

On January 27, 1995, the Board entered an “Order of Consolidation and Notice of Hearing” (the **Order of Consolidation**). The Order of Consolidation combined the FOTL petition with nine others into a consolidated case *Vashon-Maury, et al., v. King County*, CPSGMHB Case No. 95-3-0008. The other nine petitions were filed by the Vashon-Maury Island Community Council and Citizens for Rural Oriented Government (**Vashon-Maury**); the Duwamish Valley Neighborhood Coalition (**Duwamish**); Paul P. Carkeek (**Carkeek**); Maxine Keesling (**Keesling**); the Tolt Community Club (**Tolt**); two petitions filed by Mary O'Farrell (**O'Farrell I** and **O'Farrell II**); and another petition for review from FOTL, which was named “**FOTL IV**”. The Order of Consolidation noted that Port Blakely Tree Farms (**Port Blakely**) and the Quadrant Corporation (**Quadrant**), both of which had been granted Intervenor status in the FOTL III case, would retain that status in this consolidated matter. Subsequent Orders granted Intervenor status to the City of Snoqualmie (**Snoqualmie**), the Union Hill Water Association (**Union Hill**), Preston Industrial Associates (**Preston**), and the Washington State School Directors' Association (**WSSDA**). On October 23, 1996, the Board entered a Final Decision and Order (the **FDO**) in this matter. The FDO provided as follows:

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board finds that the 1994 King County Comprehensive Plan and those implementing development regulations before the Board comply with the requirements of the GMA except for the following:

- A. Comprehensive Plan Map Amendments 89, 90, and 101 and Zoning Map Amendments 81 and 81A are remanded to the County with direction to delete them and provide a reasonable opportunity for public comment prior to consideration by the Council before subsequent readoption.
- B. The UGAs for the following Rural Cities that extend beyond their expansion areas are remanded with instructions either to repeal the UGA designation to these areas or to amend the CPPs:
 - a. Carnation
 - b. Duvall
 - c. Enumclaw
 - d. North Bend
 - e. Snoqualmie
- C. Plan Policy R-206 is remanded with instructions for the County to repeal it or provide adequate justification for it consistent with the requirements of the Act and this decision.
- D. Plan Policies R-314 and R-315 are remanded with instructions for the County to make them consistent with the requirements of the Act and this decision.

On December 1, 1995, the Board entered an “Order on Motions to Reconsider and Motion to Correct” (the **Order on Reconsideration**). The Order on Reconsideration provided as follows:

Having reviewed the above-referenced documents and the file in this case, and having

deliberated on the matter, the Board enters the following Order:

1. Keesling's Motion and the Motion by Port Blakely and Quadrant are **denied**.

2. Snoqualmie's Motion to Correct is **granted**.

The challenged text on pages 36 and 37 of the Final Decision and Order shall be modified to change the references from 1,950 acres to 750 acres, and to remove references from the Rural Cities Urban Growth Area Report as to the amount of acreage at issue here.

3. Carkeek's Motion is **partially granted**.

The light industrial and P-suffix zoning in the Preston area that implement Policies R-314 and R-314 are **remanded** with instructions for the County to repeal them or otherwise make them consistent with the requirements of the Act, the Board's Final Decision and Order, and this Order on Motions.

4. FOTL's Motion is **partially granted**.

The Bear Creek island UGA portion of the Plan is **remanded** to the County with instructions to either: (a) delete it; or (b) adopt it as a fully contained community if it meets the requirements of RCW 36.70A.350; or (c) justify it pursuant to the requirements of RCW 36.70A.110, and the rank order requirements for including lands in the UGA as set forth in the *Bremerton v. Kitsap County* decision, at 38-41.

5. Tolt's Motion is **partially granted**.

To the extent that the Plan's UGAs for Rural Cities exclude expansion areas designated by the CPPs, these areas must be included in the UGAs. To the extent that the Plan adds further expansion areas to the Rural Cities' UGAs not designated by the CPPs, these areas must be removed from the UGAs because they are inconsistent with the CPPs.

6. The County's Motion is **partially granted**.

Plan Policy R-206 is **remanded** with instructions for the County to repeal it as it pertains to Vashon-Maury Island, or provide adequate justification for it consistent with the requirements of the Act, the Board's Final Decision and Order, and this Order on Motions.

On March 22, 1996, the Board received from the County a "Statement of Compliance with Board's Order" (the **Statement of Compliance**) with Attachments A through D.

On April 8, 1996, the Board received from Preston Industrial Associates a "Response to Statement of Compliance."

On April 10, 1996, the Board received the "Response by Quadrant Corporation and Port Blakely Tree Farms to Statement of Compliance; "Intervenors Port Blakely Tree Farms Response in Support of King County's Statement of Compliance Regarding Ring Hill Estates Remand"; "FOTL's and CPT's Response to Statement of Compliance and Request for Relief" with attached Exhibits 1 through 26; from Paul Carkeek a "Response to County's Statement of Compliance" (the **Carkeek Response**); from the Duwamish Valley Neighborhood Preservation Coalition a "Response to King County's Statement of Compliance"; from Tolt Community Club a "Response to Statement of Compliance;" and a letter from Mary O'Farrell.

On April 11, 1996, the Board received from Carkeek a letter containing a correction to the Carkeek Response.

The Board held a compliance hearing on Monday, April 15, 1996, at the Seattle Chamber of Commerce Board Room at 600 University Street, Seattle. Board Members M. Peter Philley, Chris Smith Towne and Joseph W. Tovar, presiding officer in this case, were present for the Board. Appearing for Preston was Alan Wallace; for Port Blakely was Katherine Laird; for Quadrant was Sarah Mack; for Snoqualmie was Pat Anderson; for Duwamish was Tim O'Brien; for FOTL and the Coalition for Public Trust was David Bricklin; for Tolt Steve Hallstrom; and for the County were Charles Maduell and Kevin Wright. Mary O'Farrell and Paul Carkeek appeared on their own behalfs. Court reporting services were provided by Duane Lodell of Robert H. Lewis & Associates, Tacoma. No witnesses testified.

During the compliance hearing, the County submitted a "Declaration of Kamuron Gurol" (the **Gurol Declaration**) with Exhibit A attached; a "Declaration of Caroline Whalen (the **Whalen Declaration**) with Exhibits A through D attached; and a "Declaration of Janet Masuo (the **Masuo Declaration**) with Exhibits A through D attached. The presiding officer orally ordered the County, by noon on April 16, 1996, to serve a copy of these declarations on the parties to which they pertained and further ordered that any party wishing to submit a post-compliance hearing brief responding to the Declarations must do so by 4 p.m. on April 19, 1996.

On April 19, 1996, the Board received from Duwamish "Rebuttal to the Declarations of Caroline Whalen and Kameron Gurol and Janet Masuo;" from Preston a "Reply to Carkeek Response to County's Statement of Compliance;" and from Carkeek a "Response to Pre-Hearing Submission by Preston Industrial Associates."

On May 14, 1996, the Board received from the City of Redmond (**Redmond**) a petition for review (the **Redmond Petition for Review**) alleging that County Ordinances 12170 and 12171 do not comply with the goals and requirements of the GMA. On this same date, the Board received from Duwamish a new petition for review (the **Duwamish Petition for Review**) alleging that Ordinance 12170 does not comply with the goals and requirements of the GMA.

On May 20, 1996, the Board entered an Order of Consolidation and Notice of Hearing in *Buckles, et al., v. King County*, CPSGMHB Case No. 96-3-0022, one portion of which is the Redmond Petition for Review, another portion of which is the Duwamish Petition for Review.

II. FINDINGS OF FACT

1. The King County Council (the **Council**) enacted Ordinance 11575, adopting the King County Comprehensive Plan (the **Plan**) on November 18, 1994. Stipulated Exhibit (**St. Ex.**) 51.
2. The Council enacted Ordinance 11653, adopting Area Zoning, on January 9, 1995. St. Ex. 20.
3. On October 23, 1995, the Board entered its Final Decision and Order in this case.
4. On December 1, 1995, the Board entered its Order on Motions to Reconsider and Motion to Correct.

5. On March 11, 1996, the Council adopted Ordinance 12170 and Ordinance 12171 adopting amendments to the Plan and area zoning.

III. DISCUSSION

The Board first must address the matter of the length of time allowed for the Board to issue its Finding of Compliance. RCW 36.70A.330, entitled "Noncompliance," provided as follows when initially enacted by the legislature in 1991 (Laws of 1991, 1st special session, chapter 32, § 14):

- (1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(1)(b) has expired, the board, on its own motion or motion of the petitioner, shall set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of this chapter.
- (2) The board shall conduct a hearing and issue a finding of compliance or noncompliance. A hearing under this subsection shall be given the highest priority of business to be conducted by the board, and a finding shall be issued within forty-five days of the filing of the motion under subsection (1) of this section with the board.
- (3) If the board finds that the state agency, county, or city is not in compliance, the board shall transmit its finding to the governor. The board may recommend to the governor that the sanctions authorized by this chapter be imposed.

Pursuant to RCW 36.70A.330(1) quoted above, the Board routinely scheduled compliance hearings on its own initiative. Furthermore, pursuant to RCW 36.70A.330(2) above, the Board always issued its compliance finding within forty-five days of the filing of the motion by a petitioner or the noting of a compliance hearing by the Board.

In 1995, the legislature amended RCW 36.70A.330 as follows (underlining denotes new language; strikethroughs denote deleted language):

- (1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(1)(b) has expired, or at an earlier time upon the motion of a county or city subject to a determination of invalidity under RCW 36.70A.300, the board ~~on its own motion or motion of the petitioner,~~ shall set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of this chapter.
- (2) The board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter. A person with standing to challenge the legislation enacted in response to the board's final order may participate in the hearing along with the petitioner and the state agency, city, or county. A hearing under this subsection shall be given the highest priority of business to be conducted by the board, and a finding shall be issued within forty-five days of the filing of the motion under subsection (1) of this section with the board.
- (3) If the board finds that the state agency, county, or city is not in compliance, the board shall transmit its finding to the governor. The board may recommend to the governor that the sanctions authorized by this chapter be imposed.

(4) The board shall also reconsider its final order and decide:

(a) If a determination of invalidity has been made, whether such a determination should be rescinded or modified under the standards in RCW 36.70A.300(2); or

(b) If no determination of invalidity has been made, whether one now should be made under the standards in RCW 36.70A.300(2).

The board shall schedule additional hearings as appropriate pursuant to subsections (1) and (2) of this section.Laws of 1995, chapter 347 § 112.

During oral argument, FOTL raised an issue of first impression for the Board, pointing out that with the amendment of RCW 36.70A.330 in 1995, the Board is required to issue a compliance finding within forty-five days only in instances where compliance has allegedly taken place prior to a compliance deadline and “... upon the motion of a county or city subject to a determination of invalidity.” Accordingly, FOTL contends that when no such motion has been filed by a city or county, and the compliance hearing has been set on the Board’s own initiative, it is no longer necessary for the Board to issue a compliance finding within forty-five days.

The Board agrees with FOTL’s interpretation of RCW 36.70A.330(1) and (2) and holds that in instances where no motion was filed pursuant to subsection (1), the Board must still give the highest priority to a compliance hearing; however, it need not issue its compliance finding within forty-five days. Only when a city or county subject to a determination of invalidity files a motion for a compliance hearing prior to the compliance deadline established by the Board pursuant to RCW 36.70A.300(1)(b), shall a compliance finding be issued within forty-five days of the filing of such a motion.

One could argue that as a matter of expedient public policy, the forty-five day period for issuing a compliance finding should apply regardless of which entity files a motion for a compliance hearing. Consequently, one would argue that the legislature made a simple scrivener’s error when amending subsection (1) by failing to similarly amend subsection (2). However, the Board must reject such an argument. The language of RCW 36.70A.330 is clear on its face and does not lead to an absurd result. If a local jurisdiction (that has had all or a portion of one of its GMA enactments determined to be invalid) contends it has obtained compliance with a Board order sooner than when required by the Board, it should be able to promptly bring this contention to the Board’s attention. More importantly, because of the impact of a determination of invalidity in such a scenario, the forty-five day requirement should, and pursuant to RCW 36.70A.330 as amended in 1995, does, continue to apply.^[1]

FOTL raised this issue in order to persuade the Board to reverse its prior rulings that at compliance hearings, the Board determines procedural compliance only, and not whether substantive compliance has occurred. This ruling was first announced in *FOTL v. King County*, CPSGMHB Case No. 94-3-0009, Order Granting Dispositive Motions (November 8, 1994), at 9-14. FOTL was case of failure to act by a specified deadline. Subsequently, the ruling was expanded to all compliance hearings. *West Seattle Defense Fund v. Seattle (WSDF I)*, CPSGMHB Case No. 94-3-0016, Finding of Compliance (November 2, 1995), at 4-5. The Board acknowledges that because of the 1995 amendments to RCW 36.70A.330 and the

Board's holding regarding them above, one of the reasons the Board limited its review to procedural matters at compliance hearings has been removed. The Board now has more than forty-five days to issue a compliance finding in most cases. It should be noted that how much additional time was allotted by the 1995 amendment is unknown since the legislature did not alter the "highest priority" language in RCW 36.70A.330(2). Presumably, this language is significantly less than the 180 days the Board has to enter an initial final decision and order. *See* RCW 36.70A.300.

Nonetheless, the other reasons listed in *FOTL* and *WSDF I* for limiting the scope of Board review at compliance hearings remain compelling. **Therefore, the Board holds that in this case (see below) it will determine only whether the County procedurally complied with the Board's Final Decision and Order.** Whether the County's actions taken to comply with the Final

Decision and Order substantively comply will be determined in a future case.^[1]

In reaching this holding, the Board rejects FOTL's suggestion the County's actions on remand taken in response to the Board's Final Decision and Order are not entitled to a presumption of validity. RCW 36.70A.320, captioned "Presumption of validity--Burden of proof--Plans and regulations," provides in part:

(1) 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.

Emphasis added.

Importantly, RCW 36.70A.320(1) does not state that actions taken in response to a Board remand are not entitled to a presumption of validity. Instead, it clearly indicates that any and all comprehensive plans, development regulations and any amendments to either, are presumed valid upon adoption. **The Board holds that formal actions taken by the legislative bodies of cities and counties to amend their comprehensive plans and/or development regulations in response to a Board remand order are entitled to the presumption of validity contained in RCW 36.70A.320(1).**

The Board acknowledges that at a compliance hearing, the burden of proof has shifted to the respondent city or county to show that it has procedurally complied with the Board's order. Accordingly, this Board routinely requires a city or county whose GMA enactment was not in compliance with the Act to first indicate what actions it took to bring the enactment into compliance. Petitioners and intervenors are then given the opportunity to comment on the city or county's statement of compliance. Finally, the city or county is given the opportunity to reply to any responses that were filed. This shifting in the burden of proof does not, however, alter the presumption of validity to which the action of local government is entitled.

Finally, the Board has always recognized that its decision to determine procedural compliance at

a compliance hearing has its shortcomings. *See* for instance, FOTL, at 10. In an effort to reconcile the difficulty with the Board's "process-only" decision and in light of the legislature's removal of the 45-day clock from many compliance hearings, the Board adopts the following general holding.

Generally, the Board will continue to determine only procedural compliance in the compliance findings it issues pursuant to RCW 36.70A.330(2). Substantive compliance will be determined only if a new petition for review is timely filed. On occasion, the Board may determine both procedural and substantive compliance in a compliance finding if it determines that the circumstances are appropriate. The Board will consider the following factors in deciding whether it will consider substantive compliance at a compliance hearing: the Board's own schedule, the number of parties in the case, the scope and nature of the legal issues before the Board, and (if possible to determine at the time) whether new petitions for review challenging the substance of the remand amendment have been timely filed.

In the event the Board elects to consider both procedural and substantive compliance in its compliance finding, it will clearly announce its decision to do so in order to enable the parties to adequately prepare. *Under current practice*, when the Board issues a final decision and order that remands a portion of the underlying GMA document, the Board establishes a compliance deadline and a deadline for the local jurisdiction to submit a statement of compliance. After receiving the respondent's statement of compliance, the Board sets a compliance hearing and establishes a briefing schedule for petitioners and any intervenors to respond, and the city or county to subsequently reply.

In the future, in instances where the Board decides that it may also determine substantive compliance in its compliance finding entered pursuant to RCW 36.70A.330(2), it will announce its intention when it enters its notice of compliance hearing. This will give the petitioners and any intervenors the opportunity to argue in writing lack of procedural and/or substantive compliance in the response to the compliance statement, and the local jurisdiction to defend its action in its reply to the petitioners or intervenors' responses. At the actual compliance hearing, because of the shift in burdens discussed above, the city or county will orally argue first and last, with petitioners and any intervenors limited to responding to the city or county's opening arguments. The Board now turns to the matter of the County's compliance. The following discussion is organized to reflect the organization of the Board's instructions to the County as set forth in the Final Decision and Order, which grouped the remand items into Topical Areas A through D. Because the Board partially granted FOTL's Motion in the Order on Reconsideration, a Topical Area E also appears.

A. Comprehensive Plan Map Amendments 89, 90 and 101, and Zoning Map Amendments 81 and 81A

The County Council, by adoption of Ordinance 12170, has taken action to designate the Spencer Industries property (Plan Amendment 89) as industrial; designated the Banks property (Plan

Amendment 90) as rural residential; and the Eastside Congregational Church property (Plan Amendment 101) as high density urban residential. By the same action, the County Council zoned the Ring Hill properties (Zoning Map Amendments 81A and 81B) for a combination of RA-5 and RA-10.

None of the parties responding to these items argued that the County had not acted. Rather, their responses went to the matter of whether the County's actions complied substantively with the requirements of the Act. Therefore, **the Board holds that the County has procedurally complied with the Board's Final Decision and Order as to Plan Amendments 89, 90, 101 and Zoning Map Amendments 81 and 81A.** Allegations and arguments that the County did not substantively comply with either the Board's FDO or the GMA must be presented as a new petition for review.^[1]

B. The UGAs for the Rural Cities

Positions of the Parties

County

The County argues:

Regarding the remand of the UGAs for the cities of Carnation, Duvall, Enumclaw, North Bend and Snoqualmie, the County determined that the Rural Cities UGAs in both the Countywide Planning Policies (Phase II) and in the Comprehensive Plan were identical and therefore no action by the County was necessary to comply with the Board's decision. Statement of Compliance, at 3.

Tolt

Tolt contends that the term "expansion areas" refers to areas designated in pre-GMA community plans as areas where rural cities would eventually incorporate. Therefore, Tolt argues that the County did not remove lands not in expansion area and failed to include within UGAs lands that within expansion areas. Tolt's Response, at 1.

Discussion re: Rural Cities' UGAs

The Board holds that the County has procedurally complied with the Board's Order on Reconsideration as to Rural Cities' UGAs, even though the County took no action. The Board's Order on Reconsideration (at 14 and 16-17) made further County action contingent on specified facts. All that item 5 (partially granting Tolt's motion) of the Order on Reconsideration did was require the County to add to the UGAs of rural cities any lands designated as expansion areas that had not been included within the UGAs, and to delete from the rural cities' UGAs any lands that extended beyond designated expansion areas, if either of these actions had occurred. The County has submitted maps verifying that the Rural Cities' UGAs adopted in the Plan are identical, as required by the CPPs, with the Rural Cities' UGAs adopted in the CPPs (Phase II). See Statement of Compliance, Attachment B, at 51-52.

C. Policy R-206 regarding rural densities on Vashon Island

The County states that it has provided justification for the application of Policy R-206 to Vashon-Maury Island and adopted Plan policy amendments pertaining to rural residential densities on Vashon-Maury Island. Statement of Compliance, at 2. Petitioner Vashon-Maury did not submit a response to the Statement of Compliance. The Board's instruction to the County, clarified in the Order on Reconsideration, was to either repeal R-206 or provide adequate justification for it. The County Council did take an action in response to the remand of R-206 (Ordinance 12170, Amendments 10 and 11-2 specifically discuss R-206 as it relates to Vashon Island.) This amendatory language includes both the revised policy as well as historical background and additional rationale for the policy. The Board deems that the County Council's revisions to R-206 provide adequate justification for the application of this policy to Vashon-Maury Island. **Therefore, the Board holds that the County has procedurally complied with the Board's Order on Reconsideration as to Policy R-206.**

D. Plan Policies R-314 and R-315

The County asserts that it has amended Policies R-314 and R-315 relating to rural industrial zoning in Preston and has adopted implementing regulations consistent with the Board's Order, in Ordinance 12170. Statement of Compliance, at 2.

The Carkeek Response goes to the substantive compliance of the County's Action. **The Board holds that the County has procedurally complied with the Board's Order on Reconsideration as to Policies R-314 and R-315.** It does not now render a judgment as to the substantive compliance of R-314 and R-315, as amended, with the Final Decision and Order or the GMA.

E. Bear Creek

The Order on Reconsideration identified three compliance options for the County regarding the Bear Creek island UGA: (a) delete it; (b) adopt it as a fully contained community if it meets the requirements of RCW 36.70A.350; or (c) justify it pursuant to the requirements of RCW 36.70A.110, and the rank order requirements for including lands in the UGA as set forth in the *Bremerton v. Kitsap County* decision, at 38-41.

The Statement of Compliance asserts that the County exercised options (b) and (c). **The Board holds that the County has procedurally complied with the Order on Reconsideration as to the Bear Creek UPD sites by adopting Ordinances 12170 and 12171 to designate the sites as fully contained communities pursuant to RCW 36.70A.350.** The Board need not and does not at this time render a judgment as to substantive compliance of Ordinances 12170 and 12171 with the goals and requirements of the Act. The Board notes that substantive compliance of those ordinances with the Act is the subject of a pending case, *Buckles, et al., v. King County*.

Where, as here, a respondent jurisdiction elects to comply with a remand order both by a legislative enactment and by a separate staff report, the Board will look first to the legislative enactment. In this case, because the Board concludes that the legislative enactment of Ordinances 12170 and 12171 procedurally complies with the Order on Reconsideration, it need not and will

not comment upon the sufficiency of the UGA justification set forth in the staff document. Having found procedural compliance with the Order on Reconsideration, the Board need not and will not address FOTL's request for a recommendation of sanctions or a finding of invalidity.

IV. FINDING of compliance

The Board, having reviewed its Final Decision and Order and the file in this case, having reviewed the above referenced documents, and having considered the arguments of the parties, concludes that the County **has complied** with the Board's Final Decision and Order. Therefore, the Board issues a Finding of Compliance to the County in this case.

So ORDERED this 24th day of May, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

[1] In instances where a jurisdiction's GMA enactment is found in a final decision and order not to comply with the requirements of the Act, but no determination of invalidity is made, a compliance hearing arguably cannot be scheduled at an earlier time than "after" the compliance deadline established in the final decision and order. Because this specific issue is not before the Board at the present time, the Board will not now determine whether it will permit accelerated compliance hearings in such a scenario.

[1] See *Buckles, et al., v. King County*, CPSGMHB Case No. 96-3-0023c.

[1] The Board notes that Duwamish has filed just such a petition for review, as has a different party that challenges the County's action regarding the Banks property. See *Buckles, et al., v. King County*.