

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

JODY L. McVITTIE,)	
)	
Petitioner,)	Case No. 00-3-0006c
)	
v.)	
)	
SNOHOMISH COUNTY,)	<i>(McVittie IV)</i>
)	
Respondent,)	
)	
and)	
)	
SNOHOMISH COUNTY-CAMANO ASSOCIATION OF REALTORS,)	Final decision and Order
)	
Intervenor,)	
)	
1000 FRIENDS OF WASHINGTON,)	
)	
Amicus Curiae.)	

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I. Procedural Background

A. General

On January 24, 2000, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jody L. McVittie (**Petitioner** or **McVittie**). The matter was assigned Case No. 00-3-0001 (*McVittie II*). Petitioner challenges Snohomish County’s (**County**) adoption of Ordinance No. 99-092, which adopted the Snohomish County: 2000-2005 Capital Improvement Plan (**2000-2005 CIP**). The basis for the challenge is noncompliance with several provisions of the Growth Management Act (**GMA or Act**).

On February 3, 2000 the Board issued a “Notice of Hearing” (**NOH**) for CPSGMHB Case No. 00-3-0001. The NOH set a date for a prehearing conference (**PHC**) and established a tentative schedule for the *McVittie II* case.

On February 11, 2000, the Board received an additional PFR from Jody L. McVittie. The matter was assigned Case No. 00-3-0003 (*McVittie III*). Petitioner challenges the County's adoption of its "2000-2005 Transportation Improvement Program" (**2000-2005 TIP**) and "2000-2005 Surface Water Management Detailed Improvement Program" (**2000-2005 SWMDIP**), Motion Nos. 99-400 and 99-404, respectively. The basis for the challenge is noncompliance with several provisions of the Act.

On February 18, 2000 the Board issued a NOH for CPSGMHB Case No. 00-3-0003. The NOH set a date for the PHC to correspond to the date established for the PHC in *McVittie II*, and established a tentative schedule for the *McVittie III* case.

On February 22, 2000, via FAX, the Board received an "Amended Petition for Review" regarding Case No. 00-3-0001 (*McVittie II*) from Petitioner McVittie.

March 7, 2000, the Board received an "Amended Petition for Review" regarding Case No. 00-3-0003 (*McVittie III*) from Petitioner McVittie.

On March 9, 2000, the Board commenced the PHC at the Financial Center, Seattle. The PHC was continued until March 16, 2000.

On March 13, 2000, the Board received a new PFR and letter from Petitioner McVittie, replicating the challenge raised in the *McVittie II* PFR. The new PFR was assigned Case No. 00-3-0006 (*McVittie IV*).

On March 15, 2000, the Board issued a "Notice of Hearing" in *McVittie IV*, indicating the PHC for the *McVittie* trilogy of cases would be held on March 16, 2000.

On March 16, 2000, the PHC was reconvened for the *McVittie* trilogy. Board members Lois H. North and Edward G. McGuire, Presiding Officer (**PO**) in this matter, attended the conference. Jody L. McVittie represented herself; Dawn Findlay and Duana Kolouskova represented Respondent Snohomish County. Thomas J Ehrlichman appeared for potential Intervenor Realtors. Michael Pattison, Government Relations Officer, from the Realtors and Andrew Lane, the Law Clerk to the Board, also attended. Potential Amicus Curiae, 1000 Friends, was not represented.

On March 20, 2000, the Board received a letter from Ms McVittie indicating that she had retained legal counsel. Due to a conflict between counsel's availability and the proposed date for the Hearing on the Merits (**HOM**), she requested the HOM be moved. Since, the request did not affect the agreed upon briefing schedule, the Board adjusted the HOM date.

On March 22, 2000, the Board received Petitioner's "Amended Petition for Review" in Case No. 00-3-0006.

On March 23, 2000, the Board issued its “Order of Consolidation, Order on Intervention and Amicus Curiae and Prehearing Order.” The Order consolidated the three McVittie PFRs into the above captioned case, established the Legal Issues and the final schedule for this matter.

On April 3, 2000, the Board received Petitioner’s “Motion to Correct the Prehearing Order.” The motion asked that reference be made to “Ordinance No. 99-092” in Legal Issues 2, 3 and 4, instead of the Board’s shorthand reference to the “2000-2005 CIP.” Additionally, Petitioner asked that a typographical error be corrected in Legal Issue 5a, changing “with our” to “without.”

On April 3, 2000, the Board issued its “Order Amending Legal Issues in Prehearing Order.”

B. INTERVENTION AND AMICUS CURIAE

On March 9, at the PHC, the Board received “Snohomish County-Camano Association of Realtors’ Motion to Intervene and Memorandum of Support” – in Case No. 00-3-0001 *McVittie II*; and “Snohomish County-Camano Association of Realtors’ Motion to Intervene and Memorandum of Support” – in Case No. 00-3-0003 *McVittie III*. Petitioner indicated that she would not object to Realtors intervention in the case.

On March 15, 2000, the Board received “1000 Friends of Washington Motion for Amicus Curiae Status [*McVittie IV*].”

On March 16, 2000, the Board received “Snohomish County-Camano Association of Realtors’ Motion to Intervene and Memorandum in Support” – in Case No. 00-3-0006, *McVittie IV*.

On March 22, the Board received “Snohomish County’s Comments Relating to Motion for Amicus Curiae Status.”

On March 23, 2000, the Board issued its “Order of Consolidation, Order on Intervention and Amicus Curiae and Prehearing Order.” The Order granted Realtors status as Intervenor in the consolidated CPSGMHB Case No. 00-3-0006c (*McVittie IV*), for all issues. The Order also authorized Amicus Curiae status for 1000 Friends. 1000 Friends participation in this matter was limited to prehearing briefing on the following two general background issues:

- 1) The circumstances under which the land use element must be reassessed because of a funding shortfall, including the meaning of “probable funding”; and
- 2) The appropriate relationship between the comprehensive plan and capital budget decisions.

c. Motions to Supplement And amend index

On February 24, 2000, the Board received “Snohomish County’s Index of the Record RE: County’s Adoption of Amended Ordinance 99-092 and Amended Motion Nos. 99-400 & 99-404 (**Index**).

On March 1, 2000, the Board received “Snohomish County’s Revised Index of the Record RE: County’s Adoption of Amended Ordinance 99-092 and Amended Motions 99-400 & 99-404” (**Revised Index**).

At the March 16, 2000, PHC the PO noted that the Revised Index incorporates items germane to McVittie’s March 13, 2000 PFR (*McVittie IV*). Since PFR 00-3-0006 (*McVittie IV*) challenges the same document as PRR 00-3-0001 (*McVittie II*), pursuant to WAC 242-02-522(15), the PO **waived** the requirement that the County file a new Index for PFR 00-3-0006. Likewise, although use of an Exhibit List was discussed at the PHC, an Exhibit List, other than the core document list, was not required.

Also at the PHC, the Board and the parties agreed that certain documents were **core documents** in this proceeding. The parties agreed to compile a list of core documents to be provided by the County.

On April 6, 2000, the Board received the County’s “List of Core Documents” for McVittie IV; eighteen documents were listed and referenced by the Index number.

On April 3, 2000, the Board received Petitioner’s “Motion to Supplement the Record.” Attached to the motion were three proposed exhibits Petitioner sought to have included in the record.

On April 18, 2000, the Board received “Snohomish County’s Response to Petitioner’s Motion to Supplement the Record.” The County did not object to two items being included in the Record, but challenged the inclusion of one item.

On April 21, 2000, the Board received “Petitioners’ Reply on Motion to Supplement.”

On April 25, 2000, the Board issued its “Order on Motion to Supplement the Record.” The Order **admitted** three items and summarized the items comprising the record in this case.

d. Dispositive Motions

On April 6, 2000, the Board received “Snohomish County’s Dispositive Motion,” with four attached exhibits and “Realtor’s Joinder in County’s Dispositive Motion.” Snohomish County and the Realtors asked the Board to dismiss PFR 00-3-0001 (*McVittie II*), as invalid since it was prematurely filed or moot.

On April 18, 2000, the Board received Petitioner McVittie’s “Response to Dispositive Motion.”

On April 21, 2000, the Board received “Snohomish County’s Reply Brief in Support of Its Dispositive Motion” and “Realtor’s Reply RE: Dispositive Motion to Dismiss McVittie II.”

The Board did not hold a hearing on the dispositive motions.

On April 25, 2000, the Board issued its “Order on Dispositive Motion.” The Order **denied** the County’s and Realtors’ motions to **dismiss**.

e. Briefing and Hearing on the Merits

On May 17, 2000, the Board received “Petitioner’s Prehearing Brief, with attached exhibits” (**McVittie Phb**)

On May 18, 2000, the Board received “1000 Friends of Washington’s [Amicus Curiae Brief” (**Amicus PHB**).

On May 22, 2000, the Board received a “List of Exhibits for Petitioner Brief.” The list noted 42 exhibits and included copies of maps that were inadvertently omitted from the May 17, 2000 submittal.

On May 31, 2000, the Board received a letter from Petitioner (**Letter**) with an “Amended” Petitioner’s Prehearing Brief” (**McVittie PHB**), clarifying [adding and deleting] the Legal Issues addressed in each section of the brief. “The argument and text of the brief remain unchanged.” Letter, at 1.

On June 12, 2000, the Board received “Snohomish County’s Prehearing Brief”(**County PHB**), with exhibits and a request to take official notice of Items A-E; and “Snohomish County-Camano Association of Realtors’ Prehearing Response Brief and Request for Official Notice”(Realtor **PHB** and **Realtor Request for Official Notice**, respectively). Realtors’ requested Items A-C be admitted to the record.

On June 16, 2000, the Board received Petitioner’s “Motion to Supplement the Record (II) and to Take Official Notice.” Petitioner requested Items A-C be admitted to the record.

On June 19, 2000, the Board received “Petitioner’s Prehearing Reply Brief.” (**McVittie Reply**).

On June 22, 2000, the Board held a Hearing on the Merits (**HOM**) in Suite 1022 of the Financial Center, 1215 4th Avenue, Seattle, Washington. Edward G. McGuire, Presiding Officer, and Board members Lois H. North and Joseph W. Tovar were present for the Board. David A.

Bricklin ^[1] represented Petitioner Jody L. McVittie. Dawn L. Findlay, Barbara Dykes and Duana Koulouskova represented Respondent Snohomish County. Thomas J. Ehrlichman represented Intervenor Snohomish County-Camano Association of Realtors. Amicus 1000 Friends did not appear. Robert H. Lewis of Robert H. Lewis & Associates, Tacoma, provided Court reporting services. Andrew Lane, Law Clerk to the Board and several members of Snohomish County staff were in attendance. The hearing convened at 10:00 a.m. and adjourned at approximately ---1:00 p.m.

On June 30, 2000, the Board received “Snohomish County’s Post-hearing Brief and Objection to Petitioner’s Submittal of New Argument at the Hearing on the Merits” (**County Post-HB**). The Board also received a letter from Intervenor Realtors incorporating the arguments in the County Post-HB, and reiterating their objection to evidence and argument presented at the HOM (**Realtors’ Letter**).

On July 5, 2000, the Board received a “Notice of Withdrawal and Substitution of Counsel. Indicating that Dawn F. Findley withdrew her representation for Snohomish County, and that Barbara J. Dykes now represented the County.

On July 12, 2000, the Board received “Petitioner McVittie’s Response to Snohomish County’s and Intervenor’s Post-Hearing Brief” (**McVittie Post-HB**).

On July 25, 2000, the Board received a transcript of the June 22, 2000 HOM, prepared by Robert Lewis (**HOM Transcript**).

II. presumption of validity, burden of proof **and standard of review**

Petitioner challenges Snohomish County’s adoption of its: 1) 2000-2005 Capital Improvement Plan, 2) 2000-2005 Transportation Improvement Program, and 3) 2000-2005 Surface Water Management Detailed Improvement Program; as adopted by Ordinance No. 99-092, Motion No. 99-400 and Motion No. 404, respectively. Pursuant to RCW 36.70A.320(1), these GMA actions of Snohomish County are presumed valid upon adoption.

The burden is on Petitioner, McVittie, to demonstrate that the actions taken by the County are not in compliance with the requirements of the GMA. RCW 36.70A.320(2). Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the [actions taken by Snohomish County are] clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find Snohomish County’s actions clearly erroneous, the Board must be “left with the firm and definite conviction that a

mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

iii. board jurisdiction, Preliminary matters, Prefatory note and Abandoned Issues

A. Board Jurisdiction

The Board finds: 1) Petitioner McVittie’s PFRs were timely filed, pursuant to RCW 36.70A.290 (2)^[2]; 2) Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and 3) the Board has subject matter jurisdiction over the challenged actions, which amend and implement the County’s Comprehensive Plan, pursuant to RCW 36.70A.280(1)(a).

B. preliminary matters – Motions – Post Hearing Briefs

At the commencement of the HOM the parties were asked to speak to the various proposed exhibits that were offered by each party. No party objected to any of the offered exhibits.^[3] The Board **granted** the parties respective motions. Exhibit numbers (keyed to Index No.) are as follows:

Proposed Exhibit: Documents	Ruling
Petitioner’s Items:	
A. May 25, 2000 Memo from James Bloodgood re: 20 th Street SE – Arterial Unit in Arrears	Admitted – Index No. 503
B. County Motion 00-157 – Approving final plat – White Oaks Ridge Division IV.	Board takes notice – Index No. 504
C. County Motion 00-159 – Approving final plat – Mission Ridge Division I.	Board takes notice – Index No. 505
Snohomish County’s Items:	
A. Pages 1-4 from Snohomish County’s Prehearing Brief in <i>McVittie I</i> .	Admitted – Index No. 506
B. Various Sections of Snohomish County Code	Board takes notice – Index No. 507
C. Snohomish County Engineering Design and Development Standards	Board takes notice – Index No. 508
D-1. County Motion 95-384 – Adopting the 1996 Surface Water Management Division Annual Construction Program	Board takes notice – Index No. 509

D-2. County Motion 96-376 – Adopting the Surface Water Management Annual Construction Program	Board takes notice – Index No. 510
D-3. County Motion 97-404 – Adopting the Surface Water Management Annual Construction Program.	Board takes notice – Index No. 511
D-4. County Motion 98-357 – Adopting the Surface Water Management Annual Construction Program	Board takes notice – Index No. 512
E. Snohomish County NPDES Permit, Permit No. WASM33002 (issued 7/5/95, effective 8/4/95, expires 7/5/00)	Board takes notice – Index No. 513
Intervenor’s Items:	
A. Snohomish County Department of Planning and Development Services – PDS Work Program “Multi-Year Overview”	Admitted – Index No. 514
B. Snohomish County Tomorrow Growth Management Advisory Council, April 12, 2000 Meeting Minutes.	Admitted – Index No. 515
Petitioner’s Demonstrative Exhibit (offered at HOM):	
<i>Demonstrative Exhibit entitled:</i> Funding Gap 2001-2002	Withdrawn – McVittie Post-HB, at 21-22.

At the HOM, Petitioner distributed a demonstrative exhibit and excerpts from the record in an effort to illustrate Petitioner’s argument regarding an alleged funding gap. According to Petitioner, the figures relied upon in the demonstrative exhibit were footnoted, indicating the source record document. The County and Realtors objected, arguing that the argument being made was new and should have been made in briefing. Also at the HOM, the County objected to “funding shortfall” arguments raised in Petitioner’s Reply Brief, specifically the “seven perspectives” addressed at 20-22. Due to the potential significance of the “funding shortfall” question, and to address the noted objections, the Board directed the County to file a post-hearing brief regarding the arguments illustrated by the demonstrative exhibit and those appearing in Petitioner’s Reply Brief at 20-22. Petitioner was also given the opportunity to file a post-hearing response brief.

In post-hearing briefing the County continued to object to the demonstrative exhibit and argued it contained several basic flaws. County Post-HB, at 1-2 and 20-26. In withdrawing the

demonstrative exhibit, Petitioner conceded, “a major part of the calculation in the exhibit is based on an improper ‘apples and oranges’ comparison.” *McVittie Post-HB*, at 21. As noted above, the demonstrative exhibit entitled *Funding Gap 2001-2002* is **withdrawn**, and will not be considered further by the Board.

C. Prefatory Note

In 1999, Petitioner *McVittie* challenged the County’s adoption of Ordinance No. 99-027, which adopted the County’s 1999 –2004 Capital Improvement Program (**1999-2004 CIP** or **CIP**). Before that case was heard, the County adopted Ordinance No. 99-092, which adopted the County’s 2000-2005 Capital Improvement Program (**2000-2005 CIP**). In reaching its decision, the Board determined that portions of *McVittie*’s challenge to the 1999-2004 CIP became **moot** due to the County’s adoption of Ordinance No. 99-092. Since the County’s funding information had been repealed and replaced, the Board could not determine, nor could Petitioner demonstrate, whether the County was experiencing capital improvement funding shortfalls that would precipitate further County action, including possible reassessment of the County’s land use plan. Nonetheless, the Board addressed those issues raised by Petitioner that were not affected by the County’s adoption of its new 2000-2005 CIP. *See: McVittie v. Snohomish County, (McVittie I)*, CPSGMHB Case No 99-3-0016c (**9316c**), Final Decision and Order (**FDO**) (Feb. 9, 2000); and *McVittie I, 9316c*, Order on Motion to Reconsider (**Reconsideration**) (Mar. 16, 2000).

Petitioner now challenges the 2000-2005 CIP, 2000-2005 Transportation Improvement Program (**2000-2005 TIP** or **TIP**) and 2000-2005 Surface Water Management Detail Improvement Program (**2000-2005 SWMDIP** or **SWMDIP**). Petitioner posed eighteen Legal Issues in the various PFRs that were ultimately reflected in the PHO. The first twelve Legal Issues are directed at the 2000-2005 CIP; the last six Legal Issues are directed at the 2000-2005 TIP and 2000-2005 SWMDIP. Obviously, there is overlap of the issues since similar challenges are brought to the different funding programs. Generally, the Legal Issues challenge the different enactments compliance with the following GMA requirements: 1) **Goals** – RCW 36.70A.020 [Legal Issues: 1, 5, 6, 8, 11, 12 and 13]; 2) **Capital Facilities Element** – RCW 36.70A.070(3) [Legal Issues: 2, 5, 14 and 16]; 3) **Transportation Element** – RCW 36.70A.070(6) [Legal Issues: 8, 9, 10, 15, 16 and 17]; 4) **Public Participation** – RCW 36.70A.140 [Legal Issues: 11, 12 and 18]; and 5) **Consistency and Implementation** – RCW 36.70A.040(3), .070 (preamble), .120 and .210 [Legal Issues: 2, 3, 4, 7, 9, 14 and 16].

The organization of this decision will follow “topical” headings, each of which references noncompliance with the GMA sections noted above. The specific Legal Issues that appeared in the PFRs and the Board’s PHO are set forth under each topical heading as appropriate. Reference to those specific Legal Issues that Petitioner is allegedly addressing in the argument under each topic is footnoted.

D. ABANDONED ISSUES

The County contends that Petitioner either abandoned or inadequately briefed the following Legal Issues: 3 (regarding .040 and .210); 6, 8, 11, 12, 18 (in their entirety); 13 (entirely); and 16 (regarding .100 and .210). County PHB, at 8. Petitioner concedes that Legal Issue 6 is abandoned, but argues the other issues are argued and briefed in the PHB. Petitioner does not respond to the County's contention regarding Legal Issue 16. Petitioner Reply, at 32-34. Having reviewed the briefs and arguments of the parties, the Board rules as follows: Legal Issues 6, 8 and 13 are **abandoned**; Legal Issue 3 is **abandoned in part** (regarding .040 and .210); Legal Issue 16 is **abandoned in part** (regarding .100 and .210); and Legal Issues 12 and 18 are **not abandoned**.

In the discussion below, abandoned issues will be noted by ~~strikeout~~, the full text of these abandoned issues is found in Appendix B. Partially abandoned issues are noted by ~~strikeout~~ and appear under appropriate topical headings.

iv. Analysis and discussion of legal issues

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[4]

A. Challenge to RCW 36.70A.020 - Goals

1. Did Snohomish County (County) fail to comply with the goals of RCW 36.70A.020 (1), (3), (9), (10) and (12) when it adopted Ordinance No. 99-092 (2000-2005 CIP) or has the County failed to act because it:

- a. failed to encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner;*
- b. failed to encourage multi-modal transportation systems;*
- c. failed to adequately evaluate and finance the capital needs for fish and wildlife conservation;*
- d. failed to protect or to provide funding to protect the environment and enhance water quality;*
- e. failed to set a level of service standard or adequate funding to address the needs for park, open space and recreational services; and*
- f. failed to establish "locally established minimum standards" by which to measure adequacy for facilities and services, and where standards were set, failed to ensure that those public facilities and services necessary to support development shall be adequate to serve development without decreasing current service levels below locally established minimum standards?*

5. *Did the County fail to act because:*

- a. *it has failed to ensure that public facilities and services were adequate without decreasing service levels below locally established minimum standards – RCW 36.70A.020(12);*
- b. *it has failed to meet previously established minimum standards for services and facilities as required by RCW 36.70A.070(3)(d) and (e); and*
- c. *it has in some cases failed to set measurable standards for facilities and services necessary to serve development RCW 36.70A.020(12).*

11. *Did the County fail to comply with the requirements of RCW 36.70A.020(11) and RCW 36.70A.140 because in adopting standards for facilities and services necessary to support development, the County has not invited public discussion and failed to provide for adequate public participation?*

12. *Did the County fail to act because it has not clearly established minimum level of service standards in a fashion that is understandable to the public and thereby discourage public participation significantly interfering with RCW 36.70A.020(11) and RCW 36.70A.140?*

Discussion

In *McVittie I*, FDO, at 23, the Board quoted its statement from *Rabie, et al., v. City of Burien*, CPSGMHB Case No. 98-3-0005c, FDO (Oct. 19, 1998) at 5-6 as follows:

To show substantive noncompliance with a planning goal, a petitioner must identify that portion of the challenged enactment that is not consistent with, or thwarts, the planning goal, and explain why the identified portion does not comply with that goal.

Here, Petitioner makes no independent argument regarding the County's compliance with any of the goals noted above. Petitioner's arguments are in the context of whether the County complied with the various *requirements* sections (capital facility, transportation element or public participation provisions) of the Act. Consequently, all further discussion of these goals, where appropriate, is included within the topical headings (requirements sections) discussed below. Petitioner has failed to carry the burden of showing how the County's actions failed to comply with the goals of the GMA.

Conclusion – Goals

Petitioner has **failed to carry the burden** of showing, beyond the requirements provisions of the Act, how the County's actions failed to comply with the goals of the GMA. Petitioner's

challenge to the County's compliance with RCW 36.70A.020(1), (3), (9), (10), (11) and (12) is dismissed.

B. Challenge to RCW 36.70A.070(3) – Capital Facilities Element ^[5]

2. *Did the County fail to comply with RCW 36.70A.070(preamble), and (3)(a), (b), (c), (d) and (e) when it adopted Ordinance No. 99-092, (2000-2005 CIP) because:*

- a. there is no current inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities;*
- b. there is no forecast of the future needs for such capital facilities and previously acknowledged "critical" infrastructure needs are not discussed;*
- c. location and capacities of the expanded or new capital facilities are not identified;*
- d. there is no six-year plan that will finance such capital facilities within projected funding capacities and sources of public money are not clearly identified for all of the elements of the plan;*
- e. when probable funding falls short of meeting existing needs, the land use element has not been reassessed;*
- f. modifications to the land use portions of the comprehensive plan and development regulations are not reflected in the capital facilities plan; and*
- g. the land use element, the capital facilities plan element, and the financing plan within the capital facilities plan element are not coordinated and consistent?*

7. *Did the County fail to comply with the requirements of RCW 36.70A.070(3)(b) when it identified future needs but chose to omit them from the 2000-2005 CIP?*

14. *Did the County fail to comply with RCW 36.70A.070(preamble), and (3)(a), (b), (c), (d) and (e) when it adopted the 2000-2005 TIP and 2000-2005 SWMDIP because:*

- a. when the TIP was adopted into the capital facility plan:*
 - i. there is no six-year plan that will finance such transportation within projected funding capabilities;*
 - ii. sources of public money are not clearly identified for all of the elements of the plan;*
 - iii. when probable funding falls short of meeting existing needs, the land use element has not been reassessed;*
 - iv. the TIP is not based on up to date data; and*
 - v. the land use element, the transportation element, the capital facilities plan element, and the financing plan within the capital*

facilities plan element are not coordinated and consistent; and

b. the funding available for surface water in the SWMDIP:

i. does not meet previously identified needs;

ii. sources of public money are not clearly identified for all elements of the plan; and

iii. when probable funding falls short of meeting existing needs, the land use element has not been reassessed?

Discussion

Issues 2 and 7 focus on the CIP, while Issue 14 attacks the TIP and SWMDIP. The basis for evaluating the County's CIP and SWMDIP is the County's capital facilities element (CFE). However, as discussed in *McVittie I*, "The transportation improvements identified in the Transportation Element are the baseline Plan provisions against which conformity of capital budget decisions [regarding transportation] are measured." *McVittie I*, FDO, at 19. Additionally, the Board stated: "the capital facilities element of the County's GMA Plan contains a *summary* of the County's transportation improvement capital budget decisions. Those actual capital budget decisions for roads are contained, as the County correctly contends, in the TIP." *McVittie I*, FDO, at 20. Petitioner asserts in Issue 14 that the County erred "when the TIP was adopted into the capital facility plan." This is simply wrong, as explained in *McVittie I*. Consequently, the Board will not review the TIP in the context of the CFE. The summary of the TIP, by category, is found in the CIP, at 23-29. Ex. 333. Issues 2 and 7 and Issue 14, as it relates to the SWMDIP, are addressed below.

CFE Minimum Standards:

Petitioner argues that the County has established a weak foundation for its capital facility planning because it has either not established minimum standards, adopted low or old minimum standards, or the minimum standards established are ill defined. *McVittie PHB*, at 11-17. Since the County has not revised its minimum standards in the challenged enactments, Petitioner's challenge is **untimely**. Additionally, the Board addressed the question of whether the County had established minimum standards in the *McVittie I*, FDO, at 22-25, and *McVittie I*, Reconsideration, at 2-4. The Board will not revisit this question here. However, to reiterate, the low end of each of the County's established service guideline ranges is the minimum standard for that facility or service. Petitioner's challenge to the County's compliance with RCW 36.70A.070 (preamble), .070(3) and .020(12) regarding adoption of minimum standards is **dismissed**.

CFE Inventories:

Petitioner argues that the County has failed to include facility capacity in its inventories, has incomplete inventories and has failed to indicate where capacity exists within the unincorporated

UGAs. *McVittie PHB*, at 19-20. Since the County has not revised its inventories in the challenged enactments, Petitioner's challenge is **untimely**. Again, the Board dealt with the question of whether the County's inventories complied with the GMA in *McVittie I*, FDO, at 32-34. The Board will not revisit this question here. Petitioner's challenge to the County's compliance with RCW 36.70A.070(3)(a), regarding capital facility inventories is **dismissed**.

CFE Needs Assessment:

Petitioner argues that the County has failed to conduct the required needs assessment and identify which needs are necessary for development or updated its needs assessment to reflect emerging growth patterns. *McVittie PHB*, at 20-30. Since the County has not revised its needs assessments, as contained in the Henderson and Young Report (Core Document 9c), or in the challenged enactments, Petitioner's challenge is **untimely**. Also, the Board dealt with the question of whether the County's needs assessments complied with the GMA in *McVittie I*, FDO, at 34-36. The Board will not revisit this question here. Petitioner's challenge to the County's compliance with RCW 36.70A.070(3)(b) and (c), regarding capital facility inventories is **dismissed**.

Six-year Financing Plan(s):

- The existence of the various Six-year Financing Plans is undisputed. These are the very documents that are the basis of Petitioner's challenge: the 2000-2005 CIP, the 2000-2005 SWMDIP, and the 2000-2005 TIP. These enactments include projects, costs and financing for the six-year period from 2000-2005. The County's adoption of the CIP, including SWMDIP, **complies** with RCW 36.70A.070(3)(d).

Probable Funding Shortfall / Reassessment – CFE and CIP/SWMDIP:

- In order to determine whether the County is experiencing a shortfall in funding, the question is simply, have the needs identified in the CIP, as derived from the CFE (and supporting documents) been funded. Petitioner does not dispute that the needs identified in the CIP are derived from the CFE. *McVittie PHB* and Reply. Reference to the CIP indicates that the answer to this question is also yes. The CIP contains a *Detailed Departmental Capital Plan List*, which includes a description of the project(s) and tables indicating the six-year capital costs and the six-year funding source. See CIP, at 22-109, Ex. 333. Each of the tables (capital costs and identified funding for each category of project) is in balance. The tables in the CIP do not illustrate or demonstrate a funding shortfall. The County contends, there is no funding shortfall for the CIP in

evidence. County PHB, at 13.

However, Petitioner argues that needed projects are not identified, not included or there are discrepancies in cost figures. McVittie PHB, at 30-34. Petitioner also argues that: the identified funding sources are not adequate to meet current needs or needs in 2005; funding is not available to meet needs identified, but not included in the CIP; and funding sources are not probable. McVittie PHB, at 35-37. The Board has addressed the question of the adequacy of the County's needs assessment in *McVittie I*, as noted above, it will not be addressed again here. The choice of what is funded during a six-year financing plan cycle is a discretionary choice of the County. It is not for Petitioner to decide which projects are to be funded in a six-year cycle. So long as the needs identified in the CFE are reflected in the CIP, the scheduling of their implementation, including the delay of project to later years, is a discretionary choice of the County. However, the County should be mindful that those needs identified in the 20-year Plan (CFE), ultimately must be addressed (funded and implemented) at some point during the original 20-year life of the Plan. Nonetheless, Petitioner has **failed to show a shortfall** in funding in the CIP. Since Petitioner failed to demonstrate a shortfall in funding, Petitioner's challenge to the reassessment provisions of the GMA is not applicable.

Regarding the SWMDIP, Petitioner suggests that the County does not address funding future surface water drainage needs since the environmental impact statement for the 2000-2005 CIP indicates a *backlog* of identified rehabilitation and corrective projects. McVittie PHB, at 36 (emphasis supplied). While project backlogs are a problem faced by most local governments, the GMA does not provide the remedy. "The Act does not impose a duty or requirement upon local governments to eliminate or substantially reduce capital facilities maintenance backlogs, nor to guarantee funding or financing of capital facilities maintenance projects." *See West Seattle Defense Fund and Neighborhood Rights Campaign v. City of Seattle (WSDF IV)*, CPSGMHB Case No. 96-3-0033, Final Decision and Order (Mar. 24, 1997), at 31. The Board notes that the CIP includes the categories of projects identified in the 2000-2005 SWMDIP and includes identified funding sources. Ex. 333, at 38-42. Petitioner has **failed to show a shortfall** in the SWMDIP. Since Petitioner failed to demonstrate a shortfall in funding, Petitioner's challenge to the reassessment provisions of the GMA is not applicable.

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Petitioner has **failed to carry the burden** of showing how the County CIP, including SWMDIP, is experiencing a shortfall in funding of capital projects. Petitioner has failed to show how the County has not complied with RCW 36.70A.070(3)(e).

-
Conclusion – Capital Facilities Element

As specified above, Petitioner's challenges to the CIP and SWMDIP are either **untimely**, or Petitioner has **failed to carry the burden** of showing how the County CIP, including SWMDIP,

fails to comply with the goals and requirements of the Act. Petitioner has failed to show how the County has not complied with RCW 36.70A.020(12), RCW 36.70A.070(preamble) or RCW 36.70A.070(3)(a), (b), (c), (d) and (e).

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[\[6\]](#)

C. Challenge to RCW 36.70A.070(6) – Transportation Element

9. Did the County fail to act in maintaining a valid Transportation Element because the transportation facilities forecasting is based on land use assumptions that are no longer consistent with the adopted Plan and regulations resulting in capital budget decisions that are no longer consistent with the Plan as required by RCW 36.70A.120?
[\[7\]](#)

10. Did the County fail to act in maintaining a valid Transportation Element because the Transportation Element is no longer consistent with the six- year Transportation Improvement Plan (TIP) as required by RCW 36.70A.070(6)(c)?

15. Did the County fail to comply with RCW 36.70A.070(6)(a), (b) and (c) in adopting the 2000-2005 TIP because:

- a. the transportation facilities forecasting is based on land use assumptions that are no longer consistent with the adopted Plan and regulations;***
- b. the needs assessment was not based on available up to date data;***
- c. the identification of state and local (transportation) system needs to meet current and future demands is incomplete;***
- d. the “probable funding” is not clearly identified and not analyzed against funding needs;***
- e. there is a lack of funding and planning for specific demand management strategies that require capital investment; and***
- f. there is no clear discussion of how additional funding will be raised or how land use assumptions will be reassessed to ensure that level of service standards will be met?***

16. Did the County fail to comply with RCW 36.70A.070(preamble), .070(3)(e), .070(6)(c), ~~RCW 36.70A.100~~, RCW 36.70A.120 and ~~RCW 36.70A.210~~ in adopting the 2000-2005 TIP and 2000-2005 SWMDIP because the six-year financing plans are not consistent with the capital facilities element, the transportation element, the Plan, the ~~County-wide Planning Policies~~ or the state or public transit plan?

17. Did the County fail to act because:

- a. it has not maintained its transportation element to comply with the***

requirements of a transportation element defined by RCW 36.70A.070(6)(a)(iii) and (iv), and .070(6)(c) to include up to date data, available analysis identifying state and local system needs to meet current and future demands and analysis of funding capabilities to judge needs against probable funding sources now that some of the previously identified sources are not available as originally anticipated; or alternatively,

b. it has failed to implement the measures identified in the transportation element now that the proposed funding is not available to meet identified needs?

Discussion

Issues 9, 10, 15, 16 and 17 challenge the County's adoption of the TIP. The basis for evaluating the County's TIP is the County's transportation element (**TE**). As discussed in *McVittie I*, "The transportation improvements identified in the Transportation Element are the baseline Plan provisions against which conformity of capital budget decisions [regarding transportation] are measured. . . . [I]n order for Petitioners to argue the County is not making capital budget decisions for roads in conformity with its comprehensive plan, Petitioners must rely on the TIP." *McVittie I*, FDO, at 19 and 20. The Board notes that Motion No. 400 only adopted the 2000-2005 TIP, thereby replacing the prior TIP within the transportation element; Motion No. 400 did not otherwise amend the TE. Issues 9, 10, 15, 16 and 17, as they relate to the TE and TIP are discussed below.

TE Minimum Standards:

Petitioner argues that the County has not established minimum standards, or even minimum guidelines, for transit routes. *McVittie PHB*, at 11. Since the County has not revised its minimum standards in the challenged enactments, specifically the TIP, Petitioner's challenge is **untimely**. Nonetheless, the County responds that in 1995, when it adopted the Transportation Element of the GMA Comprehensive Plan, it adopted minimum standards for transit. The County refers to its Transportation Element, at 37, Table 10. *County PHB*, at 19; *see also* Ex. 261, at 37, Table 10. Petitioner's challenge to the County's compliance with RCW 36.70A.070 (preamble), .070(3), .070(6) and .020(12) regarding adoption of minimum standards is **dismissed**.

TE Inventories:

Petitioner argues that, regarding transit, the County's TE only includes transit maps, not a discussion of how often busses run or what their people-carrying capacity is. *McVittie PHB*, at 19. Since the County has not revised its inventories in the challenged TIP, Petitioner's challenge is **untimely**. Also, the Board dealt with the question of whether the County's inventories were

required to be periodically updated to comply with the GMA was addressed in *McVittie I*, FDO, at 32-34. The same rationale discussed there, applies here to the TE. Petitioner’s challenge to the County’s compliance with RCW 36.70A.070(6), regarding transit inventories is **dismissed**.

TE Needs Assessment:

Petitioner argues that the County’s TE does not include the infrastructure needs identified by an independent group in 1997 in a report entitled “Snohomish County Economic Investment Plan Critical Infrastructure Project” (EIP-6/97) (**EIP-‘97**); nor does the TE acknowledge needs identified in the subarea planning process for the Lake Stevens area. *McVittie PHB*, at 25 -27. The independently produced EIP-‘97 is not incorporated as part of the County’s 1999 action. Additionally, the Board’s statement that “[O]ffered exhibits for the proposed Lake Stevens Sub Area plan are speculative in the context of Petitioners’ challenge. . .”^[8] applies to the present situation also, since the County has not taken action regarding the Lake Stevens Subarea Plan. Finally, since the County has not revised its needs assessment in adopting Motion No. 400, Petitioner’s challenge is **untimely**. Petitioner’s challenge to the County’s compliance with RCW 36.70A.070(6) regarding transportation needs assessments is **dismissed**.

Probable Funding Shortfall / Reassessment –TE and TIP:

At the HOM, Petitioner relied upon a chart within Exhibit 501,^[9] entitled Long Range Funding Gaps, to demonstrate the County’s funding shortfall for transportation projects. Additionally, Petitioner argues, “The shortfall in transportation funding is clearly evident from seven perspectives.” *McVittie Reply*, at 20-22. At the HOM, the County and Intervenor objected to Petitioner’s raising these arguments in the Reply brief for the first time. Both the County and Intervenor contended that these arguments were not offered in the Prehearing Brief and therefore should not be considered by the Board since neither the County nor Intervenor had the opportunity to respond to the assertions in writing. The Board acknowledged the lack of similar concise argument in the Prehearing Brief, however, since Petitioner’s case focused on funding shortfalls, the Board directed the County and Intervenor to prepare Post-hearing briefs that focused on the funding shortfall question. *HOM Transcript*, at 32, 45–48, 99-102.

Also at the HOM, Petitioner devoted a substantial portion of the time for oral argument to an explanation of the transportation shortfall via a demonstrative exhibit. Objections to the demonstrative exhibit were noted during the HOM, and the County and Intervenor were given the opportunity to respond to Petitioner’s argument in post-hearing briefing. *HOM Transcript*, at 32, 45-48, 99 – 102; and *County Post-HB*, at 1-4. However, in post-hearing briefing, Petitioner **withdrew** the demonstrative exhibit and argument related to it. *McVittie Post-HB*, at 21-22. Consequently, the Board will set aside the demonstrative exhibit offered by Petitioner at the

HOM.

In order to determine whether the County is experiencing a shortfall in transportation funding, the question is simply, have the needs identified in the TE (and supporting documents), been carried forward to the TIP and funded? In order to meet the burden of proof, Petitioner listed projects from the TE, and indicated whether they were unfunded or not, according to Exhibit 501; additionally Petitioner listed projects from the TE and indicated if the projects were included in the 2000-2005 TIP and noted whether they were funded or not. McVittie Post-HB, at 6-7 and 10. However, these specific arguments were not made in Petitioner's prehearing brief, or the reply brief or at the hearing on the merits. The first time these arguments appear are in the *final post hearing brief* submitted in response to the County's Post-HB. Neither the County nor Intervenor has had any opportunity to respond to these specific assertions. Consequently, the Board's review focuses on the "seven perspectives" presented by Petitioner in the Reply brief.

Petitioner's Seven Perspectives to Demonstrate Funding Shortfalls for Transportation

1. *Uncertain Funding*: Petitioner asserts that the funding source for some projects listed in the TIP are "uncertain" or "unfunded" which is not a probable funding source. McVittie Reply, at 20. The County responds that all projects in the TIP have identified funding sources and that those identified as "uncertain" means that the noted revenues have not been formally committed or guaranteed by the funding agency at the time of the adoption of the TIP. County Post-HB, at 5. The Board notes that the funding sources are local, state and federal which are typically on different fiscal calendar years and funding cycles. Therefore, it is not unreasonable for the County to distinguish in its TIP between those funds that are committed, and those that are not yet committed by an identified funding source.

These identified funding agencies are a probable source of funding for transportation improvements. However, "if the probable funding falls short of meeting identified needs, [the TE must include] a discussion of how additional funding must be raised, or how land use assumptions will be reassessed to ensure that the level of service standards will be met." RCW 36.70A.070(6)(a)(iv)(C). Thus, if the funding is not secured, which Petitioner has not shown, the County is committed to rely on its financial strategy of securing "new revenue sources" for ensuring that "the planned land uses of the comprehensive plan are adequately served by a fully-funded transportation system." Ex. 261, TE, at 110. Implementing the County's adopted "financial strategy" must occur in the public forum. Petitioner has failed to show a shortfall in funding based upon "uncertain funding" in the TIP.

The County contends that Petitioner's reliance upon Exhibit 501 to support the assertion that projects are "unfunded" is inaccurate, since the Petitioner uses exhibit 501 out of context. County Post-HB, at 13. Exhibit 501 was used as part of a presentation to support a tax levy

request and included the “entire universe of potential transportation projects” not just capacity projects adopted in the TE that are needed to ensure level of service standards will be met. County Post-HB, at 13. Exhibit 501. The Board agrees. The GMA requires the County to “ensure that levels of service standards [identified in the TE] will be met.” RCW 36.70A.070(6)(a)(iv)(C). These are the capacity projects identified by the County. Exhibit 501 does not support the proposition for which it was offered. Additionally, the “gap” illustrated on the chart entitled Long Term Capital Needs to 2020 - Funding Gap \$760,063,566 - 1998 Dollars does not show a funding “gap” in the years 2000-2005, the years covered by the TIP. The funding “gap” illustrated in the chart occurs during the years 2007-2020. Petitioner has **failed to show a shortfall** in funding based upon “unfunded projects” in the TIP.

2. *Exclusion of Projects*: Petitioner argues that the County has excluded projects from the TIP because funding was not available. McVittie Reply, at 20. The County responds that Petitioner erroneously believes that the projects identified in the EIP-‘97 and those identified during the Lake Stevens Subarea Plan process, are *needs* that the County must fund. However, such projects are not included as *needed* projects in the County’s TE. The projects the County must fund are the *capacity projects* identified in the TE that are needed to maintain established level of service standards, not those desired by Petitioner. County Post-HB, at 7-14. While Petitioner can show that projects desired by Petitioner, but not identified in the TE, are not funded, Petitioner has not demonstrated that the County cannot fund projects identified in the 1995 TE. The Board agrees with the County. Those projects that are *capacity projects*, those necessary to support new growth (noted as “E. Capacity” in the TIP) are those that the County is bound to fund. Petitioner has **failed to show a shortfall** of funding based upon “exclusion of projects” from the TIP.

3. *Lack of funding for projects in “arrears”*: Petitioner argues that both Paradise Road and Snohomish-Woodinville Road are acknowledged by the County to be below LOS, yet the County has not provided funding to rectify this deficiency. McVittie Reply, at 20-21. The County acknowledges that these roads are in arrears, but counters that the LOS deficiencies on these roads are due to congestion on state highways (SR 522 and SR 9) and that the congestion on SR 522 and SR 9 “cannot be cured by means of a funded County project.” Consequently, the County asserts that RCW 36.70A.070(6)(a)(iii)(C) provides that the County’s GMA concurrency requirements “do not apply to transportation facilities and services of state-wide significance . . .” County Post-HB, at 14-16. The Board reluctantly agrees and finds that the County is correct on the law, but Petitioner is correct that *the County is not helpless* in this situation and *the County’s hands are not tied*. The County has options it should pursue to address this problem that include: 1) Aggressively fund transit and TDM programs to reduce the need for additional capacity; 2) Work with the State to find alternate solutions or speed up funding by offering to share part of the State costs; 3) Work with the State to coordinate funding and require private investment; and 4) adopt lower LOS, after full public participation. Nonetheless, Petitioner has **failed to show a shortfall** of funding based upon concurrency deficiencies.

4. *Partial Funding*: Petitioner asserts that while projects may be listed in the TIP, the full cost of funding the entire project may not be listed. McVittie Reply, at 21. The County concedes that the 20th Street project is listed as partially funded. However, part of the project can stand as an independent unit and there is no reason to delay the project until full financing is secured. County Post-HB, at 16-17. The Board agrees with the County, but notes that during the 20-year planning period, “if the probable funding falls short of meeting identified needs, [the TE must include] a discussion of how additional funding must be raised, or how land use assumptions will be reassessed to ensure that the level of service standards will be met.” RCW 36.70A.070(6)(a)(iv)(C). Petitioner has not persuaded the Board that the County erred. Petitioner has **failed to show a shortfall** of funding based upon partial funding of projects in the TIP.

5. *The use of “1995 dollars” in the TE underestimates the current need for revenue in 2000*: Petitioner asserts that the use of ’95 dollars underestimates the current need for revenue in the year 2000. McVittie Reply, at 21. In response, the County updates the “1995 dollars” to “2000 dollars” and contends that even in “updated dollars” the County has collected more revenue than forecast in 1995. County Post-HB, at 17-18. The County’s position is not in error. Petitioner has **failed to show a shortfall** in funding based upon alleged underestimates of revenue needed in 2000.

6. *Costs have increased faster than revenues*: Petitioner contends that the County has not recognized increased costs. McVittie Reply, at 21. The County acknowledges that while costs have increased, so have revenues; and that “While this does indicate some ‘slippage’ in revenue growth keeping up with inflation of project costs, the slippage is completely contained in the part of the construction program [for] funding the capacity projects specifically listed in the TE.” County Post-HB, at 18-19. The Board again agrees with the County. Petitioner has **failed to show a shortfall** in funding based upon alleged increases in project costs.

7. *Postponing projects creates a shortfall*: Petitioner contends, “the County’s system of ‘prioritizing’ and only funding the most urgent projects i.e., postponing other projects until funding is available, is an enormous infrastructure funding shortfall. The GMA does not allow this.” McVittie Reply, at 21-22. In response, the County states, “the GMA requires [the County] to fund (over the 20-year life of the plan) only those capacity projects that ensure the adopted level of service for a public facility is being met.” County Post-HB, at 12. Postponing projects *during* the early or middle years of the 20-year planning horizon does not create a funding shortfall.

As the Board has previously discussed in this decision, the choice of what projects are funded during a six-year financing plan cycle is a discretionary choice of the County. It is not for Petitioner to decide which projects are to be funded in a six-year cycle. So long as the capacity

needs (growth induced needs) identified in the TE are ultimately included in the TIP, the implementation schedule decision, including a decision to delay a project to later years, is a discretionary choice of the County.

Nevertheless, the County should be aware that those needs identified in the 20-year Plan (TE ending in 2012), ultimately must be addressed (funded and implemented) at some point during the original 20-year life of the Plan i.e. 2012. If these needs are not met by 2012, at a minimum, the County will be noncompliant in meeting the funding requirements of RCW 36.70A.070(6). However, Petitioner **has failed to show a shortfall** in funding based upon the County's system of prioritizing and postponing projects to later years during the 20-year planning horizon.

Conclusion – Transportation Element

As specified above, Petitioner's challenges to the TIP are either **untimely**, or Petitioner has **failed to carry the burden** of showing how the County TIP is experiencing a shortfall in funding of identified transportation projects. Petitioner has failed to show how the County has not complied with RCW 36.70A.020(3), 36.70A.070 (preamble), .070(6) or .120.

D. Challenge to RCW 36.70A.140 – Public Participation [\[10\]](#)

11. Did the County fail to comply with the requirements of RCW 36.70A.020(11) and RCW 36.70A.140 because in adopting standards for facilities and services necessary to support development, the County has not invited public discussion and failed to provide for adequate public participation?

12. Did the County fail to act because it has not clearly established minimum level of service standards in a fashion that is understandable to the public and thereby discourage public participation significantly interfering with RCW 36.70A.020(11) and RCW 36.70A.140?

18. Did the County fail to comply with RCW 36.70A.140 in adopting the 2000-2005 TIP and 2000-2005 SWMDIP because in the face of inadequate probable funding to meet existing needs for transportation and surface water management the County has failed to provide the adequate public participation to either assess the land use plan, modify the Plan or develop additional sources of revenue to ensure that the finance plan, the capital facilities element and the Plan remain consistent?

Discussion

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In the Prefatory Note in *McVittie I*, the Board stated: “[I]t is important to remember that reassessments and amendments to the Plan, whether they involve land use, capital facilities, or levels of service, are subject to the ‘early and continuous public participation’ requirements of the Act. RCW 36.70A.140.” *McVittie I*, FDO, at 9. Additionally, the Board stated:

[I]f a reassessment action is triggered; the local government’s response must culminate in public action (e.g., a plan or development regulation amendment) in the public forum. The GMA’s public participation goal (RCW 36.70A.020(11)) and public participation requirements (RCW 36.70A.140, .130, .035) compel the opportunity for public participation. This includes, but is not limited to, disclosure of the need for a reassessment, disclosure of the options under consideration, and public participation prior to local legislative action. [Footnote omitted]

McVittie I, FDO, at 27.

Petitioner does not contend that the County has revised its standards or taken any other reassessment action without public participation. Petitioner does concede that even if notice and public participation was lacking during the 1998 revision of the County’s standards (LOS for Parks and Recreation), such action “cannot be challenged [now].” *McVittie Reply*, at 29. It appears that the crux of *McVittie*’s ‘failure to provide for public participation’ argument is that “the County has failed to publicly acknowledge in the context of capital facility and transportation planning (and still fails to acknowledge) that there is a funding shortfall and failed to engage the public in the required reassessment process.” Petitioner also surmises that the County denies that any reassessment is necessary, thus, no public process is required. *McVittie Reply*, at 29. Whether or not the County argues it, Petitioner’s surmise is correct.

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As set forth in *McVittie I*, and acknowledged by Petitioner, once a shortfall is established and a reassessment precipitated, the GMA’s public participation process requirements come into play. However, as resolved above, Petitioner has not shown the existence of a funding shortfall in the CIP, TIP or SWMDIP, which would trigger a reassessment action. Consequently, public participation is not required because reassessment is determined to be unnecessary. Petitioner has **failed to show** how the County has failed to comply with the public participation requirements of the Act.

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Conclusion – Public Participation

Petitioner has **failed to carry the burden** of showing how the County has failed to comply with the public participation requirements of the Act. Petitioner’s challenge to compliance with RCW 36.70A.140 and .020(11) is **dismissed**.

E. Challenge to RCW 36.70A.070(preamble) and .120 – consistency and Plan Implementation ^[11]

3. Did the County fail to comply with RCW 36.70A.070(preamble), ~~RCW 36.70A.040(3)(d), [and]RCW 36.70A.120 and RCW 36.70A.210~~ when it adopted Ordinance No. 99-092 (2000-2005 CIP) because:

- ~~a.—the 2000-2005 CIP is not internally consistent, not consistent with the development regulations, not consistent with the comprehensive plan and not consistent with the County-wide Planning Policies (CPPs); and~~***
- ~~b.—the County failed to act because though the CPPs call for phasing of growth to use land efficiently and add certainty to capital facility planning, an effective phasing ordinance has not been implemented?~~***

4. Did the County fail to comply with RCW 36.70A.070(preamble) and RCW 36.70A.120 when it adopted Ordinance No. 99-092 (2000-2005 CIP) because:

- a. although the Plan calls for a clear mechanism of phasing development there is, as of yet, no implementing ordinance and the Capital Facilities Plan is not structured to support this element of the Comprehensive Plan; and***
- b. the County failed to perform its activities and make capital budget decisions in conformity with its comprehensive plan and the CPPs?***

9. Did the County fail to act in maintaining a valid Transportation Element because the transportation facilities forecasting is based on land use assumptions that are no longer consistent with the adopted Plan and regulations resulting in capital budget decisions that are no longer consistent with the Plan as required by RCW 36.70A.120?

Discussion

RCW 36.70A.120 provides:

Each County and city that is required to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

Petitioner laments that while .120 requires conformity to a plan, “the converse mandate is not present: no where does the Act explicitly require a jurisdiction to take action to implement its Plan.”^[12] McVittie PHB, at 50. Petitioner then contends that the County has not followed its own strategies and not reevaluated its spending strategy when shortfalls occurred due to backlogs

and poor implementation. *McVittie PHB*, at 50-52. A County-wide Planning Policy (**abandoned**) and numerous General Plan Policies are quoted as the basis for inconsistency. However, the sum and substance of Petitioner's inconsistency argument is that the County has failed to identify and locate needed capital improvements and the County has failed to reassess its spending strategy. On the first point, the Board has addressed the question of needs assessment in *this case* and *McVittie I* and found the County in compliance. On the second point, Petitioner's challenge must fail since, as resolved earlier in this decision, Petitioner has not shown a funding shortfall that would precipitate the need for reassessment. Petitioner has **failed to carry the burden** of showing how the County has failed to comply with the consistency and implementation requirements of the Act.

Conclusion – Consistency and Implementation

Petitioner has **failed to carry the burden** of showing how the County has failed to comply with the consistency and implementation requirements of the Act. Petitioner's challenge to the County's compliance with RCW 36.70A.070(preamble) and .120 and is **dismissed**.

F. Invalidity Request

Petitioner asks the Board to invalidate the County's adoption of the 2000-2005 CIP, SWMDIP and TIP. *PFR*, at 6; *McVittie PHB*, at 53 –55.

RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70a.300;
 - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
 - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

A prerequisite for the Board entering a determination of invalidity is a finding of noncompliance. The Board has not found Snohomish County's CIP, TIP or SWMDIP to be noncompliant with the GMA. Consequently, the Board cannot and will not consider a determination of invalidity. Petitioner's request is **denied**.

V. ORDER

Based upon review of the PFRs, the prehearing and post-hearing briefs and exhibits submitted by the parties, having considered the arguments of the parties, the Act, prior Board decisions and having deliberated on the matter the Board ORDERS:

Petitioner's challenges have been determined to be either **untimely** or Petitioner has **failed to carry the burden** of showing how the County has failed to comply with the requirements of the Act. Therefore, Petitioner's challenges to the County's compliance with RCW 36.70A.020, .070(preamble), .070(3), .070(6), .120 and .140 are **dismissed with prejudice**.

So ORDERED this 11th day of September 2000.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

Joseph W. Tovar, AICP

Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

APPENDIX A

Findings of Fact

1. Snohomish County adopted the “Snohomish County GMA Comprehensive Plan – General Policy Plan” (**GMA Plan**) in June of 1995. Ex. 451.
2. The County’s GMA Plan includes goals, objectives, policies and implementation measures for transportation, a separate more detailed transportation element supplements the General Policy Plan provisions. Ex. 261.
3. The detailed Transportation Element was adopted as part of the 1995 GMA Plan.
4. The County’s GMA Plan has been amended every year (29 times) since its original adoption in 1995. Ex. 451, at 1-3.
5. The County’s six-year capital improvement plans are adopted as part of the County’s GMA Plan. The GMA Plan has been amended 3 times to include the six-year funding plans. Ordinance Nos. 98-060, 99-027 and 99-093. Ex. 451, at 2-3.
6. Ordinance No. 99-092 is entitled “Adopting the 2000-2005 Capital Improvement Plan as Part of Snohomish County’s Growth Management Act Comprehensive Plan and Amending Amended Ordinance No. 94-125 and Amended Ordinance No. 99-027.” Ordinance No. 99-092 was adopted on November 22, 1999. Ex. 285.
7. Motion No. 400 is entitled “Adopting the Six Year Transportation Improvement Program.” Motion 400 was adopted on November 22, 1999. Ex. 286.
8. Motion No. 404 is entitled “ Approving the 2000-2005 Surface Water Management Six-

Year Detailed Improvement Program. Motion 404 was adopted on November 22, 1999. Ex. 287.

appendix B

abandoned Legal Issues from PFRs and PHO

The following Legal Issues were abandoned, as discussed *infra*, at 9-10.

~~6.—Did the County's fail to act in maintaining its capital facility inventory and needs for 7 years, thereby substantially interfering with RCW 36.70A.020(1), (9), (10) and (12) because it cannot ensure that facilities are available if it does not know what is available and what is needed?~~

~~8.—Did the County fail to act, thereby substantially interfering with RCW 36.70A.020(1), (3) and (12) because it has not formally updated its Transportation Element to include:~~

~~a.—up to date analysis identifying state and local system needs to meet current and future demands;~~

~~b.—analysis of funding capability to judge needs against probable funding sources;~~

~~c.—a discussion of how additional funding will be raised or how land use assumptions will be reassessed to ensure that level of service standards will be met if probable funding falls short of meeting identified needs to comply with the requirements of a Transportation Element defined by RCW 36.70A.070(6)(a)(iii) and .070(6)(a)(iv)?~~

~~13.—Did the County fail to comply with RCW 36.70A.020(3), (9), (10) and (12) when it adopted Motions 99-400 (2000-2005 TIP) and 99-404 (2000-2005 SWMDIP) because:~~

~~c.—there is no, or inadequate financing for encouraging regional transportation priorities;~~

~~d.—no, or inadequate financing for efficient multi-modal transportation systems;~~

~~e.—inadequate financing to conserve fish and wildlife habitat;~~

~~f.—inadequate financing to protect the environment; and~~

~~g.—the funding is inadequate to ensure that public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy without decreasing current service levels below locally established minimum standards?~~

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- [1] Mr. Bricklin first filed a “Notice of Appearance” for Petitioner at the HOM; prior to the HOM, Counsel did not represent Petitioner.
- [2] *See*: Order on Dispositive Motion (Apr. 25, 2000).
- [3] Petitioner’s Reply Brief raised objections to Intervenor’s exhibits, but the objections were withdrawn at the HOM.
- [4] Petitioner includes challenges to RCW 36.70A.020 in Legal Issues: 1, 5, ~~6, 8~~, 11, 12 [CIP] and ~~13~~ [TIP and SWMDIP]. *See* Appendix B.
- [5] Petitioner includes challenges to RCW 36.70A.070(3) in Legal Issues: 2, , 4, 7[CIP], 14 and 15 [TIP and SWMDIP]. *See* Appendix B.
- [6] Petitioner includes challenges to RCW 36.70A.070(6) in Legal Issues: 8, 9, 10[CIP], 15, and 17 [TIP and SWMDIP]. *See* Appendix B.
- [7] This Legal Issue is addressed under “E. Consistency and Plan Implementation” below.
- [8] *See: McVittie I*, Order on Motion to Supplement the Record (Oct. 26, 1999), at 3-4.
- [9] Exhibit 501 includes the minutes and materials from the Snohomish County Council Public Works Subcommittee Meeting of October 19, 1999. *See: McVittie IV*, Order on Motion to Supplement the Record (Apr. 25, 1999) at 3.
- [10] Petitioner includes challenges to RCW 36.70A.140 in Legal Issues: 11, 12 [CIP], 18 [TIP and SWMDIP]. *See* Appendix B.
- [11] Petitioner includes challenges to RCW 36.70A.070(preamble) and .120 in Legal Issues: 2, , 4, 7, 9 [CIP], 14 and 16 [TIP and SWMDIP]. *See* Appendix B.
- [12] This is incorrect. RCW 36.70A.040(3)(d) requires jurisdictions planning under the GMA to take action to adopt a comprehensive plan and development regulations that are consistent with and *implement the comprehensive plan*. (Emphasis supplied).