002)). *Neighbors for Responsible Development, v. City of Yakima*, EWGMHB Case No. 02-1-0009, FDO, (Dec. 5, 2002).

- This Board has found counties to be in compliance with the GMA even if adoption occurs by Resolution if that jurisdiction can show resolutions have the effect of law for that County.

  Stevens County contends all their laws are adopted by resolution and it has always been that way. The County is not found to be out of compliance because they adopted these GMA provisions by Resolution rather than Ordinance. Because this matter has been remanded for other defects, the County is directed, at the first compliance hearing to present evidence, which will show the appropriateness of adopting these provisions by resolution, rather than by ordinance. *Wilma, et al. v. Stevens County*, EWGMHB Case No. 99-1-0001c, FDO, (5-21-99).

- This Board has found counties to be in compliance with the GMA even if adoption occurs by Resolution if that jurisdiction can show resolutions have the effect of law for that County. . *Concerned Friends of Ferry County v. Ferry County*; EWGMHB Case No. 00-1-0001, FDO; (July 6, 2000)

Resource Lands – See Natural Resource Lands

Riparian Areas

- The Board does not find that the County improperly is calling the buffer area, "Riparian Areas". This is a better description than "setback" that had been previously used instead of "buffer". This wording clearly has authority in case law and regulations. (WAC 365-190-080 and Case No. 95-3-0047 *Pilchuck Audubon Society v. Snohomish County*). While the Board would prefer the use of "buffer" to avoid confusion, the County's use of Riparian Areas does not cause the County to be out of compliance. *Concerned Friends of Ferry County, et al. v. Ferry County,*, EWGMHB Case No. 04-1-0007c, FDO, (Dec. 21, 2004).

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Association, et al, v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Motions on cases nos. 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- The Record shows that the County, in Ordinance 2001-09, provided for the protection of riparian areas with the "Riparian Areas Protection Attachment". This attachment does not at this time exist. The County's plan to adopt such amendment in the future is not adequate at this time. The riparian areas are not protected. *Concerned Friends of Ferry County/ Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

RAID-Rural Areas of More Intensive Development [LAMIRD]

- *See also Keyword – **LAMIRD***

- There are three types of LAMIRDS allowed under RCW 36.70A.070(5)(d)(i), (ii) and (iii). For simplicity, they will be referred to as Type I, II or III. In our previous orders we have referred to these as RAIDS. The Board now wishes to refer to these as LAMIRDS, as the Central and Western Hearings Boards have done. The previous acronym, RAIDS (Rural Areas of Intensive Development), left out the letters "L" and "M". The letter "L" which is for the word "limited" in "Limited Areas of More Intensive Rural Development", is a key part of this exception to rural development. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The GMA's key goal has been to direct urban development into urban growth areas and to protect the rural area from sprawl. In 1997 the State Legislature amended the GMA to make accommodation for "infill, development or redevelopment" of "existing" areas of "more intensive rural development," however such a pattern of growth must be "minimized" and "contained" within a "logical outer boundary." This cautionary and restrictive language evidences a continuing legislative intent to protect rural areas from low-density sprawl. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The provisions of (c)(ii) (visual compatibility) and (iii) (reduce low-density development) do not apply to those LAMIRDS designated under (d)(i). This section does not allow increased low-density development, but merely removes the reduction requirement. The logical outer boundary (LOB) provisions of (d)(iv) apply only to LAMIRDS designated under (d)(i) (Type I). Type II and III both allow "new development" and "intensification of development." Type I LAMIRDS do not allow "new development" except as it may be part of "infill, development, or redevelopment." *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- Type I LAMIRDS consist of certain "existing areas" defined in RCW 36.70A. 070(5)(d)(v). The allowed uses and areas include commercial, industrial, residential or mixed-use areas "whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments." An "industrial area" is not required to be principally designed to serve the "existing and projected rural population." Thus, all other Type I LAMIRDS (commercial, residential, or mixed-use) must be principally designed to serve the "existing and projected rural population." In designating and establishing LAMIRDS under Type I a county must "minimize and contain" ((d)(iv)) the existing area or existing use. A prohibition against including lands within the LOB that allows a "new pattern of low-density sprawl" for the existing area or existing use must be adopted ((d)(iv)). Type I LAMIRDS, being neither rural nor urban, allowing existing areas or existing uses, must always be "limited" i.e., minimized and contained. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- In establishing the LOB for an "existing area" (but not for existing uses) under RCW 36.70A.070(5)(d)(iv) a county is required to "clearly" identify and contain the LOB. That identification and containment must be "delineated predominately by the built environment," but may include "limited" undeveloped lands. We agree with the Western Growth Board and conclude that legislative intent, as determined from reading all parts of the GMA with particular

emphasis on (5)(d), means the "built environment" only includes those facilities, which are "manmade," whether they are above or below ground. To comply with the restrictions found in (d), particularly (d)(v), the area included within the LOB must have manmade structures in place (built) on July 1, 1991. (*City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c, FDO, Feb. 6, 2001.) *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The provisions of RCW 36.70A.070(5) (d)(v) (existing area or existing use as of July 1, 1990) apply to all LAMIRDS whether designed under (d)(i) (ii), or (iii). Thus, for any "intensification" allowed under Type II or Type III the designated use or area must have been in existence on July 1, 1990 (or later date under the provisions of (5)(B) or (C)). This restriction does not apply to "new development" authorized under Type II or Type III. Anytime the phrase "existing" is used to define an area or use, the provisions of RCW 36.70A.070(5) (v) (7-1-90 or as here, 7-91) modify that phrase. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- Under Type II, small-scale recreation or small-scale tourist LAMIRDS are authorized. Commercial facilities to serve those LAMIRDS are allowed. The intensification or creation of small-scale recreational or small-scale tourist uses must rely on a rural location and setting. Such LAMIRDS cannot include new residential development. The uses need not be principally designed to serve the "existing and projected rural population." "Public services and public facilities" must be limited to those "necessary to serve" only the LAMIRD. Such public services and public facilities must be provided "in a manner that does not permit low-density sprawl." *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The LAMIRDS allowed under Type III authorize intensification or creation of "isolated cottage industries and isolated small-scale businesses." These need not be principally designed to serve the "existing and projected rural population" and non-residential uses. They must provide job opportunities for rural residents. Public services and public facilities have the same constraints as those provided under Type II.

  The allowance of small-scale recreational and small-scale tourist uses, isolated cottage industries and isolated small-scale businesses are also subject to the provisions of RCW 36.70A.070(5)(a), (b), and (c), as well as the definitions contained in RCW 36.70A.030(14) and (15). *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The County designated 37 LAMIRDS as combinations of Type I, II and II. The County did not separate them and the Board must believe the County intends all three types to be included in each LAMIRD. The County contends the GMA does not require each LAMIRD be segregated into a separate designation as a Type I, II or III. They further cite a Western Board decision, *City of Anacortes v. Skagit County*, Compliance Order, WWGMHB No. 00-2-0049c, as supporting this contention. This is not correct. The GMA identifies three types of Limited Areas of More Intensive Rural Development. The County must chose, which LAMIRD is appropriate for the specific site. To hold otherwise would be to ignore the law and the cases that interpret the law. *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The statute, RCW 36.70A.070 (5)(d) is the best place to start to find that the GMA established three separate LAMIRDS. The Statute talks of the rural element to "allow for limited areas of

more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:"

The argument that there are three separate types of LAMIRDS is clearly supported when you examine the three paragraphs that are set apart, listing the type of LAMIRD and the limitations for each type. To have all three types in the same space without boundaries between them would not only be confusing but virtually impossible. Type I is a mixed-use area that can have residential development infill. This must be bound by logical outer boundaries delineated predominately by the built environment. The same case cited by the County, *Skagit, Supra*, asserts that these limitations, RCW 36.70A. 070(5)(d)(iv), do not apply to Types II and III. Further, Types II and III can have new development, isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population contrary to Type I. Also Types II and III do not allow residential development. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- The County cited dictum found in *City of Anacortes v. Skagit County,* Compliance Order, WWGMHB No. 00-2-0049c. This was dictum without legal argument and is not precedent for this Board. However, the Western Hearings Board later ordered Mason County to specify which of the three types of LAMIRDS theirs fit into. *Dawes, et al v. Mason County,* WWGMHB No. 96-2-0023c, Compliance Order, Aug., 14, 2002. That case made it clear that the Western Hearings Board felt this individual designation was needed to be able to determine if there is compliance. *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, Order on Compliance, (May 6, 2004).

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997. The Legislature amended RCW 36.70A.030, adding a new subsection, which provides: RCW 36.70A.030(14) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan. *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The Legislature at the same time amended RCW 36.70A.070, which clarified the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without such limitations and conditions, more intense rural development would constitute an impermissible pattern of urban growth in the rural area. *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (iii), (iv), and RCW 36.70A.110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for a UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that, even the "innovative techniques" for rural development must not allow urban growth. RCW

36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. RCW 36.70A.070(5)(d)(iii). *Citizens for Good Governance, et al, v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- While the Board recognizes that RCW 36.70A.070(5) provides that "some accommodation may be made for infill of certain 'existing areas' of more intense development in the rural area, that infill is to be 'minimized' and 'contained' within a 'logical outer boundary.'" Bremerton CPSGMHB Case No. 95-3-0039c (coordinated with Case No. 97-3-0024c), Finding of Noncompliance, at 24. *Citizens for Good Governance, et al., v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The County argued that its decision to establish RAIDs is justified by its consideration of local circumstances, as permitted by RCW 36.70A.070(5)(a). This provision allows counties, in developing the rural element of the plan, to consider local circumstances "in establishing patterns of rural densities and uses." However the County provides no written record of the local circumstances identified. The quote referred to by the County in their brief, speaks of the Blalock area being characterized by land uses which include small-scale farms, single-family homes, limited commercial uses and open space. Very little more is found that might relate to the creation of the boundaries of the RAID and what is included therein. The County has failed to properly limit the area of the RAID. *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- If the County used local circumstances to guide them in the development of the rural element, there must be "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA]." RCW 36.70A.070(5)(a). The County has made no attempt to explain in writing how the rural element harmonizes the planning goals. Absent the Act's mandated written explanation, the County has not complied with RCW 36.70A.070(5)(a). *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Further the County failed to give this Board any clear statement of the area existing at the time Walla Walla County opted into the GMA, Oct. 30, 1990. It is this date that is to be used to limit the boundaries of a RAID. The Findings of Fact adopted by the County contain no analysis of areas existing in the Blalock region by actual lot sizes due to common ownership of adjacent platted parcels and are devoid of findings regarding uses as of Oct. 30, 1990, relying instead solely upon historic platting and current uses to justify its "rural transition" region. *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The Blalock area now allows lots as small as ½ acre. This is urban density requiring urban services. The RAIDs were not to be rural UGAs. *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- In addition to the County's failure to follow the steps found in the GMA for the designation of Rural Areas of More Intensive Development (RAID), the Board finds that the County erred due to the RAID's proximity to the City of Walla Walla. The Blalock area is up against the UGAs of

both the City of Walla Walla and College Place. The 1997 Legislative amendment allowing RAIDS was clearly done to let the county do something with unincorporated concentrations of urban-like growth apart from existing cities. However, RCW 36.70A.110(3) provides that Urban Growth Areas should be first located in areas already characterized by urban growth that have adequate existing public facilities and service capacities to serve such development. Second, UGAs should include areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources. Here, Walla Walla County did not include the Blalock Orchards area within the City of Walla Walla's UGA. Instead, the County chose to place Blalock Orchard in a RAID up against the City of Walla Walla's UGA. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Because the County has not followed the GMA requirements for a RAID, has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA, has not adequately shown this Board data in the record of how the 1990 boundaries of the developed area were determined and have located this RAID virtually up against the City's UGA, the Board is compelled to find the Rural Transition zone out of compliance. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The Board finds that the Blalock Orchards Rural Transition zone as presently configured, constitutes an impermissible pattern of urban growth in a rural area. The Board determines this designation does not satisfy the exception to the prohibition of urban growth in rural areas provided by RCW 36.70A.070(5)(d). In addition, the County has failed to explain in writing how the Rural Transition zone harmonizes the planning goals of the GMA as required by RCW 36.70A.070(5)(a). *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Development regulations must implement the comprehensive plan. The Ferry County Comprehensive Plan (FCCP) clearly provides for rural areas of more intense development, as authorized, and limited, by the cited statutes. While the CP authorizes such land uses, limiting or regulating those uses is properly left to the development regulations. The absence of those regulations in Ordinance 2001-09 is clearly an error. The County has failed to act by not adopting such regulations that would properly implement these policies of the Comprehensive Plan. *Concerned Friends of Ferry County/ Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- If the language was chosen before the statute was changed and we must look at what the parties meant at the time the language was drafted. However, the language found in Grant County's CPP 2B is different and speaks of "urban densities". The Committee adopting the CPPs has stated this prohibition two different ways. One way might be technically challenged and said to not prohibit RAIDs, but not so with 2B. It was clear the Countywide Planning Policies intended to prohibit urban densities outside urban growth areas and the later amendment of the GMA does not change this conclusion. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000)

- In a May 23 2000 FDO the Board found the County RAIDs are out of compliance with the GMA because they violate the CPPs. This remains true. The County also was found to not have developed "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter." RCW 36.70A.070(5)(a). This still needs to be done. The written "Policy Plan" pointed to by the County does define the planning concepts and principles embodied in the Plan, but it was not what the GMA was seeking in this case. The requirement for a written record was added at the same time the option for RAIDs were given to the County. The Board finds the Legislature was seeking a written statement of how the Raids harmonize with the goals of the GMA. The County has not done this. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000) (*Affirmed*, Thurston County Superior Court Docket 00-2-01622-8).

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997, amending RCW 36.70A.070(5), adding a new subsection allowing RAIDs Rural Areas of More Intensive Development. The statute now explicitly clarifies the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without such limitations and conditions more intense rural development would constitute an impermissible pattern of urban growth in the rural area. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000)

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (d)(iii), (d)(iv), and .110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that even the "innovative techniques" for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. [3] RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000) .

- RCW 36.70A.070(5)(d)(ii) applies to development that does "not include new residential development." The RAID designation clearly does not preclude new residential development (indeed, it permits it as a matter of right); thus, (5)(d)(ii) cannot be invoked by the County here – it does not apply. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000)

- RAIDs are justified by its consideration of local circumstances, as permitted by RCW 36.70A.070(5)(a). This provision allows counties, in developing the rural element of the plan, to consider local circumstances "in establishing patterns of rural densities and uses." When considering local circumstances, there must be "a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of [the GMA]." RCW 36.70A.070(5)(a). *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000).

- The fact that the GMA was amended, thus allowing the designation of RAIDs by the County does not change the mandatory nature of *the CPPs. The County did not have* to create the RAIDs. They were a*llowed to do so. If they wishe*d to do so, the County had the option of requesting a change in the CPPs. This would give the local jurisdictions input, coordinate the plans as required by the GMA and make the change if desirable. This was not done. The Raids are contrary to directives of the County's CPPs. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000) .

  RCW 36.70A.070(5)(d) does not prohibit the development of undeveloped lands within RAIDs, under certain conditions. We find that the conditions established in the Curlew Lake Sub-Area Plan fall within the limits found in RCW 36.70A(5)(d)(iv). *Woodmansee/Concerned Friends of Ferry Co. v. Ferry County;* EWGMHB Case No. 95-1-0010, Order on Remand (Oct. 24, 2000).

Rural Centers

- A county's decision to allow, "designated rural service centers" is restrained by the same prohibition against urban growth outside the urban growth areas. New residential development in these centers must be limited to rural densities and non-residential growth must be limited to uses dependent by their very nature on a rural location and functionally and visually compatible with the surrounding rural/resource land character. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- Commercial uses within a Rural Service Area are restricted to those uses dependent upon a rural area or to serve the needs of the residents of the rural area. *Woodmansee, et al. v. Ferry County*, EWGMHB Case No. 95-1-0010, Order on Compliance (Apr. 16, 1997).

Rural Densities

- [In testing whether the County was permitting urban growth within rural areas, based on the County's own definition of rural character, the Board noted:] Resolution 09-162 made a significant change in the residential unit density … from a previous, lower density of 1 unit per 5 acres to a new, higher density of 1 unit per each acre. This new density represents an increase in density of five times the previous density. This density change clearly conflicts with the rural character definitions in the Comprehensive Plan. *Brodeur/Futurewise, et al v. Benton County*, Case No. 09-1-0010c "Rural Lands" FDO at 16 (Nov. 24, 2009) (Mulliken dissenting)

- [M]arket demand is not a relevant factor for determining "rural character" as defined in RCW 36.70A.030(15). *Brodeur/Futurewise, et al v. Benton County*, Case No. 09-1-0010c "Rural Lands" FDO at 17 (Nov. 24, 2009) (Mulliken dissenting)

- General Discussion of rural densities and uses/activities permitted in rural areas. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0015c, FDO at 11-15 (March 21, 2008).

- [R]ural character has both a "functional and a visual component" as determined in *Vashon-Maury v. King County*. The functional component refers to a dependency on a "rural setting" and the visual component refers to the "visual character of the traditional rural landscape." … there are two exceptions to the prohibition on urban growth in rural areas: (1) uses dependent on location in a rural area, such as saw mills and campgrounds, and (2) essential public facilities as described in RCW 36.70A.200(1). *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0015c, FDO at 15, 19 (March 21, 2008).

  - [I]f the County has standards in place to keep intact rural character and limit the size of development, some of the uses might be permissible in the rural area, such as kennels and agricultural-related auctions and museums. However, that's not the case here. In this case, the County failed to provide the necessary standards and limitations in its regulations to ensure urban-type uses will not be conditionally permitted or administratively decided in the rural area. The County also failed to fulfill either of the criteria in the two-part test in *Vashon-Maury*, which this Board believes is a reasonable standard that can be used to help the Board make a decision in this matter. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0015c, FDO at 19 (March 21, 2008).

- [In responding to the County's argument based on *Viking* Properties, the Board noted] This is not to say there is a "bright line" rule concerning rural lot sizes. Counties and cities do have some discretion based on local circumstances, but this discretion on rural lot sizes or density is limited by the GMA and must be justified in the record. *Futurewise v. Pend Oreille County,* EWGMHB Case No. 05-1-0011, FDO, at 16 (Nov. 1. 2006).

- *See Futurewise v. Pend Oreille County,* EWGMHB Case No. 05-1-0011, FDO, at 15-19 (Nov. 1, 2006) (General discussion of all 3 Boards' holdings in regards to rural density).

- The Growth Management Hearings Boards have generally recognized that rural development density may not exceed one housing (dwelling) unit per five acres. (internal string citation omitted) Any new land use patterns that consist of lots smaller than five acres would generally constitute urban growth and is therefore prohibited in rural areas unless authorized by the GMA. *Hanson v. Chelan County,* EWGMHB Case No. 06-1-0005, FDO, at 7 (Dec. 14, 2006).

- [T]here is no bright line as to the size of rural lots, however, densities provided for in the rural element must be rural densities, and not urban in nature. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 59 (Aug. 20, 2007).

- The Board recognizes a county may consider local circumstances in establishing patterns of rural densities and uses, but if it does so it must develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the Growth Management Act. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 60 (Aug. 20, 2007).

- A "variety of rural densities" is mandatory in a jurisdiction's comprehensive plan, not solely in the development regulations … *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order on Motions, at 23 (June 21, 2007).

- This Board notes a pattern in these decisions and others by the Growth Boards. Five-acre lots are generally considered the minimum lot size in the rural/agricultural areas and only when a variety of larger lot sizes are available, while 2.5-acre lot sizes are more urban and promote sprawl. The most important criterion for establishing minimum lot sizing in agricultural resource lands is establishing a process. How did the county or city establish the lot size, is there a variety of lot sizes available and is the process outlined in the record? *Concerned Friends of Ferry County/Robinson, v. Ferry County,* EWGMHB Case No. 01-1-0019, 3rd Order on Compliance, (June 14, 2006).

- The Petitioners can't have it both ways. They argue 700 acres on Badger Mountain is rural and will never be developed, yet cite statutes that accuse the County of not assuring visual compatibility. They argue El Rancho Reata, with its one to two acre lots, is rural, but Badger Mountain PUD at .5 DUs/acre is creating sprawling, low-density development. They also argue the County is not protecting critical areas, surface water and ground water, although El Rancho Reata is on septic and Badger Mountain PUD may be required to be sewered. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.,* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- The GMA speaks of "a variety of rural densities". RCW 36.70A.070(5)(b). However, the density must still be rural, not urban. With one narrow exception, this Board has consistently found that anything under 5-acre lots is urban. Clearly 2.5-acre lots are the clearest vehicle of sprawl. Scattering these small lots around cities would continue what the GMA is trying to stop. Services cannot be easily provided; each will have their own well, septic tank and other limited infrastructure. This size lot is one of the most difficult to bring into a city if annexed. *City of Moses Lake v. Grant County,* EWGMHB Case No. 99-1-0016, Order on Remand, (April 17, 2002).

- *Achen v. Clark County, supra,* cited by the County, does not require the Board to approve the 2.5-acre lot in rural areas. In that case the Superior court did direct the Board to give deference to the County, especially with rural density. However, the Board decision was not reversed as to a similar size lot or did it give direction to accept a 2.5-acre lot size. What it did was tell the Board to give deference as the new legislation asked, and do so in that case. This Board does give great deference to the County decisions so long as they are in compliance with the GMA. The discretion given to the County is very broad, but must fall within the sideboards of the GMA. This density is outside those sideboards. *City of Moses Lake v. Grant County,* EWGMHB Case No. 99-1-0016, Order on Remand, (April 17, 2002).

- We disagree with the statement made by the County that "the GMA gives the County, … the authority to determine appropriate lot sizes and uses in rural areas," if that statement means that the County believes there is no role for the GMA in that decision. The GMA does limit the amount of previously unbridled discretion of local governments to "determine appropriate lot sizes and uses in rural areas." This is because of RCW 36.70A.060, .070, .170, and .020(8). *City of Moses Lake v. Grant County,* EWGMHB Case No. 99-1-0016, Order on Remand, (April 17, 2002).

Rural Element

- *See also Keyword – **Rural Densities***

- For a general discussion of the dichotomy between the relative GMA provisions for an Urban Growth Area and a Rural Area, see *Brodeur/Futurewise, et al v. Benton County,* Case No. 09-1-0010c "Rural Lands" FDO at 7-11 (Nov. 24, 2009) (Mulliken dissenting)

- RCW 36.70A.070(5)(a) allows counties to establish patterns of rural densities and uses and may consider local circumstances. … The Rural-2.5 density is generally considered urban in nature, not rural. If the County chooses to use local circumstances to justify smaller density lots, the statute requires the County to provide a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirement of RCW 36.70A. *Futurewise v. Pend Oreille County,* EWGMHB Case No. 05-1-0011, FDO, at 15 (Nov. 1, 2006).

- One of the mandatory elements of a jurisdiction's comprehensive plan is a rural element. … There is no requirement in [RCW 36.70A.070(5)] for a county or city to specifically state in its comprehensive plan that sanitary sewers are prohibited in the rural area. It is certainly clear in RCW 36.70A.070(5)(b) Rural development, which states in part, "The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses." Public facilities, such as sewer, are not mentioned and, therefore, are not to be provided. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-009c, FDO, at 48 (March 12, 2007).

- The County has an obligation to its citizens to not just print the words in its Comprehensive Plan, but to also follow-through with protections for these lands … [A]s a self-defined "rural county", Stevens County has an obligation to its citizens to protect the rural nature and the resource lands so important to its economy. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-009c, FDO, at 76 (March 12, 2007).

- If the County chooses to use local circumstances to justify smaller density lots [in rural areas], the statute requires the County to provide a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of RCW 36.70A. *Futurewise v. Pend Oreille County,* EWGMHB 05-1-0011, FDO at 15 (Nov. 11, 2006).

- While the Act does allow for a variety of densities in rural areas, the densities must preserve the rural character of the area. The Board notes that the approval process allows lots as narrow as 200 feet. Houses on multiple adjacent lots only 200 feet wide is urban and will not preserve the rural character of the area. *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Respondent argues the provisions allowed in the Rural Floating zone were to balance the goals of GMA, reduce sprawl, and to protect private property rights. The Board applauds the County's actions to change the existing 10-acre minimum lot size to 20 acres, but feel the allowance of a 2-3 acre "overlay" zone is inconsistent with that change. The Board also finds it does not protect the property rights of either existing residents or vacant property owners in the area. Such small, narrow lots will degrade the rural character, reducing the appeal of the area as a place to live, to the detriment of present and prospective residents. *Citizens for Good Governance, et al. v. Walla Walla County,* EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Having said this, the Board acknowledges the work of the residents in this zone to protect both the rural character of the area, and legitimate property rights, including potential for further development. However, more work needs to be done. The Board recognizes the possibility of unique circumstances in this zone, and the potential to increase protection of critical areas. While not drawing a "bright line" test of a minimum 5-acre lot size for this rural area, any criteria applied must ensure protection of critical areas and the rural character of the area. While not addressing minimum lot sizes here, The Board finds that minimum lot widths of 200 feet are not in keeping with a desirable rural character. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The effect of the County's action here would be to continue the existing zoning at urban density in the face of statutory direction to prohibit urban growth in the Rural Element. The continuation of urban densities creates an impermissible pattern of urban growth in the rural area. Lot density, in conflict with the overall 5-acre zoning, will have a substantial impact on the density of this rural area. *1000 Friends of Washington, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The fact that such zoning existed prior to the adoption of the Plan is no excuse to continue it. The size of many preexisting platted lots is not at rural density. Where possible, the County must change what has been happening before if it violates the GMA. We addressed a similar issue in *City of Moses Lake v. Grant County*, Case No. 99-01-0016, FDO, May 23, 2000. *1000 Friends of Washington et al., v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- Allowing previous lot sizes to exist on vacant land just because that is what they are now platted for, ignores what the GMA is trying to do. Anything below 5-acre lot size is out of compliance for the remaining undeveloped lands in this rural area. *1000 Friends of Washington et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The Growth Management Act specifically differentiates between agricultural resource lands and rural lands. County residents who desire a rural lifestyle should have the opportunity to purchase rural home sites in rural areas that do not have long-term commercial value as agricultural land. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, FDO (Aug. 8, 1994).

- A county's decision to allow "designated rural service centers" is restrained by the same prohibition against urban growth outside the urban growth areas. New residential development in these centers must be limited to rural densities and non-residential growth must be limited to uses dependent by their very nature on a rural location and functionally and visually compatible with the surrounding rural/resource land character. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (d)(iii), (d)(iv), and .110(1). Areas of more intensive rural development are not "mini-UGAs" or a rural substitute for UGA and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). The Act states that even the "innovative techniques" for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the

provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. [3] RCW 36.70A.030(17). Therefore, unless the RAID designation, as presently configured, satisfies the provisions of RCW 36.70A.070(5)(d), it does not comply with the requirements of the Act. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000)

- While still recognizing rural areas are to be very different from urban areas, the legislature allowed reasonable and necessary exceptions and flexibility for compact rural development with their legislative action in 1997, amending RCW 36.70A.070(5), adding a new subsection allowing RAIDs, Rural Areas of More Intensive Development. The statute now explicitly clarifies the legislature's continuing intent to protect rural areas from low-density sprawl, while providing some accommodation for infill of certain "existing areas" of more intense development in the rural area. That infill is to be "minimized" and "contained" within a "logical outer boundary." With such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible compact rural development. Without such limitations and conditions more intense rural development would constitute an impermissible pattern of urban growth in the rural area. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000)

- RCW 36.70A.070(5)(d)(iii) contemplates the rural industrial uses permitted (but not required) by the County. However, the application of (5)(d)(iii) is limited by that paragraph's reiteration of the Act's prohibition of low-density sprawl and by (5)(d)(iv)'s requirements to minimize and contain any existing areas or uses of more intensive rural development. While the Board recognizes that (d)(iv) provides that "some accommodation may be made for infill of certain 'existing areas' of more intense development in the rural area, that infill is to be 'minimized' and 'contained' within a 'logical outer boundary.'" *Bremerton* CPSGMHB Case No. 95-3-0039c (coordinated with Case No. 97-3-0024c), Finding of Noncompliance, at 24. *Whitaker v. Grant County*; EWGMHB Case No. 99-1-0019, Order on Reconsideration; (Aug. 7, 2000); *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 7, 2000)

Sanctions

- [In denying Petitioners request for a request for sanctions, the Board stated:] Although the Board finds the County's actions concerning its disregard for the Board's legal requirements to file a SATC disturbing and unprofessional, and the County's refusal to follow proper procedure disrespectful of the law, a request for sanctions is not warranted at this time … If the County continues to ignore the Board's FDO, and rules and regulations, the Board will reconsider a request that imposition of sanctions be requested of the Governor**.** *Henderson, et al v. Spokane County,* Case No. 08-1-0002, First Compliance Order at 13 (May 7, 2009)

- The Board will, however, recommend to the Governor that sanctions authorized by the act be imposed on Ferry County pursuant to RCW 36.70A.340 for continuing non-compliance in its failure to designate Agricultural Lands of Long-term Commercial Significance. RCW 36.70A.345 allows the Governor to impose a sanction or sanctions specified under RCW 36.70A.340 on: (1) a county or city that fails to designate …agricultural lands… under RCW 36.70A.170 by the date such action was required to have been taken. Ferry County opted to plan under the GMA in 199022 and adopted its Interim Critical Areas Ordinance #93-02 on

March 8, 1993. The County adopted its Comprehensive Plan by Ordinance #95-06 on September 18, 1995. Agricultural lands of long-term commercial significance were not designated as required by RCW 36.70A.170(a) after the County opted to plan under GMA and the County has yet to do so after 19 years. Ferry County was found in non-compliance for failure to designate agricultural lands of long-term commercial significance in the Board's Final Decision and Order for this case on June 14, 2002, and has been in continuing non-compliance as determined by the Board in five compliance proceedings. *CFFC/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, Compliance Order, at 13 (Feb. 20, 2009).

- The Board remains concerned about the County's use of its "emergency" provision to allow further expansion of the UGA. Emergency land use changes are for emergency purposes, such as the necessary and immediate extension of water service, not as a tool to add a park or church property for developer purposes. The Board will reconsider sanction if the County continues to use this method to add additional land to the UGA. *McHugh et al. v. Spokane County*, EWGMHB Case No. 05-1-0004 at 4, 2nd Order of Non-Compliance (Oct. 25, 2006); *See also, Miotke/Neighborhood Alliances of Spokane*, EWGMHB Case No. 05-1-0007 at 4, 2nd Order of Non-Compliance (Oct. 25, 2006).

- The Petitioners sought the imposition of sanctions, claiming that the County is refusing to comply and will continue to expand the UGA without the appropriate information unless the Governor is asked to impose sanctions on the County. The Board is aware that the County is working to update the CFP, perform a land and population analysis and meet with the appropriate airport officials and owners. The Board is also aware that the County did not expand the UGA pursuant to other pending applications. The Board is optimistic that the refusal to expand the UGA was for the purposes of awaiting the completion of the land and population analysis and update of the CFP for that area. Because of these possibilities, the Board will not recommend the imposition of sanctions at this time. If however, the Board finds that the County further expands the UGA prior to the completion of the required tasks, the matter of sanctions shall be reconsidered and sanctions may be recommended. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, Certificate of Appealability (March 8, 2006).

Sequencing

- The Petitioners are asking that the Board find that the County is not properly sequencing the planning under the GMA. The examples given by Larson Beach are accurate and demonstrate why the GMA establishes a sequence for the adoption of Public Participation, Interim Urban Growth Areas, Resource Lands_designation, Critical area Ordinances, etc. When these steps are not followed it becomes difficult if not impossible to protect what is required to be protected, plan for what is required to be planned for, or prohibit what is required to be prohibited. *Loon Lake Property Owners Association, et al v. Stevens County;* EWGMHB Case No. 01-1-0002c, Amended FDO(Oct. 26, 2001).

- The failure of the County to properly sequence planning under the GMA requires the Board to look at Titles 4 and 5 more critically. While much of these titles might not otherwise be out of compliance, their passage without the designation and conservation of Resource Lands and the planning found in a Comprehensive plan, forces us to again find these titles out of compliance. These titles interfere with the Goals of the GMA more than is first realized. The State Legislature specifically directs the County to designate and conserve Resource Lands and Critical Areas prior to the other required actions. (RCW 36.70A.060 and .170). The Short and Long Plat_Ordinances of the County allow subdivisions, large and small, throughout the rural

areas, including areas that one would expect to find Resource lands and Critical areas. The out of sequence adoption of these regulations cause a real frustration of the goals of the GMA. *Loon Lake Property Owners Association, et al v. Stevens County;* EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

- RCW 36.70A.060 requires Stevens County to first "adopt development regulations on or before Sept. 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170." That section of the GMA goes on to require the County to place a notice in all plats or permits that allow activity within 500 feet of resource lands that such resource lands are there and that certain activities may occur which may not be compatible with residential development. This notice makes sense only if the resource lands are designated. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

Service

- Spokane County and Intervenors cite no statutes and no appellate court case law to support their allegation that service upon the County Auditor is jurisdictional. Service on the County Auditor cannot be a jurisdictional requirement since the Board's jurisdiction is set by GMA statutes, and those statutes do not specify any requirement to serve the County Auditor. *Fenske, et al v. Spokane County*, EWGMHB Case No. 10-1-0010, Order on Reconsideration of Motion to Dismiss at 2 (June 28, 2010)

- There is no showing of any prejudice to the County or Intervenors as a result of failure to serve the County Auditor. Prejudice cannot arise based solely upon the County's time and expense to defend a matter … *Fenske, et al v. Spokane County*, EWGMHB Case No. 10-1-0010, Order on Reconsideration of Motion to Dismiss at 2 (June 28, 2010)

- The Board's Rules of Practice and Procedure do require service upon the County Auditor; however, the Growth Management Act itself contains no such requirement. The statutes provide that the Board has jurisdiction to hear and decide issues presented in a Petition for Review that is filed by a party with standing and within 60 days after publication by the County legislative body. Thus, while the county auditor service rule is a requirement in the Board's promulgated rule, it is not a jurisdictional requirement in the GMA statutes … Respondent and Intervenors do not claim any prejudice from Petitioners' failure to serve the County Auditor … Accordingly, the Board finds that Petitioners substantially complied with the PFR service requirements. *Fenske, et al v. Spokane County*, EWGMHB Case No. 10-1-0010, Order on Motion to Dismiss at 2 (May 27, 2010)

- [In denying the County's motion to dismiss the case for failure to properly serve the PFR on the County Auditor, as provided in WAC 242-02-230(1), the Board stated] 230(2) of that same section the Board is given discretion on whether to dismiss a case for failure to "substantially comply" with subsection (1) as indicated by the use of the word "may" when referring to dismiss. Substantial compliance was well defined by Margery Hite, former Western Washington Growth Management Hearings Board (WWGMHB) member in her dissent in *Sherman v. Skagit County*, Case No. 07-2-0021, and is worth repeating here: *"Substantial compliance" is characterized as "satisfaction of the spirit" of a procedural requirement. Unless compliance with a procedural requirement is jurisdictional in nature, substantial compliance promotes the "sound public policy" of allowing the merits of a controversy to be reached. Crowder, et al v. Spokane County*, EWGMHB Case No. 10-1-0008, Order on Motion to Dismiss at 5 (May 12, 2010)

- The GMA specifies that the Board acts upon the PFR by setting a time for hearing and, since service upon the opposing party is not a requirement for initiating a PFR, either under the GMA or APA, there is no obligation to serve the county auditor to be jurisdictional. RCW 36.70A.270(7) clearly gives the Boards authority to set procedures to govern the practice and procedures of the boards, but the Boards' rules cannot "elevate a procedural service directive to a jurisdictional requirement" … the Petitioners substantially complied with WAC 242-02-230(1), and there has been no prejudice to the County. *Crowder, et al v. Spokane County,* EWGMHB Case No. 10-1-0008, Order on Motion to Dismiss at 8-9 (May 12, 2010)

- Pursuant to WAC 242-02-832(1), the County must file a motion for reconsideration within ten days of service of the final decision. In this case, the County filed a timely motion on June 2, 2008. Pursuant to RCW 36.70A.270(7), which provides that absent a rule of the Board, the APA guides procedures and practices. RCW 34.05.010(19) defines "service" as being deemed complete upon deposition in the U.S. mail with proper address and postage. *Wilma et al. v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order on Reconsideration at 7 (June 25, 2008).

- [County moved for dismissal based on failure to properly serve] There is no requirement in the GMA statutes to serve the petition upon the county or city whose action is challenged. However, there is a service requirement in the Board's adopted rules of procedure [WAC 242-02-230(1)] …RCW 36.70A.270(7) authorizes the GMHB to adopt "administrative rules of practice and procedure." But this statute does not authorize the GMHB to impose a jurisdictional service requirement.2 Stated differently, the GMHB cannot enlarge or add to the specified statutory requirements that invoke the Board's jurisdiction. Thus, the administrative rule requiring service on the County is procedural in nature, not jurisdictional. *Cover Heights Condo Assoc. v. Chelan County,* EWGMHB Case No. 08-1-0013, Order on Motions, at 3 (Sept 3, 2008).

- This Board has ruled in previous cases that a motion to dismiss will be denied when the jurisdiction does not demonstrate any prejudice from the failure to properly serve the PFR … In this case, the County has not shown that it was prejudiced by the delay in service of the PFR. Furthermore, the Petitioner attempted to serve Chelan County at the time of PFR filing with the Board. Under these facts, the Board finds that Petitioner substantially complied with WAC 242-02-230(1). The Respondent also argued that the delay in service divested the Board of jurisdiction. But the Board finds that the delay of service did not violate any statutory jurisdictional requirement. *Cove Heights Condo Assoc. v. Chelan County,* EWGMHB Case No. 08-1-0013, Order on Motions, at 3-4 (Sept. 3, 2008)

- [In response to County's assertion that "personal service" on the County Auditor was required, the Board stated] The Board's Rules, WAC 242-02, were adopted pursuant to RCW 36.70A.270(7) which requires the Boards to adopt administrative rules of practice and procedure. WAC 242-02 was originally adopted in 1992 and has been subject to various amendments since that time. The GMA makes no reference to RCW Title 4 - Civil Procedure, which addresses civil actions brought in Washington Courts. In addition, neither the GMA nor the WAC references RCW 4.28.080. Rather, the GMA explicitly states the Administrative Procedures Act (APA), RCW 34.05, governs the practices and procedures of the Board.10 The application of the APA to the Board's practices and procedures is logical given the fact the Board is a quasi-judicial administrative agency created by the Legislature and not a court … The Board is not aware of a provision of the APA which limits service to personal service. RCW 4.28.080 pertains to civil

actions filed in the courts and, as a quasi-judicial administrative agency, this provision of the RCWs is simply not applicable to the Board's proceedings. Therefore, under both the Board's rules and the APA, the mailing of a PFR is an appropriate manner of service so long as the PFR was deposited in the mail and postmarked on or before the date filed with the Board. *Wenatchee v. Chelan County,* EWGMHB Case No. 08-1-0015, Order on Motions at 4 (Dec. 2, 2008).

- RCW 36.70A.270(7) authorizing the adoption of "rules of practice and procedure" does not authorize a GMHB to impose a jurisdictional service of PFR requirement when no such specific authority is provided in the GMA. Under RCW 36.70A.280 and .290 there is no requirement that a PFR be served anywhere except at the appropriate GMHB office. Where the jurisdiction does not demonstrate any prejudice from the failure to serve the PFR on it, a motion to dismiss will be denied. *Humphrey v. Douglas County,* EWGMHB Case No. 07-1-0010, Order on Motion, at 3. (Sept. 21, 2007)

- WAC 242-02-230 provides that substantial compliance [in regards to serve] is sufficient. Further, in order to justify a dismissal for failure to serve, a local government must demonstrate that it has suffered prejudice. *Humphrey v. Douglas County,* EWGMHB Case No. 07-1-0010, Order on Motion, at 3. (internal citation omitted) (Sept. 21, 2007).

- Under WAC 242-02-230, a GMHB has broad discretion on the issue of dismissal for failure to properly serve a local government. The substantial compliance test, as well as the absence of any legislative requirement in the GMA that mandates service on a local government, means that absent a showing of prejudice by the local government a GMHB has no basis upon which to grant dismissal for failure to serve the Respondent. *Humphrey v. Douglas County,* EWGMHB Case No. 07-1-0010, Order on Motion, at 3 (Sept. 21, 2007).

- WAC 242-02-230(1) requires a copy of the Petition be served promptly upon Respondent, and as Respondent was a county in this matter, the county auditor shall be served. *Abercrombie v. Chelan County;* EWGMHB Case No. 00-1-0008, Order on Dispositive Motion; (June 16, 2000).

- Pursuant to WAC 242-02-230(2), this Board may dismiss this case for failure to substantially comply with §(1) of this WAC. It is a proper exercise of the discretion granted this Board when ruling upon dispositive motions to make determinations as to the credibility and weight to be given the evidence presented. *Abercrombie v. Chelan County*; EWGMHB Case No. 00-1-0008, Order on Dispositive Motion; (June 16, 2000).

Settlement

- The Board notes that pursuant to RCW 36.70A.300(2)(b) an extension of 90 days may be granted to enable the parties to settle a dispute if additional time is necessary to achieve a settlement. The Board further notes the ability of the Board to grant such an extension pertains to the time period between receipt of a PFR and the Board's issuance of a FDO. Pursuant to RCW 36.70A.300(3)(b), a County which is found to not be in compliance with the requirements of the GMA may be granted up to 180 days, except in cases of unusual scope or complexity, within which the County shall take action to comply with the GMA.4 Thus, the GMA provides for two timeframes – a 90 day settlement extension prior to the Board's issuance of a FDO <u>or</u> a 180 day compliance period after the issuance of the Board's FDO. *Wynecoop, et al v. Spokane County,* EWGMHB Case No. 07-1-0007, Order on Remand at 5 (Nov. 24, 2008).

- [Parties sought dismissal of PFR based on "Board's agreement and acceptance" of the parties' stipulated agreement. If findings this would amount to an advisory opinion, the Board stated] If the parties have resolved the basis for the Petitioners filing of this matter before the Board, then the parties can file a motion to dismiss the matter in its entirety or Petitioners can simply withdraw their PFR, both of which would terminate the Board's review of this matter as there would no longer be a dispute for the Board to address. If there is still a dispute for which the parties seek the Board's assistance to resolve as to the merits of the issues, then the parties need to move forward with the new revised schedule for briefing and hearing date under the Order section for Issues 4.1 and 4.2. Unless the Board receives a Motion for Settlement Extension, the Board will continue the schedule as set forth below in order to complete the process, as per RCW 36.70A.300(2), with several adjusted dates for briefing and the Hearing on the Merits. *Yakima County Farm Bureau, et al v. Yakima County,* EWGMHB Case No. 08-1-0009, Order on Motions at 3 (Nov. 21, 2008).

Shorelines

- The GMA confers jurisdiction upon the Boards to hear petitions alleging noncompliance with the GMA, the Shoreline Management Act or SEPA "as it relates to plans, development regulations, or amendments, adopted under the GMA". (RCW 36.70A.280(a)). In the next subsection, RCW 36.70A.280(b), the statute lists the methods by which a petitioner may establish standing to bring a petition to the Board. There is no suggestion in the language that participatory standing as a basis for bringing a petition should not be deemed sufficient to establish standing to bring any claim over which the Boards have jurisdiction, including SEPA claims. Had the Legislature wanted to set different standing requirements for different types of claims, it clearly could have done so. It did not. *Superior Asphalt & Concrete Co., v. Yakima Countyet al.,* EWGMHB Case No. 05-1-0012, Order on Dispositive Motions, (March 30, 2006).

- This Board, following the lead of the Western Washington Growth Management Hearings Board, applies instead the GMA measure of standing for the SEPA issues that this Board has jurisdiction under the GMA to review. (RCW 36.70A.280(a)). This Board cites with approval the Western Board's decision in *WEAN* v. *Island County,* N0. 03-2-0008 (FDO 08/25/03.) In that decision, the Western Board articulates its rationale for measuring a parties standing in a case such as this, by reference to the GMA rather than SEPA. *Superior Asphalt & Concrete Co., v. Yakima County, et al.,* EWGMHB Case No. 05-1-0012, Order on Dispositive Motions, (March 30, 2006).

- After significant questioning concerning the role the County's pre-GMA SMP will play in the future, the Board believes it is the intent of the County to use the recently adopted RLCAO to protect riparian areas and wetlands. The sentence inserted in the Development Regulations Ordinance that references the pre-GMA SMP, Sections 1 through 33, is moot, according to the Respondent. With the passage of the County's RLCAO, which has substantially increased wetland buffers and riparian widths from previous regulations, and with statements from the County's representative that the new RLCAO takes precedence over the pre-GMA SMP, the County is close to being in compliance. Unfortunately, the Board can not accept verbal promises from the Respondent's attorney that the pre-GMA SMP will not be used in setting riparian widths or wetland buffers. Two of the pre-GMA SMP references, as worded in the document, may have precedence over the new RLCAO.

Concerned Friends of Ferry County/Robinson v. Ferry County, EWGMHB Case No. 01-1-0019, 3rd Order on Compliance, (June 14, 2006).

- Clearly, the County is reluctant to use the phrase "best available science" in any of its regulations or ordinances, appearing to believe doing so would imperil its citizens' private property rights. The Board recognizes the rural nature of Ferry County, but continues to encourage its elected officials to protect the County's natural resources, environment and wildlife by using science based on sound technology. State agencies, such as the DOE and WDFW, employ experts in their fields and are available for local governments as sources of scientific information. The County's original SMP, referenced in its development regulations, is woefully inadequate and fails to protect fish, wildlife and riparian areas as required by RCWs 36.70A.060 and .172. While the County may bring itself into compliance without doing so, the Board strongly recommends that Ferry County prepare, process and adopt a new SMP as soon as possible. In the interim, the County has a responsibility to eliminate or properly mitigate references to the pre-GMA SMP. *Concerned Friends of Ferry County/Robinson, v. Ferry County*, EWGMHB Case No. 01-1-0019, 3rd Order on Compliance, (June 14, 2006).

- The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW "shall be considered a part of the county or city's development regulations." The same statute provides that the shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW, rather than the procedures set forth in the GMA. The County's Shoreline Master Program was already an element of the CP as provided by law. Its amendment will be pursuant to 90.58 RCW. *City of Moses Lake v. Grant County*; EWGMHB Case No. 99-1-0016, Order on Reconsideration; (Aug. 16, 2000).

Shorelines Master Program (SMP)

- [D]espite Petitioners contention EHB 1653 has no impact on this case, EHB 1653's retroactive language, makes it, in effect, the law not only at the time Ferry County took its challenged action but also at the time of the HOM. From EHB 1653's legislative history it is clear this new language was to clarify the Legislature's original intent when it enacted RCW 36.70A.480 via ESHB 1933 in 2003. Specifically, the 2003 Legislature intended to transfer protection of the relevant critical areas from the GMA to the SMA as local governments enact, and Ecology approves, new SMPs. ESHB 1933's effective date was July 27, 2003, and EHB 1653 establishes this same date for its retroactive application. Ferry County's SMP was last amended in October 2002 and, therefore, the protection of critical areas within the shoreline falls within the GMA as the transfer of protection from the GMA to the SMA has not yet occurred. The Board can only apply the law as it has been drafted which, due to EHB 1653, puts the regulation of critical areas within the shorelines of Ferry County under the GMA's authority. *Riparian Owners, et al v. Ferry County*, EWGMHB Case No. 09-1-0012, Final Decision and Order at 5 (April 5, 2010)

- Petitioners have not demonstrated that RCW 36.70A.480 imposes a legal obligation upon Ferry County to "exempt" lands lying within the jurisdiction of Ferry County's Shoreline Management Plan. The GMA does not contain any such requirement. It simply provides that lands within SMA jurisdiction are not subject to the procedural and substantive requirements of the GMA. *Riparian Owners, et al v. Ferry County*, EWGMHB Case No. 09-1-0012, Final Decision and Order at 8 (April 5, 2010)

- The Comprehensive Plan is a policy document, to be implemented by development regulations. The County's actions under review here are the development regulations, Ordinance No. 2001-09. That Ordinance incorporates the pre-GMA SMP. The County's Ordinance now brings their SMP before the Board for review because the SMP is the method adopted by the County to implement that portion of the CP. The Board will review the County's SMP to determine whether the provisions therein adequately implement the Comprehensive Plan and protect or regulate as therein provided. The Board does not review the SMP itself as to its validity, but rather its use to comply with the GMA. *Concerned Friends of Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

- Presumably, the County offered no argument defending buffers in the existing SMP because they plan to adopt a new SMP, including best available science. However, we must rule on the adequacy of the existing protections using the SMP. It is clear the existing SMP does not adequately protect shorelines and their associated on-shore and offshore habitat as required by RCW 36.70A.172 and RCW 36.70A.060. *Concerned Friends of Ferry County/ Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, FDO, (June 14, 2002).

"Show Your Work"

- Spokane County is required to plan under RCW 36.70.040. As such, RCW 36.70A.110 requires the County to designate an Urban Growth Area or Areas. Under RCW 36.70A.110(2), the County must "include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period." The projected growth is "based upon the growth management population projection made for the county by the Office of Financial Management". "The Office of Financial Management projection places a cap on the amount of land a county may allocate to UGAs" [*Diehl v. Mason County*, 94 Wn. App. 645, 654, 972 P.2d 543 (1999)]. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* FDO, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- In 2001, Spokane County, together with the towns and cities in the County, sized the County and City UGAs. The size was designed to receive the population projections made by the OFM. The Intervenors in 2003, approached the County with a variety of proposals, which would require the enlargement of the UGA north of the City of Spokane. There was no claim that there was not enough developable land within the UGA for their specific development, only that there was not enough land for the twenty-year population projection. The Intervenors then suggested that their six parcels be included in the UGA, thereby requiring the extension of the UGA boundaries.

- The GMA mandated that urban growth occur only within a UGA so that sprawl would be avoided (RCW 70A.030(17) and .070). The GMA established a careful procedure to identify the amount of land that is available within city limits for development at an urban density and what additional lands would be needed to handle the twenty-year population projection. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Spokane County adopted a procedure for establishing boundaries for UGAs, which included a land quantity analysis methodology. (Adopted 10-31-95 and CWPP Urban #19, Urban Growth Area Revisions 9/30/97.) This methodology made no provision for a developer-

provided land quantity analysis. The methodology did establish a careful method of reports, format and Technical and Steering Committees review. The County's methodology incorporated CTED's recommended process, modified to reflect local conditions. It is clear from the methodology adopted by Spokane County that the analysis provided by the proponent/developer is insufficient and unacceptable. (CWPPs Policy Topic 1 found in prior and amended versions of the Policies). It is clear from the 1998 and 2004 versions of the CWPPs that it is the local jurisdictions that are responsible for the preparation of land quantity and population analysis. (Policy Topic 1, #19 in 1998 and #16 and #17 in 2004). *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The County has the responsibility to prepare a land quantity analysis prior to any modification of the existing UGAs. The recent expansions of the UGAs, adopted by the County, include changes in the Airway Heights area, north of the City of Spokane and southeast of the City of Spokane Valley. In each of these changes the proponents argue that more land is needed within the County's UGAs to accommodate the twenty-year projected population growth. There has been no comprehensive reexamination of the County's land quantity or what population changes are expected, as is required by the GMA and the CWPPs. Such enlargements of the UGAs of Spokane County violate its own policies and the GMA's requirements. (CWPP Urban #19, Urban Growth Area Revisions 9/30/97, RCW 36.70A.110(2) and RCW 36.70A.020(2)). *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The sizing requirements and locational criteria in RCW 36.70A.110 apply to UGA expansion as well as to the initial UGA designation. (*Bremerton v. Kitsap County,* CPSGMHB, 04-3-0009c, FDO Aug. 9, 2004). RCW 36.70A.110(1) specifically contemplates that UGA boundaries may expand over time to allow for additional urban development and it specifies the locational criteria that limit such expansion. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The County did nothing to verify whether or not the present UGA is sufficient for the existing or future population growth since it designated its original UGAs. The records reflect only the unverified contentions of the developer that additional lands are needed. The County did not show their work and in fact does not claim to have done anything itself to ascertain the need to expand the County's UGA. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, EWGMHB 05-1-0007, FDO, (Dec. 16, 2005).

- The land capacity analysis required in RCW 36.70A.110(1) and (2) is a vital component of the work that must be shown. *CTED v. Snohomish County,* ***(CTED* I**), CPSGMHB Case No. 03-3-0017, FDO, (Mar. 8, 2004), at 20-22.

The record before the Hearings Board clearly shows that the County did not perform any land quantity analysis. Resolution No. 2005-0365 makes no mention of an analysis or review of land quantity in its findings or decision. The County also conceded in the Hearing on the Merits that the County did no land quantity review. The developers/Intervenors supplied the only analysis alleging a need for additional land within the UGA for Spokane. This report was included in the Record without any verification of the claims contained therein. This is not enough. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- When UGA expansions are made, the record must provide support for the actions the jurisdiction has taken; otherwise the actions may have been determined to have been taken in error – i.e., clearly erroneous. Accordingly, counties must "show their work" when a UGA is expanded. *Kitsap Citizen*s, FDO, *supra* at 12-16. To find that the record does not support a County's action, does not amount to "burden shifting." It is also extremely important, in managing growth, for the public to understand the basis for legislative policy decisions and how they relate to the jurisdiction's goals and policies as articulated in its adopted plans and regulations. Even with the requirement that the County show its work, the burden of proof remains with Petitioners. *Julia McHugh, Palisades Neighborhood, and Neighborhood Alliance of Spokane v. Spokane County, Respondent, and Greg and Kim Jeffreys, GJ L.L.C., and G.J. General Contractors, Intervenors*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- This Board has consistently required the Counties to show their work, especially in cases such as this. Here the parties did not agree upon the boundaries of the City of Spokane UGA. This, together with its last minute changes, emphasizes the need for "showing the work". The Board has a difficult time resolving such issues where there is little or no record or a record insufficient to determine what happened. However, because the County has been found out of compliance in previous issues, it is not necessary to reach this issue. The Board expects the County to show its work at the future compliance hearing held to determine if they have brought themselves into compliance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The County failed to consider, analyze and properly apply the minimum guidelines and plan criteria to the SRP site. Specifically, the Board finds that the County's criterion was not properly applied in denying the designation of the SRP site as mineral resource land. The County has not "shown its work" regarding application of the criteria to the SRP site or to other nearby sites which did receive designation as mineral resource lands. *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003, FDO, (July 19, 2002).

- Because Board decisions must be based on the record, it is helpful to both the boards and the citizens if local governments show their work and indicate the parts of the record upon which they have relied. The concept of "showing your work," is neither complex, nor burdensome. It involves a reasoned discussion of the issue in question, the selection of a choice that meets the minimum requirements established by the Growth Management Act, and is supported by the record. It need not require the use of consultants and outside experts, the local people and their government officials know their area. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Compliance Order (Jan. 30, 1995).

- The Board has consistently recognized that the planning goals may be at some point inconsistent. It has also found, in almost all cases, that potential inconsistencies may be successfully reconciled. Counties and cities have a duty to attempt to harmonize the goals. They must consider and show their work where they cannot. It is one thing to suggest that achieving the housing goal conflicts with the goal of reducing sprawl, it is quite another to show that these goals cannot both be achieved. Where a jurisdiction holds that one planning goal should be sacrificed at the expense of another, the record must show the decision making process. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- If a jurisdiction is unable to harmonize the planning goals, the record must show that the decision makers engaged in a valid process and considered the matter. This is the "show your work" standard. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

- The GMA does not specify the manner by which a county should show its work. The Board's decisions have required counties to "show their work," but do not provide a uniform method for such a showing. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- It is imperative that counties base their IUGAs on OFM's twenty-year population projection, collect data and conduct analysis of that data to include sufficient areas and densities for that twenty-year period (including deductions for applicable lands designated as critical areas or natural resource lands, and open spaces and greenbelts), define urban and rural uses and development intensity in clear and unambiguous numeric terms, and specify the methods and assumptions used to support their IUGA designation. In essence, counties must "show their work" so that anyone reviewing a UGAs ordinance can ascertain precisely how they developed the regulations adopted. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- Local circumstances, traditions and identity will result in unique choices and solutions by each County and each City within it. Jurisdictions have broad discretion to make IUGA policy decisions. While such policy choices may be included in the sizing or configuration of the IUGA, they must be made in a measurable way and with sufficient documentation as to the rationale. *Knapp et al., v. Spokane County*, EWGMHB Case No. 97-1-0015c, Order on 4th Compliance Hearing, (8-23-99).

- The County and City of Marcus has provided this Board with an adequate record of the process of sizing the Marcus IUGA. While the IUGA is large, it includes extensive areas unavailable for building or areas designated as open spaces and greenbelts. The County is entitled by law to a strong presumption of validity and we believe the Intervenor has not overcome this presumption. *Wilma, et al v. Stevens County*, EWGMHB Case No. 99-1-0001c, Order On 2nd Compliance Hearing; (Mar. 14, 2001)

Sprawl

- This Board notes a pattern in these decisions and others by the Growth Boards. Five-acre lots are generally considered the minimum lot size in the rural/agricultural areas and only when a variety of larger lot sizes are available, while 2.5-acre lot sizes are more urban and promote sprawl. The most important criterion for establishing minimum lot sizing in agricultural resource lands is establishing a process. How did the county or city establish the lot size, is there a variety of lot sizes available and is the process outlined in the record? *Concerned Friends of Ferry County/Robinson, v. Ferry County*, EWGMHB Case No. 01-1-0019, 3rd Order on Compliance, (June 14, 2006).

- The GMA speaks of "a variety of rural densities". RCW 36.70A.070(5)(b). However, the density must still be rural, not urban. With one narrow exception, this Board has consistently found that anything under 5-acre lots is urban. Clearly 2.5-acre lots are the clearest vehicle of sprawl. Scattering these small lots around cities would continue what the GMA is trying to stop. Services cannot be easily provided; each will have their own well, septic tank and other

limited infrastructure. This size lot is one of the most difficult to bring into a city if annexed. *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, Order on Remand, (April 17, 2002).

Standard of Review

- ***See also Keywords – Burden of Proof; Presumption of Validity***

- The Board reviews each and every case brought before it based on the facts and circumstances pertaining to the legislative enactment under challenge and determines compliance or non-compliance after reviewing the Record before the County at the time it took action. Two separate cases on two separate legislative enactments are based on a set of distinct facts and circumstances and supported by a Record unique to those enactments. The Board will not merge cases just because the parties believe they encompass the same overarching subject matter. *Kittitas County Conservation, et al v. Kittitas* County, Case No. 07-1-0004c Compliance Order at 11 (Aug. 7, 2008)

- In applying the "clearly erroneous" standard of review, the Board has recognized that it is much more deferential and creates a "greater burden of proof" than would a mere "preponderance of the evidence" standard. *Rush v. City of Spokane*, EWGMHB Case No. 06-1-0006, FDO, at 20 (July 13, 2007).

- It is not the role of a GMHB to "balance the equities" in deciding a case. The GMHB's role is to determine compliance. *McHugh v. Spokane County*, EWGMHB Case No. 05-1-0004, Compliance Order, at 5 (March 5, 2007).

- The Washington State Legislature granted the Growth Management Hearings Boards jurisdiction to hear matters relating to RCW 43.21 (SEPA) as it relates to plans, development regulations or amendments adopted under the GMA. The Board recognizes that the Petitioners actively participated in the joint hearing process where the EIS and the Comprehensive Plan was discussed. This together with the careful reading of WAC 197-11-545(2) in full and our liberal examination of standing, we find that the Petitioners have standing to challenge the adequacy of the EIS herein. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The EIS performed was adequate for a non-project EIS. The Board finds the law does not require the examination of each and every potential option. The contents of the EIS on non-project proposals are described in WAC 197-11-442. That code provision declares that the County "shall have more flexibility in preparing EISs on non-project proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals. The EIS may be combined with other planning documents . . .." WAC 197-11-442(1). *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The County has flexibility in preparing the non-project EIS for the Comprehensive Plan. WAC 197-11-443(2) provides that a "non-project proposal may be approved based on an EIS assessing its broad impacts. When a project is then proposed consistent with the approved non-project action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the non-project EIS. The scope

shall be limited accordingly..." *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The County further argues that the challenged amendments were within the range of alternatives considered in the environmental impact statement (EIS) prepared pursuant to the State Environmental Policy Act (SEPA) and simultaneous with the development of the Comprehensive Plan. Therefore the County was not required to provide additional opportunities for public comment pursuant to RCW 36.70A.035(2)(b)(i). Again, this Board cannot agree with the County. The alternatives were discussed only generally in the environmental impact statement and do not approach the specificity required that would have alerted interested members of the public that the challenged amendments would be considered and adopted with the Comprehensive Plan. We therefore find that the 72 amendments were not within the range of alternative addressed in the environmental impact statement. *1000 Friends of Washington/Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- The Respondents' first motion seeks the dismissal of Petitioners Issue No. 4 on the grounds that the issue had been decided in Case No. 01-1-0015c and 01-1-0014cz. In those cases, the Board ruled the County had complied with SEPA regulations as they applied to the Comprehensive Plan. *Respondent now argues that because development regulations must be consistent w*ith the comprehensive plan, and must implement the comprehensive plan, by extension, the development regulations therefore would also comply with SEPA. Petitioners argue that the actions under consideration are different and there are undecided material facts to be determined and the dispositive motion cannot be granted. The Board denies Respondent's motion, and will hear arguments on SEPA compliance at the Hearing on the Merits. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, 2nd Motion Order, (Aug. 27, 2002).

- The use of previously prepared documents in this process was appropriate and not a violation of the GMA or SEPA. The shortened process was to avoid duplication and was designed for a time such as this where most of the work had already been done. *Wilma v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- The City does not contend that it considered alternatives as is required. This GMA action was to change the zoning of the subject parcel of land to Commercial. It is not project specific and is site specific. The range of alternatives is restricted. The major alternative was no action. Detailed options that deal with the specific project of Wal-Mart are being dealt with at the permitting stage. *Wilma v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- The Board has recognized, in this case, that conditions unique to Ferry County must be reflected in our standard of review. Ferry County, while having a land area approximately the same size as King County or Whitman County, has a local property tax base of only 0.2% of King County and 21% of Whitman County. Ferry County's entire road department budget is less than $250,000. Clearly, Ferry County is constrained by financial circumstances in how it can reasonably respond to the GMA. The Board views our responsibility under the GMA to recognize local circumstances in our decisions. Counties not similarly constrained should not expect the same latitude given to Ferry County. *Woodmansee, et al. v. Ferry County*, EWGMHB Case No. 95-1-0010, 2nd Order on Compliance (Aug. 22, 1997).

Standing

- [County moved to dismiss based on lack of standing under the Administrative Procedure Act, RCW 34.05.530, alleging that Petitioner has not asserted it will have an "injury-in-fact."] In general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing under the injury-in-fact analysis. Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 830 (1998). Here, the Petitioner is an adjacent property owner, has some control of the access to the project area, and Petitioner alleges an injury to their property, i.e, additional traffic and activity will adversely affect Petitioner's property. Therefore, Petitioner satisfies the APA standing test for injury-in-fact and the Petition for Review should not be dismissed. *Cove Heights Condo Assoc. v. Chelan County,* EWGMHB Case No. 08-1-0013, Order on Motions, at 4-5 (Sept. 3, 2008)

- General Discussion of GMA standing. *Southgate Neighborhood Council, et al v. City of Spokane,* EWGMHB Case No. 08-1-0014, Order on Motions at 6-7 (Oct. 6, 2008).

- [A] party has standing to raise the issue, a party must still exhaust their administrative remedies prior to further review of administrative actions. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 20 (Oct. 6, 2008).

- Although the Board concurs with the Petitioners a challenge to standing is more properly brought early in the proceedings, thereby potentially eliminating the expenditure of resources by all parties and the Board, challenges to standing are deemed jurisdictional and may be brought at any time. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 22 (Oct. 6, 2008).

- General discussion as to standing. *Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 22-23 (Oct. 6, 2008).

- [T]he County appears to assert the Petitioners' standing is limited to those exhibits specifically attached to their brief. Although the County is correct in stating the Petitioners may not base their standing on submittals of others, the County is incorrect in its assertion a determination of standing is limited to those exhibits specifically attached to the Petitioners' HOM Brief. Once standing is challenged by a jurisdiction, Petitioners are permitted to come forward with evidence to demonstrate their participation satisfy the requirements of the GMA. *This evidence stems from the County's Record, which reflects all of the information before County when the decision was being made, not just those exhibits submitted with the Petitioners' HOM briefing which were intended to support their arguments. Larson Beach/Wagenman v. Stevens County,* EWGMHB Case No. 07-1-0013, FDO at 23 (Oct. 6, 2008).

- Because the Petitioners participation is thoroughly documented, the Board finds the Petitioners were diligent in presenting their points of view on the challenged ordinance during the course of its consideration. Their participation was directly related to the issues presented to the Board for review. The Petitioners clearly have standing based on participation as provided for in RCW 36.70A.280(2)(b). The GMA, at RCW 36.70A.280(2)(d), allows for a party to achieve standing pursuant to RCW 34.05.530 (APA standing) as an alternative; the operative conjunction in .280(2) is "or". The Petitioners, have met the GMA threshold for participation as provided in .280(2)(b) and .280(4) and, therefore, do not need to demonstrate individual injury or prejudice

which would be required under the APA. *Larson Beach/Wagenman v. Stevens County*, EWGMHB Case No. 07-1-0013, FDO at 24 (Oct. 6, 2008).

- Although the Board has previously ruled the GMA's standing provisions should be interpreted broadly, this does not mean the Petitioners do not have to provide how, either individually or as an organization, they satisfy [APA standing's] three factors. Petitioners have provided no argument in support of APA standing. Petitioners, not the Board or the County, bear the burden of establishing standing. *Wynecoop v. Spokane County*, EWGMHB Case No. 07-1-0007, FDO & Dismissal, at 8 (Nov. 14, 2007).

- This Board, following the lead of the Western Washington Growth Management Hearings Board, applies instead the GMA measure of standing for the SEPA issues that this Board has jurisdiction under the GMA to review. (RCW 36.70A.280(a)). This Board cites with approval the Western Board's decision in *WEAN* v. *Island County*, N0. 03-2-0008 (FDO 08/25/03.) In that decision, the Western Board articulates its rationale for measuring a parties standing in a case such as this, by reference to the GMA rather than SEPA. *Superior Asphalt & Concrete Co., v. Yakima County, et al.*, EWGMHB Case No. 05-1-0012, Order on Dispositive Motions, (March 30, 2006).

- The Petitioner clearly demonstrated that their attorneys, Flowers and Andreotti, submitted comments upon the proposed application, clearly stating that the comments were submitted on behalf of Superior Asphalt and Concrete Co. Furthermore, that law firm appeared on behalf of Petitioner, Superior Asphalt and Concrete Co., at each and every hearing and public meeting in this case held by Yakima County where public comment was allowed. The attorneys representing the Petitioner participated in the proceedings and identified themselves as "representatives" of the Petitioner. *Superior Asphalt & Concrete Co., v. Yakima County, et al.*, EWGMHB Case No. 05-1-0012, Order on Dispositive Motions, (March 30, 2006).

- RCW 36.70A.280(2)(3) & (4) allows a petition to be filed only by "(b) a person who has participated orally or in writing before the count or city regarding the matter on which review is being requested..." The Petitioner is a corporation and therefore a "person" under the law. In this case, that "corporate person" was unable to participate except through a representative. Clearly that Corporations' lawyer is qualified to represent the Petitioner before the County or City and is only required by common sense and Board case law to identify him or herself and give notice that they are acting in a representative capacity for that Corporation. This was done. Dismissal of the petition for lack of standing is denied. *Superior Asphalt & Concrete Co., v. Yakima County, et al.*, EWGMHB Case No. 05-1-0012, Order on Dispositive Motions, (March 30, 2006).

- Friends of Agriculturewas formed for the purpose of allowing individuals to associate themselves for purposes of filing a Petition for Review to this Board. Each of the named members (Barbara Lutz, Jean Mattson, Lee Bode, and Vera Walker) provided either written or oral testimony regarding the Laughlin Proposal. The Growth Management Act (GMA) recognizes "participation standing" as a jurisdictional basis for appeals to a Hearings Board. RCW 36.70A.280 provides, in part, as follows:

  (2) A petition may be filed only by: (a) the state, or a county or city that plans under this chapter; (b) *a person who has participated orally or in writing before the county or city regarding the matter* in which a review is being requested; (c) a person who is

certified by the governor within 60 days of filing a request with the board; (d) a person qualified pursuant to RCW 34.05.530. (Emphasis provided.)

There is no question that Barbara Lutz, Jean Mattson, Lee Bode and Vera Walker provided either written or oral testimony during the administrative review of the Laughlin proposal. Each has established "participation standing". Those members were specifically identified in the Petition for Review as members of "Friends of Agriculture". *Friends of Agriculture v. Grant County*, EWGMHB Case No. 05-1-0010, Order on Motion to Dismiss, (Dec. 27, 2005).

- Here, Petitioner argues the County is offering a "hyper-technical rationale that a petition must contain specific, canonical language to establish standing". They also note the Index of the Record includes Exhibit Two "comments submitted by Concerned Friends of Ferry County", clearly indicating participation, not just appearance at a hearing.

  While pro-se litigants must adhere to the same set of rules as attorneys, we find that Petitioners have adequately established their standing. To rule otherwise would require this Board to ignore the record and the petition as a whole. The Board recognizes the spirit of the GMA is to encourage citizens to participate, not limit participation through a technical interpretation of standing requirements. A review of the record and petition clearly establishes that the Petitioners did participate in the matters raised in their petition; the County knew what type of standing they were claiming. *Concerned Friends of Ferry County/Robinson v. Ferry County* EWGMHB Case No. 01-1-0019 Amended Motion Order, (April 16, 2002).

- The Board notes the legal advertisement for consideration of the development regulations establishes a deadline of Nov. 28, 2001, for receipt of written and oral comments. At the public hearing on that date, the Board of Commissioners extended the time for receipt of written comments to Dec. 7, 2001. The absence of a deadline within a separate display advertisement does not change the officially established deadline. The Board must therefore conclude that the letter dated Dec. 26, 2001 was submitted after the time for comments was closed, and cannot now be used as a basis for the Petitioners standing. Petitioners have no basis for challenging the substance of the draft development regulations under consideration at the Nov. 28, 2001, hearing. *1000 Friends of Washington v. Spokane County*, EWGMHB. Case No. 02-1-0006, Motion Order (June 7, 2002).

- For the Petitioner to have standing, the Growth Management Act (GMA) requires oral or written participation in the matters raised by the Petitioner herein. The reason for such requirement is to allow the County to know the Petitioner's objections and be able to respond to them if they feel it is appropriate. It was clear to the County what the objections of the Petitioner were and he participated actively in the hearings prior to the adoption of the CP and CFP. For us to now find that the Petitioner did not have standing after such participation would be a hyper technical reading of the statute. The Petitioner did participate on the matters raised herein. *Harvard View Estates, v. Spokane County*, EWGMHB Case No. 02-1-0005, FDO, (July 29, 2002).

- RCW 36.70A.280(2) does not limit standing to parties appearing before the county's legislative authority. Since the county has yet to hold a public hearing, such a narrow construction would effectively bar the petitioner from making its claim. Local governments may not evade the requirements of the GMA by failing to comply with the Act's deadlines. *No. Cascades Conservation Council/Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB Case No. 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- The Board finds that Petitioner [of a County action] has standing for the following reasons: (1) Its appearance and participation in both the City of Chelan Planning Commission hearing and the City of Chelan City Council meeting regarding Interim Urban Growth Areas became part of the record available to the Chelan County Board of County Commissioners, (2) the development of Interim Urban Growth Areas is of necessity a collaborative effort between the County and the City of Chelan in this case, and (3) Petitioner spoke with the county planning staff, including the director of the department, regarding the matter in question on several occasions. The cumulative effect of Petitioner's actions is sufficient to confer standing. The Board would not find standing if Petitioner had only met with the county planning staff, but that is not the case. Its meetings with the staff simply add to the cumulative weight of its acts. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, Order on Motions (Mar. 24, 1994).

- This Board has previously ruled the Growth Management Act (GMA) standing provisions should be interpreted broadly. *Woodmansee et al. v. Ferry County,* EWGMHB Case No. 95-1-0010, FDO, (May 13, 1996).

- In 1995, the Washington State Legislature expanded the Board's jurisdiction to include SEPA actions taken to comply with the GMA as part of regulation reform legislation (RCW 36.70A.280). The stated purpose was to simplify regulatory compliance. Standing for issues before this Board is under the GMA and Cascade Columbia Alliance has adequately demonstrated standing.

  The Board finds that standing under the GMA is sufficient standing to raise SEPA issues before this Board. This decision concurs with the ruling of the Western Washington Growth Management Hearings Board in *Achen, et al. v. Clark County* WWGMHB Case No. 95-2-0067. *Cascade Columbia Alliance, v. Kittitas County,* EWGMHB Case No. 98-1-0007, Order on Motions (March 1, 1999).

- The Growth Management Act does not require issue specific standing. The GMA, as interpreted by the Court of Appeals, requires only that the petitioner's participation be reasonably related to the issue presented to the Board. (*Wells v. Hearings Board*, 100 Wn. App. 656 (2000)). The Petitioners here have given us detailed instances where they orally or in writing participated on matters related to the issues raised by their Petition. The Board was able to find this documentation in the record and review it. This is adequate for a showing of standing under the GMA. The contention by the County that the failure to provide specific record citation prevented the review of the evidence of standing is unacceptable. This Board was able to adequately review that material. These Petitioners have provided sufficient information to substantiate their standing. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Order On Motion; (Apr. 23, 2001)

- In 1995, the Washington State Legislature expanded the Growth Management Hearings Board's jurisdiction to include SEPA actions taken to comply with the GMA. There is nothing in RCW 36.70A.280(1) that indicates a legislative intent to treat standing requirements for a SEPA challenge different than any other GMA standing requirement. The Hearings Board has no authority in the GMA to engraft a different and more rigorous standing requirement for SEPA challenges than that which is set forth in the plan language of the statute. The cases cited by the County do not apply to the question of whether a person with "appearance standing" may bring a SEPA challenge under the GMA. We find no reason to change our belief that standing for all

issues raised before this Board should be measured by the requirements of the GMA, RCW 36.70A.280(2)(b). *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Order On Motions; (Apr. 23, 2001).

- The County contended the document supporting standing was a letter from the Petitioner's attorney, not a party. The Petitioner's attorney is the representative of the Petitioners and clearly stated in the letter that he was speaking for the parties. This type of representation is so much a part of this country's legal system it would be difficult to believe you are not allowing an attorney to speak for a party. This participation is cognizable for purposes of standing if the attorney states that he or she is representing the parties in that matter. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Order On Motions; (Apr. 23, 2001).

- Issue 8 is an allegation of the County's failure to transmit copies of the subdivision codes to the Department of Community, Trade and Economic Development sixty days prior to enactment of the subdivision codes. This is a claim of a failure to act and does not require the same measure of standing. The Petitioners have adequate standing. The fact the Petitioners added comments or argument in addition to the issue is not fatal to standing. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Order On Motions; (Apr. 23, 2001).

- RCW 36.70A.280(2)(b) provides that: " a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; has standing to file a Petition for Review before the Board." The Petitioners contends they have 11 letters listed in the Index regarding the Critical Areas Ordinance. They attached 7 of those letters to the memorandum opposing Stevens County's motion to dismiss. These letters are dated over a period of time from Dec. 28, 1998 through Feb. 8, 2000. The Petitioners also point out the letters do reflect the many meetings they attended and the oral comments given to the County. The Petitioners demonstrated they have participated orally and in writing before the County Commissioners and should be deemed to have standing on Issues #3, 7, 8, 9, 10, 11 and 12. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016 Order on Motions, (May 16, 2001).

- The Petitioners contend the Growth Management Act does not require issue specific standing. They believe the specific issue raised in their Petition need not be raised before the County Commissioners. As the Board stated in Loon Lake Property Owners, et al. v. Stevens County, Case No. 01-1-0002c Order on Motions dated April 23, 2001, page 4, "The GMA does not require issue specific standing. The GMA, as interpreted by the Court of Appeals, requires only that the Petitioner's participation be reasonably related to the issue presented to the Board (*Wells v. Hearings Board*, 100 Wn App. 656 (2000))".

The Petitioners have given us detailed instances where they have participated through letters to the County Commissioners on matters related to the wetland issues raised by their Petition. They have also asserted that they have participated orally at hearings concerning these issues. The Petitioners have provided adequate evidence to substantiate their standing on issues 3, 5, 7, 8, 9, 10, 11 and 12. *Larson Beach Neighbors/Wagenman v. Stevens County,* EWGMHB Case No. 00-1-0016 Order on Motions, (May 16, 2001).

State Environmental Policy Act (SEPA)

- General discussion as to requirements for SEPA review – use of existing SEPA documents. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order, at 46-49 (Feb. 4, 2009).

- General discussion as to requirements for SEPA review. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 13-15 (Sept. 5, 2008).

- [W]hen 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 that 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" … the purpose of SEPA is "to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences," and that SEPA is to provide agencies environmental information prior to making decisions, not after they are made. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 14 (Sept. 5, 2008).

- The Hearings Boards have been consistent in their decisions that agencies must evaluate environmental impacts of non-project actions up-front and not wait until the project level. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 16 (Sept. 5, 2008).

- The County deferred environmental review to the project stage, which essentially makes the SEPA process moot. SEPA is to provide agencies environmental information prior to making decisions, not after they are made. Thus, SEPA seeks a prospective review of the environmental impacts of a proposal before the decision to authorize the action is made. SEPA does not seek a post-hoc retrospective analysis once a decision has been made and a project has been developed. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 18 (Sept. 5, 2008).

- An environmental analysis should be done at each stage of the GMA planning process and should address the environmental impacts associated with the planning decisions at that stage. Impacts associated with later planning stages, such as when there is a detailed project as in this case, may also be addressed to the extent that sufficient information is known for the analysis to be meaningful. The County's environmental review should have considered the full development potential of the site [under applicable development regulations]. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 19 (Sept. 5, 2008).

- [T]he County cannot rely upon future SEPA processes and development review when the realities of what is presently on the ground and the impacts associated with it calls for a complete SEPA review prior to a change in zoning. *Henderson v. Spokane County,* EWGMHB Case No. 08-1-0002, FDO at 39 (Sept. 5, 2008).

- Because the Petitioners failed to utilize the administrative appeal procedures available to them before seeking review by the Board, the Petitioners have failed to exhaust their administrative

remedies and dismissal of the issue is appropriate. *Larson Beach/Wagenman v. Stevens County*, EWGMHB Case NO. 07-1-0013, FDO at 20 (Oct. 6. 2008)

- In conducting the detailed examination of impacts, the County must consider the current landscape that exists and any resulting impacts from its actions. … two years have passed. The area within the expanded UGA has been blanketed with developments or vested development permits. The once rural area clearly has changed. A SEPA review is required and the simple re-adoption of a two year-old Determination of Non-Significance is insufficient. The actions do not have similar elements/impacts and the information and analysis is not relevant and adequate to assess the impacts. A review of the alternative actions surely would include no action, keeping the land within the UGA where it can receive appropriate services and safeguards. *Miotke v. Spokane County*, EWGMHB Case No. 07-1-0005, FDO, at 18-19 (Sept. 17, 2007).

- Any "person aggrieved" by a determination under the State Environmental Policy Act (SEPA) may obtain review. (RCW 43.21C.075(4)). The term "person aggrieved" includes anyone with standing to sue under existing law. Whether a person or entity has standing to challenge a State Environmental Policy Act (SEPA) determination, is determined by a two-part test: (1) The Petitioner must be within the zone of interest protected by SEPA, and (2) the party must allege an injury in fact, i.e., that he or she will be specifically and perceptibly harmed by the proposed action and the injury will be immediate, concrete, and specific. *Leavitte v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994).

  In order to show "injury in fact," a party must present testimony or affidavits indicating that it will be adversely affected by a municipal government's decision under SEPA. If the alleged injury is merely conjectural or hypothetical, then there can be no standing. *Spokane County Fire District No. 10 v. City of Airway Heights, et al.*, EWGMHB Case No. 02-1-0019, FDO, (July 31, 2003).

- To show injury in fact, the Fire District must demonstrate that it will be specifically and perceptibly harmed by the proposed action. A claim of potential injury without supporting evidentiary facts is insufficient to establish standing**.** When the entity seeking standing alleges a threatened injury, rather than an existing injury, it must show an immediate, concrete, and specific injury to itself. A showing of conjectural or hypothetical harm is insufficient to establish injury in fact. *Spokane County Fire District No. 10 v. City of Airway Heights, et al.*, EWGMHB Case No. 02-1-0019, FDO, (July 31, 2003).

- Any “person aggrieved” by a determination under the State Environmental Policy Act (SEPA) may obtain review. (RCW 43.21C.075(4)). The term “person aggrieved” includes anyone with standing to sue under existing law. Whether a person or entity has standing to challenge a State. *Spokane County Fire District No. 10 v. City of Airway Heights, et al.*, EWGMHB Case No. 02-1-0019, Order on Motion to Dismiss SEPA Issues, (July 31, 2003).

- The Washington State Legislature granted the Growth Management Hearings Boards jurisdiction to hear matters relating to RCW 43.21 (SEPA) as it relates to plans, development regulations or amendments adopted under the GMA. The Board recognizes that the Petitioners actively participated in the joint hearing process where the EIS and the Comprehensive Plan was discussed. This together with the careful reading of WAC 197-11-545(2) in full and our liberal examination of standing, we find that the Petitioners have standing to challenge the adequacy of

the EIS herein. *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The EIS performed was adequate for a non-project EIS. The Board finds the law does not require the examination of each and every potential option. The contents of the EIS on non-project proposals are described in WAC 197-11-442. That code provision declares that the County "shall have more flexibility in preparing EISs on non-project proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals. The EIS may be combined with other planning documents . . .." WAC 197-11-442(1). *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The County has flexibility in preparing the non-project EIS for the Comprehensive Plan. WAC 197-11-443(2) provides that a "non-project proposal may be approved based on an EIS assessing its broad impacts. When a project is then proposed consistent with the approved non-project action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the non-project EIS. The scope shall be limited accordingly..." *Citizens for Good Governance, et al. v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The County further argues that the challenged amendments were within the range of alternatives considered in the environmental impact statement (EIS) prepared pursuant to the State Environmental Policy Act (SEPA) and simultaneous with the development of the Comprehensive Plan. Therefore the County was not required to provide additional opportunities for public comment pursuant to RCW 36.70A.035(2)(b)(i).

  Again, this Board cannot agree with the County. The alternatives were discussed only generally in the environmental impact statement and do not approach the specificity required that would have alerted interested members of the public that the challenged amendments would be considered and adopted with the Comprehensive Plan. We therefore find that the 72 amendments were not within the range of alternative addressed in the environmental impact statement. *1000 Friends of Washington/Neighborhood Alliance of Spokane, v. Spokane County*, EWGMHB Case No. 01-1-0018, FDO, (June 4, 2002).

- The Respondents' first motion seeks the dismissal of Petitioners Issue No. 4 on the grounds that the issue had been decided in Case No. 01-1-0015c and 01-1-0014cz. In those cases, the Board ruled the County had complied with SEPA regulations as they applied to the Comprehensive Plan. Respondent now argues that because development regulations must be consistent with the comprehensive plan, and must implement the comprehensive plan, by extension, the development regulations therefore would also comply with SEPA. Petitioners argue that the actions under consideration are different and there are undecided material facts to be determined and the dispositive motion cannot be granted. The Board denies Respondent's motion, and will hear arguments on SEPA compliance at the Hearing on the Merits. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, 2nd Motion Order, (Aug. 27, 2002).

- The use of previously prepared documents in this process was appropriate and not a violation of the GMA or SEPA. The shortened process was to avoid duplication and was designed for a time such as this where most of the work had already been done. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- The City does not contend that it considered alternatives as is required. This GMA action was to change the zoning of the subject parcel of land to Commercial. It is not project specific and is site specific. The range of alternatives is restricted. The major alternative was no action. Detailed options that deal with the specific project of Wal-Mart are being dealt with at the permitting stage. *Wilma, v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO, (Sept. 4, 2002).

- The requirement for an interim ordinance has the sole purpose of protecting critical areas as a whole until the balancing with other goals and the inclusion of public and local judgments by local elected officials can be incorporated in the comprehensive plan. SEPA and "expanded SEPA" have exceptions and thresholds that do not provide the interim protection envisioned by the Act. Counties critical areas ordinances must include a standard of interim protection in each category that all parties can rely on until the comprehensive plan can be adopted. *English/Project for Informed Citizens v. Board of County Commissioners of Columbia County*, EWGMHB Case No. 93-1-0002, FDO (Nov. 12, 1993).

- In 1995, the Washington State Legislature expanded the Board's jurisdiction to include SEPA actions taken to comply with the GMA as part of regulation reform legislation (RCW 36.70A.280). The stated purpose was to simplify regulatory compliance. Standing for issues before this Board is under the GMA and Cascade Columbia Alliance has adequately demonstrated standing.

  The Board finds that standing under the GMA is sufficient standing to raise SEPA issues before this Board. This decision concurs with the ruling of the Western Washington Growth Management Hearings Board in *Achen, et al. v. Clark County* WWGMHB Case No. 95-2-0067. *Cascade Columbia Alliance, v. Kittitas County,* EWGMHB Case No. 98-1-0007, Order on Motions, (March 1, 1999).

- The fact that the Petitioners appealed the SEPA matter to the Hearing Examiner does not render this issue *res judicata.* After such appeal they could have chosen to appeal to the Superior Court or the Growth Management Hearings Board. They chose to seek review before this Board. That is authorized under the GMA. RCW 36.70A.280(1). *Loon Lake Property Owners Association, et al v. Stevens County;* EWGMHB Case No. 01-1-0002c, Order On Motions; (Apr. 23, 2001).

- In 1995, the Washington State Legislature expanded the Growth Management Hearings Board's jurisdiction to include SEPA actions taken to comply with the GMA. There is nothing in RCW 36.70A.280(1) that indicates a legislative intent to treat standing requirements for a SEPA challenge different than any other GMA standing requirement. The Hearings Board has no authority in the GMA to engraft a different and more rigorous standing requirement for SEPA challenges than that which is set forth in the plan language of the statute. The cases cited by the County do not apply to the question of whether a person with "appearance standing" may bring a SEPA challenge under the GMA. We find no reason to change our belief that standing for all issues raised before this Board should be measured by the requirements of the GMA, RCW 36.70A.280(2)(b). *Loon Lake Property Owners Association, et al v. Stevens County;* EWGMHB Case No. 01-1-0002c, Order On Motions; (Apr. 23, 2001).

- The Washington State Legislature expanded the Board's jurisdiction to include SEPA actions taken to comply with the GMA. (RCW 36.70A.280). The Board has jurisdiction to review the non-project specific County actions. The Board must determine if the EIS performed for these actions was adequate. Less detail is required for an EIS on a non-project action. WAC 197-11-

704(2)(b)(ii). A specific project shall undergo a much more rigorous SEPA review. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

Stay of Proceedings

- *See*, ***Miotke/Neighborhood Alliance v. Spokane County***, Case No. 05-1-0007, Order Reinstating Stay (Jan. 5, 2010)(Board issuing stay of proceedings)

- *See*, ***Larson Beach Neighbors/Wagenman v. Stevens County***, Case No. 07-1-0013, Order RE Stay of Proceedings (Jan. 7, 2010)(Granting abeyance of compliance proceedings during pendency of court issued stay)

- Intervenor specifically appealed [three Legal Issues], the Board acknowledges the appeal, the subsequent issued stay … and, with this order, will issue an Order of Abeyance in regards to the compliance proceedings related to these Legal Issues. The Board will not, as Intervenors request, rescind the compliance for those issues appealed. The Stay issued by the Court does not bring the County into compliance on those issues under appeal; it means only that the County does not have to take any legislative action on those issues until such time as a decision is rendered by the Court. During the pendency of the court proceedings the County remains in a non-compliant status but, as Intervenors correctly note, are not required to take action in response to the Board's FDO. Therefore, abeyance of the compliance schedule, essentially a temporary suspension, is the more appropriate terminology. *Kittitas County Conservation , et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Compliance Order, at 9 (Aug. 7, 2008).

- The parties did not appeal nor did the Court grant a stay on any other substantive ruling of this Board … The County and Intervenors attempt to succumb issues which were not specifically appealed into those appealed by asserting the "issues were similar" or that they "necessarily involve issues of appropriate rural densities." As aggrieved parties to the Board's FDO, both the County and the Intervenors had the right to appeal all issues for which they believed error had occurred. They failed to do so and the Board will not expand the foundation of the parties' appeal beyond those issues the parties themselves specifically set forth in their petitions. Nor, will the Board extend the Court's stay beyond that which was granted. *Kittitas County Conservation , et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Compliance Order, at 11 (Aug. 7, 2008).

Stipulation

- Because the primary issue concerned the County's failure to designate agricultural resource lands in a timely manner pursuant to RCW 36.70A.170, which the County admitted it had not done, a stipulation setting an agreed upon deadline for the performance of this action was entered into by the parties and memorialized in the Board's "Stipulated Agreement and FDO" dated June 22, 1994. Since this stipulation resolved the matter at hand, the development of a record for this case was deemed unnecessary and none was produced. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 94-1-0019, Order of Compliance (Oct. 21, 1994).

Subarea Plans

- Subarea plans are neither defined nor required by the GMA; Subarea plans are an optional element that a jurisdiction may include in its GMA Plan. RCW 36.70A.080(2). All that can

be inferred from the statute and prior Board cases is that Subarea plans are, as the pre-fix "sub" implies, subsets of the comprehensive plan of a jurisdiction. Additionally, Subarea plans typically augment and amplify policies contained in the jurisdiction-side comprehensive plan. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 20 (Aug. 20, 2007).

- The County's use of a Subarea planning process does not exempt that land from the goals and requirements of the GMA, the CP and the County Wide Planning Policies. This "Area" cannot exist outside of the UGA and allow urban growth or the potential of development inconsistent with areas outside of UGAs unless it is selected for one of the designations allowed under the GMA, such as Master Planned Resorts, LAMIRDs or UGAs. The vesting of properties within that area does not justify the continuing violations of the GMA. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 20 (Aug. 20, 2007).

- A subarea plan is not a requirement of the GMA. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order, at 5 (Dec 4, 2006)

- The Board finds that the GMA establishes the Countywide Planning Policies ("CPPs") as the mechanism for achieving consistencies between the comprehensive plans of a county and the cities within that county. RCW 36.70A.210(1) provides a CPP "shall ensure that city and county comprehensive plans are consistent as required by RCW 36.70A.100." The Board has already ruled that the MPR Policies are consistent with the CPPs. *City of Ellensburg v. Kittitas County,* EWGMHB No. 96-1-0017. The Board is not asked whether the Mountain Star Subarea Plan is consistent with the CPPs, but with the City of Roslyn. We find that if the Mountain Star Subarea Plan is consistent with the CPPs, it is inherently consistent with the comprehensive plan for the City of Roslyn. No one has challenged the consistency of the Roslyn Comprehensive Plan with the CPPs.

  RCW 36.70A.360(1) defines a MPR as a type of "planned unit development." The County has a zoning ordinance for planned unit developments, KCC 17.08.445. A process is established therein for the assessment of a PUD application. Instead of using this process for siting a MPR, the County established a Subarea Plan and a MPR Zoning District, which includes the process for establishing a MPR. A MPR cannot be zoned under both the MPR Zoning District and the PUD provisions. Both are separate and distinct zoning districts under the Kittitas County Code. *Ridge v. Kittitas County, et. al.*; EWGMHB Case No. 00-1-0017, FDO; (June 7, 2001).

Subject Matter Jurisdiction

- *See also Keyword:* ***Jurisdiction***

- *See, Scott Simmons v. Ferry County,* Case No. 09-1-0001, Order on Motions (April 23, 2009)(Dismissing petitioner's issues as they relate to the phrase "nexus and proportionality of the regulations" since that phrase pertains to constitutional takings claims for which the Board has no jurisdiction.)

- [T]he County should not assume that just because an action was not a "GMA legislative enactment" it is immune to a challenge. Rather, it is the effect of the jurisdiction's action – amending a comprehensive plan or development regulation – which may give rise to the Board's

subject matter jurisdiction. *Wynecoop v. Spokane County*, EWGMHB Case No. 07-1-0007, FDO & Dismissal, at 7 (Nov. 14, 2007).

- The Board does not have jurisdiction to review local government compliance with statutes other than the Growth Management Act and SEPA compliance on GMA plans and regulations. Similarly, the Board has no authority to impose a moratorium, to set aside permits, or to enjoin construction. RCW 36.70A.300 limits the type of relief a Board can grant to either finding a county in compliance or not in compliance with the Act. *No. Cascades Conservation Council/Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB Case No. 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- The Board finds that its jurisdiction extends only to matters specified in RCW 36.70A.280 (1). Therefore, the Board lacks jurisdiction to determine whether a county violated other statutes. *No. Cascades Conservation Council/Washington Environmental Council v. Chelan County Board of Adjustment*, EWGMHB Case No. 93-1-0001, Order on Dispositive Motions (May 21, 1993).

- A Growth Management Hearing Board does not have the jurisdiction to review an action of a County pursuant to a non-GMA statute unless that statute was used to comply with the requirements of the GMA. However, the Board has jurisdiction to determine if a land use planning legislative action complies with the GMA, as long as there is a sufficient nexus between the action and the GMA. The Board's jurisdiction is not to determine whether the local government has properly enacted such non-GMA law, but the effect of the law passed upon the County's compliance with the GMA. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 99-1-0004, Order on Motion to Dismiss, (Sept. 29, 1999).

- When we review Ferry County Ordinance #99-01, we will not determine if the county is in compliance with the Washington Forest Practices Rules, WAC 222-20-050, but examine this action to determine whether the County remains in compliance with the GMA. To do otherwise would allow the myriad of other planning statutes to dramatically affect a County's Comprehensive Plan with no checks. *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 99-1-0004, Order on Motion to Dismiss, (Sept. 29, 1999).

Summary Judgment (*See also* Dispositve Motions)

- WAC 242-02-530(4) does permit "[D]ispositive motions on a limited record, similar to a motion for summary judgment in superior court or a motion on the merits in the appellate courts." Summary judgment is appropriate only when, after reviewing all facts and reasonable inferences in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In essence, granting Petitioners' Motion in this case would result in a finding of non-compliance for Ferry County. *Riparian Owners of Ferry County, et al v. Ferry County*, Case No. 09-1-0012, Order on Motion for Summary Judgment at 2-3(Jan. 4, 2010)

- [T]his Board has previously held that motions for summary judgment are granted only in very limited circumstances and that complex issues are not appropriate for early dismissal as it may impact a full and fair consideration of the subject matter. *Riparian Owners of Ferry County, et al v. Ferry County*, Case No. 09-1-0012, Order on Motion for Summary Judgment at 3(Jan. 4, 2010)

- A concern for the Board when presented with a motion for summary judgment by a Petitioner is both the presumption of validity that is accorded a GMA enactment and the deference the Board is to grant Ferry County in its planning decisions. In this matter, the Board, with the exception of Section 9.03 of Ferry County's CAO, has none of the Record utilized by the County in taking the challenged action and therefore, it is difficult to determine if Ferry County has, in fact, violated the GMA as set forth in Petitioners' issue statement. All that has been presented to the Board is citation to cases without any analysis by the Petitioners as to how these cases apply to the facts and circumstances of the present matter. Thus, granting summary judgment without consideration of the Record would distort the presumption of validity granted by the GMA. *Riparian Owners of Ferry County, et al v. Ferry County*, Case No. 09-1-0012, Order on Motion for Summary Judgment at 4 (Jan. 4, 2010)

- With only one issue, this motion goes to the "heart" of the case and it is therefore, not appropriate for dismissal on a summary judgment motion but rather the Board would benefit from development of full briefing and a thorough review of the Record prior to issuing a decision on such a complex issue. *Riparian Owners of Ferry County, et al v. Ferry County*, Case No. 09-1-0012, Order on Motion for Summary Judgment at 4-5 (Jan. 4, 2010)

- WAC 242-02-530(4) permits the filing of a dispositive motion on a limited record. Such a motion is similar to a Motion for Summary Judgment before the Court and, therefore, the Board will grant such a motion only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law … When issues are complex, extensive review of the Record pertaining to the core of a case is required. Therefore, the parties require time and careful consideration of the facts and law in order to fully develop briefing. Due to the limited factual evidence and argument provided to the Board at this time, the Board concludes dismissal of the matter would not be appropriate as it is evident disputes remain as to the underlying facts and the interpretation and application of GMA provisions. *Wenatchee v. Chelan County*, EWGMHB Case No. 08-1-0015, Order on Motions at 7-8 (Dec. 2, 2008)

- The ICAO Amendment has vague unenforceable "ad hoc" standards that do not provide protection of critical areas and riparian areas as required by RCW 36.70A.060(2). Amendment 2 to the ICAO does not contain any best available science or science references supporting the replacement of set width standard buffers with site specific "no harm" buffers and therefore the County has not included the best available science in developing the Amendment. Further, the County has failed to explain its departure from science-based recommendations as required by WAC 365-195-905. There are no genuine issues of material fact and Petitioners are entitled to judgment as a matter of law on this issue. *Loon Lake Property Owners Association, et al.v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Motions on cases nos. 00-1-0016, 03-1-0003, and 03-1-0006, (Feb. 6, 2004).

- Dispositive motions before the Growth Management Hearings Board are similar to a motion for summary judgment in Superior Court. WAC 242-02-530. A dispositive motion must be based upon uncontested material facts. If there is a dispute as to any material facts, the Board will not grant the motion to dismiss. *City of Cle Elum v. Kittitas County, et al*, EWGMHB Case No. 01-1-0003, Order on Motions, (April 19, 2001).

Transformance of Governance

Transformation of local government is a legislative directive well recognized by the Boards. The Boards recognize this legislative directive as requiring a "transformation of local governance," whereby urban services (which are permitted only in UGAs) are primarily provided by cities." … *It is inappropriate to establish a n*on-municipal UGA in close proximity to a municipality with no plan for the transformation of local governance. .. Spokane County has the burden to adopt a comprehensive plan that satisfies the legislative directive requiring transformation of local governance. [The County's] Comprehensive Plan has to effectuate the legislative direction that cities are to be the primary providers of urban services within the UGA and adopt realistic strategies for achieving this directive. *City of Spokane v. Spokane County,* EWGMHB Case No. 06-1-0002, FDO, at 14-15 (internal citations omitted) (Nov. 27, 2006)**.**

Transportation

- The road plan, adopted by the ordinance, effectuates the goal of placing collector roads away from areas already developed with residences. The ordinance does not encourage urban development without adequate facilities. *Bauder v. City of Richland,* EWGMHB Case No. 01-1-0005 FDO (Aug. 16 2002).

- The location of a road or primary access road, which is not upon the subject property, does not place the City in non-compliance. The location or relocation of a road in a city or county can affect landowners near and far. An action under the GMA is not prohibited by Goal 6 simply because the action has an effect upon people's property. *While the subject change appears t*o have a substantial impact upon access to and the timing of the access to the Petitioners' development, that alone does not make the action of the City non-GMA compliant. The actions of the City are presumed to be in compliance with the GMA. The Petitioners have not shown this Board that the actions of the City are in clearly erroneous and a violation of the GMA. *Bauder v. City of Richland,* EWGMHB Case No. 01-1-0005 FDO (Aug. 16 2002).

Urban Densities

- *Kittitas Conservation v. Kittitas County*, EWGMHB Case No. 07-1-0004c, FDO at 16 (Aug. 20, 2007) (holding the County's current land use designations as urban density within rural areas).

- *The GMA speaks of "a variety of rural den*sities". RCW 36.70A.070(5)(b). However, the density must still be rural, not urban. With one narrow exception, this Board has consistently found that anything under 5-acre lots is urban. Clearly 2.5-acre lots are the clearest vehicle of sprawl. Scattering these small lots around cities would continue what the GMA is trying to stop. Services cannot be easily provided; each will have their own well, septic tank and other limited infrastructure. This size lot is one of the most difficult to bring into a city if annexed. *City of Moses Lake v. Grant County,* EWGMHB Case No. 99-1-0016, Order on Remand, (April 17, 2002).

Urban Growth Areas (UGAs)

- *See also* ***Land Capacity Analysis***

- [In addressing the sizing of the City of Kittitas UGA, which was retained upon a transfer of an additional 666 persons from the rural areas, the Board noted:] Of greater interest is the fact these 666 additional persons represent a 48 percent increase over the original allocation; almost doubling the number of people the City of Kittitas UGA must accommodate over the 20-year planning horizon which does not reflect historic growth trends for the City. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, 4th Compliance Order at 21 (May 26, 2010)

- UGAs are not solely comprised of residential lands but also must provide for a broad range of needs related to the projected urban growth including commercial and industrial uses. If additional commercial/industrial lands are sought for the UGA, the County must demonstrate a need for those types of land. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, 4th Compliance Order at 22 (May 26, 2010)

- With this reallocation, the County appears to be attempting to tweak the numbers to achieve the desired result – retaining the current, non-compliant UGA as it currently exists – as this additional allocation has no supporting rationale except in this regard. Specifically, the LCA prepared by the consultants was based not on pre-expansion UGA lands but on a UGA which included the expansion area. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0004c, 4th Compliance Order at 22 (May 26, 2010)

- [I]n order to comply with the GMA and its stated duty, Douglas County is required to ensure the East Wenatchee UGA is the appropriate size in relationship to OFM population projections. As noted above, there is nothing in the Record indicating Douglas County performed the necessary supporting analysis, whether for residential or commercial land needs. Expansion of an UGA is done through a process, not arbitrarily designated because of current use or "equity". In the end, however, it is the County's responsibility to do the analysis of the amendments, base its decisions on both an updated land quantity analysis and capital facilities plan, and designate new UGAs based on the evidence. All three boards have held that this responsibility lies with the counties. *DCCRG/Futurewise v. Douglas County,* Case No. 09-1-0011, FDO at 31 (Jan. 19, 2010)

- [Zillah asserted the County changed its methodology during the compliance phase] As to Zillah's contention that the Board's FDO restricts or binds Yakima County's approach when responding to a finding of non-compliance, this Board has previously stated: [citing to *McHugh v. Spokane County,* EWGMHB Case No. 05-1-0004, Compliance Order, at 5 (Emphasis added; Internal citations omitted) (March 5, 2007) which found that the question on compliance is whether the jurisdiction has met the GMA's requirements not any Board directives as the Board does not have authority to order the County to take any particular actions]… Thus, contrary to Zillah's assertion, the "remand" in this matter, and the issue for the Board during these compliance proceedings, remains as it did in the underlying proceeding – *is the Zillah UGA properly sized to accommodate its 20-year projected growth as required by RCW 36.70A.110?* The method Yakima County chooses to accomplish this task, so long as it conforms to the GMA, is at the County's discretion. *City of Zillah v. Yakima County,* Case No. 08-1-0001, Compliance Order at 4-5 (Jan. 4, 2010)

- For a UGA to be properly sized, the vacant land inventory within a LCA must accurately reflect the buildable nature of this land … With its Revised LCA, Yakima County has conducted a

thorough and refined analysis of the vacant lands within the Zillah UGA; one that should be mirrored in future updates to the County's UGAs and reflects the varied concerns previously raised by Zillah. Specifically, the County's Vacant Land Analysis looked at two things: (1) sensitive and critical areas and (2) partially-developed and under-utilized land. *City of Zillah v. Yakima County*, Case No. 08-1-0001, Compliance Order at 7-8 (Jan. 4, 2010)

- The development potential of vacant lands, including those that were completely vacant as well as those which were partially-developed, was assessed so as to determine the viability of these lands for development, especially infill development which is an essential aspect of GMA planning. *City of Zillah v. Yakima County*, Case No. 08-1-0001, Compliance Order at 8 (Jan. 4, 2010)

- Acreage encumbered by critical and/or sensitive areas, including buffers, were deemed "undevelopable" and the amount of vacant land was reduced accordingly. This is the correct methodology to be utilized as it removes from consideration those lands which are not suitable for development and for which state and local regulations actually prohibit development. In addition, the County assessed partially-vacant or under-utilized parcels. With the GMA's goal of focusing growth within the UGA, to disregard the development potential of these types of parcels would eviscerate that goal. Thus, it was not clearly erroneous for Yakima County to incorporate the development capacity of these lands during the revision of the Zillah UGA as this was one of the primary steps in developing a solid LCA. *City of Zillah v. Yakima County*, Case No. 08-1-0001, Compliance Order at 9 (Jan. 4, 2010)

- [J]ust because the County's [LCA] calculation resulted in a need for additional land does not warrant the expansion of the Zillah UGA by the same acreage. The GMA focuses growth first within the UGA boundaries, encouraging greater utilization of this area before turning the focus towards expansion. *City of Zillah v. Yakima County,* Case No. 08-1-0001, FDO at 26 (Aug. 10, 2009)

- [Zillah challenges the County's various land use assumptions] The Board recognizes planning assumptions amount to "educated guesses" without absolute precision and the lack of precision permeates the entire process because the assumptions are largely quantitative, reaching 20 years into the future in an educated attempt to predict future development activity. However, the Board reiterates its role is not to determine whether one assumption is better than another assumption or to substitute its judgment for that of the County. Rather, its role is to ensure the County's actions comply with the goals and requirements of the GMA, in this case – that the Zillah UGA is sized to accommodate its allocated growth. *City of Zillah v. Yakima County,* Case No. 08-1-0001, FDO at 27 (Aug. 10, 2009)

- Planning is a science based on trends and assumptions drawn from those trends …The County's assumptions are reasonable given today's economic environment and the GMA's mandate to encourage urban levels of growth within the UGA. *City of Zillah v. Yakima County,* Case No. 08-1-0001, FDO at 29-30 (Aug. 10, 2009)

- Although the GMA directs counties to establish UGAs in areas which are characterized by urban growth and can have public services provided, it does not mandate the expansion of a UGA boundary solely to encompass these lands. The GMA requires the boundary of a UGA to be defined based on population projections with land sufficient for growth. If land was added to a UGA simply to create a LOB [logical outer boundary] or because they may be urban in

character, without any correlation to population or sufficiency, then these GMA requirements would become meaningless. *City of Zillah v. Yakima County,* Case No. 08-1-0001, FDO at 32 (Aug. 10, 2009)

- RCW 36.70A.110(2) requires written justification if agreement cannot be met. Although this provision is in relationship to the initial designation of UGAs, the Board believes its requirements are still invoked during amendments to any previously established UGAs. *City of Zillah v. Yakima County,* Case No. 08-1-0001, FDO at 31 (Aug. 10, 2009)

- *See also, City of Zillah v. Yakima County,* Case No. 08-1-0001, FDO at 17-21 (Aug. 10, 2009) – UGA Sizing in relationship to OFM Population Projections with UGA's size based on OFM's most recent 10-year population projections; allocation of the county-wide population based on the City's share of the census population supported by historic trends.

- *See also, City of Zillah v. Yakima County,* Case No. 08-1-0001, FDO at 21-24 (Aug. 10, 2009) – UGA Sizing in relationship to growth projections and finding no violation as to the County's use of historical trends).

- [In finding that the record did not support the expansion of a UGA for non-residential needs by 747 acres, the Board noted:] There is substantial evidence in the record to support the County's determination that some revision to the pre-existing UGA boundaries is needed to accommodate projected urban growth for the AVA-related economic development purposes, in furtherance of the economic development goal in RCW 36.70A.020(5) -- including evidence that (1) urban growth will occur around the proposed I-82 interchange and the nearby Red Mountain AVA, and (2) this growth is dependent on freeway access which is not available within the pre-existing UGA boundaries. *Brodeur/Futurewise, et al v. Benton County,* Case No. 09-1-0010c "W. Richland UGA" FDO at 14 (Dec. 2, 2009), *see also,* "W. Richland UGA" FDO at 16-17 (Roskelley dissenting)

- The UGA sizing standard requires the County to designate no more than the amount of land necessary to accommodate the 20-year urban growth projection, plus a reasonable land market supply factor … Consistent with the OFM 20-year population forecast, the "projected urban growth" must include residential uses together with a broad range of non-residential needs and uses (e.g. commercial, industrial, service, and retail). *Brodeur/Futurewise, et al v. Benton County,* Case No. 09-1-0010c "W. Richland UGA" FDO at 15 (Dec. 2, 2009) (Roskelley dissenting)

- [In response to Petitioners' claim that the UGA expansion area was not characterized by urban growth] The Supreme Court has held that the term "growth" does not simply refer to the "built environment" – "an area could still be *presently* characterized by growth regardless of whether that 'growth' presently consists only of vested development rights, partially completed subdivisions, or completed urban neighborhoods." The Supreme Court has also held in a case involving a UGA expansion that "[b]ecause the land in question touches the Arlington UGA, it is adjacent to territory already characterized by urban growth for the purposes of *RCW 36.70A.110(1).*" Accordingly, since the acreage in question here touches the existing City of Richland corporate boundary, it is adjacent to territory already characterized by urban growth for the purposes of RCW 36.70A.110(1). *Brodeur/Futurewise, et al v. Benton County,* Case No. 09-1-0010c "W. Richland UGA" FDO at 19 (Dec. 2, 2009) (Roskelley dissenting)

- [T]he GMA places the responsibility of designating a UGA solely on Chelan County. Cities have no power, in and of themselves, to delineate UGAs. Although the duty of designating a UGA belongs to a county, coordination and consultation between a county and its cities underlies many aspects of the GMA, including the designation of UGAs. Therefore, the GMA requires counties to consult with each of its cities and attempt to reach agreement as to the location of the UGA, but if agreement cannot be reached the County may designate a UGA as it deems appropriate … Thus, it is clear from the GMA the duty for the initial delineation and the future expansion of a UGA is Chelan County's alone. *City of Wenatchee v. Chelan County*, EWGMHB Case No. 08-1-0015, FDO at 10-11 (March 6, 2009).

- There is no doubt the GMA contemplates the future expansion of a UGA as RCW 36.70A.130 requires Chelan County to review its UGAs at least every 10 years in order to ensure the County's UGAs are properly sized to accommodate urban growth projected to occur over the succeeding 20 year planning horizon. Therefore, the GMA recognizes the long-range and dynamic, but not stagnant, nature of GMA planning. However, the growth projection used for UGAs is based on growth management population projections produced by the Office of Financial Management (OFM) *not* the City of Wenatchee. Thus, the City's contention its own projections permit expansion of a UGA, and the County's apparent concession to this contention, is not supported by the GMA. *City of Wenatchee v. Chelan County*, EWGMHB Case No. 08-1-0015, FDO, at 12-13 (March 6, 2009).

- [In finding the County's relabeling of its UGNs as UGAs, the Board stated] it is plain from the County's own documentation prior to designating the areas the County had formerly labeled as UGNs to UGAs no analysis has been conducted as to whether or not these areas satisfied the GMA's criteria for designation as UGA's set forth in RCW 36.70A.110. This analysis has been prospectively charged to the County's LUAC and is anticipated to be completed by the end of 2009. Without the proper analysis, the County explicitly fails to comply with RCW 36.70A.110. *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Compliance Order, at 8 (Jan. 12, 2009).

- General Discussion as to UGA sizing. *Kittitas County Conservation, et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Compliance Order, at 34-39 (Feb 24, 2009).

- [M]erely adopting the City's LCA without reviewing that analysis to ensure it properly conforms to not only the GMA's goals and requirements but to the goals and policies of Kittitas County's existing CP does not satisfy [the County's duty to size a UGA] …. To reiterate – it is Kittitas County's duty to size a UGA, not the City of Kittitas. Upon a challenge to the size of one of the County's UGA's, the County must provide the Board with the *County's analysis* to support the sizing of the UGA. The record continues to be devoid of such an analysis. *Kittitas County Conservation, et al. v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Compliance Order, at 39 (Feb 24, 2009).

- The problem for the Board is the County fails to provide the Board the location for where in the [City of Kittitas'] CP, a 92 page document, the "needed analysis and justification" is contained. Nor, as both Petitioners and CTED point out, has the County presented any evidence that it has evaluated the City's assessment. Without this supporting analytical evidence for the Board to review, the Board has no way of determining whether the County has achieved compliance in regards to the City of Kittitas UGA. *Kittitas County Conservation, et al. v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Compliance Order at 32-33 (Aug. 7, 2008).

- The Board cannot reiterate enough the importance of capital facility planning, by all entities, when a County is setting UGA boundaries. Kittitas County must ensure the areas within the entire UGAs, both existing and expansion areas, will have adequate and available urban facilities provided over the 20-year planning period. The area impacted by the proposed applications, Nos. 06-03 and 06-04, is not within the jurisdictional limits of the City of Kittitas, but is located in what would be deemed the unincorporated portion of the UGA. It is the County, not the City, that is responsible for ensuring capital facilities within this area … If the County wishes to rely on the City to satisfy this responsibility, it is still required to demonstrate to the Board that the necessary infrastructure to serve the UGA expansion area will be available during the 20-year planning horizon. As with the LCA, simply citing to the City's CP, without more, fails to demonstrate compliance. *Kittitas County Conservation, et al. v. Kittitas County,* EWGMHB Case No. 07-1-0004c, Compliance Order at 34-35 (Aug. 7, 2008).

- This Board recognizes that designating UGAs that are not *adjacent to or abutting incorporated* UGAs is unusual, but has been done by counties in other parts of the state (citing *ADR v. Mason County,* WWGMHB Case No. 06-2-0005, FDO (Aug. 14, 2006) for definitions of "territory" and "adjacent" contained in RCW 36.70A.110). *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 19-20 (March 12, 2007).

- Without a careful analysis of the OFM twenty-year population allocation in relation to land quantity, type of land designation, density, public services and public facilities, growth patterns and other factors by the County, its Comprehensive Plan would be inaccurate and not a true planning document as required by the GMA. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 62 (March 12, 2007).

- The requirement that urban growth should be directed to appropriately-sized and delineated UGAs is one of the main organizing principles of the GMA's approach to planning for growth. To determine the appropriate size and location of an UGA requires an appropriate analysis, variously called a "land capacity analysis" or a "land quantity analysis." That analysis includes two interrelated components: (1) counties first must determine how much land should be included within UGAs to accommodate expected urban development, based on the OFM population projections; (2) counties must determine which lands in particular should be included within UGAs, based on the "locational criteria" provided in RCW 36.70A110(1) and (3). *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 65 (Aug. 20, 2007).

- *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO at 64-66 (Aug. 20, 2007) (An Urban Growth Node (UGN), as used by the County is not a variant-UGA or LAMIRD)

- Under the GMA, urban growth areas may not be expanded unless there is a need for additional capacity, based on the state Office of Financial Management (OFM) population projections, patterns of development, and other similar factors identified in RCW 36.70A.110. The purpose of a land capacity analysis is to provide the information necessary to determine whether there is a need to expand an UGA. In the absence of a land capacity analysis, there is no demonstration of need and expansion is not justified. *Kittitas Conservation v. Kittitas County,* EWGMHB Case No. 07-1-0004c, FDO, at 76 (Aug. 20, 2007).

- The process for the designation of a UGA is very clear. The County must first conduct a proper Land Quantity and Population Analysis, engage in joint planning, update its Capital Facilities Plan and, in some cases, consult with airports and aviation officials. SEPA procedures must also be followed as required by law. Upon proper completion of such actions the County will determine if an expansion of its UGAs is needed. If the expected population may be contained within the existing UGAs, the expansion should not take place. The Board finds the reduction of the size of an existing UGA requires similar actions, which are not reflected in the record before us in this matter. *Miotke v. Spokane County,* EWGMHB Case No. 07-1-0005, FDO, at 10 (Sept. 17, 2007).

- The reduction of the size of an existing UGA can have the result of allowing urban densities in rural areas. The result might also be that these densities are without the services required. *Miotke v. Spokane County,* EWGMHB Case No. 07-1-0005, FDO, at 10 (Sept. 17, 2007).

- [Designation of UGA] WAC 365-195-335 clearly spells out what a jurisdiction must do to designate UGAs. The WAC may not designate the steps as a "land quantity analysis" or "land capacity analysis", but if a county or city performs the necessary tasks, that terminology certainly describes what must be accomplished to fulfill the requirements of the GMA. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order on Motions, at 20 (June 21, 2007).

- Counties can't just arbitrarily draw a line around the built or urban-like environments in the rural areas, add thousands of acres, and call them urban growth areas or LAMIRDs without justifying the action. [They must first] use the OFM population projection; [then counties and cities are directed] to include areas and densities sufficient to permit the urban growth that is projected to occur. In order to comply with these directives, jurisdictions must undertake some form of "land capacity analysis" to determine how much land is needed for the projected growth. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, Order on Motions, at 20-21 (internal citation omitted) (June 21, 2007).

- One of the primary goals of the GMA is to protect the environment, including critical areas. As defined by RCW 36.70A.030(5), critical areas include (b) areas with a critical recharging effect on aquifers used for potable water; (d) frequently flooded areas; and (e) geologically hazardous areas. All of these areas are found on the Five Mile Prairie and within the adopted amendment areas. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Counties and cities are required by RCW 36.70A.040(3) to designate critical areas and adopt development regulations conserving and protecting these areas. Furthermore, RCW 36.70A.172 requires counties and cities to use best available science in developing policies and development regulations to protect the functions and values of critical areas. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The GMA, under RCW 36.70A.070 Comprehensive plans – Mandatory elements, requires plans to be "internally consistent" with the CP. One of the mandatory elements is (4)(c)(iv) Protecting critical areas. By amending the CP, the County is obligated to ensure that the changes are still consistent with the Critical Areas Ordinance that protects critical areas. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The Countywide Planning Policies for Spokane County now clearly provide for the referral of any Urban Growth Area Revisions to the Steering Committee of Elected Officials. (Policies Urban 16 – 17.) It is also clear to the Board that upon remand, the changes of the UGA found herein must go through the Steering Committee as is provided by the County's CWPPs. The argument that the applications requesting changes to the size of a UGA must be processed under the policies in effect at the time the application is made and that not doing so would violate RCW 36.70A.020(6) (protection of private property), is without foundation. There is no basis for such an argument. The Respondent stated that the Board is only to consider the request for modification of the UGA boundary and not the development that may later be located upon the subject land. The question is whether the UGA was properly expanded. Property rights are not involved. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Spokane County is required to plan under RCW 36.70.040. As such, RCW 36.70A.110 requires the County to designate an Urban Growth Area or Areas. Under RCW 36.70A.110(2), the County must "include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period." The projected growth is "based upon the growth management population projection made for the county by the Office of Financial Management". "The Office of Financial Management projection places a cap on the amount of land a county may allocate to UGAs" [*Diehl v. Mason County*, 94 Wn. App. 645, 654, 972 P.2d 543 (1999)]. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- In 2001, Spokane County, together with the towns and cities in the County, sized the County and City UGAs. The size was designed to receive the population projections made by the OFM. The Intervenors in 2003, approached the County with a variety of proposals, which would require the enlargement of the UGA north of the City of Spokane. There was no claim that there was not enough developable land within the UGA for their specific development, only that there was not enough land for the twenty-year population projection. The Intervenors then suggested that their six parcels be included in the UGA, thereby requiring the extension of the UGA boundaries. The GMA mandated that urban growth occur only within a UGA so that sprawl would be avoided (RCW 70A.030(17) and .070). The GMA established a careful procedure to identify the amount of land that is available within city limits for development at an urban density and what additional lands would be needed to handle the twenty-year population projection. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- Spokane County adopted a procedure for establishing boundaries for UGAs, which included a land quantity analysis methodology. (Adopted 10-31-95 and CWPP Urban #19, Urban Growth Area Revisions 9/30/97.) This methodology made no provision for a developer-provided land quantity analysis. The methodology did establish a careful method of reports, format and Technical and Steering Committees review. The County's methodology incorporated CTED's recommended process, modified to reflect local conditions. It is clear from the methodology adopted by Spokane County that the analysis provided by the proponent/developer is insufficient and unacceptable. (CWPPs Policy Topic 1 found in prior and amended versions of the Policies). It is clear from the 1998 and 2004 versions of the CWPPs that it is the local jurisdictions that are responsible for the preparation of land quantity and population analysis. (Policy Topic 1, #19 in 1998 and #16 and #17 in 2004). *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The County has the responsibility to prepare a land quantity analysis prior to any modification of the existing UGAs. The recent expansions of the UGAs, adopted by the County, include changes in the Airway Heights area, north of the City of Spokane and southeast of the City of Spokane Valley. In each of these changes the proponents argue that more land is needed within the County's UGAs to accommodate the twenty-year projected population growth. There has been no comprehensive reexamination of the County's land quantity or what population changes are expected, as is required by the GMA and the CWPPs. Such enlargements of the UGAs of Spokane County violate its own policies and the GMA's requirements. (CWPP Urban #19, Urban Growth Area Revisions 9/30/97, RCW 36.70A.110(2) and RCW 36.70A.020(2)). *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The sizing requirements and locational criteria in RCW 36.70A.110 apply to UGA expansion as well as to the initial UGA designation. (*Bremerton v. Kitsap County,* CPSGMHB, 04-3-0009c, FDO Aug. 9, 2004). RCW 36.70A.110(1) specifically contemplates that UGA boundaries may expand over time to allow for additional urban development and it specifies the locational criteria that limit such expansion. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al*, EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

- The land capacity analysis required in RCW 36.70A.110(1) and (2) is a vital component of the work that must be shown. *CTED v. Snohomish County,* ***(CTED* I**), CPSGMHB Case No. 03-3-0017, FDO, (Mar. 8, 2004), at 20-22.

The record before the Hearings Board clearly shows that the County did not perform any land quantity analysis. Resolution No. 2005-0365 makes no mention of an analysis or review of land quantity in its findings or decision. The County also conceded in the Hearing on the Merits that the County did no land quantity review. The developers/Intervenors supplied the only analysis alleging a need for additional land within the UGA for Spokane. This report was included in the Record without any verification of the claims contained therein. This is not enough. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- The sizing requirements and locational criteria in RCW 36.70A.110 apply to UGA expansion as well as to the initial UGA designation. (*Bremerton v. Kitsap County,* CPSGMHB, 04-3-0009c, FDO Aug. 9, 2004). RCW 36.70A.110(1) specifically contemplates that UGA boundaries may expand over time to allow for additional urban development, and it specifies the locational criteria that limit that expansion. A UGA may include an area not in a city only if that area already is characterized by urban growth, is adjacent to an area characterized by urban growth, or is a designated fully-contained community. *See Ass'n. of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010, FDO, (June 3, 1994), at 48. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- A UGA must provide for sufficient area and densities to accommodate the urban growth that is projected for the succeeding 20-year period. RCW 36.70A.110(2). This subsection specifically expects that UGA boundaries may expand over time as necessary to meet population projections, imposing another limitation on their expansion. Counties must review, and if necessary, revise their UGAs at least every ten years to accommodate urban growth projected for the succeeding 20 years. RCW 36.70A.130(3). A countywide land capacity analysis must accompany these statutorily mandated periodic revisions of UGAs. *Master Builders Ass'n v. Snohomish County*,

CPSGMHB Case No. 01-3-016, FDO, (Dec. 13, 2001), at 9. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- An expansion of a UGA is essentially a redesignation. Such expansion must be consistent with the requirements of RCW 36.70A.110. Changes in the size of UGAs must be supported by land use capacity analysis and the County must "show its work:" "If UGAs are altered and challenged…this Board requires an accounting to support the alteration." *Id, at 1*2. "The Board has been clear that Counties must show their work when *altering* UGA boundaries." *Id*., at 22 (emphasis in original). *McHugh, et al. v. Spokane County, et al.,* EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005) (internal citations omitted).

- When UGA expansions are made, the record must provide support for the actions the jurisdiction has taken; otherwise the actions may have been determined to have been taken in error – i.e., clearly erroneous. Accordingly, counties must "show their work" when a UGA is expanded. *Kitsap Citizen*s, FDO, *supra* at 12-16. To find that the record does not support a County's action, does not amount to "burden shifting." It is also extremely important, in managing growth, for the public to understand the basis for legislative policy decisions and how they relate to the jurisdiction's goals and policies as articulated in its adopted plans and regulations. Even with the requirement that the County show its work, the burden of proof remains with Petitioners. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- While it is unclear, the Board need not find the County out of compliance on this issue for the County's failure to provide an opportunity for the Spokane County Steering Committee of Elected Officials to consider changing the UGA boundary by this amendment. The CPP requirement for submittal for review to the Steering Committee came into effect after the application was filed. The fact that when the application was received, the Countywide Planning Policy requiring submittal to the Steering Committee was not in affect, does not necessarily mean that the old policy prevails throughout the consideration. This is a GMA amendment to the UGA. Whether policies existing at the time an application were made for a Plan change remain in effect throughout the consideration of such an amendment is not clear and we need not decide this issue at this time. It is hoped that upon remand, the County will do as the GMA requires in RCW 36.70A.100 and 210 and involve the representatives of the jurisdictions within the County and the established Steering Committee. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- The minimum six-year CFP is a living document. It is supposed to help cities and counties understand their current and future financial capabilities as they grow, how to pay for that growth and, in some respects, how to grow. They may find it is more cost-effective to increase density within their present UGA to absorb their population allocation, rather than run expensive utilities into expanding territory. An up-to-date CFE is a tool that can do this. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- The County did not update its CFE (RCW 36.70A.070(3), its utilities element (RCW 36.70A.070(4), or its transportation element (36.70A.070(6) prior to adopting Resolution 2005-0365. Considering the impacts this amendment will have to the citizens of Spokane County, an update of these comprehensive plan elements was essential to good planning required by the GMA. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- The GMA requires urban growth to be located within urban growth areas. Urban growth is permitted within the County's UGA. Under the GMA, if land is properly included within a UGA, urban growth may be allowed upon such lands. Here, the Petitioners are contending that the County is placing urban growth outside UGAs. This, of course, is not the case. The County has included these lands within its UGA and, if such change were compliant, any growth occurring thereon would be within such UGA. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

- The County had sufficient opportunity to update their CFE after determining a final boundary for its expanded UGA. In fact, the Badger Mountain Planned Development property, which was approved for urban-like development in January 2001, should have triggered an update because of the size and scope of the development. Seven years later, the Benton County CFE has not been updated to reflect the changes that have occurred within the original UGA or the proposed expansion to enlarge the UGA by 3322 acres. Good planning requires periodic updates and the GMA requires the County's CFE to be updated every six years. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.*, EWGMHB Case No. 05-1-0003, Order on Motion to Reconsider, (Oct. 19, 2005).

- Their subjective reasons and "unique local circumstances" (Intervenors' Brief, p. 12), such as creating an irregular boundary, adding 746 acres in recently planted orchard, and dealing with an already vested planned unit development, don't legally justify the exceptional increase in acreage. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.*, EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- The only reference in the GMA to "abnormally irregular boundaries" is in RCW 36.70A.070(5)(d)(iv)(C), which is the section concerning Limited Areas of More Intensive Rural Development (LAMIRDS). RCW 36.70A.110 Comprehensive Plans – Urban growth areas, does not contain any reference to irregular boundaries, thus the issue is considered moot. *Roberts/Taylor, v. Benton County and Benton County Board of Commissioners, et al.* EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- There is a world of difference between increasing a UGA a few parcels or a few hundred acres compared to the current proposal of 3,322 acres, which includes a vested PUD with over 800 homes and businesses. Perhaps the County's current six-year plan is usable for a small inclusion of land, but not for a major amendment, such as proposed here. The Badger Mountain PUD should have triggered a County and City of Richland update of their six-year plans immediately upon the application for the amendment to change the UGA, if not when the PUD was vested. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.*, EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- Under RCW 36.70A.215 Review and evaluation, the GMA is requiring some counties [see RCW 36.70A.215(7)] to adopt County-wide Planning Policies to establish a review and evaluation program. In (2)(a), the GMA asks those counties to:

"encompass land uses and activities both within and outside of urban growth areas and provide for annual collection of data on urban and rural land uses, development, critical areas, and capital facilities to the extent necessary to determine the quantity and type of land suitable for development…".

The GMA here is requiring an annual update of information to ensure a county or city has the information they need to make informed decisions on growth. It can be simple or detailed, depending on the changes within the jurisdiction. While it does not apply in Benton County, this statute shows the Legislature sees this as a need in the future and expects counties and cities to be as up-to-date as possible, so their comprehensive plan reflects current conditions and agrees with their 20-year plan and six-year CFE. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.*, EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- Benton County is required to plan under RCW 36.70.040. As such, the County must designate an Urban Growth Area or areas according to RCW 36.70A.110. Under RCW 36.70A.110(2), the County must "include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period." The projected growth is "based upon the growth management population projection made for the county by the Office of Financial Management" (OFM). "The Office of Financial Management projection places a cap on the amount of land a county may allocate to UGAs" [*Diehl v. Mason County*, 94 Wn.App. 645, 654, 972 P.2d 543 (1999)]. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.*, EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- The Board agrees with the Respondent concerning the Washington State Supreme Court's decision, *Quadrant*, 154 Wn.2d at 239-40. It is appropriate for a county to consider vested development rights when determining whether an area is "characterized by urban growth" and is properly within a UGA. Thus, the Badger Mountain PUD can be considered for annexation within the Benton County UGA, even though there was "gerrymandering" as suggested by staff (Respondent's Exhibit list; Ex. 37, p. 5). The expansion of the UGA by the City of Richland, with its addition of 454 acres to connect it to the present UGA and the political decision not to include El Rancho Reata (Petitioners' Ex. F-1, p. 8), creates a truly irregular boundary. *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.*, EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- Subjective factors may be considered. But a 56% increase above and beyond the figure calculated by the formula, which already includes a 25% market supply factor and is based on the high OFM projection, is contrary to the principals of the GMA and far in excess of any reasonable subjective factors. The Eastern Board didn't contemplate authorizing sprawl when they held that local circumstances and a jurisdiction's "community vision" among other things, are appropriate factors that may justify increasing the UGA beyond the OFM forecasts (*Benton County*, at p. 8 -9). *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.*, EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- The County and City of Richland did show their work in regards to the formula in CWPP #4. Their calculations, without increasing density, using the high OFM population allocation and a substantial market factor of 25%, came out to 2,116 acres. The County did not show its work concerning capital facilities, utilities and transportation plans, which is a major step in planning for an expanded UGA. In *Diehl v. Mason County*, 95 Wn.App. 645, 654, a market factor is consistent with a jurisdiction's determination of their land supply, but they *must demonst*rate the reaso*n*s for the market factor. "Although a county may enlarge a UGA to account for a 'reasonable land market supply factor,' it must also explain why this market factor is required and how it was reached." *Roberts/Taylor v. Benton County and Benton County Board of Commissioners, et al.*, EWGMHB Case No. 05-1-0003, FDO, (Sept. 20, 2005).

- Several provisions of the GMA are intertwined as they relate to the location, sizing, review and evaluation and expansion of UGAs. RCW 36.70A.110 deals directly with UGAs and their expansion. Several GMA Goals from RCW 36.70A.020 also address where urban growth should be, or should not be, encouraged. These provisions of the Act are set forth *below. RCW 36.70A.110 generally addresses the creation of UGAs. RCW 36.70A.110(1) deals with location criteria for delineating boundaries of UGAs, and .110(3) pertains to loca*ting or sequencing urb*an growth wit*hin UGAs. RCW *3*6.70A.110(2) regards sizing of UGAs. *Greenfield Estates Homeowners Assoc. v. Grant County et al.,* EWGMHB Case No. No. 04-1-0005, FDO, (Oct. 6, 2004).

- The GMA's Goals are to "guide the development of comprehensive plans and development regulations." With regard to the legal issues in this case, the relevant Goals of RCW 36.70A.020 are: [Board sets forth goals 1 and 10]. *Greenfield Estates Homeowners Assoc. v. Grant County et al.,* EWGMHB Case No. 04-1-0005, FDO, (Oct. 6, 2004).

- The Board now turns to whether the inclusion of the subject area into the Ephrata UGA complies with the GMA. RCW 36.70A.110 requires planning cities and counties to designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Subsection (2) of that section directs the County to include areas and densities sufficient to permit the urban growth that is projected to occur in the city for the succeeding twenty-year period. This projection is prepared by OFM. OFM establishes a range of population projections rather than a single figure. The projections include a more likely population scenario (medium) and a high and a low. The county would not be out of compliance with the GMA if it used any number within the range. A UGA determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. "In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth." RCW 36.70A.110(2). *Greenfield Estates Homeowners Assoc. v. Grant County Respondent et al.,* EWGMHB Case No. 04-1-0005, FDO, (Oct. 6, 2004).

- The proper sizing and location of an UGA involves more than a simple mathematical analysis. The county, in their original sizing or Ephrata's UGA, appropriately considered many other factors. RCW 36.70A110(2) directs a county to establish an UGA boundary "sufficient to permit" urban growth projections. The County must use GMA's planning goals to guide the development and adoption of the UGA. One of the primary purposes of the Act is to avoid sprawl and direct new growth into UGAs. *Greenfield Estates Homeowners Assoc. v. Grant County, et al.,* EWGMHB Case No. No. 04-1-0005, FDO, (Oct. 6, 2004).

- The boundaries of an UGA and the city limits of existing municipalities will be identical; assuming the cities can accommodate all the projected growth. If not, areas must be included sufficient to permit the projected urban growth for the succeeding twenty years. *Greenfield Estates Homeowners Assoc. v. Grant County, et al.,* EWGMHB Case No. No. 04-1-0005, FDO, (Oct. 6, 2004).

- Local jurisdictions have a great deal of discretion in deciding how to accommodate these projections in light of local circumstances and traditions. The Cities have the discretion in deciding specifically how they will accommodate the growth allocated to them by the county consistent with the goals and requirements of the Act.

Local circumstance, traditions and identity will result in unique choices and solutions for each county and the cities within it. While such policy choices may be included in the sizing or configuration of the UGA, they must be made in a measurable way and with sufficient documentation as to the rational. The County and the city of Ephrata made those choices when they selected the densities of their residential lands. The County/City used the 60% reduction factor, a 25% increase using their market factor, extensive industrial and commercial areas, the larger population allocation and varieties of densities throughout the city. The existing city limits of Ephrata contain more available lands than needed to accommodate the OFM estimated expected growth in the 20-year period. *Greenfield Estates Homeowners Assoc. v. Grant County, et al.*, EWGMHB Case No. No. 04-1-0005, FDO, (Oct. 6, 2004).

- The key goals of the GMA are the reduction of sprawl and the centering of development within the cities of each county. The GMA allows great discretion to each jurisdiction in their designation of an UGA. However this vision of urban development must be exercised within the sideboards of the GMA and its goals. Greenfield Estates Homeowners Assoc. v. Grant County, et al., EWGMHB Case No. No. 04-1-0005, FDO, (Oct. 6, 2004).

- In the absence of information showing land capacity analysis, we are unable to determine if an IUGA is properly sized. The GMA was amended to allow 180 days "or such longer period as determined by the board in cases of unusual scope or complexity." This Board feels the amendment was for cases such as this. It would be foolish to require the duplicated effort of the designation of a new IUGA would cause if the Final UGA can be expeditiously completed. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- The Act does not prohibit the reasonable inclusion of land over and above the acreage necessary to accommodate the twenty-year growth projection. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- *The size of an urban growth are*a should equal the area required under the OFM growth projection plus the area required by legitimate factors, reasonably evaluated and quantified, needed to realize a jurisdiction's "vision of urban development" that can be realized over the next twenty-years. This definition allows a jurisdiction to achieve its legitimate needs, while prohibiting sprawl. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0001, FDO (July 1, 1994).

- There are a variety of factors that each community should consider and evaluate in the process of designating an urban growth area. The precise set of factors will depend upon the particular circumstances of each community. *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- The Board reaffirms that the size of an urban growth area should equal the area required under the OFM growth projection plus the area required to realize a jurisdiction's "vision of urban development" that can be realized over the next twenty years. This definition allows a community to achieve its legitimate needs, while prohibiting sprawl. The Board holds that this is the meaning of RCW 36.70A.110(2). *Benton County Fire Protection District No. 1 v. Benton County, et al.*, EWGMHB Case No. 94-1-0023, FDO (Apr. 25, 1995).

- RCW 36.70A.110(2) requires counties to "attempt to reach agreement with each city on the location of an urban growth area within which the city is located. If such an agreement is not reached with each city located within the urban growth area, the county shall justify in writing

why it so designated the area an urban growth area." Nowhere does the law require the same for a disagreement as to the uses to be allowed in such UGAs. *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB Case No. 96-1-0009, FDO (Dec. 10, 1996).

- Cities are the focal points for growth. The Act intends growth will be centered on cities. Thus, the boundaries of a UGA and the city limits of existing municipalities will be identical, assuming the cities can accommodate all the projected growth. If not, areas must be included, sufficient to permit the projected urban growth for the succeeding twenty years. *Knapp, et al. v. Spokane County*, EWGMHB Case No. 97-1-0015c, FDO (Dec. 24, 1997).

- Counties planning under the GMA are required to designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if is not urban in nature. RCW 36.70A.110. This is one of the fundamental requirements of the GMA.

The first requirement listed above is key to the UGA concept. Cities are the focal points for growth. The GMA intends growth will be centered on cities. Thus, the boundaries of a UGA and the City limits of existing municipalities will be identical, assuming the cities can accommodate all the projected growth. If not, areas must be included, sufficient to permit the projected urban growth for the succeeding twenty years.

The requirement to adopt IUGAs involves both mandatory and discretionary elements. Therefore, local legislative bodies must comply with the mandatory requirements of the GMA but also have a great deal of flexibility to make choices in complying. As an example of a mandate, the GMA establishes population-planning projections upon which IUGAs must be based. The Office of Financial Management (OFM) makes these exclusive projections for each County; no discretion is permitted for local jurisdictions to use their own numbers.

On the other hand, local jurisdictions have great discretion in deciding how to accommodate these projections in light of local circumstances and traditions. Thus, counties, as regional governments, must choose how to configure IUGAs to accommodate the forecasted growth consistent with the goals and requirements of the GMA. Cities also have discretion in deciding specifically how they will accommodate the growth allocated to them by the County, consistent with the goals and requirements of the GMA.

It must be pointed out the exercise of discretion is crucial. For example, just because an area adjacent to a City is characterized by urban growth does not impose a requirement this territory be included within an IUGA, unless existing cities cannot accommodate the additional projected growth and it is otherwise an appropriate location for such growth. The consequence of existing urbanized areas outside cities not being included within an IUGA is simply that new urban development will not be permitted in those areas. Existing uses and improvements may continue, subject to applicable laws. While an area falling within one of the rank order exceptions listed above may be included within IUGAs, it is not mandatory it be included.

The IUGA is, as the City contends, a step in the development of the Final UGA and the Comprehensive Plan. The Washington State Legislature amended the GMA to add IUGAs due to a stated fear inappropriate urban development could occur unless an IUGA is designated prior to the final passage of the Comprehensive Plan and the Final UGA. The IUGA is a placeholder. The IUGA can be modified as additional information is obtained through the development of the Comprehensive Plan. *Sandra Knapp et al., v. Spokane County*, EWGMHB Case No. 97-1-0015c, Order on 4th Compliance Hearing, (Aug. 23, 1999).

- RCW 36.70A.110 requires planning cities and counties to designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. The city itself must be included within an UGA. Sub-paragraph (2) of that section directs the County to include areas and densities sufficient to permit the urban growth that is projected to occur in the city for the succeeding twenty-year period. This projection was prepared by OFM. OFM establishes a range of population projections rather than a single figure. The projections include a more likely population scenario (medium) and a high and a low. The county would not be out of compliance with the GMA if it used any number within the range. AN UGA determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. "In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth." RCW 36.70A.110(2). *Bargmann v. Grant County*; EWGMHB Case No. 99-1-0013, FDO; (May 19, 2000).

- The proper sizing and location of an UGA involves more than a simple mathematical analysis. A county, in sizing UGAs, appropriately considers many other factors. RCW 36.70A110(2) directs a county to establish an UGA boundary "sufficient to permit" urban growth projections. The County must use GMA's planning goals to guide the development and adoption of the UGA. One of the primary purposes of the Act is to avoid sprawl and direct new growth into UGAs.). *Bargmann v. Grant County;* EWGMHB Case No. 99-1-0013, FDO; (May 19, 2000).

- The requirement that each existing city must be within an UGA is key to the UGA concept. Cities are the focal points for growth. The Act intends growth to be centered on cities. Thus, the boundaries of an UGA and the city limits of existing municipalities will be identical; assuming the cities can accommodate all the projected growth. If not, areas must be included, sufficient to permit the projected urban growth for the succeeding twenty years.

Local jurisdictions have a great deal of discretion in deciding how to accommodate these projections in light of local circumstances and traditions. The Cities have the discretion in deciding specifically how they will accommodate the growth allocated to them by the county consistent with the goals and requirements of the Act. *Bargmann v. Grant County*; EWGMHB Case No. 99-1-0013, FDO; (May 19, 2000)

- Expansive UGAs violate the goals and requirements of the GMA because they allow development in areas that would be prohibited within correctly sized UGAs. The existing city limits of Ephrata contain more available lands than needed to accommodate the expected growth in the next 20-year period. This was true even though the City and the County used the highest estimate of population growth, reduced the available lands by 60% reduction factor and increased the population by a 25% market factor. *Bargmann v. Grant County;* EWGMHB Case No. 99-1-0013, FDO; (May 19, 2000)

- The GMA allows great discretion to each jurisdiction in their designation of an UGA. This discretion allows the County/City to adopt the urban density and commercial and industrial location desired by that jurisdiction. However this vision of urban development must be exercised within the sideboards of the GMA and its goals. *Bargmann v. Grant County*; EWGMHB Case No. 99-1-0013, FDO; (May 19, 2000)

Urban Growth

- For a general discussion of the dichotomy between the relative GMA provisions for an Urban Growth Area and a Rural Area, see *Brodeur/Futurewise, et al v. Benton County,* Case No. 09-1-0010c "Rural Lands" FDO at 7-11 (Nov. 24, 2009) (Mulliken dissenting)

- General discussion in regards to urban growth in rural areas (density and character). *City of Wenatchee v. Chelan County,* EWGMHB Case No. 08-1-0015, FDO at 19-21 (March 6, 2009).

- The GMA requires urban growth to be located within urban growth areas. Urban growth is permitted within the County's UGA. Under the GMA, if land is properly included within a UGA, urban growth may be allowed upon such lands. Here, the Petitioners are contending that the County is placing urban growth outside UGAs. This, of course, is not the case. The County has included these lands within its UGA and, if such change were compliant, any growth occurring thereon would be within such UGA. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

  - In their other arguments on this issue, the Petitioners object to the enlargement of the UGA to include the subject land. A key argument here contends that there was no Capital Facilities Plan update prior to the enlargement of the UGA. As this Board has held before, (*Roberts & Taylor v. Benton County* EWGMHB 05-1-0003, FDO 10/19/05) the amendment of the Comprehensive Plan to expand the UGA requires a new review of the Capital Facilities Plan (CFP) so the County would see that services are available for the area added to the UGA and how they would be paid for. This was not done here. The Record shows that Spokane County prepared a 6-year CFP approximately 6 years ago and it does not cover the area that is the subject of this enlargement of the UGA. One of the primary tenants in the GMA is RCW 36.70A.020-Planning Goals. Under that statute, subsection (12) Public facilities and services, it provides:

    > "Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."

    A county cannot fulfill the requirements of Planning Goal #12 without a futuristic look at its community using a detailed capital facilities plan element, among the other elements of its comprehensive plan. A county must have a forecast of future capital facilities needs. A new CFP needs to make the corresponding population revisions, if they exist, to the CFP whose present analytical foundations are derived from the old population allocations. Then there must be an analysis of the adequacy of capital facilities in the area. *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO, (Dec. 16, 2005).

  - The Growth Management Act, RCW 36.70A.110(1) requires urban growth to be prohibited outside IUGAs or UGAs. Urban growth refers to the intensive use of land "to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, of the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A170…." (RCW 36.70A.030(7)). *Wilma, et al v. Stevens County*; EWGMHB Case No. 99-1-0001c, Order On 2nd Compliance Hearing; (Mar. 14, 2001)

- Permitting minimum lot sizes of 2.5 acres throughout the County would encourage sprawl and not protect resource lands, critical areas and the rural nature of the non-urban areas in Stevens County. The fact that certain restrictions apply to the siting of such small lots is not enough. During the interim period where there is no comprehensive plan, critical area protections, or resource lands designation, the protection offered by these Short and Long Plat Resolutions is insufficient. *Wilma, et al v. Stevens County;* EWGMHB Case No. 99-1-0001c, Order On 2nd Compliance Hearing; (Mar. 14, 2001),

- The Growth Management Act, RCW 36.70A.110(1) requires urban growth to be prohibited outside IUGAs or UGAs. Urban growth refers to the intensive use of land "to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A170…." (RCW 36.70A.030(7)).

  Permitting minimum lot sizes of 2.5 acres and exemptions and variances allowing even smaller lots throughout the County would encourage sprawl and not protect resource lands, critical areas and the rural nature of the non-urban areas in Stevens County. The fact that certain restrictions apply to the siting of such small lots is not sufficient to achieve the goals of the GMA. During the interim period where there is no Comprehensive Plan, compliant Critical Area ordinance or Resource Lands designation, the protection offered by these short and long plat regulations is insufficient. *Loon Lake Property Owners Association, et al v. Stevens County;* EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

- Urban growth refers to the intensive use of land "to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A170…" To determine whether the County is in violation of this provision and the goals of the GMA this Board looks not only at the minimum lot size listed, but also any exemptions or variances that would allow different lot sizes in the rural areas of the County.

  While exemptions and variances are common, they need to be strictly enforced and standards must be developed to insure that the exemptions and variances are allowed only where they do not interfere with the goals of the GMA. Because the County has not adopted a comprehensive plan and the required elements contained therein, the interim regulations prohibiting urban growth in rural areas are needed to preserve the rural character of that area until the comprehensive plan decisions have been made. The exemptions and variances listed in the Platting Ordinances can be applied throughout the rural areas and lack standards. Variances can easily be granted, further encouraging sprawl prior to the adoption of the County's Comprehensive Plan. *Loon Lake Property Owners Association, et al v. Stevens County*; EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

- The Boards have held that five-acre lots in rural areas of a county will be subject to "increased scrutiny" by the Board to assure, among other things, that the number, location, and configuration do not constitute urban growth. *In the Matter of the Petition of Peter E. Overton for a Declaratory Ruling,* CPSGMHB Case No. PDR 96-3-0001, Feb. 36, 1996 (Notice of Decision Not to Issue Declaratory Ruling) 1996 WL 650335, at *3-*5. But five-acre lots are not per se violative of the GMA. The subject interim ordinance limits both

the number and the location of five-acre lots in rural areas and is interim in nature. The interim ordinance allows fully 88 percent of the rural area within the County to be zoned for lot sizes of twenty acres or larger. Further a moratorium on development is placed upon industrial and commercial development presently totaling 11,360 acres. *City of Moses Lake v. Grant County,* EWGMHB Case No. 01-1-0010, FDO, (Nov. 20, 2001).

Urban Reserves

- The Urban Reserve designation is a tool that allows counties to plan ahead to accommodate future expansions of a UGA. An Urban Reserve area can be described as land outside of an urban growth area having the potential for inclusion within a UGA as expansion of a UGA is deemed necessary to meet land availability requirements of future OFM population projections. Urban Reserve areas are selected based on the criteria for UGAs. An Urban Reserve designation allows cities to expand into Urban Reserve areas adjacent to urban growth areas as allowed by RCW 36.70A.110(1) or expand into these areas if they fit one of the six exemptions allowed by the GMA. *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 79-80 (March 12, 2007).

- There is no authorization in the GMA to designate an Urban Reserve area adjacent to a LAMIRD, either in RCW 36.70A.110 or in the six exemptions (allowed by the GMA). *Wilma v. Stevens County,* EWGMHB Case No. 06-1-0009c, FDO, at 80 (March 12, 2007).

Urban Services

- The Western Washington Growth Management Hearings Board (WWGMHB), Case No. 97-2-0060, *Abenroth, et al. v. Skagit Co.,* held it is inappropriate to establish a non-municipal UGA in close proximity to a municipality with no plan for the transformance of governance. Annexation and incorporation of urban areas within UGAs are the means to achieve this transformation of local governance. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- The Blalock area now allows lots as small as ½ acre. This is urban density requiring urban services. The RAIDs were not to be rural UGAs. *Citizens for Good Governance, et al., v. Walla Walla County*, EWGMHB Case Nos. 01-1-0015c & 01-1-0014cz, FDO (May 1, 2002).

- The City of Spokane is the largest city in Eastern Washington and has shown they can and do provide urban services to areas outside their UGA. It makes sense that the City should have room to grow. They have shown that they can handle, along with special purpose districts, the services needed. Both the GMA and Board decisions reflect that urban governmental services should be provided by the cities. The City of Spokane has shown it can provide those services. The Board finds the County has acted erroneously in excluding the City from joint planning in the North Metro Area. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

- Extending city services into rural areas of the county encourage urban growth. This is a reason why the legislature prohibited the provision of those services in rural areas except for where it can be shown to be necessary to protect the basic health and safety. That is not the case here. The Board has found Titles 4 and 5 out of compliance. Those titles encourage urban densities in rural areas. The county must bring them into compliance. Part of the

solution is to not allow the provision of urban services in the rural areas. RCW 36.70A.030. . *Loon Lake Property Owners Association, et al v. Stevens County;* EWGMHB Case No. 01-1-0002c, Amended FDO (Oct. 26, 2001).

- The Board recognizes it may be more expensive to provide urban services to 1-acre densities but it is not a hindrance for annexation. While it may be more expensive for the homeowner, it should not be more expensive for the City or County. One-acre lots in cities and Urban Growth Areas are not prohibited by the GMA. The County has discretion when establishing densities, as long as the Goals of the GMA are not frustrated. *City of Spokane v. Spokane County and City of Airway Heights*, EWGMHB Case No. 02-1-0001, FDO, (July 3, 2002).

Utilities

- The County, prior to the adoption of Resolution 5-0649, also failed to update its utilities element required by RCW 36.70A.070(4) and its transportation element required by RCW 36.70A.070(6) for this area based on the change from Urban Reserve to Low Density Residential. Considering the impacts these amendments will have to the citizens of Spokane County and the City of Spokane, an update of these comprehensive plan elements was essential to good planning required by the GMA. *Moitke/Neighborhood Alliance of Spokane v. Spokane County, et al,* EWGMHB Case No. 05-1-0007, FDO, (Feb. 14, 2006).

Water

- The DOE has authority over exempt wells, but the County has authority over land use decisions and planning, which serves to support and supplement DOE's regulations. Although DOE is the ultimate authority on just how a permit for an exempt well is obtained, the County still controls its own ground/surface water and the GMA requires protection of these resources. Given these roles within water resource management, the County's development regulations are important in that they can limit the impact on water resources by requiring a developer seeking application approval to demonstrate that the proposed development will not adversely impact ground/surface waters. Simply stating the DOE exempts the well does not remove the responsibility of the County to protect water quality and quantity as required by the GMA. *Kittitas County Conservation, et al v. Kittitas County,* EWGMHB Case No. 07-1-0015c, FDO at 30 (March 21, 2008).

- The GMA directs counties to designate, classify and protect areas with a "critical recharging effect on aquifers used for potable water." It is necessary to determine the location of recharge areas as a first step in designating and protecting them. The county must provide criteria necessary to indicate when an area needs specific scientific analysis to determine whether it is a critical aquifer recharge area. *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB Case No. 94-1-0015, Compliance Order (Apr. 8, 1999).

- RCW 36.70A.060(2) and (3) require the County to adopt development regulations that protect critical areas. Critical areas include: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. RCW 36.70A.030(5). *Larson Beach Neighbors/Wagenman v. Stevens County, et al.*, EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- While any Reclamation water does not serve this land, this Board has found in several cases that agricultural land of long-term significance does not have to be irrigated lands. This

Board has stated that junior water rights and non-irrigated lands can be as productive if not more productive than lands that are irrigated. *Wenas Citizens Association et al., v. Yakima County, et al.,* EWGMHB Case No. 02-1-0008, FDO, (Nov. 4, 2002).

- The Board has already found senior water rights were not a valid criterion in designating agricultural lands where the evidence did not show a significant difference in productivity. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, Order of Noncompliance (Nov. 5, 1998).

- The GMA dos not require water, sewer, and other services to be in place until development occurs. We require the cities to provide these facilities and services at least concurrently with the projected growth. *Cascade Columbia Alliance v. Kittitas County*, EWGMHB Case No. 98-1-0004, FDO (Dec. 21, 1998).

Wetlands

- RCW 36.70A.172(1) requires that best available science (BAS) shall be included "in developing policies and development regulations to protect the functions and values of critical areas." The Court of Appeals, Division I, held "that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations." (citing *HEAL v. CPSGMHBC*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999)). *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- RCW 36.70A.060(2) and (3) require the County to adopt development regulations that protect critical areas. Critical areas include: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. RCW 36.70A.030(5). *Larson Beach Neighbors/Wagenman v. Stevens County, et al.,* EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The Intervenor, the Washington State Department of Ecology, DOE, intervened and argued two issues. The DOE argued that the County's Critical Areas Ordinance is inconsistent with the Growth Management Act because it defines wetlands to exclude wetlands created by road and railroad construction prior to 1990; and that Stevens County's CAO is inconsistent with best available science because it excludes small wetlands from critical areas protections.

  Stevens County concedes in their brief that Title 13 fails to adequately define wetlands, erroneously excluding wetlands created by construction of roads or railroads prior to 1990, in violation of RCW 36.70A.030(20). Stevens County also concedes it has erroneously excluded exempted wetlands in Categories 2 and 3 containing less than 2500 square feet and category 4 wetlands containing less than 10,000 square feet, from Title 13, thus failing to meet the requirements of the GMA to protect critical areas, RCW 36.70A.170(d), utilizing best available science, RCW 36.70A.172. *Larson Beach Neighbors/Wagenman v. Stevens County, et al*., EWGMHB Case No. 03-1-0003, FDO, (Feb. 10, 2004).

- The test is whether the designation meets the substantive requirements of the Act's wetlands definition, RCW 36.70A.030(18). Counties should exercise a high degree of local discretion, but their discretion cannot be employed to justify an ordinance that fails to rise to the

minimum substantive requirements of the Act. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- High quality and/or particularly vulnerable wetlands require greater protection that lowers quality or less vulnerable wetlands. In order to provide the minimum level of protection for high quality wetlands, one of two approaches is necessary. Either all wetlands must be protected at a level necessary to protect wetlands requiring the greatest level of protection or a rating system can be used to differentiate wetlands of various quality levels and then protections can be accorded in relation to the need of each particular quality level. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- The required level of protection of wetlands and riparian buffers must be reasonably based on relevant science; however, a county has a range of discretion as to how exactly that level is met. To the extent a county relies on other statutes as part of its protection scheme, they should be referenced in the ordinance. A citizen should be able to understand what protection elements exist by reading the ordinance. *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021, FDO (Mar. 10, 1995).

- Counties may use the National Wetlands Inventory as an information source for determining the approximate distribution and extent of wetlands. Counties should consider using the methodology in the Federal Manual for identifying and delineating jurisdiction wetlands, cooperatively produced by the U.S. Army Corps of Engineers, United States Environmental Protection Agency, United States Department of Soil Conservation Service and the United States Fish and Wildlife Service, that was issued in 1989, and Regulatory Guidance Letter 90-7 issued by the United States Corps of Engineers on Nov. 29, 1990 for regulatory delineations. *Moore v. Whitman County*, EWGMHB Case No. 95-1-0002, FDO (Aug. 16, 1995).

- Petitioners contend the term "setback" is not defined, and includes only structures, not limiting other development activity. The term "Buffer" is necessary to provide adequate protection for wetlands and fish and wildlife habitat conservation areas.

  The Board finds the language chosen by Ferry County is adequate for purposes of the broad policy as outlined in the SACP. The protection of wetlands and fish and wildlife habitat conservation areas will need further clarification and definition in the Critical Areas Ordinance. *Concerned Friends of Ferry County, v. Ferry County,* EWGMHB Case No. 97-1-0018, Order on Compliance, (Sept. 30, 1999).

- Many of the same problems identified for Section 500, above, exist here. The standard buffer widths are too narrow. Any adjustments to these buffers must begin from a point where all the wetlands will be protected. The individual adjustments may then be considered. The best available science was not included here in a substantive way.

  The exemptions found in subsection 5, the Administrative Variance in subsection 12 and the notice and appeal provisions have the same problems here as identified above in Section 500. However, subsection 13, the Modification Provisions for Existing Lots, does not have the same defect found in the Fish and Wildlife ordinance, Section 500. This section limits the eligible lots to those existing prior to the passage of this ordinance. *Save Our Butte, Save Our*

*Basin Society, et al., v. Chelan County***,** EWGMHB Case No. 94-1-0015, Order on Compliance, (April 8, 1999).

Zoning

- *See Kittitas Conservation v. Kittitas County*, EWGMHB Case No. 07-1-0004c, FDO, at 43-44 (Aug. 20, 2007) (discussion of state and federal forest and wildlife lands; need for public use zoning district).

- While "innovative zoning techniques" under RCW 36.70A.177 are applicable, they cannot be taken advantage of without the County having a clear method for the review of such parcels and their approval for conversion. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-1-0012c Order on Remand, (Dec. 16, 2003).

- The 13 goals of the GMA are not listed in order of priority. These goals are often in conflict with each other. The Respondent gives as an example, environmental protection (goal 10) and natural resource conservation (goal 8) can add cost to development, while housing (goal 4) strives to promote affordable housing. The Petitioner insists Kittitas County, in adopting the Airport Overlay Zone, has by adopting these density levels created different classes of property owners in the City of Ellensburg UGA. However all property owners in each of the Safety Zones are treated in the same manner. The County and the City have adopted zoning they believe will protect the Airport and the residents adjacent to it. This zoning was arrived at after extensive public input and review by the departments and individuals listed in statute RCW 36.70.547. *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017, FDO. (March 14, 2002).

- The Board has carefully reviewed the Supreme Court decision in *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., Supra*. Because of that decision, the Board is compelled to find the County is out of compliance. King County, in that case, greatly limited the uses, prohibited all but a few structures and emphasized the temporary status of such uses. Yet the Supreme Court found that the County's proposed action to convert agricultural land to active recreation uses does not comply with the Act's mandate to preserve agricultural lands. The Court found that the explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that conserve agricultural lands and maintain and enhance the agricultural industry.

  In the cited case, the court concludes that "in order to constitute an innovative zoning technique consistent with the overall meaning of he Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry." The Court further points out that "The statute encourages counties to limit innovative techniques 'to lands with poor soils or otherwise not suitable for agricultural purposes'" The Court went on to say, "it should not be read that the County may encourage nonagricultural uses whether or not the soils are poor or unsuitable for agriculture." Such innovative zoning techniques are limited to lands with poor soils or otherwise not suitable for agricultural purposes. The Court pointed out that some of the land in their case was in fact Prime soils. This finding does not limit the decision to only Prime soils but rather was a statement that "The evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." Therefore, we are forced to conclude the properties in our case do not qualify for 'innovative zoning

techniques.'" While the Walla Walla County development regulations are for Agricultural Resource Lands that are not Prime or Unique, the Courts ruling would still apply to the Walla Walla Ordinance provisions. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO, (Nov. 26, 2002) (internal citations omitted).

- RCW 36.70A.400 states that any local government that is planning under the Housing Policy Act shall comply with RCW 43.63A.215(3). The Board finds that RCW 43.63A.215, when read as a whole, requires local governments to adopt development regulations, zoning regulations or official controls that provide for accessory dwelling units in areas zoned for single-family residential use by Dec. 31, 1994. *Coalition of Responsible Disabled v. City of Spokane*, EWGMHB Case No. 95-1-0001, Dispositive Motion and Final Order (June 6, 1995).

- While "innovative zoning techniques" under RCW 36.70A.177 are applicable, they cannot be taken advantage of without the County having a clear method for the review of such parcels and their approval for conversion. *City of Walla Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-1-0012c Order on Remand, (Dec. 16, 2003).

- The Superior Court of Walla Walla County remanded to this Board a portion of the FDO in *City of Walla Walla v. Walla Walla County*, No. 02-1-0012c. This Board was directed by the court to "make findings as to any legal or factual basis for not allowing use of Walla Walla County's CUP process in making such threshold determinations, including whether the mandated conservation, maintenance, and enhancement of the agricultural industry is being complied with, and whether any 'innovative zoning techniques' under RCW 36.70A.177 are applicable." (Walla Walla County Superior Court, *Walla Walla County v. Eastern Washington Growth Management Hearings Board*, No. 02-2-00784-9, April 21, 2003). The Board is to consider whether the County's use of its CUP process and its standards to make a "threshold" decision on the siting of these challenged uses, protects agricultural lands of long-term commercial significance such that the regulations comply with the GMA. The Board finds that it does not. *City of Walla Walla, et al, v. Walla Walla County*, EWGMHB Case No. 02-1-0012c Order on Remand, (Dec 16, 2003).

- The County's claims that other goals of the Act, namely the requirement to provide for recreational opportunities, could override the requirement to protect agricultural resource lands was also addressed by the Supreme Court. The Superior Court, in their review of the case, had ruled that under RCW 36.70A.177, the location of recreational uses on Agricultural Resource Lands was authorized as an innovative zoning technique. The Court of Appeals and Supreme Court reversed this interpretation. "However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques." …"Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture."

  As in the King County case above, we find here " the evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes." While the Board recognizes the circumstances in Walla Walla County are different from King County, we cannot distinguish the Supreme Court ruling in *King County v. CPSGMHB, supra*, to permit the objected-to recreational uses allowed in the Walla Walla County Ordinance No. 269. *City of Walla, et al. v. Walla Walla County*, EWGMHB Case No. 02-2-0012c, FDO, (Nov. 26, 2002) (internal citations omitted).

- The important concern is the non-agricultural impact of non-exclusive zoning, by which we mean the cumulative impact of non-agricultural related activities on the designated agricultural area. In many cases it is a proposed development's level of impact and purpose that is determinative of whether it should be allowed or not. *City of Ellensburg, et al. v. Kittitas County*, EWGMHB Case No. 95-1-0009, FDO (May 7, 1996).

Appendix A - Glossary of Acronyms

ADU	Accessory Dwelling Units
AMIRD	Areas of More Intense Rural Development
APA	Administrative Procedures Act
ARA	Aquifer Recharge Areas
BAS	Best Available Science
BMP	Best Management Practice
BOCC	Board of County Commissioners
CA	Critical Area
CAO	Critical Areas Ordinance
CARA	Critical Aquifer Recharge Area
CFE	Capital Facilities Element
CO	Compliance Order
CP	Comprehensive Plan
CPP	Countywide Planning Policy
CTED	Community, Trade & Economic Development, Department of
DOE	Department of Ecology
DNS	Determination of Nonsignificance
DR	Development Regulation
EIS	Environmental Impact Statement
EPF	Essential Public Facility
FCC	Fully Contained Community
FDO	FDO
FEIS	Final Environmental Impact Statement
FFA	Frequently Flooded Area
FWH	Fish and Wildlife Habitat Conservation Areas (FWHCA)
GHA	Geologically Hazardous Area
GMA, Act	Growth Management Act
GMHB	Growth Management Hearings Board
HMP	Habitat Management Plan
ILA	Interlocal Agreement
ILB	Industrial Land Bank
IUGA	Interim Urban Growth Area
LAMIRD	Limited Areas of More Intensive Rural Development
LCA	Land Capacity Analysis
LOS	Level of Service
LUPP	Lands Useful for Public Purposes
MCPP	Multi-County Planning Policies
MPR	Master Planned Resort
MO	Motion Order
NRL, RL	Natural Resource Land, Resource Land
OFM	Office of Financial Management
PFR	Petition for Review
PHS	WA Dept. of Fisheries and Wildlife Priority Species and Habitat Manual
PUD	Planned Unit Development
RAID	Rural Areas of Intense Development
RO	Reconsideration Order

SCS	Soil Conservation Service
SEPA	State Environmental Policy Act
SMA	Shoreline Management Act
SMP	Shoreline Master Program
TDR	Transfer of Development Rights
TMZ	Trafic Management Zone
UGA	Urban Growth Area

Appendix B - GMA Legislative History

1990
Laws of 1990, 1st Ex. Sess., ch. 17

1991
Laws of 1991, ch. 322
Laws of 1991, Sp. Sess., ch. 32

1992
Laws of 1992, ch. 207
Laws of 1992, ch. 227

1993
Laws of 1993, Sp. Sess., ch. 6
Laws of 1993, ch. 478

1994
Laws of 1994, ch. 249
Laws of 1994, ch. 257
Laws of 1994, ch. 258
Laws of 1994, ch. 273
Laws of 1994, ch. 307

1995
Laws of 1995, ch. 49
Laws of 1995, ch. 190
Laws of 1995, ch. 347
Laws of 1995, ch. 377
Laws of 1995, ch. 378
Laws of 1995, ch. 382
Laws of 1995, ch. 399
Laws of 1995, ch. 400

1996
Laws of 1996, ch. 167
Laws of 1996, ch. 239
Laws of 1996, ch. 325

1997
Laws of 1997, ch. 382
Laws of 1997, ch. 402
Laws of 1997, ch. 429

1998
Laws of 1998, ch. 112
Laws of 1998, ch. 171
Laws of 1998, ch. 249
Laws of 1998, ch. 286
Laws of 1998, ch. 289

1999
Laws of 1999, ch. 315

2000
Laws of 2000, ch. 36
Laws of 2000, ch. 196

2001
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Laws of 2001, ch. 326

2002
Laws of 2002, ch. 68
Laws of 2002, ch. 212
Laws of 2002, ch. 154
Laws of 2002, ch. 320
Laws of 2002, ch. 306

2003
Laws of 2003, ch. 39
Laws of 2003, ch. 88
Laws of 2003, ch. 286
Laws of 2003, ch. 321
Laws of 2003, ch. 332
Laws of 2003, ch. 333

2004
Laws of 2004, ch. 28
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Laws of 2004, ch. 197
Laws of 2004, ch. 206
Laws of 2004, ch. 207
Laws of 2004, ch. 208

2005
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Laws of 2005, ch. 328
Laws of 2005, ch. 360
Laws of 2005, ch. 423
Laws of 2005, ch. 477

2006
Laws of 2006, ch. 147
Laws of 2006, ch. 149
Laws of 2006, ch. 285

2007
Laws of 2007, ch. 159
Laws of 2007, ch. 194
Laws of 2007, ch. 236
Laws of 2007, ch. 353
Laws of 2007, ch. 433

2008
Laws of 2008, ch 289

2009
Laws of 2009, ch. 80
Laws of 2009, ch. 121
Laws of 2009, ch. 342
Laws of 2009, ch. 459
Laws of 2009, ch. 479
Laws of 2009, ch. 514
Laws of 2009, ch. 565

2010
Laws of 2010, ch. 26
Laws of 2010, ch. 62
Laws of 2010, ch. 107
Laws of 2010, ch. 203
Laws of 2010, ch. 210
Laws of 2010, ch. 211
Laws of 2010, ch. 216

APPENDIX C - COURT DECISIONS (PUBLISHED ONLY)

2010

Court of Appeals

- **Division One**

Citizens for Rationale Shoreline Planning v. Whatcom County, 155 Wn. App. 937 (2010)

- **Division Two**

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

2009

Supreme Court

Gold Star Resorts, Inc. v. Futurewise, 167 Wn.2d 723 (2009)

Court of Appeals

- **Division Two**

Samson v. City of Bainbridge Island, 149 Wn. App. 120, 202 P3d 334 (2009)

Kitsap Alliance of Property Owners v. Central Puget Sound GMHB, 152 Wn. App. 190, 217 P.3d 365 (2009)

- **Division Three**

Spokane County v. City of Spokane, 148 Wn. App. 120 (2009)

Feil v. Eastern Washington GMHB, 153 Wn. App. 394; 220 P.3d 1248 (2009)

2008

Supreme Court of Washington

City of Arlington v. Central Puget Sound Growth Management Hearings Board, 164 Wn.2d 768; 193 P.3d 1077 (2008)

Thurston County v. Western Washington Growth Management Hearings Board, 164 Wn.2d 329, 190 P3d 38 (2008)

Futurewise v. Western Washington Growth Management Hearings Board, 164 Wn.2d 242, 189 P3d 161 (2008)

Court of Appeals

• **Division One**

Citizens' Alliance for Property Rights v. Sims, 145 Wn.App. 649, 187 P3d 789 (2008)

• **Division Three**

Yakima County v. Eastern Washington Growth Management Hearings Board, 146 Wn. App. 679, 192 P3d. 12 (2008)

Stevens County v. Loon Lake Property Owners Association, 146 Wn.App. 124, 187 P.3d 846 (2008)

Stevens County v. Futurewise, 146 Wn. App. 493, 192 P.3d 1 (2008)

Coffey v. City of Walla Walla, 145 Wn.App. 435, 187 P.3d 272 (2008)

2007

Supreme Court of Washington

Woods v. Kittitas County, 162 Wn.2d 597; 174 P.3d 25 (2007)

Biggers v. City of Bainbridge Island, 162 Wn.2d 683; 169 P.3d 14 (2007)

Swinomish Indian Tribal Community v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wn.2d 415; 166 P.3d 1198 (2007)

Court of Appeals

- **Division One**

Gold Star Resorts, Inc. v. Futurewise, 140 Wn. App. 378; 166 P.3d 748 (2007)

City of Arlington v. Central Puget Sound Growth Mgmt. Hearings Bd., 138 Wn. App. 1; 154 P.3d 936 (2007), *Reconsideration denied*

Swinomish Indian Tribal Community v. Skagit County, 138 Wn. App. 771; 158 P.3d 1179 (2007)

MT Development LLC v. City of Renton, 140 Wn. App 422; 165 P.3d 427 (2007)

- **Division Two**

Futurewise v. Central Puget Sound Growth Mgmt. Hearings Bd., 141 Wn. App. 202; 169 P.3d 499 (2007)

Kitsap County v. Central Puget Sound Growth Mgmt. Hearings Board, 138 Wn. App. 863; 158 P.3d 638 (2007)

Thurston County v. W. Wash. Growth Mgmt. Hearings Bd., 137 Wn. App. 781; 154 P.3d 959 (2007)

2006

Supreme Court of Washington

1000 Friends of Washington v. McFarland, 159 Wn.2d 165, 149 P.3d 616 (2006).

Interlake Sporting Association Inc. v. Wash. State Boundary Review Bd. for King County, 158 Wn. 2d 545, 146 P.3d 904 (2006)

Lewis County v. W. Wash. Growth Mngmt. Hearings Bd., 157 Wn. 2d 488, 139 P.3d 1096 (2006).

City of Olympia v. Drebick, 156 Wn. 2d 289, 126 P.3d 802 (2006).

Court of Appeals

- **Division One**

Preserve Our Island v. Shorelines Hearings Board, 133 Wn. App. 503, 137 P.3d 31 (2006), *Review pending*

- **Division Two**

Alexanderson v. Board of Clark County Commissioners, 135 Wn. App. 541, 144 P.3d 1219 (2006).

Peste v. Mason County, 133 Wn. App. 456, 136 P.3d 140 (2006), *Review denied*

2005

Supreme Court of Washington

Viking Properties v. Holm, 155 Wn. 2d 112, 118 P. 3d 322 (2005).

James v. Kitsap County, 154 Wn. 2d 574, 115 P. 3d 286 (2005)

Quadrant Corporation v. Central Puget Sound Growth Mgmt. Hearings Bd., 154 Wn. 2d 224, 110 P. 3d 1132 (2005)

Chevron USA, Inc. v. Central Puget Sound Growth Mgmt. Hearings Bd., 156 Wn. 2d 131; 124 P.3d 640 (2005)

Ferry County v. Concerned Friends, 155 Wn.2d 824; 123 P.3d 102 (2005)

Court of Appeals

- **Division Two**

*Tahoma Audubon Society v. Park Junction Par*tners, 128 Wn. App 671, 116 P. 3d 1046 (2005)

Clallam County v. W. Wash. Growth Mgmt. Hearings Bd., 130 Wn. App. 127; 121 P.3d 764 (2005), *Review pending*

- **Division Three**

Woods v. Kittitas County, 130 Wn. App. 573; 123 P.3d 883 (2005), *Review granted*

2004

Supreme Court of Washington

Diehl v. W. Wash. Growth Mgmt. Hearings Bd., 153 Wn.2d 207; 103 P.3d 193 (2004)

Court of Appeals

- **Division One**

Whidbey Environmental Action Network v. Island County and W. Washington Growth Mgmt. Hearings Bd., 122 Wn. App. 156; 93 P.3d 885 (2004), *Reconsideration Denied; Review Denied*

Chevron USA, Inc. v. Central Puget Sound Growth Mgmt. Hearings Bd., 123 Wn. App. 161; 93 P.3d 880 (2004)

City of Seattle v. Yes for Seattle, 122 Wn. App. 382; 93 P.3d 176 (2004)

Biggers v. City of Bainbridge Island, 124 Wn. App. 858; 103 P.3d 244 (2004), *Reconsideration denied, Review granted* (See Supreme Court Cases 2007)

- **Division Two**

Biggers v. City of Bainbridge Island, 124 Wn. App 858, 103 P. 3d 244 (2004); *Reconsideration denied, Review granted (*See Supreme Court Cases 2007)

City of Olympia v. Drebick, 119 Wn. App. 774; 83 P.3d 443 (2004); *Reversed* (See Supreme Court Cases 2006)

Ferry County v. Concerned Friends of Ferry County and E. Wash. Growth Mgmt. Hearings Bd., 121 Wn. App. 1004; 90 P.3d 698 (2004), *Review granted, in part* (See Supreme Court Cases 2005)

2003

Court of Appeals

- **Division One**

Quadrant Corp. v. Central Puget Sound Growth Mgmt. Hearings Bd., 119 Wn. App. 562; 81 P.3d 918 (2003), *Review granted, Affirmed in part/reversed in part* (See Supreme Court Cases 2005)

City of Bellevue v. E. Bellevue Community Municipal Corp., 119 Wn. App. 405; 81 P.3d 148 (2003)

City of Redmond, v. Central Puget Sound Growth Mgmt. Hearings Bd., 116 Wn. App. 48; 65 P.3d 337 (2003); *Review denied*

- **Division Two**

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- **Division One**

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- **Division Two**

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- **Division One**

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Sammamish Community Council v. City of Bellevue, 108 Wn. App. 46, 29 P.3d 728 (2001), *Review denied*

Somers v. Snohomish County, 105 Wn. App. 937, 21 P.3d 1165 (2001), *Reconsideration denied*

- **Division Three**

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- **Division One**

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1999

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- **Division One**

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- **Division Two**

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Clark County Citizens United v. Clark County National Resources Council, 94 Wn. App. 670; 972 P.2d 941 (1999), *Review denied*

Weyerhaeuser v. Pierce County, 95 Wn. App. 883; 976 P. 2d 1279 (1999), *Review granted*

- **Division Three**

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- **Division One**

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- **Division Two**

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- **Division One**

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- **Division One**

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- **Division Two**

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- **Division One**

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- **Division Two**

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