State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

JASON & LAURIE MOE, and BRUCE MOE, Petitioners, v. KITTITAS COUNTY, Respondent, ELLENSBURG CEMENT PRODUCTS, INC., Intervenors.	Case No. 08-1-0010 **FINAL DECISION AND ORDER**

I. SYNOPSIS

Petitioners Jason & Laurie Moe and Bruce Moe (Moe) filed a Petition for Review of Kittitas County Ordinance No. 2007-38 (Ordinance 2007-38)[1], alleging noncompliance with the Growth Management Act (GMA). Moe challenges the portion of Ordinance 2007-38 that amended the Kittitas County Comprehensive Plan (KCCP) and changed the land use map designation for 80 acres of land from *Rural Lands* to *Mineral Lands of Long Term Commercial Significance*.

This case is **not** about whether mining will occur on the 80-acre parcel. Mining is a permitted use on *Rural Lands* under the KCCP and Development Regulations (DR). Moreover, Intervenor Ellensburg Cement Products, Inc. ("Ellensburg Cement") states that it already has all the necessary permits to mine this parcel. Mining can legally take place in

[1] Index of Record # 47.

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rural areas of Kittitas County regardless of whether or not the land is designated as *Mineral Resource Lands (MRL)*.

Rather, this case is about whether the 80-acre parcel should be designated as *Mineral Resource Lands* that have **long-term significance** for the extraction of minerals in Kittitas County. When designating *Mineral Resource Lands*, Kittitas County assumes a statutory obligation to conserve and protect these resource lands from incompatible uses, such as encroaching residential development. This obligation to conserve likely includes the imposition of additional regulations on adjacent private property uses that are deemed to be incompatible with designated *Mineral Resource Lands*.

Thus, the GMA seeks to strike a balance between protecting the mineral resource industry and protecting private property rights and permissible uses in the vicinity. The GMA charges counties and cities with balancing these competing interests by designating *Mineral Resources Lands* when certain statutory criteria are met. The GMA does not direct counties to designate all lands with minerals as *Mineral Resources Lands.* Rather, the GMA directs this particular designation be reserved for lands having long-term significance for the extraction of minerals.

In this case, Moe asserts that Ordinance No. 2007-38 does not comply with the statutory *Mineral Resources Lands* standards; Kittitas County and Ellensburg Cement dispute that assertion.

II. INVALIDITY

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

III. PROCEDURAL HISTORY

On February 28, 2008, JASON & LAURIE MOE, and BRUCE MOE, by and through their representative, Allan Bakalian, filed a Petition for Review.

On March 21, 2008, Respondent Kittitas County filed the Index of Record.

On March 21, 2008, the Board received ELLENSBURG CEMENT PRODUCTS, INC., Motion to Intervene.

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On March 28, 2008, the Board heard Ellensburg Cement Products, Inc.'s Motion to Intervene. There were no objections, and the Board granted intervention status to Ellensburg Cement Products, Inc.

On March 28, 2008, the Board held the telephonic Prehearing conference. Present were Dennis Dellwo, Presiding Officer, and Board Members, John Roskelley and Joyce Mulliken. Present for the Petitioners were Allan Bakalian. Present for the Respondent was Neil Caulkins. Present for Intervenors was Gregory McElroy.

On April 2, 2008, Respondent transmitted a copy of the Index of Record to Intervenor.

On April 4, 2008, the Board issued its Prehearing Order.

On April 17, 2008, the Board received Kittitas County's Motion to Dismiss and for Summary Judgment, Ellensburg Cement Products' Joinder in Kittitas County's Motion to Dismiss and for Summary Judgment.

On April 18, 2008, the Board received Petitioners' Motion to Supplement Record and Petitioners' Dispositive Motion to Invalidate Docket No. 07-01 of Ordinance No. 2007-38 Amending the Kittitas County Comprehensive Plan.

On April 30, 2008, the Board received Kittitas County's Response to Petitioners' Dispositive Motion.

On May 1, 2008, the Board received Petitioners' Response to Kittitas County's Motion to Dismiss and for Summary Judgment. The Board also received Ellensburg Cement Products' Motion to Extend Time and to Correct the Record, Memorandum in Support of Motion to Extend Time and Correct the Record, Memorandum in Opposition to Petitioners' Motion to Supplement Record, and Memorandum in Opposition to Petitioners' Dispositive Motion to Invalidate Docket No. 07-01 of Ordinance No. 2007-38 Amending Kittitas County Comprehensive Plan.

On May 8, 2008, the Board received Ellensburg Cement Products' Rebuttal in Support of Summary Judgment.

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On May 8, 2008, the Board received Petitioners' Response to Ellensburg Cement Products' Motion to Extend Time and to Correct the Record, Reply in Support of Petitioners' Motion to Supplement, and Reply to Kittitas County's and Ellensburg Cement Products' Response to Petitioner's Dispositive Motion to Invalidate the Ordinance.

On May 9, 2008, the Board received Kittitas County's Rebuttal in Motion to Dismiss and for Summary Judgment and County's Motion to Strike.

On May 12, 2008, the Board held the telephonic motion hearing. Present were Dennis Dellwo, Presiding Officer, and Board Members, John Roskelley and Joyce Mulliken. Present for the Petitioners were Allan Bakalian. Present for the Respondent was Zera Lowe. Present for Intervenors was Gregory McElroy.

On May 16, 2008, the Board issued its Order on Motions.

On July 21, 2008, the Board held the hearing on the merits. Present were Raymond Paolella, Presiding Officer, and Board Members, John Roskelley and Joyce Mulliken.[2] Present for the Petitioners were Allan Bakalian. Present for the Respondent was Zera Lowe. Present for Intervenors was Gregory McElroy. At the hearing, Intervenor moved to admit two documents from the Washington Department of Natural Resources into the record which relate to surface mining. The Board took this motion under advisement.

IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to the Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act. The Board ". . . shall find compliance unless it determines that the action by the . . . County. . . is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the [Growth Management Act]." RCW 36.70A.320.

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[2] Board Member Dennis Dellwo was the Presiding Officer in this case until his term expired on June 30, 2008. He was succeeded by newly-appointed Board Member Raymond Paolella on July 1, 2008.

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To find an action clearly erroneous, the Board must be ". . . left with the firm and definite conviction 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).

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

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

V. ISSUES AND DISCUSSION

Issue No. 1:

Should the Board invalidate the Ordinance because it does not comply with the Growth Management Act when the Ordinance was not adopted according to the schedule or procedures established in RCW 36.70A.130 and RCW 36.70A.131, or is otherwise an erroneous interpretation or application of the Growth Management Act?

Issue No. 2:

Should the Board remand the Ordinance to Kittitas County to take whatever actions are necessary to ensure that the Ordinance complies with the Growth Management Act?

The Parties' Position:

Petitioners:

Petitioners allege that Ordinance 2007-38 was improperly adopted in violation of the procedures in RCW 36.70A.130 (Comprehensive Plan Update process) and RCW 36.70A.131 (consideration of new resource or economic related information). Petitioners further allege

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that Kittitas County erroneously interpreted and applied both the GMA criteria for designating mineral lands in WAC 365-190-070 and the Kittitas County mineral resource criteria. Finally, they allege that the ordinance violated Goal 10 of the GMA, the definition of long-term significance found in RCW 36.70A.030(10).

Respondent:

The Respondent alleges that Kittitas County's ordinance complied with both the Community, Trade, and Economic Development (CTED) guidelines in WAC 365-190-070 and the County's own GMA-compliant local criteria to designate mineral resource lands. The Respondent further alleges that the ordinance complies with the County's Comprehensive Plan amendment annual docketing process and is supported by substantial evidence.

Intervenor:

The Intervenor adopted the legal arguments and authorities of Respondent and states that mining will occur under acquired permits regardless of whether the site is designated as mineral resource land. Further, the Intervenor argues that Kittitas County considered all relevant information under the GMA compliant procedures and that the ordinance is supported by substantial evidence in the record and presumed valid.

Petitioners Reply:

The Petitioners allege in their reply brief there is a lack of evidence to support the mineral lands designation and that the County failed to consider the applicable GMA and County designation criteria.

Board Analysis:

Under the GMA, Counties and Cities are required to designate and conserve *Natural Resource Lands* that have **long-term commercial significance**. RCW 36.70A.170, and .060. The statutory term *Natural Resource Lands* includes *Agricultural Lands*, *Forest Lands,* and *Mineral Resource Lands*. Counties and Cities must adopt development regulations that "assure the conservation" of *Natural Resource Lands* and that also assure that adjacent land uses "shall not interfere with the continued use" of *Natural Resource Lands* "in the

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accustomed manner and in accordance with best management practices." RCW 36.70A.060(1).

Natural Resource Lands are needed for the commercial production of food, agricultural products, timber, and the extraction of minerals. RCW 36.70A.060(1)(a). A key GMA planning goal is to maintain and enhance natural resource-based industries[3], to encourage the conservation of productive agricultural, forest, and mineral lands, and to discourage incompatible land uses. RCW 36.70A.020(8), .060. The designation and conservation of *Natural Resource Lands* prevents the irreversible loss of those lands to threatened development. *City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wash. 2d 38, 48 (1998).*

RCW 36.70A.170(1) requires the designation of *Mineral Resource Lands* that have **long-term significance** for the extraction of minerals. The term "Minerals" is defined to include "gravel, sand, and valuable metallic substances." RCW 36.70A.030(11). Although the GMA does not define the term *Mineral Resource Lands* or the phrase "long-term significance for the extraction of minerals," it does define the closely similar phrase "long-term commercial significance" as follows:

> "Long-term commercial significance" includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land.

RCW 36.70A.030(10).

Furthermore, the GMA provides the following statutory requirements that must be complied with before designating property as *Mineral Resource Lands*:

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[3] "Natural resource lands are protected not for the sake of their ecological role, but to ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry." *City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wash. 2d 38 (1998),* quoting with approval from Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future, 16 U. PUGET SOUND L. REV. 867 (1993)*.

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1. Lands that are not already characterized by urban growth;[4]
2. Lands that have long-term significance for the extraction of minerals;[5]
3. Consideration of the land's proximity to population areas;[6]
4. Consideration of the possibility of more intense uses of the land[7]
5. Consideration of the mineral resource lands classification guidelines adopted by the Department of Community, Trade, and Economic Development (CTED) pursuant to statutory directive.[8]
6. Consideration of data and information available from the Department of Natural Resources (DNR) relating to mineral resource deposits.[9]

The challenged action, adoption of Kittitas County Ordinance No. 2007-38, will now be reviewed to determine whether the statutory requirements were complied with:

1. <u>Lands that are not already characterized by urban growth</u>

"Urban growth" is defined as referring to:

> growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services.

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[4] RCW 36.70A.170(1)(c). The statutory term "urban growth" is defined in RCW 36.70A.030(18).

[5] RCW 36.70A.170(1)(c).

[6] RCW 36.70A.030(10); WAC 365-190-070.

[7] RCW 36.70A.030(10); RCW 36.70A.060; WAC 365-190-070.

[8] RCW 36.70A.170(2); RCW 36.70A.050(1).

[9] RCW 36.70A.131(1); WAC 365-190-070(2)(b).

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RCW 36.70A.030(18). "Urban governmental services" or "urban services" are defined as:

> those public services and public facilities at an intensity historically and typically provided in cities, specifically including storm and sanitary sewer systems, domestic water systems, street cleaning services, fire and police protection services, public transit services, and other public utilities associated with urban areas and normally not associated with rural areas.

RCW 36.70A.030(20). "Characterized by urban growth" is defined as referring to:

> land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth. [10]

RCW 36.70A.030(18). The statutory definition of "characterized by urban growth" contains two disjunctive growth components: the first component refers to existing urban growth on the proposed mineral lands; the second component refers to future urban growth on the proposed mineral lands that could potentially occur if "appropriate." Since urban growth typically requires urban services, urban growth cannot be appropriate without these urban services.

Accordingly, under RCW 36.70A.030(18) and .170(1)(c), land that has existing urban growth on it does not qualify for designation as *Mineral Resource Lands*. Alternatively, land that has no existing urban growth on it, but that is connected to or associated with a nearby area of urban growth, would also not qualify for designation as *Mineral Resource Lands* if the land would be suitable for future urban growth because of its proximity to urban development and urban services.

In the present case, Kittitas County Ordinance 2007-38 contains no findings or determinations regarding whether or not the proposed mineral lands (or nearby areas) are already characterized by urban growth. Ordinance 2007-38 does contain a finding that the

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[10] The phrase "located in relationship to" is not defined in the statute. Random House Webster's College Dictionary defines the word "relationship" as "a connection, association, or involvement."

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"current land use is rural" and the "current zoning is Forest and Range," which are the Kittitas County Comprehensive Plan land use and zoning designations respectively for the subject 80-acre parcel. When counties and cities designate Natural Resource Lands, they should include in their adoption legislation written findings regarding the applicable statutory standards, such as a finding that the land is not already characterized by urban growth.[11]

The Kittitas County Planning Commission made no findings or determinations regarding whether or not the proposed mineral lands are **already characterized by urban growth**. However, the Planning Commission did make a finding that public testimony "raised concerns regarding the general land use patterns in the area, impact to surrounding uses that include residential and commercial use, adequacy of access, and impact to water supplies and wildlife."

There is evidence in the record that the subject 80-acre parcel is used for grazing and has no structures on it; that the parcel is located on the south side of Interstate 90 (I-90) and is bounded on the north by I-90; that the quarry entrance is located less than 200 feet from the I-90 interchange; and that the area south of I-90 is sparsely populated (a dozen homes on the adjacent west or southwest section). Adjacent parcels are zoned Forest & Range, Highway Commercial, or General Commercial. Regarding the area just north of I-90, there is evidence in the record that a small-lot residential development with 200+ lots called "Sunlight Waters" is located north of the I-90 interchange; that this area is zoned Forest & Range with a Rural land use designation. [12]

Upon reviewing the entire record, the Board finds that there is evidence in the record that supports a determination that the land is not already characterized by urban growth.

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[11] Meaningful appellate review requires entry of adequate and detailed findings of fact and conclusions of law. *Citizens for Responsible and Organized Planning v. Chelan Co.*, 105 Wn. App. 753 (2001).

[12] Index of Record #1, 2, 7; Verbatim Transcript of Recorded Hearing, Kittitas County Commissioners (November 28, 2007 and December 18, 2007).

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2. Lands that have long-term significance for extracting minerals

Ordinance 2007-38 designated the subject 80-acre parcel as "Mineral Lands of Long Term Commercial Significance."[13] The Ordinance contains no findings or determinations regarding whether or not the subject parcel satisfies the **long-term significance** standard of RCW 36.70A.170(1)(c).

Ordinance Finding III states that "[t]he subject parcel met the requirements of mineral lands of long-term commercial significance as identified in RCW 36A-170-131 [Sic]."[14] The Ordinance contains no discussion about the evidence in support of that finding. Furthermore, RCW 36.70A.131 does not refer to long-term significance.

Counties and cities must evaluate and address the standard of **long-term significance** before Natural Resource Lands can be designated because the GMA requires something more than just cataloging Natural Resource Lands – it seeks to designate only those lands which have long-term significance. *City of Redmond v.* CPSGMHB, 136 Wash. 2d 38, 54 (1998). This Board must then determine whether Kittitas County evaluated the long-term significance standard and whether there is substantial evidence in the record to support a finding that the subject parcel met the requirements of long-term commercial significance, as that term is defined in RCW 36A.70.030(10). This statutory definition refers to long-term commercial production of the resource land, in consideration of the land's proximity to population areas, and the possibility of more intense uses of the land – considerations that are reviewed next.

3. Consideration of the land's proximity to population areas

Ordinance Finding VII states that "[t]he location of the subject parcel in regards to the county as a whole, plus close proximity to the major transportation benefits Kittitas County." In the December 18, 2007, deliberation hearing transcript (page 12), one of the

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[13] This designation deviates from the statutorily-prescribed term "Mineral Resource Lands" by inserting the word "commercial" which is explicitly found in the definitions of the analogous natural resource terms -- Agricultural and Forest Lands. *See* RCW 36.70A.030.

[14] The County apparently incorrectly cited RCW 36.70A.131. Index of Record # 47.

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County Commissioners talked about the site being "right next to public rodeways [sic], easily accessible both east and west county, upper and lower county." At the December 18, hearing, the Commissioners also referred to and considered evidence submitted in letter form on December 5, 2007, by the McElroy Law Firm, attorney for Ellensburg Cement. [15] That letter asserted that the subject 80-acre parcel has "proximity to the Ellensburg and Cle Elum processing locations and markets."[16]

WAC 365-190-070(d) provides *MRL* classification guidelines to assist counties and cities in considering the effects of the land's proximity to population areas. These guidelines are discussed in section 5 below.

4. <u>Consideration of the possibility of more intense land uses or incompatible uses</u>

Fundamentally, the GMA requires *Mineral Resource Lands* designations and development regulations in order to assure the use of lands adjacent to qualified resource lands do not interfere with the continued use of the resource lands for its intended purpose.[17] RCW 36.70A.030(10) and WAC 365-190-070 specify that consideration be given to the possibility of more intense uses of the land. This consideration certainly applies to the parcel of land proposed for *MRL* designation, but also should take into account the potential for nearby incompatible uses, such as encroaching residential or commercial development on adjacent lands. An *MRL* designation triggers the duty to also adopt resource protection rules.[18]

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[15] Verbatim Transcript of Recorded Hearing, Kittitas County Commissioners (December 18, 2007).

[16] Intervenor ECP's Hearing on the Merits Brief, Exhibit J.

[17] RCW 36.70A.060

[18] RCW 36.70A.060 requires adoption of development regulations to assure that adjacent land uses do not interfere with the extraction of minerals from the MRL-designated lands. This statute also requires written notice to adjacent landowners within 500 feet of the MRL parcel that commercial activities may occur that are not compatible with residential development. The Director of Kittitas County Community Development Services referred to these potentially new regulations on adjacent private property owners at the December 18, 2007 public hearing when he testified that a Mineral Resource Lands designation "puts the burden on adjacent property owners when they wish to develop their lands to ensure that they're compatible with preserving this resource." Verbatim Transcript of Recorded Hearing, December 18, 2007, at page 6.

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Ordinance 2007-38 contains no findings, determinations, or discussion about the possibility of more intense uses of the land. There is no evidence in the public hearing transcripts regarding consideration of the possibility of more intense uses of the 80-acre parcel or adjacent land. The record does contain statements from Ellensburg Cement that their proposed Comprehensive Plan Amendment was not a request to mine the site but was instead a request to protect the site from incompatible adjacent growth and from encroachment by future residential or commercial uses.[19] However, there is no evidence in the record that the County actually analyzed or considered the likelihood of more intense land uses of the 80-acre parcel or bordering parcels.

WAC 365-190-070(d) provides *MRL* classification guidelines to assist counties and cities in considering the possibility of more intense uses of the land. These guidelines are discussed next.

5. <u>Consideration of the *Mineral Resource Lands* classification guidelines adopted by CTED pursuant to statutory directive</u>

RCW 36.70A.170(2) provides that in making *Mineral Resource Lands* designations, "counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050." RCW 36.70A.050 provides that these designation guidelines shall be adopted by CTED to "guide the classification" of *Natural Resource Lands*, including *Mineral Resource Lands*. Subject to the RCW 36.70A.030 definitions, the CTED guidelines "shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state." RCW 36.70A.050(3). The CTED *Mineral Resource Lands* designation guidelines provide the following factors to guide classification:

> In classifying mineral resource lands, counties and cities shall also consider the effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:
>
> (i) General land use patterns in the area;

[19] Index of Record # 5.

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(ii) Availability of utilities;

(iii) Availability and adequacy of water supply;

(iv) Surrounding parcel sizes and surrounding uses;

(v) Availability of public roads and other public services;

(vi) Subdivision or zoning for urban or small lots;

(vii) Accessibility and proximity to the point of use or market;

(viii) Physical and topographic characteristics of the mineral resource site;

(ix) Depth of the resource;

(x) Depth of the overburden;

(xi) Physical properties of the resource including quality and type;

(xii) Life of the resource; and

(xiii) Resource availability in the region.

WAC 365-190-070(d). These CTED designation factors implement the definitional elements of **long-term commercial significance** specified in RCW 36.70A.030(10).

In designating *Natural Resource Lands*, cities and counties must consult the CTED Guidelines. *City of Redmond v.* CPSGMHB, 136 Wash. 2d 38, 54 (1998). While the County needs to explain the extent to which it applies the CTED Guidelines, the GMA does not dictate how much weight to assign to each factor in determining which lands have long-term commercial significance. *Lewis County v. WWGMHB*, 157 Wash. 2d 488, 503 (2006). Counties have broad discretion to make choices that are informed by local circumstances so long as they stay within GMA's confines. *Id.*

In the analogous context of *Agricultural Lands* designations, the Supreme Court stated in the *Lewis Co.* case that the factors enumerated in CTED's designation guidelines are used to determine which lands have **long-term commercial significance**. *Id.* at 502.

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The ordinance adopted by Lewis County to designate *Agricultural Lands* did "spell out in detail how the county considered" the CTED designation factors. *Id*. at 504.

In the present case, Kittitas County Ordinance 2007-38 (adopted 12/31/2007) did not spell out in detail how the County considered the CTED designation factors. In fact, the ordinance contains no reference whatsoever to these designation factors.

At the earlier December 18, 2007, deliberation hearing, one of the County Commissioners briefly referred to WAC 365-190-070 and said at one point that he just did not know if they had enough information to make a determination. There was no reference to any of the 13 designation factors and no discussion of those factors. Another Commissioner said that as he read through the record he felt like the analysis was thin.[20]

The County Commissioners never made any determination as to whether or not the CTED designation factors identified in WAC 365-190-070 were met. The County Commissioners did, however, determine that separate Kittitas County designation criteria were met. The Kittitas County criteria are not the same as the CTED designation factors, although there is some significant overlap.[21]

The Intervenors argue that the CTED designation factors are subsumed within the Kittitas County criteria. But the Board concludes that this is not correct. A comparison of the 13 CTED factors to the 9 Kittitas County criteria shows that that the following CTED factors are entirely absent from the County criteria:

(ii) Availability of Utilities;

(iii) Availability and adequacy of water supply;

(vi) Subdivision or zoning for urban or small lots;

(v) Availability of public services (other than roads); and

(xiii) Resource availability in the region.

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[20] Verbatim Transcript of Recorded Hearing, Kittitas County Commissioners (December 18, 2007).

[21] Kittitas County has adopted 9 local designation criteria for the classification of Mineral *Resource Lands of long-term commercial significance*. Kittitas County Comprehensive Plan: December 2006, Volume 1, page 38.

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Kittitas County's consideration of these five missing factors would have been important since that information (along with the other CTED factors) would have assisted the County in determining whether the proposed *Mineral Resource Lands* designation satisfies the statutory standards of **not already characterized by urban growth** and **long-term commercial significance**, as defined in RCW 36.70A.030.

To the extent that Kittitas County's designation criteria overlap with a number of the CTED designation factors, and were considered before adopting the ordinance, then Kittitas County did, in effect, consider some, but not all, of the CTED designation factors. Although minimal, there is some basic evidence in the record to support a determination that Kittitas County considered the nine county designation criteria, which in turn substantially overlap with the language of nine out of thirteen CTED designation factors.

However, there is no evidence in the record that Kittitas County considered the designation factors pertaining to availability/adequacy of utilities, water, or public services (other than roads) for the 80-acre site. There also is no evidence in the record showing any consideration of resource availability in the region or even elsewhere in Kittitas County.

In the Findings of Fact of the Kittitas County Planning Commission, there is no reference to CTED's thirteen designation factors. The Planning Commission did, however, refer to the nine County criteria and made the following finding:

> The Planning Commission finds that burden of proof has not been met by the applicant and the applicant has not met the 9 criteria as provided in the Kittitas County Comprehensive Plan. The information and studies are insufficient to determine if the site meets the criteria of the designation of Mineral Lands of Long Term Commercial Significance.

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The record shows that the County Commissioners did not discuss the Planning Commission's finding that these nine criteria were not met, and they did not enter their own finding overruling the Planning Commission's finding.

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In reviewing the entire record, the Board determines that Kittitas County failed to consider all of the CTED Guidelines, as required by RCW 36.70A.170(2), before adopting Ordinance 2007-38.

6. Consideration of new information available from the Department of Natural Resources (DNR) relating to mineral resource deposits

Ellensburg Cement's Comprehensive Plan Amendment Docketing Form and Application was submitted to Kittitas County on June 18, 2007. Index of Record #1. Since this was filed after the 2006 Comprehensive Plan Update process, the application was processed under Kittitas County's annual amendment process, which is consistent with RCW 36.70A.130(2).[22]

RCW 36.70A.131 requires the county or city to consider new information made available since the last review of its designations, including data from the DNR relating to mineral deposits.

The record contains no findings or discussion regarding DNR information on mineral resource deposits, except that one of the County Commissioners commented at the December 18, 2007, deliberation hearing that "I do not see anything in the record from the Department of Natural Resources that gives this information." The Board finds that there is no evidence in the record suggesting that new DNR data was available relative to this site.

Conclusion:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence that the action of the County, complained of herein, is clearly erroneous in view of the entire record before the Board and in light of the Goals and requirements of the GMA. Kittitas County made no determination as to whether or not the area comprised of the

[22] At the Hearing on the Merits, Intervenor moved to admit two documents from the Washington Department of Natural Resources into the record, which relate to surface mining. The Board took this motion under advisement at that time. The Board has now determined that this request to supplement the record with additional evidence should be denied because this information was not before Kittitas County during its consideration of this MRL designation and is not of substantial assistance to the Board. Therefore, these two documents have not been considered by the Board.

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subject 80-acre parcel and nearby lands is already characterized by urban growth, but there is evidence in the record to support a conclusion that the area is not already characterized by urban growth. Ordinance No. 2007-38 contains no findings and no determinations regarding whether or not the parcel has long-term significance for the extraction of minerals, as defined in RCW 36.70A.170(c). Kittitas County did consider the parcel's proximity to population areas, as contemplated by RCW 36.70A.030(10). Kittitas County did not consider the possibility of more intense uses of the land as contemplated by RCW 36.70A.010 and WAC 365-190-070. There is no evidence in the record suggesting that new information was available from DNR relating to mineral resource deposits. Kittitas County failed to consider all of the CTED Guidelines, as required by RCW 36.70A.170(2), before adopting Ordinance 2007-38.

VII. FINDINGS OF FACT

1. Kittitas County is a county located east of the crest of the Cascade Mountains and opted to plan under the GMA and is therefore required to plan pursuant to RCW 36.70A.040.

2. On December 31, 2007, Kittitas County adopted Ordinance No. 2007-38 designating an 80-acre parcel as Mineral Resources Lands of Long-Term Commercial Significance.

3. The Growth Management Act requires Cities and Counties to designate and conserve natural resource lands that have long-term commercial significance.

4. There is evidence in the record to support a determination that the 80-acre parcel is not already characterized by urban growth.

5. Kittitas County did not determine that the 80-acre parcel has long-term significance for the extraction of minerals.

6. Kittitas County did not consider all of the designation factors in WAC 365-190-070.

VIII. CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this action.

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2. This Board has jurisdiction over the subject matter of this action.

3. Petitioners have standing to raise the issues raised in the Petition for Review.

4. The Petition for Review in this case was timely filed.

5. RCW 36.70A.170 requires Cities and Counties to designate and conserve Natural Resource Lands that have long-term commercial significance.

6. Kittitas County adopted Ordinance No. 2007-38 designating an 80-acre parcel as Mineral Resources Lands of Long-Term Commercial Significance.

7. There is substantial evidence in the record to support a determination that the land is not already characterized by urban growth, as required by RCW 36.70A.170(1)(c).

8. There is no substantial evidence in the record to support a determination that the land has long-term significance for the extraction of minerals, as required by RCW 36.70A.170(1)(c).

9. Kittitas County failed to consider all of the Mineral Resource Lands designation factors in WAC 365-190-070, as required by RCW 36.70A.170(2).

10. The adoption of Kittitas County Ordinance No. 2007-38 is not in compliance with the Growth Management Act, RCW Chapter 36.70A.

XI. 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. Kittitas County's adoption of Ordinance No. 2007-38 does not comply with the requirements of the Growth Management Act, RCW Chapter 36.70A.

2. Ordinance No. 2007-38 is remanded to Kittitas County for the County to take legislative action to achieve compliance with the Growth

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Management Act pursuant to this decision no later than **December 22, 2008, 120 days** from the date issued. The following schedule for compliance, briefing and hearing shall apply:

- The County shall file with the Board by **January 6, 2009, an original and four copies** of a **Statement of Actions Taken to Comply** (SATC) with the GMA, as interpreted and set forth in this Order. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on the parties. **By this same date, the County shall file a "Remanded Index," listing the procedures and materials considered in taking the remand action.**

- By no later than **January 20, 2009**[23]**,** Petitioners shall file with the Board an **original and four copies** of their Comments and legal arguments (Petitioners' Compliance Brief) on the County's SATC. Petitioners shall simultaneously serve a copy of their Comments and legal arguments on the parties.

- By no later than **February 3, 2009,** the County and Intervenors shall file with the Board an **original and four copies** of their Response to Comments and legal arguments (Respondent's and Intervenor's Compliance Brief.) The County and Intervenors shall simultaneously serve a copy of such on the parties.

- By no later than **February 10, 2009,** Petitioners shall file with the Board an **original and four copies** of their Reply to Comments and legal arguments (Petitioners' Optional Compliance Reply Brief.) Petitioners shall serve a copy of their brief on the parties.

- Pursuant to RCW 36.70A.330(1) and WAC 242-02-891[24] the Board hereby schedules a **telephonic Compliance Hearing for February 17, 2009, from 10:00 a.m. to 12:00 p.m. The compliance hearing shall be limited to consideration of the Legal Issues**

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[23] October 14, 2008, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2).

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

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found noncompliant and remanded in this FDO. The parties will call **360-407-3780 followed by 695734 and the # sign.** Ports are reserved for: **Mr. Bakalian, Ms. Lowe, and Mr. McElroy.** If additional ports are needed please contact the Board to make arrangements.

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

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

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the 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), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review:

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

Enforcement:

The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail. Service on the

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Board means <u>actual receipt of the document at the Board office</u> within thirty days after service of the final order.

<u>Service</u>:

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

SO ORDERED this 26th day of August 2008.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
Raymond L. Paolella, Presiding Board Member

_____
John Roskelley, Board Member

_____
Joyce Mulliken, Board Member

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