

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

PILCHUCK AUDUBON SOCIETY,)	
FUTUREWISE, JODY McVITTIE, CINDY)	CPSGMHB Consolidated Case
HOWARD, SHELLY THOMAS,)	No. 06-3-0015c
BARBARA BAILEY, LISA SETTTLER;)	
and F. ROBERT STRAHM,)	<i>(Pilchuck VI)</i>
)	
Petitioners,)	
)	
v.)	
)	
SNOHOMISH COUNTY,)	FINAL DECISION AND ORDER
)	
Respondent,)	
)	
and)	
)	
CITIES OF ARLINGTON and)	
MARYSVILLE; KANDACE HARVEY and)	
HARVEY AIRFIELD, and MASTER)	
BUILDERS ASSOCIATION OF KING)	
AND SNOHOMISH COUNTIES,)	
SNOHOMISH COUNTY CAMANO)	
ASSOCIATION OF REALTORS, and RON)	
& VIKKI HERBKERSMAN.)	
)	
Intervenors.)	
)	

SYNOPSIS

In December of 2005, Snohomish County completed its Plan Update process by adopting over twenty ordinances. Fifteen of the Plan Update ordinances were challenged by numerous Petitioners who filed three¹ separate petitions for review (PFRs) [06-3-0013,

¹ The PFR filed by Camwest Development Inc was segregated from the present proceeding due to a settlement extension request. Settlement was eventually reached, the PFR withdrawn, and the matter dismissed by the Board. See *Camwest Development Inc v. Snohomish County (Camwest IV)*, CPSGMHB Case No. 06-3-0018, Order of Dismissal, (Jul. 25, 2006). Note that the settlement in the *Camwest IV* matter and subsequent legislative action of the County precipitated an appeal by a new Petitioner. See *McNaughton Group LLC v. Snohomish County (McNaughton)*, CPSGMHB Case No. 06-3-0027.

06-3-0014 and 06-3-0015] in March of 2006. The PFRs were consolidated into the present proceeding – Pilchuck VI, et al v. Snohomish County, CPSGMHB Consolidated Case No. 06-3-0015c. One PFR was ultimately segregated, settled, withdrawn and dismissed. Three Snohomish County cities, a sewer district, a building industry group and a property owner intervened on behalf of the County pertaining to the Pilchuck PFR.

The two remaining PFRs [Strahm and Pilchuck] initially posed 21 Legal Issues,² but by the Hearing on the Merits, through motions or abandonment, only 17 Legal Issues remained and only seven Plan Update ordinances were directly challenged.

Virtually all the Legal Issues in the Strahm appeal focused on the adequacy and validity of the County's Land Capacity Analysis (LCA) supporting the population allocations and UGA decisions in the Plan Update. Five Legal Issues challenged whether the LCA showed that the County could accommodate the projected 20-year population growth as reflected in the Plan Update. Based upon the same premise – inability to accommodate projected growth – Petitioner also posed an internal inconsistency issue and two external inconsistency issues [Inconsistency between the County's Plan Update and those of several cities and inconsistency with Snohomish County Countywide Planning Policies.]

The Board determined that Petitioner Strahm had **failed to carry the burden of proof** in demonstrating that the County's LCA and subsequent Plan Update actions failed to comply with any of the GMA provisions challenged. All of Petitioner Strahm's Legal Issues [A-H] were **dismissed**.

Nine Legal Issues remained to be resolved in the Pilchuck PFR. Petitioners challenged the County's minimum 10-acre parcel size criterion for designation of agricultural lands of long term commercial significance [Legal Issue 1], and the de-designation of 6-acres of agriculturally designated land [Legal Issue 6]. The Board found that the parcel size exclusion criterion **complied** with the relevant provisions of the Act; but determined that the de-designation of existing agricultural land was **clearly erroneous** and the matter was **remanded**.

The Board also found that Plan Update Policies that permitted the extension or expansion of sewers into the rural area to serve schools and churches adjacent to the UGA [Legal Issue 2] was **clearly erroneous** and **noncompliant** with RCW 36.70A.110(4). The Board also entered a **determination of invalidity** for these policies.

Pilchuck also challenged whether the County's Transportation and Capital Facilities Elements in the Plan Update complied with their respective provisions of the GMA [Legal Issues 4 and 5]. On both these questions, the Board found and concluded that the Petitioners had **failed to carry their burden of proof**; thus, Legal Issues 4 and 5 were **dismissed**.

² Many stated Legal Issues included "sub-issues" within the Legal Issue heading.

Regarding Pilchuck’s challenge to the UGA expansions for the cities of Arlington, Lake Stevens and Marysville, the Board again found that Petitioners had **failed to carry the burden of proof** in demonstrating that the UGA expansions for the cities of Lake Stevens and Marysville did not comply with the challenged provisions of the Act. Legal Issues 7 and 8 were **dismissed**. However, as to the Arlington UGA expansion, the Board concluded that the 6-acre de-designation of agricultural land and subsequent UGA expansion discussed in Legal Issue 6, **did not comply** with the locational criteria of RCW 36.70A.110, and the matter was **remanded**.

In Legal Issue 9, where Petitioners alleged the County failed to remove approximately 50 acres from the existing UGA, adjacent to the City of Snohomish, in order to protect a critical area – a frequently flooded area – the Board concluded that Pilchuck had **failed to carry the burden of proof** and Legal Issue 9 was **dismissed**. The Board reached the same conclusion on Pilchuck’s notice and public participation challenge and **dismissed** Legal Issue 12.

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I. BACKGROUND³

In December of 2005, Snohomish County adopted a series of ordinances updating their GMA Comprehensive Plan, Future Land Use Map (**FLUM**) and implementing development regulations (generally – the **Plan Update**). That action precipitated the filing of three separate timely Petitions for Review (**PFR**) by numerous Petitioners in March of 2006. Petitioners challenged 15 separate ordinances adopted by the County to accomplish its Plan Update.

The first PFR was filed by Pilchuck Audubon Society, Futurewise, Jody McVittie, Cindy Howard, Darlene & Ken Salo, Shelly & Tim Thomas, Barbara Bailey and Lisa Stettler. The second PFR was filed by F. Robert Strahm and the third was filed by Camwest Development Inc. The Board issued several notices, setting the time for the prehearing conference (**PHC**) and consolidating the PFRs. Several persons, cities, organizations and service districts filed for status as Intervenors prior to the PHC.

At the April 10, 2006 four days after the PHC, the Board issued two Orders, the first was its “Prehearing Order and Order on Intervention” (**PHO**), the second was an “Order Segregating Camwest Development LLC Petition for Review [CPSGMHB Case No. 06-3-0015 from the Consolidated Case, Granting a 90-day Settlement Extension and Prehearing Order” (**Segregation Order**). The Segregation Order separated the Camwest PFR from the consolidated proceeding, **granted** a settlement extension and established a separate schedule for the Camwest proceeding. The segregated case was assigned a new

³ The complete Procedural History in this matter is found at Appendix A.

case number CPSGMHB Case No. 06-3-0018. The PHO established a case schedule, Legal Issues to be decided and **granted** Intervenor status to: the City of Arlington, Kandace Harvey & Harvey Airfield, City of Marysville, City of Lake Stevens, Lakes Stevens Sewer District and the Master Builder Association of King and Snohomish Counties and Snohomish County Camano Association of Realtors. Subsequent to issuance of the PHO, the Board received and granted a motion from Ron and Vikki Herbkersmans to intervene. All Intervenors sought to participate in the Pilchuck portion of the consolidated case; their intervention was limited to participating on specific Legal Issues or specific challenged Ordinances.

Although several motions to supplement the record were filed, the County amended its index to include the disputed items. The record for this matter was as contained in the 2nd Amended Index filed by the County on May 4, 2006. Note that there were numerous “rebuttal” exhibits admitted to the record at the Hearing on the Merits. See Preliminary Matters, *infra*.

On May 4, 2006, the Board issued its “Order on Motions” (**OoM**). The OoM not only set the record for this proceeding but also addressed several dispositive motions made by the County. Petitioners Darlene & Ken Salo and Tim Thomas were **dismissed** as Petitioners for lack of GMA participation standing. Pilchuck’s Legal Issues 3 and 11 were **dismissed with prejudice**.

On May 15 and June 1, 2006 the Board received the requested Core Documents from the various parties. Through June and early July the Board received the briefing of the parties. All briefing was timely. This FDO refers to the briefing received as:

- Opening briefs - Petitioners: **Pilchuck PHB** and **Strahm PHB**
- Response briefs - Respondent: **County Response**
Intervenors: **Arlington Response**
Marysville Response
Harvey Airfield Response
MBA Response
- Reply briefs – Petitioners: **Pilchuck Reply** and **Strahm Reply**.

The City of Lake Stevens and Lake Stevens Sewer District withdrew as Intervenors and are **dismissed** as parties to this proceeding. No briefing was received on behalf of Intervenor Herbkersmans, nor did they participate in the hearing on the merits.

In conjunction with, and subsequent to, the filing of briefs the parties asked that the record be supplemented. These motions are discussed in Preliminary Matters, *infra*.

On July 19, 2006, the Board conducted the Hearing on the Merits for the *Strahm* portion of this proceeding. The HOM was held at the Board’s offices in Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer,

and Margaret A. Pageler were present for the Board.⁴ Petitioner F. Robert Strahm attended and was represented by C. Thomas Touhy. Respondent Snohomish County was represented by Brent D. Lloyd. Also attending for the County were Millie Judge, Jason J. Cummings, Steven Toy, and Stacy Phan. Julie Taylor, Board Law Clerk was also present. Marco de Sa e Silva, attorney for Intervenor Herbkersmans, appeared, but did not participate. Vikki Herbkersman, Ryan White, Grant Weed and Eric Laschever were also present. Court reporting services were provided by John Botelho of Byers and Anderson. The hearing convened at 10:00 a.m. and adjourned at approximately 1:00 p.m. A transcript of the proceeding was ordered.

On July 20, 2006, the Board conducted the Hearing on the Merits for the *Pilchuck* portion of this proceeding. The HOM was held at the Board's offices in Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Margaret A. Pageler were present for the Board. Petitioners Pilchuck Audubon Society, Futurewise, Jodie McVittie, Cindy Howard, Shelly Thomas, Barbara Bailey and Lisa Stettler were represented by John Zilavy. Respondent Snohomish County was represented by John R. Moffat and Jason J. Cummings. Intervenor City of Arlington was represented by Steve Pfeifle. Intervenor City of Marysville was represented by Grant Weed. Intervenor Kandace Harvey and Harvey Airfield were represented by Molly Lawrence. Intervenor MBA was represented by Duana Kolouskova. Julie Taylor, Board Law Clerk, and Board Externs Kris Hollingshead and Brian Payne were also present. Also attending were Jason Chambers, Marion Gallagher, Blair Anderson, David Toyer, Gloria Hirashima, Mary Swenson and Nathan Gorton. Court reporting services were provided by Eva Jankowitz of Byers and Anderson. The hearing convened at 12:30 p.m. and adjourned at approximately 4:45 p.m. A transcript of the proceeding was ordered.

On July 31, 2006, the Board received the transcript for the Pilchuck portion of this proceeding. (***Pilchuck* HOM Transcript**)

On August 3, 2006, the Board received the transcript for the Strahm portion of this proceeding. (***Strahm* HOM Transcript**)

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

Upon receipt of a petition challenging a local jurisdiction's GMA actions, 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 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). *See Lewis County v. Western Washington Growth Management Hearings Board*, 139 P.3d 1096 (2006) ("The Growth Management

⁴ Board member Bruce C. Laing's term expired before the Board issued the Final Decision and Order in this case. Consequently, Mr. Laing did not participate further in this matter.

Hearings Board is charged with adjudicating GMA compliance and invalidating noncompliant plans and development regulations”).

Petitioners challenge Snohomish County’s adoption of its Plan Update and amendments to its GMA Comprehensive Plan and development regulations, as adopted by Ordinance Nos. 05-069, 05-070, 05-071, 05-073, 05-074, 05-075, 05-076, 05-077, 05-078, 05-079, 05-081, 05-082, 05-090, 05-092, and 05-101⁵ each amending and updating the County’s Comprehensive Plan and/or development regulations. Pursuant to RCW 36.70A.320(1), these Ordinances are presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the actions taken by Snohomish County are not in compliance with the goals and 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 [Snohomish County] 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 Snohomish County’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).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local

⁵ In the *Pilchuck VI* PFR, as amended, and the *Strahm* PFR, as amended, the Ordinances challenged are:

- Ordinance No. 05-069 updates the Plan specifically, the Land Use element
- Ordinance No. 05-070 updates the Transportation element
- Ordinance No. 05-071 adopts the Capital Facility element [plan]
- Ordinance No. 05-073 adopts and expands the UGA for Arlington
- Ordinance No. 05-074 adopts and expands the UGA for Granite Falls
- Ordinance No. 05-075 adopts and expands the UGA for Lake Stevens
- Ordinance No. 05-076 adopts and expands the UGA for Maltby
- Ordinance No. 05-077 adopts and expands the UGA for Marysville
- Ordinance No. 05-078 adopts and expands the UGA for Monroe
- Ordinance No. 05-079 adopts a revised UGA for Snohomish
- Ordinance No. 05-081 adopts and expands the UGA for Stanwood
- Ordinance No. 05-082 adopts and expands the UGA for Sultan
- Ordinance No. 05-090 adopts FLUM changes and rezones to implement the Plan
- Ordinance No. 05-092 adopts amendments to the County’s Transportation Concurrency regulations
- Ordinance No. 05-101 adopts Plan policies and implementing regulations for FCCs.

decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to Snohomish County in how it plans for growth, provided that its planning actions or policy choices are consistent with, and comply 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 is in accord with prior 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). As the Court of Appeals explained, "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); *Quadrant*, 154 Wn.2d 224, 240 (2005). And *see*, most recently, *Lewis County*, 139 P.3d at fn. 16: "[T]he GMA says that Board deference to county decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds."

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, ABANDONED ISSUES, PRELIMINARY MATTERS and PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that the PFRs filed by Pilchuck, *et al.*, and Strahm were timely filed, pursuant to RCW 36.70A.290(2); all remaining Petitioners⁶ have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinances, which update and amend the County's Comprehensive Plan and implementing development regulation, pursuant to RCW 36.70A.280(1)(a).

⁶ Several Petitioners from the Pilchuck PFR were dismissed for lack of standing. *See* May 4, 2006 Order on Motions.

B. ABANDONED ISSUES

Abandoned Issues:

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 April 10, 2006 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 15 (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.

Also, 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, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.

The Pilchuck Petitioners have *explicitly* abandoned their challenge to Legal Issues 10 and 13. *See* Pilchuck PHB, at 2. Additionally, Petitioner Strahm has explicitly abandoned Legal Issue Bi. *See* Strahm PHB, at 9. These Legal Issues are explicitly **abandoned** and will not be further addressed by the Board.

The County asserts in its briefing that Petitioners have also abandoned several Legal Issues, or portions thereof, by failing to adequately brief them in their opening briefs. These matters will be addressed, where appropriate, in the context of the individual Legal Issue.

C. PRELIMINARY MATTERS

Oral Rulings at the HOM:

The Board made several oral rulings regarding supplementation of the record, at both the July 19 and July 20, 2006 HOM. Those rulings are summarized below:

- Snohomish County Exhibit Book - Appendix C – Board takes **official notice** of items 1-16, referenced as **Appendix C Exhibits 1-16**, respectively.

There were no objections to any of the motions to supplement or offers of illustrative exhibits. The Board assigned the following Hearing on the Merits Exhibit numbers⁷ to the following items:

- **HOM Ex. 1** – Revised Version of 2/1/06 FLUM – Agriculture Only⁸
- **HOM Ex. 2** – 5 maps showing areas designated as Local and Upland Commercial Farmland and parcels 10 acres or less. 2A = Sultan; 2B = Granite Falls; 2C = Arlington SW; 2D = Arlington NW; and 2E = Stanwood.
- **HOM Ex. 3** – Thurston Co. Briefing in 1000 Friends v. Thurston County, WWGMHB Case No. 05-2-0002.
- **HOM Ex. 4** – 7/30/02 E-mail from Kamuron Gurol (SnoCo. PDS) Re: Buildable Lands Methodology
- **HOM Ex. 5** – Snohomish County 1/31/06 Housing Needs Report
- **HOM Ex. 6** – 4/3/06 E-mail to Steven Toy (SnoCo. PDS) from Rick Cisar (*Sultan*) Re: Snohomish County Tomorrow (**SCT**) Target Reconciliation
- **HOM Ex. 7** – 4/3/06 E-mail to Steven Toy (SnoCo. PDA) from Stephanie Cleveland Hansen (*Stanwood*) Re: SCT Target Reconciliation
- **HOM Ex. 8** – 4/3/06 E-mail to Steven Toy (SnoCo. PDA) from Corbitt Loch (*Snohomish*) Re: SCT Target Reconciliation
- **HOM Ex. 9** – 4/4/06 E-mail to Steven Toy (SnoCo. PDA) from Cliff Strong (*Arlington*) Re: SCT Target Reconciliation
- **HOM Ex. 10** – 4/6/06 E-mail to Steven Toy (SnoCo. PDA) from Dennis Lewis (*Lynnwood*) Re: SCT Target Reconciliation
- **HOM Ex. 11** – 4/6/06 E-mail to Steven Toy (SnoCo. PDA) from Lyle Romack (*Granite Falls*) Re: SCT Target Reconciliation
- **HOM Ex. 12** – 4/10/06 E-mail to Steven Toy (SnoCo. PDA) from Gloria Hirashima (*Marysville*) Re: SCT Target Reconciliation
- **HOM Ex. 13** – 4/10/06 E-mail to Steven Toy (SnoCo. PDA) from Tom Rodgers (*Mill Creek*) Re: SCT Target Reconciliation
- **HOM Ex. 14** – Comprehensive Plan 10 Year Update Status for SCT Planning Advisory Committee (**PAC**) Discussion dated 4/13/06
- **HOM Ex. 15** – 4/13/06 PAC Recommendation on Reconciled Countywide Planning Policy 2025 Population Targets
- **HOM Ex. 16** – 4/20/06 memo to SCT Steering Committee from Steven Toy Re: SCT Target Reconciliation – PAC Recommendation
- **HOM Ex. 17** - 5/24/04 memo Re: SCT Growth Target Reconciliation

⁷ HOM Exs. 1-3 were admitted at the July 20, 2006 HOM – *Pilchuck* portion; HOM Exs. 4 – 18 were admitted at the July 19, 2006 HOM – *Strahm* portion.

⁸ The Board also requested and received two display size copies of the FLUM showing *all* land use designations. No new Exhibit number was assigned to the Display sized version of the FLUM.

- **HOM Ex. 18** – 5/24/06 SCT Steering Committee Meeting minutes

At the *Strahm* portion of the HOM in this matter [July 19, 2006], the following additional exhibits were admitted.

- **HOM Ex. 19** – Strahm illustrative exhibit 17 [Tables 17A and 17 B] attached to 7/10/06 Strahm Reply – corrected Illustrative Exhibit to replace Exhibits 6 and 7 attached to Strahm PHB – Tables referred to as **HOM Ex. 19A and 19B**, respectively.
- **HOM Ex. 20** – Snohomish County rebuttal exhibit, filed 7/12/06 – Table from County Buildable Lands website – “unincorporated Areas Development History Table” [Developed for 2002 Buildable Lands Report – SW and Lake Stevens UGAs – History used to predict future averages].
- **HOM Ex. 21** – Strahm rebuttal illustrative exhibits [Tables 20A, 20B and 20C], filed 7/17/06 – Tables referred to as **HOM Ex. 21A, 21B and 21C**.

At the *Pilchuck* portion of the HOM in this matter [July 20, 2006], the following additional exhibits were admitted.

- **HOM Ex. 22** – Table showing total acreage [2522 acres] added to Snohomish County UGAs, by city MUGA. Requested by the Board at the 7/19/06 HOM on *Strahm*. Delivered at the 7/20/06 HOM on *Pilchuck*.
- **HOM Ex. 23** – Excerpt from the August 2004 Snohomish County GMA Comprehensive Plan General Policy Plan – showing language for UT Policy 3.C.1 and implementing regulations from Snohomish County Code 30.29.120.
- **HOM Ex. 24** – Air photo showing “Foster UGA” offered by City of Arlington. Photo shows UGA boundary in blue [expansion area for Foster property] and city limits in red.
- **HOM Ex. 25** – Two maps City of Marysville Comprehensive Plan Map, dated May 2005, showing prior UGA and a blow up map showing a portion of the expanded UGA for Marysville.

D. PREFATORY NOTE

Order of Discussion for Legal Issues;

The Board will first address Petitioner Strahm’s Legal Issues and then address Petitioner Pilchuck’s Legal Issues.

1. Strahm PFR:

Petitioner Strahm alleged 8 Legal Issues in the PFR [Labeled A through H]. Petitioner Strahm explicitly abandoned Legal Issue B(i). Legal Issues A, D, E, F and H all challenge the County’s Land Capacity Analysis (**LCA**) methodology for sizing, or

expanding, its Urban Growth Areas (UGAs). These issues are discussed together and are grouped under the topic of Accommodating Growth. Legal Issue B is stated as an Internal Inconsistency issue; this question is addressed next. Finally, the Board takes up Legal Issue C and G, which each allege External Inconsistencies or Inconsistencies with CPPs.

2. Pilchuck PFR:

Petitioner Pilchuck's PFR originally posed 13 Legal Issues (plus a request for invalidity) for the Board to resolve. Legal Issues 3 and 11 were dismissed in the Board's May 4, 2006 Order on Motions, leaving 11 Legal Issues. Petitioners explicitly abandoned Legal Issues 10 and 13 in their prehearing brief. Pilchuck PHB, at 2; and Section III B. *supra*. Therefore, nine Legal Issues remain from the Pilchuck PFR.

The Board will address the Legal Issues from the Pilchuck PFR in the following order:

- Legal Issue 1 and Legal Issue 6, in part – Agricultural Land Designation Criteria – parcels < 10 acres and De-designation of 6 acres of Agricultural Land
- Legal Issue 2 – Extension of Urban Services (Sewers) Beyond the UGA, into the Rural Area for Schools and Churches
- Legal Issue 4 – Transportation Element challenge
- Legal Issue 5 – Capital Facilities Element challenge
- Legal Issues 6, in part, 7 and 8 – Arlington, Lake Stevens and Marysville UGA Expansion
- Legal Issue 9 – Harvey Airfield
- Legal Issue 12 – Public Participation

IV. STRAHM LEGAL ISSUES AND DISCUSSION

Overview of Strahm's Challenge

Petitioner provides an "Overview" in his brief to focus the primary areas that are of concern to Petitioner. Petitioner asserts:

The primary problems [with the Plan Update] are: The County's failure to perform the actual review and analysis required by RCW 36.70A.115 and RCW 46.70A.130(3), in connection with the urban growth areas and densities contained in the Update, because in many instances the County did not attempt to determine actual 2025 population and employment capacity figures, but merely substituted initial growth target figures; The County failed to follow Countywide Planning Policies, and the methodologies approved by Snohomish County Tomorrow, in performing its Land Capacity Analysis; and the County's Residential Land Use Needs

Analysis fails to take rights of way into account. These major areas of concern are at the core of most of the challenges to the Plan Update.

Strahm PHB, at 1-2.

The County also attempts to identify the crux of Petitioners' concerns as a challenge to Snohomish County's "methodology for sizing UGAs." County Response, at 85. The County also suggests that:

[I]n challenging the County's land capacity analysis, Petitioner Strahm repeatedly confuses the purpose of the forward-looking Ten Year Update process with the separate, backward-looking "buildable lands" review that the County is not required to complete until 2007. [Citation omitted] Similarly, in arguing that insufficient capacity exists within the County's UGAs, Strahm ignores efforts taken by the County and its cities to increase densities within existing UGA boundaries consistent with the GMA's predilection for building up and in, before building out.

Id. at 87.

The Board also construes Strahm's challenge as focusing on Snohomish County's 2005 Land Capacity Analysis prepared as part of the County's Plan Update.

A. LEGAL ISSUE NOS. A, D, E, F and H – ACCOMMODATING GROWTH

Legal Issue A⁹ alleges noncompliance with RCW 36.70A.110. Legal Issue D¹⁰ alleges noncompliance with RCW 36.70A.130. Legal Issue E¹¹ alleges noncompliance with RCW 36.70A.115. Legal Issue F¹² alleges that the County did not "show its work" in

⁹ Legal Issue A – Does the Plan Update fail to comply with RCW 36.70A.110(2), because the Plan Update is inconsistent with the requirement to "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" and with CPP (including CPP UG-8 and UG-13)?

¹⁰ Legal Issue D – Does the Plan Update fail to comply with RCW 36.70A.130(3) because the County failed to revise the comprehensive plan to include land areas and densities required to accommodate the urban growth projected to occur in the County for the succeeding twenty-year period, in accordance with CPP UG-2, UG-7 and UG-8?

¹¹ Legal issue E – Does the Plan Update fail to comply with CPP UG-2, UG-7 and UG-8 and RCW 36.70A.115 because it is inconsistent with the requirement to "provide sufficient capacity of suitable land for development within their jurisdiction to accommodate their allocated housing and employment growth as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management?"

¹² Legal Issue F – Has the County failed to "show its work" in making the assumptions that adequate capacity to accommodate the population and employment allocated to it exists through minimal expansion of the UGAs and increased densities?

claiming it can accommodate the projected growth. Legal Issue H¹³ alleges noncompliance with both RCW 36.70A.110 and .130, as well as .215. Each of these GMA sections bolster and support each other in articulating the County's duty and requirement to ensure that there is sufficient land capacity and density within the Plan's urban areas to accommodate the projected 20-year growth. Consequently, these Legal Issues are discussed together.

Applicable Law

RCW 36.70A.110(2) provides in relevant part:

Based upon the growth management population projection made for the 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. . .*

(Emphasized supplied).

-
- i. *Has the County failed to "show its work" when the calculations provided by the County in support of the Land Capacity Analysis are in the form of summaries and computer input scripts and queries?*
 - ii. *Does the Plan Update lack sufficient facts and analysis to demonstrate how the limited UGA expansions, increased densities and rates of projected re-development provide sufficient capacity to fulfill the County's allocation of population, housing and employment growth?*
 - iii. *Has the County failed to produce facts to support the conclusion in the Plan Update that as of 2002, the composite Urban Growth Area has 271,259 additional population capacity, and 152,752 employment capacity, as stated in the capacity analysis?*

¹³ Legal Issue H – *Does the Plan Update fail to comply with RCW 36.70A.110, RCW 36.70A.130 and RCW 36.70A.215 because it incorporates an incomplete and erroneous land capacity review and evaluation?*

- i. *Does the Plan Update omit sufficient facts or analysis to demonstrate how the minimal UGA expansions, increased densities and projected rates of re-development provide sufficient capacity to fulfill the County's allocation of population, housing and employment growth?*
- ii. *Does the Plan Update employ an erroneous buildable lands analysis that is inconsistent with CPP UG-13 and UG-14 and the methodology recommended by the Washington State Department of Community, Trade and Economic Development?*
- iii. *Does the Plan Update employ erroneous buildable lands analysis, because the Plan Update does not take into account the effect of proposed Best Available Science critical areas regulations that are more restrictive and would potentially reduce available buildable land, when the County is required by RCW 36.70A.172(1) to include Best Available Science in designating and protecting critical areas?*
- iv. *Does the Plan Update employ erroneous buildable lands analysis, because it lacks any valid statistical, scientific or factual analysis to support the 5% upward adjustment of unmapped critical areas?*

RCW 36.70A.130(1) and (4) required Snohomish County to complete its periodic review and evaluation of its Comprehensive Plans and implementing development regulations by December 1, 2004. [Note: the timing of the County's Update is not at issue in this proceeding.] RCW 36.70A.130 provides in relevant part:

(3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, *each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas.*

(3)(b) The county comprehensive plan designating urban growth areas, and *the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period.* The review required by this subsection may be combined with the review and evaluation required by RCW 36.70A.215.

RCW 36.70A.115 provides:

Counties and cities that are required or choose to plan under RCW 36.70A.040 shall ensure that, taken collectively, adoption and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management.

(Emphasis supplied).

RCW 36.70A.215 establishes the Buildable Lands Review and Evaluation Program and requires Snohomish County, in consultation with its cities, to adopt a CPP governing the Buildable Lands Program. Snohomish County CPP UG-14 establishes the Buildable Lands Program for Snohomish County and each of its cities. The CPP indicates that the County, and its cities, has completed the review and evaluation program as reflected in the Snohomish County Tomorrow 2002 Growth Monitoring/Buildable Lands Report – January 2003 (BLR). RCW 36.70A.215(1) states that the purposes of the Buildable Lands Program are to:

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

Discussion and Analysis

Buildable Lands, the Plan Update and .215 – part of Legal Issue H:

As the Board opined in its May 4, 2006 Order on Motions in this matter, at 7: “The question of whether the County’s 2002 BLR [Buildable Lands Report] complies with RCW 36.70A.215 is not an issue before the Board.” Petitioner has challenged the Plan Update, not the BLR. RCW 36.70A.215 is not directly applicable to the Plan Update. Consequently, that portion of Legal Issue H alluding to whether the County’s Plan Update complies with this section of the GMA is **dismissed**.

However, the Board notes that the BLR is not irrelevant to the Plan Update. The Board has explained that although the BLR looks backwards, it provides updated and important information for evaluating GMA Plans and regulations. In *CTED v. Snohomish County (CTED FDO)*, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004), the Board stated:

The review and evaluation program (the Buildable Lands Program) is an assessment of the existing designated UGAs to determine whether they were appropriately sized and located to accommodate the urban growth projected for 2012; it is a 10-year assessment, and early warning sign, which allows jurisdictions to consider reallocating population or take other actions to encourage urban development within the UGAs, thereby avoiding the need to expand them. The BLR may also provide information for mid-course corrections if adjustments to the UGA are documented in the BLR and are necessary.

The information developed for the Buildable Lands review and evaluation program provides updated and important information for updating and perhaps revising the County’s *land capacity analysis*. *As noted in RCW 36.70A.215(1), it is not a substitute for the land capacity analysis required*

by .110. Thus, if all else fails, information obtained from the .215 review and analysis may be drawn upon in updating or revising the required .110 land capacity analysis used to size, locate and designate a county's UGA.

CTED FDO, at 21; (emphasis supplied).

The required land capacity analysis in RCW 36.70A.110 is also reflected in RCW 36.70A.130 for Plan Updates. Again this reference is to assure that Plans provide sufficient land to accommodate the latest projected growth. This supporting documentation is required to enable cities and counties to discharge their respective duty to accommodate projected growth. There is a sound and logical link between the BLR's assessment of past activities and the land capacity analysis' evaluation of accommodating future growth. The information derived from the BLR should provide data better than theoretical densities and serve as a basis for modifying planning assumptions, policies and designations and testing them with a future land capacity analysis to determine whether jurisdictions have planned for the capacity to accommodate newly assigned growth.

Land Capacity Analysis and .110 and .130 – Legal Issues A, D and part of H:

SCT Methodology:

For Legal Issue A, Strahm cites the language of RCW 36.70A.110(2) that requires the County to include areas and densities sufficient to accommodate projected 20-year [2025] growth; as reinforced by CPPs UG-8 and UG-13. CPP UG-8 states, "Ensure UGAs provide sufficient density, developable land, public facilities and public services to accommodate most of the projected population and employment growth." Core Document (CD) 16 – Snohomish County CPPs. CPP UG-13 says, "Use land capacity analysis methods that are consistent among jurisdictions to calculate holding capacity approved by the Snohomish County Tomorrow Steering Committee (SCT)." *Id.* at 7.

Strahm then produces a document dated February 24, 1993 entitled Land Capacity Methodology for Residential Lands that was accepted by the SCT (hereafter **SCT 1993 LCM**). Strahm PHB, at 4; Ex. 2. Strahm notes the steps for making calculations and the worksheet attached to the SCT 1993 LCM, which suggests a 'line item – right-of way reduction factor,' and the ultimate product of using the methodology as the "net" land capacity figure. Strahm then contends that the Snohomish County UGA Land Capacity Analysis Technical Report, December 21, 2005 (**2005 LCA**) and Residential Land Use Needs Analysis (**RLUNA**) did not follow this methodology because it did not make deductions for rights-of-way, storm detention facilities and did not yield a "net" land capacity figure, as directed by the SCT 1993 LCM. *Id.* at 5-8.

The County counters that Petitioner neglects to point out that the correct and full title of the SCT 1993 LCM is "Working Paper" Land Capacity Methodology for Residential Lands. County Response, at 108. Thereby, it appears that the County is inferring that the

SCT 1993 LCM methodology was intended to be a work in progress, not the final word on how land capacity analyses were to be conducted.

The County also argues that the County's 2005 LCA is consistent with, and follows the "steps" set forth in the SCT 1993 LCM methodology. The SCT 1993 LCM's simple four step methodology involves: 1) inventory vacant¹⁴ parcels; 2) calculate theoretical housing unit yield for each parcel (acres x maximum zoning yield); 3) reduce theoretical housing unit yield to account for critical areas, rights-of-way, and other public purpose lands; and 4) make adjustments for market feasibility. *Id.* 109; *Citing* SCT 1993 LCM. The County compares the 2005 LCA with this methodology and argues that the 2005 LCA follows these same simple basic steps, but it is substantially more sophisticated and more accurate, in that it relies on technology advancements that were not available in the early 1990s (*e.g.* geographic information systems [GIS] for parcel specific and critical area mapping and data analysis.) *Id.* at 109-110.

Additionally, the County asserts that neither CPP UG-8 nor UG-13 contradict the County's calculation of "net buildable density" versus "net density" as simplistically described in the SCT 1993 LCM. *Id.* at 112. Finally, the County contends that even if there are minor differences in LCA methodologies used by the County and its cities, Strahm has failed to show material differences, and has failed to carry the burden of proof on this Legal Issue. *Id.* 113.

The Board agrees with the County. The SCT 1993 LCM is a basic, and dated, tool for Snohomish County jurisdictions to use in calculating holding capacity as part of discharging their .110 and .130 duties. The County has shown that the basic steps outlined in the SCT 1993 LCM are contained in the County's 2005 LCA, at a more sophisticated, less theoretical, and refined level of detail. The Board also notes that the SCT 1993 LCM process leads to a rough "theoretical capacity" [*i.e.* multiplying acres by *maximum* zoning yield], while the more advanced 2005 LCA conducted by the County relies on more accurate mapping and builds on experience gained from its Buildable Lands Report (**BLR**) and looks at the development history and densities derived from parcel specific analysis in the BLR, rather than theoretical maximum densities included in the SCT version. Consequently, the Board concludes that the County's methodology does not run afoul of UG-13, regarding adhering to an SCT methodology.

Reduced Buildable Land v. Net Buildable Land & Buildable Density Statistic:

Petitioner argues that the County's 2005 LCA and RLUNA calculated a "reduced buildable lands" figure rather than a "net buildable lands" figure. Strahm PHB, at 6. Petitioner asserts that the flaw with the County's approach is that it did not deduct *unbuildable* land areas devoted to storm-water retention or rights-of-way for future roads

¹⁴ There are similar steps for redevelopable parcels, which includes an additional step of subtracting existing units.

(as set forth in the SCT 1993 LCM). Therefore, the amount of land noted to accommodate future growth is overstated. *Id.*

Petitioner notes that the “buildable acres” (gross acres in the unincorporated UGA minus critical areas and buffers) noted in the 2005 LCA is the same as the “total buildable acres” used in the RLUNA. *Id.* at 7. Strahm asserts that to get to the County’s “reduced buildable acres” the County deducts 5% for public and institutional uses, and an additional 15% for vacant land with no pending projects and 30% for partially used or redevelopable parcels. Petitioner notes that the RLUNA indicates that the County concludes that there are 11,567 buildable acres in the proposed unincorporated UGA. *Id.* Petitioner then asserts that this figure (11,567 acres) is wrong because it *includes* unbuildable rights-of-way and stormwater detention facilities – essentially overstating capacity. *Id.*

Strahm then calculates “net buildable land” using the SCT methodology and its noted deductions. Petitioner’s analysis includes an *approximate* 50%¹⁵ reduction of the “gross acreage” to get “net acreage” to which additional reduction factors are applied. Based on this analysis, Petitioner concludes that there are really only 7,839 net buildable acres in the unincorporated UGA, 3,728 less than the County claims. *Id. citing* Ex. 7.

While the Board heard Petitioner’s “land capacity shoe” hit the floor, Petitioner never dropped the other shoe - the “accommodate projected population shoe.” From the Board’s point of view, Petitioner has omitted a critical part of the analysis to carry his burden of proof – taking his acreage figure and comparing it to projected population. This involves calculating persons per unit to determine number of units needed, then evaluating various density configurations [existing or proposed] to determine whether the given amount of land is sufficient to accommodate the projected population. The County, unlike Petitioner, did not omit this step in its 2005 LCA.

In response, the County argues that,

RCW 36.70A.110(2), RCW 36.70A.115 and RCW 36.70A.130(3) impose a clear duty on Snohomish County to include adequate land area and densities within its UGAs to accommodate the growth that is projected to occur during the twenty-year planning cycle. But Strahm never cites to any evidence that proves the County has failed to discharge that duty, nor

¹⁵ As the Board understands it, to derive this *approximate* 50% reduction for net density, Strahm looks to the County’s Growth Monitoring Reports from 2001 – 2003, Ex. 4, which track *each* “New Residential Lots in Recorded Formal Plats and Segregated Condos” for *all* the development in the County’s cities and unincorporated UGAs. These reports show not only observed gross and net acreage, but also buildable acreage. For example, the 2003 Growth Monitoring Report indicates that in the County’s unincorporated UGA, 512 gross acres or 408 buildable or 274 net acres were subject to platting for that year. The net acreage subject to platting was approximately 53% of the total gross acreage platted. [Buildable acreage was approximately 80%.

does he offer any specific analysis demonstrating that the County's UGAs are individually or collectively incapable of accommodating projected growth.

County Response, at 101.

The County contends that Petitioner *alleges*, but does not *show* that the County's use of city provided population growth targets¹⁶ overstate capacity. Instead, according to the County, the Petitioner *assumes* that actual capacities of the cities are less¹⁷ than those provided by the cities and used in the 2005 LCA and RLUNA. *Id.* at 102. Generally, the Board agrees with the County.

The County surmises that since Petitioner cannot prove the County lacks capacity in its UGAs he attacks the 2005 LCA and RLUNA methodology. *Id.* The County asserts that its 2005 LCA, which explicitly shows the County's methodology and analysis, concludes that "all UGAs have sufficient capacity to accommodate their 2025 population forecasts" and that the burden is on Petitioner to show otherwise – which he has not done. *Id.* at 103.

Regarding Petitioner's assertion that the County's use of "buildable acreage" versus "net acreage" is erroneous because it includes unbuildable land, the County asserts that application of either measure yields the same result in terms of *density*, but the buildable acreage calculations are simpler. *Id.* at 104-108. The Board notes that this is an important step for ensuring that future projected populations can be accommodated.

The County argues that,

[I]ts *buildable density* statistic is derived from the *observed housing unit density achieved* on all altered land in residential developments, including all land used for building lots, roads, detention ponds and tot lots. By *applying this observed buildable density statistic to the estimate of buildable land supply* (i.e. all land unconstrained by critical areas and buffers), the LCA methodology ensures that the land needed for these other non-residential uses continue to be accounted for in the estimate of future capacity. This also because the [lower] unit density per acre includes the land needed for these other non-residential uses.

Id. at 105-106, (emphasis supplied); *see also* sample density calculation, at 107; and CD 2, Exhibit NN, 2005 LCA, at 19

¹⁶ These targets are indicators of the cities' minimum capacity estimates – the future populations they can accommodate.

¹⁷ The County notes that for some cities Petitioner acknowledges that a city's actual capacity is higher than the provided growth target. County Response, at 102, footnote 161, referring to Strahm PHB, at 14.

The Board agrees that given an observed and achieved density (*i.e.* X number of units achieved on Y gross acres), use of either calculation yields the same result. The Board notes that compared to a “net density” statistic, the “buildable density” statistic will show a *higher* “buildable acreage” figure and will yield a *lower* density (dwelling units per acre), because in the buildable density statistic accommodation is made for roads and detention ponds – land that is “developed,” but not in housing. If roads and detention ponds were also deducted from the same site, with the same number of dwelling units (*i.e.* net acreage); then the result is that the acreage is *less*, but the density is *higher*. Using either calculation, the actual acreage and dwelling unit count is the same. Likewise, applying an observed density assumption derived by either methodology to vacant or partially developed lands should produce substantially the same dwelling unit count for the parcel(s) being analyzed. *See* 2005 LCA, at 19 and County Response, at 107.

In his reply brief and at the HOM, Strahm introduces a new argument questioning the validity of the County’s use of an “observed buildable density statistic.” Strahm Reply, at 6-11; HOM Transcript, at 16-19. Petitioner questions where this statistic comes from, because he was unable to recreate the County’s calculations. *Id.*

As the Board understands the argument, Petitioner looked to page 5 of the County’s 2005 LCA and obtained an observed buildable density statistic of 5.02 to be applied to urban low density residential (ULRD) designations - those designations ranging from 4-6 dwelling units per acre (du/acre). He next turned to Table 37 of the RLUNA which provided an observed buildable density statistic of 11.12 for urban medium density residential (UMDR) – 6-12 du/acre; and an observed buildable density statistic of 19.67 for urban high density residential (UHDR) – 12 to 24 du/acre. Petitioner then turned to a series of Tables in the 2005 LCA that computed capacity for unincorporated urban areas. [*e.g.* 2005 LCA, at 83-95] Petitioner applied the observed buildable density statistics to the figures appearing in the “Buildable Acreage” column to calculate additional housing unit capacity. Petitioner contended that application of the observed buildable densities to the buildable acreage figures did not yield the housing unit capacity shown in any the Tables. *Id.* Petitioner therefore concludes that the County cannot accommodate the population projected and further that the County did not show its work.

At the HOM, the County countered and responded to Petitioner’s argument. HOM Transcript, at 28-50. The County asserted that Petitioner still has not shown a capacity deficit in the County’s 2005 LCA or Plan Update, and has misapplied the observable buildable density statistics. *Id.* The County agreed that Petitioner’s math was correct if the observed buildable density statistics were simply applied to the various acreages listed. However, what Petitioner misunderstood was that the Buildable Areas were calculated through a parcel specific analysis and observable densities were derived for the parcel from the land use density designation where it was located and that fractional portions of parcels were dropped in this calculation. Then, occupancy rates and persons per household were applied. The Tables in the 2005 LCA that Strahm referred to in argument at the HOM reflect the *actual sum totals* from these calculations for the various

grouped designations (ULDR, UMDR and UHDR as applied to vacant, partially used, and redevelopable parcels). The County noted that the 2005 LCA explains the dropping of fractional lots and the truncation process. *Id.*

The Board notes that the 2005 LCA, at 11 provides:

Calculation of Additional Housing Unit and Population Capacity

When calculating additional residential capacity, the formula that applied observed densities by plan/zone to vacant, partially-used or redeveloped parcels, was performed on a parcel-by-parcel basis. Any fractional units that resulted from the parcel-level calculation or additional housing unit capacity were truncated (dropped). In addition, additional residential capacity was not assumed for parcels less than 3000 square feet in size. This resulted in the removal of many “sliver” parcels from the buildable lands inventory maps – parcels that are unlikely to develop due to their small size or irregular shape, and in which setback requirements are unlikely to be met.

The Board notes that at the HOM, the County conceded that its explanation of how the calculations were made could be clearer; and, that a better explanation of how the Tables should be read could have been provided, but neither of those shortcomings merits a finding of noncompliance. The Board agrees on both points. The Board does not find the calculation used by the County to be in error or meriting a finding of noncompliance; however, a clear explanation of exactly what the Tables show, how they were derived, and how they should be read would go a long way towards clearing the fog that Petitioner pointed out.

The Board further finds and concludes that Petitioner’s objection to the land capacity calculation methodology used by the County in its 2005 LCA and RLUNA is without merit; for calculating density, it is a distinction without a difference. Additionally, the Board finds and concludes that while Petitioner did calculate a lower available acreage figure than the County (*i.e.* using net density), Petitioner **failed to carry the burden of proof** in demonstrating how the density applied to that land would be insufficient to accommodate the projected 20-year population – which is the crux of the mandate found in RCW 36.70A.110(2) and .130(3) as challenged here. Legal Issue A is **dismissed**.

Strahm’s Legal Issue D pertains to RCW 36.70A.130(3) which requires jurisdictions to include areas and densities to accommodate the projected 20-year growth. Here Petitioner argues that the County must,

[P]erform an *actual* review and analysis as part of the 10-year Plan Update to determine whether the densities and urban growth areas are adequate to accommodate the urban growth projected for the 20-year planning period. It is not sufficient for the County to merely accept the allocation of

population and employment from the Office of Financial Management and place those into the Plan. The County must analyze its land capacity, compare the existing and projected capacities with the projections from OFM and then *make actual substantive revisions to the Comprehensive Plan to accommodate that growth*, not merely treat the growth targets as additional capacity.

Strahm PHB, at 20; (emphasis supplied).

Petitioner also notes that CPP UG-2 provides for a reconciliation process as a means for adjusting growth targets adopted by cities that may be different than the County's assigned targets. Strahm contends that this process was to be completed by October 1, 2005, but since the County has not completed it, the County has deferred accounting for allocated OFM population. *Id.* at 21. Petitioner recognizes that the mid-range OFM projection for Snohomish County in 2025 is 929,314, and the County's selected growth target for the same period is 933,000, yet, since the County has not reconciled any differences with its cities, the County has not established that it can accommodate either. *Id.*

In response, the County argues that nothing in the GMA requires the County to evaluate *actual* growth and development as a condition of designating UGAs or conducting the Plan Update review. County Response, at 114. The County then goes on to explain that in conducting its 2005 LCA the County could account for land within the *unincorporated* urban areas, but it had to rely on its 20 cities to do their own land capacity analysis calculations to account for capacity within their *incorporated* areas. Further, the County suggests that its 20 different cities had varying and "divergent land use scenarios that would have varying effects on the capacity of [incorporated and unincorporated] UGAs to absorb projected growth." *Id.* at 115. The County acknowledged the inherent difficulties in multi-jurisdictional planning and noted that differing levels of technical expertise, different legislative timelines and some resistance to engaging in long-range planning made it impossible for the County to verify all the data prior to acting on its own Plan Update. The admittedly late reconciliation process, which is set to occur after all Plans are updated and densities known, will allow a more detailed and closer review to occur. *Id.* Further, if Petitioner was upset with individual Snohomish County cities capacity analysis, or their actions regarding densities, Petitioner should have challenged those cities, not the County. *Id.* at 117.

The Board is unclear what Petitioner expects when he asserts the County must perform an *actual* review and evaluation of its land capacity in doing its Plan Update.¹⁸ The County clearly prepared the 2005 LCA and the RLUNA, which is, to the Board's way of thinking, an *actual* analysis and review of its known and expected capacity. These

¹⁸ If Petitioner is asserting that the County must independently review and analyze City Plans and regulations in doing its Plan Update and not rely upon the actions of its cities, *see* discussion of Legal Issues C and G, *infra*.

documents are the County's means of showing its work and supporting its conclusion that it can accommodate a projected 2025 OFM population. This the County has done. Petitioner has not demonstrated, as also discussed *supra*, that the 2005 LCA or RLUNA was in error or that the County, as a whole, cannot accommodate the OFM projected population.

Further, the County is correct in directing Petitioner to file a timely challenge against any City that allegedly does not have sufficient land capacity and/or densities within its city limits or its unincorporated municipal UGA (**MUGA**) to accommodate the population it has been allocated by the County. The Board notes that Petitioner Strahm has, in fact, done so in bringing a challenge to the City of Everett.¹⁹

Additionally, the Board acknowledges the difficulties inherent in multi-jurisdictional planning and commends the County for putting a reconciliation process in place in anticipation of potential discrepancies. Although the reconciliation was apparently not completed in October of 2005 prior to the County's adoption of its Plan Update, the delay is not a fatal flaw or a clear error. However, the County should proceed expeditiously to reconcile any discrepancies that have become apparent now that Plans have been adopted by the cities. The Board notes since Petitioner has **not carried the burden of proof** in demonstrating that the County cannot accommodate the projected OFM population projections for 2025, the presumption of validity regarding the size or total area of the County's UGAs adopted in the Plan Update must hold. The Board surmises that reconciliation may, or may not, affect the total area, but more likely would effect where allocated population is accommodated. Legal Issue D, challenging the County's compliance with RCW 36.70A.130(3), is **dismissed**.

All remaining aspects of Legal Issue H, challenging compliance with RCW 36.70A.110(2) and .130(3), have been disposed of in the Board's discussion of Legal Issues A and D. Therefore, since Legal Issues A and D are dismissed, the remainder of Legal Issue H is **dismissed**.

Suitable Land for Development and .115 – Legal Issue E:

The basis of Petitioner's challenge in Legal Issue E is that the County's 2005 LCA is not proper (*i.e.* not based upon the SCT 1993 LCM and net density calculations) and cannot ensure that there is sufficient land suitable for development. Strahm PHB, at 23-24. The County responds that Petitioner is rehashing arguments already raised in prior issues, and the County stands by its prior responses. County Response, at 131-132. The Board agrees with the County, as discussed *supra*; the 2005 LCA and RLUNA are valid capacity analyses, but more importantly, Petitioner has **not carried the burden of proof** in demonstrating that the County does not have sufficient land to accommodate the

¹⁹ See *Strahm v. City of Everett*, CPSGMHB Case No. 05-3-0042, Final Decision and Order, (Sep. 15, 2006).

projected 2025 OFM population. Legal Issue E, pertaining to compliance with RCW 36.70A.115 is **dismissed**.

Show Your Work – Legal Issue F:

Petitioner again challenges the assumptions, methodology and calculations within the County’s 2005 LCA and RLUNA. Strahm PHB, at 25-26. The County responds by referring back to its prior arguments supporting its methodology and calculations in the LCA and RLUNA. County Response, at 132.

As discussed *supra*, the Board has disposed of the challenges to the methodology and calculations in the County’s 2005 LCA and RLUNA, and will not restate them here. However, the Board is compelled to comment that had the County not *shown its work*, there would have been little for Petitioner to criticize or challenge. The County’s documentation of its land capacity review and evaluation is part of the Plan Update, part of this record and available for all members of the public to review, question, criticize, replicate or refine. The County having “shown its work,” has persuaded the Board that the logic and rationale of the LCA and RLUNA support of the County’s actions. Legal Issue F is **dismissed**.

Conclusions – Legal Issues A, D, E, F and H

For the reasons discussed *supra*, primarily that Petitioner has **failed to carry the burden of proof** in demonstrating noncompliance with the challenged provisions of the Act, Legal Issues A, D, E, F and H are **dismissed**.

B. LEGAL ISSUE NO. B – INTERNAL INCONSISTENCY

Legal Issue B²⁰ alleges that the County’s Plan Update is internally inconsistent, contrary to the requirements of RCW 36.70A.070.

²⁰ Legal Issue B – *Does the Plan Update fail to comply with RCW 36.70A.070, which requires comprehensive plans to be internally consistent?*

- i. ~~*Is the Plan Update internally consistent when it includes a public park (McCullum Park) as available buildable land?*~~
- ii. *Is the Plan Update internally consistent when the January 2003 Buildable Lands Report concludes that the City of Everett had an additional population capacity of 15,833 (scenario A) and 13, 236 (scenario B) in 2001, and the Land Capacity Analysis concludes that the City of Everett had an additional population capacity of 27,070 for 2001-2-25, when the City of Everett made no capacity increases in the City’s updated comprehensive plan?*
- iii. *Is the Plan Update internally consistent when the January 2003 Buildable Lands Report concludes that the City of Everett had an additional employment capacity of 39,582 (scenario A) and 31,466 (scenario B) in 2001, and the April 2005 UGA Land Capacity Technical Report (updated December 21, 2005) concludes that the City of Everett had an additional population capacity of 48,354 for 2000-2025, when the City of Everett made no capacity increases I the City’s updated comprehensive plan”*

Applicable Law

RCW 36.70A.070 provides in relevant part:

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

Discussion

Position of the Parties:

Strahm points to Land Use Objectives and Policies in the Plan Update and CPPs as the basis for the “inconsistency” alleged in Legal Issue B. The Plan Update Policies in question are as follows [new language is underlined, deleted language is in ~~strike through~~:

- LU 1.A.2 – Snohomish County shall ensure ~~a~~ no net loss of capacity to accommodate the amount and type of projected employment growth for ~~2012~~ 2025 while ensuring an adequate supply of both new and existing affordable housing.
- LU 1.A.3 – Snohomish County shall ensure ~~a~~ no net loss of housing capacity that preserves the County’s ability to accommodate the ~~2012~~ 2025 growth targets, while pursuing compliance with ~~Endangered Species Act requirements and other GMA development~~ all relevant federal, state and local laws and regulations.
- LU 1.A.5 – Determination of adequate land capacity shall be based on methodologies developed jointly with other jurisdictions ~~consistent with Department of Community, Trade & Economic Development (DCTED) guidelines and handbooks~~ and shall be consistent with the Countywide Planning Policy UG-13.
- PE 2.A – ~~Establish~~ Maintain and support a target reconciliation process using the Snohomish County Tomorrow process to review and, if necessary, adjust population and employment targets once the GMA comprehensive plans of jurisdictions in Snohomish County are ~~adopted~~ updated to accommodate the succeeding 20 years of growth.
- PE 2.A.2 – The Snohomish County Tomorrow Steering Committee will review and recommend to the County Council an updated ~~2012~~ 2025 population and employment allocation for cities, UGAs and rural areas. The updated allocations shall reconcile differences revealed during the review of locally adopted targets. The allocation shall consider the plan of each jurisdiction and be consistent with the [GMA and CPPs].

Strahm PHB, at 9-14; CD 2, Plan Update, Ex. C. at LU-3; and Ex B, at PE-6.

Petitioner also refers to CPP UG-13, which states, “Use land capacity analysis methods that are consistent among jurisdictions to calculate holding capacity approved by the Snohomish County Tomorrow Steering Committee.” Additionally, Strahm notes that the reconciliation process spoken of in PE 2.A and PE 2.A.2 is compatible with CPP UG-2, which details a process of reconciliation that is to be completed by October 1, 2005. Strahm PHB, at 12, *Citing* CD 16, at 6. Strahm then proceeds to argue that the County merely adopted the City of Everett’s growth targets instead of determining actual population capacity as required by its Plan Policies and the CPPs. *Id.*

In response, the County contends that RCW 36.70A.070’s internal consistency provisions apply to Plan elements and the future land use map (**FLUM**). Snohomish County points out that Petitioner did “not even allege (much less demonstrate) internal consistency between plan elements.” County Response, at 122. The County then characterizes Strahm’s allegation,

[Petitioner] appears to argue that the LCA Report – which is not an element of the comprehensive plan – is inconsistent with various CPPs and [Plan Policies]. He further alleges that the LCA Report is inconsistent with the [County’s] 2002 BLR, which is likewise not a plan element, in regards to Everett’s population capacity.

Id.

The County also contends that on this Legal Issue, Strahm’s arguments “simply rehash his objection to the use of growth targets in the LCA Report instead of capacity evaluations like those found in the 2002 BLR.” *Id.* The County stands on the rebuttal arguments offered in Legal Issue A and D which relate to the validity of its 2005 LCA and the methodology used to formulate it. *Id.* Respondent also notes that RCW 36.70A.130(3) requires the County to act “in conjunction with its cities” in conducting the LCA and Plan Update review. Therefore, reliance on a City’s selected population targets coupled with the reconciliation process – to reconcile discrepancies between city and county population targets – is not contrary to what the Act requires. Nor does it thwart any Plan Policies or CPPs. *Id.*

Board Discussion:

On their face, none of the Plan Policies or CPPs cited by Petitioner is contrary to any provision of the GMA; each of the noted Plan Policies or CPPs appears to be consistent with the relevant provisions of the GMA. Therefore, to succeed in a RCW 36.70A.070 challenge, it is Petitioner’s burden to demonstrate some internal inconsistency within the County’s Plan Update. It appears to the Board that the primary basis for this Legal Issue and argument is Strahm’s continuing objection to the County’s 2005 LCA. The inconsistency that Strahm infers is that since the County’s 2005 LCA is in error, the County does not have a sufficient supply of land to accommodate the projected

population. However, as discussed *supra*, the Board found that the County's 2005 LCA methodology was appropriate and supported the County's determination that it could provide sufficient land and densities to accommodate the 20-year population projections established by OFM. Therefore, Petitioner's major premise underlying this issue is without merit.

The only possible remnant of this Legal Issue is Petitioner's contention that the discrepancy between the population targets for the City of Everett and its planning area, and the population targets in the County's Plan was not reconciled, by October 1, 2005 or pursuant to the process set forth in CPP UG-2. This possible conflict is not an internal consistency issue; because the conflict does not lie *within* the County's Plan Update. Rather, any conflict would stem from an inconsistency between a city plan update and the County's Plan Update – this is an *external* consistency issue and will be addressed in Legal Issue C, *infra*. Consequently, Petitioner has **failed to carry the burden of proof** in demonstrating an internal inconsistency in the County's Plan Update. Legal Issue B is **dismissed**.

Conclusion – Legal Issue B

Petitioner has **failed to carry the burden of proof** in demonstrating noncompliance with RCW 36.70A.070(preamble) – failed to show an internal inconsistency in the County's Plan Update. Legal Issue B is **dismissed**.

C. LEGAL ISSUE NO. C and G – EXTERNAL and CPP INCONSISTENCY

Legal Issue C²¹ and G²² both allege that the County's Plan Update is externally inconsistent, and inconsistent with several County-wide Planning Policies, contrary to the requirements of RCW 36.70A.100 and .210.

²¹ Legal Issue C – Does the Plan Update fail to comply with RCW 36.70A.100 and RCW 36.70A.210, which require consistency of comprehensive plans with adjacent jurisdictions?

- i. Is the Plan Update inconsistent with the comprehensive plans of adjacent jurisdictions, when the additional population and employment capacities as stated in the County Plan Update for the cities in Snohomish County are not consistent with the population and employment capacities stated in the comprehensive plans for the cities of Bothell, Edmonds, Everett, Lynnwood, Marysville and Monroe?
- ii. Is the Plan Update inconsistent with the CPP, because the allocations of projected growth upon which the Plan Update is based were not made in accordance with CPP UG-2?

²² Legal Issue G – Does the Plan Update fail to comply with RCW 36.70A.210 and RCW 36.70A.100, because it is inconsistent with the adopted countywide planning policies: UG-1, UG-2, UG-7, UG-8, UG-10 UG-13 and UG-14?

Applicable Law

RCW 36.70A.100 provides in relevant part:

The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues.

RCW 36.70A.210 provides in relevant part:

A countywide 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.*

(Emphasis supplied).

Discussion

Regarding Legal Issue G, the Board notes that in Petitioner's opening brief, Strahm provides a short summary of the cited CPPs followed by a conclusory statement meant to suggest that the County has not adhered to the direction given in the various CPPs. *See Strahm PHB, at 27-28.* The County makes the same observation, noting that the "conclusory statements [reiterate Strahm's] position on land capacity and density calculations." County Response, at 133. The County argues that these conclusory statements fail to carry the burden of proof. *Id.* The Board agrees with the County.

Typically, the Board would consider such conclusory statements as abandonment of the issue; however, giving Petitioner the benefit of the doubt, and considering prior arguments offered by Petitioner regarding the adequacy of the 2005 LCA and RLUNA, the Board will not deem this matter abandoned. However, as determined on Legal Issues A, D, E, F and H, the Board has concluded that Petitioner has not carried the burden of proof in demonstrating that the 2005 LCA or RLUNA were inadequate or noncompliant. Consequently, for Legal Issue G, the Board concludes that Petitioner Strahm has **not carried the burden of proof** in demonstrating noncompliance with RCW 36.70A.210 or any of the cited CPPs. Legal Issue G is **dismissed**.

In Petitioner's statement of Legal Issue C, Strahm contends that the population capacities stated in the 2005 LCA and the population capacities stated in the Plan Updates of Bothell, Edmonds, Everett, Lynnwood, Marysville and Monroe are inconsistent. *See Legal Issue C, footnote 20.* Apparently what the Petitioner means is that the noted cities

are not able to accommodate the populations allocated and that the County should not have relied upon the figures they provided.

Petitioner provides a series of numbers for each of the Cities named in this Legal Issue and contrasts those numbers with a County population capacity figure. Strahm PHB, at 14-17. The County responds by asserting “Petitioner Strahm again appears to insist that the County must reject capacity estimates provided to it by cities that are required to do so under the GMA [RCW 36.70A.130(3)(b)].” County Response, at 128. Moreover, the County asserts that Petitioner “has never made a showing that they [the County’s UGA designations] lack sufficient capacity relative to city or county growth targets or the 2025 LCA report.” *Id.* at 129

The following Table arrays the figures cited by Petitioner and those from the County’s 2025 LCA. The Board notes that the 2025 population targets from the 2005 LCA correspond to the 2025 Population Targets recommended by the SCT and adopted as part of the County’s CPPs. Compare 2025 LCA population targets with CD 16, CPPs, Appendix B, at 27.

Table Comparing Population Targets and Capacities for Challenged Cities

Jurisdiction	Petitioner’s “Capacity” estimates from City Plans ²³	Petitioner’s Figures for County Capacity ²⁴	2005 LCA population targets ²⁵ for 2025	2005 LCA population capacities ²⁶ for 2025
Bothell	21,505 – 22,420 (No source provided)	22,000	22,000	22,000
Edmonds	?	?	44,880	45,624
Everett	15,924	27,070	123,060	123,060
Lynnwood	33,090	43,783	38,510	43,783
Marysville	80,431 (No source provided)	89,353	83,500	89,353
Monroe	? (No source provided)	26,621	26,590	26,621

For Bothell, Petitioner concedes that Bothell’s apparent capacity coincides with the County’s calculated capacity. Strahm PHB, at 14. The Board notes that Petitioner did

²³ Strahm PHB, at 14-17. It is unclear whether these figures are target or capacity figures.

²⁴ *Id.*

²⁵ 2005 LCA, at 23; Table 2 2025 Urban Population Targets and Capacities for County Council Final Map Adoption 12/21/05.

²⁶ *Id.*

not provide any supporting documentation or exhibits for the cited City figures. *Id.* The Board deems Legal Issue C **abandoned** as it pertains to Bothell.

For Edmonds, Petitioner provides no data but states “the growth target is very close to the City of Edmonds stated capacity.” *Id.* The Board deems Legal Issue C **abandoned** as it pertains to Edmonds.

For Monroe, Petitioner states that the Monroe Comprehensive Plan indicates that if its population target is 26,590, the City of Monroe “will have a deficit of between 3,827 and 4,800.” *Id.* at 17. Petitioner did not provide any supporting documentation or exhibits to support this statement. Therefore, the Board concludes that Petitioner has **failed to carry the burden of proof** on Legal Issue C as it pertains to Monroe.

For Marysville, Petitioner notes that Marysville did not do a capacity analysis for its city limits, but suggests that the number indicated is for both the city limits and the unincorporated urban growth area assigned to the city. Petitioner did not provide any supporting documentation or exhibits for the cited City figure. Therefore, the Board concludes that Petitioner has **failed to carry the burden of proof** on Legal Issue C as it pertains to Marysville.

For Lynnwood, Petitioner provides one page from what appears to be Lynnwood’s Comprehensive Plan. The 33,090 figure noted in Petitioner’s brief comes from “Table 2 – Growth and Development Projections” that indicates that the City population for 1994 Existing Conditions was 29,113 and the population for “Future Land Use Plan” is noted as 33,090. Ex. 13, at 8. Nowhere on the provided page is the 2025 allocated population target mentioned, or is “land capacity” implicated on the provided Table. However, the Board notes that the City of Lynnwood indicated to the County in a June 19, 2003 letter that a 2025 population target of 38,510 would be realistic for the City. *See* County Ex. IR 3.3.5.2-117-120. In that 2003 letter, the City of Lynnwood also expresses a desire to work collaboratively with the County regarding the boundaries and allocated population for Lynnwood’s assigned municipal urban growth area (MUGA). Regardless of whether Lynnwood’s MUGA concerns have been resolved, Petitioner’s reference to a population table for a future plan does not equate to a capacity analysis for the City of Lynnwood. Therefore, the Board concludes that Petitioner has **failed to carry the burden of proof** on Legal Issue C as it pertains to Lynnwood.

For Everett, Petitioner cites “additional capacity” figures for 2025, not total capacity for the City. Additionally, Petitioner provides numerous excerpts from the City of Everett Comprehensive Plan, which indicate that there is a discrepancy between population allocations and capacity for the city limits and its planning area or MUGA. Strahm PHB, at 15-16; Ex. 10. The County responds that it was entitled to rely upon the City of Everett’s estimate of capacity and include it in its 2005 LCA. County Response, at 122. The County notes that the City of Everett passed Resolution 5317, and provided it to the County, indicating that it could accommodate a population of 123,060 in its city limits by 2025 and an additional 53,530 in its MUGA [an additional 19,060]. *Id.* at 124; Citing Ex. IR 3.3.5.2 103-105. The County also relies upon Everett’s Plan Update – Table 5 in the

Land Use Element – to indicate that the City has demonstrated it can accommodate the projected 2025 population. *Id.* at 124-125.

The Board is inclined to agree with the County, regarding whether Petitioner has carried the burden of proof in demonstrating that the County’s Plan Update is at odds with the Everett Plan Update, given the scant information provided in this matter. However, Petitioner Strahm also challenged the City of Everett’s Plan Update in a separate proceeding. *See Strahm v. City of Everett*, CPSGMHB Case No. 06-3-0042, Final Decision and Order, (Sep. 15, 2006). In that matter the Board found no documentation or support for the figures reported in Table 5, *upon which the County has relied*, and the Board found discrepancies between what the City indicated it could accommodate and what the County expected to be accommodated in Everett’s planning area or MUGA.

Everett’s Plan Update has been remanded for noncompliance with RCW 36.70A.110(2) and .130(3). The County’s good faith reliance on the City’s population numbers did not breach any GMA duty. The remand to the City of Everett may likely involve the “reconciliation process” established in the CPPs. The County should be aware of this remand and be prepared to facilitate and expedite the reconciliation process as it relates to the City of Everett. Nonetheless, the Board finds and concludes that in the context of the present challenge to Snohomish County’s Plan Update, Petitioner has **failed to carry the burden of proof** on Legal Issue C as it relates to Everett.

Legal Issue C is dismissed in its entirety.

Conclusion – Legal Issues C and G.

Petitioner Strahm has **not carried the burden of proof** in demonstrating noncompliance with RCW 36.70A.210 or any of the cited CPPs, nor carried the burden of proof in demonstrating noncompliance with RCW 36.70A.100 – inconsistencies with adjacent jurisdictions. Legal Issues G and C are **dismissed**.

SUMMARY OF CONCLUSIONS FOR STRAHM PFR – LEGAL ISSUES A - H

Petitioner Strahm has **failed to carry the burden of proof** in demonstrating how the challenged land capacity analysis and Plan Update actions contained in the challenged Ordinances fail to comply with RCW 36.70A.110(2), .130(3), .115, .215, .070, .100 and .210. Therefore, Legal Issues A, B, C, D, E, F, G and H in the *Strahm* matter are **dismissed with prejudice**.

V. PILCHUCK LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUE NO. 1 and LEGAL ISSUE No. 6 (in part) *Agricultural Land Designation Criteria – parcels < 10 acres and De-designation of 6 acres of Agricultural Lands*

In Legal Issue No. 1, Petitioner Pilchuck asserts that in enacting Ordinance No. 05-069 Snohomish County failed to comply with various requirements of the GMA which pertain to the designation of agricultural lands. The Board's PHO set forth Legal Issue No. 1:

- 1. Does the adoption of Ordinance 05-069, adopting an updated and revised comprehensive plan, including policy LU 7.A.3, fail to comply with RCW 36.70A.130, RCW 36.70A.020(8), RCW 36.70A.020(10), RCW 36.70A.050, RCW 36.70A.060 and RCW 36.70A.170 when it allows exclusion of farmland from designation as agricultural land of long term commercial significance based solely on its size (parcels less than 10 acres) without considering other GMA criteria for farmland designation?*

The relevant portion of Legal Issue No. 6 pertains to the de-designation of 6 acres of farmland (known as the upland bench of the Foster Farm) which the Petitioner argues amounts to the removal of land which is still agriculturally viable.²⁷ The PHO states Legal Issue No. 6, in relevant portions, as follows:

- 6. Does the adoption of Ordinance Nos. 05-069, 05-074, 04-090, 05-070, and 05-071 ... re-designating farmland, rezoning and amending the FLUM ... fail to comply with ... RCW 36.70A.020(8) ... RCW 36.70A.050, RCW 36.70A.060 ... and RCW 36.70A.170 when it re-designates to urban commercial, land that continues to meet GMA criteria for agricultural land of long-term commercial significance, ... when the land is not characterized by urban development nor adjacent to land characterized by urban development?*

The Challenged Action

The challenged Ordinance No. 05-069 amended various provisions, including objectives and policies, of the Agricultural Lands section of the County's General Policy Plan (GPP). Core Document 2. Snohomish County's GPP Land Use policies include criteria to identify and designate agricultural lands of long term commercial significance. The

²⁷ With Legal Issue No. 6, the Petitioner also alleges that the County violated the GMA by failing to adequately update its Transportation and Capital Facilities elements to reflect the expansion of the City of Arlington's UGA when it de-designated the Foster Farm parcel. The Transportation and Capital Facilities elements portion of this issue is discussed in Legal Issues Nos. 4 and 5.

Plan provides that farmland *shall be designated as required by the GMA, giving consideration to the guidance provided by the State* for designating agricultural lands of long-term commercial significance. The Petitioner's challenge lies in the modifications to Policy 7.A.3, which address *farmland designations and expansions* on contiguous lands and state that designations should be made by considering *all of the following criteria*:

- a) prime farmland as defined by the U.S. Soil Conservation Service (SCS) and other Class III soils in the SCS capability classification;
- b) identified as devoted to agriculture by:
 - The adopted Future Land Use Map
 - Snohomish County Zoning Code Agriculture-10 acre
 - Identification in the 1982 agricultural land inventory, the 1990 aerial photo interpretation, or the 1991 field identification of land devoted to agriculture;
- c) located outside the UGA;
- d) located outside a sewer service boundary; and
- e) *a parcel of 10 acres or greater in Upland Commercial or Local Commercial Farmland areas.*

General Policy Plan, Land Use Policy, LU 7.A.3 (Emphasis added); Amended Ordinance 05-069 (Core Document 2).

Applicable Law

The GMA contains several provisions pertaining to agricultural lands, namely RCW 36.70A.020(8), .060, and .170. When read together, these provisions create an agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry. *Upper Green Valley Preservation Society v. King County*, CPSGMHB Case No. 98-3-0008c at 18, Final Decision and Order (July 29, 1998); *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 562 (2000).

RCW 36.70A.020(8) provides:

Natural resource industries. Maintain and enhance natural resource-based industries, including [productive agricultural industries]. Encourage the conservation of ... productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.060 provides, in relevant part:

(1)(a) Except as provided in RCW 36.70A.1701, each county that is required or chooses to plan under RCW 36.70A.040 and each city within

such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of ... [agricultural lands] designated under RCW 36.70A.170. Regulations adopted under this subsection ... shall assure that the use of lands adjacent to ... [agricultural lands] shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products...

RCW 36.70A.170 provides, in relevant part:

- (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate: (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products; . . .
- (2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.

To assist cities and counties in the classification of agricultural lands, RCW 36.70A.050 directs the Department of Community, Trade and Economic Development (CTED) to adopt guidelines to serve this purpose. These guidelines are found at WAC 365-190-050.²⁸

²⁸ The CTED guidelines for the designation of agricultural lands provide:

- (1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service as defined in Agricultural Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:
 - a. The availability of public facilities;
 - b. Tax status;
 - c. The availability of public services;
 - d. Relationship or proximity to urban growth areas;
 - e. Predominant parcel size;
 - f. Land use settlement patterns and their compatibility with agricultural practices;
 - g. Intensity of nearby land uses;
 - h. History of land development permits issued nearby;
 - i. Land values under alternative uses; and
 - j. Proximity to markets.
- (2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next

The GMA defines *agricultural land* as “land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, vegetable, or animal products or berries, grain, hay, straw, turf, seed, Christmas trees not subject to the tax imposed by RCW 84.33.100 through 84.33.140, finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production.” RCW 36.70A.030(2).

Lastly, the GMA defines the phrase "characterized by urban growth" as land having urban growth located on it, or land located in relationship to an area with urban growth on it so as to be appropriate for urban growth; with “urban growth” being defined as growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, or other agricultural products. RCW 36.70A.030(18).

Subsequent to briefing and oral argument in the present case, the Supreme Court has clarified the GMA’s definition of agricultural land in *Lewis County v. Western Washington Growth Management Hearings Board*, 139 P.3d 1096 (2006). In *Lewis County*, the Court held that:

“[A]gricultural land is land:

- (a) *not already characterized by urban growth*
- (b) that is *primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, and*
- (c) that has *long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses.*”

Lewis County, 139 P.3d at 1103 (Emphasis added).

Therefore, the GMA provides for a 3-part analysis for agricultural land – (1) not characterized by urban growth, (2) primarily devoted to commercial production of agricultural products, and (3) has long-term commercial significance for agricultural production.

annual report to the department of community development.

In making this determination, the *Lewis County* Court looked not only at the plain language of the statute and but also previous holdings including *Redmond v. Central Puget Sound Growth Management Hearings Board*, a 1998 case in which the Supreme Court addressed the meaning of the phrase “*primarily devoted to.*” In that case, the Court determined that land is “*primarily devoted to*” commercial agricultural production “*if it is in an area where the land is actually used or capable of being used for agricultural production*” and, that a landowner’s intended use of the land is not conclusive because if intent were the controlling factor “*local jurisdictions would be powerless to preserve natural resource lands.*” *Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wash. 2d 38, 53 (1998) (Emphasis added).

The GMA provides further guidance in regard to agricultural lands, defining *long-term commercial significance* as “the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land’s proximity to population areas, and the possibility of more intense uses of the land.” RCW 36.70A.030(10). The *Lewis County* Court, noting that the Supreme Court has not previously interpreted RCW 36.70A.030(10), approved the approach taken by the Court of Appeals in *Manke Lumber Co. v. Diehl*,²⁹ which held that counties may consider the development-related factors enumerated in WAC 365-190-050(1) in determining whether lands have long-term commercial significance. *Lewis County*, 139 P.3d at 1102; *Manke Lumber Co. v. Diehl*, 91 Wash. App. 793, 807-8 (1998). The *Lewis County* Court then went on to conclude that because the GMA does not dictate how much weight to assign each factor in determining which land has long-term commercial significance, and because RCW 36.70A.030(10) speaks to the possibility of more intense uses as a factor to be considered, a county, exercising the broad discretion accorded to it by the GMA may weigh a particular need above all else. *Lewis County*, 139 P.3d at 1103.

Discussion

Position of the Parties (Legal Issue No. 1):

The crux of Petitioner Pilchuck’s argument for Legal Issue No. 1 lies with the potential exclusion of parcels less than 10 acres from designation as agricultural land of long-term commercial significance – Policy 7.A.3(e). Pilchuck PHB at 5. The Petitioner asserts that this policy has the possibility of excluding land that otherwise meets the GMA’s statutory criteria for designation as agricultural land and, that given the GMA’s mandate to conserve agricultural land of long-term commercial significance, such a policy violates the GMA. *Id.* at 6 (citing *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 562 (2000) in which the Supreme Court held that “when read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land”).

²⁹ In *Manke*, the Court of Appeals relied largely on WAC 365-190-050 in finding that a county could limit designation based on parcel size because the guidelines allow consideration of “predominant parcel size.” WAC 365-190-050(1)(e). *Manke*, 91 Wash. App. at 807-808.

Although the Petitioner acknowledges that WAC 365-190-050(1) allows local governments to consider parcel size as one of several factors that consider the “human environment,” they may not make the determination solely on the basis of parcel size without consideration of the other listed factors. *Id.* at 7-8. An exclusion based solely on parcel size, Petitioner argues, does not appear to be in line with the County’s obligation under the GMA to designate and conserve agricultural lands of long-term significance. *Id.* at 8.

In addition, Petitioner relies on the Western Washington Growth Management Hearings Board holding in *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002, Final Decision and Order (June 20, 2005) to demonstrate that a policy based on parcel size alone fails to take into consideration that farmers often farm by area and that de-designation could result in a patchwork of farmland surrounded by incompatible designations and zoning. *Id.* at 8-10. Petitioner contends that the challenged policy would impact the Upland Commercial Farmland (UCF) and Local Commercial Farmland (LCF) districts and effect 534 farms, which range in size from 1 to 9 acres (see Pilchuck PHB at 9).

In response, the County first asserts that the Petitioner offered no arguments in regard to RCW 36.70A.130, .050, or .020(10) and that, therefore, Legal Issue No. 1 “comes down to whether the County is out of compliance with its duty to designate and conserve agricultural lands under RCW 36.70A.060(1) and .170, and the related GMA goal to maintain and enhance the agricultural industry in RCW 36.70A.020(8).” County Response at 9.

The County alleges that Petitioner’s assertion that Policy 7.A.3 provides for the exclusion of parcels less than 10 acres without considering other GMA criteria for farmland designation is in error because, in fact, Policy 7.A.3 “adds criteria for the County to consider *in addition to the criteria in the GMA* and WAC 365-190-050(1).” *Id.* at 9 (Emphasis in original). The County notes that the preamble to the challenged policy states that the County will consider the guidance provided by the State when designating agricultural lands of long-term significance and, that this “means consideration of *all of the criteria.*” *Id.* at 10 (Emphasis in original). The 10-acre minimum parcel size “is a policy guideline to be considered by the County along with many other guidelines in WAC 365-190-050(1) and the Comprehensive Plan, in designating lands of long-term commercial significance.” *Id.* at 16.

The County further asserts that Policy 7.A.3 is limited in nature, only applying to designated agricultural lands in the UCF and LCF districts, which together comprise less than seven percent (approximately 4,252 acres) of the total designated agricultural lands (approximately 62,854 acres) in Snohomish County. *Id.* at 11-12. The County points out the historical basis for the 10-acre minimum parcel size is the County’s 1982 Agricultural Preservation Plan (*See* Appendix C, Exhibit C(1)) of County’s Response) which recommended a minimum parcel size of 10 or 50 acres, depending on crops and

location, for secondary agricultural use,³⁰ with the 10-acre parcel size brought forward in the 1993 Interim Agricultural Conservation Plan (See Appendix C, Exhibit C(2)). *Id.* 12-13.

In addition, the County alleges that the Petitioner has not shown that Policy 7.A.3. will be used to rule out parcels which might otherwise be appropriate for farmland and has failed to demonstrate that the County has excluded any areas from designation solely due to parcel size without consideration of the other criteria in WAC 365-190-050(1) or the policies and objectives of the County's comprehensive plan. *Id.* at 15. According to the County, as demonstrated by Supplemental Exhibit 2, there are numerous parcels within the LCF and UCF districts that are less than 10 acres. *Id.* at 16.

Lastly, the County argues that Policy 7.A.3 is consistent with the GMA because the County, in evaluating "predominant parcel size" is following the CTED guidelines for designation criteria as required by both the courts and this Board. *Id.* The County claims that the Western Board, in *1000 Friends v. Thurston County*, misread the CTED guidelines when it held that counties are to consider "farm size" as opposed to "parcel size," thereby imposing additional requirements that are not mandated by the GMA and are clearly inconsistent with CTED criteria. *Id.* at 17.

In reply, Petitioner Pilchuck reiterates its assertion that the challenged policy allows the County to exclude from consideration any parcel in the UCF or LCF districts "in complete disregard to whether these parcels, absent the exclusionary policy, are *primarily devoted to agriculture*, are *not characterized by urban development*, and have *long term commercial significance* for agricultural production." Pilchuck Reply at 3. The Petitioner argues that the historical significance of the 10-acre parcel size or limited impact of the policy does not matter; rather, what matters is whether excluding 10-acre parcels that can be viably farmed, either on their own or as an aggregate, complies with the GMA's agricultural conservation mandate. *Id.* According to Petitioner the policy language elevates parcel size above and to the exclusion of all other factors for the excluded parcels. *Id.*

Position of the parties: (Legal Issue No. 6):

The relevant portion of Legal Issue No. 6 pertains to the de-designation of a 6-acre parcel of land (the Foster Farm) from Riverway Commercial Farmland and inclusion of this parcel within the UGA for the City of Arlington. Petitioner argues that these six acres are primarily devoted to the production of agriculture and have long-term commercial

³⁰ The 1982 Agricultural Preservation Plan (APP) stated that in order to identify farmlands important to Snohomish County, a definition of an Effective Farm Unit (EFU) was needed. As provided in the APP, an EFU is "A unit of agricultural land sufficient to support a family of four (4), currently being used for, or readily available for agricultural production ... held in parcels of at least fifty (50) acres for most crops, *ten (10) acres if contiguous to other parcels of agricultural, or ten (10) acres for some specialty crops.*" Appendix C, Exhibit C1, APP, Section 3, Part II, Page 85 (Emphasis added).

significance for agriculture. Pilchuck PHB at 27-28. The Petitioner further asserts that de-designation of the property, thereby permitting UGA expansion, does not comply with RCW 36.70A.060 which requires the County to assure uses near and/or adjacent to agricultural areas are compatible and will not interfere with the current agricultural use. *Id.* at 29. According to Petitioner, inclusion of this small portion of land within the UGA will “jeopardize the future viability of agriculture ... by putting pressure on landowners to discontinue farming...” *Id.*

In response, the County generally deferred to the City of Arlington on this issue. County Response at 63-64. The City of Arlington, arguing this issue for the County as an Intervenor, asserts that the GMA’s goal in regard to agricultural land is to conserve productive agricultural land *in order to maintain and enhance the agricultural industry.* Arlington Response at 9. Relying on this Board’s holding in *Orton Farms LLC v. Pierce County*, CPSGMHB Case No. 04-3-0007c, Final Decision and Order (Aug. 2, 2004) (holding that an agricultural designation is not necessarily permanent), the City asserts that although the intent of the GMA is to “conserve productive agricultural lands in order to maintain and enhance the industry,” the GMA “does not seek to achieve this goal by preserving every bit of soil that could theoretically produce an agricultural product.” *Id.*

The City lays out the statute’s, the Courts’, and the Board’s definition of “primarily devoted” and “long-term commercial significance,” along with the CTED guidelines of WAC 365-190-050(1), and alleges that the County is correct in determining other factors weighted more heavily in favor of de-designation than considerations such as historical use, soils, and the capability of production. *Id.* at 12-13. The City analyzes the CTED guidelines and alleges that “... on balance, virtually all of the CTED locational factors ... weigh in favor of de-designation.” *Id.* at 17. In addition, the City states that the property is already characterized by urban growth³¹ as is the surrounding area and that the site was de-designated in the context of the County’s TDR program which seeks to protect agricultural land in the Stillaguamish Valley. *Id.* at 19-20.

Both the County and the City of Arlington assert that the Petitioner has failed to or inadequately briefed portions of Legal Issue Nos. 1 and 6, namely sections of the GMA which the Petitioner cited in regard to RCW 36.70A.130, RCW 36.70A.050, and RCW 36.70A.020(10) and, therefore, has abandoned claims related to these provisions of the GMA. County Response at 6-7; Arlington Response at 6-8. Arlington also asserts that the Petitioner has failed on issues pertaining to RCW 36.70A.110. Arlington Response, at 8.

Arlington does not contest that the soils on this acreage would not be “capable” of being used for agricultural production but rather, that this 6-acre parcel is not of long-term

³¹ The City asserts that the two residences, a large building used for retail sales, and substantial gravel and paved surfaces, essentially the farm operation center, is urban growth. City’s Response at 19.

commercial significance because it is developed with 2 single-family residences, barns, outbuildings, and paved and graveled areas (historically used in connection with the dairy farm which operated from the facility) and is not currently principally devoted to agriculture. Arlington argues that urban services – water, sewer, fire and law protection, and education – are available in the area due to recent development including a water main just east of the site. Arlington further asserts that the site is immediately adjacent to the City’s UGA where commercial and residential development is already occurring. In addition, the City appears to assert that Mr. Foster’s participation in the County’s Transfer Development Rights (TDR) program supports, if not mandates, de-designation. Arlington Response, at 4-6, 21.

In reply, Petitioner notes that the aerial photographs submitted into the record (Index No. 8.3 .000662 - HOM Exhibit 24) clearly show that although there may be urban development within the area, there is no urban development physically adjacent to the property. Pilchuck Reply at 18. Petitioner counters the City’s analysis of the CTED factors, stating that it is unpersuasive for the proposition of de-designation and that the concept of farm buildings as ‘urban’ development would result in a pretext to de-designate agricultural lands. *Id.* at 19-21.

Board Discussion:

Here, the Board’s analysis of Legal Issues Nos. 1 and 6 is confined to the crux of the Petitioner’s claims which lie in the designation (or potential exclusion from designation) and the de-designation of agricultural lands. The portion of legal Issue No. 6 pertaining to the Transportation and Capital Facilities elements is discussed with Legal Issues 4 and 5, *infra*.

Snohomish County provides for 3 agricultural designations within its Comprehensive Plan. Designations include LCF, approximately 3,613 acres, UCF, approximately 639 acres, and Riverway Commercial Farmland (RCF), approximately 58,778 acres.³² Supp. Ex. 1. The action challenged by the Petitioner pertains only to the LCF and UCF designations.

Both Legal Issues deal with the County’s duty to maintain, enhance, and conserve agricultural land,³³ starting with its designation which keys on the three-part test recently articulated by the Supreme Court: (1) whether the land is already *characterized by urban growth*, (2) whether that land is *primarily devoted* to the commercial agricultural product, and (3) whether the land has *long-term commercial significance for agricultural production*. RCW 36.70A.030(2); *Lewis County*, 139 P.3d at 1101-1102.

³² Acreage numbers are as of February 1, 2006 (Supplemental Exhibit 1).

³³ See RCW 36.70A.020(8); RCW 36.70A.060(1); RCW 36.70A.170(1).

1. Legal Issue 1 – Exclusion of parcels less than 10 acres in size

Are parcels 10 acres or less in size ‘primarily devoted’ to agricultural production?

In *Lewis County*, the Supreme Court upheld its previous interpretation of “primarily devoted” as land that “is in an area where the land is *actually used or capable of being used* for agricultural production ... [with a landowner’s intent] not conclusive.” *Id.* (citing to *Redmond v. CPSGHMB*, 136 Wn. 2d 38, 53 (1998)).

Any parcel, regardless of size, that has been designated as agricultural since 1982, as these parcels have, even if the land is not actually currently being used for agricultural production, undoubtedly has the *capability of being used*, thereby satisfying the first prong of .030(2). In addition, for land that is being utilized as the headquarters for an agricultural operation to not be considered as *primarily devoted* to agricultural production is illogical.

The actual question for the Board rests more on the economic stream that the parcel can generate – its long-term commercial significance.

Do parcels 10 acres or less in size have long-term commercial significance for agricultural production?

Whether land has long-term commercial significance for agricultural production is based on:

[T]he growing capacity, productivity, and soil composition of the land for long-term commercial production, *in consideration with* the land's proximity to population areas, and *the possibility of more intense uses of the land*.

RCW 36.70A.030(10) (Emphasis added).

This provision of the GMA has two components – the intrinsic attributes of the land component (growing capacity, productivity, and soil composition) and a locational component (proximity to population and possibility of more intense uses). Based on these components, a County must do more than simply catalogue lands that are physically suited to farming, it must consider and weigh the locational factors in determining if agricultural land has the enduring commercial quality needed to fit the agricultural land definition. *Lewis County*, 139 P.2d at 1102. A county must consider the guidelines developed by CTED and contained in WAC 365-190-050; but, according to the *Lewis County* Court, it may also weigh other factors not specifically enumerated in the GMA or the WAC in evaluating whether agricultural land has long-term commercial significance.

WAC 365-190-050(1)(e) specifically states that “predominant parcel size” is a factor that may be considered and weighed in designating agricultural resource lands. In its

Response Brief, the County acknowledges that its Land Use policies require it to consider *all of the* CTED criteria contained in WAC 365-190-050 and that Policy 7.A.3, as amended, creates additional criteria for the County to consider when dealing with the designation of agricultural lands. County Response at 9-10. Nowhere in the record, nor in the Petitioner’s PHB or Reply does the Board find that the County has excluded any land from designation solely due to parcel size without consideration of the other criteria contained in WAC 365-190-50 and Policy 7.A.3. In fact, the County submitted maps into the Record which demonstrate that there currently are numerous parcels within the LCF and UCF designations that are less than 10 acres. County Supplemental Exhibit 2.

Therefore, the Board finds and concludes that the County’s use of a 10 acre parcel size as a criterion for designating agricultural lands of long term commercial significance **complies** with the provisions of the GMA. The Board also concludes that Snohomish County’s Land Use Policy 7.A.3, allowing consideration of parcel size – a parcel of 10 acres or greater - in designation of agricultural land within the UCF and LCF districts, **complies** with the GMA. Legal Issue No. 1 is **dismissed**.

2. Legal Issue 6: De-Designation of the Foster Farm parcel

The Foster Farm is an aggregated 57-acre parcel which, historically, has been operated as a dairy farm. Approximately 51 acres is within the lowlands, a 100-year flood plain, and the balance, approximately 6 acres, is on the upper bench. Operation of the dairy farm ceased in 2000 but since the closure of the dairy, the lower portion of the property has been used to grow a variety of produce and floral products which are sold at the Foster’s farm stand located on the upper bench. In addition, the lower portion has been utilized for an entrepreneurial venture – the Foster Farm Annual Pumpkin Patch and Corn Maze. Index 8.3.00053. During the comprehensive plan amendment process, Mr. Foster proposed to participate in Snohomish County’s Transfer Development Rights (TDR) program in which the bulk of his 57-acres would remain in agricultural use and, under the TDR, be a “sending area.” Arlington Response, at 5. The six acres of the upper bench would be removed from an agricultural designation and added to the City’s UGA, with the intent to be utilized for commercial development.

This Board has previously addressed what is required to remove an agricultural designation from land which has been previously designated as such. *See Grubb v. City of Redmond*, CPSGMHB Case No. 00-3-0004, Final Decision and Order, (Aug. 11, 2000) (Overruled in *Redmond v. CPSGMHB*, 116 Wn. App 48, Div. I, (2003); and *Forster Woods Homeowners Association, et. al. v. King County*, CPSGMHB Case No. 01-3-0008c, Final Decision and Order (Nov. 6, 1001). In analyzing the GMA’s provisions for amending policies and designations, the Board in the *Grubb* case found that the de-designation of resource lands may occur if the GMA’s definitions and criteria for designation are no longer met.³⁴ *Grubb*, at 11.

³⁴ *Redmond v. Central Puget Sound Growth Management Hearings Board*, 116 Wash. App. 48, 55 (Div I, 2003). Although the Board was reversed by the Court of Appeals in this case, the Board’s

The Final Environmental Impact Statement (FEIS) and Draft Supplemental Environmental Impact Statement (DSEIS) describe the Foster parcel as satisfying nearly all agricultural designation criteria including having prime farmland soil, maintaining a RCF agricultural land designation and a Agricultural-10 zoning district, located within an area identified as an agricultural area of prime importance in the 1982 inventory, and outside of a sewer service area. Nevertheless, Arlington asserts that an analysis of GMA and CTED factors weighs in favor of de-designation. Arlington Response at 11-20; Pilchuck PHB at 27; Index No. 8.5.000037. Aerial photographs submitted by the Petitioner demonstrate that the immediate surrounding area is not characterized by urban development, but by agricultural land, including 51 acres retained by the owner of the Foster Farm. Index 8.3.000662; and HOM Exhibit 24.

Although some factors may support de-designation, the City provides brief and primarily unsupported assertions as to why the property no longer is suitable for agricultural production. The City's assertion that the property is no longer devoted to agriculture because it contains structures, including a barn and outbuilding formerly utilized by the dairy operation, raises the question that if a barn cannot be seen as agriculture then what structure is? In addition, the Petitioner's assertion in regard to urban growth is confirmed by documentation submitted by the City of Arlington with their Response Brief – an aerial photo/map overlay entitled “Figure 6: Foster Request to be in the UGA.” This map clearly demonstrates that urban growth, although in the area, is not immediately adjacent to Foster property.

The Board sees these 6 acres as the “farm center” or, essentially, the operational headquarters for the farm. The purpose of the farm center is to ensure the long-term survival of the agricultural land it serves by allowing farmers to support the main agricultural operation (*i.e.* crop production or livestock rearing) and, at times, to allow small commercial and/or retail activities that provide secondary income to the farm based on its agricultural output. The farm center is not only compatible with a GMA agricultural resource land designation, but necessary to *maintain the agricultural industry*. The Record indicates that the challenged 6 acres has and continues to serve as the operational center of the farm, providing both living quarters and a retail ‘farm stand’ from which the farmer sells agricultural products grown on the adjacent acreage in addition to recent “entrepreneurial activities.” Although these 6 acres are providing “entrepreneurial” secondary income to the farm, the primary, as well as this secondary income, all arise from the agricultural activities on the adjacent land.

This is in accord with the Supreme Court's ruling in *Lewis County* in regard to “farm centers.” In *Lewis County*, the Court upheld the Western Board's invalidation of County

acknowledgment that once lands are designated as agricultural lands these lands are not necessarily destined to be agricultural forever recently was shown support by the *Lewis County* court when it noted that the GMA is not intended to trap anyone in economic failure. *Grubb*, at 11; *Lewis County*, 139 P.3d at 1104.

regulations which excluded farm homes and “farm centers” – up to five acres per farm - from designation as agricultural land, regardless of whether or not it was viable for agricultural production. *Lewis County*, 139 P.3d at 1104.

The City appears to argue that somehow Mr. Foster’s participation in the County’s TDR program supports the de-designation, apparently because the intent behind the TDR program is to preserve agricultural land by providing financial incentives to property owners. Arlington Response at 4. Although this may be true, the Board fails to see how eliminating the operational heart of the farm would result in the preservation of the remaining land. Removal of this land would effectively strip the farm of its ability to operate. The Board cannot conclude that the farm stand, barn and other structures located on the land amount to urban growth warranting the de-designation of the land as agricultural. This conclusion is supported by the Record, and the property owner’s and City’s own analysis, which describes the property as agricultural in nature. The farm land below, the land on the bench, and the structures upon it are an important component of the agricultural industry which should not be allowed to disappear, especially in the urbanizing Puget Sound region.

The Board finds that the County’s action in removing the agricultural designation Riverway Commercial Farmland from the 6-acre “Foster Farm” parcel was **clearly erroneous**, and **noncompliant** with RCW 36.70A.170. The Board **remands** this issue to the County for actions consistent with this order.

Conclusions Legal Issues 1 and part of Legal issue 6

The Board finds and concludes that Petitioner Pilchuck **has not carried its burden of proof** with respect to Legal Issue No. 1. The Board also concludes that Snohomish County’s Land Use Policy 7.A.3, allowing consideration of parcel size – a parcel of 10 acres or greater - in designation of agricultural land within the UCF and LCF districts, **complies** with the GMA. Legal Issue No. 1 is **dismissed**.

The Board finds and concludes that the County’s action in removing the agricultural designation Riverway Commercial Farmland from the 6-acre “Foster Farm” parcel, Legal Issue 6, was **clearly erroneous**. The Board **remands** this issue to the County for actions consistent with this Order.

B. LEGAL ISSUE NO. 2

Extension of Urban Services (Sewers) Beyond the UGA, into the Rural Area for Schools and Churches

The Board’s PHO set forth Legal Issue No. 2

2. *Does the adoption of Ordinance 05-069, adopting an updated and revised comprehensive plan, including policies LU 7.B.6 and UT 3.B.1, fail to comply*

with RCW 36.70A.130, RCW 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.020(8), RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.070, RCW 36.70A.060, RCW 36.70A.110 when it authorizes and allows the extension of urban services outside of urban growth areas?

The Challenged Action

Petitioners challenge the County's adoption of Ordinance No. 05-069, the Plan Update, specifically Plan Policies LU 7.B.6 and UT 3.B.1 [underlining shows new language, ~~strike through~~ shows deleted language]. LU 7.B.6 provides:

In cases where a sewer line has been installed through farmland, residences shall be prohibited from connecting to the sewer line, unless a public emergency is declared.

Policy UT 3.B.1 provides:

The County shall prohibit new municipal sanitary sewer systems within the rural and resource lands unless sewers are necessitated by serious public health considerations or by necessary public facilities, or there are compelling reasons for such locations related to engineering design requirements or significant limitations on site availability, and when they are intended and designed solely to serve urban development within the UGA, with the exception that churches or schools located within the rural lands may hook up to sewer lines located on or directly adjacent to the church or school property.³⁵

Applicable Law

The focus of Pilchuck's challenge on this Legal Issue is an alleged noncompliance with RCW 36.70A.110(4), which provides:

In general, cities are the units of local government most appropriate to provide urban governmental services. *In general, it is not appropriate that urban governmental services be extended or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such*

³⁵ Policy UT 3.B.1 is identical to former Policy UT 3.C.1. The Board found Policy UT 3.C.1 noncompliant and invalid in *CTED II*, at 6-13. In response to the Board's remand, the County adopted Resolution 04-023, which acknowledged that the challenged Ordinance's [Ordinance No. 04-104] Severability Clause reinstated the prior language – *i.e.* without the language underlined *supra*. The Board subsequently entered an Order Finding Compliance on September 30, 2004. The Plan Update reinstates the underlined language that was formerly found noncompliant, invalid and deleted by the County on remand.

services are financially supportable at rural densities and do not permit urban development.

(Emphasis supplied).

Discussion

The foundation of Petitioners' arguments on this Legal Issue is twofold: 1) the State Supreme Court's ruling in *Thurston County v. The Cooper Point Association (Cooper Point)*, 148 Wn 2d1, 57 P. 3d 1156 (2002); and 2) this Board's prior ruling in *The Director of the State Department of Community, Trade and Economic Development v. Snohomish County [Snohomish County School District No. 201 - Intervenor] (CTED II)*, CPSGMHB Case No. 03-3-0020, Final Decision and Order, (May 5, 2004). Pilchuck argues these prior decisions are binding on the County. Pilchuck PHB, at 10-18.

In discussing the same amendatory language challenged here, the Board wrote in *CTED II*:

RCW 36.70A.110(4), especially as construed and applied by the Supreme Court in *Cooper Point*, is very clear. The extension of urban governmental services into the rural area is **prohibited** except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment. Unless there is a public health, safety or environmental problem to be addressed, the extension of sewers into the rural are is **not permitted**. There is one exception, and only one – necessary to protect the public health safety or environment - recognized in .110(4). The Board previously acknowledged and recognized this sole exception to .110(4) in its FDO in *CTED I*.

...

As adopted, Ordinance No. 03-104 amends the County's Plan and regulations to: 1) allow sewers "for churches and schools located within rural lands with sewer lines located on or directly adjacent to the church or school property" (Plan Land Use Policy 1.C.4); 2) prohibit sewers "with the exception that churches or schools located within the rural lands may hook up to sewer lines located on or directly adjacent to the church or school property" (Plan Utility Policy 3.C.1); 3) require sewer connections "including churches or schools located within rural lands, when sewer lines are located on or directly adjacent to the church or school property" (SCC 7.44.030); 4) allow sewers "when a church or school is located within rural lands and existing sewer lines are located on or directly adjacent to the church or school property" (SCC 30.29.110); and 5) allow sewers "when a church or school is located within rural lands and existing sewer lines are located on or directly adjacent to the church or school property" (SCC 30.29.120).

The amendatory language of the Ordinance is unambiguous; it either *allows*, or *requires*, schools or churches in the rural area to connect to sewers, based solely upon proximity to sewers. This action is contrary to the explicit provisions of .110(4) and its limited exception – necessary for protection of public health and safety and environment.

The Board finds:

1. Sewers are an urban governmental service (RCW 36.70A.020(19));
2. The churches and schools that would potentially be the beneficiary of Ordinance No 03-104's provisions must be located in the rural area (Ordinance No. 03-104, Sections 2, 3, 4, 5 and 6);
3. The churches or schools in the rural area that would be subject to Ordinance No. 03-104's provisions are not presently connected or hooked-up to sewers (*Id.*);
4. The Ordinance does not require schools or churches in the rural area to demonstrate a need for the sewer extensions for the purpose of protecting the basic health and safety and the environment. (Ordinance No. 03-104); and
5. Proximity to a sewer, not the protection of basic public health and safety and the environment is the County's only stated basis for connecting schools or churches in the rural area to sewer service under the provisions of Ordinance No. 03-104, Sections 2, 3, 4, 5 and 6).

Given these facts, the Board also finds that it logically follows that where churches or schools in the rural area are not presently connected to a sewer system, the sewer system would have to be extended, or expanded, to accomplish the connection or hook-up.³⁶ Therefore, the Board concludes, that the provisions of Ordinance No. 03-104, on their face, permit the extension or expansion of sewers (urban governmental services) into the rural area without such extension being necessary to protect the basic health and safety or environment. The Ordinance creates a new exception (proximity to sewers) beyond the one limited exception in RCW 36.70A.110(4) identified by the Supreme Court in *Cooper Point*. Consequently, Ordinance No. 03-104 does not comply with, and in fact contradicts, the clear statutory direction of RCW 36.70A.110(4).

³⁶ In *CTED I*, at 18, the Board focused in on the specific requirements of RCW 36.70A.110(4) and stated, “[T]he focus of this issue is whether the extension or expansion of a sanitary sewer (urban governmental service) beyond the UGA boundary into the rural area complies with .110(4). *The issue is not the uses that would ultimately be served, the distance of the extension, or the size of the pipe extended.*” (Emphasis supplied.) The same focus applies in the present case.

CTED II, FDO, at 9-11. The Board notes that, on remand, the County deleted the noncompliant language and the Board entered a Finding of Compliance. See *CTED II*, Finding of Compliance, (Sep. 30, 2004). Nonetheless, the County chose, in its Plan Update, to reinstate the same language found to be noncompliant and invalid by this Board in 2004.

In response, regarding Policy LU 7.B.6, the County contends this policy is not new, but that “it is a policy that was part of the County’s ‘Implementation Measures’ for Agricultural Lands contained in Section LU 7 of Appendix H to the 1995 [GMA Plan].”³⁷ County Response, at 19-20. The County argues that by placing this policy among the Agricultural Land Use Policies,

[I]t intended to clarify and limit sewer hookups in agricultural lands, not to expand those hookups. It is important to note that the Policy only applies where a sewer already exists in farmland areas. Those geographical areas are extremely limited. They currently exist only because the sewer line was installed in the past to address a situation where septic systems were failing and sewer was necessary to ameliorate that existing health hazard.

Id. The County argues that Policy LU 7.B.6 is consistent with RCW 36.70A.110(4) and *Cooper Point*, since it allows hookups to existing sewer lines in agricultural lands only when a public health emergency is declared. *Id.*

Nonetheless, Pilchuck argues that LU 7.B.6 still allows an expansion or extension of sewer into non-urban areas [agricultural lands] and is contrary to the GMA and *Cooper Point*. Pilchuck Reply at 5-6. Regarding this Policy, Pilchuck ignores the limited exception allowed by RCW 36.70A.110(4) – necessary to protect the public health safety or environment. Here, an existing sewer line through agricultural lands cannot be tapped for hookups unless a public health emergency is declared. The Board agrees with the County regarding Policy LU 7.B.6: it is limited and it falls within the very narrow exception permitted in RCW 36.70A.110(4).

Regarding Policy UT 3.B.1, the County contends that this policy is a companion to Policy LU 1.C.4, which provides in relevant part: “Annexations and planned urban densities shall be prohibited outside the UGA boundary, and the provision of sanitary sewers to development outside and adjacent to the UGA shall be allowed only for: . . .”

³⁷ This reference provided:

b. Review and consider for adoption infrastructure policies such as:

. . .

(2) in cases where a sewer line is installed through farmland, hookups from farmland to the sewer line shall be prohibited, unless a public health emergency is declared. . .

County Response, at 23.³⁸ The County continues, “These policies [LU 1.C.4 and UT 3.B.1], read together, allow churches and schools located on rural lands outside but adjacent to a UGA boundary to hook up to sewer lines.” *Id.* (emphasis in original). The County next contends that these Plan Policies are consistent with the County’s County Wide Planning Policy CPP OD-4, which provides:

In general, allow the extension of urban infrastructure and urban levels of service only within UGAs except as shown to be necessary to protect basic public health and safety and the environment, when such services are financially supportable at rural densities and do not permit urban development, provided, *a church located in a rural area directly adjacent to (abutting) an Urban Growth Area shall not be precluded from hooking up to an existing sewer main, so long as the size, scale and uses at the church are compatible with the surrounding area and preserve rural character, as evidenced by the issuance of a conditional use permit. Use of the stub-outs or connecting lines serving the church by any residential, commercial, or industrial use in the rural area is prohibited.*

County Response, at 23-24; (emphasis supplied). The County acknowledged that the emphasized portions of CPP OD-4 were challenged by the State in *CTED v. Snohomish County (CTED I)*, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004) and found noncompliant; but the County appealed the Board’s FDO to Thurston County Superior Court where it was reversed by the Honorable Judge Richard Hicks.³⁹ CTED chose not to appeal the decision and stipulated to dismissal by the Board on remand from the Court. As a result, the Board dismissed the original PFR.⁴⁰ Consequently, the County asserts, it “was free to adopt [comprehensive plan] policies that implement it. LU Policy 1.C.4 and UT Policy 3.B.1 are those policies.” *Id.*

³⁸ The full text of Plan Policy LU 1.C.4 states

Annexations and planned urban densities shall be prohibited outside of the UGA boundary, and the provision of sanitary sewers to development outside and adjacent to the UGA shall be allowed only for: (a) public health emergencies; (b) ~~and~~ for necessary for necessary public facilities that are required to be served by sanitary sewers and cannot be feasibly located within the UGA; and (c) for churches and schools located within rural lands with sewer lines located on or directly adjacent to the church or school property. Urban capital facilities, including sanitary sewer facilities, may be located outside a UGA only when there are compelling reasons for such locations related to engineering design requirements or significant limitations on site availability and when they are intended and designed solely to serve urban development within the UGA.

Plan Update, Ex. C, at LU-10; (emphasis supplied).

³⁹ The Court’s reversal was based upon the Board’s error of considering and applying the goals of the GMA to the challenged Snohomish County CPPs. See Judge Hick’s November 15, 2004 Order and Judgment, Thurston County Superior Court, No. 04-2-00655-1, Consolidated with No. 04-2-00659-4, at 3.

⁴⁰ See *CTED I*, CPSGMHB Case No. 03-3-0017, Order of Dismissal, (Nov. 29, 2004).

The County then quotes from its findings to indicate that there are four reasons for adopting the two policies [LU 1.C.4 and UT 3.B.1], they are:

1) consistency with the Religious Land Use and Institutionalized Persons Act (RLUIPA, 42 USC § 2000cc(b)(i));⁴¹ 2) the extension is allowed only under extremely limited circumstances since it is only to churches and schools located just outside of but adjacent to a UGA boundary; 3) the extension will not lead to any increased residential, commercial or industrial development in the rural area since it is limited to churches and schools; and 4) these limitations (2 and 3) so limit the exception that it comes within the “In general” language of RCW 36.70A.110(4) as an exception to the general rule that extensions of sewer outside UGAs can only be for circumstances “necessary” to protect the public health and safety.

Id. at 26. In conclusion the County argues that *CTED II* is not binding on the County because that decision was based on *CTED I*, which was reversed by the Thurston County Superior Court, and as a result, the County can rely upon CPP OD-4, which supports UT 3.B.1. *Id.* at 30-32.

In reply Pilchuck again asserts that the language of RCW 36.70A.110(4) and the *Cooper Point* case are not ambiguous. The only time urban services can be extended or expanded into the rural area are if such extension is *necessary to protect basic public health and environment and when such services are financially supportable at rural densities and do not permit urban development*. Petitioners assert all three conditions must be met. Pilchuck Reply, at 5-8.

First, the Board notes that the Thurston County Superior Court did not reverse the Board’s FDO in *CTED II – CPSGMHB* Case No. 03-3-0020. Instead the Court addressed a challenge to Snohomish County’s adoption of CPPs, including OD-4. In reversing the Board’s *CTED I* FDO, Judge Hicks stated:

Countywide planning policies may, in some cases such as King County v. CPSGMHB, 138 Wn.2d 161, 979 P.2d 374 (1999), be directive and mandate that certain specific comprehensive plan policies or development regulations be later adopted. However, countywide planning policies may also be precatory,⁴² and not directive, and therefore do not require a particular result at the comprehensive plan stage. The Court finds in this case that the record does not support the Board’s conclusion that CPP OD-

⁴¹ The County recognizes that the Board has no jurisdiction to hear and determine RLUIPA claims. County Response, at 26.

⁴² Black’s Law Dictionary, Seventh Edition, at 1195, defines “*precatory*” as “requesting, recommending, or expressing a desire for action, but usually in a non-binding way. An example of precatory language is ‘it is my wish or desire to . . .’”

4 and UG-14(d)(8) and (9) are necessarily directive. Whether the policies in this case are precatory or directive can be determined upon appeal of any comprehensive plans or development regulations adopted in order to implement a specific CPP.

Judge Hicks' November 15, 2004 Order and Judgment, in Cause No. 04-2-00655-1, Consolidated with No. 04-2-00659-4, at 3.

The present case *does not present a direct challenge to a CPP*, be it directive or precatory; rather, it is an appeal of the County's action to adopt a comprehensive plan policy, UT 3.B.1, and as implicated by the County, its companion LU 1.C.4. Both these Plan Policies, as admitted by the County, are to implement CPP OD-4. For the same reasons the Board discussed in *CTED I*, the Board concludes here that the Plan Update's Policy UT 3.B.1, and its companion LU 1.C.4 **do not comply** with RCW 36.70A.110(4). The Board affirms its findings and conclusions in *CTED I* and reiterates them here as applied to Policy UT 3.B.1 and LU 1.C.4:

1. RCW 36.70A.110(4), especially as construed and applied by the Supreme Court in *Cooper Point*, is very clear. The extension or expansion of urban governmental services into the rural area is **prohibited** except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment. Unless there is a public health, safety or environmental emergency to be addressed, the extension or expansion of sewers into the rural is **not permitted**. There is one exception, and only one – necessary to protect the public health safety or environment - recognized in .110(4).
2. Sewers are an urban governmental service (RCW 36.70A.020(19);
3. The churches and schools that would potentially be the beneficiary of the provisions of UT 3.B.1 and LU 1.C.4 must be located in the rural area (Ordinance No. 05-069, Plan Update, Exhibit U, Plan Policy UT 3.B.1, at UT-7; and Plan Update, Exhibit C, Plan Policy LU 1.C.4, at LU-10.);
4. The churches or schools in the rural area that would be subject to UT 3.B.1 and LU 1.C.4's provisions are not presently connected or hooked-up to sewers (*Id.*);
5. Policies UT 3.B.1 or LU 1 C.4 do not require schools or churches in the rural area to demonstrate a need for the sewer extensions for the purpose of protecting the basic health and safety and the environment. (*Id.*);
6. Proximity to a sewer, and adjacency to a UGA, not the protection of basic public health and safety and the environment is the County's only stated basis for connecting schools or churches in the rural area to sewer service under the provisions of Policy UT 3.B.1 or LU 1.C.4. (*Id.*).

7. Therefore, Plan Policies UT 3.B.1 and LU 1.C.4 **do not comply** with RCW 36.70A.110(4) and must be stricken.

The Board has concluded that Comprehensive Plan Policies UT 3.B.1 and LU 1.C.4 are noncompliant with RCW 36.70A.110(4). The County has argued that these Plan Policies were to implement CPP OD-4. The Board therefore concludes, as suggested by the Thurston County Court, that CPP OD-4 is directive, not precatory. The Supreme Court stated in *King County* that “A UGA designation that blatantly violates GMA requirements should not stand simply because CPPs mandated its adoption. Rather, upon a determination that the provision violates the GMA, it should be stricken from both the comprehensive plan and CPPs.” *King County*, 138 Wn 2d, at 177. Reasoning by analogy, since the County acknowledges UT 3.B.1 and LU 1.C.4 were necessary to implement the policy direction of CPP OD-4 and the Board has determined that Plan Policies UT 3.B.1 and LU 1.C.4 violate the GMA and must be stricken, likewise CPP OD-4 must be stricken.

The Board notes that school or church property that is adjacent to a UGA may be *included* within the UGA without running afoul of RCW 36.70A.110(4). Apparently, the County is also aware of this approach to dealing with the situation where a school or church is adjacent to the UGA, since it: 1) added five acres to the Arlington UGA for school purposes (Ordinance No. 05-073, Section 1, Finding II 3, at 13; and attached UGA map); and 2) added 67 acres to the Marysville UGA for church and school purposes (Ordinance No. 05-077, Section 1, Finding EE 4, at 10; and attached UGA map). This approach does not conflict with RCW 36.70A.110, since the school or church properties are drawn into the UGA where the needed urban services are available.

Conclusion

The County’s adoption of Plan Update Policy LU 7.B.6, was **not clearly erroneous**, since it is limited and it falls within the very narrow exception permitted in .110(4); the Board finds that it **complies** with that GMA provision. However, the County’s adoption of Plan Policies UT 3.B.1 and LU 1.C.4 were **clearly erroneous** since they do not fall within or recognize the narrow exception permitted in .110(4). Therefore, UT 3.B.1 and LU 1.C.4 **do not comply** with RCW 36.70A.110(4). The Board will **remand** Policies UT 3.B.1 and LU 1.C.4 to the County with direction to strike the noncompliant provisions to achieve compliance with RCW 36.70A.110(4). Further, CPP OD-4 is likewise noncompliant with RCW 36.70A.110(4) and is unenforceable and inoperative, and shall remain so, until the County and its cities next amend the Snohomish County CPPs, at which time, the provisions of CPP OD-4 that violate RCW 36.70A.110(4) shall be stricken.

C. LEGAL ISSUE NO. 4
Transportation Element Challenge

The Board's PHO set forth Legal Issue No. 4:

4. *Does the adoption of Ordinance 05-069 and Ordinance 05-092, adopting an updated and revised comprehensive plan and concurrency regulations, fail to comply with RCW 36.70A.130, RCW 36.70A.020(12) and RCW 36.70A.070 when the adopted Transportation Element and concurrency regulations [a] fail to provide for transportation improvements sufficient to implement the land use element, [b] fail to include specific actions and requirements for bringing into compliance locally owned transportation facilities or services that are either currently or in the future will be below an established level of service standards, [c] fail to include a multiyear financing plan based on the needs identified in the comprehensive plan and the Transportation Element, [d] exempt arterials of a certain volume from concurrency analysis, [e] adopts concurrency amendments that violate the GMA, and [f] fail to disallow development that does not meet concurrency requirements?*

The Challenged Action

Petitioners challenge the County's enactment of Ordinance Nos. 05-069 and 05-092. Ordinance No. 05-069 updates the County's GMA Plan – the General Policy Plan – making text, policy and map amendments. Ordinance No. 05-092 amends the County's concurrency regulations. Revisions included in Ordinance No. 05-092 include: changes to level of service standards for County arterials, refinements to capacity determinations, revisions to concurrency requirements, and alterations to transportation impact fee rates.

Applicable Law

Goal 12 of the GMA provides: "Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time development is available for occupancy and use without decreasing current service levels below locally established minimum standards." RCW 36.70A.020(12).

RCW 36.70A.070 specifies the contents of the mandatory elements of the GMA Plan. The required components of a Transportation Element (**TE**) are set forth in .070(6). This section of the Act requires the TE to be consistent with, and implement the Land Use Element. Sub-elements are listed for inclusion in the TE, including: 1) land use assumptions used for estimating travel; 2) estimated traffic impacts on state owned facilities; 3) identification of needs for facilities and services [including an inventory of facilities, level of service standards (**LOS**), actions to maintain LOS, 10-year traffic forecasts, and identification of needs to meet future demands]; 4) an analysis of funding capability, a multi-year financing program, and a strategy for addressing gaps between funding and needs while maintaining LOS. Once the Plan, including TE is adopted,

jurisdictions must adopt and enforce ordinances that prohibit development approval if the development generates traffic that falls below the adopted LOS.

RCW 36.70A.130 requires, among other things, periodic Plan Updates.

Discussion

Petitioners turn to the County's FEIS for the Plan Update to support their assertion that the Plan Update fails to provide for sufficient transportation improvements to meet future needs. Petitioners contend that the FEIS indicates that "under the recommended transportation element and comprehensive plan, 37 transportation segments will be operating at an adopted level of service (LOS) deficiency by 2012 and that the number increases to 39 [*sic* 59] by the year 2025." Pilchuck PHB, at 18-19; *referencing* Index No. 8.5.000037, the FEIS, at 3-85. Pilchuck then quotes from the TE, noting that primary revenues will not likely be sufficient to allow improvements and that the County will experience a funding shortfall if it relies only on primary revenues. *Id.*, citing CD 3, TE, at 105. Petitioners then contend that the TE does not provide a strategy or financing to address the transportation deficiency predicted. *Id.* Further, Petitioners argue that the Act requires the County to address the deficiency [projected 37 segments below LOS by 2012] in the Plan Update, and it does not. *Id.* at 20. Finally, Pilchuck asserts that the TE shows a shortfall in funding for transportation improvements needed by 2012 of \$36 million and a shortfall of perhaps \$150 - \$766 million by 2025. However, Petitioners note that \$496 million of additional revenue is identified in the TE, but contend that the County has not acted to adopt or pursue these revenue sources. *Id.* at 20-21; *referencing* Tables 26 and 27 of the TE.

In response, the County argues that the Board lacks jurisdiction to review the TE and that Petitioner has abandoned most, if not all of this Legal Issue. The County summarizes, as follows:

In Legal Issue 4, Pilchuck did not challenge Ordinance No. 05-070, the very ordinance which adopted the County's Transportation Element. Consequently, the Board lacks jurisdiction to consider any challenge to the County's Transportation Element under this legal issue. Second, Pilchuck's failure to brief how Ordinances 05-069 and 05-092 violate RCW 36.70A.130, RCW 36.70A.020(12), and RCW 36.70A.070, results in abandonment of the challenge to these ordinances and requires dismissal of the legal issue. Third, Pilchuck's failure to cite, let alone analyze, RCW 36.70A.130 and RCW 36.70A.020(12) in this legal issue of its brief, results in abandonment of any challenge under these provisions of the GMA. Fourth, even if the first three setbacks could be overcome, Pilchuck failed to brief sub-issues [*d*] through [*f*] of Legal Issue 4, which challenged the County's concurrency regulations adopted by Ordinance No. 05-092. This failure to brief the sub-issues results in abandonment of the challenges to the concurrency regulations.

County Response, at 37.

In reply to the County's contention that Petitioners have not challenged the TE, and have basically abandoned Legal Issue 4, Pilchuck offers a three part response: 1) Ordinance No. 05-069 adopts Exhibit S⁴³, which is the Transportation Element; 2) Legal Issue 4 specifically refers to the "Transportation Element" in its text; and 3) Petitioners' argument that the County did not have a plan for accommodating growth without violating LOS is fairly within Legal Issue 4. Pilchuck Reply, at 8-10.

The County offers a strong argument for dismissing this issue in its entirety. However, the Board is not persuaded by the County's "they challenged the wrong ordinance" argument.

The GMA "Comprehensive Plan" is a single subject, covered in one chapter of the RCWs, which is defined in the statute as a "generalized *coordinated* land use policy statement of the governing body." RCW 36.70A.030(4); emphasis supplied. Nevertheless, the County chose to accomplish its Plan Update by adopting multiple ordinances on components, elements and pieces of its overall GMA Comprehensive Plan. At least *fifteen* of the "Plan Update Ordinances" were cited and challenged in the present consolidated matter.⁴⁴ While this multiple ordinance approach may assist the County in tracking issues and amendments arising out of its review process, the Board has witnessed that it can be challenging for the public to follow which issue of concern is addressed in which ordinance and when testimony and comment is appropriate.

Consequently, in the present matter, the Board will not dismiss Legal Issue 4 in its entirety because Ordinance No. 05-070, adopting the Transportation Element, was not specifically called out. Legal Issue 4, although largely unbriefed and abandoned by Petitioners, does clearly identify three alleged failures of the TE, related to .070, noted as [a], [b] and [c] in the issue statement. This is the only remnant of the Legal Issue that the Board will consider.

⁴³ The Board notes that Exhibit S to Ordinance No. 05-069 is entitled, "Amendments to the Transportation Chapter of the General Policy Plan." See CD 2, Ordinance No. 05-069, Section 22, at 47; and attached Ex. S. Ex. S includes Transportation Goals, Objectives and Policies which guide the Transportation Element adopted by Ordinance No. 05-070. The Board notes that the County's TE is identified as a "Component of the GMA Comprehensive Plan" and Ordinance No. 05-070 adopts the TE to fulfill the requirements of RCW 36.70A.070(6) and .130. See CD 3, Ordinance No. 05-070, adopting Transportation Element, at 1.

⁴⁴ None of the petitioners here has challenged the County's multiple-ordinance approach as violative of the GMA, so the Board does not reach that question. See RCW 36.70A.290(1). Nevertheless, the Board has observed, as in the present matter, citizen confusion. Indeed, even the County representatives could not answer at the HOM the basic comprehensive plan question of total number of acres added to the UGA but had to go back and add up the total from multiple UGA-adjustment ordinances.

In short, Petitioners contend, *supra*, the FEIS notes a deficiency of capacity in meeting future growth, the TE lacks a strategy or financing strategy to meet the shortfall, and the shortfall must be addressed now. Pilchuck PHB, at 18-21.

The County notes that its TE, as adopted by Ordinance No. 05-070, includes a chart in the Preface that identifies each of RCW 36.70A.070(6)'s requirements and identifies the location in the TE or related documents where that particular sub-element is addressed.⁴⁵ County Response, at 38-44; *see also* CD 3, TE, at (i-ii), and referenced locations. The Board agrees, the County's TE has all the component parts required by RCW 36.70A.070(6) and **complies** with this aspect of RCW 36.70A.070(6). The Board also acknowledges that the TE, as well as Ordinance No. 05-092, addresses the GMA's requirement to have concurrency regulations prohibiting development if projects generate impacts falling below LOS.

The County argues that Petitioners have mischaracterized the two documents they rely upon to make their argument – the references to the FEIS and TE. County Response, at 44. The County does not dispute that Table 3.2-17 summarizes the number of improvements that would be needed to mitigate potential future LOS problems; but points out that the text continues, “These values represent the cumulative LOS problems that could potentially occur if identified improvements were not made on state highways and County/city arterials.” *Id.* at 45, citing Index No. 8.5.000037, FEIS, at 3-85; (emphasis in brief). The County contends the FEIS did exactly what it was suppose to do, inform the County Council of the potential impacts of the Plan Update, including noting the need for transportation improvements to maintain LOS. The County then asserts that the needed improvements are in the TE, Chapter 4, “Recommended Transportation Improvements” and funded through the County's six-year Transportation Improvement Program (**TIP**). *Id.* at 45-46. The County notes that Petitioners ignored, and did not challenge, the County's TIP, which is where needed projects have the funding identified, as required by the Act. *Id.*

Additionally, the County notes that Petitioner focus on the statement in the TE indicating that Table 27 suggests that primary revenue sources may not be sufficient to fund needed transportation improvements; but, the County states, Petitioners neglected to provide the additional portion of the Table 27 discussion: “It can be seen, from the ranges of revenues that can be generated from realistic revenue measures described in Table 27, that the County has the ability to close the funding gap for needed capacity-related arterial improvements.” *Id.* at 47; citing CD 3, TE, at 105. The County notes that Petitioners also seem to acknowledge that the TE identifies potential revenue sources, but apparently object that they are not tapped now. *Id.* Finally, the County argues, correctly, that the GMA's funding requirements for the TE mandates a six-year financing plan – the TIP. The Board agrees, noting that while the TE should identify 20-years of need, the multi-

⁴⁵ The Board notes that the TIP is a critical piece of the County's funding program for the TE, yet it is not referenced in this chart. Including it would go a long way towards knitting together the various pieces of the County's TE. The Board also notes that the TE itself refers to the TIP at 100, 109 and 110.

year financing requirement is satisfied by the six-year TIP. Ideally, the TIP, as it rolls forward, will ultimately identify the funding for the projects that are needed over the life of the Plan.

Petitioner has **abandoned** portions of Legal Issue 4 by failing to brief them and on the remaining portions of Legal Issue 4 Petitioner has **failed to carry the burden of proof**. The County's action, related to the Plan Update's Transportation Element, was **not clearly erroneous**. Legal Issue 4 is **dismissed**.

Conclusion

Petitioner has **abandoned** portions of Legal Issue 4 by failing to brief them and on the remaining portions of Legal Issue 4 Petitioner has **failed to carry the burden of proof**. The County's action, related to the Plan Update's Transportation Element, was **not clearly erroneous**. Legal Issue 4 is **dismissed**.

D. LEGAL ISSUE NO. 5 *Capital Facilities Element Challenge*

The Board's PHO set forth Legal Issue No. 5:

5. *Does the adoption of Ordinance No. 05-071, adopting an updated and revised Capital Facilities Plan, fail to comply with RCW 36.70A.130, RCW 36.70A.020(12) and RCW 36.70A.070 when the adopted plan fails to meet the criteria required by RCW 36.70A.070(3)?*

The Challenged Action

Ordinance No. 05-071 amends and adopts the Capital Facility Plan – and Element of the Snohomish County GMA Comprehensive Plan. See CD 4, Ordinance No. 05-071, Capital Facilities Element.

Applicable Law

As noted *supra*, Goal 12 pertains to having facilities and services available at occupancy, and .130 requires the Plan Update. RCW 36.70A.020(12) and RCW 36.70A.130.

RCW 36.70A.030(3) sets forth the required components of the Capital Facilities Element (CFE). These required components include: a) an inventory of existing capital facilities, showing location and capacity; b) a forecast of future needs for capital facilities; c) the locations and capacities of future (new or expanded) capital facilities; d) a six-year financing plan that identifies funding sources; and e) a requirement to reassess the land use element if a funding shortfall arises.

Discussion

Petitioners argue that Ordinance No. 05-071, adopting and updating the County's Capital Facilities Element, does not meet the component requirements of RCW 36.70A.070(3), specifically failing to provide the forecast of future needs, the locations and capacities of needed capital facilities, and a multi-year financing plan – RCW 36.70A.070(3)(b),(c), and (d). Pilchuck PHB, at 21-22. These omissions, Pilchuck contends, interfere with fulfillment of Goal 12. *Id.* at 22-23.

The County asserts that Petitioner has abandoned all aspects of this Legal Issue, save the question of whether the County's CFE contains the required component parts. County Response, at 51-53. The Board agrees.

The County directs Petitioners to Ordinance No. 05-110, which adopted the County's 2006-2011 Capital Improvement Program (CIP), adopted concurrently with the County's annual budget, as permitted by RCW 36.70A.130(2)(a)(iii). The County asserts that the mere existence of this document is sufficient to disprove Pilchuck's claim. County Response, at 53-54. The Board agrees, and notes that Ordinance No. 05-071, adopting the Capital Facilities Element, contains an explanation that the CIP, adopted as part of the annual budget process, is the County's six-year financing plan as required by RCW 36.70A.070(3)(d). Section III of the CFE is entitled Six-Year Capital Improvement Program (CIP). See County Exhibit Documents Appendix C-9 [Ordinance No. 05-110] and CD 4, Ordinance No. 05-071, the CFE, at 67-70.

The County also directs Petitioners to Section II of the CFE adopted by Ordinance No. 05-071 for the County's future capital needs assessment. Again the County asserts that Petitioners' claim fails simply because this section of the CFE exists. County Response, at 55-57. The Board agrees; Section II of the CFE is entitled Forecast of Future Capital Facility Needs, and discusses the future needs of the County, for facilities it owns, and owned by others. See CD 4, Ordinance No. 05-071, the CFE, Section II, at 32-66.

Finally, regarding the location and capacity of needed facilities, the County refers Petitioners to its CFE and CIP and notes that the CFE references other companion documents containing the required information. The County notes, for example, that for the location of needed transportation facilities the CFE, at 6, 14, 37 and 45-46 directs readers to the Transportation Element; for needed Parks, the CFE notes the needed facilities and locations at 56-59, as well as in the cross referenced County Parks Plan. Again, the County contends that this required GMA component is present in the CFE, and Petitioners' claim must fail. County Response, at 57-62. Again the Board agrees.

In reply, Pilchuck argues that “[T]he CIP was adopted November 21, 2005. This is exactly a month before the [Plan Update] was adopted which set the size and location of the urban growth area, the County's new growth target, and the other drivers of necessary capital facilities. . . [Therefore, the] CIP is not the “internally consistent” comprehensive

plan with all elements [that] shall be consistent with the future land use map required by RCW 36.70A.070.” Pilchuck Reply, at 14-16.

At the HOM the County responded that the County’s capital facilities needs did not change in thirty days and that as budget documents, the CIP and TIP are required by County Charter to be adopted at least 30 days prior to the end of the fiscal year. HOM Transcript, at 68. Additionally, the County asserts that even in their reply brief Petitioners’ have not identified any inconsistencies between the CIP, CFP and FLUM. *Id.*

The Board notes Petitioners’ PHB did not address internal inconsistencies or the timing of the adoption of the CIP. *See* Pilchuck PHB, at 21-23, regarding Legal Issue 5; or at 1-33. The Board directs Petitioners to the Board’s April 10, 2006 PHO, which provides:

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 15. The Board concludes that the “internal inconsistency” argument, although within the confines of Legal Issue 5, was not addressed in Petitioners’ PHB, and is therefore, deemed **abandoned**. The Board further finds that Petitioners’ merely noting the different timing in the adoption of the CIP and Plan Update, without more, falls short of carrying the burden of proof.

Conclusion

Petitioners’ have either **abandoned** portions of their challenge or **failed to carry their burden of proof** in demonstrating noncompliance with the provisions of RCW 36.70A.020(12), .130, .070(preamble) and .070(3). The County’s action, related to the Plan Update’s Capital Facilities Element, was **not clearly erroneous**. Legal Issue 5 is **dismissed**.

E. LEGAL ISSUE NOS. 7, 8 and 6 (in part) *Arlington, Lake Stevens and Marysville UGA Expansion*

The Board’s PHO set forth Legal Issue No. 7, 8 and 6 (in part):

7. Does the adoption of Snohomish County Ordinance No. 05-069, No. 05-075, 05-070 and 05-071, adopting an updated and revised comprehensive plan, expanding the City of Lake Stevens UGA, and updating the Transportation and Capital Facilities elements respectively, fail to comply with RCW 36.70A.130, RCW 36.70A.020(12) RCW 36.70A.110, RCW 36.70A.070(3) and RCW 36.70A.070(6) when it expands the Lake Stevens UGA into an area with steep slopes and drainage issues and fails to adequately update either the Transportation Element or Capital Facilities

plan to reflect the increased impacts from more intense development and to adequately serve this area.

The City of Lake Stevens intervened on this issue but withdrew as Intervenor and did not submit a brief.

8. Does the adoption of Snohomish County Ordinance Nos. 05-069, 05-077, 05-090, 05-070 and 05-071, adopting an updated and revised comprehensive plan, amending the City of Marysville UGA, amending the FLUM, and updating the Transportation element and Capital Facilities element respectively, fail to comply with RCW 36.70A.130, RCW 36.70A.020(12) RCW 36.70A.110, RCW 36.70A.070(3) and RCW 36.70A.070(6) when it expands the Marysville UGA and fails to adequately update the Transportation Element to reflect a large increase in daily trip generation that, according to the EIS, would result from the expansion and fails to adequately update the Transportation Element and Capital Facility Element to serve this area?

The City of Marysville intervened in this matter for the limited purpose of supporting the County in regard to this issue.

6. [In relevant part] Does the adoption of Ordinance Nos. 05-069, No. 05-073, 05-090, 05-070 and 05-071 adopting an updated and revised comprehensive plan, redesignating farmland, rezoning and amending the FLUM and updating the Transportation and Capital Facilities elements respectively, fail to comply with RCW 36.70A.130, RCW 36.70A.020(1), RCW 36.70A.020(2), . . . and RCW 36.70A.110 . . . when it . . . fails to adequately update the Transportation Element and Capital Facility Element to reflect the UGA expansion and when the land is not characterized by urban development nor adjacent to land characterized by urban development?

The City of Arlington intervened for the limited purpose of supporting the County in regard to this issue.

The Challenged Action⁴⁶

⁴⁶ Ordinance 05-075 revised the existing UGA for the City of Lake Stevens. The recitals of the ordinance note that the territory to be added to the Lake Stevens UGA is characterized by urban growth or adjacent to territory characterized by urban growth, is an adequate amount to accommodate the 20-year population and employment allocation, and to provide additional economic development opportunities through new job creation. Core Document 7, at 2-5. Specifically, for the challenged acreage, it was found that the UGA expansion would provide needed employment land to off-set the partial conversion of the Agilent property to residential use, thereby increasing opportunities for economic development. *Id.* at 5 – Recital F. This acreage is, according to the County, an “appropriate addition to the Lake Stevens UGA” and was re-designated from Rural Residential (RR) to Urban Low Density.

Petitioner Pilchuck challenges one specific area of the expanded UGA for each of three cities – Arlington, Lake Stevens, and Marysville. Pilchuck PHB, at 24, footnote 45. For Arlington, the challenged area is the 6-acre parcel described in Amended Ordinance 05-069 and Amended Ordinance 05-073, as the Foster Farm site. Core Documents 2 and 5. For Lake Stevens, the challenged area is the 20-acre parcel described in Amended Ordinance 05-075 (Page 9, No. 3) as the Lundeen Parkway Estates. Core Document 7. And, for Marysville, the challenged area is the 407-acre area described in Amended Ordinance 05-077 (Page 10, No. 3) as the Whiskey Ridge area. Core Document 9.

Applicable Law

Several provisions of the GMA are intertwined as they relate to the location, sizing, review, evaluation, and expansion of UGAs. RCW 36.70A.110 generally addresses the creation and amendment of UGAs - .110(1) deals with location criteria for delineating boundaries of UGAs, .110(2) speaks to the sizing of UGAs, and .110(3) pertains to locating or sequencing urban growth within UGAs. In relevant part, RCW 36.70A.110 provides:

(1) Each county ... shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth...

(2) Based upon the growth management population projection made for the county by the office of financial management, the county and

Ordinance 05-077 revised the existing UGA for the City of Marysville. For this addition, the County uses identical language as it did for the Lake Stevens expansion – characterized by urban growth, adequate to accommodate population and employment, and economic development. Core Document 9, at 2-9. For the Marysville’s challenged acreage, it was specifically stated that the area was needed for employment capacity. *Id.* at 10. This acreage was added for employment capacity and was re-designated from RR-10 with an Urban Reserve Overlay to Urban Industrial.

Ordinance 05-073 revised the existing UGA for the City of Arlington. The genesis for this expansion, as it was for Marysville and Lake Stevens, is the accommodation of the population and employment growth forecast for 2025 and to provided additional economic development opportunities. Core Document 5, at 5.

Ordinance 05-069 seeks to accomplish a multitude of tasks including adopting text and map amendments to the GPP and adopting a UGA land capacity analysis. Core Document 2. This Ordinance, over 50 pages in length, makes no direct reference to the expansion of the City of Arlington’s UGA except in a more generalized reference to the amendment of Municipal Urban Growth Areas. *Id.* at 51, Section 39

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 ... An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

(3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas ...

RCW 36.70A.130 sets forth the process for reviewing and amending a jurisdiction's comprehensive plan. In particular, .130(3) provides for modifications to UGAs:

(3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban growth area or areas ...

(b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, *shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period.* The review required by this subsection may be combined with the review and evaluation required by RCW 36.70A.215.

RCW 36.70A.130(3) (Emphasis added).

The cited provisions indicate that as time and conditions change and urban services become available, the boundaries for a UGA may be adjusted to accommodate the projected growth within the area. The question posed in Legal Issues 6, 7 and 8 is whether the adjusted UGAs are needed to accommodate projected growth and whether the areas can be adequately served.

Discussion

The issues raised by Petitioner in regard to the expansion of the various UGAs are based on whether the inclusion of the challenged areas into the cities of Arlington, Lake Stevens, and Maryville UGAs complies with the GMA. However, with the sole exception of Arlington, the challenge is not grounded in the size, location, or even the need for the expansion of the UGAs, but in the County's apparent failure to address potential impacts to transportation and capital facilities that may result from increasing the urbanized area of the County, an action which the Petitioner asserts violates not only .110 but RCW 36.70A.070(3), .070(6), and Goal 12 of the GMA. Pilchuck PHB at 23-24; Pilchuck Reply at 16. Essentially, the Petitioner puts forth the same argument for all three cities – namely, that “neither the Capital Facilities nor TEs provide for any inventory or financing plan that address the significant additional impacts and needs that will result from increasing the urbanized area of the County.” *Id.* at 24. The Petitioner's belief in the inadequacy of these two elements was further referenced in their Reply in which they stated that “the issues 7 and 8 ... are linked exclusively to the ... inadequacies of the TE and capital facilities element.” Pilchuck Reply at 16.

In their PHB the Petitioner asserts that RCW 36.70A.110(3) contains a “concurrency requirement” for locating UGA expansions as does Goal 12 of the GMA.⁴⁷ *Id.* at 25-26; Despite their subsequent change in position, the Petitioner cites to portions of the referenced provisions for support of this “concurrency requirement”:

.110(3) – Urban Growth should be located in areas already characterized by urban growth that will be served *adequately by a combination of both existing public facilities and services and any additional needed public facilities and services.*

.020(12) – Local governments are to *ensure that public facilities and services necessary to support development shall be adequate to serve the development* at the time the development is available for occupancy and use *without decreasing current service levels below locally established minimum standards.*

RCW 36.70A.130(3) and .020(12) (Emphasis added).

While the County and the intervening Cities expend a notable amount of energy in defending the County's actions, Petitioner's argument is limited to a few pages reiterating the text from the FEIS which pertains to traffic impacts of the Marysville ‘Whiskey Ridge’ expansion and making a conclusory assertion that .110(3) contains a concurrency requirement to which the County failed to adhere. Pilchuck PHB at 24-26. The

⁴⁷ The Petitioner later retracts this claim. See Pilchuck Reply at 17 (Marysville argues that “the GMA imposes no concurrency requirement ... Petitioners are not arguing that it does”).

Petitioner makes no specific reference to the Lake Stevens or Arlington UGA expansions except to note that the arguments “are the same.” *Id.* at 24, 30.

To support their assertion that the TE is insufficient; the Petitioner cites to the FEIS which states that the UGA expansion for Marysville “could introduce a major amount of new vehicular trip generation ... [and] most likely have significant adverse LOS (Level of Service) impacts” on city streets, state highways, and area trestles. *Id.* at 25. The Petitioner then argues that pursuant to the GMA the Capital Facilities and TE must contain land use assumptions, estimated impacts on facilities, measures to maintain adopted LOS standards, a forecast of future needs, a coordinating financing plan to maintain consistency, and a minimum 6-year financing plan to maintain standards. *Id.* The Petitioner alleges that the County’s CFE and TE are lacking in any discussion as to an inventory or financing plan to meet future infrastructure demands the UGA expansions would create. *Id.*

The County’s TE is discussed by the Board in Legal Issue No. 4, *supra*. There the Board noted that in the County’s TE, as adopted by Ordinance No. 05-070, contained a chart in the Preface identifying each of RCW 36.70A.070(6)’s requirements and the location in the TE or related documents where that particular sub-element is addressed.⁴⁸ County Response, at 38-44; *see also* CD 3, TE, at (i-ii), and referenced locations. The TE, as well as Ordinance No. 05-092, addresses the GMA’s requirement to have concurrency regulations prohibiting development if projects generate impacts falling below LOS.

The CFE is discussed within Legal Issue No. 5, *supra*. There the Board noted that Ordinance No. 05-071, adopting the CFE, contains an explanation that the CIP, adopted as part of the annual budget process, is the County’s six-year financing plan as required by RCW 36.70A.070(3)(d). *See* County Exhibit Documents Appendix C-9 [Ordinance No. 05-110] and CD 4, Ordinance No. 05-071, the CFE, at 67-70. In addition Section II of the CFE discusses the future needs of the County, for facilities it owns, and owned by others. *See* CD 4, Ordinance No. 05-071, the CFE, Section II, at 32-66.

In both Legal Issues Nos. 4 and 5, Petitioner failed to demonstrate that the County’s update of its TE or CFE was clearly erroneous, did not comply with the relevant provisions of the Act and that Petitioners had not carried the burden of proof. For Legal Issues 6, 7 and 8, the Board reaches the same conclusion. Petitioner’s unsupported and conclusory assertions in regard to the inadequacies of the TE and CFE in relation to Arlington, Lake Stevens and Marysville fail to demonstrate noncompliance with the Act.

The Board will not address the Petitioner’s original assertion that the GMA contains a concurrency requirement relating to UGA expansion since it appears from their Reply Brief, cited *supra*, that the Petitioner retracted this argument.

⁴⁸ The Board notes that the TIP is a critical piece of the County’s funding program for the TE, yet it is not referenced in this chart. Including it would go a long way towards knitting together the various pieces of the County’s TE. The Board also notes that the TE itself refers to the TIP at 100, 109 and 110.

For the Arlington UGA expansion, Petitioner goes beyond asserting deficiencies in the TE or CFE as a basis for challenging the UGA. Petitioner does set forth “locational” arguments – namely that the 6-acre parcel is *not located* within a city, is *not characterized* by urban growth, and is *not adjacent* to urban growth. Pilchuck PHB at 29. This aspect was partially addressed within Issue 6 when the Board concurred with the Petitioner that just because a site has residences, a barn, and outbuildings which serve the agricultural operation does not make it urban in nature and, based on the maps and photographs submitted into the Record, it is evident that urban growth is not immediately adjacent to the 6-acre site.⁴⁹

Although the GMA does not prohibit the inclusion of agricultural lands within a UGA, prior to doing so a jurisdiction must have a transfer or purchase of development rights program (TDR), pursuant to RCW 36.70A.060(4), in place. Snohomish County and the City of Arlington have such a program. However, the mere fact that a TDR program is in place does not entitle a jurisdiction to disqualify agricultural lands that satisfy designation criteria solely because the land is covered by the TDR program.

Conclusion

The Board finds and concludes that the Petitioner **did not carry its burden** in showing that the County’s TE and CFE were deficient so as to prevent the expansion of the UGAs. For the City of Lake Stevens and the City of Marysville, the Petitioner put forth no arguments based on locational factors. Legal Issue Nos. 7 and 8 are dismissed. Regarding the Arlington UGA expansion – Foster Farms - as the Board concluded in its prior discussion of Legal Issue 6, Petitioner did carry its burden in showing that the expansion of the Arlington UGA was improper on the basis of locational criteria contained within RCW 36.70A.110. On this basis, Legal Issue 6 is **remanded**.

F. LEGAL ISSUE NO. 9 ***Harvey Airfield UGA Challenge***

The Board’s PHO set forth Legal Issue No. 9:

9. *Does the adoption of Snohomish County Ordinance 05-069, 05-079 and 05-090, adopting an updated and revised comprehensive plan, amending the City of Snohomish UGA and amending the FLUM respectively, fail to comply with RCW 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.020(9), RCW 36.70A.020(10),*

⁴⁹ In addition, the Board notes that Amended Ordinance No. 05-073, entitled “Revising the Existing Urban Growth Area for the City of Arlington,” does not appear to include the ‘Foster Farm’ site. Several pages of the Ordinance discuss de-designation of a 1.5 acre parcel located on 188th Street NE and 47th Avenue NE and the inclusion of this parcel within the UGA; Section II of the Ordinance states only that these areas and two others, neither of which are the Foster Farm, are to be added to the UGA. CD 5, at 12; and Ex. A – Map of Arlington UGA expansion. As Petitioner noted, the Foster Farm seems to have been a last minute addition to the Arlington UGA since it only appears in an amendment to the FLUM. Pilchuck PHB, at 27.

RCW 36.70A.060, RCW 36.70A.110 and RCW 36.70A.172 when it keeps at least 50 acres of Snohomish River flood plain inside of the City of Snohomish UGA?

The Challenged Action

Ordinance No. 05-069 updates the Plan's Land Use element; Ordinance No. 05-079 adopts a revised UGA for the City of Snohomish; and Ordinance No. 05-090 adopts corresponding FLUM changes and rezones to implement the Plan Update.

Ordinance No. 05-079 added 171 acres to the City of Snohomish's UGA: 95 acres are located south of SR 2 and west of SR 9; 66 acres are located west of Bickford Avenue and east of 83rd Avenue SE; and 10 acres are located east of 85th Avenue SE and south of 76th Street SE. The 95 acre addition near SR 2 and SR 9 expands the existing UGA, which already includes approximately 53 acres encompassing the Harvey Airfield. Petitioners do not challenge any of these additions to the UGA. Instead Petitioners assert that proximity to the Snohomish River floodplain merits the removal of 53 acres [Harvey Airfield] from Snohomish's UGA.

Applicable Law

Petitioners allege noncompliance with GMA Goals 1 (Urban Growth), 2 (Reduce Sprawl), 9 (Open Space and Recreation), and 10 (Environment). RCW 36.70A.020(1), (2), (9) and (10).

Pilchuck also asserts noncompliance with: 1) RCW 36.70A.060, which requires the County and its cities to adopt development regulations to protect critical areas, including frequently flooded areas; 2) RCW 36.70A.172, which requires the use of best available science in developing regulations to protect the functions and values of critical areas; and 3) RCW 36.70A.110, which governs the designation [sizing and location] of urban growth areas.

Discussion

Petitioners claim that 50+ acres of the Snohomish River floodplain remain in the UGA in spite of a recommendation by staff and the Planning Commission to remove this area from the UGA, since it lies within an area categorized as "density fringe flood hazard" by the Federal Emergency Management Agency (**FEMA**). Pilchuck PHB, at 30. Pilchuck asserts non-removal of the area from the UGA fails to comply because urban growth will be directed into this critical area and the functions and values of this frequently flooded area will not be protected. *Id.* at 30-31. Petitioners then cite to a staff report that recommends removal from the UGA and encouragement of agricultural uses, due to the FEMA floodway study. *Id.* at 32: *Citing* Index No. 4.4.14.3.1, at 19.

In response, the County notes that the challenged ordinances do not alter or amend the County's critical areas regulations, therefore the bulk of Petitioner's claims are

misplaced. County Response, at 74. The County then points to a fundamental flaw in Pilchuck's theory, namely, that "just because an area is comprised of critical areas, [does not mean that] it cannot be made part of a UGA." *Id.* The County also notes that the cited staff report is from December of 2004, a year before the Plan Update ordinances were adopted. To the County this is significant because the staff report did not consider the County's request to FEMA to reconsider the flood mapping in the area. *Id.* at 75. The County includes the chronology of events regarding the flood mapping issue with FEMA in its recitals in Ordinance No. 05-079. *Id.* In short, the area was not within FEMA's density fringe when the Plan was first adopted, and it was only in 2000 that the area was included by FEMA in the density fringe. Until present efforts by the County and property owner to have the area remapped are addressed by FEMA, the County chose to retain the area within the UGA, albeit, zoned for agriculture. Since FEMA had not addressed the request at the time the Plan Update was adopted, the County believed it would be premature to alter the designation. *Id.* at 76-79.

Intervenor Harvey Airfield recounted the history of Harvey Airfield's development and interactions with FEMA and echoed the reasoning of the County. Harvey Airfield Response, at 1-7. Additionally, Intervenor argued that the area is in need of expansion since, as an airfield, it is an essential public facility, and the County cannot preclude its expansion. *Id.* at 7-9.

In reply, Petitioners note that both the County and Intervenor are anticipating a ruling from FEMA that will justify the area's inclusion in the UGA; however, Petitioners contend, that is not the case at present since much of the area is in pasture (agriculture), and the Plan Update should reflect current evidence in the record, not some future event. Pilchuck Reply, at 21. Petitioners do not dispute that Harvey Airfield, as a regional airport, is an essential public facility, but note that if the Federal Aviation Administration (FAA) approves the potential expansion of the airport in the future, a public process by the County will ensue. *Id.* 22-23.

Whether FEMA changes its density fringe designation along the Snohomish River floodway, or whether the FAA approves expansion of Harvey Airfield are interesting wrinkles that the County will have to iron out when those federal decisions are ultimately made. However, the issue before the Board is whether the County's retention of some 50 acres within the City of Snohomish's UGA is clearly erroneous. The Board concludes that it is not. The focus of Petitioners' argument is that the area within the UGA is a critical area and its inclusion in the UGA indicates it is not, will not, or cannot be protected. Pilchuck has not made its case on this point, nor could it in the context of the present ordinance. Further, the Board finds that Petitioners' theory is unsupported by the GMA. The GMA acknowledges that critical areas occur throughout the landscape, within urban, rural and resource land designations. The GMA does not discriminate; it simply requires that their functions and values be protected *wherever they are found*. Consequently, Petitioners have **failed to carry the burden of proof** in demonstrating noncompliance with the GMA. Legal Issue 9 is **dismissed**.

Conclusion

Petitioners have **failed to carry the burden of proof** in demonstrating noncompliance with the GMA. The County's action was **not clearly erroneous**. Legal Issue 9 is **dismissed**.

G. LEGAL ISSUE NO. 12 *Public Participation Challenge*

The Board's PHO set forth Legal Issue No. 12:

12. *Did the County fail to comply with RCW 36.70A.020(11), RCW 36.70A.035 and RCW 36.70A.140 when the public did not have an opportunity to review and comment on significant impacts associated with the UGA expansions, Transportation Element and concurrency regulations that were included in the Final Environmental Impact Statement for the updated Comprehensive Plan but not available for public review during the draft EIS phase?*

Applicable Law

Goal 11 of the GMA provides, "Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts." RCW 36.70A.020(11).

The notice provisions of the GMA are found in RCW 36.70A.035, which requires that public participation "shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals . . . of proposed amendments to comprehensive plans and development regulations." This section of the Act also identifies types of reasonable notice provisions.

Discussion

Pilchuck's complaint here is that the FEIS on the Plan Update was not released until December 13, 2005, after the end of the public involvement process on the Plan Update. Pilchuck PHB, at 32. According to Petitioners, the FEIS disclosed more level of service (LOS) deficiencies due to the deletion of several state funded highway projects than were presented in the Plan Update. Consequently, the public could not comment on this concern. *Id.* at 33.

The County responds that Petitioner has conflated GMA and SEPA notice and public participation requirements and is using a SEPA notice concern to improperly allege a GMA notice and public participation violation. County Response, at 81. The County contends that the basis of Petitioners' complaint is their ability to comment on a SEPA document – the FEIS – not on the GMA Plan Update. *Id.* at 82. The County notes that SEPA does not require public comment on a *Final EIS*, but rather the County must send

copies of the FEIS to those who did comment on the draft; and the County further notes that it did not take action on its Plan Update until at least seven days after the FEIS issued, which is what SEPA requires. *Id.* The County suggests that Petitioners are attempting to use GMA requirements to impose notice and the opportunity to comment on the FEIS, which is beyond what SEPA requires. The County notes that the Board has held that SEPA and GMA notice and public participation requirements are separate and asserts that it has complied with each. *Id.* at 84.

In reply, Pilchuck reasserts that it is alleging noncompliance with GMA, not SEPA. Petitioners contend that new information was disclosed in the FEIS that was not available for comment during the Plan Update public participation process. Pilchuck Reply, at 22-23. The “new information” disclosed between the Draft EIS and Final EIS was that,

30 originally planned WSDOT highway improvement projects that were included in the DEIS analysis were dropped by the time the FEIS was underway. . . .The result is that many state highways under the FEIS analysis have a lower capacity than was projected under the DEIS, and consequently, the model indicates that they will carry lower traffic under the FEIS scenario [Approximately 10 segments will have 5%-30% less traffic capacity than originally projected].

Id. at 24; *Citing* Index No. 8.5.000037, FEIS, at 3-87.

Pilchuck says that the County contends that this new information standing alone does not require more comment, but that Petitioners must show that the new information caused the County to adopt enactments that were not within the scope of the earlier EIS and notice. *Id.* at 25. Petitioners assert that GMA requires early and continuous public participation, and that the new information disclosed had significant impacts on the County that the public could not comment on in relation to the Plan Update, thereby violating the GMA’s continuous public participation process requirements. *Id.*

At the HOM Petitioners suggested that based upon the new information that “the loss of 30 projects is fairly substantial, and some change [to the Plan Update] would be warranted at that point. And the impetus for that change could have come from input from people in the public process.” Pilchuck HOM Transcript, at 35. The County rebutted by arguing the “new information” does not automatically precipitate a new round of comments and that even though apprised of this information in the FEIS, the County did not change anything in the Plan Update in response to it. Pilchuck HOM Transcript, at 56-57. Further, the County asserted that Petitioner has not demonstrated any flaw in the County’s Transportation Element or Concurrency regulations stemming from the “new information.” The public got to comment on exactly what the County adopted. *Id.* at 57-58.

The Board agrees with the County. Petitioners have not alleged that the Plan Update includes actions that are beyond the scope of the alternatives available for comment in the

EIS, thereby precipitating an additional opportunity for public comment. RCW 36.70A.035(2)(b)(ii). Nor has it been argued or suggested that the County was unaware of the potential impacts that a reduction in state funding for approximately 10 projects in the County's road network might have. The Board must assume that the County decision-makers were aware of these potential impacts, but were not convinced that they merited a change or alteration in the pending Plan Update. By failing to identify any mandatory change in the Plan Update necessitated by this new information, Petitioners have simply **failed to carry their burden of proof**. The County's action was within its discretion and **not clearly erroneous**.

Conclusion – Legal Issue 12 [Notice and Public Participation]

Petitioners have simply **failed to carry their burden of proof** in demonstrating noncompliance with the notice and public participation requirements of the GMA. RCW 36.70A.020(11), .035 or .140. The County's action was within its discretion and **not clearly erroneous**. Legal Issue 12 is **dismissed**.

VI. INVALIDITY – STRAHM and PILCHUCK

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.

Applicable Law

RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
 - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
 - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or City. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before

receipt of the board's order by the City or city or to related construction permits for that project.

The Board has concluded, *supra*, that Snohomish County's de-designation and inclusion of six acres of agricultural land **does not comply** with RCW 36.70A.170 and .110 [Legal Issue 6]. The Board's Order, *infra*, **remands** the 6-acre de-designation and inclusion in the Arlington UGA as referenced in Ordinance No. 05-069 and 05-090.⁵⁰ However, the Board **declines to enter a determination of invalidity** on this issue.

The Board has also concluded, *supra*, that Snohomish County's Plan Update, specifically Plan Policies UT 3.B.1 and LU 1.C.4 as contained in Ordinance No. 05-069, **does not comply** with RCW 36.70A.110(4). The Board Order, *infra*, **remands** Ordinance No. 05-069 with direction to take legislative action to achieve compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

In addition, based upon the Board's findings and conclusions as discussed in Legal Issue 2, *supra*, the continued validity of Plan Policies UT 3.B.1 and LU 1.C.4 as contained in Ordinance No. 05-069 during the period of remand would substantially interfere with the fulfillment of Goals 1 and 2 – RCW 36.70A.020(1) and (2), because they would allow sewers to be extended or expanded to serve schools and churches in the rural area. Therefore, these Plan Policies do not encourage growth in the urban area (Goal 1) and do not reduce sprawl (Goal 2). Therefore, the Board **enters a Determination of Invalidity** for Plan Policies UT 3.B.1 and LU 1.C.4 in Ordinance No. 05-069.

VII. ORDER

Based upon review the GMA, case law, prior decisions by this and other Growth Boards, review of the Petitions for Review, the briefs and exhibits submitted by the parties, having considered the written and oral arguments of the parties, and having deliberated on the matter the Board ORDERS:

- 1. Petitioner Strahm has failed to carry the burden of proof** in demonstrating the County's noncompliance with the challenged provisions of the GMA. Strahm Legal Issues A, B, C, D, E, F, G and H are **dismissed with prejudice**.

⁵⁰ As discussed in Legal Issue 6, although Ordinance No. 05-073 amended the Arlington UGA, the area in question apparently was not included in the UGA expansion in that Ordinance. References to its inclusion in the UGA are in Ordinance Nos. 05-069 and 05-090.

2. Pilchuck Petitioners have **failed to carry the burden of proof** in demonstrating the County's noncompliance with the challenged provisions of the GMA in relation to Legal Issues 4, 5, 7, 8, 9 and 12. Therefore, these Legal Issues are **dismissed with prejudice**.

3. Pilchuck's Legal Issues 3 and 11 were **dismissed** by the Board's May 5, 2006 Order on Motions; and Pilchuck has **abandoned** Legal Issues 10 and 13.

4. The Board concludes that Snohomish County **complied** with the challenged provisions of the GMA as alleged in Legal Issue 1. Legal Issue 1 is **dismissed with prejudice**.

5. However, the Board finds and concludes that Snohomish County's action was **clearly erroneous**, in relation to the 6 acre de-designation of agricultural land and its inclusion in the Arlington UGA [Legal Issue 6], and **does not comply** with the requirements of RCW 36.70A.170 or the locational criteria of RCW 36.70A.110. Ordinance No. 05-069 and 05-090 are **remanded** with direction to the County to take the necessary legislative action(s) to comply with the goals and requirements of the GMA as set forth in this FDO.

6. Additionally, the Board finds and concludes that Snohomish County's action was **clearly erroneous**, in relation to Plan Update Policies UT 3.B.1 and LU 1.C.4 [Legal Issue 2] and **does not comply** with the requirements of RCW 36.70A.110(4). Plan Update Policies UT 3.B.1 and LU 1.C.4, as contained in Ordinance No. 05-069, are **remanded** with direction to the County to take the necessary legislative action(s) to comply with the goals and requirements of the GMA as set forth in this FDO. The Board further enters a **Determination of Invalidity** for Plan Update Policies UT 3.B.1 and LU 1.C.4, as contained in Ordinance No. 05-069.

7. Ordinance Nos. 05-069 and 05-090 are **remanded** pursuant to the following compliance schedule.

- The Board establishes **January 18, 2007**, as the deadline for Snohomish County to take appropriate legislative action.
- By no later than **January 25, 2007**, Snohomish County shall file with the Board an original and four copies of the legislative enactment described above, along with a

statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). The County shall simultaneously serve a copy of the legislative enactment(s) and SATC, with attachments, on Pilchuck Petitioners and Intervenors. By this same date, the County shall also file with the Board a “**Compliance Index**,” listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.

- By no later than **February 1, 2007**,⁵¹ the Petitioners may file with the Board an original and four copies of any Response to the County’s SATC. Petitioners shall simultaneously serve a copy of their Response to the City’s SATC on the County and Intervenors.
- By no later than **February 6, 2007**, the County may file with the Board an original and four copies of any Rebuttal to Petitioners’ Response. The County shall simultaneously serve a copy of any Rebuttal on the Pilchuck Petitioners and Intervenors.
- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. February 12, 2007**, at the Board’s offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If Snohomish County takes the required legislative action prior to the **January 18, 2007**, deadline set forth in this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

⁵¹ **February 1, 2007** is also the deadline for a person to file a request to participate as a “participant” in the compliance proceeding. See RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City’s remand actions comply with the Legal Issues addressed and remanded in this FDO.

So ORDERED this 15th day of September 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

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

APPENDIX A

Procedural Background

A. General

[PFR Consolidation, Segregation, Issues & Intervenors]

On March 3, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Pilchuck Audubon Society, Futurewise, Jody McVittie, Cindy Howard, Darlene Salo, Ken Salo, Shelly Thomas, Barbara Bailey and Lisa Stettler (**Petitioners** or **Pilchuck**). The matter was assigned CPSGMHB Case No. 06-3-0013, and is hereafter referred to as *Pilchuck VI v. Snohomish County*. Board member Edward G. McGuire was the Presiding Officer (**PO**) for this matter. Petitioner challenges Snohomish County's (**Respondent** or the **County**) adoption of Ordinance Nos. 05-69, 05-70, 05-71, 05-73, 05-75, 05-77, 05-79, 05-90, 05-92, 05-69 and 05-101 each amending and updating the County's Comprehensive Plan and/or development regulations⁵². The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On March 8, 2006, the Board received a "Notice of Appearance" indicating that John R. Moffat and Jason J. Cummings would be representing Snohomish County in the *Pilchuck VI* matter.

On March 9, 2006, the Board issued a "Notice of Hearing" (**NOH**) in the *Pilchuck VI* matter and set the prehearing conference for April 6, 2006, at the Board's office.

⁵² In the *Pilchuck VI* PFR, as amended, the Ordinances challenged are:

- Ordinance No. 05-069 updates the Plan specifically, the Land Use element
- Ordinance No. 05-070 updates the Transportation element
- Ordinance No. 05-071 adopts the Capital Facility element [plan]
- Ordinance No. 05-073 adopts and expands the UGA for Arlington
- Ordinance No. 05-075 adopts and expands the UGA for Lake Stevens
- Ordinance No. 05-077 adopts and expands the UGA for Marysville
- Ordinance No. 05-079 adopts a revised UGA for Snohomish
- Ordinance No. 05-090 adopts FLUM changes and rezones to implement the Plan
- Ordinance No. 05-092 adopts amendments to the County's Transportation Concurrency regulations
- Ordinance Nos. 05-069 and 05-101 adopt Plan policies and implementing regulations for FCCs.

On March 10, 2006, the Board received a PFR from F. Robert Strahm (**Petitioner II** or **Strahm**). The matter was assigned CPSGMHB Case No. 06-3-0014, and captioned *Strahm II v. Snohomish County*. Board member Edward G. McGuire was also the PO for this matter. Petitioner II challenges the County's adoption of Ordinance Nos. 05-069, 05-073, 05-079, 05-081 and 05-082 each amending and updating the County's Comprehensive Plan and/or development regulations.⁵³ The basis for the challenge is noncompliance with various provisions of the GMA.

On March 16, 2006, the Board received a "Notice of Appearance" indicating that Brent D. Lloyd and Laura C. Kisielius would be representing Snohomish County in the *Strahm II* matter.

Also on March 16, 2006, the Board issued a "Notice of Hearing and Order of Consolidation" (**NOH2**) in the *Pilchuck VI* matter that consolidated the Pilchuck PFR and the Strahm PFR.

On March 20, 2006, the Board received a PFR from Camwest Development Inc. (**Petitioner III** or **Camwest**). The matter was assigned CPSGMHB Case No. 06-3-0015, and is captioned *Camwest IV v. Snohomish County*. Board member Edward G. McGuire is the PO for this matter. Petitioner III challenges the County's adoption of Ordinance Nos. 05-069, 05-090 and 05-141 each amending and updating the County's Comprehensive Plan and/or development regulations.⁵⁴ The basis for the challenge is noncompliance with various provisions of the GMA.

On March 21, 2006 the Board received: 1) "Motion to Intervene on Behalf of Kandace Harvey and Harvey Airfield, Inc." (**Harvey Airfield**); and 2) "Motion for Intervention" submitted on behalf of the City of Arlington" (**Arlington**).

On March 22, 2006, the Board received "City of Marysville's Motion to Intervene" (**Marysville**).

Also on March 22, 2006, the Board received an e-mail from Tom Ehrlichman, representing Camwest Development Inc., noting that Camwest incorrectly included a

⁵³ In the *Strahm II* PFR, as amended, five of the eleven Ordinances challenged are the same as those challenged in the *Pilchuck VI* matter [Ordinance Nos. 05-069, 05-073, 05-075, 05-077, 05-079 and 05-090]. The five new Ordinances challenged are:

- o Ordinance No. 05-074 adopts and expands the UGA for Granite Falls
- o Ordinance No. 05-076 adopts and expands the UGA for Maltby
- o Ordinance No. 05-078 adopts and expands the UGA for Monroe
- o Ordinance No. 05-081 adopts and expands the UGA for Stanwood
- o Ordinance No. 05-082 adopts and expands the UGA for Sultan

⁵⁴ In the *Camwest IV* PFR, as amended, two of the Ordinances challenged are the same as those challenged in the *Pilchuck VI* and *Strahm II* matters [Ordinance Nos. 05-069 and 05-090].

challenge to Ordinance No. 05-141 in its PFR and that an amended PFR would be filed deleting the challenge to this Ordinance. Additionally, Camwest indicated that settlement negotiations were being pursued with the County and consequently, Petitioner requested that PFR No. 06-3-0015 not be consolidated with the other PFRs in the *Pilchuck VI* matter.

On March 23, 2006, the Board issued its “Third Notice of Hearing and Second Order of Consolidation” (**NOH3**). The Camwest PFR was consolidated with the Pilchuck and Strahm PFRs, but the Board noted that if settlement negotiations were pursued by any party, that portion of the consolidated case would be segregated. Other than a change to the due date for the final decision and order, the schedule remained the same.

On March 24, 2006, the Board received “Snohomish County’s Response to Motions to Intervene.” The County indicated no objection to the intervention of the Cities of Marysville, Arlington or Kandace Harvey and Harvey Airfield.

On March 27, 2006, the Board received “Lake Stevens Sewer District’s Motion to Intervene” (**LSSD**). Attached to the LSSD motion was a Declaration of Darwin Smith in Support of the Motion to Intervene.

On March 28, 2006, the Board received “City of Lake Stevens’ Motion to Intervene.”

On March 29, 2006, the Board received a “Notice of Appearance” indicating that John R. Moffat and Jason J. Cummings would be representing Snohomish County in the *Camwest* matter. On this same date the Board also received “Snohomish County’s Response to Motion to Intervene by Lake Stevens Sewer District.” The County indicated no objection to intervention by Lake Stevens Sewer District. The next day, the County filed “Snohomish County’s Response to Motion to Intervene by City of Lake Stevens.” The County did not object to intervention by the City of Lake Stevens.

On March 30, 2006, the Board received Pilchuck’s “First Amended Petition for Review” (**Pilchuck Amended PFR**). In a cover letter, Pilchuck explained that the only substantive change was the addition of Ordinance No. 05-092 into Issue Statement No. 4.

Also on March 30, 2006, the Board issued an “Order Changing Time of the Prehearing Conference on April 6, 2006.” The Board was informed that an earthquake drill was going to be commenced at 9:45 a.m. on April 6, 2006, which would have disrupted the prehearing conference. Consequently, the conference was delayed until 11:00 a.m. on April 6, 2006.

On the same date, the Board received “Motion to Intervene – Master Builders Association of King and Snohomish Counties, Snohomish County Camano Association of Realtors, L133-1 Lindsay, LLC and L123-1 Nilsson, LLC” (**MBA/Realtors**). Also attached to the motion were Declarations of Don Davis, Nathan Gorton and David Toyer in Support of Motion to Intervene.

On April 4, 2006, the Board received Camwest's "Amended Petition for Review" (**Camwest Amended PFR**). This amended PFR deleted reference to Ordinance No. 05-141, adopting a Transfer of Development Rights Program, and corrected typographical errors. Also filed was a "Stipulation and Proposed Order Segregating Cases and Extending Time" (**Settlement Extension Request**), signed by attorneys for Camwest and Snohomish County. This stipulation asked the Board to segregate the Camwest IV matter from the consolidated case and grant a ninety-day settlement extension in order for these parties to pursue settlement discussions. Settlement Extension Request, at 1-4.

On April 5, 2006, the Board received "Strahm's First Amended Petition For Review" (**Strahm Amended PFR**). The Amended PFR clarified that Petitioner was challenging the County's UGA process generally and not limited to individual UGAs. Petitioner Strahm also filed, "Strahm's Response to Proposed Stipulation Segregating Camwest Case and Extending Time" (**Strahm Opposition to Extension**). Strahm argued that there is overlap of the issues presented in the Strahm and Camwest PFRs and that segregating the Camwest matter and granting an extension could cause Strahm prejudice if the Camwest IV case does not settle and goes to hearing after Strahm's issues have been decided. Strahm Opposition to Extension, at 3-4.

On April 6, 2006, prior to the prehearing conference, the Board received "Snohomish County's Response to Motion to Intervene by Master Builders Association of King and Snohomish Counties, Snohomish County Camano Association of Realtors, L133-1 Lindsay, LLC and L123-1 Nilsson, LLC." The County indicated no objection to the intervention of MBA/Realtors. The Board also received "Camwest's Answers to Board Questions (April 4, 2006)" (**Camwest Answers Re: PFR**). Camwest clarified the scope of its PFR and provided citations to alleged internal and external inconsistencies and identified alleged inconsistencies between the Plan Update and the implementing development regulations. Camwest Answers Re: PFR, at 1-4.

At 10:00 a.m., on April 6, 2006, the Board conducted the PHC at its offices in Seattle. Board member Edward G. McGuire, Presiding Officer (**PO**) in this matter, conducted the conference. Present for the Board were Board members Margaret A. Pageler and Bruce C. Laing, law clerk Julie Taylor and externs Amie Hirsch and Justin Titus. John Zilavy represented Petitioners Pilchuck, Futuewise, McVittie, Howard, Salo, Thomas, Bailey and Stettler. C. Thomas Tuohy represented Petitioner Strahm. Thomas J. Ehrlichman represented Petitioner Camwest. Respondent Snohomish County was represented by John R. Moffat, Brent C. Lloyd, Laura Kisielius and Jason J. Cummings. Molly A. Lawrence represented potential intervener Kandace Harvey & Harvey Airfield; Grant K. Weed represented potential intervener City of Marysville and City of Lake Stevens; and Duana Kolouskova represented potential intervener MBA/Realtors/Lindsay/Nilsson. Steven J. Peiffle, via letter, indicated he could not attend the conference on behalf of potential intervener City of Arlington. Christopher J. Knapp did not attend the conference on behalf of potential intervener Lake Stevens Sewer District. Blair Anderson, Anitra Beruti, David K. Toyer, Mike Pattison, Barbara A. Dilhoal and George Kresovich also attended.

On April 10, 2006, the Board issued its “Prehearing Order and Order on Intervention” (**PHO**). The PHO set the final schedule for the consolidated case and established the Legal Issues to be decided by the Board. The PHO also granted Intervenor status, on behalf of Snohomish County, to the Cities of Arlington, Marysville, and Lake Stevens; Kandace Harvey and Harvey Airfield, Lake Stevens Sewer District and MBA/Realtors. Intervenors’ participation was limited to specific issues or Ordinances, as set forth in the PHO.

Also on April 10, 2006, the Board issued an “Order Segregating Camwest Development LLC Petition for Review [CPSGMHB Case No. 06-3-0015] from the Consolidated Case, Granting a 90-day Settlement Extension and Prehearing Order” (*Camwest IV PHO*). In segregating the Camwest matter from the consolidated proceeding, *Camwest IV* was assigned a new case number – CPSGMHB Case No. 06-3-0018. The *Pilchuck VI* matter retained CPSGMHB Consolidated Case No. 06-3-0015c.

On May 5, 2006, the Board received a “Motion to Intervene” from Ron and Vikki Herbkersman. The Herbkersmans’ sought to intervene on behalf of Snohomish County regarding the Stanwood UGA.

On May 10, 2006, the Board received “Snohomish County’s Response to Herbkersman Motion to Intervene.”

On May 11, 2006, the Board issued an “Order on Intervention” granting Intervener status, on behalf of the Herbkersmans. Intervenors’ participation was limited to specific issues or Ordinances.

On May 30, 2006, the Board received the City of Lake Steven’s “Notice of Withdrawal of Intervenor City of Lake Stevens.” The caption in this case has been revised to reflect the withdrawal of the City as an Intervenor.

On July 10, 2006 the Board received “Lake Stevens Sewer District’s Motion to Withdraw as Intervenor.” The caption in this case has been revised to reflect the withdrawal of the Sewer District as an Intervenor

B. Motions to Supplement the Record and Amend the Index

On April 7, 2006, Snohomish County filed “Snohomish County’s Index to the Administrative Record” (**Index**). The County’s Index consisted of 291 pages listing hundreds of items related to the fifteen ordinances adopted by the County during its update process.

The Board’s April 10, 2006 PHO listed various “Core Documents” to be provided by Snohomish County, Pilchuck and Strahm, by June 1, 2006.

On April 14, 2006, Snohomish County filed “Snohomish County’s First Amended Index to the Administrative Record” (**Amended Index**). The Amended Index added six items

requested by Intervener Harvey Airfield and includes the 16 Core Documents requested by the Board.

On April 14, 2006, the Board received “City of Marysville’s Motion to Supplement the Record” (**Marysville Motion – Supp.**) Marysville requests that the record be supplemented with five items: 1) Marysville’s draft Comprehensive Plan, development regulations and environmental impact statement; 2) Marysville’s final Plan, development regulations and EIS; 3) Marysville Ordinance No. 2569, adopting the final Plan, development regulations and EIS; 4) an Interlocal Agreement between Marysville and Snohomish County regarding mitigation of transportation impacts; and 5) an Interlocal Agreement between Marysville and Snohomish County concerning annexation and development within the City’s UGA.

On April 17, 2006, pursuant to the Board’s request, Pilchuck’s attorney provided maps of four UGA expansion areas adopted by the various challenged ordinances [UGAs for: Arlington, Snohomish, Lake Stevens and Marysville.]

On April 20, 2006, the Board received a “Motion to Correct the Record” from Petitioner Pilchuck. The Motion asked that the record be corrected to include 3 items inadvertently omitted by the County. The items were a declaration of Kristin Kelly and two letters submitted by Ms. Kelly to the County.

On April 20, 2006, the Board received “Snohomish County’s Response to City of Marysville’s Motion to Supplement the Record” (**SnoCo Response – Supp.**). The County did not object and proposed that it amend the index to include Marysville’s requested items.

On April 24, 2006, the Board received “Snohomish County’s Second Amended Index to the Administrative Record” (**2nd Amended Index**). The 2nd Amended Index included items inadvertently omitted, including those requested by Pilchuck⁵⁵ and the items requested by the City of Arlington. There are nine separate listings of documents added submitted to the Planning Commission and County Council from County Departments, primarily documents submitted by the County’s Public Works Department.

On May 4, 2006, the Board issued its “Order on Motions” (**OoM**). The OoM noted that “Given the County’s 2nd Amended Index, there were no outstanding motions to supplement or correct the record. **The Record for this case is as contained in the 2nd Amended Index.**” (Emphasis in original).

⁵⁵ The three items offered by Pilchuck related to testimony and correspondence offered by Kristin Kelly indicating she had testified at a public hearing at Mill Creek on June 2, 2005 and submitted two letters for the record. In its reply brief on dispositive motions, the County acknowledges that the three items “for correction” were inadvertently omitted from the Index and are now contained in the 2nd Amended Index. SnoCo Reply – Dismiss, at 2. If the County had not included them in the 2nd Amended Index, the Board would have admitted these items to the record.

On May 15, 2006, the Board received the 16 Core Documents requested from Respondent Snohomish County; on June 1, 2006, the Board received the one Core Document requested from Petitioner Pilchuck; on June 1, 2006, the Board received the seven Core Documents requested from Petitioner Strahm.

C. Dispositive Motions

On April 14, 2006, the Board received “Snohomish County’s Dispositive Motions” (**SnoCo Motion – Dismiss**), with nine attached exhibits. The County moved to dismiss several of the Pilchuck Petitioners and Pilchuck’s Legal Issues 3, 5 and 11 for lack of standing. The County also moved to dismiss two components of the Strahm PFR: Buildable Lands Report (**BLR**) and Internal Consistency Issues.

On April 19, 2006, the Board received Pilchuck’s “Motion Response,” with no attached exhibits; and “Strahm’s Response to County’s Dispositive Motion,” with six attached exhibits.

On April 24, 2006, the Board received “Reply Brief of Snohomish County on Dispositive Motions,” with no attached exhibits.

The Board did not hold a hearing on the dispositive motions.

As noted *supra*, on May 4, 2006, the Board issued its OoM. The OoM **granted** Snohomish County’s motion to dismiss Pilchuck Petitioners Darlene and Ken Salo and Tim Thomas as Petitioners; **granted** the motion to dismiss Pilchuck’s Legal Issues 3 and 11; **denied** the motion to dismiss Pilchuck’s Legal Issue 5, and **denied** the motion to dismiss Strahm’s Legal Issue B.

D. Briefing and Hearing on the Merits

On June 1, 2006, the Board received: 1) “Petitioner Pilchuck Audubon Society, et al., Hearing on the Merits Brief” (**Pilchuck PHB**), including a Table of Exhibits and five attached exhibits; and 2) “Petitioner Strahm’s Prehearing Brief” (**Strahm PHB**), with a Table of Exhibits and 16 attached exhibits.

On June 30, 2006, the Board received:

- Snohomish County’s Response Brief” (**County Response**), with a binder of Exhibits and Table of Contents that explained the contents of each exhibit in the five Appendices:
 - Appendix A = Excerpts from 5 Core Documents
 - Appendix B = 31 items from the Record/Index (**RI**) and one additional item added that was inadvertently omitted from the Index
 - Appendix C = 15 Additional items – Not Subject to Motion to Supplement

- Appendix D = 18 items per Motion to Supplement [Items 1-3 relate to *Pilchuck* portion of the case, items 4-18 relate to the *Strahm* portion of this case]
 - Appendix E – Maps Depicting the Challenged UGA Expansions – four maps included: Arlington, Marysville, Lake Stevens and Snohomish.
- “Snohomish County’s Motion to Supplement the Record,” requesting that the 18 items from Appendix D, *supra*, be added to the record.
 - “Responsive Brief of City of Arlington” (**Arlington Response**), with numerous untabbed exhibits and no Table of Exhibits
 - “City of Marysville’s Response Brief” (**Marysville Response**), with no attached exhibits
 - “Harvey Airfields’ Response Brief Re: Pilchuck Issue No. 9” (**Harvey Airfield Response**), with numerous untabbed exhibits and no table of exhibits
 - “Intervenors MBA et al., Response Brief” (**MBA Response**), with no attached exhibits.
 - The Board did not receive any briefing from Intervenor Herbkersmans.

On July 3, 2006 the Board received a letter from the County, with attachments, correcting citations and references in several pages to the County’s Response brief and correcting a citation in Appendix C (13).

Also on July 3, 2006, the Board issued an “Order Rescheduling Hearing on the Merits [1-day] and Setting a HOM Agenda.” The HOM in this matter was originally scheduled for a two-day hearing on July 19 and 20, 2006. With the segregation of the Camwest PFR from the case and after review of the Briefing, the PO determined that the matter could be heard in a single day – July 20, 2006.

On July 7, 2006, the Board received an e-mail from Petitioners attorney requesting an extension on filing Petitioners’ reply brief. Petitioners asked that they be granted until July 14, 2006 to file their reply.

On July 10, 2006, The Board received “Petitioner Strahm’s Reply Brief” (**Strahm Reply**), with attached one attached exhibit. The attached exhibit #17 [Table 17A and 17B] was offered as an “illustrative exhibit” to replace “illustrative exhibits 6 and 7 from PHB”

Also on July 10, 2006, the Board received faxes from Snohomish County and the City of Marysville objecting to the requested extension filed by Petitioner Pilchuck. Additionally, the Board also received an e-mail from one of the County’s co-counsel requesting that the *Strahm* portion of the HOM be moved up to July 19, 2006. The

transmittal indicated that Petitioner Strahm did not object to this adjustment in the schedule. Via e-mail, the Board **granted** the Petitioners' request for an extension in filing the reply brief. Petitioner Pilchuck was given until noon, July 13, 2006 to file the reply brief, and exhibits with the Board in hard copy.

On July 11, 2006, pursuant to the County's request, the Board issued an "Order Rescheduling Hearing on the Merits for the Strahm Portion of CPSGMHB Consolidated Case No. 06-3-0015c." The Strahm portion of the case was rescheduled for the morning of July 19, 2006.

On July 12, 2006, the Board received a letter from the County offering rebuttal exhibits to an "unavailability" argument offered by Petitioner Strahm in Petitioner's reply brief. Two items were attached to the letter: Item 1 – an e-mail string re: Lynnwood City Center Plan; and Item 2 – Tables relating to observable buildable densities for unincorporated UGAs from Co. website.

On July 13, 2006, the Board received Petitioner Pilchuck's "HOM Reply Brief" (**Pilchuck Reply**), with no exhibits.

On July 14, 2006, the Board received "Petitioner Strahm's Motion to Submit Additional Evidence." Petitioner asked that additional items be added to the record. Item 1 – proposed illustrative exhibit #20 [Tables 20A, 20B and 20C], Item 2 - and an excerpt from a July 2000 document from ECO Northwest pertaining to Buildable Lands Methods – Chapter 5 = Phase II – Data collection, Analysis and Evaluation, and Item 3 - a copy of CTED's BLR Program 2002 Evaluation Report – A Summary of Findings.

On July 19, 2006, the Board conducted the Hearing on the Merits for the *Strahm* portion of this proceeding. The HOM was held at the Board's offices in Suite 12470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Margaret A. Pageler were present for the Board.⁵⁶ Petitioner F. Robert Strahm attended and was represented by C. Thomas Touhy. Respondent Snohomish County was represented by Brent D. Lloyd. Also attending for the County were Millie Judge, Jason J. Cummings, Steven Toy, and Stacy Phan. Julie Taylor, Board Law Clerk was also present. Marco de Sa e Silva, attorney for Intervenor Herbkersmans, appeared, but did not participate. Vikki Herbkersman, Ryan White, Grant Weed and Eric Laschever were also present. Court reporting services were provided by John Botelho of Byers and Anderson. The hearing convened at 10:00 a.m. and adjourned at approximately 1:00 p.m. A transcript of the proceeding was ordered.

On July 20, 2006, the Board conducted the Hearing on the Merits for the *Pilchuck* portion of this proceeding. The HOM was held at the Board's offices in Suite 12470, 900 4th

⁵⁶ Board member Bruce C. Laing's term expired before the Board issued the Final Decision and Order in this case. Consequently, Mr. Laing did not participate further in this matter.

Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Margaret A. Pageler were present for the Board. Petitioners Pilchuck Audubon Society, Futurewise, Jodie McVittie, Cindy Howard, Shelly Thomas, Barbara Bailey and Lisa Stettler were represented by John Zilavy. Respondent Snohomish County was represented by John R. Moffat and Jason J. Cummings. Intervenor City of Arlington was represented by Steve Pfeifle. Intervenor City of Marysville was represented by Grant Weed. Intervenor Kandace Harvey and Harvey Airfield were represented by Molly Lawrence. Intervenor MBA was represented by Duana Kolouskova. Julie Taylor, Board Law Clerk, and Board Externs Kris Hollingshead and Brian Payne were also present. Also attending were Jason Chambers, Marion Gallagher, Blair Anderson, David Toyer, Gloria Hirashima, Mary Swenson and Nathan Gorton. Court reporting services were provided by Eva Jankowitz of Byers and Anderson. The hearing convened at 12:30 p.m. and adjourned at approximately 4:45 p.m. A transcript of the proceeding was ordered.

On July 31, 2006, the Board received the transcript for the Strahm portion of this proceeding. (***Strahm HOM Transcript***)

On August 3, 2006, the Board received the transcript for the Pilchuck portion of this proceeding. (***Pilchuck HOM Transcript***)