

All Petitioners challenged some of the City’s residential land use designations and the City’s definition of “net buildable area.” The City’s definition provided that certain areas be deducted from gross acreage to determine the net acreage upon which density calculations are to be based. The Board found that the City’s definition was not clearly erroneous and within its discretion to define. Likewise, the Board found that the densities provided for by the City’s residential land use designations were appropriate urban densities, including two low density designations established to protect critical areas – a hydrologic system critical area [North Creek] and a geological critical area [Norway Hill].

I. BACKGROUND¹

On December 27, 2004, the City of Bothell enacted Ordinance No. 1942, updating its GMA Comprehensive Plan (*Imagine Bothell. . . 2004 Plan Update*), hereafter **Plan Update**. Notice of adoption of Ordinance No. 1942 was published on December 31, 2004. Within the 60-day appeal period, the Board received six petitions for review (**PFRs**) challenging various aspects of Bothell’s Plan Update. The Petitioners are: Richard Apollo Fuhriman,² Master Builders Association of King and Snohomish Counties, North Creek Village LLC, Tom and Susan Berry – James and Sharlyn Phillips – Camwest Development Inc, Gateway Office LLC and Futurewise. The Board consolidated the six PFRs, issued a notice of hearing, conducted the prehearing conference and issued its prehearing order (**PHO**) in March of 2005. The PHO set forth the final schedule and the Legal Issues³ to be decided in this proceeding. The PHO also granted intervention to Friends of North Creek and its Neighbors and Norway Hill Residents. There were no dispositive motions filed in this matter; however the record was supplemented with several items offered by Petitioners.

During April and May, two Petitioners began settlement negotiations with the City of Bothell. Petitioners Gateway Office LLC and Futurewise along with the City of Bothell requested and received settlement extensions. These two Petitioners were segregated from the consolidated case and given separate schedules and hearing dates.

¹ The complete procedural history of this matter is in Appendix A. This Order includes six Appendices [A-F] accounting for approximately 35 pages in this decision. In Order to save paper, the Appendices are done with a reduced font size.

² Petitioner Fuhriman filed an initial PFR, a revised and amended PFR and a final revised and amended PFR, all were timely filed.

³ The six PFRs set forth 38 Legal Issues to be decided by the Board. The Legal Issues posed by each Petitioner are set forth in Appendix B. The Board’s PHO also indicated that the Board would be addressing the Legal Issues by “Topical Area.” The seven “Topical Areas,” listing the individual PFR Legal Issues are contained in Appendix C. The seven “Topical Areas” are: Appropriate Urban Densities, Notice and Public Participation, Internal Consistency, Consistency with CPPs, Compliance with Goals, Provision for Innovative Techniques or Reasonable Measures in Plan Update and Compliance with Housing Element.

Consequently, the *Gateway Office LLC* and *Futurewise* Legal Issues are not addressed in this Order.⁴

During May and June, the Board received timely briefing from all the parties. Hereafter the opening briefs submitted by Petitioners are noted as follows: **Fuhriman PHB, North Creek Village PHB, Camwest PHB** and **MBA PHB**. The response briefs submitted by Respondent and Interveners are noted as follows: **Bothell Response, Friends of North Creek Response** and **Norway Hill Response**. The reply briefs tendered by Petitioners are noted as follows: **Fuhriman Reply Bothell, Fuhriman Reply – Norway Hill, North Creek Village Reply, Camwest Reply** and **MBA Reply**.

On June 14, 2005, the Board held a hearing on the merits (**HOM**) in conference room 1940, Seattle Municipal Tower, 700 Fifth Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Margaret A. Pageler and Bruce C. Laing were present for the Board. Petitioner Richard Apollo Fuhriman appeared *pro se*, Petitioner MBA was represented by Alan L. Wallace, Petitioner North Creek Village LLC was represented by Cythia Kennedy and Bill Chapman, Petitioner Berry/Phillips/Camwest was represented by Robert D. Johns. Respondent City of Bothell was represented by Peter J. Eglick, Jane S. Kiker and Joshua A. White. Jan Erik Aagaard and William Moritz appeared for Intervener Norway Hill Residents and Intervener Friends of North Creek did not appear. Board externs Sabrina Wolfson and Brad Paul also attended. The following persons also attended part, or all, of the day-long HOM: Andrea Perry, Janice McClean, George Perry, Michael Weight, Bill Wiselogle, Bruce Blackburn, Glen Sims, Gary Wight, William Daspit, and Mike Westerly. Court reporting services were provided by Eva Jankovitz of Byers and Anderson. The hearing convened at 10:00 a.m. and adjourned at approximately 4:45 p.m. A transcript of the HOM was ordered. On June 20, 2005 the Board received an electronic version of the transcript (**HOM Transcript**).

Following the HOM, the Board received several post-hearing briefs and responses. These post-hearing briefs are noted as: **Camwest Motion** and **Camwest Post-Hearing Brief, Bothell Post-Hearing Response, Fuhriman Post-Hearing Brief** and **Bothell Objection**. The Board issued an Order on June 27, 2005, indicating that the Board would address the question of whether to accept the “Post-Hearing Briefs” in its Final Decision and Order (**FDO**).

In late-August the Board received several submittals regarding additional authority based upon a recently reported Washington State Supreme Court Case.

⁴ As a consequence of these PFRs being segregated from the consolidated case, there are 32 Legal Issues and six “Topical Area,” addressed in this FDO. Appendix B and Appendix C show strikethrough of the Gateway Office LLC and Futurewise Legal Issues.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF and STANDARD OF REVIEW

Petitioners challenge the City of Bothell's adoption of its 2004 Plan Update – *Imagine Bothell*, as adopted by Ordinance No. 1942. Pursuant to RCW 36.70A.320(1), the City of Bothell's 2004 Plan Update is presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the action taken by the City of Bothell is 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 of Bothell] 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 Bothell's actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to the City of Bothell in how it plans for growth, provided that its policy choices are 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*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005). The Quadrant decision affirms prior State Supreme Court rulings that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (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 . . . 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.3d 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*, fn. 7.

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION, PRELIMINARY MATTERS, ABANDONED ISSUES and PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that all four remaining Petitioners' PFRs were timely filed, pursuant to RCW 36.70A.290(2); all remaining 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 ordinance, which adopts the City of Bothell's 2004 Plan Update – *Imagine Bothell*, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

Oral Rulings at the HOM:

North Creek Village asked the Board to take official notice of three items attached to its reply brief – M, N and O. North Creek Village Reply, at 8. The City objected to items M and O, questioning their relevancy and probative value. Following discussion by the parties and the Board, the Board **orally** took **official notice** of the three exhibits, noting that their relevancy and weight will be assessed accordingly. Item M [Bothell Connector information from the City's Transportation Improvement Program, at 36] – **HOM Ex. 1**; Item N [arterial connector between 228th and 240th from the City's Environmental Impact Statement - website] – **HOM Ex. 2**; and O [Figures from DSEIS on Bothell Connector] – **HOM Ex. 3**. HOM Transcript, at 11-12.

During the Master Builders Association oral argument, counsel offered four “illustrative” exhibits⁵ that were not attached to any briefing of Petitioner. The City objected, on the grounds that they were not part of the record and had not been previously attached to briefing. The City's objection was noted and the Board **declined** to accept the “illustrative” exhibits. HOM Transcript, at 29-31.

At the HOM, the Board displayed a copy of Figure LU-4 Land Use Designations, from the City's Plan – the future land use map [**FLUM**]. The FLUM was marked in pink to outline the Subareas that were in contention, and the two areas designated as R-40,000 were outlined in green. The parties verified the depictions on the FLUM. During the course of the hearing, the City was asked to draw the boundary between King and Snohomish Counties on the FLUM. The county boundary was depicted in orange highlight. The City also was asked to depict the city limits on the FLUM. The city limits were depicted in yellow highlight. Certain streets were highlighted in blue for orientation. HOM Transcript, 81-84.

⁵ The offerings included newspaper articles, excerpts from the Seattle, Bellevue and Kirkland code and a prior Board decision.

The Board accepted a demonstrative color map presented by the City of Bothell entitled “Plan Designations Allowing Residential Uses.” This item was assigned **HOM Ex. 4**. HOM Transcript, at 95.

In response to questioning from the Board regarding the FLUM, the City produced color maps depicting the zoning for a portion of King County [around Norway Hill] and a portion of Snohomish County [around the Fitzgerald Subarea]. These items were assigned **HOM Ex. 5** (King County) and **HOM Ex. 6** (Snohomish County). HOM Transcript, at 144-145.

Board Member Disclosure:

Board Member Pageler noted that some of the briefing referred to WRIA 8.⁶ Ms. Pageler disclosed that as a Seattle City Council Member she was a member of the Steering Committee for WRIA 8 until the close of 2003. Pursuant to WAC 242-02-533, none of the parties sought disqualification or objected to Board Member Pageler’s continued participation in the case.

Discrepancies between Fuhriman PFR and PHO⁷:

Petitioner Fuhriman filed his original PFR on January 14, 2005. That PFR listed 16 Legal Issues. On February 11, 2005 Board received a revised and amended PFR, listing 18 Legal Issues. On February 14, the Board received a “final” revised and amended PFR, listing 18 Legal Issues. All filings were timely. On March 11, 2005, the day after the prehearing conference, the Board issued the PHO, setting forth Mr. Fuhriman’s 18 Legal Issues.

At the June 14, 2005 HOM, the City noted a discrepancy regarding Legal Issue 13 as stated in the PHO and the 2/14/05 revised and amended PFR. The PFR referenced alleged noncompliance with RCW 36.70A.110(2), .020(4) and .070; while the PHO only referenced alleged noncompliance with RCW 36.70A.070. In reviewing the final PFR and the PHO, the Presiding Officer acknowledged the mistake in the PHO and indicated that it should have contained references to .110(2) and .020(4). (*See* HOM Transcript, at 173-175.)

Mr. Fuhriman’s PHB stated Legal Issue 13 correctly (*See* Fuhriman PHB, at 49.); however, the City, in its response, relied upon the statement of Legal Issue 13 from the

⁶ Watershed Resource Inventory Area 8.

⁷ While this matter was settled at the HOM with the concurrence of the parties, the Board notes that no objections were filed regarding the PHO. WAC 242-02-558(10) provides:

Any objection to such order [PHO] shall be made in writing within seven days after the date it is dated. A board shall serve its prehearing order on the same day that it is dated. The order shall control proceedings unless modified for good cause by a subsequent order.

PHO (*See* Bothell Response, at 57.) Notwithstanding the discrepancy between the PFR and PHO, the City argues that Petitioner has effectively abandoned this issue.

The City did not assert that this discrepancy was prejudicial to their response, nor their defense; therefore, Legal Issue 13 (Appendix B) notes the correct RCW references in Legal Issue 13, as briefed by Mr. Fuhriman.

Post-hearing Briefing:

Two days after the HOM, the Board received a motion from Berry/Phillips/Camwest seeking permission to file a post-hearing brief, and attached a post-hearing brief. The focus of the two-page brief was discussion of the City's reference to, and interpretation of an exhibit [Ex. 744] discussed at the HOM. Five days later the City filed a response. In its response, the City did not oppose the motion, provided the Board considered the City's attached post-hearing brief. Two weeks after the HOM, Petitioner Fuhriman filed a post-hearing brief that never referred to the exhibit that precipitated the initial motion. The City objected to Fuhriman's post-hearing brief and moved to strike it.

The Board **grants** the Berry/Phillips/Camwest motion and will consider the attached post-hearing brief, as well as the City's post-hearing response brief. The Board **grants** the City's motion to **strike** the Fuhriman post-hearing brief. Petitioner Fuhriman's post-hearing brief goes beyond the limited discussion of Ex. 744 in the other post-hearing submittals and will not be considered.

Pursuant to WAC 242-02-660(2), the Board **takes notice** of *Viking Properties Inc. v. Oscar W. Holm and Martha J. Holm*, 2005 WL 1981699 (Wash).

C. ABANDONED ISSUES

Legal Issues Not Briefed in PHB:

The Board's Rules of Practice and Procedure provide:

A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue.* Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied).

Additionally, the Board's March 11, 2005 PHO in this matter states: "**Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits.**" PHO, at 9, (emphasis in original). *See City of Bremerton, et*

al., v. Kitsap County, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5; and *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7.

Several Legal Issues, as stated in the PHO, were not briefed by Petitioners. Therefore the Board deems the following Legal Issues **abandoned**:⁸

- Fuhriman Legal Issues 18 and 10. *See* Fuhriman PHB, at 10-11, 40 and 63-132.
- North Creek Village LLC Legal Issues 6. *See* North Creek Village PHB, at 8, 9-18.
- Berry/Phillips/Camwest Legal Issues 2g, 5 and 6. *See* Berry/Phillips/Camwest PHB, at 3-4.

MBA PHB:

The PHB filed by MBA on May 6, 2005 consisted of two pages. Argument consists of the following: “The arguments and authority cited in Appendix A apply to Issues 1 and 2 raised in MBA’s Petition for Review.” MBA PHB, at 2. [Accompanying “Appendix A” are four attachments.] Appendix A consists of “Master Builders and BORGR’s Dispositive Motion and Memorandum of Support” (**MBA Brief in FEARN**) filed on March 31, 2004, in a prior Board case – *FEARN, et al., v. City of Bothell (FEARN)*, CPSGMHB Consolidated Case No. 04-3-0006c (**04306c**). That matter involved a failure to act challenge, alleging that the City of Bothell had failed to update its implementing development regulations. Since the statutory deadline for updating the development regulations had not occurred,⁹ the Board dismissed the challenge presented in the PFRs in *FEARN, 04306c*, Order on Motions, (May 20, 2004), at 10.

The present challenge is to the City of Bothell’s Plan Update, not its implementing development regulations. Bothell’s Plan Update was adopted on December 27, 2004, at

⁸ These Legal Issues are noted in ~~strikeout~~ in Appendix B and C.

⁹ The Board subsequently found that the City had failed to act in adopting implementing development regulations, found noncompliance, and remanded the matter to the City with direction to comply by July 2005. *See Fuhriman I v. City of Bothell*, CPSGMHB Case No.04-3-0027, Order Finding Noncompliance – Failure to Act [failure to update implementing development regulations], (Jan. 12, 2005). MBA then filed a PFR challenging the same defect. The Board dismissed the MBA PFR, but joined MBA to the Fuhriman I compliance proceeding, since the Board had already issued an Order on the same issue. *See Master Builders of King and Snohomish Counties v. City of Bothell (MBA-Bothell)*, CPSGMHB Case No. 05-3-0011, Order of Dismissal and Joining MBA to the Fuhriman I Compliance Proceeding, (Feb. 1, 2005). The Board held the compliance proceeding telephonically on July 25, 2005; MBA chose not to participate in that proceeding. On July 25, 2005, the Board issued “Order Finding Compliance [Re: Adopting Implementing Development Regulation]” in Fuhriman I, CPSGMHB Case No. 04-3-0027. The only matter before the Board in the compliance proceeding was *whether the City had acted to update and adopt* implementing development regulations; which it had done by adopting Ordinance No.1946. The *substance* of the updated and amended implementing development regulations were not before the Board in the compliance proceeding; any challenge to the substance of those regulations would be the subject of a new PFR.

least 10 months following the MBA Brief in *FEARN*. While the MBA PFR specifically references Land Use Policies LU-P4 and LU-P6, the MBA PHB makes no mention of, or reference to, these challenged policies or the Plan Update in its PHB. Further, there are no references to the present record.

At the HOM, the City suggested that MBA had abandoned its Legal Issues; likewise, the Presiding Officer asked Mr. Wallace how the Board could conclude otherwise. MBA indicated that the prior brief was filed “for the sake of efficiency, we see these issues as being essentially the same. . . [Additionally] . . . I look at our argument as really being a backstop to the Camwest petition; we didn’t know what petitions were going to be filed. So the Camwest petition hits to the heart of that issue.” *See* HOM Transcript, at 17-26. The Presiding Officer then allowed limited oral argument in support of Camwest by MBA. The City had rebuttal time and MBA reply time. *Id.* 26-35.

Having reviewed the MBA PHB, Bothell Response, MBA Reply and the HOM Transcript, the Board now rules that MBA **abandoned** Legal Issues 1 and 2 as stated in its PFR and the PHO. The briefing filed was unresponsive to the Legal Issues posed by MBA. These Legal Issues will not be addressed in this FDO and are **dismissed**.

Inadequately Briefed Legal Issues:

In addition to Legal Issues clearly not addressed in briefing, the Board has addressed inadequately briefed issues. The Board has stated:

If a party is unable to muster sufficient legal or factual argument to meet the standards required by the Act, or has not been able to assemble all the components necessary to meet the burden of proof, the Board can not decide in its favor. Therefore, inadequately briefed issues must be considered similar to unbriefed issues.

Sky Valley, et al., v. Snohomish County (Sky Valley), CPSGMHB Case No. 95-3-0068c, Final Decision and Order, (Mar. 12, 1996), at 24.

Further, the Board has stated, “Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned.” *Sky Valley*, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.

Finally, the Board has stated, “An issue is ‘briefed’ when legal argument is provided; it is not sufficient for a petitioner to make conclusory statements, without explaining how, as the law applies to the facts before the Board, a local government has failed to comply with the Act.” *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order, (Jan. 8, 1997), fn 1, at 7.

The Board will address abandonment of “inadequately briefed issues,” if applicable, under the Topical Areas in this FDO.

D. PREFATORY NOTE

The Board has organized this Order according to the “Topical Areas” originally explained and outlined in the PHO. The Board addresses each Legal Issue of the Petitioners according to those identified Topical Areas, and in the following Order:

- **A. Notice and Public Participation** (Fuhriman 17);
- **B. Appropriate Urban Densities** (Fuhriman 1, 2 and 11; North Creek Village 1, 2 and 3; Camwest 1, 2a-f, 3 and 4);
 - LU-P4 Net Buildable Area
 - Net Buildable Area Definition
 - Effect or Application of Net Buildable Area on Certain Designations
 - R-40,000 Designation – Fitzgerald Subarea and Norway Hill Subarea
 - Fitzgerald Subarea
 - Norway Hill Subarea
 - 100’ Buffers between Residential Uses;
- **C. Innovative Techniques and Reasonable Measures** (Fuhriman 7 and 14);
 - Reasonable Measures
 - Innovative Techniques
- **D. Consistency with Goals** (Fuhriman 3, 4, 8, 9, 12, 15, and 16);
 - FLUM Designations
 - Citywide Plan Policies
 - Subarea Plan Policies
- **E. Consistency with CPPs** (Fuhriman 6);
- **F. Internal Consistency** (Fuhriman 5 and 13, North Creek Village 5);
 - Fuhriman Issues
 - Bothell Connector
- **G. Invalidity.**

IV. LEGAL ISSUES AND DISCUSSION – BY TOPICAL AREA

A. NOTICE AND PUBLIC PARTICIPATION

Petitioner Fuhriman is the only remaining Petitioner challenging the City's notice and public participation process for the Plan Update. The PHO states Fuhriman's Legal Issue 17 as follows:

17. Did the City violate RCW 36.70A.020(11) and BMC 14.02.250(B)(2) during the City's update and review of its PLAN and implementing development regulations?

Applicable Law

The goals of the GMA, which are to guide the development of comprehensive plans and development regulations, are found at RCW 36.70A.020. Fuhriman alleges noncompliance with Goal (11). This GMA goal provides:

(11) Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

Discussion

Position of the Parties:

Fuhriman argues that the City violated the Act's public participation goal by failing to provide adequate public notice throughout the Comprehensive Plan update process, and specifically, on November 3, 2004. Fuhriman PHB, at 40-44. Fuhriman alleges that the notice for the November 3, 2004 meeting was inadequate because (1) individual property owners were not notified; (2) the City was required to provide heightened notice because the November 3, 2004 meeting was not a regularly scheduled meeting; and (3) the agenda for the meeting was not sufficiently detailed to allow a potentially interested member of the public to determine which subareas, plan provisions, or issues would be discussed. *Id.*

The City responds that Petitioner Fuhriman has failed to demonstrate that the City violated the public participation goal. Bothell Response, at 48-55. The City argues that the issue has been abandoned, except for the portion regarding the November 3, 2004 notice, because Petitioner has failed to cite any specific instances of inadequate public notice. *Id.* at 49-50. On the merits, the City argues that it provided adequate notice of the November 3, 2004 meeting because (1) the City sent out detailed monthly and bi-monthly notices in October and November 2004; (2) the agenda for the November 3, 2004 meeting, although less specific than the monthly notice, provided effective notice of the issues that the council was to address; (3) the Act does not require individualized notice;

and (4) the record indicates that Fuhriman attended several meetings, including the November 3, 2004 meeting, and that he presented his comments to the Council. *Id.* at 50-55.

In reply, Petitioner Fuhriman concedes that the City sent out multiple notices throughout the update process but argues that the notices during the crucial, decision-making months of September through December failed to provide sufficient detail of the topics that would be discussed at the meetings. Fuhriman Reply, at 9-12. Additionally, Fuhriman argues that his attendance and participation at several meetings does not indicate that he received adequate notice; rather, Fuhriman asserts that he attended these meetings because he could not determine from the notices when the City would be discussing his property. *Id.* at 11-12.

Board Discussion:

Ordinance No. 1942 updated the City's Plan, not its development regulations. Also, Petitioner did not provide copies of, argue, or reference BMC 14.02.250(B)(2) in prehearing briefing. *See* Fuhriman PHB, at 40-44. Therefore, these portions of Legal Issue 17 are deemed **abandoned**. Further, Petitioner concedes that the City generally provided notice and the opportunity for public participation throughout the three-year Plan Update process; however, Petitioner takes particular issue with the notice and agenda¹⁰ for the November 3, 2003 meeting regarding properties in the Norway Hill subarea.

Ex. 766 includes monthly notices regarding the Plan Update process, dating from April 2001 through December 2004. This *Imagine Bothell* document is entitled "Notice of Public Hearings and Meetings concerning Comprehensive Plan Amendments, Code Amendments, and related items;" it was published monthly in the King County Journal and the Bothell-Kenmore Reporter, as well as being posted in City Hall and 12 other locations throughout the City. This document was also e-mailed or mailed to approximately 210 residents who had requested it. *See* Bothell Response, at 50, and Ex. 766.

The published November 2004 schedule states, "The City Council will conduct hearings and deliberations concerning the 2004 Comprehensive Plan and Code Update potentially every Monday, Tuesday and Wednesday¹¹ evening in November in an effort to complete the Update by the December 1, 2004 deadline established by the state [GMA]." Ex. 766, November Schedule, at 1. The notice schedule also states, "In November the Council will conduct hearings on the Planning Commission's recommendations for amendments to subarea plans. The subarea plan amendments recommended by the Commission fall

¹⁰ Petitioner refers to, and apparently quotes excerpted provisions of the notice and agenda, but did not provide a record citation to these items or a copy of the items for the Board to review. Fuhriman PHB, at 42-43.

¹¹ November 3, 2004 was a Wednesday.

into three categories: 1) Amendments to existing designations of fewer than four dwelling units per acre [among the subareas plans include is the Waynita/Simonds/Norway Hill Subarea – R1 area on top of Norway Hill – retain existing R1 designation as is]. . .” *Id.* at 2, (emphasis supplied). The *Imagine Bothell* notice also states, “For more detailed information on proposed changes to the Comprehensive Plan or development regulations, please visit the City’s website [citation omitted] or contact the following city staff members [four names, titles, e-mail and phone numbers listed.] *Id.* at 3.

The Plan Update public participation process developed and relied upon by the City of Bothell is exceptional. See Ordinance No. 1942, Exhibit A. Findings 5, 6 and 7, and Ex. 766. The *Imagine Bothell* notice for the upcoming month’s meeting schedule provides context and substance as to items or issues the City is slated to consider. In the run-up to final adoption, with numerous Council hearings each week, it was not unreasonable for the City to specify its website and contact persons for specific information regarding individual meetings. Bothell’s notice and public participation process surpasses the minimum notice and public participation requirements of the GMA, which *does not require individual notice* of property owners, as suggested by Petitioner. The Board finds and concludes that the City of Bothell’s notice and public participation process for the Plan Update was guided by, and complies with RCW 36.70A.020(11).

Conclusion

- The City of Bothell’s notice and public participation process for the Plan Update [Ordinance No. 1942] **was guided by**, and **complies** with, RCW 36.70A.020(11). Fuhriman’s Legal Issue No. 17 is **dismissed**.

B. APPROPRIATE URBAN DENSITIES

Three Petitioners¹² challenged whether the City of Bothell has provided appropriate urban densities in its Plan Update. Petitioner Fuhriman challenges virtually *all* of the City’s residential land use designations on the City’s future land use map (**FLUM**) and land use policy LU-P4, asserting that they do not comply with RCW 36.70A.110(2) and Goals 1 and 2.¹³ Petitioner North Creek Village LLC poses a narrower challenge,

¹² MBA’s PFR and Legal Issues have been abandoned and dismissed.

¹³ Petitioner Fuhriman’s Legal Issue 10 was included under this topical area. However, Petitioner abandoned this Legal Issue, see *supra*. Fuhriman indicates, “This Legal Issue [Legal Issue 10] is completely and effectively addressed by Fuhriman in Legal Issue #11.” Fuhriman PHB, at 40. Fuhriman’s remaining Legal Issues are stated as:

1. *Do the R 40,000, R 9,600, R 8,400, R 7,200, and R 5,400d Plan designations adopted and applied by the City of Bothell on its Land Use Maps (Map) and within its subarea plans fail to comply with RCW 36.70A.110 (2) and Goals 1 and 2 of the Act by failing to provide for appropriate minimum urban densities throughout the City’s residential zoned areas?*
2. *Does LU P4 which regulates density by establishing minimum lot size restrictions in each Plan designation or classification violate Goals 1 and 2 of the Act by using an inappropriate and inflexible method to determine appropriate urban densities?*

asserting that the 40,000 square foot lot FLUM designation in the Fitzgerald Subarea does not comply with RCW 36.70A.110(2), Goals 1 and 2, and does not meet the Litowitz test provisions allowing larger lot designations on the FLUM.¹⁴ Petitioner Berry/Phillips/Camwest allege noncompliance with .110(2) and Goals 1, 2 and 4 in their challenge to city-wide land use policy LU-P4 and the 40,000 and 9,600 minimum lot size requirements, in addition to land use policies LU-6a, 7 and 8 in the Fitzgerald Subarea.¹⁵

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11. *Do Land Use policies 2, 3 or 4 of the WSNH subarea plan and land use policy 7 of the DNER subarea plan violate goals 1, 2 and 4 of the Act and RCW 36.70A.070 which require internal and external consistency within and between county-wide planning policies, the City comprehensive plan and subarea plans and the adopted Comprehensive Plan Map, by precluding application of flexible development regulations, such as clustering provisions, PUD/PRD regulations, and other innovative and flexible regulatory instruments necessary to achieve environmental, recreation, transportation, urban design, housing and other city and county-wide planning policies, while providing for minimum urban densities?*

PHO, at 10.

¹⁴ North Creek Village LLC's Legal Issues are stated as:

1. *Did the City violate RCW 36.70A.110(2) by failing to plan for urban densities within the Fitzgerald Subarea, and instead adopting an R-40,000 Plan density that does not achieve urban densities in the UGA?*
2. *Did the City violate RCW 36.70A.020(1) and (2) by failing to plan for appropriate urban densities within the Fitzgerald Subarea, and instead adopting an R-40,000 Plan density that promotes sprawling low density development?*
3. *Did the City violate the GMA, and specifically the best available science requirement under RCW 36.70A.172(1), in the Fitzgerald Subarea by misapplying the Litowitz test and including an R-40,000 Plan density that does not meet the Litowitz criteria?*

PHO, at 13, 14.

¹⁵ Berry/Phillips/Camwest's Legal Issues are stated as:

1. *Did the City fail to be guided by the goals contained in RCW 36.70A.020, specifically goals (1), (2) and (4), in adopting Ordinance No. 1942, with its R-40,000 and R-9600 land use designations (Policy LU-P4), Fitzgerald/35th Avenue SE Subarea Plan Land Use Policy 6(a), and/or North Creek/NE 195th Street Subarea Plan Land Use Policy 10?*
2. *Does Ordinance No. 1942, including its Land Use designation maps, fail to comply with RCW 36.70A.110(2) because:*
 - a. *The City's R-40,000 land use designation (Policy LU-P4)*
 - i. *Is not supported by, nor does it meet the standards set forth in LMI v. Woodway for designations resulting in densities less than four dwelling units per acre?*
 - ii. *Precludes urban densities?*
 - b. *Fitzgerald/35th Avenue SE Subarea Plan Land Use Policy 7*
 - i. *Is not supported by, nor does it meet the standards set forth in LMI v. Woodway for designations resulting in densities less than four dwelling units per acre?*
 - ii. *Precludes urban densities?*
 - c. *Fitzgerald/35th Avenue SE Subarea Plan Land Use Policy 8*

City also has unchallenged residential land use designations for residential activity centers, specialized senior housing overlay and mobile home parks.

Imagine Bothell – Citywide Land Use Element provisions:

LU-P4 The City shall maintain a Comprehensive Plan Map (*see* Figure LU-4 in map pocket) for the purpose of illustrating the proposed allocation of land uses throughout the Bothell Planning Area. Land uses shall be categorized by the following designations. It is intended that these designations be utilized separately where only one type of land use is determined to be appropriate, and in combination where more than one type of land use is determined to be appropriate. *The development potential of any individual property under the land use designations of this Comprehensive Plan shall be based on the net buildable area of that property, and shall be further subject to planned unit development provisions, availability of necessary utilities, critical area regulations, impact mitigation, and other applicable development policies, regulations and standards. Net buildable area, for the purposes of this Comprehensive Plan, shall mean the gross land area, measured in acres, minus land area in roads and other rights of way, surface stormwater retention/detention /water quality facilities, critical areas, critical area buffers, and land dedicated to the City.* Comprehensive Plan Map designations shall be implemented through zoning classifications on the City's official Zoning Map.

1. Residential, 40,000 square foot minimum lot size (R 40,000).

This designation shall provide for detached residential development at a minimum lot size of 40,000 square feet, plus compatible uses such as schools and churches.

This designation is appropriate for land encumbered by critical areas determined to be large in scope, complex in structure and function, and high in rank order value; land found to be a particularly important source of cool groundwater benefiting the health of anadromous fisheries in North Creek and its tributaries, and the Sammamish River; and/or land constrained in some other way so as to preclude the full range of public facilities and services necessary to support urban development.

The R 40,000 Plan designation shall be implemented by the R 40,000 zoning classification.

2. Residential, 9,600 square foot minimum lot size (R 9,600); Residential, 8,400 square foot minimum lot size (R 8,400); Residential,

7,200 square foot minimum lot size (R 7,200); Residential, 5,400 square foot minimum lot size, detached (R 5,400d).

These designations shall provide for detached residential development at minimum lot sizes of 9,600, 8,400, 7,200 and 5,400 square feet, and compatible uses such as schools and churches.

In the R 9,600 designation, limited lot size averaging shall be allowed. Under this approach, the total area of all lots within a proposed R 9,600 subdivision divided by the number of lots shall amount to an average lot area of at least 9,600 square feet: 20 percent of lots in such a subdivision may be smaller than 9,600 square feet, but no smaller than 8,400 square feet nor larger than 14,400 square feet.

Generally, these designations are appropriate for most land in the planning area suitable for residential use with the exception of land located convenient to principal arterials and/or business and commercial activity centers, where higher densities may be warranted.

These Plan designations shall be implemented by identically named zoning classifications. That is, the R 9,600 Plan designation shall be implemented by the R 9,600 zoning classification; the R 8,400 Plan designation shall be implemented by the R 8,400 zoning classification; and so forth.

3. Residential, one dwelling unit per 5,400 square feet of net buildable area, attached or detached (R 5,400a); Residential, one dwelling unit per 4,000 square feet of net buildable area (R 4,000); Residential, one dwelling unit per 2,800 square feet of net buildable area (R 2,800).

These designations shall provide for attached or detached residential development at one dwelling unit per 5,400, 4,000 and 2,800 square feet of net buildable area, and compatible uses such as schools, churches and day care centers.

Generally, these designations are appropriate for land which is located convenient to arterials and to business and commercial activity centers.

These Plan designations shall be implemented by identically named zoning classifications. That is, the R 5,400a Plan designation shall be implemented by the R 5,400a zoning classification; the R 4,000 Plan designation shall be implemented by the R 4,000 zoning classification; and the R 2,800 Plan designation shall be implemented by the R 2,800 zoning classification.

[Additional residential designations (**Residential Activity Center, Specialized Senior Housing Overlay, Mobile Home Park, and Mixed Use**) are also included, but are not at issue here.]

See *Imagine Bothell* Comprehensive Plan – 2004 Update, second section, at LU-24 to 26; and Figure LU-4, Land Use Designations (Future Land Use Map or **FLUM**); (emphasis supplied in LU-P4 language).

Fitzgerald/35th Avenue SE Subarea Plan Element provisions:

LU-6. The area north of 240th Street SE, extending approximately 660 feet north of 240th west of 39th Avenue extended, and approximately 1,320 feet north of 240th east of 39th Avenue extended, is appropriate for attached or detached residential development at one dwelling unit per 5,400 square feet as described in the Land Use Element Policy LU-P4 (R-5,400a on southern portion of map).

Any development in this area shall incorporate the following measures to protect the existing single family neighborhood to the north:

- a. Installation of a minimum 100-foot buffer adjacent to single family zoning utilizing fences, walls, berms, existing mature landscaping or dense, fast-growing landscaping, or other noise-absorbing or sight-obscuring techniques (exact width of the buffer to be determined in conjunction with development plan review);

...

LU-7. The balance of the Subarea is appropriate for detached residential development at a minimum lot size of 40,000 square feet as described in Land Use Element Policy LU-P4 (R 40,000 in central portion of map). This designation is necessary to protect the complex structure, function, values and high rank order of the critical area contained within this Subarea and to establish the North Creek Fish and Wildlife Critical Habitat Protection Area described below.

LU-8. Lands within the Fitzgerald Subarea bounded by 228th Street SE in the north, 240th SE in the South, Fitzgerald Avenue to the west and 45th Avenue SE in the east shall be identified as the North Creek Fish and Wildlife Critical Habitat Protection Area (NCFWCHPA) as delineated in Figure 4 to recognize the special environmental significance of the streams and wetlands within the Fitzgerald/35th Avenue SE Subarea which contain complex, high function, and valuable critical habitat for anadromous fish and other wildlife. The City should not consider property-owner initiated comprehensive plan amendments for properties within the NCFWCHPA until completion of additional wetland, stream, and wildlife habitat

delineations and assessments as identified under the Natural Environment policies.

Imagine Bothell Comprehensive Plan – 2004 Update, third section Fitzgerald/35th Avenue SE Subarea Plan, at FI-6 and 7.

Applicable Law

All Petitioners allege noncompliance with RCW 36.70A.110(2). The relevant provisions of RCW 36.70A.110(2) provide:

Based upon the growth management population projection made for each county by the office of financial management, the county and *each city* within the county *shall include areas and densities sufficient to permit the urban growth that is projected to occur* in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historic reserve.

Each urban growth area shall permit urban densities and shall include greenbelts and open space areas. . . . Cities and counties have *discretion* in their comprehensive plans to make many choices about accommodating growth.

(Emphasis supplied.)

All Petitioners allege noncompliance with Goals 1 and 2, one alleges noncompliance with Goal 4. These GMA goals provide:

(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.

. . .

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage the preservation of existing housing stock.

One Petitioner alleges noncompliance with the GMA's best available science requirement – RCW 36.70A.172(1). This section of the GMA provides:

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

Discussion

The Board's framework for analyzing challenges to urban density is set forth in *Kaleas v. City of Normandy Park*, CPSGMHB Case No. 05-3-0007c, Final Decision and Order, (Jul. 19, 2005), at 5-6. In the present challenge, it is undisputed that the City of Bothell is accommodating the growth projected by OFM, and allocated to the City by King and Snohomish County. Nor is there a challenge that the City is not encouraging and stimulating urban growth within its borders and providing a variety of urban densities. However, the present challenge has three separate aspects. The first involves the City's definition of "net buildable area;" the second questions the City's 40,000 square foot lot size designation in the Fitzgerald Subarea; and the third challenges a 100' buffer requirement between residential uses. The Board addresses them in that order.

LU-P4 – Definition of Net Buildable Area:

Position of the Parties:

Petitioner Camwest argues that the City's Plan violates Goals 1 and 2 of the Act because it fails to accommodate urban growth at appropriate urban densities. Camwest PHB, at 9-14. First, Camwest argues that the net density definition precludes areas within the R-9,600 designation from achieving an urban density of 4 du/acre. *Id.* at 9. Camwest demonstrated this fact to the City Council by submitting a development plan, with explanatory testimony, for a property known as Bothell Heights. *Id.* at 9-11, *citing* Exhibit 799. Although the plan used the minimum lot size permitted in the R-9,600 area, including a 15% lot reduction permitted by the Planned Unit Development process, Camwest was only able to achieve a final density of 2.95 du/acre. *Id.* at 10. Moreover, Petitioner argues, there is no evidentiary or scientific justification in the record for the City's net density definition; no support exists in the GMA or in any Board ruling for the City to exclude rights of way, buffers, and storm water detention facilities from the density calculation. *Id.* at 11. Furthermore, the idea that a city can subvert urban densities by creating a definition that excludes buildable land from density calculations is contrary to the Board's bright line rule of 4 du/acre. *Id.*

Petitioner Fuhriman argues that each of the R-40,000, R-9,600, R-8,400, R-7,200, and R-5400d density designations fail to comply with RCW 36.70A.110(2) and Goals 1 and 2 of the Act because the designations do not provide for a minimum urban density of 4 du/acre once the net density calculation in LU-P4 is applied. Fuhriman PHB, at 15-27.

Fuhriman further maintains that since the R-9,600¹⁶ zone has not achieved urban densities since 1996, the additional deductions and restrictions contained in LU-P4 will make it impossible for the R-9,600 zone to achieve minimum urban densities. *Id.* at 18-19. Moreover, Fuhriman argues that the City's net density definition contained in LU-P4 violates Goals 1 and 2 of the Act because it erroneously deducts future rights-of-way, critical areas, critical area buffers, and other buildable land from the density calculation. *Id.* at 36. Fuhriman cites the Board's decision in *Benaroya et al. v. Redmond* for the proposition that all land not encumbered with any rights-of-way and certain critical areas is buildable and therefore should be included in the density calculation. *Id.* at 37. Lastly, Fuhriman argues that the Board's bright line ruling is 4 du/acre, not a minimum lot size; therefore, the City must base its zoning on a yield-base calculation rather than a lot-size calculation. *Id.* at 39.

In response to Petitioners, the City asserts that an appropriate urban density of 4 du/acre refers to net, rather than gross, density and that its Plan achieves the net densities required by the Board and the Act. Bothell Response, at 22-23. Additionally, the City argues that its methodology for calculating "net buildable acre" is based on sound GMA planning principles and best available science. *Id.* at 24-30. Also, the City argues that the R-9,600 designation meets the Board's bright line rule for minimum urban density and also includes a "safety net" in the form of moderate lot averaging provisions. *Id.* at 30-32. Furthermore, the City contends that its decision to establish land use designations according to minimum lot size rather than approximate lot yield so that the designations are consistent with the zoning code regulations is clearly within its discretion under the Act. *Id.* at 32-34. Bothell also contends that its Comprehensive Plan includes urban densities sufficient to accommodate its assigned growth targets. *Id.* at 37-39.

The City asserts that its decision to deduct detention ponds and parks from the net density calculation was based on advice from the City Community Development Director that detention ponds and parks meet the Board's definition of unbuildable acreage because they are not available for the placement of housing. *Id.* at 25, *citing, Benaroya et al., City of Redmond*, CPSGMHB Case No. 95-3-0072 FDO (March 25th, 1996), at p. 21. Moreover, the City's decision to deduct critical area buffers from the net density calculation was based on (1) the City of Bellevue's definition of buildable area, *Id.* at 25, *citing, Bellevue Code* § 20.50.12B ("definitions"); § 20.25H.070A3; (2) the King County and Snohomish County Buildable Lands analyses, *Id.* at 26, *citing, Index No. 774*, at p.11; *Index No. 775, Exhibit 9*; (3) the draft "Guidance Paper" issued by the State Department of Community Trade and Economic Development in June 2004, *Id.* at 27, *citing, Index No. 775, Exhibit 22* at p. 4; (4) a draft publication by the Washington State Department of Ecology (DOE), *Id., citing, Freshwater Wetlands in Washington State, Vol. I: A Synthesis of the Science*" (August 2003); (5) advice provided by former Board Member Joe Tovar; and (6) written reports and oral testimony from environmental consultants presented to the Council in October and November, 2004, *Id., citing e.g., Index # 675, Excerpts of Transcript of October 12, 2004 Council Meeting*, at pp. 3-9

¹⁶ This zone was formally called R-4.

(testimony by Janne Kaje of Steward & Associates, regarding the importance of riparian buffers.) *Id.* at 34-37.

The City also contends that its Plan complies with the requirements of the Act because it allows lot size averaging for the R 9,600 designation and provides for a range of urban densities. *Id.* The City points out that, with only two exceptions, it eliminated its former R-1, R-2, and R-3 zones and converted the properties in those zones to the denser R-9,600 zone. *Id.* at 35. In addition, the City's Comprehensive Plan includes multi-family residential designations; expands the use of the Residential-Activity Center designation, which provides for multi-family housing without prescribing a specific density; and contains a Specialized Senior Housing Overlay, which allows specialized senior housing development at higher densities than normally permitted in certain single family residential designations. *Id.* at 35-37. The City further maintains that the designations contained in its Comprehensive Plan will accommodate its growth projections. *Id.* at 37-39.

In reply, Camwest argues that Board's rulings in *Litowitz v. City of Federal Way* and *LMI v. Town of Woodway* make it clear that the 4 du/acre bright line rule is based on a gross density calculation and that cities can only deduct critical areas if they satisfy the *Litowitz/LMI* test. Camwest Reply, at 2. Camwest maintains that there would be no need for the *Litowitz/LMI* test related to critical areas if the 4 du/acre rule was based on net density because critical areas would already have been deducted from the density calculation. *Id.* at 2. Additionally, Camwest asserts that a net density calculation would open the door to lack of predictability and lack of consistency between jurisdictions. *Id.* at 3. Cities and counties could alter what is or is not excluded from the calculation by changing their definition of net. *Id.* Moreover, Camwest contends that with adequate buffers there is no need to lower densities below urban levels because buffers protect the critical areas from the impacts of urban density. *Id.* at 4. Furthermore, Camwest argues that the Board has never accepted the argument that a range of densities is acceptable to show that a city has appropriate urban densities. *Id.* at 4-5.

Fuhriman's reply challenges the information upon which the City based its decision to eliminate critical area buffers from the density calculation. Fuhriman Reply, at 5-8. Specifically, Fuhriman argues that the City erroneously stated that Snohomish County deducts critical areas buffer from the net density calculation; rather, the County actually permits 120% credit for critical areas and their buffers. *Id.*, at 5-6, *citing*, Exhibit 775-18 at 30.42B.040. Moreover, Fuhriman maintains that the City should not have relied on draft guidance papers from DCTED to make its decision because the guidance had not been finalized. *Id.* at 6-7. Furthermore, Fuhriman argues that the City improperly relied on advice from former Board Member Tovar as support for eliminating buffers from the density calculation because the advice was given during a confidential settlement negotiation between the parties and no official record was kept of the meeting. *Id.* at 7-8. Lastly, Fuhriman argues that the City's Plan does not encourage the availability of affordable housing to all segments of the population or promote a variety of residential

density and housing types because the vast majority of land available for development is located in the R-9,600 and R-40,000 zones. *Id.* at 9.

In its post-hearing brief, Petitioner Camwest maintains that during the Hearing on the Merits counsel for the City misrepresented the City's analysis (Index 744, at p. 12) of the R-9,600 zone and Policy LU-P4 by implying that the analysis concluded that the R-9,600 zone meets the 4 du/acre rule on a gross density basis. Camwest Post-Hearing Brief, at 3. Camwest points out that the City's study was based on a net density calculation, which deducts various features, including rights-of-way, storm drainage facilities, and critical areas and buffers. *Id.* Moreover, Camwest asserts that its Bothell Heights study is the only evidence in the record demonstrating the potential density available under LU-P4 on a gross density basis. *Id.* Lastly, Camwest submits that the R-9,600 zone and LU-P4 are in violation of the Act if the Board concludes that the 4 du/acre rule is to be applied on a gross density basis. *Id.* at 4. In contrast, the R-9,600 zone and LU-P4 are in compliance if the Board agrees with the City that the rule should be applied on a net density basis. *Id.*

In its post-hearing response, the City argues that Camwest incorrectly asserted that the City misrepresented its analysis of the R-9,600 zone and LU-P4. Bothell Post-Hearing Response, at 3. The City made clear at the Hearing on the Merits that its analysis demonstrates that the City is in compliance with the Board's bright line rule, which is based on a net density calculation. Additionally, the City asserts that Camwest's acknowledgement that the City is in compliance if the Board agrees that the 4 du/acre rule is to be applied on a net density basis, should end the discussion because the Board has consistently stated that the 4 du/acre rule is based on a net density calculation. *Id.*, at 2. Furthermore, the City argues that Camwest has failed to meet its burden of proof because it has not cited any authority in support of its assertion that the 4 du/acre rule is based on a gross density calculation. *Id.* at 4.

Board Discussion:

There are two separate parts for the Board to consider in this portion of this issue. The first, relates to the terms of the definition within LU-P4; and the second, as argued by Petitioners, relates to the effect or application of that definition to certain density designations.

Definition of Net Buildable Area:

Once again it is not disputed by any of the parties that 4du/acre is an appropriate urban residential density. The disputed issue here is how that urban residential density is calculated. Although the parties have characterized the conflict as being whether urban residential density is calculated on a *gross* acreage basis¹⁷ or a *net* acreage basis,¹⁸ there is

¹⁷ Permitted density divided into total acres.

no persuasive argument offered indicating that the GMA, or this Board, has ever indicated that urban residential density must be calculated based on *gross* acreage.

The GMA is silent. It does not define urban density or the basis for calculating urban density. This Board, however, has discussed urban density on numerous occasions.

In an early case concerning sizing of interim urban growth areas, in discussing RCW 36.70A.110(2)'s requirement to include within UGAs "areas and densities sufficient to permit the urban growth that is projected," this Board noted the distinction between gross versus net densities. In *Association of Rural Residents v. Kitsap County (Rural Residents)*, CPSGMHB Case No. 93-3-0010, Final Decision and Order, (Jun. 3, 1994), this Board stated,

In order to achieve sufficient urban densities, a county must determine how many acres . . . are within the UGA so that, in the event of an appeal, the Board can determine whether the selected UGA is indeed "sufficient." In undertaking this requirement, *counties must distinguish between gross acres and net (or buildable) acres. For instance, undevelopable critical areas, open spaces, rights of way, etc., should be deducted from the gross acreage. See also WAC 365-195-335(3).* Counties have a great deal of discretion in how they achieve this requirement.

Rural Residents, at 35; (emphasis supplied). Here, the Board indicated that *net acreage* was intended to reflect the *buildable acreage*, and acknowledged that *gross acreage* (which included the total acreage of buildable and non-buildable acres) should be reduced by deducting unbuildable areas such as certain critical areas, open space and rights of way. The Board also acknowledged that local governments have a "great deal of discretion in how they achieve this requirement."

In another early case also involving, among other things, the sizing of final urban growth areas and urban residential density designations, the Board concluded that 4 *net* du/acre constituted an appropriate urban density, generally, a residential density that complied with the Act – a safe harbor. In *Bremerton v. Kitsap County (Bremerton)*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order, (Oct. 6, 1995), at 50; this Board stated, "Any residential pattern of four *net* dwelling units per acre, or higher, is compact urban development and satisfies the low end of the range [of appropriate urban densities] required by the Act." (Emphasis supplied).

Both these cases were County cases. Unlike cities, counties have designated resource lands and rural areas to manage; but counties, like cities, have the duty to manage growth in their respective urban areas. However, cities (within UGAs by definition) have less

¹⁸ Permitted density divided into buildable acres; buildable meaning gross acreage minus unbuildable acreage.

flexibility in “sizing their city limits¹⁹” than counties do in “sizing their UGAs.” Nonetheless, the distinction between gross versus net, equating net with buildable, and the 4du/acre designation [appropriate urban density] has been generally accepted as common practice in jurisdictions within the region.

In a city case, *Benaroya, et al., v. City of Redmond (Benaroya I)*, CPSGMHB Case No. 95-3-0072, Final Decision and Order, (Mar. 25, 1996), the Board stated,

With regard to the claim that the City impermissibly calculated the urban density for [Petitioner’s] property using the entire property, the Board finds no inconsistency between the City’s action and the meaning of “net density.” As applied to GMA planning exercises, “*net*” has the same general meaning as “*buildable*.” Most cities within King County determined their “net” land supply was for purposes of the County’s UGA allocation exercise. From the record in Vashon-Maury, the Board is aware that *various cities in King County deducted, for example, public rights-of-way and environmentally sensitive lands in order to determine the “net supply” of buildable land. Generally speaking, the concept of “net” remains the same when applied to a specific parcel of land – that portion which is encumbered with rights-of-way or certain critical areas would not be available for the placement of housing, for example.* [The Board went on to discuss “average net density” in instances where a property contains several different residential density designations.] The Board concurs with the City that acreage that is unbuildable must be deducted in order to obtain the net acreage of a site.

Benaroya I, at 32-33; (emphasis supplied). Here, based upon experience in reviewing UGAs, the Board again acknowledged and recognized that net acreage equated to buildable acreage, which involved the deduction of unbuildable areas (here, rights-of-way and certain critical areas) from the gross acreage.

Does the City of Bothell’s “net buildable area” definition in LU-P4 stray from the goals and requirements of the Act or the interpretations of the Act provided by this Board or other sources? – No. Is it within the scope of the City’s discretion? – Yes.

As illustrated *supra*, in the cases presented for review to this Board, the Board has discussed density in terms of a net yield of units on buildable acreage. The present dispute focuses on how the City of Bothell has chosen to define its buildable acreage. In reviewing this question, the Board recognizes that local governments have discretion in

¹⁹ Annexations can occur within designated unincorporated UGA, but generally, cities have less flexibility in altering their boundaries; and some cities are bounded by other cities or natural features that limit the opportunity for expansion.

how they plan for growth consistent with the goals and requirements of the Act. *See* RCW 36.70A.3201.

As noted *supra*, “net buildable area” is not a term defined in the Act; however, the Board has opined that a *net* density of 4 du/acre is an appropriate urban density. The Board has interpreted various means of calculating density for various purposes, and acknowledged certain “deductions” from gross area as an appropriate means of determining buildable area and determining the net density yield in units per acre. However, which factors are deducted in the calculations is a policy choice for local government to make, so long as they are supported by evidence in the record and consistent with the goals and requirements of the Act. Consequently, the Board’s review is undertaken in this context.

LU-P4 specifically defines net buildable area as, “Net buildable area, for the purposes of this Comprehensive Plan, shall mean the gross land area, measured in acres, minus land area in *roads* and other *rights of way*, *surface stormwater retention/detention /water quality facilities*, *critical areas*, *critical area buffers*, and *land dedicated to the City*.” (Emphasis supplied.) This definition equates net acreage with buildable acreage and reflects the concept of net buildable density. The definition clearly allows for the deduction of roads, rights-of-way and critical areas, which are generally acknowledged, and recognized by the Board, as being “unbuildable” areas that are not available for housing. Therefore, these areas could appropriately be deducted from gross acreage to determine net buildable acreage. *See also* Ex. 416 and 744.

But the City also includes stormwater retention/detention /water quality facilities, critical areas buffers, and lands dedicated to the City as additional “unbuildable” deductions. To support its decision, the City relies upon advice in memos from its City Attorney and Planning Director noting that the City’s existing regulations and code do not permit areas such as public parks and other common tracts (open stormwater facilities) to be included in the calculation of the permitted number of lots on a parcel. *See* Bothell Response, at 25; and Ex. 744, at 6-7. The Board notes that such public facilities have generally been recognized as unavailable for housing and may be deducted from gross acreage to determine buildable acreages. *See* King County Buildable Lands Report (**BLR**) and Snohomish County BLR, Ex. 774 and 775. The Board finds that there is supporting evidence for the City’s decision to include areas encumbered by stormwater retention/detention/water quality facilities and lands dedicated to the City as deductions in its “net buildable area” definition; this decision was reasonable and **not clearly erroneous**, and including these components falls within the scope of the City’s discretion.

However, most of the argument in briefing, and at the HOM, focused on the City’s decision to include *critical area buffers* as a deduction in its net buildable area definition. The City indicates that there was substantial discussion and debate as to whether critical areas buffers should be considered as unbuildable and included as a deduction for establishing net density. *See* Bothell Response, at 25-30. The Board notes that the City Attorney advised that there was not case law on the topic and that a conservative

approach would be to allow critical area buffers to be *included* in calculating net buildable density. *See* Ex. 416, at 4. Following this advice would have provided more land area upon which to base density determinations and likely yielded more density. Ultimately, the City chose to deduct critical area buffers from the calculation of net buildable density.

As noted in briefing, the City points to numerous sources in the record to support this decision including the following: its own critical areas regulations [contradictory in that they allowed density credits for critical area buffers, but required buffers to be included in critical area tracts which could not be included in density calculations²⁰ – *See* Ex. 744, at 7], definitions from other cities [Bellevue deducts protected areas, such as wetland buffers from its density calculations – Bothell Response, at 25], BLRs from King and Snohomish Counties [for determining buildable land supply *for BLR purposes*, King County deducts critical area buffers – *See* King County BLR, at 16, and Ex. 774, at 11; Snohomish County likewise considers critical area buffers not to be buildable areas – *See* Snohomish County BLR, at 14 and Exs. 774, at 11, and 775, Attachment 9], guidance publications from the State Departments of Community, Trade and Economic Development (**CTED**) [indicating critical area buffers should be excluded in buildable area calculations, April 2004 CTED Guidance Paper, at 3 – Ex. 774, Attachment 12] and Ecology (**DOE**) [discussing the importance of buffers in protecting critical area functions and values – Ex. 744, Attachment 8], and other oral and written comments [*e.g.* transcripts from various meetings where the subject was discussed, Exs. 648, 672, and 675. *See also* Ordinance No. 1942, Exhibit. A “Findings Concerning Amendments to Planning Area-wide Elements,” No. 13b.]

The Board finds that the City’s decision to deduct critical area buffers in determining net buildable density was not unreasonable. There was ample evidence in the record to support the decision of the City to include critical areas buffers as a deduction in the definition of net buildable area to be used in calculating net residential density. Consequently, the Board finds that the adoption of the “Net Buildable Area” definition in LU-P4 was reasonable and was **not clearly erroneous**; this decision is within the scope of the City’s discretion and consistent with the goals and requirements of the Act. Fuhriman’s Legal Issue 2 and Camwest’s Legal Issues 1, 2a, 3 and 4 are **dismissed**.

Although the Board concludes that the deductions in the City’s definition of “net buildable area” were reasonable, not clearly erroneous, and fall within the scope of the City’s discretion; that does not mean that the Board is not concerned with a very practical problem voiced by Petitioners. Namely, that, different definitions of “net buildable density” with varying deductions could be adopted by each jurisdiction. This uncoordinated and inconsistent approach in methodology could create a balkanization in the Central Puget Sound (**CPS**) region, and could undermine coordinated planning under the GMA. Therefore the Board offers the following thoughts.

²⁰ Whether the City of Bothell’s “existing” critical areas regulations are consistent with or implement LU-P4 is not before the Board in this case.

The Board notes that the issue here involves planning methodology and calculations that can have significant impact on coordinated and consistent GMA planning. In other instances where the necessity for coordinated and consistent data collection, planning methodology and calculations were required, jurisdictions were compelled to meet and agree upon consistent procedures through the County-wide Planning Policy (CPP) process. The Board recognizes that CPPs cannot be construed to alter the land use powers of cities, but CPPs have been used to forge important coordination and consistency policy agreements among a county and its cities.

Previously, CPPs were used for coordination among jurisdictions when counties, in conjunction with their cities, had to size, locate and designate UGAs. RCW 36.70A.210(3)(a), specifically requires CPPs to implement the GMA's requirements for the location and sizing of UGAs involving components such as deductions from gross area and market factor increases. Additionally, for Central Puget Sound counties and cities that are required to conduct buildable lands reviews and evaluations, a CPP is also required. RCW 36.70A.215(1) required the adoption of a CPP to establish the review and evaluation program, including coordinated data to be collected and methodology to be used.

In the context of the present issue, the Board agrees that critical area buffers are generally "unbuildable" and should be preserved to offer the protections they provide to associated critical areas. However, just because they should not be intruded upon, does not mean they are without value beyond the value they provide in the protection of critical areas.

One of the GMA challenges to local governments, both cities and counties, is to balance competing goals of the Act [e.g. balancing development densities on resource, rural and urban lands with critical area protection.] If jurisdictions define terms such as "net density" differently, allowing different areas to be "deducted" in calculating density, predictability [an underpinning of GMA planning] can be undermined. Further, dismissing critical area buffers from density calculations forgoes an opportunity to balance potentially conflicting GMA goals [i.e. preventing public harm (critical area protection) while promoting urban density and protecting private property rights.] Critical area buffers provide a plausible basis for mechanisms such as density transfers, credits or bonuses. A CPP could either be developed to provide consistency among all jurisdictions within a county on how critical area buffers are treated, or at least establish the parameters for how jurisdictions address them. A CPP addressing this issue should result in more predictability for all.

Additionally, important innovative techniques, such as the transfer of development rights (TDRs), are a mechanism that can help in balancing goals within a jurisdiction or among jurisdictions. Under such a program, permissible density from "unbuildable" areas can be transferred to "buildable" areas. This can be done internally, within a city, and between rural and urban areas. Critical area buffers can have an important role in providing fuel for the potential market of transferable development rights. The design of an effective TDR program is not a simple undertaking for an individual jurisdiction;

hence, the importance of cooperation and coordination among a county and its cities. The opportunity to create, implement and reap the benefits of a larger scale county-wide TDR program could be foreclosed if jurisdictions limit their ability to participate by relying on traditional regulatory approaches.

Consequently, it seems appropriate, that to avoid a balkanization and uncoordinated system of regulation and to preserve opportunities for innovation, jurisdictions on their own initiative, should consider the adoption of a CPP to establish a framework for addressing density calculations, including critical area buffers and their role in balancing goals or developing TDR programs. A consistent definition of terms and methodology could be among the items included. While such a CPP may yield variations among the four-CPS counties, there would be consistency among all the jurisdictions within a given county. Use of the already familiar CPP mechanism could enhance predictability and flexibility within the region.

Effect of Application of the Net Buildable Area Definition on Certain Designations:

LU-P4 not only defined net buildable area, it also established a range of residential densities for the City of Bothell. Instead of portraying generalized densities for its residential designations, the City chose to define the residential land use designations in terms of minimum lot sizes. The minimum lot sizes that have been challenged and will be discussed here are the R 9,600, R-8,400, R-7,200 and R-5,400 square foot minimum lot sizes. The R-40,000 minimum lot size is addressed in a subsequent portion of this discussion.

On their face, each of these minimum lot sizes arrayed on one net buildable acre *yields* a residential density of 4 du/acre or more – 4.5, 5.2, 6.0 and 8.0 dwelling units per net buildable acre, respectively.²¹ Nonetheless, Petitioner Fuhriman’s Legal Issue 1 challenges each of these designations. However, Petitioner only argues about the R-9,600 [formerly R-4] in briefing. *See* Fuhriman PHB, at 15-27. Therefore, the Board deems Petitioner Fuhriman’s attack on the City’s R-8,400, R-7,200 and R-5400 residential designations as **abandoned**, and will not discuss them further here. However, Petitioners Fuhriman and Camwest provide argument in their challenge to the R-9,600 residential designation.

The R-9,600 designation applies to approximately 3,157 acres, approximately 63% of the residentially designated lands in the City of Bothell.²² Petitioner Fuhriman argues that the R-9,600 residential designation fails to produce 4 du/acre when the definition of net buildable area is applied. *Id.* However, the evidence Fuhriman relies upon to support

²¹ Densities are derived by simply dividing the minimum lot size into 43,560 square feet – the area in an acre.

²² Both Petitioners Fuhriman and Camwest reference this figure and the City does not refute it. However, no party cited, nor was the Board able to find, a table or chart in the Plan Update to verify this assertion. Therefore, the Board accepts the reference as factual.

this assertion is an April 24, 2004 staff memo to the Planning Commission that notes that the City's R-1, R-2 and R-3 Plan designations provide for less than four net dwelling units per acre and would not comply with the GMA [The Board notes that each of these designations has been eliminated in the 2004 Plan Update.] The memo goes on to state,

The R-4 Plan designation complies with the Board's bright line rulings because it specifically provides for a net density of four dwelling units per acre. However, during the implementation phase following adoption of the Plan in 1994, the Planning Commission and Council elected to retain the minimum lot size approach which predated the plan. *The R-4 Plan designation was thus implemented by R4 zoning which required a minimum lot size of 9,600 square feet. As was discussed in the previous section,²³ plats developed under this zoning classification have historically yielded less than four units per net acre.*

Fuhriman PHB, at 18; *citing* Ex. 813, at 13,²⁴ (emphasis supplied).

In essence, Petitioner concludes that, based upon past experience with the R-4 [*i.e.* the R-9,600 lot size] and the new net buildable density definition the City will be unable to implement the Plan Update's 9,600 minimum lot size designation to yield 4 du/acre.

Camwest also references past admissions by the City that its R-4 designation does not achieve 4 du/acre – “Since 1996 in the R-4 zone, single family residential subdivisions did not attain a density of 4 dwelling units per acre.” Ex. 385, at 7. However, Camwest also references an illustrative development plan to prove that the Plan Update's R-9600 minimum lot size designation will continue to fall short of the 4 du/acre density. The development plan, referenced as Bothell Heights, contained no critical areas, used the minimum lot size of 9,600 square feet, with a 15% reduction allowed as a PUD, placed a minimum amount of land in open space and roads as required by City code. According to Petitioner, the result was 49 lots on 16.59 acres, yielding a density of 2.95 du/acre, or 3.49 du/acre if public roads on the site were deducted. Camwest PHB, at 9-10.

However, the City contends that the R-9,600 designation coupled with pending code provisions to allow lot size averaging in the R-9,600 and adjustments to the “lot circle” provisions will assure compliance with the 4 du/acre requirement. Bothell Response, at 30-31. Additionally, the City notes it has eliminated designations that permitted low residential densities [former R-1, R-2 and R-2] and references its own analysis of six subdivisions approved since 1996. The City's subdivision analysis shows that three of the subdivisions achieved 4 du/acre, and three fell slightly short [a *de minimus* amount – 3.94, 3.98 and 3.95 du/acre] of the acknowledged appropriate urban density of 4 du/acre.

²³ The section referenced discusses problems with the 9,600 minimum lot size failing to yield 4 du/acre in the Waynita/Simonds/Norway Hill Subarea. See Ex. 813, at 12.

²⁴ Petitioner does allude to Ex. 793 apparently showing five previously approved plats that allegedly do not achieve 4 du/acre. It appears that some of these plats are in the Waynita/Simonds/Norway Hill Subarea.

Id. citing Ex. 774, at 12. In its post-hearing brief, Camwest notes that the City's conclusions in this exhibit are based upon a *net density* calculation, not a *gross density* calculation as urged by Petitioner, and illustrated by the Bothell Heights example. Petitioner goes on to state, "If the Board agrees with the City that the 4 du/acre rule is to be based upon the City's definition of net buildable acre, then the R-9600 zone and Policy LU-P4 are in compliance." Camwest Post-Hearing Brief, at 1-2. The City verifies that its calculations are based upon *net density*, and yield appropriate urban densities. The City urges the Board to dismiss the challenge asserting that Petitioners have failed to meet their burden of proof. Bothell Post-Hearing Response, at 3-4.

The Board has resolved the dispute, *supra*, as to whether the calculation of 4 du/acre may be based upon a net density in lieu of a gross density calculation – the Board found that it can. Net buildable area calculations that *yield* a density of 4 du/acre is an appropriate urban density. Review of the relevant provisions of the City's 2004 Plan Update suggest that the City has taken appropriate steps, such as eliminating the R-1, R-2 and R-3 designations, and has provided for a yield of 4 du/acre with the R-9,600 residential designation *in its Plan*. The City's pending implementing development regulations must be consistent with and implement the Plan.

It is important to distinguish that the document placed before the Board for review is the 2004 *Plan* Update, not the City's *update* to its implementing development regulations. As the Board has previously stated,

While there is an important directive linkage between them, policies (i.e. plans) and regulations are distinct GMA creatures. The Act's consistency requirements give plans directive effect over regulations, however this does not convert plan policy documents into land use controls. Simply put, plans are not regulations.

Tulalip Tribes of Washington v. City of Monroe (Tulalip II), CPSGMHB Case No. 99-3-0013, Final Decision and Order, (Jan. 28, 2000), at 4. *See also, King County v. CPSGMHB [Supreme Court Remand of a portion of Vashon-Maury v. King County, CPSGMHB Case No. 95-3-0008c] (Bear Creek)*, CPSGMHB Case No. 95-3-0008c, Order Finding Partial Noncompliance and Partial Invalidity, (Nov. 3, 2000), at 9-10.

As the City acknowledges, the update to the development regulations is pending.²⁵ The illustration provided by Camwest (*i.e.* Bothell Heights) and the City's review of prior subdivisions, were obviously not based upon the pending revised development regulations. Therefore, the Board is not persuaded that they are accurate reflections of

²⁵ The Board acknowledges that pursuant to the Board's Order in *Fuhriman I*, on July 11, 2005, the City adopted Ordinance No. 1946, updating its implementing development regulations. The Board issued an Order Finding Compliance [Re: Adopting Implementing Development Regulations] on July 25, 2005. In that Order, the Board noted that compliance meant the City had acted to update its development regulations and that the substance of the updated development regulations was not before the Board, nor had they been challenged as of that date.

how the Plan Update provisions will be implemented by the updated development regulations. The Board emphasizes that the updated development regulations are **required**, pursuant to RCW 36.70A.040(3)(D) and .130(1)(b), to be consistent with and implement the provisions of the City's Plan, including designations that allow appropriate urban densities.

Therefore, the Board finds and concludes that 2004 *Plan Update's* R-9,600 designation on its face, was **not clearly erroneous**, provides for appropriate urban densities pursuant to the GMA, and **complies** with the Act. Fuhriman's Legal Issue 1 and Camwest's Legal Issue 1, 2a, 3 and 4 are **dismissed**.

While the Board concludes that the Plan's R-9,600 minimum lot size is intended to yield an appropriate urban density of 4 du/acre; the Board is also mindful that *de minimus* variations may occur. However, such variations should be minimized through techniques such as lot-size averaging, density bonuses or credits, cluster development, perhaps *maximum* lot sizes and other innovative techniques.²⁶ The Board trusts that the City's updated implementing development regulations will provide the necessary flexibility to ensure that appropriate urban densities of 4 du/acre are attained in the areas designated R-9,600 in the Plan Update.

²⁶ In *Master Builders Association/Brink, et al., v. Pierce County (MBA/Brink)*, CPSGMHB Case No. 02-3-0010, Order Finding Partial Noncompliance and Continuing Invalidity, (Sep. 4, 2003) the Board addressed whether *every* residential zone in a jurisdiction must permit 4du/acre on *every* property. In *MBA/Brink*, Petitioners argued that every parcel within a jurisdiction must be designated at 4du/acre. There the Board stated,

In *LMI/Chevron* [citation omitted] the Board held, "the GMA requires every city designate all lands within its jurisdiction at appropriate urban densities." *LMI/Chevron*, FDO, at 23. This concept of designating lands at appropriate urban densities within unincorporated UGAs was extended to counties and zoning designations in *Forster Woods Homeowners Association, et al., v. King County*, CPSGMHB Case No. 01-3-0008c, Final Decision and Order, (Nov. 6, 2001), at 12. Hence designation of urban lands at urban densities, within city limits and UGAs is what the GMA requires. This is the GMA requirement the County must meet.

Petitioners seem to assert that every parcel or property within the city-limits and within an unincorporated UGA must ultimately be developed at at least 4 du/acre. The GMA does not require this, nor has the Board ever said this. In reviewing the Future Land Use Map in the Litowitz and LMI/Chevron cases, the Board focused on the question of appropriate land use designations in an area-wide context, not a parcel-specific one. When translating densities from an area-wide FLUM to a localized parcel-specific zoning map it is expected that *de minimus* variations will occur. However, even in these limited situations jurisdictions can, and are encouraged to, attain urban densities through site design, cluster development, lot averaging, zero lot line zoning, and other local innovative techniques. [Footnote omitted.]

MBA/Brink, 9/4/03 Order, at 10.

R-40,000 Designation in the Fitzgerald Subarea and Norway Hill Subarea²⁷:

Position of the Parties – Fitzgerald Subarea:

Camwest asserts that the City's Plan violates the Act because the R-40,000 designation does not achieve 4 du/acre. Camwest PHB, at 12-14. Rather, the designation anticipates a maximum density of 1 du/acre. *Id.* at 12. In addition, the City has not demonstrated that its existing critical areas regulations will not protect the area or that the R-40,000 designation in the Fitzgerald Subarea is justified under the *Litowitz* test. *Id.* at 12-13. Fuhriman also asserts that the R-40,000 designations do not meet the *Litowitz* test. Fuhriman PHB, at 19-20.

North Creek also takes issues with the R-40,000 designation in the Fitzgerald Subarea. North Creek Village PHB, at 9-15. First, North Creek Village argues that the City violated RCW 36.70A.110(2) by adopting an R-40,000 designation because the designation falls short of the four du/acre density required by the GMA. *Id.* at 9-10. Second, Petitioner contends that the R-40,000 designation of the Fitzgerald Subarea violates goals 1 and 2 of the Act because the designation is not justified by the *Litowitz* test. *Id.* at 10-12. According to North Creek Village, the critical areas within the affected portion of the Fitzgerald Subarea are not large, of high value, or complex in structure or function, nor has the City indicated that its present regulations cannot adequately protect the area. *Id.* Lastly, Petitioner maintains that the City violated RCW 36.70A.172(1) because (1) the City's *Litowitz* Test Report considered wetlands and other critical areas outside of the 357-acre area being considered for the R-40,000 designation; (2) the Report was based upon insufficient field data; (3) the Report is not persuasive when it concludes that the large-in-scope criterion was met because there is only one large wetland in the area, and that wetland will be impacted by the Bothell Connector; (4) the Report does not support its conclusion that the complex in structure and function criterion was met because the wetlands present are typically forested; and (5) the Report's conclusion that the high-rank-order criterion was met is weak because there is limited overlap of critical areas in the portion of the subarea designated R-40,000. *Id.* at 12-15, *citing* Ex. 776 (Attachment O).

In response to the arguments regarding the R-40,000 designation in the Fitzgerald Subarea, the City asserts that the Board does not have the authority to apply an increased scrutiny standard in reviewing urban density designations of less than 4 du/net acre, *citing City of Redmond v. CPSGMHB*, 116 Wash. App. 48, 65 P.3d 337 (2003). Bothell Response, at 40. In the alternative, the City argues that the *Litowitz* Report conducted by Pentec Environmental demonstrates that the R-40,000 in the Fitzgerald Subarea meets the *Litowitz* Test. *Id.* at 41-45, *citing* Index 776. Furthermore, the City argues that there is additional scientific information in the record, such as a technical report prepared by

²⁷ For continuity, the R-40,000 designation in the Norway Hill area is discussed here even though Fuhriman's Legal Issue 11 was slated for discussion under the topical heading for Reasonable Measures and Innovative Techniques.

Steward and Associates, *Id.* at 45-46, *citing* Ex. 781, Attachment 4, and letters from the Washington Department of Fish and Wildlife, which supports the lower density designation. *Id.* at 46, *citing* Ex, 835.

Intervener Friends of North Creek responds that the City's decision to designate a portion of the Fitzgerald Subarea as R-40,000 because of its special environmental significance is supported by the record and is not clearly erroneous. Statement of Intervener Friends of North Creek, at 3.

In reply, Camwest asserts that the City's main justification for the R-40,000 designation in the Fitzgerald Subarea, that the area has not yet been developed to an urban density, does not meet the *Litowitz* test. *Id.* at 5-6.

In reply, North Creek Village reasserts that the City's *Litowitz* test was flawed and that the portion of the Fitzgerald Subarea designated R-40,000 does not meet the *Litowitz* test because the critical areas are not large, of high value or complex in structure or function. North Creek Village Reply, at 3-7. Additionally, North Creek points out that the City's response does not address the obvious flaws and inconsistencies in the *Litowitz* Report. *Id.* at 5-7.

Board Discussion – Fitzgerald Subarea:

At issue here is the rationale, or basis, for the City's decision to designate some 350 acres in the Fitzgerald Subarea with the R-40,000 residential land use designation. On its face, the R-40,000 designation yields a density of just over 1 du/acre – not generally an appropriate urban density. However, the City claims this designation in this area is merited because this lower density designation adds protections to a critical area (wetlands and streams) that are large in scope, complex in function and structure and of high rank order value – *i.e.* comports with the analysis the Board used in *Litowitz, et al., v. City of Federal Way (Litowitz)*, CPSGMHB Case No. 96-3-0005, Final Decision and Order, (Jul. 22, 1996).²⁸ Petitioners Camwest, Fuhriman and North Creek Village dispute the City's conclusion. The question for the Board is whether the balance the City has struck between providing appropriate urban densities and protecting critical areas is within the parameters of the Act.

The City relies heavily upon a report prepared by Pentec Environmental to support its decision in this area (***Litowitz Test Report***). The *Litowitz* Test Report, Ex. 776, evaluated five different subareas to determine whether densities lower than 4 du/acre were warranted to protect sensitive areas meeting the *Litowitz* analysis. The five areas evaluated were identified as: 1) Canyon Creek/39th Avenue SE area; 2) Fitzgerald/35th Avenue SE area [areas 1 and 2 containing approximately 357 acres were combined in the analysis]; 3) Waynita/Simonds/Norway Hill area [approximately 263 acres]; 4) Westhill

²⁸ This analysis has subsequently become known among GMA practitioners as the "*Litowitz* Test."

area [approximately 33 acres]; and 5) Shelton View/Meridian/3rd Street SE areas [approximately 155 acres]. See Ex. 776, at 2 and attached figures and tables.

The City's *Litowitz* Test Report concluded that only the Canyon Creek/39th Avenue SE and Fitzgerald/35th Avenue SE contained critical areas that were large in scope, complex in function and structure and of high rank order value. This area was hydrologically connected through numerous wetlands and several creeks, contained fish and wildlife habitat conservation areas and geologically hazardous areas. *Id.* at 6-13 and Table 1. The *Litowitz* Test Report was transmitted to the Planning Commission.

The Planning Commission rejected the notion of having a low density designation such as R-40,000 applied to a portion of the Fitzgerald/35th Ave SE Subarea Plan area. Instead the Planning Commission recommended,

The Fitzgerald/35th Ave SE Subarea contains one of the very best reaches of North Creek within the City of Bothell and contains tributaries to North Creek which also exhibit high quality fish habitat features. The Planning Commission finds that scientific sources have demonstrated that retaining native vegetation, minimizing impervious surface coverage, implementing surface water runoff controls, and establishing non-disturbance buffers are all vital protections for streams, fish habitat and other critical areas. Assigning only an R-1 [*i.e.* R-40,000] designation does not preserve these critical habitat areas more effectively than assigning an R-4 [*i.e.* R-9,600] designation. *Therefore, the Planning Commission finds that a more effective protection for these critical habitat areas is to establish a special overlay designation which would be applied to ALL parcels which contain a critical area or associated buffer consistent with approach 3 (presented to the Commission on August 3, 2004). Such parcels would be subject to a suite of special protections intended to protect these sensitive systems from urban development. A part of these special regulations should include preservation of natural, existing vegetation, applying impervious surface coverage limitations and implementing special stormwater standards.*

Ex. 783, at F-4, and at 4, (emphasis supplied). Notwithstanding the Planning Commission's recommendation, and after further consideration and deliberation, the City Council designated a portion of the Fitzgerald/35th Ave SE Subarea as R-40,000. See FLUM and Subarea Plan Policies LU-7 and 8, quoted *supra*.

Petitioner North Creek Village is primarily critical of the *Litowitz* Test Report, asserting that it is flawed because it considered critical areas for a surrounding 1,513 acres, not just the 357 acres designated R-40,000. North Creek Village PHB, at 12. Further, Petitioner suggests that other measures recommended by the Planning Commission or other innovative techniques should be used to protect the area. *Id.* at 16.

The City notes that the *Litowitz* Test Report identified, within the subarea, 14 wetlands covering 33 acres and a large 18 acre wetland linked to the others. These wetlands and habitats were also hydrologically linked to Cole Creek and North Creek and its tributaries. Landslide and seismic hazard areas were also present. Therefore, the City determined that the conclusions of the report were reasonable. Bothell Response, at 44-45. However, the City Council also acknowledged additional scientific analysis [Draft City of Bothell Wetland BAS; City of Bothell Streams and Riparian Areas: Best Available Science, Revised CAO maps – *See* Ex. 781; and City Departmental memos and maps and correspondence from Washington State Department of Fish and Wildlife – *See* Ex. 835] and recommendations supporting the *Litowitz* Test Report’s conclusions. Additionally, the City’s Findings reflect these considerations and documents its deliberations and decision. *See* Ordinance No. 1942, Attachment B, Finding No. 32, at 25 through 30.

It seems apparent to the Board that, at least for the 357-acres disputed here, the City’s present critical areas regulations were believed to be inadequate in protecting the critical areas at issue. This is evidenced by the *Litowitz* Test Report and the fact that even the Planning Commission recommended a “special overlay designation” and “special protections and regulations” to be developed to adequately protect the critical areas in question. The Commission’s recommendation by itself evidences perceived inadequacies in the City’s existing critical area regulations that can support the added protection of the R-40,000 designation. Further, the overall size and interconnectedness of the affected hydrologic system is well documented; it is not inappropriate to look at a sub-basin or related hydrological feature to assess critical areas in a specific area. *See* Ex. 776, 781 and 835. The Board finds that it was **not clearly erroneous** for the City to provide these critical areas the added protection of the R-40,000 designation on its FLUM in the Fitzgerald/35th Street SE Subarea Plan. Fuhriman’s Legal Issue 1, Camwest’s Legal Issues 1, 2a through 2e, 3 and 4, and North Creek Village’s Legal Issues 1, 2 and 3 are **dismissed**.

Position of the Parties – Norway Hill Subarea:

Fuhriman argues that the R-40,000 designation in the Norway Hill Subarea is to preserve the existing low density neighborhoods on the upper slopes of Norway Hill. Petitioner further contends, citing the aforementioned *Litowitz* Test Report, that the designated area does not contain large scale, complex, high value critical areas that warrant a low density designation; and any present critical areas could be adequately protected by existing critical area regulations. Fuhriman PHB, at 137-138. Fuhriman argues that the rationale for the designation offered by the City: erosive soils, difficulty in providing sewer, emergency services and the presence of a “potential” aquifer recharge area, were all “debunked” during discussion of the designation. *Id.* at 138 – 139. Petitioner asserts that even if some parcels are constrained, the area designated R-40,000 is too extensive and constitutes sprawl. *Id.* at 139.

The City counters that the City's designation is supported by the facts in the record. Bothell Response, at 83. The City asserts that the R-40,000 designation for the WSNH Subarea was proper because (1) the record indicates that a denser designation was inappropriate due to the physical constraints deriving from steep slopes and erosive soils, and the difficulty of providing urban services; (2) the presence of aquifer recharge areas, specifically as a source of potential cold water to address the decline of Chinook salmon habitat along the Sammamish River, *citing* Ex. 802, WRIA 8 watershed study and Ex. 781, BAS Report; (3) the Council's conclusions are the same conclusions that had been reached independently by King County's Department of Development and Environmental Services, *citing* Ex. 802, DDES report on densities on Norway Hill; (4) the Council, like the Planning Commission, properly recognized that a classic Litowitz analysis would not necessarily address the factors which suggested special consideration for Norway Hill, but this was debated and discussed [Ex. 702] and the City properly concluded that the Litowitz factors were not confining in light of the special circumstances involved on Norway Hill; (5) the City could look beyond *Litowitz* if the R-40,000 designation was reasoned, based on the record and within the City's discretion – which it was; and (6) the designation does not create a pattern of one-acre lots since there are only scattered pockets of vacant land in the area. *Id.* at 82-93.

Intervenor Norway Hill argues in support of the City's reasoning for the R-40,000 designation decision and emphasizes that because the City has no regulations that adequately protect functions and values of groundwater, critical aquifer recharge areas, or aquifers for salmon-bearing streams this designation is necessary. Norway Hill Residents Response, at 1-17.

Petitioner does not reply to the City [*See* Fuhriman Reply – Bothell, at 1-18]; however, Fuhriman does reply to Intervenor Norway Hill Residents' brief. Petitioner asserts, as Interveners acknowledge, that there are urban densities on Norway Hill, and that these densities should be throughout the area. Fuhriman Reply – Norway Hill, at 2-4. Petitioner then reiterates his argument that the Litowitz test is not satisfied and the City's rationale, especially pertaining to aquifer protection and limitations on sewer, does not support the designation. *Id.* at 10.

Board Discussion – Norway Hill Subarea:

The Board notes with interest that the area designated as R-40,000 in the Norway Hill Subarea on the City of Bothell FLUM extends well beyond the city limits. [*Compare* FLUM and HOM Ex. 4, entitled “Plan Designations Allowing Residential Uses.”] A significant portion of this area is within unincorporated King County, but within the UGA and Bothell's planned annexation area. The Board notes that HOM Ex. 5, a portion of the King County zoning atlas, indicates that the unincorporated portion the City has indicated as R-40,000 is zoned by King County as R-1 or Residential one dwelling unit per acre. Hence, how the area is cooperatively managed by the City and County is of significant importance. There is no evidence in the record as to whether the City and County have an interlocal agreement specifying whether the City's designations have any

effect on unincorporated lands in King County. Therefore the Board has to presume that the City's designations are only applicable within its city-limits and the County's, which are not before the Board, govern the unincorporated portion of the City's PAA until such time as the area is annexed.

There is no question that the area designated R-40,000 within the Norway Hill Subarea is not a large scale, complex, high rank order value critical area as analyzed in the Board's *Litowitz* case. The City's *Litowitz* Test Report confirms this conclusion. See Ex. 776, at 13-18 and Table 2. However, in a recent Board decision, the Board acknowledged that the critical areas discussed in the *Litowitz* case, and several cases thereafter, were linked to the hydrologic ecosystem, and that the Board could conceive of unique geologic or topographical features that would also require the additional level of protection of lower densities in those limited geologically hazardous landscapes. See *Kaleas v. City of Normandy Park*, CPSGMHB Case No. 05-3-0007c, Final Decision and Order, (Jul. 19, 2005)

In that decision, Board Member Pageler's concurrence explained a possible expansion of *Litowitz* analysis, to include geologically hazardous areas, would require the geologically hazardous "critical areas . . . to be mapped, using best available science, to identify their function and values, whether as feeder bluffs to salt water beaches, as sources of cool water for streams and rivers, as eagle and hawk habitat, etc. RCW 36.70A.172(1). The City would then need to articulate why critical area protections need to be supplemented by low-density . . . designations in order to protect those functions." *Kaleas*, FDO, at 29.

Here the Board notes that the City's critical areas related to geologic hazards are mapped. Figure NE-1 depicts Landslide Prone Deposits – including known landslides. The areas depicted on this map correspond closely to the area designated R-40,000 on Norway Hill. See 2004 Plan Update, Natural Environment Element, Figures following NE-10. Figure NE-3 depicts Erosive Soils – including severely and very severely erosive soils. Again, the R-40,000 designation corresponds with the very severely erosive soils depicted on this map. *Id.* Figure NE-6 shows a composite of the various critical areas that encompasses the North Hill area at issue. *Id.* Additionally, the Natural Environment Element contains a section that articulates policies specifically related to "Soils, Slopes and Geologically Hazardous Areas" (Policies NE-P33 through 38). *Id.* at NE-8. Also included are Actions for Soils, Slopes and Geologically Hazardous Areas. *Id.* at NE-10.

The Board notes that these revised critical area maps were developed in 2002 at the University of Washington based on "a combination of high-quality elevation data and best available geologic information." See Ex. 781, Attachment 5, at 1. The Board also notes that the draft report entitled "City of Bothell Streams and Riparian Areas: Best Available Science" prepared in October of 2004, by Steward and Associates, focuses on streams and riparian areas giving special consideration to salmonids [*i.e.* per RCW 36.70A.172]; and acknowledges the significance of the WRIA 8 work in the recovery of salmon in the watershed. Ex. 781, Attachment 4.

Review of the record established by the City in taking this action related to the R-40,000 residential designation for the effected area on Norway Hill, including the corresponding and consistent designation imposed by King County for the unincorporated portion of the area, leads the Board to conclude that the City's action was reasonable and supported by the record. Therefore, the Board finds that it was **not clearly erroneous** for the City to provide these critical areas the added protection of the R-40,000 designation on its FLUM in the Waynita/Simonds/Norway Hill Subarea Plan. Fuhriman's Legal Issue 11 is dismissed.

100' Buffers between Residential Uses:

Position of the Parties:

Camwest argues that the City's imposition of a minimum 100-ft buffer between the R-5,400 designation and the adjacent R-9,600 and R-40,000 designations violates the Act because it further precludes urban densities without any evidentiary basis. "The imposition of this buffer is basically a refinement of the net density definition to exclude more buildable land." Camwest PHB, at 14.

The City did not specifically respond to this assertion in its response brief. Bothell Response, at 1-94. Camwest did not address this issue further in its reply brief. Camwest Reply, at 1-6.

Board Discussion:

Camwest's assertion regarding the "buffers between residential uses" is that these non-critical area buffers are another exclusion from the calculation for density. This argument was reasserted at the HOM by Mr. Johns, "[Bothell] is buffering single family residences from single family residences and requiring a hundred foot buffer zone. That area would have to be deducted in order to calculate net buildable area given the City's formula in LU-P4." HOM Transcript, at 89. Upon questioning from the Board, Mr. Eglick, on behalf of the City, clarified that buffering between different density residential zones is common and a longstanding practice, and that,

[T]he buffer between the R 40,000 and the R 5,400 which the question was: Is that something that is excluded? And actually, the R 5,400 gets credit for it, and so *it's not excluded*. It is something where the R 5,400 zone that has to provide the buffer gets credit for it, and so I don't think that should be kind of the fulcrum of your concern about buffers. I think we're back to critical area buffers in general, whether they're excluded.

HOM Transcript, at 129, (emphasis supplied).

Camwest's representative, Mr. Johns, agreed,

Mr. Eglick is correct. The 5,400 – the hundred-foot buffer – is not presently one of the things that the City deducts under LU-P4, but if you let them, there is no reason the city council couldn't, one week from now, decide that that's one more thing given they're allowed to have the discretion to define buildable area to take that out.

HOM Transcript, at 132-133.

Since Petitioner has conceded that the 100' buffer in question is not part of the deduction for calculating net density, as defined in LU-P4, the Board considers this portion of the LU-P4 challenge and the challenge to Fitzgerald Subarea Plan Policy LU-P6a to be **withdrawn**. The Board cannot rule on speculation by Petitioner of actions the City could consider. Camwest's Legal Issues 2f, 3 and 4 are **dismissed**.

Conclusions

- The Board finds and concludes that the adoption of the “Net Buildable Area” definition in LU-P4 was reasonable and was **not clearly erroneous**; this decision is within the scope of the City's discretion and consistent with the goals and requirements of the Act.
- The Board finds and concludes that 2004 Plan Update's R-9,600 designation on its face, was **not clearly erroneous**, provides for appropriate urban densities pursuant to the GMA, and **complies** with the Act.
- The Board finds and concludes that it was **not clearly erroneous** for the City to provide these critical areas the added protection of the R-40,000 designation on its FLUM in the Fitzgerald/35th Street SE Subarea Plan or the Waynita/Sigmond/Norway Hill Subarea Plan. These two limited designations in the 2002 Plan Update provide for appropriate urban densities.
- The Board finds and concludes that the challenge to the 100' buffer between residential uses has been **withdrawn**.
- Fuhriman's Legal Issues 1 and 2; Camwest's Legal Issues 1, 2a through 2f, 3 and 4, and North Creek Village's Legal Issues 1, 2 and 3 are **dismissed**.

C. INNOVATIVE TECHNIQUES AND REASONABLE MEASURES

Petitioner Fuhriman and North Creek Village offer argument under this topical area. The PHO sets forth Fuhriman's Legal Issues 7 and 14 as follows:

7. *Did the City violate RCW 36.70A.215 (4) in failing to provide Plan policies and designations to adopt and implement reasonable measures to*

achieve appropriate urban densities in Plan designations as necessary to bring the City's policies into compliance with the goals and requirements of the GMA, specifically Goals 1 and 2 and RCW 36.70A.110(2) and as identified in Snohomish County in its County-wide planning policies, UG-14(b) and further defined by Snohomish County in Appendix C of the CPP?

14. *Did the City violate RCW 36.70A.090 because its Plan fails to provide for effective, innovative land use management techniques, including, but not limited to transfer of density, density bonuses, cluster housing, zero lot line, etc.; and was the elimination of City Land Use Policy which stated: "LU-P5 "Encourage innovative land development concepts and techniques which further other goals and policies of this Plan" (in the previous Comprehensive Plan) appropriate in light of goals 1, 2, 4, 6, 9 and 10 of the Act or RCW 36.70A.215?*

The PHO sets forth North Creek Village's Legal Issue 4 as follows:

4. *Did the City violate RCW 36.70A.090 in the Fitzgerald Subarea by failing to provide for innovative land use management techniques like clustering housing and increasing densities away from critical area as an alternative to retaining inappropriately low densities adjacent to critical areas?*

Applicable Law

RCW 36.70A.090 provides:

A comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights.

RCW 36.70A.215(4) provides in relevant part:

[If the buildable land review and evaluation demonstrates inconsistencies between what has occurred and what was envisioned in the Plan and development regulations, regarding residential densities, among other things] the county and its cities shall adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period.

Discussion

The Board first addresses Fuhriman's "reasonable measures" argument, then the assertions by Fuhriman and North Creek Village regarding "innovative techniques."

Position of the Parties:

Petitioner Fuhriman argues that the City violated RCW 36.70A.215(4) because the City, aside from adopting policies relating to accessory dwelling units, has failed to adopt effective reasonable measures designed to accommodate growth. Fuhriman PHB, at 133-35. Moreover, Fuhriman alleges that the Plan precludes the possibility of adopting effective reasonable measures with any new code update. *Id.* at 135.

The City responds that it did not violate RCW 36.70A.215(4) because (1) the City's 2004 Plan Update achieves appropriate urban densities required by the GMA; (2) the buildable lands analyses performed by Snohomish and King County in 2002 pursuant to RCW 36.70A.215 were fully considered and addressed in the City's Plan analysis of the City's 2025 growth targets and capacities and no additional reasonable measures are required; and (3) nonetheless, the City has adopted policies and regulations relating to accessory dwelling units, which are found on Snohomish County's list of possible reasonable measures. Bothell Response, at 81-82.

Additionally, Fuhriman argues that the City violated RCW 36.70A.090 because the Plan does not provide for innovative land use management techniques. *Id.* at 143-146. Petitioner argues that although the City has a PUD ordinance, the ordinance is ineffective because the R-9600 zone has not achieved densities of 4 du/acre since 1996. *Id.* at 144. Lastly, Fuhriman argues that the City's elimination of the LU-P5, which provided, "Encourage innovative land development concepts and techniques which further other goals and policies of this Plan." in the Comprehensive Plan update is contrary to the goals of the GMA. *Id.* at 145-46.

North Creek Village argues that the City violated RCW 36.70A.090 because it used low densities, instead of innovative planning techniques, to protect the critical areas in the Fitzgerald Subarea. North Creek Village PHB, at 16.

The City contends that it did not violate RCW 36.70A.090 because the GMA does not impose a duty to utilize innovative techniques, and even if it did, Bothell is using innovative techniques which are specifically provided for in its comprehensive plan. *Id.* at 82-83. Moreover, the City argues that Petitioner Fuhriman cannot challenge the City's rejection of LU-P5 because the action took place in 2003, and the GMA does not mandate that a city adopt any particular ordinance to achieve the necessary urban density. *Id.* at 83.

The City responds to North Creek Village asserting that it has complied with RCW 36.70A.090 because (1) the provision encourages, but does not require, local jurisdictions to use innovative land use management techniques; (2) a city's decision not to include innovative land use management techniques cannot be found to be clearly erroneous if the city can achieve appropriate urban densities necessary to accommodate projected growth without adopting such techniques; and (3) the City has a Planned Unit

Development ordinance and several other specialized land use management techniques, including a Specialized Senior Housing Overlay designation, a Residential Activity Center designation, a Mobile Home Parks designation, and provisions for Accessory Dwelling Units. City Response, at 80-81.

In reply, Fuhriman argues that although the Plan does provide for mobile home parks, there have not been any new mobile home parks for decades and no land on the FLUM is zoned for new mobile home parks. Fuhriman Reply, at 15-16. Consequently, innovative design techniques cannot be used unless the City rezones areas for mobile home parks. *Id.*

In reply, North Creek Village argues that although the GMA does not require the use of innovative techniques, the City's failure to use them undermines its argument that low density designations are necessary to protect its critical areas. North Creek Village Reply, at 8. Furthermore, North Creek contends that there is no legitimate reason to use the blunt instruments of low densities to protect critical areas when more strategic types of development controls would be more effective and would avoid sacrificing other GMA goals. *Id.*

Board Discussion:

Reasonable Measures:

Has Bothell failed to comply with RCW 36.70A.215(4) – the requirement that jurisdictions adopt and implement reasonable measures if the buildable lands report (BLR) identifies inconsistencies between what has occurred and what was anticipated in a jurisdiction's Plan and development regulations? – No

As the Board stated in *FEARN, et al., v. City of Bothell*, CPSGMHB Case No. 04-3-0006c, Order on Motions, (May 20, 2004),

[I]f the buildable lands review and evaluation that is completed by September 1, 2002 demonstrates inconsistencies as noted in RCW 36.70A.215(3), then jurisdictions must adopt and implement the identified reasonable measures [reasonable measures] to increase consistency.

FEARN, 5/20/04 Order, at 7, (emphasis supplied).

Petitioner Fuhriman has failed to identify any *inconsistencies noted in the BLR's of either King or Snohomish County*. Fuhriman PHB, at 133-135. Therefore the Board questions whether it even needs to address this question. Petitioner does acknowledge that the City has adopted provisions for accessory dwelling units.²⁹ However, Petitioner does seem to

²⁹ However, Petitioner does not indicate whether the ADU provision was adopted in the 2004 Plan Update or in prior development regulations.

suggests that since 1996 the City has not achieved a density of 4 du/acre in areas designated as R-9,600; and that in the past, the City has either discussed or altered its regulations to eliminate density transfers from buffers and other incentives. *Id.* The Board has addressed *supra*, the question of whether the Plan's R-9,600 designation is an appropriate urban density, and it need not repeat itself here. Additionally, the Board discussed *supra*, the fact that the City's update of its implementing development regulations were pending. Therefore, in light of the limited briefing and conclusory argument presented on this question the Board finds that Petitioner Fuhriman has **failed to carry the burden of proof** in demonstrating noncompliance with RCW 36.70A.215(4), and Fuhriman's Legal Issue No. 7 is **dismissed**.

Innovative Techniques:

Has Bothell failed to comply with RCW 36.70A.090 – the GMA's innovative technique provision? – No

On the question of compliance with the GMA's innovative techniques provision, the Board agrees with the City; this provision does not create a GMA duty *requiring* jurisdictions to include innovative techniques in its Plan. RCW 36.70A.090 states, "comprehensive plans *should* provide for innovative land use techniques" (Emphasis supplied.) North Creek Village acknowledges that the GMA does not compel the inclusion of innovative techniques in the Plan, but nonetheless, this Petitioner urges the City to consider alternative regulatory techniques and incentives to implement its Plan in lieu of low density residential designations. North Creek Village Reply, at 8. Also the City is correct in that it is untimely for Petitioner Fuhriman to challenge a deletion from its Plan (elimination of LU-P5) that occurred during 2003.

The City notes that its Plan Update provides for Accessory Dwelling Units, Mobile Home Parks, Residential Activity Center [mixed uses] and Specialized Senior Housing Overlay – asserting that these measures, as well as its PUD regulations, are innovative techniques. Bothell Response, at 80-81. The Board notes that if a Plan does not explicitly mention "innovative techniques" a jurisdiction is not precluded from including such measures in its implementing development regulations. Nonetheless, the Board must yield to the City's discretion in deciding not to explicitly include reference to innovative techniques, such as density transfers, cluster zoning and other regulatory techniques, specifically in its Plan Update, since .090 creates no GMA duty. However, since the City's implementing development regulations are required to be consistent with and implement the Plan, including the attainment of appropriate urban densities, the City may still consider such innovative regulatory techniques as it updates its implementing development regulations. Here, the Board finds and concludes that the City's decision not to explicitly include, in its 2004 Plan Update, the types of innovative land use techniques urged by Petitioners was **not clearly erroneous** and within the City's discretion. Fuhriman's Legal Issue No. 14 and North Creek Village's Legal Issue No. 4 are **dismissed**.

Conclusion

- The Board finds that Petitioner Fuhriman has **failed to carry the burden of proof** in demonstrating noncompliance with RCW 36.70A.215(4).
- The Board finds and concludes that the City's decision not to explicitly include, in its 2004 Plan Update, the types of innovative land use techniques urged by Petitioners was **not clearly erroneous** and was within the City's discretion.
- Fuhriman's Legal Issue No. 7 and 14 and North Creek Village's Legal Issue No. 4 are **dismissed**.

D. COMPLIANCE WITH GMA GOALS

Seven of Petitioner Fuhriman's Legal Issues allege that the City's 2004 Plan Update was not guided by, and not consistent with, various Goals of the GMA.³⁰ Two of the Legal Issues challenge the designations in the Plan Update and FLUM [Legal Issues 3 and 4], three Legal Issues challenge Plan Update policies [Legal Issues 8, 9 and 15], and two Legal Issues challenge Subarea Plan policies [Legal Issues 12 and 16]. The PHO sets forth Fuhriman's Legal Issues 3, 4, 8, 9, 12, 15 and 16 as follows:

Plan Designation³¹ Issues [3 and 4]:

3. *Do the R 40,000, R 9,600, R 8,400, R 7,200, and R 5,400d Plan designations as applied by the City of Bothell on its Map and within its subarea plans fail to comply with RCW 36.70A.020(4)?*
4. *Did the City fail to provide for urban densities in the R 40,000, R 9,600, R 8,400, R 7,200, and R 5,400d Plan designations that provide for effective, efficient, and environmentally responsible multimodal transportation in violation of RCW 36.70A.020 (3) and (10) or are these lot sizes inconsistent with HO-P25 or TR-G6?*

Plan Policy³² Issues [8, 9 and 15]:

8. *Do Natural Environment Policies NE-P8 through NE-P11, NE-P23, NE-P26, NE-P33, NE-P36, NE-P38 and Natural Environment Action NE-A12 violate goals 1, 2, 3, 6 or 10 and RCW 36.70A.172 by seeking to inappropriately restrict development?*

³⁰ Goals 1 and 2 are addressed in the Board's discussion of Appropriate Urban Densities, *supra*.

³¹ The explanation of the various Plan designations involved here, are set forth *supra*, in the discussion of Appropriate Urban Densities.

³² The Plan Policies involved here, are set forth in Appendix D.

9. Do Urban Design Policies UD-P7, UD-P15, UD-P17 and UD-P19 violate goals 1, 2, 3, 6 and 10 and RCW 36.70A.172 of the Act?

15. Do housing goal HO-G6, housing policy HO-P3 or HO-P7 or Land-Use Policy LU-P6, LU-P11 violate goals 1, 2, 4, 6, 9 and 10 of the Act?

Subarea Plan Policy³³ Issues [12 and 16]:

12. Do Natural Environment Polices 1, 5, 6 or 7 of the WSNH and Natural Environment Policies 1, 4, 5, or 6 and Natural Environment Actions 4, 5 or 6 of the DNER subarea plans violate goals 1, 2 and 6 of the Act by inappropriately restricting development activity in significant portions of the subarea?

16. Do UD-P7, UD-P25, UD-P35, Land Use Policy 7 of the Maywood/Beckstrom Hill subarea (“MBH”), Natural Environment Policy 1 of MBH; Westhill subarea LUP-1, 2, 3 or 4, Natural Environment Policy 1; DNER Land Use Policy 16, Natural Environment Policy 1, 4, 5 or 6 and Natural Environment Actions 1, 2 or 3, Urban Design Policy 7; WSNH Urban Design Actions 1, 2 or 3 and Urban Design Policies 3, 5 or 6, alone or when combined with LU-P4 violate RCW 36.70A.030 [sic .020] (1), (2), (3), (4), (5) or (6)?

Applicable Law

Fuhriman alleges noncompliance with Goals (1), (2), (3), (4), (5), (6), (9), and (10) [RCW 36.70A.020]. Goals 1, 2 and 4 are set forth *supra*; the other challenged goals provide:

(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

...

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

³³ The Subarea Plan Policies involved here, are also set forth in Appendix D.

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

...

(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.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

Discussion

Position of the Parties:

Fuhriman takes issue with the density designations adopted by the City in its Comprehensive Plan. Fuhriman PHB, at 63-78. Fuhriman argues that the designations violate Goal 4 of the Act because they fail to promote a variety of housing types and to provide housing for all economic segments of the population. *Id.* at 63-76. Rather, the City's restrictive zoning promotes low density, sprawling neighborhoods. *Id.* Of the 4,881 acres zoned for single family development, 3,600 acres are zoned for R-9,600 and R-40,000. *Id.* at 73, *citing* Figure LU4 and Exhibit #399, slide 42. Only 55.2 acres, or 1% of the single family zoned property, is zoned for R-5,400d. *Id.* at 75, *citing* Exhibit #399, slide 42. Additionally, Fuhriman asserts that the designations violate Goal 3 of the Act and are inconsistent with HO-P25 and TR-G6 because they do not accommodate transit within the planning area. *Id.* at 76-79. The designations do not provide for an effective mix of housing near existing and planned transportation centers nor do they permit 7 du/acre, the density necessary to support multimodal transportation. *Id.* at 77-79. Furthermore, Fuhriman submits that the designations encourage more cars and roads, thereby harming the environment in violation of Goal 10 of the Act. *Id.* at 77.

Fuhriman also takes issue with various Natural Environment, Urban Design, Housing, and Land Use provisions in both the city-wide plan and subarea plans. First, Fuhriman argues that various Natural Environment Policies and Actions³⁴ in the city-wide plan violate the Act because they (1) restrict development, thereby precluding urban densities and perpetuating sprawl, in violation of Goals 1 and 2; (2) do not permit urban densities necessary to support multimodal transportation in violation of Goal 3 (3) do not provide affordable housing for all segments of the population in violation of Goal 4; (4) are arbitrary and capricious and force the creation of open space without providing compensation to the private owner in violation of Goal 6; (5) encourage the

³⁴ NE-P8, NE-P9, NE-P10, NE-P11, NE-P13, NE-P23, NE-P26, NE-P33, NE-P36, and NE-P38; NE-A12. See Appendix D.

inappropriate conversion of land in violation of Goal 10; and (6) impose restrictions on potential or possible critical areas in violation of RCW 36.70A.172. *Id.* at 79-95. Second, Fuhriman contends that various Urban Design Policies³⁵ frustrate Goals 1, 2, 3, and 10 of the Act because they restrict development on buildable land. *Id.* at 96-99. Additionally, Fuhriman asserts that the Urban Design policies force the creation of open space in violation of Goal 6 and the Washington Supreme Court's holding in *Isla Verde Int'l. Holdings Inc. v. City of Camas*³⁶. *Id.* at 96-97. Further, Fuhriman submits that the Urban Design policies violate RCW 36.70A.172. *Id.* at 96.

Third, Fuhriman asserts that various Natural Environment Policies and Actions in the WSNH and DNER Subarea Plans³⁷ violate Goals 1, 2, and 6 of the Act because the provisions preclude urban densities, perpetuate sprawl, are arbitrary and capricious, and force the retention of open space by imposing development restrictions on non-critical and non-hazardous areas. *Id.* at 100-106. Fourth, Fuhriman argues that several city-wide Housing and Land Use provisions³⁸, which promote compatibility with existing development and natural surroundings, violate Goals 1, 2, 4, 6, 9, and 10 of the Act because they restrict development on buildable land and create public benefits on private land without providing a method for on-site density transfers. *Id.* at 106-114. Similarly, Fuhriman challenges Policies and Actions³⁹ in several subarea plans, which seek to maintain natural features and preserve the character of existing development. *Id.* at 114-33. Fuhriman maintains that these provisions violate Goals 1, 2, 3, 4, 5, and 6 of the Act because the provisions create public amenities on private property without providing compensation to the owner; are unduly restrictive, thus perpetuating sprawl and decreasing the possibility of achieving urban densities in urban areas; promote homogeneity of housing types; and increase the costs of development, thereby decreasing the availability of affordable housing. *Id.*

In response, the City argues that the Board should deem Petitioner's challenges to the city-wide Natural Environment and Urban Design provisions and to the various Subarea provisions as abandoned because Fuhriman has failed to adequately brief the alleged violations, and the Board does not have jurisdiction to determine whether the Urban Design Policies are inconsistent with the Supreme Court's holding in *Isla Verde*. *Id.* at 75-77.

Further, the City contends that Fuhriman cannot rely on urban density designations to assert that the City's Comprehensive Plan violates Goals 3 and 4 of the Act. The City

³⁵ UD-P7, UD-P15, UD-P17, and UD-P19. *See* Appendix D.

³⁶ 146 Wn. 2d 740, 49 P.3d 867 (2002).

³⁷ NE-P1, NE-P5, NE-P6, and NE-P7 of WSNH Subarea Plan; NE-P1, NE-P4, NE-P5, NE-P6, NE-A4, NE-A5, and NE-A6 of DNER Subarea Plan. *See* Appendix E.

³⁸ HO-G6, HO-P3, and HO-P7; LU-P6 and LU-P11. *See* Appendix D.

³⁹ UD-P7, UD-P25, UD-P35, and LU-P7 of the Maywood/Beckstrom Hill Subarea Plan; LU-P1, LU-P3, LU-P4, and NE-P1 of the Westhill Subarea Plan; LU-P16, NE-P1, NE-P4, NE-P5, NE-P6, NE-A4, NE-A5, NE-A6, and UD-P7 of the Downtown/NE 190th/Riverfront Subarea Plan; and UD-A1, UD-A2, UD-A3, UD-P3, UD-P5, and UD-P6 of the Waynita/Simonds/Norway Hill Subarea Plan. *See* Appendix E.

maintains that it has included numerous measures to promote and encourage a variety of housing types, affordable housing, and mass transit. City Response, at 71. Additionally, the City asserts that it is required to protect critical areas and provide open space and greenbelts in each urban growth area. *Id.* at 77. Lastly, the City argues that its Housing and Land Use policies, which promote compatibility, reflect traditional notions of zoning and land use regulation and are aimed at protecting owners from incompatible uses. *Id.* at 72.

Fuhriman replies that the City may acquire open space by donation or purchase but not by decree or by designating such space on a map. Fuhriman Reply, at 17. Moreover, Fuhriman argues that the City does not believe that all of the land designated on Figure LU 5 (Land Use Element and Open Space Corridors) is unbuildable; otherwise, the City would have deducted the land from the net density calculation. *Id.* Lastly, Fuhriman contends that the City has failed to balance all of the various goals and requirements of the Act. *Id.*

Board Discussion:

FLUM Designations:

One of the underpinnings to Petitioner Fuhriman’s entire appeal is that the City of Bothell is not providing for appropriate urban densities, especially in the way the City has defined “net buildable area.” The Board has resolved this question in its discussion of “appropriate urban densities,” *supra*. In short, the Board concluded that the City’s definition of “net buildable area” was within its discretion to define and consistent with Board interpretations of the Act, and that the two challenged R-40,000 designations and its use of the R-9,600 designation yielded appropriate urban densities as required by Goals 1 and 2. Thus, the Board’s conclusion on this major premise effectively undermines the basis for Petitioner’s other challenges. In Legal Issues 3 and 4, Petitioner Fuhriman asserts that these same residential density designations, and even those permitting higher densities, fail to comply with Goals 3, 4 and 10 of the Act because these densities do not provide housing for all economic segments of the population, they do not permit 7 du/acre, a density conducive to supporting transit, and that these densities harm the environment. The Board, however, does not find Petitioner’s assertions persuasive.

The Board has previously determined that Goals 3 and 4 do not require that every residential land use designation employed by a jurisdiction support transit (multimodal transportation) or provide for affordable housing. See *LMI/Chevron v. Town of Woodway (LMI/Chevron)*, CPSGMHB Case No. 98-3-0012, Final Decision and Order, (Jan. 8, 1999), at 29. A Plan providing a variety and mix of housing densities and types is guided by these GMA goals. Without more evidence, a challenge to residential map designations must fail. *Id.* Bothell’s Plan reflects such a variety and mix of housing densities and therefore has pursued these GMA Goals. Further, Petitioner’s conclusory statements asserting that the challenged designations require roads that will harm the

environment fall short of sustaining Petitioner's burden of proof. Therefore, the Board finds and concludes that Petitioner has **failed to carry the burden of proof** in demonstrating the challenged residential designations fail to be guided by Goals 3, 4 and 10. Petitioner Fuhriman's Legal Issues 3 and 4 are **dismissed**.

Citywide Plan Policies:

In addition to challenging residential FLUM designations, Petitioner also challenges specific citywide natural environment, urban design and housing Plan Policies as not being guided by the Goals of the Act. *See* Legal Issues 8, 9 and 15 and Appendix D. The Board's review of the challenged Natural Environment⁴⁰ Policies and Action indicates that these Policies demonstrate the City's commitment to the preservation, protection, restoration and enhancement of its natural environment, with special consideration being given to fish habitat [pursuant to RCW 36.70A.172], in an urban setting. Likewise, the "optional" Urban Design Policies reflect sensitivity to the natural environment without compromising urban development. The noted Housing and Land Use Policies refer to single family and multifamily development, accommodation of topographic constraints and open space, and promotion of infill within existing neighborhoods in a compatible manner. Further, Petitioner has failed to demonstrate how the *Isla Verde* case,⁴¹ is controlling over the Plan's generalized Urban Design Policies, since Plans are not regulations. Petitioner has failed to persuade the Board that these challenged Policies are not guided by Goals 1, 2, 3, 4, 6, 9 and 10 of the Act. The Board is not persuaded that any of these Policies thwart the attainment and fulfillment of these Goals. Petitioner has **failed to carry the burden of proof** in demonstrating that the challenged citywide Plan Policies are not guided by the referenced Goals of the Act. Petitioner Fuhriman's Legal Issues 8, 9 and 15 are **dismissed**.

Subarea Plan Policies:

Lastly, Petitioner Fuhriman challenges specific Policies within the City of Bothell's Subarea Plans as not being guided by the Goals of the Act. *See* Legal Issues 12 and 16 and Appendix E. Review of the challenged Subarea Plan Policies yields the same result as its review of the challenged citywide Plan Policies. These Subarea Plan Policies reflect the same direction as the citywide Plan Policies. Petitioner has failed to persuade the Board that these challenged Policies are not guided by Goals 1, 2, 3, 4, 5, 6, 9 and 10 of the Act. The Board is not persuaded that any of these Policies thwart the attainment and fulfillment of these Goals. Petitioner has **failed to carry the burden of proof** in demonstrating that the challenged Subarea Plan Policies are not guided by, the referenced Goals of the Act. Petitioner Fuhriman's Legal Issues 12 and 16 are **dismissed**.

⁴⁰ The Board notes that a "Natural Environment Element" is not a *required* element of a GMA Comprehensive Plan, pursuant to RCW 36.70A.070; nonetheless, many jurisdictions have wisely elected to include this optional element in their GMA Comprehensive Plans.

⁴¹ Citation provided *supra*. *Isla Verde* was apparently intended to relate to Petitioner's challenge to compliance with Goal 6 [private property rights].

Conclusion

- Petitioner has **failed to carry the burden of proof** in demonstrating the challenged residential designations fail to be guided by Goals 3, 4 and 10. Petitioner Fuhriman's Legal Issues 3 and 4 are **dismissed**.
- Petitioner has **failed to carry the burden of proof** in demonstrating that the challenged citywide Plan Policies are not guided by, the referenced Goals of the Act. Petitioner Fuhriman's Legal Issues 8, 9 and 15 are **dismissed**.
- Petitioner has **failed to carry the burden of proof** in demonstrating that the challenged Subarea Plan Policies are not guided by, the referenced Goals of the Act. Petitioner Fuhriman's Legal Issues 12 and 16 are **dismissed**.

E. CONSISTENCY WITH CPPS

Petitioner Fuhriman is the only Petitioner challenging whether the City of Bothell's Plan Update is consistent with the County-wide Planning Policies of King and Snohomish County. The PHO states Fuhriman's Legal Issue 6 as follows:

5. *Did the City of Bothell fail to meet the requirements of RCW 36.70A.070 and RCW 36.70A.100 by failing to adopt Comprehensive Plan policies that achieve consistency with King and Snohomish County wide planning Policies specifically the King County County-Wide planning policy LU-66, T-10, T-11 and T-12 and Snohomish County County-Wide planning policies HO-12, OC-2(a), OD-8, UG-16, UG-8, UG-5 and UG-14(b) and further defined by Snohomish County in Appendix C of the CPP?*

Applicable Law

While Petitioner Fuhriman's GMA citations refer to RCW 36.70A.070 and .100, it is obvious from the phrasing of the Legal Issue that the challenge is to whether Bothell's Plan Update is consistent with both King and Snohomish County's CPPS. Consistency with the CPPs is derived from RCW 36.70A.210(1), which provides, in relevant part:

For the purposes of this section, a "county-wide planning policy" is a written policy statement or statements used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100. Nothing in this section shall be construed to alter the land-use powers of cities. (emphasis added).

In addition, the Board has held that “comprehensive plans must be consistent with county-wide planning policies.” *Vashon-Maury, et al. v. King County, et al.*, CPSGMHB No. 95-3-008c, Final Decision and Order (October 23, 1995), at 34.

Discussion

Position of the Parties:

Petitioner Fuhriman argues that the City’s Plan is inconsistent with various King County County-Wide Planning Policies.⁴² Fuhriman PHB, at 55-59. Fuhriman contends that the City’s Plan is inconsistent with LU-66(b) because the City has established maximum, rather than minimum, densities for new construction in each residential zone. *Id.* at 56-57. Additionally, Fuhriman argues that the City’s Plan is inconsistent with LU-66(c) because the City has not adopted goals that identify the amount of each housing type. *Id.* at 57. Furthermore, Fuhriman argues the Plan is inconsistent with T-10, T-11, and T-12 because it does not permit 7 du/acre, the minimum density necessary for effective mass transit or multi-modal transportation. *Id.* at 59.

Fuhriman also argues that the Plan is inconsistent with several Snohomish County County-Wide Planning Policies.⁴³ *Id.* at 60-63. Fuhriman submits that the Plan violates HO-12 because it discourages innovative urban design techniques. *Id.* at 60. Additionally, Fuhriman maintains that the Plan violates OD-2 because it does not include strategies or land use policies to achieve urban densities. *Id.* Moreover, Fuhriman argues that the Plan violates OD-8 because its land use policies do not encourage mass transit or multi-modal transit. *Id.* at 62. Petitioner asserts that seventy-four percent of vacant, partially used, or redevelopable land located in the Snohomish County portion of Bothell is zoned for low density development. *Id.* Lastly, Fuhriman argues that the City’s Plan violates UG-14 because the City has not attained 4 du/acre in the R-9,600 zone since 1996 and has not adopted reasonable measures to provide for urban densities in this zone. *Id.* at 61.

The City responds that the Board should dismiss the issue because it is inadequately briefed. City Response, at 60-64. The portion of the issue related to RCW 36.70A.070 should be dismissed because Petitioner Fuhriman does not include any argument related to this provision of the Act. *Id.* at 60. Also, RCW 36.70A.070 does not impose any requirements regarding consistency with CPPs. *Id.* Furthermore, the alleged violation of RCW 36.70A.100 should be dismissed because Fuhriman has failed to brief the alleged inconsistencies. *Id.* at 64.

On the merits, the City argues that the Fuhriman has not met his burden of proving any inconsistency with the King County County-Wide Planning Policies. *Id.* at 64. The Plan is consistent with LU-66 because the City has clearly established minimum urban densities for each residential zone and has adopted numerous goals and policies which

⁴² LU-66, T-10, T-11, and T-12. *See* Appendix F.

⁴³ HO-12, OD-2(a), OD-8, UG-16, UG-8, UG-5, and UG-14(b). *See* Appendix G.

identify a target mix of housing types [e.g. HO-G1, P1, P9-11, P13, P16-19]. *Id.* at 65-66. Moreover, the Plan is not inconsistent with King County’s transportation policies because the Board did not intend that 4 net du/acre would automatically equate to inadequate transportation planning under the GMA. *Id.* at 67.

Similarly, the City argues that there is no facial inconsistency between Snohomish County County-Wide Planning Policies and the City’s Plan. *Id.* at 67-69. The City did not violate HO-12 because there are no specific requirements in the language of this policy that the City could have violated. *Id.* at 68. However, even if there were specific requirements, the City has complied with them by adopting policies which encourage a variety of housing types, by zoning for a variety of densities, and by actively using innovative techniques. *Id.* Moreover, the City has complied with OD-8 because it has planned for lawful urban densities and has adopted housing and transportation policies which plan for effective public transportation. *Id.* at 69. Lastly, the City argues that it has complied with UG-14 by establishing and adopting a review evaluation program as indicated by LU-P15 and LU-P17. *Id.*

In reply, Fuhriman argues that the City’s Plan, particularly LU-P4, is inconsistent with King County County-Wide Planning Policy LU-66 because the Plan has established a minimum lot size instead of a minimum density, and the plan does not promote a variety of densities and housing types because the vast majority of land available for development is zoned in two uses – R-9,600 and R-40,000. Fuhriman Reply, at 13-15.

Board Discussion:

While Petitioner has identified numerous CPPs of both King and Snohomish County which provide a unifying framework for the City of Bothell’s Plan Update, Petitioner only identifies one City Plan Policy LU-P4 (pertaining to the residential FLUM designations) as purportedly being inconsistent with any of these CPPs.⁴⁴ *See* Fuhriman PHB, at 56-63. As discussed *supra*, LU-P4’s definition of “net buildable area,” as well as the various “minimum lot size” designations set forth in LU-P4 comply with the Act, are consistent with prior Board interpretations of the Act, and fall within the City’s discretion. Further the Board has also concluded *supra*, that LU-P4 is guided by the various Goals of the Act. Again, the Board observes that Petitioner’s basis for raising this challenge is substantially undercut.

In relation to Petitioner’s CPP challenge, the Board agrees with the City. Petitioner offers little argument in the context of 2002 Plan Update Policies or provisions as being inconsistent with CPPs. In this Order, the Board has found certain of Bothell’s 2002 Plan Update designations and policies to be guided by the transportation and housing Goals of the Act. Here Petitioner references and relies on the same arguments to challenge consistency with several CPPs.

⁴⁴ Petitioner does identify a Policy – LU-P5 – from the prior Bothell Plan, but this Policy has been deleted and is not relevant in the present inquiry.

As evidenced by review of the relevant CPPs of each County, the CPPs are substantially more detailed and specific than the generalized language found in the GMA's Goals [RCW 36.70A.020]. Nonetheless, Petitioner largely references and relies upon the same arguments to challenge consistency with CPPs. Where Petitioner has offered new argument regarding LU-P4's consistency with either a King or Snohomish County CPP, the City has effectively rebutted it, and explained how the City's 2002 Plan Update [citing Plan Policies] is guided by and consistent with the relevant CPPs.

The cited King and Snohomish County CPPs speak to minimum densities – that is what Bothell's residential designations permit. The range of densities provided by Bothell, although not to Petitioner's liking, are appropriate urban densities, provide for a range of densities and these, among other Plan Policies, do address affordable housing and transportation CPPs. Although not abandoned, Petitioner has clearly **failed to carry the burden of proof** in demonstrating LU-P4's inconsistency with any of the challenged CPPs. Petitioner Fuhriman's Legal Issue 6 is **dismissed**.

Conclusion

- Petitioner has **failed to carry the burden of proof** in demonstrating LU-P4's inconsistency with any of the challenged CPPs. Petitioner Fuhriman's Legal Issue 6 is **dismissed**.

F. INTERNAL CONSISTENCY

Petitioners Fuhriman and North Creek Village pose challenges to the internal inconsistency of the City of Bothell's 2002 Plan Update. The PHO states Fuhriman's Legal Issues 5 and 13 as follows:

- 5. Do the following designations violate RCW 36.70A.070 by failing to provide internal consistency:*
 - A. Does the R 9600 Plan designation adopted and applied by the City of Bothell on its Map and in Land Use Policy 7 of the Downtown/NE 190th/Riverfront ("DNER") subarea conflict with Transportation Policy 14 or Housing Policy 1 of the DNER subarea or citywide goals UD-G3 or TR-G6?*
 - B. Does the R 9600 Plan designation adopted and applied by the City of Bothell on its Map and in Land Use Policy 3 of the Waynita/Simonds/Norway Hill ("WSNH") subarea conflict with Transportation Policy 8 or Housing Policy 1 of the WSNH subarea or citywide goals TR-G6 or UD-G3?*
- 13. Do the R 40,000, R 9,600, R 8,400, R 7,200, and R 5,400d Plan designations adopted and applied by the City of Bothell on its Land Use Map fail to comply with RCW 36.70A.070 [sic RCW 36.70A.110(2), RCW*

36.70A.020(4) and RCW 36.70A.070⁴⁵] by failing to provide internal consistency by conflicting with HO-G1, HO-P2 or HO-P25?

The PHO states North Creek Village's Legal Issue No. 5 as follows:

5. Did the City violate RCW 36.70A.070 by failing to provide internal consistency in its Comprehensive Plan, and adopting an inappropriate R-40,000 Plan density in the same portion of the Fitzgerald Subarea where it plans to construct a major arterial connector street between 228th and 240th (the Bothell Connector)?

Applicable Law

RCW 36.70A.070 provides:

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. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140 (emphasis added).

Internal consistency was explained by the Board more than a decade ago. In *West Seattle Defense Fund, et al., v. King County (WSDF I)*, CPSGMHB Case No. 94-3-0016, Final Decision and Order, (Apr. 16, 1995), at 27, the Board first stated,

Internal consistency means that provisions [of a Plan] are compatible with each other – that they fit together properly. In other words, *one provision may not thwart another*. Consistency can also mean more than one policy *not being a roadblock* for another; it can also mean that policies of a comprehensive plan, for instance, must work together in a coordinated fashion to achieve a common goal.

(Emphasis supplied.)

Discussion

Position of the Parties – Fuhriman Issues:

⁴⁵ See Discussion of PFR and PHO discrepancy under Preliminary Matters, *supra*.

Fuhriman asserts that the R-9600 Plan designation in DNER⁴⁶ and WSNH⁴⁷ subareas is inconsistent with various transportation goals and policies in the subareas and overall planning area⁴⁸ because the designation does not provide for 7 du/acre. Fuhriman PHB, at 44-49. In addition, Fuhriman contends that the R-40,000, R-9600, R-8400, R-7200, and R-5400 designations are inconsistent with various housing goals and policies⁴⁹ in the overall planning area because the designations do not provide for or promote a variety of residential densities and housing types. *Id.* at 49-55.

The City responds that the Board's holding in *LMI, et al. v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, FDO, at 22 (1999), precludes Petitioner Fuhriman from relying on urban density designations alone to assert that the City's Plan is inconsistent with its subarea and planning area-wide goals of promoting and encouraging mass transit. Bothell Response, at 55-57. Moreover, the City argues that review of the DNER and WSNH subarea plans show that the City has included a broad range of plan designations within these subareas, many of which are aimed at furthering the City's transportation and housing goals and policies, including those goals and policies cited by Petitioner as inconsistent. *Id.* at 57.

Lastly, the City asserts that Fuhriman has inadequately briefed Issue 13 regarding whether the density designations are inconsistent with goals and policies promoting a variety of residential densities. *Id.* at 57-58. On the merits, the City argues that its Comprehensive Plan provides a broad and appropriate range of urban densities. *Id.* at 34-37 and 58. The City points out that its Plan eliminated its former R-1, R-2, and R-3 zones [designations which permitted less than 4 du/acre]; includes multi-family residential designations; expands the use of the Residential-Activity Center designation, which provides for multi-family housing without prescribing a specific density; and contains a Specialized Senior Housing Overlay, which allows specialized senior housing development at higher densities than normally permitted in certain single family residential designations. *Id.* at 35-37

In reply, Fuhriman reasserts that the R-9600 density designations within the DNER and WSNH subareas are inconsistent with goals and policies promoting mass transit and multi-modal forms of transportation because the designation does not permit 7 du/acre. Fuhriman Reply, at 2-3.

Board Discussion – Fuhriman Issues:

Once again, Petitioner Fuhriman's argument is based upon a false premise. Namely that the City's residential designations, especially the R-9,600 designation, do not provide for appropriate urban densities, support transit, or provide a variety of densities in support of

⁴⁶ Downtown/NE 190th/Riverfront Subarea Plan [DNER] LU-P7. *See* Appendix F.

⁴⁷ Waynita/Simonds/Norway Hill Subarea Plan LU-P3. *See* Appendix F.

⁴⁸ DNER TP-14 and WSH TP-8; Planning Area-wide Goal TR-G6. *See* Appendix E and F.

⁴⁹ HO-G1, HO-P2 and HO-P25. *See* Appendix E.

affordable housing. As discussed in numerous Legal Issues *supra*, this is not the case. Nonetheless, Petitioner's conclusory argument on these issues relies upon this false premise. In particular, Petitioner fails to establish how the residential designations thwart a multimodal transportation system or affordable housing in the context of the Plan Update in aggregate. Consequently, Petitioner has **failed to carry the burden of proof** in demonstrating internal inconsistency among the challenged Plan and Subarea Plan policies and designations. Petitioner Fuhriman's Legal Issues 5A, 5B and 13 are **dismissed**.

Position of the Parties – Bothell Connector:

Petitioner North Creek argues that the City's Comprehensive Plan is internally inconsistent for three reasons. First, the City's R-40,000 designation in the Fitzgerald Subarea designed to protect critical areas is inconsistent with the City's plan to construct the Bothell Connector because the Bothell Connector will be constructed along 39th Avenue, right down the length of the largest wetland feature (Wetland #105) in the Fitzgerald Subarea. North Creek Village PHB, at 15. Second, the R-40,000 designation is inconsistent with the economic and transportation policies of the Plan because the designation creates an island of low density development between the Canyon Park and North Creek Regional Activity Centers. *Id.* Additionally, half of the affected portion of the Fitzgerald Subarea lies within the "Bothell Business Loop," which connects the business parks with the City Center. *Id.* Third, the City's density designations themselves are inconsistent because the area immediately on the west bank of North Creek is designated at higher densities (R-9,600 and R-5,400) than the area immediately on the east bank (R-40,000). *Id.* at 15-16.

In response, the City argues that North Creek Village provides no support for its claim that the Bothell Connector will be constructed along 39th Avenue through the largest wetland in the Fitzgerald Subarea. Bothell Response, at 58. While North Creek Village does point out that the Fitzgerald Subarea Plan contains two references to the Bothell Connector, neither of the references identifies 39th Avenue as the final alignment. *Id.* at 59. Moreover, the City asserts that North Creek Village fails to explain how the Bothell Connector would "thwart" the R-40,000 residential designation. *Id.* Lastly, the City argues that North Creek's two other inconsistency arguments relating to the economic policies and density designations should be disregarded because these issues were not included in North Creek's PFR, and are only supported by conclusory statements. *Id.* at 58-59.

In reply, North Creek argues that the City cannot deny that it is planning to construct the Bothell Connector along the 39th Avenue alignment because the route is clearly identified in the City's 6-year Transportation Improvement Plan. North Creek Village Reply, at 7; *citing* City of Bothell, Six-Year TIP, at.36 (Attachment M – HOM Ex. 1). Moreover, the City of Bothell's website indicates that the City has selected the 39th Avenue alignment as the preferred alternative for the Bothell Connector. *Id.*, *citing* City of Bothell, Official Website, Bothell Connector Project Notice (Attachment N – HOM Ex. 2).

Board Discussion – Bothell Connector:

The thrust of Petitioner’s argument is that the R-40,000 designation to protect a wetland and related critical areas is inconsistent with the pending or potential development of a possible 5-lane arterial roadway referred to as the “Bothell Connector” that will transect the area designated R-40,000. Instead, Petitioner infers that the area should be designated at a more intensive or higher density designation because it is between two Regional Activity Centers, within the “Bothell Business Loop” and an adjacent bank of North Creek is designated at higher densities.

It is obvious to the Board that Petitioner would have preferred a different designation; and Petitioner had the opportunity to persuade the Council to do so. However, the City chose to do otherwise; and as the Board discussed *supra*, the R-40,000 designation in the Fitzgerald Subarea was not clearly erroneous and complied with the GMA. The fact that a road may, or even will, go through a critical area and connect two Regional Activity Centers, does not negate the validity of the R-40,000 designation, especially between two higher intensity areas. The Board acknowledges that such a *project*, if it does materialize, will be subject to the provisions of the State Environmental Policy Act (SEPA). Any probable adverse environmental impacts would be identified and mitigated through that process. Petitioners have **failed to carry their burden of proof** in demonstrating internal inconsistency among a Subarea Plan designation and a possible roadway project – the Bothell Connector. North Creek Village’s Legal Issue No. 5 is **dismissed**.

Conclusion

- Petitioner has **failed to carry the burden of proof** in demonstrating internal inconsistency among the challenged Plan and Subarea Plan policies and designations. Petitioner Fuhriman’s Legal Issues 5A, 5B and 13 are **dismissed**.
- Petitioners have **failed to carry their burden of proof** in demonstrating internal inconsistency among a Subarea Plan designation and a possible roadway project – the Bothell Connector. North Creek Village’s Legal Issue No. 5 is **dismissed**.

G. 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. However, since the Board has not found that any of the Petitioners’ challenges succeeded in demonstrating noncompliance with the goals and requirements of the Act, **the Board need not address any request for invalidity**.

V. ORDER

Based upon review of the four Petitions for Review, the extensive pre-hearing and post-hearing briefing and exhibits submitted by the parties, having conducted the hearing on the merits, considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

- The City of Bothell's adoption of Ordinance No. 1942, adopting the City of Bothell 2004 Plan Update – *Imagine Bothell*, was **not clearly erroneous**.
- Petitioners either **abandoned** issues, **failed to carry their burden of proof**, or the City's challenged actions were found to **comply** with the various provisions of the Act.
- The 18 Legal Issues posed in Petitioner Fuhriman's PFR are **dismissed**; the 2 Legal Issues posed in MBA's PFR are **dismissed**; the 6 Legal Issues posed in North Creek Village's PFR are **dismissed**; and the 6 Legal Issues posed in the Berry, Phillips, Camwest PFR are **dismissed**.
- The matter of *Fuhriman, et al v. City of Bothell (Fuhriman II)*, CPSGMHB Case No. 05-3-0025c is **closed**.

So ORDERED this 29th day of August 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

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 242-02-832.⁵⁰

⁵⁰ Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

APPENDIX A

Procedural Background

A. General

On January 14, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Richard Apollo Fuhriman (**Petitioner** or **Fuhriman**). The matter was assigned Case No. 05-3-0005. The matter is referred to as *Fuhriman II v. City of Bothell*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenged the City of Bothell's (**Respondent** or **Bothell**) adoption of Ordinance No. 1942, amending and updating the City of Bothell's comprehensive plan [*Imagine Bothell*] (**Plan Update**). The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On January 21, 2005, the Board issued a Notice of Hearing in the *Fuhriman II* matter and set the prehearing conference for March 3, 2005, at the Board's office.

On February 11, 2005, the Board received a "Revised and Amended Petition for Review" from Petitioner Fuhriman. This timely amended PFR added two Legal Issues, to bring the total to 18.

On February 14, 2005, the Board received a "Final Revised and Amended Petition for Review" from Petitioner Fuhriman. This amended PFR was timely filed.

On February 24, 2005, the Board received a PFR from the Master Builders Association of King and Snohomish Counties (**Petitioner II** or **MBA**). The case was assigned CPSGMHB Case No. 05-3-0021. MBA challenges Bothell's Plan Update as being noncompliant with various provisions of the GMA.

On February 25, 2005, the Board received a PFR from North Creek Village LLC (**Petitioner III** or **North Creek Village**). The case was assigned CPSGMHB Case No. 05-3-0022. North Creek Village challenges Bothell's Plan Update as being noncompliant with various provisions of the GMA.

On February 25, 2005, the Board issued an Order of Consolidation and Notice of Hearing (**2/25/05 Order**) in the *Fuhriman II* matter. This 2/25/05 Order consolidated three PFRs, but kept the prehearing conference (**PHC**) date as March 3, 2005, at the Board's office.

After the 2/25/05 Order was issued, on that same day, the Board received a PFR from James and Sharlyn Phillips, Tom and Susan Berry and Camwest Development, Inc. (**Petitioner IV** or **Phillips**). The case was assigned CPSGMHB Case No. 05-3-0023. Phillips challenges Bothell's Plan Update as being noncompliant with various provisions of the GMA.

On February 28, 2005, the Board received a PFR from Gateway Office LLC. (**Petitioner V** or **Gateway**). The case was assigned CPSGMHB Case No. 05-3-0024. Gateway challenges Bothell's Plan Update as being noncompliant with various provisions of the GMA.

On March 1, 2005, the Board received a PFR from Futurewise. (**Petitioner VI** or **Futurewise**). The case was assigned CPSGMHB Case No. 05-3-0025. Futurewise challenges Bothell's Plan Update as being noncompliant with various provisions of the GMA.

On March 2, 2005, the Board issued an "Order of Consolidation and Notice of Hearing" (**NOH**). The NOH rescinded the prior notices of hearing and rescheduled the PHC for March 10, 2005.

On March 10, 2005, the Board conducted the PHC at the Financial Center, Seattle. Board member Edward G. McGuire, PO in this matter, conducted the conference. Board members Bruce C. Laing and Margaret A. Pageler were also present for the Board. Richard Apollo Fuhriman appeared *pro se*. Alan L. Wallace represented Petitioner MBA; Cynthia A. Kennedy and William H. Chapman represented Petitioner North Creek Village; Robert Johns represented Petitioner Phillips/Berry/Camwest; G. Richard Hill and Courtney Flora represented Petitioner Gateway; John Zilavy represented Petitioner Futurewise. Michael S. Weight and Michael C. Walter represented Respondent City of Bothell. David S. Mann represented potential Intervener Friends of North Creek and its Neighbors. Jay Evered appeared for potential Intervener Norway Hill Residents. Also in attendance were Ingrid and Bob Fuhriman, Bill Summers (Gateway), Bill Wiselogle (Bothell), Glenn Simms (FEARN) and Jenny Lynn Zappala (Bothell-Kenmore Reporter).

On March 11, 2005, the Board issued the "Prehearing Order and Order on Intervention" (**PHO**). The PHO set the final briefing schedule, hearing date and solidified the Legal issues to be decided.

B. Intervention

On March 7, 2005 the Board received: 1) "Motion to Intervene by Friends of North Creek and its Neighbors" (**North Creek Motion**); and 2) "Motion and Memorandum of Norway Hill Residents to Intervene" (**Norway Hill Motion**).

On March 11, 2005, after the prehearing conference, the Board issued the "Prehearing Order and Order on Intervention" (**PHO**). The PHO **granted** intervention to the two potential interveners.

C. Motions to Supplement the Record and Amend the Index

On March 10, 2005, the Board received "Respondent City of Bothell's Index of Documents" (Index).

On March 28, 2005, the Board received "Petitioner Fuhriman's Motion to Amend Respondent City of Bothell's Index of Documents" (**Fuhriman Motion – Amend**). The motion proposes to add 32 documents to the record as items "inadvertently omitted." Attached to the motion was an e-mail string, dated March 28, 2005 that included: 1) message from Fuhriman to Wiselogle asking that the Index be amended; 2) message from Wiselogle to Fuhriman indicating no objection to amending the Index; 3) message from Fuhriman to Wiselogle indicating new Index numbers for new items *i.e.* 803-834 (**Amended Index**); and 4) message from Jane Kiker/Peter Eglick [Bothell's Attorneys in this matter] acknowledging no objection to amending the Index, but indicating the City would not be submitting an "Amended Index" to the Board. Also attached to the motion was a proposed listing of documents with proposed Index numbers from 803 through 834.

Also on March 28, 2005, the Board received from the City of Bothell, “Notice of Inclusion of Additional Record Documents in Index of Documents” (**Amended Index 2**). The City’s Amended Index 2 includes additions to Index Documents 792 and 802; and proposes three additional document references [803, 804 and 805 *i.e.* 835, 836 and 837].

Finally, on March 28, 2005, the Board received “North Creek Village LLC’s Motion to Supplement the Record” (**North Creek Motion – Supp.**), with five attached proposed exhibits (Attachments 1 through 5).

On April 4, 2005, the Board received “Respondent City of Bothell’s Opposition to Motion to Supplement filed by Petitioner North Creek Village, LLC” (**Bothell Response – Supp.**) The City did not object to four items being added to the record but did object to one item.

On April 7, 2005, the Board received “North Creek Village LLC’s Reply to the City of Bothell’s Opposition to the NCV’s Motion to Supplement the Record” (**North Creek Village Reply – Supp.**), with one reattached proposed exhibit (Attachment 1).

On April 11, 2005, the Board issued its “Order on Motions to Supplement the Record.” The 4/11/05 Order acknowledged that the Index had been amended to include the Fuhriman items, and granted North Creeks Motion to supplement the record with four items; one item was denied.

On May 4, 2005 the Board received the following **Core Documents**: King County Countywide Planning Policies; Snohomish County Countywide Planning Policies (from Petitioner Fuhriman) and *Imagine Bothell*. . Incorporating the 2004 Plan Update (from the City of Bothell).

C. Dispositive Motions

No dispositive motions were filed in this matter.

D. Segregation of Consolidated Petitions and Settlement Extensions

On April 1, 2005, the Board received a letter indicating that Gateway Office LLC and the City of Bothell had agreed to enter settlement discussions. Attached to the Letter was a “Stipulated Agreement and Order Extending the Time for Issuing a Decision” (**Settlement Extension Request**) signed by representatives of Petitioner Gateway Office LLC and Respondent the City of Bothell. The parties ask for a 30-day settlement extension in order to pursue settlement discussions. Letter, at 1 and Settlement Extension Request, at 2.

On April 5, 2005, the Board issued an “Order Segregating Gateway Office LLC Petition for Review [CPSGMHB Case No. 05-3-0024] from the Consolidated Case and Granting a 30-day Settlement Extension.” The Board's 4/5/05 Order indicated that the Gateway matter would proceed according to a separate schedule.

On May 31, 2005, the Board received a “Stipulated Agreement Between Respondent City of Bothell and Petitioner Futurewise, and Order Extending the Time for Issuing a Decision and All Other Actions” (**Settlement Extension Request**) signed by representatives of Petitioner Futurewise and Respondent the City of Bothell. The parties ask for a 90-day settlement extension in order to pursue settlement discussions.

On June 3, 2005, the Board issued an “Order Segregating Futurewise Petition for Review [CPSGMHB Case No. 05-3-0025 hereafter 05-3-0033] from the Consolidated Case and Granting 90-day Settlement Extension]. The Board’s 6/3/05 Order indicated that Futurewise IV matter would proceed according to a separate schedule.

On June 3, 2005, the Board received a “Stipulated Agreement Between Respondent City of Bothell and Petitioner Gateway Office LLC, and Order Extending the Time for Issuing a Decision and all Other Actions” (**Second Settlement Request**). The request asks that the parties be given an additional 60-days to continue settlement discussions and stipulates that Legal Issue No. 2 be dismissed from the proceeding.

On June 7, 2005, the Board issued “Order Granting a Second 60-day Settlement Extension.”

The segregation of these two PFRs from the consolidated case left four PFRs and their respective issues in the consolidated case [Fuhriman, MBA, North Creek Village and Phillips/Berry/Camwest.]

E. Briefing and Hearing on the Merits

On May 4, 2005, the Board received “Petitioner Fuhriman’s Opening Brief” (**Fuhriman PHB**), with a notebook containing 33 exhibits.

On May 5, 2005, the Board received: 1) “North Creek Village, LLC’s Pre-hearing Brief” (**North Creek Village PHB**), with 23 attached exhibits; and 2) “Petitioner Phillips, Berry and Camwest Development, Inc. Prehearing Brief” (**Camwest PHB**), with three attached exhibits.

On May 6, 2005, the Board received “Master Builders Association of King and Snohomish Counties Prehearing Brief” (**MBA PHB**), with four attachments.

On June 2, 2005, the Board received: 1) “Response Brief of the City of Bothell” (**Bothell Response**), with two notebooks containing 36 exhibits [Volume 1 – 29 documents and Volume II – 7 documents]; 2) “Statement of Intervenor Friends of North Creek and Its Neighbors in Support of the City of Bothell” (**Friends of North Creek Response**), with no attached exhibits; and 3) Interveners Norway Hill Residents Prehearing Brief (**Norway Hill Response**), with no attached exhibits.

On June 6, 2005, the Board issued an “Order Setting Location for Hearing [schedule for HOM arguments].

On June 8, 2005, the Board received: 1) “Petitioner Fuhriman’s Reply Brief to the City of Bothell’s Prehearing Brief” (**Fuhriman Reply - Bothell**); 2) “Petitioner Fuhriman’s Reply to Interveners Norway Hill Residents Prehearing Brief” (**Fuhriman Reply – Norway Hill**); 3) “Master Builders Association of King and Snohomish Counties’ Reply Brief” (**MBA Reply**), with three attached exhibits; 4) North Creek Village, LLC’s Reply Brief” (**North Creek Village Reply**), with 17 attached exhibits; and 5) “Petitioner Phillips, Berry and Camwest Development Inc. Reply Brief” (**Camwest Reply**), with no attached exhibits.

All prehearing briefing was timely filed.

On June 14, 2005, the Board held a hearing on the merits (**HOM**) in conference room 1940, Seattle Municipal Tower, 700 Fifth Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Margaret A. Pageler and Bruce C. Laing were present for the Board. Petitioner Richard Apollo Fuhriman appeared *pro se*, Petitioner MBA was represented by Alan L. Wallace, Petitioner North Creek Village LLC was represented by Cythia Kennedy and Bill Chapman, Petitioner Berry/Phillips/Camwest was represented by Robert D. Johns. Respondent City of Bothell was represented by Peter J. Eglick, Jane S. Kiker and Joshua A. White. Jan Erik Aagaard and William Moritz appeared for Intervener Norway Hill Residents and Intervener Friends of North Creek was not represented. Board externs Sabrina Wolfson and Brad Paul also attended. Court reporting services were provided by Eva Jankovitz of Byers and Anderson. The hearing convened at 10:00 a.m. and adjourned at approximately 4:45 p.m. The following persons also attended part or all of the day-long HOM: Andrea Perry, Janice McClean, George Perry, Michael Weight, Bill Wiselogle, Bruce Blackburn, Glen Sims, Gary Wight, William Daspit, and Mike Westerly. A transcript of the HOM was ordered.

F. Post-Hearing Submittals

On June 16, 2005, the Board received “Petitioner Phillips, Berry and Camwest Development Inc. Motion to Allow Post-Hearing Brief and Post-Hearing Brief” (**Camwest Motion and Camwest Post-Hearing Brief**).

On June 20, 2005 the Board received an electronic version of the transcript (**HOM Transcript**).

On June 21, 2005, the board received “City of Bothell’s Response to Motion by Camwest, et al. to Allow Post-Hearing Brief and Response to Post Hearing Brief” (**Bothell Post-Hearing Response**).

On June 27, 2005, the Board received “Petitioner Fuhriman’s Response to the City of Bothell’s Response to Camwest’s Post-Hearing Brief and Motion” (**Fuhriman Post-Hearing Brief**)

On June 27, 2005, the Board issued an “Order Scheduling Decision on Post-Hearing Motion and Responses.” The 6/27/05 Order instructed the parties that the Board would address the question of whether to accept the “Post-Hearing Briefs” in its Final Decision and Order.

On July 5, 2005, the Board received “The City of Bothell’s Objection and Motion to Strike or in the Alternative, Response to Fuhriman’s Post-Hearing Brief” (**Bothell Objection**).

On August 19, 2005, the Board received “City of Bothell’s Statement of Additional Authorities.” Included was an extensive quote from a recent Supreme Court decision in *Viking Properties Inc. v. Holm*, Supreme Court No. 240-1, filed August 18, 2005.⁵¹

On August 23, 2005, the Board received “Petitioner Fuhriman’s Reply to City of Bothell’s Statement of Additional Authorities.”

On August 26, 2005, the Board received “Motion to Strike Petitioner Fuhriman’s Reply to Bothell’s Statement of Additional Authority.

⁵¹ The Board has access to the entire Viking decision – the Board **takes notice**, pursuant to WAC 242-02-660(2).

APPENDIX B

Legal Issues from PHO by Petitioner

[Legal Issues shown in ~~strikeout~~ have either been **segregated** from this consolidated case or **abandoned** since they were not briefed in the PHBs]

Fuhriman PFR Issues (18)

[Citywide & Subareas Plans: DNER,⁵² WSNH,⁵³ MBH,⁵⁴ WH⁵⁵]

1. Do the R 40,000, R 9,600, R 8,400, R 7,200, and R 5,400d Plan designations adopted and applied by the City of Bothell on its Land Use Maps (Map) and within its subarea plans fail to comply with RCW 36.70A.110 (2) and Goals 1 and 2 of the Act by failing to provide for appropriate minimum urban densities throughout the City's residential zoned areas?
2. Does LU P4 which regulates density by establishing minimum lot size restrictions in each Plan designation or classification violate Goals 1 and 2 of the Act by using an inappropriate and inflexible method to determine appropriate urban densities?
3. Do the R 40,000, R 9,600, R 8,400, R 7,200, and R 5,400d Plan designations as applied by the City of Bothell on its Map and within its subarea plans fail to comply with RCW 36.70A.020(4)?
4. Did the City fail to provide for urban densities in the R 40,000, R 9,600, R 8,400, R 7,200, and R 5,400d Plan designations that provide for effective, efficient, and environmentally responsible multimodal transportation in violation of RCW 36.70A.020 (3) and (10) or are these lot sizes inconsistent with HO-P25 or TR-G6?
5. Do the following designations violate RCW 36.70A.070 by failing to provide internal consistency:
 - A. Does the R 9600 Plan designation adopted and applied by the City of Bothell on its Map and in Land Use Policy 7 of the Downtown/NE 190th/Riverfront ("DNER") subarea conflict with Transportation Policy 14 or Housing Policy 1 of the DNER subarea or citywide goals UD-G3 or TR-G6?
 - B. Does the R 9600 Plan designation adopted and applied by the City of Bothell on its Map and in Land Use Policy 3 of the Waynita/Simonds/Norway Hill ("WSNH") subarea conflict with Transportation Policy 8 or Housing Policy 1 of the WSNH subarea or citywide goals TR-G6 or UD-G3?
6. Did the City of Bothell fail to meet the requirements of RCW 36.70A.070 and RCW 36.70A.100 by failing to adopt Comprehensive Plan policies that achieve consistency with King and Snohomish County wide planning Policies specifically the King County County-Wide planning policy LU-66, T-10, T-11 and T-12 and Snohomish County County-Wide planning policies HO-12, OC-2(a), OD-8, UG-16, UG-8, UG-5 and UG-14(b) and further defined by Snohomish County in Appendix C of the CPP?
7. Did the City violate RCW 36.70A.215 (4) in failing to provide Plan policies and designations to adopt and implement reasonable measures to achieve appropriate urban

⁵² Downtown/190th/Riverfront Subarea Plan.

⁵³ Waynita/Simonds/Norway Hills Subarea Plan

⁵⁴ Maywood/Beckstrom Hill Subarea Plan

⁵⁵ West Hill Subarea Plan

- densities in Plan designations as necessary to bring the City's policies into compliance with the goals and requirements of the GMA, specifically Goals 1 and 2 and RCW 36.70A.110(2) and as identified in Snohomish County in its County-wide planning policies, UG-14(b) and further defined by Snohomish County in Appendix C of the CPP?
8. Do Natural Environment Policies NE-P8 through NE-P11, NE-P23, NE-P26, NE-P33, NE-P36, NE-P38 and Natural Environment Action NE-A12 violate goals 1,2,3,6 or 10 and RCW 36.70A.172 by seeking to inappropriately restrict development?
 9. Do Urban Design Policies UD-P7, UD-P15, UD-P17 and UD-P19 violate goals 1,2,3,6 and 10 and RCW 36.70A.172 of the Act?
 - ~~10. Do land use policies 2, 3 and 4 of the WSNH subarea plan and land use policy 7 of the DNER subarea plan provide for appropriate minimum urban densities within the areas addressed by those policies in violation of Goals 1, 2 and 4 of the Act?~~
 11. Do Land Use policies 2, 3 or 4 of the WSNH subarea plan and land use policy 7 of the DNER subarea plan violate goals 1, 2 and 4 of the Act and RCW 36.70A.070 which require internal and external consistency within and between county-wide planning policies, the City comprehensive plan and subarea plans and the adopted Comprehensive Plan Map, by precluding application of flexible development regulations, such as clustering provisions, PUD/PRD regulations, and other innovative and flexible regulatory instruments necessary to achieve environmental, recreation, transportation, urban design, housing and other city and county-wide planning policies, while providing for minimum urban densities?
 12. Do Natural Environment Polices 1, 5, 6 or 7 of the WSNH and Natural Environment Policies 1, 4, 5, or 6 and Natural Environment Actions 4, 5 or 6 of the DNER subarea plans violate goals 1, 2 and 6 of the Act by inappropriately restricting development activity in significant portions of the subarea?
 13. Do the R 40,000, R 9,600, R 8,400, R 7,200, and R 5,400d Plan designations adopted and applied by the City of Bothell on its Land Use Map fail to comply with RCW 36.70A.070 [*sic* RCW 36.70A.110(2), RCW 36.70A.020(4) and RCW 36.70A.070⁵⁶] by failing to provide internal consistency by conflicting with HO-G1, HO-P2 or HO-P-25?
 14. Did the City violate RCW 36.70A.090 because its Plan fails to provide for effective, innovative land use management techniques, including, but not limited to transfer of density, density bonuses, cluster housing, zero lot line, etc.; and was the elimination of City Land Use Policy which stated: “LU-P5 “Encourage innovative land development concepts and techniques which further other goals and policies of this Plan” (in the previous Comprehensive Plan) appropriate in light of goals 1, 2, 4, 6, 9 and 10 of the Act or RCW 36.70A.215?
 15. Do housing goal HO-G6, housing policy HO-P3 or HO-P7 or Land-Use Policy LU-P6, LU-P11 violate goals 1, 2, 4, 6, 9 and 10 of the Act?
 16. Do UD-P7, UD-P25, UD-P35, Land Use Policy 7 of the Maywood/Beckstrom Hill subarea (“MBH”), Natural Environment Policy 1 of MBH; Westhill subarea LUP-1, 2, 3 or 4, Natural Environment Policy 1; DNER Land Use Policy 16, Natural Environment Policy 1, 4, 5 or 6 and Natural Environment Actions 1, 2 or 3, Urban Design Policy 7; WSNH Urban Design Actions 1, 2 or 3 and Urban Design Policies 3, 5 or 6, alone or when combined with LU-P4 violate RCW 36.70A.030[*sic*.020](1), (2), (3), (4), (5) or (6)?
 17. Did the City violate RCW 36.70A.020(11) and BMC 14.02.250(B)(2) during the City’s update and review of its PLAN and implementing development regulations?

⁵⁶ See Discussion of PFR and PHO discrepancy under Preliminary Matters, *supra*.

18. ~~Did the City fail to ensure predictability, timeliness and/or fairness in the processing of permits under RCW 36.70A.020(7)?~~

MBA PFR Issues (2)

[Citywide Plan]

1. ~~Did the City of Bothell violate RCW 36.70A.020(1), .110 and .130, because its comprehensive plan continues to require residential development within an urban growth area at less than four dwelling units per acre, as evidenced by policy LU P4 and the associated comprehensive Plan Map?~~
2. ~~Did the City of Bothell violate RCW 36.70A.020(1), .110 and .130, because its comprehensive plan continues to require infill residential development within its urban growth area at less than four units per acre, as evidenced by policy LU P6?~~

North Creek Village PFR Issues (6)

[Fitzgerald Subarea Plan]

1. Did the City violate RCW 36.70A.110(2) by failing to plan for urban densities within the Fitzgerald Subarea, and instead adopting an R-40,000 Plan density that does not achieve urban densities in the UGA?
2. Did the City violate RCW 36.70A.020(1) and (2) by failing to plan for appropriate urban densities within the Fitzgerald Subarea, and instead adopting an R-40,000 Plan density that promotes sprawling low density development?
3. Did the City violate the GMA, and specifically the best available science requirement under RCW 36.70A.172(1), in the Fitzgerald Subarea by misapplying the *Litowitz* test and including an R-40,000 Plan density that does not meet the *Litowitz* criteria?
4. Did the City violate RCW 36.70A.090 in the Fitzgerald Subarea by failing to provide for innovative land use management techniques like clustering housing and increasing densities away from critical area as an alternative to retaining inappropriately low densities adjacent to critical areas?
5. Did the City violate RCW 36.70A.070 by failing to provide internal consistency in its Comprehensive Plan, and adopting an inappropriate R-40,000 Plan density in the same portion of the Fitzgerald Subarea where it plans to construct a major arterial connector street between 228th and 240th (the Bothell Connector)?
6. ~~Did the City violate RCW 36.70A.020(11) and .140 in the Fitzgerald Subarea by failing to provide adequate notice and opportunity for public participation regarding the use of the *Litowitz* test, the application of an R-40,000 Plan density and the critical habitat protection area criteria?~~

Berry, Phillips and Camwest PFR Issues (6+)

[Citywide and Subarea Plans for Fitzgerald & North Creek]

1. Did the City fail to be guided by the goals contained in RCW 36.70A.020, specifically goals (1), (2) and (4), in adopting Ordinance No. 1942, with its R-40,000 and R-9600 land use designations (Policy LU-P4), Fitzgerald/35th Avenue SE

- Subarea Plan Land Use Policy 6(a), and/or North Creek/NE 195th Street Subarea Plan Land Use Policy 10?
2. Does Ordinance No. 1942, including its Land Use designation maps, fail to comply with RCW 36.70A.110(2) because:
 - a. The City's R-40,000 land use designation (Policy LU-P4)
 - i. Is not supported by, nor does it meet the standards set forth in *LMI v. Woodway* for designations resulting in densities less than four dwelling units per acre?
 - ii. Precludes urban densities?
 - b. Fitzgerald/35th Avenue SE Subarea Plan Land Use Policy 7
 - i. Is not supported by, nor does it meet the standards set forth in *LMI v. Woodway* for designations resulting in densities less than four dwelling units per acre?
 - ii. Precludes urban densities?
 - c. Fitzgerald/35th Avenue SE Subarea Plan Land Use Policy 8
 - i. Is not supported by, nor does it meet the standards set forth in *LMI v. Woodway* for designations resulting in densities less than four dwelling units per acre?
 - ii. Precludes urban densities?
 - d. The City's R-9600 land use designation (Policy LU-P4) precludes urban densities as a result of the City's other land use policies, including Fitzgerald 35th Avenue SE Subarea Plan Land Use Policy 6(a), and existing development regulations, including but not limited to minimum lot width and other dimensional requirements?
 - e. Policy LU-P4 and/or City's Fitzgerald/35th Avenue SE Subarea Plan Land Use Policy 7 effectively preclude urban densities sufficient for urban growth that is projected to occur in the county for the twenty year period?
 - f. Fitzgerald/35th Avenue SE Subarea Plan Land Use Policy 6(a) effectively precludes urban densities?
 - ~~g. North Creek/NE 195th Street Subarea Plan Land Use Policy 10

 - ~~i. Is not supported by, nor does it meet the standards set forth in *LMI v. Woodway* for designations resulting in densities less than four dwelling units per acre?~~
 - ii. Effectively precludes urban densities?~~
 3. Did the City violate RCW 36.70A.110 and WAC 365-195-335 by adopting Ordinance No. 1942, specifically LU -P4 and/or Fitzgerald/35th Avenue SE Subarea Plan Policy 7, which changes available urban densities, and lowers densities in urban growth areas below minimum urban density standards, without showing its work as to the impact of Ordinance No. 1942 on the sizing of the UGA?
 4. Did the City violate RCW 36.70A.070(1) in adopting Ordinance No. 1942, specifically the R-9600 and R-40,000 land use designations (Policy LU-P4), North Creek/NE 195th Street Subarea Plan Land Use Policy 10, and Fitzgerald/35th Avenue SE Subarea Plan Land Use Policy 6(a) and 7, or any one of the foregoing policies, because they result in a failure to designate urban areas to accommodate urban growth at appropriate urban densities, preclude of urban densities or both?
 - ~~5. Did the City violate RCW 36.70A.130 in adopting Ordinance No. 1942, specifically the R-96 and R-40,000 land use designations (Policy LU-P4), North Creek/NE 195th Street Subarea Plan Land Use Policy 10, and Fitzgerald/35th Avenue SE Subarea Plan Land Use Policies 6(a) and 7, or any one of the foregoing policies,~~

~~because they fail to designate urban areas to accommodate urban growth at appropriate urban densities?~~

- ~~6. Did the City violate RCW 36.70A.130(2) and/or 36.70A.140 in adopting Ordinance No. 1942, specifically Fitzgerald /35th Avenue SE Subarea Plan Land Use Policy 8, by failing to ensure public participation and barring the public the opportunity to propose amendments to the Comprehensive Plan in a manner inconsistent with the City's public participation program?~~

Gateway PFR Issues (5)

[North Creek Subarea Plan]

- ~~1. Whether the City violated GMA public participation requirements in adopting special site specific conditions in the North Creek/195th Street Subarea Plan without providing for GMA public notice and comment? [RCW 36.70A.035, .130 and .140]~~
- ~~2. Whether the Mayor's demonstrated bias against development of the property violated GMA public participation requirements?~~
- ~~3. Whether the City's adoption of special site specific conditions in the North Creek/NE 195th Street Subarea Plan creates an internal inconsistency in the City's Comprehensive Plan in violation of RCW 36.70A.070 and RCW 36.70A.080(2)?~~
- ~~4. Whether the City's adoption of special site specific conditions in the North Creek/NE 195th Street Subarea Plan was arbitrary and discriminatory?~~
- ~~5. Whether the Plan violates GMA planning goals 6 and 11?~~

Futurewise Issues (1) [05-3-0025]

[Citywide]

- ~~1. Does the adoption of Ordinance No. 1942, updating and revising the City's comprehensive plan, fail to comply with RCW 36.70A.020(4) and RCW 36.70A.070(2) when the updated comprehensive plan **does not**: include (a) an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) a statement of goals, policies and objectives and mandatory provisions for the preservation, improvement and development of housing; (c) the identification of sufficient land for housing, including, but not limited to, government assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) adequate provision for existing and projected needs of all economic segments of the community?~~

APPENDIX C

Challenges to Bothell Plan Update by TOPICAL AREA

Fuhriman II, et al., v. City of Bothell
CPSGMHB Consolidated Case No. 05-3-0025c

[Legal Issues shown in ~~strikeout~~ have either been **segregated** from this consolidated case or **abandoned** since they were not briefed in the PHBs]

1. Appropriate Urban Densities [Citywide or of Subarea Plans]

- *Fuhriman* PFR Issues: 1, 2 ~~and 10~~ 11 [DNER & WSNH]
- ~~MBA PFR Issues: 1 and 2~~
- *North Creek Village* PFR Issues: 1, 2 and 3 [All Fitzgerald]
- *Phillips/Berry/Camwest* PFR Issues: 1, 2a-f g, 3, 4, ~~and 5~~ [and for Fitzgerald and North Creek]

2. Notice and Public Participation

- *Fuhriman* PFR Issue: 17
- ~~North Creek Village PFR Issue: 6~~
- ~~Phillips/Berry/Camwest PFR Issue: 6~~
- ~~Gateway PFR Issues: 1, 2 and 5 [North Creek]~~

3. Internal Consistency

- *Fuhriman* PFR Issues: 5a, 5b and 13
- *North Creek Village* PFR Issue: 5
- ~~Gateway PFR Issue: 3~~

4. Consistency with County-wide Planning Policies

- *Fuhriman* PFR Issue: 6

5. Compliance with Goals [specific provisions and individual goals]

- *Fuhriman* PFR Issues: 3, 4, 8, 9, 12 [DNER, WSNH], 15, 16 [DNER, WSNH, MBH & Westhill], ~~and 18~~
- ~~Gateway PFR Issues: 4 and 5~~

6. Provision for Innovative Techniques or Reasonable Measures in Plan Update

- *Fuhriman* PFR Issues: 7, ~~14~~ [DNER & WSNH] and 14
- ~~North Creek Village PFR Issue: 4~~

~~7. Compliance with Housing Element~~

- ~~Futurewise PFR Issue: 1~~

APPENDIX D

Relevant Provisions of Bothell's Comprehensive Plan – Citywide Plan Policies

Housing Element

HO-G1 To promote a variety of residential densities and housing types to ensure an adequate choice of attractive living accommodations to persons desiring to reside in Bothell.

HO-G6 To ensure the vitality and character of established residential neighborhoods.

HO-P2 Provide for a range of densities to ensure maximum choice in housing options for persons desiring to live in Bothell.

HO-P3 Promote single family and multiple family housing design, including subdivision, site and building design, which enhances the community image, ensures compatibility with surrounding development, and promotes City energy, transportation, historic preservation, urban design and parks and recreation goals and policies.

HO-P7 Ensure that infill development is compatible and in scale with surrounding existing development.

HO-P25 Promote an appropriate supply and mix of housing to meet the needs of people who work and desire to live in Bothell, especially near existing and planned transportation and employment centers.

Land Use Element

LU-P6 Preserve the character of established neighborhoods and protect such neighborhoods from intrusion by incompatible uses. Infill development in established neighborhoods should be sensitive to and incorporate to the maximum extent possible those features which impart to each neighborhood a unique identity and sense of coherence. Examples of such features include a particular scale or style of housing, commonality in building materials (e.g. brick vs. wood siding), a predominant street pattern, a prevailing lot size and width, and similarities in landscaping from property to property.

LU-P7 Ensure that private property is not taken for public use without just compensation having been made.

LU-P11 Protect and preserve tree-covered hillsides and hilltops — particularly the feathered edge ridgeline image so valued by the community — for their visual and aesthetic benefits to Bothell, as well as for their functions as habitat, erosion control, and runoff retardation. See also Land Use Policy LU-P4, designation 16, Open Space. See **Figure LU-6**.

Natural Environment Element

NE-P8 Preserve, protect, restore and enhance the Sammamish River and North Creek and their tributaries as fish and wildlife habitat by implementing the goals and policies as contained in this

Element, the Parks and Recreation Element, the Shorelines Master Program Element, the Land Use Element, best available science, and the following special objectives:

For the Sammamish River:

- Protect, restore and create cold water resources in the Sammamish River and its tributaries.
- Investigate alternative methods to address the impacts to salmon of increased temperatures in the Sammamish River.
- Improve fish access through the Sammamish River system.
- Enhance channel complexity, connectivity, and riparian conditions.
- Reduce surface and groundwater withdrawals that reduce river flow and groundwater seeps and provide for a more natural hydrologic regime.
- Reduce runoff and fine sediments entering the river.
- Understand and reduce impact of low dissolved oxygen and contaminants on salmon in the Sammamish River.

For North Creek and its tributaries:

- Provide unimpeded access to all potential natural spawning and rearing habitats for all life stages of salmon.
- Protect existing stream channel complexity and floodplain and longitudinal connectivity and restore channel and floodplain connectivity where necessary.
- Protect and restore a more natural hydrologic regime.
- Reduce runoff and fine sediments.
- Reduce accelerated streambank erosion.
- Maintain and restore a more natural temperature regime.
- Protect and restore riparian habitats.
- Reduce nutrient and chemical pollutant loading and reduce impacts on salmon.

NE-P9 The City of Bothell recognizes the listing of Chinook Salmon and Bull Trout as threatened species under the Endangered Species Act and acknowledges the possibility that other plant and animal species may be listed in the future. Bothell should participate in regional efforts to recover listed species including watershed planning, restoration efforts, and other recovery actions.

NE-P10 Stream and wetland buffer requirements may be increased to protect species identified as threatened or endangered by the state or federal government or to provide the buffers established under any special rules promulgated to protect a listed species or by including best available science.

NE-P11 Preserve and protect critical areas and buffers in as natural a state as possible, emphasizing avoidance of alterations to these areas. Identify and create a system of fish and wildlife habitat, including habitat for any species listed as threatened or endangered by the state or federal government, with connections between large habitat blocks and open spaces. Minimize habitat fragmentation by linking wildlife habitats via corridors. Connect wildlife habitats with each other within the City and the region to achieve a continuous network. Development proposals shall identify critical areas and unique and significant wildlife habitat areas and habitat areas associated with any species listed as threatened or endangered by the state or federal

government and ensure that buildings, roads, and other improvements are located on less sensitive portions of the property.

NE-P13 Require “fish sensitive” site design, construction and maintenance practices throughout the city that incorporate best management practices (BMPs). “Fish sensitive” site design, construction and maintenance may include but is not limited to removing or preventing fish passage barriers, improving fish habitat as part of a development proposal or a capital improvement project, preserving existing forested areas, reducing the amount of impervious surface coverage in roads and parking areas, constructing special storm water control facilities, restoring culverted (piped) streams, enhancing existing streams, planting drought-resistant landscaping, limiting or prohibiting pesticide use and other elements that create properly functioning conditions. “Fish sensitive” best management practices are specific construction and maintenance methods, practices, and techniques that have been shown to have minimal impact on fish habitat.

NE-P23 Protect groundwater recharge areas that benefit anadromous fisheries through the critical areas regulations.

NE-P26 Protect the quantity and quality of cool groundwater supplying the Sammamish River and North Creek and its tributaries. Require development potentially affecting natural groundwater flows to follow existing topography; minimize changes in grade, cleared area and volume of cuts and fills; and minimize potential for blockages from foundations, retaining walls and rockeries.

NE-P33 Encourage environmentally sensitive site design that respects existing topography, sensitive lands and critical areas, provides for retention of native vegetation, provides active and passive recreational open space and minimizes impervious surface coverage. The City should create special design and building standards based upon best management practices to protect hillsides from impacts associated with development on slopes.

NE-P36 Promote soils stability by the use of natural drainage systems and retention of existing native vegetation.

NE-P38 Preserve the special ecological functions of hillsides by developing design and construction standards that help protect hillside ecological functions such as groundwater recharge, natural drainage courses, soil retention, and wildlife habitat and corridors.

NE-A12 Develop hillside design and construction standards for development on slopes.

Transportation Element

TR-G6 Reduce the quantity and length of trips in single-occupant vehicles by encouraging the use of transit and non-motorized transportation modes.

Urban Design Element

UD-G3 To reduce dependence on the automobile through building, site and district design which promotes pedestrian, bicycle, and transit usage.

UD-P7 Retain existing natural features such as steep slopes, wetlands, streams, and mature wooded areas as community open space. See page G-31 in Appendix H. See also Natural Environment and Land Use Element.

UD-P15 Ensure that development on hillsides blends visually and functionally into the natural environment to the maximum extent possible.

UD-P17 Provide clearly marked pedestrian entries from the street. Parking garage and parking lot entries should be physically separated from the pedestrian entry and should be designed to complement rather than subordinate the pedestrian entry. See page G-66 in Appendix H.

UD-P19 Retaining walls and exposed foundations should be either of materials which reduce their scale, such as brick or stone, or treated sculpturally to appear less monolithic. High retaining walls should be terraced down and incorporate hanging or climbing vegetation. In hillside development, retaining walls and high foundations on the underside of buildings shall be screened with vegetation. See page G-68 in Appendix H.

APPENDIX E

Subarea Plan Policies (Policies referenced in briefing)

Downtown / NE 190th / Riverfront Subarea Plan [DNER]

HO-P1. Provide for a range of housing alternatives within the Subarea for persons of varying incomes and lifestyles and which support the various commercial and business park employment centers. Reference is made to the Land Use policies above, which provide for housing types ranging from detached residential at minimum lot sizes of 9,600 square feet to attached residential at one dwelling unit per 2,800 square feet outside of the Community Activity Center and higher densities within the Community Activity Center.

LU-P7. The land along the north slope of Norway Hill is appropriate for detached residential development at a minimum lot size of 9,600 square feet as described in Land Use Element Policy LU-P4, (R9,600 in south portion of map). This designation reflects the existing pattern of development in this area. Within this area, a Specialized Senior Housing Overlay (SSHO on map) is appropriate for land within approximately one-quarter mile walking distance of the Northshore Senior Center, as depicted on the Subarea land use map, in order to provide opportunities for development of specialized senior housing in close proximity to the variety of services offered by the Senior Center and to Downtown Bothell shopping, dining and entertainment opportunities.

Development of specialized senior housing within the SSHO designation in this Subarea shall be in accordance with the following policies intended to maintain the single family character of the area and protect existing and future single family residences from the adverse impacts of large buildings and parking areas and other aspects of development typical to specialized senior housing:

- a. Development shall comply with city-wide development regulations concerning senior housing except as may be provided otherwise by these policies and subsequent implementing development regulations.
- b. For the purposes of this policy, "specialized senior housing dwelling unit" shall mean a room or rooms located within a structure and designed, arranged, occupied or intended to be occupied by not more than one senior family or household (which may be one person) as living accommodations separate from other households, except that specialized senior housing dwelling units need not contain a food preparation area within the room or rooms.
- c. Design of specialized senior housing developments shall comply with Comprehensive Plan Urban Design Policies UD-P37, UD-P38, UD-P39 and UD-P40 and should incorporate architectural features reflective of the historical buildings within and near the SSHO.

All specialized senior housing buildings within the SSHO shall have pitched roofs with a minimum pitch of 4/12. Multiple-building developments and developments adjacent to other developments should vary design elements to distinguish one building from another and/or one development from another, so as to avoid a monotonous appearance.

- d. Development shall conform to the existing topographic contours to the maximum extent practical. Stepping buildings up the hillside to accommodate significant changes in elevation shall

be preferred to locating buildings on an artificially created grade. Extensive grading and use of retaining walls is discouraged except where it can be demonstrated that such practices would result in lesser visual impacts of development on surrounding existing and future single family residences than what would occur if development were to conform to existing contours. Where the use of retaining walls is determined to be appropriate, exposure of such walls as viewed from surrounding existing and future residences shall be screened by landscaping and/or hidden by buildings.

e. There shall be no maximum density within the SSHO. The number of units attainable in a specialized senior housing development shall be dictated by the dimensional and other standards prescribed in these Subarea policies and subsequent implementing regulations.

f. Except as otherwise provided for below, each specialized senior housing development within the SSHO shall incorporate a transition in intensity of development as follows:

i. The area from the exterior property lines which describe the perimeter boundary of the development inward a minimum distance of 15 feet shall be planted in buffer landscaping. This area shall be planted to Type II standards when along a public street, and to Type I standards (specifying Western Red Cedar and/or Leland Cypress trees) when abutting another property, except as follows:

(a). Adjacent to the Northwest Promontory Open Space tract, no buffer landscaping shall be required;

(b). Within areas having a slope of 35 percent or greater, existing vegetation shall be retained and no additional buffer landscaping shall be required;

(c). In all other areas in which buffer landscaping would be required, existing vegetation may suffice if it meets the purpose of the applicable planting type as set forth in Section 12.18.040 of the Zoning Code, or such vegetation may be augmented to achieve said purpose. Berming and/or fencing may be required in addition to the required landscaping if, through the conditional use permit process, it is determined to be necessary to achieve the desired screening effect.

ii. The area from the exterior property lines which describe the perimeter boundary of the development inward a minimum distance of 25 feet shall be a building, parking and a driveway setback, except for driveways which provide access directly from a public street. In order to preserve the character of the Eason Avenue neighborhood, access from Eason Avenue shall not be allowed. The setback may be relaxed for parking and driveways only if it is determined, through the conditional use permit process, that equal protection from motor vehicle noise, light and glare can be achieved by other measures. In no case shall the setback for parking and driveways be relaxed to less than 15 feet. Within the area between the buffer landscaping and the 25 foot setback, common walkways and decks and patios associated with individual units shall be permitted: the remainder of the setback shall be landscaped with lawn, shrubs and/or trees. Sports courts and other communal recreation facilities shall not be located within this area.

iii. The area from the 25 foot setback inward a distance of 50 feet for portions of property abutting East and West Riverside Drive and 75 feet for all other portions of property shall be a transitional building zone in which the following shall apply, in addition to citywide policies and implementing regulations concerning multiple family development adjacent

to single family development, or, where a conflict exists, in lieu of such policies and regulations:

- (a). Maximum building coverage of 35 percent, calculated on the basis of the total land area between the perimeter property line and the inside boundary of the transitional building zone (which boundary would be 75 feet from East and West Riverside Drive and 100 feet from all other property lines);
- (b). Maximum building height of two stories;
- (c). Horizontal and vertical massing, articulation and modulation of buildings so as to approximate or complement the patterns and rhythms of adjacent single family residences.

iv. The area inward of the inside boundary of the transitional building zone shall be the core building zone in which the following shall apply:

- (a). Maximum building coverage of 50 percent;
- (b). Maximum building height of three stories.
- (c). Wings may extend from buildings located in the core building zone into the transitional building zone, subject to the restrictions under iii above.

v. Where a specialized senior housing development would abut other senior housing or the Northshore Senior Center or other use more intensive than single family residences along a property line, the above policies shall be modified with respect only to those portions of the property line abutting the abovementioned uses, as follows:

- (a). Buffer landscaping would not be required;
- (b). The minimum setback would be five feet;
- (c). The policies of the core building zone would apply.

g. Outdoor lighting fixtures within specialized senior housing developments shall be directed away from single family residences and kept as low in elevation as is consistent with providing adequate light levels for safety and security while minimizing the impact on single family residences.

h. Sports courts and other communal recreation facilities shall be oriented away from single family residential development.

LU- P16. Encourage infill development which is compatible with existing design and density in areas with established land use patterns. Development at higher densities shall include features to enhance compatibility with existing residential neighborhoods.

NE-P1. Protect and preserve the hazardous slope critical areas in accordance with the City's Critical Area Ordinance and any special provisions resulting from any special critical aquifer recharge and groundwater protection studies as outlined below. Protect non-hazardous slope areas in accordance with the Planning Area Wide Natural Environment and Urban Design Element policies and actions. These natural areas provide valuable erosion control, stormwater mitigation, wildlife habitat, and visual relief from the built environment, and contribute to the character and identity of the Subarea.

NE-P4. Protect the quantity and quality of cool groundwater inputs from Norway and Finn Hills into the Sammamish River. Implementing regulations should include provisions requiring all development activities which may affect groundwater to follow the existing topographic contours, minimize changes to pre-existing ground elevations, minimize cut and fill earthwork volumes and preserve natural foliage and vegetation. Excavation shall be prohibited from intruding into that part of the groundwater table which experiences saturated soil conditions, as measured during the dry season.

NE-P5. Construction occurring on the non-hazardous slopes within this subarea should be subject to special provisions to reduce the disturbance of natural topography, preserve existing vegetation, implement special building practices suitable for sloped conditions, and minimize the amount of alteration to natural soils.

NE-P6. Protect the potential critical aquifer recharge area and the possible large aquifer located below Norway and Finn Hills. Preserve the existing flow of both shallow and deep groundwater towards the Sammamish River. This groundwater contributes cool water to the Sammamish River which addresses one of the limiting factors in the recovery of anadromous fish; the high temperatures present in the Sammamish River migratory corridor.

NE-A4. Protect the quantity and quality of cool groundwater inputs from Norway and Finn Hills into the Sammamish River. Implementing regulations should include provisions requiring all development activities which may affect groundwater to follow the existing topographic contours, minimize changes to pre-existing ground elevations, minimize cut and fill earthwork volumes and preserve natural foliage and vegetation. Excavation shall be prohibited from intruding into that part of the groundwater table which experiences saturated soil conditions, as measured during the dry season.

NE-A5. Construction occurring on the non-hazardous slopes within this subarea should be subject to special provisions to reduce the disturbance of natural topography, preserve existing vegetation, implement special building practices suitable for sloped conditions, and minimize the amount of alteration to natural soils.

NE-A6. Protect the potential critical aquifer recharge area and the possible large aquifer located below Norway and Finn Hills. Preserve the existing flow of both shallow and deep groundwater towards the Sammamish River. This groundwater contributes cool water to the Sammamish River which addresses one of the limiting factors in the recovery of anadromous fish; the high temperatures present in the Sammamish River migratory corridor.

TR-P14. New development within the Subarea should be designed and built so as to be transit oriented.

UD-P7. To the extent that it conflicts with achievement of a common design solution for the area, small, incremental development should be discouraged.

Fitzgerald / 35th Avenue SE Subarea Plan [Fitzgerald]

LU-P6. The area north of 240th Street SE, extending approximately 660 feet north of 240th west of 39th Avenue extended, and approximately 1,320 feet north of 240th east of 39th Avenue extended, is appropriate for attached or detached residential development at one dwelling unit per

5,400 square feet as described in Land Use Element Policy LU-P4 (R 5,400a on southern portion of map).

Any development in this area shall incorporate the following measures to protect the existing single family area to the north:

- a. Installation of a minimum 100-foot buffer adjacent to single family zoning utilizing fences, walls, berms, existing mature landscaping or dense, fast-growing landscaping, or other noise-absorbing or sight-obscuring techniques (exact width of the buffer to be determined in conjunction with development plan review);
- b. A transition of building mass and density from the greatest mass and density near 240th Street SE to the least mass and density adjacent to single family zoning. Abutting the buffer, development should be limited to one story in height.

LU-P7. The balance of the Subarea, is appropriate for detached residential development at a minimum lot size of 40,000 square feet as described in Land Use Element Policy LU-P4 (R 40,000 in central portion of map). This designation is necessary to protect the complex structure, functions, values and high rank order of the critical areas contained within this Subarea and to establish the North Creek Fish and Wildlife Critical Habitat Protection Area as described below.

LU-P8. Lands within the Fitzgerald Subarea bounded by 228th Street SE in the north, 240th Street SE in the south, Fitzgerald Avenue to the west and 45th Avenue SE in the east shall be identified as the North Creek Fish and Wildlife Critical Habitat Protection Area (NCFWCHPA) as delineated in Figure 4 to recognize the special environmental significance of the streams and wetlands within the Fitzgerald/35th Avenue SE Subarea which contains a complex, high function and value critical habitat for anadromous fish and other wildlife. The City should not consider property-owner initiated comprehensive plan amendments for properties within the NCFWCHPA until completion of additional wetland, stream, and wildlife habitat delineations and assessments as identified under the Natural Environment policies.

Maywood / Beckstrom Hill Subarea Plan [MBH]

LU-P7. The remainder of the land within the Subarea is appropriate for detached residential development at minimum lot sizes of 8,400 and 9,600 square feet as described in Land Use Element Policy LUP4 (R 8,400 and R 9,600 on majority of map). This designation reflects the existing pattern and character of development in the majority of the Maywood / Beckstrom Hill Subarea.

NE-P1. Protect and preserve the steep and heavily treed hillsides which comprise the east and west edges of the Subarea. These natural open spaces provide valuable erosion control, wildlife habitat, and visual relief from the built environment, and help define the character and identity of the Subarea.

North Creek / NE 195th Street Subarea [North Creek]

LU-P10. Natural open space within the Subarea should be preserved where possible (<OS> on map).

Waynita / Simonds / Norway Hill Subarea Plan [WSNH]

HP-1. Provide for a range of housing alternatives within the Subarea for persons of varying income and lifestyles. Reference is made to the land use policies above, which provide for a range of housing types ranging from detached residential at minimum lot sizes of 40,000 square feet to attached residential at one dwelling unit per 2,800 square feet within the Subarea .

LU-P2. Land throughout most of the Subarea is appropriate for detached residential development at a minimum lot size of 9,600 square feet as described in Land Use Element Policy LU-P4 (R 9,600 throughout most of map).

LU-P3. Land in the valley along 100th Avenue NE and Waynita Way NE between Norway Hill and Finn Hill is appropriate for detached residential development at a minimum lot size of 9,600 sq. ft. as described in Land Use Element Policy LU-P4 (central portion of R 9,600 of map).

LU-P4. Land on the upper slopes of Norway Hill, extending east to I-405, is appropriate for detached residential development at a minimum lot size of 40,000 square feet as described in Land Use Element Policy LU-P4 (R 40,000 in northeast portion of map). This low density designation is appropriate on Norway Hill primarily due to the limited access for emergency services and long response times, presence of potentially important aquifer recharge areas and important groundwater recharge areas which contribute cool water to the Sammamish River, and the inability to serve the area with sanitary sewer due to the steep slopes and erosive soils present within this area.

LU-P8. New development within the Subarea should be designed and built so as to be transit oriented.

UD-P3. Ensure that new development within the Subarea is designed with a sensitivity to the steep slopes, streams, springs, ground water flows, and wetland areas throughout the Subarea. Reference also Natural Environment policies.

UD-P5. Preserve existing view corridors on Norway Hill, Finn Hill and through the Waynita Valley, and promote the development of view access points.

UD-P6. Preserve the heavily treed character of the Subarea. Ensure that new development within the Subarea maintains the "feathered edge" appearance on hillsides when viewed from below.

UD-A1. The City shall produce an urban design map of the planning area that identifies urban design opportunities such as view corridors, gateways, and other significant features within the Subarea to aid in planning for these features.

UD-A2. In reviewing development proposals for Norway Hill and Finn Hill, the City will identify viewpoints that can be preserved. Where possible, these viewpoints should be made accessible to the public through the use of pedestrian linkages, bicycle trails, or car pull-off points.

UD-A3. The review process for proposed development within the Subarea shall include consideration of the "feathered edge" concept. Trees key to maintaining the feathered edge appearance shall be retained within a development.

Westhill Subarea Plan [West Hill]

LU-P1. Maintain the predominantly single-family residential character of the Subarea while providing opportunities for commercial, office-professional and multi-family residential uses along SR- 522.

LU-P3. Land throughout much of the Subarea is appropriate for detached residential development at a minimum lot size of 9,600 square feet as described in Land Use Element Policy LU-P4 (R 9,600 over most of the map).

LU-P4. Land bounded by 7th Avenue SE on the east, the King/Snohomish County line on the south, the western lot lines of the subdivision on the west, and 240th Street SE on the north, is appropriate for single-family residential development at a minimum lot size of 9,600 square feet as described in Land Use Element Policy LU-P4 (a portion of the R 9,600 designation in the north portion of the map, north of the King County / Snohomish County line).

NE-P1. Regulate development on hazardous slopes in accordance with the critical areas ordinance. Protect and preserve non-hazardous slopes in the subarea consistent with the Urban Design and Natural Environment Planning Area-wide Policies. These natural areas provide valuable erosion control, wildlife habitat, and visual relief from the built environment, and contribute to the character and identity of the Subarea

APPENDIX F

Relevant Provisions of King County Countywide Planning Policies at Issue

LU-66 In order to ensure efficient use of the land within the Urban Growth Area, provide for housing opportunities, and to support efficient use of infrastructure, each jurisdiction shall:

- a. Establish in its comprehensive plan a target minimum number of net new households the jurisdiction will accommodate in the next 20 years in accordance with the adopted household growth targets identified in Table LU-1. Jurisdictions shall adopt regulations to and commit to fund infrastructure sufficient to achieve the target number;
- b. Establish a minimum density (not including critical areas) for new construction in each residential zone; and
- c. Establish in the comprehensive plan a target mix of housing types for new development and adopt regulations to achieve the target mix.

T-10 Each local jurisdiction shall establish mode-split goals for non-single-occupancy vehicle travel to all significant employment centers to reflect that center's contribution to the solution of the region's transportation problem. Mode-split goals will vary according to development densities, access to transit service and other alternative travel modes and levels of congestion. Comprehensive plans shall demonstrate what transportation system improvements, demand management and land use strategies will be implemented to achieve these mode-split goals. These local goals shall be coordinated to achieve County and regional goals.

T-11 Elements to be considered in the level-of-service standard are mobility options that encourage the use of transit, other high-occupancy vehicles, demand management actions, access to transit, and non-motorized modes of travel. These standards shall be consistent with the requirements of the Commute Trip Reduction Act.

T-12 Mode split goals and measures of mobility for transit, ridesharing and non-motorized travel shall be established by local jurisdictions and METRO.

APPENDIX G

Relevant Provisions of Snohomish County Countywide Planning Policies at Issue

HO-12 Encourage a variety of housing types and densities that allow for infill using innovative urban design techniques to foster broad community acceptance. (Amended Mar. 31, 2004 – Amended Ord. 04-007)

OD-2 Allow development within the incorporated and unincorporated portions of the UGA as follows:

- a. City comprehensive plans shall include strategies and land use policies to achieve urban densities and provide for urban governmental services and capital facilities. (Amended Feb. 2, 1994 - Ord. 94-002)
- b. The county will regulate development within the unincorporated portions of urban growth areas in a manner that does not preclude urban densities, based on strategies which will be developed as part of the joint comprehensive planning process for each urban growth area. These strategies will consider the unique development opportunities and constraints in each urban growth area and could range from development limitations in one area to the authorization of development at planned urban densities in those areas that have urban governmental services and capital facilities available. (Amended Feb. 2, 1994 - Ord. 94-002)
- c. Development will be consistent with six and twenty year land use and capital facilities plans.

OD-8 Encourage land use, economic and housing policies that co-locate jobs and housing to optimize use of existing and planned transportation systems and capital facilities.

UG-5 Ensure the siting and development of urban growth areas support pedestrian, bicycle and transit compatible design.

UG-8 Ensure UGAs provide sufficient density, developable land, public facilities and public services to accommodate most of the projected population and employment growth. In addition, the density should be adequate, according to recent studies, to support transit services and the efficient utilization of infrastructure.

UG-14 Establish a review and evaluation program, which includes an annual data collection component, pursuant to RCW 36.70A.215 (“Buildable Lands Program”). The evaluation component required by the Buildable Lands Program will be completed no later than September 1, 2002. Subsequent evaluations shall occur at least once every five years. This evaluation may be combined with the review and evaluation of county and city comprehensive land use plans and development regulations required by RCW 36.70A.130(1), and the review of urban growth areas required by RCW 36.70A.130(3).

- a. Procedures Report: Using the Snohomish County Tomorrow process, develop an analysis procedures report for the evaluation required by the first Buildable Lands Program, that has been accepted and recommended by the Snohomish County Tomorrow Steering Committee and adopted by the County Council, and is used by all Snohomish County jurisdictions when conducting their buildable lands review and evaluation; provided that in the event of subsequent disagreement among jurisdictions the SCT

process will be used in an attempt to resolve the disagreement, and, if unresolvable, an individual jurisdiction may adopt its own procedures report. The procedures report used by local jurisdictions shall address the following issues:

1. Multi-year work program and schedule;
2. Jurisdictional responsibilities for data collection, analysis and reporting;
3. Five-year buildable lands review and evaluation methodology, including a methodology for establishing an accurate countywide baseline inventory of commercial and industrial lands;
4. Annual data collection requirements;
5. Coordinated interjurisdictional data collection strategy; and
6. Content of the five-year buildable lands review and evaluation report. (Added Feb. 16, 2000 – Amended Ord. 99-121; Amended July 9, 2003 – Amended Ord. 03-072)

b. Identification of Reasonable Measures: A list of reasonable measures that may be used to increase residential, commercial and industrial capacity in UGAs, without adjusting UGA boundaries, is contained in Appendix C. The County Council will use the list of reasonable measures and guidelines for review contained in Appendix C to evaluate all UGA boundary expansions proposed pursuant to UG-14(d) 1 through 4. (Added Feb. 16, 2000 – Amended Ord. 99-121; Amended July 9, 2003 – Amended Ord. 03-072)

c. Procedures for Resolving Inconsistencies in Collection and Analysis of Data: In the event of a dispute among jurisdictions relating to inconsistencies in collection and analysis of data, the affected jurisdictions shall meet and discuss methods of resolving the dispute. In the event a successful resolution cannot be achieved, the Snohomish County Tomorrow Steering Committee shall be asked to meet and discuss resolution of the matter. In such instances, the Steering Committee co-chairs will make every effort to ensure that all Steering Committee jurisdictions are present and in attendance, and that the affected jurisdictions are provided with proper notice of such discussion. Nothing in this policy shall be construed to alter the land use power of any Snohomish County jurisdiction under established law. (Added Feb. 16, 2000 – Amended Ord. 99-121; Amended July 9, 2003 – Amended Ord. 03-072)

d. Expansion of the Boundary of an Individual UGA: Expansion of the boundary of an individual UGA to include additional residential, 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, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following ten conditions are met, provided that conditions six through eight do not apply to the Southwest UGA:

1. The expansion is a result of the most recent buildable lands review and evaluation required by RCW 36.70A.215.
2. The expansion is a result of the review of UGAs at least every ten years to accommodate the succeeding twenty years of projected growth, as required by RCW 36.70A.130(3).
3. Both of the following conditions are met for expansion of the boundary of an individual UGA to include additional residential land:

(a) Population growth within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the additional population capacity estimated for the UGA at the start of the planning period, as documented in the most recent Snohomish County Tomorrow Growth Monitoring Report or the buildable lands review and evaluation (Buildable Lands Report).

(b) An updated residential land capacity analysis conducted by city and county staff for the UGA confirms the accuracy of the above finding using more recent residential capacity estimates and assumptions, and any new information presented at public hearings by any jurisdiction that confirms or revises the conclusions is considered. (Added Feb. 16, 2000 – Amended Ord. 99-121; Amended July 9, 2003 – Amended Ord. 03-072)

4. For expansion of the boundary of an individual UGA to include additional commercial and industrial land, the county and the city or cities within that 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 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 Tomorrow Growth Monitoring Report or the buildable lands review and evaluation (Buildable 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. (Added Feb. 16, 2000 – Amended Ord. 99-121; Amended July 9, 2003 – Amended Ord. 03-072)

5. The expansion will result in the realization of a significant public benefit as evidenced by Transfer of Development Rights (TDR) to the expansion area from Agriculture or Forest lands designated as TDR sending areas. The expansion area shall not be a designated forest or agricultural land of long-term significance. (Added July 9, 2003 – Amended Ord. 03-072)

6. The expansion is necessary to make technical corrections to a UGA boundary to be more consistent with UG-1, which requires a UGA to have identifiable physical boundaries such as natural features, roads, or special purpose districts, where feasible. Provided that expansions shall not increase total residential or employment capacity of an individual UGA, as reported in the most recent Snohomish County Tomorrow Growth Monitoring Report, by more than 0.5% in any given year. (Added July 9, 2003 – Amended Ord. 03-072)

7. The expansion will allow the development of 1) a church, or 2) a school, K-12, including public, private and parochial, provided that the expansion area is adjacent to an existing UGA and will be designated and zoned exclusively for that use and will not add any residential, commercial or industrial capacity to the affected UGA. (Added July 9, 2003 – Amended Ord. 03-072)

8. The expansion will permanently preserve a substantial land area containing one or more significant natural or cultural feature(s) as open space adjacent to the revised UGA boundary and will provide separation between urban and rural areas. The presence of significant natural or cultural features shall be determined by the respective legislative bodies of the county and the city or cities immediately adjacent to the proposed expansion, and may include, but are not limited to, landforms, rivers, bodies of water, historic properties, archeological resources, unique wildlife habitat, and fish and wildlife conservation areas. (Added July 9, 2003 – Amended Ord. 03-072)

9. The expansion is a response to a declaration by the County Executive, or the County Council by resolution, of a critical shortage of affordable housing which is incurable in a timely manner by the implementation of reasonable measures or other instrumentality reasonably available to the jurisdiction, and the expansion is reasonably calculated to provide affordable housing. (Added July 9, 2003 – Amended Ord. 03-072)

10. The expansion will result in the economic development of lands that no longer satisfy the designation criteria for natural resource lands and the lands have been redesignated to an appropriate non-resource land use designation. Provided that expansions are supported by the majority of the affected cities and towns whose UGA or designated MUGA is being expanded and shall not create a significant increase in total employment capacity (as represented by permanent jobs) of an individual UGA, as reported in the most recent Snohomish County Tomorrow Growth Monitoring Report in the year of expansion. (Added July 9, 2003 – Amended Ord. 03-072)

UG-16 Minimize the adverse impacts on resource lands from storm water drainage, light and glare, and pedestrian and automobile traffic in designing new developments within towns and cities.