

On May 24, 2004, the County passed Ordinance No. 04-057 in response to the FDO, re-adopting the same plan and development regulations that the Board had found noncompliant and invalid in Ordinance No. 03-063. At the compliance hearing, the burden was on the County to demonstrate that its actions removed substantial interference with the goals of the Act and merited a rescission of the determination of invalidity.

The County argued that new information justified the County's action again removing agricultural resource land designations, designating the entire Island Crossing area for commercial uses and including the area within the Arlington urban growth area. Arguing in support of the County was Intervenor Dwayne Lane (**Lane**), a landowner in Island Crossing who wishes to re-locate his automobile dealership there. In opposition were petitioners 1000 Friends of Washington (**1000 Friends**), the Stillaguamish Flood Control District (the **SFCD**), and the Washington State Department of Community, Trade and Economic Development (**CTED**), acting on behalf of and at the direction of Governor Gary Locke.

The Board agreed with petitioners that the County's "new information" did not cure the defects of Ordinance No. 03-063 and therefore found that Ordinance No. 04-057 does not comply with the goals and requirements of the GMA regarding resource lands and urban growth areas. The Board entered a finding of continuing noncompliance and invalidity for the Snohomish County comprehensive plan and development regulation provisions for Island Crossing.

The Board noted that this is the third time that Snohomish County has attempted to convert agricultural land at Island Crossing into the Arlington urban growth area, notwithstanding consistent contrary readings of the law by the Snohomish County SEPA Responsible Official, Snohomish County Executive, the Growth Management Hearings Board, Snohomish County Superior Court, the First Division of the Washington State Court of Appeals, and the Governor of the State of Washington. The Board recommended to Governor Locke that he impose financial sanctions until and unless Snohomish County provides assurance that it will take no legislative action contrary to the Board's interpretation of the GMA in this matter unless those holdings are subsequently reversed by a court of competent jurisdiction.

II. PROCEDURAL BACKGROUND

A. Case History Preceding Final Decision and Order

On March 22, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) entered a Final Decision and Order (the **FDO**) in the above captioned case finding that Snohomish County Ordinance No. 03-063 was in noncompliance with RCW 36.70A.020(1), (2), (8), and (10) and .040, .060(1), .110, .170(1)(a) and .215, and entered a finding of invalidity with respect to the zoning and plan amendments wrought by adoption of Ordinance No. 03-063. The portion of the procedural history of this case that preceded issuance of the FDO appears in Appendix A.

B. Compliance Phase History

On March 30, 2004, the Board received “Snohomish County’s Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)” (the **County’s Motion**).

On March 31, 2004, the Board issued a “Notice of Corrected Final Decision and Order” which listed a number of corrections to the FDO and attached a “Corrected FDO” (the **Corrected FDO**).

On April 9, 2004, in response to the County’s Motion, the Board issued “Order Rescinding Findings of Noncompliance and Invalidity” (the **Board’s April 9, 2004 Order Rescinding Findings of Noncompliance and Invalidity**).

On May 26, 2004, the Board received “Petitioners’ Request for Permission to File a Motion after Motion Deadline/Motion to Rescind Finding of Compliance and to Reinstate Invalidity” (**Petitioners’ May 26, 2004 Pleading**). Attached to Petitioners’ May 26, 2004 Pleading was a copy of Snohomish County “Amended Emergency Ordinance No. 04-057” (**Ordinance No. 04-057**.)

On May 27, 2004, the Board received a letter from Andrew S. Lane, counsel for Snohomish County, opposing the Petitioners’ May 26, 2004 Pleading.

On May 28, 2004, the Board issued “Order on Petitioners’ Request and Notice Regarding Compliance Hearing” (the **Board’s May 28, 2004 Order**). The Board’s May 28, 2004 Order granted leave for 1000 Friends to file “Petitioners’ Motion to Rescind Finding of Compliance and to Reinstate Invalidity” (the **Petitioners’ Motion**) and provided that any interested party could, at its option, submit a Response Brief to Petitioners’ Motion by noon on June 1, 2004. The Board’s May 28, 2004 Order also changed the start time of the Compliance Hearing to 1:30 p.m. on Monday, June 14, 2004.

After the issuance of the Board’s May 28, 2004 Order, the Board received the following: correspondence from Henry E. Lippek, counsel for the Stillaguamish Flood Control District; a letter from Andrew S. Lane, (signed by Millie Judge), counsel for Snohomish County; and two letters from Todd C. Nichols, counsel for Intervenor Dwayne Lane.

No Response pleadings were received by the deadline set forth in the Board’s May 28, 2004 Order.

On June 1, 2004, the Board issued “Order Rescinding the April 9, 2004 Order Rescinding Findings of Noncompliance and Invalidity.”

On June 2, 2004, the Board received Snohomish County’s Statement of Actions Taken to Comply” (the **SATC**) with attached exhibits, including a copy of Amended Ordinance No. 04-057.

On June 9, 2004, the Board received “Intervenor Lane’s Response to Snohomish County’s Statement of Actions Taken to Comply and Statement of Authorities” (the

Lane Response); “CTED’s Response to Snohomish County’s Statement of Actions Taken to Comply” (the **CTED Response**); “Petitioners’ Response to Snohomish County’s Statement of Actions Taken to Comply” (the **1000 Friends Response**); and “Flood District’s Response to Snohomish County’s Statement of Actions Taken to Comply” (the **SFCD Response**) with attached exhibits.

The Board conducted the compliance hearing in this matter on June 14, 2004 beginning at 1:30 p.m. in the conference center on the fifth floor of the Bank of California Building, 900 Fourth Avenue, in Seattle. Present for the Board were members Edward G. McGuire, Bruce C. Laing, and Joseph W. Tovar, presiding officer. Representing the parties were the following: for the County were Andrew S. Lane and Shawn Aronow; for Intervenor Dwayne Lane was Todd C. Nichols; for 1000 Friends of Washington was John T. Zilavy; for CTED was Alan D. Copsey; and for the SFCD were Henry E. Lippek and Ashley E. Evans. Court reporting services were provided by J. Gayle Hays, of Byers and Anderson, Inc., Seattle. No witnesses testified. After hearing oral argument from the parties, Mr. Tovar stated that the Board would accept simultaneous post-compliance hearing briefing from the parties on the narrow subject of whether the Board has continuing authority to answer Legal Issue No. 5 as set forth in the Prehearing Order. He stated that such briefing was to be submitted not later than 4:00 p.m. on Thursday, June 17, 2004 and not to exceed 10 pages in length from the combined Petitioners and 10 pages in length from the combined County and Intervenor. After the compliance hearing, a transcript was ordered (the **Transcript**).

On June 17, 2004, the Board received “Intervenor Lane’s and Respondent Snohomish County’s Joint Memorandum of Authorities Regarding Critical Areas Compliance” (the **Lane/Snohomish Brief Re: Legal Issue 5**) and “Petitioners’ Joint Brief Re: The Board’s Jurisdiction to Address Issue 5 (Critical Areas)” (the **Petitioners Brief Re: Legal Issue 5**).

III. FINDINGS OF FACT

1. The FDO specifically identified the invalidated portions of Ordinance No. 03-063 as:
 - The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
 - The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
 - The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
 - The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
 - The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

FDO, at 40-41.

2. Snohomish County adopted Ordinance No. 04-057 on May 24, 2004. SATC, Attachment 1.
3. The title caption of Ordinance No. 04-057 reads: “RELATING TO GROWTH MANAGEMENT; REVISING THE EXISTING URBAN GROWTH AREA FOR THE CITY OF ARLINGTON; ADOPTING MAP AMENDMENTS TO THE GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN; AND ADOPTING COUNTY-INITIATED AREA-WIDE REZONES PURSUANT TO CHAPTER 30.74 SCC; AND AMENDING AMENDED ORDINANCE 94-125, ORDINANCE 94-120, AND EMERGENCY ORDINANCE 01-047.”

Id.

4. Among the County Council’s findings of fact and conclusions listed in Section 1 of Ordinance No. 04-057 are the following:

B. The proposal by Dwayne Lane to amend the FLU map of the GPP to expand the Arlington UGA to include 110.5 acres to be redesignated from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial and rezone 110.5 acres from Rural Freeway Service and Agriculture-10 Acres to General Commercial more closely meets the policies of the GPP than the existing plan designation based on the planning commissioner’s following findings of facts and conclusions:

1. When Dwayne Lane purchased the subject property, the General Policy Plan designation was Urban Commercial.

....

6. Ragnar soils are the best soils for production of commercial crops and there are no Ragnar soils at Island Crossing. The Island Crossing area consists primarily of Puget soils that are adequate for hay, green chop and pasture, but are not suitable for more valuable crops like berries and corn. The Puget soils are considered “prime” only when artificially drained, which the land at the site is not, and even when drained the Puget series is considered low productivity.

7. Farming is no longer financially viable at Island Crossing. Busy highways, high assessed value, small parcel size and safety issues eliminate the viability of the Island Crossing interchange site as agricultural land.

8. Snohomish County is growing rapidly and it is inevitable that sites like Island Crossing will be converted from agricultural uses to commercial uses.

9. The Commission has concerns about the history of floods in this area and the associated impacts. However, the Commission believes that the impacts can be mitigated as is clearly shown in the DSEIS.

D. The County has received a new analysis prepared by the Higa Burkholder Associates, LLC, (“Buildable Lands Report 2003 Update, City of Arlington UGA”, County Council Exhibit 12) that analyzes commercial and industrial land capacity in the Arlington UGA, and that also analyzes the availability of large parcels of commercial or industrial lands that have high visibility for commercial uses. From this analysis the Council concludes the Arlington UGA experiences a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA.

....

X. Approval of the Island Crossing Interchange Docket Proposal is not precedent for redesignation of Agricultural land in the Stillaguamish Valley . . .

Y. The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance . . . Council finds that this land cannot be profitably farmed, and is not agricultural land of long term commercial significance.

Z. The Island Crossing Interchange Docket Proposal site has episodically flooded in the past and will continue to episodically flood in the future, whether or not the site is developed. The relevant question is not whether the proposal site experiences floods, but rather does the site experience significant adverse flood impacts which cannot be reasonably mitigated . .

AA. In Ex. 135, applicant of the Island Crossing Interchange Docket Proposal states various development techniques and plans which will be voluntarily used to minimize the prospect of flood impacts ...

5. Section 3 of Ordinance No. 04-057 provides, in part:

After the effective date of Emergency Ord. 04-057, development in the Island Crossing Interchange Docket Proposal area added to the Arlington UGA by Emergency Ord. 04-057 should be conditioned upon use of the flood protection measures outlined above in finding AA of Section 1, provided such flood protection measures are technically feasible and do not defeat the purpose of the development.

Id.

6. The substance of the amendments created by Ordinance No. 04-057 are identical to those created by Ordinance No. 03-063. Transcript, at 18.

7. The Island Crossing area is located within the floodplain of the Stillaguamish River. Planning and Development Services (PDS) Report, at 10. FDO, Findings of Fact, at 9-10.

8. The Stillaguamish River basin suffers from damaging floods on average every three to five years according to the Federal Emergency Management Agency. PDS Report, at 11. *Id.*
9. The 110.5 acre area subject to Ordinance No. 03-063 [and Ordinance No. 04-057] is configured as a multi-sided polygon with two roughly mile-long sides that follow north-south right-of-way lines, two smaller but *parallel* east-west sides that do not follow right-of-way lines, and a number of other smaller sides that follow jogs in right-of-way or property lines. DEIS, Figure 1-2, scale map of “Proposed Comprehensive Plan Amendment – Dwayne Lane.” *Id.*
10. The two long sides of the 110.5 acre shape are (a) the western side which coincides with the western edge of the Interstate 5 right-of way for approximately 5,900 linear feet; and (b) the eastern side of approximately 5,000 linear feet, of which roughly the southerly 4,300 feet coincide with the eastern edge of the Smokey Point Boulevard right-of-way. The two parallel sides of this shape are (a) the northerly edge which is approximately 2,700 linear feet and coincides with the northern edge of parcels which front onto S.R. 530; and (b) the southern side, which is roughly 450 linear feet long, and lies entirely within public right-of-way. *Id.*
11. The southerly 700 feet of the 110.5 acre shape (*i.e.*, that portion which lies south of 200th Street NE, if extended) is entirely within either Interstate 5 right-of-way or Smokey Point Boulevard right-of-way. *Id.*
12. The City of Arlington city limits abut the southern edge of the 110.5 acre shape. *Id.*
13. The closest point of contact between Arlington’s city limits and private property within the 110.5 acre shape is approximately 700 feet. *Id.*
14. The Island Crossing Area is designated floodway fringe by the County’s flood hazard regulations. PDS Report, at 14. *Id.*
15. With the exception of the cities of Stanwood and Arlington, the flood plain of the main fork of the Stillaguamish River is designated on the County’s Future Land Use Map as Agricultural Resource Land. Snohomish County General Policy Plan, Future Land Use Map, dated May 24, 2004, posted online at <http://www.co.snohomish.wa.us/pds/905-GIS/maps/flu/flu117.pdf> .
16. The agricultural resource industry in the Stillaguamish River Valley includes Twin City Foods, Inc. of Stanwood Washington. SFCDD Response, Ex. 6.
17. Lands in the “Island Crossing triangle” have historically and are currently being contracted to provide crops for processing by Twin City Foods. *Id.*
18. While the “Island Crossing triangle” is within the flood plain of the Stillaguamish River, the existing Arlington UGA to the south sits on higher ground above the flood plain. Transcript, at 45.

IV. Legal Issue No. 5 regarding the GMA's Critical Areas Provisions

In the FDO, the Board did not reach Legal Issue No.5 which alleged noncompliance with RCW 36.70A.170(1)(d) and RCW 36.70A.060(2).¹ Legal Issue No. 5 is:

By expanding the Arlington UGA into a frequently flooded area and by redesignating lands within that area for commercial use, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with RCW 36.70A.060 and RCW 36.70A.170?

During the compliance phase of this case, Petitioners asked that the Board now answer Legal Issue No. 5 as it applies to Ordinance No. 04-057. CTED Response, at 19. In post-compliance hearing briefing, the parties argued whether the Board retains jurisdiction to answer Legal Issue No. 5 in a compliance proceeding.

While both sides present cogent arguments, the most compelling is the argument that the Petitioners did not avail themselves of the opportunity to file a post-FDO motion specifically requesting that the Board also address Legal Issue No. 5. Lane/Snohomish Brief Re: Legal Issue 5, at 2. Had Petitioners done so, the Board clearly would have had jurisdiction to answer Legal Issue No. 5 in the context of clarifying or reconsidering the FDO. The Board concludes that it lacks authority to answer Legal Issue No. 5 during the compliance phase of this proceeding.

While the Board will not address as a separate legal claim the issue of compliance of Ordinance No. 04-057 with the GMA's critical areas provisions, facts presented in that context regarding the area's environmental attributes do shed light on the analysis of issues which remain before the Board. Therefore, the Board will take note, as appropriate, of those environmental factors in the analysis, *infra*.

V. APPLICABLE LAW AND PLEADINGS OF THE PARTIES

A. Noncompliance, Invalidity and Sanctions

Once the Board finds a jurisdiction is not in compliance with the GMA and remands the matter back to the jurisdiction, the Board must specify the compliance period in its FDO. RCW 36.70A.300. The Act prescribes a limited period to achieve compliance; it provides in relevant part:

[In the FDO], [t]he board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board

¹ The FDO stated: "The Board concludes that because it found, *supra*, that Ordinance No. 03-063 is noncompliant with the agricultural conservation and urban growth area provisions of the GMA, and remanded the Ordinance to the County, it need not and does not reach the question of whether the Ordinance fails to comply with RCW 36.70A.170(1)(d) and RCW 36.70A.060(2)." FDO, at 38.

in cases of unusual scope or complexity, within which the . . . city shall comply with the requirements of this chapter.

RCW 36.70A.300(3)(b).

In the Board's FDO, May 24, 2004 was established as the compliance date by which Snohomish County was required to take legislative action to achieve compliance with the goals and requirements of the Act. FDO, at 40.

RCW 36.70A.330 provides, in relevant part:

- (1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(3)(b) has expired, or at an earlier time upon the motion of a . . . county or city subject to a determination of invalidity under RCW 36.70A.300 [now RCW 36.70A.302], the board shall set a hearing for the purpose of determining whether the . . . city is in compliance with the requirements of this chapter.
- (2) The board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter and with any compliance schedule established by the board in its final order. . . .
- (3) If the board after a compliance hearing finds that the . . . county or city is not in compliance, the board shall transmit its finding to the Governor. The board may recommend to the Governor that the sanctions authorized by this chapter be imposed. The board shall take into consideration the . . . county's or city's efforts to meet its compliance schedule in making the decision to recommend sanctions to the Governor.

The Board remanded the matter with direction to Snohomish County to take appropriate legislative action. Snohomish in its SATC points to Ordinance No. 04-057 as its action taken to comply with the FDO. Because the Board found that Snohomish County's prior action was not only noncompliant, but also invalid, Snohomish bears the burden of proof:

A county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard of RCW 36.70A.302(1).

RCW 36.70A.320(4).

RCW 36.70A.340 provides:

Upon receipt from the board of a finding that a state agency, county, or city is in noncompliance under RCW 36.70A.330, or as a result of failure to meet the requirements of RCW 36.70A.210, the governor may either:

(1) Notify and direct the director of the office of financial management to revise allotments in appropriation levels;

(2) Notify and direct the state treasurer to withhold the portion of revenues to which the county or city is entitled under one or more of the following: The motor vehicle fuel tax, as provided in chapter 82.36 RCW; the transportation improvement account, as provided in RCW 47.26.084; the urban arterial trust account, as provided in RCW 47.26.080; the rural arterial trust account, as provided in RCW 36.79.150; the sales and use tax, as provided in chapter 82.14 RCW; the liquor profit tax, as provided in RCW 66.08.190; and the liquor excise tax, as provided in RCW 82.08.170; or

(3) File a notice of noncompliance with the secretary of state and the county or city, which shall temporarily rescind the county or city's authority to collect the real estate excise tax under RCW 82.46.030 until the governor files a notice rescinding the notice of noncompliance.

B. Substantive Requirements and Goals of the Act

1. GMA Provisions concerning Agricultural Resource Lands

RCW 36.70A.020 provides in relevant part:

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

....

(8) 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.040 provides in relevant part:

(1) Each county that has both a population of fifty thousand or more . . . shall conform with all of the requirements of this chapter.

....

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the

county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; . . .

Emphasis added.

RCW 36.70A.050 provides in relevant part:

(1) Subject to the definitions provided in RCW 36.70A.030, the department shall adopt guidelines, under chapter 34.05 RCW, no later than September 1, 1990, to guide the classification of: (a) Agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. The department shall consult with the department of agriculture regarding guidelines for agricultural lands, the department of natural resources regarding forest lands and mineral resource lands, and the department of ecology regarding critical areas.

. . . .

(3) The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170.

Emphasis added.

RCW 36.70A.060 provides in relevant part:

(1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. . . .

RCW 36.70A.170 provides in relevant part:

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for commercial production of food or other agricultural products;

Emphasis added.

Agricultural lands of long term commercial significance (**ALLTCS**) is defined as “the growing capacity, productivity, and soil composition of the land for long-

term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land." RCW 36.70A.030 (10).

2. GMA Provisions regarding Urban Growth Areas

RCW 36.70A.020 provides in relevant part:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

RCW 36.70A.110(1) sets forth locational factors which govern the designation of urban growth areas:

Each county that is required or chooses to plan under RCW 36.70A.040 shall 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. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350

RCW 36.70A.215(1) requires the County and its cities to adopt county-wide planning policies to establish a review and evaluation program – the “buildable lands” report and review. The purpose of the review and evaluation program is to:

- (a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and
- (b) Identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter.

The first evaluation, or “buildable lands report,” was to be completed by September 1, 2002. RCW 36.70A.215(2)(b). The evaluation component, described in RCW 36.70A.215(3), is required to:

- (a) Determine whether there is sufficient suitable land to accommodate the county-wide population projection established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and its cities and the requirements of RCW 36.70A.110;
- (b) Determine the actual density of housing that has been constructed and the actual amount of land developed for commercial and industrial uses within the urban growth area since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) or this section; and
- (c) Based upon the actual density of development as determined under (b) of this subsection, review the commercial, industrial and housing needs by type and density range to determine the amount of land needed for commercial, industrial and housing for the remaining portion of the twenty-year planning period used in the most recently adopted comprehensive plan.

C. Positions of the Parties and Board Analysis

1. Agricultural Resource Lands

a. Positions of the Parties

Snohomish County and Lane

The County states that, in response to the FDO, the County Council conducted a public hearing on May 19, 2004 and debated the new testimony and comments before the public on May 24, 2004. SATC, at 2. The Council “heard from individuals who own agricultural land in Island Crossing, live in or near Island Crossing and have lifelong and current knowledge of Island Crossing.” SATC, at 2-3. Oral testimony in support of the proposition that agriculture at Island Crossing does not have long term commercial significance was cited from Roberta Winter, Orin Barlund, John Henken, and John Koster. *Id.* Written and oral testimony in support of the proposition that Island Crossing retains long term commercial significance for agriculture was cited from Robert Grimm, Tristan Klesick, Roger Lervick, Ralph Omlid, Leland Larson. SATC, at 5-6. The County states: “The witnesses that provided testimony in support of farming in this area were less credible in the Council’s view, because they spoke of speculative possibilities, rather than the existing market realities testified to by Winters, Barlund, and Henken.” SATC, at 7.

The County also asserts that no evidence was presented showing that redesignating Island Crossing would have any negative impact on adjacent agricultural lands. The County argues:

Although the Board opined that “[i]t is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations,” the FDO cited no evidence from the record to support its opinion. There is no evidence to support a conclusion that the buffer created by these highways will not be adequate to avoid negative impacts on adjacent lands.

Id.

Intervenor Lane supports the County’s adoption of Ordinance No. 04-057 and adopted the County’s SATC by reference. Lane Response, at 2. The balance of the Lane brief cites statutory references, Board and court decisions addressing the standard of review. Lane Response, at 2-9.

CTED, 1000 Friends and SFCD

CTED asserts that the same fatal errors that rendered Ordinance No.03-063 noncompliant and invalid have been repeated in Ordinance No. 04-057. CTED states:

The County makes the same error it made when it adopted Ordinance 03-063; it treats economic viability as if it were the sole determinant of long-term commercial significance. As we pointed out in our opening brief . . . the economic viability of farming at Island Crossing is but one factor to consider in assessing whether agricultural lands must be designated and conserved under the GMA, especially, as here, where the viability is threatened by adjacent or pending land uses.

CTED Response, at 8, citing CTED Opening Brief, at 39.

CTED points to the GMA definition of “long-term commercial significance” to support its contention that soils conditions and capabilities are the primary determinant and that, other factors, such as proximity to population areas and the possibility of more intense uses of the land, are secondary ones. CTED Response, at 8. It argues that the “procedural criteria” concerning designation of agricultural resource lands² are meant to

² The Department of Community, Trade, and Economic Development was directed by RCW 36.70A.050 to adopt guidelines to guide the classification of agricultural lands. These provide:

- (1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service [SCS] as defined in Agricultural Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture [USDA] into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. 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. The availability of public facilities;
 - b. Tax status;
 - c. The availability of public services;

be applied on an area-wide basis for designating such lands, not as a parcel-by-parcel checklist for de-designating land.

1000 Friends discounts the “anecdotal testimony from two additional farmers who each say that he personally wouldn’t farm Island Crossing because it would be too expensive or the location of the highways make it too dangerous.” 1000 Friends Response, at 2. 1000 Friends argues that the County misunderstands and mischaracterizes its burden in view of the Board’s prior finding of invalidity. Petitioner states:

The County argues that the board may not substitute its judgment for that of the Council on factual matters, or assessing witness credibility. The County states that “the question is whether Council’s decision was clearly erroneous, not whether Petitioners or the Board would have decided another way. Both of these statements are incorrect when the SATC is addressing invalidity. The question for the board on compliance is whether it is persuaded by the record that *Emergency Ordinance 04-057* does not substantially interfere with the goals of the GMA. Petitioners urge that the answer is no.

1000 Friends Response, at 3-4. Footnotes omitted. Emphasis in original.

With respect to the criteria listed at WAC 365-190-050, 1000 Friends points out that “The SATC does not present methodical evidence on any of these criteria. Instead, the SATC presents anecdotal testimony from three farmers . . . [Barlond, Henken, and Winter.]” 1000 Friends Response, at 4. With respect to Mr. Barlond, petitioner states:

This testimony is not accompanied by any detailed analysis into the economics of farming that lead to a conclusion that no one could make a living farming on Island Crossing. This is not sufficient evidence for the County to meet its burden of establishing that dedesignating Island Crossing no longer should carry a tarnish of invalidity. It is additional anecdotal evidence.

1000 Friends Response, at 5.

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- d. Relationship or proximity to urban growth areas;
 - e. Predominant parcel size;
 - f. Land use settlement patterns and their compatibility with agricultural practices;
 - g. Intensity of nearby land uses;
 - h. History of land development permits issued nearby;
 - i. Land values under alternative uses; and
 - j. Proximity to markets.
- (2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to the department of community development.

WAC 365-190-050.

Petitioner SFCD disputes the veracity of Finding No. 1 of Ordinance No. 04-057 , which states “When Dwayne Lane purchased the subject property, the GPP designation was Urban Commercial.” SFCD Response, at 11. SFCD asserts that when Dwayne Lane purchased his interest in the former site of the Winters farm in 1993, the property was zoned Ag-10. *Id.*³

SFCD agrees with other Petitioners that statements by individuals that they are incapable of profitably farming Island Crossing does not indicate a lack of long-term commercial significance. SFCD states:

[U]nder GMA, it is not permissible to consider prospective economic returns as a primary criterion for redesignating agricultural land because “it will always be financially more lucrative to develop such land for uses more intense than agriculture.” *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091, 1097 (1998).

SFCD Response, at 10.

b. Board Analysis

By the County’s admission, the land use plan and zoning designations wrought by Ordinance No. 04-057 are identical to those created by noncompliant and invalid Ordinance No. 03-063. Transcript, at 18. The only remedial action taken by the County on remand from the Board was to place more testimony in its record, both pro and con, regarding the historical or speculative future ability of specific individuals to profitably farm specific parcels within the Island Crossing triangle. The County insists that, notwithstanding soils characteristics, the Council may divine the long-term commercial significance of agricultural lands by weighing the credibility of opposing opinions.

The County and Lane make much of the opinions expressed by Mrs. Winter, Mr. Barlund and Mr. Henken, three individuals whom the County characterizes as knowledgeable about “existing market realities”⁴ Mrs. Winter relates her experiences as a dairy farmer before her family sold the property to Dwayne Lane, yet asserted no particular expertise as a real estate or agricultural industry analyst, nor did the County point to any. Nor did she, Mr. Barlund or Mr. Henken address either the criteria listed at WAC 365-190-050 nor the issue of the long-term agricultural significance of the larger pattern of agricultural land of which the Island Crossing triangle is a part, *i.e.*, the Stillaguamish River Valley. With regard to Mr. Henken’s remarks, the Board notes that he is a landowner within the Island Crossing triangle. SATC, at 4. Just as the Supreme Court has clarified that “land

³ SFCD quotes portions of its comments to the County: “On December 15, 1993, Mr. Lane and Mr. Henken jointly purchased the Winter’s farm, parcel #31050800301000.” *Id.* Neither the County nor Lane disputed this assertion. At the compliance hearing, counsel for Lane stated that he did not know when his client purchased property in the Island Crossing triangle. Transcript, at 24.

⁴ SATC, at 7.

owner intent” is not determinative of the “devoted to” prong⁵ of resource lands designations, the Board agrees with CTED that “land owner intent” alone cannot be conclusive in determining LTCS.⁶

In the final analysis, however, the relative weight or credibility that the County assigned to the opinions expressed by individuals during the May 19, 2004 hearing, sheds little light on the question of whether agricultural lands at Island Crossing have long-term commercial significance. While the Board would agree that soils information alone is not determinative, neither is reliance on anecdotal, parcel-focused expression of opinion nor is landowner intent. Instead, to cull from the universe of lands that are “devoted to” agriculture the subset that also has “long term commercial significance” demands an objective, area-wide inquiry that examines locational factors⁷ as well as the adequacy of infrastructure to support the agricultural industry. The County errs in its assumption that “long term commercial significance” is determined simply by weighing anecdotal, parcel-specific witness testimony. As explained *infra*, the Board concludes that the County’s reading of the law is incorrect, clearly erroneous,⁸ and Respondent therefore fails to carry its burden of proof for the removal of noncompliance and invalidity.

⁵ With respect to the “devoted to” prong of agricultural lands designations, the Supreme Court has clarified: [I]f land owner intent were the controlling factor, 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 . . . All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the “agricultural land” designation.

City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wash. 2d 38 (1998), at 53.

⁶ The Board agrees with CTED’s reading of the guidance that WAC 365-190-050 provides in determining ALLTCS. Just as the Board would defer to the interpretation that the County gives its own words, the Board defers to CTED’s interpretation of the words it adopted pursuant to RCW 36.70A.050.

⁷ Many of the criteria listed at WAC 365-190-050 regarding “the possibility of more intense uses of the land” are essentially “locational factors” to be used in this “culling” process. When applying the listed considerations to the facts in the present case, the Board continues to agree with both CTED and The Snohomish County Planning and Development Services Department (PDS) that the Island Crossing triangle includes 75.5 acres of agricultural resource lands of long-term commercial significance, surrounded by a much larger pattern of agricultural resource land and 35.5 acre node of freeway service uses.

⁸ The Board has no duty to defer to the County when interpreting the meaning of the words of the statute. The Courts have consistently recognized that statutory interpretation of the GMA is the province of the Boards, not local governments. In 2003, Division I of the Court of Appeals held:

The goals of the Growth Management Act are better served by a consistent interpretation of that Act, and the expertise of the GMA hearings board for interpretation of the GMA is a far more reliable basis for achieving such consistency than are the various counties. . .

Quadrant v. Central Puget Sound Growth Management Hearings Board, 119 Wn. App. 562, 81 P.3d 918. In 2001, Division II of the Court of Appeals held:

. . . notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and goals of the GMA.

Cooper Point Association v. Thurston County, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

The County's reliance on anecdotal, parcel-focused witness testimony as the primary determining factor of LTCS has too narrow a focus - it misses the broad sweep of the Act's natural resource goal, which is to maintain and enhance the agricultural resource *industry*, not simply agricultural operations on individual parcels of land. RCW 36.70A.020(8).⁹ This breadth of vision informs a proper reading of the Act's requirements for resource lands designation under .170 and conservation under .060. Reading these provisions as a whole, it is apparent that agricultural lands with "long-term commercial significance" are *area-wide patterns of land use*, not localized parcel ownerships.

Historical or speculative statements by individuals regarding their personal inability to profitably farm certain parcels does not inform a GMA-required inquiry into the *long term commercial significance* of *area-wide patterns of land use* that are to *assure the maintenance and enhancement of the agricultural land resource base to support the agricultural industry*.¹⁰ By de-designating resource lands based on anecdotal testimony regarding specific parcels (the Island Crossing triangle viewed in isolation),¹¹ as opposed to the contextual land use pattern of the agricultural lands and industry infrastructure that serves the surrounding Stillaguamish River Valley (*see Findings of Fact 16-18*), the County has committed a clear error.

This view of the meaning of these statutory provisions is consistent both with prior Board and court holdings concerning the purpose, importance, and criteria for designating and conserving resource lands. *See Appendix B*. This reading of the law does not preclude the removal of all designated resource lands from that status. For example, the Board has previously found compliant the removal of agricultural resource lands that had become entirely surrounded by incompatible urban uses.¹² In another case, the Board found compliant the removal of forest resource lands that were no longer supported by necessary industry infrastructure, such as sawmills.¹³

⁹ RCW 36.70A.020(8) provides:

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. Emphasis supplied.

¹⁰ The Supreme Court has underscored the sweep and directiveness of the GMA's agricultural goal:

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 v. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 558; 14 P.3d 133, 141 (2000). Emphasis supplied. *See also* Code Revisor's note following RCW 36.70A.030 – Finding of Intent.

¹¹ Even the Intervenor observed that when people refer to "Island Crossing," they make reference to a larger area than simply the triangle of land that is the subject of Ordinance No. 04-057. Transcript, at 49.

¹² *Grubb v. Redmond*, Final Decision and Order, CPSGMHB Case No. 00-3-0004, Aug. 11, 2000, (reversed on appeal on other grounds.)

¹³ *Alpine v. Kitsap County [Alpine]* coordinated with *Screen v. Kitsap County [Screen]*, Order on Compliance re: Forestry Issues in *Alpine* and Final Decision and Order in *Screen*, CPSGMHB Case Nos. 98-3-0032c and 99-3-0006c, Oct. 9, 1999.

In the present case, the County does not claim that the “Island Crossing triangle” is isolated from an area-wide land use pattern of agricultural resource lands – indeed, these agricultural lands abut no other land use activity, save the small freeway service node that is itself isolated from the existing Arlington UGA.¹⁴ Nor does the County claim that the time for agriculture has passed in the Stillaguamish River Valley because the necessary infrastructure, including food processing plants nearby, has changed. The only evidence in this record supports the contrary conclusion. *See* Findings of Fact 16-17.

Lastly, the Board notes the County’s complaint that the Board did not cite record evidence to support the FDO’s statement that “[i]t is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations.”¹⁵ This axiom is reflected in statutory language of the Act that seeks to protect agricultural uses from more intensive adjacent activities.¹⁶ It is somewhat ironic that part of the County’s rationale for converting agricultural lands at Island Crossing to commercial uses is its assertion that the impact from the businesses in the Freeway Service node has been so serious (*i.e.*, dangerous) that farming on adjacent lands is untenable.¹⁷

In summary, the Board agrees with Petitioners that the County fails to carry its burden of proof pursuant to RCW 36.70A.320(4) and that the County’s comprehensive plan and development regulations for the Island Crossing triangle continues to not comply with the GMA’s resource lands provisions, specifically RCW 36.70A.020(8) and .040, .060(1), and .170(1)(a).

2. Urban Growth Areas

a. Positions of the Parties

Snohomish County and Lane

The County states that its “record now includes a land capacity analysis demonstrating the need to expand the Arlington UGA.” SATC, at 9. The County cites County-wide Planning Policy (CPP) UG-14.d¹⁸ and points to a report prepared by Higa-Burkholder

¹⁴ The County’s characterization of the node of freeway service uses at Island Crossing as “urban growth” has been consistently rejected by the Board and the Courts. *See* Appendix B.

¹⁵ FDO, at 29.

¹⁶ RCW 36.70A.060(1) provides in relevant part:

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, . . . contain a notice that the subject property is within or near designated agricultural lands, . . . on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration.

¹⁷ The Board takes official notice of the Snohomish County Code to observe that the range and intensity of uses allowed in the County’s General Commercial zone is far greater than in the Freeway Service Zone. Logic dictates that the County’s new General Commercial zoning will therefore have a greater impact on the surrounding agricultural lands than is now the case with the impacts from the lesser intensity Freeway Service uses.

¹⁸ CPP UG-14.d provides in relevant part:

Associates (**HBA**) titled “Buildable Lands Report 2003 Update, City of Arlington UGA, Analysis of Availability of Commercial Parcels and Land Supply” (the **HBA Large Parcel Analysis**). The County explains:

The analysis sought to determine whether there is a shortage of commercial parcels in Arlington’s UGA capable of supporting large-scale commercial uses that require frontage on a major arterial and visual access. The analysis concluded that three sites exist within the Arlington UGA that have adequate size and good exposure to major arterials, but that none exist with direct exposure and access to Interstate 5.

SATC, at 11.

The County states that the City of Arlington concurred with the HBA Large Parcel Analysis by adopting Resolution 679 on May 17, 2004, and that after the May 19, 2004 public hearing and May 24, 2004 public hearing, the County Council agreed with the conclusions by adopting Emergency Ordinance 04-057. SATC, at 12. In refuting the suggestion by 1000 Friends that other parcels were also available meeting the criteria adopted in the HBA Large Parcel Analysis, the County argues:

A laundry list of parcels simply cannot compare to the reasoned analysis of the availability of developable properties the Council had before it. The Council reasonably relied on the information before it and the Board cannot substitute its judgment for that of the Council.

Id.

Expansion of the Boundary of an Individual UGA: Expansion of the boundary of an individual UGA to include additional . . . commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, . . .

. . .

4. For the expansion of the boundary of an individual UGA to include additional commercial or industrial land, the county and the city or cities within the UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes that there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the most recent Snohomish County Growth Monitoring Report or the buildable lands review and evaluation (Building Lands Report), as they may be confirmed or revised based upon any new information presented at public hearings, may also be considered as a basis for expansion of the boundary of an individual UGA to include additional commercial or industrial land.

The County argues that “the Large Parcel Analysis is the type of land capacity analysis contemplated by UG-14, and it complies with the GMA by satisfying the requirements of CPP UG-14, which implements RCW 36.70A.215.” SATC, at 13.

Turning to the UGA locational factors of RCW 36.70A.110, the County also asserts that it is now in compliance. The County states that “the Council reconsidered the locational requirements in light of the entire record and concluded that Island Crossing is adjacent to land characterized by urban growth.” *Id.* Summing up the Council’s reasoning, the SATC states:

As revealed in the proceedings below, sewer service is available to Island Crossing and there are existing commercial uses within Island Crossing. In consideration of the voluminous testimony that Island Crossing is no longer of long-term commercial significance, its adjacency to the City of Arlington, and the existing urban-level uses within Island Crossing, the Council concluded that the Island Crossing triangle meets the Legislature’s locational requirements for a UGA.

Id.

CTED, 1000 Friends, and SFCD

CTED argues that Ordinance No. 04-057 does not address any of the flaws that the Board found with the County’s UGA designation with Ordinance No. 03-063. CTED begins its attack on the County’s compliance by arguing that the HBA Large Parcel Analysis “does not address the criteria specified in RCW 36.70A.110 and does not exhibit the characteristics of a land capacity analysis under the GMA.” CTED Response, at 17. CTED contends that the criteria used by the HBA Large Parcel Analysis are those that might used by “big-box” stores and automobile dealerships to determine where to locate, rather than those mandated in RCW 36.70A.110. CTED Response, at 18. CTED further alleges that using such criteria for large-scale commercial development would favor development in less expensive rural areas or in strip development along freeways and major arterials, in contravention of the Act’s goals favoring compact urban development. *Id.*

1000 Friends agrees with CTED that Ordinance No. 04-057 does not meet the locational criteria of RCW 36.70A.110 and questions the objectivity, and therefore the credibility of the HBA Large Parcel Analysis. 1000 Friends points out that the report was paid for by consultants hired by Mr. Lane, and opines that the consultant’s motivation “is not dispassionate, but is to get Mr. Lane his redesignation.” *Id.* 1000 Friends also takes issue with the validity of the analysis, arguing:

The biggest problem is that it [the analysis] is based on Scenario B of the County’s Buildable Lands Report. Scenario B does not use the population and employment targets that were adopted by the County. Consequently,

any analysis based on Scenario B cannot by definition comply with the GMA.

1000 Friends Response, at 7.

1000 Friends also disputes the accuracy of the report relative to availability of large lots in the Arlington UGA and complains that it does not examine the possibility of rezoning additional large lots to commercial designations. *Id.*

SFCD agrees with 1000 Friends that the HBA Large Lot Analysis is suspect because it was prepared by Mr. Lane's consultant, and argues that it therefore should be discounted as merely an expression of landowner intent. SFCD Response, at 7. SFCD also argues that the County's Department of Planning and Development Services does not support the Burkholder "updates." *Id.*

b. Board Analysis

It is a close question whether the HBA Large Lot Parcel Analysis is consistent with the entirety of UG-14(d). There appears to be no dispute on the question of whether the 50% threshold named in UG-14(d) has been exceeded, and no argument was presented that the County must conduct its re-evaluation and adjustments in the context of a county-wide review of capacity and need. While the petitioners raise questions about the methodology and assumptions of the analysis, the Board is inclined to agree that the HBA Large Parcel Analysis cures the County's inconsistency with CPP UG-14(d) and thereby cures the noncompliance with RCW 36.70A.215.

However, achieving consistency between Ordinance 04-057 and CPP UG-14(d), does not cure the County's noncompliance with RCW 36.70A.110 because it does not address the "UGA location" deficiencies identified in the FDO. The "summary" of the County's reasoning (SATC, at 13, ln. 13-20) simply reiterates the arguments that the Board rejected in the FDO. No new facts or reasoning are presented to disturb the Board's conclusions that Island Crossing continues to have agricultural lands of long-term commercial significance, that the presence of a sewer line is irrelevant, particularly given its limitations,¹⁹ that the freeway service uses do not rise to the status of "urban growth,"²⁰ and that Island Crossing is not "adjacent" to the Arlington UGA or a

¹⁹ No new evidence or persuasive argument was presented to the Board to undercut the Court of Appeals' 2001 conclusion that:

The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist.

Lane v. Central Puget Sound Growth Management Hearings Board, 2001 WL 244384 (Wash. App. Div. I, Mr. 12, 2001). See Appendix B.

²⁰ No new evidence or persuasive argument was presented to the Board to undercut the Superior Court's 1997 conclusion that "An isolated special purpose freeway service node does not constitute generalized urban growth." See Appendix B.

residential “population” of any sort.²¹ In fact, the private lands within this proposed UGA expansion would be connected to the Arlington UGA only by means of a 700 foot long ‘cherry stem’ consisting of nothing but public right-of-way. Findings of Fact Nos. 11 and 13. While such dramatically irregular boundaries were common in the pre-GMA era, the meaning of “adjacency” under the GMA precludes such behavior.

Even if the HBA Large Parcels Report and CPP UG-14 compels the County to attempt to expand Arlington’s UGA, it is significant to recognize that such expansion is a self-imposed, rather than statutorily compelled, duty. Therefore, the County cannot point to UG-14 as justification for Ordinance No. 04-057. Specifically on point, the Supreme Court has held that a CPP that “mandates” the inclusion of specific lands within a UGA cannot trump the statutory requirements of RCW 36.70A.110.

We conclude that a comprehensive plan provision is not immune from challenge merely because the County was required to adopt the provision by its CPPs . . . There is no statutory language immunizing provisions of the comprehensive plan from review on the grounds that those provisions are mandated by the CPPs. *A UGA designation that blatantly violates GMA requirements should not stand simply because CPPs mandated its adoption.*

King County v. Central Puget Sound Growth Management Hearings Board, 138 Wn.2d 161, 176-177; 979 P.2d 372, 382 (1999). Emphasis supplied.

Here, the Board has determined, *supra*, that Ordinance No. 04-057 does not comply with the statutory requirements for resource lands and urban growth areas. Therefore, an argument that UG-14 somehow compels the inclusion of Island Crossing in the Arlington UGA is unavailing.

The Board concludes that Snohomish County has not carried its burden of proof in its attempt to overcome the finding of invalidity and noncompliance in the FDO, particularly with regard to RCW 36.70A.020(1) and (2), RCW 36.70A.040, and RCW 36.70A.110. The Board remains convinced that the County’s reading of these areas of the law is in error, clearly erroneous.²²

²¹ This point is even more apparent when the “Island Crossing triangle” is considered in context to the geography and topography of the area. It sits in the flood plain of the Stillaguamish River, suffering from the same damaging floods that occur every three to five years throughout the basin. Findings of Fact Nos. 7 and 8. Unsurprisingly, the elevation of Island Crossing is at essentially the same elevation as designated agricultural resource lands to the west, north and east, whereas the existing Arlington UGA to the south is on higher ground. Finding of Fact 18.

²² The Board also notes that, in addition to failing to comply with the locational requirements of RCW 36.70A.110, the inclusion of the Island Crossing triangle within the UGA would create an impermissible conflict with RCW 36.70A.060(4). The County admits that it has not “enacted a program authorizing transfer or purchase of development rights” of designated agricultural resource lands within urban growth areas. Transcript, at 57. Since the Board has found, *supra*, that the de-designation of 75.5 acres of agricultural resource lands in the Island Crossing triangle is noncompliant, and invalid, and since the

VI. CONCLUSIONS OF LAW

A. Noncompliance and Invalidity

Based on the analysis in Section V *supra*, the Board concludes that Snohomish County's comprehensive plan and development regulations for the Island Crossing Area continues not to comply with the goals and requirements of the GMA, specifically RCW 36.70A.020(1), (2), (8), and (10) and RCW 36.70A.040, RCW 36.70A.060(1), RCW 36.70A.110, and RCW 36.70A.170(1)(a), respectively. Therefore, **the Board will enter a Finding of Continuing Noncompliance and Continuing Invalidity.**

B. Sanctions

Because the Board finds Snohomish County in continuing noncompliance with the GMA, RCW 36.70A.330(3) directs that these findings be transmitted to the Governor. Significantly, Ordinance No. 04-057 represents Snohomish County's **third** attempt under the GMA (and second attempt within the past nine months)²³ to convert Island Crossing from a part of the designated agricultural resource lands of the Stillaguamish River Valley into Arlington's urban growth area. It has done so notwithstanding consistent contrary readings of the Growth Management Act by the Snohomish County SEPA Responsible Official,²⁴ Snohomish County Executive,²⁵ the Growth Management Hearings Board,²⁶ Snohomish County Superior Court,²⁷ the First Division of the Washington State Court of Appeals,²⁸ and the Governor of the State of Washington.²⁹

By its actions, the County Council has evidenced an ongoing unwillingness to comply with those portions of the Growth Management Act with which it disagrees. Therefore, the Board will recommend to the Governor that he impose financial sanctions authorized by RCW 36.70A.340. The Board will further recommend that any sanctions be lifted only when Snohomish County provides sufficient assurance that it will take no further legislative action contrary to the GMA, as interpreted by the Board in this matter, unless the Board's holdings are reversed by a court of competent jurisdiction.

County admits that it has no transfer of development rights program pursuant to RCW 36.70A.060(4), Snohomish County is further barred from including this 75.5 acres of land within the UGA.

²³ Ordinance No. 03-063 was adopted on September 10, 2003, FDO, Finding of Fact 1; Ordinance No. 04-057 was adopted May 24, 2004. Finding of Fact 2.

²⁴ PDS Report, Index of Record No. 21, and DSEIS for Dwayne Lane Docket Proposal, Index of Record No. 22, at 2-36.

²⁵ Executive Veto Message re: Dwayne Lane Docket Proposal, Index of Record No. 1114.

²⁶ CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane], Jan. 20, 1999; and CPSGMHB Case No. 03-3-0019c, *1000 Friends v. Snohomish County*, FDO, March 22, 2004.

²⁷ Snohomish Superior Court Case No. 96-2-03675-5, Nov. 19, 1997. See Appendix B.

²⁸ *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001). See Appendix B.

²⁹ CTED Petition for Review, attached letter from Governor Gary Locke.

The Board recognizes that the Governor will decide whether to impose sanctions and, if so, which to choose from among those listed at RCW 36.70A.340. The Governor likewise will decide the circumstances under which any imposed sanctions will be lifted and when further proceedings before the Board are necessary and appropriate.

VII. ORDER

Having reviewed and considered the above-referenced documents, the goals and requirements of the Growth Management Act, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- 1) Snohomish County has **failed to carry its burden of proof** to justify a Board finding of compliance and rescission of invalidity. Snohomish County's adoption of Ordinance No. 04-057 **does not comply** with the requirements of RCW 36.70A.040, .060, .110, .170, and **was not guided by** RCW 36.70A.020 (1), (2), (8) and (10); the County's action was **clearly erroneous**.
- 2) Because the continued validity of Ordinance No. 04-057 would substantially interfere with the fulfillment of RCW 36.70A.020 (1), (2), (8) and (10), the Board also enters a **determination of invalidity** for Ordinance No. 04-057.
- 3) A copy of this Order shall be transmitted to the Governor together with a letter recommending the imposition of financial sanctions pursuant to RCW 36.70A.340. The parties to this case shall be copied on the letter to the Governor.
- 4) At such time as the Governor so indicates, or a court directs, the Board shall notify the parties to this case of a schedule for further compliance proceedings.

So ORDERED this 24th day of June 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member
Note: Mr. McGuire files a concurring opinion below

Joseph W. Tovar, FAICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300. Any party wishing to file a motion for reconsideration of this final order must do so within ten days of service of this order. WAC 242-02-830(1). Any party wishing to appeal this final order to superior court must do so within thirty days of service of this order. WAC 242-02-898.

Concurring Opinion of Board Member McGuire

I concur with the conclusions of my colleagues as expressed in this Order, save one. I would have addressed Legal Issue 5, pertaining to the Ordinance's compliance with the GMA's critical areas requirements for frequently flooded areas. Legal Issue 5 states:

By expanding the Arlington UGA into a frequently flooded area and by redesignating lands within that area for commercial use, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with RCW 36.70A.060 and RCW 36.70A.170?

See Corrected FDO, at 37.

I agree with the County's assertion that: 1) it has identified and designated critical areas, including frequently flooded areas, as required by RCW 36.70A.170; and 2) it has adopted critical areas development regulations intended to protect those critical areas, including frequently flooded areas. County Response, at 4-6. Intervenor Lane even acknowledges that "[N]o development will be allowed in Island Crossing that is not required to meet all critical areas regulations, including requirements for mitigation." Lane Response, at 30.

However, the direction provided in Ordinance No. 04-057's³⁰ Findings undermine the importance of meeting the County's own critical areas mitigation requirements. Several Findings speak to mitigation:

- In Ex. 135, *applicant* of the Island Crossing Interchange Docket Proposal states various development techniques and plans which will be *voluntarily used to minimize the prospect of flood impacts*. . . . *See* Ordinance No. 04-057, Section 1, B.9.AA; and Finding of Fact 4, (emphasis supplied).
- After the effective date of Emergency Ordinance No. 04-057, *development in the Island Crossing Interchange Docket Proposal area added to the Arlington UGA by Emergency Ordinance No. 04-057 should be conditioned upon use of the flood protection measures outlined above in finding AA of Section 1, **provided such flood protection measures are technically feasible and do not defeat the purpose of the development***. *See* Ordinance No. 04-057, Section 3, (emphasis supplied).

³⁰ Ordinance No. 03-063 was the subject of the Board's FDO; however, Ordinance No. 03-063, Section 1, Finding V, is virtually the same as Finding B.9.AA quoted *supra*. Likewise, Ordinance No. 03-063, Section 3, contains the same language as Section 3 quoted *supra*.

These statements draw me to conclude that notwithstanding the actual mitigation requirements of the County's critical areas development regulations, the Ordinance directs that this proposal will be voluntarily mitigated by the applicant to the extent needed flood protection measures are technically feasible and do not defeat the purpose of the development. If this is the extent of protection the County provides for frequently flooded areas - voluntarily determined by the applicant - I would find **noncompliance with RCW 36.70A.060(2)**.

Appendix A

PROCEDURAL HISTORY PRECEDING FINAL DECISION AND ORDER

On October 23, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from 1000 Friends of Washington, Stillaguamish Flood Control District (**SFCD**), Agriculture for Tomorrow, and Pilchuck Audubon Society (collectively, **Petitioners** or **1000 Friends**) and “Request for Expedited Review.” Petitioners challenge the adoption by Snohomish County (the **County** or **Snohomish**) of Amended Ordinance No. 03-063.

The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**). The matter was assigned Case No. 03-3-0019 and is hereafter referred to as *1000 Friends, et al., v. Snohomish County*. Board member Joseph W. Tovar is the Presiding Officer for this matter.

On October 28, 2003, the Board issued the “Notice of Hearing” in this matter.

On November 5, 2003, the Board received “Snohomish County’s Response to Petitioners’ Request for Expedited Review.” Also on this date, the Board received from Dwayne Lane a “Motion for Status as Intervenor” (the **Dwayne Lane Motion to Intervene**) in Case No. 03-3-0019 and a draft “Order Granting Motion for Status as Intervenor.” Also on this date, the Board received a PFR from “The Director of the State of Washington Department of Community, Trade, and Economic Development” (the **CTED II PFR**) challenging the adoption of Snohomish County Ordinances Nos. 03-063 and 03-104, together with a “Motion to Consolidate” (the **CTED Motion to Consolidate**) with Cases Nos. 03-3-0017 and 03-3-0019. The CTED II PFR case was assigned Case No. 03-3-0020 and the case was titled *CTED v. Snohomish County [II]*.

On November 6, 2003, beginning at 10:00 a.m., the Board conducted the prehearing conference in the training room on the 24th floor of the Bank of California Building, 900 Fourth Avenue in Snohomish. At the prehearing conference, the presiding officer orally granted the portion of the CTED Motion to Consolidate that includes issues addressed to Snohomish Ordinance No. 03-063. He indicated that the legal issues addressed to Snohomish Ordinance No. 104 would not be consolidated with Case No. 03-3-0019, but would be referred to Mr. McGuire, the presiding officer in Case No. 03-3-0017. The presiding officer also orally granted the motion by Dwayne Lane to intervene in the consolidated 1000 Friends and CTED challenges to Snohomish Ordinance No. 03-063.

On November 10, 2003, the Board received “Snohomish County-Camano Association of Realtors and Master Builders Association of King and Snohomish Counties’ Joint Opposition to CTED’s Motion to Consolidate.” The caption of this pleading listed both Case No. 03-3-0017 (CTED I) and Case No. 03-3-0020 (CTED II).

On November 12, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued “Prehearing Order, Order Partially Granting Motion for

Consolidation, and Order Granting Motion for Intervention” (the **PHO**) in the above captioned matter. The PHO set the Final Schedule for the submittal of motions and briefs. PHO, at 4-5. Later on this same date, the Board received from Petitioner 1000 Friends a letter (the **1000 Friends letter**) attached to which were: (1) a City of Arlington Development Services “City Council Agenda Bill” with a Council Meeting Date of September 17, 2003 and the subject heading caption “Consideration of Intention of Annexation 10% Petition for Island Crossing Annexation (File No. A-03-068)” and (2) a memorandum, dated September 7, 2003, from Cliff Strong, Arlington Planning Manager to the Mayor and City Council.

On November 13, 2003, the Board received from the County a letter (the **County letter**) responding to the 1000 Friends letter.

On November 14, 2003, the Board received “Snohomish County’s Index to the Record” (the **County’s Index**). Later on this same date, the presiding officer directed Susannah Karlsson, the Board’s Administrative Officer, to contact the parties to the case for the purpose of setting up a telephone conference call to hear oral argument regarding the 1000 Friends letter and the County letter on Tuesday, November 18, 2003 commencing at 9 a.m.

On November 18, 2003, the Board conducted a telephonic conference call to hear argument regarding the 1000 Friends letter and the County letter. Participating for the Board were Bruce C. Laing and Joseph W. Tovar, presiding officer. Participating for 1000 Friends was John T. Zilavy, for the County was Andrew S. Lane, for Stillaguamish were Henry Lippek and Ashley E. Evans, for Intervenor Dwayne Lane was Todd C. Nichols, and for the Washington State Department of Community, Trade and Economic Development was Alan D. Copey.

On November 24, 2003, the Board issued “Order Granting Motion to Supplement the Record” (the **First Order on Motions**). The First Order Granting Supplementation admitted to the record before the Board two supplemental exhibits and assigned them exhibit numbers Supp. Ex. 1 and Supp. Ex. 2.

On December 4, 2003, the Board received “1000 Friends’ Motion to Correct the Record and Index of Record” (the **1000 Friends Motion**) with proposed supplemental exhibits A, B, and C.

On December 5, 2003, the Board received “Flood Control District’s Motion to Correct the Record and Index of the Record,” (the **Stillaguamish Motion**) with proposed supplemental exhibits A and B.

On December 12, 2003, the Board received “Snohomish County’s Response to Motions to Supplement the Record” (the **County Response**) with Attachments A, B and C. On this same date the Board received “Dwayne Lane’s Memorandum in Opposition to Correct the Record and Index of Record” (the **Lane Memorandum**) together with the

“Declaration of Dwayne Lane Re: Motions to Correct or Supplement the Record” (the **Lane Declaration**).

On December 18, 2003, the Board received “Petitioners’ Reply to Motion to Correct the Record and Index of Record” (the **1000 Friends Reply**).

On December 19, 2003, the Board received “Flood District’s Reply to Dwayne Lane and Snohomish County’s Responses to Motion to Correct the Record and Index of Record” (the **Flood District Reply**).

On January 2, 2004, the Board issued “Second Order on Motions” (the **Second Order on Motions**).

On January 9, 2004, the Board received the “Petitioner Stillaguamish Flood Control District’s Prehearing Brief” (the **Flood District PHB**) “1000 Friends of Washington Opening Brief” (the **1000 Friends’ Opening Brief**); and “CTED’s Opening Brief” (the **CTED Opening Brief**).

On January 23, 2004, the Board received “Snohomish County’s Response Brief” (the **County Response**) and “Intervenor Lane’s Hearing Response Memorandum” (the **Lane Response**) and “Intervenor Lane’s Motion to Supplement the Record” (the **Lane January 23, 2004 Motion to Supplement**).

On January 29, 2004, the Board received “Flood District’s Reply Brief” (the **Flood District Reply**), and “CTED’s Reply Brief” (the **CTED Reply**).

On January 30, 2004, the Board received “1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Reply Brief” (the **1000 Friends Reply**).

The Board conducted the Hearing on the Merits (the **HOM**) in this matter on February 2, 2004 in the conference room adjacent to the Board’s office, Suite 2470, 900 Fourth Avenue in Seattle. Present for the Board were Edward G. McGuire, Bruce C. Laing, and Joseph W. Tovar, presiding officer. Also present were the Board’s legal externs Ketil Freeman and Lara Heisler. Court reporting services were provided by Scott Kindle of Mills and Lessard, Seattle. The parties were represented as follows: for 1000 Friends was John T. Zilavy; for Stillaguamish Flood Control District were Henry Lippek and Ashley Evans; for CTED was Alan D. Copsy; for the County was Andrew S. Lane; and for Intervenor Dwayne Lane was Todd C. Nichols. No witnesses testified. At the conclusion of the HOM, the presiding officer directed that a transcript (the **HOM Transcript**) be prepared.

On February 11, 2004, the Board received a letter from counsel for the County indicating that “Snohomish County will not be submitting a post-hearing rebuttal to 1000 Friends’ late reply brief.”

On February 13, 2004, the Board received “Intervenor Lane’s Surrebuttal Memorandum” (the **Lane Surrebuttal**).

On March 18, 2004, the Board received “1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Motion to Supplement the Record” (the **1000 Friends March 18, 2004 Motion to Supplement**). Later on this same date, the Board received “Respondent Snohomish County’s Response to 1000 Friends’ Motion to Supplement the Record” (the **County Response to the 1000 Friends March 18, 2004 Motion to Supplement**).

On March 19, 2004, the presiding officer directed the Board’s Administrative Officer Susannah Karlsson to contact the parties to ask if they wished to file any response to the 1000 Friends March 18, 2004 Motion to Supplement. She made telephone contact with all parties. Later on this same date, the Board received “Intervenor Dwayne Lane’s Response to 1000 Friends’ Motion to Supplement the Record” (the **Lane Response to the 1000 Friends March 18, 2004 Motion to Supplement**) and correspondence from counsel for the Stillaguamish Flood Control District (the **Flood District Letter**).

Appendix B

HISTORY OF GMA LITIGATION RE: ISLAND CROSSING³¹

1. Among the seventy issues challenging the GMA compliance of Snohomish County's first comprehensive plan in 1996 was an allegation by Pilchuck Audubon Society that the County had violated the agricultural resource lands provisions of the Growth Management Act in removing from resource lands designation lands in the Island Crossing Area. The Board upheld the County's action. CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Final Decision and Order, Case No. 96-3-0068c, April 15, 1996.
2. On November 19, 1997, Snohomish County Superior Court, in reviewing the Board's decision in *Sky Valley v. Snohomish County*, issued a "Judgment Affirming in Part and Remanding in Part," Superior Court Case No. 96-2-03675-5.
3. In an oral decision incorporated by the Court into the Judgment Affirming in Part and Remanding in Part, the Superior Court stated:

Evidence and arguments supporting de-designation were presented by [the City of Arlington] . . . focused almost exclusively on issues relating to the City of Arlington's economic growth and well-being, and not on Growth Management Act Criteria. . . .An isolated special purpose freeway service node does not constitute generalized urban growth . . . What happened to the fundamental axiom of the Growth Management Act that "the land speaks first"? Where does the Act state that the economic welfare of cities speaks first? Where does the evidence submitted by Arlington even reference the agricultural productivity or the floodplain status of the lands which are not proposed for automobile dealerships? Freeways are no longer longitudinal strips of urban opportunity. Agricultural lands must be conserved as a first priority, and urban centers must be compact, separate and distinct features of the remaining part of the landscape.

Id., Transcript of Proceedings, Court's Oral Ruling, at 14-18.

4. The Superior Court remanded the *Sky Valley* matter to the Board, finding no substantial evidence to support the removal of the agricultural designation. PDS Report, at 4.
5. Subsequent to the Superior Court remand, the Snohomish County Planning Commission and County Council reconsidered the land use designations for Island Crossing in 1998 and redesignated the agricultural areas as agricultural and

³¹ This history was set forth in the FDO, at 2-3.

redesignated the commercial area as Rural Freeway Service, and removed Island Crossing from the Arlington UGA.

Id.

6. Dwayne Lane, the owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land and filed a petition for review with the Growth Management Hearings Board. The Board rejected Lane's appeal. CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane]. Jan. 20, 1999.
7. Snohomish County Superior Court affirmed the Board's January 20, 1999 Order, after which Lane appealed to the Court of Appeals. *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001).
8. The Court of Appeals described the Island Crossing area as follows:

Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).

Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devoted to freeway services. Thus, the record indicates that the land is actually used for agricultural production. *See City of Redmond*, 136 Wn.2d at 53. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist. *Id.*

FDO, at 2-3.