

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

Peninsula Neighborhood Association,)	Case No. 95-3-0071
Petitioner,)	[PNA II]
v.)	FINAL DECISION AND ORDER
Pierce County,)	
Respondent.)	
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I. PROCEDURAL HISTORY

On September 22, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board** or **CPSGMHB**) received a Petition for Review from Peninsula Neighborhood Association (**PNA**) in the above-captioned matter. PNA challenged the passage by Pierce County (the **County**) of Ordinance No. 95-79S (the **Ordinance**), which adopted “Development Regulations - Zoning” (the **Regulations** ^[1]) that implement the County’s Comprehensive Plan (the **Plan**), claiming that the Regulations do not comply with the Growth Management Act (**GMA** or the **Act**). The case is referred to as **PNA II** since it is PNA’s second petition in a non-consolidated case brought before the Board. ^[2]

On November 13, 1995, the Board entered a Prehearing Order that established the schedule for this case, including deadlines for filing dispositive motions and motions to supplement the record, and included a statement of five legal issues to be determined by the Board.

On November 16, 1995, Pierce County’s Motion to Dismiss was filed with the Board along with Pierce County’s Brief in Support of Motion to Dismiss which contained three components, each asking for dismissal of the case: for lack of State Environmental Policy Act (**SEPA**) standing; pursuant to the doctrines of *res judicata* and collateral estoppel; and for mootness. PNA responded to this motion on November 22, 1995.

On December 29, 1995, PNA's "Prehearing Brief" (**PNA's Brief**) was filed with the Board. Three documents were attached: excerpts from the Regulations; excerpts from Pierce County's Shoreline Management Use Regulations; and excerpts from Chapter 246 WAC, Washington State Department of Health On-Site Sewage Systems.

On January 9, 1996, the Board entered an "Order Denying Pierce County's Motion to Dismiss."

On January 19, 1996, "Pierce County's Prehearing Brief Responding to PNA" (the **County's Brief**) and five exhibits were filed with the Board.

On January 19, 1996, "Pierce County's Motion to Supplement the Record and Request Official Notice of Resolution No. 96-16" was also filed, as was Pierce County's Exhibit List. Four proposed exhibits, A through D, were attached.

On January 26, 1996, PNA's "Reply Brief" was filed.

On January 30, 1996, the Board held a hearing on the merits of the legal issues raised by PNA's Petition for Review, at the Metropolitan Park District offices in Tacoma, Washington. M. Peter Philley, Presiding Officer in this matter, and Chris Smith Towne appeared for the Board. Thomas D. Morfee represented PNA and Eileen M. McKain represented the County. Court reporting services were provided by Cynthia J. LaRose of Robert H. Lewis & Associates, Tacoma. No witnesses testified.

As a preliminary matter, the County's Motion to Supplement was discussed. Even though the County's Motion to Supplement was filed long past the deadline for filing such a motion, PNA did not object to any of the proposed exhibits being admitted into the record as supplemental exhibits. Therefore, the following exhibits were **admitted**:

County Exhibit A Pierce County Resolution No. 96-16

County Exhibit B Declaration of Sean Gaffney

County Exhibit C Declaration of Mark Truckey

County Exhibit D Oversized map, dated January 18, 1996, and captioned "Shoreline Environments"

II. FINDINGS OF FACT

1) On November 29, 1994, the Pierce County Council (**County Council**) passed and the County Executive approved Ordinance No. 94-82S which adopted the Pierce County Comprehensive Plan (the **Plan**) to meet the requirements of the GMA. *See Gig Harbor v. Pierce County (Gig Harbor)*, CPSGMHB Consolidated Case No. 95-3-0016, Final Decision and Order, Finding of Fact No. 31, at 9.

2) On December 20, 1994, the County Council adopted Emergency Ordinance No. 94-167. It

- established interim zoning regulations (**the Interim Emergency Zoning Regulations**) to implement the Plan and became effective on January 1, 1995. Ex. 7000, Ordinance portion, at 1.
- 3) On January 1, 1995, the Plan also took effect. *See Gig Harbor*, Finding of Fact No. 35, at 9.
- 4) On January 27, 1995, the Board received the first of seven petitions for review challenging the Plan and related enactments. On February 3, 1995, PNA filed a petition for review in that matter which was consolidated into one case, *Gig Harbor*.
- 5) On February 15, 1995, the County Council held a post-adoption public hearing on the Interim Emergency Zoning Regulations. Ex. 7000, Ordinance, at 2.
- 6) On March 21, 1995, the County Council adopted Resolution No. R95-16, requesting the Department of Planning and Land Services (**PALS**) to prepare text for the final development regulations that would implement the Plan, and Resolution No. R95-31, asking PALS to prepare a county-wide zoning atlas that would also serve to implement the Plan. Ex. 7000, Ordinance, at 2.
- 7) On March 29, 1995, the Pierce County Planning Commission (**the Planning Commission**) began hearing public testimony and reviewing the proposed final implementing regulations. Exhibit (**Ex.**) 7000, Ordinance, at 3.
- 8) On April 28, 1995, a Draft Supplemental Environmental Impact Statement was issued on the proposed final implementing regulations. Ex. 7000, Ordinance, at 3.
- 9) On April 26, May 3, 17, 23, 24, and 31; and June 7, 8, 12, 13, and 14, 1995 the Planning Commission held additional public hearings on the proposed final implementing regulations. During the same period, the County Council's Planning and Environment Committee held study sessions and public hearings on the proposed final development regulations on May 18 and 25; and June 1 and 8, 1995. Ex. 7000, Ordinance, at 3. *See also* ex. 7251.
- 10) On June 14, 1995, the Planning Commission recommended the adoption of the proposed final regulations, as amended. Ex. 7000, Ordinance, at 3.
- 11) On June 15, 22, and 29; and July 6, 1995, the County Council's Planning and Environment Committee held public hearings on the proposed final implementing regulations. Ex. 7000, Ordinance portion, at 4.
- 12) On July 7 and 10, 1995, the County Council held special meetings to hear public testimony on the proposed final development regulations. Ex. 7000, Ordinance, at 4; *see also* Ex. 7403.b.
- 13) Testimony from County planning staff at the July hearing revealed that, with passage of the Plan, Pierce County has between 1,000 and 10,000 non-conforming uses of which almost ninety percent would be commercial. Ex. 7403.b, at 28-29.
- 14) On July 11, 1995, the County Council passed Ordinance No. 95-79S, captioned as follows: "An Ordinance of the Pierce County Council Repealing Title 18 of the Pierce County Code; Adopting a New Title 18A of the Pierce County Code Entitled 'Pierce County Development Regulations-Zoning'; Adopting the Pierce County Zoning Atlas; and Adopting Findings of Fact." Ex. 7000. The actual final Regulations that implement the Plan are attached to and incorporated by reference as Exhibit A to the Ordinance.

15) On October 31, 1995, the Board issued its Final Decision and Order in *Gig Harbor* that found a majority of the Plan complied with the GMA, but remanded specified portions of the Plan that did not comply.

16) The Board's Final Decision and Order in *Gig Harbor v. Pierce County* was not subsequently appealed to superior court.

17) In November 1995, the County Council passed Ordinance No. 95-132S amending the Plan, including amendments to the shoreline policies in its Plan. Ordinance 95-132S was subsequently appealed to the Board, *Cole v. Pierce County*, CPSGMHB Consolidated Case

[\[3\]](#)

No. 96-3-0009c, to which PNA is a party.

18) On January 16, 1996, the County Council passed Resolution No. R96-16, captioned: "A Resolution of the Pierce County Council Confirming the County's Commitment to Comply with the CPSGMHB Order in Case No. 95-3-0016" [*Gig Harbor*]. Ex. A.

19) April 3, 1996, is the date the Board established as the deadline for the County to achieve compliance with the Board's Final Decision and Order in *Gig Harbor*.

III. DISCUSSION AND CONCLUSIONS

PNA's GMA Standing

The County contends that PNA lacks standing to bring a GMA appeal because its Petition for Review insufficiently sets forth a statement indicating the basis for standing. County's Brief, at 5. Part IV of PNA's Petition for Review, at 3, provides:

PNA derives its standing to petition the Board from the Growth Management Act, specifically RCW 36.70A.110. Members of PNA formally testified in public hearings on Ordinance 95-79S. In addition, the Board granted standing to PNA in Case No. 95-3-0016, *City of Gig Harbor, et al. v. Pierce County*.

In response to the County's standing issue, which was raised for the first time in the County's Brief (filed on January 19, 1996), PNA indicated:

... members of PNA (including Tom Morfee) did appear during the County's public hearings, workshops, etc. on Ordinance 95-79S and did enter oral and written testimony on the matter, thereby satisfying the above requirement. We are prepared to offer evidence of this if necessary. PNA's Reply, at 6 (filed on January 26, 1996).

The Board notes that according to one of the County's senior planners who supervised the preparation and publication of the Regulations:

Peninsula Neighborhood Association (PNA) was invited to attend the informal citizens advisory group. However, a representative of PNA attended only one of the several meetings held by the informal citizens advisory group. Ex. B (Declaration of Sean Gaffney), at ¶5.

RCW 36.70A.280(2) sets forth the GMA standing requirements:

A petition may be filed only by the state, a county, or city that plans under this chapter, a person who has either appeared before the county or city regarding the matter on which a

review is being requested...

Under the GMA, a "person" is "any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character." RCW 36.70A.280(3). Therefore, one way for a person to obtain standing is to appear before the county or city regarding the matter on which a review is being requested. This method is called "appearance standing." See *Friends of the Law v. King County*, CPSGMHB No. 94-3-0003, Order on Dispositive Motions, at 8. The Board has given guidance as to what actions constitute appearance standing:

Appearance before a local legislative body can be accomplished either [1] by personally appearing at a [public] hearing or meeting at some time during the process, [2] by personally appearing and participating or testifying at a [public] hearing or meeting during the process, or [3] by submitting written comments to the local jurisdiction or its agents... *Twin Falls, et al. v. Snohomish County*, CPSGMHB Case No. 93-3-0003 (1993), Order Partially Granting Petitioners' Motions to Supplement the Record and Order Granting County's Motion for Limited Discovery, at 6.

The Board holds that PNA does have standing to bring this appeal. A statement at the end of PNA's Petition for Review indicates that the petitioner read the contents of that document and believed them to be true; Ex. 7030 consists of a letter inviting Mr. Morfee of PNA to participate in a weekly citizens' advisory meeting to obtain his "input and advice" in the development of the Regulations and confirms PNA's participation in the development of the Plan; and the Declaration of Sean Gaffney confirms that a PNA representative did attend a citizens' advisory group meeting reviewing the Regulations; [4] Furthermore, the record contains no information that contradicts PNA's claim to standing, such as an affidavit or declaration indicating that members of PNA did not appear before the County regarding the Regulations.

Mootness

The County asks the Board to dismiss Legal Issues Nos. 1, 2 and 4 for mootness [5] due to its "... demonstrated willingness to comply..." with the Board's Final Decision and Order in *Gig Harbor*, as evidenced by the passage of Pierce County Resolution No. 96-16 (Ex. A to County's Brief). County's Brief, at 6. The Board does not question the County's willingness to act in compliance with the *Gig Harbor* decision. In fact, it presumes that jurisdictions will act in good faith to comply with the Act. Here, the County's intent to do so is clearly evidenced by both the fact that the *Gig Harbor* decision was not appealed and by the passage of Resolution No. 96-16. Unfortunately, April 3, 1996, is the compliance deadline that the Board established for the County in *Gig Harbor*, while this Final Decision and Order must be issued no later than March 20, 1996. The Board has not been notified of any formal action by the County that indicates that either the Plan or its implementing Regulations have been amended, either of which might make Legal Issues Nos. 1, 2 and 4 moot. Although the questions raised might become moot in the future, they have not yet become so. Therefore, the Board must meet its statutory obligation to

issue a final decision on PNA's Petition for Review within 180 days of receipt of that petition.

Accordingly, the Board holds that this case is not moot.

Closely related to the County's mootness arguments is its contention that the Regulations comply with the Act because they implement and are consistent with the Plan as required by RCW 36.70A.040(3). Pursuant to RCW 36.70A.320, both a comprehensive plan and implementing development regulations are presumed valid upon adoption. The County points out that its Plan was adopted on November 29, 1994, and the Regulations on July 11, 1995. The Board's Final Decision and Order in the *Gig Harbor* case was not entered until October 31, 1995. Consequently, the County argues that it was impossible for it to realize that the Board would find portions of the Plan in noncompliance:

PNA now seems to suggest that the County should have not only predicted the Board's [October 31, 1995] decision, but should have adopted regulations [on July 11, 1995] which implement a decision that did not yet exist. County's Brief, at 4.

The Board notes that one of the practical problems created by the GMA is the fact that comprehensive plans and the development regulations that implement those plans need not be simultaneously adopted. RCW 36.70A.040(3) authorizes cities and counties to take up to an additional 180 days to adopt development regulations that implement a comprehensive plan. This feature of the Act itself is based on practical realities. Given the length of time afforded jurisdictions to adopt comprehensive plans in the first place, and the magnitude of comprehensive planning under the GMA, it is extremely difficult for jurisdictions to adopt plans and their implementing development regulations simultaneously.

As a result of this practical and legal reality, the situation that presents itself in this case arises where the Board initially reviewed only the comprehensive plan because the implementing development regulations had not yet been adopted within the sixty day statute of limitations for appealing the Plan. See RCW 36.70A.290(2). Then, subsequently, the Board must review the implementing development regulations that were based upon a comprehensive plan that, at the time the regulations were adopted, was presumed valid but subsequently was found in noncompliance.

The question remains, how will the Board reconcile the dilemma posed by this set of facts? One theoretical solution would have been for the Board, at the time the *Gig Harbor* decision was made, pursuant to RCW 36.70A.300, to have invalidated any and all development regulations that implemented the Plan. To date, the Board has taken such an action only once, in *Bremerton, et al. v. Kitsap County*, (***Bremerton***) CPSGMHB Consolidated Case No. 95-3-0039. The *Bremerton* case is easily distinguishable from the present case since in the former the entire Kitsap County Comprehensive Plan was found invalid. The Board had no choice but to also invalidate any development regulations that attempted to implement that invalid plan.

Here, although portions of the Pierce County Comprehensive Plan were found in *Gig Harbor* to be in noncompliance with the Act, no provisions were determined invalid. RCW 36.70A.300 does not authorize the Board to make a determination of invalidity unless it is convinced that the continued validity of a comprehensive plan or development regulation would substantially

interfere with the fulfillment of the Act's goals. Accordingly, when making the *Gig Harbor* decision on October 31, 1995, the Board summarily dismissed the notion of invalidating the Regulations which had been appealed on September 22, 1995. Instead, the Board elected to review them in this case. Other than invalidating the development regulations when finding the Plan in noncompliance in *Gig Harbor*, or waiting until now to review them in this case, or waiting until the compliance hearing in the *Gig Harbor* case and invalidating portions of the Plan and related implementing development regulations at that time, the Act affords the Board no other choices.

The Board concludes that its review of the Regulations is not limited, as the County urges, to just determining pursuant to the requirement of RCW 36.70A.040(3) whether the Regulations implement and are consistent with the Plan, albeit a partially non-complying comprehensive plan. To reach such a result would lead to a rather absurd result where the Board could be forced to find development regulations that are blatantly in violation of the GMA's goals and requirements to be in compliance simply because they were consistent with a comprehensive plan that the Board may have already determined failed to comply with the Act.

RCW 36.70A.280, .290 and .300 require comprehensive plans and development regulations that implement them to comply with the Act's requirements, including procedurally and substantively complying with the goals of the GMA set forth at RCW 36.70A.020. *See Association of Rural Residents v. Kitsap County*, CPSGPHB Case No. 93-3-0010, where the Board held that the section of the Act setting forth the planning goals, RCW 36.70A.020, has both a procedural and a substantive element. **Therefore, the Board holds that it will examine development regulations to determine whether they comply with all the Act's relevant goals and requirements, in addition to the requirement at RCW 36.70A.040(3) that such regulations be consistent with the comprehensive plan.**

Legal Issue No. 1

Did the County comply with RCW 36.70A.020(2), .110(2), .210(1) and Pierce County's County-wide Planning Policies (PCCPPs) 2.1.1 and 2.1.2 if the development regulations and zoning adopted by Ordinance 95-79S exceed the Office of Financial Management population projections?

PNA voluntarily withdrew Legal Issue No. 1 in view of the Board's remand in the *Gig Harbor* decision of the County's "land supply market factor." Therefore, the Board will not address this issue further.

Conclusion No. 1

The Board will not address Legal Issue No. 1 since PNA has voluntarily withdrawn it.

Legal Issue No. 2

Do the County's development regulations and zoning for Rural Activity Centers (RACs), codified at Pierce County Code (PCC) 18A.25.150(A)(2)(a), 18A.25.150(D), 18A.25.180(B)(3), 18A.25.270 and 18A.25.280 comply with RCW 36.70A.070(5), .110(1) and (3)?

Positions of the Parties

PNA's Position

PNA contends that the Regulations for Rural Activity Centers (**RACs**), specifically those codified at Pierce County Code (**PCC**) 18A.25.150(A) and (D), PCC 18A.25.180(B), PCC 18A.25.270 and PCC 18A.25.280, permit “large scale urban uses in rural areas...” that are “far beyond a scale and character appropriate to the rural environment” or far beyond those necessary to “meet the needs of the local rural community.”PNA’s Brief, at 3-4.PNA contends that the Regulations allow a scale of development in the rural area that “... could be as large as, and in some cases much larger than, the existing commercial and industrial developments in the urban areas of the Gig Harbor UGA [**Urban Growth Area**].”PNA’s Reply, at 2.Unlimited industrial uses are cited as an example that on its face violates the Act.

County's Position

The County contends that the Regulations for the RACs merely implement the Plan’s RAC policies and therefore they comply with the Act.Nonetheless, the County points out that it is in the process of modifying the Plan’s and the Regulations’ RAC designations. County’s Brief, at 7. In addition, the County maintains that as a pre-condition to any proposed use in a RAC, PCC 18A.25.150(A)(2)(a) requires that the use must “... meet the needs of a local rural community.”Finally, the County alleges that PNA failed to meet its burden of showing how rural-based commercial and industrial uses are incompatible with rural areas.County’s Brief, at 8.

Discussion

Three different Rural Centers zone classifications are recognized in the Regulations:

- Rural Activity Centers,
- Rural Neighborhood Centers, and
- Rural Gateway Communities.PCC 18A.25.150(A)(2), Ex. 7000, at 37.

A RAC is not defined in the Regulations’ definitional section, PCC 18A.15.020.However, the Plan’s Glossary defines a RAC as a land use designation meaning:

... a location where commercial businesses are concentrated, providing goods and services meeting the needs of a local rural community.Resource based industrial operations can also be found in these centers.Plan, Appendix B, at B-20.

PCC 18A.25.150(A)(1) indicates the purpose of rural centers generally:

To provide for commercial growth in rural areas...The functions of Rural Centers include serving the retail and other commercial and business needs of the local communities ... at a scale and character appropriate to the rural environment.Ex. 7000, at 37.

PCC 18A.25.150(A)(2) generally describes Rural Centers as:

... concentrations of shopping, services, and employment in rural areas....Ex. 7000, at 37.

PCC 18A.25.150(A)(2)(a) further describes the RAC zone classification as:

... a concentration of commercial and industrial businesses that provide goods, services,

employment, group homes, and senior housing which meet the needs of a local rural community. Ex. 7000, at 37-38.

PCC 18A.25.150(D) consists of a series of tables indicating eight major permitted use categories [6]

and types within rural zone classifications, including the RAC. See PCC 18A.25.200, Ex. 7000, Regulations, at 54. The letter “P” next to a specified use within a RAC signifies that the use is permitted outright; the letter “C” signifies that a conditional use permit (CUP) [7] is required; and the letter “A” means that administrative review is required. There are 70 subcategories of uses within the eight major use categories. Within a RAC, 35 of these subcategories are permitted without condition (i.e., are assigned the letter “P”).

PCC 18A.25.270 contains commercial use category regulations. Pursuant to the preamble to PCC 18A.25.270, within that use category, the only use not permitted outright is “... [A]ny store or variety of stores exceeding 80,000 square feet...” [8]. Stores larger than 80,000 square feet are

considered a Commercial Centers Use Type, [9] which requires a CUP. Ex. 7000, Regulations, at 64; see also at 48. Conversely, all of the remaining subcategories of commercial uses are permitted as long as they are less than 80,000 square feet: amusement and recreation; building materials and garden supplies; bulk fuel dealers; business services; buy-back recycling center; eating and drinking establishments; food stores; level 1 and 2 lodging; mobile, manufactured and modular home sales; motor vehicles and related equipment sales/rental/repair and services; personal services; storage; pet sales and services; rental and repair services; sales of general merchandise; and wholesale trade. Ex. 7000, Regulations, at 48-49.

PCC 18A.25.280 indicates that industrial use categories include:

... the on-site production, processing, storage, movement, servicing, or repair of goods and materials.... The Industrial Use Categories typically have one or more of the following characteristics: relatively large acreage requirements, create substantial odor or noise, create heavy traffic passenger vehicle and/or truck volumes, employ relatively large number of people, and/or create visual impacts incompatible with residential development. Ex. 7000, Regulations, at 69 (emphasis added).

Unlike commercial uses, where those uses permitted without condition are limited to less than 80,000 square feet, the Regulations place no size limit on industrial uses. Within the industrial use category, basic manufacturing, contractor yards, level 1 printing, publishing and related industries and level 1 salvage yards/vehicle storage facilities are permitted outright while food and related products, intermediate manufacturing and intermediate/final assembly, offsite hazardous waste treatment and storage facilities, level 2 printing publishing and related industries, level 2 salvage yards/vehicle storage, and level 1 warehousing, distribution and freight movement are allowed upon obtaining a CUP. Ex. 7000, Regulations, at 49-50.

PCC 18A.25.180(B)(3) is the fifth specific subsection of the Regulations challenged by PNA in this issue. It places a further limitation upon all non-residential uses within the Tacoma Narrows

Airport Area of Influence. Pursuant to PCC 18A.25.180(B)(3)(a), all such uses permitted outright are subject to Administrative Review by the Director of PALS. Pursuant to PCC 18A.25.180(B)(3)(b), all such uses permitted with a CUP are subject to hearing examiner review. Pursuant to PCC 18A.25.180(B)(3)(c), no additional dwelling units are permitting within the Tacoma Narrows Airport Area of Influence. Ex. 7000, Regulations, at 52.

[10]

In *Gig Harbor*, the Board reviewed the Plan's specific RAC policies; the Board held:

... that the Plan's RAC policies do not limit non-residential uses to only those uses that, by their very nature, are dependent upon being in a rural area and are compatible with the functional and visual character of the immediate vicinity. Instead, RUR Policy 6.5(b) focuses on established mixed commercial land uses. In *Vashon-Maury* [*Vashon-Maury, et al., v. King County*, CPSGMHB Consolidated Case No. 95-3-0008 (1995)] the Board rejected the concept that new commercial or industrial uses of any nature can be permitted in the rural area. See Ex. 74, which lists a series of "Permitted Uses" in RACs, the vast majority of which are not dependent on being located in a rural area. The Plan does not adequately restrict such uses in the rural area. Although RUR Policy 6.6.3 states that expansion of RACs should be compatible with adjacent uses, this policy is problematic for two reasons. First, it uses a discretionary auxiliary verb "should" rather than the mandatory "shall." Second, and more important, when a RAC is literally adjacent to a UGA — like the South Gig Harbor RAC — or nearly so — like the Tacoma Narrows Airport RAC — it creates a conflict between the land uses within the RAC and those of the adjacent urban area. The purpose of a rural designation is to distinguish rural land from urban land, not to blend the two together.

The preamble to RCW 36.70A.070 requires that a comprehensive plan be internally consistent. **The Board also holds that the designated Tacoma Narrows Airport and the Gig Harbor South RACs do not comply with the Act because their designation as such is internally inconsistent with the purpose of rural centers.** RUR Objective 6(e) indicates that the purpose of a Rural Center, of which a RAC is one category, is to "provide an opportunity to develop facilities that can function as a community center in those areas where an incorporated town does not serve that role for the surrounding area." Plan, at III-12-13. Both RACs lie between the Tacoma Narrows Bridge and the City of Gig Harbor. The South Gig Harbor and Tacoma Narrows Airport RACs are adjacent to and within one mile respectively of the Gig Harbor satellite UGA to the north and slightly over one mile from the Tacoma portion of the CUGA to the south. These RACs cannot usurp the community center functions of incorporated areas located so nearby. In contrast, the designated RACs on the Key Peninsula, far from any city or recognized central place, do constitute such community centers. This part of the Board's decision is limited to just these two Gig Harbor Peninsula RACs. *Gig Harbor*, at 51-52 (emphasis in original; footnote omitted).

The Board now holds that PCC 18A.25.150(A)(2)(a) and (D), PCC 18A.25.270, and PCC 18A.25.280 do not comply with the Act because they violate the requirements of RCW

36.70A.110(1).

RCW 36.70A.110(1) addresses UGAs and provides:

(1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350.

The challenged sections of the Regulations do permit new urban growth outside of designated UGAs, be it new commercial or industrial growth. Although counties cannot be expected to undo past land use practices, they cannot adopt regulations that fail to place appropriate conditions on growth outside UGAs to limit it to achieve conformance with requirements of .110. The Regulations in questions impose no such constraints. For instance, new commercial centers of over 80,000 square feet in size are permitted within a RAC upon approval of a CUP; any new commercial use under 80,000 square feet is allowed without a CUP. Moreover, certain new industrial uses within the RAC are allowed without a CUP regardless of size or whether or not they are resource-related, while other industrial uses require a CUP, but again without a size limitation. Furthermore, industrial uses, by their very nature, cannot as a general rule occur outside of UGAs (see their description in PCC 18A.25.280, above). The Board does note that in 1995 the legislature adopted RCW 36.70A.365, entitled “Major industrial developments,” which creates an exception to the general rule of RCW 36.70A.110 by permitting a county to establish a process for siting major industrial developments outside of UGAs. However, that process was not invoked through the Regulations at issue here.

As for PCC 18A.25.180(B)(3), the Board holds that PNA has not shown how this provision, which places further restraints on development in the Tacoma Narrows Airport Area of Influence, violates the Act.

Conclusion No. 2

PCC 18A.25.150(A)(2)(a) and (D), .270 and .280 do not comply with RCW 36.70A.110(1). PNA has not met its burden of showing how that portion of the Regulations codified at PCC 18A.25.180(B)(3) violates the requirements of the GMA.

Legal Issue No. 3

Do the County’s development regulations and zoning for a “shoreline density exception,” codified at PCC 18A.35.020(C)(3), comply with RCW 36.70A.020(1), (2), (8), (9) and (10), .070 (5), .110 (1) and (3)?

Positions of the Parties

PNA’s Position

PNA contends that the shoreline density exception permitted by PCC 18A.35.020(C)(3), permits the County to allow urban densities in the rural shorelines of the County. Specifically, PNA alleges that PCC 18A.35.020(C)(3) exempts new shoreline lots from “normal” density requirements if the lots are at least 75 feet wide on the shoreline, comply with the densities established in the County’s Shoreline Management Use Regulations (**SMUR**), codified in Title 20 PCC, and comply with Health Department regulations. PNA’s Brief, at 4. PNA claims that PCC 20.62.040(A)(5) permits 5 maximum dwelling units (**du**) per net acre. Furthermore, PNA contends that Health Department regulations allow minimum residential lot sizes of 12,500 square feet or .29 acres if on-site septic is available.

... Thus a 5-acre shoreline tract could theoretically accommodate 13 dwelling units (2.6 du/acre) if it is assumed that the net developable acreage is 3.75 acres (25% of the acreage reserved for roads and utilities) and no other serious physical constraints are present. PNA’s Brief, at 4.

County’s Position

The County points out that the shoreline density exception simply implements the Plan’s policy at III-10, and that the County amended the shoreline policies in its Plan in November 1995. Third, the County contends that it balanced the GMA’s goals by identifying existing development patterns along shorelines and permitting higher densities in limited waterfront areas which were already developed. County’s Brief, at 9.

Discussion

RCW 36.70A.020(1) and (2) provide:

RCW 36.70A.020 Planning goals. The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

Although PNA did not specifically challenge the Plan’s shoreline density exception ^[11] in *Gig Harbor*, the organization did challenge the Plan’s extensive use of a five acre parcel sizes, the Rural Five designation. The Board found that the Rural Five designation did not comply with the Act. *Gig Harbor*, at 52-60 and 62. RUR Objective 2 in the Plan provides:

Encourage a range of low-intensity rural development to maintain rural character. Plan, at III-7.

Under the Plan, the Rural Five designation allows a basic density of 1 du/5 acres; the Rural Ten

designation allows a basic density of 1 du/10 acres. Plan, Policy RUR 2.4.3 and 2.4.4, at III-9. Policy RUR 2.4.5 in the Plan constitutes what the parties refer to as the “shoreline density exception.” It provides:

Density requirements of the Rural Five and Rural Ten land use designations shall not apply to the first 200 feet adjacent to the ordinary high water mark of marine or lake shorelines of Pierce County, as described in the Shoreline Management Use Regulations for Pierce County. Instead, these areas shall have a maximum density that is double the base density permitted under this Plan. The maximum densities for the rural land use designations are as follows:

2.4.5.1 Marine and lake shorelines within the Rural Five designation:

2 dwelling units per 5 acres; or

4 dwelling units per 5 acres, when 50 percent or more of the property is designated open space or reserve.

2.4.5.2 Marine and lake shorelines within the Rural Ten designation:

2 dwelling units per 10 acres; or

4 dwelling units per 10 acres, when 50 percent or more of the property is designated open space; or

5 dwelling units per 10 acres, when 75 percent or more of the property is designated as open space. Plan, at III-10 (emphasis added).

The “Rural Density Incentive” in the Regulations, codified at PCC 18A.35.020(C)(2) states:

A property owner may designate a portion of a development project as open space or set-aside lands. If open space or set-aside land incentives are utilized, the maximum densities shall be as follows:

a. Rural Five. Two dwelling units per five acres (0.4 du/ac), when 50 percent of the property is designated as open space, set-aside lands...

b. Rural Ten.

(1) Two dwelling units per 10 acres (0.2 du/ac) when 50 percent of the property is designated as open space.

(2) Two and one-half dwelling units per 10 acres (0.25 du/ac) when 75 percent of the property is designated as open space. Ex. 7000, Regulations, at 83 (emphasis added).

The Board notes that the maximum densities for Rural Five and Ten designations listed in the Plan (as adopted in November 1994) are not the same as those described in the Regulations (adopted in July 1995). Those densities listed in the “Rural Density Incentive” provisions within the Regulations are actually more restrictive than the densities listed in RUR 2.4.5 of the Plan. However, it is not specifically the Rural Density Incentive densities in the Regulations at issue, but rather the densities referred to both in the Plan and in the Regulations that are contained in the County’s Shoreline Management Use Regulations (SMUR).

PCC 18A.35.020(C)(3) is entitled “Shoreline Density Exception.” It provides:

For the creation of new lots abutting a marine or lake shoreline as described in Title 20, Shoreline Management Use Regulations [SMUR], the maximum densities shall be as

follows:

a. The density requirements of the zone classification shall not apply to the first tier of lots abutting the shoreline, provided that all newly created lots maintain 75 feet of shoreline frontage and comply with the applicable densities in Title 20. The minimum lot size required for the creation of new lots abutting the shoreline shall be subject to the requirements of the Health Department....Ex. 7000, Regulations, at 83.

In turn, the SMUR at PCC 20.62.040(A)(5) [Ex. 9406, at 20-134], entitled “Density Requirements,” provides:

MAXIMUM DWELLING UNITS PER NET ACRE (30,000 sq. ft.) OR PROPORTIONATELY FOR A FRACTION THEREOF

RURAL-

TYPE URBAN RESIDENTIAL RURAL a. Subdivision, single family detached 3.333.11.5

b. Duplexes 4.44.02.0

c. Subdivision, group or cluster, prepared under PDD ordinance 5.55.05.0d. Multifamily, prepared under

PDD ordinance 15.010.08.0

e. Mobile home parks 5.55.05.0

Clearly, the maximum densities listed in the SMUR are much greater than those listed in either the Plan or in the Regulations’ Rural Density Incentive.

Exhibit D lists the five different shoreline environments contained in the County’s SMURs and the percentage of shoreline frontage so designated. This information is summarized below. In addition, the respective maximum densities in each environment (according to the County (*see* County’s Brief, at 11)), are shown:

Shoreline Maximum Dwelling All Rural Gig Harbor
Environment Units/Acre Pierce County Peninsula only

Urban 5.5.41.2

Rural Residential 5.019.129.8

Rural 5.016.818.4

Conservancy 1.054.635.6

Natural 0.08.914.9

TOTAL 99.899.9

Pursuant to PCC 18A.15.020, “Health Department” means the Tacoma-Pierce County Health Department. Ex. 7000, Regulations, at 15. PNA Attachment 3 contains regulations of the State Board of Health. Table VII of those regulations indicates the “Minimum Land Area Requirement [for] Single Family Residence or Unit of Volume of Sewage,” broken down between public or individual water supply and soil type per lot. On soil type 1A and 1B lots with public water supplies, the minimum lot size varies from 0.5 to 2.5 acres dependent upon the type of sewage

system used. Attachment 3 to PNA's Brief, at 45. As PNA points out, for soil type 2A and 2B with public water supplies, the minimum lot size is 12,500 square feet. Since one acre equals 43,560 square feet, this equals approximately 3.5 du/gross acre or 2.4 du/net acre.

That which the County allows in the challenged SMUR constitutes urban development outside a UGA, and is therefore prohibited by RCW 36.70A.020(1) and (2) and .110(1). **The Board holds that the County has failed to demonstrate how such rural shoreline densities constitute permissible exceptions to the general rule that urban growth is prohibited in rural areas or how such a pattern of land use constitutes permissible compact rural development.** See *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c (1996), at 46-48. See also *Kitsap Citizens for Rural Preservation v. Kitsap County*, CPSGMHB Case No. 94-3-0005 (1994), at 15-16.

Conclusion No. 3

The County's shoreline density exception at PCC 18A.35.020(C)(3) does not comply with RCW and .020(1) and (2) and 36.70A.110(1). PNA has not met its burden of showing how the Regulations violate RCW 36.70A.020(8), (9) and (10).

Legal Issue No. 4

Do the County's development regulations and zoning for the "Rural Five" zone classification, codified at PCC 18A.35.020(B)(2) and .080, comply with RCW 36.70A.020(2), .070(5), and .110(1) and (3)?

Positions of the Parties

PNA's Position

PNA contends that PCC 18A.35.020(B)(2) [Ex. 7000, Regulations, at 81], permits a maximum density of 2 du/5 acres in the Rural Five zone which violates the Board's bright line rule in *Vashon-Maury* that ten acre or more lots per dwelling unit are clearly rural, or the Board's holding in *Gig Harbor* that the Rural Five zone allows urban growth in rural areas. Because PCC 18A.35.080 [Ex. 7000, Regulations, at 129] permits an accessory dwelling unit (ADU) on each lot, the total density in the Rural Five zone becomes 4 du/acre. PNA's Brief, at 6.

County's Position

The County points out that it is in the processing of amending the Plan by the April 3, 1996, compliance deadline established in *Gig Harbor*, and will also amend its Regulations accordingly. It contends that PNA has not shown how the Rural Five Regulations violate the Act. Moreover, the County argues that its ADU Regulations merely implement the Plan's ADU policies, RUR

[12]

Objective 2.5, at III-10. Finally, it points out that RCW 43.63A.215(3) requires local governments to incorporate into their development regulations ADU provisions. Because single family residences are permitted in both rural and urban areas, the County contends that ADUs

must also be permitted there. County's Brief, at 13-14.

Discussion

In *Gig Harbor*, the Board discussed the County's Rural Five acre designation and stated:

In view of the large portions of the County that carry the Rural 5 designation, and thus a virtually unrestricted opportunity to plat into 2.5-acre lots, the Board concludes that, as drafted, Rural 5 very well could result in urban growth in the rural area. *Gig Harbor*, at 57.

...

In the present case, a five acre lot pattern far removed from the County's designated UGAs, such as Anderson or Fox Islands, or even the most westerly portion of the Gig Harbor Peninsula, would not constrain potential future UGA expansion. In contrast, the entire Gig Harbor UGA is surrounded by Rural 5, as is the area immediately south of the metropolitan UGA, east of Ft. Lewis, and the lands between the Sumner-Puyallup and the Bonney Lake-Orting UGAs. In fact, with very limited exceptions, Rural 5 appears to be the rural designation of choice adjacent to cities within the Metropolitan UGA.

The Board concludes that Rural 5, as it is presently drafted and located adjacent to the Gig Harbor and Metropolitan CUGA, will create a land use pattern that effectively locks in the size of those UGAs. *Gig Harbor*, at 57-58 (footnote omitted).

...

To recapitulate, the Board holds that Rural 5, as adopted in the Plan and applied in the Generalized Proposed Land Use Map, will result in urban growth in a rural area and would thwart the county's long term flexibility to expand the UGA. Further, the County has failed to meet the requirement of RCW 36.70A.070(5) to provide a "variety" of rural densities. *Gig Harbor*, at 59 (emphasis in original).

...In this instance, the Board concludes that the weight of the evidence in the record indicates that the Rural 5 designation, as applied county-wide, and with the provision for 2.5-acre platting, does not comply with RCW 36.70A.070(5) because it would constitute urban growth in the rural area and thwart the long term flexibility to expand the UGA. *Gig Harbor*, at 60.

Subsequently, in *Vashon-Maury*, the Board discussed five-acre zoning further:

The Board has previously held that 10 acre residential lots are rural and therefore do not constitute urban growth. *See Tacoma*, at 21. The Board has held that 1- and 2.5-acre parcels constitute urban growth and are thus prohibited in a rural area. *Bremerton*, at 51. In the present case, the Board must determine whether a five-acre lot size is appropriate in a rural area. In answering this question, we must first address the more fundamental question of whether, and under what circumstances, such a lot size is allowed in a rural area. Policy R-205 applies to all of the County's rural area. Then, we turn to the matter of whether the County's policies relative to five-acre lots on Vashon Island violates the Act's direction to protect groundwater.

At first blush, a five-acre lot size appears more rural than urban in functional and visual

character. It is also less likely than, for example, a 2.5 acre lot, to constitute urban growth and generate use conflicts with nearby resource lands. However, the experience in Florida suggests that five-acre parcels can also constitute a form of sprawl. *See Bremerton*, at 50, fn. 33. Further, the experience in Oregon indicates that, when located immediately adjacent to urban growth boundaries, five-acre parcels can foreclose the opportunity for future expansion of the UGA. *See Achen, et al., v. Clark County*, WWGMHB Case No. 95-2-0067, at 33. Either of these outcomes would thwart fundamental objectives of the GMA.

Therefore, rather than adopt a minimum rural residential lot size, the Board instead adopts as a general rule a “bright line” at 10 acres. **The Board holds that any residential pattern of 10-acre lots, or larger, is rural.** Any smaller rural lots will be subject to increased scrutiny by the Board to assure that the pattern of such lot sizes (their number, location and configuration) does not constitute urban growth; does not present an undue threat to large scale natural resource lands, such as forest lands, and large scale critical areas, such as aquifers; will not thwart the long term flexibility to expand the UGA; and will not otherwise be inconsistent with the goals and requirements of the Act.

Applying this test to the present facts, the Board finds the evidence unpersuasive that five-[acre] lots on Vashon Island will contribute to sprawl or thwart the future expansion of a UGA. There is no UGA on the island. Nevertheless, the Board is troubled by two things. First is the potential threat that further development at any density, but especially in five-[acre] lots, presents to the island’s sole source aquifer. The County’s response that such problems must be documented before revisiting the fundamental land use issue does not give sufficient regard to the importance of such water supplies nor the difficulty of lowering development intensity after parcelization and vesting has resulted in five-acre lots. Second is the prospect that all lots larger than five acres and not subject to the limitations in Policy R-205 would be platted down to five acres, thereby jeopardizing, if not eliminating, the Act’s required range of densities. **Accordingly, the Board holds that the pattern of five-acre lots on Vashon Island does not comply with the Act given the County’s admission that Vashon Island has a history of water quantity and quality problems.**

Vashon-Maury, at 78-79 (emphasis in original).

Most recently, in *Sky Valley*, the Board further held:

The Board affirms a prior holding that a pattern of 10-acre lots is clearly rural and now holds that, as a general rule, a new land use pattern that consists of between 5- and 10-acre lots is an appropriate rural use, provided that the number, location and configuration of lots does not constitute urban growth; does not present an undue threat to large scale natural resource lands; will not thwart the long-term flexibility to expand the UGA; and will not otherwise be inconsistent with the goals and requirements of the Act. The Board further holds that, as a general rule, any new land use pattern that consists of lots smaller than 5 acres would constitute urban growth and is therefore prohibited in rural areas. The greater the density becomes, the more difficult it will become to justify an exception to the general rule. The exceptions to this

general rule are few, both because the circumstances justifying them are rare and because excessive exceptions will swallow a general rule. *Sky Valley, et al., v. Snohomish County (Sky Valley)*, CPSGMHB Consolidated Case No. 96-3-0068c (1996), at 46 (emphasis in original; footnote omitted).

PCC 18A.35.020(B)(2), Table 2, is a table showing base and maximum densities allowed in rural zones. Ex. 7000, Regulations, at 81. Under the Rural 5 column, the base density is 0.2 du/acre; the maximum density in such a zone is 0.4 du/acre. The Board has held in its review of the Plan that the County's Rural Five designation does not comply with the Act. Similarly, **the Board now holds that this regulation does not comply with RCW 36.70A.020(2) and .110(1) for the same reasons.** The Board reaches a similar result here for the same reasons.

The Board next examines the County's ADU Regulations.

"Accessory Dwelling Unit" is defined at PCC 18A.15.020:

"Accessory dwelling unit" means a second dwelling unit added to, created within, or detached from a single-family detached dwelling for use as a completely independent or semi-independent unit with provisions for cooking, eating, sanitation, and sleeping.

RUR Policy 2.5 in the Plan (at III-10) provides:

Develop regulations which would allow one accessory dwelling unit on a residential lot where an existing single-family dwelling exists.

This portion of the Plan was not appealed and therefore is now irrefutably valid. The County's ADU regulations have been codified at PCC 18A.35.080. Subsection (A) contains the purpose of the regulations and provides:

Accessory dwelling units (ADUs) are intended to increase the supply of affordable and independent housing for a variety of households, increase home and personal security, provide supplemental earnings for people with limited incomes, and increase residential densities. This should occur by utilizing the existing infrastructure and community resources throughout the County while protecting the existing character of single-family neighborhoods. Ex. 7000, Regulations, at 129.

PCC 18A.35.080(C) contains the general requirements for the creation of an ADU. Pursuant to subsection 1, only one ADU shall be allowed per lot; subsection 3 limits the size of an ADU to no greater than 1,000 square feet. Subsection 4 requires the ADU to be designed to maintain the appearance of the principal dwelling. *See* Ex. 7000, Regulations, at 130.

It is crucial to remember that these are "accessory" dwellings - not the primary dwelling.

Furthermore, they are limited in size and design to fit in with the primary dwelling. The Board also notes that RCW 36.70A.400 requires local governments to comply with RCW 43.63A.215, which in turn mandates that local governments include ADU provisions within their development regulations. That mandate must be reconciled with RCW 36.70A.020(2) and .110(1). Except for areas outside UGAs, the County has appropriately balanced these two requirements by placing clear restrictions on ADUs.

Construction of a detached new ADU on a parcel smaller than 10 acres is generally prohibited

because it would effectively allow two freestanding dwelling units. The effect would necessarily be one freestanding dwelling on a lot smaller than 5 acres, which the Board has previously held to constitute urban growth. Regardless of the size of the rural lot, ADU's attached to the main residence or a conversion of a detached existing structure (e.g., a garage) in close association with the primary residence would not constitute new urban growth.

The Board therefore holds that PNA has met its burden of showing how the ADU regulations violate the Act.

Conclusion No. 4

The densities allowed by PCC 18A.35.020(B)(2) in rural residential areas do not comply with RCW 36.70A.020(2) and .110(1).

PCC 18A.35.080(C) does not comply with RCW 36.70A.020(2) and .110(1).

Legal Issue No. 5

Do the County's development regulations and zoning, codified at PCC 18A.35.130(D) and 18A.75.070, comply with RCW 36.70A.070(5) and .110(1) and (3) if they expand non-conforming uses, including uses which are urban in nature, within rural areas?

Positions of the Parties

PNA's Position

PNA alleges that the County's development regulations and zoning, specifically as codified at PCC 18A.35.130(D) and 18A.75.070, create a policy for the expansion of nonconforming uses that would allow for urban growth in rural areas, which violates RCW 36.70A.070(5) and .110(1) and (3).

County's Position

The County repeats its claim that since the nonconforming use regulations implement the nonconforming use policies of the Plan (at II-71 and II-72), these regulations are in fact in compliance with the Act. The County further claims that it is in fact *compelled* by the Act to so implement these policies through the nonconforming use regulations, so long as such policies have not been found invalid or remanded. The County also contends that because PNA did not challenge the Plan's nonconforming use policies, it cannot now challenge the development regulations that implement these policies. Additionally, the County alleges that the nonconforming use regulations ensure that nonconforming uses will expand in a controlled and limited manner, thus ensuring both compatibility with surrounding uses and the implementation of the Plan's central goal of encouraging economic development. County's Brief, at 14-15.

Discussion

Initially, the Board holds that a petitioner is not precluded from challenging development regulations that implement a certain comprehensive plan policy, even though the petitioner

did not challenge the specific policies in the plan (assuming the petitioner otherwise meets the standing and timely petition filing requirements of the Act). To hold otherwise would force petitioners to challenge every policy in a comprehensive plan. This would be overly burdensome on not just the petitioner but also the responding local jurisdiction and the Board. Moreover, it would force petitioners to appeal comprehensive plan policies even if they agreed with the policy but subsequently concluded that the implementing regulation failed to comply with the Act.

PCC 18A.15.020, a definitional section, provides:

Nonconforming Structure. “Nonconforming structure” means a building or structure which was legal when established but does not meet current development standards including, but not limited to design, height, setback, or coverage requirements of the zone classification in which it is located.

Nonconforming Use of Land. “Nonconforming use of land” means a use which does not involve a structure and which was allowed when established but is not allowed in the current zone classification in which it is located. Ex. 7000, Regulations, at 19.

All expansions of nonconforming uses or replacement of structures occupied by nonconforming uses are subject to PCC 18A.35.130(D). ^[13] Pursuant to PCC 18A.35.130(D)(2), an expansion of a legally existing nonconforming use is allowed under three situations and procedures, measured quantitatively.

The first category, proposed expansion of a nonconforming use or the nonconforming use of a structure that does not exceed 10 percent of the floor area of the total existing structure or use, if those expansions do not create impervious cover exceeding 25 percent of the existing impervious area of the lot or parcel, is allowed outright. PCC 18A.35.130(D)(2)(b)(1). Second, proposed expansions that exceed the above limits *but are less than a 25 percent increase of total floor area and a 33 percent increase of impervious cover*, require an Administrative Nonconforming Use

Permit (ANUP). ^[14] PCC 18A.35.130(D)(2)(b)(2). And third, for expansions *in excess of 25 percent floor area and 33 percent impervious cover*, a Nonconforming Use Permit (NUP) ^[15] is required. PCC 18A.35.130(D)(3).

The essence of PNA’s challenge is that under the above standards, uses or structures that qualify as “legally existing nonconforming” and are located within rural areas may be expanded in a manner that would constitute urban growth in rural areas, clearly violating the Act. *See* RCW 36.70A.110(1). This particular challenge raises an issue of first impression for the Board, as it has never been asked to determine whether the Act permits the expansion of nonconforming uses or structures, let alone the permissible amount of such expansion. In such circumstances it is appropriate and even necessary to look to non-GMA, Washington case law on this issue for instruction. The specific object of such an inquiry is to learn: historically, how much expansion of

a nonconforming use is considered “too much” under Washington law?

In Washington, it is clear that the general policy and purpose of zoning legislation is to phase out nonconforming uses, being, as they are, inconsistent with the ultimate object of zoning regulations. *State ex rel. Smilanich v. McCollum*, 62 Wn.2d 602, 607, 384 P.2d 358 (1963); *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 221, 242 P.2d 505 (1952). Accordingly, as a general rule preexisting nonconforming uses are not to be perpetuated. *State v. Dupay*, 4 Wn. App. 530, 531, 482 P.2d 794 (1971). However, by the same token, although not favored in the law, nonconforming uses are vested property rights which are protected. *Summit-Waller Assn. v. Pierce County*, 77 Wn. App. 384, 388, 895 P.2d 405 (1995); *Van Sant v. Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993). Therefore, governments have the option of forcing a discontinuance of nonconforming uses. *Pasco v. Rhine*, 51 Wn. App. 354, 362, 753 P.2d 993 (1988); *Seattle v. Martin*, 54 Wn.2d 541, 342 P.2d 602 (1959). Likewise, a policy of controlled expansion or extension of nonconforming uses is within the discretion of the legislative body concerned, just as the severity of limitations in the phasing out of nonconforming uses is discretionary. *Bartz v. Board of Adjustment*, 80 Wn.2d 209, 217, 492 P.2d 1374 (1972). Therefore, under the common law, it is up to the judgment of the individual local authority to decide whether or not nonconforming uses may continue, and if so, to what degree they may be extended or expanded. In this case, the requirements of the GMA control. Although the case law historically indicates a high degree of deference to a local authority’s policies on nonconforming uses, the GMA significantly changed the landscape by creating further requirements that comprehensive plans and implementing development regulations must satisfy. Besides the clear statutory mandate prohibiting urban development in rural areas in RCW 36.70A.110(1), it is a central policy of the GMA to both encourage urban development within UGAs and to reduce sprawl. RCW 36.70A.020 (1) and (2). Allowing new urban development in rural areas frustrates both of these fundamental goals.

Thus, the County’s development regulations regarding nonconforming uses and structures must comply with the added requirements of the GMA. The ultimate question becomes: **whether the County’s development regulations permit new urban development to occur outside UGAs? The Board holds that they do, and therefore do not comply with RCW 36.70A.110(1).**

As stated above, the challenged regulations provide for three types of expansion. The first type (PCC 18A.35.130(D)(2)(b)(1)), which requires no permit at all and involves less than a 10 percent increase in total floor area and a 25 percent increase in impervious lot cover, may allow for expansion that would constitute urban development, regardless of where it occurred, simply because it utilizes absolutely no constraints. To put it another way: nothing in this Regulation would prevent the proposed expansion of a nonconforming use even if such expansion constituted urban development in a rural area. The provision makes no mention of compliance with the GMA policies or mandates and neither does it provide for consistency with the County’s own provisions as to what is or is not “rural” development. Thus, in certain circumstances, i.e., outside a designated UGA, this provision could allow what the Act specifically prohibits. The regulation must be amended to distinguish between the expansion or enlargement of

nonconforming uses or structures inside a UGA, where urban growth is encouraged, and outside a UGA, where new urban growth is generally prohibited.

As for the other two types of expansion, prerequisites for the issuance of either an ANUP or an NUP are that certain written findings must be made. For the ANUP, the regulations require that

[16] the Director first be “satisfied” from the evidence that certain conditions exist. These requisites, however, taken together with the standards contained in PCC 18A.35.130(D)(2)(b), fail to prevent expansions that would constitute new urban development in rural areas. Subsection (d) and (e) both contain certain language which comes close to curing this defect in the ANUP process. Subsection (d) states that, “[t]he proposed alteration...will result in improvements...which will make the use or structure more compatible with allowed uses,” while (e) provides that the expansion “...will not detract from the intent of the Comprehensive Plan and any implementing regulation.” Although both subsections could be argued to compensate for the identified deficiency, such argument fails. The Plan contains myriad policies; many of these policies, taken out of context or inappropriately compared (for instance comparing an urban policy with a rural one) conflict. Therefore, ascertaining the precise intent of the Plan would be difficult without more direction. What is needed is some clear reference to specific policies that will prevent new urban development in rural areas; the cited language fails for vagueness in this regard.

As for the NUP approval process, nearly identical findings requirements exist as for the ANUP

[17] .Unfortunately, the identical problem also remains. It is perhaps an even greater problem in this category of expansion because, as PNA points out, no limits exist beyond which an expansion may not occur, provided the applicant acquires an NUP. See PCC 18A.35.130(D)(3). Previously, in *Vashon-Maury*, the Board discussed the meaning of certain terms contained in RCW 36.70A.070(5). There, in reference to that section stating, “[t]he rural element shall permit appropriate land uses that are compatible with the rural character of such lands...” the Board established that:

...for purposes of determining if a proposed use constitutes impermissible urban growth or permissible rural growth, we will consider “such lands” to refer not to an individual parcel, but rather to the *land use pattern* in the immediate vicinity of a proposed use, and whether the proposed use will be compatible with rural character of the land use pattern in the vicinity.

Turning to the matter of “rural character” the Board holds that “rural character” has both a functional and a visual component. *Vashon-Maury*, at 68.

And later:

The “functional” portion of this analysis requires an evaluation of whether the functions traditionally found in the rural area would be unduly and negatively impacted.... The “visual” portion of this test requires an assessment of the visual character of the rural area.

As the discussion above demonstrates, the type of expansion of nonconforming uses or structures that the County's development regulations would allow, because they do not apply the Act's requirements to prohibit new urban development outside of UGAs, is incompatible with both the functional and visual characteristics of rural areas within Pierce County. The Board distinguishes between regulations that ameliorate negative consequences or impacts of continuing nonconforming uses or structures, such as landscaping requirements that attempt to make a nonconforming use or structure better "fit in" to the adjacent area or regulations that permit the improvement of an existing nonconformity, and those regulations that allow the expansion or enlargement of nonconforming uses or structures. It is the latter type of regulation that violates the Act if it permits enlargement or expansion of a nonconforming use or structure located outside UGAs so as to constitute new urban growth.

Conclusion No. 5

The establishment of nonconforming use regulations is a historic part of land use planning in the State of Washington. However, with the passage of the GMA, the discretion of local jurisdictions to craft nonconforming use provisions has been limited, at least in areas outside of designated UGAs. The Act's requirement at RCW 36.70A.110 and the Act's planning goals at RCW 36.70A.020(1) and (2), provide that as a general rule, new urban growth shall not be permitted outside UGAs. The County's nonconforming use development regulations, codified at PCC 18A.35.130 and PCC 18A.75.070, fail to comply with the Act in that they allow for expansion or enlargement of nonconforming uses that could constitute new urban growth in rural areas. Those sections of the regulations are **remanded** to the County for revision to bring them into compliance with the Act by establishing criteria that will prevent the expansion or enlargement of nonconforming uses or structures that constitute new urban growth outside designated UGAs.

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 orders:

- 1) PCC 18A.25.150(A)(2)(a) and (D), .270 and .280 are **remanded** with instructions for the County to bring them into compliance with the Act.
- 2) PCC 18A.35.020(B)(2) is **remanded** with instructions for the County to bring it into compliance with the Act.
- 3) PCC 18A.35.020(C)(3) is **remanded** with instructions for the County to bring it into compliance with the Act.
- 4) PCC 18A.35.080 is **remanded** with instructions for the County to bring it into compliance with the Act.
- 5) PCC 18A.35.130 and PCC 18A.75.070 are **remanded** with instructions to bring them into compliance with the Act.

So ordered this 20th day of March, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

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.

Appendix a

PCC 18A.75.030

18A.75.030 Conditional Use Permit.

D.Purpose. The purpose of this Section is to establish decision criteria and procedures for special uses called Conditional Uses which possess unique characteristics. Conditional Uses are deemed unique due to factors such as size, technological processes, equipment, or location with respect to surroundings, streets, existing improvements, or demands upon public facilities. These uses require a special degree of control to assure compatibility with the Comprehensive Plan, adjacent uses, and the character of the vicinity.

Conditional Uses will be subject to review by the Examiner and the issuance of a Conditional Use Permit. This process allows the Examiner to:

1. determine that the location of these uses will not be incompatible with uses permitted in the surrounding areas; and
2. make further stipulations and conditions that may reasonably assure that the basic intent of this Title will be served.

D.Decision Criteria. The Examiner shall review Conditional Use Permits in accordance with the provisions of this Section and may approve, approve with conditions, modify, modify with conditions, or deny the Conditional Use Permit. The Examiner may reduce or modify bulk requirements, off-street parking requirements, and use design standards to lessen impacts as a condition of the granting of the Conditional Use Permit.

1.Required Findings. The Examiner may use Design Standards and other elements in this code to modify the proposal. A Conditional Use permit may be approved only if all of the following findings can be made regarding the proposal and are supported by the record:

- a. That the granting of the proposed Conditional Use Permit will not:
 - 1) be detrimental to the public health, safety, and general welfare;

- 2)adversely affect the established character and planned character of the surrounding vicinity; nor
- 3)be injurious to the uses, planned uses, property, or improvements adjacent to, and in the vicinity of, the site upon which the proposed use is to be located.
- b.That the granting of the proposed Conditional Use Permit is consistent and compatible with the intent of the goals, objectives and policies of the County’s Comprehensive Plan, appropriate Community Plan (provided that, in the event of conflict with the Comprehensive Plan, the Comprehensive Plan prevails), and any implementing regulation.
- c.That all conditions necessary to lessen any impacts of the proposed use are conditions that can be monitored and enforced.
- d.That the proposed use will not introduce hazardous conditions at the site that cannot be mitigated to protect adjacent properties, the vicinity, and the public health, safety, and welfare of the community from such hazard.
- e.That the conditional use will be supported by, and not adversely affect, adequate public facilities and services; or that conditions can be imposed to lessen any adverse impacts on such facilities and services.
- f.That the Level of Service standards for public facilities and services are met in accordance with concurrency management requirements.

2.Burden of Proof.The applicant has the burden of proving that the proposed conditional use meets all of the criteria in Section 18A.75.030 B.1., Required Findings.

3.Approval.The Examiner may approve an application for a Conditional Use Permit, approve with additional requirements above those specified in this Title or require modification of the proposal to comply with specified requirements or local conditions.

4.Denial.The Examiner shall deny a Conditional Use Permit if the proposal does not meet or cannot be conditioned or modified to meet Section 18A.75.030 B.1., Required Findings.

the Plan’s specific RAC policies

LU-RC Objective 12.Direct a higher intensity mix of uses into Rural Activity Centers, consistent with the Rural Element.

12.1Commercial and industrial development in Rural Areas should locate in existing Rural Activity Centers to provide employment, shopping, services and housing opportunities that will reinforce these areas as rural centers, at a scale which is compatible with surrounding roads, utilities and rural character.Plan, at II-42.

RUR Objective 6.A higher intensity of mix of uses should be directed into Rural Centers.

...

6.5Locations for Rural Activity Centers should be determined by the following characteristics:

- a.Having immediate access onto state routes or major arterials;
- b.Characterized by established mixed commercial land uses; and
- c.New Rural Activity Centers should be located more than five miles from other Rural Activity Centers or Rural Gateway Communities.

6.6Establish standards to guide development of Rural Activity Centers.

6.6.1Utilize existing patterns as the foundation for the designation of Rural Activity Centers.

6.6.2 Mixed-uses, commercial and industrial developments should be allowed in Rural Activity Centers where adequate facilities and improvements exist or can be provided.

6.6.3 Expansion of Rural Activity Centers should be compatible with other adjacent uses.

6.6.4 Rural Activity Centers should not be expanded into areas of natural hazards.

6.6.5 Residential development should be permitted in Rural Activity Centers so long as it is consistent with the residential density permitted in the adjacent rural designations. Plan, at III-13.

...

PCC 18A.75.070.C

1. Required Written Findings for an Administrative Nonconforming Use. An expansion of a nonconforming use may be allowed by the Director, subject to the provisions of this Section and Section 18A.35.130 D.2.b. No permits shall be granted unless the Director is convinced by the evidence presented that:

a. The proposed alteration, enlargement, expansion, or replacement of the administrative nonconforming use is necessary to adapt the administrative nonconforming use and associated structures to changes in technology, merchandising, or other generally recognized trends which affect the utility of structures or the applicant's ability to compete;

b. The proposed alteration, enlargement, expansion, or replacement will not introduce any hazards or interfere with the potential development of nearby properties in accordance with present zoning regulations;

c. The administrative nonconforming use and associated structures will comply with the requirements of Section 18A.35.130 C.5;

d. The proposed alteration, enlargement, expansion, or replacement will result in improvements in functionality or safety and in exterior appearance, screening, access or other features which will make the use or structure more compatible with the allowed uses; and

e. The proposed alteration, enlargement, expansion, or replacement is consistent with and furthers the goals of the Comprehensive Plan and will not detract from the intent of the Comprehensive Plan and will not detract from the intent of the Comprehensive Plan and any implementing regulation. Ex. 7000, Regulations, at 184.

D. Expansion Standards for Nonconforming Uses. Expansion of nonconforming uses or replacement of structures occupied by nonconforming uses shall be subject to the following provisions provided the Basic Standards of this Section are satisfied.

1. Where a nonconforming use of a structure exists, that structure can be replaced provided the original footprint is not relocated or altered except as provided in the expansion standards below.

2. An expansion of a legally existing nonconforming use may be allowed under the following situations and procedures.

a. Alteration, enlargement, or expansion of a nonconforming single- or two-family house in the employment center classifications (HEC/MEC) is allowed outright. No Administrative Nonconforming Use Permit, Nonconforming Use Permit, or review is required.

b. For legally existing nonconforming uses other than those identified in Section 18A.35.130 D.2.a.:

1) An Administrative Nonconforming Use Permit or a Nonconforming Use

Permit shall not be required if:

(a)Together with any previously approved expansions, the proposed expansion of the nonconforming use or the nonconforming use of a structure does not exceed 10 percent of the floor area or the total existing use or structures nor create more than 10 percent additional pad sites for mobile home parks and RV parks; or

(b)Together with any previously approved expansions, the proposed expansion of the nonconforming use or the nonconforming use of a structure does not create impervious cover exceeding 25 percent of the developed area for mobile home parks and RV parks.

2)An Administrative Nonconforming Use Permit (see Section 18A.75.070 C, Nonconforming Use Permit) shall be required if the criteria in Section 18A.35.130 D.2.b. above are exceeded and:

(a)Together with any previously approved expansions, the proposed expansion of the nonconforming use or the nonconforming use of a structure does not exceed 25 percent of the floor area of the total existing use or structures nor create more than 25 percent additional pad sites for mobile home parks and RV parks; or

(b)Together with any previously approved expansions, the proposed expansion of the nonconforming use or the nonconforming use of a structure does not create impervious cover exceeding 33 percent of the existing impervious area of the lot or parcel nor exceed 33 percent of the developed area for mobile home parks and RV parks.

2.Any proposed expansion of a nonconforming use exceeding the criteria in Section 18A.35.130 D.2.b.(2) above shall require a Nonconforming Use Permit.Ex. 7000, Regulations, at 148-150.

PCC 18A.75.070.B

18A.35.130Nonconforming Standards.

A.Purpose.The purpose of this Section is to provide standards and conditions to regulate lots, structures, and uses which were legally established prior to the adoption, revision, or amendment of this Title and which remain legal, but have become nonconforming as a result of this Title's application.This Section provides reasonable alternatives to property owners for the limited expansion and continuance of nonconformities.

B.Applicability.The provisions of this Section shall be applicable to any nonconforming lots, structures, developments, or uses and lots which were made nonconforming by an acquisition of land in the public interest.The provisions of this Section shall not be applicable to any discretionary land uses action specifically authorized prior to or after the adoption of this Title.Discretionary land uses shall comply with conditions and restrictions set forth in the approval through which it was authorized.

1.Required Written Findings for Nonconforming Use Permit.An expansion of a nonconforming use may be allowed by the Examiner subject to the provisions of this Section and the provisions of 18A.35.130.No permit shall be granted unless the Examiner is satisfied from the evidence that:

a.The proposed alteration, enlargement, expansion, or replacement of thenonconforming use is necessary to adapt the nonconforming use and associated structures to changes in technology, merchandising, or other

- generally recognized trends which affect the utility of structures or the applicant's ability to compete;
- b. The proposed alteration, enlargement, expansion, or replacement will not introduce any hazards or interfere with the potential development of nearby properties in accordance with present zoning regulations;
- c. The nonconforming use and associated structures will comply with the requirements of Section 18A.35.130 C.5;
- d. The proposed alteration, enlargement, expansion, or replacement will result in improvements in functionality or safety and in exterior appearance, screening, access or other features which will make the use or structure more compatible with the allowed uses;
- e. The proposed alteration, enlargement, expansion, or replacement is consistent with and furthers the goals of the Comprehensive Plan and will not detract from the intent of the Comprehensive Plan and will not detract from the intent of the Comprehensive Plan and any implementing regulation.
- f. There will be no significant increase in the amount of smoke, dust, noise, vibration, odor, fumes, or glare; and
- g. There will be no significant adverse impact due to the hours or times of operation. Ex. 7000, Regulations, at 182-183.

[1] The parties also refer to the Regulations as “the **DRZ**.”

[2] What is referred to as “PNA I” is CPSGMHB Case No. 95-3-0059, which involved a challenge of the State Environmental Policy Act (**SEPA**) analysis the County conducted on the Plan.

[3] At the time the Declaration of Mark Truckey was prepared, this ordinance had not been appealed. *See* Ex. C, Declaration of Mark Truckey, at 2, ¶ 8.

[4] The Declaration of Sean Gaffney was filed with the Board on January 19, 1996, with the County's Brief, and consequently before PNA's Reply Brief was due. The contents of the Gaffney Declaration confirm PNA's standing. Therefore, it was unnecessary for PNA to file additional proof of its standing.

[5] The Board first discussed mootness in *Tacoma, et al., v. Pierce County*, CPSGPHB Case No. 94-3-0001, Order on Dispositive Motions (March 4, 1994), at 16-17.

[6] The eight use categories are: residential, civic, utilities, essential public facilities, office/business, resource, commercial and industrial.

[7] See Appendix A for text of PCC 18A.75.030, the County's conditional use permit process.

[8] PNA points out that 80,000 square feet is the equivalent of 1.86 acres. PNA's Brief, at 3.

[9] Commercial centers are permitted only within a RAC and not elsewhere within the rural zone. Ex. 7000, at 48. Level 1 Commercial Center is any center containing a variety of stores with a cumulative floor area greater than 80,000 square feet but less than 200,000 square feet. Level 2 is any such variety of stores greater than 200,000 feet, or 4.6 acres or more. Pursuant to PCC 18A.25.270:

Commercial Centers Use Type refers to any lot or combination of lots with a store or variety of stores, offices, and services integrated into a complex utilizing uniform parking facilities. A variety of goods are sold or services provided at these centers ranging from general merchandise to specialty goods and foods. Ex. 7000, at 66.

[10] See Appendix A for the text of the Plan's policies for RACs.

[11] The Board did note the existence of this exception in a footnote. *See Gig Harbor*, at 53, fn. 29.

[12] The County's Brief contained a typographical error by incorrectly citing to II-10. No such policy objective exists in the Plan.

[13] See Appendix A for the text of PCC 18A.35.130, entitled "Nonconforming standards."

[14] PCC 18A.35.130(D)(2)(b)(2) reads:

1.1. An Administrative Nonconforming Use Permit or a Nonconforming Use Permit shall not be required if:

a.a. Together with any previously approved expansions, the proposed expansion of the nonconforming use or the nonconforming use of a structure does not exceed 10 percent of the floor area of the total existing use or structures nor create more than 20 percent additional pad sites for mobile home parks and RV parks; or

b.b. Together with any previously approved expansions, the proposed expansion of the nonconforming use or the nonconforming use of a structure does not create impervious cover exceeding 25 percent of the existing impervious area of the lot or parcel nor exceed 25 percent of the developed area for mobile home parks and RV parks.

[15] PCC 18A.35.130(D)(3) reads:

(3) Any proposed expansion of a nonconforming use exceeding the criteria in Section 18.A.25.130.D.2.b. (2) above shall require a Nonconforming Use Permit.

[16] See Appendix A for the text of PCC 18A.75.070(C).

[17] See Appendix A for the text of PCC 18A.75.070(B).