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

KATHY MIOTKE, JULIA McHUGH,
NEIGHBORHOOD ALLIANCE OF SPOKANE,
and PALISADES NEIGHBORHOOD,

Petitioners,

v.

SPOKANE COUNTY,

Respondent.

Case No. 07-1-0005

FINAL DECISION AND ORDER

I. SYNOPSIS

On February 14, 2006, the Eastern Washington Growth Management Hearings Board (Board) issued its Final Decision and Order (FDO) finding Spokane County's (County) Resolution No. 5-0649, expanding the urban growth area (UGA) into Five Mile Prairie, out of compliance with the Growth Management Act (GMA). In that decision, the Board found the County's expansion of the UGA was in error. The County failed to prepare a population and land quantity analysis as required by the GMA; failed to engage in joint planning as required; failed to plan for capital facilities, utilities, and transportation within the land

1 affected by Resolution No. 5-0649; and failed to "show its work" in the expansion of the
2 UGA. The County further failed to insure that these changes were consistent with its
3 Comprehensive Plan (CP) and development regulations.

4 On December 16, 2005, the Board issued its FDO for Case No. 05-1-0004 finding
5 Spokane County out of compliance with the GMA. In that decision, the Board found the
6 County's expansion of the UGA in the West Plains of Spokane County was in error prior to
7 the County's review and updating of its Capital Facilities Plan (CFP) covering the area
8 added; the County's failure to update a population and land quantity analysis showing that
9 an expansion of the UGA is needed; and prior to the County formally consulting with the
10 airport owners, managers, operators, pilots and Aviation Division of DOT as required by
11 RCW 36.70A.547. The County was directed to "take the appropriate legislative action to
12 bring itself into compliance with this order...." (P. 30, FDO December 16, 2005).

13 The County chose to perform the missing steps at the same time as the mandated
14 update of the County's Comprehensive Plan. With that update, the County would perform a
15 review and amendment of the Capital Facilities Plan and perform a population and land
16 quantity analysis. The contact with the airports and their personnel, and the DOT was to
17 occur separately. The County, upon being found out of compliance twice due to the delay in
18 the process, chose to repeal Resolution 2005-0365, thus causing the Comprehensive Plan –
19 Land Use Map and the UGA to revert to its former state prior to the adoption of the
20 amendments to which Petitioners objected. In both these cases, the majority of the Board
21 found the County in compliance with the FDO entered in that case.

22 A new petition was filed objecting to the repeal of Resolution 2005-0365, contending
23 such a reduction of a UGA cannot occur without performing necessary steps to consider the
24 impact of the urban growth that has occurred in the once expanded UGA. The Board finds
25 the Petitioners have carried their burden of proof and have shown that the County's actions
26 are clearly erroneous.

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II. INVALIDITY

While the County is found out of compliance, the Board does not make a finding of invalidity in this matter at this time. As is allowed by the GMA, the Board can review the question of such a finding and impose invalidity in the future should it feel it is appropriate. RCW 36.70A.330(4).

III. PROCEDURAL HISTORY

On March 21, 2007, KATHY MIOTKE, JULIA McHUGH, NEIGHBORHOOD ALLIANCE OF SPOKANE, and PALISADES NEIGHBORHOOD, by and through their representative, Rick Eichstaedt, filed a Petition for Review.

On April 17, 2007, the Board issued its Prehearing Order.

On May 2, 2007, the Board received Respondent's Motion and Memorandum in Support of Motion to Dismiss Petition or in the Alternative to Strike Issues in Petition for Review.

On May 7, 2007, the Board received Petitioners' Motion and Memorandum in Objection to Portions of Respondent's Index of Record and to Strike Extra-Record Materials.

On May 31, 2007, the Board received Respondent's Motion to Extend Time for Filing of Reply Memorandum Regarding Dispositive Motions and Reply Memorandum in Support of Motion to Dismiss Petition or in the Alternative to Strike Issues in Petition for Review.

On June 5, 2007 the Board held a Motion's Hearings. Present were Dennis Dellwo, Presiding Officer and Board Members John Roskelley and Joyce Mulliken. Present for Petitioner was Rick Eichstaedt. Present for Respondent was Dave Hubert.

On June 11, 2007, the Board issued its Order on Motions.

On July 23, 2007, the Board held the hearing on the merits. Present were Dennis Dellwo, Presiding Officer and Board Members John Roskelley and Joyce Mulliken. Present for Petitioners was Rick Eichstaedt. Present for Respondent was Dave Hubert.

1 **IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF**
2 **REVIEW**

3 Comprehensive plans and development regulations (and amendments thereto)
4 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
5 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to
6 demonstrate that any action taken by the respondent jurisdiction is not in compliance with
7 the Act. The Board ". . . shall find compliance unless it determines that the action by the .
8 . . . County. . . is clearly erroneous in view of the entire record before the Board and in light
9 of the goals and requirements of [Growth Management Act]." RCW 36.70A.320. To find an
10 action clearly erroneous, the Board must be ". . . left with the firm and definite conviction
11 that a mistake has been committed." *Department of Ecology v. Central Puget Sound*
Growth Management Hearings Board, 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

12 The Hearings Board will grant deference to counties and cities in how they plan
13 under Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated,
14 "local discretion is bounded, however, by the goals and requirements of the GMA." *King*
15 *County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561,
16 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County*, and
17 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
18 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and
19 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31
20 P.3d 28 (2001).

21 The Hearings Board has jurisdiction over the subject matter of the Petition for
22 Review. RCW 36.70A.280(1)(a).

23 **V. ISSUES AND DISCUSSION**

24 **Issue No. 1:**

25 Did Spokane County violate the letter and the spirit of Growth Management Act
26 36.70A et. seq., including RCW 36.70A.010, RCW 36.70A.020, and RCW 36.70A.110, when
it reversed UGA Amendments 03-CPA-31 through 36 and 04-CPA-01, allowing urban growth
outside of the urban growth boundary and permitting unplanned and uncoordinated growth

1 without adequate consideration of capital facilities, environmental/critical area protection,
2 sprawl reduction, and the planning and protection of rural areas?

3 **The Parties' Position:**

4 **Petitioners:**

5 The Petitioners contend the County's action, the adoption of Resolution 07-0077,
6 violates the GMA's clear prohibition of urban development outside of the UGA in two ways:
7 (1) reversing the previously adopted UGA designation and (2) failing to recognize and
8 address urban development that has and will continue to occur in those areas.

9 The Petitioners cite the Legislative Findings governing the GMA: "[t]hat
10 uncoordinated and unplanned growth, together with a lack of common goals expressing the
11 public interest in the conservation and the wise use of our lands, pose a threat to the
12 environment, sustainable economic development, and the health, safety and high quality of
13 life enjoyed by the residents of this state." RCW 36.70A.010.

14 The Petitioners cite *Quadrant Corp. V. State Growth Management Hearings Bd.*, 119
15 Wash. App. 562, 567, (Wa. Ct. App. 2003) to support their contention the GMA prohibits the
16 inappropriate conversion of undeveloped land into sprawling, low-density development.
17 The Petitioners also point out that urban growth is prohibited outside UGAs, citing
18 *Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-2-0010, Final
19 Decision and Order (June 3, 1994). The Petitioners argue Resolution 07-0077 has the
20 effect of eliminating previously designated UGAs and causing urban growth to occur outside
21 of UGAs and is prohibited by the GMA. The Petitioners contend the action of first creating a
22 UGA, then allowing urban development to vest at low or medium density residential, then
23 reversing the UGA without regard for or analysis of that development, clearly violates the
24 GMA. They believe this is the specific type of urban development the GMA seeks to
25 prevent. The County cannot simply redraw its UGA to allow urban growth outside the UGA.

26 The Petitioners contend the County's action is inconsistent with the fundamental
goals of the GMA that prohibit development outside of the UGA, prohibit sprawl and require

1 adequate public facilities and services. The Petitioners list Goal 1, Urban Growth; Goal 2,
2 Reduce Sprawl; and Goal 12, Public Facilities and Services; and demonstrate how the
3 actions of the County violate each of these Goals. The violation of these three Goals and the
4 failure to adequately consider environmental and critical areas impact are offered as the
5 basis for a finding of non-compliance in Issue No. 1.

6 **Respondent:**

7 The County argues Resolution 07-0077 was not a new or additional amendment of
8 the UGA boundary, but a repeal of the previous additions to the UGA boundary that were
9 found to be non-compliant with the GMA. The County contends this Petition is simply the
10 Petitioners' objection to the finding of compliance in cases numbered 05-1-0004 and 05-1-
11 0007 previously decided by this Board. The County argues the issues raised by the
12 Petitioners are identical to those already decided by this Board. Time for reconsideration of
13 the previous decisions has passed and a different decision herein would be in direct
14 contradiction of the findings in the previous two cases.

15 The County observes that the applications for preliminary plats vested prior to the
16 Final Decisions and Orders in the 2005 cases and are presumed to be GMA compliant. The
17 vesting freezes the development regulations and land use controls for the development of
18 the proposed plats which exist at the time of the vesting of the applications.

19 The County contends the legislative intent section contains no requirements and
20 therefore the County cannot be in violation of that section.

21 Under the presumption that the Comprehensive Plan and the UGA boundary are GMA
22 compliant at the time of the vesting of the preliminary plan applications, there is no basis
23 upon which to conclude that the development on the properties not outside of the UGA at
24 the time of vesting, are non-compliant with the GMA.

25 **Petitioners HOM Reply:**

26 Spokane County violated the GMA by diminishing the UGA in an area characterized
by urban development without considering capital facilities, environmental/critical area
protection, sprawl reduction, and protecting of rural areas. The County's arguments in its

1 defense in regards to Issue No. 1 are that: (1) RCW 36.70A.010 is unenforceable and (2)
2 projects on the impacted properties are vested.

3 First, *City of Spokane v. Spokane County*, Case No. 06-1-0002, Final Decision and
4 Order (EWGMHB, November 27, 2006), held that RCW 36.70A.010 is enforceable.

5 Second, and more importantly, regardless of the fact that these projects have
6 vested, nothing in the GMA allows the County to remove urban development from its UGA.
7 The vesting of these projects occurred prior to the adoption of Resolution 07-0077. The
8 record clearly indicates the County was aware of this and decided to remove this urban
9 development from Spokane's UGA anyway. The County did not and cannot cite any legal
10 authority that allows a jurisdiction to remove urban development from its UGA. Indeed, as
11 set forth in Petitioners' opening brief, such an action is claimed to violate the objectives of
12 RCW 36.70A.010, the mandate of RCW 36.70A.110(1) (confining urban growth to UGAs),
13 and the Goals contained in RCW 36.70A.020(1), (2), (12).

14 The Petitioners contend the challenge is to an entirely separate Comprehensive Plan
15 amendment and, therefore is not barred by *res judicata* or collateral estoppel. They believe
16 the County is confusing compliance with the Board's Final Decisions and Orders in the two
17 previous cases with compliance with other provisions of the Growth Management Act and
18 the State Environmental Policy Act raised here. Petitioners are not re-litigating the previous
19 cases. Instead, Petitioners argue that Resolution 07-0077 independently and separately
20 violates state law. Moreover, while some of the issues may appear similar, the facts of
21 these cases clearly distinguish them. In the *Miotke* and *McHugh* cases, Petitioners
22 challenged the unlawful expansion of the UGA and the associated adverse impacts. Here,
23 Petitioners challenge the diminishment of the UGA and the associated impacts. These are
24 clearly two separate actions with two separate records.

25 The Petitioners contend the Board's review of this matter in fact includes a new
26 record and Petitioners bear the burden to show the County's GMA violations in light of that
27 new record. In *City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*,
28 the Court of Appeals rejected the application of the doctrine of *res judicata* to a challenge of

1 a UGA expansion and designation of land as urban commercial on a parcel of land, where
2 the previous challenge was to designate the land agricultural. 154 P.3d 936, 949 (Wa. Ct.
3 App. 2007). The Court rejected arguments that challenges of similar actions on the same
4 piece of property should be bound by *res judicata* largely because the record supporting
5 such action is unique to each action and the burden of proof is applied specifically to that
6 record.

7 The County also asserts the issues presented in this case are barred by the doctrine
8 of collateral estoppel. Here, the Petitioners contend it is clear the issues in the various
9 proceedings are not identical, but in fact, are very different. Here, the Board is reviewing
10 the adequacy of the County Resolution 07-0077, including whether in adopting that
11 resolution the County violated SEPA and whether it has encouraged urban growth outside of
12 a UGA. On the other hand, the previous cases considered whether the County's inclusion of
13 certain areas into the UGA was lawful, particularly whether the County consulted with
14 airports, conducted a land quantity analysis, and updated its capital facilities plan. This
15 Board's previous orders in those cases did not consider whether the County complied with
16 the GMA in the act of undoing the UGA. In fact, the County argued, and the Board
17 accepted, that the Board lacked jurisdiction to do so in those proceedings!

18 **Board Analysis:**

19 The Petitioners are asking the Board to consider whether Spokane County can
20 reduce its UGA without adequate consideration of capital facilities, environmental/critical
21 area protection, sprawl reduction, and the planning and protection of rural areas. The
22 County says this is not a requirement where that UGA had been found out of compliance.

23 The County first contends these issues are barred by *Res judicata*. In order to
24 succeed on a claim of *res judicata*, the County must demonstrate that "the prior judgment
25 has 'a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause
26 of action, (3) persons and parties, and (4) the quality of the persons for or against whom
the claim is made.'" In re *Election Contest Filed by Coday*, 156 Wash.2d 485, 500-01, 130
P.3d 809 (Wa. 2006) (*quoting Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763, 887

1 P.2d 898 (Wa. 1995)).

2 Here, the subject matter is different – the adoption of a UGA versus the withdrawal
3 of the designation of a UGA. The actions subject to this appeal occurred more than two
4 years after the Comprehensive Plan amendments challenged in the earlier *McHugh/Miotke*
5 proceedings. In those cases, Petitioners challenged the adoption of Comprehensive Plan
6 amendments 03-CPA-31 through 36 and 04-CPA-01, which expanded Spokane County's
7 UGA into areas of the Five Mile Prairie and West Plains of Spokane County. There, the
8 Petitioners argued that the adoption of the UGAs failed to include a capital facilities plan
9 update, consult with airports, and other actions specific to the expansion of the UGA
10 boundary. Here, the Petitioners challenge a different County action (Resolution 07-0077)
11 and raise some similar, but otherwise different claims. This matter is not barred by *Res*
12 *Judicata*.

13 The County also asserts that the issues presented in this case are barred by the
14 doctrine of collateral estoppel. Motion to Dismiss at 7-9. The doctrine of collateral estoppel
15 bars re-litigation between the same parties on an issue of ultimate fact that has been
16 already determined by a valid and final judgment. *Ashe v. Swenson*, 397 U.S. 436, 443
17 (1970). Collateral estoppel applies only where: (1) the issues presented in both cases are
18 identical; (2) there was a final judgment on the merits in the first action; (3) the party
19 against whom the doctrine is asserted was a party to or in privity with a party to the prior
20 action; and (4) application of the doctrine does not work an injustice against the party to
21 whom it is applied. *State v. Barnes*, 85 Wn. App. 638, 650, 932 P.2d 669, *review denied*,
22 133 Wn.2d 1021 (Wa. 1997).

23 As stated above, the issues in both cases are not identical. While the parties are the
24 same and there was a final judgment on the merits in the first action, the Petition before
25 the Hearings Board raises new issues resulting from a different action of the County. This
26 action is not barred by the doctrine of collateral estoppel.

Issue No. 1 raises an unusual concern. There is no specific provision in the GMA
which requires the County to follow a set procedure in the reduction of a UGA which existed

1 for sufficient time to allow urban growth to locate within the area. This is an issue of first
2 impression. The process for the designation of a UGA is very clear. The County must first
3 conduct a proper Land Quantity and Population Analysis, engage in joint planning, update
4 its Capital Facilities Plan and, in some cases, consult with airports and aviation officials.
5 SEPA procedures must also be followed as required by law. Upon proper completion of such
6 actions the County will determine if an expansion of its UGAs is needed. If the expected
7 population may be contained within the existing UGAs, the expansion should not take place.

8 The Board finds the reduction of the size of an existing UGA requires similar actions,
9 which are not reflected in the record before us in this matter. The County did not consult
10 with the City of Spokane or other jurisdictions abutting Spokane County, other than the
11 public notice issued for the hearings prior to the subject action. The County adopted the
12 SEPA review and finding of Non-significance issued two years before in the expansion of the
13 UGAs. There was no contact with the aviation community described in RCW 36.70A.547;
14 the Capital facilities plan was not reviewed; and the existence of services for urban
15 development in the area was not reviewed.

16 The reduction of the size of an existing UGA can have the result of allowing urban
17 densities in rural areas. The result might also be that these densities are without the
18 services required. The example given by the Petitioners, while extreme, still raises the
19 pitfalls of reducing the UGA without consultation, SEPA review and facilities review. The
20 example was the reduction of the City of Spokane's UGA to eliminate a portion of the
21 densely developed South Hill. The City of Spokane should be consulted. This was not done.
22 The services for that area should have been examined, etc. Also, it would be unacceptable
23 to exclude such an urban area from the UGA. This would clearly be a violation of the GMA
24 requirements found in RCW 36.70A.110.

25 **Conclusion:**

26 The Petitioners have carried their burden of proof and shown that the reduction of
the UGAs without following the proper procedures by the County is clearly erroneous and
such reductions are found out of compliance with the GMA.

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2 **Issue No. 2:**

3 Did Spokane County fail to comply with the Growth Management Act, including RCW
4 36.70A.010, RCW 36.70A.020, RCW 36.70A.070, RCW 36.70A.110, RCW 36.70A.210, by:
5 (a) failing to fully participate in joint planning; (b) failing to coordinate with other
6 jurisdictions; and (c) encouraging growth where inadequate public facilities and services
7 exist when it took legislative action to reverse the UGA expansion without any evidence of
8 consultation with local jurisdictions/service providers and evidence that it considered the
9 effects of UGA reversal?

10 **The Parties' Position:**

11 **Petitioners:**

12 The Petitioners contend the County is required to coordinate with cities when setting
13 UGAs. They point out there is nothing in the record to indicate that the County adequately
14 addressed this requirement by entering into inter-local agreements, conducting joint
15 planning, or otherwise consulted with other entities. Further, the Petitioners contend they
16 found nothing in the record to indicate this issue was referred to the Steering Committee of
17 Elected Officials as specifically directed by the Board in the 2005 cases. The Petitioners
18 contend the record is devoid of any efforts on the part of the County to coordinate this
19 action with any other entity.

20 **Respondent:**

21 The County contends the record is clear that the action taken in repealing the 2005
22 UGA additions was done in direct response to the directive given to the County in the Final
23 Decision and Order in cases numbered 05-1-0004 and 05-1-0007. The County does not
24 believe its action performed in response to a direct order from the Board requires specific
25 response from other jurisdictions. The County points out the Planning Commission held a
26 hearing which was well attended. No objection was raised by any jurisdiction or service
27 agency. The County believes that to require them to obtain a specific statement of
28 agreement from all other jurisdictions regarding the County performing what the Board has
29 instructed the County to do would be putting form over substance.

1 The County states the process of updating the Capital Facilities Plan will be required
2 in conjunction with the review and revision of the UGA boundary that the County is
3 currently in the process of completing. The Petitioners did not challenge the CFP at the time
4 of its recent adoption. The Petitioners are claimed to be premature in their assertions that
5 the CFP is defective. They have not allowed the County time to complete the review and
6 revision of the UGA that is in process. Part of that process will be an update of the CFP.

6 **Petitioners HOM Reply:**

7 The Petitioners reply that Spokane County violated the GMA by diminishing the UGA
8 in an area including urban development without proper coordination with other jurisdictions
9 and consideration of capital facilities. The Petitioners observe the County's primary
10 defenses to this issue (Issue #2) are: (1) RCW 36.70A.010 is unenforceable; (2) the
11 diminishment of the UGA was in response to Orders from other proceedings; (3)
12 coordination with other jurisdictions is not required; (4) Petitioners should have challenged
13 the Capital Facilities Plan; (5) Petitioners object to the vested development; and (6)
14 Petitioners should have challenged the County-wide Planning Policies. While these
15 arguments are claimed to lack any citation to any Board precedent or to the record,
16 Petitioners respond to each argument in turn.

16 First, as stated above and illustrated by the *City of Spokane v. Spokane County* case,
17 RCW 36.70A.010 is enforceable. In fact, that case dealt specifically with the County's
18 obligations to coordinate with other jurisdictions and the obligation to do so under that
19 provision. *City of Spokane v. Spokane County*, Case No. 06-1-0002, Final Decision and
20 Order (EWGMHB, November 27, 2006).

21 Second, nothing in the GMA allows the County to violate other GMA provisions simply
22 to meet the requirements of a Board order. In fact, the provision cited by the County, RCW
23 36.70A.130(2)(b), specifically recognizes the requirements of the County to conduct public
24 outreach on a proposal stating, "However, after appropriate public participation a county or
25 city may adopt amendments or revisions to its comprehensive plan that conform with this
26 chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan

1 filed with a growth management hearings board or with the court." (Emphases added).
2 Importantly, it must be recognized that the purpose of this provision was to grant a
3 jurisdiction limited flexibility in the once per year concurrent review requirement of the
4 GMA.

5 Petitioners do not challenge the new Capital Facilities plan. Rather, Petitioners
6 specifically challenge the County's adoption of Resolution 07-0077 and its failure to ensure
7 that capital facilities will be available. See Petitioner's Opening Brief at 21-23. Nothing in
8 the record for this Resolution indicates that capital facilities will be available for the areas
9 now outside of the UGA. In fact, as stated in Petitioners opening brief, it indicates
10 shortcomings with current service planning, including: (1) new storm water facilities will not
11 serve the areas on the Five Mile Prairie and (2) the new capital facilities plan did not
12 address transportation issues within the areas impacted by this decision. The failure to
13 adequately address capital facilities amounts to a violation of the GMA.

14 Petitioners do not challenge the vested development, but rather the County's action
15 to diminish the UGA where vested urban growth has and will occur. Moreover, nothing in
16 the GMA allows the County to arbitrarily carve out a piece of the UGA containing vested
17 urban development.

18 Lastly, as pointed out by the County, "Petitioners do not assert any claim that the
19 [County-wide Planning] policies are inadequate in any way." Response Brief at 23.
20 Petitioners agree they are not challenging any aspect of those policies. The Petitioners
21 state the argument that Petitioners should have challenged the policies is misplaced and
22 inconsistent with the County's own argument.

23 **Board Analysis:**

24 The record is clear; the County did not consult with the City of Spokane or other local
25 jurisdictions prior to the reduction of the size of the UGA which abutted the City of Spokane.
26 The County did not enter into inter-local agreements, conduct joint planning, or otherwise
consult with other entities. Nothing is found in the record to indicate this issue was referred
to the Steering Committee of Elected Officials as specifically directed by the Board in the

1 2005 cases. The record is devoid of any efforts on the part of the County to coordinate this
2 action with any other public or private entity.

3 The fact that the expansion had occurred over two years earlier and had been found
4 out of compliance or invalid, does not change the requirement for consultation with others
5 in this case. The UGA expansion was in effect throughout the whole period or until, in the
6 one case, it was found to be invalid. RCW 36.70A.140 does allow some appropriate
7 variation in public participation in cases where such legislation is found invalid. The
8 participation must always, however, be appropriate and effective. It was not so in this
9 case. RCW 36.70A.130(2)(b), specifically recognizes the requirements of the County to
10 conduct public outreach on a proposal stating, "However, after appropriate public
11 participation a county or city may adopt amendments or revisions to its comprehensive plan
12 that conform with this chapter whenever an emergency exists or to resolve an appeal of a
13 comprehensive plan filed with a growth management hearings board or with the court."
14 (Emphases added). Importantly, it must be recognized that the purpose of this provision
15 was to grant a jurisdiction limited flexibility in the once per year concurrent review
16 requirement of the GMA. The finding of non-compliance or invalidity does not authorize the
17 violation of other GMA provisions.

18 The statement of purpose found in RCW 36.70A.010, is enforceable. In fact, this
19 Board dealt specifically with the County's obligations to coordinate with other jurisdictions
20 and the obligation to do so under that provision. *City of Spokane v. Spokane County*, Case
21 No. 06-1-0002, Final Decision and Order (EWGMHB, November 27, 2006).

22 **Conclusion:**

23 The County is found out of compliance on this issue. The Petitioners have carried
24 their burden of proof and shown that the actions of the County are clearly erroneous.

25 **Issue No. 3:**

26 Did Spokane County violate RCW 36.70A.510 and RCW 36.70A.547 by adopting
Resolution 7-0077 without consulting with local airports before taking legislative action to
reverse UGA amendment 04-CPA-01, located near Spokane International Airport and
Fairchild Air Force Base?

1 **The Parties' Position:**

2 **Petitioners:**

3 The Petitioners contend that the County failed to consult or coordinate with any
4 aviation entities in the removal of the UGA designation from the subject property. RCW
5 36.70.547 requires the County to consult with a variety of aviation entities on all proposed
6 and adopted plans and regulations and discourage the siting of incompatible land uses
7 adjacent to general aviation airport. The adoption and amendment of comprehensive plan
8 provisions and development regulations under this chapter affecting a general aviation
9 airport are subject to this statute.

10 Nothing is noted in the record by the Petitioners which indicates that the County
11 consulted with any aviation entity in regards to its intent to revoke UGA designation or in
12 regards to the passage of the resolution doing so.

13 **Respondent:**

14 The County contends this action is not a new amendment to the comprehensive plan
15 nor is it a change to the UGA from what was a GMA compliant state. The County contends
16 this is form over substance. The shrinking of the UGA is not a covered action.

17 **Petitioners HOM Reply:**

18 The record clearly indicates no coordination or consultation with airports or aviation
19 entities occurred regarding the adoption of Resolution 07-0077. The County's only defenses
20 to its failure to consult (Issue No. 3) are that such a requirement puts "form over
21 substance" and to question whether "the GMA really require[s] the County call and hold yet
22 another meeting with the agencies." Response Brief at 23-24. This flippant response
23 demonstrates well the County's disregard for the law. The record clearly demonstrates that
24 in adopting Resolution 07-0077, the County failed to conduct any consultation, meetings, or
25 coordinate with any aviation entities.

26 **Board Analysis:**

The County is required, under RCW 36.70A.510 and RCW 36.70.547, to include

1 consideration of general aviation airports. An amendment of comprehensive plan provisions
2 and development regulations under this chapter affecting general aviation are subject to
3 formal consultation with such airport personnel. The County is discouraged from siting
4 incompatible uses adjacent to general aviation airports. While the reduction of the UGAs
5 near the airports seem of no effect to the airports and in fact a benefit, the permitting of
6 urban development near the airport without consultation and without adequate capital
7 facilities could very well be damaging. Impacts of this expansion of the UGA and later
8 reduction could be lessened after consultation and action suggested.

8 **Conclusion:**

9 The Petitioners have carried their burden of proof and shown that the objected to
10 actions are clearly erroneous and the actions of the County are found out of compliance.

11 **Issue No. 4:**

12 Did Spokane County fail to comply with the substantive and procedural requirements
13 of the State Environmental Policy Act (SEPA) as set forth in 43.21C RCW when it adopted
14 Resolution 7-0077 without conducting any environmental analysis or review of the impact of
15 UGA reversal?

15 **The Parties' Position:**

16 **Petitioners:**

17 The Petitioners contend the County failed to conduct any environmental assessment
18 as required by SEPA for this project. SEPA is required for any local agency decision that is
19 not categorically exempt. The SEPA Determination of Non-significance (DNS) from the
20 expansion of the UGA was adopted in the reduction of the same UGAs. These documents
21 were prepared for an entirely different action and prior to any on the ground construction
22 occurring, and are dated. The Petitioners contend that the County cannot simply adopt an
23 existing SEPA document without conducting some assessment that the existing document is
24 sufficient to address the action for which it plans to take. The Petitioners assert that the
25 adoption of the 2004 SEPA documents, which were prepared for the inclusion of certain
26 areas into the County's UGA, fails to meet the requirements of RCW 43.21C.034. The

1 actions do not have similar elements/impacts and the information and analysis is not
2 relevant and adequate to assess the impacts.

3 **Respondent:**

4 The County contends the record clearly indicates the County adopted the DNS from
5 the original actions adding to the UGA in this non-project action to repeal the additions to
6 the UGA. The County has complied with SEPA as indicated by the adoption of the prior DNS.
7 The County argues the action of locating the UGA boundary on a map is similar, if not
8 identical, regardless of whether it is expanding the UGA or repealing a previous expansion.
9 Both actions are an exercise in locating the UGA boundary. The action triggering the SEPA
10 requirements in this matter is the repeal of the 2005 UGA additions, not the development of
11 the plats occurring on the properties.

12 **Petitioners HOM Reply:**

13 The Petitioners believe the record is clear in this case that the County failed to
14 conduct any environmental assessment as required by SEPA for this project. SEPA
15 environmental review is required for any local agency decision that is not categorically
16 exempt, including, as here, the amendment of a county comprehensive plan. WAC 197-11-
17 704(b)(ii). Rather than conduct any environmental analysis, the County "adopted" existing
18 SEPA DNSs that were conducted for the actions expanding the UGA into the subject
19 properties.

20 The Petitioners contend the County cannot ignore the realities the development has
21 created and will create on the affected properties. Development of these properties,
22 coupled with removal of UGA designation, will have impacts. Here, the Petitioners claim the
23 record is clear that the County: (1) did not consider the ongoing storm water impacts of the
24 development of the property; (2) failed to consider capital facilities issues associated with
25 the removal of these areas from the UGA, including provision of the previously mentioned
26 storm water issues; and (3) failed to consider overall changes to the landscape since the
adoption of the now dated DNSs. The Petitioners state it is critical to note that while the
County references in its response brief a SEPA analysis was completed for the individual

1 plats (Response Brief at 26-27), these SEPA documents were not adopted by the County as
2 part of the SEPA process or are part of the record in this matter.

3 While the county argues that this SEPA challenge is barred by collateral estoppel, the
4 Petitioners contend no other prior case dealt with SEPA claims on these properties and, in
5 particular, SEPA claims as it applies to the action diminishing the UGA. Moreover, as
6 identified by the Board in the *Miotke* case, the prior SEPA documents contain a
7 misrepresentation of critical area impacts that may indicate environmental impact as
8 provided in WAC 197-11-600(3)(b)(ii). The Petitioners argue the County never amended or
supplemented this shortcoming to address these concerns.

9 The Petitioners believe instead of adopting a dated assessment of an entirely
10 different action, the County should have conducted a new SEPA assessment of this action
11 and, therefore, must be found out of compliance with SEPA.

12 **Board Analysis:**

13 The Court of Appeals in *Moss v. Bellingham* reiterated the long-standing rule that the
14 purpose of SEPA is to function "as an environmental full disclosure law." 109 Wn. App. 6
15 (Wa. Ct. App. 2001). Accordingly, agency decision makers must consider more than the
16 narrow, limited environmental impact of the immediate, pending action and cannot close
17 their eyes to ultimate probable environmental consequences. *Cheney v. Mountlake Terrace*,
18 87 Wash.2d 338, 344, 552 P.2d 184 (Wa. 1976). SEPA specifically requires that the
19 responsible administrative official conduct a detailed and comprehensive review, rather than
20 take a "lackadaisical approach." *Eastlake Cmty. Council v. Roanoke Assocs., Inc.*, 82 Wn.2d
21 475, 494, 513 P.2d 36 (Wa. 1973); *see also Norway Hill Pres. & Prot. Ass'n v. King County*
22 *Council*, 87 Wn.2d 267, 273, 552 P.2d 674 (Wa.1976) (SEPA requires "detailed statement").
23 SEPA further requires the official issue a report showing 'that environmental factors were
24 considered in a manner sufficient to amount to prima facie "compliance with the procedural
25 requirements of SEPA." *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (Wa.
26 1977) (*quoting Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn.App. 59, 73, 510
P.2d 1140, *review denied*, 83 Wn.2d 1001 (Wa. 1973)).

1 In conducting the detailed examination of impacts, the County must consider the
2 current landscape that exists and any resulting impacts from its actions. Specifically, SEPA
3 requires the County to "carefully consider the range of probable impacts, including short-
4 term and long-term effects [,]" including direct and indirect impacts "that are likely to arise
5 or exist over the lifetime of a proposal or, depending on the particular proposal, longer."
6 WAC 197-11-060(4)(c)-(d). Moreover, WAC 197-11-330(3) requires that the responsible
7 official "take into account" whether "several marginal impacts when considered together
8 may result in a significant adverse impact."

9 Here, two years have passed. The area within the expanded UGA has been blanketed
10 with developments or vested development permits. The once rural area clearly has
11 changed. A SEPA review is required and the simple re-adoption of a two year-old
12 Determination of Non-Significance is insufficient. The actions do not have similar
13 elements/impacts and the information and analysis is not relevant and adequate to assess
14 the impacts. A review of the alternative actions surely would include no action, keeping the
15 land within the UGA where it can receive appropriate services and safeguards.

16 The Board also finds this issue is not barred by collateral estoppel. This issue was not
17 previously decided and these are new facts.

18 **Conclusion:**

19 The Petitioners have carried their burden of proof and the County's actions herein
20 are clearly erroneous and found out of compliance.

21 **Issue No. 5:**

22 Does the action taken by Spokane County to reverse the urban growth area in
23 Resolution 7-0077 substantially interfere with the fulfillment of the goals of the Growth
24 Management Act such that the enactments at issue should be held invalid pursuant to RCW
25 36.70A.302?

26 **The Parties' Position:**

Petitioners:

The Petitioners contend that the action of the County substantially interferes with the

1 GMA's Goal (1) because the County has allowed urban development outside of the UGA
2 without addressing the impacts of the expected urban development within the subject
3 parcels (outside the UGA). The County's action also interferes with the GMA's Goal (2) by
4 allowing urban densities to occur with rural areas. Goal (12) is said to have been violated
5 due to the County's failure to adopt a current Capital Facilities Plan.

6 **Respondent:**

7 The County argues they are in compliance and the Petitioners have not met their
8 burden of proof in this case.

9 **Petitioners HOM Reply:**

10 The Petitioners contend the touchstone is a finding by the Board that "the continued
11 validity of part or parts of the plan or regulation would substantially interfere with the
12 fulfillment of the goals of this chapter." RCW 36.70A.302(1)(b).

13 The Petitioners claim the County's approval of Resolution 07-0077 substantially
14 interferes with a number of GMA Goals. The County's action interferes with the GMA's Goal
15 (1) because the County has allowed urban development outside of the UGA without
16 addressing the impacts of the expected urban development within the subject parcels
17 (outside the UGA). The County's action also interferes with the GMA's Goal (2) by allowing
18 urban densities to occur within rural areas. Lastly, the County's action interferes with the
19 GMA's Goal (12). Without a current Capital Facilities Plan or other indication that
20 governmental services and facilities will be available in the urban developments outside of
21 the UGA, the clear burden of that development will stress the resources of the City of
22 Spokane and County, frustrating the purposes of Goal (12).

23 A review of the record and the arguments presented above indicates that the
24 continued validity of Resolution 07-0077 substantially interferes with the fulfillment of Goals
25 (1), (2), and (12). Spokane County is non-compliant with the GMA requirements and the
26 County's actions clearly frustrate the goals of the GMA to provide for well-planned
development. Accordingly, it is appropriate for this Board to find them invalid.

1 **Board Analysis:**

2 The actions of the County do interfere with goals of the GMA and invalidity could at
3 this time be found. However, as RCW 36.70A.330(4) allows, the Board can review this case
4 at a compliance hearing and reconsider whether a finding of invalidity should then be
5 ordered. At this time, the Board directs the County to make the necessary corrections and
6 bring its actions into compliance with this order and the GMA.

7 **Conclusion:**

8 A finding of invalidity will not at this time be ordered.

9 **VI. FINDINGS OF FACT**

- 10 1. Spokane County is a county located East of the crest of the Cascade
11 Mountains and plans under the GMA pursuant to RCW 36.70A.040.
- 12 2. The Petitioners are citizens of Spokane County and participated in the
13 process to adopt Resolution 07-0077.
- 14 3. The Petitioners filed a timely petition on March 22, 2007, arguing that
15 Resolution 07-0077 was improperly adopted in a number of respects,
16 violating the GMA.
- 17 4. The County adopted Resolution 07-0077, which repealed
18 Comprehensive Plan Amendments 03-CPA-31 through 36, thereby
19 reducing the County's Urban Growth Area by 229 acres on the Five Mile
20 Prairie of Spokane, and Amendment 04-CPA-01, thereby reducing the
21 County's Urban Growth Area by 80 acres in the West Plains area.
- 22 5. The County reduced the subject UGAs allowing urban growth outside
23 the urban growth boundary which had developed after the earlier
24 expansion of the UGA into those areas.
- 25 6. Spokane County failed to fully participate in joint planning and failed to
26 coordinate with other jurisdictions prior to the reduction of these UGAs.
7. Spokane County failed to consult with local airports before taking
legislative action to reverse UGA amendment 04-CPA-01, located near
Spokane International Airport and Fairchild Air Force Base.

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V. CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this action.
2. This Board has jurisdiction over the subject matter of this action.
3. The Petitioners have standing to raise the issues raised in the Petition for Review.
4. Petition for Review in this case was timely filed.
5. The reduction of an existing UGA requires the County to perform the same review required for the expansion of a UGA.
6. The County must participate in joint planning and coordinate with other jurisdictions.
7. The County must consult with local airports before taking legislative action having a potential impact upon such airports and their industry.
8. The County must comply with the substantive and procedural requirements of the State Environmental Policy Act when it reduces the size of its UGA where extensive new development has occurred or is expected to occur.
9. Any Conclusion of Law herein after determined to be a Findings of Fact, is hereby adopted as such.

VI. ORDER

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

1. Spokane County's adoption of Resolution No. 7-0077 is clearly erroneous and does not comply with the GMA.
2. The Board finds the Petitioners have carried their burden of proof on Issue Nos. 1, 2, 3 and 4 as listed in the Prehearing Order.

1 3. Spokane County must take the appropriate legislative action to bring
2 itself into compliance with this Order by **January 10, 2008, 120 days**
3 from the date issued. The following schedule for compliance, briefing
4 and hearing shall apply:

- 5 • The County shall file with the Board by **January 17, 2008, an**
6 **original and four copies** of a Statement of Actions Taken to Comply
7 (SATC) with the GMA, as interpreted and set forth in this Order. The
8 SATC shall attach copies of legislation enacted in order to comply. The
9 County shall simultaneously serve a copy of the SATC, with
10 attachments, on the parties. **By this same date, the County shall**
11 **file a "Remanded Index," listing the procedures and materials**
12 **considered in taking the remand action.**
- 13 • By no later than **January 31, 2008**, Petitioners shall file with the
14 Board an **original and four copies** of Comments and legal arguments
15 on the County's SATC. Petitioners shall simultaneously serve a copy of
16 their Comments and legal arguments on the parties.
- 17 • By no later than **February 14, 2008**, the County and Intervenors shall
18 file with the Board an **original and four copies** of their Response to
19 Comments and legal arguments. The County shall simultaneously serve
20 a copy of such on the parties.
- 21 • By no later than **February 21, 2008**, Petitioners shall file with the
22 Board an **original and four copies** of their Reply to Comments and
23 legal arguments. Petitioners shall serve a copy of their brief on the
24 parties.
- 25 • Pursuant to RCW 36.70A.330(1) the Board hereby schedules a
26 telephonic Compliance Hearing for **February 26, 2008, at 10:00**
a.m. The parties will call **360-709-4803 followed by 529339 and**
the # sign. Ports are reserved for: Mr. Eichstaedt and Mr. Hubert. If
additional ports are needed please contact the Board to make
arrangements.

1 If the County takes legislative compliance actions prior to the date set forth in
2 this Order, it may file a motion with the Board requesting an adjustment to this
3 compliance schedule.
4

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

6 **Reconsideration:**

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

15 **Judicial Review:**

16 Any party aggrieved by a final decision of the Board may appeal the decision to
17 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
18 review may be instituted by filing a petition in superior court according to the
19 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

20 **Enforcement:**

21 The petition for judicial review of this Order shall be filed with the appropriate
22 court and served on the Board, the Office of the Attorney General, and all parties
23 within thirty days after service of the final order, as provided in RCW 34.05.542.
24 Service on the Board may be accomplished in person or by mail. Service on the
25 Board means **actual receipt of the document at the Board office** within thirty
26 days after service of the final order.

1 **Service:**

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

4 **SO ORDERED** this 17th day of September 2007.

5
6 EASTERN WASHINGTON GROWTH MANAGEMENT
7 HEARINGS BOARD

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9 _____
Dennis Dellwo, Board Member

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11 _____
John Roskelley, Board Member

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13 _____
Joyce Mulliken, Board Member