

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

JAMES HALMO, <i>et al.</i>	)	
	)	<b>Case No. 07-3-0004c</b>
Petitioners,	)	
	)	<b>(Halmo, <i>et al.</i>)</b>
v.	)	
	)	
PIERCE COUNTY,	)	<b>FINAL DECISION</b>
	)	<b>AND ORDER</b>
Respondent.	)	
	)	
	)	
	)	

---

**SYNOPSIS**

*Pierce County adopted the Graham Plan and implementing development regulations on October 10, 2006, by enacting Ordinance Nos. 2006-52s and 2006-53s. Two groups of petitioners here appealed various provisions of the Ordinances. The Halmo petitioners are twelve members of the Graham Community Planning Board that had been appointed by the County Council to develop recommendations for the Graham sub-area plan. The CROWD petitioners are a coalition of residents and organizations opposed to the LRI Landfill - an operating solid waste facility in the Graham area.*

*Both Halmo and CROWD challenge Pierce County's public process. In particular, they object to various County amendments to the sub-area plan which had been developed and recommended by the Community Planning Board. This Board finds that the County considered the various amendments over a period from February to October, 2006. Both groups of petitioners availed themselves of opportunities to comment on the amendments and, in fact, are simply dissatisfied with the policy choices made by the County. The Board finds no violation of GMA public process requirements.*

*The Community Planning Board recommendations generally sought to be protective of rural character and natural resources in the sub-area. Halmo objects to various County enactments allowing more development, but still within rural parameters, than proposed by the Community Planning Board. This Board sustains the action of the County except in three instances:*

- *The County's action in expanding the UGA without submitting the proposed expansion to the Pierce County Regional Council, as required by the County-wide Planning Policies, was found out of compliance with RCW 36.70A.210 and invalidated as likely to thwart GMA Planning Goal 2.*

- *The County’s action in establishing the outer boundary of the Graham Rural Activity Center – a LAMIRD – was found out of compliance with RCW 36.70A.070(5)(d)(vi) and invalidated as substantially interfering with GMA Planning Goal 2.*
- *The County’s action in amending the Upper Nisqually Community Plan and other sub-area plans in Exhibit A to Ordinance 2006-52s – the Graham Community Plan – was found out of compliance with RCW 36.70A.035(1) requirements for public notice.*

*The CROWD petitioners challenged the County’s action in enacting an “Essential Public Facilities/Solid Waste Facilities Overlay” and providing for gas-to-energy uses on the LRI Landfill site. The Board found that the County’s Overlay essentially recognizes an existing and operating essential public facility and is not inconsistent with the identification and siting process required in RCW 36.70A.200(1), while the gas-to-energy provisions are subject to future project-specific review.*

*CROWD’s SEPA claims were dismissed for failure to state the basis for SEPA standing in the PFR or to demonstrate any injury-in-fact resulting from the County’s actions. The Board found Pierce County’s action in adopting the Overlay to be consistent with its comprehensive plan, specifically the Capital Facilities Element, Solid Waste Management Plan, and Essential Public Facilities Element. The Board found that CROWD failed to carry its burden of proof in demonstrating noncompliance with the GMA and dismissed the CROWD claims.*

## **I. BACKGROUND<sup>1</sup>**

### *Challenge and Consolidation*

On October 10, 2006, Pierce County adopted Ordinance Nos. 2006-52s and 2006-53s, which adopted the Graham Community Plan and implementing development regulations.

On January 4 and 5, 2007, the Board received three separate Petitions for Review (**PFRs**), one from the Muckleshoot Indian Tribe, one from James Halmo, *et al*, and one from CROWD, *et al*, challenging Ordinance Nos. 2006-52s and 2006-53s.<sup>2</sup> At the Prehearing Conference, convened February 5, 2007, the Board consolidated these PFRs into the consolidated matter referenced by CPSGMHB Case No. 07-3-0004c.<sup>3</sup> On

---

<sup>1</sup> The complete chronology of these proceedings is attached as Appendix A.

<sup>2</sup> Each PFR was assigned a case number. The Muckleshoot PFR was assigned CPSGMHB Case No. 07-3-0002. The Halmo PFR was assigned CPSGMHB Case No. 07-3-0003. The CROWD PFR was assigned CPSGMHB Case No. 07-3-0004.

<sup>3</sup> The Muckleshoot PFR was subsequently segregated from the consolidated case in order to allow an extension for settlement discussions. Order Segregating Muckleshoot Petition for Review from the Consolidated Case and Granting Settlement Extension (March 2, 2007).

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

February 6, 2007, the Board issued its Prehearing Order and Order of Consolidation (**PHO**).

### *Motions and Settlement Extension*

At the Prehearing Conference, Pierce County filed “Respondent Pierce County’s Motion to Dismiss” seeking dismissal of the Halmo and *CROWD* PFRs for defective service. The motion was subsequently withdrawn. On February 22, 2007, the Halmo Petitioners filed a Motion to Supplement, to which Pierce County responded by filing an “Index- Graham Community Plan – Supplemental.” No hearing was held on motions.

On March 14, 2007, the Board issued its Order on Motions. The Board found that the County’s motion to dismiss the Halmo and *CROWD* Petitioners for defective service was withdrawn. The Board also granted Halmo Petitioners’ motion to supplement the record and admitted the items as already in the record.

On April 10, 2007, *CROWD*, Halmo, and Pierce County filed a Stipulated Motion for Settlement Extension. The motion stated that the Hearing Examiner’s pending decision on the environmental appeal could lead to a settlement of this matter; a 90-day extension was requested. On April 16, 2007, the Board issued its Order Granting Settlement Extension and Amending Case Schedule.

On June 11, 2007, the Board received a Settlement Status Report stipulating, on behalf of Petitioners *CROWD* and Halmo and Respondent Pierce County, the parties’ agreement to proceed before the Board with all issues.

### *Proceedings on the Merits*

The following briefing was timely filed:

- Halmo Petitioners’ Prehearing Brief with exhibits 1-50 and A-P – **Halmo PHB**.
- Prehearing Brief of Petitioner *CROWD*, *et al.*, with 27 exhibits - **CROWD PHB**.
- Pierce County’s Prehearing Brief with 84 exhibits – **County Response**.
- Halmo Petitioners’ Reply Brief - **Halmo Reply**.
- Reply Brief of Petitioners *CROWD*, *et al.*, - **CROWD Reply** - with Declaration of Viki Steiner in Support of Reply Brief of Petitioners *CROWD*, *et al.*, and Declaration of Andy Bales in support of Reply Brief of Petitioners *CROWD*, *et al.*

On August 9, 2007, the Board held the hearing on the merits (**HOM**) at the Attorney General’s office, 20<sup>th</sup> Floor, 800 5<sup>th</sup> Avenue, Seattle, Washington. Board Members Margaret Pageler, Presiding Officer, and David Earling were present for the Board.<sup>4</sup> *Halmo pro se* petitioners James Halmo, Marilyn Sanders, and Harry Bell attended, with

---

<sup>4</sup> Board member Ed McGuire was unable to attend the HOM. He has reviewed the HOM Transcript.  
*07304c Halmo, et al v. Pierce County (September 28, 2007)*

James Halmo speaking for the group. The *CROWD* Petitioners were represented by Mickey Gendler and Kathy George of Gendler & Mann, L.L.P., with consultant Amy Parker also in attendance. Respondent Pierce County was represented by Prosecuting Attorneys Pete Philley and Todd Campbell. Also attending were William (Bud) Rehberg, Cindy Zable, and Ann Norman.

The Hearing on the Merits afforded the Board the opportunity to ask a number of questions and develop a clear understanding of the County's plan and policies and the Petitioners' challenge. The Hearing convened at 2:00 p.m. and adjourned at 4:30 p.m. Court reporting services were provided by Beth L. Drummond of Byers and Anderson, Inc. The Board ordered a transcript of the Hearing. The transcript was received on August 17, 2007, and is referred to herein as **HOM Transcript**.

## **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS**

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 are 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). As articulated most recently by the Supreme Court, "the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance." *Lewis County v. Western Washington Growth Management Hearings Board (Lewis County)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

Legislative enactments adopted by Pierce County pursuant to the Act are presumed valid upon adoption. RCW 36.70A.320(1). The burden is on the Petitioners to demonstrate that the actions taken by Pierce County are not in compliance with the Act. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the actions taken by [Pierce County] are 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 the action of Pierce County 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, 849 P.2d 646 (1993).<sup>5</sup>

---

<sup>5</sup> The State Supreme Court's most recent delineation of the "clearly erroneous" standard is found in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, Docket Number 76339-9 (Sept. 13, 2007), at 20, fn. 8:

Without question, the "clearly erroneous" standard requires that the Board give deference to the county, but all standards of review require as much in the context of administrative action. The relevant question is the degree of deference to be granted under the "clearly erroneous" standard.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

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 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 Pierce County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The Supreme Court has made clear: “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). In *Lewis County*, the Court reaffirmed this ruling, stating: “[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.” 157 Wn. 2d at 506, fn. 16.

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to only those issues presented in a timely petition for review. RCW 36.70A.290(1).

### **III. BOARD JURISDICTION AND PRELIMINARY MATTERS**

#### **A. Board Jurisdiction**

The Board finds that Petitioners Halmo and CROWD’s PFRs were timely filed, pursuant to RCW 36.70A.290(2); and that the Board has subject matter jurisdiction over the challenged Ordinances, which amend the County’s comprehensive plan and development regulations, pursuant to RCW 36.70A.280(1)(a). The Board finds that Petitioners Halmo and CROWD have standing to appear before the Board with respect to their GMA claims, pursuant to RCW 36.70A.280(2). The CROWD Petitioners’ standing to bring a SEPA claim is addressed, *infra*, in Section V.I.

#### **B. Preliminary Matters**

##### County Decision Chronology

Pierce County’s Response provided a 15-page “Chronological History” of the County’s Solid Waste Management Plan, the LRI Landfill, and the consideration and adoption of the Graham Community Plan. County Response at 5-20. CROWD’s Reply included “CROWD’s Alternative Chronology.” CROWD Reply, Attachment 1. The PO inquired

---

The amount is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the county’s actions a “critical review” and is a “more intense standard of review” than the arbitrary and capricious standard. See, e.g., *Cougar Mountain Assocs. V. King County*, 111 Wn.2d 742, 749, 765 P.2d 264 (1988). And even the more deferential “arbitrary and capricious” standard must not be used as a “rubber stamp” of administrative actions. See *Ocean Advocates v. United States Army Corps of Eng’rs*, 361 F.3d 1108, 1118, 1119 (9<sup>th</sup> Cir. 2004).

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

Page 5 of 60

whether the Halmo Petitioners would stipulate to the County's chronology and, if not, to indicate disputed items. HOM Transcript at 7-8.

On August 13, 2007, the Board received Petitioner Halmo's Supplemental Chronological History.

On August 17, 2007, the Board received Respondent Pierce County's Response to Petitioner Halmo's Chronological History and Comments, with Attachment A.

#### County Motions to Dismiss

The County moves to dismiss Halmo's allegations of noncompliance with RCW 36.70A.530, a section of the GMA that was not cited in the stated Legal Issues here. Halmo responds that RCW 36.70A.035 requires notice to affected government agencies, and it is the effectiveness of notice to the adjacent agency that is being challenged. As set forth below in Section V.B, the Board agrees with the County that the scope of its inquiry here is limited to compliance with RCW 36.70A.035, not .530.

The County also moves to dismiss Halmo Legal Issue 11 as abandoned. Legal Issue 11 challenges the County's adoption of an "Essential Public Facilities – Solid Waste Facility Overlay" recognizing the LRI Landfill. On this issue, Halmo adopted CROWD's briefing by reference. The Board denies the motion and accepts Halmo's adoption by reference, for the reasons set forth below in Section V.F.

The County moves to dismiss CROWD Legal Issues 19 and 20 for lack of SEPA standing. The Board reviews this matter below in Section V.I.

### **IV. THE CHALLENGED ACTION**

On October 20, 2006, Pierce County enacted Ordinance No. 2005-52s adopting the Graham Community Plan and incorporating it into the County's Comprehensive Plan as a sub-area plan. At the same time, the County enacted Ordinance No. 2006-53s which contains the development regulations to implement the Graham Community Plan.

The Graham sub-area encompasses almost 50,000 acres of mostly-rural land in south-central Pierce County. County Response, at 3. The sub-area planning process began in the spring of 2002 with the County's appointment of a 25-member Graham Community Planning Board (**GCPB**) which held bi-monthly public meetings until December 2005. On December 20, 2005, the GCPB forwarded its recommended community plan to the Pierce County Planning Commission.

The Draft SEIS was released on January 30, 2006. Alternatives reviewed included the no-action alternative, GCPB-recommended community plan, and a "growth potential alternative." County Response, at 9, Ex. 1.

During 2006, the GCPB-proposed community plan was considered and amended through multiple processes: Graham Land Use Advisory Commission, Pierce County Department of Planning and Land Services (PALS) staff reports, Pierce County Planning Commission, Pierce County Council Community Development Committee (CDC), and finally, County Council adoption.

The Final SEIS, issued on September 15, 2006, was appealed to the Pierce County Hearing Examiner. Parties to this present proceeding were part of that appeal. The Hearing Examiner's decision was issued on May 18, 2007, and has not been introduced as an exhibit in this proceeding.

Several issues of continuing controversy resulted in petitions for review to this Board. First, the Halmo petitioners are twelve members of the Graham Community Planning Board. They oppose County amendments to their recommended community plan that they believe water down the protections for rural lands and rural character which their plan included. Second, the CROWD petitioners are a community alliance opposed to the LRI Landfill. They oppose County amendments to the GCPB-recommended plan concerning the landfill.

The LRI Landfill is a privately owned and operated landfill situated on 325 acres in the Graham Plan area. The LRI Landfill disposes of most of the County's solid waste, under a contract with the County. The landfill facility, which vested its permits before the enactment of the GMA, has always been controversial, in particular, because it is sited over a sole source aquifer.<sup>6</sup>

The Graham Community Planning Board did not include the landfill in its proposed sub-area plan. The County, however, amended the GCPB proposal by recognizing the LRI Landfill as an EPF with an "Essential Public Facility – Solid Waste Facility Overlay" (**Overlay**) and by adding gas-to-energy facilities to the potential uses on the landfill site.

## **V. LEGAL ISSUES AND DISCUSSION**

### **A. UGA EXPANSION HALMO LEGAL ISSUE 6**

The PHO sets forth Legal Issue 6 (Halmo PFR # 1)<sup>7</sup> as follows:

---

<sup>6</sup> As determined by the Court of Appeals, the development rights for the LRI Landfill vested in 1989, upon LRI's application for a conditional use permit. *Weyerhaeuser v. Pierce County*, 95 Wn.App. 883, 976 P.2d 1279 (1999). The application preceded state legislation that banned the location of solid waste landfills over sole source aquifers.

<sup>7</sup> The numeration of issues in the PHO included issues posed in the PFR of Muckleshoot Indian Tribe, which has since been segregated from the consolidated case for settlement proceedings. Halmo's PHB uses the original 1-6 numeration from the PFR. In the PHO, Halmo Legal Issues are Issue Nos. 6-11, and the PHO numeration is used in this FDO.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

Page 7 of 60

6. Was the County's action in moving the Urban Growth Area line inconsistent with RCW 36.70A.210 and RCW 36.70A.215, with WAC 365-195-335, as well as with the County's own "Countywide Planning Policies for Pierce County, Washington" (Ordinance No. 2005-52s) for coordinated consistent planning, and was such action also inconsistent with the County's Comprehensive Plan 19A.30.030 and 19A.40.050 as well as the Comprehensive Plan Procedures 19C.10.086?

### **Applicable Law**

RCW 36.70A.210 provides for the development of county-wide planning policies as a framework for ensuring cooperative and consistent comprehensive planning among a county and its cities. County-wide planning policies must address policies to implement establishment and amendment of urban growth boundaries (RCW 36.70A.210(3)(a)), and policies for economic development and employment (RCW 36.70A.210(3)(g)).

RCW 36.70A.215 requires counties, before extending the UGA for industrial lands, to review and evaluate development trends, determine the "actual amount of land developed for commercial and industrial use," and then determine the amount of land needed for industrial uses. RCW 36.70A.215(3)(b) and (c).

Pierce County's County-wide Planning Policies require that an urban growth boundary may only be expanded if it is consistent with RCW 36.70A.215, as cited above. The policies also require:

2.4 A proposed amendment to the Urban Growth Area boundaries shall be referred to the Pierce County Regional Council for its review and recommendation.

### **Discussion**

#### *Positions of the Parties*

The Graham Community Plan expanded the Pierce County UGA to allow 53 acres of newly designated "Employment Center" along Meridian Avenue, south of 200<sup>th</sup>. The anticipated use is salvage yard and vehicle storage facility. Halmo claims this violates RCW 36.70A.210 and .215 because the expansion is unsupported by any land capacity analysis indicating a need for additional industrial-zoned land in that part of the County. Halmo PHB at 8. There is no town or city associated with the newly-created commercial zone, and Halmo argues that it resembles spot-zoning, not the result of "a considered, unbiased analytical review of the County's needs." *Id.*

Halmo also claims the action is inconsistent with County-wide Planning Policies and Comprehensive Plan Policies. Citing PCC 19A.30.30, LU-EC Objectives 9G and 9H, Halmo argues that the re-designation is inconsistent with the County's locational criteria

for Employment Centers, particularly avoidance of wetlands and critical areas. *Id.* Halmo points out that all but 10 acres of the 53-acre tract is wetland, and that salvage yards and auto facilities pose particular risks of water pollution. *Id.* at 5 and 8, citing FEIS, pp 21-23. Halmo contends the designation extends “strip mall development ... along the once rural route [that] does not make for good living today.” Halmo PHB, at 9; Ex. H. Halmo also argues that PCC 19A.40.050 requires a land capacity analysis and a showing that “the need for additional land capacity is clearly demonstrated.” *Id.* at 10-11.

Finally, Halmo points to the “County-Wide Planning Policies on Amendments and Transitions” requiring formal review and recommendations by the Pierce County Regional Council (**PCRC**) for all UGA boundary changes.

The County in response concedes to Halmo’s final point. The County acknowledges that the UGA expansion should have been referred to the PCRC prior to enactment. County Response, at 27. However, the County states that the PCRC review is merely advisory, not binding on the Pierce County Council. *Id.*

### Board Discussion

Pierce County conceded that its action in expanding the UGA for a 53-acre “Employment Center” was taken without first submitting the question to the Pierce County Regional Council, as required by the County-wide Planning Policies. The Board agrees that the County’s action was inconsistent with both the County-wide Planning Policies and Comprehensive Plan procedures, which require that all new proposed changes to the UGA boundary be subject to review and formal recommendation from the PCRC. County-wide Planning Policy on Amendments and Transition, Policy 2.2, 2.3, 2.4, Halmo Ex. 9, pp. 80-81; PCC 19G.10.086, Halmo Ex. 15.

The Board finds and concludes that the County’s action was **clearly erroneous**. Because the Board remands the Ordinance to Pierce County for procedural compliance, the Board does not now decide Halmo’s issues of (1) lack of land capacity analysis to support UGA expansion for industrial uses and (2) violation of County locational criteria for zoning of industrial lands. These matters will necessarily be revisited by Pierce County on remand, and the Board will not now issue an advisory opinion.

### **Conclusion**

The Board finds and concludes that Pierce County’s action in expanding the UGA in the Graham Community Plan to accommodate an Employment Center at Meridian Avenue and 200<sup>th</sup> Street East was inconsistent with County-wide Planning Policies and **did not comply** with RCW 36.70A.210. The Board **remands** Ordinance 2006-53s to Pierce County to take legislative action to bring the Graham Community Plan into compliance with the GMA.

## **B. NOTICE AND PUBLIC PARTICIPATION HALMO LEGAL ISSUES 7 AND 10**

The PHO sets forth Legal Issues 7 (Halmo PFR # 2) and 10 (Halmo PFR #5) as follows:

*7. Did the County violate the public participation requirements of the law by its action in adopting amended provisions for a “Reserve 5” area in the Graham Community Plan, and was such action a violation of RCW 36.70A.140, WAC 365-195-600, the County’s Comprehensive Plan 19A.110, and the Comprehensive Plan procedures 19C.20.090 and 19C.20.100?*

*10. Did the County’s adoption of substantial amendments and revisions to the Graham Community Plan violate the spirit and intent of the formal mandate to provide for meaningful participation as called for in RCW 36.70A.140, RCW 36.70A.035, the County’s Comprehensive Plan 19A.110, as well as the County’s Comprehensive Plan Procedures 19C.20.090 and 19C.20.100?*

### **Applicable Law**

RCW 36.70A.140 and .035 set forth the notice and public participation requirements of the GMA, providing the following:

**36.70A.140 Comprehensive plans — Ensure public participation.** Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.

**36.70A.035 Public participation — Notice provisions.** (1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulations.

RCW 36.70A.035 provides examples of reasonable notice provisions and articulates special rules concerning late amendments by the elected decision makers. In summary, after the close of public testimony and comment, a county or city council may not make

further amendments to GMA legislation unless the amendments are within the scope of the alternatives that have been available for public discussion (.035(2)).

## **Discussion**

### *Positions of the Parties*

Halmo argues that the County has not formally adopted a public participation process for sub-area plan adoptions. Halmo PHB, at 43, 46. Here, Halmo says, the County appointed the Graham Community Planning Board to develop a proposed sub-area plan. However, after the Community Planning Board (**CPB**) submitted its plan, it was substantially revised. Changes were enacted by the Planning Commission and, later, by the County Council without the required public review, according to Halmo. *Id.* at 41-42.

The Halmo Petitioners are all members of the Graham Community Planning Board. After spending four years as volunteers crafting the proposed sub-area plan, they were understandably unhappy with some of the amendments made by the County Council. See, e.g., Halmo PHB, at 38-46. Halmo argues that County staff recommended a number of changes to the CPB plan and submitted them to the Planning Commission, and that the Planning Commission adopted most of the staff recommendations at a March 8, 2006, meeting where no public testimony was taken. *Id.* at 40. Further, Halmo contends that many of these staff recommendations and subsequent amendments were adopted without explanation or without defensible rationale. *Id.*

Halmo asserts that the Community Planning Board was intent on preserving the rural character of the Graham area: “The residents were opposed to the continued policy position of the County that stressed continued sub-urban sprawl in the greater Graham area.” *Id.* at 14. Many of the County’s amendments to the CPB Plan, according to Halmo, allow increased development and are less protective of the rural area. *Id.* at 16-17.

A specific dispute concerns “Reserve 5” zoning. (Halmo Legal Issue No. 7) The County has retained Reserve 5 zoning in a rural area abutting Fort Lewis. This area was up-zoned from Reserve 10 during the time period of the Graham Community Plan deliberations.<sup>8</sup> Halmo contends that Reserve 5 introduces “urbanization” that is incompatible with the Fort’s mission (citing a letter from CTED). Halmo PHB at 18. The Community Plan recommended a return to the previous Reserve 10 for this area, but the County amended the Community recommendation and retained Reserve 5.

Halmo argues that Pierce County’s UGAs already have a 38% excess of land to accommodate anticipated growth, and no additional rural density can be justified. *Id.* at 15. Halmo contends that the County changed the Reserve 5 designation and development regulations incrementally in a series of decisions, including *after* the close of Planning

---

<sup>8</sup> The Board received no appeal of this action at the time. Halmo’s theory is that the amendments to Reserve 5 in the Graham Plan Ordinance [No. 2006-53] put the appropriateness of this zoning back on the table.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

Commission testimony, therefore not allowing continuous public participation as required by RCW 36.70A.140. *Id.* at 13-16; Halmo Reply, at 4. Halmo further objects that the County's treatment of these issues in the Graham Plan is inconsistent with its treatment of the same matters in the Gig Harbor Plan.

Halmo also raises RCW 36.70A.530 "Land Use Development Incompatible with Military Installation Not Allowed," arguing that Reserve 5 zoning results in quasi-urban growth in the area abutting Fort Lewis. Halmo PHB, at 20.

The County responds that, in its application of Reserve 5 zoning, it merely retained zoning from the preexisting Comprehensive Plan and code. Thus, according to the County, this was essentially the "no action" alternative. The County states that the purpose of applying Reserve 5 in the area at issue is to acknowledge the circumstance of a sewer trunk line through the area. County Response, at 30.

The County moves to dismiss Halmo's argument based on RCW 36.70A.530 as introducing a new issue. County Response, at 31. In addition, the County states that it sent a letter to the Fort Lewis Commander and received no response, which is all that .530 requires. *Id.* fn. 31. Finally, the County asserts that sub-area plans do not have to be consistent with each other, so long as each is consistent with the Comprehensive Plan, so that differences between the Graham and Gig Harbor Plans are irrelevant.

In rebuttal, Halmo states that the issue of notification to the Ft. Lewis commander is a violation of RCW 36.70A.035 which requires procedures "reasonably calculated to provide notice" to affected government agencies. Halmo asserts that after the County's initial notice to the commander, the County made additional amendments allowing new uses in Reserve 5, without apprising the commander. Halmo Reply, at 4-5.

### Board Discussion

Pierce County's enactment of the Graham sub-area plan involved a four-year community process followed by a year of discussion at the Planning Commission and County Council level. After the Graham Community Planning Board submitted its recommendation in December 2005, an additional 18 public meetings were provided on various elements of the community plan. County Response, at 33, fn. 54. The County documents testimony from Community Planning Board members at 12 of these meetings. *Id.* fn. 53. Not all of these meetings allowed testimony on the full range of Graham Plan issues, but the County Council accepted written and emailed comments until the day the plan was adopted. HOM Transcript at 69-70.

The Board notes that the Community Planning Board made special efforts to protect the rural character of their area, and their proposals to un-do the Reserve 5 zoning and to create a Rural Sensitive Resource designation were a part of their program of ensuring that the Graham sub-area remains truly rural. The County Council, however, amended out a number of the protections in the Community Planning Board's proposal. The

Board's review is limited to whether these actions violated the GMA, not whether the County exercised good planning judgment.

Under the GMA, while citizen input is encouraged, elected city and county council members are ultimately responsible for local planning. RCW 36.70A.1201. Both groups of petitioners in this case complain that the Pierce County Council (and/or county staff and Planning Commission) proposed and adopted changes to the recommended plan forwarded by the Community Planning Board without allowing appropriate public comment.

Similar arguments were raised and rejected in *Keesling III v. King County*, CPSGMHB Case No. 04-3-0024, Final Decision and Order (May 31, 2005), at 39-41 (amendment adopted in County Council committee meeting and publicly available for two months before final Council vote did not violate .035) and *Cave/Cowan v. Renton*, CPSGMHB Case No. 07-3-0012, Final Decision and Order (July 30, 2007) at 10-12 (down-zoning proposal that "morphed" to include petitioners' property did not violate .035 when the City provided three months of "continuing opportunities for the public to provide input"). In each of the foregoing cases, petitioners, while alleging failure of notice of amendments, were personally involved throughout the process, attending meetings, testifying, and submitting written comments.

In reviewing Pierce County's record here, the Board finds that Pierce County's proceedings were open, petitioners participated actively at all stages of the process, and comment was accepted until the final vote of the County Council. No violation of .035 or .140 is apparent on the face of the matter.

However, Halmo raises specific concerns about the Reserve 5 zoning. Halmo PHB, at 13. Along the portion of the Graham sub-area adjacent to Fort Lewis, some 3,679 acres (7.5% of the plan area) was previously zoned Reserve 10. Prior to completion of the Graham sub-area plan, the County rezoned this area Reserve 5. Reserve 5 is a zoning classification in anticipation of urbanization, allowing 1du/5acre and lot clustering. PCC 19A.40.050, Halmo Ex. 16. The Graham Community Planning Board opposed this zoning as promoting low-density sprawl; they recommended a more-rural designation for this area.

The Community Planning Board recommendation was well-founded. First, there is no city or town associated with this "reserve" area. Second, Pierce County's UGA is already 38% oversized;<sup>9</sup> there is no need to absorb additional densities in the rural area.<sup>10</sup> Third, the Reserve 5 zoning does not "reduce the inappropriate conversion of undeveloped land

---

<sup>9</sup> See PCC 104, Halmo Ex. 14; letter from Tacoma Economic Development Department to Pierce County Council: "Previous staff reports [by PALS] acknowledge that the existing urban growth areas have an excess of 38%."

<sup>10</sup> In its recent ruling in *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wash. App 781, 804, 154 P.3d 959 (2007), the Court of Appeals, Division II, held that the Western Board correctly determined that the 38% excess land in Thurston County's UGA was too large.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

into sprawling, low-density development,” as required by GMA Planning Goal 2. Fourth, the quasi-urbanization of the area may interfere with the military operations of Fort Lewis, as suggested by CTED’s comment letter: “Protecting the eastern boundary of the base from further urbanization is an important means of supporting its mission requirements.” PCC 2-77, Halmo Ex. 22.

Pierce County, however, declined to remove the Reserve 5 designation. In response to public protests, the County made some modifications to the land uses in Reserve 5 (Halmo PHB, at 16), and it provided formal notice of its process to the Fort Lewis Commandant. PC 1-1, Halmo Ex. 26. Absent a clear violation of a GMA requirement, the particular rural zoning adopted by the County is within its discretion. In *Thurston County v Western Washington Growth Management Hearings Board*, 137 Wn.App. 781, 154 P.3d 959 (Apr. 3, 2007) the Court of Appeals, Division II, stated:

The Act requires counties to identify and protect rural lands not designated for urban growth, agriculture, forest, or mineral resources. The rural element of a comprehensive plan must permit rural development and provide for “a variety of rural densities.” ... The [Western] Board considers a density of not more than one dwelling unit per five acres to be rural.

137 Wn.App. at 805 ( citations omitted). The Court pointed out:

The Supreme Court has referred to a density of one dwelling unit per five acres as “a decidedly rural density.” Skagit Surveyors, 135 Wn.2d at 571.

*Id.* at 806. Here Pierce County has chosen a rural density for the area in question, though not as protectively-rural as recommended by the Community Planning Board.

While Halmo raises many objections to the Reserve 5 zoning, the Legal Issue before the Board is not whether the rural density violates the GMA but whether the County’s public process specific to this decision met GMA standards. Halmo states that on the day the Planning Commission voted to re-instate the Reserve-5 zoning, it allowed no testimony on that issue. PCC 2-8, Halmo Ex. 18. However, public testimony was taken when the issue came before the County Council’s CDC. PCC 104, 106, 224, Halmo Ex. 14, 19, and 20.

With respect to the various amendments, Halmo argues that the public was not fully involved, the County did not explain its revisions, and the modifications were enacted without any analytical discussion and without “specific findings of fact addressing changes” made to the Reserve 5 classification. Halmo PHB, at 17. Citizens who have spent four years on an advisory committee analyzing the minutia of various zoning categories and their application in their neighborhood, as have the Halmo petitioners, understandably expect thoughtful explanations for Council amendments to their

proposals. However, while reasoned explanations are certainly desirable in a GMA public process, the Board cannot find that they are required by the statute.

As to the notice to Fort Lewis, on April 18, 2006, the County formally notified the Fort Lewis commandant of its consideration of the Graham Community Plan, providing a cover letter and the voluminous draft plan and development regulations. The cover letter contains no reference to the Reserve 5 zoning adjacent to Fort Lewis but merely characterizes the whole sub-area as “maintaining a mostly rural residential and natural resource land use pattern.” PC 1-1, Ex. 26. Halmo argues this notice was legally insufficient, as it failed to indicate the “potential future urbanization” of the area.<sup>11</sup> Halmo also argues the County made changes to the Reserve 5 designation *after* sending the April 18 notice, and should have provided Fort Lewis with additional notice.

The Board finds that the County’s formal compliance with the .035 provision of notice to affected government agencies and the .530 provision for special notice to military installations informed the Fort Lewis commandant that a planning process was underway. Such notice generally shifts to the recipient the responsibility to inquire, keep informed and involve one’s agency. *Burrows v. Kitsap County*, CPSGMHB Case No. 99-3-0018, Order on Compliance in a Portion of *Alpine* and Final Decision and Order in *Burrow* (Mar. 29, 2000), at 10.

Halmo also objects that the County incorporated into the Graham Plan an amendment to the Upper Nisqually Plan, without separate notice to the Nisqually community. Halmo PHB, at 44. On September 18, 2006, the CDC adopted a number of amendments to the Graham Community Plan under the title “Implementing Regulations for Graham Community Plan – Technical Amendments.” PCC 62, Halmo Ex. 49, Committee Ex. No. 7 Red; PCC 230, at 22, Halmo Ex. C. The Technical Amendments included an amendment to the Use Category Agricultural Supply Sales in the Upper Nisqually Rural Zone Classifications (Table 18A.31.020). Halmo asserts, and the County does not deny, that the public notice for the technical amendment contained no reference to the Upper Nisqually Plan. Halmo PHB, at 44.

The Board notes, as pointed out by Halmo, *id.*, that Ordinance No. 2006-53s, Exhibit A, amends density/dimension tables for Fredrickson, Gig Harbor, Mid-County, Parkland-Spanaway-Midland, South Hill, and areas outside community plan areas, in addition to Upper Nisqually and the Graham Plan area. To the extent the County publicized the process for consideration and adoption of Ordinance No. 2006-53s as addressing only the Graham sub-area, the County’s notice and public process did not comply with RCW 36.70A.035(1).

The Board has held that public notice is at the core of public participation. *Weyerhaeuser Real Estate v. Dupont (WRECO)*, CPSGMHB Case No. 98-3-0035, Final Decision and

---

<sup>11</sup> The record does not indicate whether Fort Lewis had been notified of the previous up-zoning from Reserve 10 to Reserve 5.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

Order (May 19, 1999) at 6. Where the notice is in error, the public participation process fails to comply with the GMA. *Kelly, et al., v. Snohomish County*, CPSGMHB Case No. 97-3-0012, Final Decision and Order, (July 9, 1997).

In the present case, Pierce County's notice concerning the proposed technical amendments was fatally deficient. The Board is left with a firm and definite conviction that a mistake has been made. The Board finds and concludes that the County's action in adopting Exhibit A to Ordinance 2006-53s, amending certain Use and Density/Dimension Tables for communities other than the Graham sub-area, under notice and title referencing adoption of or technical amendments to the Graham Community Plan, was **clearly erroneous** and **does not comply** with RCW 36.70A.035.

### Conclusion

The Board finds and concludes that the Halmo Petitioners **failed to carry their burden of proving** that the County's process in adopting Ordinance Nos. 2006-52s and 2006-53s did not comply with RCW 36.70A.035 and .140, except with respect to Exhibit A of Ordinance No. 2006-53s. The County's adoption of Exhibit A of Ordinance No. 2006-53s was **clearly erroneous** and **does not comply** with RCW 36.70A.035. Exhibit A of Ordinance No. 2006-53s is remanded to Pierce County to take legislative action in compliance with the GMA. In all other respects, Legal Issue Nos. 7 and 10 are **dismissed**.

### C. RURAL SENSITIVE RESOURCE LANDS HALMO LEGAL ISSUE 8

The PHO sets forth Legal Issue 8 (Halmo PFR #3) as follows:

*8. Was the County's action in adopting amended zone classification "Rural Sensitive Resource" (RSR) inconsistent with RCW 36.70A.070, WAC 365-195-330, as well as the County's Comprehensive Plan 19A.20.050 and 19A.40.020?*

### Applicable Law

RCW 36.70A.070(5) provides, in relevant part:

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

(a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the

rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and ground water resources; and

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

Pierce County's Comprehensive Plan espouses a goal to "Preserve resource lands, rural lands, and ecologically fragile areas that would be vulnerable to uncontrolled growth." PCC 19A.20.050(H).

## **Discussion**

### *Positions of the Parties*

Legal Issue 8 concerns the zoning designation "Rural Sensitive Resources." The GCPB proposed the RSR designation to further protect certain open space corridors and critical areas from sprawl. The proposed RSR zoning was essentially 1 du/10 acres with no density bonuses. The County Council amended the proposed zone to allow density bonuses, with 5-acre minimum lot size and low-impact development requirements.

Halmo argues that the “low-density sprawl” that will result is inconsistent with rural character [.070(5)(a)]. Halmo PHB, at 26-27. The Community Planning Board’s recommendation was modeled on a 5000-acre component of the Gig Harbor Community Plan where extra protection was accorded to rural environmental and open space resources. *Id.* The Graham Community Planning Board recommended similar protection for elements of the Nisqually River Watershed Area and the Muck Creek Basin. Halmo Reply, at 6. These areas “are somewhat unique in the Puget Sound area because the watershed and basin have remained relatively intact and healthy despite their proximity to higher density urban land uses.” *Id.* at 7. Halmo argues that the County’s changes to the RSR land use designation in the Graham area are inconsistent with preserving the rural character, the rural visual landscape, and the “protection of critical areas and natural water flows and recharge and discharge areas.” *Id.* Thus, according to Halmo, the County’s action violates .070(5) and is inconsistent with PCC 19A.20.050.

The County responds that its version of RSR is “more protective” than the prior rural designation of the lands at issue, though not as protective as the GCPB recommendation. County Response, at 39. The County argues that bonus densities are within its discretion. These changes are not inconsistent with the comprehensive plan, according to the County, because the Plan was amended in parallel with the zoning. *Id.* at 39-40.

### Board Discussion

The Rural Sensitive Resource Designation purports to provide additional protection to open space corridors and lands in the vicinity of water bodies. However, the RSR designation as enacted by the County is only slightly more protective than the base R-10 zone, and several of the key restrictions proposed by the GCPB were not adopted by the County.

The GCPB proposed that development in the RSR zone be limited to 1du/10 acres, with no density bonuses, and that low-impact development techniques be required. The County Council retained the low-impact development requirement, but restored the density bonus provisions. As enacted by the County:

The Rural Sensitive Resource Designation shall allow a density of 1 dwelling unit per ten acres.

- a. Ten-acre minimum lot sizes are encouraged in the rural Sensitive Resource Designation. Densities may be increased to a maximum of 2 dwelling units per 10 acres when it can be demonstrated to the satisfaction of Pierce County that the increase in density will not result in adverse impacts to the resources being protected.
- b. An increase in density above basic density shall be allowed only when at least 50 per cent of the gross acreage is dedicated in perpetuity as open space through deed restriction and other appropriate mechanisms. The open space tract shall be located so as to provide the greatest protection

for fish and wildlife habitat and water quality protection. This open space area shall be located in a tract that is separated from any newly created lots.

- c. Bonus densities shall not be permitted in the RSR designation unless it can be shown that the clustered residential development will not impact the integrity of the open space tract.

PCC 19A.40.020(6).

Pierce County spends much of its brief insisting that the County Council *considered* the GCPB proposal (County Response, at 36-39), but in the last analysis, the RSR zoning enacted with the Graham Plan allows two homes per 10 acres with minimum 5-acre lot sizes when 50% of the property is dedicated as open space. The remaining “sensitive” provision is the requirement for low-impact development methods.

The GCPB had proposed RSR zoning to protect 20,000 acres, or approximately 40%, of the plan area, including “those properties designated as open space on the Pierce County Open Space Corridor map and located within 500 feet of sensitive water bodies such as wetlands, Muck Creek, South Creek, Kapowsin Creek, etc. This designation is intended to protect surface waters, aquifers, and fish and wildlife habitat from degradation by more intensive rural residential development....” DSEIS, Ex. 1, Chapter II, at 49. The County Council, however, had different priorities.

As with the question of Reserve 5 zoning [Section 5.B], the Board finds that the specific rural zoning for the Nisqually River Watershed Area and Muck Creek Basin is within the discretion of the Pierce County Council. While environmentally critical areas must be protected by regulations based on best available science (RCW 36.70A.172(1)), the County is free to provide any *further* protection through density restrictions beyond the buffers required by critical area regulations.

Here the Community Planning Board requested additional protection for some “relatively intact and healthy” creek headwaters, proposing R-10 zoning without density bonuses. The County Council simply disagreed, adding bonus provisions that in essence allow 1du/5ac development. This zoning is still rural (*Thurston County, supra*, 137 Wn.App.at 804-805), and is within the Council’s discretion.

### **Conclusion**

The Board finds and concludes that Halmo Petitioners have **failed to carry their burden** of proving that Pierce County’s enactment of Ordinance Nos. 2006-52s and 2006-53s failed to comply with RCW 36.70A.070(5) or PCC 19A.20.050. Legal Issue 8 is **dismissed**.

**D. LAMIRD**  
**HALMO LEGAL ISSUE 9**

The PHO sets forth Legal Issue 9 (Halmo PFR #4) as follows:

*9. Did the County's action in adopting amended limited area of more intensive rural development (LAMIRD) provisions fail to comply with RCW 36.70A.070(5)(d) and was it inconsistent with the County's Comprehensive Plan 19A.110.030D?*

**Applicable Law**

RCW 36.70A.070(5)(d) sets forth the criteria for establishing and modifying limited areas of more intensive rural development (**LAMIRDs**): (emphasis added)

(d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for *limited areas of more intensive rural development*, including necessary public facilities and public services to serve the limited area as follows:

(i) Rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.

(A) A commercial, industrial, residential, shoreline, or mixed-use area shall be subject to the requirements of (d)(iv) of this subsection, but shall not be subject to the requirements of (c)(ii) and (iii) of this subsection.

(B) Any development or redevelopment other than an industrial area or an industrial use within a mixed-use area or an industrial area under this subsection (5)(d)(i) *must be principally designed to serve the existing and projected rural population*.

(C) Any development or redevelopment *in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas*. Development and redevelopment *may include changes in use* from vacant land or a previously existing use *so long as the new use conforms to the requirements of this subsection (5)*;

(ii) The intensification of development on lots containing, or new development of, small-scale recreational or tourist uses ... [not applicable].

(iii) The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries ... [not applicable].

(iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses *shall not extend beyond the logical outer boundary of the existing area or use*, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary *delineated predominately by the built environment*, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl;

(v) For purposes of (d) of this subsection, *an existing area or existing use is one that was in existence: (A) On July 1, 1990.*

## Discussion

### Positions of the Parties

Halmo challenged the County configuration and use allowances for the Graham Rural Activity Center (**RAC**) – a LAMIRD. Halmo contended the RAC was too large and included extraneous parcels, citing a comment letter from CTED. Halmo PHB, at 31.

Halmo also argued that the County action allowed “serious permissive intensity of uses in the plan area,” adding day-care centers, nursing homes, group homes, and religious institutions of any size. *Id.* at 32, 34-35. The challenged ordinances did not create the rural centers but expanded the uses, “effectively permitting new urban-sized growth.” *Id.* at 36-37, citing .070(5)(d) and *Hensley V v. Snohomish County*, CPSGMHB Case No. 02-3-0004c, Order on Reconsideration (Aug. 12, 2002), at 3-5.

Halmo further explained that the permitted new uses (group homes, nursing homes) are quasi-residential, and thus contrary to the GMA provision [RCW 36.70A.070(5)(d)(ii)] that excludes new residential development from LAMIRDs. Halmo Reply, at 9, citing Ordinance No. 2006-52s, at 38: “More intensive rural development may also include small-scale recreational or tourist uses ... which rely on a rural location and setting, but

do not include new residential development.” Finally, these uses do not primarily serve rural communities. *Id.* at 10. With respect to church size, Halmo points out that “these expanded sizes do not serve rural areas, ... lead to potential low-density sprawl, ... and are contrary to ... the rural visual landscape.” *Id.*

The County explains that the LAMIRD criteria of RCW 36.70A.070(5) were addressed during the County’s ten-year update of its Comprehensive Plan in 2004 by requiring evaluation of LAMIRDs in connection with sub-area planning. County Response, at 46. Accordingly, the Graham Community Planning Board was asked to review the Graham and Benston RACs under the new statutory criteria. The Community Plan reduced the size of the Graham RAC from 370 acres to 303 acres, which was adopted by the County.

The County states that the range of uses in the RAC prior to July 1, 1990, included two churches, a shopping center, post office, fire station, mobile home park, medical office and warehouse. Subsequent to July 1990, other uses were developed or vested: auto parts, salvage and service, offices, mini mart/gas station, junior high school, and pet clinic. *Id.* at 47. The County argues that the GMA LAMIRD provision requiring that only the types of uses existing prior to 1990 be allowed, refers to *categories* of uses – small industry, service businesses, neighborhood retail – and is not restricted to the specific types of prior businesses. *Id.* at 48. The County contends that in the civic use category, day-care centers and religious assemblies are included; in the residential use category, group homes and nursing homes are included. *Id.*

### Board Discussion

The statutory provision for local areas of more intensive rural development (LAMIRDs) requires that the county identify the *logical outer boundary* and the *uses* in the LAMIRD based on the areas and uses that existed on July 1, 1990.

In *Gold Star Resorts, Inc. v. Futurewise*, Docket Number 58379-4 (Court of Appeals, Division I, Aug. 27, 2007), the Court of Appeals underscored the legislative criteria for LAMIRDs in RCW 36.70A.070(5). The Court stated:

LAMIRDs must be mapped and restricted to their existing use, so as to minimize and contain more intensive development. ... In sum, LAMIRDs are not tools for encouraging development or creating opportunities for growth, and their densities must be confined to the clearly identifiable area of more intense development existing as of July 1990.

In *Gold Star Resorts*, Futurewise had introduced aerial photographs showing swaths of apparently undeveloped land within the LAMIRD boundaries. One photograph as described by the Court “strikingly illustrates that LAMIRD boundaries are not restricted to areas already developed as of 1990, do not ‘minimize and contain’ the areas of intensive development, and seemingly take little account of physical boundaries.” The *Gold Star* Court supported the Western Board’s remand to the County for review of its

LAMIRDs, in particular, to adopt logical outer boundaries based on pre-1990 development.

Here, the Graham RAC totals 303 acres, the size of a small town. Five of Pierce County's 24 cities and towns are smaller than 300 acres.<sup>12</sup> As much as 60% of the Graham RAC is buildable land, and the LAMIRD designation sets the stage for intensive development. In a comment letter to the County, CTED laid out the flaws in the County's plan:

The purpose of LAMIRDs are to balance several objectives: to recognize existing more intensely developed areas, to decrease the number of nonconforming uses in rural areas, and to protect rural character by minimizing and containing the existing areas or uses of more intensive rural development [RCW 36.70A.070(5)(d)(iv)]. ...

Existing areas are those that existed on July 1, 1990, are clearly identifiable and contained, and where there is a logical boundary delineated predominantly by the built environment. There must be more than existing zoning because designation must rely on the built environment. Given the state mandate to minimize and contain LAMIRDs based on a boundary established by the existing built environment, the inclusion of vacant parcels (especially those on the edge of the boundary) and parcels already developed in a less intensive use such as single-family housing should only be considered if there is a very compelling reason, based on other statutory criteria ....

Even for those parcels that have some commercial use, it is not necessary to include them within a LAMIRD if the existing use is an appropriate rural use. This is especially important in cases where inclusion within the LAMIRD will allow a significant increase in the intensity of the use and contribute to a greater intensity of uses in a rural area....

... [I]f the Graham LAMIRD boundaries are accepted, over 200 acres of buildable land would be included in the LAMIRD.... These acreages represent significant potential for the dramatic expansion and intensification of existing development and could adversely impact the rural character of the community and strain the area's transportation infrastructure and water resources.

PC 2-60, Halmo Ex. 22, at 2. The County Council made no adjustment to the Graham RAC boundaries in response to CTED's guidance letter. The Board is left with the firm and definite conviction that a mistake has been made by the County in adopting the boundaries of the Graham RAC. The Board concludes that the County's action **does not**

---

<sup>12</sup> Pierce County's Buildable Lands Report identifies the City of Roy, 160 acres, and the Towns of Carbonado, 250 acres, Ruston, 170 acres, South Prairie, 260 acres, and Wilkeson, 290 acres.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**comply** with the RCW 36.70A.070(5)(d)(iv) standards for defining the logical outer boundary of a LAMIRD in such a way as to contain the more intensive development.

Halmo is also concerned about allowance of new uses or more intensive uses in the Graham RAC. RCW 36.70A.070(5)(d)(i) provides: “Development and redevelopment [in a LAMIRD] *may include changes in use* from vacant land or a previously existing use *so long as the new use conforms to the requirements of this subsection (5).*” The requirements are that the development “must be principally designed to serve the existing and projected rural population” [.070(5)(d)(i)(B)] and “in terms of building size, scale, use or intensity shall be consistent with the character of the existing areas” [.070(5)(d)(i)(C)].

For the Graham RAC, Halmo protests that the County has allowed day-care centers, nursing homes, group homes, and religious assemblies of any size. The Board finds that day-care centers are a civic use providing service to the local population, and that facilities to care for local children were a pre-1990 use in the area. Nursing homes and group homes may serve a local population or draw from a broader area but are health and social service facilities like the pre-1990 medical offices.<sup>13</sup> The County development regulations should ensure that the size and scale of these facilities is consistent with the rural area. Similarly, the area already has a church or churches: the County’s regulations should focus on size, scale, and service to the local population. Petitioners have **not carried their burden of proving** that the County’s inclusion of these uses in the Graham RAC was clearly erroneous.

### **Conclusion**

The action of Pierce County in adopting the *logical outer boundary* for the Graham RAC was **clearly erroneous** and **did not comply** with RCW 36.70A.070(5)(d)(iv). However, Petitioners failed to carry their burden of demonstrating that the *uses* permitted in the Graham RAC were non-compliant with RCW 36.70A.070(5)(d). The Board **remands** Ordinances 2006-52s and 2006-53s, specifically the provisions establishing the boundary of the Graham RAC, to Pierce County to take legislative action to comply with the GMA.

### **E. NOTICE AND PUBLIC PARTICIPATION CROWD LEGAL ISSUE 18**

The PHO sets forth Legal Issue 18 as follows:

*18. Did Pierce County violate the public participation requirements of RCW 36.70A.140 and RCW 36.70A.035, as well as its own comprehensive plan policies, by introducing substantial amendments to the Graham Community Plan*

---

<sup>13</sup> Halmo’s objection to these uses because they are residential is based on language in RCW 36.70A.070(5)(d)(ii) that excludes new residential development from LAMIRDS that are formed around “small scale recreational and tourist uses.” This section of the statute is not applicable to the Graham RAC. *07304c Halmo, et al v. Pierce County (September 28, 2007)*

*and related regulations without adequate public notice and opportunity for comment?*

### **Applicable Law**

RCW 36.70A.140 and .035 are set forth above in Section B.

### **Discussion and Analysis**

#### *Positions of the Parties*

CROWD argues that substantial amendments to the Graham Plan were introduced without public notice or opportunity for comment. CROWD PHB, at 31-32. CROWD specifically objects to the County's actions in adopting the "essential public facility-solid waste facility overlay" (**Overlay**) and the landfill gas-to-energy amendments to the Graham Community Plan. CROWD PHB, at 30-32. CROWD states that the Comprehensive Plan "includes especially strict participation requirements for planning essential facilities," pointing to provisions of PCC 19A.120.020, which requires that the County "consult the host community." CROWD Reply, at 11. However, instead of consulting the host community, CROWD asserts, the County didn't introduce its proposal to designate the LRI Landfill as an EPF until *after* the four-year community planning effort had closed. *Id.* Further, the gas-to-energy provisions were not introduced until September, 2006, according to CROWD, when they were introduced and adopted by the County Council Community Development Committee on the same day, without public testimony.

The County explains that the Graham Community Planning Board recommended eliminating the LRI landfill. According to the County, at the second of seven Planning Commission hearings, on February 15, 2006, the County Solid Waste Administrator introduced his recommendation to create a solid waste facility overlay to recognize the operating LRI landfill. County Response, at 32. The County states that 18 public meetings were held after the GCPB submitted its recommendations on December 20, 2005, and before the County Council took action on October 10, 2006. The County also notes that the County Council accepts comments until it votes on a matter. Thus, the County insists there was continuous opportunity for public comment. *Id.*

#### *Board Discussion*

As the Board reads the record, it is apparent that during the Graham Community Planning Board deliberations, when the CPB proposed not to allow landfills in the sub-area, County staff became concerned and alerted the CPB to the question of whether this proposal complied with the GMA requirement to "not preclude" the siting of essential public facilities. The question was referred to the Prosecuting Attorney. CROWD PHB, Ex. 7; CROWD Reply, Ex. 1, CROWD's Alternative Chronology.

After the Community Planning Board had submitted its plan, which did not include the LRI Landfill, County Solid Waste Administrator Steve Wamback submitted a formal public comment letter to the Planning Commission. PC 2-75, CROWD Ex. 9. The letter, dated February 15, 2006, proposed recognizing the existing landfill as an EPF with an overlay zone and “improving the environmental controls and operations of the facility, including gas extraction systems and reuse or conversion of the methane gas to energy or liquefied natural gas.” *Id.* at 5. Code text was proposed, including changes to the language to allow landfill gas extraction and recovery as an allowed accessory use. *Id.* at 6. A week later, on February 20, County planning staff submitted Supplemental Staff Report #1 to the Planning Commission, endorsing the overlay proposal and including code text: “Landfill gas extraction and methane recovery and utilization facilities for energy conservation purposes.” PC 2-18, CROWD Ex. 30.

The final enactment of Ordinance 2006-53s was on October 10, 2006. The public thus had more than seven months – from February to October - to react and comment on the proposed Overlay and gas-to-energy amendments before the County took final action.

CROWD makes much of the fact that the County Council did not insert “findings” concerning the landfill into its ordinance until the end of the process. CROWD PHB, at 8. The Board understands that an elected body may need to hear and deliberate on a whole range of facts before adopting findings, and is not troubled by the County’s use of placeholder language in preliminary drafts of its ordinance. The public, including the CROWD petitioners, were well aware that matters concerning the landfill were at issue; thus they participated actively.<sup>14</sup>

In reviewing Pierce County’s record here, the Board finds that Pierce County’s proceedings were open, petitioners participated actively at all stages of the process, and comment was accepted up until the final vote of the County Council.<sup>15</sup> No violation of .035 or .140 is apparent on the face of the matter.

However, CROWD contends that the County presented amendments without affording sufficient public process. *Pilchuck V v. City of Mukilteo*, CPSGMHB Case No. 05-3-0029, Final Decision and Order (October 10, 2005), involved a last-minute amendment to a wetlands ordinance. In that case, after a year’s public process, after the last public hearing, and literally at the 11<sup>th</sup> hour (11:30 p.m.), the City Council introduced and adopted an amendment that was not within the scope of the best available science that had been vigorously debated for a year. On those facts, the Board concluded that the

---

<sup>14</sup> Planning Commission meeting minutes, March 1, 2006, testimony of Andrew Bales and others, PC 2-7, at pp. 3-7, Halmo Ex. A; CROWD comment letter March 3, 2006, CROWD Ex. 2; CROWD comment letter July 14, 2006, CROWD Ex. 14; CROWD letter with attachments August 7, 2006, CROWD Ex. 27; CDC meeting minutes September 18, 2006, testimony of Marilyn Rasmussen and George Wearn (CROWD), PCC 230, at 14, Halmo Ex. C; CROWD letter with attachments, September 18, 2006, CROWD Ex. 21.

<sup>15</sup> See also, Board discussion of notice and public participation, *supra*, at Section V.B, and authorities cited therein.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

Page 26 of 60

GMA requirement for notice and public participation was violated. In the present case, by contrast, the overlay zone and gas-to-energy proposals were introduced and made part of the public debate in February, followed by ample opportunity for public comment prior to County Council final action in October. The Board can discern no violation of either the letter or spirit of .035 and .140.

In *Montlake v City of Seattle*, CPSGMHB Case No. 99-3-0002c, Final Decision and Order (July 30, 1999) at 9, the Board said:

Petitioner has identified numerous opportunities it utilized to offer its comments and concerns to the City. Petitioner's arguments regarding public participation amount to a disagreement with the City over the policy choices made by the City Council. Petitioner's dissatisfaction and disappointment with the decision made by the City does not mean that the public participation process used by the City for amending its Plan failed to comply with the requirements of RCW 36.70A.140.

Similarly, in the present case, the disappointment and dissatisfaction of CROWD (and of Halmo) over the policy choices made by the County Council does not mean that the County's public process was deficient. The Board is not persuaded that GMA public participation requirements were violated.

### **Conclusion**

The Board finds and concludes that CROWD has **failed to carry its burden** of proving that the County's action did not comply with RCW 36.70A.035 and .140. Legal Issue No. 18 is **dismissed**.

### **F. ESSENTIAL PUBLIC FACILITIES – OVERLAY ZONE HALMO LEGAL ISSUE 11 CROWD LEGAL ISSUE 13 AND 15**

The PHO sets forth Legal Issues 11 (Halmo PFR #6), 13 and 15 as follows:

*11. Did the County's use of the Graham Community Plan to adopt an "essential public services solid waste overlay" and to recognize the private LRI 304<sup>th</sup> Landfill site as an essential public facility violate RCW 36.70A.040, RCW 36.70A.200, WAC 365-195-340, WAC 365-195-840 as well as the County's Comprehensive Plan 19A.120 by failing to develop and adopt development regulations controlling the siting of public facility overlays through a public and countywide comprehensive review process?*

*13. Did Pierce County violate RCW 36.70A.200, WAC 365-195-340 and its own Comprehensive Plan by adopting an "Essential Public Facility - Solid Waste Facility Overlay" in the Graham Community Plan in the absence of a countywide*

*effort to identify and site solid waste handling facilities as essential public facilities?*

*15. Did Pierce County violate the internal consistency requirement [RCW 36.70A.070 (preamble)] by adopting an “Essential Public Facility - Solid Waste Facility Overlay” encompassing a privately owned landfill in Graham, when the County’s comprehensive plan requires siting essential public facilities according to countywide criteria that have yet to be established?*

### **Applicable Law**

RCW 36.70A.200 contains the GMA requirements concerning planning for the siting of essential public facilities (EPFs). The relevant provisions are as follows:

- (1) The comprehensive plan of each county and city that is planning under RCW 36.70A.040 shall include a process for identifying and siting essential public facilities. Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities as defined in RCW 47.06.140, state and local correctional facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW 71.09.020.
  
- (5) No local comprehensive plan or development regulation may preclude the siting of essential public facilities.

CTED’s explanatory guidelines are contained in WAC 365-195-340, which provides:

*(1)(a):* Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities, state and local correctional facilities, state or regional transportation facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, and group homes.

*(1)(a)(i):* Identifying facilities. In the identification of essential public facilities, the broadest view should be taken of what constitutes a public facility, involving the full range of services to the public provided by government, substantially funded by government, contracted for by government, or provided by private entities subject to public service obligations.

*(2)(b)(v):* The siting process should take into consideration the need for county-wide, regional, or statewide uniformity in connection with the kind of facility under review.

RCW 36.70A.070 (preamble) requires that all components of a comprehensive plan must be consistent with each other. For Legal Issues 11, 13, and 15, the provisions of the Graham Plan must be consistent with Pierce County’s Comprehensive Plan Essential Public Facilities Element.

## Discussion

### Positions of the Parties

The challenged Ordinances adopted an “Essential Public Facility/Solid Waste Facilities Overlay” (**Overlay**) for the Graham Plan, recognizing the 325-acre LRI Landfill site. Other solid waste facilities (e.g., transfer and recycling stations) were prohibited in the Graham sub-area, as were sewer treatment plants and certain other EPFs. The Ordinance also amended the use regulations to allow the Landfill operator to apply to build a gas-to-electricity plant.

CROWD first argues that LRI is not an essential public facility because long-haul is a cost-effective alternative to local landfill trash disposal and therefore LRI is not “essential.” CROWD at 15. Secondly, CROWD contends that the County has treated LRI differentially, because other solid waste facilities such as transfer stations are not subject to overlays. *Id.* Indeed, the new Graham Plan *precludes* all new waste disposal sites, group homes in single-family and rural residential areas, sewage treatment plants and other EPFs, which is illegal preclusion under RCW 36.70A.200, according to CROWD. *Id.* The flaw in the County’s plan, CROWD argues, is that it lacks the *uniform county-wide siting criteria and process* which CROWD contends are required by .200(1). *Id.*

CROWD further points to relevant policies in Pierce County’s Comprehensive Plan:

- PCC 19A.120.010C – EPFs must be “permitted in the same zoning classification as other similar types of land uses.”
- PCC 19A.120.040A – “Siting criteria shall provide for the uniform treatment of similar types of land uses.”
- PCC 18A.33.230 – Solid waste facilities are “utilities.”
- PCC 19A.120.040B(9) – Calls for the County to “fairly distribute public facilities.”
- PCC 19A.120.040I states that federal and state siting requirements<sup>16</sup> must be incorporated.

CROWD argues that the Overlay is inconsistent with these provisions of Pierce County’s Comprehensive Plan and thus in violation of RCW 36.70A.040(3)(d) and .130(1)(d) and .070.

---

<sup>16</sup> One state requirement found at RCW 70.95.060(2)(a)(ii) prohibits siting landfills over sole source aquifers.

07304c Halmo, et al v. Pierce County (September 28, 2007)

#07-3-0004c Final Decision and Order

Page 29 of 60

Pierce County first responds that the EPF Siting Process and Siting Criteria sections of its Comprehensive Plan – PCC 19A.120.010 and .040 - were last amended in 2004 and any challenge to these provisions is untimely. County Response, at 52. In any event, the County contends, it is not inconsistent to recognize an existing EPF solid waste facility in a sub-area plan. *Id.*

The County points out that the siting of the LRI landfill over an aquifer was litigated all the way to the State Supreme Court, which decided the question of vesting in *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999). County Response, at 53, fn. 99.

The County reads “essential” to mean necessary for meeting a current need in the County or in a particular area of the County. The County states that the landfill is “essential” because the County currently has no other solid waste disposal arrangement. *Id.* at 53. However, the County contends that precluding other solid waste facilities in the Graham sub-area is appropriate because Pierce County has no future need. *Id.* Pierce County makes similar arguments with respect to siting group homes and sewage treatment facilities in the sub-area. *Id.* at 55-57.<sup>17</sup>

In reply, CROWD reiterates its insistence on “uniform, county-wide” criteria and process. CROWD Reply, at 5-7. CROWD cites CTED regulations and points out that the Courts “routinely consult GMA regulations in determining GMA compliance.” CROWD Reply, at 4, citing court consideration and deference to CTED regulations in *Lewis County, supra*, 157 Wn.2d at 501; *Des Moines v. PSRC*, 98 Wn.App. 836, 842 fn. 4 (1999), *Manke Lumber v. Diehl*, 91 Wn. App. 793, 807-08 (1998). CROWD cites CTED regulations concerning the siting of EPFs, at WAC 365-195-340 (CROWD Reply, at 7), and also in support of its argument that a failure-to-act challenge can be brought at any time after the statutory deadline has passed. CROWD Reply, at 5, fn. 1.

### Board Discussion

#### **Is Halmo Legal Issue 11 Abandoned? - NO.**

For this issue, Halmo adopts the CROWD arguments by reference. Halmo PHB, at 48. The County argues that Halmo’s issue should be dismissed as abandoned. County Response, at 50. Halmo replies that the Board requested at the PHC that the parties

---

<sup>17</sup> Sewage treatment facilities are not “essential” here, according to the County, because the Chambers Creek Wastewater Treatment Plant, located in the City of University Park, has more than enough capacity to serve the Graham area’s needs, and additional treatment facilities in the area would be inconsistent with the County’s General Sewerage Plan. *Id.* at 57. Under the Graham Plan, group homes are allowed in RAC, RNC and Urban Residential Moderate Density and mixed-use zones. *Id.* at 56. The County determined that group homes must be allowed as other single-family homes but “may be reasonably restricted in lower-density residential areas based on distinctions of size and intensity of use.” *Id.* at 55-56. The County Code distinguishes “family” (up to six unrelated individuals) from “group homes” (seven or more). “Group homes” are allowed in areas where services are more readily available, according to the County. *Id.*

07304c Halmo, et al v. Pierce County (September 28, 2007)

coordinate their arguments to the extent possible. Halmo Reply, at 11. The Board will allow the adoption of arguments by reference and declines to dismiss Halmo Legal Issue 11 as abandoned.

**Is the LRI Landfill “Essential?” – YES.**

CROWD argues that the LRI Landfill is not an essential public facility because the County has alternatives for its waste management – notably, long-haul disposal. The Board notes that opponents of the siting of EPFs often raise the possibility of alternative solutions. Most recently, in *Cascade Bicycle Club v City of Lake Forest Park*, CPSGMHB Case No. 07-3-0010c, Final Decision and Order (July 23, 2007), the City had enacted regulations that precluded the improvement of the Burke Gilman Trail to meet County standards. The City asserted that the trail was not an “essential” public facility because bicyclists have access to the highway as an alternative. *Cascade Bicycle*, at 11-12. The Board found that a hypothetical alternative to the facility did not make that facility any less essential. *Id.* So here, the fact that Pierce County may in the future adopt alternatives to extending its contract with LRI, does not obviate the “essential” status of the facility today.

**Is Recognition of an Existing EPF Compliant with RCW 36.70A.200? – YES.**

RCW 36.70A.200 requires each city and county to enact a process for siting EPF’s, and jurisdictions are barred from precluding EPFs.<sup>18</sup> The statute focuses on the challenge of *finding a location* (siting) for these controversial uses and requires adoption of a process for identifying and siting EPFs. The Board has held that the ban on preclusion of EPFs means cities and counties must allow EPFs not only to be sited, but to be improved and expanded as necessary. *Cascade Bicycle*, at 13.<sup>19</sup>

Pierce County’s Essential Public Facilities Element has five sections:

- PCC 19A.120.010 – Siting Process
- PCC 19A.120.020 - Participation
- PCC 19A.120.030 – Recognition of Existing EPFs**
- PCC 19A.120.040 – Siting Criteria
- PCC 19A.120.050 – Review Procedures

(Emphasis supplied).

---

<sup>18</sup> The provisions of Ordinance Nos. 2006-52s and 2006-53s that preclude certain EPFs in all or part of the Graham sub-area were not put before the Board in the Legal Issues in this case. However, this proceeding puts the County on notice that the EPF provisions in the Graham Plan, to the extent they might be applied in an effort to preclude an EPF, may not survive GMA scrutiny. See, Concurring Opinion of Board Member Pageler, *infra*.

<sup>19</sup> Citing *Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 988 P.2d 27 (1999) (Court of Appeals held that “siting” included expansion of an EPF – SeaTac Airport).

07304c Halmo, et al v. Pierce County (September 28, 2007)

**#07-3-0004c Final Decision and Order**

The policies include a process (.010), public participation (.020), siting criteria (.040) and a goal of standardized procedures with interlocal agreements (.050). The EPF policies also include a mechanism for recognizing existing EPFs through overlay zoning and inclusion in Section .030. As CROWD points out, there are many existing EPFs in Pierce County that are not yet listed in Section .030. That certainly reduces the County's credibility on this issue, but the Board is not persuaded that the County's approach violates the GMA.

The GMA requires that the County's plan "include a process for identifying and siting" EPFs. CROWD insists on a "county-wide process,"<sup>20</sup> but the statute does not say "county-wide." EPFs are in many cases unique facilities, with the location pre-selected by the proponent agency, so that the siting process is necessarily local, rather than county-wide. The Board finds and concludes that the County's action in recognizing the LRI Landfill as an existing EPF by acknowledging it in Section .030 and providing overlay zoning is compliant with RCW 36.70A.200.

### **Is the Overlay Consistent with the County's EPF Policies? – YES.**

CROWD contends that the EPF policies promise actions that have never been fulfilled by the County. Each EPF policy begins with an Objective:

“Establish a process...” (.010)

“Provide broad participation...” (.020)

“Establish siting criteria...”(.040)

CROWD contends that the County has never completed those planning activities. The County has never developed a county-wide process for identifying and siting EPFs, according to CROWD, and has not adopted county-wide siting criteria. CROWD argues that enacting an Overlay for the LRI Landfill in the absence of this county-wide plan was inconsistent with the County's EPF policies. CROWD PHB, at 15-16. CROWD asks the Board to invalidate and remand the Graham Plan and related zoning ordinance with instruction to the County to identify what kinds of facilities are locally essential and difficult to site and to devise and use a siting process that reflects the need for "county-wide uniformity" regarding the kind of facility under review. *Id.*

Specifically, CROWD asserts that the Pierce County Comprehensive Plan requires that, once the County identifies a type of facility as an EPF, it "shall" amend its development regulations to incorporate siting criteria for that type of facility. PCC 19A.120.010D. CROWD PHB, at 21; CROWD Reply, at 9. The County has yet to establish such "uniform, county-wide" standards for siting solid waste disposal facilities; therefore, CROWD argues, the overlay for the LRI landfill violates the consistency requirement of RCW 36.70A.070.

---

<sup>20</sup> CROWD's Legal Issue 13 calls for "a county-wide effort to identify and site solid waste facilities as EPFs."

07304c Halmo, et al v. Pierce County (September 28, 2007)

The Board reads the County’s EPF policies differently. The County’s Objective under Section .010 Siting Process is “Establish a process for identifying and siting EPFs,” and then the provisions that follow, in fact, constitute the process: ascertain and determine what facilities qualify as EPFs, conduct site evaluation analysis, incorporate siting criteria as amendments in development regulations, and use land-use permit processes. In Section .020 Participation, the County’s Objective is “Provide broad participation by affected agencies, interests and citizens,” and then the provisions that follow list three specific strategies. Similarly, the County’s Objective under Section .040 Siting Criteria is “Establish siting criteria for EPFs” and then the provisions that follow list the criteria that must be considered.

The Board does not find the County’s process or criteria to be incomplete – the Petitioners have not proved any failure-to-act. Further, the Board finds and concludes that neither the statute nor the County Comprehensive Plan imposes any additional requirements on the action the County took here – recognizing an existing EPF with an Overlay.

CROWD also calls out various siting criteria that the LRI Landfill Overlay allegedly violates. For example, the Comprehensive Plan indicates that siting criteria for EPFs in the rural area must consider the “planned capacity needs of the facility” and the “compatibility of nearby rural uses with the facility.” PCC 19A.120.040D. CROWD PHB, at 21-22. CROWD contends the overlay violates these criteria. *Id.* The County responds that the Overlay zone recognizes an existing facility; it does not “site” the landfill.

The Board concurs with the County. The Board is not persuaded that the County’s adoption of an Overlay recognizing an existing landfill as an EPF is inconsistent with Pierce County’s comprehensive plan EPF policies.

### **Conclusion**

The Board finds and concludes that the CROWD Petitioners have **failed to carry their burden** of demonstrating that the County’s action in adopting the Overlay for the LRI Landfill did not comply with RCW 36.70A.200 or was inconsistent with the County’s EPF Policies. Legal Issues 11, 13, and 15 are **dismissed**.

### **G. INTERNAL CONSISTENCY CROWD LEGAL ISSUES 14**

The PHO sets forth Legal Issue 14 as follows:

*14. Did Pierce County violate the RCW 36.70A.070 requirement for internal consistency in its comprehensive plan by adopting a Graham Community Plan as an element of the comprehensive plan, when the Graham Community Plan*

*includes an “Essential Public Facility - Solid Waste Facility Overlay” that is inconsistent with numerous comprehensive plan policies, including but not limited to policies to: recognize and protect local neighborhood values; prioritize and protect important aquifers in order to maintain or improve water quality; evaluate new technologies for disposal of residential solid waste; and reduce dependency on landfills?*

### **Applicable Law**

RCW 36.70A.070 provides the mandatory elements of a comprehensive plan. The preamble states the requirement for internal consistency among the elements of a plan:

The comprehensive plan ... shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. *The plan shall be an internally consistent document* and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

Emphasis supplied.

### **Discussion**

#### *Positions of the Parties*

Regarding Legal Issue 14, CROWD cites to the following Pierce County Comprehensive Plan provisions.

- PCC 19A.20.090D – recognize and protect local neighborhood character
- PCC 19A.60.050 – protect important aquifers to protect water quality
- PCC 19A.90.060D – protect the environment while providing solid waste disposal
- PCC 19A.90.060D(2) – reduce dependency on landfills
- PCC 19A.90.060A(2) – evaluate new solid waste disposal technologies

CROWD PHB at 24-25. CROWD argues that the Overlay recognizing the LRI Landfill is not consistent with these Comprehensive Plan policies.

The County responds that the Comprehensive Plan recognizes the sole source aquifer underlying the LRI Landfill and has adequate protective provisions at Standard 55.1.8. County Reponse, at 42. Further, the County asserts that the overlay is not inconsistent with reducing dependence on landfills; current solid waste disposal needs must be met, while recycling policies and other waste-reduction initiatives go forward. *Id.*

In reply, CROWD charges the County with a “stubborn refusal to reduce dependency on landfills.” CROWD Reply, at 12. “The single-minded focus on perpetuating an ugly,

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

Page 34 of 60

smelly, environmentally threatening landfill, without even trying to fulfill the Comprehensive Plan policies to evaluate new disposal technologies and reduce landfill dependency, was clearly erroneous ...” *Id.*

### Board Discussion

The Board notes that the Overlay proposal, when first submitted by County Solid Waste Manager Steve Wamback, was designed to ensure consistency between the Graham Plan and the County’s Capital Facility Element. PC 2-75, CROWD Ex. 9. Mr. Wamback pointed out that the community plan for the Graham Area would make the LRI Landfill non-conforming. However, the County’s Capital Facility Plan and Solid Waste Management Plan identify LRI as providing the solid waste disposal capacity for the County. Recognizing the existing landfill as an EPF by means of an Overlay zone was proposed *in order to ensure consistency* between the Graham sub-area plan and the Capital Facility Plan. *Id.*

Recognizing the existing landfill is also consistent with the County’s solid waste policies. While CROWD quotes the County’s goal of “reducing dependency on landfills,” that language is embedded in policies that acknowledge the need to provide these facilities within the County. PCC 19A.90.060D provides in part:

UT-SW Objective 19. Protect the environment *while providing for solid waste facilities.*

1.Design and locate solid waste facilities with proper consideration for present and future health and environmental impacts, while *recognizing the need to provide these facilities within the County.*

2.Provide an environmentally safe and reliable disposal system(s) which protects human health and reduces dependency on landfills.

(Emphasis supplied).

The Board finds that Pierce County’s recognition of the LRI Landfill with an Overlay designation was necessary to ensure consistency of the Graham Plan with the County’s Capital Facility Plan and Solid Waste Management Plan. The Board is not persuaded that Pierce County’s recognition of the LRI Landfill with an Overlay designation was inconsistent with Pierce County’s Comprehensive Plan.

### **Conclusion**

The Board finds and concludes that Petitioners have **failed to carry their burden** of demonstrating that Pierce County’s adoption of an Overlay designation recognizing the LRI Landfill as an EPF created an inconsistency with the comprehensive plan or failed to comply with RCW 36.70A.070(preamble). Legal Issue 14 is **dismissed**.

## **H. PROTECTING THE RURAL AREA CROWD LEGAL ISSUES 12, 16, AND 17**

The PHO sets forth Legal Issue Nos. 12, 16, and 17 as follows:

*12. Did Pierce County violate RCW 36.70A.070(5)(b) by failing to provide for essential solid-waste facilities, including solid waste handling facilities, in the rural element of its comprehensive plan?*

*16. Did Pierce County violate RCW 36.70A.070(5)(c) by adopting a Graham Community Plan that fails to protect the rural character of the area?*

*17. Did Pierce County violate the RCW 36.70A.011 mandate to “enhance the rural sense of community and quality of life” by adopting an “Essential Public Facility - Solid Waste Facility Overlay” to the Graham Community Plan over the considered objections of the host community?*

### **Applicable Law**

RCW 36.70A.070 sets forth the mandatory elements of comprehensive plans. With respect to the Rural Element, Section .070(5)(b) provides, in relevant part:

...The rural element shall provide for a variety of rural densities, uses, *essential public facilities*, and rural governmental services needed to serve the permitted densities and uses. ...

(Emphasis supplied.) CROWD contends that the Rural Element of the County’s Plan is deficient because it fails to provide for essential public facilities.

RCW 36.70A.070(5)(c) provides, in relevant part:

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by: (i) Containing or otherwise controlling rural development; (ii) *Assuring visual compatibility of rural development with the surrounding rural area*; (iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area; (iv) *Protecting* critical areas, as provided in RCW 36.70A.060, and surface water and *ground water resources*; and (v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

(Emphasis supplied). RCW 36.70.A.030(15) defines “rural character” as follows:

(15) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

(a) In which open space, the natural landscape, and vegetation predominate over the built environment;

(b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;

(c) That provide visual landscapes that are traditionally found in rural areas and communities;

(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;

(e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;

(f) That generally do not require the extension of urban governmental services; and

(g) That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

CROWD contends that the Graham Plan is non-compliant with the requirement to protect rural character by assuring visual compatibility and protecting groundwater resources.

RCW 36.70A.011 sets out legislative findings concerning rural lands:

**36.70A.011 Findings — Rural lands.**

The legislature finds that this chapter is intended to recognize the importance of rural lands and rural character to Washington's economy, its people, and its environment, while respecting regional differences. Rural lands and rural-based economies enhance the economic desirability of the state, help to preserve traditional economic activities, and contribute to the state's overall quality of life. ...

Finally, the legislature finds that in defining its rural element under RCW 36.70A.070(5), a county should foster land use patterns and develop a local vision of rural character that will: Help preserve rural-based

economies and traditional rural lifestyles; ... and enhance the rural sense of community and quality of life.

## Discussion and Analysis

### Legal Issue 12

CROWD argues that the Rural Element of the County Plan does not provide for essential public facilities, as required by RCW 36.70A.070(5)(b). CROWD PHB, at 23. In fact, according to CROWD, the County's Rural Element imposes conditions on EPFs that cannot be met. PC Code 19A.40.101G allows an identified EPF in a rural area only when (a) it depends by its very nature on being in a rural setting, (2) does not require urban-level services, (c) is compatible with functional and visual character of the immediate rural area, and (4) meets site development and performance standards. CROWD points out that these criteria would eliminate many major transportation and utility facilities, for example. *Id.*

CROWD argues that the GMA and case law require that EPFs must be allowed in the rural area even if they are not dependent on rural location, citing *Vashon-Maury, et al, v. King County*, CPSGMHB Case No. 95-3-0008, Final Decision and Order (Oct. 23, 1995), at 48-50. Thus, CROWD concludes, Pierce County's Overlay for the LRI Landfill and preclusion of other solid waste handling facilities in the Graham sub-area violates RCW 36.70A.070(5)(b).

The County points out that the Rural Element of its Comprehensive Plan, adopted in 2004, is not subject to appeal here; the only issue is the Graham Sub-Area Plan. County Response, at 51.

The Board concurs with Pierce County. CROWD's collateral attack on the Rural Element of the Comprehensive Plan is untimely and will not be considered by the Board.<sup>21</sup>

### Legal Issue 16

CROWD's Legal Issue 16 asserts that allowing the LRI Landfill by enacting the Overlay fails to protect rural character. CROWD points out that the GMA requirement to protect rural character – RCW 36.70A.070(5)(c) - includes “assuring visual compatibility of rural development with the surrounding area,” (*ii*), and protecting “surface and groundwater resources” (*iv*). An unsightly and environmentally-risky garbage dump next to Woodbrook Estates does not comply with this requirement, according to CROWD. CROWD PHB, at 26.

---

<sup>21</sup> Pierce County is cautioned not to read this decision as ruling that its Rural Element complies with the GMA requirements as to EPFs. To the contrary, this proceeding puts the County on notice that the EPF provisions in its Rural Element, to the extent they might be applied in an effort to preclude an EPF, may not survive GMA scrutiny. See, Concurring Opinion of Board Member Pageler, *infra*.

07304c Halmo, et al v. Pierce County (September 28, 2007)

#07-3-0004c Final Decision and Order

Page 38 of 60

The County says that the Graham Plan protects rural land by designating the majority of the planning area “Rural Sensitive Resource,” a more protective designation than the former rural zoning. Further, the County asserts that the Graham Plan does not “provide for” a landfill over a sole source aquifer; rather, the landfill predated the Comprehensive Plan and the GMA. County Response, at 59-60. The County states that the Comprehensive Plan recognizes the sole source aquifer underlying the LRI Landfill and has adequate protective provisions at Standard 55.1.8. County Reponse, at 42.

The Board notes that land uses which vested prior to enactment of the GMA sometimes create intractable difficulties in achieving GMA goals. See, e.g., *Bremerton II v. Kitsap County*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order, (Aug. 9, 2004), at 23 (pre-GMA platting of small lots in the rural area); *Kaleas v. City of Normandy Park*, CPSGMHB Case No. 05-3-0007c, Order on Remand (July 31, 2006) (pre-GMA restrictive covenants requiring over-sized lots in the city).

The Petitioners stress the incompatibility of a large solid waste landfill with the elements of rural character described in RCW 36.70A.030(15) and required to be protected in RCW 36.70A.070(5)(c). However, the LRI Landfill has been determined by the courts to have vested prior to enactment of the GMA, *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 976 P.2d 1279 (1999). Further, the State Supreme Court has deferred to County consideration of vested land uses in enacting comprehensive plans. *Quadrant Corporation v. State of Washington Growth Management Hearing Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005).

As for protecting the sole source aquifer, CROWD has provided no factual record to counter the County’s recital of its regulations and monitoring to protect groundwater. The County – and the Board – acknowledge that siting a solid waste landfill over a sole source aquifer would not be allowed under today’s federal and state regulations. Petitioners have not demonstrated how that makes recognition of the existing landfill through an Overlay zone somehow violative of the GMA. The Board is not persuaded that Pierce County’s adoption of an Overlay recognizing the permitted and operating landfill violated the GMA requirements to adopt measures to protect rural character.

### Legal Issue 17

CROWD’s Legal Issue 17 alleges non-compliance with RCW 36.70A.011, the Legislature’s findings concerning rural lands. CROWD argues that the “local vision was cast aside in favor of a top-down, staff-driven vision of Graham as the long-term dumping ground of Pierce County.” CROWD PHB, at 26.

Pierce County responds that RCW 36.70A.011 contains legislative findings. No enforceable duty is created by legislative findings, the County asserts; therefore Legal Issue No. 17 must be dismissed. County Response, at 60, citing *Keesling v. King County*, CPSGMHB Case No. 05-3-0001, Final Decision and Order (July 5, 2005), at 58.

The Board concurs with the County. Legislative findings set out in the statute do not create an independent duty upon which a GMA appeal may be based.

### **Conclusion**

The Board finds and concludes that CROWD Legal Issue No. 12 is an untimely challenge to the Rural Element of the Pierce County Comprehensive Plan. Legal Issue No. 12 is **dismissed**.

The Board finds and concludes that Petitioners have **failed to carry their burden** of proving that Pierce County's enactment of Ordinance Nos. 2006-52s and 2006-53s does not comply with RCW 36.70A.070(5). Legal Issue 16 is **dismissed**.

The Board finds and concludes that RCW 36.70A.011 sets forth legislative findings which do not create an enforceable duty. Legal Issue 17 is **dismissed**.

### **I. SEPA CROWD LEGAL ISSUES 19 AND 20**

The PHO sets forth Legal Issues 19 and 20 as follows:

*19. Did Pierce County violate SEPA regulations, including WAC 197-11-230 and WAC 197-11-400, by delaying purported analysis of the environmental impacts of the solid-waste overlay to the Graham Community Plan until less than a month before final adoption of the plan, when it was too late for public comment?*

*20. Did Pierce County violate SEPA regulations including WAC 197-11-402 by adopting an "Essential Public Facility - Solid Waste Facility Overlay" that authorized new land uses and that was not within the range of alternatives discussed in the draft environmental impact statement for the Graham Community Plan?*

### **Applicable Law**

The applicable provisions of the WAC cited by the Petitioners address the integration of the GMA and SEPA process and both the purpose and general requirements of an Environmental Impact Statement [EIS].

In general, WAC 197-11-230 provides that a GMA/SEPA integrated document must be issued for public and agency reviewed 60 days prior to final adoption of comprehensive plans and development regulations. WAC 197-11-400 states the purpose of an EIS is to ensure that SEPA policies are an integral part of a governmental action; that decision makers are informed of impacts, reasonable alternatives, and mitigation measures in a clear and concise format; and that agencies and the public have an opportunity to

comment. WAC 197-11-402 sets forth the general requirements for an EIS including a discussion of probable impacts and reasonable alternatives.

## Discussion

### Positions of the Parties

Under Legal Issue 19, CROWD asserts that Pierce County failed to analyze alternatives to (1) the solid waste overlay and (2) the gas-to-energy proposals. CROWD PHB, at 28-29. CROWD states that the overlay proposal received no SEPA review until six months after the close of the SEPA comment period and the gas-to-energy proposal was not made available for comment until after the FEIS was issued. *Id.*

Under Legal Issue 20, CROWD asserts that the overlay and gas-to-energy provisions were not within the range of alternatives reviewed in the DEIS. Further, both proposals were issued by the Solid Waste Division on February 15, 2006 and submitted to the Planning Commission by PALS on February 22, 2006, one week before the close of the SEPA comment period. According to CROWD, the County violated SEPA by failing to revise the scope of the DSEIS. CROWD PHB, at 26-30.

The County in response moves to dismiss Legal Issues 19 and 20 arguing that CROWD has failed to demonstrate standing to bring a SEPA claim. The County states that CROWD can show no injury that is immediate, concrete and specific; in other words, there is no showing of “injury in fact” as required to meet the *Trepanier* test. County Response, at 61-62. The County describes three actions:

- Designation of the area RSR – (more protective than prior zoning)
- Overlay over “pre-existing, fully operational but highly regulated, vested and conforming LRI landfill.”
- Conditional allowance of new use levels within previously-allowed Use Types (electric generating facilities and natural gas facilities) within the pre-existing Use Category – Utilities. The new use levels are conditioned on additional site-specific and project-specific SEPA analysis.

*Id.* The County states that these three actions were reviewed in the FSEIS, though the review was generalized because the County’s action was a non-project action. *Id.* at 67-68.

The County states that the Graham Plan as it came from the Community Planning Board proposed to ban the landfill, so no analysis was required. The County points to WAC 197-11-408(5) which requires the scope of the EIS to be revised “if substantial changes are made later in the proposal.” The County asserts that the overlay is not a *substantial* change but is simply the No Action alternative. County Response, at 71. With respect to the new use levels for gas-to-energy facilities, these would require permit application, environmental review at the project-specific level, and a Tacoma-Pierce County Health

Department determination that the applied-for method qualifies as Best Available Control Technology. Thus the County argues that revising the scope of the DSEIS was unnecessary. *Id.*

In rebuttal, CROWD states that the County is barred from raising the standing question by virtue of a stipulation documented in the Settlement Status Report filed with this Board on June 11, 2007:

The parties have agreed to proceed before the board with all issues, including the SEPA issues raised by Petitioners related to the Graham Community Plan and implementing regulations. Pierce County has agreed that it will not assert any jurisdictional defenses to Petitioners' SEPA issues, including *res judicata* and collateral estoppel.

Settlement Status Report, paragraph 5. CROWD Reply, at 12-13, citing case law to the effect that standing is a jurisdictional issue. CROWD contends that the County's motion to dismiss is barred by the stipulated agreement or, alternatively, that Petitioners have standing even under the *Trepanier* test. *Id.* at 14-15. CROWD appends the Declarations of Viki Steiner and Andy Bales, neighbors of the landfill, who testify to odors that keep them indoors, garbage-truck traffic that interferes with their daily driving, and even "vibrations shaking the very foundations of their homes." *Id.* The County's Overlay action has the effect of extending this impact over the next 20 years, when it would otherwise end as soon as 4 years when the County contract expires, according to CROWD. *Id.*

CROWD states that the FEIS "barely mentioned" alternatives to the gas-to-energy facilities at the landfill. CROWD Reply, at 16. Further, CROWD argues that the Overlay proposal was a "substantial" change to a DEIS that banned all landfills in the sub-area plan. *Id.* at 17.

### Board Discussion

#### **Did the CROWD PFR allege standing to bring a SEPA claim? NO.**

In its Response Brief, the County moved to dismiss Legal Issues 19 and 20 in their entirety asserting that CROWD does not have standing to raise SEPA-based challenges because, due to the non-project nature of the action, CROWD has not been injured. County Response, at 60-61. In reply, CROWD alleges that the County's motion to dismiss is barred by the Stipulated Settlement Status Report (Settlement Report) submitted to the Board on June 11, 2007 which provided:

The parties have *agreed to proceed before the board with all issues, including the SEPA issues* raised by Petitioners related to the Graham Community Plan and implement regulations. Pierce County has agreed

that it *will not assert any jurisdictional defenses to Petitioners' SEPA issues*, including res judicata and collateral estoppel.

CROWD Reply, at 12 (citing Settlement Report, at 2) (emphasis in Reply Brief).

For the County to now assert that CROWD does not have standing is contrary to the agreement between the parties represented by the Settlement Report. However, the Board does not enforce settlement agreements.<sup>22</sup> CROWD is effectively asking the Board to enforce an agreement entered into by the parties in regard to the SEPA-based issues. This, the Board will not do. Rather, the Board raises a threshold question: Did CROWD's PFR satisfy the Board's Rules of Procedures requirement of containing "a statement specifying the type and basis of the petitioner's standing"? WAC 242-02-210(2)(d). The Board concludes that it did not.

This Board has repeatedly ruled that the GMA and SEPA are two distinct statutes with their own standing requirements, with each required to be met by petitioners. See, e.g., *Robison v. Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order on Motions, (Feb. 16, 1995) at 6-7.

For SEPA challenges, the Board applies the two-part standing analysis developed by the courts – the *Leavitt/Trepanier* test. *West Seattle Defense Fund (WSDF I) v. Seattle*, CPSGMHB Case No. 94-3-0016, Order on Motions (Dec. 30, 1994) at 6-7. The *Leavitt/Trepanier* test requires that a petitioner demonstrate:

1. The petitioner's supposedly endangered interest must be arguable within the *zone of interests protected by SEPA*; and
2. The petitioner must allege an *injury-in-fact*; that is, the plaintiff must present sufficient evidentiary facts to show that the challenged SEPA determination will cause the petitioner *specific and perceptible harm*. A petitioner who alleges a *threatened injury* rather than an existing injury must also show that the injury will be *immediate, concrete, and specific*; a *conjectural or hypothetical injury will not confer standing*.

*Hood Canal Environmental Council, et al v. Kitsap County*, CPSGMHB Case No. 06-3-0012, Order on Motions, (May 8, 2006) at 7 (emphasis in original).

Petitioners must specify within their PFR which method of standing allows them to proceed with a case before the Board and must provide information that supports the standing allegation (i.e. zone of interest, injury). See *Robison, supra*, ("*None of the petitioners has alleged an injury in fact*"); *Hapsmith v. Auburn (Hapsmith I)*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996) at 16.

---

<sup>22</sup> Any Board review of a settlement agreement is limited to a challenge to the legislative action taken to implement such an agreement. See, *McNaughton Group v. Snohomish County*, CPSGMHB Case No. 06-3-0027, Order on Motions, (Oct. 30, 2006) fn. 13 at 15. CROWD does not assert that the County took a challengeable legislative action in regard to the agreement.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

Although the Board schedules a motions practice, challenges to SEPA standing may be brought at any time by either party or by the Board *sua sponte*. *Pilchuck-Newberg Organization v. Snohomish County*, CPSGMHB Case No. 04-3-0018, Final Decision and Order (Apr. 28, 1995) at 19.

In response to a challenge regarding SEPA standing, the Board will grant a petitioner the opportunity to *provide additional evidence* of the basis for SEPA standing (CROWD Reply, fn. 3 at 14), but here CROWD *failed to even assert* SEPA standing within its PFR – either by citing to it or alleging facts clearly indicating the basis for such standing. Instead, CROWD relied solely on RCW 36.70A.280(2)(b) (participation standing) with the exception of a single reference in the PFR that it had “joined in an appeal of the environmental impact statement for the Graham Community Plan” (CROWD PFR, at 6).

Section V of the PFR provides CROWD’s statement in regard to standing:

Petitioners have standing under RCW 36.70A.280(2)(b) because they and their members submitted written materials and made oral comments to the Pierce County Council and Pierce County Planning Commission as part of the public process regarding the challenged ordinances. Petitioners additionally and alternatively have standing because the Graham Community Plan ordinances adversely affect their organizational interests and the interests of their members. Members of Concerned Residents on Waste Disposal (“CROWD”), Woodbrook Estates Homeowners Association (“WEHA”), and Ohop Grange include residents and property owners of the Graham Community Plan area. State Senator Rasmussen is an elected representative of the 2<sup>nd</sup> District, which includes the Graham Community Plan area, and resides and owns property within the plan area. Also, Petitioners joined in an appeal of the environmental impact statement for the Graham Community Plan that is pending before the Pierce County Hearing Examiner.

CROWD asserts that RCW 36.70A.280(1) gives the Board jurisdiction over petitions alleging GMA or SEPA violations and that it has satisfied GMA standing requirements due to its extensive participation in the County’s planning process regarding the Graham Community Plan and Overlay. *Id.* at 13. CROWD asserts that the Board may not impose standing requirements that vary from those explicitly outlined in the GMA by borrowing standing requirements from non-GMA law. CROWD Reply, at 13-14, citing *Wells v. WWGMHB*, 100 Wn. App 657, 676 (2000).<sup>23</sup>

---

<sup>23</sup> CROWD’s reliance on this case is misplaced as it asserts that the Court’s holding would bar the application of accepted SEPA standing analysis to Board proceedings because it would “render meaningless the standing provision set forth in RCW 36.70A.280(b)(2).” However, in *Wells*, the Court was considering the application of RCW 34.05 (Administrative Procedures Act), more specifically, the distinction between “issue,” “matter,” and “enactment” – and exactly what a petitioner needed to do in order to achieve participation standing under the GMA. The Court determined that “issue” was a technical

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

The Board notes that it has been applying the courts' *Leavitt/Trepanier* test to SEPA challenges consistently since the mid-1990s.<sup>24</sup> Therefore, despite CROWD's plea to the contrary, the Board continues to adhere to the application of this standing test when a petitioner asserts, as here, that a jurisdiction has acted in violation of SEPA.

Failure to allege SEPA standing in the PFR is grounds for the Board to dismiss a SEPA claim. *MBA/Brink*, CPSGMHB Case No. 02-3-0010, Order on Motions (Oct. 21, 2001), at 5-6; *Hensley VI v. Snohomish County*, CPSGMHB Case No. 03-3-0009c, Order on Motions (May 19, 2003) at 11; *Bremerton II v. Kitsap County*, CPSGMHB Case No. 04-3-0009c, Order on Motions (Apr. 22, 2004) at 6-7. CROWD's PFR did not assert SEPA standing. Further, no allegations were made by CROWD in the PFR as to an injury-in-fact - specific, speculative, or otherwise - that its members would experience as a result of the County's actions. This deficiency alone is grounds for the Board to dismiss Petitioners' SEPA claims and therefore, the County's Motion to Dismiss Legal Issues 19 and 20 is **granted**.

The Board notes that even if CROWD had provided a statement in its PFR in regard to an injury-in-fact pursuant to SEPA, CROWD still would have not satisfied the *Trepanier* analysis because the harms CROWD asserts are speculative in nature. CROWD asserts that its members "will be directly and severely harmed by the Overlay's extension of the present land use at the LRI site" and submits two declarations in support. CROWD Reply, at 15; Declaration of Stiener; Declaration of Bales. The Board acknowledges that members of CROWD live within close proximity to the existing LRI landfill and experience unpleasant impacts from the facility - including odors, truck traffic, and vibrations.<sup>25</sup> However, CROWD's SEPA issues are grounded in the County's adoption

---

legal issue (at 671); "matter" referred to a subject or topic of concern or controversy (at 673); and "enactment" was an action adopted by the jurisdiction (at 672).

In addition, the *Wells* Court affirmed this Board's decision in *Alpine v. Kitsap County*, CPSGMHB Case No. 98-3-0032c, finding that for petitioners to have participation standing before the Board they must demonstrate a nexus between the "matters" on which they participated before the governmental body and the "issues" presented to the Board for resolution. *Wells*, 100 Wn. App at 673-765. Although the GMA provides for separate methods under which a petitioner may obtain standing, the Board does not read the *Wells* case as prohibiting the application of tests developed by the Courts to analyze a petitioner's standing to raise issues based on a particular statute for which the Board has limited jurisdiction - here, SEPA.

<sup>24</sup> See, e.g., *Dyes Inlet v. Kitsap County*, CPSGMHB Case No. 07-3-0021, Order on Motions (May 3, 2007) at 3-6 (petitioner failed to allege SEPA standing in PFR, and subsequent declarations demonstrated only speculative injury); *McNaughton Group v. Snohomish County*, CPSGMHB Case No. 06-3-0027, Order on Motions (Oct. 30, 2006), at 11-14 (petitioner failed to allege SEPA standing in PFR, and subsequent allegations did not meet the "zone of interest" test); *Buckles v. King County*, CPSGMHB Case No. 06-3-0022c, Final Decision and Order (Nov. 12, 1996) at 23 (obtaining GMA standing does not automatically bestow SEPA standing); *Citizens for Responsible Growth v. Kitsap County*, CPSGMHB Case No. 03-3-0013, Order on Motions (Aug. 15, 2003), at 11 (threatened injuries are speculative).

<sup>25</sup> Injuries from the existing landfill were articulated in two declarations. Ms. Steiner, who lives approximately one-half mile from the existing landfill, states that environmental impacts experienced by her included odors, truck traffic, and potential contamination of the aquifer. Declaration of Steiner. Mr. Bales, who lives adjacent to the landfill, alleges similar environmental impacts - odor, drinking water

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

of the Overlay which does nothing more than recognize an existing and operational landfill for which the environmental impacts were reviewed during the original action siting the landfill. The Overlay is simply the “No Action” alternative.

CROWD’s argument is essentially that the Overlay authorizes the continuation of the landfill which they had “hoped and expected” would be terminated in four years when the County’s contract with LRI expires and, therefore, the impacts they are experiencing now will continue for years to come. The Board notes that CROWD’s own language – “hoped and expected” – is speculative in nature; the Overlay does not change the types of impacts which had been previously evaluated nor does it shift the use of the land to a more intense category. *See MBA/Brink v. Pierce County*, CPSGMHB Case No. 02-3-0010, Order on Motions, (Oct. 21, 2002) fn.6 at 5-6. Consequently, the Board concludes that the threatened injuries alleged by CROWD are not “immediate, concrete or specific;” the threatened injuries are “conjectural, speculative and hypothetical.” CROWD would not have satisfied the second prong of the two-part test and therefore would have no standing to raise SEPA claims in this proceeding.

The Board further notes that the County’s action included the addition of new Public Facilities Permit (PFP) use categories including Electrical Generation Facility and Natural Gas Facilities which are intended to address Best Available Control Technology (BACT) requirements for the landfill and to allow for changes to the manner in which the landfill operator manages the gasses created through waste decomposition. Subsequent development of these types of facilities is subject to review under the County’s Conditional Use Permit process, and all environmental impacts would be reviewed during the site-specific permit approval process. Again, there are no “immediate, concrete, or specific” environmental impacts.

Finally, the Board notes that even if Crowd’s SEPA standing had been (a) alleged and (b) proved, it seems unlikely that a violation of the SEPA review process would have been found, given that the one alleged violation – the Overlay – was essentially the “no action” alternative, and the other alleged violation – the gas-to-energy provision – is *more* protective of the environment and will be subject to project-specific SEPA analysis.

### **Conclusion**

The Board finds and concludes that CROWD lacks standing to challenge the County’s action under SEPA. CROWD Legal Issues 19 and 20 are **dismissed**.

### **VI. INVALIDITY**

The Board has previously held that a request for an order of invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King*

---

contamination, and traffic - in addition to visual impacts, vibrations, dust, and gas flarings. Declaration of Bales. The Board notes that although both Declarations allege drinking water contamination, no evidence was submitted to support this allegation.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

**#07-3-0004c Final Decision and Order**

*County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. The Halmo Petitioners here have requested the Board to find certain provisions of the challenged Ordinances invalid. See Halmo PHB, at 12, Halmo Reply, at 3.

### **Applicable Law**

The GMA's Invalidation Provision, 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 county. 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 county or city or to related construction permits for that project.

### **Discussion and Analysis**

#### *UGA Expansion.*

In enacting the Graham Plan, Pierce County expanded the UGA to allow 53 acres of newly-designated "Employment Center" along Meridian Avenue, south of 200<sup>th</sup>. The anticipated use is salvage yard and vehicle storage facility. The UGA expansion was enacted without review and recommendation from the Pierce County Regional Council, as required by County-wide Planning Policies prior to any UGA expansion. The Board has found that the County's adoption of the UGA expansion was **clearly erroneous** and **does not comply** with RCW 36.70A.210 and is not consistent with the CPPs. The Board **remands** the Ordinances to the County to take legislative action to bring its plan and development regulations into compliance with the GMA as set forth in this Order.

The Board is empowered to make a determination of invalidity with respect to non-compliant city or county ordinances when it finds that their further implementation would substantially interfere with the goals and requirements of the Act. Invalidation is

particularly appropriate to prevent vesting of land uses that would otherwise thwart the purposes of the GMA.

GMA Planning Goal 2 provides:

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

The Board finds and concludes that the County’s expansion of the UGA in the Graham Plan by creating an “Employment Center” at Meridian and 200<sup>th</sup>, absent review and recommendation of the PCRC, is an “inappropriate conversion” of land that thwarts Goal 2 of the GMA. The Board is persuaded that the enactment substantially interferes with and **was not guided by** GMA Planning Goal 2. The Board therefore enters a **determination of invalidity** for those sections of Ordinance Nos. 2006-52s and 2006-53s which expand the UGA to create an “Employment Center” at 200<sup>th</sup> and Meridian.

*Graham RAC Logical Outer Boundaries*

In enacting the Graham Plan, Pierce County adopted boundaries for the Graham RAC that do not comply with the criteria for logical outer boundaries of a LAMIRD as set forth in RCW 36.70A.070(5). The Board has found that the County’s adoption of the logical outer boundaries of the Graham RAC, in Section -- of Ordinance --, was **clearly erroneous** and **does not comply** with RCW 36.70A.070(5)(d)(iv). The Board **remands** the Ordinances to the County to take legislative action to bring its plan and development regulations into compliance with the GMA as set forth in this Order.

The Board is empowered to make a determination of invalidity with respect to non-compliant city or county ordinances when it finds that their further implementation would substantially interfere with the goals and requirements of the Act. RCW 36.70A.302(1)(b). Invalidity is particularly appropriate to prevent vesting of land uses that would otherwise thwart the purposes of the GMA.

GMA Planning Goal 2 provides:

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

The Board finds and concludes that the County’s action in adopting “logical outer boundaries” for the Graham RAC that do not meet GMA criteria is likely to result in “inappropriate conversion of undeveloped land into sprawling, low-density development” so as to thwart Goal 2 of the GMA. The Board is persuaded that the enactment substantially interferes with and **was not guided by** GMA Planning Goal 2. The Board therefore enters a **determination of invalidity** for those sections of Ordinance Nos. 2006-52s and 2006-53s which establish the boundary of the Graham RAC.

## Conclusion

With respect to Ordinance Nos. 2006-52s and 2006-53s, in particular, the UGA “Employment Center” expansion and the Graham RAC “logical outer boundaries,” the Board makes a finding of **noncompliance** and issues an order of **remand**. The Board further **enters an order of invalidity** for Ordinance Nos. 2006-52s and 2006-53s with respect to the UGA expansion and the Graham RAC boundaries.

## VII. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. Pierce County’s action in expanding the UGA in the Graham Community Plan to accommodate an Employment Center at Meridian Avenue and 200<sup>th</sup> Street East was inconsistent with County-wide Planning Policies and **did not comply** with RCW 36.70A.210. The Board **remands** Ordinance Nos. 2006-52s and 2006-53s, specifically those sections expanding the UGA, to Pierce County to take legislative action to bring the Graham Community Plan into compliance with the GMA.
2. Pierce County’s action in adopting the logical outer boundary for the Graham RAC was **clearly erroneous** and **did not comply** with RCW 36.70A.070(5)(d)(iv). The Board **remands** Ordinance Nos. 2006-52s and 2006-53s, specifically those sections establishing the boundaries for the Graham RAC, to Pierce County to take legislative action to bring the Graham Community Plan into compliance with the GMA. However, Halmo Petitioners **failed to carry their burden** of demonstrating that the *uses* permitted in the Graham RAC were non-compliant with RCW 36.70A.070(5)(d).
3. Pierce County’s actions in expanding the UGA and in setting the logical outer boundary for the Graham RAC **were not guided by** GMA Planning Goal 2. The Board has found that vesting of projects under those provisions would substantially interfere with the Goal of reducing sprawl. The Board therefore enters a determination of **invalidity** with respect to those provisions of Ordinance Nos. 2006-52s and 2006-53s.
4. Pierce County’s action in amending the Upper Nisqually Community Plan and other community plans in Ordinance No. 2006-53s, Exhibit A, did not comply with RCW 36.70A.035. The Board remands Exhibit A of Ordinance No. 2006-53s to Pierce County to take legislative action to comply with the GMA.
5. Except as set forth in Paragraph 1, 2, and 4 above, the Halmo Petitioners **failed to carry their burden of proving** that the County’s process in adopting Ordinance Nos. 2006-52s and 2006-53s did not comply with RCW 36.70A.035 and .140 or that the enactments failed to comply with RCW 36.70A.070(5) or were inconsistent with PCC 19A.20.050. Except as indicated, Halmo Legal Issues 7, 8, and 10 are **dismissed**.

6. The CROWD Petitioners have **failed to carry their burden** of proving that Pierce County's enactment of Ordinance Nos. 2006-52s and 2006-53s did not comply with RCW 36.70A.035 and .140, RCW 36.70A.011, RCW 36.70A.070(preamble) or .070(5), RCW 36.70A.200 or was inconsistent with the County's EPF Policies or other elements of the County's Comprehensive Plan. CROWD Legal Issues 12-20 and Halmo Legal Issue 11 are **dismissed**.
7. The CROWD Petitioners lack standing to challenge the County's action under SEPA. CROWD Legal Issues 19 and 20 are **dismissed**.
8. The Board sets the following schedule for the County's compliance:
  - The Board establishes **February 1, 2008**, as the deadline for Pierce County to take appropriate legislative action.
  - By no later than **February 15, 2008**, Pierce 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**). By this same date, the County shall also file a "**Compliance Index**," listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
  - By no later than **February 29, 2008**,<sup>26</sup> the Petitioners may file with the Board an original and four copies of Response to the County's SATC.
  - By no later than **March 7, 2008**, the County may file with the Board a Reply to Petitioner's Response.
  - Each of the pleadings listed above shall be simultaneously served on the other parties to this proceeding.
  - Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **March 13, 2008, at 2:00 p.m.** The hearing will be held at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the County takes the required legislative action prior to the February 1, 2008, deadline set forth in this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 28th day of September, 2007.

---

<sup>26</sup> February 29, 2008, 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 County's remand actions comply with the Legal Issues addressed and remanded in this FDO.

*07304c Halmo, et al v. Pierce County (September 28, 2007)*

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

---

David O. Earling  
Board Member

---

Edward G. McGuire, AICP  
Board Member

---

Margaret A. Pageler  
Board Member [Board Member Pageler files a  
separate concurring opinion]

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.<sup>27</sup>

---

<sup>27</sup> Pursuant to RCW 36.70A.300 this is a final order of the Board.

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

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

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

### **Concurring Opinion of Board Member Margaret Pageler**

I concur in all respects with the conclusions drawn by my colleagues in this matter. I write separately to address Pierce County's preclusion of certain essential public facilities in the Graham sub-area.

Ordinance Nos. 2006-052 and 2006-053 ban the siting of solid waste handling facilities (other than the LRI Landfill), sewage treatment facilities, and group homes in all or parts of the Graham sub-area. RCW 36.70A.200(5) states unequivocally:

No local comprehensive plan or development regulation may preclude the siting of essential public facilities.

Both groups of petitioners here raised questions in their briefs about Pierce County's actions concerning some or all of these EPFs. Halmo argued that group homes were incorrectly allowed in the Graham LAMIRD. Halmo PHB, at 34-35. CROWD argued that the County's treatment of the LRI Landfill, by adopting an Overlay, was inconsistent with its treatment of other solid waste handling facilities, sewage treatment facilities and group homes. CROWD PHB, at 15-16.

However, neither group of Petitioners presented the Board with a Legal Issue directly challenging the County's preclusion of EPFs under the Graham Plan. Therefore the Board cannot rule on the matter in this FDO. RCW 36.70A.290(1).

Pierce County should not read this decision as an endorsement of those portions of the Graham Plan that ban certain EPFs in the Graham area. Indeed, it is hard for this Board Member to imagine that these provisions would survive GMA challenge in the event they were applied in an effort to preclude the siting of an EPF. *DOC II v. Lakewood*, CPSGMHB Case No. 05-3-0043c, Final Decision and Order (Jan. 31, 2006), involved an effort by the Department of Corrections to establish a half-way house on property it owned in the City of Lakewood. The City enacted a moratorium on such facilities in that zone. The City argued, unsuccessfully, that because other city zones allowed such uses, the EPF was not precluded. The Board ruled that the City did not comply with RCW 36.70A.200(5). See also *DOC/DSHS v. Tacoma*, CPSGMHB Case No. 00-3-0007, Final Decision and Order (Nov. 20, 2000); *Children's Alliance v. Bellevue*, CPSGMHB Case No. 95-3-0011, Final Decision and Order (July 25, 1995); *Hapsmith I v. Auburn*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996), at 31-32.

However, because the issue was not squarely presented to the Board in the present appeals, I concur that the Board should not rule on the question in this Final Decision and Order.

## APPENDIX - A

### **Chronology of Procedures in CPSGMHB Case No. 07-3-0004c**

On January 4, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Muckleshoot Indian Tribe (**Petitioner** or **Muckleshoot**).<sup>28</sup> The matter was assigned Case No. 07-3-0002, and is hereafter referred to as *Muckleshoot v. Pierce County*. Board member Margaret Pageler is the Presiding Officer (**PO**) for this matter. Petitioner challenges **Pierce County's** (**Respondent** or the **County**) adoption of Ordinance Nos. 2006-52s and 2006-53s, which amended the comprehensive plan and adopted development regulations for the Graham Community Plan. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA**).

On January 5, 2007, the Board received a PFR from James L. Halmo, Judy Willmott, Diane M. Harris, Steven Kelley, Wally Balmer, Linda Clough, Arnold Andrews, Jr., Louise K. Carson, Sally Uhl, Jeffrey K. Harmier, Harry F. Bell, and Marilyn K. Sanders (**Petitioners** or **Halmo, et al.**). The matter was assigned Case No. 07-3-0003, and is hereafter referred to as *Halmo, et al. v. Pierce County*. The Petitioners challenge **Pierce County's** adoption of Ordinance Nos. 2006-52s and 2006-53s which amended the comprehensive plan and adopted development regulations for the Graham Community Plan. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**) and the State Environmental Policy Act (**SEPA**).

On January 5, 2007, the Board received a PFR from Concerned Residents On Waste Disposal, Woodbrook Estates Homeowners Association, Senator Marilyn Rasmussen, and Ohop Grange (**Petitioners** or **CROWD**). The matter was assigned Case No. 07-3-0004, and is hereafter referred to as *CROWD v. Pierce County*. These Petitioners also challenge **Pierce County's** adoption of Ordinance Nos. 2006-52s and 2006-53s for noncompliance with various provisions of the GMA and SEPA.

On January 11, 2007, the Board issued its Notice of Hearing and Intent to Consolidate, (**NOH**) setting a date for prehearing conference and a tentative schedule for briefing and hearing in these matters. The NOH indicated the Board's intent to consolidate these PFRs with a prior PFR filed by the Muckleshoot Tribe [07-3-0002] challenging these same Ordinances. The Board requested a restatement of legal issues from Petitioners *Halmo, et al.*, and also asked for any objections to consolidation by January 29, 2009.

On January 12, 2007, the Board received Notices of Appearance from M. Peter Philley, Deputy Prosecuting Attorney for Pierce County in the *Muckleshoot* [07-3-0002] and *CROWD* [07-3-0004] cases.

On January 25, 2007, the Board received Halmo Petitioners' Amended Legal Issues.

---

<sup>28</sup> The Muckleshoot matter was subsequently segregated out from the consolidated cases.

07304c *Halmo, et al v. Pierce County* (September 28, 2007)

**#07-3-0004c Final Decision and Order**

Page 53 of 60

On February 2, 2007, the Board received attestations from the twelve individual Halmo Petitioners attesting to the amended legal issues filed January 25, and designating as their spokespersons Wally Ballmer, Harry Bell, and James Halmo. The Board also received the Halmo Petitioners' Declarations of Service of the Amended Legal Issues.

On February 2, 2007, the Board received Halmo Petitioners' Declaration of Service of the PFR indicating that the PFR was served by registered mail posted January 5, 2007, on (1) the Office of the Public Prosecutor, Civil Division; (2) Michael Panagiotu, Pierce County Risk Manager, and (3) the Clerk of the Council, Pierce County Council.

The PHC was convened on February 5, 2007, at 10:00 a.m. in the Chief Sealth Room, Suite 2010, 800 Fourth Avenue, Seattle, by Presiding Officer Margaret Pageler. Board members Ed McGuire and Dave Earling, law clerk Julie Taylor, and legal extern Moani Russell were also in attendance. The Muckleshoot Indian Tribe [MIT] was represented by Peter Eglick and Jane Kiker of Eglick Kiker Whited PLLC. Muckleshoot Tribal Attorney Laura Weeks and outside counsel for MIT Jessica Kuchan also attended. Halmo *pro se* petitioners James Halmo, Harry Bell, and Marilyn Sanders attended, with James Halmo speaking for the group and Bud Relberg also in attendance. The CROWD Petitioners were represented by Mickey Gendler and Kathy George of Gendler & Mann, L.L.P., with consultant Amy Parker also in attendance.

At the outset of the PHC, the Board stated that, no party having objected, the three PFRs will be consolidated. The Board then discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The Board is empowered to grant settlement extensions for up to ninety days and will resegment individual cases from the consolidated matter if necessary to accommodate settlement discussions.

At the PHC the Board received Respondent's Index to the Record. The Board reviewed its procedures for the hearing, including the composition of the Index to the record below; exhibit lists and supplemental exhibits; dispositive motions; the Legal Issues to be decided; and a Final Schedule. The Board did not request any Core Documents, the parties having agreed to attach relevant sections of Pierce County comprehensive plan and countywide planning policies to their briefs.

At the PHC, Pierce County filed Respondent Pierce County's Motion to Dismiss the Halmo and CROWD PFRs for defective service. Attached to the Motion were three date-stamped exhibits and the Declaration of Trish Adams in Support of Respondent Pierce County's Motion to Dismiss. The PO set an expedited briefing and decision schedule on the matter.

The parties also informed the Board that the parallel proceeding in the SEPA appeal before the hearing examiner presents legal questions that may be presented to the Board on motions by MIT, the County, or both, during the motions calendar. The County did not anticipate filing other dispositive motions.

On February 6, 2007, the Board issued its Prehearing Order and Order of Consolidation, consolidating the three appeals as *Muckleshoot, et al v. Pierce County*, CPSGMHB Case No. 07-3-0004c.

On February 7, 2006, the Board received a Declaration of Service indicating service of the CROWD PFR on Pierce County Auditor Pat McCarthy by U. S. mail on January 6, 2007.

On February 9, 2007, the Board received a Declaration of Service indicating service of the Halmo PFR on Pierce County Auditor Pat McCarthy by registered mail on February 5, 2007.

On February 15, 2007, the Board received the Brief of CROWD and James Halmo in Opposition to Pierce County's Motion to Dismiss. Attached to the Brief were four exhibits, including the Declaration of James Halmo (Exhibit 1), and the Declaration of Katherine A. George in Opposition to Pierce County's Motion to Dismiss (Exhibit 3, with attachments).

On February 22, 2007, the Board received Respondent Pierce County's Withdrawal of Motion to Dismiss.

On February 22, 2007, the Board received Halmo Petitioners' Motion to Supplement with four attachments.

On March 1, 2007, the Board received a Stipulated Agreement between Petitioner Muckleshoot Indian Tribe and Respondent Pierce County and Order Extending the Time for Issuing a Decision and All Other Actions. The Stipulated Agreement requested that the Muckleshoot matter [Case No. 07-3-0002] be bifurcated from the consolidated case and that a 45-day settlement extension be granted.

On March 2, 2007, the Board issued its Order Segregating Muckleshoot Petition for Review [CPSGMHB Case No. 07-3-0002] from the Consolidated Case and Granting Settlement Extension. The Board segregated the Muckleshoot PFR from the consolidated proceeding and re-captioned the consolidated case as *Halmo, et al. v. Pierce County*, CPSGMHB Case No. 07-3-0004c.

On March 7, 2007, the Board received Respondent Pierce County's Response to Halmo's Motion to Supplement, with attached Index – Graham Community Plan – Supplemental. The County's Response indicates that the supplemental documents requested by Halmo are indeed in the County's record, as clarified in the Supplemental Index.

No hearing was held on motions.

On March 14, 2007, the Board issued its Order on Motions. The Board found that the County's motion to dismiss Halmo and CROWD Petitioners for defective service was

withdrawn. The Board also granted Halmo Petitioners' motion to supplement the record and admitted the items as already in the record.

On April 10, 2007, CROWD, Halmo and Pierce County filed a Stipulated Motion for Settlement Extension. The motion stated that the Hearing Examiner's pending decision on the environmental appeal could lead to a settlement of this matter; a 90-day extension was requested.

On April 16, 2007, the Board issued its Order Granting Settlement Extension and Amending Case Schedule.

On June 11, 2007, the Board received a Settlement Status Report stipulating, on behalf of Petitioners CROWD and Halmo and Respondent Pierce County, that the parties agree to proceed before the Board with all issues.

On July 11, 2007, the Board received Halmo Petitioners' Prehearing Brief with exhibits 1-50 and A-P – **Halmo PHB**.

On July 16, 2007, the Board received Prehearing Brief of Petitioner CROWD, et al., with 27 exhibits - **CROWD PHB**.

On July 30, 2007, the Board received Pierce County's Prehearing Brief with 84 exhibits – **County Response**.

On August 6, 2007, the Board received Petitioners' Reply Brief - **Halmo Reply**.

On August 6, 2007, the Board received Reply Brief of Petitioners CROWD, et al, with Declaration of Viki Steiner in Support of Reply Brief of Petitioners CROWD, et al., and Declaration of Andy Bales in support of Reply Brief of Petitioners CROWD, et al. - **CROWD Reply**.

On August 9, 2007, the Board held the hearing on the merits (**HOM**) at the Attorney General's office, 20<sup>th</sup> Floor, 800 5<sup>th</sup> Avenue, Seattle, Washington. Board Members Margaret Pageler, Presiding Officer, and David Earling were present for the Board.<sup>29</sup> *Halmo pro se* petitioners James Halmo, Marilyn Sanders, and Harry Bell attended, with James Halmo speaking for the group. The *CROWD* Petitioners were represented by Mickey Gendler and Kathy George of Gendler & Mann, L.L.P., with consultant Amy Parker also in attendance. Respondent Pierce County was represented by Prosecuting Attorneys Pete Philley and Todd Campbell. Also attending were William (Bud) Rehberg, Cindy Zable, and Ann Norman.

The Hearing on the Merits afforded the Board the opportunity to ask a number of questions and develop a clear understanding of the County's plan and policies and the

---

<sup>29</sup> Board member Ed McGuire was unable to attend the HOM. He has reviewed the HOM Transcript. *07304c Halmo, et al v. Pierce County (September 28, 2007)*

Petitioners' challenge. The Hearing convened at 2:00 p.m. and adjourned at 4:30 p.m. Court reporting services were provided by Beth L. Drummond of Byers and Anderson, Inc. The Board ordered a transcript of the Hearing. The transcript was received on August 17, 2007, and is referred to herein as **HOM Transcript**.

Pierce County's Response provided a 15-page "Chronological History" of the County's Solid Waste Management Plan, the LRI Landfill, and the consideration and adoption of the Graham Community Plan. County Response at 5-20. CROWD's Reply included "CROWD's Alternative Chronology." CROWD Reply, Attachment 1. The PO inquired whether the Halmo Petitioners would stipulate to the County's chronology and, if not, to indicate disputed items.

On August 13, 2007, the Board received Petitioner Halmo's Supplemental Chronological History.

On August 17, 2007, the Board received Respondent Pierce County's Response to Petitioner Halmo's Chronological History and Comments, with Attachment A.

On September 10, 2007, the Board received from Petitioner CROWD its omitted List of Exhibits and various exhibits omitted from the filing of its PHB.

## **APPENDIX - B**

### **LEGAL ISSUES CPSGMHB Case No. 07-3-0004c**

#### ***Halmo Legal Issues (adopted by CROWD Petitioners)***

6. *Was the County's action in moving the Urban Growth Area line inconsistent with RCW 36.70A.210 and RCW 36.70A.215, with WAC 365-195-335, as well as with the County's own "Countywide Planning Policies for Pierce County, Washington" (Ordinance No. 2005-52s) for coordinated consistent planning, and was such action also inconsistent with the County's Comprehensive Plan 19A.30.030 and 19A.40.050 as well as the Comprehensive Plan Procedures 19C.10.086?*
7. *Did the County violate the public participation requirements of the law by its action in adopting amended provisions for a "Reserve 5" area in the Graham Community Plan, and was such action a violation of RCW 36.70A.140, WAC 365-195-600, the County's Comprehensive Plan 19A.110, and the Comprehensive Plan procedures 19C.20.090 and 19C.20.100?*
8. *Was the County's action in adopting amended zone classification "Rural Sensitive Resource" (RSR) inconsistent with RCW 36.70A.070, WAC 365-195-330, as well as the County's Comprehensive Plan 19A.20.050 and 19A.40.020?*
9. *Did the County's action in adopting amended limited area of more intensive rural development (LAMIRD) provisions fail to comply with RCW 36.70A.070(5)(d) and was it inconsistent with the County's Comprehensive Plan 19A.110.030D?*
10. *Did the County's adoption of substantial amendments and revisions to the Graham Community Plan violate the spirit and intent of the formal mandate to provide for meaningful participation as called for in RCW 36.70A.140, RCW 36.70A.035, the County's Comprehensive Plan 19A.110, as well as the County's Comprehensive Plan Procedures 19C.20.090 and 19C.20.100?*
11. *Did the County's use of the Graham Community Plan to adopt an "essential public services solid waste overlay" and to recognize the private LRI 304<sup>th</sup> Landfill site as an essential public facility violate RCW 36.70A.040, RCW 36.70A.200, WAC 365-195-340, WAC 365-195-840 as well as the County's Comprehensive Plan 19A.120 by failing to develop and adopt development regulations controlling the siting of public facility overlays through a public and countywide comprehensive review process?*

## **CROWD Legal Issues**

*12. Did Pierce County violate RCW 36.70A.070(5)(b) by failing to provide for essential solid-waste facilities, including solid waste handling facilities, in the rural element of its comprehensive plan?*

*13. Did Pierce County violate RCW 36.70A.200, WAC 365-195-340 and its own Comprehensive Plan by adopting an “Essential Public Facility - Solid Waste Facility Overlay” in the Graham Community Plan in the absence of a countywide effort to identify and site solid waste handling facilities as essential public facilities?*

*14. Did Pierce County violate the RCW 36.70A.070 requirement for internal consistency in its comprehensive plan by adopting a Graham Community Plan as an element of the comprehensive plan, when the Graham Community Plan includes an “Essential Public Facility - Solid Waste Facility Overlay” that is inconsistent with numerous comprehensive plan policies, including but not limited to policies to: recognize and protect local neighborhood values; prioritize and protect important aquifers in order to maintain or improve water quality; evaluate new technologies for disposal of residential solid waste; and reduce dependency on landfills?*

*15. Did Pierce County violate the internal consistency requirement by adopting an “Essential Public Facility - Solid Waste Facility Overlay” encompassing a privately owned landfill in Graham, when the County’s comprehensive plan requires siting essential public facilities according to countywide criteria that have yet to be established?*

*16. Did Pierce County violate RCW 36.70A.070(5)(c) by adopting a Graham Community Plan that fails to protect the rural character of the area?*

*17. Did Pierce County violate the RCW 36.70A.011 mandate to “enhance the rural sense of community and quality of life” by adopting an “Essential Public Facility - Solid Waste Facility Overlay” to the Graham Community Plan over the considered objections of the host community?*

*18. Did Pierce County violate the public participation requirements of RCW 36.70A.140 and RCW 36.70A.035, as well as its own comprehensive plan policies, by introducing substantial amendments to the Graham Community Plan and related regulations without adequate public notice and opportunity for comment?*

*19. Did Pierce County violate SEPA regulations, including WAC 197-11-230 and WAC 197-11-400, by delaying purported analysis of the environmental impacts of the solid-waste overlay to the Graham Community Plan until less than a month before final adoption of the plan, when it was too late for public comment?*

*20. Did Pierce County violate SEPA regulations including WAC 197-11-402 by adopting an “Essential Public Facility - Solid Waste Facility Overlay” that authorized new land uses and that was not within the range of alternatives discussed in the draft environmental impact statement for the Graham Community Plan?*

*[21. Petitioners adopt by reference the issues set forth in the Petition for Review brought by James L. Halm, et. al., concerning the Graham Community Plan.]*