



*dismissed. In particular, the Board found that later-enacted Snohomish County Ordinance 07-022 enacted design and infrastructure standards for the zoning category at issue and addressed several of the cities' complaints.*

*To accommodate the Fairview Ministries project – a continuous care retirement community – which required UGA expansion, Snohomish County amended its county-wide planning policies to allow UGA expansions for Level II Health and Human Services Facilities as Public/Institutional uses. The Board found this action non-complaint with the GMA scheme for contained urban growth boundaries, as provided in RCW 36.70A.110, 210, 020(1) and .020(12). The Board invalidated and remanded the action and set a schedule for compliance.*

*The Board dismissed the City of Lynnwood's challenge to the actions accommodating the Scriber Creek proposal. The Board determined that Lynnwood was barred from bringing its SEPA claims, that the County's "urban center" designation was not inconsistent with the designation of Lynnwood by the Puget Sound Regional Council as a "regional growth center," and that Lynnwood failed to carry its burden of proving the County action inconsistent with Lynnwood's comprehensive plan.*

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

### ***Petitions and Consolidation***

On December 20, 2006, Snohomish County adopted a series of Ordinances constituting its 2006 Docket and its related 2006 comprehensive plan amendments.

On March 16 and March 20, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received timely Petitions for Review (**PFR**) from the City of Bothell (**Bothell**) - CPSGMHB Case No. 07-3-0023, the City of Mill Creek (**Mill Creek**) - Case No. 07-3-0025, and the City of Lynnwood (**Lynnwood**) – Case No. 07-3-0026. Petitioners Bothell and Mill Creek challenge Snohomish County's (**Respondent** or the **County**) adoption of Amended Ordinances 06-097, 06-098, 06-102, 06-104, 06-111, 06-112, 06-113, and 06-114,<sup>2</sup> which amend Snohomish County's County-Wide Planning Policies, Comprehensive Plan, and Zoning Code. Petitioner Lynnwood challenges Snohomish County's adoption of Amended Ordinances 06-102 and 06-104. The basis for all three challenges is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**) and Lynnwood also alleges noncompliance with the State Environmental Policies Act (**SEPA**).<sup>3</sup> Board Member Margaret A. Pageler is the Presiding Officer (**PO**) in this matter.

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<sup>1</sup> A complete chronology of procedures is set forth in Appendix A.

<sup>2</sup> A brief explanation of what each of these Ordinances do is provided in Appendix B.

<sup>3</sup> The Board also received a PFR challenging only Ordinance 06-111, filed by Lorraine Luschen, Larry Hatch, Steven Meissner, Bjorn Tonnessen, David Carlson, Andrew Callaci, Douglas Greenway, Ruth Coleman, and the Estate of Douglas Erlandsen (**Luschen**) - Case No. 07-3-0024. The Luschen matter was at first consolidated with the other three challenges but subsequently voluntarily withdrawn and dismissed. Order of Dismissal Re: Petition of Luschen, *et al.* (May 7, 2007).

During April, 2007, the Board received motions to intervene on behalf of Snohomish County from The McNaughton Group LLC (**McNaughton**), Fairview Ministries (**Fairview**), and Scriber Creek Investments (**Scriber**). The Friends and Neighbors of the York and Jewell Roads Community – FNYJC (**FNYJC**) moved to intervene on behalf of Petitioners Bothell and Mill Creek.

The Prehearing Conference (**PHC**) was convened on April 19, 2007, at the Board's offices in Seattle. The PFRs were consolidated into one proceeding and the motions to intervene were granted. At the PHC, the Board received "Snohomish County's Index to the Administrative Record" (**Index**). The Board then reviewed its procedures for the Hearing, including the Legal Issues to be decided. The Legal Issues for Bothell and Mill Creek are essentially the same and were combined in the PHO.

On April 24, 2007, the Board issued its **Prehearing Order, Order of Consolidation and Order on Intervention (PHO)**. A Corrected Prehearing Order, correcting transcription errors, was issued on May 7, 2007.

### *Motions to Dismiss and for Supplementation*

In April and May, 2007, pleadings were timely filed on dispositive motions. Snohomish County and Scriber moved to dismiss City of Lynnwood Issue No. 3 for lack of SEPA standing. Lynnwood responded and submitted the Declaration of Keith Maw. In reply, the County and Scriber moved to strike the Maw Declaration.

Also in April and May, 2007, the Board received Core Documents and the parties filed timely briefing on motions to supplement the record. On May 7, 2007, the Board received Core Documents from Snohomish County as follows:

- Ordinance No. 06-097
- Ordinance No. 06-098
- Ordinance No 06-113,
- Ordinance No. 06-102
- Ordinance No. 06-104
- Ordinance No 06-111
- Ordinance No 06-112
- Snohomish County Countywide Planning Policies
- Snohomish County Future Land Use Map (FLUM)
- Snohomish County Zoning Map Quadrangle 1
- Snohomish County General Policy Plan

Lynnwood, Bothell and McNaughton filed motions to supplement the record. Responses to the various motions were filed by Scriber, Bothell, FNYJC, and Snohomish County. Replies were filed by Lynnwood and McNaughton.

No hearing was held on motions. On June 1, 2007, the Board issued its Order on Motions, substantially denying the motions to dismiss and strike, and admitting 11 supplemental exhibits.

The Board received Snohomish County's Third Amended Index on June 5, 2007, the Fourth Amended Index on June 12, 2007, and the Fifth Amended Index on June 27, 2007.

### ***Briefing and Hearing on the Merits***

In June and July, 2007, the parties filed timely briefs on the merits, along with additional requests for supplementation and responses. On June 15, 2007, the Board received the opening briefs in this matter as follows:

- City of Lynnwood's Hearing Brief [**Lynnwood PHB**] and City of Lynnwood Second Motion to Supplement the Record.
- Friends and Neighbors of the York and Jewell Roads Community Intervenor's Prehearing Brief [**Intervenor FNYJC PHB**].
- Prehearing Brief of Petitioner City of Bothell with exhibits 1-55 and disc [**Bothell PHB**].
- Petitioner City of Mill Creek's Opening Brief with exhibits A-G [**Mill Creek PHB**].

On June 29, 2007, the Board received briefs in response to the prehearing briefs as follows:

- Snohomish County's Responding Brief with exhibits [**County Response**].
- Snohomish County's Response to City of Lynnwood's Second Motion to Supplement the Record.
- Snohomish County's Motion to Supplement the Record
- The McNaughton Group LLC's Pre-Hearing Brief [**McNaughton Response**].
- Fairview Ministries' Prehearing Brief [**Fairview Response**].
- Scriber Creek Investments Prehearing Brief [**Scriber Response**].
- Scriber Creek Investments' Motion to Strike Maw Declaration or, in the Alternative, Motion to Supplement the Record with the Gardner Declaration.

On July 2, 2007, the Board received Snohomish County's Response to City of Lynnwood's Second Motion to Supplement the Record.

On July 12, 2007, the Board received rebuttal pleadings as follows:

- City of Bothell's Prehearing Reply Brief [**Bothell Reply**]

- City of Mill Creek Reply Brief and Response to Motion to Strike Brief of FNYJC [**Mill Creek Reply**]
- City of Lynnwood’s Reply Brief [**Lynnwood Reply**]
- City of Lynnwood’s Response to (1) Scriber Creek’s Motion to Strike and Supplement the Record and (2) Snohomish County’s Response to Lynnwood’s Second Motion to Supplement

On July 16, 2007, the Board received FNYJC’s untimely reply brief, “The Friends and Neighbors of the York and Jewell Roads Community (FNYJC) Intervenor’s Response Brief” [**FNYJC Reply**], correcting their opening brief and replying to Snohomish County’s Motion to Strike.

On July 16, 2007, the Board received a “Stipulation and Joint Request to Bifurcate and Extend Time Regarding Lynnwood Petition and Issues,” signed on behalf of Petitioner City of Lynnwood, Respondent Snohomish County, and Intervenor Scriber Creek Investments. On the same day, the Board issued an “Order Denying Joint Request to Bifurcate and Extend Time,” based on the statutory directive of RCW 36.70A.300(2)(b). On July 18, 2007, Lynnwood, Snohomish County and Scriber Creek Investments informed the Board electronically that they would not argue at the Hearing on the Merits but would rest on their briefing.

The Hearing on the Merits was convened on July 19, 2007, at 10:45 a.m. in the Chief Sealth Room, Suite 2000, 800 Fifth Avenue, Seattle. Present for the Board were Presiding Officer Margaret Pageler and Board members Dave Earling and Ed McGuire, along with Board law clerk July Taylor and legal extern Linda Jenkins. Petitioner City of Bothell was represented by Peter Eglick and Jane Kiker of Eglick Kiker Whited PLLC, accompanied by City Attorney Michael Weight and Planner Bill Wiselogle. Petitioner City of Mill Creek was represented by Scott Missall of Short Cressman and Burgess PLLC, accompanied by Jill Monnin. Petitioner City of Lynnwood was represented by Rosemary Larson of Inslee, Best, Doezie, & Ryder, P.S., accompanied by Planners Keith Maw and Paul Krauss. Dorothy Nesbit appeared on behalf of FNYJC. John R. Moffat and Jason Cummings represented Snohomish County, accompanied by Laura Kiselius and Kelly Ryan. Andrew Lane and Michael Brunet appeared for Intervenor McNaughton, accompanied by Brian Holtzclaw. Courtney Flora of McCullough Hill, PS appeared for Intervenor Scriber Creek and Fairview Ministries, accompanied by Steve Stewart of Fairview Ministries.

Court reporting services were provided by Katie Eskew of Byers & Anderson. The HOM was adjourned at approximately 3:00 p.m. The Board ordered a copy of the transcript, which was received on August 1, 2007. [**HOM Transcript**]

Subsequent to the HOM, the Board received a letter from attorneys for Bothell regarding the County’s citing to the unpublished Superior Court decision in *CTED I* (CPSGMHB Case No. 03-3-0017) and a response from the Snohomish County Prosecutor’s office, both dated July 23, 2007. The Board also received from Snohomish County two pages of

the County's Draft SEIS concerning the Crane (SW 23) property that had not been presented at the HOM. Index #8, 3-32 and 3-33.

On August 28, 2007, the Board issued its Order Allowing Supplemental Briefing [Re: *MT Development LLC v. City of Renton*]. On September 5, 2007, the Board received supplemental briefing from the Cities of Bothell, Mill Creek and Lynnwood, and from Snohomish County.

## **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 Snohomish County pursuant to the Act are presumed valid upon adoption. RCW 36.70A.320(1). The burden is on the Petitioners to demonstrate that the actions taken by Snohomish 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 [Snohomish 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 Snohomish 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 Snohomish County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA.<sup>4</sup> The Supreme Court has stated: "We hold that deference to

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<sup>4</sup> The State Supreme Court's most recent delineation of the deference standard is found in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, Docket Number 76339-9 (September 13, 2007), at 20, fn. 8:

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.<sup>5</sup>

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, SUPPLEMENTATION OF THE RECORD, AND PRELIMINARY MATTERS**

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

The Board finds that the Petitioners’ PFRs were timely filed, pursuant to RCW 36.70A.290(2); that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and that the Board has subject matter jurisdiction over the challenged Ordinances, which amend the County’s comprehensive plan and development regulations, pursuant to RCW 36.70A.280(1)(a).

#### **B. Motions to Supplement the Record**

In connection with their briefing on the merits, the parties moved to supplement the record with various documents. At the Hearing on the Merits, the PO **admitted** the documents listed in Appendix C as subject to **official notice**. WAC 242-02-660.

Three proffered items were taken under consideration:

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Without question, the “clearly erroneous” standard requires that the Board give deference to the county, but all standards of review require as much in the context of administrative action. The relevant question is the degree of deference to be granted under the “clearly erroneous” standard. The amount is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the county’s actions a “critical review” and is a “more intense standard of review” than the arbitrary and capricious standard. See, e.g., *Cougar Mountain Assocs. V. King County*, 111 Wn.2d 742, 749, 765 P.2d 264 (1988). And even the more deferential “arbitrary and capricious” standard must not be used as a “rubber stamp” of administrative actions. See *Ocean Advocates v. United States Army Corps of Eng’rs*, 361 F.3d 1108, 1118, 1119 (9<sup>th</sup> Cir. 2004).

<sup>5</sup> The *Lewis County* Court is in accord with prior rulings that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 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.3<sup>rd</sup> 1156 (2002).

- Snohomish County Response Attachment A – Amended Ordinance No. 07-022
- Lynnwood Proposed Supplemental Exhibit 13 – Declaration of Keith Maw, and attachments.
- Scriber Creek Proposed Supplemental Exhibit 1 – Snohomish County website page “History of Urban Centers,” *see* Scriber PHB, fn. 2

The Board takes official notice of Ordinance No. 07-022, pursuant to WAC 242-02-066, for the reasons set forth in Section IV.C below. Ordinance No. 07-022 is **admitted as Supplemental Exhibit 44**.

Snohomish County and Intervenor Scriber moved to strike Lynnwood Proposed Supplemental Exhibit 13, Declaration of Keith Maw with exhibits. The Maw Declaration was submitted in support of the City of Lynnwood’s SEPA claims. The Board decides in Section V.D, below, that Lynnwood is barred from bringing a SEPA challenge under WAC 197-11-545. Therefore the Board grants the motion to strike, and Lynnwood’s Proposed Supplemental Exhibit is **denied**.

The Board **denies** Scriber Proposed Supplemental Exhibit 1 – Snohomish County website page “History of Urban Centers.” The Board finds that it is neither necessary nor of substantial assistance to the Board’s decision in this matter.

### C. Abandoned Issues

The Board’s Rules of Practice and Procedure provide:

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

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

Additionally, the Board’s April 24, 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 10 (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.

Snohomish County asserts in its briefing that Petitioners have abandoned various Legal Issues or portions thereof. County Response, at 9. The Board concurs as follows:

- The Board finds that Petitioner Bothell **abandoned** allegations of non-compliance with RCW 36.70A.035, .130, and .140 in Legal Issue 6. Bothell's argument in Legal Issue 6 is confined to compliance with RCW 36.70A.020(11).
- The Board acknowledges that Petitioner Mill Creek **withdrew** its allegations under Legal Issue No. 6.
- The Board finds that Petitioner Lynnwood **abandoned** its allegations of violations of RCW 36.70A.020(7) under Legal Issue 2.
- The Board finds that Petitioners Bothell and Mill Creek **abandoned** their challenge to Ordinance 06-098 under Legal Issues 5 and 6.

The Petitioners' Legal Issues identified various Countywide Planning Policies (**CPPs**) and Snohomish County Comprehensive Plan Policies (**GPPs**) and alleged that the challenged County actions were inconsistent with these provisions. To the extent any of these policies were uncited or unbriefed, the Board will indicate abandoned CPPs and GPPs in the discussion below.

#### **D. Motion to Strike**

Snohomish County and Intervenor McNaughton moved to strike the prehearing brief of Intervenor FNYJC. The County and McNaughton pointed out that the two "legal issues" listed by FNYJC were not the same as the legal issues approved in the PHO for the Board's consideration in this matter. The County and McNaughton also asserted that FNYJC's brief introduced an extraneous dispute about whether the McNaughton rezones considered in the 2006 Docket were within the scope of the 2005 TYU.

Mill Creek opposed the motions to strike.

FNYJC responded to the County and McNaughton's critique by submitting, in essence, a substitute prehearing brief, which was filed a few days after the deadline for reply briefs. The FNYJC Reply admits error in its restated "legal issues," pleads its status as a novice *pro se* party to Board proceedings, corrects the errors objected to by the opposing parties, and reargues the matters before the Board in the appropriate format. At the Hearing on the Merits, neither the County nor McNaughton took issue with FNYJC's participation in oral argument.

The Board accepts FNYJC's July 16, 2007, brief as a correction or substitution for its prehearing brief.<sup>6</sup> The Board **grants** the motion to strike the FNYJC Prehearing Brief and

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<sup>6</sup> Generally the Board disregards a late brief, but this was essentially a restatement of the novice *pro se* party's opening brief, but without the misstated "legal issues."

**will substitute the FNYJC Reply** as constituting FNYJC’s facts and legal arguments. In this FDO, references to FNYJC positions will be based on the FNYJC Reply.

### **E. Other Preliminary Matters**

In this FDO, the Board takes up, first, the Bothell/Mill Creek challenges concerning the McNaughton and Park Ridge Chapel properties (**McNaughton rezones**); second, the Bothell/Mill Creek challenges concerning the Fairview Ministries project; and third, the Lynnwood challenges concerning the Scriber Creek property. Bothell and Mill Creek allege that the McNaughton rezones are inconsistent with a number of countywide planning policies (**CPPs**) and County Comprehensive Plan Policies (**GPPs**). The Board addresses the non-transportation policies together in Section IV E.

## **IV. BOTHELL/MILL CREEK LEGAL ISSUES**

### **A. THE CHALLENGED ACTIONS**

Petitioners City of Bothell and Mill Creek, supported by Intervenor FNYJC, challenge amendments to Snohomish County’s comprehensive plan and development regulations affecting approximately 118 acres of property along the urban growth boundary in the County’s Southwest Urban Growth Area (**SW UGA**).<sup>7</sup> The properties at issue straddle the designated Municipal Urban Growth Areas (**MUGAs**) of Bothell and Mill Creek.

The first area of dispute is 93 acres directly east of 35<sup>th</sup> Avenue S.E. and north of Maltby Road referred to as SW 14 – McNaughton and SW 20 – Park Ridge Chapel (together, **McNaughton rezones**). County Ordinance No. 06-102 redesignated this property from ULDR (urban low density residential) to UMDR (urban medium density residential) and Ordinance No. 06-104 up-zoned it from R9600 (approximately 4 du/acre) to Low Density Multiple Residential - LDMR. LDMR allows maximum densities of one dwelling unit per 4,000 square feet or nearly 11 homes per acre (du/ac) and has produced a development pattern referred to as “horizontal condominiums.” Index 8, p. 3-30.

No expansion of the UGA was involved in the McNaughton rezones – just an increase in density for lands already designated Urban. According to the DSEIS, the up-zone allowed for an additional 486 housing units and an additional population capacity of 1169. Index 8, p. 1-7, 1-9. Many of the up-zoned parcels are owned by members of the neighborhood group FNYJC, who oppose the County’s action.

The major north-south arterial on the west side of the re-zoned properties is 35<sup>th</sup> Avenue S.E, which angles and merges with York Road. The 35<sup>th</sup>/York Road alignment is further complicated by an angled intersection with Jewell Road. The major east-west arterial along the south of the properties is Maltby Road/ Route 524. The area is not currently served by transit.

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<sup>7</sup> The Ordinances challenged here are listed and summarized in Appendix B.

The second change in dispute is a set of amendments to the County's policies allowing expansions to the UGA for certain types of public institutions and enacting a UGA expansion involving 17 acres referred to as the Groemaere/Fred Lind Manor parcel. Ordinance Nos. 06-097, 06-098, 06-111, 06-112, 06-113, 06-114. The County amended its CPPs, GPPs and development regulations to allow expansion of the UGA for Level II Housing and Social Service Facilities (**HSSF**) as Public/Institution (**P/I**) uses. The County then expanded the UGA to allow Fairview Ministries to develop a continuous care retirement facility on the Groemaere/Fred Lind Manor Parcel (hereafter, **Fairview Ministries**). An additional 7.7 acres owned by the Northshore School District (Fernwood Elementary School) was included in the expansion.<sup>8</sup> The area is just east of the McNaughton parcel – SW 14. The area was redesignated from Rural Residential to ULDR and rezoned from R-5 (1 du/5 acres) to R-7200 (6 du/acre).

### **B. LEGAL ISSUE NOS. 2 AND 4 TRANSPORTATION AND LAND USE PLAN CONSISTENCY**

The PHO states Bothell/Mill Creek Legal Issue Nos. 2 and 4 as follows:

1. *Did Snohomish County's adoption of Ordinance Nos. 06-102 and 06-104, in particular the provisions relating to SW-14 (McNaughton) and SW-20 (Park Ridge Chapel), fail to comply with the internal consistency provisions of RCW 36.70A.070(preamble) and Snohomish County Countywide Planning and Comprehensive Plan Policies adopted pursuant to the same [e.g., GPP Policy LU-2]? [Intended to reflect remainder of Legal Issue 1.]*
  
4. *Did the County's adoption of Ordinance Nos. 06-102 and 06-104, in particular the provisions relating to SW-14 (McNaughton) and SW-20 (Park Ridge Chapel), fail to comply with the transportation planning goals and related consistency requirements of RCW 36.70A.020(3), RCW 36.70A.210 [e.g., CPP TR-4, TR-8, OD-3, and JP-1 through 4] and Comprehensive Plan Policies adopted pursuant to the same [e.g., GPP Policy Nos. TR-1 and TR-7] and the concurrency requirements of RCW 36.70A.070(6)?<sup>9</sup> [Intended to reflect Legal Issue 2 and Legal Issue 3]*

### **Applicable Law**

The preamble to RCW 36.70A.070 requires internal consistency among elements of a comprehensive plan:

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<sup>8</sup> The Petitioners do not challenge the 7-acre expansion for Fernwood Elementary School, and the Board finds the County's action incorporating the school into the UGA to be presumed valid and in compliance with the GMA.

<sup>9</sup> Neither Bothell nor Mill Creek has raised any argument concerning JP-3; this issue is **dismissed as abandoned**.

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. ...

RCW 36.70A.070(6) states that every GMA Comprehensive Plan must contain:

A transportation element that implements and is consistent with the land use element.

The GMA allows a six-year window to provide capital and transportation facilities to match the planned development, but the necessary improvements within that window must be identified and a multi-year financing plan must be adopted. RCW 36.70A.070(6)(a)(iii)(D) and (iv)(B) provide that the transportation element must include:

- (iii) Facilities and services needs, including: ... (D) Specific actions and requirements for bringing into compliance locally owned transportation facilities and services that are below an established level of service standard, ... [and]
- (iv) Finance, including: ... (B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year [TIP].

The GMA transportation planning provisions call for joint planning and coordination among county and cities. RCW 36.70A.020(3) is the GMA Planning Goal for transportation:

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

RCW 36.70A.210(3)(d) and (f) require county-wide planning policies that address transportation facilities and strategies and that provide for joint county and city planning within urban growth areas:

- (3) A county-wide planning policy shall at a minimum address the following: ... (d) policies for county-wide transportation facilities and strategies; ... (f) policies for joint county and city planning within urban growth areas ....

## Discussion and Analysis

### Positions of the Parties

**Petitioner City of Bothell.** The City of Bothell begins by describing its participation in Snohomish County's 2005 process for the ten-year-update of its comprehensive plan (TYU). Bothell PHB, at 2-10. In the TYU process, a proposal by McNaughton for increasing density on certain parcels in the SW UGA ("Jewell Assemblage") was considered and rejected by the County Council. Index 340. Bothell actively opposed the Jewell Assemblage proposal, joined by Dorothy Nesbit of FNYJC and others, on the grounds of inadequate infrastructure to support the increased density.<sup>10</sup> Bothell PHB, at 7-9. Bothell also argued that the proposal was incompatible with existing development patterns and would overwhelm existing single-family neighborhoods. *Id.*

While the County's 2005 TYU rejected the Jewell Assemblage proposal, a substantially similar upzoning proposal, but without any UGA expansion, was put on the County's 2006 Docket. In addition to McNaughton's 74-acres (SW-14), the County's 2006 Docket considered the adjacent 19-acre Park Ridge Chapel proposal (SW-20). Both these properties were already within the UGA, straddling the MUGAs for the Cities of Bothell and Mill Creek, and designated ULDR (zoned R-9600). Bothell PHB, at 10, Index 3.

Bothell indicates that it expressed its continuing opposition as early as the County's Docket-setting public hearing on April 6, 2006, where Ms. Nesbit also testified in opposition. Index 47, attachment F;<sup>11</sup> Index 284. Bothell PHB, at 12-13. In the 2006 Docket process, according to Bothell, the County's Draft SEIS, planning and public works staff analysis, and County Executive memorandum all pointed out "the stark inconsistency of these infill density proposals with the County's Transportation Element." Bothell PHB, at 24.

Bothell asserts that the intersection of York Road and Jewell Road has been designated an "Inadequate Road Condition," based on analysis of traffic volumes, collision history, intersection alignment and projected growth. Bothell PHB, at 37; Index 110. Bothell states that the County Public Works Department has identifies the York Road/35<sup>th</sup> Ave. SE segment "in arrears," determining that the LOS will fall from LOS E to LOS F as a result of development already occurring. Bothell cites County staff memoranda and testimony that improvements to increase traffic capacity in the area are not included or funded in the 6-year TIP. Bothell PHB, at 37, Index 27. Bothell also points out that the area lacks transit service and pedestrian amenities. *Id.*<sup>12</sup> In its Reply, Bothell states that the Final SEIS, issued two weeks after enactment of the 2007 TIP, lists "mitigation measures" including "accelerating the schedule of planned improvements to the area." However, the TIP was not in fact amended to "accelerate" the necessary projects. Bothell

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<sup>10</sup> See, Index 127, 7.4.185 and 7.6.24.2, attached as Bothell PHB Ex. 6 and 5, respectively

<sup>11</sup> The Board finds that this document is ambiguous concerning Bothell's support or opposition to SW 14 and SW 20.

<sup>12</sup> At the HOM, FNYJC stated that it was two miles to bus service. HOM Transcript, at 100.

Reply, at 12. Bothell thus concludes that the County's action increasing density in the York/35<sup>th</sup> corridor makes the County's land use plan inconsistent with its transportation plan. Bothell PHB, at 38.

Bothell further contends that both the GMA and Countywide Planning Policies (CPPs) require a county to coordinate its transportation planning with cities. Bothell PHB, at 38. Bothell cites:

RCW 36.70A.020(3) – Transportation. Encourage efficient multimodal transportation systems that are ... coordinated with county and city comprehensive plans.

RCW 36.70A.070(6)(v) – [The transportation element must include] intergovernmental coordination efforts, including the assessment of the impacts of the transportation plan and land use assumptions on the transportation systems of adjacent jurisdictions.

Bothell states that the County did not assess how the increased residential densities might impact traffic in Bothell and did not address Bothell's LOS standards. Bothell PHB, at 39.

Bothell argues that the SW-14 and SW-20 densities are inconsistent with Snohomish County CPP transportation policies TR-4 and TR-8. Bothell PHB, at 39-40. Bothell cites the following:

CPP TR-4. Provide transportation facilities and services that support the land use elements of the county and cities' comprehensive plans, particularly roadway capacities together with public transportation services appropriate to the designated land use types and intensities.

CPP TR-4d. [Provide for mutual review by cities and counties where] roadway capacity and/or transit service capacity cannot adequately serve or expect to achieve concurrency for development allowed under the designation.

CPP TR-4(e). Adequate access to and circulation for public service and public transportation vehicles will be part of the planning for comprehensive plan land use designations and subsequent development.

CPP TR-8(e). The county and cities will reconsider land use designations where it is evident transportation facilities and services can not be financed or provided in sufficient time to maintain concurrency with land development.

Bothell reads these policies to require that “evidence of infrastructure must come first (at least in the Transportation Element and TIP), and then the heightened land use

designations.” Bothell PHB, at 40. Bothell underscores this conclusion by reference to Snohomish County Comprehensive Plan Policies (**GPPs**).

GPP TR 7.A.6 A process shall be established for reassessing first the levels of service and then the land use element of the county’s comprehensive plan if transportation funding falls short of meeting the existing and projected needs.

GPP TR 7.A.7. The land use element, the planned transportation improvements and the finance plan shall be coordinated and consistent.

Bothell contends that the CPP and GPP provisions require that land use designation must be *preceded* by available road capacity and public transit. *Id.* at 40. Bothell argues that the McNaughton rezones “create the very problems [these policies] are aimed at eliminating.” *Id.* at 41.

As to GMA Planning Goal 3, Bothell asserts that “multimodal transportation systems” include auto, buses, bicycles and pedestrians. Bothell Reply, at 26, citing the definitions in Snohomish County Transportation Element. Index C13, at A8. Bothell points out that public transit requires road capacity, sidewalks and bus stops, all of which are lacking here. Bothell Reply, at 26-27.

**Petitioner City of Mill Creek.** The City of Mill Creek states that the County’s action rezoned property that crosses the far southeast corner of Mill Creek’s MUGA. Mill Creek PHB, at 4. Mill Creek points out that the city has not made any provisions in its own comprehensive plan for the increased traffic volumes into the city from the up-zoned properties. *Id.* at 14.

Mill Creek points to the preamble to the CPP Policies for Transportation:

Transportation and land use are profoundly interrelated. The type, intensity, and timing of land development will influence the mode of transportation provided, the effectiveness in moving people and the travel behavior of people using the land.

Mill Creek PHB, at 15. Mill Creek also cites to CPP TR-4 (above) and CPP TR-8, which calls for “achieving concurrency requirements for land development by considering transportation levels of service and available financial resources to make needed transportation improvements.” *Id.* at 16.

**Intervenor Friends and Neighbors of York and Jewell Roads Community.**<sup>13</sup> FNYJC is comprised of property owners and residents living in or adjacent to the McNaughton rezones. FNYJC explains, at the outset, that of the up-zoned 118 acres of property, 17 parcels are owned or controlled by the McNaughton Group, 8 parcels are owned or

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<sup>13</sup> The Board cites to FNYJC Reply. See Section III D.

controlled by Park Ridge Chapel (and key parishioners), and 46 parcels are owned and controlled by other parties, including the members of FNYJC. FNYJC Reply, at 2. Thirty-four households within the targeted area signed a petition to the County Council opposing the rezones. Index 116; FNYJC Reply, Ex. 2.

FNYJC participated in the public process for consideration, first, of the Jewell Assemblage in the 2005 TYU and, later, of the McNaughton rezones in the 2006 Docketing process. *Id.*<sup>14</sup> According to FNYJC, property owners of the majority of the parcels inside the two proposals signed petitions, testified at hearings, or wrote or emailed *in opposition* to the higher-density zoning. *Id.*

FNYJC relates first-hand experience of the transportation deficiencies in the neighborhood. They point out that there is no public transit: (1) most of SW 14 is outside the RTA boundary which is the taxing authority for Sound Transit; (2) Snohomish County Community Transit does not provide bus service to the area; and (3), the area is two miles from a bus stop, and thus too far for the paratransit services of DART. *Id.* at 5. See also, HOM Transcript at 42-43, 100, and 121.<sup>15</sup>

FNYJC contends that there is no safe pedestrian access to basic services such as banks, pharmacies, grocery stores, bus stops – pointing out that the area designated “urban village” at the intersection of York and Maltby Roads is in fact an active and growing church, not local commercial services. *Id.* at 5.

**Respondent Snohomish County.** The County asserts that the Transportation Element of its Comprehensive Plan was enacted in December 2005 and the 2007 TIP was adopted November 20, 2006. Neither one is now subject to appeal.<sup>16</sup> County Response, at 33, 45. The County points out that the Transportation Element contains each of the mandatory elements listed in RCW 36.70A.070(6), including a land use reassessment process if funding for needed projects falls short, and that its development regulations include a concurrency management system. *Id.* at 37-40. The County requests that the Board dismiss “petitioners Bothell and Mill Creek’s untimely collateral attacks on the Transportation Element and transportation policies.” *Id.* at 34.

The County asserts that a number of transportation improvements to serve the McNaughton rezones are included in the Transportation Element and identified in the

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<sup>14</sup> See, Index 127, 8.3.000817 and 8.3.000747, Index 284, Index 20, Index 117, attached to Bothell PHB as Ex. 11, 12, 22, 32, and 52, respectively.

<sup>15</sup> Ms Nesbit states: “Nothing is within reasonable walking distance of this neighborhood.” *Id.* at 41. “It’s two miles down this steep road to the Bothell-Everett Highway where the bus service is. And it’s two miles down this steep road to Thrasher’s Corner where the banks, the pharmacies, the Safeway, the Fred Meyer, and what have you, are, the things that people need. And you cannot walk down this road safely....So there’s no safe means to get there. It’s two miles downhill and two miles uphill.” *Id.* at 100-101.

<sup>16</sup> *Pilchuck VI, et al v. Snohomish County*, CPSGMHB Case No. 06-3-0015c, Final Decision and Order (Sept. 15, 2006), involved a timely challenge to *different* provisions of the County’s transportation element. The Board in that case concluded that Petitioners failed to carry their burden of proving noncompliance with the GMA.

Draft and Final SEIS. *Id.* at 41-42. The scheduling and financing of these improvements, however, is directed by the County Council through the Six-Year TIP. *Id.* at 43. The County points out that the current TIP was adopted a month before the approval of the McNaughton rezones, and so the projects necessary to support the rezones were not funded in the current TIP. *Id.* at 44. The County argues that the 2007 TIP has not been appealed and is not before the Board. *Id.* at 45.

The County contends that its concurrency regulations will solve any temporary mismatch between local land use planning and transportation planning.

The transportation element clearly identifies projects that may be programmed on the Six Year TIP that would mitigate impacts from the SW 14 and SW 20 proposals. However, at the time the current TIP was adopted, the infill proposals [McNaughton rezones] were not before the County Council for consideration.<sup>17</sup> The next opportunity to review the TIP will be in conjunction with the 2008 budget process. Nonetheless, the County's concurrency management system will delay any development on an arterial unit in arrears until necessary improvements are programmed for funding.

*Id.* at 48-49, citing *Hensley V v. Snohomish County*, CPSGMHB Case No. 01-3-0004c/02-3-0004, Order Finding Compliance in *Hensley IV* and Final Decision and Order in *Hensley V* (June 17, 2002).

The County argues that the approved infill development does not violate GMA Goal 3 because petitioners cannot prove that the enactment "thwarts the encouragement of regionally-coordinated alternative transportation systems." *Id.* at 49. The County states that increased density in the area will eventually help support an extension of transit services. Index 27, at 3.

As for the joint planning called for in GMA Planning Goal 3, the County states that the County-wide Planning Policies provide for coordination of county-city planning within urban growth areas through inter-local agreements, and here neither Bothell nor Mill Creek has alleged that the County's actions are inconsistent with any inter-local agreement. *Id.* at 50.

**Intervenor The McNaughton Group LLC.** McNaughton characterizes the County's action as a choice between *expanding the UGA* to accommodate population growth, as considered and rejected in the 2005 TYU, or *embracing infill at higher densities within the existing UGA*. McNaughton Response, at 2-3.

McNaughton specifically addresses the contention in Legal Issue 3 that the County's action fails to comply with the concurrency requirements of RCW 36.70A.070(6).

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<sup>17</sup> However, the Board notes that the County Executive forwarded the 2006 Docket, with the Planning Commission's recommendations and the Executive's comments, to the County Council on October 25, 2006. The TIP was not adopted until November 20, 2006. Index 38.

McNaughton asserts that “the increase in potential population under the LDMR rezone has a relatively insignificant effect on the area’s transportation infrastructure,” which is already in arrears; but “without the redesignation and rezone there is no identified funding source to pay for needed improvements.” *Id.* at 9. McNaughton states that the way the County intends to fund its infrastructure backlog is through developer payments for comprehensive plan amendments. McNaughton Response, at 13. McNaughton points to provisions of the County’s concurrency ordinance that call for developer commitments to fund transportation projects made necessary in connection with requested comprehensive plan amendments, citing SCC 30.66B.315:

Any increases in the capacity needs of the roads analyzed will be considered an impact caused by the plan amendment and will be mitigated as a requirement of development approvals if the plan amendment is allowed.

McNaughton concludes that the comprehensive plan amendment redesignating and rezoning SW-14 and SW-20 “effectively sets the stage for resolving the existing IRC [inadequate road condition] and the future arterial capacity issues” by permitting development that will require transportation improvements to be funded by developers. *Id.* at 13.

#### Board Discussion

At the outset, the Board concurs with the County and McNaughton that a collateral attack on the Transportation Element or on the 2007 TIP is untimely and will be disregarded by the Board. The Transportation Element was adopted in December 2005 as part of Snohomish County’s ten-year-update (TYU). The 2007 TIP was adopted November 20, 2006. Neither adoption is before the Board in this challenge. The County asserts, and the Board has previously ruled, that the Transportation Element contains all of the planning components required by RCW 36.70A.070(6). County Response, at 34-40; see *Pilchuck VI, supra*, at 57. However, the issue before the Board is not the sufficiency of the Transportation Element and TIP but whether the McNaughton land use redesignations and rezones are consistent with the Transportation Element and TIP. Mill Creek Reply, at 13.

Petitioners Bothell and Mill Creek have provided un rebutted evidence that up-zoning the McNaughton and Park Ridge Chapel parcels (SW-14 and SW-20) for increased residential density was inconsistent with Snohomish County’s Transportation Plan. The County’s record on this matter is clear.

- A March 9, 2006 staff memorandum noted, for SW 14 and SW 20, “There are prerequisite public facilities, such as adequate public roads and stormwater, which are not available or have not been programmed to serve the proposed site.” Index 242, p. 8, 13; Index 240, SW 14 and SW 20 attachments.

- The DSEIS, issued September 2006, analyzed SW-14 and SW-20 together and indicated that, even under a “No action” alternative and with the assumption that three identified improvements would be completed as planned, a drop in LOS would occur by 2025, and, for York Road, as early as 2012.<sup>18</sup> Index 8, 3-61, 3-62.
- A staff memo from Planning and Development Services (**PDS**) to the Planning Commission, dated September 26, 2006, stated:
 

While the proposal maintains consistency with many of the plan elements and development regulations, the *proposed change in land use designation is not consistent with the transportation element*. The intersection of Jewell Rd. and York Rd. has been designated by Snohomish County as an “Inadequate Road Condition” based on an analysis of the intersection, traffic volumes, collision history, and projected growth. Analysis indicates improvements identified in the Transportation Element *will not be sufficient* to maintain the arterials so that they operate within adopted levels of service.

...There are no transit routes in the area and there are few pedestrian improvements that will serve the additional population. However, *adequate public road infrastructure is not available and has not been programmed to serve the subject site*.

Index 4, using identical text for SW 14 and SW 20 (emphasis supplied).
- A staff memo from PDS to the Planning Commission, dated October 2, 2006, stated bluntly: “[T]he proposed changes in the land use designations are not consistent with the County’s Transportation Element.” Index 27, at 2.
- On October 3, 2006, PDS Planning Staff testified before the Planning Commission:
 

And [SW 20] is, you know, this is adjacent to Southwest 14, also. And, and again that comes down to it wasn’t consistent with the transportation element. There are no projects programmed or funded that would mitigate any of the traffic impacts that would be a result of increased density. And that would hold true for both proposals.

Index 205c, testimony of Troy Holbrook, PDS, at 5.
- Also on October 3, 2006, George Godley, Transportation Planning Coordinator, County Department of Public Works, told the Planning Commission:
 

With the recent capital initiative that the Executive pursued and the council approved, there would be some spot improvements to deal with some of the problems were going to have over the next six years, and those’ll be intersection improvements. But we won’t have the capacity improvements in the area, and we have identified that as a

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<sup>18</sup> “Improvements ... to Urban Three Lane standards are identified in the Transportation Element. However, analysis indicates that this will not be sufficient to maintain County LOS standards. [The York Road/35<sup>th</sup> SE segment] would need additional mitigation by 2012.” *Id.* Index 8, at 1-7.

critical arterial, meaning it's going to be multimodal – we need to do curb, gutter, sidewalk capacity improvements to it.

Index 205c, at 5-6.

- A County Executive Memorandum to the County Council dated October 25, 2006, stated:  
*These proposals are not consistent with the Transportation Element of the GMA Comprehensive Plan, including Policy TR 5.A.4, “concurrency requirements for land developments in unincorporated areas shall be pursued by considering adopted levels of service standards and the financial resources available to make needed transportation improvements for county roads.”*  
Index 38, at 5 (emphasis added).
- An attachment to the minutes of the November 14, 2006, Snohomish County Council Planning and Community Development Committee meeting listed “Potential Mitigation Improvements” for the transportation problems connected with the SW 14 and SW 20 proposals. Index 48, Attachment. None of the potential improvements was added to the 2007 TIP, which the County Council adopted a week later.
- A December 5, 2006, Memorandum to Public Works Director Steve Thomsen, officially declared the York Road/35<sup>th</sup> Avenue S.E. arterial unit from Grannis Road to SR 524 (Maltby Road) to be “in arrears.”<sup>19</sup> The memo noted the development already occurring in the 35<sup>th</sup> Avenue Corridor and stated that the LOS will fall to LOS F and that there are “no projects currently programmed or funded that will address this LOS deficiency.” Index 117, at 2.

In short, the GMA and the County’s transportation policies require adequate roadway capacities to serve designated land uses and intensities. However, because the County is not currently meeting its level of service standards in the portion of the SW UGA affected by the McNaughton rezones, the authorization of increased density in SW-14 and SW-20 will further reduce the LOS in the area: thus, **the action is inconsistent with the County’s transportation policies.**

Interestingly, McNaughton asserts that the Transportation Element, as drafted and approved in 2005, assumed several expansions to the SW UGA, including the Jewell Assemblage, and so it included some projects to support road capacity improvements in the area. McNaughton Response, at 12-13. If projects were included in 2005, then this makes the County staff and Executive conclusion that the present proposal is inconsistent all the more telling.

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<sup>19</sup>At the HOM, “Arterial Unit in Arrears” was defined as an arterial segment that has fallen below the adopted LOS. Any development placing more than 3 additional p.m. peak period trips in that segment triggers the concurrency requirement. HOM Transcript at 127-128.

The County and McNaughton point to various transportation projects identified in the Transportation Element to improve road capacity in the corridor. However, the GMA requires that necessary improvements be actually scheduled and funding identified at the time land use designations are made. RCW 36.70A.070(6)(a)(iv)(B) and (C). The Board declines McNaughton's suggestion that the only source of funding for such improvements is, in essence, the sale of comprehensive plan amendments to developers. The Six-Year TIP, as a required component of the Transportation Element (RCW 36.70A.070(6)(a)(iv)(B)) must be updated to ensure transportation facilities are provided to serve planned growth.

In *Hensley V v. Snohomish County*, CPSGMHB Case No. 01-3-0004c/02-3-0004, Order Finding Compliance in *Hensley IV* and Final Decision and Order in *Hensley V* (June 17, 2002), at 16, the Board accepted Snohomish County's designation of two LAMIRDs "since the County ... has funding for improvements programmed into its TIP (i.e., no funding shortfall)." In the *Hensley* matter, the County amended its TIP in coordination with the LAMIRD designation to include the necessary projects. Therefore the Board concluded that the "County has maintained consistency between the Land Use and Transportation elements of its plan." *Id.*

The County's response is, first, that the necessary road capacity projects are listed in the Transportation Element but just need to be rescheduled and funded, and, second, that it enacted its 2007-2012 TIP just prior to adopting the 2006 Docket that included the McNaughton upzones, and that it can address the transportation impacts of the upzones in the next TIP iteration, scheduled for adoption at the end of 2007. The County argues that its transportation and land use planning can never be perfectly synchronized because its TIP and Capital Facilities elements are adopted annually as part of its budget cycle<sup>20</sup> and its plan and development regulations are amended in the annual docketing process.<sup>21</sup> As a practical matter, the County states, there is bound to be some timing gap where the plans are inconsistent. In this instance, according to the County, the TIP was adopted a month prior to the challenged ordinances, so the TIP did not incorporate the McNaughton rezones; amending the TIP in next year's cycle should be sufficient.

The Board is not persuaded. The heart of the GMA is the requirement for coordinated and comprehensive planning. Infrastructure must match and support urbanization. The costs of supplying urban services are to be taken into account *at the time* the urban growth boundary is extended or capacity is increased.

Yes, the County has transportation concurrency regulations and the Transportation Element contains the required re-assessment provisions. But, as Bothell correctly argues in its Reply, concurrency and re-assessment provisions are hollow tools if increased densities are authorized in the land use plan notwithstanding documented deficiencies in the transportation system. Bothell Reply, at 20-25.

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<sup>20</sup> See RCW 36.70A.130(2)(a)(iii).

<sup>21</sup> See RCW 36.70A.130(2)(a).

Granted the CFE and Docketing process will not absolutely coincide, but each must be considered and adopted in light of the other. Given the County's deliberative process and the extent of public participation, the County staff that prepares the TIP and the County Council that adopts it cannot pretend ignorance of matters under consideration in a docketing process that is virtually concurrent.<sup>22</sup> Snohomish County is quite capable of amending various portions of its plans and regulations concurrently, when necessary to accommodate a desired project.<sup>23</sup> Here, however, the County Council failed to coordinate the proposed rezones and the required transportation improvements.

The Board must conclude that the County's adoption of the McNaughton rezones, without adopting corollary amendments to the Transportation Element or at least updating the Six Year TIP to support these higher density land use designations, made the County's land use plan inconsistent with its transportation plan, in violation of RCW 36.70A.070 (preamble) and .070(6).

The Board finds and concludes that the McNaughton rezones (SW-14 and SW-20) were not consistent with the Transportation Element of the Snohomish County Comprehensive Plan. Petitioners have carried their burden of demonstrating that the County's action was clearly erroneous and did not comply with RCW 36.70A.070 (preamble) and .070(6). The Board is left with a firm and definite conviction that a mistake has been made.

GMA Planning Goal 3 calls for "efficient multimodal transportation systems" that are "coordinated with county and city comprehensive plans." By enacting the McNaughton rezones, Snohomish County thwarts this goal because the County comprehensive plan allows more development density than the roads can handle or than the TIP is scheduled to provide for. Transportation systems are not coordinated with the comprehensive plan.

### **Conclusion**

Snohomish County's adoption of Ordinance Nos. 06-102 and 06-104 was **clearly erroneous** and **failed to comply** with RCW 36.70A.070 (preamble) and .070(6) in that the land use designation and rezoning was inconsistent with the County's transportation plan. The County's action also failed to be guided by GMA Planning Goal 3 – RCW 36.70A.020(3) – and was inconsistent with county-wide transportation planning policies in violation of RCW 36.70A.210. The Board will remand Ordinances Nos. 06-102 and 06-104 to Snohomish County for action to bring the ordinances into compliance with the GMA.

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<sup>22</sup> This is particularly apparent here, where the County Council had rejected a similar proposal a year earlier because of transportation infrastructure deficiencies (see Bothell PHB, at 9, and cited exhibits), and where the 2006 Docket including the McNaughton rezones was forwarded to the County Council for action almost a month before the Council voted on the TIP.

<sup>23</sup> See, e.g., under Legal Issue 5, County adoption of six ordinances to accommodate the Fairview Ministries proposal.

## C. LEGAL ISSUE 1 EXTERNAL CONSISTENCY

The PHO states Bothell/Mill Creek Legal Issue 1 as follows:

1. *Did Snohomish County's adoption of Ordinance Nos. 06-102 and 06-104, in particular the provisions relating to SW-14 (McNaughton) and SW-20 (Park Ridge Chapel), fail to comply with the external consistency (consistent with adjacent jurisdictions) provisions of RCW 36.70A.100 and Snohomish County Countywide Planning and Comprehensive Plan Policies adopted pursuant to the same? [Intended to reflect part of Legal Issue 1—PFR 5.1]*

### Applicable Law

The Growth Management Act requires coordination and consistency of comprehensive plans among adjacent jurisdictions. RCW 36.70A.100 provides:

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

### Discussion and Analysis

#### Positions of the Parties

**Petitioner Mill Creek.** This portion of the parties' dispute focuses on the densities and design standards associated with LDMR (low density multiple residential) designation for the McNaughton rezones. As Bothell took the lead in arguing the transportation issues, Mill Creek takes the lead in arguing the land use density concerns.

Mill Creek contends that the LDMR designation approved by the County allows detached condominium development "without providing standard infrastructure improvements such as roads, sidewalks, fire access, parks, and open spaces." Mill Creek PHB at 4. Mill Creek asserts that, pursuant to RCW 36.70A.100, the County's plan is required to be coordinated with and consistent with Mill Creek's plan, and the McNaughton rezones violate that mandate.

First, Mill Creek asserts that the County's LDMR zoning lacks standard infrastructure improvements which are required under Chapter 58.17 RCW and Mill Creek's Development Code. Mill Creek PHB, at 11.

Second, Mill Creek contends that the high density residential development allowed by the County's LDMR zoning is inconsistent with Mill Creek's locational criteria for high-

density residential uses, which Mill Creek requires to be located in its central core or adjacent to commercial centers and transit facilities. *Id.* Mill Creek contends that the County has placed “high demand and high intensity uses on the fringe of the MUGA where there are no commercial or transit facilities, and it inherently strains Mill Creek’s ability to provide services so far removed from the Mill Creek core.” *Id.* at 12.

Mill Creek argues that applying LDMR zoning on the fringe of the UGA - away from commercial, employment and transit facilities – is inconsistent with GPP policy LU-2.A:

Increase residential densities within UGAs by concentrating and intensifying development in *appropriate locations*.

*Id.* at 12-13 (emphasis supplied).

Mill Creek points out that Snohomish County Tomorrow reviewed the County’s LDMR zoning and raised a series of concerns. Mill Creek PHB, at 18. Snohomish County Tomorrow (**SCT**) is the inter-jurisdictional group, established pursuant to RCW 36.70A.210, that acts as the forum for all amendments to the Countywide Planning Policies and makes policy recommendation to the County Council. Bothell PHB, at 61. In the fall of 2006, the SCT Steering Committee drafted and proposed principles and amendments to the County for incorporation into the LDMR process, citing the following issues:

Inadequate-sized streets  
Lack of planned pedestrian and vehicular circulation pattern  
Lack of sidewalks  
Little to no landscaping  
Poor parking provision for residents and guests  
Lack of properly located usable open space  
Unattractive storm water facilities  
Building forms that present garage doors to the street

Supp. Ex.10, Oct. 6, 2006 SCT Steering Committee minutes, at 6-8. Mill Creek asserts that the County did not incorporate any of SCT’s recommendations into the McNaughton rezones. Mill Creek PHB, at 18, fn. 7.

Mill Creek urges the Board to disregard Snohomish County Ordinance No. 07-022. Mill Creek argues (1) the County decided the McNaughton rezones without development standards and thus, County approval of LDMR was inconsistent with Mill Creek’s comprehensive plan; (2) Board consideration of the subsequent ordinance would allow after-the-fact cure of GMA challenges; (3) the Board cannot substantively review the ordinance because it is outside of the record in this case; and (4) the fact that the County took this action is proof that the flaw existed. Mill Creek Reply, at 10-11.

**Petitioner Bothell.** Bothell urges the Board to read the GMA requirement for intergovernmental coordination to mean that development regulations in the

unincorporated UGA must be compatible with the development standards of the city that will eventually annex the area. Bothell describes its own plan – *Imagine Bothell* - as envisioning a dense urban core surrounded by lower-density residential neighborhoods. Thus, along its northwest city boundary, Bothell’s plan calls for low urban densities.

Bothell states that the higher densities allowed by the County in Bothell’s MUGA conflict with Bothell’s plan and will impede Bothell’s ability to incorporate and govern these areas. Bothell PHB, at 48. Bothell complains that the county made no attempt to reconcile the proposed densities in Bothell’s MUGA with Bothell’s vision for the rest of its planning area. *Id.* at 50. The McNaughton rezones, in Bothell’s view, “are facially inconsistent with Bothell’s Land Use Element and its FLUM.” *Id.* Bothell argues that this is contrary to the GMA goal of “transformance of governance” – progressive assumption by cities of the responsibility for providing urban services in urban areas.

**Intervenor FNYJC.** FNYJC states that, at the time the McNaughton rezones were enacted, the County had no development standards for LDMR zoning, creating the likelihood of “instant slum.” FNYJC Reply, at 3-4. Arguing that their neighborhood is an inappropriate location for denser development, FNYJC states:

Nothing is within reasonable walking distance of this neighborhood. These properties are outside the service area of public transportation and away from other necessary services such as pharmacies, banks and other businesses. The nearest Urban Center is located 2 miles away.

*Id.* at 8.

FNYJC argues that the County’s adoption of Ordinance 07-022 should not be considered by the Board, stating that the development regulations in the ordinance apply only to single-family development within the zone, not to the townhomes, multifamily structures and other uses allowed under LDMR zoning.

**Snohomish County.** With respect to Legal Issue 1, the County contends that an argument based on RCW 36.70A.100 can only relate to consistency between city and county comprehensive plans, not development regulations. So Ordinance 06-104 is not at issue here.

Snohomish County explains that LDMR development consists of multiple single-family detached units located on a single lot or collection of lots, often developed with common areas and access roads being owned and maintained by the homeowners’ association. County Response, at 15-16. The County characterizes LDMR zoning as an infill strategy for moderate (not high) density single-family detached housing likely to produce more affordable neighborhoods.

The County argues that the unincorporated UGA on both sides of the 35<sup>th</sup> S.E./York Road corridor is planned and zoned for urban development, with subdivisions at 4 du/acre (R 9600), 6-10 du/acre (R 7200), and 11 du/acre (LDMR). The McNaughton

parcels “are located adjacent or proximate to large, urban residential subdivisions that are zoned Residential 7,200 [under which] developers routinely take advantage of the County’s lot size averaging or planned residential development provisions to achieve net densities ... up to 10.5 units per acre.” County Response, at 16. The additional LDMR zoning approved in the McNaughton rezones is consistent with this development pattern, the County contends.

According to the County, LDMR zoning furthers the County’s commitment to Goal 4 of the GMA by “encouraging the availability of affordable housing to all economic segments of the population and promoting a variety of residential densities and housing types.” County Response, at 14. The County’s comprehensive plan establishes objectives and policies that further the goal of “safe, sanitary and affordable housing.” Goal H 1, C 11, at pp. HO-3 to HO-5. The County points to CPP land use policy LU 2.A.6 which provides:

Within UGAs, alternatives to standard single family designs, such as zero lot line housing and cottages on small lots around a central courtyard, shall be considered in development regulations for residential areas.

As to the lack of development standards, the County points to newly-adopted Ordinance No. 07-022 which it states began with a series of four stakeholder meetings in December 2006 that were attended by city representatives. Ordinance 07-022, at 3. The County acknowledged that “most Snohomish County cities are concerned with the density, minimum road width, minimal pedestrian and recreational facilities, inadequate parking, and lack of landscaping provided in some of the single family detached unit developments they would inherit if these developments are annexed.” *Id.* The LDMR development standards adopted in Ordinance 07-022 include:

Setback requirements  
Minimum road width  
Pedestrian access requirements  
Parking standards and signage  
Fire land access  
Open space and recreational facility requirements  
Landscaping requirements

The County asks the Board to take official notice of Ordinance No. 07-022 and to determine that it resolves the comprehensive plan inconsistencies complained of by Petitioners Bothell and Mill Creek.

**Intervenor McNaughton.** McNaughton adopts the County’s arguments throughout. McNaughton urges the Board to take official notice of County Ordinance No. 07-022 which McNaughton asserts provides the necessary design standards for LDMR developments – road standards, pavement depth, parking, open space, and building setbacks for fire access. *Id.* at 7.

### Board Discussion

The Board finds Petitioners' arguments of external inconsistency unpersuasive on several grounds. Petitioners object that LDMR zoning is standardless and, as such, is inconsistent with City comprehensive plans. Petitioners rely on RCW 36.70A.100, which requires that comprehensive plans of jurisdictions with common borders be coordinated and mutually consistent.

The Board agrees with the County that RCW 36.70A.100 only applies to comprehensive plans, not development regulations.<sup>24</sup> Ordinance 06-104 applying LDMR zoning to SW 14 and SW 20 is a development regulation and so is not properly the subject of a Section .100 challenge.

However, Mill Creek asserts that its *comprehensive plan* requires development standards, adopting the subdivision provisions of Chapter 58.17 RCW, and argues that a land use designation within its MUGA that lacks infrastructure and design requirements is inconsistent. This argument has some merit. In fact, Snohomish County acknowledged the validity of the cities' concerns when it enacted Ordinance 07-022 in April of 2007.

According to Mill Creek and Bothell, the County's LDMR zoning was discussed at a series of Snohomish County Tomorrow meetings, and SCT informed the County of the cities' concerns. Mill Creek PHB, at 18; Supp. Ex. Nos. 9, 10, 11. The County adopted the McNaughton rezones without the requested revisions to LDMR standards, and this appeal followed. Nevertheless, the County proceeded to consider and enact development standards for the single-family detached application of LDMR zoning. The resulting Ordinance 07-022, adopted in April, 2007, addresses road standards, parking, pedestrian access, open space and landscaping, fire safety and other design concerns.

Bothell, Mill Creek and FNYJC urge the Board to disregard Ordinance 07-022 because it was enacted *after* the McNaughton rezones and it is not substantively before the Board for review.<sup>25</sup> However, the Board will take official notice of later actions taken by challenged jurisdictions that address the matters at issue in a case before the Board. See, e.g., *McVittie I v. Snohomish County*, CPSGMHB Case No. 99-3-0016c, Final Decision and Order (Feb. 8, 2000); *Giba, et al. v. City of Burien*, CPSGMHB 06-3-0008, Order of Dismissal (Apr. 17, 2006). The Board will consider dismissing GMA petitions when the challenged jurisdiction takes subsequent action that cures the fault or renders the issues raised by a petitioner moot.

In this case, the Board will take official notice of Ordinance 07-022. While the substance of the Ordinance has not been briefed or argued by the parties, the Board concludes, as

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<sup>24</sup>Bothell agrees that the consistency required by RCW 36.70A.100 is consistency between comprehensive plans (not development regulations). Bothell PHB, at 45, citing RCW 36.70A.210(1) and *Snoqualmie v. King County*, CPSGMHB 92-3-004, Final Decision and Order (Mar. 1, 1993), at 8.

<sup>25</sup> No GMA challenge to Ordinance 07-022 was filed within the time for appeal. Had the cities been dissatisfied with the ordinance, the remedy would have been to challenge it and ask the Board to consolidate the challenge with the present matter.

set forth below, that the cities do not have the authority to dictate specific development standards outside their borders. The Board finds and concludes that Ordinance 07-022 cures the discrepancy between City comprehensive plans that require and incorporate infrastructure and design standards and a County land use designation that formerly lacked development standards.

Finally, the fact that the County allows higher densities in the Bothell and Mill Creek MUGAs than the cities allow at their boundaries is an issue that appears to the Board to be governed by the reasoning of the Court of Appeals, Division I, in *MT Development LLC, et al., v. City of Renton*, Docket No. 59002-2 (Court of Appeals, Div. I, August 27, 2007).<sup>26</sup> In *MT Development*, the developer protested the City of Renton's attempt to impose its specific zoning standards as a condition of sewer extension to a project outside the city limits but within its potential annexation area [the King County equivalent of a MUGA]. Renton's zoning at its boundary was 4 du/acre and the King County zoning outside the Renton city limits allowed 8 du/acre. The Court ruled that Renton had no authority to impose its comprehensive plan or zoning regulations beyond its city borders. Although the City argued that it was not imposing zoning but merely planning for urban growth by establishing land use designations for its potential annexation area, the Court was not persuaded:

The heart of a typical zoning ordinance defines the various districts and the regulations of use, lot size, site coverage, density, height, landscaping, parking, signs and other matters.

*Id.* at 8 (quoting R. Settle, *Washington Land Use and Environmental Law and Practice*, 2.3a (1983)). The Court found that the city's conditions on sewer extension would regulate the use of property, having the effect of zoning outside the city limits, and were therefore unlawful.

The present matter is distinguishable, of course, as the cities point out, because Mill Creek and Bothell are not seeking to enforce their zoning as a condition of extending a necessary urban service. The Court's reasoning, however, persuades the Board that the GMA principle of inter-jurisdictional coordination does not give cities the authority to impose their urban density and design criteria beyond their boundaries in the guise of inter-jurisdictional coordination.

In the present matter, the Board concludes that the requirement for inter-jurisdictional coordination and consistency in RCW 36.70A.100 does not require Snohomish County to adopt zoning regulations within a MUGA that are the same as or approved by the associated city.<sup>27</sup>

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<sup>26</sup> Because *MT Development v. Renton* was issued after the HOM, the Board invited supplemental briefing from the parties. Briefs were submitted by the cities of Bothell, Mill Creek (joinder), and Lynnwood, and by Snohomish County.

<sup>27</sup> A land use designation and zoning category with **no** development standards might arguably be inconsistent with the comprehensive plan of a potentially-annexing City, but Snohomish County has rendered that issue moot with its adoption of Ordinance No. 07-022.

The Board notes that the GMA does not prescribe a particular process for the county/city collaboration and consistency that is promoted by the statute. County-wide planning policies provide only a framework for city/county planning consistency, unless the parties in a particular county agree to a more binding arrangement. RCW 36.70A.210(1). In Snohomish County, the county-wide planning policies establish Snohomish County Tomorrow as a merely advisory body (CPP JP-4) and apparently contemplate that any binding city-county joint planning be established by inter-local agreement. (CPP JP-1) None of the parties point to any inter-local agreement by which the County has agreed to give Bothell or Mill Creek a deciding voice as to zoning in their respective MUGAs. The Board concludes that the County's adoption of the McNaughton rezones did not require the concurrence of Bothell or Mill Creek.

### **Conclusion**

Petitioners Bothell and Mill Creek have **failed to carry their burden** of demonstrating that Snohomish County's adoption of Ordinance Nos. 06-102 and 06-104 did not comply with RCW 36.70A.100. Legal Issue No. 1 is **dismissed**.

### **D. LEGAL ISSUE 3 GMA GOALS 1, 9, AND 12**

The PHO states Bothell/Mill Creek Legal Issue No. 3 as follows:

3. *Did the County's adoption of Ordinance Nos. 06-102 and 06-104, in particular the provisions relating to SW-14 (McNaughton) and SW-20 (Park Ridge Chapel), fail to be guided by Goals 1, 9 and 12 of the GMA [RCW 36.70A.020(1), (9) and (12)] and was it inconsistent with Snohomish County's Countywide Planning and Comprehensive Plan Policies adopted pursuant to the same [CPP OD-1 through OD-3, OD-6, OD-8, TR-1, TR-4, TR-8; and GPP LU-2, UT-3]? [Intended to reflect Legal Issues 4 and 5.]*<sup>28</sup>

### **Applicable Law**

The planning goals of the GMA are set forth in RCW 36.70A.020. Petitioners appeal to Goals 1, 9, and 12.

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

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<sup>28</sup> The Petitioners have failed to brief GPP UT-3, and their challenge to consistency with that policy is **dismissed as abandoned**.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(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 ready for occupancy and use without decreasing current service levels below locally established minimum standards.

## Discussion and Analysis

### Positions of the Parties

**Petitioner Mill Creek.** Mill Creek asserts that GMA Planning Goals 1 and 12 call for planning to ensure efficient and timely provision of adequate public facilities and services. The City argues:

*High density development away from core services and facilities is not efficient land use or land planning, particularly as is the case here, where the county has not planned for timely or coordinated extension of any urban services for the proposed developments.*

Mill Creek PHB, at 17 (emphasis in original).

GMA Planning Goal 9 promotes planning for open space and recreation. Mill Creek contends that the McNaughton rezones violate Goal 9 because LDNR developments allowed by the County are not required to provide open space, parks, or recreation facilities as part of development approval. *Id.* at 18.

**Petitioner Bothell.** Bothell argues that Goals 1 and 12 require an orderly urban growth pattern. Bothell PHB, at 42. Read together with RCW 36.70A.110(3), the goals “establish a density hierarchy for growth within the UGA – urban growth is to first locate where the existing public services have the greatest capacity to accommodate it, followed by concurrent areas where it can be demonstrated that growth will be supported by a combination of existing and planned public services.” *Id.*

Bothell contends that the McNaughton rezones “create a leapfrog pattern” of higher density development a long way from public services and amenities. *Id.* Bothell characterizes the County’s action as “facilitating the development of relatively small, isolated areas on the UGA fringe with great intensity without regard to public services and infrastructure and without concern for the urban lands zoned less densely ... that occupy large areas, closer to city centers.” *Id.* at 44. The Board should thus find the rezones violate Goals 1 and 12.

**Intervenor FNYJC.** FNYJC emphasizes that the McNaughton rezones fail to meet the criteria of GMA Goal 12 (concurrent provision of urban infrastructure), citing the parallel County Code provisions of SCC 30.74.060 and asserting that key criteria are not met.

**Snohomish County.** In response, Snohomish County characterizes the McNaughton rezones as “infill development within an urban growth area, adjacent to the city limits of Bothell and dense residential subdivisions, in an area served by utilities, schools, and parks.” County Response, at 58. The County points out that the designation and zoning changes have the effect of increasing density from 4-6 du/acre to 6-12 du/acre, in an area already characterized by R-7200, R-9600, and LDMR zoning. The city limits of Bothell, “where the full range of urban facilities and services are available,” is right across the street. *Id.* at 59.

The County argues that infill development is an efficient use of land, as required by CPP OD-1. Further, the area is already characterized by urban growth, with densely-developed subdivisions along the west side of 35<sup>th</sup>. *Id.* at 62. The County asserts that it has collaborated with both cities, citing the terms of their respective inter-local agreements. *Id.* at 63.

Further, the County references its responsibilities under GMA Planning Goal 4: Housing, to encourage the availability of affordable housing to all economic segments of the population and promote a variety of residential densities and housing types. County Response, at 14. Zoning land for more dense residential development is an important component of the affordability strategy, the County states. *Id.*

### Board Discussion

Goal 1 requires urban growth to be located in urban areas where urban facilities and services are available or can be efficiently provided. Goal 12 requires provision of public facilities and services timed to serve planned development. The Board concluded above that the area of the McNaughton rezones currently lacks adequate transportation facilities and services and that the County adopted the rezones without a plan for providing the necessary improvements. As to transportation, Petitioners have met their burden of demonstrating non-compliance with Goals 1 and 12.

However, the County asserts that the area is “served by utilities, schools, and parks,” along with “the full range of urban facilities and services” available “across the street” in the City of Bothell. County Response, at 58-59.<sup>29</sup>

Intervenor FNYJC provided anecdotal testimony to questions about the provision of sewer service in the Little Bear Creek watershed [HOM Transcript, at 90-92) and to overcrowding at the Fernwood Elementary School in the neighborhood. *Id.* at 99.

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<sup>29</sup> Regarding SW 14, the PDS staff report states: “The site has frontage on 35<sup>th</sup> Ave S.E., an arterial road. ... Sewer service is available. Fernwood Elementary is immediately adjacent to the site, middle and high schools are further. The nearest parks are both approximately 1 ½ miles away.” Index 2.

However, the Petitioners failed to *document* any public facility or service deficiencies (other than transportation) to overcome the County's representations.

As the County correctly points out, the GMA favors infill in the urban area, rather than expansion of the UGA. The Board agrees with Bothell and Mill Creek that the highest densities are most appropriate in the core of cities. However, the development pattern at issue here is not high-rise multi-family; rather it is moderate-density single family detached or zero-lot-line housing. The fact that Bothell has chosen to zone much of the land within its city limits at much lower densities<sup>30</sup> does not make the County's medium-density designation within the unincorporated UGA non-compliant with Goal 1. The Board concludes that upzoning the McNaughton and Park Ridge Chapel properties was within the discretion of the County, subject to concurrent amendment of its transportation plan.

As to GMA Planning Goal 9, the Board takes official notice of Ordinance No. 07-022 and concludes that the County's LDMR zoning takes into consideration the need for open space, landscaping, and recreational amenities in the newly-adopted development standards.

### **Conclusion**

The Board finds and concludes that Petitioners City of Bothell and City of Mill Creek have met their burden of proving that the County's adoption of the McNaughton rezones was not guided by GMA Planning Goals 1 and 12, in failing to concurrently plan for appropriate transportation facilities and services. In all other respects, petitioners have failed to carry their burden of proving noncompliance with GMA Planning Goals 1, 9, and 12.

### **E. LEGAL ISSUES 1-4 CPP AND GPP CONSISTENCY**

As set forth above, the GMA requires internal consistency between the components of a comprehensive plan and between a plan and its development regulations (RCW 36.70A.070 preamble and .070(6)). The GMA also requires external consistency between the comprehensive plans of a county and its cities, particularly between plans of jurisdictions with common borders (RCW 36.70A.110), and mandates development of county-wide planning policies as a framework to provide that external consistency (RCW 36.70A.210(1)).

In Legal Issues 1 through 4, the Cities of Bothell and Mill Creek contend that the County's action in adopting the McNaughton rezones was inconsistent with various Snohomish County CPPs and GPPs. The transportation-related policies were reviewed in Section B, above. For clarity of review, Board takes up in this section the cited policies concerning land use and inter-jurisdictional coordination.

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<sup>30</sup> See, *Fuhriman II v. City of Bothell*, CPSGMHB Case No. 05-3-0025c, Final Decision and Order (Aug. 29, 2005).

**Land Use and Orderly Growth.** Beginning with the CPPs for orderly development, Bothell points out that the “orderly growth” hierarchy of RCW 36.70A.110(3) is incorporated verbatim in CPP OD-1, which calls for growth within each UGA to be directed “consistent with the land use and capital facilities elements.” Bothell PHB, at 43.

CPP OD-1: Promote development within urban growth areas in order to use land efficiently, add certainty to capital facility planning, and allow timely and coordinated extension of urban services and utilities for new development.

Mill Creek complains that the County has failed to plan “for timely or coordinated extension of *any* urban services for the proposed developments.” Mill Creek PHB, at 17.

CPP OD-3 requires County “policies for promotion of contiguous and orderly development and provisions of urban services to such development,” and provides that the County must:

CPP OD-3: Coordinate among jurisdictions within a particular UGA, the data, analysis and methodologies relating to Levels of Service standards.

...

Mill Creek contends that the County is not currently meeting LOS standards in this area, and has not coordinated with the adjacent jurisdictions whose LOS may also be implicated. Mill Creek PHB, at 15.

Both Bothell and Mill Creek cite CPP OD-8, which provides:

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

Bothell PHB, at 43; Mill Creek PHB, at 18. Mill Creek contends that the McNaughton rezones result in an “increased population of 1169 persons ... [in] homes without co-located jobs or easy access to get to their jobs.” Mill Creek PHB, at 18.

Petitioners also point to Land Use policies in the County’s comprehensive plan (GPPs) and argue that SW-14 and SW-20 are not “appropriate locations” for increased densities. GPP LU-2 provides that it is the County policy to establish development patterns that use urban land more efficiently.<sup>31</sup> Objective 2.A reads:

GPP LU-2 Objective 2.A: Increase residential densities within UGAs by concentrating and intensifying development in appropriate locations.

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<sup>31</sup> Bothell also sites GPP Goal LU 2.B.1: Establish development patterns that use urban land more efficiently. The County points out that this is a commercial and industrial lands policy. County Response, at 66.

Mill Creek argues that the SW-14 and SW-20 properties - far away from commercial, employment and transit facilities – are not an “appropriate location” for the increased density of LDMR zoning. Mill Creek PHB, at 13. In particular, Bothell points to the County’s locational criteria for medium and high density residential development:

GPP LU Policy 2.A.5: Medium and high density residential development ... shall be encouraged to locate, where possible, within walking distance of transit access or designated transit corridors, medical facilities, urban centers, parks, and recreational amenities.

FNYJC underscores the County’s locational criteria, and points out the complete lack of transit or pedestrian amenities in the area. FNYJC, at 8.

In response, Snohomish County first points to its Housing Policies which call for “a broad range of housing types,” “opportunities for affordable home ownership,” “development of innovative housing types that make efficient use of the county land supply,” “mix of densities,” “expeditious and efficient infill development in urban growth areas.” C11, pp. HO-3 to HO-5; County Response, at 14-15.

The County then lays out a number of GPP Land Use policies that support the McNaughton rezones:

LU Policy 2.A.1; Within UGAs, ... require that new residential subdivisions achieve a minimum net density of 4-6 dwelling units per acre.

LU Policy 2.A.3: Any UGA shall provide for a variety of residential densities ....

LU Policy 2.A.4: Any UGA shall provide opportunities for a mix of affordable housing types (e.g., small lot detached ...) within medium density residential areas.

LU Policy 2.A.6: Within UGAs, alternatives to standard single family designs such as zero lot line housing and cottages on small lots around a central courtyard, shall be considered in development regulations for residential areas.

*Id.* pp. LU-16 to LU-17. The County points out that LDMR development allows an alternative to standard single-family design and provides opportunities for affordability. County Response, at 65. The County concludes that “infill development, where services are available, establishes development patterns that use urban land more efficiently,” and thus is consistent with the County’s CPPs and GPPs. *Id.* at 66.

The County also points to its CPPs for orderly development and argues that the McNaughton rezones are not “high density development away from core services and

facilities” or “leap frog development,” but rather provide infill development in an area already characterized by urban growth, with densely developed subdivisions and available urban services. County Response at 62.

The Board finds that the County’s GPP land use policies, taken as a whole, support infill development within the UGA, at the medium densities and with the design flexibility allowed by the County’s LDMR zoning, notwithstanding Bothell and Mill Creek’s preference for development at lower densities. The County’s action was also consistent with its GPP housing policies. The high price of housing in the Central Puget Sound region is a “notorious fact,” of which the Board takes official notice pursuant to WAC 242-02-670(2). The GMA does not compel local jurisdictions to adopt innovative strategies to provide affordable housing, but Snohomish County has done so.<sup>32</sup> In this context, the Board is not persuaded that the County’s action was inconsistent with county-wide policies for orderly development.

**Joint Planning and Inter-jurisdictional Coordination.** Bothell points out that Snohomish County’s CPPs require coordination efforts between the county and cities, addressing the need for a coordinated vision for growth patterns and for transportation and capital facilities coordination. Bothell cites:

CPP JP-1. Coordination of county and municipal planning to the extent required by GMA, within urban growth areas, may proceed in accordance with inter-local agreements between the county and the city(ies) concerned. These planning processes should emphasize the importance of early and continuous public participation, focus on the decision-making by elected officials at the local level, and *review the consistency of comprehensive plans with each other* and the GMA.

Bothell PHB, at 46; Mill Creek PBH, at 16.

CPP JP-2. Encourage policies that allow accessible effective and frequent inter-jurisdictional coordination relating to the consistency of comprehensive plans within a particular UGA ....

CPP JP-4 calls for the establishment of “an inter-jurisdictional group of elected officials, appointed officials, citizens and staff to review disputes regarding the consistency of comprehensive plans with each other” – *viz.* Snohomish County Tomorrow.

Mill Creek argues that “none of these policies are satisfied by the county’s unilateral ordinances” approving the McNaughton rezones. Mill Creek PHB, at 16. In particular, Mill Creek asserts that the County failed to coordinate with Mill Creek to provide

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<sup>32</sup> In *Futurewise VI v. Bothell*, CPSGMHB Case No. 07-3-0014, Final Decision and Order (August 2, 2007), the Board ruled that the City of Bothell’s comprehensive plan meets the minimum requirements of the GMA in zoning to accommodate the lower and middle-income segments of its projected population. The Board rejected petitioner’s contention that special incentives, subsidies, or financial commitments are required.

adequate LOS for the increased density associated with the McNaughton rezones. *Id.* citing CPP OD-3, CPP OD-6, GPP LU-2.

Bothell contends that, in contrast to its handling of the 2005 TYU, the County failed to consult and coordinate concerning the 2006 McNaughton rezones; the result was to “allow disproportionate residential development on the UGA fringe – but within areas to which the cities, rather than the County, are expected to provide public services.” Bothell PHB, at 46. Bothell complains that the County has in effect usurped the City’s ability to plan for its future. *Id.* at 48.

Bothell points out that its own comprehensive plan *Imagine Bothell*, requires it to “ensure consistency among land use designations near jurisdictional planning boundaries.” Bothell Goal LU-G5. The corollary land use policy, LP-P1, provides that land within the MUGA “shall be planned in a coordinated manner” by the city and county, followed by an inter-local agreement addressing matters concerning annexation. Bothell PHB, at 47.

The County’s Comprehensive Plan contains goals and policies to implement the regional coordination required in the CPPs. The preamble to the Inter-jurisdictional Coordination element of the comprehensive plan reads:

The development of unincorporated land adjacent to cities has created a number of complex issues. When cities seek to extend their corporate boundaries through annexation without coordination with the county, they may find it difficult to provide public services to this new land at appropriate urban service levels because of: incompatible lot sizes; road alignments; utility line sizes; and differing design standards....

GPP IC Preamble. In addition, the IC element specifically acknowledges the Southwest UGA:

The county’s Southwest Urban Growth Area includes nine cities and unincorporated county land. Urban-level services within UGAs should ultimately be provided by cities. Dividing the SWUGA into separate Municipal Urban Growth Areas will facilitate coordinated planning between the cities and Snohomish County. The delineation and adoption of initial MUGA boundaries by the county council allows the county to plan for the development of these urban areas in coordination with the city they are most likely to join in the future.

*Id.* Bothell PHB, at 50-51.

The specific IC goals and policies include:

GPP Goal IC. Promote the coordination of planning, financing and implementation programs between the county and local jurisdictions including tribal governments.

GPP IC Policy 1.A.1 The county shall continue participation in Snohomish County Tomorrow ... to resolve possible inconsistency between local jurisdictions' plans....

GPP IC Policy 1.A.2 The county shall work with cities and private citizens to develop more detailed plans where local conditions and interests demand it.

GPP Objective IC 1.B. Work with cities and towns to provide for the orderly transition of unincorporated to incorporated areas within the UGAs

GPP IC Policy 1.B.1. The county shall work with cities in planning for orderly transfer of service responsibilities in anticipation of potential or planned annexations or incorporations within UGAs.

Bothell contends that GPP 1.A.2 was violated, as Bothell and FNYJC had clearly indicated to the County during the TYU process their opposition to increased density on the McNaughton properties, yet “the County made no overtures to the city or residents of the affected areas to work toward a coordinated solution to the problems.” Bothell PHB, at 51. Bothell argues that the County’s adoption of the McNaughton rezones without further consultation with Bothell, in the face of Bothell’s known opposition to the prior Jewell Assemblage, “essentially makes a mockery of” the above goals.

The County responds that Countywide Planning Policies for joint city-county planning within UGAs provide for coordination through inter-local agreements. County Response, at 50, 55; C8, at 13. Specifically, CPP JP-1 allows coordinated planning “in accordance with inter-local agreements.” Here, neither Bothell nor Mill Creek is alleging County violation of the terms of any inter-local agreement. *Id.* CPP JP-2 encourages adoption of comprehensive plan policies for inter-jurisdictional coordination, which the County has done. CPP JP-4 calls for the establishment of Snohomish County Tomorrow, which has also been done.

The County asserts that it presented its 2006 docket proposals to SCT in two meetings and therefore complied with the IC policies. Supplemental Ex. Nos 20 and 21 [check Ex. B] ; County Response, at 29.

The County points out that none of the Inter-jurisdictional Coordination policies require that the County designate the unincorporated areas in a MUGA “exactly as each affected city would like to have it.” County Response, at 27, 55. The policies do not give adjacent cities or the SCT a veto over County planning and zoning. “The fact that Bothell wants low density residential growth inside its borders is not inconsistent with the county having medium density urban residential growth” in the UGA outside the city borders. County Response, at 28.

The Board agrees with the County. Beyond the fact that the planning designations are facially not identical, Bothell and Mill Creek have provided no cognizable evidence of inability to provide services or to extend governance, except with respect to transportation.

The Board notes that each of the counties within the Central Puget Sound region has developed, with its cities, different processes for coordination of planning, particularly with respect to land in the unincorporated UGA. In each instance, the Board looks to the county-wide planning policies developed pursuant to RCW 36.70A.210. Snohomish County's CPPs call for *inter-local agreements* between the County and the affected city, to govern joint planning for a particular MUGA (CPP JP-1), and for *consultation* through SCT (CPP JP-4). The Board is not persuaded that the County's action in approving the McNaughton rezones violated either the CPPs or the parallel GPPs. However, the Board urges the County and cities to strengthen their inter-jurisdictional coordination through SCT.

The Board notes that ultimately it will be cities, not the County, which will be responsible for planning and provision of urban services for these currently-unincorporated areas. *Poulsbo, et al., v. Kitsap County*, CPSGMHB 92-3-0009, Order Granting Kitsap County's Petition for Reconsideration and Modifying Final Decision and Order (May 17, 1993), at 2; RCW 36.70A.210(1). In the present case, the Board has acknowledged, in its Order on Motions, that county actions on a city's border may conceivably cause the city "injury in fact" as they require the city to revise its planning and financing and divert resources to provide urban services for unanticipated development on the city's fringe. Order on Motions, at 5. In connection with that motion, the City of Lynnwood placed into the record allegations about specific impacts on its storm water system, sewer system, multimodal transportation services, economic development projections, city center plan, and more. The allegations of Bothell and Mill Creek are much more amorphous. Beyond generalized concerns about neighborhood compatibility, their only specific, documented problems are with the inadequacy of the transportation facilities in the area. In the absence of inter-local agreements requiring more, the Board is not persuaded of an inconsistency.

### **Conclusion**

Petitioners Bothell and Mill Creek have **failed to carry their burden** of proving that Snohomish County's action in approving the McNaughton rezones was inconsistent with the comprehensive plans of Bothell or Mill Creek or inconsistent with the County-wide Planning Policies or County Comprehensive Plan, except with respect to the transportation matters previously decided. Petitioners' issues regarding CPP OD-1, OD-2, OD-3, OD-6, OD-8, CPP JP-1 through 4, GPP LU-2, and GPP IC are **dismissed**.

### **F. LEGAL ISSUE 5 – UGA EXPANSION**

The PHO states Bothell/Mill Creek Legal Issue No. 5 as follows:

5. *Did the County’s adoption of Ordinance Nos. 06-097, 06-098 (amending Snohomish CPP UG-14), and 06-113 and 06-114 (amending corresponding GPP policies and zoning code provisions) to allow UGA expansion in the vicinity of the Southwest UGA to accommodate Level II Health and Social Services Facilities, and 06-111 and 06-112 (amending the Future Land Use Map (FLUM)) to include the “Groemaere/Fred Lind Manor” parcel, and others, in the Mill Creek UGA),<sup>33</sup> fail to comply with the urban growth area goals and related urban growth area requirements of RCW 36.70A.020(1) and (12), RCW 36.70A.110, RCW 36.70A.210 [e.g., CPP UG-7 and CPP UG-12, and OD-1, and OD-3] and internal consistency requirements of RCW 36.70A.070(preamble) and Comprehensive Plan Policies adopted pursuant to the same [e.g., GPP Policy LU-2]? [Intended to reflect Legal Issue 6.]*

### **The Challenged Action**

Petitioners challenge six Ordinances adopted by the County. These Ordinances amended the County-wide Planning Policies, the relevant Plan and zoning text and the relevant zoning maps and FLUM.

The CPP amendment at issue is CPP UG-14(d), specifically condition 7. CPP UG-14(d) provides, in relevant part:

(d) Expansion of the Boundary of an Individual UGA. Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council, pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following ten conditions is met:

...

7. The expansion will allow the development of 1) a church or a school, K-12, including public, private and parochial; provided that the expansion area is adjacent to an existing UGA and will be designated and zoned exclusively for that use and will not add any residential, commercial or industrial capacity to the affected UGA; or 2) a Level II Health and Social Service Facility, provided that the expansion area is adjacent to an existing UGA and will be designated and zoned exclusively for that use.

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<sup>33</sup> In light of the fact that Snohomish County Ordinance Nos. 06-097, 06-098, 06-113, and 06-114 purport to amend Countywide Planning Policy, GPP and zoning code language to allow UGA expansions to accommodate Level II Housing and Social Services Facilities throughout the County, the City’s challenge is not limited to the County’s application of this amended language to approve the Goemaere/Fred Linde Manor [Fairview Ministries] proposal.

Ordinance No. 06-097, at 5. The underlined language was the amendment to this CPP. This CPP frames an exception for UGA expansions for churches and schools; the amendment included Level II Health and Social Service Facilities (**HSSFs**) within this exception. The Board notes that the limitation that no new residential, commercial or industrial capacity be added is not included for Level II HSSFs.

Ordinance No. 06-113 amended the text of County's General Policy Plan – its GMA Plan – to allow UGA expansions for Level II Health and Social Service Facilities. GPP LU-91 and LU-92, policies pertaining to Public/Institutional uses were the amended policies. See Ordinance 06-113, Ex. A, at 1. This Ordinance also referred to the definition of Level II HSSFs in Snohomish County Code (**SCC**) 30.91H.095.

SCC 30.91H.095 provides in relevant part:

Level II Health and Social Service Facilities – a use which is licensed or regulated by the state to provide emergency medical treatment on a 24-hour per day basis or which houses persons in an institutional setting that provides chronic care or medical service on regular recurring basis to its residents and which includes but is not limited to a:

- a. Hospital (including acute alcoholism/drug, psychiatric and state mental hospitals);
- b. Nursing home;
- c. Private adult treatment home
- d. Mental health facility, adult and child residential
- e. Soldiers' home and veterans' home
- f. *Large institutional boarding home for the care of senior citizens and the disabled sometimes known as assisted living facilities or continuous care retirement communities with emphasis on assisted living that may also include independent living and congregate care;*
- g. State residential school for hearing and visually impaired;
- h. Alcoholism and drug residential treatment facility
- i. Child birthing center/facility; and
- j. Hospice.

SCC 30.91H.095(2); (emphasis supplied). These Level II uses had been defined and identified since at least 2004. Ordinance No. 04-010.

The County's FLUM was amended to expand the UGA by approximately 17 acres (Goemaere site – SW 12a) and designate the newly included area as Public/Institutional (P/I). See Ordinance No 06-111, Section 6, Exhibit A. Additionally, the County's zoning map was amended to rezone the same site (Goemaere site - SW 12a) from R-5 to R-7,200 [apparently an implementing zone for the P/I FLUM designation]. See Ordinance No. 06-112, Section 5, Exhibit A. Ordinance No. 06-114, Section 2, at 14, amended the County's zoning matrix (Snohomish County Code 32.22.130(88)) to allow Level II HSSFs in the P/I Plan designation and for the R-7,200, R-8,400 and R-9,600 zoning designations. Although the change in the FLUM and zoning map would allow a school, church or any of the ten Level II HSSF uses,<sup>34</sup> the acknowledged impetus for extension of the UGA is to include the proposed Fairview Ministries continuous care retirement community.

The Board notes that neither the City of Bothell nor the City of Mill Creek provided any briefing regarding Ordinance No. 06-098's noncompliance with the Act. Therefore, the challenge to Ordinance No. 06-098 is deemed **abandoned**.

### **Applicable Law**

In this issue Petitioners challenge the County's action for noncompliance with Goals 1 and 12, which provide:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- ...
- (12) Public facilities and services. Ensure that those public facilities and services necessary to support development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

The relevant provision of RCW 36.70A.110 that the Cities challenge are subsections (3) and (4), which provide:

- (3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capabilities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both exiting public facilities and services and any needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth area.
- (4) In general, cities are the units of local government most appropriate to provide urban governmental services. In general, it is not appropriate that

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<sup>34</sup> An additional 7.7 acres owned by the Northshore School District (Fernwood Elementary School) was included in the UGA expansion and is not challenged here.

urban governmental services be extended to or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.

RCW 36.70A.210 provides the county-wide policy framework that binds the County and its cities together by assuring consistency among each jurisdiction's comprehensive plans. At issue in this matter are the following Snohomish County County-wide Planning Policies (**CPPs**):

CPP UG-7. As part of the joint comprehensive planning process for each UGA, develop regulations and incentives to encourage higher densities and employment concentrations so that the majority of growth locates within UGAs.

CPP UG-12. Where possible, locate new human service facilities near access to transit to promote service delivery at affordable cost.

CPP OD-1. Promote development within urban growth areas in order to use land efficiently, add certainty to capital facility planning, and allow timely and coordinated extension of urban services and utilities for new development.

Identify six-year growth areas geographically within each UGA or establish policies which direct growth consistent with the land use and capital facilities plan elements to meet state law. In particular, RCW 36.70A.110(3) states that "urban growth should be located first in areas already characterized by urban growth that have existing public facility and service capabilities to serve such development, and second in areas already characterized by growth that will be served by a combination of both existing facilities and services and any additional needed public facilities and services that are provided by either public or private sources." Further it is appropriate that urban governmental services be provided by cities, and urban governmental services should not be provided in the rural area.

CPP OD-3. Coordinate among jurisdictions within a particular UGA the data, analysis and methodologies relating to levels of service (LOS) standards, as required by GMA. Each jurisdiction may implement and monitor its own LOS standards in accordance with each jurisdiction's adopted comprehensive plan.

Petitioners also allege noncompliance with RCW 36.70A.070(preamble) dealing with the internal consistency of the plan. This 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.

Of particular import to Petitioners in this matter is Snohomish County's General Plan Policy (**GPP**) LU-2, which states, "Establish development patterns that use urban land more efficiently."

## **Discussion and Analysis**

### *Positions of the Parties*

Mill Creek asserts that the six challenged ordinances are directed at allowing Level II HSSFs to be located at the boundaries of the UGA, which will significantly increase high-density development on the UGA fringe where demand for services cannot be met. Mill Creek PHB, at 19. Further, Mill Creek argues that the County has made no provision for serving such developments on the fringe. *Id.* Additionally, the City asserts that Level II HSSFs facilities serve people at high risk and need for emergency health and safety services, and locating such facilities on the fringe of the UGA, far from emergency services and transit, will thinly spread the existing emergency services that are already available near the urban core. *Id.* at 20. Mill Creek notes that CPPs UG-7, UG-12, OD-1 and OD-3 promote higher densities and employment concentrations near the urban core and promote the location of human service facilities near access to transit – allowing Level II HSSF facilities on the fringe is counter to each of these CPPs. *Id.* at 20-21. Finally, Mill Creek asserts that if such development is permitted on the fringes of the UGA, the responsibility to provide urban services will fall upon either Mill Creek or Bothell, neither of which have planned to serve these areas. *Id.*

Bothell argues that the UGA cannot be a line in the sand in the battle against sprawl if the UGA can be expanded as is permitted by the challenged amendments. Bothell PHB, at 55. The crux of Bothell's argument, like Mill Creek's, is that locating such facilities (Level II HSSF) which require urban level services, on the fringe of the UGA, where the necessary urban services are not adequate nor available, is contrary to the Act. *Id.* at 55-58. Bothell also argues that many of the Level II uses are residential, not institutional in nature, and should be prohibited. *Id.* In short, both Mill Creek and Bothell assert that expanding the UGA for such uses is not only contrary to the UGA, but that it is just bad planning, since such uses should be directed toward the urban core.

The County responds that the Cities' attack on its action is merely NIMBY (not in my back yard) opposition. County Response, at 67. The County opines that Level II HSSFs are difficult to site, suggesting that they are essential public facilities which cannot be precluded under RCW 36.70A.200(5). *Id.* at 69, 77. The County claims allowing the UGA to expand for Level II HSSFs was supported by Vision 2020, the Snohomish County Tomorrow Planning Advisory Committee, and the City of Bothell's Community Development Director, and that the expansion area is within the Alderwood Sewer and Water District service area. *Id.* 69-73.

The County also asserts that Petitioner Bothell has either abandoned or insufficiently briefed its claims against the County. *Id.* at 73-75. The County argues that the expansion of UGAs with allowed-for Public/Institutional Uses advances the provisions of CPP UG-7 and UG-12, and that neither CPP imposes any requirements upon the County. *Id.* at 75. The County claims that Level II uses are not residential but rather “state-licensed facilities providing emergency medical treatment or institutionalized care” - “the patient is not a permanent resident.” *Id.* at 77.

The County asserts that Petitioner Mill Creek’s concern about the adequacy of urban services at the site is ill-founded, since the area is located within the Alderwood Sewer and Water District service area, and there is evidence in the record indicating there are no specific transportation deficiencies or needed transportation mitigation identified. *Id.* at 78. The County also dismisses Mill Creek’s “development at the fringe” argument as misplaced since the area is not “nearly rural;” rather, it is now urban and compliant with RCW 36.70A.110. *Id.* at 79.

Intervenor Fairview Ministries, a non-profit corporation, admits it was the proponent of these amendments since it was trying to locate a continuous care retirement facility in the area just north of the Bothell city limits. Fairview Response, at 1-2. Intervenor argues that the Level II facilities are recognized in the CPPs as governmental/institutional uses, not residential, commercial, or industrial uses and that for such uses, limited UGA expansions are appropriate. *Id.* at 13. Fairview also argues that *some* of the Level II facilities are more appropriately located at the urban core, and there is no evidence to suggest that *most* will seek locations on the urban fringe. *Id.* 14. Fairview also asserts that RCW 36.70A.110(4) is not applicable, since now the area in question is in the urban area, not the rural area. *Id.* at 16.

In reply, Mill Creek contends that the approach the County is using to accommodate a retirement community, by allowing expansion of the UGA for Level II facilities, is *ad hoc*, not coordinated, planning. Mill Creek Reply, at 2-5. The City asserts that the legislative decision to allow UGA expansions is general and prospective and cannot address site-specific concerns; and that the site-specific decisions are quasi-judicial that must conform to existing legal requirements; as such these decisions cannot insure that infrastructure support is adequate and available if it is not already a legal requirement. And such a provision is not part of the amendatory language. *Id.* Mill Creek also argues that the “legislative and quasi-judicial safeguards” applicable to UGA expansions that the Respondent and Intervenor refer to are illusory. The City asserts they are simply *ad hoc* decisions that are counter to good coordinated planning. *Id.* Mill Creek counters the NIMBY label by noting that it currently has senior residential and Alzheimer’s facilities, as well as adult family housing, within its city limits. *Id.*, at 7.

Bothell argues that many of the Level II HSSFs are residential, unlike CPP UG-14(d)(7)’s original allowance for churches and schools which are not in use 24 hours per day. Therefore, the challenged amendments substantially increase the need to provide urban services on the urban fringe. Bothell Reply, at 38. Bothell further notes that the language of the CPP amendment does not require that urban services be adequate and

available. *Id.* at 40. Bothell argues that all Level II HSSFs are not essential public facilities, especially senior housing. *Id.* The City claims there is no evidence supporting the notion that Level II HSSFs are being precluded so as to create a need to expand existing UGAs to accommodate their siting. *Id.* at 42.

### Board Discussion

It is significant to note that Level II HSSFs are allowed in virtually all of the County's *urban zoning designations* with a conditional use permit [See SCC 30.22.100], and Level II HSSFs are allowed in several of the *rural zoning designations* with a conditional use permit. [See 30.22.110 and .120]. In fact the 17 acre UGA expansion was previously designated R-5 which allows Level II HSSFs with a conditional use permit. So permitting a previously prohibited use can not be the impetus for the changes. Fairview Ministries candidly explains its rationale for seeking these amendments – “Rural zoning does not, however, permit sewer service to serve the site.” Fairview Response, at 5. Therefore, apparently to make sewer available to the site, and apparently to make Fairview's proposed continuous care retirement community feasible, a UGA expansion was sought and obtained. The Board notes that on prior occasions the County had denied a request to include the 17 acre site in the UGA. See Fairview Response, at 5.

This is not a question of the Cities wanting to preclude alleged “essential public facilities” as the County suggests.<sup>35</sup> The Board questions whether a continuous care retirement community or assisted living facility is a square peg in a round EPF hole. There is no evidence to suggest that senior retirement communities or facilities are “difficult to site.” Nor is there evidence to support the notion that the residents of these facilities are not permanent – they reside there. As Fairview Ministries suggests, these facilities are “horizontal condominiums.” Fairview Response, at 1.

Fairview argues that the CPPs recognize Level II HSSFs as governmental/institutional uses and that for such uses, UGA expansions are appropriate. While some of the Level II facilities may be governmental and institutional uses, the Board is not convinced that a senior retirement community is not a residential use for all practical purposes. These senior facilities are not “use and leave” facilities, like schools and churches; residents are there 24 hours per day. It is also significant to the Board that the limiting language of the CPP that does not allow the addition of “residential, commercial, industrial capacity” for churches and schools is **not** included in the amendment for Level II HSSFs. Therefore, arguably Level II HSSFs could add residential capacity. Additionally, the Board notes that “assisted living facilities,” licensed by the state, refer to residential accommodations – “the resident is housed in a private apartment-like unit.” See RCW 74.39A.009(3). Further, the Board observes that the CPPs generally recognize the importance of locating Level II facilities near the urban core where the necessary urban support facilities (sewer, transit, emergency services) are already available and efficiently provided.

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<sup>35</sup> The County accuses the Cities of bad motives. However, the Board's task, under the GMA, is not to determine whether petitioners' motives are pure or self-interested, but whether they have carried their burden of proving non-compliance with the Act.

It appears to the Board that the challenged amendments were adopted to allow a single facility to locate on the urban boundary without regard for the potential impacts of allowing retirement communities and nine other Level II uses to locate on the UGA fringe. If other Level II HSSFs pursue locations in the rural area and then seek to be included in the UGA, there would be little ability to deny such expansions. The location of retirement communities, assisted living facilities, and other Level II facilities on the urban fringe creates pressure to expand urban services away from the urban core. The Board agrees with Mill Creek and Bothell that this UGA expansion scheme, for relatively high-density senior housing, is *ad hoc* and not the product of coordinated planning with the adjacent cities.

Additionally, the County indicates that the 17-acre expansion area is within the Alderwood Sewer and Water District service area. Yet, there is no evidence presented, or argument made, that the Alderwood Sewer and Water District has the capacity to service the area or has been asked if plans are in place to accommodate such demand. The Board addressed a similar concern in *Suquamish II v. Kitsap County*, CPSGMHB Case No. 07-3-0019c, Final Decision and Order, (Aug. 5, 2007), noting the importance of coordinated capital facility planning in establishing UGA boundaries. The same concern is apparent here. The Board finds and concludes that the amendments to CPP UG-14(d)(7), and the 17-acre UGA expansion to incorporate the Fairview Ministries retirement community were **clearly erroneous**, and **do not comply** with Goals 1 and 12, as well as RCW 36.70A.110.

### Conclusion

The County's adoption of Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114, as they relate to the expansion of UGAs for Level II HSSFs, was **clearly erroneous**, was **not guided by** Goals 1 and 12 [RCW 36.70A.020(1) and (12)], and **does not comply** with the requirements of RCW 36.70A.110.

Petitioners have **abandoned** their challenge to Ordinance No. 06-098.

### G. LEGAL ISSUE 6 - PARTICIPATION

The PHO states Bothell/Mill Creek Legal Issue No. 6 as follows:<sup>36</sup>

6. *Did the County's adoption of Ordinance Nos. 06-097, 06-098, 06-111, 06-112, 06-113 and 06-114, fail to comply with the notice and public participation goals and requirements of RCW 36.70A.020(11), RCW 36.70A.035, RCW 36.70A.130 and RCW 36.70A.140 and was it inconsistent with specific CPP and GPP policies [CPP JP-1 through JP-4,*

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<sup>36</sup> The City of Mill Creek withdrew its Legal Issue No. 6 challenge prior to the Hearing on the Merits. Mill Creek PHB, at 9, fn. 4. Mill Creek had only challenged Snohomish County's compliance with the notice requirements of RCW 36.70A.035, not the public participation requirements or Goal 11. The challenge did extend to the six noted Ordinances. See 4/23/07 Restatement of Mill Creek Appeal Issues Pursuant to Board Request, at 3.

*TR-1; and GPP LU 1.D, IC 1] requiring regional collaboration and inter-jurisdictional planning? [Intended to reflect Legal Issue 7.]*

### **Applicable Law**

Bothell's PHB focuses on RCW 36.70A.020(11), the GMA Planning goal for public participation and inter-jurisdictional coordination, which provides:

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

Bothell's PHB, in discussing Legal Issue 6, makes no reference to RCW 36.70A.035, .130, or .140. Allegations of non-compliance with these provisions of the GMA are **dismissed as abandoned**.

### **Discussion and Analysis**

#### *Positions of the Parties*

Bothell asserts that the GMA requirement for external consistency (RCW 36.70A.100) "is implemented through planning jurisdictions' compliance with adopted countywide planning policies aimed at ensuring coordination between adjacent jurisdictions." Bothell PHB, at 59. In Snohomish County, this regional collaboration process is overseen by Snohomish County Tomorrow. *Id.* citing CPP JP-1, JP-2, JP-4, GPP Goal 1C and preamble, and the SCT Operating Guidelines.

Bothell explains that the SCT Steering Committee discussed the County's proposed UGA expansions for Level II HSSFs on several occasions and finally made a "no action" recommendation. Bothell PHB, at 63-64.<sup>37</sup> Nevertheless, the County Council enacted the suite of ordinances, including, in the Recitals to Ordinance 06-097, the erroneous statement that the County council "approved the proposed amendment to Policy UG-14, as recommended by the SCT Steering Committee." C1, Amended Ordinance 06-067. Bothell states that a month later the County recognized its error and adopted a Resolution correcting the Recital. Bothell Ex. 55, Index 204.

Bothell contends that the County action amending its CPPs in the face of SCT "no action" recommendation was non-compliant with the GMA requirement for a public process that "ensures coordination between communities and jurisdictions to reconcile conflicts." *Id.* at 65.

Snohomish County responds by citing *Postema v. Snohomish County*, 83 Wn. App. 574, 922 P.2d 176 (1996), where the Court of Appeals addressed the legal status of SCT. The

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<sup>37</sup> Bothell references Supp. Ex. 9; Index 30, Index 38, at 5, Supp. Ex. 10, at 4-5, and Supp. Ex. 11, at 3-7, attached to Bothell PHB as Exhibits 29, 30, 39, 40, and 47, respectively.

Court held that SCT “is not an entity which possesses governmental powers.” 83 Wn. App. at 581. The court said: “Under the statute (RCW 36.70A.210), collaboration is required to provide only a process and a framework.” *Id.* at 582. *Postema* thus affirms the essentially advisory role of the SCT, according to the County. County Response, at 82.

The County points out that the proposed amendments relating to Level II HSSFs were presented and discussed in at least three SCT meetings – September 27, October 25, and November 25, 2006 – where County Council members and County staff participated in the discussion. Supp. Ex. 9, 10, and 11. The County argues that these discussions demonstrate that the County collaborated with SCT regarding the amendments, but simply reached a different conclusion. County Response, at 84.

As to the incorrect recital of SCT support, the County states it “was an inadvertent oversight that the County corrected,” pointing out that County Council members who were present at the SCT meetings were well aware of SCT opposition. *Id.* at 85.

### Board Discussion

The Board concurs with the County. As set forth in the Board’s discussion of Bothell/Mill Creek Legal Issue 1, above, SCT’s recommendations are not binding on the County. It follows that County Council action contrary to SCT resolutions is not a violation of GMA requirements for a collaborative process.

The Court of Appeals in *Postema* pointed out that “the possibility that a county would adopt a policy disagreeable to cities is anticipated in the statute, which gives the cities a right to appeal. RCW 36.70A.210(6).” 83 Wn.App. at 583. In the present case, the Cities have appealed and the Board has upheld their appeal on substantive grounds. The Board does not find a violation of GMA process requirements.

## **Conclusion**

The Board finds and concludes that Petitioner City of Bothell has **failed to carry its burden** of proving that the County’s enactment of Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114 did not comply with RCW 36.70A.020(11). The allegations of non-compliance with RCW 36.70A.035, .130, and .140 are dismissed as abandoned. Bothell Legal Issue No. 6 is **dismissed**.

## **V. LYNNWOOD LEGAL ISSUES**

### **A. THE CHALLENGED ACTION**

Petitioner City of Lynnwood challenges amendments to Snohomish County’s comprehensive plan and development regulations in regard to approximately 7 acres of land which the County denoted during its comprehensive plan update as Amendment SW-23 but is also commonly known as the “Crane Property” amendment. The Crane Property is located within Lynnwood’s MUGA and adjacent to an existing 20-acre Urban

Center.<sup>38</sup> The site was previously designated as Urban High Density Residential with Multiple Residential Zoning but with the adoption of the challenged ordinances, the County re-designated the site as Urban Center with Planned Community Business zoning.

Lynnwood’s Legal Issues challenge the County’s actions in regard to consistency and coordination between neighboring jurisdictions, consistency with the application and compliance of the County-Wide Planning Policies (CPPs), General Planning Policies (GPPs), the Puget Sound Regional Council’s (**PSRC**) Multi-County Planning Policies (MCPPs), the Snohomish County Code (SCC), and environmental review under SEPA.

## **B. LEGAL ISSUE 1 – EXTERNAL CONSISTENCY**

The PHO sets forth Lynnwood Legal Issue 1 as follows:

- 1. Did Snohomish County’s adoption of Ordinance Nos. 06-102 and 06-104, specifically as they relate to map amendment SW-23 (Crane) and rezone, fail to comply with the consistency requirements of RCW 36.70A.100 and 210, related to CPPs UG-4, UG-6 and UG-9? [Intended to reflect PFR Legal Issue 1.]*

### **Applicable Law**

RCW 36.70A.100 provides:

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

RCW 36.70A.210 sets forth the requirement for development of county-wide planning policies and begins:

The legislature recognizes that counties are regional governments within their boundaries, and cities are primary providers of urban governmental services within urban growth areas. For purposes of this section, a “county-wide planning policy” is a written policy framework from which the county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100.

Snohomish County CPP UG-4, UG-6 and UG-9 provide:

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<sup>38</sup> The Board notes that Lynnwood has challenged two ordinances which provide for the addition of 7 acres (Crane) to an existing 20-acre Urban Center. The Board further notes that the addition of these 7 acres must stand on its own merits and established criteria are not satisfied by merely stating that it is an addition to an existing Urban Center.

UG-4: The *regional Vision 2020 1995 Update* should be implemented through a *collaborative planning process* between cities and counties. This process should include the citizens appointed [by cities and counties] ... *establish a hierarchy and recommended designation of centers* [within the UGA and consistent with Vision 2020] ... Council may consider ... modifications made by [PSRC and SCT]...

UG-6: Coordinate urban center designations with the appropriate transit planning agencies to achieve compatibility of land use and transportation objectives within urban growth areas.

UG-9: Respect the character of existing residential neighborhoods and non-residential areas when planning for urban centers and mixed use development within urban growth areas. Develop planning and design processes implementing strategies to:

1. require all new residential and commercial development to achieve a high level of pedestrian and public transit compatibility,
2. encourage infill development, and
3. enhance the existing community character and mix of uses.

Exhibit C8, at 7 (emphasis supplied).

## **Discussion and Analysis**

### *Positions of the Parties*

The crux of Lynnwood's argument is that the County's action in locating an urban center within close proximity to Lynnwood's planned City Center violates the GMA, PSRC's Vision 2020, and several CPPs, all of which together require that comprehensive plans of neighboring jurisdictions be coordinated and consistent and for jurisdictions to engage in a collaborative planning process. In essence, Lynnwood claims that if an Urban Center is developed on the site just outside the city limits, then it would effectively preclude or compete with Lynnwood's plans for its City Center. Lynnwood's City Center has been designated as a "regional growth center" by the PSRC.

According to Lynnwood, the County's action in approving the SW-23 (Crane) amendment was not consistent with several CPPs, specifically those addressing urban centers and transit, and several policies contained within PSRC's Vision 2020. *Id.* at 15-20 (citing RCW 36.70A.210). In addition, Lynnwood asserts that the County's action was not consistent with Lynnwood's Comprehensive Plan, particularly Lynnwood's City Center plan, which implements the regional growth center designation pursuant to PRSC planning documents. *Id.* at 20-21 (citing to RCW 36.70A.100).

In response, the County first complains that the City is attempting to raise a new issue in regard to PSRC's Vision 2020 policies and, even if the City is permitted to argue compliance with those policies, that the SW-23 (Crane) amendment is consistent because of the difference between Snohomish County's "urban centers" and PSRC's "regional growth centers." County Response, at 88-90.<sup>39</sup> The County further argues that the SW-23 amendment complies with CPPs cited by the City because it adds 7 acres of land to an existing urban center (established in 2005) which is adequately served by transit. *Id.* at 92-93. Lastly, the County argues that it is free to plan within the unincorporated UGA and that the County's urban center designation is not inconsistent with the cited CPPs just because it is located near the City's regional center. *Id.* at 94-95.

Scriber Creek Investments, owner of the subject property, intervened on behalf of the County. Scriber underscores the County's argument that a County urban center differs from a PSRC regional growth center. Scriber Response, at 5. Scriber describes at length the County's planning process for its urban centers in the unincorporated UGA, including the previous Urban Center designation of a 20-acre parcel immediately north of SW 23, which was not appealed by Lynnwood. *Id.* at 6-9. Scriber points out that the County's comprehensive plan designates six urban centers in the unincorporated UGA. Index C11 (GPP) at LU-18, LU-19.

In reply, Lynnwood reasserts its position that RCW 36.70A.100 and .210 impose a duty on the County to ensure that the County's planning is coordinate and consistent with that of neighboring cities and supports this assertion based primarily on PSRC Vision 2020 policies. Lynnwood Reply, at 1-2. In response to the County's assertion that Lynnwood should be barred from raising Vision 2020 policies, Lynnwood points out that CPP UG-4 mandates the implementation of PSRC's Vision 2020 policies and therefore Lynnwood's reliance on these policies is proper. *Id.* at 6-9. In regard to UG-6, Lynnwood argues that neither the County nor the intervenor presented any evidence of coordination with transit planning agencies. Lynnwood Reply, at 8-9.

### Board Discussion

Consistency with PSRC Vision 2020. PSRC is a multi-county agency responsible for coordinated land use and transportation planning for the four Central Puget Sound counties. PSRC's Vision 2020 planning document identifies a limited number of regional growth centers for special concentrations of population and/or employment as a way of focusing public infrastructure and transportation expenditures. PSRC Centers Report, Lynnwood Supp. Ex. 2. The County argues that Lynnwood's reliance of specific Vision 2020 policies should be stricken, as the policies were not specifically listed in Legal Issue 1. The Board disagrees. Lynnwood's citation to CPP UG-4 calls the PSRC Vision 2020 regional plan into play.

However, as Scriber's Response makes clear, PSRC "regional growth centers" are large, important, sub-regional hubs (there are only three in Snohomish County), as contrasted

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<sup>39</sup> The County adopted Scriber Creek's arguments on Vision 2020 policies. County Response, at 89, fn. 53.

with the County’s “urban center” zones. As defined by PSRC: “The term ‘regional growth center’ is used to differentiate centers that are designated for regional purposes from those that have a more local focus.” *Id.* at v. Vision 2020 designates 21 “regional growth centers” and established three types of centers – urban centers, town centers, and manufacturing/industrial centers. Ex. PSE 12, at 19. PSRC defines an “urban center” as a location which includes a dense mix of business, commercial, residential, and cultural activity within a compact area of *up to* 1.5 square miles. *Id.* at 86. In contrast, a “regional growth center” is an area designated by the PSRC and targeted for population, housing, and employment growth; the term “regional growth center” is used to differentiate centers that are designated for regional purposes from those that have a more local focus. Central Puget Sound Regional Growth Centers, Executive Summary.

Thus, it is not inconsistent with the PSRC policies for Snohomish County to designate as one of its six “urban centers” an area of the unincorporated UGA that does not meet the criteria for a PSRC “regional growth center.” Lynnwood’s arguments on this issue lack merit.

Consistency with Lynnwood’s City Center Plan. Lynnwood asserts that the County’s action in adopting the SW-23 amendment is not consistent or coordinated with Lynnwood’s Comprehensive Plan, specifically its City Center Sub-Area Plan, because having an urban center in close proximity would impede the development of the Lynnwood City Center as a thriving, functional urban center.

RCW 36.70A.100 states that the comprehensive plans of adjacent jurisdictions must be consistent and coordinated – this is the GMA’s “external consistency” requirement. Lynnwood reads this provision as meaning that a planning action contained within the County’s Comprehensive Plan must either (1) mirror the City’s Plan or (2) not create conflict. The Board has previously stated that plans are inconsistent if an adjacent jurisdiction’s comprehensive plan policies are thwarted by the policies of a neighboring jurisdiction. (*See LMI/Chevron v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, Final Decision and Order (Jan. 8, 1999) at 48. Has the County’s designation of 7 acres as an urban center thwarted Lynnwood’s plans to develop its City Center?

Both the City and County comprehensive plans seek to provide for mixed-use development that will encourage economic development and dense urban residential growth within the community. The tension, or conflict, stems from Lynnwood’s belief that developers, and subsequently tenants and customers, will be drawn to the County’s Urban Center thereby impeding the development potential of the Lynnwood City Center. The Board is not persuaded that two jurisdictions seeking to develop adjacent areas so as to provide viable, economically-sound mixed-use development for their residents are necessarily in conflict.

Consistency with CPP UG-4, UG-6, and UG-9. The bulk of Lynnwood’s argument in regard to Legal Issue 1 is based on claims that the County’s action was not consistent with specific Vision 2020 policies, and that the County’s Urban Center does not meet the PSRC criteria for regional growth centers. Lynnwood PHB, at 19-29. In addition,

Lynnwood argues that UG-4's statement that Vision 2020 *should be implemented through a collaborative planning process* translates into a mandate that the Vision 2020 "regional growth centers" criteria shall be implemented.

The Board reads UG-4 differently. This CPP requires that Vision 2020 should be implemented through a collaborate planning process and then sets forth the particulars *of the process* including citizen involvement, establishment of a hierarchy and recommended designation of centers, location of centers consistent with Vision 2020, and the ability of the County to consider changes made and/or recommended by the PSRC or SCT Steering Committee to Vision 2020.

Lynnwood does not assert that the County has failed to establish a collaborative planning process to implement Vision 2020. Indeed, with respect to the subordinate "urban centers" in the County's plan, Scriber describes a lengthy multi-party process. And for the SW-23 (Crane) amendment, the proposed amendment was (1) distributed to interested parties, including Lynnwood; (2) processed through Snohomish County Tomorrow (SCT); and (3) available for comment by Lynnwood throughout the process. The fact that Lynnwood does not agree with the outcome does not mean that the process leading up to the County's decision was not collaborative.<sup>40</sup> The GMA does not mandate that a city and county decision-making process result in a singular result; it mandates that these governmental entities work together when developing plans for the community.<sup>41</sup>

As for UG-6 and UG-9, Lynnwood once again turns to Vision 2020 polices in support of its assertion that the location of Crane Property is not conducive to pedestrian use of transit and does not respect the neighborhood character. Lynnwood PHB, at 19-20. In addition, Lynnwood argues that the size, just 7 acres, will not support the diversity of mixed-use development envisioned for urban centers by Vision 2020. *Id.* at 20. In addition, Lynnwood asserts that the close proximity to Lynnwood's City Center does not respect the character of an existing (although yet to be re-developed) regional growth center because it will detract from and impede Lynnwood's City Center development.

The Board notes that much of Lynnwood's rationale is based on applying the PSRC criteria for regional growth centers to Snohomish County's less-ambitious urban centers. However, the provision for public transportation is an important consideration when determining the location for an urban center and this fact is reflected in UG-6. Here, the County's record demonstrates that the SW-23 (Crane) site is currently served by two Community Transit routes and the Lynnwood Transit Center is located within one-half mile. Community Transit, King County Metro Transit, and Sound Transit were on the distribution list for SEPA documents and therefore had the ability to comment on the proposal. Ex. 8, DSEIS, at 3-67.

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<sup>40</sup> As the Court stated in *Postema, supra*: "Under the statute (RCW 36.70A.210), collaboration is required to provide only a process and a framework." 83 Wn. App. at 582.

<sup>41</sup> The Board does agree with Lynnwood's assertion that the County is bound to act in accordance with the policies contained in Vision 2020, as the multi-county planning policies adopted pursuant to 36.70A.210(7). However, that is not what Lynnwood asserts with Legal Issue 1; it asserts non-compliance with UG-4.

The Board concludes that the City of Lynnwood has **failed to carry the burden of proof** in demonstrating that the County's actions failed to comply with RCW 36.70A.100, or were inconsistent with CPP UG-4, UG-6 and UG-9.

### Conclusion

The Board finds and concludes that the City of Lynnwood has **failed to carry the burden of proof** in demonstrating that the County's actions in adopting Ordinance 06-102 and 06-104 were non-compliant with RCW 36.70A.100 and 36.70A.210, in relation to UG-4, UG-6, and UG-9. Lynnwood Legal Issue 1 is **dismissed**.

### **C. LEGAL ISSUE 2 – INTERNAL CONSISTENCY AND GOALS**

The Board's PHO sets forth Lynnwood Legal Issue 2 as follows:

2. *Did the County's adoption of Ordinance Nos. 06-102 and 06-104, specifically as they relate to the map amendment SW-23 (Crane) and rezone,*
  - a. *Fail to comply with the consistency and implementation requirements of RCW 36.70A.070(preamble), .120 and .130(1)(d)?[Specific GPP provisions are cited in the PFR]<sup>42</sup>*
  - b. *Fail to be guided by Goals 5, 7, 9, 10, and 12 of the Act [RCW 36.70A.020(5), (7), (9), (10) and (12)?*
  - c. *Fail to comply with the County's criteria governing Plan amendments, specifically Chapter 30.74 Snohomish County Code (SCC) 30.74? [Each intended to reflect PFR Legal Issue 2.]*

With Legal Issue 2, Lynnwood asserts three violations – that the County's action was not consistent with its own Comprehensive Plan – the GPPs (an internal inconsistency challenge); that the action violates several goals of the Act; and that the County failed to conform to its own code provisions in regard to comprehensive plan amendments.

The Board addresses each of these issues separately.

#### Legal Issue 2(a) – Internal Consistency

#### **Applicable Law**

RCW 36.70A.070(preamble) provides:

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<sup>42</sup> GPP policies and goals stated in Lynnwood's original PFR are: LU3.A.1, LU3.A.2, LU3.A.3, LU3.F, LU3.F.1, LU3.G.2, LU3.G.5, TR.2.A, TR.2.B, NE.1.A, NE.1.B, NE.1.B.1, NE.1.C, NE3.B.5, NE.3.B.8, NE.3.B.10, IC.1.B, and IC.1.B.1. Lynnwood will be limited to these cited policies, any additional policies (with the exceptions of sub-policies, i.e. TR.2.A.1 or TR.2.A) raised in its PHB or Reply Brief will be deemed improper and will not be considered by the Board. In addition, any policy not raised or adequately brief will be deemed abandoned.

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

RCW 36.70A.120 provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

RCW 36.70A.130(1)(d) provides:

Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

## **Discussion and Analysis**

### *Position of the Parties*

Lynnwood asserts that the County's action in approving the SW-23 amendment was inconsistent with a variety of policies contained within the County's Comprehensive Plan – its GPPs. First, Lynnwood cites to GPP policies regarding Urban Centers – LU.2.A, LU.2.B, LU.2.B.1, LU.3.A.1, LU.3.A.2, LU.3.A.3, LU.3.A.4, LU.3.A.6, LU.3.F, LU.3.F.1, LU.3.G.2, LU.3.G.5 – asserting that the County failed to coordinate the location and designation of the Urban Center with Lynnwood; the amendment does not meet locational criteria; and the amendment fails to encourage compact development in appropriate areas. Lynnwood PHB, at 23-24, 26-27, 30. Second, Lynnwood cites to GPP policies pertaining to inter-jurisdictional coordination – IC, IC.1.B, IC.1.B.1 – asserting that the County failed to coordinate with Lynnwood and to meaningfully work in concert with the City. *Id.* at 25. Third, Lynnwood cites to GPP policies pertaining to transportation – TR.2.A, TR.2.A.1, TR.2.A.2, TR.2.A.3, TR.2.A.4, TR.2.A.5, TR.2.B, TR.2.B.1, TR.2.B.2, TR.2.B.3, TR.2.B.4 – asserting that the County failed to work with Lynnwood on related transportation issues including transit centers and roadway improvements. *Id.* at 29. Lastly, Lynnwood cites to GPP policies pertaining to the natural environment – NE.1.A, NE.1.B, NE.1.B.1, NE.1.C – asserting that the County's environmental review was inadequate, especially in regards to Scriber Creek which is on and/or near the site. *Id.* at 31-32.

Lynnwood puts special emphasis on inter-jurisdictional cooperation (in regard to location and the provision of transportation services), the availability of high capacity transportation routes, and transit stations. Lynnwood argues that the Crane Property (1)

is not adjacent to a freeway, (2) is not within one-quarter mile of a transit center or park-n-ride, (3) is not adjacent to nor contains a transit center, and (4) does not have good access to higher frequency transit – required elements pursuant to LU.3.A.2, LU.3.A.3, and the Transportation Element. *Id.* at 28.

In response, the County argues that most of Lynnwood’s assertions concerning the cited GPPs are conclusory in nature and states that the City fails to demonstrate inconsistency on the GPPs that it does adequately brief. County Response, at 96-97. The County contends that the addition of 7 acres to an existing Urban Center is consistent with the GPPs and that the location – along a high capacity/transit corridor in an area designated for urban high density development – is appropriate. *Id.* at 97. The County further argues that inter-jurisdictional coordination occurred through the SCT process, of which Lynnwood is a member. *Id.*

Intervenor Scriber Creek submits arguments similar to those of the County. Scriber Response, at 20-25. Scriber asserts that the designation of the 7-acres complies with all of the comprehensive plan policies cited by Lynnwood and with the underlying concept for Urban Centers and that Lynnwood has had continuing opportunities to participate in the challenged action and related development of Urban Centers within the unincorporated areas of the County. *Id.*

In reply, Lynnwood reiterates its arguments pertaining to inter-jurisdictional coordination and the County’s failure to comply with stated policies which demonstrate a strong commitment to such cooperation. Lynnwood Reply at 18-20, 22-23. In addition, Lynnwood asserts that the designation of the 7-acre parcel as an Urban Center must stand on its own and that the County is not excused from ensuring that the proposal is consistent with the County’s Comprehensive Plan. *Id.* at 21. Lynnwood reiterates its arguments on why the proposal does not satisfy Land Use and Transportation policies contained in the GPPs. *Id.* at 23-28.

### Board Discussion

Lynnwood has asserted that the County’s action is inconsistent with GPP’s LU.2.A, LU.2.B, and LU.2.B.1, all of which were not raised within Lynnwood’s Legal Issue 2(a) and will not be considered by the Board.

In addition, Lynnwood bases its inconsistency argument for the GPPs pertaining to the natural environment on its allegation that the County’s environmental review was inadequate. As noted *infra*, Lynnwood’s SEPA claims are barred, therefore the City may not rely on an assertion that the County’s environmental review was inadequate to support its argument.

As to the County’s decision to add an additional 7 acres to an existing, designated Urban Center located adjacent to 44<sup>th</sup> Avenue West (a principal arterial road) and in close proximity to Interstate 5, the Board is not persuaded by Lynnwood’s arguments that the adoption of the SW-23 amendment was clearly erroneous and contrary to the GPPs. In

fact, Land Use Policy LU.2.B.1 provides that the County *shall encourage expansion ... of existing areas before new sites are designated and zoned*. This is exactly what the County has done – expanded an existing Urban Center.

The development of urban centers within Snohomish County began as early as 1995. The County's Comprehensive Plan notes that several reports, including Snohomish County's Opinion Survey and Visual Preference Assessment, Transit Oriented Development Guidelines (SCT 1999), the Residential Development Handbook for Snohomish County, the Snohomish County Tomorrow Urban Centers paper, and the Snohomish County Centers Studies, provided direction for the County's goals, policies, and objectives. County Comprehensive Plan, Land Use Element, at LU-15. These reports and studies demonstrate that the County did not make its locational decision in isolation.

The Comprehensive Plan states that the location for centers had been identified by the *County and its cities* with these centers intended to be *compact and centralized living, work, shopping and/or activity areas linked by high capacity or regular bus service*. *Id.* at LU-18. Six Urban Centers areas, including 44<sup>th</sup> Avenue West and Interstate 5 (where the property is located), were designated in 2005 and delineated on the FLUM. Land Use Policy 3.A.5. Adding 7 acres to an existing, although undeveloped, Urban Center is not contrary to the basic purpose of an Urban Center in that it is compact development within the UGA and with access to regular bus service, is in close proximity to a major interchange for Interstate 5, and urban services necessary to support development. Specific design details – i.e. density, residential to commercial ratio, public services and amenities – will all be addressed during site-specific permit review.

### **Conclusion**

The Board finds and concludes that the City of Lynnwood has **failed to carry the burden of proof** in demonstrating that the County's action in adopting Ordinance 06-102 and 06-104, in particular the SW-23 (Crane) amendments, was non-compliant with the cited goals, policies, and objectives of the County's Comprehensive Plan. The Board is not persuaded that the addition of 7 acres of land to an existing Urban Center is clearly erroneous. Lynnwood Legal Issue 2a is **dismissed**.

### **Legal Issue 2(b) – compliance with GMA goals**

#### **Applicable Law**

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development

opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

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

(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.

## **Discussion and Analysis**

### *Position of the Parties*

Lynnwood argues that the GMA requires coordinated and planned growth that is based on common goals. Lynnwood PHB, at 44. Lynnwood asserts that the County's action in adopting the SW-23 amendment violated Goal 5, Economic Development, because it would impede Lynnwood's own plans for economic development of its City Center; violated Goals 9 and 10, Open Space/Environment, because of inadequate SEPA review; violated Goal 11, Public Participation, because the County failed to coordinate the action with Lynnwood; and violated Goal 12, Public Facilities and Services, because the County's review was based on inaccurate density assumptions. *Id.* at 44-45.

In response, the County contends that Lynnwood has abandoned Goal 7 and is attempting to raise a new issue with its citation to Goal 11. County Response, at 103-104. The County further asserts that Lynnwood's argument in regard to Goals 9 and 10 is contained in a single sentence and that its argument in regard to Goal 12 relates to the County's SEPA review which was properly conducted at a programmatic level. *Id.* at 104-105. Lastly, the County notes that Goal 5 does not discourage economic competition as Lynnwood appears to assert. *Id.* at 105.

Intervenor Scriber Creek provides limited response on the GMA goals, essentially arguing points similar to those of the County. Scriber Response, at 40-41.

Lynnwood's Reply Brief does not contain countering arguments in regard to GMA Goals.

### Board Discussion

The Board first notes that Lynnwood's Legal Issue 2(b), as set forth in the Board's Prehearing Order and amended by the Order on Motions, alleges a violation of Goals 5, 7, 9, 10, and 12. Within its PHB, Lynnwood fails to brief Goal 7 and raises argument pertaining to Goal 11 (Public Participation). **Goal 7 is deemed abandoned** due to Lynnwood's failure to brief this Goal. **Goal 11 was not raised in the Legal Issue** and therefore, Lynnwood may not raise this Goal now and the Board will disregard any argument presented in regard to this Goal.

Goal 5 encourages economic development. Lynnwood argues that the County's designation of the Crane Property as an Urban Center is inconsistent with Goal 5 because the County's Urban Center will compete with and impede the economic development of Lynnwood's City Center. As noted in Section V.B *supra* (Lynnwood Legal Issue 1), the Board determined that the GMA does not prohibit two jurisdictions from seeking to develop adjacent areas so as to provide viable, economically-sound mixed-use development for their residents. This same rationale is applicable here. Goal 5 does not favor economic development in one jurisdiction over another. Lynnwood's argument in regard to Goal 5 is without merit.

Goal 9 seeks to retain open space, recreational areas, and fish and wildlife habitat. Goal 10 addresses environmental protection. Lynnwood argues that since the County's SEPA review was inadequate then the County's approval of the SW-23 amendment fails to comply with these two goals. As noted in Section V.D, *infra*, Lynnwood's SEPA claims are barred; therefore the City may not rely on an assertion that the County's environmental review was inadequate to support its argument that the County has violated Goals 9 and 10.

Goal 12 requires that public facilities and services necessary to support development will be adequate without a decrease in current service levels. Lynnwood simply states that the County's review was based on inaccurate assumptions regarding density and therefore it was not guided by Goal 12. The Board notes that Lynnwood argued that the County, during SEPA review, inaccurately assumed lower density development which impacts public facilities and services (i.e. transportation, sanitary sewer, etc). *See* Lynnwood PHB at 36-37. As noted above, Lynnwood may not challenge the adequacy of the County's SEPA review. The subsequent provision of public services will undergo heightened scrutiny when a project-specific environmental review is conducted for any proposal.

### **Conclusion**

The Board finds and concludes that the City of Lynnwood has **failed to carry the burden of proof** in demonstrating that the County's actions in adopting Ordinance 06-

102 and 06-104 were non-compliant with Goals 5, 9, 10, and 12 of the GMA Lynnwood Legal Issue 2b is **dismissed**. In regard to Goal 7, Lynnwood failed to brief this goal and it is deemed **abandoned**.

### **Legal Issue 2(c) – compliance with SCC 30.74**

#### **Applicable Law**

SCC 30.74 is the County's regulation establishing procedures for the proposal of amendments to the Comprehensive Plan and implementing development regulations. Lynnwood relies on one section of this chapter, SCC 30.74.060(2) which provides:

(2) The department will process the final docket in accordance with chapter 30.73 SCC [Type 3 Decisions – Legislative]. *The department shall prepare a report including a recommendation on each proposed amendment and forward the report to the planning commission. The department will recommend approval if all the following criteria are met:*

- (a) The proposed amendment and any related proposals on the current final docket maintain consistency with the other plan elements or development regulations;
- (b) All applicable elements of the comprehensive plan, including but not limited to the capital plan and the transportation element, support the proposed amendment;
- (c) The proposed amendment more closely meets the goals, objectives and policies of the comprehensive plan than the relevant existing plan or code provisions;
- (d) The proposed amendment is consistent with the countywide planning policies;
- (e) The proposed amendment complies with the GMA; and
- (f) New information is available that was not considered at the time the relevant comprehensive plan or development regulation was adopted that changes underlying assumptions and supports the proposed amendment.

#### **Discussion and Analysis**

##### **Position of the Parties**

Lynnwood asserts that the County failed to comply with SCC 30.74, its procedural rules for amending the Comprehensive Plan and implementing rezones during the annual docket. Lynnwood PHB, at 41. Lynnwood argues that the SW-23 amendment is inconsistent with criteria set forth in SCC 30.74.060(2) because (1) it is not consistent or support by the Comprehensive Plan; (2) it is not consistent with CPPs or Vision 2020 policies; and (3) it does not comply with the GMA. *Id.* at 42.

In response, the County contends that compliance with SCC 30.74.060 is not mandated for a proposal to be approved and the Record demonstrates that the Crane Property proposal meets the applicable criteria. County Response, at 105. The County states that the County's Planning and Development Services Department (PDS) reviewed the criteria and found that the proposal, in light of environmental review, satisfied the criteria. *Id.* at 106. In addition, the County argues that Lynnwood provides only conclusory allegations with no supporting facts. *Id.*

Intervenor Scriber Creek provides arguments similar to the County's. Scriber Response, at 39-40.

Lynnwood's Reply Brief does not contain countering arguments in regard to SCC 30.74.

### Board Discussion

The Board reads Lynnwood's argument as a consistency argument – that the SW-23 amendment is not consistent with the criteria set forth in SCC 30.74.060(2). However, what the cited SCC provision requires is that PDS *prepare and provide a report* to the Planning Commission which *analyzes the listed criteria and if all of the criteria area satisfied, PDS must recommend approval*.

Lynnwood does not assert that the County failed to prepare the required report, rather it cites to Ordinance 06-102 which not only states that PDS conducted the required SCC 30.74 but that the proposal satisfies the criteria. *See* Ex. C4, at 1-2. What Lynnwood asserts is that it does not agree with PDS's analysis of the proposal, specifically that it complies with the stated criteria. This is the argument Lynnwood has presented, and the Board has addressed, with Legal Issue 1 and 2(a).

### **Conclusion**

The Board concludes that SCC 30.74.060(2) is a procedural requirement that mandates the preparation of a report for submittal to the County Planning Commission. The County has complied with this requirement. The merits of that report are not properly raised by a challenge to SCC 30.74 but through allegations of inconsistency such as those raised by Lynnwood within Legal Issues 1, 2(a), and 2(b). Therefore, the Board finds that the County **complied** with the requirements of SCC 30.74.060(2) and the City of Lynnwood's Legal Issue 2(c) is **dismissed**.

### **D. LEGAL ISSUE 3 - SEPA**

The PHO states Lynnwood Legal Issue No. 3 as follows:

- 3. Did the County's adoption of Ordinance Nos. 102 and 06-104, specifically as they relate to map amendment SW-23 (Crane) fail to comply with the environmental review requirements of RCW 43.21C.030, and .031 the State Environmental Policy Act (SEPA), because the environmental review was inadequate? [Intended to reflect PFR Legal Issue 3.]*

## Applicable Law

WAC 197-11-545 provides:

### Effect of no comment

- (1) **Consulted agencies.** If a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise. Any consulted agency that fails to submit substantive information to the lead agency in response to a draft EIS is thereafter barred from alleging any defects in the lead agency's compliance with Part Four of these rules.
- (2) **Other agencies and the public.** Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis, if the requirements of WAC 197-11-510 are met.

## Discussion and Analysis

In the June 1, 2007 Order on Motions, the Board found that the City had demonstrated injury-in-fact, per the *Trepanier* SEPA test and therefore, had standing to assert a claim under SEPA. Order on Motions, at 13. Prior to addressing the City's assertion that the County's Supplemental Environmental Impact Statement (SEIS) was not adequate (Lynnwood PHB, at 36), the Board must evaluate the County's argument that the City failed to submit comments on the Draft SEIS (DSEIS) by the comment period deadline and that this failure must be construed as a lack of objection which bars the City from raising a SEPA challenge now. County Response, at 111. The City states that it did comment on the DSEIS and points to correspondence, testimony before the County Planning Commission, and the County's general awareness of Lynnwood's opposition to the proposal. Lynnwood Reply, at 32 (citing Ex. 21, 27, and 47).

The County cites to two separate WAC provisions in support of its argument:

WAC 197-11-545 provides (emphasis added):

### Effect of No Comment

(1) Consulted agencies. If a consulted agency *does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise.* Any consulted agency that fails to submit substantive information to the lead agency in response to a draft EIS is thereafter *barred from alleging any defects* in the lead agency's compliance with Part Four of these rules.

(2) Other agencies and the public. *Lack of comment* by other agencies or members of the public on environmental documents, *within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis*, if the requirements of WAC 197-11-510 are met.

WAC 197-11-550 provides, in relevant part (emphasis added):

#### Specificity of Comments

(1) *Comments* on an EIS, DNS, scoping notice or proposal *shall be as specific as possible* and may address either the *adequacy of the environmental document* or the *merits of the alternatives* discussed or both.

It is clear from these WAC provisions that those agencies which, during the specific comment period, fail to comment on environmental documents may not subsequently challenge those documents as being defective. The time for challenging the adequacy of the documents is during the comment period so as to provide the lead agency with the opportunity to incorporate those comments into the final analysis. After all, review and comment on a DEIS are a focal point of SEPA process because comments help ensure thorough and accurate environmental analysis.

In addition, not only do the SEPA rules require an agency to submit *written comments* on a proposal, but comments *must be specific*. Comments should explain to the lead agency the commenter's environmentally-based concerns in sufficient detail so as to give the lead agency the opportunity to consider and address these concerns during preparation of the Final EIS.

Here, the County issued the DSEIS on September 8, 2006 with an invitation for comments to be submitted to the County's Long-Range Planning Manager no later than October 9, 2006. Ex. 8, Cover Letter to DEIS. The City does not allege that it never received this invitation. The City points to a single-page letter dated September 25, 2006 (Ex. 21) and to testimony provided at a September 26, 2006 public hearing (Ex. 27) in support of its assertion that it commented on the DSEIS within the required 30-day period.

The Board notes several aspects of the September 25 letter which lead to a conclusion that it did not adequately serve as "written, specific comments" pursuant to WAC 197-11-545 and -550. First, the letter was addressed to the County's Planning Commission and not the Long-Range Planning Manager as was requested by the invitation to comment. Second, there is no reference whatsoever in the letter – directly or indirectly - that its purpose is to comment on the DSEIS. Third, statements made in the letter are general and point primarily to the City's concern about expansion of the previously established Urban Center in regards to its potential impacts on the Lynnwood City Center

and the need for joint planning. From the form and content of this letter, no reader would conclude that the City was commenting on the DSEIS.

The City further asserts that testimony provided by one of its staff at a September 26, 2006 Planning Commission public hearing<sup>43</sup> (Ex. 27, at 3 (SW23 Crane) satisfies WAC 197-11-545's comment requirements. The Board notes that although there was discussion in regard to the locational and functional aspects of the proposal, including impacts to Scriber Creek, and that the exhibit references "written and oral testimony," the City does not provide, nor cite to, any of the written documentation as required by WAC 197-44-545. Therefore, testimony alone does not satisfy SEPA commenting requirements.

Lastly, the City points to Exhibit 122, a letter dated November 15, 2006 and addressed to the Snohomish County Council. This letter sets forth the City's concerns in regards to the 2005 Comprehensive Plan FEIS and the 2006 Docket SEIS. SEPA provides for a commenting period on a DSEIS of no less than 30 days (*see* WAC 197-11-502(5)(b)), a time period which was adhered to by the County. Although this letter conforms to SEPA's commenting requirements, the City's letter was received over a month after the close of the commenting period and therefore cannot be deemed a "comment" on the DSEIS.

The Board notes that WAC 197-11-545 states that failure to comment bars a challenge to a lead agency's compliance with Part IV of the SEPA rules – WAC 197-11-400 through -460 – which sets forth the requirements (purpose, content, timing, etc) of an EIS. Lynnwood's Legal Issue 3 alleges non-compliance with RCW 43.21C.030 and .031 (these two sections provide the Legislature's directive to prepare an EIS for major actions having a probable significant, adverse environmental impact). However, review of Lynnwood's PHB reveals that the City is not alleging that the County failed to prepare an EIS; rather, it is alleging that the DSEIS is inadequate – a challenge the Board concludes is linked to WAC 197-11, Part IV.

The Board concludes that the City of Lynnwood failed to comment on the DSEIS for which it now seeks to challenge the adequacy of the County's environmental review. Pursuant to WAC 197-11-545, the City is barred from challenging the adequacy of the SEPA review for SW 23 (Crane). **Legal Issue 3 is DISMISSED.**

### **Conclusion**

The Board finds and concludes, pursuant to WAC 197-11-545, the City of Lynnwood is barred from challenging the adequacy of the County's environmental review in this matter. Lynnwood Legal Issue 3 is **dismissed**.

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<sup>43</sup> This public hearing was specifically mentioned in the Invitation to Comment for the DSEIS (*see* Cover Letter, Ex. 8).

## **E. LEGAL ISSUE 4 - INVALIDITY**

The PHO sets forth Lynnwood Legal Issue 4 as follows:

4. *If the Board finds noncompliance with any of the GMA provisions cited in Legal Issues 1, 2 or 3, supra, does such noncompliance substantially interfere with the fulfillment of Goals 5, 7, 9, 10 and 12, thereby meriting a determination of invalidity related to SW-23? [Intended to reflect PFR Legal Issue 4.]*

The Board addresses invalidity in Section VI, below.

## **VI. INVALIDITY**

The Board has previously held that a request for an order of invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. Petitioners here have requested the Board to find the challenged Ordinances invalid. Lynnwood Legal Issue 4; Bothell PHB, at 66; Mill Creek PHB, at 2, 22.

### **Applicable Law**

The GMA's Invalidation Provision, RCW 36.70A.302, provides:

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

### (3) Discussion and Analysis

#### McNaughton Rezones.

The Board has found that the County's adoption of Ordinance 06-102 and 06-104, in particular the McNaughton rezones, was **clearly erroneous** and **does not comply** with RCW 36.70A.070 requirements for consistency between the land use and transportation elements of the County's plan. The Board has further found that these enactments **were not guided by** GMA Planning Goals 1, 3, and 12. The Board **remands** the Ordinances to the County to take legislative action to bring its plan and development regulations into compliance with the GMA as set forth in this Order.

The Board is empowered to make a determination of invalidity with respect to non-compliant city or county ordinances when it finds that their further implementation would substantially interfere with the goals and requirements of the Act. The Board **declines to enter an order of invalidity** at this time with respect to the McNaughton rezones. The Board is persuaded by the County and McNaughton's argument that the County's concurrency regulations will prevent development in the 35<sup>th</sup>/York Road corridor until appropriate transportation improvements are identified and funded as required by this Order. Thus, an order of invalidity is not required to prevent the goals and requirements of the GMA from being thwarted.

#### Level II HSSF UGA Expansions

The Board has found that the County's adoption of Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114, allowing the expansion of the UGA for Level II HSSFs as Public/Institutional Uses, in particular, the Fairview Ministries continuous care retirement community, was **clearly erroneous, does not comply** with the requirements of RCW 36.70A.110 and **was not guided by** GMA Planning Goals 1 and 12. The Board **remands** the Ordinances to the County to take legislative action to bring its plan and development regulations into compliance with the GMA as set forth in this Order.

A Board may enter an order of invalidity upon a determination that the continued validity of a non-compliant city or county enactment substantially interferes with fulfillment of the goals of the GMA. RCW 36.70A.302(1)(b). The Board finds and concludes that the continued validity of these Ordinances substantially interferes with the goals and requirements of the Act. The Board finds that the Ordinances are likely to thwart the GMA goals of locating compact urban development where urban services are available, in that the Ordinances authorize expansion of the UGA for residential development independent of the land use analysis and regional coordination otherwise required under the statute.<sup>44</sup> The Board therefore enters **a determination of invalidity** for Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114.

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<sup>44</sup> The Petitioners did not challenge the 7-acre UGA expansion for Fernwood Elementary School, and the Board finds the County's action incorporating the school property into the UGA to be presumed valid and in compliance with the GMA.

## **Conclusion**

With respect to Ordinance Nos. 06-102 and 06-104, in particular, the McNaughton rezones, the Board makes a finding of **noncompliance** and issues an order of **remand** but declines to enter an order of invalidity.

With respect to Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114, the Board makes a finding of **noncompliance** and issues an order of **remand**. The Board further **enters an order of invalidity** for Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114.

## **VII. ORDER**

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

1. Petitioners City of Bothell and City of Mill Creek **failed to meet their burden** of proving that Snohomish County's enactment of Ordinance Nos. 06-102 and 06-104, in particular the provisions related to the McNaughton rezones, did not comply with RCW 36.70A.100 and were not guided by GMA Goals 9 and 11. Bothell/Mill Creek Legal Issues No. 1, 3, and 6 are **dismissed with prejudice**.
2. Petitioner City of Lynnwood failed to meet its burden of proving that Snohomish County's enactment of Ordinance Nos. 06-102 and 06-104, in particular the provisions related to the Scriber Creek property, did not comply with the cited provisions of the GMA and SEPA. Lynnwood Legal Issue Nos. 1, 2, 3, and 4 are **dismissed with prejudice**.
3. Snohomish County's adoption of Ordinance Nos. 06-102 and 06-104, in particular, the provisions relating to the McNaughton rezones, was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.070 (preamble), .070(6), .210(3)(d), and **is not guided** by GMA goals RCW 36.70A.020(1), (3), and (12).
4. The Board **remands** Ordinance Nos. 06-102 and 06-104 to Snohomish County with direction to the County to take legislative action to comply with the requirements of the GMA as set forth in this Order.
5. Snohomish County's enactment of Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114 was **clearly erroneous** and **does not comply** with the urban growth area goals and requirements of RCW 36.70A.110, .210, .020(1), and .020(12).
6. The Board **remands** Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114 to Snohomish County to take legislative action to comply with the requirements of the GMA as set forth in this Order.
7. The Board further finds and concludes that the enactment of Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114 substantially interferes with the goals and requirements of the GMA. The Board therefore enters an **order of invalidity** for Ordinance Nos. 06-097, 06-111, 06-112, 06-113 and 06-114.
8. The Board sets the following schedule for the County's compliance:

- The Board establishes **February 1, 2008**, as the deadline for Snohomish County to take appropriate legislative action.
- By no later than **February 15, 2008**, Snohomish County shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). By this same date, the County shall also file a “**Compliance Index**,” listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
- By no later than **February 29, 2008**,<sup>45</sup> the Petitioners may file with the Board an original and four copies of Response to the County’s SATC.
- By no later than **March 7, 2008**, the County may file with the Board a Reply to Petitioner’s Response.
- Each of the pleadings listed above shall be simultaneously served on the other parties to this proceeding.
- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **March 13, 2008, at 10:00 a.m.** The hearing will be held at the Board’s offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the County takes the required legislative action prior to the February 1, 2008, deadline set forth in this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 17th day of September, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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David O. Earling  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member

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<sup>45</sup> February 29, 2008, is also the deadline for a person to file a request to participate as a “participant” in the compliance proceeding. See RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the County’s remand actions comply with the Legal Issues addressed and remanded in this FDO.

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.<sup>46</sup>

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<sup>46</sup> Pursuant to RCW 36.70A.300 this is a final order of the Board.

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

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

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

## APPENDIX – A

### CHRONOLOGY OF PROCEEDINGS CPSGMHB CASE NO. 07-3-0026c

#### *Petitions and Consolidation*

On March 16, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the City of Bothell (**Bothell**). The matter was assigned CPSGMHB Case No. 07-3-0023. Board Member Margaret A. Pageler is the Presiding Officer (**PO**) in this matter. Petitioner challenges Snohomish County's (**Respondent** or the **County**) adoption of Amended Ordinances 06-097, 06-098, 06-102, 06-104, 06-111, 06-112, 06-113, and 06-114,<sup>47</sup> which amend Snohomish County's County-Wide Planning Policies, Comprehensive Plan, and Zoning Code. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On March 16, 2007, the Board received a PFR from Lorraine Luschen, Larry Hatch, Steven Meissner, Bjorn Tonnessen, David Carlson, Andrew Callaci, Douglas Greenway, Ruth Coleman, and the Estate of Douglas Erlandsen (**Luschen**). The matter was assigned Case No. 07-3-0024. Board Member Margaret A. Pageler is the PO in this matter. The challenge of these Petitioners is *limited* to Snohomish County's adoption of Amended Ordinance 06-111, which revises the Southwest Urban Growth Area, for noncompliance with various provisions of the GMA.

On March 16, 2007, the Board received a PFR from the City of Mill Creek (**Mill Creek**). The matter was assigned Case No. 07-3-0025. Board Member Margaret A. Pageler is the PO in this matter. Mill Creek also challenges Snohomish County's adoption of Amended Ordinances 06-097, 06-098, 06-102, 06-104, 06-111, 06-112, 06-113, and 06-114, for noncompliance with various provisions of the GMA.

On March 19, 2007, the Board issued its "Notice of Hearing and Intent to Consolidate" (**NOH I**). The NOH I set April 19, 2007 at 2:00 p.m. as the date for the prehearing conference (**PHC**) and indicated that the Board intended to consolidate the three PFRs. Any objections to consolidation were to be filed by April 12, 2007. NOH I, at 2-3.

On March 20, 2007, the Board received a PFR from the City of Lynnwood (**Lynnwood**). The matter was assigned Case No. 07-3-0026. Board Member Margaret A. Pageler is also the PO in this matter. Lynnwood challenges Snohomish County's adoption of Amended Ordinances 06-102 and 06-104, for noncompliance with various provisions of the GMA.

On April 5, 2007, the Board issued its "Notice of Hearing and Intent to Consolidate" (**NOH II**). The NOH II again indicated the Board's intent to consolidate the four PFRs, and set the *same date and time* for the PHC, and in fact kept all the dates in the tentative schedule the same, except for the due date of the FDO. NOH II, at 4-5 and 10. Any objections to consolidation were to be filed by April 12, 2007. NOH II, at 3.

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<sup>47</sup> A brief explanation of what each of these Ordinances do is provided in Appendix B.

By April 12, 2007 the Board did not receive any “Objections to Consolidation” from any of the parties.

On April 16, 2007, the Board received: 1) “Motion to Intervene of the McNaughton Group LLC”; 2) “Motion to Intervene of Fairview Ministries”; and 3) “Motion to Intervene of Scriber Creek Investments.” These potential interveners seek to support Snohomish County.

On April 18, 2007 the Board sent a memorandum to the Petitioners and Respondent in this matter outlining possible Restatements of the Legal Issues for each of the Petitioners. The memorandum asked the Petitioners to review the possible Restatements, and provide additional clarification of the Legal Issues, for discussion at the April 19, 2007 PHC.<sup>48</sup>

On April 19, 2007, the Board received “Motion to Intervene of the Friends and Neighbors of the York and Jewel Roads Community – FNYJC.” FNYJC seeks to intervene on behalf of Petitioners Bothell and Mill Creek.

On April 19, 2007, the Board conducted the PHC at the Board’s offices in Seattle. Board member Edward G. McGuire conducted the PHC and prepared this Prehearing Order. Board Members David O. Earling and Margaret A. Pageler, and Board Law Clerk, Julie Taylor, also attended. Peter J. Eglick, Jane S. Kiker and Michael E. Weight represented the City of Bothell. David S. Mann represented the Luschen Petitioners. Scott M. Missall and Beth Prieve Gordie represented the City of Mill Creek. Mike Ruark represented the City of Lynnwood. John R. Moffat and Jason Cummings represented Respondent Snohomish County. Andrew S. Lane appeared for potential Intervener The McNaughton Group LLC [**McNaughton**]. Courtney E. Flora appeared for potential Interveners Fairview Ministries [**Fairview**] and Scriber Creek Investments [**Scriber**]. Dorothy Nesbit appeared on behalf of potential Interveners Friends and Neighbors of the York and Jewel Roads Community [**FNYJC**]. Also present were: Bill Wiselogle, Brian Holtzclaw, Steve Stewart, Bob Smyth and Yosi Shelton.

At the PHC, the Board received “Snohomish County’s Index to the Administrative Record” (**Index**). The Index is 14 pages, listing 238 items.

The first matter of business was discussion of the consolidation of the four PFRs. Having received no objections from the parties by the April 12, 2007 date, the PO **orally** announced the four matters would be consolidated into one proceeding. See *infra*. The PO also indicated that if any of the Petitioners entered settlement negotiations with the Respondent, and requested a settlement extension from the Board, that their portion of the case would be segregated from the consolidated proceeding and set on a separate time schedule.

Next, the Board addressed the motions to intervene on behalf of Snohomish County filed by McNaughton, Fairview and Scriber. Without objection, the PO **orally granted** the motions to intervene, and explained the conditions of intervention, as reflected *infra*.

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<sup>48</sup> Appendix C lists the Issues presented in each of the PFRs, as restated in the PHO.

The motion to intervene filed by FNYJC on behalf of Petitioners Bothell and Mill Creek was the next matter discussed. The County noted that it had just received the FNYJC Motion and needed time to review it. The PO gave the County until April 26, 2007 to respond to the FNYJC motion and indicated that it would address FNYJC's motion in a separate order.

The Board discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The Board then reviewed its procedures for the Hearing, including the composition of the Index to the Record Below; Supplemental Exhibits; Dispositive Motions; the Legal Issues to be decided; and a Final Schedule of deadlines.

In the discussion of Legal Issues, Petitioner Luschen **agreed** to use the Restatement of the Legal Issues from the PO's April 18, 2007 memo. These are the Legal Issues stated in the PHO for Petitioner Luschen.

Petitioner Lynnwood also **agreed** to use the Restatement of the Legal Issues from the PO's April 18, 2007 memo, **with minor changes and corrections**. These are the Legal Issues stated in the PHO for Petitioner Lynnwood.

Petitioner Bothell submitted an alternative to the Restatement of the Legal Issues from the PO's April 18, 2007 memo and was asked to provide additional clarification of the Legal Issues by April 23, 2007.

Petitioner Mill Creek notified the PO that the City had not received the PO's April 18, 2007 memo. The Board gave Mill Creek until April 23, 2007 to review the proposed Restatement of the Legal Issues. Due to similarity between the Mill Creek's and Bothell's concerns, the PO asked the two Petitioners to coordinate their submittal of Restated Legal Issues to see if they could be combined.

On April 23, 2007, the Board received: 1) "City of Bothell's Issue Statement, Further Revised Pursuant to the Board's Request;" and 2) "Restatement of Mill Creek Appeal Issues Pursuant to Board Request." The Legal Issues for Bothell and Mill Creek are essentially the same and were combined in the PHO.

On April 24, 2007, the Board issued its **Prehearing Order, Order of Consolidation and Order on Intervention**. On May 7, 2007, the Board issued a Corrected Prehearing Order, Order of Consolidation and Order on Intervention.

### ***Motions to Dismiss and for Supplementation***

In April and May, 2007, pleadings were timely filed on dispositive motions.

On April 30, 2007, the Board received Snohomish County's Dispositive Motions [**County Motions – Dismiss**] with 14 attachments and the Declarations of John Moffat, Dianna Harper, and Kris Davis. The Motions included a motion to dismiss Petitioners Luschen, et al., on various grounds and a motion to dismiss City of Lynnwood Issue No. 3 for lack of SEPA standing.

On April 30, 2007, the Board received Scriber Creek Investments' Motion to Dismiss the City of Lynnwood's SEPA Claims for Lack of Standing and its Site-Specific Rezone Claims for Lack of Jurisdiction [**Scriber Motion – Dismiss**], accompanied by the Declaration of Stephen J. Crane.

On May 2, 2007, the Board received "Notice of Voluntary Withdrawal" from Petitioners Luschen, *et al.* These petitioners "respectfully withdraw their petition for review in this matter." On May 7, 2007, the Board issued an Order of Dismissal Re: Petition of Luschen, *et al.*

On May 14, 2007, the Board received City of Lynnwood's Response to Scriber Creek's and Snohomish County's Dispositive Motions [**Lynnwood Response – Dismiss**], with 7 attachments.

On May 25, 2007, the Board received Snohomish County's Reply Re: Dispositive Motions and Motions to Strike Portions of Declaration of Keith Maw and Attachments Thereto [**County Reply – Dismiss**].

On May 25, 2007, the Board received Scriber Creek Investments' Reply to City of Lynnwood's Response to Motion to Dismiss SEPA Issues, and Motion to Strike Maw Declaration [**Scriber Reply – Dismiss**].

Also in April and May, 2007, the Board received Core Documents and the parties filed timely briefing on motions to supplement the record. On May 7, 2007, the Board received Core Documents from Snohomish County as follows:

- Ordinance No. 06-097
- Ordinance No. 06-098
- Ordinance No 06-113,
- Ordinance No. 06-102
- Ordinance No. 06-104
- Ordinance No 06-111
- Ordinance No 06-112
- Ordinance No. 06-114<sup>49</sup>
- Snohomish County Countywide Planning Policies
- Snohomish County Future Land Use Map (FLUM)
- Snohomish County Zoning Map Quadrangle 1
- Snohomish County General Policy Plan

On May 7, 2007, the Board received Petitioner City of Lynnwood's Motion to Supplement the Record, with 9 attached documents proposed for supplementation.

On May 8, 2007, the Board received The NcNaughton Group's Motion to Supplement the Record, with two attachments proposed for supplementation.

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<sup>49</sup> Ordinance No. 06-114 was inadvertently omitted in the May 7, 2007, transmission and was supplied subsequently.

On May 9, 2007, the Board received Petitioner City of Bothell's Motion to Complete and/or Supplement Snohomish County's Amended Index Pursuant to RCW 36,70A.290(4), with three proposed additional documents attached.

On May 14, 2006, the Board received Scriber Creek Investments' Objection to City of Lynnwood's Motion to Supplement the Record, with attached Declaration of Michael Gardner.

On May 14, 2007, the Board received Petitioner City of Bothell's Opposition to the McNaughton Group's Motion to Supplement the Record.

On May 14, 2007, the Board received Snohomish County's Response to Motions to Supplement the Record.

On May 14, 2007, the Board received Snohomish County's Seconded Amended Index to the Administrative Record.

On May 15, 2007, the Board received The FNYJC's Motion in Response to the McNaughton Group's Motion to Supplement the Record, with multiple attachments. Intervenor FNYJC objects to the McNaughton Group's proposed supplementation.

On May 21, 2007, the Board received the City of Lynnwood's Reply to Responses to Lynnwood's Motion to Supplement the Record, with the Declaration of David Kleitsch in Support of City of Lynnwood's Motion to Supplement.

On May 25, 2007, the Board received The McNaughton Groups's Reply Re: Motion to Supplement the Record.

No hearing was held on motions. On June 1, 2007, the Board issued its Order on Motions, substantially denying the motions to dismiss and admitting 11 supplemental exhibits.

On June 5, 2007, the Board received the Third Amended Index and on June 12, 2007, the Board received the Fourth Amended Index to the Administrative Record 2006 Docket with Minutes from Snohomish County Council meetings weeks of: 10.17, 10/31/11/7, 11/14, 12/5. 12/12, 12/14, and 12/19.

### ***Briefing and Hearing on the Merits***

On June 15, 2007, the Board received the opening briefs in this matter as follows:

- City of Lynnwood's Hearing Brief [**Lynnwood PHB**] and City of Lynnwood Second Motion to Supplement the Record.
- Friends and Neighbors of the York and Jewel Roads Community Intervenor's Prehearing Brief [**Intervenor FNYJC PHB**].

- Prehearing Brief of Petitioner City of Bothell with exhibits 1-55 and disc [**Bothell PHB**].
- Petitioner City of Mill Creek’s Opening Brief with exhibits A-G [**Mill Creek PHB**].

On June 27, 2007, the Board received the Fifth Amended Index to the Administrative Record with CD 12, Amended Ordinance 06-114, and CD 13, Transportation Element.

On June 27, 2007, the Board received a Notice of Withdrawal and Substitution of Attorney indicating the withdrawal of Beth Prieve Gordie and substitution of Shane Moloney, both of Short Cressman & Burgess PLLCC, as attorney for Petitioner City of Mill Creek.

On June 29, 2007, the Board received briefs in response to the prehearing briefs as follows:

- Snohomish County’s Responding Brief with exhibits [**County Response**].
- Snohomish County’s Response to City of Lynnwood’s Second Motion to Supplement the Record.
- Snohomish County’s Motion to Supplement the Record
- The McNaughton Group LLC’s Pre-Hearing Brief [**McNaughton Response**].
- Fairview Ministries’ Prehearing Brief [**Fairview Response**].
- Scriber Creek Investments Prehearing Brief [**Scriber Response**].
- Scriber Creek Investments’ Motion to Strike Maw Declaration or, in the Alternative, Motion to Supplement the Record with the Gardner Declaration.

On July 2, 2007, the Board received Snohomish County’s Response to City of Lynnwood’s Second Motion to Supplement the Record.

On July 12, 2007, the Board received rebuttal pleadings as follows:

- City of Bothell’s Prehearing Reply Brief [**Bothell Reply**]
- City of Mill Creek Reply Brief and Response to Motion to Strike Brief of FNYJC [**Mill Creek Reply**]
- City of Lynnwood’s Reply Brief [**Lynnwood Reply**]
- City of Lynnwood’s Response to (1) Scriber Creek’s Motion to Strike and Supplement the Record and (2) Snohomish County’s Response to Lynnwood’s Second Motion to Supplement

On July 16, 2007, the Board received FNYJC’s tardy reply brief, “ The Friends and Neighbors of the York and Jewell Roads Community (FNYJC) Intervenor’s Response Brief,” correcting their opening brief and replying in response to Snohomish County’s Motion to Strike.

On July 16, 2007, the Board received a Stipulation and Joint Request to Bifurcate and Extend Time Regarding Lynnwood Petition and Issues, signed on behalf of Petitioner City of Lynnwood, Respondent Snohomish County, and Intervenor Scriber Creek Investments. On the same day, the Board issued an Order Denying Joint Request to Bifurcate and Extend Time, based on the statutory directive of RCW 36.70A.300(2)(b). On July 18, 2007, Lynnwood, Snohomish County and Scriber informed the Board electronically that they intended to rest on their briefing rather than presenting oral argument at the Hearing on the Merits.

The Hearing on the Merits was convened on July 19, 2007, at 10:45 a.m. in the Chief Sealth Room, Suite 2000, 800 Fifth Avenue, Seattle. Present for the Board were Presiding Officer Margaret Pageler and Board members Dave Earling and Ed McGuire, along with board law clerk July Taylor and legal extern Linda Jenkins. Petitioner City of Bothell was represented by Peter Eglick and Jane Kiker of Eglick Kiker Whited PLLC, accompanied by City Attorney Michael Weight and Planner Bill Wiesogle. Petitioner City of Mill Creek was represented by Scott Missall and Shane Maloney of Short Cressmann and Cable PLLCC, accompanied by Jill Monnin. Petitioner City of Lynnwood was represented by Rosemary Larson of Inslee, Best, Doezie, & Ryder, P.S., accompanied by Planners Keith Maw and Paul Krauss. Dorothy Nesbit appeared on behalf of Friends and Neighbors of York and Jewell Roads Community (FNYJC). John R. Moffat and Jason Cummings represented Snohomish County, accompanied by Laura Kiselius and Kelly Ryan. Andrew Lane and Michael Brunet appeared for Intervenor McNaughton, accompanied by Brian Holtzclaw. Courtney Flora and Rich Hill of McCullough Hill, PS appeared for Intervenor Scriber Creek and Fairview Ministries, accompanied by Steve Stewart of Fairview Ministries.

Court reporting services were provided by Katie Eskew of Byers & Anderson. The HOM was adjourned at approximately 3:00 p.m. The Board ordered a copy of the transcript, which was received on August 1, 2007. **[HOM Transcript]**

Subsequent to the HOM, the Board received a letter from Attorneys for Bothell regarding the County's citing to the unpublished Superior Court decision in *CTED I* (CPSGMHB Case No. 03-3-00a17) and a response from the Snohomish County Prosecutor's office, both dated July 23, 2007. The Board also received from Snohomish County two pages of the County's DSEIS concerning the Crane (SW 23) property that had not been presented at the HOM. Index #8, 3-32 and 3-33.

On August 28, 2007, the Board issued its Order Allowing Supplemental Briefing [Re: *MT Development LLC v. City of Renton*].

On September 5, 2007, the Board received City of Bothell's Supplemental Briefing re *MT Development v. Renton*, City of Mill Creek's Joinder in City of Bothell's Supplemental Briefing on *MT Development LLC v. City of Renton*; City of Lynnwood's Supplemental Brief; and Snohomish County's Supplemental Brief [Re: *MT Development v. Renton*].

## **APPENDIX B**

### **Brief description of the challenged Ordinances**

**Ordinance No. 06-097**, amends the Snohomish County Countywide Planning Policies (CPPs), specifically UG-14(d)(7), to allow a UGA to be expanded to allow development of Level II Health and Social Service Facilities (HSSF), if adjacent to an existing UGA.

**Ordinance No. 06-098**, amends the CPPs, specifically UG-14(d) and (d)(6), to clarify that criteria 6-8 now apply to the Southwest UGA (SWUGA) and allow technical corrections for UGA expansions if they are the lesser of .5% or 20 acres.

**Ordinance No. 06-102**, amends the Snohomish County's General Policy Plan (GPP) [The County's GMA Comprehensive Plan] and the future land use map (FLUM). **Exhibit A** includes 11 map amendments to the FLUM [128<sup>th</sup> Street, the entire FLUM, LS-3, LS-4, SW-14, SW-18 through SW-23]. **Exhibit B** includes 7 text amendments [GPP1, 2a, 2b, 2c, 3b, 3c and 3d].

**Ordinance No. 06-104**, amends the Snohomish County Zoning map to implement the FLUM designations. Specifically, **Exhibit A** changes the Zoning map to reflect LS-3, LS-4, SW-14, and SW-18 through SW-23. Also included are zoning map amendments for properties referenced as LS-1 (Robinett) and GPP3c (Opus).

**Ordinance No. 06-111**, revises the SWUGA, which was not amended as part of the County's Ten-Year Update. **Exhibit A** adds 7.7 acres, identified as SW-12A-Goemaere. **Exhibit B** adds 20 acres, identified as SW-12B – Bentley/Krause.

**Ordinance No. 06-112**, revises the Zoning for the SWUGA for both SW-12A and SW-12B. **Exhibits A and B**, respectively.

**Ordinance No. 06-113**, amends the GPP, specifically LU-91 and LU-92, related to Public and Institutional Use designations (P/I) allowing a UGA expansion for Level II HSSF, requiring them to be designated P/I.

**Ordinance No. 06-114**, amends the Zoning Map Use Matrix, specifically Note 88, to allow for Level II HSSF in the P/I category.

## APPENDIX – C

### Supplemental Documents

The following documents were requested by the indicated parties for supplementation of the record. The Board finds that it can take official notice of these documents unless otherwise indicated in the table below. The documents to which the Board has assigned a Supplemental Exhibit Number (**Supp. Ex.**) are admitted. Decisions on the documents “under consideration” will be finalized in the FDO.

#### **Petitioner City of Lynnwood**

Proposed Supplemental Ex. 12	PSRC Vision 2020, 1995 Update	<b>Supp. Ex. 12</b>
Proposed Supplemental Ex. 13	Declaration of Keith Maw, w/ attachments	<i>Under consideration</i>
Proposed Supplemental Ex. 14	Snohomish County Comprehensive Plan Transportation Element, excerpts	<b>Supp. Ex. 14</b>
Proposed Supplemental Ex. 15	PSRC Vision 2020+ Update – Issue Paper on Subregional Centers	<b>Supp. Ex. 15</b>
Proposed Supplemental Ex. 16	PSRC Designation Criteria for Regional Growth and Manufacturing/Industrial Centers	<b>Supp. Ex. 16</b>
Proposed Supplemental Ex. 17	City of Lynnwood Comprehensive Plan Capital Facilities Plan – Stormwater Projects, excerpts	<b>Supp. Ex. 17</b>
Proposed Supplemental Ex. 18	Snohomish County Code Ch. 30.31A, 30.73, 30.74	<b>Supp. Ex. 18</b>
Proposed Supplemental Ex. 19	City of Lynnwood Wastewater Comprehensive Plan, excerpts	<b>Supp. Ex. 19</b>
<b>Snohomish County</b>		
Proposed Supplemental Ex. 20	SCT Steering Committee Meeting agenda and minutes, March 22, 2006	<b>Supp. Ex. 20</b>
Proposed Supplemental Ex. 21	SCT Planning Advisory Committee Meeting minutes, Oct. 12, 2006	<b>Supp. Ex. 21</b>
Proposed Supplemental Ex. 22	Community Transit System map of bus routes and bus schedule for routes 212 and 477	<b>Supp. Ex. 22</b>
Proposed Supplemental Ex. 23	Inter-local Agreement between the County and City of Mill Creek, 2006	<b>Supp. Ex. 23</b>
Proposed Supplemental Ex. 24	Inter-local Agreement between the County and City of Bothell	<b>Supp. Ex. 24</b>
Proposed Supplemental Ex. 25	SCT Planning Advisory Committee Meeting minutes for Sept. 14, 2006	<b>Supp. Ex. 25</b>
Response Attachment A	Amended Ordinance No. 07-022	<i>Under consideration</i>
Response Attachment B	SC Charter Section 6.50	<b>Supp. Ex. 26</b>
Response Attachment C	Motion 06-446, adopting 2007-2012 TIP	<b>Supp. Ex. 27</b>

Response Attachment D(1)	Map: City of Mill Creek Transportation	<b>Supp. Ex. 28</b>
Response Attachment D(2)	Map: UGA Neighborhood Planning Areas	<b>Supp. Ex. 29</b>
Response Attachment E	Mill Creek Resolution 2004-39	<b>Supp. Ex. 30</b>
Response Attachment F	SCC 30.91H/095(2)	<b>Supp. Ex. 31</b>
Response Attachment G	Ordinance No. 94-125 with 1995 GPP, excerpts	<b>Supp. Ex. 32</b>
Response Attachment H	Motion No. 96-116; Inter-local Agreement between County and City of Lynnwood	<b>Supp. Ex. 33</b>
Response Attachment I	SCC 30.74.060(2)	<b>Supp. Ex. 34</b>
Response Attachment J	Amended Ordinance 05-069	<b>Supp. Ex. 35</b>
<b>City of Mill Creek</b>		
Proposed Supplemental Ex. B	Mill Creek Municipal Code, excerpts	<b>Supp. Ex. 36</b>
Proposed Supplemental Ex. C	Mill Creek Comprehensive Plan Land Use Element	<b>Supp. Ex. 37</b>
<b>City of Bothell</b>		
Proposed Supplemental Ex.1.a	Bothell's FLUM	<b>Supp. Ex. 38</b>
Proposed Supplemental Ex.1.b	<i>Imagine Bothell ...</i> Comprehensive Plan Land Use Element, excerpts	<b>Supp. Ex. 39</b>
<b>Intervenor FNYJC</b>		
Response Attachment 9	Chapter 30 SCC, excerpts	<b>Supp. Ex. 40</b>
<b>Intervenor McNaughton</b>		
Attachment 5	SCC Chapter 30.66B – Concurrency and Road Impact Mitigation	<b>Supp. Ex. 41</b>
<b>Intervenor Scriber Creek</b>		
Proposed Supplemental Ex. 1	Snohomish County website page “History of Urban Centers” [see Scriber PHB, fn. 2]	<i>Under consideration</i>
Proposed Supplemental Ex. 2	Snohomish County Code 30.21; 30.23;30.34A; 30.74, excerpts	<b>Supp. Ex. 42</b>
Proposed Supplemental Ex. 3	Dictionary definitions of “adjacent”	<b>Supp. Ex. 43</b>