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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

KITTITAS COUNTY CONSERVATION, et al.,

Case No. 06-1-0011

Petitioners,

FINAL DECISION AND ORDER

v.

KITTITAS COUNTY, a political sub-division
of the State of Washington,

Respondent,

CENTRAL WASHINGTON HOME BUILDERS
ASSOCIATION, MITCHELL F. WILLIAMS,
d/b/a MF WILLIAMS CONSTRUCTION CO.
INC, and BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON, a non-
profit corporation, MISTY MOUNTAIN, LLC,
PAT DENEEN,

Intervenors.

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I. SYNOPSIS

The Petitioners, Kittitas County Conservation, et al., filed a petition raising six issues regarding Kittitas County Ordinance 2006-36 and the failure of the County to properly adopt regulations as required by the GMA. The Ordinance amended the County's development regulations, in particular the performance based cluster platting section. The Petitioners also contend that Kittitas County failed to act by refusing to adopt development regulations consistent with and implementing the adopted Kittitas County Comprehensive Plan.

The Respondent, Kittitas County, and Intervenors, Central Washington Home Builders Association, et al., believe the petition is without merit and should be dismissed. They contend that the Petitioners are actually challenging Ordinance 2005-35, which was

1 adopted November 2, 2005, through a collateral attack by using the recent amendment,
2 Ordinance 2006-36. The Respondent and Intervenors argue that the Petitioners are time-
3 barred from seeking review of Ordinance 2005-35 per RCW 36.70A.290(2). They also
4 contend that the County properly adopted its development regulations as part of its GMA
5 planning and that Ordinance 2006-36, which amends the cluster platting provisions, reduces
6 density in the rural and resource lands.

7 The Eastern Washington Growth Management Hearings Board (Board) found the
8 Petitioners failed to carry their burden of proof on Issue Nos. 1, 2 and 3. The Petitioners
9 challenged Ordinance 2006-36 on the basis the amendments authorized urban density
10 development in rural lands. The Board, after a careful review of the amendments authorized
11 in Ordinance 2006-36, found this was not the case. The amendments apparently reduce the
12 density within the Rural-3 and Agricultural-3 zoning. The Board agrees with the Respondent
13 and Intervenors that these three issues sought review of Ordinance 2005-35, which was
14 adopted by the Kittitas County BOCC on November 2, 2005. Petitioners did not timely seek
15 review of this ordinance within 60 days as required by RCW 36.70A.290(2) and, therefore,
16 these three issues must be dismissed. This is not to say the Board agrees with the densities
17 in the rural areas found in Ordinance 2005-35, only that Ordinance 2006-36 was not shown
18 by the Petitioners to be out of compliance. The Board also found the Petitioners failed to
19 brief Issue No. 4 and deemed that issue abandoned. In Issue No. 5, the Petitioners
20 requested a finding of invalidity. This remedy was not granted.

21 However, the Board finds there is clear and convincing evidence that the County
22 failed to act by failing to adopt regulations implementing its Comprehensive Plan (CP),
23 failing to review Agriculture-3 and Rural-3 regulations for consistency with its
24 Comprehensive Plan, and failing to provide for proper notice and public participation.

25 **II. INVALIDITY**

26 The Board determined there was not a basis for a finding of Invalidity.

1 **III. PROCEDURAL HISTORY**

2 On October 12, 2006, KITTITAS COUNTY CONSERVATION, PAULA J. THOMPSON,
3 JAN SHARAR, DAWN DOUGLAS, MARGE BRANDSRUD, JOHN JENSEN, and ROGER OLSEN,
4 by and through their representative, JAMES CARMODY, filed a Petition for Review.

5 On October 27, 2006, CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION,
6 (CWHBA), MITCHELL F. WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., INC. and
7 BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, (BIAW), filed a Motion to
8 Intervene. Also on October 27, 2006, MISTY MOUNTAIN, LLC, filed a Motion to Intervene.

9 On October 31, 2006, PAT DENEEN, filed a Motion to Intervene.

10 On November 6, 2006, the Board received Petitioner's Memorandum in Opposition to
11 Motions to Intervene.

12 On November 7, 2006, the Board received CWHBA, Declaration of Jerry T. Martens.

13 On November 7, 2006, prior to the Prehearing conference, the Board heard the
14 Motions to Intervene. The Board granted all Motions to Intervene limiting the briefing to
15 one coordinated brief filed by the Intervenors. The Intervenors were instructed to
16 determine which attorney would argue which issue(s). An Intervenor with a separate and
17 distinct argument for a particular issue should include their argument in the coordinated
18 brief and would be allowed to argue their issue at the Hearing on the Merits separately if
19 necessary. The Board would accept one brief from Respondent and one additional
20 coordinated brief from the Intervenors.

21 On November 7, 2006, the Board held a telephonic Prehearing conference. Present
22 were, John Roskelley, Presiding Officer, and Board Members Judy Wall and Dennis Dellwo.
23 Present for Petitioners was James Carmody. Present for Respondent was James Hurson.
24 Present for Intervenors were Andrew Cook, William Crittenden, and Jeff Slothower.

25 On November 8, 2006, the Board issued its Prehearing Order.

26 On November 28, 2006, the Board received Intervenors' Motion to Dismiss and
Declaration in Support.

1 On November 29, 2006, the Board received Respondent's Motion and Memorandum
2 in Support of Motion to Dismiss.

3 On December 13, 2006, the Board received Petitioners' Memorandum in Opposition
4 to Motion to Dismiss and Declaration is Support.

5 On December 20, 2006, the Board received Respondent's Reply Brief in Support of
6 Motion to Dismiss. Also on December 20, the Board received Intervenors' Rebuttal on
7 Motion to Dismiss.

8 January 3, 2007, the Board held a telephonic motion hearing. Present were, John
9 Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Joyce Mulliken. Present
10 for Petitioners was James Carmody. Present for Respondent was James Hurson. Present for
11 Intervenors were Andrew Cook, William Crittenden, and Jeff Slothower.

12 On February 5, 2007, the Board issued its Order on Motions.

13 On February 8, 2007, the Board received Intervenors' Application for Prehearing
14 Conference.

15 On February 12, 2007, the Board issued its Order on Application for Prehearing
16 Conference.

17 On February 5, 2007, the Board received Petitioners' Hearing on the Merits Brief.

18 On February 26, 2007, the Board received Respondent's and Intervenors' Hearing on
19 the Merits Briefs.

20 On March 2, 2007, the Board received Petitioners' Hearing on the Merits Reply Brief.

21 On March 6, 2007, the Board received Intervenors' Motion to Strike Improper Brief.

22 On March 7, 2007, the Board received Intervenors' Surreply Brief.

23 On March 7, 2007, the Board held the hearing on the merits. Present were, John
24 Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Joyce Mulliken. Present
25 for Petitioners was James Carmody. Present for Respondent was James Hurson. Present for
26 Intervenors were Andrew Cook, William Crittenden, and Jeff Slothower.

1 **Issue No. 2:**

2 Does Kittitas County Ordinance No. 2006-36 violate RCW 36.70A.020(2) by allowing
3 rural development densities greater than 1 dwelling unit per 5 acres?

4 **Issue No. 3:**

5 Does Kittitas County Ordinance No. 2006-36 violate RCW 36.70A.177 by failing to
6 limit non-agricultural uses in Agriculture-3 and Agriculture-20 zones to lands with poor soil
7 or otherwise not suitable for agricultural purposes?

8 **The Parties' Position:**

9 **Petitioners:**

10 The Petitioners combined Issue Nos. 1, 2, and 3 in their Hearing on the Merits (HOM)
11 brief under 5.2 Cluster Subdivision Provisions Violate Growth Management Prohibitions on
12 Development Densities in Rural Areas. They argued that Ordinance No. 2006-36, adopted
13 on August 16, 2006, established criteria for "Performance Based Cluster Platting" for both
14 rural and urban areas within Kittitas County. This ordinance allows for a doubling of rural
15 density with a resulting development potential of one dwelling unit per one and one-half
16 acres.

17 The Petitioners contend that a "trial" ordinance, Ordinance No. 2005-35, was
18 adopted on November 2, 2005. Petitioners HOM brief. Both Planning Director Piercy and
19 Kittitas County Commissioner Huston advised the community that the ordinance would be
20 reviewed within one year. After its adoption, the ordinance had problems. An emergency
21 moratorium was imposed on June 20, 2006, by Resolution No. 2006-91. The resolution
22 recognized that "[E]ach application fully utilized the bonus density provisions and each
23 proposed a Group B Water system to serve up to 14 lots." Petitioners brief at 25. Resolution
24 2006-91 recognized that the "...continued use and implementation of Section 16.09 will
25 allow for unintended results regarding urban densities, rural densities, water use, open
26 space and the development of habitat corridors."

After public hearings, Kittitas County sought to address the rural density and sprawl
components associated with the performance based cluster platting in Ordinance 2006-36,

1 which in part says, "...Kittitas County finds that this "Performance Based Cluster Platting"
2 technique would foster the development of urban and rural designated lands at appropriate
3 densities, while protecting the environment and maintaining a high quality of life in Kittitas
4 County." Petitioners brief at 26.

5 Ordinance 2006-36 was the first interim review of the performance based cluster
6 platting provisions. The Petitioners contend that the ordinance does not achieve its stated
7 goal and is non-compliant with the Growth Management Act (GMA). The ordinance included
8 substantial modifications to the Public Benefit Rating Systems Chart and open space
9 requirements, but failed to meet legislative requirements.

10 The Petitioners argue that this Board, in *Wenatchee Valley Mall Partnership v.*
11 *Douglas County*, EWGMHB Case No. 96-1-0009, FDO, Dec. 10, 1996, provided guidance
12 with respect to cluster development by concluding that clustering is only appropriate for
13 lands not designated for agriculture, forest, or mineral resources, which was a reasoned
14 and sound application of the GMA principles and requirements. The Petitioners argue that
15 clustering should not be allowed in resource land areas; that overall development must not
16 be urban in nature within the rural areas; and that the regulatory process needs to include
17 a maximum residential density for rural non-resource lands. Ordinance 2006-36 violates
18 each of these principles.

19 According to the Petitioners, the provisions in the interim cluster subdivision
20 ordinance allow development within Rural-3 and Agricultural-3 zoning districts at an
21 effective density of one dwelling unit per one and one-half acres. Resolution No. 2006-99
22 reflects this development density, where twenty-one acres contain fourteen lots. This is a
23 misinterpretation of the Group B water system rules and a clear violation of permissible
24 rural densities of one dwelling unit per five acres. The Petitioners contend Kittitas County is
25 in clear violation of RCW 36.70.020(2) by not having a written record explaining how the
26 rural plan harmonizes the planning goals.

The Petitioners acknowledge that the GMA encourages clustering and innovative
development techniques, but RCW 36.70A.070(5) does not authorize urban development

1 levels and it is clear that one dwelling unit per one and one-half acres is not appropriate
2 rural density. They contend that a maximum density under a cluster subdivision must be
3 contained in the ordinance and should not exceed one dwelling unit per five acres. The
4 Petitioners did not argue that the most recent ordinance, Ordinance 2006-3, was out of
5 compliance. They argued that it did not go far enough.

6 **Respondent:**

7 The Respondent argues that the GMA does not prohibit three acre zoning in rural
8 areas. There is no specific minimum lot size for rural development. "Rural development can
9 consist of a variety of uses and residential densities". RCW 36.70A.030(16). The
10 Respondent cites several cases where the Board has upheld the approval of zoning in rural
11 areas that allows rural lot sizes that are even smaller than the three acre zoning at issue in
12 this case, including *Woodmansee v. Ferry County*, EWGMHB Case No. 95-1-0010, FDO, May
13 13, 1996, which upheld a two and one-half acre density zoning, and *1000 Friends v. Chelan*
14 *County*, EWGMHB Case No. 04-1-0002, FDO, Sept. 2, 2004, which upheld a two and one-
15 half acre density as well. But the Respondent agrees that there may arguably be a question
16 as to how much of a rural portion of a county may properly be allowed to have two and
17 one-half or three acre zoning. The blanket rejection of any three acre density zoning in rural
18 Kittitas County as proposed by the Petitioners is contrary to the established precedent of
19 the Board and should be rejected.

20 The Respondent also argues that the 2006 amendments to the Kittitas County
21 Performance Based Cluster Subdivision Ordinance are compliant with the GMA and cite RCW
22 36.70A.090, which recognizes that a county's comprehensive plan should provide for
23 innovative land use management techniques, including cluster housing and planned unit
24 developments. Kittitas County includes clustering as part of its GMA implementation. The
25 County reviewed and amended its cluster subdivision ordinance in 1996, 2005, and again in
26 2006, with Ordinance 2006-36. The Respondent contends that the Petitioners have not
raised any issue or claim that the 2006 amendments violate the GMA.

1 The Respondent argues that Ordinance 2006-36 actually reduces or restricts the
2 density that could be achieved. The real challenge by the Petitioners is to Ordinance 2005-
3 35, which would be untimely and dismissed. The Respondent contends that the Petitioners
4 claim that Ordinance 2005-35 was an interim ordinance. According to the Respondent, this
5 is not the case. The ordinance is not an interim ordinance, nor does it provide for a sunset
6 clause at six months or any other time. The Respondent argues that Ordinance 2005-35
7 was a permanent replacement for the previously existing GMA Cluster Subdivision Code
(Ordinance 96-06).

8 The Respondent addresses Issue No. 3 under Failure to Limit Non-Agricultural Uses.
9 They argue that RCW 36.70A.177, which relates to "...zoning techniques in areas
10 designated as agricultural lands of long-term commercial significance under RCW
11 36.70A.170", is not relevant to this issue before the Board. The Respondent contends that
12 the Agriculture-3 zone and the Agriculture-20 zone are rural zones. They are not used to
13 designate agricultural lands of long-term commercial significance, which are lands zoned
14 under the Commercial Agriculture Zone (CAZ) and are not eligible for performance based
15 cluster platting. Thus, RCW 36.70A.177 does not apply.

16 **Intervenors:**

17 The Intervenors argue that Ordinance 2006-36, which are amendments to Kittitas
18 County Code (KCC) Chapter 16.09, do not permit increased rural densities or decrease
19 existing protections for agricultural lands. They contend that the substance of the
20 Petitioners arguments relate to the 2005 adoption of KCC Chapter 16.09.

21 Concerning Issue No. 1, the Intervenors contend that Ordinance 2006-36 did not
22 increase the rural densities already permitted by the 2005 version found in KCC Chapter
23 16.09. The 2006 amendments did, however, clarify that no density bonus was available for
24 areas already protected by other regulations; increase the minimums for acreage and open
25 space; and reduce the number of points available in the rural area to the Public Benefit
26 Rating System Chart. All of these changes reduced the density that can be achieved
through Performance Based Cluster Platting.

1 In Issue No. 2, the Intervenor argue that the 2006 amendments did not increase
2 the rural densities already permitted by the 2005 version of KCC Chapter 16.09. The rural
3 densities previously permitted under KCC Chapter 16.09 were reduced.

4 Concerning Issue No. 3, the Intervenor argue that Ordinance 2006-36 did not
5 change any of the provisions of KCC Chapter 16.09 relating to the use of agricultural lands.
6 According to the Intervenor, the 2006 amendments do not increase rural densities or
7 reduce protections for agricultural lands. The Intervenor believe that the Petitioners'
8 challenges relate to the 2005 adoption of KCC Chapter 16.09. The Intervenor contend this
9 same situation arose in *Orton Farms, LLC. v. Pierce County*, CPSGMHB Case No. 04-3-
10 0007c, FDO, August 2, 2004. The Central Board in *Orton Farms* determined that the
11 Petitioners erred. Their challenge was untimely and that the Petitioners real challenge was
12 to the potential application of existing CP policies and regulations specifically regarding
13 clustering and density bonuses, which were not amended by the action of the County in
14 that case. The same is true in this case. The Intervenor argue that the Petitioners are
15 actually attempting to bring untimely challenges to the 2005 adoption of KCC Chapter 16.09
16 and, because the Petitioners failed to analyze *Orton Farms*, their case must be deemed
17 abandoned.

18 **Petitioners HOM Reply:**

19 The Petitioners HOM Reply brief covers Issue No. 3 under 2.3 Kittitas County's
20 Performance Based Cluster Platting Provisions Violate Growth Management Act (GMA) Goals
21 and Policies. The Petitioners claim the County has adopted a "Performance Based Cluster
22 Platting" ordinance, Ordinance 2006-36, that allows for expanded urban development in
23 rural areas. The ordinance violates the GMA by allowing rural development at impermissible
24 residential densities of one dwelling unit per one and one-half acres; by encouraging sprawl
25 and urban development in the rural areas; and for failure to adopt performance standards
26 that further the seven criteria for "rural character". RCW 36.70A.030(15). The ordinance
fails to limit the number of units in a cluster; is void of consideration of cumulative or
sequential development of cluster subdivisions; and fails to consider proximity of cluster

1 subdivisions. A 100% density bonus is allowed in Rural-3; Agriculture-3, Rural-5 and
2 Agriculture-5 zones and a 200% density bonus in Agriculture-20 and Forest and Range-20
3 zones.

4 The Petitioners argue that the cluster plat subdivision provisions are built on pre-
5 GMA three acre zoning. Ordinance 2006-36 authorizes a doubling of density in the three
6 acre zoning districts. The ordinance does not contain limitation on the permissible number
7 of lots created by the subdivision; allows contiguous development plats; does not contain
8 location considerations or limitations; reduces absolute open space within the rural area;
9 and substantially increases demands for water, sewer/septic and other public services.
10 Bonus points are awarded for a variety of development enhancements.

11 The Kittitas County Comprehensive Plan establishes the total acreage for rural
12 residential land use at 67,298 acres. The inventory of Rural-3 and Agricultural-3 totals
13 40,024 acres. With performance based cluster platting, a total of 26,682 residential lots at
14 one and one-half acres is possible. The twenty-year population allocation for unincorporated
15 Kittitas County is 5,418 people. This is the equivalent of 2,325 residences. The potential
16 with performance based clustering is ten times that projection.

17 The Petitioners acknowledge that clustering is permitted under the GMA, but only
18 under certain conditions, such as consistency with rural character. Innovative techniques
19 must involve appropriate rural densities and uses that are not characterized by urban
20 growth. They cite *City of Bremerton v. Kitsap County*, CPSGMHB No. 04-3-0009c, FDO,
21 August 9, 2004, and *Durland v. San Juan County*, WWGMHB No. 99-2-0010c, FDO, May 7,
22 2001.

23 The Petitioners contend that in *Durland*, the local jurisdiction was required to
24 "develop a written record explaining how the rural element harmonizes the planning goals
25 in RCW 36.70A.020 and meets the requirements of this chapter." RCW 36.70A.070(5). In
26 *Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039c, Finding of Non-compliance and
Determination of Invalidity, Sept. 8, 1997, the Central Board recognized that past practice
does not establish a basis for future planning. The Petitioners argue that Kittitas County has

1 both perpetuated and exacerbated past practices. The Petitioners cite numerous Board
2 cases to establish that clustering must allow only development at acceptable rural densities;
3 that densities greater than one dwelling unit per five acres is not rural; and that cluster
4 developments in rural areas can not become urban and require urban services. The
5 Petitioners argue that the Boards have held that growth is urban where development
6 exceeds one dwelling unit per five acres (*Sky Valley v. Snohomish County*, CPSGMHB No.
7 95-3-0068c, FDO, March 12, 1996) and that the consequences of rural clustering cannot be
8 to create urban growth in the rural area (*Kitsap Citizens for Rural Preservation v. Kitsap*
9 *County*, CPSGMHB No. 94-3-0005, 1994). Ordinance 2006-36 does not contain an upper
10 limit on acreage; does not limit unit counts; does not restrict the location or proximity to
11 other developments; and does not contain or limit development.

11 According to the Petitioners, cluster development regulations must include a limit on
12 the maximum of lots allowed on the land included in the cluster and cite *Whatcom*
13 *Environmental Council v. Whatcom County*, WWGMHB Case No. 94-2-00009, Order on
14 Invalidation, and *C.U.S.T.E.R Association v. Whatcom County*, WWGHMB Case No. 96-2-0008,
15 Order on Invalidation, July 25, 1997.

16 The Petitioners contend Ordinance 2006-36 did not limit unit counts and actually
17 doubles the level of rural development within the Rural-3 and Agricultural-3 zoning districts.
18 The Petitioners argue that the Performance Based Cluster Plat Ordinance is the antithesis of
19 containing or otherwise controlling rural development.

20 In addition, the Petitioners contend there are no limits on the place or location of
21 cluster plat subdivisions. Kittitas County already has more lots than needed to
22 accommodate the Comprehensive Plan's growth target. The Petitioners argue that
23 Ordinance 2006-36 will reduce available open space; will increase impacts on ground and
24 surface water; and will adversely impact rural character.

24 **Intervenors Surreply:**

25 The Intervenors contend that the Petitioners identified only two provisions of the
26 GMA that Kittitas County's Ordinance 2006-36 allegedly violates. Those provisions are RCW

1 36.70A.020(2) (Issue Nos. 1 and 2) and RCW 36.70A.177 (Issue No. 3). In their reply brief,
2 Petitioners argue that Ordinance 2006-36 violates RCW 36.70A.070(5)(a). The Intervenors
3 argue that this issue was not raised in the Petition for Review, nor was it identified in this
4 Board's Pre-hearing Order. This statute deals with creating a county's rural element under
5 its comprehensive plan and this case has nothing to do with whether Kittitas County's CP
6 plan violates the GMA. The Intervenors also contend that the Petitioners allege Ordinance
7 2006-36 violates the definition of "rural character" under RCW 36.70A.030(15). According to
8 the Intervenors, this statute does not create GMA duties. The Petitioners did not raise this
9 issue in their petition and it is without merit.

9 **Board Analysis:**

10 The Board finds the Petitioners' arguments compelling and, had they been made in a
11 timely manner, might have persuaded this Board that the County was in error and the
12 performance based cluster platting provisions violate the GMA requirements for rural
13 densities. There must be controls in place to limit clustering to prevent urbanization of the
14 rural areas. The Western Board in *Butler v. Lewis County* opined:

15 "The allowance of unlimited clustering does not comply with the Act when its
16 purpose is to assure greater densities in rural and resource areas and not to
17 conserve resource lands and open space. When allowable clustering results in
18 urban, and not rural, growth it substantially interferes with the goals of the
19 Act." *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, FDO, June 30,
20 2000.

19 But the Petitioners challenge is untimely. The Board agrees with the Respondent and
20 Intervenors that these three issues are a collateral attack on Ordinance 2005-35, which was
21 adopted by the Kittitas County BOCC on November 2, 2005. Petitioners did not seek review
22 of this ordinance within 60 days as required by RCW 36.70A.290(2) and, therefore, these
23 three issues must be dismissed.

24 Ordinance 2006-36, if anything, was an improvement to the original 2005 ordinance.
25 According to the County, the ordinance clarified that density bonus was not available for
26 areas already protected by other regulations; increased the minimums for acreage and open

1 space; and reduced the number of points available in the rural area to the Public Benefit
2 Rating System Chart. All of these changes reduced the density that can be achieved
3 through performance based cluster platting. The Board must determine compliance based
4 on the changes made by the 2006 amendments. The Rural-3 and Agricultural-3 zones were
5 not amended by Ordinance 2006-36, therefore are not subject to Board review.

6 The Respondent and Intervenors cited two cases from the Central Board that
7 address similar arguments. In *Torrance v. King County*, the Central Board found that the
8 Petitioners failed to challenge the County's original designation in 1994. Instead, nearly two
9 years later, the Petitioners requested that the County re-designate their land, which the
10 County refused to do. The Petitioners filed a petition in 1996, after the County enacted an
11 ordinance amending the original 1994 ordinance. The Board decided the Petitioners' new
12 challenge was a challenge to the original 1994 designation and thus was time-barred.

13 In *Cole, et al., v. Pierce County*, CPSGMHB Case No. 96-3-0009c, FDO, July 31, 1996,
14 the Central Board ruled it did not have jurisdiction to hear an untimely challenge brought in
15 1996, challenging an ordinance passed in 1994. Again, the Central Board decided the
16 challenge was untimely and dismissed the case for lack of jurisdiction.

17 The Petitioner's argument was not that the most recent ordinance, Ordinance 2006-
18 36, was out of compliance. They argued that it did not go far enough to control urban-type
19 densities in the rural areas.

20 **Conclusion:**

21 The Board finds that the Petitioners' challenge is untimely and they have failed to
22 carry their burden of proof and Issue Nos. 1, 2 and 3 are dismissed.

23 **Issue No. 4:**

24 Does Kittitas County Ordinance No. 2006-36 allow for "limited areas of more
25 intensive rural development" in violation of RCW 36.70A.070(5)(d)?
26

1 **Board Analysis:**

2 The Petitioners failed to argue this issue.

3 **Conclusion:**

4 The Board finds that the Petitioners have failed to brief this issue and it is therefore
5 deemed abandoned.

6 **Issue No. 5:**

7 Does Kittitas County Ordinance No. 2006-36 substantially interfere with the
8 fulfillment of the goals of the Growth Management Act and should be declared invalid?

9 **The Parties' Position:**

10 **Petitioners:**

11 The Petitioners contend they have sought review of two separate matters: (1) review
12 of Kittitas County's "failure to act" in adopting implementing and consistent development
13 regulations and (2) review of the performance based cluster platting provisions of
14 Ordinance No. 2006-36. The Petitioners are requesting the invalidation of Ordinance 2006-
15 36 because development and subdivision proposals could vest during the period of remand.
16 According to the Petitioners, invalidation is necessary to protect the directives of the GMA
17 and failure to do so would result in the continued application of an ordinance that
18 substantially interferes with the fulfillment of the goals of the GMA.

19 **Respondent:**

20 The Respondent did not brief this issue.

21 **Intervenors:**

22 The Intervenors argue that the Petitioners can not challenge Ordinance 2005-35 in
23 this proceeding and that the Board has no jurisdiction to invalidate that ordinance. It is the
24 Intervenors' position that the requested invalidity of the 2006 ordinance would simply
25 restore KCC Chapter 16.09 to its 2005 provisions and that the Board should hold that a
26 determination of invalidity with respect to the 2006 amendments would restore the pre-
existing 2005 version of that ordinance.

1 The Intervenors contend that Ordinance 2005-35 was not an interim ordinance as
2 claimed by the Petitioners. Nothing in the text of the ordinance or legislation that enacted it
3 had a requirement that the legislation be reviewed or reenacted to remain in effect. The
4 Intervenors argue that Ordinance 2006-36 amended the existing provisions of KCC Chapter
5 16.09. In addition, the Board has no jurisdiction to consider a challenge to the 2005
6 ordinance or to invalidate that ordinance.

7 The Intervenors argue that the Petitioners have abandoned the issue and have not
8 briefed the issue as required. WAC 242-02-570(1). If the Board invalidates the 2006
9 amendments to KCC Chapter 16.09, they should hold that such invalidation restores the
pre-existing 2005 version of that ordinance.

10 **Petitioners HOM Reply:**

11 The Petitioners argue that they are challenging the 2006 version of KCC Chapter
12 16.09. They contend that the Intervenors have provided an unsupported suggestion to the
13 Board that invalidation of the 2006 ordinance would revive the 2005 version of the
14 ordinance. According to the Petitioners, this position is "unsupported and improper."
15 Petitioners HOM Reply brief at 37. The remedial consequences of invalidation of the 2006
16 ordinance would be to invalidate KCC Chapter 16.09.

17 The Petitioners contend that Washington courts have rejected the automatic revival
18 of previous versions of repealed law. In *El Caba Co. Dormitories, Inc. v. Franklin County*
19 *Public Utility District*, 8 Wn.App. 28 (1972), the court refused to apply the principle of
20 revival absent express language in the amending law to do so. The 2006 version of the KCC
21 Chapter 16.09 does not contain any language that provides for the revival of the 2005
22 version of the ordinance. Therefore, if the Board invalidates the 2006 version, then reviving
the 2005 version would be improper and KCC Chapter 16.09 should be invalidated.

23 **Intervenors Surreply:**

24 The Intervenors argue that a determination of invalidity with respect to the 2006
25 amendments to KCC Chapter 16.09 would restore the pre-existing 2005 version of that
26 ordinance. They contend that the Petitioners cannot challenge the 2005 version of KCC

1 Chapter 16.09, and the Board has no jurisdiction to invalidate that ordinance. In addition,
2 the Intervenors argue that the Petitioners failed to brief this issue in their opening brief, yet
3 in their reply brief they assert that a determination of invalidity would not revive the 2005
4 version.

5 According to the Intervenors, the Petitioners contend that the Board of County
6 Commissioners (BOCC) did not adopt revival language to revive the 2005 ordinance upon
7 the invalidation of the 2006 ordinance. The Intervenors argue that the BOCC did not intend
8 to repeal the 2005 version of KCC Chapter 16.09. The findings in Ordinance 2006-36 state
9 that the BOCC merely intended to modify elements in Chapter 16.09. No section of the
10 2005 ordinance was repealed in its entirety, just modified. The BOCC did not indicate any
11 intent to repeal either version of KCC Chapter 16.09, so the *Schooley v. City of Chehalis*
12 cited by the Petitioners does not apply. *Schooley v. City of Chehalis*, 84 Wn. 667, 147 P.
13 410 (1915). The same situation applies in the Petitioners second cited case, *El Caba Co.*
14 *Dormitories, Inc. v. Franklin County*, 8 Wn.App. 28, 503, P.2d 1082 (1972). The BOCC has
15 not repealed either version of KCC Chapter 16.09 or indicated any intent to do so.

16 According to the Intervenors, a determination that Ordinance 2006-36 is invalid
17 would not repeal that ordinance, nor would it indicate any intent by the BOCC to do so. The
18 ordinance would remain in effect pending an appeal to superior court. The Intervenors
19 argue that the Petitioners cannot directly challenge the 2005 version of KCC Chapter 16.09,
20 and the Board has no jurisdiction to invalidate that ordinance. The Board can only invalidate
21 the changes to KCC Chapter 16.09 created by Ordinance 2006-36.

22 **Board Analysis:**

23 The Board has been asked by the Petitioners to enter a finding of invalidity in this
24 matter. The Board can make such a finding if it first finds that the County is out of
25 compliance and second, that the continued validity of the subject provisions would
26 substantially interfere with the goals of the GMA. Here, the Board has not found the County
out of compliance in the first four issues and the sixth issue involves pre-GMA or non-GMA
regulations. Under the ruling in *Skagit Surveyors v. Friends* 135 W.2d 542 (1998), a Growth

1 Management Hearings Board does not have statutory authority to invalidate pre-GMA
2 development regulations.

3 **Conclusion:**

4 The Board does not find invalidity in this matter.

5 **Issue No. 6:**

6 Has Kittitas County failed to act in reviewing Rural-3 and Agriculture-3 zoning district
7 for compliance with Growth Management Act (GMA) in rural areas?

8 **The Parties' Position:**

9 **Petitioners:**

10 The Petitioners argue that despite the passage of more than ten years, Kittitas
11 County has failed to adopt development regulations that are consistent with and implement
12 its adopted Comprehensive Plan. Pre-GMA regulations have remained in place and are still
13 utilized without review or compliance with the GMA. Specifically, Kittitas County has relied
14 on pre-GMA zoning regulations and refuses to act in amending those regulations and to
15 assure consistency with both the adopted CP and the GMA. According to the Petitioners, the
16 pre-GMA zoning ordinances authorize urban level development in the rural areas, including
17 two rural zoning districts that result in clear violations of statutory directives prohibiting
18 urban sprawl: Agriculture-3 (Ag-3) and Rural (R-3). Both establish minimum lot sizes of
19 three acres with permitted density of one dwelling unit per three acres. The rural density
20 can be doubled through the application of the Performance Based Cluster Subdivision Rules
21 that are incorporated in Ordinance 2006-36. The Petitioners contend that this allows a
22 density of one dwelling unit per one and one-half acres and is in clear violation of the
23 directives of the GMA Boards. The failure to act has resulted in a grossly non-compliant
24 situation in Kittitas County.

25 The Petitioners argue that Kittitas County opted to plan under the GMA on December
26 27, 1990, and is required to adopt a CP and development regulations that are consistent
with and implement the adopted CP per RCW 36.70A.040(4). The statute is clear. The

1 County must adopt development regulations that are consistent with and implement the CP
2 not later than four years from the date the County adopted its resolution of intention. A
3 failure to act claim may be instituted at any time after the deadline for action has passed.
4 WAC 242-02-220(5). The Petitioners cite *Overton Associates v. Mason County*, WWGMHB
5 Case No. 05-2-0009c, FDO, August 25, 2005.

6 Kittitas County adopted its initial CP under the GMA on July 26, 1996, with the
7 adoption of Ordinance 96-10. The County has never undertaken a systematic review of pre-
8 existing development regulations for consistency and implementation of its CP. The
9 Petitioners argue that it is critical that development regulations must be reviewed and
10 approved either contemporaneous with or after the adoption of the CP. WAC 365-195-800
11 describes the relationship between the CP and implementing regulations and WAC 365-195-
12 805 sets forth an "implementation strategy" for development regulations.

13 The Petitioners contend that the County failed to follow the regulatory process
14 required by WAC 365-195-805(2), which is a specific strategy for adoption and/or
15 amendment of development regulations. WAC 365-195-805(3) and (4) require development
16 regulations to be enacted either by a deadline for the adoption of the CP or within six
17 months thereafter. The Petitioners argue that the County clearly contemplated an
18 implementation process that post dated the adoption of the CP and references the
19 Comprehensive Plan Executive Statement. Instead, the County continued to use the pre-
20 GMA regulations.

21 The Petitioners contend that the pre-GMA ordinances were adopted pursuant to the
22 Planning Enabling Act, RCW 36.70, which pre-dated the public participation procedures.
23 Rural-3 was adopted March 3, 1992, and Agricultural-3 was adopted in 1983. There have
24 been no amendments to these density components since initial adoption. The GMA Boards
25 did not exist; there was no appeal procedure available to the public; and amendments were
26 not sent to CTED. The GMA requires that rural areas be protected from inappropriate low-
density sprawl. RCW 36.70A.070(c)(iii). Of particular concern are the zoning ordinances,
which allow for rural densities greater than one dwelling unit per five acres. Under KCC

1 16.09, bonus density and cluster development would allow one dwelling unit per one and
2 one-half acres. This is urban in nature and non-compliant with the GMA.

3 The Petitioners contend that at the heart of the rural land use planning is the
4 determination of permissible density levels. The GMA requires counties to provide a variety
5 of rural densities [RCW 36.70A.070(5)(b)], but is charged with the responsibility of
6 preventing inappropriate conversion of undeveloped land into sprawling, low-density
7 development. According to the Petitioner, all three Growth Boards have "clearly and
8 unequivocally found that minimum lot sizes smaller than five acres are urban designations,
9 not rural." Petitioners HOM Reply brief at 22. The Petitioners cite numerous Hearings
10 Boards cases in support of this statement. In addition, the Petitioners argue that the
11 Eastern Board has said that past practices cannot form the basis for current determinations
12 (*Citizens for Good Governance v. Walla Walla County*, EWGHMB Case No. 01-1-0015c, FDO,
13 May 1, 2002), and that pre-existing patterns cannot be a basis for future planning for new
14 growth on its past development practices, if those practices do not comply with the GMA or
15 the CP (*City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, FDO, May 23,
16 2000).

17 Kittitas County has failed to act with respect to adoption of consistent and
18 implementing development regulations, and continued utilization of pre-GMA ordinances is
19 non-complaint with the GMA.

20 **Respondent:**

21 The Respondent argues that the Rural-3 zone is not a pre-GMA zoning classification,
22 but one of the County's first actions under GMA. The County opted into the GMA in
23 December 1990, and then re-worked its "Forest and Range" classification, which resulted in
24 the creation of the Rural-3 zone in 1992. Further changes were made to the "Forest and
25 Range" classification, which changed the minimum lot size from one acre to twenty acres
26 with the passage of Ordinance 92-6. The Rural-3 zone has subsequently been amended in
1996 and again in 2006.

1 The Respondent contends that the Agriculture-3 zoning was initially enacted prior to
2 the GMA, but has been "acted upon and incorporated into the County GMA planning tools."
3 Respondent's HOM brief at 4. Both the Rural-3 and Agriculture-3 have been changed over
4 the years. For instance, in 1996, the County adopted its earlier version of a Cluster
5 Subdivision Code, which adopted and incorporated the use of Rural-3 and Agriculture-3
6 zoning. In 2001, the County adopted its airport overlay zone, which also incorporated into
7 and recognized the use of one dwelling unit per three acre zoning. The airport overlay zone
8 was upheld by the Board in *Son Vida II v. Kittitas County*, EWGMHB Case No. 01-1-0017,
9 FDO, March 14, 2002. The Board acknowledged that the Kittitas County Code allows for
10 three acre lot density in the rural areas under various areas of our airport overlay zoning
classification and upheld that rural density.

11 The Respondent argues that the courts have also recognized and upheld the use of
12 three acre zoning in rural Kittitas County, citing *Henderson v. Kittitas County*, 124 Wn. App.
13 747, 100 P.3d 842 (2002), and *Woods v. Kittitas County*, 130 Wn. App. 573, 123 P.3d 883
14 (2005).

15 **Intervenors:**

16 The Intervenors argue that the Petitioners have failed to provide a record on which
17 the Board can conduct a review of the failure to act issue by Petitioners and cite WAC 242-
18 202-520, which requires an index to contain sufficient identifying information to enable
19 unique documents to be distinguished. According to the Intervenors, Kittitas County filed an
20 index in this matter and it did not identify any documents related to the Petitioners failure
21 to act claim. The Board is required to base its decision on the record considered by the
22 County in taking the challenged action and the record can not be supplemented unless a
23 party brings a motion to supplement the record. The Petitioners failed to designate the
24 record to support the failure to act claim and did not bring a motion to supplement the
25 record. The Intervenors acknowledge that the record does contain the ordinances used by
26 the County to implement its CP. The Petitioners did not seek to add to or supplement the

1 record to provide the Board and the parties with copies of ordinances and/or regulations,
2 which authorize the reclassification of the zone on site specific parcels.

3 The Intervenors also contend that the Board has no subject matter jurisdiction to
4 consider an untimely challenge to the Kittitas County Code. In addition, the Intervenors
5 argue that Kittitas County has not failed to act because it has adopted development
6 regulations to implement its CP. The County adopted the Rural-3 zone in 1992, and revised
7 it twice. The Agriculture-3 zone existed prior to the adoption of the current Kittitas County
8 CP and was revised in 1993, after Kittitas County opted into the GMA, but prior to the
9 adoption of the CP. This zone was also revised in 1996 and 2006. The Intervenors contend
10 that the reference in the CP incorporating existing three acre density development
11 regulations fulfills the County's obligation to the GMA.

12 According to the Intervenors, there is no prohibition against using pre-existing
13 development regulations or ordinances to implement the CP. Kittitas County was not
14 required to specifically adopt a separate ordinance to implement the development
15 regulations in the County. They contend that all that was required is a clear indication by
16 the County that it intends to use specific pre-existing development regulations to implement
17 its CP and the County must publish the adopted document. The County can incorporate the
18 intended development regulations by reference in the CP. The Intervenors also argue that
19 the County has an amendment process that takes place every year and that gives the
20 citizens of the County an opportunity to seek review of the CP and development regulations.

21 **Petitioners HOM Reply:**

22 The Petitioners address this issue in their Reply brief under 2.2 Kittitas County Has
23 Failed to Act In Adopting Development Regulations Which Are Consistent With and
24 Implement the Adopted Comprehensive Plan. They base their claim on two facts: (1)
25 Kittitas County failed to undertake any systematic review of pre-GMA development
26 regulations following adoption of its CP on July 26, 1996; and (2) the failure to act fueled
urban level development in rural areas. The Petitioners contend that the perpetuation of
three acre zoning (Rural-3 and Agriculture-3) allowed for potential creation of 13,341

1 residential lots, which is an inventory sufficient to accommodate 31,084 people. This is
2 more than the growth projections for the unincorporated area of 5,418 people.

3 The Petitioners contend that Kittitas County failed to act and adopt implementing
4 development regulations and did not properly incorporate pre-GMA regulations into the CP.
5 The County failed to identify a single systematic public process or adopted ordinance
6 reflecting the adoption of pre-GMA development regulations and cite *Durland v. San Juan*
7 *County*, WWGMHB Case No. 00-2-0062c, FDO, May 7, 2001, which in summary says that if
8 existing policies and regulations do not meet certain GMA requirements, then counties have
9 a duty to adopt new ones.

10 The Petitioners argue that *Citizens for Mount Vernon v. City of Mount Vernon*, 133
11 Wn.2d 861, 873-874, 947 P.2d 1208 (1997) addressed the exact circumstances found in
12 this case. The court held that the newly adopted comprehensive plan provisions were
13 subordinate to pre-existing zoning ordinances. The Petitioners contend that the practical
14 implications of this case are that a GMA comprehensive plan has no practical or legal impact
15 until implementing development regulations are adopted pursuant to statutory directives.
16 The Petitioners also cite *Cingular Wireless. LLC v. Thurston County*, 131 Wn.App. 756, 769,
17 129 P.3d 300 (2006), and *Lakeside Industries v. Thurston County*, 119 Wn.App. 886, 894,
18 83 P.3d 433 (2004). The implementation of a comprehensive plan cannot occur without the
19 subsequent adoption of consistent and implementing development regulations. According to
20 the Petitioners, the sole remedy available to the public is the failure to act proceeding.

21 Despite the BOCC's recognition of the need for public participation in developing
22 regulations, they failed to implement a public participation process or develop an
23 "implementation strategy" required by WAC 365-195-805. The Petitioners contend the
24 County started a process several times, but failed to have a public process. According to the
25 record, no hearing or action was ever taken on the zoning, subdivision or critical areas
26 codes, and the BOCC adopted amendments to the code on January 19, 1999. There was
"utter failure to notify or involve the public in the process of adopting the implementing
development regulations." Petitioners HOM Reply brief at 20.

1 The Petitioners contend the Intervenors' argument that there is no prohibition
2 against using pre-existing development regulations as adopted by Kittitas County fails for
3 lack of reference to a specific ordinance or resolution, which adopted pre-existing
4 development regulations. In addition, no authority is offered that a purported statement of
5 "clear indication" satisfies the statutory requirements of RCW 36.70A.040(4)(d). The words
6 "shall adopt" mean just that. The County's CP Executive Statement also recognizes that the
7 development regulations must be adopted to achieve the objectives of the CP.

8 The Petitioners also contend that the review and adoption of implementing and
9 consistent development regulations may not be undertaken on a piecemeal basis. The
10 Intervenors and Respondent do not offer any support for this proposition, which is in direct
11 conflict with regulations regarding implementation. Six months is allowed between CP
12 adoption and adoption of implementing development regulations. WAC 365-195-810. The
13 CP and development regulations implementing the CP must occur within six months with
14 public participation and notice clearly advising that the pre-GMA regulations will be
15 reviewed for consistency with the adopted CP.

16 The Petitioners argue that four out of five ordinances cited by Kittitas County pre-
17 dated the adoption of the CP. The County makes the argument that the Rural-3 zone is not
18 a pre-GMA zoning classification, but does not reference the Agriculture-3 zoning because
19 this ordinance was adopted in 1983. Kittitas County relies on three ordinances to establish
20 legal predicate that the zoning ordinances adopting three acre rural densities were
21 undertaken pursuant to the GMA. The Petitioners contend these ordinances were all
22 adopted pursuant to the Planning Enabling Act, RCW 36.70. This act does not contain
23 guidelines or requirements with regard to urban growth areas; rural land use or densities;
24 identification or protection of resource lands; or statutory review or appeal mechanisms.

25 The Petitioners contend that the County failed to analyze permissible rural densities
26 because there were no designated urban growth areas and no statutory directives
mandating a rural element in the CP. In 1997, the legislature passed a series of
amendments. The first was a requirement to include in the CP a rural land use element. The

1 second was specific direction with respect to land uses that were permitted in rural areas.
2 Kittitas County adopted a rural component at a later point in time than its CP.

3 The fifth ordinance cited by Kittitas County, Ordinance No. 2001-10, adopted in
4 2001, relates to the creation of an Airport Safety Overlay zone. According to the Petitioners,
5 this ordinance has nothing to do with review and confirmation of pre-existing zoning
6 districts (Rural-3 and Agriculture-3) and their consistency with the CP.

7 The Petitioners argue that there is no record in a failure to act claim because Kittitas
8 County failed to act. They contend that there were no notices to the public or agencies, no
9 public hearings, no testimony accepted from the public, and no decision adopted by the
10 local jurisdiction. There is an absence of action with respect to this matter, and the Kittitas
11 County Conservation group has not found any action with respect to the adoption of
12 implementing regulations in its hunt for records.

Intervenors Surreply:

13 The Intervenors argue that the Board has no authority to invalidate the Agriculture-3
14 and Rural-3 zones with respect to the issue of did Kittitas County fail to act. This is beyond
15 the issue Petitioners requested the Board to review. The Intervenors contend the issue is
16 framed differently because the Board corrected the misspelled words in the issue language.
17 The Intervenors argue that the Petitioners' new requested relief found in the Petitioners'
18 Reply Memorandum is beyond the issues Petitioners asked the Board to review. The
19 Intervenors contend that if the Board were to conclude that Kittitas County did fail to act,
20 then the Board will have concluded that Kittitas County's Rural-3 and Agriculture-3 zones
21 are pre-GMA development regulations and the remedy to the Board is to order Kittitas
22 County to act and specifically set a compliance schedule for the County to adopt GMA
23 compliant development regulations.

24 The Intervenors argue that in *Skagit Surveyors and Engineers, LLC v. Friends of*
25 *Skagit County*, 135 Wn.2d, 542, 568, 958 P.2d, 962 (1998), the court concluded that the
26 Growth Management Hearings Boards do not have the jurisdiction to invalidate pre-GMA
zoning regulations and the Petitioners acknowledge this in their HOM brief. But in the

1 Petitioners Reply brief, they seek invalidation of the Agriculture-3 and Rural-3 zoning
2 designations. This is the first time they have done so.

3 The Intervenors contend that if the Board determines that Kittitas County is not in
4 compliance with the GMA, then the Board should remand the matter to the County with an
5 order to comply with the requirements of Chapter 36.70A.

6 **Board Analysis:**

7 Kittitas County opted into the Growth Management Act voluntarily on December 27,
8 1990. On July 26, 1996, Kittitas County adopted its Comprehensive Plan. (Ordinance No.
9 96-10). Ordinance No. 96-10 dealt only with the adoption of the County's Comprehensive
10 Plan and did not consider or adopt either existing zoning ordinances or other development
11 regulations for purposes of implementing the Kittitas County Comprehensive Plan.

12 In 1983, Kittitas County adopted the "Kittitas County Zoning Code". Various Zoning
13 districts were established, including Agricultural-3. Rural-3 zone was adopted in 1992.
14 (Ordinance No. 92-4). Both Agricultural-3 and Rural-3 zones established a minimum
15 residential lot size of three acres. (KCC 17.28.030).

16 The Petitioners contend Kittitas County failed to adopt development regulations that
17 are consistent with and implement its adopted Comprehensive Plan. They state the County
18 is using pre-GMA regulations that have remained in place and been utilized without review
19 or compliance with the Growth Management Act. They believe this inaction is in violation of
20 RCW 36.70A.040(4). In that statute, the County is required to adopt a comprehensive plan
21 and development regulations that are consistent with and implement the comprehensive
22 plan no later than four years from the date the County legislative authority adopts its
23 resolution of intention to plan under the GMA.

24 The County contends that these regulations were adopted to comply with the GMA.
25 They referenced five other ordinances as a basis for asserting that Rural-3 and Agriculture-3
26 were adopted under GMA and implement its Comprehensive Plan. Four of the five listed
ordinances were also adopted prior to the adoption of the County's Comprehensive Plan.
The fifth deals with an airport overlay zoning district.

1 The record is sufficient to determine whether the County properly readopted the pre-
2 GMA and Non-GMA regulations to implement their CP. The record is as the Petitioners
3 contend, void of any re-adoption legislation, public participation, or review sufficient to
4 comply with the requirements of the GMA. The record shows only references to Rural-3 and
5 Agriculture-3 at various places in the Comprehensive Plan or other regulations. Clearly,
6 more must occur before a pre-GMA ordinance becomes a regulation, which implements the
7 Comprehensive plan. This is certainly true for the Agriculture-3 zone district. The
8 Agriculture-3 land use zone was adopted in 1983, prior to the legislative adoption of the
9 GMA. The contention that Rural-3 was adopted as part of the GMA also fails where the
10 Comprehensive Plan, which was to be implemented, did not exist until four years later. The
11 claim that Rural-3 was adopted as part of the GMA is not supported by any reference in the
12 adopting resolution that it was part of the GMA process. A newly published decision from
13 the Court of Appeals Division II looks at Thurston County's resolution's findings to
14 determine if the actions taken were part of the review of regulations as required under RCW
15 36.70A.130(1)(a). (*Thurston County v. Western Wa Growth Management Hearings Board*,
16 04/03/07, 05-2-01833-7). Here, there are no findings demonstrating that either the 1983 or
17 1992 regulations were adopted pursuant to the GMA.

18 In the adoption of the two zoning districts, the County did not provide pre-adoption
19 notice, notifying the public that the County was considering the adoption of these
20 regulations as regulations implementing its Comprehensive Plan in compliance with the
21 GMA. If it was the intent of the County to incorporate these two regulations into its GMA
22 process and implementing its Comprehensive Plan, the County needed to do more. A
23 jurisdiction cannot simply decide, without public hearing, that a non-GMA action has
24 suddenly been "blessed" as meeting the requirements of the GMA. Instead, the local
25 government's legislative body, when enacting a GMA regulation, must make a specific
26 determination that the pre and non-GMA action complies with the GMA. This can only be
done after permitting the public the opportunity to comment upon the proposal. To hold

1 otherwise would mock the GMA's citizen participation goal at RCW 36.70A.020 (11), which
2 states:

3 Encourage the involvement of citizens in the planning process and ensure
4 coordination between communities and jurisdictions to reconcile differences.

5 If the County intends to have non-GMA ordinances or pre-Comprehensive Plan
6 regulations meet the RCW 36.70A.040 requirement, procedurally it must do so by a
7 legislative enactment that explicitly incorporates these specific pre-existing documents.

8 Furthermore, attempting to do this by way of a mere reference in the Comprehensive
9 Plan or other regulations does not suffice. The County must review the regulations for
10 consistency with the CP, give specific notice of its action to the public, and provide for
11 public participation with full knowledge that the regulations would be re-adopted to
12 implement the County's CP. The County must also give post-adoption notice as required by
13 RCW 36.70A.290(2). Otherwise, until and unless such a legislative enactment either adopts
14 new regulations or pre-existing (pre-GMA) regulations to comply with the requirements of
15 RCW 36.70A.060, no action pursuant to the GMA has taken place.

16 The County failed to act in order to comply with the requirements of RCW
17 36.70A.170 and .060. A key to this conclusion is that the County failed to provide any notice
18 or conduct a public hearing regarding the incorporation of these regulations into the GMA
19 process.

20 Simply listing non-GMA and pre-GMA statutes and regulations does not
21 comply with GMA requirements. The record must reflect how such regulations and
22 laws were sufficient and reflect that public participation requirements had been
23 completed in order to comply with the GMA. *WEC v. Whatcom County*, WWGMHB
24 Case No. 95-2-0071, Compliance Order, September 12, 1996. *FOSC v. Skagit*
25 *County*, WWGMHB Case No. 95-2-0075, FDO, January 22, 1996.

26 "Reliance on pre-GMA designations and regulations without public
participation and new legislative action did not comply with the Act, *Friends of*
Skagit County." *Achen v. Clark County*, WWGMHB Case No. 95-2-0067, FDO,
September 20, 1995.

1
2 In *Friends of the Law v. King County, et al.*, the Central Board specified what is
3 necessary for a jurisdiction to use pre-existing ordinances:

4 If the County at its discretion elects to incorporate by reference specific pre-
5 existing ordinances or regulations to now comply with the Growth
6 Management Act (GMA), it must do so by legislative enactment. Therefore, if
7 the County elects to use such ordinances or other regulations to comply with
8 the GMA, the County shall provide public notice; clearly indicating its intention
9 to do so; specify which pre-existing regulations or ordinance it is relying upon;
10 hold at least one public hearing; and publish notice of the adopted ordinance
11 pursuant to RCW 36.70A.290(2)." *Friends of the Law vs. King County, et al.*,
12 CPSGMHB Case No. 94-3-0003, Order on Dispositive Motions, April 22, 1994.

13 The County did none of this. The Board finds there was clear and convincing
14 evidence that the County failed to act when it failed to adopt regulations implementing its
15 CP, review Agriculture-3 and Rural-3 regulations for consistency with its Comprehensive
16 Plan, and provide for proper notice and public participation.

17 **Conclusion:**

18 The Petitioners have carried their burden of proof and have shown by clear
19 convincing evidence that the County clearly erred by failing to adopt regulations
20 implementing its CP or properly reviewing existing regulations for consistency with the
21 County's CP with proper notice and public participation.

22 **VI. FINDINGS OF FACT**

- 23 1. Kittitas County is a county located east of the crest of the Cascade
24 Mountains and has chosen to plan under Chapter 36.70A.
25 2. Petitioners are citizens of Kittitas County and participated in the
26 adoption of Kittitas County Ordinance 2006-36.
3. Kittitas County opted into the GMA voluntarily on December 27, 1990,
adopted its Comprehensive Plan, Ordinance 96-10, on July 26, 1996,
adopted Ordinance 2005-35 on November 2, 2005, and adopted
Ordinance 2006-36 on August 16, 2006.

- 1 4. Petitioners filed a timely petition on October 12, 2006, and raised six
- 2 legal issues.
- 3 5. Kittitas County tried to incorporate by reference pre-existing
- 4 regulations, specifically Agricultural-3 zoning and Rural-3 zoning.
- 5 6. The County, in adopting pre-existing regulations, failed to provide the
- 6 opportunity for public participation, specify which pre-existing
- 7 regulations it was re-adopting or adopting to implement its CP, hold at
- 8 least one public hearing, and publish notice of the adopted regulations.
- 9 7. The County failed to review Agriculture-3 and Rural-3 regulations for
- 10 consistency with its CP and provide the proper notice and public participation.
- 11 8. The Board determined that the Petitioners' arguments on Issue Nos. 1, 2 and
- 12 3 were directed toward, and in response to, Ordinance 2005-35, rather than
- 13 Ordinance 2006-36. Petitioners did not timely seek review of Ordinance 2005-
- 14 35 within 60 days as required by RCW 36.70A.290(2), so are thus time-barred
- 15 from further action on this ordinance.
- 16 9. The Petitioners failed to carry their burden of proof on Issue Nos. 1, 2
- 17 and 3.
- 18 10. The Board finds that Issue No. 4 was not addressed by the Petitioner
- 19 and was deemed abandoned.
- 20 11. The Board determined that there was not a basis for invalidity and
- therefore dismissed Issue No. 5.

VII. CONCLUSIONS OF LAW

- 21 1. This Board has jurisdiction over the parties to this action.
- 22 2. This Board has jurisdiction over the subject matter of this action.
- 23 3. The Petitioners have standing to raise the issues listed in the Petition
- 24 for Review.
- 25 4. The Petition for Review in this case was timely filed.

- 1 5. The Board has jurisdiction over the action taken by the County in
2 Ordinance 2006-36, but not Ordinance 2005-35.
- 3 6. The Board has determined that Kittitas County failed to act by failing to
4 adopt regulations implementing its CP or properly reviewing existing
5 regulations for consistency with the County's CP with proper notice and
6 public participation.

7 **VIII. ORDER**

- 8 1. The Board finds that the Petitioners failed to carry their burden of proof on
9 Issues 1, 2 and 3 and abandoned Issue 4.
- 10 2. The Board finds the Petitioners have carried their burden of proof on Issue 6
11 and that the County's actions are clearly erroneous. The County is found out
12 of compliance on Issue No. 6 (failure to act).
- 13 3. Kittitas County must take the appropriate legislative action to bring
14 itself into compliance with this Order by **July 23, 2007, 110 days**
15 from the date issued. The following schedule for compliance, briefing
16 and hearing shall apply:
- 17 • The County shall file with the Board by **July 30, 2007, an original**
18 **and four copies** of a Statement of Actions Taken to Comply (SATC)
19 with the GMA, as interpreted and set forth in this Order. The SATC shall
20 attach copies of legislation enacted in order to comply. The County
21 shall simultaneously serve a copy of the SATC, with attachments, on
22 the parties. **By this same date, the County shall file a**
23 **"Remanded Index," listing the procedures and materials**
24 **considered in taking the remand action.**
 - 25 • By no later than **August 13, 2007**, Petitioners shall file with the Board
26 an **original and four copies** of Comments and legal arguments on
the County's SATC. Petitioners shall simultaneously serve a copy of
their Comments and legal arguments on the parties.
 - By no later than **August 20, 2007**, the County and Intervenors shall
file with the Board an **original and four copies** of their Response to

1 Comments and legal arguments. The County shall simultaneously serve
2 a copy of such on the parties.

- 3 • By no later than **August 27, 2007**, Petitioners shall file with the Board
4 an **original and four copies** of their Reply to Comments and legal
5 arguments. Petitioners shall serve a copy of their brief on the parties.
- 6 • Pursuant to RCW 36.70A.330(1) the Board hereby schedules a
7 telephonic Compliance Hearing for **September 5, 2007, at 10:00**
8 **a.m.** The parties will call **360-357-2903 followed by 17047 and**
9 **the # sign**. Ports are reserved for Mr. Carmody, Mr. Hurson, Mr. Cook,
10 Mr. Crittenden, and Mr. Slothower. If additional ports are needed
11 please contact the Board to make arrangements.

12 If the County takes legislative compliance actions prior to the date set forth in
13 this Order, it may file a motion with the Board requesting an adjustment to this
14 compliance schedule.

15 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**

16 **Reconsideration:**

17 Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this
18 Order to file a petition for reconsideration. Petitions for reconsideration shall
19 follow the format set out in WAC 242-02-832. The original and four (4) copies of
20 the petition for reconsideration, together with any argument in support thereof,
21 should be filed by mailing, faxing or delivering the document directly to the
22 Board, with a copy to all other parties of record and their representatives. **Filing**
23 **means actual receipt of the document at the Board office.** RCW 34.05.010(6),
24 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite
25 for filing a petition for judicial review.

26 **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.

1 **Enforcement:**

2 The petition for judicial review of this Order shall be filed with the appropriate
3 court and served on the Board, the Office of the Attorney General, and all parties
4 within thirty days after service of the final order, as provided in RCW 34.05.542.
5 Service on the Board may be accomplished in person or by mail. Service on the
6 Board means actual receipt of the document at the Board office within thirty
7 days after service of the final order.

6 **Service:**

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

9 **SO ORDERED** this 3rd day of April 2007.

10 EASTERN WASHINGTON GROWTH MANAGEMENT
11 HEARINGS BOARD

12
13 _____
14 John Roskelley, Board Member

15 _____
16 Dennis Dellwo, Board Member

17 _____
18 Joyce Mulliken, Board Member