

**CENTRAL PUGET SOUND**

**GROWTH PLANNING HEARINGS BOARD**

**STATE OF WASHINGTON**

CITY OF POULSBO,)CASE NO. 92-3-0009

)

Petitioner,)FINAL DECISION AND ORDER

)

CITY OF PORT ORCHARD,)

)

Petitioner,)

)

CITY OF BREMERTON,)

)

Petitioner,)

)

vs.)

)

KITSAP COUNTY, )

)

Respondent.)

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**A.PROCEDURAL HISTORY OF THE CASE**

On September 29, 1992, the City of Poulsbo (**Poulsbo**) filed a Petition for Review with the Central Puget Sound Growth Planning Hearings Board (the **Board**), assigned Case No. 92-3-0007.Poulsbo challenged the validity of the county-wide planning policies (**CPPs**) adopted by Kitsap County (the **County**), particularly its annexation policies.

On October 8, 1992, the City of Port Orchard (**Port Orchard**) filed its Petition for Review with the Board, assigned Case No. 92-3-0008.Port Orchard also challenged the County's CPPs, specifically the annexation policies.

Also on October 8, 1992, the City of Bremerton (**Bremerton**) filed a Petition for Review with the Board, assigned Case No. 92-3-0009.This petition repeated the concerns raised by Poulsbo and Port Orchard and added new legal issues challenging the urban services policy and asking

whether the County breached its agreement with the cities.

On October 9, 1992, the Board's presiding officer in this case, Joseph W. Tovar, sent a letter to the parties in the Poulsbo case, notifying them that a January 11, 1993 hearing date had been scheduled and advising them that two additional petitions had been filed regarding the County's CPPs.

On October 21, 1992, the presiding officer issued an Order of Consolidation consolidating the three cases into a single case and setting a January 11, 1993 hearing date on the merits of the petitions for review. The parties were informed that the consolidated cases would thereafter be referred to as Case No. 92-3-0009.

On October 22, 1992, Kitsap County filed an Answer to Petitions for Review denying the allegations raised by the three cities.

The County filed a Proposed Index of Materials Used in Taking Action on November 12, 1992. Thereafter, Poulsbo filed its Preliminary List of Exhibits on November 30, 1992. Bremerton filed Petitioner's Designation of Exhibits on December 2, 1992.

On December 3, 1992 the Board held a prehearing conference at its offices. The meeting was continued at the parties' request to enable them to pursue settlement possibilities with their clients. The presiding officer entered an Order of Continuance of Prehearing Conference on that day, continuing the prehearing conference until December 17, 1992.

Since the parties were unable to settle the case, the continued prehearing conference was held on December 17, 1992. The parties orally stipulated to the Index of Materials Kitsap County filed on November 12, 1992 as the controlling exhibit list, with the addition of the CPPs actually adopted by the County on August 10, 1992. A Prehearing Order to that effect and containing other stipulations and matters was entered on December 18, 1992.

On December 23, 1992, the County filed copies of the complete set of exhibits that comprise the record below with the Board.

The Briefs of Petitioners City of Poulsbo, City of Port Orchard and City of Bremerton were filed on December 31, 1992.

On January 7, 1993, the County filed the Brief of Respondent Kitsap County.

The hearing on the merits of the petitions was held on January 11, 1993 in the City of Bremerton City Council Chambers. Present were the three members of the Board: M. Peter Philley, Joseph W. Tovar and Chris Smith Towne; James K. Sells representing Port Orchard; Ian R. Sievers representing Bremerton; Wayne D. Tanaka representing Poulsbo; and Douglas B. Fortner representing the County. Court reporting services were provided by Duane Lodell of Robert H. Lewis and Associates. No witnesses testified in this matter. Since the signature page to the Inter-Local Agreement between the Cities and the County was unsigned, the presiding officer ordered the parties to submit signed versions of the signature page. {Exhibit 1, p. 4}. The Board also took official notice of population figures for Kitsap County {see Finding of Fact No. 2 below}.

On January 11, 1993, Bremerton filed a copy of the Inter-Local Agreement signature page. Port Orchard did the same on January 14, 1993. Using those documents, the Board was able to ascertain that representatives from Kitsap County and the Cities of Bremerton, Port Orchard and

Poulsbo had signed the Inter-Local Agreement (Exhibit 1, p. 4}.  
On January 26, 1993 Poulsbo filed Proposed Findings of Fact, Conclusions of Law and Order.

## **B.FINDINGS OF FACT**

1. What is commonly referred to as the Growth Management Act (the **GMA** or the **Act**) is primarily codified at Chapter 36.70A RCW. It became effective on July 1, 1990<sup>u</sup>.
2. The *1991 Officials of Washington Cities Directory 1992-1993*, published by the Association of Washington Cities, contains a section entitled "1991 Municipal and County Population Listed by County" (pp. 103-104). The document indicated that the population of Kitsap County was 196,500 people. Of that total, 132,821 lived in unincorporated areas. 63,679 people lived in incorporated areas, broken down as follows: Bremerton - 37,040; Port Orchard - 5,109; Poulsbo - 5,140; and Bainbridge Island - 16,390. Bremerton is a first class city; Port Orchard a third class city; and Poulsbo, a noncharter, optional municipal code city.
3. On June 13, 1991, the Kitsap Regional Planning Council (**KRPC**) was established pursuant to an inter-local agreement (**the Inter-Local Agreement**). {Exhibit 1}. The Inter-Local Agreement was made pursuant to the Interlocal Cooperation Act of 1967 (Chapter 39.34 RCW) and for the purpose of compliance with the Growth Management Act of 1990.
4. The "Recital" provisions of the Inter-Local Agreement provide:
  - WHEREAS, the undersigned member agencies recognize the need and desirability to participate in a forum for cooperative decision making by elected officials of said agencies in order to bring about a continuous and comprehensive regional planning process pursuant to the Growth Management Act of 1990; and
  - WHEREAS, the undersigned member agencies desire to jointly undertake continuous cooperative regional development, land use, housing and transportation planning; and
  - WHEREAS it is the belief of the undersigned member agencies that regional planning and review would be accomplished whenever possible by jurisdictions affected and should receive policy direction from all local general purpose and tribal governments; and
  - WHEREAS, the undersigned member agencies are authorized and empowered to enter into this agreement pursuant to Chapter 39.34 RCW.... {Exhibit 1, p. 2}.
5. The delegated authority and purposes of the KRPC, as set forth in the Inter-Local Agreement, are:
  - A. To provide a forum for cooperative decision making by the region's elected officials in order to bring about a continuous and comprehensive planning process.
  - B. To foster cooperation and mediate differences among governments throughout the region.
  - C. To maintain an ongoing planning program and coordinate actions so that we may make the best use of our land, air, water and energy resources and overcome the problems of waste and pollution.

D.To carry out such other planning and coordinating activities which are authorized by a majority vote of the Council. {Exhibit 1, pp. 2 - 3}.

6.On July 1, 1991 the representatives of Kitsap County and the Cities of Bremerton, Port Orchard and Poulsbo, among others, signed the Inter-Local Agreement creating the KRPC. {Exhibit 1, p. 4}.

7.The Bylaws of the KRPC {Exhibit 2} were attached to the Inter-Local Agreement and incorporated by reference to it. Section 1, the purpose provision, indicated that the KRPC was necessary to:

a.Maintain a regular intergovernmental communication network for all local and tribal governments within the County.

b.Facilitate compliance with the coordination and consistency requirements of the Growth Management Act of 1990;

c.Provide an effective vehicle to resolve conflict among and/or between jurisdictions with respect to urban growth boundaries or comprehensive plan consistency;

d.Build consensus on planning solutions for County-wide growth management issues; {Exhibit 2, p. 5}.

8.Section 2 of the Bylaws contains the KRPC's mission statement:

Kitsap Regional Planning Council is established to assure coordination, consensus, consistency, and compliance in the implementation of the Growth Management Act of 1990 and comprehensive planning by County, city and tribal jurisdictions within Kitsap County. The Council will also provide a voice for all jurisdictions in the development of comprehensive planning policies to be applied County-wide. {Exhibit 2, p. 5}.

9.According to Section 3(2) of the Bylaws, the KRPC "... shall sunset at the end of five years unless reauthorized by the general purpose and tribal governments in the region". {Exhibit 2, p. 5}.

10.Section 5 of the Bylaws addresses "Functions and Authority":

...

2.The Council shall review and revise a draft County-wide comprehensive policy plan as prepared by Council planners in consultation with member agencies and be responsible for recommending the plan and amendments to its members for approval. The Council will seek to act on the plan or amendments within 90 days of receipt. Ratification of the plan and its amendments shall be achieved when member jurisdictions representing 80% of the population within the region vote to approve within 120 days of presentation.

3.The Council shall promote coordination in the development of local comprehensive plans and the County-wide comprehensive policy plan with the County....

4.The Council shall assure consistency among local plans and between local plans and the County-wide plan with the Growth Management Act of 1990 to the extent necessary to achieve County-wide goals and policies. The Council shall establish a

process to monitor and review local comprehensive plans to determine consistency with the County wide comprehensive plan....

5. In cases where the Council finds apparent inconsistency between a local comprehensive plan and the County-wide comprehensive policy plan, it will notify the affected local jurisdiction and initiate a process of conflict resolution.... {Exhibit 2, p. 6}.

11. Section 6 of the Bylaws, entitled "Planning Relationships", establishes the following inter-jurisdictional planning relationships within Kitsap County:

...

2. The policies and direction set in the County-wide comprehensive policy plan are reflected in comprehensive plans of cities and the County, as well as in the comprehensive plan prepared for the unincorporated area by the County. Local jurisdictions complete detailed comprehensive plans in accordance with the State law. {Exhibit 2, p. 7}.

12. The Bylaws at Section 7 mention public participation, while Section 8 details the membership and representation of the KRPC. Section 9 deals with staffing and funding of the KRPC. Section 10 of the Bylaws, entitled "Amendments", provides:

This plan and its provision may be amended upon agreement of jurisdictions representing 80% of the population within the region. {Exhibit 2, p. 8}.

13. On July 16, 1991, the 1991 amendments to the GMA became effective, including the addition of the requirement for county-wide planning policies<sup>[2]</sup> (CPPs), codified at RCW 36.70A.210.<sup>[3]</sup>

14. On November 13, 1991, a Memorandum of Understanding (MOU) was adopted by representatives of the KRPC, including elected officials from Kitsap County and the Cities of Bremerton, Port Orchard and Poulsbo. {Exhibit 3}. The MOU was subtitled "An Agreement on the Process for the Development and Adoption of a County-wide Planning Policy for Kitsap County". Section I of the MOU discusses General Provisions. Subsection A, the purpose portion, provides:

Section 2 of ReESHB 1025 requires counties planning under RCW 36.70A.040 to adopt a county-wide planning policy in cooperation with the cities located in the county. A county-wide planning policy is a written policy statement or statements used solely for establishing a framework from which county and city comprehensive plans are developed and adopted. This framework shall insure that county and city comprehensive plans are consistent as required in RCW 36.70A.100. A collaborative process providing the framework for policy development and adoption must be agreed upon by the County and the cities. Pursuant to Section 2(2)(b) of ReESHB 1025, this agreement constitutes acceptance of the process and framework outlined herein. {Exhibit 3, p. 1}.

15. Section II of the MOU outlines a nine step collaborative process:

Step 1:

A) A subcommittee comprised of county, city and tribal representatives shall be

appointed by the Chair of the Council to meet as necessary to develop a recommended Agreement meeting the requirements of Section 2 (2)(a) and (b) of ReESHB 1025. The recommendation of the subcommittee will be presented at the October 1991 Council meeting.

B) The Council shall consider the recommendation of the subcommittee, modify if necessary and approve the process Agreement. This approval will be considered as satisfying the agreement timeframe as specified in Section 2 (2)(d) of ReESHB 1025.

Step 2:

The draft county-wide planning policy will be prepared with primary professional staff support provided by Kitsap County with assistance from city and tribal professional staff. Administrative support will be provided by Kitsap County and the Kitsap Regional Planning Council. Specific staff assignments and responsibilities will be recommended by, and under the supervision of, the Council Director.

Step 3:

The draft county-wide planning policy will be reviewed and modified as appropriate by a joint county-wide planning policy committee established in accordance with Section IV of this Agreement.

Step 4:

The draft county-wide planning policy will be forwarded to member agencies for review and comment.

Step 5:

The joint planning committee will review comments, amend policy as deemed appropriate and forward a recommendation to the Council.<sup>[4]</sup> The transmittal of this recommendation shall include a record of the comments from member agencies and a synopsis of the joint planning committee discussions and actions on the comments.

Step 6:

The Council shall consider the recommendation of the joint planning committee at a public hearing or hearings, amend the draft planning policy as appropriate and forward a recommendation to the Kitsap County Board of Commissioners. If the Council is unable to agree on a recommendation by May 15, 1992 the Board of Commissioners may initiate proceedings that will lead the [sic] to adoption of the county-wide planning policy by July 1, 1992.

Step 7:

The Kitsap County Board of Commissioners will conduct a public hearing or hearings to consider the recommendation of the Council, modify the proposed county-wide planning policy as determined appropriate and adopt a county-wide planning policy in final form.

Step 8:

The adopted county-wide planning policy will be transmitted to the Council and

member agencies within twenty (20) days following adoption by the Board of Commissioners.

Step 9:

The adopted county-wide planning policy will be implemented through comprehensive plans adopted by the County, the cities and tribes and through other agreements as necessary. It is recognized that this portion of the process is not subject to the schedule mandates of Section 2 of ReESHB 1025. {Exhibit 3, pp. 1 - 3}.

16. Section III of the MOU details the elements that will be addressed in the CPPs. Section IV establishes a Joint Planning Committee (JPC). Section V outlines a citizen participation process. Section VI discusses staff support and financing. Section VII contains a process schedule. Finally, Section VIII, entitled "Amendments", provides:

Modifications to this Agreement, including the estimated budget and process schedule, may be made by a majority vote of the Council as defined in the By-laws. {Exhibit 3, p. 8}.

17. Members of the KRPC also signed a "Region Wide Growth Management Strategy" on November 13, 1991. The strategy listed a series of tasks and indicated the agency responsible for completing the task and a targeted completion date. {Exhibit 4}.

18. The first Draft CPPs are dated December 27, 1991. {Exhibit 5}. Policy II(A)(3)(f) in the first Draft CPPs stated that:

All annexations by cities in Kitsap County shall require a favorable majority vote by the citizens living in the annexation area. {Exhibit 5, p. 8}.

19. On January 22, 1992, the KRPC's JPC met. {Exhibit 14}. Mark Kulaas, KRPC Director, explained the framework for adopting the CPPs as outlined in the MOU.

20. The second Draft CPPs are dated January 30, 1992. {Exhibit 7}. Policy A(3)(j) contained the following introductory remarks:

**[Note: The following is provided as background information for draft policies i. and j.]** Under Washington State annexation law there are two primary methods for cities to annex unincorporated property: the "petition" and the "election" method. Under the "petition" method property owners may request to be annexed provided that a petition signed by the owners of not less than seventy-five percent of the land value in the area is presented to the legislative body. This method, which is often preferred by cities, allows annexations to occur without a vote by the residents of the area to be annexed.

Under this method property can be encircled and then merged with the petitioner property without the consent of the encircled residents. Sometimes this occurs in order to straighten irregular boundaries and/or to ensure efficient extension of public facilities. This may result in annexations without the knowledge or consent of affected property owners. {Exhibit 7, p. A-4; emphasis in original}.

21. Two alternative Policy A(3)(j)'s were listed in the second draft CPPs:

In those instances when an annexation has been initiated using the "petition method"

and non-petition property is included in the annexation proposal a city shall first conduct a public hearing with public notice to all owners of property within the annexation area in order to gather and consider public sentiment.

**(Alternate)**All annexations by cities in Kitsap County shall require a favorable majority vote by the citizens living in the annexation area. {Exhibit 7, p. A-5; emphasis in original}.

22. On February 3, 1992, Donald L. Pratt, Director of the City of Bremerton Department of Community Development, sent a memorandum to the Joint Policy [sic; "Planning"] Committee with comments on the January 28, 1992 draft of the CPPs.<sup>[5]</sup> Among several comments, he suggested adding a statement at the end of the Introduction portion of the CPPs indicating that:

...The KRPC Board will review and recommend to the Kitsap County Board who will review and adopt County-wide planning policies. Action by individual cities is not required. The County Commissioners action is binding on the Cities unless overturned through appeal to the Growth Management Hearings Board. {Exhibit 8, pp. 1 - 2; emphasis added}.

23. Mr. Pratt also recommended that Policy A(3)(j) be deleted in its entirety. He commented: State law has determined appropriate methods of annexation. The City has agreed to provide expensive and scarce City services to properties outside the City with the promise that these properties would annex when more surrounding properties receive these services. The item as proposed violates these established contracts and would philosophically require the City to remove its services from these areas. This cannot be done legally. {Exhibit 8, p. 8}.

24. The third Draft CPPs are dated February 6, 1992. {Exhibit 9}. Only the first two pages of this version are contained in the record. In response to Mr. Pratt's suggestion, a third paragraph was added to the "Introduction" portion that stated:

A joint planning committee has been appointed by the County, cities and tribal governments to review the draft policies and develop a recommendation to the Kitsap Regional Planning Council. The Regional Council will conduct public hearings as necessary and prepare a recommendation for adoption by the Kitsap County Board of Commissioners. Action by individual cities and tribal governments is not required by ReESHB 1025. Board of Commissioner action is final and binding on on[sic] the cities unless overturned on appeal. {Exhibit 9, p. 1; underlining in original; italics added}.<sup>[6]</sup>

25. On February 13, 1992, Ron Perkerewicz, the Director of the Kitsap County Department of Community Development, sent a memorandum to the JPC commenting on Don Pratt's February 3, 1992, recommendations to the same body. {Exhibit 11}. Mr. Perkerewicz commented upon Policy A(3)(j) by stating:

In our opinion, this policy is needed to provide for adequate notice and participation by people that otherwise may not be aware of annexation proposals affecting them. We urge the committee to retain the second or alternate A3j policy requiring a vote.

{Exhibit 11, p. 2}.

26. On February 20, 1992, Ron W. Hough, Bremerton Planning Manager, sent a memorandum to Robin Abille of the JPC regarding the regional policies presentation, suggesting that a discussion of the specifics of the annexation process should take place at a later date. {Exhibit 6; p. 2}.

27. On March 5, 1992 the KRPC's JPC met and reviewed the February 6, 1992 [third] draft of the CPPs. {Exhibit 15}. The meeting notes indicate that Policy A(3)(j) was discussed:

Mark Kulaas outlined procedures for cities to annex contiguous property through the petition method and the election method. Kulaas explained how these procedures relate to the proposed policies j. and alternate j. The committee asked staff to request a clarification if a county could limit annexation actions by a city to the election method only and what role do residents who are not property owners have in the election. {Exhibit 15, p. 3}.

28. The fourth Draft CPPs are dated March 12, 1992. {Exhibit 10}. The introductory comment to Policy A(3)(i) and (j) was not changed. However, Policy A(3)(j) was modified by the KRPC as follows:

The election method of annexation is available and is encouraged as a preferred process when practical. In those instances when an annexation has been initiated using the "petition method" and non-petition property is included in the annexation proposal a city shall first conduct a public hearing with public notice to all owners of property within the annexation area in order to gather and consider public sentiment. ~~(Alternate) All annexations by cities in Kitsap County shall require a favorable majority vote by the citizens living in the annexation area.~~ {Exhibit 10, p. A-6; emphasis in original: underlining signifies new language; strike-through designates deleted language}.

29. Also on March 12, 1992<sup>[7]</sup>, the KRPC's JPC again met. {Exhibit 16}. Although the meeting notes do not specify which draft CPPs were being discussed, citations to the CPPs seem to correspond to the March 12, 1992 fourth draft (i.e., Exhibit 10). The meeting notes indicate that:

Mark Kulaas relay [sic] information requested by the committee concerning annexations by petition and election methods. Both methods are allowed by state law. Doug Fortner, legal counsel to the Boundary Review Board, indicated that cursory consideration of the issue leads him to believe that there may not be [sic; "be"] any legal method for a county to enforce a county adopted policy that all annexations require a favorable note [sic; "vote"]. Secondly, their [sic] may be some complications if a property owner requesting annexation has a legally valid petition and does not agree to use the election method. Mr. Fortner indicated that considerable review would be necessary to definitively address this issue.

Committee members also discussed instances where voting may not be practical such as when only one or two property owners are involved, the cost an [sic] timing of elections and the possibility that property may be approved for annexation when the owner disagrees.

Committee members agreed that annexation by election should be encouraged when practical, but in each method, notice should be sent to affected property owners. Staff will prepare a revision for consideration. {Exhibit 16, p. 2}.

30. On April 27, 1992, the KRPC held a review session on the CPPs. {Exhibit 17}. The meeting notes indicate that Policy A(3)(h), involving methods of annexation, was discussed as follows<sup>[8]</sup>: Mayor Weatherill stated that the City of Port Orchard does not agree with the policy as proposed. Mayor Weatherill and Mayor Mitchusson both agreed that the election method of annexation is not the preferred method. Mayor Mentor commented that the election method of annexation can be preferable when practical and the policy is not forcing the cities to use the election method. Councilmember Horton stated that there [are] some instances where it is necessary to use the election method. Mayor Granato recommended deleting the wording "encouraged as a preferred process when practical." The Regional Council agreed that a public hearing is necessary. After further discussion the Regional Council decided to reconsider the policy at the next meeting. {Exhibit 17, p. 4}.

31. On May 7, 1992, the KRPC held a further review session on the CPPs. The meeting notes {Exhibit 18} indicate that Policy A(3)(j), involving methods of annexation, was discussed as follows<sup>[9]</sup>:

The City of Bremerton recommended that new language be inserted into this policy regarding methods of annexation. The Regional Council discussed the best circumstances for each method of annexation. Councilmember Horton stated that this addition would help get around the problem of defining what is practical. The Regional Council agreed to include the two paragraphs from the written comments. Richard Mitchusson made a proposal to eliminate the first sentence of the policy. Lynn Horton concurred with the City of Poulsbo. Win Granlund believed that the sentence should stay in the policy. The consensus of the Regional Council was to delete the first sentence. {Exhibit 18, p. 2}.

32. On May 13, 1992, the KRPC held a public hearing on the draft of the Kitsap CPPs. It is unclear from the meeting notes {Exhibit 19} precisely which draft of the CPPs was being reviewed. (See footnote 9). At the conclusion of the hearing:

Commissioner Horsley noted that there are still unresolved questions relating to affordable housing (Element E), preferred annexation process (Element A), timeframe for the development of annexation agreements (Element A) and coordination of planning between local governments, tribal governments and the federal government (Element I). It was suggested that the Regional Council hold an additional study session. It was agreed that this session would be Tuesday, May 26 from 9:00 A.M. to Noon. Mark Kulaas will secure a meeting location and notify the Regional Council.

The public hearing was continued to Wednesday, June 3, 1992 at 11:00 A.M. ... {Exhibit 19, p. 4a-4}.

33. On June 3, 1992, the KRPC held a continuation of its May 13, 1992, public hearing on the [fifth] draft of the CPPs. The preferred methods of annexation and delivery of urban services were again discussed as follows:

The Regional Council discussed Policy A.3.j. Commissioner Horsley noted that the election method of annexation is more in keeping with the "one-person-one vote" concept of governance. Councilmember Lynn Horton noted that the petition method of annexation required a super majority (75%) of property owners' approval and the election method required a 60% approval by voters.

No changes were made to this policy. {Exhibit 20, p. 4a-3}.

34. At the June 3, 1992 meeting, the KRPC also discussed delivery of urban governmental services {i.e., Exhibit 12 - the second paragraph of Element A, page A-1, lines 23 through 29}:

Commissioner Horsley discussed the citation of the Growth Management Act relative to service delivery and indicated that in general urban government services are provided by cities, however, in Kitsap County services are also provided by special purpose districts and Kitsap County. Mayor Granato suggested deleting the last sentence of this paragraph. There was no further discussion on this issue and the paragraph (lines 23 through 29) was not revised. {Exhibit 20, pp. 4a-3 and 4a-4}.

35. The fifth Draft Kitsap CPPs are dated June 3, 1992. {Exhibit 12}. The second paragraph of Element A, at lines 23 through 29, indicates:

The Growth Management Act states that "*Urban growth should be located first in areas already characterized by urban growth that have existing public facility and service capacity to serve such development, and second in areas already characterized by urban growth that will be served 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. Further, it is appropriate that urban government services be provided by cities, and urban government service should not be provided in rural areas.*" (Section 29{3} ReESHB 1025). {Exhibit 12, p. A-1; emphasis in original}.

36. Element A(3)(j) of the fifth draft of the CPPs provides:

Of the two primary methods of annexation available to cities, the election method allows the annexation decision to be based more directly on the desires of the area's occupants than on the desires of the area's landowners, and is encouraged when determined by the annexing jurisdiction to be the most efficient and cost effective method. On the other hand, when annexations are supported by petitioners for service delivery purposes and the area is covered in an urban growth management agreement, the petition method is appropriate. In those instances when an annexation has been initiated using the "petition method" and non-petition property is included in the annexation proposal a city shall first conduct a hearing with public notice to all owners of property within the annexation area in order to gather and consider public sentiment. {Exhibit 12, p. A-5}.

37. Element J of the fifth draft addresses the "Growth Management and Land Use Planning Role and Responsibility of Each Member Agency of the Kitsap Regional Planning Council and Special Districts Including Sewer and Water Districts, Port Districts and Fire Districts." {Exhibit 12, p. J-1}. Element J(a), regarding Kitsap County, provides:

Kitsap County is the regional government within the county boundaries providing various services within unincorporated and incorporated areas as required and specified by law and by legal agreements.... {Exhibit 12, p. J-3}.

38. Element J(c) of the fifth draft states that:

Cities within Kitsap County provide a variety of services primarily to residents within their respective municipal boundaries. Cities shall:

i. provide urban governmental services as identified in the Growth Management Act (Chapter 36.70A RCW) and adopted urban growth management agreements... {Exhibit 12, p. J-4}.

39. At the conclusion of the KRPC's June 3, 1992 hearing, Kitsap County Commissioner Billie Eder moved that the KRPC recommend that the [fifth] draft CPPs {i.e., Exhibit 12} as revised through June 3, 1992, be adopted by the Kitsap County Board of Commissioners. Mayor Granato seconded the motion. The KRPC, including Bremerton's mayor, the chair of its city council and another councilmember, unanimously passed the motion. {Exhibit 20, p. 4a-4}.

40. The minutes of the Kitsap County Board of Commissioners' July 27, 1992 meeting make reference to a June 24, 1992 KRPC study session to discuss annexation and other related issues. {Exhibit 23, p. 39}.

41. The minutes of the Kitsap County Board of Commissioners' June 29, 1992 meeting {Exhibit 21, p. 375} make reference to two amendments to the Kitsap County CPPs having been made on June 26, 1992. The first discussed:

Page 3, Section D<sup>[\[10\]](#)</sup>, Annexation by Election. When annexation is proposed, citizens in the area affected should be given the opportunity to vote whether or not to annex. {Exhibit 21, p. 375; emphasis in original}.

42. The second June 26, 1992 amendment involved:

Page A-1, Subsection A<sup>[\[11\]](#)</sup>, Provision of Urban Services. Based on an overview of experience State-wide, the Legislature concluded, "it is appropriate that urban services be provided by cities." Based on our experience here in Kitsap County with the services provided by the County, Fire Districts, Regional Library, PUD, Ports, Water and Sewer Districts, we have found that it is appropriate that urban services be provided by entities other than cities. Citizens Should Decide. Urban governmental services should be provided by the governmental entities that can, as determined by the affected residents, provide those services in the most responsive manner at the lowest cost. Citizens should also be given the opportunity to review whether the consolidation of many of these services at a regional level might not lead to even more cost-effective and responsive service.... {Exhibit 21, pp. 375 - 376; emphasis in original}.

43. The record before the Board does not specifically indicate which entity proposed and/or adopted the two June 26, 1992 amendments to the CPPs. The record strongly implies that the amendments were made by Kitsap County staff. The Board so finds and bases this finding on the following facts within the record:

a. It was Glen Gross from the Kitsap County Department of Community Development who reported the two amendments at the Kitsap County Board of County Commissioners' public hearing on June 29, 1992. {Exhibit 21, p. 375}.

b. Bremerton City Councilmember Lynn Horton, the KRPC's Chairman, testified that:

... she felt that the amendments added on June 26th was [sic] a slap in the face and a major blow to Kitsap County. Ms. Horton said she received a copy of the amended document after she received a telephone call from the press asking for her opinion of the changes. She believed growth management was vital for good planning. She asked that the process be kept in the open and requested that the Board [of County Commissioners] adopt the original document submitted by the Kitsap Regional Planning Council or extend the time frame to continue dialogue on the amendments.... {Exhibit 21, p. 376}.

c. Brad Davis, the City of Port Orchard City Planner, appeared on behalf of Port Orchard Mayor Weatherill. Davis read the mayor's statement into the record, including his opinion that:

... the recent changes were not in keeping with a new spirit of cooperation and that he was requesting the City Council to appeal the recent changes to the Central Puget Sound Growth Planning Hearings Board, if the changes were approved in its [sic] present form. {Exhibit 21, p. 376}.

d. Poulsbo Mayor Mitchusson, also a member of the KRPC, stated that:

... he had not received the document until today and had also been called by the press on Friday for his opinion. He said he was disappointed that the last minute changes were made... {Exhibit 21, p. 376}.

e. In addition, representatives from two other KRPC member jurisdictions, the City of Bainbridge Island and the Suquamish Tribe, indicated that they had not had the opportunity to review the amendments. {Exhibit 21, p. 377}.

f. Helen Haven-Saunders, a South Kitsap resident who attended most of the KRPC workshops, indicated that:

... she was disappointed that the recommendations made by advisory committees were set aside as reflected in the last minute changes to the Policy Plan.... She blamed the Board [of County Commissioners] for causing the disharmony with the cities by revising the Policy Plan.... {Exhibit 23, p. 41}.

44. On June 29, 1992, the Kitsap County Board of Commissioners held a public hearing to consider adoption of the Kitsap CPPs. Following approximately fifty-five minutes of public testimony and discussion, a motion was unanimously passed to "adopt the Kitsap County-Wide Planning Policy dated June 3, 1992 with proposed revisions through June 26, 1992 subject to

future amendments."The hearing was then continued until 7:00 p.m. on July 27, 1992. {Exhibit 21, p. 383}.

45.On July 22, 1992, the KRPC held a work session where city representatives again voiced their disapproval over the County's amendments to the CPPs. {Exhibit 22, and Exhibit 24, p. 57}.

46.On July 27, 1992, the Kitsap County Board of Commissioners continued the public hearing of June 29, 1992.The continued hearing was held "to give the cities and the public another opportunity to comment on the policy document."County Commissioner Horsley reported that:

... the debate was ongoing between cities and counties whether petition or voting method should be used to determine annexations.Commissioner Horsley pointed out that a group of citizens had approached the County requesting that language be included in the KCWPP [CPPs] allowing citizens the right to vote for or against annexations and to not allow cities to annex by the petition method.... {Exhibit 23, p. 39}.

...

Commissioner Horsley read Page 4, subparagraph d. into the record: "Annexation by Election.When annexation is proposed, citizens in the area affected should be given the opportunity to vote whether or not to annex."This portion, if appealed and not overturned by the State Board, would become a part of the KCWPP.However, Commissioner Horsley noted that State law would prevail allowing for either petition or election method for annexations.He stressed that the Growth Management Act mandated that boundaries be drawn around the cities and the Policy Plan include a common approach to planning for urban growth boundaries.Commissioner Horsley said the County would encourage cities to allow citizens the right to vote for or against annexation, but reiterated that without the State law being changed the County could not guarantee the voting method.... {Exhibit 23, p. 43}.

... In closing, he [Commissioner Horsley] felt State-wide solutions on annexations did not work for Kitsap County and citizens should have the right to develop recommendations for how to handle annexations. {Exhibit 23, p. 44}.

47.At the conclusion of the public hearing before the county commissioners, a motion passed that the matter of the CPPs be continued until August 10, 1992, for decision only.{Exhibit 23, p. 44}.

48.On August 10, 1992, the Kitsap County Board of Commissioners unanimously adopted Resolution No. 297-A-1992, which approved the amended Kitsap County-wide Planning Policy. {Exhibit 24, p. 57}.<sup>[12]</sup>

49.The final version of the CPPs, as adopted by the Kitsap County Board of County Commissioners on August 10, 1992, is Exhibit 13.

50.Section C of the Coordination and Cooperation portion of the CPPs states:

The Kitsap Regional Planning Council shall amend the county-wide planning policy process Memorandum of Understanding to establish the process and guidelines for reviewing and amending county-wide planning policy.The amendments to the Memorandum of Understanding shall address time frames, citizen participation, how

amendments may be proposed and specific adoption proceedings. Amendments to the Memorandum of Understanding shall be considered by the Regional Council no later than 120 days after the initial adoption of the county-wide planning policy by the Kitsap County Board of Commissioners and enacted no later than 180 days after adoption. {Exhibit 13, p. 3}.

51. Section D of The Coordination and Cooperation portion of the CPPs is entitled Citizens Rights: Principles of Policy. <sup>[13]</sup> Principle of Policy D(2)(d) incorporates the language of the first June 26, 1992 amendment previously quoted in Finding of Fact No. 41. {See also Exhibit 13, p. 3}.

52. Element A of the CPPs deals with "Policies to Implement RCW 36.70A.110 Relating to the Establishment of Urban Growth Areas". The second paragraph of the KRPC's recommended CPPs {Exhibit 12, p. A-1} was deleted. Instead, under the heading "Provision of Urban Services", Element A incorporates the language of the County's second June 26, 1992 amendment, previously quoted in Finding of Fact No. 42. {See Exhibit 13, p. A-1}.

53. The third paragraph of Element A of the CPPs is also new language. Entitled "Citizens Should Decide", it contains the same heading and language as in the County's second June 26, 1992 amendment, already quoted in Finding of Fact No. 42. {See Exhibit 13, p. A-1}.

54. Element A(3)(k) of the Kitsap County CPPs {see Exhibit 13, pp. A-4 and A-5} discusses the two annexation methods. It contains the identical language as the KRPC's fifth draft Element A(3)(j) previously quoted in Finding of Fact No. 36. Element A(3)(k) is one of the specific policies within the CPPs adopted by Kitsap County that was challenged by the Cities, [see Legal Issue No. 3] even though it is the verbatim policy approved by the cities as members of the KRPC.

### **C. STATEMENT OF LEGAL ISSUES**

***1. What are the purpose and effect of county-wide planning policies?***

***2. May county-wide planning policies include discussion of annexation policy, methods of annexation and urban service delivery?***

***3. If yes, what is the effect of Kitsap's county-wide planning policies, specifically, the following principles and policies: D(2)(d) on page 3; Element A(3)(k) on pages A-4 and A-5; and the portions of Element A on page A-1 captioned "Provision of Urban Services" and "Citizens Should Decide"?***

***4. Are Kitsap's county-wide planning policies in compliance with the Growth Management Act?***

***5. Did Kitsap County breach the Inter-Local agreement and/or the requirements of RCW 36.70A.210 by adoption of either the Memorandum of Understanding and/or the county-wide planning policies?***

***6. If the answer to question #5 is yes, are some or all of the county-wide planning policies null and void?***

## D.DISCUSSION AND CONCLUSIONS

### Legal Issue No. 1

*What are the purpose and effect of county-wide planning policies?*

#### Positions of the Parties

##### a.City of Poulsbo

Poulsbo contends that the purpose of county-wide planning policies is:

... to establish a framework from which the county and its respective cities can then develop consistent comprehensive land use plans.The intended result is to achieve orderly, coordinated land use planning.The GMA's relation to annexation is limited strictly to the initial act of setting urban growth boundaries and thereby limiting where annexations may occur, but not how cities may thereafter pursue annexations. Emphasis supplied.(Brief of Petitioner City of Poulsbo, p. 7).

##### b.City of Bremerton

Bremerton contends that the purpose of county-wide planning policies is to:

....ensure minimum content and consistency for comprehensive plans of cities and counties.What once was voluntary regional planning under RCW 36.70.060, is now mandatory in select fast growing counties.The minimum areas to be addressed in these comprehensive plans are listed in Section .210 (3)....(Brief of Petitioner City of Bremerton, pp. 8 - 9).

##### c.Kitsap County

Kitsap County contends that the purpose and effect are as follows:

The purpose of the county-wide planning policy is to ensure that the new comprehensive plans enacted by the Cities and the County are consistent. The effect of the County-Wide Planning Policies is to lay out a course of action for common procedures and policies to be incorporated into the various comprehensive plans.The Cities [sic] fear that the Boundary Review Board might seize on language in the planning policies to deny on [sic] otherwise proper annexation is not founded in the law.RCW 36.70A.210 clearly limits the use of county-wide planning policies, and the Boundary Review Board should not be able to expand the use of such policies beyond those granted by law.(Brief of Respondent Kitsap County, p. 4).

#### Discussion and holdings

The parties agree that the purpose of the CPPs is to provide a framework for the comprehensive plans of cities and the county.They further agree that this framework is to provide a means to

achieve consistency between the comprehensive plans. The parties cite to the specific wording of RCW 36.70A.210 which contains the words 'framework' and 'consistent', and to RCW 36.70A.100 which states that the plans must be made consistent if they share a common border or regional issues. While the Board agrees that an immediate purpose of the CPPs is to achieve consistency between plans, the Board previously determined in the *Snoqualmie v. King County* case (CPSGPHB Case No. 92-3-0004) that the CPPs also have a long term purpose. Further, with regard to the effect of the CPPs, the Board agrees that they do have the procedural effect that Kitsap County suggests; however, they also have an important substantive and directive effect on comprehensive plans.

The *purpose* of the CPPs and their *effect* were legal issues specifically raised and briefed by the parties in this case. In the *Snoqualmie* case, the Board determined that it was also necessary to answer a third related question, to wit, what is the *nature* of the CPPs?

The Board has heard no new evidence or argument in this case that alters the conclusions reached in the *Snoqualmie* case with regard to the purpose, nature or effect of the CPPs. Consequently, the Board hereby incorporates as though fully set forth herein the discussion and holdings of the *Snoqualmie* case, beginning on line 7 of page 7 and continuing through line 5 of page 19 of that order. While some may have construed the referenced text from the *Snoqualmie* case as dicta rather than holdings, the Board wishes to clearly state that these are holdings in this case.

While the Board has adopted in toto the above referenced portions of the *Snoqualmie* order, a summary of that discussion and holdings is presented as follows:

*1. The purpose of county-wide planning policies*

The Board holds that the CPPs have both an immediate purpose and a long term purpose. The immediate purpose is to assure consistency among the comprehensive plans that the GMA requires to be adopted by July 1, 1993. The long term purpose of county-wide planning policies is to facilitate the transformation of local governance in urban growth areas so that urban governmental services are provided by cities and rural and regional services are provided by counties. That which is urban should be municipal. Over time, counties are to become divested of urban service delivery responsibilities and invested with responsibilities for regional policy making and service delivery, and will retain responsibility for providing rural services.

*2. The nature of county-wide planning policies*

The Board holds that policy documents, such as CPPs and comprehensive plans, are fundamentally different in nature than development regulations or other exercises of "land use powers" such as "right-of-way or street vacation, annexation or environmental review procedures".<sup>[14]</sup> While GMA policy documents derive their authority from Chapter 36.70A RCW and generally address issues at a community-wide level, the exercise of local land use powers is derived from other statutes which address the governance, development or servicing of individual parcels of land within a local government's jurisdiction.

The lawful extent and the mechanics whereby local governments wield such "land use powers" are established and limited by such enabling statutes as the State Environmental Policy Act (Chapter 43.21C RCW), the Shoreline Management Act (Chapter 90.58 RCW), the Public

Disclosure Act (Chapter 42 RCW) and the annexation and zoning authority derived from Titles 35 and 35A RCW.

### *3. The effect of county-wide planning policies*

The GMA requires 'consistency' between the plans of local governments, in or adjacent to a county, and between the plans and regulations of individual jurisdictions. The Board therefore holds that county-wide planning policies are not just procedural in their effect, but also substantive. CPPs have a substantive effect on the comprehensive plans of cities and the county adopting them if they meet a three prong test: (1) they must serve a legitimate regional purpose; (2) they must not alter the land use powers of cities, and (3) they must otherwise be consistent with relevant provisions of the GMA.

#### Conclusion No. 1

County wide planning policies are policy documents that have both a procedural and a substantive effect on the comprehensive plans of cities and the county. The immediate purpose of the CPPs is to achieve consistency between and among the plans of cities and the county on regional matters. A long term purpose of the CPPs is to facilitate the transformation of local governance in urban growth areas so that cities become the primary providers of urban governmental services and counties become the providers of regional and rural services and the makers of regional policies. The CPPs may include goals to provide general direction to comprehensive plans and/or specific numeric objectives to be achieved in comprehensive plans. In neither case may the land use powers of cities be altered.

#### Legal Issue No. 2

***May county-wide planning policies include discussion of annexation policy, methods of annexation and urban service delivery?***

#### Positions of the parties

##### a. City of Poulsbo

With regard to including a discussion of annexation policy in a CPP, petitioner Poulsbo contends that:

... Because the GMA requires counties to designate urban growth boundaries in their county-wide policies<sup>[15]</sup>, the GMA does address annexation on a limited level. Specifically, in setting urban growth boundaries, the county-wide policies define the limits of where cities can pursue annexation: cities can only pursue annexations within their designated urban growth boundaries. The GMA is silent as to methods of annexation because state law has already provided what methods are available to

cities.(Brief of Petitioner City of Poulsbo; emphasis in original, pp. 6 - 7).

Poulsbo further argued that, while the CPPs could contain a discussion of annexation policy and urban service delivery, it was not appropriate for the CPPs to include a discussion of annexation methods.They argued:

Nowhere in the aforementioned list is there a provision for inclusion of policies regarding methods of annexation.The logical conclusion is that the legislature recognized that annexation methods are dealt with in another section of state regulatory authority, specifically Chapters 35.13 and 35A.14 of the Revised Code of Washington.

It is Poulsbo's position that because the GMA does not provide for the inclusion of annexation policies, the County may not include a discussion of annexation methods within its county-wide planning policy.Methods of annexation are dealt with under separate state law provisions.

With respect to the inclusion of provisions regarding the delivery of urban services, RCW 36.70A.210(3)(b) does provide that county-wide planning policies include policies for the "provision of urban services" to "contiguous and orderly development."More precisely, the GMA includes certain policies on the provision of urban services:

**...Further it is appropriate that urban government services be provided by cities, and urban government services should not be provided in rural areas.** (Brief of Petitioner City of Poulsbo, pp. 8 - 9; emphasis in original).

#### b.Kitsap County

In responding to Poulsbo's argument, Kitsap states:

Petitioner, City of Poulsbo, states that since there is not mention made of annexation policies, methods of annexation or urban service deliveries, the County-Wide Planning Policies are prevented from making discussions of those issues.However, the wording of the statute clearly states that the enumerated policies in Sub-Paragraphs A through H are only a minimum, and that other issues can be addressed. There is no prohibition placed on annexation policies, methods of annexation or urban service delivery within the confines of RCW 36.78.210(3) [sic; 36.70A.210 (3)].

To bolster its position that the CPPs may include additional policies besides those specifically listed, Kitsap cites the entirety of RCW 36.70A.210(3) and provides emphasis as follows:

A county-wide planning policy shall at a minimum address the following:

- (a)Policies to implement RCW36.70A.110; [Note:RCW 36.70A.110 is the section of the GMA dealing with urban growth areas].
- (b)Policies for promotion of contiguous and orderly development and provision of urban services to such development;
- (c)Policies for siting public capital facilities of a county-wide or state-wide nature;

- (d)Policies for county-wide transportation facilities and strategies;
  - (e)Policies that consider the need for affordable housing, such as housing for all economic segments of the population and parameters for its distribution;
  - (f)Policies for joint county and city planning within urban growth areas;
  - (g)Policies for county-wide economic development and employment; and
  - (h)An analysis of the fiscal impact.
- (Brief of Respondent Kitsap County, pp. 4 - 5; Emphasis supplied).

### General discussion

As the Board concluded in answering Legal Issue No. 1, local governance is intertwined with many other growth management issues such as land use, urban service delivery, the making of regional policy and the local implementation of legitimate regional objectives. Further, as the Board held in answering Legal Issue No. 1, a key long term objective of the CPPs is to facilitate the **transformation** of local governance for urban growth areas such that cities are the primary providers of urban governmental services. Thus, the question of whether the urban growth area is to be primarily served by cities has been resolved by the GMA itself, and Kitsap's CPPs should proceed from this premise. Kitsap's CPPs, or subsequent steps including establishment of urban growth area boundaries, need to address specifically how the presently unincorporated portions of the urban growth area are to be served (i.e. come within the municipal boundaries of cities). It therefore logically follows that the subjects of annexation and incorporation may be discussed in the CPPs.

The Board notes that pre-annexation utility service agreements are common in Washington state. In view of the GMA's direction that cities are to be the primary providers of urban governmental services, the Board construes such agreements to be a logical and appropriate predicate to the annexation of unincorporated land. Because the range of activities listed in the definition of 'urban governmental services' at RCW 36.70A.030(16) is broader than the range of services provided by special districts, the Board holds that the eventual and logical culmination of 'cities as the primary providers of urban services' requires that annexation and incorporation occur rather than service agreements sufficing as more than a transitional device.

The Board holds, therefore, that a CPP may include a discussion of policies regarding annexation and urban service delivery. Indeed, it is difficult to fathom how to achieve the legislatively desired result of cities as the primary providers of urban governmental services without facilitating the annexation and incorporation of urbanized and urbanizing land. CPPs could logically include policies to help achieve cityhood for areas that are presently unincorporated but included within urban growth areas.

With regard to the methods of annexation, the Board held in the *Snoqualmie* decision that the substantive and directive effect of a CPP upon the comprehensive plan of a city is limited by a three prong test. The second prong requires that the CPP not alter the land use powers of cities. The Board holds that annexation is an exercise of the land use powers of cities, and therefore a

CPP cannot express a preference or otherwise provide direction to cities as to the methods of annexation. If the county wishes to discuss methods of annexation within the CPPs, it may do so, provided that such language serves to facilitate rather than frustrate the legislative directive of "that which is urban should be municipal". In any event, such language must not alter the land use powers of cities. Whether that circumstance exists in the Kitsap CPPs is one of the questions addressed in Legal Issue No. 3 below.

### Conclusion No. 2

County-wide planning policies may include a discussion of policies regarding annexation and urban service delivery. Indeed, it is expected that policies discussing annexation, incorporation and urban service delivery would be appropriate in order to help achieve the legislatively preferred configuration of local governance within urban growth areas whereby cities are the primary providers of urban governmental services. However, policies in the CPPs that attempt to express a preference for or otherwise provide direction about the annexation methods employed by a city constitute an alteration of the land use powers of cities, and are therefore barred.

### Legal Issue No. 3

***If yes, what is the effect of Kitsap's county-wide planning policies, specifically, the following principles and policies: D(2)(d) on page 3; Element A on page A-1; and Element A(3)(k)<sup>[16]</sup> on page A-4?***

The answer to Legal Issue No. 2 is yes: CPPs can include a discussion of policies regarding annexation and urban service delivery. The answer to the portion of Legal Issue No. 2 that deals with directing or expressing a preference for a specific method of annexation is no. Therefore, we must now answer Legal Issue No. 3 by reviewing the specific sections in dispute to determine if they comply with the requirements of the GMA and the Board's previous holdings in *Snoqualmie*. In so doing, we will determine the effect of the referenced policies.

In addressing this legal issue, the Board first notes that the *effect* of valid policies in the CPPs is substantive as well as procedural. The Board reaffirms its holding in *Snoqualmie* that policy documents under the GMA (including CPPs and comprehensive plans) are no longer 'just' advisory blueprints to be heeded or disregarded at the discretion of the local legislative body. Rather, these policy documents provide substantive direction and must be followed.

The Board further held in *Snoqualmie* that the use of the word 'should' does not reduce a CPP to the status of a purely advisory statement. Even 'shoulds' when included in GMA policy documents provide a measure of substantive direction. Thus, the legislative bodies and others reading the CPPs must give weight to any policy statement, regardless of whether it uses the modifying verb 'should' or 'shall'.<sup>[17]</sup> For this reason, the Board rejects Kitsap's argument that the CPPs are purely "discretionary and not mandatory". If a policy is included in the CPPs, substantial weight and regard must be given to it by all parties, including individual citizens, city and county

governments and state agencies.

In a related vein, the Board notes that Kitsap makes a distinction in the CPPs between "principles of policy" and "policies". Because all text within the CPPs must have some measure of substantive effect (i.e. even the 'shoulds', even that which is vague or general as opposed to specific), the Board holds that both Kitsap's principles and policies are subject to compliance with the Act. The substantive effect of policy documents under the GMA means that little distinction remains between 'policies' and 'principles'. So long as the language appears within the CPPs, it must be given some substantive meaning. Thus, both Principle of Policy D(2)(d) and the policy in Element A(3)(k) are, in effect, policies of the Kitsap County CPPs.

The policies referenced above are grouped into two general categories for purposes of the Board's analysis: (a) policies that deal with annexation and (b) policies that deal with urban service delivery. We turn first to the policies that deal with annexation, stating the policies in dispute, the positions of the parties and the Board's discussion and holdings. Then we will turn to the policies dealing with urban service delivery, stating the policies in dispute, the positions of the parties and the Board's discussion and holdings. Last, the Board then sets forth its conclusions on both the annexation and urban service delivery policies.

#### A. Policies that deal with Annexation

Two of the above referenced CPPs deal with annexation as follows:

Annexation by Election. When annexation is proposed, citizens in the area affected should be given the opportunity to vote whether or not to annex. (underlining in original). {Exhibit 13, Principle of Policy D(2)(d) on page 3}.

Of the two primary methods of annexation available to cities, the election method allows the annexation decision to be based more directly on the desires of the area's occupants than on the desires of the area's landowners, and is encouraged when determined by the annexing jurisdiction to be the most efficient and cost effective method. On the other hand, when annexations are supported by petitioners for service delivery purposes and the area is covered in an urban growth management agreement, the petition method is appropriate. In those instances when an annexation has been initiated using the "petition method" and non-petition property is included in the annexation proposal a city shall first conduct a public hearing with public notice to all owners of property within the annexation area in order to gather and consider public sentiment. {Exhibit 13, Element A(3)(k) on page A-4 and A-5}. (Emphasis added).

#### Positions of the Parties

##### a. City of Poulsbo

Poulsbo contends that the County intended to use the policies in the CPPs to indicate a preference

for annexations by the election method. The City's brief made reference to earlier drafts of the CPPs as evidence that the County was attempting to alter the options available for annexation.

With respect to the County's inclusion of policies pertaining to annexation methods, the policies contained in the final draft were less bold than the policies initially proposed... the initial drafts contained an explicit policy requiring that all annexations proceed by the election method (See, e.g., Exhibit No. 5, p. 8; Exhibit No. 7, pp. A-4 and A-5). The policies ultimately adopted and set forth below were watered down considerably, although it is still clear that the intent was to indicate a preference for annexations by the election method. (Brief of Petitioner City of Poulsbo, pp. 3 - 4).

...

... it is inappropriate for the County to include, in its county-wide planning policy, policies with respect to preferred annexation methods...

...

With respect to the County's inclusion of policies pertaining to annexation methods (Exhibit 13, page 3, section D(2)(d) and page A-4, section 3(k)), while it is clear that such policies cannot in fact alter a city's right to pursue annexation by any lawful method, the problematic provisions will undoubtedly mislead and confuse the public. (Brief of Petitioner City of Poulsbo, p. 10).

...

As such language is confusing and misleading given a municipality's right to pursue any lawful method of annexation available, the inclusion of the language results in the creation of a county-wide planning policy that does not comply with the Growth Management Act. Precisely speaking, the Policy is contradictory to not only the GMA, but also existing state law regarding annexation methods. (Brief of Petitioner City of Poulsbo, p. 18).

#### b. City of Port Orchard

Port Orchard opposes the policies in question because they are:

...inconsistent with existing state law regarding annexations, and it encourages one method of annexation over another, an action which is far beyond the intended scope of a Planning Policy. (Brief of Petitioner City of Port Orchard, p. 3).

Port Orchard goes on to cite RCW 36.70A.210(1): "...Nothing in this section shall be construed to alter the land use powers of cities..." and then argues that the method of annexation chosen by a city for a particular area is an exercise of the city's "land use powers".

#### c. City of Bremerton

Bremerton takes the position that the CPPs are likely to be misunderstood by citizens and the Boundary Review Board. The City argues:

Bremerton is more concerned about collateral use of the Kitsap County Planning Policy by the Kitsap County Boundary Review Board or parties arguing before the Board on a City annexation. RCW 36.93.157 states:

The decision of the Boundary Review Board located in a county that is required or chooses to plan under RCW 36.70A.040 must be consistent with RCW 36.70A.020; 36.70A.110, and 36.70A.210.

....

The city assumes that a court interpretation giving meaning to the boundary review statute would find that boundary review board decisions should be guided by the actual policies adopted pursuant to Section .210. This might well cause the Boundary Review Board to reject any annexation which was approved through a petition method rather than election. (Brief of Petitioner City of Bremerton, pp. 9 - 10).

Apart from the concerns that the CPPs in question might be misunderstood and misused, Bremerton argues that Kitsap is simply without authority to alter a provision of the annexation statutes which governs the methods of annexation available. Bremerton contends:

Kitsap County may not supersede a method of annexation made available to county residents and cities by the State legislature, unless the GMA expressly authorizes this policy, in that such a policy would conflict with current State laws. The GMA is concerned with locating growth and cities within growth areas, but does not express a preference on the method by which cities grow within urban growth areas. (Brief of Petitioner City of Bremerton, pp. 12 - 13).

#### d. Kitsap County

Kitsap County contends that Principle of Policy D(2)(d) is not a policy, and therefore does not provide direction to the manner in which annexations occur. Kitsap alleges that a statement of principle simply provides a basis for the policies and that, in any case, the use of the word 'should' (as opposed to 'shall') means that Principle of Policy D(2)(d) is discretionary. The County's specific position on these points is as follows:

Thus, it is clear that the intent of the County Commissioners in enacting this Section was to provide a basis for the policies which follow, and not to elevate these sections to the status of a formal policy.

Finally, the language of Section D(2)(d) is not mandatory, but discretionary. The use of the word "should" as opposed to the use of the word "shall" is generally construed as being discretionary and not mandatory. Starks v. Kentucky Health Facilities, 684 SW 2d 5 (Kentucky Appeals 1985); and Sutherland Statutory Construction Section 57.03 (Fifth Edition, 1992).

Thus, the effect of Section D(2)(d) is to provide a basis for some of the policies contained within the KCWPP, and not to direct the Cities to use one method of annexation over the other. (Brief of Respondent Kitsap County, p. 7).

With regard to Element A(3)(k) of the CPPs, Kitsap took the position that this policy "is based on the principle outlined in Section D(2)(d) above".<sup>[18]</sup> By its own terms that policy states that "... the election method allows the annexation decision to be based more directly on the desires of the area's occupants than on the desires of the area's landowners, and is encouraged".

Kitsap clarifies its position that, while the election method of annexation provides an opportunity

for residents to express their desires, there is a circumstance when the petition method of annexation is appropriate. Specifically, Kitsap states:

The policy also recognizes that the petition method of annexation is appropriate when the area is covered by an Urban Growth Management Agreement, which will be worked out between the County and each of the Cities and that the City hold a public hearing with notice to all owners of property within the annexation area prior to approving the petition. (Brief of Respondent Kitsap County, p. 9).

### Discussion and Holdings

The Board's determination of the validity of Element A(3)(k) requires first an examination of the laws that govern annexation of unincorporated land. Bremerton is a first class city and Port Orchard is a third class city, both deriving their authority to annex unincorporated land from Title 35 RCW. Poulsbo is a noncharter optional municipal code city which derives its authority to annex unincorporated land from Title 35A RCW. Both Titles describe the petition method and the election method of annexation. Crucially, each Title contains a section that states that the election method is an alternative that does not supersede the petition method. RCW 35.13.120 states:

#### **Election method is alternative.**

The method of annexation provided for in RCW 35.13.020 to 35.13.110 [election method], shall be an alternative method, not superseding any other.

A similar section in RCW 35A.14.110 states:

#### **Election method is alternative.**

The method of annexation provided for in RCW 35A.14.015 through 35A.14.100 is an alternative method and is additional to the other methods provided for in this chapter.

These above cited sections set forth applicable law governing annexation of unincorporated land. Nothing in either Title suggests that a city is obliged to prefer one method over the other, nor is there a requirement that an advisory election be held as a condition of the petition method. Further, the Board agrees with Port Orchard that annexation is an exercise of the 'land use powers of cities'. The Board first reached this conclusion in its *Snoqualmie* order, p. 16, line 7. Therefore, application of the 'three prong test', set forth by the Board in *Snoqualmie* results in the Board's holding that Kitsap Element A(3)(k) on pages A-4 and A-5 is not a valid county-wide planning policy because it alters the land use powers of cities.

On the subject of Principle of Policy D(2)(d), the Board agrees that it is appropriate for counties to set forth the rationale for their policies. It may even be permissible to differentiate between that which is policy and that which is the basis for that policy. In such cases, language that is clearly identified as 'policies' can be construed as having greater substantive effect than principles. However, even statements of principle, when included within the CPP document, must be construed to have some meaning and to have some, albeit lesser, substantive effect. Furthermore, the Board holds that when explicitly labeled policies themselves are found by the Board to be out

of compliance with the requirements of the Act, they call into question the compliance of the 'principles' from which those policies flowed. In the case of Element A(3)(k), which the County said was based on principle D(2)(d), the Board holds that both the element and the principle are out of compliance with the GMA because they alter the land use power of cities, and therefore must be removed from the CPPs.

### B. Policies that deal with Urban Service Delivery

A portion of Element A of the CPPs deals with urban service delivery. It provides:

Provision of Urban Services. Based on an overview of experience State-wide, the Legislature concluded, "it is appropriate that urban services be provided by cities". Based on our experience here in Kitsap County with the services provided by the County, Fire Districts, Regional Library, Public Utility District, Ports, Water and Sewer Districts, we have found that in some cases it is also appropriate that urban services be provided by entities in addition to cities. (underlining in original). {Exhibit 13, page A-1}.

Citizens Should Decide. Urban governmental services should be provided by the governmental entities that can, as determined by the affected residents, provide those services in the most responsive manner at the lowest cost. Citizens should also be given the opportunity to review whether the consolidation of many of these services at a local or regional level might not lead to even more cost-effective and responsive service. (underlining in original). {Exhibit 13, page A-1}.

### Positions of the Parties

#### a. City of Poulsbo

Poulsbo contends that:

The inclusion of the aforementioned policies flies in the face of the statutorily mandated policy that "urban services be provided by cities." Essentially, the County is attempting to act like the legislature and amend RCW 36.70A.110 by providing that cities may not be appropriate for providing urban services. Clearly, the County does not have the authority to amend state law in this fashion and the Policy provisions regarding delivery of urban services should be stricken as they are contradictory to state law. (Brief of Petitioner City of Poulsbo, p. 10).

Because the County's Policy implies that cities may not be appropriate providers of urban services, the Policy directly conflicts with RCW 36.70A.110(3) which states that cities are appropriate providers of urban services. (Brief of Petitioner City of Poulsbo, p. 11).

The foregoing authorities and arguments establish that the Kitsap County-Wide Planning Policy does not comply with the Growth Management Act because Kitsap

County erroneously interpreted and applied certain provisions of the Act, specifically, RCW 36.70A.110(3) pertaining to providers of urban services. In addition, Kitsap County erroneously interpreted the GMA as providing the County with the authority to dictate to cities methods of annexation. (Brief of Petitioner City of Poulsbo, pp. 19 - 20).

b. City of Bremerton

Bremerton contends:

The County openly challenges the State legislature's policy on urban services by inserting its policy A at page A-1. It corrects what it sees as an oversight by the State. However, the role of Special Purpose Districts in Kitsap County is hardly unique among those counties selected for mandatory planning by the Act. There is no reason to believe the State legislature was addressing the issue of urban services state-wide, as suggested by Kitsap County, rather than focusing on the few specific counties that were required to plan under the Act, including Kitsap County.

The legislature has determined that urban governmental services should not be provided in rural areas, and that cities are appropriate providers of urban services in urban growth areas. RCW 36.70A.110. (Brief of Petitioner City of Bremerton, p. 11).

...

...allowing cost to dictate which entity will provide services or allowing citizens to vote on where urban growth should occur based on their own localized financial self-interest has created urban sprawl, abandonment of urban core areas and the need for growth management. (Brief of Petitioner City of Bremerton, p. 12).

c. Kitsap County

Kitsap County takes the position that there is no contradiction between the language of Element A (3)(k) and that of RCW 36.70A.110(3). The relevant portion of the latter states:

...Further, it is appropriate that urban governmental services be provided by cities, and urban government services should not be provided in rural areas.

Likewise, when reviewing RCW 36.70A.210(1), Kitsap observes that the word "primary" is used to describe the role of cities as providers of urban governmental service within urban growth areas. The County argues:

It is clear from reading the entire Growth Management Act, including RCW 36.70A.210(1) that the legislature did not intend for the Cities to become the sole source of urban services. The language in RCW 36.70A.210(1) clarifies the language in RCW 36.70A.110(3) and reads as follows, "The legislature recognizes that counties are regional governments within their boundaries, and cities are primary providers of urban governmental services within urban growth areas." (Emphasis supplied). The Growth Management Act did not repeal any of the statutes relating to the formation of water, sewer, fire, or other such districts, nor did it curtail the ability of the County to provide sewer or water services. The language in RCW 36.70A.210(1) and .110(3) reflect that the legislature has expressed a preference for the cities to

be the provider of urban services. By inclusion of the term "primary" in RCW 36.70A.210(1), the legislature necessarily implied that there would be secondary providers of such services; e.g. the existing special purpose districts. (Brief of Respondent Kitsap County, p. 8).

Kitsap then goes on to say:

The effect of this particular statement within the KCWPP is merely to state the status quo in Kitsap County. It will not hinder the cities annexation attempts within these areas. (Brief of Respondent Kitsap County, p. 9).

### Discussion and Holdings

The last part of the county's brief quoted above is very telling. It is an acknowledgment that Kitsap's status quo, which is the result of its unique history of urbanization, service delivery and governance, has been used as the template for crafting these CPPs. The county is saying, in effect, that Kitsap's present situation is the product of its past decisions and that in planning for the future, it essentially contemplates more of the same. The CPPs entitled "Provision of Urban Services" reveal at best a lack of a grasp of the legislature's clear direction on the subject, and at worst an attempt to circumvent that legislative direction.

As adopted, the CPPs perpetuate, rather than **transform**, Kitsap's past pattern of urbanization and local government service delivery. The Board is persuaded by Bremerton's argument that such past practices have "created urban sprawl, abandonment of urban core areas and the need for growth management." The GMA contemplates quite a different future and the Board therefore holds that Kitsap's policy language regarding urban service delivery is not in compliance with the intent of the Act nor the specific direction of RCW 36.70A.210(1) that "cities are primary providers of urban governmental services within urban growth areas".

The County's brief argues that the word 'primary' implies that there will continue to be other local government service providers besides cities. The Board agrees that 'primary' does not mean 'sole'. Where, as here, a statute does not define a material term, the word should be given its ordinary meaning. In ascertaining common meaning, resort to dictionaries is acceptable. *TLR, Inc. vs. Town of LaConner*, 68 Wn. App. 29,33, \_\_\_ P.2d \_\_\_ (1992). (citations omitted).

*Black's Law Dictionary* 1041 (5th ed. 1981) defines "primary" as:

First; principal; chief; leading. First in order of time, or development, or in intention.

An application of these definitions to the circumstances in Kitsap suggests a need to specify that cities, present and future, would be the "first in order of time" or "order of ... development" with regard to the provision of urban governmental services. Cities would be the "chief" providers of those services within the urban growth area.

The portion of the CPPs entitled "Citizens Should Decide" evidences a denial if not outright rejection by Kitsap County of the GMA's clear direction regarding the configuration of local governance of the urban growth area. The legislative direction that cities be the primary providers of urban services within the urban growth area is to be embodied in the CPPs. The CPPs, in turn,

are to provide direction to the comprehensive plans of the cities and the county. Once that legislative direction has been embodied in valid CPPs and comprehensive plans, many individual implementing actions are to follow, including the development of capital programs and the adoption of development regulations and other exercises of land use powers, such as annexation and incorporation, which are derived from other statutes. Policies that are intended or function to thwart GMA's policy direction are in violation of the requirements of the Act.

The portion of the CPPs captioned "Citizens Should Decide" seems to suggest that certain growth management decisions, such as urban service delivery, are best made by individuals and that this approach is somehow more responsive grassroots democracy. However, the "public participation" that is one of the hallmarks of the GMA, does not equate to "citizens decide". The Act requires the elected legislative bodies of cities and counties, not individual citizens, to ultimately "decide" on the direction and content of policy documents such as county-wide planning policies and comprehensive plans. The Act assigns this policy making authority to city and county elected officials, who are accountable to their citizens at the ballot box.

Citizens have a right to provide input to their elected officials about CPPs and comprehensive plans. This is especially important because of the new relationship that the GMA creates between policy documents (e.g., CPPs and comprehensive plans) and implementing actions (e.g., land use regulations and annexation). However, once those GMA policy documents are adopted, many policy questions will have been settled (e.g. where are the urban growth areas and what is the designated land use). Implementation actions, such as annexation proposals, are not the appropriate forum for individuals to debate the merits of adopted GMA policies or the GMA itself. Instead, the opportunity for citizens to participate and/or decide is limited to whatever avenues and rights are delineated by specific statutory provisions used to implement adopted GMA policies, such as the election or petition methods of annexation.

Another problem with the "Citizens Should Decide" policy language is that it invites a continued fragmentation of service delivery and therefore local governance. To allow costs, determined by individual and localized self interest, to dictate which entity will provide a local government service is the antithesis of coordinated planning, efficient service delivery and the concept of concentrating urban development to avoid the loss of resource lands and critical areas.

### Conclusion No. 3

Principle of Policy D(2)(d) {Exhibit 13, p.3} and Policy Element A3(k) {Exhibit 13, pp. A-4 and A-5} of the Kitsap County-wide Planning Policies are not in compliance with the GMA because they attempt to influence or otherwise dictate the method of annexation chosen by a city. This constitutes an alteration of the land use powers of cities. These portions of the CPPs should be deleted.

The portion of Kitsap's CPPs in Element A, captioned "Provision of Urban Services" {Exhibit 13, p. A-1} is not in compliance with the Act because it does not effectuate the legislative direction that cities are to be the primary providers of urban services within urban growth areas. Kitsap's

CPPs must acknowledge this legislative direction and adopt realistic strategies for achieving it. The transformation of local governance within Kitsap's urban growth areas requires that the county recognize cities as the primary or chief providers of urban governmental services. Kitsap's CPPs should support the development of a system of urban service delivery for the urban growth area in which existing cities and potential future cities, such as Silverdale, would be the primary providers of urban governmental services. In such a system, special districts and the county would be secondary providers of urban governmental services. Thus, special districts and the County would play a continuing, albeit diminishing, role as providers of urban governmental services.

The portion of Kitsap's CPPs in Element A captioned "Citizens Should Decide" {Exhibit 13, p. A-1} is not in compliance with the GMA because it thwarts the legislative directive that cities are to be the primary providers of urban governmental services.

#### Legal Issue No. 4

***Are Kitsap's county-wide planning policies in compliance with the Growth Management Act?***

#### Discussion and Holdings

As set forth in Legal Issue No. 3, the following sections of the Kitsap County-wide Planning Policies are not in compliance with the Growth Management Act: Principle of Policy D(2)(d) on page 3; Element A(3)(k) on pages A-4 and A-5, and the portions of Element A, on page A-1, that are entitled "Provision of Urban Services" and "Citizens Should Decide".

#### Conclusion No. 4

The following portions of the Kitsap County-wide Planning Policies are not in compliance with the Growth Management Act: D(2)(d) on page 3; Element A(3)(k) on pages A-4 and A-5, and the portions of Element A, on page A-1, that are entitled "Provision of Urban Services" and "Citizens Should Decide".

Because no other county-wide planning policies were appealed for the Board's review, the Board renders no judgment about the rest of the Kitsap CPPs.

#### Legal Issue No. 5

***Did Kitsap County breach the Inter-Local agreement and/or the requirements of RCW 36.70A.210 by adoption of either the Memorandum of Understanding and/or the county-wide planning policies?***

## Position of the Parties

### a. City of Bremerton

Legal Issue No. 5 was raised only by the City of Bremerton. Therefore, Port Orchard and Poulsbo did not brief or argue this question. Bremerton's position is that the Bylaws control the actions taken by Kitsap County in adopting its CPPs. Bremerton alleges that:

Neither the KRPC final policy nor the policy as revised by the County on June 29 has been ratified by the legislative bodies of any of the incorporated cities in Kitsap County. (Brief of Petitioner City of Bremerton, pp. 3 - 4).

...

Although GMA does not require cities to ratify as part of the [CPPs adoption] process, it can be demanded under Section .210(2)(b). As noted above, the cities did reach an agreement on process, including ratification of final agreement. The Bylaws Section 5(2)... calls for ratification of the plan and amendments by "member jurisdictions representing 80% of the population within the region." (Brief of Petitioner City of Bremerton, p. 6; emphasis in original).

Furthermore, it is Bremerton's position that:

Nothing in the MOU amends the ratification process of the KRPC By-Laws, and the By-Laws themselves are referenced in the Memorandum.... County adoption is contemplated in State law and is also necessary under the 80% ratification formula [in the Bylaws]. (Brief of Petitioner City of Bremerton, p. 7).

... neither the KRPC County-wide Policy or the Kitsap County revision to the policy has yet been adopted and ratified according to the County/Cities Agreement mandated in Section .210 of the Growth Management Act. (Brief of Petitioner City of Bremerton, p. 8).

Bremerton also contends that the Inter-Local Agreement is without force, and in violation of RCW 39.34.030(2), since the Bremerton City Council never delegated authority to the mayor and individual city council members to enter into the Inter-Local Agreement. (Brief of Petitioner City of Bremerton, pp. 7 - 8).

### b. Kitsap County

In contrast, Kitsap County argues that:

... the MOU superseded any provisions in the bylaws of the Kitsap Regional Planning Commission... (Brief of Respondent Kitsap County, p. 10).

...

... the MOU is the controlling document. (Brief of Respondent Kitsap County, p. 2).

...

... the MOU was validly executed by all members of the KRPC, and that it validly superseded any contradictory language in the original Interlocal Agreement, and the bylaws of the KRPC. The process followed by the KRPC and Kitsap County in adopting the KCWPP are in accordance with the MOU and with the Growth

Management Act.(Brief of Respondent Kitsap County, p. 12).

...

The plain wording of [RCW 36.70A.210(2)(b)] does not require the Cities to ratify the County-Wide Planning Policy, but instead that they should agree to a ratification process.The MOU [a document agreed to by the cities] does not require ratification by the Cities... and the Cities agreed to the MOU... (Brief of Respondent Kitsap County, p. 12).

As for whether Bremerton violated the Interlocal Cooperation Act because the city council failed to delegate authority to enter into the Inter-Local Agreement, Kitsap County contends that the:

... Board does not have jurisdiction to determine whether or not the City validly approved the MOU, or to consider Kitsap County's equitable arguments [of] estoppel and waiver. (Brief of Respondent Kitsap County, p. 11).

### RCW 36.70A.210

RCW 36.70A.210, entitled "County-wide planning policies", refers to two frameworks.The first, in subsection (1), indicates that CPPs are a written policy statement used solely to establish:

... a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter.This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100....

As discussed in detail in the Board's *Snoqualmie* decision, and in Legal Issue No. 1 of this decision, this first framework is substantive in nature.The second framework is procedural.It is described in RCW 36.70A.210(2):

The legislative authority of a county that plans under RCW 36.70A.040 shall adopt a county-wide planning policy in cooperation with the cities located in whole or in part within the county as follows:

(a) No later than sixty calendar days from July 16, 1991, the legislative authority of the county shall convene a meeting with representatives of each city for the purpose of establishing a collaborative process that will provide a framework for the adoption of a county-wide planning policy.

(b) The process and framework for adoption of a county-wide planning policy specified in (a) of this subsection shall determine the manner in which the county and the cities agree to all procedures and provisions including but not limited to desired planning policies, deadlines, ratification of final agreements and demonstration thereof, and financing, if any, of all activities associated therewith;...

...

(e) No later than July 1, 1992, the legislative authority of the county shall adopt a county-wide planning policy according to the process provided under this section and that is consistent with the agreement pursuant to (b) of this subsection, and after holding a public hearing or hearings on the proposed county-wide planning policy.

(emphasis added).

## Discussion and Holdings

### a. The Memorandum of Understanding

The Board holds that the MOU does constitute the process and framework agreement for adopting CPPs as required by RCW 36.70A.210(2)(b); it was purposefully prepared and executed to comply with this specific requirement of the GMA. The subtitle of the MOU labels the document "An Agreement on the Process for the Development and Adoption of a County-wide Planning Policy for Kitsap County". {Finding of Fact No. 14}. This title corresponds to the language in the GMA. Moreover, Section I clearly indicates that the MOU "constitutes acceptance of the process and framework outlined" in RCW 36.70A.210(2). {Exhibit 3, p. 1; Finding of Fact No. 14}.

What then did the MOU require? A nine step process was outlined in Section II, entitled "Collaborative Process". The relevant portions are quoted below:

...

#### Step 6:

The Council [KRPC] shall consider the recommendation of the joint planning committee at a public hearing or hearings, amend the draft planning policy as appropriate and forward a recommendation to the Kitsap County Board of Commissioners. If the Council is unable to agree on a recommendation by May 15, 1992 the Board of Commissioners may initiate proceedings that will lead the [sic] to adoption of the county-wide planning policy by July 1, 1992.

#### Step 7:

The Kitsap County Board of Commissioners will conduct a public hearing or hearings to consider the recommendation of the Council, modify the proposed county-wide planning policy as determined appropriate and adopt a county-wide planning policy in final form.

#### Step 8:

The adopted county-wide planning policy will be transmitted to the Council and member agencies within twenty (20) days following adoption by the Board of Commissioners. {Exhibit 3, p. 3; Finding of Fact No. 15; emphasis added}.

Summarized, the KRPC was required to make a recommendation to the Kitsap County Board of Commissioners, who were then charged with adopting the CPPs in final form. A city ratification process was not included nor were the Bylaws or Inter-Local Agreement mentioned in the nine step collaborative process.

### b. The Bylaws

The only reference in the MOU to the Bylaws is in Section VIII, entitled "Amendments", which provides:

Modifications to this Agreement [the MOU], including the estimated budget and

process schedule, may be made by a majority vote of the Council as defined in the By-laws. {Exhibit 3, p. 8; emphasis added}.

The fact that Section VIII of the MOU refers to the Bylaws amendment process simply means that for the MOU to be amended, an 80% majority of the participating jurisdictions would have to agree. (See Section 10 of the Bylaws, entitled "Amendments" -- Findings of Fact No. 12). Section 10 of the Bylaws does not stand for the proposition that the CPPs adopted by Kitsap County had to be ratified by the cities.<sup>[19]</sup>

Despite the fact that the MOU does not cite to the ratification provisions in the Bylaws, Bremerton contends that the ratification formula contained in Section 5(2) nonetheless controls. Section 5(2) provides:

The Council [the KRPC] shall review and revise a draft *County-wide comprehensive policy plan* as prepared by Council planners in consultation with member agencies and be responsible for recommending the plan and amendments to its members for approval. The Council will seek to act on the plan or amendments within 90 days of receipt. Ratification of the plan and its amendments shall be achieved when member jurisdictions representing 80% of the population within the region vote to approve within 120 days of presentation. {Exhibit 2, p. 6; emphasis added; Finding of Fact No. 9}.

The Board holds that the ratification formula in the Bylaws at Section 5(2) does not apply to the adoption of CPPs. The Board points to a historical rationale for its conclusion. The Inter-Local Agreement was prepared on June 13, 1991 {Finding of Fact No. 3}, and entered into on July 1, 1991 {Finding of Fact No. 6}. Incorporated by reference in the Inter-Local Agreement were the Bylaws of the KRPC. {Finding of Fact No. 7}. At the time of execution of the Inter-Local Agreement and the Bylaws, the requirement for the adoption of county-wide planning policies (CPPs) legally did not exist; the first set of amendments to the Growth Management Act, which included the requirement for CPPs, did not take effect until July 16, 1991. {Finding of Fact No. 13}.

Therefore, when the Bylaws were adopted, only the original provisions of SHB 2929 were in effect. The Act had yet to require CPPs; it has never specifically required a "*county-wide comprehensive policy plan*". Yet, the Bylaws concentrate on the creation of precisely such a plan. The reference in Section 5(2) to ratification of "the plan" is to the "*County-wide comprehensive policy plan*" discussed in that subsection and repeatedly in other Bylaw provisions. (See also Section 5(3), 5(4) and 5(5) and Section 6 of the Bylaws. {Exhibit 2, pp. 6 - 7}). Such a plan is not defined in the Bylaws and may be an entirely different document than the "county-wide planning policies" required by RCW 36.70A.210.<sup>[20]</sup>

It is also important to note that Section 5(2) of the Bylaws does not mention either KRPC or individual jurisdiction ratification after board of county commissioner adoption. The board of county commissioners is not even named. The only ratification is by 80% of the KRPC member jurisdictions -- after KRPC approval. Yet RCW 36.70A.210(2)(e) requires adoption of CPPs by a county's legislative authority.

Furthermore, as indicated above, Section 5(2) of the Bylaws calls for ratification of the *county-wide comprehensive policy plan* and "... its amendments..." {Exhibit 2, p. 6; emphasis added}. Clearly, the Bylaws are not addressing CPPs. This fact is verified by the CPPs themselves. Section C of the CPPs' Coordination and Cooperation provisions acknowledges that the KRPC:

... shall amend the county-wide planning policy process Memorandum of Understanding to establish the process and guidelines for reviewing and amending county-wide planning policy. The amendments to the Memorandum of Understanding shall address time frames, citizen participation, how amendments may be proposed and specific adoption proceedings. Amendments to the Memorandum of Understanding shall be considered by the Regional Council no later than 120 days after the initial adoption of the county-wide planning policy by the Kitsap County Board of Commissioners and enacted no later than 180 days after adoption. {Exhibit 13, p. 3; Finding of Fact 50; emphasis added}.

The county commissioners adopted this portion of Section C **verbatim** from the KRPC's final version of the CPPs {i.e., the June 3, 1992 Fifth Draft - Exhibit 12, pp. 2-3}. Notice again that no mention whatsoever is made of the Bylaws, the Inter-Local Agreement or any city ratification process. The KRPC's final version was unanimously approved by the members of the KRPC in attendance on June 3, 1992, including Bremerton Mayor Louis Mentor and Bremerton City Council Chair Lynn Horton (also the Chair of the KRPC) and Council member Lon Overson. {Exhibit 20, p. 4a-1 and 4a-4; Finding of Fact No. 39}.

The Introduction to the CPPs adopted by the Kitsap County Board of Commissioners also contains pertinent language. The fourth paragraph states:

A joint planning committee was appointed by the County, cities and tribal governments to review draft policies and develop a recommendation to the Kitsap Regional Planning Council. The Regional Council conducted a public hearing and prepared a recommendation for adoption by the Kitsap County Board of Commissioners. Action by individual cities and tribal governments is not required by ReESHB 1025. Board of Commissioner action is final and binding on the cities unless overturned on appeal. {Exhibit 13, p. 1; see also Finding of Fact Nos. 22 and 24, emphasis added}.

Again, this language is **identical** to the language adopted by the KRPC in its June 3, 1992 version of the CPPs. {See Exhibit 12, p. 1}. Therefore, the mayor, council chair and a council member from the City of Bremerton approved this language. {Finding of Fact No. 39}. Ironically, as pointed out in Finding of Fact No. 22, virtually the same language as that quoted above was initially proposed by the City of Bremerton's Planning Director. {See also Finding of Fact No. 24}.

Finally, if the KRPC intended Section 5(2) of the Bylaws to be the controlling section for adopting CPPs, the MOU would refer to it. Clearly, the KRPC was able to cite to the Inter-Local Agreement and Bylaws in other provisions within the MOU. Yet, Step 7 is totally silent about the Bylaws, particularly about Section 5(2). Common sense dictates that something as important as

city ratification, if it was required or intended, would have been included in the nine step collaborative process. The MOU's collaborative process is too detailed not to include a ratification formula if it applied.<sup>[21]</sup> Therefore, the Bylaws ratification formula is not applicable to the adoption of CPPs. The Board agrees with Kitsap County that the MOU, not the Bylaws, is the controlling document for determining the details of the "collaborative process and framework agreement" established by the cities and Kitsap County.

### c. The Inter-Local Agreement

Bremerton has asked whether Kitsap County breached the Inter-Local Agreement. Yet its argument focuses on the ratification formula in the Bylaws. Although the Bylaws were incorporated by reference in the Inter-Local Agreement {Finding of Fact No. 7}, the Board treats them separately in discussing this issue. As for the Inter-Local Agreement itself, the only reference in the MOU to the Inter-Local Agreement is in Section I(C), entitled "Definitions", which provides:

Unless specified otherwise, terms in this agreement [the MOU] shall have the meaning generally ascribed to them by common usage, by existing relative legislation and by the Council Interlocal Agreement. {Exhibit 3, p. 1; emphasis added}.

This reference to the definitions provisions in the Inter-Local Agreement is not determinative to the issue before the Board.

Although Bremerton did not raise as a formal legal issue to be determined by the Board the question of whether the Interlocal Cooperation Act of 1967, specifically RCW 39.34.030(2), was breached, it argued the matter. The Board has previously held that it does not have jurisdiction to determine whether statutes other than those specified in RCW 36.70A.280(1) have been violated (see *Gutschmidt v. Mercer Island*, CPSGPHB Case No. 92-3-0006). The Inter-Local Agreement was independently entered into pursuant to the Interlocal Cooperation Act {Finding of Fact No. 3}; unlike the collaborative process agreement required by RCW 36.70A.210, this agreement was not mandated by the GMA. The Interlocal Cooperation Act constitutes an "other" statute over which this Board has no jurisdiction. Therefore, *assuming* that Kitsap County had breached RCW 39.34.030(2), the Board would nonetheless be powerless to provide a remedy.

### d. Compliance with RCW 36.70A.210(2)

Whether CPPs that have been adopted by the legislative authority of a county must then be ratified by the cities within that county is not a specific issue before this Board. Bremerton has even acknowledged that the "GMA does not require cities to ratify as part of the process..." (Brief of Petitioner City of Bremerton, p. 6, lines 2 and 3; emphasis in original). Nonetheless, Bremerton has implicitly asserted this issue by asking whether the requirements of RCW 36.70A.210 were "breached" by adoption of the MOU. The Board holds that whether cities must ratify CPPs that have been adopted by a county remains within the discretion of local governments. If the specific collaborative process agreement reached by local jurisdictions requires city ratification, then this process must be followed. However, if the collaborative process agreement

does not contain a city ratification clause, as in the case of the MOU before the Board in this case, only county adoption is required. This holding is consistent with the language of RCW 36.70A.210(2)(e) which provides:

No later than July 1, 1992, the legislative authority of the county shall adopt a county-wide planning policy according to the process provided under this section and that is consistent with the agreement pursuant to (b) of this subsection... (emphasis added).

Subsection (2)(e) by itself does not require city ratification. The Board refuses to interpret the language "ratification of final agreements" in RCW 36.70A.210(2)(b) to mean that city ratification is mandatory. The GMA's use of the phrase "ratification of final agreements" simply means that the agreement between the cities and county can (as opposed to must) include a ratification requirement and process. In conclusion, city ratification of county-adopted CPPs is mandatory only if the collaborative process and framework agreement for adopting CPPs clearly requires it. Agreements that do not contain a ratification process are also in compliance with RCW 36.70A.210.

Accordingly, the Board holds that the County complied with RCW 36.70A.210 when it adopted its CPPs.

#### Conclusion No. 5

The Memorandum of Understanding (MOU) entered into between Kitsap County and certain jurisdictions within the county, including the Cities of Bremerton, Port Orchard and Poulsbo, not the Inter-Local Agreement and Bylaws, constitutes the collaborative process and framework agreement required by RCW 36.70A.210(2). Although such an agreement can include a requirement that individual cities must ratify the county-wide planning policies adopted by a county, such a requirement is optional and left to the discretion of the local jurisdictions. In this case, the MOU did not contain a city ratification requirement. Instead, the MOU's nine step collaborative process culminated with the KRPC making a recommendation to the Kitsap County Commissioners. The Kitsap County Commissioners were then free to amend the KRPC's recommendation and to ultimately adopt the CPPs without further input from the cities or the KRPC.

Both the collaborative process/framework agreement reached in Kitsap County and Kitsap County's actions pursuant to that agreement complied procedurally with the Growth Management Act. The fact that the Kitsap County and the cities located within the county had earlier reached an Inter-Local Agreement and Bylaws to adopt a "county-wide comprehensive policy plan" is immaterial. The necessity of such a plan is not an issue before the Board.

#### Legal Issue No. 6

*If the answer to question #5 is yes, are some or all of the county-wide planning policies null*

*and void?*

Conclusion No. 6

Since the Board determined in Conclusion No. 5 that by executing a Memorandum of Understanding and adopting county-wide planning policies, Kitsap County did not breach the terms of the Inter-Local Agreement and Bylaws of the KRPC, and that it complied with the requirements of RCW 36.70A.210, the Board will not address Legal Issue No. 6.

**E.ORDER**

Having reviewed the file and exhibits in this case, having considered the briefs and arguments of counsel, and having entered the foregoing Findings of Fact and Conclusions, the Board orders that:

The four portions of the Kitsap County County-wide Planning Policies that were challenged by the Cities are **remanded**:

1.Principle of Policy D(2)(d) on page 3 and Element A(3)(k) on pages A-4 and A-5 are not in compliance with the Act.Kitsap County is instructed to remove these policies from the CPPs.

2.The portion of Element A on page A-1 which is captioned "Citizens Should Decide" is not in compliance with the Act.Kitsap County is instructed to remove this language from the CPPs.If Kitsap wishes to include within the CPPs a description of recommended public participation procedures, it is instructed to do so in a fashion that does not alter the land use powers of cities and is otherwise in compliance with the Board's holdings and conclusions.

3.The portion of Element A on page A-1 which is captioned "Provision of Urban Services" is not in compliance with the Act.Kitsap County is instructed to remove this policy and to replace it with one that is in compliance with the Board's holdings and conclusions.

Pursuant to RCW 36.70A.300(1)(b), the Board directs Kitsap County to comply with this Final Decision and Order by **5:00 p.m. on July 12, 1993.**

DATED this 6th day of April, 1993

CENTRAL PUGET SOUND GROWTH PLANNING HEARINGS BOARD

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M. Peter Philley  
Board Member

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Joseph W. Tovar, AICP  
Board Member

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Chris Smith Towne

## Board Member

Note: This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

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<sup>[1]</sup> SHB 2929; 1990 1st ex.s. c. 17.

<sup>[2]</sup> The Board notes that RCW 36.70A.210 is entitled, "County-wide planning policies". However, the text of RCW 36.70A.210 refers to a county-wide planning policy. The Board refers to county-wide planning policies (plural) when it discusses the entire set of individual policies that comprise a county's policies; when the Board refers to a planning policy (singular), it is discussing a specific individual policy within the county-wide planning policies.

<sup>[3]</sup> 1991 1st sp.s. c 32 § 2 (ReESHB 1025)

<sup>[4]</sup> Section IV(C)(6) of the Bylaws provides that the JPC will submit a final recommendation to the KRPC not later than March 10, 1992. {Exhibit 3, p. 6}.

<sup>[5]</sup> The Board assumes, based upon the record before it, that Mr. Pratt's reference to a January 28, 1992 draft of the CPPs is referring to Exhibit 7, the [second] draft CPPs, dated January 30, 1992.

<sup>[6]</sup> The Board notes that the italicized language in this quotation was repeated verbatim in both the final version of the CPPs recommended by the KRPC (see fifth draft {Exhibit 12, p.1}) and in the CPPs ultimately adopted by Kitsap County {see Exhibit 13, p. 1}. This language is virtually identical to the language proposed by Bremerton's Director of Community Development {see Exhibit 8, p. 2; Finding of Fact No. 22}.

<sup>[7]</sup> It appears that the JPC failed to comply with the mandate to "submit a final recommendation to the KRPC not later than March 10, 1992." {see Exhibit 3, Section IV(C)(6), p. 6}.

<sup>[8]</sup> The meeting notes {Exhibit 17} do not indicate which draft of the CPPs was being discussed, but the Board again assumes that it was the fourth draft, dated March 12, 1992, since it is the only draft in the record between March 12, 1992 and the date of the fifth draft, June 3, 1992. However, references in the meeting notes refer to sections that do not exist in the fourth draft. For instance, on page 2 of the meeting notes, Sam Granato had questions about Policy F (3)(a). Such a policy number does not appear in the record before the Board until the fifth draft {Exhibit 12, at p. F-2}.

<sup>[9]</sup> The meeting notes again do not indicate which draft of the CPPs is being discussed. Because the notes refer to elements A, B, E, H, I and J {see Exhibit 18, p. 1}, and those "elements" do not exist in the fourth draft of the CPPs, dated March 12, 1992, (but do correspond to the fifth draft, dated June 3, 1992) the Board assumes that the reference is either to a draft of the CPPs not included in the record before the Board or to an earlier version of the fifth draft.

<sup>[10]</sup> Reference to "Page 3, Section D" is to Exhibit 13, the final version of the CPPs as adopted by Kitsap County, and not to Exhibit 12, the KRPC's recommended version.

<sup>[11]</sup> The Board notes that the reference to "Page A-1, Subsection A" is to Exhibit 12, Element A, second paragraph, p. A-1, lines 23 through 29. There is no subsection A on page A-1 of Exhibit 12 or Exhibit 13-- only Element A.

<sup>[12]</sup> The Board notes with interest that, according to the June 29, 1992 Minutes of the Kitsap County Board of Commissioners, the Board adopted the CPPs on that date instead of August 10, 1992. {see Exhibit 21, p. 383 and Finding of Fact No. 44}. However, the final version of the CPPs is dated August 10, 1992. The actual date of adoption was not an issue before the Board. The petitions for review were filed within sixty days of August 10, 1992, not June 29, 1992. Therefore, the Board concludes that the August 10, 1992 Board of County Commissioners' action is the controlling date of adoption.

<sup>[13]</sup> The Board notes that the KRPC's final version of the CPPs, the June 3, 1992 fifth draft, did not contain a section D. {See Exhibit 12, p. 3}. Section D is new language, first added in the final version of the CPPs adopted by Kitsap County.

<sup>[14]</sup> *Snoqualmie v. King County*, CPSGPHB Case No. 92-3-0004, p. 16, lines 6-8. (Emphasis added)

<sup>[15]</sup> The Board notes that the GMA does not specify how urban growth areas must be designated.

<sup>[16]</sup> The Board notes that the specific labeling of the portions of the CPPs that are in question uses D.2.d and 3.k,

whereas these same items are referred to in the briefs as D(2)(d) and Element(3)(k). For clarity and consistency, the Board employs the parenthetical notation format throughout this Decision and Order.

<sup>[17]</sup>The Board also cautions that the action verbs that follow 'should' or 'shall' in a statement must be carefully chosen because they can provide much more precise and clear direction as to what implementing action or compliance is expected and required. A more detailed discussion of this subject appears in *Snoqualmie* at p. 14, lines 1-18.

<sup>[18]</sup>Kitsap County Opening Brief, p. 9, lines 11-12.

<sup>[19]</sup>Whether the reference in Section 10 to "[T]his plan" refers to the Bylaws themselves or to the "County-wide comprehensive policy plan" discussed in the Bylaws is immaterial to the question before the Board. {see Exhibit 2, p. 8}.

<sup>[20]</sup>The Board has noted the distinction between a comprehensive plan and county-wide planning policies in its *Snoqualmie* decision. The two policy documents are not identical.

<sup>[21]</sup>For instance, Step 8 goes to the high level of detail of requiring the County to transmit the adopted CPPs to the KRPC within twenty days of adoption. {See Exhibit 3, p. 3; Finding of Fact No. 15}.