

Reconsideration,” (**Master Builders’ Motion**), and “Snohomish County’s Petition for Reconsideration” (the **County’s Petition**), attached to which was a “Declaration of Sheila McCallister” (the **McCallister Declaration**).

On December 19, 1995, the Board entered an “Order Requiring Responses to Motions.”

On January 2, 1996, the Board received the “Response of Pilchuck Audubon Society and the Tulalip Tribes of Washington to Petition for Reconsideration by Snohomish County Motion for Clarification, or, in the Alternative, for Reconsideration by Master Builders” (the **Pilchuck/Tulalip Response**).

On January 3, 1996, the Board received the “State’s Response to Snohomish County’s Petition for Reconsideration” (the **State’s Response**).

On January 4, 1996, the Board received “Snohomish County’s Answer to State’s Motion for Reconsideration” (the **County’s Answer**).

On January 10, 1996, the Board received “Snohomish County’s Reply Concerning Petition for Reconsideration” (the **County’s Reply**).

II. DISCUSSION

A. COUNTY’S MOTION

County Basis for Reconsideration No. 1

The Board should reconsider the March 1, 1996 compliance date set forth in the FDO and extend the deadline to not earlier than May 1, 1996.

Discussion

The maximum amount of time that the Board may allow for a local government to comply with a Final Decision and Order is 180 days.RCW 36.70.A.300(1). Paragraph 4 of the FDO provides:

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 Friday, March 1, 1996.**

Because the FDO in this case was entered on December 6, 1995, the latest date that the Board can set for the County to comply is May 6, 1996.

Positions of the parties

County

The County acknowledges that, because it has adopted a GMA Comprehensive Plan, its revisions to the CAO will be implementing, rather than interim, development regulations, and it will therefore need to comply with its own adopted public participation procedures. The County argues that the March 1, 1996 compliance deadline provides insufficient time to adopt revisions to the CAO and still fulfill the GMA's public participation requirements. County's Petition, at 7. The County notes that the mechanics for Planning Commission and County Council review will require at least another two months beyond the current deadline, or not earlier than May 1, 1996. McCallister Declaration, at 3.

State

The State does not object to the extension of the compliance deadline, provided that the Board grants the State's Motion for invalidation of SCC 32.10.430(8). State's Response, at 1. If granted, the State argues that the County's request:

... will allow for a minimum of two additional months of the continued and ongoing exemption from the CAO of 42 percent of the County's legal building lots. This result is inconsistent with the Board's conclusion that the exemption found in SCC 32.10.040(8) constitutes "... an egregious violation of the Act." State's Motion, at 2.

Conclusions regarding County Basis for Reconsideration No. 1

The Board is persuaded that the additional two months are warranted, given the delay caused by this reconsideration process. That portion of the County's Petition will be **granted**, and the County will be given until Monday, May 6, 1996 to comply with the Board's Order.

County Basis for Reconsideration No. 2

The Board should reconsider paragraph 1.A of the FDO which lists provisions of the CAO that exempt or exclude lands from being designated and/or protected as critical areas, and identify with particularity those provisions of the CAO which do not comply with the GMA.

Paragraph 1.A of the FDO provides:

1. Snohomish County Ordinance 94-108, the CAO, is in compliance with the requirements of the Growth Management Act with certain crucial exceptions:

A. All provisions of the CAO that exempt or exclude lands from being designated and/or protected as critical areas, or have that effect, including but not limited to SCC 32.10.030, .040, .110 (11, 21, 23, 33, 38, 41), .410, .420, .510, .520, and .560.

With respect to the request that the Board identify, with particularity, which provisions of the

cited sections do not comply with the GMA, the County makes a general argument and several focused arguments. Its general argument is that, in view of the dire consequences that could follow a county's noncompliance with a Board Order, "it is imperative that the Board's Order be totally free of ambiguity." County's Petition, at 3. With respect to the inclusion of SCC 32.10.040 in the list of non-complying sections, the County argues that:

The Board, by failing to include a discussion of its reasoning for including this section in its list, has provided no guidance to the county in modifying this section so that it would comply with the GMA. County's Petition, at 5.

SCC 32.10.040(2)

This subsection exempts "Legally established structures and uses in existence on the effective date of this chapter" from the CAO. The County argues that, because no petitioner challenged this provision, it should continue to enjoy its presumption of validity. It also argues that:

... this provision does nothing more than recognize that development which occurred before the CARs [i.e., the CAO] were enacted is vested and not subject to the CARs. Is the effect of the Board's Order intended to be that all preexisting development in the county not be subject to the regulations found in the CARs? County's Petition, at 3.

SCC 32.10.110(11) and (23)

These definitions in the CAO define "Erosion Hazard Areas" and "Landslide Hazard Areas", respectively. ^[1] The County argues that, because the GMA does not define these terms, the County has the discretion to do so. The County asks if the Board has concluded that the County is not permitted to use a percentage of slope as a means of defining erosion hazard areas and, if yes, then what the permissible degree of slope would be. The County argues that these definitions do not operate as, in effect, exemptions or exclusions simply by virtue of referencing a 33 percent threshold.

SCC 32.10.110(38)

This is the CAO's definition of "stream". ^[2] The exclusions stated in this definition are artificially created water courses. The County argues that the Board held in *Tracy v. Mercer Island*, CPSGPHB Case No. 92-3-0001 (1993) that, where the GMA does not define terms, a local government has the discretion to define them as it sees fit. The County argues that the Board should delete SCC 32.10.040(38) from its list of non-complying sections.

SCC 32.10.410

[3]

The County argues that this section contains no exemptions or exclusions at all, but simply uses the term “erosion hazard areas” which is defined in a manner which the Board determined does not meet the requirements of the GMA. County Motion, at 6. If this is so, the County asks that the Board clarify that only the definition of “erosion hazard areas” needs to be revised and SCC 32.10.410 should not be included in the list of non-complying sections.

SCC 32.10.420(1)

This section regulates landslide hazard areas but excludes areas where mineral extraction operations are conducted. [4] The County argues that these provisions do not result in the non-designation of landslide hazard areas, but simply state that the regulations set forth in that section do not apply to mineral extraction practices on landslide hazard areas. County Reply, at 3. It argues that there is no requirement that all activities on critical areas be subject to the same protective regulations, and that the types of regulations that might apply to other types of development activities affecting landslide hazard areas, such as setbacks, cannot be applied to mineral extraction activities in a practical or workable way.

SCC 32.10.510

The County points out that .510 contains the County’s stream and wetland classification system. For the stream classification system, the County has adopted the state’s system by reference. As to the wetlands classification system set forth in subsection (2), the County points out that no party challenged this classification system and that it therefore should retain its presumption of validity.

Pilchuck/Tulalip

With respect to Paragraph 1.A of the FDO, the petitioners argue that SCC 32.10.040(11) dealing with erosion hazards and (23) dealing with landslide hazards do not regulate, and therefore protect, lands with less than a 33% slope, and exempt mineral extraction practices from the landslide hazard provisions of the CAO. Pilchuck/Tulalip Response, at 2.

Pilchuck/Tulalip argues that the Board should reject the County’s request to specify a particular critical slope at which erosion and/or slope stability hazards become evident. In support of this view, it cites to a prior Board decision:

Thus, if a local jurisdiction had ten policy options, each of which was in compliance with the GMA, and selected one that the Board believed was not the best option, this Board would nonetheless grant deference to the local legislative decision and find the action in compliance. However, if the local body, faced with the same ten choices, elected an

eleventh option -- one not in compliance with the GMA -- this Board would not hesitate to find the action in non-compliance. *Twin Falls Inc., v. Snohomish County*, CPSGPHB Case No. 93-3-0003(1993), at 223, cited in Pilchuck/Tulalip Response, at 3.

With respect to SCC 32.10.410, Pilchuck/Tulalip argues that this section does not comply with the Act because it adopts a definition of erosion hazard areas which the Board has concluded do not comply with the Act.

Finally, Pilchuck/Tulalip argues that, contrary to the County's assertion, that there was a party that challenged the County's stream and wetland system pursuant to SCC 32.10.510. Petitioners cited to the portion of their prehearing and reply briefs in which they challenged the provision of SCC 32.10510(3) for the exclusion of non-riparian Category 2 and 3 wetlands smaller than 5000 square feet and non-riparian Category 4 wetlands smaller than 10,000 square feet. Pilchuck/Tulalip Response, at 4.

Conclusions regarding County's Basis for Reconsideration No. 2

With respect to the second basis for reconsideration, the County's request for "particularity" as to the offending sections listed in Paragraph 1.A, the Board first offers a caveat.

It is important to bear in mind that how the County proceeds on remand is within its discretion. As the Board first said in *Twin Falls*, cited above by Pilchuck/Tulalip, and has said many times since, the Board's role is not to select from among possible policy choices, but instead to inform a local government when it has selected an option that falls outside the range of GMA-complying options. When a local government selects such a non-complying option, this Board sees its duty

not only as finding noncompliance, but explaining why. [5] That we have attempted to do and in response to the County's request, the following clarification is offered.

SCC 32.10.040(2)

The most fundamental reason that this subsection does not comply with the Act is that it is a part of a section, .040, that is entitled "Exemptions," a label and a concept fundamentally opposed to the Act's directive to protect critical areas. The County may not "exempt" preexisting improvements or uses from the operation of the CAO. Therefore, the Board reaffirms its holding that SCC 32.10.040(2) does not comply with the Act. However, the Board agrees with the County's assessment that "vested" developments are not subject to the CAO. The vested law doctrine operates regardless of what a local government may say in a GMA enactment, and it is within the County's discretion to include such a declaration in the CAO.

The Board notes an important distinction between "preexisting" improvements and uses and "vested" improvements and uses. The County uses the former term in its Motion, while SCC 32.10.040(2) uses the term "legally established" to convey a status akin to vested rights. The fact that improvements or uses are preexisting may not be sufficient to insulate them from a requirement to comply with the CAO. Furthermore, any new improvements or uses, even on sites that are otherwise "legally established" or "vested", will be subject to the CAO. The County may

wish to be clearer on this point in subsequent revisions to the CAO.

SCC 32.10.110(11) and (23)

The GMA requires cities and counties to designate critical areas (RCW 36.70A.170) and to adopt development regulations that protect such designated critical areas (RCW 36.70A.060(2)). RCW 36.70A.030(5) indicates that “critical areas” include:

... the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

The Act does not define every type of area that constitutes a critical area. However, RCW 36.70A.030(10) defines “geologically hazardous areas” as:

... areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns.

The Board makes two important observations about this definition. First, unlike wetlands, areas with a critical recharging effect on aquifers, or fish and wildlife habitat conservation areas -- which are designed to protect the natural environment from people-- geologically hazardous areas are designed to protect development from this type of critical area.

Second, the fact that geologically hazardous areas must be designated, coupled with the phrase in the Act’s definition of these areas (“ ... are not suited to the siting of commercial, residential or industrial development...”) does not constitute an absolute prohibition of development in these areas. Instead, the Board interprets this definition as requiring local jurisdictions to adopt development regulations that adequately protect development from these areas.

The CAO defines “geologically hazardous areas” as follows at SCC 32.10.110(16):

... areas that because of their susceptibility to erosion, sliding, earthquake, or other geologic events, may not be suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns. Geologically hazardous areas include erosion hazard areas, landslide hazard areas, seismic hazard areas and mine hazard areas as defined in this chapter.

In turn, SCC 32.10.110(11) defines “Erosion Hazard Areas as:

... those natural areas sloping 33 percent or more.

The Board reaffirms its holding that SCC 32.10.110(11) does not comply with the Act. The Board has acknowledged that where the Act does not define a term, cities and counties have the authority and the duty to derive their own definitions. Here, the Act does define “geologically hazardous areas.” It does not define “Erosion Hazard Areas” even though a component of geologically hazardous areas is that the area is susceptible to erosion. RCW 36.70A.030(10). Therefore, the County has discretion to adopt its own definition of an erosion hazard area, as long as the definition complies with the Act.

The Board does not conclude that the use of a 33% slope criterion violates the Act. Instead, the Board acknowledges that it is helpful for cities and counties to adopt such a “bright line.” What is wrong with SCC 32.10.110(11) is two-fold: it eliminates any lands with less than 33% slope that

might nonetheless be susceptible to erosion, and it automatically includes any lands with over 33% slope even if they are not susceptible to erosion.

Therefore, the Board **remands** SCC 32.10.110(11) with instructions for the County to amend it so that other criteria are also applied to determine whether land is susceptible to erosion. For instance, the County might consider the soil composition -- lands with certain soils having less than 33% slope may be more susceptible to erosion than other lands with certain soils having more than 33% slope. The test must be whether the land is susceptible to erosion, so as to make it unsuitable for siting certain uses

SCC 32.10.110(23) defines “Landslide Hazard Areas” as:

... areas that, due to a combination of slope inclination, soil type and presence of water, are susceptible to landsliding in accordance with the following criteria:

(a) Areas which slope 33 percent or more and are underlain by soils that consist predominantly of silt and clay; areas which slope 323 percent or more and are underlain by sand, gravel, glacial till or soil-mantled bedrock and which contain springs and seeps; and areas located on an alluvial fan or a canyon susceptible to inundation by debris flows or catastrophic flooding;

(b) areas where landslides are known to have occurred, as indicated by landslide deposits, avalanche tracks, and areas susceptible to basal undercutting by streams or waves; and

(c) slopes of 40 percent or greater.

For purposes of this definition, continuous slopes of less than 33 percent, or slopes with less than 6.25 feet of vertical height are not landslide hazard areas.

The Board also reaffirms its holding that SCC 32.10.110(23) as adopted does not comply with the Act. In contrast to SCC 32.10.110(11) which did not include lands with lands less than 33% slope, SCC 32.10.110(23)(b) would apply to any area susceptible to landslides regardless of the percentage of slope, but for the stand-alone sentence following SCC 32.10.110(23) which indicates that slopes less than 33% are not landslide hazard areas. The County must designate all lands that are susceptible to landslides regardless of slope. Again, a slope criterion is not *per se* a violation of the Act; however, it can only be a bright line under and over which other factors must be considered. SCC 32.10.110(23) can easily be brought into compliance by eliminating the portion of the last sentence that exempts any lands with less than 33% slope from being defined as a “Landslide Hazardous Area.”

Finally, the Board notes that, consistent with its interpretation of RCW 36.70A.030(10), the fact that lands are designated geologically hazardous areas does not preclude development from occurring at these locations. Instead, development may occur if it is protected from the hazard and does not result in harm to other properties. Moreover, the County retains full discretion in how it achieves this protection. It can adopt development regulations that treat lands with specified slopes and other characteristics differently as long as the protections afforded are commensurate with the degree of hazard. Thus, the degree of protection required for areas that, although susceptible to erosion or landslides, are least susceptible, can be less than for areas most susceptible to such hazards.

SCC 32.10.110(38)

The Board agrees with the County's argument on this definition, and will remove it from the list of noncomplying sections.

SCC 32.10.410

The Board agrees with the County that clarification regarding this section of the CAO is

necessary. SCC 32.10.410 as drafted *by itself* does not violate the GMA. ^[6] The Board listed it as failing to comply with GMA because of its reference at SCC 32.10.410(1) to "... erosion hazard areas as defined in this chapter..." As indicated above, the definition of "erosion hazard areas" does not comply with the Act. Although that definition must be amended, it is unnecessary for the County to amend SCC 32.10.410; only if it does not amend the definition will this section be non-compliant.

SCC 32.10.420

SCC 32.10.420 contains the CAO's landslide hazard area regulations. **The Board reaffirms its prior holding that SCC 32.10.420 does not comply with the GMA.** However, the Board will clarify this holding. To begin with, all lands that are susceptible to landslides must be designated regardless of the intended land use. Therefore, SCC 32.10.420 does not comply with the Act since the first sentence exempts mineral extraction practices. However, once the County has designated its geologically hazardous areas, it can utilize different methods and adopt varying regulations depending on the circumstances. Mineral extraction practices are a perfect example of a use for which the County might adopt unique development regulations distinct from other uses of such hazardous areas. This different treatment is justified by the Act itself.

RCW 36.70A.060(2) requires a county to adopt development regulations for critical areas, including designated geologically hazardous areas. Yet a county is also required by RCW 36.70A.170(1)(c) to designate mineral resource lands that have long-term significance for the extraction of minerals and by RCW 36.70A.060(1) to adopt development regulations that assure the conservation of designated mineral resource lands. Although the County cannot exempt mineral resource lands from "landslide hazard area" regulations, it can and should give special treatment to lands that fall within both classifications.

In addition, the Board's holding regarding SCC 32.10.420 was based on the fact that this provision only regulates landslide hazard areas with slopes greater than 33%. As the Board's discussion above regarding the definition of "landslide hazard areas" indicates, the County must designate all areas that are susceptible to landslides regardless of slope. However, it is worth repeating that the County retains full discretion as to what methods it utilizes and what degree of protection it affords designated landslide hazard areas. Less susceptible lands can be treated differently than more susceptible lands and the nature of the development can be taken into account.

SCC 32.10.510

The County's adoption of the State's classification system for Streams and Wetlands occurs in subsections (1) and (2) of SCC 32.10.510. The Board, on reconsideration, concludes that those

sections do comply with the Act. Subsection (3) the CAO, by setting area thresholds for the application of regulatory protection to non-riparian wetlands, does not comply with the Act. Therefore, the Board reaffirms its prior holding as limited to subsection (3).

Although the terms “exemption” and “exclusion” do not appear in SCC 32.10.510, the setting of these area thresholds achieves the same effect for such Category 2 and 3 wetlands smaller than 5,000 square feet and Category 4 wetlands smaller than 10,000 square feet. The County does have the discretion to regulate less stringently such smaller wetlands, such as reducing the size of buffers or using a less rigorous review process, but the Act does not allow it the discretion to simply exempt smaller wetlands from any protection.

B. STATE’S MOTION

State Basis for Reconsideration

The Board should reconsider its decision not to invalidate the exemption found at SCC 32.10.040(8).

Discussion of State’s Motion

SCC 32.10.040 is entitled “Exemptions” and lists development activities that are exempt from the provisions of the Critical Areas Ordinance. Subsection (8) exempts:

Any development activity on a lot, tract, or parcel which was created through the subdivision or short subdivision process or which received binding site plan approval, since the adoption of the State Environmental Policy Act, Chapter 43.21C RCW and prior to the effective date of this chapter.

Positions of the parties

State, Pilchuck and Tulalip

In its prehearing brief, the State argued that SCC 32.10.040(8) not only does not comply with the requirements of RCW 36.70A.040(3), .060(2) and .020, but that the Board should find this exemption invalid pursuant to RCW 36.70A.300. State PHB, at 26. In the State’s Motion, it cited a portion of the **FDO**.

In view of the paramount importance of the structure, values and functions of critical areas, omitting such a large area from the operation of the CAO’s provisions to protect critical areas is an egregious violation of the Act. State’s Motion, at 2, quoting FDO, at 21.

County

In the County's Answer, it argues that the State has not established a valid basis for invalidation. It points out that, in order to invalidate a provision of the CAO, the Board would need to find that the continued validity of SCC 32.10.040(8) "would substantially interfere with the fulfillment of the goals" of the Act, and that neither the Board in the FDO, nor the State in its Motion, had provided such a finding. County's Answer, at 2.

The County further argues that, even if the State's Motion were granted, the exemption's impact upon critical areas is limited due to the existence of other regulations and the relatively small likelihood that significant numbers of the exempted lots will be developed in the next several months.

Conclusions regarding State's Motion

This question is a close call. At this time, the State has not presented evidence or argument sufficient to refute the County's factual allegation regarding the scope of the potential impact of SCC 32.10.040(8). For the Board to invalidate this provision, it must find that this provision substantially interferes with the fulfillment of the goals of the Act. RCW 36.70A.300(2)(a). A majority of the Board has not independently reached such a conclusion. The issue of invalidity may arise again at the compliance hearing. RCW 36.70A.330. Of the 42,000 parcels exempted by this section of the CAO, it is unknown how many have critical areas on them, and of those it is unknown what amount of critical areas are present or what level of critical areas analysis was previously done as part of platting, subdivision, or SEPA review. It is problematic to speculate as to the precise, or even approximate, numbers of lots that are likely to develop or vest within any given time period, and whether those lots have critical areas which would be unprotected under other regulations. Therefore, the Board will **deny** the State's Motion.

Board Member Tovar's Dissent

I agreed with the majority in the FDO that characterized the exemption wrought by SCC 32.10.040(8) as "an egregious violation of the Act." I also agree with the majority in this Order that it is speculative to estimate how many parcels will vest before the County finally acts, on remand by this Board or a court, to eliminate this loophole. This interval of the CAO's noncompliance could result in the loss of two acres of wetlands on two parcels or it could result in the loss of two hundred acres of wetlands on twenty parcels. We simply do not know. More so than the other noncomplying portions of the CAO, which I agree should simply be remanded for deletion or correction, SCC 32.10.040(8), by its very nature, flies directly in the face of the Act's directive to *protect all critical areas*. It has the effect of saying that parcels which *must* be protected by the CAO will *not* be protected by the CAO. Such a blatantly and fundamentally flawed provision substantially interferes with RCW 36.70A.020 (9) and (10) regardless of the speculative magnitude of its impact. I would grant the State's Motion to invalidate this exemption.

C. MASTER BUILDERS' MOTION

Master Builders' Basis for Reconsideration

The Board should reconsider its decision that SCC 32.10.040(6) and (7) do not comply with the goals and requirements of the Act.

Both of the exemptions listed in the Master Builders' Motion deal with utilities. The first exemption is SCC 32.10.040(6) which exempts:

Any replacement, operation, repair, modification, installation or construction by a state or local franchised utility company in an improved right-of-way or utility corridor.

The only term from the above cited subsection that is defined in the CAO is "utility corridor," which means:

areas identified for utility facility development, public right-of-way and other dedicated utility right-of-way. SCC 32.10.110(45).

The second exemption is SCC 32.10.040(7) which exempts:

Normal and routine maintenance and repair of utility facilities, equipment, and appurtenances.

The CAO does not define "normal and routine maintenance" with respect to utilities."

Discussion

Positions of the Parties

Master Builders

The Master Builders' Motion asks the Board for clarification or, in the alternative, reconsideration. It points out that the FDO did not specifically discuss the utility exemptions, but rather found that all of the activities listed at SCC 32.10.040, as exemptions, do not comply with the GMA because of the Board's conclusion that any exemption, as a matter of law, fails to protect critical areas. Master Builders argues that RCW 36.70A.020(1) and (12) require adequate public utility service. It also argues that those knowledgeable about utility services support these exemptions as reasonable and practical. Master Builders' Motion, at 4.

The Master Builders Motion cites to two recommendations in the record in support of limited exemptions for utilities. The first was from a representative of Washington Natural Gas who asked the County to allow:

... normal and routine maintenance or repair of existing utility structures or rights-of-way; the relocation of specific utility facilities ... ; the replacement, operation, repair, modification, or installation or construction in an improved County road right-of-way or improved private access roadway or utility easement... Transcript of Snohomish County Council Public Hearings, November 28, 1994, at 35-36, cited in Master Builders' Brief, at 2.

Also cited was the following recommendation by the Washington Department of Fish and

Wildlife:

The following uses within a Critical Area are exempt from the permit requirements; provided that, adverse impacts are minimized and disturbed areas are immediately restored:

...

For the following utility line activities, when undertaken pursuant to best management practices to avoid impacts to critical areas...Emphasis added.Exh. 56(b), at 4, cited in Master Builders' Brief, at 3.

Pilchuck/Tulalip

The Pilchuck/Tulalip Response referred to its opening brief in the case in chief, at 25-26, and its reply brief, at 21-22, to support its argument that the utility exemption provisions of SCC 32.10.040(6) and (7) would allow construction, maintenance, and repair activities in utility rights-of-way that can have significant long-term effects on streams, wetlands, fish and wildlife. It also argued that the CAO's limitation of work to an improved right-of-way does not assure that there are no valuable critical areas present that could be significantly impacted by the work. Pilchuck/Tulalip Response, at 5, 6.

It further argues that there is no legal justification under the GMA for exempting the functions, structure and values of critical areas within utility rights-of-way from designation or protection. Absent such designation or protection, Pilchuck/Tulalip argues that utility work in such rights-of-way will cause impacts that are not mitigated.

Conclusions regarding Master Builders' Motion

The Board agrees with the Master Builders' argument that adequate provision of public utilities is essential to fulfilling the Act's direction at RCW 36.70A.020(1) and (12). Nevertheless, the Board **reaffirms its prior holding** that the Act requires that all critical areas must be designated and all designated critical areas must be protected, although the manner and degree of protection may vary. FDO, at 19. Just as the County cannot exempt critical areas from regulation, neither can it exempt a class of activities from such regulation. The proposal for a specific use, or continuation of an existing use, on a site containing a critical area cannot act to eliminate a critical area designation on the site, or to excuse compliance with applicable regulations for protection of the critical area.

However, the provision of utility services and the protection of critical areas are not mutually exclusive; on the contrary, the Act requires that they be reconciled. Because the County may utilize different techniques to achieve protection, it has broad latitude to adopt and select from a range of methods for regulating critical areas protection, including methods which allow for the installation, operation and maintenance of utility facilities consistent with such protection.

Master Builders cited one possible means in its brief. The Washington State Department of Fish and Wildlife suggested that the County could develop and administer “best management practices” to accommodate utility services on sites with critical areas, and offered its own recommendations about what those might be. So long as the County provides for such an alternative in its regulations, and the alternative meets the statutory requirement for protection of critical areas, its use is authorized by the Act.

The Board **reaffirms its prior holding** that any categorical exemption of a specific activity from regulations to protect critical areas is, on its face, a violation of the requirements of RCW 36.70A.040(3) and RCW 36.70A.060(2). On remand, the County has the discretion to adopt development regulations that provide means of protection for utility-related activities which differ from those generally applicable to activities affecting a critical area, so long as those alternative means meet the direction of the Act to protect critical areas. To the extent that the Master Builders’ Motion is a Motion to Reconsider, it is **denied**.

III. 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:

1. The State’s Motion is **denied**.
2. The Master Builders’ Motion is **denied**.
3. The County’s Petition is **partially granted** as follows:

County’s Basis for Reconsideration No. 1

The date for compliance with the Final Decision and Order is **5:00 p.m. on Monday, May 6, 1996**. The County shall file, by **5:00 p.m. on Monday, May 13, 1996**, one original and three copies with the Board and serve a copy on each of the other parties of a statement of actions taken to comply with the Final Decision and Order. The Board will then promptly schedule a compliance hearing to determine whether the County has procedurally complied.

County’s Basis for Reconsideration No. 2

The County’s Petition asked the Board to reconsider specified portions of the FDO, paragraph 1. A, at 45, previously quoted. The Board has attempted to clarify each of its holdings regarding the specified provisions and issues the following order on the County’s Petition as follows:

- a) The County’s Petition regarding SCC 32.10.040(2) is **denied**.
- b) The County’s Petition regarding SCC 32.10.110(11) is **denied**. This provision is **remanded** with instructions to the County to amend it so that criteria are established to determine whether land is susceptible to erosion.

c)The County’s Petition regarding SCC 32.10.110(23) is **denied**.

d)The County’s Petition regarding SCC 32.10.110(38) is **granted**.Upon reconsideration, the Board concludes that SCC 32.10.110(38) complies with the requirements of the GMA.

e)The County’s Petition regarding SCC 32.10.410 is **denied**.

f)The County’s Petition regarding SCC 32.10.420 is **denied**.

g)The County’s Petition regarding SCC 32.10.510 is **granted**.Upon reconsideration, the Board concludes that only SCC 32.10.510(3) does not comply with the GMA.SCC 32.10.510(1) and (2) do comply with the Act.

So ordered this 25th day of January, 1996

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

[1] SCC 32.10.110, Definitions,includes the following:

(11) Erosion Hazard Areas means those natural areas sloping 33 percent or more.

(23) Landslide Hazard Areas means areas that, due to a combination of slope inclination, soil type and presence of water, are susceptible to landsliding in accordance with the following criteria:

(a) Areas which slope 33 percent or more and are underlain by soils that consist predominantly of silt and clay; areas which slope33 percent or more and are underlain by sand, gravel, glacial till or soil-mantled bedrock and which contain springs and seeps; and areas located on an alluvial fan or a canyon susceptible to inundation by debris flows or catastrophic flooding;

(b) areas where landslides are known to have occurred, as indicated by landslide deposits, avalanche tracks, and areas susceptible to basal undercutting by streams or waves; and

(c) slopes of 40 percent or greater.

For purposes of this definition, continuous slopes of less than 33 percent, or slopes with less than 6.25 feet of vertical height are not landslide hazard areas.

[2] SCC 32.10.110(38) provides:

“Stream” means those areas where naturally occurring surface waters flow sufficiently to produce a defined channel or bed which demonstrates clear evidence of the passage of water including, but not limited to, bedrock channels, gravel beds, sand and silt beds and water during the entire year.This definition does not include water courses which were created entirely by artificial means, such as irrigation ditches, canals, roadside ditches or storm or surface water run-off features, unless the artificially created water course contains salmonids or conveys a stream that was naturally occurring prior to the construction of the artificially created water course.

[3] SCC 32.10.410 entitled “Erosion hazard areas” provides:

(1)Development activity proposed in erosion hazard areas as defined in this chapter shall be protected by use of best management practices found in Title 24 SCC.

(2)The director may approve erosion control measures which differ from those required by subsection (1) above if the applicant submits a geotechnical report which technically demonstrates and visually illustrates that the alternative measures provide protection which is greater than or equal to that provided by the measures required in subsection (1).

(3)All portions of erosion hazard areas on the site which are undisturbed by development activities shall be designated as Native Growth Protection Areas in accordance with SCC 32.10.240.

[4] SCC 32.10.420(1) provides:

Except for mineral extraction practices, development activity on, or adjacent to, slopes steeper than 33 percent, shall comply with the requirements of this section.

[5] The County asks for this decision to be “totally free of ambiguity” by providing a “discussion of its reasoning” and “guidance to the county ... so that it would comply with the GMA.”County’s Petition, at 5.The Board will honor this request, but is compelled to note thatprior Board decisions have been criticized for doing precisely what the County now asks--- providing not just narrowly drawn legal answers but also the context necessary to convey understanding and, where appropriate, provide direction.This Board has never seen its role as akin to the fortune-telling eight-ball, offering up an unembellished “yes” or “no” that is only slightly less cryptic than “maybe” and “ask again later.”When it is possible and helpful to illuminate the GMA’s uncharted landscape for the benefit of all those obliged to navigate it, this Board will attempt to do so.

[6] SCC 32.10.410 entitled “Erosion hazard areas” provides:

(1)Development activity proposed in erosion hazard areas as defined in this chapter shall be protected by use of best management practices found in Title 24 SCC.

(2)The director may approve erosion control measures which differ from those required by subsection (1) above if the applicant submits a geotechnical report which technically demonstrates and visually illustrates that the alternative measures provide protection which is greater than or equal to that provided by the measures required in subsection (1).

(3)All portions of erosion hazard areas on the site which are undisturbed by development activities shall be designated as Native Growth Protection Areas in accordance with SCC 32.10.240.