



On June 6, 1995, the Board issued an Order on Motions to Supplement the Record, Granting Motion to Clarify Issues, and Amending Briefing Schedule. The Presiding Officer ruled on each of the proposed supplementary exhibits that had been proposed by Alberg and Farm Trust, and granted Alberg's Motion for modification of issues.

On June 15, 1995, Alberg filed its prehearing Brief (**Alberg's Brief.**)

On June 16, 1995, Farm Trust filed Puget Sound Farm Trust, et al.'s Prehearing Brief (**Farm Trust's Brief**) and attached exhibits.

On July 5, 1995, the County filed King County's Response to Petitioner Alberg's Prehearing Brief (**County's Alberg Brief**) and attached exhibits.

Also on July 5, 1995, the County filed the Response of King County to Prehearing Brief of Petitioner Puget Sound Farm Trust, et al. (**County's Farm Trust Brief**) and attached exhibits.

On July 6, 1995, the Board received the parties' joint exhibits, consisting of the County-wide Planning Policies, the 1994 Plan, and the Implementing Regulations. Those exhibits use the prefix "Jt. Ex." Farm Trust's exhibits use the prefix "FT"; Alberg's exhibits are shown with the prefix "A-"; and the County's exhibits use the prefix "C A or C FT."

On July 10, 1995, Farm Trust filed Petitioner Puget Sound Farm Trust's Reply to King County's Response to Petitioner's Prehearing Brief (**Farm Trust's Reply Brief.**)

Petitioner Alberg did not file a reply brief.

The Board held a hearing on the merits of the consolidated cases on July 11, 1995, at Kirkland City Hall, Kirkland, Washington. The Board's three members were present: M. Peter Philley, Joseph W. Tovar, and Chris Smith Towne, presiding officer in this case. Annalee Cobbett, Melinda McBride and Robert E. Tidball appeared for Farm Trust; Michael J. Alberg and Kay L. Alberg appeared for Alberg, and Cassandra Newell, Kevin Wright and David Allnut represented the County. Court reporting services were provided by Robert H. Lewis, Robert H. Lewis & Associates. No witnesses testified.

## **II. FINDINGS OF FACT**

### **General**

#### **1994 Plan Ordinance**

The Metropolitan King County Council (the **Council**) enacted Ordinance 11575, adopting the 1994 King County Comprehensive Plan (the **1994 Plan**), on November 18, 1994. Jt. Ex. B.

Notice of adoption of the Ordinance, as required by the Growth Management Act (**GMA** or the **Act**), was published on November 25, 1994. Ex. C FT-8.

The 1994 Plan Glossary describes Agricultural Production Districts (**APD**) as follows:

The Growth Management Act requires cities and counties to designate, where appropriate, agricultural lands that are not characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products. The Comprehensive Plan designates Agricultural Production Districts where the principal land use should be agriculture. Lands within Agricultural Production Districts should remain in parcels large enough for commercial agriculture (See Six, Natural Resource Lands.) Jt. Ex. B, at 235.

The 1994 Plan shows Agricultural Production Districts on a map entitled “Agricultural Lands.” Jt. Ex. B, at map following 104.

Natural Resource Lands are described in the 1994 Plan Glossary as follows:

The Growth Management Act requires cities and counties to designate natural resource lands which include the following: 1) agricultural lands that have long-term significance for the commercial production of food or other agricultural products; 2) forest lands that have long-term significance for the commercial production of timber; and 3) mineral resource lands that have long-term significance for the extraction of minerals. The Comprehensive Plan designates Agricultural Production Districts, Forest Production Districts, and Mineral Resource Sites. Jt. Ex. B., at 243

Open Space is described in the 1994 Plan Glossary:

The Growth Management Act requires cities and counties to identify open space corridors within and between urban growth areas which include lands useful for recreation, wildlife habitat, trails, and connection of critical areas. Open space lands, as designated by the Comprehensive Plan, include federal, state and locally owned parks and wilderness areas, developed parks and areas left in a natural state so they can sustain sensitive ecosystems, community identity and aesthetics and links between important environmental or recreational resources. (See Chapter Ten, Parks, Recreation and Open Space) Jt. Ex. B., at 244

The 1994 Plan describes Urban Separators:

The Countywide Planning Policies call for the County and cities to implement Urban Separators. These are low-density areas within the Urban Growth Area that create open space corridors, provide a visual contrast to continuous development and reinforce the unique identities of communities. These areas provide recreational benefits, such as parks and trails, and meet the Growth Management Act’s requirement for greenbelts and open space in the Urban Growth Area. (See Chapter Two, Urban Land Use) Jt. Ex. B, at 253.

Chapter Six of the 1994 Plan, Natural Resource Lands, is characterized as satisfying “... the Growth Management Act’s Goal 8 to maintain and enhance natural resource-based industries; Requirement 35.70A.170 to designate natural resource lands; Requirement 36.70A.080 optional conservation element by conserving natural resource lands.” Jt. Ex. B, preface, at 95.

In Chapter Six of the 1994 Plan, the County describes the extent and status of agricultural lands in the county:

Approximately 42,000 acres in King County remain in agriculture. In 1992, farmers in King County produced over \$84 million in agricultural sales that contributed to a diverse regional economy and provided fresh local foods. Commercial agricultural production, however, has declined by 30 percent in gross sales since 1978. The average farm and parcel size has also decreased, thus reducing the potential for many types of commercial operations. Fortunately, many of the smaller parcels still are undeveloped. If residences were built on all of the undeveloped parcels, King County's ability to sustain commercial agriculture would be significantly affected.

King County residents have supported efforts to preserve good farmland and active farms for the value of local crops, dairy and livestock and for scenic and historic values. In 1979, voters approved a measure to buy farmland development rights, indicating a significant public commitment to preserve farmlands. This program preserved 12,600 acres of farmland by purchasing the development rights. During the 1980's, King County established Agricultural Production Districts with large lot zoning and specifying agriculture as the preferred use in these areas. Despite the conservation of farmland resulting from these actions, the number of acres in agricultural production has declined significantly in the last ten years--by almost 12,000 acres, or 22 percent. To meet the GMA requirement to maintain and enhance agriculture, a variety of methods and programs continue to be necessary. Jt. Ex. B, at 103.

In the 1994 Plan, under the heading "Resource Conservation Strategy", the County describes the means by which agricultural lands were designated:

Agricultural lands of long-term commercial significance are designated as Agricultural Production Districts on the Agricultural Lands Map in this chapter. (The Land Use Map, located in Chapter One, designation of Agriculture encompasses Agricultural Production District lands and lands outside the districts that are zoned for Agriculture.) Jt. Ex. B, at 96.

### Implementing Regulations Ordinances

On December 19, 1994, the County Executive transmitted a proposed Zoning Atlas to the Council. The proposal included a complete list of parcels having unclassified use permits, including properties belonging to the Albergs. Each was mapped as being within the M zone. Ex. C A-16, -17.

The Council adopted a series of ordinances to implement the 1994 Plan on December 19, 1994. This group of documents is referred to as the **Implementing Regulations Ordinances**. They consist of eleven ordinances that adopt, amend or add titles to the King County Code (KCC) "... to be consistent with and implement the comprehensive plan as required by the Washington State Growth Management Act; ..." Each ordinance adopts and amends one or more KCC Titles, as follows:

Ordinance No. 11615, Title 9, Surface Water Management. Jt. Ex. C.

Ordinance No. 11616, Title 13, Sewer and Water Utilities. Jt. Ex. D.

Ordinance No. 11617, Title 14, Transportation, Jt. Ex. E.

Ordinance No. 11618, Title 16, Clearing and Grading, Jt. Ex. F.

Ordinance No. 11619, Title 19, Subdivision of Land, Jt. Ex. G.

Ordinance No. 11620, Title 20, Comprehensive Planning and Zoning, Jt. Ex. H.

Ordinance No. 11621, Title 21A, Zoning, Jt. Ex. I.

Ordinance No. 11622, Titles 7, 16, 19, 21A, 23 and 25; Jt. Ex. J.

Ordinance No. 11623, Titles 14 and 27, Development Permit Fees, Jt. Ex. K.

Ordinance No. 11624, Titles 8 and 9, Water Quality, Jt. Ex. L.

Ordinance No. 11625, Title 17, Fire Code, Jt. Ex. M.

### Ordinance 11653

Of particular importance to this case is Ordinance 11653, adopted on January 9, 1995. It adopted zoning, zoning maps and development conditions to implement the 1994 Plan. Ordinance 11653 was based on the County Executive's proposed Ordinance No. 94-737. Jt. Ex. N.

The legislative finding for Ordinance 11653 states that:

The changes to the area zoning maps and text are required to bring this Title into compliance with the 1994 Comprehensive Plan and to fully implement Title 21A. KCC Jt. Ex. N, at Preamble.

Ordinance 11653, at section 1, states that it was adopted "as a development regulation to be consistent with and implement the comprehensive plan in accordance with RCW 36.70A.120." Jt. Ex. N, at 2.

Ordinance 11653 includes a package of amendments entitled Resource Lands P-Suffix Conditions. Those P-Suffix Conditions included Amendment 91A, a substitute amendment, adopting P-suffix conditions for the Torrance property. Amendment 91A is an attachment to Ordinance 11653, and delineated as Appendix N. It is referred to as **Appendix N** in this decision and is the underlying document challenged by Farm Trust. Jt. Ex. N, Appendix N, Amendments to Resource Lands P-Suffix Conditions, unnumbered.

### Specific Implementing Regulations Ordinance Provisions

Ordinance 11621, one of the series of Implementing Regulations Ordinances discussed above, modified Title 21A, the County Zoning Code. Among the sections amended was 21A.38.030, which sets forth the nature, purpose of, and limitations on, P-Suffix development standards. Jt. Ex. I, at 1, 95.

KCC Chapter 21A.04, Zones, Maps and Designations, establishes map symbols for each of sixteen zoning designations at KCC 21A.04.010. The Agricultural zoning map symbol is A (10 or 35 acre minimum lot size); the Mineral symbol is M; property-specific development standards have a -P -suffix appended to the zone's map symbol. Ex. C A-22.

KCC 21A.04.020 defines Agricultural zone as follows:

A. The purpose of the agricultural zone (A) is to preserve and protect irreplaceable and limited supplies of farmland well suited to agricultural uses by the location, geological formation and chemical and organic composition and to encourage environmentally sound agricultural production. These purposes are accomplished by:

1. Establishing residential density limits to retain lots sized for efficient farming;
2. Allowing for uses related to agricultural production and limiting nonagricultural uses to those compatible with farming, or requiring close proximity for the support of agriculture; and
3. Allowing for residential development primarily to house farm owners, on-site agricultural employees and their respective families.

B. Use of this zone is appropriate for lands within agricultural production districts designated by the Comprehensive Plan and for other farmlands deemed appropriate for long-term production. Ex. C A-23.

KCC 21A.08.030(A) provides a matrix of zones and specific land uses. Subsection B sets forth development conditions applicable to specified uses, including condition 2.a, to be applied to single detached dwelling units in the Agriculture, Forest and Mineral zones:

a. Prior to issuance of any residential building permit, the property owner shall sign an affidavit acknowledging the following declaratory statement and shall record it in the deed and mortgage records for the subject property: ‘The subject property is located in or adjacent to an area designated by King County for forestry, agriculture, and mineral extraction and other compatible uses. Noise, dust, smoke and odors result from the harvesting, planting, fertilization, pest control, and other resource-related activities associated with usual and normal forest, agricultural or mining resource management practices, and, as such, these normal and usual practices, when performed in accordance with county, state and federal law, shall not be subject to legal action as public nuisances’; Ex. C A-28.

KCC 21A.12.030(B) establishes development conditions for residential zones, including a requirement that residences have a setback of at least 100 feet from any property line adjoining A, M or F zones or existing extractive operations. Ex. C A-25.

KCC 21A.22.010 - .090 contains development standards for mineral extraction, “...to minimize the impact of extractive operations upon surrounding properties.” Grading permits are required; non-conforming uses are to be brought into conformance with the chapter; periodic review of an operation is required; and a reclamation plan and bonding are required. The chapter specifies site design requirements for phased development; perimeter fencing and signage; structural setbacks on the site, including a 100-foot setback from residential-zoned properties for materials processing facilities, and a 20-foot setback for clearing, grading or excavation from the property line; and operating requirements including regulation of noise levels; hours of operation, including notice to nearby residents; air quality measures; and impacts on roadways. Ex. C A-24.

## Public Involvement

The public involvement process for adoption of the Implementing Regulations was a continuation of the process used for adoption of the County-wide Planning Policies (**CPPs**) and 1994 Plan. It included establishment and use of a 500-member stakeholders' group to review and comment on a regulations matrix, and the circulation of and solicitation of comments on a Draft Zoning Atlas. Jt. Ex. B, Appendix L; Ex. C A-1, at 1; Ex. C A-2, Ex. C A-3 through -6.

Subgroups of stakeholders, such as the Stakeholders for Mineral Resources Policies, participated in review of specified sections of the proposed Implementing Regulations, for instance, resource lands. Ex. C A-27.

In the two months preceding adoption of the Implementing Regulations, the County provided information by phone and FAX; worked with the media to disseminate information, and sent zoning notification letters to 187,000 property owners. C A-1; C A-10.

The Council's Growth Management Committee held four public hearings on the Implementing Regulations. Ex. C A-11 through -13.

The full Council held one hearing on the proposed legislation; the Albergs were among those testifying. Ex. C A- 14; Alberg Brief, at 11.

RCW 36.70A.370 directs the state attorney general to establish a process for use by state agencies and local governments planning under the Act "... to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property." In February, 1992, the Attorney General first issued the "State of Washington Attorney General's Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property." Ex. C A-30. The Board takes official notice that this document was updated in March, 1995.

## **FARM TRUST**

John Torrance owns two parcels of land in the lower Green River Valley in King County, totaling approximately 25 acres. The unincorporated property lies south of the City of Kent, and north of the City of Auburn. The property is bounded by the Green River on the north, (the south boundary of Kent); by Central Avenue, a major arterial, on the east; by 277<sup>th</sup> Street, a major east/west arterial, on the south; and by a railroad track on the west. The property lies within an area designated by the County as the Thomas Historic District and is within a designated urban growth area. Ex. FT-313-4, at 2; Ex. FT-1112-a; Jt. Ex. B., map following 104.

The property south of the Torrance parcel is in use as a dairy; its development rights have been purchased through the County's Farmlands Preservation Program. FT-313-4, at 11.

Properties in the unincorporated area surrounding the Torrance site are designated in the 1994 Comprehensive Plan as Greenbelt, Open Space, Agriculture, Industrial, Commercial and Urban Residential. Jt. Ex. B, Land Use Map #15.

Properties within the City of Kent immediately north of the Green River, and at some distance to the south

in the City of Auburn, are zoned commercial and industrial. Ex. FT-5.

In 1985, the County adopted a Comprehensive Plan, (the **1985 Plan**), including a land use map specifying land use designations for all properties located in unincorporated King County. In the Plan, the County designated two APDs within or near urban areas, the Lower Green River Valley and the Sammamish Valley. Those districts were retained in the 1994 Plan. Jt. Ex. B, at 104.

The Torrance property lies within the Lower Green River Valley APD. Jt. Ex. B, Map following 104.

In 1989, the County adopted Resource Lands Area zoning in order to implement the resource land use designation, including Agricultural Production Districts, established in the 1985 Plan. The Torrance property received an A-10 zoning designation (i.e., Agriculture, 10 acre minimum lot size.) Ex. FT-4.

The County Executive's Proposed 1994 Comprehensive Plan, pursuant to the requirements of the Act, recommended retaining the APD land use designation for the Torrance property. Ex. FT-6.

Torrance requested that the Council provide an industrial land use designation for the property. Ex. FT-5.

The Council committee charged with making recommendations on the Executive Proposed Plan to the full Council agreed that the designation should be changed from APD to Industrial. The committee prepared [Proposed] Amendment 107A to the County Executive's Proposed Plan to accomplish this change on that Plan's accompanying Land Use Map. Ex. FT-7.

On November 18, 1994, the full Council amended proposed Amendment 107A, returning the proposed designation from industrial to agriculture, with instructions to add a P-suffix condition to the property during adoption of Implementing Regulations. The amendment, Substitute Amendment 107A (hereafter **Amendment 107**), was then adopted as part of the 1994 Plan, Ordinance 11575. Ex. FT-7.

Neither Farm Trust nor Torrance filed a petition for review challenging the 1994 Plan in general or Amendment 107A in particular.

Area Zoning Map #15, a part of the King County Zoning Atlas, dated February 2, 1995, shows the zoning classification for the Torrance property as A-10 - Agriculture, one DU per 10 acres. Ex. FT-16.

## **ALBERG**

Mineral Resource Sites are described in the 1994 Plan Glossary as follows:

The Growth Management Act requires cities and counties to designate, where appropriate, mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals. The Comprehensive Plan designates Mineral Resource Sites which are existing approved mining sites currently either zoned outright for mining or operation under an approved Unclassified Use Permit (those with Quarrying/Mining zoning, Mineral Extraction zoning, or an approved Unclassified Use Permit). The Comprehensive Plan also designates Potential Mineral Resource Sites which are properties on which King County expects some future mines to be located. (See Chapter Six, Natural Resource Lands, page 10 (sic)) Jt. Ex. B,

at 242-3.

The 1994 Plan identifies Mineral Resources on a map following page 108. The Mineral Resources map identifies: Designated Mineral Resource Sites; Legal, Non-Conforming Mineral Sites with Active Permits; Potential Surface Mineral Resource Sites; and Owner-Identified Potential Sub-Surface Coal Sites. The accompanying text states that:

The Mineral Resources Map identifies Designated Mineral Resource Sites so as to conserve King County's mineral resources, consistent with requirements of the GMA. The Designated Mineral Resource Sites are those properties which are currently either zoned outright for mining or those operating under an approved Unclassified Use Permit. Such sites have undergone a formal review and approval process and, therefore, will permit long-term operations to continue with minimal conflicts with adjacent land uses and continued environmental protection. Through the code conversion process, these sites, except those in the forest Production District, will be zoned Mineral (M) under the zoning code adopted in 1992. Jt. Ex. B, following 108

RL-401, the planning policy immediately following the above text, directs the County to "... designate existing approved mining sites (those with Quarrying/Mining zoning, designated Mineral Extraction zoning, or an approved Unclassified Use Permit) as Designated Mineral Resource Sites ..." Jt. Ex. B, at 108.

Planning policy RL-402 directs the County to designate as Mining on the comprehensive Plan Land Use Map all existing approved mining sites; potential mining sites with a pre-existing potential mineral zone; and potential sites with pending rezone applications for Quarrying/Mining zoning. Jt. Ex. B, at 108.

Because information on sites having unclassified use permits (UUPs) was not complete at the time of adoption of the 1994 Plan, the draft atlas did not identify those parcels having UUPs as being M zoned. County's Farm Trust Brief, at 6.

KCC 21A.04.050 defines Mineral zone:

A. The purpose of the mineral zone (M) is to provide for continued extraction and processing of mineral and soil resources in an environmentally responsible manner by:

1. Reserving known deposits of minerals and materials within areas as protection against premature development of the land for non-extractive purposes;
2. Providing neighboring properties with notice of prospective extracting and processing activities; and
3. Providing appropriate location and development standards for extraction and on-site processing to mitigate adverse impacts on the natural environment and on nearby properties.

B. Use of this zone is appropriate for known deposits of minerals and materials on sites that are of sufficient size to mitigate the impacts of operation and that are served or capable of being served at the time of development by adequate roads and other public services; and for sites containing

mineral extracting and processing operations that were established in compliance with land use regulations in effect at the time the use was established. Ex. C A-23

The properties at issue in the Alberg case are:

Alberg & Associates/Pinnacle, parcel Nos. 292306-9060, -9006, -9061, -9009, -9062 and -9052, is located southeast of the City of Renton and northeast of the Cedar River. It is a deposit of expanded shale, sand and gravel, and amber glass sandstone. Parcel -9009, previously designated Q-M, received M zoning in the Implementing Regulations. Ex. A-24, -25, -25(a), -25(c), -34; Ex. C A-17.

Cedar Mountain, parcel Nos. 292306-9005-00, -9037-01, -9038-00, and -9043-03, is located southeast of the City of Renton and is situated on the border between the Newcastle and Soos Creek subareas. It was not identified as a mining site in either Community Plan. Its split zoning was changed in the Implementing Regulations to M for the entire site. Ex. A-23; Ex. C A-17.

West Snoqualmie Valley, parcel Nos. 232606-9007-01, -9004-05, and -9054-04, is located in the Bear Creek planning subarea. It is a 94 acre sand and gravel pit lying west of West Snoqualmie Valley Road and immediately north of the Tolt River Pipeline. The site has been mined since 1915, yielding more than five million tons of product. The mine is currently operating under a County mining and grading permit and Department of Natural Resources (DNR) surface mining permit. It is classified as a Legal Nonconforming Use. The site was identified in Bear Creek Community Plan as an existing mine. The 1994 Plan designates it as a legal, non-conforming mineral site, with an active (unclassified use) permit. Ex. A-18, -19, -22, -33, -34; Jt. Ex. B, map following 108.

East Snoqualmie Valley, located in the Snoqualmie Valley planning subarea, is a sand and gravel, silica sand and clay deposit. It has been mined intermittently over the past fifty years, but is not being mined at the present time. The site was identified in the Snoqualmie Valley Community Plan as a potential mining site. The 1994 Plan also designates it as a potential site. Ex. A-2021; Jt. Ex. B, at map following 108.

The Albergs were aware of the stakeholders' process not later than March 31, 1994. Ex. C A-27.

The Albergs communicated with, and received responses from, the County on the subject of designations for their mining properties, from mid-1992 through the adoption of the 1994 Plan and Implementing Regulations. Ex. A-7, -9 through -17, -19 through -25, -28 through -35.

Alberg did not file a petition for review with the Board challenging the 1994 Plan.

### **III. DISCUSSION of issues**

#### **FARM TRUST Legal Issue No. 1**

*Is Appendix N inconsistent with RCW 36.70A.020(8), (9), (10), and (13), if it fails to, respectively, encourage the conservation of productive agricultural lands and discourage incompatible uses; encourage the retention of open space; protect the environment, including water quality and availability of water; and encourage the preservation of lands with historic and archeological significance?*

## **Positions of the Parties**

### **Farm Trust**

The Farm Trust argues that Appendix N lacks procedural compliance with the Act's planning goals because the County failed to record that it considered the planning goals during the process of drafting and enacting the ordinance. Farm Trust concedes that the record need not contain written documentation of the County's thought processes with respect to the goals, but asserts that the County lacks proof that it discussed or analyzed the goals at all. Farm Trust further argues that because the record contains no written evidence that the County weighed the planning goals, the Board may not grant deference to the County's adoption of Appendix N. Farm Trust asserts that the County has failed to comply substantively with the Act's goals because Appendix N was not guided by consideration of the cited planning goals.

### **King County**

The County maintains that Farm Trust is questioning the appropriateness of allowing non-agricultural uses on the Torrance Property, which is in fact a challenge to Amendment 107A of the King County Comprehensive Plan. Such a challenge is time barred, the County asserts, because Farm Trust failed to file its petition for review within 60 days after publication of notice of the County's adoption of Amendment 107A. The County contends that the Board is barred from considering whether the uses allowed by Appendix N conflict with the Comprehensive Plan because the allowed uses were established in the unchallenged Amendment 107A. The only parts of Appendix N that are at issue, the County argues, are the provisions relating to development standards for impervious surface and building coverage.

## **Discussion**

Because the Board determines below in its conclusions regarding Farm Trust Legal Issues Nos. 4 and 5 that Appendix N does not comply with the Act's consistency requirements, the Board need not address this issue other than to reject an argument made by Farm Trust.

As the Board stated in *WSDF I*:

... cities and counties must comply with the Act's planning goals, found at RCW 36.70A.020, both procedurally and substantively. *See Rural Residents*, at 23- 28. Procedural compliance however, involves the local government merely "considering" the goals. Since consideration is a mental process, procedural compliance can be readily achieved and need not be shown in writing. *See Rural Residents*, at 25. *West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 94-3-0016, Final Decision and Order, at 48 (April 4, 1995).

The Board rejects Farm Trust's contention that because the record contains no explicit indication that the County considered the Act's planning goal, that the Board should not give deference to the County's enactment. RCW 36.70A.320 requires the Board to presume that a comprehensive plan and development regulations are valid. It does not condition this presumption on the record containing an explicit statement by the local government that it considered the Act's planning goals. Instead, substantive compliance with those goals remains a requirement of the Act that all jurisdictions are presumed to have met unless and

until a petitioner proves otherwise.

### **Conclusion**

Because the Board holds below in its discussion and conclusion in Farm Trust Legal Issue Nos. 4 and 5 that Appendix N fails to comply with the Act because it is inconsistent with other provisions of the 1994 Plan and certain provisions of the Implementing Regulations Ordinances, the Board need not and will not otherwise rule on this issue. However, the Board repeats prior conclusions that local governments are not required by the GMA to indicate that the Act's planning goals have been considered.

### **FARM TRUST LEGAL ISSUE NO. 2**

*Does Appendix N fail to comply with the requirements of RCW 36.70A.060(1), (2), and (3) if it fails to assure conservation of agricultural lands; assure that use of lands adjacent to resource lands shall not interfere with continued use of designated lands for agricultural production; and protect sensitive and critical areas?*

### **Positions of the Parties**

#### **Farm Trust**

Farm Trust asserts that the Torrance property is designated as agricultural land in the King County Agricultural Resource Lands Map, a part of the 1994 Plan. It argues that Appendix N renders the property unsuitable for agricultural use, and therefore fails to assure the conservation of designated agricultural lands. Farm Trust contends that Appendix N will effectively prohibit agricultural uses legally existing on the parcels today and will substantially interfere with the continued use of adjacent lands for the production of agricultural products. Finally, Farm Trust argues that the Torrance property is a critical area and Appendix N fails to provide adequate protection of it.

#### **King County**

The County asserts that RCW 36.70A.060(1) requires counties planning under the Act to adopt interim development regulations on or before September 9, 1991, to assure the conservation of agricultural, forest and mineral resource lands. The County argues that it has already enacted regulations under .060 which were previously challenged and upheld.<sup>[1]</sup> The County asserts that under RCW 36.70A.060(3), it has discretion to alter its regulations concerning natural resource lands and critical areas in order to make the regulations consistent with the County's Comprehensive Plan. The County argues that Farm Trust failed to prove that the development regulations enacted pursuant to RCW 36.70A.060(1) must be revised in order to be consistent with the King County Comprehensive Plan.

### **Discussion**

RCW 36.70A.060 Natural resource lands and critical areas—Development regulations provides in relevant part:

(1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within

such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.120.Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals...

(2)Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170...

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

Subsection (3) requires the County to review its natural resource designations and regulations when, as in this matter, it adopts development regulations to implement its comprehensive plan.It authorizes, but does not require, modification of those regulations.

Although the last phrase in subsection (3) uses the auxiliary verb “may,” which is generally a discretionary verb, in the context of this sentence it is contingently directive.If a jurisdiction conducts its mandatory review and concludes that the prior development regulations adopted under the authority of RCW 36.70A.060 are inconsistent with the subsequently adopted comprehensive plan, then the jurisdiction must amend its regulations to make them consistent with the comprehensive plan.If the jurisdiction concludes that the prior development regulations are consistent with the comprehensive plan, it may, but need not, amend those regulations, for instance to serve another policy purpose.In the event it elects to amend the regulations, it must ensure that they remain consistent with the comprehensive plan.*See* RCW 36.70A.040 (3)(d) and .120.

Once a comprehensive plan has been adopted, the focus turns to the question of consistency between development regulations adopted to implement a plan and the comprehensive plan itself.Because Legal Issue No. 4 addresses the question of consistency between Appendix N and the 1994 Plan, the Board will not consider this issue.

### **Conclusion**

The Board will not review this issue because of its holdings and conclusion regarding Farm Trust Legal Issue No. 4 below.

### **FARM TRUST LEGAL ISSUE NO. 3**

***Are the County’s Regulations required to be consistent with the County’s CPPs, and if yes, is Appendix N inconsistent with CPPs on Resource Lands - LU-2; Open Space - LU-1, LU-27, FW-24, CC-7, CC-11 and CC-12; Sensitive and Critical Areas - FW-4, FW-5, CA-3, CA-6, CA-7, CA-8, CA-9, CA-11 and CA-***

### **Discussion**

Farm Trust Legal Issue No. 3 was not briefed; therefore, the Board will deem it to have been abandoned by Farm Trust, and will not consider it further. The Board first considered the question of unbriefed issues in *Twin Falls*. The Board began its analysis by observing that the burden of proof in a case before the Board is on the Petitioner. To meet that responsibility:

... it must show why the actions of a local government are not in compliance with the GMA. Simply raising an issue is not enough for the Board to resolve it. The Board must review the Petitioner's rationale for its contention, and weigh that argument against the local government's response. Without preparing a brief or legal memoranda, a petitioner cannot meet its burden.

....

Finally, the Board notes that it need not determine whether an issue was intentionally abandoned (for instance, a tactical decision or because the issue has subsequently been resolved) or abandoned through neglect. As a general rule, so long as the party was afforded ample opportunity to brief its issues, either by means of dispositive motions or hearing briefs, as in the present instance, the Board will treat an unbriefed legal issue as abandoned; it will not be considered, and will be dismissed with prejudice. *Twin Falls*, supra, at 17-18.

### **Conclusion**

Legal Issue No. 3 was abandoned by Farm Trust; the Board will not consider it further. It is dismissed from this case with prejudice.

## **FARM TRUST LEGAL ISSUE NO. 4**

***Does Appendix N fail to comply with RCW 36.70A.040(3)(d) because it is inconsistent with the County Comprehensive Plan Land Use Map and the following Plan policies: Resource Lands - Chapter 1 Goal A (7); RL-101, RL-104, RL-109, RL-113, RL-301, RL-302 and Substitute Amendment 107A to the Land Use Map, RL-303 and RL-304; Open Space - PR-102, PR-104, PR-105, PR-107, and Substitute Amendment 107A; Sensitive and Critical Areas - NE-301, NE-329, NE-330, NE-332, NE 601 and NE-602; Public Services - F-314; Cultural Resources and Community Character - CR-101, CR-102, CR-201 and CR-202; and Inconsistency with Development Regulations I-401?***

### **Positions of the Parties**

#### **Farm Trust**

Farm Trust asserts that Appendix N is inconsistent with the goals and policies in the comprehensive plan relating to resource lands, open space, sensitive and critical areas, public services, cultural resources, and implementation and planning, enumerated in the statement of Farm Trust Legal Issue No. 4. Farm Trust contends that Appendix N thwarts the preservation and continued viability of agricultural land and

agricultural uses on that land.

### The County

The County argues that Appendix N does nothing more than implement zoning on the Torrance property in accordance with Amendment 107A to the Comprehensive Plan and asserts that Farm Trust's arguments that Appendix N is inconsistent with various resource lands policies are merely belated attempts to challenge Amendment 107A. The County responds to Farm Trust's arguments regarding open space and wetlands protections by asserting that issues relating to drainage, sensitive areas, and environmental concerns will be addressed at the development permit approval stage. The County asserts that Appendix N, which implements the P-suffix condition for the Torrance property, not only complies with the 1994 Plan, but is mandated by Amendment 107A. Further, the County correctly asserts that the uses established by Amendment 107A cannot be challenged at this time.<sup>[2]</sup> The County also contends that Appendix N essentially repeats the uses authorized by Amendment 107A.

### Discussion

#### Consistency

The Department of Community, Trade and Economic Development's Procedural Criteria for Adopting Comprehensive Plans and Development Regulations discusses "consistency" at WAC 365-195-060(7). It opines that "the phrase 'not incompatible with' conveys the meaning of 'consistency' most suited to preserving flexibility for local variations." The Board has stated that "consistency can also mean more than one policy not being a roadblock for another; it can also mean that the policies of a comprehensive plan, for instance, must work together in a coordinated fashion to achieve a common goal." *West Seattle Defense Fund v. Seattle*, CPSGMHB Case No. 94-3-0016 (1995), at 27; *Children's Alliance v. City of Bellevue*, CPSGMHB Case No. 95-3-0011 (1995), at 25.

The Act imposes five major consistency requirements<sup>[3]</sup> on a jurisdiction undertaking adoption of comprehensive plans and development regulations under the Act:

- 1) a comprehensive plan must be internally consistent (RCW 36.70A.070);
- 2) comprehensive plans of one jurisdiction must be consistent with comprehensive plans of cities and counties with common borders or related regional issues (RCW 36.70A.100);
- 3) development regulations must be consistent with the comprehensive plan (RCW 36.70A.040);
- 4) a development regulation must be internally consistent (*WSDF II*, at 7); and
- 5) a development regulation must be consistent with other relevant development regulations (*WSDF II*, at 7).

Where, as here, the challenged enactment is an implementing development regulation, the first requirement is not applicable. Farm Trust Legal Issue No. 4 deals with the third requirement: is Appendix N consistent

with the Comprehensive Plan? Farm Trust Legal Issue No. 5, while stated as a question of internal consistency (and thus implying internal consistency of only one development regulation), falls within the fifth requirement: is the challenged regulation, Appendix N, consistent with other specified development regulations?

### 1994 Plan Policies

Policy statements, in policy documents like CPPs and comprehensive plans, are substantive and directive. The use of either “shall” or “should” in a GMA policy document must be construed to have specific directive meaning. *Snoqualmie v. King County*, CPSGPHB Case No. 92-3-0004 (1993), at 14.

Farm Trust asserts that Appendix N is inconsistent with twenty-four general policies in the 1994 Plan summarized below:

Resource Lands Policies RL-101, -104, -109, -113, -301, -302, -303, and -304. The policies: urge the promotion of resource-based industries; encourage siting of resource-based industries and services in proximity to designated resource lands; encourage cooperative efforts toward long-term productivity and environmental protection of resource lands; direct use of best management practices by resource industries; urge establishment of an Agricultural Commission; identify agriculture as the principal land use in APDs, with development that does not disrupt agriculture operations and has a compatible scale; urge preservation of APD parcels in or near urban growth areas; and discourage conversion of lands in APDs. Jt. Ex. B, at 96-105.

Park, Recreation and Open Space Policies PR-102, -104, -105, and -107. The policies: urge preservation of open space lands; direct each community to provide for open spaces; direct preservation of open space through incentives, regulation or purchase; and will work to promotion and preservation of open space. Jt. Ex. B, at 190-1.

Natural Environment Policies NE-301, -329, -330, -332, -601, and -602. The policies: direct use of incentives, regulations and programs to manage water resources; urge development of a wetland mitigation banking program; direct protection of floodplains, wetlands and riparian corridors; direct protection of identified sole-source aquifers and areas susceptible to contamination; urge protection of fish and wildlife habitats; and work to maintain fish and wildlife through habitat protection. Jt. Ex. B, at 118-131.

Facilities and Services Policy F-314. The policy discourages location of sewer facilities in rural areas. Jt. Ex. B, at 151.

Cultural Resources Policies CR-101, -102, -201, and -202. The policies: mandate protection of cultural resources; support transmission of the region’s cultural legacy, encourage retention of historic resources and community character; and protect those resources through project review. Jt. Ex. B, at 196-7.

Implementation Policy I-401. The policy directs land use regulation to implement and be consistent with the 1994 Plan and other adopted land use goals, policies and plans. Jt. Ex. B., at 228-9.

## Amendment 107A

In addition to the 1994 Plan's general policies discussed above, Farm Trust also claims that Appendix N is inconsistent with Amendment 107A, a Council amendment to the Executive's proposed Plan, that was adopted as part of the 1994 Plan. Amendment 107A states:

Add a P-suffix Condition to the [Torrance] property during the Development Regulations process which will allow appropriately-scaled agriculturally related commercial development consistent with the neighboring agricultural uses, including retail nursery operations, garden stores, health food store, gourmet store, farmer's market, and university agricultural programs, microbrewery, and winery, with food services. Development proposals for the property are subject to a Conditional Use Permit to ensure that the aesthetic building and site design that (sic) do not detract from the open space urban separator and the agricultural character of the area. The P-suffix condition shall also require the site to be self buffered and constructed facilities to be of a high quality design. Ex. FT-7. (Emphasis added.)

## Appendix N

Appendix N is the only enactment adopted by the County that Farm Trust has challenged. It was adopted through Amendment 91A to Ordinance 11653, which adopted zoning to implement the 1994 Plan. It provides:

The following King County Resource Lands Area Zoning P-Suffix conditions are hereby adopted:

### 1. Torrance Property

The following P-Suffix Conditions apply to the subject property consisting of tax lots 0006800021 and 0006800023:

#### A. Permitted Uses

The following uses are conditionally permitted: retail nursery operations, garden store, food stores, specialty food store, university agricultural programs, restaurants, microbrewery, and winery.

Any development proposal is subject to a conditional use permit pursuant to KCC 21.14.040 to ensure that the building and site design do not detract from the agricultural urban separators and open space character of the area. Application for a conditional use permit shall include:

- 1) Demonstration that construction of the development project shall result in minimal disruption to areas of the site that will not have permanent buildings or pavement.
- 2) Wetland and other environmental analyses to define the environmentally sensitive areas on the site that may be limiting factors for development.

#### B. Dimensional Standards

The maximum impervious surface allowed shall be 45% of the project area.This maximum can be exceeded in the case of temporary greenhouses, covered paths, or other farm buildings that do not disrupt the soil.

The maximum building coverage allowed shall be 25% of the project area.This maximum can be exceeded in the case of temporary greenhouses, covered paths, or other farm buildings that do not disrupt the soil.

There shall be no limit on the percent of the project area devoted to retail sales area as long as it is within the maximum percentages allowed for building and impervious surfaces coverage.

### C. Building and Site Design:

Design of site layout, buildings, and landscaping shall be of high quality. Design and scale shall be compatible with and transition into the agricultural urban separators and open space character of the surrounding farmland. Buildings shall have design elements and colors appropriate to an agricultural area.

Landscape design shall reflect agricultural character and maintain the impression of continuous open space between the Green River and S. 277th, especially as viewed from Central Avenue. Type 1 landscape buffers shall be required between the development and both the Green River and the property to the south.

There shall be a 50 ft. buffer along Central Avenue that can include landscaping and pathways. There shall be a minimum 200 ft. from the Green River. However, this area may be used as a park and outdoor entertainment area. There shall be a minimum 100 ft. buffer from the south property line that may be used for non-impervious retail nursery operations, or retention/detention facilities. Jt. Ex. N, Appendix N, at 1-2. (Emphasis added.)

The Board agrees with the County that Amendment 107A of the 1994 Plan or the 1994 Plan itself cannot be challenged here; it is too late to challenge those enactments. Instead, the question posed in this issue is whether the uses, and scale and intensity of the uses, permitted by Appendix N are inconsistent with the cited policies of the 1994 Plan and Amendment 107A. The Board will focus on three segments of Appendix N and compare them with the 1994 Plan: (1) restaurant use; (2) percent of building coverage and impervious surface; and (3) open space character.

#### *Restaurant Use*

It is instructive to compare the above emphasized portions of Amendment 107A and Appendix N. This can be phrased as: Is the zoning regulation inconsistent with the comprehensive plan if the former allows “restaurants, microbrewery, and winery” whereas the latter allows “appropriately-scaled agriculturally related commercial development .... including ... microbrewery, and winery, with food services?”

Amendment 107A allows “appropriately scaled agriculturally related commercial development.” This embodies two key concepts: that the *scale* of any project be appropriate and that any commercial development is to be *agriculturally related*. Significantly, the word “restaurant” does not appear following

the word “including.” At the hearing, the County argued that “restaurant” and “food services” are synonymous and that it is therefore not inconsistent for the zoning to allow a restaurant use. The Board rejects the County’s argument. Significantly, the Amendment 107A in the 1994 Plan language uses the words “winery, with food service” rather than “food service” as a free-standing use, or the actual use listing from which it is derived, “food service establishment.”<sup>[4]</sup> The 1994 Plan’s sentence construction clearly limits the food service aspect to a modifier of the winery use rather than a freestanding restaurant.

This is not a subtle or minor difference. While the Board agrees that the words “restaurant” and “food service establishment” are synonymous, neither of them is synonymous with “winery” and both are beyond the scope of a winery with some ancillary food service component.<sup>[5]</sup> Restaurants are among the most intensive of commercial uses, in terms of human occupancy, hours of operation, required parking and service deliveries. In addition, the definition of winery seems to suggest that any food service or restaurant activity is to be limited to “public concert events.”

In addition, returning to the two key concepts identified above, *scale* and *agriculturally related* uses, the definition of winery makes clear that, as a primary use, it is agriculturally related and appropriate in scale for an agricultural area. Unlimited restaurant use, which Appendix N permits, is not of an appropriate scale and related to agricultural use. The Board is not persuaded by the County’s argument that the conditional use permit process will be used to screen out free-standing intensive restaurant uses that would be inappropriate in scale and incompatible with agricultural uses. It is disingenuous at best, and a violation of RCW 36.70A.020(7) at worst, for a zoning code to, on its face, grant the full scope of a restaurant use right, then use the permit process to reduce the food service component to an ancillary and limited activity.

#### *Percent of Building Coverage and Impervious Surface*

Policy RL-302 of the 1994 Plan states:

Agriculture should be the principal land use in the Agriculture Production Districts. Permanent new construction within districts should not conflict with commercial farming and should be limited to residences, farm buildings, and direct marketing farm stands. New development should also not disrupt agriculture operations and should have a scale compatible with an active farming district. (Emphasis added.)

Policy RL-303 provides:

King County should continue to commit resources and efforts to preserve Agricultural Protection District Parcels in or near the Urban Growth Area because of their high production capabilities, their proximity to markets, and their value as open space. (Emphasis added.)

Policy RL-304 indicates:

Agricultural Production Districts are comprised of blocks of contiguous farmlands where agriculture is supported through the protection of agricultural soils and related support services and activities. Roads and natural features should be used as boundaries for Agricultural Production Districts to reduce the possibility of conflicts with the adjacent land uses. Conversion to other uses should occur only when it can be demonstrated that such lands are no longer suitable for agricultural purposes and

that their removal will not diminish the effectiveness of farming within the Agricultural Production District boundaries. Conversion of Agricultural Production District land may only occur if mitigated through the addition of agricultural land abutting King County Agricultural Production District of equal acreage, and of equal or greater soils and agricultural value. (Emphasis added.)

In contrast to these three 1994 Plan policies, Appendix N allows the maximum building coverage to be 25 percent and the maximum amount of impervious surface to be 45 percent of the Torrance property.<sup>[6]</sup> Furthermore, it indicates that the impervious surface limit can be exceeded, in the case of temporary greenhouses or other farm buildings. The regulation does not define the duration of “temporary” nor does it indicate by how much the 45 percent limit can be exceeded. Appendix N is inconsistent with the three 1994 Plan policies quoted above.

Accordingly, by permitting up to 25 percent building coverage and up to 45 percent of the surface to be impervious and by not limiting the duration or amount of temporary impervious surfaces, Appendix N does not permit agriculture to be “the principal land use” in APDs (RL-302), does not preclude new development from disrupting agricultural operations (RL-302), is not in scale with an active farming district (RL-302), and does not permit the preservation of an APD inside an Urban Growth Area (RL-303). In addition, Appendix N conflicts with RL-304’s requirement to prohibit conversion of land unless the lands are no longer suitable for agricultural purposes and that removal of such land will not diminish the effectiveness of farming within the APD. By permitting up to 25 percent building coverage and 45 percent of the surface lands on the Torrance property to be paved, Appendix N has effectively converted the land from agricultural use without the necessary showing required by RL-304.

### *Open Space*

The 1994 Plan provides in RL-303 that parcels of land in Agricultural Production Districts are valuable open spaces and should be preserved.

One need only look at the aerial photograph of the Torrance Property to appreciate its importance as open space between the cities of Kent and Auburn, within the County’s principal urban growth area. Ex. FT 1111-e.

Further, the County acknowledges that the Torrance property has significant open space and urban separator characteristics, in Appendix N itself:

Any development proposal is subject to a conditional use permit pursuant to KCC 21.24.040 to ensure that the building and site design do not detract from the agricultural, urban separators and open space character of the area.

Design and scale shall be compatible with and transition into the agricultural, urban separators and open space character of the surrounding farmland.

Landscape design shall reflect agricultural character and maintain the impression of continuous open space between the Green River and S. 277th, especially as viewed from Central Avenue. Jt. Ex. N, at 2. (Emphasis added.)

Although a development's site and building design are extremely important, design alone cannot remedy fundamental problems of inappropriate scale and intensity. A strip mall with a sit-down restaurant "dressed up" to resemble rustic farm buildings is still a strip mall; it is not consistent with agricultural or open space character. The scale of development permitted on the Torrance property renders Appendix N inconsistent with Policy RL-303 of the 1994 Plan to preserve the open space and agricultural character of land in the lower Green River Valley APD.

### **Conclusion**

Appendix N, a development regulation designed to implement the Amendment 107A portion in the County's 1994 Plan, does not comply with the GMA because it is inconsistent with the comprehensive plan. Amendment 107A only authorizes food services associated with a winery while Appendix N far more broadly permits restaurants of any type and scale. In addition, because Appendix N allows 45 percent impervious surface coverage and 25 percent building coverage on the Torrance Property, it is inconsistent with Comprehensive Plan policies RL-302, RL-303, and RL-304. Moreover, Appendix N is inconsistent with Policy RL-303's requirement to preserve the open space nature of agricultural lands. Because the Board concludes that Appendix N is so inconsistent with the above-cited provisions of the 1994 Plan, including Amendment 107A, it will not determine whether Appendix N is inconsistent with the remaining policies listed in Legal Issue No. 4.

### **FARM TRUST LEGAL ISSUE NO. 5**

*Do RCW 36.70A.070 and .040(3)(d) require that development regulations be internally consistent, and if yes, does Appendix N fail to comply because it is inconsistent with Ordinance 11621 Section 97(D); Amending Ordinance 10870, Section 576; and King County Code 21A.38.030?*

### **Positions of the Parties**

#### **Farm Trust**

Farm Trust asserts that each planning jurisdiction, when it is adopting development regulations to implement the comprehensive plan, must review the regulations for conserving natural resource lands and critical areas to ensure consistency. It argues that since the comprehensive plan is internally consistent, and development regulations must be consistent with it, the development regulations must also be consistent with each other. Specifically, Farm Trust contends that Appendix N is inconsistent with KCC 21.38.030D because it improperly expands permitted uses and reduces minimum requirements on the Torrance property.

#### **The County**

The County contends that Farm Trust is time barred from alleging a conflict between KCC 21.38.030, Section D, prohibiting use of P-suffix conditions to expand permitted uses or reduce minimum requirements of the Zoning Code, and the provisions of Appendix N regarding permitted uses on the property and maximum allowable impervious surface for those uses. Furthermore, the County argues that the GMA does not require development regulations to be consistent with each other, only that they be consistent with the Comprehensive Plan.

## Discussion

### Development Regulations Must be Internally and Externally Consistent

In its recent decision in *West Seattle Defense Fund II*, CPSGMHB Case No. 95-3-0040, the Board considered for the first time whether a development regulation must be consistent with other development regulations, in order to comply with the Act. The Board reaffirms what it held there, that:

... the Act does not contain an explicit requirement that a development regulation be internally consistent, or that any such regulation be consistent with another development regulation. However, the Board cannot read the above-referenced provisions [of the Act], nor the GMA as a whole, without concluding that the Act necessarily creates such requirements. Accordingly, the Board now holds:

**A development regulation must be internally consistent; and**

**All development regulations must be consistent with each other.**

Sound public policy demands such a holding. It makes absolutely no sense to require that comprehensive plans be internally consistent and implementing development regulations be consistent with those comprehensive plans, yet not require that those same development regulations be internally consistent or externally consistent with other development regulations. To hold that development regulations may be internally inconsistent would be an absurd result. ... *WSDF II*, at 7. (Emphasis in original.)

Having concluded that a development regulation must be consistent with other relevant development regulations, the Board begins its analysis of this issue with consideration of the nature and purpose of P-suffix conditions since Appendix N is such a condition.

#### P-Suffix Conditions

KCC 21A.38.030, one of the Implementing Regulations Ordinances (Ordinance 11621), states:

A. Property-specific development standards, denoted by the zoning map symbol -P after the zone's map symbol or a notation in the SITUS file, shall be established on individual properties through either reclassifications or area zoning. Upon the effective date of reclassification of a property to a zone with a -P suffix, the property-specific development standards adopted thereby shall apply to any development proposal on the subject property subject to county review, including, but not limited to, a building permit, grading permit, subdivision, short subdivision, subsequent reclassification to a potential zone, urban planned development, conditional use permit, variance, and special use permit.

B. Property-specific development standards shall address problems unique to individual properties or specifically defined geographic areas that are not addressed or anticipated by general minimum requirements of this title or other regulations.

C. Property-specific development standards shall cite the provisions of this title, if any, that are to be augmented, limited, or increased, shall be supported by documentation that addresses the need for such condition(s), and shall include street addresses, tax lot numbers or other clear means of identifying the properties subject to the additional standards. Property-specific development standards are limited to:

1. Limiting the range of permitted land uses;
2. Requiring special development standards for property with physical constraints (e.g. environmental hazards, view corridors);
3. Requiring specific site design features (e.g. building orientation, lot layout, clustering, trails or access location);
4. Specifying the phasing of the development of a site;
5. Requiring public facility site dedications or improvements (e.g. roads, utilities, parks, open space, trails, school sites); or
6. Designating sending and receiving sites for transferring density credits as provided in KCC 21A.36.

D. Property-specific development standards shall not be used to expand permitted uses or reduce minimum requirements of this title [21A.] Ex. I, at 95-6. (Emphasis added.)

The question raised by this issue is whether Appendix N is consistent with the above-quoted language from Ordinance 11621. The Board holds that it is not consistent. Appendix N expands the uses on the Torrance Property.<sup>[7]</sup> For example, as discussed in Farm Trust Legal Issue No. 4, Appendix N allows restaurants on the property, which is a clear expansion of the limit placed on the property by Amendment 107A to permit only food services associated with wineries.

A second glaring example of an expansion of uses created by Appendix N is the 45 percent impervious surface limit. KCC 21A.38.030 states that “P-suffix” regulations cannot be adopted to reduce minimum requirements. Yet Appendix N does precisely that — it reduces minimum requirements. The standards for impervious surfaces on land designated Agriculture are found at KCC 21A.12.040. Pursuant to a table found at KCC 21A.12.040A, the maximum building coverage on agriculture lands is 5 percent while the maximum impervious surface coverage for such lands is 15 percent. In bold contrast, Appendix N permits five times the maximum building coverage (25 percent) and three times the maximum impervious surface coverage (45 percent).<sup>[8]</sup> Appendix N clearly permits the reduction of the minimum requirements of the County’s zoning regulations. As such, Appendix N is inconsistent with KCC 21A.12.040A and KCC 21A.38.030.

### Conclusion

Appendix N, a development regulation designed to implement the Amendment 107A portion in the County’s 1994 Plan, is inconsistent with other relevant County development regulations. KCC 21A.38.030

establishes the requirements for property-specific development standards such as Appendix N. It specifies that P-suffix conditions cannot allow the expansion of permitted uses or the reduction of minimum standards. Contrary to this mandate, Appendix N does both. Appendix N is also inconsistent with KCC 21A.12.040A, which establishes significantly lower building coverage and impervious surface limits on agriculturally zoned lands.

## **FARM TRUST LEGAL ISSUE NO. 6**

*Did the County fail to comply with RCW 36.70A.020(11) and .140 because no proposal was disseminated prior to or at public hearings, or otherwise in time to allow public comment before adoption of development regulations?*

### **Positions of the Parties**

#### **Farm Trust**

Farm Trust argues that the County violated the GMA's public participation requirements by failing to disseminate the proposed Appendix N prior to its enactment and not allowing the public adequate time to comment on the proposal prior to the public hearing. Farm Trust asserts that it requested copies of the proposed version of Appendix N before the December 12, 1994, hearing, but the County did not provide them. Farm Trust alleges that the only information available to them was the staff recommendation for the p-suffix condition. Farm Trust argues that this was substantially different than the proposal actually voted on, and therefore did not constitute meaningful notice.

#### **The County**

The County argues that it was not required to offer additional opportunity for public comment when it changed the language in a single p-suffix condition, applicable to one parcel of land. The County contends that for practical reasons, public comment must be completed at some point, and elected officials must retain the ability to change details of a proposed development regulation. The County argues that Farm Trust knew that the amount of impervious surface to be allowed on the Torrance property was an issue and that Mr. Torrance wanted a higher ratio of impervious surface than they favored. The County asserts that the GMA public participation requirement entails allowing the public to have a reasonable opportunity to comment about the substance of the County's Comprehensive Plan and development regulations; this opportunity, the County argues, was afforded to Farm Trust.

### **Discussion**

Because the Board is remanding Appendix N to the County with instructions to bring it into compliance, the Board will not address the substantive merits of Farm Trust's Legal Issue No. 6. However, when the County takes action to bring Appendix N into compliance, it must comply with RCW 36.70A.020(11) and .140.

### **Conclusion**

Because the Board is remanding Appendix N, which will require further action by the County to bring it

into compliance, it is unnecessary for the Board to determine at this time whether the County complied with RCW 36.70A.020(11) and .140. The County will be required to comply with those provisions when bringing Appendix N into compliance.

### KING COUNTY AFFIRMATIVE DEFENSE

The County requests that the Board reconsider its only holding to date regarding the indispensable party rule, *Pilchuck Newberg Organization v. Snohomish County (PNO)*<sup>[9]</sup>, by concluding that the rule applies in cases where a single, non-party property owner is affected by the Board's decision. Accordingly, the County asks the Board to dismiss Farm Trust's Petition for Review. County's Farm Trust Brief, at 44-45.

In reply, Farm Trust urges the Board to deny the County's request and points out that the individual in question, Mr. Torrance, had other means at his disposal such as becoming an intervenor or amicus or appealing the Board's decision to superior court. Farm Trust's Reply Brief, at 16-17.

The indispensable party rule is a common law doctrine.<sup>[10]</sup> The rule provides as follows:

The owner of property is an indispensable party in a writ proceeding challenging a land use decision. To initiate review, all indispensable parties must be named within the time period provided. Later joinder of such parties and relation back under CR 15(c) will be permitted only when the omission is due to excusable neglect. *Waterford Place Condominium Association v. Seattle*, 58 Wn. App. 39, 42, 791 P.2d 908 (1990) citing *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wn.2d 201, 207, 634 P.2d 853 (1981), *Andrus v. Snohomish County*, 8 Wn. App. 502, 507-09, 507 P.2d 898 (1973), *Tellinghuisen v. King County Council*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984) and *North Street Ass'n v. Olympia*, 96 Wn.2d 359, 367-69, 635 P.2d 721 (1981).

The doctrine of indispensability is not jurisdictional but rather is founded on basic equitable principles. *Cathcart*, at 206, citing 3A J. Moore, *Federal Practice* ¶ 19.19, at 19-345 (2d ed. 1979). Yet, it also has constitutional underpinnings:

Procedural due process requires that an individual have notice and an opportunity to be heard before he can be deprived of an established property right. It follows that a person who has acquired a valuable property right as a result of a favorable zoning administration decision must be given notice when judicial review of that decision is sought. *Veradale Valley Citizens' Planning Committee v. Spokane County*, 22 Wn. App. 229, 232, 588 P.2d 750 (1978).

In *Lakemoor Community Club v. Swanson*, 24 Wn. App. 10, 17, 600 P.2d 1022 (1979) the court noted that:

the inability of the trial court to render a judgment that affords all interested persons their rights to due process of law. See 3A J. Moore, *Federal Practice* ¶¶ 19.01, 19.04 (2d ed. 1978). As stated by the Supreme Court in the nineteenth century decision of *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139, 15 L. Ed. 158 (1854), [Indispensable persons are those] [p]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. See also L. Orland, 3A *Washington Rules of Practice*, § 19 (2d ed. 1968). *Mayo v. Jones*, 8 Wn. App. 140, 505 P.2d 157 (1972).

The remedy imposed against a plaintiff for failing to join an indispensable party is to have the action dismissed, generally without prejudice. *Lakemoor Community Club*, at 18; *Toulouse v. New York Life Ins. Co.*, 39 Wn.2d 439, 235 P.2d 1003 (1951); *Williams v. Poulsbo Rural Tel. Ass'n*, 87 Wn.2d 636, 555 P.2d 1173 (1976).

The indispensable party rule has been applied in numerous land use settings including quasi-judicial rezone cases (*see Cathcart*, at 207; *Balser Investments v. Snohomish County*, 59 Wn. App. 29, 795 P.2d 753 (1990); *Nolan v. Snohomish County*, 59 Wn. App. 876, 802 P.2d 792 (1990)), in subdivision plat application cases (*see Nolan*), in shoreline development permit application cases (*see Nolan*), and in master use permit application cases (*see Waterford Place*).

In determining whether to dismiss a case due to the failure to join an indispensable party, the courts have considered several factors:

(1) The successful property owner-applicant is a necessary party because he is “most affected” by the granting of the writ of review, and he should be a party to any proceeding, the purpose of which is to invalidate or affect his interests. *Andrus v. County of Snohomish*, 8 Wn. App. 502, 507-08, 507 P.2d 899 (1473). (2) As a quasi-judicial body, a zoning board has no legal interest in the ultimate decision, but represents the public interest, and is primarily concerned with assisting the court to make a proper judgment. *Sumner-Tacoma Stage Co. v. Department of Public Works*, 142 Wash. 594, 597, 254 P. 245 (1927). By contrast, a property owner would have a very real interest in opposing the demands of others who seek to reverse the decision of the zoning board on appeal. (3) There is nothing in the statutes concerning the writ of certiorari to indicate that an adversary proceeding is not contemplated. (4) A judgment made by the court in a review by certiorari would not be binding upon the property owners who were not made parties, and it, therefore, could not take away the property interests they have established under our zoning laws. *Sumner-Tacoma Stage Co.*, at 600. *Cathcart*, at 207 quoting *Veradale*, at 232-33 (Emphasis added; footnote omitted).

In *PNO*, the Board first addressed whether the indispensable party rule applies to legislative actions taken to meet the requirements of the GMA. The Board concluded:

... that persons appealing matters to a growth management hearings board are not required to name any parties other than the city, county or state agency taking the underlying challenged action. Consequently, PNO's petition for review will not be dismissed for failure to join necessary and indispensable parties prior to the expiration of the GMA's statute of limitations for bringing appeals.

As indicated above, the Board has jurisdiction only over the legislative acts of local legislative bodies, or over the administrative actions of state agencies such as the office of financial management. As PNO points out, nothing in the GMA, the Board's Rules of Practice and Procedure or other Washington Administrative Code provisions, nor published court decisions, requires a petitioner in an appeal to a growth management hearings board to name any party other than the jurisdiction that took the challenged action. The Board agrees with PNO that to invoke such a rule would be overly prohibitive and violative of the legislature's intent, as expressed by RCW 36.70A.010, .020(11), .140 and .280(2), to permit full and continuous public participation in the

GMA process, including the right to appeal. The action being reviewed by this Board is a legislative action — not quasi-judicial. Thus, the individual protections afforded property owners by the indispensable party rule do not apply here. Nonetheless, interested persons, whether they own property or not, are readily permitted to participate in an appeal to the hearings boards as either an amicus or intervenor. See WAC 242-02-270 and -280. *Pilchuck-Newberg Organization v. Snohomish County*, CPSGMHB Case No. 94-1-0018, Order Denying Dispositive Motions, at 17 (February 1, 1995).

The Board has considered the County's request for reconsideration of *PNO* and reviewed the above-referenced cases. It again holds that the indispensable party doctrine does not apply to cases before the Board.

The three growth management hearings boards are quasi-judicial state agencies charged by the legislature with determining whether governments have complied with the requirements of the GMA. In one of its first cases, the Board reviewed case law regarding the authority of such agencies and concluded that the growth management hearings boards' authority must be strictly limited in its operations to those powers granted by the legislature. *Gutschmidt v. City of Mercer Island*, CPSGPHB Case No. 92-3-0006, Order on Prehearing Motions, at 10-13 (December 31, 1992).

Subsequently, the Board has consistently defined its jurisdiction in a narrow fashion and concluded that it does not have authority to determine:

- whether the United States and Washington State **Constitutions** have been violated (*see Gutschmidt*, Order on Prehearing Motions, at 11-13 );
- whether **statutes** other than the GMA or the State Environmental Policy Act (**SEPA**) as it relates to the GMA have been violated (*see Twin Falls, Inc. et al. v. Snohomish County*, CPSGPHB Case No. 93-3-0003, Order on Dispositive Motions, (June 11, 1993) and *Robison et al. v. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order Granting BISD's Dispositive Motion re: Jurisdiction, at 6 (February 24, 1995);
- whether the **common law** has been violated (*see Twin Falls*, Final Decision and Order, at 66 and Order on Dispositive Motions, at 4-12); or
- whether **equitable doctrines** have been violated (*see Cities of Tacoma, Milton, Puyallup and Sumner v. Pierce County*, CPSGPHB Case No. 94-3-0001, Order on Dispositive Motions at 3-4, March 4, 1994).

The indispensable party rule is based on equitable and constitutional considerations. The Board does not have jurisdiction over either equitable doctrines or constitutional provisions. Instead, the Board's jurisdiction is limited to that prescribed by the legislature. The relevant GMA provisions indicate who can file a petition and when. See RCW 36.70A.280 and .290. The Act does not contain a requirement that petitioners name indispensable parties. Because the GMA is silent on that point, the Board does not have the authority to impose such a requirement. Instead, the Board is charged with determining only whether governments have complied with the requirements of the Act. The legislature is presumed to be aware of common law doctrines such as the indispensable party rule. If the legislature intended to impose the

requirement on petitioners that they name all property owners affected by a GMA enactment when filing a petition for review, the legislature would have done so. In the absence of such a requirement, the Board does not have the power to create such a requirement.

Despite the Board's determination that the indispensable party rule does not apply to legislative actions taken by local governments to comply with the Act's requirements, the Board notes that individuals like Mr. Torrance are afforded several protections. First, as Farm Trust contends, Mr. Torrance may be able to appeal the Board's Final Decision and Order in this case. RCW 36.70A.300(5) provides:

Any party aggrieved by a final decision of the hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the board.

It will be up to the courts to decide whether phrase "any party aggrieved" will be narrowly applied to mean only actual parties who appeared before the Board or more broadly to include any person affected by the Board's order. In the event the more liberal interpretation is made, the fact that Mr. Torrance was not named by Farm Trust in the present case will be irrelevant — he will be able to appeal.

Second, even if only a party actually before the Board can appeal its decision, Mr. Torrance is nonetheless still protected. Because the Board is remanding Appendix N with instructions to bring it into compliance with the Act and this order, the Board presumes that the County will have to take some form of legislative action to bring Appendix N into compliance. When the Board holds the compliance hearing in this matter (*see* RCW 36.70A.330) the key issue will be whether the County procedurally has complied with the Board's order. The Board will not determine as part of the compliance hearing process whether the subsequent action taken by the County substantively complies with the Act. Instead, substantive compliance will only be determined if a person files a petition for review challenging the legislative enactment undertaken to comply with the Board's order on remand. *See Friends of the Law and Bear Creek Citizens for Growth Management v. King County*, CPSGMHB Case No. 94-3-0009, Order Granting Dispositive Motions, (November 8, 1994) and *West Seattle Defense Fund v. Seattle (WSDF II)*, CPSGMHB Case No. 95-3-0040, Final Decision and Order, at 17, fn. 9 (September 11, 1995). Mr. Torrance would have the opportunity to be such a petitioner, assuming he meets the Act's standing requirements as specified at RCW 36.70A.280(2), and he timely files his petition for review (*see* RCW 36.70A.290(2)).

Third, it must be remembered that the Board's review is primarily limited to a review of the record below. *See* RCW 36.70A.290(4). Only rarely and in special circumstances will this Board permit witness testimony or admit exhibits outside of the record. In this case, the record is replete with documents submitted by Mr. Torrance that enunciate his position regarding whether his property should be designated for agricultural use in the first place, and if so designated, to what extent restrictions should be placed on the use. The Board is clearly aware of Mr. Torrance's position. By actively participating in the County's process, Mr. Torrance guaranteed protection of his interests. Even had he elected to appear before the Board in this case, he more than likely would have been barred from submitting any "new" evidence. Instead, the merits of his arguments would be added to the material he submitted in the record below and weighed against the relevant provisions of the Act and the County's 1994 Plan and Implementing Regulations.

Aside from the considerations already mentioned, the Board must discuss some practical concerns. The County has asked the Board to impose the indispensability doctrine in any case where only one property owner is affected by a city or county's legislative action. Although such a holding would certainly constitute a "bright line," the Board questions whether any such line is appropriate. Equitable considerations are the basis of the doctrine. Yet, it does not seem fair that in cases with only one property owner, the rule would apply when, under the County's proposal, it would not apply in cases with two or more property owners. Conversely, a rule that every affected land owner in a city or county must be named as a party in a case before the growth management hearings boards raises its own unique problems. Conceivably, many provisions of a comprehensive plan or implementing development regulation affect every property owner within the jurisdiction. If the jurisdiction challenged is a large city or county, literally tens of thousands of persons are affected and would have to be named. Such a requirement would quickly prove prohibitive, especially for individual petitioners. Likewise, the same restraints would apply to cities and counties when they challenge the legislative actions of other cities or counties taken pursuant to the GMA.

Even more troublesome would be a holding that in all Board cases the indispensable party rule applies up to a randomly selected number of affected property owners. For instance, if the requirement were imposed upon petitioners to name the first 10,000 property owners affected by a legislative action, how fair would it be to the remaining property owners who were not required to receive notice? Furthermore, how would a petitioner attempting to apply such a rule know which 10,000 persons had to be named as parties?

One must remember the context of the indispensable party rule. The cases cited above all involve quasi-judicial decisions of local governments. In sharp contrast, actions taken by local governments to comply with the GMA are legislative. Therefore, they are taken to meet the broad public policy goals of the Act for the public good in general rather than to either grant or deny an individual's permit application. The County did cite to one case, *Harvey v. Board of County Commissioners of San Juan County*, 90 Wn.2d 473, 584 P.2d 391 (1978) for the proposition that the indispensable party rule applies to legislative actions. County's Brief, at 46. The case is readily distinguishable. *Harvey* involved an appeal of a shoreline management master program adopted by San Juan County as required by the Shoreline Management Act, Chapter 90.58 RCW. The County moved for dismissal because the plaintiff had failed to name a necessary party, the Washington State Department of Ecology (**DOE**), pursuant to CR 19(a). The court concluded that DOE should be named. It did not even cite the indispensable party rule. Instead, it pointed out that RCW 90.58.090 and .120 mandated that action by DOE was an integral part of the development and adoption of master programs since such documents do not take effect unless DOE approves or adopts the program. *Harvey*, at 474-75.

Rather than holding that the indispensable party rule applies to legislative actions, the Board concludes that *Harvey* stands for the proposition that a petitioner must name the agency with the ultimate responsibility for adopting a shoreline master program — DOE, in addition to the city or county that proposed the master program in the first place. Of significance is the fact that it is the language of the underlying statutory provision that controls. The Shoreline Management Act specified DOE's mandatory role. In contrast, state agency approval of local governments' legislative actions is not required by the GMA. See RCW 36.70A.106.

Accordingly, the Board will continue to rule that the indispensable party rule does not apply to GMA

legislative actions. If the legislature amends the Act to require that petitioners name one, some or all indispensable parties and specifies the conditions for doing so, or if a reviewing court determines that the rule should apply, the Board will certainly enforce the doctrine. However, unless and until such specific direction is given to the Board, the indispensable party defense will be of no avail to respondent cities and counties.

Finally, the Board will react to one point raised by the County. It claims that:

... a Board rule requiring the joinder of the affected landowner (where, as here, only one landowner would be affected) would support these goals without unduly prejudicing potential Petitioners. County's Brief, at 48.

If the indispensable party rule applied in this case, the Board would be required to dismiss Farm Trust's case. Although the *Lakemoor Community Club* court indicated that the dismissal is generally without prejudice, such a holding does not relate to the realities of the GMA. Pursuant to RCW 36.70A.290(2), petitioners must file petitions for review within sixty days of the date notice of adoption was published. Board experience has shown that the vast majority of petitioners file their petitions on the sixtieth day. Although some might argue that this is due to a human propensity to procrastinate, the Board concludes that other legitimate factors contribute to this tendency to file late in the 60-day appeal period. From extensive experience in reviewing the plans, regulations and records prepared by local governments, the Board recognizes that it takes a considerable amount of time to read the often lengthy documents under challenge, let alone the generally voluminous records. It is therefore understandable why petitioners do not file their petitions for review any sooner than near, or on, the sixtieth day. Under these circumstances, if a Board dismisses a case for failure to name an indispensable party, the statute of limitations will have passed and the petitioner will be precluded from filing a new petition for review. Contrary to the County's assertions, no better example of undue prejudice to petitioners exists.

### **ALBERG LEGAL ISSUE NO. 1**

***Did the County violate RCW 36.70A.060(1) and (3) and RCW 36.70A.020(8) in its adoption of Regulations relating to mineral resource lands?***

#### **Positions of the Parties**

##### **Alberg**

Alberg alleges that the County failed to identify, and provide zoning protection to, a large segment of commercial mineral resource lands in King County. The mineral lands not included are: active mines of legal non-conforming status; inactive but previously mined resources; unmined sites with proven resources; and unmined sites with potential resources. Failure to identify such sites as "Mineral" on the current zoning map means that County staff is unaware of their existence, and thus cannot provide protection for those sites from interference by incompatible uses on adjacent lands, as required by the Act. Further, in its development standards for mineral extraction, it fails to provide significant regulatory incentives to enhance mining activities in King County, in violation of the Act's requirements. Alberg asserts that the County must identify, through zoning, all commercial mineral resource lands, so that they will be protected and available for future use, and alleges that the County has failed to assure that

landowners adjacent to a mining site do not interfere with operations on the site.

## County

The County argues that RCW 36.70A.060(1) imposed requirements on the county only when it adopted interim regulations to assure the conservation of natural resource lands. Since it adopted those regulations in 1992, any challenge under .060(1) is time-barred. While agreeing that the requirements of .060(3) are applicable here, the County argues that the duty imposed by that subsection is limited to a review of the interim regulations, and it is not a requirement to change those regulations. The County states that the Implementing Regulations' creation of a new zone for mining, application of that zone to all lands designated "Mining" in the 1994 Plan, and specific provisions dealing with protection from interference with mining operations, meets those requirements. As to the goal to maintain and enhance natural resource-based industries, the County states that it evidenced its concern with the goal throughout the process of adopting interim regulations, designating lands in the 1994 Plan, and adopting development regulations. It further notes that the list of natural resource-based industries listed in RCW 36.70A.020(8) does not include mineral resources.

## Discussion

### Planning Goals

RCW 36.70A.020, Planning goals, " ... shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." Goal (8) provides:

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.

### Designation of Mineral Resource Lands

RCW 36.70A.170(1), Natural resource lands and critical areas — Designations, provides that not later than September 1, 1991, each county shall designate:

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

RCW 36.70A.030(12) defines "Minerals" to "include gravel, sand, and valuable metallic substances. The term "mineral resource lands" is not defined.

RCW 36.70A.030(15) defines "Urban growth":

"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 its as to be appropriate for urban growth.

### Regulations to Conserve Resource Lands

RCW 36.70A.060, Natural resource lands and critical areas — Development regulations, provides:

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

....

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

The Board begins its analysis by examining the sequence of actions the County was required by the Act to undertake regarding natural resource lands. First, in 1991, it was required to designate specified resource lands, including mineral lands. RCW 36.70A.170(1)(c). Second, at the same time, it was required to adopt development regulations to assure the conservation of resource lands which had been designated, including mineral lands. RCW 36.70A.060(1). Third, at the time it adopted its comprehensive plan and implementing development regulations, it was required to review the designations and development regulations, and was authorized to alter the designations and regulations to insure consistency. RCW 36.70A.060(3). The issue of whether the designations were appropriately reviewed, and modified, if necessary to achieve consistency, was not presented by means of an appeal at the time the comprehensive plan was adopted. Therefore, the Board's review here will be limited solely to the question of whether the County complied with the requirement of RCW 36.70A.060(3) to review, and modify the regulations it had adopted pursuant to the requirement of RCW 36.70A.060(1) at the time it adopted its Implementing Regulations.

The burden is Alberg's to demonstrate that the County was required by the Act to take the action he believes it should have taken — to provide zoning protection to all mineral lands in the Implementing Regulations, and to protect operations on designated sites from interference from adjoining property owners.

In *Robison, et al., v. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025 (1995), the Board observed that: "When challenging a local government's compliance with the GMA, the petitioner must first show that the jurisdiction had a duty to take a certain action under the Act." *Robison*, footnote 1, at 4. Here, the question is whether the County was required to designate each and every property with mineral resources, whether or not it is currently mined, or had been mined at an earlier time, or never mined.

The decision to limit designation to a subset of all properties known to have mineral resources was made in the 1994 Plan. As stated in the Plan Glossary:

The Growth Management Act requires cities and counties to designate, where appropriate, mineral resource lands that are not already characterized by urban growth and that have long-term

significance for the extraction of minerals. The Comprehensive Plan designates Mineral Resource Sites which are existing approved mining sites currently either zoned outright for mining or operation under an approved Unclassified Use Permit (those with Quarrying/Mining zoning, Mineral Extraction zoning, or an approved Unclassified Use Permit). The Comprehensive Plan also designates Potential Mineral Resource Sites which are properties on which King County expects some future mines to be located. (See Chapter Six, Natural Resource Lands, page 10 (sic)) Jt. Ex. B, at 242-3.

The 1994 Plan identifies Mineral Resources on a map following page 108. The Mineral Resources map identifies: Designated Mineral Resource Sites; Legal, Non-Conforming Mineral Sites with Active Permits; Potential Surface Mineral Resource Sites; and Owner-Identified Potential Sub-Surface Coal Sites. The accompanying text states that:

The Mineral Resources Map identifies Designated Mineral Resource Sites so as to conserve King County's mineral resources, consistent with requirements of the GMA. The Designated Mineral Resource Sites are those properties which are currently either zoned outright for mining or those operating under an approved Unclassified Use Permit.<sup>[11]</sup> Such sites have undergone a formal review and approval process and, therefore, will permit long-term operations to continue with minimal conflicts with adjacent land uses and continued environmental protection. Through the code conversion process, these sites, except those in the forest Production District, will be zoned Mineral (M) under the zoning code adopted in

1992. Jt. Ex. B, following 108

Planning policy RL-401, immediately following the above text, directs the County to "... designate existing approved mining sites (those with Quarrying/Mining zoning, designated Mineral Extraction zoning, or an approved Unclassified Use Permit) as Designated Mineral Resource Sites ..." Jt. Ex. B, at 108.

Planning policy RL-402 directs the County to designate as Mineral on the comprehensive Plan Land Use Map all existing approved mining sites; potential mining sites with a pre-existing potential mineral zone; and potential sites with pending rezone applications for Quarrying/Mining zoning. Jt. Ex. B, at 108.

The Board holds that the County reviewed its Natural Resource Lands designations, made pursuant to RCW 36.70A.170, when it adopted its 1994 Plan. After that review, it made alterations to those designations in the 1994 Plan. Alberg did not challenge the 1994 Plan; the appropriateness of the designations is not before the Board in this case. The Board further holds that the County reviewed its natural resource lands regulations, adopted pursuant to RCW 36.70A.060, when it adopted regulations to implement the 1994 Plan. Those Implementing Regulations, specifically the parts involving mineral lands, are all that are challenged here. The sole question to be answered in this issue is whether the County complied with RCW 36.70A.060(1) and (3), and was guided by Goal 8, when it adopted the challenged mineral resource regulations.

The Board holds that Alberg has failed to show that the zoning applied by the County to mining sites is inconsistent with the 1994 Plan directions and designations discussed above. Alberg has failed to demonstrate that the County's selective application of Mineral zoning to only a portion of all mineral

resource lands in King County violates the requirements of the Act.

Next, Alberg asserts that the County's failure to zone all mineral resource lands as Mineral means that those properties not so zoned will not receive the protection contemplated by the Act, specifically the requirement at RCW 36.70A.060(1) that:

... Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with the best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals. Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within three hundred feet of [designated] lands contain a notice that the subject property is within or near designated agricultural lands, forest lands, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration.

As an example of the consequences of failure to designate all mineral sites, Alberg notes that the County recently issued an Environmental Impact Statement (EIS) for a plat application on property, Ring Hill Estates, adjoining his West Snoqualmie Valley mineral resources site. He asserts that the EIS failed to acknowledge the mine's existence. Ex. A-34.

The County cites to regulations intended to meet the requirements of RCW 36.70A.060(3): KCC 21A.04.050, describing the purpose of the Mineral zone, Ex. C-23; 21A.22, KCC design and operating standards, Jt. Ex. I, at 63-4; KCC 21A.12.030(B)(9), setbacks from Mineral-zoned land, Ex. C-25; and KCC 21A.08.030(B)(2)(a), notification of purchasers that a property adjoins Mineral-zoned land, Ex. C-26.

The Board acknowledges the problem inherent in not designating all sites with mineral resources, and, as a result, zoning each such site as Mineral use in the Implementing Regulations. Those properties not zoned as Mineral are not afforded the protection available to sites with Mineral zoning. Nonetheless, Alberg has failed to show that the County's exercise of its discretion in including some but not all mineral resource lands in the Mineral zone violates the cited provisions of the Act.

Finally, the Board holds that Alberg has failed to present sufficient evidence to overcome the presumption that the County was guided by planning goal 8 in taking the challenged action.

### **Conclusion**

The County's adoption of zoning to mineral resource lands complies with RCW 36.70A.060(1) and (3) and RCW 36.70A.020(8).

### **ALBERG LEGAL ISSUE NO. 2**

***Are the County's Regulations relating to mineral resource lands inconsistent with the County's Plan, in violation of RCW 36.70A.040(3)(b) and (d), and RCW 36.70A.060(3) and RCW 36.70A.070 and RCW 36.70A.120?***

## Discussion

Alberg did not brief Alberg Legal Issue No. 2; the analysis in Farm Trust Legal Issue No. 3 is applicable here. The Board deems the issue to have been abandoned.

## Conclusion

Alberg Legal Issue No. 2 was abandoned by Alberg; the Board will not consider it further. It is dismissed from this case with prejudice.

### **ALBERG LEGAL ISSUE NO. 3**

*Did the County violate RCW 36.70A.140 and violate RCW 36.70A.020(6) in its adoption of Regulations relating to mineral resource lands?*

## Positions of the Parties

### Alberg

Alberg alleges that the County determined that only those mineral lands designated prior to GMA would be zoned for that use, regardless of a consensus among a “stakeholders’ group” to designate all such lands. Second, Alberg claims that the County arbitrarily favored certain land owners in making the designations, including the County itself. Third, the County failed to provide effective notice for property owners to apply for specific parcel zoning. Fourth, even where the Council agreed that Alberg’s concerns had merit, and directed staff to resolve the identified problems, staff failed to do so.

### County

The County points out that the Act directs it to seek and facilitate citizen involvement in the drafting of implementing regulations, but does not dictate a result nor require that the County heed all public input. The County recites its public involvement process, beginning with the CPPs and Comprehensive Plan, and throughout the process of developing its Implementing Regulations. In particular, it cites to its use of more than 500 stakeholders to review and comment on a “regulations matrix,” and publication and wide dissemination of a draft Zoning Atlas, including proposed Mineral zoning, more than two months before adoption of the regulations. The County further details its broad dissemination of information on how to comment on the proposed regulations; mailings to property owners potentially affected by zoning changes; and public hearings with public notice.

## Discussion

The preamble to RCW 36.70A.020 sets forth the purpose for thirteen planning goals: “... to guide the development and adoption of comprehensive plans and development regulations ....”

RCW 36.70A.020(6) Property rights, provides:

Private property shall not be taken for public use without just compensation having been made. The

property rights of landowners shall be protected from arbitrary and discriminatory actions.

RCW 36.70A.140 establishes the specific requirements for that citizen involvement cited above, directing planning jurisdictions to:

... establish procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed.

In an early case involving County-wide Planning Policies (CPPs), *City of Poulsbo, et al., v. Kitsap County*, CPSGPHB Case No. 92-3-0009 (1993), the Board first discussed the role of citizens in planning activities under the Act. The specific issue was whether a planning policy could delegate to a group of citizens a decision on annexation that would otherwise be solely the responsibility of the County's Commissioners. In holding that such delegation was contrary to the Act, the Board observed:

... the "public participation" that is one of the hallmarks of the GMA, does not equate to "citizens decide." The Act requires the elected legislative bodies of cities and counties, not individual citizens, to ultimately "decide" on the direction and content of policy documents such as county-wide planning policies and comprehensive plans. The Act assigns that policy making authority to city and county elected officials, who are accountable to their citizens at the ballot box. *Poulsbo*, at 36.

In *Twin Falls*, one of the issues decided by the Board was whether the county had taken public input into consideration when it took action to designate and regulate natural resource lands — in that instance, forest lands. One of the petitioners alleged that "... the public's input was not properly considered because the hearing, indeed the entire public participation process, was manipulated." In determining that the County had met the Act's requirements for public participation, the Board explained that:

... 'consider public input' does not mean 'agree with' or 'obey' public input. ... The Board notes that participation is one of the cornerstones of the GMA and encourages local governments to consider public input, even when such consideration, as here, is not explicitly required by the Act. The principle that the public should provide input to legislative bodies is one of the most basic precepts of the comprehensive planning process - that a variety of inputs (data, values, public opinion) must be solicited and weighed and then a decision rendered. Public participation is one of many critical inputs that the Act recognizes as indispensable to comprehensive planning (RCW 36.70A.140, RCW 36.70A.020(11)); however, the Act reserves to city and county legislative bodies the authority to 'adopt' or 'enact' or 'designate' plans and regulations pursuant to RCW 36.70A.040(1), RCW 36.70A.060, RCW 36.70A.120 and RCW 36.70A.170. (Footnote omitted.) *Twin Falls*, at 77.

The Board holds that the above cited rulings, made in cases involving CPPs and designation of forest lands respectively, are equally applicable to the adoption of the Implementing Regulations at issue here. The

County undertook significant efforts to encourage public involvement generally, and property owner involvement specifically, as directed by RCW 36.70A.020(11) and through use of the procedures mandated by RCW 36.70A.140. *See Findings of Fact, Public Participation*. Alberg did not meet the burden of demonstrating that Planning Goal 6, Property rights, obligated the County to undertake a participation process different from that taken under RCW 36.70A.140.

Alberg has alleged that their family members were unable to participate as members of the stakeholders' group in early phases of the planning process. While that may well have constituted an error in exact compliance by the County with its duties under .140, the omission was remedied several months before the action at issue in this case was taken. Further, even during the period when Alberg was not a participant in the Stakeholders' group, a family member communicated general and property-specific concerns to the County on several occasions, thus evidencing both his awareness of the planning process, and of his right to be heard. Alberg has offered no evidence to support the claim that the error is violative of Planning Goal 6.

### **Conclusion**

The County has met the specific requirements of RCW 36.70A.140 to establish procedures for public participation and to comply with those procedures. Its failure to include the Albergs in early stakeholders' meetings was remedied at a later stage, and Alberg had, and took advantage of, the opportunity to review and comment on the County's proposed Implementing Regulations. Alberg has not met its burden to prove that the County violated RCW 36.70A.020(6).

### **ALBERG LEGAL ISSUE NO. 4**

***Did the County fail to be guided by RCW 36.70A.020(6) and RCW 36.70A.160 when its Regulations for agricultural lands limited uses other than agricultural, and development rights were not purchased?***

### **Positions of the Parties**

#### **Alberg**

Alberg asserts that land designated for agricultural use is intended by the County to be used for the public's benefit, citing cultural heritage, scenic views and environmental benefits, while the designation severely restricts building and land uses other than agriculture and does not provide compensation for loss of those uses. Alberg acknowledges that the County has had a program for purchase of development rights for affected properties, but maintains that limitations on uses where landowners have not sold their rights are discriminatory.

#### **County**

The County states that nothing in the 1994 Plan or the Implementing Regulations restricts the use of private lands for their open space value. The Implementing Regulations adopt "Agriculture" (A) zoning for agricultural resource lands, which permits a variety of farm-related uses. Only property owners who choose to sell their development or farming rights to the county find their land limited to use as open space. As to the property rights planning goal, the County points to a 1994 Plan theme that "regulations must be

equitable, reasonable and responsibly administered,” and specifically directs that the Implementing Regulations “[p]rovide for relief from regulations when they would deprive a property owner of uses allowed to similar properties with the same zoning or environmental or other constraint ...”The County points to its designation of urban separators as an action taken to comply with the requirements of RCW 36.70A.160 to identify open space corridors, and notes that no regulations restrict the use of designated lands in order to preserve that open space function.Finally, the County asserts that nothing in the record indicates that the county acted arbitrarily or discriminated when it adopted regulations for agricultural lands.

## Discussion

### Property Rights

One of the Act’s thirteen planning goals deals specifically with property rights:

RCW 36.70A.020(6) Property rights.Private property shall not be taken for public use without just compensation having been made.The property rights of landowners shall be protected from arbitrary and discriminatory actions.

Private property rights are also the subject of RCW 36.70A.370, Protection of private property:

(1) The state attorney general shall establish by October 1, 1991, an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property.

### Identification of Open Space Corridors

RCW 36.70A.160 directs each jurisdiction planning under the Act to identify open space corridors within and between urban areas, and authorizes their purchase. The corridors “ ... shall include lands useful for recreation, wildlife habitat, trails, and connection of critical areas as defined in RCW 36.70A.030.This section further provides that:

Identification of a corridor under this section by a county or city shall not restrict the use or management of lands within the corridor for agricultural or forest purposes.Restrictions on the use of management of such lands for agricultural or forest purposes imposed after identification solely to maintain or enhance the value of such lands as a corridor may occur only if the county or city acquires sufficient interest to prevent development of the lands or to control the resource development of the lands. ... Nothing in this section shall be interpreted to alter the authority of the state, or a county or city, to regulate land use activities... (Emphasis added.)

In effect, Alberg asks the Board to hold that Planning Goal 6 must be interpreted to mean that the imposition of zoning which limits the uses on a property gives rise to the County’s duty to compensate for the uses which are not allowed.The Board rejects this argument.

The Board begins with a review of the GMA’s sequence of planning and regulatory actions regarding

agricultural lands. *See* Alberg Issue No. 1, Discussion - Regulations to Conserve Resource Lands. To summarize, RCW 36.70A.170 required designation of agricultural lands. Next, RCW 36.70A.060(1) required adoption of regulations to assure conservation of the designated lands. Finally, when the county adopted its 1994 plan and regulations to implement the plan, it was required by RCW 36.70A.060(3) to review the designations, and was authorized by that subsection to make modifications if and as necessary to insure consistency. The County's actions to comply with the first two requirements are not before us in this case. The issue here is confined to the requirements Subsection (3), directing that the County review the regulations adopted under RCW 36.70A.060 when it adopted its development regulations, and to exercise its discretion to take action after review.

The heart of Alberg's allegation is the County's failure to provide compensation for loss of non-agricultural uses on lands zoned Agricultural. *See* Alberg's Brief, at 14. A second theme is his observation that "King County several years ago recognized that agricultural lands could be used for the public benefit (open space, etc.) and as private property, the County would have to purchase these rights of the landowner to put agricultural land to other uses." Alberg directs our attention to RCW 36.70A.160. Alberg's Brief, at 13.

The highlighted section of RCW 36.70A.160 deals with restrictions on agricultural uses to meet other objectives related to open space; it does not address the issue here, which is concerned with prohibition of uses other than agriculture through imposition of an Agriculture zoning designation on lands designated and comprehensively planned for agricultural use.

The Board holds that its discussion of how planning goals are to be used, in Farm Trust Legal Issue No. 1, is applicable here. Applying that analysis to Issue No. 4, the Board concludes that the County was guided by RCW 36.70A.020(6) and complied with RCW 36.70A.160 when it adopted its Implementing Regulations.

### **Conclusion**

The County complied with the requirements of RCW 36.70A.020(6) and .160 when it adopted its Implementing Regulations.

## **ALBERG LEGAL ISSUE NO. 5**

*Was the County required to utilize the process developed pursuant to RCW 36.70A.370 when it adopted its Regulations, and if yes, did it fail to do so?*

### **Positions of the Parties**

#### **Alberg**

Alberg charges the County with failing to sufficiently utilize the process provided in RCW 36.70A.370 in adopting its Implementing Regulations, referring the Board to its arguments in Issue No. 3. This failure, Alberg asserts, can result in a taking — the minerals are lost if the County's regulations result in the loss of the ability to mine in the future. Further, the purchase of development rights on some Agricultural lands, but not other lands, as discussed in Legal Issue No. 4, indicates the County's failure to follow the Act and the Attorney General's process.

## County

The County cites to the Board's ruling in *Gutschmidt* that a "private party does not have a cause of action against an agency for failing to utilize the recommended process." It points to the record, which contains the Attorney General's Recommended Process to Avoid Takings (**Attorney General's Process**), and notes that the review process is protected as an attorney client privilege, by its own terms.

### Discussion

RCW 36.70A.370 Protection of private property, provides that:

- (1) The state attorney general shall establish by October 1, 1991, an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. It is not the purpose of this section to expand or reduce the scope of private property protections provided in the state and federal Constitutions. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in case law.
- (2) Local governments that are required to choose to plan under RCW 36.70A.040 and state agencies shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property." ..
- (3) The process used by government agencies shall be protected by attorney client privilege. Nothing in this section grants a private party the right to seek judicial relief requiring compliance with the provisions of this section.

The County does not disagree that it is required to utilize the Attorney General's Process. It asserts that it has done so, as directed by RCW 36.70A.370(2), but notes that subsection (3) protects that utilization from public scrutiny. The Board, holding that its ruling in *Gutschmidt* is applicable in this case, agrees with the County's position; the County need not affirmatively demonstrate that it has utilized the Attorney General's Process to meet the requirement of RCW 36.70A.370.

### Conclusion

The County has met the requirement to utilize the Attorney General's Process pursuant to RCW 36.70A.370.

### **ALBERG LEGAL issue No. 6**

***Did the County fail to be guided by RCW 36.70A.020(8) and to comply with the requirements of RCW 36.70A.060(1) when it adopted its regulations for agricultural lands, relative to parcel size, nature and extent of agricultural operations, and limitations on accessory uses and structures?***

Alberg did not brief Alberg Legal Issue No. 6; the analysis in Farm Trust Legal Issue No. 3 is applicable here. The Board deems the issue to have been abandoned.

**Conclusion**

Alberg Legal Issue No. 6 was abandoned by Alberg; the Board will not consider it further. It is dismissed from this case with prejudice.

**IV. ORDER**

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board enters the following order:

The County's Implementing Regulations Ordinances are in compliance with the requirements of the Growth Management Act, except:

1. Appendix N is not in compliance with the Act because it is inconsistent with the County's 1994 Plan and other relevant development regulations. Appendix N is **remanded** to the County with instructions to bring it into compliance with the requirements of the Act and the Board's Final Decision and Order.
2. Pursuant to RCW 36.70A.300(1)(b), the board directs the County to comply with this Final Decision and Order no later than 5:00 p.m. on December 1, 1995.

So **ORDERED** this 13th day of September, 1995.

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

Note: This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

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<sup>[1]</sup> In *Friends of the Law v. King County*, CPSGMHB Case No. 94-3-0003, Order on Dispositive Motions, the Board concluded that King County had not yet designated and adopted interim development regulations that conserve natural resource lands and that protect critical areas pursuant to the GMA, except for adoption of its Sensitive Areas Ordinance (SAO), King County Ordinance No. 9614, on August 29, 1990. The Board held that the SAO did not include aquifer recharge areas, but did not otherwise rule on whether the SAO substantively complied with the GMA because FOTL's Petition for Review in that case was not filed in a timely manner to challenge the SAO.

<sup>[2]</sup> RCW 36.70A.290(2) provides that "[a]ll petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter...must be filed within sixty days after publication by the legislative bodies of the county or city.

<sup>[3]</sup> The Act is replete with consistency requirements other than the five specified here. *See WSDF II*, at 6-7.

<sup>[4]</sup> Pursuant to KCC 8.40.010(L), "Food service establishment" means:

any fixed or mobile restaurant, coffeeshop; cafeteria; short-order cafe; luncheonette; grill; tearoom; sandwich shop; soda fountain; tavern, bar; cocktail lounge; night club; roadside stand; industrial-feeding establishment; retail grocery; retail food market; retail bakery; private, public, or non-profit organization or institution routinely serving food; catering kitchen; food processing establishment; commissary or similar place in which food or drink is prepared for sale or for service on the premises or elsewhere; and any other establishment or operation where food is served or provided for the public with or without charge. Milk establishments governed by other resolutions of the county shall not be included within the provisions of this title. (Emphasis added.)

<sup>[5]</sup> The Board takes official notice of the following King County Code definitions:

KCC 8.04.030 "Restaurant" or "kitchen" means any place where for pay, persons are served with food or furnished with table board, or where food is cooked or prepared for serving to the public as food, excepting, however, private homes in which table board is served. Res. 585 Regulation 18 part, 1920. (Emphasis added.)

KCC 21.04.922 "Winery" shall mean any building or structure devoted to the manufacture, processing, storage, distribution, or sales of viticultural products including accessory uses such as offices, grounds maintenance, and parking as well as visitor services customarily associated with wineries. Such services may include recreational, retail and restaurant and community service oriented public concert events. Ord. 8167 § 1, 1987. (Emphasis added.)

<sup>[6]</sup>

In *WSDF I*, the Board first briefly pointed out that even though the Act requires a comprehensive plan to be internally consistent, that requirement does not prevent a plan from having exceptions to a rule:

... The fact that the Plan establishes a general policy (i.e., protect single-family areas) but also allows exceptions to that general policy (i.e., allow rezoning in certain instances to multi-family) is not inconsistent. *WSDF I*, at 31.

The Board holds that the same rule applies to development regulations. It is not internally inconsistent for a development regulation to contain regulations that have exceptions. However, a process for formulating exceptions must be clearly enunciated. For instance, if one portion of a development regulation states that "all sidewalks shall be ten feet wide" and another portion of the same regulation states that "all sidewalks shall be five feet wide," the two provisions are inconsistent. On the other hand, if the first regulation states "all sidewalks shall be ten feet wide unless otherwise noted" [or unless specified conditions are met such as obtaining a variance] then a second portion of the regulation can state "sidewalks in area 'X' shall only be five feet wide."

The same analysis holds true between two separate development regulations. If one regulation contains a standard and a second regulation contains a completely contradictory standard, the two regulations are inconsistent unless one contains an exception or variance clause.

In this case, KCC 21A.12.040A, entitled "Densities and dimensions - resource and commercial/industrial zones" is a table showing the maximum amount of building coverage (5 percent) and the maximum impervious surface coverage (15 percent) for resource lands designated Agricultural 10. No exceptions or variance procedures to this limit are listed.

In contrast, the relevant portion of Appendix N states:

The maximum impervious surface allowed shall be 45 % ...

The maximum building coverage allowed shall be 25%...

Since the general regulation does not contain an exception clause and since Appendix N was adopted after the general regulations, Appendix N is inconsistent with the development regulation codified at KCC 21A.12.040A.

<sup>[7]</sup> The Torrance property is zoned A-10 (Agriculture - 10 acre minimum lot size.) Chapter 21A.08, King County Code, contains eight permitted use tables, one for each major grouping of land uses. On each table, the uses allowed on agricultural resource land are set forth, and designated as a permitted (P), conditional (C), or special (S) use, with restrictions as indicated in the accompanying text for C and S uses. In summary, on a parcel designated on the land use map as Agriculture:

KCC 21A.08.030, Residential Land Uses, allows a single detached house (P), and residential accessory uses (P) limited to one accessory dwelling unit per lot.

KCC 21A.08.040, Recreation/Cultural Land Uses, allows parks (P), with facilities limited to trails and trailheads, including related accessory uses such as parking, trails; and arboreta.

KCC 21A.08.050, General Services Land Uses, allows day care (P) as an accessory to residential use or as a home occupation; a veterinary clinic (P) as a home occupation; a stable (P), (C), with a covered riding arena limited to 20,000 square feet; and an interim recycling facility, limited to source-separated yard or organic waste processing facilities.

KCC 21A.08.060, Government/Business Service Land Uses, allows utility facilities (P), (C), limited to transmission, distribution, and service lines and associated facilities; farm product warehousing, refrigeration and storage (P), (C), limited to products produced on-site; and log storage (P), limited to products produced on site.

KCC 21A.08.070, Retail/Wholesale Land Uses, allows forest products sales (P), limited to products produced on-site (except hay), and covered sales areas limited to 500 square feet; and agricultural product sales, with the same limitations; and retail sales as a conditional use, with a floor area not to exceed 2500 square feet, with at least 60 percent of average annual gross sales derived from products grown in the county; sales limited to agricultural produce and plants; limited hours of operation.

KCC 21A.08.080, Manufacturing Land Uses, allows food and kindred products (P), winery/brewery (P); and wood products (P), except furniture, limited to rough milling and planing of products grown on-site with portable equipment.

KCC 21A.08.090, Resource Land Uses, allows growing and harvesting crops (P); raising livestock and small animals (P); growing and harvesting forest products; hatchery/fish preserve and aquaculture (P), subject to Shoreline Management Act provisions; wildlife shelters (P); and resource accessory uses (P), i.e. housing for agricultural workers employed on the premises.

KCC 21A.08.100, Regional Land Uses, allows a jail farm/camp use (S); a non-hydroelectric generation facility (C), (S), limited to cogeneration for on-site use; major communication facility (C), (S), limited to tower consolidations; oil and gas extraction; municipal water production (S); airport/heliport (S), limited to a landing field for aircraft used in forest or agricultural practices or for emergency landing sites; and college/university (P), only as re-use of a public school facility. *Jt. Ex. I*, at 19 - 34.

<sup>[8]</sup> Under Appendix N, 11.25 acres of the Torrance property (45 percent of the 25-acre site) could be covered with permanent impervious surface, and 6.25 acres (25 percent of the 25-acre site) with permanent structures.

<sup>[9]</sup> CPSGMHB Case No. 94-1-0018, Order Denying Dispositive Motions (February 1, 1995).

<sup>[10]</sup> A codified version of the doctrine appears as Washington Superior Court Civil Rule (CR) 19 entitled "Joinder of Persons Needed for Just Adjudication." However, as the Board pointed out in *Cities of Tacoma, Milton, Puyallup and Sumner v. Pierce County*, CPSGPHB Case No. 94-3-0001, Order on Dispositive Motions (March 4, 1994):

The Board's Rules of Practice and Procedure, specifically WAC 242-02-650(3), indicate that the Board may refer to but is not bound by the Washington Rules of Evidence (ER). A similar rule regarding the use of Superior Court Civil Rules (CR) does not exist. However, WAC 242-02-270(2) and WAC 242-02-410(2) specifically cite to a limited portion of these rules. Finally, WAC 242-02-530(4) by implication refers to the CRs when it mentions dispositive motions being similar to motions for summary judgment in superior court. Except for these provisions, that explicitly or by implication, refer to the CRs, the CRs are not binding upon the Board. As is the case with the ERs, a Board is free to refer to the CRs for assistance; however, the Board is not bound by them. As the Board has pointed out on previous occasions, although it has many of the

trappings of a court of law, it is not *per se* a court of law. Instead, it is a quasi-judicial body, not bound by either the ERs or CRs unless Chapter 242-02 WAC so directs. See *Twin Falls*, at 49 and *Northgate Mall Partnership v. Seattle*, CPSGPHB Case No. 93-3-0009, Order Granting Seattle's Motion to Dismiss..., at 8 (1993).

[\[1\]](#) Because information on sites having unclassified use (UUP) permits was not complete at the time of adoption of the 1994 Plan, the Draft Atlas did not identify those parcels having UUP permits as being M zoned. County Brief, at 6.