CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

SUQUAMISH TRIBE, KITSAP CITIZENS FOR RESPONSIBLE PLANNING and JERRY HARLESS,	)	**Case No. 07-3-0019c**
	)	***(Suquamish II)***
Petitioners,	)	
PORT GAMBLE S'KLALLAM TRIBE	)	
Interveners,	)	**FINAL DECISION and ORDER**
v.	)	
KITSAP COUNTY,	)	
Respondent.	)	

SYNOPSIS

In late 2006, Kitsap County completed its 10-Year review and update of its Comprehensive Plan and development regulation as required by the Growth Management Act. The Suquamish Tribe, Kitsap Citizens for Responsible Planning, and Jerry Harless filed timely petitions for review challenging a number of the County's actions.

*Petitioners took issue with the County's reduction of urban densities in its Plan and development regulations, which reduced the minimum density in certain low-density residential designations from 5 dwelling units per acre (**du/ac**) to 4 du/ac. This same reduction was used by the County in its land capacity analysis (**LCA**). Petitioners argued that the building industry trend in the County supported a continuing minimum density of at least 5 du/ac and the County's reduction allowed for an unnecessarily expansion of urban growth areas. The Board noted that in Kitsap County, 4 dwelling units has historically been an "appropriate" urban density, and the GMA did not compel the County to follow its experienced trend. Likewise, the use of the lower assumption in the LCA was not precluded by the GMA.*

However, while finding the Petitioners did not carry their burden in demonstrating noncompliance with the Urban Density and LCA issues, the Board did find that the County's Capital Facilities Plan was noncompliant with goals and requirements of the

Act because it did not demonstrate that there would be adequate public facilities and services [sanitary sewer] available to serve the expanded urban growth areas during the planning period.

Petitioners also prevailed on challenges to the County's Rural Wooded Incentive Program and Transfer of Development Rights program, primarily due to the "temporary" [40-year] nature of these programs, which created ambiguity and uncertainty as to the status of development on these lands when the period lapsed.

On all other matters challenged by Petitioners - reasonable measures, SEPA categorical exemption and notice provisions, open space corridors, and GMA goals balanced - the Board concluded the Petitioners had not carried the burden of proof.

The Board found certain provisions of the County's Capital Facilities Plan, Rural Wooded Incentive Program and Transfer of Development Rights Program noncompliant and invalid. These provisions were remanded to the County to bring into compliance with the Act, and a compliance schedule was set for early 2008.

I. BACKGROUND[1]

In December of 2006, Kitsap County adopted a series of Ordinances [Ordinance Nos. 367-2006, 368-2006, 369-2006 and 370-2006] [collectively the "Plan Update"] to complete the 10-Year Plan Update and development regulation review required by the Growth Management Act.

In February of 2007, the Board received several challenges to the County's Plan Update effort. The Board issued a notice of hearing that consolidated two of those petitions for review (**PFR**) into the present proceeding – Suquamish Tribe [PFR 07-3-0018], Kitsap Citizens for Responsible Planning and Jerry Harless [PFR 07-3-0019] [collectively, **Petitioners** or **Suquamish**].

The Board conducted the prehearing conference (**PHC**) in March. The Port Gamble S'Klallam Tribe was granted intervention following the PHC and the Board issued its prehearing order (**PHO**) setting the final schedule and stating the Legal Issues to be resolved by the Board. There were five common issues raised by both Petitioners that the Board organized topically – Urban Density, Land Capacity Analysis, Rural Wooded Reserve, Capital Facilities and Transferable Development Rights. Five additional issues pertaining to Transportation[2], Reasonable Measures, Categorical Exemptions under SEPA, Open Space Corridors, and the Balancing of Goals with Local Circumstances, were posed solely by the Suquamish Tribe.

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[1] The complete Procedural History of filings and orders is contained in Appendix A.

[2] Suquamish Tribe's Legal Issue 4, alleging transportation issues, was dismissed by the Board's May 3, 2007 Order Granting Dispositive Motion.

There were no motions to supplement the record filed during the Board's motion practice; however, the County and Petitioners having consulted on the record for this proceeding, identified items inadvertently omitted from the Index, and in May, prior to briefing, the County filed an amended Index of the Record. During the motions' filing period, the County moved to dismiss Suquamish Tribe's Legal Issue 4, arguing that the Tribe did not have standing to raise this issue before the Board. The Board granted the County's Motion in May.

All prehearing briefing was timely filed with appropriate exhibits. Petitioners filed a joint brief. The briefing filed will be referred to throughout this Final Decision and Order (**FDO**) as follows:

- Petitioners Suquamish Tribe, Kitsap Citizens for Responsible Planning and Jerry Harless – **Suquamish PHB**;
- Intervener Port Gamble S'Klallam Tribe - **S'Klallam PHB**[3];
- Respondent Kitsap County's Prehearing Brief – **Kitsap Response**;
- Petitioners Reply Brief – **Suquamish Reply**.

On June 28, 2007, the Board held the Hearing on the Merits (**HOM**) in Kitsap County at the Eagles Nest Room at the Kitsap County Fairgrounds, 1200 NW Fairgrounds Road, Bremerton, WA. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present. The Board's Law Clerk, Julie Taylor, and Extern, Linda Jenkins, were also present for the Board. Petitioner Suquamish Tribe was represented by Melody Allen. Petitioner KCRP was represented by David Bricklin. Petitioner Jerry Harless appeared *pro se*. Respondent Kitsap County was represented by Lisa J. Nickel and Andrew S. Lane. Intervenor Port Gamble S'Klallam Tribe was represented by Lauren Rasmussen. Court reporting services were provided by Barbara L. Brace of Byers and Anderson, Inc. The following persons also attended the HOM to observe: Eric Baker, Angie Silva, Chris Dunagan, Tom Donnelly, John Taylor, Alison O'Sullivan, Tom Nevins, Patrick Haas, Charles Michael, Fred DePee, Beth Wilson, Michele McFadden and Dorothy Reinhardt. The hearing convened at 1:30 p.m. and adjourned at approximately 5:00 p.m. The HOM afforded the Board the opportunity to ask a number of questions and gain a thorough understanding of the matters at issue. The Board ordered a transcript of the proceeding, which was received electronically on July 10, 2007. (**HOM Transcript.**)

Several proposed exhibits were presented with the briefing that were addressed at the HOM (*see* Preliminary Matters, *infra*) and the Board requested, and received, post-hearing briefing on one HOM Exhibit.

[3] Intervenor Port Gamble/S'Klallam Tribe intervened on the following issues: Transfer of Development Rights (Squamish Issue 10; KCRP Issue 5), Rural Wooded Incentive Program (Suquamish Issue 3; KCRP Issue 4), Open Space and GMA Balancing (Squamish Issues 8 and 9).

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 Kitsap County pursuant to the Act are presumed valid upon adoption. RCW 36.70A.320(1). The burden is on the Petitioners, here, Suquamish Tribe, Kitsap Citizens for Responsible Planning and Jerry Harless, to demonstrate that the actions taken by Kitsap 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 [Kitsap 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 Kistap 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).

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 Kitsap 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 stated: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005). In *Lewis County*, the Court reaffirmed and clarified its holding in *Quadrant*, stating that: "… the 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.[4]

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[4] The *Lewis County* majority is in accord with prior rulings that "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing*

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, PREFATORY NOTE, PRELIMINARY MATTERS and ABANDONED or NEW ISSUES

A. BOARD JURISDICTION

The Board finds that each Petitioner's PFR was timely filed, pursuant to RCW 36.70A.290(2); the Suquamish Tribe, KCRP and Jerry Harless each have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged Ordinances, which update Kitsap County's GMA Plan and development regulations, pursuant to RCW 36.70A.280(1)(a).

B. PREFATORY NOTE

The Action Challenged:

Petitioners challenge portions of the County's 10-year update of its Comprehensive Plan and various development regulations adopted to implement the goals and policies of the Comprehensive Plan and its update. A total of four ordinances, all adopted on December 11, 2006, are involved in this challenge.

Ordinance 367-2006 amended various sections of the County's Zoning Ordinance. The amendments under challenge include those to Chapter 17.301 – Rural Wooded Zone (specifically the Rural Wooded Incentive Program [**RWIP**], KCC 17.301.080 and Chapter 17.430 – Transfer of Development Rights [**TDRs**]). Petitioners' primary challenge to these provisions is that the "temporary" nature of these programs induces suburban sprawl and does not protect natural resources, open space, and environmentally sensitive lands.

Ordinance 368-2006 amended Chapter 18.04 – State Environmental Policy Act [**SEPA**], to include a categorical exemption, based on local conditions, from SEPA Threshold Determinations and Environmental Impact Statement requirements for development proposals of up to 4 dwelling units outside of the UGA and up to 9 dwelling units within the UGA. Challenge to this Ordinance is limited to the Suquamish Tribe's assertion that

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Board, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). See also, *Cooper Point Association v. Thurston County*, 108 Wash. App. 429, 444, 31 P.3d 28 (2001) ("notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent' with the requirements and goals of the GMA"); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002).

application of this categorical exemption will preclude historic and archeological preservation.

Ordinance 369-2006 amends certain sections of Chapter 21.04 – Land Use and Development Procedures.

Ordinance 370-2006 amends the Comprehensive Plan and the County's Future Land Use Map [**FLUM**]. These amendments include the expansion of urban growth areas [**UGAs**], the re-designation of certain lands from rural to urban uses, and modifications to the County's Capital Facilities Element [CFE] and Capital Facilities Plan [**CFP**]. Petitioners' challenge to this Ordinance stems from amendments involving urban density, the Land Capacity Analysis, CFE, reasonable measures, open space, and balancing of GMA goals.

Topics and Order of Discussion of Legal Issues:

There are five common Legal Issues raised by the Petitioners that the Board organized topically in the PHO – Urban Density, Land Capacity Analysis, Rural Wooded Incentive Program, Capital Facilities and Transferable Development Rights. Petitioner Suquamish Tribe presents four additional Legal Issues pertaining to Reasonable Measures, Categorical Exemptions and Notice, Open Space and Balancing of GMA Goals.[5] Although the Board discusses these issues topically, each specific Legal Issue is set forth under each topical heading.

The Board's discussion of the Legal Issues occurs in the following order:

A. Urban Density
B. Land Capacity Analysis
C. Capital Facilities
D. Rural Wooded Incentive Program
E. Transferable Development Rights
F. Reasonable Measures
G. Categorical Exemptions – SEPA
H. Open Space
I. Balancing of GMA Goals
J. Invalidity

[5] As noted *supra*, the Suquamish Tribe originally presented 5 distinct issues. However, one of these issues was dismissed by the Board in May 2007.

C. PRELIMINARY MATTERS

Oral Rulings at the HOM:

At the HOM, the Board briefly reviewed the Core Documents presented and ruled on several matters.

Core Documents: The Board acknowledged it had received and continued to use various Core Documents from Kitsap County in a prior matter. [January 11, 2007 submittals in CPSGMHB Case NO. 06-3-0007 – 7 Core Documents labeled A-G, including Kitsap County's 10-Year Plan Update, the integrated DEIS and integrated FEIS, amendment to the County's development regulations, and four approval matrices.]

The County moved to strike Exhibits A, B, H, I, J and K, attached to Petitioners' prehearing brief. Kitsap Response, at 11-14. Petitioners subsequently filed a motion to supplement the record with these challenged exhibits. At the HOM, the PO ruled as follows on these motions:

- Exhibit A – *see* "Post-HOM Exhibits," *infra*.
- Exhibit B – Puget Sound Regional Council, "Growth Trends in Central Puget Sound," dated November 2005. The Board takes **official notice** per WAC 242-02-670(2) – **HOM Ex. 1**.
- Exhibit H – Washington State Conservation Commission, "Salmonid Habitat Limiting Factors," dated November 2000. The Board takes **official notice** per WAC 242-02-670(2) – **HOM Ex. 2**.
- Exhibit I – May 21, 2007, Declaration of Dennis E. Lewarch, Re: archeological fieldwork in Kitsap County. The declaration was prepared *after* the County adopted the challenged Ordinances and could not have been part of the record. Supplementing the record with Ex. I is **denied**; however, the Board will not strike reference in Petitioners' briefing that there are significant archeological sites within Kitsap County.
- Exhibit J – August 4, 1989, Centennial Accord, between the Federally-recognized Indian Tribes in Washington State and the State of Washington. The Board takes **official notice** per WAC 242-02-660(5) – **HOM Ex. 3**.
- Exhibit K – April 28, 2005, Proclamation of Governor Christine Gregoire, Re: Centennial Accord. The Board takes **official notice** per WAC 242-02-660(2) – **HOM Ex. 4**.

Additionally, both Petitioners and Respondent attached Exhibits to their briefing that were not part of the official record, nor were these documents included in the Amended Index. Neither party objected to the inclusion of these items. The Board can take **official notice** of these items and assigns the following Exhibit Numbers:

Petitioners' HOM Exhibits:

- Exhibit C – KCRP/Harless Prehearing Brief in CPSGMHB Case No. 06-3-0007 – **HOM Ex. 5**
- Exhibit D – Thurston County Superior Court – 12/21/05 Decision of the Court following Trial held December 2, 2005 – **HOM Ex. 6.**
- Exhibit E – Declaration of Laura Overton Joannes in CPSGMHB Case No. 04-3-0009c – **HOM Ex. 7**.
- Exhibit F – Kitsap County Ordinance No. 351-2005 – **HOM Ex. 8**.
- Exhibit G – Kitsap County webpage showing environmental maps, specifically "Building Limitations" map – **HOM Ex. 9**

Respondent HOM Exhibits:

- Exhibit A – *see* **HOM Ex. 5**
- Exhibit B – Kitsap County Coordinated Water System Plan – Regional Supplement, 2005 Revision – **HOM Ex. 10**.
- Exhibit C – Kitsap County Code (**KCC**) Chapter 17.301 Rural Wooded Zone – **HOM Ex. 11**.
- Exhibit D – KCC Chapter 17.430 Transfer of Development Rights – **HOM Ex. 12**
- Exhibit E – KCC 21.04.060 thorough KCC 21.04.110 – **HOM Ex. 13**
- Exhibit F – KCC 22.28.080 – **HOM Ex. 14**.

Post-HOM Exhibits – "Illustrative" Exhibits from the HOM:

- Exhibit A - "Illustrative" Summary Table compiled from FEIS Appendix B – Land Capacity Analysis. The Board did not rule on this Exhibit at the HOM, but rather directed the parties to discuss their objections regarding the methodology used to derive the table and provide the Board with a copy of figures showing the combined UGA Capacity for Kitsap County. The parties did reconcile their differences and provided a "*Corrected*" copy of the proposed exhibit within the timeframe specified. Corrected Exhibit A from Suquamish PHB is **admitted** – **Post-HOM Ex. 1**.
- Pie Chart "Illustrating" figures – The Pie Chart has been modified to reflect the corrected figure from Post-HOM Ex. 1 – **admitted - Post-HOM Ex. 2**.
- Line graph depicting hypothetical residential density development trend lines – **denied**.
- Rural Wooded conceptual layouts – **admitted - Post-HOM Ex. 3**.
- Rural Wooded layout illustration – McCormick Woods – **denied**.

While the above-noted items have been included as part of the record in this proceeding, the Board will assess their relevancy, and the weight to be accorded each, in reaching this decision.

D. ABANDONED ISSUES and NEW ISSUES

The Board's Rules of Practice and Procedure provide:

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

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

Additionally, the Board's March 23, 2007, PHO in this matter states: "**Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits**." PHO, at 8, (emphasis in original). *See City of Bremerton, et al., v. Kitsap County*, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5*; and Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7.

Also, the Board has stated, "Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned." *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.

Further, RCW 36.70A.290(1) properly constrains the Board's review; it provides, in relevant part,

> *The board shall not issue advisory opinions on issues not presented and to the board in the statement of the issues* [*i.e.* the statement of Legal Issues in the PFR], as modified by any prehearing order.

(Emphasis supplied).

In other words, it is the Legal Issues in the PHO[6] that frame the questions the Board is asked to address. Briefing and argument on issues that are beyond the scope of the Legal Issues presented in the PHO are **new issues** which the Board cannot address, per .290(1). Any such issue and argument that appears in briefing will be ignored by the Board and dismissed. The Board will only address the Legal Issues from the PHO that are briefed by Petitioners. Petitioners must demonstrate (through evidence and argument) that the

[6] Often the Statement of Legal Issues in the PHO merely replicates the statement of issues from the PFR; on occasion, the original statement(s) of issues are modified after discussion at the PHC, and it is the end result that is reflected in the Statement of Legal Issues set forth in the PHO.

action challenged does not comply with the specific goals or requirements set forth in the statement of the Legal Issues in the PHO.

In the present matter, Kitsap County argues several of the Legal Issues set forth in the PHO have been abandoned, and new issues have been argued that do not fall within the scope of the Legal Issues in the PHO. Kitsap Response, at 5-13. The Board addresses these arguments in the context of the Board's discussion of the Legal Issues, *infra*.

IV. LEGAL ISSUES AND DISCUSSION

A. URBAN DENSITY

[Suquamish Tribe Legal Issue No. 1 and KCRP/Harless Legal Issue No. 1]

The Board's PHO, at 8, sets forth the Urban Density Legal Issues as follows:

1. *Did Kitsap County (**the County**) fail to follow guidance under RCW 36.70A.020(1), (2), (3), (4), (10) and (12), and fail to comply with RCW 36.70A.070 (internally consistent plans) and RCW 36.70A.110 by allowing reduced urban residential densities, and expanding Urban Growth Areas (**UGAs**) by about 35%, as part of the 10-Year Update to its Comprehensive Plan (**Plan Update**) adopted by Ordinance No. 370-2006, thereby promoting sprawl in direct contradiction to the fundamental goals of the GMA? [Suquamish PFR]*

1. *Did the County fail to be guided by RCW 36.70A.020(1), (2), (3), (4) and (12), and fail to comply with RCW 36.70A.110 when it reduced permitted urban residential densities by twenty percent, triggering the otherwise unnecessary expansion of several UGAs), as part of the Plan Update and zoning adopted with Ordinance Nos. 370-2006 and 367-2006? [KCRP PFR]*

The Challenged Action

Petitioners challenge the County's actions in adopting Ordinances 370-2006 and 367-2006 as contrary to the GMA's mandate to reduce sprawl and accommodate urban density. Although the County retained the Comprehensive Plan land use designation - Urban Low Density Residential - two of the implementing zoning districts were modified, changing the density ranges from 5-9 dwelling units per acre (du/acre) to 4-9 du/acre in Urban Low density residential zone and Urban cluster residential zone.

Applicable Law

Petitioners allege that the County has not been guided by, nor complied with 6 different Goals of the GMA – RCW 36.70A.020 – as follows:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

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

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

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

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

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally-established minimum standards.

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

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

RCW 36.70A.110, provides in relevant part:

(1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designated an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can only occur if it not urban in nature.

(2) . . .[T]he county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period. . .

Discussion

Position of the Parties:

Petitioners argue that the County's decision to reduce minimum residential densities from five dwelling units per acre (5 du/acre) to four dwelling units per acre (4 du/acre) within UGAs ignores the GMA's mandate for a compact urban form (as articulated by the combined purpose of Goals 1, 2, and 12) and forces a 35 percent expansion of UGAs, thereby perpetuating low-density sprawl. Petitioners assert that (1) the County has failed to reasonably justify its change in minimum density and the subsequent UGA expansions and (2) reduction in residential densities contradicts both County policies and the GMA's goals and requirements. Petitioners assert that the County's rationale is not supported by the GMA's requirements for urban density, transportation, affordable housing, urban facilities and services, and environmental protection. Suquamish PHB, at 6 - 26.

In response, the County asserts that the Petitioners have abandoned allegations pertaining to 36.70A.110, providing only conclusory arguments without specifically citing to which of the 7 sections contained in .110 that the County failed to satisfy. The County notes that it modified densities, from 5-9 du/acre to 4-9 du/acre, only within two zoning districts - Urban Low Residential and Urban Cluster Residential – and that the GMA does not maintain a duty demanding a specific density. The County asserts that its decision is justified by (1) community desire, (2) long-standing 4 du/acre "appropriate" urban density standard, (3) the provision of a greater variety of residential densities and housing types, (4) coordination and consistency with urban densities in County cities, (5) is not contrary to the stated GMA goals, and (6) is consistent with the County's Comprehensive Plan policies. Kitsap Response, at 6-7, 16-33.

In reply, Petitioners assert that they have not abandoned any issues, rather they have provided sufficient supporting facts and legal arguments to meet their burden of proof. The Petitioners note that the issue raised with their challenge is a change from one minimum density to another and whether the County has documented local conditions which would allow for such a modification, and the County failed to respond to this assertion focusing on 4 du/acre being an "appropriate" urban density. Petitioners reassert their arguments in regard to historic development patterns, housing variety, efficiency of services, and inconsistency with GMA mandates and County policies. Suquamish Reply, at 4-14.

Board Discussion:

As an initial matter, the Board addresses the County's contention that Petitioners have not adequately briefed their allegation that the County has not complied with the provisions of RCW 36.70A.110. *See* Kitsap Response, at 6-7, referring to Suquamish PHB, at 6-26. The Board has reviewed the arguments presented by Petitioners in their PHB, at 6-26 and finds that a recurring theme is the impact of the density reduction on the UGAs. The Legal Issues reference to .110 and the various goals of the Act clearly puts this

relationship in play. Therefore, the Board finds and concludes that Petitioners have not abandoned their challenge to RCW 36.70A.110.

It is undisputed that the County's Urban Low Density Residential (**ULDR**) Plan designation [in the Plan text and on the Future Land Use Map or **FLUM**] was modified to reduce the permitted density ranges from a minimum density of 5 dwelling units per acre (**du/ac**) to 4 du/ac. There are three implementing zones for the ULDR designation: 1) Urban Restricted Residential (**URR**), used where critical areas are present, which allows 1-5 du/ac; 2) Urban Low Density Residential (**ULR**), which allows 4-9 du/ac; and 3) Urban Cluster Residential (**UCR**), which also allows 4-9 du/ac. Plan Update, at 2-20, 2-21. It is also undisputed that 90% of the lands designated for *urban* residential growth are within these three zoning designations [URR = 21%, ULR and UCR = 69%]. See Post HOM Ex. 2.

At the outset, the Board acknowledges that 4 du/ac is an "appropriate" urban density; it is not low-density sprawl. In fact, the County is correct in noting that since 1995, 4 du/ac has been an approved and accepted minimum urban density for Kitsap County. *See Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order, (Oct. 6, 1995). What, then, is the basis for Petitioners' complaint? Doesn't the County have discretion to plan for and regulate land use within the parameters of the Act?

As the Board understands it, Petitioners' argument is based upon the fact that the County's prior Plan and zoning had a minimum density range for the affected designations of 5 du/ac and that between 2000 and 2005, the County has achieved an average density for urban residential plats of 5.6 units /net acre. *See* Plan Update, at 2-9. The County's Plan appeared to be encouraging increased densities in the urban area. *Id.* Therefore, Petitioners argue, given this trend of increasing urban residential densities and compact urban growth, the County's new reduction of its minimum densities will cause this trend to be reversed requiring more land to be needed in the UGA to accommodate projected growth. In addition to adjusting the required densities, Petitioners also argue that the County has lowered the urban/rural split for accommodating population growth from 83% to 76% for urban areas and increased from 17% to 24% in rural areas, a modification that is contrary to GMA's mandate for compact urban growth.

Petitioners point to numerous exhibits within the Record, very impressive evidence,[7] which support the notion that higher densities are more cost-effective for jurisdictions

[7] Exhibit 29761 is a letter from Petitioner Jerry Harless urging retention of the higher densities which includes the following significant attached documents: Ten Principles for Successful Development Around Transit, by the Urban Land Institute; Appropriate Urban Densities in the Central Puget Sound Region: Local Plans, Regional Visions and the Growth Management Act, by Joseph W. Tovar; Taking Its Toll: The Hidden Costs of Sprawl in Washington State, by Patrick Mazza and Eben Fodor; Higher Density Development – Myth and Fact, by the Urban Land Institute; Creating Great Neighborhoods: Density in Your Community, by the National Association of Realtors; and The Economics of Conservation Subdivisions – Price Premiums, Improvement Costs and Absorption Rates, by Rayman Mohamed.

when providing services (i.e. water, sewer, public transit) than at lower densities. The Board agrees that there is certainly persuasive evidence providing a solid basis and rationale for increased densities and compact urban growth, but is the County's chosen action outside the boundaries of what the GMA allows? It is apparent that Petitioners see a wiser choice and a wiser, more cost-effective course of action for the County than the one chosen, but the Board is not persuaded that the County's reduction of its minimum density from 5 to 4 du/ac falls outside the GMA's requirements.

Petitioners also question whether the recommendations of a Citizen Advisory Group merely perpetuate historic low densities; whether changing minimum densities from 5 to 4 du/ac encourages anything other than single-family development; and whether adding area to the UGA will lower the costs of providing capital facilities and services to the urban area. The Board notes, as stated *supra,* that 4 du/ac is an appropriate urban density and not the historic pattern previously found in Kitsap County. Further, although the Board notes that a change in density from 5 to 4 du/ac alone is not likely to increase the variety of housing types, nor will adding area to the UGA necessarily lower the costs of providing services, but it will affect the distribution of the costs incurred. The Board agrees with Petitioners that a reduction of the minimum urban density will have intended or unintended consequences on the size of the UGA. Regardless of these adjustments, the County must assure that urban facilities and services will be adequate and available to provide for the UGA – a separate Legal Issue in this matter. Nonetheless, the Board does not find that the County's action of establishing a minimum urban density of 4 du/ac is clearly erroneous or contrary to the challenged provisions of the GMA.

Conclusion

The Board finds and concludes that the County's action **was not clearly erroneous.** Additionally, Petitioners have **failed to carry the burden of proof** in demonstrating noncompliance with RCW 36.70A.020(1), .020(2), .020(3), .020(4), .020(10), .020(12), .070 (Preamble), and .110. **Legal Issue No. 1 (Suquamish) and Legal Issue No. 1 (KCRP) is DISMISSED.**

B. LAND CAPACITY ANALYSIS

[Suquamish Tribe Legal Issue No. 2 and KCRP/Harless Legal Issue No. 2]

The Board's PHO, at 8-9, sets forth the Land Capacity Analysis Legal Issues as follows:

2. *Did the County fail to follow guidance under RCW 36.70A.020(1) (2), and fail to comply with RCW 36.70A.070 (internally consistent plans) and RCW 36.70A.110 by expanding UGAs based on a non-compliant Urban Land Capacity Analysis (**LCA**), which results in substantially over-sized UGAs as part of the Plan Update*

adopted by Ordinance No. 370-2006, thereby promoting sprawl in direct contradiction of the fundamental goals of the GMA? [Suquamish PFR]

2. *Did the County fail to be guided by RCW 36.70A.020(1) and (2), and fail to comply with RCW 36.70A.070 (internally consistent plans) and RCW 36.70A.110 when it expanded several UGAs based on a non-compliant Urban Land Capacity Analysis (**LCA**), resulting in an excessively oversized UGA as part of the Plan Update and zoning adopted with Ordinance Nos. 370-2006 and 367-2006? [KCRP PFR]*

The Challenged Action

The challenged action here is the County's Land Capacity Analysis (**LCA**) as found in Appendix B of the Final Environmental Impact Statement (**FEIS**). The LCA describes the vacant lands and underutilized lands designated for residential, commercial and industrial development. A separate table is included that breaks down the land capacity for the following unincorporated areas: 1) Kingston UGA; 2) Poulsbo Transition Area; 3) Silverdale UGA; 4) Central Kitsap UGA; 5) Bremerton East UGA; 6) Bremerton West UGA; 7) Gorst UGA; 8) Port Orchard UGA; 9)ULID #6 UGA; and 10) South Kitsap Industrial Area. The Board notes that there is no table showing the cumulative total of the County's land capacity for different uses in the urban areas. See FEIS, Appendix B. However, Petitioner Harless and the County have stipulated to a composite table that shows the individual area totals and a cumulative total in gross, net, and dwelling units for the Urban Residential classifications. *See* Post HOM Ex. 1.

Applicable Law

Petitioners pose additional challenges here pertaining to Goals 1 and 2 and RCW 36.70A.110, both set forth *supra.*

Additionally, Petitioners assert noncompliance with the internal consistency requirements of RCW 36.70A.070(preamble) which provides in relevant part:

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

Discussion

Position of the Parties:

Petitioners assert that the GMA requires that when a UGA is being designated, such designation must be supported by two analyses – a Land Capacity Analysis [**LCA**] and a Capital Facilities Element [**CFE**] – which ensure properly-sized UGAs and adequate infrastructure. With the challenged ordinances, and in response to the Board's holding in *KCRP VI v. Kitsap County,* CPSGMHB Case No. 06-3-0007, the County removed "sewer

constrained lands" from its LCA and reduced residential zoning density (*see* Legal Issues 1, *supra*) but did not adjust the size of the UGAs. Petitioners asset that the density assumptions utilized within the LCA are a clear error because (1) with the Urban Restricted Residential [URR] zone, the County has "double-dipped" the reduction for critical areas, (2) fails to show consistency with the BLR's on-the-ground densities of recent development projects (5.6 du/acre), and (3) is inconsistent with density factors and policies stated in the Comprehensive Plan. The Petitioners do not dispute that the County "showed its work." Rather, they assert that this showing falls short by not providing explanation. Suquamish PHB, at 27-35.

In response, the County concurs with Petitioners that the County has "shown its work" and that the LCA density factor must, at least, be the minimum density allowed in FLUM designations. The County asserts that the LCA satisfies the challenged GMA Goals – urban growth and reduce sprawl – by demonstrating that urban level densities will be provided for within the UGA and that the LCA is consistent with Comprehensive Plan Policies in regard to target densities and higher density within UGAs than rural areas and with .110's UGA sizing requirements. The County argues that it is not double counting critical areas by providing a reduced density within the URR zone (1-5 du/acre) while utilized minimum-density factors in the LCA. Essentially, according to the County, the Petitioners' challenge is based solely on the fact that they do not like the density assumptions utilized by the County. Kitsap Response, at 33-40.

In reply, Petitioners assert that the County, as it did with the density reduction issue, is sidestepping the real issue – that the LCA uses a predicted density that is lower than measured trends in direct contradiction to County planning policies and leading to an oversized UGA. Petitioners assert that the "inconsistency" they allege stems from the common goal of County land use policies to achieve higher densities within UGA, to conserve rural and resource lands, and to provide efficient transportation and governmental services, which is not supported when land supply is allocated on a lower density. Petitioners provide further clarification of their "double dipping" argument in regard to URR zone lands, asserting that the LCA subtracts mapped critical areas and buffers and that the URR zone is predicated on this very reduction. Suquamish Reply, at 15-18.

<u>Board Discussion</u>:

The parties and the Board agree that whether the County "showed its work" pertaining to the LCA is not disputed in this matter. The County clearly showed its work by publishing the LCA in the FEIS.

However, what Petitioners object to is that reducing the low end of the urban residential density assumption from 5 du/ac to 4 du/ac yields lesser land capacity within existing UGAs, thereby precipitating the need to expand the UGAs in order to accommodate allocated population growth. Much like the argument presented in Legal Issue 1, Petitioners assert that a higher density assumption – the 5.6 du/acre trend – or at least a

mid-range density, should be used in determining land capacity. The County counters that there is no GMA requirement that compels the result that Petitioners seek and that the County has discretion in sizing its UGAs so long as urban densities are provided for in the UGA and low-density sprawl is not encouraged. The County, as it did in Legal Issue 1, claims that a 4 du/ac LCA assumption is an urban density and that, as a conservative measure, the lower end of the density range is an acceptable choice when calculating land capacity. The County asserts that while Petitioners may wish to have higher density assumptions used in the LCA, the GMA does not compel such a choice and that Petitioners have simply failed to meet the burden of proof in demonstrating noncompliance with the noted GMA provisions.

Just as the Board agreed with the County in regard to urban density, the Board here also agrees with the County on its methodology. The LCA largely rests upon a residential density assumption of 4 du/ac, which, as the Board has stated *supra*, is an "appropriate" urban density. The consequence of adopting this lower assumption is, in fact, to demonstrate a need for more urban land. The methodology of the County is not flawed, nor is the use of a minimum of 4 du/acre rather than a trend or mid-range density flawed or in violation of any GMA directive. However, the Board does agree with Petitioners that adopting this approach may dampen the recent success the County has had in encouraging higher densities in the UGAs, since the County concedes that between 2000 and 2005, the County achieved an average of 5.6 units/net acre for urban low density plats. *See* Plan Update, at 2-9. Again, if the County is expanding its urban areas, the County must assure that urban facilities and services will be adequate and available to provide for these UGAs. Nonetheless, the Board cannot find that the County's action was clearly erroneous or noncompliant with the cited provisions of the GMA.

Conclusion

The Board finds and concludes that the County's action **was not clearly erroneous.** Additionally, Petitioners have **failed to carry the burden of proof** in demonstrating noncompliance with RCW 36.70A.020(1), .020(2), .070 (Preamble), and .110. **Legal Issue No. 2 (Suquamish) and Legal Issue No. 2 (KCRP) is DISMISSED.**

C. CAPITAL FACILITIES

[Suquamish Tribe Legal Issue No. 5 and KCRP/Harless Legal Issue No. 3]

The Board's PHO, at 9, sets forth the Capital Facilities Legal Issues as follows:

5. *Did the County fail to follow guidance under RCW 36.70A.020(1), (2) and (12), and fail to comply with RCW 36.70A.070(3) when it designated several expanded UGAs as part of the Plan Update – Ordinance 370-2006 – without a compliant Capital Facilities Element and Plan to ensure that necessary facilities and*

services will be adequate and available to support development within the 20-year planning period? [Suquamish PFR]

3. *Did the County fail to be guided by RCW 36.70A.020(1), (2) and (12), and fail to comply with RCW 36.70A.070(3) when it designated several expanded UGAs as part of the Plan Update and zoning adopted with Ordinance Nos. 370-2006 and 367-2006 without a compliant Capital Facilities Element and Plan to ensure that necessary facilities and services will be adequate and available to support development within the 20-year planning period?[KCRP PFR]*

The Challenged Action

In essence, Petitioners challenge the adequacy of the County's Capital Facilities Element [**CFE**], Chapter 11 of the County's Comprehensive Plan, and the County's 6-year Capital Facilities Plan [**CPF**], Appendix A of the County's Comprehensive Plan. The basis of the Petitioners' challenge is that these two documents do not demonstrate that the County can provide necessary facilities and services that are adequate and available to support both existing and recently expanded UGAs during the 20-year planning period.

Applicable Law

Petitioners pose additional challenges here pertaining to Goals 1, 2 set forth *supra.*

Goal 12 is worth repeating here, since it is a critical requirement of this Legal Issue. RCW 36.70A.020(12) provides:

> (12) Public facilities and services. *Ensure that those public facilities* and services *necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use* without decreasing current service levels below locally established minimums.

(Emphasis supplied).

RCW 36.70A.070(3) governs the requirements for the County's Capital Facilities Element. The provisions are as follows:

> A capital facilities plan element consisting of:
>
> > (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities;
> > (b) a forecast of the future needs for such capital facilities
> > (c) the proposed locations and capacities of expanded or new capital facilities;

> (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and
> (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

Discussion

Position of the Parties:

Petitioners point out that the Board has previously found the County's Capital Facilities Element and Plan [**CFE/CFP**], in regard to sanitary sewers and the Kingston Sub-area Plan, non-compliant with Goals 1, 2, and 12, entering an order of invalidity which currently remains in effect. *See KCRP VI v. Kitsap County*, CPSGMHB Case No. 06-3-0007. Petitioners now assert that the County has once again failed to ensure adequate and available urban services within the UGA. Petitioners assert that the CFE/CFP: (1) fails to address concurrency and financial planning for all necessary capital facilities, (2) fails to identify the geographic locations and capacities of facilities for serving new and existing populations, and (3) therefore, fails to adequately plan for future needs of facilities in support of the Land Use Element. Suquamish PHB, at 36-45.

In response, the County asserts that the Petitioners erroneously rely on the Board's holding in *KCRP VI* to support their argument that if Kingston's sewer plan was found to be noncompliant with the GMA, then the entire CFE/CFP is noncompliant. The County argues that if it has acted in compliance with RCW 36.70A.070(3) – requiring an inventory, a needs analysis, proposed future facilities location, 6-year funding plan, and a reassessment requirement – it is also compliant with 36.70A.020(12). The County states that the Petitioners' argument is flawed because certain facilities and services are not "necessary to support development" and "concurrency," as defined by the Act, is not required. In addition, the County points out that Petitioners do not dispute that the CFE/CFP satisfies the requirements of 36.70A.070(3). Rather, Petitioners assert that the County has failed to provide enough detail, but cite to no "level of detail" requirement in the GMA. The County then counters the Petitioners' assertion that information is lacking by pointing to supporting facts within the CFE/CFP. Kitsap Response, at 40-53.

In reply, Petitioners claim that the CFE/CFP fails Goal 12's test of ensuring that facilities necessary to support urban growth will be adequate and available during the 20-year life of the Comprehensive Plan. Petitioners assert that the Board's finding in *KCRP VI* is directly on point and that the "overreaching" nature of the requirement to serve UGAs still exists today. The Petitioners reiterate their claims that the CFE/CFP fails to meet the requirements of 36.70A.070(3). Suquamish Reply, at 18-23.

Board Discussion:

The essence of Petitioners' complaint is that the County has expanded certain UGAs and that the County has failed to demonstrate that the new UGA areas can be supported by the County's 20-year CFE. The basis of this complaint is rooted in Goal 12 which requires that the County ensure that it has the necessary capital facility "capacity" (*i.e.* adequate capacity and available facilities) to support the new and existing development within the various UGAs – *i.e.* the urban areas are served with urban level facilities.

It is undisputed that the County's Plan Update expanded the previous UGA areas by approximately 33% over the previous UGA areas. *See* FEIS, at 2-56. The total unincorporated UGA area in the Plan Update includes approximately 51.1.square miles. *Id*. Thus in general terms, the Plan Update's UGA expansion added approximately 17 square miles to the UGAs [17 square miles is roughly 1/3 of the 51 square miles in the new UGAs].

The Plan Update identifies 10 UGAs in Kitsap County. Seven of these UGAs were to be expanded under Alternative 2 of the EIS, but in the County's final action, only six were expanded as indicated in Alternative 2 in the FEIS, at 2-36. The Plan Update, Ordinance No. 370-2006, Section 4, at 8, indicates that Alternative 2 from the FEIS is adopted *absent* the Poulsbo UGA expansion, which leaves the Poulsbo UGA at the "no action" level as described in the FEIS – *i.e*, no UGA expansion for Poulsbo. Therefore, the Board will focus on the *six UGAs where expansion occurred.*

The Plan Update, at 2-11, illustrates the 10 UGA areas and their respective acreages. The following Table is based upon information contained in the Plan Update, at 2-11, and depicts the UGA areas for those "expanded UGAs" and those UGAs that were not altered.

Kitsap County's 10 UGAs

Expanded UGAs	**Total UGA Acreage**	**Non-Expanded UGAs**	**Total UGA Acreage**
Silverdale	7400	Kingston	1600
Central Kitsap	6400	Poulsbo	850
West Bremerton	1100	East Bremerton	1300
Gorst	330	ULID #6 [McCormick Woods]	2400
Port Orchard	6600		
SKIA	4700		

Of these 10 UGAs, which are factors in the Board's present inquiry?

Five UGAs are **not of significance** in the present inquiry:

- Poulsbo UGA = Not expanded, therefore not part of the present inquiry;
- East Bremerton = Not expanded, therefore not part of the present inquiry;
- ULID#6 [McCormick Woods] = Not expanded, therefore not part of the present inquiry;
- SKIA = An *industrial area* UGA expansion, therefore not part of the present inquiry;
- Kingston = No present expansion. However, the Kingston Subarea Plan was addressed in *KCRP VI v. Kitsap County*, 06-3-0007, FDO, (Jul. 26, 2006) and KCRP VI, Order of Partial Compliance and Order of Continuing Noncompliance and Invalidity [Re: Kingston Wastewater Facilities Plan].

However, **five UGA**s are a factor in the Board's present inquiry because they involve expansions that include Urban Low-Density Residential development. These UGAs are:

- Silverdale UGA
- Central Kitsap UGA
- West Bremerton UGA
- Gorst UGA
- Port Orchard UGA

With regards to these five UGA expansion areas, the Board makes the following observations based upon a comparison of the maps showing the "No Action Alternative" and the "Preferred Alternative 2" from the DEIS and the Plan Update.

- **Silverdale UGA** – substantial urban low-density residential capacity is added to the UGA to the northwest and southwest of the previous UGA for Silverdale; some of this expansion is adjacent to Dyes Inlet.
- **Central Kitsap UGA** – urban low-density residential capacity is added to the UGA at the northeast portion of the area on Port Orchard Bay, and residential capacity is added to the UGA to the southwest portion of the area along Dyes Inlet.
- **West Bremerton UGA** – substantial low-density residential capacity is added to the UGA on the peninsula extending from Phinney Bay up to Rocky Point, with an additional area inland, west of Kitsap Way and near Sinclair Inlet.
- **Gorst UGA** – a modest low-density residential capacity is added to the UGA west of Sinclair Inlet near Hamilton Road.
- **Port Orchard UGA** – the Port Orchard UGA expansion is significant. It adds significant acreage of low-density residential capacity to the east and southeast portion of the City's prior UGA.

The Central Kitsap, West Bremerton and Gorst UGAs are addressed in the Plan Update, generally, and the Capital Facilities Element goals and policies are applicable. *See* Plan Update, Chapter 11. The Plan Update also applies to the Silverdale and Port Orchard areas, including the UGAs, but these areas are also subject to goals and policies articulated in their respective Sub-area Plans. *See* Plan Update, at 14.1 and 13.1 respectively.

The Plan Update Capital Facility Element's Goal 1, at 11-2, states:

> Define types of public facilities, establish standards for levels of service for each type of public facility, and *determine what capital improvements are needed to achieve and maintain the standards for existing and future populations*, and to repair and replace existing public facilities.

(Emphasis supplied).

Policy CF-1 defines 13 different types of capital improvements and systems that the County deems to be public facilities – sanitary sewer and water are public facilities. *Id*.

Policy CF-2 establishes categories for the various public facilities. Sanitary sewer and water fall within Category C and Category D public facilities and are explained as follows.

> **Category C**. Category C public facilities are *facilities owned or operated by the County* but not subject to the concurrency requirement. The LOS standards of Category C facilities do not apply to development permits issued by the County (beginning in the 2007 fiscal year and following adoption of the County's budget and Capital Improvements Program beginning in the 2007 fiscal year) or to the concurrency management system set forth in Policy CF-15. Category C facilities LOS standards apply to GMA and other statutory requirements (*i.e.* GMA Planning Goal 12, Subdivision Approvals, Impact Fees), regarding the provision of appropriate and adequate public facilities. Category C facilities include community centers, open space, trails, *sanitary sewer (County-owned)*, solid waste and surface water management.
>
> **Category D**. Category D public facilities are facilities *owned or operated by federal, state, or city governments; independent districts, or private organizations*; but not subject to the requirement for concurrency. The LOS standards of Category D facilities do not apply to the concurrency management system as set forth in Policy CF-15. Category D facilities are provided by entities other than Kitsap County; therefore the LOS standards do not apply to the County's budget or the County's Capital

> Improvements Program. However, the LOS standards apply to the budgets and capital improvements programs of the entities that provide the public facilities, GMA (*i.e*. GMA Planning Goal 12, Subdivision Approvals, Impact Fees) and other statutory requirements regarding the provision of appropriate and adequate public facilities, and other chapters of the Plan. Category D facilities include fire and emergency medical services, school district and *water facilities* and *non-county sanitary sewer* facilities.

Plan Update, at 11-3, 11-4; (emphasis supplied).

The County notes that CF-15 applies *only* to Category A and Category B public facilities and is actually limited exclusively to transportation infrastructure – *i.e*. roads. Kitsap Response, at 41-44. The Board agrees. The County then explains that Category C and Category D facilities require a different type of concurrency – *i.e.* the provision of appropriate and adequate public facilities – per Goal 12 of the GMA. This type of concurrency is based upon maintaining the established levels of service. *Id*. at 47. The Board does not dispute this, since these "concurrency" management approaches deal with *new development at the permitting level*. However, the County does not respond to Petitioners' argument that the CFE does not support *existing* and planned development within the UGAs – the same argument offered in the *KCRP VI* case involving the Kingston UGA and sewer plan. At issue here is the question of drawing UGAs where urban services are available, adequate and can be provided to "meet existing needs" (RCW 36.70A.070(3)(e)), not just support future growth, throughout the UGA. This is the crux of Petitioners' concern.

For the five UGAs of interest, who provides capital facilities and services – specifically sanitary sewer - to these five UGAs?

The Central Kitsap UGA and the Silverdale UGA are provided sanitary sewer service by Kitsap County. Plan Appendix A, at 60-61 states:

> Kitsap County owns and operates conveyance and treatment facilities in the Central Kitsap service area. This service area is the largest system in Kitsap County and includes the naval facilities at Bangor, Keyport, and the City of Poulsbo along with developed areas in the Silverdale and Central UGAs. The service area extends northerly from Waaga Way along Silverdale Way to include the Ridgetop area. To the east, the service area includes much of the existing urban areas located south of Waaga Way and north of Bremerton. The plant also treats septic tank waste hauled to the plant.
>
> . . .
>
> Treatment facilities at the Central Kitsap WWTP [wastewater treatment plant] are currently rated for an Average Daily Flow (ADF) of 6.0 mgd [million gallons per day]. . . . The County plans to expand the plant based

> on the extent of growth predicted within the existing sewer service area. The second phase of construction at the plant will upgrade to 10.6 mgd ADF. The existing 68-acre site is expected to accommodate layout of facilities for capacity in excess of 25 mgd ADF. Table SS.2 shows the 2012 and 2025 population allocations for the areas served by Central Kitsap wastewater facilities.

Table SS.2, in relevant part shows the following:

Table SS.2 Kitsap County Sewer System Population Allocation

Sewer Facilities	**2003**	**2012**	**2025**
Central Kitsap Service Area			
Sewered	27,898	49,324	65,406
Unsewered	15,074	11,305	7,537

Id. at 65. The County explains "unsewered" as follows: "Estimate that as density increases and septic systems fail, one quarter of existing septic system in UGA/LAMIRD's will connect to sewer by 2012 and one quarter by 2025." *Id*. footnote 3.

What is striking about this table is that the County acknowledges that by 2025, 7,537 existing residents will remain without sewer service in the UGA. The County appears to be acknowledging that sanitary sewer facilities will not be adequate and available for over 7,000 residents during the planning period within this UGA. This is exactly the point the Board understands Petitioners to be making, yet the County does not address this concern. This Table alone is sufficient for the Board to find and conclude that the County's sizing, of at least the Central Kitsap and Silverdale UGAs, is contrary to Goal 12 and RCW 36.70A.070(3).

The Board also notes that for the Gorst UGA Plan Appendix A, at 66, states:

> In 1996, the Bremerton-Kitsap County Health District (now Kitsap Health District) published a study "Gorst Area On-site Sewage Systems Sanitary Sewer Project," that concluded that 14 percent of the Gorst septic systems had failed (49 failures out of 341 systems surveyed) and that 81 percent had either failed or were in danger of failing in the near future (277 out of 341). By 1998 the Health District had declared Gorst and the surrounding area a "severe public health hazard" and defined an LID boundary that encompassed only those properties that had on-site system failures or the potential for failure. This project will construct a sewer collection system for Gorst to connect to an existing treatment plant, or allow for

> construction of a satellite treatment facility should that prove to be technically and financially feasible.

Yet there is no indication in the Plan Update whether or how the problems in this "severe public health hazard area" have been addressed. The Board notes that the Gorst area is not apparently part of the County-owned or operated system.

For the Port Orchard and West Bremerton UGAs, sanitary sewer service is provided by the Cities of Port Orchard and Bremerton, respectively; they are not County-owned and operated systems. However, there is no indication in the Plan Update that these City systems can make sanitary sewer service adequate and available to serve the UGAs the County has drawn, including "meeting existing needs" as required by RCW 36.70A.070(3)(e).

In 1997, the Board addressed the County's CFE in another case, and stated:

> The Board notes a concern with sanitary sewers. The County manages only five of the twelve wastewater treatment facilities operating within the County. The County indicates that "[c]urrently, the county does not have planned sewage treatment works in the south area that could provide service to the Port [of Bremerton industrial area] or to Gorst. The closest sewage treatment works are in Port Orchard, managed jointly by the City of Port Orchard and Sewer District #5; and in Bremerton, owned and operated by the City of Bremerton. [*citing* CFP, at 3-58].
>
> Additionally, for facilities not owned or operated by Kitsap County, the County indicates that the financing and locational information is described elsewhere. [*citing* CFP 3-65]. However, there is no indication where "elsewhere" might be. Obviously, for cities within the County, the information would be available in the CFP of each city's comprehensive plan. But for tribes and private sewer districts, there is no capital facility planning requirement. If the County designates a UGA that is to be served by such a provider, the County should at least cite, reference or otherwise indicate where such locational or financing information may be found that supports the County's UGA designations and GMA duty to ensure that adequate public facilities will be available within the area during the twenty-year planning period.

Bremerton, et al. v. Kitsap County, CPSGMHB Case No. 95-3-0039c, coordinated with *Port Gamble, et al. v. Kitsap County*, CPSGMHB Case No. 97-3-0024c, Finding of Noncompliance and Determination of Invalidity in *Bremerton* and Order Dismissing *Port Gamble*, (Sep. 8, 1997), at 41.

The Board has reiterated the importance of capital facility planning, by all entities, when a *County is setting UGA* boundaries. The County must be sure that the areas within the

UGAs will have adequate and available urban services provided over the 20-year planning period – otherwise, the UGAs must be adjusted or other remedial measures taken. See *Hensley III v. City of Woodinville*, CPSGMHB Case No. 96-3-0031, Final Decision and Order, (Feb. 25, 1997); *Johnson II v. King County*, CPSGMHB Case No. 97-3-0002, Final Decision and Order, (Jul. 23, 1997); [*Bremerton coordinated with*] *Alpine Evergreen v. Kitsap County*, CPSGMHB Case No. 98-3-0030c, Order Rescinding Invalidity in Bremerton and Final Decision and Order in Alpine, (Feb. 8, 1999); and most recently, *KCRP VI v. Kitsap County*, CPSGMHB Case No. 06-3-0007, Order of Partial Compliance [Re: Kingston Sub-area Plan], Order of Continuing Noncompliance and Invalidity [Re: Kingston Wastewater Treatment Plan], (Mar. 16, 2007).

Given that the Central Kitsap UGA and the Silverdale UGA are reliant upon sanitary sewer service from the County and the County acknowledges that by 2025, over 7,000 residents in that sub-area will likely go unsewered and un-served, the Board finds and concludes that the County has not complied with the provisions of RCW 36.70A.020(12) and .070(3). The County may chose to rethink or redraw the UGAs in these areas, accommodate a lesser OFM population [within the range projected], modify its urban densities to increase the efficiency of the existing sewer system without extensions for new development, or draw up a plan to service the area. This is not to say that the Board is requiring each existing residence to be connected, but that the service provider should have the capacity (i.e. treatment facilities, trunk lines) to make adequate service available to the area.

Regarding the Gorst UGA, the Board finds and concludes that the County has not indicated how or who will address the septic system failure issue[8] for the Gorst area. Thus, the County should either retract the UGA, increase densities, or obtain assurances that sanitary sewer service will be adequate and available within the 20-year period for these areas.

For the West Bremerton and Port Orchard UGAs, again, the County should retract UGAs, increase densities, or obtain assurances that sanitary sewer service will be adequate and available within the 20-year planning period for these areas. While the Board's analysis has focused on sewer services, other capital facilities may be similarly deficient in providing service to existing residents in the UGA. The CFE must take into account, through its inventory and plan, the urban services needed throughout the UGA, not just on its developing fringe, over the 20-year planning period.

Conclusion

The Board finds and concludes that the County's adoption of Ordinance 370-2006, specifically the CFP at Appendix A, was **clearly erroneous.** Additionally, the Board finds and concludes that the County **has not complied with RCW 36.70A.020(12) and**

[8] The Board notes that the Governor's Puget Sound Partnership recognizes that one of the major contributors to water pollution, and the health of Puget Sound, is failing septic tanks

36.70A.070(3)'s mandate to provide necessary services to support existing and new development within the UGAs within the 20-year planning period.

D. RURAL WOODED INCENTIVE PROGRAM

[Suquamish Tribe Legal Issue No. 3 and KCRP/Harless Legal Issue No. 4]

The Board's PHO, at 9, set forth the Rural Wooded Lands Legal Issues as follows:

3. *Did the County fail to follow guidance under RCW 36.70A.020(9) and (10), and fail to comply with RCW 36.70A.070(5) and RCW 36.70A.030(16) when the Plan Update – Ordinance No. 370-2006 – and implementing development regulation Ordinance No. 367-2006 allow for a very large number of clustered residential developments to occur on a phased basis, but without clear objective standards for proceeding with each next phase, on up to 50,000 acres of Rural Wooded designated areas, and which relies upon substantial amounts of temporary 40-year open space called Wooded Reserve, thereby promoting sprawl in direct contradiction to the fundamental goals of the GMA? [Suquamish PFR]*

4. *Did the County fail to be guided by RCW 36.70A.020(1), (2), (8), (9), and (10), and fail to comply with RCW 36.70A.070(5)(c) when it instituted, as part of its Plan update – Ordinance No. 370-2006 – a phased program to encourage forestry by creating additional rural residential lots but does not contain adequate controls to protect rural character or prevent eventual conversion of most of the forested lands to residential use? [KCRP PFR]*

<u>The Challenged Action</u>

Kitsap County's provisions for its Rural Wooded Incentive Program (**RWIP**) are found in its zoning code, recently amended by Ordinance No. 367-2006, and codified at chapter 17.301 Kitsap County Code (**KCC**), HOM Ex. 11. The provisions of the RWIP [KCC 17.301.080] are set forth in full in **Appendix B**. Relevant provisions are included in the Board's Discussion.

<u>Applicable Law</u>

Petitioners raise compliance with numerous Goals of the GMA – Goals 1, 2, 9 and 10, each set forth *supra*. However, Petitioners also challenge compliance with RCW 36.70A.020(8) – Goal 8 – which provides:

> (8) Natural resource industries. Maintain and enhance natural resource based industries, including productive timber, agriculture, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.030(16), noted in the Legal Issue statement, is the GMA's definition of "rural development" which states:

> [Rural development] refers to development outside the urban growth area and outside agriculture, forest and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, *including clustered residential development, at levels that are consistent with the preservation of rural character and the requirement of the rural element.* Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.

(Emphasis supplied.)

RCW 36.70A.070(5) establishes the components of a county's mandatory rural element. This section of the Act provides, in relevant part:

> 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 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. *In order 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 are consistent with rural character*.[9]

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[9] The Act defines "rural character" as:

> [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;

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).

Discussion

Position of the Parties:

Petitioners Suquamish Tribe and KCRP/Harless challenge the County's RWIP generally arguing that the RWIP program cannot be borne out on the ground and specifically argue: 1) the RWIP cluster and bonus density provisions[10] encompass a large area [up to 50,000 acres in 10 phases of 5,000 acres each] thereby promoting urban type sprawl [through high-density clusters] that will not preserve and protect the area's rural character; 2) the RWIP does not contain specific standards on lot sizes, internal and external cluster separation requirements, limits on the number of clusters or locational requirements for clusters; 3) the County failed to asses the cumulative effects of the incremental phasing of this program; 4) the 40-year "temporary reservation" of Wooded Reserves is ambiguous; 5) the monitoring and approval process does not thwart negative effects of incremental

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b. That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in the rural areas;
c. That provide visual landscapes that are traditionally found in the 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.

RCW 36.70A.030(15), (emphasis supplied).

[10] The base density for the RWIP is 1 dwelling unit per 20 acres, but incentives and bonuses allow this base to be adjusted to 1 du per 5 acres, which *could* yield homes on lots of just over one acre.

development, since it is "after the fact" monitoring; 6) the RWIP promotes development which will require urban-type services; 7) the RWIP fails to foster compact urban development or further the environmental and resource industries goals of the Act; and 8) the County failed to document how the RWIP harmonizes the various goals of the GMA. Suquamish PHB, at 61-83.

Intervenor argues: 1) the RWIP would increase densities that are inconsistent with the County's rural character; 2) the RWIP would "lure people out of the UGA" into the rural area rather than directing growth into the urban area; and 3) the RWIP provides bonuses and incentives which saves land temporarily but encourages future development of the Wooded Reserve. S'Klallam PHB, at 8-10.

The County explains the context of the RWIP Plan policies and development regulations and argues: 1) Petitioners have abandoned the challenge to compliance with RCW 36.70A.070(5)(a) or (c) since there in no argument as to how 5(c) is violated and 5(a) is not cited, and there is no explanation of how the goals are violated; 2) Petitioners' arguments 7 and 8, *supra* are new arguments not within the scope of the Legal Issues (SEPA, 36.70A.110(2), 36.70A.170); 3) the extent or scope of RWIP is phased and limited; 4) there are specific and clear standards governing the clusters; 5) monitoring and phasing and evaluation of RWIP allow cumulative effects to be addressed; 6) the 40-year limitation is consistent with planning cycles; 7) urban services cannot be extended to clusters; and 8) the RWIP adds protections to resource lands. Kitsap Response, at 7-8, 11-12, 64-88.

In reply, Suquamish reiterates and embellishes the arguments made in its PHB, but emphasizes the lack of 'on the ground' analysis to support the expectations of the RWIP. Suquamish Reply, at 30-45.

Board Discussion:

Petitioners mention the long history of disputes pertaining to the County's efforts to address its forest lands and Rural Wooded lands, noting that a similar program to the one challenged here was addressed by this Board in *Bremerton, et al. v. Kitsap County [Manke Lumber Company, Overton Family, McCormick Land Company, Olympic Property Group and Port of Bremerton – Intervenors; 1000 Friends of Washington – Amicus Curiae]* (***Bremerton II***), CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order, (Aug. 9, 2004).

As the Board observed in *Bremerton II*,

> Forestry activities are permissible on lands designated as "Rural" in the County's Plan. *See* RCW 36.70A.070(5)(b). However, forestry on these "wooded lands" is not entitled to the protections from encroachment of incompatible uses that attach to lands designated as forest resource lands

> of long-term commercial significance. *See* RCW 36.70A.170, .060, .030(8) and .020(8).
>
> Likewise, the Act permits the County to include cluster development and density bonus incentive programs for "Rural" lands (*i.e.* in the Rural Element of the Plan), as mechanisms to provide for a variety of rural densities. *See* RCW 36.70A.070(5)(b) and .090. The County can rely on local circumstances to help shape its rural density provisions. *Id.* As articulated by the parties in briefing and at the HOM,[11] the relevant local circumstances in Kitsap County include, at a minimum: 1) a large number of nonconforming small lots in the rural area; 2) a significant number of large ownerships and large lots in the rural area; 3) ongoing forestry activities in the rural area that does not have long-term commercial significance (*i.e.*, not forest resource lands); and 4) the lack of aggregation of smaller nonconforming lots in the rural area.
>
> As all the parties briefing this issue acknowledge, the County has been pursuing some form of incentive program in the forested portions of its rural area for some time. *See* City PHB, Tribe PHB, County Response I, Manke Response and Overton Response. There does not appear to be any dispute regarding the *need* for some type of an incentive program in light of the local circumstances found within these rural areas of Kitsap County.

Bremerton II, FDO, at 23. The Board notes that the "local circumstances" articulated in *Bremerton II* have apparently not changed, but have not been specifically articulated in briefing. The Board therefore assumes that these "local circumstances" have not changed and remain the problem that the County is attempting to solve with the RWIP.

In *Bremerton II*, the Board found noncompliance pertaining to Kitsap County's Plan Policies that were adopted to address Rural Wooded Lands. Among the reasons the Board found noncompliance was the fact that the County's Plan policies were ambiguous, there were *no implementing development regulations* to carry out the Plan policies[12] and there was no environmental assessment of the impact of such a program. *See Bremerton II*, at 23-26.

The present challenge is to the County's latest effort to address the local circumstances it faces. Unlike the situation in *Bremerton II*, the County now has both Comprehensive Plan Policies to address the Rural Wooded Lands (*See* Ordinance No. 370-2006; Plan Update, at 3-17 through 3-19) and development regulations – zoning and an incentive program to implement these policies (*See* Ordinance No. 367-2006; chapter 17.301 KCC, HOM Ex. 11.)

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[11] *See* HOM Transcript, at 35, 46, 49, 55, 60-61, 65 and 75.

[12] The Board declined to enter a determination of invalidity simply because without implementing regulations, potential project proposals would have no basis for vesting. *See Bremerton II*, at 56.

Petitioners have alleged noncompliance with RCW 36.70A.070(5) in their Legal Issues. This allegation provides ample latitude to argue noncompliance with RCW 36.70A.070(5)(a) and (c), as well as its others provisions. Petitioners' arguments are within the scope of the Legal Issue and are not abandoned or new; the Board will entertain them. However, in their briefing for Legal Issues 3 and 4, Petitioners present argument in regard to inconsistency between the RWIP and the Comprehensive Plan and violations of Chapter 43.21C RCW (SEPA), RCW 36.70A.020(3), .110(2) and .170, none of which were cited within these Legal Issues. The County correctly asserts that Petitioners are attempting to raise new issues not properly before the Board, and the Board agrees. These allegations will not be addressed by the Board.[13]

The scope and extent of the RWIP:

Petitioners assert that the scope of the RWIP is too extensive, that it will promote suburban sprawl, and that it will not protect the rural character of the area. The RWIP is available to all properties with the "Rural Wooded" (**RW**) zoning district that are 20 acres or larger in size; with individual projects not to exceed 500 contiguous acres. KCC 17.301.080(B), HOM Ex. 11. There are 49,500 acres zoned RW in the County. Ex. 30515. Of that acreage, an estimated 42,108 acres are within parcels 20 acres or larger, approximately 85% of the RW lands, and therefore potentially eligible for this program. *Id*. The bulk of the eligible parcels are located in the northern portion of the County, a second cluster within the westerly portion, along Hood Canal, and a third cluster in the southern portion of the County, south of State Route 3. *Id*. Figures 1, 2 and 3. These areas are not in close proximity to any of the County's cities or UGAs. *See* Plan Update, FLUM, at 2-3 and 2-5. Land available for use in the program is to be released in a series of 10 phases. KCC 17.301.080(B)(1) states,

> Land available for use in this program will be *designated in the Comprehensive Plan* in an incremental phased approach consisting of *10 phases*. The phased process of this program is described below:
>
> a. Initial phase shall be limited to a total of five-thousand (5000) acres of Rural Wooded (RW) land.
> b. All parcel acreage utilized in [RWIP] developments, including any Permanent Open Space, Wooded Reserve, fresh water bodies, critical areas, and residential acreage, shall be included for calculations toward the remaining available Phase acreage.
> c. Subsequent phases may be released based upon the provisions identified in subsection 17.301.080(B) with each limited to a total of five-thousand (5000) acres of Rural Wooded (RW) land.

HOM Ex. 11, (emphasis supplied).

[13] At the HOM, Petitioners acknowledges that these were new issues. Suquamish Reply, at 4.

The Plan Update designates the entirety of RW lands – approximately 50,000 acres – but the Board finds no reference, nor do any of the parties direct the Board to, any designation in the Plan Update *where the initial "5000 acre" phase is identified or located.* If the language of KCC 17.301.080(B)(1)(a) is the authorization of the "initial phase" designation, then only 5000 acres have been authorized or released for this phase of the program. The Board finds that the scope and extent of this "release" is modest – less than 10% of all RW lands eligible. However, how are subsequent phases released? Are the next nine phases automatically and incrementally released, until the entire RW designation has been phased?

KCC 17.301.080(B)(2) details the requirements for "monitoring" of the program. The criteria for determining whether to release subsequent phase [a new decision] is set forth as follows:

> a. Monitoring shall be conducted every two years to evaluate the effectiveness of the [RWIP] . . .
> b. Releases of the subsequent phases of acreage available for the [RWIP] *shall* be determined based upon *all* the following decision criteria.
>
> (1) Satisfactory progress toward achieving the Rural/Urban split identified in the County-Wide Planning Policies[14]
> (2) Final approval of the [RWIP] developments comprising more than 30 per cent or 1,500 acres, whichever is greater of the total phase acreage;
> (3) Determination of no level-of-service failures on roadways serving existing [RWIP] developments.
> (4) Satisfactory maintenance of rural character as defined in subsection 17.301.080.(C) [Type III subdivision approval process] for [RWIP] developments.
>
> . . .
> c. *Prior to the release of each subsequent phase, the Department of Community Development [**DCD**] shall prepare a "Rural Wooded Incentive Program: Phase Assessment Report.*" This report shall assess the program's consistency with the purposes outlined in subsection 17.301.080A and the monitoring requirements of 17.301.080B. The report shall be submitted to the board of County Commissioners.

HOM Ex. 11, (emphasis supplied).

KCC 17.301.080(B)(3), headed "Authority," provides:

[14] Currently the rural-urban split is 76% of population growth for the UGA and 24% for the rural areas. *Kitsap Comprehensive Plan, Land Use Policy LU-2.*

a. *The Board of County Commissioners shall have the authority to* recommend, recommend with conditions, or disapprove *release of each subsequent phase of acreage available to [RWIP]* developments, subject to the provisions of this section.
b. The Board of County Commissioner's decision on a subsequent [RWIP] phase may be appealed as set forth in Title 21 of this code.

(Emphasis supplied).

These RWIP provisions set the parameters for the release process. The RWIP is apparently consistently monitored and evaluated at least every two years by DCD. A release of each subsequent phase is subject to specific criteria that must be applied by the County Commissioners in making any decision to release subsequent phases. It appears that the DCD evaluation must precede any release. The decision of the County Commissioners to release additional *RWIP phases* generally does not involve any proposed development,[15] but rather a broader assessment of the RWIP program, a component of the County's Plan and its development regulations – a legislative action that is subject to review by this Board. **Thus, it appears to the Board that the initial scope of the RWIP program [Phase I – 5000 acres] is modest and reasonable and not clearly erroneous.**

The Density Bonus Alternatives:

The County's RWIP *sliding scale* of density bonuses is depicted on the following table:

Table 1: RWIP Density Bonus Options

	Alternative One	**Alternative Two**	**Alternative Three**	**Alternative Four**
Density Bonus (Base density = 1 du/20 acres)	1 du/10 ac.	3 du/20 ac. (1 du/6.67 ac)	1 du/ 5 ac.	1 du/5 ac.
Wooded Reserve (WR)	75% of site designated as RW for a minimum of 40 years	50% of site designated as RW for a minimum of 40 years	25% of site designated as RW for a minimum of 40 years	None Required
Permanent Open Space (POS)	None Required	25% of site designated as permanent open	50% of site designated as permanent open	75% of site designated as permanent open

[15] These decisions – RWIP development project decisions – are made by the hearing examiner. *See* 17.301.080(H). However, *see* 17.301.080.B(4)(c), which apparently allows a request for phase release in conjunction with a development application. The Board notes with interest that there are no provisions for any such application or request for phase release.

		space	space	space
Uses Permitted in WR or POS	**WR** = Forestry [consistent with an approved Timber Harvest Permit], existing Agriculture, other Resource Activities, water lines, community wells, drainfields, re/detention ponds, logging and access roads etc. **POS** = Forestry, existing agriculture, other resource activities, logging and access roads, trails, docks, picnic areas, and non-motorized passive recreation.	**WR** = Same as Alternative One **POS** = Same as Alternative One	**WR** = Same as Alternative One **POS** = Same as Alternative One	**WR** = N/A **POS** = No development or forestry permitted
Total Open Space and/or RW	75%	75%	75%	75%

Under any of the four alternatives, only 25% of the site is developable. The development potential of the Density Bonus options as applied to a 100-acre site would be as follows:

- ***Not using the density bonus options*** = 5 lots with no deed restrictions (1 du/20 ac)
- ***Alternative One*** = 10 residential lots on 25 acres, with 75 % of the site designated as RW for a minimum of 40 years.

- ***Alternative Two*** = 15 residential lots on 25 acres, with 50% of the site designated as RW and 25% designated as permanent open space.
- ***Alternative Three*** = 20 residential lots on 25 acres, with 25% of the site designated as RW and 50% designated as permanent open space.
- ***Alternative Four*** = 20 residential lots on 25 acres, with 75% of the site designated as permanent open space.

Derived from KCC 17.301.080E, and KCC 17.301.080F. *See* Appendix B.

Given that RCW 36.70A.070(5)(b) provides that "*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 are consistent with rural character,"* there is no inherent error in the County's clustering program provided for in the RWIP. The Board notes that under the most generous option, a 100-acre parcel is allowed up to a maximum of 20 residences, a net residential density of 1 du/5 acres – a rural, not urban, density, that is consistent with preserving the rural character. The Board acknowledges that the clustered design of the development appears more dense when viewed in isolation, but it is nonetheless a rural density when viewed in the context of the entire parcel. **The County's clustering alternatives are not clearly erroneous.**

Specific standards pertaining to clusters:

Petitioners complain that the RWIP has no specific standards governing clusters. Petitioners are in error. KCC 17.301.080(E) details development standards. These standards govern base density, the bonus densities for the different RWIP alternatives, minimum and maximum contiguous acreage requirements, clustering requirements [including setbacks, but not a minimum lot size], the maximum number of units in a cluster, vegetative buffers from roads and buffers between clusters, require compliance with the County's critical areas regulations and road standards. *See* 17.301.080(E), HOM Ex. 11. There are ample specific standards here governing the RWIP program.

The Board also notes that the lack of a required minimum lot size is not fatal, since one of the purposes of clustering is to concentrate development on a smaller portion of the eligible parcel while preserving a larger portion from development. Additionally, Kitsap Comprehensive Plan Policy RL-61 directs that clustering be limited and monitored, "such that clustering does not become the predominant pattern in the rural area."

Because of the specific standards provided for in the RWIP program and the County directive to prevent clustering from becoming a predominant land use pattern in the rural area, **the Board concludes that the County's actions were not clearly erroneous.**

Cumulative effects of clustering and "after-the-fact" monitoring:

Petitioners assert that the cumulative effects of clustering have not been assessed, implying that if they had been, the assessment would indicate urban sprawl and the destruction of rural character.

In *KCRP I v. Kitsap County*, CPSGMHB Case No. 94-3-0005, Final Decision and Order, (Oct. 25, 1994), at 11, the Board said,

> The 'true test of whether' a development regulation results in urban growth is to determine what the regulation permits to be 'physically constructed on the ground, in the real world' and 'how that potential outcome squares with the Act's definition of urban growth."

The County's RWIP monitoring program addresses an on-the-ground evaluation of how the RWIP is progressing.[16] The provisions for the biennial monitoring program are contained in KCC 17.301.080B)(2). *See* HOM Ex. 11. Further, the Board notes that Ex. 30515 identifies the outer boundaries of the RWIP program – the maximum allowable acreages that could be subject to RWIP. So its potential scope, as discussed *supra*, is known, which provides a context for monitoring and assessing whether clustering is trending toward becoming a predominant pattern of development threatening the rural character. See Plan Policy RL-61. **The Board finds that this approach is not clearly erroneous**.

The 40-year period:

In *Bremerton II*, one of the reasons the Board remanded the RWIP was the ambiguity surrounding the end of the 40-year period. The challenged Plan Policies did not clearly address this question.

In the present RWIP implementing regulations, what happens at the end of 40 years in a wooded reserve is addressed. KCC 17.301.080(F) – Uses Permitted Within the Wooded Reserve and Permanent Open Space – provides:

> 1. Wooded Reserve. This area shall be designated wooded reserve for a minimum of forty (40) years. . . *.After this period has expired, the owner may seek additional development on the wooded reserve. The density and lot requirements for the wooded reserve area shall be consistent with the County Code at the time of the future application.*

(Emphasis supplied).

[16] The Board notes again that in the hypothetical situation, the most generous clustering provisions yields a net density of 1 du/5 acres on a 100 acre parcel – this is not an urban density or urban growth.

Petitioners assert that the County's development regulations, as was the case in *Bremerton II*, remain ambiguous in that the regulations do not clearly state whether this area could only accommodate the remainder of previously approved but unused units, or whether a new development proposal could be sought for the undeveloped Wooded Reserve [WR]. Petitioners' PHB, at 69-70.

At the HOM, the County argued that at the time of original RWIP application, the entire site is platted with individual lots for residential development and tracts containing the WR, Permanent Open Space, and/or critical areas. HOM Transcript, at 104. According to the County, if, in 40 years, the property owner wishes to develop the WR tract, the densities permitted under the then-existing zoning would need to be applied to the entire plat and not just the percentage retained within the WR. Only if the zoning has been amended to allow for the overall density to increase will the property owner have the opportunity to essentially re-plat the entire property and develop at those higher densities. *Id.* at 105-108.

The County's iteration of the WR 40-year development restriction seems reasonable, as the site would be approved as a plat. However, the code reads that after 40 years, *additional development may be sought on the WR*, with this subsequent development subject to conformance with density and lot requirements in place at that time. No reference is made to the "parcel as a whole" as the County asserts. From these code provisions, an applicant could reasonably believe that only the acreage contained in the WR tract would be under consideration.

The **Board concludes that the County's development regulations**, as the plan policies did in *Bremerton II,* **fail to address how much density could be accommodated within the WR after the 40-year period has expired** by creating ambiguity as to the total base acreage for density calculation.

<u>*Urban services for clusters*</u>:

Petitioners claim that a proliferation of clusters will require urban services and that uncapped clusters will result in the creation of a suburban village or LAMIRD "springing up willy-nilly" in the most remote and rural wooded lands of the County. Suquamish PHB at 74-75. The County argues there is no basis for this speculative assertion by Petitioners, especially since 17.301.080(H)(2) provides: [The examiner *shall* find that *all* 8 decision criteria are met including] "[T]he proposed development will not require the extension or provision of sanitary sewer service or other urban services to the development."

Although the Board can understand that clustered residential development gives the appearance of a suburban environment and a need for urban services, the property subject to the RWIP remains in the rural area and clusters are limited to 25 units with specific location and buffering requirements. The Petitioners have failed to adequately demonstrate that clustered development within a rural area will result in a demand for

urban services and the Board must presume that the County, and its examiner, will adhere to the approval criteria for the RWIP. **The Board finds no clear error on the part of the County.**

Fostering compact growth and preserving rural character:

Petitioners argue that the RWIP does not encourage compact urban growth in urban areas by failing to promote infill development, perpetuating small non-conforming lots, and directing growth away from urban areas. Petitioners' PHB, at 77-78. Intervenor asserts that the location of lands eligible for the RWIP are near enough to existing UGA that residential units will be an attractive option for County residents, effectively "luring" people out of the UGA and into the rural area. Intervenor's PHB, at 9-10. Petitioners further assert that the RWIP allows a pattern of lot sizes – number, location, and configuration – that constitute urban-type sprawl within the rural area contrary to RCW 36.70A.070(5)(b), which states that clustering may be provided only when it will accommodate *appropriate rural densities* and uses that are *not characterized by urban growth* and that are *consistent with rural character*. Suquamish PHB at 65, 69.

On its face, permitting clustered development within the rural area seems contrary to a key tenet of the GMA – encouraging urban-style growth within urban area. However, the GMA promotes the use of innovative land use management techniques such as clustering and the Act specifically defines rural development to include clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. *See* RCW 36.70A.030(16), 36.70A.090. Although clustering is permitted in the rural areas, the GMA is cognizant that the magnitude of such clustering can potentially affect rural character. This is why it is important that rural clustering be monitored to ensure that its magnitude and extent is not overreaching. The County has included such monitoring provisions in the RWIP.

Approval criteria for RWIP developments specifically require that rural character be preserved. KCC 17.301.080(H)(4). Comprehensive Plan policies and design standards are also in place to ensure that one of the stated purposes of the RWIP – "produce a development pattern in rural areas that is consistent with rural character" – is met. KCC 17.301.080(A)(1). These same design standards also address cluster size, location, and aesthetic buffering. KCC 17.301.080(E). The biennial monitor program also works to ensure maintenance of the qualities of rural character. KCC 17.301.080(B)(2).

Given the GMA's allowance for clustering within rural areas, the County's RWIP, including the supporting Plan Policies and monitoring provisions to protect the rural character, cannot be seen to be in violation of the Act.

Maintenance of natural resource industries and preserving rural character:

Petitioners argue that residential development of lands through the RWIP will "frustrate efforts to maintain forestry on those reserved forest lands based on the RWIP

development patterns," thereby thwarting the GMA's Goal 8 in regard to protection of natural resource lands. Petitioners' PHB, at 76-77. The County asserts that the RWIP's regulations actually provide additional protection, over and above that which is required by the GMA. Kitsap Response, at 83-84. In essence, it seems that Petitioners argue that the lands in question [WR and RWIP lands] are forest resource lands. The County appears to argue forestry is allowed in rural lands and that there are additional protections to the "industry" in the RWIP provisions.

The GMA basically defines three fundamental and significant land use categories: Resource, Rural and Urban lands. Each category is distinct and each merits specific direction under the GMA. *See MBA/Brink v. Pierce County*, CPSGMHB Case No. 02-3-0010, Order on Motions, (Oct. 21, 2002). These fundamental statutory land use categories cannot be altered by local discretion. Under the GMA, natural resource industries, such as productive timber industries, are to be maintained and enhanced through the conservation of productive natural resource lands. RCW 36.70A.020(8). Lands that have been designated as natural resource lands (RCW 36.70A.170) because of their long-term commercial significance and lack of urban growth maintain special protection under the GMA. *See* RCW 36.70A.060 (development regulations to protect continued use of resource land and plat notification). Rural lands are lands that "are not designated for urban growth, agriculture, forest or mineral resources." RCW 36.70A.070(5). Rural development, not urban development, is allowed, and protection of the rural character [defined in RCW 36.70A.030(15)] is the GMA mandate. *Id*. Lands designated as natural resource lands are to protect the resource *and the industry* from incompatible uses. Lands designated rural are to foster rural development and preserve the rural character. While forestry, agriculture and mining are permitted in rural areas, they are not accorded the same protections from incompatible uses as those lands formally designated as resource lands. Rural development, even clusters, may encroach upon such operations in the rural areas.

It appears to the Board that the question is whether the RWIP, as applied to the Rural Wooded lands, is a program to provide for a variety of rural densities while preserving rural character, or is this an effort to preserve forestry, while preserving future development options and bestowing the protections of designated forest resource lands upon these *rural lands*, without designating them as *resource lands.*

Pursuant to the County's Comprehensive Plan, the Rural Wooded designation is applied to larger parcels of land in contiguous blocks that are *forested in character*, that *have been actively managed for forestry and harvested*, and that *may be currently taxed as timber lands*. The stated objective of this designation is to *promote continued forestry practices, provide on-going opportunities for large- and small-scale timber management*, and maintain large contiguous blocks of forested lands to protect significant environmental features (i.e. wildlife corridors, steep slopes, wetlands, streams), while allowing limited residential development in keeping with rural character. Kitsap Comprehensive Plan, Chapter 3 – Rural and Resource Lands, at 3-5. This land use designation is implemented by the Rural Wooded zoning district – KCC 17.301.

As for Forest Resource Lands, the County's zoning designation focuses on lands that contain long-term, commercially-significant forestry resources. And this designation is intended to keep these lands available for commercially-significant resource production. *Id.* at 3-12. Kitsap County has a zoning district applicable to natural resource (forestry) lands – KCC 17.300 Forest Resource Lands (FRL).

Comparing the two zoning districts [table derived from KCC 17.300 and KCC 17.301]:

	Forest Resource Land	**Rural Wooded**
Primary purpose	• Commercial timber production and harvesting; • Discourage activities and facilities which are detrimental to commercial timber production and harvesting.	• Encourage preservation of forest uses, conservation of natural resources; provide some residential use; • Discourage activities and facilities which are detrimental to the maintenance of timber production. • Density: Varies under RWIP, with base of 1 du/20 acre
Notice to Residents (adjacent and within)	• Residents will be subject to normal and accepted forestry practices which do not give rise to a nuisance claim; KCC 17.300.010 and 17.300.070	• Same; KCC 17.301.010 and 17.301.080(E)(12)
Uses	• Commercial timber production and harvesting • Residential: Density of 1 du/40 acre	*Within Wooded Reserve:* • Forestry activities consistent with Timber Harvest Permit • Community services (wells, drainfields, access roads, water systems, etc) • Residential: Various densities, base of 1 du/20 acre

The only discernible feature between these two zoning districts, except for residential density, appears to be the use of the word "commercial" which is undoubtedly linked to the GMA's "long-term commercial significance" requirement for natural resource production. The County acknowledges that it has not designated the 49,500 acres of Rural Wooded lands (primarily forested lands) as Forest Lands of Long-Term Commercial Significance (**LTCS**), asserting that these lands are "not productive enough"

while still recognizing some potential for contribution to the timber industry. Kitsap Response, at 83-84. However, more significantly, the RWIP development provisions of KCC 17.301.080(E)(12) provide:

> A disclosure statement shall be placed on the final plat for all Rural Wooded Incentive Program developments stating that:
>
> The Wooded Reserve designated parcel or tract within the [insert name of plat] plat is reserved for forestry operations. A variety of forestry activities may occur on the Wooded Reserve that are not compatible with residential development for limited periods. Residents may be subject to inconvenience or discomforts arising from forestry activities, including but not limited to noise, odors, fumes, dust, smoke, the operations of machinery of any kind, timber harvest, brush control, the application by spraying or otherwise chemical or organic fertilizers, soil amendments, herbicides and pesticides, hours of operation, and other forestry activities. So long as such forestry operations are in compliance with the Washington Forest Practices Act, RCW Ch. 76.009, they shall not constitute a nuisance. No perimeter buffers are required within the Wooded Reserve area. Urban levels of service will not be provided by Kitsap County or the developer of this property.

RCW 36.70A.069(1)(b), pertaining to designated natural resource lands provides, in relevant part:

> Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration.

Comparing these two "plat note" requirements, the Board is struck that Rural Wooded lands, which are all potentially subject to the RWIP, are accorded the same "industry protections" accorded to Forest Resource Land, yet are permitted increased development densities through clustering. Either these lands are forest resource lands or they are rural – they cannot be both. The County cannot, under the guise of preserving rural character and providing for a variety of rural densities, create a new category of forest lands that are accorded resource land and industry protection AND encourage potential incompatible residential development.

The County's RWIP clearly sets forth various mechanisms to protect the timber industry, namely density, based on percentage of Wooded Reserve set aside, notice provisions,

preservation of interconnectivity of open space, and compliance with the applicable Timber Harvest Permit. These factors, and the RWIP's stated purpose of encouraging the continuation of forestry, demonstrate that although Rural Wooded lands are not "resource lands" as defined by the GMA, the County is offering protection to rural lands which serve to provide limited, as opposed to significant, resources to the community.

The RWIP, absent 17.301.080(E)(12) could conceivably be consistent with the goals and requirements of the Rural Element, RCW 36.70A.070(5), but with such a provision, the RWIP is a resource land and industry protection scheme as well as a rural development incentive program. Alternatively, the County could designate these lands as Forest Resource Lands pursuant to the Act if the industry requires protection. However, the County cannot blur the lines between these two fundamental land use categories. Including such a provision in the RWIP is **clearly erroneous** and contrary to the requirements of RCW 36.70A.070(5).

A written record explaining how the rural element harmonizes the planning goals:

Petitioners assert that there is no written record explaining how the rural element, in the context of the RWIP, harmonizes the goals of the Act.[17] Suquamish PHB, at 82. The Board found a similar flaw in the County's prior effort with the RWIP in *Bremerton II*. The County merely claims that it has an adequate written record, citing Section 3.2.2 of the DEIS and the findings of Ordinance Nos. 367-2006 and 370-2006. Kitsap Response, at 88. In reply, Petitioners claim there is no discrete document that accomplishes the harmonizing of goals. Petitioners' Reply, at 45-46.

Exhibit 30984 is the County's DEIS for the Plan Update. The County contends that the written record is found in the DEIS between pages 3.2-61 and 3.2-99. Kitsap Response, at 88. These pages of the DEIS contain a general description of the relationship between the Plan Update and various Plans and Policies. The RWIP program is mentioned at 3.2-80, "The County's Rural Wooded Incentive Program was the subject of a CPSGMHB case that resulted in the remand of the program back to the County. One of the goals of this 10-year Update is to resolve these issues." This hardly appears to be a harmonizing of the goals in light of local circumstances. The County points to nothing specific in Ordinance Nos. 367-2006 or 370-2006, nor can the Board discern any reference to RWIP and harmonizing the goals of the Act, in these Ordinances. The Board concludes that the County has **failed to comply** with the provisions of RCW 36.70A.070(5)(a) by ignoring this requirement to explain how local circumstances as reflected in the rural element (i.e. the RWIP) are harmonized with the goals of the Act.

[17] RCW 36.70A.070(5)(a) provides: 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.

Conclusion

The Board finds and concludes that the County's action in adopting Ordinance No. 367-2006, specifically the development regulations pertaining to the 40-year limitation and disclosure statement requirements of the RWIP program contained in KCC 17.301.080(E)(12) and .080(F), **failed to comply** with the requirements of RCW 36.70A.020(8). Additionally, the Board finds that the County **failed to comply** with RCW 36.70A.070(5) which requires that the County harmonize the goals of the GMA.

E. TRANSFERABLE DEVELOPMENT RIGHTS

[Suquamish Tribe Legal Issue No. 10 and KCRP/Harless Legal Issue No. 5]

The Board's PHO, at 9-10, sets forth the Transferable Development Rights Legal Issues as follows:

10. *Did the County fail to follow the guidance under RCW 36.70A.020(2), (9) and (10) and fail to comply with RCW 36.70A.090 when Ordinance No. 370-2006 and the Draft Ordinance for Transfer of Development Rights allow for restoration of the transferred development rights to the transferor property after 40 years? [Suquamish PFR]*

5. *Did the County fail to be guided by RCW 36.70A.020(1), (2), (8), (9), and (10), and fail to comply with RCW 36.70A.070(5)(c) and .090 when it designated several expanded UGAs and implemented a Transfer of Development Rights Program as part of the Plan Update by instituting a program to allow rural property owners to sell the development rights from their lands to property owners within the urban growth areas while simultaneously prohibiting application to and implementation in this update? [KCRP PFR]*

The Challenged Action

The Plan Update [Ordinance No. 370-2006][18] includes a section in its Rural Element pertaining to the Transfer of Development Rights (**TDRs**). The following Plan Update polices set forth the basic structure of the TDR program.

> Policy RL-68 - Support and work actively to facilitate the transfer of rural development rights to:
>
> a. Preserve the rural environment, encourage retention of resource-based uses, and reduce service demands in the rural area.
> b. Provide protection to significant natural resources.

[18] Tab F of the Core Documents includes the revisions to KCC 17.430 – the County's TDR program.

c. Increase the regional open space system.

Policy RL-69 – *Promote transfers of development rights by facilitating the transfers from private property owners with sending sites to property owners with receiving sites*, and by working with cities to develop interlocal agreements that encourage transfers into cities and within adopted appropriations.

Policy RL-70 – Require private properties qualified as sending sites to provide a protected area of sufficient size to provide public benefit. Priority candidates for *sending sites* are:

a. All Rural lands
b. Lands contributing to the protection of significant landscape or habitat features.
c. Lands contributing to the protection of environmentally-sensitive features including but not limited to aquifer recharge areas.
d. Lands that contribute to the preservation of scenic views or maintaining the rural character or that are suitable for inclusion in and provide important links to the regional open space system.

Policy RL-71 – Consider the following as candidates for TDR *receiving sites*:

a. Unincorporated UGAs and incorporated cities may receive transfers of development rights.
b. Preferences should be given for locations within designated urban centers, or adjacent to transit stations and park and ride lots. Transfers to incorporated areas shall be detailed in interlocal agreements between the city and County.

Plan Update Core Document, at 3-20, 3-21; (emphasis supplied).

Ordinance No. 367-2006 adopted the development regulations to implement the Plan Update's TDR provisions. Chapter 17.430 Kitsap County Code (**KCC**) contains the TDR provisions. The relevant provisions are as follows:

KCC 17.430.050 Sending areas.

A. Designation of Sending Areas. In addition to those areas that qualify as sending areas according to the Kitsap County Comprehensive Plan, the board of county commissioners may

approve *additional sending areas* through a change to the Kitsap County Code or a Comprehensive Plan amendment.

B. *Rural Sending Areas. All parcels located within rural designated lands* and zoned Rural Wooded, Rural Residential, Rural Protection, or Forest Resource are available to be certified as TDRs based on the zone's permitted density.

KCC 17.430.060 Receiving areas.

A. Designation of Receiving Areas. In addition to those areas that qualify as receiving areas according to the Kitsap County Comprehensive Plan, the board of county commissioners may approve *additional areas as receiving areas*. Additional areas may be approved through a change to the Kitsap County Code or a Comprehensive Plan amendment. The designation of additional TDR receiving areas is base on findings that the area or site is appropriate for higher residential densities, is not limited by significant critical areas, and no significant adverse impacts to the surrounding properties would occur.

B. Designated Receiving Areas. *Receiving areas or parcels must be within the urban growth area*.

KCC 17.430.100 Reinstituting development rights of a sending site.

A. Properties that have transferred their development right(s) to an allowed receiving site may have them reinstituted *if a separate development right is purchased* from a property with an allowed sending site. The purchase of a development right must be consistent with the process established by this chapter. *The reinstitution shall not create an increase in density beyond that allowed at the time of original transfer* unless a subsequent code change allows.

B. Unless otherwise prohibited by the board of county commissioners in the annual Comprehensive Plan Amendment docketing resolution, *properties who have transferred their development rights to an approved receiving site* <u>*and*</u> *have been included in an urban growth area* expansion through sub-area plan or similar area-wide planning effort may have their development rights reinstituted for development at urban densities. The reinstitution shall be automatic after review and approval of the Comprehensive Plan Amendment and associated SEPA review.

HOM Ex. 12, at 17-184-185 and 17-187; (emphasis supplied).

Applicable Law

Petitioners allege noncompliance with Goals 1 [urban growth], 2 [reduce sprawl], 8 [natural resource industries], 9 [open space and recreation] and 10 [environment]; each of these Goals is set forth *supra*.

RCW 36.70A.070(5)(c), pertaining to measures governing rural development in the Rural Element of the Comprehensive Plan, is also set forth *supra*.

RCW 36.70A.090 provides:

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

(Emphasis supplied.)

Discussion

Position of the Parties:

In challenging the County's TDR program, Petitioners assert that: 1) the TDR program creates growth capacity of an unknown magnitude in excess of the capacity needed to accommodate the County's share of the 20-year growth target; 2) reinstating development rights to the transferor after 40 years is inconsistent with preserving habitat, resource and environmental goals and policies geared toward creating permanent open space networks and protecting resource lands and critical areas; and 3) the County has no written record explaining how the TDR program harmonizes GMA Goals. Suquamish PHB, at 83-93.

Intervener Port Gamble S'Klallam Tribe concurs with Petitioners and questions: 1) the County Commission's discretion to adopt new receiving areas in the future, and 2) whether the protection and preservation of critical areas and open space can be achieved, since transferred rights may be reinstated. S'Klallam PHB, at 5-8.

The County argues that Petitioners have abandoned portions of these Legal Issues by not briefing (36.70A.090) or by making only conclusory statements (36.70A.020(1), (2), and (8)). Kitsap Response, at 8-9. The County also argues: 1) the purpose of the TDR program is to reduce rural development as evidenced by the requirement that sending areas must be rural or forest resource areas and the receiving areas must be within the UGA; 2) the TDR program will not upset the land capacity analysis or urban capacity because the population capacity will be monitored as part of the buildable lands program and adjusted if needed; 3) the reinstatement period of 40 years is appropriate since it mirrors two complete 20-year planning cycles; 4) habitat and critical areas are protected through the County's critical areas regulations, regardless of where the land is located;

and 5) the County has a written record of how the TDR program harmonizes the Goals of the Act in the DEIS, FEIS, adopting ordinances and Ex. 30518. Kitsap Response, at 89-96.

In reply, Petitioners assert; 1) they did not abandon any issues, nor are there any new arguments; 2) the TDR program applies to the whole County; and 3) the TDR is temporary since the transferor gets the rights reinstated after 40 years, which violates Goals 8, 9 and 10. Suquamish Reply, at 3-4, 46-49.

Board Discussion:

After reviewing the briefing and argument, the Board has determined that Petitioners have not abandoned their respective Legal Issues related to the TDR question, but the Board questions their challenge to the entire TDR program.

First, the transfer of development rights is considered an innovative technique and specifically encouraged by RCW 36.70A.090. The County's choice to pursue a TDR program cannot be noncompliant with this section of the Act – it is permissive and encouraged, imposing no duty upon the County. Further, the purpose of a TDR program is typically to provide incentives for encouraging urban growth within UGAs, directing growth pressures away from rural and resource lands – compact urban development and sprawl avoidance – while equalizing property values. This is a laudable purpose that is also considered a reasonable measure in avoiding the expansion of UGAs. Kitsap's TDR program is consistent with this general purpose.[19]

Second, the Board finds no problem with the current extent of the TDR program. It is presently limited by the Plan Update and chapter 17.430 KCC since the sending sites are Rural and the receiving sites must be Urban – in the UGA. Plan Update Policies RL 70 and 71; and 17.430.050 and .060 KCC, *supra*. The existing TDR system is clearly designed to reduce development pressures in the rural area and focus them in the urban areas, which preserves the rural character. Further, the potential addition of sending or receiving areas by the county commissioners in the future is simply speculative. If and when such an action occurred, it would be appealable to the Board since the necessary amendment would involve an amendment to either the Plan or development regulations.

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[19] KCC 17.430.010 provides, in relevant part:

> The transfer of development rights from one property to another is allowed in order to provide flexibility and better use of land and building techniques; to help preserve critical areas, watersheds and open space; to provide increased *equalization of property values* between various zones, and to work toward *achieving county-wide land use planning goals* as determined by the Kitsap County Comprehensive Plan, the objectives of approved sub-area Plans and the purpose of county implemented regulations.

(Emphasis supplied).

Third, while Petitioners' argument that allowing a TDR program creates additional unknown capacity and exceeds the capacity needed is a creative argument, it is not persuasive. It does not appear to the Board that a TDR program *creates* capacity as much as it *reallocates* existing capacity to different locations. TDRs are specifically encouraged in the GMA; they are a means of *directing growth to different geographic locations* – in Kitsap County's case – creating an incentive to direct growth from the rural areas to the urban areas. This is a direction the County, as well as Petitioners, have been pursuing since the GMA was enacted. Further, as the County argues, the Buildable Lands Program required by RCW 36.70A.215, enables the County to monitor development and assess how the GMA generally, and a TDR program, are succeeding. If necessary, mid-course corrections can be made. The Board is not persuaded by Petitioners that the TDR program upsets the County's present planned-for population capacity or creates an inconsistency with the GMA Goals.

Fourth, the Board finds no error in the County's reinstatement provisions as found in KCC 17.430.100. The language of that section allows a transferor to purchase a separate property right from a property within an allowed sending site – it can be bought back. The reinstitution cannot increase the density beyond that allowed at the time of the original transfer unless a subsequent code change allows increased density. KCC 17.430.100A. The other option for reinstatement can occur when the sending property gets included in a UGA through a legislative action of the county commissioners – again, an appealable event. One of the things that distinguishes Urban from Rural areas is the increased intensity and density of land uses and the availability of urban facilities and services. The Board is not persuaded that the County's limited TDR reinstitution provisions run afoul of any of the cited provisions of the Act.

Fifth, Petitioners make a conclusory suggestion that the County has not prepared a written record supporting the TDR program that harmonizes the Goals of the Act, as required by RCW 36.70A.070(5)(a) [not specifically cited in the statement of the Legal Issue]. The Board finds that the written record contained in the Core Document DEIS, at 3.2-61 through 3.2-100; Ex. 30518; the Plan Update, at 3.1 through 3.8 and 3-20, 21; and chapter 17.430 KCC, satisfies this requirement.

Lastly, however, the Board pauses in looking at 17.43.090(F)(3) and especially (F)(4), dealing with requirements for final approval of a TDR transfer, which respectively provide:

> 3. Recording of a deed restriction, as specified by the county on all of the sending parcels from which development rights are obtained. A copy of the recorded deed restriction must be submitted to the Department, which certifies the transfer of all development rights on each sending parcel. The deed restriction must be approved as to form by the Department. The document notifies all owners and successors that the transfer and its concomitant restrictions run with the land and are binding on all future owners.

4. *For all sending parcels, the deed restriction is sufficient to retire all transferred development rights on the sending parcel* *<u>for a period of 40 years</u>*.

(Emphasis supplied).

The Board notes that the preliminary draft of subsection 4 stated:

> (4) The deed restriction shall be approved as to form by the prosecuting attorney. The document shall notify all owners and successors that the transfer and its concomitant restrictions run with the land and be binding on all future owners. [Note that these sentences parallel subsection 3, *supra*.] *For all sending parcels, the deed restriction shall be sufficient to retire all transferred development rights upon the sending parcel* *<u>in perpetuity</u>*.

Ex. 30518, 5/2/06 preliminary draft of Kitsap County TDR program, proposed draft code language, at .077 (emphasis supplied). The *draft* language recognizes that these transfers are in perpetuity and is consistent with the structure of the TDR program.[20] However, the adopted language "for a period of 40 years" calls into question and makes it unclear as to the ability of the TDR program in achieving its purpose – protecting critical areas, watersheds and open space. Are these areas now in need of new protections while the benefits initially transferred to the receiving areas [the development rights to build] are constructed and permanent? The Board has previously found ambiguity in the 40-year provision within the RWIP, and found noncompliance due to this ambiguity. Likewise, the Board finds ambiguity here as to the effect and impact of the 40-year, or "temporary," transfer of development rights on the County's TDR program. The Board finds and concludes that the adoption of KCC 17.430.090.F.4 was **clearly erroneous** in that it creates ambiguity in the TDR program and creates uncertainty as to whether the TDR program can achieve its purposes.

<u>Conclusion</u>

The County's adoption of the Plan Update [Ordinance No. 370-2006] and the Transfer of Development Rights program – chapter 17.430 KCC [Ordinance No. 367-2006] **generally complies** with RCW 36.70A.090, .070(5)(c), and is guided by Goals 1, 2, 8, 9 and 10 [RCW 36.70A.020(1), (2), (8), (9) and (10), **except** that the "temporary" or 40-year provision of KCC 17.430.090(F)(4), is **clearly erroneous** and **does not comply** with RCW 36.70A.070(5), .020(1), .020(2), .020(9), and .020(10) due to the ambiguity and uncertainty it creates in the County's TDR program.

[20] To the Board, it appears that the considered alternatives were silent on this 40-year timeline, looking more at permanent status.

F. REASONABLE MEASURES
[Suquamish Tribe Legal Issue No. 6]

The Board's PHO, at 10, set forth the Reasonable Measure Legal Issue as follows:

6. *Did the County fail to comply with RCW 36.70A.215 and RCW 36.70A.070 (internally consistent plans) when Ordinance No. 370-2006 only lists proposed reasonable measures and does not evaluate whether the listed reasonable measures are reasonably likely to increase consistency with the Countywide Planning Policies (**CPPs**) pertaining to increasing residential densities in UGAs, and does not adopt or implement any measures that are reasonably likely to increase consistency with the CPPs? [Amended PFR language is underlined.]*

Applicable Law

RCW 36.70A.215, in relevant part:

> (1) … The purpose of the review and evaluation program shall be to:
>
> (a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities;
>
> (b) *Identify reasonable measures, other than adjusting urban growth areas*, that will be taken to comply with the requirements of this chapter.
>
> (4) If the evaluation required by subsection (3) of this section demonstrates an *inconsistency between what has occurred since the adoption of the county-wide planning policies and the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans* and the planning goals and the requirements of this chapter, as the inconsistency relates to the evaluation factors specified in subsection (3) of this section, the county and its cities *shall adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period*. If necessary, a county, in consultation with its cities as required by RCW 36.70A.210, shall adopt amendments to county-wide planning policies to increase consistency. The county and its cities shall *annually monitor the measures adopted under this subsection to determine their effect and may revise or rescind them as appropriate*.

(Emphasis supplied).

Discussion

Position of the Parties:

The crux of Suquamish's argument is that the County has failed to evaluate just how the identified and adopted reasonable measures are reasonably likely to resolve inconsistencies pertaining to residential urban densities. According to Suquamish, the GMA requires (1) identification, (2) adoption/implementation, and (3) evaluation – with the evaluation prong missing in this matter.

Suquamish asserts that the County is required to resolve inconsistencies that were identified in the County's Buildable Lands Analysis Report (**BLR**) by adopting reasonable measures which are likely to increase consistency during the subsequent 5-year period, and that such measures must be implemented with the results monitored *prior to expansion of the UGA.* Suquamish PHB, at 47-49 (citing to *Bremerton II,* CPSGMHB Case No. 04-3-0009c; *1000 Friends et al v. Kitsap County,* CPSGMHB Case No. 04-4-0031c, Final Decision and Order(June 28, 2005), consolidated before Thurston County Superior Court Cause Nos. 04-2-02138-1, 05-2-01564-8, 05-2-01678-4 and appealed to Court of Appeals (Div. II), Docket No. 35267-2). With the cited court case, Suquamish asserts that the Superior Court's holding – finding that 36.70A.215 requires that there must be an evaluation to determine if reasonable measures are achieving the desired results – is binding.

Suquamish argues that all the County has done is provide a list of new and expanded reasonable measures without *evaluating* whether these measures are reasonably likely to increase "on the ground" residential densities within the UGA. *Id.* at 45. Suquamish asserts that any evaluation provided by the County was merely an "inadequate consideration … bare assertions, unsupported conclusions." *Id.* at 55. Suquamish further argues that the County expanded its UGA boundaries without considering the reasonable measures, as required by 36.70A.215, and that the County has failed to evaluate the interplay of measures (*i.e.* RWIP) between urban and rural areas. *Id.* at 54-55, 57. Therefore, this action was inconsistent with the County's Comprehensive Plan because of conflicts between the BLR and the LCA, with the LCA thwarting the very purpose of the BLR and reasonable measures. *Id.* at 57-58.

In response, the County notes that the Court of Appeals issued its decision pertaining to reasonable measures on May 30, 2007, and held that the previously-adopted reasonable measures (Kitsap Resolution 158-2004) in existence during the time of an inconsistency were not reasonable measures and therefore the County had violated 36.70A.215 when it relied on these measures. Kitsap Response, at 53-54 (*citing Kitsap County v. CPSGMHB,* Court of Appeal (Div II) Docket 35267-2 (May 30, 2007)). Kitsap County has since adopted and implemented new reasonable measures through the Plan Update and the measures utilized have been found to be compliant by the Board (*see KCRP VI,* CPSGHMB Case No. 06-3-0007, Compliance Order, at 7.). *Id.* at 54. The County

asserts that it did assess and consider the newly-adopted reasonable measures, which is demonstrated by a variety of documents, and that it looked at how the measures were intended to work, potential benefits, and implementation procedures. *Id.* at 58-61.

The County further argues that the Court of Appeals determined that the County's obligation to review and revise its UGAs under RCW 36.70A.130(3) is *not affected* by the requirement to adopt reasonable measures under .215.[21] *Id.* The County asserts that the GMA requires it to accommodate its allocated growth by reviewing its UGAs, conducting a LCA, and allocating areas to accommodate growth – not merely adopting reasonable measures and hoping that these measures will accommodate all of the 20-year growth population. *Id.* at 54-55; 62-64.

In sum, the County alleges three flaws with Suquamish's argument in regard to reasonable measures in that the GMA does *not* require: (1) a quantitative assessment; (2) a guarantee of success, but rather only a finding that the measure is "reasonably likely" to resolve inconsistencies; and (3) a "show your work" requirement for reasonable measures. *Id.* at 56-57. In addition, the County asserts that Suquamish's position is contrary to RCW 36.70A.320's presumption of validity. *Id.* at 57.

In reply, Suquamish reiterates RCW 36.70A.215's requirement that if inconsistencies are found between actual growth and that envisioned by the Comprehensive Plan, then reasonable measures to resolve this conflict are required, a conclusion that is supported by the Court of Appeals' May 30, 2007 decision, and the County must show its work or perform a quantitative assessment. Suquamish Reply, at 23-24, 27. Suquamish also argues that the County has misinterpreted the Court of Appeals decision in regard to the application of reasonable measures and UGA expansions and that the Board's holding in *KCRP VI* does not automatically ensure compliance of adopted measures. *Id.* at 26-28. Suquamish's position is essentially that the GMA requires the implementation of reasonable measures *prior to* expansion of a UGA. *Id.* at 29-30.

<u>Board Discussion</u>:

Reasonable measures are actions that should be taken by a jurisdiction to facilitate increased urban density and infilling that will lessen the need to expand UGAs and the necessary supporting infrastructure. At the end of the day, the parties simply disagree about what is required by RCW 36.70A.215. Is it solely a list of measures that are reasonably likely to address inconsistencies between actual growth and adopted policies, or does .215 require something more – an analysis that these measures will actually address/resolve these inconsistencies revealed by the BLR?

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[21] The County provides no specific page citation for this assertion. Rather, it appears to be derived from a single footnote of the Court's decision which states that "[T]his does not affect the county's obligations under RCW 36.70A.215" when the Court found that the County had until December 2008 to submit its UGA review. *Kitsap County v. CSPGHMB*, Docket 35267-2, fn. 4 at 17.

RCW 36.70A.215 sets forth a review and evaluation program, the purpose of which is to allow counties to determine whether they are achieving urban densities in line with their policies and plans under the GMA. The Board has previously held that the purpose of 36.70A.215's reasonable measures is to identify mechanisms to accommodate growth other than the expansion of existing UGAs. RCW 36.70A.215(1)(b) (Identify reasonable measures, other than adjusting urban growth areas), *see e.g. Hensley VI 03309c, FDO at 27, KCRP VI 06307 FDO at 17; Strahm v. Everett*, 05-3-0042 FDO 9/15/06.

RCW 36.70A.215(4) requires that reasonable measures must be *reasonably likely* to increase consistency during the subsequent five-year period, with a jurisdiction *annually monitoring* the measures to determine their effect so as to make necessary adjustments. From this provision two distinct evaluation requirements can be drawn: (1) adoption and implementation of "reasonably likely" measures and (2) annual monitoring. Therefore, the Board concludes that the GMA requires both pre-adoption (will the measure work) and post-adoption (has the measure actually worked) evaluation of adopted reasonable measures. The pre-adoption analysis does not equate to a 100 percent guarantee but rather a threshold determination that there is a probability of occurrence, or something more than mere speculation. It is the pre-adoption evaluation that Suquamish questions in this matter.

Suquamish asserts that the County has failed to perform this evaluation, with the County relying on bare assertions or simply providing no analysis at all. Suquamish relies on Appendix C of the FEIS – Reasonable Measures Review – to support its argument, pointing to the column entitled "Quantified or Analyzed for Review in 10-year Update." This document lists the 46 measures developed by the Kitsap Regional Coordinating Council (KRCC) (*see* Index 31064), most of which provide no analysis as to their potential success. Suquamish further cites to the County's analysis of reasonable measures in Appendix C of the FEIS which revealed that some of these measures[22] were shown not to have significantly increased the capacity within the UGAs – in other words, they were not reasonably likely to produce the desired effect.

The County points to various documents in support of its assertion that it did assess and consider the functionality of the newly-adopted reasonable measures, including the Reasonable Measures Review (Index 30987 – Appendix C), the KRCC Reasonable Measures Desktop Reference Guide (Index 31064), and Silverdale and Port Orchard Citizens' Advisory Committees discussion matrixes (Index 30682) – all presumably before the County Commissioners when adopting the challenged action. Both Index 31064 and 30682 appear to list the same 46 measures and provide a description, potential benefits, jurisdictions using the measure, and for the Advisory Committees' matrix - the effectiveness of the measure.

[22] These measures included duplexes, condominiums, cluster development, ADUs, mixed-used development, and density bonuses.

It is Index 30682 that is of particular emphasis. Although Appendix C to the FEIS omits analysis of the effectiveness of the stated reasonable measures, one of the provided matrices offers a brief analysis of the effectiveness of each measure while another matrix provides a low-to-high rating system of effectiveness based on the jurisdiction implementing the measure. This is the pre-adoption analysis that the GMA requires.

Section 2.2.3 of the County's Comprehensive Plan addresses the updated reasonable measures and provides a non-exclusive list of 17 measures, with previous unsuccessful measures removed or slated for revision (*i.e.*, mixed-use and density bonuses).

The Board concludes that Kitsap County's actions in adopting reasonable measures was not in violation of RCW 36.70A.215. The County's comprehensive plan provides for a list of adopted reasonable measures and the Record demonstrates that reasonable measures under consideration for inclusion within the plan were analyzed to determine whether they were reasonably likely to address inconsistencies in regard to residential density. Future monitoring of these measures will provide analysis of their success or failure.

Conclusion

The Board finds and concludes that the County's adoption of Ordinance No. 370-2006, pertaining to reasonable measures, **was not clearly erroneous**. Additionally, the Board finds and concludes that the Petitioners' **failed to carry the burden of proof** in demonstrating noncompliance with RCW 36.70A.215. **Legal Issue No. 6 is DISMISSED.**

G. CATEGORICAL EXEMPTIONS AND NOTICE

[Suquamish Tribe Legal Issue No. 7]

The Board's PHO, at 10, sets forth the Categorical Exemption and Notice Legal Issue as follows:

7. *Did the County fail to follow guidance under RCW 36.70A.020(1), (2) and (13) when Ordinance No. 368-2006 (SEPA implementation ordinance) amendments allow for new categorical exemptions that will make it easier for new up to four unit short plat residential developments to occur outside of UGAs, and will allow for excavation and fill which may destroy and/or desecrate possible archeological sites and cultural resources without providing for notice and opportunity for comment by agencies and Indian Tribes with expertise on such possible sites and resources?*

The Challenged Action

Ordinance No. 368-2006 amended KCC 18.04 to categorically exempt certain minor new construction activities from environmental review. KCC 18.04.090(A), entitled "flexible thresholds for categorical exemptions," provides in relevant part:

> The county establishes the following exempt levels for minor new construction under WAC 197-11-800(1)(b) based on local conditions:
>
> 1. For residential dwelling units in WAC 197-11-800(1)(b)(i):
> a. up to 9 residential dwelling units within the boundaries of an urban growth area; or
> b. up to 4 residential dwelling units outside the boundaries of an urban growth area

Petitioner Suquamish Tribe asserts that this categorical exemption will allow development to occur that may destroy or desecrate possible archeological sites and cultural resources without prior notification to relevant agencies and the Tribe.

Applicable Law

Goals 1 and 2, related to urban growth and sprawl are set forth *supra*. Goal 13 – RCW 36.70A.020(13) provides :

> Historic preservation. Identify and encourage the preservation of lands, sites and structures, that have historic or archeological significance.

The SEPA rules include a section identifying *categorically exempt actions* that are exempt from the threshold determination and EIS requirements. WAC 197-11-800. Minor new construction, a categorically-exempt action, is defined in WAC 197-11-800(1), which provides in relevant part:

> (a) . . . To be exempt under this subsection, the project must be smaller than the exempt level. For a specific proposal, the exempt level in (b) of this subsection shall control, unless the county/city in which the project is located establishes an exempt level under (c) of this subsection. . . .
>
> (b) The following types of construction *shall be exempt*, except when undertaken wholly or partly on lands covered by water:
>
> i. The construction or location of any residential structures of *four dwelling units*.
>
> . . .

(c) Cities, towns and *counties may raise the exempt levels to the maximum specified below* by implementing ordinance or resolution. . . . A newly-established exempt level shall be supported by local conditions, including zoning or other land use plans or regulations. An agency may adopt a system of several exempt levels (such as different levels for different geographic areas). The maximum exempt level for the exemptions in (1)(b) of this section shall be, respectively:

i. *20 dwelling units*.

(Emphasis supplied).

Discussion

Position of the Parties:

The Suquamish Tribe's issue here stems from its concern and tribal responsibilities over archeological and cultural sites. It is undisputed that there are archeological sites throughout Kitsap County, many associated with shorelines. It is also common knowledge that many sites are discovered in association with development projects that disturb the land. The essence of the Tribe's issue here is that if developments of four dwelling units in the rural areas and nine dwelling units in the urban areas are categorically exempt from environmental review, the Tribe will not have notice of possible and potential archeological sites. Thus, the Tribe argues that the categorical exemption is not supported by the GMA's goal for historic preservation. Additionally, to support its allegation of noncompliance with Goal 13, the Suquamish Tribe relies upon the 1989 Centennial Accord [acknowledging the government-to-government relationship between the federally-recognized Tribes and the State], and an April 28, 2005 Proclamation of Governor Gregoire reaffirming the Centennial Accord. *See* HOM Ex. 3 and HOM Ex. 4. Suquamish PHB, at 103-113.

Respondent counters that its adoption of the SEPA categorical exemption for new construction of four dwelling units or less is in accord with the levels established by the State in WAC 197-11-800(1). Likewise, the categorical exemption of nine dwelling units is also within the parameters permitted by SEPA. Kitsap Response, at 104-106. The County also argues that the notice that the Tribe is concerned about will be provided through its notice requirements for short plats (KCC 21.04.030), as well as through its shoreline master program and regulations which require notification to affected tribes upon discovery of archaeological artifacts. Kitsap asserts that the Tribes' expertise in addressing archeological and cultural issues will continue to be sought out and employed. Additionally, the County contends it will continue to adhere to the Centennial Accord and Proclamation. *Id*. at 106-108.

In reply, the Tribe argues that the County is not required to adopt the categorical exemptions that it has adopted, and continues to voice its concern about being given notice of pending development activity. Suquamish Reply, at 53-56.

Board Discussion:

Review of WAC 197-11-800 leads the Board to find and conclude that the categorical exemption levels the County has selected and adopted are consistent with the SEPA requirements articulated in this section of WAC. The 4-dwelling-unit level is specified as a minimum level in the WAC, and the County clearly has discretion to adjust it up to *20* dwelling units and still fall within the parameters of WAC 197-11-800. The County's action was not clearly erroneous.

Categorically exempt actions are those that do not significantly affect the environment and "neither a threshold determination nor any environmental document, including an environmental checklist or environmental impact statement, is required for any categorically-exempt action." WAC 197-11-720, *citing* RCW 43.21C.031. If environmental review is not required for categorical exemptions, there are no environmental review documents to circulate for review and comment.

Goal 13 – identification and preservation of significant historic and archeological sites is an important, yet seldom challenged, Goal of the GMA. Here, it is undisputed that the Tribe has recognized expertise in this area and the Tribe asserts that without notice, it will be unable to assist the County in achieving Goal 13. However, the Tribe grounds its complaint in SEPA and the Centennial Accord and Gubernatorial Proclamation. The Board has already noted that reliance upon SEPA is misplaced. The Tribe seems to have recognized this by supplementing the record with the Centennial Accord and the Gubernatorial Proclamation. However, these documents are beyond this Board's scope of review. This Board is charged with determining compliance with the goals and requirements of the GMA, and SEPA as it relates to GMA.[23] RCW 36.70A.280. Therefore, the Board finds and concludes that it lacks subject matter jurisdiction to determine whether the County's actions are consistent with the terms of these agreements.

The Board notes that the County did indicate in argument and briefing that it values the Tribe's expertise and assistance in identifying and preserving significant historical and archeological sites and that through other regulatory means [*e.g.* short-plat review, shoreline master program activities], notice will be provided. The Board concludes that the Tribe has failed to carry the burden of proof in demonstrating noncompliance with Goal 13 – RCW 36.70A.020(13). However, it would serve the County well to explore additional government-to-government communications' avenues to foster continued cooperation between the County and the Tribe.

[23] Chapter 90.58 RCW – the Shoreline Management Act (**SMA**) – also falls within the Board's jurisdiction; however, the SMA is not alleged in the present matter.

Conclusion

The Board finds and concludes that the County's adoption of Ordinance No. 368-2006, pertaining to categorically-exempt new minor construction, was **not clearly erroneous** and **complies** with SEPA, specifically WAC 197-11-800**.** Further, Petitioner has **failed to carry the burden of proof** in demonstrating noncompliance with RCW 36.70A.020(13). **Legal Issue No. 7 is DISMISSED**.

H. OPEN SPACE

[Suquamish Tribe Legal Issue No. 8]

The Board's PHO, at 10, sets forth the Open Space Legal Issue as follows:

8. *Did the County fail to follow guidance under RCW 36.70A.020(9) and (10), and fail to comply with RCW 36.70A.070 (internally consistent plans) and RCW 36.70A.160 when Ordinance No. 370-2006 and Maps related thereto, do not provide (or do not provide adequate) open space corridors for protecting wildlife and fisheries habitat in certain streams and creeks, especially Chico Creek and Gorst Creek?*

Applicable Law

Petitioners allege noncompliance with Goals 9 [open space and recreation] and 10 [environment]; each of these Goals is set forth *supra*.

The relevant provision of RCW 36.70A.070(preamble) provides: "The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

RCW 36.70A.160 provides, in relevant part:

> *Each county* and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 *shall identify open space corridors within and between urban growth areas. They shall include lands useful for recreation, wildlife habitat, trails, and connection of critical areas* as defined in RCW 36.70A.030.

Discussion

Position of the Parties:

Suquamish argues: 1) the County failed to identify and prioritize open space corridors in the UGA element and other elements of its Plan or the future land use map (**FLUM**); 2)

the County's references to maps depicting open space is confusing; 3) the County's Open Space Plan is not clear; and 4) the lack of identified and prioritized open spaces is inconsistent with various Plan policies. Suquamish PHB, at 93-103.

Intervener Port Gamble S'Klallam Tribe incorporates by reference the Suquamish arguments. S'Klallam PHB, at 11.

In response, the County asserts: 1) Suquamish has abandoned its challenge regarding Goals 9 and 10, because they were not briefed; 2) RCW 36.70A.160 does not require mapping or regulating open space corridors, citing *LMI/Chevron v. Town of Woodway*, (***LMI/Chevron***) CPSGMHB Case No. 98-3-0012, Final Decision and Order, (Jan. 8, 1999) and *Agriculture for Tomorrow v. City of Arlington* (***AFT***), CPSGMHB Case No. 95-3-0056, Final Decision and Order, (Feb. 13, 1996); 3) the Parks, Recreation and Opens Space Plan, referenced in Chapter 10 of the Plan Update, includes a clear inventory of open space areas and graphic depictions of the inventory; and 4) having identified and mapped open space corridors, there is no inconsistency with any Plan policy. Kitsap Response, at 8-9 and 96-103.

In reply, Suquamish contends: 1) the challenge to Goals 9 and 10 had not been abandoned, since they were cited, and Petitioner briefed RCW 36.70A.160, a GMA requirement supporting both goals; 2) *AFT* supports the Suquamish position, not the County's; and 3) identification of open spaces necessarily infers they should be designated and protected. Suquamish Reply, at 49-53.

Board Discussion:

Petitioner Suquamish Tribe has not abandoned the challenge to Goals 9 and 10. The Tribe has adequately made the linkage between RCW 36.70A.160 and these two Goals to merit their consideration in this Legal Issue.

In *AFT*, the Board concluded that the City of Arlington had not identified open space corridors, and directed the City to do so in order for the public to know which lands are intended to be considered open space corridors. *AFT*, at 17. However, the Board observed,

> RCW 36.70A.160 is silent as to how identification is to be accomplished, and where the identification is to be recorded. There is no requirement to adopt an ordinance, to incorporate the identification within the jurisdiction's comprehensive plan, or to prepare implementing development regulations for identified areas.

Id.

In *LMI/Chevron*, the Board held,

> Thus, while .160 requires identification of open space corridors, it does not require regulating to protect open space corridors, it does not provide that mere identification is protection of an open space corridor, nor does it provide an independent source of authority for regulating land use activities within an open space corridor.

LMI/Chevron, at 54.

Therefore, based upon these two cases' interpretation of RCW 36.70A.160, which the Board affirms, Kitsap County is required to identify open space corridors pursuant to .160, but there is no GMA requirement that these areas be regulated or protected. So has the County identified and mapped the necessary open space corridors, recreation areas, trails and fish and wildlife habitat areas?

The Kitsap County Parks, Recreation & Open Space Plan includes an inventory that *identifies* parks, recreation facilities, open spaces and trails. Ex. 31139, at 7-15. Additionally, this document includes maps depicting: 1) Habitat Priority [Figure 6-A]; and 2) Open Space Corridors [Figure 6-B]. Ex. 31139, at 42-43. Therefore, the Board finds and concludes that Kitsap County has complied with the requirements of RCW 36.70A.160 and Goals 9 and 10. Having found that the County has identified the requisite open space corridors, the Board further finds that the Tribe's basis for arguing inconsistency with the Plan policies is dissolved and therefore Petitioner has not carried the burden of proof in demonstrating internal inconsistencies.

Conclusion

The Board finds and concludes that Kitsap County's adoption of Ordinance No. 370-2006 **complies** with the requirements of RCW 36.70A.160 and **is guided by** Goals 9 and 10 [RCW 36.70A.020(9) and (10)], and that Petitioner has **failed to carry the burden of proof** in demonstrating inconsistency – RCW 36.70A.070(preamble). **Legal Issue No. 8 is DISMISSED.**

I. BALANCING GMA GOALS

[Suquamish Tribe Legal Issue No. 9]

The Board's PHO, at 10-11, sets forth the Balancing GMA Goals Legal Issue as follows:

9. *Did the County fail to comply with RCW 36.70A.040, .070, .110, .130, .215 and .3201 when Ordinance No. 370-2006 and Ordinance No. 369-2006 make substantive findings and/or conclusions, but fails to explain how Ordinance 370-2006 reflects a careful balance of the GMA goals and local circumstances, in addition to failing to provide any detailed explanation or analysis and/or*

descriptive text, including but not limited to the statements that Ordinance No. 370-2006 amendments reflect a careful balance of the GMA goals and the local conditions of Kitsap County, that circumstances have substantially changed since the 1998 Plan was adopted, that there is new information available that was not considered when the 1998 Plan was adopted, and the Plan Update adopts reasonable measures? [Amended PFR language is underlined.]

Discussion

The preamble to the Goals' provision of the Act states, "The following *goals are not listed in order of priority . . .*" RCW 36.70A.020, (emphasis supplied). Additionally, RCW 36.70A.3201 provides in relevant part, "Local comprehensive plans and development regulations *require cities and counties to balance priorities and options for action* in full consideration of local circumstances." (Emphasis supplied.)

The premise of Petitioner Suquamish Tribe's argument on this Legal Issue is that Petitioner, through prior argument on the previous eight Legal Issues, has demonstrated that the County has not complied with the Goals and requirements of the Act. Having demonstrated noncompliance, Petitioner asserts, is essentially *prima facia* evidence that Kitsap County has not properly balanced the Goals of the Act. Suquamish PHB, at 113-120.

The County, obviously, offers the counter argument that it has complied on each Legal Issue presented, which illustrates a proper balancing of the various Goals of the Act. Further, the County asserts that there is no GMA requirement that compels a jurisdiction to explain *how* it has balanced the competing Goals other than reference to the extensive public participation process where all points of view are presented. The adopted action, itself, is the product of this balancing and nothing more is required. Kitsap Response, at 108-112.

The Board finds these arguments to be self-evident. If any portion of a jurisdiction's challenged legislative action, the product of its public process, is determined to not comply with a provision(s) of the Act; then the jurisdiction's balancing of Goals can be inferred to be faulty. Conversely, plans and development regulations found to be compliant reflect appropriate balancing. The action stands by itself as a testament to balancing, no explicit explanation of balancing is required.[24]

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[24] The Board notes that RCW 36.70A.070(5)(a), pertaining to the Rural Element, does provide:

> Because local 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.

(Emphasis supplied.) This requirement to develop a written record explaining how the Goals of the Act have been harmonized, is a specific requirement within the Rural Element; it does not apply to the

The Board notes that if the noncompliant action is determined to substantially interfere with the fulfillment of the Goals and requirements of the Act, the Board may enter a determination of invalidity, discussed *infra*.

Conclusion

Petitioner Suquamish Tribe's Legal Issue No. 9 is **DISMISSED**.

J. INVALIDITY

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

Here, Petitioner Suquamish Tribe and Petitioners' KCRP and Harless have asked the Board to not only find noncompliance on the presented issues and remand, but also they have requested that the Board make a determination of invalidity. *See* Suquamish Amended PFR, at 5; and KCRP/Harless PFR, at 4.

Applicable Law

RCW 36.70A.302 provides:

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

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jurisdiction's overall balancing of Goals in its entire Plan. The Board notes that noncompliance with the provisions of RCW 36.70A.070(5)(a) is not alleged in any Legal Issue presented in this matter.

project that vested under state or local law before receipt of the board's order by the City or city or to related construction permits for that project.

<u>Findings of Fact and Conclusions of Law</u>

In its discussion of the Capital Facilities Plan (**CFP**), Rural Wooded Incentive Program (**RWIP**) and Transfer of Development Rights Program (**TDR**), *supra*, the Board found and concluded that the certain provisions of the CFP, RWIP and TDR did **not comply** with the requirements of RCW 36.70A.070(3) and .070(5), respectively. Further, these provisions were **not guided** by Goals (12), (8), (1), (2), (9) and (10), respectively. The Board is also **remanding** Ordinance Nos. 367-2006 and 370-2006 with direction to the County to comply with the requirements of the GMA.

In light of these deficiencies the Board further finds and concludes that the continued validity of the CFP, specifically Appendix A, pertaining to sanitary sewer services, [Ordinance No. 370-2006] substantially interferes with Goal 12 – RCW 36.70A.020(12), because the CFP does not demonstrate that adequate public facilities and services [sanitary sewer] will be available within the planning period for the population within certain expanded urban growth areas. Therefore, the Board enters a **determination of invalidity** with respect to these provisions of the Plan Update - Ordinance No. 370-2006, as discussed *supra*.

Further the Board finds and concludes that the continued validity of the RWIP and TDR Programs, specifically KCC 17.301.080(E)(12) and KCC 17.301.080(F) [*i.e.* RWIP] and KCC 17.430.090(F)(12), substantially interfere with Goals (1), (2), (8), (9) and (10) because the temporary 40-year provision of these sections is ambiguous and creates uncertainty as to the extent and intensity of development, if any, to be allowed upon lands affected by these programs. Therefore, the Board enters a **determination of invalidity** with respect to these provisions of the County's implementing development regulations – Ordinance No. 367-2006, as discussed *supra*.

V. <u>ORDER</u>

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

1. Petitioners' challenge to urban density, Land Capacity Analysis, reasonable measures, SEPA categorical exemption and notice, open space corridors, and the balancing of GMA goals, as discussed *supra*, were each **dismissed with prejudice.**

2. As discussed *supra*, Kitsap County's adoption of certain provisions of Ordinance Nos. 370-2006 [10-year Plan Update] and 367-2006 [implementing regulations, specifically sections of Title 17 of the Kitsap County Code], was **clearly erroneous**.

3. As discussed *supra*, the Plan Update [Ordinance No. 370-2006], specifically the Capital Facility Plan, at Appendix A, **does not comply** with the requirements of RCW 36.70A.070(3) and .020(12), since it does not demonstrate that adequate public facilities and services [*sanitary sewer*] will be available within the planning period for the population within certain expanded urban growth areas.

4. As discussed *supra*, certain implementing development regulations of Title 17 of the Kitsap County Code [Ordinance No. 367-2006], specifically KCC 17.301.080(F), 17.301.080(E)(12), and 17.430.090(F)(4), related to the County's Rural Wooded Incentive Program and Transferable Development Rights program **do not comply** with the requirements of RCW 36.70A.070(5) and .020(1), (2), (8), (9) and (10).

5. Additionally, as discussed *supra*, the Board has found that the continued validity of the Capital Facility Plan in Appendix A, related to certain sanitary sewer provisions, in the 10-Year Plan Update [Ordinance No 370-2006], substantially interferes with the fulfillment of Goal 12 – RCW 36.70A.020(12). Further, the Board has found that the continued validity of certain provisions of the Rural Wooded Land Program [KCC 17.301.080(E)(12) and 17.301.080(F)] and a certain provision of the Transfer of Development Rights Program [KCC 17.430.090(F)(4)] [Ordinance No. 367-2006], substantially interfere with the fulfillment of Goals 1, 2, 8, 9 and 10 – RCW 36.70A.020(1), (2), (8), (9) and (10). Consequently, the Board has entered a **determination of invalidity** with respect to these noted Plan Update and implementing development regulation provisions.

6. The Board **remands** Ordinance Nos. 367-2006 and 370-2006 to Kitsap County with direction to take the necessary legislative actions to comply with the requirements of RCW 36.70A.070(3), .070(5) and the Goals of RCW 36.70A.020(1), (2), (8), (9), (10) and (12), as set forth and interpreted in this Order.

   - The Board establishes **February 11, 2008,** as the deadline for Kitsap County to take appropriate legislative action to comply with the GMA as interpreted and set forth in this Order.
   - By no later than **February 21, 2008**, Kitsap 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 the

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

- By no later than **March 6, 2008**,[25] the Petitioners may file with the Board an original and four copies of Response to the County's SATC. Petitioners shall simultaneously serve a copy of their Response to the County's SATC on the County.
- By no later than **March 13, 2008**, the County may file with the Board an original and four copies of the County Reply to Petitioners' Response. The County shall simultaneously serve a copy of their Reply on Petitioners.
- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. March 24, 2008**, 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 11, 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 15th day of August, 2008.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
David O. Earling
Board Member

_____
Edward G. McGuire, AICP
Board Member

[25] **March 6, 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 Town's remand actions comply with the Legal Issues addressed and remanded in this FDO.

Margaret A. Pageler
Board Member [Board Member Pageler also files a separate dissenting 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.[26]

Dissent of Board Member Pageler

I respectfully dissent from the analysis and conclusions of the Board majority in deciding Legal Issues 1 and 2. The Board majority relies too heavily on the notion of four dwelling units per acre (4du/acre) as an "appropriate" urban density. As I read the Supreme Court's opinion in *Viking Properties v. Holmes*, 155 Wn.2d 112 (2005), neither the Board nor the parties can take refuge in a "bright line" urban density measure when cogent facts point in another direction.

The cogent facts in this case are that Kitsap County's average residential density for urban low density (ULDR) plats for the past five years has been 5.6 du/acre and its minimum density in ULDR designations, except where critical areas are especially protected, has been 5 du/acre.

In updating its UGA to accommodate new population targets, the task before a county is to determine whether there is capacity within its UGA to absorb the additional housing or whether more land is needed. A county's assumption about the density of development on the available land is the nub [core] of that calculation. This is why the Board has long insisted that counties "show their work" in support of UGA sizing. The "show your

[26] 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)

work" rule is meaningless, however, if the work that's shown doesn't have to be based in reality [is unsupported by the facts]. Here Kitsap County has abandoned the facts in its own record and on its own land that support a residential density of at least 5 du/acre. It has expanded its UGA based on a hypothetical 4 du/acre and seeks to hide behind an outdated "bright line."

I am left with a "definite and firm conviction that a mistake has been made." I would find noncompliance on Legal Issues 1 and 2 and would remand for a recalculation of the land capacity and resizing of the UGAs.

In all other respects, I concur with the decision of the Board.

_____

Margaret A. Pageler
Board Member

APPENDIX A

Procedural Background

A. General

On February 15, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Suquamish Tribe (**Petitioner I** or **Suquamish**). The matter was assigned Case No. 07-3-0018, and is captioned, *Suquamish II v. Kitsap County*. Board member Edward G. McGuire will serve at the Presiding Officer (**PO**) for this matter. Petitioner challenges Kitsap County's (**Respondent, Kitsap** or the **County**) adoption of Ordinance Nos. 367-2006, 368-2006, 369-2006 and 370-2006 amending Kitsap County's Comprehensive Plan (collectively the **Plan Update**). Petitioner contends that certain provisions of the County's Plan Update are noncompliant with various provisions of the Growth Management Act (**GMA** or **Act**).

On February 16, 2007, the Board received a PFR from the Kitsap Citizens for Responsible Planning and Jerry Harless (**Petitioner II** or **KCRP/Harless**). The matter was assigned Case No. 07-3-0019, and is captioned *KCRP/Harless II v. Kitsap County*. Board member Edward G. McGuire will serve at the Presiding Officer (**PO**) for this matter. Petitioners challenge Kitsap County's adoption of Ordinance Nos. 367-2006 and 370-2006 amending Kitsap County's Comprehensive Plan – the Plan Update. Petitioners contend that certain provisions of the County's Plan Update are noncompliant with various provisions of the GMA.

On February 22, 2007, the Board issued its "Notice of Hearing and Consolidation" (**NOH**), in the above-captioned case. The NOH set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case. The two matters were consolidated into CPSGMHB Case No. 07-3-0019c, and are captioned S*uquamish II v. Kitsap County*.

On March 21, 2007, the Board received: 1) "Motion to Intervene by Port Gamble S'Klallam Tribe" (**S'Klallam Motion**); and 2) "Motion to Amend Petition for Review" from the Suquamish Tribe. (**Motion to Amend PFR**).

On March 22, 2007, the Board held the PHC. The parties and the Board discussed the Legal Issues, as proposed by the Suquamish Tribe. All agreed the Amended PFR clarified the Legal Issues to be decided. The PO orally **granted** the Motion to Amend the PFR. Following the PHC, and after the County had the opportunity to review Port Gamble S'Klallam Tribes Motion to Intervene, the County informed the PO that it had no objection to the S'Klallam Tribes' intervention.

On March 23, 2007, the Board issued a "Prehearing Order" (**PHO**) setting the schedule and Legal Issues for this case. The PHO listed five topic areas where Petitioners

Suquamish Tribe and KCRP/Harless had overlapping issues. There were six additional Legal Issues that were only posed by the Suquamish Tribe. The PHO also granted the Port Gamble S'Klallam Tribe's Motion to Intervene and established the conditions and parameters for their intervention.

B. Motions to Supplement the Record and Amend the Index

On March 22, 2007, the Board received Kitsap County's "Ten Year Comprehensive Plan Update- Index to the Record" (**Index**). The Index is 73 pages, with approximately 25 items listed on each page.

Core Documents: The Board agreed to use the Core Documents, labeled A through G, in a prior case [CPSGMHB Case No. 06-3-0007] involving Kitsap County's 10-year Plan Update. The Core Documents, received January 11, 2007, included: the County's 10-year Plan Update, DEIS, FEIS, amendments to the Kitsap County Code [development regulations and zoning] and four "approval matrices."

On April 2, 2007, the Board received copies of the Kitsap County County-wide Planning Polices [Ordinance No. 327-2004], and signed copies of Ordinance Nos. 367-2006, 368-2006 and 369-2006. Each item is a Core Document.

On May 18, 2007, the Board received Kitsap County's "Amended Index to the Record" (**Amended Index**). The cover letter noted that the parties had worked together to review the record to make sure all necessary items were included in the Amended Index. The Amended Index includes several items inadvertently omitted by the County.

There were no motions to supplement the record within the timeframes for motions set forth in the PHO. However, there were motions to supplement the record attached to briefing that were addressed at the Hearing on the Merits (**HOM**).

C. Dispositive Motions

On April 10, 2007, the Board received Kitsap County's "Motion to Dismiss Petitioner Suquamish Tribe's Legal Issue 4" (**Kitsap Motion**). Attached to the motion was a "Declaration of Angie Silva" (**Silva Declaration**).

On April 16, 2007, the Board received "Petitioner Suquamish Tribe's Reply in Opposition to Kitsap County's Motion to Dismiss Petitioner Suquamish Tribe's Legal Issue 4" (**Suquamish Response**).

On April 24, 2007, the Board received "Kitsap County's Response to Suquamish Tribe's Reply re: County's Motion to Dismiss Legal Issue No. 4" (**Kitsap Reply**).

All filings were timely. The Board did not hold a hearing on the motions.

On May 3, 2007, the Board issued its "Order Granting Dispositive Motion – Legal Issue No. 4." The Order **granted** Kitsap's Motion to dismiss a Legal Issue pertaining to the Transportation Element of the County's Plan, for lack of participation standing.

D. Briefing and Hearing on the Merits

On May 24, 2007, the Board received "Petitioners' Suquamish Tribe, Kitsap Citizens for Responsible Planning and Jerry Harless Opening Brief" (**Suquamish PHB**), with a List of Exhibits, 22 tabbed Exhibits, 11 noted as A-K and 11 Exhibits from the record. On the same day, the Board also received "Intervener Port Gamble S'Klallam Tribes Prehearing Brief" (**S'Klallam PHB**), with six attached Exhibits.

On June 4, 2007, the Board received and accepted an "Errata Sheet" for the Suquamish PHB.

On June 15, 2007, the Board received "Kitsap County's Prehearing Brief" (**Kitsap Response**), with a List of Exhibits, six noted as A-F and eight Exhibits from the record. Within its brief, the County moved to strike certain Exhibits attached to the Suquamish PHB.

On June 19, 2007, the Board received "Motion Requesting Relief from Prehearing Order Deadline: Motion to Supplement the Record; and Reply to County's Motion to Dismiss Petitioners' Exhibits." This Motion asked that the record be supplemented with six items.

On June 22, 2007, the Board received "Petitioners' Suquamish Tribe, Kitsap Citizens for Responsible Planning and Jerry Harless Reply to Respondent Kitsap County's Prehearing Brief" (**Suquamish Reply**). No additional Exhibits were attached.

On June 25, 2007, the Board received and accepted an "Errata Sheet" for the Kitsap Response.

On June 28, 2007, the Board held the Hearing on the Merits (**HOM**) in Kitsap County at the Eagles Nest Room at the Kitsap County Fairgrounds, 1200 NW Fairgrounds Road, Bremerton, WA. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present. The Board's Law Clerk, Julie Taylor, and Extern, Linda Jenkins, were also present for the Board. Petitioner Suquamish Tribe was represented by Melody Allen. Petitioner KCRP was represented by David Bricklin. Petitioner Jerry Harless appeared *pro se*. Respondent Kitsap County was represented by Lisa J. Nickel and Andrew S. Lane. Intervenor Port Gamble S'Klallam Tribe was represented by Lauren Rasmussen. Court reporting services were provided by Barbara L. Brace of Byers and Anderson, Inc. The following persons also attended the HOM to observe: Eric Baker, Angie Silva, Chris Dunagan, Tom Donnelly, John Taylor, Alison O'Sullivan, Tom Nevins, Patrick Haas, Charles Michael, Fred DePee, Beth Wilson, Michele McFadden and Dorothy Reinhardt. The hearing convened at 1:30 p.m. and

adjourned at approximately 5:00 p.m. The Board ordered a transcript of the proceeding, which was received electronically a week later. (**HOM Transcript**).

At the HOM, the Board asked the County and Petitioner Harless to collaborate and resolve questions on a proposed Exhibit illustrating "Urban Density and Land Capacity" and file an agreed-upon Exhibit with the Board.

On July 9, 2007, the Board received hard copy of: 1) "Response of Petitioners' Kitsap Citizens for Responsible Planning, Suquamish Tribe and Jerry Harless to Kitsap County's Objections to Urban Density, Land Capacity and RWIP Exhibits;" and 2) "Post-Hearing on the Merits Response of Kitsap County to Petitioners' Exhibits, *as requested by the Board*."

On July 10, 2007, the Board received the HOM Transcript.

APPENDIX B

Rural Wooded Incentive Program – KCC 17.301.080

A. Purpose. The purpose of this section is to provide a clustering program for land designated Rural Wooded, which provides incentives to landowners, promotes coordinated open space, and encourages the continuation of forestry. This chapter encourages development to occur on the most buildable and least environmentally sensitive portions of sites while retaining a substantial portion of each site in restricted open space tracts or easements. Specifically, this chapter is designed:

1. To produce a development pattern in rural areas that is consistent with rural character and to produce a rural development pattern which encourages variety in design, placement of buildings, more efficient use of the most buildable portion of sites, and retention of the environmentally sensitive and scenic portions of sites as permanent open space;
2. To encourage the development of cluster housing, which provides greater compatibility with surrounding development and land uses in rural areas by providing larger buffer areas;
3. To encourage the retention of permanent open space with its natural vegetative cover, which protects continued groundwater recharge and reduces potential water pollution, flooding, erosion and other drainage-related problems often associated with rural development;
4. To minimize adverse development impacts on the county's productive forestry, mineral and other important resource lands;
5. To minimize adverse impacts on the county's environmentally-sensitive streams, shorelines, wetlands, fish and wildlife habitat areas and corridors, areas of unique vegetation or wildlife species, steep slopes, and other critical areas;
6. To minimize impervious surfaces and the cost of installing essential public and private capital facilities necessary for a rural infrastructure; and
7. To protect rural natural features and landscape by minimizing tree, vegetation, and soil removal.

B. Applicability. This program applies to all properties within the Rural Wooded zone 20 acres or greater in size. Individual projects using this program may not exceed more than 500 contiguous acres.

1. Phase Description. Land available to use this program will be designated in the Comprehensive Plan in an incremental phased approach consisting of 10 phases. The phased process of this program is described below:
   a. Initial phase shall be limited to a total of five-thousand (5,000) acres of Rural Wooded (RW) land.
   b. All parcel acreage utilized in Rural Wooded Incentive Program developments, including any Permanent Open Space, Wooded Reserve, fresh water bodies, critical areas, and residential acreage, shall be included for calculations toward the remaining available Phase acreage.
   c. Subsequent phases may be released based upon the provisions identified in subsection 17.301.080.B with each limited to a total of five-thousand (5,000) additional acres of Rural Wooded (RW) land.
2. Monitoring.

a. Monitoring shall be conducted every two years to evaluate the effectiveness of the Rural Wooded Incentive Program. The monitoring shall include:
   (1) Evaluation of the county-wide split between rural and urban dwelling unit development and lot creation. The methodology shall be consistent with that approved in the most recent Buildable Lands Report;
   (2) Evaluation of the total acreage within the Rural Wooded Incentive Program that has submitted a complete application, that has received preliminary approval, and that has received final approval as well as the total acreage of Permanent Open Space and Wooded Reserve in these approved developments;
   (3) A transportation analysis of the roadways adjacent to and serving Rural Wooded Incentive Program developments;
   (4) Evaluation of the Rural Wooded (RW) designated lands for the maintenance of qualities of "Rural Character" as defined in this section; and
   (5) Evaluation of development in the Rural Wooded zone in regards to critical area buffers, on-site and adjacent parcel well levels, on-site stream flow levels and increases in project-based impervious surfaces.
b. Releases of the subsequent phases of acreage available for the Rural Wooded Incentive Program shall be determined based upon all the following decision criteria.
   (1) Satisfactory progress toward achieving the Rural/Urban split identified in the County-Wide Planning Policies.
   (2) Final approval for Rural Wooded Incentive Program developments comprising more than 30 percent or 1,500 acres, whichever is greater, of the total Phase acreage.
   (3) Determination of no level of service failures on roadways serving existing Rural Wooded Incentive Program developments.
   (4) Satisfactory maintenance of rural character as defined in subsection 17.301.080.C for Rural Wooded Incentive Program developments.
c. Prior to the release of each subsequent phase, the Department of Community Development shall prepare a "Rural Wooded Incentive Program: Phase Assessment Report." This report shall assess the program's consistency with the purposes outlined in subsection 17.301.080.A and the monitoring requirements of 17.301.080.B. The report shall be submitted to the Board of County Commissioners.

3. Authority.
   a. The Board of County Commissioners shall have the authority to recommend, recommend with conditions, or disapprove release of each subsequent phase of acreage available to Rural Wooded Incentive Program developments, subject to the provisions of this section.
   b. The Board of County Commissioner's decision on a subsequent Rural Wooded Incentive Program phase may be appealed as set forth in Title 21 of this code.
4. Phase Process.
   a. Should an application for a Rural Wooded Incentive Program development be submitted that would exceed the 5,000 acres available for that phase, that application will be rejected, however that applicant will be permitted to amend the application to reduce the number of proposed acres for which development is sought to remain under the 5,000-acre phase limit.

b. Once 5,000 acres of Rural Wooded Incentive Program developments have received preliminary approval, no future applications will be accepted that exceed the 5,000 acres available for that phase until the subsequent phase is recommended for release subject to the provisions of this Section.

c. An application may include a request for a subsequent phase to be released concurrent with the Rural Wooded Incentive Program development application; however, that application will not be deemed complete until the subsequent phase is recommended for release subject to the provisions of this section.

C. Approval procedure. Rural Wooded Incentive Program developments shall be approved through a Type III subdivision approval process.

D. Submittal requirements. In addition to the subdivision submittal requirements, each application for a Rural Wooded Incentive Program development shall include the following information to be considered a complete application:

1. The approximate location and general dimensions for all lots, tracts, easements, roadways, and other improvements;
2. The proposed location and acreage of the Wooded Reserve and Permanent Open Space, as applicable;
3. The approximate location of all existing or proposed pedestrian walkways, landscaped areas and areas to permanently remain in a natural condition;
4. The location of existing and proposed on-site water sources and generalized designation of sewage disposal drainfields and reserve areas;
5. The location and width of proposed roadways and driveway areas for turning and maneuvering of vehicles, and the relationship of circulation to adjacent properties;
6. A general description of any major physiographic or other natural features, such as drainage ways, wetlands, fish and wildlife habitats, geologic hazard areas, steep slopes, shorelines and all other critical areas, as well as a topographic map with contour lines as 5-feet contours;
7. The location and approximate acreage, either on or adjacent to the property(s), designated as natural resource lands and the approximate size (in square feet or acres);
8. The approximate area proposed to be included in paved or other impervious surfaces, Wooded Reserve, Permanent Open Space, and the total area of the site;
9. A description of, and proposed schedule for, any proposed phasing of the project;
10. A general landscape, clearing and buffering plan, drawn to scale and showing: community areas, pathways or other recreation areas, significant landscape features and vegetation on the site, natural vegetation and mature trees to be retained, and the location and conceptual design of landscaped areas and buffers. Detailed site analysis and design information shall not be required for those portions of the site proposed for retention in Wooded Reserves or Permanent Open Space tracts, except for portions of Permanent Open Space tracts which contain proposed recreation facilities;
11. A vicinity sketch to identify the effect of proposed development on surrounding properties and uses;
12. A conceptual storm drainage plan, prepared by a qualified engineer, showing that the project will comply with the Kitsap County storm water standards in effect at the time of the application; and
13. A report from a certified septic system installer, showing that there is a drainfield and a replacement drainfield available for each dwelling unit within each proposed cluster, or if a community or group drainfield is to be used, that there is a site and a replacement site for such community or group drainfield, that will meet the standards of the

Washington Department of Health or the Kitsap County Health Department, whichever is more stringent.

E. Development Standards. A Rural Wooded Incentive Program development shall meet the following development standards:

1. The base density permitted within a Rural Wooded Incentive Program development shall be one (1) dwelling unit per twenty (20) acres.
2. Additional density may be allowed based upon the designation of a portion of the development as "Wooded Reserve" and a portion of the development acreage as "Permanent Open Space" under one of the following ratio alternatives.
   a. Alternative One.
      (1) The maximum number of dwelling units permitted within a Rural Wooded Incentive Program development shall be one (1) dwelling unit per ten (10) acres; and
      (2) A minimum of seventy-five percent (75%) of the Rural Wooded Incentive Program development site must be designated Wooded Reserve for a period of 40 years or greater.
   b. Alternative Two.
      (1) The maximum number of dwelling units permitted within a Rural Wooded Incentive Program development shall be three (3) dwelling units per twenty (20) acres;
      (2) A minimum of fifty percent (50%) of the Rural Wooded Incentive Program development site must designated Wooded Reserve for a period of 40 years or greater; and
      (3) A minimum of twenty-five percent (25%) of the Rural Wooded Incentive Program development site shall be designated as Permanent Open Space tract(s).
   c. Alternative Three.
      (1) The maximum number of dwelling units permitted within a Rural Wooded Incentive Program development utilizing Alternative Three shall be one (1) dwelling unit per five (5) acres.
      (2) A minimum of twenty-five percent (25%) of the Rural Wooded Incentive Program development site must be designated Wooded Reserve for a period of 40 years or greater.
      (3) A minimum of fifty percent (50%) of the Rural Wooded Incentive Program development site shall designated as Permanent Open Space tract(s).
   d. Alternative Four.
      (1) The maximum number of dwelling units permitted within a Rural Wooded Incentive Program development utilizing Alternative Four shall be one (1) dwelling units per five (5) acres.
      (2) A minimum of seventy-five percent (75%) of the Rural Wooded Incentive Program development site shall be placed in a Permanent Open Space tract(s) where no development or forestry uses will be allowed.
3. The maximum number of acres for any single Rural Wooded Incentive Program development application shall be limited to a total of 500 gross acres, including all Wooded Reserve, Permanent Open Space and development acreage.
4. The minimum number of acres for any Rural Wooded Incentive Program development application shall be limited to a minimum of twenty (20) acres, including all Wooded Reserve, Permanent Open Space and development acreage.

5. Development shall be clustered.
   a. Lot Requirements.
      (1) Front Yard. Minimum front yard setback shall be twenty (20) feet.
      (2) Side and Rear Yard. Minimum side and rear yard setbacks shall be five (5) feet and fifty (50) feet for accessory structures used for agricultural purposes.
      (3) Minimum Lot Size: None
6. Each cluster shall be limited to 25 units or fewer. Clusters within a development should be sited to achieve the following objectives and criteria. The Director may allow exceptions based upon site-specific conditions or when conflicts occur between the criteria.
   a. Optimize protection of critical areas, including wetlands and stream corridors, by keeping clusters and other development away from critical areas to the extent possible;
   b. Optimize preservation and interconnectivity of open space, either for continuation of forestry practices or as a permanent preservation of open space;
   c. Avoid development on ridgelines, in the center of open field, or located on other prominent topographical features or scenic elements, visible to adjacent and vicinity properties when other locations are available; and
   d. Minimize topographic alteration.
7. Clusters developed under this program shall provide a 100-foot vegetated buffer from existing public roadways and adjoining properties and a 150-foot buffer between clusters in order to preserve rural character and the aesthetic values of Rural Wooded lands.
   a. Where two Rural Wooded Incentive Program developments abut each other, they are encouraged, where practical, to coordinate required Wooded Reserves and Permanent Open Space to provide interconnectivity;
   b. Buffers are encouraged to incorporate natural features to maximize retention of views and rural character;
   c. Where native vegetation is available to create a sight-obscuring buffer, that vegetation should be preserved to the extent consistent with public safety. Hazard trees may be removed with approval of the Director;
   d. Preservation of trees greater than 10 inches diameter breast height (dbh) is encouraged;
   e. Except where an exception is needed to preserve or create scenic views from county or state roads, internal roads and building locations within a Rural Wooded development should be designed to maximize the extent to which the external buffer obscures the planned development from existing county or state roads; and
   f. Where native vegetation is not available to create a sight-obscuring buffer between the planned development and existing county or state roads, fast-growing native vegetation that will grow to obscure the planned development should be planted within the buffer area.
8. Water provision from new wells drilled within the Rural Wooded designated lands are encouraged to minimize impacts to surface and groundwater resources. For projects proposing new wells, submission of well log records and a report by a Washington State certified hydrogeologist demonstrating utilization of deep aquifers and the lack of continuity with surface water features is encouraged during project review and may be included as a condition of approval.

9. Development shall fully comply with Kitsap County Code Title 19 (Critical Areas). All environmentally sensitive areas such as streams, shorelines, wetlands, fish and wildlife habitat areas and corridors, steep slopes, and other critical areas regulated by Title 19 and/or other applicable county ordinances or policies are encouraged to be located within the Wooded Reserve or Permanent Open Space areas of the development, except to the extent development in those areas is permitted by Title 19.
10. Roads should be designed to comply with adopted Kitsap County Road Standards for rural roads.
    a. Rural Wooded Incentive Program developments shall meet applicable rural concurrency standards;
    b. Roads should have shoulders and grass-lined ditches, rather than curbs, gutters and adjacent sidewalks;
    c. Pedestrian and/or bike paths through a development are encouraged but may be separate from roads and should be narrow and designed to adapt to the natural contours and features of the land; and
    d. To the extent consistent with adopted Kitsap County Road Standards, roads should follow topography, and other natural features, such as major trees or other elements that contribute to rural character.
11. In designating the areas for Permanent Open Space tracts, the following is encouraged:
    a. Preserve areas along saltwater shoreline;
    b. Include open water bodies, creeks, rivers and other natural water features;
    c. Protect scenic views and significant natural features;
    d. Conserve areas of significant terrestrial wildlife, salmonid habitat, and groundwater supply; and
    e. Coordinate with Washington State Department of Fish & Wildlife, Washington State Department of Natural Resources, non-profit agencies, and local Tribes to identify priority conservation areas.
12. A disclosure statement shall be placed on the final plat for all Rural Wooded Incentive Program developments stating that:

    "The Wooded Reserve designated parcels or tracts within the *(insert name of plat)* plat is reserved for forestry operations. A variety of forestry activities may occur on the Wooded Reserve that are not compatible with residential development for limited periods. Residents may be subject to inconvenience or discomforts arising from forestry activities, including but not limited to noise, odors, fumes, dust, smoke, the operations of machinery of any kind, timber harvest, brush control, the application by spraying or otherwise of chemical or organic fertilizers, soil amendments, herbicides and pesticides, hours of operation, and other forestry activities. So long as such forestry operations are in compliance with the Washington Forest Practices Act, RCW Ch. 76.09, they shall not constitute a nuisance. No perimeter buffers are required within the Wooded Reserve area. Urban levels of service will not be provided by Kitsap County or the developer of this property."

F. Uses permitted within the Wooded Reserve and Permanent Open Space.

1. Wooded Reserve. This area shall be designated Wooded Reserve for a minimum of forty (40) years. Uses allowed with the Wooded Reserve during this period include:

a. Forestry, existing agricultural and other resource activities; and
b. Community wells, well houses, water lines, community drainfields, retention and detention ponds, logging and access roads, water recharge and infiltration facilities, water system appurtenances and biofiltration swales. After this period has expired, the owner may seek additional development on the Wooded Reserve. The density and lot requirements for the Wooded Reserve area shall be consistent with the County Code in effect at the time of future application.

2. Forestry activities within the Wooded Reserve area must be consistent with an approved Timber Harvest permit. The Wooded Reserve will require an updated Forest Management Plan pursuant to Washington State Department of Revenue "Guidelines for Forest Land Management Plans." Such plan shall be prepared by a certified forester.
3. Permanent Open Space tract. A Permanent Open Space tract created under this section may be used for the following resource and passive recreational and roadway uses:
   a. Forestry, existing agricultural or other resource uses;
   b. Trails/pedestrian walkways, beaches, docks, swimming areas or any non-motorized passive recreational facilities;
   c. Logging and access roads; and
   d. Open space uses along a shoreline shall allow for visual and physical access to the shoreline and may include view corridors, community beaches, docks, swimming areas, picnic areas, trails/pedestrian walkways, or any non-motorized passive recreational facilities.
4. Vegetation removal in a Permanent Open Space tract shall be in accordance with an approved open space management plan. Permanent vegetation removal within the Permanent Open Space tract shall not be permitted, except that the following activities shall be allowed where vegetation removal is the minimum necessary to conduct the activity:
   a. Construction of pedestrian or equestrian trails;
   b. Maintenance of existing pastures;
   c. Forestry, existing agricultural or other resource activities;
   d. Removal of dead, diseased or hazardous vegetation, consistent with best management practices;
   e. Fire breaks provided in accordance with fire district requirements; and
   f. A management plan which details the required maintenance and management tasks and responsibilities may be required by the department for all Wooded Reserve and Open Space areas. These plans shall include monitoring to assess compliance with the approved plan(s).

G. Ownership of the Wooded Reserve and Permanent Open Space.

1. Upon recording of a final plat for a Rural Wooded Incentive Program development, Permanent Open Space tracts may be held by the original owner, conveyed to a homeowners association or to the owner or owners of a lot or lots within the subdivision as tenants in common or to a land trust or other non-profit steward, subject to the restrictions on the future use of the Permanent Open Space described in 17.301.080.F.
2. Ownership of the Wooded Reserve may, at the discretion of the proponent of the development, remain with the original owner, or may be conveyed to a third party or parties, or may be conveyed to a homeowners association or to the owners of lots

within the subdivision, as tenants in common, provided, however, that upon recording of a final plat of a Rural Wooded Incentive Program a restrictive covenant will be recorded in favor of the lot owners and in favor of Kitsap County, restricting future use of the Wooded Reserve as provided in 17.301.080.F.

H. Decision Criteria. An application for a Rural Wooded Incentive Program development may be approved or approved with modification if the Examiner finds that all of the following requirements, as established by this section, are met:

1. The site plan complies with the Development Standards of 17.301.080.E and the other requirements of this chapter.
2. The proposed development will not require the extension or provision of sanitary sewer service or other urban services to the development.
3. The proposed development complies with all applicable County Codes.
4. The development demonstrates preservation of rural character by incorporating the following:
   a. Clustering of development, as applicable;
   b. Preservation of critical areas, resource areas, groundwater recharge, and natural features;
   c. Provision for a coordinated, comprehensive, interconnected, and integrated system of Wooded Reserve and Permanent Open Space areas; and
   d. Placement of structures, circulation systems and utilities that minimize impervious surfaces and the alteration of the land and also responds to physical characteristics of the property.
5. The development is consistent with the goals and policies of the Kitsap County comprehensive plan.
6. The development complies with all other applicable codes and policies of the county.
7. If Rural Wooded Incentive Program development will be phased, each phase of a proposed development must contain adequate infrastructure, open space dedication, forest reserve dedication, and all other conditions of the development to stand alone if no other subsequent phases are developed.
8. If no reasonable conditions or modifications can be imposed to ensure the application meets the criteria set forth above, then the application shall be denied.

I. Vesting.

1. Approval of a Rural Wooded Incentive Program development shall be effective for five years from the date of final approval.
2. Property owners with an approved Rural Wooded Incentive Program development may receive one five-year extension from the hearing examiner in accordance with the criteria below:
   a. An extension request must be filed in writing with the director at least sixty days prior to the expiration of the approval period;
   b. The applicant must demonstrate to the hearing examiner tangible progress toward completion of the approved Rural Wooded Incentive Program development; and
   c. The applicant must demonstrate to the hearing examiner that there are no significant changes in conditions that would render approval of the extension contrary to the public health, safety or general welfare.

3. The hearing examiner may take any of the following actions upon receipt of a timely extension request:
    a. Approve the extension if no significant issues are presented under the criteria set forth in this section.
    b. Conditionally approve the extension if any significant issues presented are substantially mitigated by minor revisions to the original Rural Wooded Incentive Program development.
    c. Deny the extension if any significant issues presented cannot be substantially mitigated by minor revisions to the Rural Wooded Incentive Program development.

J. Forest Practice Permits. All forest practices in the Wooded Reserve shall be conducted pursuant to a Timber Harvest Permit issued by the Department of Natural Resources. The Wooded Reserve shall not be deemed to have been converted to another use or likely to convert to urban development under WAC 222-16-050(2). Except to the extent that jurisdiction has been transferred to Kitsap County pursuant to RCW 76.09.240(3), the Department of Natural Resources shall remain the agency responsible for permitting of forest practices in the Rural Wooded area.

K. Taxation Status. Under the Current Use Assessment Program, all property located within the Permanent Open Space or developed portion of the project shall be removed from the Program and all compensating tax paid prior to final approval of the subdivision.

L. Third Party Review. The county may require third party review in cases where additional professional or technical expertise is required.

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