

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

JOCELYNNE FALLGATTER and)	
JEFF KIRKMAN,)	
)	Case No. 04-3-0021
Petitioners <i>pro se</i> ,)	
)	(Fallgatter/Kirkman)
v.)	
)	FINAL DECISION AND ORDER
CITY OF SULTAN,)	
)	
Respondent,)	

SYNOPSIS

The City of Sultan amended its development regulations for residential subdivisions and planned unit developments to allow developers to make contributions “in-lieu” of the explicit regulatory requirements for provision of open space and recreational facilities. At the time of the adoption of these provisions, Sultan’s Comprehensive Plan, Future Land Use Map, Capital Facilities Plan and Parks Plan were inaccurate or had expired. Petitioners sought review, alleging Sultan’s noncompliance with the Growth Management Act in failing to have adopted current plans and in enacting development regulations inconsistent with the Comprehensive Plan and with the requirements of GMA.

During the pendency of this matter, the City of Sultan adopted its 2004 Comprehensive Plan Update, Future Land Use Map, Capital Facilities Plan and Parks Plan. Petitioners revised their Petition for Review, challenging the “in-lieu” development regulations on the basis that relevant provisions of the 2004 Plan Update are so flawed as to require invalidation of implementing development regulations.¹ The Board finds that Petitioners have not met their burden of proof on this issue.

Petitioners also challenged the regulations as internally inconsistent and inconsistent with the 2004 Plan Update. Under the particular facts of this case, the Board finds internal inconsistency in the City of Sultan’s development regulations for provision of open space and recreational facilities, and inconsistency with the Sultan Comprehensive Plan. The Board enters an order of noncompliance and invalidity, and remands the Ordinances to the City of Sultan for legislative action to cure the defect.

¹ Petitioners have filed a separate PFR challenging the City of Sultan’s 2004 Comprehensive Plan on grounds not related to the “in lieu” development regulations. CPSGMHB Case No. 05-3-0010c. Nothing in the Board’s decision here affects the issues in that case.

I. BACKGROUND²

On July 14, 2004, the City of Sultan (**City** or **Sultan**) adopted Ordinances Nos. 853-04 and 854-04 (the **Ordinances**). The Ordinances amended Sultan's development regulations to allow a residential developer to make cash contributions or dedicate off-site property in lieu of the on-site open space and recreational facilities otherwise required. On September 13, 2004, Jocelyne Fallgatter and Jeff Kirkman (**Petitioners** or **Fallgatter/Kirkman**) filed a timely Petition for Review (**PFR**) challenging the City's action.

Some of the issues in contention were resolved and remaining issues were restated in an amended PFR following a settlement extension. There were no dispositive motions filed. On Petitioners' motion, the Board supplemented the record with seven exhibits.

All prehearing briefing was timely filed. The prehearing briefs are referenced in this Final Decision and Order (**FDO**) as: **Petitioners' PHB, City Response, and Petitioners' Reply.**

On April 7, 2005, the Board held a Hearing on the Merits (**HOM**) at the Board's offices in Suite 2470, 900 Fourth Avenue, Seattle, Washington. Board Members Margaret A. Pageler, Presiding Officer, Edward G. McGuire, and Bruce C. Laing were present for the Board. Petitioners Jocelyne Fallgatter and Jeff Kirkman appeared *pro se*. Respondent was represented by Thom Graafstra of Weed, Graafstra, and Benson, Inc., P.S.. Rick Cisar, City Administrator/Planner, also attended. Court reporting services were provided by Eva Jankovits from Byers and Anderson, Inc. The hearing convened at 10:00 a.m. and adjourned at approximately 12:00 noon. The Board did not order a transcript of the HOM.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF

AND STANDARD OF REVIEW

Petitioners challenge the City of Sultan's adoption of Ordinance Nos. 853-04 and 854-04. Pursuant to RCW 36.70A.320(1), the City's Ordinance Nos. 853-04 and 854-04 are presumed valid upon adoption.

The burden is on Petitioners, Jocelyne Fallgatter and Jeff Kirkman, to demonstrate that the actions taken by the City are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by [the city] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find Sultan's actions clearly erroneous, the Board must be "left with the firm and definite

² A complete statement of the proceedings in this matter is appended as Appendix A.
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conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to the City of Sultan in how it plans for growth, consistent with the goals and requirements of the GMA. The State Supreme Court’s most recent delineation of this required deference states: “We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA ... cedes only when it is shown that a county’s planning action is in fact a ‘clearly erroneous’ application of the GMA.” *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, [docket number 75076-9; 2005 WL 1037145, --- P3d --- (Wash.), at 10]. The *Quadrant* decision affirms prior State Supreme Court rulings that “Local discretion is bounded, however, by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000). Division II of the Court of Appeals further clarified, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a county’s plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, 108 Wn.App. 429, 444, 31 P.3rd 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002) and cited with approval in *Quadrant, supra*, fn. 7, at 5.

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to the specific issues presented in a timely petition for review. RCW 36.70A.290. The Board’s decision does not extend to unchallenged elements of a city’s ordinance or plan, which are presumed valid as a matter of law.

III. BOARD JURISDICTION, PRELIMINARY MATTERS AND PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that the Petitioners’ PFR was timely filed, pursuant to RCW 36.70A.290; Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinances, which amend the City of Sultan’s development regulations, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

At the Hearing on the Merits, Petitioners indicated they did not intend to offer two exhibits proposed in Petitioners’ Motion to Supplement the Record, which the Presiding Officer had indicated “may be offered.” Petitioners submitted a map which they had marked to show discrepancies among various UGA proposals and designations. The map was marked **HOM Ex. No. 1**. The City disputed some elements of HOM Ex. No. 1 and was invited to provide the Board an alternate map showing changes in the UGA

designations and proposals. The City has provided no such clarification. However, the Board makes no rulings in this matter that require determinations concerning the City of Sultan's UGA.

C. PREFATORY NOTE

In this Final Decision and Order (**FDO**) the Board first discusses Petitioners' Legal Issue No. 1 and then Legal Issue No. 3, except that Legal Issue No.1(c) and RCW 36.70A.130(1) are also discussed in the context of Legal Issue No. 3. Legal Issue No. 2 regarding invalidity is discussed last.

IV. LEGAL ISSUES AND DISCUSSION

A. THE CHALLENGED ACTION

On July 14, 2004, the City of Sultan published its adoption of Ordinances 853-04 and 854-04 amending Planned Unit Development and residential subdivision development regulations.³ The existing regulations, codified as SMC 16.10.140B and SMC 16.72.050 respectively, required certain on-site recreational facilities and open space in connection with residential development. The amendments allow off-site land dedications and financial contributions "in lieu" of on-site improvements.

Ordinance 853-04 amends the Planned Unit Development (PUD) 20-percent open space requirement [SMC 16.10.140.B] by adding this proviso:

... provided, however, the City, the Hearing Examiner, and the City Council may reduce the amount of required Open Space to not less than 5-percent in the event that the Applicant shall offer to the City dedication of property off-site or a payment into the City Park System Improvement Fund that will provide the City comparable property, or the funds to acquire comparable Open Space. Should the City, Hearing Examiner, or City Council accept a payment into the fund, such monies shall be impaired and used for Park System Improvements or open space acquisition, or refunded in the same manner and under the same terms as provided for in SMC Sections 16.112.110 and 16.112.120.

Ordinance 854-04 amends the Recreational and Open Space Standards for Subdivisions, SMC 16.72.050, Space Standards Requirements B, by adding:

If, however, an Applicant wishes to provide Recreations Facilities in a manner that is not consistent with these standards, either by dedication or construction of improvements off-site, or by financial contribution, this shall be allowed, if in the opinion of the City, the Hearing Examiner, and

³ These documents are exhibits to the City's Response as follows:

Ordinance 853-04 -- City Response, Ex. 1

SMC 16.10 -- City Response, Ex. 3

Ordinance 854-04 -- City Response, Ex. 2

SMC 16.72 -- City Response, Ex. 4

City Council, the proposed deviation from these standards will be equivalent to the requirements contained herein. Should a financial contribution be accepted it shall be used to fulfill the goals and objectives of the recreational element of the Comprehensive Plan.

Each of the amended regulations now contains two schemes: one requires dedication or development of specific open space and recreational facilities such as tot-lots within easy walking distance of new residents based on a clear numeric formula. This serves the goals of providing recreation where people live and developing facilities concurrent with urban growth, thus supporting the City's adopted Level of Service standards for parks and recreation. See *infra*, at 16; City Response, Ex. 10.

The second scheme, adopted with the Ordinances, allows off-site land donations or payments in lieu of on-site recreational facilities.

At the time of adoption of the Ordinances [July, 2004], the City of Sultan's Comprehensive Plan, Future Land Use Map and Capital Facilities Plan and Parks Plan were outdated, had expired, or had not been updated per RCW 36.70A.130(1).

The 1994 Comprehensive Plan had projected and planned for growth north and northwest of the City. The City's Future Land Use Map outlined an Urban Growth Area (UGA) boundary in that direction. However, Snohomish County designated Sultan's UGA east and northeast of the City, an area referred to as "the Plateau." Between 1994 and 2004, Sultan failed to amend its 1994 Comprehensive Plan or FLUM to reflect the Snohomish County UGA designation or other changes. During that time, Sultan annexed lands which were outside the UGA boundary which the City had proposed and mapped in its 1994 Comprehensive Plan but within the UGA officially adopted by Snohomish County. Sultan also rezoned city lands without amending its Plan or FLUM. Petitioners' Reply, at 2-3, Ex. 2.

Sultan's six-year Capital Facilities Plan had expired in 1999 and was not updated until after the passage of the Ordinances. Petitioners' Reply, Ex. 3. No detailed capital facilities planning had been done in anticipation of or in response to Sultan's post-1994 annexations and zoning changes. Supp. Ex. 3.

The City's Parks Plan had also expired (Supp. Ex. 3, *see infra*, at 13, fn. 12) and needed to be updated and reflected in the Capital Facilities Plan and Comprehensive Plan in light of anticipated urban expansion on the Plateau. Supp. Ex. 4. With respect to open space, parks, and recreation facilities, Sultan had preserved or developed large tracts of open space on the west and south of the City, some school grounds in the center, but nothing to the east and northeast – the Plateau - where urban development is now anticipated. City Response, Ex. 13, 15.

Sultan began updating its Comprehensive Plan in 2003. Planning Commissioners, including these Petitioners, questioned the adequacy of capital facilities and financial planning for urban services for the projected areas of growth on the Plateau. Supp. Ex. 2,

3, 4. The City Planner indicated that developing a capital facilities plan is “very involved” and could take six to nine months.⁴

In December 2003, Sultan forwarded a draft update of its Comprehensive Plan to the Department of Community Trade and Economic Development (CTED). CTED reviewed the plan and commented on the lack of a Capital Facilities Plan:

As your Capital Facilities Plan (CFP) will not be completed until later this year, we suggest you not adopt these [Comprehensive Plan] amendments until the CFP is complete. The process of expanding a UGA needs to be thoroughly evaluated in conjunction with the ability to provide adequate public facilities and service to the entire UGA....

In addition, ensure that the Land Use Element, Capital Facilities Plan Element and financing plan are coordinated and consistent [RCW 36.70A.070(3)].

CTED February 27, 2004, letter to Rick Cisar, at 4.⁵ Petitioners’ PHB, Ex. 1B.

On March 16, 2004, CTED wrote again to answer a question from Mr. Cisar as to whether Sultan’s Capital Facilities element could be adopted outside the update schedule for its Comprehensive Plan. CTED stated:

The City of Sultan Urban Growth Area (UGA) expansion proposals require an analysis of the capital facilities needed to support those proposed UGA expansion areas.... This analysis needs to include: a forecast of future needs, the proposed location and capacities of expanded or new facilities, and at least a 6-year financing plan that will finance such capital facilities within projected funding capacities and clearly identify sources of public money for such purposes.

CTED March 26, 2004, letter to Rick Cisar. Petitioners PHB, Ex. 1D.

On July 14, 2004, in the absence of an operative Capital Facilities Plan, Parks Plan or updated Future Land Use Map and Comprehensive Plan, the City of Sultan adopted the Ordinances at issue here. The Ordinances amend PUD and subdivision regulations to allow developers to make “in-lieu” contributions of off-site land and/or funds rather than providing on-site open space and recreational facilities for new residents.

⁴ Rick Cisar: “You gotta realize that, you know, a CIP is a major undertaking. I mentioned six months and that’s if I really work on it.... But I’ve spent as much as nine months just doing a CIP. The CIP’s I’ve worked on are... they’re very involved.” Transcript, Sultan Planning Commission Meeting, May 20, 2003; Supp. Ex. 3, at 2-3.

⁵ CTED also noted that the proposed UGA expansion could probably not be justified, as Sultan already has enough undeveloped land to accommodate allocated growth. *Id.* at 3. Sultan has a residential holding capacity sufficient for triple its current population. Comprehensive Plan, p. 24. That question is not before the Board in this proceeding.

On September 13, 2004, Jocelyne Fallgatter and Jeff Kirkman, *pro se*, filed a Petition for Review (**PFR**) challenging the City of Sultan's annexation and rezoning of lands without amendment of the Future Land Use Map, without update of the Capital Facilities Plan, and without the GMA-required analysis.

Petitioners also challenged the City's adoption of the Ordinances amending the City's development regulations for PUDs and subdivisions. Petitioners asserted that without a current Capital Facilities Plan, the amended development regulations could not be consistent with the Comprehensive Plan or the requirements of the GMA:

Without the proper planning tools, the City of Sultan cannot prepare a prioritized list of lands for potential sites for parks and recreation and an estimated date by which the lands will be needed [RCW 36.70A.150]. Nor can it make capital budget decisions with any certainty that the fees collected will enable the City to provide community parks that would meet or exceed the levels of service contemplated in the current comprehensive plan [RCW 36.70A.120]. It cannot even guarantee that the fees will be used within the specified time rather than being refunded without retaining open space [or] developing parks and recreation facilities [RCW 36.70A.020(9)].

Petition for Review, at 3.

At the Prehearing Conference in October, 2004, Petitioners and the City mutually agreed to a settlement extension while the City completed adoption of its 2004 Comprehensive Plan, stipulating that Petitioners would be permitted to amend their PFR if final settlement were not achieved. The City of Sultan Comprehensive Plan, 2004, (**Update**), containing a capital facilities plan and recreation element, was adopted on November 22, 2004. Petitioners PHB, Ex. A. The Board takes official notice of the Plan Update.

Petitioners' amended PFR, filed January 24, 2005, stated legal issues concerning (1) the inadequacy of the 2004 Comprehensive Plan Update and Capital Facilities Plan for 2005-2010 to support the Ordinances and (3) concerning the internal inconsistency of the Ordinances and inconsistency with the Plan Update.⁶ The Board reviews the Ordinances in the context of the 2004 Comprehensive Plan Update, not the 1994 Plan.

B. LEGAL ISSUE NO. 1

Legal Issue No. 1. Is the City's adoption of Ordinances 853-04 and 854-04 inconsistent with the Growth Management Act for the following reasons:

(a) GMA requires that the plan be an internally consistent document containing mandatory elements as specified in RCW

⁶ Petitioners have filed a separate PFR challenging the City of Sultan's 2004 Comprehensive Plan on other grounds. CPSGMHB Case. No. 05-3-0010c.

36.70A.070(3), (8), and the adopted comprehensive plan does not meet these requirements;

(b) RCW 36.70A.120 requires a city to perform its activities and make capital budget decisions in conformity with its comprehensive plan, and the newly adopted capital facilities plan and park plan are insufficiently detailed to guide such decisions;

(c) RCW 36.70A.130 requires that any change to development regulations shall be consistent with and implement the comprehensive plan and as written these ordinances fail to do so;⁷

(d) RCW 36.70A.150 requires the city to prepare a prioritized list of lands necessary for the identified public uses including an estimated date by which the acquisition will be needed and without this list the City has no basis for decision making?

Applicable Law

RCW 36.70A.070 Comprehensive plans -- Mandatory elements.

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map....

Each comprehensive plan shall include a plan, scheme, or design for each of the following:

... (3) A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

⁷ The Board addresses this issue further under Legal Issue No. 3, *infra*.
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....

(8) A park and recreation element that implements, and is consistent with, the capital facilities plan element as it relates to park and recreation facilities. The element shall include: (a) Estimates of park and recreation demand for at least a ten-year period; (b) an evaluation of facilities and service needs; and (c) an evaluation of intergovernmental coordination opportunities to provide regional approaches for meeting park and recreational demand.

RCW 36.70A.120 Planning activities and capital budget decisions -- Implementation in conformity with comprehensive plan.

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

RCW 36.70A.130 Comprehensive plans -- Review -- Amendments.

(1)(b) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

RCW 36.70A.150 Identification of lands useful for public purposes.

Each county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 shall identify lands useful for public purposes such as utility corridors, transportation corridors, landfills, sewage treatment facilities, storm water management facilities, recreation, schools, and other public uses.... The jurisdictions within the county shall prepare a prioritized list of lands necessary for the identified public uses including an estimated date by which the acquisition will be needed.

Discussion and Analysis

Positions of the Parties

Petitioners first contend that the Ordinances fail because they rest upon and purport to implement a Comprehensive Plan and Capital Facilities Plan that are fatally noncompliant with the GMA. First, the City Administrator's recommended UGA and the 1994 UGA maps show different Urban Growth Area boundaries. Petitioners' PHB, at 4-6. Because the City's 1994 Comprehensive Plan projected a different UGA, to the north and west, the City has never done the detailed analysis required to plan for development on the Plateau to the east. Petitioners' Reply, at 4-5.

Petitioners argue that the Comprehensive Plan and the Capital Facilities Plan are incomplete and inconsistent with respect to parks, open space and recreational facilities. They contend that Sultan does not devote enough acreage to recreation and open space to meet the adopted levels of service, and that the City wrongly includes police, fire, and school facilities in its tabulation. *Id.* at 6-7. Furthermore, Sultan is not providing enough funding to add the necessary space.⁸ Petitioners conclude these arguments by pointing out that the Comprehensive Plan and Capital Facilities Plan “do not distinguish between the population capacities at total build out over 20 years or projected over a 6 year time frame.” *Id.* at 7.

Next Petitioners argue that the locations of future parks are not adequately specified; nor are their capacities identified, as required by RCW 36.70A.070(3)(c). *Id.* at 7-9. They contend that sources and amounts of funding for each project are not adequately specified. *Id.* at 10. Petitioners are also concerned that “[n]o distinction is made between projects that are maintenance related projects and those that are to add system capacity required to service growth at adopted levels of service as inherent in the requirements of RCW 36.70A.070(3)(d).” *Id.* at 11-12. Petitioners also note the inadequacy of the park impact fee. *Id.*

In sum, Petitioners contend that the Capital Facilities Plan and Parks Plan are insufficiently detailed to allow the city to make capital budget decisions in conformity with the Plan. Pursuant to RCW 36.70A.130(1)(b), amendments of development regulations must be consistent with and implement the comprehensive plan, but with respect to future parks needs and funding, Petitioners allege, the Sultan Plan is too vague and general to guide city officials in administering “in lieu” contributions. Given the City’s “haphazard approach to fiscal planning,” Sultan’s citizens have no way to be sure that “in-lieu” contributions will be used to fulfill the goals of the GMA or of the comprehensive plan. *Id.* at 13-15.

Petitioners contend that Sultan has ignored RCW 36.70A.150 by not preparing a prioritized list of necessary lands for the identified public uses that includes a date by which acquisitions will be needed. *Id.* at 21.

⁸ City Planner Rick Cisar advised the Planning Commission that vision must precede fiscal planning:
Kraut: [H]ave you analyzed the costs associated with each different alternative? Or are you, you know, picking an alternative without knowing the costs associated with it?
Cisar: You’re not going to know the costs. You, you’re gonna pick the alternative which you think is in the best interests of the city. Then we’re gonna go back and see how we can fund it.
Kraut: ...[H]ow do you know what the best alternative is, if you don’t know if you can fund it? ...
Cisar: Your funding’s gonna vary. What you gotta do is, is in – adopt your plan and with [sic] your priorities, then you’re gonna figure out how you’re gonna fund it. Are you, are you gonna fund it with impact fees? Well, you want to increase your impact fees. Uh, you know, what proportion of your, your real estate tax dollars do you want to throw towards your roads, for parks.. uh, what can you get in grants? That’s how you fund it. And some other sources [unintelligible]. But first of all, you gotta have that vision. You gotta show us what you want, and what, how you finance it.
Fallgatter: But what if we can’t finance it? What if I pick an alternative that there’s no way we can finance?
Cisar: Well, it depends on what element you can’t finance. Then it goes to the bottom of the list.
Transcript, Sultan Planning Commission Meeting, May 20, 2003; Supp. Ex. 3.

Based on these flaws, Petitioners assert that the Comprehensive Plan has fatal legal defects. Petitioners rely on the Board's decision in *Bremerton, et.al. v. Kitsap County*, (*Bremerton*), CPSGMHB No. 95-3-0039c, Final Decision and Order (Oct. 9, 1995), where the Board held that a comprehensive plan without a Capital Facilities Element was fatally flawed and was "fully non-complying." *Bremerton*, at 82. In *Bremerton*, this Board said: "Regulations that attempt to implement and be consistent with a fatally flawed comprehensive plan are in turn poisoned by the plan's defects." *Id.* Petitioners quote *Bremerton* for the standard that development regulations designed to implement a fully noncomplying comprehensive plan cannot stand as a matter of law. Petitioners' PHB, at 16.

Sultan replies that the City's updated 2004 Comprehensive Plan is now complete and compliant. City Response, at 9. While it is impossible for the City to identify precisely where future parks will be located, when the facilities will be needed or acquired, or what sources of funds will be used for a particular project, the City asserts, the identification of future projects, costs and funding sources in the 2004 Plan meets the requirements of the GMA. *Id.* at 10-15.

Sultan asserts that there is no inconsistency between maps showing UGA boundaries because the City has only adopted one map of the UGA – the map as recommended by the City Planner [Ordinance 841-04, Ex. B]. *Id.* at 11; City Response, Ex. 11, 12. Responding to Petitioners' concerns about financing recreation facilities and open space, Sultan outlines various sources for funding that the City may utilize.⁹ *Id.* at 12. Sultan then asserts that municipal finance is complex and fluid and cannot be nailed down in the present. *Id.* Sultan also states that it does not plan on using park funds for facilities that the city does not control. *Id.* at 13.

That the Capital Facilities Plan does not project population growth over the next six years is not a fatal flaw, according to Sultan, because construction of needed acreage and facilities will be based on actual funds at the appropriate time. The City intends to preserve its level of service ratio. *Id.* at 13-14. Sultan argues that it is inconceivable that a city be specific in identifying parks needs and sites because to do so would cause targeted property to skyrocket in price. *Id.* at 14. That is why, according to Sultan, the law exempts cities from publicly identifying property acquisition intentions. *Id.*

Even assuming, *arguendo*, that the plan does contain some flaws, Sultan contends that the supposed flaws do not render the plan noncompliant nor the Ordinances invalid. City Response, at 4. For a ruling of invalidity, the plan must be "fully noncomplying," according to the Board's ruling in *Bremerton*. *Id.* at 4-5.

⁹ Sources listed by the City include park impact mitigation fees, "in-lieu" dedications and payments, on-site dedications and recreation facilities provided with development, interlocal agreements with other jurisdictions, multipurpose use of existing or new facilities, a bond issue for voter approval, and loans and grants. *Id.* Grant sources include Interagency for Outdoor Recreation Committee, Aquatic Lands Enhancement Act, Community Development Block Grant, Coastal Zone Management, Brownfields (if applicable), and Conservation Futures. City Response, Ex. 17.

Sultan distinguishes the Board’s decision in the *Bremerton* case based on the difference between the incompleteness of Kitsap County’s Comprehensive Plan in *Bremerton*, and the marginal deficiencies, if any, in Sultan’s plan. *Id.* at 4. The alleged flaws in the Sultan Plan are simply the result of a small city trying to deal with an uncertain future. Sultan also argues that *Bremerton* “does not hold that every development regulation must fail if a comprehensive plan is flawed.” *Id.* at 6. Nor, according to Sultan, does *Bremerton* hold that the existence of perceived flaws in a capital facilities plan renders a comprehensive plan invalid, *per se.* *Id.*

Board Discussion

The Board concurs with the City. On its face, the Parks and Recreation Capital Improvement Plan at Table CF-5 of the Plan Update lays out a six-year plan for five capital improvements, prioritized by year, with estimated costs and sources of funds for each. City Response, Ex. 17.

Table CF - 5: Parks & Recreation Capital Improvement Plan

PROJECT	2005	2006	2007	2008	2009	2010	TOTAL	LOCAL FUNDS	State & Fed; Funds	OTHER
Reese Park Improvements	\$85,695						\$85,695		\$85,695 (3)	
Plateau Neighborhood Park #1 Acquire Property & Development		\$500,000	\$100,000	\$100,000	\$1,00,000		\$800,000	\$200,000	\$400,000 (1)	\$200,000 (7)
Sportsman’s Park Improvements	\$25,561						\$25,561		\$25,561 (3)	
Skate Board Park		\$30,000					\$30,000	\$8,000	\$22,000 (1)	
Expand Trail System		\$35,000		\$35,000			\$70,000		\$35,000 (1), (2), (3), (4), (6)	
TOTAL	\$111,256	\$565,000	\$100,000	\$135,000	\$1,000,000		\$1,011,256	\$208,000	\$568,256	\$200,000

In 2005, Reese Park Improvements and Sportsman Park Improvements will be paid for with \$111,256 of Community Development Block Grant. In 2006, the Skateboard Park will be built with \$8,000 of local funds and \$22,000 from the Interagency for Outdoor Recreation Committee (IORC). Also in 2006, the City will seek to acquire land for Plateau Neighborhood Park No. 1. Acquisition and development over the next three years is expected to cost \$800,000 and to come from local funds (\$200,000), developer donations (\$200,000), and an IORC grant (\$400,000). Trail system expansion is scheduled for \$35,000 in 2006 and \$35,000 in 2008 from a mix of funds.

In addition to the Capital Facilities Plan above, Sultan's 2004 Comprehensive Plan Update provisions concerning open space and recreational facilities include a set of broadly generalized Goals and Objectives [Petitioners' PHB, Ex. 6], an inventory and map of natural areas, recreation facilities and public meeting rooms [*Id.* Ex. 5, at 244-247], and a list of future projects to be implemented under a "low growth scenario" [*Id.* at 248-251]. There are seven greenway or wetlands projects, 16 quite-specific trail proposals, and three projects for parks and recreation. The future parks and recreation projects are broadly described as improvements to existing Sultan School District athletic fields, development of plateau neighborhood parks,¹⁰ and development of a plateau community park.¹¹

Petitioners' lack of confidence in this plan is understandable, given City staff's resistance to capital facilities planning (Supp. Ex. 3; *see supra*, at 10, fn. 8) and perspective on parks planning. At a Sultan Planning Commission meeting August 3, 2004, City Planner Rick Cisar described parks planning to commissioners as a *pro forma* exercise undertaken merely to qualify the City to apply for state funds.¹²

Petitioners rely on this Board's ruling in *Bremerton, supra*. That case is readily distinguishable, however, on its facts. In the *Bremerton* case, Kitsap County adopted its Comprehensive Plan (**the Plan**) on December 29, 1994, six months after the Board had ruled, in a prior challenge, that Kitsap's UGA did not comply with the GMA because it was not based on the [OFM] population projection, among other failures. *Bremerton*, at 6. Also adopted on the same day were two development regulations: an Interim Zoning Ordinance and an Interim Critical Areas Ordinance. *Id.*

¹⁰ "[A] system of local parks will be developed on the plateau with access to trail networks and open spaces, and furnished with playground and picnic facilities for local residents." *Id.* at 250.

¹¹ "[A] community park will be developed on the plateau ... and furnished with recreational courts and fields for citywide resident use." *Id.*

¹² Fallgatter: "Yeah. I'm a little confused, Rick. If we don't have a park plan, how does [sic] the hearing examiner going to check an application for conformity to it?"

Cisar: "He'll look at that section that requires the recreation and open space, uh, in the onsite recreation areas and he'll follow that section., You know, until we, we formalize, uh, and, and, and we re-adopt some type of a park plan Uh, but the council back in, what? two, three years ago? adopted a plan, uh, for state approval to allow us the ability to go after funds for parks. It's a procedural thing. We've gotta have some plan adopted, so we did that. And that's what—and that's expired.

"...I mean, we can't right now apply for any park funds, uh, through the state, the state system. What we'd like to do is come back and just update that plan that we had, uh, just to get it on the books. And it, it'll, it'll probably—well, it will recommend, you know, if the comp plan is recommending that we may put neighborhood parks up on the, on the plateau. And that gives us, you know, a foot in the door so we can actually go after and apply for some funds if, if some property should come up."

Murphy: "And that was—I think that was in '96—'97. It was quite some time ago, really."

Cisar: "And again, as a procedural thing, we, we did it to get a plan on the books just to go after, you know, state funding.

"...And I think it may be a good generic design that we need for recreation parks up on the plateau—uh—that would be the extent of it. We may get and apply some ballfields or soccer fields or something like that. But you have to jump through that hoop of the state to get that and approve that, so we can come back with a, an, an application or some plan."

Transcript, Sultan Planning Commission Meeting, August 3, 2004. Supp. Ex. 2.

Among many flaws and inconsistencies in the Kitsap Plan, the Capital Facilities Element of the Plan was woefully incomplete—in the County’s own estimation. *Id.* at 74. It lacked a six year capital improvement plan, as well as projected needs and financing plans. Four sections of the Capital Facilities Element required “substantial modification and/or creation of new subsections to be considered complete sections.” *Id.* First, the Board held that “because the Plan as adopted uses projections for the wrong year made by the wrong entity, all sections of the capital facilities element will have to be revised to correspond to OFM’s projections.” *Id.* at 75. The Board went on to state that the incompleteness of the sewer and water facilities sections, and the lack of a six year capital improvement program, constituted an “incompleteness [that] by itself is a fatal violation of the Act.” *Id.*

In this context the Board stated:

Jurisdictions cannot set land use policy without completing the necessary capital facilities analysis. The Board holds that the lack of a fully complete capital facilities plan is more than a conceptual shortcoming – it is a fatal legal defect in the County’s plan.

Id. at 77. The Board also concluded:

[A]ny development regulations that attempt to implement such a fully noncomplying comprehensive plan cannot stand as a matter of law during the period that the plan fails to comply with the act. Regulations that attempt to implement and be consistent with a fatally flawed comprehensive plan are in turn poisoned by the plan’s defects.

Id. at 82. The Board went on to declare the “entire Plan and all its implementing development regulations invalid.” *Id.* at 89.

In the present case, by contrast, Sultan, at the repeated urging of CTED as well as these Planning Commissioners, has updated its Capital Facilities Plan for Parks and Recreation Facilities [RCW 36.70A.070(3)], and included a park and recreation element [RCW 36.70A.070(8)]. By adopting these elements as part of its 2004 Comprehensive Plan a few months following adoption of the Ordinances challenged here, the City cured what might otherwise have been inconsistencies at the level found in *Bremerton*. Petitioner’s allegations of a fatal legal defect are mooted by the City’s enactment of the 2004 Plan Update.

The Board concludes that Petitioners have not met their burden of proving them so “fatally flawed” as to overcome the presumption of validity accorded to City actions under the GMA, RCW 36.70A.320(3).

Conclusion

The Board concludes that Petitioners **have not met their burden** on Legal Issue No. 1. Sultan’s Comprehensive Plan and Capital Facilities Plan with respect to parks and

recreational facilities, whatever their weaknesses,¹³ are not so “fatally flawed” as to require invalidating all implementing development regulations, including the Ordinances challenged here.

C. LEGAL ISSUE NO. 3

Legal Issue No. 3. Do these ordinances lack the internal consistency and consistency with other development regulations which would make them meaningful in context of the GMA as intended in RCW 36.70A.070 (preamble). [The Board incorporates in its discussion of this issue the references to RCW 36.70A.130(1) in Legal Issue 1(c).]

Applicable Law

RCW 36.70A.070 Comprehensive plans -- Mandatory elements.

.... The plan shall be an internally consistent document and all elements shall be consistent with the future land use map....

RCW 36.70A.130 Comprehensive plans -- Review -- Amendments.

(1)(b).... Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

Discussion and Analysis

Positions of the Parties

According to Petitioners, the Ordinances thwart existing regulations that provide specific measures for the development of recreational facilities in conjunction with new residential neighborhoods. *Id.* at 27-29. Petitioners point out that, unamended, the PUD and subdivision development requirements “were quite specific about the types and amounts of open space and recreation facilities that are to be provided by development.” *Id.* at 29. The Ordinances render those regulations meaningless, Petitioners allege, because the alternative they provide lacks any standards that would provide assurance that the goals of the Plan and of the GMA will be achieved.

Petitioners contend that the language of the Ordinances does not direct funding with effective specificity; for example, the Ordinances do not preclude funding from being used for maintenance, rather than for projects that add capacity.¹⁴ Petitioners’ PHB, at 17. Ordinance 854-04 refers to the goals and objectives of the Plan, but Petitioners assert

¹³ Petitioners have challenged the adoption of the Comprehensive Plan and Capital Facilities Plan on other grounds in CPSGMHB Case No. 05-3-0010c. The Board’s ruling here expresses no opinion on the issues in that case.

¹⁴ A capital facility is defined in the Plan as including “major rehabilitation or maintenance projects on capital assets.” Petitioners’ Reply, Ex. 4.

that these goals and objectives are so general that there is no assurance that funds will be used for developing recreational facilities or adding new capacity. *Id.* at 17-18; Ex. 6.

Petitioners also argue that there are “no objective ways to determine if the value of dedications or payments is equitable.” *Id.* at 18. They point out that potential processes for deciding whether payments or dedications are equitable do not exist and will not be instituted unless the city wishes to institute them. *Id.* at 19-20. They conclude, “[w]ith no delineation in the CFP for funding of maintenance as opposed to projects that add capacity, the applicant has no way to know if they are paying arbitrary or duplicative fees.” *Id.* at 20.

Petitioners argue that there is a pressing need for open space and recreation facilities to serve a population projected to triple in twenty years. Petitioners’ PHB, at 23, *citing* CTED letter, Ex. 1.B. They point to the City’s adopted level of service (LOS) standards for parks.

Park facilities LOS – ratio fields, courts, miles, each per 1,000 persons

Measurement unit	1994 Plan	Exist LOS**	Prpsd LOS	Existing Supply*	20-year Rqmnt***	20-year Deficit	Action required
Softball field	0.31	0.26		1	3	2	Park plan
Baseball field - lighted	0.07	0.26		1	1	0	Park plan
Baseball field - not light	0.20	1.05		4	2	(2)	Park plan
Soccer field	0.24	0.79		3	3	0	Park plan
Football field	0.18	0.79		3	2	(1)	Park plan
Multipurpose court	0.25	0.26		1	3	2	Park plan
Basketball court	0.85	0.52		2	10	8	Park plan
Tennis court	0.85	0.00		0	10	10	Park plan
Volleyball court	0.20	0.26		1	2	1	Park plan
Bike trail – miles	0.50	0.05		0.20	5.6	5.4	Park plan
Jogging trail – miles	0.50	0.07		0.25	5.6	5.35	Park plan
Hiking trail – miles	0.50	0.18		0.70	5.6	4.9	Park plan
Outdoor pool - each	0.04	0.26		1	0.4	(0.6)	Park plan

Source: National Park & Recreation Association (NRPA) 1984.

* Existing supply includes city, school district, and private providers within UGA. Fields total includes 5 multipurpose softball, baseball, soccer, and football field combinations. Swimming pool is located at VOA park site of unknown dimension.

** Existing LOS is based on current estimated population of 3,814 residents.

*** 20-year requirement based on extrapolation of 1994 Plan ratio for estimated population build-out of 11,119 persons.

Petitioners’ PHB, Ex. 3. With only generalized projects and generic funding sources in the Parks Plan, Petitioners fear that the adopted level of service (LOS) standards will not be met. *Id.* at 25. Petitioners argue that the Ordinances increase the future risk of lack of services, as the certainty provided by requirements for on-site development of recreational facilities is replaced by the standardless “in-lieu” option. *Id.* “If these Ordinances create a situation whereby something certain is replaced by the potential for the fees exacted (for comparable amenities) to be refunded without achieving the intended results or providing for open space and recreation facilities, then that thwarts the goals of RCW 36.70A.020.” Petitioners’ Reply, at 21.

Petitioners rely on this Board's holding in *West Seattle Defense Fund v. City of Seattle (WSDF II)*, CPSGMHB Case. No. 95-3-0040, Final Decision and Order (Sep. 11, 1995):

[T]he Board now holds:

A development regulation must be internally consistent; and

All development regulations must be consistent with each other.

Sound public policy demands such a holding. It makes absolutely no sense to require that comprehensive plans be internally consistent and implementing development regulations be consistent with those comprehensive plans, yet not require that those same development regulations be internally consistent or externally consistent with other development regulations. To hold that development regulations may be internally inconsistent would be an absurd result. Delay and unpredictability in the permit process are chronic problems exacerbated by internally inconsistent development regulations. [see Goal (7) Permits – RCW 36.70A.020(7).]

Sultan responds that the Ordinances are consistent and without flaw. They direct money received under their dictate to be used for “park system improvements,” which must mean new capacity, not maintenance. *Id.* at 16-17. The Ordinances hold amounts of money or land to be dedicated or contributed under their purview to standards of “comparability” and “equivalency”; hardy standards, according to Sultan. *Id.* at 18. Processes may be established by the City Council to determine values of dedications and contributions to assure comparability, which is adequate assurance of process according to Sultan. *Id.* Rather than thwarting the existing regulations, Ordinances 853-04 and 854-04 enhance them. *Id.* at 21.

The City argues that the Ordinances provide important flexibility and are the kind of innovative approach encouraged by the GMA. “They are designed to take the City out of lockstep with on-site improvements and park impact mitigation fees. They are tools therefore to encourage development in urban areas and to provide adequate public facilities.” City Response, at 21.

Sultan contends that the Board's conclusion in *WSDF II*, that development regulations must be internally consistent and consistent with each other, is *dicta* and that the Board does not have jurisdiction to so decide. City Response, at 7-9, 16.¹⁵

¹⁵ Sultan also argues that the Board lacks jurisdiction to hear this issue. City Response, at 16-17. However Sultan does not assert that the “in-lieu” payments here are “impact fees” governed by RCW 82.02.050-.090, and the Board does not so read them.

Board Discussion

Are the Ordinances internally consistent and consistent with the Comprehensive Plan? The Board concurs with Petitioners that they are not.

Petitioners correctly rely on *West Seattle Defense Fund II*.

The difference between the holding quoted by Petitioners in *WSDF II* and those quoted from *Bremerton* becomes important when considering Sultan's response to Petitioners' use of *WSDF II*. Sultan contends that the Board's *WSDF II* conclusion - that development regulations must be internally consistent and consistent with each other - is *dicta*. City Response, at 7-9. Sultan bases this argument on the fact that the Board did not actually apply its holding on internal consistency of development regulations to the regulations in question in *WSDF II*. *Id.* at 8. However, the reason the Board did not apply its holding to the regulations in *WSDF II* was that the regulations which had been adopted were not yet in effect and were awaiting amendment of the Plan in the future. The Board therefore thought it premature to pass judgment on the regulations, *WSDF II* at 8, but held, broadly, that **"A development regulation must be internally consistent; and all development regulations must be consistent with each other."** *WSDF II* at 7.¹⁶

The Board's rulings are clear: development regulations must be internally consistent and consistent with other regulations.¹⁷

Sultan's PUD and subdivision regulations provide clear sets of standards for developers to follow in including recreational facilities as part of their residential construction projects. If Ordinance Nos. 853-04 and 854-04 render those already existing regulations meaningless because they do not ensure that funds will be spent on new capacity located where, and developed when, it will serve new residents, then the ordinances are internally inconsistent and inconsistent with the Comprehensive Plan and its adopted levels of service for recreation facilities.

Ordinance 854-04 amends the subdivision regulations of SMC 16.72. SMC 16.72.030 states: "The City has determined that it is important that each development provide recreational facilities to serve residents of such developments." SMC 16.72.040E codifies the importance that recreational facilities serve the needs of residents by requiring that they be "centrally located," "easily accessible," and "no more than 2,000 feet from the dwelling units they will serve." SMC 16.72.040G requires that developments provide

¹⁶ The sequence of events in *WSDF II* compelled this outcome. The City of Seattle passed its comprehensive plan on July 25, 1994. West Seattle Defense Fund (WSDF) filed a petition for review on October 7, 1994. This petition and subsequent case became known as *WSDF I*. On December 12, 1994, Seattle adopted development regulations to implement the Plan which did not take effect until April 3, 1995. On April 4, 1995, the Board published its Final Decision and Order in *WSDF I*, remanding Seattle's CFP and Transportation elements for noncompliance with the GMA. A deadline of September 1, 1995, was set for Seattle to bring its Plan into compliance. *WSDF II*, at 2-3.

¹⁷ RCW 36.70A.130(1) governs this question. See *Corrine R. Hensley and Jody L. McVittie v. Snohomish County*, CPSMGHB Case No. 01-3-0004c, Final Decision and Order (Aug. 15, 2001) at 20; *Olson, et al., v. City of Kent*, CPSMGHB Case No. 03-3-0003, Final Decision and Order (June 30, 2003) at 7.

facilities suited to the age brackets of the residents; tot lots are required unless it is demonstrated that there will be only a small percentage of children under 12.

Ordinance 854-04, which amends the subdivision regulations, contains no process or criteria to ensure that its application doesn't thwart the goal of providing recreational facilities to meet the needs of new residents as development occurs.

Ordinance 853-04 amends the Planned Unit Development (PUD) regulations of SMC 16.10. The PUD option requires 20% open space, while allowing flexibility in site design. SMC 16.10.140. It allows for density increases as outlined in SMC 16.10.120A. One of the density increase factors is described in SMC 16.10.120A.1.a:

The project may be granted a maximum of five percent increase in density if it serves the needs of the development's residents and would include such facilities as play areas with equipment, basketball courts, handball courts, ball fields, tennis courts, or swimming pools. This could also include landscaping, streetscape, open spaces, plazas, pedestrian facilities and recreational areas and recreational facilities in excess of those minimums required by the underlying zoning.

This provision provides flexibility while ensuring that recreational facilities are available to meet the needs of new residents. Ordinance 853-04 may thwart this provision in two ways: by allowing an applicant to make a payment in lieu of providing the higher level of amenities to offset denser living conditions, and by at the same time reducing the on-site open space requirement to as little as five per cent.

In summary, the Ordinances here amend two sections of the Sultan Municipal Code, each of which spells out very specific open space and recreation requirements. The goals of the unamended code are apparent: on-site provision for small children, age-appropriate facilities for other residents near where they live, and development concurrent with occupancy, all without increasing the tax burden on the existing population. The regulations are keyed to the City's adopted LOS standards for parks and open space.

The amendments describing the "in lieu" option, by contrast, are virtually standardless, circumscribed only by the words "comparable" and "equivalent" as measured by the subjective judgment of City officials on a case-by-case basis. Addressing an analogous question related to administrative discretion in permit processing, the Board commented: "There is a sharp contrast between vague direction to 'be consistent'...and clear delineation of the criteria to be used...." *Kent C.A.R.E.S. III v. City of Kent*, CPSGMHB Case No. 03-3-0012, Final Decision and Order, (Dec. 1, 2003), at 12.¹⁸ Consistency

¹⁸ The Board's reasoning on Goal 7 challenges is instructive here, but cited only to shed light on the issue of consistency between development regulations and the plans they implement. In *Pilchuk Audubon Society, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0047, Final Decision and Order, (Dec. 6, 1995), at 36, the Board approved "development regulations that provide administrators with clear and detailed criteria so that, in wielding professional judgment, the Director has regulatory 'sideboards' and policy direction." More recently in *Olson, et al., v. City of Kent*, CPSGMHB Case No. 03-3-0003, Final Decision and Order (June 30, 2003) at 7, the Board approved a permit extension ordinance that established 04321 Fallgatter/Kirkman (June 13, 2005)

between the Ordinances here and the Sultan Comprehensive Plan requires a “*clear delineation of criteria*” to guide the City Council’s legislative action. The Ordinances make the articulation of such criteria voluntary. SMC 16.40.110.B.1 and SMC 16.72.050 each contain the following language:

In addition, the City Council *may* establish the process necessary to determine the value of dedications or payments into the park system improvement fund to ensure they are comparable to the applicant’s on-site development obligations. (Emphasis added)

In light of the City Planner’s assertion that the Sultan Parks Plan was a mere *pro forma* exercise to qualify for state funding, the in-lieu provisions in Ordinance 854-04, requiring financial contributions from subdivision developers to be used “to fulfill the goals and objectives of the recreational element of the Comprehensive Plan,” are inconsistent with the on-site recreation facilities standards of SMC 16.72.050 and likely to thwart the adopted level of service standards in the comprehensive plan.

Similarly, in light of the generality of the Parks Plan and the City Planner’s disparagement of Sultan’s recreational facilities planning, the in-lieu provisions of Ordinance 853-04, reducing open space requirements for PUD developers who make contributions to be used “for Park System Improvements,” are inconsistent with the on-site recreation facilities standards of SMC 16.40.110.B.1 and likely to thwart the adopted level of service standards in the comprehensive plan.

While “in-lieu” provisions may be a valuable tool to provide flexibility to meet infrastructure needs in the context of a robust City plan for growth, the Petitioners here have put the bona fides of the Sultan Plan in question in the words of the City Planner. In this context, an in-lieu option that lacks a defined process or criteria fails to comply with the consistency required in RCW 36.70A.130(1) and is clearly erroneous. The Board is “left with the firm and definite conviction that a mistake has been made.”

Conclusion

The Board finds that the “in lieu” provisions of the Ordinances lack clear criteria or processes governing their administration and thus tend to thwart the specific goals of the on-site dedications that are otherwise required under the Sultan Municipal Code and so fail to implement the LOS standards for Parks and Open Space in the Sultan Comprehensive Plan. The Board concludes that, under the circumstances in this case, the

four clear criteria to guide the administrator’s flexibility. By contrast, in *Kent C.A.R.E.S. III v. City of Kent*, CPSGMHB Case No. 03-3-0012, Final Decision and Order, (Dec. 1, 2003), at 11, the Board found noncompliant a development regulation that authorized the City’s planning manager to make certain determinations limited only by the criterion of “consistency” with “a planned action ordinance or development agreement.” The Board commented: “There is a sharp contrast between vague direction to ‘be consistent’ ...and clear delineation of the criteria to be used.” *Id.* at 12.

Ordinances are internally inconsistent and fail to implement Sultan's Comprehensive Plan. **The City adoption of Ordinances Nos. 853-04 and 854-04 pertaining to these provisions was clearly erroneous.**

The Board **remands** Ordinances 853-04 and 854-04 to the City of Sultan to take legislative action to make the relatively minor but necessary revisions to the Ordinances to achieve GMA compliance.

V. INVALIDITY

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. Nevertheless, Petitioners have framed the request for invalidity as Legal Issue No. 2.

Petitioners request a determination of invalidity if the City is found noncompliant with any of the allegations made in the Petitioner's Legal Issues:

2. *Do these failures substantially interfere with RCW 36.70A.020(1), (9) or (12)?*

Applicable Law

RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
 - (b) Includes in the final order 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; and
 - (c) Specifies 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.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or City. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the City or city or to related construction permits for that project.

RCW 36.70A.020 lists goals (9) and (12) as follows:

(9) Open space and recreation. *Retain* open space, *enhance* recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and *develop* parks and recreation facilities.

(12) 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 service levels below locally established minimum standards.

Emphasis added.

Findings of Fact and Conclusions of Law

In its discussion of Legal Issue 3, *supra*, the Board found and concluded that City of Sultan's adoption of Ordinance Nos. 853-04 and 854-04 failed to comply with the internal consistency requirements of the Act. The Board is **remanding** the Ordinances with direction to the City to comply with the requirements of the GMA.

In light of the inconsistencies between the City of Sultan's 2004 Plan [Update] and the provisions of the two noncompliant Ordinances, and the internal inconsistencies between the noncompliant Ordinances, and the problem of projects vesting in these noncompliant provisions of the City of Sultan's development regulations, the Board finds and concludes that the continued validity of the amendments adopted by Ordinance Nos. 853-04 and 854-04 substantially interferes with Goals 9 and 12 – RCW 36.70A.020(9) and (12). The Board finds that, absent a defined process and criteria for implementing the “in-lieu” contributions under Sultan's Plan, the GMA goals of “retaining,” “enhancing,” and “developing” recreation and open space, and the goal of concurrent delivery of capital facilities, are likely to be thwarted. Therefore, the Board enters a **determination of invalidity** with respect to Ordinance Nos. 853-04 and 854-04.

VI. ORDER

Based upon review of the GMA, case law, prior Orders of this Board and the other Boards, the PFR, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

- Petitioners have failed to meet their burden of proof with respect to Legal Issue No. 1. **Legal Issue No. 1 is dismissed.**
- The Board finds Ordinance Nos. 853-04 and 854-04 **noncompliant** with RCW 36.70A.130(1) and has entered a determination of **invalidity**. The Ordinances are **remanded** to the City of Sultan with direction to take legislative action to

achieve the internal consistency requirements of RCW 36.70A.070 as interpreted and set forth in this Order.

- The Board establishes **November 17, 2005**, as the deadline for the City of Sultan to take appropriate legislative action.
- By no later than **November 28, 2005**, the City of Sultan shall file with the Board an original and four copies of the legislative enactment(s) described above, along with a statement of how the enactments comply with this Order (**Statement of Actions Taken to Comply - SATC**). The City shall simultaneously serve a copy of the legislative enactment(s) and compliance statement, with attachments, on Petitioners. By this same date, the County shall also file a “**Compliance Index**,” listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
- By no later than **December 12, 2005**,¹⁹ the Petitioners may file with the Board an original and four copies of Response to the City’s SATC. Petitioners shall simultaneously serve a copy of their Response to the City’s SATC on the City.
- By no later than **December 19, 2005**, the City may file with the Board an original and four copies of the City’s Reply to Petitioners’ Response, if any. The City shall simultaneously serve a copy of such Reply on Petitioners.
- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. January 5, 2006**, at the Board’s offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Sultan takes the required legislative action prior to the November 17, 2005, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 13th day of June 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

¹⁹ December 12, 2005 is also the deadline for a person to file a request to participate as a “participant” in the compliance proceeding. See RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City’s remand actions comply with the Legal Issues addressed and remanded in this FDO.

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

APPENDIX A
Chronology
of
CPSGMHB Case No. 04-3-0021
Fallgatter/Kirkman v. City of Sultan

On September 13, 2004 the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jocelyne Fallgatter and Jeff Kirkman (**Petitioners**), with six (6) exhibits attached. The matter was assigned Case No. 04-3-0021. Petitioners challenge certain action and inaction of the City of Sultan (**Respondent** or the **City**) – annexations and rezoning without amendment to the Comprehensive Plan and Future Land Use Map, failure to adopt a current capital facilities plan, and adoption of Ordinance Nos. 853-04 and 854-04 (the **Ordinances**) concerning parks and open space. The basis for the challenge is noncompliance with the Growth Management Act (**GMA**).

On September 15, 2004 the Board received a Notice of Appearance for the City from Thom H. Graafstra of Keithly, Weed, Graafstra, and Benson, Inc., P.S.

On October 13, 2004 the Board received Respondent's Index.

On October 14, 2004 at 10:00 a.m. a Prehearing Conference (**PHC**) was held at the Board's offices in Suite 2470, 900 Fourth Avenue, Seattle, Washington. Board member Margaret Pageler conducted the conference, with board members Bruce Laing and Ed McGuire in attendance. Petitioners Jocelyne Fallgatter and Jeff Kirkman were present *pro se*. Respondent City of Sultan was represented by its counsel Thom Graafstra accompanied by City Administrator/Planner Rick Cisar.

Upon discussion of the issues presented by Petitioners and the City's current process to update its comprehensive plan by December 1, 2004, the parties stipulated to a 90-day settlement extension. The parties' handwritten "Agreement re: Settlement Extension" was signed by Petitioners Jocelyne Fallgatter and Jeff Kirkman and by Rick Cisar for the City of Sultan. Copies of the agreement were provided to the Board and to all parties.

The Board then continued the Prehearing Conference to January 13, 2005 pursuant to the stipulation of the parties.

On January 13, 2005, at 2:00 p.m., the Board conducted the continued Prehearing Conference at the Board's offices in Seattle. Board member Margaret Pageler, Presiding Officer in this matter, conducted the conference with Board member Bruce Laing in attendance. Petitioners Jocelyne Fallgatter and Jeff Kirkman appeared *pro se*. The City of Sultan was represented by Thom Graafstra, its attorney, and Rick Cesar, City Administrator/Planner.

The City reported that during the period of the settlement extension it adopted a new Comprehensive Plan, under Ordinance No. 841-04 enacted November 26, 2004. However, the Plan had not yet been printed and made available to the public in final

form. The City stated that Ordinance No. 841-04 cured the Petitioners' "failure to act" claim in that the City has now amended its Comprehensive Plan to include the annexed lands and rezoned lands referenced in the Petition.

The Petitioners requested to revise their Petition for Review, as contemplated in the Order Granting Settlement Extension. The Board extended the time for the City to file an amended Index, in view of the Petitioners' intention to amend their PFR. Petitioners also indicated the likelihood of filing a new PFR with respect to Ordinance No. 841-04.

On January 14, 2005, the Board received Petitioners' "Motion to Amend Petition for Review." Pursuant to the Order Granting Settlement Extension and the discussion at the Prehearing Conference, this pleading will be deemed the Amended Petition for Review.

On January 26, 2005, the Board issued its Prehearing Order (**PHO**).

On February 4, 2005, the Board received a copy of Petitioners' letter to Thom Graafstra requesting the Respondent's Amended Index. The Board issued an Order Amending Motions Schedule adjusting the time for Petitioners' motions to supplement the record. Subsequently on February 4, the Board received Respondent's Index – Amended.

On February 17, 2005, the Board received Petitioners' "Motion to Supplement the Record and to Take Official Notice" (**Motion**). The Motion was timely filed. Attached to the motion were six proposed exhibits and supporting documentation for a seventh exhibit. The Board received no response to the Motion.

On February 28, 2005, the Board issued its Order on Motion to Supplement the Record, admitting four of the seven exhibits requested by Petitioners and renumbering them as Supplemental Exhibits 1 through 7.

On March 18, 2005, the Board received two sets of the following Core Documents:

- City of Sultan Comprehensive Plan 2004, including adopting Ordinance 841-04 and City of Sultan Comprehensive Plan CD's
- City of Sultan Development Codes and Regulations 2004, including CD's
- City of Sultan Final Comprehensive Plan 1994, including Resolution 94-4 adopting the Plan
- Draft Environmental Impact Statement Comprehensive Plan Update 2003
- Supplemental Environmental Impact Statement Comprehensive Plan Update 2004
- Final Supplemental Environmental Impact Statement Comprehensive Plan Update – Watershed Addition 2004

All prehearing briefing was timely filed. On March 14, 2005, the Board received Petitioners' Prehearing Brief (**Petitioners' PHB**) with 15 exhibits. On March 25, 2005, the Board received Respondent City of Sultan's Prehearing Brief (**City Response**) with 18 exhibits. On April 4, 2005, the Board received Petitioners' Reply Brief (**Petitioners' Reply**) with 12 exhibits.

On April 7, 2005, the Board held the Hearing on the Merits in the Board's offices, 900 Fourth Avenue, Seattle, from 10:00 a.m. until 12:05 p.m. Board member Margaret Pageler conducted the conference, with board members Bruce Laing and Ed McGuire in attendance. Petitioners Jocelyne Fallgatter and Jeff Kirkman were present *pro se*. Respondent City of Sultan was represented by its counsel Thom Graafstra accompanied by City Administrator/Planner Rick Cisar. Court reporting services were provided by Eva Jankovitz of Byers and Anderson, Inc. The Board did not order a transcript of the hearing.

At the hearing, Petitioners presented a map depicting Urban Growth Area boundaries, which was the subject of some debate and discussion. The Presiding Officer admitted the map as HOM Ex. No. 1, subject to the clarifying comments of the City. The City was allowed until April 15, 2005, to submit a map with a corrected depiction of the boundaries in dispute. The City has not provided any correction for the record.

The Board issued its Final Decision and Order on June 13, 2005.