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

KITTITAS COUNTY CONSERVATION et al.,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON (BIAW), CENTRAL
WASHINGTON HOME BUILDERS
ASSOCIATION (CWHBA), MITCHELL
WILLIAMS, d/b/a MF WILLIAMS
CONSTRUCTION CO., TEANAWAY RIDGE,
LLC, KITTITAS COUNTY FARM BUREAU

Intervenors,

ART SINCLAIR and BASIL SINCLAIR,

Amicus Parties.

Case No. 07-1-0004c

**PARTIAL SECOND ORDER
FINDING CONTINUING NON-
COMPLIANCE AS TO LEGAL
ISSUES 3** (RE: Agricultural and
Forest Land Designation/De-
Designation Criteria), **AND LEGAL
ISSUE 7** (Re: Zoning map & future land
use map)

**FINDING CONTINUING NON-
COMPLIANCE AND INVALIDITY AS
TO LEGAL ISSUES 4 and 13** (RE:
Application Nos. 06-03 and 06-04) and
LEGAL ISSUES 6 and 14 (RE: City of
Kittitas UGA)

**FINDING COMPLIANCE AS TO
LEGAL ISSUE 3** (RE: Mineral Lands
Notice Provision) **and LEGAL
ISSUES 4 and 13** (RE: Repeal of
Application No. 06-17)

**ACKNOWLEDGING CONTINUED
APPLICATION OF ABEYANCE OF
COMPLIANCE AS TO LEGAL
ISSUES 1, 10, and 11**

I. SYNOPSIS

With the Eastern Washington Growth Management Hearings Board's (Board) August 2008 First Order RE: Compliance (1st Compliance Order), the Board concluded Kittitas

1 County (County) failed to bring itself into compliance with the Growth Management Act
2 (GMA) as set forth in the August 2007 Final Decision and Order (FDO) for several issues and
3 found the County in continuing non-compliance, determined the continuation of invalidity
4 was warranted, and acknowledge the stay issued by the Kittitas County Superior Court.¹

5 The County's Second Statement of Actions Taken to Comply (2nd SATC), the
6 responsive briefing, and the January 6, 2009, Compliance Hearing related to all of these
7 non-compliant issues. However, because of the gravity of the issues presented in
8 relationship to the County's action in designating those areas formerly identified as Urban
9 Growth Nodes (UGNs)² as Urban Growth Areas (UGAs), on January 12, 2009, the Board
10 issued a Partial Second Order RE: Compliance as to Legal Issues 2, 5, and 12. With this
11 Order, the Board found Kittitas County's actions in regards to Legal Issues 2, 5, and 12
12 failed to achieve compliance with the GMA and this continuing failure substantially
13 interfered with the goals and requirements of the GMA, thereby requiring the Board to issue
14 a Determination of Invalidity.³

15 The present Partial 2nd Compliance Order addresses whether or not the County
16 achieved compliance in regards to the other issues presented during the compliance
17 proceedings - Legal Issues 1, 3, 4, 6, 7, 10, 11, 13, and 14. Within this Order, the Board
18 finds the August 2008 Order of Abeyance related to Legal Issues 1, 10, and 11 remains in
19 effect. For all other issues, with the exception of the mineral resource land (MRL) notice
20 provisions alleged with Issue 3 and the rescission of Application 06-17 in conjunction with
21 Issues 4 and 13, the Board concludes Kittitas County's efforts failed to achieve compliance
22 with the GMA.

23 ¹ August 7, 2008 1st Compliance Order, at 36-39. With this Compliance Order the Board found continuing non-
24 compliance, in whole or in part, as for Legal Issues 2, 3, 4, 5, 6, 7, 12, 13, and 14. Continuing Invalidity was
25 determined warranted for Legal Issues 4, 6, 13, and 14.

26 ² Easton, Ronald, Thorp, Vantage, and the Snoqualmie sub-area, including Gold Creek.

³ January 12, 2009 Partial 2nd Compliance Order, at 8, 11, 12-13

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II. INVALIDITY

The Board finds Kittitas County's actions in regards to Legal Issues 4, 6, 13, and 14, as those issues relate to Applications Nos. 06-03 and 06-04 and the City of Kittitas UGA, continue to substantially interfere with the GMA goals set forth in RCW 36.70A.020, as the board previously determined in the 2007 FDO and 2008 1st Compliance Order. Therefore, the Board's invalidity continues in effect as to these Legal Issues.

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III. PROCEDURAL HISTORY

On August 20, 2007, the Board issued its FDO in the above-captioned matter. The case represented a challenge to Kittitas County's enactment of Ordinance 2006-63 amending its Comprehensive Plan (CP) pursuant to RCW 36.70A.130. In the FDO, the Board found Kittitas County had complied with the GMA in some regard, but several of its actions were also non-compliant and, for some, warranted the imposition of a Determination of Invalidity.

On August 7, 2008, the Board issued its 1st Compliance Order. Relevant to this Partial 2nd Order RE: Compliance, in the 1st Compliance Order the Board determined Kittitas County had received a stay from the Kittitas County Superior Court as to Legal Issues 1, 10, and 11; Kittitas County had taken no action to achieve compliance as to Legal Issue 7; and the actions the County had taken in regards to Legal Issues 3, 4, 6, 13, and 14 failed to achieve compliance with the GMA. Because of this, the Board found the County in continuing non-compliance as to Legal Issues 3, 4, 6, 7, 13, and 14, continuing invalidity as to Legal Issues 4, 6, 13, and 14, and issued an Order of Abeyance as to Legal Issues 1, 10, and 11.⁴ A deadline of November 6, 2008, was established for the County to take legislative action to bring itself into compliance with the GMA.

On October 22, 2008, Kittitas County filed a Motion for Continuance, requesting an extension of the compliance deadline to December 5, 2008. Objections to this Motion were

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⁴ August 7, 2008 1st Compliance Order, at 9-12.

1 filed by Futurewise on October 28, 2008. The Board denied the motion with the issuance of
2 its October 31, 2008, Order Denying Motion for Continuance.

3 On November 17, 2008, the Board received American Forest Lands Company's
4 (AFLC) Notice of Intent to Participate. On the same day, the Board issued its Order on
5 Notice of Intent to Continued Participation American Forest Land Company, LLC,
6 acknowledging AFLC's participation in the compliance proceedings.

7 On November 19, 2008, the County filed its Second Statement of Actions Taken to
8 Comply (2nd SATC). The County enacted Ordinance 2008-20 in response to the Board's FDO
9 and 1st Compliance Order.

10 On December 4, 2008, Petitioners Kittitas County Conservation, Ridge, & Futurewise
11 (collectively, Futurewise) filed their Objections In Part to a Finding of Compliance and Lifting
12 of Invalidity (Futurewise Objections). Also, on December 4, Petitioner Washington State
13 Department of Community, Trade, and Economic Development (CTED) filed its Response to
14 the County's 2nd SATC (CTED Objections).

15 On December 18, 2008, Kittitas County filed its Response to Petitioners' Comments
16 on County's 2nd SATC (County Response).

17 On December 24, 2008, the Board received AFLC's Response to Petitioner's Response
18 to Kittitas County's 2nd SATC (AFLC Response).⁵

19 On December 31, 2008, the Board received CTED's Reply Regarding Kittitas County's
20 2nd SATC (CTED Reply).

21 On January 6, 2009, the Board held a telephonic Compliance Hearing in this matter.
22 Present were Joyce Mulliken, Presiding Officer, Board Members John Roskelley and
23 Raymond Paoella, and Board Staff Attorney Julie Taylor. Parties were represented as
24 follows: Rob Beattey for Petitioners' KCC/RIDGE/Futurewise, Alan Copsey for CTED, Neil

25 ⁵ AFLC's participation in this matter is limited to Legal Issue 3 which relates to the County's Commercial Forest
26 Lands.

1 Caulkins for Kittitas County, Tim Harris for Intervenor BIAW/CWHBA/Mitchell, and Eric
2 Merrifield and Patrick Ryan for Participant AFLC.

3 As noted *supra*, on January 19, 2009, the Board issued its Partial 2nd Order RE:
4 Compliance, finding Kittitas County in continuing non-compliance as to Legal Issues 2, 5,
5 and 12 and issuing a determination of invalidity.

6 IV. STANDARD OF REVIEW

7 RCW 36.70A.320(4) provides:

8 A county or city subject to a determination of invalidity ... has the burden of
9 demonstrating that the ordinance or resolution it has enacted in response to
10 the determination of invalidity will no longer substantially interfere with the
11 fulfillment of the goals of this chapter under the standard in RCW
12 36.70A.302(1).

13 Thus, with respect to invalidity, the burden is on Kittitas County to demonstrate the actions
14 it has taken in response to the Board's orders of invalidity set forth in the August 2007 FDO
15 and August 2008 1st Compliance Order no longer impede GMA goals.

16 With respect to compliance, the burden is on Petitioners to demonstrate whether the
17 County's enactments are "clearly erroneous in view of the entire record before the board
18 and in light of the goals and requirements of [the GMA]." ⁶ To meet the burden, Petitioners'
19 legal and factual arguments must leave the Board with "the firm and definite conviction that
20 a mistake has been committed." ⁷ RCW 36.70A.3201 requires the Board to give deference to
21 a county's choices in GMA compliance, but the Swinomish Court clarified: ⁸

22 The amount [of deference] is neither unlimited nor does it approximate a
23 rubber stamp. It requires the Board to give the [jurisdiction's] actions a

24 ⁶ RCW 36.70A.320(3).

25 ⁷ *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161
26 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).

⁸ *Swinomish*, 161 Wn.2d at 435, fn. 8 (internal citations omitted); *See also, Lewis County v. WWGMHB*, 157
Wn.2d 488 (2006) at fn.7 (Board's role not a deskbook "dayminder" telling counties what decisions are due),
fn. 16 (Board deference to county decisions extends only as far as such decisions comply with GMA goals and
requirements.. In other words, there are bounds.

1 "critical review" and is a "more intense standard of review" than the arbitrary
2 and capricious standard.

3 For this current compliance proceeding, the Petitioners, in regards to Legal Issues 3
4 and 7, bear the burden of proof and Kittitas County, in regards to Legal Issues 4, 6, 13, and
5 14, must demonstrated that its actions no longer substantially interfere with the goals of
6 the GMA.

7 V. DISCUSSION

8 A. KITTITAS COUNTY'S APPEAL OF THE BOARD'S AUGUST 2007 FDO

9 As noted in the Board's August 2008 1st Compliance Order, Kittitas County filed a
10 timely appeal of certain issues of the Board's August 2007 FDO with the Kittitas County
11 Superior Court and the Court has issued a stay of the Board's compliance proceedings in
12 this regard.⁹ In acknowledgement of this, the Board issued an Order of Abeyance in regards
13 to compliance as to Legal Issues 1, 10, and 11.¹⁰ Although there is no dispute amongst the
14 parties as to the court appeal and related stay, CTED requests the Board "renew" the Order
15 of Abeyance regarding compliance.¹¹

16 The Board notes the appeals have now been consolidated in proceedings before
17 Division III Court of Appeals. And, as of the issuance date of this Partial 2nd Compliance
18 Order, the Court has not rendered a decision in the appeal nor lifted the stay and,
19 therefore, the Board's Order of Abeyance remains in effect until such time as a decision is
20 rendered.¹² The parties are reminded during the pendency of the court appeal, although
21 Kittitas County is not required to take any legislative action, the County remains in a non-
22 compliant status as to Legal Issues 1, 10, and 11.

23 Conclusion:

24 ⁹ August 2008 1st Compliance Order, at 9-12.

25 ¹⁰ August 2008 1st Compliance Order, at 36, 39-40.

26 ¹¹ CTED Response, at 6 (specifically in reference to Legal Issue 11).

¹² August 2008 1st Compliance Order, at 9.

1 In August 2008, the Board issued an Order of Abeyance in regards to the County's
2 duty to achieve compliance with the GMA until such time as the court renders a decision.
3 The Board finds and concludes the Court has not rendered a decision in Kittitas County's
4 appeals of the Board's 2007 FDO as to Legal Issues 1, 10, and 11 and, therefore, the Order
5 of Abeyance remains in effect.

6 **B. DESIGNATION/DE-DESIGNATION OF NATURAL RESOURCE LANDS - Legal
7 Issue 3**

8 In the August 2008 1st Compliance Order, the Board found Kittitas County failed to
9 achieve compliance in relationship to the designation of natural resource lands (NRL) in
10 three regards:

- 11 • Kittitas County's designation criteria must contain provisions that
12 specifically reflect the GMA's definition of agricultural lands as set forth by
13 the GMA and interpreted by the Court ... The Board finds and concludes
14 the County's agricultural designation and de-designation criteria as set
15 forth in the Kittitas County CP is non-compliant with the GMA, RCW
16 36.70A.020(8) and 36.70A.170. The County's criteria must encompass all
17 of the definitional elements for Ag Lands of LTCS and require the
18 consideration of soils and development related factors when determining
19 whether the land has enduring qualities so as to be designated as a
20 resource with long-term commercial significance, thereby ensuring the
21 conservation of such lands for the maintenance and enhancement of the
22 agricultural industry within Kittitas County.¹³
- 23 • The GMA requires, at a minimum, the County to include lands not
24 characterized by urban growth and primarily devoted to the growing of
25 trees as the initial land base for forest lands of long-term commercial
26 significance. Then, the County is to consider the factors set forth in WAC
365-190-060, to classify the forest land so as to conserve the higher
grades, and to consider development related impacts as indicated by WAC
365-190-060(1)-(7). The County's designation and de-designation process
does not adequately encompass these requirements and, as was found for
agricultural lands, includes factors which are not respectful of the GMA's
mandate to conserve lands and maintain and enhance the timber industry

13 August 2008 1st Compliance Order, at 20-21.

1 ... the Board finds and concludes the County's designation and de-
2 designation process and related criteria is non-complaint with RCW
36.70A.020(8) and 36.70A.170.¹⁴

- 3 • The Board finds and concludes the County has failed to take corrective
4 action to comply with the requirements of the Board's August 20, 2007,
5 FDO and amend its CP to include all of the language set forth in RCW
6 36.70A.060(1)(b). Thus, the County remains non-compliant in this
7 regard.¹⁵

7 In response to the Board's Order, the County states it has adopted new criteria¹⁶ for
8 resource land designation and de-designation which reflect the applicable statutes, case
9 law, and local circumstances and amended its CP to reflect statutory language in regards to
10 notice provisions. Petitioners bear the burden of proof in demonstrating the County's
11 actions remain non-compliant.

11 **1. Designation/De-Designation Criteria – Agricultural Lands**

12 Futurewise contends although the agricultural designation criteria is "significantly
13 more compliant with the GMA than earlier criteria and earlier proposals," the County has still
14 failed to bring itself into compliance with the GMA.¹⁷ Futurewise argues some of the criteria,
15 i.e. market factors and other administrative costs, focus on immediate costs as opposed to
16 long-term significance and information is missing as to how the factors should be applied,
17 i.e. identified parcel size, determination of expense, percentage of irrigated land.¹⁸

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19 _____
20 ¹⁴ August 2008 1st Compliance Order, at 26.

21 ¹⁵ August 2008 1st Compliance Order, at 28.

22 ¹⁶ In regards to the designation/de-designation process for NRLs, the Board notes the County's 2nd SATC
23 merely states the County has adopted new criteria but does not cite to where in the numerous pages of
24 exhibits submitted this criteria is set forth. The County is reminded although the burden of proof is on the
25 Petitioners with matters of non-compliance, the County has a correlating duty to provide the Board with briefs
26 that clearly denote where in the Record the supporting information is located.

¹⁷ Futurewise Objections, at 13. In its Objections, Futurewise asserted the County has failed to include
foundational criteria - not characterized by urban growth, primarily devoted to agriculture, long-term
commercial significance – within its designation criteria. However, as noted in Fn. 19, Kittitas County
erroneously omitted this language.

¹⁸ Futurewise Objections, at 16.

1 In addition, Futurewise notes GPO 2.114B contains several GMA non-compliant
2 components such as defining Prime Farmland pursuant to 7 CFR Chapter VI Part 657.5 and
3 limiting consideration to just Prime Farmland.¹⁹ According to Futurewise, these components
4 result in a CP that is internally inconsistent. Futurewise further asserts the County continues
5 to categorize land based on the availability of water – irrigated croplands and non-irrigated
6 grazing lands - and contends GPO 2.114B fails to reference Unique Farmland or Farmland of
7 Statewide Significance, once again resulting in inconsistency but also becomes too
8 restrictive.²⁰

9 In response, Kittitas County argues the GMA provides for consideration of local
10 circumstances and the inclusion of criteria beyond those specifically described in the RCW or
11 WAC.²¹ The County cites to RCW 36.70A.050, 36.70A.3201, WAC 365-190-040, 365-190-
12 050, and the Supreme Court's holding in *Lewis County* to support their assertion.²²

13 **Board Discussion and Analysis:**

14 With the enactment of Ordinance 2008-20, the County adopted new criteria for
15 agricultural land of long-term commercial significance (Ag Land of LTCS).²³ This criteria
16 established separate processes for the designation and de-designation of Ag Land of
17 LTCS.²⁴

- 18 • Designation of Agricultural Lands of Long-Term Commercial Significance

19 Futurewise Objections, at 16-17.

20 Futurewise Objections, at 17-18.

21 County Response, at 2.

22 County Response, at 2-3.

23 The Board finds reference to this at Section III, Page 8 of Ordinance 2008-20, incorporating the language of Attachment 3 and adding that language to the CP. It is further noted not all of the language set forth in Attachment 3 was incorporated in the CP. Kittitas County concedes references to the standards of RCW 36.70A.170 and the definitions of RCW 36.70A.030 were erroneously omitted. In order to correct this omission, on December 16, 2008, the County adopted Ordinance 2008-23 and the CP was amended accordingly. *Kittitas Response to Objections, at 2*. Although the incorporated language occurred after the Board's deadline for compliance, thus the County was technically out of compliance in this regard, since the omission was unintentional and was corrected prior to the Board's Compliance Hearing, the Board will consider Ordinance 2008-23 in conjunction with these compliance proceedings. For this reason, the Board will utilize the CP attached to the County's Response to Objections for review of this issue.

24 Kittitas County CP, at 32-33

1 In order to be designated, the County is to review land based on RCW 36.70A.170's
2 designation standards and the definitions contained in RCW 36.70A.030. Review based on
3 these RCW provisions is required as they encompass the foundational structure for
4 designation: (1) land is not characterized by urban growth; (2) land is primarily devoted²⁵
5 to the commercial production of agricultural products; and (3) land has long-term
6 commercial significance for agricultural production.²⁶ The inclusion of this foundation within
7 the process, something that was previously missing from the County's criteria, is the
8 County's first step towards compliance.

9 However, the Board notes Kittitas County established two categories of land which it
10 has determined are appropriate for designation – irrigated cropland and non-irrigated
11 grazing lands.²⁷ The County then goes on to establish definitions for each. Irrigated
12 croplands are lands located within the Ag-20 zone, within an irrigation district, consist
13 primarily of prime and unique soils, and comply with the other criteria under the GMA.²⁸
14 Non-irrigated grazing lands are lands lacking adequate water for crop growing, have a
15 capacity for and historic use for grazing, and are predominantly a section of land in size
16 with contiguous blocks of ownership of those lots.²⁹ From this language, it appears the
17 County has established a new definition of agricultural land separate and distinct from that
18 of the GMA and thereby excludes land which potentially may qualify for Ag Land of LTCS.
19 Furthermore, RCW 36.70A.030(2) does not limit agricultural land to land utilized just for
20 irrigated crops or grazing. The definition of agriculture addresses non-grazing, non-crop
21 types of agriculture such as the raising of bees (apiary), poultry farms, and even finfish
22 hatcheries.

22 ²⁵ In *Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn. 2d 38, 53 (1998), the
23 Supreme Court determined the phrase “primarily devoted” pertained to land in current agricultural production
24 as well as land which is capable of being used for agriculture.

24 ²⁶ See *Lewis County v. WWGMHB*, 157 Wn.2d 488 (2006)(Court articulated the definition for agricultural land).

24 ²⁷ Kittitas County CP, at 33.

25 ²⁸ Kittitas County CP, at 33.

25 ²⁹ Kittitas County CP, at 33.

1 In addition, as this Board has previously pointed out for Kittitas County, once a
2 county has found lands not characterized by urban growth and currently being used or
3 capable of being used for agriculture, the final inquiry addresses the long-term commercial
4 significance of the land and utilizes five elements related to the quality or capability of soils
5 and the development-related impacts from the surrounding area.³⁰ Kittitas County's
6 "Designation" criteria, opens with the following:³¹

7 In classifying agricultural lands of long-term commercial significance, Kittitas
8 County shall use the prime and unique soils as contained in the land-capability
9 classification system of the United States Department of Agricultural Soil
10 Conservation Services as defined in Agriculture Handbook No. 210, the actual
11 presence of such soils on the subject property to be demonstrated by the best
12 available science. Kittitas County may further consider the combined effects
13 of proximity to population areas and the possibility of more intense uses of the
14 lands as indicated by ...

15 Handbook 210³² establishes eight classifications ranging from soils suitable for cultivation
16 due to very limited restrictions (Class I) to soils subject to severe restrictions which limit
17 their use for any purpose (Class IV). Although the Board finds no error in a county's
18 selection of Prime and Unique Farmland as a basis for designation, since these two
19 categories represent land which has the best combination of physical and chemical
20 characteristics for agricultural production, these categories are established within 7 CFR 657
21 and not Handbook 210. In addition, Prime and Unique Farmland are not types of soils but
22 rather categories of land which satisfy several criteria including moisture and temperature

23 ³⁰ August 2008 1st Compliance Order, at 14-17. See RCW 36.70A.030(10) for definition of LTCS.

24 ³¹ Compliance Exhibit A, Kittitas County CP Nov. 6, 2008, at 32

25 ³² WAC 365-190-050. The Board notes Handbook 210 has been updated by the NRCS November 2006
26 publication. While WAC 365-190-050 references USDA Handbook 210, CTED has indicated until it amends this
WAC, its interpretation is a county using the updated USDA publication for the purpose of classifying ARLS
fulfills the intent of the WAC provision. *Butler, et al v. Lewis County, Panesko, et al v. Lewis County, Hadaller,
et al v. Lewis County*, WWGMHB Coordinated Case Nos. 0-2-0031c/99-2-0027c/08-2-0004c, FDO and
Compliance Order, at 41 (July 7, 2008).

1 regimes, pH levels, location of water tables, soil management horizons, erodibility factors,
2 etc.³³ Thus, Kittitas County's reference to "Prime and Unique Soils" creates confusion.

3 Of intense concern to the Board, is the County's statement that "the actual presence
4 of such soils on the subject property to be demonstrated by the best available science."³⁴

5 The Board first notes, as stated above, Prime and Unique are labels assigned by NRCS to
6 categories of farmland so the County's statement leaves a reader to question what is to be
7 shown – a type of soil, or a category of farmland. In addition, within the GMA the
8 Legislature limited the use of Best Available Science (BAS) to the designation and protection
9 of critical areas,³⁵ not to the designation agricultural lands. RCW 36.70A.170 was adopted
10 in 1990, RCW 36.70A.172 was adopted in 1995. If the Legislature had wanted BAS to be
11 included within the designation process of NRLs it would have amended the GMA to reflect
12 this. The Legislature did not amend the GMA in this regard and the Board will not expand
13 the application of BAS beyond that explicitly intended by the Legislature. As the County is
14 well aware, although the GMA grants discretion to local jurisdictions, this discretion is
15 bounded by the goals and requirements of the GMA. Thus, by including a provision within
16 its designation criteria which states Best Available Science is to be utilized in the designation
17 process for Ag Lands of LTCS, the County has expanded the NRL designation parameters
18 beyond that established by the Legislature and in opposition to the GMA's mandates.

19 After an unclear consideration of soils, Kittitas County states it *may further consider*
20 the combined effects of proximity to population areas and the possibility of more intense
21 uses of land as indicated by 14 factors. RCW 36.70A.030(10) provides long-term
22 commercial significance is defined not solely on the agricultural capability of soils but also *in*
23 *consideration with* the land's proximity to population area and the possibility of more
24 intense use. In other words, a jurisdiction must consider these development-related impacts

25 ³³ See 7 CFR 657. Pursuant to WAC 242-02-660, the Board takes official notice of the Federal Law pertaining
26 to USDA/NRCS soils, including, but not limited to, 7 CFR 622, 7 CFR 657, and Handbook 210.

³⁴ The Board wonders, if the data produced by the NRCS is not BAS for soil, what would constitute BAS for
soils within Kittitas County?

³⁵ RCW 36.70A.172

1 to properly apply the definition. In addition, RCW 36.70A.170(2) is clear - when making NRL
2 designations jurisdictions *shall consider* the WAC guidelines. Thus, the consideration of
3 NRL's proximity to population and the possibility of more intense use is a mandatory
4 consideration under the GMA, not a discretionary one.

5 The wording utilized by Kittitas County – *may further consider* – is permissive as
6 opposed to mandatory. Kittitas County has stated prime and unique soils *shall* be used but
7 the County *may* consider the effects of proximity to population and possibility of more
8 intense uses. When different words are used in the same statute and are not otherwise
9 defined, as is the situation here, the Board must give the words their usual and ordinary
10 meaning and presume a different meaning was intended for each regardless of the policy of
11 the enacting law or the seeming confusion that may follow an enactment.³⁶ The Board
12 further notes if the BOCC intended the same meaning, it could have utilized “shall” in both
13 instances.³⁷ The language provided in Kittitas County's updated CP does not express this
14 mandatory intent.

15 In addition, with its' newly adopted criteria Kittitas County sets forth 14 factors which
16 are to be addressed when considering the combined effects of proximity to population areas
17 and the possibility of more intense uses of land. Although most of the County's factors
18 mirror the language of WAC 365-190-050(1), some expand that language and others set
19 forth new considerations. The Board contrasts these factors as follows; variations from the
20 WAC are shown in *italics*.³⁸

WAC 365-190-050	Kittitas County Criteria
(a) Availability of Public Facilities	(a) Availability of Public Facilities
(b) Tax Status	(b) Tax Status
(c) Availability of Public Services	(c) Availability of Public Services
(d) Relationship or proximity to UGAs	(d) Relationship or proximity to

23 ³⁶ See e.g., *State ex rel Public Disclosure Commission v. Rains*, 87 Wn. 2nd 626, 633-34 (1976); *Washington*
24 *Dept. of Revenue v. Hoppe*, 82 Wn.2d 549, 552 (1973).

25 ³⁷ See e.g., *State v. Roth*, 78 Wn.2d 711, 715 (1971)

26 ³⁸ The contents of this table are based on WAC 365-190-050 and Kittitas County Comprehensive Plan at 32-33.

	UGAs, <i>which shall include areas of where historic growth has occurred</i>
	(e) <i>Location of public roads, utilities and other public services</i>
(e) Predominant Parcel Size	(f) <i>Predominant parcel size and parcel size of the resource</i>
(f) Land use settlement patterns and their compatibility with agricultural practices	(g) <i>Land use settlement patterns and their compatibility with agricultural practices</i>
(g) Intensity of nearby land uses	(h) <i>Intensity of nearby land uses</i>
(h) History of land development permits issued nearby	(i) <i>History of land development permits issued nearby</i>
(i) Land values under alternative uses AND	(j) <i>Land values under alternative uses</i>
(j) Proximity of markets	(k) <i>Proximity to markets</i>
	(l) <i>Availability of agriculture infrastructure</i>
	(m) <i>Availability and adequate water supplies OR</i>
	(n) <i>Long-term economic conditions which affect the ability to manage and/or maintain commercially viable agricultural lands, which should include consideration of the following market factors:</i> <i>i. Location of manufacturing or processing facilities</i> <i>ii. Equipment and transport costs</i> <i>iii. Site productivity and production costs</i> <i>iv. Taxes and administrative costs</i>

The Board first notes the WAC Factors, with the use of the conjunction "AND," require the consideration of *all* the listed factors. In contrast, Kittitas County's Factors use the conjunction "OR," thereby failing to provide for the consideration of all of the stated factors. Although the Board recognizes factors are not weighted, jurisdictions are to

1 consider all of the development-related factors enumerated in WAC 365-190-050(1).³⁹
2 Thus, the County's use of "OR" fails to comply with the GMA, specifically RCW
3 36.70A.060(2) which requires complete consideration.

4 As for the County's factors themselves, in the 1st Compliance Order the Board
5 stated:⁴⁰

6 Although the ability to include outside criteria was addressed in the *Lewis*
7 *County* case, the Court did note such considerations must be within the
8 mandates of the GMA and pertain to the characteristics of the agricultural land
9 to be evaluated. The additional factors adopted by the County are not limited
10 in this regard, but rather address the influences of the market on an individual
11 farmer's ability to operate.

12 With Ordinance 2008-20, the County has reorganized the layout of its criteria, adopted new
13 criteria, removed some previously-enacted factors,⁴¹ and let other criteria remain.⁴² The
14 Board concurs with Kittitas County in that it is not barred from adopting criteria beyond that
15 set forth in the WAC, but such considerations must be within the mandates of the GMA and
16 pertain to the characteristics of the agricultural land to be evaluated.⁴³ In the 1st
17 Compliance Order, the Board concluded the County's additional factors were not limited by
18 the mandates of the GMA to conserve, maintain, and enhance but rather addressed the
19 influences of the market on an individual farmer's ability to operate.⁴⁴ This second
20 compliance effort sees no change in this and some of the factors are duplicative and
confusing. For example, Factor (c) states consideration is to be given to the availability of
public services while Factor (e) appears to repeat this consideration by addressing the

21 ³⁹ *Lewis County v. WWGMHB*, 157 Wn.2d 488, 502-503 (2006); see also, *Redmond v. CPSGMHB*, 136 Wn.2d at
22 55.

⁴⁰ August 2008 1st Compliance Order, at 19.

23 ⁴¹ E.g. Kittitas County has removed consideration of the *Compatibility and Proximity to Critical Areas and Ability*
to Maintain the "Right to Farm" Ordinance.

24 ⁴² E.g. Kittitas County has retained consideration of the *Availability of Agriculture Infrastructure, Proximity*
[Location] to Manufacturing and Processing Facilities, and Administrative Costs.

25 ⁴³ August 2008 1st Compliance Order, at 19 (referencing the *Lewis County* case).

⁴⁴ August 2008 1st Compliance Order, at 19-20.

1 location of public services; effectively given consideration twice to the same thing. Factor
2 (l) considers the availability of agricultural infrastructure, which in the Board's opinion would
3 encompass such things as irrigation canals/pipes, while Factor (m) similarly addresses the
4 availability of water supplies.

5 In addition, as was noted by Futurewise, the County failed to provide objective
6 criteria by which factors would be applied. For example, the County states both
7 predominant parcel size and parcel size of the resource are to be considered. While the
8 Board acknowledges parcel size is relevant,⁴⁵ no specific size requirement is provided to
9 guide future decision makers and no distinction is made as to what is a "predominant"
10 parcel size versus the "resource" parcel size. Although the Board recognizes not all factors
11 require specific parameters, some type of basic guidance is needed to provide consistency
12 and prevent arbitrary decisions in the future.

13 Conclusion – Designation Criteria:

14 The Board finds and concludes although Kittitas County has amended its CP to
15 include the statutory definitions necessary for the designation of Ag Land of LTCS,
16 specifically RCW 36.70A.170 and RCW 36.70A.030, with the establishment of two categories
17 of land it has deemed appropriate for designation, the County deviates from these statutory
18 standards. However, the County's criteria continues to contain factors which are to be
19 utilized when considering the combined effect of proximity to population areas and the
20 possibility of more intense uses on the LTCS of the land which exceed the GMA's mandate
21 as to agricultural land as set forth in RCW 36.70A.020(8), .060, and .170.

22 ⁴⁵ Lewis County, 157 Wn.2d at 502 (citing with approval *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 807-
23 08, 959 P.2d 1173 (1998) (holding that a county may set a minimum parcel size based on the factors in WAC
24 365-190-050), review denied, 137 Wn.2d 1018 (1999)). See also, *Futurewise v. CPSGMHB*, 141 Wn. App. 202
25 (2007)(approving 5 acres parcel size in Pierce County but noting that the "absence of a specific legislative or
26 agency prohibition does not grant counties unfettered discretion in setting parcel sizes ... a county may
designate a minimum parcel size for certain land type designations so long as the limitation is consistent with
the GMA and with CTED principles; *City of Arlington v. CPSGMHB*, 164 WN.2d 768 (2008)(noting Snohomish
County's parcel size criteria ranging from 10 acres (specialty crops) to 40 acres).

1 • De-Designation of Agricultural Lands of Long-Term Commercial Significance

2 As for de-designation, Kittitas County has substantially simplified its criteria. Now,
3 for Agricultural Land of LTCS to be de-designated, one of the following elements, which
4 mirror the criteria of WAC 365-190-040(2)(g), need to be shown:

- 5 1. Change in circumstances pertaining to the CP or public policy
6 2. A change in circumstances beyond the control of the landowner pertaining
7 to the subject property
8 3. An error in designation, or
9 4. New information on NRL or critical area status.

10 In addition to these four non-inclusive elements, the County states when making a
11 determination as to de-designation it *should* consider the criteria for designation. As with
12 the use of the word "may" the use of the word "should" denotes permissive discretion as
13 opposed to a mandatory requirement. This Board has previously held when de-designating
14 agricultural lands, the same criteria utilized to designate the land must be utilized to
15 determine whether the land no longer qualifies for designation as Ag Land of LTCS.⁴⁶
16 Under the County's criteria, Ag Land of LTCS could conceivably be de-designated based
17 solely on one of the four listed elements without any consideration of the County's
18 designation criteria. Furthermore, if the County was to review a de-designation request
19 based on its designation criteria, it would be relying on criteria which the Board has
20 concluded *supra* does not conform to the GMA's requirements. Thus, the County's de-
21 designation criteria are non-compliant with the GMA as well.

22 Conclusion:

23 The Board finds and concludes Kittitas County's criteria for the de-designation of
24 agricultural land fails to comply with the RCW 36.70A.020(8), 36.70A.030(2),
25 36.70A.030(10), and 36.70A.170.

26 • Comprehensive Plan Policy GPO 2.114B

⁴⁶ *KCC, et al v. Kittitas County*, Case No. 07-1-0004c, FDO, at 72 (citing *Citizens for Good Governance v. Walla Walla County*, EWGMHB No. 05-1-0013, FDO, at 30 (June 15, 2006)).

1 Futurewise asserts GPO 2.114B creates internal inconsistencies. The Board concurs
2 as it finds several inconsistencies created by this policy. GPO 2.114B conflicts with the
3 County's own designation criteria which states both Prime and Unique Farmland are to be
4 considered, not just Prime Farmland. GPO 2.114B references "commercial agricultural
5 lands" while the County's designation process uses the terms "commercial agricultural
6 designation" and "agricultural lands of long-term commercial significance" in addition to the
7 term "commercial agricultural lands," leaving a reader to wonder whether these are three
8 distinct types of land or a single classification. GPO 2.114B states commercial agricultural
9 lands include those lands (1) having the high probability of an adequate and dependable
10 water supply, (2) are economically productive, and (3) meet the definition of "Prime
11 Farmland" as defined under 7 CFR 657.5.⁴⁷ With this language, the Board is left to question
12 whether the County is attempting to establish its own definition for agricultural land; a
13 definition not conforming to the one provided in the GMA. Such vagueness and confusion in
14 a legislative enactment creates the very inconsistencies RCW 36.70A.070 prohibits.

15 Conclusion:

16 The Board finds and concludes, as to the amendment of GPO 2.114B, the County has
17 created inconsistencies in violation of RCW 36.70A.070.

18 **CONCLUSION: Designation and De-Designation of Agricultural Lands**

19 The Board finds the County, with its newly adopted criteria, is establishing a process
20 by which even the finest of agricultural land would not qualify for designation due to the
21 expansive, undefined scope of the criteria which addresses everything from an individual
22 farm's administrative costs to the location of processing facilities. With the creation of an
23 almost insurmountable barrier to designation, the Board simply cannot find this designation
24 process fulfills the GMA's mandate to conserve land in order to maintain and enhance the
25 agricultural industry.

26 _____
⁴⁷ Kittitas County CP, at 34.

1 The Board further finds this process does not err on the side of including viable
2 agricultural land but rather establishes a preference for exclusion. With this exclusionary
3 tone, the County is permitting land to be converted to uses which will not ensure the
4 continuation of agriculture within Kittitas County and these irreplaceable lands will be lost
5 forever.

6 Thus, as this Board stated in the 1st Compliance Order and reiterates today, **with**
7 **the establishment of a permissive process which defines agricultural land by**
8 **terminology other than that provided by the GMA and includes factors to**
9 **determine the long-term commercial significance of agricultural land which fall**
10 **outside of the GMA's mandate to conserve, maintain, and enhance, Kittitas**
11 **County does not comply with the RCW 36.70A.020(8), 36.70A.060, 36.70A.170.**
12 Since the **County's de-designation process relies on flawed criteria**, the failure to
13 maintain and enhance the industry is perpetuated when designation land is stripped of this
14 designation and, thus, **the de-designation process violates the cited GMA provisions**
15 **as well.**

16 In addition, with **the adoption of amended GPO 2.114B, Kittitas County has**
17 **created internal inconsistencies within its Comprehensive Plan in violation of**
18 **RCW 36.70A.070 and has set forth language which violates the GMA's definition**
19 **of agricultural land contained with RCW 36.70A.030 and 36.70A.170.**

20 **2. Designation/De-Designation Criteria – Forest Lands**

21 With the August 2007 FDO, the Board found Kittitas County had failed to establish
22 any criteria for the designation of Forest Lands of Long-Term Commercial Significance
23 (LTCS Forest). With the August 2008 Compliance Order, the Board held:⁴⁸

24 The County's designation and de-designation process does not adequately
25 encompass these requirements [RCW 36.70A.020(8), .170, WAC 365-190-
26 060] and, as was found for agricultural lands, includes factors which are not

48 August 2008 Compliance Order, at 26.

1 respectful of the GMA's mandate to conserve lands and maintain and enhance
2 the timber industry.

3 Because of this, the Board concluded the County's process did not comply with the GMA by
4 not facilitating the maintenance and enhancement of the timber industry and exceeding the
5 GMA's and WAC's requirement for consideration of development related impacts.

6 Futurewise contends Kittitas County continues to have designation criteria which fail
7 to comply with the GMA in regards to Forest Lands of Long-Term Commercial Significance
8 (LTCS Forest).⁴⁹ Futurewise also alleges, the County's criteria fails to contain the key criteria
9 for designating LTCS Forest as required by RCW 36.70A.30 and .170 (not characterized by
10 urban growth, primarily devoted to, and long-term commercial significance) as well as
11 including evaluating criteria which exceeds the GMA's mandate. Futurewise argues, the
12 County's CP states long-term economic conditions should be considered but then sets forth
13 criteria which are unrelated to long-term economic conditions (i.e. milling facilities, log size)
14 or reasons a change in circumstances can be demonstrated by laws which predate the
15 GMA.⁵⁰ Futurewise further notes the County's CP, with language heralding a change from
16 an economy based on natural resource industries to recreation and service industries, fails
17 to comply with the GMA's mandate to maintain and enhance natural resource industries.

18 In response, Kittitas County notes, as with agricultural lands, the language by RCW
19 36.70A.030 and .170 was erroneously omitted from Ordinance 2008-20 and this error was
20 corrected with the adoption of Ordinance 2008-23 on December 16, 2008.⁵¹ Also, as with
21 agricultural lands, the County contends the GMA grants discretion in adoption criteria to
22 evaluate the long-term commercial significance of Forest Lands in consideration of local
23 circumstances.⁵²

24 ⁴⁹ Futurewise Objections, at 9.

25 ⁵⁰ Futurewise Objections, at 10-13.

26 ⁵¹ County Response, at 2.

⁵² County's Response, at 2-3.

1 American Forest Land Company (AFLC), whose participation in this matter is limited
2 to this issue, similarly notes the language omitted by Ordinance 2008-20 has since been
3 inserted into the CP under the heading of "Resource Lands" and the County should
4 therefore not be found non-compliant.⁵³ AFLC further states the County's criteria for the
5 designation and de-designation of LTCS Forest adopts "verbatim" CTED's guidelines found
6 in WAC 365-190-040(2)(g) and the County is free to consider factors not expressly
7 contained in the GMA.⁵⁴ AFLC states Kittitas County has modified its CP so these factors
8 "may" be considered and are intended to "flesh out" the designation criteria established by
9 the GMA.⁵⁵ As for the narrative portions of the CP, AFLC contends the GMA does not set
10 forth any specific requirements and language is present which reflects the County's vision of
11 conserving LTCS Forest.⁵⁶

11 **Board Discussion and Analysis:**

12 With the enactment of Ordinance 2008-20 the County adopted two separate
13 processes for the designation and de-designation of LTCS Forest. And, under the all
14 encompassing heading of "Resource Lands," with the enactment of Ordinance 2008-23
15 Kittitas County has included reference to RCW 36.70A.030 and 36.70A.170 within the
16 designation process. Thus, as the Board determine for Ag Land of LTCS, the County has
17 taken the first step toward developing compliant designation criteria for LTCS Forest. But,
18 contention still persists as to the factors utilized by Kittitas County in determining what
19 lands actually have long-term commercial significance.

19 • Designation of LTCS Forest

20 The definition of LTCS Forest necessarily follows the template established by the
21 Supreme Court for Ag Land of LTCS: (1) land is not characterized by urban growth, (2) land
22 is primarily devoted to the growing of trees for long-term commercial timber production on

23 _____
24 ⁵³ AFLC Response, at 2-4.

25 ⁵⁴ AFLC Response, at 4-6.

26 ⁵⁵ AFLC Response, at 6.

⁵⁶ AFLC Response, at 7.

1 land that can be economically and practically managed for such production, and (3) land
 2 has long-term significance for the commercial production of timber.⁵⁷ However, unlike
 3 agriculture, the Legislature has provided specific guidance to be used in determining the
 4 “primarily devoted” portion of the definition as RCW 36.70A.030(8), with language
 5 addressing the ability of the land to be “economically and practically managed.”⁵⁸
 6 Therefore, the County’s reference to the standards of RCW 36.70A.170 and the definitions
 7 of RCW 36.70A.030 for designation of Resource Lands includes the critical foundation for
 8 designation.

9 The final consideration for designation of LTCS Forest is whether or not the land has
 10 long-term significance for commercial timber production. The definition of Long-Term
 11 Commercial Significance set forth in RCW 36.70A.030(10), in conjunction with the language
 12 of RCW 36.70A.030(8), guides the Board with the factors enumerated in WAC 365-190-060
 13 to be considered in order to evaluate the combined effects of the proximity to population
 14 areas and the possibility of more intense uses of the land.⁵⁹ As the County did with
 15 agriculture, it adopted an expanded list of factors in relationship to LTCS Forest. Differing
 16 language is denoted in *italics* and all of the criteria is shown in comparison:⁶⁰

WAC 365-190-060	Kittitas County Criteria
(1) The availability of public services and facilities conducive to the conversion of forest land.	(a) The availability of public services and facilities conducive to the conversion of forest land;
(2) The proximity of forest land to urban	<i>(d) Relationship or proximity to urban</i>

20 ⁵⁷ RCW 36.70A.030(8), 36.70A.170

21 ⁵⁸ RCW 36.70A.030(8) provides: In determining whether forest land is primarily devoted to growing trees for
 22 long-term commercial timber production on land that can be economically and practically managed for such
 23 production, the following factors shall be considered: (a) The proximity of the land to urban, suburban, and
 24 rural settlements; (b) surrounding parcel size and the compatibility and intensity of adjacent and nearby land
 25 uses; (c) long-term local economic conditions that affect the ability to manage for timber production; and (d)
 26 the availability of public facilities and services conducive to conversion of forest land to other uses.

⁵⁹ RCW 36.70A.170(2).

⁶⁰ This table is based on the criteria provided in WAC 365-190-060 and Kittitas County Comprehensive Plan at 37-38.

1 2 3 4	and suburban areas and rural settlements: Forest lands of long-term commercial significance are located outside the urban and suburban areas and rural settlements	<i>growth area(s), which shall include areas of where historic growth has occurred</i>
5 6	(3) The size of the parcels: Forest lands consist of predominantly large parcels	(f) <i>Predominant parcel size:</i> Forest lands should consist of predominantly large parcels of land
7 8 9	(4) The compatibility and intensity of adjacent and nearby land use and settlement patterns with forest lands of long-term commercial significance.	(g) <i>Land settlement patterns and their compatibility with forest practices of long-term commercial significance</i> (h) <i>Intensity of nearby land uses</i>
10 11 12 13 14 15 16	(6) Local economic conditions which affect the ability to manage timberlands for long-term commercial production.	(m) <i>Long-term economic conditions which affect the ability to manage and/or maintain commercially viable forest lands of long-term significance, which should include consideration of the following market factors:</i> <i>(i) The location of manufacturing or processing facilities</i> <i>(ii) Equipment and transport costs</i> <i>(iii) Site productivity and production costs</i> <i>(iv) Taxes and administrative costs</i>
17 18	(7) History of land development permits issued nearby.	(i) History of land development permits issued nearby
19		(c) <i>The availability of public services</i>
20		(e) <i>The location of public roads, utilities, and other public services</i>
21		(j) <i>Land values under alternative uses</i>
22		(k) <i>Proximity to markets</i>
23		(l) <i>Availability and adequate water supplies, OR</i>

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1 In many regards, Kittitas County has simply reiterated the same factors it has
2 articulated for agricultural lands, some of which are not at all applicable to LTCS Forest.
3 For example, the Board is aware of only a few commercial forestry operations which rely on
4 irrigation so a factor pertaining to the adequacy of adequate water supplies appears largely
5 irrelevant. The Board is also cognizant of the fact that most of Washington's wood and
6 timber products are exported out-of-state, with a significant percentage of raw logs
7 exported to foreign markets, and therefore the consideration of the "proximity to markets"
8 would likewise be of little relevance due to the global marketplace. In conjunction with
9 using factors which are irrelevant to the timber industry, Kittitas County has modified the
10 GMA's requirements. For example, RCW 36.70A.030(8) provides that when determining
11 whether land can be economically and practically managed, long-term local economic
12 conditions affecting the ability to manage the land for timber production shall be
13 considered. This is similarly reflected in WAC 365-190-060(6) which states local economic
14 conditions which affect the ability to manage timberlands should be considered in
15 relationship to the proximity of the land to population and the possibility for more intensive
16 uses. The language of the GMA and WAC both reflect a consideration of *local* economics
17 and the ability to *manage* the land for commercial production; Kittitas County's language
18 does not limit the consideration in this regard.

17 In common with the County's agricultural criteria, is the use of the conjunction "OR"
18 and the statement that the combined effects of proximity to population areas and the
19 possibility of more intense uses "SHOULD" consider these aspects. As the Board stated
20 *supra*, RCW 36.70A.170(2) *mandates* the consideration of the WAC guidelines. By using
21 permissive, non-inclusive terminology the County fails to meet the requirements of
22 36.70A.170(2). Also, in common with the agriculture criteria is the duplicity of factors, such
23 as Factors (a), (c), (e) which all address public services, and the lack of objective criteria by
24 which to apply the factors, such as parcel size.

1 Confusion for the Board also arises within the County's CP in regards to GPO 2.131
2 which sets forth parameters for the designation of LTCS Forest – the very same parameters
3 the Board held was non-compliant in the August 2008 Compliance Order.⁶¹ The Board must
4 ponder -- which criteria will the County be using to designate LTCS Forest, the standards
5 and definitions set forth in the GMA along with appropriate factors for determining the LTCS
6 of forest land as set forth in the County's narrative regarding designation or the
7 considerations contained within GPO 2.131? Kittitas County must establish a single process
8 by which LTCS Forest is designated and its CP must be clear as to that process.

8 Conclusion:

9 As adopted by Ordinance 2008-20, the County's process not only includes criteria
10 which is not relevant to the commercial forest industry and exceeds the GMA's mandate for
11 the conservation of such lands and the maintenance and enhancement of the timber
12 industry, but also uses permissive, non-inclusive terminology and creates an unclear
13 designation process.

13 • De-Designation of LTCS Forest Lands

14 With the adoption of Ordinance 2008-20, Kittitas County established a separate and
15 distinct process for the de-designation of LTCS Forest Land. The new criteria sets forth the
16 language of WAC 365-190-040(2)(g), for example, a change in circumstances, which the
17 County further states should recognize not only changes since 1993, but also continuing
18 changes. The County's process requires that the criteria for designation "should" be
19 considered. The County then requires an impressive consideration of the following:

- 20 1. Long-Term Economic Conditions
21 a. Milling Facilities
22 b. Transportation
23 c. Log Values
24 d. Species Mix and Log Size
25 e. Land Holding and Administrative Costs
26 f. Needs of the local forest products industry and the available of

25 ⁶¹ August 2008 Compliance Order, at 24-25.

- 1 long-term sources of timber
- 2 2. Intensity of Nearby Land Uses
- 3 a. Compatibility and intensity of adjacent and nearby uses
- 4 b. Land Use Plan consistent with de-designation, including
- 5 operational impacts on adjacent commercial forest land
- 6 c. Demonstrated compatible use with rural and forest land use
- 7 parcels
- 8 3. Availability of Public Services
- 9 a. Current and future status of infrastructure
- 10 b. Public roads or potentially public roads
- 11 c. Fire district
- 12 d. Location in relation to Wildland Urban Interface boundary
- 13 e. Within or potentially included in a Community Wildlife Protection
- 14 Plan
- 15 f. Public Schools
- 16 g. Water available or potentially available
- 17 h. Waste water treatment
- 18
- 19 4. Site Productivity
- 20 a. Demonstrated that the majority, or significant portion, of the
- 21 property does not meet site class 1-4 pursuant to Dept. of
- 22 Revenue rating system (no marketable stand in a 100-year
- 23 growth period)
- 24 5. Change in Circumstances
- 25 a. Kittitas County land use patterns/land use planning
- 26 b. Legislative land use direction
- c. Changes in the GMA (RCW and WAC) and KCC
- d. Recognize the evolving regulatory changes affecting the
- management of state and private forest land – i.e. State Forest
- & Fish Law, Clean Water Act

20 The Board notes Kittitas County requires the consideration of each criteria as well as

21 the consideration of the cumulative influences of all criteria. In addition, GPO 2.133 states

22 any proposal for de-designation shall be subject to a cumulative impacts analysis on the

23 local forest product industry needs as well as potential benefits such as property tax gains.

24 Thus, with the de-designation criteria, Kittitas County has established an intensive review.

1 The problem with Kittitas County's de-designation process is it appears to encompass
2 a more expansive review than the designation process itself. Although it is appropriate for
3 any change in designation to be evaluated based on a change in circumstance or the
4 availability of new information, as noted in WAC 365-190-040(g), all of the foundational
5 requirements leading to the initial designation of the land must be evaluated to ensure the
6 land no longer satisfies the criteria. As this Board stated previously in the initial FDO for this
7 matter:⁶²

8 While nothing in the GMA requires [natural resource lands], once designated,
9 to remain designated as such forever, and nothing in the GMA specifies
10 precisely how a county may determine that designated [natural resource
11 lands] no longer should be designated; logically, the only way to make such a
12 determination consistent with the GMA is to apply the same statutory criteria
13 to a proposed de-designation of [natural resource lands] as for a proposal to
14 designate such lands. Any other approach defeats the GMA's requirements ...

15 Conclusion:

16 By expanding beyond the considerations made in the initial designation process, the
17 County creates a separate and distinct process which due to varying considerations may not
18 fulfill the GMA's mandates for the conservation of NRL and the maintenance and
19 enhancement of the industry relying on them. In addition, since the de-designation process
20 relies, in part, on non-compliant designation criteria the de-designation process fails to
21 comply with the GMA. Thus, the Board finds and concludes by establishing a de-designation
22 process which does not directly align with the County's designation process for LTCS Forest,
23 the County fails to comply with RCW 36.70.020(8) and 36.70A.170.

24 **CONCLUSION: Designation and De-Designation of Forest Lands**

25 Although Kittitas County has taken its first steps towards compliance with the
26 inclusion, by reference, of the GMA's standards for NRL designation provided in RCW

⁶² August 2007 FDO, at 71

1 36.70A.030 and 36.70A.170, the County still fails to comply with the GMA's mandate for the
2 conservation of NRL as provided in RCW 36.70A.020(8), 36.70A.060, and 36.70A.170.

3 Similarly, with its Ag Lands of LTCS, Kittitas County's designation process for LTCS
4 Forest creates a confusing, almost impermeable barrier to designation for which the Board
5 simply cannot find the County has fulfilled the GMA's mandate to conserve land in order to
6 maintain and enhance the forestry industry.

7 By establishing a permissive process which defines **forest lands by terminology**
8 **other than that provided within the GMA and by including factors to determine**
9 **the long-term commercial significance of forest land which fall outside of the**
10 **GMA's mandate to conserve, maintain, and enhance, Kittitas County fails to**
11 **comply with the RCW 36.70A.020(8), 36.70A.060, 36.70A.170.** Since the County's
12 **de-designation process establishes a distinctly separate process and relies on**
13 **flawed criteria**, a failure to maintain and enhance the industry is immortalized and
14 **violates the cited GMA provisions as well.**

15 **3. Notice Provisions – Mineral Resource Lands**

16 With both the August 2007 FDO and August 2008 1st Compliance Order, the Board
17 found the County failed to fully incorporate the mandated language contained in RCW
18 36.70A.060(1)(b) within General Planning Policy (GPO) 2.145.⁶³ Kittitas County states GPO
19 2.145 was amended to add the missing language.⁶⁴ Futurewise does not contest this action
20 achieves compliance.⁶⁵

21 **Board Discussion and Analysis:**

22 As previously noted by the Board, a single sentence was missing from the County's
23 CP regarding notice for mineral resource lands. Namely, language to reflect the final
24 sentence of RCW 36.70A.060(1)(b) which provides:

25 ⁶³ August 2007 FDO, at 28; August 28 1st Compliance Order, at 27.

26 ⁶⁴ 2nd SATC, at 7.

⁶⁵ Futurewise Objections, at 9. Neither CTED nor AFLC participated on this aspect of Issue 3.

1 The notice for mineral resource lands shall also inform that an application
2 might be made for mining-related activities, including mining, extraction,
3 washing, crushing, stockpiling, blasting, transporting, and recycling of
materials.

4 With Ordinance 2008-20, the County has amended GPO 2.145 to specifically incorporate
5 this language.

6 **Conclusion:**

7 The Board finds and concludes the County's notice provisions, specifically in regards
8 to mineral resource lands, sets forth the language mandated by RCW 36.70A.060(1)(b).
9 Therefore, the **Board finds and concludes the County is now compliant with the**
10 **GMA in this regard as to Legal Issue 3.** However, as the Board notes *infra*, Kittitas
11 County failed to comply with the procedural requirements of SEPA and, despite the nominal
12 nature of this aspect of the County's compliance efforts, SEPA does not exempt
13 amendments to CP from its procedural requirements. Thus, although the addition of this
14 language achieves substantive compliance with the GMA, the County is still required to
15 procedurally comply with SEPA and this language must be re-enacted after conducting an
appropriate SEPA process.

16 **C. SITE-SPECIFIC DE-DESIGNATION OF AGRICULTURAL LANDS – Legal**
17 **Issues 4 and 13**

18 In the August 2007 FDO, the Board concluded Kittitas County improperly de-
19 designated several parcels of Ag Land of LTCS, namely parcels identified as Application Nos.
20 06-01, 06-03, 06-04, 06-05, 06-06, 06-13, and 06-17.⁶⁶ In its first attempt at compliance,
21 Kittitas County withdrew Applications 06-01, 06-05, 06-06, and 06-13 and the Board
22 deemed the County in compliance as to those applications. As for Application No. 06-17, the
23 County stated this application was erroneously omitted and it would rescind the de-
24 designation. As for Application Nos. 06-03 and 06-04, the County took no action

25 ⁶⁶ August 2007 FDO, at 82-84.

1 whatsoever. The Board concluded since the County had failed to fully comply, continuing
2 non-compliance was warranted and also deemed the continuation of invalidity was
3 necessary in order to prevent the vesting of inappropriate development.⁶⁷

4 In this second attempt at compliance, the County has rescinded Application No. 06-
5 17.⁶⁸ Futurewise does not contest a finding of compliance in regards to Application No. 06-
6 17 and CTED likewise indicates the rescission of this application brings the County into
7 compliance with the GMA.⁶⁹ The basis for the Board finding Kittitas County non-compliant,
8 in part, was founded on Application No. 06-17. With the rescission of this application, the
9 County has brought itself into compliance in this regard.

10 As for the re-affirmation of Application Nos. 06-03 and 06-04, the County submits the
11 City of Kittitas's CP and correspondence from CTED and a City of Kittitas Planner as
12 supporting evidence.⁷⁰ Futurewise contends the County has (1) failed to properly analyze
13 the land encompassed by the applications for de-designation and (2) failed to conduct a
14 proper country-wide/area-wide analysis of agricultural land in conjunction with this
15 analysis.⁷¹ Futurewise further asserts since the County bears the burden of proof due to the
16 imposition of invalidity, simply submitting the City of Kittitas's CP, which Futurewise
17 contends demonstrates these two applications are not needed for residential growth and is
18 void of analysis as to commercial/industrial land needs, fails to demonstrate the County has

19 ⁶⁷ August 2008 1st Compliance Order, at 28-29.

20 ⁶⁸ Ordinance 2008-20, at 8.

21 ⁶⁹ Futurewise Objections, at 19; CTED's Objections, at 12-13.

22 ⁷⁰ County's 2nd SATC, at 7. The County cites the City of Kittitas CP and to Exhibit 1 and 17, all of which were
23 not attached to the County's 2nd SATC but rather the County provided the Board with a hyperlink to the
24 County's Official Record maintained on the County's website. The County is reminded that it bore the burden
25 of proof as to Legal Issues 4 and 13 and, therefore, if it desires the Board to consider an exhibit, it is to
26 specifically attach the exhibit to the brief and not simply cite to a website which contains a plethora of
documents which may or may not relate to the issue presently being considered by the Board. Despite this,
the Board did locate and review these two pieces of correspondence and notes these letters pertain to the
validity of the City's CP in regards to GMA, which as stated in this 2nd Compliance Order, is not the subject of
Issues 4 and 13.

⁷¹ Futurewise Objections, at 19.

1 conducted the necessary analysis. CTED submits no assertions in regards to these two
2 applications.⁷²

3 Because of the Board's previous finding of non-compliance and invalidity, it is Kittitas
4 County who bears the burden of demonstrating that its actions achieve compliance with the
5 GMA.

6 **Board Discussion and Analysis:**

7 The County apparently misunderstood the Board's holdings in its August 2007 FDO
8 and August 2008 Compliance Order as to Issues 4 and 13. Although the land encompassed
9 by Application Nos. 06-03 and 06-04 relates to the expansion of the City of Kittitas's UGA,⁷³
10 the contention with Issues 4 and 13 was whether or not the County had properly analyzed
11 the land for de-designation as Ag Land of LTCS. As such, these lands were not available for
12 inclusion within the City's UGA for urban levels of development until the County had
13 properly determined the land no longer qualified as Ag Land of LTCS.⁷⁴ Thus, *the City of*
14 *Kittitas CP has no bearing on the County's obligation in relationship to its agricultural land,*
15 and the County directs the Board to no place within the Compliance Record which
16 articulates any analysis of the specific characteristics of the parcels which would support the
17 de-designation of lands encompassed by Application Nos. 06-03 and 06-04. In addition,
18 even if the County had conducted an analysis of these lands, as noted *supra*, the County's
19 process for de-designation of Ag Lands of LTCS fails to comply with the GMA and therefore
20 any analysis founded on a non-compliant process will not be permitted to stand.

21
22 ⁷² CTED Objections, at 12-13. The Board notes within its response to Issue 13 CTED states the Board should
23 find the County in compliance. However, CTED's original challenge was based on four applications – Nos. 06-
24 01, 06-05, 06-06, and 06-17 – all of which have been rescinded by the County. Application Nos. 06-03 and 06-
25 04 were challenged solely by Futurewise.

26 ⁷³ The expansion of UGAs within Kittitas County is addressed with Legal Issues 6 and 14, *infra*.

⁷⁴ The Board notes the GMA does not prohibit the designation of agricultural land within a UGA. However,
before this may occur, a city or county must have enacted a program authorizing transfer or purchase of
development rights. RCW 36.70A.060(4).

1 Lastly, in both the August 2007 FDO and August 2008 Compliance Order, the Board
2 found the County failed to conduct a county-wide analysis of its agricultural lands.⁷⁵ Once
3 again, no evidence as to whether the County has completed such an analysis was submitted
4 with the 2nd SATC.

5 **Conclusion:**

6 The Board finds and concludes the County has rescinded Application No. 06-17,
7 thereby removing the substantive basis for non-compliance raised by Legal Issues 4 and 13
8 in regards to the de-designation of Ag Lands of LTCS encompassed by this application.
9 The Board notes CTED requests compliance as to Issue 13 and Application No. 06-17.
10 Therefore, **the Board enters a finding of compliance and removes invalidity in**
11 **regards to the lands impacted by Application No. 06-17 and deems the**
12 **allegations of non-compliance raised by CTED within Legal Issue 13 remedied by**
13 **this action.** However, as the Board noted *supra* in regards to Legal Issue 3 and the Mineral
14 Land Notice Provisions, the rescission of Application No. 06-17 was effectuated by an
15 Ordinance for which SEPA's procedural requirements where not met. As such, the County
16 should ensure re-enactment of this rescission occurs as part of the SEPA review process.

17 In addition, the **Board further finds and concludes the County has failed to**
18 **analyze the Ag Lands of LTCS encompassed by Application Nos. 06-03 and 06-04**
19 **with GMA-compliant standards and criteria as provided by RCW 36.70A.030(2),**
20 **36.70A.030(10), and 36.70A.170.** In addition, the **Board finds and concludes**
21 **Kittitas County failed to perform an area-wide analysis of agricultural lands**
22 **which the *Redmond* Court deemed was intended by the Legislature within the**
23 **GMA land use planning process.** Thus, in regards to Futurewise's Legal Issue 4 and
24 Application Nos. 06-03 and 06-04, **the Board finds continuing non-compliance and**

25 ⁷⁵ August 2007 FDO, at 72; August 2008 1st Compliance Order, 30. *See also, Redmond v. CPSGMHB*, 136
26 Wn.2d 38, 52 (1998) (Finding the Legislature intended the land use planning process of GMA to be area-wide
in scope).

1 further finds the potential for vesting of development during the pendency of the
2 compliance proceedings, as was noted previously by the Board,⁷⁶ remains; therefore, the
3 Board determines the **continuing application of a Determination of Invalidity** is
4 likewise warranted.

4 **D. City of Kittitas Urban Growth Areas – Legal Issues 6 and 14**

5 In the August 2007 FDO, the Board found Kittitas County had failed to conduct a
6 proper land capacity analysis (LCA) and updated capital facilities plan (CFP) to support the
7 UGA expansions for the City of Kittitas and the City of Ellensburg.⁷⁷ With the August 2008
8 1st Compliance Order, the Board concluded the County's actions achieved compliance in
9 regards to the Ellensburg UGA but the County still failed to provide the necessary analysis
10 to support the expansion of the City of Kittitas UGA. Because the County's action continued
11 to substantially interfere with the goals of the GMA, the Board determined the continuation
12 of invalidity was warranted.⁷⁸

13 With the adoption of Ordinance 2008-20, Kittitas County re-affirmed the expansion of
14 the City of Kittitas UGA and relies on the City's CP to support this expansion. The County
15 notes the location within the CP of the LCA and the CFP and further cites to correspondence
16 from CTED and a City of Kittitas Planner.⁷⁹ The County requests the Board find compliance
17 and lift the Order of Invalidity applicable to this UGA expansion.⁸⁰

18 Futurewise contends the County presents no evidence it evaluated the City's
19 assessment for UGA expansion nor does it provide the required LCA and/or CFP.⁸¹
20 Futurewise further asserts, the City's own analysis confirms the UGA has land available to
21 meet the City's needs.⁸² Futurewise relies on argument presented within its objections

22 ⁷⁶ August 2007 FDO, at 78-85; August 2008 1st Compliance Order, 28-30.

23 ⁷⁷ August 2007 FDO, at 39, 78. Board found the County's action non-compliant and issued a Determination of
24 Invalidity.

25 ⁷⁸ August 2008 1st Compliance Order, at 35-36.

26 ⁷⁹ County 2nd SATC, at 7.

⁸⁰ County 2nd SAT, at 8.

⁸¹ Futurewise Objections, at 23.

⁸² Futurewise Objections, at 23-24.

1 under Legal Issue 4 in relationship to the proper sizing of a UGA based on population
2 projections and a reasonable market factor, which does not include an “Ag Conversion”
3 deduction.⁸³ As with the County’s first attempt at compliance, based on an independent
4 review of City documents, CTED does not allege further non-compliance as to Legal Issue
5 14.⁸⁴

6 In response, Kittitas County states the City of Kittitas had done the requisite LCA and
7 CFP, which is presumed valid. The County further states analysis is contained within the
8 Record, and the County has adopted the analysis by reference.⁸⁵ The County contends
9 there is nothing in the GMA which requires the County to “check the work” of the City
10 because this would result in a distortion of the presumption of validity. The County further
11 contends Futurewise misunderstands the role of a market factor in UGA sizing and OFM
12 population numbers do not set an outer limit for the size of a UGA.⁸⁶

13 Because of the Board’s prior finding of non-compliance and invalidity, it is Kittitas
14 County who bears the burden of demonstrating its actions achieve compliance with the
15 GMA.

16 **Board Discussion and Analysis:**

17 This issue questions a key structural component within the GMA – the requirements
18 for the sizing of a UGA. The tension of the present issue essentially revolves around the
19 County’s use of the City of Kittitas’s analysis. Thus, a basic understanding of the
20 requirements for sizing UGAs is necessary to fully comprehend the issue before the Board.

21 Under the GMA planning framework, jurisdictions were first required to designate
22 natural resource lands and critical areas.⁸⁷ Once these lands were designated, the GMA
23 then required counties to designate UGAs within which urban growth was to be encouraged

24 ⁸³ Futurewise Objections, at 21.

25 ⁸⁴ CTED’s Objections, at 13-14.

26 ⁸⁵ County Response, at 3

⁸⁶ County Response, at 3-4

⁸⁷ RCW 36.70A.170; See *Redmond v. Central Puget Sound GMHB*, 136 Wn.2d 38 (1998).

1 and outside of which growth could occur only if it was not urban in nature.⁸⁸ The GMA
2 states each city within a county must be included within a UGA but a UGA may also include
3 unincorporated areas if those areas are characterized by urban growth or are adjacent to
4 areas already characterized by urban growth.⁸⁹ The size of the UGA is based on the GMA's
5 requirement to include areas and a range of densities and uses, including greenbelts and
6 open spaces, sufficient to permit the urban growth projected to occur for the succeeding
7 20-year period based on growth management population projections produced by the Office
8 of Financial Management (OFM).⁹⁰ The GMA also provides when determining the size of a
9 UGA, a reasonable land market supply factor may be utilized and local circumstances may
be considered in arriving at this market factor determination.⁹¹

10 Recently, the Supreme Court provided clarity and further guidance as to the size of a
11 UGA when the Court held:

12 ... [A]lthough the GMA does not explicitly limit the size of a UGA, to give
13 meaning to the market supply factor provision and in light of the GMA goal of
14 reducing sprawl, we hold *a county's UGA designation cannot exceed the*
amount of land necessary to accommodate the urban growth projected by
*OFM, plus a reasonable land market supply factor.*⁹²

17 ⁸⁸ RCW 36.70A.110(1). "Urban Growth Area" is defined in RCW 36.70A.030(19). "Urban Growth" is defined in
18 RCW 36.70A.030(18).

19 ⁸⁹ RCW 36.70A.110(3). The GMA reiterates urban growth should be located in UGAs and establishing the
20 following hierarchy for location: *First*, in areas already characterized by urban growth that have adequate
21 existing public facility and service capacities to serve such development; *Second*, in areas already
22 characterized by urban growth that will be served adequately by a combination of both existing public facilities
and services and any additional needed public facilities and services that are provided by either public or
private sections; and *Third*, in the remaining portions of the urban growth area. "Characterized by Urban
Growth" is defined in RCW 36.70A.030(18).

⁹⁰ RCW 36.70A.110(2).

⁹¹ *Id.*

23 ⁹² *Thurston County v. WWGMHB*, Docket No. 80115-1, at 29 (Aug. 14, 2008, En Banc) (Emphasis added). The
24 Court was addressing a previous holding by the Court of Appeals in *Diehl v. Mason County 94 Wn. App. 645*
25 (*1999*), where the *Diehl* Court found the OFM population numbers set the minimum and maximum size of the
UGA, essentially upholding previous Board cases which concluded the meaning of "sufficient" amounted to a
not too little, not too much approach to GMA sizing.

1 Thus, the framework for delineating the boundaries of a UGA is clearly established within
2 the GMA.

3 The GMA further provides Kittitas County has the task of designating a UGA.⁹³
4 Although the duty of designating a UGA belongs to a county, coordination and consultation
5 between a county and its cities underlies many aspects of the GMA, including the
6 designation of UGAs. Therefore, the GMA requires counties to consult with each of its cities
7 and attempt to reach agreement as to the location of the UGA, but if agreement cannot be
8 reached the County may designate a UGA as it deems appropriate so long as it justifies its
9 actions in writing.⁹⁴ Thus, it is clear from the GMA, the responsibility for designating a UGA
10 is Kittitas County's alone. In other words, RCW 36.70A.110(2) places the ultimate
11 responsibility of sizing UGAs with the County and this includes the designation of the urban
12 growth boundary and any assumptions used to size the UGA. The mere fact that no party
13 appealed the City of Kittitas's CP does not transform the City's LCA into a binding mandate
14 the County was forced to follow. Nor does this alter the County's ultimate responsibility and
15 authority to designate UGAs for, as noted above, it is counties and not cities that size UGAs.

16 In order to analyze whether the County has properly designated the UGA, a record
17 which contains supporting documentation of the designation decision is required – an
18 evidentiary record that has been termed "Show Your Work". Although this phrase has not
19 been specifically articulated in this compliance proceeding, the importance of Kittitas County
20 in "showing its work" in regards to the City of Kittitas UGA is the foundation of the issue.

21 ⁹³ RCW 36.70A.110(1): Each county ... shall designate an urban growth area or areas ...

22 ⁹⁴ RCW 36.70A.110(2). The Board notes this provision addresses the initial designation of UGAs. However, the
23 Board finds and concludes these same provisions apply to future alterations of a UGA boundary. The Board
24 also recognizes although the GMA does require a county to consult with its cities as to boundary lines, cities
25 have no power, in and of themselves, to delineate UGAs. Cities are only capable of submitting a
26 recommendation for the location of the UGA and filing any objection with Washington State Department of
Community, Trade and Development (CTED) over the UGA designation or filing an appeal before the Board.
RCW 36.70A.110(2); RCW 36.70A.280(1); .280(2)(a). *See also*, our colleagues at the WWGMHB: *See*
Harader et al v. City of Winlock, WWGMHB Case No. 06-2-0007, Final Decision and Order (Aug 30, 2006) (City
has no ability or duty under the GMA to set or alter UGA boundaries); *Wells v. Whatcom County*, WWGMHB
Case No. 97-2-0030 (Nov. 5, 1997)(County not a city has responsibility for UGA boundary); *Reading et al v.*
Thurston County, WWGMHB Case No. 94-2-0019 (March 25, 1995).

1 The phrase “show your work” was first used by the Central Puget Sound Growth
2 Management Hearings Board to describe the explicit documentation of factors and data
3 used by counties when undertaking the sizing of UGAs.⁹⁵ Because UGA sizing relies primarily
4 on mathematical calculations and numerical assumptions, a “showing of work” is required in
5 order to demonstrate the analytical rigor and accounting that support the sizing and
6 designation of UGAs; without which both the Board and interested citizens would have no
7 criteria against which to judge a County’s UGA delineation.⁹⁶

8 The Board recognizes, as with all legislative enactments, comprehensive plans and
9 development regulations are presumed valid upon adoption.⁹⁷ Thus, it should be clarified
10 requiring the record to support a jurisdiction’s actions does not amount to “justification” nor
11 does it result in a shifting of the burden; the burden remains on the petitioner to
12 demonstrate the analysis was clearly erroneous.⁹⁸

13 However, the presumption of validity Kittitas County seeks to invoke with the City’s
14 LCA is not evidence; a presumption’s efficacy is lost when the opposing party uses *prima*
15 *facie* evidence to the contrary.⁹⁹ Therefore, the presumption of validity accorded to
16 legislative enactments is not conclusive but rebuttable. In order to overcome the
17 presumption, a petitioner must persuade the Board the jurisdiction’s action was clearly

18 ⁹⁵ *Association of Rural Residents v. Kitsap County*, CSPGMHB Case No. 93-3-0010, Final Decision and Order, at
19 35 (1994). The Eastern Washington Growth Management Hearings Board has also adopted this requirement –
20 see *Knapp, et al v. Spokane County*, EWGMHB Case No. 97-1-0015c, Final Decision and Order (1997).

21 ⁹⁶ *Futurewise et al v. Lewis County*, WWGMHB Case No. 06-2-0003, Final Decision and Order (2006); See
22 *coordinated cases Klein v. San Juan County*, WWGMHB Case No. 02-0008, *Ludwig et al v. San Juan County*,
23 WWGMHB Case No. 05-2-0019c, *Campbell et al v. San Juan County*, WWGMHB Case No. 05-2-0022c,
24 Compliance Order/Final Decision and Order (2006); *Master Builders Association v. Snohomish County*,
25 CSPGMHB Case No. 01-3-0016, Final Decision and Order (2001); *Hensley, et al v. Snohomish County*,
26 CSPGMHB Case No. 03-3-0009c, Final Decision and Order (2003); *McAngus Ranch, et al v. Snohomish County*,
CSPGMHB Case No. 99-3-0017, Final Decision and Order (2000).

⁹⁷ RCW 36.70A.320(1).

⁹⁸ See *coordinated cases Abenroth v. Skagit County*, WWGMHB Case No. 97-2-0060c and *Skagit County*
Growthwatch v. Skagit County, WWGMHB Case No. 07-2-0002, Final Decision and Order (2007)(citing to *Port*
Townsend v. Jefferson County, WWGMHB Case No. 94-2-0006, Final Decision and Order (1994)); See also
Hensley, et al v. Snohomish County, CSPGMHB Case No. 03-3-0009c, Final Decision and Order (2003).

⁹⁹ *Bates v. Bowles White & Co*, 56 Wn.2d 374, 378 (1960) (citing *Kay v. Occidental Life Ins. Co.*, 28 Wn. (2d)
300, 183 P. (2d) 181 (1947); *Gardner v. Seymour*, 27 Wn. (2d) 802, 180 P. (2d) 564 (1947)).

1 erroneous and to do so it must present clear, well-reasoned legal argument supported by
2 appropriate reference to the relevant facts, statutory provisions, and case law which
3 establishes the GMA's requirements have not been met. Once a petitioner has overcome the
4 presumption, the responding jurisdiction must then present evidence to contradict a
5 petitioner's allegations.¹⁰⁰ Thus, although the Supreme Court held in *Thurston County v.*
6 *WWGMHB*¹⁰¹ a requirement for the County to identify and prospectively justify an action in
7 its CP distorts the presumption of validity afforded to such enactments, the Board does not
8 read the Court's holding in *Thurston County* as transforming the presumption of validity into
9 a conclusive presumption. The presumption of validity is rebuttable and remains as such.

10 Therefore, what the Board continues to seek from Kittitas County are the facts and
11 evidence supporting the sizing of the City of Kittitas UGA. There is no distortion of the
12 presumption of validity; the presumption is rebuttable by evidence and legal argument for
13 which the County must present contrary evidence from the Record. Without having the
14 ability to review supporting evidentiary documentation, the Board's ability to determine
15 whether a jurisdiction has complied with the GMA would be irretrievably compromised.
16 Since the Board has previously found Kittitas County's actions substantially interfered with
17 the GMA and issued a Determination of Invalidity, the County is under an even greater
18 burden to prove *Kittitas County has fulfilled its mandated duty to ensure one of its UGA's*
19 *has been sized in accordance with the GMA.*

20 At the heart of the required analysis for determining the appropriate size of the UGA
21 is a Land Capacity Analysis (LCA)¹⁰² in which the County determines if a UGA has sufficient
22 capacity to absorb the projected growth. The LCA is a critical mechanism for the sizing of a
23 UGA because it is utilized to determine how much urban land is needed. It is prospective –

24 ¹⁰⁰ *Wells v. WWGMHB*, 100 Wn. App. 657, 661 (2000).

25 ¹⁰¹ *Thurston County v. WWGMHB*, 164 Wn.2d 329 (2008)

26 ¹⁰² The term Land Capacity Analysis (LCA) will be utilized by the Board in this matter. Jurisdictions entitle the document in a variety of ways – Land Supply Analysis, Land Quantity Analysis, Urban Land Analysis, Land Supply Methodology Report – but no matter what the document is called it serves the same purpose – to review the supply and demand of land in order to accommodate growth.

1 looking forward over the coming 20 years to see if there is enough land within the UGA to
2 accommodate the growth allocated to the area. Because Futurewise's original challenge set
3 forth a *prima facie* case as to the sizing of the UGA, without the County's analysis the Board
4 is unable to determine if the City of Kittitas UGA was properly sized. The question before
5 the Board is whether the County's mere adoption of the City's LCA, without more, satisfies
6 Kittitas County's duty under the GMA.

7 As was noted above, the ultimate responsibility for sizing a UGA pursuant to the
8 GMA's mandate lies with Kittitas County. Thus, merely adopting the City's LCA without
9 reviewing that analysis to ensure it properly conformed to not only the GMA's goals and
10 requirements but to the goals and policies of Kittitas County's existing CP does not satisfy
11 this duty. This, the Board has stated before in regards to the incorporation of plans
12 developed by water and/or sewer districts which a jurisdiction intends to utilize to
13 demonstrate it has complied with the GMA as to capital facilities.¹⁰³ The Board sees nothing
14 different here. To reiterate – it is Kittitas County's duty to size a UGA, not the City of
15 Kittitas. Upon a challenge to the size of one of the County's UGA's, the County must provide
16 the Board with the *County's analysis* to support the sizing of the UGA. The record continues
17 to be devoid of such an analysis.¹⁰⁴

18 In addition, Futurewise points to an "Ag Conversion 60%" reduction within its
19 briefing. In order to understand what this reduction was, the Board reviewed the City's CP.
20 The Board notes within its Land Use Element the City made the following basic
21 assumptions, totaling 65 percent, as reductions in the land available for development: 30
22 percent for roads, 5 percent for parks and trails, 5 percent for critical areas, and a 25

23 ¹⁰³ See e.g. *Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, FDO (March 12, 2007); *Suquamish v.*
Kitsap County, CPSGMHB Case No. 07-3-0019, FDO (Aug. 15, 2007)

24 ¹⁰⁴ The Board notes the original authorization for inclusion of land within the Kittitas County UGA was done
25 December 11, 2006 with the adoption of Ordinance 2006-63. The City did not complete its CP update until
26 2007, adopting the revised plan on July 24, 2007 with Ordinance 07-11, and hence analysis was not
completed until then.

1 percent market factor. Prior to applying these reductions, the City reduced the amount of
2 "Ag Land" by a 60 percent "Ag Conversion" factor.¹⁰⁵

3 The County contends Futurewise fails to understand the role of a market factor in
4 GMA planning, asserting a market factor is not required to be shown unless the jurisdictions
5 disagree. It is the County, not Futurewise, that misunderstands the application of a
6 reasonable market factor to the sizing of a UGA. First, the City did explicitly state its market
7 factor – 25 percent. Second, the *Thurston County* Court did not state a market factor was
8 only required to be shown when a County and its municipality disagreed on a UGA's size.
9 The *Thurston County* Court held once the size of an UGA has been challenged and a County
10 asserts a market factor was used in designating the boundary then the petitioner may argue
11 the factor was unreasonably based on the facts in the record.
12 Third, the Court did not hold OFM population projection numbers do not establish the outer
13 limit for a UGA's size, as the County asserts, rather the Court held:¹⁰⁶

14 [A]lthough the GMA does not explicitly limit the size of a UGA, to give
15 meaning to the market supply factor provision and in light of the GMA goal of
16 reducing sprawl, we hold *a county's UGA designation cannot exceed the*
17 *amount of land necessary to accommodate the urban growth projected by*
18 *OFM, plus a reasonable land market supply factor.*

19 Thus, OFM's population projections establish a limitation on the size of a UGA with a
20 reasonable market factor permitted to adjust the UGA's size. For clarity, a market factor is
21 used to represent the estimated percentage of net developable acres contained within a
22 UGA that, due to idiosyncratic market forces, are likely to remain undeveloped and/or
23 underdeveloped over the course of the twenty-year planning cycle. Thus, the market factor
24 acknowledges not all developable land will be put to its maximum use because of such
25 things as owner preference, cost, stability, quality, and location; jurisdictions may include
26 within a UGA acreage to offset this fact; this offset percentage is reflected by a reasonable

24 ¹⁰⁵ The Board questions why the City of Kittitas County is making an adjustment for "Ag Land" as the Board is
25 aware of no agricultural land located within the City limits.

26 ¹⁰⁶ *Thurston County*, 164 Wn.2d, at 351-353

1 market factor. But, because the Legislature only provided for a market factor, to size the
2 UGA in excess of the acreage required by OFM population based upon any other reduction
3 factor is simply not authorized by the GMA.¹⁰⁷

4 The Board sees the "Ag Conversion" factor as functioning similar to a market factor
5 in that it reflects the fact 40 percent of land now under agricultural designation will not be
6 developed during the 20-year planning period. Thus, under the auspice of a market factor,
7 the City reduced developable land by 65 percent. By simply adopting the City's LCA without
8 conducting its own analysis, the County has passively accepted an unauthorized adjustment
9 to the size of the UGA.

10 In addition, the Board's prior holding found the County had failed to comply with
11 RCW 36.07A.070(3) in regards to capital facilities for the proposed areas of expansion.¹⁰⁸
12 As it did with the Land Capacity Analysis (LCA), Kittitas County simply states, within
13 Ordinance 2008-20, it has incorporated the City of Kittitas's Capital Facilities Plan (CFP).
14 However, the County does not direct the Board's attention to any place within the County's
15 CP that denotes this fact. The Board did locate, at Pages 92-93 of the CP, the City of Kittitas
16 is the "primary" provider for certain public facilities and services within unincorporated
17 portions of the UGA, such as providing sanitary sewer, domestic water, and stormwater
18 management, but this section also denotes other services, such as local roads, solid waste,
19 and emergency services are provided by others, including Kittitas County itself. Therefore,
20 the provision of public facilities and services within the proposed expansion areas would not

21 ¹⁰⁷ The Board notes that in 1992 CTED released two resource documents: *Issues in Designating Urban*
22 *Growth Areas: Part I: Providing Adequate Urban Land Supply, Art & Science in Designation Urban Growth*
23 *Areas, Part II: Suggestions for Criteria and Densities*, and *Buildable Lands Program Guideline*. Within this
24 guidance was a 6-step system permitting adjustments to the total land acreage based on "suitability,"
25 "availability," and "safety". Although a realistic approach, the Board notes this methodology was established
26 prior to the Legislature's adoption of EHB 1305 which amended the GMA to include the provision of a
reasonable land market supply factor and, therefore, if the Legislature had wished for cities and counties to
utilize such a variety of factors to adjust the available land supply as was addressed by the CTED publication it
would have amended the GMA accordingly. This, the Legislature did not do and, therefore, by the GMA's own
terms, a UGA may be adjusted only to reflect a reasonable land market supply factor.

¹⁰⁸ August 2008 Compliance Order, at 34-35.

1 be solely the responsibility of the City of Kittitas and therefore reliance on a CFP which does
2 not sufficiently address the needed facilities fails to satisfy the County's duty under
3 36.70A.070(3).

4 Once again, as the Board noted in its August 2008 Compliance Order, the County has
5 a duty to ensure the necessary public facilities and services are available throughout the
6 UGA during the 20-year planning horizon. Simply citing to the City's CFP, without more,
7 fails to satisfy this requirement.

8 **Conclusion:**

9 The Board finds and concludes the expansion of the City of Kittitas UGA by Kittitas
10 County is not supported by an analysis conducted by the County as to whether or not the
11 UGA is sized in accordance with RCW 36.70A.110 and capital facilities are adequate to serve
12 the expansion area over the 20-year planning horizon as required by RCW 36.70A.070(3).
13 The County, in passively accepting the City's LCA and CFP, failed to perform its GMA-
14 mandated duty to ensure its UGAs are property sized and its UGAs will have the necessary
15 infrastructure to serve the area during the planning period.

16 **E. KITTITAS COUNTY'S ZONING MAP AND FUTURE LAND USE MAP – Legal**
17 **Issue 7**

18 In the August 2008 1st Compliance Order, the Board found the County in continuing
19 non-compliance because the County had taken no legislative action to address Legal Issue
20 7. In the August 2007 FDO, the Board held:¹⁰⁹

21 The Petitioners have carried their burden of proof and shown that the land
22 use map is inconsistent with the Zoning map section in the ten areas listed on
23 pages 43 and 44 of Futurewise Brief on the Merits.

24 The County states it has dedicated a staff position to fixing inconsistencies between
25 the Future Land Use Map (FLUM) and the Zoning Map by March 1, 2009. Futurewise

26 ¹⁰⁹ August 2007 FDO, at 41

1 contends Kittitas County has failed to properly review the zoning and land use maps and,
2 therefore, inconsistencies remain.¹¹⁰

3 **Board Discussion and Analysis:**

4 The Board supports the County's dedication to completing this task. However, as the
5 Board noted in the 1st Compliance Order, compliance is determined only after the
6 jurisdiction has taken action through its governing body by adopting ordinances or
7 resolutions. Compliance may not be founded on a promise to act. Kittitas County has not
8 taken legislative action to remove the inconsistencies which exist between the FLUM and
9 the Zoning Map and, therefore, a finding of continuing non-compliance is warranted.

10 **Conclusion:**

11 The Board finds and concludes Kittitas County has failed to take corrective *legislative*
12 action to remove the inconsistencies which exist between its FLUM and Zoning Map as was
13 noted in the August 2007 FDO and August 2008 1st Compliance Order. Thus, **pursuant to
14 RCW 36.70A.070, the Board finds the County in continuing non-compliance as to
15 Legal Issue 7.**

16 **F. PUBLIC PARTICIPATION – Compliance Proceedings**

17 Futurewise asserts Kittitas County failed to provide for meaningful public
18 participation, as required by RCW 36.70A.035(2)(a), when it adopted amendments which
19 differed from those made available for public review and comment.¹¹¹ Futurewise contends
20 the version of the draft made available for public review “varied significantly from versions
21 subsequently posted” and points to one specific aspect – agricultural criteria – alleging the
22 initial draft failed to contain any criteria.¹¹²

23 Kittitas County states it provided for ample public participation, with drafts made
24 available for public comment and opportunity for written and oral comments. The County
25 states the adopted language was proposed by one of the County Commissioners, was

26 ¹¹⁰ Futurewise Objections, at 24.

¹¹¹ Futurewise Objections, at 25.

¹¹² Futurewise Objections, at 25.

1 subsequently accepted by the BOCC, and the GMA's public participation requirements do
2 not bar this.¹¹³

3 **Board Discussion and Analysis:**

4 Although Futurewise raises a valid argument, it fails to support this argument with
5 evidence. The GMA contains several provisions addressing citizen involvement in
6 comprehensive land use planning, including RCW 36.70A.020(11), .035, and .140, all of
7 which combine to create a strong foundation for public participation which cannot be
8 compromised.¹¹⁴ The Board notes the purpose and intent of public participation is to
9 provide the BOCC with comments so these can be considered and incorporated into the
10 subsequent legislative enactment. The Board also acknowledges failure of the BOCC to
11 specifically adopt suggested language does not amount to a violation of the GMA's
12 mandates because public participation does not equate to citizens decide. The ultimate
13 decision-makers in land use matters under the GMA are the elected officials of cities and
14 counties.

15 Thus, if the BOCC wishes to make changes to the draft of a proposed comprehensive
16 plan amendment that has presumably satisfied the GMA's public participation requirements,
17 it has discretion to do so. However, if the changes the BOCC wishes to make are
18 substantially different from the proposed language and are submitted after the opportunity
19 for public review and comment has passed, RCW 36.70A.035(2) requires additional
20 opportunity must be provided prior to the legislative body voting on the proposal unless,
21 applicable to this situation, the proposed change is within the scope of alternatives available
22 for public comment.¹¹⁵ In the present matter, the issue is two-fold: What was the proposed
23 language available for public review and comment and was the BOCC language substantially
24 different?
25

26 _____
¹¹³ County's Response to Objections, at 4.

¹¹⁴ See, *McFarland v. 1000 Friends of Washington*, 159 Wn.2d 165; 149 P.3d 616 (2006)(noting the extensive provisions for citizen involvement and public participation in the GMA).

¹¹⁵ RCW 36.70A.035(2)(a)(b)(ii).

1 According to Ordinance 2008-20, the BOCC held public hearings on October 29,
2 2008, November 3, 2008, and November 6, 2008. Although Futurewise states the initial
3 draft varied from that adopted, a claim founded on a premise Kittitas County adopted
4 language which was substantially different from that presented to the public for comment
5 and review, Futurewise fails to provide the Board with supporting evidence to make the
6 comparison required for such a determination.¹¹⁶ Without supporting documentation, the
7 Board is unable to determine whether the language ultimately adopted by the BOCC
8 substantially differed from that initially presented so as to require additional opportunities
9 for public comment and review.

9 **Conclusion:**

10 The Board finds and concludes Futurewise failed to carry its burden of proof to
11 demonstrate Kittitas County violated the GMA's public participation requirement set forth in
12 RCW 36.70A.035(2)(a) when it adopted Ordinance 2008-20.

13 **G. STATE ENVIRONMENTAL POLICY ACT (SEPA)**

14 Futurewise contends Kittitas County did not conduct an environmental review of the
15 comprehensive plan amendments adopted by Ordinance No. 2008-20, the legislative action
16 taken by the County in this compliance proceeding.¹¹⁷ Futurewise argues SEPA requires
17 such a review, comprehensive plans are not exempt, and a review of the County's website
18 and the SEPA register indicate this requirement was not complied with.¹¹⁸

19 In response, Kittitas County contends if filled out a SEPA check list and adopted, by
20 reference, the original Environmental Impact Statement (EIS) done in 1996 for its original
21 CP when it conducted the 2006 update.¹¹⁹ The County argues its' most recent amendments

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23 ¹¹⁶ At the minimum, the Board would expect Futurewise to present the Board with language made available
24 for public comment and review, the McClain memorandum, and the language adopted by the County in order
25 to show the required comparison.

24 ¹¹⁷ Futurewise Objections, at 26.

25 ¹¹⁸ Futurewise Objections, at 26 (citing to RCW 43.21C.030(2)(c)).

26 ¹¹⁹ County Response to Objections, at 4-5.

1 are the result of an appeal of its 2006 update and, therefore, are covered under the scope
2 of the SEPA work done for the 2006 update.¹²⁰

3 **Board Discussion and Analysis:**

4 The State Environmental Policy Act (SEPA) requires all government agencies to
5 consider the environmental effects of a proposed action, together with alternatives to the
6 proposed action.¹²¹ The Supreme Court has referred to SEPA as an environmental full
7 disclosure law. SEPA requires agencies to identify, analyze, disclose, and consider mitigation
8 of impacts on both the natural and built environments resulting from a proposed action.
9 The disclosure of environmental impact information to the county decision-makers and to
10 the public promotes the policy of fully informed decision-making by government bodies and
11 better opportunities for meaningful public participation.¹²²

12 Thus, when a county or city amends its CP or changes zoning, a detailed and
13 comprehensive SEPA environmental review is required.¹²³ SEPA is to function "as an
14 environmental full disclosure law",¹²⁴ and the County must demonstrate environmental
15 impacts were considered in a manner sufficient to show "compliance with the procedural
16 requirements of SEPA."¹²⁵ Although the County decision is afforded substantial weight,¹²⁶
17 environmental documents prepared under SEPA require the consideration of
18 "environmental" impacts with attention to impacts that are likely, not merely speculative,¹²⁷
19 and "shall carefully consider the range of probable impacts, including short-term and long-
20 term effects."¹²⁸

21 ¹²⁰ County Response to Objections, at 5.

22 ¹²¹ RCW 43.21C.030(2).

23 ¹²² RCW 43.21C.030; RCW 36.70A.035; *Norway Hill Preservation & Protection Assn. v. King County*, 87 Wn. 2d
24 267 (1976).

25 ¹²³ WAC 197-11-704(b)(ii).

26 ¹²⁴ *Moss v. Bellingham*, 109 Wn. App. 6 (2001).

¹²⁵ *Sisley v. San Juan County*, 89 Wn.2d 78, 64, 569 P.2d 712 (1977).

¹²⁶ RCW 43.21C.090.

¹²⁷ WAC 197-11-060(4)(a).

¹²⁸ WAC 197-11-060(4)(c).

1 In *King County v. Washington State Boundary Review Board for King County*, the
2 Supreme Court recognized the purpose of SEPA is “to provide consideration of
3 environmental factors at the earliest possible stage to allow decisions to be based on
4 complete disclosure of environmental consequences,”¹²⁹ and the SEPA is to provide
5 agencies environmental information *prior to making decisions, not after they are made*.¹³⁰

6 Generally, the first step in the SEPA analysis is the preparation of an Environmental
7 Checklist.¹³¹ The checklist provides information to the County about the proposal and its
8 probable environmental effects on the natural and built environments. It is the County's
9 responsibility to review the environmental checklist and any additional information available
10 on a proposal to determine any probable significant adverse impacts, to consider reasonable
11 alternatives, and to identify potential mitigation.

12 Alternatively, an agency may under limited circumstances use pre-existing SEPA
13 documents for a new proposed action. Lead agencies are authorized to use in whole or in
14 part existing environmental documents for new project or non-project actions, if the
15 documents adequately address environmental considerations set forth in RCW 43.21C.030.
16 The prior proposal or action and the new proposal or action need not be identical, but must
17 have similar elements that provide a basis for comparing their environmental consequences
18 such as timing, types of impacts, alternatives, or geography. The lead agency shall
19 independently review the content of the existing documents and determine the information
20 and analysis to be used is relevant and adequate. If necessary, the lead agency may require
21 additional documentation to ensure all environmental impacts have been adequately
22 addressed.¹³²

23 In this case, Petitioners argue the County did not conduct any environmental review
24 for the 2008 CPAs adopted by Ordinance 2008-20 as required by SEPA and should be

25 ¹²⁹ *King County v. Washington State Boundary Review Board for King County*, 122 Wn2d 648, 664, 860 P.2d
26 1024 (1993). *See also, Lasilla v. Wenatchee*, 89 Wn. 2d 804 (1978).

¹³⁰ *Id.*

¹³¹ WAC 197-11-960

¹³² RCW 43.21C.034.

1 remanded to the County for SEPA compliance. Kittitas County argues its amendments were
2 adopted in an attempt to comply with this Board's 2007 FDO, and as such, did not require
3 additional SEPA review beyond that done for the 2006 CP Update.

4 However, the Board notes the 2008 amendments are different in material respects
5 from the 2006 amendments (e.g. Urban Growth Areas and Agricultural Resource Lands).
6 Furthermore, SEPA does not contain any exemption from environmental review for CPAs
7 adopted in response to this Board's finding of non-compliance with the GMA.

8 In November 2005, Kittitas County prepared and issued a SEPA DNS, SEPA
9 Addendum, and Notice of SEPA Action for the "Scope of 2006 Update to the Kittitas County
10 Comprehensive Plan."¹³³ In August 2007, the Board issued its FDO in this case. There is no
11 indication in the record Kittitas County updated its 2005 SEPA documentation to take into
12 account the impact of the holdings of the August 2007 FDO. The record contains no
13 indication the County conducted any SEPA review relating to CPAs after November 2005.

14 The 2005 SEPA process conducted for the CPAs adopted in 2006 simply could not
15 have taken into account the specific areas of non-compliance determined in the Board's
16 2007 FDO (e.g. Urban Growth Nodes/Urban Growth Areas and Agricultural Resource Land
17 designations/de-designations). Because the 2008 amendments contain changes from the
18 previously determined non-compliant 2006 ordinance, they are clearly different legislative
19 actions. Thus, Ordinance 2008-20 was a new action that required some form of SEPA
20 review. As noted *supra*, SEPA review is required to ensure decision-makers have all the
21 pertinent information needed to make informed decisions, and also so an informed public
22 has an opportunity to meaningfully participate in the CPA process.

23 Kittitas County further argues state law authorizes the adoption of pre-existing SEPA
24 documents under RCW 43.21C.034. While this is a correct statement, the County offers no
25 evidence it actually took action to adoption any pre-existing SEPA documents. The process
26

¹³³ County Response to Objections, Exhibits A, B, C, and D; Book one Comprehensive Plan Update & Amendments, Index 18 and 19.

1 for the adoption of pre-existing SEPA documents is not self-executing. Rather, if an agency
2 elects this process, the Responsible SEPA Official must take affirmative action to activate
3 the adoption process and notify the public and the decision-makers.

4 In order to adopt a pre-existing SEPA document, an agency must follow three
5 essential steps as set forth in RCW 43.21C.034 and WAC 197-11-630:

6 (1) determine prior action and the new action have similar elements that provide
7 a basis for comparing their environmental consequences such as timing, types of
8 impacts, alternatives, or geography;

9 (2) take official action to adopt the pre-existing SEPA document using the
10 adoption form substantially as in WAC 197-11-965; and

11 (3) provide a copy of the adopted SEPA document to accompany the current
12 proposal submitted to the decision-maker.

13 In this case, there is no evidence in the record Kittitas County complied with any of
14 these three legally-prescribed steps to adopt a pre-existing SEPA document. There is no
15 evidence in the record the County updated its 2005 SEPA documents after issuance of the
16 2007 FDO. There is also no evidence in the record Kittitas County conducted any form of
17 SEPA review in conjunction with its adoption of Ordinance 2008-20. Therefore, Kittitas
18 County failed to comply with the requirements of SEPA when it adopted Ordinance 2008-20.

19 **Conclusion:**

20 The Board finds and concludes Kittitas County failed to conduct an environmental
21 review in regards to the comprehensive plan amendments adoption by Ordinance No. 2008-
22 20 as required by RCW 43.21C.030(2)(c).

23 **VI. FINDINGS AND CONCLUSIONS**

24 1. The Board issued its Final Decision and Order (FDO) in this matter on
25 August 20, 2007. In the FDO, the Board found the County non-
26 compliant in regards to Legal Issues 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13,
and 14 and ordered the County to take legislative action to achieve
compliance with the goals and requirements of the GMA as noted by
the Board.

- 1 2. With the August 2007 FDO, the Board also found certain actions of the
2 County's substantially interfered with the goals and requirements of the
3 GMA. A Determination of Invalidity was entered by the Board in regard
4 to the expansion of Kittitas County's UGAs and the de-designation of
5 agricultural resource land related to those expansions.
- 6 3. On August 7, 2008, the Board issued its 1st Order RE: Compliance
7 which, in relationship to this Partial 2nd Compliance Order, found Kittitas
8 County continued to be non-compliant in regards to Legal Issues 1, 3,
9 4, 6, 10, 11, 13, and 14 and the Board found continuation of the
10 previously issued Determination of Invalidity was warranted as to Legal
11 Issues 4, 6, 13, and 14.
- 12 4. On November 6, 2008, Kittitas County adopted Ordinance 2008-20 in
13 response to the August 2007 FDO and August 2008 1st Compliance
14 Order.
- 15 5. On December 18, 2008, Kittitas County adopted Ordinance 2008-23 in
16 order to include language as to natural resource lands which was
17 erroneously omitted from Ordinance 2008-20.
- 18 6. With its 1st Compliance Order, because of a pending court appeal and
19 related stay, the Board issued an Order of Abeyance in regards to Legal
20 Issues 1, 10, and 11. No Court has rendered a decision and,
21 therefore, the Order of Abeyance remains in effect.
- 22 7. With Ordinance 2008-20 and Ordinance 2008-23, Kittitas County has
23 included statutory language for natural resource lands so as to
24 encompass GMA foundational criteria. This criteria pertains to the
25 three primary characteristics of resource land: (1) not characterized by
26 urban growth, (2) primarily devoted to natural resource production,

1 and (3) long-term commercial significance for natural resource
2 production.

3 8. Kittitas County established a process for the designation of Ag Land of
4 LTCS. The designation process requires the actual presence of
5 agricultural soils to be demonstrated by Best Available Science, sets
6 forth 14 undefined criteria by which the long-term commercial
7 significance of the land could be determined, and establishes two types
8 of agricultural land – irrigated croplands and non-irrigated grazing

9 9. The County's agricultural criteria expands on the language of WAC 365-
10 190-050 and creates a non-inclusive, permissive listing of undefined
11 criteria which are, at time, duplicate, but also exceed the GMA's
12 mandates in regard to Ag Land of LTCS. The establishment of two
13 types of Ag Land of LTCS is based on definitional criteria not provided
14 for in the GMA.

15 10. With Ordinance 2008-20, although Kittitas County has incorporated the
16 required statutory provisions set forth in RCW 36.70A.030 and
17 36.70A.170, the County's designation process continues to violate the
18 GMA's mandate to conserve, maintain, and enhance the agricultural
19 industry as provided in RCW 36.70A.020(8), 36.70A.060, and
20 36.70A.170, by establishing a non-inclusive, permissive process based
21 on criteria which conflict with the GMA's mandate, requiring the use of
22 BAS, and modifying the GMA's definition of Ag Land of LTCS.

23 11. Kittitas County has established a process for the de-designation of Ag
24 Land of LTCS which relies on the County's designation criteria.

25 12. Since the County's designation criteria for Ag Land of LTCS has been
26 deemed in violation of RCW 36.70A.020(8), 36.70A.030, and

1 36.70A.170, reliance on that criteria similarly results in a non-
2 compliant de-designation process.

3 13. GPO Policy 2.114B creates internal inconsistencies by utilizing differing
4 terminology and setting forth, yet again, another definition of
5 agricultural land which is independent of that provided within the GMA.

6 14. RCW 36.70A.070 requires Kittitas County's Comprehensive Plan to be
7 internally consistent. With amendments to GPO 2.114B effectuated by
8 Ordinance 2008-20, the County has created an internally inconsistent
9 Comprehensive Plan.

10 15. With Ordinance 2008-20, Kittitas County has included statutory
11 language for mineral resource lands notice provisions as required by
12 RCW 36.70A.060(1)(b).

13 16. Kittitas County has established a process for the designation of LTCS
14 Forest. This process includes the consideration of GMA's mandated
15 definition and a non-inclusive, undefined listing of 12 criteria to
16 determine whether the land has long-term commercial significance.
17 GPO 2.131 sets forth distinct parameters for the designation of LTCS
18 Forest, creating vagueness and inconsistencies between the County's
19 stated designation process and the process articulated in GPO 2.131. In
20 some regards, Kittitas County has simply reiterated criteria used in the
21 designation of Ag Land of LTCS which has no bearing on LTCS Forest,
22 has enacted duplicative criteria, or has adopted criteria which conflicts
23 with the GMA's mandate to conserve, maintain, and enhance the
24 commercial forestry industry as set forth in RCW 36.70A.020(8),
25 36.70A.060, and 36.70A.170.

26 17. Kittitas County has adopted a separate and distinct process for the de-
designations of LTCS Forest. This process relies, in part, on designations

1 criteria which the Board has determined violates the GMA's mandate to
2 conserve, maintain, and enhance the forestry industry. In addition,
3 the de-designation process encompasses a more expansive review than
4 the designation process itself. A de-designation process which relies
5 on non-compliant provisions also violates the GMA's mandates set forth
6 in RCW 36.70A.020(8), 36.70A.060, and 36.70A.170.

7 18. With Ordinance 2008-20, although Kittitas County has incorporated the
8 required statutory provisions set forth in RCW 36.70A.030 and
9 36.70A.170, the County's designation process continues to violate the
10 GMA's mandate to conserve, maintain, and enhance the forestry
11 industry as provided in RCW 36.70A.020(8), 36.70A.060, and
12 36.70A.170, by establishing a non-inclusive, permissive process based
13 on criteria which conflict with the GMA's mandate.

14 19. With Ordinance 2008-20, Kittitas County has repealed Application No.
15 06-17, thereby removing the basis for the Board's prior finding on non-
16 compliance in regards to this application.

17 20. Kittitas County has re-affirmed Application Nos. 06-03 and 06-04;
18 allowing for the de-designation of Ag Land of LTCS. In re-affirming
19 these applications, Kittitas County relied on criteria which does not
20 comply with the GMA and failed to conduct a county-wide analysis of its
21 agricultural lands as provided in , RCW 36.70A.020(8), 36.70A.030,
22 36.70A.060, and 36.70A.170.

23 21. Kittitas County's actions in re-affirming Application Nos. 06-03 and 06-
24 04, because of the potential for vesting of development, substantially
25 interferes with the GMA Goals 36.70A.020(1), .020(2), .020(8), .020(9),
26 and .020(12); thereby warranting a continuation of the Board's
Determination of Invalidity.

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- 22. With the adoption of Ordinance 2008-20, Kittitas County re-affirmed the expansion of the City of Kittitas UGA. This re-affirmation is based on the City's Land Capacity Analysis and Capital Facilities Element, both contained within the City's Comprehensive Plan.
- 23. The GMA explicitly states the designation of an Urban Growth Area is the duty of a county. By relying solely on the City of Kittitas's documents without an independent review by Kittitas County to ensure the UGA was appropriately sized and the necessary public facilities and services are available fails to satisfy RCW 36.70A.110's requirements which burdens the County with this duty.
- 24. The County's reliance on a Land Capacity Analysis which utilizes any other reduction factor other than a reasonable market factor violates RCW 36.70A.110.
- 25. Kittitas County failed to take any legislative action to cure the inconsistencies the Board determined, within the August 2007 FDO, existing between the Future Land Use Map and Zoning Map in violation of RCW 36.70A.070.
- 26. Futurewise failed to demonstrate the County's adoption of Ordinance 2008-20 did not comply with the GMA's public participation requirement as set forth in RCW 36.70A.035.
- 27. Kittitas County failed to conduct any environmental review in regards to the adoption of Ordinance No. 2008-20 as required by RCW 43.21C.030(2)(c).

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VII. ORDER

Based upon a review of the County's Second Statement of Actions Taken to Comply, the briefs and exhibits submitted by all parties, the requirements set forth in the Board's August 20, 2007, FDO and August 7, 2008, 1st Order RE: Compliance, the GMA, prior Board orders, case law, and having considered the argument of the parties and deliberated on the matter, the Board ORDERS:

1. Kittitas County has failed to take appropriate legislative action to bring itself into compliance with the GMA as set forth in the Board's August 20, 2007, FDO and August 7, 2008, Compliance Order and for which **the Board issues an Order of Continuing Non-Compliance and, where relevant, invalidity continues in effect:**
 - A. As for Legal Issue 3, in regards to the designation and de-designation of Agricultural Lands of Long-Term Commercial Significance, Kittitas County failed to adopt criteria which conforms to the requirements of the GMA as set forth in RCW 36.70A.020(8) and 36.70A.170, and the guidelines established by WAC 365-190-050. In addition, with GPO 2.114B, Kittitas County has created inconsistencies within its own Comprehensive Plan in violation of RCW 36.70A.070.
 - B. As for Legal Issue 3, in regards to the designation and de-designation of Forest Lands of Long-Term Commercial Significance, Kittitas County failed to adopt criteria which conforms to the requirements of the GMA as set forth in RCW 36.70A.020(8) and 36.70A.170, and the guidelines established by WAC 365-190-060. In addition, with GPO 2.131, Kittitas County has created inconsistencies within its own Comprehensive Plan in violation of RCW 36.70A.070.
 - C. As for Legal Issues 4 and 13, as these issues relate to Application Nos. 06-03 and 06-04, Kittitas County failed to properly analyze these lands

1 for de-designation from the lands current designation of Ag Land of
2 LTCS and failed to conduct a proper county-wide or area-wide analysis
3 of agricultural land in conjunction with this review as required by RCW
4 36.70A.020(8), 36.70A.170, and WAC 365-190-050.

5 D. As for Legal Issues 6 and 14, as those issues relate to Applications Nos.
6 06-03 and 06-04 and the City of Kittitas UGA, Kittitas County failed to
7 conduct an independent analysis of the City of Kittitas's Land Capacity
8 Analysis and Capital Facilities Element to ensure that the UGA was
9 properly sized pursuant to RCW 36.70A.110.

10 E. As for Legal Issues 4, 6, 13, and 14, because of Kittitas County's failure
11 to take appropriate legislative action and the potential for vesting of
12 development to occur during the pendency of these compliance
13 proceeding, the County's action continues to substantially interferes
14 with the GMA goals as set forth in RCW 36.70A.020 and therefore
15 continuing invalidity is warranted.

16 F. Kittitas County failed to conduct an environmental review of the
17 amendments to its Comprehensive Plan effectuated by Ordinance 2008-
18 20 and Ordinance 2008-23 as required by RCW 43.21C.030(2)(c).

19 2. With the adoption of Ordinance 2008-20, Kittitas County has taken
20 legislative action which has brought it into compliance with the GMA in
21 the following regards for which **the Board issues an Order Finding
22 Compliance:**

23 A. Kittitas County has fully incorporated statutory language set forth in
24 RCW 36.70A.060(1)(b) in regards to notice provisions for mineral
25 resource lands. For Legal Issue 3, in this limited regard, the Board
26 finds the County in compliance with the GMA.

1 B. Kittitas has rescinded Application No. 06-17. For Legal Issues Nos. 4
2 and 13, in this limited regard, the Board finds the County in compliance
3 with the GMA.

4 C. HOWEVER, the Board finds although the County has *substantively*
5 complied with the GMA, the County is still required to *procedurally*
6 comply with SEPA and, therefore, these two actions must be re-enacted
7 after the County has conducted the appropriate SEPA process.

8 3. The Board directs Kittitas County to take legislative action to achieve
9 compliance with the Growth Management Act pursuant to the Board's
10 August 2007 FDO, the August 2008 1st Order on Compliance, and this
11 2nd Partial Order on Compliance for Legal Issues 3, 4, 6, 7, 13, and 14
12 for which non-compliance has been found and, if relevant, invalidity
13 continues in effect. Such action shall be taken by no later than **July**
14 **14, 2009, 160 days** from the date issued. The following schedule for
15 compliance, briefing, and hearing shall apply:

- 16 • Respondent's Statement of Action Taken to Comply is due **July 20, 2009**.
- 17 • Petitioners' compliance brief is due **August 3, 2009**.
- 18 • Respondent's and Intervenors' brief is due **August 17, 2009**.
- 19 • Petitioners' option compliance reply brief is due **August 24, 2009**.
- 20 • The Board will hold a telephonic compliance hearing on **August 31, 2009, at**
21 **10:00 a.m. to 1:00 p.m.** The parties will call **360-407-3780 followed by**
22 **116113 and the # sign**. Ports are reserved for all parties to this matter.
23 **The compliance hearing shall be limited to consideration of the Legal**
24 **Issues found noncompliant and remanded in this Order. The parties**
25 **shall file their briefing electronically to: aandreas@ew.gmhb.wa.gov.**
26 **The parties shall file the original and four copies. Board originals,**
Board Member copies and exhibits must be single sided, two hole,

1 top center punched, clearly tabbed, and accompanied by a table of
2 attached exhibits naming and describing each document. NO
3 EXCEPTIONS.

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

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

7 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
8 mailing of this Order to file a petition for reconsideration. The original and four
9 copies of a motion for reconsideration, together with any argument in support
10 thereof, should be filed with the Board by mailing, faxing, or otherwise
11 delivering the original and four copies of the motion for reconsideration directly
12 to the Board, with a copy served on all other parties of record. **Filing means**
13 **actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-
14 02-240, WAC 242-02-330. The filing of a motion for reconsideration is not a
15 prerequisite for filing a petition for judicial review.

13 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal
14 the decision to superior court as provided by RCW 36.70A.300(5). Proceedings
15 for judicial review may be instituted by filing a petition in superior court
16 according to the procedures specified in chapter 34.05 RCW, Part V, Judicial
17 Review and Civil. The petition for judicial review of this Order shall be filed with
18 the appropriate court and served on the Board, the Office of the Attorney
19 General, and all parties within thirty days after service of the final order, as
20 provided in RCW 34.05.542. Service on the Board may be accomplished in person
21 or by mail. Service of the Board means **actual receipt of the document at the**
22 **Board office** within thirty (30) days after service of the final order. A petition for
23 judicial review may not be served on the Board by fax or electronic mail.
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1 **Service. This Order was served on you the day it was deposited in the United**
2 **States mail. RCW 34.05.010(19).**

3 **SO ORDERED** this 4th day of February, 2009.

4 EASTERN WASHINGTON GROWTH MANAGEMENT
5 HEARINGS BOARD

6 _____
7 Joyce Mulliken, Board Member

8 _____
9 John Roskelley, Board Member

10 _____
11 Raymond Paoella, Board Member