

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

BREMERTON, et al.,)	Case No. 95-3-0039c
Petitioners,)	coordinated with
v.)	Case No. 97-3-0024c
KITSAP COUNTY,)	FINDING OF
Respondent.)	NONCOMPLIANCE AND
)	DETERMINATION OF
<hr/>)	INVALIDITY IN <i>BREMERTON</i>
PORT GAMBLE, et al.,)	AND ORDER DISMISSING
Petitioners,)	<i>PORT GAMBLE</i>
v.)	
KITSAP COUNTY,)))))))))	
Respondent.		

I. PROCEDURAL HISTORY

On October 9, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) entered a Final Decision and Order (the **FDO**) in *Bremerton, et al. v. Kitsap County [Bremerton]*, CPSGMHB Case No. 95-3-0039c, finding that the comprehensive plan adopted by Kitsap County (the **County**) by Ordinance No. 169-1994 on December 29, 1994, (the **1994 Plan**) was not in compliance with the Growth Management Act (the **GMA** or the **Act**) and invalidating the Plan and all its implementing development regulations. The Board remanded the Plan to the County and gave the County the maximum period to bring its Plan and implementing regulations into compliance with the Act.

On May 9, 1996, the Board conducted the first *Bremerton* compliance hearing (the **First Compliance Hearing**).

On May 28, 1996, the Board entered a Finding of Noncompliance (the **Finding of Noncompliance**) with a contingent recommendation of sanctions.

On December 23, 1996, the Kitsap County Board of County Commissioners adopted Ordinance 203-1996 (the **Plan**), which adopted a countywide comprehensive plan including a Capital Facilities plan and a land use map.

On January 14, 1997, the Board issued an “Order Granting County’s Motion for Continuance of Second Compliance Hearing and Notice of Pre-Compliance Hearing Conference.”

Between February 28 and March 10, 1997, the Board received ten Petitions for Review (**PFR**), each of which alleged that the County’s Plan, adopted by Ordinance 203-1996, did not comply with the requirements of the GMA. These Petitioners were the Port Gamble S’Klallam Tribe (**Port Gamble**); the Banner Forest Committee of Olalla Community Council (**Banner Forest**); the Association to Protect Anderson Creek (**APAC**), Helen E. Havens-Saunders, the Union River

Basin Protection Association (**URBPA**), and Elaine Manheimer; CarolAnn Stockton, Ed Brown, Gene Monroe and Grow Smart! (**Grow Smart**); Ron Ross (**Ross**); the Homebuilders Association of Kitsap County and the Kitsap County Association of Realtors (**Homebuilders**); Kitsap Citizens for Rural Preservation and Association of Rural Residents (**KCRP**); Illahee Trust Land Task Force Of Illahee Community (**Illahee Trust**); the Suquamish Tribe (**Suquamish**); and Martin P. Hayes (**Hayes**).

On March 3, 1997, the Board issued a “Pre-Compliance Hearing Order” recognizing as participants pursuant to RCW 36.70A.330(2) Homebuilders, Hayes, Apple Tree Point, the Port of Bremerton and URBPA.

On March 12, 1997, the Board entered an “Order of Consolidation and Notice of Hearing” (the **First Order of Consolidation**). The First Order of Consolidation consolidated the ten PFRs listed above into a single, consolidated case with the caption *Port Gamble, et al., v. Kitsap County [Port Gamble]* and assigned CPSGMHB Case No. 97-3-0024c.

On March 20, 1997, the Board held a prehearing conference for *Port Gamble* in Poulsbo, Washington.

On March 28, 1997, the Board issued the “Second Order of Consolidation, Order on Motion to Intervene and Prehearing Order” (the **Second Order of Consolidation**). The Second Order of Consolidation added to *Port Gamble* the petition of Gloria Agas, Pepito Soriano and Rosalinda Soriano (**Agas**).

On March 27, 1997, the Board issued a “Notice of Legal Issues and Amendment of Schedule.”

On April 7, 1997, the Board issued an “Order Amending Schedule and Notice of Clarification.”

On April 22, 1997, the Board entered an “Order on Motions” that granted Motions to Intervene from Manke Lumber Co. (**Manke**) and the Washington State Department of Natural Resources (**DNR**); granted Motions to Supplement from Pope Resources and Port Blakely Tree Farms (**Port Blakely**); and denied the County’s Motions to dismiss URBPA, Suquamish, APAC in part, and Apple Tree Point in part. This Order also denied the County’s Motion to Bifurcate or Extend Time; granted the County’s motion to Dismiss Banner Forest, Illahee Trust and Agas; and granted Hayes’ Motion for Expanded Participation.

On April 30, 1997, the Board entered a “Second Order Amending Schedule.”

On May 22, 1997, the Board issued an “Order Regarding County’s Record” that directed the County to file and provide to all parties a County Record Status Report indicating items missing from file folders 25, 26 and 27. The length, author and nature of the items were also to be noted.

On May 28, 1997, the Board received the following briefs and notices: Adams' Second Prehearing Brief, with attachments; Bremerton’s Prehearing Brief; Council I's Prehearing Brief; Prehearing Brief of Grow Smart (Stockton, Brown, Monroe) with attachment; Notice of Availability of Prehearing Brief, Martin Hayes; Prehearing Brief, Martin Hayes; Opening Brief of KCRP, ARR, Banigan, Hartley, Burrow, Thomas, Donnelly; Ollalla Community Council, NKCC, Kane, Wilson, and CKCC, with attachments; Notice of Availability of Opening Brief of KCRP et al.; Notice of Availability of Opening Brief of Port Gamble; Opening Brief of Port Gamble S'Klallam Tribe, with attachments; Petitioner Suquamish Tribe's Brief in Support of Finding of Invalidity of

Kitsap Co. Comp. Plan; Brief on the Merits with attachments, URBPA, APAC; Notice of Availability of Brief on the Merits, URBPA, APAC; and the State's Brief in Partial Opposition to Comp. Plan, with attachments.

On May 30, 1997, the Board received Exhibits to Petitioner Suquamish's "Opening Brief."

On June 2, 1997, the Board received Bremerton's "Corrected Compliance Hearing Memo."

On June 9, 1997, the Board issued an "Order Amending Schedule, Order on Motions and Order Establishing Location" that granted the State's Motion to Supplement, such that the Board took official notice of Kitsap County's Shoreline Master Program. This Order also granted Suquamish's Motion to Correct the Index, and dismissed, with prejudice, Homebuilder's Association of Kitsap County, Kitsap County Association of Realtors, and the City of Poulsbo.

On June 16, 1997, the Board received Adams' "Supplemental Prehearing Brief," and Hayes' "Notice of Availability of Supplemental Prehearing Brief" and "Supplemental Prehearing Brief, in Opposition to County Compliance."

Also on June 16, 1997, the Board received "Dispositive Motions on a Limited Record, Motion to Dismiss, K.C. Ordinance 203-1996" (**Hayes' Dispositive Motion**).

On June 24, 1997, the Board received the Brief of Participants Bosanko, Anderson, Fortune, Tarbill, and Apple Tree Point Partners, with attachments.

On June 25, 1997, the Board received the Notice of Availability of Brief of Participants Bosanko, Anderson, Fortune, Tarbill, and Apple Tree Partners; Manke Lumber Co., Inc.'s, Prehearing Brief, with attachments; Prehearing Brief of Intervenor McCormick Land Co.; Exhibit List to Brief of Overton & Assoc., Alpine Evergreen, Inc., and Peter Overton; Brief of Overton & Assoc., Alpine Evergreen Inc., and Peter Overton; Notice of Availability of Brief of Overton & Assoc., Alpine Evergreen, Inc., and Peter Overton; Intervenor Pope Resources' Opening Brief in Support of Comp. Plan; Intervenor Port Blakely Tree Farms' Opening Brief in Support of Comp. Plan, with exhibits; and the Port of Bremerton's Prehearing Brief in Response

On June 27, 1997, the Board received the Port of Bremerton's "Notice of Availability."

On July 8, 1997 the Board received "Adams' Dispositive Motion" (**Adams' Dispositive Motion**), which objected to, but did not formally move to strike, County Exhibits 2, 7-14, 16, 18, 20, and 21.

On July 10, 1997, the Board entered an "Order on Motions to Supplement, Motions to Dismiss and Establishing Schedule for Oral Argument" that granted the Motion to Supplement of Overton & Assoc., Alpine Evergreen, Inc., and Peter Overton (**Overton**), and denied Adams' Motion to extend the reply deadline. The Order deferred the Dispositive Motions of Hayes and Adams.

On July 14, 1997 the Board received "Port Gamble's Reply Brief." Port Gamble moved to strike McCormick and County Exhibits 2, 3, 7 and 19, and those portions of the briefs relying on the Exhibits (**Port Gamble's Motion to Strike**.)

On July 15, 1997 the Board received "Kitsap County's Response to Adams' Dispositive Motion (RE: County's Brief) and Port Gamble's Motion to Strike, and Alternative Motions to Supplement and to Strike" (the **County's Motion to Strike**). The County moved to supplement the record with the Exhibits, or, in the event the Board granted a motion to strike any of the

County's Exhibits, to strike the following:

- Exhibits 4-9 and 11 of Adams' Opening Brief
- Exhibit 3 of Adams' Supplemental Brief
- Exhibit 8 of Adams' Reply Brief
- Un-numbered exhibits to GrowSmart's Prehearing Brief, consisting of a February 24, 1993 letter from Poulsbo Growth Management Advisory Committee to Kitsap County Board of Commissioners, a 9/13/93 "Notice to Editor", and a 7/18/93 letter from Poulsbo Growth Management Advisory Committee.

On July 16, 1997, the Board simultaneously held the third compliance hearing in *Bremerton* and the hearing on the merits in *Port Gamble* in Poulsbo, Washington. Present for the Board were Edward G. McGuire, Chris Smith Towne and Joseph Tovar, presiding officer. Present representing the County was Sue Tanner. Appearing on behalf of the parties and participants in *Bremerton* and *Port Gamble* were: Tracy Burrows for 1000 Friends of Washington (**1000 Friends**); Tommy Prud'homme for the State of Washington (**State**); Ray Bock for Council I (**Council I**); John Sledd for Suquamish; Nobu Kawasaki for Sandra Adams (**Adams**); Martin P. Hayes *pro se*; David Bricklin for Port Gamble and KCRP; CarolAnn Stockton for Grow Smart; Elaine Manheimer for URBPA and Helen Havens-Saunders for APAC; Jane Koler for the City of Bremerton; James Tracy for Ross; Richard Hill for Bosanko, et al.; William T. Lynn for Manke; Katherine Kramer Laird for Pope Resources and Port Blakely; Elaine Spencer for Overton; Bob Johns for McCormick; and David Weibel for the Port of Bremerton. Also present were Roger Wynne for Rainier Evergreen; Beth Wilson for Olalla Community Council; and Tom Donnelly for Thomas II. Court reporting services were provided by Cynthia J. LaRose, Robert H. Lewis and Associates, Tacoma. No witnesses testified. At the beginning of the hearing, the Board heard oral arguments regarding Hayes' Dispositive Motion, Adams' Dispositive Motion, Port Gamble's Motion to Strike, the County's Motion to Strike and McCormick's Motion to Strike. The presiding officer announced that the Board would not rule on these motions orally, but would rule in the subsequent order. During the course of the hearing, the presiding officer made a number of procedural rulings. One of these was direction to the County to submit to the Board, with a copy to Bremerton, a copy of record evidence regarding UGA consultation between the County and Bremerton. The presiding officer also directed Bremerton to submit a post-hearing brief narrowly focused on the record information concerning the County's UGA consultation with the City of Bremerton.

On July 16, 1997, at the Hearing on the Merits, McCormick moved to strike the Donnelly brief and any new arguments in "recent responses" (**McCormick's Motion to Strike.**)

On July 17, 1997, the Board received from the County a "Submittal of Record Documents Regarding Bremerton-Kitsap County UGA Consultations," with attachments. On this same date, the Board received "Kitsap County's Response to Adams' Dispositive Motion (RE: County's Brief) and Port Gamble's Motion to Strike, and Alternative Motions to Supplement and Strike." On July 23, 1997, the Board received the "City of Bremerton's Supplemental Reply Brief."

II. FINDINGS OF FACT

1. The Board adopts by reference the Findings of Facts listed at pages 6-20 of the *Bremerton* Final Decision and Order entered on October 6, 1995.
2. Ordinance 203-1996, which adopted the Kitsap County Plan including a Capital Facilities plan and a land use map, was adopted by the Kitsap County Board of County Commissioners on December 23, 1996. The Plan consists of three volumes: Part I, Land Use Plan; Part II, Capital Facilities Plan, Part III; Figure Book.
3. Ordinance 208-1997 entitled “Relating to Growth Management and Renewing for a Period of Six Months Ordinances Adopting Interim Zoning, Interim Development Regulations to Protect Critical Areas, and Interim Urban Growth Areas” (the **Interim Regulations**) was adopted by the Kitsap County Board of County Commissioners on June 30, 1997.
4. Designated Urban Growth Areas (**UGAs**) will need to accommodate an additional 67,551 people by the year 2012. Land Use Plan, at 16.
5. The Plan contains UGA selection criteria, including: (a) cities were included within UGAs; (b) the location of existing urban services (both public water and sanitary sewer service) was considered; and (c) the existing development pattern was analyzed to identify areas already characterized by urban growth (unincorporated Silverdale, East Bremerton, and industrially zoned area in the vicinity of the Port of Bremerton were identified). Preliminary boundaries were drawn and a capacity analysis was completed for each UGA. Land Use Plan, at 17.
6. The following UGAs were designated: Bainbridge Island UGA – consists of the City of Bainbridge Island; Poulsbo UGA – consists of the City of Poulsbo and unincorporated areas immediately adjacent to the incorporated city; Port Orchard UGA – consists of the City of Port Orchard, unincorporated areas immediately adjacent to the incorporated city, and “the boundary of Sewer ULID #6 which is characterized by urban growth according to the definition of one unit per acre being urban from the Growth Management Hearings Board”; Central Kitsap UGA – consists of the City of Bremerton and the unincorporated areas of Silverdale, Tracyton, Illahee and East Bremerton, and industrially designated land west and north of Bremerton’s city limits; Anderson Hill UGA (South Kitsap) – consists of part of the incorporated area of the City of Bremerton; Port of Bremerton UGA – consists of a 587-acre industrial park owned by the Port, a 1,200-acre transport-class airport owned by the Port, and numerous, privately owned industrial properties; Port Gamble UGA – consists of a historic townsite; Kingston UGA; Keyport UGA; Suquamish UGA; and Manchester UGA. Land Use Plan, at 18-19.
7. To calculate the number of acres needed to accommodate the population growth assigned to its unincorporated UGAs, the County assumed new residential development would occur at 4 du/acre. Land Use Plan, at A-30.

8. The County calculated its amount of land available for UGAs using the following steps: Tabulate vacant and underutilized land within each UGA (vested projects are tabulated at their approved densities); apply a development “efficiency factor” (varies according to parcel size); and apply reduction factors to account for public facilities (15 percent), unavailable land (15 percent), critical areas (15 percent), and street rights-of-way (17 percent). The remaining acreage is the net developable residential acreage. Land Use Plan, at A-31-33.

9. The County utilized a market factor of 25 percent. Land Use Plan, at A-31.

10. The Plan contains a “Grandfathering Clause.” This clause is intended “to address the issue of long-time property owners who purchased property in Kitsap County with the perception that they would always be allowed to subdivide their property.” The Grandfathering Clause allows subdivision of properties of 20 acres or less “in the same manner as those properties that surround [them].” This provision applies to all properties “purchased, transferred or somehow otherwise obtained before December 29, 1994.” The Grandfathering Clause is to be in effect for one year after the Plan is validated by the Board. Land Use Plan, at 21-22.

11. The County has several rural residential designations and policies to increase residential densities within these rural residential designations.

a) The Rural Wooded designation has a nominal minimum lot size of 1 dwelling unit (du)/10 acres. This density can be increased if a clustering incentive program is used. Parcels with shoreline frontage may be subdivided to 2½-acre lots, under certain conditions.

b) The Plan also creates a Rural Wooded Incentive Program which allows densities of 1 du/5 acres. The Rural Wooded Incentive Program may be utilized on no more than 25 percent of the land designated Rural Wooded.

Fifty percent of a site utilizing the incentive program must be placed in “Wooded Reserve Status,” encouraging forestry and prohibiting development or subdivision until 2012. Permanent open space must be created either from one-half of the land placed in Wooded Reserve Status or from one-half of the remaining 50 percent of the site. The remainder of the site must be clustered. Each cluster must not contain more than 25 units; clusters may be as close as 100 feet. Urban services shall not be provided to clusters. A single project may be no more than 1,000 contiguous acres.

c) The Rural Low-Density Residential designation has a nominal minimum lot size of 1 du/10 acres. This density may be doubled to 1 du/5 acres if the parcel is not constrained by critical areas. Additional increased density may be achieved through the Plan’s Rural Infill provisions. The Rural Infill provisions allow up to 2½ du/10 acres. In addition, parcels with shoreline frontage may be subdivided into 2½-acre lots.

d)The Rural Medium-Density Residential designation has a nominal minimum density of 1 du/5 acres.This density may be doubled to 2 du/5 acres through the Plan’s Rural Infill provisions.In addition, parcels with shoreline frontage may be subdivided into 1-acre lots.

e)The Urban Reserve designation has a minimum density of 1 du/10 acres.

f)The Plan states:“The Rural Infill Area is that area which, due to past development trends, has an existing platting pattern which primarily consists of small, divided parcels less than 10 acres in size.”

Land Use Plan, at 48-52.

12.Kitsap County presently has 76,818 acres of forest land: 49,014 acres in private ownership, (with 37,613 acres, or 85 percent, owned by six companies) and the remainder held by the State (16,000 acres), two Tribes (3,204 acres) and a city (8,600 acres).Land Use Plan, Table A-LU-10, at A-76.

13.Approximately 49,014 acres of land in Kitsap County are taxed as forest land or open space timber by the County Assessor’s Office.These lands have been used for commercial production, reforestation or forest habitat, although they may at some point be taken out of that tax classification.Land Use Plan, at A-75.

14.The County’s designation criteria, originally set forth in Strategies for Resource Lands Designations and Interim Development Regulations (April 20, 1992), are:1.A Douglas Fir 50-year site index of 110 or greater for a predominant portion of the parcel;2.A nominal 80 acres or more of single ownership;3.Property tax classification: Property is enrolled, as of January 1, 1991, in the Open Space Timber; is Designated Forest or Classified Forest property tax classification program pursuant to Chapter 84.33 or 84.34 RCA; or is owned by a state or local governmental body with long-term forest management as its primary use; and4.In designating forest lands, the effects of proximity to population areas and the possibly [sic] of more intense uses of the land as indicated by the following shall also be considered (WAC 365-190-060 Forest Resource Lands):a.The availability of public services and facilities conducive to the conversion of forest land: Not within a special purpose sewer or local (not countywide) water district;b.The proximity of forest land to urban and suburban areas and rural settlements: Forest lands of long-term significance are located outside the urban and suburban areas of rural settlements;c.The size of the parcels: Forest lands consist of predominately large parcels; d.The compatibility and intensity of adjacent and nearby land use settlement patterns with forest lands of long-term commercial significance; Greater than 50% of the linear frontage of the perimeter of any parcel meeting the above criteria shall abut parcels that are greater than five acres in size;e.Property tax classification: Property is assessed as open space or forest land pursuant to chapter 84.33 or 84.34 RCW;f.Local economic conditions which affect the ability to manage timberlands for long-term commercial production: Economic conditions should be

conducive to long-term commercial forestry management; and g. History of land development permits issued nearby: Would allow for compatibility with forestry activities. Land Use Plan, at A-77-78.

15. Table A-LU-11, 1994 Employment and Wages for Industry in Kitsap County, states that the industrial category of Forestry employs 88 persons, of a countywide total of 67,961 workers. Lumber/Wood Products, with 200 workers in 1994, was zero in 1995, reflecting the closure of the Port Gamble Mill. Land Use Plan, at A-81.

16. The County has determined that no “forest lands,” within the meaning of the GMA, exist within Kitsap County. Land Use Plan, at 34.

17. The County estimates the costs of County-owned and managed capital improvements for 1995-2000 to be \$187,736,700. The County estimates funding available for 1995-2000 to be \$187,736,770, including \$96,043,800 from existing revenues and \$91,692,900 from new revenues. Capital Facilities Plan, at ES-2-ES-3.

18. On June 16, 1997, the Kitsap County Board of Commissioners decided, by motion, to provide the Kitsap Prosecuting Attorneys with the following direction concerning the County’s defense of the Plan in the current proceeding:

1. The County will not provide briefing or argument in support of the following changes to the Planning Commission’s recommendation on the Plan which were made by the former Board of County Commissioners on October 7, and December 23, 1996:

A. Expanding the northern Kingston Urban Growth Area boundary;

B. Increasing the shoreline density in the Rural Wooded (RW), Rural Low (RL) and Rural Medium (RM) designations; and

C. Reducing the density in the Rural Wooded designation from one unit per twenty acres to one unit per ten acres.

2. The County will not provide briefing or argument in support of the “Rural Infill Area” in the Rural Lands element of the Plan;

3. The County will not provide briefing or argument in support of retaining Gorst as part of an urban growth area rather than designating it as Urban Reserve Residential and reviewing the designation at the next annual review of the comprehensive plan following completion of the sewer feasibility study;

4. The County will not provide briefing or argument on the issue of whether or not the changes made on December 23, 1996 to the proposed comprehensive plan by the previous Board of County Commissioners meet the legal requirements for public notice;

5.The County will stipulate that the following statement regarding affordable housing allocations should be included in the housing element of the comprehensive plan:“Affordable housing allocations will be put on the Kitsap Regional Coordinating Council (KRCC) agenda, and the comprehensive plan will be amended accordingly at the next annual review; and

6.The County will request that the Hearings Board issue a decision in these cases at the earliest possible date, as it did when it issued its Final Decision and Order in Bremerton v. Kitsap County in October of 1995.

June 19, 1997 letter from Kitsap County Board of Commissioners to Russell Hauge and Sue Tanner.

III. dispositive motions and MOTIONS TO STRIKE

Hayes’ Dispositive Motion is **denied**.

Adams’ Dispositive Motion is **denied**.

Port Gamble’s Motion to Strike is **denied**.

The County’s Motion to Strike is **denied**.

McCormick’s Motion to Strike is **denied**.

IV. STANDARD OF REVIEW

The County urged the Board to apply Engrossed Senate Bill (**ESB**) 6094, specifically Section 20. County PHB, at 2; *see* ESB 6094, Chapter 429, Laws of 1997..Section 20 changes the standard of review to be used by the Boards.The Board takes official notice of ESB 6094, which became effective on July 27, 1997.Section 53 expressly provides that this new law is prospective in effect, except for Section 22, which is explicitly retroactive. ^[1] In other words, the 1997 amendments to the GMA became effective on July 27, 1997.

The Board obtained jurisdiction to review the *Bremerton* portion of this coordinated matter when the PFRs were filed between January 27, 1995 and March 8, 1995.*Bremerton*, at 3.The Board obtained jurisdiction to review the *Port Gamble* portion when PFRs were filed between February 28, 1997 and March 10, 1997.*Port Gamble*, Second Order of Consolidation, Order on Motion to Intervene and Prehearing Order, at 2.Briefing, pursuant to the Board’s Rules of Practice and Procedure, was received from May 28, 1997, through July 14, 1997.The simultaneous third compliance hearing on the *Bremerton* case and the hearing on the merits in the *Port Gamble* case were held on July 16, 1997.But for the issuance of this Order, all events in this proceeding occurred prior to July 27, 1997 -- the effective date of ESB 6094.

If, as the County suggests, the date of issuance of the Board’s decision is determinative as to the law to be applied, the Board could select the law to apply based upon its desire and ability to

accelerate or delay the issuance of its decision. This is an outcome the Board cannot reach, nor can the Board conclude that it is a result the legislature intended. [2] Consequently, to give effect to the legislature's clear direction, as contained in Section 53, the Board has a duty to apply the provisions of the GMA as they existed at the time the actions were taken and the PFRs filed. [3]

RCW 36.70A.320(1) provides that:

Except as provided in subsection (2) of this section, 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.

V. OVERVIEW

This decision and Order covers twenty-one issues. The Legal Issues are addressed in the following Order: 1; 3 and 5; 4; 6 and 8; 7; 9; 10 and 2; 11; 12; 13 and 16; 14 and 16; 15; and 17 through 21.

Vi. specific LEGAL ISSUES

Legal Issue No. 1

Did the County violate RCW 36.70A.110 and RCW 36.70A.020 when it designated Urban Growth Areas in Ordinance No. 203-1996?

Discussion

In *Bremerton*, the Board concluded, among other things, that “[t]he County’s designated UGAs do not comply with the requirements of RCW 36.70A.110. They are far too large to accommodate the urban portion of the necessary growth projected to occur in the next twenty years and also meet the Act’s other requirements.” *Bremerton*, at 66. Petitioners and Participants argue that the Plan’s UGA designations continue to fail to comply with RCW 36.70A.110. Specifically, they allege that the UGAs are too large and are inappropriately located.

RCW 36.70A.110 provides:

(1) Each county that is required . . . to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may

include more than a single city.An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is designated a new fully contained community as defined by RCW 36.70A.350.

(2)Based upon the growth management population projection made for the county by the office of financial management, the urban growth areas in the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county for the succeeding twenty-year period.Each urban growth area shall permit urban densities and shall include greenbelt and open space areas.An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses.In determining this market factor, cities and counties may consider local circumstances.Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth. . . .

(3)Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas.Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350.

(Emphasis added.)

Population Density Assumption

To determine the amount of land necessary to accommodate OFM’s projected population growth, the County assumed an average of 2.5 persons per dwelling unit ^[4] and an average urban density of 4 dwelling units per acre (du/acre) to calculate the average urban population density of 10 ^[5] persons per acre.To accommodate the anticipated urban growth in the unincorporated UGAs of 30,598 persons at 10 persons per acre, the County calculated a need for 3,060 acres of unincorporated UGAs in Kitsap County.In addition, the County applied a 25 percent market factor “to keep urban land prices from rising dramatically due to speculation.”Thus, the County concluded that it required 3,825 acres in unincorporated UGAs to accommodate OFM’s twenty-year population growth estimate.Land Use Plan, at A-30-31.

UGA Delineation

The Plan contains three criteria for delineating UGAs. *See* Finding of Fact 5. First, all cities must be within UGAs. *See* RCW 36.70A.110(1). Second, the location of existing urban services, such as public water and sanitary sewer service, must be considered. Third, areas already characterized by urban growth must be considered. The County delineated eleven UGAs. *See* Finding of Fact 6 for a complete listing of the County’s UGAs. The County’s unincorporated UGAs account for a total of 13,101 acres. [\[6\]](#)

Land Capacity Analysis

The County performed a land capacity analysis to determine whether the lands delineated as UGAs included 3,825 acres available for residential development. First, the County tabulated all vacant and underutilized land within each UGA. [\[7\]](#) Second, the County applied an “efficiency factor,” according to parcel size, to reflect the difficulty of developing smaller parcels (up to 50 percent per parcel). Third, the County subtracted “reduction factors” to account for non-residential development such as public facilities (15 percent); land unavailable due to property owners with no intent to sell or develop their land during the twenty-year planning period (15 percent); critical areas (15 percent); and street rights-of-way (17 percent). The remaining acreage is considered to be net developable residential acreage. Land Use Plan, at A-31-33. The County’s land capacity analysis determined that there are 3,827 acres in unincorporated UGAs available for residential development. Thus, the County concluded that the UGAs delineated contain sufficient lands to accommodate the anticipated 20-year population growth. Land Use Plan, at 20.

Discussion

Petitioners and Participants argue that the County’s UGAs are too large because the population density assumptions are flawed, the deductions applied in the land capacity analysis are too great, and the market factor is unnecessarily large.

The County assumed that the average urban density in its unincorporated UGAs would be 4 du/acre. The Plan states that this density “is based on the average urban densities of the incorporated cities in Kitsap County.” Land Use Plan, at A-30. However, if the pattern and distribution of residential densities and commercial development in the County’s cities is not in the same proportion as that planned for the County’s unincorporated areas, the County’s historical urban residential density assumption is suspect. The Plan does not reveal what lands were included to reach this average; there is no indication in the Plan whether commercial and industrial lands and other non-residential lands were excluded.

Petitioners assert that the County should use the densities reflected in the plan for sizing its UGA. The County counters that a population density of 4 du/acre for calculating land capacity was approved by the Board in *Gig Harbor v. Pierce County* [***Gig Harbor***], CPSGMHB Case No. 95-

3-0016, Final Decision and Order (October 31, 1995), and that a density of 4 du/acre is “urban.” The County’s characterization of *Gig Harbor* is not accurate. In *Gig Harbor*, the Board did not approve or disapprove the use of 4 du/acre for calculating land capacity; the Board determined that the Petitioner failed to meet its burden of proof to show that Pierce County’s land capacity analysis violated the GMA. Absent such a showing by Petitioner, the Board must find compliance with the Act. RCW 36.70A.320(1).

The County also seems to be arguing that a land capacity analysis that relies on any urban density complies with the Act. Although 4 du/acre may be an urban density, the appropriateness of using this density for calculating land capacity depends on the facts of a particular case. In the present case, 4 du/acre is not appropriate because the County’s urban land use designations throughout the unincorporated UGAs, indicate a range of densities with maximum densities far above 4 du/acre.

By using 4 du/acre, the County seems to assume that its future urban growth will occur at “historic” urban densities. This “historic” density is well below the densities allowed by the [\[8\]](#) County’s urban residential designations. Excluding the Urban Restricted designation, the maximum densities allowed by the County’s urban residential designations range from a low of 6-9 du/acre to a high of 20-43 du/acre. Given this range of densities, it is unreasonable to assume that the average density achieved by the year 2012 would be so far below the allowable densities. The record certainly does not support such an assumption.

What the record does show is that 4 du/acre is far below the County’s planned-for densities, resulting in exaggerated UGAs. As Port Gamble observes, the majority of the areas of the unincorporated UGAs are designated at maximum densities that are:

50 to 125 percent **higher** than the 4 [du/ac] density utilized in the County’s land capacity analysis. . . . [B]y using 4 units per acre instead of the lowest maximum density in any UGA (6 units per acre), the County increased the UGA size by 50 percent. By using four instead of nine units per acre, the County more than doubled the size of the UGA. Port Gamble PHB, at 6 (footnote omitted; emphasis in original).

The County states: “[F]or purposes of analysis at this time, the County found nothing to indicate that it would be likely to achieve a density that was greater than the average density of the incorporated cities within the county.” County PHB, at 6. In light of the present incarnation of the County’s Plan, the Board agrees with the County -- with such a low urban residential density assumption, the County’s unincorporated UGAs will be so oversized that there is no reason to expect the County’s future urban growth to develop at densities greater than 4 du/ac. The Plan’s UGA population density assumption (4 du/ac) perpetuates low density development.

The Plan states that its land capacity analysis is consistent with CTED’s recommendations. Land

Use Plan, at A-28. CTED recommends that total land capacity is calculated by multiplying the number of acres in the parcels remaining after applying various reduction factors by the number of units per acre allowed by the zoning in the area where the parcel is located. Issues in Designating Urban Growth Areas, Part I, Department of Community Development [now, Department of Community, Trade, and Economic Development (CTED)] (March 1992), at 3. This is not what the County did in determining the size of its UGAs.

The County first calculated the amount of land needed in UGAs to accommodate the population allocated to UGAs (3,060 acres, plus the 25 percent market factor, equals 3,825 residential acres needed) based on an assumed density (4 du/acre) that in no way reflected the County's planned-for densities. The County also delineated unincorporated UGAs for 11 areas that encompass

[9] 13,101 acres. The County next calculated the net available land in its delineated UGAs by applying a series of discount and reduction factors, to the total gross acreage included in the UGAs. Through these discount and reduction factors the County eliminated approximately 9,275 acres from the designated UGAs that would not be available to accommodate the population

[10] growth by the year 2012. Nowhere in the calculation of land necessary to accommodate population growth or the calculation of available land did the County consider the densities it planned for.

To exacerbate the understated density assumptions, the County actually applied an average urban density of 4 du/acre to only 56 percent of its UGA lands. For the 24 percent of lands designated as Urban Restricted, the County assumed 2 du/acre; and for the 20 percent of lands within sewer ULID #6, the County assumed a density of 1 du/acre. The County argued in its brief that most of the land within ULID #6 is vested at 1 du/acre. However, the Plan itself is silent on why this lower density was assumed and the tables in the Plan's land use capacity analysis separate ULID #6 from vested lands. Land Use Plan, at A-37 ("Total - Potential Developable Land (Encumbered Land, Unencumbered Land, ULID #6, and Vested Projects)").

The size of the County's UGAs was determined without regard to the County's Plan for future growth. In contrast to the methodology utilized in sizing the County's UGAs, the County applied the Plan's density designations when it allocated population to its subareas.

In allocating population to its subareas, the County began at the parcel level. The County then determined the **planned** capacity for each parcel "by multiplying the parcel size by the plan density for the given designation. (For example: A three-acre parcel designated 'Urban Residential 6' or 'UR6' has a planned capacity of 18 dwelling units.)" Land Use Plan, at 15. However, the County never reconciled these figures with its density assumptions used in its land capacity analysis. In essence, the County determined how many acres were needed in its unincorporated UGAs by looking at historical development patterns -- not by looking at its stated plan for future

development patterns. For the County to calculate the amount of unincorporated UGA land necessary to accommodate its allocated population growth, the County must utilize a population density assumption that reflects development densities anticipated by the County's Plan.

The Board agrees with Petitioners. The Board finds that for sizing UGAs, the density assumption used cannot be based upon historic patterns that perpetuated low density sprawl, and must reflect the planned-for urban densities. The Board further finds that the County's density assumption of 4 du/acre is too low, resulting in UGAs sized excessively larger than what is necessary to accommodate the County's projected population for the year 2012.

Petitioners and Participants also argue that the County's 25 percent market factor is unreasonable because of assumptions made in the land capacity analysis. Petitioners and Participants have presented no evidence to persuade the Board that using a 25 percent market factor to determine residential acreage needs is inappropriate for the County's Plan.

Finally, Petitioners and Participants challenge the County's land capacity analysis, arguing that the County's discount factors for critical areas, redevelopment constraints, and public facilities are exaggerated. The County admitted to inadvertently discounting for critical areas on unavailable land. Since unavailable lands have already been excluded from the developable UGA lands, deducting another 15 percent of these unavailable lands for critical areas amounts to "double counting." On remand, the County will be instructed to correct its analysis to avoid double counting.

The County claims that its land capacity analysis is based upon CTED methodology and methodology the Board approved in *Sky Valley*. Yet as Petitioner Port Gamble points out, the County's County-wide Planning Policies set forth a methodology for conducting the County's land capacity analysis. Port Gamble PHB, at 19 (citing KCCP App. B, Tasks 2.04 and 2.05). The analysis used by the County does not follow (or even mention) the KCCP methodology, nor can it easily be related to the *Sky Valley* or CTED models. The Board questions an analysis that allows approximately 13,100 acres of UGAs to accommodate 3,825 acres needed for new urban residential development. The Board finds that the land capacity analysis has double counted some lands and has not been related to the KCCP methodology or other accepted models. Therefore, as part of the remand Order, the Board will direct the County, in its Land Use Plan, Population Appendix to eliminate, modify or more fully explain the rationale supporting its discount and reduction factors, and relate its land capacity analysis to the methodology set forth in its or other accepted land capacity analysis models.

The Board holds that the deficiencies in the density assumptions and land capacity analysis yield UGAs that are excessively oversized and, therefore, do not comply with the requirements of RCW 36.70A.110.

Because the Board finds that collectively, the land in the unincorporated UGAs is excessively large, the County will be directed to recalculate and redesignate its UGAs. The revised UGAs must more closely reflect the land needed to accommodate anticipated future growth and urban development based on OFM's projections. By necessity, the size of the UGA must shrink, and consequently, some, if not all, of the unincorporated UGAs will have to be changed by the County. Therefore, the Board need not, and will not, examine nor evaluate specific UGAs in this Order.

While the Plan and Appendix discuss the UGA acreages, the only place the UGAs are depicted is on the land use map (Comprehensive Plan Map). ^[11] Therefore, **the Board holds that the land use map does not comply with the GMA (RCW 36.70A.110(6) and the County will be directed to depict the revised UGAs on a new land use map and, on that map, reference the location of maps of appropriate scale to discern the actual location of the UGA boundaries.**

Conclusion No. 1

Because of the deficiencies in the density assumptions and land capacity analysis used by the County, the UGAs have been excessively oversized, and do not comply with the requirements of RCW 36.70A.110. Since the UGAs are oversized, the land use map, which depicts the UGAs, does not comply with the requirements of RCW 36.70A.110.

Legal Issues No. 3 and 5

[Issue 3] Does the County Comprehensive Plan (the Plan) fail to preclude urban growth outside of designated urban growth areas contrary to the requirements of RCW 36.70A.020(1), (2), (3),

(4), (5), (7), (8), (9), (10), (12); RCW 36.70A.070 ^[12]; and RCW 36.70A.110(1)?

[Issue 5] Are the densities and uses prescribed in the Land Use/Rural Element of the Plan for rural areas compatible with the rural character of such lands and appropriate as required by RCW 36.70A.070(5)?

Statutory Provisions

RCW 36.70A.110(1) provides in pertinent part:

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.)

RCW 36.70A.070(5) ^[13] 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 appropriate

land uses that are compatible with the rural character of such lands and provide for a variety of rural densities and uses and may also provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural uses not characterized by urban growth.

RCW 36.70A.020 includes the following planning goals that were cited in this legal issue:(1), [\[14\]](#) (2), (3), (4), (5), (7), (8), (9), (10), and (12).

Plan Provisions being challenged

The provision of the Plan that are alleged not to comply with the above cited statutory provisions are the “Grandfathering Clause” and the Comprehensive Plan Land Use Map, which are contained in or referenced by the Land Use Element, and the “Rural Infill Area” and the “Rural Residential” land use designations (Rural Wooded, Rural Low-Density, Rural Medium-Density and Urban Reserve), which are contained in the Rural Element. Also challenged is a development option for the Rural Wooded designated land, the “Rural Wooded Incentive Program” (**RWIP**).

Discussion

a. Grandfathering Clause

The “Grandfathering Clause” allows the subdivision of properties of 20 acres or less “in the same manner as those properties that surround [them]”; applies to all properties “purchased, transferred or somehow otherwise obtained before December 29, 1994”; and is to be in effect for one year after the Plan is validated by the Board. Finding of Fact 10.

b. Rural Infill

The Rural Infill area is that area which, due to past development trends, has an existing platting pattern which primarily consists of small, divided parcels less than 10 acres in size. Finding of Fact 11.

c. Map Designations

Rural Wooded

The Rural Wooded land use designation has a nominal minimum lot size of 1 dwelling per 10 acres. Parcels with shoreline frontage may be subdivided into 2.5-acre lots, subject to certain conditions.

Rural Wooded-designated lands may allow densities of 1 unit per five acres through utilization of the RWIP. Properties developed under the RWIP may utilize no more than 25 percent of the land. Fifty percent of the sites utilizing the RWIP must be placed in “Wooded Reserve Status,” encouraging forestry and prohibiting development or subdivision until 2012. Permanent open space must be created either from one-half of the land placed in Wooded Reserve Status or from one-half of the remaining 50 percent of the site. The remainder of the site must be clustered. No

cluster may exceed 25 units; clusters may be as close as 100 feet. Urban services shall not be provided to clusters. A single project may be no more than 1,000 contiguous acres. Finding of Fact 11.

Rural Low-Density

Rural Low-Density has a nominal minimum lot size of 1 unit per ten acres. This density may be doubled to 1 unit per five acres if the parcel is not constrained by critical areas. Additional increased density may be achieved through the Plan's Rural Infill provisions, which allow for up to 2-1/2 units per 10 acres. In addition, parcels with shoreline frontage may be subdivided into 2.5-acre lots. Finding of Fact 11.

Rural Medium-Density

Rural Medium-Density has a nominal minimum density of 1 unit per five acres, which may be doubled to 2 units per five acres through the Rural Infill provisions. In addition, parcels with shoreline frontage may be subdivided into 1 acre lots. Finding of Fact 11.

Urban Reserve

The minimum density in the Urban Reserve land use designation is one unit per 10 acres. Finding of Fact 11.

The Board has previously addressed the GMA's requirements and the range of discretion afforded counties regarding "Rural" in county cases from each of the four counties in the Central Puget Sound Region. ^[15] These include *Rural Residents*, *Kitsap Citizens*, and *Bremerton* in Kitsap County; *Vashon-Maury* in King County; *Sky Valley* in Snohomish County, and *Gig*

Harbor and *Peninsula Neighborhood Association II* in Pierce County. ^[16] From these decisions has emerged a body of law regarding the GMA's requirements regarding the rural area and the range of discretion that the Act grants to counties in permitting uses of varying densities and intensities.

The Board first focused on the rural issue in three Kitsap County cases. In a 1994 decision, the Board held that the use of the word "only" in RCW 36.70A.110 clearly meant that new

development that meets the Act's definition of urban growth ^[17] is prohibited in the rural area and on resource lands. *Rural Residents*, at 20. In a subsequent case, the Board clarified that, if subject to certain limits and parameters, rural development proposals could constitute "compact rural development" permissible in a rural area. *Kitsap Citizens*, at 15. In the FDO of the case under review, the Board stated that a residential land use **pattern** of 1 and 2.5 acre lots is an urban land use **pattern** and that intensity of physical improvements on rural land can, alone, determine whether a proposal crosses the line between permissible rural growth and impermissible urban growth. *Bremerton*, at 49-51.

In a King County case, the Board clarified the meaning of the word "pattern" in the context of

residential development to mean the *number, location and configuration* of lots. *Vashon-Maury*, at 79. In that case, the Board also articulated two exceptions to the prohibition against new urban growth in the rural area: (1) essential public facilities (such as schools) and (2) uses dependent upon being in the rural area which are compatible with the functional and visual character of the rural area (such as sawmills). *Vashon-Maury*, at 68. In a Pierce County case, the Board approved a five acre rural lot size as a future urban reserve, provided that steps are taken to preclude division or development of such lots so as to preclude future growth at urban densities. *Gig Harbor*, at 58. In a Snohomish County case, the Board upheld a county's authority to allow rural clustering on lots as small as 5 acres, provided that provisions were made to assure that the number, location and configuration (i.e., the **land use pattern**) of such lots do not constitute urban growth (i.e., an **urbanland use pattern**). *Sky Valley*, at 48.

Most recently, the Board rejected Pierce County's argument that 2.4 to 3.5 du/acre lots on rural shorelines are justifiable exceptions and clarified that, while counties have authority to allow pre-existing urban-intensity uses to continue in the rural area, the expansion or enlargement of such uses would constitute prohibited new urban growth. *Peninsula Neighborhood Association II*, at 17 and 27.

In the above-cited county cases, the Board affirmed one of the GMA's most fundamental principles - that urban areas are to be characterized by urban growth and rural areas are not. Even so, from the facts, circumstances and arguments presented in these cases, the Board has recognized reasonable and necessary exceptions to the prohibition of urban growth in the rural area. The Board has even construed the Act to permit **compact** rural development, under certain circumstances and if sufficiently limited in scope and character.

The essence of these Board decisions - that rural areas are to be very different from urban areas, while recognizing reasonable and necessary exceptions and flexibility for compact rural development - presaged legislative action in 1997. ESB 6094, Section 7, amended RCW 36.70A.070(5) by adding a new subsection, which provides:

(d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the Rural Element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area. . . .

. . .

(iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new **pattern** of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical outer boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary the county shall address (A) the need to preserve the character of

existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl. (Emphasis added.)

Although these provisions of ESB 6094 were not available to the County when it acted, these new statutory provisions are consistent with the essence of the above cited-Board decisions. What those decisions alluded to the statute now explicitly clarifies: the legislature's continuing intent to protect rural areas from low-density sprawl; and that, while some accommodation may be made for infill of certain "existing areas" of more intense development in the rural area, that infill is to be "minimized" and "contained" within a "logical outer boundary." *With* such limitations and conditions, more intense rural development in areas where more intense development already exists could constitute permissible **compact rural development**; *without* such limitations and conditions more intense rural development would constitute an impermissible **pattern** of urban growth in the rural area. It is within the context of the GMA prior to July 27, 1997, and the Board's prior cases, that the Board must analyze the challenges asserted by Petitioners. Nonetheless, the Board finds the legislature's intent useful and instructive.

Kitsap's rural land use patterns are, in large measure, the result its past land-use planning. While the County used 2.5 and 1-acre rural lot sizes beginning in 1977, prior to that time, landowners could create lots as small as 7,500 square feet. Plan, at 21. This legacy of 2.5-acre, 1-acre, 7,500-square-foot, and even smaller rural parcels, and the problems and limitations that such a land use pattern presents, is acknowledged in the Plan.

There is a variety of parcel sizes occurring in the rural areas. These range from small, urban-sized lots . . . to square miles of undivided land in forested areas. . . . Within this range of lots are parcels of every imaginable size and shape. Subdivisions have occurred in both organized and disorganized fashion over the years. . . . This has resulted in a platting pattern in the rural area of the county that is hard to serve with utilities and public services and also creates problems for future planning.

Public services in the rural areas are less than what one would expect in the more urban areas of the county. Rural areas generally are less accessible, with narrow two-lane roadside. Fire flow is limited or non-existent. Septic systems and private wells prevail, and emergency response times are longer than in more urban areas. Land Use Plan, at 46- 47 (emphasis added).

Thus, rural property owners can recall a time when Kitsap's policy for the rural area was

[18]
effectively an urban land use policy. However, the advent of the GMA changed land use law in this state in a profound way, changing the **land use patterns** that counties may permit in rural areas. Kitsap County has attempted in its Plan to meet the Act's requirements while including mechanisms to meet the history-based desires of some of its landowners. Pre-existing parcelization cannot be undone, however there is no reason to perpetuate the past (i.e., creation of an urban **land use pattern** in the rural area) in light of the GMA's call for change. This axiom,

recognized by the Board in the *Bremerton* FDO, remains true today:

The County cannot base its future planning for new growth on its past development practice if those practices, as here, do not comply with the GMA. What was once permissible is no longer so. The GMA was passed to stop repeating past mistakes in the future. *Bremerton*, at 71.

Evaluating Kitsap's 1996 Plan against the GMA's requirements, as construed in Board decisions and clarified by ESB 6094, reveals that the County is still far wide of the mark. Port Gamble presented persuasive argument that, given the proliferation of lots smaller than five acres throughout the county, "the Grandfathering Clause has the potential to create many more of these classic, urban sprawl lot sizes. *See, e.g.,* Plan at 53 (Table RL-1) (17,966 (88 percent) of 20,342 lots in non-UGA Rural Infill Area are five acres or less. Port Gamble PHB, at 32. On reply, the County estimated the potential for new parcels to be created by the Grandfathering Clause as 4,580 new 2.5-acre lots. County PHB, Ex. 7.1000 Friends correctly characterized the Grandfathering Clause as a one-year suspension of the rural density provisions of the Plan, a "gaping loophole" that would promote the inappropriate and premature conversion of undeveloped rural land at urban densities three years after the County's statutory deadline for Plan adoption. It also argued that the Rural Infill Provisions would provide excess rural capacity, providing for enough lots to accommodate a third of the total population growth projected for the entire county by the year 2012. 1000 Friends PHB, at 4-5. The City of Bremerton observed that the Rural Infill Areas, comprising about two-thirds of the entire County, would have broad impact county-wide and argues that the GMA does not allow rural parcels to be divided into urban density lots simply because such land division occurred in the past. *Bremerton* PHB, at 6. Finally, the State provided sound argument that the Rural Infill provisions, particularly with regard to 1 and 2.5 acre lots on shorelines, would fail to protect the environment in an area that is largely unsewered and unlikely to receive such facilities, even with a pattern of lots of such sizes. State PHB, at 27.

[\[19\]](#)

The Board agrees with these and other arguments put forward by Petitioners and Participants that the "Grandfathering Clause" and "Rural Infill" provisions of the Plan, together with the Plan's Rural Land Use densities that effectively permit a **pattern of urban growth** on the rural shoreline and throughout the rural area, do not meet the goals and requirements of the GMA. The cumulative effect of these Plan provisions is to perpetuate a **land use pattern** that converts a significant portion of the County's rural land to low density sprawl, in violation of RCW 36.70A.020, RCW 36.70A.070(5) and RCW 36.70A.110. Such an outcome would substantially interfere with the fulfillment of the Act's planning goals and therefore warrants a determination of invalidity, as discussed in Section VII of this Order.

The Board holds that certain provisions of the County's Rural Element, specifically the Rural Infill Provisions, and the provisions in the Wooded Rural, Rural Low-Density and Rural Medium Density that permit 2.5 acre and 1 acre lots, and the Grandfathering Clause provisions of the Land Use Element, and the Comprehensive Plan Map do not comply with

requirements of the Act and fail to be guided by its goals, as construed by the Board in the above cited cases and as clarified by recent legislative amendments.

Conclusion Nos. 3 and 5

The Board answers both Issues 3 and 5 in the affirmative. The Rural Element provisions, specifically the Rural Infill, Wooded Rural, Rural Low-Density and Rural Medium-Density provisions that permit 2.5-acre and 1-acre lots, together with the Grandfathering Clause provision in the Land Use Element, and the Comprehensive Plan map, perpetuates a **pattern** of urban growth outside of designated UGAs, and permits densities and uses that are incompatible with the rural character of such lands, contrary to the requirements of RCW 36.70A.070(5) and RCW 36.70A.110(1). In addition, these Plan provisions fail to be guided by the goals of RCW 36.70A.020 set forth in Section VII of this Order.

LEGAL ISSUE NO. 4

Does the Plan include an appropriate distribution, location, and extent of land uses for agriculture, timber production, housing, commerce, industry, recreation, public utilities, and other land uses as required by RCW 36.70A.070(1)?

Discussion and Conclusion No. 4

RCW 36.70A.070(1) provides the requirements for the Land Use Element of comprehensive plans. Legal Issue 4 asks whether the Plan's Land Use Element has satisfied certain of these requirements. Because the Board is remanding the Land Use Element the County must significantly modify this part of its Plan. Therefore, the Board will not, address Legal Issue 4.

legal issue nos. 6 and 8

[Issue 6] Does the Land Use Element of the Plan fail to adequately review drainage, flooding and stormwater run-off and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the State as required by RCW 36.70A.070(1)?

[Issue 8] Does the Land Use Element of the Plan fail to provide for the protection of the quality and quantity of groundwater uses for public water supplies including the protection of aquifer recharge areas as required by RCW 36.70A.020(10), (11), (12); RCW 36.70A.070(1); and RCW 36.70A.110 (4)?

Discussion

RCW 36.70A.070(1) provides, in part:

The land use element shall provide for protection of the quality and quantity of ground water used for public water supplies. Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of

the state, including Puget Sound or waters entering Puget Sound.

The cited planning goals, RCW 36.70A.020, guiding the development and adoption of comprehensive plans, provide:

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

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

[\[20\]](#)

reconcile conflicts.

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

RCW 36.70A.110(4) provides:

In general, cities are the units of local government most appropriate to provide urban governmental services. In general, it is not appropriate that urban governmental services be extended to or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.

Drainage, Flooding and Stormwater Run-off

Petitioners assert that the Plan's land uses, particularly development on the shoreline and near rivers and streams and other critical areas, threaten receiving water quality and fail to include actions to mitigate and correct the problem.

The County responds by pointing to Plan policies to minimize impervious surfaces, limit grading activities and protect vegetation to decrease stormwater runoff, to direct growth to reduce sprawl and allow for better stormwater runoff control, and to limit densities where there are critical areas constraints.

The Plan's Surface Water map shows a number of fresh water discharges to the waters of the state, including Puget Sound. Figure Book, Figure A-NS-8, at M-10. Therefore, the portion of the challenged provision relating to review of drainage, flooding, and storm water run-off is applicable to the County; the Land Use Element of the Plan must contain such a review.

The Plan Introduction sets forth four framework principles; No. 3. B. and C. address prospective actions to manage storm water and conservation of surface and ground water quantity and quality. The Plan's Natural Systems section contains a number of goals and policies addressing protection of critical areas, aquifer recharge areas, surface water, and habitat areas; again, these are prospective actions.

However, the Plan's Land Use Element does not contain the required review of drainage, flooding, and storm water run-off, or make reference to such a review in other documents. Because the Land Use Element does not contain the required review, there is no information

provided as to existing polluting discharges; such a finding is necessary to trigger the requirement for guidance for corrective actions if such discharges exist. When the County has completed its review of discharges, if it finds that there are polluting discharges, it will be required to provide guidance for corrective actions in its Land Use Element.

Groundwater Used for Public Water Supplies

Petitioners charge that the Plan fails to distinguish deep and shallow aquifers; fails to identify aquifers needing recharge protection; extends UGA boundaries over aquifer recharge areas and shallow aquifers, threatening the future water supplies of cities; fails to protect forested areas, and increases impervious surfaces; and fails to control land clearing. [21]

The County points to the Natural Systems Element and Natural Systems Appendix of the Plan addressing aquifer recharge areas, well head protection, and storm water management. In addition, it cites to land use designations of Rural Medium, Rural Low and Rural Wooded as environmentally protective. In addition, the County relies on the Interim Critical Areas Ordinance, which includes a chapter on critical aquifer recharge areas, including regulation of land use activities and required buffers, and the draft Kitsap County Groundwater Management Plan and Coordinated Water System Plan. County Brief, at 21-22.

Petitioners' challenges are primarily focused on the nature and intensity of land uses, as those uses affect the quality and quantity of groundwater. Because the Land Use Element is being remanded to the County, the Board will defer consideration of whether that element, as revised, meets the Act's requirement to protect groundwater. The county is reminded that the protective provisions required by RCW. 36.70A.070(1) must be a part of the Land Use Element of the revised Plan.

Conclusion No. 6

Regarding the Act's requirement to include in the Land Use Element of the Plan a review of drainage, flooding, and storm water runoff, the County's Plan **does not comply** with RCW 36.70A.070(1). Regarding the Act's requirement to include in the Land Use Element guidance for corrective actions for polluting discharges, once the County has provided the required review, it must determine whether there are polluting discharges, and if so, provide guidance for corrective actions in the Land Use Element.

The Land Use Element will be **remanded** with direction to bring it into compliance with the provision of RCW 36.70A.070(1) relating to review of drainage, flooding, and storm water runoff, and provision of guidance for corrective action, if required.

Conclusion No. 8

Regarding the Act's requirement that the Land Use Element of the Plan provide for the protection of ground water used for public water supplies, because the Board is remanding that element, it

will not rule on Issue No. 8 in this Order. When the County undertakes revision of the Land Use Element it shall include in its consideration a review of whether the Plan provides for protection of the quality and quantity of groundwater, as required by the Act, and include protective provisions in the Land Use Element, if required.

Legal Issue No. 7

Does the Plan encourage corridors of forest and canyon areas, including the Illahee Trust lands, which protect the quality of water in the area, and which preserve habitat for wildlife and salmon production in the adjacent streams in violation of RCW 36.70A.020(8), (9), and (10)?

Discussion and Conclusion No. 7

The Petitioners allege that the Plan does not comply with GMA planning goals regarding natural resource industries, open space and recreation, and environment. See RCW 36.70A.020(8), (9), and (10). To prove noncompliance with these provisions, Petitioners must show that the Plan is inconsistent with these GMA goals. See *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (January 8, 1997), at 15 (determining compliance with GMA goals that are not implemented by specific statutes can be achieved by evaluating consistency between a critical areas ordinance and the GMA goals).

The Board is remanding the County's Plan and the County will be required to significantly modify its land use and Rural Elements. Since the current Plan is being remanded and the Board cannot know the provisions in its new Plan, the Board will not, further address Legal Issue 7.

LEGAL ISSUE NO. 9

Does the Plan fail to designate forest lands and agricultural lands pursuant to RCW

36.70A.170 and RCW 36.70A.020(8)? ^[22]

The *Bremerton* Order directed that the County:

Review its determination as to whether Kitsap County has any forest lands of long-term commercial significance; and to designate such forest lands if it concludes that such lands do exist, and amend the Plan and implementing development regulations accordingly. FDO, at 90.

Petitioners in *Port Gamble*, as well as several of the *Bremerton* parties challenged compliance with forest land requirements: conservation of productive forest lands, discouragement of incompatible uses, as required by RCW 36.70A.020(8); and failure to designate and protect natural resource lands.

The County asserts that it has complied with the FDO's direction to review the question of forest land designation, citing to the Plan, at 32-33 and A-71 through A-84 (Land Use Appendix.) After that review, it concluded that "no such lands exist within Kitsap County, [and] the county did not

designate long term forest lands.”County’s PHB, at 13.

Discussion

RCW 36.70A.020(8), Natural resource industries, directs the County to:

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.

RCW 36.70A.170, Natural resource lands and critical areas - Designations, directs the County to: designate, where appropriate:

...

(b) forest lands that are long-term significance for the commercial production of timber;

RCW 36.70A.030(8) defines “forest land” as:

land primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, including Christmas trees subject to the excise tax imposed under RCW 84.33.100 through 84.33.140, and that has long-term commercial significance. In determining whether forest land is primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, the following factors shall be considered: (a) The proximity of the land to urban, suburban, and rural settlements; (b) surrounding parcel size and the compatibility and intensity of adjacent and nearby land uses; (c) long-term local economic conditions that affect the ability to manage for timber production; and (d) the availability of public facilities and services conducive to conversion of forest land to other uses.

The County’s 1996 Plan does not include “forest land” designations. *See* Table LU-2, Land Designation Acreages for Unincorporated Kitsap County Land Use Plan, at 23. However, the Table does include a “Rural Wooded” designation, with 54,788 acres so designated.

The County’s initial review process, commencing in 1992, is described in the Plan at A-71, Land Use Appendix. It culminated in the April 20, 1992 adoption of Strategies For Resource Lands Designations and Interim Development Regulations (the **Strategies Document**). The Board also noted in the *Bremerton* decision that “although no document in the record presently before the Board indicates precisely how many acres were designated forest land pursuant to the GMA’s requirements, it appears that at least 27,100 acres were designated as forest lands.” *Bremerton*, at 79.

When the County adopted its 1994 Plan, it found that there were 76,818 acres of forest land in the County, just as it subsequently found in its 1996 Plan. However, in the 1994 Plan, the County repealed the Strategies Document, and elected not to designate any forest lands. Because of other flaws in the 1994 Plan, the Board did not make a final determination on legal issues related to forest land designations; rather, it remanded the matter to the county, with directions to re-examine the question of whether any forest lands should be designated. *Bremerton*, at 74-78. In the 1996 Plan, the County again has declined to designate forest lands:

After considering that definition created by the statute and the criteria contained in the April 20, 1992 [Strategies Document], the County has concluded that it does not presently have “forest land” within the meaning of the Growth Management Act. Land Use Plan, at A-78.Emphasis added.

The Land Use section of the Plan discusses the application of the GMA definition of “forest lands,” and notes that:

only a few major timber owners actively harvest, log or cultivate their lands for commercial forest production... very little of the remaining commercial forest lands are more than 1-1/2 miles from urban-density residential uses. The overwhelming percentage of [the County’s] employment comes from urban, non-forest related jobs. The long-term commercial significance of Kitsap County’s forest lands is also impacted by the reduction over time of the infrastructure necessary to support commercial forestry. This includes the loss of mills, contractors, and equipment dealers which has occurred as the county’s forest land base has shrunk over time. Land Use Plan, at 33-34.

The Plan then “recognizes the ongoing forest practices on lands beyond county jurisdiction. These lands include the forestry management activities being carried out on tribal, federal and incorporated lands.” According to Table A-LU-10, that is a total of 11,804 acres. Land Use Plan, at 34 and A-76.

In the Land Use Appendix, the Plan further discusses the basis for the County’s decision not to designate. The following is a summary of the Plan’s discussion:

Existing land use: a significant portion of the area managed for timber production is within one-half mile of existing urban-density development, and only a small portion is more than 1-1/2 miles from such development.

Soils: Significant portions of the currently forested lands do not average site index 110 or higher.

Availability of public facilities and services: Most of the currently forested land within the county has reasonable available public facilities and services which would be necessary for rural levels of development, or are situated so that those facilities and services could be brought to the site for a reasonable cost.

Block size: Most of the parcels in the County are smaller than those found in other jurisdictions; there is encroachment by residential development on large private ownerships.

Compatibility with surrounding Plans: Adjacent counties have not designated lands abutting Kitsap’s forested lands; land use patterns surrounding the lands in question are largely suburban; the influence of nearby urban uses restricts necessary commercial forest practices activities. Land Use Plan, at A-78 - 80.

The record of the County’s consideration and application of the requirements of the Act, the definition of “forest lands” and the criteria in the Strategies Document makes it clear that there is currently active harvesting, logging or cultivation by major timber owners. Land Use Plan, at 33. At least some commercial forest lands are more than 1-1/2 miles from urban-density residential

uses (and there is no explanation in the Plan as to why the 1-1/2 mile distance was selected).Id. Some portion of currently forested lands has a site index of 110 or higher.Some of the currently forested land does not have reasonably available public facilities and services (for urban development.)Some of the forest land parcels are as large as those found in other jurisdictions. Land use patterns surrounding some of the forest lands parcels are not suburban in nature.Land Use Plan, at A-79.

The Board is, however, concerned with the unrefuted evidence that there has been a significant reduction, or even elimination, of parts of the infrastructure necessary to support a forest industry. It notes that RCW 36.70A.020(8) directs the County to maintain and enhance that industry, and that generally, the goals of the Act are the foundation for specific statutory provisions such as the duty to designate forest lands.RCW 36.70A.170.The question, then, is whether a county which has only 22 people employed in forestry, and has no receiving facility for its timber, can be deemed to in fact have a forest industry requiring protection.None of the Boards has addressed this issue; there is no evidence in the record indicating the current or prospective disposition of timber harvested from the forested areas of the County; there was no briefing or oral argument on the subject.

Therefore, the Board will direct the County to evaluate whether the Act requires that all necessary components of a forest industry be contained within the jurisdictional boundaries of the County.It will further direct the County to reconsider the application of its criteria for designation of forest lands

Finally, to the extent that the County's failure to designate forest lands is attributable to the land uses expected to occur on lands adjacent to forested parcels under the land use provisions of the 1996 Plan remanded by this Order, the County is directed to reconsider the appropriateness of forest land designation as it modifies its land use designations.

Conclusion No. 9

The Board makes no finding that the Plan failed to comply with the duty to designate forest lands and agricultural lands pursuant to RCW 36.70A.170 and RCW 36.70A.020(8).The forest lands designation criteria contained in the Plan are within the range that the Act permits the County and the Board renders no judgment now about the application of those criteria to the circumstances in Kitsap County.However, because the Plan has been remanded for further work by the County, many of the premises upon which the County may have based its judgments regarding forest lands are now called into question.At the very least, the County is required by RCW 36.70A.070 to evaluate whether its forest land decisions will be consistent with the Plan it brings back on remand.

LEGAL ISSUE NOS. 10 and 2

[Issue 10] Has the County adequately identified and protected its critical areas, including wetlands, as required by RCW 36.70A.020(10); .030(5), (17); .040(3)(b); .060(2); .070(1); .170 (1)(d); and .172.

[Issue 2] If the answer to legal issue No. 10 is no, are the UGAs inconsistent with the GMA

because there is not a valid designation and protection of natural resource lands and critical areas as provided by RCW 36.70A.060, .170, and .180(1)(a) and (b)?

Discussion

The Board will first address Legal Issue No. 10. Counties and cities planning under GMA must designate critical areas and must adopt development regulations that protect critical areas. RCW 36.70A.170(1)(d) and RCW 36.70A.060(2). The GMA deadline for designating and protecting critical areas occurred prior to the deadline for completing comprehensive plans. *See* RCW 36.70A.170, RCW 36.70A.060, and RCW 36.70A.040. The GMA also requires counties and cities planning under GMA to “review [critical areas] designations and development regulations when adopting their comprehensive plans . . . and development regulations . . . to insure consistency.” RCW 36.70A.060(3).

The Board recognizes that the County is operating on a cycle substantially beyond the statutorily imposed deadlines. Nonetheless, the County has readopted an interim critical areas ordinance. *See* Finding of Fact 3. The County’s 1994 Plan was invalidated and now the County is pursuing compliance with the present effort. It is not clear from the record whether the County reviewed its interim critical areas ordinance in adopting the 1996 Plan, but it appears that the County still has interim regulations protecting critical areas. These regulations, or some variation of them will, ultimately, have to become permanent.

Because the Board is remanding the County’s Plan for revisions, the County will, by necessity, have to review, possibly modify, and adopt a permanent critical areas ordinance as the County adopts its revised Plan to comply with the GMA. However, since the County has an interim critical areas ordinance that will continue to be in effect until the County adopts the permanent critical areas ordinance, the Board will answer Legal Issue 10 in the affirmative. Nonetheless, the County will be directed on remand to comply with RCW 36.70A.060 by adopting permanent regulations to protect its critical areas when it adopts its revised Plan.

Resolution of Legal Issue 2 is necessary only if the Board answers “no” to Legal Issue 10. Because the Board answered “yes” to Legal Issue 10, the Board need not, and will not, address Legal Issue 2.

Conclusion Nos. 10 and 2

Presently, the County is protecting critical areas through its interim critical areas regulations. Therefore, on remand, the County is directed to adopt permanent critical area protections as it adopts its revised Plan.

LEGAL ISSUE NO. 11

Can the Plan be in compliance with the GMA if its implementing regulations and CAO are not yet in place, and, if not, is the County in violation of RCW 36.70A.020, .040, .060, .070, .130(1), (2)(b) and .170?

Discussion

The County has a duty to adopt a comprehensive plan and implementing regulations (RCW 36.70A.040(3)), to designate critical areas (RCW 36.70A.170) and to adopt regulations to protect critical areas (RCW 36.70A.060). The premise of this legal issue is that there is also a duty to have implementing regulations and a critical areas ordinance in place in order to have a GMA-compliant plan. The County readopted its interim development regulations in June 1997 (Ordinance 208-1997). Interim, not permanent, regulations are in place.

As a practical matter, permanent implementing development regulations (such as zoning regulations) cannot precede, i.e., already be “in place,” the comprehensive plan that they are ostensibly to implement. The Board is persuaded by the County’s argument, and particularly in view of the history and circumstances in Kitsap County, that the adoption of implementing regulations could not precede adoption of a GMA-compliant plan. However, the County does have interim development regulations. As to critical areas regulations, the Board addressed them separately in Legal Issue No. 10.

However, pursuant to RCW 36.70A.040, the County will be required to have permanent development regulations that implement its Plan when the Plan is revised to comply with the Act and this Order, and adopted during the remand period. Plan and implementing regulation adoption must occur simultaneously.

Conclusion No. 11

The Board concludes that the Petitioners have failed to meet their burden to demonstrate that the GMA creates a duty for a county to have permanent implementing regulations “in place” prior to adoption of a comprehensive plan.

LEGAL ISSUE NO. 12

Did the County fail to meet the requirements of Chapter 43.21C RCW and WAC 197-11-600(4) (d); 400(4); 402(10); 406; 448(1); 655(2) and (3); and 660 because the FSEIS failed to address substantial changes made to the proposal and the County Commission did not use the FSEIS in its decision process?

Discussion

The crux of the argument on this issue, offered by URBPA and APAC, [\[23\]](#) is that since the FSEIS was issued in October 1996, and adopted on December 2, 1996, “[t]his late blooming FSEIS could not have been used to guide the development of the Plan, which itself was adopted only three weeks later [December 23, 1996].” URBPA PHB, at 23. The WACs cited by Petitioners do not go to the real question of when a decision-maker can act after receiving the required

environmental information. These sections are cited below:

WAC 197-11-055(2)(c) [Timing of the SEPA process] provides:

Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC 197-11-070). (Emphasis supplied.)

WAC 197-11-070 [Limitations on actions during SEPA process] provides in pertinent part:

(1) Until the responsible official issues a final determination of nonsignificance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would:

(a) Have an adverse environmental impact; or

(b) Limit the choice of reasonable alternatives.

(2) In addition, certain DNSs require a fifteen-day period prior to agency action (WAC 197-11-340(2)), and FEISs require a seven-day period prior to agency action (WAC 197-11-460(4)). (Emphasis supplied.)

WAC 197-11-460(5) provides:

Agencies shall not act on a proposal for which an EIS has been required prior to seven days after issuance of the FEIS. (Emphasis supplied.)

[24]

In short, under SEPA, the County had to give appropriate consideration to the environmental information presented in the FSEIS, and the County was precluded from acting on the Plan for seven days after issuance and adoption of the FSEIS, which occurred on December 2, 1996. The Plan was adopted on December 23, 1996. Other than the timing of the adoption of the Plan, the Petitioners have offered no evidence to show that the County did not give appropriate consideration to the information in the FSEIS. The timing of the County's action was within the time frames set forth for considering environmental information. Therefore, the Board concludes that the Petitioners have failed to meet their burden of proof on Legal Issue No. 12; and, pursuant to SEPA, the County acted in a timely manner.

Conclusion No. 12

Petitioners have failed to meet their burden of proof on Legal Issue No. 12; and, pursuant to SEPA, the County acted in a timely manner.

Legal Issues No. 13 and 16

[Issue 13] Does the Capital Facilities Element of the Plan fail to comply with the requirements of RCW 36.70A.070(3)?

[Issue 16] Is the Plan internally inconsistent (between and among the various Plan elements)

and therefore in violation of RCW 36.70A.070?

Discussion

Components of Capital Facilities Element:

Every comprehensive plan of a county or a city required to plan under RCW 36.70A.040 must contain the six "mandatory" elements listed in RCW 36.70A.070. The capital facilities plan element at RCW 36.70A.070(3) requires:

(3) A capital facilities plan element consisting of:

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

The Board has held that, for purposes of conducting the inventory required by RCW 36.70A.070(3)(a), "public facilities" as defined at RCW 36.70A.030(12) are synonymous with "capital facilities owned by public entities." *See West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016, Final Decision and Order (April 4, 1995), at 43.

RCW 36.70A.030(12) defines public facilities as "streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water supply systems, storm and sanitary sewer systems, parks and recreation facilities and schools."

Regarding RCW 36.70A.070(3)(a) and (b), the Board has held that counties and cities must include an inventory and needs analysis of existing publicly-owned capital facilities, regardless of ownership, in their Capital Facilities Elements. *See Sky Valley*, at 67.

Regarding RCW 36.70A.070(3)(c) and (d), the Board has recognized that if a county does not own or operate a facility, it should not be required to include the locational or financing

information in its Capital Facilities Element, since these decisions are beyond its authority. [\[25\]](#)
Sky Valley, at 67.

However, when the jurisdiction that owns and/or operates a specified capital facility cooperates

with the county and discloses information pertaining to location and financing, the county may include such information in its Capital Facilities Element (per RCW 36.70A.070(3)(c) and (d)). Indeed, aside from being sound growth management and public policy, it may be a necessary prerequisite to access a new funding source - e.g., impact fees. [\[26\]](#)

RCW 36.70A.070(3)(e) requires the planning entity's commitment to reassess the Land Use Element in certain situations and bolsters the internal consistency requirements discussed separately below.

It is within this context that we review Kitsap County's Comprehensive Plan - Part II: Capital Facilities Plan (CFP); Part III: Figure Book; and if appropriate, Part I: Land Use Plan and Appendices.

The Capital Facilities Plan addresses the following categories of public facilities: County Public Buildings at 3-5; Fire Protection Facilities at 3-13; Law Enforcement at 3-36; Parks and Recreation at 3-44; Sanitary Sewers at 3-57; Schools at 3-91; Solid Waste Management System at 3-110; Stormwater Facilities at 3-118; Transportation at 3-138, [\[27\]](#); and Water Systems at 3-168. On its face, the Plan's CFP includes the required categories of public facilities defined by RCW 36.70A.030(12).

Upon review of these portions of the CFP, the Board finds that, **except** for Water Supply, Treatment and Distribution (CFP, at 3-168 to 3-192), the requisite inventories and needs assessments for existing publicly owned capital facilities are included as is required by RCW 36.70A.070(3)(a) and (b).

The section on Water Systems indicates that there are 1145 public water systems within the County. Of these, 256 systems are Group A, which serve 80 percent of the population; of these Group A systems, 37 are Class 1 serving 100 connections or more. There are 729 Group B, Class [\[28\]](#) 4 systems, serving between 2 and 9 connections. The inventory descriptions and tables only address 18 water systems which would serve about 183,500 (63 percent) of the 2012 population [\[29\]](#)

.Separately, the Utilities Appendix of the Land Use Plan (at A-204 to A-207) inventories 9 privately owned water systems with 100 connections or more, which will serve about 12,000 [\[30\]](#) (4%) of the 2012 population. The Utilities element itself indicates "Larger municipal water districts are discussed in the Capital Facilities Element of this Plan. Smaller purveyors, those serving between five and 99 connections, and private wells, those serving less than five connections, are not discussed in any detail in this plan." Land Use Plan, at A-207, Table A-UT-5.

The County did not inventory and provide a needs assessment of the County's public water systems, regardless of ownership. Also, separating the inventories and needs assessments for water systems in different parts of the Plan and conducting the required analysis only for systems intended to serve less than 70% of the 2012 population fails to comply with the Capital Facilities Element requirements. The County should inventory and assess its Group A systems. At a minimum, the County should include Class I and Class III of Group A in its inventory and needs analysis. **The Board holds that the separate and limited domestic water supply system inventories and needs assessments prepared by the County, do not comply with the requirements of RCW 36.70A.070(3)(a) and (b), and the Capital Facilities Element will be remanded with directions to bring the domestic water system inventories and needs assessments into compliance.**

The Board's review of the CFP in light of the requirements of RCW 36.70A.070(3)(c) and (d) indicated that generally, the County has noted the location of, though not mapped ^[31] in Part III: Figure Book, the needed new or expanded facilities and included a six-year financing plan for County-owned or operated: parks and recreation facilities; sanitary sewers; stormwater facilities; schools, ^[32] certain domestic water systems, ^[33] and transportation facilities. ^[34] Thus, the County has included, for facilities owned and operated by the County, the necessary locational and financing information.

However, the Board notes a concern with sanitary sewers. The County manages only five of the twelve wastewater treatment facilities operating within the County. The County indicates that "[c]urrently, the county does not have any planned sewage treatment works in the south area that could provide service to the Port [of Bremerton industrial area] or to Gorst. The closest sewage treatment works are in Port Orchard, managed jointly by the City of Port Orchard and Sewer District #5; and in Bremerton, owned and operated by the City of Bremerton." CFP at 3-58.

Additionally, for facilities not owned or operated by Kitsap County the County indicates that the financing and locational information is described elsewhere. CFP 3-65. However, there is no indication of where "elsewhere" might be. Obviously, for cities within the County, the information would be available in the CFP of each city's comprehensive plan. But for tribes or private sewer districts, there is no GMA capital facility planning requirement. If the County designates a UGA that is to be served by such a provider, the County should at least cite, reference or otherwise indicate where any such locational or financing information may be found that supports the County's UGA designations and GMA duty to ensure that adequate public facilities will be available within the area during the twenty-year planning period.

The final component required in a Capital Facilities Element is "a requirement to reassess the Land Use Element if probable funding falls short of meeting existing needs and to ensure that the

Land Use Element, capital facilities element, and financing plan within the capital facilities plan element are coordinated and consistent.”RCW 36.70A.070(3)(e).Several parties ^[35] raised non-compliance with this provision as a shortcoming of the County’s CFP.The Board has been unable to find, nor did the County indicate, where this requirement has been addressed.**Therefore, the Board holds that the County’s CFP does not comply with RCW 36.70A.070(3)(e), since it has not included a commitment or implementation strategy to address this requirement.**

Internal Consistency:

The preamble to RCW 36.70A.070, which outlines the requirements for the mandatory elements of a comprehensive plan, provides in relevant part:“The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.”

As was discussed in Legal Issue No. 1, one of the fundamental premises of the Act is that UGAs are to be designated with sufficient land and densities to accommodate the urban area portion of the projected twenty years of countywide population growth.RCW 36.70A.110(2).In making these UGA determinations, counties must include all cities in a UGA and may include unincorporated areas within the UGA.As this Board has previously noted, “the county, as to the unincorporated portions of the UGA, and the cities, as to their respective portions of the UGA, have a duty to adopt comprehensive plans that accommodate growth over the twenty-year life of their plans, including the provisions of public facilities and services.”*Hensley v. Woodinville*, CPSGMHB Case No. 96-3-0031, Final Decision and Order (February 25, 1997), at 8 (emphasis added).

This Board has also stated:“Designation of a . . . UGA means several things of relative certainty to citizens:the development of the land within it will be urban in nature; this urban land will ultimately be provided with adequate urban facilities and services within the planning horizon; the land will eventually be developed at urban densities and intensities. . .”*Johnson v. King County*, CPSGMHB Case No. 97-3-0002, Final Decision and Order (July 23, 1997), at 10 (emphasis added).

As is noted above, if a county has limited authority to locate and finance needed infrastructure because those aspects of capital facility decision-making rest with special districts, other jurisdictions (city, state or federal governments) or private interests, then a county should be cautious and judicious in designating UGAs until assurances are obtained that ensure public facilities and services will be adequate and available.This is one of the rationales supporting the need for RCW 36.70A.070(3)(e).

In light of the inextricable linkage between the Land Use Element, including the UGA designation, and the Capital Facilities Element, it is imperative that theCapital Facilities Plan

paints a clear picture of the infrastructure needed to support future growth and contain a firm commitment and strategy to meet those needs. This is essential to providing the certainty the UGA is designed to achieve. This certainty is tempered, however, by the requirement to reassess the Land Use Element, including the UGAs, if funding falls short of meeting existing needs or public facilities will be inadequate or unavailable during the planning period.

Since the Board has found that the Urban Growth Areas (Legal Issue 1), Land Use Element, Rural Element and land use map (Legal Issues 3-5), and portions of the Capital Facilities Element, noted above, do not comply with the requirements of the Act and they will consequently be remanded with direction to bring them into compliance, the Board need not specifically evaluate the Capital Facilities Element for internal consistency with other noncomplying elements of the Plan. However, to the extent that the Capital Facilities Element is consistent with noncomplying Plan elements or the land use map **the Board holds that the Capital Facilities Element is deemed to be internally inconsistent with other Plan elements and therefore not in compliance with the requirements of RCW 36.70A.070 preamble.** The Board will **remand** the Capital Facilities Element with direction to bring it into compliance with the internal consistency requirements of RCW 36.70A.070 and this Order.

Conclusion Nos. 13 and 16

Regarding the specific components required for a Capital Facilities Element, the Kitsap County's capital facility plan **complies** with the requirements of RCW 36.70A.070(3) except that:

- the water supply system inventories and needs assessments **do not comply** with RCW 36.70A.(3)(a) and (b)
- the capital facility plan element **does not comply** with RCW 36.70A.070(3)(e).

Regarding internal consistency of the capital facility plan with the other elements and the land use map, Kitsap County's capital facility plan is deemed to **not comply** with RCW 36.70A.070.

The Capital Facilities Element will therefore be **remanded** with direction to bring it into compliance with RCW 36.70A.070(3)(a)(b) and (e), as noted above; and to bring it into compliance with RCW 36.70A.070's direction to achieve internal consistency with the other Plan elements and the land use map as required by the act and this Order.

Legal Issue Nos. 14 and 16

[Issue 14] Does the Transportation Element of the Plan fail to comply with the requirements of RCW 36.70A.070(6)?

[Issue 16] Is the Plan internally consistent (between and among the various Plan elements) and therefore in violation of RCW 36.70A.070? (Preamble)

Discussion

The County's Transportation Element is found in: Part I: Land Use Plan, Chapter 8; Part I: Land Use Plan, Transportation Appendix; Part II: Capital Facilities Plan, at 3-138, and Part III: Figure Book. Chapter 8 addresses Transportation Goals and Policies. The Transportation Appendix includes sections on: I. Transportation Inventory (A-1); II. Land Use and Transportation (A-12); Transportation Needs and Deficiencies (A-36); IV. Transportation System Improvements (A-64); and V. Financing and Implementation of the Transportation Element (A-79). The Capital Facilities Element includes a County Road Inventory, LOS standards, a listing of road projects and a six-year financing scheme. The Figure Book includes several maps depicting congested roadway links and location of transportation projects. In brief review, it appears that the County [\[36\]](#) has done extensive work on its Transportation Element. However, several Petitioners challenged the Plan's Transportation Element as failing to comply with the Act.

Every comprehensive plan of a county or a city required to plan under RCW 36.70A.040 must contain the six "mandatory" elements listed in RCW 36.70A.070. RCW 36.70A.070(6) details the requirements for the Transportation Element, many of the components were noted in the narrative listing above.

The Board's analysis of the Transportation Element begins with the first sentence of RCW 36.70A.070(6) which requires: "A Transportation Element that implements, and is consistent with, the Land Use Element." This internal consistency requirement is repeated in the preamble of RCW 36.70A.070, which outlines the requirements for the mandatory elements of a comprehensive plan. The preamble of .070 provides in relevant part: "The plan shall be an internally consistent document and all elements shall be consistent with the future land use map." We have already discussed the inextricable linkage between the Land Use Element, including the UGA designation, and the Capital Facilities Element, in Legal Issue No. 13. RCW 36.70A.070 (6) emphasizes an additional critical link in this chain - the Transportation Element.

Since the Board has found that the Urban Growth Areas (Legal Issue No. 1), Land Use Element, Rural Element and land use map (Legal Issue No. 3-5), and portions of the Capital Facilities Element (Legal Issue 13), do not comply with the requirements of the Act, and they will consequently be remanded with direction to bring them into compliance, the Board will not specifically evaluate the Transportation Element for compliance or internal consistency with other noncomplying elements of the Plan. However, to the extent that the Transportation Element is consistent with noncomplying Plan elements or the land use map **the Board holds that the Transportation Element is deemed to be internally inconsistent with other Plan elements and therefore not in compliance with the requirements of RCW 36.70A.070 preamble and (6).** The board will **remand** the Transportation Element with direction to bring it into compliance with the internal consistency requirements of RCW 36.70A.070 and this Order.

Conclusions Nos. 14 and 16

Regarding the internal consistency of the Transportation Element with the other Plan elements and the land use map, Kitsap County's Transportation Element is deemed to **not comply** with RCW 36.70A.070 (preamble) and (6). The Transportation Element will therefore be **remanded** with direction to bring it into compliance with RCW 36.70A.070's direction to achieve internal consistency with the other Plan elements and the land use map as required by the Act and this Order.

LEGAL ISSUE NO. 15

Is the Plan inconsistent with the Kitsap County-wide Planning Policies (KCCPs), and therefore in violation of RCW 36.70A.210?

Discussion

Port Gamble generally alleges that the land capacity analysis is not consistent with the methodology set forth in the CPPs. Port Gamble PHB, at 19. Since the Board found the UGAs not in compliance with the Act in Legal Issue No. 1, the Board need not address Port Gamble's issue here.

Petitioner Ross asserts that "the Plan does not contain a forecast of population for the succeeding twenty-year period. Therefore, the Plan is not consistent with County-wide Planning Policy (KCCP) 1(j) . . . which states: Sufficient areas must be included in the urban growth areas to accommodate a minimum 20-year population forecast." Ross PHB, at 5.

The Plan uses an increase in population of 86,624, yielding a total population for Kitsap County of 292,224 in the year 2012. This population forecast is well within the *range* forecast (low = [\[37\]](#) 271,982 -- high = 317,654) prepared by the OFM in 1995. However, Petitioner Ross' concern seems to be that the planning period ends in 2012, which is not a *minimum* twenty-year period for a 1996 Plan. Petitioner misunderstands the provisions of the Act.

RCW 36.70A.110(2) in relevant part, clearly provides:

Based upon the growth management population projection made for the county by the office of financial management, the urban growth areas in the county shall include areas and densities sufficient to permit the urban growth that is projected [by OFM] to occur in the county for the succeeding twenty- year period. (Emphasis added.)

The County is required to use the twenty-year population projections made by OFM. The OFM population forecasts used by the County end in year 2012; the projection period was 1992 -- 2012.

[\[38\]](#) The statutory direction to OFM for doing GMA population projections is found at RCW

43.62.035, which provides in relevant part:

At least once every ten years the office of financial management shall prepare twenty-year growth management planning population projections required by RCW 36.70A.110 for each county that adopts a comprehensive plan under RCW 36.70A.040 and shall review these projections with such counties and the cities in those counties before final adoption. The county and its cities may provide to the office such information as they deem relevant to the office's projection, and the office shall consider and comment on such information before adoption. Each projection shall be expressed as a reasonable range developed within the standard state high and low projection. The middle range shall represent the office's estimate of the most likely population projection for the county. If any city or county believes that a projection will not accurately reflect actual population growth in a county, it may petition the office to revise the projection accordingly. The office shall complete the first set of ranges for every county by December 31, 1995.

A comprehensive plan adopted or amended before December 31, 1995, shall not be considered to be in noncompliance with the twenty-year growth management planning population projection if the projection used in the comprehensive plan is in compliance with the range later adopted under this section. (Emphasis supplied.)

As noted above, the population projection used by the County falls within the range projection done by OFM for Kitsap County. More importantly, RCW 43.62.035 clarifies that OFM is only required to prepare the twenty-year projections required by RCW 36.70A.110(2) “[a]t least once every ten years.” Therefore, the “minimum 20-year population forecast” referred to in KCCP 1(j) [39]

refers to the required (and only) OFM population projection available which only extends to the year 2012. **The Board holds that the twenty-year OFM population projection used by Kitsap County in its Plan (292,224 in 2012) is consistent with KCCP 1(j) and RCW 36.70A.110(2) and does not violate RCW 36.70A.210.**

Conclusion No. 15

The twenty-year OFM population projection used by the County in its Plan is consistent with KCCP 1(j) and complies with RCW 36.70A.110(2) and .210.

Legal issue no. 16

Is the Plan internally consistent (between and among the various Plan elements) and therefore in violation of RCW 36.70A.070?

Discussion and Conclusion No. 16

The Board has addressed the question of internal consistency in its discussion of the challenges to the various Plan elements. See Legal Issues No. 13 and 14. Therefore this issue will not be

addressed separately here.

legal issue no. 17

Is the Plan internally consistent and has it failed to be guided by the goals of RCW 36.70A.020?

Discussion

[40]

Those parties that specifically addressed Legal Issue No. 17 in their briefs referenced their arguments made on other legal issues where specific goals were discussed or argued. Likewise, where necessary, the Board addressed the consistency of various goals in its discussion of other legal issues. Therefore the Board will not further address them here.

Conclusion No. 17

The parties offered no specific argument under this Legal Issue, but merely referenced arguments made on other legal issues. The Board has addressed internal consistency and consistency with various goals in other parts of this decision and will not address them here.

legal issue no. 18

Did the County fail to provide enhanced public participation as required by RCW 36.70A.140, .280(2)(b) and WAC 365-190-040(2)?

Discussion

[41]

Several parties argued that the County failed to provide for enhanced public participation during the adoption of the December 23, 1997 Comprehensive Plan or otherwise ignored recommendations of the County's Growth Management Advisory Committee. The Board notes that the County Commissioner's letter to the County Prosecutor provided the following direction: "4. The County will not provide briefing or argument on the issue of whether or not the changes made on December 23, 1996 to the proposed comprehensive plan by the previous Board of County Commissioners meet the legal requirements for public notice." Finding of Fact 18.

In addressing other legal issues, the Board has found portions of the Plan not in compliance with the GMA. Consequently, it will be necessary to remand the Plan and direct the County to take the necessary actions to achieve compliance. The remand process will involve additional enhanced public participation as required by RCW 36.70A.140. Additionally, the Board acknowledges that

[42]

the legislature's recent amendments to Chapter 36.70A RCW added a new section clarifying the notice requirements for Plan amendments and revisions. These new provisions will apply to the County's actions on remand. The County will have another opportunity to provide enhanced public participation for its citizens. Therefore, the Board need not address Legal Issue 18.

Conclusion

Having found the County's Plan not in compliance with the Act on other legal issues, which will lead to a remand, the Board need not address Legal Issue No. 18.

legal issue no. 19

Has the County failed to protect the environment, as directed in RCW 36.70A.140, RCW 36.70A.020(11), and WAC 365-190-040(2)?

Discussion

[43]

This issue was briefed by two Petitioners. In essence, the noted Petitioners argue that since the UGA is too big, the County has failed to protect the environment (*See* Legal Issue No. 1) and that the County has not adopted development regulations as directed by the Board's 1995 FDO (*see* Legal Issue No. 21). Since these issues are addressed elsewhere, the Board will not and need not address Legal Issue 19.

Conclusion No. 19

Having addressed this Legal Issue elsewhere, the Board will not address it here.

legal issue no. 20

Should the Plan be held invalid and/or should the existing order of invalidity remain in effect?

Discussion and Conclusion No. 20

The question of invalidity is addressed in Section VII - Determination of Invalidity, of this Final Decision and Order.

Legal Issue No. 21

Has the County failed to comply with the direction in the FDO to adopt implementing development regulations?

Discussion and Conclusion No. 21

The question of adopting development regulations is squarely addressed in Legal Issue No. 10 (critical areas) and Legal Issue No. 11 (development regulations). Therefore it is not repeated here.

Vii. DETERMINATION OF INVALIDITY

The Board may impose invalidity on a comprehensive plan and its development regulations if the final order 1) includes a determination supported by findings of fact and conclusions of law that the continued validity of the Plan or regulation would substantially interfere with the fulfillment of the goals of the GMA, and 2) specifies the particular part or parts of the Plan or regulation that are determined to be invalid and the reasons for their invalidity. RCW 36.70A.300(2)(a) and (b).

The Board **rescinds** the previous determination of invalidity of the County's entire 1994 Comprehensive Plan. However, having reviewed the 1996 Plan, exhibits, and record in this case, and considered the arguments of the parties and participants, the Board enters a more limited **Determination of Invalidity** regarding the Land Use Element, including the UGAs and land use map, and the Rural Element, including rural residential densities, the "Grandfathering Clause" and the "Rural Infill" provisions, as adopted by Ordinance 203-1996.

Reasons for Invalidity

As revealed by the Board's general discussion in Part V and its discussion of specific legal issues in Part VI of this Order, significant elements of the County's 1996 Plan do not comply with the requirements of the Act and fail to be guided by its goals. The cumulative impact of the noncomplying provisions of the Land Use Element and the Rural Element is substantial interference with the fulfillment of the GMA's goals. In particular, interfere with Planning Goals 1 and 2, which are discussed below.

Planning Goals 1 and 2

RCW 36.70A.020(1) encourages development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. RCW 36.70A.020(2) seeks a reduction in the inappropriate conversion of undeveloped land into sprawling, low-density development.

As the Board's discussion regarding the sizing of the UGAs indicates, the Land Use Element and map are defective since the UGA analysis and designations artificially inflate the amount of land needed to serve the projected population.

In the Rural Element, outside the designated UGAs, the Plan permits 2.5-acre zoning and 1 acre zoning in the rural low-density and rural medium-density areas. In addition, the Rural Infill and Grandfathering Clause add additional excess capacity to the rural area. These Land Use and Rural Element provisions perpetuate a pattern of urban growth in the area and cumulatively direct a disproportionate share of the County's projected growth away from UGAs.

These flaws increase the inappropriate conversion of undeveloped land into sprawling, low-density development, and rather than reducing it, fail to encourage development in urban areas. Therefore, the Land Use Element, including the UGAs, land use map, and the Grandfathering Clause, and the Rural Element substantially interfere with Goal 1 and 2 of the GMA.

Conclusions of Law

During the period of remand (*see* below), the continued validity of the Land Use Element, including the UGAs, the land use map, and Rural Element of the Kitsap County Comprehensive Plan adopted by Ordinance 203-1996 on December 23, 1996 will substantially interfere with the fulfillment of Planning Goals 1 and 2 found at RCW 36.70A.020. Therefore, having found that the Land Use Element, including UGAs and land use map, the Grandfathering clause, and the Rural Element, including rural residential densities, the "Grandfathering Clause" and "Rural

Infill” provisions, do not comply with the requirements of RCW 36.70A.020, .070 (preamble), 070(1), .070(5) and .110; **the Board concludes and determines that the 1996 Kitsap County Plan’s Land Use Element -- including UGAs, the land use map and the “Grandfathering Clause”-- and Rural Element -- including rural residential designations and the “Rural Infill” provisions -- are Invalid.**

Viii. PORT GAMBLE

The Board has found that significant elements of the County’s Plan substantially interfere with the fulfillment of the goals of the Act, and above entered a determination of invalidity as to the Land Use and Rural Elements. Further, the Capital Facilities Element and Transportation Element of the Plan have been found in noncompliance with the GMA and have been remanded, together with the balance of the Plan. Because several key elements of the Plan have been found in noncompliance; two significant elements have been determined invalid; and the entire Plan remanded; the issues raised in the petitions for review filed in *Port Gamble* are now moot. Those petitions for review, and *Port Gamble* case, will be **dismissed with prejudice.**

IX. ORDER

The Board, having reviewed its Final Decision and Order in the *Bremerton* case, and the files in the coordinated *Bremerton* and *Port Gamble* cases, having reviewed the above-referenced documents and attached exhibits, and having considered the arguments of the parties and participants, concludes that, as described below, the County **has not complied** with the Board's Final Decision and Order in the *Bremerton* case and the requirements of the GMA. The Board remands the entire Plan adopted by Ordinance 203-1996 to the County. Therefore, the Board takes the following actions:

- The Board **rescinds** the determination of invalidity on Kitsap County’s entire Plan;
- The Board **withdraws** its recommendation of **contingent sanctions** earlier forwarded to the Governor;
- The Board issues the following Order:
 - 1.The Board issues a **Determination of Invalidity** as to the Rural and Land Use Elements, including the UGAs and land use map of the Plan, rural residential densities, the “Grandfathering Clause” and “Rural Infill” provisions. As a condition precedent to being **determined invalid** these elements have been determined to be **not in compliance** with the requirements of RCW 36.70A.020, RCW 36.70A.070(1) and (5), and RCW 36.70A.110. These elements are **remanded** with instructions to the County to adopt new Rural and Land Use Elements, including UGAs, land use map, and drainage, flooding, and stormwater runoff provisions, that comply with the goals and requirements of the Act, as set forth and decided in this Order.
 - 2.The Board finds the Capital Facilities Element of the Plan **does not comply** with the internal consistency requirements of RCW 36.70A.070 (preamble). Further, the Capital Facilities

Element **does not comply** with the requirements of RCW 36.70A.070(3)(e); and the water systems portion of the Element **does not comply** with the requirements of 36.70A.070(3)(a) and (b). The Board further finds that the Transportation Element does not comply with the internal consistency requirements of RCW 36.70A.070(preamble) and (6). These elements are **remanded** with instructions to the County to bring the Capital Facilities Elements and Transportation Element into compliance with the requirements of the GMA, as set forth and decided in this Order.

3. The entire Plan is **remanded** with instructions to the County to review and revise all Plan elements, as is necessary to achieve compliance with RCW 36.70A.070 (preamble). This action is necessary to assure that, once the invalid and noncomplying portions of the Plan (Items 1 and 2 above) are brought into compliance, the balance of the Plan is internally consistent with the revised elements and consistent with the revised future land use map.

4. The County is instructed to fully comply with RCW 36.70A.060 by adopting permanent regulations to protect its critical areas when it adopts its revised Plan.

5. The County is instructed to re-adopt its interim development regulations as is necessary until the ultimate adoption of a GMA-compliant Plan and simultaneous adoption of implementing development regulations.

6. By **Friday, January 9, 1998**, the County is instructed to submit to the Board, with a copy to all parties and participants in the *Bremerton* and *Port Gamble* cases, a Compliance Status Report describing actions that the County has taken to comply with the requirements of the GMA, as set forth and decided in this Final Decision and Order.

7. The County is **Ordered** to bring its comprehensive plan into compliance with the GMA, as set forth and decided in this Order, by no later than **4:00 p.m. on Friday, April 3, 1998**.^[45] By no later than **4:00 p.m. on Friday, April 17, 1998**, the County shall submit four copies to the Board, with a copy to all parties and participants in the *Bremerton* case and to all parties in the *Port Gamble* case, a "Statement of Actions Taken to Comply with the Board's September 8, 1997 Order." Attached to each of the Board copies shall be a copy of the Plan and implementing development regulations adopted in response to this Order.

8. The PFRs filed in the *Port Gamble* case, as well as the case itself, are now moot and are **dismissed with prejudice**.

The Board will report its Finding of Noncompliance and Determination of Invalidity to the Governor; however, it will recommend that the contingent sanctions that were previously recommended by the Board **not** be imposed at this time. The Board will forward periodic reports to the Governor's office, beginning with the receipt in January of the County's Compliance

Status Report.

So ORDERED this 8th day of September, 1997

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP

Board Member

Joseph W. Tovar, AICP

Board Member

Chris Smith Towne

Board Member

[1]

Section 22 enables a county or city subject to an order of invalidity [such as Kitsap County] to request, by motion, that the board review the order of invalidity in light of changes in the law made by ESB 6094. However, Kitsap County did not avail itself of this opportunity.

[2]

The Board takes notice of the legislature's clear intent that the Boards defer to city and county decisionmakers in how they plan for growth and how they implement those plans, so long as the adopted plans and implementing regulations comply with, and are consistent with, the goals and requirements of Chapter 36.70A RCW.

[3]

The Board notes that any actions taken by a local government after July 27, 1997, including actions taken to comply with a Board remand order, will be subject to the provisions of ESB 6094. Likewise, the Board's compliance review of the remand action will be subject to ESB 6094.

[4]

Land Use Plan, at A-30 (citing a publication by the Puget Sound Regional Council, *Population and Employment Forecast for the Puget Sound Region, August 1995*).

[5]

OFM's range forecast was 271,982 (low) to 317,654 (high). The County used 292,224, well within the OFM ranges, for an increase of 86,624 people by 2012. Land Use Plan, at 14. Per the County's County-wide Planning Policies, two-thirds of the increase (67,551) was slated for urban areas; of this amount, 36,953 was allocated to cities, including the unincorporated Poulsbo UGA. Therefore, the remainder (30,598 people) is intended to be accommodated in unincorporated UGAs. Land Use Plan, at A-28-30 and Table A-PE-9.

[6]

See footnote 11.

[7]

Vested projects and lands designated Urban Restricted were tabulated separately from vacant and underutilized land. Vested projects were tabulated at their approved densities before adding their land area to the available lands totals; Urban Restricted lands were tabulated with a 50 percent discount before adding to the available lands totals. Land Use Plan, at A-32.

[8]

The Urban Restricted designation includes lands that the County has determined are characterized by environmentally critical areas. Maximum densities allowed in this designation range from 1-5 du/acre.

[9]

This figure is derived by adding the gross acres in Table A-PE-12 on page A-36 of the Land Use Plan.

[10]

13,101 gross acres are in the UGAs, while 3,825 residential acres are needed to accommodate the 2012 growth.

[11]

Figure Book, at M-19 and M-20, includes UGA maps but they do not illustrate discrete UGA boundaries.

[12]

Although no specific subsection of RCW 36.70A.070 is cited in this legal issue, the context of the issue and the briefing make clear that the focus is subsection (5).

[13]

The Board takes official notice of ESB 6094, adopted by the legislature in 1997. While ESB 6094 does not control the outcome of the cases presently before the Board, subsequent revisions to a plan after July 27, 1997, will be subject to its procedural and substantive requirements. Nevertheless, to the extent that portions of ESB 6094, such as Sec. 7 dealing with the rural element, can provide clarification of legislative intent, it is useful and instructive to so note.

[14]

The planning goals cited in Legal Issue No. 3 are set forth at RCW 36.70A.020:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
- (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.
- (4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.
- (5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.
- (7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.
- (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.
- (9) Open space and recreation. Encourage the retention of open space and development of recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks.
- (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water

quality, and the availability of water.

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

[15]

The Central Puget Sound Region consists of King, Pierce, Snohomish and Kitsap Counties. RCW 36.70A.250(1) (b).

[16]

A chronological summary of major conclusions and holdings from these county cases follows:

In *Association of Rural Residents v. Kitsap County [Rural Residents]*, CPSGMHB Case No. 93-3-0010 , Final Decision and Order (June 3, 1994), the Board stated:

RCW 36.70A.110(1) uses the somewhat equivocal word "encouraged" with respect to what is to happen inside the designated urban growth area. Significantly, however, it says something very different with regard to the land outside the urban growth area. The phrase "outside of which growth can occur only if it is not urban in nature" (emphasis added) is not equivocal. It does not say "reduce" or "discourage" urban growth outside the UGA. The use of the word "only" clearly means that urban growth is **prohibited** outside of the UGA. *Rural Residents*, at 20. Bold emphasis in original. Underlined and Bold emphasis in original

In *Kitsap Citizens for Rural Preservation, et al., v. Kitsap County [Kitsap Citizens]*, CPSGMHB Case No. 94-3-0005 , Final Decision and Order (October 25, 1994), the Board stated:

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 [Conservation Easement Ordinance] does not have parameters to prevent development projects that constitute urban growth from occurring. For example, there is no upper limit on the acreage or unit count that the CEO would permit in rural areas, nor are there any parameters regarding the configuration, servicing or location of such development. . . . While no clear breakpoint is evident from the 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. *Kitsap Citizens*, at 15 (italicized emphasis in original, bold emphasis added).

In *City of Bremerton, at al., v. Kitsap County [Bremerton]*, CPSGMHB Case No. 95-3-0039 , Final Decision and Order (October 9, 1995), the Board stated:

The regional physical form [in the Central Puget Sound Region] required by the Act is a compact urban landscape, well designed and well furnished with amenities, encompassed by natural resource lands and a rural landscape. *Bremerton*, at 29 (footnote omitted).

A **pattern** of 1 and 2.5-acre lots is an **urban land use pattern** that constitutes sprawl, both inside and outside a UGA. *Bremerton*, at 49.

Permitting new residences on designated mineral resource lands at densities of 1 dwelling unit per 2.5 acres or less is fundamentally incompatible with the use of that land for mineral resource purposes. *Bremerton*, at 73.

[T]he net intensity of physical improvements placed on rural land can, alone, be conclusive in determining if growth proposed for a rural area can be permitted or if it crosses the threshold into impermissible urban growth. Dimensions of development intensity traditionally include building height, setbacks, parking

requirements, impervious surface coverage, the degree of grading and its consequent removal of existing vegetation.*Bremerton*, at 50-51 (bold emphasis added).

In *Vashon-Maury, et al., v. King County [Vashon-Maury]*, CPSGMHB Case No. 95-3-0008 , Final Decision and Order (October 23, 1995), the Board stated:

In determining if a proposed use is permitted in a rural area, the words “such lands” in RCW 36.70A.070(5) refers not to the individual parcel, but to the **land use pattern** in the immediate vicinity.*Vashon-Maury*, at 68 (italicized emphasis in original, bold emphasis added).

“Rural character” has both a functional and a visual component.As a general rule, uses that meet the definition of urban growth will be prohibited in the rural area unless: (1) the use is dependent upon being in a rural area and is compatible with the functional and visual character of rural uses in the immediate vicinity; OR (2) the use is an essential public facility.*Vashon-Maury*, at 68.

Smaller [than 10 acres] lots in the rural area will be scrutinized to assure that, **as a pattern**, they do not constitute urban growth; do not unduly threaten large scale natural resource lands or critical areas; will not thwart the long term flexibility to expand the UGA; and are not otherwise inconsistent with the goals and requirements of the Act.*Vashon-Maury*, at 79 (bold emphasis added).

In *City of Gig Harbor, et al., v. Pierce County [Gig Harbor]*, CPSGMHB Case No. 95-3-0016 , Final Decision and Order (October 31, 1995), the Board stated:

If a County wishes to use a 5-acre lot size abutting the UGA line as, in effect, an urban reserve, it must include provisions to assure that such lots will not be divided or developed to impermissibly constitute urban growth in the rural area, and include provisions to assure that, if and when included in the UGA, such parcels could be developed at a truly urban density.*Gig Harbor*, at 58.

In *Concerned Citizens for Sky Valley, et al., v. Snohomish County [Sky Valley]*, CPSGMHB Case No. 95-3-0068c , Final Decision and Order (March 12, 1996), the Board stated:

A rural residential **land use pattern** of lots smaller than 5 acres must be eliminated or, in the alternative, provisions of the Plan modified, so that the number, configuration and location of such lots do not constitute urban growth.Future clustered development in the rural area must be configured and served to constitute compact rural development rather than urban growth.*Sky Valley*, at 48 (bold emphasis added).

In *Peninsula Neighborhood Association v. Pierce County [Peninsula Neighborhood Association II]*, CPSGMHB Case No. 95-3-0071 , Final Decision and Order (March 20, 1996), the Board stated that:

Pierce County failed to demonstrate how rural shoreline densities of 2.4 to 3.5 dwelling units per acre constitute permissible exceptions to the general rule that urban growth is prohibited in rural areas, or how such a **pattern** of land use constitutes permissible compact rural development.*Peninsula Neighborhood Association II*, at 17.

The historical discretion of counties to craft nonconforming use provisions has been limited by the GMA, particularly with regard to areas outside of the UGA.In a rural area, the expansion or enlargement of uses that constitute urban growth would itself constitute new urban growth outside the UGA, and is therefore prohibited.*Peninsula Neighborhood Association II*, at 27 (emphasis added).

[17]

In 1994, the definition provided by RCW 36.70A.030(14) was:

"Urban growth" refers to 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" 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.

[18]

The Board previously held that Kitsap's land use pattern of 1 and 2.5-acre lots are urban. *Bremerton*, at 49. The 7,500 square foot lot size (about 5.8 units per acre) is even more clearly an urban density. Significantly, the County's pre-1977 rural lot size policy of 5.8 units per acre exceeded that of its most dense city, Bremerton, which currently has an average density of 5.19 units per acre. Land Use Plan, at A-30.

[19]

State, 1000 Friends, Council I, Suquamish, Adams, Hayes, URBPA, Bremerton and Port Gamble.

[20]

Goal 11 was not argued, and will not be considered further in this Order.

[21]

Union River charges that the County is "putting the cart of land use before the horse of capital facilities planning, and both cart and horse before the preparation of the path of resource delineation and critical areas designation and protection."

[22]

None of the parties or participants briefed the "and agricultural lands" portion of these legal issues. Therefore, the Board deems this portion of the legal issues to be **abandoned** and the portions that addresses agricultural lands are **dismissed with prejudice**.

[23]

These were the only parties to prepare any briefing specifically on this issue.

[24]

State Environmental Policy Act, Chapter 43.21C RCW, and the SEPA Rules, Chapter 197-11 WAC.

[25]

The Board has interpreted RCW 36.70A.070(3)(c) as if the phrase "owned or operated by the city or county" existed at the end. This interpretation is required by necessary implication. To hold otherwise would require a county government, as the regional planning entity within a county, to conduct capital planning for all public facilities regardless of ownership. Thus, all capital facilities within a county's boundaries would be integrated into a single capital facility plan. Unlike a major city which is likely the sole provider of public services within its boundaries, counties often do not own or operate all the facilities which provide the public services within its boundaries. To require a county to assume this capital facilities planning responsibility is impractical. The county may be unable to incur the expense of additional administration, it may lack expertise to conduct effective administration, special districts may either not cooperate, or they may not share the necessary relevant information because they deem it to be proprietary.

A more appropriate reading of the current requirements of section .070(3) is that after the initial inventory and forecast requirements of section .070(3)(a) and (b) are completed, the Act permits a county to choose to shift some of the facility components that it has inventoried to other categories within the overall mandatory elements of section .070 if there is adequate supporting rationale. Clear identification of components within another section, as in the case of the transportation elements, is adequate rationale. Compare "streets" and "roads" in .030(12) with the transportation element .070(6). And, under the current version of the Act, lack of ownership is also adequate rationale. *See Sky Valley*, at 67.

[26]

Generally, if impact fees are authorized by a jurisdiction for roads, parks, schools or fire facilities, revenues can be expended only on capital projects identified within an adopted county or city GMA capital facility plan element. *See* Chapter 83.02 RCW:

[27]

The GMA requirements for the Transportation element are the issue in Legal Issue No. 14.

[28]

CFP at 3-168 and 3-169.

[29]

To reach these figures the 2012 population allocations for each of the 18 systems (Tables WF-3 to WF-20, page 3-179 to 3-183, CFP) were added.

[30]

To reach these figures the 2012 population allocation for the 9 systems (Table A-UT-5, page A-207, Utilities Appendix) were added.

[31]

The maps in the Figure Book assist in understanding some of the descriptive text in the Plan. Additional maps could illustrate text analysis.

[32]

Each of the four school districts (North, Central and South Kitsap and Bremerton) that have facilities in the unincorporated County have apparently provided their six-year financing plan to the County for incorporation into the County's CFP. CFP, 3-91.

[33]

The Board has held that the water system inventory and needs assessment provisions of the Plan do not comply with the Act. However, the County did include a capital projects summary for 16 water systems (3 had no projects planned) and a financing summary for six of the systems with project planned. CFP, 3-184 to 3-192.

[34]

The transportation plan is the focus of Legal Issue 14 *infra*.

[35]

Council I, Suquamish Tribe and Martin P. Hayes.

[36]

Council I, Adams, Union River Basin Protection Association / Association to Protect Anderson Creek, and Ross.

[37]

: Land Use Plan, at 14.

[38]

The range forecast prepared by OFM in 1995 was also for the year 2012.

[39]

The Kitsap County-wide Planning Policies were originally adopted in 1992.

[40]

Suquamish Tribe, Adams, Martin P. Hayes and URBPA/APAC.

[41]

Council I, Grow Smart and URBPA/APAC.

[42]

Section 9 of ESB 6094, Chapter 429, Laws of 1997.

[43]

Suquamish Tribe and URBPA/APAC.

[44]

Although ESB 6094 amended RCW 36.70A.300, it did not alter the requirements and provisions for determining invalidity.

[45]

If the County chooses, it may prepare and submit, for the Board's consideration, a proposed Compliance Schedule to outline actions to be taken by the County between the date of this Order and the **April 3, 1998** compliance date.