

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

JOHN R. KALEAS, BRUCE W. HORST and FUTUREWISE,)	
)	
Petitioners,)	ORDER ON REMAND – KING COUNTY SUPERIOR COURT FINAL ORDER AND JUDGMENT – No. 05-2-27090-0 KNT
v.)	
)	
CITY OF NORMANDY PARK,)	
)	(Kaleas Remand: CPSGMHB Case No. 05-3-0007c)
Respondent.)	
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I. BACKGROUND¹

On July 19, 2005, the Board issued its “Final Decision and Order” in CPSGMHB Case No. 05-3-0007c (*Kaleas - FDO*). The Board found the City of Normandy Park noncompliant with provisions of the GMA and established a compliance schedule. The FDO invalidated the noncompliant land use designations as may be applied to vacant, undeveloped and underdeveloped properties.

On August 17, 2005, the City appealed the Board’s FDO to King County Superior Court, Cause Number 05-2-27090-0 KNT. During late 2005 and early 2006, the case was heard by the Court.

On March 30, 2006, the Honorable Judge Bruce W. Hilyer issued the “Final Order and Judgment Granting Relief Under the Administrative Procedures Act.” (**Final Order and Judgment**). In short, the Court reversed the Board and the matter was remanded to the Board for entry of an order consistent with the decision.

Shortly after the Final Order and Judgment was issued, the City moved the Board to enter a finding of compliance. Futurewise filed a response to the City’s request and the City filed a reply and further requested that the Board’s proceedings in this matter be clarified.

In mid-May, the Board issued a “Notice of Pre-Remand Hearing Conference” to address the remand of the Court. On May 30th the conference was held and on June 1, 2006, the Board issued the “Pre-Remand Hearing Order” setting a date of hearing, a briefing schedule and identifying the issues to be addressed by the Board on remand.

¹ The complete Procedural History for this matter is found in Appendix A.
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On June 22, 2006, the Board received “Futurewise’s Pre-Remand Hearing Brief” (**Futurewise PRH Brief**), with eight attached exhibits.

Also on June 22, 2006, the Board received a letter from David S. Mann, attorney for Petitioners Kaleas and Horst, indicating that “[W]e will not be filing a Pre-Remand Hearing Brief in this matter but instead will defer to Futurewise. We respectfully reserve our right to continue to participate in these proceedings, including participating in the July 27, 2006 remand hearing.” 6/22/06 Mann letter, at 1.

On July 6, 2006, the Board received “City of Normandy Park’s Remand Response Brief” (**Normandy Park PRH Response**), with 20 attached exhibits [Appendices A –L, with Appendix H including 4 items, Appendix J including 5 items, and Appendix L including 3 items].

On July 21, 2006, the Board received “Futurewise’s Reply Brief” (**Futurewise Reply**), with one attached exhibit.

On July 27, 2006, the Board convened the Remand Hearing at the Board’s offices in Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Margaret A. Pageler and Bruce C. Laing² were present for the Board. Julie Taylor, Board Law Clerk, and Board Externs Brian Payne and Kris Hollingshead also attended. Petitioner Futurewise was represented by Tim Trohimovich. Petitioners Kaleas and Horst were represented by David S. Mann. Respondent City of Normandy Park was represented by Jay P. Derr. Also in attendance at the hearing were: Jack Kaleas, Brock Howell, Duncan Green, Noah Davis and John Adamson. Court reporting services were provided by John Botelho of Byers and Anderson, Inc. The hearing convened at 10:00 a.m. and adjourned at approximately 11:45 a.m. The Board ordered a transcript of the proceeding.

II. PRELIMINARY MATTERS

At the remand hearing, the Board made several oral rulings on supplemental exhibits. They are summarized below:

- Normandy Park provided numerous exhibits requested by the Board in the Pre-Remand Hearing Order related to covenants, population and density information from prior City Plans. The Board **admitted** these items, indicating they would be referred to by the Appendix number provided by the City.
- The Board **granted** Futurewise’s motion to take **official notice** of *Table 2*, at pages 19 -20 of Appropriate Urban Densities in the Central Puget Sound Region: Local Plans, Regional Vision and the Growth Management Act, by Joseph W. Tovar. This item was assigned **Remand Hearing Exhibit 1 – (RH Ex. 1)**. Although the City objected to the report, generally, it did not object to the Board taking official notice of Table 2, or Futurewise’s reference to it. Consequently,

² Governor Gregoire extended Board Member Laing’s term of office until July 31, 2006. Letter of June 15, 2006.

the Board construes the City's concession as a **withdrawal** of its prior motion to strike reference to the report in its entirety. The Board noted that RH Ex. 1 would be accorded the weight it merits if the Board considers it in rendering its decision.

- The Board **granted** Normandy Park's motion to supplement the record with Appendix G and Appendix H-1 through H-4. These exhibits illustrated information generated through application of a G.I.S. system. Appendix G was assigned **RH Ex. 2**, and Appendix H-1 through H-4 was assigned **RH Exs. 3a through 3d**.
- Futurewise used a power point presentation during opening argument that included various excerpts and items from the record. Hard copy of the power point materials were provided to the Board and the City. Normandy Park did not object to these materials. The hard copy of the power point presentation was assigned **RH Ex. 4**.

III. BOARD DISCUSSION on REMAND

The starting point for the Board is the Court's Final Order and Judgment, which provides in relevant part:

Conclusions of Law

1. The Supreme Court's decision in *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005) ("*Viking Properties*"), controls the outcome of this Petition for Review. *Viking Properties* holds that the Board does not have the authority to impose a "bright line" rule of a minimum four dwelling units per acre ("4 DU/acre") as defining appropriate urban density or to require local jurisdictions to establish a uniform minimum residential density, and that the GMA itself contains no such rule or requirement. This ruling in *Viking Properties* is not *dictum*. While it may not have been necessary for the Supreme Court to address this issue, it chose to do so and to analyze the Board's basis for the 4 DU/acre rule. As such, the Supreme Court's statements regarding the Board's authority under the GMA, and whether the GMA itself requires a 4 DU/acre density, were not *dicta*.
2. This Court holds that the Board does not have the authority to impose a "bright line" rule of a minimum 4 DU/acre as defining appropriate urban density or to require local jurisdictions to establish a uniform minimum residential density, and that the GMA itself contains no such rule. The GMA leaves this decision to the City's discretion.
3. Because the Board in this case based its Order on the 4 DU/acre rule and increased scrutiny of any city-adopted exceptions to that rule, the Board's Order is contrary to *Viking Properties* and the

legal conclusions of this Court. Therefore, the Board's Order is outside the statutory authority and jurisdiction of the Board, the Board erroneously interpreted and applied the law in issuing its Order, and the Board erred in finding the City of Normandy Park's comprehensive plan land use designations out of compliance with the GMA. RCW 34.05.570(3)(b),(d).

4. Because the Board erred in finding the City of Normandy Park's comprehensive plan out of compliance with the GMA, the Board also erred when it invalidated the R-20, R-15 and R-12.5 land use designations in the City's comprehensive plan.
5. By applying its 4 DU/acre rule and increased scrutiny of city-adopted exceptions in this case, the Board failed to apply the presumption of validity and give proper deference to the City of Normandy Park's decision regarding appropriate urban densities in the City, based on local circumstances reflected in the City's record in this case. Therefore, the Board's Order is not supported by evidence that is substantial when viewed in light of the whole record before the court. RCW 34.05.570(3)(e).

ORDER

Based upon the foregoing Conclusions of Law, NOW THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that:

1. The Board's decision that the City of Normandy Park's comprehensive plan R-20, R-15 and R-12.5 land use designations fail to meet the requirements of the GMA is reversed.
2. The Board's determination of invalidity with respect to the R-20, R-15 and R-12.5 land use designations is reversed because it was based on the Board's improper finding of noncompliance.
3. This matter is remanded to the Board for entry of an order consistent with this decision.
4. The City of Normandy Park is awarded \$675.35 costs and \$200.00 statutory attorney's fees.
5. Should further review of the Board's decision on remand be required, it shall be brought under this cause number.

Final Order and Judgment, at 3-4; (underlined emphasis supplied).

The Board clearly acknowledges that it is bound by Orders of the Court. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113 (En Banc 1992); *Greene v. Rothschild*, 68 Wn.2d. 1, 10 (1966), RAP 12.2, *State v. Strauss*, 93 Wn. App 691, 697 (1999). On remand, this Court Order directs the Board to enter an order consistent with the Superior Court's decision. The Order holds and affirms the *Viking Properties* holding that the Board does not have authority to impose a "bright line" rule of a minimum density of 4 du/acre or to require a uniform minimum residential density, since the GMA contains no such requirement.

However, the Superior Court goes *beyond* this holding in *Viking Properties* and concludes that here, the Board must defer to Normandy Park's decisions regarding residential densities. The Court indicates that the "Board failed to . . . give proper deference to the City of Normandy Park's decision regarding appropriate urban densities in the City, *based on local circumstances reflected in the City's record* in this case." See *supra*, emphasis supplied. The Court then reverses the Board's decision that the City of Normandy Park's comprehensive plan R-20, R-15 and R-12.5 land use designations failed to comply with the Act and remands to the Board for entry of an order consistent with the decision.

The only action of the City presented to the Board in the original case was Normandy Park's adoption of Ordinance 742, which adopted and retained the R-20, R-15 [low density single family], and R-12.5 [medium density single family] residential land use designations. See *Kaleas, et al., v. City of Normandy Park (Kaleas - FDO)*, CPSGMHB Consolidated Case No. 05-3-0007c, Final Decision and Order, (Jul. 19, 2005), at 7. Further, the only issue before the Board was whether these densities complied with various provisions of the GMA. *Id.* at 6. Since the Superior Court has clearly decided that the Board erred by failing to defer to Normandy Park's decision regarding its selected urban densities, which, according to the Court, were based upon local circumstances reflected in the City's record, the Board is compelled to enter a finding of compliance.

The Board notes that 1) it has attempted to interpret the Act to recognize a balance between the need and desire for *certainty* and the need and desire for *flexibility*;³ 2) the "bright line" was not the only rationale discussed in the FDO;⁴ 3) the Board has not required "uniform minimum densities"⁵ for the City of Normandy Park or in any other case; and 4) few of the facts and few of the arguments presented to the Superior Court, or to this Board on Remand, were presented to the Board prior to the issuance of the FDO. Nonetheless, the Court has spoken regarding Normandy Park's R-20, R-15 and R-12.5 land use designations, indicating that the Board must defer to the City's selection of these designations, and the Board will comply with the Court's Order. Based upon the direction provided to the Board in the Court's Final Decision and Judgment, the Board finds and concludes that Normandy Park's adoption of Ordinance 742, specifically the residential land use designations of R-20, R-15 and R-12.5 **comply** with the Act.

³ See *Kaleas* FDO, at 15-17.

⁴ See *Kaleas* FDO, at 10-15 and 18-20.

⁵ See *Kaleas* FDO, footnotes 25, 26, 27, 28, 29, and 30, at 17 -19.

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Additionally, the Board's **rescission of invalidity** in its June 1, 2006 Pre-Remand Hearing Order is affirmed.

IV. ORDER

Based upon review of the briefing and materials presented by the parties, this Board's prior FDO in this matter, case law, the King County Superior Court's Final Order and Judgment, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

- As directed by the King County Superior Court's Final Order and Judgment, the Board finds and concludes that the City of Normandy Park's residential land use designations of R-20, R-15 and R-12.5, as adopted by Ordinance No. 742, **comply** with RCW 36.70A.110, .130 and 020(1). The Board therefore enters a **Finding of Compliance**.
- Having found Normandy Park's land use designations of R-20, R-15 and R-12.5 compliant with the GMA, the Board **affirms** its June 1, 2006 **rescission of invalidity** as these designations apply to vacant, undeveloped and underdeveloped lands within the City of Normandy Park.

So ORDERED this 31st day of July 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Margaret A. Pageler,
Board Member

Board Member McGuire enters the following
dissenting opinion.

Board Member McGuire’s Dissenting Opinion

I understand, but respectfully dissent from the conclusion drawn by my colleagues in this matter. While I agree that the Court’s Final Order and Judgment held that the Board erred in using a “bright line” of 4 du/acre and erred by not explicitly deferring to the City of Normandy Park’s decision in defining urban densities, I disagree that the Court’s Final Order and Judgment left the Board little or no alternative but to enter a finding of compliance without further review and discussion. I dissent to offer a different perspective than my colleagues.

The legislature directed the Boards to hear and determine whether the challenged actions were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature also directed that the Boards “after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA].” RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). The Superior Court did not find Normandy Park compliant with the Act, nor could it. *See also Manke Lumber v. Diehl*, 91 Wn. App. 793 (Div. II, 1998) and *WEAN v. Island County*, 122 Wn. App. 156 (Div. I, 2004). Thus, I would have inquired further into the matter, along the following line.

First, I offer the following observation. In my opinion, two of the primary rationales for the adoption of the GMA were to compel local governments, through cooperative and coordinated land use planning, to accommodate projected population and employment growth and to encourage and guide such growth into urban areas – primarily cities. Since passage of the Act in 1990, the GMA Plans and implementing regulations of the cities and counties in the Puget Sound region have faced this challenge with remarkable success. Under GMA, one would expect each of the region’s cities and counties to have grown. However, it is ironic that after 15 years of GMA planning, the City of Normandy Park, in 2003 and 2004, accommodates fewer residents than it did in 1990.⁶

Second, the Board and the parties agree that the Act does not define “urban densities.” Petitioners sought to resort to a dictionary definition of the term⁷ and Respondent sought to equate “urban growth” with urban density.⁸ Neither is necessary if the Board simply defers to the City’s decision as to what it has defined as urban density in its Plan and zoning. I, like the majority, defer to the City’s choice of “urban densities” as identified in its Plan and zoning designations.

Normandy Park’s decisions are illustrated on the Table below, which depicts: 1) the residential designations adopted in the City of Normandy Park’s 2004⁹ Comprehensive Plan and the Future

⁶ The 1990 Census indicates that Normandy Park had 6,709 residents in 1990. In 2000 it provided homes for 6,392 residents, the 2003 OFM estimates were 6,345 persons. Futurewise Ex. 11, 2003 King County Annual Growth Report, at 51. The 2004 King County Growth Report, at 55, shows a 2004 OFM population estimate of 6,400, only 309 short of its 1990 population. The City’s 2022 [32 years after GMA] allocation of 100 households would likely still be short of its 1990 population. *Id.*

⁷ Futurewise PRH Brief, at 12-13.

⁸ Normandy Park PRH Response, at 17-18.

⁹ Normandy Park’s 1995 GMA Plan and zoning also indicate a “Low Density Single Family” designation in the Plan text (Normandy Park PRH Response, Appendix B, at 1-9) on the FLUM (*Id.* at Figure 1.5), implemented by the R-20 and R-15 zoning designations (*Id.* at 1-9, 1-10 and 1-16). However, the 1995 GMA Plan does not distinguish the current “Medium Density Single Family” designation. Instead the 1995 Plan and FLUM include it in the “High Density Single Family” designation, implemented by the R-12.5 and R-7.2 zoning (*Id.*). For further perspective, the *pre-GMA 1987* Normandy Park Comprehensive Plan

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Land Use Map (FLUM); 2) the residential zoning designations that implement the various Plan designations; 3) the permitted residential densities; 4) the total acres in each residential zone designation; and 5) the vacant acres within each residential zone designation. [The shaded cells show the designations that were challenged in this matter.]

Table 1 – City of Normandy Park Residential Designations – “Urban Densities”

Plan Residential Designations¹⁰	Implementing Zone Designations¹¹	Permitted Residential Densities¹²	Total Acres within the Zone¹³	Vacant Acres within the Zone¹⁴
<i>Low Density Single Family</i>	R-20 R-15	2 du/acre 2.7 du/acre	477.4 740.8	62 - [55.63] ¹⁵ 27 - [27.83]
<i>Medium Density Single Family</i>	R-12.5	3.25 du/acre	162.6	9.2 - [1.74]
<i>High Density Single Family</i>	R-7.2	6 du/acre	172.1	5
<i>Low Density Multi Family</i>	R-5	8 du/acre	18.1	0.2
<i>High Density Multi Family</i>	RM-1800 RM-2400	1 du/1800 sq. ft. 1 du/2400 sq. ft.	13.3 9.5	0 0
<i>Mixed Use</i>	MU	No limit	7.1	1.7
<i>Neighborhood Center</i>	NC	No limit	24.1	2.7
TOTAL Acres			1,635	107.6
Acres in challenged areas			1,380.8	98.2 [85.2]

As the first three columns of this Table demonstrate, the City of Normandy Park has identified, in its Plan and zoning designations, a “range of urban densities.” Each of these urban density designations can be appropriate “urban densities” within any city or unincorporated urban growth area. As the majority notes, *supra*, at footnote 4, the Board has found compliance where similar designations have been used. The Board has never required “uniform minimum densities.” Thus, it becomes more a question of a jurisdiction’s *application, or mapping*, of the various urban density designations to the land within its jurisdiction, cognizant of local circumstances. In the Board’s experience, it is this *mapping* action that has been challenged by various Petitioners as clearly erroneous, and occasionally found to be noncompliant with the goals and requirements of the Act. It is on this question that I dissent from my colleagues.

FLUM (Normandy Park PRH Response, Appendix A, Figure 1, map appendices) appears indistinguishable from the 1995 FLUM. (*Compare* 1987 FLUM to 1995 FLUM). The implementing zoning for the 1987 Plan is not referenced in the 1987 Plan, but the Plan indicates the *maximum* gross density in any single family district shall be 6.0 units per acre (minimum lot size of 7200 square feet).” (Normandy Park Response, Appendix A, at 9)

¹⁰ City of Normandy Park 2004 Comprehensive Plan and FLUM, Core Document, Figure 1.4, following page 1-7.

¹¹ City of Normandy Park Zoning Map, RH Ex. 3a (Appendix H-1 to Normandy Park PRH Response).

¹² Futurewise PRH Brief, at 7, not disputed by the City.

¹³ City of Normandy Park 2004 Comprehensive Plan, at 1-7.

¹⁴ *Id.*

¹⁵ Calculated from RH Ex. 2 (Appendix G to Normandy Park PRH Response), Updated G.I.S. parcel data.

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Third, I believe that although the Act does not define urban densities, it provides guidance as to what the legislature intended. Goal 1 is instructive – “Urban Growth – *Encourage development in urban areas* where adequate public facilities and services exist or can be provided in an efficient manner” [RCW 36.70A.020(1)]. Goal 2 is directive – “Reduce Sprawl – Reduce the inappropriate conversion of undeveloped land into sprawling, *low density* development” [RCW 36.70A.020(2), emphasis supplied]. This goal is clear. GMA jurisdictions are directed to reduce the amount of undeveloped (*i.e.* vacant) land that is converted to “low density development.” Coupling these two GMA goals, it appears that what the Legislature intended is that cities and counties should be encouraging *non* low density development within their city limits and unincorporated urban areas; and they clearly should not be permitting undeveloped/vacant areas to be developed at low densities. But is there any guidance as to what *low density* single family development could be in *numeric* terms?

Turning to the 2002 King County Buildable Lands Report (BLR)¹⁶ for assistance, one finds the *numeric* urban density ranges used by King County and each of its 39 cities, including Normandy Park, for conducting the required review and evaluation to determine whether urban densities are being achieved. I note that Normandy Park’s chosen “Low Density” residential densities [2 du/acre and 2.7 du/acre] and even its “Medium Density” residential density [3.25 du/acre] correspond to the two lower ranges of single family urban densities [expressed *numerically*] used in the 2002 King County BLR.

By the City’s own definition, its Plan and zoning shows that over 1200 acres of the 1600 acres of land in Normandy Park are planned for, and regulated for, *Low Density Single Family* [R-20 and R-15] development [at least 74%]. Likewise, between 84 and 89 acres of the 107 vacant/undeveloped acres in Normandy Park are planned for, and regulated for *Low Density Single Family* development [between 77% and 82%]. These figures do not include Normandy Park’s full *infill* potential, *i.e.* lands that are underdeveloped or redevelopable. Do these designations, applied so broadly, reduce low density sprawl or perpetuate it?

The BLR is also instructive in that it depicts the *recent new* urban densities [expressed in terms of new permits (du/acre) and new plats (lots/acre)] for single family development achieved by its jurisdictions from 1996 through 2000. This is new urban development that has occurred since GMA Plans and implementing regulations were adopted. Comparing Normandy Park with its 15 sister cities¹⁷ in the King County “South Sub Area” I find that every one of the cities entirely within the South Sub Area of King County, except Normandy Park,¹⁸ has achieved an average new plat density of *4 lots/acre or more* between 1996 and 2000. Looking at the average new permit densities for the same cities, the BLR shows that Normandy Park has achieved the lowest

¹⁶ The Buildable Lands Program mandated by RCW 36.70A.215, requires a county, *in consultation with its cities*, to adopt a county-wide planning policy (CPP) to establish the basis for the BLR review and evaluation. King County CPP Framework Policy FW-1, Step 5(b) charged the Growth Management Planning Council with the task of carrying out .215. See King County CPPs, at 5. The product of this review and evaluation, the BLR, used an agreed upon methodology to collect data to determine if the County and its cities were *achieving urban densities* within their urban areas. The BLR identifies multifamily zones as those permitting 8 DU/acre or more. Single Family zones are those permitting 8 du/acre or less. The Single Family zones are further broken down into four categories: *0-2 du/acre, 2-4 du/acre, 4-6 du/acre* and *6-8 du/acre*. See King County 2002 BLR.

¹⁷ The 15 cities included in the King County “South Sub Area” are: Algona, Auburn, Black Diamond, Burien, Covington, Des Moines, Federal Way, Kent, Maple Valley, Milton (partially within King County), Normandy Park, Pacific (partially within King County), Renton, SeaTac and Tukwila. See BLR, South Sub Area.

¹⁸ Normandy Park has achieved an average new plat density of 2.3 lots per acre.

new permit density (2.2 *du/acre*) of all its similarly situated cities in the South Sub Area. Is Normandy Park planning and regulating to reduce low density sprawl? I think not. Normandy Park is clearly trailing the pack.

Fourth, the City suggests that its designations are the product of local circumstances: critical areas, limitations on services and covenants. *See* Normandy Park PRH Response, at 25-34. I note that: 1) Critical areas are required to be protected regardless of where they occur – resource lands, rural lands and urban lands – regardless of density. If the adopted critical areas regulations are unable to provide the protections needed, especially for large scale hydrologic systems or extensive areas of geologically unstable areas, the use of low density FLUM designations and zoning may be appropriate. But these circumstances do not apply to over 74% of the City, nor to all of the vacant properties within the City. 2) The same is true for limited access to services such as sewer. Here, the South West Suburban Sewer District’s Plans indicate its intention to provide sewer service to the entire City. *See* Ex. 28 SWSSD Plan excerpt and map. 3) I acknowledge that the Supreme Court’s holding in *Viking Properties* indicates that density covenants have to be factored into GMA planning and may ultimately affect permitted density in a jurisdiction’s Plan and zoning. But here the covenants provided by the City,¹⁹ if they restrict density at all,²⁰ do not apply throughout the entire City, nor are all vacant properties subject to the provided covenants.

Finally, the City’s extremely limited application of its multifamily Plan and zoning designations coupled with its use of its low density designations abutting First Avenue South, the City’s only transit route,²¹ makes me question the City’s commitment to the type of growth management mandated by the GMA.

In light of the above, I conclude that the City of Normandy Park has chosen to *perpetuate* an existing low density residential development pattern and has not encouraged growth within its boundaries, nor reduced the conversion of vacant lands into low density sprawl.

Edward G. McGuire, AICP
Board Member

¹⁹ *See* Appendix I, J and K, Normandy Park PRH Response.

²⁰ At the Hearing on the Merits the parties disputed whether the provided covenants limited density at all.

²¹ Metro Bus Route 130 provides service to Des Moines, Burien, downtown Seattle and connects with other routes. Normandy Park 2004 Plan, at 3-9.

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APPENDIX A

Procedural History

On July 19, 2005, the Board issued its “Final Decision and Order” (**FDO**) in CPSGMHB Case No. 05-3-0007c (*Kaleas*). The Board found the City of Normandy Park (the **City**) noncompliant with provisions of the GMA and established a compliance schedule. The FDO invalidated the noncompliant land use designations as may be applied to vacant, undeveloped and underdeveloped properties.

On August 17, 2005, the City appealed the Board’s FDO to King County Superior Court, Cause Number 05-2-27090-0 KNT.

On September 15, 2005, the Board received an “Application for Certificate of Appealability” (**Certification Request**) from the City regarding the Board’s July 19, 2005 FDO. The Certification Request asked the Board to issue a Certificate of Appealability with the Superior Court of Washington for King County certifying the Board’s FDO for direct review by the Court of Appeals pursuant to RCW 34.05.518(6).

On September 26, 2005, the Board issued its decision on the Certification Request, **denying** the City’s request (*Kaleas, et al v. Normandy Park*, CPSGMHB 05-3-0007c, Order Denying Certificate of Appealability (Sept. 26, 2005)).

On November 21, 2005, via e-mail from the Board’s Assistant Attorney General (**AAG**) – Martha Lantz – the Board received a copy of an “Order Granting Motion For Partial Stay of Final Decision and Order,” signed by the Honorable Bruce W. Hilyer from King County Superior Court.

On November 23, 2005, the Board issued an Order Acknowledging the Stay. (*Kaleas, et al v. Normandy Park*, CPSGMHB 05-3-0007c, Order Acknowledging Stay (Nov. 23, 2005)).

On March 30, 2006, a “Proposed Final Order and Judgment Granting Relief Under Administrative Procedure Act” (**Final Order of Relief**), was signed by the Honorable Bruce W. Hilyer of King County Superior Court. In his Final Order of Relief, Judge Hilyer stated that based upon the Supreme Court’s holding in *Viking Properties v. Holm*, 155 Wn.2d 112 (2005), the Board does not have the authority to impose a “bright line” rule of a minimum four dwelling units per acre, and that the Board does not have the authority to require local jurisdictions to establish a uniform minimum residential density, that decision is left to the City’s discretion. Final Order of Relief at 2-3. Based on these findings, Judge Hilyer ruled that the Board’s FDO was outside of the statutory authority and jurisdiction of the Board and was an erroneous interpretation and application of the law. *Id.* at 3. Judge Hilyer reversed the Board’s FDO in *Kaleas* regarding non-compliance and the resulting invalidity for vacant and undeveloped properties, because the Board based its decision on the bright line rule. The Court remanded the matter to the Board for entry of an order consistent with the Court’s decision. *Id.* at 2-4.

On April 10, 2006, based on Judge Hilyer's Order, the Board received "City of Normandy Park's Request for Finding of Compliance."

On April 24, 2006, the Board received "Futurewise's Response to the City of Normandy Park's Request for a Finding of Compliance," with three attached exhibits.

On April 26, 2006, the Board received "City of Normandy Park's Reply Regarding Request for Finding of Compliance, Alternatively, Request for Clarification of Proceedings," with three attached exhibits.

On May 9, 2006, via e-mail from the Board's AAG – Martha Lantz, the Board received a copy of a "Notice of Direct Appeal to Supreme Court" filed by Petitioners John R. Kaleas and Bruce W. Horst filed on April 26, 2006, seeking review of the Final Order of Relief, as issued by Judge Hilyer on March 30, 2006.

On May 11, 2006 the Board issued an "Acknowledgement of Notice of Direct Appeal to Supreme Court" indicating that the Board would not take any action on the matter until resolution of the matter before the Court.

On May 12, 2006, the Board received a letter from Jay Derr, representing the City of Normandy Park, requesting the Board to enter a finding of compliance and lift invalidity or schedule a pre-remand hearing conference to discuss and clarify the pending proceedings before the Board and courts. On the same day, the Board received, via e-mail from the Board's AAG – Martha Lantz, a copy of Petitioner Kaleas' "Statement of Grounds for Direct Review."

On May 15, 2006 Board received, via e-mail from the Board's AAG – Martha Lantz, a copy of "Normandy Park's Answer to Statement of Grounds for Direct Review," indicating direct review by the Supreme Court is appropriate. Later that day, the Board issued a "Notice of Pre-Remand Hearing Conference for Superior Court Remand of King County Superior Court No. 05-2-27090-0 KNT." The Notice set May 30, 2006 as the date for a Pre-Remand Hearing Conference (**PRHC**) to discuss the remand matter.

On May 30, 2006, the Board held the PHRC at the Board's offices. Board Member, and Presiding Officer in the *Kaleas* matter, Edward G. McGuire convened the conference. Board members Bruce C. Laing and Margaret A. Pageler also attended the conference. Jay Derr and Duncan Green appeared for the City of Normandy Park. Tim Trohimavich appeared for Petitioner Futurewise. David Mann appeared for Petitioners Kaleas and Horst. Petitioner Jack Kaleas and interim Mayor George Hadley of Normandy Park also attended. Julie Taylor, Board Law Clerk, and Kris Hollingshead and Brian Payne, Board externs were also present.

At the PRHC, the Board and the parties discussed the record, the legal issue subject to the remand and a schedule for the case.

The City of Normandy Park renewed its request that the Board enter a finding of compliance and rescind the determination of invalidity, pursuant to the Superior Court's Order. Neither Petitioners Kaleas nor Futurewise objected to the City's request to rescind invalidity. The Board indicated it would address the question in this Pre-Remand Hearing Order.

On June 1, 2006, the Board issued its "Pre-Remand Hearing Order for Superior Court Remand of King County Superior Court No. 05-2-27090-0 KNT (*Kaleas* Remand: CPSGMHB Case No. 05-3-0007c)" (**PRHO**). The PRHO set the briefing and argument schedule for the matter and rescinded the determination of invalidity applicable to vacant, undeveloped and underdeveloped lands subject to the R-20, R-15 and R-12.5 residential designations. *Id.* at 5.

The PRHO also requested that the City provide one original of the City of Normandy Park's 2004 GMA Plan, including Future Land Use Map and zoning map. Additionally, the City was asked to provide relevant information pertaining to land encumbered by covenants restricting density and information regarding population and residential densities for 1990. *Id.* at 4.

The PRHO set forth the following Legal Issues for resolution by the Board:

1. *Does the adoption of Ordinance 742, adopting an updated and revised plan, fail to comply with RCW 36.70A.130, .020(1) and .110, as to permitted urban densities?*
2. *Does the adoption of the challenged provisions of Ordinance 742 substantially interfere with the goals of the Growth Management Act, thereby warranting invalidity?*
3. *Whether Petitioners are entitled to re-argue before the Board the same issues that were presented to and rejected by the Superior Court on appeal?*
4. *Whether, under Viking Properties and Judge Hilyer's Order, the City is given discretion under GMA to decide what constitutes appropriate urban densities under RCW 36.70A.110; and whether the Petitioners in this case have met their burden of proving that the City's decision in this case, based on the information in the record regarding existing conditions, was clearly erroneous?*

PRHO, at 4-5.

On June 22, 2006, the Board received "Futurewise's Pre-Remand Hearing Brief" (**Futurewise PRH Brief**), with eight attached exhibits.

Also on June 22, 2006, the Board received a letter from David S. Mann, attorney for Petitioners Kaleas and Horst, indicating that "[W]e will not be filing a Pre-Remand Hearing Brief in this matter but instead will defer to Futurewise. We respectfully reserve

our right to continue to participate in these proceedings, including participating in the July 27, 2006 remand hearing.” 6/22/06 Mann letter, at 1.

On July 6, 2006, the Board received “City of Normandy Park’s Remand Response Brief” (**Normandy Park PRH Response**), with 20 attached exhibits [Appendices A –L, with Appendix H including 4 items, Appendix J including 5 items, and Appendix L including 3 items].

On July 21, 2006, the Board received “Futurewise’s Reply Brief” (**Futurewise Reply**), with one attached exhibit.

On July 27, 2006, the Board convened the Remand Hearing at the Board’s offices in Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Margaret A. Pageler and Bruce C. Laing were present for the Board. Julie Taylor, Board Law Clerk, and Board Externs Brian Payne and Kris Hollingshead also attended. Petitioner Futurewise was represented by Tim Trohimovich. Petitioners Kaleas and Horst were represented by David S. Mann. Respondent City of Normandy Park was represented by Jay P. Derr. Also in attendance at the hearing were: Jack Kaleas, Brock Howell, Duncan Green, Noah Davis and John Adamson. Court reporting services were provided by John Botelho of Byers and Anderson, Inc. The hearing convened at 10:00 a.m. and adjourned at approximately 11:45 a.m. The Board ordered a transcript of the proceeding.