CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

SUQUAMISH TRIBE, KITSAP CITIZENS FOR RESPONSIBLE PLANNING, and JERRY HARLESS, Petitioners, v. KITSAP COUNTY, Respondent, PORT GAMBLE S'KLALLAM TRIBE Intervenor.	)	**Case No. 07-3-0019c** ***(Suquamish II)*** **ORDER FINDING PARTIAL COMPLIANCE [TDRs] and FINDING CONTINUING NONCOMPLIANCE [RWIP] and FINDING CONTINUING NONCOMPLIANCE AND INVALIDITY [Capital Facilities and UGAs]**

I. PROCEDURAL HISTORY

On August 15, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its "Final Decision and Order" (**FDO**) in the above captioned case. In the FDO the Board found the County's Capital Facility Plan (**CFP**), Rural Wooded Incentive Program (**RWIP**), and Transfer of Development Rights Program (**TDR**) noncompliant with the GMA. The Board entered a determination of invalidity for all three noncompliant provisions. A compliance schedule was established in the FDO. *See* FDO, at 64-67.

On September 13, 2007, the Board issued its "Order on Motion for Reconsideration" (**9/13/07 Order**). The Board granted Petitioner's motion for reconsideration and invalidated five UGA expansion areas[1] that were unsupported by urban services – sewer service – in the Capital Facility Plan. The compliance period was not altered in the 9/13/07 Order. *See* 9/13/07 Order, at 4.

On October 25, 2007, the Board issued its "Order on Motion to Clarify, Modify or Rescind" (**10/25/07 Order**). The Board denied the County's request to modify the

[1] The invalidated UGA expansion areas are: Silverdale, Central Kitsap, West Bremerton, Gorst, and Port Orchard.

Board's decision pertaining to the five UGA expansion areas. The compliance period was not altered in the 10/25/07 Order. *See* 10/25/07 Order, at 4.

On January 29, 2008, the Board issued its "Order Denying Motion for Extension of Compliance Period" (1/29/08 Order). The County stated that it needed more time to comply regarding the CFP and UGAs and asked that the 180-day deadline set forth in the FDO be extended. Citing statutory limitations, the Board denied the County's request. The compliance schedule was not altered in the 1/29/08 Order.

On February 21, 2008,[2] the Board received: 1) "Kitsap County's Statement of Actions Taken to Comply" (**Kitsap SATC**), with 11 attached exhibits; and 2) "Respondent's Index to the Record" (**Remand Index**), listing 103 items. Kitsap's SATC was timely filed.

On February 25, 2008, the Board received "Petitioner Harless' Response to Kitsap County's February 21, 2008 Statement of Actions Taken to Comply" (**Harless Response**); no exhibits were attached.

On March 6, 2008, the Board received "Petitioner Suquamish Tribe and Citizens for Responsible Planning and Intervenor Port Gamble Tribe Response to Kitsap County's Statement of Actions Taken to Comply" (**Suquamish Response**), with two attached exhibits.

On March 12, 2008, the Board received "Kitsap County's Reply to Statement of Actions Taken to Comply" (**Kitsap Reply**); no exhibits were attached.

The Board conducted the Compliance Hearing on March 24, 2008, at 10:00 a.m. at the Sealth Training Center, 20th Floor, 800 Fifth Avenue, Seattle, Washington. Board Member Edward G. McGuire presided. Board members David O. Earling and Margaret A. Pageler, and Board Attorney Julie Ainsworth-Taylor also attended. *Pro se* Petitioner Jerry Harless participated as did Melody Allen, representing the Suquamish Tribe, and Tom Donnelly, representing Kitsap Citizens for Responsible Planning. Lauren Rasmussen participated for Intervenor Port Gamble S'Klallam Tribe. Shelly E. Kneip represented the Respondent Kitsap County. Also attending the hearing were Commissioner Josh Brown, Eric Baker, Tom Nevins and Alison O'Sullivan. Court reporting services were provided by Rebecca L. Meyers of Byers and Anderson, LLC. The Compliance Hearing was adjourned at 11:40 a.m.

On March 24, 2008, at the compliance hearing, the County submitted: 1) "Kitsap County's Supplemental Statement of Actions Taken to Comply" (**Kitsap SATC2**), with six attached exhibits; and 2) "Respondent's Supplemental Compliance Index to the

[2] The Board received hard copy of this filing on February 25, 2008.

Record" (**Remand Index 2**), listing 49 items. This late filing addressed the County's actions pertaining to the CFP and UGAs.

II. BOARD DISCUSSION

Context – FDO and Order for Reconsideration:

In its August 15, 2007 FDO the Board stated:

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

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

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

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

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

FDO, at 64-65.

Additionally, in its September 13, 2007 Order on Motion for Reconsideration, the Board stated:

> Having reviewed the August 15, 2007 FDO, the Suquamish Motion for Reconsideration, the County's Answer, and the relevant provisions of the GMA and the Board's Rules of Practice and Procedure, prior decisions of the Boards, and having deliberated on the matter, the Board ORDERS:
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> . . .
>
> 2. The Suquamish Motion for Reconsideration pertaining to Legal Issue 3 [Capital Facilities Element] is **GRANTED**.
>
> 3. The Board hereby enters a **determination of invalidity** for the *Silverdale* UGA expansion, *Central Kitsap* UGA expansion, *West Bremerton* UGA expansion, *Gorst* UGA expansion and the *Port Orchard* UGA expansion, for substantially interfering with the fulfillment of Goal 12 – RCW 36.70A.020(12). Further, the Board refines its determination of invalidity for the County's Capital Facilities Element, Appendix A, pertaining to sanitary sewers, to be limited to those provisions dealing with those entities (*i.e.* Kitsap County, Port Orchard and Bremerton) that allegedly provide sanitary sewer service to these five UGA expansion areas.

Order on Reconsideration, at 4.

In short, provisions of the County's Transferable Development Rights program and Rural Wooded Incentive programs were found noncompliant and declared invalid. Also the Board found the County's Capital Facilities Plan, as it related to sanitary sewers, noncompliant and invalid as were five UGA expansion areas.

On February 13, 2008,[3] the County adopted Ordinance No. 407-2008 (Ex. 69), with attachments and Ordinance No. 408-2008 (Ex. 78). Ordinance No. 407-2008 amends the

[3] February 11, 2008 was the deadline established in the August 15, 2008 FDO for the County to take legislative action.

County's Comprehensive Plan and development regulations to address the TDR and RWIP remand issues. Kitsap SATC, at 4-21. As of the date the County filed the SATC [2/21/08], the County had not completed its remand work on the Capital Facilities Plan and the UGA expansion areas. *Id*. at 21-22.

The Board will address the remand issues in the following order: Transferable Development Rights; Rural Wooded Incentives; and finally, the Capital Facilities Element and UGA expansion areas.

Discussion and Analysis:

A. Transferable Development Rights

The Board's discussion of the County's TDR program is contained in the FDO at 44-50. Significantly, the only error the Board found with the County's program was with a provision in the County Code (17.430.090(F)(4)) that provided for a 40-year limitation on the transferred right. *See* FDO, at 49-50.

To comply with the Act, the County amended: 1) the Kitsap County Comprehensive Plan to change Land Use Goal 15, and Rural Lands Policies RL-66, RL-68, and RL-70; Kitsap SATC, at 5; Ex., 69, Sec. 2, at 3; and 2) Kitsap County Code (**KCC**) sections 17.430.010 and 17.430.090. *Id*. at Sec 3 and 4. At 4-6. Specifically, the County amended KCC 17.430.090(F)(4) as follows [deletions shown in ~~strikethrough~~ and new language in underlining]:

> 4. For all sending parcels, the deed restriction is sufficient to retire all transferred development rights on the sending parcel ~~for a period of~~ in perpetuity ~~40 years~~.

Petitioners agree that the County's legislative action, particularly the amendment to KCC 17.430.090(F)(4) which removes the provision reinstating development rights after forty years, achieves compliance with the GMA. Suquamish Response, at 2. The Board agrees.

The Board finds and concludes that by adopting Ordinance No. 407-2008, specifically the noted Plan and development regulation amendments pertaining to the County's TDR program, the County now **complies** with the requirements of the Act [RCW 36.70A.070(5) and .020(1), (2), (8), (9) and (10)]. The Board will enter a **Finding of Compliance** on this issue and **rescind** the **Determination of Invalidity**.

B. Rural Wooded Incentive Program

The Board's discussion of the County's RWIP occurs in the FDO at 27-44. It states:

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

FDO, at 44.

Essentially the RWIP remand involved three parts: 1) the ambiguity concerning future development of wooded reserve areas at the end of 40-years; 2) the blurring of resource and rural lands as evidenced by the disclosure statement; and 3) absence of a document harmonizing RWIP with the goals of the Act. However, as an initial matter, the Board will address an objection made by Petitioners to the County's adoption of Ordinance No. 408-2008 – the moratorium.

The Moratorium

It is undisputed that on the same day the County adopted Ordinance No. 407-2008 to address the TDR and RWIP issues on remand in this case, it also adopted Ordinance No. 408-2008 – a 180-day moratorium on acceptance of new applications for development using the RWIP, Chapter 17.301 KCC. Ex. 78, at 1-4. The County contends that the moratorium allows the County to address additional issues[4] that were raised during the public hearings on Ordinance No. 407-2008 while still seeking compliance from the Board on the adoption of Ordinance No. 407-2008. Kitsap SATC, at 19-20.

Petitioners assert that the establishment of the moratorium and the County's intent to modify the RWIP in the future precludes the Board from reviewing Ordinance No. 407-2008 and entering a finding of compliance now. Suquamish Response, at 3. Given the moratorium, Petitioners contend that Ordinance No. 407-2008 is nothing more than an interim ordinance and the Board should not review it until the County makes its final decision on the RWIP program. *Id*. at 4-5. To support their position, Petitioners cite to several prior Board decisions: *King County v. Snohomish County*, CPSGMHB Case No.

[4] Issues the County would like to consider during the moratorium period include, but are not limited to, (1) management plans for privately-owned opens space tracts which also address forestry activities; (2) increased minimum project size to ensure public and environmental benefits; (3) increased maximum project size to increase flexibility in project development; (4) increased connectivity of open spaces and trails; (5) additional protections for critical areas; (6) a requirement for the use of low impact development techniques; (7) mechanisms to address the perpetual nature of the open space. See Kitsap SATC, at 19; Ex. 78, Sec. 1(H), at 3.

03-3-0025, Order Finding Continuing Noncompliance and Continuing Invalidity and Notice of Second Compliance Hearing, (May 26, 2004) and *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008c, Correcting Order Finding Partial Noncompliance and Partial Invalidity, (Nov. 8, 2000). *Id*.

The County counters that Ordinance No. 407-2008 was not adopted pursuant to RCW 36.70A.390, does not contain a sunset clause and in fact is not an interim ordinance. Thus, the County asserts, the Board has authority to, and should, review the Ordinance for compliance. Kitsap Reply, at 3-4. The County notes, however, that the "unchallenged" moratorium is an interim control that is scheduled to sunset in August of 2008. Nonetheless, the County claims that if no further action is taken, Ordinance No. 407-2008 will control RWIP development. But if the RWIP (Ordinance No. 407-2008) is amended Petitioners will have the opportunity to challenge that action. *Id*. The County also argues that the prior Board authority Petitioners rely upon for their position is either distinguishable, off point, or has been stricken by the Board. *Id*. at 5-7. The Board concurs with the County's analysis of the prior Board decisions referenced by Petitioners. None are on point to the present circumstances.

Further, the Board agrees with the County's position on the moratorium. Ordinance No. 407-2008 has been adopted to comply with the GMA – it is not an interim regulation. In essence, Ordinance 407-2008's effective date has been *delayed* by the moratorium. The effect of the moratorium, which prevents vesting in the newly adopted program, is two-fold: 1) it allows the County to proceed through the compliance review without concern for projects vesting in a new untested program; and 2) it allows the County to address additional issues uncovered and unanticipated during the course of adopting Ordinance No. 407-2008. As the County correctly points out, if the RWIP program is revised in the future, that revision could be challenged and brought before the Board. The Board is not troubled by the County's approach given its long history with RWIP; nor does the Board read RCW 36.70A.302(7) as inhibiting the Board's ability to proceed with its review of Ordinance No. 407-2008 as adopted for compliance with the GMA. **The Board also notes that the presence of the moratorium negates the need for continued invalidity on the RWIP.**

The 40-year Limitation

The Board's discussion in the FDO focused on the problem that the Plan and development regulations failed to address how much density could be accommodated within the Wooded Reserve after the 40-year period had expired. It was not clear whether additional density could be added or whether development was limited to the initial proposal. The 40-year limitation issue was only tied to the Wooded Reserve alternatives to be offered in the prior RWIP. *See* FDO, at 37-38.

The most significant change the County made to the RWIP program on this issue was to amend KCC 17.301.080(E) and remove all alternatives using the Wooded Reserve concept. The only remaining incentive option to obtain a bonus density in the RWIP is if development is clustered and 75% of the site remains in permanent open space. The bonus allows clustered development at a density of 1 dwelling unit per five acres rather than 1 du/20 acres. Additionally, all references to the "Wooded Reserve" in the Plan and development regulations were deleted. Kitsap SATC, at 5-6, and 12; Ex. 69, Section 5, 6, 7 and 8, at 6-12.

Petitioners agree that the County's deletion of all reference to the Wooded Reserve and the single remaining incentive option complies with the Board's Order. Suquamish Response, at 2-3.

The Board concurs. With the removal of the Wooded Reserve concept, and elimination of the reference to the 40-year limitation, retention of the single incentive option removes the ambiguity about potential development in the future on RWIP lands. KCC 17.301.080(E)2 [*sic* 1] now provides:

> Through the use of the Program [RWIP], the number of dwelling units permitted in the Rural Wooded zone may be increased to 1 dwelling unit per 5 acres with the designation of a minimum of 75% of the property(s) gross acreage in Permanent Open Space.

Ex. 69, Sec. 8, at 12. The Board finds and concludes that the Plan and development regulation revisions that eliminated reference to the wooded reserve and the 40-year limitation **comply** with the GMA. The Board will enter a **Finding of Compliance** on this aspect of the RWIP program.

The Disclosure Statement – Blurring of Rural and Resource Lands

In the FDO the Board couched its concern over the blurring of Resource and Rural designations as follows:

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

FDO, at 40.

The Board concluded that the RWIP was geared more towards protecting timber interests and future development options rather than preserving rural character. The Board stated:

> The County's RWIP clearly sets forth various mechanisms to protect the timber industry, namely density, based on percentage of Wooded Reserve set aside, notice provisions, the interconnecting of open space, and compliance with applicable Timber Harvest Permits.

FDO, at 42-43. Pertaining to the disclosure statement provisions, the Board noted that the deletion of KCC 17.301.080(E)(12) could conceivably be consistent with the GMA. *Id*.

In response, the County removed all reference to the Wooded Reserve and the requirement for a Timber Harvest Permit, but chose to retain the disclosure statement [plat notice] as a consumer protection measure. SATC, at 14-15. The County states that the plat notice will only apply to clustered portions of any RWIP property. *Id*. at 16. The County asks the Board to reconsider its reference to deletion of the disclosure statement of KCC 17.301.080(E)(12). *Id*. at 15.

Petitioners agree that the removal of reference to the Wooded Reserve in the Plan and zoning regulations [KCC 17.301.080] concerning large and small scale timber management and allowing a variety of forestry activities, complies with the Board's Order. Suquamish Response, at 2-3.

The Board notes that although the County retained much of the disclosure statement of KCC 17.301.080(E)(12), it was specifically amended to delete references to the Wooded Reserve and reference to perimeter buffers. *See* Ordinance No. 407-2008, Section 8, at 15.

At the HOM, the Board questioned the County as to why it retained the following language in the disclosure statement: "So long as such forestry operations are in compliance with the Washington Forest Practices Act RCW 76.09 they shall not constitute a nuisance." The County responded that this sentence was inadvertently left in the final draft that was adopted and that the County intends to delete it.[5]

The Board is familiar with the local circumstances that have shaped Kitsap County's policies for rural wooded lands [*Kitsap Citizens for Rural Preservation, et al., v. Kitsap County*, CPSGMHB Case No. 94-3-0005, Final Decision and Order (Oct. 25, 1994); *Bremerton, et al., v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Finding of Noncompliance and Determination of Invalidity in Bremerton and Order Dismissing Port Gamble, (Sep. 8, 1997); and *Bremerton, et al., v. Kitsap County*, CPSGMHB Case No.

[5] The Board did not order a transcript of the hearing, but if this reference is disputed, the Board can do so.

04-3-0019c, Final Decision and Order, (Aug. 9, 2004]. Owners of large tracts of timberland[6] within the County wish to continue harvesting timber while at the same time developing residential subdivisions on portions of their own lands. Forestry practices are acknowledged by statute to be incompatible with residential development. [RCW 36.70A.060(1)(b)]. Nevertheless, some Kitsap timber owners want to be able to create residential development that is incompatible with forestry while at the same time seeking to be protected from the consequences of incompatibility. However, the fact remains that some degree of forestry is permitted in the rural areas.

The Board recognizes the County's desire to have some form of disclosure statement/plat notice as a consumer protection device. The Board also acknowledges that the County has taken significant steps to clarify the distinction between resource and rural lands. However, retention of the "shall not constitute a nuisance" language leans heavily towards protection for the timber industry, not for the consumers of residential lots in the RWIP and continues to blur the distinction between resource and rural designations. Therefore, the Board finds and concludes that the disclosure statement/plat notice aspect of the RWIP program merits a finding of **Continuing Noncompliance** and this provision will be **remanded** for the County to take corrective action.

Document Harmonizing GMA Goals

RCW 36.70A.070(5)(a) provides:

> Growth Management Act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but *shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020* and meets the requirements of this chapter.

In the FDO, the Board found that the County had not followed this direction, and stated: "The Board concludes that the County has failed to comply with the provisions of RCW 36.70A.070(5)(a) by ignoring this requirement to explain how local circumstances as reflected in the rural element (*i.e.* the RWIP) are harmonized with the goals of the Act." *See* FDO, at 43.

On remand the County compiled a discrete document entitled Rural Wooded Incentive & Transfer of Development Rights Programs – Growth Management Act Evaluation that is offered as meeting this GMA requirement. See Ex. 69, Attachment A. The County contends that this document provides a goal-by-goal evaluation of how the RWIP [and

[6] The County acknowledges that large landowners such as Olympic Property Group, Overton, Manke, and Alpine Evergreen, have been involved in the evolution of the RWIP proposal since its inception. Kitsap SATC, at 11.

TDR] programs meet each goal. As such, the County asserts, it explains how the rural element is harmonized with the goals of the Act. Kitsap SATC, at 13-14.

Petitioners contend that the discrete document prepared by the County fails to consider the local circumstances creating the need for the County to establish a pattern of densities and uses that would not otherwise be considered rural. Suquamish Response, at 6. Petitioners assert that while the Board is aware of the local circumstances present in rural Kitsap County, the County neglected to address them in the context of this document. *Id*. Petitioners then recite prior holdings of this Board pertaining to noncompliant rural densities. *Id*. at 6-10.

In reply, the County contends the Act requires the County to have a written record harmonizing the goals of the Act to the RWIP – which the County asserts it has done. Kitsap Reply, at 9. The County also counters that prior cases involving rural densities are not relevant in the present compliance proceeding. However, the County notes that the rural densities resulting from the RWIP still maintain a rural density of 5 acre lots. *Id*. at 10.

Generally, the Board agrees with the County. The "Goal Harmonizing Document" prepared by the County explains the RWIP [and TDR] program and then methodically evaluates each of the GMA's goals in light of the general provisions of the two programs. However, the Board finds that Petitioners' make a valid point by asserting that there needs to be an explanation of how the RWIP is responding to local circumstances.

The Rural Element is required to provide for a variety of rural densities and uses. RCW 36.70A.070(5)(b). The Board construes the purpose of .070(5)(a) as acknowledging that local circumstances may lead to different approaches and programs to achieve the variety of densities and uses. Here, the County is offering the RWIP as a means of meeting the GMA requirement for a variety of densities and uses, but has not explained how the RWIP addresses the unique local circumstances in the County. To comply, the County merely needs to briefly explain what local circumstances the RWIP is designed to address. Therefore, the Board finds **Continuing Noncompliance** and will **remand** the Goal Harmonizing Document for this simple explanation to be added. The Board notes that Petitioners' continued questioning of rural densities was addressed in the FDO in the discussion of clustering, the bottom line being that the clustering provisions yielded rural densities.[7]

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[7] The FDO, at 36, states:

> Given that RCW 36.70A.070(5)(b) provides that "*counties may provide for clustering,* density transfer, design guidelines, conservation easements, and other innovative techniques *that will accommodate appropriate rural densities and uses that are not characterized by urban growth and are consistent with rural character,*" there is no inherent error in the County's clustering program provided for in the RWIP. The Board notes that under the most generous option, a 100-acre parcel is allowed up to a maximum

To summarize:

The adoption of Ordinance No. 407-2008, has addressed the remand issue pertaining to the ambiguity concerning future development of Wooded Reserve areas at the end of 40-years [40-year limitation]. The Board will enter a **Finding of Compliance** on this aspect of the RWIP program.

However, as discussed and detailed *supra*, pertaining to the blurring of resource and rural lands as evidenced by the disclosure statement, and to the document harmonizing RWIP with the goals of the Act the Board finds that the remaining defects are minor; but nonetheless the Board will enter a **Finding of Continuing Noncompliance** and **remand** these matters to the County to take corrective action.

Additionally, as noted supra, the presence of the RWIP moratorium [Ordinance No. 408-2008] eliminates the need for a determination of invalidity on the RWIP program. Consequently, the Board **rescinds** the Determination of Invalidity for the RWIP program.

C. Capital Facilities Element and UGA Expansion Areas

The Board's discussion of the County's CFP and UGAs is contained in the FDO at 17-27 and in the Reconsideration Order at 2-4. In essence, the Board found that the CFP did not provide for adequate and available sanitary sewer service throughout the noted UGAs.

In the Board's January 20, 2008 Order Denying Motion for Extension of Compliance Period, the Board stated:

> As to the Capital Facilities Plan, the County acknowledges[8] that it will not be able to adhere to the maximum 180-day compliance schedule established in the FDO. County Motion, at 1. Consequently, if the County cannot complete its remand work by February 11, 2008, it should so indicate in the SATC and the Board will address it at the March 24, 2008

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of 20 residences, a net residential density of 1 du/5 acres – a rural, not urban, density, that is consistent with preserving the rural character. The Board acknowledges that the clustered design of the development appears more dense when viewed in isolation, but it is nonetheless a rural density when viewed in the context of the entire parcel.

[8] "Because of the complexity of the issues involved on remand, as well as the fact that the County must rely on other jurisdictions for certain actions and information to comply, *it has taken longer than the County expected to meet the deadlines set out in the Order*." County Motion, at 2; (emphasis supplied).

> compliance hearing. If this work is not finished, a likely outcome would be that the Board would issue an Order Finding Continuing Noncompliance pertaining to the Capital Facilities Plan in the *Suquamish II* matter (CPSGMHB Case No. 07-3-0019c). However, a new compliance schedule would be provided which could accommodate the County's work plan and allow the County to complete its compliance work.

1/29/08 Order, at 3.

In the County's SATC, the County again acknowledges that it has not completed all its work on the Capital Facilities Plan and UGA expansion issues, but urged the Board to consider reviewing the entire CFP package rather than proceed in a piecemeal manner. Kitsap SATC, at 21. The County states:

> The County expects to finalize the capital facilities work by the date of the compliance hearing, and may file a supplemental SATC before the hearing. [The County anticipated taking action on the CFE issues on March 10, 2008]. We realize that the Petitioners may not feel that they have adequate time to review and respond to the County's action, and will defer to the Board's decision on the schedule for filing responses to the CFE. Having said that, however, the County would desire a decision as early as practical to alleviate the issues associated with a pending moratorium regarding development in the expansion UGAs.

Id. at 21-22.

Petitioners do not object to the County filing a supplemental SATC on the "entire package" by the compliance hearing; but request adequate time to review and comment upon the County's action. Suquamish Response, at 2; Harless Response, at 2.

As noted *supra*, at the Compliance Hearing, the County provided the Board with a Supplemental SATC and apparently the "entire CFP package" including copies of Ordinance No. 409-2008 [Kitsap County], Resolution No. 3049 [City of Bremerton], Resolution No. 034-07 [Port Orchard], and Resolution 02-07 [West Sound Utility District], and Ordinance No. 410-2008 [Kitsap County]. The Board acknowledges the amount of time, effort and coordination that went into this compliance effort. Nonetheless, as explained at the hearing, due to the untimeliness of the submittal, the Board is compelled to issue a **Finding of Continuing Noncompliance and Invalidity** pertaining to the Capital Facilities Plan and UGAs. However, the Board will accelerate the compliance period and set a second compliance hearing that allows adequate time for the Petitioners and the Board to review the Supplemental SATC and related materials.

The Board finds and concludes that County failed to take legislative action to address the remand of the CFP issue, pertaining to sanitary sewers, and the UGA issue within the compliance period established in the FDO. Therefore the Board will issue a **Finding of Continuing Noncompliance and Invalidity** on these issues, and set a second compliance hearing.

IV. ORDER

Based upon review of the GMA, the August 15, 2007 Final Decision and Order, the September 13, 2007 Order on Reconsideration, the Statement of Actions Taken to Comply, the Response and Reply briefs and exhibits, and presentations at the Compliance Hearing, the Board ORDERS:

- Kitsap County's adoption of Ordinance No. 407-2008, specifically the noted Plan and development regulation amendments pertaining to the County's TDR program, **complies** with the requirements of the Act [RCW 36.70A.070(5) and .020(1), (2), (8), (9) and (10)]. Therefore, the Board enters a **Finding of Compliance** on this issue and **rescinds** the **Determination of Invalidity**.

- Kitsap County's adoption of Ordinance No. 407-2008, has addressed the remand issue pertaining to the ambiguity concerning future development of Wooded Reserve areas at the end of 40-years [40-year limitation]. The Board will enter a **Finding of Compliance** on this aspect of the RWIP program. However, as discussed and detailed *supra*, pertaining to the blurring of resource and rural lands as evidenced by the disclosure statement, and to the document harmonizing RWIP with the goals of the Act the Board finds that the defects are minor; but nonetheless the Board will enter a **Finding of Continuing Noncompliance** and **remand** these matters to the County to take corrective action. Additionally, as noted *supra*, the presence of the RWIP moratorium [Ordinance No. 408-2008] eliminates the need for a determination of invalidity on the RWIP program. Consequently, the Board **rescinds** the Determination of Invalidity for the RWIP program.

- Kitsap County failed to correct the compliance deficiencies in the Capital Facilities Plan (specifically sanitary sewers) and the related UGAs within the compliance period established in the FDO. Therefore the Board enters a **Finding of Continuing Noncompliance and Invalidity** on these issues.

- The Board, however, acknowledges that Kitsap County has taken legislative action to comply with the CFP and UGA remand issues on March 10, 2008 [Ordinance Nos. 409-2008 and 410-2008] and has filed a Supplemental SATC. Additionally, the County may take the necessary corrective actions to

bring the RWIP program into compliance [disclosure statement/title notice deletion and supplementing the Goal Harmonizing Document] within the accelerated timeframe. Therefore, the Board establishes the following schedule for the second compliance hearing.

RWIP and Goal Harmonizing Document

- By no later than **May 12, 2008**, the County shall take the necessary legislative action to address the RWIP disclosure statement/title notice remand issue and take the necessary administrative action to address the Goal Harmonizing Document remand issue. The County shall provide an original and four copies to the Board, and serve copies on Petitioners and Intervenors.
- Petitioners may file a comment on the County's actions to comply on the two RWIP issues by no later than **May 14, 2008**. Petitioners shall simultaneously serve a copy of their Response on the County.
- These matters will be addressed at the compliance hearing on the schedule established below.

Capital Facilities Plan and UGAs

- By no later than **May 7, 2008**,[9] the Petitioners and Intervenor may file with the Board an original and four copies of Response to the Supplemental SATC [CFE/UGAs issue]. Petitioners shall simultaneously serve a copy of their Response on the County.
- By no later than **May 14, 2008**, Kitsap County may file with the Board an original and four copies of the County's Reply. The County shall simultaneously serve a copy of their Reply on Petitioners and Intervenor.
- Pursuant to RCW 36.70A.330(1) and WAC 242-02-891,[10] the Board hereby gives notice of and schedules the Second Compliance Hearing in this matter for **10:00 a.m. May 19, 2008**, at the Board's offices. **The second compliance hearing shall be limited to consideration of the matters found to be of continuing noncompliance in this Order**. 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 deadline set forth in this Order, or the County determines it needs more time – up to 180 days of the date of this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

[9] May 7, 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).

[10] The Presiding Officer may issue an additional notice after receipt of the SATC to set the format and additional procedures for the compliance hearing.

So ORDERED this 4th day of April, 2008.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
David O. Earling
Board Member

_____
Edward G. McGuire, AICP
Board Member

_____
Margaret A. Pageler
Board Member

Note: This order constitutes a final order, as specified by RCW 36.70A.300, unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[11]

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[11] 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)