

**Central Puget Sound  
Growth Management Hearings Board**  
STATE OF WASHINGTON

BREMERTON, et al.,	)	<b>Consolidated</b>
Petitioners,	)	<b>Case No. 95-3-0039</b>
v.	)	<b>FINDING OF</b>
KITSAP COUNTY,	)	<b>NONCOMPLIANCE</b>
Respondent.	)	<b>[Contingent Recommendation of</b>
	)	<b>Sanctions]</b>
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**I. PROCEDURAL BACKGROUND**

Between January 27, 1995, and March 8, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) received four petitions for review challenging the adoption by Kitsap County (the **County**) of its 1995 comprehensive plan (the **Plan**), urban growth areas (**UGAs**), interim critical area regulations and certain regulations implementing the Plan under the Growth Management Act (**GMA** or **Act**). In addition, some of the petitioners alleged that the County's environmental analysis conducted pursuant to the State Environmental Policy Act (**SEPA**) was inadequate. The Association of Rural Residents (**Rural Residents**) and Kitsap Citizens for Rural Preservation (**KCRP**) filed a joint petition for review (**ARR & KCRP**) on January 27, 1995, Case No. 95-3-0010. The Suquamish Tribe (**Suquamish**) filed a petition for review on February 27, 1995, Case No. 95-3-0018. The City of Bremerton (**Bremerton**) filed a petition for review on March 2, 1995, Case No. 95-3-0019.

On March 8, 1995, the Board received a petition for review from Leslie Banigan and Nyle Hartley (**Banigan I**), Case No. 95-3-0022.

On March 10, 1995, the Board received "Port Blakely's Motion to Intervene" (**Port Blakely**). Also on March 10, 1995, the Board received 14 petitions for review from the following parties and assigned the following case numbers: Olalla Community Council and Beth Wilson (**Olalla**), Case No. 95-3-0023; Charlotte Garrido (**Garrido**), Case No. 95-3-0024; North Kitsap Coordinating Council (**Council**), Zane Thomas, Linda Cazin, Ray Bock and Vivian Hiatt-Bock (**Council I**), Case No. 95-3-0025; Leslie Banigan and Charlie Burrow (**Banigan II**), Case No. 95-3-0026; Sandra M. Adams and Nobi Kawaski (**Adams**), Case No. 95-3-0027; City of Poulsbo (**Poulsbo**), Case No. 95-3-0028; 1000 Friends of Washington (**1000 Friends**), Case No. 95-3-0029; Kitsap Citizens for Rural Preservation, Zane Thomas, Tom Donnelly and Beth Wilson

(**KCRP I**), Case No. 95-3-0032; Zane Thomas, North Kitsap Coordinating Council, Nyle Hartley, Central Kitsap Coordinating Council (**Thomas I**), Case No. 95-3-0033; North Kitsap Coordinating Council, Zane Thomas, Leslie Banigan, Tom Donnelly, and Olalla Community Council (**Council II**), Case No. 95-3-0034; North Kitsap Coordinating Council, Rural Residents, Zane Thomas, Leslie Banigan and Moira Kane (**Council III**), Case No. 95-3-0035; Zane Thomas, North Kitsap Coordinating Council, Nyle Hartley, Central Kitsap Coordinating Council, Moira Kane, Rural Residents, Leslie Banigan and Tom Donnelly (**Thomas II**), Case No. 95-3-0036; State of Washington by and through the Director of Community, Trade and Economic Development, on behalf of the Commissioner of Public Lands, the Director of the Department of Fish and Wildlife, the Director of the Department of Ecology and the Secretary of the Department of Transportation (**State**), Case No. 95-3-0037; and Kitsap Citizens for Rural Preservation and Association of Rural Residents (**KCRP II**), Case No. 95-3-0038.

On March 13, 1995, the Board received a petition for review from Ronald R. Ross (**Ross**) and assigned it Case No. 95-3-0039.

On March 15, 1995, the Board issued its “Amended Order of Consolidation and Notice of Hearing, and Order Denying Motions for Expedited Review and Summary Disposition,” consolidating all the above-mentioned cases, assigning the consolidated matter Case No. 95-3-0039, and stating that the case would be referred to as *Bremerton, et al., v. Kitsap County* (**Bremerton**). No further consolidation occurred.

Between March 31, 1995, and April 13, 1995, the Board received motions to intervene from the following: Overton and Associates, Overton and Alpine Evergreen Co., Inc. (**Overton**); Harvey B. Hubert (**Hubert**); McCormick Land Company (**McCormick**); the Economic Development Council of Kitsap County (**EDC**); Manke Lumber Co. (**Manke**); Pope Resources (**Pope**); and Rainier Evergreen (**Rainier**). Intervention was subsequently permitted on May 5, 1996 for all intervenors.

On July 26, 27 and 28, 1995, the Board held a hearing on the merits of the 19 consolidated petitions for review at Fire Station No. 1 in Poulsbo, Washington.

On October 9, 1996, the Board entered a Final Decision and Order in this case finding that the Plan was not in compliance with the Act and invalidating the Plan and all its implementing development regulations. The Board remanded the Plan and its implementing development regulations to the County and gave the County the maximum period to bring its Plan and implementing development regulations into compliance with the Act, i.e., by April 3, 1996. In addition, the County was ordered to submit a statement of compliance by April 12, 1996.

The Board’s Final Decision and Order was subsequently appealed to superior court. However, the Board’s compliance review was not stayed.

On April 15, 1996, the County filed “Kitsap County’s Statement of Actions Taken to Comply with Order” (**County’s Compliance Statement**) and four exhibits.

On April 16, 1996, the Board entered a “Notice of Compliance Hearing and Briefing Schedule.”

On April 29, 1996, the Board received the “State’s Response to Kitsap County’s Statement of Actions Taken to Comply with Order.”

On April 30, 1996, the Board received a “Joint Response to Kitsap County’s Statement of Compliance” from ARR, KCRP, KCRP II, and Banigan I and II;” “1000 Friends of Washington’s Response to Kitsap County’s Statement of Compliance;” “Adams’ Response to the County’s Statement of Compliance;” Bremerton’s “Response to Kitsap County’s Compliance with the Order of the Board;” Council I’s “Response to Kitsap County’s Statement of Actions Taken to Comply with Orders;” “Council III, KCRP I, Thomas I, Council II Response to County’s Statement of Compliance;” Garrido’s “Compliance Response Brief;” the “Reply of Petitioner Suquamish Tribe to Kitsap County’s Statement of Compliance;” and Thomas II’s response, entitled “Petitioner’s Response to Kitsap County’s Statement of Actions Taken to Comply with Order.”

On May 1, 1996, the Board received Olalla’s response entitled, “Kitsap County’s Statement of Actions Taken to Comply with Order.”

On May 7, 1996, the Board received “Kitsap County’s Reply Memorandum on Compliance” (**County’s Reply**).

On May 9, 1996, the Board held a compliance hearing in this matter in the City of Port Orchard Council Chambers, Port Orchard, Washington. M. Peter Philley, Presiding Officer in this case, Joseph W. Tovar and Chris Smith Towne were present from the Board. Sue A. Tanner represented the County. Tracy Burrows represented 1000 Friends; Tom Donnelly represented ARR, Banigan I and II, KCRP, KCRP II and Thomas II; Susan Johnson represented Bremerton; Linda Cazin represented Council I; Zane Thomas represented Council II and III, KCRP I and Thomas I; Tommy Prud’homme represented the State; Mary Linda Pearson represented the Suquamish Tribe; and Elaine Spencer represented EDC and Overton. Court reporting services were provided by Cynthia LaRose of Robert H. Lewis & Associates, Tacoma.

## **II. FINDINGS**

- 1) The GMA required Kitsap County to adopt a comprehensive plan by July 1, 1994. RCW 36.70A.040.
- 2) On December 29, 1994, the County enacted Ordinance No. 169-1994, which adopted the County’s Comprehensive Plan, Ordinance No. 168-1994, which adopted an Interim Zoning Ordinance, and Ordinance No. 170-1994, which adopted an Interim Critical Areas Ordinance. Final Decision and Order, Findings of Fact Nos. 4, 5, 6.
- 3) On October 6, 1995, the Board entered its Final Decision and Order in this case, finding the Plan and its implementing development regulations in noncompliance with the Act’s requirements and invalidating it and all its implementing development regulations.
- 4) On October 23, 1995, the County adopted an Emergency Interim Zoning Ordinance, Emergency Interim Zoning Map, Emergency Interim Urban Growth Boundaries and an Emergency Interim Critical Areas Ordinance. County’s Compliance Statement, Exhibit (**Ex.**) 1, at 1.
- 5) On January 8, 1996, the County adopted an Interim Zoning Ordinance, Interim Zoning Map and Interim Critical Areas Ordinance (**Current Interim Regulations**). County’s Compliance

Statement, Ex. 1, at 1-2.

6) On January 29, 1996, the County passed Resolution No. 044-1996, establishing “Framework Principles” to guide the County in revising its Plan and implementing development regulations. County’s Compliance Statement, Ex. 2.

7) On April 8, 1996, the County adopted Resolution No. 129-1996, accepting the Kitsap County Planning Commission’s proposed schedule for accomplishing comprehensive plan revisions and asking the Kitsap County Prosecuting Attorney to seek additional time for revisions. County’s Compliance Statement, Ex. 4.

8) The parties advised the Board that on July 7, 1996, the County’s Current Interim Regulations expire.

### **iii. DISCUSSION**

The Board’s Order provided in part:

Specifically, the County shall do the following:

1. Explicitly show how the size of the UGAs designated in the Plan will meet the OFM twenty year population projection for Kitsap County for the year 2012 (or any subsequent population projection adopted by OFM).

2. Explicitly show how and why the Plan’s UGAs were designated. The Plan or documents specifically incorporated by reference in it, must indicate the capacity of all existing incorporated areas (including the City of Bainbridge Island) to accommodate future growth, the definition of terms used in various factors that are used to obtain “net” acreage (i.e., the Plan’s deduction factors in addition to its “market factor”), and a rationale for utilizing any “market factor” or “cushion” above the Board’s 25 percent bright line standard in sizing the UGAs.

3. Amend its land use, housing and the capital facilities plan elements to contain a consistent figure for the average number of persons per household.

4. Amend its rural element to include a variety of rural, as opposed to urban, densities as required by RCW 36.70A.070(5).

5. 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.

6. Amend its rural element to not include designated natural resource lands (agricultural, mineral and forest) as required by RCW 36.70A.070(5).

7. Amend the Plan so as not to permit new residences on designated mineral resource lands at incompatible densities such as 1 du/2.5 acres.

8. Include a complete capital facilities plan element as required by RCW 36.70A.070(3).

9. Include a process for identifying and siting essential public facilities as required by RCW 36.70A.200.

10. Review the other legal issues raised by Petitioners that the Board has not addressed in this decision to determine whether Petitioners’ claims are legitimate, thus requiring a

modification of the Plan.

11. Conduct any necessary SEPA analysis as a result of actions taken to bring the Plan and its implementing regulations into compliance.

12. Review the Plan and amend it as necessary to ensure that it is internally consistent as required by the preamble to RCW 36.70A.070. In particular, attention should be paid to ensure that the land use, capital facilities and transportation elements are consistent.

13. Review and amend as necessary all development regulations that implement the Plan to ensure that these regulations are consistent with the Plan as required by RCW 36.70A.040 and .130(1).

At a compliance hearing, the Board always reviews the official actions of the legislative body of a city or county taken on remand to determine whether the non-complying GMA document has now come into procedural compliance with the Board's final decision and order. On occasion, the Board will also determine whether actions taken on remand to bring a GMA document into compliance substantively comply with the Act. *See Vashon-Maury, et al. v. King County*, CPSGMHB Case No. 95-3-0008, Finding of Compliance (May 24, 1996).

The County's position is:

1. Clearly, the County has not yet adopted a comprehensive plan which complies with all the procedural requirements of the Board's Order. County's Reply, at 1.

However, the County further argued:

... The County has proceeded in good faith to work toward adoption of a plan which complies with the Order. County's Reply, at 3.

Furthermore:

... The County is doing the work required of it by the Hearings Board, but needs more time in which to complete the process before there is a final document for the Board to review. County's Reply, at 2.

The County's Compliance Statement contains an attachment (Ex. 4), Kitsap County Resolution No. 129-1996, that indicates that the Board of County Commissioners is scheduled to adopt the new comprehensive plan on or before July 8, 1996. County's Compliance Statement, at 2.

However,

The County must advise the Board that, aside from the potential need for more environmental review, it is unlikely that the Commissioners will be able to adopt a plan before the end of July.... County's Compliance Statement, at 2.

... Accordingly, the County asks that the Board continue the compliance hearing to a date no earlier than August 1, and determine following the continued hearing whether or not the County has complied with the procedural requirements of the Board's Order. County's Reply, at 4.

During oral argument, the County again altered its position by indicating that the earliest conceivable time for adoption of the new comprehensive plan would be mid-August 1996, but that adoption might not occur until October 1996. Furthermore, the County contends that, more than likely, it will not know with any degree of certainty when it will formally adopt a

comprehensive plan until September 1, 1996. Given these uncertainties, the County requested that the Board order the County to indicate on or about September 10, 1996, the estimated date of adoption, and continue the compliance hearing until November 1, 1996.

The County also urged the Board to deny the requests of several petitioners to recommend that the governor impose sanctions. The County argued:

... A recommendation of sanctions at this point in the process would serve no useful purpose and, in fact, would be destructive to the compliance process in which the County is engaged. The same can be said for an order, sought by the State, which guarantees that sanctions will be imposed if compliance is not accomplished by a specific date. Such an order would also violate the County's basic right of due process... County's Reply, at 3.

RCW 36.70A.330 is the controlling provision in the GMA regarding compliance hearings and findings. In 1995, the legislature amended RCW 36.70A.330 as follows (underlining denotes new language; strikeouts 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.

RCW 36.70A.330 imposes several mandatory requirements on the Board.

- The Board shall set a compliance hearing. Subsection (1);
- The Board shall conduct a compliance hearing. Subsection (2);
- The Board shall issue a compliance finding (i.e., issue a finding of compliance or a finding of

noncompliance). Subsection (2);

- The Board shall give a compliance hearing its “highest priority.” Subsection (2);
- The Board shall transmit its compliance finding to the governor. Subsection (3); and
- The Board shall reconsider its final order. Subsection (4).

The Board has already set and held a compliance hearing. Furthermore, it is uncontested that the County has not complied with the Board’s Order -- it has yet to adopt a fully complete comprehensive plan and the necessary development regulations to implement such a plan as required by RCW 36.70A.040 and .070. Since the County has not acted, it has achieved neither procedural nor substantive compliance.

One issue before the Board is determining when must it issue a compliance finding. As the Board recently held in its *Vashon-Maury* compliance finding, the 45-day deadline of RCW 36.70A.330 (2) now applies only in limited circumstances, when the a jurisdiction with an invalid GMA document takes a remand action earlier than the compliance deadline and makes a motion for a compliance hearing. Nonetheless, the Board interprets the language in subsection (2), that a hearing shall be given the highest priority of business to be conducted by the Board, as meaning that not only must the compliance hearing be promptly held, but that the compliance finding itself must be promptly issued.

Although in most cases a compliance finding no longer must be issued within 45 days, the Board will nevertheless continue to use this timeframe as a benchmark. Accordingly, the Board will attempt to issue its findings of compliance within 45 days from the date of the notice of hearing entered by the Board, especially in cases where it is simply ascertaining procedural compliance. May 31, 1996, would be the forty-fifth day from the date the Board noted the compliance hearing in this case. Consequently, since this case involves procedural compliance only, the Board will issue a Finding of Noncompliance at this time.

RCW 36.70A.330, despite its many mandatory requirements, does afford the Board some discretion. Importantly, the Board is not required to recommend that the governor impose sanctions simply because the Board issues a finding of noncompliance. Instead, the Board is permitted to exercise its discretion. In the past, the Board has made three different types of findings: a finding of noncompliance and no recommendation of sanctions; a finding of noncompliance with a recommendation of immediate sanctions; and a finding of noncompliance with a recommendation of sanctions contingent on certain events.

Here, the Board must reconcile the fact that the County is proceeding in good faith to comply

with the Board’s Order, <sup>[1]</sup> and the fact that its entire comprehensive plan and implementing development regulations were invalidated, with the fact that the Act was initially passed in 1990 and the County’s deadline for adopting a comprehensive plan was July 1, 1994. RCW 36.70A.040.

The Board gave the County the maximum amount of time permitted by the Act, 180 days, to achieve compliance. RCW 36.70A.300. The County’s contention that even this was insufficient time is not unfounded, given the amount of work the County still had to do before adopting a

complete comprehensive plan. On the other hand, much of the work that was unfinished for even the invalidated Plan, let alone the yet-to-be-adopted plan, should have been completed years ago. The Board concludes that it is reasonable to recommend that the County be granted *additional time* to complete its comprehensive plan and implementing development regulations. However, this must be balanced by the fact that the County's Interim Regulations expire on July 7, 1996, and the fact that the County has already had nearly six years to adopt a fully completed comprehensive plan that complies with the requirements of the Growth Management Act. Accordingly, the Board will also make a *contingent recommendation* to the governor that sanctions be imposed (*see below*). The Board rejects the County's argument that its basic right of

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due process is violated by the Board's recommendation of any sanctions. The County was afforded the opportunity to present its case in writing and orally to the Board through the compliance hearing process, which culminates in the Board deciding whether to recommend sanctions or not.

Finally, in light of the fact that the County is still not in compliance with the Act, the Board will not rescind its determination of invalidity at this time. RCW 36.70A.330(4).

### **III. finding of NONcompliance**

The Board, having reviewed its Final Decision and Order and the file in this case, having reviewed the above-referenced documents and attached exhibits, and having considered the arguments of the parties, concludes that the County **has not complied** with the Board's Final Decision and Order. Therefore, the Board issues a **Finding of Noncompliance** to Kitsap County. In addition, the Board **does not rescind** its determination of invalidity at this time.

The Board will also make a **contingent recommendation** to the governor that he impose sanctions upon Kitsap County if it has not adopted its fully completed comprehensive plan by **September 3, 1996**.

The Board orders the County to file an original and three copies of a Compliance Status Report, and serve a copy on each of the other parties, no later than **4:00 p.m. on July 15, 1996**, regarding the status of the County's Interim Regulations, and regarding an update on the progress the County is making toward complying with the Board's Final Decision and Order (including a detailed schedule of anticipated actions that contains the estimated date of adoption.) The Board will then review the Compliance Status Report. Although the Board cannot rescind this Finding of Noncompliance, since the County failed to comply by the specified compliance deadline, it can take further appropriate action, if necessary. For instance, the Board might modify or withdraw its recommendation of sanctions to the governor and/or it might schedule a further hearing, or it may simply order a subsequent Compliance Status Report to be filed by a date certain.

So ordered this 28th day of May, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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M. Peter Philley  
Board Member

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Joseph W. Tovar, AICP  
Board Member

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Chris Smith Towne  
Board Member

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[1] Given the magnitude of work before the County on remand, the Board does not construe the lack of a finished plan to be the result of bad faith. The Board also rejects the suggestion made by Council II that the County's judicial appeal of the Board's Final Decision and Order and its lobbying efforts before the legislature to amend the GMA are evidence of bad faith. The Board respects the County's legal prerogative to take those steps. However, the only matter within the Board's purview is the County's good faith attempts to comply with the law as it now exists.

[2] The County argued that a Board recommendation of sanctions "guarantees" that such sanctions will be imposed. The Board points out the obvious: its recommendation is simply that; the governor is not bound by the recommendation to impose sanctions nor is the imposition of sanctions required within a specified timeframe. *See* RCW 36.70A.330, .340 and .345. Furthermore, to date, the governor has not imposed sanctions against any jurisdiction in instances where this Board has made such a recommendation. Therefore, no such "guarantee" exists.