

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

KITSAP CITIZENS FOR RURAL)Case No. **94-3-0005**
PRESERVATION, BETH WILSON,))
CHARLIE BURROW, TOM DONNELLY))
and CHARLOTTE GARRIDO,)FINAL **DECISION AND ORDER**
))
Petitioners,))
))
and))
))
KITSAP AUDUBON SOCIETY,))
))
Intervenor,))
v.))
))
KITSAP COUNTY,))
))
Respondent,))
))
and))
))
PORT BLAKELY TREE FARMS,))
))
Intervenor.))
))

A.PROCEDURAL HISTORY

On April 29, 1994, the Central Puget Sound Growth Planning Hearings Board^[1] (the **Board**) received a Petition for Review from Kitsap Citizens for Rural Preservation, Beth Wilson, Charlie Burrow, Tom Donnelly and Charlotte Garrido (collectively referred to hereafter as **Citizens**).The Petition challenged Kitsap County (the **County**) Ordinance No. 93-P-1994, referred to as the Conservation Easement Ordinance (**CEO**), and the County's alleged failure to designate forest

lands and adopt development regulations to assure the conservation of forest lands pursuant to RCW 36.70A.170 and .060 respectively. Subsequently, the Board entered separate orders granting intervention status to Port Blakely Tree Farms (**Port Blakely**) and Kitsap Audubon Society (**Audubon**), and amicus status to 1000 Friends of Washington (**1000 Friends**).

One dispositive motion was filed in this case when the County filed a "Dispositive Motion to Dismiss Petition ..." on May 25, 1994. On June 20, 1994, the County filed an "Amended Motion to Dismiss Petition" (**County's Motion**) that replaced its earlier motion. The County's Motion had two major parts, the first claiming that the Board lacked jurisdiction over Ordinance 93-P-1994, an amendment to the County's zoning ordinance. The second part claimed that the County's document, entitled "Strategies for Resource Lands Designations and Interim Development Regulations" (the **Strategies document**), constitutes the County's effort to comply with the requirements of RCW 36.70A.170 and .060 for forest lands, and that the statute of limitations for challenging that document had run long before Citizens filed their Petition for Review.

On Thursday, July 14, 1994, the Board held a hearing on the County's Motion in Poulsbo, Washington. Subsequently, on July 27, 1994 the Board issued an Order on Kitsap County's Dispositive Motion. The Board dismissed that portion of the case involving the Strategies document. The Board concluded that since the County had acted to procedurally comply with the Growth Management Act (**GMA** or the **Act**) requirement regarding forest lands when it adopted the Strategies document, the statute of limitations had passed for appealing that document before Citizens filed its Petition for Review. In addition, the Board denied the County's Motion regarding Ordinance 93-P-1994, the CEO, and thus permitted the CEO portion of the case to proceed to the hearing on the merits.

Subsequently, the following prehearing, response and reply briefs were filed by the parties and amicus:

- 1)"1000 Friends of Washington's Brief Amicus Curiae" [with seven exhibits attached] -- filed August 12, 1994;
- 2)"Brief on the Merits by Petitioners Kitsap Citizens for Rural Preservation et al. and Intervenor Kitsap Audubon Society" [with no exhibits attached] -- filed August 15, 1994;
- 3)"Kitsap County's Response to Prehearing Briefs" [with six exhibits attached] -- filed August 30, 1994;
- 4)"Hearing Brief by Intervenor Port Blakely Tree Farms" [with no exhibits attached] -- filed August 30, 1994; and
- 5)[Reply] "Brief on the Merits by Petitioners Kitsap Citizens for Rural Preservation, et al. and Intervenor Kitsap Audubon Society" [with eight exhibits attached] -- filed September 6, 1994.

On Wednesday, September 7, 1994, the Board held a hearing on the merits of the remaining legal issues before it at Kitsap County Fire District No. 18 headquarters in Poulsbo, Washington. The Board's three members were present: M. Peter Philley, presiding, Joseph W. Tovar, and Chris Smith Towne. David A. Bricklin represented Citizens and Audubon, Douglas B. Fortner represented the County, and Thomas A. Goeltz represented Port Blakely. Court reporting services

were provided by Duane W. Lodell, CSR of Robert H. Lewis & Associates, Tacoma.No witnesses testified.

During the prehearing conference held in this case, the parties orally stipulated that the exhibits attached to their briefs would constitute the record below that the Board would review.The parties were either to stipulate to a list of numbered exhibits or, in lieu of such a stipulation, to refer to the number assigned to an exhibit in the County's Index.As a preliminary matter, because the parties did not fully comply with their stipulation and the Board's June 16, 1994 Prehearing Order regarding the numbering of exhibits, and to avoid duplication and be consistent with the Prehearing Order, the parties agreed to the following "re-numbering" of exhibits that took place on the record.*See also* September 6, 1994 File Memorandum from the Board's Presiding Officer regarding "Exhibits comprising the record below."

CorrectIncorrect Exhibit NumberDocument

Exhibit NumberListed by Parties

244Citizens' 7Motion for ... Stay

245Citizens' 8; Kitsap County Zoning OrdinanceCounty's 2, 3 and 4; and
1000 Friends' unnumbered

98Citizens' 9DNS

53Citizens' 109/13/93 Agenda Summary

2Citizens' 114/4/94 Granlund letter

5Citizens' 12Conservation Easement

190Citizens' 1310/11/93 Minutes

77Citizens' 146/7/93 Staff Report

246County's 1Ordinance 155-1993

1County's 5Ordinance 93-P-1994 (CEO)

247County's 6Resolution 288-1987

The Board's reference to exhibits in this Final Decision and Order is to the "Correct Exhibit Number" that corresponds to the specific numbers assigned to exhibits in the County's Index. Exhibits 244 through 247 were not listed on the County's Index but constitute additional exhibits the Board took official notice of pursuant to WAC 242-02-660 and -670.

B.FINDINGS OF FACT

For convenience and clarity, the Board repeats the Findings of Fact regarding Ordinance No. 93-P-1994 that were included in the Board's Order on Kitsap County's Dispositive Motion (at 7-10), and includes further findings based upon additional exhibits submitted for the hearing on the merits.References to exhibits in *italics* correspond to the exhibit number the parties assigned to the particular exhibit at the time in arguing the County's Dispositive Motion since these exhibits were not refiled with prehearing briefs.References to exhibits in [brackets] refer to the "Corrected" Index exhibit number (*see* above).

1.The Kitsap County Zoning Ordinance, No. 93-1983 (the **Zoning Ordinance**) was initially

adopted on June 6, 1983. Prior to the amendment in question (i.e., the CEO), the Zoning Ordinance was last amended on March 1, 1990 by Ordinance 93-M-1989. [Exhibit 245.]

2. The Growth Management Act was adopted on April 1, 1990, effective July 1, 1990. SHB 2929; Laws of 1990, 1st Ex. Sess., ch. 17; it was codified primarily at Chapter 36.70A RCW.

3. Effective June 1, 1993, subsection (4) was added to RCW 36.70A.110, pursuant to ESHB 1761. Laws of 1993, 1st Sp. Sess., ch. 6. Subsection (4) requires counties planning under the Act to adopt development regulations designating interim urban growth areas (**IUGAs**) by October 1, 1993, after public notice, public hearing and compliance with the requirements of chapter 43.21C and subsections (1), (2) and (3) of RCW 36.70A.110.

4. A June 7, 1993 Staff Report from John P. Vodopich, Senior Planner, to the Kitsap County Planning Commission outlined proposed amendments to several County enactments. One proposal would amend Section 14(p) of the Zoning Ordinance (regarding the applicability of planned unit developments (**PUDs**) in Rural 2.5 and Resource Protection 2.5 acre zones). A second proposal added a new subsection (b) (regarding conservation easements and density transfer agreements) to Section 14 of the Zoning Ordinance.^[1] In addition, amendments to the 1977 Kitsap County Comprehensive Plan, the 1984 North Kitsap Subarea Plan, the 1983 Central Kitsap Subarea Plan and the 1982 South Kitsap Subarea Plan were proposed. [Exhibit 77.]^[1]

5. On June 11, 1993, the County issued a Determination of Nonsignificance (**DNS**), pursuant to the State Environmental Policy Act (**SEPA**), based upon the June 7, 1993 Staff Report proposal. The DNS described the proposed Zoning Ordinance amendments as follows:

Description of Proposal: Proposed Adoption [sic: of] Amendments to the Planned Unit Development (PUD) section of the Kitsap County Zoning Ordinance to include a public benefit rating for use in determining maximum densities in rural planned unit developments and provisions for conservation easements and internal density transfers.

...
COMMENTS: The proposal will not result in more than moderate adverse impacts to the existing environment. The proposed amendments will reduce the maximum density possible, through the Rural Planned Development process, in outlining [sic] areas of the County which are currently designated rural on the County Comprehensive Plan. This reduction in maximum density will result in an overall reduction of impacts associated with development in Rural designated portions of Kitsap County. This may result in a moderate increase in impacts from development in Semi-Urban and Urban designated areas of the County over time. [Exhibit 98 (emphasis in original).]

The DNS also notified interested persons that they could appeal this determination no later than June 29, 1993. [Exhibit 98.]

6. On June 11, 1993, the County also issued a Notice of the DNS that was virtually identical to the DNS. *County's Exhibit 4.*

7. On September 13, 1993, the Board of County Commissioners held an initial public hearing on proposed amendments to the Zoning Ordinance. The proposal being considered at this hearing had

been altered from the version attached to the June 7, 1993 Staff Report. More specifically, this latest proposal amended Section 6 (re: rural, residential, agricultural, forestry and undeveloped land zones) of the Zoning Ordinance by adding a new subsection (m), the "internal transfer of density through the conservation easement process." In contrast, the June 7, 1993 Staff Report contained conservation easement proposals that amended Section 14 (re: PUDs) of the Zoning Ordinance.

The September 13, 1993 proposal also contained different language than the initial June 7, 1993 proposal about what factors staff should analyze before making a recommendation:

... The staff recommendation shall include an evaluation of the size and characteristics of the proposed easement area to ensure that approval is consistent with and carries out the intent of the Zoning Ordinance, Comprehensive and Subarea Plan policies and is in the public interest. [Exhibit 53, at 1.]

The September 13, 1993 proposal also added the following new language to §6(m)(1)(b) of the Zoning Ordinance, not contained in the prior version:

... In reaching its decision, the County shall determine whether all or part of the conservation easement shall count toward applicable open space requirements should a Planned Unit Development (PUD) be subsequently proposed for the future use of the property receiving the transferred development rights. [Exhibit 53, at 2.]

In addition, the September proposal amended Section 14 (re: planned unit development) of the Zoning Ordinance by adding new subsections (p)(4) and (5) creating "design criteria for rural planned unit developments" in lieu of the "Public Benefit Rating System" in the June proposal. The Board of Commissioners' Agenda Summary explained that both sets of proposed amendments had been "recommended by the Kitsap County Planning Commission with additions and deletions recommended by the Department of Community Development in the August, 1993 Staff Report." [Exhibit 53.]^[1]

8. On September 20, 1993, the Board of County Commissioners adopted Kitsap County Resolution No. 349-1993, entitled "A Resolution Adopting Interim Urban Growth Areas as Required by the Growth Management Act." The first finding to Resolution 349-1993 provides:

WHEREAS, the Board of County Commissioners, pursuant to the requirements of RCW 36.70A.110, Kitsap County is hereby adopting development regulations designating "Interim Urban Growth Areas" with the use of the existing Kitsap County Comprehensive Plan, Subarea Plans, and Environmental Impact Statements before the October 1, 1993 deadline as required by the Growth Management Act." *Citizens' Exhibit A-2*.

The resolution portion (second paragraph of the document) provides:

... The designations will be implemented by appropriate regulations contained in the Kitsap County Zoning Ordinance. *Citizens' Exhibit A-2*.

9. On October 4, 1993, the Board of County Commissioners adopted Ordinance No. 155-1993, entitled "A [sic] Ordinance Adopting Interim Urban Growth Areas as Required by the Growth Management Act." Section 2 of Ordinance 155-1993 provides:

The [IUGAs] designations will be implemented by appropriate regulations contained in the

Kitsap County Zoning Ordinance.[Exhibit 246.]

10. Also on October 4, 1993, the Board of County Commissioners adopted Kitsap County Resolution No. 365-1993, entitled "A Resolution Adopting Justifications for Adoption of Interim Growth Areas as Required by the Growth Management Act." Numbered paragraph one provides:

The County has adopted regulations using the existing Kitsap County Comprehensive Plan and Subarea Plans.... These designations will be implemented by appropriate land use regulations in the County Zoning Ordinance.... *Citizens' Exhibit A-3*.

11. An October 4, 1993 staff report was prepared by John P. Vodopich, Senior Planner, to the Kitsap County Board of Commissioners. The report continued to recommend adding a new subsection (m) (regarding conservation easements) to Section 6 of the Zoning Ordinance. The report also recommended adding the following sentence to subsection 6(m)(1)(a):

The use of the Conservation Easement process precludes any future increase in density through the Planned Unit Development process. *Citizens' Exhibit D, at 1*.

In addition, rather than requiring any conservation easement and density transfer agreement to have a section on "Future Use of Resource and Remaining Lands," the October 4, 1994 Staff Report recommended requiring a section on:

Master Plan Concept which includes densities, amenities, buffers, open space, roads and a conceptual preliminary platting layout utilizing a clustering concept for the resource and remaining lands. *Citizens' Exhibit D, at 2*.

A third recommended change to the prior proposed conservation easement provisions was to add subsection (m)(1)(c) to require clustering:

Standards. All development or subdivision of the subject property shall utilize a clustering concept and be subject to all applicable regulations in place at the time of said development or subdivision. In no case shall the transferred density be allowed to exceed the allowable densities under health regulations in place at the time of said development. *Citizens' Exhibit D, at 2*.

This staff report also recommended replacing Section 14(p)(1)(a) of the Zoning Ordinance (regarding PUDs), in light of public input received at the initial public hearing held by the county commissioners on September 13, 1993, with different design criteria for rural planned unit developments. *Citizens' Exhibit D*.^[1]

12. An intra-departmental Kitsap County Department of Community Development (**DCD**) memorandum from Christine Nasser, Open Space Planner, to John Vodopich, Senior Planner, was dated October 5, 1994. Ms. Nasser raised several "concerns about the proposed interim ordinance":

... A conservation easement is a legal agreement a property owner makes to restrict the type and amount of development that may take place on his or her property. It is not "a means by which the internal transfer of density may occur..." By transferring density, we are not "restricting the type or amount" of development, we are simply relocating it. Thus it is not really a conservation easement in the true sense of the term....

... I have never come across conservation easements used to transfer density to another part

of a property. This is an unexplored use of this tool which will have consequences for existing land preservation throughout the county...

To summarize, I am concerned that we are promoting a revolutionary use of conservation easements without giving the enormous complexities and expense of this preservation tool due consideration. And, I believe, by loosely applying the conservation easement concept to density transfers, we are threatening the integrity of the conservation tool for non-PUD related open space preservation throughout Kitsap County. [Exhibit 39 (emphasis in original).]

13. On October 11, 1993, the Board of County Commissioners held a second public hearing on proposed amendments to the Zoning Ordinance. [Exhibit 190.]

14. On November 16, 1993, Keith W. Dearborn sent a letter containing proposed amendments to the CEO to Kitsap County Commissioner Win Granlund. [Exhibit 23.] Specifically, Mr. Dearborn recommended:

- i. making the internal transfer of density process through a conservation easement be applicable only in Rural 2.5 acre and Resource Protection 2.5 acre zones; { § 6(m) };
- ii. adding a sentence about the purpose of conservation easements that provided:
... It is intended to allow property owners an option that allows development decisions to be deferred while securing for the citizens of Kitsap County long term protection of open space and resource lands...; { § 6(m)(1)(a) }
- iii. precluding the use of the conservation easement process to increase density in PUDs unless the commitment imposed by the conservation easement was in perpetuity; { § 6(m)(1)(a) }
- iv. imposing at least a twenty (20) year term on the conservation easement rather than in perpetuity; { § 6(m)(1)(b) }
- v. replacing the requirement for a Master Plan Concept section with a section on covenants or conditions of future use; { § 6(m)(1)(b) }
- vi. requiring the staff recommendation to include an evaluation of the size and characteristics of the portion of the subject property to which density is proposed to be transferred; { § 6(m)(1)(b) }
- vii. striking the clustering concept requirement^[1]; { § 6(m)(1)(c) }
- viii. requiring development to be subject to rural design standards, once they are adopted by the Board of County Commissioners; { § 6(m)(1)(c) }
- ix. requiring any development proposing density greater than the permitted base density to be approved through the PUD process and to meet minimum open space, buffer and setback requirements for PUDs; { § 6(m)(1)(c) }
- x. requiring that the maximum density for the property covered by the PUD cannot exceed the maximum density that would be permitted without the transfer. { § 6(m)(1)(c) } [Exhibit 23.]

All but recommended Items ii and iii above were ultimately adopted by the Board of County Commissioners (BCC) when they adopted Ordinance 93-P-1994, the CEO amendment to the

Zoning Ordinance. *See* Finding of Fact No. 19 below.^[1]

15. Pursuant to the BCC Minutes of December 13, 1993, a November 23, 1993 staff report was prepared for the Board of County Commissioners regarding the proposed conservation easement amendments. *See Citizens' Exhibit C, at 332-333.*^[1]

16. On December 13, 1993, the Board of County Commissioners continued its public hearing (i.e., third such hearing) on the proposed amendments to the Zoning Ordinance. The hearing was limited to a discussion of the proposed conservation easement amendment. The Public Benefit Rating System and Design Criteria for Rural PUDs were to be discussed at a future hearing. *Citizens' Exhibit C, at 332.*

Pursuant to the BCC Minutes of December 13, 1993, the following recommended changes to the conservation easement ordinance proposal, from the preceding version contained in the October 4, 1993 staff report, were contained in the November 23, 1993 staff report:

1) November 23rd staff report, Item m, added that the conservation easement or the internal transfer of density would be applicable only in the rural 2.5 acre and the resource protection 2.5 acre zones; 2) Section (1)a. deleted a sentence that referred to the use of the conservation easement would preclude use of a PUD at a future date; 3) Page 2 deleted the section to the master plan concept and replaced it with a section called Covenants or Conditions of Future Use; 4) Second paragraph added the sentence that staff recommendation shall include an evaluation of the size and characteristics of the proposed easement area as well as the portion of the subject property to which the density was proposed to be transferred; 5) item c, All development or subdivision of the subject property shall be subject to all applicable regulations in place at the time of said development, shall meet health regulations, any development proposing density greater than the permitted base density shall be approved through a Planned Unit Development process, and maximum density for the property covered by the Planned Unit Development cannot exceed the maximum density that would be permitted without the transfer. *Citizens' Exhibit C, at 332-333.*

17. At the December 13, 1993 public hearing, John Vodopich responded to Commissioner Granlund's question by indicating that "he thought there was" wording in the proposal regarding contiguous land owners. *Citizens' Exhibit C, at 337.* The Board has been unable to locate language in any version of the CEO before it that requires lands subject to the CEO to be contiguous. Subsequently, the County, in a letter signed by Commissioner Granlund but prepared by staffer "JPV," concurred:

2. As adopted, there is no requirement that the properties be contiguous, adjacent or abutting. [Exhibit 2, at 1; *see also* Finding of Fact No. 22 below.]

18. On February 28, 1994, the Board of County Commissioners proceeded with the public hearing (i.e., fourth such hearing) on the proposed amendments to the Zoning Ordinance regarding conservation easements. *Citizens' Exhibit B.*

19. At the conclusion of the February 28, 1994 hearing, the Board of County Commissioners

adopted Ordinance 93-P-1994, the CEO.[Exhibit 1.]^[1]The full text of the CEO is as follows:

ORDINANCE AMENDMENT

93-P-1994

The following amendments are hereby made to Kitsap County Ordinance 93-1983, An Ordinance Concerning Land Use:

Section 6.Rural, residential, agricultural, forestry and undeveloped land zones.

m.The internal transfer of density through the conservation easement process is allowed in the Rural 2.5 acre and Resource Protection 2.5 acre zones as follows:

(1)Conservation Easements

a.Purpose.A conservation easement is a means by which the internal transfer of density may occur on a parcel or parcels of property under the same or multiple ownership(s).The conservation easement allows for the preservation of productive commercial resource uses, open spaces, critical areas and significant rural areas on a portion of the property while allowing all or a portion of the permitted density to be transferred to the remaining portion of the property.Once approved by the Board of County Commissioners, a conservation easement becomes a binding agreement controlling the use and density of the subject property.

b.Procedure.The applicant shall submit a written request for a conservation easement to the Kitsap County Department of Community Development together with a legally binding conservation easement and density transfer agreement for a minimum twenty (20) year timeframe. The agreement will include at a minimum the following sections (sample agreement is available upon request):

Grantor;

Grantee;

Purpose;

Grant of Easement;

Anticipated Future Use;

Transfer of Development Rights;

Indemnification;

Enforcement;

Right to Inspect Property;

Modification;

Notarized Signature Blocks.

Following review and approval by the Kitsap County Prosecuting Attorney, the Department of Community Development shall prepare a staff recommendation.The staff recommendation shall include an evaluation of the size and characteristics of the proposed easement area as well as the portion of the subject property to which the density is

proposed to be transferred to ensure that approval is consistent with and carries out the intent of the Zoning Ordinance, Comprehensive and Subarea Plan policies and is in the public interest. The staff recommendation together with the conservation easement and density transfer agreement will be sent forward to the Kitsap County Hearing Examiner for consideration and recommendation to the Kitsap County Board of Commissioners for final decision. In reaching its decision, the Board of County Commissioners shall determine whether all or part of the conservation easement shall count toward applicable open space requirements should a Planned Unit Development (PUD) be subsequently proposed for the future use of the property receiving the transferred development rights.

c. Development Standards. All development or subdivision of the subject property shall be subject to all applicable regulations in place at the time of said development or subdivision, including once adopted by the Board of County Commissioners, rural design standards. Any development proposing density greater than the permitted base density shall be approved through a Planned Unit Development process and shall meet the minimum open space, buffer and setback requirements for a Planned Unit Development. In no case shall the transferred density be allowed to exceed the allowable densities under health regulations in place at the time of said development^[1] and the maximum density for the property covered by the Planned Unit Development cannot exceed the maximum that would be permitted without the transfer.

These amendments shall be in full force and effect upon approval by the Board of County Commissioners.

20. Comparison between original proposal [Exhibit 77] and as-adopted CEO [Exhibit 1]:

Differences

Exhibit 77 (Proposed) Exhibit 1 (Adopted CEO)

Contains public benefit rating system Public benefit rating system deleted

Amends §14 of Zoning Ordinance Amends §6 of Zoning Ordinance (i.e., (i.e., PUDs) by adding new rural, residential, agricultural, subsection (b) forestry and undeveloped land zones) by adding new subsection (m)

Applies to all land zones Applies to rural, residential, agricultural, forestry & undeveloped lands only

Has special rules for R-2.5 and RP-2.5 Limited to R-2.5 and RP-2.5 zones zones

Same ownership of property required Multiple ownership of properties permitted

No mention of BCC approval & effect Once BCC approves, becomes binding on controlling use & density agreement controlling use & density

In effect for perpetuity In effect for a minimum of 20 years

Agreement must have section on "Future Agreement must have section on Use of Resource and Remaining" Anticipated Future Use" Lands"

Staff evaluation includes: (at a minimum) Staff evaluation includes:

project size; size of proposed easement area;

site characteristics; characteristics of proposed easement;

open space requirement size of proposed transferred area;

characteristics of proposed transferred area

No consistency requirement Proposal must be consistent with:

Zoning Ordinance

Comprehensive Plan

Subarea Plans

the public interest

No PUD clause (presumably since it BCC must determine how much of easement amends the PUD section of counts toward open space the Zoning Ordinance) requirements if a PUD is sought

No development standards section Has development standards, subsection (c):

Development applications on "subject property" subject to all applicable regulations at time of development

Applications proposing more density than the permitted base density must obtain PUD approval and meet minimum open space, buffer and setback requirements for PUDs

Transferred density cannot exceed densities permitted by health regs in place at time

of development Maximum density for the property covered by a PUD

cannot exceed the maximum density that would be permitted without the transfer

Similarities

Exhibit 77 (Proposed) Exhibit 1 (Adopted CEO)

Internal transfer of density Internal transfer of density

May occur on a parcel or parcels May occur on a parcel or parcels

Purpose: preservation & transfer Purpose: preservation & transfer

DCD staff recommendation DCD staff recommendation

Prosecuting Attorney approval Prosecuting attorney approval

Hearing examiner recommendation Hearing examiner recommendation

Final decision by BCC Final decision by BCC

21. On March 11, 1994, Thomas F. Donnelly sent a letter containing a series of questions about the Ordinance to the Kitsap County Board of Commissioners. [Exhibit 3.]

22. On April 4, 1994, Kitsap County Commissioner Win Granlund sent Thomas F. Donnelly a

letter in response to Donnelly's prior questions.[Exhibit 2.]The letter explained that the CEO's reference to "subject property" referred to:

... all of the property or properties which are involved in the Conservation Easement.This includes both the property from which the density is transferred and the property to which the density is transferred.[Exhibit 2, at 2.]

23.The Board is unaware of how many conservation agreements have actually been entered into by the County.Although the County, in written argument only, indicates that one application for a conservation easement has been received since the adoption of the CEO (*see* Kitsap County's Response to Prehearing Brief, at 15), nothing in the record before the Board indicates the status of the conservation easement process:either the number of agreements solicited, the number of applications received or the number of conservation agreements actually reached.

C.STATEMENT OF REMAINING LEGAL ISSUES BEFORE THE BOARD

1. Was Kitsap County Ordinance No. 93-P-1994 (the CEO) enacted pursuant to the requirements of the Growth Management Act (the GMA or the Act)?

If Legal Issue No. 1 is answered affirmatively:

2.Does the CEO comply with RCW 36.70A.110?

3.Does the CEO comply with RCW 36.70A.020, subsections 1, 2, 3, 8, 9, 10, 11 and 12?

4.Does the CEO comply with RCW 36.70A.060?

5.Does the CEO comply with RCW 36.70A.350?

6.Did the Petitioners exhaust all administrative remedies below before raising a State Environmental Policy Act (SEPA) challenge of the CEO?

7.Assuming the Petitioners' SEPA challenge is properly before the Board, did the County comply with the requirements of SEPA when it failed to prepare an environmental impact statement (EIS) for the CEO?

D.DISCUSSION AND CONCLUSIONS

Legal Issue No.1

Was Kitsap County Ordinance No. 93-P-1994 (the CEO) enacted pursuant to the requirements of the Growth Management Act (the GMA or the Act)?

Discussion

Kitsap County Ordinance 93-P-1994, which has been referred to as the Conservation Easement Ordinance or CEO, is a GMA enactment.The Board has previously determined that, because the County incorporated unspecified "appropriate" provisions of the Kitsap County Zoning Ordinance to serve as its GMA required implementing regulations when it designated IUGAs, the

Zoning Ordinance became a GMA enactment. *See* Findings of Fact Nos. 8, 9 and 10. More specifically, the Zoning Ordinance became an IUGA development regulation. *See Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010 and the Board's Order on Kitsap County's Dispositive Motion in the present case. Because the CEO is an amendment to Zoning Ordinance provisions that can significantly affect IUGAs, it too is a GMA development regulation. However, the CEO does not comply with the requirements of the GMA because it allows urban growth to occur in rural areas, a direct contradiction of the explicit purpose of urban growth areas (UGAs).

RCW 36.70A.110(1) provides:

Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature...(Emphasis added.)

The Board can conceive of a well designed compact rural development containing a small number of homes that would not look urban in character, not require urban governmental services, nor have undue growth-inducing or adverse environmental impacts on surrounding properties. Such a rural development proposal could constitute "compact rural development" rather than "urban growth." However, the CEO does not have parameters to prevent development projects that constitute urban growth from occurring in rural areas.

For example, there is no upper limit on the acreage or unit count that the CEO would permit to occur in rural areas, nor are there any parameters regarding the configuration, servicing or location of such development. The CEO could potentially result in thousands of dwelling units being aggregated in a single development in the rural area. It is difficult to conceive of a project of such magnitude, no matter how compact and how well designed, that would not meet the Act's definition of urban growth. As the size of a rural development project increases, the demand for urban governmental services inevitably increases, as do the offsite impacts on both natural systems and abutting properties. Likewise, as the size of a project site increases, the more likely it is that it will exhibit the characteristics of urban growth (i.e. "the 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....") RCW 36.70A.030(15). While no clear breakpoint is evident from information presently before the Board, it is only logical that, at some point along the continuum of potential project size and intensity, the *quantitative* dimension of clustered development in a rural area must have *qualitative* urban growth consequences.

As for calculating densities resulting from the CEO, there is fundamental disagreement between Citizens on the one hand and the County and Intervenor Port Blakely on the other. Citizens argue that the Board should look only at the impact on the "receiving" property. The County and Intervenor argue that the Board should look at both the "receiving" and the "sending" properties. The Board agrees that, under the terms of the CEO itself, it is necessary to consider the gross acreage and zoning of all properties involved in an agreement for the purpose of calculating total UNIT COUNT. Thus, one needs to consider acreage and zoning of both the sending and receiving

properties to make this density calculation. But gross acreage, gross unit count or even gross density are mere abstractions. The true test of whether the CEO results in urban growth is to ask the question -- what does the CEO permit to be physically constructed on the ground, in the real world, and how does that potential outcome square with the Act's definition of urban growth?^[1] It is the Board's conclusion that, for the purposes of this latter test, the "land" in question is the receiving property where the CEO-enabled development would occur rather than both the sending and receiving land. Preserving lands as open space in a natural state on the sending property may well be a significant public good, and satisfy important objectives of the GMA. However, a GMA development regulation must comply with the requirements of the entire Act. Therefore, if the mechanism to achieve this public good also creates as a consequence urban growth within a rural area, it does not comply with the Act. Because that clearly is a potential outcome of the operation of the CEO, the Board must find that the CEO does not comply with the Act.

The Board's finding that the CEO is in violation of the Act does not presume that a PUD will be used, nor has the Board concluded that the use of a PUD enables an increase in base density. Section 6(m)(1)(c), entitled Development Standards (*see* Finding of Fact No. 19), gives apparently contradictory direction on this latter point. On the one hand, this section states that "Any development proposing density greater than the permitted base density shall be approved through a Planned Unit Development process ...". However, in the very next sentence, it states that "In no case shall the transferred density be allowed to exceed the ... maximum density that would be permitted without the transfer." The Board need not reconcile this apparent contradiction at this time^[1] because the CEO allows urban development within a rural area, with or without a PUD.

The Board also notes that both the County and Port Blakely argued that the CEO complies with the GMA because it is an "innovative technique" that is specifically mentioned in the GMA. RCW 36.70A.090 provides:

Comprehensive plans- Innovative techniques

A comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights.^[1] (Emphasis added.)

A review of the CEO shows that it includes some of the techniques used in this GMA provision.^[1] Most importantly, however, the County and Port Blakely ignored the emphasized words that indicate that this section applies to comprehensive plans, not development regulations.

Comprehensive plans are encouraged to "provide" for the listed techniques. The unstated shared concept among most of the listed techniques is setting aside and conserving open space and natural systems as a predicate to land development. This concept is often referred to generically as "clustered development."

The concept of "clustered development" is not new or innovative in and of itself.^[1] The true

innovation under the GMA, and the approach suggested by RCW 36.70A.090, is to first establish a clear public policy strategy for managing growth, i.e., a comprehensive plan, and then craft and apply land use management techniques, such as development regulations, to implement that adopted comprehensive plan. Absent a comprehensive plan, there is no final urban growth area (FUGA) as required by RCW 36.70A.110(5), and there is no “rural” comprehensive plan element, as required by RCW 36.70A.070(5). ^[1] The comprehensive plan provides the necessary “policy context” to explain not just that these techniques are good ideas, but just how, when and where they are to be applied to achieve the GMA policy purposes that the comprehensive plan ^[1] represents.

Conclusion No. 1

Kitsap County Ordinance 93-P-1994, the CEO, being an amendment to the Kitsap County Zoning Ordinance that directly affects lands inside and outside IUGAs, is a GMA enactment. However, it does not comply with the requirements of the Growth Management Act because it permits urban growth to occur in rural areas outside the IUGA.

The most prudent course at this time is for the County to repeal the CEO and to re-consider such a regulation after the comprehensive plan has been adopted. ^[1] This would clarify how an innovative land use management technique for development in the rural area, such as the CEO and/or a transfer of development rights ordinance, would affect and be affected by the

^[1] assumptions and objectives that underlie the FUGA. The rural element of the County's comprehensive plan could include a discussion of what comprises rural development, and set forth procedural safeguards and development standards to assure that the result of such an innovative land use management technique in a rural area will not be urban growth.

Alternatively, in order for the County to pursue this regulatory path before it adopts its comprehensive plan, it must first establish sufficient explicit requirements, criteria and safeguards to prevent the CEO from being used as a mechanism for allowing urban growth in rural areas. For instance, the CEO might be amended to permit the transfer of unit count only to receiving property sites within the IUGAs. However, whatever action the County elects to take must be in compliance with the requirements of the Act.

Legal Issues Nos. 2, 3, 4 and 5

Conclusion Nos. 2, 3, 4 and 5

The County pointed out that Legal Issue No. 1 was dispositive and that accordingly, Legal Issues Nos. 2, 3, 4, and 5 need not be addressed. Kitsap County's Response to Prehearing Briefs, at 8. The

Board concurs. The Board concluded in Legal Issue No. 1 that the CEO does not comply with the GMA because it permits urban growth in rural areas outside the IUGAs. Therefore, the Board need not and will not decide Legal Issues Nos. 2, 3, 4, and 5.

Legal Issue No. 6

Did the Petitioners exhaust all administrative remedies below before raising a State Environmental Policy Act (SEPA) challenge of the Ordinance?

Legal Issue No. 6 was addressed by the Board in response to the County's Dispositive Motion. In denying that portion of the motion dealing with the SEPA challenge to the Ordinance, the Board concluded that Citizens could not exhaust the County's administrative SEPA appeals procedures since that process only involved challenges to the initial threshold determination. Instead, rather than challenging the issuance of the DNS itself, Citizens were challenging the failure of the County to withdraw its DNS --a type of challenge for which the County did not have an administrative appeals process. Order on Kitsap County's Dispositive Motion, at 16.

Conclusion No. 6

Kitsap County does not have an administrative process for challenging the failure of the County to withdraw a DNS. Therefore, Citizens are entitled to bring this SEPA appeal challenging the Ordinance directly to the Board for review. Accordingly, Citizens SEPA challenge is properly before the Board.

Legal Issue No. 7

Assuming the Petitioners' SEPA challenge is properly before the Board, did the County comply with the requirements of SEPA when it failed to prepare an environmental impact statement (EIS) for the CEO?

Conclusion No. 7

Because the Board held in Legal Issue No. 1 that the CEO does not comply with the GMA because it permits urban growth in rural areas outside the IUGAs, the Board need not and will not decide Legal Issue No. 7.

E. ORDER

Having reviewed the file and record in this case, having reviewed and considered the parties' and amicus briefs and the arguments of counsel, and having entered the foregoing Findings of Fact and Conclusions, the Board finds that Kitsap County Ordinance No. 93-P-1994, the CEO, is **not**

in compliance with the requirements of the Growth Management Act. The Board therefore orders the County to either repeal the CEO in its entirety or to modify it in compliance with this Final Decision and Order by **5:00 p.m. on Friday, December 30, 1994**.
So ORDERED this 25th day of October, 1994.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Presiding Officer

Joseph W. Tovar, AICP
Board Member

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.

Sent to:

*Kitsap Citizens for Rural Preservation, et al.; and
Kitsap Audubon Society*

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[1]

Effective June 9, 1994, the Board's name was changed to Growth *Management* Hearings Board. See ESSHB 2510.

[1]

Section 14 of the Zoning Ordinance already had a subsection (b).

[1]

The Board notes that for purposes of its review, the proposal contained in the June 7, 1993 Staff Report was the initial proposal. Although at least one earlier version of the proposal must have existed, since the June 7, 1993 report amends prior language, that prior version was not submitted as part of the record nor is it relevant to the legal issues before the Board.

[1]

Neither the Kitsap County Planning Commission's recommendation nor "the August, 1993 Staff Report" appears to be part of the record before the Board. The Board notes, however, that Exhibit 53, the Agenda Summary, was initially dated August 17, 1993 for an August 23, 1993 meeting. The August 23, 1993 date was crossed out and replaced by a September 13, 1993 date.

[1]

Citizens' Exhibit D, the October 4, 1993 Staff Report from Vodopich to the County Commissioners, refers to "staff's September 13, 1993 recommendation on the proposed Planned Unit Development Ordinance Amendment...." Presumably, the reference to a September 13, 1993 recommendation is to Exhibit 53, the recommended action contained in the Board of Commissioners' Agenda Summary. *Citizens' Exhibit D* is Exhibit 42 in the County's Index but was not re-submitted when Citizens filed their prehearing brief.

[1]

Although the title of the paragraph in Mr. Dearborn's letter was captioned "Clustering Should Be Mandatory," the narrative portion of the letter was consistent with the proposed recommendation -- that clustering should not be mandatory. See Exhibit 23, at 2.

[1]

The Board of County Commissioners did strike the Master Plan concept as recommended in Item v. However, instead of replacing it with a required section entitled "Covenants or Conditions of Future Use," the adopted CEO requires a section on "Anticipated Future Use." [See Exhibit 1, at § 6(m)(1)(b).]

[1]

The November 23, 1993 staff report itself is not in the record before the Board.

[1]

Although Exhibit 1 is undated, a copy of the Ordinance attached to Citizens' Petition for Review is dated February 28, 1994. During oral argument of the County's Dispositive Motion, the County confirmed that the Ordinance 93-P-1994 was adopted on February 28, 1994.

[1]

Copies of applicable health regulations were not before the Board in this case.

[1]

1000 Friends discussed the example given in the Conservation Easement and Density Transfer Agreement (i.e., Exhibit 5). [The Board is aware that the County pointed out that this agreement was not created or approved by the County. Kitsap County's Response to Prehearing Briefs, at 6, fn. 10. Nonetheless, the CEO itself indicates that a "sample agreement is available upon request." Although the County may not have created or approved Exhibit 5, it was the only sample agreement before the Board.] In that example, the property owner owned 3,880 acres of property that was zoned Rural 2.5, or one du/2.5 acres. Thus, under existing zoning, the property owner was allowed to build 1,552 units on the 3,880 acres.

In the example given, the property owner wants to keep 1,680 acres (or 43%) of the property zoned "as is" and build only 84 dwelling units on that 1,680 acres instead of the permissible 672 dwelling units. Accordingly, under the CEO, the land owner would be able to transfer the difference, 588 dwelling units, to the other 57% of the property (2,200 acres).

As for the 2,200 acres, under existing zoning the property owner would be permitted to build only 880 dwelling units on that land. By utilizing the CEO, the owner would be able to build 880 dwelling units permitted by existing zoning on this portion of the site, plus build an additional 588 dwelling units transferred from the 1,680 acre portion of the property, i.e., the sending portion of the property. Consequently, the property owner would be able to build 1,468 dwelling units on the remaining 2,200 acres (i.e., the receiving property) instead of 880 dwelling units. 1,468 du on 2,200 acres equates to **.67 du/acre** or **1.5 acres/du**. In contrast, per existing zoning, 880 du on 2,200 acres equals **.40 du/acre** or **2.5 acres/du**.

1000 Friends then calculated that the property owner in the example above intended to place 95% of the possible dwelling units for the entire 3,880 acres (1,468 du out of 1,552 possible du) onto the 2,200 acre portion of the property. 1000 Friends illustrated what would happen if the same 95% of the permitted dwelling units were again transferred, but to only 25% of the property (979 acres), and to 10% of the property (388 acres), instead of transferring 95% of the dwelling units to 57% of the property, as occurred in the example given in the Agreement. Under the 10% of the property scenario, the resulting density would be **3.78 du/acre**, calculated as follows: 10% of 3,880 acres is 388 acres. 1,474 du (i.e., 95% of the total du permitted) on 388 acres equals **.26 acres/du**, or rounded off to **3.8 du/acre**. 1000 Friends of Washington's Amicus Brief, at 7-8.

The Board notes that .26 acres/du on the receiving property (per the 10% property development scenario given by 1000 Friends) is nearly **six times** the 1.5 acres/du per the 57% property development scenario contained in the example in Exhibit 5. Furthermore, 3.8 du/acre on the receiving property is **nine and one-half times** the .4 du/acre permitted on the receiving property pursuant to existing zoning. Accordingly, more than a fivefold increase in density is possible because of the CEO when one looks at the resulting density increase on the "receiving" property.

[1]

In its first case, the Board held that development regulations must be internally consistent. *Tracy v. Mercer Island*, CPSGPHB Case No. 92-3-0001 (1993), at 26.

[1]

Several of the innovative techniques listed are "development regulations." *See* RCW 36.70A.030(8). While the Act does advocate the use of such innovative tools, the operative verb in RCW 36.70A.090 is "provide for" in the plan as opposed to "include" or "incorporate within" the plan. This is an important distinction to make because comprehensive plans are policy, rather than regulatory, in nature. Development regulations are specific controls on the use of land, rather than direction-setting policy documents. The Board has addressed this difference and the relationship between policy and implementing measures in *Snoqualmie v. King County*, CPSGPHB Case No. 92-3-0004 (1993), at 12.

[1]

The CEO allows for the transfer of development rights by "sending" unit count from one parcel to another parcel, but does not require that the parcels be contiguous. *See* Finding of Fact No. 17. The CEO does not require a planned unit development permit; however, a PUD is required for any proposed increased density (i.e., a density bonus).

Although the CEO does not use the word "cluster" to describe its ostensible purpose or what it requires of ultimate on-site development, the operational concept does seem to be that of concentrating development on a portion of property(ies) rather than configuring it in a more dispersed fashion. The County acknowledges the CEO's clustering effect when it states:

Ordinance 93-P-1994 allows for the clustering of development...Kitsap County's Response to Prehearing Briefs, at 11 (emphasis added).

[1]

The history of human settlement and the literature of city and regional planning is replete with clustered development as an organizing principle. The Board takes official notice of *The Design of Cities*, Edmund N. Bacon, Penguin Books, New York, 1967; *Design with Nature*, Ian L. McHarg, Natural History Press, Philadelphia, Pa. 1969; and *Rural by Design*, Randall Arendt, Planners Press, Chicago, 1994. Traditional objectives of such innovative techniques, such as the protection and conservation of natural resources, have been augmented by more recent public policy priorities such as housing affordability, air quality and transportation goals.

[1]

RCW 36.70A.070(5) provides:

Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The rural element shall permit land uses that are compatible with the rural character of such lands and provide for a variety of rural densities.

[1]

The Board of County Commissioners did not include a suggestion to add a sentence to the "Purpose" portion of the CEO that specified that one purpose of the ordinance was to let citizens defer development decisions. See Finding of Fact No. 14. However, omission of that clause does not mean that the effect of the CEO is any different.

[1]

Waiting until after a comprehensive land use plan has been adopted is consistent with the GMA's interactive and iterative sequence: (1) Designate and adopt interim critical areas and resource lands regulations (RCW 36.70A.170, .060); (2) Adopt CPPs with at least procedural fiscal analysis (per *Snoqualmie*); (3) Adopt Interim Urban Growth Areas (RCW 36.70A.110(4)); (4) Adopt final phases of CPPs and/or substantive fiscal analysis as needed (per *Snoqualmie*); (5) Adopt comprehensive plans, including Final Urban Growth Areas (RCW 36.70A.040 and .110(5)); (6) Perform activities and make capital budget decisions in conformity with the adopted comprehensive plan. RCW 36.70A.120. *City of Edmonds and City of Lynnwood v. Snohomish County*, CPSGPHB Case No. 93-3-0005 (1993), at 26, fn 10.

[1]

For example, if the County elects to allow a density multiplier in the rural areas, via a PUD or other regulatory mechanism, it should be mindful of the potential impact on the county-wide allocation of growth inside and outside the UGA. Without some accounting mechanism to adjust the UGA assumptions and population allocation, similar to the adjustment that must be made for fully contained communities (*see* RCW 36.70A.350), a density multiplier mechanism in the rural area could erode the validity of the UGA accounting and thwart the Act's predilection for growth to locate primarily in UGAs.