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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

**THIRD ORDER FINDING CONTINUING
NON-COMPLIANCE**

[Legal Issues 2, 3, 4, 5, 6, 7, 12, 13, and 14]

AND CONTINUING INVALIDITY

[Legal Issues 2, 4, 5, 6, 12, 13, and 14]

**ACKNOWLEDGING CONTINUED
APPLICATION OF ABEYANCE OF
COMPLIANCE**

[Legal Issues 1, 10, and 11]

I. SYNOPSIS

Within this Compliance Order, the Eastern Washington Growth Management Hearings Board (Board) reiterates that the August 2008 Order of Abeyance related to Legal Issues 1, 10, and 11 remains in effect.¹ For all other issues, the Board concludes that although Kittitas County is actively embarking on a process to achieve compliance with the Growth Management Act (GMA), RCW 36.70A, it has failed to take the legislative action necessary

¹ August 2008 Compliance Order, at 36; 39-40
THIRD ORDER ON COMPLIANCE
Case 07-1-0004c
September 18, 2009
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1 to complete the process. Therefore, Kittitas County's actions, as raised by Legal Issues 2,
2 3, 4, 5, 6, 7, 12, 13, and 14, remain non-compliant with the GMA and the continuation of
3 Board's Determination of Invalidity as to Legal Issues 2, 4, 5, 6, 12, 13, and 14 is
4 warranted.² In addition, the County must comply with the State Environmental Policy Act
5 (SEPA), RCW 43.21C, during these compliance proceedings.

6 **II. RELEVANT PROCEDURAL HISTORY**

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

13 On August 7, 2008, the Board issued its 1st Compliance Order finding the County had
14 achieved compliance in limited regards but that continuing non-compliance and continuing
15 invalidity was still necessary.³ With this 1st Compliance Order, the Board also issued an
16 Order of Abeyance.⁴

17 On January 19, 2009, the Board issued its Partial 2nd Order RE: Compliance in which
18 the Board concluded Kittitas County had failed to bring itself into compliance with the GMA
19 in regards to Legal Issues 2, 5, and 12 and a Determination of Invalidity was warranted
20 since Kittitas County's actions substantially interfered with the goals of the GMA.⁵ These
21 issues related primarily to the re-designation of the County's Urban Growth Nodes (UGNs) -
22 Easton, Ronald, Vantage, Thorpe, and Snoqualmie Pass, including Gold Creek – as Urban
23 Growth Areas (UGAs).

23 ² Invalidity as to Legal Issues 4, 6, 13, and 14 was determined in the Board's August 2007 FDO and continued
24 with both of the Board's previous Compliance Orders. Invalidity as to Legal Issues 2, 5, and 12 was
25 determined in the Board's January 2009 Compliance Order.

26 ³ August 2008 Compliance Order, at 39-42.

⁴ August 2008 Compliance Order, at 39-40.

⁵ January 2009 Partial 2nd Compliance Order, at 13-14 (Emphasis in Original).

1 On February 4, 2009, the Board issued its Partial 2nd Order RE: Compliance.
2 Although the Board noted Kittitas County had taken some legislative action, except for part
3 of Legal Issue 3,⁶ the Board found non-compliance, and where relevant, continued invalidity
4 as to Legal Issues 3, 4, 6, 7, 13, and 14.⁷ Issue 3 relates to the criteria for the
5 designation and de-designation of Agricultural Lands of Long-Term Commercial Significance
6 and Forest Lands of Long-Term Commercial Significance.⁸ Issues 4 and 13 relate to
7 Applications Nos. 06-03 and 06-04, de-designating agricultural lands.⁹ Issues 6 and 14
8 also relate to Application Nos. 06-03 and 06-04 and to the City of Kittitas UGA.¹⁰ Issue 7
9 relates to the County's Zoning Map and Future Land Use Map.¹¹ In addition to these Legal
10 Issues, the Board concluded Kittitas County failed to conduct environmental review as
11 required by SEPA for actions taken during these compliance proceedings.¹²

11 With both the January 2009 and February 2009 Compliance Orders, the Board
12 established a deadline of July 14, 2009, for Kittitas County to take legislative action to
13 achieve compliance with the GMA.

14 On July 20, 2009, Kittitas County sought a stay of the compliance schedule
15 deadline.¹³ Because it was not timely filed, the Board denied this request on July 30, 2009
16 with its Order on Motion for Continuance.

17 In August 2009, the Board received timely briefing from the parties and participants
18 of this matter.¹⁴

19 ⁶ February 2009 Partial 2nd Compliance Order, at 56 (Finding compliance as to Legal Issue 3 – notice
20 provisions for mineral lands).

21 ⁷ February 2009 Partial 2nd Compliance Order, at 55-56.

22 ⁸ February 2009 Partial 2nd Compliance Order, at 7-28. Conclusion for agricultural land, at 18-19; Conclusion
23 for forest land, at 27-28.

24 ⁹ February 2009 Partial 2nd Compliance Order, at 29-32. Conclusion, at 32-33.

25 ¹⁰ February 2009 Partial 2nd Compliance Order, at 33-42. Conclusion, at 42.

26 ¹¹ February 2009 Partial 2nd Compliance Order, at 42-43.

¹² February 2009 Partial 2nd Compliance Order, at 45-59. Conclusion, at 49.

¹³ Kittitas County's Motion for Continuance.

¹⁴ Kittitas County's Supplement to SATC, filed August 5, 2009; Kittitas County Conservation, Ridge, and
Futurewise's Compliance Brief, filed August 29, 2009; American Forest Land Company's Response Brief, filed
August 26, 2009; Washington State Dept. of Commerce Response Brief, filed August 14, 2009; Kittitas
County's Response Brief, filed August 25, 2009.

1 On September 9, 2009, the Board held a telephonic compliance hearing. Board
2 members Joyce Mulliken, John Roskelley, and Ray Paoella were present, Board member
3 Mulliken presiding. Kittitas County Conservation, Ridge, and Futurewise (collectively,
4 Futurewise) were represented by Robert Beatty; Washington State Department of
5 Commerce¹⁵ (Commerce) was represented by Alan Copsey and Dorothy Jaffe; Kittitas
6 County was represented by Neil Caulkins; American Forest Land Company (AFLC) was
7 represented by Patrick Ryan; Building Industry Association of Washington (BIAW) was
8 represented by Julie Nickels.¹⁶

9 **III. STANDARD OF REVIEW**

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

16 The amount [of deference] is neither unlimited nor does it approximate a
17 rubber stamp. It requires the Board to give the [jurisdiction's] actions a
18 "critical review" and is a "more intense standard of review" than the arbitrary
19 and capricious standard.

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21 ¹⁵ Formerly known as Department of Community, Trade, and Economic Development (CTED).

22 ¹⁶ BIAW did not file a brief related to these compliance proceedings. Therefore, BIAW participated in the
23 telephonic hearing as a 'listener,' but did not actively participate in the hearing.

24 ¹⁷ RCW 36.70A.320(3).

25 ¹⁸ *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).

¹⁹ *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 With respect to invalidity, the burden is on Kittitas County to demonstrate the actions it has
2 taken in response to the Board's orders of invalidity set forth in the August 2007 FDO and
3 August 2008 1st Compliance Order no longer impede the GMA's goals.²⁰

4 **IV. DISCUSSION and ANALYSIS**

5 **A. Supplemental Evidence**

6 AFLC, in association with its briefing, seeks to supplement the record of these
7 compliance proceedings with documents related to the Upper Teanaway Subarea Planning
8 Process.²¹ According to AFLC, the purpose of these documents is to respond to concerns
9 raised by Futurewise as to the Teanaway River Basin.²²

10 However, as AFLC correctly notes, not only are Futurewise's concerns potentially
11 outside of the scope of these compliance proceedings²³ but these concerns generally
12 amount to complaints about the steps being taken by Kittitas County. This is something
13 which is more properly addressed to the County itself so that it may incorporate them into
14 the compliance process.

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17 ²⁰ RCW 36.70A.320(4) provides:

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

20 ²¹ AFLC Motion to Admit Supplemental Evidence Pursuant to WAC 242-02-540, filed August 26, 2009. AFLC
21 seeks supplementation with three documents: (1) Resolution 2009-100 – Establishing the Upper Teanaway
Subarea Planning Process; (2) Kittitas County Upper Teanaway Subarea Plan Memorandum of Agreement on
Fees and Costs; (3) Resolution 2009-110 – Approving Execution of MOU for Costs associated with Upper
Teanaway Subarea Planning Process.

22 ²² AFLC Motion to Supplement, at 2; Futurewise Response, at 7.

23 ²³ Although the designation criteria for natural resource lands is one of the compliance issues (Legal Issue 3),
the Teanaway Subarea Plan is not represented by the legal issues subject to these compliance proceedings
nor is the County's Critical Areas Ordinance. See e.g., *Wenatchee Valley Mall Partnership, et al. v. Douglas
County*, EWGMHB Case No. 96-1-0009, *Wenatchee Valley Mall Partnership, et al. v. Douglas County*, EWGMHB
Case No. 97-1-0003, Order on Compliance (May 20, 1997)(In a compliance proceeding, petitioners are
precluded from attacking portions of the comprehensive plan and interim development regulations, which
were not raised or considered during petitioners' appeal before this Board).

1 How Kittitas County seeks to comply with the GMA is at the County's discretion and
2 the Board will not dictate the steps the County should take.²⁴ It is the final action taken to
3 achieve compliance, not intermediary steps, which the Board will review. If Futurewise
4 believes the steps being utilized by the County are in violation of the GMA it may file a new
5 Petition for Review or it will have the opportunity to address the County's process and final
6 action(s) in relationship to the compliance issues when Kittitas County files its Statement of
7 Actions Taken to Comply.

8 Therefore, since the sole purpose of supplementing the Record is to respond to
9 Futurewise's concerns related to a subarea planning process not specifically before the
10 Board in these compliance proceedings, AFLC's Motion to Supplement is DENIED.

11 **B. Order of Abeyance**

12 With the Board's August 2008 1st Compliance Order, the Board issued an Order of
13 Abeyance in regards to Legal Issues 1, 10, and 11 because of a pending court appeal and
14 the fact that the Kittitas County Superior Court had issued a stay of the Board's compliance
15 proceedings in this regard.²⁵ Despite the Board's reiteration as to the Order of Abeyance in
16 its February 2009 Compliance Order,²⁶ both Futurewise and Commerce request the Board's
17 Order of Abeyance should remain in effect or be maintained.²⁷

18 As the Board previously noted, the Board's Order of Abeyance remains in effect until
19 such time as a decision is rendered by the court.²⁸ As of the issuance date of this
20 Compliance Order, the Court has not rendered a decision in the appeal nor lifted the stay
21 and, therefore the Order of Abeyance is still in effect.

22 ²⁴ See e.g. *McHugh v. Spokane County*, EWGMHB Case No. 05-1-0004, Compliance Order at 5 (March 5,
23 2007)(Board does not have authority to order the County to take any particular actions to bring itself into
24 compliance).

²⁵ August 2008 1st Compliance Order, at 9-12.

²⁶ February 2009 Partial 2nd Compliance Order, at 6-7, 50

²⁷ Commerce Response, at 5 (...the Order of Abeyance should remain in effect.); Futurewise response at 5 (...
25 the board should maintain the "order of Abeyance...").

²⁸ August 2008 1st Compliance Order, at 9.

1 **C. Compliance with the GMA**

2 With both its July 2009 Motion for Continuance and its August 2009 Supplemental
3 SATC, Kittitas County concedes it has failed to take legislative action to achieve compliance
4 with the GMA.²⁹ And, with its filings the County sets forth the efforts it has engaged in to
5 achieve compliance with the GMA such as retaining consultants ICF Jones & Stokes;
6 preparing amendments to resolve map discrepancies and natural resource lands
7 designation/de-designation criteria; holding public meetings and workshops; developing an
8 informational website; and consulting with Commerce.³⁰ Both Futurewise and Commerce
9 appear to generally support the County's efforts but state these efforts have not resulted in
10 legislative action and, therefore, do not achieve compliance with the GMA.³¹

11 As the County is well aware, for those issues previously found to be non-compliant
12 with the GMA, the County was required to take legislative action to achieve compliance by
13 the established deadline and failure to do so warrants a finding of continuing non-
14 compliance and, where relevant, continuing invalidity. The Board notes the steps being
15 made by the County as to its compliance efforts and does not dispute the County is working
16 diligently and in good faith on the issues. However, compliance is not founded on working
17 copies, draft proposals, or on a plan; compliance is determined only after the jurisdiction
18 has taken action through its governing body by adopting ordinances or resolutions which
19 implement the GMA.³²

20 Because Kittitas County has taken no legislative action to achieve compliance with
21 the GMA, the Board finds continuing non-compliance as to Legal Issues 2, 3, 4, 5, 6, 7, 12,
22 13, and 14. The Board's previous Determinations of Invalidity, as to Legal Issues 2, 4, 5, 6,
23 12, 13, and 14 remain in effect. In addition, the County is reminded that it must still
24 comply with SEPA during these compliance proceedings.

25 ²⁹ July 2009 Motion for Continuance; August 2009 County Response, at 1; Statement of Neil Caulkins.

26 ³⁰ July 2009 Motion for Continuance; August 2009 Supplemental SATC; August 2009 County Response

³¹ Futurewise Response, at 6 (A work plan intended to assure future compliance is not sufficient to comply with the GMA); Commerce Response at 5 (A plan to come into compliance is not compliance).

³² *KCC/Futurewise, et al v. Kittitas County*, EWGMHB Case No. 07-1-0004c, Compliance Order at 12 (August 7, 2008).

V. ORDER

Based upon a review of the County’s Statement of Actions Taken to Comply and Supplemental 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, subsequent Compliance Orders, 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, as supplemented by the January 2009 Partial 2nd Compliance Order and February 2009 Partial 2nd Compliance Order, and for which the Board issues an Order of Continuing Non-Compliance and, where relevant, the Board’s Determination of Invalidity continues in effect:
 - Legal Issue 2 – Continuing Non-Compliance and Invalidity [MPRs/Snoqualmie Pass-Gold Creek]
 - Legal Issue 3 – Continuing Non-Compliance [Agricultural and Forest Lands Designation/De-Designation Criteria]
 - Legal Issue 4 – Continuing Non-Compliance and Invalidity [Application Nos. 06-03 and 06-04]
 - Legal Issue 5 – Continuing Non-Compliance and Invalidity [UGNs/UGAs]
 - Legal Issue 6 – Continuing Non-Compliance and Invalidity [City of Kittitas UGA]
 - Legal Issue 7 – Continuing Non-Compliance [Zoning Map and Future Land Use Map]
 - Legal Issue 12 – Continuing Non-Compliance and Invalidity [UGNs/UGAs]
 - Legal Issue 13 – Continuing Non-Compliance and Invalidity [Application Nos. 06-03 and 06-04]

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- Legal Issue 14 – Continuing Non-Compliance and Invalidity [City of Kittitas UGA].
2. The Board directs Kittitas County to take legislative action to achieve compliance with the Growth Management Act pursuant to the Board’s August 2007 FDO and subsequent Compliance Orders for all Legal Issues for which non-compliance has been continued and, if relevant, invalidity continued in effect.

Such action shall be taken by no later than **January 4, 2010**. The following schedule shall apply:

ACTION	DUE DATE
Respondent’s Statement of Actions Taken to Comply	January 25, 2010
Petitioner’s Brief due	February 16, 2010
Respondent/Intervenors’ briefs due	March 9, 2010
Compliance Hearing (Telephonic)	March 17, 2010 @ 10:00 a.m.

Ports are reserved for all parties to this matter. Please call **360 407-3780** and use **pin 146851#** to be connected to the call. The compliance hearing shall be limited to consideration of the Legal Issues found noncompliant and remanded in this Order. The parties shall file their briefing electronically to: eastern@ew.gmhb.wa.gov. The parties shall file the original and four copies. Board originals, Board Member copies and exhibits must be single sided, two hole, top center punched, clearly tabbed, and accompanied by a table of attached exhibits naming and describing each document. **NO EXCEPTIONS.**

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

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