

# CENTRAL PUGET SOUND

## GROWTH PLANNING HEARINGS BOARD

### STATE OF WASHINGTON

TWIN FALLS, INC.,)Case No. 93-3-0003

)  
WEYERHAEUSER REAL ESTATE CO.,)

)**FINAL DECISION AND ORDER**

and)

)  
SNOHOMISH COUNTY PROPERTY)  
RIGHTS ALLIANCE and DARRELL R.)  
HARTING, Individually,)

)  
Petitioners,)

)  
v.)

)  
SNOHOMISH COUNTY,)

)  
Respondent.)

)

### SYNOPSIS of THE Case

Snohomish County is required by the Growth Management Act to designate forest lands (RCW 36.70A.170(1)(b)) and to adopt development regulations to assure their conservation.RCW 36.70A.060(1).In meeting this obligation, the County undertook a lengthy process, beginning in early 1991, involving staff research, public involvement, establishment of an advisory committee, and development of a recommendation by the County Planning Commission, before hearings and final action by the County Council on December 14, 1992.

The County's compliance took the form of three actions.The County Council adopted a Motion which includes findings of fact, an Interim Forest Land Conservation Plan, and the designation of two classes of forest lands, Interim Commercial Forest and Interim Forest Reserve, on maps.It enacted an ordinance adopting interim regulations to conserve these forest lands and amending five titles of the Snohomish County Code; and it amended an ordinance relating to substantive

environmental authority, to add protection of Interim Forest Lands as an environmental policy.

## **A. PROCEDURAL HISTORY OF THE CASE**

[Because of the lengthy nature of the procedural history in this consolidated case, it is attached as Appendix 1 to this Final Decision and Order.

For reference purposes, the letter "R" signifies a citation to the Record below;"S" refers to SNOCO PRA exhibits;"T" refers to a Twin Falls exhibit;"W" refers to Weyerhaeuser Real Estate Co. (WRECO) exhibits.]

## **B.FINDINGS OF FACT**

### **Public Participation**

- 1.The Snohomish County Planning Department (**Department**) advertised and held a public informational meeting on May 15, 1991 "...to inform the public of the county's intention to plan for the timber industry and commercial forest lands.The meeting was attended by about 60 and was reported by articles in the Seattle Times and The Herald."R-106.
- 2.The Department held three public interest group workshops in June, 1991, attended by about 90 citizens.Issues identified included protection of commercial forest lands from adjacent residential development and conversion to other uses, a wide range of property rights issues (the ability to convert forest lands, the ability to conduct forest practices, protection from chemical spray drift on adjacent commercial forest properties), and environmental concerns.Participants at all three workshops agreed that forest lands should be classified and designated into two or three different classes based on scale of operation: Commercial Forests, Rural Forests, and perhaps Urban Forests.R-106-7.
- 3.The Department held a follow-up public workshop on November 4, 1991, to provide citizens an opportunity to learn about the interim plan, evaluate the alternatives and the policies, and choose a preferred alternative.The workshop was attended by about 25 to 30 citizens.R-107.
- 4.The Department established a Forestry Advisory Committee (the **FAC**) of 12 citizens and representatives of special interest groups to advise and assist the Department in developing the forest land conservation program, including the interim plan and the forestry element of the countywide comprehensive plan.The Committee met five times between August and November of 1991 to consider forest land designations and formulate its recommendation.While the Committee reached consensus on support of proposed Alternative 3 Interim Commercial Forest (**ICF**) designations, and the conservation and planning policies in the interim plan, they did not reach consensus on the proposed Interim Forest Reserve (**IFR**) designation.The minority could not support the IFR designation because it included some areas that had been segmented into 20 acre parcels and removed from forest tax classification.R-107-8, 1612.

### **SEPA Compliance**

- 5.A Determination of Non-Significance (**DNS**) and Environmental Checklist were issued on

November 6, 1991, pursuant to the authority and requirements of the State Environmental Policy Act (**SEPA**). The proposal was described as: "...an ordinance to adopt and implement the county's Interim Forestland Conservation Plan (the **Plan**), which is intended to meet the Growth Management Act [the **GMA** or the **Act**] (SHB 2929) interim requirements for conservation of commercial forestlands. The ordinance would designate mapped areas of the County as Commercial Forest and Forest Reserve lands and conserve designated lands for commercial timber production with interim policies and regulations." R-109, 1935-49.

#### Department's Development of Proposed Plans and Regulations

6. Utilizing the Washington State Department of Community Development's (**DCD**) Minimum Guidelines, the Department developed five criteria to identify productive commercial forest lands eligible for interim designation: 1) Forty Acre Parcel Size; 2) Forest Land Cover; 3) Forest Land Grades; 4) Parcel Pattern Adjacent to Islands and Peninsulas; and 5) 5 acre Subdivisions and 20 acre Segregation. R-8-9.

7. Using the five criteria, a countywide inventory of forest lands identified a large contiguous block of such lands in the eastern portion of the county, and smaller, more isolated lands to the west, referred to as "islands and peninsulas."

Only those islands and peninsulas having at least 640 acres and minimum potential for land use conflicts with adjacent landowners, measured by parcel size and density around the forested perimeter, were considered productive forest land. Therefore, these islands and peninsulas identified in the plan are productive forest lands that should be conserved in a condition suitable for timber production during the interim planning period.

A common argument has been that the islands and peninsulas are needed to accommodate growth in the county. The county's screening process eliminated many large, developable parcels from designation because they did not meet one of the five criteria. As a result, there is more than enough non-forest land and forest land which is not proposed for designation under any of the alternatives available to accommodate projected growth during the interim planning period and for the next 20 years. Excerpt from Memo to Planning Commission from Planning Department, dated January 17, 1992, R-83.

8. The Department developed three designation and regulation alternatives. Alternative 1 (Maximum Commercial Forest Lands Designation Proposal) would designate as Interim Commercial Forest all productive forest lands identified in the interim plan, providing maximum protection to the largest amount of productive forest land. Alternative 2, developed by the Washington Forest Protection Association (**WFPA**), would designate only these lands identified as suitable for long-term commercial timber production by Association members and the Washington State Department of Natural Resources (**DNR**). Alternative 3 would distinguish between large and small scale forestry operations, and establish two designations and sets of policies, ICF and IFR. R-103-104.

Alternative 1: The forest land identified in Alternative 1 is the result of applying the five criteria described in the plan uniformly county-wide. These lands are generally 40 acre parcels or larger, have commercial forest cover, are in areas of high forest land grades, and have minimal adjacent

land use conflicts. Furthermore, no lands with approved 5-acre subdivisions have been proposed for designated forest. These criteria were developed in consultation with the FAC as a means to identify forest lands in Snohomish County that have potential long-term commercial significance consistent with the state's minimum guidelines. Alternative 1 designates these lands as interim Commercial Forest lands, thus protecting all potential forest lands of long-term commercial significance equally during the interim planning period.

Alternative 2 was proposed by the WFPA members and the DNR Northwest region, who each evaluated their land for its ability to remain in forest management over the long-term. Although the landowners were able to consider proprietary economic data in the evaluations, the use of these data varies among landowners. This proposal only evaluated and considered the lands of eight large industrial landowners and the DNR, thus limiting the study area and the lands proposed for designation.

Alternative 3 was not one of the Planning Department's original alternatives, but was developed through the FAC process. Prior to development of Alternative 3, half the committee strongly favored Alternative 1 and half strongly favored Alternative 2. Alternative 3 was developed as a means of resolving the issues that polarized the committee on this decision. Technically, Alternative 3 was developed from Alternative 1 by differentiating between large scale forestry operations, which generally occupy the large contiguous block of forest land in the eastern portion of the county, and smaller scale forestry operations which generally occupy the islands and peninsulas lying westward. Large scale forestry operations are classified as Commercial Forest land and smaller scale operations as Forest Reserve lands. The less restrictive development regulations applied to the Forest Reserve lands were intended to reduce the potential economic impact of designation on smaller Forest land owners during the interim planning period.

Alternative 1 encompassed a total land area of 288,797 acres, all designated Commercial Forest; Alternative 2 covered only 242,992 acres, all designated ICF; Alternative 3 designated 257,080 acres as ICF, and 31,717 acres as IFR (the same number of acres as Alternative 1).R-13.

#### Recommendation of Planning Department

9."The Planning Department recommended Alternative 3, because unlike Alternative 1, Alternative 3 differentiates between small and large scale forestry operations with two classifications of commercial forest land. Furthermore, the Planning Department felt Alternative 3 was responsive to public concerns and issues identified by the FAC and citizens participating in public workshops."R-82.

Alternative 3:

...maximizes the amount of productive forest land conserved during the interim planning period, while recognizing that the different scale forestry operations common to Interim Commercial Forest and Interim Forest Reserve lands warrant different conservation measures. Eliminating subdivision of the Interim Commercial Forest would maintain some forest lands in parcels sizes capable of maximizing timber production efficiency. Restricting subdivision of Interim Forest Reserve to parcels 20 acres and larger is intended to maintain parcels at a size that may be managed for timber production, but assumes that maximizing

timber production efficiency may not be the primary objective of smaller forestry operations.... Excerpt from Planning Department Memo to Planning Commission, dated November 14, 1991, R-105.

Approximately 684 individual parcels exist within the areas proposed as Forest Reserve. A total of approximately 5,350 parcels could theoretically be created in the proposed Forest Reserve area, assuming the ability to subdivide at the maximum density permitted by existing zoning and no loss of density due to roads, utility easements, environmentally sensitive areas, etc. Excerpt from December 19, 1991 Memo, Planning Dept. to Planning Commission, R-98.

10. In response to statements that the designation of Forest Reserve lands went beyond the county's authority under the GMA, a Department report noted that:

The Forest Reserve lands and Commercial forest lands identified in Alternative 3 are both considered potential forest lands of long-term commercial significance based on the established criteria and county-wide inventory. Forest Reserve lands were not "added" to the plan, but differentiated from the Commercial Forest lands shown in Alternative 1. Adoption of Alternative 1 or Alternative 3 would not go beyond the State's GMA minimum requirements. Adoption of Alternative 2 may not meet the State's GMA minimum requirements since it did not result from a complete county-wide inventory of commercial forest lands. Furthermore, Alternative 2 designates substantially less land than the existing areas plans, which did utilize designation criteria and land use inventories on a planning subarea basis.

Designation of Forest Reserve Lands: Forest Reserve lands do not go beyond the Commercial Forest designation required by the GMA. Forest Reserve lands meet all the criteria for classification as Commercial Forest lands. Under Alternative 3, Forest Reserve lands were differentiated from Commercial Forest lands because they were composed of smaller parcels and located closer to developed areas. This differentiation prompted a relaxing of the more restrictive measures associated with the Commercial Forest designation and therefore, creation of the Forest Reserve (and Alternative 3). In fact, most of the Forest Reserve lands produce more valuable trees at a faster rate than do the Commercial Forest lands because of lower elevation, smoother terrain and excellent soil conditions. Excerpt from Memo to Planning Commission from Planning Department, dated January 17, 1992, R-83-85.

#### Effect of Plan and Regulations on Legally Existing Uses

11. During development of the Plan, the issue of whether designation would affect permitted uses on designated properties was discussed repeatedly. The Department stated that:

The interim plan is an overlay to existing area plans and zoning. Except for subdivision restrictions, setbacks, and fire protection assurances imposed on designated and adjacent lands, landowners are not restricted in use of their property beyond its current zoning. The policies would not prevent landowners from building a house or other structures, harvesting timber, clearing trees for a pasture, mining or any other land uses permitted under their

current zoning. The purpose of limiting subdivision on designated lands is to maintain those properties in a condition in which they could be managed for timber production now, and in the future if they are designated permanently in the county-wide comprehensive plan. This interim plan does not require all designated lands (Commercial Forest and Forest Reserve) to remain in forestry uses. While forestry is encouraged, all existing and allowed uses under the zoning code will still be allowed, but new dwelling units will be subject to the 200' or maximum possible setback, whichever is less, and to the fire protection measures. Excerpts from Memo to Planning Commission from Planning Department, dated January 17, 1992, R-83-84 (emphasis added).

12. The Department, in response to public comments related to some of the lands which would be subject to designation under Alternative 3, but had been recently segregated or otherwise planned for development, considered potential modifications to meet such objections. Under Alternative 3B:

Forest lands recently segregated into parcels smaller than 40 acres would be removed from the Forest Reserve. Pending and future development projects on these lands would be required to meet the interim plan requirements applying to lands adjacent to designated forest lands to maintain the productivity of remaining Forest reserve lands.

[Although recently segregated forest lands (1990 and 1991)] no longer meet the 40 acre size criteria, they were designated Forest Reserve because the parcels are still within the 20 acre minimum lot size and have potential for producing some timber, and a substantial number of the parcels created have not changed ownership.) This alternative would essentially remove 5,270 acres of forest lands from the Forest Reserve, including segregated lands and additional parcels that would otherwise remain isolated and therefore warrant removal as well. These changes would completely remove the Bosworth Block, Menzell Lake Road, and Little Pilchuck Creek areas referred to in the interim plan document. (Figure 3)

[Alternative 3C would have excluded parcels with pending large-lot subdivision applications as of 1/1/92 from the Forest Reserve. Alternative 3D would identify and designate Commercial Forest and Forest Reserve; however, subdivision of FR would not be restricted; all incentives and disincentives would apply to FR.] Excerpts from Memo from Planning Department to Planning Commission, dated February 13, 1992, R-57-58.

13. The Plan itself, in setting forth the need for interim regulation of commercial forest lands, analyzed the acreage in each of eleven zoning designations for each of the three alternative classification and designation proposals. It noted that "The most productive private and state commercial forest lands remaining in the county are zoned Forestry, Rural-5, Rural Conservation and Rural Diversification." R-12-13.

#### Property Rights

14. In a memo to the Planning Commission, the Department commented on issues raised at the former's January 28, 1992 hearing related to individual property exclusions, individual property rights, and economic impact of the Plan:

Because all of the [Forest Land Plan/Regulations] alternatives are interim, overlay existing zoning, and impose more stringent development regulations than the existing underlying zoning, none of the three alternatives are expected to have a significant adverse environmental impact.

The restriction of subdivision of designated lands during the interim could have a short-term adverse economic impact on the landowners of designated lands as lost or postponed income. This impact only applies to those lands that would have been subdivided and developed during the interim in the absence of this Plan.

The costs imposed on landowners by the interim plan are limited in scope and short-term. Since the designations and conservation measures of the interim plan may change in the county-wide comprehensive plan, reimbursement of affected landowners may result in premature allocation of county or taxpayer funds. Excerpts from Memo from Planning Department to Planning Commission, dated February 13, 1992. R-57-58.

#### Planning Commission Hearings and Action

15. The Department transmitted a Draft "Interim Forest Land Conservation Plan and an Ordinance Establishing Interim Designations and Conservation of Productive Forest Lands" to the Planning Commission on November 14, 1991.

16. On January 13, 1992 the Department sent 5,200 public hearing notices to all owners of property proposed for designation as interim forest land or within 300 feet of lands proposed for such designation.

The Alternative 3 map that was sent out as part of the public notice was drafted from the Planning Commission Exhibit map, which was compiled from the Assessor's maps that show the official designation boundary. Extreme care was taken to depict Alternative 3 as accurately as possible on an 1:422,400 scale map.... This map [R-68] also appears in the January Draft of the Interim Forest Land Conservation Plan. R-66-67. (Emphasis added).

17. The Planning Commission received extensive written and oral communications from corporations, private citizens, and citizen organizations, including the Petitioners in this matter, commenting on the proposal and alternatives. R-118-437 - Letters; R-903-910 - Hearing Sign-up Sheets; R-1098-1102, 1129-1171 - Partial Transcripts of Hearings, 1172-1178 - Minutes of February 24, 1992 Meeting. The Department also received letters throughout the development, consideration and adoption of the regulations. R-1974-2073.

18. The Planning Commission held public hearings on the proposed Interim Forest Land Conservation Plan and Implementing Ordinance on November 26 and December 11, 1991, and January 28 and February 24, 1992. It discussed and considered the Plan on December 19, 1991 and February 24, 1992.

19. On February 24, 1992, the Planning Commission voted to recommend approval of an amended version of Alternative 3 to the County Council. Recommended amendments to the Plan and implementing ordinance addressed the following topics:

Addition of Resource Protection Area of at least 50 foot width along boundaries of Interim Forest Lands.

Increase of minimum subdivision parcel size from 20 to 80 acres in Interim Forest Reserve areas.

Reduction of setback, requirement for pre-application survey, fire protection for dwellings. Establishment of a 200 foot resource protection area when subdividing parcels adjacent to forest land.

Clustering Ordinance to be developed by July 1, 1992; if no adoption by January 1, 1993, Regulation 2 of the Forest Lands Ordinance shall be repealed.

Within six months of adoption of the Plan, landowners may request exclusion from or addition to Interim Forest Land designation. Staff will evaluate properties for consistency with the criteria in Section III of the Plan, and conduct a site visit. Recommended changes "...shall be processed as a comprehensive plan amendment. This policy shall be repealed when permanent forest lands are designated as part of the countywide comprehensive plan." R-45-51.

20. The Planning Commission recommendation included the following findings:

The subdivision restriction on Interim Forest Reserve lands should be increased from 20 to 80 acres because the minimum amount of forest land required for efficient timber production is uncertain and the forest lands remaining in the county should be held in place while the Planning Department staff conduct further research on the economics of timber production and prepare the comprehensive plan.

Commercial forest practices may cause a hazardous situation to dwellings located within 200 feet of commercial forest properties and both the adjacent residential landowner and the forest landowner should share the responsibility of reducing the potential hazard. Under the State Forest Practices Act, however, the County cannot regulate forest practices, although forest managers are currently required to abate logging slash adjacent to residences, thus reducing the potential fire hazard caused by logging debris. Therefore, the requirement for a 200 foot setback should be reduced to 50 feet for new dwelling or existing legal lots, strong fire prevention measures should be required in new dwellings, and developing landowners adjacent to designated forest lands should be encouraged to establish a 200 foot setback between their dwelling and adjacent interim forest land boundaries.

New subdivisions of parcels adjacent to interim forest lands have a better ability than existing legal lots to minimize hazards and conflicts associated with forest practices near residential development by establishing a 200 foot wide resource protection area during the platting process or clustering homes away from interim forest land boundaries. R-40, 50-51.

#### Snohomish County Council Hearings and Action

21. The County Council received the proposed Plan, implementing ordinance and SEPA ordinance amendment on March 31, 1992. It held public hearings on September 30, and November 4, 1992; the latter hearing was continued to and concluded on December 14, 1992. R-40-41.

22. The County Council received extensive written and oral comment from corporations, private

citizens, and citizen organizations, including Petitioners, on the proposed Motion and Ordinances. R-438-811 - Letters; 14 tapes of public hearings.

Motion No. 92-283 (the **Motion**) Adopting Interim Forest Land Conservation Plan

23. The County Council considered, modified and enacted Motion No. 92-283, "Adopting The Interim Forest Land Conservation Plan and Designating Interim Forest Lands" on December 14, 1992. The action responded to the GMA requirement to classify, designate and adopt interim development regulations to conserve productive forest lands until the countywide comprehensive plan is adopted. R-1-25.

The Plan describes the county's commercial forest lands and industry, the alternatives considered, and methods selected to classify and designate forest lands. It sets forth interim policies "intended to address the immediate threats to commercial forest lands..." and characterizes the policies as "... a temporary overlay for existing zoning and land use designations. This interim plan does not revise or replace existing zoning and land use restrictions except in the case of conflicting regulations; then the interim plan policies would take precedence." R-14-16. The Plan also delineates a set of policies to guide the comprehensive planning process, identifying issues requiring additional research, ordinances, or other remedies. R-17-19.

In its deliberations after the conclusion of the final hearing, a Department staff member, in response to a question from the County Council, stated that: "The motion that you have before you adopts the designation, and the designation is shown on maps....[T]he motion that adopts the designation simply refers to the maps. So if we are to change the designation line, it would just have to be done on the maps and there would be no text changes needed. Transcript, December 14, 1992 County Council Meeting, W-14, at 17-18.

A Department staff member, responding to an earlier request by the County Council to review approximately 15 requests for changes in the proposed designation, presented staff recommendations for each request.

24. In its Findings, the County Council found that:

Approximately 43 percent of the county's land area is devoted to commercial forestry; of that 579,636 acres, about 62 percent is privately owned. R-5. The Snohomish County timber industry is productive and contributes significantly to the economic vitality of several communities in the county.... Historically, forest products mills in the county have depended primarily on timber supplied from the Mount Baker-Snoqualmie National forest, which is expected to decline by more than 83 percent over the next ten years. Due to large cutbacks in federal timber supply to local mills, the future health of the timber industry and dependent communities in the county rely on the availability of timber from state and private commercial forest lands. R-105.

The Plan itself, at II.A, finds that:

The timber industry in Snohomish County is productive and should be maintained and

enhanced....Combined third quarter 1990 wages for manufacturers of lumber and wood products, and paper and other allied products totaled \$35,911,818, ranking third highest among manufacturing industries....In the communities of Darrington, Gold Bar, Granite Falls and Arlington, between 10 and 52 percent of the population was employed by 47 wood products employers in 1990....The economic vitality and perhaps the existence of some of these communities depend on the health of the timber industry in Snohomish County.R-4-5.

The Plan comments that:

When residential development is located adjacent to commercial forest land, the costs of forest management increase....These costs reduce the productivity of forest lands and leave some lands inoperable for timber production.R-7.

#### Classification and Designation of Forest Lands: Alternatives

25.The Plan cites DCD's definition of classification in its Minimum Guidelines: "Defining categories to which natural resource lands and critical areas should be assigned." "Further classification may be appropriate and is consistent with the minimum guidelines." The Plan states: "...designation relates classifications to a map." "The Minimum Guidelines served as a guide for county planning staff in determining what forest lands in the county may have long-term commercial significance and thus, are eligible for interim forest land classification, designation and conservation. The Minimum Guidelines (WAC 365-190-060) state that counties and cities should use the private forest land grades of the Department of Revenue."R-7-8.

26.The County adopted the five criteria referred to in Finding No. 6 above to identify productive commercial forest lands eligible for interim designation:

Forty acre parcel size:The County relied on studies showing 20 acres as the minimum size allowing a positive return on investments, and that economies of scale level off at about 80 acres, and its observation that large contiguous areas of 40 acre or larger parcels remain in the County.R-8.

Forest land cover:The County examined aerial photographs, noting that "large commercial forest areas, densely built areas and agricultural areas were easily identified on the aerial photographs, unlike areas of mixed forest, agriculture and residential development."In the former areas, "forested areas of at least 40 acres without a building were identified as productive forest land...."R-9.

Forest land grades: The County determined that grades one through three of the State Department of Revenue forest land grades were the most productive forest lands for timber production in Snohomish County, and utilized the Department's [of Revenue's] Land Grade maps to identify "a large contiguous area of productive commercial forest land in eastern Snohomish County, and islands and peninsulas of productive commercial forest lands westward."R-9.

Parcel pattern adjacent to islands and peninsulas:The County used the size of adjacent parcels, as determined from Assessor's maps, as an indicator of existing land use conflicts. R-9.

Five acre subdivisions and 20 acre segregation:To determine recent development history, the County used Planning Division maps to locate proposed large lot subdivisions and land segregations filed between 1988 and 1991.R-9.

27.Three classification and designation schemes were considered as alternatives:

Alternative 1:All areas identified as productive commercial forest land, according to the classification and designation criteria described in Section III, would be designated as Commercial Forest.

... Alternative 2 would designate all lands within the WFPA proposed line as Commercial Forest.

In Alternative 3 ... islands and peninsulas and areas of recent 20 acre segregations are recognized as having forest land characteristics different from those of larger contiguous forest land parcels in the eastern portion of the county.Therefore, two interim forest land classes are used in this Alternative.The area identified in Alternative 2, along with seven adjacent areas which consist of large parcels owned primarily by one timber company or the DNR and not segmented into 20 acre parcels, would be designated as Commercial Forest.All remaining areas identified in Alternative 1 would be designated as Forest Reserve.These two classes of forest land would be protected under different interim conservation policies and regulations.R-11-12.

In a presentation to the County Council at the September 30, 1992 hearing, a staff member commented on the use of two classes:

Alternative 3 recognized all forest land identified by countywide inventory as productive forest lands....[H]owever, it also recognized that some of these areas lie farther west in the county and are surrounded by mixed rural uses.Therefore it designated these areas as forest reserve.The forest reserves are considered productive forest lands, because of the development pressure they face, being farther west and surrounded by rural land uses, and they would be allowed some residential development, as long as that development conserves some forest land and doesn't convert all of it, and is compatible with forest land uses on adjacent properties.

The Planning Commission found that these lands, [proposed for designation as Forest Reserve] under the development pressure they are, would not be likely for permanent designation if they were not designated in the interim plan, and therefore should be included in the interim plan so they could at least undergo further study.

In response to a County Council member's question: "What is the likelihood of forest reserve designated land being productive forestry? Will it be logged, planted and relogged....Criteria notwithstanding, is it productive - are they actually harvesting off that land?" A staff member responded: "You're saying current use in forest management should be a criteria."The council member continued: "If it's going to be productive timber land, then that's some kind of guarantee in all of this that that's what that land is going to be used for.If there's a chunk of land in that green area that's just a hillside and it's never going to be logged or it's bare now, what is the likelihood of forest reserve land being productive timber land?"The staff member responded: "I

don't know. I don't know if we can have policy that guarantees that... We didn't interview anyone to see if they are currently managing those areas - thinning, spraying, other activities that take place typically on forest lands, although they do meet the criteria.... The areas currently have trees or were recently clearcut or harvested and replanted. They may not already be replanted." Tape of September 30, 1992 County Council Hearing.

In response to a County Council member's question concerning the difference between the two designations, a Department staff member answered: "Alternative 3... says the lands identified as forest reserve are generally not those owned by large timber companies, but are generally smaller parcels of land - 40 to 200 acres, rather than 30000. But really it was a political decision by the [FAC] committee. The land is similar to commercial in that it does meet the five criteria." Tape of November 4, 1992 County Council Hearing.

28. The Plan classifies and designates productive forest lands in the county into two classes: ICF and IFR, as delineated on a 1:48,000 scale map and county assessor's maps. R-3.

Maps showing Private Forest Land Grades (**FLGs**) (Fig. 1), Areas Evaluated for Existing Adjacent Land Use Conflicts (Fig. 2), Large Lot Subdivisions and Segregations within Productive Forest Lands (Fig. 3), Alternative 1: Maximum Commercial Forest Lands Designation Proposal (Fig. 4), Alternative 2: WFLPA Proposal (Fig. 5) and Alternative 3: Commercial Forest/Forest Reserve Proposal (Fig. 6). R-20-25.

29. The County Council determined that "[I]t is probable that some commercial forest land will be converted to residential use while the comprehensive plan is being prepared, thereby increasing the potential for conflict with surrounding commercial forest lands, eroding the integrity of the existing commercial forest land base that supports the timber industry in the county, and subverting the comprehensive planning process." The Plan is intended to meet the GMA requirement to "...adopt interim regulations to conserve all resource lands, including commercial forest lands" during the period when the Comprehensive Plan is being prepared, as well as to identify data needs and issues the county should consider in preparing the Comprehensive Plan. R-4.

#### Ordinance No. 92-101 - Adopting Interim Regulations to Conserve Forest Lands:

30. The County Council adopted Amended Ordinance No. 92-101, "Adopting Interim Regulations to Conserve Forest Lands Amending Snohomish County Codes Titles 17, 18, 19, 20 and 32", on December 14, 1992 pursuant to the GMA requirement to adopt interim development regulations to conserve productive forest lands during the interim planning period prior to adoption and implementation of the countywide comprehensive plan.

31. The Ordinance adds a new chapter 32.13 - Interim Forest Land Conservation Regulations - to the Snohomish County Code (**SCC**). Sections include: definitions; subdivision restrictions; siting of dwellings on or adjacent to interim forest lands; notice of commercial forestry activities required; establishment of resource protection areas; and applicability.

32. The Ordinance sets forth twelve planning policies, intended to "...guide staff preparation of the forestry element of the countywide comprehensive plan required by the GMA" including:

...

(2) Within six months of the date this ordinance is adopted, the county shall adopt a "Right to Practice Forestry" ordinance that discourages adjacent landowners from filing a nuisance suit against an interim forest land owner who is operating under best management practices as defined by current Washington Forest Practice Rules and Regulations.

...

(9) When the county adopts an ordinance that allows clustering of homes in rural area subdivisions, subdivision and short subdivision of parcels adjacent to interim forest lands shall be required to cluster home sites away from interim forest lands.

(10) The county shall review landowners' requests to have their land excluded from an interim forest land designation. Requests for exclusion shall be accepted by the county for six months following the adoption of the Interim Forest Land Conservation Plan. The properties to be reviewed under this policy shall be evaluated for their consistency with the five criteria described in Section III of the Interim Forest Land Conservation Plan and for the presence of other interim resource land designations; and a site visit from Planning department staff shall be conducted as part of the review.... Recommended changes in the interim forest land boundary resulting from review of individual properties shall be processed as a comprehensive plan amendment. This policy shall be repealed when permanent forest lands are designated as part of the countywide comprehensive plan. R-30.

33. The Ordinance adds a new section (.035) to SCC chapter 17.04, a new section (.035) to SCC chapter 18.11, a new section (.015) to SCC chapter 19.08, and a new section (.015) to SCC chapter 20.12, each providing that "In the event of a conflict between a provision in this chapter and chapter 32.13 SCC, the requirements of chapter 32.13 SCC shall control." R-31.

34. The Ordinance bars subdivision of land designated ICF "...until the final commercial forest designation is established and the comprehensive plan and implementing development regulations are adopted pursuant to the GMA. SCC 32.13.020(1). "Land designated Interim Forest Reserve shall not be divided into parcels of less than 80 acres in size. SCC 32.13.020(2). R-28.

35. In speaking to a proposed amendment to change the designation of a portion of the Bosworth Block from IFR to ICF, a council member noted that:

...the land would fall under the requirements of commercial forestry in the ordinance so that, for example, there would not be further subdivision into 5-acre parcels. For example, it would, as part of its -- or as appropriate for its forest land grade status, continue as commercial forest or, if sold to individuals as subdivided, would not be further subdivided beyond that. Transcript of December 14, 1992 County Council Meeting, W-14, at 39.

Responding to another council member's question regarding the change from Forest Reserve to Commercial Forest, the first council member said:

[IFR designation] allows for subdivision into the rural cluster much smaller lots. R-5, for example, I believe is the underlying zoning for the majority of that property and would allow for what I believe is a significantly incompatible use with commercial forestry. W-14, at 39.

Designation of WRECO Property

36. In 1990, the Weyerhaeuser Company conveyed property in the Bosworth Tract, in the vicinity of Granite Falls, to its subsidiary, Weyerhaeuser Real Estate Company (**WRECO**). The property had been designated as Rural-5 in 1984, as a part of the County's Granite Falls Comprehensive Plan. That designation permits low-density residential development of one dwelling unit per five acres. The County Zoning Code, SCC 18.12.040, designates the land as R-5, allowing single-family, mobile home and duplex dwellings.

In 1990, WRECO removed the property from the tax designation for timber lands, paying a compensating tax to the County. In March, 1991, WRECO segregated the entire property into lots of approximately 20 acres; since that date, it has sold 27 lots and carried out minor road improvements.

37. In a memorandum from the Department to the County Council, dated December 11, 1992, Figure A, attached to that transmittal, recommends that WRECO's property be designated as IFR. R-823; R-105. That recommendation was consistent with the recommendation of the FAC and Planning Commission. "Eliminating subdivision of the Interim Commercial Forest would maintain some forest lands in parcels sizes capable of maximizing timber production efficiency. Restricting subdivision of Interim Forest Reserve to parcels 20 acres and larger is intended to maintain parcels at a size that may be managed for timber production, but assumes that maximizing timber production efficiency may not be the primary objective of smaller forestry operations. A cluster ordinance would allow controlled increases in residential development on Interim Forest Reserve lands with the establishment of a conservancy tract solely for timber production." R-105.

During the County Council's consideration of the Motion and Ordinances on December 14, 1992, the designation of the WRECO property was changed from IFR to ICF.

#### Designation of Twin Falls Property

38. Twin Falls acquired approximately 190 acres in the Arlington Area of central Snohomish County in May, 1992, with the intention to develop the property for low density recreational/residential use (10 or 11 homesites). The property is in a classified timber tax category. The property was segregated into nine 20 acre parcels on February 3, 1993. The property is currently being logged under Class II and III Forest Practices permits issued by DNR. The County may impose a six year moratorium on acceptance of any development permits if a landowner has logged under those classes of permits. There is informal recreational use of the property by adjacent residents. T-292-294; Twin Falls' Brief, at 3-4.

39. The site has FLGs of primarily 2 and 3, with pockets of non-commercial forest land. It has two lakes with associated wetlands, two waterfalls, and terrain varying from floodplain to steep cliffs and valleys. "Lack of regeneration and management for commercial timber production could explain why the site contains an uneven-aged, mixed species stand of timber, which is less valuable than an even aged stand of Douglas Fir and Western Hemlock. T-292-293; Twin Falls' Brief, at 5-7.

40. The major portion of Twin Falls' property (120 acres) was designated Interim Commercial Forest; a lesser portion, 20 acres at the southern end, was designated Interim Forest Reserve. The

property is surrounded by designated interim forest land except for a 1/4 mile portion along its southwestern property boundary. In February, 1993, Twin Falls sought to remove interim forest designations from its property; the Department determined that the "site meets all of the criteria for designation as interim forest land, and recommended it remain designated as Interim Commercial Forest (160 acres) and Interim Forest Reserve (20 acres)." T-292-294.

Ordinance No. 92-102 - Substantive Environmental Authority:

41. (Amended) Ordinance No. 92-102 amends Chapter 23.36 SCC, the County's SEPA substantive authority ordinance, to add the Forest Land Conservation Plan and Interim Development Regulations to Conserve Forest Lands as bases for the county's exercise of SEPA authority. R-33-34.

**C. DISCUSSION OF SPECIFIC LEGAL ISSUES**

All legal issues do not pertain to all Petitioners. If a specific legal issue does not pertain to all three Petitioners, it is followed by a bracketed notation indicating the party or parties to which it applies. The letter "T" represents Twin Falls, "W" represents WRECO and "S" represents the Snohomish County Property Rights Alliance and Darrell R. Harting (**SNOCO PRA**).

Legal Issue No. 1

***Does Section 2(10) of Snohomish County Ordinance 92-101, which provides for legislative review of forest land designations for a six month period, comply with the GMA? [T]***

This issue, raised only by Twin Falls, was neither discussed in writing, via briefs or memoranda, nor orally argued. Therefore, the Board deems Legal Issue No. 1 abandoned, and will not consider it further. This is the first such instance in the Board's history; since the question is one of first impression, an elaboration follows.

The burden of proof in a case before the Board is on the Petitioner. *See* WAC 242-02-632. As an essential first step, RCW 36.70A.290(1) requires a petitioner to include in a petition for review a "...detailed statement of issues to be presented for resolution by the board." Meeting this requirement puts the Board and other parties on notice as to the basis for the petition, and promotes a better understanding of the case. More importantly, it also promotes efficiency by requiring petitioners to explain precisely how the local jurisdiction has failed to comply with the GMA. Such efficiency is of particular import because of the Board's tight schedule for decisions established by RCW 36.70A.300.

Where a legal issue is not sufficiently detailed in the petition, the prehearing conference affords an opportunity to refine the issues. WAC 242-02-550(3). In this case, the Board devoted most of its prehearing conference to this task, and then amended its Prehearing Order three times in response to Petitioners' requests.

Twin Falls met the requirement to prepare a detailed statement of its legal issues, but as to Legal Issue No. 1, it failed to carry out its second responsibility, to show why the actions of a local government are not in compliance with the GMA. Simply raising an issue is not enough for the Board to resolve it. The Board must review the Petitioner's rationale for its contention, and weigh that argument against the local government's response. Without preparing a brief or legal memoranda, a petitioner cannot meet its burden.

The Board treats raising detailed statements of legal issues as analogous to an appellant assigning errors in a case before an appellate court: if they are not argued in a brief, they are abandoned. This is consistent with case law discussing how appellate courts treat unbriefed issues. As the Washington Supreme Court succinctly held, "[W]e do not pass upon this unbriefed issue." *Maybee v. Machart*, 110 Wn.2d 902, 906, 757 P.2d 967 (1988). "...A party abandons assignments of error to findings of fact if it fails to argue them in its brief." *Valley View v. Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987), (citing *Seattle School District 1 v. State*, 90 Wn.2d 476, 488, 585 P.2d 71 (1987); *Lassila v. Wenatchee*, 89 Wn.2d 804, 809-10, 576 P.2d 54 (1978); and *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977)).

For future reference, (because this did not happen in this case) the Board also holds that a petitioner who raises a legal issue but fails to brief it cannot revive that issue by orally arguing it. A petitioner will be entitled to present oral argument on a specific issue only if a brief has been filed on that issue. *See also* RAP 11.2(1). On the other hand, a petitioner who has briefed an issue need not orally argue it. That decision remains at the petitioner's sound discretion.<sup>[1]</sup>

Finally, the Board notes that it need not determine whether an issue was intentionally abandoned (for instance, a tactical decision or because the issue has subsequently been resolved) or abandoned through neglect. As a general rule, so long as the party was afforded ample opportunity to brief its issues, either by means of dispositive motions or hearing briefs, as in the present instance, the Board will treat an unbriefed legal issue as abandoned; it will not be considered, and will be dismissed with prejudice.

#### Conclusion No. 1

Legal Issue No. 1 was abandoned by Twin Falls. The Board will not consider it further. It is dismissed from this case with prejudice.

#### Legal Issue No. 2

***Are the review criteria in Snohomish County Ordinance 92-101 to be used by the Snohomish County Council in compliance with the GMA? [T]***

This issue also was raised only by Twin Falls. Twin Falls again did not brief this legal issue nor present oral arguments about it. Therefore, the Board deems Legal Issue No. 2 abandoned; it will not be considered further by the Board.

### Conclusion No. 2

Legal Issue No. 2 was abandoned by Twin Falls. The Board will not consider it further. It is dismissed from this case with prejudice.

### Legal Issue No. 3

***Are the legislative scheme and goals of the GMA frustrated when the County adopts development regulations for only one natural resource rather than all, within the appropriate time limit for designating all natural resources? [T]***

### Conclusion No. 3

Twin Falls' Dispositive Motion #1, filed with the Board on May 12, 1993, addressed Legal Issue No. 3. Twin Falls requested that the Board declare the Motion and Ordinances not in compliance with the GMA because the County designated only forest land rather than also designating agricultural and mineral lands and critical areas.

On June 11, 1993, the Board entered an "Order on Dispositive Motions" that denied Twin Falls' motion and dismissed Legal Issue No. 3. Please refer to that document for a detailed discussion of the Board's analysis.

### Legal Issue No. 4

***What does the following sentence in RCW 36.70A.060 mean:***

***...Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.120... [T, W]***

Neither Twin Falls nor WRECO specifically addressed Legal Issue No. 4 in its brief.<sup>12</sup> However, the Board will not treat this issue as abandoned because the issue itself is integral to the discussion of Legal Issue No. 7. Therefore, the Board will include its discussion of Legal Issue No. 4 within its discussion of Legal Issue No. 7.

### Conclusion No. 4

The Board will address this issue within its conclusion in Legal Issue No. 7.

### Legal Issue No. 5

***Do the Motion and Ordinances prohibit uses legally existing on any parcel prior to their adoption in violation of the Growth Management Act? [T, W]***

Neither Twin Falls nor WRECO specifically addressed Legal Issue No. 5 in its brief. However, the Board will not treat this issue as abandoned because the issue itself is addressed by Legal Issue No. 7. Therefore, the Board will include its discussion of Legal Issue No. 5 within its discussion of Legal Issue No. 7.

Conclusion No. 5

The Board will address this issue within its conclusion in Legal Issue No. 7.

Legal Issue No. 6

***Did Snohomish County comply with the requirements of the GMA in adopting its Motion and Ordinances which amend the County's previously existing development regulations as defined at RCW 36.70A.030(7)? [T, W]***

WRECO addresses Legal Issue No. 6 at pp. 19 - 23 of its Hearing Memorandum. WRECO's main argument again is that the County failed to **consider** the Minimum Guidelines, particularly WAC 365-190-040(2)(b) which provides in part:

Adoption process. Statutory and local processes already in place governing land use decisions are the minimum processes required for the designation and regulation pursuant to RCW 36.70A.060....

WRECO then cites specific provisions of the SCC and Charter, and from the Planning Enabling Act, Chapter 36.70 RCW, that it claims the County violated.

The Board has already discussed the nature of the Minimum Guidelines generally and specifically, the above-quoted portion of WAC 365-190-040(2)(b), in its Order on Dispositive Motions entered in this case on June 11, 1993. The Board concluded that the Minimum Guidelines are advisory only, to be considered by counties when classifying and designating natural resource lands. *See* Order on Dispositive Motions, at 7.

The Board addressed the meaning of the word "consider" in *Gutschmidt v. Mercer Island*, CPSGPHB Case No. 92-3-0006 (1993), and consequently concluded that the document (e.g. the Minimum Guidelines of the DCD) that the Act requires a local government to "consider" is advisory rather than mandatory. Because "consider" or its derivatives is not defined by the Act, the Board cited the following definition of "consider":

To fix the mind on, with a view to careful examination; to examine; to inspect. To deliberate about and ponder over. To entertain or give heed to. *Black's Law Dictionary*, 277 (5th ed. 1979)

The Board notes that the word "consider" appears in the Act a total of nine times, and the related word "consideration" appears three times.<sup>[3]</sup> The *Black's* definition of "consider" conveys that the direction provided is to be advisory rather than mandatory in effect. This reading works well in

the instances cited. In each case, some factor, opinion or other input is to be made a part of or included in the deliberation prior to some action. However, in no instance is it suggested that the factor, opinion or other input must be agreed with or obeyed.<sup>[4]</sup>

If the County has violated its own charter or code provisions, or other statutes, it remains for the superior court to so rule. For the Board's purposes, the County is presumed to not only have considered its own prior enactments but also to have complied with them; WRECO has not shown by a preponderance of the evidence that the County failed to consider these statutory and local processes. As WRECO indicated in a footnote:

... the parties will be litigating the validity of the regulations in superior court... WRECO's Hearing Memorandum, at 20, footnote 6.

#### Conclusion No. 6

Snohomish County complied with the requirements of the GMA by considering the Minimum Guidelines in its adoption of the Motion and Ordinances.

#### Legal Issue No. 7

***Do the Motion and the Ordinances classify forest land in compliance with the requirements of RCW 36.70A.170, RCW 36.70A.060 and Chapter 365-190 WAC, and the definitions contained in RCW 36.70A.030?***

***A. Did the County improperly add an additional criterion to the minimum GMA criteria by using the identity of the landowner as the determining criterion in designating forest land? [W]***

***B. Did the County fail to comply with DCD's Minimum Guidelines at WAC 365-190-040 (1) by changing the landowner's "right to use his or her land under current law"? [T, W]***

***C. Did the County fail to comply with the GMA by using its designation of the landowner's property to create new commercial land rather than to preserve the continued use of the property for the commercial production of timber? [T, W]***

#### A. GMA Requirements

##### 1. Planning Goals

Forest lands are discussed in numerous sections of the GMA. Initially, RCW 36.70A.020, entitled "Planning goals," indicates:

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

plans and development regulations.

...

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands and discourage incompatible uses. (Emphasis added).

"Forest land" itself is defined at RCW 36.70A.030(8) to mean:

land primarily useful for growing trees, including Christmas trees subject to the excise tax imposed under RCW 84.33.100 through 84.33.140, for commercial purposes, and that has long-term commercial significance for growing trees commercially.

Although the phrase "productive forest lands"<sup>[5]</sup> as used in planning goal eight (*see* RCW 36.70A.020(8), above) is undefined, the phrase "long-term commercial significance" is defined at RCW 36.70A.030(10) as:

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

## 2. Designation of Forest Lands

RCW 36.70A.170 is entitled "Natural Resource Lands and Critical Areas --

Designations." Subsection (1) requires cities and counties to designate forest lands where appropriate. It provides as follows:

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;

(b) Forest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber;

(c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and

(d) Critical areas. (Emphasis added).

"Urban growth" is defined by RCW 36.70A.030(14) to mean:

growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources. When allowed to spread over wide areas, urban growth typically requires urban governmental services.

"Characterized by urban growth" is contained within the definition of "urban growth" at RCW 36.70A.030(14) and refers to:

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

The Act is silent as to how a county or city should designate forest lands. However, RCW

36.70A.170(2) provides:

In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.

The relevant "Minimum Guidelines" established by RCW 36.70A.050 are quoted later in the Board's discussion.

### 3. Interim Forest Land Development Regulations

Once counties and cities designate forest lands, they are also required to adopt development regulations to assure the conservation of such lands. RCW 36.70A.060, entitled "Natural Resource Lands and Critical Areas -- Development Regulations" provides:

(1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.120. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals. Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within three hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration.<sup>[6]</sup>

...

(3) Such counties and cities shall review these designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW 36.70A.120 and may alter such designations and development regulations to insure consistency.

(4) Forest land and agricultural land located within urban growth areas<sup>[7]</sup> shall not be designated by a county or city as forest land or agricultural land of long-term commercial significance under RCW 36.70A.170 unless the city or county has enacted a program authorizing transfer or purchase of development rights. (Emphasis added).

### 4. Other Provisions

Besides the citations to the Act already discussed, the GMA refers to forest lands in several other sections. See RCW 36.70A.070(5), .180(1), .350(1), .360(3), .380 and Section 5 of ESHB 1761 enacted by the 1993 legislature. None of these provisions are as relevant to the Board's discussion as those cited in subsection (3) above.

## B. DCD's Minimum Guidelines

RCW 36.70A.170(2) requires that counties and cities "consider" the guidelines established pursuant to RCW 36.70A.050 when designating natural resource lands and critical areas. RCW 36.70A.050, entitled "Guidelines to classify agriculture, forest, and mineral lands and critical areas" (emphasis added), provides:

(1) Subject to the definitions provided in RCW 36.70A.030, the department [of community development] shall adopt guidelines, under chapter 34.05 RCW, no later than September 1, 1990, to guide the classification of: (a) Agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. The department shall consult with the department of agriculture regarding guidelines for agricultural lands, the department of natural resources regarding forest lands and mineral resource lands, and the department of ecology regarding critical areas.

...

(3) The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170.

(4) The guidelines established by the department under this section regarding classification of forest lands shall not be inconsistent with guidelines adopted by the department of natural resources. (Emphasis added).

The DCD complied with this legislative mandate by adopting "Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas" (the **Minimum Guidelines**). The Minimum Guidelines became effective on April 15, 1991, and are codified as Chapter 365-190 WAC. WAC 365-190-020 describes the purpose of the Minimum Guidelines; -030 contains relevant definitions<sup>[8]</sup>; -040 explains the general process for classifying and designating natural resource lands and critical areas.

Specific to this case, WAC 365-190-060 entitled "Forest land resources," recommends the following:

In classifying forest land, counties and cities should use the private forest land grades of the department of revenue (WAC 458-40-530). This system incorporates consideration of growing capacity, productivity and soil composition of the land. Forest land of long-term commercial significance will generally have a predominance of the higher private forest land grades. However, the presence of lower private forest land grades within the areas of predominantly higher grades need not preclude designation as forest land.

Each county and city shall determine which land grade constitutes forest land of long-term commercial significance, based on local and regional physical, biological, economic, and land use considerations.

Counties and cities shall also consider the effects of proximity to population areas and the

possibility of more intense uses of the land as indicated by:

- (1) The availability of public services and facilities conducive to the conversion of forest land.
- (2) The proximity of forest land to urban and suburban areas and rural settlements: Forest lands of long-term commercial significance are located outside the urban and suburban areas and rural settlements.
- (3) The size of the parcels: Forest lands consist of predominantly large parcels.
- (4) The compatibility and intensity of adjacent and nearby land use and settlement patterns with forest lands of long-term commercial significance.
- (5) Property tax classification: Property is assessed as open space or forest land pursuant to chapter 84.33 or 84.34 RCW.
- (6) Local economic conditions which affect the ability to manage timberlands for long-term commercial production.
- (7) History of land development permits issued nearby.

### C. Discussion: Did the County Comply with the GMA?

#### 1. Definition of Forest Lands

Before the County could comply with the GMA's requirement at RCW 36.70A.170(1) to "designate" appropriate forest lands, it first had to determine what lands constituted forest lands. Although the Act contains a definition of "forest lands" at RCW 36.70A.030(8), the definition itself does not enable one to readily or easily ascertain exactly what constitutes such land. To make this determination, the County first classified forest lands. Classification is a way to describe what constitutes forest lands. WAC 365-190-040(1) provides that:

Classification is the first step in implementing RCW 36.70A.050. It means defining categories to which natural resource lands... will be assigned.

In preparing for the designation of forest lands, the County was guided by the Act's definition of forest lands at RCW 36.70A.030(8).

The Act's definition of "forest lands," when considered with the Act's definition of "long-term commercial significance," coupled with the directive to designate such lands "not already characterized by urban growth" and to adopt development regulations that assure the conservation of forest lands while not prohibiting "uses legally existing" on the land, is the most complex equation this Board has been asked to review to date.

#### Primarily Useful

Summarized in broadest strokes, the Petitioners' position is that the County failed to comply with the GMA because certain designated properties did not fit within the definition of "forest lands." Both Twin Falls and WRECO, for instance, contend that property cannot be "primarily useful for growing trees" if it is not being managed for timber production. Accordingly, they maintain that the property owner's intent controls: only if the land owner intends to manage the land for commercial timber production can the land be designated as forest land.

The Board rejects the contention by Twin Falls and WRECO that because a parcel of land is not being managed for commercial forestry purposes, it cannot be designated forest lands. Neither the GMA's definition of forest lands, nor its requirements that counties and cities designate forest lands and adopt interim development regulations that assure the conservation of those lands, bolster such a contention. Simply put, if the intent of the landowner were the crucial determining factor for designating forest lands, there might be far fewer forest lands designated, since high density residential or commercial use would be more lucrative. This would defeat the purpose of interim forest land development regulations -- to conserve these lands until GMA required comprehensive plans and implementing development regulations are adopted.

The Petitioners' suggestion that the landowner's intent to manage land for forestry purposes should control mirrors the historic pattern of land utilization in the central Puget Sound region: **market forces** have driven where, when, and how land would be used. The GMA has put a sudden stop to this practice. Market forces, coupled with the landowner's intent, are no longer the sole controlling factors for determining where commercial forestry will take place -- land use planning that assures the conservation of forests for commercial purposes in appropriate areas has now become part of the formula.

This holding is consistent with the legislature's intent. The Board finds that RCW 36.70A.060(1) (a), regarding agricultural lands, is worded virtually identically to subsection (1)(b) of that section, regarding forest lands. However, the definitions of the two types of natural resource lands are significantly different. While RCW 36.70A.030(8) defines forest land as "land **primarily useful** for growing trees," RCW 36.70A.030(2) defines agricultural land as "land **primarily devoted** to the commercial production of horticultural... products." (Emphasis added). The latter terminology includes the landowner's intent: if the land is not currently being utilized for the commercial production of agricultural products, it cannot be designated agricultural land.

In sharp contrast, "primarily useful" is not limited to the land owner's intent to currently manage property for commercial timber production. Instead, it addresses the possibility of using the property for forestry purposes. The legislature was obviously aware of the distinction between the terms "primarily useful" and "primarily devoted." The Board concludes that "useful" is a much broader term. Accordingly, the Board holds that the land owner's intent relative to management of the property for commercial timber production is not controlling in determining whether the land should be designated as forest land.

#### Commercial Purposes

Although landowner's intent alone cannot keep a parcel of property from being designated as forest land, other factors may. The Board has already addressed the "primarily useful" component in the definition of "forest land." However, there is an additional component in the definition. The second component can be referred to as the "human" factor: the land must have long-term commercial significance for growing trees commercially.

Obviously, commerce was critically important to the legislature; the definition of forest lands uses a derivative of the word three times. However, "commerce," or its derivatives, is undefined in the Act. As the Board frequently does in such situations, it turns to dictionary definitions for

assistance. "Commerce" means:

The exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles. *Black's*, at 244.

"Commercial" relates to or is connected with trade and traffic or commerce in general. It is a generic term for all aspects of buying and selling. *Black's*, at 245. This definition is similar to the main definition found in a general purpose dictionary:

1. of or connected with commerce or trade. *Webster's New World Dictionary of the American Language*, 285 (2nd College ed. 1984).

"Profit" explicitly enters the picture in the fourth meaning of "commercial":

4a. made, done, or operating primarily for profit. *Ibid.*

Twin Falls argues that "long-term commercial significance" means that forest land must be operated at a profit to be so designated. Twin Falls' Dispositive Motion #2, at 11. While the County agrees that "an essential element of commerce is the ability to make a profit," it contends that "commercial" does not necessarily mean maximizing a profit. The County uses as an example a tomato farmer who sells the product at a public market but for not nearly as large a profit as a large scale agribusiness. The County points out that both the tomato farmer and the large agribusiness are pursuing commercial activities. Snohomish County's Response to Twin Falls' Dispositive Motions Nos. 1, 2 and 3, at 12.<sup>[9]</sup>

The Board rejects Twin Falls' contention that "long-term commercial significance" means only that forest land must be operated at a profit. However, the County's example is not quite on point either. Relying on the generic definition of "commerce" and its derivatives, the Board holds that profit is not the controlling factor; the emphasis should be placed on the buying and selling of goods. Thus, for example, the small scale tomato farmer can engage in the commercial tomato business and still take a loss. Likewise, there is no guarantee that the large agribusiness will always operate at a profit. This Board does not presume to know all the tax ramifications of operating a business at a loss; yet it is common knowledge that many businesses suffer losses over a long period; nonetheless, they are still engaged in commerce. The Board refuses to interpret the references to commerce and its derivatives in the GMA definitions to require cities and counties to ascertain whether land has been profitable, or is expected to be profitable, in order to designate and regulate it as natural resource land.

While it can be argued that the "long-term" portion of the definition of forest lands implies that such lands must be operated at a profit over a long period of time, the Board cannot give the phrase only this meaning. Referring again to agricultural lands, they too must have "long-term significance" for commercial production. Yet most agricultural products are harvested or sold at least annually. In comparison, timber is not harvested annually, but instead requires a rather lengthy period to achieve commercial size, and potential profit.

#### Physical Attributes of the Land

The "long-term commercial significance" portion of the definition of forest lands itself has two components: the physical attributes of the land (e.g., the growing capacity, productivity and soil composition of the land) and the human impact (e.g., the proximity to population areas and the

possibility of more intense uses of the land).

The County classified forest lands initially utilizing three criteria: forty acre parcel size, forest land cover and FLGs.R-10.This was a fairly objective screening process that enabled the County to address the physical component of the definition of "long-term commercial significance." The forty acre parcel size criterion was selected after reviewing scientific studies cited in the Plan. R-8.The Petitioners contend that forty acre parcels were too small.Although the Petitioners attacked the validity of the County's use of these studies, having reviewed the referenced studies, the Board is not persuaded that the use of the forty acre criterion is improper.This conclusion is bolstered by the Act's definition of forest land to include land primarily useful for growing Christmas trees.Had the definition of forest land excluded reference to Christmas trees, a different result might have been necessary.However, the inclusion of Christmas trees suggests the Legislature's intent to include fairly small parcels of land within the definition of "forest land," presumably including parcels less than forty acres. Christmas trees are also harvested more rapidly than trees grown for timber or pulp.Accordingly, the County's use of the forty acre parcel size criterion is in compliance with the GMA.

The County's second criterion was forest land cover.The County used 1990 and 1991 aerial photographs to identify forest lands and was able to readily ascertain "large commercial forest areas, densely built areas and agricultural areas."R-9.In instances of "mixed" use, the County eliminated from designation forested parcels of less than forty acres or forested parcels of more than forty acres that contained buildings.R-9.Clearly, the County more than complied with the GMA's directive to designate forest lands "... not already characterized by urban growth."RCW 36.70A.170(1)(b).The County eliminated any parcel over forty acres with just a single building on it even though the Act defines "urban growth" as meaning "intensive use of the land for the location of buildings [and] structures...."RCW 36.70A.030(14) (emphasis added).Intensive use connotes more than a single building.Therefore, the use of the forest land cover criterion is in compliance with the GMA.

The third criterion the County used to classify forest lands was forest land grades, suggested by the introductory paragraph of WAC 365-190-060 which cited to WAC 458-40-530.WAC 458-40-530, entitled "Property tax, forest land -- Land grades," divides the state into east and west sides per species of tree.The taller a tree, the higher the FLG that is assigned.Thus, the most productive forests are graded as FLG 1 while the most marginal forest productivity is given an FLG of 7 or 8. Non-commercial land is also assigned an 8.

It must be noted that WAC 365-190-060 does not refer to WAC 458-40-535, dealing with operability classes of forest land according to soil characteristics and geomorphic features.Nor does WAC 365-190-060 cite to WAC 458-40-510(2) which defines "forest land" for purposes of ad valorem taxation.Yet, Twin Falls based much of its argument on WAC 485-40-535.The Board holds that the County was not required to consider these operability classes.

Instead, the County followed the suggestion in WAC 365-190-060 when it utilized the Department of Revenue's forest land grade maps and grades.Furthermore, the County determined that:

[F]orest land grades one through three were the most productive forest lands for timber production in Snohomish County.R-9.

As indicated above, the Act's definition of "long-term commercial significance" at RCW 36.70A.030(10) has two components: the physical characteristics of the land and the human element (i.e., the land's proximity to population areas, and the possibility of more intense uses of the land).Pursuant to WAC 365-190-060, use of WAC 458-40-530 "incorporates consideration of growing capacity, productivity and soil composition of the land."Therefore, the first component of the definition of "long-term commercial significance" was addressed by the County's use of FLGs as a classification criterion.The criterion itself is in compliance with the GMA, especially since the County considered only grades one through three as most productive.

In summary, classifying the physical nature of forest lands was a relatively easy and objective task for the County."By applying the first three criteria, planning staff were able to identify a large contiguous area of productive commercial forest land in eastern Snohomish County, and islands and peninsulas of productive commercial forest lands westward..."R-9.In establishing the first three criteria discussed above, the County was able to address the first component of the GMA's requirement that forest lands be of long-term commercial significance.

#### Human Component

However, the second component of the definition of "long-term commercial significance," the human use element, is more subjective and difficult to ascertain.In contrast to the first component, where one simply has to examine physical characteristics of the land as they relate to growing capacity, productivity and soil composition, and where virtually the entire Puget Sound basin could be included as suitable for long-term commercial production of trees, the second component assists in screening out "forest lands that are ... already characterized by urban growth" by requiring counties to consider the "... land's proximity to population areas, and the possibility of more intense use of the land."RCW 36.70A.170.

The Board holds that the mere possibility of more intense uses of the lands does not preclude land from being classified as forest land.As the language in RCW 36.70A.170(1)(b) indicates, only lands already characterized by urban growth are inappropriate to be designated as forest lands.As the definition of urban growth reveals, just because a residence, building or other structure exists on land does not automatically mean that the land is already characterized by urban growth.Urban growth denotes "intensive use of the land ... to such a degree as to be incompatible with the primary use of such land for production..."RCW 36.70A.030(14).

Importantly, the legislature has specifically allowed for forest land designations even in areas of urban growth.RCW 36.70A.060(4) provides that forest land can be located within urban growth areas if a program authorizing the transfer or purchase of development rights has been enacted. Under the Act's definition of urban growth, intensive use of the land is contemplated.What the second component of the definition of "long-term commercial significance" does is to require counties and cities to consider these more intense uses.However, even if more intense uses existed (as opposed to having a potential to occur), forest lands can still be designated as such. To address the second component of the definition of "long-term commercial significance," the

County used a fourth and a fifth screening criterion. The fourth criterion was the "parcel pattern adjacent to islands and peninsulas." While the large contiguous area of forest land identified by the criteria one through three screening process was basically undeveloped, when the County examined peninsulas and islands (i.e., areas not surrounded by forest lands, unlike the large contiguous areas in eastern Snohomish County) for possible designation, it evaluated the size of parcels of land adjacent to parcels of forest land identified using the first three criteria. The County's purpose was "...to assess existing land use conflicts..." R-10. The Board holds that using this criterion was a reasonable means of ascertaining proximity to population areas and the possibility of more intense uses, and in compliance with the GMA.

The fifth criterion, five acre subdivisions and 20 acre segregations, identified "locations of proposed large lot subdivisions and land segregations filed between 1988 and August 1991" in order to indicate "recent development history." R-9. "Approved five acre... subdivisions ... were eliminated because they are too small to be efficiently managed for commercial timber production. Twenty acre subdivisions were not eliminated because the twenty acre lots had not been sold to different parties or developed, and therefore, ... still represent productive forest lands suitable for forest management." R-10.

In contrast to what the County actually did to ascertain conflicting uses, the second paragraph of WAC 365-190-060 (quoted on p. 27) urges counties to consider seven indicators. As the County points out in its Hearing Brief, these guidelines are not mandatory but must only be considered by the County. In addition, the seven items are "indicators" of the "possibility of more intense uses of the land;" yet the County is under no obligation to exclude forest lands merely because they have the possibility of a more intense use. Snohomish County Hearing Brief (**SCHB**), at 19.

Importantly, Section III(A) of the Plan specifically recognized the Minimum Guidelines as:

... a guide for county planning staff in determining what forest lands in the county may have long-term commercial significance and thus, are eligible for interim forest land classification, designation and conservation. R-8.

The Plan indicates that the five criteria the County used to identify productive commercial forest lands were selected and used pursuant to the Minimum Guidelines. R-8. Specifically, the County considered public services and facilities in its Interim Policy 4 of the Plan. It requires that land use conflicts on all designated forest lands and lands adjacent to such lands be prevented and that new dwellings not be permitted unless "within a rural fire district" with adequate fire vehicle access or unless the dwelling had a fire sprinkler system. R-15. Map 21 illustrates fire districts within the forest land boundary.

The County eliminated any parcels with a building on it. R-9. The County eliminated any parcel less than forty acres. R-8. The County ascertained the compatibility and intensity of adjacent and nearby land use and settlement patterns through criteria four and five. *See also* R-6-7. The County utilized assessor's maps (M-18) and documents. The County reviewed local economic conditions. R-4-7. The County reviewed recent subdivision and segregation permits. <sup>[10]</sup>R-6, 9, 10.

In conclusion, the Board holds that the County did consider the Minimum Guidelines in classifying forest lands. Furthermore, the County did comply with the GMA's definition when it

classified such lands.

## 2.Designation of Forest Lands

Once the County completed classifying forest lands, its next task was to designate those lands. Section 3 of the Motion provides:

Based on the foregoing findings and conclusions, the County Council hereby adopts the Interim Forest Land Conservation Plan attached hereto as Exhibit A and classifies and designates productive forest lands in the county into two interim classes: Interim Commercial Forest and Interim Forest Reserve as shown on the 1:48,000 scale map attached hereto as Exhibit B [Maps 23 and 24] and on the County Assessor's maps, attached hereto as Exhibit C. [Map 28].R-3.

The County elected to designate its forest lands by use of maps. See R-20 - 25; M- 23, 24 and 28. WAC 365-190-040(1) indicates that "... inventories and maps can indicate designations of natural resource lands." Furthermore, WAC 365-190-040(2)(d) recommends that "mapping should be done to identify designated natural resource lands...."

Therefore, the Board holds that the County complied with the requirement in RCW 36.70A.170 (1) to designate forest lands.

## 3.Interim Development Regulations: Uses Legally Existing

### a.What the Act provides

RCW 36.70A.060(1) provides:

Each county ... shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170....(Emphasis added).

Ordinance No. 92-101 was adopted by the County to comply with this requirement.RCW 36.70A.060(1) further provides that:

Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.120.Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals....(Emphasis added).

### b.Positions of the parties

The Petitioners have challenged Ordinance No. 92-101 because they maintain it prohibits uses legally existing on their property: SCC 32.13.020(1) precludes subdivision of land designated ICF.R-28.SCC 32.13.020(2) prohibits subdivisions of less than 80 acres on land designated IFR. R-28.SCC 32.13.030 requires that new dwellings on interim forest lands<sup>[11]</sup> or adjacent to these lands have a minimum 50 foot setback from the boundary of the forest lands.R-28.

Prior to the adoption of Ordinance 92-101, the County's zoning code permitted residential development in all areas of the county.R-13.The zoning code further provided that:

Lands zoned Forestry may currently be subdivided into 20 acre lots, while Rural zones

allow subdivision into 5 and 2.3 acre lots.R-12.

Table 3 to the Plan illustrates the number of acres of forest land per existing zoning designation. R-13.

Because WRECO's property was designated ICF, WRECO is prohibited from subdividing it or constructing a clustered development during the interim period.WRECO claims that the County's Ordinance No. 92-101 thus prohibits "uses legally existing" on WRECO's land prior to its adoption (i.e., the right to cluster development and the right to subdivide for 5-acre residential development).WRECO maintains that this is in direct conflict with its "Rural 5" land use designation on the Granite Falls Community Plan and the County's Official Zoning Map.WRECO also alleges that the setback requirement imposed by the Ordinance was not previously existing. WRECO's Hearing Memorandum (**WHM**), at 17, 20.

Citing the definitions of the term "use" that it quoted from a zoning treatise, law dictionary and general purpose dictionary<sup>[12]</sup>, the County took the position that it had not violated WRECO's rights because "the things WRECO is prohibited from doing were not "uses legally existing on" its parcel of property."SCHB, at 58 (emphasis added).

The County further argued that future subdivisions of currently existing 20-acre parcels into 5-acre lots is not a preexisting use of the 20-acre parcels.Although subdividing land was a "process conducted on paper" that might have "physical manifestations on the land," WRECO was not in the process of dividing its land when the interim regulations were adopted, since it had not even made an application to do so.SCHB, at 58-59.In response to a similar argument by Twin Falls, the County responded that Twin Falls failed to provide any evidence of previously existing uses on the property: no residences or homes presently exist on the land nor have any building permit applications been submitted.Snohomish County's Response to Twin Falls' Dispositive Motions Nos. 1, 2 and 3, at 23-24.

In WRECO's Reply Memorandum, WRECO rebutted the County's proposition that "uses legally existing" refers to actual uses on the land by pointing out that the Anderson zoning treatise definition of "use" included "any purpose for which a ... tract of land ... may be intended..."WRECO's Reply Memorandum, at 16, (citing SCHB at 58, (quoting Anderson, *American Law of Zoning*, (3d ed. 1986))).

### c.Analysis

As the County has correctly pointed out, the key words that must be interpreted from the emphasized portion of RCW 36.70A.060 are "uses legally existing on any parcel."

Most of the argument presented by the parties focused on the meaning of the word "uses."While that is a key focal point for analysis, the sub-phrase "on any parcel" is equally important to discern the meaning of this directive.This is particularly so in view of the 1991 legislative amendments to this section of the Act.We begin by analyzing the two alternative views of the meaning of the word "uses."

The County argues that "uses" means the actual physical use to which a property is put.This includes demonstrable activity (i.e. recreation, grazing of cattle) and tangible improvements (i.e. buildings, roads).An important component of this meaning of "uses" is the focus on discrete

parcels. "Parcels" means:

A description of property, formally set forth in a conveyance, together with the boundaries thereof, in order for its easy identification. *Black's*, at 1002.

Demonstrable activities or tangible improvements are attributes of specific parcels rather than attributes of many parcels of land (e.g. the four buildings and two miles of roadways on a hypothetical parcel are unique to that parcel - they do not exist on any other parcel of land). This meaning of "uses" therefore focuses on individual parcels and their unique circumstances.

By contrast, WRECO argues that "uses" also means "use *rights*." While not material in the same sense as activities or improvements, WRECO argued that "use rights" do constitute "uses existing on any parcel." This argument rests on the premise that such "uses" exist by means of some legal instrument, such as the zoning ordinance. Zoning grants or limits rights to use property by means of land use districts or zones, which in the case of forest lands, ranges widely over many parcels of land. Thus, an important component of WRECO's suggested meaning of "uses" is an emphasis on the wholesale permission granted to many parcels of land by virtue of their shared attribute of being within a certain zone. Another way to say this is that certain prospective activities or improvements would be *permitted* by virtue of the property attribute of being within a specific land use district or zone.

This latter point is significant because language that would protect such a wide ranging permission for a prospective use of property was suggested in an earlier version of this section of the Act, and that language was specifically amended. As originally worded, the relevant portion of subsection (1), in discussing what the interim forest land development regulations could not prohibit, used the terminology "may not prohibit uses permitted prior to their adoption." (Emphasis added). A 1991 amendment to this section deleted the word "permitted" and replaced it with "legally existing on any parcel." (Emphasis added).

The use of the word "permitted" connotes the previous legislative intent to protect the use *rights* of entire properties within land use districts or zones. This earlier version of the section would bolster WRECO's argument that the legislature intended to prohibit limitations on use *rights*. However, by replacing the word "permitted" with the phrase "legally existing on any parcel," the Board holds that the Legislature shifted the focus to the unique physical characteristics of discrete individual parcels and intended therefore to prevent the interim regulations from prohibiting improvements or activities that already physically and lawfully existed on such parcels.

The Board holds that the County's reading of "uses" is the correct one. WRECO's reading would eviscerate the Act's direction to "conserve" the forestry resource. If the County could only impose a forest land regulation where previous non-GMA controls already did so, why bother with the GMA enactments? This is an absurd result. The language in question must be presumed to intend that pre-GMA plans and regulations were inadequate to conserve forestry resources.<sup>[13]</sup>

RCW 36.70A.060 requires that the County's forest land regulations assure the conservation of forest resource lands. It provides:

(1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to

assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.(Emphasis added).

The emphasized phrase cannot mean that the County is to simply copy pre-GMA comp plans and regulations that were prepared pursuant to Chapter 36.70A RCW. Therefore, the Board rejects WRECO's argument that the legislature intended that GMA enactments were not to further limit uses that may have been permitted by pre-GMA enactments (either explicitly or by default). The most fundamental premise of the GMA is that the planning that was done under the authority of Chapter 36.70 RCW was insufficient to serve the quality of life enjoyed by residents of this state. RCW 36.70A.010 states:

The legislature, finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety and high quality of life enjoyed by residents of this state....(Emphasis added).

To achieve the conservation and wise use of lands, including forest lands, requires that counties and cities look toward the past as well as to the future. To fulfill the legislative mandate of the GMA, local government must neither ignore nor be bound by, the manner and degree to which forestry issues were addressed by pre-GMA enactments. To ignore pre-GMA enactments would needlessly dismiss legitimate interests and valuable experiences. However, to enact GMA plans and regulations that are bound by the 'old way of doing things' would perpetuate the very flaws of the past that the legislature explicitly set out to correct.

WRECO is understandably concerned that the County's forest land regulations will preclude a use of the property that was permitted under the pre-GMA forestry plans and regulations. The Board notes that the County's GMA forest land regulations did not have the force of law until adopted and the GMA does not alter this state's common law vested rights doctrine or its codification in the subdivision statute. *See* RCW 58.17.033. In view of the long lead time for the GMA forest lands planning process, WRECO and other property owners had ample opportunity to anticipate further regulatory limitations and to submit a fully completed plat or permit application to vest their rights to pre-GMA land use regulations.<sup>[14]</sup> The fact that they did not do so is not a reason for the Board to now attempt to preserve those rights by concluding that GMA enacted forestry regulations can be no more restrictive than pre-GMA forestry regulations.

#### 4. Spot Zoning

WRECO claims that the County singled out its property, the Bosworth Block, and illegally spot zoned it Commercial Forest Land. WHM, at 2, 27-31. The Board rejects the claim that the County's action constituted spot zoning. The Board does not agree that the County has rezoned any parcel, let alone spot zoned it.<sup>[15]</sup> Here, the County, acting in a legislative capacity, has designated WRECO's property as interim forest lands pursuant to the GMA in an effort to assure the conservation of forest lands. Even if the County had achieved this via rezoning, such an action

does not benefit a particular individual but instead is a benefit to the community as a whole, and in this case works against the Petitioner's interest. Furthermore, WRECO did not submit an application for a rezone -- a request for a classification change for a specific tract of land that triggers rezone reviews.

#### Conclusion No. 7

The Board concludes that the County acted within its discretion under the Act by designating as forest lands parcels that may not currently be managed as commercial forestry or lands that may not yield a profit that meets the expectations or desires of the landowner. Moreover, the mere possibility that a parcel might be more intensively used does not preclude its consideration for designation as forestry. The Board acknowledges that this is a departure from the past, however, a departure that is specifically signaled by the GMA's directive to conserve the forestry resource during the interim while comprehensive plans and development regulations are being developed. In the past, the decisions of individual landowners and market forces largely determined when and where land converted from forestry use to non-forestry use. This laissez faire approach often led to the inappropriate or premature conversion of land to urban uses, and was precisely the reason that the Act now requires active steps be taken to conserve the forestry resource. The Board therefore concludes that market forces, landowner intentions, and profitability are factors that the County may wish to consider in forest land designation, however, none of those historic factors are controlling under GMA. Furthermore, the phrase "uses legally existing on any parcel" means activities or improvements that actually exist on the land, as opposed to legal use rights. The County did not spot zone or rezone the WRECO property, nor improperly add the identity of a property owner as a criterion for designating forest land. It is not material whether the County was in compliance with Chapter 365-190 WAC because the Board has previously held that the Minimum Guidelines are advisory rather than mandatory. The County was obliged to *consider* the Minimum Guidelines because that is the explicit direction of RCW 36.70A.170(2). The Board concludes that the County did consider the Minimum Guidelines and is therefore in compliance with the Act.

The Board concludes that the forest land Motion and Ordinances adopted by Snohomish County are in compliance with the requirements of RCW 36.70A.170, RCW 36.70A.060 and the definitions contained in RCW 36.70A.030.

#### Legal Issue No. 8

***Did Snohomish County adequately consider private property rights pursuant to the GMA in adopting the Motion and Ordinances?***

The Board holds that the County did adequately consider private property rights. In reaching this determination, the Board's first inquiry was to examine what requirements are imposed by the Act to undertake such consideration.

The Act provides thirteen planning goals at 36.70A.020 to "... guide the development and adoption of comprehensive plans and development regulations...."Of these goals, one deals specifically with property rights:

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

The other reference to private property rights in the Act is at 36.70A.370:

Protection of Private Property. (1) The state attorney general shall establish by October 1, 1991, an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property.It is not the purpose of this section to expand or reduce the scope of private property protections provided in the state and federal constitutions.The attorney General shall review and update the process at least on an annual basis to maintain consistency with changes in case law.

(2) Local governments...shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property.

...

(4) The process used by government agencies shall be protected by attorney client privilege. Nothing in this section grants a private party the right to seek judicial relief requiring compliance with the provisions of this section.R-1958-72 (emphasis added).

The Attorney General issued a document in compliance with this requirement in February, 1992, entitled "State of Washington Attorney General's Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property" (**Attorney General's Process**).R-1958-72.

In its introductory discussion the Attorney General's Process notes that:

The government may limit the use of property through land use planning, zoning ordinances, setback requirements and environmental regulations.

...

Government regulation which goes "too far," however, constitutes a taking of property for which just compensation may have to be paid."Attorney General's Process at 3-4;R-1960-1961.

The Attorney General's Process, at Section II, sets out five "warning signals" indicating potential constitutional issues:

Does the regulation or action result in a permanent physical occupation of Private Property?

Does the regulation or action require a property owner to dedicate a portion of property or to grant an easement?

Does the regulation deprive the owner of all economically viable uses of the Property?

Does the regulation have a severe impact on the landowner's economic interest?

...Although a reduction in property value, alone, may not be a taking, a severe reduction in property value often indicates a reduction, or elimination of reasonably profitable uses. Another economic factor which courts will consider is the extent to which the challenged regulation frustrates legitimate, investment-backed expectations of the owner.

Does the regulation deny a fundamental attribute of ownership (the right to possess, exclude others and dispose of all or a portion of the property)? Attorney General's Process at 6-8; R-1963-1965.

### Discussion

In deciding *Tracy v. City of Mercer Island*, Case No. 92-3-0001 (1993), the Board held that a critical areas ordinance, required by RCW 36.70A.060, is a development regulation as defined at RCW 36.70A.030(7). It notes that there are two kinds of development regulations, interim and implementing. The former are required by the Act at RCW 36.70A.060 for natural resource lands and critical areas, and the latter at 36.70A.120 for implementing the local government's comprehensive plan required by RCW 36.70A.070 et seq.

The Board first examined what the legislature meant when it characterized the thirteen planning goals as intended to guide local governments' development of comprehensive plans and development regulations in *Gutschmidt v. City of Mercer Island*, Case No. 92-3-0006 (1993). The Board, after concluding it lacked the authority to determine whether a regulation enacted pursuant to the requirements of RCW 36.70A.060 is unconstitutional because it violates the rights of private property owners, found that:

...the Board has jurisdiction only to determine whether a local government appropriately considered the potential of unconstitutional takings before adopting a regulation or plan under the Act. *Gutschmidt*, at 10.

In making that determination, the Board first gave serious thought to the meaning of the prefatory language of RCW 36.70A.020, describing the use of the planning goals to "guide the development of development regulations." We noted that the Attorney General was asked whether the GMA gives the Boards jurisdiction to hear a claim which alleges that a city or county failed to properly consider the impact of its comprehensive plans or regulations on private property rights, RCW 36.70A.020(6). In Attorney General Opinion (AGO) 1992 No. 23, the Attorney General answered this question in the affirmative, emphasizing the use of "to guide" and "for the purpose of guiding" in the preface. Although the AGO never explicitly asked the question "What did the legislature mean by the 'guidance' language?", the opinion repeatedly answered it. The Attorney General's Office concluded that the guidance language in RCW 36.70A.020 means that a local jurisdiction must **consider** the GMA's planning goals. See AGO 1992 No. 23, at 3, 8, 11. The Board noted that the easiest way to show that a jurisdiction has "considered" planning goals is to acknowledge their existence in writing.

This recommendation is a practical one; however, it is not a mandatory requirement. To

give serious thought to something, to ponder it or carefully examine it does not mean that written proof of that subjective process must exist. Whether the document in question is an interim critical areas development regulation, a comprehensive plan or an implementing development regulation, it need not have an explicit discussion of the planning goals. However, the Board strongly recommends that the document itself or a part of the underlying record contain such a discussion, so that there can be no question that planning goals were "considered." ...

Whether a local jurisdiction decides to explicitly consider the planning goals in writing remains in that jurisdiction's discretion. However, whether the planning goals are just mentally considered, or discussed in writing, the hurdle that the document in question must clear is achieving compliance with the GMA. RCW 36.70A.290(2) requires that comprehensive plans and development regulations "meet" or are "in compliance" with "the goals and requirements" of the Act. Therefore, the Board holds that both types of development regulations, interim and implementing, must meet or be in compliance with the planning goals of the Act specified at RCW 36.70A.020. *Gutschmidt*, at 15.

The Board then looked at the distinguishing characteristics of interim regulations, in order to determine whether those distinctions would affect the application of the requirements of the Act: Interim development regulations are different by nature than implementing regulations. For one, they are "interim" in nature. *See* RCW 36.70A.060(3). In addition, under the GMA, critical areas regulations have only one explicit goal: to protect critical areas. As such, this type of development regulations is self-guided by an internal goal. In contrast, comprehensive plans and implementing development regulations must balance thirteen goals.... [It] makes less sense for these *planning* goals (i.e., by their very name, goals to guide the development of policy documents such as CPPs and comprehensive plans) to be considered when adopting interim development regulations since the latter must be adopted before CPPs or comprehensive plans have been adopted; in essence, before any policy planning has occurred.

Nonetheless, the Act requires local jurisdictions to consider the planning goals when adopting any development regulation, interim or implementing. In order to reconcile this statutory requirement with the Board's own understanding of the hierarchy of planning established by the Act, the Board holds that local jurisdictions will be held to a lesser standard of compliance for considering planning goals when adopting interim critical areas development regulations than they will when adopting comprehensive plans or implementing development regulations. *Gutschmidt*, at 16.

The Board notes that while the subject of the interim regulation at issue in *Gutschmidt* was critical areas, and in the case before us it is forest lands, both are subject to the same requirement of the GMA: to designate (RCW 36.70A.170) and to adopt interim development regulations to assure conservation of designated areas. RCW 36.70A.060. The Board adopts its *Gutschmidt* holdings cited above in the case before us.

Given the number of workshops, meetings and hearings over a two year period, where property

owners (including two of the Petitioners in this case) presented their opinions of proposed designations and regulations, and the development of a record of several thousand pages over that period, again including written submittals by the Petitioners, the County Council could not fail to be cognizant of general and specific concerns about private property rights. Where there is no requirement for a local government to document its "consideration," and in fact where the Act provides that "...the process used by government agencies shall be protected by attorney client privilege," it is the Petitioners' burden to demonstrate a failure to comply. See Findings of Fact 1-4; 14; 17; 18; and 22.

In this case, the Petitioners have failed to overcome the presumption of validity granted to Snohomish County in adopting its interim forest land plan, designations and regulations. The preponderance of the evidence indicates that the County did take planning goal No. 6, RCW 36.70A.020(6), into consideration. The County met or complied with the requirement to consider that goal.

#### Conclusion No. 8

RCW 36.70A.020, the planning goals provision of the GMA, applies to both types of specific development regulations mandated by the Act: interim development regulations required by RCW 36.70A.060 and implementing development regulations required by RCW 36.70A.120. Both types of development regulations, as well as comprehensive plans, must *meet* and *comply* with the Act's planning goals. A lesser standard of compliance is required for interim regulations because their adoption prior to adoption of comprehensive plans necessitates their being guided by the single internal goal of RCW 36.70A.060, to conserve resource lands, rather than the full range of goals at RCW 36.70A.020 that must be balanced. The comprehensive planning process will require a more thorough consideration of all goals in light of local circumstances and priorities to achieve a weighted application of those goals. Nonetheless, in adopting its interim forest land development regulations, Snohomish County has considered the property rights planning goal at RCW 36.70A.020(6).

#### Legal Issue No. 9

***Does the Board have jurisdiction to determine whether Snohomish County was required to comply with statutory and local processes already in place governing land use decisions when it adopted the Motion and Ordinances? [T, W]***

#### Conclusion No. 9

"WRECO's Dispositive Motion on Issues 9 and 10 ..." and the County's "... Motions and Arguments in Support Thereof," addressed Legal Issue No. 9. WRECO requested a ruling that the Board had jurisdiction to determine whether the County was required to comply with statutory

and local processes already in place governing land use decisions. Conversely, the County asked the Board to dismiss Legal Issue No. 9 since the Board lacked jurisdiction. On June 11, 1993, the Board entered an "Order on Dispositive Motions" that denied WRECO's motion and granted the County's dispositive motion regarding Legal Issue No. 9. Accordingly, Legal Issue No. 9 was dismissed by the Board. Please refer to that document for a detailed discussion of the Board's analysis.

Legal Issue No. 10

***Was the County required to comply with the statutory and local processes already in place at the time it adopted the Motion and Ordinances? [T, W]***

Conclusion No. 10

"WRECO's Dispositive Motion on Issues 9 and 10 ..." and the County's "... Motions and Arguments in Support Thereof" addressed Legal Issue No. 10. WRECO requested a ruling from the Board that the County had to comply with statutory and local processes already in place; the County requested that the issue be dismissed because the Board lacked the requisite jurisdiction. On June 11, 1993, the Board entered an "Order on Dispositive Motions" that granted the County's dispositive motion regarding Legal Issue No. 10 (and denied WRECO's). Accordingly, Legal Issue No. 10 was dismissed by the Board. Please refer to that document for a detailed discussion of the Board's analysis.

Legal Issue No. 11

***What are the applicable statutory and local processes in Snohomish County? [T, W]***

Conclusion No. 11

The County's "... Motions and Arguments in Support Thereof" addressed Legal Issue No. 11. The County again requested that the issue be dismissed because the Board lacked jurisdiction. On June 11, 1993, the Board entered an "Order on Dispositive Motions" that granted the County's dispositive motion regarding Legal Issue No. 11. Accordingly, Legal Issue No. 11 was dismissed by the Board. Please refer to that document for a detailed discussion of the Board's analysis.

Legal Issue No. 12

***If the County is required to comply with the statutory and local processes already in place at the time it adopted the Motion and Ordinances, did the County comply with those statutory and local processes? [T, W]***

## Conclusion No. 12

The County's "... Motions and Arguments in Support Thereof" addressed Legal Issue No. 12 and also requested that the issue be dismissed.

On June 11, 1993, the Board entered an "Order on Dispositive Motions" that granted the County's dispositive motion regarding Legal Issue No. 12. Accordingly, Legal Issue No. 12 was dismissed by the Board. Please refer to that document for a detailed discussion of the Board's analysis.

## Legal Issue No. 13

***Assuming that the Board concludes that it has jurisdiction to determine whether the forest land designations of Petitioners' specific properties in the Motion and Ordinances are in compliance with the GMA, is the forest land classification of Twin Falls' property and the development regulations incident to such classification in compliance with the requirements of the GMA and Chapter 365-190? [T]***

In comparison to Legal Issue No. 7, which discussed the forest land requirements of the GMA generally, Legal Issues No. 13, 14 and 15 ask the Board to determine whether the forest land designations and interim development regulations undertaken by the County, as applied to individual parcels of property, comply with the GMA.

In its May 17, 1993 "Order Accepting Board Jurisdiction over Forest Land Designations on Specific Parcels of Property," the Board ruled that it had jurisdiction to determine whether the County's designations as applied to individual parcels of property were in compliance with the GMA. However, the Board did not discuss the extent of its jurisdiction in that order, partially because we had never had an "as applied" challenge before and partially because we did not know what type of evidence would be offered. With the experience of this case, the Board is now prepared to consider the related sub-issues. Having examined the specifics raised by the parties and pondered the more fundamental questions of law, the Board is also prepared to revisit the matter of "as applied" review. In so doing, the Board must necessarily address its standard of review and its ability to supplement the record.

The standard of review that applies in any case hinges on three interrelated factors: 1) the nature of the body reviewing the decision (i.e., this Board); 2) the nature of the body that made the decision that is being reviewed (i.e., generally city and county legislative authorities; and 3) the nature of the decision being reviewed (i.e., generally legislative decisions). However, it is virtually impossible to discuss separately the concepts of "standard of review", "review of the record" and the amount of "deference" to be given the underlying decision.

## The Nature of the Growth Planning Hearings Boards

The Washington State Growth Planning Hearings Boards have determined that each board "is a quasi-judicial body created pursuant to Chapter 36.70A. RCW." WAC 242-04-020(1). A board's interpretation of its enabling statute is accorded great deference. *See San Juan County, et al. v.*

*Dept. of Natural Resources, et al.*, 28 Wn. App. 796, 626 P.2d 995 (1981); (quoting *Hayes v. Yount*, 87 Wn.2d 280,293, 552 P.2d 1038 (1976); *Dept. of Ecology v. Ballard Elks Lodge* 827, 84 Wn.2d 551, 556, 527 P.2d 1121 (1974)). A quasi-judicial body is one that determines "the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding." RCW 42.36.010.

The quasi-judicial designation is important when considering this Board's role and authority to resolve disputes arising under the GMA. For all intents and purposes, the Board is a specialized body (*see* RCW 36.70A.260(1)) charged with resolving a narrowly defined category of disputes. *See* RCW 36.70A.280(1). As such, the Board carries out its functions utilizing common judicial standards and methods of analyzing the challenges brought before the Board. In addition, the Board's quasi-judicial label also signals to parties that a basic court room format will likely be followed. For example, the rules of professional conduct are applicable (WAC 242-02-120(1)); *ex parte* communications with Board members are prohibited (WAC 242-02-130); all pleadings must be signed (WAC 242-02-140); intervention and amicus status is possible pursuant to the civil rules of the superior courts and the rules of the appellate courts respectively (WAC 242-02-270 and -280); papers must be served (WAC 242-02-310); a subpoena can be issued (WAC 242-02-430); a motions practice is permitted (WAC 242-02-530); if testimony is permitted, all witnesses must be sworn (WAC 242-02-610(1)); and witnesses, if any, are subject to cross examination. These are some of the "judicial" aspects of the Board's "quasi-judicial" characterization.

However, the Board does not have to strictly adhere to traditional court room rules. For instance, the Board's presiding officer "may refer to, but shall not be bound by, the Washington rules of evidence." WAC 242-02-650(3). As another example, "[d]iscovery shall not be permitted..." WAC 242-02-410(1). For that matter, as opposed to the courts, only one of the three Board members must be an attorney. RCW 36.70A.260(1). These are examples of the "quasi" half of the Board's "quasi-judicial" designation.

#### Standard of Review and Burden of Proof in Cases before the Board

With this background in mind, the Board turns to the meaning of its standard of review of the record as provided in RCW 36.70A.320 and RCW 36.70A.290(4). The former provides:

Comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption. In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter.... The board shall find compliance unless it finds by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied this chapter.

RCW 36.70A.290(4) states:

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

In analyzing these provisions, the Board examined the requirements for other quasi-judicial bodies. One conclusion became clear: although there are similarities between the growth planning hearings boards and other quasi-judicial boards, the growth boards are unique because of the particular requirements of the GMA.

For example, while the Shorelines Hearings Board conducts a *de novo* hearing (*see* WAC 461-08-174), as a general rule, a growth planning hearings board is required to review only the record below in making its decision. As another example, the regulations governing Pollution Control Hearings Board and Forest Practices Appeals Board enable additional evidence to be admitted "as deemed necessary to decide the appeal fairly and equitably" (*see* WAC 371-08-185 and WAC 223-08-180) and the Shorelines Hearings Board can admit relevant evidence before it "whether or not such evidence had been submitted to the local government unit." In contrast, only if the Board itself determines that "additional evidence would be necessary or of substantial assistance" should the record be supplemented. RCW 36.70A.290(4). In actual practice, only in extremely limited situations will this Board even allow such evidence. *See* as an example, the Board's "Order Partially Granting Petitioners' Motions to Supplement the Record...."

RCW 36.70A.320 provides the burden of proof the litigants are to meet as well as the standard by which the county's development regulations are to be judged. It constitutes a conundrum of burdens and standards that applies seemingly incompatible concepts of (quasi) judicial review to decisions of local governments. After addressing each component of this statute in its own light, the Board will analyze how the conflicting standards and burdens can be read together, and finally, our determination of the intended standard of review. However, the Board must first determine what type of action taken by the County it is reviewing: legislative, administrative or quasi-judicial.

#### Deference to Legislative Actions

More precisely, the Board must determine if the Snohomish County Council's adoption of the Motion, Plan and Ordinances was similar enough to a judicial proceeding to lose the protection of judicial deference that reviewing courts historically give to legislative actions. WRECO argues that because its property was "lifted out" of the Bosworth Block for inclusion in the County's ICF designation, the Council's December 14, 1992 proceedings should be considered quasi-judicial because its rights as a specific party were substantially altered. Ultimately, WRECO argues for relief from the County's designation through *de novo* review of the County's actions, hoping to convince the Board that it should grant little deference to the Council's decision. Not surprisingly, the County argues that its actions were legislative in nature and should be given great deference by this Board. The level of deference usually given to legislative actions is articulated in case law.

The determination of the nature of the proceedings before us is fundamental to our ability to make the appropriate decision. If the actions before us are legislative in nature, great deference should be afforded them. It is not our role to substitute our judgment for that of duly elected officials. Moreover, the separation of powers doctrine is implicated in this determination. In addition, the appropriate remedy when legislative action is considered unjust is political. *Raynes v. Leavenworth*, 118 Wn.2d 237, 243, 821 P.2d 1204 (1992), (citing *Standow v. Spokane*, 88 Wn.2d 624, 630, 564 P.2d 1145, *appeal dismissed*, 434 U.S. 992 (1977)).

Therefore, a legislative enactment of a city or county cannot be reviewed by the courts except if it contravenes the constitution or if there has been a manifest abuse of discretion, which is usually characterized as arbitrary and capricious conduct. *Harris v. Hornbaker*, 98 Wn. 2d 650, 657-58,

660-61, 658 P.2d 1219 (1983) (citing *Fleming v. Tacoma*, 81 Wn.2d 292, 301, 502 P.2d 327 (1972); *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 34, 586 P.2d 860; *Lutz v. Longview*, 83 Wn.2d 566, 574-75, 520 P.2d 1374 (1974)). Arbitrary and capricious conduct is defined as being: willful and unreasonable action, without consideration and [in] disregard of the facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached [*Barrie (II) v. Kitsap County*, 93 Wn.2d 843, 850, 613 P.2d 1148 (1980) (citing *Buell v. Bremerton*, 80 Wn.2d 518, 526, 495 P.2d 1358 (1972); *Murden Cove v. Kitsap County*, 41 Wn. App. 515, 519, 704 P.2d 1242 (1985); *Bishop v. Houghton*, 69 Wn.2d 786, 794, 420 P.2d 368 (1968))] or even though one may believe an erroneous conclusion has been reached. [*Kenart & Associates v. Skagit County*, 37 Wn. App. 295, 298-99, 680 P.2d 439 (1984); *Pierce County Sheriff v. Civil Service Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983) (citing *State v. Rowe*, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980))].

If the court can reasonably conceive of any facts which justify a legislative determination, then that determination will be sustained. *Raynes*, at 250, (citing *Teter v. Clark County*, 104 Wn.2d 227, 234, 704 P.2d 1171 (1985)). If reasonable minds can differ concerning whether a particular zoning restriction has a substantial relationship to the public health, safety or general welfare, no abuse of discretion is established and the legislative act must stand. *Duckworth*, at 34, (citing *Lutz*, at 574-75 and 8A McQuillin, *Municipal Corporations* §25.279 (3d ed. 1977)). The burden of proving such abuse rests upon the challenging party and not upon the local government that enacted the legislation. *Duckworth*, at 34, (citing *Farrell v. Seattle*, 75 Wn.2d 540, 543, 452 P.2d 965 (1969)). Furthermore, courts generally will not inquire into the motives of legislative officers acting in a legislative capacity. *Harris v. Hornbaker*, at 657; *Fleming*, at 297-98. This rule follows from the separation of powers doctrine. *Raynes*, at 243; *Fleming*, at 298. Accordingly, legislative actions, such as the enactment of comprehensive land use plans and "promulgatory zoning regulations," are traditionally presumed valid. <sup>[6]</sup>*Bassaniv. Yakima County Commissioners*, 70 Wn. App. 389, 393, \_\_\_ P.2d \_\_\_ (1993); *Cathcart v. Snohomish County*, 96 Wn.2d 201, 211, 634 P.2d 853 (1981) (citing *Narrowsview Preservation Ass'n. v. Tacoma*, 84 Wn.2d 416, 526 P.2d 897 (1974), *Duckworth* at 33-34, (1978)); *Barrie II*, at 853; see also *Belcher v. Kitsap County*, 60 Wn. App. 949, 952, 808 P.2d 750 (1991) and *Parkridge v. Seattle*, 89 Wn.2d 454, 460, 462, 573 P.2d 359 (1978).

Generally, when a municipality adopts a comprehensive plan and zoning code, it acts in a purely legislative, policy making capacity. *Barrie II*, at 851-52 (citing *Parkridge v. Seattle*, at 463; *Harris v. Hornbaker*, at 660; *Leonard v. Bothell*, 87 Wn.2d 847, 850, 557 P.2d 1306 (1976); *Fleming* at 292, 299, (1972)). However, in its 1972 decision in *Fleming*, the Supreme Court held that subsequent amendments are adjudicatory because: 1) the parties whose interests are affected are readily available and the decision has a far greater impact on one group of citizens than on the public; 2) the decisions have localized applicability; and 3) zoning hearings are required by statute, charter, or ordinance, which shows that the decision-making process must be more sensitive to the rights of the individual citizen involved. *Fleming*, at 299. Subsequently, appearance of fairness provisions were enacted by the legislature (Chapter 42.36 RCW) and the *Raynes* court overturned its *Fleming* decision on this point.

The unambiguous language of the statute indicates that not all amendments to a zoning

ordinance should be classified as quasi-judicial. The statute defines quasi-judicial to include actions of local legislative bodies "which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding." RCW 42.36.010. But, the statute goes on to specifically exclude three categories of actions: those adopting or revising comprehensive plans, those adopting area-wide zoning ordinances, and those adopting zoning amendments of area-wide significance. RCW 42.36.010; *Raynes*, at 247 (emphasis added).

Thus, today making amendments to zoning ordinances is not considered a quasi-judicial act. Instead, it involves the public policymaking (i.e., legislative) role of a local legislative body. *Raynes*, at 245, 249. This is crucial because:

all policy decisions are the result of balancing the entirety of discrete individual rights in the community. It is not surprising that two groups may make a legislative decision appear adjudicatory by focusing the decision makers on how the decision will affect their individual rights. This does not make the decisions adjudicatory, however. *Harris v. Hornbaker*, at 659 (citing Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U.Pa.L. Rev. 485, 504 (1970)).

The *Raynes* decision also points out that realistically:

[n]o clear line can be drawn between judicial, legislative and administrative functions of local decision-making bodies. Judicial actions have no single essential attribute. Instead, a number of factors are important to the determination. If a given proceeding of a decision-making body has a sufficient number of relevant characteristics, it may be considered quasi-judicial in nature.

A 4-part test has been developed to determine when a given action is quasi-judicial or legislative. Examination of the following factors is useful in deciding if the actions taken are functionally similar enough to court proceedings to warrant judicial review:

(1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators. *Raynes*, at 243-45 (citing *Standow*, at 631); *see also Williams v. Seattle Sch. Dist. 1*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982).

Was the County Council's action legislative, administrative, or quasi-judicial?

Considering the four-part test outlined in *Raynes* above, the County Council's actions in designating forest lands and adopting interim forest land development regulations (i.e., in adopting the Motion and Ordinances) pursuant to the GMA were undertaken as a legislative function. No quasi-judicial board or court was charged with these GMA policy-making responsibilities as they relate to forest lands. Moreover, no board or court has historically performed such duties. In addition, the County's actions did not involve applying existing law to past or present circumstances for the purpose of declaring or enforcing liability. The designations were undertaken in response to both changed conditions and through the enactment of a new law, namely the GMA. Finally, the actions taken by Snohomish County did not resemble the ordinary business of a quasi-judicial board or the courts. As an example: those testifying at the public hearing were given a short period of time to make their presentation, cross examination was not permitted and those testifying were not sworn in. In short, the public hearings closely resembled a

legislative hearing because that is precisely what they were. Accordingly, the Board concludes that the County's actions were legislative in nature. Under the traditional analysis reviewed above, these legislative actions are entitled to great deference by this Board.

The Board must reconcile past judicial determinations that grant a high level of deference given to legislative actions of city and county legislative bodies, that do not "second guess" what the local policy-makers decided to do, with the language of the GMA which gives total discretion to growth planning hearings boards to expand the record below with supplemental evidence that would be "necessary or of substantial assistance to the board in reaching its decision." RCW 36.70A.290(4).

This Board decided that it would allow supplemental evidence relating to specific parcels of property. Accordingly, Twin Falls and WRECO each submitted supplemental evidence regarding their property. By making the decision to "open the door" by allowing additional evidence, the Board was able to hear evidence that was never considered by the County Council. Relying on this supplemental evidence, the Petitioners contend that their respective properties were not properly designated as forest lands.

However, the County Council never received this information during the public participation phase of its legislative process prior to adopting the Motion and Ordinances even though all landowners had more than ample opportunity to comment. What is troubling is the realization that, but for its decision to permit supplemental evidence, the Board would review only the documents before the County Council existing at the time the underlying actions were taken. In light of the historic deference given to legislative decisions, an element of unfairness is suggested in the Board considering what the County Council never saw.

How then, can these conflicts be resolved? Here, the Board decided that the additional evidence would be of substantial assistance in reaching its decision. The Board concludes however, that it cannot use this supplemental evidence, which was never considered by the Snohomish County Council, to find the County not in compliance with the GMA in designating specific parcels of property. Instead, the Board will only use this additional evidence solely to assist it in determining whether the County's legislative enactments, applied county-wide and not to specific parcels of land, complied with the Act. In so deciding, the Board is able to grant the County the historic deference its legislative actions would be given while acknowledging that a preponderance of the evidence from the record below could overcome it.

### The Board's Quasi-Judicial Role

This Board perceives its quasi-judicial role as being limited to determining whether the legislative actions taken by local legislative authorities actually comply with the requirements of the GMA. When this Board reviews supplemental evidence, it will only use that additional evidence to assist the Board in determining whether the underlying legislative action complies with the GMA; it will not substitute its judgment for that of a local legislative body based on supplemental evidence that, by its definition was not before the local legislative authority, to ascertain how the legislative action is applied to a particular parcel of property. The Board's use of

supplemental evidence "as applied" evidence will be used merely to assist the Board in determining whether the legislative action taken by the local jurisdiction complies with the GMA. Once this Board determines that a city or county's GMA-required legislative actions in fact do comply with the GMA, it is not this Board's role to determine whether the actual application of that local legislative enactment is in compliance with the GMA. Those types of challenges should take place pursuant to existing land use procedures. The GMA presumes that local actions are valid. However, if someone believes that the local legislative action does not comply with the Act, they have sixty days to appeal the action to a growth planning hearings board. The state legislature purposefully limited appeals of local legislative actions to this 60 day period so that the GMA's iterative planning process can continue with some certainty. As a result, if no one appeals an action within the statutory time period, the local legislative action is valid -- the presumption (that an action that is appealed to this Board can only be overcome by a preponderance of the evidence) has now become irrefutable.

People may not understand that a GMA-required action may have significantly changed their property rights until well after the 60 day period for filing appeals. Yet they are still protected by the ability to file a permit application and to then appeal any unfavorable decision to the superior court. In such an instance, the superior court will be reviewing the quasi-judicial, as opposed to legislative, determination of a local legislative authority since the filing of a permit application triggers quasi-judicial review. The underlying legislative action itself (i.e., the enactment of the comprehensive plan, interim or implementing development regulations pursuant to the GMA) will be irrefutably presumed valid (unless the superior court appeal is raised on constitutional grounds).

Conversely, in this case the Petitioners' timely filed the petitions to the Board. Yet none of the Petitioners have filed any type of land use development permit application with the County for development of the respective properties.<sup>[17]</sup> Accordingly, quasi-judicial review by the County of a permit application has yet to occur. Naturally, had a fully completed permit application been submitted by any of the Petitioners prior to the County's adoption of the Motion and Ordinances, their rights would have vested under the then existing pre-GMA requirements pursuant to Washington's vested rights doctrine. See *Valley View Industrial Park v. Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987) (citing *State ex re. Hardy v. Superior Court*, 155 Wash. 244, 284 P. 93 (1930)); *West Main Associates v. Bellevue*, 106 Wn.2d 47, 50-51, 720, P.2d 782 (1986) (citing *Comment, Washington's Zoning Vested Rights Doctrine*, 57 Wash. L. Rev. 139, 147-50 (1981)); *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 495-96, 275 P.2d 899 (1954); *Victoria Partnership v. Seattle*, 49 Wn. App. 755, 760, 745 P.2d 1328 (1987)). Thus, this portion of the present challenge would have been moot. Because no land use development permit applications have been made, the possibility of quasi-judicial review locally is not yet ripe. Furthermore, if and when it ever becomes ripe, the reviewing authority of the local government's quasi-judicial permit application decision will be the superior courts and not this Board.

Thus, an "as applied" challenge of an ordinance must be done by the local jurisdiction that adopted the legislation in the first place (i.e., wearing its judicial "hat" instead of its legislative

one).<sup>[18]</sup>This Board's role is limited to reviewing the legislative decisions of cities and counties pursuant to the GMA, not their quasi-judicial determinations. When this Board considers supplemental evidence (possibly the identical evidence that a local government would hear in a quasi-judicial arena) regarding how a particular local legislative action is applied to specific property, it will be used only to assist us in determining whether the underlying enactment complies with the GMA. The Petitioners must first obtain quasi-judicial review of a land use development permit application before they can receive appellate review. They will have to obtain that subsequent appellate review from the superior courts and not from this Board. To the extent that the conclusions above are inconsistent with the May 17, 1993 "Order Accepting Board Jurisdiction over Forest Land Designations on Specific Parcels of Property", the latter is overruled.

One final segment of RCW 36.70A.320 remains to be discussed. The "erroneously interpreted or applied" language at the end of RCW 36.70A.320 is also used in the Administrative Procedure Act (APA), Chapter 34.05 RCW. RCW 34.05.570(3)(d) indicates that one of the grounds upon which an agency order may be overturned is that "[t]he agency has erroneously interpreted or applied the law...." This phrase constitutes the error of law standard where a court reviews matter *de novo*. *Fisher v. Employment Security*, 63 Wn. App. 770, 773, 822 P.2d 791 (1992). The error of law standard allows a reviewing court to essentially substitute its judgment for that of the administrative body although substantial weight is accorded the agency's view of the law. *Franklin County v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982).

However, courts may not substitute their judgment for that of an administrative agency concerning factual findings from an agency order in an adjudicative proceeding. *Franklin County*, at 325. Courts review factual findings under the "substantial evidence" standard whereby agency findings of fact will be upheld if supported by "evidence which is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e); *see also* R. Finnigan, et al., *Washington Administrative Law Practice Manual* Section 10.05, 10-17.0 (1992). The standard is defined as "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *Olmstead v. Department of Health, Medical Section*, 61 Wn. App. 888, 893, 812 P.2d 527 (1991). In making its determination of substantial evidence, the court also may take into account any *new* evidence received by the court pursuant to RCW 24.05.562.<sup>[19]</sup> RCW 34.05.570(3)(e); *see also* R. Finnigan, et al. 10-17.0.

The substantial evidence test in the latest incarnation of the APA returns the standard of review of factual findings to what it was prior to 1967 when the Legislature abandoned the substantial evidence test in favor of the more deferential "clearly erroneous" standard. Logically, the switch back to the substantial evidence test should be a signal to the courts for a less intensive standard of review, and there are Washington cases consistent with that logic. R. Finnigan, et al., *supra*, at 10-17 (citing *Franklin County*, at 324; *Highline Community College v. Higher Education Personnel Board*, 45 Wn. App. 803, 808-09, 727 P.2d 990 (1986), *rev. denied* 107 Wn.2d 1030, (1987)).

Although the APA case law regarding the error of law standard and its accompanying *de novo* review is important in the appropriate setting -- adjudicatory proceedings of administrative bodies, it does not apply to county councils or commissioners, particularly performing in legislative capacities.

Here, the Board is a quasi-judicial body reviewing the legislative decisions of the Snohomish

County Council. Therefore, this Board holds that the only way it can reconcile conflicts between the GMA, the APA and the common law is to turn to the language of the GMA itself, which the Board is charged with reviewing. Thus, the unique language of RCW 36.70A.320, when taken into consideration with the equally unique language of RCW 36.70A.290(4), controls how this Board reviews cases, not necessarily the APA or common law interpretations of other laws. The latter will be considered only if they can be reconciled with the specific requirements of the GMA.

Accordingly, this Board will grant deference to local legislative bodies attempting to comply with the Act. This deference is in recognition of the presumption of validity expressly given local government enactments by the Act and is consistent with the deference courts have historically given legislative actions. As a consequence, it is also consistent with the arbitrary and capricious standard where the reviewing body will not substitute its judgment for that of the original decisionmaking body. In this case, the local legislative authority had to decide from among conflicting opinions if a forest land designation should be given to particular parcels of land. This Board will not substitute its judgment for that of the County Council, especially when the Board has received evidence not seen or considered below, such as how the adopted GMA ordinance might be applied to a particular parcel of property.

Pursuant to RCW 36.70A.320, if the Board determines that the local legislative authority has erroneously interpreted or applied the GMA, this Board is required to find that body's action not in compliance with the Act. Thus, if a local jurisdiction had ten policy options, each of which was in compliance with the GMA, and selected one that the Board believed was not the best option, this Board would nonetheless grant deference to the local legislative decision and find the action in compliance. However, if the local body, faced with the same ten choices, elected an eleventh option -- one not in compliance with the GMA -- this Board would not hesitate to find the action in noncompliance.

The Board recognizes that the GMA states that local legislative actions are presumed valid. RCW 36.70A.320. This tenet is consistent with the historic deference given legislative actions. However, under the GMA, this presumption can be overcome by a preponderance of the evidence. Although the fact that the presumption of validity can be overcome may not square with the historic deference given legislative decisions, the legislature clearly enunciated this standard when enacting the GMA. Since the legislature is presumed to be aware of judicial interpretations of its actions, the legislature knew of the historic deference given to legislative actions and determined that, although it would continue, it would do so to a lesser degree. Accordingly, the Board's decision reconciles the historic deference to legislative actions with the GMA's restriction on it.

### Conclusion No. 13

As the discussion and conclusions regarding Legal Issue No. 7 reveal, the Board concludes that the County's classification and designation of Twin Falls' property as forest land complies with the GMA. This Board's primary function is to review the legislative enactments of the legislative bodies of cities and counties for compliance with the GMA. Although this Board may on occasion admit supplemental evidence that may show how such a legislative enactment applies to particular parcels of property, such evidence will be used solely to assist the Board in determining

whether the local jurisdiction's legislative action complies with the Act. This Board will not utilize "as applied" supplemental evidence to usurp the quasi-judicial authority of a local government. "As applied" challenges must first be made with the local jurisdiction, triggered by a permit application submittal; appeals of quasi-judicial decisions made by cities and counties then must be filed with the superior court and not with this Board. The Board notes that some may view this conclusion as inconsistent with the Board's May 17, 1993 "Order Accepting Board Jurisdiction over Forest Land Designations on Specific Parcels of Property." Now that we have had an opportunity to examine this issue in some detail, we have an informed basis from which to make this judgment: To the extent that this decision is viewed as inconsistent with the May 17 Order, the latter is overruled.

The Board concludes that, although there are some similarities between the growth planning hearings boards and other quasi-judicial boards, the growth boards are unique because of the particular requirements of the GMA. The deference which the courts have historically given to the legislative enactment of comprehensive plans and development regulations guides the direction if not the degree of deference which the Boards should give when reviewing GMA mandated plans and regulations. With regard to GMA mandated plans and regulations, the great degree of deference that legislative bodies have historically enjoyed is diminished by the explicit direction of RCW 36.70A.320 that the presumption of validity may be overcome by a preponderance of the evidence.

#### Legal Issue No. 14

***Assuming that the Board concludes that it has jurisdiction to determine whether the forest land designations of Petitioners' specific properties in the Motion and Ordinances are in compliance with the GMA, is the forest land classification of WRECO's property in compliance with the requirements of the GMA and Chapter 365-190? [W]***

Legal Issue No. 14 is virtually identical to Legal Issue No. 13 except that the former deals with WRECO's property while the latter refers to Twin Falls' property. Therefore, the Board's discussion of Legal Issue No. 13 and Conclusion No. 13 also applies to this issue.

#### Conclusion No. 14

Please refer to the Board's discussion of Legal Issue No. 13 and Conclusion No. 13.

#### Legal Issue No. 15

***Assuming that the Board concludes that it has jurisdiction to determine whether the forest land designations of Petitioners' specific properties in the Motion and Ordinances are in compliance with the GMA, is the forest land classification in compliance with the requirements of the GMA and Chapter 365-190? [S]***

Legal Issue No. 15 is virtually identical to Legal Issues No. 13 and 14 except that the latter two deal with Twin Falls' and WRECO's properties respectively while the former was raised by SNOCO PRA even though no specific SNOCO PRA properties were discussed in the case. Therefore, the Board's discussion of Legal Issue No. 13 and Conclusion No. 13 also applies to this issue.

Conclusion No. 15

Please refer to the Board's discussion of Legal Issue No. 13 and Conclusion No. 13.

Legal Issue No. 16

***Did confining future development on designated land to the provisions of the Clustered Housing Ordinance, when no such ordinance exists, comply with the GMA? [T]***

This issue was raised only by Twin Falls. Twin Falls did not brief this legal issue nor present oral arguments about it. The Board notes that the County ultimately enacted a clustered housing ordinance No. 93-021 on May, 3, 1993. *See* W-12. Therefore, the Board deems Legal Issue No. 16 abandoned and will not consider this issue any further.

Conclusion No. 16

Legal Issue No. 16 was abandoned by Twin Falls. The Board will not consider it further. It is deemed dismissed from this case with prejudice.

Legal Issue No. 17

***In adopting the Motion and Ordinances, did Snohomish County comply with the requirements of Chapter 43.21C RCW, SEPA? [T, W]***

On November 6, 1991, the County completed an environmental checklist (R-1937-49) and issued a DNS on its proposed Plan and Interim Regulations. The proposal was described as:

[A]n ordinance to adopt and implement the County's Interim Forestland Conservation Plan, which is intended to meet the Growth Management Act (SHB 2929) interim requirements for conservation of commercial forestlands. The ordinance would designate mapped areas of the County as Commercial Forest and Forest Reserve lands and conserve designated lands for commercial timber production with interim policies and regulations. R-109.

The DNS included a map that labeled areas for classification as either IFR or ICF. WRECO's property was depicted on the map as being proposed for IFR classification. SCHB, at 52. On December 14, 1992, the County Council changed the designation of WRECO's property from IFR to ICF and subsequently adopted the amended proposal as Ordinance No. 92-101. RCW 43.21C.030(2)(c) requires state and local governments to evaluate the environmental impacts of legislation and other actions affecting the quality of the environment. WAC 197-11-310 (1) and (4) begin the SEPA process by requiring that a "threshold determination" be documented

in the form of a “determination of nonsignificance” or a “determination of significance” (DS) for any proposal that meets the definition of “action” and is not categorically exempt.

"Actions" include legislative proposals and are further categorized as “project” and “nonproject”; a nonproject action is “the adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling the use or modification of the environment.” WAC 197-11-704 (1)(c) and (2)(b)(i). "Nonproject actions" means "actions which are different or broader than a single site specific project, such as plans, policies and programs." WAC 197-11-774. The significance of nonproject actions is most pronounced when a DS, instead of a DNS, has been made.

The lead agency shall have more flexibility in preparing EISs on nonproject proposals, because there is normally less detailed information available on their environmental impacts.... WAC 197-11-442(1).

The County’s proposal clearly constituted a nonproject action. WRECO does not charge the County with failing to prepare an environmental checklist required by WAC 197-11-315 that assists the lead agency in making a threshold determination for such an action. Nor does WRECO challenge the County's threshold determination itself, the DNS. Instead, WRECO's contention is that because the environmental checklist only reviewed the impacts of Alternative 3, when the County changed the designation of its property from IFR to ICF (what it refers to as "the reclassification"), the County was required to undertake additional SEPA analysis of the impacts of that change. WHM, at 17-18.

Specifically, WRECO asserts that the County failed to prepare an environmental checklist describing the environmental impacts of "reclassifying" its property as required by WAC 197-11-315. Second, WRECO claims that the County did not supplement its original environmental checklist to account for the reclassification as required by WAC 197-11-600(4). Third, WRECO contends that the County did not prepare a new threshold determination for the "reclassification" as required by RCW 43.21C.030(2)(c) and WAC 197-11-310(1) and (4). Fourth, WRECO claims that the County did not invite public comment on the impacts of the change in designation as required by WAC 197-11-502(3). Lastly, WRECO contends that the County did not provide the public a timely opportunity to comment on the environmental review of the reclassification of WRECO's property as required by WAC 197-11-340(2)(c). WHM, at 23- 24.

Summarized, WRECO's argument is essentially twofold: 1) it challenges the alleged separate action undertaken by the County in "reclassifying" its property; and 2) it contests the lack of public notice and opportunity to comment.

### Was There a Separate Action?

First, WRECO points to several alleged procedural SEPA errors by the County based on the assumption that the "reclassification" constituted a separate action. WRECO contends that the County Council's action of December 14, 1992, “lift[ing] the WRECO property out of the Bosworth Block and designat[ing] it Interim Commercial Forest Land” constituted a separate action by the County that required a separate analysis under SEPA. WHM, at 23. Alternatively, WRECO contends that the "reclassification" of its property was such a significant change from the impacts contemplated by the County’s original SEPA analysis that the County should have supplemented its environmental documents to account for the impacts of the reclassification.

Turning to the first of the authorities WRECO cited above, WAC 197-11-315, entitled "Environmental checklist," provides:

(1) Agencies:

(a) Shall use the environmental checklist substantially in the form found in WAC 197-11-

960 to assist in making threshold determinations for proposals, except for: Public proposals on which the lead agency has decided to prepare its own EIS, or proposals on which the lead agency and applicant agree an EIS will be prepared.

(b) May use an environmental checklist whenever it would assist in their planning and decisionmaking, but shall not require an applicant to prepare a checklist under SEPA, unless a checklist is required by (1)(a) of this section.

(2) The lead agency shall prepare the checklist or require an applicant to prepare the checklist.

(3) The items in the environmental checklist are not weighted. The mention of one or many adverse environmental impacts does not necessarily mean that the impacts are significant. Conversely, a probable significant adverse impact on the environment may result in the need for an EIS.

The County's environmental checklist:

[A]ppplies to areas designated as interim Commercial Forestry and Interim Forest Reserve, and properties adjacent to and within 300 feet of designated areas.R-1939.

Although the Board agrees with WRECO's contention that the County's checklist reviewed only Alternative 3, since only Alternative 3 contained the ICF-IFR distinction, this contention, accepted literally, can be misleading. Although Alternative 3 indeed makes the distinction between ICF and IFR designations, the lands covered by Alternative 3 were also included in Alternatives 1 (where all lands identified in Alternative 3 were designated ICF) and Alternative 2 (where only a portion of Alternative 1's ICF lands were designated). The distinction between ICF and IFR at issue here is the potentially different environmental impacts of the interim development regulations associated with each (previously discussed in Legal Issue No. 7). The Board concludes that the County's environmental checklist adequately addressed the impacts arising from both designations of forest lands.

As for the reference to WAC 197-11-600, it contains criteria for determining whether an environmental document must be used unchanged and describes when existing documents may be used to meet all or part of an agency's responsibilities under SEPA. WAC 197-11-600(1). Subsection (4) contains five methods for using existing documents for a proposal: adoption, incorporation by reference, addendum, preparation of supplemental environmental impact statement (SEIS), and adoption of a substantially similar existing environmental impact statement (EIS). WAC 197-11-600(4)(d)(i) and (ii) requires an SEIS if there are "substantial changes so that the proposal is likely to have significant adverse environmental impacts" or if "new information indicating a proposal's probable significant adverse environmental impacts" comes to light. WRECO referred to WAC 197-11-600(4) presumably for the proposition that the County had to supplement its environmental checklist when it "reclassified" WRECO's property. Again, the County's checklist covered both types of forest land designations. The fact that the WRECO property's proposed designation of IFR was changed to ICF does not mean that the County failed to prepare an adequate environmental checklist.

The County's environmental checklist and DNS considered the environmental impacts of both IFR and ICF classifications as they applied to all forestry lands so designated in the map issued with the DNS on November 6, 1991. Requiring the County to prepare a new threshold determination or to supplement its existing environmental documents would not yield new information beyond what was contemplated in the County's original environmental checklist and DNS. Moreover, a review of the environmental documents and the County's Plan indicates that the "reclassification" was not a separate action: the County was acting on the same proposal for

which it prepared its environmental checklist and DNS.

A brief review of some relevant cases will make these conclusions abundantly clear.

... if the action will not have an environmental impact substantially different from the earlier proposed action, the lead agency ... is not required to prepare a new or supplemental draft or final EIS. *Nisqually Delta Association v. DuPont*, 103 Wn.2d 720, 729, 696 P.2d 1222 (1985).

In addition, “[a]n action which does not have an environmental impact substantially different from an earlier proposed action does not require ... new threshold determination...” *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 613, 744 P.2d 1101 (1987) (citing *Nisqually Delta Association v. DuPont*, at 728 (emphasis added)). WRECO offered no evidence to show that the "reclassification" of its property from IFR, which allows subdivision, to ICF, which does not allow subdivision, would alter the scope of the impacts considered in the County's environmental documents. These documents concerning the proposal already addressed the impacts of the two designations of forest lands. Thus the change in designation (the so-called "reclassification") of the WRECO property did not require separate or supplemental SEPA analysis.

WRECO also contends that the County violated RCW 43.21C.030(2)(c). The entire section is entitled "Guidelines for state agencies, local governments--Statements--Reports--Advice--Information" and provides:

The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

...

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action;
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (iii) alternatives to the proposed action;
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

In addition, WRECO claims that the County violated WAC 197-11-310(1) and (4). Entitled "Threshold determination required," it provides:

(1) A threshold determination is required for any proposal which meets the definition of action and is not categorically exempt.

(2) The responsible official of the lead agency shall make the threshold determination, which shall be made as close as possible to the time an agency has developed or is presented with a proposal (WAC 197-11-784 ).

(3) In most cases, the time to complete a threshold determination should not exceed fifteen days. Complex proposals, those where additional information is needed, and/or those

accompanied by an inaccurate checklist may require additional time. Upon request by an applicant, the responsible official shall select a date for making the threshold determination and notify the applicant of such date in writing.

(4) All threshold determinations shall be documented in:

(a) A determination of nonsignificance (DNS) (WAC 197-11-340 ); or

(b) A determination of significance (DS) (WAC 197-11-360 ).

The Board rejects WRECO's assertion that the County violated the SEPA statute or rule quoted immediately above. As previously stated, the change in designation of WRECO's property from IFR to ICF did not require a new checklist or new threshold determination since both designations were adequately reviewed and evaluated by the County's original SEPA documents. The County did make a threshold determination pursuant to WAC 197-11-310, assisted by an environmental checklist pursuant to WAC 197-11-315, that enabled it to comply with RCW 43.21C.030(2)(c).

#### Public Notice and Opportunity to Comment

WAC 197-11-502(3)(a) requires agencies to send the DNS to other agencies with jurisdiction, if any, as required by WAC 197-11-340(2).<sup>[20]</sup> WAC 197-11-502(3)(b) further states that public notice must be provided and comments received for fifteen days if threshold determinations were prepared under WAC 197-11-340(2). Thus, if an agency's proposal does not fall into one of the categories listed in WAC 197-11-340(2)(a), public notice and comment is not required. The Board holds that the County's proposal did not meet the definition of any of the proposals listed in WAC 197-11-340(2)(a).<sup>[21]</sup> See also SCHB, at 55. Therefore, WAC 197-11-502(3) and WAC 197-11-340(2)(c) did not require the County to invite public comment or to provide a timely opportunity for the public to comment on the County's original proposal.<sup>[22]</sup>

As a matter of guidance, WAC 197-11-502(1) provides that efforts to involve the public in the SEPA process should be commensurate with the type and scope of the environmental document.

#### Conclusion No. 17

In adopting the Motion and Ordinances, the Board finds that the County complied with the requirements of Chapter 43.21C RCW, the State Environmental Policy Act. The so-called "reclassification" of WRECO's property from IFR to ICF did not constitute a separate action under SEPA as the County's SEPA documents contemplated the environmental impacts of both classifications. Therefore, RCW 43.21C.030(2)(c), WAC 197-11-310, WAC 197-11-315 and WAC 197-11-600(4) did not require the County to prepare new SEPA documents or to supplement existing SEPA documents.

Accordingly, the Board finds that SEPA did not require the County to invite public comment on the "reclassification" as there was no separate action under SEPA on which to comment. Moreover, the Board finds that public comment was not required (even though it was in fact provided) because the County's original proposal was not one required by WAC 197-11-340(2) to provide a public comment period. Therefore, the County did not violate the requirements of WAC 197-11-340(2)(c) and WAC 197-11-502(3).

#### Legal Issue No. 18

***Does the Board have jurisdiction to determine whether Snohomish County violated Chapter 64.40 RCW, 42 U.S.C. 1983, the 5th and 14th Amendments to the Federal Constitution, Article I at Section 3 and 16 of the Washington State Constitution and Chapter 4.96 RCW or whether the County's conduct constituted tortious interference with contractual relations? [T, W]***

Conclusion No. 18

The third of the County's "... Motions and Arguments in Support Thereof," filed with the Board on May 12, 1993, addressed Legal Issue No. 18. The County requested that the issue be dismissed because the Board does not have jurisdiction to consider the issue.

On June 11, 1993, the Board entered an "Order on Dispositive Motions" that granted the County's dispositive motion regarding Legal Issue No. 18. Accordingly, Legal Issue No. 18 was dismissed by the Board. Please refer to that document for a detailed discussion of the Board's analysis.

Legal Issue No. 19

***Whether a two hundred foot buffer zone is justified under the GMA, SEPA and WACs? [S]***

Conclusion No. 19

Legal Issue No. 19 was abandoned by SNOCO PRA since it did not brief this issue. The Board will not consider this issue further. It is dismissed from this case with prejudice.

Legal Issues No. 20, 21, 22, 23

A. General Discussion

Issues 20 through 23 relate to the requirements of the Act and SEPA and the County's compliance relative to public participation in the process of preparing and adopting forest land designations and regulations. Therefore, it is helpful to first set forth the framework on this subject established by the Act, the Procedural Criteria (WAC 365-195) and relevant Board holdings in other cases. Issues 20 and 21 deal with the question of *notice* for the public hearings on the Motions and Ordinances, while Issues 22 and 23 deal with the public hearings themselves. Issue 22 deals with the *adequacy* of the hearings, while Issue 23 asks whether or not the County was required to and properly did "*take into account*" the input of the hearings. All four issues presumably address the County Council public hearings, rather than Planning Commission Hearings, because the terms "Motion" and "Ordinances" refer to the legislative enactments of the County Council.

1. The Growth Management Act

What are the GMA's public participation requirements? As the Board asked and answered this

question in *Tracy*, the words "public participation" are found only in three places in the GMA.<sup>1231</sup> First, RCW 36.70A.070, entitled "Comprehensive plans -- Mandatory elements," provides:

... A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140....(Emphasis added).

The other two references to the phrase are located in RCW 36.70A.140, entitled "Comprehensive plans -- Ensure public participation." It provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed. *Tracy*, at 10 (emphasis added).

## 2. Procedural Criteria (Chapter 365-195 WAC)

Section (1) of WAC 365-195-600 is almost a verbatim regurgitation of RCW 36.70A.140. Section (2)(a) includes several subsections that touch on the subject of hearings, notice and public comment. These include:

(v) Public hearings. When the final draft of the plan has been completed, at least one public hearing should be held prior to the presentation of the final draft to the legislative authority of the jurisdiction adopting it. When the plan is proposed for adoption, the legislative authority should conduct another hearing prior to voting on adoption

(vi) Written comment. At each stage of the process when public input is sought, opportunity should be provided to make written comment.

...

(ix) Notice. Notice of all events at which public input is sought should be broadly disseminated in advance through all available means, including flyers and press releases to print and broadcast media. Notice should be published in a newspaper of general circulation at least one week in advance of any public hearing. When appropriate, notices should announce the availability of relevant draft documents on request.

(x) All meetings and hearings to which the public is invited should be free and open. At hearings all persons desiring to speak should be allowed to do so, consistent with time constraints.

(xi) Consideration of and response to public comments. All comments and recommendations of the public should be reviewed. Adequate time should be provided between the time of any public hearing and the date of adoption of all or any part of the comprehensive plan to evaluate and respond to public comments. The proceedings and all public hearings should be recorded. A summary in response to them should be made in writing and included in the

record of adoption of the plan.

### 3. Holdings from Earlier Board Cases

The Procedural Criteria sections cited above clearly deal with preparation of comprehensive plans and development regulations. It is less clear that such WAC guidelines and even the Act's requirements for citizen participation apply in the same fashion or degree to regulations adopted before the adoption of the comprehensive plans referred to as interim regulations. The Board answered this question in the negative in *Tracy*.

The heart of the GMA's public participation requirements is clearly RCW 36.70A.140. This provision mandates that local governments planning under the GMA establish procedures for early and continuous public participation in addition to any other existing statutory requirements for public participation. It is crucial to note that this "enhanced" public participation requirement applies only to "... comprehensive land use plans and development regulations implementing such plans." As previously discussed, two types of development regulations exist: "interim" development regulations required by RCW 36.70A.060 and "implementing" development regulations required by RCW 36.70A.120. RCW 36.70A.140 refers only to the latter -- implementing development regulations. If the legislature intended the public participation requirements of RCW 36.70A.140 to apply to RCW 36.70A.060's "interim" development regulations, it would have required it by referring to development regulations generically or by referencing both types of required development regulations rather than just implementing ones. Therefore, Mercer Island was not required to comply with the enhanced public participation requirements of RCW 36.70A.140 when it formulated and adopted its interim development regulations pursuant to RCW 36.70A.060.<sup>[24]</sup> *Tracy*, at 11.

...

The Growth Management Act's enhanced public participation requirements, as specified in RCW 36.70A.140, do not apply to the process for adopting development regulations pursuant to RCW 36.70A.060. Therefore, the City of Mercer Island was not required to comply with those provisions in adopting Ordinance No. A-96. *Tracy*, at 13 (emphasis added).

The Board also discussed public participation in *Poulsbo et al. v. Kitsap County* (CPSGPHB Case No. 92-3-0009) (1993).

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). *Poulsbo*, at 36.

## B. Discussion of Specific Legal Issues

### Legal Issue No. 20

***Whether proper notice pursuant to the GMA and SEPA was given to affected property owners of the public hearings to consider adoption of the Motions and Ordinances?[S]***

This issue regarding 'proper notice' with regard to the County Council's public hearings to consider adoption of the Motions and Ordinances must be stated as a question of compliance in the order for the Board to render a judgment. In essence, the two parts of this question are: 1) what notice, if any, was required of the County by the GMA; and 2) did the County meet such a requirement, if any?

### Positions of the Parties

#### a. SNOCO PRA

SNOCO PRA in its brief stated its position by first asking the question:

Did the county give prior notice of the public hearings prior to passage of the motion and ordinance, and did the county provide the required notice to affected property owners?

SNOCO PRA Prehearing Brief, at 1.

SNOCO PRA argued at the hearing that "most people didn't get notice or were otherwise not aware of the county's process. Even if they did get a notice and attend a hearing, they would only get two to five minutes."

SNOCO PRA said the notice was insufficient because it did not say the critical thing about the potential effect on property rights. Petitioner further argued at the hearing that "If you just say you're going to have a meeting, it doesn't get people's attention. You need to say 'your property rights are affected.'"

In its brief, SNOCO PRA argued that the County violated the notice requirements of the Act and also WAC 365-190-040(2)(b), which provides:

Statutory and local processes already in place governing land use decisions are the minimum processes required for designation and regulation pursuant to RCW 36.70A.060 and 36.70A.170.

SNOCO PRA argued that this language of the DCD guideline is mandatory in nature.

#### b. Snohomish County

The County argued that it did not violate the Act relative to notice, pointing out that the DCD guidelines have previously been held by the Board to be advisory rather than mandatory.

## Discussion and Holdings

To answer the question "was proper notice given to affected property owners of the public hearings to consider adoption of the Motions and Ordinances?", it must first be remembered that the Board has previously ruled that it has jurisdiction only over compliance with the GMA and SEPA as it relates to the GMA. Therefore the question is really "was the notice given in compliance with the Act and SEPA?" Turning to the Act itself, we find that there is direction that cities and counties "designate" forest lands and "adopt" regulations to conserve forest lands. RCW 36.70A.060 and .170. However, the Act does not mention the words "notice" or "hearing" or in any other way explicitly describe what rights or expectations "affected property owners" should have in this regard.

RCW 36.70A.170(2) does require that, in making the designations of forest lands, the county "consider" the guidelines established pursuant to RCW 36.70A.050. The Minimum Guidelines prepared by DCD include discussion of public participation at WAC 365-190-040. Section (2)(a) (i) provides:

... The public participation program should include early and timely public notice of pending designations and regulations. (Emphasis added).

WAC 365-190-040(2)(b) provides:

Adoption process. Statutory and local processes already in place governing land use decisions are the minimum processes required for designation and regulation pursuant to RCW 36.70A.060 and 36.70A.170....

SNOCO PRA argued that the Minimum Guidelines are mandatory and binding on the County. This is not correct. Rather, the Board holds that the Minimum Guidelines *advise* early and timely notice of the "pending designations and regulations," to wit, the proposed Motions and Ordinances by which the County enacted the forest land regulations. Further, the County was *advised* by the Minimum Guidelines to use its processes "already in place," which presumably included requirements relative to providing public notice found in other statutes or county code. The word "advised" is appropriate here because the Board has previously held that the Minimum Guidelines are *advisory* only, to be considered by counties and cities when classifying and designating natural resource lands. *See* Order on Dispositive Motions, at 7. The Act provides no binding requirement relative to public notice of interim development regulations and therefore no objective measure for determining compliance.

The Board notes that the Record shows that extensive notice was mailed in January of 1992 to all owners of property proposed for designation as interim forest land, or within 300 feet of lands proposed for such designation. The Board notes that many public meetings and hearings, and extensive media coverage, provided ample opportunity for public involvement, and thus, notice of the entire process. These facts, and the fact that representatives of SNOCO PRA and Mr. Harting participated in the hearings before the County Council, suggest that effective notice was provided about the hearings to consider the Motions and Ordinances. The County was acting within the discretion that the Act affords to local government in the conduct of the public hearing

process -- including the means of notice.

If SNOCO PRA wishes to pursue the argument that the hearing notice was not "proper" because it did not follow notice requirements outlined in the County charter or code or other statutes, its argument must be pursued elsewhere. For the Board's purposes, the County is presumed to have considered its own processes for land use decisions; SNOCO PRA has not shown by a preponderance of the evidence that the County failed to consider these statutory and local processes.

Turning to the matter of notice required by SEPA, the Board notes that SNOCO PRA framed the issue but did not argue it. Because it was not briefed, it is abandoned. Nevertheless, the Board finds no evidence of a SEPA requirement that has been violated by the County. SEPA requires scoping notice and permits notice of action to be published, but there is no requirement in SEPA that requires mailing of notice to any party, or class of parties, prior to a hearing. *See also* Legal Issue No. 17.

#### Conclusion No. 20

The Act provides no binding direction as to the notice that must be given prior to an enactment pursuant to RCW 36.70A.170 or RCW 36.70A.060. The Act is silent as to what, if any, notice must be provided to property owners prior to such enactments. Therefore, the notice of the County Council hearings on the Motions and Ordinances did not violate the Act.

In this issue, SNOCO PRA did not argue that the County violated SEPA. Therefore, this portion of the issue as it relates to SEPA was abandoned. However, the Board concludes that SEPA does not contain a requirement that notice of a hearing on a SEPA document or an action described by a SEPA document be given to any class of individuals, such as property owners. Therefore, the County did not violate any SEPA notice requirements.

#### Legal Issue No. 21

***If Snohomish County was required, pursuant to the GMA and SEPA, to notify property owners of the public hearing to consider adopting the Motion and Ordinances, did the Snohomish County Council provide such notice?[S]***

#### Conclusion No. 21

As concluded in Issue No. 20, neither the Act nor SEPA create a duty to notify property owners of the public hearing in question. Therefore, it is unnecessary to answer the question of whether the County provided such notice.

#### Legal Issue No. 22

***Pursuant to the GMA and SEPA, did Snohomish County conduct adequate public hearings on the Motion and Ordinances? [S]***

The phrase 'adequate public hearing' must be construed to mean 'sufficient to satisfy the requirements of the Growth Management Act,' because that is the scope of the Board's jurisdiction. Thus, in reviewing the public hearings that were held, the Board must first consider what constitutes an adequate public hearing to meet the Act's requirements, and whether or not what the County did meets that requirement.

Positions of the Parties

a. SNOCO PRA

The petitioners presented no argument that the County did not hold public hearings. Rather, SNOCO PRA argued that the public participation process in general and the public hearings in particular were fundamentally unfair. SNOCO PRA argued that the balancing between efficiency and fairness had been tipped too far in favor of efficiency.

As one example of the alleged "unfairness," petitioner orally argued that insufficient time was allowed for individuals to provide their input. As a second example, SNOCO PRA made oral argument that the fact that a County staff member chaired the Forest Advisory Committee (FAC) created a conflict and that the FAC was "engineered by staff to achieve a pre-determined outcome." SNOCO PRA further argued that the votes taken by the FAC were not representative of the opinions of the majority of the FAC.<sup>[25]</sup>

SNOCO PRA voiced objection during oral argument to what it saw as "public relations and managing of the public" as contrasted to "meaningful broad solicitation of public input." SNOCO PRA stated that there was only one week's notice of the Planning Commission hearing and alleged that this " ... indicates a pre-disposed notion that they intended to get [it] adopted and they resisted public input."

b. Snohomish County

The County argued that its public hearing process was adequate. The County cited to the Record, which indicates that ground rules were set for how much time would be allowed for parties to address the County Council. The County also argued that written testimony carries as much weight as oral testimony and that there was a great volume of such public input in the Record presented to the Council.

In its brief, the County cited to a number of times in the Record when the public was encouraged to provide input, first to the staff, then the FAC, then the Planning Commission, and finally to the County Council. The County cited its public participation schedule and program as evidence of the effort to engage the public in a meaningful and fair way. With regard to the chairing of the FAC by County staff, the County's brief pointed out that the staff member attempted to relinquish this responsibility and was asked by the FAC itself to continue as chair.

## Discussion and Holdings

As the Board determined with regard to notice in Legal Issue No. 20, neither the GMA nor SEPA define adequacy of a public hearing held to take public comment on a proposed GMA enactment. The County was required to enact interim forest land regulations and did so. To the extent that the County violated its own Charter or Code or constitutionally protected due process rights, those are issues beyond the jurisdiction of this Board. *See* discussion of Issues Nos. 8 and 20. The Board must therefore presume that the County has not violated the Act. Similarly, any alleged violations of the legal requirement that the hearings be fundamentally fair must be pursued through the Courts rather than this Board. <sup>[26]</sup>

As to the Petitioner's allegation that insufficient time was allowed for individuals to provide their input, the Board makes the following observations. The record shows that the County Council announced the limitation on length of oral testimony for individuals, that a group representative would have more time, and that written testimony was welcome up until the time oral testimony was closed. Tapes of September 30, 1992 County Council hearing. These seem like fair and reasonable ground rules for a public hearing in view of the volume of people who wish to express an opinion and the limitations of the hearing format. A saving grace is that written testimony was specifically solicited and is typically afforded equal weight with oral testimony. The County's effort to run a fair and orderly hearing process is both understandable and necessary. The Board agrees with the point that efficiency cannot be allowed to drive out fundamental fairness. However, we see nothing persuasive in SNOCO PRA's argument that such was the case.

### Conclusion No. 22

Snohomish County did conduct public hearings on the Motion and Ordinances, notwithstanding that the GMA did not require such hearings for the adoption of interim development regulations.

### Legal Issue No. 23

***Pursuant to the GMA and SEPA, was the Snohomish County Council required to and did it properly take into account the public input received prior to enacting the Motion and Ordinances? [S]***

It must first be remembered that the Board has jurisdiction only over whether or not the enactment in question is in compliance with the Act. Thus, we must construe a phrase such as "properly take into account the public input" to mean, "constitute compliance with the requirements of the Act relative to public participation." Once the Board establishes the Act's requirements relative to "taking into account the public input" we can then turn to the question of whether the County was required to comply with such requirements, and if so, did the County do so.

## Positions of the Parties

### a. SNOCO PRA

SNOCO PRA, both in brief and in oral argument, contends that the County was required to take into account the public input received prior to enacting the Motion and Ordinances and did not do so.

...  
Clearly the intent and spirit of the law is that the regulations should be molded around community agreement and broad public input and coordination -- at least to the fullest extent possible. SNOCO PRA Prehearing Brief, at 15.

...  
The hearing procedure whereby advisory board opinions and recommendations were ignored, where the makeup of the advisory board was manipulated and its consensus twisted, and where predetermined goals and important policy matters were withheld from committee members and the public, also demonstrates arbitrary and unreasonable disregard for the purposes of the GMA. SNOCO PRA Hearing Brief, at 22.

### b. Snohomish County

The County's brief cited to the adopted Scope of Work, Public Participation Plan and Schedule for the Forest Land Conservation Element. R-1014 to 1045. These documents indicate that the County saw its task as both to inform the public as well as solicit public comment.

The County also cites the five public meetings and workshops, five meetings of the FAC, the five hearings and meetings held by the Planning Commission and the three public hearings held by the County Council as evidence of the extensive public participation process that was used over a two year period to assemble the record reviewed by the County Council prior to action.

The County contended:

Each of the petitioners at various points claims that the County did not meet its obligation to seek and encourage public participation in the development of the Interim Forest Land Conservation Plan. PRA Prehearing Brief, pp. 13-17; WRECO Hearing Memo., pp. 20-23; TF Prehearing Brief pp. 31-34. TF goes so far as to assert that County Staff co-opted what public participation there was. TF Prehearing Brief, p. 32. In fact, as stated on the first page of Motion No. 92-283 adopting the plan, there was extensive public participation, notice and hearings over a two year period leading up to the Council's action on December 14, 1992. SCHB at 6-7.

## Discussion and Holdings

The essence of the question framed in Legal Issue No. 23 is whether or not the County properly took into account or consideration the public's input. Much of SNOCO PRA's argument focuses on the contention that the public's input was not properly considered because the hearing, indeed

the entire public participation process, was manipulated. The discussion and holdings on this issue will be grouped into these two headings.

1. Did the County take into consideration public input?

The words "take into account" do not appear in the Act and this phrase is therefore not useful as a standard to measure compliance. *Webster's New Riverside University Dictionary* 72 (1988), reveals that the phrase "take into account" is synonymous with "to take into consideration." *Webster's* at p. 301, provides a more applicable definition of "consideration" as:

1. Careful thought: DELIBERATION. 2. Something to be considered in forming a judgment or decision. 3. Mindful concern for others: SOLICITUDE. 4. A thoughtful opinion.

The root of "consideration" is "consider," which *Webster's* defines at p. 301 as:

1. To think about seriously. 2. To regard as. 3. To believe after deliberation: JUDGE. 4. To take into account; bear in mind. 5. To show consideration for. 6. To regard highly: ESTEEM. 7. To look at thoughtfully. (Emphasis added).

Thus, the Board holds that "take into account public input" means "consider public input." The Board further holds that "consider public input" means "to think seriously about" or "to bear in mind" public input. Significantly, the Board holds that "consider public input" does not mean "agree with" or "obey" public input. These definitions and this holding are consistent with the *Black's* definition of "consider" cited in the Board's discussion on Legal Issue No. 6.

The Board notes that public participation is one of the cornerstones of the GMA and encourages local governments to consider public input, even when such consideration, as here, is not explicitly required by the Act. The principle that the public should provide input to legislative bodies is one of the most basic precepts of the comprehensive planning process - that a variety of inputs (data, values, public opinion) must be solicited and weighed and then a decision rendered. <sup>[27]</sup> Public participation is one of many critical inputs that the Act recognizes as indispensable to comprehensive planning (RCW 36.70A.140, RCW 36.70A.020(11)); however, the Act reserves to city and county legislative bodies the authority to "adopt" or "enact" or "designate" plans and regulations pursuant to RCW 36.70A.040(1), RCW 36.70A.060, RCW 36.70A.120 and RCW 36.70A.170.

The multiple client nature of public policy making virtually assures that the decision rendered by the elected officials will agree with the public input of some individuals and not with that of others. Certainly, many of the choices that the Act places before elected officials are essentially value driven, and hearing the opinions of citizens is an important duty for elected officials. Nevertheless, the Act also obliges local elected officials to be responsive to many other duties and it therefore does not follow that a local legislative enactment will always comport with popular public opinion. *See Poulsbo, Order Granting Kitsap County's Petition for Reconsideration and Modifying Final Decision*, at 13.

Even though the Board holds that the Act does not explicitly require the County to give consideration to the public input in the record, we are not convinced that they did not do so. It is relatively easy to document that a fact or opinion was entered into the record and therefore to

presume that the legislative body was aware of it. It is not possible to document that every one of the many thousands of bits of information in the record was subjected to independent evaluation and disposition in the mind of each of the members of the legislative body. Likewise, it is impossible to prove that an elected official did *not* evaluate and dispose of every bit of input. The mere fact that an individual comment or fact in the record is not explicitly mentioned prior to the action by the legislative body is not evidence that consideration was not given.

Absent conclusive evidence to the contrary, the Board must presume that elected officials will act in a lawful manner and review the record below. The opinions of many individuals, including Petitioners in this case, were entered into the record below. Therefore, the Board holds that, having reviewed the record below, the elected officials of the County have, in fact, considered (i. e. properly taken into account) public input prior to taking action on the Motion and Ordinances even though the GMA did not require them to do so.

## 2. Did the County 'manipulate' public input?

The Board sees no support for the argument that the County attempted to 'manipulate' the process by virtue of its staff providing the public with information while at the same time soliciting comment from the public. The County's efforts, as part of its public participation program, to explain the Act's requirements for designation and regulation of forest lands do not constitute 'manipulation'. The County's description of the Act's requirements, potential issues and approaches was an appropriate and necessary predicate to the public's expression of its concerns, desires and opinions. Meaningful and effective public participation does not simply equate to "the public telling the county, not the reverse."<sup>[28]</sup> The Act's purposes are served when public participation is an interactive dialogue between local government and the public. Those purposes are not served by a soliloquy.

With regard to the SNOCO PRA allegation that "advisory board opinions and recommendations were ignored," the Board notes that the operative word in this phrase is "advisory." The FAC and the Planning Commission played a role in the public participation efforts of the County and each provided recommendations for subsequent consideration by the legislative body. However, the duty of a legislative body is to consider such public input, not to agree with or obey it. The legislative body has the authority to create whatever advisory apparatus it deems appropriate - however, the authority to adopt cannot be delegated to such advisory groups. This is consistent with the Board's conclusion in *Snoqualmie v. King County*, Case No. 92-3-0004 (1993).<sup>[29]</sup>

### Conclusion No. 23

No language in the Act requires that a legislative body "take into account" public input in the development of any plans or regulations. Therefore, the Board concludes that, pursuant to the GMA, the County was not required to "take into account" the public input it received prior to enacting the Motion and Ordinances.

Instead of using the phrase "take into account", the Act at RCW 36.70A.140 provides:

Each County and City that is required or chooses to plan shall establish procedures... the procedures shall provide for...consideration of and response to public comments... (Emphasis added).

However, because the Board has previously held that interim development regulations are not subject to the requirements of RCW 36.70A.140, the Board concludes that the Act does not explicitly require the County to consider such input. While the Board therefore can render no judgment about the County's compliance with a non-existent requirement, there is nothing to preclude a local government from giving due consideration to public input. In fact, such consideration is always an important part of any policy making decision. Nonetheless, in this case there is ample evidence in the record to indicate that Snohomish County did consider the public input it received during its decision making process.

#### Legal Issue No. 24

*Whether the Forest Reserve designation violates the GMA criteria and other laws and constitutional restrictions? [S]*

#### Conclusion No. 24

To the extent that Legal Issue No. 23 addresses whether the County's forest reserve designation violates the GMA, the matter has been fully discussed by the Board in its discussion above of Legal Issue No. 7.

To the extent that Legal Issue No. 23 addresses whether other laws and constitutional restrictions have been violated, the Board concludes that it has no jurisdiction to determine whether statutes, other than the GMA or SEPA as it relates to the GMA, or constitutional provisions have been violated. For further information and a discussion of the Board's jurisdiction, please refer to the Board's "Order on Dispositive Motions" (in particular, the discussion at pages 4 through 10; and page 12) entered in this case on June 11, 1993.

### **D.ORDER**

Having reviewed the file and record in this case, having considered the testimony of the witnesses, having considered the briefs and arguments of counsel, and having entered the foregoing Findings of Fact and Conclusions, the Board finds that the interim forest land designations and interim development regulations adopted by Motion 92-283 and Ordinances 92-101 and 92-102 are in compliance with the Growth Management Act and the State Environmental Policy Act.

DATED this 7th day of September, 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.

APPENDIX 1

## A. PROCEDURAL HISTORY OF THE CASE

### Prehearing

On March 5, 1993, the Central Puget Sound Growth Planning Hearings Board (the **Board**) received a Petition for Review from Twin Falls, Inc. (**Twin Falls**). The matter was assigned Case No. 93-3-0010.

On March 9, 1993, the Board received a Petition for Review from the Weyerhaeuser Real Estate Company (**WRECO**). The matter was assigned Case No. 93-3-0011.

On March 10, 1993, the Board received a Petition for Review from the Snohomish County Property Rights Alliance and Darrell R. Harting (**SNOCO PRA**). The matter was assigned Case No. 93-3-0012.

On March 15, 1993, the Board issued an "Order of Consolidation and Notice of Hearing." The three above-referenced cases were consolidated into one case, pursuant to RCW 36.70A.290(5). In addition, the case numbers of the three cases were re-numbered as 93-3-0001, -0002 and -0003 respectively. The consolidation order also indicated that the three consolidated cases would be referred to as Case No. 93-3-0003. The hearing notice was entered pursuant to RCW 36.70A.290 (3). It scheduled a hearing on the consolidated petitions for June 7, 1993. A prehearing conference was also set for April 19, 1993.

On March 29, 1993, WRECO filed a "Motion and Memorandum of WRECO to Reschedule Prehearing Conference and Schedule Separate Prehearing Conference."

On April 2, 1993, Snohomish County (the **County**) filed its "Answer to Petitions for Review" with the Board.

On April 5, 1993, WRECO filed a motion related to its March 29, 1993, motion. It was entitled "Motion and Memorandum of WRECO to Bifurcate Proceedings and Clarify Jurisdiction."

On April 7, 1993, "Snohomish County's Response to WRECO's 'Motions to Reschedule Prehearing Conference and Schedule Separate Prehearing Conference' and 'Motion and Memorandum of WRECO to Bifurcate Proceedings and Clarify Jurisdiction'" was filed with the Board.

On April 8, 1993, the Board entered an "Order of Continuance of Prehearing Conference" that re-scheduled the prehearing conference to April 26, 1993. The second portion of WRECO's March 29, 1993 motion was denied; the Board declined to hold separate prehearing conferences for each petitioner. Finally, WRECO's April 5, 1993, "Motion... to Bifurcate Proceedings..." was stayed.

On April 16, 1993, "Snohomish County's Complete Index of Documents for Interim Forest Land Conservation and Designations and Interim Regulations to Conserve Forest Lands (Ordinances 92-101, 92-102, and Motion 92-283)" was filed. On April 19, 1993, the County submitted a "Supplemental" version of its original index.

On April 26, 1993, the Board held a prehearing conference in this matter. SNOCO PRA submitted an Amended Petition for Review but was instructed to file a motion to amend its petition since more than thirty days had passed since it filed its original petition.

On April 28, 1993, the Board entered a "Prehearing Order" in the consolidated cases that re-set the hearing to July 12, 1993. In addition, the "Prehearing Order" established deadlines for the parties to file motions, exhibit and witness lists, and legal briefs. The "Prehearing Order" also specified twenty three legal issues for the Board to determine. A Board-raised jurisdictional issue, that must be determined before the Board could review Legal Issues Nos. 13, 14, and 15, also was specified.

On April 29, 1993, the Board entered an "Order Denying Motion to Bifurcate Proceedings and Clarify Jurisdiction" that addressed WRECO's April 5, 1993 motions which had previously been stayed. The Board pointed out that the jurisdictional issues raised in WRECO's motion were addressed in Legal Issue No. 18, as specified in the "Prehearing Order."

On May 3, 1993, the Board received a letter from WRECO requesting that the Board add three issues to its "Prehearing Order."

On May 3, 1993, the parties filed memoranda regarding the preliminary jurisdictional issue raised by the Board. Subsequently, on May 10, 1993, response briefs were filed by WRECO and SNOCO PRA.

On May 4, 1993, the Board entered an "Order Amending Prehearing Order." This order granted WRECO's request by adding three subsections to Legal Issue No. 7, as specified in the "Prehearing Order."

Also on May 4, 1993, the Board received a letter from Twin Falls asking that Legal Issues Nos. 7 (B) and 7(C) be made applicable to it and that the language of Legal Issue No. 13 be amended.

On May 5, 1993, the Board entered a "Second Amended Prehearing Order" that granted Twin Falls' request. Legal Issues Nos. 7(B) and 7(C) were added as Twin Falls issues and Legal Issue No. 13 was amended.

Later on May 5, 1993, the County filed an "Objection to Prehearing Order and Order Amending Prehearing Order." The County objected to the statement of Legal Issues 9 through 12, 16, and 20

through 23 of the Prehearing Order and to sub-issues A, B, and C of Legal Issue No. 7 in the Amended Prehearing Order. In addition, the County objected to not being provided an opportunity to respond to the requests filed by the Petitioners, before the Board entered orders modifying the Prehearing Order.

On May 6, 1993, SNOCO PRA filed its "Objections to Pretrial Order." On May 11, 1993, SNOCO PRA filed an additional "Request for Consideration of Revision of Issue Wording."

On May 10, 1993, the Board entered an "Order Denying Snohomish County's Objection to Prehearing Order and Order Amending Prehearing Order."

On May 11, 1993, the Board heard oral arguments on the preliminary issue whether the Board had jurisdiction to determine whether forest land designations of specific parcels of property were in compliance with the Growth Management Act.

On May 11, 1993, the Board entered an "Order Denying SNOCO PRA and Harting's Objections to Pretrial Order" because they had not been timely filed. However, the parties were encouraged to stipulate to the wording of specific legal issues.

On May 12, 1993, the following dispositive motions were filed: "Respondent's Motions and Arguments in Support Thereof;" "WRECO's Dispositive Motion on Issues 9 and 10 in Prehearing Order and Memorandum in Support;" "Twin Falls' Dispositive Motion #1;" and "Twin Falls' Dispositive Motions [sic] #2."

Also on May 12, 1993, a "Motion to Amend Petition of SNOCO PRA and Darrell R. Harting" was filed with the Board. In addition, a "Motion for Reconsideration of Order Denying SNOCO PRA and Harting's Objections to Pretrial Order" was filed.

On May 13, 1993, Twin Falls filed "Twin Falls' Dispositive Motions #3" (which was subsequently withdrawn on May 26, 1993) and a "Motion to Consider New and/or Supplemental Evidence." Twin Falls also filed a "Motion to Accept Twin Falls' Dispositive Motion 3 and Motion to Consider New and/or Supplemental Evidence" on May 13, 1993, since the deadline for submitting motions had been May 12, 1993.

On May 14, 1993, the County filed a "Motion for an Extension of Time to Respond to Motions." Later that same day, "WRECO's Reply to Snohomish County's Motion for an Extension of Time to Respond to Motions" was filed with the Board.

On May 17, 1993, the Board entered an "Order Accepting Board Jurisdiction over Forest Land Designations on Specific Parcels of Property."

On the same day, the Board entered a "Third Amended Prehearing Order... and Order Granting SNOCO PRA's 'Motion for Reconsideration of Order Denying SNOCO PRA and Harting's Objections to Pretrial Order'." Legal Issues Nos. 15, 19, 20, and 23 (as specified in the "Prehearing Order") were amended and Legal Issue No. 24 was added.

The same document also contained an "... Order Granting Snohomish County's 'Motion for an Extension of Time to Respond to Motions...'" In essence, the County was given two additional days to respond to any dispositive or other motions. Petitioners were given an additional day to file any rebuttal memoranda. The Board's order also contained an "... Order Granting Twin Falls' 'Motion to Accept Twin Falls' Dispositive Motion 3 and Motion to Consider New and/or

Supplemental Evidence'."

On May 19, 1993, the following responses to dispositive motions were filed: "WRECO's Memorandum in Opposition to Snohomish County's Motion on Jurisdiction;" "Twin Falls' Response to Dispositive Motions by Weyerhaeuser and Snohomish County;" and a "Response of PRA and Harting to Respondent's Motion."The County's "Memorandum in Opposition to WRECO's Dispositive Motion on Issues 9 and 10" and "Snohomish County's Response to Twin Falls' Dispositive Motions Nos. 1, 2 and 3" were filed on May 21, 1993.Subsequently, "Snohomish County's Rebuttal to Memoranda in Opposition to County's Motions" and Twin Falls' "Reply to County's Response to Twin Falls' Dispositive Motions 1 and 2" were filed on May 26, 1993.On May 27, 1993, "WRECO's Reply Memorandum in Support of Its Dispositive Motions on Issues 9 and 10" and "WRECO's Memorandum Re: Twin Falls' Dispositive Motions" were filed.

On June 1, 1993, the Board held a hearing on the dispositive motions specified above. During the June 1, 1993 hearing, the Board also heard argument on the Petitioners' motions to supplement the record.Each Petitioner had filed motions to supplement the record with additional documentary evidence and witness testimony in early and mid- May, 1993."Snohomish County's Response to Motions to Supplement the Record Filed by Each of the Three Petitioners" was filed with the Board on May 21, 1993.In late May, each Petitioner filed a rebuttal to the County's response.

On June 4, 1993, the Board entered an "Order Partially Granting Petitioners' Motions to Supplement the Record and Order Granting County's Motion for Limited Discovery."The order admitted certain supplemental documents proposed by each Petitioner.Other proposed documents were denied.The parties were instructed that other documents could be offered at the July 12, 1993 hearing, at which time the Board would either admit or exclude them.The order also directed the Petitioners as to which witnesses would be allowed to testify.

On June 7, 1993, the parties submitted a "Stipulation Regarding the Record."Four days later, the County filed a "List of Maps and Tapes to Be Included in Record."

On June 11, 1993, the Board entered an "Order Granting SNOCO PRA and Harting's Motion to Amend Petition for Review."

On June 11, 1993, the Board also entered an "Order on Dispositive Motions."The order granted all four of the County's dispositive motions.Therefore, Legal Issues 9, 10, 11, 12 and 18 were dismissed.Legal Issues Nos. 20 through 23 were amended to apply only to the GMA and SEPA. Conversely, WRECO's motion regarding Legal Issues Nos. 9 and 10 was denied.Finally, Twin Falls' first dispositive motion was denied; therefore, Legal Issue No. 3 was dismissed.Although Twin Falls' second dispositive motion was also denied, Legal Issue No. 7 remained before the Board.

On July 2, 1993, the "County's Motion to Supplement for Rebuttal Purposes" was filed with the Board.The County sought permission to have documents labeled Attachment E and F attached to its hearing brief.These documents related to only the Twin Falls portion of the case.

On July 8, 1993, Twin Falls filed its "Response to Snohomish County's Motion to Supplement

the Record," generally not objecting to the motion.

Also on July 8, 1993, "WRECO's Motion and Memorandum to Supplement the County Record" was filed with the Board. WRECO requested admission of proposed exhibits W-5 through W-9. On July 9, 1993, the Board entered on Order Granting Snohomish County's Motion to Supplement for Rebuttal Purposes. Attachments E and F were attached to "Snohomish County's Hearing Brief."

On June 15, 1993, the Board received "Petitioner Twin Falls' Prehearing Brief" and "WRECO's Hearing Memorandum" with supporting documents. On June 16, 1993, the "Prehearing Brief of Petitioner's SNOCO PRA and Darrell R. Harting" was filed with the Board, and an amended version of this document was filed on June 18, 1993. "Snohomish County's Hearing Brief" was filed with the Board on July 2, 1993.

On July 8, 1993, the Board received Twin Falls' "Reply to Snohomish County's Hearing Brief," the "Reply Brief of SNOCO PRA and Darrell R. Harting," and WRECO's "Reply Memorandum."

### Hearing

On Monday, July 12, 1993, the hearing in this matter began and continued through the week, concluding on Friday afternoon, July 16, 1993. The first two days of hearings were held in the Lynnwood City Council Chambers. The remaining three days were held in the 55th floor conference room of Two Union Square in downtown Seattle. All three Board members were present throughout the hearing: M. Peter Philley, presiding officer, Joseph W. Tovar and Chris Smith Towne. Scott E. Stafne represented Twin Falls. WRECO was represented by Mark C. McPherson and/or Thomas J. Ehrlichman. Douglas J. Smith represented SNOCO PRA. The County was represented by Carol J. Weibel and Gordon W. Sivley. Court reporting services throughout the hearing were provided by Debbie Carrigan of Likkell & Associates, Everett. Each Petitioner presented its case separately. The County presented rebuttal argument following the close of each Petitioner's case in chief. Each Petitioner was then permitted to present surrebuttal/closing arguments. WRECO presented its oral arguments first. Although it had been permitted to call specific witnesses pursuant to prior Board rulings, WRECO elected not to call any witnesses. Twin Falls argued its case next. Twin Falls called two witnesses: Erik Anderson, a forestry consultant and Todd Stafne, a Twin Falls officer. The County called one witness in rebuttal, George Shelton from the Washington State Department of Natural Resources. SNOCO PRA presented its arguments last. It was not permitted to call witnesses, pursuant to earlier Board rulings.

### The Record

As a preliminary matter, the Board clarified the Record it would be considering. The County's "Record below" consists of five volumes in white three-ring binders. Although the County did not assign unique numbers to individual exhibits, each page of the record was consecutively

numbered. References to the County's Record therefore refer to specific pages and are preceded by the letter "R."

In addition to the documents contained in the "R" portion, the County's Record also contained 30 cassette tape recordings of planning commission and county council proceedings. Certain portions of these tapes have been transcribed and included as part of the County's Record or as Petitioners' supplemental exhibits. Finally, the County Record also contained the maps listed in the "List of Maps and Tapes to Be Included in Record." References to individual maps are identified as "M" followed by the applicable number.

Twin Falls submitted a packet of supplemental exhibits contained in one burgundy three-ring binder. The County orally stipulated to the admission of all the documents contained in the binder. These documents were referenced as "T" followed by the specific consecutively numbered page, as Twin Falls did not assign unique numbers to individual exhibits.

WRECO's supplemental exhibits were contained in one black three-ring binder. WRECO exhibits are referred to by the letter "W" followed by reference to the number of the unique exhibit. In response to "WRECO's Motion and Memorandum to Supplement the County Record" of July 2, 1993, the County did not object to proposed exhibits W-5 through W-9; and they were admitted into evidence at the hearing. In addition, WRECO offered proposed exhibits W-11 and W-12 at the hearing which were also admitted. Exhibits W-10 and W-13 were admitted for illustrative purposes only. At the close of the hearing, the presiding officer informed WRECO that an uncertified transcript of an excerpt of the December 14, 1993 County Council hearing, that had been offered only for illustrative purposes, would be admitted if it were certified. Subsequently, a certified copy of the transcript was filed with the Board on July 20, 1993. Accordingly, it becomes WRECO's Exhibit W-14.

SNOCO PRA had filed a "Final Exhibit List of Snohomish County PRA and Darrell R. Harting" on June 7, 1993 listing proposed supplemental exhibits P-1 through P-8. Three days later, on June 11, 1993, SNOCO PRA filed a document entitled "Supplemental Exhibits to Be Offered." This later list proposed exhibits labeled P-3 through P-7. Because the numbering and some of the proposed exhibits listed on the two lists did not jibe, SNOCO PRA clarified that the latter list, the "Supplemental Exhibits to Be Offered," was the controlling document for consideration of its supplemental exhibits. Proposed Exhibits P-3 and P-4 from the later list were admitted; proposed Exhibits P-5 and P-6 were withdrawn because they were already contained in the County's record; and proposed Exhibit P-7 was denied because it was dated well after the County's adoption of the legislative enactments at issue.

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<sup>[1]</sup>WAC 242-02-680 enables Board members to ask questions during a hearing, whether or not the issue has been orally argued.

<sup>[2]</sup>Twin Falls' brief did not distinguish which legal issue was being discussed. Interestingly, Twin Falls' Dispositive Motion #3, although not referring specifically to legal issues 4 and 5, does seem to address those issues. On page one of that motion, Twin Falls asks that Ordinance 92-101 be declared in noncompliance "because it represents restrictions on uses which were not previously existing on Twin Falls land prior to its being designated as Forest Land." However, Twin Falls never really develops its arguments. In any case, Twin Falls withdrew its Dispositive

Motion #3 on May 26, 1993 when it filed its "Reply to County's Response to Twin Falls' Dispositive Motions 1 and 2" [see p. 27 which stated: "Twin Falls withdraws Dispositive Motion 3 at this time, but intends to raise it later"]. WRECO's brief did not single out Legal Issues 4 and 5 for discussion the way it did with its other legal issues. Instead, WRECO stated:

WRECO joins in the arguments of other petitioners that the County's action prohibited previous uses legally existing in violation of RCW 36.70A.060(1). WRECO's Hearing Memorandum, at 38, footnote 12.

<sup>[3]</sup>Following are excerpts from the Act where "consider" or "consideration" appear:

RCW 36.70A.030(10) "Long-term commercial significance" includes the growing capacity, productivity, and soil composition of the land for long term commercial production, in **consideration** with the land's proximity to population areas, and the possibility of more intense uses of the land.

RCW 36.70A.050(2) ...In addition to the consultation required under this subsection, the department shall conduct public hearings in the various regions of the state. The department shall **consider** the public input obtained at such public hearings when adopting the guidelines. Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and **consideration** of and response to public comments. Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed..

RCW 36.70A.140 Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and **consideration** of and response to public comments. Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed. (Emphasis added).

RCW 36.70A.170 Natural resource lands and critical areas designations....(2) In making the designations required by this section, counties and cities shall **consider** the guidelines established pursuant to RCW 36.70A.050.

RCW 36.70A.210 County-wide planning policies.(3)(e) Policies that **consider** the need for affordable housing, such as housing for all economic segments of the population and parameters for its distribution

RCW 36.70A.280 Matters subject to board review.(4) When considering a possible adjustment to a growth management planning population projection prepared by the office of financial management, a board shall **consider** the implications of any such adjustment to the population forecast for the entire state.

RCW 36.70A.320 Presumption of validity--Burden of proof.Plans and regulations.Comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.In any petition under this chapter, the board, after full **consideration** of the petition, shall determine whether there is compliance with the requirements of this chapter.In making its determination, the board shall **consider** the criteria adopted by the department under RCW 36.70A.190(4).The board shall find compliance unless it finds by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied this chapter.

RCW 36.70A.385 Environmental planning pilot projects.(1) ... Such pilot projects should be designed and scoped to **consider** cumulative impacts resulting from plan decisions, plan impacts on environmental quality, impacts on adjacent jurisdictions, and similar factors in sufficient depth to simplify the analysis of subsequent specific projects being carried out pursuant to the approved plan.

...

(4)(b) **Consider** adoption of any further rules or guidelines as may be appropriate to assist counties and cities in meeting requirements of Chapter 43.21C RCW when considering comprehensive plans RCW 36.70A.800 Role of growth strategies commission. The growth strategies commission created by executive order shall:

(1)(d)(ii) **Consider** the environmental, economic, and social values of the lands and resources with state-wide significance. (Emphasis added).

<sup>[4]</sup>By requiring local government's simply to "consider" specified factors, rather than demanding a more mandatory outcome, the state legislature seemingly reinforced the deference the courts historically give to decisions of local legislative bodies. See discussion in Legal Issue No. 13 below.

<sup>[5]</sup>The phrase "productive forest lands" is defined by Snohomish County in its Plan as "those lands meeting criteria 1, 2 and 3 in Section IV.A of this document." R-6. The County's Plan gives the same meaning to the phrase "productive commercial forest lands." See R-11, note 1 to Table 2.

<sup>[6]</sup>The Board points out that RCW 36.70A.060, enacted as part of the original 1990 GMA, was amended in 1991. The changes to subsection (1) are shown below:

... Regulations adopted under this (~~(section)~~) subsection may not prohibit uses (~~(permitted)~~) **legally existing on any parcel** prior to their adoption and shall remain in effect until (~~(a)~~) the county or city adopts development regulations pursuant to RCW 36.70A.120. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals. Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within three hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. (Language with a ~~striketrough~~ indicates original 1990 wording; underlined language denotes wording added by 1991 amendments; bolding added for emphasis).

In addition, subsection (4) of RCW 36.70A.060 was added by the 1991 amendments.

<sup>[7]</sup>"Urban growth areas" are defined at RCW 36.70A.030(15) to mean those areas designated by a county pursuant to RCW 36.70A.110.

<sup>[8]</sup>WAC 365-190-030(6) defines "forest land" identically to RCW 36.70A.030(8); WAC 365-190-030(11) defines "long-term commercial significance" identically to RCW 36.70A.030(10); WAC 365-190-030(15) defines "natural resource lands" as agricultural, forest and mineral resource lands which have long-term commercial significance.

<sup>[9]</sup>Twin Falls' Dispositive Motion #2 was denied by the Board. However, the Board indicated that it would further consider the arguments made on that motion in reaching its Final Decision and Order. Consequently, both the County and Twin Falls incorporated prior arguments on this motion into their hearing briefs.

<sup>[10]</sup>The Board agrees with WRECO that the County could have looked at other types of permits. However, the County had the discretion to do what it did and still comply with the GMA.

<sup>[11]</sup>"Interim forest lands" are defined by SCC 32.13.010(1) to mean all land designated either Interim Commercial Forest or Interim Forest Reserve by the Motion.R-27.

<sup>[12]</sup>Some words or phrases in the Act are undefined. The word "use" is one such example. The County provided three definitions of the term "use." See SCHB, at 58. Most generally, use means:

(1) The act of using or the state of being used; usage.

...

(5) Way of using.

...

(7)The object, end, or purpose for which something is used.

(8)Function; service.

...

(10)In law, (a) the enjoyment of property, as from occupying, employing, or exercising it; (b) . . . profit, benefit, or advantage, especially that of lands or tenements held in trust by another. *Webster's New Twentieth Century Dictionary*, 2012 (Unabridged, 2d ed. 1977).

Pursuant to a legal dictionary, use means:

The enjoyment of property which consists in its employment, occupation, exercise or practice. *Black's*, at 1382.

A legal treatise on zoning law indicates that use means:

(a)Any purpose for which a building or other structure or a tract of land may be designed, arranged, intended, maintained, or occupied, or (b) any activity, occupation, business, or operation carried on, or intended to be carried on, in a building or other structure or on a tract of land. Anderson, *American Law of Zoning*, (3d ed. 1986).

<sup>[13]</sup>This holding is especially true in light of the status the courts have traditionally given comprehensive plans adopted pursuant to the Planning Enabling Act, Chapter 36.70 RCW. Comprehensive plans are merely a blueprint for zoning regulations. As such, a pre-GMA comprehensive plan is simply a guide to the adoption of zoning regulations. Strict adherence to such a comprehensive plan has not been required; instead, only general conformance is necessary. *Cathcart v. Snohomish County*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981); *Barrie v. Kitsap County*, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980); *State ex rel. Standard Mining & De. Corp. v. Auburn*, 82 Wn.2d 321, 330, 510 P.2d 647 (1973); *Lutz v. Longview*, 83 Wn.2d 566, 574, 520 P.2d 1374 (1974); *Buell v. Bremerton*, 80 Wn.2d 518, 526, 495 P.2d 1358 (1972); *Sharinghouse v. Bellingham*, 4 Wn. App. 198, 203, 480 P.2d 233 (1971).

<sup>[14]</sup>The Board notes that vesting rules exist and operate independent of the GMA. The Board has no jurisdiction to confer or extinguish any such rights. Those determinations are the province of the courts.

<sup>[15]</sup>Spot zoning is a zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from, and inconsistent with, the classification of surrounding land and not in accordance with the comprehensive plan. *Save a Neighborhood Environment (SANE) v. Seattle*, 101 Wn.2d 280, 286, 676 P.2d 1006 (1984) (citing *Save Our Rural Environment (SORE) v. Snohomish County*, 99 Wn.2d 363, 368, 662 P.2d 816 (1983); *Smith v. Skagit County*, 75 Wn.2d 715, 744, 453 P.2d 832 (1969)). It is zoning with disregard for the welfare of the whole community for the benefit or private gain of a particular individual or a few, or in violation of the comprehensive plan. *Save a Valuable Environment (SAVE) v. Bothell*, 89 Wn.2d 862, 869, 576 P.2d 401 (1978); *Lutz v. Longview*, 83 Wn.2d 566, 573, 520 P.2d 1374 (1974); *Smith*, at 743.

Although spot zoning is not per se illegal, it is almost universally condemned. *Anderson v. Island County*, 81 Wn.2d 312, 325, 501 P.2d 594 (1972). Nonetheless, the Washington Supreme Court has warned against "laying down a hard and fast rule that all spot zoning is illegal". *SORE*, at 368, (citing *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 225, 242 P.2d 505 (1952)).

The vice of a spot zone is its inevitable effect of granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors or the community without adequate public advantage or justification.

*Smith*, at 743, (citing *Thomas v. Toten of Bedford*, 11 N.Y.2d 428, 184 N.E.2d 285 (1962)).

Traditional spot zoning analysis by appellate courts has been in the context of reviewing the granting or denial of a rezone application. For instance, *SORE* involved a rezone of Soper Hill where the court had to determine whether the rezone constituted illegal spot zoning. *SORE*, at 368. Similarly, the *SANE* case involved a rezone application by a church. *SANE*, at 282. *SAVE* also revolved around the question whether the rezoning of a farm constituted illegal spot zoning. *SAVE*, at 868.

Actions are characterized as rezoning when there are specific parties requesting a classification change for a specific

tract. *Cathcart v. Snohomish County*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981) (citing *Fleming v. Tacoma*, 81 Wn.2d 292, 502 P.2d 327 (1972)). For instance, a request or application for a planned unit development (PUD) is treated as a request for a rezone. *Cathcart*, at 212, *Johnson v. Mount Vernon*, 37 Wn. App. 214, 218, 679 P.2d 405 (1984) and *Kenart & Associates v. Skagit County*, 37 Wn. App. 295 298, 680 P.2d 439 (1984) (all citing *Lutz v. Longview*, 83 Wn.2d 566, 568-69, 520 P.2d 1374 (1974)).

A local legislative body's decision to rezone specific tracts of land under a zoning code is a quasi-judicial act. *Bassani v. Yakima County Commissioners*, 70 Wn. App. 389, 393, \_\_\_ P.2d \_\_\_ (1993). Rezone actions are therefore adjudicatory in nature rather than legislative. *Barrie (II) v. Kitsap County*, 93 Wn.2d 843, 852, 613 P.2d 1148 (1980), (citing *Fleming v. Tacoma*, 81 Wn.2d 292, 299, 502 P.2d 327 (1972) *partially overruled by Raynes v. Leavenworth*, 118 Wn.2d 237 247, 821 P.2d 1204 (1992)); *Parkridge v. Seattle*, 89 Wn.2d 454, 460, 573 P.2d 359 (1978). Rezones are adjudicatory because:

(1) the parties whose interests are affected are readily identifiable and the decision has a far greater impact on one group of citizens than on the public, (2) the decisions have localized applicability, and (3) zoning hearings are required by statute, charter or ordinance, which shows that the decision-making process must be more sensitive to the rights of the individual citizen involved. *Barrie II*, at 852, (citing *Fleming*, at 299).

Thus, when faced with rezone challenges, "the main inquiry of the court is whether the zoning action bears a **substantial relationship** to the general welfare of the affected community." *SANE*, at 286; *SORE*, at 368; *see also Parkridge*, at 460, 462. The "affected community" means the entire affected community. The "entire" community can mean more than the municipality engaged in a rezone -- it can include the "regional welfare" when the interest at stake is the quality of the environment. *SAVE*, at 871.

Only where the spot zone grants a discriminatory benefit to one or a group of owners to the detriment of their neighbors or the community at large without adequate public advantage or justification will the county's rezone be overturned. *SANE*, at 286 (quoting *SORE*, at 368).

The *Parkridge* court summarized the test for rezones in the following manner:

In considering the evidence, we note that (1) there is no **presumption of validity** favoring the action of rezoning; (2) the proponents of the rezone have the **burden of proof** in demonstrating that conditions have substantially changed since the original zoning, ... and (3) the rezone must bear a **substantial relationship** to the public health, safety, morals or welfare. *Parkridge*, at 462.

<sup>[16]</sup>In contrast, actions involving an application for a rezone (which are adjudicatory in nature) are not given such a presumption because the rezone involves the forfeiture of rights or deprivation of the use of property. The *Raynes* court pointed out however, that there is an important distinction between applying for a rezone of a specific site and making amendments which modify the text of a zoning ordinance. In the *Raynes* case, the City of Leavenworth amended the text of its zoning code. The modification had "areawide significance" effecting an entire district and not just a specific parcel of land. Therefore, the court held that the amendment proceedings did not constitute rezoning. *Raynes*, at 248. The court pointed out that just because the ordinance affected specific individuals was not sufficient reason to classify the proceeding as a rezone, and thus as a quasi-judicial action taken by the legislative body. Policy problems facing an entire city, even though the chosen solution has a high impact on a few people, does not alter the fundamental legislative nature of the legislative body's decision. *Raynes*, at 248-49.

<sup>[17]</sup>Despite the Board's holding as to "as applied" challenges and how it will review supplemental evidence relating to specific parcels of property, Petitioners' remedies regarding their specific properties remain multiple: 1) they can apply and have a permit granted either outright or through a variance-type procedure; 2) they can apply for a permit, have their application denied and then proceed through normal non-GMA judicial appeals of that permit denial; 3) they can challenge the constitutionality of the underlying enactment in superior court; 4) they can ask the Snohomish County Council, the County's legislative body, to amend the underlying ordinance; or 5) they can actively campaign for the election of County Council candidates with a viewpoint more akin to theirs.

<sup>[18]</sup>The Board notes that not all jurisdictions involve the legislative body in deciding quasi-judicial matters. The use of the hearing examiner system is one method allowed under law to handle such matters.

<sup>[19]</sup>RCW 34.05.562 provides:

(1)The court may receive evidence in addition to that contained in the agency record for judicial review only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:  
(a)Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;  
(b)Unlawfulness of procedure or of decision-making process; or  
(c)Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

<sup>[20]</sup>WAC 197-11-340 (2) provides:

When a DNS is issued for any of the proposals listed in (2)(a), the requirements in this subsection *shall* be met.

(a) An agency shall not act upon a proposal for fifteen days after the date of issuance of a DNS if the proposal involves:

(i) Another agency with jurisdiction;

(ii) Demolition of any structure or facility not exempted by WAC 197-11-880;

(iii) Issuance of clearing or grading permits not exempted in Part Nine of these rules; or

(iv) A DNS under WAC 197-11-350 (2), (3) [re: mitigated DNSs] or WAC 197-11-360 (4) [re: DNSs issued after withdrawal of a DS].

(b) The responsible official shall send the DNS and environmental checklist to agencies with jurisdiction, the department of ecology, and affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal, and shall give notice under WAC 197-11-510....(Emphasis added).

<sup>[21]</sup>The Board is aware that the County itself indicated that its DNS was "issued under [WAC] 197-11-340(2)."R-109.

<sup>[22]</sup>Even though it was impossible for the County to have committed the procedural SEPA errors cited by WRECO regarding notice, as the regulations never required the County to provide for public involvement in the first place, the County nonetheless provided the public with an opportunity to comment on its DNS.*See* R-109.

<sup>[23]</sup>The Board is aware that the phrase "citizen participation," as opposed to "public" participation, is used within the GMA.RCW 36.70A.020, entitled "Planning goals," provides as follows:

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

...

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

Secondly, RCW 36.70A.190(6) provides that DCD:

... shall provide planning grants to enhance citizen participation under RCW 36.70A.140.(Emphasis added).

Since the phrase "citizen participation" is used only twice in the GMA, at RCW 36.70A.020(11) and in RCW 36.70A.190(6), and since the latter specifically cites to the public participation requirements of RCW 36.70A.140, the Board determines that the terms "citizen" and "public" participation are synonymous; the citizen participation referenced in the planning goals of RCW 36.70A.020(11) is referring to the enhanced public participation procedures outlined in RCW 36.70A.140.*Tracy*, at 10.

<sup>[24]</sup>The Board recognizes that WAC 365-190-040(2)(a), Minimum Guidelines, discusses public participation requirements.However, DCD's Minimum Guidelines are only advisory -- they are not mandatory.RCW 36.70A.170 (2) directs that cities and counties "consider" the guidelines; they are not bound to follow them.This interpretation is consistent with DCD's own explanation:WAC 365-190-020 specifies only that the minimum guidelines "... shall be

considered by counties and cities in designating these lands".

<sup>[25]</sup>SNOCO PRA argued that the recommendation vote of the F.A.C. was manipulated. It was alleged that votes were 5 to 3 with only 8 people present, when the membership of the whole F.A.C. was 12. Thus, it was argued, the recommendation of the F.A.C. was actually that of a minority of the total membership.

<sup>[26]</sup>Apart from the requirements of the Act, the fundamental question of fairness has another important legal basis. While we have no jurisdiction to determine compliance with the case law, the Board certainly supports the concept and the practice of fairness as set forth in *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969):

It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only of fair substance, but fair in appearance as well. *Smith*, at 739.

...

...The term "public hearing" then presupposes that all matters upon which public notice has been given and on which public comment has been invited will be open to public discussion, and that persons present in response to the public notice will be afforded reasonable opportunity to present their views, consistent, of course, with the time and space available. *Smith*, at 740.

...

...but common sense dictates that the hearing must be so conducted as to demonstrate that the relevant opinions of all person invited to attend will be considered and weighed by the legislative body in the light of all other factors influencing their decision. *Smith*, at 742.

<sup>[27]</sup>Comprehensive planning is an interactive and iterative deliberation process that weighs a variety of inputs prior to taking action. This methodology is described in many texts. The Board takes official notice of *Urban Design within the Comprehensive Planning Process*, M. Wolfe and D. Shinn, University of Washington Press, Seattle, 1970. This reference sets forth the sequential stages of the comprehensive planning process as: (1) **Recognition** Stage wherein existing policies, permitting actions, regulations and visual form and character are inventoried; (2) **Specification** Stage wherein Goals and Priorities are set forth; (3) **Proposal** Stage wherein a variety of alternative concepts are generated at the city, sector and project scales; (4) **Evaluation** Stage wherein the alternatives are scored against adopted criteria, including public review; (5) **Decision** Stage wherein a specific choice is made, developed and/or modified; and (6) **Effectuation** Stage wherein the selected alternative(s) are implemented via revisions to the land use, circulation, and facilities plans, regulatory measures and capital programs. M. Wolfe and D. Shinn, at 37.

<sup>[28]</sup>This assertion was made by Twin Falls during oral argument.

<sup>[29]</sup>In *Snoqualmie*, the Petitioner had alleged that the County had delegated GMA decision-making authority to the Growth Management Planning Council (GMPC). The Board concluded:

The GMPC may exercise authority delegated to it to perform certain tasks such as establishing specific population and employment goals, but its work remains only recommendations unless and until the King County Council adopts them by amending the King County CPPs. The GMPC's actions alone have no binding effect on cities within King County, nor must cities have comprehensive plans that are consistent with GMPC recommendations. The actions of the King County Council are controlling -- the Board will review only the King County Council's actions for compliance with the GMA and not those of the GMPC. *Snoqualmie*, at 26.