CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES, CAMWEST DEVELOPMENT INC., CONNER HOMES COMPANY, JOHN F. BUCHAN CONSTRUCTION INC., LOZIER AT GRAMERCY PARK LLC., PACIFIC LAND INVESTMENT INC., WILLIAM BUCHAN HOMES INC., and WINDWARD REAL ESTATE SERVICES INC. Petitioners, v. CITY OF SAMMAMISH, Respondent.	)	**Case No. 05-3-0041** ***(Camwest III)*** **FINAL DECISION AND ORDER**

SYNOPSIS

*On July 26, 2005, the City of Sammamish adopted Ordinance No. 02005-183 (**Growth Phasing Lottery**). The Growth Phasing Lottery was intended to immediately follow the lifting of a six-year moratorium on applications for residential property development. The Growth Phasing Lottery replaced the moratorium with phased acceptance of a limited number of development applications at a fixed maximum rate of 420 units/lots per year for two years.*

Petitioners are a group of property developers with land zoned at urban densities who have not been allowed to submit development applications because of the six-year moratorium and are now subject to the Growth Phasing Lottery. In addition to these professional developers, the City's record is replete with the testimony of individual property owners, long-time residents with homes on rural-sized parcels – 1 to 10 acres – which are now zoned for urban densities but could not be subdivided since 1999. Because of the nature of the lottery and the cap on annual applications, the Growth Phasing Lottery has the effect of continuing to preclude application for development by all but the lucky winners.

The City moved to dismiss several Petitioners for lack of standing on the basis that some Petitioners had won rights to submit applications in the Growth Phasing Lottery and

others had not submitted lottery bids; therefore they could demonstrate no injury. The Board denied the motion to dismiss, noting that Petitioners all amply demonstrated participation standing under the GMA [RCW 36.70A.280(2)(b)] and were not required to make an additional showing of APA standing [evidence of injury- .280(2)(d)].

The Board found that Ordinance No. 02005-183 failed to meet the requirements of RCW 36.70A.110 and was inconsistent with the growth phasing provisions of the GMA. The Board determined that the Growth Phasing Lottery failed to further the goals of the GMA to encourage and permit urban growth in urban areas served by adequate infrastructure [RCW 36.70A.020(1), (2), and (12)] and the goals of predictable permit process [.020(7)] and inter-jurisdictional coordination [.020(11)]. The Board declined to rule that the Growth Phasing Lottery was a de facto extension of the City's six-year moratorium (which the Board had ruled invalid in CPSGMHB Case No. 05-3-0027).

*The Board was left with a "firm and definite conviction" that the Growth Phasing Lottery is a **clearly erroneous** application of the GMA and is inconsistent with the goals and requirements of the Act. The Board entered an **order of non-compliance**, **remanded** Ordinance 02005-183 to the City, and set a compliance schedule.*

I. BACKGROUND[1]

On August 24, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Master Builders Association of King and Snohomish Counties, a Washington non-profit corporation; CamWest Development, Inc.; Conner Homes Company; John F. Buchan Construction, Inc.; Lozier at Gramercy Park, LLC; Pacific Land Investment, Inc.; William Buchan Homes, Inc.; and Windward Real Estates Services, Inc. (**Petitioners** or **MBA/CamWest**). The matter was assigned Case No. 05-3-0041, and is hereafter referred to as *MBA/CamWest III v. Sammamish*. Petitioners challenged the City of Sammamish (**Respondent** or **City**) adoption of Ordinance No. 02005-183 (**Growth Phasing Lottery**) as noncompliant with the Growth Management Act (**GMA or Act**).

This is the fourth GMA challenge brought in 2005 against the City of Sammamish by Master Builders Association of King and Snohomish Counties, CamWest Development, Inc., and substantially the same set of petitioners. As the actions are related, and as the Board's consideration of the first three challenges has been completed, they are summarized *infra*, at Section IV.A.

The Board issued a notice of hearing in the present matter, conducted the prehearing conference and issued its prehearing order (**PHO**) setting forth the schedule[2] and Legal

[1] A more complete statement is contained in APPENDIX A - Chronology of Proceedings in CPSGMHB Case No. 05-3-0041

[2] At the outset of the Hearing on the Merits, the Presiding Officer advised the parties that the PHO set a date for issuance of the Final Decision and Order that is a national holiday – February 20, 2006. Therefore pursuant to WAC 242-02-060 the FDO is due on the following day, February 21, 2006.

Issues to be decided. No motions were filed by the parties during the time scheduled for motions practice.

During December 2005 and January 2006, the Board received timely briefing from all the parties. Hereafter, the briefs are noted as follows:

- Petitioner's Prehearing Brief (**MBA/CamWest PHB**)
- City's Revised Prehearing Brief (**City Response**)[3]
- Petitioner's Reply Brief (**MBA/CamWest Reply**).

The City Response contained a motion to dismiss for lack of standing. The MBA/CamWest Reply included evidentiary motions.

On January 24, 2006, the Board held a hearing on the merits (**HOM**) in Suite 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington. Board members present were Edward McGuire, Bruce Laing, and Margaret Pageler, Presiding Officer. Duana Kolouskova represented the Petitioners. Bruce Disend represented the City of Sammamish. The court reporter was Gayle Hays, Byers & Anderson, Inc. The hearing convened at 2:04 p.m. and adjourned at approximately 4:30 p.m**.** A transcript of the proceeding was ordered by the Board and received on January 26, 2006. (**HOM Transcript**).

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

Petitioners challenge the City's adoption of Ordinance No. 02005-183 which creates a Growth Phasing Lottery for selecting a limited number of development projects which may be applied for during each year of a two-year period. Comprehensive plans and development regulations, and amendments thereto, adopted by Sammamish pursuant to the Act, are presumed valid upon adoption. RCW 36.70A.320(1).

The burden is on the Petitioners to demonstrate that the actions taken by Sammamish are not in compliance with the Act. RCW 36.70A.320(2).

The Board shall find Sammamish in compliance with the Act, unless it determines that the City's action was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Act. RCW 36.70A.320(3). As articulated most recently by the Supreme Court in *Ferry County v. Concerned Friends of Ferry County, et al.* ***(Ferry County),*** 155 Wn.2d 824, 833, 123 P.3d 102 (2005): "The Board adjudicates compliance with the GMA and must find compliance unless a county's or city's action is clearly erroneous. RCW 36.70A.280, 320(3)." For the Board to find the City's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

[3] The City filed a revised brief correcting technical errors. References herein to **City Response** are to the City of Sammamish Prehearing Brief (Revised).

Pursuant to RCW 36.70A.3201 the Board will "apply a more deferential standard of review" to Sammamish in how it plans for growth, so long as its action "is consistent with the goals and requirements of [the GMA]." The Supreme Court delineated this required deference in *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board* ***(Quadrant)***, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005), stating: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA … cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." The Court in *Quadrant* noted that no deference is due a county or city when its proposed action violates a specific statutory mandate. 154 Wn.2d at 240, fn. 8. [4]

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION AND PRELIMINARY MATTERS

A. PREFATORY NOTE

This Final Decision and Order considers and decides, first, the motions contained in the briefs of the parties concerning Petitioners' standing and evidentiary matters. The FDO then addresses the Legal Issues in the following order.

- Legal Issue No. 5. Urban Growth – RCW 36.70A.110, and Legal Issue 4, GMA Planning Goals 1, 2, and 12.
- Legal Issue Nos. 1 and 2. De Facto Moratorium – RCW 36.70A.390
- Legal Issue Nos. 3 and 4. GMA Planning Goals 4, 5, 6, 7, and 11, and the City's arguments concerning Goals 3, 4, 9, and 10.

The FDO then addresses the request for the remedy of invalidity.

B. TIMELINESS AND SUBJECT MATTER JURISDICTION

The Board finds that the Petitioner's PFR was timely filed, pursuant to RCW 36.70A.290(2); and that the Board has subject matter jurisdiction over the challenged ordinance, which amends the City's development regulations, pursuant to RCW 36.70A.280(1)(a).

[4] This is consistent with prior Supreme Court holdings: "[L]ocal discretion is bounded, however, by the goals and requirements of the GMA," *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000); and "deference is only given to policy choices that are consistent with the goals and requirements of the GMA," *Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 14, 57 P.3d 1156 (2002).

C. CITY'S MOTION TO DISMISS FOR LACK OF STANDING

The City's Response contains a Motion to Dismiss Petitioners for Lack of Standing. This motion was argued at the Hearing on the Merits.

Applicable Law.

RCW 36.70.280 (2) provides in relevant part:

> A petition may be filed only by … (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; … *or* (d) a person qualified pursuant to RCW 34.05.530.

(Emphasis supplied.)

Positions of the Parties.

The City argues that most or all of the Petitioners do not qualify for participation standing under the GMA because they failed to demonstrate active individual participation in the planning process with respect to the parcels they own. City Response, at 13-15.

Further, the City contends that each Petitioner is also required to establish APA standing under RCW 34.05.530. *Id*. at 16. APA standing requires a showing of direct prejudice or injury in fact, a standard which the Petitioners individually have not met, according to the City. The City points out that some Petitioners won a development allocation in the lottery and so should have no complaint. Other Petitioners did not even apply. *Id.* at 18 and Attachment B.

Petitioners reply by arguing that participation standing under the GMA, as defined by the Court of Appeals in *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 659, 997 P.2d 405 (2000) and by RCW 36.70A.280: Intent – 2003 c 332, requires "a showing of some nexus between the petitioner's participation in the county [or city] process and the issues it raises before the growth management hearings board." The *Wells* Court approved this Board's formulation that petitioners must explain their concerns, during the public process, "in sufficient detail to give the government the opportunity to consider these concerns as it weights and balances its priorities and options under the GMA." [5] MBA/CamWest Reply, at 4.

Petitioners point out that their attorney submitted three letters to the City Council concerning the proposed ordinance [Index 48, 65, and 74], and testified verbally before the Planning Commission and City Council on at least four separate occasions during consideration of the ordinance [Index 32, at 13-17; Index 50, at 12; Index 57, at 5; Index

[5] In *Alpine v. Kitsap County*, CPSGMHB 98-3-0032c, Order on Dispositive Motions (October 7, 1998), at 7-8.

84, at 23]. MBA/CamWest Reply, at 6. In these communications, the attorney stated specifically that she spoke as the representative of Master Builders Association of King and Snohomish Counties, John. F. Buchan, William Buchan, Lozier at Gramercy Park, CamWest Development, Pacific Land Investments, Conner Homes and Windward Real Estate Services – the eight Petitioners here.[6] *Id.*

In addition, principals of several of the Petitioners participated in the City Council's stakeholder process and testified individually at various Planning Commission and City Council meetings [Index 32, at 22, 25, 52, 56; Index 38, at 39; Index 57, at 6, 12; Index 71, at 31, 45]. MBA/CamWest Reply, at 7.

While Petitioners contend that it is not necessary to demonstrate APA standing, they provide additional information concerning the prejudice to the interests of each Petitioner resulting from the Growth Phasing Lottery. *Id.* at 11-12.

Board Discussion

The City's Motion to Dismiss borders on the frivolous. The participation of these eight Petitioners, both orally and in writing, primarily through their attorney who repeatedly identified herself as such, but also on many occasions through the testimony of their principals, is thoroughly documented in the City's record, as compiled here in Appendix B. The Board finds that the Petitioners, through counsel and through their principals, were diligent in presenting their points of view on the proposed ordinance during the course of its consideration. Their participation was directly related to the issues presented to the Board for review. Petitioners clearly have GMA standing based on participation [RCW 36.70A.280(2)(b)].

The statute allows standing pursuant to RCW 34.05.530 (APA standing) as an alternative; the operative conjunction is "*or*" [.280(2)(d)]. Petitioners here, having met the GMA threshold, do not need to demonstrate individual injury or prejudice.

Conclusion

The Board **finds that each of the Petitioners has standing** in this matter. The City's Motion to Dismiss for Lack of Standing is **denied**.

D. PETITIONERS' MOTION TO STRIKE AND FOR SUPPLEMENTATION

Petitioners' Reply objects to several exhibits submitted by the City, and requests to submit supplemental materials in response to the motion to dismiss for lack of standing. Petitioners' motions were heard at the Hearing on the Merits. HOM Transcript, at 9-21.

[6] APPENDIX B to this FDO, at 46-50, compiles excerpts from the City's record documenting Petitioners' participation in the City's process for the enactment of Ordinance 02005-183.

Petitioners move to strike Respondent's Exhibits A through E, attached to the City Response, on various grounds, including the City's failure to file a motion to supplement the record. MBA/Camwest Reply, at 1-3. Petitioners move to supplement the record with documents they believe are relevant to the challenge of APA standing: Petitioners' Exhibit A and the Declarations of Mike Miller and Jim Tosti. *Id*. at 11.

Petitioners also request the Board to substitute a full version of Index 53 for the truncated copy attached to their opening brief. Index 53 is the June 8, 2005, letter from Department of Community Trade and Economic Development Planner Anne Fritzel to Sammamish Mayor Don Gerend, hereafter **CTED comment letter.**

RCW 36.70A.290(4) provides:

> The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

Having reviewed the disputed exhibits and heard the arguments of the parties, in light of the GMA and the Board's rules, the Board makes the rulings indicated in the table below.

Proposed Exhibit: Documents	**Ruling**
1. Respondent's A – Sammamish Plateau Water and Sewer District notice of lifting water supply limitations 12/21/2004	***Admitted – Supplemental Exhibit 1*** – relevant to the timing of Ordinance 02005-183 [HOM Transcript, at 14]
2. Respondent's B – Chronology of Public Meetings – prepared by City's attorney for purposes of summary of events	**Allowed** as **Attachment A to City Response**
3 Respondent's C – Land Use Study Commission 1996 Annual Report	The Board **takes official notice** pursuant to WAC 242-02-660(2)
4. Respondent's D – Final Bill Report – ESB 6094 – Partial Veto	The Board **takes official notice** pursuant to WAC 242-02-660(2)
5. Respondent's E – "Petitioners' Allocation under Ordinance No. 02005-183" – prepared by City's attorney for purposes of challenge to Petitioners' standing	**Allowed** as **Attachment B to City Response** – relevant to standing challenge and of assistance to consideration of GMA Goals 6 and 7
6. Petitioners' A – Preliminary Year 1 and Year 2 Subdivision Allocation – color printout from City website 10/25/2005	***Admitted – Supplemental Exhibit 2 –*** relevant to standing and of assistance to consideration of GMA Goals 6 and 7
7. Declaration of Michael Miller	***Admitted – Supplemental Exhibit 3***
8. Declaration of Jim Tosti	***Admitted – Supplemental Exhibit 4***

In this Final Decision and Order, the Board's references to the allocations under the Growth Phasing Lottery are to Supplemental Exhibit 2 [Petitioners' Reply, Exhibit A]. The Board's references to the "CTED comment letter" are to the full copy provided with

Petitioners' Reply, Index 53. The Board's references to portions of transcripts of public meetings are by Index Number, page, and name of speaker (if indicated).

IV. LEGAL ISSUES AND DISCUSSION

A. The Challenged Action and Context

The City of Sammamish incorporated in 1999. It is a large suburb at the fast-growing edge of the King County Urban Growth Area. Upon incorporation, the City adopted a moratorium prohibiting applications for virtually all new development except for single family dwellings on preexisting lots.[7] The original purpose of the moratorium was to give the new City time to staff up, to develop and adopt a comprehensive plan, and to adopt development regulations. The moratorium was extended every six months for six years. Meanwhile the City continued to process development applications, at a rate of 400-500 per year, for lots that had vested under King County rules prior to Sammamish incorporation. City Response, at 34; Index 84, at 41.

The Sammamish Comprehensive Plan and development regulations were adopted in 2003, designating and zoning much of the City at urban residential densities of R-4 or R-6 [four or six homes per acre]. However, the City determined to delay implementing its adopted Plan designations and zoning. Accordingly, since incorporation in 1999, the City has not permitted applications for subdivisions and short plats in the general course of business, notwithstanding the Plan and zoning.

The Sammamish Comprehensive Plan called for consideration of one or more strategies to moderate the flow of development applications.[8] At the time the Plan was adopted [September 2003], the Sammamish Plateau Water and Sewer District could not guarantee water for new subdivisions, and new home construction was significantly constrained by limitations on water availability. The Comprehensive Plan noted that the continuation of water restrictions would give the City time to "evaluate the appropriate measures to manage growth," listing the following options:

> Additional measures available to the City include [1] *limiting the number of new lots created or dwelling units constructed through a random lottery system, a complex point system, or a proportional system of issuing permits*. The City may also choose to [2] *strengthen its concurrency requirements*, allowed in the Growth Management Act, resulting in infrastructure being provided truly concurrent with development. Finally, the City may consider revising its zoning ordinance by changing the method by which density is calculated, such as [3] *a net density system* in place of gross density system, or [4] *down-zoning parcels encumbered by significant sensitive areas.*

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[7] See generally, *MBA/CamWest v. City of Sammamish*, CPSGMHB Case No. 05-3-0027, Final Decision and Order (August 4, 2005).

[8] APPENDIX C sets out the relevant portions of the City of Sammamish Comprehensive Plan.

Sammamish Comprehensive Plan, Land Use Element, III-4 (numeration and emphasis supplied).

On December 21, 2004, the Sammamish Water and Sewer District announced that it had secured a new water supply, and restrictions on water availability were lifted. Supplemental Exhibit 1. The City of Sammamish proceeded to consider and enact various measures for restricting development of subdivisions and short plats. This Board heard and decided three related challenges during 2005.

One of the City's stated concerns was that development should be curtailed until the new city updated its critical areas regulations, so that new subdivisions wouldn't vest under outdated rules. *See, e.g.*, Index 84, at 40. On January 31, 2005, the present Petitioners, and others, brought a petition alleging that the City had failed to comply with the GMA by not completing the update of its critical areas ordinances by December 1, 2004. *CamWest, et al., v. City of Sammamish*, CPSGMHB Case No. 05-3-0012. The Board entered an Order Finding Noncompliance – Failure to Act (April 1, 2005) and set a compliance schedule. The City subsequently completed and adopted its critical areas regulations. Order Finding Compliance (January 26, 2006).[9]

On February 1, 2005, the City Council adopted Ordinance No. 02005-169, renewing its moratorium on subdivisions and short plats. The present Petitioners brought a timely petition for review challenging the City's continually-renewed development moratorium, then in its 12th iteration and 6th consecutive year.[10] *MBA/Camwest et al., v. City of Sammamish*, CPSGMHB Case No. 05-3-0027. The Board found that the moratorium had ceased to be an interim regulation and was a regulation of development inconsistent with the GMA and with the Sammamish Comprehensive Plan. The Board entered an order finding noncompliance and invalidated the moratorium. Order Segregating Case No. 05-3-0027 from Consolidated Case No. 05-3-0030c and Final Decision and Order in 05-3-0027 (August 4, 2005). The City allowed the Moratorium to lapse without attempting to renew it, and the Board entered a subsequent Finding of Compliance (October 20, 2005).

On March 1, 2005, Sammamish enacted Ordinance No. 02005-174, the Net Density Ordinance. "Net density" requires the density allowance for a project to be calculated after the deduction of road right-of-way, utility easements, critical areas and buffers, and other factors. The result of net density calculation is to reduce the development actually achievable in an urban subdivision. The present Petitioners filed a timely petition for review challenging the Net Density Ordinance. *MBA/Pacific Land v. City of Sammamish*, CPSGMHB Case No. 05-3-0030. The Board ruled that the Net Density Ordinance was

[9] The Board's order only affirmed that the City had acted; the substance of the City's CAO was not before the Board.

[10] Petitioners' challenge to the Moratorium was based, in part, on the continuation of the moratorium beyond the City's adoption of its Comprehensive Plan and development regulations. Petitioners noted in that challenge that the City continued to refuse to allow development other than single family homes on existing lots even though the land was now zoned and regulated for urban development. The City pointed to its Comprehensive Plan Land Use Policies as indicating a commitment to restrict growth notwithstanding urban zoning allowances.

within the discretion of a city as it planned for growth, but noted the likely impacts on adjacent jurisdictions and the risks to regional coordination. Final Decision and Order (September 22, 2005). *See also*, *Fuhriman, et al., v. City of Bothell*, CPSGMHB Case No. 05-3-0025c, Final Decision and Order (August 29, 2005), at 25-32.

Beginning in June, 2004, the Sammamish Planning Commission and City Council also considered imposing a cap on the number of lots that could be developed through some form of phasing or metering. City Response, at 8, and Attachment A. The City's goal, apparently, was to replace the ongoing moratorium, before the August end of its most recent term, with a new set of timed restrictions on multi-family projects, subdivisions and short plats.[11] According to the City, the lifting of constraints on water availability, and the anticipated pressures of ensuing development, also drove the timing of the City's adoption of the Growth Phasing Lottery. HOM Transcript, at 13-14; Supplemental Exhibit 1.

The City faced an acknowledged bow wave of potential applications for development of properties which had been held out of the building market for six years because of the moratorium. By mid-2005, pre-application interviews had been requested for over a thousand new lots. Index 73, Attachment B. In addition to professional builders like these Petitioners, many city residents and small investors were anxious to develop. These included long-time residents whose family circumstances had changed since cityhood but who had as yet been denied the opportunity to implement the zoning on their land.[12]

The Planning Commission considered, and abandoned as too complex, a "point system" which would give priority to certain projects based on quantifiable factors.[13] The Planning Commission, under pressure to respond to the Council, forwarded a plan to allow application for development of 906 units/lots over a six-year period. Index 42. The

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[11] Presenting the growth metering ordinance to the City Council on June 7, 2005, Planning Commission Chair Scott Jarvis said: "This ordinance is in response to your request to have some method of growth management in place before the lifting of the moratorium this summer." Index 50, at 3.

[12] For example, Sam Bell bought 2 ½ wooded acres thirty years ago, built a house, raised a family, and retired ten years ago. The land is zoned R-6 and surrounded by housing developments. "Considering the fact that retirement and social security are losing the battle against inflation," Mr. Bell and his wife want to develop the property. Index 57, at 1-2; Index 38, at 30.

Bruce Hall has waited ten years to subdivide a one-acre parcel, resubmitting his application for the water lottery every six months. Now he worries that the City will "be done allocating all the lots you're going to have" before he gets a turn. Index 84, at 28-29.

Jeanine and Jim Pruitt, 15-year Sammamish residents, wish to rebuild their home which burned down two years ago. The project is not feasible, due to new sewer requirements, unless they subdivide to offset building costs. The property is zoned R-6, is not a wetland or sensitive area, and is surrounded by housing developments. Index 38, at 32-33; Index 57, at 8-9; Index 71, at 32.

[The Bells and Pruitts were losers in the lottery. Mr. Hall won a lottery allocation for year 2. Supplemental Exhibit 2.]

[13] According to Index 53, at 2, this early draft "included criteria for various attributes of development [such as] the provision of public utilities, environmental protection, affordable housing, bicycle and pedestrian facilities, and design elements."

Planning Commission's cover memorandum [Index 42] states their "significant concern of unintended consequences by using a stop gap number for growth" and their "unanimous opinion … that there are better growth management tools available." *Id.* In particular, the Commission recommended that the Council consider "concurrency for infrastructure deficits within specific geographic districts of the city." *Id.*

The City Council made substantial changes before enacting Ordinance No. 02005-183. The City Council plan allowed a limited number of development applications in each of the next two years, with a percentage of the applications reserved for short plats and any subdivision of over 60 lots limited to 60 lots in the first year and 30 lots in the second year. The method of selection of applicants by lottery (euphemistically amended to be referred to as "allocation"- Index 84, at 48, 77, 91, 98-99) and the exemption for multi-family low-income housing were added by the City Council in the final weeks before passage of the ordinance. Index 84, at 6.

On July 26, 2005, the City of Sammamish adopted Ordinance No. 02005-183, "Adopting a New Chapter of the Sammamish Municipal Code, Chapter 19.08, Entitled Growth Management Phasing of Residential Development" – the Growth Phasing Lottery challenged in this action. The ordinance limits the number of residential lots/units created through multi-family, subdivisions and short plats that can be applied for in the City of Sammamish in a two year period. A one-time lottery is set up to determine who will be permitted to submit development applications. The lottery is held once [in October, 2005] and names are drawn and assigned years [year 1, year 2] during which they will be permitted to submit applications. Lucky winners have six months within which to submit completed applications, which are then subject to the normal permit processing rules. Subject to a weighting between short plats and subdivisions, the lottery allows a maximum of 420 lots/units to be applied for in year 1 and 420 in year 2. Subdivisions of over 60 lots must be phased across several years. Development proposals for exclusively low-income housing and for single family homes on existing lots are exempt from the lottery, and multi-family projects are exempt from the 60-unit phasing requirement.

This challenge followed.

B. Urban Growth - Legal Issue 5 and Legal Issue 4 (Goals 1, 2, and 12)

In this section the Board considers Petitioners' legal issues concerning compliance with RCW 36.70A.110 and with GMA Planning Goals 1, 2, and 12, which are directly linked to the requirements of RCW 36.70A.110.

The Board's Prehearing Order states Legal Issue No. 5 as follows:

> *Does Ordinance No. 02005-183 fail to comply with RCW 36.70A.110(1), (2) and (4) by precluding urban densities?*

The Prehearing Order states Legal Issue No. 4:

Whether the City failed to be guided by the goals contained in RCW 36.70A.020, including but not limited to (1) Urban Growth; (2) Reduce Sprawl; (4) Housing; (5) Economic Development; (6) Property Rights; (7) Permits; (11) Citizen Participation and Coordination; (12) Public Facilities and Services?

Applicable Law

RCW 36.70A.110 is the section of the GMA articulating the requirement that cities must plan for and accommodate urban growth at urban densities. The section includes a provision, at subsection (3), for *phasing growth locationally* based on availability of urban services. The pertinent portions of RCW 36.70A.110 (emphasis supplied) are as follows:

> **RCW 36.70A.110 – Comprehensive Plans –**
> **Urban Growth Areas**
> (1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an *urban growth area* or areas *within which urban growth shall be encouraged* and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area….
>
> (2) Based upon the growth management population projection made for the county by the office of financial management, the county and *each city* within the county *shall include areas and densities sufficient to permit the urban growth that is projected to occur* in the county or city for the succeeding twenty-year period …
>
> *Each urban growth area shall permit urban densities* and shall include greenbelt and open space areas. … An urban growth area determination may include a reasonable land market supply factor and *shall permit a range of urban densities* and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth. …
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> (3) *Urban growth should be located first in areas* already characterized by urban growth *that have adequate existing public facility and service capacities* to serve such development, second in areas already 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 sources, and third in the remaining portions of the urban growth areas….

(4) In general, cities are the units of local government most appropriate to provide urban governmental services…

Discussion and Analysis – Part 1
RCW 36.70A.110

Positions of the Parties

Petitioners MBA/CamWest contend that the Growth Phasing Lottery fails to comply with RCW 36.70A.110(1), (2) and (4) by precluding urban densities. MBA/CamWest PHB, at 13-17. They point out that, aside from those persons who win an opportunity in the lottery, the only people who can build are those who wish to build a single residence on an existing lot. *Id.* If a landowner who would otherwise be entitled to subdived a large lot fails to win the lottery, he is forced to wait until some date after August 2007 to submit an application. *Id*. at 10-11.

Petitioners point out that all of the City's growth since incorporation is a result of projects that vested prior to cityhood; the City itself has allowed no new development applications since it incorporated. *Id.* at 21. Thus, Petitioners argue, the City has not encouraged urban growth. Though development of pre-incorporation vested lots has enabled Sammamish to accommodate a portion of its 20-year growth target, the Petitioners point out that many other King County cities have achieved much higher percentages or all of their allocated growth. *Id.* In any event, Petitioners argue, the GMA mandate to encourage urban growth in cities does not end when the 20-year target is reached. *Id*. at 19.

The City of Sammamish asserts that the ordinance fully complies with RCW 36.70A.110(1),(2) and (4), because Sammamish already has more urban growth than it can reasonably handle and the Growth Phasing Lottery would maintain nearly the same rate of growth the City has seen since incorporation. City Response, at 46. Sammamish argues that the Growth Phasing Lottery allows the development of 840 lots over two years, which is very close to the 500 per year average that was being developed prior to the ordinance. *Id.* at 34. Furthermore, the City asserts that this number does not take into account exempted units and previously vested developments that will still be allowed to go forward. *Id.*

As proof that allowing 840 new units over two years is more than adequate to promote urban growth, the City points out that it is growing at twice the regional rate and that it will reach its 20-year growth target well before 20 years' end. *Id*. at 46-47.

Lastly, the City argues that it simply need not encourage and promote more urban growth when it is having difficulty dealing with the effects of current development. Citing traffic congestion, jammed schools, and the need for some breathing room, Sammamish argues that without a phasing requirement the City could not handle the enormous volume of applications it would receive. *Id.*

Board Discussion

The City of Sammamish has adopted a Comprehensive Plan and a zoning code which are not challenged here. Apparently the Petitioners' properties are generally designated in the Plan and zoned for urban densities. The City, however, believes it may continue to refuse to accept development applications that are otherwise consistent with its Plan designations and zoning.

Allowing urban growth in urban areas is a GMA requirement. RCW 36.70A.110 declares that "urban growth shall be encouraged" in all urban growth areas, which by definition include cities, and that urban densities "shall be permitted" by cities. The language is mandatory – "shall be encouraged," "shall permit" – but cities "may consider local circumstances" in determining a market factor and "have discretion … to make many choices" about accommodating growth.

The Supreme Court in *Quadrant, supra,* calls the urban growth requirement of RCW 36.70A.110(1) "one of the central *requirements* of the GMA." 154 Wn.2d at 232 (emphasis supplied). The *Quadrant* court notes that no deference is due a city or county when its proposed action violates a specific statutory mandate. 154 Wn.2d at 240, fn. 8.

Does accommodation of the 20-year population target satisfy the GMA requirement?

The City's first argument is that RCW 36.70A.110 is satisfied when a city demonstrates that it will meet its allocated 20-year population target. City Response, at 32. Sammamish states that its zoned capacity, at build-out, will accommodate another 5000 dwelling units. Index 72. The 2022 Growth Target in the Comprehensive Plan is for 3,842 new units. There were 2,582 permits pending or in the pipeline as of July 2005. This leaves 1,260 units remaining to meet the 2022 growth target. *Id*. The City contends that its Growth Phasing Lottery - paced at 420 units per year for two years - amply meets the requirement of accommodating the 20-year population target. City Response, at 32.

This Board has held that the GMA duty to "encourage urban growth" and "permit urban densities" is an ongoing duty. *Benaroya et al. v. City of Redmond*, CPSGMHB Case No. 95-3-0072c, Finding of Compliance (March 13, 1997), at 8. The GMA requires a regular cycle of city and county review of urban densities in the light of new OFM projections: "the densities permitted … by the comprehensive plans of … each city … shall be revised to accommodate the [projected] urban growth…" RCW 36.70A.130(3)(b). Thus, accommodating the growth allocated to meet a one-time projected 20-year target does not extinguish a city's GMA obligations.

Applying this GMA principle in a recent ruling, the Board explained:

> The GMA is dynamic, not static. The Act requires OFM to produce periodic population projections and it requires cities and counties to accommodate these new growth forecasts by reviewing and updating their Plans and development regulations accordingly. RCW 36.70A.130. …

> As growth continues, it will be allocated and accommodated – the bar continues to be raised.
>
> Therefore [a city] may not close its eyes, or borders, to growth just because it can accommodate the growth targets it is assigned.

Kaleas v. City of Normandy Park, CPSGMHB Case No. 05-3-0007c, Final Decision and Order (July 19, 2005), at 11, 12, 13.

In the case at hand, the fact that Sammamish may reach its population target prior to 2022 does not exhaust the statutory requirement to "encourage urban growth" and "permit urban densities." RCW 36.70A.110(1) and (2).

Is the Growth Phasing Lottery based on ***location*** *of infrastructure and services?*

The City argues that its Comprehensive Plan supports growth metering [see Appendix C] and that the Growth Phasing Lottery is an appropriate "innovative technique" within the City's discretion as it manages growth. City Response, at 7.

The GMA anticipates development phasing that is linked to the availability of public infrastructure. That linkage may be *spatial*, with development allowed first in the locations already served by public services and then following the extension of those services, [RCW 36.70A.110(3)], or the linkage may be *temporal*, with development timed to match an infrastructure investment plan [RCW 36.70A.070(6) (transportation) and RCW 36.70A.020(12) (concurrency)]. The phasing provisions of the GMA allow a local jurisdiction to "manage" and guide growth both locationally and temporally. However, such phasing is inextricably linked to the availability and adequacy of the necessary infrastructure to support that growth. The GMA never contemplates development phasing that is purely random, with one's rights to develop under the adopted Plan designations and zoning dependent on the luck of the draw.

The GMA allows for restrictions on urban growth tied to the *location of adequate urban infrastructure*, and recognizes that developers may be called on to build infrastructure if they wish to develop beyond the location of the existing and planned public/private improvements. RCW 36.70A.110(3).[14] The Sammamish Growth Phasing Lottery, however, is not based on geographic or spatial linkage to infrastructure availability.

The Planning Commission discussion acknowledged that allocating growth geographically would be more effective:

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[14] (3) *Urban growth should be located first in areas* already characterized by urban growth *that have adequate existing public facility and service capacities* to serve such development, second in areas already 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 sources, and third in the remaining portions of the urban growth areas….

> We could divide the city into smaller pieces as we take a look at concurrency both on the school front, and on traffic, on parks, … But it sounds like we all pretty much agree that that's a much better tool and methodology for managing growth and infrastructure (inaudible) in that situation. It allows us, the city to prioritize their efforts and investment and higher in some areas and lower in other areas, where they could actually manage growth through the concurrency process as well.

Index 38, at 88-89.

Similarly, the June 8, 2005, CTED comment letter, from CTED Planner Anne Fritzel to Mayor Don Gerund, noted that the ordinance as proposed "will not help to *guide the location* of development." Index 53, at 2. CTED urged the City to consider phasing "not as a tool to phase the quantity of growth, but as a tool to *phase the location* of growth as envisioned by the GMA." *Id.* (emphasis supplied). Sammamish incorporated the principle of infrastructure linkage into its Comprehensive Plan,[15] but then ignored it in enacting the purely random lottery and annual caps.

Is the Growth Phasing Lottery based on concurrency – i.e., ***timing*** *of infrastructure improvements?*

Alternatively, the GMA allows growth phasing to be linked to a Capital Facilities Plan and service availability through the mechanisms of concurrency, level of service standards, and impact fees. RCW 36.70A.070(3),[16] (6), (8) and .020(12). This principle was incorporated into the Sammamish Comprehensive Plan but then essentially disregarded in enacting the random lottery.

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[15] LUP-3.2 Growth should be directed as follows: first, to areas with existing infrastructure capacity; second, to areas where infrastructure improvements can be easily extended; and last, to areas requiring major infrastructure improvements.

[16] RCW 36.70A.070 prescribes mandatory elements of comprehensive plans. .070(3) describes the capital facilities plan element, and (6) and (8) provide parallel requirements for the transportation element and parks element, respectively. RCW 36.70A.020(12) expresses these requirements as a planning goal – Goal 12 – Public Facilities and Services.

> RCW 36.70A.070(3) A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

The Sammamish Comprehensive Plan provides,

> LUP 3.3 The City shall institute a concurrency management system to provide for infrastructure to be in place at the time of development and meeting level of service goals of the Community. The Transportation Element and Capital Facilities Element shall identify the level of service objectives, the infrastructure, facilities, and services that must be in place to serve development at the time of development, including, but not limited to roads, stormwater facilities, water service, wastewater service, parks, schools, and others. The City shall monitor the effectiveness of concurrency standards.

CTED's comment letter urged the City, in lieu of the proposed growth metering lottery, to use "other tools such as your concurrency ordinance or impact fees … to address the real topics of concern, which may include increasing demands on transportation and other infrastructure, or on parks and schools." Index 53, at 1.

The City asserts that "the intent of Growth Metering is to match the rate of growth with the public's ability to provide transportation, park and school facilities." City Response, at 19, fn. 5. However, MBA/CamWest contends that the City has no hard data on infrastructure deficits, just generalized perceptions. MBA/CamWest PHB, at 18. Petitioners assert:

> Neither staff nor council identified what the specific problems are that the City has now in providing urban services and why it cannot use GMA tools such as concurrency and impact fees to address any issues.
>
> There is no evidence in the record to support even the generalized concerns cited to by Council members. None of the vague concerns outlined during the adoption process were based on any adopted level of service problems or system deficiencies.

Id. at 23.

In response, the City has not submitted for the record or cited in its briefs to any concurrency documentation, capital facilities reports, or infrastructure financing plan.[17]

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[17] The colloquy in City Council meeting transcripts is equivocal, with mayor and council members acknowledging general deficits, describing achievement, and assuring citizens of near-term project completion. For example, Councilmember Lee Fellinge commented on the scope of the City's near-term infrastructure investment to support urban growth:

> [T]here's some very important park, road, safety, sidewalks, and other infrastructure that is underway and will be completed over the next couple of years. There's been very important infrastructure that's already been completed. But the city is getting into a situation over these next couple of years where we have more projects underway than ever before. The next couple of years are going to be a huge peak of project activity. When that's completed, that will bring into line more closely the needed infrastructure of

The City has not produced for the Board the "concurrency management system" required by Sammamish LUP 3.3, and the Board must conclude that concurrency analysis has not been done or does not support growth phasing.

Is the Sammamish Growth Phasing Lottery based on transportation system deficits?

In the case of transportation concurrency, the meeting transcripts that are a part of the Board's record make it clear that the Sammamish transportation plan does not support development rationing. Sammamish adopted a *Transportation Concurrency Plan* shortly before enacting the Growth Phasing Lottery. That plan demonstrated that the City could accommodate another 1400 housing units without concurrency problems. In consideration of the Growth Phasing Lottery, Mayor Don Gerend asked the planning staff:

> If we had no phasing at all, and we opened the doors and we did get a thousand applications, would we have a failure of concurrency somewhere along the line?

Index 71, at 78.

The Council-staff colloquy that followed was unambiguous: there is capacity in the Sammamish transportation system to add 1400 units – the City's 20-year target. *Id*. at 78-80. Looking later in the 20-year planning horizon and assuming build-out at 5000 new dwellings, additional road capacity or lowering level-of-service standards might need to be considered in the out years. *Id*. at 81-82. See concurring testimony of Councilmember Jack Barry, Index 84, at 179-180 ("we have covered the [transportation] projects needed for concurrency through the target for 2020").

Similarly, the Planning Commission concluded that the City couldn't use traffic concurrency to stop development because the City's newly-adopted traffic concurrency plan provides a credible six-year program to address the City's growth needs. As noted by Commission Chair Scot Jarvis:

> The Council has also put into place a six-year transportation improvement plan that includes all the road projects necessary to avoid being out of concurrency from the traffic standpoint. As a result, *we cannot use concurrency as a method of managing growth*, which is one of the tools, and probably one of the better tools, that is in our tool kit for managing growth.

Index 38, at 63. Thus the Growth Phasing Lottery can not be rationalized by appeal to transportation deficiencies.

> parks, roads, and other safety enhancements, along with the population growth that we've had.

Index 84, at 37. See also Mayor Don Gerend, Index 84, at 78-91.

Could the Sammamish Growth Phasing Lottery be based on other concurrency deficits?

Water. The Board notes that a prior Sammamish infrastructure deficiency related to *water supply* has been alleviated by the Water System's recent arrangement for additional water supply. Supplemental Exhibit 1.

Environment. The City points to the need for *environmental protections.* City Response at 40-41, fn. 17; Index 73, at 1; Index 84, at 40, 76. However the provisions of the Growth Phasing Lottery are not timed to expire upon the enactment of updated critical areas regulations or stormwater regulations.

Parks. The City points to a desire for additional *parks, trails and open space*. City Response, at 40-41, 45. Planning Commission Chair Scot Jarvis suggested:

> There is also potential – although we don't have them in place yet that I'm aware of – of parks concurrency, trails concurrency; we could create many other concurrency methods, I guess, of managing growth ….

Index 38, at 63. Councilmember Lee Fellinge spoke of the possibility of adopting transfer of development rights legislation to enable the City to preserve greenways. Index 84, at 40. The Mayor listed a number of parks, recreation and open space projects recently added or under development or consideration. Index 84, at 38. However, the City does not have a parks facility plan with concurrency standards, impact fees, and the other tools provided by the GMA.[18] MBA/CamWest PHB, at 25. In short, the City offered no evidence demonstrating the City's level of services for parks; nor its investment/financing strategy to maintain the established levels of service. These documents would verify existing and needed parks and should identify any parks "deficiencies."

Schools. The City points to fast-growing *schools*, with portable classrooms and kids bussed to facilities away from their neighborhoods. City Response, at 45, fn. 20; Index 57, at 34-35; Index 84, at 38-39. However, City Engineer Steve Hartwig explained to the City Council that school officials were contemplating a bond and levy package, including a proposed "$152 million dollars in capital space additions," based on growth projections, [Index 57, at 36], and there was no Council proposal in the record concerning school impact fees or concurrency standards to manage growth in conjunction or coordination with the affected school districts. Councilmember Jack Barry commented: "I can assure you that the School District is already planning for that growth." Index 84, at 179.

[18] Petitioners point out that the City rejected a proposed amendment to Ordinance No. 02005-183 that would have encouraged dedications of land for parks and ballfields. Index 71, at 47. See also Index 38, at 39 (Jim Tosti: "There's no park mitigation fee; there's no park bond fee" and pledging "the development community [to] take care of that").

Conclusion – Non-compliance with RCW 36.70A.110

At the Hearing on the Merits, the City indicated that the rationale for the Growth Phasing Lottery is clearly stated in one of the "Whereas" clauses of the ordinance:

> The City Council and the City of Sammamish finds that legislative action is necessary and appropriate in order to allow the City of Sammamish: 1) to develop in accordance with the State Growth Management Act; 2) to develop in accordance with the City's Comprehensive Plan; 3) to accommodate the City's projected population growth in a reasonable manner; 4) to avoid placing an undue strain upon the City's resources; and 5) to serve the public health, safety, and welfare.

Ordinance 02005-183, at 5; HOM Transcript, at 89-90. Of the five rationales noted, only the fourth rationale may suggest a linkage to the City's ability to provide infrastructure, but that assertion is not supported by the record before the Board.[19]

The Board finds that, rather than using the growth phasing tools provided by the GMA, the Sammamish Growth Phasing Lottery allocates development opportunities on a purely random basis, without reference to infrastructure availability, location, or funding strategy to address specific identified deficits in the interim. The Growth Phasing Lottery simply denies near-term property development which is otherwise allowed by the Comprehensive Plan and zoning code in order to defer build-out in the 20-year planning horizon.

The Board finds that the City's restrictions on development of zoned urban land **do not comply** with the GMA mandate to encourage urban growth and permit urban densities in urban areas. RCW 36.70A.110(1) and (2). Further, the Growth Phasing Lottery is **contrary to the express GMA provisions** for managing the timing or location of development in relationship to provision of urban infrastructure and services. RCW 36.70A.110(3), RCW 36.70A.070(3), (6), (8) and .020(12). The Board is therefore persuaded that the Growth Phasing Lottery is a "**clearly erroneous**" application of the GMA.

Discussion and Analysis – Part 2
GMA Planning Goals 1 and 2

Was the City guided by GMA Planning Goals 1 and 2?

RCW 36.70A.020 sets out the goals of the GMA that are to guide cities and counties in their comprehensive plan and development regulation enactments. Goals 1 and 2 provide:

[19] This may also refer to the City's ability to process permits – a staffing or operational budget issue, not an infrastructure or capital improvement issue.

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

Petitioners contend that the Growth Phasing Lottery thwarts Goals 1 and 2 by failing to encourage urban densities in urban areas. MBA/CamWest PHB, at 13-16. According to Petitioners, the City's action will result in inefficient land use and premature expansion of the urban growth area (UGA). *Id.*

Petitioners contend, first, that the City's Growth Phasing Lottery has the effect of encouraging landowners to develop by building a single residence on an oversized lot now, rather than wait to build at urban densities or possibly be subject to a new lottery or other uncertainties after August 2007. *Id.* at 14. Since the City does not have a minimum lot size requirement, Petitioners argue that the City's ordinance has the effect of encouraging sprawl and discouraging urban growth at urban densities, which runs counter to the goals of the Act. *Id.* at 5, 14; HOM Transcript, at 43.

Further, Petitioners assert, the Growth Phasing Lottery will hasten the need to expand King County UGA boundaries: "On the one hand, other jurisdictions will have to accommodate the growth that would otherwise occur in Sammamish regardless of population allocation figures on paper. On the other hand, the County will be forced to expand its UGA at an artificially early stage to accommodate that growth." MBA/Camwest PHB, at 15. Petitioners contend that the "GMA becomes useless" if "each jurisdiction can simply shrug off its duty to affirmatively foster growth" by such devices. *Id*. at 15-16.

Sammamish responds that it has continued to develop, since cityhood, based on pre-existing applications, and that the Growth Phasing Lottery continues that absorption of urban growth at a rate of up to 420 units/lots per year for two years. City Response, at 34. According to the City, Petitioners' arguments are mere generalizations and hypotheses, not supported by "any studies, reports, statistics, or analyses to substantiate these assertions." *Id*. at 33.

The Board finds that the MBA/CamWest assertion concerning *inefficient land use* is supported by the CTED comment letter and the assertion concerning *premature expansion of UGA boundaries* is supported by a comment letter from King County Executive Ron Sims.

CTED's Anne Fritzel states:

> We are also concerned that the proposed growth phasing ordinance is not a long term solution to the problem of rapid development and instead will

> change the nature of current development in way that would result in *inefficient land use*, and even fewer options for affordable housing.

Index 53, at 1. CTED explains:

> Phasing of development as currently proposed (exempting single lots), in an environment where there are no minimum lot sizes, may have the effect of increasing average lot size. For example, a lot which could be subdivided into two or three lots would be subject to phasing, where a large lot developed as a single lot would be exempt from this ordinance. As a result, we are concerned that *urban land would be used less efficiently, and would be developed at less than urban densities*. Not only does this decrease the residential capacity of the city, but increases the per capita cost of providing public facilities.

Id. CTED urged the city to adopt minimum densities in order to "utilize land efficiently and allow for the cost-effective provision of infrastructure and city services." *Id.* at 2.

The CTED and MBA/CamWest arguments are underscored by the testimony of several citizens who advocated for continuing the moratorium or growth metering, asserting – and citing neighborhood examples - that a moratorium or growth metering would not diminish property rights because a land owner could still get good money by selling an oversized lot with a single home. E.g., Greg Allen, Index 38, at 52-53.

As to pressure on the King County UGA boundaries, King County Executive Ron Sims stated the issue squarely in his May 13, 2005, letter to Sammamish Mayor Don Gerend:

> Our concerns about the proposed metering plan reach beyond the boundaries of your city. In the past few years only four percent of overall growth in the county has occurred in the designated rural area. This success could not have been imagined without the full cooperation of all the cities and their dedication to accommodating growth within their city limits. Any restriction on growth in the cities could put renewed pressure to move the Urban Growth Area boundary to accommodate projected growth and undo our great success of previous years.

Index 41, at 1. By "put[ting] artificial constraints on housing development within the Urban Growth Area," the Sammamish growth metering scheme poses a threat to regional success in accommodating urban growth within the King County UGA, according to Executive Sims. *Id.*

The importance of UGAs is underscored by the Supreme Court in *Quadrant:*

> One of the central requirements of the GMA … is that counties and cities which plan under it must designate UGAs "within which urban growth

> *shall be encouraged* and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110(1).

154 Wn.2d at 232 (emphasis supplied). Under the GMA, county governments are responsible for setting UGA boundaries [RCW 36.70A.110(1)], and cities must allow the projected growth [.110(2)].

In considering GMA Planning Goals 1 and 2, the Board looks to the ruling in *Quadrant, supra,* where the Court indicated that "the primary method for meeting the goals of subsections .020(1) (urban growth) and .020(2) (reduce sprawl) is set forth in RCW 36.70A.110." 154 Wn.2d at 246, c*iting, Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 548, 958 P.2d 962 (1998).

The Board has found that the Growth Phasing Lottery does not comply with RCW 36.70A.110. Section IV.B, Part 1, above. The Board further finds that the Growth Phasing Lottery is likely to result in inefficient land use and premature expansion of the UGA boundary. The Board is persuaded that the City's enactment of Ordinance No. 02005-183 **was not guided by** the urban growth and antisprawl goals of the GMA. Further, the Board finds and concludes that the Growth Phasing Lottery, in not complying with the RCW 36.70A.110 requirements, **substantially interferes with the fulfillment** of the Act's urban growth and antisprawl goals.

Discussion and Analysis – Part 3
GMA Planning Goal 12

Was the City guided by GMA Planning Goal 12?

RCW 36.70A.020 (12) provides:

> (12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

Petitioners allege that the Growth Phasing Lottery violates Goal 12, which requires the City to ensure that facilities and services are adequate for its selected level of growth. MBA/CamWest PHB, at 18. Petitioners reject the attempt by the City to justify the ordinance based on vague assertions of alleged shortfalls in facilities and services. MBA/CamWest PHB, at 5 ("not based on any … analysis of public facility or service needs or problems"); *id*. at 27 (no reason why GMA tools have not been used to evaluate public facilities and services). Petitioners argue this "thwarts Goal 12's requirements that the City base its decisions on actual analysis and review of its needs and established levels of service." MBA/CamWest PHB, at 19.

Sammamish points to language in the Growth Phasing Lottery stating that growth should be managed to overcome infrastructure burdens as well as to provide established levels of service for parks, schools and other public facilities and services. City Response, at 44-45; Ordinance 02005-183, at 4. These acknowledgements, the City argues, along with the City's focus on open space and parks and the City Council's comments on adequate recreation facilities during planning meetings, demonstrate the City's consideration of Goal 12. City Response, at 45.

The Board reads Goal 12 as referring to specific capacity analysis and adopted levels of service. In reading the voluminous transcripts of City meetings in this case, the Board is struck by repeated acknowledgement of lack of infrastructure plans, lack of concurrency standards (except for roads), lack of impact fees – in short, that the GMA tools for identifying and addressing infrastructure deficits are not in place. While the burden is on Petitioners here, the Board notes that Petitioners have argued that the City has no hard evidence – only anecdotal complaints – of capital facilities deficits. In the face of this assertion, the Board anticipated the City would point to staff reports, consultant studies, capital facilities financing plans, and the like. No such information has been supplied.[20]

Specific GMA requirements underlie Goal 12. See Section IV.B, Part 1, above, and fn. 16. The GMA sets forth the methods for meeting the goal of RCW 36.70A.020(12) (public facilities and services) in RCW 36.70A.070(3), (6) and (8) – concurrency, level of service standards, and impact fees - and in RCW 36.70A.110(3) – locational growth phasing. As set forth above, the Sammamish Growth Phasing Lottery does not take either of these paths, opting instead for a random lottery to delay urban development.

The Board is left with "a firm and definite conviction" that the Lottery is being imposed to deal with pent-up demand created by the 6-year moratorium, not to ensure infrastructure concurrency based on locally-adopted levels of service. The Board concludes that the City's enactment of the Growth Phasing Lottery **was not guided by** GMA Planning Goal 12 (public facilities and services).

Conclusion

The Board concludes that the City of Sammamish adoption of Ordinance No. 02005-183 **does not comply** with the urban growth mandates of RCW 36.70A.110. Further, the City's discretion in accommodating growth **was not guided by** RCW 36.70A.020(1), (2), and (12). The Board is left with "a firm and definite conviction" that the Growth Phasing Lottery is a **clearly erroneous** application of the GMA. The Board will **remand** Ordinance No. 02005-183 for action consistent with this order.

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[20] The Board notes that RCW 36.70A.070(3)(e) [requirements for the Plan's capital facilities element] provides:

> [A] requirement to reassess the land use element if probable funding falls short of meeting existing needs [i.e. a deficiency] and to ensure that the land use element, capital facilities plan element and financing plan within the capital facilities element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

C. De Facto Moratorium – Legal Issues 1 and 2

The Board's Prehearing Order states Legal Issue Nos. 1 and 2 as follows:

> *Whether Ordinance No. 02005-183 violates RCW 36.70A.390 by imposing a de facto moratorium on residential development within the City for two years except for a select number of property owners selected through lottery, without complying with the requirements of RCW 36.70A.390, including but not limited to failing to adopt findings of fact justifying the moratorium?*
>
> *Whether Ordinance No. 02005-183 violates RCW 36.70A.390 by imposing a de facto moratorium on all residential development within the City for an unknown period pending the actual lottery without complying with the requirements of RCW 36.70A.390, including but not limited to failing to adopt findings of fact justifying the moratorium?*

Applicable Law

The GMA contains the following provision concerning moratoriums.

> **RCW 36.70A.390 Moratoria, interim zoning controls -- Public hearing -- Limitation on length -- Exceptions.**
>
> A county or city governing body that adopts a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing on the proposed moratorium, interim zoning map, interim zoning ordinance, or interim official control, shall hold a public hearing on the adopted moratorium, interim zoning map, interim zoning ordinance, or interim official control within at least sixty days of its adoption, whether or not the governing body received a recommendation on the matter from the planning commission or department. If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after this public hearing. A moratorium, interim zoning map, interim zoning ordinance, or interim official control adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium, interim zoning map, interim zoning ordinance, or interim official control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal….

Discussion and Analysis

Positions of the Parties

Petitioners MBA/CamWest argue that Ordinance No. 02005-183 violates RCW 36.70A.390 by imposing a de facto moratorium on residential development within the City for at least two years, except for a select number of property owners chosen by luck of the draw. MBA/CamWest PHB, at 9-10; HOM Transcript, at 32. They argue that the majority of applicants, many of whom have been waiting for several years already, will not be lottery winners, and will therefore be forbidden to submit their applications for development for at least two more years.[21] *Id.* at 33.

Petitioners contend that RCW 36.70A.390 establishes specific requirements for moratoriums and that the Growth Phasing Lottery doesn't meet the statutory requirements. First, the City has failed to adopt findings of fact justifying the moratorium. MBA/CamWest PHB, at 9. Petitioners reject the City's justifications based upon generalized concerns about schools, parks, and transportation as unsupported by any real evidence. MBA/CamWest Reply, at 29-30; HOM Transcript, at 40-41. Even if problems in these areas are identified in the future, Petitioners argue that the GMA provides the City with adequate tools, including concurrency and impact fees, to address such issues. HOM Transcript, at 42.

Petitioners state that under Section 390 of the GMA, moratoriums are typically limited to six months, or perhaps up to one year with the adoption of a specific work plan. HOM Transcript, at 34; MBA/CamWest PHB, at 7. Petitioners note that the Growth Phasing Lottery extends beyond six months or even one year and that the City has not adopted a work plan. *Id*. at 9-10. Petitioners remind the Board that Sammamish has imposed some sort of moratorium since its incorporation in 1999, ostensibly in order to allow for the development of its Comprehensive Plan and development regulations. *Id*. at 3. After six years, this Board invalidated the City's moratorium because the City's Plan and regulations had been adopted. *Id*. Petitioners assert that the Growth Phasing Lottery, adopted effective two days after the Board issued its final order invalidating the moratorium, acts as a de facto moratorium extension by prohibiting non-lottery winners from submitting development applications. *Id*. at 2-3; HOM Transcript, at 35.

Petitioners further contend that as a moratorium, the Growth Phasing Lottery was illegitimate inasmuch as it was adopted without the specific public participation process mandated by RCW 36.70A.390. MBA/CamWest PHB, at 9; HOM Transcript, at 36.

The City of Sammamish denies that Ordinance No. 02005-183 is a de facto moratorium, thus negating any possible violations of RCW 36.70A.390. The City contends that the Growth Phasing Lottery does not meet the definition of a moratorium because it does not

[21] Several Sammamish Planning Commissioners and City Council members characterized growth phasing as a "moratorium" for those who failed to win the lottery. Commissioner Stuart Carson, Index 38, at 74; Councilmember Jack Barry, Index. 71, at 59, 65; Councilmember Kathleen Huckabay, Index 71, at 121, 139; Councilmember Nancy Whitten, Index 71, at 172.

place a "freeze" on development and it does not maintain the status quo. City Response, at 19. Sammamish urges that the ordinance is not a bar to development, but rather a timing mechanism that will allow the City to match growth with required infrastructure and resources. *Id.* According to the City, the Growth Phasing Lottery does not *stop* anyone from applying for a development permit; it only affects the *time* of application. *Id.* at 21. If a landowner is not successful in the lottery or failed to submit an application to be entered, the time for applying for a development permit is simply delayed. The lottery is thus a timing mechanism and not an outright prohibition. *Id.*

Sammamish points to a multitude of cases in Washington and around the country that validate the use of growth phasing ordinances, in some cases including lotteries, to accommodate specific local needs.[22] City Response, at 25-29.

Petitioners reply that none of these cases is based on analysis of any similar growth management statute; thus, the cases are not relevant to the Board's review of whether the Growth Phasing Lottery violates the GMA. MBA/CamWest Reply, at 21-22.

Board Discussion

The Board does not find Petitioners' "de facto moratorium" argument persuasive.

- [22] *Golden v. Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 368, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972) *appeal dism'd*, 409 U.S. 1003, 93 S. Ct. 436, 34 L.Ed.2d 294 (1972) (ordinance tying subdivision approval to infrastructure availability not unconstitutional).
- *Construction Industry Ass'n of Sonoma County v. City of Petaluma***,** 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976) (growth rate restrictions not violative of federal due process nor unreasonable burden on interstate commerce).
- *Conway v. Town of Stratham,* 120 N.H. 257, 414 A.2d 539 (N.H. 1980) ("slow growth" ordinance permissible under state law as temporary measure pending adoption of comprehensive plan).
- *Del Oro Hills v. City of Oceanside*, 31 Cal.App.4th 1060, 37 Cal.Rptr.2d 677 (1995) (growth control ordinance invalid as contrary to state law, but not unconstitutional, i.e., entitled to some deference in constitutional takings challenge).
- *Schenck v. City of Hudson***,** 114 F.3d 590 (6th Cir.1997) (growth rate restrictions tied to availability of infrastructure and awarded by lottery not unconstitutional on substantive due process grounds).
- *Bateson v. Geisse,* 857 F.2d 1300 (9th Cir. 1988) (arbitrary refusal to issue building permit violated property owner's substantive due process rights).
- *Silver v. Franklin Township, Board of Zoning Appeals,* 966 F.2d 1031 (6th Cir. 1992) (constitutional challenge for takings, substantive due process, and equal protection).
- *Lakeview Development Corp. v. City of South Lake Tahoe,* 915 F.2d 1290 (9th Cir. 1990) cert denied, 111 S.Ct. 2890 (1991) (constitutional challenge for takings and due process).
- *Associated Home Builders etc., Inc. v. City of Livermore,* 18 Cal.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473 (1976) (moratorium pending development of water, sewer and school facilities held constitutional).
- *Long Beach Equities, Inc. v. County of Ventura,* 231 Cal.App.3d 1016, 282 Cal.Rptr. 877, (1991) (growth management regulation held constitutional).
- *Albany Area Builders Ass'n v. Town of Clifton Park,* 172 A.D.2d 54, 576 N.Y.S.2d 932, (1991) (phased growth tied to traffic infrastructure not unconstitutional on substantive due process grounds).

The Board has considered moratoriums in several recent decisions in which it concluded that, under the circumstances in those cases, ordinances enacted as moratoriums were development regulations that contravened other requirements of the GMA.[23] While the Growth Phasing Lottery at issue here has the effect of continuing to preclude development except for the lucky winners in the October 2005 drawing, the Lottery does not preclude all development or freeze development to preserve the status quo. Because some new applications are accepted, and development may proceed if such applications are approved, the Board cannot characterize the Growth Phasing Lottery as a moratorium as provided for in RCW 36.70A.390.

The cases cited by the City are not helpful to the resolution of the specific issues before the Board. Most of the cited cases are decided on constitutional grounds or under the laws of other states,[24] not within the Board's purview.[25] It is not up to the Board to determine whether the Growth Phasing Lottery would survive constitutional challenge. "The Board *adjudicates compliance with the GMA." Ferry County, supra*, 155 Wn.2d at 833.

However, as the Board has already found, the vice of the Sammamish Growth Phasing Lottery is that it does not comply with RCW 36.70A.110 and is not guided by GMA Goals 1, 2, and 12. Characterizing it as a moratorium is a leap of logic that is not necessary to the conclusion that the lottery is inconsistent with the goals and requirements of the GMA.

Conclusion

The Board finds that Petitioners have **not carried their burden of proving** that the Growth Phasing Lottery violates the GMA because it is a de facto moratorium. Legal Issue Nos. 1 and 2 are **dismissed.**

D. GMA Planning Goals – Legal Issues 3 and 4

The Board's Prehearing Order states Legal Issue Nos. 3 and 4 as follows:

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[23] *MBA/CamWest v. City of Sammamish*, CPSGMHB Case No. 05-3-0027, *supra*, (the City's general development moratorium, extended 12 times at 6-month intervals, was in effect a permanent development regulation; as such, the moratorium failed to comply with the GMA requirement for cities to allow urban growth at urban densities and failed to implement the City's Comprehensive Plan).

DOC IV v. City of Lakewood, CPSGMHB Case No. 05-3-0043, Final Decision and Order (January 31, 2006) (moratorium halting DOC's application to site a correctional facility, when the city already had a conditional use process in place to address its stated concerns, was in effect a development regulation which precluded the siting of an essential public facility, in contravention of RCW 36.70A.200).

[24] Most of the regulations at issue in the cited cases also appear to be tied to the adequacy of infrastructure and linked to an investment strategy.

[25] In 1993, this Board established that it did not have jurisdiction to determine federal or state constitutional issues arising from a jurisdiction's implementation of the Act. *See Gutschmidt v. City of Mercer Island*, CPSGMHB Case No. 92-3-0006, Final Decision and Order, (April 6, 1993). Since that time the Board has consistently held that it does not have jurisdiction to resolve constitutional issues. See Digest of Board Decisions (1992-2005), keyword "Subject Matter Jurisdiction," at 470-481.

Whether the City failed to adequately consider and adopt findings relating to the goals contained in RCW 36.70A.020?

Whether the City failed to be guided by the goals contained in RCW 36.70A.020, including but not limited to (1) Urban Growth; (2) Reduce Sprawl; (4) Housing; (5) Economic Development; (6) Property Rights; (7) Permits; (11) Citizen Participation and Coordination; (12) Public Facilities and Services?

Applicable Law

RCW 36.70A.020 sets forth the GMA planning goals, which are attached in full as Appendix D to this FDO, and set out individually in the Discussion and Analysis below.

Discussion and Analysis – Part 1
Legal Issue No. 3

Adoption of Findings

The parties take very different views of the goals of the GMA. Petitioners contend that the City violated the Act by failing to make *specific findings*, in Ordinance 02005-183, concerning the relevant GMA planning goals. MBA/CamWest PHB, at 11. The City retorts that it *recited* the GMA goals in the "Whereas" of the ordinance and, furthermore, that it is entitled to "balance" the goals in the light of local circumstances. City Response, at 29-30. Petitioners argue that while the City mentions the GMA in the ordinance via an insertion in the preamble, it is "an empty action;" that is, it fails to actually weigh any of the Growth Management Act's goals, much less further the advancement or achievement of any of them. MBA/CamWest PHB, at 12; HOM Transcript, at 83.

Petitioners' argument appears to be premised upon the "findings" requirements of RCW 36.70A.390, which governs the adoption of moratoriums and interim measures. However, the Board has determined that the Growth Phasing Lottery is not a "moratorium" and is therefore not subject to the requirements of RCW 36.70A.390. Consequently, the GMA doesn't require findings by a jurisdiction in these circumstances, though they may be helpful in demonstrating, for example, how various GMA goals have been considered. Petitioners' Legal Issue No. 3 is **dismissed.**

Discussion and Analysis – Part 2
GMA Planning Goals 4, 5, 6, 7, and 11

Petitioners allege that the City disregarded GMA planning goals 1, 2, 4, 5, 6, 7, 11, and 12. The City responds that it balanced its consideration of various GMA goals with a particular emphasis on Goals 3, 4, 9, 10, and 12. The Board determined in Section IV.B, above, that Sammamish was not guided by Goals 1, 2, and 12.

In this section the Board reviews the remaining GMA planning goals cited by Petitioners and asks whether the City has been guided by each one substantively. In the following section, the goals relied on by the City are reviewed.

The Board views the GMA planning goals as substantive legislative values that must guide local government actions. *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order (October 6, 1995), at 24. The burden is on the challenger to identify the planning goals that are at issue and show how the challenged enactment thwarts that goal. *See Rabie v. City of Burien*, CPSGMHB Case No. 98-3-0005c, Final Decision and Order (October 19, 1998), at 6.

The Legislature has declared its intent that "within a framework of state goals and requirements … the ultimate burden and responsibility for … harmonizing the planning goals of the [GMA]" lies with the local jurisdiction. RCW 36.70A.3201. In looking to the GMA planning goals to assess a city or county's compliance with the GMA, the Supreme Court admonishes us not to rely on an applicable goal in isolation from other goals and not to hold the goals to independently create substantive requirements not specified elsewhere in the GMA. *Quadrant, supra,*154 Wn.2d at 246. The City's local discretion is due deference where the City's policy choices are consistent with GMA goals and requirements. *Id.* at 248.

Goal (4) - Housing

> (4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

Petitioners reject the City's argument that the Growth Phasing Lottery will somehow promote GMA Goal 4 (affordable housing). MBA/CamWest PHB, at 16-17; HOM Transcript, at 79. They argue that to the contrary, the development of affordable housing is discouraged by limiting the number of applications for urban-density housing that will be considered. *Id.* Petitioners argue that since denser housing developments are usually more affordable, by limiting such development the Growth Phasing Lottery thwarts Goal 4. *Id.* The exemption for low income housing is too limited, Petitioners state, because high land prices make affordable housing development infeasible except as a component of large market-rate projects. MBA/CamWest PHB, at 16-17.

Sammamish responds that Goal 4, in fact, is advanced by the Growth Phasing Lottery. City Response, at 37. The City points out that the City Council explicitly exempted projects that provide housing exclusively for low and moderate income families from the allocation process in response to their recognized responsibility under this GMA goal. Ordinance 02005-183, at 4; Index 71, at 69-74. Accordingly, any developer proposing to build a project devoted exclusively to house low to moderate income families can apply for a permit without being subject to the lottery and without regard to the number of units allocated under growth phasing. City Response, at 37. Additionally, the development of

homes on existing lots and the development of accessory dwelling units (ADUs) are not subject to the Growth Phasing Lottery. *Id.* and Ordinance No. 02005-183, at 4.

The Board notes that compliance with Goal 4 in Sammamish is a problem larger than this Ordinance. The City has only two or three locations available for multi-family development. Index 71, at 101, 71. CTED's comment letter expresses concern that the Growth Phasing Lottery, together with the lack of minimum lot size, will result in "even fewer options for affordable housing."[26] Index 53, at 1. However, the Board finds that the Growth Phasing Lottery itself credibly incorporates Goal 4 by exempting housing projects for low and moderate income households and by including a determination that accessory dwelling units will not count against the 20-year growth target. Ordinance 02005-183, at 4.

Petitioners have **not carried their burden of proving** disregard of RCW 36.70A.020(4) - Housing.

Goal (5) Economic Development

> (5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

MBA/CamWest claim that the Growth Phasing Lottery does not comply with GMA Goal 5 - Economic Development. MBA/CamWest PHB, at 17. They argue that growth metering closes the door to providing housing for employees of large corporations, and that it discourages small businesses from locating within Sammamish. *Id*. Petitioners argue that these businesses will turn instead to other markets that can provide them with a growing population. *Id.*

The Board finds that Petitioners' argument is unsupported by any facts in the record or even by citation to credible authority. Petitioners have **not carried their burden of proving** that the City was not guided by RCW 36.70A.020(5) – Economic Development.

[26] CTED notes that the December 2004 King County Benchmark Report documents the lack of affordable housing in Sammamish, compared with county-wide targets, and urges the City to adopt minimum lot sizes in single-family zones, exempt all multi-family housing, and exempt bonus density units. *Id.* at 2.

Goal (6) – Property Rights

> (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

Petitioners contend that the Growth Phasing Lottery violates Goal 6 because the City fails to give any consideration to the rights of landowners who have waited up to six years and now, in many cases, must wait at least two more years before they can even submit an application to develop property that has long been zoned for urban densities. MBA/CamWest PHB, at 17. The City responds that "MBA cites no law or regulation that establishes a right to submit a development application whenever and wherever one pleases." City Response, at 21. In reply, Petitioners cite *Norco Construction, Inc. v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982), for the proposition that "Petitioners have the underlying right to submit a development application at their timing discretion." MBA/Camwest Reply, at 14-15.

The Board finds that Petitioners' conclusory assertions fail to address the Goal 6 issue of protection from arbitrary and discriminatory actions. Petitioners **have not carried their burden of proving** that the City was not guided by RCW 36.70A.020(6) – Property Rights.[27]

Goal (7) - Permits

> (7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

Goal 7 (permits) is also violated, Petitioners argue, because the Growth Phasing Lottery does not provide applicants with timeliness, fairness, and predictability in the permitting process. MBA/CamWest PHB, at 18. Because the process is unpredictable, Petitioners assert, developers may rush to undertake potentially poorly planned and uncoordinated development proposals, rather than risk a two-year wait for what may be another lottery or similar strategy. *Id*. at 27.

The City argues that in choosing a lottery as its growth phasing tool the City Council was guided by Goal 7 because the purpose of allocating development rights at random was specifically to ensure that the permit process was fair and equitable. City Response, at 39-40. As Sammamish sees it, in a lottery each developer has equal odds and the permit process doesn't become a "beauty contest" between prospective developers. *Id.*

In the Board's view, a development application lottery is the antithesis of Goal 7's "timely, fair, and *predictable*" standard.

[27] *But see*, concurring opinion of Board Member Margaret Pageler, *infra*.

- A "timely" process would require prompt consideration by permit officials of applications submitted in accordance with the statutory and local procedures and time lines for processing permits.
- A "fair" process would implement the adopted zoning and the Comprehensive Plan.
- A "predictable" process would **not be based on the luck of the draw**.

The CTED comment letter raised objections to the City's growth metering based, first of all, on its impact on "the predictability needed for economic investment."

> Goal 7 of the Growth Management Act is that *permits should be processed in a timely and fair manner to ensure predictability*. We are concerned that a growth phasing ordinance will create *artificial market conditions which do not provide predictability*. We suggest that instead of this type of ordinance, other tools such as your concurrency ordinance or impact fees be considered. …

Index 53, at 1 (emphasis supplied).

Random development allocation throughout the entire City by lottery runs directly counter to the predictable permit application processes called for by Goal 7. Many of the citizens who testified before the City Council and Planning Commission spoke of the hardships caused by lack of predictability in the phasing plan.[28] Representatives of Petitioners and other development professionals described the importance of predictability for sound financial planning and responsible design. E.g., Greg Nelson (William Buchan), Index 32, at 56; Michael Reid, Index 38, at 44-46; Rick Lennon, Index 57, at 17-19.

The Board finds that the Sammamish Growth Phasing Ordinance does not process development applications in a timely and fair manner to ensure predictability. The Board concludes that Sammamish' action **was not guided by** Goal 7. Further, the Board finds and concludes that the Sammamish Growth Phasing Lottery **substantially interferes**

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[28] Robert and Linda Welsh, 37-year residents on 2 ½ acres now zoned R-6 and surrounded by subdivisions: "I would like to speak briefly about uncertainty…. For six years we have been trying to plan our future, and we can't plan that future…." Index 32, at 51-52. "I would like to have some sort of certainty about how to plan my future." Index 57, at 14. Index 71, at 39.

Gary Bunten, 51-year resident: "I'm 71 now, and I don't know if I'm going to outlive … these moratoriums." Index 71, at 41.

Katie and Dennis Richter, 20-year residents on a 5-acre parcel: "My husband and I would like to plan for our future…. [W]e have folks … in our neighborhood who are seriously in trouble because they cannot plan for their health and well being under the current and proposed rules."

[The Walshes and Richters did not win in the lottery. Mr. Bunten won a second-year allocation. Supplemental Exhibit 2]

with the fulfillment of the GMA goal of timely, fair and predictable permit process. RCW 36.70A.020(7).

Goal (11) - Citizen Participation and Coordination

> (11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

GMA Goal 11 requires cities to involve citizens in the planning process and also to ensure coordination among jurisdictions. The City affirmatively contends that it was guided by the first part of Goal 11 – citizen participation. City Response, at 41-44. The public input process in adopting this ordinance was remarkably thorough, according to the City, clear evidence that all of the requirements of public participation were met and exceeded. [29]

Considering the goal of *public participation*, the Board agrees with the City: there is no question but that Sammamish involved its citizens, including the Petitioners here, in the planning process.

Petitioners focus on the second prong of Goal 11 – inter-jurisdictional coordination – and allege that the City violates the second prong of Goal 11 by failing to appropriately accommodate growth, thereby forcing the growth that would otherwise occur within its borders to other jurisdictions. MBA/CamWest PHB, at 15-16; HOM Transcript, at 39. By failing to foster urban growth within Sammamish boundaries, Petitioners argue, the Growth Phasing Lottery thwarts the GMA requirement of coordinated planning with other jurisdictions. *Id*.

> The ramifications of this ordinance are very significant. Metering means that the City is not permitting urban densities in the vast majority of the City. Metering results in haphazard long-range planning. It's uncoordinated, and it fails to encourage urban growth. What's going on with metering is growth and population that the City does not accommodate now will be forced onto other jurisdictions, some of whom may have actual infrastructure problems and are not ready or adequately funded to take on that growth ….
>
> .

HOM Transcript, at 44.

Petitioners argue that the City's current status in terms of meeting its growth target is irrelevant to justify the Growth Phasing Lottery, as many other cities are meeting their targets as fast or faster than Sammamish; allowing such cities to unilaterally exclude

[29] The process involved twenty meetings that included public comment time, further public comment that was solicited for at hearings before the planning commission, full compliance with the publishing requirements in RCW 36.70A.035, e-mails to known interested parties and news releases and postings on the city's website. See City Response, Attachment A.

further growth through arbitrary "phasing" would lead to the collapse of the inter-jurisdictional cooperation that is at the heart of the Growth Management Act. MBA/Camwest PHB, at 20-22, 26; HOM Transcript, at 44. The City's Response proposes no answer to this Goal 11 argument.

The Board notes that it has long been the rule in Washington that a City's consideration of the public interest, in adopting its land use measures, may under certain circumstances be required to include the interest of a general public beyond the city's own boundaries. *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978). This principle is embedded in the GMA both in general intentions [RCW 36.70A.010] and in specific requirements for inter-jurisdictional planning and coordination, particularly with respect to absorbing urban growth. RCW 36.70A.100, .110(2), .210, .215. While the Act recognizes local discretion to deal with local circumstances, it *requires* regional coordination in accommodating urban growth. *Id.* The requirement is reflected in the second part of Goal 11 – RCW 36.70A.020(11).

The Board agrees with Petitioners that the City's enactment of the Growth Phasing Lottery was not guided by the goal of *inter-jurisdictional coordination*. While RCW 36.70A.110(3) allows growth phasing within the urban growth area when it is linked to the documented extension of urban services over time, the Sammamish metering scheme threatens, rather than contributing to, regional coordination and long-range planning.

In his May 13, 2005, letter to Sammamish Mayor Don Gerend, King County Executive Ron Sims reminded the City that "the success of growth management in King County depends on *each jurisdiction doing its part* to use land efficiently within its boundaries." Index 41, at 1 (emphasis supplied). Executive Sims objected to Sammamish growth phasing because it threatens to undermine GMA-compliance efforts of King County and its other constituent cities.

> Our concerns about the proposed metering plan reach beyond the boundaries of your city. In the past few years only four percent of overall growth in the county has occurred in the designated rural area. This success could not have been imagined without the full cooperation of all the cities and their dedication to accommodating growth within their city limits. Any restriction on growth in the cities could put renewed pressure to move the Urban Growth Area boundary to accommodate projected growth and undo our great success of previous years.

Id.

The City of Sammamish chose to adopt the Growth Phasing Lottery despite Councilmember Jack Barry's recognition of the conflict with regional growth management priorities: "Certainly King County says that they don't think it's defensible. The state says it's not defensible." Index 57, at 22.

The Board concludes that Sammamish **was not guided by** Goal 11 in designing a phasing ordinance based on a random lottery. Further, the Board finds and concludes that the Sammamish Growth Phasing Lottery **substantially interferes with the fulfillment** of the inter-jurisdictional coordination goal of RCW 36.70A.020(11).

Discussion and Analysis – Part 3
GMA Planning Goals 3, 9, and 10

Affirmatively, the City cites to GMA goals RCW 36.70A.020(3), (9), and (10).
Goal (3) – Transportation

> (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

Affirmatively, the City of Sammamish argues that the Growth Phasing Lottery was guided by Goal 3. City Response, at 34-35. During the public comment period the City heard testimony from concerned citizens on traffic congestion, gridlock and funding shortfalls.[30] *Id.* Ordinance No. 02005-185 was enacted with those worries in mind, the City insists, and will slow growth in order to maintain concurrency of the roads in the City with the increased traffic caused by more new homes. *Id.* Therefore, the City argues that growth phasing is not only consistent with Goal 3 but aids in its advancement. *Id.*

The Board notes that this goal is not among those challenged by Petitioners. Therefore the Board is not compelled to address it. However, the Board notes that the City's argument is inconsistent with the facts in its record. See Section IV.B. Part 1, above. The City's Transportation Concurrency Plan demonstrates that Sammamish can absorb 1400 new units without exceeding its concurrency limits, as the Mayor was told by planning staff when the Growth Phasing Lottery was enacted. The Planning Commission Chairman also acknowledged that, in light of the concurrency plan, transportation infrastructure deficits could not be used to stop development. *Supra.* The record suggests that the transportation goal is being furthered without the need for the City's Growth Phasing Lottery.

Goals (9) and (10) – Open Space and Recreation, and Environment

> (9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.
>
> (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of

[30] For example, the City points to a March 10, 2005, memo from Scott Hamilton, a member of the City Planning Advisory Board, indicating three roads that fail concurrency standards or are approaching concurrency failure. City Response, at 36, citing Index 59, at 3.

water.

The City asserts that the GMA Goals of open space, recreation and environmental protection were explicitly considered in adopting the Growth Phasing Lottery. City Response, at 40-41. The City points out that the ordinance states that the City is obligated "to adopt residential growth management tools that guide the location and timing of residential development, recognizing environmental capacities and *established level of service standards* for … parks." Ordinance 02005-183, at 4, quoting LUP 3.4[31] (emphasis supplied).

Again, these goals are not challenged by Petitioners, and are not in dispute. However, the Board again notes that, as spelled out in Section IV.B, Part 3, above, the City has *no established level-of-service standards* for parks. Further, under the Growth Phasing Lottery, the timing of development is not linked to level of service standards for parks or even to location of existing and planned parks, but is awarded at random. Nor is the Growth Phasing Lottery linked to adoption of updated CAOs or other environmental regulations. The record suggests that the Growth Phasing Lottery is not needed for the furtherance of these goals.

Conclusion

Petitioners have **failed to carry their burden** of demonstrating that the City's enactment of the Growth Phasing Lottery was not guided by Goals 4, 5, and 6. The Board is persuaded that, in its adoption of the Growth Phasing Lottery, the City **was not guided by** Goal 7, nor was it guided by the inter-jurisdictional coordination principle of Goal 11, as linked to the requirements of RCW 36.70A.110.

Reviewing the record and the arguments of the parties with respect to each of the GMA planning goals, including Goals 1, 2, and 12, the Board is left with a "firm and definite conviction" that the Growth Phasing Lottery is **clearly erroneous** in view of the entire record before the Board and in light of the goals and requirements of the Act. The Board will remand Ordinance No. 02005-183 to the City with direction to comply with the goals and requirements of the GMA.

V. INVALIDITY

Applicable Law

The GMA's Invalidity Provision**,** RCW 36.70A.302, provides:

(1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
    (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;

[31] See APPENDIX C.

(b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
(c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Discussion and Analysis

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (October 13, 2003) at 18. Petitioners here have requested the Board to find the Growth Phasing Lottery invalid. MBA/CamWest PHB, at 27-28.

In the discussion of Legal Issues 4 and 5 (Sections IV.B and D, *supra)*, the Board found and concluded that the City of Sammamish's adoption of Ordinance No. 02005-183 was **clearly erroneous** and **non-compliant** with the requirements of RCW 36.70A.110. The Board further found that the Growth Phasing Lottery is **clearly erroneous** in view of the entire record before the Board and **in light of the goals** of the Act. The Board is **remanding** the Ordinance with direction to the City to take legislative action to repeal the Growth Phasing Lottery or otherwise comply with the goals and requirements of the GMA.

A Board *may* enter an order of invalidity upon a determination that the continued validity of a non-compliant city or county enactment substantially interferes with fulfillment of the goals of the GMA. RCW 36.70A.302(1)(b).[32] As set forth in the findings and conclusions above, the Growth Phasing Lottery interferes with the fulfillment of the goals of the GMA, in particular RCW 36.70A.020(1), (2), (7), (11), and (12), because the enactment thwarts the GMA mandate to accommodate and encourage urban growth and does so in a manner which negates predictable permit processes and inter-jurisdictional coordination.

Nonetheless, the Board is cognizant of the "bow wave" of development applications created by the City's six years of moratorium and additional lottery restrictions, and acknowledges that an immediate order of invalidity would pose a challenge for City

[32] Invalidity is most often invoked to prevent the vesting of projects to city or county enactments that are not compliant with the GMA. Vesting is not an issue in this matter.

staff.[33] Accordingly, the Board does not enter an order of invalidity but remands Ordinance No. 02005-183 and establishes a 90-day compliance schedule.

Conclusion

The Board makes a finding of **noncompliance** and issues an order of **remand**. The Board **does not enter an order of invalidity at this time**, but sets a 90-day period for the City to comply with the Growth Management Act as set forth in this Order.

VI. ORDER

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

1. Petitioners have not carried their burden of proving Legal Issues No. 1, 2, and 3. **Legal Issues 1, 2, and 3 are dismissed.**

2. The City of Sammamish's adoption of Ordinance No. 02005-183 was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.110 and is **not guided by** the goals of the GMA.

3. Therefore the Board **remands** Ordinance 02005-183 to the City of Sammamish with direction to the City to repeal the Ordinance or take other legislative action to comply with the requirements of the GMA as set forth in this Order.

4. The Board sets the following schedule for the City's compliance:

- The Board establishes **May 22, 2006,** as the deadline for the City of Sammamish to take appropriate legislative action.

- By no later than **June 5, 2006**, the City of Sammamish shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). The City shall simultaneously serve a copy of the legislative enactment(s) and compliance statement, with attachments, on Petitioners. By this same date, the City shall also file a "**Compliance Index**," listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.

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[33] *See, MBA/Camwest v, City of Sammamish,* CPSGMHB Case No. 05-3-0027, Order Denying Reconsideration and Stay (September 1, 2005), at 3, 4.

- By no later than **June 15, 2006**,[34] the Petitioners may file with the Board an original and four copies of Response to the City's SATC. Petitioners shall simultaneously serve a copy of their Response to the City's SATC on the City.

- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. June 22, 2006,** at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Sammamish takes the required legislative action prior to the May 22, 2006, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 21st day of February, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

_____
Margaret A. Pageler
Board Member
(Board Member files a separate
Concurring Opinion)

[34] June 15, 2006, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

Board Member Pageler Concurring Opinion

I concur with the conclusions reached by my colleagues in this Final Decision and Order. However, I write separately regarding GMA Goal 6 - Property Rights.

> (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

I agree that Petitioners did not meet their burden of proof with respect to non-compliance with the GMA's property rights goals. This is the rare GMA case, however, in which I believe Petitioners might have demonstrated non-compliance with the goal of protecting landowner rights against arbitrary and discriminatory actions.

In reviewing a claim of property-rights infringement[35] based on GMA Goal 6, the Board asks four questions: Is the challenge within the Board's jurisdiction? Did the local government take landowner rights into consideration in its procedure? Was the challenged action arbitrary? Was the challenged action discriminatory? *Maxine Keesling III v. King County (**Keesling III**)*, CPSGMHB Case No. 05-3-0001, Final Decision and Order (July 5, 2005), at 28-29. I would have welcomed argument and authorities on the latter two questions.

Is the challenge within the Board's jurisdiction? Goal 6 challenges alleging "takings" pose constitutional questions which the Board lacks jurisdiction to decide.[36] Petitioners have not asserted a "takings" claim here.

Did the local government take landowner rights into consideration? Procedural compliance with Goal 6 is shown where the record demonstrates that city officials took note of citizen concerns about the effect of a proposed enactment on property rights. *Keesling III, supra*, at 30; *Shulman v. City of Bellevue*, CPSGMHB Case No. 95-3-0076, Final Decision and Order (May 13, 1996), at 12. Oddly, Petitioners argue that the City "has not given any consideration" to the property rights of affected landowners. MBA/CamWest PHB, at 17. In fact, the Sammamish record is replete with citizen and developer testimony that the Growth Phasing Lottery is an infringement on property rights. Index 32, at 30-31; Index 84, at 12-13. On the other side, citizens testified that rampant growth undermines their property right to adequate athletic space, stream protection, tree preservation and other property values. Index 32, at 44-45. The record indicates that the Planning Commission and City Council[37] discussed and wrestled with these arguments, amply complying with Goal 6 procedural requirements.

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[35] It is well-settled in Washington that the right to develop one's land in accordance with applicable zoning is a property right. *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d. 782 (1986).

[36] As the cited case law indicates, various "growth phasing" techniques have withstood constitutional challenge. Section IV.C, fn. 22, above.

[37] Commissioner Stuart Carson, Index 38, at 73: ("we're dealing with a basic civil right"); Commissioner Will Sadler, Index 38, at 83: ("growth metering is wrong….because at its core, we're impacting property

Was the challenged action arbitrary? The Board generally applies a legal definition to the word "arbitrary" – "baseless, in disregard of the facts and circumstances." This is the case where Petitioners might have argued for the ordinary, everyday meaning of "arbitrary." The Merriam Webster Dictionary defines "arbitrary" as "determined by will or caprice: selected at random." The Sammamish Growth Phasing Lottery awards development opportunities at random, without reference to the Comprehensive Plan or service availability. As resident Jim McGraw testified: "You've had six years to develop a plan to do things, and now what you're going to do is *put it to the Fates* to decide who gets to develop their property and who doesn't." Index 84, at 21; Index 71, at 26. This seems to me to be the antithesis of the planned, coordinated and managed urban growth called for in RCW 36.70A.010.

A lottery, by definition, subjects landowner rights to the luck of the draw. Numerous Sammamish property owners testified to the Planning Commission and City Council that the City's proposed growth metering interfered with rational, planned use of their land, in disregard of family circumstances, financial and market considerations, and thoughtful design.[38] It seems to me that the argument could be made that the selection of "winning" projects by lottery, in order delay full implementation of the City's adopted Plan and zoning, is arbitrary action with respect to property rights.

Was the challenged action discriminatory? Goal 6 requires a finding that a challenged action is both arbitrary *and* discriminatory.[39] The City asserts that a virtue of selection of projects by lottery is that there is no preference or discrimination; the odds are equal for everyone who submits a name. Petitioners might have picked up on the reasoning of Planning Commission Chair Scot Jarvis. Mr. Jarvis says:

> [W]hat the City has asked us to do is buy some time – …. In that process we have to keep asking ourselves, *who are we buying the time from* … ?

Index 38, at 64-65 (emphasis supplied). Mr. Jarvis concludes that property owners who own land that has already been built to urban densities are the beneficiaries of former owners who exercised their reasonable expectations under urban zoning. But current owners of undeveloped land are not allowed to exercise the same rights (although they

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rights"); Councilmember Nancy Whitten, Index 84, at 180: (the ordinance "takes into consideration.. the importance of the property rights interest").

[38] Beverly Keffer is one of the "small property owners" who "can't afford to gamble." Ms. Keffer points out: "[I]n the six years of this moratorium – it hasn't stopped our kids from growing up and needing to go to college, and us from getting to the age of retirement. So I would encourage you not to have any kind of metering." Index 71, at 43-44. [Ms. Keffer did not win in the lottery. Supplemental Exhibit 2]

See, Michael Reid, Index 38, at 44-46, (haphazard development results from metering), and Councilmember Nancy Whitten, Index 84, at 122, (hardship for people who have to move because of Alzheimers or cancer, which can't be predicted two years in advance).

[39] *Homebuilders Association of Kitsap County v. City of Bainbridge Island*, CPSGMHB Case No. 01-3-0019, Order on Motion (October 18, 2001), at 2-3: (under Goal 6, the requirement to find both arbitrary and discriminatory action is not the same as finding a violation of a constitutional provision.)

are taxed based on the same zoning), first, by virtue of the six-year moratorium, and now because of growth phasing. "[T]hat's what's most problematic about any kind of growth metering." *Id.*

The argument could be made that the Growth Phasing Lottery discriminates against current owners of undivided property, because it is not based on a plan for infrastructure improvement that will match development allowances with build-out of capital facilities, but simply on the City's determination to delay full implementation of its adopted Plan and zoning. Thus long-time Sammamish residents who endured the urbanization and subdivision that now surrounds their once-rural home sites are now being prevented from developing to urban zoning by the anti-growth politics of their newly-arrived neighbors.[40]

I would have welcomed thoughtful analysis as to whether the Sammamish Growth Phasing Lottery is "arbitrary and discriminatory" with respect to the property rights of landowners. However, I concur with my colleagues that Petitioners have not carried their burden on this issue and the Goal 6 challenge must be dismissed.

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[41]

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[40]See, testimony of Randy Kim, 10-year resident, Index 71, at 50-53; Index 57, at 14-15; Pam and Jack Skeen, 18-year residents, Index 57, at 3, 17; Index 71, at 37-38; LaVerne Poston, Index 71, at 41-42; Index 84, at 26-28; Ted McIntyre, 30-year resident, Index 57, at 3; Index 71, at 34-35. [None of these homeowners won in the lottery. Supplemental Exhibit 2]

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

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

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

APPENDIX – A

Chronology of Proceedings in CPSGMHB Case No. 05-3-0041

On August 24, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Master Builders Association of King and Snohomish Counties, a Washington non-profit corporation; CamWest Development, Inc.; Conner Homes Company; John F. Buchan Construction, Inc.; Lozier at Gramercy Park, LLC; Pacific Land Investment, Inc.; William Buchan Homes, Inc.; and Windward Real Estates Services, Inc. (**Petitioners** or **MBA/CamWest**). The matter was assigned Case No. 05-3-0041, and is hereafter referred to as *MBA/CamWest III v. Sammamish*. Board member Margaret A. Pageler is the Presiding Officer for this matter. Petitioners challenge the City of Sammamish (**Respondent** or **City**) adoption of Ordinance No. 02005-183 as noncompliant with the Growth Management Act (**GMA or Act**).

On September 8, 2005, the Board issued its Notice of Hearing, setting the date for a prehearing conference.

On September 13, 2005, the Board received a Notice of Appearance from Bruce Disend, on behalf of the City of Sammamish.

A copy of Ordinance No. 02005-183, inadvertently omitted from the Petition for Review, was received from Petitioners electronically on September 22 and in hard copy September 23, 2005.

Respondent's Index to the Record was received by the Board on September 26, 2005.

On September 26, 2005, the Board convened the Prehearing Conference at Suite 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle. Board member Margaret Pageler, as Presiding Officer, convened the PHC, with Board members Bruce Laing and Edward McGuire in attendance. Duana Kolouskova represented Petitioners MBA/CamWest, and Bruce Disend represented Respondent City of Sammamish. On September 28, 2005, the Board issued its prehearing order (**PHO**) setting forth the schedule and Legal Issues to be decided.

On October 3, 2005, the Board received Respondent's Supplemental Index to the Record and the requested Core Document – the City's Comprehensive Plan adopted September 16, 2003.

On November 10, 2005, the Board received Respondent's Second Supplemental Index to the Record.

No motions were filed by either party during the time prescribed in the Prehearing Order for motions practice.

On December 7, 2005, Petitioners filed their Prehearing Brief with exhibits. **[MBA/CamWest PHB]**

On January 4, 2006, the Board received the City of Sammamish Prehearing Brief, with exhibits. The Prehearing Brief contained a motion to dismiss for lack of standing.

Through its Administrative Officer, the Board requested that Sammamish file a corrected brief, having noted that some exhibits referenced in the brief didn't match the exhibit numbers in the attachments or only alternate pages were copied. The Board also reminded both parties of the requirement to file a table of exhibits with their briefs. Accordingly on January 12, 2006, the Petitioners filed a Table of Exhibits, listing Index documents 41, 42, 53, 67, 69, 71, 72, 73, 84, and 86. However, Index 67 (Mike Miller Proposed Growth Phasing Ordinance) was not provided with the Petitioners' briefs. On the same day, Respondent City of Sammamish filed City of Sammamish Prehearing Brief (Revised) **[City Response]** and a Table of Exhibits, listing Respondent's Exhibits A through E and Index documents 32, 38, 50, 57, 59, 71, 84, and 86.

For the convenience of the parties and the Board, the scheduled Hearing on the Merits was rescheduled to the afternoon of January 24, 2006, and the Board issued its Order Rescheduling Hearings on January 12, 2006.

On January 18, 2006, the Board received Petitioners' Reply Brief, with exhibits. **[MBA/CamWest Reply]** The Table of Exhibits listed Petitioners' Exhibit A and Index documents 10, 32, 41, 43, 48, 50, 51, 53, 57, 58, 65, 71, 74, 84, 85, and 97. [Index documents 32, 50, 57, 71, and 84 are references to or portions of meeting transcripts previously submitted by Respondents.] The MBA/CamWest Reply included evidentiary motions. Petitioners asked the Board to take official notice of Attorney General Opinion 192, No. 023, *Toll Brothers Inc., v. West Windsor Township*, 312 N.J.Super. 540, 712 A. 2d 266 (1998), and *Zuckerman v. Town of Hadley*, 442 Mass. 511, 813 N.E.2d 843 (2004), copies of which were supplied with Petitioners' Reply Brief. The Board also received the Declaration of Michael Miller and the Declaration of Jim Tosti.

On January 24, 2006, the Board held the Hearing on the Merits (**HOM**) in Suite 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington. Board Members present were Edward McGuire, Bruce Laing, and Margaret Pageler, Presiding Officer. Board Extern Amie Hirsch also attended. Duana Kolouskova represented the Petitioners. Paul G Ebensteiner of Lozier at Gramercy Park and Mike Miller of Pacific Land Investments accompanied Ms. Kolouskova. Bruce Disend represented the City of Sammamish. Mr. Disend was accompanied by Joseph Levan, Kathy Hardy, and Monica Buck of Kenyon Disend, PLLC, and by Sammamish City Council member Lee Fellinge and City staff Susan Cesar and Stacy Herman. Also in attendance were Rebeckah Cook, Dave Earling, and Liz Jones. The Court Reporter was J. Gayle Hays, Byers & Anderson, Inc. The hearing convened at 2:04 p.m. and adjourned at approximately 4:30 p.m**.** A transcript of the proceeding was ordered by the Board and received on January 26, 2006. (**HOM Transcript**).

APPENDIX B

Petitioners' GMA Participation – Verbatim Excerpts from City Record

Index 10 – E-mail from Bob Horne (City planning staff) re Stakeholders' Meeting

> From Bob Horne
> Sent February 13, 2005
> To Greg Nelson[42][@buchanhomes.com]; Eric Campbell [@camwest.com]; Duana Kolouskova; Mike Miller[43] [@murrayfranklin.com]; Paul Ebensteiner[44] [@loziergroup.com]; and others
> Subject: Agenda for February 17 Stakeholder Meeting on Growth Metering

Index 32 – Transcript of Planning Commission Meeting, May 5, 2005, at 13-14.

> Ms. Kolouskova: Thank you. My name is Duana Kolouskova …
> Many of you know who I am now. I am the legal counsel for several interested parties who own property in the City of Sammamish, Lozier at Grammercy Park, Pacific Land Investments, Conner Homes, (inaudible) Development, William Buchan, John F. Buchan, CamWest Development, and the Master Builders Association of King and Snohomish Counties. …
> We have a significant objection to any form of growth metering or phasing….

Index 32 – Transcript of Planning Commission Meeting, May 5, 2005, at 22.

> Mr. Tosti:[45] My name is Jim Tosti. … I'm here representing (inaudible) consultants and developers (inaudible) called Norris Estates. It has been called Norris Estates, (inaudible) 248th. You have probably heard about it (inaudible)….

Index 32 – Transcript of Planning Commission Meeting, May 5, 2005, at 25.

> Mr. Ebensteiner: … I am here representing one of the companies that I work for, which is Lozier at Grammercy Park. We own property in the City of Sammamish

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[42] Greg Nelson represents Petitioner William Buchan Homes, Inc. HOM Transcript, at 27-28.

[43] Mike Miller is president of Pacific Properties, Inc., and authorized agent of Petitioner Pacific Land Investments Corp. Declaration of Michael Miller. Petitioners Pacific Land Investment Group, William Buchan Homes, John F. Buchan Construction Inc together form the Trossachs Gropup, for which Pacific Properties is the consulting agent. *Id.* The Trossachs Group has approximately 220 acres of land in the City of Sammamish proposed for residential development, of which they drew the right to submit applications for a 70-acre subdivision in 2005-2006, subject to a limit on number of lots which may be recorded per year. *Id.,* and Supplemental Exhibit A. HOM Transcript, at 6.

[44] Paul Ebensteiner represents Petitioner Lozier at Gramercy Park. HOM Transcript at 6, 28.

[45] Jim Tosti is president of Petitioner Windward Real Estate Services, Inc. Declaration of Jim Tosti. Windward holds a legal interest in the property listed under Jim Tosti's name and ranked number 25 [permitted to submit a development application after August 2006] in the City of Sammamish lottery drawing. *Id*., and Supplemental Exhibit A. HOM Transcript, at 28.

> and have had for a number of years. Looking forward to someday developing in and (inaudible) will happen in the near future….

Index 32 – Transcript of Planning Commission Meeting, May 5, 2005, at 52.

> Mr. Miller: Mike Miller, 14410 Bel-Red Road, Bellevue. … I have to ask not so much the Planning Commissioner but the City Council and the citizens, for that matter, what has been going on for the last six year (inaudible) planning. How many more years (inaudible) moratorium to come up with more ordinances and better ordinances? …[argues that moratorium and growth phasing create a land rush]

Index 32 – Transcript of Planning Commission Meeting, May 5, 2005, at 56-57.

> Mr. Nelson: Hello, members of the Commission., I'm Greg Nelson. I work for William E. Buchan, Incorporated. I am a home builder. I am a member and owner of the Trossachs Group, part owner of the Trossachs Group. I (inaudible) other properties to be developed in the Trossachs neighborhood… [argues that phasing creates uncertainty and unpredictability].

Index 38 –Transcript of Planning Commission Meeting, May 19, 2005, at 39.

> Jim Tosti: 981 168th Avenue Northeast. You heard an awful lot of facts and I don't want to go over them again, but I though I would try to come up with a couple of different issues and different approaches to this problem or supposed problem that we have here. [suggests parks impact fee] …[T]he City has dropped the ball badly in parks; there's no park mitigation fee, there's no park bond fee; there's no excuse for that. It's been six years. The development community is behind taking care of that…. [suggests tax incentive for voluntarily taking property out of development for a time certain].

Index 43 – Minutes of Planning Commission Meeting, January 20, 2005

> Duana Kolouskova, 1500 114th Ave SE Suite #102, Bellevue, WA 98004; Attorney for a conglomeration of 9 or 10 voter and developer groups that are operating on properties in the City of Sammamish as well as representing the Master Builders Association of King and Snohomish Counties. Stated she will be attending the meetings of the Planning Commission and following the growth meeting. Just wanted to introduce herself. Staff has contact information.

Index 48 – Letter from Duana Kolouskova submitted at City Council Public Hearing, June 7, 2005.

> This office represents the Master Builders of King and Snohomish Counties, John F. Buchan Construction, Inc., William Buchan Homes, Inc., Lozier at Gramercy Park, LLC, CamWest Development, Inc., Pacific Land Investment, Inc., Conner

> Homes Company, Inc., and Windward Real Estate Services, Inc. Our clients maintain a variety of property interests within the City of Sammamish and, as a consequence, are all significantly affected by the City's actions. …
> We agree that growth metering is fundamentally unfair and likely to randomly discriminate among the City's property owners….

Index 50 – Transcript of City Council Public Hearing, June 7, 2005, at 12.

> Kolouskova: Thank you honorable council members. I'm Duana Kolouskvova … I represent Master Builder's Association of King and Snohomich Counties, John F. Buchan, William Buchan, Lozier at Gramercy Park, CamWest Development, Pacific Land Investments, Connor Homes and Winward [sic] Real Estate Service. As this council is likely fairly well aware, we are here this evening because we do not believe that growth metering is a fair or even a legal approach to address the city's concerns. …

Index 51 – Minutes of City Council Meeting, June 7, 2005, at 5.

> Duana Kolouskova, Johns, Monroe, Mitsunaga, 1500 114th Avenue SE, Suite 102, Bellevue, representing the Master Builders of King and Snohomish Counties, John F. Buchan construction, William Buchan Homes, Lozier at Gramercy Park, CamWest Development, Pacific Land Investment, Conner Homes, Windward Real Estate Services. She presented a letter to Council. (See Exhibit 2)

Index 57 –Transcript of City Council Public Hearing, June 21, 2005, at 5.

> Kolouskova: Good evening, councilmembers. My name is Duana Kolouskova…. I represent the same group of people I've been representing this whole time, Master Builders Association, the group of developers, real estate interests and private property owners that are all directly affected by this growth metering ordinance…. [W]e have ongoing concerns for the legal, equitable and practical obstacles that growth metering will necessarily impose upon the constituents of the city of Sammamish. …

Index 57 – Transcript of City Council Public Hearing, June 21, 2005, at 6.

> Miller: Good evening. I'm Mike Miller. My address is 14410 Bel Red Road, Bellevue. I think you all know how I feel about the proposed ordinance in front of you, but just to make sure that there are no misunderstandings, I am firmly opposed to it….

Index 57 – Transcript of City Council Public Hearing, June 21, 2005, at 12.

> Ebensteiner: Thank you, Mr. Mayor. For the record, my name is Paul Ebensteiner. I'm representing Lozier at Gramercy Park. We own a couple of pieces of property

here in the city, have for a number of years now. One of the many people waiting to submit an application for development of the property….
As far as growth metering in particular, I attended a number of the planning commission meetings. I testified. I listened. I watched the planning commission struggle with all the issues. A number of us really tried to give as really substantive input as we could. …

Index 65 – Letter from Duana Kolouskova submitted at City Council Public Hearing, July 19, 2005.

Re: Proposed Amendment Regarding Growth Metering and Phasing Ordinance – Written Testimony
This office represents the Master Builders of King and Snohomish Counties, John F. Buchan Construction, Inc., William Buchan Homes, Inc., Lozier at Gramercy Park, LLC, CamWest Development, Inc., Pacific Land Investment, Inc., Conner Homes Company, Inc., and Windward Real Estate Services, Inc. Our clients maintain a variety of property interests within the City of Sammamish and, as a consequence, are all significantly affected by the City's actions. …[Stating opposition to ordinance]

Index 71 – Transcript of City Council Meeting July 19, 2005, at 31-32.

Mr. Tosti: Jim Tosti, 7981 168th Avenue N.E. in Redmond…. A number of months ago, the City council, for whatever reason, charged the Planning Commission to come up with some kind of growth metering ordinance and a recommendation to the City Council. We had a number of meetings, called stakeholder meetings, which all sorts of citizens, the development community, renters, owners – everybody was here; everybody had a say. The discussions were held….
In those stakeholder meetings, the lottery was discussed, and it was determines it was the absolute worst idea you can possibly come up with, bar none….
And last week I gave you folks a proposal on where to -- … if you're going to do something on growth metering, move it down the process line – get it away from the application stage, and get it in the recorded lots stage. And that's more fair for everybody, in my estimation.

Index 71 – Transcript of City Council Meeting July 19, at 45-48.

Mr. Miller: Good evening. Mike Miller, 14410 Bel-Red Road, Bellevue. And I'm not going to go into my general opposition to the moratorium and any phasing that you may think that you should need to impose, because I think you all know how I feel about it.
[Distributes a proposed amendment, explaining] … if a proposal comes into the City that proposes to dedicate enough land to build a ball field on the property, then that proposal would be exempt from the maximum limit …[and] it would be exempt from the provisions of the lottery.

Index 74 – Letter from Duana Kolouskova submitted at City Council Public Hearing, July 15, 2005.

> Re: Proposed Growth Metering and Phasing Ordinance – Written Testimony -
> This office represents the Master Builders of King and Snohomish Counties, John F. Buchan Construction, Inc., William Buchan Homes, Inc., Lozier at Gramercy Park, LLC, CamWest Development, Inc., Pacific Land Investment, Inc., Conner Homes Company, Inc., and Windward Real Estate Services, Inc. Our clients maintain a variety of property interests within the City of Sammamish and, as a consequence, are all significantly affected by the City's actions. [Objecting to ordinance].

Index 84 – Transcript of City Council Meeting, July 26, 2005, at 23.

> Ms. Kolouskova: Good evening, Councilmembers. Duana Kolouskova. And I've provided plenty of testimony, written and verbal, to the Council. And I just wanted to add a few more comments for the Council tonight.

Index 85 – Minutes of City Council Meeting, July 26, 2005, at 3.

> Duana Kolouskova, Johns, Monroe, Mitsunaga, 1500 114th Avenue SE, Suite 102, Bellevue. She believes the ordinance the Council is considering is not the same ordinance that was recommended by the Planning Commission. She pointed out that all of the public comment has been against growth metering. The Council does not have jurisdiction over the school district issues. (See written comments.)

Index 97 – Minutes of Planning Commission Meeting, May 5, 2005, at 1.

> Duana Kolouskova … legal council [sic] for several interested parties in the city. … Objects to any form of growth metering or phasing. It is their position that growth metering is in no way endorsed by state law in Washington. The City has been designated as being within an urban growth area and should accommodate urban growth…..

Index 97 – Minutes of Planning Commission Meeting, May 5, 2005, at 2, 4.

> Jim Tosti …. Developer/Norris Estates. [Opposed metering]
> Paul Ebensteiner …. Representing Lozier/Gramercy Park [specific suggestions on multi-family housing]
> Mike Miller …. [Opposed metering]
> Greg Nelson, Trossachs Group, part owner … Growth metering is counterproductive to a lot of ideals that the city and citizens want. …

APPENDIX C

City of Sammamish Comprehensive Plan
Excerpts from Land Use Element

Managing Growth

As a result of rapid development over the past decade, the City of Sammamish has experienced a severe burden on its infrastructure, particularly its roadway system. With an imbalance between jobs and housing, making Sammamish basically a bedroom community, traffic congestion exiting an entering the community has steadily become worse. Other basic infrastructure such as sewer and water service is also struggling to meet the demand of this increasing population. In order to provide for adequate infrastructure capacity for the existing population and meet the preferred level of service standards, the City must plan for future growth and its increased infrastructure demands.

The City has several choices of growth control tools by which the City can meet its preferred level of service standards and growth targets. Currently the construction of new homes is significantly constrained by the limited availability for water. The primary provider of water service to the community, the Sammamish Plateau Water and Sewer District, is currently only awarding recaptured water certificates on a periodic basis, pending a new water supply. Additional measures available to the City include limiting the number of new lots created or dwelling units constructed through a random lottery system, a complex point system, or a proportional system of issuing permits. The City may also choose to strengthen its concurrency requirements, allowed in the Growth Management Act, resulting in infrastructure being provided truly concurrent with development. Finally, the City may consider revising its zoning ordinance by changing the method by which density is calculated, such as a net density system in place of gross density system, or down-zoning parcels encumbered by significant sensitive areas. In order to control development so that the adequate infrastructure is provided, level-of-service standards are met, and community character is maintained, any of these methods can help the City achieve these goals. Since it may be several years before there is adequate water to support new subdivisions, the City has time to evaluate the appropriate measures to manage growth and to monitor the need for growth controls in accordance with the policies contained in this plan.

GOAL LUG-3: As new development occurs, preserve Sammamish's character, human scale and neighborhood quality.

LUP-3.1

The land use plan should accommodate carefully planned levels of development, consider existing uses, safeguard the environment, reduce sprawl, promote

efficient uses of land, create alternative modes of transportation, and foster the development of the City's sense of community.

LUP-3.2

Growth should be directed as follows: first, to areas with existing infrastructure capacity; second, to areas where infrastructure improvements can be easily extended; and last, to areas requiring major infrastructure improvements.

LUP-3.3

The City shall institute a concurrency management system to provide for infrastructure to be in place at the time of development and meeting level of service goals of the Community. The Transportation Element and Capital Facilities Element shall identify the level of service objectives, the infrastructure, facilities, and services that must be in place to serve development at the time of development, including, but not limited to roads, stormwater facilities, water service, wastewater service, parks, schools, and others. The City shall monitor the effectiveness of concurrency standards.

LUP-3.4

The City shall adopt residential development growth management tools that guide the location and timing of residential growth, recognizing environmental capacities, and established level of service standards for water, sewer, surface water, transportation, parks, schools, and other public service facilities and services. The growth management tools shall provide for City attainment of the City's housing target of 3,842 over the 20-year planning period (2001 – 2022), including affordable housing. Additional measure to control growth may be required if any of the following thresholds are exceeded:

1. Building permit applications submitted to the City for the construction of new residential development in one year period is at a rate that if continued, could result in over 3000 building permits being issued in the twenty year period of 2003 to 2022.

2. Subdivision or commercial site development permit applications are submitted to the City if any two consecutive years at a rate that if continued, could result in the creation of over 1000 new residential units in the twenty year period of 2003 to 2022.

3. A finding is made by the City Council that new growth and development is occurring at a rate or in a manner that precludes the timely provision of necessary public facilities or services, and/or that established level of service standards are not being met.

APPENDIX D

RCW 36.70A.020
Planning goals.

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
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> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
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> (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.
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> (4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.
>
> (5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.
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> (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.
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> (7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.
> …..
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> (9) Open space and recreation. Retain open space, enhance recreational

opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.